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RECENT DECISIONS

LABOR LAW — UNFAIR LABOR PRACTICE — EMPLOYER MAY VIOLATE § 8(A)(1) IN ATTEMPTING TO ASCERTAIN UNION MAJORITY STATUS. — On August 7, 1963, a union organizer informed Strutsnes Construction Company that he would like to discuss a contract as he felt the union represented a majority of the company's twenty-six workers. Further correspondence ensued. The company expressed no anti-union sentiments and made no effort to curtail the organizational drive. On August 13, the president of the company decided to conduct a poll to determine whether his employees wished him to bargain with the union. He or one of his two supervisors approached each employee with a sheet of paper and requested him to place his signature in one of two columns expressing whether or not he desired the employer to bargain. The employees were assured that they were not required to sign the statement and that no reprisals would be taken against them. Fifteen men voted against the union; nine voted affirmatively; and one man abstained. The organizer continued his activities until August 20, when he learned the poll had been conducted. He then filed an unfair labor practice charge with the National Labor Relations Board under §§8(a)(1) and 8(a)(5) of the National Labor Relations Act.[1] The Board, with one member dissenting, reversed the Trial Examiner's finding of a §8(a)(1) violation and dismissed the complaint.[2] The United States Court of Appeals for the District of Columbia Circuit, noting the possible inherent restraint resulting from an employer's polling his employees, set aside the Board's order and, in remanding the case, *held:* the Board should reconsider this action in an attempt to reconcile it with its other decisions and to come to grips with this elusive, constantly recurring problem. *International Union of Operating Engineers, Local 49, AFL-CIO v. National Labor Relations Board,* 353 F.2d 852 (D.C. Cir. 1965).

Unionization campaigns raise complex problems for the employer. Most organizers prefer to keep their unionization attempts secret.[3] The professional

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1 Section 8(a) provides: "It shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 49 Stat. 452 (1935), 29 U.S.C. §158(a)(1) (1964).

Section 7 provides:

> Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). 61 Stat. 140 (1947), 29 U.S.C. §157 (1964), amending 49 Stat. 452 (1935).

The §8(a)(5) aspect of the problem will not be considered in this article.

The Union filed a complaint for a §8(a)(1) violation rather than a petition for an election under §9(c) because of the power of the Board to issue a cease and desist order and to petition a court to enjoin such conduct. In addition, if the employer's conduct had caused the union to lose majority status, the Board could have required the employer to recognize the union even though it didn't win an election. Frank Bros. v. NLRB, 321 U.S. 702 (1944).

2 148 N.L.R.B. 1368 (1964).

3 See GITELMAN, UNIONIZATION ATTEMPTS IN SMALL ENTERPRISES (1963) for a complete analysis of the organizational campaign and the law governing these activities. The book is written especially to aid the employer and the general practitioner who is only occasionally confronted by a labor problem.

organizer will usually seek out a few key employees favorable to the union cause and use them to conduct the actual campaign. Secrecy allows the union to enlist workers without having to counteract the employer's anti-union propaganda. Also, by presenting the employer with a *fait accompli,* the union may persuade him to recognize it outright and avoid an NLRB election.[4]

Once the union makes a demand for recognition, the employer must use caution in determining what course of conduct he will pursue. He may simply refuse to bargain. But this may be perilous if the Board concludes that he did not have a good faith doubt as to the union's majority status and therefore finds him guilty of a §8(a)(5) violation.[5] On the other hand, § 7[6] gives an employee the right to refrain from union activities. Thus, if the employer recognizes the union without correctly determining the sentiments of his employees, he may lay himself open to a §8(a)(1) violation even though he acted in good faith.[7]

There are several methods by which the employer can determine if the union actually represents his employees. He may persuade the union to petition the Board for an election, or he may file such a petition himself under §9(c) of the N.L.R.A.[8] He may ask the union to furnish proof of its majority status. Although unions are naturally reluctant to give the names of their members to the employer, the parties may agree to submit the union's authorization cards to an impartial third party for a cross-check against the company's payroll records.[9] The parties may also agree to conduct an election under the supervision of an impartial third party.[10]

Frequently, an employer will attempt to find out directly from his employees if they wish to be represented by the union. Such questioning offers an easy and immediate method for the employer to ascertain the union's status. The possible abuse of such questioning, however, has always been recognized. The Board made its first comprehensive ruling on such employer "interrogation,"[11]

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4 As a general rule, unions do not favor the NLRB election procedures because of the possibility for delay and the rules permitting certain anti-union tactics by the employers. Consequently, the union will often press for outright recognition or at least for a private election. Gitelman, *supra* note 3, §2.12.

5 See Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied,* 341 U.S. 914 (1951).

6 61 Stat. 140 (1947), 29 U.S.C. §157 (1964).

7 See International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961).

8 61 Stat. 144 (1947), 29 U.S.C. §159(c) (1964).

9 For a criticism of the authorization card approach as an accurate means of determining union majority status, see Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority,* 16 LAB. L.J. 434 (1965).

10 The NLRB has held such elections to be a valid means of certification. See, *e.g.,* Olin Mathieson Chem. Corp., 115 N.L.R.B. 1501 (1956); Interboro Chevrolet Co., 111 N.L.R.B. 783 (1955); Oil Transp., Inc., 106 N.L.R.B. 1321 (1953).

11 This method of directly questioning employees is frequently classified under the general term "interrogation." The use of the word seems unfortunate and perhaps prejudicial. The term smacks of the inquisition and third-degree; whereas, very often, the employer's questioning is quite innocent on its face, unaccompanied by the overt pressures and threats "interrogation" seems to import.

Employer interrogation should not be confused with employer free speech. See NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). Interrogation is not the expression of any view or opinion and thus does not fall in under the protection of the First Amendment or §8(c) of the N.L.R.A. See Cannon Elec. Co. & Charles H. Warren, 151 N.L.R.B. No. 141 (1965). *But see* Beaver Canning Co. v. NLRB, 332 F.2d 429 (8th Cir. 1964). If one accepts the premise that interrogation is inherently coercive, there would appear to be no objection to regulating it under the First Amendment.

in *Standard-Coosa-Thatcher Co.* in 1949.[12] There, it was held that §8(a)(1) is violated whenever an employer questions his employees concerning any aspect of their union activities. The Board stated that "inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment. . . ."[13] " '[F]ull freedom' from employer intermeddling, intrusion, or even knowledge," is guaranteed employees in their union activities by §7.[14] The Board recognized the inherently coercive influence of any questioning by the employer:

> The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union interests and activities but also contemplates some form of reprisal once the information is obtained. . . . He fears that a refusal to answer or a truthful answer may cost him his job. He is also in effect warned that any contemplated union activity must be abandoned, or he will risk loss of his job. Weighing these "subtle imponderables," the Board early characterized direct interrogation as "a particularly flagrant form of intimidation of individual employees."[15]

No actual intimidation or coercion had to be shown; the mere fact that the employer questioned his employees was *per se* unlawful. Although this *per se* rule was consistently applied by the Board,[16] its application was never so inflexible that violations were found where the employer's conduct was of such an isolated nature that its effect was trivial.[17]

During this period when the Board applied the *per se* rule, it offered a severe warning to any employer who questioned his employees to ascertain their union status. However, the circuit courts were admittedly uncertain on the subject. They felt the *per se* rule was too harsh and insisted on making an independent judgment as to whether such conduct was actually coercive.[18] They rejected the *per se* rule[19] and tended to apply some variation of the totality of conduct doctrine.[20] Thus, it was held that each case must be examined on its merits and that

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12 85 N.L.R.B. 1358 (1949).
13 *Id.* at 1360.
14 *Ibid.*
15 *Id.* at 1361.
16 See Syracuse Color Press, Inc., 103 N.L.R.B. 377 (1953), *enforced,* 209 F.2d 596 (2d Cir.), *cert. denied,* 347 U.S. 966 (1954).
17 See Central Foundry Div., 107 N.L.R.B. 1096 (1954); McGraw Constr. Co., 107 N.L.R.B. 1043 (1954); New Mexico Transp. Co., 107 N.L.R.B. 47 (1953); Walmac Co., 106 N.L.R.B. 1355 (1953) for cases where the Board found the conduct too isolated. See also Poe Mach. & Eng'r Co., 107 N.L.R.B. 1372 (1954); H. R. Vanover Coal Co., 107 N.L.R.B. 1339 (1954) where the Board found no violation when the conduct was not accompanied by other unfair labor practices.
18 In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Supreme Court held that circuit courts had a responsibility to review the findings of fact by the Board to see that they are supported by substantial evidence.
19 See, *e.g.,* NLRB v. Mississippi Prods., Inc., 213 F.2d 670 (5th Cir. 1954); NLRB v. England Bros., Inc., 201 F.2d 395 (1st Cir. 1953); NLRB v. Superior Co., 199 F.2d 39 (6th Cir. 1952); NLRB v. Arthur Winer, Inc., 194 F.2d 370 (7th Cir.), *cert. denied,* 344 U.S. 819 (1952). For a case in which a court applied the *per se* rule, see NLRB v. Jackson Press, Inc., 201 F.2d 541 (7th Cir. 1953).
20 See NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941) for the classic statement of the totality of conduct doctrine: "If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act."

> mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8(a) (1).[21]

In 1954, in *Blue Flash,*[22] the Board explicitly rejected its *per se* approach in favor of the totality of conduct doctrine. In this case, after a union had contacted the employer to inform him it represented a majority, the employer called his workers individually into his office and, after assuring them of his good faith, asked if they had joined the union. The Board found that this interrogation fell short of interference or coercion and hence was not unlawful. In formulating its new standard, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that the employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees — a purpose which was legitimate in nature — to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent.[23]

That same year, when the Board was confronted with a case in which an employer had polled his employees by secret ballot to determine union majority, it stated that "polling of employees is akin to interrogation and the tests for determining the unlawfulness of the latter are equally applicable to the former."[24]

The *Blue Flash* doctrine gave warning that future cases involving an employer who questioned or polled his employees on union activities would be decided on an *ad hoc* basis. No longer would the Board mechanically apply a standard rule; rather it would examine each case to see if the "interrogation" was *actually* coercive. During the more than ten years since the *Blue Flash* decision, the Board has continued to examine each case on its individual merits. Because the *Blue Flash* test is necessarily elusive, the decisions have become almost impossible to reconcile. No general statements can be formulated as to which types of interrogation are permissible and which are unlawful. There are three general requirements which the Board usually applies to determine whether the employer's conduct is coercive: (1) What was the purpose of the questioning: Did the employer have a legitimate objective and was this purpose communicated to the employees? (2) Did the employer give assurances against any

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21 Sax v. NLRB, 171 F.2d 769 (7th Cir. 1948).

22 109 N.L.R.B. 591 (1954). For an analysis of this case in light of the political change in the composition of the Board following the Republican victory in 1952, see Wirtz, *The New National Labor Relations Board; Herein of "Employer Persuasion,"* 49 Nw. U.L. Rev. 594 (1954). See also Comment, 39 Minn. L. Rev. 584 (1955).

23 109 N.L.R.B. at 593-94.

24 A. L. Gilbert Co., 110 N.L.R.B. 2067, 2072 (1954). In this case, the Board found that under *all the circumstances* the employer had committed a §8(a)(1) violation.

reprisal? and (3) What was the general background against which the questioning occurred: Is the employer known for his anti-union bias? Has the company been guilty of other unfair labor practices?[25]

The situation has become further complicated by the fact that in reviewing Board orders, the circuit courts have continued to make their own determinations as to what constitutes a §8(a)(1) violation. The Second Circuit, for instance, has formulated a series of five rules to determine if the conduct complained of is coercive:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
>
> (5) Truthfulness of the reply.[26]

An examination of several recent decisions will illustrate the present state of the law.

In *Johnnie's Poultry Co.*,[27] the union submitted its authorization cards to the employer who then petitioned the Board for an election. The employer warned his employees that he would have to close the plant if he were forced to pay union wages. His attorneys went to the plant and interviewed approximately one-fourth of the employees who had signed the authorization cards to ascertain their authenticity. All the employees acknowledged their signatures. In reaching its conclusion, the Board enumerated the various factors it had taken into consideration:

> Despite the inherent danger of coercion therein, the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability. The purposes which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended . . . and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case.
>
> In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts

25 See Orkin Exterminating Co., 136 N.L.R.B. 399 (1962). See also the discussion on interrogation in Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act*, 78 HARV. L. REV. 38, 107 (1964).
26 Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964).
27 146 N.L.R.B. 770 (1964).

