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## Dealing with the Problem of Unreliable Evidence Admitted Under a Literal Interpretation of Federal Rule of Evidence 803-18

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## DEALING WITH THE PROBLEM OF UNRELIABLE EVIDENCE ADMITTED UNDER A LITERAL INTERPRETATION OF FEDERAL RULE OF EVIDENCE 803-18

### INTRODUCTION

Federal Rule of Evidence 803-18,<sup>1</sup> the "learned treatise" exception to the Hearsay Rule, allows the introduction of learned treatises into evidence to prove the matters asserted within. The rule substantially increases the use of learned treatises from that allowed in federal courts prior to the enactment of the Federal Rules of Evidence<sup>2</sup> and from that allowed by a majority of the states.

The Hearsay Rule of evidence is traditionally one of the most difficult areas of law to master and apply. The very existence of the rule is paradoxical. Although almost one-third of the evidentiary law deals with hearsay problems,<sup>3</sup> the greater part is devoted to the exceptions and not the rule itself.<sup>4</sup> Hearsay evidence is defined<sup>5</sup> as "a statement other than one made by the declarant while testifying at the trial or hearing offered as evidence to prove the truth of the matter asserted."<sup>6</sup>

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1. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination statements contained in published treatises, periodicals, or pamphlets 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.

FED. R. EVID. 803-18.

2. The Federal Rules of Evidence were approved on January 2, 1975, and took effect on July 2, 1975. Pub. L. No. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1929.

3. Nokes, *The English and the Law of Evidence*, 31 TUL. L. REV. 153, 167 (1956).

4. Booker & Morton, *The Hearsay Rule, the St. George Plans and the Road to the Year Twenty Fifty*, 44 NOTRE DAME LAW. 7 (1968).

5. "Although approximately one third of the evidentiary decisions involve hearsay evidence, most of those cases involve evidence admissible under one of the exceptions to the rule. It appears that a definition of hearsay can be based on knowing what it is not, rather than what it is."

Maguire, *The Hearsay System Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961).

6. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 246 (2d ed. 1972). Similarly, FED. R. EVID. 801(c) defines hearsay evidence as a "statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted".

Historically, the transformation of the jury from a group of persons with special knowledge of the facts at issue to a disinterested group with no such information accounted for the creation of the Hearsay Rule.<sup>7</sup> The rule evolved to guarantee that facts would be developed by persons having firsthand knowledge.<sup>8</sup>

Three elements of firsthand testimony making it inherently more trustworthy than hearsay are the oath,<sup>9</sup> physical presence at the trial,<sup>10</sup> and the opportunity for cross-examination.<sup>11</sup> However, the rule has been liberalized to admit out-of-court or secondhand evidence for two reasons. First, if circumstantial factors lend a high degree of reliability to the hearsay evidence, the danger of presenting untrustworthy evidence to the fact trier which cannot be discredited through cross-examination is greatly reduced. Second, when the evidence is available only in hearsay form, and necessary to a just disposition of the case, the information brought forth by hearsay may be deemed so important that a high degree of trustworthiness need not be proven. Courts consider both the trustworthiness and necessity of evidence in determining whether it should be exempted from the Hearsay Rule.<sup>12</sup>

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7. J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, ¶800[02] (1977); J. WIGMORE, *WIGMORE ON EVIDENCE*, § 1364 (6th ed. 1977).

8. J. WEINSTEIN, *supra* note 7, at ¶800[02].

9. J. THAYER, *PRELIMINARY TREATISES ON EVIDENCE* 47 (1898). While the oath does not have the effect it historically held when fear of divine punishment would make witnesses more truthful than without the oath, it does give the act of testifying some semblance of solemnity. Furthermore, the witness may fear perjury prosecution, and be more likely to testify truthfully than if the statement was not repeated under oath. *Id.* at 47.

10. The trier of fact may be better able to judge the credibility of the witness if he can observe the witness' demeanor while testifying. Also, the requirement of physical presence makes false accusations more difficult; especially if the accused is present at the trial. The constitutional right of confrontation of accusing witnesses, as guaranteed by the Sixth Amendment, rests on this rationale. C. McCORMICK, *supra* note 5, at § 245; J. WEINSTEIN, *supra* note 7, at ¶800[01]; J. WIGMORE, *supra* note 7, at § 1364.

11. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948). "Cross-examination is beyond a doubt the greatest legal engine ever invented for the discovery of truth". J. WIGMORE, *supra* note 7, § 1367. The cross-examining party has a very strong motivation to highlight any weaknesses in a witness's testimony or credibility. It is the inability to cross-examine an absent declarant that is generally considered the most pressing reason for excluding hearsay evidence. C. McCORMICK, *supra* note 5, at § 245.

12. "The principles of necessity and trustworthiness are not exclusive but are intended to mutually supplement one another. Where one is weak, the other may compensate and still provide an exception." Note, *Learned Treatises and Rule 803(b)(18) of the Proposed Federal Rules of Evidence*, 5 VAL. U.L. REV. 126, 137 (1970). See also J. WIGMORE, *supra* at note 5, at § 1420.

The new Federal Rules of Evidence<sup>13</sup> codified existing common law exceptions and, in addition, created many new exceptions to the Hearsay Rule. The new rules deal with two types of exceptions; where the declarant is unavailable for cross-examination,<sup>14</sup> and where the declarant's availability is immaterial.<sup>15</sup> The exceptions listed in the latter group concern types of evidence that are very likely to be trustworthy and should be admitted, despite their hearsay form.

One type of evidence considered sufficiently trustworthy to merit an exception to the Hearsay Rule is information contained in learned treatises.<sup>16</sup> The goal of Rule 803-18 is to bypass the necessity of expensive and frequently unavailable expert testimony to prove matters which, although unknown to the lay public, are undisputed within the field of knowledge covered by the treatise. The major fault of Rule 803-18 is its apparent failure to exclude the flood of unreliable evidence that could be admitted under a literal interpretation. Evidence meeting the specific criteria set forth in the rule is presumed to be reliable.<sup>17</sup>

Once evidence is determined to have met these criteria, the court cannot, in the context of Rule 803-18, exclude evidence based

13. See note 2 *supra* and accompanying text.

14. FED. R. EVID. 804 lists five types of evidence that are excepted to the Hearsay Rule when the declarant is unavailable for cross-examination.

15. FED. R. EVID. 803 lists twenty four types of evidence that are excepted to the Hearsay Rule.

16. FED. R. EVID. 803-18, *supra* note 1.

17. Evidence submitted pursuant to Rule 803-18 must meet the following standards:

- (1) The evidence must have the physical form of a "treatise, periodical, or pamphlet".
- (2) The evidence must have sufficient distribution to be considered published.
- (3) The writing must deal with history, medicine, or another art or science.
- (4) An expert in the field covered by the treatise must testify that the treatise is authoritative.

These factors are more than mere guidelines to aid the court in their determination of whether the offered evidence has the requisite trustworthiness for admission. The hearsay exceptions dealing with business and public records, 803-6 and 803-8, specifically exclude the submitted evidence if untrustworthiness can be shown through circumstantial evidence. The absence of such a savings clause in Rule 803-18 can only mean that the drafters intended that the standards in the rule trigger an irrebuttable presumption that the offered evidence is sufficiently reliable to warrant an exception to the Hearsay Rule. See note 49 *infra* and accompanying text.

on its own discretionary determination of its apparent unreliability.<sup>18</sup> However effective the requirements set forth in Rule 803-18 may be as general indicators of reliability, they cannot, by themselves, guarantee the trustworthiness of material submitted for admission as substantive evidence.

This note has three purposes. It demonstrates that, as presently drafted, Rule 803-18 does not adequately require a showing that documents admitted are sufficiently trustworthy to merit an exception to the Hearsay Rule. In addition this note discusses the rationale for repealing 803-18. Finally and alternatively, this note illustrates several methods by which evidence apparently admissible under Rule 803-18, but still in an unreliable form, can be excluded.

#### HISTORICAL BACKGROUND OF THE LEARNED TREATISE EXCEPTION

The notion that hearsay evidence is inadmissible is a relatively recent concept in English legal history.<sup>19</sup> The establishment of the Hearsay Rule has been attributed to the use of the jury as fact finders,<sup>20</sup> from which unreliable hearsay evidence was meant to be kept. Another factor was the adversary system<sup>21</sup> which, through the vehicle of cross-examination, made it more likely than not that deficiencies in evidence admitted would be made apparent. Most of the

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18. Certainly, the court is not precluded from excluding evidence based on its perception of unreliability. The court might determine to interpret the standards in the rules to exclude much unreliable evidence. For example, although it might be argued that an anonymous folded leaflet distributed on a public street is a "published pamphlet" and eligible for admission, the court can and should interpret the distribution and form requirements of the Rule to exclude such obviously untrustworthy evidence. See notes 117-19 *infra* and accompanying text.

Furthermore, a judicial determination of untrustworthiness can be used to exclude unreliable evidence pursuant to Rules 401 and 403.

However, these rules are meant to exclude evidence that is of so little value that its defect cannot be cured, even by cross-examination. In instances where cross-examination of the declarant is impossible, as in the admission of hearsay evidence, a higher standard of reliability is necessary. The evidence that has a minimal degree of probative value, and still meeting the standards of Rule 803-18 cannot be excluded by other hearsay rules. See notes 126-143 *infra*.

