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COMMENTARY

Learned Treatises in Illinois: Are We Witnessing the Birth of a New Hearsay Exception?

ROBERT G. SPECTOR*

[Exceptions to the hearsay rule] resemble an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists.¹

It is a rare occurrence when courts add a new "patch" to the "crazy quilt" of hearsay exceptions. Therefore, it is somewhat startling to discover that Illinois is on the brink of creating an exception for learned treatises. This commentary traces the development of this potential exception. In so doing, it will attempt to understand how a common law court traverses a twisted path to arrive at an unforeseen destination; a destination so unanticipated that, in this case, the Illinois courts seem relatively unaware of where they have arrived.

LEARNED TREATISES: FROM *Ellis* THROUGH *Darling*

The use of books, pamphlets, studies and other written materials in the trial process is hardly a new phenomena. As early as 1878 the Illinois Supreme Court had approved the use of textbooks for cross-examining an expert witness. In *Connecticut Mutual Life Insurance Co. v. Ellis*,² an expert testified that the cause of the decedent's death was excessive use of alcohol, a fact which, if true, would excuse payment under the life insurance policy. The witness stated that he had read texts on *delerium tremens*, but did not specify what those texts were. On cross-examination, plaintiff's attorney read passages from standard texts in the field and asked the expert whether he agreed with those passages. The court discerned little difference whether the questions asked of the expert were read out of a textbook or framed independently by counsel; there was no better way to test fully the expert's knowledge.³ The thrust of the opinion approves the use of texts and treatises to probe the expert

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1. Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937).

2. 89 Ill. 516 (1878).

3. *Id.* at 519.

witness's knowledge. However, there is no intimation in the opinion that these books could be used substantively to prove the facts contained in them.

This interpretation of *Ellis* was reaffirmed in later cases.⁴ However, its scope as an impeachment decision was also restricted. The developing Illinois position was that an expert witness could be cross-examined from learned treatises only to the extent that the expert had relied on those treatises in arriving at his opinion in the particular case.⁵ The sole purpose of cross-examining an expert witness in Illinois has always been to impeach. Hence, any attempts to introduce a treatise substantively have been rebuffed.⁶ This stance of the Illinois courts was criticized by both commentators⁷ and the bar.⁸

In *Darling v. Charleston Community Memorial Hospital*, the Supreme Court of Illinois reacted to this criticism.⁹ The rule that an expert witness can be questioned only about texts upon which he expressly relies was set aside:

[The rule] is supported by the considerations that support the hearsay rule, but the inapplicability of those considerations to scientific works has been convincingly demonstrated¹⁰

4. *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340 (1883); *City of Bloomington v. Schrock*, 110 Ill. 219 (1884).

5. *City of Bloomington v. Schrock*, 110 Ill. 219 (1884). In the early part of this century there was considerable controversy over the method by which a cross-examiner determined the expert's reliance. If the expert testified on direct examination that he used a certain treatise, then cross-examination could be based on that treatise. Otherwise, the cross-examiner would ask the expert if he relied on a specific treatise. If the witness answered yes, the cross-examiner would ask questions based on the treatise. This procedure received apparent approval in *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, 81 N.E. 816 (1907). However, a number of appellate courts later held that the name of a specific book could not be mentioned by the cross-examiner. All the cross-examiner could do was to ask the expert if he relied on any treatises and, if so, which one. If the witness answered yes and specified the treatise, then cross-examination could proceed on the basis of the treatise. If the witness answered in the negative, the attorney had to take his answer. See, e.g., *Neiner v. Chicago City Ry. Co.*, 181 Ill. App. 449 (1st Dist. 1913). The supreme court eventually approved this latter position. *Ullrich v. Chicago City Ry. Co.*, 265 Ill. 338, 106 N.E. 828 (1914).

6. See, e.g., *Browdie v. City of Lewistown*, 164 Ill. App. 335 (3rd Dist. 1911); *Shaw v. Chicago R.I. & Pac. Ry. Co.*, 173 Ill. App. 107 (1st Dist. 1912).

