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AT ISSUE

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How to Use Learned Treatises in Pennsylvania

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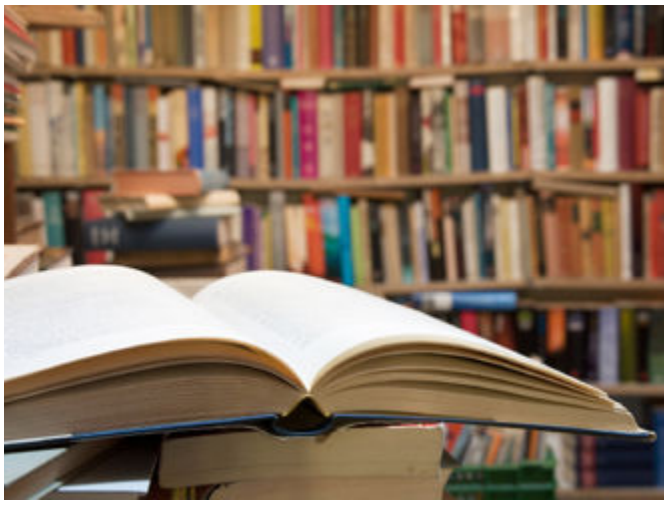
A "learned treatise" is simply a published work, such as a periodical, scientific article, or medical textbook, that is considered authoritative in a given field. Learned treatises can be a great aide in the courtroom for supporting your experts' opinions, impeaching opposing counsel's experts, discrediting theories of liability or defense or shielding expert testimony from motions *in limine* and appeal. Nevertheless, law students and litigators alike struggle with the dreaded "learned-treatise doctrine" and its confusing relationship with the hearsay rules of evidence.

Statements from learned treatises are generally recognized as hearsay because they are often introduced to prove the truth of the matter asserted. For example, Gray's Anatomy is an accepted authority on medicine and could be used to establish a doctor's breach of the necessary standard of care while treating a patient. Because of the inherent reliability of treatises, many states permit authoritative texts to be read into evidence as an exception to the rule against hearsay. See, e.g., N.J.R.E. 803(18). Pennsylvania, however, has *not* adopted this exception, largely due to legislators' concerns about placing too much emphasis on literature or confusing a jury of laypeople with excessive scientific or technical information. As a result, the learned treatise doctrine is governed by common law.

In this commonwealth, the admissibility of expert testimony is held to the *Frye* standard, i.e., whether "the expert's methodology is generally accepted in the relevant field." See Pa.R.E. 702. An expert may utilize her education, training, and experience to analyze the facts of a case and form opinions as to whether the defendants deviated from the applicable standard of care, provided her methods are "acceptable."

A learned treatise can help establish the general acceptance of an expert's methodology, but beware—there is a fine line between identifying a learned treatise (admissible non-hearsay) and offering it as substantive evidence (inadmissible hearsay). On direct examination, an expert may recognize literature as a basis of her opinion. For example:

> "*Gray's Anatomy* is consistent with my opinion that antibiotics should have been administered to the patient."



The above quote likely presents no issues in terms of admissibility. However, a litigator must be careful to not allow her expert to appear as if she is offering the literature to prove or disprove any theories or principles. To illustrate, your expert should avoid providing opinions such as:

> "This excerpt from *Gray's Anatomy* proves my opinion that Dr. Brown was negligent," or "I believe Dr. Brown should have administered antibiotics because *Gray's Anatomy* says so."

Klein v. Aronchick, 85 A.3d 487 (Pa. Super. 2014) demonstrates this delicate balance between identification and hearsay. The defendant in *Klein* prescribed an off-label use of a sodium phosphate drug, which allegedly caused permanent kidney disease. *Klein*, 85 A.3d at 489. On appeal, the Superior Court considered whether the trial court erred in allowing the defense to introduce medical literature. *Id.* at 490. Specifically, the defense expert relied on several studies while opining that the drug did not cause the plaintiff's injuries, testifying that "[the author of the studies] is probably the leader in the field in this area. He has found in his world search less than 40 patients who he thinks . . . have a problem taking large doses of sodium phosphate in preparation for their colonoscopy." *Id.* at 503. The court held that the expert offered the studies for their "direct substantive effect" and to "bolster

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and corroborate his own opinion" and that such a use of the studies was impermissible. *Id.* at 503-04.

