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LEARNED TREATISES AND RULE 8-03(b) (18) OF THE PROPOSED FEDERAL RULES OF EVIDENCE

INTRODUCTION

The most recent contribution in the long continued trend¹ toward evidentiary reform is the Proposed Rules of Evidence for the United States District Courts and Magistrates.² These Federal Rules of Evidence³ represent an attempt to conform federal practice to the demands of modern litigation and society.⁴ As a result of the liberalization of procedures⁵ as well as the continued growth in the educational level of jury members,⁶ an atmosphere conducive to such reform has been created. It is in reaction to this environment that the Rules may find substance.⁷

The principle of hearsay, however, has suffered a most vigorous

1. The trend began with the Rule Making Act of June 1934; Rules of Court Act, 28 U.S.C. § 2072 (1964). This initially resulted in the Federal Rules of Civil Procedure, effective September 16, 1938. Rule 43(a) of these rules was promulgated to fill the resulting evidentiary gap. There followed several other attempts: the ALI Model Code of Evidence in 1942; the National Conference of Commissioners on Uniform Laws proposed the Uniform Rules of Evidence in 1953; the California Rules became effective January 1, 1967 and were based on the Uniform Rules but modified to comply with state policies; the New Jersey Evidence Act of 1960 established portions of the Uniform Rules; and the Supreme Court of New Jersey Rules of Evidence which became effective September 11, 1967.

2. FED. R. EVID., 46 F.R.D. 161 (Prelim. Draft 1969).

3. *Sabatina v. Curtiss Nat'l Bank*, 415 F.2d 632 (5th Cir. 1969); *United States v. 60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961); *Fleury v. Edwards*, 14 N.Y.2d 334, 341, 200 N.E.2d 550, 554, 251 N.Y.S.2d 647, 653 (1964).

4. FED. R. EVID., 46 F.R.D. 161 (Prelim. Draft 1969).

The materials supporting the need for uniform Rules of Evidence are impressive and, unanimously, the members of the Committee have tentatively concluded that—

1. Rules of Evidence applied in the Federal Courts should be improved; and

2. Rules of Evidence which would be uniform throughout the Federal court system, are both advisable and feasible.

Id. at 177.

5. An example might be the liberalization of pretrial discovery procedures. FED. R. CIV. P. 26-36.

6. ALI MODEL CODE OF EVIDENCE 8, 9 (1942); Weinstein, *Devising Evidentiary Rules*, 66 COLUM. L. REV. 223 (1966). Statistical evidence of this rising level of education can be found in the U.S. BUREAU OF CENSUS, STAT. ABS. OF U.S. 121 (90th ed. 1969).

7. Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise*, 54 A.B.A.J. 231 (1968); Weinstein, *Devising Evidentiary Rules*, 66 COLUM. L. REV. 223 (1966).

assault⁸ because of its myriad exceptions.⁹ The practical difficulty in judicial application of the rule has led courts to refuse to view hearsay as a "strait-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the proffered evidence"¹⁰ with the result that they have embarked upon a period of creative expansion.¹¹ The most viable legislative solutions offered in response for adoption are threefold:¹² abolish the rule against hearsay and admit all such evidence,¹³ abandon the classification of exceptions and admit hearsay possessing probative force,¹⁴ or revise the present system of class exceptions. The Committee on Rules of Practice and Procedure has chosen the final alternative and has implemented it in the form of Article Eight of the Proposed Federal Rules of Evidence. The purpose of this note is to examine the validity of this attempt as it relates to Rule 8-03(b)(18) dealing with learned treatises.

THE CURRENT LAW ON LEARNED TREATISES

The Common Law

It is generally accepted that learned treatises are hearsay and, therefore, not admissible to prove the truth of the statements they contain.¹⁵ The cogent consideration in support of this position is that

8. "Exceptions to the hearsay rule have virtually swallowed the rule." *De La Salle Institute v. United States*, 195 F. Supp. 891, 894 (N.D. Cal. 1961).

9. Booker & Morton, *The Hearsay Rule, St. George Plays and the Road to the Year Twenty-Fifty*, 44 NOTRE DAME LAW. 7 (1968), have compiled a list of sources with a varying number of exceptions:

MODEL CODE RULES 503-18, 520-30 (27 exceptions); 2 E. CONRAD, *MODERN TRIAL EVID.* 673 (1956) (16 exceptions); T. GREEN & C. HARPER, *THE GEORGIA LAW OF EVID.* 235-326 (1957) (48 exceptions by our best count); 1 S. GREENLEAF, *EVIDENCE* 175 (14th ed. 1883) (5 exceptions); H. KELLEY, *CRIMINAL LAW AND PRACTICE* 227-32 (3d ed. 1913) (4 or, perhaps, 5 exceptions); R. KENNEDY, *TRIAL EVIDENCE* 76-126 (1909) (13 exceptions); MORGAN, *Foreword to MODEL CODE* at 38 (18 exceptions); J. WIGMORE, *EVIDENCE* § 1426 (3d ed. 1940) (14 exceptions); J. WIGMORE, *CODE OF EVIDENCE* 151-70 (3d ed. 1942) (20 exceptions); *UNIFORM RULES OF EVIDENCE* 63 (31 exceptions).

Id. at 10-11 n.22.

10. *United States v. Castellana*, 349 F.2d 264, 276 (2d Cir. 1965).

11. *Sabatina v. Curtiss Nat'l Bank*, 415 F.2d 632 (5th Cir. 1969); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961). The license for such expansion is found in *FED. R. CIV. P.* 43.

12. *FED. R. EVID.*, 46 F.R.D. 161, 325-28 (Prelim. Draft 1969); Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375 (1968); Weinstein, *Probative Force of Hearsay*, 46 *IOWA L. REV.* 331 (1960).

13. *Cf.* *MODEL CODE OF EVIDENCE* 503.

14. Weinstein, *Probative Force of Hearsay*, 46 *IOWA L. REV.* 331 (1960); *FED. R. EVID.*, 46 F.R.D. 161, 327 n.2 (Prelim. Draft 1969).

15. *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963); *Trustees of Pencader Presby. Church v. Gibson*, 26 Del. Ch. 357, 22 A.2d 782 (1941); *Isley v. Little*, 219

it places the opinion of an uncross-examined author before the jury. This results in the lack of opportunity to test the accuracy or weight of the statement.¹⁶ Two jurisdictions, Alabama and Wisconsin, rationalize admission by acknowledging first, difficulty in obtaining competent medical testimony, and second, that professional knowledge is in a great degree derived from treatises of the particular profession.¹⁷ The landmark cases¹⁸ from these jurisdictions suggest no further substitute for cross-examination. They do, however, require¹⁹ that the proponent demonstrate that the treatise is a standard or authoritative work.²⁰

The exclusionary rule set forth above has been held inapplicable to historical works of deceased authors being of general notoriety and interest²¹ or books on exact sciences,²² *e.g.*, mortality tables,²³ annuity

Ga. 23, 131 S.E.2d 623 (1963); *Brown v. Collins*, 223 So. 2d 453 (La. App. 1969); *Guidry v. Grain Dealers Mut. Ins. Co.*, 193 So. 2d 873 (La. App. 1967); *Zubryski v. Minneapolis St. Ry. Co.*, 243 Minn. 450, 68 N.W.2d 489 (1955); *Milner Enterprises v. Jacobs*, 207 So. 2d 85 (Miss. 1968); *McComish v. DeSoi*, 83 N.J. Super. 505, 200 A.2d 511 (1964); *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968); *Piotrowski v. Corey Hosp.*, 172 Ohio St. 61, 176 N.E.2d 355 (1961); *Gulf Oil Corp. v. Miller*, 198 Okla. 54, 175 P.2d 335 (1946); *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

16. *Colorificio Italiano Max Meyer S.P.A. v. S.S. Hellenic Wave*, 419 F.2d 223 (5th Cir. 1969); *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963); *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349 (D. Mass. 1950); *Zubryski v. Minneapolis St. Ry. Co.*, 243 Minn. 450, 68 N.W.2d 489 (1955); *Milner Enterprises v. Jacobs*, 207 So. 2d 85 (Miss. 1968); *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968); *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

17. *Franklin v. State*, 29 Ala. App. 306, 197 So. 55 (1940); *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857); *Halldin v. Peterson*, 39 Wis. 2d 668, 159 N.W.2d 738 (1969); *Lewandowski v. Preferred Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

18. *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857); *Lewandowski v. Preferred Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

19. This, of course, is in addition to relevance and authentication which is always required of such evidence. *See generally* 5 WIGMORE, EVIDENCE § 1424 (3d ed. 1940) [hereinafter cited as WIGMORE].

