IMPEACHMENT BY MEDICAL OR SCIENTIFIC LITERATURE: THE MAGIC AND ELUSIVE "AUTHORITATIVE " RULE
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In the seminal case of ***Egan v. Dry Dock, East Broadway and Battery Railroad Company***.,(1) the First Department permits the cross-examination of the defense expert by use of statements in two books on the subject of design, construction and operation of boilers which books the expert knew and admits were standard works on engineering subjects.

The Court explains:

> "...There is no doubt that the contents of scientific books cannot be read to a jury for the purpose of proving the facts or establishing the deductions stated in them. The reasons for this rule are so thoroughly stated in the text books that it is not here necessary to comment upon it. But the contents of the books which are referred to in this particular case did not come within that rule. Whenever a man holds himself out as an expert witness and undertakes to give his opinion upon any scientific matter, it is not only proper to examine him as to the grounds of his opinion, but his qualifications as an expert may be tested upon cross-examination in any way which will enable the jury, who are to pass upon the weight to be given to his testimony, to judge intelligently about it. **For that purpose it is perfectly proper to ask him whether or not the opinion he has expressed agrees with the opinion of other people who are conceded to be learned upon the same subject, because, if an expert witness admitted that the opinion which he expressed was contrary to the opinion which was held upon the same subject by other men who were acquainted with the same science, it might, unless the reasons which he gave for his opinion were satisfactory, tend strongly to detract from the weight which that opinion would otherwise receive."** (Emphasis added)

The Court further explains:

> "Therefore, it has been the custom, in this State at least, to call the attention of an expert witness, *upon cross-examination,* to books upon the subject, and ask whether or not authors whom

he admitted to be good authority had not expressed opinions different from that which was given by him upon the stand."

In the leading case of ***Hastings v. Chrysler Corp.***(2) the First Department states the rule as follows:

> "Although there is a conflict of authorities in other jurisdictions, the rule in this state, and it reflects the weight of authority generally, is that on cross-examination an expert may, for discrediting purposes, be confronted with a passage for a treatise or recognized authority which is at variance or in conflict with the opinion expressed by the witness on the stand. Wigmore indicates his disapproval of the practice but many authorities cited by him sustain its validity (6 Wigmore on Evidence [3d Ed.] Sec. 1700). In this state, as in many other jurisdictions, the practice has been upheld by well-reasoned judicial decisions.
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> The opinions expressed in treatises or recognized authority which are at variance with those given on the stand by the expert may not be received in evidence. (**527 *McEvoy v. Lommel*, 78 App.Div. 324, 327, 80 N.Y.S. 71,73); the reference to them has no bearing on their truth or validity; they are used only as tending to impeach the witness on the stand with respect to his knowledge or the subject on which he professes to be an expert. If the expert does not concede the authoritativeness of the literature attempted to be resorted to, it may not be used on cross-examination."

Further, this Court states:

> "Cross-examination for discrediting purposes along the lines mentioned is not, as respondents contend, limited to text-books or literature to which the witness (without objection) has referred on his direct examination. Of course, any misstatement of a witness may be developed on cross-examination. Nor is the practice confined to those cases only where the witness *295 testifies that he has read the book concerning which he is being questioned. Where an expert testifies that he has read the treatise, the scope of the examination may be broader; but that

does not affect the general application of the rule that treatises, which the witness concedes are authoritative in character, may be used to impeach the testimony given by him."

In ***Ithier v Solomon***, (3);

"The Supreme Court, Appellate Division, Second Department, held that questions whether doctor recognized any books, authorities or works as authoritative or standard in field of tuberculosis, what books doctor considered authoritative in field of tuberculosis, and what books doctor had studied in medical school or subsequent thereto dealing with tuberculosis were too broad, and did not require answer by doctor."

Further, the Court states:

"It is well settled that an expert may be questioned through the use of a scientific work or treatise. However, in order to lay a foundation for the use of such material, he must first admit to its authoritativeness (People v. Feldman, 299 N.Y. 153, 85 N.E.2d 913; Mark v. Colgate Univ., 53 A.D.2d 884, 385 N.Y.S.2d 621; Hastings v. Chrysler Corp., 273 App.Div. 292, 77 N.Y.S.2d 524; Richardson, Evidence (Prince 10th ed.), s 373). In the case at bar, appellant was never confronted with a specific work or treatise and asked whether he considered it authoritative. Rather, he was asked which books he considered authoritative. These question were altogether too broad."

