LEARNED TREATISE HEARSAY EXCEPTION

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Editor's Note: On February 26, 1999, the Nebraska Legislature adopted LB64 which amended the Nebraska Rules of Evidence to include the learned treatise hearsay exception. The following article is an excerpt from the recently revised Mangrum on Nebraska Evidence *(1999). Richard Collin Mangrum, Professor of Law, Creighton University School of Law. ©1999. Our thanks to Professor Mangrum for his permission to reprint.*

SECTION 27-803(17): LEARNED TREATISE HEARSAY EXCEPTION

803(17)[A] Statement of the Rule

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 the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits.[1]

803(17)[B] Legislative History

When the Nebraska Supreme Court Committee on Practice and Procedure in 1973 considered the Federal Rules of Evidence for purposes of adoption, the learned treatise exception (Federal Rule of Evidence 803(18)) was only one of two hearsay exceptions that the Committee rejected.[2] The Committee gave no explanation why the exception was rejected, but undoubtedly the lack of Nebraska common law authority supporting a learned treatise exception convinced the Committee to reject it.

The Nebraska Association of Trial Attorneys in 1997 first proposed amending the Nebraska Rules of Evidence to include the learned treatise exception.[3] Senator Hilgert of the Judiciary Committee recommended the amendment for the purpose of harmonizing the Nebraska Rules of Evidence with the Federal Rules of Evidence and the current law of most states. To illustrate the usefulness of the exception, Senator Hilgert suggested that in a case alleging the faulty construction of a home wherein the architect had used Krazy Glue to fasten the beams, the learned treatise exception would permit the plaintiff to read into evidence a statement in an accepted construction manual that beams should be fastened with braces, bolts and lug nuts. Senator Hilgert explained that the use of the learned treatise exception would both reduce the cost of trials and avoid the difficulty faced by many claimants of finding experts willing to testify against their colleagues.[4] Tom Massey testified in favor of the learned treatise exception on behalf of the Nebraska Association of Trial Attorneys. Mr. Massey testified that between 35 to 40 states, as well as the federal courts, have adopted the learned treatise exception. He explained that the exception provides a reliability check to the proliferation of expert opinions.[5]

Opposing the inclusion of the learned treatise exception, Jim Snowden, who characterized himself as a medical malpractice defense attorney, argued that the learned treatise hearsay exception too liberally admits hearsay testimony. He explained that the present system which limits use of such scientific treatises to cross-examination, "is a better, more reliable, more trustworthy system for administering justice."[6] While the Judiciary Committee advanced the bill on a 5 to 2 vote, the bill was never debated on the floor and died at the end of the 1998 legislative session.

On January 20, 1999, Senator Hilgert reintroduced to the Judiciary Committee the learned treatise hearsay exception as LB 64. As an illustrative example of the usefulness of the exception, Senator Hilgert suggested that if the tobacco industry provided testimony that there is no link between cancer and cigarettes, the learned treatise exception would allow the introduction of reputable medical journal articles to the contrary.[7] John Lindsay, a registered lobbyist appearing on behalf of the Nebraska Association of Trial Attorneys, further testified before the Judiciary Committee that without the learned treatise exception an expert witness could not be cross-examined on the basis of reputable cutting edge research unless the expert being cross-examined accepted the research as reliable.[8]

The Judiciary Committee advanced the learned treatise exception amendment on a 7 to 0 vote. LB 64 was presented to the Unicameral for debate on February 2, 1999. Senator Hilgert testified that adopting the learned treatise exception would bring Nebraska's hearsay rule more in line with the federal courts and most state courts. The bill was adopted February 26, 1999 on a 45 to 1 vote.

803(17)[C] Foundation

1. The examining counsel on either direct or cross-examination calls to the attention of an expert witness a published statement.

2. The subject of the published statement relates to history, medicine, or other science or art.

3. The statement is published in a treatise, periodical, or a pamphlet.

4. Either the court judicially notices the published text as a reliable authority, or an expert witness admits or testifies to the reliability of the published treatise, periodical or pamphlet.

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5. The statement is read into evidence, but is not received as an exhibit.

