

# WHY ILLINOIS SHOULD ADOPT FEDERAL RULE OF EVIDENCE 803(18) TO ALLOW THE LEARNED TREATISE EXCEPTION TO THE HEARSAY RULE

Ralph Ruebner,\* Katarina Durcova\*\* & Amy Taylor\*\*\*

## I. INTRODUCTION

Illinois still adheres to a rigid and outdated common law principle that treats a learned treatise as hearsay. This principle stands at odds with the adoption of Federal Rules of Evidence 703 (“FRE 703”)<sup>1</sup> and 705 (“FRE 705”)<sup>2</sup> by the Illinois Supreme Court.<sup>3</sup> Illinois courts have developed clever ways to get around the common law prohibition thereby creating an incoherent and inconsistent jurisprudence that at times yields bizarre outcomes.

Adopting the federal learned treatise exception to the hearsay rule would set out a consistent standard in Illinois for admitting learned treatises and allowing them as substantive evidence. Now that Illinois has codified the Illinois Rules of Evidence,<sup>4</sup> including provisions similar to FRE 703<sup>5</sup>

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\* Professor of Law and the Associate Dean for Academic Affairs at The John Marshall Law School. He serves as the Professor-Reporter of the Supreme Court Committee on Illinois Evidence. This Article presents the author’s personal views and does not reflect the views of the Supreme Court Committee on Illinois Evidence.

\*\* Cook County Assistant State’s Attorney. This Article presents the author’s personal views and does not reflect the views of the Cook County State’s Attorney’s Office.

\*\*\* A third year law student at the John Marshall Law School.

1. ILL. R. EVID. 703.

2. ILL. R. EVID. 705.

3. *Wilson v. Clark*, 417 N.E.2d 1322, 1326 (Ill. 1981).

4. ILL. R. EVID. 1102. The rules were adopted on September 27, 2010, and effective as of January 1, 2011. *Id.*

5. *Compare* ILL. R. EVID. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.”), *with* FED. R. EVID. 703 (“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence *in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that*

and 705,<sup>6</sup> it is time to adopt the learned treatise exception to the hearsay rule, Federal Rule of Evidence 803(18) (“FRE 803(18)”)<sup>7</sup>. This will complete the incorporation cycle.<sup>8</sup> More importantly, it will enhance the efficiency of trials in Illinois courts. Failure to adopt an Illinois equivalent of FRE 803(18) will impede the full and proper application of Illinois Rule of Evidence 703 (“IRE 703”) and 705 (“IRE 705”).

This Article will lay out the current standards in Illinois regarding the use of learned treatises. It will focus on the inconsistencies in the application of the current Illinois common law and then address how adoption of a learned treatise exception to hearsay will increase efficiency among trial courts.

## II. CURRENT USE OF LEARNED TREATISES IN ILLINOIS

Currently, in Illinois, a learned treatise is inadmissible as substantive evidence because it is deemed to be hearsay. A learned treatise can be used to impeach an expert witness on cross-examination and to rehabilitate the expert witness during re-direct examination.<sup>9</sup> This rule allowing a learned treatise for impeachment and rehabilitation purposes has evolved.

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*their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”*) (emphasis added to show difference between Illinois and Federal Rule).

6. Illinois Rule of Evidence 705 - Disclosure of Facts or Data Underlying Expert Opinion states, “The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.” ILL. R. EVID. 705.
7. Federal Rule of Evidence 803(18) states:
 

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert’s admission or testimony, by another expert’s testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

FED. R. EVID. 803(18).
8. SPEC. SUPREME COURT COMM. ON ILL. EVIDENCE, COMMITTEE COMMENTARY ON THE ILLINOIS RULES OF EVIDENCE (2010), available at <https://www.state.il.us/court/SupremeCourt/Evidence/Evidence.htm> [hereinafter *Committee Commentary*]. Other Federal Rules of Evidence that Illinois has not adopted are FRE 407 and FRE 803(1). *Id.* The IRE Committee Commentary states that the reason for not incorporating Rule 407, Subsequent Remedial Measures, is “because Appellate Court opinions are sufficiently in conflict concerning a core issue that is now under review by the Supreme Court.” *Id.*
9. Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 SETON HALL L. REV. 183 (1995).

This section will first address the current rules regarding impeachment, cross-examination, and discovery issues related to learned treatises. Next, this section will discuss the requirements for setting up foundation and establishing authoritativeness.

#### A. Cross-Examination, Impeachment, and the Confusion of Discovery

Since 1965, the Illinois Supreme Court has allowed for the “liberal” use of a learned treatise “for impeachment purposes” on cross-examination.<sup>10</sup> In *Darling v. Charleston Community Memorial Hospital*, the Supreme Court allowed cross-examination of an expert witness “as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.”<sup>11</sup> It extended the impeachment of the expert’s opinion with a learned treatise regardless whether the expert relied or did not rely on that text in forming the basis of his or her opinion.<sup>12</sup> The Illinois Supreme Court explained that to prevent such cross-examination would “protect the ignorant or unscrupulous expert witness.”<sup>13</sup> The learned treatise may therefore be used on cross-examination by “reading from the treatise and asking the witness if the witness agrees with the statements read.”<sup>14</sup> On cross-examination, counsel should have “the widest latitude to . . . demonstrate any interest, bias, or motive of the expert witness to testify, and to test his accuracy, recollection and credibility.”<sup>15</sup> To perfect cross-examination, counsel may delve into the “facts, data, and opinions which form the basis of the expert’s opinion but which are not disclosed on direct examination . . . .”<sup>16</sup>

Some have argued, albeit unsuccessfully, that a learned treatise which a party intended to use to impeach an expert witness should be disclosed during discovery pursuant to Supreme Court Rule 213.<sup>17</sup> Supreme Court Rule 213 provides the limitations on written interrogatories in civil cases. Specifically, Rule 213(g) limits the information admissible *on direct examination* to information that was disclosed in a Rule 213(f) answer or in a discovery deposition.<sup>18</sup> Rule 213(g), however, places no such limitation

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10. *Id.* at 254 (citing *Darling v. Charleston Cmty. Mem’l Hosp.*, 211 N.E.2d 253, 259 (Ill. 1965)).

11. *Darling*, 211 N.E.2d at 259.

12. *Id.* at 258–61.

13. *Id.* at 259.

14. 11 WILLIAM A. SCHROEDER, ILLINOIS PRACTICE SERIES: COURTROOM HANDBOOK ON ILLINOIS EVIDENCE § 803(18):1 (2014) (citing *Darling*, 211 N.E.2d at 258–61; *Fornoff v. Parke Davis & Co.*, 434 N.E.2d 793, 800–01 (Ill. App. Ct. 1982)).

15. *Piano v. Davison*, 510 N.E.2d 1066, 1081–82 (Ill. App. Ct. 1987) (citing *Mielke v. Condell Mem’l Hosp.*, 463 N.E.2d 216, 220–21 (Ill. App. Ct. 1984)).

16. *Id.* at 1081.

17. *Stapleton ex rel. Clark v. Moore*, 932 N.E.2d 487, 497–98 (Ill. App. Ct. 2010) (citing *Maffett v. Bliss*, 771 N.E.2d 445, 457–58 (Ill. App. Ct. 2002)).

