

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. VIII]

Proposed Amendment of Pa.R.E. 803 to Add a New Rule F.R.E. 803(18)

The Committee on Rules of Evidence is planning to recommend that the Supreme Court of Pennsylvania approve the Amendment of Pa.R.E. 803. The change is being proposed to add subsection (18) Learned Treatise and Comment.

This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The text for the proposed changes precede the Report. Additions are bold, and deletions are in bold and brackets.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel:

Richard L. Kearns
Staff Counsel
Supreme Court of Pennsylvania
Committee on Rules of Evidence
5035 Ritter Road, Suite 700
Mechanicsburg, PA 17055

no later than August 15, 2008.

By the Committee on Rules of Evidence

SANDRA D. JORDAN,
Chair

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE VIII. HEARSAY

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following statements, as hereinafter defined, are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(18) *Learned Treatises* [Not Adopted]. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness 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 the testimony or admission of the witness or by other expert testimony or by judicial notice.

This exception to the hearsay rule is not applicable unless the party calling the expert witness on direct examination has given timely notice of the intent to offer the learned treatise.

[Comment

Pennsylvania has not adopted F.R.E. 803(18). Pennsylvania does not recognize an exception to

the hearsay rule for learned treatises. See *Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334 (1988).

Regarding the permissible uses of learned treatises under Pennsylvania law, see *Aldridge v. Edmunds*, 750 A.2d 292 (Pa. 2000).]

Comment

Pa.R.E. 803(18) is similar to F.R.E. 803(18). Prior Pennsylvania law did not permit the substantive use of statements contained in learned treatises. See *Aldridge v. Edmunds*, 561 Pa. 323, 750 A.2d 292 (2000). A clear majority of the states have adopted the Federal rule, based on the judgment that statements contained in learned treatises are especially reliable because they are subject to peer review, and, except in rare instances, the author will have no interest in the case before the court. The second sentence of the federal rule that prohibits giving the statements to the jury during deliberations has been omitted because Pennsylvania law gives the trial judge discretion to decide which exhibits are given to the jury during deliberations. See *Wilson v. Pennsylvania R.R. Co.*, 421 Pa. 419, 219 A.2d 666, n. 8 (Pa. 1966); Pa.R.Crim.P. 646(B).

The notice requirement in the second paragraph of the rule does not appear in F.R.E. 803(18), but federal discovery practice differs from Pennsylvania practice. The notice requirement is intended to prevent unfair surprise, and so that the opposing party will have the opportunity to investigate the validity of the author's statements or seek other authority. The notice should be provided in the normal course of discovery. See Pa.R.C.P. 4003.5(a)(1)(b).

* * * * *

REPORT

Proposed Amendment of Pa.R.E. 803 to Add the Learned Treatise Exception to the Hearsay Rule

There are some fairly solid grounds for adopting the Learned Treatise exception to the hearsay rule. As a general rule, the material is a pretty reliable type of hearsay. It is subject to peer review, and usually the author will have no interest in the case before the court.

A second reason for adopting the rule is that learned treatises now may come before the jury to explain the basis for an expert's opinion or to impeach an expert. In these cases, the judge is obligated, upon request, to give a limiting instruction to the effect that the learned treatise is not admissible for its truth, but only to explain the basis for the opinion or to impeach. See *Aldridge v. Edmunds*, 750 A.2d 292 (Pa. 2000). It is questionable whether the jurors will understand the instruction. If we adopt the rule the court will not give the instruction, and the jury will not have to figure out what the judge is talking about.

A third reason is that this is so confusing that the courts and counsel frequently trip over the handling of learned treatises in court. Adoption of the rule might simplify the handling of learned treatises for the courts, counsel, and the jury.

