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Impeachment: Evidence Amendments

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IMPEACHMENT: EVIDENCE AMENDMENTS

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Several amendments to the Ohio Rules of Evidence, all of which deal with methods of impeachment, became effective in 1998.

Although numerous factors, including demeanor, may be considered in evaluating the credibility of witnesses, McCormick identifies "five main lines of attack upon the credibility of a witness." 1 McCormick, Evidence § 33, at 111 (4th ed. 1992). These include: (1) bias or interest, (2) prior inconsistent statements, (3) specific contradiction, (4) sensory or mental defects, and (5) character for untruthfulness, which includes impeachment by reputation, opinion, prior convictions, and prior untruthful acts. The Ohio Rules of Evidence contain provisions on three of these methods of impeachment — e.g., untruthful character (Evid. R. 608 and 609), prior inconsistent statements (Evid. R. 613), and bias (Evid. R. 616). The rule on bias was added in 1991.

Prior to the 1998 amendments, the Rules did not contain provisions on impeachment by (1) specific contradiction, (2) sensory or mental defects, (3) prior inconsistent conduct, or (4) learned treatise. See Kenney v. Fealko, 75 Ohio App.3d 47, 51, 598 N.E.2d 861 (1991)("The Ohio Rules of Evidence do not enumerate the various ways in which the credibility of a witness can properly be attacked.... Under [Evid.R. 611(B)] and the common-law rule, evidence of appellant's state of intoxication was admissible because it was relevant to the issue of her ability to perceive and hence her credibility."). The amendments fill in these gaps in the law of impeachment. The amendments are as follows:

- (1) Rule 607(B) codifies the good faith basis-in-fact requirement for impeaching questions,
- (2) Rule 613(B) codifies the common law rule on the admissibility of extrinsic evidence of prior inconsistent statements,
- (3) Rule 613(C) deals with impeachment by prior inconsistent conduct,
- (4) Rule 616(B) deals with impeachment by sensory-mental defects,
- (5) Rule 616(C) deals with impeachment by specific contradiction,
- (6) Rule 706 codifies the common law learned treatise impeachment rule, and
- (7) Rule 806, which governs the impeachment of hearsay declarants, removes an inconsistency between that rule and Rule 609 (prior convictions).

FEDERAL RULES

The Federal Rules of Evidence do not contain provisions comparable to the 1998 amendments. Indeed, the Federal Rules do not have a rule on impeachment by showing bias. It took a United States Supreme Court opinion to resolve the issue. See United States v. Abel, 469 U.S. 45, 51 (1984)("the lesson to be drawn ... is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption.").

The federal drafters were aware that the Federal Rules as proposed did not have provisions on all the common law impeachment rules. The federal drafters included impeachment rules only when they intended to limit impeachment. In their view, there was no need for an impeachment rule when no limitation on that type of impeachment applied. They assumed that such impeachment was admissible under Federal Rule 402, which makes relevant evidence admissible. Professor Cleary, the Reporter for the Federal Rules, wrote that Federal Rule 102 indicates "one thing of importance: the answers to all questions that may arise under the Rules may not be found in specific terms in the Rules." Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908, 908 (1978). Professor Cleary noted that the "common law experience will, then, suggest additional applications" such as "purportedly scientific evidence in an insufficiently established field, contradiction on collateral matters for impeachment purposes, and speculative and conjectural evidence." Id. at 916. One federal court stated it this way: "It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common law precedent." Werner v. Upjohn Co., Inc., 628 F.2d 848,

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856 (4th Cir. 1980).

The Ohio amendments are based on a different philosophy — that all important evidence rules should be codified. Thus, the rationale for these amendments is straightforward: Since the amended rules currently apply in Ohio trials through the common law (see Evid. R. 102), they should be codified in order to make them readily accessible at trial. See 1 Giannelli & Snyder, Baldwin's Ohio Practice Evidence § 102.4 (1996)(Rules of Evidence and common law).

REASONABLE BASIS REQUIREMENT

Amended Rule 607(B) requires that a questioner have a good faith basis for a question that implies the existence of an impeaching fact.