18. ILL. SUP. CT. R. 213.

on information used during *cross-examination*.<sup>19</sup> In fact, Rule 213(g) explicitly states that, “Without making disclosure under this rule, however, a cross-examining party can elicit information, including opinions, from the witness.”<sup>20</sup> Rule 213(g) therefore “does not require that a party disclose journal articles that the party intends to use in cross-examining the opposing party’s [expert] opinion witness,”<sup>21</sup> because “[t]he disclosure requirements of Rule 213 simply do not apply to cross-examination of an opposing party’s opinion witness.”<sup>22</sup>

It should be noted that Rule 213 is a discovery rule and does not govern the admissibility of learned treatises. In a footnote in *Stapleton ex rel. Clark v. Moore*, the appellate court noted that some confusion may arise with practitioners who are familiar with FRE 803(18), because the federal rule allows admissibility of a learned treatise as substantive evidence once the materials are established as reliable.<sup>23</sup> The court explained that Rule 213 disclosure requirements do not apply to cross-examination.<sup>24</sup> Rule 213 also does not require disclosures of learned treatises intended to be used on cross-examination of an expert witness.<sup>25</sup> The court in *Stapleton* noted that once a treatise is established as authoritative by judicial notice or by the testimony of the opposing party’s expert witness, the *author* of a learned treatise is established as an expert in that particular field.<sup>26</sup> Unlike the federal rule, however, Illinois courts will not admit the treatise itself as substantive evidence.<sup>27</sup>

Although *Stapleton* addressed the use of learned treatises, the appellate court appears to have confused the issue at hand and applied a Rule 213 analysis. As noted, Rule 213 is a discovery rule that imposes disclosure requirements on the parties. It does not address the foundation for establishing the authoritativeness of the learned treatise or its author. The limited use of a learned treatise in Illinois is currently governed by common law and does not implicate Rule 213, although an untimely disclosure of a party’s intent to use a learned treatise may be among the factors that an appellate court may use in determining whether the use of the learned treatise prejudiced the opponent.<sup>28</sup>

For instance, in *Sharbono v. Hilborn*, the appellate court found that the use of diagrams taken from a learned treatise was highly prejudicial

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19. *Id.*

20. *Id.*

21. *Stapleton*, 932 N.E.2d at 497.

22. *Id.* at 497.

23. *Id.* at 498 n.1.

24. *Id.* at 497.

25. *Maffett v. Bliss*, 771 N.E.2d 445, 458 (Ill. App. Ct. 2002).

26. *Stapleton*, 932 N.E.2d at 497.

27. *Id.* at 498 n.1.

28. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 36, 12 N.E.3d 530, 545.

because the defendant failed to establish proper foundation for their introduction, the diagrams helped to bolster the defendant's expert medical opinion with respect to a very substantial issue in the case, and the defendant failed to timely disclose the diagrams under Supreme Court Rule 213.<sup>29</sup> The appellate court noted that IRE 703 and 705 place the burden on the adverse party on cross-examination to challenge the facts that underlie the expert's opinion.<sup>30</sup> As such, the appellate court concluded that "it is a matter of fundamental fairness that the adverse party be given proper and timely disclosure so that it may have the opportunity to prepare for cross-examination."<sup>31</sup> The court found that

[w]ithout timely disclosure, plaintiff was completely deprived of her ability to effectively cross-examine defendant[']s expert] as to such matters as the extent of his reliance on the treatise, whether the treatise was truly a reliable authority, whether the specific images and diagrams in question were reliable, and whether it was reasonable for defendant[']s expert] to rely on the treatise in this case.<sup>32</sup>

#### B. Foundation and Establishing Authoritativeness

In Illinois and under the Federal Rules of Evidence, the proponents of a learned treatise must establish proper foundation for the authoritativeness of the publication.<sup>33</sup> Under FRE 803(18), the standard for determining the authoritativeness of a treatise is as follows: "[to the extent] called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination," statements contained in published treatises, periodicals, or pamphlets may be admitted as substantive evidence as an exception to hearsay if such materials themselves are "established as a reliable authority *by the expert's admission or testimony, by another expert's testimony, or by judicial notice.*"<sup>34</sup> Judicial notice, however, does not assign probative value to evidence; it operates only to qualify a work as reliable.<sup>35</sup>

The appellate court in *Bowman v. University of Chicago Hospitals*, addressed the process of establishing whether a source is "authoritative."<sup>36</sup> *Bowman* was a medical negligence case brought following the death of a

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29. *Id.*, 12 N.E.3d at 545.

30. *Id.*, 12 N.E.3d at 545.

31. *Id.*, 12 N.E.3d at 545.

32. *Id.* at ¶ 37, 12 N.E.3d at 545.

33. *Stapleton ex rel. Clark v. Moore*, 932 N.E.2d 487, 498 (Ill. App. Ct. 2010) (citing *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 259 (Ill. 1965)).

34. FED. R. EVID. 803(18) (emphasis added).

35. GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 667–69 (7th ed. 2011).

36. *Bowman v. Univ. of Chi. Hosps.*, 852 N.E.2d 383, 392–93 (Ill. App. Ct. 2006).

premature baby from a bacterial infection.<sup>37</sup> On direct examination, the plaintiff's expert admitted that he had relied on hospital charts for the basis of his opinion that the child's death could have been prevented with a timely dose of antibiotics.<sup>38</sup> The defendants then cross-examined the plaintiff's expert with medical literature, inquiring whether the treatise "suggested a point at which certain blood counts required" the administration of medication.<sup>39</sup> Two of the plaintiff's experts admitted on cross-examination that the text was "a good source," "standard book," and was "well-respected."<sup>40</sup> The plaintiff argued on appeal that the defendant failed to establish proper foundation for the introduction of the medical text.<sup>41</sup> The appellate court rejected the claim, finding that the defendant sufficiently established the particular text as reliable.<sup>42</sup> It did not matter that the witnesses did not use the term "authoritative."<sup>43</sup> The court reaffirmed the principle that on cross-examination "a recognized text or treatise is proper where either the court has taken judicial notice of the author's competence or, absent concession by the witness, the cross-examiner proves the text or treatise is authoritative."<sup>44</sup> The court further noted that "[a]n author's competence can be established by a witness with expertise in the subject matter."<sup>45</sup> Here, the court found that the statements made by the plaintiff's experts met the standard under *Darling* to satisfy a showing of author's competence<sup>46</sup> and that the term "authoritative" was not determinative in establishing the reliability or credibility of the source.<sup>47</sup> The court concluded that once a text "is shown to be authoritative, any concerns that it is not 'scientific enough' go to weight and not to admissibility."<sup>48</sup>

Most recently, in *Sharbono v. Hilborn*, the defendant in a medical negligence case sought to use a Power Point presentation containing drawings and images taken from a learned treatise, as well as copies of the mammograms and ultrasounds taken of the plaintiff as demonstrative evidence.<sup>49</sup> The Power Point slides with images of the plaintiff's mammograms and ultrasounds contained descriptive headings often using

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37. *Id.*

38. *Id.* at 385–86.

39. *Id.* at 386–87.

40. *Id.* at 385–87.

41. *Id.* at 391–93.

42. *Id.* at 392–93.

43. *Id.*

44. *Id.* at 392 (quoting *People v. Johnson*, 564 N.E.2d 1310, 1312 (Ill. App. Ct. 1990)).

45. *Id.* (citing *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 259–60 (Ill. 1965)).

46. *Id.* at 393.

47. *Id.* at 392–93.

48. 11 SCHROEDER, *supra* note 14 (citing *Nassar v. Cnty. of Cook*, 333 Ill. App. 3d 289 (Ill. App. Ct. 2002)).

49. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶15, 12 N.E.3d 530, 537.

the word “benign” along with the name of the particular treatise used.<sup>50</sup> The defendant sought to use the Power Point “to help the jury understand the complicated medical testimony” during defendant radiologists’ testimony on direct examination.<sup>51</sup> Defense counsel distinguished between images taken from the treatise from those identified as the plaintiff’s and “stressed numerous times” that the treatise images were being used for demonstrative purposes only.<sup>52</sup> Following deliberations, the jury entered a verdict in favor of the defendant.<sup>53</sup>

The plaintiff appealed, arguing that the defendant failed to establish the proper foundation for the Power Point presentation, that the exhibit could not be introduced on direct examination, and the exhibit was improperly used to bolster the defendant’s medical opinion that he had correctly diagnosed the plaintiff’s lesions as benign.<sup>54</sup> The appellate court found that the exhibit “went well beyond merely trying to teach or educate the jury . . . .”<sup>55</sup> Rather, the court found that the exhibit “help[ed] show the basis of [the] defendant’s own medical opinion in this case and to support his diagnosis” which found the plaintiff’s lesions to be benign.<sup>56</sup> The appellate court also found that the defendant had failed to establish a proper foundation for the reliability of the treatise as required under IRE 703 and *Wilson v. Clark*.<sup>57</sup> The court concluded that the use of the diagrams “went right to the heart of the malpractice claim” and was therefore “highly prejudicial.”<sup>58</sup>

The appellate court’s reasoning and the outcome in *Sharbono* complicate a proponent’s ability to establish the authoritativeness of a learned treatise and, in this case, to explain the basis of the expert’s opinion at trial. The appellate court in *Sharbono* set as high a standard in Illinois for the use of demonstrative evidence as is generally used for the admissibility of evidence. Such an outcome is simply not justified under Illinois practice.