The conspicuous absence of a trustworthiness requirement in Rule 803-18 apparently prevents the court from using its own determination of reliability to exclude marginally credible evidence, provided that evidence meets the standards set forth in the rule.

19. J. WIGMORE, *supra* note 7, at § 1364.

20. C. MCCORMICK, *supra* note 6, at § 245; J. WIGMORE, *supra* note 7, at § 1421.

21. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 258 (1937); Morgan, 62 HARV. L. REV. *supra* note 11.

attacks upon hearsay evidence have dealt with the presentation to the jury of evidence in a form highly unlikely to be reliable.<sup>22</sup> Hearsay evidence is more suspect than firsthand testimony since the out-of-court declarant is not testifying under oath,<sup>23</sup> not physically present at the trial,<sup>24</sup> and not subject to cross-examination.<sup>25</sup> The Hearsay Rule serves to keep unreliable evidence from the jury. However, that rule has no justification when there are adequate circumstantial guarantees of the trustworthiness of the evidence submitted.<sup>26</sup> Another cogent reason for admission of hearsay evidence is its occasional necessity for a just determination of the case. The concerns of trustworthiness and necessity, taken together, lay the foundation for exceptions to the Hearsay Rule.<sup>27</sup>

Prior to enactment of the present Federal Rules of Evidence, several types of written out-of-court assertions had been held to be exceptions to the Hearsay Rule. Writings containing facts so well proven and known either within the general public domain or within the community of the special field covered by the writing, have long been excepted from the Hearsay Rule. Mortality tables,<sup>28</sup> census reports,<sup>29</sup> and almanacs<sup>30</sup> have traditionally been admitted into evidence as exceptions to the Hearsay Rule.

However, texts containing facts which are not conclusively proven and known have not generally been admissible to prove the truth of the assertions contained within themselves.<sup>31</sup> The only

22. J. WIGMORE, *supra* note 7, at § 1361.

23. *Bridges v. Nixon*, 326 U.S. 135, 153 (1945). *See* note 9 *supra* and accompanying text.

24. *Mattox v. United States*, 156 U.S. 237, 242, (1895). *See* note 10 *supra* and accompanying text.

25. *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Novicki v. Department of Finance*, 373 Ill. 343, 26 N.E.2d 130 (1940); J. WIGMORE, *supra* note 7, at § 1367. *See* note 8 *supra* and accompanying text.

26. *Maguire*, 14 VAND. L. REV., *supra* note 5, at 749; Note, 62 HARV. L. REV., *supra* note 21, at 179.

27. *See* note 12 *supra* and accompanying text.

28. *Mealey v. Slayton Machinery Sales, Inc.*, 508 F.2d 87 (5th Cir. 1975); *Bair v. American Motors Co.*, 473 F.2d 740 (3d Cir. 1974); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Roberts v. United States*, 316 F.2d 489 (3d Cir. 1963); *Danzios v. Kelly*, 112 Ill. App. 2d 14, 250 N.E.2d 801 (1969).

29. *Pendry v. Addison*, 105 Ga. App. 673, 125 S.E.2d 523 (1960); *Fields v. Jackson*, 102 Ga. App. 117, 115 S.E.2d 877 (1960).

30. *Minnesota Amusement Co. v. Larkin*, 299 F.2d 142 (3d Cir. 1963); *Gaphill v. Bergman*, 108 N.H. 507, 240 A.2d 55 (1968).

31. *Hickok v. G. D. Searle & Co.*, 496 F.2d 444 (10th Cir. 1974); *Brown v. United States*, 419 F.2d 337 (8th Cir. 1970); *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967); *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Cone v. Benjamin*, 157 Fla. 800,

means by which the information contained in a text dealing with disputed facts could be admitted as substantive evidence was through the testimony of an expert witness.<sup>32</sup> Some jurisdictions have, however, altered this general rule by statute.

### *Statutory Alteration of Common Law*

Several states have statutes allowing treatises to be used as independent evidence for specific types of cases. Massachusetts<sup>33</sup> and Nevada<sup>34</sup> permit learned treatises to be used as substantive

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27 So.2d 90 (1946); *Isley v. Little*, 237 Ga. 602, 131 S.E.2d 623 (1963); *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939); *Hicks v. Brown*, 136 Tex. 399, 151 S.W.2d 790 (1939).

32. Expert witnesses, in gaining the background knowledge in their field of expertise, must rely in part upon texts. The information presented in a textbook, which has become incorporated into his general expert knowledge, has long been admissible. This contention was aptly stated by Justice Holmes in *Finnegan v. Fall River Gas Works Co.*, 159 Mass. 311, 34 N.E. 523 (1893):

Although it might not be admissible merely to repeat what a witness had read in a book, not itself admissible, still, when one who is competent on the general subject accepts from his reading as provable a matter of detail which he had not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject perhaps to the exercise of some discretion should be admitted.

*Id.* at 529.

33. MASS. ANN. LAWS ch. 233 § 79c (Supp. 1979), provides:

Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in so far as the court shall find the said statements are relevant and the writer of said statements is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice or error or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitarium, as evidence tending to prove said facts or as opinion evidence provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action give the adverse party or his attorney notice of such intention stating the name of the writer of the statements, the title of the treatise, periodical, book, or pamphlet in which they are contained, the date of publication of the same, the name of the publisher of the same, and whenever possible or practical, the page or pages of the same on which the said statements appear.

34. NEV. REV. STAT. § 51.040 (1960) provides:

(1) A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall in the discretion of the court, and if the court finds that it is relevant and that the writer of such statements is recognized in his profession or calling as an expert on the subject be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, chiropractors, naturopathic physicians, hospitals, and sanitarium to prove the fact or as opinion evidence.

(2) The party intending to offer as evidence any such statements shall,

evidence in medical malpractice trials. South Carolina allows use of learned treatises in the proof of insanity.<sup>35</sup> Other statutes would accept such writings if their content, or authoritativeness of the writing itself, can be made the subject of judicial notice.<sup>36</sup> Furthermore, several states have adopted the Uniform Code of Evidence, which, like the Federal Rules, permits the substantive use of learned treatises in all types of cases.<sup>37</sup>

The recent codification of federal evidence law<sup>38</sup> relaxed the

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not less than three days before the trial of the action give the adverse party notice of such intention stating the name of the writer of the statement and the title of the treatise, periodical, book, or pamphlet in which it is contained.

(Emphasis added). The Massachusetts and Nevada statutes differ from Rule 803-18 in three areas. The use of the writing is limited to medical malpractice actions. Secondly, both statutes require that the author, and not the treatise, as required by Rule 803-18, be qualified as authoritative. Finally, the qualification determination is made by the court, and not by an expert witness, as required by Rule 803-18.

35. S.C. CODE § 26-142 (1962), provides:

In all actions or proceedings, civil or criminal, in which the question of sanity or the administration of poison or any other article destructive to life is involved and *in which expert testimony has been introduced*, medical or scientific works, or such parts thereof as may be relevant to the issues involved shall be competent and admissible to be read before the court or jury in addition to such expert testimony.

(Emphasis added). This statute differs from Rule 803-18 not only in the limited type of cases in which the treatises could be used, but in the requirement that live testimony accompany the treatise evidence. This apparent reluctance to decide a material issue solely on the basis of learned treatise evidence was voiced in *Apicella v. McNeil Laboratory, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).

36. Seven states have adopted a general statute which reads: "historical works, books on science or art, and published maps or charts made by persons indifferent between the parties are prima facie (or primary, or presumptive) evidence of facts of general notoriety." Since the court makes the determination of which works are conclusive proof of the facts asserted, the court is effectively taking judicial notice of the trustworthiness of the treatises. IDAHO CODE § 9-402 (1979); IOWA CODE ANN. § 622.23 (1950); MONT. REV. CODES ANN. § 93-1101-8 (1947); NEB. REV. STAT. § 25-1218 (1943); ORE. REV. STAT. § 41.670 (1978); UTAH CODE ANN. § 78-25-6 (1953).

37. A published treatise of a periodical or pamphlet on a subject of history, science or art [is admissible] to prove the truth of the matter stated therein if the judge takes judicial notice or a witness expert in the subject testifies that the treatise, periodical, or pamphlet is a reliable authority in the subject.

UNIFORM RULES OF EVIDENCE 63(31), adopted by Kansas, KAN. STAT. ANN. § 60-460cc (1964); the Canal Zone, C.Z. CODE TIT. 5 § 2962(31) (1963); and by the Virgin Islands, V.I. CODE TIT. 5 § 932(31) (1957). In addition, the courts of Arkansas, Maine, Minnesota, North Dakota, and Oklahoma have all adopted the Federal Rules of Evidence by judicial promulgation.