In ***Bryant v. Bui*** (4):

"The Supreme Court, Appellate Division, Fourth Department held that: (1) physician was properly ordered to provide names of books he found authoritative"

Further, the Court states:

"With respect to question (a), defendant stated that there were "two, three or four" books that he found authoritative, and thus the court properly ordered him to provide the names of those books. Any material that may be used as evidence-in-chief or for rebuttal or impeachment is discoverable (*see*, CPLR 3101;

> *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 407 288 N.Y.S.2d 449, 235 N.E.2d 430). An expert may be cross-examined on a textbook only after the expert has accepted the textbook as authoritative (*Labate v. Plotkin*, 195 A.D.2d 444, 445, 600 N.Y.S.2d 144)."

Violation of this Rule by defense counsel led to a reversal by the Second Department in ***Labate v. Plotkin*** (5) in which the Court states:

> "However, during cross-examination the defense counsel improperly utilized hearsay statements from medical textbooks and articles which the plaintiff's experts had not accepted as authoritative. It is well settled that on cross-examination an expert witness may be confronted with a passage from a treatise or book which contradicts the opinion the expert witness previously expressed on the stand, only after the expert witness has accepted the treatise or book as authoritative (see *Mark v. Colgate Univ.*, 53 A.D.2d 884, 886). In light of the numerous instances in which the defense counsel utilized passages of books not accepted as authoritative, we find that the plaintiff was unduly prejudiced and is entitled to a new trial (*see, Mark v. Colgate Univ., supra.*, 53 AD2d at 886). **We note that although the defense counsel did not read directly from the books, his questions clearly indicated to the jury that the statements which he read off his notepad were taken from those texts."** (Emphasis added)

A physician is not allowed to foreclose full cross-examination on a treatise by the semantic trick of denying the work is authoritative after the physician relies on the published article on direct and later says "it [the article] is of value" and "I agree with a lot of what they [the authors] said." ***Spiegel v. Levy*** (6)

The Second Department in ***Lipschitz v. Stein*** (7) a malpractice case reversed a defense verdict and granted plaintiff a new trial stating the following errors:

> "..."...the defendant's infectious disease expert testified, over the plaintiffs' objection, that an injection of antibiotics immediately after surgery "would not have made any demonstrable difference." The defendant's counsel asked "Why is that, Doctor?" and the expert replied "because there are...essentially no properly done randomized or controlled comparison studies of the ethicacy [*sic*] of any of these preventative approaches in the literature." Although opinion in a publication which an expert deems authoritative maybe used to impeach an expert on cross-examination (*see People v. Feldman*, 299 NY 153, 168 [1949]; *Watkins v. Labiak,* 6 AD3d 426 [2004]; *Labate v. Plotkin*, 195 AD2d 444, 445 [1993]; *Mark v. Colgate Univ.,* 53 AD2d 884, 886 [1976]), the introduction of such testimony on direct examination constitutes impermissible hearsay (*see Kelly v. St. Luke's Hosp. Of Kansas City*, 826 SW2d 391, 396-397 [Mo App 1992]; *Niagara Vest v. Alloy Briquetting Corp.*, 244 AD2d 892, 893 [1997]). In any event, the expert testified on cross-examination that he did not consider any books or articles in the field of infectious diseases "authoritative.""

Further, the defense expert in ***Lipschitz***, supra. was wrongly permitted to testify over objection as to the results of a published "Endophthalmitis Vitrectomy Study" regarding the most common sign of endophthalmitis and as to the time of presentation of this infection after cataract surgery.

The Court states:

> "The EVS was not admitted into evidence and it reliability was not established. Accordingly, testimony with respect to the EVS should not have been admitted (*see Niagara Vest Alloy Briquetting Corp., supra* at 893)."

However, the Court of Appeals in ***Hinlicky v. Dreyfuss*** (8) holds that clinical practice guidelines containing algorithm published by medical association and used by Anesthesiologist to evaluate patient's preoperative need for cardiac evaluation were

admissible for defense as non-hearsay demonstrative aid. The court notes that plaintiff's attorney did not timely object to questions regarding the process the defense Anesthesiologist followed in using the "clinical guidelines" in deciding not to obtain a preoperative cardiology work-up. Plaintiff's attorney never requested a limiting instruction.