Similar to the court’s concerns in *Sharbono*, other courts have attempted to distinguish between an expert’s intent to provide a foundation for his or her opinion and the expert’s attempt to merely bolster his or her opinion.<sup>59</sup> Only the former is allowed. The distinction between providing a

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50. *Id.*

51. *Id.*

52. *Id.* at ¶16, 12 N.E.3d at 538.

53. *Id.* at ¶20, 12 N.E.3d at 539.

54. *Id.* at ¶27, 12 N.E.3d at 541.

55. *Id.* at ¶33, 12 N.E.3d at 543.

56. *Id.*

57. *Id.* at ¶35, 12 N.E.3d at 544.

58. *Id.* at ¶36, 12 N.E.3d at 544.

59. Walsh & Rose, *supra* note 9, at 237.

foundation for an opinion and merely bolstering the opinion, however, is confusing to litigators and courts alike.<sup>60</sup>

Consistent with FRE 803(18), the standard for establishing the authoritativeness or reliability of an author in the relevant field may be established by a witness who is an expert in the field,<sup>61</sup> if a “witness concedes the author’s competence,”<sup>62</sup> or by judicial notice.<sup>63</sup> Although the standard for determining the authoritativeness of a treatise is the same under Illinois<sup>64</sup> and the Federal Rules of Evidence,<sup>65</sup> under the Federal Rules of Evidence, the statement can be admitted substantively, but it will not be submitted as an exhibit to the jury. Illinois common law rules of evidence only permit an expert witness to read from a reliable publication; however, the statements in it will not be admitted substantively<sup>66</sup> or submitted as an exhibit to the jury.<sup>67</sup> Illinois common law rules essentially expect the jurors to hear but not see the exhibits; allowing them to listen to the evidence, but preventing them from actually using this evidence substantively to make their ultimate determination. How we treat a learned treatise in Illinois and how it can be used at trial can only lead to jury confusion.

### C. Treatises Are Generally Not Admissible as Substantive Evidence

In Illinois, learned treatises are inadmissible as substantive evidence because they constitute hearsay.<sup>68</sup> Illinois courts reject the substantive use of learned treatises because of their concerns that learned treatises will

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60. *Id.*

61. Stapleton *ex rel.* Clark v. Moore, 932 N.E.2d 487, 498 (Ill. App. Ct. 2010) (quoting Downey v. Dunnington, 895 N.E.2d 271, 297 (Ill. App. Ct. 2008)). See also Darling v. Charleston Cmty. Mem’l Hosp., 211 N.E.2d 253, 259–60. (Ill. 1965).

62. Downey, 895 N.E.2d at 297 (quoting Bowman v. Univ. of Chi. Hosps., 852 N.E.2d 289, 292–93 (Ill. App. Ct. 2006)).

63. *Id.* (quoting Darling, 211 N.E.2d at 259–60).

64. *Id.*

65. Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820 (5th Cir. 1980).

66. Fornoff v. Parke Davis & Co., 434 N.E.2d 793, 801 (Ill. App. Ct. 1982); Darling, 211 N.E.2d at 259–60; Walski v. Tiesenga, 381 N.E.2d 279, 283 (Ill. 1978). The trial court in Downey v. Dunnington erred in not allowing the use of a medical article on cross when it was admissible. Downey, 895 N.E.2d at 297.

67. Terrence J. Lavin & Michelle L. Wolf, *Expanding the Use of Medical Treatises in Illinois Trials*, 94 ILL. B.J. 426, 427–28 (2006) (citing Darling, 211 N.E.2d at 259); FED. R. EVID. 803(18).

68. *Id.* (citing Hoem v. Zia, 606 N.E.2d 818, 833–34 (Ill. App. Ct. 1992)). See also 11 SCHROEDER, *supra* note 14 (citing People v. Anderson, 495 N.E.2d 485, 488–90 (Ill. 1986); Jackson *ex rel.* Jackson v. Reid, 935 N.E.2d 978, 995 (Ill. App. Ct. 2010), *as modified on denial of reh’g*, (June 29, 2010); Goldberg v. Dep’t of Prof’l Regulation, 771 N.E.2d 1075, 1083–84 (Ill. App. Ct. 2002); Prairie v. Snow Valley Health Res., Inc., 755 N.E.2d 1021, 1032–33 (Ill. App. Ct. 2001); Costa v. Dresser Indus., Inc., 642 N.E.2d 898, 905 (Ill. App. Ct. 1994); see also Downey v. Dunnington, 895 N.E.2d 271, 295 (Ill. App. Ct. 2008), *as modified on denial of reh’g*, (Aug. 21, 2008)).



“serve as a substitute for expert testimony” at trial.<sup>69</sup> The appellate court in *Fornoff v. Parke* however, suggested that an exception to the rule may exist.<sup>70</sup> The *Fornoff* court opined that a learned treatise may be admitted as substantive evidence when their exclusion would cause “serious hardship”<sup>71</sup> to the plaintiff. The court explained that the existence of such “serious hardship” may be found where a plaintiff, for instance, makes a “positive showing” that securing the live testimony of an expert is otherwise impossible.<sup>72</sup> The showing of serious hardship, however, may not be the sole exception to the rule that prohibits the use of a learned treatise as substantive evidence. By way of an analogy, in *Ohligshlager v. Proctor Community Hospital*, the Illinois Supreme Court also showed a willingness to accept a drug manufacturer’s instructions pamphlet to establish the standard of care in a medical negligence case.<sup>73</sup> In *Ohligshlager*, the defendant physician and the plaintiff’s expert both testified about the manufacturer’s instructions that came with an intravenous drug.<sup>74</sup> The plaintiff’s claim was that the defendant was negligent in failing to properly supervise the administration of the drug to the plaintiff.<sup>75</sup> The manufacturer’s instructions that came with the drug cautioned that intravenous use of the drug at higher concentrations should be more closely supervised so as to prevent certain medical complications from occurring.<sup>76</sup> The Supreme Court of Illinois held that “there was sufficient evidence of deviation from the manufacturer’s recommendations and instructions for the issue of defendant [doctor’s] negligence to have been submitted to the jury.”<sup>77</sup> The holding in *Ohligshlager* suggests that the traditional rule of inadmissibility may be relaxed in the interests of fairness.<sup>78</sup> That same acceptance should be extended to learned treatises.

Despite some willingness to find limited exceptions to the traditional rule of inadmissibility of learned treatises, Illinois courts refuse to adopt FRE 803(18). In *Roach v. Springfield Clinic*, the Illinois Supreme Court

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69. *Hoem*, 606 N.E.2d at 833–34.

70. *Fornoff*, 1434 N.E.2d 793, 800–01.

71. Walsh & Rose, *supra* note 9, at 254. Walsh and Rose stated that “while Illinois has consistently refused to admit learned treatises for their truth, one court has suggested an exception might be made where exclusion would subject plaintiff to serious hardship.” *Id.* (citing *Fornoff*, 434 N.E.2d 793).

72. Walsh & Rose, *supra* note 9.

73. *Ohligshlager v. Proctor Cmty. Hosp. (Ohligshlager I)*, 303 N.E.2d 392, 396–97 (Ill. 1973).

74. *Ohligshlager v. Proctor Cmty. Hosp. (Ohligshlager II)*, 294 N.E.2d 729 (Ill. App. Ct. 1972) *rev’d*, 303 N.E.2d 392 (Ill. 1973).

75. *Id.*

76. *Ohligshlager I*, 303 N.E.2d at 395–96.

77. *Id.* at 396.