803(17)[D] Interpretive Analysis

The learned treatise hearsay exception changes the common law restriction on the use of such publications. While statements in medical, scientific or other learned publications have long been part of the trial process, traditionally their use has been limited either to testing the reliability of an expert opinion on cross-examination or corroborating expert testimony on redirect or rebuttal. Because of their hearsay nature, statements contained in the learned treatise were inadmissible as substantive evidence. Federal Rule of Evidence 803(18) changed the common law rule in 1975, allowing use in federal courts of learned treatises as independent evidence of the truthfulness of the claims presented therein if established as authoritative and called to the attention of an expert.

Nebraska's earlier refusal to adopt Federal Rule of Evidence 803(18) effected the manner of presentation of expert testimony. The significance of the difference can be illustrated by two recent Nebraska cases. In *Ketteler v. Daniel*,[9] the court held that it was improper for an expert physician to introduce as substantive evidence statements contained in the *New England Journal of Medicine*.[10] Under the newly adopted Rule 803(17), the *New England Journal of Medicine*, a highly reputable medical journal, would likely qualify, upon proper expert testimony, for admissibility. 803(17).

Similarly, in *Stang-Starr v. Byington*,[11] a medical malpractice case, the Nebraska Supreme Court explained why the plaintiff's attempt to introduce evidence from a medical text through an expert medical witness was inappropriate under the then existing Nebraska Rules of Evidence. The court held that while medical texts and other authorities may be used for purposes of impeaching, contradicting, or discrediting a witness through cross-examination,[12] or during rebuttal testimony,[13] the text could not be introduced as substantive evidence of the opinions and theories advanced.[14] Moreover, the court held that "[n]or does the fact that the out-of-court statements contained in the authorities were offered in the guise of forming the bases for the testifying experts' opinions alchemically transmute them from inadmissible hearsay into admissible nonhearsay."[15] Restated, under prior authority while an expert under Rule 703 could rely upon inadmissible evidence in forming an opinion if the inadmissible evidence relied upon was the type of authority reasonably relied upon by other experts in the field, the expert witness could not serve "as a conduit for inadmissible hearsay."[16] The court explained that "[t]he recitation of a passage by a nontestifying authority, even if such is in conformity with the opinion of the testifying expert, is hearsay."[17] The result in *Stang-Starr* would clearly be otherwise under the newly enacted Rule 803(17).

803(17)[D.1] The Examining Counsel on Either Direct or Cross-Examination Calls to the Attention of an Expert Witness a Published Statement.

An important justification for permitting the reading into evidence of passages from learned treatises (and excluding such excerpts from being introduced as an exhibit where the jury may misinterpret or misapply the passage on their own during deliberation) is that the passage is only admissible if called to the attention of the expert who can explain, critic or otherwise place the learned treatise in context.

803(17)[D.2] The Subject of the Published Statement Relates to History, Medicine, or Other Science or Art.

803(17)[D.3] The Statement is Published in a Treatise, Periodical, or a Pamphlet.

The fact of publication in a treatise, periodical or pamphlet is a foundational requirement for admitting testimony under 803(17), Nebraska's learned treatise hearsay exception.[18] Not only is publication foundational, the reliability of the publication itself is a relevant factor, although not controlling,[19] in determining authoritativeness. The Advisory Committee Notes for the identical Federal Rule of Evidence 803(18) suggested that the reliability of a published learned treatises "is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake." Based upon this legislative history, the paradigm publication intended to fit within the learned treatise exception would be those publications written for professionals (professional journals), subject to scrutiny (peer reviewed publications), where the reputation of the author is well established.