20. *Smarr v. State*, 260 Ala. 30, 68 So. 2d 6 (1953); *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857); *Lewandowski v. Preferred Mut. Ins. Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966).

21. *Morris v. Harmer's Heirs*, 10 U.S. (7 Pet.) 554 (1833); *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Montana Power Co. v. F.P.C.*, 185 F.2d 491 (D.C. Cir. 1950); *Trustees of Pencader Presby. Church v. Gibson*, 26 Del. Ch. 375, 22 A.2d 782 (1941); *Lazell v. Boardman*, 103 Me. 292, 69 A. 97 (1908); *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

22. *Nix v. Hedded*, 149 U.S. 304 (1892); *Bixby v. Omaha & C. B. Ry. & Bridge Co.*, 105 Iowa 293, 75 N.W. 182 (1898); *Guidry v. Grain Dealers Mut. Ins. Co.*, 193 So. 2d 873 (La. App. 1967); *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969).

23. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Roberts v. United States*, 316 F.2d 489 (3d Cir. 1963); *Minnesota Amusement Co. v. Larkin*, 299 F.2d 142 (8th Cir. 1962); *Kenebs v. Kettle*, 406 F.2d 1951 (D.C. Cir. 1968); *Danzios v. Kelly*, 112 Ill. App. 2d 14, 250 N.E.2d 801 (1969); *Sherman v. City of*

tables,²⁴ tide tables and almanacs.²⁵ Works of living and available authors,²⁶ however, or treatises dealing with inductive or inexact sciences²⁷ are generally held inadmissible.²⁸

When the texts are offered only for impeachment purposes and not as independent evidence of the facts in issue, the hearsay objection is not appropriate.²⁹ Consequently, the majority view allows use of treatises on cross-examination, but the extent varies with the jurisdictions. It is generally agreed that where the witness has relied upon a particular treatise to support his opinion, he may be cross-examined from that treatise to demonstrate that such support is not forthcoming.³⁰ Some jurisdictions confine use of the treatise to only these circumstances.³¹ A broader view recognizes that where the witness has relied upon treatises generally,³² works other than those specifically referred to may

Springfield, 111 Ill. App. 2d 391, 250 N.E.2d 537 (1969); Howard v. Gulf Mobile & Ohio R.R. Co., 13 Ill. App. 2d 482, 142 N.E.2d 825 (1957); Budd v. Erie Lackawanna R.R. Co., 98 N.J. Super. 47, 236 A.2d 143 (1967); Horton v. State, 50 Misc. 2d 1017, 272 N.Y.S.2d 312 (Ct. Cl. 1966).

24. Continental Oil Co. v. Elias, 307 P.2d 849 (Okla. 1957).

25. Pendry v. Addison, 105 Ga. App. 673, 125 S.E.2d 523 (1962); Fields v. Jackson, 102 Ga. App. 117, 115 S.E.2d 877 (1960); Gaphill v. Bergman, 108 N.H. 507, 240 A.2d 55 (1968).

26. Morris v. Harmer's Heirs, 10 U.S. (7 Pet.) 554 (1833); Gallager v. Marketstreet Ry. Co., 67 Cal. 13, 6 P. 869 (1885).

27. Bixby v. Omaha & C. B. Ry. & Bridge Co., 105 Iowa 293, 75 N.W. 182 (1898); Piotrowski v. Corey Hosp., 172 Ohio St. 61, 176 N.E.2d 355 (1961); Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

28. The determination of admissibility of any text or treatise is made after consideration of the need for its use and the trustworthiness the source affords. A more thorough discussion of these two requisites follows. See notes 74-90 *infra* and accompanying text.

29. Creaghe v. Iowa Home Mut. Cas. Co., 323 F.2d 981 (10th Cir. 1963); Carantzas v. Iowa Home Mut. Ins. Co., 235 F.2d 193 (5th Cir. 1956); Downie v. United States Lines Co., 231 F. Supp. 192 (E.D. Pa. 1964); Am-Cal Invest. Co. v. Sharlyn Estates, Inc., 255 Cal. App. 2d 526, 63 Cal. Rptr. 518 (1967); Dussault v. Condon, 170 Cal. App. 2d 693, 339 P.2d 896 (1959); Gass v. Carducci, 37 Ill. App. 2d 181, 185 N.E.2d 285 (1962); Wilson v. Hartford Acc. & Indem. Co., 272 N.C. 138, 158 S.E.2d 1 (1967); Potter v. Baker, 164 Ohio St. 488, 124 N.E.2d 140 (1955).

30. Farmer's Union Fed. Co-op. Ship. Ass'n. v. McChesney, 251 F.2d 441 (8th Cir. 1958); Scarano v. Schnoor, 158 Cal. App. 2d 612, 323 P.2d 178 (1958); Rice v. Clement, 184 So. 2d 678, 680 (Fla. App. 1966); Crowley v. Elgin, Joliet & E. Ry. Co., 1 Ill. App. 2d 481, 117 N.E.2d 843 (1954); Godthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1952); McComish v. DeSoi, 83 N.J. Super. 505, 200 A.2d 511 (1963); Texas Employer's Ins. Ass'n. v. Nixon, 328 S.W.2d 809 (Tex. Civ. App. 1959).

31. Wall v. Weaver, 145 Colo. 337, 358 P.2d 1009 (1961); Drucker v. Philadelphia Dairy Prod. Co., 35 Del. 437, 166 A. 796 (1933).

32. There has been some indication that this rule may be extended. Therefore, although the witness had not referred to any specific authority, it could be assumed from the nature of his testimony that he had relied somewhat on his study of texts. See Reilly v. Pinkus, 338 U.S. 269 (1949).

be invoked with the proviso that the authority is otherwise established.⁸³ Finally, the most comprehensive conception contemplates use on cross-examination of any text the witness recognizes as authoritative, whether or not he purports to base his opinion upon it.⁸⁴ This concluding view has been altered⁸⁵ in a number of jurisdictions to allow the authority of the work to be established by means other than the witness' recognition, *e.g.*, by other expert testimony or judicial notice.⁸⁶

Statutory Alteration of the Common Law

Fourteen jurisdictions have to date enacted statutes in attempted modification of the common law standard. Eight are of general scope⁸⁷ purporting to admit treatises⁸⁸ as "primary,"⁸⁹ "prima facie"⁴⁰ or "presumptive"⁴¹ evidence of "facts of general notoriety and interest."⁴² By

33. Farmer's Union Fed. Co-op. Ship. Ass'n. v. McChesney, 251 F.2d 441 (8th Cir. 1958); Gluckstein v. Lipsett, 93 Cal. App. 391, 209 P.2d 98 (1949); Morton v. Equitable Life Ins. Co., 218 Iowa 846, 254 N.W. 325 (1934); McComish v. De-Soi, 83 N.J. Super. 505, 200 A.2d 511 (1963); Godthwaite v. Sheraton Restaurant, 154 Me. 362, 145 A.2d 362 (1952); Texas Employer's Ins. Ass'n. v. Nixon, 328 S.W.2d 809 (Tex. Civ. App. 1959).

34. Stottlemire v. Cawood, 215 F. Supp. 266 (D.D.C. 1963); Myers v. St. Francis Hosp., 91 N.J. Super. 377, 220 A.2d 693 (1966); McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964); Gravis v. Physicians & Surgeons Hosp. of Alice, 415 S.W.2d 674 (Tex. Civ. App. 1967).