Through *Klein*, litigators understand that treatises may only be used to clarify the foundation of an expert's opinion, but not as a substitute for, nor as corroboration with, expert testimony. Any attempt to introduce a treatise into evidence will be immediately suspect, therefore, on direct examination, an attorney should avoid asking her expert to read from the treatise or describe it in detail. Sticking to a brief line of questioning—such as "Is *Gray's Anatomy* compatible with your expert opinions?" or "Did you cite *Gray's Anatomy* in your expert report?"—is the safest bet.

On cross-examination, learned treatises can be used to impeach an expert. The expert need not have relied on the treatise when forming her opinions, but she must recognize its scholarly merit. See *Majdic v. Cincinnati Mach. Co.*, 537 A.2d 334, 339 (Pa. Super. 1988). Litigators should push the opposing expert to use "magic words" such as "recognized work," "standard," or "reliable authority." Once this foundation is established, counsel may cross-examine the expert with the treatise and call her credibility into question.

In light of this jumble of rules and practice tips, would it not be safest to avoid using learned treatises all together? Unfortunately, the plot further thickens with *Snizavich v. Rohm & Haas Co.*, 83 A.3d 191 (Pa. Super. 2013), a toxic exposure case in which the plaintiff suffered brain cancer as a result of chemical exposure in the workplace. Curiously, the defense sought to exclude the plaintiff's causation expert under *Frye* because he did not cite to any scientific authority (as opposed to seeking to preclude the expert for relying too heavily on a scientific authority). See *Snizavich*, 83 A.3d at 193. The *Snizavich* court held that "[w]hen an expert *fails to include [scientific] authority*, the trial court has no choice but to conclude that the expert opinion reflects nothing more than mere personal belief." *Id.* at 197 (emphasis added). The opinion suggested that, in certain scenarios, (1) an expert's testimony must depend on or cite scientific authority, (2) an expert must apply the cited authority to the facts at issue, and (3) the authority must support the expert's conclusions. See *id.* The court also noted that the plaintiff's causation expert cited to a report that directly contradicted his opinions and was inconclusive on causation. See *id.* at 197-98.

Fortunately, the *Snizavich* holding has a limited application. A wealth of medical malpractice case law indicates that an expert's education, training and experience as applied to the facts of a case can be enough to support her opinions. For example, in *Catlin v. Hamburg*, 56 A.3d 914 (Pa. Super. 2012), the court held that "an expert witness need not cite to medical literature ... to support his opinion," and that literature speaks to the weight of the testimony rather than its admissibility. *Catlin*, 56 A.3d at 920-21. In a more recent case, *Tillery v. CHOP,* 156 A.3d 1233 (Pa. Super.), appeal denied, 172 A.3d 592 (Pa. 2017), the court agreed to apply *Snizavich* but concluded that the plaintiff proved causation because her experts relied on the "wealth of facts drawn from Minor-Plaintiff's extensive medical records" in conjunction with the "application of their expertise." *Tillery,* 156 A.3d at 1242 n.2.

In sum, the learned-treatise doctrine may seem daunting—especially in a commonwealth without a hearsay exception—but there are a few takeaways that can help any litigator utilize published authorities to their advantage:

1. On direct, your expert can identify, without elaborating or bolstering, a learned treatise as a basis of her opinion.
2. On cross, an expert can be impeached with a treatise so long as she recognizes its scholarly merit.
3. Depending on the nature of your expert's testimony, failure to cite to a supportive treatise may open the door to a *Snizavich* attack by opposing counsel.
4. In an abundance of caution, your expert should be able to cite to a learned treatise which forms a basis for her opinions ***in addition to*** her education, training and experience as applied to the facts of the case.

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