When Rule 803(18) of the Federal Rules of Evidence (Federal Rule 803(18)) was adopted in the early 1970's,

the rule that permitted the contents of learned treatises to be admitted as substantive evidence was a distinctly minority view. As the Note to paragraph 18 revealed, only Alabama, Wisconsin, and Kansas then followed the Federal Rule 813(18). However, as of today, thirty states (as well as the Military Code of Justice) have adopted rules or enacted statutes that are either identical or substantively identical to the Federal Rule 803(18). Those states are:

Alabama	Alaska	Arizona	Arkansas
Delaware	Hawaii	Indiana	Iowa
Kentucky	Maine ¹	Maryland	Minnesota
Montana	Nebraska	New Jersey ²	New Mexico
North Carolina	North Dakota	Ohio	Oklahoma
Rhode Island	South Carolina ³	South Dakota	Texas
Utah	Vermont	Virginia	Washington
West Virginia		Wyoming	

Another seven states have adopted rules or enacted statutes that also permit statements in learned treatises to be used as substantive evidence, but otherwise differ from Federal Rule 803(18) in that admission of the statements as exhibits is or may be permitted. Those states are:

Colorado	Connecticut	Idaho	Kansas
Louisiana ⁴	Nevada	New Hampshire	

Two other states (Mississippi and Wisconsin) have adopted rules or enacted statutes that differ from the Federal Rule 803(18) in that the intended use of the learned treatise must be disclosed to the opposing party prior to trial. Massachusetts, by statute, permits the introduction of statements in learned treatises as substantive evidence only in medical malpractice actions if prior notice is provided.

[Pa.B. Doc. No. 08-1281. Filed for public inspection July 11, 2008, 9:00 a.m.]

Title 25—LOCAL COURT RULES

LACKAWANNA COUNTY

Adult Probation ARD Fees; No. 2008-MISC-343

Administrative Order

Now, this 11th day of June, 2008, effective 30 days following publication in the *Pennsylvania Bulletin*, the annual fee imposed by the Adult Probation and Parole Department for entry into the ARD program will increase to \$1,200 for both DUI offenders and non-DUI offenders. ARD fees are shared by a number of funds including the present amount of \$180 which goes to the President Judge's Supervision fund. The increased fee will now apportion \$520 for DUI cases to the President Judge's Supervision fund and \$675 for non-DUI cases to this same fund. The Clerk of Judicial Records shall collect this fee as part of Court fees levied on ARD defendants and

¹Maine's rule permits statements of a learned treatise to be used as substantive evidence only where those statements are used during cross-examination of an expert witness.

²New Jersey's rule differs only in that it permits "graphics" to be shown to a jury.

³South Carolina's rule is identical to Federal Rule 803(18) except that it adds the following sentence at the end thereof: "This rule is in addition to any statutory provisions on the subject."

⁴Louisiana's rule specifically prohibits any exhibit admitted pursuant thereto from being taken into the jury room.

the Lackawanna County Treasurer shall continue to maintain and administer the separate President Judge's Supervision fund.

It is further ordered that, in accordance with Pa.R.C.P. 239, the District Court Administrator of Lackawanna County, Pennsylvania, shall:

(a) File seven (7) certified copies hereof with the Administrative Office of Pennsylvania Courts;

(b) Distribute two (2) certified copies hereof to the Legislative Reference Bureau for Publication on the *Pennsylvania Bulletin*;

(c) File one (1) certified copy hereof with the Criminal Rules Committee;

(d) Cause a copy hereof to be published one (1) time in the *Lackawanna Jurist* at the expense of the County of Lackawanna; and

(e) Supervise and distribute hereof to all Judges of this Court.

It is Further Ordered that copies of this Order are directed to: the Court of Common Pleas; the District Court Administrator; the Lackawanna County District Attorney's Office; the Lackawanna County Public Defender's Office; the Lackawanna County Clerk of Judicial Records Office; the Lackawanna County Adult Probation and Parole Office; and the Lackawanna County Treasurer's Office.

By the Court

CHESTER T. HARHUT,
President Judge

[Pa.B. Doc. No. 08-1282. Filed for public inspection July 11, 2008, 9:00 a.m.]

LACKAWANNA COUNTY

Adult Probation CallTrack Fee; No. 2008-MISC-346

Administrative Order

Now, this 11th day of June, 2008, it is hereby ordered that a monthly fee be imposed on ARD cases and other specific probation or parole cases when the offender is placed on CallTrack in lieu of direct officer contact. This fee will be \$48.00 for the six month period billed directly by the vendor, Digital Solutions, Inc. Since a portion of this fee will be returned to the County's Probation and Parole Department, the Lackawanna County Treasurer shall establish and administer a separate Lackawanna County Adult Probation CallTrack Fund, consisting of those funds received from the CallTrack program.