Under the common law, a party inquiring into specific instances of conduct must have a good faith basis in fact for asking the question. E.g., State v. Gillard, 40 Ohio St.3d 226, 231, 533 N.E.2d 272 (1988) ("[A] cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists."), cert. denied, 492 U.S. 925 (1989); Kornreich v. Indus. Fire Ins. Co., 132 Ohio St. 78, 88, 5 N.E. 153 (1936) ("These collateral attacks must be made in good faith . . . ."). This rule is especially important in criminal cases where the unfair prejudice may be great. See also 1 McCormick, Evidence § 41, at 140 (4th ed.1992) ("A good faith basis for the inquiry is required.").

Professor Graham explains the requirement as follows:

> Note that the requirement of a good faith basis applies only when the cross examiner is effectively asserting in the form of a question the truth of a factual statement included within the question. If the cross-examiner is merely inquiring whether something is or is not true, a good faith basis is not required. Thus the question, "Your glasses were being repaired at the time of the accident, weren't they?" requires a good faith basis, while the question, "Were you wearing your glasses at the time of the accident?" does not. 1 Graham, Handbook of Federal Evidence § 607.2, at 679-80 (4th ed. 1996).

In addition to the Rules of Evidence, the Code of Professional Responsibility imposes requirements in this context. See D.R. 7-106(C) ("In appearing in his professional capacity before a tribunal, a lawyer shall not: . . . (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.").

SENSORY OR MENTAL DEFECT

Amended Rule 616(B) codifies the common law rule on impeachment by showing sensory or mental defect. Any sensory or mental deficiency that might affect a witness's capacity to observe, recall, and relate the events about which the witness has testified is admissible to impeach that witness's credibility.

Pre-Rules Cases

The pre-Rules cases permitted inquiry into a witness's capacity to observe and remember as well as other factors affecting perception and memory. See State v. Auerbach, 108 Ohio St. 96, 98, 140 N.E. 507 (1923) ("means of observation"); Morgan v. State, 48 Ohio St. 371, 373-74, 27 N.E. 710 (1891) (opportunity to observe, "intelligence"); Shelby v. Clagett, 46 Ohio St. 549, 552-53, 22 N.E. 407 (1889) (opportunities to observe, "intelligence, fairness"); Lee v. State, 21 Ohio St. 151, 154 (1871) (recollection); Stewart v. State, 19 Ohio 302, 304 (1850) (proper to cross-examine witness on opportunity to observe and to remember); McAllister v. State, 13 Ohio Abs. 360, 362 (App. 1932) (mental condition affects credibility); State v. Webb, 72 Ohio Abs. 306, 308, 131 N.E.2d 273 (C.P. 1955) (mental condition affects credibility).

In addition, evidence that the witness was under the influence of alcohol or drugs at the time of the event or at the time of the trial fell within this category but generally not alcoholism or drug addiction. E.g., Bell v. Rinner, 16 Ohio St. 45, 48 (1864) (evidence that witness was "drunk, paralyzed, deaf'" proper; but extrinsic evidence of lack of ordinary intelligence inadmissible); Johnson v. Knipp, 36 Ohio App.2d 218, 221, 304 N.E.2d 914 (1973) (intoxication of witness at time of event relevant to credibility); 1 McCormick, Evidence § 44, at 162 (4th ed. 1992) ("Habitual addiction stands differently. It is generally held that the mere fact of chronic alcoholism is not provable on credibility."); 3A Wigmore, Evidence §§ 931-35, 989-95 (Chadbourn rev. 1970).

Post-Rule Cases

Even though no provision addressed this issue until the 1998 amendment, the post-Rules cases are in accord with the pre-Rules cases. The Ohio Supreme Court has ruled that a witness's visual impairment is not a ground for incompetency under Rule 601, but rather a factor "relat[ing] to the credibility of the statements made by [the witness]." Turner v. Turner, 67 Ohio St.3d 337, 343, 617 N.E.2d 1123 (1993). See also Kenney v. Fealko, 75 Ohio App.3d 47, 51, 598 N.E.2d 861 (1991) ("The Ohio Rules of Evidence do not enumerate the various ways in which the credibility of a witness can properly be attacked. . . . Under [Evid.R. 611(B)] and the common-law rule, evidence of appellant's state of intoxication was admissible because it was relevant to the issue of her ability to perceive and hence her credibility."); State v. Troutman, 71 Ohio App.3d 755, 759, 595 N.E.2d 414 (1991) (per curiam) ("[T]he statements were admissible for the purpose of attacking the police officer's credibility through a showing of . . . faulty memory.").

