Evidence —The Use of Learned Treatises on Cross-Examination of a Medical Expert—Treatises Which an Expert Witness Has Used in His Studies Are Acceptable for the Sole Purpose of Impeaching His Testimony. *Seeley v. Eaton,* 506 S.W.2d 719 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

Florene Seeley consulted Dr. Cox concerning certain abdominal complaints and was referred to Dr. Eaton, a specialist. Dr. Eaton recommended a hysterectomy. Shortly after this surgery was performed Mrs. Seeley suffered complications which were considered serious enough to warrant further surgery. A second specialist performed the remedial surgery and discovered an infection. Mrs. Seeley died shortly thereafter from a massive pelvic infection. As a result, Mrs. Seeley's husband, estate, and children joined in a malpractace suit against Cox and Eaton. During cross-examination of Dr. Eaton, counsel for plaintiff attempted to use a number of learned treatises[1] to impeach the doctor's testimony. Eaton refused to recognize any of the treatises as authoritative even though he admitted using some of them in his medical studies. The trial court upheld defendant's objection and refused to allow any excerpts to be read from the treatises.[2] The court then entered a directed verdict in favor of Dr. Cox, and the jury returned a verdict in Dr. Eaton's favor.[3] Plaintiffs appealed.[4] The Houston Court of Civil Appeals affirmed and held that the trial court had correctly followed the Texas rule concerning the use of learned treatises during cross-examination of expert witnesses.[5]

In reaching this decision the court relied entirely on the rule laid down in *Bowles v. Bourdon:*[6]

> When a doctor testifies as an expert relative to injuries or diseases he may be asked to identify a given work as a standard authority on the subject involved; and if he recognizes it, excerpts therefrom

1. Wigmore favors the use of the term "learned treatise" when dealing with books of science and art. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1690 (3d ed. 1940). For the purposes of this note the term is used to refer exclusively to medical treatises.

2. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

3. *Id.* at 721.

4. *Id.*

5. *Id.* at 723. The case contains several issues. This note deals only with the learned treatise issue.

6. Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

> may be read not as original evidence but solely to discredit his testimony or to test its weight. [7]

The *Seeley* court followed the *Bowles* rule, but stated in important dictum that it might not have been error if the trial court had utilized its discretion to allow treatises used in defendant's studies to be used for impeachment.[8] The court commented on the harshness of the *Bowles* rule and pointed out that the effect of the rule is to permit a testifying expert to exclude qualified treatises simply by stating that they are not authoritative.[9]

Four views exist in the United States as to when learned treatises can be used to impeach an expert's testimony.[10] Under the first view, only those treatises which the witness has specifically cited during direct examination as supporting his opinion can be used on cross-examination.[11] The second view provides that when an expert has relied generally or specifically upon any authorities during direct examination, he may be attacked upon the basis of authorities which are not necessarily the same as those relied upon.[12] According to the third view, an expert may be cross-examined on the basis of treatises which he has recognized as authoritative, whether or not he relied thereon to form his opinion.[13] An expert may be cross-examined under the fourth view with any treatise that is established as an authority in an acceptable manner, regardless of whether that witness has relied upon or recognized the treatise.[14] Although the

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7. *Id.* at 6, 219 S.W.2d at 783.

8. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

9. *Id.*

10. Annot., 60 A.L.R.2d 77, 79 (1958).

11. *E.g.*, De Haan v. Winter, 262 Mich. 192, 247 N.W. 151 (1933). See the cases cited in Annot., 60 A.L.R.2d 77, 81 (1958).

12. *E.g.*, Farmers Union Federated Cooperative Shipping Ass'n v. McChesney, 251 F.2d 441 (8th Cir. 1958). See the cases cited in Annot., 60 A.L.R.2d 77, 87 (1958).

13. *E.g.*, Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949). See the cases cited in Annot., 60 A.L.R.2d 77, 94 (1958).