35. Reilly v. Pinkus, 338 U.S. 269 (1949); Darling v. Charleston Comm. Mem. Hosp., 33 Ill. 2d 326, 211 N.E.2d 243 (1965); Dabroe v. Rhodes Co., 64 Wash. 2d 431, 392 P.2d 317 (1964). *Contra*, Myers v. St. Francis Hosp., 91 N.J. Super. 377, 220 A. 2d 693 (1966); Hastings v. Chrysler Corp., 273 App. Div. 292, 77 N.Y.S.2d (1948).

36. This more liberal view is allegedly accepted and implemented in the Fed. R. EVID., 46 F.R.D. 161, 372 (Prelim. Draft 1969).

37. Seven jurisdictions, Alabama, Idaho, Iowa, Nebraska, Montana, Oregon and Utah have accepted a general statute which reads:

Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties are prima facie [primary or presumptive] evidence of facts of general notoriety and interest.

See notes 39-41 *infra* and accompanying text. Cf. CAL. EVID. CODE § 1341 (West 1965).

38. There is indication that journals and pamphlets may not come within the rule in some jurisdictions. Wiggins v. State, 39 Ala. App. 433, 104 So. 2d 560 (1958). *Contra*, Julien v. Barbien, 75 Idaho 415, 272 P.2d 718 (1954).

39. ORE. REV. STAT. § 41.670 (1965). For case material discussing this statute see Eckleberry v. Kaiser Found. N. Hosp., 226 Ore. 616, 359 P.2d 1090 (1948).

40. ALA. CODE tit. 7, § 413 (1958); IDAHO CODE ANN. § 9-402 (1948); MONT. REV. CODE ANN. § 93-1101-8 (1947); UTAH CODE ANN. § 78-25-6 (1953). For case material considering these statutes see City of Dothan v. Hardy, 237 Ala. 603, 188 So. 2d 264 (1939); Julien v. Barbien, 75 Idaho 415, 272 P.2d 718 (1954).

41. IOWA CODE ANN. § 622.23 (1950); NEB. REV. STAT. § 25-1218 (1943). For mention of these statutes see Austin v. Whitaker, 135 Iowa 737, 110 N.W. 910 (1907); Bixby v. Omaha & C. B. Ry. & Bridge Co., 105 Iowa 293, 75 N.W. 182 (1898).

42. Cf. CAL. EVID. CODE § 1341 (West 1965) which reads:

Historical works, books of science or art and published maps or charts made by persons indifferent between the parties *are not made inadmissible by the hearsay rule* when offered to prove facts of general notoriety and interest.

the inclusion of the terminal phrase "facts of general notoriety and interest," books of inexact science and implicitly, if not explicitly, books of history or art of living authors are held inadmissible.⁴³ The court in *Gallager v. Marketstreet Railway Co.*⁴⁴ poses the question,

[w]hat are 'facts of general notoriety and interest?' We think the term stands for facts of a public nature, either at home or abroad, not existing in the memory of men as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of exact sciences, and of literature or art, when relevant to a cause, that, under the provisions of the Code [California Statute], proof may be made by the production of books of standard authority. So Mr. Justice Story, in *Morris v. Lessees of Harmer's Heirs*, 7 Pet. 558, speaking upon this subject, says:

'Historical facts of general and public notoriety may be proven by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better in existence; and where, from the nature of the transaction, or, the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within the reach of the process of the court, can hardly, be deemed of this nature.'⁴⁵

Thus, it has been asserted that these statutes effect no material alteration of the Common Law.⁴⁶

Three other jurisdictions have statutes of more limited scope, restricting application to specified types of cases. Massachusetts⁴⁷ and

Id. (emphasis added). For judicial mention of this statute, see *Gluckstein v. Lipsett*, 93 Cal. App. 391, 209 P.2d 98 (1949).

43. *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951); *Bixby v. Omaha & C. B. Ry. & Bridge Co.*, 105 Iowa 293, 75 N.W. 182 (1898); *International F. & A. M. Masons v. Most Worshipful Prince Hall Grand Lodge, F. & A. M. Masons*, 318 S.W.2d 46 (Ky. 1958); *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

44. 67 Cal. 13, 15, 6 P. 869, 871 (1885).

45. *Id.* at 15, 6 P. at 871.

46. 66 MICH. L. REV. 183, 184 (1967).

47. MASS. ANN. LAWS ch. 233, § 79C (1949):

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 that the said statements are relevant and that the writer of such statements is recognized in his profession or calling as an expert on the subject,

Nevada,⁴⁸ recognizing the difficulty of securing medical testimony in malpractice suits,⁴⁹ allow the use of medical texts in this instance at the discretion of the court.⁵⁰ There has been, however, some indication of judicial reluctance to accept medical texts as authoritative under these statutes.⁵¹ South Carolina allows books of medicine and science to be utilized as independent evidence in proceedings in which the question of sanity is presented.⁵² A careful reading of the statute, however, demonstrates that such use is acceptable only *in addition to such expert testi-*

be admissible in actions of contract or tort for malpractice, 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.

Id. For interpretation of the above statute see *Ramsland v. Shaw*, 341 Mass. 56, 166 N.E.2d 895 (1960); *Reddington v. Claymore*, 334 Mass. 244, 134 N.E.2d 920 (1956); *Murawski v. Laird*, 330 Mass. 549, 116 N.E.2d 279 (1953); *Thomas v. Ellis*, 329 Mass. 94, 106 N.E.2d 690 (1952).

48. NEV. REV. STAT. § 51.040 (1969). The statute reads:

Opinion evidence of experts admissible in malpractice actions; notice of intention to offer.

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 statement 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, dentists, optometrists, osteopathic physicians or surgeons, chiropractors, podiatrists, naturopathic physicians, hospitals and sanitarium, as evidence tending to prove the fact or as opinion evidence.

2. The party intending to offer as evidence any such statement shall, 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.

Id. See *Foreman v. Ver Bruggen*, 81 Nev. 87, 398 P.2d 994 (1965), for construction of this statute.

49. "It is a well-accepted fact that it is very difficult to secure members of the medical profession to testify against colleagues in malpractice actions." *Halldin v. Peterson*, 29 Wis. 2d 668, 671, 159 N.W.2d 738, 741 (1968).

50. Case material has also suggested that notice be required in order to facilitate pretrial discovery. *Myers v. St. Francis Hosp.*, 91 N.J. Super. 377, 220 A.2d 693 (1966).

51. *Ramsland v. Shaw*, 341 Mass. 56, 166 N.E.2d 894 (1960); *Reddington v. Claymore*, 334 Mass. 244, 134 N.E.2d 920 (1956).

52. S. C. CODE ANN. § 26-142 (1962):

In all actions are proceedings, civil or criminal, in which the question of sanity or insanity or the administration of poison or any other article destructive to life is involved and in which expert testimony may be 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.*

Id. (emphasis added).

mony as may be introduced. Furthermore, case material applying the statute indicates that it is limited solely to the genre of cases specified.⁵³

Finally, three jurisdictions⁵⁴ have enacted the Uniform Rules of Evidence provision.⁵⁵ These enactments, however, have not undergone significant judicial scrutiny.⁵⁶ Although potentially revolutionary, they have accomplished little in practical alteration of the common law standard.⁵⁷

THE PROPOSED RULE 8-03(b) (18)⁵⁸

The Federal Rules of Evidence, as previously stated, adopt the generic proposition that hearsay is inadmissible.⁵⁹ Rule 8-02 provides:

Hearsay⁶⁰ is inadmissible except as provided by these rules

53. *Baker v. Southern Cotton Oil Co.*, 161 S.C. 479, 159 S.E. 822 (1931); *Edwards v. Union Buffalo Mills Co.*, 162 S.C. 17, 159 S.E. 818 (1931).

54. KAN. STAT. ANN. § 60-460 (cc) (1964); C. Z. CODE tit. 5, § 2962(31) (1963); VIRGIN ISLANDS CODE tit. 5, § 932(31) (1957). *Accord*, N.J. SUP. CT. RULES § 63(31) (1965).

55. A published treatise or 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).

56. *City of Wichita v. Unified School Dist. No. 259*, 201 Kan. 121, 439 P.2d 163 (1968).

57. Each of these statutes has been in force for a substantial duration, however, none has received a significant amount of use. Therefore, although they may provide latent changes in the Common Law, to date, there has been no apparent alteration.

