IS IT ADMISSIBLE?: IMPEACHING THE WITNESS WITH LEARNED TREATISES UNDER INDIANA EVIDENCE RULE 803(18)

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The deposition is not more than ten-minutes old.

"So, doctor," says opposing counsel, "tell me the names of the professional journals and periodicals you receive, or that you have access to, and especially the ones that you actually read."

Your client duly complies with the request, naming several medical publications. The next question follows casually. "Do you consider them to be reliable and authoritative?"

Thus begins the groundwork for impeachment of your client on cross-examination or hostile direct examination at trial. To guard against improper use of the evidence rule governing learned treatises, it is useful to review the parameters of Indiana Evidence Rule 803(18), which is one of the many exceptions to the hearsay rule:

> *To the extent called to the attention of an expert witness upon cross-examination or relied upon the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets that contradict the expert's testimony on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.*

It is an ancient tactic to gain the witness's admission that an entire publication is a "reliable authority," and then to confront him with excerpts taken from the publication, usually out of context, in order to contradict his testimony. However, the mere publication of a journal or text containing a host of articles or chapters does not make them automatically reliable authority, *Meschino v. North American Drager, Inc*., 841 F.2d 429, 434 (1st Cir. 1988); and a witness's endorsement that does not rise to the level of "reliable authority" is insufficient to qualify the publication for purposes of impeachment. As noted by the *Meschino* court: "In these days of quantified research, and pressure to publish, an article does not reach the dignity of a 'reliable authority' merely because some editor, even a most reputable one, sees fit to circulate it." *Id*. Medical texts usually contain chapters authored by many different physicians, who in turn have drawn upon a constellation of sources for their material, footnoted at the end of each chapter. Thus, to declare a text on cardiovascular disease "reliable and authoritative" is to make a far more sweeping concession than to acknowledge the reliability of a chapter dealing with complications of anticoagulant therapies.

Indiana's version of 803(18) is notably more restrictive than its federal counterpart, because to be admissible the statement *must contradict the expert's testimony*. This reflects a concern on the part of Indiana's Regional Advisory Commitee that the rule not be misused. In its analysis of other jurisdictions' approaches to the application of the federal rule, the committee "doubt[ed] the efficacy of instructions designed to limit a jury's use of this evidence to impeachment purposes only." 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE §803.118, App. B, p. 270 (2d ed. 1995). The concern is heightened when proponents seek to introduce the content of the treatise into evidence as an exhibit.

If the threshold requirement of establishing a publication as "reliable and authoritative" is met, the statements within it may be read into evidence but not be received as exhibits. If it were otherwise, the proponents of the evidence could rather cheaply advance expert testimony in support of their case. No longer would a party have to retain an expert witness to testify at significant expense; and the cheap "paper expert" would obviously not be subject to any pesky cross-examination. Given the potential for this kind of misuse, it is not difficult to see why the drafters of the rule limited its application to verbal testimony.

Nevertheless, some practitioners do not seem content to simply read from a learned treatise before the jury. Instead, they occasionally attempt to show the jury the literature in question through various media, for example, an enlarged demonstrative exhibit, or computer-generated presentations, or through videotape,[1] making the image conveyed a more indelible one and, in effect, treating the publication as a physical exhibit. As a gatekeeper of the evidence, the trial court must balance the probative value of the learned treatise against its use as an actual exhibit. In *United States v. Phillips*, 515 F. Supp 758 (E.D.Ky.1981), for example, an expert witness called in the defendant's case qualified a learned treatise on psychiatry as a reliable work. Then, after the expert had left the courtroom and was no longer available, the defense moved that a photocopy of a chapter from the treatise be introduced as an exhibit and passed to the jury. The motion was denied, and the trial court's ruling was affirmed on

appeal, with the trial court noting that the restriction of reading the treatise *versus* allowing it as an exhibit "was a compromise by the drafters of the rule to allow the use of such treatises while preventing them from having undue effect." 515 F. Supp. at 762. *See also Dartez v. Fibreboard Corp*., 765 F.2d 456 (5th Cir. 1985) (articles concerning medical dangers of asbestos exposure were improperly admitted given failure of plaintiff's expert to testify about disputed articles and fact that they were actually given to jury).

When a statement from a medical text is taken out of context to impeach the defendant, it may be necessary to correct the distortion immediately. Indiana Evidence Rule 106 allows the introduction of "any other part or any other writing or recorded statement[2] which in fairness ought to be considered contemporaneously with [the excerpt read to the jury and witness]," subject to the discretion of the trial court. The rule is designed to avoid misleading impressions that may result from lifting statements out of their proper context or "otherwise conveying a distorted picture by selective introduction of parts of a comprehensive whole." *Atwell v. State*, 738 N.E.2d 332, 335 (Ind. Ct. App.2000); *Merrick v. Mercantile-Safe Deposit & Trust Co*., 855 F.2d 1095, 1103-04 (4th Cir. 1988); *see* R. MILLER, COURTROOM HANDBOOK ON INDIANA EVIDENCE (2004 Ed.), p. 23. It may serve as the avenue by which the defense explains contemporaneously the admitted portion of the statement. *Lieberenz v. State*, 717 N.E.2d 1242, 1248 (Ind. Ct. App.1999). However, the evidence offered to complete or explain the portion offered by your adversary must do just that— qualify and explain the portion in question, and be relevant to the issues raised by the evidence. *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir.1992).

The effective use, by either side, of Rule 803(18) publications can neutralize the effect of an adverse witness's testimony. However, counsel should be alert to any effort to make the impact of a learned treatise more enduring through graphic presentation. If it is suspected that this will be an issue at trial, a motion in limine should be considered to prevent introduction of this information to the jury in any form before it is established as "reliable and authoritative" as required by the rule.

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[1]*See, e.g.*, *Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000)(Rule 803(18) invoked to introduce videotape of delivery techniques in shoulder dystocia births).

[2]The rule also applies to videotaped material. *See Desjardins v. State*, 759 N.E.2d 1036, 1037 (Ind.2001).