38. The codification of federal evidence law was first proposed in 1962 by the American Judicial Conference which prepared the proposed rules to the Supreme Court in November, 1971. The court set forth the rules as its own on November 20,



Hearsay Rule to allow learned treatises that satisfy specific criteria to be introduced into evidence, as contrasted with the former rule allowing such admission only by way of impeachment.<sup>39</sup> The wording of the rule differs from the Uniform Code of Evidence with respect to admissibility in two respects. The Federal Rule prohibits the use of learned treatises as exhibits and requires that they be read into evidence.<sup>40</sup> In addition, the portion of the treatise admissible is

1972, but Congress preempted the court's right to promulgate its own rules of evidence. Congress passed Pub. L. No. 93-12, which kept the proposed rules from taking effect until Congress had approved them. The sweeping change in privileges allowed to witnesses was considered a change in substantive law that required legislative approval. After a full hearing in both houses of Congress, the Federal Rules of Evidence were approved on January 2, 1975, and took effect on July 1, 1975.

Congress added a provision allowing amendment of the Rules, 28 U.S.C. § 2076, which required the Supreme Court to obtain congressional approval to propose an amendment to any section dealing with privilege. The Court could amend any other provisions by its own proposal, absent a specific congressional vote defeating the amendment. See note 103, *infra* and accompanying text.

Hon. Elizabeth Holzman, a member of the House Judiciary Committee responsible for revising the proposed Rules of Evidence drafted by the Supreme Court, expressed grave doubts about the need for codification of the rules of evidence and concern about the dangers that codification would inflict upon evidence law. In a statement presented to the House Committee, she stated:

Black letter rules will make evidentiary points high profile. Presently, evidentiary rulings are generally not considered critical at trial. Once we adopt a 'black letter' code, lawyers will have a field day determining how many evidentiary angels can dance on the top of a pin. A number of witnesses testified that the rules will generate appeals and increase reversals on evidentiary rulings.

Another thorny problem this codification will produce is forum shopping. Because this code substantially liberalizes the Hearsay Rules, federal courts may become a more attractive forum for litigation. This is not the time to increase the work load of the already congested federal courts. Nor is there any substantial justification on a hearsay issue for a different outcome in a federal court where state law is involved. . . . In making our decision, we should bear in mind the testimony of Judge Friendly:

There is no need (for the proposed rules). Someone once said that in legal matters, when it is not necessary to do anything, it is necessary to do nothing . . . We know we are now having almost no serious problems with respect to evidence; we cannot tell how many the Proposed Rules will bring.

Proposed Rules of Federal Evidence, Hearings Before the Judiciary Committee, on H.R. 5496 93rd Cong. 1st Sess. (1973) (statement of Hon. Elizabeth Holzman).

39. FED. R. EVID. 803-18, *supra* note 1.

40. See note 36 *supra*. Another minor addition Rule 803-18 makes to U.C.E. 63(31) is the inclusion of "medicine" as allowable subject matter of treatises eligible for admission. Perhaps this conscious inclusion is an indication that FED. R. EVID. 803-18 was passed in part to aid the evidentiary plight of medical malpractice plaintiffs. See note 95 *infra* and accompanying text.

limited to the "extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination."<sup>41</sup> This limitation of the use of treatises as substantive evidence to those situations in which an expert is on the stand and available to explain and assist in the application of the treatise theoretically guards against the possibility of the jury misusing the treatise.<sup>42</sup>

Rule 803-18 represents a substantial change in the use of learned treatises as substantive evidence from that allowed in federal courts before enactment of the Federal Rules of Evidence. The rule lists four separate criteria that a writing must meet to be eligible for admission. The work must have the physical form of a "treatise, periodical, or pamphlet."<sup>43</sup> The work must have sufficient distribution to be considered published.<sup>44</sup> The writing must have as its subject matter "history, medicine, or other science or art."<sup>45</sup> Finally, the writing must be qualified by an expert in the field of the treatise as being authoritative.<sup>46</sup> An explicit requirement that the writings eligible for admission be deemed trustworthy is *not* present in the rule.<sup>47</sup> In comparison, several other federal rules<sup>48</sup> defining broad classes of

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41. FED. R. EVID. 803-18 provides that learned treatise evidence is admissible "to the extent called to the attention of expert witness upon cross-examination or relied upon him by direct examination". The fact that the rule does not state any other circumstances where the learned treatise can be introduced indicates that an expert witness must be on the stand during the admission of the writing into evidence.

42. Supreme Court Advisory Note to Rule 803-18.

43. FED. R. EVID. 803-18, *supra* note 1.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Rules 803-6 and 803-7 deal with records of regularly conducted activity, and the absence of such records, which are made exceptions to the Hearsay Rule.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and it is was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness.* The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803-6 (emphasis added).

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance

writings granted hearsay exceptions *do* specifically require that the writings not only meet the criteria stated in the rule, but have a requisite degree of trustworthiness. This conspicuous absence of a "savings clause" can only mean that the drafters of the rule did not intend to require a judicial determination of trustworthiness. The rule evidently creates a presumption that evidence meeting the stated requirements is reliable enough to be excepted from the Hearsay Rule. A judicial ruling of unreliability will be relevant to an exclusion of evidence pursuant to Federal Rules 403 and 401.<sup>49</sup> Unfortunately, application of those rules might not be able to exclude much of the evidence which is admissible under Rule 803-18 yet not sufficiently trustworthy to merit an exception to the Hearsay Rule.<sup>50</sup>

#### POTENTIAL OF ADMITTING UNRELIABLE EVIDENCE UNDER A LITERAL APPLICATION OF RULE 803-18

As seen above, Rule 803-18 sets out four tests that a treatise must pass before it is admitted into evidence for substantive purposes.<sup>51</sup> Once these tests are met, the writing must be admitted into

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with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, *unless the sources of information or other circumstances indicate lack of trustworthiness.*

FED. R. EVID. 803-7 (emphasis added). Rule 803-8 deals with the public records that are considered eligible for admission over a hearsay objection.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, *unless the sources of information or other circumstances indicate lack of trustworthiness.*

FED. R. EVID. 803-8 (emphasis added).

49. Rule 401 deals with the definition of relevance. If the court determines that the evidence submitted is so untrustworthy that it is totally without any probative value, the treatise may be excluded by operation of Rule 401. Similarly, Rule 403 requires that the prejudice, waste of time, etc., will exclude the evidence. However, if an otherwise unqualified ditch digger makes an assertion about nuclear physics in a treatise he authored, his opinion has so little credibility that it would not have the tendency to make the existence of that assertion more probable than if that evidence were not admitted. This probative value, the tendency to make the existence of a material fact more likely than without the evidence, is also a factor in Rule 403.

50. See notes 126-36 *infra*.

51. See notes 44-47 *supra*.

evidence. Under Rule 803-18, the judge has no discretionary power to exclude evidence of dubious reliability that meets the above criteria.<sup>52</sup>

### *Necessary Distribution*

Any writing admissible under Rule 803-18 must be published as opposed to being prepared for private use. The Advisory Note to 803-18, citing Wigmore, states that treatises are inherently trustworthy since they are "written primarily and impartially for the professional, subject to scrutiny and exposure for inaccuracy with the reputation of the writer at stake."<sup>53</sup> A reputation-conscious author of a treatise having a wide distribution within his professional community would certainly be motivated to be sufficiently accurate in his work to withstand the attacks from his professional colleagues. The fact that a writing is published is, at the least, relevant to the existence of such a motivation to write accurately. However, the mere publishing of a writing does not guarantee its reliability. The fact that a writing is published does not mean that the writing is readily available from commercial outlets, or even that duplicate copies exist. Federal courts have held that a writing is published when it is put up for sale<sup>54</sup> or distribution. A "published" text might have such a narrow distribution that the potential peer pressure normally leveled at the writer of an unreliable text might not be strong enough to motivate the author to write accurately. Even if the treatise were distributed to all the members of the author's professional community, he might not be motivated by peer pressure to provide trustworthy information. The author himself might consider his own published work too theoretical or speculative to be considered as authoritative. Indeed, the author may never have intended that his work be taken seriously, intending instead only to spark a controversy in the field, or to write a tongue-in-cheek parody of a treatise.<sup>55</sup>

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52. See notes 48 and 49 *supra*.

53. FED. R. EVID. 803-18, Supreme Court Advisory Note.

54. *United States v. Williams*, 3 F. 484 (C.C.N.Y. 1880); *United States v. Baltimore Post Co.*, 2 F. 761 (C.C.N.Y. 1879). See also *Kaplan v. Edmondson*, 68 Ga. App. 151, 22 S.E.2d 343 (1942); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946). Some courts seem to require an effective distribution for a writing to be considered published. *Robert v. City of Norfolk*, 188 Va. 412, 49 S.E.2d 697 (1948) (to make known before the public); *Wolfe County Liquor Dispensary Ass'n v. Ingra*, 272 Ky. 38, 113 S.W.2d 839 (1938) (a book is published only when it is offered for sale or put into the general circulation).

