EVIDENCE REVIEW: THE PAST YEAR IN THE EIGHTH CIRCUIT, PLUS *DAUBERT*

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I. GENERAL PROVISIONS

A(1). Timely Objection; Rule 103: *United States v. Zerba*.[1]

Black-Letter Law: (1) An objection after the question has been answered is not a timely objection. (2) Absent plain error, an untimely objection waives the right to argue on appeal that the question was improper. (3) Error in overruling a timely objection to evidence, which was testified to by another witness without objection, may be harmless error.

Facts: The defendant was convicted of possession with intent to distribute methamphetamine. This appeal involved evidence regarding marijuana found during the search of a co-conspirator's apart-

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1. 21 F.3d 250 (8th Cir. 1994).

ment. Testimony about the marijuana came in through one witness without objection. When two later witnesses were asked about it, defense counsel did object.[2] See also, Part IV(D)(6), below.

Held: The lack of timely objection to the questions asked of the first witness rendered harmless any error in overruling the objections to the same questions asked of two other witnesses.[3] See also, Part IV(D)(6), below.

A(2). Timely Objection; Rule 103: *United States v. Swanson*.[4]

Black-Letter Law: (1) An objection raised for the first time on appeal will be reviewed under the plain error standard: Does the error prejudice substantial rights and lead to a miscarriage of justice? (2) Where there is lots and lots of other evidence against the appellant, no substantial rights are prejudiced and there is no miscarriage of justice.[5]

The Rest of the Story: For the rest of the story, see Parts I(E), VI(C), and VIII(A), all below.

A(3). Timely Objection; Rule 103: *United States v. Van Dyke*.[6]

Black-Letter Law: When the objection is to repeated actions of the trial judge and the trial judge will not allow side-bar conferences, it is understandable that counsel may keep these objections to a minimum. In such a situation, the rules regarding continuing, timely objection may be relaxed.[7]

The Rest of the Story: For the rest of the story, see Parts VI(F)(1) & VII(E), both below.

A(4). The Need For a Timely Objection and The Doctrine of Invited Error; Rule 103: *United States v. Martinez*.[8]

Black-Letter Law: When the court sustains a party's objection, the party may not later claim the ruling was in error.

Facts: In this opinion, discussed more fully below, at Part VII(B)(1), after the district court decided to admit DNA-match evidence, it asked counsel to comment on the propriety of admitting statistical evidence of the likelihood of a match between the DNA sample and any one particular individual (the defendant, for example).[9] The

2. United States v. Zerba, 21 F.3d 250, 253 (8th Cir. 1994).
3. *Id.*
4. 9 F.3d 1354 (8th Cir. 1993).
5. United States v. Swanson, 9 F.3d 1354, 1357 (8th Cir. 1993).
6. 14 F.3d 415 (8th Cir. 1994).
7. United States v. Van Dyke, 14 F.3d 415, 423 n.1. (8th Cir. 1994).
8. 3 F.3d 1191 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994).
9. United States v. Martinez, 3 F.3d 1191, 1199 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994). Had it been allowed, the evidence would have been "that as a matter

defendant suggested the court exclude the probability evidence, and the court did just that. On appeal, the defendant took the opposite position and complained it was error not to admit the probability evidence. With the evidence, the jury would have known that someone else could have been the rapist, argued the defendant; without it, there is a great danger that the jury concluded that the defendant was the only person who could have raped the victim.[10]

Held: "We conclude that [the defendant] is barred from raising this argument on appeal by the doctrine of invited error. . . . Having specifically requested that the district court exclude [evidence, the defendant] may not now complain about its exclusion."[11]

A(5). Invited Error; Rule 103: *Wactor v. Spartan Transportation Corp.*[12]

Black-Letter Law: The party who introduced the evidence may not claim that its receipt was reversible error.

Facts: The plaintiff appealed the trial court's denial of his claim for neck and back injuries. The plaintiff claimed that the trial court violated Rule 609 when it allowed into evidence his (plaintiff's) own examination of a psychiatrist who testified to the plaintiff's juvenile and adult criminal convictions. See also, Part VI(C)(2), below.

Held: Because the plaintiff introduced the testimony, he invited the error and cannot now claim it is grounds for reversal.

B(1). Preliminary Questions Regarding the Admissibility of Evidence; Rule 104(a): *United States v. Clay*.[13]

Black-Letter Law: When deciding whether counsel has established foundational elements under the hearsay rule, the court may consider the substance of the out-of-court statement sought to be admitted. This is so for the foundational elements of the definitional exclusions in Rule 801 and the exceptions in Rules 803 and 804.

Facts: The defendant, a ten-year mayor of Kinloch, Missouri, appealed his conviction on two counts of attempted extortion by an elected official (there was evidence of a running pattern of extortion of kickbacks from recipients of government contracts). The evidence against him included recorded and unrecorded conversations between a coconspirator and the complaining witness. The evidence was allowed in under 801(d)(2)(E), the definitional exclusion for statements offered against a party, made by a coconspirator.

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of probability, one Native American in 2600 could have provided DNA that matched the samples found on the victim." *Id.*

10. *Id.*
11. *Id.*
12. 27 F.3d 347 (8th Cir. 1994).
13. 16 F.3d 892 (8th Cir. 1994).

On appeal, the defendant argued that in deciding whether an out-of-court statement fits under the definitional exclusion for coconspirators' statements, the judge may not consider the text of the out-of-court statement itself. He gamely cited Justice Harry A. Blackmun's dissenting opinion in *Bourjaily v. United States*,[14] a case in which the United States Supreme Court ruled squarely against the defendant's position. It is as though the defendant was asking the Eighth Circuit to overrule the Supreme Court. (Perhaps he had a particularly bold panel.)

Held: Statements offered against a party and made by that party's coconspirator, in furtherance of the conspiracy, are nonhearsay.[15] Before admitting the statements of the alleged coconspirator into evidence, the district court must determine by a preponderance of the evidence that the defendant knowingly participated in the conspiracy. In making this determination, the court can consider the substance of the statements sought to be admitted. The statement can bootstrap itself over the hearsay rule.[16] The statements in this case were properly admitted, and the judgment was affirmed.[17]

B(2). Preliminary Questions; Rule 104(b): *MDU Resources Group v. W.R. Grace & Co.*[18]

Black-Letter Law: (1) If the relevance of evidence depends upon a condition of fact, then, once there is sufficient support for the predicate fact, both the predicate fact and the fact conditioned thereon are for the jury. (2) When the party who has evidence fails to produce it, the factfinder may infer that the evidence would fail to sustain that party's contention.[19]

Facts: This was an asbestos removal case. MDU sued after learning that the fireproofing the defendant had installed in MDU's building, in 1968, contained harmful asbestos fibers. At trial, the plaintiff offered into evidence certain documents that the defendant's insurance company had given to the defendant; the documents were offered to prove that the defendant was aware of the dangers of asbestos prior to 1968. The trial court excluded these documents because MDU

14. United States v. Clay, 16 F.3d 892, 895 (8th Cir. 1994) (citing Bourjaily v. United States, 483 U.S. 171, 198 (1987)).

15. *Clay*, 16 F.3d at 894; FED. R. EVID. 801(d)(2)(E).

16. *Clay*, 16 F.3d at 894-95; FED. R. EVID. 104.

17. *Clay*, 16 F.3d at 895-96. *See* G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 9 (1993).

18. 14 F.3d 1274 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).

19. And, I would add, as a corollary thereto, counsel may argue this inference to the jury.

failed to establish when the defendant received them.[20] See also, Part IV(A)(1), below.