> have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.[28]

The Board concluded that the employer had transgressed the permissible boundaries and was guilty of a §8(a)(1) violation. On review, the Eighth Circuit reversed, saying the violation was not supported by substantial evidence.[29]

In *Lorben Corp.*,[30] an employer, when confronted by a union's recognition demands, prepared a paper with the heading, "Do you wish Local 1922 of the Electrical Workers to represent you?" Under this were two columns — yes and no. The paper was submitted to each employee who was told he need not sign. No employer hostility was proved nor were any other unfair labor practices committed. Nevertheless, the Board found a violation by applying the same considerations under which it found a violation in the *Johnnie* case. On review, the Second Circuit applied its own five point test and concluded that no violation had been committed.[31] The court noted that the Board had rejected the comprehensive approach outlined in previous decisions by the Second Circuit and applied its own five point test. It concluded that to apply the Board's narrow approach would be a departure from the rules it had already recognized and which were formerly approved by the Board.[32]

The five tests outlined by the Second Circuit have been recently adopted by the Fifth Circuit in *NLRB v. Camco, Inc.*[33] The Board itself, in *Cannon Elec. Co. & Charles H. Warren,* used the five tests but noted that "none of these tests can be definitive."[34]

In examining these cases and the many others handed down in the past ten years, one is immediately aware of inconsistencies. The Board, applying the same general standards, reaches different conclusions in cases where the facts are scarcely distinguishable. Nor are the holdings of the circuit courts more consistent. Decisions appear to be reached perchance. The explanation, if there is one, is that we are dealing with intangibles. No one can really say how an employee is affected when a supervisor approaches him and questions him about

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28 *Id.* at 774-75.
29 NLRB v. Johnnie's Poultry Co., 344 F.2d 617 (8th Cir. 1965).
30 146 N.L.R.B. 1507 (1964).
31 NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965).
32 *Id.* at 348.
33 340 F.2d 803 (5th Cir. 1965).
34 151 N.L.R.B. No. 141 (1965). In this case, after a union campaign and election which the union lost, the employer sent a questionnaire to employees to ask them to evaluate the campaign conducted by the company. The employees were not to sign their names, but questions were asked as to their sex, length of service and department. No assurances were given against reprisals. The Board found that under all the circumstances the questionnaire had a coercive effect and, therefore, violated §8(a)(1).

union activities. One can only speculate on the reasons why a particular employee votes for or against a union. The Board and courts attempt to look at the complete picture to see if the questioning, in fact, looks like interference or coercion. In a few cases, it is clear the conduct is definitely unlawful, but the normal case is not so easily resolved, and the decision often rests on some relatively artificial factor. Viewed alone, the result may be quite rational, but when compared with other cases reaching the opposite result, one is unable to explain why, in reality, this particular conduct is coercive whereas that in another case is held not coercive.

The present state of the law is unsatisfactory to both the employer and the union. Undoubtedly, much employer conduct is condoned which actually has an effect upon the organizational campaign. And, when the conduct is found to be unlawful, it seems unlikely that the Board's cease and desist order can actually eliminate the tension which has been created by the employer's activities. The employer, likewise, is in a delicate position. Interrogation is not expressly prohibited, but he engages in it only at his peril.[35] It is quite reasonable, then, that the court, when confronted with *Local 49 v. NLRB,* would remand the case to the Board in the hope that new light would be shed on this complicated issue.

It is indeed ncessary that the Board come to grips with the problems involved in this situation. A basic premise of our legal system is that law consists of rules known in advance. It is, of course, not possible to prescribe in minute detail what types of conduct are prohibited, but the law should at least achieve a level of stability which will enable an employer to consult his attorney and reasonably rely upon his advice. The unfair labor practices outlined by Congress should be thought of, not as punitive, but as preventative. The statute was not enacted to punish offenders, but to set up guidelines to govern union-employer-employee relationships. The establishment of unfair labor practices was not intended to trap the employer, but to alert him as to what conduct is unlawful and to provide the Board with broad remedial discretion to insure that these standards are upheld. The guidelines prescribed by Congress are necessarily vague, and it is the duty of the Board in interpreting these provisions to clarify and elucidate what conduct actually violates the Act. If the statute is preventative, then its purpose will be frustrated if the Board allows the employer to proceed blindly, and then suddenly slaps his hand when it thinks he has gone too far. In a very real way, this is being done in the Board's treatment of §8(a)(1).

The Board is faced with three alternatives. It could formulate more specific rules within the totality of conduct principle. This would provide necessary consistency within the framework of a very flexible doctrine. However, the employer-employee relationship is unique in each individual case, and it would be impossible to provide rules which are any more specific than those already

35 See Blue Flash, 109 N.L.R.B. 591, 594 (1954). It is not unusual for a violation to be found even where the employer has proceeded in good faith under the advice of an attorney. See, *e.g.,* NLRB v. Lorben Corp., 146 N.L.R.B. 1507 (1964), *rev'd,* 345 F.2d 346 (2d Cir. 1965); NLRB v. Johnnie's Poultry Co., 146 N.L.R.B. 770 (1964), *rev'd,* 344 F.2d 617 (8th Cir. 1965).

outlined by the Board or Second Circuit without their being criticized as arbitrary. Secondly, the Board might revert to the *per se* approach and hold all interrogation unlawful. However, it is doubtful that it would return to this test or that the courts would be any more favorable to it.[36] A third approach would be for the Board to withdraw from this area entirely, except where interference is actually proved by independent evidence.[37] However, such an approach would disregard the employer-employee relationship and the probable inherent coercion present any time an employer questions his employees. Conduct lawful on its face may, in the proper context, be coercive even though this effect is impossible to substantiate by independent evidence.

The only effective alternative is for the Board to go to the very root of the problem and begin anew. In the general topic of interrogation, the Board has included polling of employees, systematic questioning of employees, and casual inquiries by the employer or his representatives, without attempting to distinguish between these very different kinds of conduct. It is this failure to differentiate different employer activities which lies at the basis of the confusion in this area. Therefore, it is proposed that in the future the Board set up different categories of conduct and establish a specific rule to govern each category. This approach will, of course, be criticized as artificial, but this is inevitable whenever one attempts to categorize conduct.

At a minimum, the Board should differentiate polling from the general category of interrogation. Whether the employer assembles all the employees and has them vote as a group, or whether he polls them on an individual basis, it can be argued that the employees will be restrained, however slightly, in stating their preferences. In most cases, the Board has held that, considering all the circumstances, a poll conducted by the employer is an unfair labor practice,[38] but it has not expressly set down a separate rule regulating such activities. An effective standard would hold that the polling of employees is

36 The courts have warned the Board against the use of too mechanical an approach in rule setting even in adjudication. See Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); NLRB v. Local 60, United Bhd. of Carpenters, 365 U.S. 651 (1961); NLRB v. Pittsburgh Plate Glass Co., 270 F.2d 167 (4th Cir. 1959), *cert. denied,* 361 U.S. 943 (1960). See also Address by Chairman McCulloch, Administrative Law Section of the American Bar Association, August 11, 1964, on file in office of NOTRE DAME LAWYER.

37 The Supreme Court adopted such an approach in determining whether an employer's lockout is an unfair labor practice. In NLRB v. Brown, 380 U.S. 278, 287-8 (1965), the Court said:

> We recognize that, analogous to the determination of unfair practices under §8(a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of §8(a)(3). . . . But where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adopted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employers must be established by independent evidence.

Interrogation, however, would appear to be inherently destructive of employee rights and not justified by important business ends.

38 See, *e.g.,* Cannon Elec. Co. & Charles H. Warren, 151 N.L.R.B. No. 141 (1965); Lorben Corp., 146 N.L.R.B. 1507 (1964); Frank Sullivan & Co., 133 N.L.R.B. 726 (1961); A. L. Gilbert Co., 110 N.L.R.B. 2067 (1954).

unlawful unless conducted by an impartial third party by secret ballot. Such a proposal would provide minimum protection for employees.[39]

To go a step further, the Board might set up a category covering the systematic questioning of employees. This would include all systematic attempts by the employer to inquire as to his employees' union sentiments. Such conduct, no matter how pursued, is inherently coercive and should be unlawful. The employer-employee relationship is prima facie evidence that any systematic interrogation will make the employees wary, and therefore, such conduct constitutes interference.

The systematic questioning of employees should be distinguished from mere casual snooping by the employer or his representative. It is inevitable that an employer will become curious as to the extent of a union's organizational campaign. This natural curiosity will prompt the employer to make casual inquiries of his employees. Such inquiries normally will not be coercive, and they should not constitute an unfair practice unless it is proved by independent evidence that this snooping actually had the effect of interfering, restraining, or coercing employees.[40] However, employer snooping may verge upon the category presently identified as employer spying. In such a case, it would be prohibited by the Board.[41]

Of course, such a solution is not an infallible guide. Each particular fact situation will have to be analyzed and categorized. But, on the whole, it does alert the employer that systematic questioning and spying are definitely prohibited, that polling can only be conducted if surrounded by specific safeguards, and that casual inquiries may be unlawful if proved coercive in fact. It is inevitable that mistakes will be made, but if we remember the purpose of the statute is preventative, then the above approach does offer the most effective guide to the employer and maximum protection to the employees and the union.[42]

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39 The secret ballot has always been recognized as the most elementary means of insuring that each voter has freedom to exercise his personal preference. It would appear also that the election would be more effective if conducted by a third party to completely prevent any undue interference by either the employer or the union. See Interboro Chevrolet Co., 111 N.L.R.B. 783 (1955) where the Board set aside an election conducted jointly by employer and union.

40 Perhaps the requirement that coercion be established by independent evidence is too stiff. If this is the case, the Board could apply the totality of conduct doctrine to this narrow category to determine if this employer snooping is unlawful.

41 Espionage and surveillance have consistently been held to violate the act. See, *e.g.*, Kohler Co., 128 N.L.R.B. 1062 (1960), *enforced,* 300 F.2d 699 (D.C. Cir.), *cert. denied,* 370 U.S. 911 (1962); Continental Bus System, Inc., 128 N.L.R.B. 384 (1960); Idaho Egg Producers, 111 N.L.R.B. 93 (1955).

42 The Court suggested the Board exercise its rule-making power to provide a solution. International Union of Operating Eng'rs, Local 49, AFL-CIO v. N.L.R.B., 353 F.2d 852 (D.C. Cir. 1965). §6 gives the Board power to establish substantive rules of law in the manner proscribed by the Administrative Procedure Act. 61 Stat. 140 (1947), 29 U.S.C. §156 (1964). To date, this power has not been exercised. The Board has refrained from exercising this power to prevent rigidifying its judgments into hard and fast rules, and also because it is relatively as easy for the practitioner to find the Board's rulings on a particular subject in the labor-reporting services as it is to consult the Federal Register. See SEC v. Chenery Corp., 332 U.S. 194 (1947); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 YALE L.J. 729 (1961); Address by Chairman McCulloch, Administrative Law Section of the American Bar Association, August 11, 1964, on file in office of NOTRE DAME LAWYER.

It can be persuasively argued that so long as the Board clarifies the subject of §8(a)(1), it matters little if done through its decisions or through a formal rule. There is one advantage, however, in the Board's formulation of a rule under the Administrative Procedure Act

Until the Board clarifies its position, lawyers should advise their clients to avoid any conduct which might possibly be classified as interrogation. If the employer desires to ascertain whether the union represents a majority of his workers, he should either petition the Board for an election, ask the union to demonstrate its status, request that an election be conducted by some impartial third party, or, if he has a genuine good faith doubt, simply refuse to bargain. Such solid preventative counselling is essential if the employer is to avoid the pitfalls of §8(a)(1).

Michael P. Seng

EVIDENCE — EXPERT WITNESS — NO HYPOTHETICAL QUESTION REQUIRED WHERE FACT BASIS IS BEFORE THE JURY. — On April 16, 1960, a group of men and boys were working on cabin construction at a lake in Alaska. During their operations, one of the boys — plaintiff Larry Crawford — injured his arm. It was decided that A. O. Rogers would return him to his home in his private plane. Rogers' plane was a tandem seat, dual control craft in which the control stick had been removed from the rear seat. After the plane reached an altitude of 150 to 300 feet, the engine sputtered momentarily, then resumed normal operation. Immediately thereafter, it made a sharp turn to the left, went into a spin and crashed. The pilot was killed and the passenger was seriously injured. Crawford then instituted a personal injury action against the defendant executrix of Rogers' estate. Based upon the testimony of witnesses to the crash, his own subsequent observations of the scene and a bent right rudder pedal which he found at the scene, Ward Gay, an expert witness for the defendant, gave his opinion as to the cause of the crash, completely exonerating the pilot. The expert stated, without having been asked in hypothetical form for his opinion, that the crash was caused by plaintiff's stomping on his left rudder pedal which threw the plane into a spin. According to his theory, the right front rudder pedal was bent by the pilot's exerting tremendous pressure on it to counteract the plaintiff's stomping on the left rear pedal. After a jury verdict for the defendant, plaintiff's motion for judgment n.o.v., or in the alternative, a new trial, was denied. The Supreme Court of Alaska, affirming, *held:* where the facts upon which an expert opinion is based are before the jury, no hypothetical question need be asked. *Crawford v. Rogers,* 406 P.2d 189 (Alaska 1965).

For the most part, decisional law on expert witnesses is in general agreement. For a witness to be qualified as an expert and for his opinion to be admitted into evidence, there are two requirements:

> First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge

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other than the mere fact that it would provide a solid, unequivocal statement of the Board's position. As we have seen, the courts have been reluctant to follow the Board's determinations. But if the Board does set down specific rules for various categories of conduct through its rule-making power, the courts will be obliged to follow them so long as they are found to be reasonable.

> or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for the truth.[1]

The requirements for the use of the hypothetical question vary as the basis on which the expert relies varies. Where the expert has personally observed the person or thing in question, there is no need for a hypothetical question.[2] This situation generally occurs among medical experts who are asked to give their opinions on patients whom they have examined. But where the expert has had no personal observation of the person or thing in question, the factual basis upon which his opinion is requested must be presented in hypothetical form.[3] In a third situation, the expert is relying partially on his personal observation and partially on assumed facts. This situation is also quite common in medical expert cases where the physician was not familiar with the patient before the occurrence in question, but examined and/or treated him subsequently, and portions of the fact basis for his opinion were obtained other than by personal observation. Here, the hypothetical form is required to supply those assumed facts.[4] The latter situations involve a reliance on the opinion of others, generally other experts, such as other physicians, hospital charts and records. If these charts and records are not included in the hypothesis to the expert who testifies, the opinion is excluded.[5]

It often happens that the expert is called upon to give an opinion on the ultimate question which the jury is to decide. To some courts, admitting such an opinion into evidence is a reversible error because it invades the province of the jury and usurps their function.[6] On the other hand, many admit the opinion even though it is on the ultimate issue.[7] Some cases indicate that it is precisely because the opinion goes to the ultimate question to be decided that the opinion should be received.[8] This rationale buttresses a recent statement by the New Hampshire Supreme Court: "[T]he test usually applied to determine the admissibility of opinion evidence is to inquire whether the witness' knowledge of the *matter in question* will probably aid the triers in their search for the truth."[9] (Emphasis added.)