78. *Id.*

had an opportunity to adopt FRE 803(18),<sup>79</sup> but declined to do so.<sup>80</sup> In *Roach*, the plaintiffs sought the admissibility of medical texts to support their argument that the defendant physicians should have performed a certain medical procedure on the plaintiff.<sup>81</sup> The trial court instructed the jury that medical treatises could be used only for impeachment purposes and not as substantive evidence.<sup>82</sup> The plaintiffs argued that FRE 803(18) was a “logical extension”<sup>83</sup> of FRE 703 and 705, which the Supreme Court had previously adopted in *Wilson v. Clark*.<sup>84</sup> The plaintiffs further argued that the limiting jury instruction “seriously undermine[d] expert testimony based upon published treatises, which were customarily relied upon by experts.”<sup>85</sup> The Supreme Court of Illinois rejected the plaintiffs’ claim, noting that “the admission of treatises as substantive evidence would undermine the foundation of the hearsay rule.”<sup>86</sup> The court explained that unless the authors of the scientific treatises are available for cross-examination in court, “the trier of fact will not know how they collected their data, on what they based their opinions; and whether they would apply the same data and express the same opinions under the circumstances of the case being tried.”<sup>87</sup> The court therefore declined to adopt FRE 803(18).<sup>88</sup> However, on rehearing, the court deemed FRE 803(18) inapplicable to the case, because the plaintiffs failed to seek the admissibility of the medical texts at issue as substantive evidence.<sup>89</sup> The court’s ultimate decision on

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79. On the plaintiff’s appeal from a verdict for the defendants in *Roach*, a medical malpractice action, the plaintiff claimed “that the medical treatise upon which their experts relied should have been admitted as substantive evidence.” Walsh & Rose, *supra* note 9, at 237 n.268. This was not allowed because the “admission of treatises as substantive evidence would undermine the foundation of the hearsay rule.” *Id.* Although the Illinois Supreme Court declined to adopt Rule 803(18) the court stated that experts could refer to such authorities on direct examination. *Id.* “The extent to which *Roach* remedied *Schuchman* is unclear, because the Supreme Court’s opinion was withdrawn and modified on rehearing. The court’s final opinion in the case dispensed with the learned treatise issue in short order.” *Id.* (discussing *Roach v. Springfield Clinic (Roach I)*, No. 73394, 1992 Ill. Lexis 204 (Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993)).

80. *Roach v. Springfield Clinic (Roach II)*, 623 N.E.2d 246, 253–54 (Ill. 1993).

81. *Roach I*, No. 73394, 1992 Ill. Lexis 204 (Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993).

82. *Id.*

83. *Id.*

84. *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981).

85. *Roach I*, No. 73394, 1992 Ill. Lexis 204 (Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Roach II*, 623 N.E.2d 246, 253–54 (Ill. 1993) (the Illinois Supreme Court also found the evidence to be irrelevant to the instant case). Similarly, in *Walski v. Tiesenga*, the Illinois Supreme Court declined to consider whether a medical treatise could be admitted as substantive evidence. *Walski v. Tiesenga*, 381 N.E.2d 279, 283–84 (Ill. 1978). The court noted that “it is unnecessary for us to decide now whether and under what circumstances a plaintiff may introduce medical treatises as substantive evidence” because the plaintiff had not submitted the medical treatises at issue as substantive evidence. *Id.* at 283.

rehearing suggests that the court may not have been ready to adopt FRE 803(18) at that time.<sup>90</sup>

#### D. An Expert May Acknowledge Reliance on a Learned Treatise to Explain the Basis of His or Her Opinion Pursuant to Rule 703

IRE 705 places the burden of eliciting the facts upon which an expert based his or her opinion on the cross-examiner. It does not state whether such facts may be brought out on direct examination.<sup>91</sup> IRE 703 likewise does not completely resolve the extent to which an expert may divulge the basis for his or her opinion on direct examination.<sup>92</sup> It merely requires that the facts relied upon be “of a type reasonably relied upon by experts in the particular field.”<sup>93</sup> IRE 703, however, does not require that the facts or data relied upon by the expert to be admitted in evidence and submitted to the trier of fact.<sup>94</sup>

Although the Illinois Supreme Court rejected the plaintiffs’ argument in *Roach* that FRE 803(18) is a “logical extension”<sup>95</sup> of FRE 703 and FRE 705, which it had previously adopted in *Wilson v. Clark*, the plaintiffs’ argument is persuasive.<sup>96</sup> In 1981, the Illinois Supreme Court in *Wilson v. Clark*<sup>97</sup> adopted FRE 703 and 705,<sup>98</sup> which were intended to “broaden the scope of expert testimony.”<sup>99</sup> FRE 703 and IRE 703 allow experts to “rely on facts or data not admitted into evidence if it is ‘of a type reasonably relied upon by experts’ in the field.” FRE 703 was intended “to bring the judicial practice into line with the practice of experts themselves when not

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90. In the vacated *Roach* opinion, however, the court did go into some detail. The court relied on the holding in *People v. Anderson. Roach I*, No. 73394, 1992 Ill. Lexis 204 (Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993). The court (in the vacated opinion) said that the limiting instruction in *Anderson* (that an expert can explain the basis for opinion on direct in regards to relied on materials but that the court must instruct jury that the evidence is not to be considered substantively) was valid and allowing evidence to be substantive would undermine the foundation of hearsay. *Id.*

91. *People v. Anderson*, 495 N.E.2d 485, 488 (Ill. 1986); *Wilson v. Clark*, 417 N.E.2d 1322, 1326–27 (Ill. 1981).

92. ILL. R. EVID. 703; *Anderson*, 495 N.E.2d at 488.

93. See ILL. R. EVID. 703; *Anderson*, 495 N.E.2d at 488.

94. Walsh & Rose, *supra* note 9, at 235. “After *People v. Anderson*, it appeared that experts would be permitted to reveal the contents of texts upon which they relied for their opinions. While the texts themselves would remain inadmissible, they could be discussed so that the jury would understand the expert’s reasoning process.” *Id.* at 235–36.

95. *Roach I*, No. 73394, 1992 Ill. Lexis 204. (Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993)).

96. *Wilson*, 417 N.E.2d 1322.

97. *Id.*

98. *Id.* at 1327.

99. *Griffin v. Subram*, 606 N.E.2d 560, 564–65 (Ill. App. Ct. 1992). Cf. Walsh & Rose, *supra* note 9, at 184 (noting that “Federal Rules of Evidence 703 and 803(18) broadly delimit the materials upon which experts may rely to formulate their opinions.”). Also noting that, “Federal Rule of Evidence 703 is considerably broader than Federal Rule of Evidence 803(18).” *Id.* at 232–33.

in court.”<sup>100</sup> FRE 705 and IRE 705 allow an expert to testify to her opinion without disclosing the facts underlying her reasoning.<sup>101</sup>

In *Wilson*, which was a medical negligence case, hospital records were placed in evidence without proper foundation.<sup>102</sup> The Supreme Court of Illinois stated that the hospital records need not be in evidence so as to serve as the basis for an expert’s medical opinion and aligned itself with the “modern trend” under FRE 705, which allows an expert to give an opinion without disclosing the facts underlying the basis for the opinion.<sup>103</sup> The Illinois Supreme Court noted that “both Federal and State courts have interpreted Rule 703 to allow opinions based on facts not in evidence” and that in applying the rule it is important to know “whether the information upon which the expert bases his opinion is of the type that is reliable.”<sup>104</sup> Similarly, the appellate court in *Piano v. Davidson* determined that an expert witness can rely on facts, data, or opinions contained in a learned treatise, and that under FRE 703 “such facts or data need not be admissible in evidence if they are of a type reasonably relied upon by experts in the particular field.”<sup>105</sup> These materials may include “reports, and opinions from nurses, technicians, and other doctors, hospital records, and x-rays.”<sup>106</sup> Regarding these other materials, Illinois has already adopted FRE 703 and FRE 705 and courts have been applying this standard for decades.

### III. INCONSISTENCIES IN THE USE OF LEARNED TREATISES IN ILLINOIS

The current use of a learned treatise in Illinois already allows an expert to acknowledge a learned treatise as the basis for his or her opinion on direct examination. The extent to which an expert may discuss the contents of the treatise on which he or she relied on direct examination, however, varies among Illinois trial courts. To determine whether an expert may discuss the contents of a treatise that formed the basis of his or her opinion, some courts have attempted to distinguish between an expert’s intent to provide a foundation for his or her opinion and the expert’s attempt to merely bolster his or her opinion.<sup>107</sup> The distinction between providing a foundation for an opinion and merely bolstering the opinion, however, remains “unclear.”<sup>108</sup> Moreover, Illinois courts often require

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100. Walsh & Rose, *supra* note 9, at 184.