It is further ordered that, in accordance with Pa.R.C.P. 239, the District Court Administrator of Lackawanna County, Pennsylvania, shall:

(a) File seven (7) certified copies hereof with the Administrative Office of Pennsylvania Courts;

(b) Distribute two (2) certified copies hereof to the Legislative Reference Bureau for Publication on the *Pennsylvania Bulletin*;

(c) File one (1) certified copy hereof with the Criminal Rules Committee;

(d) Cause a copy hereof to be published one (1) time in the *Lackawanna Jurist* at the expense of the County of Lackawanna; and

(e) Supervise and distribute hereof to all Judges of this Court.

It is Further Ordered that copies of this Order are directed to: the Court of Common Pleas; the District Court Administrator; the Lackawanna County District Attorney's Office; the Lackawanna County Public Defender's Office; the Lackawanna County Clerk of Judicial Records Office; the Lackawanna County Adult Probation and Parole Office; and the Lackawanna County Treasurer's Office.

By the Court

CHESTER T. HARHUT,
President Judge

[Pa.B. Doc. No. 08-1283. Filed for public inspection July 11, 2008, 9:00 a.m.]

LACKAWANNA COUNTY

Adult Probation Drug Test Fees; No. 2008-MISC-344

Administrative Order

Now, this 11th day of June, 2008, effective 30 days following publication in the *Pennsylvania Bulletin*, the Adult Probation and Parole Department will impose a \$30.00 annual fee for those ordered by the courts to undergo one or more Drug Tests. The Clerk of Judicial Records shall collect this fee as part of Court fees levied on defendants and the Lackawanna County Treasurer shall establish and administer a separate Lackawanna County Adult Probation Drug Test Fund, consisting of those funds received from this Drug Test Fee.

It is further ordered that, in accordance with Pa.R.C.P. 239, the District Court Administrator of Lackawanna County, Pennsylvania, shall:

(a) File seven (7) certified copies hereof with the Administrative Office of Pennsylvania Courts;

(b) Distribute two (2) certified copies hereof to the Legislative Reference Bureau for Publication on the *Pennsylvania Bulletin*;

(c) File one (1) certified copy hereof with the Criminal Rules Committee;

(d) Cause a copy hereof to be published one (1) time in the *Lackawanna Jurist* at the expense of the County of Lackawanna; and

(e) Supervise and distribute hereof to all Judges of this Court.

It is Further Ordered that copies of this Order are directed to: the Court of Common Pleas; the District Court Administrator; the Lackawanna County District Attorney's Office; the Lackawanna County Public Defender's Office; the Lackawanna County Clerk of Judicial Records Office; the Lackawanna County Adult Probation and Parole Office; and the Lackawanna County Treasurer's Office.

By the Court

CHESTER T. HARHUT,
President Judge

[Pa.B. Doc. No. 08-1284. Filed for public inspection July 11, 2008, 9:00 a.m.]

LACKAWANNA COUNTY

Adult Probation Supervision Fund Fee Increase; No. 2008-MISC-345

Administrative Order

Now, this 11th day of June, 2008, effective 30 days following publication in the *Pennsylvania Bulletin*, the monthly Adult Probation Supervision fee will increase from \$35.00 monthly to \$47.00 monthly. This fee is apportioned half (new amount \$23.50) to the Adult Probation Supervision Fund (Account Line item # 4010) and half (\$23.50) to the Adult Probation PBPP Supervision Fund (per Act 35 of 1991/Account Line item # 4528), the latter of which is maintained by the Lackawanna County Treasurer's Office for the President Judge.

It is further ordered that, in accordance with Pa.R.C.P. 239, the District Court Administrator of Lackawanna County, Pennsylvania, shall:

(a) File seven (7) certified copies hereof with the Administrative Office of Pennsylvania Courts;

(b) Distribute two (2) certified copies hereof to the Legislative Reference Bureau for Publication on the *Pennsylvania Bulletin*;

(c) File one (1) certified copy hereof with the Criminal Rules Committee;

(d) Cause a copy hereof to be published one (1) time in the *Lackawanna Jurist* at the expense of the County of Lackawanna; and

(e) Supervise and distribute hereof to all Judges of this Court.

It is Further Ordered that copies of this Order are directed to: the Court of Common Pleas; the District Court Administrator; the Lackawanna County District Attorney's Office; the Lackawanna County Public Defender's Office; the Lackawanna County Clerk of Judicial Records Office; the Lackawanna County Adult Probation and Parole Office; and the Lackawanna County Treasurer's Office.