Questioning whether the publication is a peer-reviewed publication that is generally accepted by professionals within a recognized field of expertise, is consistent with the United States Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[20] holding that two of the four tests for determining whether a theory or technique is sufficiently reliable to be admissible as scientific knowledge include peer review and general acceptability.[21] More recently, the Supreme Court in *Kumho Tire Company, LTD.*,[22] held that while the *Daubert* factors are not a definitive checklist that apply to the testimony of nonscientific experts

who have experienced-based theories or methodologies, and further held that the reliability inquiry must necessarily be tied to the facts of the case, the Court opined that "some of *Daubert's* questions can help to evaluate the reliability even of experienced-based testimony."[23]

As applied to the publication foundational issue for learned treatises, certainly the courts are more likely to be persuaded that their "gate keeping" responsibility for determining the relevancy and reliability of a publication has been satisfied if the publication at issue satisfies two of the *Daubert* factors of being peer reviewed and generally accepted within the relevant professional community as a reliable publication.

803(17)[D.4] Either the Court Judicially Notices the Published Text as a Reliable Authority, or the Sponsoring Expert Witness Admits or Testifies to the Reliability of the Published Treatise, Periodical or Pamphlet.

Nebraska's Rule 803(17) shifts the common law focus away from the witness' reliance upon the treatise in forming the expert's opinion, towards the reliability of the treatise, author or published passage. Focusing on the reliability of the learned treatise is consistent with the judge's Rule 104(1) (*Daubert*-like) gate keeping responsibility to make preliminary findings regarding the relevancy and reliability of expert testimony generally.[24] In keeping with this gate keeping responsibility, the court could reasonably permit cross-examination of an expert witness prior to establishing the reliability of the treatise upon the condition that another expert will later establish the authoritativeness of the treatise.[25] The rule provides that the treatise's authoritativeness can be established by (1) judicial notice, (2) admission or (3) the testimony of the witness.

803(17)[D.4.a] Judicial Notice

While most courts will be reluctant to judicially notice the reliability of a treatise or passage contained therein,[26] Rule 803(17) provides for such a possibility. An opinion by the Third Circuit Court of Appeals for the *United States in Jamison v. Kline*,[27] illustrates the use of judicial notice to establish the reliability of a passage from a learned treatise "whose accuracy cannot reasonably be questioned." In *Jamison* the court judicially noticed the reliability of a speed chart prepared for scientific inquiry by the Northwest University Traffic Institute that was merely "a reduction to usable form of the operations of the laws of physics with regard to speed, mass, and the coefficient of friction between tires and pavement."[28] The court permitted a state trooper with eight years of experience to testify to an opinion deduced by mere application of the excerpt from the learned treatise to the facts of the case.

803(17)[D.4.b] Admission

The "admission" foundational alternative for learned treatises follows the traditional practice of asking the opposing expert on cross-examination whether he or she "admits" either reliance on or recognition of the learned treatise as "authoritative." Under the most restrictive view of prior authority a learned treatise could only be used for impeachment or corroboration if the witness admitted his or her reliance upon the treatise in the forming of the expert opinion. This view was rejected by the United States Supreme Court in *Reilly v. Pinkus*,[29] which held that restricting cross-examination to only those learned treatises an expert relied upon in forming his or her opinion unduly restricted the right of cross-examination. Following *Pinkus*, most courts began permitting impeachment or corroboration if the expert merely admitted that the learned treatise is authoritative upon the subject to which the expert has expressed an opinion. Under either view an expert could entirely avoid cross-examination by refusing to admit either reliance on or the authoritativeness of the learned treatise.

Rule 803(17) decreases the likelihood that this ploy to avoid cross-examination by denying either reliance on or authoritativeness of a learned treatise will work. For example, in *McCarty v. Sisters of Mercy Health Corp.*,[30] a medical malpractice case interpreting Michigan's learned treatise rule, the defense expert witness who testified that the defendant did not breach any standard of care, on cross-examination refused to accept as "authoritative" an article on obstetrics written by the editor-in-chief of a well-recognized obstetrics journal. Even though the expert witness being cross-examined agreed that the particular obstetrics journal "is probably as close to a bible as obstetricians have today,"[31] and "as reliable as anything we have in our literature,"[32] he testified that he "would never admit to any journal being authoritative" because to him that would signify that "everything within that journal would be considered absolute truth."[33] Consequently the trial judge refused to allow cross-examination of the expert on the basis of the subject article, because the expert witness being cross-examined refused to accept it as "authoritative." On appeal, the court interpreting language similar to Nebraska's 803(17) but limiting the use to impeachment only,[34] held that the trial judge had abused his discretion in precluding cross-examination despite the witness' inferential concessions.[35] Moreover, under Nebraska's Rule 803(17) if an expert refuses on cross-examination to even "inferentially"[36] admit the authoritativeness of a learned treatise, the expert can be cross-examined on the learned treatise if another expert establishes by testimony the reliability of the treatise.[37]