55. Under a literal interpretation of Rule 803-18, Jonathan Swift's parody of British aristocratic attitudes, *A MODEST PROPOSAL* (1874), in which the author proposed

Additionally, not all treatises have disclosed authors. The facts that an article has wide distribution, and that the author intended it to be considered as reliable, have no effect on his motivation to be accurate when the writing is published anonymously. The author is immune from the attack on his reputation by his professional colleagues, since he cannot be associated with the unsigned writing. In fact, authors who know that their writing is unreliable, or even slanderous, may resort to anonymous authorship to avoid attack by their colleagues or victims. Still further, the writing offered for evidence may have been published without the author's consent or knowledge.<sup>56</sup> The material may be so unreliable that the author chose not to distribute it publicly, and was only published against his wishes. Virtually any private writing might be admissible if stolen and published by a third party.<sup>57</sup> Any of the above considerations may indicate that the author did not intend his work to be considered trustworthy despite it having been published. If the author does not take his own work seriously, the court should not accept that writing without cross-examination.

### *Physical Form*

A writing must not only be published to be eligible for admission under Rule 803-18, it must also be in the physical form of a "treatise, periodical, or pamphlet."<sup>58</sup> The terms, "periodical" and

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that the overpopulation problem be solved by cannibalism, could be considered for admission as a treatise on methods of population control! Hopefully, such a piece of evidence would not even be submitted to the court for introduction as substantive evidence. Unfortunately, Rule 803-18 does not give the court discretion to exclude evidence, although obviously not reliable, that complies with its standards. However, the court has several evidentiary devices available to it that will exclude obviously ludicrous evidence. Unfortunately, the irony of the writing might be so subtle that only experts could recognize its non-serious nature. If the writing has no obvious marks of unreliability, there is no apparent reason for the court to exclude the evidence, nor for the jury to disbelieve it. See notes 117-32 *infra* and accompanying text.

56. There is no specific requirement that the writing be published legally to be admissible under Rule 803-18. Writings that are reprinted without the author's permission, or even without his knowledge, are apparently eligible for admission. Thus, virtually any writing that an individual might wish to reproduce and distribute could be deemed "published".

57. Under the liberal definition of "publish", a stolen and coded diary could be admissible evidence. More potentially abusive is the "publishing", by rummaging through a researcher's waste basket for discarded information, and copying and distributing the results of the study that he himself may have thought was not sufficiently accurate for publication. The court might not be aware of the shady nature of the publishing, and would have no clue as to the work's untrustworthiness. The publishing of a document need not confer any guarantee of trustworthiness.

58. FED. R. EVID. 803-18, *supra* note 1.

"pamphlet", can be construed so that many writings in a physical form highly unlikely to be reliable could be admissible. A pamphlet might be no more substantial than a single, folded sheet of paper.<sup>59</sup> Moreover, periodicals and pamphlets often tend to be speculative and subjective in nature, making insurance of their truth by virtue of being "learned treatises" most uncertain.<sup>60</sup> Clearly Rule 803-18's requirement that a document eligible for admission as substantive evidence have the physical form of a treatise, periodical, or pamphlet does not exclude admission of writings that are in such an unsubstantial form that their reliability is highly suspect.

*Material Eligible for Admission Under 803-18*

A document judged a published learned treatise, periodical, or pamphlet must also deal with "history, medicine, or other art or science"<sup>61</sup> to be eligible for admission under Rule 803-18. As with the form and distribution requirements of the rule, the subject matter standard is very easily met. Indeed, few nonfictional works could not be construed as dealing with either an art or a science.<sup>62</sup> It is apparent from cases applying Rule 803-18, or related rules, that treatises covering the fields of engineering,<sup>63</sup> medicine,<sup>64</sup> and phar-

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59. The VII OXFORD BRITISH ENGLISH DICTIONARY 410 (1970), defines a "pamphlet" as a "small treatise occupying fewer pages than a book". It would appear that a pamphlet must have more than one page. A writing composed of only one page may be in the form of a leaflet. Since there is no requirement in any definition of the word pamphlet that it must contain more than one piece of paper, a pamphlet may have more than one "page" by virtue of its being folded. By this literal definition of the term pamphlet, a folded roadmap or menu could be eligible for admission under Rule 803-18. This type of hypertechnical distinction appears to be the precise sort of evil of codifying evidence rules that was feared by Hon. Elizabeth Holzman, *supra* note 38.

60. Note, 5 VAL. U.L. REV., *supra* note 12, at 147. An author seeking to publish his personal unorthodox opinions and theories may find little intellectual or financial support from his professional colleagues. The prospective author may be forced to present his material in an inexpensively produced pamphlet, or to have his work printed in a trade periodical, rather than have his work published using more traditional and expensive media. The view that pamphlets may be inherently less reliable than would be treatises was implied in *Wiggins v. State*, 39 Ala. 433, 104 So.2d 560 (1958). In this case, despite Alabama's liberal statute allowing admissibility of "learned treatises, books, or pamphlets", ALA. CODE tit. 7 § 413 (repealed 1975), a pamphlet containing only one case study was deemed to be too unreliable to be admissible.

61. FED. R. EVID. 803-18, *supra* note 1.

62. The precise definition of "science" and "art" has baffled generations of philosophers. The mere inclusion of such metaphysical terms in a statute is most unfortunate. There appear to be no works of nonfiction that could not qualify as being either an art or a science.

63. *Bair v. American Motors Corp.*, 473 F.2d 740 (3d Cir. 1974).

64. *Walker v. North Dakota Eye Clinic, Ltd.*, 415 F. Supp. 891 (D.N.D. 1976); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp., 255 (E.D.Pa. 1976).

macology<sup>65</sup> are considered to deal with "sciences". What is less clear is the rule's treatment of submitted texts on astrology, alchemy, or other such honored "sciences."<sup>66</sup> Such material is especially suspect since there is no scientific community scrutinizing the text to motivate the author to write accurately.<sup>67</sup>

One additional criterion used by state courts in interpreting the term "science" is the degree of exactness of the general field of knowledge dealt with by the text.<sup>68</sup> Interest tables<sup>69</sup> and chemical tables<sup>70</sup> are said to deal with the "exact" fields of chemistry and mathematics and are considered proper subjects for admissible treatises. In comparison, a study dealing with jury behavior was deemed inadmissible since it dealt with psychology, considered an inexact field of knowledge.<sup>71</sup>

Treatises dealing with rapidly developing sciences are somewhat suspect. In the settled sciences,<sup>72</sup> there is little subjective interpretation from the compiler of the treatise. Relatively little opportunity exists for the author's bias to influence the writing and hence, the necessity for cross-examination, or an inquiry into his qualifications and techniques is minimized. In comparison, an inexact science is a rapidly changing and uncertain field of knowledge in which there is no set of conclusively agreed upon and universally accepted facts. Any assertion made in such a context relies heavily upon a subjective analysis of the author. Since the subjective bias of the author is such a strong influence on the contents of the treatise, the jury must be aware of that bias to adequately evaluate the work. Unfortunately, as the author is not available for cross-examination, that vital information is not available to the jury.

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65. *Apicella v. Medical Laboratories, Inc.*, 66 F.R.D. 78 (S.D.N.Y. 1975) (excluded on other grounds). *Generella v. Weinberger*, 388 F. Supp. 1086 (E.D.Pa. 1974).

66. The introduction of texts on such spurious fields of "knowledge" seems ludicrous. Whether or not a given field is a "serious science" is a difficult question. For example, acupuncture, once demeaned as unscientific, has gained credibility in the scientific community. There are many such fields on the borders of accepted science which enjoy at least a small degree of credibility. However, once the court considers a topic as a science or art, the court has no discretionary power to exclude the evidence based on its judgment of the writing's reliability.

67. See note 54 *supra* and accompanying text.

68. J. WEINSTEIN, *supra* note 7, at ¶803(18)[01].

69. *Owens-Illinois Glass Co. v. American Costal Lines, Inc.*, 222 F. Supp. 923 (S.D.N.Y. 1963).

70. *Azoplate Corp. v. Silverlith, Inc.*, 367 F. Supp. 711 (D. Del. 1973).

71. *Zimmer v. State*, 206 Kan. 304, 477 P.2d 971 (1970).

72. Fields such as anatomy and arithmetic where there is little controversy could be classified as being relatively settled, as opposed to psychiatry and philosophy which are highly speculative and unsettled.

However useful the distinction between "exact" and "inexact" sciences might seem in excluding unreliable evidence, the exactness determination is not a guarantee of the treatises' trustworthiness. This distinction would apply only to those treatises classified as "science", and not those classified as "art" or "history".<sup>73</sup> Determining if a treatise deals with an exact or inexact science is difficult for two reasons. Deciding under which field a given piece of information should be classified can be an impossible task. A treatise dealing with the causes of alcoholism could be considered as within the "exact" field of biochemistry, or within the "inexact" field of psychology. The method in which the subject is examined, and not the subject matter itself, could apparently determine the arbitrary classification of the treatise as "exact" or "inexact". Merely changing the method of analysis from subjective to objective in no way makes the subject more precisely known. Secondly, even if the subject can be identified, and classified as exact or inexact, those terms have little relevancy when applied to an entire field of knowledge. There are many aspects of "exact" sciences, such as physics and chemistry, which are very much in controversy. Perhaps a better designation than "settled science" is "settled fact."