By the Court

CHESTER T. HARHUT,
President Judge

[Pa.B. Doc. No. 08-1285. Filed for public inspection July 11, 2008, 9:00 a.m.]

LUZERNE COUNTY

Order Adopting Rule 1038; Amending Rules 1301 and 1308 and Adopting Rule 1311; Rules of Civil Procedure; No. 8804 of 2008

Order

Now, this 25th day of June, 2008, the Court hereby adopts Luzerne County Rule of Civil Procedure 1038, amends Luzerne County Rules of Civil Procedure 1301 and 1308 and adopts Luzerne County Rule of Civil Procedure 1311, in the attached form, effective immediately.

It is further ordered that the District Court Administrator shall file seven (7) certified copies of this Order and the following Rules, along with a diskette to the Administrative Office of Pennsylvania Courts, two (2) certified copies of this Order and the following Rules along with a

diskette to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*, one (1) certified copy to the Civil Procedural Rules Committee, one (1) certified copy to the Judicial Council of Pennsylvania Statewide Rules Committee, and one (1) copy to the *Luzerne Legal Register* for publication in the next issue.

It is further ordered that these local rules shall be kept continuously available for public inspection and copying in the Prothonotary's Office.

By the Court

MARK A. CIAVARELLA, Jr.,
President Judge

Rule 1038. Trial without a Jury.

Appeals From Tax Assessments of Real Estate.

The following provisions shall govern trial of appeals from tax assessments of real estate:

1. The court shall refer trial of all tax assessment appeals to a special master for trial without a jury.

2. Conciliation.

(a) All appeals shall be conciliated before trial by a special master assigned thereto.

(b) At the time of conciliation, all parties or their counsel shall be present with full authority to effectuate a settlement of the appeal. Note: Parties and counsel are advised to pay particular attention to the notice of conciliation. In appropriate cases, the conciliation and trial may be scheduled on the same day. In such instances, the parties must appear at the conciliation ready to move directly into trial if the conciliation does not result in settlement.

(c) If any party fails to comply with the provisions of this local rule, the special master may include in the report a recommendation for the imposition of appropriate sanctions, including but not limited to, attorneys' fees and costs against the party or parties failing to comply.

3. Pre-Trial Statement.

a. Sixty days prior to the date scheduled for conciliation of tax assessment appeal, the appellant shall distribute to all counsel of record, or if counsel have not entered an appearance, on the party(ies), and to the special master assigned to the case a pre-trial statement. The pre-trial statement shall incorporate the following:

(i) a description of the user of the real estate and the nature of the real estate.

(ii) a list of all persons who will give testimony in the trial of this appeal.

(iii) a list of all exhibits which the party intends to use at trial.

(iv) any report, including without limitation an expert report or appraisal, of any person or entity who has been retained, employed, or consulted by the parties, who will give testimony in the trial of this appeal.

b. Twenty days prior to the date scheduled for conciliation of a tax assessment appeal, the appellee(s) shall distribute to all counsel of record, or if counsel have not entered an appearance, on the party(ies), and to the special master assigned to the

case a pre-trial statement. The pre-trial statement shall incorporate the following information or documents:

(i) a description of the use of the real estate and the nature of the real estate.

(ii) a list of all persons who will give testimony in the trial of this appeal.

(iii) a list of all exhibits which the party intends to use at trial.

(iv) any report, including without limitation an expert report or appraisal, of any person or entity who has been retained, employed, or consulted by the parties, who will give testimony in the trial of this appeal.

c. All interested parties whose interests are aligned with the appellant shall distribute their Pre-Trial Statement in accordance with subsection (a) herein. All interested parties whose interests are aligned with the appellee(s) shall distribute their Pre-Trial Statement in accordance with subsection (b) herein.

d. The failure to comply with subsections (a), (b) and (c) of this local rule shall result in appropriate relief, which may include the exclusion or limitation at trial of testimony or evidence which was not provided in the pre-trial statement or a recommendation for the imposition of attorneys' fees and costs against the party or parties failing to comply.

4. Trial.

a. The special master shall schedule a trial and shall provide notice of the trial to all party(ies) and/or counsel of record.

b. The trial shall be open to the public and recorded by a court reporter.

c. The special master, in the discretion of the special master, may continue the trial.