58. FED. R. EVID., 46 F.R.D. 161, 349 (Prelim. Draft 1969).

59. *Id.* at 343.

60. FED. R. EVID. 8-02(c), 46 F.R.D. 161, 331 (Prelim. Draft 1969):

Hearsay. "Hearsay" is a statement, offered in evidence to prove the truth of the matter asserted, unless

(1) *Testimony at Hearing*. The statement is one made by a witness while testifying at the trial or hearing; or

(2) *Prior Statement by Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony, or (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (iii) one of identification of a person made soon after perceiving him, or (iv) a transcript of testimony given under oath at a trial or hearing or before a grand jury; or

(3) *Admission by Party Opponent*. The statement is offered against a party and is (i) his own statement, in either his individual or representative capacity, or (ii) a statement of which he has manifested his adoption or belief in its truth, or (iii) a statement by a person authorized by him to make a statement concerning the subject, or (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Id. at 331. *Cf.* McCORMICK, EVIDENCE § 225 (1954) [hereinafter cited as McCORMICK]; Booker & Norton, *The Hearsay Rule, The St. George Plays and the Road to the Year Twenty-Fifty*, 44 NOTRE DAME LAW. 7, 14-21 (1968). *See also* Am-Cal Invest.

or by the Rules of Civil and Criminal Procedure or by Act of Congress.⁶¹

There are two categorical provisions in exception to this generality: first, Rule 8-03⁶² where the "Availability of Declarant"⁶³ [is] Immaterial;" and second, Rule 8-04⁶⁴ limited to where the "Declarant [is] Unavailable."⁶⁵ This note is directed to the former which states:

A statement⁶⁶ is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.⁶⁷

This rule is allegedly a synthesis of the exception developed by the Common Law in which the unavailability of the declarant is not a relevant factor.⁶⁸ It is thought that the present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may be as good as testimony given by the declarant in person; thus, his production is not required.⁶⁹

The learned treatise example is to be by way of illustration of the above rule only and not by way of limitation.⁷⁰ In this way the drafting committee intended to furnish only a guide to appropriate application while simultaneously enabling growth and development in the law of

Co. v. Sharlyn Estates, Inc., 255 Cal. App. 2d 526, 63 Cal. Rptr. 518 (1967); Wilson v. Hartford Acc. & Indem. Co., 272 N.C. 138, 158 S.E.2d 1 (1967).

61. FED. R. EVID. 8-02, 46 F.R.D. 161, 343 (Prelim. Draft 1969).

62. *Id.* at 345-77.

63. FED. R. EVID. 8-01, 46 F.R.D. 161, 331 (Prelim. Draft 1969):

"Unavailable as a witness" includes situations in which the declarant is:

(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persistent in refusing to testify in spite of an order of the judge to do so; or

(3) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(4) Absence from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance.

A declarant is not unavailable as a witness if his exemption, refusal, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

64. *Id.* at 377-87.

65. *Id.* at 332.

66. FED. R. EVID. 8-01(a), 46 F.R.D. 161, 331 (Prelim. Draft 1969), states: "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *Id.*

67. *Id.* 8-03(a) at 345.

68. *Id.* 8-03, Advisory Committee's Note at 351.

69. *Id.* at 350.

70. *Id.* 8-03(b) at 345.

evidence.⁷¹ Rule 8-03(b)(18)⁷² provides:

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 reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [are allowed in evidence].⁷³

As this note proceeds, it will attempt to demonstrate first, that Rule 8-03 is not a synthesis of prior exceptions because it eliminates the requirement of necessity heretofore imperative; secondly, that if it can be conceded that there must exist necessity, the exception for learned treatises only minimally demonstrates this quality; and thirdly, that learned treatises do not provide the requisite complement of trustworthiness for an exception to the hearsay rule.

THE PRINCIPLES OF EXCEPTION AND RULE 8-03(b)(18)

The theory of the hearsay rule is that an out of court statement may be replete with inaccuracy and/or untrustworthiness which would not be detected without being subjected to the test of cross-examination.⁷⁴ The factors to be considered in evaluating testimony, namely perception, memory, sincerity and, most important, narration,⁷⁵ might remain unobserved and untested.⁷⁶ Of course, in a given instance the test of cross-examination may be either impossible to employ because of the unavailability of the declarant,⁷⁷ or superfluous because of the

71. *Id.* 8-03, Advisory Committee's Note at 351.

72. *Id.* 8-03(b)(18) at 349.

73. *Id.*

74. McCORMICK § 224. See *Buchanan v. Nye*, 128 Cal. App. 2d 582, 275 P.2d 767 (1954), which states:

The basic theory [of hearsay] is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the basic untested assertions of a witness, may be best brought to light by the test of cross-examination.

Id. at 770.

75. Morgan, *Hearsay Dangers and the Application of the Hearsay Test*, 62 HARV. L. REV. 177 (1948), acknowledged in FED. R. EVID. Art. VIII, Introductory Note, 46 F.R.D. 161, 324 (Prelim. Draft 1969). See *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961).

76. *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

77. The principle of necessity has been found to be satisfied upon the showing of: (1) the unavailability of the declarant; (2) an inconvenience caused the courts in requiring the declarant's attendance; or (3) that the hearsay statement may be better than one which could be obtained were the declarant to take the stand.

obvious accuracy of the statement.⁷⁸ In such a case, an exception to the hearsay rule may be well-founded.⁷⁹ Of these two criteria, the first, unavailability, must be considered under the principle of necessity, and the second, inaccuracy, under the principle of trustworthiness. The two principles in combination serve as requisites for exception to the hearsay rule.⁸⁰ As summarized by the court in *Zippo Manufacturing Co. v. Rogers*:⁸¹

[A] determination that a statement is hearsay does not end the inquiry into admissibility; there must still be a further examination of the need for the statement at trial and the circumstantial guaranty of trustworthiness surrounding the making of the statement.⁸²

The Proposed Rules purport to recognize the application of necessity and trustworthiness in forming exceptions to the hearsay rule.⁸³ While the federal courts have been particularly liberal in looking to these principles,⁸⁴ it is submitted that the theory of hearsay as proposed by Rule 8 is too simplistic. To illustrate: if the declarant is available, Rule 8-03 dictates that the evidence is admissible if its quality is considered to be at least *as good as* that which would be forthcoming had

78. 5 WIGMORE § 1420. See also *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 644, 453 P.2d 619 (1969).

79. *Bailey v. Metropolitan Life Ins. Co.*, 115 S.W.2d 151 (Mo. App. 1938); *Southern Underwriters v. Boswell*, 141 S.W.2d 442 (Tex. Civ. App. 1940), *aff'd*, 138 Tex. 255, 158 S.W.2d 280 (1942).

80. *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515 (2d Cir. 1913); *Edsall v. Rockland Paper Co.*, 38 Del. 495, 194 A. 115 (1937); *Whittaker v. Thornberry*, 206 Ky. 830, 209 S.W.2d 498 (1948); *Smith v. State*, 49 Misc. 2d 985, 268 N.Y.S.2d 873 (Sup. Ct. 1966); *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955); *Southern Underwriters v. Boswell*, 141 S.W.2d 442 (Tex. Civ. App. 1940), *aff'd*, 138 Tex. 255, 158 S.W.2d 280 (1942); *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 644, 453 P.2d 619 (1969). But see *Pope v. United States*, 296 F. Supp. 17 (S.D. Cal. 1968), where the court stated: "[T]he key requirement for the admission of a hearsay statement as an exception to the hearsay rule is trustworthiness." *Id.* at 20. See also *Mikula v. Balogh*, 9 Ohio App. 2d 250, 224 N.E.2d 148 (1965), in which the court said, "[e]xceptions to the hearsay rule are found in cases of necessity or where the reliability of the evidence is established." *Id.* at 253, 224 N.E.2d at 151.

However, an exception based on necessity or public policy was recognized in *Jendresak v. Metropolitan Life Ins. Co.*, 330 Ill. App. 157, 70 N.E.2d 863 (1947), and *Bailey v. Metropolitan Life Ins. Co.*, 115 S.W.2d 151 (Mo. App. 1938). Finally, in *Moore v. Atlantic Transit Sys., Inc.*, 105 Ga. App. 70, 123 S.E.2d 693 (1961), hearsay was admitted solely on the basis of necessity.