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1 McCormick, Evidence §13, at 28-29 (1954). See Bratt v. Western Airlines, Inc., 155 F.2d 850, 853 (10th Cir. 1946).

2 2 Wigmore, Evidence §675 (3d ed. 1940).

3 *E.g.*, Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 Pac. 671 (Dist.Ct.App. 1919); Harp v. Illinois Cent. R.R., 370 S.W.2d 387 (Mo. 1963).

4 2 Wigmore, *op. cit. supra* note 2, §678.

5 Dean McCormick noted the strong argument for allowing an opinion based in part on another expert's opinion or statement in that the experts are competent judges of the reliability of the sources and if they would accept them in their practice, they should be allowed to rely on them on the witness stand. McCormick, *op. cit. supra* note 1, §15, at 33.

6 *E.g.*, Carroll v. Magnolia Petroleum Co., 223 F.2d 657 (5th Cir. 1955); Caves v. Barnes, 178 Neb. 103, 132 N.W.2d 310 (1964).

7 *E.g.*, Dickerson v. Shepard Warner Elevator Co., 287 F.2d 255 (6th Cir. 1961); Kennelley v. Travelers Ins. Co., 273 F.2d 479 (5th Cir. 1960) (referring to Texas law); Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 Pac. 671 (Dist. Ct.App. 1919); Grismore v. Consolidated Prods., 232 Iowa 328, 5 N.W.2d 646 (1942). The Uniform Rules of Evidence embody this view in Rule 56(4). An especially good discussion is found in Grismore v. Consolidated Products, *supra* at 655-64.

8 *E.g.*, Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 152, 180 Pac. 671, 674 (Dist.Ct.App. 1919); Grismore v. Consolidated Products, 232 Iowa 328, 345, 5 N.W.2d 646, 656 (1942); Snow v. Boston & Me. R.R., 65 Me. 230, 231 (1875).

9 Walker v. Walker, 210 A.2d 468, 470 (N.H. 1965).

Pervading the entire realm of admissibility of evidence is the discretionary role of the trial judge. While appellate courts state that the preliminary questions as to the qualifications of the expert and admissibility of his testimony are within the sound discretion of the trial judge and unreviewable,[10] still these questions are being reviewed, especially as to the experiential qualifications of the expert.[11] Rule 45 of the Uniform Rules of Evidence gives much discretion to the judge on the question of *excluding* otherwise admissible evidence.[12] The form and length of the hypothetical question are largely within the discretion of the trial judge,[13] and one federal court has stated that the trial judge has the affirmative power and duty to exercise close control over the framing of the hypothetical question.[14]

Most of the legal scholars are in disagreement with the present law on hypothetical questions. Dean Wigmore devoted an entire section of his treatise to a plea for abolition of the hypothetical question requirement.[15] Dean McCormick apparently agreed with Wigmore and stated that the only two possibilities of reform are impractical.[16] Pointing out that "no remedy short of extirpation will suffice," Wigmore disclosed the three main objections to the requirement — first, due to the complexity of wording and mode of answering required, the mouth of the expert is "artificially clamped"; second, the jury is misled as to the expert's real opinion because he cannot express it freely; third, the jury is confused by the complexity and length of the hypothetical.[17] The greatest problem appears to be with those who use the question. Those unable to handle it create havoc with their clumsiness, while the truly clever phrase the question and select their facts so as to mislead the jury. Since the misuse and abuse cannot be adequately controlled, many scholars recommend its abolition.[18]

Some members of the judiciary have also had their say about the hypo-

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10 *E.g.,* Bratt v. Western Airlines, Inc., 155 F.2d 850 (10th Cir. 1946); Activated Sludge, Inc. v. Sanitary Dist. of Chicago, 64 F.Supp. 25 (N.D.Ill. 1946), *aff'd,* 157 F.2d 517 (7th Cir.), *cert. denied,* 330 U.S. 834 (1947); Smith v. Twin City Motor Bus Co., 228 Minn. 14, 36 N.W.2d 22 (1949); Walker v. Walker, 210 A.2d 468 (N.H. 1965); Stevens v. Spring Valley Water Works & Supply Co., 42 Misc.2d 86, 247 N.Y.S.2d 503 (App.T.), *aff'd,* 22 App.Div.2d 830, 255 N.Y.S.2d 466 (1964).

11 Bratt v. Western Airlines, Inc., 155 F.2d 850 (10th Cir. 1946); see 2 WIGMORE, *op. cit. supra* note 2, §561.

12 UNIFORM RULE OF EVIDENCE 45 states:

> The judge may in his discretion exclude evidence if he find that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

But cf. FED. R. CIV. P. 43(a) which instructs the judge to apply whichever rule will *admit* the evidence.

13 *E.g.,* Dickerson v. Shephard Warner Elevator Co., 287 F.2d 255 (6th Cir. 1961); Ranger, Inc. v. Equitable Life Assur. Soc'y, 196 F.2d 968 (6th Cir. 1952).

14 Pierkowskie v. New York Life Ins. Co., 147 F.2d 928, 933 (3d Cir. 1945).

15 2 WIGMORE, *op. cit. supra* note 2, §686.

16 McCormick stated that to leave to the judge which facts are significant and to be included prior to the asking or to have the judge and opposing counsel participate in a pretrial hearing in order to decide on the questions are time and effort wasting. MCCORMICK, *op. cit. supra* note 1, §16.

17 2 WIGMORE, *op. cit. supra* note 2, §686, at 812.

18 *E.g.,* MCCORMICK, *op. cit. supra* note 1, §16; 2 WIGMORE, *op. cit. supra* note 2, §686; Morgan, *The Future of the Law of Evidence,* 29 TEXAS L. REV. 587 (1951).

thetical question. In an oft-quoted passage, Judge Learned Hand described it as "the most horrific and grotesque wen upon the fair face of justice."[19] While recognizing the obvious defects in the hypothetical question, Judge Burr W. Jones had hopes of reform rather than extinction of the question.[20]

A number of states delegated to legislative or judicial commissions the task of revamping not only the law on hypothetical questions, but all of the law of evidence. As a result of the recommendations of the 1963 New Jersey Supreme Court Committee on Evidence, that state's Supreme Court adopted much of the Uniform Rules of Evidence in 1964.[21] Uniform Rule 58, dealing with the hypothetical question, provides:

> Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data.

The New Jersey rule, based on Uniform Rule 58, provides: "Questions calling for the opinion of an expert witness need not be hypothetical in form."[22]

California, like New Jersey, spent nine years in a study of the Uniform Rules of Evidence. Instead of adopting a single rule on hypothetical question, California divided Uniform Rule 58 among several sections of its new Evidence Code. The essence of the rule is contained in Evidence Code §802 which provides:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.[23]

The official comments state that the section brings both expert and lay opinion under one heading, codifies the existing law concerning lay testimony and probably states the existing law on expert testimony:

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19 Hand, L., in LECTURES ON LEGAL TOPICS, 1921-1922, at 104 (1926).

20 The efforts at reform attempted

> to reduce the occasions for need of hypothetical questions by the more general use of demonstrative evidence and experimental procedure; by more general resort to other means, such as depositions or trial audition, of apprising the witness of the hypothetical facts; by the use of a series of shorter questions, where possible, in preference to a single, cumbersome question embodying minute detail; and by encouraging the common law power of the judge to call upon impartial experts free of obligation to any party. 2 JONES, EVIDENCE §422, at 798 (5th ed. 1958).

21 See headnote to N.J. STAT. ANN. §2A:84A—1 (Supp. 1965). The Evidence Act of 1960 which embodies the rules of evidence that the New Jersey Supreme Court adopted was to become effective on July 1, 1965. The legislature, however, on May 24, 1965, enacted Assembly Bill 751, which postponed the effective date until January 12, 1966, in order that they have more time to study the report of the Legislative Commission on the rules. Comment to N.J. STAT. ANN. §2A:84-36 (Supp. 1965).

22 N.J. STAT. ANN. 2A:84A—Rule 58 (Supp. 1965).

23 CAL. EVIDENCE CODE §802 (1965) (to become operative on January 1, 1967).

> Under existing law, where a witness testifies in the form of opinion not based upon his personal observation, the assumed facts upon which his opinion is based must be stated in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts.[24]

The comment to the tentative recommendations of 1964 stated that disapproval of Uniform Rule 58 was due to the lack of differentiation

> between the varying bases upon which expert opinion may be founded, some of which may require the use of hypothetical questions. . . . [W]here an expert's opinion is based upon facts assumed by him to exist, it must be made clear from his testimony that the facts upon which his opinion is based are only assumed to exist. Hence, examination of the expert witness by hypothetical questions may be essential. . . .[25]

The Commission appears to have failed to note that under Uniform Rule 58 the judge in his discretion may require use of the question and the opposing counsel may bring out the fact basis of the opinion in cross-examination.[26]

An important California decision, *In re Collin's Estate,*[27] indicates that the present California law approximates Uniform Rule 58.[28] The case concerned a will probate proceeding in which the sanity of the testator was questioned. Dr. Norman Levy, a professor of psychiatry, was called upon to testify as to the testamentary capacity of Collin, a man whom he had never met. The question asked Dr. Levy was:

> Not basing your opinion or founding your opinion upon the opinion of any witness in this case as to the mental capacity of Mr. Verneuil [Collin], but solely based upon the testimony which was given by Miss Ryan and Miss de Vynck as to the conversations had with Mr. Verneuil and the correspondence that you have examined, I will ask you if you have an opinion as to his mental capacity and to give, state it.[29]

An objection that the question was a hypothetical in different form was overruled and on cross-examination the doctor went into detail and related precise evidence upon which his opinion was based. The court stated that putting the question in hypothetical form would have accomplished nothing more. On the other hand, a great deal of extra time would have been consumed to no one's benefit.[30] The law applied in the *Collin* case allows the expert to give his true opinion of the fact situation and places the burden on the opponent in

24 Comment, CAL. EVIDENCE CODE §802.
25 CALIFORNIA LAW REVISION COMMISSION, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 916-17 (1964).
26 Indeed, the conclusion of the last-quoted sentence is "it being in the judge's discretion to regulate the extent to which the hypothetical nature of the assumed facts needs to be shown in the form of the questions asked." *Id.* at 917.
27 150 Cal.App.2d 702, 310 P.2d 663 (Dist.Ct.App. 1957).
28 If, as the Commission stated in its official comment, the section does not change present law which requires the hypothetical question, criticism of New York's §4515 is appropriate to California Evidence Code §802. See note 39 *infra,* and accompanying text.
29 *In re* Collin's Estate, 150 Cal.App.2d 702, 310 P.2d 663, 670 (Dist.Ct.App. 1957).
30 *Id.* at 671.

cross-examination. This is also what Uniform Rule 58 does, which California decided *not* to adopt.

Some members of the Oregon bar have attempted a review of the Uniform Rules of Evidence and their effect on current law.[31] One of the authors of this survey indicated that the change occasioned by Rule 58 would not be as revolutionary as it appears. In the difficult situations where the evidence is voluminous, physical evidence of the facts are not before the expert, or the expert has no personal knowledge of the facts, the judge in exercising his discretion would probably require that the hypothetical form be used.[32] To date, the Oregon legislature has not seen fit to adopt the Uniform Rules of Evidence.

The history of statutory reform of evidence dates back to the 1930's and includes the Model Code of Evidence and the Model Expert Testimony Act. Each of these attempts contained a section on hypothetical questions.[33] The Model Expert Testimony Act was adopted by only one state — South Dakota by court rule in 1942.[34] The Model Code found little support but served as the basis for the Uniform Rules of Evidence.

Aside from New Jersey and California, which adopted some portions of the Uniform Rules while ignoring or changing others, only three jurisdictions — the Canal Zone, Kansas and the Virgin Islands — have accepted the rules as promulgated by the National Conference of Commissioners on Uniform State Laws.[35] The rule on hypothetical questions as promulgated has been adopted verbatim by each of the three.[36] In 1939, Vermont adopted an expert witness act somewhat similar to the Model Expert Testimony Act, but the Conference stated that Vermont's version was too much at variance to be considered an enactment of their act.[37]

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31 Butler, Hutchens, Joseph & Swearingen, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon,* 41 ORE. L. REV. 273 (1962), 42 ORE. L. REV. 181 (1963).

32 Butler, *How the Adoption of the Uniform Rules of Evidence Would Affect the Law of Evidence in Oregon: Rules 56-61,* 42 ORE. L. REV. 181, 194 (1963).

33 The MODEL CODE OF EVIDENCE rule 409 (1942) provided:

> An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the trier of fact, and he may state his reasons for such inferences and need not, unless the judge so orders, first specify, as an hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data.

The MODEL EXPERT TESTIMONY ACT §9 (1937) provides:

> (1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based.
>
> (2) An expert witness may be required, in direct or cross-examination, to specify the data on which his inferences are based.

34 S.D. CODE §36.0117 (Supp. 1960).

35 5 C.Z. CODE §§2731-2996 (1963); KAN. STAT. ANN. §§60-401 to 60-469 (1964); 5 V.I. CODE §§771-956 (1957).

36 5 C.Z. CODE §2933 (1963); KAN. STAT. ANN. §60-458 (1964); 5 V.I. CODE §913 (1957).

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> An expert witness may be asked to state his opinion based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying

New York relied on the Model Act and Uniform Rule 58 in enacting its provision on expert witness' opinion.[38] The New York revision has been criticized as useless insofar as it is the professional witness who has discredited the hypothetical question and may continue to do so. It is charged that elimination of the requirement will increase, not decrease, the opportunities for expressing baseless and speculative opinions.[39] The critic, Professor Schwartz, feels that §4515 eliminates any effective control by the trial judge over the hypothetical question if counsel wishes to employ it. Absent the statutory provision, the trial judge has a certain amount of discretionary control over the question. The statute should not be interpreted as tying his hands when its very purpose is to give him more leeway.