7. The Illinois stance reflected the attitude of most state judiciaries toward the use of learned treatises. While most criticism was directed against the restrictive use of treatises in the impeachment process, some commentators vehemently argued for its substantive admissibility. See, e.g., 6 J. WIGMORE, EVIDENCE §1690-92 (Chadborn rev. 1976) [hereinafter cited WIGMORE]. *Reilly v. Pinkus*, 338 U.S. 269 (1949), held that for federal courts, a cross-examiner could use any treatise that was authoritative, whether or not relied on by the expert.

8. The Illinois Bar Association criticized this line of cases by pointing out that the "cagey" or "coached" witness could testify that his opinion was based on his own experience and thus preclude the use of any text on cross-examination. Illinois State Bar Association, Section on Civil Practice and Procedure, 7 Trial Briefs 1-3 (Nov. 1964).

9. 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

10. *Id.* at 335, 211 N.E.2d at 259.

Preventing cross-examination upon the entire field of the witness's expertise only served to protect the ignorant "expert." Therefore, the court further stated that

expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.¹¹

Confusion concerning the appropriate role of learned treatises stems from these two quotations. Although the *Darling* court recognized that the hearsay rule should be inapplicable to treatises, it still did not hold the treatises to be substantively admissible. Yet the court did not expressly limit the use of the texts solely for impeachment purposes. Nevertheless, the apparent limitation of treatises to cross-examination has lead all commentators to conclude that *Darling* was exclusively concerned with the impeachment process.¹²

LEARNED TREATISES: FROM *Darling* To *Roddy*

The cases following *Darling* limited the use of learned treatises to the cross-examination stage of the expert's testimony, thereby reinforcing the view that treatises were not substantively admissible.¹³ However, in *People v. Gillespie*, the second district intimated an alteration in this view.¹⁴ In this entirely circumstantial case, the prosecution, attempting to prove that the defendant robbed a store, introduced blood samples taken from the scene and compared these with blood taken from the defendant. The blood proved to be type A with a positive rheumatoid arthritis factor. The state's expert testified that only 2.7 percent of the black population had blood of

11. *Id.* at 336, 211 N.E.2d at 259. The *Darling* decision was anticipated in *Deeke v. Steffke Freight Co.*, 50 Ill. App. 2d 1, 199 N.E.2d 442 (2nd Dist. 1964). In this wrongful death case, the plaintiff's expert testified as to braking distances, within which defendant's truck should have been able to stop. On cross-examination, the expert was presented with a chart containing breaking distances and was asked whether he agreed with the dimensions set therein. The expert had not relied upon the chart in direct examination. The trial court permitted the question and the appellate court affirmed. It held that since the witness acknowledged the chart to be accurate, no false impression was created.

12. See, e.g., C. McCORMICK, EVIDENCE §321, at 743 (2d ed. 1972) [hereinafter cited as McCORMICK]; FED. R. EVID. 803 (18) (Advisory Committee Comment).

13. See, e.g., *In re Urbasek*, 76 Ill. App. 2d 375, 222 N.E.2d 233 (1st Dist. 1966); *Taylor v. Carborundum Co.*, 107 Ill. App. 2d 12, 246 N.E.2d 898 (1st Dist. 1965). In *Carborundum*, the court was concerned with whether the treatises were within the expert's field. A chemist had testified that variations in the density of a wheel caused it to shatter. The court refused to allow him to be cross-examined about a "Safety Code" for abrasive wheels, since he admitted to being unfamiliar with the grinding wheel manufacturing industry.

14. 24 Ill. App. 3d 567, 321 N.E.2d 398 (2d Dist. 1974).

that classification. He based his opinion, in part, on blood frequency statistics published by various pharmaceutical companies. The defendant objected to the testimony as based on hearsay and argued it was inadmissible.¹⁵ The trial court overruled the objection and the defendant was subsequently convicted.

This conviction was affirmed by the appellate court, which held that the expert's opinion was properly admitted. The court analogized the pharmaceutical material to mortality tables which are generally assumed to be admissible.¹⁶ However, this data was published in journals which normally would have been inadmissible themselves. Thus, the court went further than prior Illinois courts in admitting the evidence. The court held that the reliability of the evidence was shown by the publisher's lack of motive to fabricate, the potential scrutiny of the material by others in the field, and the dependence of the publisher's reputation on the validity of the materials.¹⁷