Extrinsic Evidence

The common law cases did not indicate whether extrinsic evidence (i.e., the testimony of other witnesses) of sensory or mental defects may be introduced. There was probably no hard and fast rule. Sensory and mental defects often can be effectively disclosed through cross-examination, in which case the admissibility of extrinsic evidence could be regulated by the trial court pursuant to Rules 403 and 611(A). See 1 McCormick, Evidence § 44, at 161 (4th ed.1992) ("It seems eminently a case for discretion. The trial judge would determine whether the crucial character of the testimony attacked and the evaluative light shed by the impeaching evidence overbalance the time and distraction involved in opening this side-dispute.").

The amended rule provides for the admissibility of this type of evidence on cross examination or through extrinsic evidence. Moreover, the amended rule does not affect Rule 601, which governs the competency of witnesses, or Rule 602, which specifies the firsthand knowledge requirement.

SPECIFIC CONTRADICTION

Rule 616(C) codifies the common law rule on impeachment by specific contradiction. There are two distinct methods of impeachment by contradiction. First, self-contradiction involves the use of a witness's own prior inconsistent

statements or conduct to contradict the witness's present testimony. Rule 613 governs this type of impeachment. Second, contradiction may involve the testimony of one witness that conflicts with the testimony of another witness (called "specific contradiction"). For example, witness A may testify that he saw the defendant shoot the victim, but witness B, who was also present, may testify that she saw a different person shoot the victim. In this example, witness B's testimony, as an eyewitness, would be admissible even in the absence of the incidental impeachment effect on the testimony of witness A. The problem arises when the only purpose of witness B's testimony is to contradict A's testimony, especially if the contradiction is on a minor point. This situation gave rise to the so-called "collateral matters" rule. E.g., Byomin v. Alvis, 169 Ohio St. 395, 396, 159 N.E.2d 897 (1959) (per curiam) ("It is elementary that a witness may not be impeached by evidence that merely contradicts his testimony on a matter that is collateral."); State v. Cochrane, 151 Ohio St. 128, 135, 84 N.E.2d 742 (1949) ("The cross-examiner is not permitted to introduce rebuttal evidence to contradict the witness on collateral matters.").

"Collateral Matters" Rule

The circumstances under which a party may introduce *extrinsic evidence* of contradiction is typically stated in terms of the so-called "collateral matters" rule. The term "collateral matters" may be misleading. The common law rule did not prohibit a party from cross-examining on a "collateral matter." It prohibited only the introduction of extrinsic evidence on the issue. The underlying policy was to "avoid[] the dangers of surprise, jury confusion and wasted time." State v. Kehn, 50 Ohio St.2d 11, 17, 361 N.E.2d 1330 (1977) (per curiam), cert. denied, 434 U.S. 858 (1977). The impeachment theory here is that the witness made one mistake and therefore may have made others. This line of attack has limited probative value for impeachment (a person who makes a mistake on one unimportant issue may also make a mistake on an important issue) and the introduction of extrinsic evidence would consume time.

Admissible on the Merits

Attempting to codify the common law decisions, amended Rule 616(C) recognizes three instances when extrinsic evidence on contradiction is admissible. According to Wigmore, extrinsic evidence of contradiction should be admitted if the evidence would be admissible "for any purpose independently of the contradiction." 3A Wigmore, Evidence § 1003, at 961 (Chadbourn rev. 1970). Explaining this test, McCormick wrote that two types of facts were independently provable: "The first kind are facts that are relevant to the substantive issues in the case." McCormick, Evidence § 47, at 110-11 (3d ed. 1984). Rule 616 (C)(1) addresses this issue. An illustration would be eyewitness B in the above example; as an eyewitness, B's testimony was admissible on the merits (or substantively) and thus there is basis for admission, in Wigmore's words, that is independent of the contradiction.