While the federal courts have a very liberal rule governing admissibility,[40] preferring the statute or rule which favors admission over exclusion, Congress has done nothing to adopt an evidence code similar to the Uniform Rules of Evidence. The Judicial Council of the United States, in 1963, approved the conclusion of its Standing Committee on Practice and Procedure that it is "feasible and desirable to formulate uniform rules of evidence to be adopted by the Supreme Court for the United States District Courts."[41]

In *Crawford v. Rogers*, the Alaska court found that since the factual basis upon which the expert's opinion relied was in evidence, there was no need for a hypothetical question.[42] The court stated that the following facts were in evidence:

> . . . [T]hat the airplane had taken off from a lake in a certain direction, that the engine had failed when the airplane had reached a certain altitude, that the airplane made a left turn in what appeared to witnesses to be an attempt to return to the lake, and that it had gone into a spin and had crashed nose down.[43]

> hypothetically in the question the data on which this opinion is based. On direct or cross-examination, such expert witness may be required to specify the data on which his opinion is based. 12 VT. STAT. ANN. §1643 (1958).

See disclaimer at 9A UNIFORM LAWS ANN. 537 (1965).

38 N.Y. CIV. PRAC. §4515 states:

> Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

39 It is further contended that those who desire to may continue to use it as a convenient means of summarizing and reviewing favorable facts for the jury. Schwartz, *The CPLR and the Trial Lawyer*, 9 N.Y.L.F. 269, 278 (1963).

40 FED. R. CIV. P. 43(a) provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

41 REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 20 (1963).

42 Crawford v. Rogers, 406 P.2d 189, 191 (Alaska 1965).

43 *Ibid.*

These facts were coupled with the expert's own observations of the scene (several weeks after the accident[44]), the finding of a bent right, front rudder pedal and his own experience as a pilot.[45] Appellant's recurrent theme was that Gay's opinion was based on his own theory derived from his own experience rather than an impartial opinion based on the facts of the case.[46] Involved in the question of how the pedal became bent was the fact that the pilot — who was supposed to have applied tremendous force to the pedal — was an amputee, having neither a right foot nor leg, but only an artificial limb.[47] In a courtroom demonstration, using a fuselage of a similar plane, expert Gay — of good health and strong legs — was unable to bend such a pedal.[48] The final difficulty with Gay's testimony was that he was not asked any question at all, hypothetical or nonhypothetical.[49]

The Alaska court came to a unique conclusion in this case. It neither claims that the case is an ordinary application of the common law, nor does it purport to be a departure therefrom. The briefs and the court's opinion indicate that there was an evidentiary conflict on when the engine failed,[50] what was done to the plane prior to flight,[51] and the position of the injured plaintiff after the crash.[52] Under traditional law, the hypothetical form would be required in questioning the expert on conflicting evidence.[53] The form would not have been required only if there had been no conflict, only a few witnesses, and little testimony.[54]

The majority opinion in *Crawford* was careful neither to lay down a new rule nor to indicate a departure from present law. The court held that where the reason for the hypothetical form is absent (*i.e.*, where facts are before the jury from the testimony of other witnesses), the requirement itself is also absent.[55] The concurring opinion of Justice Rabinowitz, however, fully discussed the treatment given the hypothetical question by the commentators and some of the statutory reforms. Regretting the majority's failure to promulgate an efficacious rule, he stated: "The views of Dean Wigmore and Dean McCormick are persuasive. In my opinion a rule similar to that urged by these authorities referred to in this separate opinion would have been more appropriate."[56]

The way out of the hypothetical maze has been shown by the Uniform Rules of Evidence in the section on expert and other opinion testimony.[57] A sensible plea for the adoption of the Uniform Rules was made by Judge Spencer

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44 Brief for Appellant, p. 34.
45 Crawford v. Rogers, 406 P.2d 189, 191-92 (Alaska 1965).
46 Brief for Appellant, p. 23; Reply Brief for Appellant, pp. 3, 8-9, 12; Appellant's Petition for Rehearing, p. 3.
47 Brief for Appellant, pp. 2, 43; Appellant's Petition for Rehearing, pp.1-2.
48 Brief for Appellant, pp. 24, 42.
49 Reply Brief for Appellant, pp. 8-9.
50 Crawford v. Rogers, 406 P.2d 189, 191 (Alaska 1965).
51 Brief for Appellee, pp. 14-15.
52 *Id.* at 15.
53 See, *e.g.*, *In re* Elliott's Estate, 269 Mich. 677, 257 N.W. 919 (1934); Zelenka v. Industrial Comm'n, 165 Ohio St. 587, 138 N.E.2d 667 (1956).
54 *Ibid.*
55 Crawford v. Rogers, 406 P.2d 189, 191 (Alaska 1965).
56 *Id.* at 196.
57 UNIFORM RULES OF EVIDENCE 56-61.

A. Gard, who chaired the committee which drew up the rules.[58] Judge Gard stated that the objective of a trial is to discover truth and attain a just result. This is a uniform objective, and human nature is the same throughout the nation so the mechanics for achieving this objective should be the same.[59] The experts who drafted and studied the Uniform Rules believe they have found the best method for solving uniform problems and recommended adoption of the rules in all states. New Jersey has indicated that it must adopt rules adapted to its peculiar state problems.[60] To such a contention Judge Gard has answered: "If it's good, it's good; if it's bad, it's bad wherever you find it."[61] It is submitted that while the Alaska Supreme Court has taken a step forward it would have done better if it had heeded the plea of Justice Rabinowitz and had promulgated an equivalent of Uniform Rule 58 as its law on the hypothetical question.

Harold J. Bliss

LABOR LAW — FAIR LABOR STANDARDS ACT — SERVICE AND CUSTODIAL EMPLOYEES OF INSURANCE OFFICE BUILDING COVERED. — Columbian Mutual Life Insurance Company had a 99-year lease on an office building in which it maintained its home office, occupying 11% of the space. It had a contract with a rental agent who, in return for a percentage of the gross rental income, secured tenants and provided a building manager. The insurance company retained and exercised the right to hire and discharge the service employees; it also fixed and paid their wages. Materials and supplies used in the building were approved by the agent and invoices were forwarded to the insurance company for payment. The employees of the insurance company were admittedly covered by the Fair Labor Standards Act.[1] In 1961, the Act was amended to provide, in §3(s)(3), that employees of

> any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000; . . .[2]

are subject to the minimum wage and overtime provisions of the Act.[3] In a suit to enjoin[4] failure to pay the minimum wage and overtime compensation,

58 Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958).
59 *Id.* at 287-89.
60 NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE REPORT 4 (1963).
61 Gard, *supra* note 58, at 288.

1 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§201-219 (1964).
2 29 U.S.C. §203(s)(3) (1964).
3 As of September 3, 1965, the minimum wage for newly covered employees was $1.25 an hour and they must receive overtime compensation at one and one-half times their regular rate for hours in excess of forty in one week. 29 U.S.C. §§206(b), 207(a)(2) (1964).
4 Under 29 U.S.C. §216(b) (1964), an employee may bring an action for unpaid minimum wages and overtime pay and receive, in addition, an equal amount as liquidated damages.

and failure to maintain records as required by the Act,[5] the United States District Court for the Western District of Tennessee *held:* there was only one establishment comprised of insurance company employees and maintenance employees, all of whom were subject to the provisions of the Act; alternatively, if the building is found to be an establishment separate from the insurance establishment, two or more of the building employees are themselves engaged in commerce extending coverage to all maintenance employees.[6] *Wirtz v. Columbian Mutual Life Insurance Company,* 246 F.Supp. 198 (W.D. Tenn. 1965).

Prior to the 1961 amendments, the Fair Labor Standards Act provided coverage for those individuals engaged in interstate or foreign commerce or in the production of goods for such commerce. Retail and service establishment employees were largely excluded from the Act's coverage under §13(a)(2) which provided exemptions for:

> any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. . . A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . . .[7]

The amended Act continues this exemption, but limits it severely by providing in §3(s) that the following types of enterprises are not subject to the provision:[8] (1) an enterprise which has one or more retail or service establishments and whose gross volume of sales is not less than one million dollars; (2) a transit system with a gross volume of sales of not less than one million dollars; (3) any establishment of any enterprise other than the four here mentioned which has employees engaged in commerce or in the production of goods for commerce if the gross volume of sales[9] is not less than one million dollars; (4) an enter-

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5 29 U.S.C. §211(c) (1964) provides:

> Every employer subject to any provision of this chapter . . . shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, . . . [and shall preserve such and make such reports as shall be prescribed by the administration].

6 The court said: "However, because we may be in error in holding that they are one establishment, we will also consider whether the office building itself has employees in commerce." 246 F.Supp. 198, 205 (W.D. Tenn. 1965).

7 29 U.S.C. §213(a)(2) (1964).

8 The amended act in §§13(a)(1)-13(a)(22) contains numerous exceptions, as well as adding certain new ones—e.g., certain laundry and cleaning establishments, taxicabs, agricultural employees employed in the growing and harvesting of shade-grown tobacco and those employed in food service in retail and service establishments.

9 A point that has flared in cases under the §3(s)(3) provision, 29 U.S.C. §203(s)(3) (1964), has been the $1,000,000 sales test. In Wirtz v. First Nat'l Bank & Trust Co., 239 F.Supp. 613 (W.D. Okla. 1965) where the bank had a total of three buildings and coverage was sought for the maintenance employees of all three, including those that serviced the tenants, since these maintenance employees were employed by a separate management corporation, the court found no coverage, adding that the rental income and bank income were not sales within the meaning of §3(k), 29 U.S.C. §203(k) (1964) and §3(s)(3). It said the enterprise sales concept "seems to fit a large department store or a chain store. It does not seem to fit a banking institution and a building management organization." Wirtz v. First Nat'l Bank & Trust Co., *supra* at 617. In Columbian Mutual the difficulty arose in that the insurance company's annual premium income was never as large as $1,000,000. Yet, the investment income, when added to the premium income, would exceed the amount. The

prise engaged in the business of construction or reconstruction if the annual gross volume from the business is not less than three hundred and fifty thousand dollars; and (5) any gasoline service establishment if the annual gross volume of sales is not less than two hundred and fifty thousand dollars.[10]

Special attention must be directed to the interplay of the words "enterprise" and "establishment." The above five provisions of §3(s) are parts of the definition of the term "enterprise," each provision being defined as an enterprise. In addition, §3(s)(3), under which coverage was claimed in *Columbian Mutual,* reads, "any establishment of any such enterprise." To find coverage, a court must first find that there is an "enterprise" and then that an "establishment" exists. This article will examine the definitions and qualifications of these terms. Each has been previously used in the Fair Labor Standards Act. Thus, in different contexts, each has acquired a meaning. The main question is whether the words, as used in the new section, have the same meaning. A working definition of the terms would be as follows: An establishment may be either less than or co-terminous with an enterprise; enterprise is a term used when referring to the presence or absence of elements usually found in a business as an accounting or purchasing department are part of the same enterprise, whereas establishment is used to refer to physically located places as an establishment in town *X* and an establishment in town *Y*.[11]

A second major amendment causes coverage to extend not only to the individual engaged in commerce or in the production of goods for commerce, but also to the employee of an enterprise which has two or more[12] of its employees engaged in commerce or in the production of goods for commerce including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person.[13] Thus the individual need not

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court recognized that the §3(k) definition— "'Sale' or 'sell' includes any sale, exchange, contract, contract to sell, consignment for sale, shipment for sale, or other disposition"— would not fit investment income. It wisely looked to the legislative history:

> The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law. S. REP. No. 145, 87th Cong., 1st Sess. 5 (1961).

Congress clearly did not intend to extend coverage to 100,000 employees of finance and insurance enterprises and then provide that their income be forced into a rigid sales concept. Further, 29 C.F.R. §779.248 (1965) treats the subject thusly: "The annual gross volume of sales of an enterprise consists of its gross receipts from all types of sales during a 12-month period."

10 29 U.S.C. §203(s)(1)-203(s)(5) (1964).

11 It is not at all surprising that confusion has resulted from the use of these words. Section 3(s), for example, defines "any establishment of any such enterprise" as itself being an enterprise; thus establishment equals enterprise. The court, in Wirtz v. Savannah Bank & Trust Co., 51 CCH LAB. CAS. 42,324 (S.D. Ga. 1964), where the maintenance employees engaged in servicing the tenants of the bank-owned building exclusively were the subject of coverage, asserted that coverage was sought under §3(s)(3), the establishment provision, and thereafter never discussed establishment in the case, limiting itself exclusively to the term enterprise.

12 The "two or more" requirement is an interpretation placed on the section by the history and it has been followed by the courts. H.R. REP. No. 327, 87th Cong., 1st Sess. 16 (1961).

13 It is questionable that §3(s)(3) has the benefit of coverage on the basis that there are employees in the establishment who handle, sell, or otherwise work on goods that have been moved in or produced for commerce by any person. It is the only one of the five provisions, (see text accompanying note 10 *supra*), that includes the words "engaged in com-

be engaged in interstate commerce; he may be doing what is traditionally thought of as local work and still be covered.[14]

In terms of effect, the establishment section, §3(s)(3),[15] was viewed as one of the more limited. The retail section, §3(s)(1), was expected to extend the Act's coverage to nearly 2.5 million employees; §3(s)(3) was thought to cover a mere 100,000.[16] Congress intended this provision for

> all employees of any establishment, not elsewhere referred to in section 3(s), which now has some employees who are and others who are not individually engaged in commerce or in the production of goods for commerce, if the establishment is in an enterprise, . . . which has an annual gross volume of sales of not less than $1 million.[17]

While this section was part of the general expansion, Congress specifically desired

> to eliminate fragmentation of coverage in the establishments of those large enterprises and prevent continuation of a situation in which some of the employees in such an establishment have the protection of the Act which others who work side by side with them do not.[18]

Specifically, "this section would provide minimum wage and overtime protection under the Act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation . . . and similar services."[19] This design to eliminate fragmentation is the key to the new law. If some workers in a business are covered by the minimum wage and overtime provisions because they are engaged in commerce, their fellow workers in the same unit receive the same benefits.