Although more useful than the "exact science" standard, the proposed settled fact criteria still presents several serious problems in practical application. Determining if a fact is settled within a scientific community may be most difficult. The court might not be aware of the extent of generally accepted knowledge within a field. Of course, the experts in that field could testify that a given fact is generally accepted as being true, but resorting to expert testimony thwarts one of the reasons behind the rule; doing away with the need for expensive and often unavailable expert testimony.<sup>74</sup>

In addition, if the fact sought is a physical measurement, such as the melting point of a certain chemical, the result may be a "settled fact" only to a certain degree of accuracy. Determining the amount of experimental error in such measurements may also require the expert testimony that is sought to be avoided by Rule 803-18.<sup>75</sup>

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73. Rule 803-18 specifically allows works concerning "history" and "art" to be admitted. Evidently, a newspaper might qualify as "history", albeit very recent, and be eligible for admission.

74. Comment, *Evidence—Products Liability—Federal Rule of Evidence 803-18*, 27 S.C.L. REV. 766 (1976). In addition, FED. R. EVID. 102 provides: "These rules shall be construed to secure fairness in administration, *elimination of unjustifiable expense and delay*, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined". (Emphasis added). See also note 45 *supra*.

75. See note 74 *supra*.



The subject matter requirement<sup>76</sup> is no more effective than the distribution and physical form criteria in screening suspect evidence from admission. At best, these factors are effects not causes, of trustworthiness. The only other safeguard provided by Rule 803-18 is the qualification of the treatise as authoritative by expert testimony or by judicial notice.

#### *Qualification of the Text*

There is one final hurdle which the treatise must clear to be admitted into evidence to prove the truth of its own assertions. The treatise must be "established as a reliable authority by the testimony or admission of the witness or by other expert testimony, or by judicial notice."<sup>77</sup> At first glance the qualification requirement excludes unreliable and outdated writings offered as substantive evidence. The conclusive proof of the veracity of a document eliminates the pressing need for requiring cross-examination and negates the primary danger of admitting hearsay evidence. Application of the qualification requirement, however, poses several practical problems.

The court may take judicial notice of the facts within the treatise if they are recognized as being generally known. Likewise, the court may recognize that the authoritativeness of the submitted writing is beyond dispute.<sup>78</sup> If the accuracy of the work is so conclusively known that the judicial notice is proper, there is little doubt that it is sufficiently reliable to merit admission under an exception to the Hearsay Rule.

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76. See note 61 *supra* and accompanying text.

77. FED. R. EVID. 803-18, *supra* note 1.

78. Rule 201(d) states: "A court *shall* take judicial notice if requested by a party and supplied with the necessary information". (Emphasis added). With respect to judicial notice of the authoritativeness of a treatise, the "necessary facts" could be affidavits from experts attesting to the book's reliability, data concerning the high reputation of the author's writing, and institution sponsoring the treatise, data concerning distribution of the treatise, and any other information that would be useful to the court in determining its reliability. Presumably, counsel opposing admission would have the opportunity to challenge the testimony presented in favor of the treatise.

If the submitting party can convince the court that the writing is authoritative by presentation of such necessary facts, it may be admitted pursuant to Rule 201.

Application of this rule would allow admission of all treatises that can be shown to be trustworthy and would exclude evidence of low or uncertain credibility.

In *Generella v. Weinberger*, 388 F. Supp. 1086 (E.D. Pa. 1974) the district court held that an administrative judge abused his discretionary power to take judicial notice when he read into evidence a medical text which was not otherwise certified as being authoritative.

Should the court refuse to take judicial notice of the trustworthiness of a treatise, it must be established as a reliable authority by expert testimony.<sup>79</sup> Rule 803-18 does not state whether an expert witness may qualify as authoritative on a treatise in a field outside his own specialty. If specialists, expert in the topic covered by the treatise, are not required to attest to its validity, the entire purpose of having the text qualified may not be accomplished. A general practitioner having only marginal experience in urology might qualify as a "medical expert" and have the standing to certify treatises in that specialty.<sup>80</sup> He might, however, be totally unable to judge whether that text represented the standard of the specialty community.<sup>81</sup> Moreover the rule requires only one expert to qualify the text.<sup>82</sup> If one general practitioner qualified a urology text as authoritative, the court could apparently not consider the opinion of the many urologists who might totally disagree with the text.<sup>83</sup>

Assuming that the witness qualifying the treatise as authoritative must be expert in the specific topic of the treatise, deciding what type of specialist is competent to qualify the text poses serious problems. Many treatises of very narrow scope may deal with a topic that is within the realm of several fields of knowledge. For example, a text concerning the proper metal to used in a hip prosthesis involves the fields of orthopedic surgery, metallurgy, and mechanical engineering, among others. If such a text can be qualified by an expert in any one of the different fields, the danger of having a witness qualify a text in a field unfamiliar to him is present.<sup>84</sup>

A similar problem arises when the text is so broad in scope that several fields are covered. An extensive treatise on internal medicine may contain chapters covering biochemistry, anatomy, and

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79. FED. R. EVID. 803-18, *supra* note 1.

80. Note, 5 VAL. U.L. REV., *supra* note 12, at 147. The court may, of course, require experts in the narrow field of the treatise to qualify the text, but this might make qualification quite difficult. The purpose of the rule, elimination of expensive and unavailable expert testimony, might be thwarted. See notes 103-106 *infra* and accompanying text.

81. In addition, the generalist might have difficulty in aiding the court in the interpretation of the treatise.

82. FED. R. EVID. 803-18, *supra* note 1.

83. However, the testimony of the general practitioner would have to have enough credibility to establish the work as authoritative. Once this requirement is satisfied the court cannot exclude the evidence under 803-18 based on its own opinion of the work's trustworthiness. See notes 17-19, and accompanying text *supra*.

84. See notes 81 and 82 *supra* and accompanying text.

pharmacology. The qualification of the entire work should require a series of experts for each specialty topic included.

The requirement that an expert witness certify the text offered for admission under Rule 803-18 would appear to exclude unreliable evidence, though conforming with the standards of physical form, distribution, and subject matter requirements listed in Rule 803-18. However, the potential of witnesses qualifying as authoritative texts in fields with which they are minimally familiar severely limits the effectiveness of the qualification requirements.<sup>85</sup>

Rule 803-18 puts great importance on the qualification of the text by expert testimony. Given the conspicuous absence of language requiring a judicial determination of trustworthiness, drafters of the rule apparently intended to rely on the experts rather than judges to determine the trustworthiness of the submitted text.<sup>86</sup> Unfortunately, qualification by experts as prescribed by Rule 803-18 is not an adequate substitute for a judicial determination of trustworthiness. The rule specifically requires only one "expert"<sup>87</sup> to certify the text. Once a single expert has qualified the text, the court can not consider the opinion of other, perhaps more qualified, witnesses who might denounce the text to exclude it from admission. Without the safety valve of a discretionary ruling on trustworthiness,<sup>88</sup> the potential of admitting highly suspect evidence over a hearsay objection is imminent. Finally, there is no adequate means of impeaching the suspect reliability of material that could be admissible under Rule 803-18.

### *Difficulty of Impeaching Admitted Evidence*

Any information contained in a "learned treatise", although meeting all the requirements of Rule 803-18, may be rendered unreliable by the normal advance of the state of knowledge within any developing science.<sup>89</sup> A formerly authoritative, but presently outdated text, cannot be adequately discredited once admitted into evidence. Several commentators claim that the antiquated treatise is no less reliable than live testimony based on outdated views.<sup>90</sup>

85. *Id.*

86. See note 84 *supra* and accompanying text.

87. FED. R. EVID. 803-18, *supra* note 1.

88. Such a "savings clause" is present in Rules 803-6, 803-7, and 803-8. See note 49 *supra* and accompanying text.

89. J. WIGMORE, *supra* note 7, at § 1692.

90. Comment, *Substantive Admissibility of Learned Treatises and the Medical Malpractice Plaintiff*, 71 NW. U.L. REV. 678 (1976); Note, *Medical Treatises as Evidence—Helpful But Too Strictly Limited*, 29 U. CINN. L. REV. 255 (1960); J. WIGMORE, *supra* note 7, at § 1692.

However, the expert presenting the outdated information, unlike the author of the outdated treatise, must undergo a vigorous adversarial cross-examination that will reveal any faults in his testimony. Proponents of Rule 803-18 might note that cross-examination of the author is unnecessary since Rule 806 allows the introduction of evidence impeaching the author of the treatise.<sup>91</sup> Certainly evidence showing the poor reputation of an author is a very effective means of discrediting his writings. Unfortunately many defects of the expert status of the author may only become apparent in the course of cross-examination. For example, the fact that the author of a medical text was only a "doctor" by virtue of an honorary degree might become apparent only on cross-examination. Furthermore Rule 806 is totally ineffective when the writing is published anonymously<sup>92</sup> since the reputation of an unknown author cannot be impeached.

The credibility of the contents of the treatise may be impeached by introducing, pursuant to Rule 803-18, treatises of opposite opinion. However, in a developing science, highly reputable authors often have conflicting explanations of phenomena of uncertain origins. The mere difference of opinion does little to lower the credibility of either author. Much more indicative of unreliability is the use of substandard equipment and research techniques. This information is seldom present in the treatise itself, and can only be learned through cross-examination of the author.