Held: Reversible error. When the district court held that MDU had not established the date that the defendant received the documents, the court was, in effect, determining as a matter of law that a Rule 104 preliminary fact had not been established.[21] When admissibility depends on a condition of fact, once there is sufficient support for the predicate fact, then both the predicate fact and the fact conditioned thereon are for the jury. Here there was sufficient evidence from which a reasonable juror could find a date of receipt, including this: The documents had been in the sole custody and control of the defendant, and the defendant did not come forward with the evidence necessary to establish date of receipt. From this, the jury could infer that any such evidence would establish the document was received prior to the relevant date in 1968.[22]

B(4). The *Daubert* case; Preliminary Questions Regarding the Admissibility of Scientific Expert-Testimony; Rule 104(a):

Cross Reference: See Part VII(A) and (B), below, for a discussion of the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[23] dealing with the trial court's handling of preliminary questions regarding the admissibility of novel scientific evidence.

C(1). Failure to Produce Evidence Under the Control of and Reasonably Available to a Party; Inference Evidence Is Unfavorable: *MDU Resources Group W.R. Grace & Co.*[24]

Cross Reference: See Part I(B)(2), above.

C(2). Failure to Produce Evidence Under the Control of and Reasonably Available to a Party; Inference Evidence Is Unfavorable: *McCrary-El v. Shaw*.[25]

Black-Letter Law: If a party fails to produce evidence under the control of and reasonably available to that party, the factfinder may infer the evidence is unfavorable to that party. And, the opposing party may argue that inference.

Facts: The plaintiff was serving a life sentence for intent to kill with malice aforethought, first-degree arson, and carrying a concealed weapon. He alleged he was housed in a one-man cell, officers attempted to force him to take a cell-mate, he refused, and they beat

20. MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274, 1281 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).
21. *Id.*
22. *Id.*
23. 113 S. Ct. 2786 (1993).
24. 14 F.3d 1274 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).
25. 992 F.2d 809 (8th Cir. 1993).

him. The correction facility videotaped the incident and did not produce the tape at trial. The plaintiff asked for a jury instruction that a party's failure to produce evidence under its control and reasonably available to it supports the inference that the evidence is unfavorable to that party. The trial court refused that instruction and, instead, gave one that said that the same inference could be drawn if the jury finds "a party intentionally destroyed [such] evidence."[26] See also, Part VI(A), below.

Held: Error. The plaintiff was entitled to the instruction and "to argue to the jury that the government still had the videotape and was refusing to produce it because it was damaging to its case."[27] Because there was plenty of other evidence, however, the error was harmless.[28]

D. Surveillance Tapes and the Work Product Rule; Fed. R. Civ. P. 26(b): *Wegner v. Cliff Viessman, Inc.*[29]

Black-Letter Law: Work product protection does not apply to information regarding defendant's post-accident surveillance of plaintiff; such information, including the surveillance tapes, is discoverable.

Facts: The plaintiffs sustained serious personal injuries in an automobile accident that was the gravamen of this lawsuit. They moved to compel discovery regarding defendant's surveillance films of them. The defendant objected that the films were protected from discovery because (1) they were "primarily of an impeachment character," citing the advisory committee note to Rule 26(b) of the Federal Rules of Civil Procedure;[30] and (2) they were protected work-product, unnecessary to the plaintiffs' trial preparation because, with or without it, they were fully able to testify accurately about their activities.[31]

Held: Surveillance information is discoverable. (1) Regarding the defendant's first objection: this is not just impeachment evidence, but also part substantive evidence of a critical issue in any personal injury case — it tends to prove or disprove injury. (2) Regarding the defendant's second objection: this is not protected as work product because there is nowhere else the plaintiffs can obtain the precise information fixed on this film; there is "substantial need," in that the information on this evidence is probative of a critical issue in the case (plaintiffs' injuries); and the evidence serves the collateral interests of encouraging settlement, avoiding unnecessary interruptions at trial, facilitat-

26. McCrary-El v. Shaw, 992 F.2d 809, 810-13 (8th Cir. 1993).
27. *Id.* at 813.
28. *Id.*
29. 153 F.R.D. 154 (N.D. Iowa 1994).
30. Wegner v. Cliff-Veissman, Inc., 153 F.R.D. 154, 157 (N.D. Iowa 1994) (quoting FED. R. CIV. P. 26(b) advisory committee's note).
31. *Wegner*, 153 F.R.D. at 156.

ing stipulations and admissions, exposing fraudulent or misleading photography, and fostering fairness.[32]

E. A Wrong Ruling Is Only Wrong When It Is Not Otherwise Right; Rule 103(a): *United States v. Swanson*.[33]

Black-Letter Law: If the trial court cites a "wrong" reason for its ruling, the appellate court may affirm if there is a different "right" reason for the same ruling.

Facts: At trial, evidence was excluded as inadmissible hearsay.[34]

Held: On appeal, the Eighth Circuit found that in fact the evidence was not hearsay: it was not offered to prove the truth of the matter asserted. It was, however, inadmissible impeachment and character evidence. Exclusion of the evidence was affirmed.[35] The judgment of conviction was affirmed.[36]

II. JUDICIAL NOTICE

A. Capable of Ready and Accurate Determination By Resort to Sources . . .; Judicial Notice of a Firecode; Rule 201: *Holst v. Countryside Enterprises, Inc.*[37]

Black-Letter Law: A fact — here a firecode — "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,"[38] may be judicially noticed.[39]

Facts: While the plaintiff, Holst, was sitting in a motorized golf cart, a pull-type golf cart fell from the upper level of the clubhouse and struck him in the head, causing brain damage. Holst alleged that the defendant was negligent in not having adequate guardrails on the upper level to prevent falling carts. While cross-examining the defendant's expert, Holst's lawyer tried to ask about an applicable firecode regarding guardrails. The trial court did not allow this cross-examination.[40]

Held: The plaintiff could have either asked the court to take judicial notice of the firecode or introduced it during the direct examination of his own expert. Not having done so, he "provided no basis for

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32. *Id.* at 159.
33. 9 F.3d 1354 (8th Cir. 1993).
34. United States v. Swanson, 9 F.3d 1354, 1358 (8th Cir. 1993). For more facts, see Parts VI(C) and VIII(A), and Part I(A)(2).
35. *Swanson*, 9 F.3d at 1358-59. Under Federal Rule of Evidence 103(a), "error" is not "reversible error" unless it affects a substantial right of a party. FED. R. EVID. 103(a).
36. *Swanson*, 9 F.3d at 1360.
37. 14 F.3d 1319 (8th Cir. 1994).
38. FED. R. EVID. 201.
39. For more on this subject, see Part VI(E)(2).
40. Holst v. Countryside Enter., Inc., 14 F.3d 1319, 1320-22 (8th Cir. 1994).

the introduction of that evidence on cross-examination."[41] See also, Part VI(E)(2).

B. Capable of Ready and Accurate Determination By Resort to Sources . . .; Post-*Daubert* Judicial Notice of the Reliability of Scientific Techniques; Rule 201: *United States v. Martinez*.[42]

Black-Letter Law: One court, based on a thorough and exhaustive study of the matter in another court, may take judicial notice of the reliability of scientific theory and methodology.

Facts: In this post-*Daubert* opinion discussed more fully below in Part VII(B)(1), the United States Court of Appeals for the Eighth Circuit addressed the validity of DNA profiling that had been used against the defendant at his trial for the rape of a fourteen-year-old girl.

Held: Courts can take judicial notice of the reliability of the general theory and methodology of DNA profiling. (If new techniques or new methodologies are offered, there will have to be an *in limine* hearing on their reliability — a *Daubert* hearing (see Part VII(A)).)[43]

Commentary: Perhaps my statement of the Black-Letter Law of this case is too broad. It is, however, the lesson I draw from this case.

C. Generally Known Within the Jurisdiction; Judicial Notice of the Reputation of Golden Gophers Medical Research; Rule 201. *Halikas v. University of Minnesota*.[44]

Black-Letter Law: A court may take judicial notice of a fact that is "not subject to reasonable dispute" because it is "generally known within the court's territorial jurisdiction."[45]

Facts: The plaintiff was a tenured professor in the University of Minnesota Medical School's Department of Psychiatry. Subsequent to an investigation by the Institutional Review Board, a medical research review board whose function is to ensure compliance with University and federal drug research standards, the University disseminated information regarding its investigation of some of the plaintiff's research. (For example, the University issued a press release and notified the United States Food and Drug Administration.) The plaintiff filed this suit both to enjoin the University from further

41. *Id.* at 1323. Even further off his game, the plaintiff's lawyer made no offer of proof.