Congress has built its expanded coverage around two central concepts—enterprise and establishment. Enterprise is defined in §3(r) as:

> the related activities performed (either through unified operations or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: . . .[20]

This definition has four major elements which are clarified by the legislative history. The term "related" is used for both exclusion and inclusion. An example of an excluded, unrelated activity would be a company which owned several

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merce or in the production of goods for commerce" from the general provision of §3(s) of which all five are a part. Since it does not have the words "handling, selling," etc., it impliedly has a limit the others do not have.

14 See generally A.B.A. Rep.—Section of Labor Relations Law 115 (1961). Donahue, *Wage and Hour Developments—The Fair Labor Standards Act,* 15 N.Y.U. Conference on Labor 137 (1962).

15 See text accompanying note 2 *supra.*

16 H.R. Rep. No. 75, 87th Cong., 1st Sess. 8, 13 (1961) [hereinafter cited as H.R. Rep. 75].

17 *Id.* at 12.

18 *Id.* at 12, 13.

19 *Id.* at 13.

20 29 U.S.C. §203(r) (1964). See also text accompanying note 10 *supra.*

retail apparel stores and also engaged in the lumbering business. These would be two distinct enterprises and their annual dollar volumes could not be added together to meet, for example, the million dollar sales test of §3(s)(3); nor could the employees of the lumbering operation take advantage of the coverage afforded those who work in the apparel stores.[21] Activities which would be considered "related," causing an employee to be included and therefore covered, are partially defined in the legislative history of the Act:

> They are . . . "related" when they are auxiliary and service activities such as central office and warehouse activities and bookkeeping, auditing, purchasing, advertising, and other services. Likewise, activities are "related" when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose.[22]

Failure to meet the "related activities test" was one of the elements which led to finding no coverage in *Wirtz v. First Nat'l Bank & Trust Co.*[23] There, the bank owned a bank building, an office building and a parking garage. It occupied 20.7% of the space of all three buildings. It was the sole owner of a separate management company whose employees were the subject of the suit. The court reasoned that the activity of a bank is that of conducting a general banking business; the activity of a management corporation is the renting and maintenance of an office. These are separate and distinct endeavors — not related activities. The fact that the management corporation employed an average of 205 persons while the bank employed 440 was influential in establishing the management corporation as a separate and distinct effort.[24] The larger the unit is, the more it appears to be operating on its own. It was also on this "related activities" concept that *Columbian Mutual* turned. While here only 11% of the space was occupied, the ownership of the building was an outlet for investment. The same general services of cleaning and delivering were performed for the insurance company and for the tenants. Therefore, the court concluded the activities were "related."[25]

A sub-element of the "related activities" requirement is that they be performed "either through unified operation or common control."[26] It is clear from the legislative history that these words have specific reference to §3(s)(1) which concerns retail service establishments, and are intended to put the franchised operator who is an independent businessman outside the scope of the Act.[27] Where franchise agreements exist, courts are to see if there is, in reality,

21 H.R. REP. 75 at 7.
22 S. REP. No. 145, 87th Cong., 1st Sess. 41 (1961) [hereinafter cited as S. REP. 145].
23 239 F.Supp. 613 (W.D. Okla. 1965).
24 *Id.* at 617.
25 Wirtz v. Columbian Mut. Life Ins. Co., 246 F.Supp. 198, 202 (W.D. Tenn. 1965).
26 29 U.S.C. §203(r) (1964).
27 Thus the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control. . . . The facts may show that the arrangements reserve the necessary right of control in the grantor or unify the operations among the separate "franchised" establishments so as to create an economic unity of related activities for a common business purpose. In that case, the "franchised" establishment will be considered a part of the same "enterprise." S. REP. 145 at 42.

unified operation directed by one large enterprise or common control over the supposedly independent operators. If common control is found, courts must insure that employees are not denied coverage. Despite the legislative intent, the statute is so drawn that the "unified operation or common control" qualification falls on all five elements of §3(s).[28]

Since "unified operations or common control" are disjunctive phrases, the court in *Columbian Mutual* discussed only the common control aspect and found it clearly met since there was but one legal entity, the agreement with the agent notwithstanding. The right to fix wages, the right to hire and the right to discharge demonstrated that real control remained in the insurance company.[29] The Secretary of Labor contended in *Columbian Mutual* that there was a distinction between management and control.[30] While the rental agent did perform the general management services of a building supervisor, the insurance company retained the ultimate control over its agent's actions. This argument would find control at its source and the reservation of rights in the insurance company by agreement with its agent gives it the type of control specified in the statute. The *First National* case stated that even if "unified operation" might be absent in this situation, nevertheless, the other element, "common control," was present. The First National Bank owned the buildings and was sole stockholder in the management corporation. There was only one policy-making body since the officers and directors of both corporations were the same.[31] It is submitted that this discussion reinforces the conclusion that "unified operations or common control" is applicable to a franchise situation. The clarification provided by a finding of either element avails little in a discussion of a §3(s)(3) situation.

The last element in the definition of enterprise is the concept of a "common business purpose." On this, the legislative history is decidedly unclear,[32] but the court in *Columbian Mutual* equated it with the term "related." Consequently, the court found a "common business purpose" from the fact that the building was an investment outlet providing home office space and was held out to the public as an asset, making it a unit constituting a related activity.[33] In *Wirtz v. Savannah Bank & Trust Co.*,[34] where a bank occupied 22% of an office building and coverage was denied to those maintenance employees who were exclusively engaged in servicing the offices of the tenants, the court decided that the mere fact that both the operation of the building and the running of the bank were for profit did not constitute a "common business purpose."[35] Similarly, the *First National* case held that the simple objective of making a profit for stockholders could not constitute a "common business purpose." Where one

28 See text accompanying notes 7-9 *supra*.
29 Wirtz v. Columbian Mut. Life Ins. Co., 246 F.Supp. 198, 201 (W.D. Tenn. 1965).
30 Brief for Plaintiff, pp. 17-18.
31 Wirtz v. First Nat'l Bank & Trust Co., 239 F.Supp. 613, 616 (W.D. Okla. 1965).
32 The sole clarification reads:

> Eleemosynary, religious, or educational and similar activities of organizations which are not operated for profit are not included in the term "enterprise" as used in the bill. Such activities performed by nonprofit organizations are not activities performed for a common business purpose. S. REP. 145 at 41.

33 Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198, 202 (W.D. Tenn. 1965).
34 51 CCH LAB. CAS. 42,324 (S.D. Ga. 1964).
35 *Id.* at 42,325.

objective is banking and the other the renting and maintaining of office buildings, the test is not met. "[T]he general efforts of the two elements or establishments involved should constitute a common business."[36]

It is submitted that the above discussion shows that "enterprise" is of only limited value for exclusionary purposes when applied to bank and insurance company maintenance employees. The "related activities" test would exclude few of them since maintenance employees do not stand in relation to the office force of an insurance company as the employees of a retail apparel store do to the employees of a lumbering business. "Unified operations or common control" are meaningful only in a franchise situation. The "common business purpose" test as a separate qualification has failed. The court in *Columbian Mutual* read it as having the same meaning as "related activities." On the other hand, the *First National* and *Savannah* courts were unable to define it positively, but, negatively, held it was not fulfilled by the mere making of profit. The reason the courts are unable to use "enterprise" as an exclusionary concept is that it was never intended as such. Those whom Congress wished to exclude are, at length, excluded by designation in §13. The enterprise definition, §3(r), in fact, only excludes the employees of an independent contractor.

Recalling that the employee Congress was trying to reach is one working side by side with one engaged in commerce or in the production of goods for commerce (but not one who handles, sells or otherwise works on goods that have moved in or been produced for commerce by another)[37] where they are both working in the same establishment, we may turn to the administrative and judicial decisions applying the second concept — "establishment." The Secretary of Labor issued an interpretive bulletin in which he explained the concept:

> As used in the Act, the term "establishment," which is not specifically defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation.[38]

The 1949 debates which preceded use of the "establishment" qualification confirm this interpretation.[39]

In the area of judicial decisions,[40] the leading case is *A. H. Phillips v.*

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36 Wirtz v. First Nat'l Bank & Trust Co., 239 F. Supp. 613, 617 (W.D. Okla. 1965).

37 See note 13 and accompanying text *supra*.

38 29 C.F.R. §779.23 (1965).

39 In these debates, Senator George, speaking to the amendment, said:

> I wish to say that the word "establishment" has been very well defined in the Wage and Hour Act. It means now a single physically separate place of business which possesses the characteristics of a retailer and it does not mean an entire business enterprise, 95 CONG. REC. 12579 (1949).

40 While the word defined is "establishment," it is to be noted that it occurred in a different context. Section 13(a), the retail exemption (see text accompanying note 7 *supra*), was the place where it was located. In that context, if the employer could prove that his employee was in a part of his retail or service "establishment," he could escape coverage of the Act. Employers tried unsuccessfully to read the term in its broadest possible context to hopefully exclude warehouse employees and the like from coverage by drawing them into the retail exemption.

Walling,[41] in which an employer contended that the employees of his central office, warehouse and forty-nine retail stores were all part of a retail establishment and therefore exempt from coverage. The court held that the exemption did not apply to the warehouse employees since they were in a separate wholesale establishment. Each store was found to be a separate retail establishment and the warehouse to be a wholesale establishment because, individually, they were a "distinct physical place of business."[42] In *McComb v. Wyandotte Furniture Co.*,[43] where the business comprised five stores and two warehouses, the court likewise limited "establishment" so that each of the five stores was a separate establishment.[44] However, two Fifth Circuit cases show that the concept is not necessarily limited to a single building. In *Mitchell v. Gammill*,[45] where a fairly large wholesale poultry business was being operated in a building in which there was also a grocery, a market and a liquor store, as well as a building close by in which there was a barbecue stand, the court found that since in most respects it was operated as a single unit, it constituted a distinct physical entity and therefore qualified as a single retail establishment. In *Mitchell v. T. F. Taylor Fertilizer Works*,[46] the court found that a mixing plant and office constituted a single establishment even though they were physically five blocks apart. The court held that it is the functional entity, although composed of separate physical units, to which the concept of establishment is to be referred.[47] It buttressed this conclusion by reasoning that "if parts of it are not [engaged in retail activity], it would not matter for the purposes of coverage that they are conducted behind a partition or even in the same room, provided that they are truly separable. . . ."[48] These cases show a tendency to break away from the "distinct physical place of business" test,[49] but the Secretary has not seen fit to expand his definition of establishment to comport with these ideas of "functional entity" or "physical entity," retaining the "distinct physical place" interpretation.[50]

The court in *Columbian Mutual* discussed the establishment concept and found that the office building and home office of the insurance company were one establishment as they were a distinct physical place of business. It further found that a functional entity existed.[51] An establishment was found to exist

41 324 U.S. 490 (1945).
42 *Id.* at 496.
43 169 F.2d 766 (8th Cir. 1948).
44 *Accord*, Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027 (1957) (per curiam).
45 245 F.2d 207 (5th Cir. 1957).
46 233 F.2d 284 (5th Cir. 1956).
47 *Id.* at 286.
48 *Ibid.*
49 See Acme Car & Truck Rentals, Inc. v. Hooper 331 F.2d 442 (5th Cir. 1964) (one corporation engaged in renting autos, the other in leasing found to be one establishment).
50 See text accompanying note 38 *supra*.
51 Wirtz v. Columbian Mut. Life Ins. Co., 246 F.Supp. 198, 205 (W.D. Tenn. 1965). The First National case discussed only the enterprise concept. However, it is only under the establishment concept, §3(s)(3), that coverage can be sought:

> The Senate Amendment, [which was the one finally adopted] unlike the House bill, extends the coverage of the Act to any establishment which has two or more employees engaged in commerce or in the production of goods for commerce if it is part of an enterprise which is not covered by one of the foregoing, and has an annual gross volume of sales of not less than $1 million. H.R. Rep. 327, 87th Cong., 1st Sess. 16 (1961).

because the building service employees cleaned for the insurance company while the insurance company employees handled the payroll and bookkeeping functions for the service personnel.[52]

To understand this expanded coverage, the alternative holding in *Columbian Mutual* should be examined. The court found that the building itself had employees engaged in commerce because of the nature of their work. The 1949 amendments changed the definition of an employee engaged in the production of goods for commerce. Section 3(j) defining the term "produced" and an employee's relation to that production, now reads ". . . or in any *closely related* process or occupation *directly essential* to the production thereof. . . ." (Emphasis added.) The italicized words were inserted into the law replacing the §3(j) definition which read ". . . or in any process or occupation necessary to the production thereof. . . ." The purpose and effect of this change was to narrow the scope of the law, and this should be recalled as pre-1949 decisions are examined.

The leading case holding maintenance employees were covered because they were in a building in which tenants were engaged in the production of goods for commerce is *Kirschbaum v. Walling*.[53] There, where the company carried on the physical process of manufacturing, the court said:

> [T]he work of the employees . . . had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."[54]

In *10 East 40th Street Co. v. Callus*,[55] where there was a 48-story office building in which a great variety of tenants were quartered, given the fact that 42% of the area was occupied by the executive offices of one elsewhere engaged in the production of goods for commerce, the service employees of the building were held not to meet the "necessary to the production of goods for commerce" test for coverage under the Act. In *Borden Co. v. Bordella*,[56] in which the same type of employees sought coverage, the court held that where 58% of the building housed like executive offices, these service employees had a close and immediate tie to the production of goods for commerce.[57] The test thus emerged of granting coverage where a single employer occupied a substantial percentage of the space. While the Secretary cited additional cases[58] in *Columbian Mutual*,

52 Wirtz v. Columbian Mut. Life Ins. Co., 246 F.Supp. 198, 205 (W.D. Tenn. 1965). The history explains the establishment concept in reference to a retail franchise situation:

> The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?" S. REP. 145 at 42.