81. 216 F. Supp. 670 (S.D.N.Y. 1963).

82. *Id.* at 683.

83. FED. R. EVID. 8-04, Advisory Committee's Note, 46 F.R.D. 161, 379 (Prelim. Draft 1969).

84. *Sabatina v. Curtiss Nat'l Bank*, 415 F.2d 632 (5th Cir. 1969); *United States v. 60.14 Acres of Land*, 362 F.2d 660 (3d Cir. 1966); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

the declarant taken the stand. This proposition, however, ignores the significance of prior exceptions which were predicated upon the necessity of receiving a statement only when it is *better than* one which could be obtained were the declarant to take the stand.⁸⁵ To accept the test as proposed by Rule 8-03 is to reject *any* requirement of necessity and to relegate the burden for exception solely to the guarantee of trustworthiness. If Rule 8-03 were to require the hearsay statement to be *better than* one which could be obtained were the declarant to take the stand, then the principle of necessity would be fulfilled.

The principles of necessity and trustworthiness are not exclusive but are intended to mutually supplement one another.⁸⁶ Where one is weak, the other may compensate and still provide exception. Recognition of this dichotomy is clearly demonstrated by Rule 8-04.⁸⁷ If there is a showing of necessity by demonstrating the unavailability of the declarant, the evidence is admissible assuming it also offers strong assurances of accuracy. The Committee appears to have equated the unavailability-availability determination with that of necessity. Once the declarant is determined to be either available or unavailable under the Rules, the search for necessity ceases and the test of accuracy is applied. This interpretation is a misconception or an alteration in derogation of the common law principle. It is submitted that a determination of availability is not synonymous with nor should it foreclose the inquiry into necessity.⁸⁸ Trustworthiness alone has not sufficed to allow exception⁸⁹—some degree of necessity has been required. Rule 8-03 is not, therefore, a synthesis of common law exceptions because it deletes the major principle of necessity.⁹⁰

85. *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945); *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940).

86. 5 WIGMORE § 1420; Wickes, *Ancient Documents and Hearsay*, 8 TEXAS L. REV. 450 (1930).

87. FED. R. EVID. 8-04, 46 F.R.D. 161, 377-88 (Prelim. Draft 1969).

88. *Jendresak v. Metropolitan Life Ins. Co.*, 330 Ill. App. 157, 70 N.E.2d 863 (1947).

89. *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961); *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515 (2d Cir. 1913).

90. The Proposed Rules may be an attempt to eliminate the principle of necessity as historically defined. This may be done legislatively as long as there is no concurrent infringement of constitutional rights. Of main concern in view of this possibility is the right to confrontation in criminal trials.

The main policy underlying the hearsay rule is to protect the right of the party against whom the statement is being offered by giving him the opportunity to confront the person making the statement.

United States v. National Homes Corp., 196 F. Supp. 370, 372 (N.D. Ind. 1961). See also *Colorificio Italiano Max Meyer S.P.A. v. S.S. Hellenic Wave*, 419 F.2d 223 (5th Cir. 1969).

The Common Law generally recognized two exceptions to the rule of confronta-

A SURVEY OF THE PRINCIPLE OF NECESSITY

The first of the common law requisites for exception to the hearsay rule is necessity. The import of this desideratum is that unless certain hearsay statements are admitted, the facts they tend to establish may be lost to the tribunal.⁹¹ As the law has developed, however, it has not always demanded a showing of total inaccessibility as a condition precedent to admission of such evidence.⁹² "[I]f it were otherwise the result would be that the exception to the hearsay rule would thereby be mostly if not completely destroyed."⁹³

The narrowest interpretation ever applied for exception to the hearsay rule is total inaccessibility to any competent evidence, *i.e.*, the declarant is unavailable and there is no other evidence available from any source.⁹⁴ This position was adopted in a number of the early cases which considered dying declarations.⁹⁵

Evidence of this sort [dying declarations] is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be eyewitness to the fact; and the usual witness on occasion of other felonies, namely, the party

tion: 1) dying declarations, and 2) testimony given at a former trial. *Kirby v. United States*, 174 U.S. 47 (1899); *Mattox v. United States*, 156 U.S. 237 (1895).

The enactment of the Constitution allegedly secured rights already possessed under the Common Law, but what were these rights? Some felt that only the two exceptions already existing to confrontation should be allowed. Others felt that new concessions could be made and it was only the criteria for exception that were established by the Constitution. *Motes v. United States*, 178 U.S. 458 (1900); *Reynolds v. United States*, 98 U.S. 145 (1878); *Orcutt v. State*, —Iowa—, 173 N.W.2d 66 (1969). In all exceptions to the rule, however, the requirement of necessity was recognized. *Mattox v. United States*, 156 U.S. 237 (1895). Traditional exceptions to the rule have been made when the witness was shown to be unavailable. *West v. Louisiana*, 194 U.S. 258 (1904). Recently, however, this criteria has been strictly construed to demand a showing that not only is the witness unavailable but also that an attempt has been made to obtain his presence. *Barber v. Page*, 390 U.S. 719 (1968). In the light of recent decisions, it does not appear likely that an exception for learned treatises would be consistent or within the spirit of the current interpretation of the constitutional guarantee; therefore, the exception must ultimately be found inapplicable to criminal adjudication. *Cf. FED. R. EVID. Art. VIII, Confrontation and Due Process*, 46 F.R.D. 161, 328-31 (Prelim. Draft 1969).

91. *Jendresak v. Metropolitan Life Ins. Co.*, 330 Ill. App. 157, 70 N.E.2d 863 (1947); *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940); 5 WIGMORE § 1421.

92. *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940).

93. *United States v. Aluminum Co. of America*, 35 F. Supp. 820, 823 (S.D.N.Y. 1940).

94. "The law has therefore wisely rejected all hearsay evidence excepting where it is impossible in the nature of things to obtain any other . . ." SWIFT, EVIDENCE, § 121 (1810). See 5 WIGMORE §§ 1420, 1431.

95. *Ellicott v. Pearl*, 12 U.S. (10 Pet.) 412 (1836); *Fulkerson v. Holmes*, 117 U.S. 389 (1886); *Landers v. Hayes*, 196 Ala. 533, 72 So. 106 (1916). See 5 WIGMORE § 1481.

injured himself is gotten rid of.⁹⁶

Although the strict application to dying declarations has been labeled a misconception of the law,⁹⁷ the position has been reasserted in cases of general reputation.⁹⁸ The court in *Davis' Administration v. Chasteen*⁹⁹ stated:

Evidence of this character is admitted because it is the best obtainable under the circumstances, and greater evils result from the rejection of such proof than from its admission.¹⁰⁰

The majority of the courts and text writers have held it sufficient under the hearsay rule that only the declarant be unavailable.¹⁰¹ They would admit his out of court statement where it demonstrates the requisite trustworthiness even if other and adequate testimony is available. Availability has turned on a variety of different issues including death,¹⁰² insanity,¹⁰³ absence from the jurisdiction¹⁰⁴ and privilege.¹⁰⁵ Rule 8-04 would appear to be the counterpart of this view.¹⁰⁶

Even where the witness is available, the inquiry into necessity has not been foreclosed under Common Law. In such a case the recognized exceptions result from further recognition of one of two qualities. First, exception is allowed where the statement of hearsay is of *better quality*

96. *Pleas of the Crown I*, 353 (1803), cited in 5 WIGMORE § 1431.

97. 5 WIGMORE § 1432.

98. *Landers v. Hayes*, 196 Ala. 533, 72 So. 106 (1916); *State v. Schaller*, 111 Ind. App. 128, 40 N.E.2d 976 (1942) (family reputation); *Piper v. Voorhees*, 130 Me. 305, 155 A. 556 (1931) (general reputation). See also 5 WIGMORE §§ 1481, 1582; McCORMICK §§ 297, 299.

99. 273 S.W.2d 368 (Ky. 1954).