42. 3 F.3d 1191 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994).

43. United States v. Martinez, 3 F.3d 1191, 1197 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994).

44. 856 F. Supp. 1331 (D. Minn. 1994).

45. FED. R. EVID. 201.

disseminating information about the investigation and to recover for damages suffered as a result of the investigation and its publication.[46]

Held: In justifying a ruling for the defendants, one of which is the University of Minnesota, the trial court took judicial notice of the worldwide fame of the University of Minnesota's medical research. In support of that ruling, the court cited Rule 201. Then, the court stated that "such an institution has a great — and protectable — interest in assuring the integrity and humanity of its research investigations."[47]

Commentary: Here, a court whose territorial jurisdiction is the State of Minnesota takes judicial notice that one of the parties to the lawsuit is famous worldwide. Is the judge noticing that it is generally known within Minnesota that the local university's medical school is famous worldwide, or is the judge noticing that it is generally known worldwide that the medical school is famous? If the former, is the opinion of the Minnesotan-on-the-street really the judge of the worldwide fame of the Golden Gophers' medical research? If the latter, has not the judge gone beyond the bounds of the rule; that is, hasn't he gone beyond bounds of his "territorial jurisdiction?"

III. PRESUMPTIONS

IV. RELEVANCY AND ITS LIMITS

A(1). It Does Not Take Much to Make Evidence Relevant; Definition of Relevant Evidence; Rule 401: *MDU Resources Group v. W.R. Grace & Co.*[48]

Black-Letter Law: Evidence need not be conclusive, or even very persuasive, to be relevant: it need only make something of consequence to the action somewhat more or less likely.

Facts: See Part I(B)(2), above. The defendant denied there was *any* substitute for asbestos prior to 1968. The plaintiff offered into evidence a 1943 trademark for Cellufloc. (Other evidence showed that post-1968 one product used as an asbestos substitute was marketed under the name Cellufloc.) The trial court seemed to exclude the trademark because it did not "prove" the plaintiff's contention; that is, it did not show that the thing trademarked was an adequate substitute for asbestos.[49]

Held: Evidence need not "prove" anything to be relevant, but need only tend to make more or less likely something that matters to

46. Halikas v. University of Minnesota, 856 F. Supp. 1331, 1332-33 (D. Minn. 1994).

47. *Id.* at 1334.

48. 14 F.3d 1274 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).

49. MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274, 1280 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).

the case. It need only be a link in the chain of inferences a party is weaving and, so long as it is not unduly and unfairly prejudicial, it can be a weak link. This evidence is one such link — the '43 trademark evidences the pre-'68 existence of a product that had the same name as the product eventually used to replace plaintiff's asbestos — and excluding it was an abuse of discretion. See also Part I(B)(2), above.

Commentary: This is so right, and so often forgotten: to be relevant, evidence need only be one small link in the chain of inferences (one place it may have been forgotten is in the *Campbell* case, discussed immediately below).

A(2). It Doesn't Take Much to Make Evidence Relevant, Except Sometimes; Exceptions to the General Rule; Definition of Relevant Evidence; Rule 401: *Campbell v. Vinjamuri*.[50]

Black-Letter Law: Even Black-Letter law has exceptions. The connection between a piece of evidence and an issue, necessary to make the evidence relevant, is one that ebbs and flows from case to case; while mostly there need not be much of a connection, sometimes more is required. (Contrast this case with *MDU Resource Group*, immediately above).

Facts: In this medical malpractice action, the plaintiff awoke from back surgery with an almost total loss of vision in one eye. On appeal, the plaintiff claimed that the district court abused its discretion when it failed to admit evidence that the anesthesiologist-defendant (who was not board certified) had failed the board certifying examination three or four times.[51]

Held: Failure to pass the exam does not make it more or less likely that the defendant was negligent in his specific actions during this particular surgery. The Court stated that "we agree with [defendant] that the evidence was not relevant to this issue as a person's performance on a written or oral examination is not *determinative* of one's ability to meet the standard of care required on a specific occasion."[52]

Commentary: This seems to be too strict a test. The court's error seems to be revealed in its use of the word "determinative": evidence need not be determinative of anything in order to be relevant; it need only make something of consequence to the action even just somewhat more or less likely.

Contrast this case with *MDU Resource Group*, immediately above. And even contrast it with *Daubert v. Merrell Dow*

50. 19 F.3d 1274 (8th Cir. 1994).

51. In the defendant's deposition, he had testified that he had failed "three or four times." Campbell v. Vinjamuri, 19 F.3d 1274, 1276 (8th Cir. 1994).

52. *Campbell*, 19 F.3d at 1276-77 (emphasis added).

Pharmaceuticals, Inc.,[53] wherein the United States Supreme Court quoted Rule 401 and then stated that: "The Rule's basic standard of relevance thus is a liberal one."[54]

A(3). Questions of Relevance and of Low Probative Value Substantially Outweighed By the Danger of Unfair Prejudice Are Reviewed For Abuse of Discretion; Definition of Relevant Evidence; Rule 401: *McCrary-El v. Shaw*.[55]

Black-Letter Law: Rule 401 and 403 rulings are reviewed for abuse of discretion. A record that supports a particular discretionary choice should result in the ruling being affirmed on appeal.

Facts: Twice, close together in time, prison officials physically moved the plaintiff within his cell.[56] He claimed he was beaten both times, and made each move one count in his complaint: The first move was Count I, the second Count II. Each move was videotaped. The defendants did not produce the tape of the first move.[57] They did produce the tape of the second move; it showed no excessive force. The court granted the defendants motion to dismiss Count II. Count I proceeded to trial, where the defendants were allowed to play the nonviolent videotape of the second move. The plaintiff argued Rules 401 and 403: the second tape was irrelevant to the amount of physical force used during the first move, and, if not irrelevant, its probative value was low, and was substantially outweighed by the danger of unfair prejudice.[58]

Held: No abuse of discretion. (The defendants argued that the tape showed plaintiff's mobility shortly after the first move, the one on trial, "and was thus highly probative of whether he had been injured" during that first move.)[59]

B. Similar Happenings Evidence; Impeachment; Rule 403: *Drabik v. Stanley-Bostich, Inc.*[60]

Black-Letter Law: The admissibility of similar happenings evidence depends upon Rule 403: has there been a sufficient showing of similarity of circumstances between the other events and the one on trial (probative value); will the other evidence lead the jury to lose interest in the particulars of the case at trial and find against the defendant just because a lot of people have been hurt (dangers of confu-

53. 113 S. Ct. 2786 (1993). This case is discussed below, at Part VII(A).
54. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993).
55. 992 F.2d 809 (8th Cir. 1993).
56. McCrary-El v. Shaw, 992 F.2d 809, 810 (8th Cir. 1993). See discussion in Parts I(C)(2) & VI(A).
57. *McCrary-El*, 992 F.2d at 811. See discussion in Part I(C)(2).
58. *McCrary-El*, 992 F.2d at 811.
59. *Id.* at 811.
60. 997 F.2d 496 (8th Cir. 1993).

sion of the issues and unfair prejudice); and will too much time and effort go into the proof and counterproof of the other events (undue delay, waste of time, and needless presentation of cumulative evidence).