101. Lavin & Wolf, *supra* note 67, at 427–28 (quoting *Wilson*, 417 N.E.2d at 1326–27).

102. *Wilson*, 417 N.E.2d at 1327.

103. *Id.* at 1325–26.

104. *Id.*

105. *Piano v. Davison*, 510 N.E.2d 1066, 1081 (Ill. App. Ct. 1987).

106. *Id.*

107. Walsh & Rose, *supra* note 9, at 237.

108. *Id.*

limiting instructions to reduce the likelihood that a jury would mistakenly consider the learned treatises as substantive evidence.<sup>109</sup>

In Illinois, the inconsistent standards regarding the use and authoritativeness of learned treatises on direct examination have given rise to confusion. Under FRE 803(18), the standard for the use of a learned treatise on direct examination is clearer, allowing its use as substantive proof on direct and cross-examination, and requiring no giving of limiting instruction.<sup>110</sup> This section will discuss the inconsistencies in Illinois's treatment of learned treatises, that although an expert witness may rely on a learned treatise during his or her testimony, there is a lack of agreement as to whether the expert may disclose the contents.

The use of learned treatises varies among Illinois trial courts because there appears to be no established rule or principle for uniform application. A good example is how a learned treatise may be used on direct examination of an expert witness. Opinions of the Illinois Appellate Court see this problem frequently because trial courts continue to apply varied standards to determine whether a purported treatise is "learned" or whether a source is "authoritative."<sup>111</sup>

#### A. Direct Examination

On direct examination, it is undisputed that an expert witness may testify that he or she used a reliable source as the basis of his or her opinion.<sup>112</sup> Before 1965, when the Illinois Supreme Court issued its opinion in *Darling v. Charleston Community Memorial Hospital*,<sup>113</sup> an expert on direct examination could only refer to a learned treatise to explain the basis of his or her opinion.<sup>114</sup> Although it is generally permitted in Illinois, there is confusion regarding whether an expert may read or summarize the information contained in a learned treatise when explaining the basis for his or her opinion on direct examination. In determining whether an expert may be allowed to discuss the contents of a treatise that formed the basis of his or her opinion, courts have attempted "to determine whether the information provided represents the foundation of an opinion or merely an effort to bolster it."<sup>115</sup> The distinction between providing a

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109. *Lewis v. Stoval*, 650 N.E.2d 1074, 1076–77 (Ill. App. Ct. 1995).

110. RONALD L. CARLSON ET AL., *EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES* (7th ed. 2012).

111. The term authoritative is probably outdated. *See supra* Part II.B.

112. *Piano v. Davison*, 510 N.E.2d 1066, 1081 (Ill. App. Ct. 1987) (citing *Lawson v. G. D. Searle & Co.*, 356 N.E.2d 779, 786–87 (Ill. 1976)).

113. *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 259–60 (Ill. 1965).

114. *Walsh & Rose*, *supra* note 9, at 233 (citing *Ullrich v. Chi. City Ry.*, 106 N.E. 828, 829 (Ill. 1914); *Bloomington v. Shrock*, 110 Ill. 219 (Ill. 1884)).

115. *Id.* at 237.

foundation for an opinion and merely bolstering an opinion, however, remains “unclear.”<sup>116</sup> The problem with current Illinois practice is that a medical expert, for example, may “dangle[] the authoritative text before the fact-finder but is forced to withhold the actual information upon which he or she relies.”<sup>117</sup>

In 1976, the court in *Lawson v. Searle*, “expanded the admissible use of learned treatises when it held that expert witnesses could rely on medical literature in forming their opinions.”<sup>118</sup> However, in 1984, the court in *Mielke v. Condell Memorial Hospital* tightened the rule and affirmed the trial court’s exclusion of expert testimony where the expert sought to read a summary from his notes on his findings from certain medical literature.<sup>119</sup> The appellate court found that it was not error to exclude the expert’s testimony, noting its concern that the article’s authors were not available for cross-examination.<sup>120</sup> However, two years earlier, the court in *Alton v. Kitt* allowed a defense expert to testify from the Physician’s Desk Reference manual, because the court had found the PDR to be reliable and because the expert had written a part of that manual.<sup>121</sup>

The court in *People v. Anderson*,<sup>122</sup> according to the authors of *Expanding the Use of Medical Treatises*, took Illinois “one step forward, two steps back.”<sup>123</sup> In *Anderson*, the trial court prevented a criminal defendant’s psychiatric expert witness from disclosing the contents of the reports upon which he based his diagnosis regarding the defendant’s mental state at the time he had committed murder.<sup>124</sup> The trial court, however, allowed the expert to testify that he relied on specific reports, which included evaluations by other psychiatrists, physicians, and counselors made while the defendant was serving in the army and when he was previously incarcerated, reports by the state’s psychiatric experts, and

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116. *Id.*

117. The court in *Bowman v. University of Chicago Hospitals* accepted the phrases “standard,” “well-respected,” and “good source” as sufficient foundation for the use of medical textbooks, the court decided that the term ‘authoritative’ was not controlling. Lavin & Wolf, *supra* note 67, at 427–28 (discussing *Bowman v. Univ. of Chi. Hosps.*, 852 N.E.2d 383 (Ill. App. Ct. 2006)).

118. *Lawson v. G. D. Searle & Co.*, 356 N.E.2d 779 (Ill. App. Ct. 1976); *see also* Lavin & Wolf, *supra* note 67, at 428 (discussing *Lawson*, 356 N.E.2d 779). The expert in this case was allowed to base his conclusions on published studies where he referred to his sources as “published clinical studies” and did not refer to them by report name, or the data drawn from the materials. *Lawson*, 356 N.E.2d at 786. The Supreme Court of Illinois found that the expert was not reciting hearsay evidence but rather was giving his “medical opinion.” *Id.* The Supreme Court relied on part of FRE 703 in rendering this conclusion. *Id.*

119. *Mielke v. Condell Mem’l Hosp.*, 463 N.E.2d 216, 226 (Ill. App. Ct. 1984).

120. *Id.*

121. *Alton v. Kitt*, 431 N.E.2d 417, 424–25 (Ill. App. Ct. 1982).

122. *People v. Anderson*, 495 N.E.2d 490, 490 (Ill. 1986).

123. Lavin & Wolf, *supra* note 67.

124. *Anderson*, 495 N.E.2d at 490.

information relating to the defendant's previous criminal offense.<sup>125</sup> Although *Anderson* did not deal with learned treatises, its treatment of the disclosure of materials on which an expert bases his or her opinion is equally relevant to the disclosure of facts in a learned treatise.

The Illinois Supreme Court held in *Anderson* that

an expert may reveal the basis of his opinion because to prevent the expert from referring to the contents of materials upon which he relied in arriving at his conclusion places an unreal stricture on him and compels him to be not only less than frank with the jury but also . . . to appear to base his diagnosis upon reasons which are flimsy and inconclusive when in fact they may not be.<sup>126</sup>

Additionally, the Supreme Court of Illinois noted that, “[w]ithout a full explanation of witness’s reasoning, juries would find the expert testimony to be meaningless.”<sup>127</sup> However, the court limited the use of such evidence: the “underlying facts and conclusions of an expert’s opinion [can]not be allowed for substantive purposes,” and it required the trial judge to give “a limiting jury instruction to avoid the danger of the jury ‘misusing the information.’”<sup>128</sup>

The court in *Anderson* “acknowledged that neither *Wilson* nor FRE 703 addressed the question of whether facts could be provided to the jury,” concluding that, based on the underlying logic of the rule, the “expert should be allowed to reveal the contents of materials upon which he reasonably relies in order to explain the basis for his opinion.”<sup>129</sup> The court explained that “[s]ince Federal Rule of Evidence 703 was designed to broaden the basis of expert testimony and to allow experts to function more naturally in the courtroom, ‘it would be both illogical and anomalous to deprive the jury of the reasons supporting that opinion.’”<sup>130</sup> The court concluded that the disclosure of the contents of the reports did not violate the hearsay rule, because the information was not offered to show the truth of the matter asserted, but merely to explain the basis of the expert’s opinion.<sup>131</sup>

Following *Anderson*, Illinois courts continued to struggle with the question: should an expert be allowed on direct examination to reveal the contents of the materials that he or she relied on in forming the basis for

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125. *Id.*

126. *Id.* at 488.