53 316 U.S. 517 (1942).

54 *Id.* at 525, 526.

55 325 U.S. 578 (1945).

56 325 U.S. 679 (1945).

57 The Supreme Court recently discussed the above cases and distinctions drawn therein. Mitchell v. H. B. Zachry Co., 362 U.S. 310 (1960).

58 Union Nat'l Bank v. Durkin, 207 F.2d 848 (8th Cir. 1953). This case is important in that it was decided after the 1949 amendment. It found that where 75% of the tenants were engaged in commerce, this was sufficient to extend coverage to the service employees. Darr v. Mutual Life Ins. Co., 169 F.2d 262 (2d Cir.), *cert. denied*, 335 U.S. 871 (1948). Cover-

none allowed coverage where the employer occupied as little as 11% of the building. Accordingly, the court found no coverage on the basis of the nature of the work done by the occupants.

The court then turned to the contention that the employees of the building were covered because of their own work, i.e., they are personally (two or more) engaged in commerce.[59] Since the court proceeded on the assumption that an establishment existed, it was necessary under §3(s)(3) only that the enterprise meet the million dollar sales test for the employees of the separate establishment to be covered. This highlights the fact that establishment coverage may be found where the establishment is only a small unit of a much larger enterprise. Arguably, the monetary limit on the enterprise, rather than on the establishment, makes any discussion of the establishment concept difficult when used to specify a unit whose employees are to receive the minimum wage.[60] Yet, the foregoing discussion in which the limitations on enterprise were shown to have developed in a retail enterprise context, and the explicit use of the word establishment in §3(s)(3) indicate that establishment, with its distinct place of business distinction, was meant to play the primary role. In the alternative holding, the key question was: are two or more of the employees of the separate establishment engaged in commerce? The court first considered a telephone operator who answered calls for various tenants, including long distance calls for the insurance company, concluding she was engaged in commerce under §3(b).[61] It relied on *Telephone Answering Serv., Inc. v. Goldberg,*[62] which held that five switchboard operators were individually covered because they were engaged in commerce when they answered long distance calls for airlines.[63] In satisfaction of the two employee requirement, it found that the elevator operators and porters who received parcels and distributed them after hours were engaged in commerce. To establish this fact, the court used three cases

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age of insurance company service employees was found when it occupied 76% of space in the building. Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946). When 48% of the building was used for the production of goods for commerce, it was found sufficient for coverage. Baldwin v. Emigrant Indus. Sav. Bank, 150 F.2d 524 (2d Cir.), *cert. denied,* 326 U.S. 767 (1945). The administrator's standard of 20% was found reasonable, but here a larger percentage of the building was occupied by one engaged in the production of goods for commerce.

59 See the remarks of Mr. Justice Frankfurter in Kirschbaum v. Walling, 316 U.S. 517, 520 (1942): "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle."

60 An attempt to meet this difficulty may be inferred from the instant case. The reasoning proceeds: Establishment, as a concept, is very narrow and many may be found in a single business. But, coverage may still be granted to an establishment employee if two or more can be found who meet the production for commerce test. Therefore, the definition of engaging in commerce or the production of goods for commerce must be expanded to reach these service employees. It is submitted that the major premise is incorrect and establishment, as a concept, should not be narrowly construed.

61 Wirtz v. Columbian Mut. Life Ins. Co., 246 F.Supp. 198, 207 (W.D.Tenn. 1965). 29 U.S.C. §203(b) (1964): "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States. . . ."

62 290 F.2d 529 (1st Cir. 1961).

63 *Accord,* Bloemer v. Ezell, 112 F.Supp. 814 (W.D. Ky. 1953) (telephone answering service found to be engaged in interstate commerce). *But cf.* Mahoney v. Mahoney, 186 F. Supp. 636 (E.D. Tenn. 1960) (individual operator of answering service found exempt from provisions of Fair Labor Standards Act as common conception of industry was that answering service was retail enterprise and thus subject to exemption of §13(a)).

which held that employees of manufacturers or distributors who moved interstate shipments of materials from unloading areas into warehouses for storage were engaged in commerce.[64] It is submitted that these cases do not stand for the proposition that those who finally receive the goods are engaged in commerce. Rather, the goods have now come to rest, and are no longer in interstate commerce.[65]

Expanded coverage is the key to an understanding of the 1961 Act. Congress intended to remedy a problem — of those who worked side-by-side in banks and insurance companies, only some received the minimum wage because they were engaged in commerce; others were excluded from the provisions of the Act because they were not so engaged. As a practical compass, the million dollar test was used as it was felt that those doing this amount of business were capable of bearing the burden of the minimum wage. The framework chosen was the previously used concepts of enterprise and establishment. It is submitted that while they are workable guidelines, they must be carefully interpreted to achieve congressional intent. In that §3(s)(3) is aimed at "an establishment of an enterprise," these words should be given a liberal construction to attain the broadening intent behind the Act. Enterprise is the wider term and those excluded by it should be limited to the employees of an unrelated activity. The work of maintenance employees is certainly related to that of the employees in an office since one could not function without the other. If they are paid by the same department, subject to the same overall control, and discharged by the same management, it is difficult to imagine them being in anything but a related activity if not, in point of fact, in the same activity. The escape hatch is available for those companies who desire to obtain less expensive maintenance services. Section 3(r) specifically excludes from coverage the employees of an independent contractor.[66] The rationale is simple. If one wishes to profit from another's labor, supervise his conduct and control his wages in a million-dollar business, he must bear the burden of the minimum wage. Because it was the intent of

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64 Sucrs. De A. Mayol & Co. v. Mitchell, 280 F.2d 477 (1st Cir.), *cert. denied,* 364 U.S. 902 (1960). A Puerto Rican hardware importer's warehouse custodial employees were found to be covered as the goods continued through the warehouse. Mitchell v. Royal Baking Co., 219 F.2d 532 (5th Cir. 1955). Here a wholesale bakery's employees who unloaded goods and handled letter writing, etc., connected with the ordering of such goods were found covered and not subject to the retail exemption of §13(a) as the goods had not come to rest and were still in interstate commerce. McComb v. Herlihy, 161 F.2d 568 (4th Cir. 1947). Employees of an oil company were granted coverage of the Act as not subject to the §13(a) exception. They ordered, kept account of and paid for goods from out of state as well as receiving goods and placing them in a warehouse where their interstate journey ended.

65 In Walling v. Goldblatt Bros., Inc., 128 F.2d 778, 783 (7th Cir. 1942), *cert. denied,* 318 U.S. 757 (1943) it was held that "[S]ince upon delivery of the goods at the defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent moving and storing of the goods in the warehouses are not in commerce." The leading case is Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943). The Court said: "[I]f the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points." 317 U.S. 564, 568 (1943). For a recent explanation of the doctrine, see Mitchell v. C & P Shoe Corp., 286 F.2d 109 (5th Cir. 1960).

66 It should be noted that under the decision in Fibreboard Paper Prods. Corp v. NLRB, 379 U.S. 203 (1964), an employer must notify and bargain with a union representing maintenance employees when he intends to replace them with the employees of an independent contractor even though his motivation be economic.

Congress to eliminate fragmentation in side-by-side employment, it limited the expansion to establishments, that is, those in a distinct physical location. The judicial interpretation of this term shows a tendency to expand it to physical and functional entities. This is consistent with the side-by-side rationale and such an interpretation should be allowed.

Gerard K. Sandweg

EVIDENCE — LEARNED TREATISES — ADMISSIBLE FOR USE IN CROSS-EXAMINING EXPERT TO TEST KNOWLEDGE. — On November 5, 1960, the eighteen-year-old plaintiff, Dorrence Darling II, broke his leg while playing in a college football game. Due to tissue infection, allegedly caused by negligent medical and hospital treatment, his right leg had to be amputated below the knee. An action was then brought by his father and next friend to recover damages for the allegedly negligent treatment.[1] During the cross-examination of defendant's expert witnesses, plaintiff's counsel, over defendant's objection, questioned them concerning their views of recognized authorities in their fields. The trial court allowed this use of treatises and awarded judgment for the plaintiff against the defendant hospital. On appeal, the Supreme Court of Illinois, affirming this judgment, *held:* it is not error for a trial court in a personal injury action to permit cross-examination of the hospital's expert witnesses concerning views of recognized authorities in their fields, even though the witnesses did not purport to base their opinions on the views of these authorities. *Darling v. Charleston Community Memorial Hospital,* 211 N.E.2d 253 (Ill. 1965).

It has long been held that learned treatises on inexact or inductive sciences, even though authenticated and identified as standard authorities, are not admissible to prove the truth of statements therein.[2] The primary reason for this is that to admit such evidence would violate the time-honored Hearsay Rule.[3] The main hearsay objection to the use of learned treatises is that such an offer of evidence purports to employ testimonially a statement made out of court by a person not subjected to cross-examination.[4] A further rationale, used by some authorities, is that science is constantly shifting so that, due to its uncertainty and instability, scientific treatises are untrustworthy.[5] Under this reasoning, a medical book which was standard one year may be obsolete the next. Opponents of admissibility charge that there is danger of confusing a jury by reading highly technical passages of learned treatises without comment.[6] It is further

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1 Darling v. Charleston Community Hosp., 50 Ill.App.2d 253, 200 N.E.2d 149 (1964), *aff'd,* 211 N.E.2d 253 (1965).

2 See, *e.g.,* Barks v. Herzberg, 206 A.2d 507 (Md. 1965); Brady v. Shirley, 14 S.D. 447, 85 N.W. 1002 (1901); Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964). See generally MCCORMICK, EVIDENCE §296 (1954).

3 For a general discussion of the Hearsay rule, see 5 WIGMORE, EVIDENCE §§1361-63 (3d ed. 1940).

4 *Ibid.*

5 WHARTON, CRIMINAL EVIDENCE §566 (12th ed. 1955).

6 For one of the earliest cases using this argument, see Ashworth v. Kittredge, 12 Cush. 195 (Mass. 1853). See also 6 WIGMORE, EVIDENCE §1690, at 4 (3d ed. 1940). Wigmore soundly enumerates these arguments against admissibility and use in court and then refutes such reasoning.

charged by some that if they are admitted, passages may be read out of context, leading the jury to false conclusions.[7]

The basic arguments for allowing the use of learned treatises revolve around the necessity of their use, and their trustworthiness.[8] Four differing categories of acceptance of the learned treatise as an exception to the Hearsay Rule have developed.[9] The first category is that of total acceptance. Alabama[10] and Iowa[11] are the only two jurisdictions which fully recognize an exception from the common law rule of inadmissibility. The English courts lack the compulsion to enforce the Hearsay rule as strictly as do the United States courts, and so they allow a virtual exception for learned treatises.[12] Several jurisdictions, including Iowa, have enacted statutes to establish the exception.[13] However, the statutes have, by judicial interpretation, been limited in their application to matters in treatises which are generally held to be otherwise admissible as evidence because they related to reputation and general knowledge.[14] Alabama remains the only state which will allow learned treatises to be used as substantive evidence of the facts contained therein. However, Alabama courts require, for the introduction of medical books and treatises, that the party attempting to introduce the books show they are relevant to the issues of the case, and that they are standard works or authorities recognized by the medical profession on the subject at issue. A failure to do so results in exclusion.[15] All the cases assume that the authoritative status of the treatise must be established to the satisfaction of the court before it is introduced, but there is little case law as to how this is to be done.[16]

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7 These objections, once only slightly mentioned in judicial opinions, were given authoritative status by 6 WIGMORE, *op. cit. supra* note 6 §1690.

8 6 WIGMORE, *op. cit. supra* note 6, at 5-6.

9 *Id.* §§1693-96.

10 *E.g.,* Smarr v. State, 260 Ala. 30, 68 So.2d 6 (1953); City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

11 Bowman v. Woods, 1 Greene 441 (Iowa 1848).

12 NOTABLE ENGLISH TRIALS SERIES 71, 143, 152 (Filson Young ed. 1920).

13 *California:* CAL. CODE CIV. PROC. §1936 (West 1955); *Idaho:* IDAHO CODE ANN. §9-402 (1948); *Iowa:* IOWA CODE §622.23 (1946); *Massachusetts:* MASS. GEN. LAWS ch. 233, §79(c) (1955); *Montana:* MONT. REV. CODES ANN. §93-1101-8 (1947); *Nebraska:* NEB. REV. STAT. §25-1218 (1943); *Nevada:* NEV. REV. STAT. §51.040 (1957); *Oregon:* ORE. REV. STAT. §41.670 (1963); *Pennsylvania:* PA. STAT. tit. 31, §700j-801 (1958) (only in regard to milk control act); *Puerto Rico:* P.R. LAWS ANN. tit. 32, §1827 (1956). *South Carolina:* S.C. CODE ANN. §26-142 (1962) (limited use of scientific works where there is a question of sanity or the administration of poison or other article destructive to life); *Utah:* UTAH CODE ANN. §78-25-6 (1953). The Iowa Code is representative of this type of statute which attempts to allow the use of treatises generally but which, by judicial interpretation, has been limited to matters of general knowledge. IOWA CODE §622.23 (1946) states: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest therein stated."

14 6 WIGMORE, *op. cit. supra* note 6, §1693, at 8. See, *e.g.,* Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904); Van Skike v. Potter, 53 Neb. 28, 73 N.W. 295 (1897).

15 Uhl v. Echols Transfer Co., 238 F.2d 760 (5th Cir. 1956); Smarr v. State, 260 Ala. 30, 68 So.2d 6 (1953); Franklin v. State, 29 Ala.App. 306, 197 So. 55, *cert. denied,* 240 Ala. 57, 197 So. 58 (1940).