100. *Id.* at 369.

101. This view would include the more liberal interpretation applied to dying declarations. See 5 WIGMORE § 1436.

102. *Stein v. Bowman*, 13 U.S. (13 Pet.) 209 (1839); *Jarchow v. Jrosse*, 257 Ill. 36, 100 N.E. 290 (1912); *Ellis v. Dixon*, 294 Ky. 609, 172 S.W.2d 461 (1943); *Piper v. Voorhees*, 130 Me. 305, 155 A. 556 (1931); *Osborne v. Purdome*, 250 S.W.2d 159 (Mo. 1952).

103. *McCoy v. State*, 221 Ala. 466, 129 So. 21 (1930); *Weber v. Chicago*, R. I. & P. R. Co., 175 Iowa 358, 151 N.W. 852 (1915).

104. *Alabama Power Co. v. Ray*, 249 Ala. 568, 32 So. 2d 219 (1947); *Wolski v. National Life & Acc. Ins. Co.*, 135 Neb. 643, 283 N.W. 381 (1939); *Norton v. State*, 148 Tex. Crim. 249, 186 S.W.2d 347 (1945).

105. *Wyatt v. State*, 35 Ala. App. 147, 46 So. 2d 837 (1950); *McCoy v. State*, 221 Ala. 466, 129 So. 21 (1930); *Woodward v. State*, 21 Ala. App. 417, 109 So. 119 (1926); *State v. Reidie*, 142 Kan. 290, 46 P.2d 601 (1935); *State v. Stewart*, 85 Kan. 404, 116 P. 489 (1911). See FED. R. EVID. 8-01, Advisory Committee's Note, 46 F.R.D. 161, 342-43 (Prelim. Draft 1969).

106. For a discussion of Rule 8-04, see Note, *Rule 8-04(b)(2) of the Proposed Federal Rules of Evidence: A Step Too Far?*, 4 VAL. U.L. REV. 327 (1970).

than could be expected if the witness were to take the stand.¹⁰⁷ Statements of mental or physical condition¹⁰⁸ and spontaneous exclamations¹⁰⁹ are two examples of such exceptions. In summary of this proposition Justice Holmes stated in *Elmer v. Fessenden*:¹¹⁰

[S]uch declarations [a statement of mental condition] made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same person.¹¹¹

The second and alternative quality depends on the practical inconvenience of requiring the declarant's attendance. Such considerations have provided for use of official statements,¹¹² standard pricelists,¹¹³ market and trade reports,¹¹⁴ law reports,¹¹⁵ surveys,¹¹⁶ safety codes¹¹⁷ and various commercial and professional registers.¹¹⁸ The rationali offered in support of these admissions are: first, were there no exception for official statements, public servants would be found devoting the greater part of their time as witnesses with the result that the administration of

107. *Montana Power Co. v. F.P.C.*, 185 F.2d 491 (D.C. Cir. 1950); *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940); 5 WIGMORE § 1421.

108. *Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285 (1892); *Meaney v. United States*, 112 F.2d 538 (2d Cir. 1940); *Valentine v. Weaver*, 191 Ky. 37, 228 S.W. 1036 (1921); *Bacon v. The Inhabitants of Charleton*, 61 Mass. (7 Cush.) 581 (1851). See 6 WIGMORE § 1714.

109. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946); *Showalter v. Western Pac. R. Co.*, 16 Cal. 2d 460, 106 P. 2d 895 (1940); *Jacobs v. Village of Buhl*, 199 Minn. 572, 273 N.W. 245 (1937); *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945); *Simprini v. Boston & M. R.R.*, 87 N.H. 279, 179 A. 349 (1935).

110. 151 Mass. 359, 24 N.E. 208 (1889).

111. *Id.* at 359, 24 N.E. at 208.

112. 5 WIGMORE § 1631.

113. *Tallant v. Hamilton*, 406 S.W.2d 599 (Mo. 1966).

114. *Robey v. Sun Record Co.*, 242 F.2d 684 (5th Cir. 1957); *General Electric Employees Sec. Corp. v. Manning*, 173 F.2d 637 (3d Cir. 1943); *Mohr v. Schultz*, 861 Idaho 531, 388 P.2d 1002 (1964); *Baker v. Atkins*, 258 S.W.2d 16 (Mo. 1953); *California Sugar & Whitepine Co. v. Whitman Jackson & Co.*, 33 N.M. 117, 263 P. 504 (1928); *McMillan Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App. 1966); *Houston Packing Co. v. Spivey*, 333 S.W. 2d 423 (Tex. Civ. App. 1960).

115. *Mackay v. Easton*, 87 U.S. (19 Wall.) 632 (1873); *Moumdjis v. S.S. The Ionian Trader*, 157 F. Supp. 319 (E.D. Va. 1957); *Baggett v. Davis*, 124 Fla. 701, 169 So. 372 (1936); *Garza v. Greyhound Lines, Inc.*, 418 S.W.2d 595 (Tex. Civ. App. 1967).

116. *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961); *Girl Scouts of U.S.A. v. Hollingsworth*, 188 F. Supp. 707 (E.D.N.Y. 1960); *Smith v. State*, 49 Misc. 2d 985, 268 N.Y.S.2d 873 (Sup. Ct. 1966).

117. *Bergeron v. Hetherwick*, 140 So. 2d 440 (La. 1962); *Catholic Diocese of Natchez-Jackson v. Joquith*, 224 So. 2d 216 (Miss. 1960). *Contra*, *Guidry v. Grain Dealers Mut. Ins. Co.*, 193 So. 2d 873 (La. 1967); *Breshears v. Myers*, 226 S.W.2d 638 (Mo. 1954); *Smith v. Hardy*, 228 S.C. 112, 88 S.E.2d 865 (1955).

118. *Baker v. Atkins*, 258 S.W.2d 16 (Mo. 1953).

government and consequently, the public, would suffer greatly;¹¹⁹ secondly, the inaccessibility of authors in other jurisdictions and the inconvenience that would be caused the courts by the summoning of all the individuals whose knowledge had gone into the final work would be crippling;¹²⁰ and thirdly, that the written statement made contemporaneously with the official act would be of better quality than the official's present testimony.¹²¹

A division of exceptions into declarant available and declarant unavailable may be convenient; however, necessity is a broader concept and includes the aforementioned two qualities as well as a determination of whether the declarant is available or unavailable.

Necessity as Applied to Learned Treatises

If necessity has been omitted, but is deemed implicit in interpretation of Rule 8-03, one still must specifically demonstrate such precept for learned treatises to justify their individual inclusion. The necessity commonly advanced for learned treatises is that of inconvenience. The possibilities of inconvenience are threefold: first, the general inaccessibility to experts;¹²² secondly, the great expense for litigants to employ such experts;¹²³ and thirdly, the slowing of court procedures with resulting contribution to the docket crisis.¹²⁴

The concept of inaccessibility is founded on the assumption that courts only admit expert evidence derived from personal observation but reject evidence obtained by study and reading of textual materials.¹²⁵ If this proposition is accepted, it follows that it may be difficult or impossible to obtain locally a "qualified" expert. The necessity would result from the great distance from which these experts must be summoned. There are two difficulties with this rationalization: first, the initial assumption is fallacious since courts generally do not reject expert testimony based on study;¹²⁶ and secondly, if, in fact, it is im-

119. 5 WIGMORE § 1631; 6 WIGMORE § 1702.

120. 5 WIGMORE § 1631; 6 WIGMORE § 1702.

121. McCORMICK § 291.

122. 6 WIGMORE § 1691; 66 MICH. L. REV. 183 (1967); 2 U.C.L.A.L. REV. 252 (1955).

123. 6 WIGMORE § 1691; 66 MICH. L. REV. 183 (1967); 12 S. CAL. L. REV. 424 (1939).

124. Smith, *The Hearsay Rule and the Docket Crisis: The Futile Search for Paradise*, 54 A.B.A.J. 231 (1968).

125. *Soquet v. State*, 72 Wis. 659, 40 N.W. 391 (1888).