127. Lavin & Wolf, *supra* note 67, at 429 (quoting *Anderson*, 495 N.E.2d at 489).

128. *Id.*

129. *Id.* (citing *Anderson*, 495 N.E.2d at 488).

130. *Id.*

131. *Anderson*, 495 N.E.2d at 488–89.

their opinions?<sup>132</sup> In *Schuchman v. Stackable*, the appellate court held that an expert could not recite from learned treatises even though they formed a part of the basis for his opinion.<sup>133</sup> Rather than relying on *Anderson*, the court used *Mielke*<sup>134</sup> to hold that an expert could not read from or summarize materials in a learned treatise that he or she relied on.<sup>135</sup> The court noted that, as in *Mielke*,<sup>136</sup> the proposed testimony of the expert “did not directly concern plaintiff’s treatment,” concluding that the proposed testimony summarizing the expert’s notes that he had taken while reviewing medical literature was essentially the same as reading the underlying facts and data into evidence.<sup>137</sup> The court disapproved of allowing such facts and data into evidence given the fact that the author of the treatise was not available for cross-examination.<sup>138</sup> The court distinguished *Wilson v. Clark*<sup>139</sup> where the defense expert was allowed to respond to a hypothetical question, which was based on facts contained in the plaintiff’s medical chart.<sup>140</sup> The facts and data were therefore directly related to the litigation.<sup>141</sup>

The dissent in *Schuchman* sought to give juries greater access to information, finding that the court’s majority interpreted the case law incorrectly when it relied on *Mielke*.<sup>142</sup> The dissent determined that *Anderson* had implicitly overruled *Mielke* and that the treatises were of “particularly trustworthy nature” and that to allow their admissibility would serve the interest of judicial economy.<sup>143</sup>

Several courts, applying *Schuchman*, have incorrectly refused to allow experts from discussing the medical treatise which formed the basis for their opinions.<sup>144</sup> However, they generally do allow the experts to refer to articles that they have authored.<sup>145</sup> For instance, in *Toppel v. Redondo*, the appellate court found that the defendant’s medical expert’s reference on direct examination to an article he authored was permissible, since the

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132. Walsh & Rose, *supra* note 9, at 254.

133. *Schuchman v. Stackable*, 555 N.E.2d 1012 (Ill. App. Ct. 1990).

134. *Mielke v. Condell Mem’l Hosp.*, 463 N.E.2d 216 (Ill. App. Ct. 1990).

135. Lavin & Wolf, *supra* note 67, at 429 (citing *Schuchman*, 555 N.E.2d at 1024–26).

136. *Mielke*, 463 N.E.2d 216.

137. *Schuchman*, 555 N.E.2d at 1026.

138. *Id.*

139. *Wilson v. Clark*, 417 N.E.2d 1322 (Ill. 1981).

140. *Schuchman*, 555 N.E.2d at 1026 (citing *Wilson*, 417 N.E.2d at 1325–26).

141. *Id.*

142. *Id.* at 1026–27 (Chapman, J., dissenting).

143. *Id.* at 1038. The dissent argued that there was “no legitimate difference between use of learned treatises during cross-examination and as part of the basis of an expert’s opinion because in both situations they were offered for non-substantive reasons.” Walsh & Rose, *supra* note 9, at 236 n.261 (citing *Schuchman*, 555 N.E.2d at 1028 (Chapman, J., dissenting)).

144. Walsh & Rose, *supra* note 9, at 254 (citing *Toppel v. Redondo*, 617 N.E.2d 403, 405 (Ill. App. Ct. 1993); *Weekley v. Indus. Comm’n*, 615 N.E.2d 59, 63–64 (Ill. App. Ct. 1993)).

145. *Toppel*, 617 N.E.2d at 405.



expert “simply identified the article as one that he authored and at no point discussed or relied on the article during his testimony.”<sup>146</sup>

Some Illinois courts appear to allow expert testimony about the contents of learned articles when they are not used to simply bolster the expert’s own opinion or to prove the truth of the matter asserted. In *Kochan v. Owens-Corning Fiberglass Corp.*,<sup>147</sup> the court distinguished<sup>148</sup> *Schuchman* and *Mielke*, explaining that the materials relied on by the experts in *Schuchman* and *Mielke* on direct examination were “not directly pertinent to the litigation or to the plaintiff’s treatment.”<sup>149</sup> The court in *Kochan* found it significant that the expert did not use the articles “to show that other experts agreed with him or . . . that the articles proved the truth of the matter asserted.”<sup>150</sup> Rather, in *Kochan*, the court determined that the articles relied on by the expert were necessary for the expert to explain his opinion and why he had come to that opinion.<sup>151</sup>

In *Lewis v. Stoval*, the trial court admitted two medical articles in evidence and allowed the experts to read them and then submitted them to the jury during deliberation with no limiting instructions.<sup>152</sup> The articles were used on direct examination only and not for cross-examination or on

146. *Id.* at 405.

147. *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683 (Ill. App. Ct. 1993) *overruled by* *Nolan v. Weil-McLain*, 910 N.E.2d 549 (Ill. 2009).

148. Walsh & Rose, *supra* note 9, at 236–37. Walsh and Rose argue that although the testimony was admitted the court’s reasoning was not “comforting.” *Id.* Their article asserts that *Schuchman* and *Kochan* are not “easily reconciled.” *Id.*

We believe that *Schuchman* is limited to those situations where the expert is not using the content of the medical literature as a basis for his or her opinion but rather the expert is attempting to bolster his opinion by showing that other experts agree with him. The expert witness then becomes a conduit for bringing before the jury a number of opinions of other experts without incurring the cost of hiring such experts and without subjecting these other experts to cross-examination. Under these circumstances it does not matter if the witness is an expert in the field for which he is called, but rather the only question is whether the witness can read!

Walsh & Rose, *supra* note 9, at 236–37. The article adds, “[i]t is difficult first to determine whether the information provided represents the foundation of an opinion or merely an effort to bolster it. What is the difference anyway? In short, despite the plain language of *People v. Anderson*, the circumstances under which experts may discuss authoritative texts in Illinois still remain unclear.” *Id.* (citing Charles F. Redden, *Limits on Admitting Learned Treatise*, 82 ILL. B.J. 186 (1994)).

149. *Kochan*, 610 N.E.2d at 697–98, *overruled by* *Nolan v. Weil-McLain*, 910 N.E.2d 549 (Ill. 2009).

150. *Id.* at 697–98.

151. Walsh & Rose, *supra* note 9, at 236 (citing *Kochan*, 610 N.E.2d at 697–98, *overruled by* *Nolan v. Weil-McLain*, 910 N.E.2d 549 (Ill. 2009)). The case was assessed/cited before it was overruled by *Nolan*, which directly overruled the holding that evidence of other asbestos exposures was not admissible; however, there was no mention of admission of articles. The court in *Kochan* allowed the expert witness to read “the underlying data and information on which he based his opinion that asbestos was linked to asbestosis by 1930 and to lung cancer between 1949 and 1955.” *Kochan*, 610 N.E.2d at 697.

152. *Lewis v. Stoval*, 650 N.E.2d 1074, 1075–76 (Ill. App. Ct. 1995). About 1–2 sentences from each article were read to the jury.

rebuttal.<sup>153</sup> The appellate court nevertheless affirmed, holding that the error was harmless.<sup>154</sup> The first article was partially written by the expert and the second one was referenced in the expert's article.<sup>155</sup> The trial court allowed the experts to read statements from the articles on direct examination despite the defense's objection that it was hearsay.<sup>156</sup> The plaintiff relied on *Anderson* to argue that the "articles were admitted for the limited purpose of showing the materials" on which the expert relied.<sup>157</sup> The court, however, distinguished *Anderson*, stating that in *Anderson* the material relied on was relevant to the issues and directly concerned the defendant's sanity.<sup>158</sup> The *Stoval* court noted that "the *Anderson* court was not saying such materials were not hearsay. They were admissible for the limited purpose of explaining the basis for the expert's opinion and the jury should be so instructed."<sup>159</sup> Does this imply that had there been a limiting instruction the use of the articles would not have been in error?<sup>160</sup> It appears unlikely that a limiting instruction would have been enough. In addition to the absence of a limiting instruction, the appellate court also considered whether the materials pertained to the treatment of the plaintiff and the fact that the materials were allowed to go to the jury during deliberations.<sup>161</sup> In other words, the absence of limiting instructions was not the appellate court's only determinative factor.