14. Two jurisdictions following this rule allow the use of treatises for impeachment purposes only. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, ____, 211 N.E.2d 253, 259 (1965), *cert. denied*, 383 U.S. 946 (1966); McCay v. Mitchell, 62 Tenn. App. 424, ____, 463 S.W.2d 710, 720 (Tenn. Ct. App. 1970). Three jurisdictions allow the introduction of learned treatises into direct evidence thus accomplishing the same result. City of Dothan v. Hardy, 237 Ala. 603, ____, 188 So. 264, 265 (1939); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis. 2d 69, ____, 146 N.W.2d 505, 509 (1966); 4 KAN. STAT. ANN. § 60-460(cc) (1964). In addition, one jurisdiction allows this use of treatises only for the impeachment of defendants in malpractice cases. 40 MASS. GEN. LAWS ANN. ch. 233, §79C (Supp. 1974).

Texas rule is now explicitly the third view,[15] the rule has not always been so clear.

The learned treatise issue was first dealt with by the Texas Supreme Court in *Gulf, Colorado & Santa Fe Railway v. Farmer.*[16] In *Farmer* the trial court disallowed the use of treatises on cross-examination because of the hearsay rule.[17] The supreme court stated that authoritative treatises could be used on cross-examination but solely for the purpose of ascertaining the weight to be given the witness' testimony.[18] Unfortunately, the court did not provide any method for deciding what was authoritative and what was not.[19]

After the *Farmer* decision in 1909 and prior to the *Bowles* decision in 1949, confusion prevailed in Texas as to what the proper method was for determining authority. Several cases recognized that the witness must identify the treatise as authoritative before excerpts could be used to impeach his testimony.[20] Several others, like *Farmer,* provided no definitive method of determining which treatises could be used.[21] In two cases, *Hicks v. Brown*[22] and *William*

15. Bowles v. Bourdon, 148 Tex. 1, 6, 219 S.W.2d 779, 783 (1949); Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); Texas Employers Ins. Ass'n v. Nixon, 328 S.W.2d 809, 812 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

16. 102 Tex. 235, 240-41, 115 S.W. 260, 262 (1909).

17. *Id.*

18. The court also ruled that if at any time during the cross-examination the jury might look upon the treatise as direct evidence the court should give an instruction that it is not to be so considered. Gulf, C. & S.F. Ry. v. Farmer, 102 Tex. 235, 240, 115 S.W. 260, 262 (1909). Commentators have discussed the futility of such an instruction. It is felt, however, that if treatises are not to be allowed as exceptions to the hearsay rule then the interest in seeing that the cross examiner has sufficient opportunity to test the opinions of the expert outweighs any dissipation of the hearsay rule by such an instruction. Note, *Admissibility of Medical Treatises in Iowa; Expert Witnesses In Hardback Covers,* 56 IOWA L. REV. 1028, 1032 (1971); Note, *Impeachment of Medical Expert-Use of Treatises Unknown To The Expert,* 38 TENN. L. REV. 449, 451 (1971).

19. Gulf, C. & S.F. Ry. v. Farmer, 102 Tex. 235, 240, 115 S.W. 260, 262 (1909). The court stated: "[I]t seems to us that no better way could be devised for doing this than to take the *accepted* authorities upon the subject and to see how his knowledge of the matter corresponds with that of such authorities." *Id.* (emphasis added).

20. Hess v. Millsap, 72 S.W.2d 923 (Tex. Civ. App.— -Austin 1934, no writ); Texas & P. Ry. v. Hancock, 59 S.W.2d 313 (Tex. Civ. App.—Fort Worth 1933, writ ref'd), *citing* Gulf, C. & S.F. Ry. v. Farmer, 102 Tex. 235, 115 S.W. 260 (1909); Northern Texas Traction Co. v. Bryan , 299 S.W. 325 (Tex. Civ. App.—Fort Worth 1927, writ dism'd) (citing no authority).

21. Cisco & N.E. Ry. v. Proctor, 272 S.W. 308 (Tex. Civ. App.—Fort Worth 1925, writ granted), *aff'd,* 277 S.W. 1047 (Tex. Comm'n App. 1925, jdgmt adopted); San Antonio Pub. Ser. Co. v. Alexander, 270 S.W. 199 (Tex. Civ. App.—San Antonio 1925), *aff'd,* 280 S.W. 753 (Tex. Comm'n App. 1926, jdgmt adopted); Gulf, C. & S.F. Ry. v. Dooley, 131 S.W. 831 (Tex. Civ. App.—1910, no writ).