The next step occurred when the fifth district in *People v. Behnke*¹⁸ read *Darling* as establishing a modified hearsay exception. In *Behnke*, the defendant was charged with possession of lysergic acid diethylamide (L.S.D.). His expert testified that the tablets taken from the defendant did not contain L.S.D. The government attempted to cross-examine the expert on the basis of a federal government manual for training forensic chemists. The witness did not recognize the authoritativeness of the manual and the state tried to authenticate it through its own expert. The appellate court reversed the defendant's conviction, holding that the manual's authoritativeness had not been established.¹⁹ However, in dicta, the court took the extraordinary position of representing *Darling* as a partial recognition of the learned treatise exception to the hearsay rule.²⁰ Moreover, the court apparently did not realize that it was the

15. Formerly, in Illinois an expert opinion had to be based on admitted or, at least, admissible evidence. That is no longer the Illinois position. See *People v. Ward*, 61 Ill. 2d 559, 338 N.E.2d 171 (1975); *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 356 N.E.2d 779 (1976). The *Ward* case and the basis of expert opinion is discussed in Spector, *People v. Ward: Toward a Reconstruction of Expert Testimony in Illinois*, 26 DEPAUL L. REV. 284 (1977) [hereinafter cited as Spector].

16. *City of Joliet v. Blower*, 155 Ill. 414, 40 N.E. 619 (1885); *Henderson v. Harness*, 184 Ill. 520, 56 N.E. 786 (1900); *Sherman v. Springfield*, 111 Ill. App. 2d 391, 250 N.E.2d 537 (1969). While this exception to the hearsay rule has never been actually rationalized, it exists in most jurisdictions. Wigmore argued that it was merely a form of a learned treatise. WIGMORE, *supra* note 7, at §1698.

17. These are the considerations usually specified in justifying learned treatises as an exception to the hearsay rule. See text accompanying notes 28 through 31 *infra*.

18. 41 Ill. App. 3d 276, 353 N.E.2d 684 (5th Dist. 1976).

19. This holding seems dubious. See text accompanying notes 38 through 39 *infra*.

20. 41 Ill. App. 3d at 280, 353 N.E.2d at 688.

first Illinois court to suggest that texts and treatises could be used for substantive proof.²¹ While the issue in *Behnke* arose on cross-examination, there was no indication in the opinion that recognizing a learned treatise exception would confine the use of such material for impeachment purposes.

The step that was implicit in *Behnke* was rendered explicit in *Roddy v. Chicago & N.W. R.R.*²² In *Roddy*, the defendant attempted to introduce in its case-in-chief a bulletin from the National Safety Council relating to the stopping distances of standard size automobiles. The defendant was allowed to read from the bulletin over plaintiff's objection that it was hearsay. The appellate court agreed with plaintiff's characterization of the bulletin as hearsay, but continued the inquiry to determine whether it qualified as a learned treatise. The court held that the bulletin was not authoritative because there was no indication as to the identity of the author or whether the author was an expert in the subject area. Thus, *Roddy* assumed a learned treatises exception to the hearsay rule and confined its discussion to whether the bulletin qualified for that exception.

However, there is still no Illinois case expressly holding that a treatise can be substantively admissible. *Behnke* suggested such an exception, but that case involved the use of a treatise on cross-examination. *Roddy*, by contrast, involved the use of a treatise on direct examination. The court implied that had the defendant laid a proper foundation the bulletin would have been admissible. It is inevitable that trial lawyers will, in the future, lay the proper foundation and cite *Behnke* and *Roddy* as authority for admitting the text or treatise.

Thus, by a slow process of common law accretion, Illinois may have recognized a new hearsay exception. However, before the final step on this path is taken, it is appropriate to discuss whether the courts are traveling the proper road. Creating new exceptions to the hearsay rule involves balancing various aspects of the trial process, and should not be performed by one-line assumptions in appellate court opinions. Since rationale behind the learned treatise exception is not obvious on its face, nor is there complete agreement among courts and commentators as to its scope, the remainder of this commentary will indicate why the path is a reasonable one and will also

21. The dissenting judge did not quarrel with the majority's characterization of learned treatises as an exception to the hearsay rule. His dissent focused, instead, on the authoritativeness of the manual. 41 Ill. App. 3d at 284, 353 N.E. 2d at 690.

22. 48 Ill. App. 3d 548, 363 N.E.2d 65 (1st Dist. 1977).

express some thoughts as to the character of the ultimate destination.