As illustrated above, the courts are struggling to make sense of which standard to apply when determining whether a treatise is authoritative and how the contents of an authoritative treatise may be used at trial. The confusion stems from the lack of an established rule or clear guideline or standard. Although it is clear that an expert witness may rely on a learned treatise as the basis for his or her opinion, the various attempts to distinguish situations in which to allow disclosure of the contents of the learned treatise are confusing and difficult for litigators and for trial courts to follow. Hopefully, the adoption of FRE 803(18) will remedy the problem.

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153. *Id.*

154. *Id.* at 1077.

155. *Id.* at 1075.

156. *Id.*

157. *Id.* at 1076 (citing *People v. Anderson*, 495 N.E.2d 485, 488-89 (Ill. 1986)).

158. *Id.*

159. *Id.*

160. Assuming that the articles were also on point and not submitted as exhibits to the jury. In the *Lewis* case the articles used addressed how rapidly certain antibiotics penetrate human tissues but the defendant's use of antibiotics was not at issue. *Id.* The *Anderson* case used medical reports that discussed the defendant's sanity, which was an issue. *People v. Anderson*, 495 N.E.2d 485 (Ill. 1986).

161. *Lewis*, 650 N.E.2d at 1076-77.

#### IV. ADOPTING A LEARNED TREATISE EXCEPTION TO THE HEARSAY RULE WILL REMOVE THE DISCREPANCY AMONG TRIAL COURTS AND MAKE TRIALS MORE EFFICIENT

Adopting the federal rule will increase the effectiveness of trials in Illinois. It would decrease the amount of confusion and misinterpretation of various rules that already exist, such as Supreme Court Rule 213 and IRE 703 and 705. To best transition into an established practice on the admissibility of learned treatises as an exception to hearsay, Illinois should adopt FRE 803(18).

##### A. Adoption of FRE 803(18) in Illinois Will Allow for the Full Implementation of IRE 703

To ensure the full implementation of IRE 703, Illinois should adopt FRE 803(18). The two rules would operate “in tandem” to “permit experts to refer to a broad spectrum of information in reaching their opinion and conveying them to the fact finder.”<sup>162</sup> The failure to adopt FRE 803(18) or an equivalent, but having adopted IRE 703, will leave Illinois trial judges without clear guidance as to what information relied on by an expert may be disclosed to the fact finder and would prevent the fact finder from obtaining such valuable information.<sup>163</sup>

##### B. Most of the Principles Underlying FRE 803(18) Are Already Well Established in Illinois

Illinois already sets out similar standards for determining the authoritative nature of a learned treatise as the federal rule and the process for cross-examining the expert with learned treatises parallels the federal rules. The most significant change in adopting a hearsay exception for a learned treatise in Illinois would be to admit the treatise as substantive evidence. Even this change, however, would not be absolutely new to Illinois as noted by the appellate court in *Fornoff*, in suggesting that there may already be an exception for admissibility of learned treatises as substantive evidence.<sup>164</sup> The federal rule allows for statements that are “called to the attention of the expert witness on cross-examination or relied on by the expert on direct

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162. Walsh & Rose, *supra* note 9, at 254.

163. *Id.*

164. Although courts cite *Fornoff* for its holding that generally treatises cannot be used as substantive evidence (*Costa v. Dresser Indus.*, 624 N.E.2d 898, 906 (Ill. App. Ct. 1994); *Goldberg v. Dep’t of Prof’l Regulation*, 771 N.E.2d 1075, 1083 (Ill. App. Ct. 2002)), courts do not seem to note that an exception might exist. *Fornoff v. Parke Davis & Co.*, 434 N.E.2d 793, 800–01 (Ill. App. Ct. 1982).

examination.”<sup>165</sup> This is the same standard as the one used in Illinois. Under FRE 803(18), learned treatises can be based on history, medicine, other sciences, or art.<sup>166</sup> Due to their inherent reliability, these scholarly works are permitted to prove the truth of the matter asserted.<sup>167</sup>

Aside from treatises, periodicals, or pamphlets, there are other acceptable forms of evidence, including charts, almanacs, government publications, and videotapes.<sup>168</sup> To avoid the misuse of these other acceptable forms of evidence by the jury, they may not be offered as substantive evidence absent accompanying expert testimony, and may not be received as exhibits.<sup>169</sup>

### C. The Existing Opposition to the Adoption of a Learned Treatise Exception Is Not Sufficient

There exist several arguments against the adoption of an Illinois learned treatise hearsay exception. All of these arguments, however, have already been addressed and rejected at the federal level in the adoption of FRE 803(18). The most frequent objections are that: (1) “scholarly works of technical nature” may confuse and mislead the trier of fact into giving the material undue weight;<sup>170</sup> (2) the proponent of the evidence could present materials out of context or may distort them;<sup>171</sup> (3) there is an inference that live testimony by an expert in “resolving technical issues [is superior to] consultation of written works”;<sup>172</sup> (4) with the fields of art, science, and history constantly changing and evolving, learned treatises are likely to become quickly outdated and may create the possibility of misinformation being introduced to the trier of fact;<sup>173</sup> and (5) the adoption of the learned treatise exception would lead to the rise of preparation of

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165. FED. R. EVID. 803(18).

166. See generally WEISSENBERGER & DUANE, *supra* note 35, at 670. See also *Constantino v. Herzog*, 203 F.3d 164, 170 (2d Cir. 2000); *Connecticut Light & Power Co. v. Fed. Power Comm’n*, 557 F.2d 349, 356 (2d Cir. 1977) (citing *Montana Power Co. v. Fed. Power Comm’n*, 185 F.2d 491, 498 (D.C. Cir. 1950)).

167. 7 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 803:18 (7th ed. 2013).

168. See *Constantino v. Herzog*, 203 F.3d 164 (2d Cir. 2000) (finding that an authoritative videotape can be used as a learned treatise); *United States v. Mangan*, 575 F.2d 32, 48 (2d Cir. 1978) (discussion on handwriting characteristics chart, taken from a learned treatise, was considered proper under 803(18)); *Bair v. Am. Motors Corp.*, 473 F.2d 740, 743 (3d Cir. 1973) (referring to documents other than medical treatises that can be considered learned treatises, the court noted “that there are many other such works, including, besides annuity tables, almanacs, astronomical calculations, tables of logarithms [sic], interest tables, weather reports, and tables of the rise and fall of the tide, all of which have been admitted in evidence”).

169. FED. R. EVID. 803 advisory committee’s note.

170. *Id.*

171. DAVID H. KAYE ET AL., THE NEW WIGMORE: EXPERT EVIDENCE §5.5 (2014).

172. *Id.* § 5.4.

173. *Bowers v. Garfield*, 382 F. Supp. 503, 507 (E.D. Pa. 1974), *aff’d*, 503 F.2d 1398 (3d Cir. 1974).

scientific material specifically for litigation.<sup>174</sup> Each of these arguments has been discredited, and the “drafters of [FRE] 803(18) [have] found that the concerns underlying the hearsay objection [were] not significant.”<sup>175</sup>

First, the concerns regarding the possibility that the “technical nature” of certain publications may confuse and mislead the trier of fact into giving the material undue weight are ameliorated by the fact that a learned treatise will not be admitted in evidence absent testimony of an expert witness.<sup>176</sup> The introduction of learned treatises via expert testimony reduces and often eliminates the problem of misunderstanding the evidence by the trier of fact.<sup>177</sup> Similarly, the prohibition against allowing learned treatises as exhibits reduces the possibility that triers of fact will attempt to understand the treatises without professional guidance.<sup>178</sup>

One Illinois court has already addressed how FRE 803(18) minimizes the danger that the trier of fact could misuse the contents of a learned treatise. In *Downey v. Dunnington* the appellate court recognized that while learned treatises may be trustworthy, they are not intended to be understood by a lay person.<sup>179</sup> The appellate court noted that FRE 803(18) provides two ways in which these issues are avoided by: (1) offering an opportunity for the expert to testify and to explain the learned treatise and its application to the case before it can be used as substantive evidence; or (2) prohibiting the treatise itself from being admitted in evidence.