803(17)[D.4.c] Testimony

If the opposing expert will not admit either reliance on or the authoritativeness of the learned treatise on

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cross-examination, then the foundation may be established by the "testimony" of an expert on direct. Because of the nature of the adversarial process, the courts are most likely to require the most extensive foundation for this method of establishing relevancy and reliability of a learned treatise. Again in establishing the relevancy and reliability of a learned treatise by expert testimony, the four-part *Daubert*[38] factors for determining whether a theory or technique is sufficiently reliable to be admissible as expert testimony remain as useful guides: (1) testing; (2) peer review; (3) rate of error; and (4) general acceptability. However, given the Nebraska court's rejection of *Daubert* and continued adherence to the Frye standard for expert testimony,[39] foundational testimony that the author, publication or specific passage is generally accepted as authoritative or reliable in the relevant scientific or expert community will likely be the most critical factor in establishing the admissibility of a learned treatise in Nebraska.

Under Federal Rule of Evidence 803(18) the courts have permitted expert witnesses who have testified to the authoritativeness of learned treatises regarding medical literature,[40] safety codes,[41] Department of Transportation reports,[42] a magazine on arson,[43] and tax shelter arrangements.[44] On the other hand, the courts have excluded testimony from learned treatises on medical literature,[45] and the National Institute of Occupational Health and Safety manual[46] where no expert testimony has established the authoritativeness of the learned treatise.

803(17)[D.5] The Statement Is Read Into Evidence, but Is Not Received as an Exhibit.

Although 803(17) permits the substantive use of passages from learned treatises, the contents may only be "read into evidence," and cannot be "received as exhibits." The Advisory Committee's Notes to Federal Rule of Evidence 803(18) explained that restriction on use was imposed to avoid the fear that learned treatises may be "misunderstood or misapplied without expert assistance and supervision."

While an expert reading into evidence and explaining passages from learned treatises ordinarily will not cause any particular problem, difficulty may arise if the relevant section of the treatise is a chart, photograph or diagram, which cannot be effectively "read into evidence." The federal courts which have encountered this issue have generally read "statements" reasonably to include demonstrative passages of treatises and have allowed the passages to be "read into evidence" by showing the jury some form of visual depiction, such as an enlargement or computer assisted display, but not necessarily allowing the chart, photograph or diagram to be introduced as an exhibit.[47] The approach of permitting a demonstrative passage of a learned treatise to be visually depicted to the jury, but not received as an exhibit is the most consistent with the language and legislative history of the learned treatise exception.

803(17)[E] Federal Variations

Nebraska Rule of Evidence 803(17) adopts verbatim Federal Rule of Evidence 803(18) and variations in application are, therefore, not expected.

References

[1]Nebraska Rules of Evidence 803(17) will be effective 90 days from the close of the legislative session, approximately August 29, 1999.

[2]Nebraska Supreme Court Committee on Practice and Procedure, Proposed Nebraska Rules of Evidence 153 (1973). The only other Federal Rules of Evidence hearsay exception rejected by the Committee was 803(1), present sense impression, still has not been adopted in Nebraska. The Committee also rejected the nonhearsay category 801(d)(1)(C), pretrial identification. Nebraska still has not adopted the pretrial identification nonhearsay category, although many practitioners fail to recognize this omission. The Nebraska Supreme Court first recognized that pretrial identification is inadmissible hearsay in Nebraska in *State v. Salmon*, 241 Neb. 878, 891, 491 N.W.2d 690 (1992), citing Mangrum, *Doesn't Anyone in Nebraska Realize that Pretrial Identification Testimony Raises Hearsay as well as Constitutional Issues?*, 20 CREIGHTON L. REV. 335 (1986-87).