22. 128 S.W.2d 884 (Tex. Civ. App.—Amarillo 1939), *rev'd on other grounds,* 151 S.W.2d 790 (Tex. Comm'n App. 1941, opinion adopted).

Cameron Co. v. Downing,[23] the courts seemingly attempted to break new ground and forge a more liberal rule. In *Hicks*, the witness stated that he did not recognize the treatise as an authority but continued to say that it ought to be authoritative because of the eminence of the author.[24] The court allowed excerpts from the treatise to be used for impeachment on cross-examination and seemed to indicate that a treatise need only be generally recognized by the profession and not specifically by the witness.[25] The court in *Cameron*, citing *Farmer*, held that a treatise is authoritative if any competent doctor, not just the witness being examined, recognized the treatise as authoritative.[26]

The confusion was finally eliminated when the *Bowles* court stated the rule definitively.[27] During the period following *Bowles* and until *Seeley*, the only attempt to liberalize the *Bowles* rule was made in *Texas Employers Insurance Association v. Nixon*,[28] in which the appellee relied on *Hicks* and *Cameron*. In *Nixon*, Dr. A recognized a certain treatise as authoritative on cross-examination, but Dr. B refused to do likewise.[29] Appellee contended that Dr. A's recognition qualified the treatise as a standard authority and that it could therefore be used to cross-examine Dr. B. The trial court agreed.[30] The Court of Civil Appeals reversed the trial court calling the *Cameron* language dictum and pointing out that regardless of the language used in the *Hicks* opinion, the trial court actually followed the *Bowles* rule.[31] Since *Nixon*, numerous cases have followed the *Bowles* rule without comment.[32]

Because of the confusion of early courts and the overall lack of substantive comment, the logic and reasoning behind the Texas learned treatise rule is vague.[33] Prior to *Seeley*, *Bowles* was the only

23. 147 S.W.2d 963 (Tex. Civ. App.—El Paso 1941, no writ).

24. 128 S.W.2d 884, 893 (Tex. Civ. App.—Amarillo 1939), *rev'd on other grounds*, 151 S.W.2d 790 (Tex. Comm'n App. 1941, opinion adopted).

25. *Id.*

26. 147 S.W.2d 963, 968 (Tex. Civ. App.—El Paso 1941, no writ).

27. Bowles v. Bourdon, 148 Tex. 1, 7, 219 S.W.2d 779, 783 (1949).

28. 328 S.W.2d 809 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

29. *Id.* at 811.

30. *Id.*

31. *Id.* at 812.

32. Goodnight v. Phillips, 458 S.W.2d 196 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.); American Motorists Ins. Co. v. Williams, 395 S.W.2d 392 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.); Gray v. L-M Chevrolet Co., 368 S.W.2d 861 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.); Cross v. Houston Belt & Terminal Ry., 351 S.W.2d 84 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

33. The *Bowles* court placed emphasis on the fact that the rule was "usual" and fol-

case that made any attempt to explain the reasoning behind the rule.[34] The *Bowles* court listed, without comment, three justifications for the rule[35] which, as pointed out by Professor Wigmore, do not stand the light of day when examined closely.[36]

As its first justification, the *Bowles* case noted that medical science is in an unsettled condition.[37] This justification is pointed at the progressive nature of medical science and would be equally applicable to a ban on expert witnesses.[38] Many doctors testify on the basis of information obtained from medical school or treatises published years ago.[39] This outdated testimony is admissible, and its credibility is affected only when an opposing counsel is able to impeach its validity.[40] If the adversary system is deemed a sufficient safeguard against such outdated oral testimony, it ought to be capable of protecting against the use of old and unreliable treatises.[41] For example, older treatises can be repudiated by the opposing counsel showing that there are more recent authoritative treatises available.[42] In reality, the fact that medical science is constantly progressing is a justification for using authoritative treatises.[43]

The second justification listed by the *Bowles* case is that the language of medical treatises is not within the understanding of the average juror.[44] This justification actually calls into issue the qualification of jurors to judge oral expert testimony because it is often

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lowed by the great majority of jurisdictions. Bowles v. Bourdon, 148 Tex. 1, 7, 219 S.W.2d 779, 783 (1949).

34. *Id.*.