Opponents of FRE 803(18) nevertheless fear that there is potential for evidence to be distorted or to be considered out of context by the trier of fact.<sup>180</sup> Proponents of the learned treatise hearsay exception, however, are confident that the “adversarial process” would provide “a sufficient safeguard to this type of abuse.”<sup>181</sup>

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174. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL: A COMPLETE GUIDE TO THE FEDERAL RULES OF EVIDENCE 803-82 (10th ed. 2011).

175. FED. R. EVID. 803 advisory committee’s note; WEISSENBERGER & DUANE, *supra* note 35, at 667; KAYE, *supra* note 171.

176. FED. R. EVID. 803(18) (“If admitted, the statement may be read into evidence but not received as an exhibit.”); *Bair v. Am. Motors Corp.*, 473 F.2d 740, 745 (3d Cir. 1973).

177. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶36, n.4, 12 N.E.3d 530 (discussing the possibility of getting out a medical opinion on direct examination and the importance of the cross-examination of that expert).

178. *See Alton v. Kitt*, 431 N.E.2d 417, 425 (Ill. App. Ct. 1982) (stating that a PDR is a trustworthy text, “we believe a vigorous cross-examination would cure any objection to a medical expert’s reference to it when testifying”).

179. *Downey v. Dunnington*, 895 N.E.2d 271, 295 (Ill. App. Ct. 2008).

180. KAYE, *supra* note 171, §5.5 (2014). *See also* *Wilson v. Knight*, 26 Kan. App. 2d 226, 229 (1999) (discussing the discretionary role of a judge in admitting learned treatises and protecting jury from unnecessary confusion in both the Federal Rule of Evidence and the Kansas Rule of Evidence).

181. WEISSENBERGER & DUANE, *supra* note 35, at 667.

Opponents further argued that live testimony of experts would be a better means to resolve technical issues.<sup>182</sup> There is, however, no evidence to support the argument that a testifying expert has a superior depth of knowledge to that of a published author on the same topic.<sup>183</sup> In addition, the knowledge possessed by a testifying expert witness may be just as outdated as the information contained in a learned treatise.<sup>184</sup> Just as a testifying expert must be qualified, the author of a learned treatise must be recognized as reliable prior to any use of the publication.<sup>185</sup> Moreover, any “deficiencies” in the contents of a learned treatise can be thoroughly illuminated and explained by the testifying expert.<sup>186</sup>

Another argument that is being advanced against the adoption of FRE 803(18) is that a publication may become obsolete because art, history, and science change at such a rapid pace.<sup>187</sup> But that can also be said of an expert who can easily be “just as outdated as a publication,”<sup>188</sup> and the adversarial process of cross-examination safeguards against the introduction of obsolete materials.<sup>189</sup> On cross-examination, the expert could be questioned in-depth about the extent of the current use of the publication, allowing for the disclosure that the work was obsolete or outdated.<sup>190</sup> Moreover, to ensure and to retain the respect of colleagues in the respective professions, authors of learned treatises have the incentive to be truthful and accurate in their writing.<sup>191</sup> Additionally safeguarding against out-of-date publications is the reality that the publisher of such publication arguably lacks the “motive to misrepresent,” since the publication will be closely scrutinized by professionals in that particular field, and “its reputation [will] depend[] upon the correctness of the material published.”<sup>192</sup>

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182. FED. R. EVID. 803 advisory committee’s note; *In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761, 765 (N.D. Ohio 2008).

183. KAYE, *supra* note 171, § 5.4.2.

Just as the live expert could not discuss these reports as the basis for a causal inference, in a jurisdiction that screens out dubious scientific evidence, the writings cannot be introduced for this purpose. Consistent with this analysis, no court has held that learned treatises are exempt from *Daubert* or *Frye* scrutiny.

*Id.* (citing *Shelton v. Consumer Prods. Safety Comm’n*, 277 F.3d 998 (8th Cir. 2002)).

184. *Id.* See also *Bowers v. Garfield*, 382 F. Supp. 503, 507 (E.D. Pa. 1974), *aff’d*, 503 F.2d 1398 (3d Cir. 1974).

185. *Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1184 (7th Cir. 1994).

186. FED. R. EVID. 803 advisory committee’s note.

187. *Bowers v. Garfield*, 382 F. Supp. 503, 507 (E.D. Pa. 1974), *aff’d*, 503 F.2d 1398 (3d Cir. 1974).

188. WEISSENBARGER & DUANE, *supra* note 35, at 668.

189. *Id.*

190. *United States v. Mangan*, 575 F.2d 32, 48 (2d Cir. 1978).

191. *Schneider v. Revici*, 817 F.2d 987, 991 (2d Cir. 1987); Robert F. Magill, Jr., *Issues Under Federal Rule of Evidence 803(18): The “Learned Treatise” Exception to the Hearsay Rule*, 9 ST. JOHN’S J. LEGAL COMMENT. 49, 59 (1993).

192. See *Downey v. Dunnington*, 895 N.E.2d 271, 295 (Ill. App. Ct. 2008). The court said that “the hearsay objection must be regarded as unimpressive” because “a high standard of accuracy” is

Lastly, some argue that the adoption of the learned treatise exception would lead to the rise of purchased publications specifically designed for litigation.<sup>193</sup> As in the case of exposing the possible bias of an expert witness, the bias of a learned treatise could be exposed in the process of cross-examination. Moreover, a learned treatise would be subjected to public scrutiny and peer review in the expert author's field before it is presented as evidence in litigation.<sup>194</sup> Ultimately, a publication which is prepared for litigation would not be deemed learned or authoritative and therefore it would not be admitted in evidence.<sup>195</sup>

Codification of an Illinois equivalent to FRE 803(18) would bring Illinois in line with numerous other states that have adopted the rule, and would more accurately reflect the current needs of litigation practice. States that have adopted FRE 803(18) or similar rules that allow an expert witness to divulge relevant statements from a learned treatise on direct examination include the following: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.<sup>196</sup> Additionally, several other states allow the introduction of learned treatises as exhibits: Colorado, Connecticut, Idaho, Louisiana, and New Hampshire.<sup>197</sup> Only a few states still limit the use of learned treatises to cross-examination and impeachment: Florida, Michigan, Ohio, Oregon, and Tennessee,<sup>198</sup> while Maine and Massachusetts took out the reference to direct examinations.<sup>199</sup> The adoption of a learned treatise exception to the hearsay rule would allow Illinois to join the majority of the nation and provide consistent guidance to Illinois practitioners and judges.

## V. CONCLUSION

Illinois needs a clear and consistent rule regarding the admissibility and use of learned treatises. The arguments opposing the adoption of a

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engaged by factors mentioned in the FRE 803(18) Notes of Advisory Committee on Proposed Rules. *Id.*

193. SALTZBURG, MARTIN & CAPRA, *supra* note 174, at 803–82; *See also* SPECIAL SUPREME COURT COMM. ON ILLINOIS EVIDENCE PUBLIC HEARINGS, ARCHIVES, §§ 13:23–14:9 (May 20, 2010).

194. *United States v. Martinez*, 588 F.3d 301, 312 (6th Cir. 2009); *see also* FED. R. EVID. 803(18) advisory committee's notes; 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1692 (3d ed. 1940)

195. SALTZBURG, MARTIN & CAPRA, *supra* note 174.

196. WALTER R. LANCASTER & DAMIAN D. CAPOZZOLA, EXPERT WITNESSES IN CIVIL TRIALS § 10:10 (Oct. 2012).

197. *Id.*

198. *Id.*

199. *Id.*

learned treatise hearsay exception are unsubstantiated and unpersuasive. To allow for the full realization of IRE 703 and IRE 705, Illinois should adopt the federal learned treatise hearsay exception. It will provide clarity and consistency to the admissibility of expert testimony, which is badly needed in Illinois.