126. *Hope v. Arrowhead & Puritas Waters*, 174 Cal. App. 2d 222, 344 P.2d 428 (1959); *Godthwaite v. Sheraton Restaurant*, 154 Me. 214, 145 A.2d 362 (1952); *Town of Framingham v. Department of Pub. Util.*, 355 Mass. 138, 244 N.E.2d 281 (1969).

possible to obtain a "qualified" expert within the jurisdiction, the necessity involved would no longer be one of convenience but rather one of unavailability.¹²⁷ Furthermore, this unavailability would be of the highest degree, being not only that of the declarant, but also of any other competent, substitute evidence. If such were the case, Rule 8-04 may be applicable to allow possible exception.

Unavailability may arise not only by the lack of "qualified" experts within the jurisdiction but also when they are present but unwilling to testify.¹²⁸ Massachusetts and Nevada have recognized the unavailability problem in malpractice cases and accordingly have provided a statute directed solely toward resolving the situation.¹²⁹ It would appear that this more limited approach may be more sensible than providing for unlimited use of treatises.

One could argue on the basis of unavailability that, as in dying declarations, it is not the unavailability of testimony, but the unavailability of the declarant, that should be of concern.¹³⁰ If this were accepted, one could choose a text written by an absent but sympathetic author, prove his unavailability, and subsequently introduce his work into evidence. This hypothetical should point out the difficulty in applying this singular test of necessity to learned treatises. The nature of the evidence itself provides a larger source from which a variety of views could be extracted. Therefore, the range of choice in obtaining expert evidence is much wider than can be found in the other exceptions for unavailability, *e.g.*, dying declarations. Expert opinion of this nature is not restricted by personal knowledge of the particular case in which it would be introduced, but it is formed in consideration of extrinsic materials which may be beyond the scope of the inquiry. This evidence should not, therefore, be utilized if other competent testimony is otherwise easily available. The fear of loss of a valuable source should not prompt its admission when other equally qualified experts could be called upon to testify. It is suggested that calling an expert to the stand more effectively serves the court's quest for truth. A more rigorous test should be demanded of the proponent of the learned treatise. Unlike other forms of evidence, the treatise is more likely to receive extensive use even when other testimonial evidence is available. This is a result of other considerations such as the expense of substitute evidence. Possibly, material of this sort should be excluded unless a pressing need

127. See notes 94-106 *supra* and accompanying text.

128. See note 49 *supra*.

129. See note 47 *supra* and accompanying text.

130. See notes 102-06 *supra* and accompanying text.

for use of such evidence is clearly demonstrated, *e.g.*, total inaccessibility of any alternative. Where such a "pressing need" is present, Rule 8-04 rather than Rule 8-03 would be the appropriate instrument for exception.

The second objection is more difficult to answer for one cannot easily ignore the continually rising expense of litigation.¹⁸¹ The mere fact of expense, however, should not determine the admissibility of hearsay.¹⁸² This evidence may be instrumental in deciding the issues of the case. The right of cross-examination¹⁸⁸ should not be abrogated in favor of the proponent's financial interest. Furthermore, Rule 8-03(b) (18) requires attendance of an expert in order to introduce a treatise.¹⁸⁴ With the exception of those cases where an expert is either a summonable witness or a party to the suit, this rule would necessitate at least one of the parties bearing the expense of an expert before either could make use of any treatise. The expense of an expert witness is of small consequence when weighing the parties' rights and responsibilities under the Federal Rules.

Finally, there has been some comment inferring that the hearsay rule impedes the search for truth by contributing greatly to the congestion of the courts.¹⁸⁵ This may be a valid criticism of the rule generally but should not be directed solely at learned treatises. It is burdensome to reject any hearsay statement and require substitute evidence; however, it is only where further difficulty is encountered in obtaining this evidence that exception is justified.¹⁸⁶ If one accepts the hearsay rule generally, as does the Committee,¹⁸⁷ he should not be heard to make exception to the rule based on a characteristic common to all such evidence. Furthermore, this argument loses some of its persuasive power when considered in conjunction with Rule 8-03(b)(18). Since the

131. See note 122 *supra* and accompanying text.

132. *Johns-Mansfield Prod. Corp. v. Cather*, 208 Miss. 268, 44 So. 2d 405 (1950). See *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945), which indicates that hardship does not warrant exception, but the existence of a class of cases in which hearsay is the only possible proof necessitates exception.

133. MCCORMICK § 19:

The Common Law judges and lawyers for two centuries have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that cross-examination is a right and not a mere privilege.

Id. See also *Alford v. United States*, 282 U.S. 687 (1931).

134. The rule states: "To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination . . ." FED. R. EVID. 8-03(b)(18), 46 F.R.D. 161, 349 (Prelim. Draft 1969). See also *Id.* Advisory Committee's Notes at 371.

135. See note 124 *supra*.

136. See notes 107-21 *supra* and accompanying text.

137. FED. R. EVID. Art. VIII, Introductory Note, 46 F.R.D. 161, 327-28 (Prelim. Draft 1969).

rule requires the attendance of an expert in order to introduce a text, any judicial inconvenience which is likely to occur has in all probability already come to pass.¹³⁸

In final critique it has been stated that the foundation for exception of learned treatises is that of inconvenience. When compared with that of previously accepted exceptions, however, the inconvenience of admitting learned treatises appears to be of different specie. In previous examples, the inconvenience referred to was either that of the public or that of the court.¹³⁹ Here, however, the inconvenience appears to lie with the litigant and/or the author. Neither the expense nor the effort of summoning authors is the responsibility of the court. Necessity in this instance is of partisan interest and not grounded on obtaining the best evidence available. It is submitted that the necessity can at best be minimal, and exception, therefore, should be allowed only after a demonstration of a high degree of trustworthiness.

TRUSTWORTHINESS

The principle of trustworthiness is considered to be a practical substitute for the ordinary test of cross-examination.¹⁴⁰ When combined with necessity, trustworthiness induces the courts to accept evidence untested.¹⁴¹ There has not been a comprehensive attempt, to date, to secure uniformity in the degree of trustworthiness which the circumstances for admitting hearsay presuppose.¹⁴² Accordingly, any attempt to compare the trustworthiness of treatises with that of other exceptions would be futile.¹⁴³ Wigmore, however, has suggested three circumstances under which adequate testimony may be recognized:¹⁴⁴

[W]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; where even though a desire to falsify might be present itself, other considerations, such as the chance of easy detection or the fear of punishment, would probably counteract its force; where the statement was made under such

138. See note 134 *supra* and accompanying text.

139. See notes 108-20 *supra* and accompanying text.

140. 5 WIGMORE § 1422.

141. *Id.*

142. *Id.*

143. *Hamilton v. Huebner*, 146 Neb. 320, 19 N.W.2d 552 (1945). See also 5 WIGMORE § 1422.

144. 5 WIGMORE § 1422. See also *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961); *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 644, 453 P.2d 619 (1969).

conditions of publicity that an error if it had occurred would probably have been detected and corrected.¹⁴⁵

An exception for learned treatises might find support from the first and third of the proposed tests. In satisfaction of the first test, it has been asserted that such writings would naturally be sincere having been written by non-partisan authors with no view toward litigation.¹⁴⁶ In many of the states' attempts at codification, this presumption was made a statutory prerequisite to admissibility.¹⁴⁷ In the Federal Rules of Evidence, however, the assurance has not been included. It has been assumed that this test will have been satisfied.¹⁴⁸ While the possibilities of use of partisan or self-serving documents are few, the Committee's intent might be better served by the inclusion of such a phrase.

The third test offers the most support for learned treatises. It has frequently been asserted by proponents of admissibility that the author writes for his profession and anticipates that his opinions will be subject to the greatest scrutiny. Accordingly, if an author's conclusions are discovered to be ill-founded, it is assumed that such statements will be refuted.¹⁴⁹ This assumption is itself the foundation of possible objection to the admission of learned treatises as independent evidence. If issue is taken with an author's opinion or observation, can an inexperienced jury be expected to resolve the controversy?¹⁵⁰ Many conflicting statements may be eliminated by the requirement of authority, but even the authorities differ at times.¹⁵¹ It is submitted that this assimilation of fact and knowledge is far more difficult to resolve than mere opinion of fact admissible under other exceptions.¹⁵² To relegate this duty to the jury is to place an unreasonable burden upon men and women of limited capabilities.