[3]Legislative Bill 244 was offered to Nebraska's Ninety-Fifth Legislature on January 13, 1997, by Senator John Hilgert of the Judiciary Committee on behalf of the Nebraska Association of Trial Attorneys. The bill was advanced to the General File on a 5 to 2 vote of the Judiciary Committee.

[4]LB 244, at 93-94, Transcript prepared by the Clerk of the Legislature, March 13, 1997.

[5]Id. at 96.

[6]Id. at 99-100.

[7]LB 64, at 3, Judiciary Committee, Transcript Prepared by the Clerk of the Legislature, January 20, 1999.

[8]LB 64, at 7-8, Judiciary Committee, Transcript Prepared by the Clerk of the Legislature of testimony before the Judiciary Committee on January 20, 1999.

[9]251 Neb. 287, 556 N.W.2d 623 (1996).

[10]251 Neb. 287, 295, 556 N.W.2d 623, 628-29 (1996) (the court held that while opposing counsel's foundation objection did not preserve the hearsay objection for appeal, it is generally improper to introduce as substantive evidence the text of a learned treatise).

[11]248 Neb. 103, 532 N.W.2d 26 (1995).

[12]248 Neb. 103, 109, 532 N.W.2d 26, 30 (1995), citing *Fonda v. Northwestern Public Service Co.*, 138 Neb. 262, 292 N.W. 712 (1940); *Winters v. Rance*, 125 Neb. 577, 251 N.W. 167 (1933); *Hutchinson v. State*, 19 Neb. 262, 27 N.W. 113 (1986).

[13]*Stang-Starr v. Byington*, 248 Neb. 103, 109, 532 N.W.2d 26, 30 (1995); citing *Oliverius v. Wicks*, 107 Neb. 821, 187 N.W. 73 (1922).

[14]248 Neb. 103, 109, 532 N.W.2d 26, 30 (1995).

[15]248 Neb. 103, 110, 532 N.W.2d 26, 31 (1995).

[16]248 Neb. 103, 110, 532 N.W.2d 26, 31 (1995).

[17]248 Neb. 103, 110-11, 532 N.W.2d 26, 31 (1995).

[18]For example, in *United States v. Jones*, 712 F.2d 115 (5th Cir. 1983) the court held that 803(18) did not provide a hearsay exception for cross-examining a government expert on gambling regarding the testimony of an another government expert in another case. The court explained that 803(18) "is confined to published works that have been subjected to widespread collegial scrutiny."

[19]In *Meschino v. North American Drager, Inc.*, 841 F.2d 429 (1st Cir. 1988) the court rejected plaintiff's argument that the contents of any "highly regarded" periodical are necessarily admissible under 803(18). Also in *Schneider v. Revici*, 817 F.2d 987 (2d Cir.

1987) the court upheld the exclusion of a book authored by the defendant in a medical malpractice case where defense counsel failed to establish its authoritativeness despite repeated instructions from the court on the specific need for such foundation.

[20]113 S.Ct. 2786, 2798-99, 509 U.S. 579, 596-98 (1993).

[21]113 S.Ct. 2786, 2799 (1993). The other two *Daubert* criteria for determining reliability include "testing" and an established "rate of error," two issues also often discussed in peer reviewed publications.

[22]119 S.Ct. 1167, 1999 WL 152455 (decided March 23, 1999).

[23]119 S.Ct. 1167, 1176, 1999 WL 152455 at 7.

[24]The *Daubert* issue of reliability of scientific evidence followed the controversy engendered by Peter Huber's GALILEO'S REVENGE, JUNK SCIENCE IN THE COURTROOM, 17 (1991) highlighting the author's claim that junk science often has been admitted into the courtroom.

[25]*Dawsey v. Olin Corp.*, 782 F.2d 1254, 1264 (5th Cir. 1986).

[26]The reluctance of courts to judicially notice the authority of learned treatises follows from Rule 201 which permits judicial notice only if either (a) "generally known within the territorial jurisdiction of the trial court (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be question." Few learned treatises qualify under Rule 201 criteria.