16 On the use of medical and scientific treatises, see generally *Annot.,* 60 A.L.R.2d 77 (1958). On determination of authoritative status of books, see Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956); De Haan v. Winter, 262 Mich. 192, 247 N.W. 151 (1933); State v. Catellier, 63 Wyo. 123, 179 P.2d 203 (1947). For a discussion of cross-examination of experts, see generally, Vogel, *Cross-Examination of Medical Experts,* 7 DE PAUL L. R. 149 (1958).

The second relatively distinguishable category of treatise acceptance includes those states which nominally reject a general exception for learned treatises. These courts reject the exception on a broad scope, but actually do accept it for certain limited purposes. At least fourteen jurisdictions fall into this category.[17] However, some states have not clearly ruled on the issue and even those which have often allow the use of treatises for certain specific purposes.[18]

The third category includes those states which recognize the use of certain specific types of learned treatises. A general exception to the rule excluding scientific texts as independent evidence exists in most, if not all, states for publications on an exact science containing either ascertained facts or matters which have come to be accepted as standards.[19] The materials enveloped by this exception, accepted to varying degrees among almost all states, include almanacs,[20] mortality tables,[21] and tables of logarithms, weights, measures, interest and similar compilations.[22] The reason given for admitting such matters is that "the body of knowledge is so relatively constant or static, that an accepted and recognized work may safely be regarded as stating a fact which will be true at the time of the trial as well as the time when the work was written."[23] Dictionaries,[24] histories,[25] and general literature[26] also fall into this category, but their introduction as aids to the memory and understanding of the court is usually made by way of judicial notice.[27]

The final category of treatise acceptance embraces those states in which

17 Union P. R. R. v. Yates, 79 Fed. 584 (8th Cir. 1897); Moore v. State, 184 Ark. 682, 43 S.W.2d 228 (1931); Denver City Tramway Co. v. Gawley, 23 Colo.App. 332, 129 Pac. 258 (1912); Johnston v. Richmond & D. R.R., 95 Ga. 685, 22 S.E. 694 (1895); North Chicago Rolling Mill Co. v. Monka, 107 Ill. 340 (1883); Kentucky Public Service Co. v. Topmiller, 204 Ky. 196, 263 S.W. 706 (1924); Shaw's Case, 126 Me. 572, 140 Atl. 370 (1928); Stokes v. Godefroy Mfg. Co., 85 S.W.2d 434 (Mo. 1935); Darnell v. Panhandle Co-op. Ass'n, 175 Neb. 40, 120 N.W.2d 278 (1963); Dole v. Johnson, 50 N.H. 452 (1870); Lamble v. State, 96 N.J.L. 231, 114 Atl. 346 (1921); Devine v. Southern Pac. Co., 207 Ore. 261, 295 P.2d 201 (1956); State v. Sexton, 10 S.D. 127, 72 N.W. 84 (1897); Baldwin v. Gaines, 92 Vt. 61, 102 Atl. 338 (1917); Stilling v. Thorp, 54 Wis. 528, 11 N.W. 906 (1882).

18 *E.g.*, Hultberg v. Phillippi, 169 Kan. 610, 220 P.2d 208 (1950) (motor vehicle speed chart admitted); *In re* Nielsen's Estate, 118 Mont. 304, 165 P.2d 792 (1946) (pages from treatise on Danish language admitted); Jones v. Eppler, 266 P.2d 451 (Okla. 1954) (mortality and annuity tables allowed in personal injury case).

19 McAffee v. United States, 111 F.2d 199 (D.C. Cir. 1940) (temperatures); Unity Co. v. Gulf Oil Corp., 141 Me. 148, 40 A.2d 4 (1944) (dates); Miller v. Fowler, 200 Miss. 776, 28 So.2d 837 (1947) (dates of warfare).

20 See, *e.g.*, Electric Storage Battery Co. v. Shimadzu, 123 F.2d 890 (3d Cir. 1941) (chemical reaction); Swarzwald v. Cooley, 39 Cal. App.2d 306, 103 P.2d 580 (1940) (geography); Munshower v. State, 55 Md. 11, 39 Am.Rep. 414 (1880) (almanac).

21 See, *e.g.*, Butler v. Borowsky, 120 So.2d 656 (Fla. 1960); Newman v. Blom, 249 Ia. 836, 89 N.W.2d 349 (1958); Nolop v. Skemp, 7 Wis.2d 462, 96 N.W.2d 826 (1959).

22 *E.g.*, Westchester Fire Ins. Co. v. Buffalo H. & Salvage Co., 40 F.Supp. 378 (W.D.N.Y. 1941) (U.S. Bureau of Explosives pamphlet held admissible); Hultberg v. Phillippi, 169 Kan. 610, 220 P.2d 208 (1950) (motor vehicle speech chart admitted); Mitchell v. Arrowhead Freight Lines, 117 Utah 224, 214 P.2d 620 (1950) (annuity tables admitted).

23 See WHARTON, *op. cit. supra* note 5, §567, at 437.

24 See Nix v. Hedden, 149 U.S. 304 (1893).

25 See Hilton v. Roylance, 25 Utah 129, 69 Pac. 660 (1902) (church history).

26 See Winthrop Chem. Co. v. Blackman, 150 Misc. 229, 268 N.Y.Supp. 647 (Sup. Ct. 1934) (books cited to give meaning of word).

27 For a general discussion of judicial notice, see 9 WIGMORE, EVIDENCE §2565 (3d ed. 1940).

learned treatises are allowed to be used for certain specific purposes. Included in this category are those jurisdictions where an expert witness is allowed to cite the writers of his profession as supporting his views. This may be done, where permissible, either by direct citation or as a general reference.[28] In one jurisdiction, portions of such treatises may be read to the jury as "illustrations." In such cases, courts draw a fine distinction between their use in this manner and their use as evidence.[29] One Illinois case held passages from such treatises admissible to show different "theories," but not as evidence.[30] Often the courts themselves will cite such sources as encyclopedias and medical works as the basis for a fact determination and may do so even after they have ruled that such writings cannot be introduced for the purpose of giving information.[31] Within this same category is Massachusetts, the one state which has recognized the use of the learned treatise for specific purposes by statute, rather than court rule. It recognizes the exception to the Hearsay rule, by statute, for treatises on inductive sciences in certain types of litigation.[32] The statute provides that in actions, either tort or contract, against certain parties, such as doctors and hospitals, for malpractice or error, a statement of fact or opinion on the subject of science or art contained in a published treatise, periodical, book, or pamphlet may be admitted by either party, at the court's discretion, as evidence tending to prove such fact.[33] This statute is unusual since it is the only legislation excepting inductive science treatises from the Hearsay rule. Often, cases represent more than one of the four categories.[34] However, there is a trend toward liberality in permitting the use of treatises.[35] Indeed, the drift is toward the acceptance of treatises even as primary evidence.[36]

The use of the learned treatise in the cross-examination of expert witnesses is a subject of much uncertainty. The wide discretion left to judges, plus a

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28 *E.g.,* Eagleston v. Rowley, 172 F.2d 202 (9th Cir. 1949) (expert allowed to use text writer's language in connection with prognosis of brain injury), State v. Baldwin, 36 Kan. 1, 12 Pac. 318 (1886); State v. Nicolosi, 228 La. 65, 81 So.2d 771 (1955) (expert allowed to read from government pamphlet in case involving drugs); State v. Sturtevant, 96 N.H. 99, 70 A.2d 909 (1950) (allowed testimony where opinion based on books).

29 See State v. O'Neil, 51 Kan. 651, 33 Pac. 287 (1893) for an example of judicial double-talk.

30 Yoe v. People, 49 Ill. 410 (1868).

31 Washburn v. Cuddihy, 74 Mass. 431 (1857).

32 MASS. GEN. LAWS ANN. ch. 233, §79(c) (1955) states:

> 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 action of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitaria, as evidence tending to prove said fact or as opinion evidence; provided, however, that 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.

33 *Ibid.*

34 See Lawrence v. Nutter, 203 F.2d 540 (4th Cir. 1953); Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958); Allison v. State, 203 Md. 1, 98 A.2d 273 (1953).

35 See cases cited note 60 *infra.* See also MASS. GEN. LAWS ANN. ch. 233 §79(c) (1955); MODEL CODE OF EVIDENCE rule 529 (1942).

36 See 6 WIGMORE, *op. cit. supra* note 6, §1690.

distorted adherence to the rigid enforcement of the Hearsay rule[37] accounts for the many positions taken by courts considering the subject. Naturally, a court which rejects the use of treatises for all purposes will not allow them to be used for cross-examination. Therefore, the following positions are those taken by courts which fall within the fourth category already discussed — states which allow the use of treatises for certain purposes only.[38]

Courts almost universally hold that an opposing counsel cannot read directly from a treatise to contradict and thereby discredit a statement made by an expert on the stand where the true objective is to prove or at least introduce the facts stated therein.[39] The reason usually given is that to permit a learned treatise to be so utilized allows the examiner to do indirectly what he is forbidden by the Hearsay rule to do directly — *i.e.*, to introduce the professional treatise as substantive evidence.[40] This position seems logically justifiable without further examination.

Those cases which have allowed treatises to be used in the cross-examination of experts may be readily classified into two groups. The first consists of those cases holding it proper to "contradict" an expert by showing that the treatise he purportedly relied on does not, in fact, support his position.[41] Many cases hold that the cross-examiner may use only those treatises which the expert witness has specifically cited as supporting his opinion.[42] This is the so-called rule of reference which requires that the expert must make some reference to such treatises as supporting his opinion before they may be used to impeach him on cross-examination.[43] One court has held that the examiner may ask the expert on cross-examination whether his opinion is based on personal experience or on treatises.[44] That court also said that, where a witness testifies that he relied on treatises for the first time on cross-examination, opposing counsel may contradict him with those authorities.[45] A similar case held that where an expert has based his opinion on a particular medical book, he may be cross-examined on it, and those parts which contradict him may be read into the record.[46] A majority of these cases have held, however, that so long as a

37 2 WIGMORE, EVIDENCE §665 at 784-85 (3d ed. 1940). See also, for illustration of discretion of judges in accepting or rejecting expert opinion, Krizak v. W. C. Brooks & Sons, Inc., 320 F.2d 37 (4th Cir. 1963); Lawrence v. Nutter, 203 F.2d 540 (4th Cir. 1953).

38 See note 28 *supra*.

39 See, *e.g.*, City of Bloomington v. Shrock, 110 Ill. 219 (1884); Briggs v. Chicago, Great Western Ry., 238 Minn. 472, 57 N.W.2d 572 (1953). See also MCNEIL, THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES 232-33 (3d ed. 1939). *Cf.* Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964).

40 *Ibid.*

41 *E.g.*, Zubryski v. Minneapolis St. Ry., 243 Minn. 450, 68 N.W.2d 489 (1955); People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913 (1949); Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949). See generally *Annot.*, 160 A.L.R.2d 77, 79 (1958). *Cf.* Ripon v. Bittel, 30 Wis. 614 (1954).

42 Drucker v. Philadelphia Dairy Prods. Co., 35 Del. 437, 166 Atl. 796 (1933); City of Bloomington v. Schrock, 110 Ill. 219, 51 Am. Rep. 678 (1884). *But see* Ruth v. Fenchel, 21 N.J. 171, 121 A.2d 373 (1956) (overruling rule in N.J. that expert must rely on the treatise before he can be cross-examined upon it).

43 Levitan v. Chicago City Ry., 207 Ill.App. 384 (1917). Baker v. Southern Cotton Oil Co., 161 S.C. 479, 159 S.E. 822 (1931). See generally *Annot.*, 82 A.L.R. 440 (1933).

44 Wilcox v. International Harvester Co., 278 Ill. 465, 469, 116 N.E. 151, 153 (1917).

45 *Ibid.* See also Ruth v. Fenchel, 37 N.J. 295, 117 A.2d 284 (1955), *aff'd*, 21 N.J. 171, 121 A.2d 373 (1956).

46 See Briggs v. Chicago Great W. Ry., 238 Minn. 472, 494, 57 N.W.2d 572, 583 (1953).

witness has not assumed to base his opinion on the authority of a particular author, such author's opinion as expressed in a treatise (even if the same opinion is expressed by the witness) is incompetent.[47]

Another position, taken by some courts, is that where the expert has relied generally or specifically upon the authorities in his field, he may be attacked on the basis of authorities which are not necessarily the same as those he has used.[48] One case held that where a medical expert stated that he relied on all medical literature, it was not error to permit the use of medical authorities in cross-examining him.[49]

Another group of cases takes the view that an expert witness may be examined on the basis of treatises which he himself has recognized by his testimony as having authoritative status, whether or not he has relied upon them in forming his opinion, for the purpose of contradicting the witness or calling into question the weight of his opinion.[50] Some courts, reluctant to allow cross-examination on an expert's knowledge generally, hold that the witness may be questioned "as to whether the authorities do not lay down a different doctrine."[51] Very logically, many cases hold that it is particularly appropriate to permit cross-examination on the reason for an expert's opinion.[52]

As a safeguard on the reliability of the opinion testimony of an expert witness, such witness, no matter how skilled or experienced, will not be permitted to guess or state a judgment based on mere conjecture.[53] Where an expert has seemed familiar with standard medical works treating the subject of his testimony, several cases have held that it is not unfair to call his attention to definitions given in books and to ask him if he concurs with them.[54] Similarly, other cases have held that textbooks may be used in cross-examining an expert to discover whether or not he agrees with the statements of authors of recognized standard authorities in the profession with which he states he is familiar.[55] However, some courts have stubbornly refused to allow this method of establishing general agreement or disagreement of the expert witness with standard authorities.[56]

The second group of cases allowing treatises to be used in cross-examina-

47 Wehy v. Chicago City Ry., 148 Ill.App. 165 (1909); Roveda v. Weiss, 11 A.D.2d 745, 204 N.Y.S.2d 699 (1960); Hopkins v. Gromovsky, 198 Va. 389, 94 S.E.2d 190 (1956).