It is submitted that even if these two tests are satisfied, they would

145. 5 WIGMORE § 1422.

146. "Their statement is made with no view to a litigation or to the interests of a litigable affair." 6 WIGMORE § 1692. *But see* Grubb, *A Code of Evidence for Wisconsin?*, 1946 WIS. L. REV. 81.

147. *See* notes 36 and 42 *supra* and accompanying text.

148. *See* note 72 *supra* and accompanying text.

149. *See* note 146 *supra* and accompanying text.

150. *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963); *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949); Grubb, *A Code of Evidence for Wisconsin?*, 1946 WIS. L. REV. 81.

151. *Van Striker v. Poter*, 43 Mont. 317, 117 P. 81 (1911).

152. Opinion of fact requires no application of personal knowledge but calls merely for personal observation. Opinion of fact and knowledge requires the application of formally acquired knowledge, personal to the declarant or a class to which he belongs, to the facts. The result is an opinion of fact tempered by the knowledge of the author.

remain inadequate to justify admission of learned treatises. They do not bear directly on the objections to such evidence. Wigmore's classification is intended to protect against insincerity, a propensity to falsify and poor perception and memory, whereas the primary objection to the admission of treatises is that of skepticism that the jury can comprehend and effectively utilize the evidence without cross-examination.¹⁵³ Most authorities neither question the integrity of the author nor infer that the writer is likely to falsify; rather, they fear that isolated passages from his opinions may not give a full and clear view of his thoughts¹⁵⁴ or that the language may be too technical and beyond the understanding of the average juror.¹⁵⁵ The material on this topic indicates that cross-examination is more than a mere opportunity to discover and uncover insincerities; it is a tool to facilitate communication of the entire issue to the jury.¹⁵⁶ If a book is allowed to speak when called forth by the proponent, but remains immune from cross-examination, it is not possible to qualify, impeach or explain its contents beyond its face.¹⁵⁷ If the same testimony were elicited from an expert witness, it would be limited to hypothetical questions qualified by the facts of the particular case.¹⁵⁸ There would exist an opportunity to explain the import of the text for the benefit of the jury. The obvious narrative imbalance resulting from use of treatises has been a determining factor in rendering this type of evidence unacceptable. The trustworthiness has been deemed of too low a quality to justify admission, at least in light of the necessity of receiving the evidence.

The Proposed Rule

In striving to render treatises admissible, the Federal Rules of Evidence have endeavored to rectify a number of the aforementioned shortcomings. The Proposed Rules have attempted solution of the dangers of misunderstanding or misapplication of the evidence by limiting the use of treatises to situations where an expert witness is on the stand and available to explain the import of passages read into evidence.¹⁵⁹

153. *Stottlemire v. Cawood*, 215 F. Supp. 266 (D.D.C. 1963); *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949).

154. Dana, *Admission of Learned Treatises in Evidence*, 1945 WIS. L. REV. 455.

155. *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949).

156. For an excellent discussion of the problems of communication in the court room, see Korn, *Law, Fact and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966).

157. *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968); *Hallsworth v. Republic Steel Corp.*, 153 Ohio 349, 91 N.E.2d 690 (1950); *Eckleberry v. Kaiser Found. N. Hosp.*, 226 Ore. 616, 359 P.2d 1090 (1961).

158. *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968).

159. See note 134 *supra* and accompanying text.

This creates still additional difficulties. An article may be subject to varying interpretations by different experts.¹⁶⁰ The jury would have the impossible task of resolving the issue. Furthermore, who is an expert under the Federal Rules of Evidence? There appears to be no requirement that the witness be an expert in the field for which the text is being offered, nor are there any criteria for expertise within any field. If the statute is to be applied literally, a general medical practitioner or a registered nurse could establish as reliable authority a text on neurology which contains material beyond even his own understanding. The purpose for inclusion of this method is to place only reliable sources before the jury, but the method of implementation must be altered if it is to be effective.

The Federal Rules appear to have directly confronted still another issue—the admission of treatises on inexact sciences. Rule 8-03(b)(18) specifically alludes to “treatises, periodicals, or pamphlets on a subject of . . . medicine, or other science . . .”¹⁶¹ To date, few jurisdictions have allowed use of medical or other inexact authority because the state of such sciences are predominantly dynamic and unsettled.¹⁶² These inductive sciences are generally thought too untrustworthy for admission except in circumstances where better evidence is not available. There may be some merit in the statement that it is not the entire body of such science that is changing but only a mere segment.¹⁶³ When viewed, however, in the light of the minimal degree of necessity provided, the trustworthiness should not be considered substantial enough to justify exception. Finally, by inclusion of pamphlets and periodicals, the rule invites use of articles of predominately experimental or forensic character.¹⁶⁴ It is not certain that the basis for establishing their authority is to be different than that required of treatises. Possibly there should be a limitation upon their use beyond merely requiring that it be published and deemed authoritative by a single and possibly biased witness. There could, for example, be a requirement of giving notice of their use to the opposing party, thereby affording him time to rebut their reliability.¹⁶⁵ It is submitted that without additional restraints the use of such documents would prove to be too untrustworthy.

160. Grubb, *A Code of Evidence for Wisconsin?*, 1946 WIS. L. REV. 81.

161. FED. R. EVID. 8-03(b)(18), 46 F.R.D. 161, 349 (Prelim. Draft 1969).

162. “The reasons for this usual rule [treatises inadmissible] are because of the unsettled conditions of the sciences themselves . . .” *Bowles v. Bourdon*, 148 Tex. 1, 219 S.W.2d 779 (1949).

163. 6 WIGMORE § 1692.

164. See note 38 *supra* and accompanying text.

165. See note 50 *supra*.

CONCLUSION

Rule 8-03(b)(18) is impractical and academically unsound in its attempt to admit learned treatises as substantive evidence. It is said to be an illustration of Rule 8-03(a).¹⁶⁶ In its complexity, however, it offers no guide to further application of this generality. It merely serves to admit learned treatises in a single restricted context. Furthermore, the illustration is not to be a limitation of the rule.¹⁶⁷ If this theory were carried to its logical extreme, it might provide a license for admission of learned treatises on grounds more liberal than those contemplated by the proposed standards. Therefore, Rule 8-03(b)(18) is inadequate. It neither provides direction for future employment of Rule 8-03(a) nor restricts its operation in respect to admission of learned treatises.

Even greater academic difficulties would arise by promulgation of the Proposed Rule. By eliminating the requirement of necessity it is drastically deviating from the common law model.¹⁶⁸ It is therefore not a synthesis of prior exceptions as alleged.¹⁶⁹ Furthermore, in altering the principles of hearsay, this anomaly may foster serious curtailment of sixth amendment rights.¹⁷⁰

Finally, although the rule has confronted the problem of untrustworthiness, the alternatives provided have multiplied the impediments.¹⁷¹ In an attempt to expedite trial procedure, Rule 8-03(b)(18) may be sacrificing an excess of the opponent's rights. The learned treatise example, therefore, is unsuccessful, at least in view of the limited necessity of receiving such evidence.

It is submitted, however, that in appropriate circumstances exception for learned treatises is well-founded, *e.g.*, when no better evidence is available. It is suggested, then, that the Committee reexamine its position and consider placing the illustration for learned treatises under Rule 8-04.¹⁷² In so doing, the Proposed Rules could accommodate the deficient situation evidenced in malpractice cases¹⁷³ without sanctioning unlimited and unnecessary use of learned treatises.

166. FED. R. EVID. 8-03(b), 46 F.R.D. 161, 345 (Prelim. Draft 1969).

167. *Id.*

168. See notes 74-121 *supra* and accompanying text.

169. FED. R. EVID. 8-03, Advisory Committee's Note, 46 F.R.D. 161, 351 (Prelim. Draft 1969).

170. See note 90 *supra* and accompanying text.

171. See notes 159-65 *supra* and accompanying text.

172. FED. R. EVID. 8-04, 46 F.R.D. 161, 377 (Prelim. Draft 1969).

173. See note 49 *supra*.