

Admission into Evidence of Market Reports, Commercial Publications, and Learned Treatises
(by Charles F. Vuotto, Jr., Esq.)

As divorce attorneys we deal with business valuations, psychological reports, real estate appraisals, and a plethora of other expert reports. Many, if not all, of these experts rely on some other authority such as market reports (e.g., RMA Annual Statement Studies; Integra Information; Dun and Bradstreet); commercial publications (e.g., Ibbotson's Stock, Bonds Bills and Inflation; Ibbotson's Cost of Capital Quarterly; Federal Reserve Board; Moody's); and learned treatises (such as Shannon Pratt, et al. Valuing a Business, 4th Edition; Jay Fishman, Shannon Pratt, et al. Practitioners Publication Company's Guide to Business Valuations). Counsel may wish to introduce these publications into evidence in our case-in-chief, for purposes of cross examination of the other party, or, more commonly, for purposes of cross examination of the other party's expert. This article will address when and how these materials may be used.

Market Reports & Commercial Publications

Evidence Rule 803 deals with hearsay exceptions not dependent on a declarant's unavailability. Rule 803(c)(17) provides that the following are exceptions to the hearsay rule:

MARKET REPORTS, COMMERCIAL PUBLICATIONS. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The foregoing applies broadly to stock market and commodity reports, life expectancy tables, directory listings of phone numbers, television schedule listings contained in newspapers, and other highly utilized listings, the accuracy and reliability of which are of great importance not only to the users but also to the success of the information publishers. See Associated Metals, Corp. v. Dixon Chemical, 82 N.J.Super. 281 (App. Div. 1963) (holding commodity prices are admissible evidence); But see Horst v. Peter Breidt City Brewery, 94 N.J.L. 230 (Sup. Ct. 1920)

(holding that a newspaper price quotation was not admissible because it was considered not competent evidence without proof of the source). In State v. Carrano, 27 N.J.Super. 382 (App.Div. 1953), the court held that the veracity of compilations demonstrated by their use by the public or by persons in a particular occupation, in conjunction with the difficulty of obtaining direct testimony as to the preparation of the compilations, outweigh any technical objection to their use as evidence. Furthermore, the term “occupation” within Rule 803(c)(17) does not refer only to occupations that are lawful, but rather extends to a published reporting that facilitates gambling. Id. (holding a newspaper strictly devoted to horseracing information as admissible because it contained a list regularly relied on by persons engaged in the defendant’s “occupation”).

Counsel must also be mindful of N.J.S. 12A:2-724, which in commercial settings, allows the market price of goods to be established by reports in “official publications or trade journals, or in newspapers or periodicals of general circulation published as the reports of such market.”

Learned Treatises

An additional exception to the hearsay rule is found in N.J.R.E. 803(c)(18), which provides as follows:

LEARNED TREATISES. To the extent called to the attention of the expert witness upon cross examination or relied upon by the expert 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 testimony or by judicial notice. If admitted, the statements may not be received as exhibits but may be read into evidence or, if graphics, shown to the jury.

This rule now renders admissible, statements in reliable learned treatises on history, medicine or other science, or art. N.J.R.E. 803(c)(18) (2006). The statements may be used as

evidence or to impeach the testimony of an expert witness¹. Ruth v. Fenchel, 21 N.J. 171, 176 (1956) (holding that treatises may be used to impeach a witness where the witness recognizes the treatises as authoritative). Under this new rule, the Jacober Court held that a text will qualify as a “reliable authority” if it is representative of the kinds of material reasonably relied upon by experts in the field. In making this determination, the Court must focus on what experts in the relevant field actually rely upon, not what the Court thinks they should rely upon. A statement will be admitted if it meets the following requirements: 1) the work must be relied upon by an expert during direct testimony, or called to his attention during direct examination; 2) the work must be proven reliable by testimony or by judicial notice; the expert may testify to its reliability and general acceptance within her field, but need not do so; and 3) the work must be a published treatise, periodical, or pamphlet on a subject of science or art. Jacober v. St. Peter’s Medical Center, 128 N.J. 475 (1992). Prior to the Supreme Court’s decision in Jacober in 1992, learned treatises were not admissible under New Jersey law to provide the opinions they contained. Id. at 486.

This Rule “covers publications beyond what one might normally think of as a ‘treatise.’” Brambley v. McGrath, 347 N.J. Super. 1, 7 (App.Div. 2002). For example, the Court in Brambley determined that a manufacturer’s pamphlet providing the proper installation of a replacement heart valve, could be established as “reliable authority” within the meaning of this Rule, either by way of expert testimony or judicial notice.

When a publication’s reliability is in doubt, a Rule 104(a) hearing must be conducted before or during the trial to determine whether the text qualifies as a learned treatise. Jacober, at 496. However, a publication which meets the requirements of Rule 803(c)(18) may still be

¹ Refer to NJRE 705[3] for a discussion on the use of learned treatises in the cross examination of expert witnesses.

barred by the court because the potential for prejudice outweighs its probative value or is cumulatively wasteful under Rule 403. State v. Harvey, 121 N.J. 407, 492-493 (1990).

Once a treatise is admitted as evidence, statements from the treatise may be read to the jury or, if graphics, shown to the jury, but not submitted to the jury as exhibits. N.J.R.E. 803(c)(18). Rule 803(c)(18) is intended to provide a means of clarifying the testimony of experts, and not to permit the use of learned treatises in place of expert testimony. See Jacober v. St. Peter's Medical Center, supra, at 496. Accordingly, a party cannot introduce a treatise as a substitute for expert testimony. Morlino v. Medical Center, 152 N.J. 563, 580-581 (1998). Nor can a party call their adversary's expert witness for the purpose of qualifying a treatise. Adamski v. Moss, 271 N.J. Super. 513, 520 (App. Div. 1994).

CONCLUSION

Market reports and commercial publications are rendered admissible evidence under the N.J.R.E. hearsay exception § 803(c)(17), while learned treatises are rendered admissible under N.J.R.E. hearsay exception § 803(c)(18).