35. *Id.* The court actually listed five justifications. Two of them are justifications, however, for not admitting treatises into direct evidence. This note deals only with the use of treatises for impeachment purposes.

36. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1690, at 4 (3d ed. 1940). "All these objections, appearing in the beginning as the casual thoughts of individual judges in past and less liberal generations, were elevated to the rank of accepted reasons and given vogue in one or two treatises on evidence, and thence found their way into many judicial opinions of a latter generation." *Id.*

37. Bowles v. Bourdon, 148 Tex. 1, 7, 219 S.W.2d 779, 783 (1949).

38. Ruth v. Fenchel, 37 N.J. Super, 295, ____, 117 A.2d 284, 294 (N.J. App. Div. 1955), *aff'd on other grounds*, 21 N.J. 171, 121 A.2d 373 (1956) [hereinafter cited as *Ruth*]; Note, *Admissibility of Medical Treatises In Iowa; Expert Witness In Hardback Covers*, 56 IOWA L. REV. 1028, 1032 (1971) [hereinafter cited as *Hardback Covers*].

39. *Hardback Covers, supra* note 38, at 1033.

40. *Id.*

41. *Id.*

42. Comment, *Learned Treatises As Direct Evidence: The Alabama Experience*, 1967 DUKE L.J. 1169, 1189 (1967) [hereinafter cited as *Alabama Experience*].

43. *Id.*

44. Bowles v. Bourdon, 148 Tex. 1, 7, 219 S.W.2d 779, 783 (1949).

technical and unintelligible to the layman.[45] Therefore, if juries are to have the advantage of expert testimony they must be assumed capable of understanding some amount of technical language, both live and published.[46] Several solutions are available to clarify technical and unintelligible language in treatises. The trial judge may ask for clarification of the excerpt just as he often does with oral testimony.[47] In addition, the opposing counsel can have the meaning of the excerpt made clear by soliciting further clarification from his expert or by calling a general practioner who is familiar with the treatise to explain the excerpt in lay language.[48]

For its final justification the *Bowles* court pointed to the difficulty in determining what treatises are of good and established authority.[49] This justification fails when one considers that the present method of allowing an interested expert[50] or defendant in a malpractice suit to determine what is authoritative is the least desirable of all methods. Many methods exist for establishing what is or is not authoritative.[51] Texas courts have suggested several methods, such as the use of the treatise in medical school,[52] the opinion of the treatise by the witness himself,[53] and the opinion of the treatise by other expert witnesses.[54] These methods combined with the discretion of the trial court are clearly more acceptable than the present method.

In addition to the *Bowles* justifications other jurisdictions commonly list two additional justifications for restricting the use of learned treatises, which are no more persuasive than those previously discussed.[55] First, isolated passages can be selected which cause inaccurate or misleading presentation of the information, and

45. *Ruth, supra* note 38, 37 N.J. Super at ____, 117 A.2d at 295; *Alabama Experience, supra* note 42, at 1191.

46. *Alabama Experience, supra* note 42, at 1191.

47. *Ruth, supra* note 38, 37 N.J. Super at ____, 117 A.2d at 295.

48. *Id.*

49. Bowles v. Bourdon, 148 Tex. 1, 7, 219 S.W.2d 779, 783 (1949).

50. For the proposition that an expert is normally interested in one litigant or the other, see E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 17, at 38 (2d ed. 1972).

51. Holz, *Learned Treatises as Evidence in Wisconsin, 51* MARQ. L. REV. 271, 277 (1967-1968).

52. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

53. Bowles v. Bourdon, 148 Tex. 1, 6, 219 S.W.2d 779, 783 (1949).

54. William Cameron Co. v. Downing, 147 S.W.2d 963, 968 (Tex. Civ. App.—El Paso 1941, no writ).

55. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1690 (3d ed. 1940).

second, a battle of books may ensue where there is disagreement among the various treatises on certain points.[56] Even live expert testimony, however, is subject to possible unfair presentation.[57] Should an unfair presentation of treatise material take place, whether deliberate or inadvertent, it should be corrected by our adversary system of litigation.[58] Opposing counsel can require that the writer's views are fully stated.[59] The battle-of-books criticism envisions a situation where one side will attempt to overcome the other by sheer numbers.[60] The same criticism could be leveled at the use of oral expert testimony.[61] Pretrial discovery of the treatises to be used and control on that number by the court would alleviate this problem.[62] It should be noted that Alabama, a jurisdiction which allows the introduction of treatises into evidence, has encountered no such problem.[63]