RATIONALE FOR LEARNED TREATISES AS AN EXCEPTION TO THE HEARSAY RULE

A modern approach to the law of evidence clearly indicates that Illinois courts are proceeding correctly. Commentators and codifiers have long argued for the adoption of the learned treatise exception.²³ Texts and treatises meet the test of reliability to qualify as an exception to the hearsay rule, and their substantive use would greatly improve the quality of litigation in Illinois courts.

It is undisputed that treatises, when offered for the truth of their contents, are hearsay. It is also recognized that hearsay is excluded because it is subject to four dangers: (1) the ambiguity of the declarant's language; (2) the declarant's sincerity; (3) the declarant's perception; (4) the declarant's memory.²⁴ Recently, Professor Tribe diagrammed these dangers as a triangle.²⁵ The dangers of ambiguity of language and sincerity form the left side of the triangle and represent the dangers associated with the inference of the declarant's belief from the declarant's statement. The dangers of perception and memory are on the right side of the triangle and represent the problems associated with the inference of the existence of the event from the belief of the declarant.²⁶ While these dangers are present in all testimony, courts usually assume that they can be alleviated by cross-examination.

The present catalogue of exceptions allows a vast amount of hearsay evidence to be admitted.²⁷ Admissible hearsay is not free from all the dangers mentioned above. If all out-of-court statements were required to be free from hearsay dangers, few such statements would qualify. Professor Tribe points out that most hearsay exceptions minimize the dangers on at least one side of the triangle.²⁸ Thus, if

23. See WIGMORE, *supra* note 7; Note, *Learned Treatises*, 46 IOWA L. REV. 463 (1961); Note, *Medical Treatises To Be Admitted as Direct Evidence in Wisconsin—Lewandowski v. Preferred Risk Mutual Ins. Co.*, 66 MICH. L. REV. 183 (1967); MODEL CODE OF EVIDENCE 529; UNIFORM RULES OF EVIDENCE 63(31).

24. See, e.g., Morgan, *Hearsay Dangers And The Application Of The Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

25. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974) [hereinafter cited as Tribe].

26. *Id.* at 959.

27. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961); Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271 (1952).

28. Tribe, *supra* note 25, at 966. Tribe notes that hearsay exceptions actually fall into three classes: first, those statements which have an adequate procedural substitute for cross-examination, i.e., former testimony; second, those statements where it is thought that a party

problems of ambiguity and sincerity are few, or if problems of perception and memory are few, the statement should be admissible as an exception to the hearsay rule.

Commentators have long agreed that treatises present little, if any, problem of ambiguity and sincerity.²⁹ The text or treatise writer normally expresses his thoughts on paper expecting that others will read them. Since a misunderstood book is practically useless, a writer is motivated to present his thoughts as clearly and concisely as possible. A book is subject to criticism by the author's colleagues and thus runs a gamut of professional "cross examination." In many fields the text is relied upon and used by other members of the profession in arriving at their own views in particular areas. These considerations combine to insure that the danger of ambiguity of language is minimal.

The hearsay danger of sincerity also appears to be satisfied. The text writer is not preparing the work for a particular lawsuit. Hence there is no legally-related bias or self-interest underlying the treatise that compels exclusion. While it is possible for the writer to be a member of a particular school of thought, that problem is no more prevalent than when an expert testifies in person. Thus, with problems of sincerity and ambiguity satisfied, a treatise is as reliable as other exceptions that rely on the minimization of those problems.³⁰

has no right to cross-examine, *i.e.*, admissions of a party opponent; third, those statements which seem to satisfy one leg of the triangle. Thus, a declaration against interest can be thought of as a strong left leg exception because the dangers of ambiguity and sincerity are minimal. A declaration of bodily condition is a strong right leg exception because the dangers of perception and memory are minimized.

29. WIGMORE, *supra* note 7; McCORMICK, *supra* note 12, §321 at 743-45; 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* §803 (18) [01] at 803-214 (1976); Tribe, *supra* note 25, at 966-67; Comment, *Learned Treatises As Direct Evidence: The Alabama Experience*, 1967 DUKE L.J. 1169; *see also* the authorities cited in note 23 *supra*.

