

In a civil trial for professional malpractice, the plaintiff sought to show that the defendant, an engineer, had designed the plaintiff's flour mill with inadequate power. The plaintiff called an expert witness who based his testimony solely on his own professional experience but also asserted, when asked, that a certain book on milling systems was a reliable treatise in the field and consistent with his views.

On cross-examination, the defendant asked the witness whether he and the treatise were ever wrong. The witness answered, "Nobody's perfect." The defendant asked no further questions. The defendant later called his own expert witness and asked, "Do you accept the book on milling systems as reliable?" The witness said, "It once was, but it is now badly out of date." The plaintiff requested that the jury be allowed to examine the book and judge for itself the book's reliability.

Should the court allow the jury to examine the book?

- A. No, because the jury may consider only passages read to it by counsel or by a witness.
- B. No, because the plaintiff's expert did not rely on the treatise in his testimony but on his own experience.
- C. Yes, because an expert has testified that the treatise is reliable.
- D. Yes, because the jury is the judge of the weight and credibility to be accorded both written and oral evidence.

Explanation:

An out-of-court statement is hearsay when offered to prove the truth of the matter asserted therein. Such statements are generally inadmissible. However, statements in a **learned treatise**, periodical, or pamphlet are **excepted** from the **rule against hearsay** and are admissible for their truth when:

the statements are **called to the attention** of, or relied on by, an **expert witness** during examination *and*

the publication is **established** as a reasonably **reliable authority** by a **party's expert** or by judicial notice.

Expert testimony that a treatise is a reliable authority lays a foundation for admitting the statements therein. But those statements may only be **read into evidence**, so the treatise itself may not be offered as an exhibit.

Here, the plaintiff's expert witness asserted, when asked on direct examination, that the book on milling systems was a reliable treatise in the field. And though the expert did not rely on the book during his testimony, his assertion is sufficient to establish it as reliable and admissible under the learned treatise hearsay exception **(Choice B)**. But since the jury may only consider passages *read* to it by counsel or a witness, the court may not allow the jury to *examine* the book itself **(Choice C)**.

(Choice D) A jury assesses the weight and credibility of evidence only *after* it has been admitted. And here, the jury may not examine the book itself because it is inadmissible.

Educational objective:

Statements in a publication (eg, learned treatise) may be read into evidence if they are (1) called to the attention of, or relied on by, an expert witness during examination and (2) the publication is established as a reliable authority by any party's expert or by judicial notice. However, the publication itself may not be offered as an exhibit.

References

Fed. R. Evid. 803(18) (hearsay exception – statements in learned treatises).

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Statements in learned treatises hearsay exception
(FRE 803(18))