Extrinsic evidence impeaching the author, admitted under Rule 806, is far less damaging than is a vigorous, live cross-examination. The jury would have the opportunity to observe the demeanor of the author during the examination. Also, the counsel opposing admission can more effectively discredit a treatise which appears at first glance to be trustworthy.<sup>93</sup> Rule 806 is a poor substitute for

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91. FED. R. EVID. 806 provides:

When a hearsay statement . . . has been admitted in evidence, *the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if declarant testified as a witness.* Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

(Emphasis added).

92. See notes 59-61 *supra* and accompanying text.

93. There is little likelihood in an obviously bogus "treatise" being admitted by the court, or believed by the jury. See note 93 *supra* and accompanying text.

adversarial cross-examination for impeaching the credibility of a disreputable author, or of his writings.

The potential danger of admitting unreliable writings as substantive evidence is great, given a literal interpretation of Rule 803-18. The hearsay evidence cannot be impeached by a cross-examination of the declarant; nor does Rule 806 provide adequate means to reveal the weakness of the evidence. For this reason, the repeal of Rule 803-18 should be considered.

#### RATIONALE FOR REPEAL OF RULE 803-18

The argument for repealing the potentially abusable Rule 803-18 becomes stronger when that rule is shown to be both ineffective in achieving its main goal, and usurped by other more effective evidentiary devices. Despite the high potential for abuse of Rule 803-18, the rule can be validly applied. However, information contained in documents that are sufficiently trustworthy to merit an exception to the Hearsay Rule can be admitted under another exception to the Hearsay Rule, or through the testimony of an expert witness. In addition to being unnecessary, Rule 803-18 is largely ineffective in solving one of the main problems that prompted its enactment—the easing of the inability of malpractice plaintiffs to obtain expert testimony.<sup>94</sup> Finally, because of the unique amendment

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Other discrediting factors such as shoddy research techniques and bias of the author towards a certain result might only be evident after a cross-examination of the author himself.

94. A report investigating medical malpractice compiled from a nationwide survey of physicians was conducted by a commission established by the Secretary of Health, Education, and Welfare. The Commission found that physicians were markedly reluctant to testify in medical malpractice suits for the following reasons:

- (1) Hesitancy to lose the time and income from practice that may be involved in a court appearance.
- (2) The inability to provide care to patients while testifying.
- (3) The fear and resentment of attorneys by physicians while undergoing adversarial cross-examination.
- (4) The natural reluctance to injure their fellow colleagues.
- (5) The common belief that most malpractice claims are without merit.

U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, REPORT TO THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, *cited in* Comment 71 NW. U.L. REV., *supra* note 91, at 686 n.51.

Massachusetts and Nevada have both adopted statutes allowing the use of learned treatises as independent evidence to specifically alleviate plaintiff's evidentiary disadvantage in malpractice actions.

The drafting change in FED. R. EVID. 803-18 which specifically mentions that a treatise may deal with "medicine" may be significant in showing legislative intent that Rule 803-18 was drafted to aid malpractice plaintiffs in obtaining expert medical testimony. *See* note 39 *supra*.

procedure of the Federal Rules of Evidence, the rule could be easily repealed.<sup>95</sup>

*Rule 803-18 is not Needed to Admit Information Contained in Reliable Treatises*

Much of the reliable evidence that should be admitted under Rule 803-18 can be admitted under other exceptions to the Hearsay Rule. Stock market reports,<sup>96</sup> records of vital statistics,<sup>97</sup> and laboratory reports<sup>98</sup> are examples of types of statements that can be admitted under both Rule 803-18, and other exceptions to the Hearsay Rule. Furthermore, if the treatise is more than twenty years old, it might be admissible under Rule 803-16.<sup>99</sup> Many of the facts in the "settled sciences"<sup>100</sup> have been conclusively known for more than twenty years. Such information could be presented in the form of the older, although still reliable, text. Information contained in government run studies might be admissible under Rule 803-8.<sup>101</sup> Also, if the information is compiled by a business as part of its records, and is of the type of information usually recorded as part of its normal business activity, it may be admissible under Rule

95. Sections not dealing with privileges may be amended by the court itself absent a specific congressional veto of the change. See note 37 *supra*.

96. Market reports are admissible over a hearsay objection pursuant to FED. R. EVID. 803-17, which provides: "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations" shall not be barred by the Hearsay Rule.

97. Records of vital statistics are exempted by FED. R. EVID. 803-9. The rule specifically exempts from the Hearsay Rule: "Records or data compilations, in any form of births, fetal deaths, deaths, or marriages, if the report was made to a public office pursuant to requirements of law."

98. Business records are excepted from the Hearsay Rule by Rule 803-6. See note 49 *supra*.

99. FED. R. EVID. 803-16 grants an exception to the Hearsay Rule for those "statements in a document in existence twenty years or more, the authenticity of which is established".

100. See notes 73-76 *supra* and accompanying text.

101. FED. R. EVID. 803-8 states:

**Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

803-6.<sup>102</sup> The records of an independent testing laboratory, containing results of certain relevant tests performed, might be admissible under this rule. Finally, any piece of hearsay evidence is admissible as proof of a material fact under 803-24, the so-called "catch-all" exception to the Hearsay Rule,<sup>103</sup> if sufficient trustworthiness and necessity can be shown. Although huge quantities of unreliable hearsay could be considered as "business records" or "government records", the rules specifically require that the court find the submitted evidence trustworthy.<sup>104</sup> There is no such expressed requirement of a judicially determined finding of reliability required in Rule 803-18. For this reason, application of other exceptions to the Hearsay Rule are preferable to 803-18.

*The Main Purpose of 803-18 is not Achievable*

It is very possible that a prudent interpretation of Rule 803-18 could not solve one of the major problems leading to its enactment, the evidentiary plight of malpractice plaintiffs.<sup>105</sup> If available at all to plaintiff, expert testimony in malpractice cases is expensive and time consuming.<sup>106</sup>

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102. Records of regularly conducted activities are granted an exception to the Hearsay Rule by FED. R. EVID. 803-6. The rule defines such records as:

A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was, the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, *unless the source of information or the method of circumstances of preparation indicate a lack of trustworthiness*. The term "business" as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

(Emphasis added).

103. FED. R. EVID. 803-24 states:

**Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

104. See note 103 *supra* and accompanying text.

105. See note 95 *supra* and accompanying text.

106. *Id.*

The treatise submitted for admission must still be qualified as authoritative by an expert in the field covered by the treatise.<sup>107</sup> Members of a tightly knit professional community who are reluctant to personally testify against their colleagues<sup>108</sup> would also be unlikely to consider as authoritative a text that strongly damages their peers.

Once the book is qualified as authoritative, the malpractice plaintiff must still call a witness to be present on the stand while the treatise is being read into evidence. Rule 803-18 limits the use of the treatises "to the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination. . . ."<sup>109</sup> The rule does not provide for the introduction of the treatise into evidence other than in the course of the testimony of an expert witness.<sup>110</sup> If the plaintiff is able to obtain expert testimony, the treatise may be presented to the extent relied upon by that expert. Unfortunately, determining the precise extent to which an expert has relied on any given treatise in the formation of an opinion is most difficult.<sup>111</sup> If the plaintiff is unable to find experts to testify on his behalf, he must present the treatise during the examination of the defendant-physician. Although there appears to be no limit to the extent which the treatise may be used on cross-examination,<sup>112</sup> the damaging effect of the treatise may be blunted by its interpretation by the defendant. The defendant may tend to distinguish some of the more harmful aspects of the treatise as being irrelevant to the facts of the case.<sup>113</sup>

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107. FED. R. EVID. 803-18, *supra* note 1.

108. See note 95 *supra* and accompanying text.

109. FED. R. EVID. 803-18, *supra* note 1.

110. The requirement of having a witness on the stand during the introduction of the treatise into evidence insures that an expert will be present to aid the court in interpreting and applying the treatise for the jury. Supreme Court Advisory Note to FED. R. EVID. 803-18.

111. *Jones v. Bloom*, 388 Mich. 98, 200 N.W.2d 196, 208 (1972) (Black, J., dissenting).

112. There are no reported cases where the use of a learned treatise was not allowed in cross-examination of an expert witness because the treatise was not "sufficiently called to the attention" of the cross-examined witness. Apparently, merely reciting, "Let me call this section of this treatise to your attention", appears adequate to bring the treatise within the allowable scope of use during cross-examination.

113. In *Walker v. North Dakota Eye Clinic, Ltd.*, 415 F. Supp. 891 (D.N.D. 1976), a treatise concerning the dangers of a surgical procedure was admitted into evidence under Rule 803-18. However, the defendant physician distinguished the text on the grounds that the facts assumed by the writer of the text were different than those present in the defendant's case history.