Judicial recognition of the exception has been slow. Only Wisconsin and Alabama have judicially recognized learned treatises as an exception to the hearsay rule. *Lewandowski v. Preferred Risk Mutual Insurance Co.*, 33 Wis. 2d 69, 146 N.W.2d 505 (1966); *City of Dolthan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Stoudenmier v. Williamson*, 29 Ala. 558 (1847). A few states have recognized the exception by court rule. *See, e.g.*, KAN. STAT. ANN., §60-460 (cc) (1964). Approximately a dozen states have statutes that could be construed to admit some texts and treatises. *See Note, Medical Treatises To Be Admitted as Direct Evidence in Wisconsin—Lewandowski v. Preferred Risk Mutual Ins. Co.*, 66 MICH. L. REV. 183, 184 n. 4 (1967). The Federal Rules of Evidence contain a learned treatise exception in Rule 803 (18); approximately ten states have followed the federal rules in their own evidence codifications. *Federal Rules of Evidence News* 77-41 (June, 1977).

30. Indeed, it may be more reliable than some exceptions, *i.e.*, excited utterances. The learned treatise exception is sometimes justified on the need for the evidence. For example, it has been suggested that the treatise could serve as a substitute expert in medical malpractice cases, where it is often extremely difficult for plaintiffs to obtain reputable medical experts. The recent explosion of large recoverys and statutory "malpractice statutes" throughout the country suggest that this is no longer the case.

The objections that are normally made to learned treatises are: (1) the writer is not available to be cross-examined; (2) concepts tend to change rapidly, and thus books become outdated; (3) material from a book can be presented out of context; (4) the jury will be confused by the technical language of the book; (5) the trial would become a "battle of books"; and (6) the impact of the books on the jury would be overwhelming.³¹

Only the first of these objections is pertinent to the hearsay aspect of learned treatises. However, the minimization of the language and sincerity dangers easily compensates for this lack of cross-examination. The other objections relate more to relevancy than to hearsay and do not justify a blanket rule of exclusion against learned treatises. They constitute problems entrusted to the discretion of the trial judge. For example, if the facts and concepts found in the treatise are dated, it may lack probative value and could be excluded. If one party quotes the treatise out of context the remainder of the treatise could be introduced under the "doctrine of completeness."³² The dangers of the jury being confused or unduly swayed by a treatise are similar to the problems of confusion and prejudice involved in admitting all circumstantial evidence. The trial judge has discretion to balance these factors against the probative value of the text in order to determine its admissibility. As to the "battle of the books," it is not really different from the omnipresent "battle of the experts."

The substantive admission of learned treatises would greatly improve the quality of litigation in Illinois. Presently, texts can be used in a trial for two different purposes. First, *Darling* and its progeny authorize their use to impeach an expert. Second, recent supreme court decisions have held that an expert may use out-of-court information as part of the basis of his opinion.³³ This information which is used by the expert need not be admissible at trial, so long as it is the type of information upon which experts in that field would normally rely.³⁴ It also appears that the expert may relate the out-of-

31. The above objections are taken from Report of the New Jersey Supreme Court, Comment on Rule 63 (31) at 212 (1963).

32. See McCORMICK, *supra* note 12, §56 at 131.

33. *People v. Ward*, 61 Ill. 2d 559, 338 N.E.2d 171 (1975); *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 356 N.E.2d 779 (1976).

34. The Illinois Supreme Court may have adopted Federal Rule of Evidence 703. That rule reads as follows:

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

court statements to the fact finder for the purpose of explaining how he arrived at his opinion.³⁵

The result is that the information contained in a text or treatise is placed before the jury with a somewhat complicated instruction. The jury is told that it can use the text for evaluating the method by which the expert arrived at his opinion, and for assessing the credibility of the expert, but it may not find as facts those statements contained in the treatise. This exercise in mental gymnastics may well be beyond the jury's competence. A hearsay exception for learned treatises would complement the other two reasons for admissibility,³⁶ by removing the confusion and allowing the jury to use the treatises substantively, as it may, in its confusion, be doing now.