Facts: One carpenter accidently shot another in the head with a "pneumatic nailing tool." The carpenter on the receiving end of the nail filed a products liability action against the manufacturer of the tool. The plaintiff introduced evidence of other accidents involving various nailing guns. Some of this evidence was introduced on cross-examination of the defendant's expert, after that expert's direct testimony that the tool was generally safe.[61]

Held: The district court erred in admitting this extrinsic evidence of other injuries. The plaintiff made no showing of substantial similarity. Regarding impeaching the expert, the court stated that "[t]o hold that an expert who simply offers his opinion that a product is 'generally safe' opens the door to all other accident evidence would create an exception which would swallow the general rule."[62]

Commentary: Similar happenings evidence does not have a rule of its own, as does habit or character evidence, for example. It is a matter of applying Rule 403.

C(1). Probative Value Versus Danger of Unfair Prejudice; No Abuse of Discretion; Rule 403. *McCrary-El v. Shaw*.[63]

Cross Reference: For the discussion of this case, see Part IV(A)(3), above.

C(2). Probative Value Versus Danger of Unfair Prejudice; No Abuse of Discretion; Rule 403. *United States v. Roach*.[64]

Black-Letter Law: Rule 403 rulings are reviewed for abuse of discretion. No abuse of discretion, no reversible error.

Additionally, in this case, there was no objection at trial.[65] Therefore, the appellate court reviewed this issue under what I suppose we could call the plain-error/abuse-of-discretion standard (would this be the highest standard known to humankind?).

Facts: On appeal of their convictions of possession of ephedrine with the intent to manufacture methamphetamine, the defendants challenged the admission into evidence of videotapes of conversations between themselves and federal agents. One defendant contended, among other things, that the tapes should have been kept out under

61. Drabik v. Stanley-Bostich, Inc., 997 F.2d 496, 498, 502-03 (8th Cir. 1993).
62. *Id.* at 509.
63. 992 F.2d 809 (8th Cir. 1993).
64. 28 F.3d 729 (8th Cir. 1994).
65. United States v. Roach, 28 F.3d 729, 732 (8th Cir. 1994).

Rule 403, because the lack of clearly audible sound rendered the tapes more prejudicial then probative.[66]

Held: The trial court has a "wide discretion to determine the potential for prejudice," which it did not here abuse. There is no indication that poor sound rendered the tape prejudicial, or "more prejudicial than it would have been with a clear audio track."[67]

C(3). Probative Value Versus Danger of Unfair Prejudice; Rule 403: *United States v. Yellow*.[68]

Cross Reference: See Part IV(D)(1), immediately below.

D(1). Character Evidence; Evidence of Bad Acts Admitted; Rule 404: *United States v. Yellow*.[69]

Black-Letter Law: Here is the Black-Letter Law as I see it: (1) Prior bad-acts evidence is admissible except in those few cases where its only use is to show criminal predisposition or where its probative value to other-than-criminal-predisposition issues is substantially outweighed by the danger of unfair criminal-predisposition prejudice. (2) Evidence a defendant "committed prior sexual assaults against the victim is relevant in identifying [defendant] as the person who committed the assault charged."[70]

Facts: The defendant was convicted of raping his younger sister and disabled brother. The trial court admitted testimony from the sister and the brother that the defendant had sexually abused them for many years prior to the assaults on trial. The defendant appealed the overruling of his Rule 403 and 404 objections.[71]

Held: First, because the defendant generally denied the acts in question, the court said 404(b) allowed the prior acts evidence to the issue of intent. You ask: How is intent an element? The court answers: because the defendant denied the acts, the government had to prove he "specifically intended to rape" his brother and sister.[72] Second, because the defendant tried to incriminate someone else in the rape of his sister, Rule 404(b) allows the prior acts evidence to the issue of identity: evidence a defendant "committed prior sexual assaults against the victim is relevant in identifying defendant as the person who committed the assault charged."[73]

66. *Id.* at 733.
67. *Id.* at 733-34.
68. 18 F.3d 1438 (8th Cir. 1994).
69. 18 F.3d 1438 (8th Cir. 1994).
70. United States v. Yellow, 18 F.3d 1438, 1441 (8th Cir. 1994).
71. *Id.* at 1439. See discussion in Part VIII(C)(3).
72. *Yellow*, 18 F.3d at 1441.
73. *Id.*

The Eighth Circuit views Rule 404(b) as a rule of inclusion,[74] calling for the admission of bad-acts evidence unless its only relevance is to prove criminal disposition.

Additionally, the Rule 403 objection was properly overruled because the evidence had high probative value.

Commentary: How is this case — the defendant denies he raped his siblings; evidence of prior rapes of same siblings allowed as relevant to intent; affirmed on appeal, in spite of Rule 404 — different from the *Jenkins* case, below — the defendant denies distributing drugs; prior drug sales to the same individual received by trial court as relevant to intent; reversed on appeal, under Rule 404? Perhaps the answer is in the discussion of the rules of evidence and child abuse cases in my article *Law Professor Reveals Shocking Truth About Hearsay*: When the case involves child abuse and the question is "How do the rules apply?" all bets are off.[75]

D(2). Character Evidence; Evidence of Bad Acts Excluded; Rule 404: *United States v. Jenkins*.[76]

Facts: The defendant appealed from a two-count conviction of distributing LSD. After the defendant had made an absolute denial of the crimes charged, the district court allowed rebuttal evidence concerning drug sales he had made to the same individual in the indefinite past. The district court stated that the testimony was highly relevant to his intent and knowledge.[77]

Held: After noting that this was a case of first impression in the Eighth Circuit, the court went on to review how other circuits had dealt with the issue. In agreement with the decisions of the United States Court of Appeals for the Second and Ninth Circuits, and citing Rule 404(a) and (b), the court rejected the use of character evidence when the defense has rested on an absolute denial of the crime.[78] Because the appellate court could not conclude that the rebuttal testimony was not harmless beyond a reasonable doubt, the case was reversed and remanded for a new trial.

Commentary: How is this case — the defendant denies distributing drugs; prior drug sales to the same individual received by trial court as relevant to intent, but reversed on appeal, under Rule 404 — different from the *Yellow* case — the defendant denies he raped his

74. *Id. See* Unites States v. Wiley, 29 F.3d 345 (8th Cir. 1994). See Part IV(D)(3). This is the federal rules approach. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-47 & 404-48 (1994).

75. G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 64-70 (1993).

76. 7 F.3d 803 (8th Cir. 1993).

77. United States v. Jenkins, 7 F.3d 803, 805-06 (8th Cir. 1993).

78. *Id.* at 807.

siblings; evidence of prior rapes of same siblings allowed as relevant to intent, and affirmed on appeal in spite of Rule 404?

D(3). Character Evidence; Evidence of Bad Acts Admitted into Evidence; Rule 404: *United States v. Wiley*.[79]

Black-Letter Law: An appropriate other use — admissible use — for prior bad-acts evidence is to rebut the "wrong place, wrong time" defense.

Facts: The defendant appealed his conviction for possession with intent to distribute cocaine base and use of a firearm during and in relation to a drug crime.[80] On appeal, the defendant argued Rule 404 and claimed that the trial court improperly admitted evidence of events surrounding a prior arrest.

Held: Evidence of prior bad acts was admissible to rebut defendant's "wrong place, wrong time" defense.[81] It went to defendant's knowledge and intent.[82] The court stated that:

> Rule 404(b) is a rule of inclusion[83] that precludes admission of evidence that is relevant solely to the defendant's character. . . . Evidence of prior bad acts is admissible under Rule 404(b) if it is '(1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the crime charged.'[84]

Commentary: Prong number one of the court's four prong test only says that the evidence must have something to do with something that matters in the case. This is required by Rule 401. It has always seemed to me to be unnecessary, perhaps even perilous, to state this as a prong of the Rule 404(b) test. Doing so seems somehow to indicate that relevance is not a prong of every test of the admissibility of evidence, from hearsay, to judicial notice, to privilege, to the rule requiring the production of the original, to subsequent remedial meas-

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79. 29 F.3d 345 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 522 (1994).

80. United States v. Wiley, 29 F.3d 345, 346 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 522 (1994). Though it has nothing to do with this appeal, I enjoyed reading that the day after his arrest, when an Alcohol Tobacco and Firearms agent interviewed defendant and told him he faced an additional five years because of possession of the gun, defendant responded, "Damn, I just got that gun, too." *Id.* at 348.