As illustrated by the preceding discussion, the rules restricting the use of authoritative treatises during both direct and cross-examination have been criticized for years.[64] Medical experts rely not only on their own experiences, but also invariably on a considerable body of literature which they have read or heard discussed in medical school.[65] Wigmore, in his treatise on evidence, points out that in contrast to the defendant in a malpractice suit or a paid expert, the author of a treatise does not have a bias in favor of a lawsuit or individual.[66] An author's statement is not made with a view toward litigation.[67] On the other hand, in order to avoid having his witness questioned from treatises on cross-examination, the practiced trial attorney will instruct or coach his witness not to refer to any treatise or to recognize any treatise as an authority.[68] "Such

56. *Ruth, supra* note 38, 37 N.J. Super. at ____, 117 A.2d at 294.
57. *Alabama Experience, supra* note 41, at 1189.
58. *Hardback Covers, supra* note 38, at 1034.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Alabama Experience, supra* note 41, at 1140.
64. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1690 (3d ed. 1940); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 296, at 620 n.3 (1954).
65. Comment, *The Expert Witness: Hearsay vs. Opinion,* 24 BAYLOR L. REV. 108, 111 (1972).
66. 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1692 (3d ed. 1940).
67. *Id.*
68. M. BELLI, TRIAL AND TORT TRENDS OF 1965 486 (1966). "It is amazing, these doctors or experts are working in a particular field, the attorney is ready to show that there is something inconsistent in the subject matter of a book relating to their subject, and suddenly

tactics give the ignorant and unscrupulous expert an undue advantage over the honest and well-trained expert.[69]"

The proper rule and the one that should be adopted by Texas courts would allow an expert witness to be cross-examined for the purpose of impeachment by reading excerpts from any treatise that is considered authoritative. The court should be allowed a wide degree of discretion in determining what is or is not authoritative.[70] Some factors that might be considered in determining authoritativeness are the use of the treatise in medical school by the witness,[71] the opinion of the treatise by the witness himself,[72] and the opinion of the treatise by other expert witnesses.[73] In fact, the Model Code of Evidence proposes a rule which would accomplish this result.[74] Although the Model Code of Evidence rule goes beyond what is advocated in this note by advocating the admission of treatises into evidence, the comments to the rule do recommend the elimination of all prohibitions on the use of treatises during cross-examination.[75]

The language used by the *Seeley* court may encourage future trial courts, at least in the Houston District, to allow the use of excerpts from medical treatises for impeachment purposes when it can be shown that the expert used the treatises in his medical studies.[76] Such a step would surely lead to the adoption of a rule similar to the one outlined in this note. Again, it is hoped that Texas courts will abandon the present inequitable rule and adopt a rule which

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he discovers that they have learned their art, science or medicine around the autopsy table or from the stone tablets, and may never have read a book! They have been warned beforehand never to have read a book or to acknowledge a book." *Id.* For an interesting example of trial technique with respect to this rule see J. APPLEMAN, CROSS EXAMINATION 183 (1963).

69. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 296, at 620 n.3 (1954).

70. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.); Holz, *Learned Treatises as Evidence in Wisconsin*, 51 MARQ. L. REV. 271, 275 (1968).

71. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

72. Bowles v. Bourdon, 148 TEX. 1, 6, 219 S.W.2d 779, 783 (1949).

73. William Cameron Co. v. Downing, 147 S.W.2d 963, 968 (TEX. CIV. APP.—EL PASO 1941, no writ); MODEL CODE OF EVIDENCE, R. 529 (1942).

74. MODEL CODE OF EVIDENCE, R. 529 (1942). "A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of the matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical, or pamphlet is recognized in his profession or calling as an expert in the subject." *Id.*

75. *Id.*, Comment *a*.

76. Seeley v. Eaton, 506 S.W.2d 719, 723 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.).

will more accurately reflect the realities of the practice of medicine and the needs of our adversary system of litigation.

Fred N. Diem