5. Report.

Following the trial, the special master shall file a written report and recommendation which may be in narrative form stating the reasons for the recommendations and shall include a proposed final order. The special master shall serve a copy of the report and recommendation on all counsel of record or the party(ies), if not represented, by first class United States mail and the court administrator.

6. Objections.

The parties shall file objections, if any, to the report and recommendation in writing within twenty days of the date of mailing of the report and recommendation by the special master. Objections must be accompanied by a certification of counsel that the trial transcript, or necessary portions thereof, has been ordered from the court reporter. Copies of the objections and certification shall be served on all counsel of record or if counsel have not entered their appearance on the party(ies), the special master and the court administrator.

7. Briefs on Objections.

Within twenty days of the date on which the transcript is filed of record, the moving party shall file a brief in support of objections and shall serve a copy on all counsel of record or if counsel have

not entered their appearance on the party(ies) and the court administrator. The brief in support of objections shall refer to transcript page numbers where possible. The moving party's failure to file a brief in support of objections shall constitute a waiver of all issues which could have been raised therein.

8. Opposing Briefs.

Within twenty days after the moving party has filed a brief in support of objections, responding parties shall file their briefs in opposition to objections and serve a copy on all counsel of record or if counsel have not entered their appearance, on the party(ies), and the court administrator.

9. Oral Argument.

After the date set for briefs in opposition to objections has passed, the moving party shall notify the court administrator that the matter is ripe for argument by filing a notice that matter is ripe for oral argument with the court administrator on the civil argument request form which shall be made available at the court administrator's office. The moving party shall serve a copy of this notice on all counsel of record or if counsel have not entered their appearance on the party(ies). Upon the filing of this notice, the court shall schedule oral argument.

10. Final Order.

Following oral argument the court may enter an appropriate final order. In the event that none of the parties file objections as described above to the report and recommendation, the court shall enter a final order consistent with the report, recommendation and proposed final order submitted by the special master.

Rule 1301. Arbitration. Scope.

The following civil actions shall first be submitted to compulsory arbitration and heard by a board of arbitrators:

(a) All appeals to court from tax assessments of real estate.

(b) All other civil actions and actions in replevin in which the amount in controversy, exclusive of interest and costs, is Fifty Thousand (\$50,000.00) Dollars or less shall be submitted to and heard and decided by a Board of Arbitrators pursuant to and in accordance with the provisions of 42 Pa.C.S. § 7361 and Pa.R.C.P. 1301 et seq.

[Rule 1308. Appeal—Praecept for Trial List

Appeals from an award of the board of arbitrators shall be ordered on the trial list on praecipe of either party.]

Rule 1308. Appeal from Award of Arbitrators. Tax Assessments. Notice.

(b) In addition to the requirements of Pa.R.C.P. 1308(b), the appellant shall also provide the Prothonotary with a copy of the required notice of appeal from award of arbitrators in a tax assessment appeal for service by the Prothonotary upon the court administrator.

Rule 1311. Procedure On Appeal.

(1) The court shall refer an appeal of an award of arbitrators in a tax assessment appeal to a special master for conciliation and a trial de novo, if necessary, pursuant to Luzerne County Rule of Civil Procedure 1038.

(2) Appeals from an award of the board of arbitrators, except as set forth in paragraph 1 hereof, shall be ordered on the trial list on praecipe of any party.

[Pa.B. Doc. No. 08-1286. Filed for public inspection July 11, 2008, 9:00 a.m.]

NORTHAMPTON COUNTY

Administrative Order 2008-3—N-801 Qualification to Serve as Defense Counsel in a Capital Case

Administrative Order

And Now, this 23rd day of June, 2008, it is hereby ordered that the attached Northampton County Rule of Criminal Procedure N-801, Qualification To Serve As Counsel In a Capital Case, is adopted. Said rule is effective immediately.

By the Court

ROBERT A. FREEDBERG,
President Judge

N-801 Qualification To Serve As Defense Counsel In a Capital Case

In all cases in which the District Attorney has filed a Notice of Aggravating Circumstances pursuant to Pa.R.Crim.P. 802, before an attorney may participate in the case either as retained or appointed counsel for defendant, the attorney shall file a statement certifying qualification to serve as defense counsel in a capital case pursuant to Pa.R.Crim.P. 801.

[Pa.B. Doc. No. 08-1287. Filed for public inspection July 11, 2008, 9:00 a.m.]