48 Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516 (1878); Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W.2d 481 (1948). See also 2 WHARTON, *op. cit. supra* note 5, §526, at 357.

49 See Garfield Memorial Hosp. v. Marshall, 204 F.2d 721 (D.C. Cir. 1953).

50 See Zubryski v. Minneapolis St. Ry. Co., 243 Minn. 450, 68 N.W.2d 489 (1955); McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116 (1964); People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913 (1949).

51 Donnally v. Chicago City Ry., 163 Ill.App. 7, 13 (1911). See also Chicago Union Traction Co. v. Ertrachter, 228 Ill. 114, 81 N.E. 816 (1907); Briggs v. Chicago Great W. Ry., 238 Minn. 472, 57 N.W.2d 572 (1953).

52 See, *e.g.*, Plank v. Summers, 205 Md. 598, 109 A.2d 914 (1954).

53 See Schwartz v. Peoples Gas Co., 35 Ill.App.2d 25, 181 N.E.2d 826 (1962).

54 *E.g.*, Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516 (1878); *cf.* State v. Brunette, 28 N.D. 539, 150 N.W. 271 (1914).

55 *E.g.*, Cooper v. Atchison T. & S. F. R. Co., 347 Mo. 555, 148 S.W.2d 773 (1941); Devine v. Southern Pac. Co., 207 Ore. 261, 195 P.2d 201 (1956).

56 *E.g.*, Wall v. Weaver, 145 Colo. 337, 358 P.2d 1009 (1961); Neiner v. Chicago City Ry., 181 Ill.App. 449 (1913); Allison v. State, 203 Md. 1, 98 A.2d 273 (1953); Roveda v. Weiss, 11 A.D.2d 745, 204 N.Y.S.2d 699 (1960).

tions of expert witnesses permits the cross-examiner to use treatises, the authority of which has been established in any acceptable manner, to test the qualifications of the expert witness, regardless of whether that witness has relied upon or recognized the particular treatise directly, indirectly, or at all.[57] Courts taking this position have also held that an expert witness who offers his opinion invites an investigation into the extent of his knowledge, the reasons for his opinion, and the facts and other matters on which it is based. Consequently, they permit rigid cross-examination on his qualifications, his opinions and their sources.[58] Related cases have held that *in every case* where an expert is allowed to express an opinion, he may be subjected to rigid cross-examination on the basis of that opinion.[59] In federal courts, an expert may be cross-examined on his knowledge of textbooks, treatises, articles and other publications in his field and may be confronted wtih extracts from them and asked whether or not they are familiar to him or if he agrees with them.[60] Thus it can be seen that courts have taken many differing positions on the use of treatises in cross-examination.

Prior to *Darling,* Illinois was committed to the rule that cross-examination on textbook statements contradicting testimony of an expert witness was not generally permissible.[61] But if an expert relied either wholly or in part upon books he had read, he could be cross-examined on contradictory statements therein.[62] By the prior Illinois rule, it was improper to cross-examine an expert witness using the authorities in his field when he had not relied on them for his opinion.[63] Commitment of this position seemed fairly certain until *Nicketta v. National Tea Co.*[64] indicated a tendency to allow a more expanded use of judicial notice for certain facts set out in scientific treatises. In that case, the court read the literature in the field and took judicial notice of the fact that trichinosis could not be contracted from properly cooked pork. In *Darling,* referring to the prior decisions holding that an expert witness could only be examined about those texts upon which he expressly based his opinion,[65] the court said that "the rule is not supported by sound reasons, and should no longer be adhered to."[66]

There are many valid and compelling reasons why extensive use of learned treatises should be allowed in the cross-examination of expert witnesses. Due to the increasing complexity of an already highly technical society, it is evident that the use of expert testimony will increase. Today, in certain areas, expert testimony is a necessity. In Oregon, for example, it is generally held that expert testimony is necessary to prove negligence and proximate cause, unless the cir-

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57 *E.g.,* Lawrence v. Nutter, 203 F.2d 540 (4th Cir. 1953); Stottlemire v. Cawood, 215 F.Supp. 266 (D.D.C. 1963); Hastings v. Chrysler Corp., 273 App.Div. 292, 77 N.Y.S.2d 524 (1948).

58 See LeMere v. Goren, 43 Cal. Rptr. 898 (Cal.App. 1965).

59 See, *e.g.,* City of Laurel v. Upton, 175 So.2d 621 (Miss. 1965).

60 See cases cited note 57 *supra.* See also Reilly v. Pinkus, 338 U.S. 269 (1949); Dolcin Corp. v. FTC, 219 F.2d 742 (D.C. Cir. 1954), *cert. denied,* 348 U.S. 269 (1955).

61 This rule was based originally on City of Bloomington v. Schrock, 110 Ill. 219 (1884).

62 See Wilcox v. International Harvester Co., 278 Ill. 465, 116 N.E. 151 (1917). See also McNeill, *op. cit. supra* note 39, at 232-33.

63 *Ibid.*

64 338 Ill.App. 159, 87 N.E.2d 30 (1949).

65 See note 61 *supra.*

66 211 N.E.2d 253, 259 (1965).

cumstances are such that it is obvious, even to a layman, that the defendant was negligent and that his negligence was the proximate cause of the plaintiff's injury.[67] In cases involving determinations of malpractice and insanity, expert testimony is undoubtedly a necessity.[68] Areas such as foreign law[69] and handwriting analysis[70] likewise require the use of expert testimony. Logic would dictate that the areas requiring the use of expert testimony will increase in the future due to increased specialization in our society.

Perhaps the most resounding blow was struck against expert testimony when the court in *Opp v. Pryor* said:

> That class of evidence [medical testimony], however, is generally discredited and regarded as the most unsatisfactory part of judicial administration. This is with good reason, because the expert is often the hired partisan, and his opinion is a response to a pecuniary stimulus. . . . The field of medicine is not an exact science, and the expert being immune from penalties for perjury, his opinion is too often the natural and expected result of his employment.[71]

How can this situation be remedied? At least a partial remedy could be achieved by allowing the use of authoritative treatises to test the expert's knowledge and qualifications. Cleary suggests that a greatly expanded use of judicial notice of relevant authoritative treatises would go far in solving this problem and would afford a "welcome escape from senseless limitations on the use of treatises in cross-examination."[72]

The problem is to give the proper weight to the expert testimony. Wharton has said that greater latitude is (and should be) allowed in the cross-examination of expert witnesses to test their credibility by eliciting knowledge of the matters about which they give an opinion so that the jury may properly weigh that opinion.[73] Any limitation of the cross-examiner in testing the skill of the witness deprives the opposing party of a most valuable weapon. Therefore, it is preferable to permit the cross-examiner to make full use of cross-examination in order to disprove the truth of the expert's opinion.[74]

In 1359, an English case held that "[w]itnesses must testify to nothing except what they are certain of, that is, what they have seen or heard."[75] Fortunately, that argument is not heard today. But, to an extent, courts still often appear to favor it. To warrant the use of an expert, one leading scholar has

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67 See, *e.g.*, Ritter v. Sivils, 206 Ore. 410, 293 P.2d 211 (1956); Stroh v. Rhoads, 188 Ore. 563, 217 P.2d 245 (1950); Emerson v. Lumberman's Hosp. Ass'n, 100 Ore. 472, 198 Pac. 231 (1921).

68 Een v. Consolidated Freightways, 120 F.Supp. 289 (N.D. 1954), *aff'd*, 220 F.2d 82 (8th Cir. 1955); Lince v. Monson, 363 Mich. 135, 108 N.W.2d 845 (1961) (malpractice); MINN. STAT. ANN. §246.013 (1953) (discharge of persons from mental hospital requires three or more experts); 7 WIGMORE, EVIDENCE §2090, at 453-62 (3d ed. 1940).

69 WIGMORE, *op. cit. supra* note 68, at 463. See also United States v. West Coast News Co., 228 F.Supp. 171 (W.D.Mich. 1964) (obscenity).

70 *Id.* §2012, at 207.

71 294 Ill. 538, 545-46, 128 N.E. 580, 583 (1919); see also State v. Creech, 229 N.C. 662, 671, 51 S.E.2d 348, 355 (1949).

72 CLEARY, HANDBOOK OF ILLINOIS EVIDENCE §3.3, at 41 (2d ed. 1963).

73 2 WHARTON, CRIMINAL EVIDENCE §525, at 354 (1955).

74 *Id.* at 355.

75 THORPE, C. J. in Y.B., 23 Ass. pl. 11 (1359).

suggesed two requirements.[76] They are that the subject must be so related to some science, profession, business or occupation as to be beyond the comprehension of the average layman and that the expert must have the specialized knowledge in that field to make it appear that his opinion would aid the trier of fact.[77] From whence can this knowledge come? The data of every science is enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths.[78] So, he relies on the reported data of fellow scientists by studying their reports in journals and treatises. For courts to reject testimony by an expert because some of the facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on "finical and impossible standards."[79] So, with the absorbed learning of others as the direct or at least indirect basis of any expert's opinion, fairness requires that if there is an authoritative treatise in conflict with the impartial expert's opinion, the cross-examiner should at least be allowed to use it for limited purposes.

It is argued that the problem of proving the status of a treatise as an authority in its field is insurmountable. New York courts, for instance, hold that if the expert himself recognizes the work as authoritative, he can be confronted with a passage from the book which conflicts with his opinion.[80] Most courts appear capable of resolving the situation by allowing the status to be established either by direct admissions of the expert testifying or by other experts in the field.[81]

The arguments based on the so-called "shifting" character of scientific knowledge, the possibility of distortion by the prejudiced selection of treatise passages, and the Hearsay rule present few problems when one soundly analyzes the arguments in the light of the increased trustworthiness of authors of such treatises.[82] Usually treatise writers have a state of mind which fulfills the ordinary requirement for Hearsay exceptions — they have no motive to misrepresent the facts. While they may be biased towards a theory, this is only a bias in favor of the truth. Such writers publish for their own professions so every conclusion is subject to careful scrutiny by fellow professionals of the author. The unwelcome probability of detection and exposure of errors is always present to curb and prevent unwarranted conclusions. There is also at least circumstantial probability of greater trustworthiness of a treatise author regardless of his being unsworn and unexamined in court than an expert in the pay of one of the parties. The final result of disallowing cross-examination of expert witnesses

76 McCormick, Evidence §13, at 28 (1954).
77 *Ibid.*
78 Cleary, *op. cit. supra* note 72, at 784.
79 *Ibid.*
80 People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913 (1949); Hastings v. Chrysler Corp., 273 App.Div. 292, 77 N.Y.S.2d 524 (1948). One criticism of this position, however, is that the expert could escape such cross-examination as to his knowledge simply by denying recognition of the authority, even though this would not enhance his position in the eyes of the jury.
81 See Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956); De Haan v. Winter, 262 Mich. 192, 247 N.W. 151 (1933); State v. Catellier, 63 Wyo. 123, 179 P.2d 203 (1947).
82 6 Wigmore, Evidence §1690 (3d ed. 1940).

using authoritative treatises, without regard to whether or not they recognize the author as an authority on the subject, is that the courts thereby give "an undue advantage to the ignorant and unscrupulous expert over the honest and well trained one."[83]

Legislative authority also indicates a trend toward liberality in the use of learned treatises, both as substantive evidence and for purposes of cross-examination. The A.L.I. Model Code of Evidence would allow the use of published treatises and periodicals as probative evidence of the truth of the matter stated therein, provided that judicial notice is taken of such matter or an expert in the field with which it deals qualifies it for court use.[84] This was also the basis for the Uniform Rule of Evidence 63 (31) which rejects the rule excluding learned treatises dealing with inductive sciences.[85] The Uniform Rules of Evidence also favor eliminating all prohibitions on the use of such treatises for purposes of cross-examination.[86] The Model Expert Testimony Act requires that "an expert witness may be required, on direct or cross-examination, to specify the data on which his inferences are based."[87] The Federal Rules of Civil Procedure manifest a tendency toward a liberal policy of admissibility in case of conflict between state and federal admissibility practices.[88]

Thus, after much investigation, it would appear that the *Darling* decision is in agreement with modern authorities in expressing a trend towards increased use and recognition of the learned treatise as an effective tool in the attainment of justice. Today in Illinois, an expert witness may be cross-examined concerning the views of recognized authorities in his field, even though the expert does not purport to base his opinion upon the views of those authorities. The new rule thus established in *Darling* appears ultimately productive of greater justice than the more restrictive rule, because no longer need the testimony of an incompetent "expert" witness be given the same weight as that of the well-qualified and learned expert. *Darling* appears to be a logical and sound decision, consistent with modern thinking on the subject.

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83 McCormick, *op. cit. supra* note 76, at 620 n.3.

84 Model Code of Evidence rule 529 (1942).

85 Uniform Rule of Evidence 63(31) provides:

> A published treatise, periodical or pamphlet on a subject of history, science or art [is admissible] to prove the truth of a 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.

86 Uniform Rule of Evidence 63(31). The comment states:

> This exception will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose.

Rule 63(31) has been adopted in: *Canal Zone:* C.Z. Code tit. 5 §2962 (1963); *Kansas:* Kan. Code Civ. Proc. §60-460 (1965); *Virgin Islands:* V.I. Code tit. 5 §932 (1957).

87 Model Expert Testimony Act §9(2). Approved in 1937 and designated as a Model Act in 1943, it has been adopted only in South Dakota.

88 Fed. R. Civ. P. 43(a) states:

> . . . All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case, the statute or rule which favors the reception of the evidence governs.* . . . (Emphasis added.)