Rule 803-18 might not only be ineffective in easing the evidentiary handicap of malpractice plaintiffs, but might not reduce the need for many expensively rented expert witnesses. The proper qualification of a text's authoritativeness might require the testimony of a battery of experts.<sup>114</sup> The expense involved in merely qualifying the treatises could be so great that it could approach the cost of live testimony. A prudent application of Rule 803-18 would not appear to solve several of the problems for which it was designed. Malpractice plaintiffs might find adequate expert testimony just as unobtainable after the enactment of Rule 803-18 as it was before.<sup>115</sup>

Rule 803-18 should be repealed. Application of the rule might allow introduction of very unreliable evidence which cannot be adequately impeached. Other evidence rules can be used to admit much reliable evidence that would have been admissible under Rule 803-18. Even if the potential abuse of Rule 803-18 were cured, the pressing problems creating the need for the rule would remain. Finally, given the unique means of amending the Federal Rules of Evidence, the unchallenged recommendation of the Supreme Court,<sup>116</sup> it is more likely that Rule 803-18 is more amenable to legislative reform than are most statutes.<sup>117</sup> However, until Rule 803-18 is repealed, courts should be made aware of the many devices available to exclude evidence which, although meeting the requirements of Rule 803-18, is so untrustworthy that it should not be excepted from the Hearsay Rule.

If the party seeking admission of a treatise under Rule 803-18 can find one expert witness willing to testify on his behalf, the infor-

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114. See notes 84 and 85 *supra* and accompanying text.

115. In evaluating the effect of a Massachusetts statute allowing substantive use of treatises on the evidentiary plight of malpractice plaintiffs, one commentator concluded: "In its fourteen years of operation it has changed the malpractice practice only slightly. Malpractice plaintiffs still labor under a severe evidentiary handicap." Kehoe, *Massachusetts Malpractice Evidentiary Statute—Success or Failure?*, 44 BOS. U.L. REV. 10 (1964). See note 42 *supra*.

116. See note 96 *supra* and accompanying text.

117. See note 38 *supra* and accompanying text. Judge Friendly articulated the failure of legislators to adequately amend technical and procedural statutes.

The petty tinkering of the legal system which is necessary to keep it in running order is not given proper attention by the legislator. The difficulty is rather that the Congressmen are too driven to be able to attend to such matters. . . . [I]t is not unusual for a member to devote 80% of his time to dealings with constituents, and the demands on the remainder of his time are enormous. Is it not strange that there is neglect of the undramatic legislative activity as I have depicted?

Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

mation contained in the treatise can be admitted through the testimony of an expert witness relying on the text. In federal courts, the expert may base his opinion on any facts, hearsay in form or not, if those facts are of the type reasonably relied upon by other experts in his particular field in forming inferences or opinions.<sup>118</sup> If the treatises submitted for admission are of such a type, the expert may base his testimony on the information contained in them.

Since the expert would be restating the information contained in the treatise, the jury might tend to associate his credibility as an expert to the contents of the treatise. Contrarily, under Rule 803-18, the treatise is read into evidence by the introducing party. There is no aura of expert's credibility lent to treatises introduced into evidence this way.

As with the alternative exceptions to the Hearsay Rule, the application of Rule 703 provides a guarantee of trustworthiness not present in the application of Rule 803-18. Whether or not a treatise is deemed to be reasonably relied upon by experts in the witness's specialty is a judicial determination.<sup>119</sup>

#### METHODS BY WHICH UNRELIABLE EVIDENCE ADMISSIBLE UNDER 803-18 CAN BE EXCLUDED FROM ADMISSION

Rule 803-18 could serve a useful function if the possibility of admitting unreliable evidence could be minimized. Evidence which has a high degree of credibility and is only available in the form of a learned treatise might not fit within one of the other hearsay exceptions. Until the Rule is repealed, or amended to include a specific requirement of judicially determined trustworthiness, the courts should work within other existing rules to minimize the potential danger of Rule 803-18.

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118. FED. R. EVID. 703 allows expert witnesses to base their opinions on facts that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. *If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.*

(Emphasis added). This rule would allow introduction, through the testimony of an expert witness, of the information contained in certain reliable treatises.

119. The court will generally accept the expert witness's advice as to what texts are generally considered reliable in his specialty. However, the court can exclude the testimony if the treatise upon which it is based is obviously not of a type to be trustworthy. This safeguard against untrustworthy evidence is not present in Rule 803-18.

### *Restrictive Interpretation*

Although there is no expressed provision in Rule 803-18 that requires a judicial certification of the reliability of the evidence<sup>120</sup> the court can exclude apparently unreliable evidence by restrictively interpreting the requirements stated in the Rule. Given an ambiguity in the definitions of "publish" or "pamphlet" the court could exercise discretion to interpret those terms<sup>121</sup> so that a "published pamphlet" might be of a form likely to be trustworthy. The courts could claim such an interpretation by claiming that Congress intended to exempt from the Hearsay Rule only that evidence which was deemed sufficiently necessary or trustworthy so as not to require cross-examination.<sup>122</sup> The courts could restrictively interpret the criteria of Rule 803-18 so that some of the writing of suspect form and credibility that is currently admissible could be excluded.

There is little actual danger of a jury being misled by evidence having a very unimpressive physical form and distribution. These factors are obvious to the jury and would themselves greatly reduce the credibility of the submitted writing. Much more dangerous is the introduction of evidence which, although having the physical form and distribution of a reliable treatise, is in fact inaccurate. After all, the thick, impressively bound book gives no indication to the jury of its unreliability. For this reason, the qualification of the treatise by expert testimony is the most effective of the criteria in the Rule in excluding unreliable evidence.

### *Raising the Standard of Qualification*

A court may insure an adequate qualification of a treatise by demanding that the expert certifying the text be qualified in the specific, rather than general, field covered by the treatise. This requirement would prohibit a generalist from qualifying as reliable

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120. Unlike many other rules granting hearsay exceptions, Rule 803-18 does not specifically contain a requirement of trustworthiness. See notes 42-53 *supra* and accompanying text.

121. The plain meaning rule, the rule of statutory construction that precludes judicial interpretation of the terms in the statute, can only apply in those instances where only one meaning can be assigned to the words in the statute. *Caminetti v. United States*, 242 U.S. 470 (1917). Since there is an inherent ambiguity in the language describing the requirements, the courts may use their discretion in shaping the meaning of those terms to fit more closely with the intent of the legislature to admit only trustworthy evidence under an exception to the Hearsay Rule.

122. FED. R. EVID. 803-24 deals with the required degrees of trustworthiness and necessity of evidence, not fitting any of the listed hearsay exceptions, which should not be barred by a hearsay exception. The criteria of necessity and trustworthiness are present in each of the listed exceptions in Rules 803 and 804. Note, 5 VAL. U.L. REV., *supra* note 12, at 137.

texts in fields with which he is only slightly familiar.<sup>123</sup> Placing similarly strict requirements on the credentials of the expert on the stand during the introduction of the treatise into evidence would guarantee the presence of an expert well able to aid the court in interpreting and applying the treatise.

The court might also make qualification of the text more difficult by requiring more than one expert to qualify the treatise. If such a step was taken, the court would be applying its discretionary judgment of the trustworthiness of the text instead of the certification of the one expert witness required by Rule 803-18. This preemption of the expert's unilateral power to qualify the text could exclude much of the suspect evidence that would be admissible under the arbitrary and inflexible requirements of Rule 803-18.<sup>124</sup>

This approach was applied in a Kansas court<sup>125</sup> in interpreting a statute<sup>126</sup> containing the same requirement for qualification found in Rule 803-18. The court held that the treatise was inadmissible despite the fact that the required expert witness had testified to its veracity. The court stated that "considerable judicial discretion is in order for determining which works are trustworthy."<sup>127</sup> Even if the court refuses to override the Rule's clear intent that only one expert is needed to qualify the text, different rules of evidence could be used to exclude untrustworthy hearsay apparently admissible under Rule 803-18.

#### *Application of Rule 401*

All admissible evidence must have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.<sup>128</sup> This concept of relevancy, adopted by the Federal Rule 401, was applied in a Massachusetts court<sup>129</sup> citing a rule<sup>130</sup> similar to Rule 803-18. The court held that anesthesiology text published in England was inadmissible, despite the required qualification by ex-

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123. However, this raising of the standards for the qualifying witness may make qualification itself more difficult. See notes 112 and 113 *supra* and accompanying text.

124. If the court chose to interpret "authoritativeness established by expert testimony" to be the consensus opinion of all expert testimony available, rather than just one expert, this method would be proper.

125. *Zimmer v. State*, 206 Kan. 304, 477 P.2d 971, 975 (1970).

126. KAN. STAT. ANN. § 60-460cc. (1964).

127. *Zimmer v. State*, 206 Kan. 304, 477 P.2d 971, 975 (1970).

128. FED. R. EVID. 401.

129. *Ramsland v. Shaw*, 341 Mass. 56, 166 N.E.2d 894 (1960).