81. *Wiley*, 29 F.3d at 351. It might also have been a factor that the appellate court felt defendant's " 'wrong place at the wrong time' defense was transparently frivolous," and that "the government's evidence overwhelmingly established Wiley's guilt." *Id.* at 350.

82. *Wiley*, 29 F.3d at 350-51.

83. *See* United States v. Yellow, 18 F.3d 1438 (8th Cir. 1994). The *Yellow* case is discussed in Part IV(D)(1).

84. *Wiley*, 29 F.3d at 350 (quoting United States v. Jones, 990 F.2d 1047, 1050 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 699 (1994)).

ures, to witness examination, and everywhere in between. You never get to the Rule 404 question unless the evidence is relevant.[85]

On the other hand, perhaps what prong number one means is that the evidence must be relevant to a material issue and sometimes character, though otherwise relevant, is rendered immaterial by Rule 404(a). Perhaps prong number one is a nod to Rule 404(a), which says that character evidence is not admissible to prove conforming conduct. If that is what it means, then it should be what it says.

Regarding prong number three, it seems to me that this prong actually misstates the law. The test here is the test from Rule 403. First, the legislative history of this rule makes it clear that the policies of Rule 403 are to be applied to Rule 404(b) admissibility.[86] Second, this case states the test as "higher in probative value than in prejudicial effect."[87] Third, the test of Rule 403 is that the probative value must be "*substantially* outweighed by the danger of *unfair* prejudice."[88] Fourth, a straight probative value to prejudice balance (prong number three from this case) is a far cry from a balance where *unfair* prejudice must *substantially* outweigh probative value (Rule 403).

If I am right, and prong number three is meant to note the application of Rule 403, then its statement as prong three presents this additional problem: to state that Rule 403 applies here runs the risk of implying that Rule 403 does not apply across the board, rules-of-evidence wide. One should not need to state, as part of a Rule 404(b) test, that the evidence must be relevant and that its probative value must not be substantially outweighed by the danger of unfair prejudice.

And in prong four, does the court really mean that the crime must be "close in time to the crime charged?"[89] Assume the crime is felon in possession of a firearm, and it is a specific intent crime, and the defense is "I did not know that it was a crime for a felon to possess a firearm." Assume further that the prosecutor offers a fifteen-year-old arrest for felon in possession (charges later dropped). What difference does it make that the prior bad act is fifteen years old? Are we saying fifteen years is a long time and defendants are as forgetful? If so, let them argue: "I forgot!" Are we saying defendants may reasonably believe the law had changed in the last fifteen years? That too can be

85. Under the Federal Rules of Evidence the common-law concepts of relevancy and materiality are combined into one concept, the one described in Rule 401 and, by that rule, labeled relevancy.

86. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[18], at 404-108 & 404-109 (1994).

87. *Wiley*, 29 F.3d at 350.

88. FED. R. EVID. 403 (emphasis added).

89. *Wiley*, 29 F.3d at 350.

argued to the jury. Are we saying we want to wipe the slate clean for defendants who have kept their noses clean for fifteen years? If so, a given defendant's nose might not be so clean; it may just be that fifteen years ago was the most recent example of this specific crime of felon in possession of a firearm. Perhaps this time problem should be handled under Rule 403, and this makes prong four redundant of prong three, which in turn is redundant of Rule 403.

The test boils down to this: if the bad-act evidence is relevant, then Rule 404 must be considered. The test under Rule 404 is whether the bad-act evidence is relevant to something other than character used to prove conforming conduct. If it is, the bad act need only be proved by a preponderance of the evidence (and not beyond a reasonable doubt), and the bad act must be similar in kind and close in time to the crime charged. And then Rule 403 must be considered.

D(4). Character Evidence; Use of "Other Crimes" Evidence When the Crime Charged Is Conspiracy And the Acts Argued to be "Other Crimes" Are Part of the Conspiracy; Rule 404: *United States v. Severe*.[90]

Black-Letter Law: Where specific-act evidence probative of character is also inextricably intertwined with the acts that constitute the crime charged, Rule 404(b) does not apply.

Facts: Among other things, the defendants were convicted of conspiracy to distribute cocaine. On appeal, one defendant challenged a government witness' testimony about deliveries of cocaine other than the particular delivery that directly led to the arrest. This defendant argued that the government's use of this evidence without the pretrial notice required in Rule 404(b) was reversible error.

Held: Rule 404(b) did not apply here. The court stated that " '[w]here the evidence of an act and the evidence of a crime charged are inextricably intertwined, the act is not extrinsic and Rule 404(b) is not implicated.' "[91] This testimony was properly admitted because it "concerned not prior acts, but acts intertwined with the conspiracy charged. . . . [The evidence] tends to prove whether a conspiracy . . . existed."[92]

Commentary: This sounds a bit like a character evidence equivalent to the common-law *res gestae* exception to the hearsay rule, but it is not. The court is, no doubt, correct: what has been offered

90. 29 F.3d 444 (8th Cir. 1994), *cert. denied*, — S. Ct. —, 63 U.S.L.W. 3516 (1995).

91. United States v. Severe, 29 F.3d 444, 447 (8th Cir. 1994), *cert. denied*, — S. Ct. —, 63 U.S.L.W. 3516 (1995) (quoting United States v. DeLuna, 763 F.2d 897, 913 (8th Cir. 1985), *cert. denied sub nom.*, Thomas v. United States, 474 U.S. 980 (1985)).

92. *Id.* at 447. The charge involved a conspiracy "continuing to on or about the 17th day of March, 1993." *Id.* The testimony was that defendant had delivered cocaine to the witness "in the beginning of March 1993." *Id.*

into evidence here is not, using the words of Rule 404(b), "[e]vidence of other crimes, wrongs, or acts."[93] Rather, it is evidence of the crime charged, evidence of the conspiracy charged.[94]

D(5). Character Evidence; Use of Bad-Acts Evidence as Evidence of Intent; Rule 404: *United States v. Southwest Bus Sales, Inc.*[95]

Black-Letter Law: When the crime charged is a specific intent crime, evidence of similar crimes is admissible to the issue of intent.

Facts: The defendants were charged with anticompetitive price fixing and bid rigging regarding the sale of school buses to local school districts in South Dakota.[96] The prosecution offered testimony about the defendants' similar scheme in Minnesota. The trial court would not let the prosecution use this evidence during its case-in-chief, but only as rebuttal evidence, after the defendants denied taking part in the conspiracy, thereby opening the door to proof of intent, motive, and the like.[97] On appeal, the defendants argued that it was error to allow this other bad-acts evidence at all.[98] Additionally, they argued that it was error to allow the evidence in the prosecution's rebuttal case. As rebuttal evidence, this evidence would not be admissible under the impeachment rule, Rule 608,[99] and it would be prejudicial to allow the government to have the last say through evidence of the defendants' prior misconduct.[100]

Held: Evidence of the Minnesota conspiracy was admissible "to the issue of intent to conspire, motive, and lack of mistake."[101] Because the evidence was directly relevant to an issue in the case — the prosecution must prove intent beyond a reasonable doubt — the trial court should have allowed this evidence during the prosecution's case-in-chief. In this case, however, making the prosecution wait until its rebuttal case was not an abuse of discretion.

Commentary: The trial court treated this government evidence as though it were not admissible until the defendants put their intent

93. FED. R. EVID. 404(b).

94. *Weinstein's Evidence* discusses this issue. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[9], at 404-58 (1994).

95. 20 F.3d 1449 (8th Cir. 1994).

96. United States v. Southwest Bus Sales, Inc., 20 F.3d 1449, 1450-51 (8th Cir. 1994).

97. *Id.* at 1455.

98. *Id.*

99. FED. R. EVID. 608.

100. *Southwest Bus*, 20 F.3d at 1457.