Other Methods of Impeachment

The second category, according to McCormick, are "facts showing bias, interest, conviction of crime, and want of capacity or opportunity for knowledge." Id. In other words, the second category encompasses those methods of impeachment, such as bias, that always permit the introduction of extrinsic evidence. The Ohio Supreme Court appeared to have adopted Wigmore's approach in an early case. See Kent v. State, 42 Ohio St. 426, 431 (1884) (Extrinsic evidence is admissible when "the matter offered in contradiction is in any way relevant to the issue, or such as tends to show prejudice or interest."). Rule 616(C)(2) enumerates the rules that fall within this category — for example, impeachment by showing bias under Rule 616(A).

Common Law

McCormick argued that extrinsic evidence of contradiction should also be admitted in a third situation, one in which such evidence is critical to determining the credibility of a witness's story. He refers to this as "linchpin" evidence: "So we may recognize this third type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story was true." McCormick, Evidence § 47, at 112 (3d ed. 1984).

McCormick provides several examples: Stephens v. People, 19 N.Y. 549, 572 (1859) (murder by poisoning with arsenic; defendant's witnesses testified the arsenic was administered to rats in cellar where provisions kept; held proper for state to prove by *another witness* that no provisions were kept in cellar); Hartsfield v. Carolina Cas. Ins. Co., 451 P.2d 576 (Alaska 1969) (on issue whether insurance cancellation notice was sent to defendant by insurer; defendant denied receipt and also receipt of notices of cancellations of the insurance from two other sources. Evidence of the mailing by the two latter sources was held not collateral). By referring to the common law, Rule 616(C)(3) encompasses this category. Admittedly, this is a vague category.

For example, assume that a defendant claims alibi for a bank robbery that was committed on May 1 in Cleveland. An alibi witness testifies that the defendant was with her in Chicago on May 1. The alibi witness further testifies that she remembers the day because it was a sunny day and they walked by the lake. May a prosecutor impeach by introducing the testimony of a weather forecaster, which reveals that it snowed in Chicago on May 1? Such testimony is not "independently provable." This evidence, however, is important and is therefore admissible under this category.

Extrinsic Evidence Defined

In the impeachment context, extrinsic evidence means evidence introduced through the testimony of other witnesses. See 1 McCormick, Evidence § 36, at 118 (4th ed.1992) ("Extrinsic evidence, that is, the production of attacking witnesses . . . is sharply narrowed for obvious reasons of economy of time and attention."). Accordingly, documentary evidence offered through the witness being impeached is not extrinsic evidence because it typically does not consumed much additional time.

PRIOR INCONSISTENT STATEMENTS

Rule 613(B) was changed to specify when extrinsic evidence of a prior inconsistent statement is admissible. As adopted in 1980, Rule 613 did not fully specify the circumstances under which extrinsic evidence is admissible in this context; it merely conditioned the admission of extrinsic evidence on the laying of a foundation on cross-examination.

Pre-Rules Cases

Even if a proper foundation had been laid on cross-examination, extrinsic evidence of a prior statement was admissible only if it did not relate to a "collateral matter." Byomin v. Alvis, 169 Ohio St. 395, 159 N.E.2d 897 (1959); Kent v. State, 42 Ohio St. 426 (1884). The collateral matter rule ap-

plied only to extrinsic evidence; it did not preclude inquiry on cross-examination so long as the examination was relevant to impeachment.

The cases, however, were not altogether consistent. If the witness admitted making the prior statement, it was not error for the trial court to refuse to admit the statement in evidence. See Blackford v. Kaplan, 135 Ohio St. 268, 270, 20 N.E.2d 522 (1939); Babbitt v. Say, 120 Ohio St. 177, 165 N.E. 721 (1929); Dietsch v. Mayberry, 70 Ohio App. 527, 47 N.E.2d 404 (1942). A court's decision to admit the statement, however, was also probably not error. See Bluestein v. Thompson, 102 Ohio App. 157, 139 N.E.2d 668 (1957). Although one appellate court held that, "after a proper foundation for impeachment has been laid for the introduction of inconsistent statements of a witness, it becomes necessary to prove them," Dorsten v. Lawrence, 20 Ohio App.2d 297, 305, 253 N.E.2d 804 (1969), this was not a hard and fast rule.