The court further comments:

> "*648 Defendants additionally maintain that the algorithm was properly admitted under the professional reliability exception to the hearsay rule, which enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession (*see e.g.*, Hambsch v. New York City Tr. Auth., 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195, 469 N.E.2d 516 [1984]; *see also* Prince, Richardson on Evidence § 7-311 [Farrell 11th ed.]). Because the trial court's proper basis for admitting the algorithm was demonstrative and plaintiff made no request for clarification or limiting instructions, we need not reach this issue. We note only that whether evidence may become admissible solely because of its use as a basis for expert testimony remains an open question in New York (*see* People v. Goldstein, 6 N.Y.3d 119, 126-127, 810 N.Y.S.2d 100, 843 N.E.2d 727 [2005] [concerning out-of-court *factual* statements]). While some jurisdictions allow otherwise inadmissible materials relied upon by an expert witness to reach the jury for nonhearsay purposes, we have acknowledged the need for limits on admitting**1292 the basis of an expert's opinion to avoid providing a "conduit for hearsay" (*id.* at 126, 810 N.Y.S.2d 100, 843 N.E.2d 727). Absent timely objection by plaintiff, however, we need not decide whether in this instance the trial court applied proper limits in allowing the algorithm to be viewed by the jury to evaluate the experts' opinions or for some other nonhearsay purpose."

In ***Lenzini v. Kessler*** (9), the First Department in upholding a defense verdict held that:

> "Although a scientific text is inadmissible as hearsay when

> offered for its truth or to establish a standard of care, it may be introduced to cross-examine an expert witness where it has been demonstrated that the work is the type of material commonly relied upon in the profession and has been deemed authoritative by such expert (*Hinlicky v Dreyfuss,* 6 NY3d 636 [2006]; *cf. Matter of Yazalin P.*, 256 AD2d 55 [1998]). In the subject medical malpractice trial, the court did not improvidently exercise its discretion in authorizing the use of certain material for impeachment purposes as against plaintiffs' expert witnesses. Plaintiffs' expert in radiology was, in that regard, questioned about a medical text he had brought to court, made notes thereon, and clearly deemed sufficiently authoritative notwithstanding that he may not have accepted everything contained in it. As for plaintiffs' expert in gynecology, he expressly recognized the reliability of the material about which he was cross-examined. Indeed, a physician may "not foreclose full cross-examination by the semantic trick of announcing that he did not find the work authoritative" where he has already relied upon the text and testified that "he agreed with much of it" (*Spiegel v. Levy,* 201 AD2d 378, 379 [1994], *lv denied* 83 NY2d 758 [1994])."

In ***Winiarski v. Harris*** (10), the Fourth Department follows the holdings of the Second Department in ***Labate,* supra.** and ***Lipschitz,* supra.**

Recently, in ***Halls v. Kiyici***, (11), the First Department upheld the defendant's testimony and admission of the clinical guidelines of the American Gastroenterological Association regarding the frequency of performing colonoscopies depending on cancer risk. However, the Court reversed the defendant's verdict holding that the patient was entitled to a limiting jury instruction with regard to this evidence.

The Court states as follows:

> "...The court's instruction as rendered failed to make clear to the jury that the Guidelines were simply recommendations regarding

treatment, and thus, that compliance with the Guidelines **425 did not, in and of itself, constitute good and accepted medical practice (*see Spensieri v. Lasky*, 94 N.Y.2d 231, 701 N.Y.S.2d 689, 723 N.E.2d 544 [1999]; *see also Sawyer v. Dreis & Krump Mfg. Co.*, 67 N.Y.2d 328, 337, 502 N.Y.S.2d 696, 493 N.E.2d 920 [1986]).

The trial court should have given the jury an instruction specifically stating that the Guidelines were not the same as standards of care and that the jury was to make its determination based on the particular circumstances of the case, not on the Guidelines alone. Introducing the Guidelines into evidence without the appropriate limiting instruction allowed the jury to infer that a physician need not exercise professional judgment with regard to individual patients, but could simply abide by the recommendations promulgated in the Guidelines."