SCOPE OF THE EXCEPTION

Illinois should adopt a learned treatise exception based on the Uniform Rules of Evidence³⁷ rather than the Federal Rules of Evidence.³⁸ The primary difference between the two models concerns the role of the expert. Under the Uniform Rules the expert must only authenticate the authoritativeness of the writing in question. He need not explain the writing to the fact-finder. Under the Federal Rules, the book is seen as an adjunct to the expert. The text or treatise is not admissible unless it is relied on by the expert in direct examination, or is used in his cross-examination. The presence of the expert is always necessary to explain, qualify, or otherwise interpret the text for the fact-finder. The reason for this limitation, according to the Advisory Committee, is to avoid the danger of the jury misunderstanding and misapplying the text.³⁹

Rule 703 is discussed in Spector, *supra* note 15.

35. This seems to have occurred in *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 356 N.E.2d 779 (1976).

36. See, e.g., K. REDDEN & S. SALTZBERG, FEDERAL RULES OF EVIDENCE MANUAL 279-80 (1975), suggesting that Rule 703 (basis) must be read with Rule 803 (18) (learned treatises).

37. Uniform Rule 63 (31) (1953):

A published treatise, periodical, or pamphlet on a subject of history, science, or art 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.

38. Federal Rule 803(18):

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

39. FED. R. EVID. 803(18) (Advisory Committee Comment).

The Federal Rules approach is too restrictive. Texts and treatises are extremely varied. Some are unduly complicated and cannot be understood without extensive training in the author's discipline. Others, however, are manuals that can be adequately understood by the layman. The trial judge should have considerable discretion in determining which are admissible by themselves and which require explanation by an expert in order to be intelligently understood by the jury.

A further problem is determining what treatises are "learned" within the scope of the exception. *People v. Behnke*,⁴⁰ for instance, took a very restrictive approach toward this question. The defendant, in appealing his conviction for possessing L.S.D., contended that his expert had been improperly cross-examined on the basis of a non-authoritative treatise. The government had examined the defendant's expert on the basis of a Federal Bureau of Narcotics and Dangerous Drugs manual entitled "Basic Training Program for Forensic Drug Chemists." The court found that the manual was not authoritative for several reasons: there was no independent proof of who the authors were; the manual was written with a view toward litigation; and there was no independent proof of the authoritativeness of the manual.

This view is too restraining. Independent proof need not be introduced concerning the expertise of the authors or the authoritativeness of the text. All that should be required is that the expert testify that the authors are experts and that the text is reliable. This may be accomplished by the expert who is basing an opinion on the text. In *Behnke*, the court refused to allow the government chemist to authenticate the text because it thought he was biased in favor of the state. Such reasoning would exclude all expert testimony. In this case, the bias of the witness went to credibility, not admissibility.

The court also incorrectly stated that the manual was prepared for purposes of litigation. The dissenting judge correctly points out that the scientific chemical tests discussed in the manual exist independent of any prosecution. While a book prepared specifically for admission at trial might be excluded as untrustworthy, that was certainly not the case in *Behnke*. Thus the court took the anomalous position of allowing the state's chemist to state an opinion based on a manual that it would not allow to be used to cross-examine the opposing expert because it was not authoritative.

Nevertheless, some standard must be applied to determine if the

40. 41 Ill. App. 3d 276, 353 N.E.2d 684 (5th Dist. 1976).

text is authoritative. On this point Illinois should adopt the Federal Rules approach. Under the Federal Rules there is a clear nexus between the basis of expert opinion and learned treatises.⁴¹ The result is that if the text is of a type that an expert could use in arriving at an opinion, it is admissible as a learned treatise. Thus, the appropriate standard is whether experts in the field rely on the text in framing opinions or drawing inferences.⁴² This foundation could be laid either by the expert who is testifying, or by any expert who could be qualified to so testify. This approach has the distinct advantage of avoiding any possibility that the jury could become confused as to the reason why a text or treatise is admitted. Once a text is admitted, it could be used as basis, impeachment, and as substantive evidence.

CONCLUSION

Illinois is on the verge of joining those jurisdictions that recognize learned treatises as an exception to the hearsay rule. Learned treatises have a reliability equivalent to most other hearsay exceptions. Their substantive use would eliminate the confusing and anomalous method that these texts presently serve in the trial process. This is another step in the reconstruction of expert testimony in Illinois.⁴³

41. See note 38 *supra*.

42. Of course, in exceptional cases, the judge could take judicial notice of the authoritativeness of the text.

43. See Spector, *supra* note 15.

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