Post-Rules Cases

The exact definition of what constituted a collateral matter in Ohio, as elsewhere, was unclear. Some courts indicated that the issue should be decided by the trial court under Rule 403. E.g., State v. Shaffer, 114 Ohio App.3d 97, 102, 682 N.E.2d 1040 (1996) ("The decision whether to admit a prior inconsistent statement which is collateral to the issue being tried and pertinent to the credibility of a witness is a matter within the sound discretion of the trial judge."); State v. Riggins, 35 Ohio App.3d 1, 3, 519 N.E.2d 397 (1986) (admissibility of evidence on collateral matters is a matter within the discretion of the trial court); Schwartz v. Wells, 5 Ohio App.3d 1, 3, 449 N.E.2d 9 (1982); 1 McCormick, Evidence § 36, at 118 (4th ed.1992) (The "statements must have as their subject facts relevant to the issues in the cause."'); 3A Wigmore, Evidence § 1020 (Chadbourn rev. 1970).

See also State v. Jacobs, 108 Ohio App.3d 328, 333, 670 N.E.2d 1014 (1995) (because the witness admitted making the prior inconsistent statement at a preliminary hearing, "whether the transcript itself was admitted into evidence made little difference since the substance of the prior inconsistent statement was already before the jury"); State v. Minor, 47 Ohio App.3d 22, 27, 546 N.E.2d 1343 (1988) ("There is no requirement that extrinsic evidence be introduced to establish a prior inconsistent statement if such statement is denied, unless there is an indication that the impeaching question may have been posed without a good faith belief that such an inconsistent statement had been made.").

Amended Rule

Rule 613(B) was changed to specify when extrinsic evidence of a prior inconsistent statement is admissible. These circumstances closely track those of impeachment by evidence of specific contradiction as provided in Rule 616(C). See Staff Note, Evid. R. 616(C) (1998). Under the amended rule, extrinsic evidence is admissible if the prior statement relates to the material issues in the case, is otherwise admissible under some other impeachment rule (e.g., Evid. R. 616(A)(bias)), or is admissible under the common law.

PRIOR INCONSISTENT CONDUCT

As adopted in 1980, Ohio Rule 613 did not provide for impeachment by evidence of prior inconsistent conduct. Nor did the federal rule. See Advisory Committee's Note, Fed. Evid. R. 613 ("Under principles of expression unius the rule does not apply to impeachment by evidence of prior inconsistent conduct."). Because no rule prohibited such impeachment, this type of evidence was admissible under Evidence Rule 102 (construction and purpose provision) if relevant.

In a pre-Rules case, the Ohio Supreme Court had written: "Conduct inconsistent with the testimony of a witness, may be shown as well as former statements thus inconsistent." Dilcher v. State, 39 Ohio St. 130, 136 (1883). Accord Westinghouse Electric Corp. v. Dolly Madison Leasing & Furniture Corp., 42 Ohio St.2d 122, 132, 326 N.E.2d 651 (1975)("inconsistency in behavior" admissible for impeachment); 1 McCormick, Evidence § 34, at 113 n. 5 (4th ed. 1992) ("Conduct . . . evincing a belief inconsistent with the facts asserted on the stand is usable on the same principle" as a prior inconsistent statement.).

Foundation

In *Westinghouse Electric Corp.*, the Supreme Court imposed the same foundational requirements for impeachment by prior inconsistent *conduct* as were required for impeachment by prior inconsistent *statements:* "an adequate foundation for admission of the film was laid during cross-examination . . . and the witness was allowed to explain the apparent inconsistency upon redirect." 42 Ohio St.2d at 132. The rule adopts a comparable requirement.

Substantive Use

The amendment applies to the impeachment of a witness, including a party who testifies. It does not, however, apply to a party's inconsistent conduct that may be introduced on the merits; admissions by the conduct of a party (sometimes known as "implied admissions") may be admissible substantively and are not restricted by Rule 613(C). See Staff Note(1998) (citing 1 Giannelli & Snyder, Baldwin's Ohio Practice Evidence § 401.8-.10 (1996) (adverse inferences: spoliation, admissions by conduct, failure to produce evidence or call witnesses)).