101. *Id.* at 1456.

into issue.[102] It is as though the court were saying evidence of guilt is not admissible until the defendants put on evidence of non-guilt.

It *is* true that intent must be a disputed issue in a case. Otherwise, though bad-acts evidence may be relevant to intent, it will not be relevant to any issue in the case. On the other hand, here intent is an essential element of the crime and the prosecution should be allowed to evidence each and every essential element of its case until such time as it is apparent that a particular element is not disputed and can be removed from the jury instruction or instructed as agreed upon as true.

The trial court, however, seemed to proceed as though this evidence were only admissible after defendant put on some evidence at trial disputing it. The truth is that the not-guilty plea puts every essential element of the crime into dispute until the defendant takes some action to the contrary.

Further, as the Eighth Circuit noted, if " 'evidence . . . necessary to prove an element of the charge' " is not admitted during the prosecution's case-in-chief, then defendants are entitled to a directed verdict of acquittal.[103]

D(6). Character Evidence; The Secret Way Out of The Maze of Bad-Acts Evidence; Rule 404: *United States v. Zerba*.[104]

Black-Letter Law: Rule 404(b) is not the only way around the exclusionary rule of 404(a): Failure to object to testimony by one witness, may render harmless admission-over-objection of like testimony by later witnesses.

Facts: See Part I(A), above. At this trial, other-bad-acts evidence came in through one witness without objection. When two later witnesses were asked about it, defense counsel did object. The government argued that this bad-acts evidence, coupled with a cautionary instruction, was properly admitted under Rule 404(b).[105]

Held: The lack of timely objection to the first witness' testimony allowed the court to avoid the underlying bad-acts issue. The appellate court noted the government's 404(b) argument, without comment, and affirmed the conviction because of the previous unobjected-to tes-

102. Quoting from the Eighth Circuit's opinion: the trial court "ruled that the government could only use the evidence in rebuttal 'if the issues arise.' " *Southwest Bus*, 20 F.3d at 1455.

103. *Southwest Bus*, 20 F.3d at 1457 (quoting United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985), *cert. denied sub nom.*, Dellinger, Inc. v. United States, 474 U.S. 1005 (1985)).

104. 21 F.3d 250 (8th Cir. 1994).

105. United States v. Zerba, 21 F.3d 250, 253 (8th Cir. 1994).

timony about the same bad acts: any error in overruling the objection during the testimony of the later two witnesses was harmless.[106]

V. PRIVILEGES

VI. WITNESSES

A. Lack of Personal Knowledge; Rule 602: *McCrary-El v. Shaw*.[107]

Black-Letter Law: Witnesses may not testify about matters they had no opportunity to observe.

Facts: The plaintiff was serving a life sentence for intent to kill with malice aforethought, first-degree arson, and carrying a concealed weapon. He alleged that he was housed in a one-man cell, officers tried to force him to take a cell-mate, he refused, and they beat him. Plaintiff sought to read into evidence the deposition of the inmate in the next cell. The "witness" testified that "there was a crack at the corner of his cell door that was about an inch and a half, through which he witnessed [plaintiff]'s assault" and "he could see into the cell only until all the officers were inside."[108] The trial court ruled the neighbor was not competent[109] under Rule 602.[110]

Held:

> Rule 602 excludes "testimony concerning matter the witness did not observe or had no opportunity to observe." We cannot say that the trial court abused its discretion in determining that no reasonable person could conclude that Jones was able to see anything of relevance. There was therefore no error in excluding his testimony.[111]

B. Inquiry Into Internal Deliberations of Jury; Rule 606(b): *United States v. Moses*.[112]

Black-Letter Law: Rule 606(b) forbids inquiry into the validity of a verdict through juror testimony (live or by affidavit) about the jury's internal deliberations or any juror's thought process, except as regards influences or information improperly brought to bear from the outside. Not every post-verdict allegation of outside influence improperly brought to bear upon jurors requires an evidentiary hearing: there must at least be a colorable claim of actual outside influence.

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106. *Id.* at 253. *See* G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC LAW REV. 1, 56-57 (1993) (discussing harmless error).
107. 992 F.2d 809 (8th Cir. 1993).
108. McCrary-El v. Shaw, 992 F.2d 809, 811 (8th Cir. 1993).
109. *Id.* at 811.
110. FED. R. EVID. 602. See discussion in Part I(C)(2).
111. *McCrary-El*, 992 F.2d at 811 (citations omitted).
112. 15 F.3d 774 (8th Cir. 1994), *cert. denied*, 114 S. Ct. 2691 (1994).

Facts: See also Part VIII(C)(1), below. After his conviction, the defendant received two letters from a juror reporting hostility during the deliberations, his post-verdict belief in the defendant's innocence, and his claim that during the trial, while the jury was at the local restaurant where they were taken for their meals, someone tampered with his food and drink. The defendant submitted these letters to the court and, based thereon, asked for an evidentiary hearing and a new trial.[113]

Held: "[Rule] 606(b) prohibits any inquiry into internal jury deliberations. Thus, the district court properly declined to investigate the juror's reports of hostility during deliberations and his post-verdict belief that [defendant] is innocent. The comments concern internal jury deliberations and reflect the jurors' thought processes."[114] Regarding the food-tampering claim, the defendant argued that this fit the exception to 606(b) for "outside influence . . . improperly brought to bear upon any juror."[115] The appellate court agreed with the district court that "the juror's letter did not raise a colorable claim of outside influence. Not every allegation of outside influence requires an evidentiary hearing."[116]

C(1). Impeachment With Details of Crime of Which Defendant Was Previously Convicted; Rule 609: *United States v. Swanson*.[117]

Black-Letter Law: (1) A guilty plea with deferred judgment, later dismissed, may qualify as a "conviction" for purposes of Rule 609 impeachment unless defendant shows the dismissal was based on a finding of innocence or rehabilitation. (2) Though Rule 609 forbids the introduction of details regarding an impeaching conviction, if defendant opens the door with his own version of the details, the prosecutor may enter with competing details.

Facts: The defendant was convicted of crimes arising out of "one of the largest and most sophisticated indoor marijuana grow operations ever uncovered by enforcement officials in Minnesota."[118] His defense was that he was coerced into participating. The court stated that "the trial court admitted evidence of a guilty plea by [the defendant] in connection with a 1987 felony menacing incident."[119] Regarding the '87 incident, the defendant had pleaded guilty; that court

113. United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994), *cert. denied*, 114 S. Ct. 2691 (1994).
114. *Id.* at 778 (citations omitted).
115. *Id.*; FED. R. EVID. 606(b).
116. *Moses*, 15 F.3d at 778.
117. 9 F.3d 1354 (8th Cir. 1993).
118. United States v. Swanson, 9 F.3d 1354, 1356 (8th Cir. 1993).
119. *Id.* at 1356.

deferred sentence, continued judgment, and put him on probation for two years; at the end of the two years, that court terminated the deferred judgment and dismissed the case.[120]

The defendant argued that evidence of the '87 incident was inadmissible because: (1) "his guilty plea did not qualify as a 'conviction' " under Rule 609(a);[121] (2) the dismissal of the '87 case "was equivalent to a pardon, annulment or other procedure that precludes admission of evidence under Rule 609(c)."[122] (3) In addition, the defendant argued that the court improperly allowed the government to go into the circumstances of the '87 incident, allowed the government to go farther than Rule 609 allows.[123]

Held: Regarding each of the defendant's three arguments: (1) Because the defendant raised this objection for the first time on appeal, it will be reviewed under the plain error standard. Here, no substantial rights of the defendant were prejudiced — evidence and admission of the evidence did not result in a miscarriage of justice.[124] (2) The defendant did not provide evidence that the dismissal of the prior case "was based on a finding of innocence or rehabilitation" and, therefore, it was proper for the trial court to refuse to exclude the evidence under Rule 609(c).[125] (3) On cross-examination, it was proper for the government to go into detail regarding the '87 incident because, on direct, the defendant attempted to explain away the '87 incident in detail; the defendant opened the door for the prosecution's cross-examination.[126]

C(2). Juvenile Adjudications; Invited Error; Rule 609: *Wactor v. Spartan Transportation Corp.*[127]

Facts: Rule 609, the rule regarding impeachment by evidence of conviction of a crime, states that evidence of juvenile adjudications generally are not admissible. The plaintiff claimed the trial court erred when it allowed into evidence his (plaintiff's) own examination of a psychiatrist who testified to the plaintiff's juvenile and adult criminal convictions.[128] See also Part I, above.