130. MASS. ANN. LAWS ch. 233 § 79c (Supp. 1979). See note 39 *supra*.

pert witness. The court rationalized that since the standards of anesthesia might be different in the United States than in England, the English text was irrelevant to ascertaining the American standards. Additionally, an obviously bogus "treatise" could be deemed to have no probative value and excluded by Rule 401. For example, the fact that a faith healer makes certain assertions in a neurology text might have no relevance to the truth of those assertions. Unfortunately, evidence of minimal probative value may be deemed relevant. Normally, the unreliability of the evidence will be made apparent by cross-examination. With admission of hearsay evidence this safeguard is not present. Therefore, the standard of relevance is far too lax to exclude all the potentially misleading evidence apparently admissible under Rule 803-18.<sup>131</sup>

#### *Application of Rule 403*

Assuming that the court finds that the offered treatise possesses sufficient probative value to meet the relevancy requirement of Rule 401,<sup>132</sup> the evidence must not violate the criteria set forth in Rule 403. That rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>133</sup>

This concept was applied in *Apicella v. McNeil Laboratories*<sup>134</sup> where evidence that appeared to be admissible under both Rule 803-18 and Rule 703 was excluded on the grounds that the evidence generated unfair prejudice that substantially outweighed its probative value. The pamphlet offered for admission asserted that defendant's product was dangerous, cited anonymous reports of fatalities resulting from its use, and concluded that the drug should be removed from the market. Defendant sought to compel the publication to release the names of those responsible for drafting the report on the drug. The court denied the motion, restating the strong public policy of protecting the confidential sources of journalists. However, the court recognized that defendant would be "severely disadvantaged to refute"<sup>135</sup> the assertions made in the pamphlet without the requested information, and held that the prejudice outweighed the probative value of the evidence. The court ap-

131. See note 1 *supra*.

132. FED. R. EVID. 402 requires that all admissible evidence must be relevant, according to the standards in FED. R. EVID. 401.

133. FED. R. EVID. 403.

134. 66 F.R.D. 78 (S.D.N.Y. 1975).

135. *Id.*

parently did not exclude the evidence merely because of its low probative value.

The court added a second ground for exclusion, pursuant to Rule 403, holding that the evidence, if offered, would substantially confuse the issue:

There is a danger that the jury might focus on the accuracy of the 1974 article rather than on the liability in 1972 when knowledge of the art may have been quite different. To the element of unfair prejudice in being unable to cross-examine the experts who relied upon the article is added the hazard of confusion and misleading the jury.<sup>136</sup>

This concept of unfair prejudice may be used in criminal cases to exclude from evidence a highly inculpatory or prejudicial statement by a declarant who is either unavailable for, or privileged from cross-examination by defense counsel. If such information is contained in a treatise admitted under Rule 803-18, the defendant's right to confront his accusers, as protected by the Sixth Amendment, may be violated.<sup>137</sup>

Courts have generally held that the right to confrontation is not violated by the admission of out-of-court statements which fit within one of the established exceptions to the Hearsay Rule.<sup>138</sup> However, the rapid erosion of the Hearsay Rule<sup>139</sup> suggests a need to reconsider whether the limitation of a constitutional right can be tied solely to the minimally acceptable degree of trustworthiness controlling the admission of hearsay evidence. Indeed, the Supreme Court has stated that the right for a witness to confront his accusers is a right that the court "has been zealous to protect . . . from erosion."<sup>140</sup>

136. *Id.* at 86.

137. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; *to be confronted with witnesses against him*; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added).

138. *Cox v. United States*, 449 F.2d 679 (10th Cir. 1971); *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971); *Warren v. United States*, 447 F.2d 259 (9th Cir. 1971).

139. See notes 3 and 4 *supra* and accompanying text.

140. *United States v. Hampton*, 419 U.S. 593 (1974).

The court might avoid an unconstitutional application in criminal cases of Rule 803-18 in two ways. It might simply require the author of the writing to be available for cross-examination giving the defendant the opportunity to confront his accuser. If the declarant is unavailable for cross-examination,<sup>141</sup> the evidence could be excluded under Rule 403 in that the prejudice of the evidence substantially outweighs its probative value.

The other considerations of Rule 403, waste of time, and needless cumulation of evidence,<sup>142</sup> could also be utilized to exclude writings apparently admissible under Rule 803-18. The reading of an entire lengthy volume into evidence, even if the information was relevant and not overly prejudicial, may be excluded, or limited, to the extent that the probative value is not outweighed by the waste of time. A similar argument can be employed when the evidence submitted is cumulative of the other evidence already introduced.

Not only may the court exclude seemingly admissible evidence by finding extreme prejudice, delay, or confusion presented by the evidence, it may consider the potentially low probative value of the evidence, based on its unreliability. In this way, the court can directly apply its own determination of trustworthiness to the ultimate admissibility of the writing.<sup>143</sup>

#### *Application of Rule 805*

Evidence submitted pursuant to Rule 803-18 seems especially susceptible to exclusion by operation of Rule 805,<sup>144</sup> the "Double Hearsay Rule." The rule requires that in order for a compilation of hearsay statements to be admissible, each of the individual statements must be admissible under an exception to the Hearsay Rule. Articles which are hastily written, poorly packaged, and poorly distributed are often the type of writing not considered authoritative within the relevant professional community. These writings are

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141. The declarant could be unknown or outside of the jurisdiction of the court. The declarant might be exempt from cross-examination by operation of the attorney-client privilege, newsman's privilege, or any other privilege against cross-examination allowed by that jurisdiction.

142. See note 133 *supra* and accompanying text.

143. This discretionary exclusion on the basis of a judicial determination of trustworthiness is the key safeguard in the other exceptions to the Hearsay Rule listed in Rule 803. See note 14 *supra* and accompanying text.

144. FED. R. EVID. 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the Hearsay Rule provided in these rules."

often not based on the results of original research, or of painstaking original analysis of the work of others, but consist of recitation of statements of others.<sup>145</sup> Such writings would be likely to contain more non-expected hearsay assertions than would treatises of more substantial physical form, enjoying wide distribution and high respect among the professional community. Since the entire compilation, and not just the non-expected portion of the document is excluded, many ill-considered writings could be excluded by Rule 805.

Although there is no prohibition against the number of stages hearsay evidence could pass through and still be admitted, prospect of admissibility decreases with each level. Multiple hearsay is even more suspect to the same objections which apply to simple hearsay.<sup>146</sup> Therefore, courts could consider that with each level of hearsay, the reliability and probative value decreases to the point where an exclusion under Rule 403 or Rule 401 would be proper.<sup>147</sup>

Despite the apparent inflexibility of Rule 803-18 in admitting any writings that conform to its criteria, reliable or not, there are several means by which courts can use their discretion to exclude unreliable evidence. A more restrictive reading of the requirements of Rule 803-18, or application of the relevancy standard imposed by Rule 401, would allow judicial input into the admissibility decision. Furthermore, application of Rule 403 requires that the court balance the unfair prejudice, waste of time, or confusion generated by the treatise against its probative value. In determining a writing's probative value, the courts can use their judgment of the writing's reliability. In this way, the discretion to exclude suspect evidence that is lacking in Rule 803-18, but present in other rules, can be applied. Rule 805, the double hearsay standard, could also exclude writings of a suspect nature which are more likely to contain non-expected hearsay assertions that would treatises that are in a form likely to be reliable. Through these evidentiary devices, some of the worst abuses of Rule 803-18 can be cured.

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145. A major medical school would be more likely to possess and apply the human and financial resources needed to perform the expensive original research needed for a reliable medical text in a rapidly developing field. An unaffiliated and unknown author would be less likely to have the needed resources available, and would be more reliant upon statements of facts and opinions of other parties. Furthermore, the unknown and unsponsored author whose lack of credentials would make his treatise's reliability suspect, would be less likely and able to publish his work in as wide a distribution, or in as substantial a physical form as would the respected institutionally sponsored author. See note 61 *supra* and accompanying text.

146. J. WEINSTEIN, *supra* note 7, at ¶805[01].

147. See notes 126-34 *supra* and accompanying text.



### CONCLUSION

The purpose of Rule 803-18 is valid. The utilization of reputable learned treatises to prove generally accepted facts within a specialized field of knowledge could apparently save countless hours and dollars by doing away with the need for great quantities of costly and time consuming expert testimony. Rule 803-18 places certain requirements on writings to be submitted as independent evidence that would supposedly guarantee their trustworthiness. The writing must be published; it must be in the form of a treatise, periodical, or pamphlet; and it must deal with a subject of medicine, history, or other art or science. Furthermore, the veracity of the text must be certified by an expert witness. Rule 803-18 also requires that a witness remain on the stand to help interpret the text, and that the treatise not be admitted as an exhibit.

However, the safeguards employed by Rule 803-18 are not adequate; the lenient standards allow evidence that is in a form highly unlikely to be reliable to be admissible. According to a literal interpretation of Rule 803-18, an unsigned, folded scrap of paper stolen from the writer and passed to a third party could be eligible for admission. Evidence in such a form needs the device of cross-examination to reveal its weakness to the jury.

Information contained in highly reliable treatises that should rightly be admitted as independent evidence can be introduced into evidence without resorting to Rule 803-18. Information contained in such a writing is likely to fit one of the other exceptions to the Hearsay Rule listed in Rule 803 of the Federal Rules of Evidence. In addition, the facts within the treatise may be admissible through an expert's testimony, pursuant to Rule 703. Because the above alternative rules allow judicial discretion in excluding unreliable evidence, they are less prone to abuse than is Rule 803-18. In addition, if the rule is rationally interpreted the major evil that caused the enactment of the rule, the evidentiary plight of malpractice plaintiffs, cannot be remedied.

Rule 803-18 at best is superfluous, and at worst is dangerous. Much evidence of questionable credibility will pass the standards in 803-18, but will not appear to be so obviously bogus that it will be excluded by other Rules. The Rule should be amended to specifically require a judicial determination of trustworthiness, or be repealed entirely.

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