LEARNED TREATISES

The common law rule restricted the use of a learned treatise to the impeachment of an expert. Accordingly, the substantive use of such a treatise violated the hearsay rule.

Hearsay: Federal Rule

When the Ohio Rules of Evidence were adopted in 1980, Ohio rejected Federal Evidence Rule 803(18), which recognizes a hearsay exception for learned treatises. In contrast to the federal rule, the Ohio cases have limited the use of learned treatises to impeachment; the treatise is considered hearsay and may not be used as substantive evidence. This limitation applied at common law. For example, in Hallworth v. Republic Steel Corp., 153 Ohio St. 349, 91 N.E.2d 690 (1950) (syllabus, para. 2), the Ohio Supreme Court held: "Medical books or treatises, even though properly identified and authenticated and shown to be recognized as standard authorities on the subject to which they relate, are not admissible in evidence to prove the truth of the statements therein contained." According to the Court, the "bases for exclusion are lack of certainty as to the validity of the opinions and conclusions set forth, the technical character of the language employed which is not understandable to the average person, the absence of an oath to substantiate the assertions made, the lack of opportunity to cross-examine the author, and the hearsay aspect of such matter." Piotrowski v.

Corey Hospital, 172 Ohio St. 61, 69, 173 N.E.2d 355 (1961). See also Lambert v. Dally, 30 Ohio App.2d 36, 281 N.E.2d 857 (1972); Bluebird Baking Co. v. McCarthy, 19 Ohio Abs. 466, 470, 36 N.E.2d 801 (App. 1935).

After the Ohio Rules of Evidence were adopted in 1980, the common law rule continued under Evidence Rule 102. In 1992 the Ohio Supreme Court commented in Ramage v. Cent. Ohio Emergency Serv. Inc., 64 Ohio St.3d 87, 110, 592 N.E.2d 828 (1992)(citing Giannelli, Ohio Evidence):

> Unlike the evidentiary rules of the federal courts, the Ohio Rules of Evidence do not provide for the learned treatise exception to the hearsay rule. In Ohio, textbooks and other learned treatises are considered hearsay, may not be used as substantive evidence, and are specially limited to impeachment purposes only.

See also Kane v. Ford Motor Co., 17 Ohio App.3d 111, 112, 477 N.E.2d 662 (1984)("Ohio has not adopted the learned treatise exception to the hearsay rule, as have the federal courts (Fed.R.Evid. 803[18])."); Beavercreek Local Schools v. Basic, Inc., 71 Ohio App.3d 669, 676, 595 N.E.2d 360 (1991)("The Ohio Rules of Evidence do not incorporate the learned treatise exception to the hearsay rule incorporated in Fed.Evid.R. 803(18)."); Steinfurth v. Armstrong World Industries, 27 Ohio Misc.2d 21, 23, 500 N.E.2d 409 (C.P. 1986)("The Ohio Rules of Evidence omit the learned treatise rule which is contained in Fed.Evid.R. 803(18).").

Scope of the Rule

Jurisdictions that have limited the use of learned treatises to impeachment have differed as to when impeachment is proper:

> The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Advisory Committee's Note, Fed. Evid. R. 803.

The key issue in Ohio was whether treatises "recognized as authoritative," in addition to those "relied upon," by an expert could be used for impeachment. At one time the Ohio position was somewhat difficult to characterize. The syllabus in Hallworth v. Republic Steel Corp., 153 Ohio St. 349, 356, 91 N.E.2d 690 (1950), referred to treatises "recognized as standard authorities" without mentioning reliance by the expert. The language of the opinion, however, was more restrictive:

> [I]t is difficult to understand how inquiries with respect to statements in a particular book would be proper if it had not first been brought out that Dr. Kramer based his conclusions in some way on statements in that book. If Dr. Kramer denied that he had known about this particular book, it is difficult to see how his further cross-examination with regard to the book would be proper at all.