Held: Because the plaintiff was the one who introduced the testimony, he invited error and cannot now claim this is reversible.[129]

D. Trial Court Protection of Witnesses from Harassment or Undue Embarrassment Through Control of the Mode of Wit-

120. *Id.* at 1356 n.2.
121. *Id.* at 1356.
122. *Id.* at 1357.
123. *Id.*
124. *Id.* at 1356-57.
125. *Id.* at 1357.
126. *Id.* at 1357-58.
127. 27 F.3d 347 (8th Cir. 1994).
128. Wactor v. Spartan Transp. Corp., 27 F.3d 347, 350 (8th Cir. 1994).
129. *Id.* at 350.

ness Interrogation and Evidence Presentation; Rule 611(a): *Hopfinger v. Kidder International, Inc.*[130]

Facts: In the defendant's post-trial Motion for Recusal or Disqualification, the defendant presented a laundry list of alleged examples of trial court unfairness and impartiality. See Part VI(F)(2). The one involved here is this: the judge required the defendant to submit alleged inconsistent statements to the bench before allowing impeachment.[131]

Held: "The Court's management of attempted impeachment was a proper use of the Court's discretion in exercising 'reasonable control of the mode and order of interrogating of witnesses and presenting evidence so as to . . . (3) protect witnesses from harassment or undue embarrassment.' [Rule] 611."[132] There was "no biased intent or appearance in this regard."[133]

E(1). The Scope and Form of Cross-Examination; Rule 611(b) & (c): *Holst v. Countryside Enterprises, Inc.*[134]

Black-Letter Law: A fact — here a firecode — "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," may be judicially noticed; once one side has it judicially noticed, it may provide a proper basis for that side's cross-examination of the other side's expert witnesses; it is proper to deny cross-examination on a firecode that is not in evidence.

Facts: This is the hit-on-the-head-by-the-falling-golf-cart case described in Part II(A), above.

Held: This may be an example of the judge exercising the power not to extend the scope of the cross-examination beyond the subject matter of the direct. Cross-examining the defendant's expert, the plaintiff's lawyer tried to ask about a firecode; the Eighth Circuit holds there was "no basis for the introduction of that evidence on cross;"[135] he should have asked his own expert on direct or asked the trial court to take judicial notice. See also Part II(A), above.

E(2). The Scope and Form of Cross-Examination; Rule 611(b) & (c): *MDU Resource Group v. W.R. Grace & Co.*[136]

Black-Letter Law: When the court allows cross-examination of a non-hostile witness, which is beyond the scope of the direct and designed to establish the examiner's case-in-chief, the examination must proceed as if on direct.

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130. 827 F. Supp. 1444 (W.D. Mo. 1993).
131. Hopfinger v. Kidder Int'l, Inc., 827 F. Supp. 1444, 1448 (W.D. Mo. 1993).
132. *Id.* at 1448.
133. *Id.*
134. 14 F.3d 1319 (8th Cir. 1994).
135. Holst v. Countryside Enter., Inc., 14 F.3d 1319, 1323 (8th Cir. 1994).
136. 14 F.3d 1274 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 89 (1994).

Facts: See Part I(B)(2), above.

Held:

> [A]lthough the scope of cross-examination is within the discretion of the trial court, it should not be allowed to get out of hand. When cross-examination goes beyond the scope of direct, as it did here, and is designed, as here, to establish an affirmative defense . . . the examiner must be required to ask questions of non-hostile witnesses as if on direct.[137]

Commentary: "[T]he examiner *must be* required to ask questions . . . as if on direct."[138] It is mandatory.

F(1). Calling and Interrogation of Witnesses by the Court; Rule 614: *United States v. Van Dyke*.[139]

Black-Letter Law: Regarding a trial judge's comments during a trial, the appellate court balances and weighs the comments against the overall fairness of the trial. " '[T]he balance is adversely tipped against the defendant in a criminal trial where the judge's role loses its color of neutrality and tends to accentuate and emphasize the prosecution's case.' "[140]

Facts: The defendant, former president of a bank in Sioux City, Iowa, was found guilty on four counts of false statements to a financial institution, three counts of bank fraud, one count of false loan documentation, and one count of mail fraud.

Held: The trial judge repeatedly interrupted the defendant's testimony, often taking on an impeaching air, and got overly involved in questioning the defendant and other defense witnesses, mostly on behalf of the prosecution. Regarding at least one witness, the judge gave the jury "a perception that [he] had general disdain and/or disbelief for the defense witness and counsel."[141] The trial judge was involved "perceptibly as an advocate for the prosecution,"[142] and "very possibly [gave] the jury an impression that he and the prosecutor were working toward a common goal."[143] The Eighth Circuit stated that "[i]n other words, based on the record we cannot help but conclude that the conduct of the trial judge probably so impressed the jury with his partiality to the prosecution that this became a factor in determining defendant's guilt."[144]

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137. MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274, 1282 (8th Cir. 1994) (dictum) (citations omitted), *cert. denied*, 115 S. Ct. 89 (1994).

138. *Id.* at 1282 (dictum) (emphasis added).

139. 14 F.3d 415 (8th Cir. 1994). See discussion Part I(A)(3) and Part VII(E).

140. United States v. Van Dyke, 14 F.3d 415, 417-18 (8th Cir. 1994) (quoting United States v. Leuth, 807 F.2d 719, 727 (8th Cir. 1986)).

141. *Id.* at 422.

142. *Id.*

143. *Id.* at 419.

144. *Id.* at 423.

In light of the fact that the objections related to the trial judge's actions and the trial judge refused to allow side-bar conferences, it is understandable that counsel kept objections to a minimum. Defense counsel did enough to preserve the record and, if he had not, "the court's excessive intervention and lack of neutrality [was] plain error which deprived defendant of a fair trial."[145]

F(2). Calling and Interrogation of Witnesses by the Court; Rule 614: *Hopfinger v. Kidder International, Inc.*[146]

Facts: The plaintiff was injured when using a waterski manufactured by the defendant. The case was tried on failure to warn and products liability. The jury returned a plaintiff's verdict of $3,600,000, with a finding that the defendant was 100% at fault.[147] This was an order regarding post-trial motions, including the defendant's Motion for Recusal or Disqualification. The defendant moved that the court disqualify itself from hearing the post-trial motions, alleging that the court was not fair and impartial during the trial. The defendant had a laundry list of allegations regarding unfairness and impartiality. The one involved here was that the judge was biased in his questioning of witnesses.[148]

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145. *Id.* at 423 n.1.

146. 827 F. Supp. 1444 (W.D. Mo. 1993).

147. *Hopfinger*, 827 F. Supp. at 1446.

148. *Id.* at 1446-48. Here are some other incidents that the defendant's motion alleged were improper, followed by the court's responses:

(1) Motion: The judge told all counsel that the case should have been settled. Response: The judge was assuming the management and facilitator role urged on the court by court administrators. *Hopfinger*, 827 F. Supp. at 1446.

(2) Motion: The judge told the defendant's counsel that the president of the defendant should be present in the courtroom to hear the impact of the plaintiff's case. Response: This was an effort to save the defendant corporation from financial ruin, as the court believed, and the verdict bore out, that the defendant had grossly underestimated its exposure. *Hopfinger*, 827 F. Supp. at 1446.

