

SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

Title 225 - Rules of Evidence
[225 Pa. Code Act IV]

Proposed Amendment of Pa.R.E. 803
To Add a New Rule F.R.E 803(18)

The Committee on Rules of Evidence is planning to recommend that the Supreme Court of Pennsylvania approve the Amendment of Pa.R.E. 803. The change is being proposed to add subsection (18) Learned Treatise and Comment.

This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

Additions are underlined, and deletions are in **[bold and brackets]**.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel:

Richard L. Kearns, Staff Counsel
Supreme Court of Pennsylvania
Committee on Rules of Evidence
5035 Ritter Road, Suite 700
Mechanicsburg, PA 17055

no later than August 15, 2008

By the Committee on Rules of Evidence

PROFESSOR SANDRA D. JORDAN, CHAIR

ANNEX A

Title 225 Rules of Evidence

Article VIII: Hearsay

Rule 803(18)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

(18) Learned treatises **[not adopted]**. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness 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.

This exception to the hearsay rule is not applicable unless the party calling the expert witness on direct examination has given timely notice of the intent to offer the learned treatise.

[Comment

Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to the hearsay rule for learned treatises. See *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

Regarding the permissible uses of learned treatises under Pennsylvania law, see *Aldridge v. Edmunds*, 750 A.2d 292 (Pa. 2000).]

Comment

Pa.R.E. 803(18) is similar to F.R.E. 803(18). Prior Pennsylvania law did not permit the substantive use of statements contained in learned treatises. See *Aldridge v. Edmunds*, 561 Pa. 323, 750 A.2d 292 (2000). A clear majority of the states have adopted the Federal rule, based on the judgment that statements contained in learned treatises are especially reliable because they are subject to peer review, and, except in rare instances, the author will have no interest in the case before the court. The second sentence of the federal rule that prohibits giving the statements to the jury during deliberations has been omitted because Pennsylvania law gives the trial judge discretion to decide which exhibits are given to the jury during deliberations. See

Wilson v. Pennsylvania R.R. Co., 421 Pa. 419, 219 A.2d 666, n. 8 (Pa. 1966); Pa.R.Crim.P. 646(B).

The notice requirement in the second paragraph of the rule does not appear in F.R.E. 803(18), but federal discovery practice differs from Pennsylvania practice. The notice requirement is intended to prevent unfair surprise, and so that the opposing party will have the opportunity to investigate the validity of the author's statements or seek other authority. The notice should be provided in the normal course of discovery. See Pa.R.C.P. 4003.5(a)(1)(b).

REPORT

Proposed Amendment of Pa.R.E. 803 to Add the Learned Treatise Exception to the Hearsay Rule

There are some fairly solid grounds for adopting the Learned Treatise exception to the hearsay rule. As a general rule, the material is a pretty reliable type of hearsay. It is subject to peer review, and usually the author will have no interest in the case before the court.

A second reason for adopting the rule is that learned treatises now may come before the jury to explain the basis for an expert's opinion or to impeach an expert. In these cases, the judge is obligated, upon request, to give a limiting instruction to the effect that the learned treatise is not admissible for its truth, but only to explain the basis for the opinion or to impeach. See *Aldridge v. Edmonds*, 750 A.2d 292 (Pa. 2000). It is questionable whether the jurors will understand the instruction. If we adopt the rule the court will not give the instruction, and the jury will not have to figure out what the judge is talking about.

A third reason is that this is so confusing that the courts and counsel frequently trip over the handling of learned treatises in court. Adoption of the rule might simplify the handling of learned treatises for the courts, counsel, and the jury.

When Rule 803(18) of the Federal Rules of Evidence (Federal Rule 803(18)) was adopted in the early 1970's, the rule that permitted the contents of learned treatises to be admitted as substantive evidence was a distinctly minority view. As the Note to paragraph 18 revealed, only Alabama, Wisconsin, and Kansas then followed the Federal Rule 813(18). However, as of today, thirty states (as well as the Military Code of Justice) have adopted rules or enacted statutes that are either identical or substantively identical to the Federal Rule 803(18). Those states are:

Alabama	Alaska	Arizona	Arkansas
Delaware	Hawaii	Indiana	Iowa
Kentucky	Maine ¹	Maryland	Minnesota
Montana	Nebraska	New Jersey ²	New Mexico
North Carolina	North Dakota	Ohio	Oklahoma

¹ Maine's rule permits statements of a learned treatise to be used as substantive evidence only where those statements are used during cross-examination of an expert witness.

² New Jersey's rule differs only in that it permits "graphics" to be shown to a jury.

Rhode Island	South Carolina ³	South Dakota	Texas
Utah	Vermont	Virginia	Washington
West Virginia	Wyoming		

Another seven states have adopted rules or enacted statutes that also permit statements in learned treatises to be used as substantive evidence, but otherwise differ from Federal Rule 803(18) in that admission of the statements as exhibits is or may be permitted. Those states are:

Colorado	Connecticut	Idaho	Kansas
Louisiana ⁴	Nevada	New Hampshire	

Two other states (Mississippi and Wisconsin) have adopted rules or enacted statutes that differ from the Federal Rule 803(18) in that the intended use of the learned treatise must be disclosed to the opposing party prior to trial. Massachusetts, by statute, permits the introduction of statements in learned treatises as substantive evidence only in medical malpractice actions if prior notice is provided.

³ South Carolina's rule is identical to Federal Rule 803(18) except that it adds the following sentence at the end thereof. "This rule is in addition to any statutory provisions on the subject."

⁴ Louisiana's rule specifically prohibits any exhibit admitted pursuant thereto from being taken into the jury room.