[27]454 F.2d 1256 (3rd Cir. 1972).

[28]454 F.2d at 1257 (3rd Cir. 1972).

[29]338 U.S. 269, 70 S.Ct. 110 (1949).

[30]176 Mich.App. 593, 440 N.W.2d 417 (1989).

[31]176 Mich.App. 593, 598, 440 N.W.2d 417, 420 (1989).

[32]176 Mich.App. 593, 599, 440 N.W.2d 417, 420 (1989).

[33]176 Mich.App. 593, 598, 440 N.W.2d 417, 419 (1989).

[34]Michigan's Rule 706 incorporated most of the language of Federal Rule of Evidence 803(18), but limited the use of such evidence "for impeachment purposes only."

[35]176 Mich.App. 593, 600, 440 N.W.2d 417, 420 (1989).

[36]*Dawson v, Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert.denied, 450 U.S. 959 (1981).

[37]*Carroll v. Morgan*, 17 F.3d 787 (5th Cir. 1994).

[38]509 U.S. 579, 113 S.Ct. 2786, 2799 (1993).

[39]See *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

[40]*Tart v. McGann*, 697 F.2d 75 (2d Cir. 1982); *Carroll v. Morgan*, 17 F.3d 787 (5th Cir. 1994).

[41]*Alexander v. Conveyors & Dumpers, Inc.* 731 F.2d 1221 (5th Cir. 1984) (excerpts from the 1957 American Standard Safety Code for Conveyors could be read to jury, displayed by photographic enlargement, but not admitted as an exhibit); *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 609 F.2d 820 (5th Cir. 1980) (error to exclude safety codes established as reliable).

[42]*Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981).

[43]*Allen v. Safeco Ins. Co.*, 782 F.2d 1517, 1519-20, modified on other grounds, 793 F.2d 1195 (11th Cir. 1986) (permitting plaintiff's counsel during the cross-examination of defendant's expert to read statements from a magazine entitled the Fire Arson Investigator).

[44]*Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984) (treatise published by the preeminent industry expert).

[45]*Hemingway v. Ochsner*, 608 F.2d 1040 (5th Cir. 1979) (text written by nurses not established as reliable); *United States v. Turner*, 104 F.3d 217 (8th Cir. 1997) (medical texts properly excluded where no expert testimony established authoritativeness); *Schneider v. Revici*, 817 F.2d 987 (2d Cir. 1987) (defendant's text in a medical malpractice case excluded where no expert testimony on the text's authoritativeness, despite the court's warning of lack of foundation).

[46]*Dawsey v. Olin Corp., 782 F.2d 1254 (5th* Cir. 1986) (no testimony of authoritativeness of manual).

[47]In *United States v. Mangan*, 575 F.2d 32, 48 (2nd Cir. 1978), cert. denied, 439 U.S. 931 (1978) Judge Friendly criticized the district court for refusing to allow the defense to introduce on cross-examination a chart on handwriting contained in a learned treatise. The chart showed that those characteristics which the prosecution expert had testified were identifying were actually common characteristics. Judge Friendly remarked: "It is not altogether clear to us how a chart can `be read into evidence,' and good sense would seem to favor its admission into evidence, at least in a case where . . . its significance had been fully explored with the expert." 575 F.2d at 48. In comparison, the Fifth Circuit Court of Appeals in *Alexander v. Conveyers & Dumpers, Inc.*, 731 F.2d 1221, 1229 (5th Cir. 1984) held that while the trial court had permitted the plaintiff's expert to display a photographic enlargement of an industry standard safety code, the judge had properly excluded the code itself because while 803(18) permits excerpts from a learned treatise to be "read into evidence," but not "received as exhibits." The Fifth Circuit again in *Gordy v. City of Canton*, 543 F.2d 558 (5th Cir. 1976) permitted an expert to testify regarding a safety code, but concluded that the trial court had committed harmless error in allowing the jury to take portions of the safety code to the jury room. Also in *United States v. An Article of Drug, etc.*, 661 F.2d 742 (9th Cir. 1981), the court rejected the argument that the jury should have been granted their request to review treatises during deliberations.