In ***Halls*, supra,** the Court further states:

"Our decision comports with the Court of Appeals' decision in *Hinlicky v. Dreyfuss* (6 N.Y.3d 636, 815 N.Y.S.2d 908, 848 N.E.2d 1285 [2006]). In *Hinlicky*, the defendant-anesthesiologist in a medical malpractice case testified that he followed an algorithm set forth in certain clinical guidelines, and during his testimony, referred to the algorithm (*id.* at 642, 815 N.Y.S.2d 908, 848 N.E.2d 1285). The plaintiff objected to the testimony on the grounds that the algorithm was hearsay (*id.* at 642-643, 815 N.Y.S2d 908, 848 N.E.2d 1285). The trial court found that the algorithm was admissible as non-*505 hearsay demonstrative evidence of the steps that the defendant had followed in treating his patient *(id.* at 646-647, 815 N.Y.S.2d 908, 848 N.E.2d 1285) (quotations omitted). What is more, the plaintiff in *Hinlicky* never requested any limiting instruction."

Various dictionaries define the word "**Authoritative**" as:

1. Able to be trusted as being accurate or true; reliable;

2. Synonyms; dependable, trustworthy, sound, authentic, valid

The Federal Rule of Evidence: "Rule 803. Exceptions to the Rule Against

Hearsay- -Regardless of Whether the Declarant is Available as a Witness

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:
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> (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
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> (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.
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> If admitted, the statement may be read into evidence by not received as an exhibit." (Emphasis added)

In ***Tart v. McGann*** (12), the Second Circuit in explaining the history of this Rule explains:

> " Prior to the enactment of Rule 803(18), learned treaties were generally usable only on cross-examination, and then only for impeachment purposes. See Weinstein, supra. ¶ 803(18)[01]. Most commentators found the hearsay objections to learned treatise evidence unconvincing, and recommended that treatises be admitted as substantive evidence. Some commentators went so far as to suggest that treatises be admitted independently of an expert's testimony. Id. ¶803(18)[02]. The Advisory Committee rejected this position, noting that a treatise might be "misunderstood and misapplied without expert assistance and supervision." Fed.R.Evid. 803(18) advisory committee notes. Accordingly, the Rule permits the admission of learned treatises as substantive evidence, but only when "an expert is on the stand and available to explain and assist in the application of the treatise..." Id."

Unfortunately, what's most frustrating to Trial attorneys is that under State Law, the word "Authoritative" is not always clearly defined thereby continuing to make it a magical and elusive word which has been interpreted and used by experts and attorneys to obfuscate and block a means of effective cross-examination. This has led the New Jersey Supreme Court to adopt the Federal Rule of Evidence. See ***Jacober v. St. Peter's Medical Center*** (13).

Perhaps the New York Courts should adopt the definition of "Authoritative" used in the Federal Rule and previously followed by the New Jersey Courts in ***Ruth v. Fenchel***, (14) and originally set forth in ***Egan*, supra.**, over 115 years ago which is simply whether the expert acknowledges the literature as a recognized standard or reliable authority in the field. This is more of an objective than subjective way of establishing "Authoritative"and prevents an expert from disingenuously blocking effective cross-examination.

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(1) 12 A.D. 556, 42 N.Y.S. 188 (App.Div. 1st Dept., 1896)

(2) 273 A.D. 292, (N.Y.A.D. 1 Dept. ,1948);

(3) 59 A.D.2d 935, 399 N.Y.S.2d 450 (App.Div. 2nd Dept., 1977);

(4) 265 A.D.2d 848, 695 N.Y.S.2d 790 (App.Div. 4th Dept., 1999);

(5) 195 A.D.2d 444, 600 N.Y.S.2d 144 (App.Div. 2nd Dept., 1993);

(6) 201 A.D.2d 378, 607 N.Y.S.2d 344 (App.Div. 1st Dept., 1994);

(7) 10 A.D.3d 634, 781 N.Y.S.2d 773 (App.Div. 2nd Dept., 2004);

(8) 6 N.Y.3d 636, 848 N.E.2d 1285, 815 N.Y.S.2d 908 (2006);

(9) 48 A.D.3d 220, 851 N.Y.S.2d 163 (App.Div., 1st Dept., 2008);

(10) 78 A.D.3d 1556, 910 N.Y.S.2d 742 (App.Div. 4th Dept., 2010);

(11) 104 A.D.3d502, 960 N.Y.S.2d 423 (App.Div. 1st Dept., 2013);

(12) 697 F.2d 75;

(13) 12 21 N.J. 171, 121 A.2d 373 (1956);

(14) 1956, 21 N.J. 171, 121 A.2d 373, 60 A.L.R.2d 71