In a later case, however, the Court wrote: "[I]n Ohio, a learned treatise may be used for impeachment purposes to demonstrate that an expert witness is either unaware of the text or unfamiliar with its contents. Moreover, the substance of the treatise may be employed only to impeach the credibility of an expert who has relied upon the treatise, . . ., *or has acknowledged its authoritative nature.*" Stinson v. England, 69 Ohio St.3d 451, 458, 633 N.E.2d 532 (1994). The rule permits impeachment in both circumstances, as well as through judicial notice. A possible expansion of the common law rule concerns the use of judicial notice to establish the treatise as a reliable authority. A court taking judicial notice of *Grey's Anatomy* illustrates this aspect of the rule.

The trial court decides under Rule 104(A) if the treatise is a "reliable authority," and Rule 105 requires a limiting instruction upon request. If an opposing expert witness refuses to recognize a treatise as reliable, the judge may permit the impeachment, subject to counsel's subsequent laying of the foundation through its own expert. There is no need to inform the jury of the trial court's determination.

Learned Treatise Defined

In O'Brien v. Angley, 63 Ohio St.2d 159, 164, 407 N.E.2d 490 (1980), the Ohio Supreme Court ruled that an editorial in the *Journal of the American Medical Association* was not a learned treatise because it had been prepared with a view toward litigation. An author writing for her profession has a strong incentive for accuracy because the author seeks acceptance by the profession. In contrast, where "the author publishes an article with a view toward litigation, or where he possesses a personal interest in a litigable matter, a probability of bias exists which undermines the logic supporting the admission of this material in evidence as an exception to the rule against hearsay." This case, however, was decided before the adoption of the Rules of Evidence in 1980, and it differs from the Rules because the quoted language appears to recognize a hearsay exception. Only in the hearsay context is the reliability of the treatise important. For impeachment, the critical point is that a text that the expert either relied upon or recognizes as authoritative is inconsistent with that expert's testimony.

Nevertheless, the issue was raised again in a later case. Worthington City Schools v. ABCO Insulation, 84 Ohio App.3d 144, 616 N.E.2d 550 (1992), involved the use of a learned treatise that the plaintiff claimed had been written for asbestos litigation. The court acknowledged that the underlying research may have been prepared in anticipation of litigation, but the article itself was not. The article did not mention litigation, and the testifying expert was one of 16 co-authors. Moreover, the article had been submitted for peer review and revised before it was published in a scientific journal.

IMPEACHMENT OF HEARSAY DECLARANTS

Ohio Rule 806 governs the admissibility of evidence relating to the credibility of hearsay declarants and persons who make representative admissions, which include authorized admissions, servant and agent admissions, and conspirator admissions under Rule 801(D)(2). As the federal drafters explained, "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified.'" Advisory Committee's Note, Fed. Evid. R. 806. Accordingly, these declarants may be impeached by showing bias, untruthful character, evidence of prior convictions, inconsistent statements, and so forth. See 2 Giannelli & Snyder, Baldwin's Ohio Practice Evidence § 806.1 (1996).

1998 Amendment

In 1998 Rule 806 was restructured, and the following statement was added: "Evidence of a declarant's prior conviction is not subject to any requirement that the declarant be shown a public record." The limitation in Rule 609(F) that a prior conviction offered for impeachment be proved by the testimony of the witness or by public record shown to the witness during the examination clearly contemplates the witness's presence at trial; this is in tension with Rule 806, which provides that a hearsay declarant may be impeached "by any evidence which would have been admissible for those purposes if declarant had testified as a witness."

In State v. Hatcher, 108 Ohio App.3d 628, 671 N.E.2d 572 (1996), a witness for the defense at the defendant's first trial was unavailable at the time of a second trial. His testimony from the first trial was admitted into evidence as former testimony under Rule 804(B)(1). The trial court then admitted into evidence certified copies of the declarant's prior felony convictions, which were offered by the prosecution to impeach the witness (now declarant). The court of appeals noted the "arguable conflict" between Rule 609(F) and Rule 806, but determined that the admission of the certified copies of the witness's prior felony convictions was not error. The amendment clarifies this ambiguity.