(3) Motion: The judge required the defendant to submit alleged inconsistent statements to the bench before allowing impeachment. Response: See Part VI(D); *see Hopfinger*, 827 F. Supp. at 1448.

(4) Motion: The Court exhibited bias when it instructed the defendant's counsel that, during a break between witnesses, he was not to discuss his previous witness's testimony with his next witness. Response: See Part VI(G); *see Hopfinger*, 827 F. Supp. at 1448.

(5) Motion: "[T]he Court ridiculed [defendant's] anatomist, in the eyes of the jury by parroting the African-American spiritual 'Dem' Bones.' " Response:

> The Court was attempting to clarify for the jury the distinction between the areas of expertise of a biomechanist, who had testified earlier, and [this witness], who was an anatomist. The biomechanist studies the relation of the human body to external devices, while an anatomist studies the relations of parts of the body to one another. The Court found the familiar saying, "the knee bone's connected to the foot bone" as a way to convey clear information to the jury about the role of an anatomist while adding a bit of levity to a drawn out trial. That the defendant could infer sinister intent to such a comment is preposterous.

Hopfinger, 827 F. Supp. at 1448.

Held: The judge asked questions to aid himself and the jury in understanding key issues in the case, as allowed in Rule 614(b), and at no time was there any objection to his questions, as required by Rule 614(c).[149]

G. Sequestering Witnesses; Rule 615: *Hopfinger v. Kidder International, Inc.*[150]

Black-Letter Law: The judge has considerable power to prevent later witnesses from learning the details of the testimony of earlier witnesses.

Facts: As discussed in Part VI(F)(2), immediately above, defendant's post-trial Motion for Recusal or Disqualification presented a laundry list of alleged examples of trial court unfairness and impartiality. The one involved here is that the court exhibited bias when it instructed the defendant's counsel that, during a break between witnesses, he was not to discuss the testimony of the previous witness with the next witness.[151]

Held: "The court took the measure of preventing communication so that the jury could hear [the second witness's] independent recollection of [a conversation with the first witness]. The court can identify nothing improper in this action."[152]

Commentary: Neither can this author find anything improper in this action. This is a valid use of Rule 615 power to exclude witnesses from hearing each other's testimony. How much value is there in sequestration if others can be present in the courtroom and can fill the sequestered witness in on the testimony of the previous witnesses? This also most likely is a valid use of the more general Rule 611 power over witnesses and their testimony, and, in any event, a valid use of inherent judicial power not dependent on the statute.

VII. OPINIONS AND EXPERT TESTIMONY

A. *Daubert*; Expert Testimony; Rule 702: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[153]

Black-Letter Law: Before admitting scientific expert-testimony, the trial judge has to favorably assess the reliability both of the general scientific theory and methodology and of the application of the theory and methodology to the facts of the case. That will be done either through judicial notice or after a full evidentiary hearing on the matter.

149. *Hopfinger*, 827 F. Supp. at 1447-48.
150. 827 F. Supp. 1444 (W.D. Mo. 1993).
151. *Hopfinger*, 827 F. Supp. at 1448.
152. *Id.* at 1448.
153. 113 S. Ct. 2786 (1993).

The test is no longer whether the theory, the methodology, and their application to the facts meet a standard of "general acceptance." Instead, the test is whether the evidence is "scientific knowledge," whether it will assist the trier of fact, and whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Even Briefer Black-Letter Law: The trial judge must determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[154]

Facts: While pregnant, Mrs. Daubert took a prescription anti-nausea drug marketed by Merrell Dow Pharmaceutical under the name Bendectin. Her son Jason was born with serious birth defects. The Dauberts and another similarly-situated family sued Merrell Dow.[155]

Merrell Dow offered the evidence of a well-qualified expert witness who had reviewed all of the literature on Bendectin and human birth defects and could not find a single study showing that the drug is capable of causing fetal malformation. This expert concluded that Bendectin is not a risk factor for human birth defects. The district court decided that this is "generally accepted" scientific evidence. Therefore, this expert's testimony was admissible.

The plaintiffs offered the testimony of eight also-well-qualified experts who conducted different, more novel tests. They concluded Bendectin can cause birth defects. The district court decided that the methodology they had employed was not "sufficiently established [in the scientific community] to have general acceptance." In other words, the judge concluded that the evidence was what has been labeled "junk science." Therefore, the plaintiffs' experts' testimony was not admissible.

The district court granted defendant's motion for summary judgment, and the United States Court of Appeals for the Ninth Circuit affirmed.[156]

Held: For fifty years, the test for the admissibility of novel scientific evidence in federal court was the common-law general-acceptance test from *Frye v. United States*.[157] Fifty years after *Frye*, Congress enacted the Federal Rules of Evidence. Thereafter, the statute controls, not the common law (the common-law may aid the interpretation of the Rules, but it no longer controls).[158]

154. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2799 (1993).
155. *Id.* at 2791.
156. *Id.* at 2792.
157. 293 F. 1013 (D.C. Cir. 1923).
158. *Daubert*, 113 S. Ct. at 2793-94.

Regarding expert testimony, the statute has a specific rule, Rule 702. Nothing in that rule establishes a "general acceptance" test as a prerequisite to admissibility and nowhere in that Rule or in its drafting history is *Frye* ever mentioned.[159] The general approach of the federal rules is one "of relaxing the traditional barriers to "opinion" testimony."[160] In sum, "the *Frye* test was displaced by the [Federal] Rules of Evidence."[161]

What, then, is the new test? The judge uses the Federal Rules of Evidence to handle post-*Daubert*, scientific expert-testimony. The rules the judge uses are Rules 702, 703, 706 and 403.[162] To begin with, absent a clear case, a case for judicial notice, or a case of *prima facie* statutory recognition, the judge will have to hold what, not surprisingly, is becoming known as a *Daubert* hearing.[163] This is a Rule 104 hearing to resolve "[p]reliminary questions concerning . . . the admissibility of evidence."[164] At that *Daubert* hearing, the proponent of the evidence will have to convince the judge, by a preponderance of the evidence, that the *Daubert* test is satisfied.[165]

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159. *Id.* at 2794.

160. *Id.* (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

161. *Id.* at 2793.

162. Altogether, *Daubert* lists eleven checks on so-called junk science. Here they are, in a row, more or less in the words of the court:

(1) "Scientific" — is the testimony "ground[ed] in the methods and procedures of science?" *Daubert*, 113 S. Ct. at 2795 (regarding Rule 702).

(2) "Knowledge" — does the testimony rise above "subjective belief or unsupported speculation?" *Id.*

(3) "Will assist the trier of fact" — does the evidence have "a valid scientific connection to the pertinent inquiry." *Id.* at 2796 (regarding Rule 702).

(4) If the expert opinion is based on otherwise inadmissible evidence, it is "to be admitted only if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.' " *Id.* at 2798 (quoting Rule 703).

(5) Rule 706 allows the trial court to secure its own expert. *Id.*

(6) Rule 403 applies, and probative value may be " 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " *Id.* (quoting Rule 403).

(7) Further, we rely on the capabilities of juries. *Id.*

(8) We rely on the "traditional . . . means of attacking shaky but admissible evidence," the adversarial process of cross-examination; and

(9) the presentation of contrary evidence. *Daubert*, 113 S. Ct. at 2798.

(10) We rely on careful jury instruction on the burden of proof. *Id.*

(11) We rely on the power of the directed verdict or summary judgment. *Id.*

163. I predict, by the way, that judicial notice will come to be relied upon more and more in this area of scientific expert testimony — because of the difficulties associated with the alternative, the *Daubert* test, which, back in the text, I am about to describe. The Eighth Circuit's opinion in *Martinez* is an example of this judicial notice in action. See discussion in Parts II(B) and VII(B)(1).

164. FED. R. EVID. 104.

165. Preponderance of the evidence (or, as we have renamed it in Nebraska, greater weight of the evidence, *NJI2d* 2.12A) is the admission-of-evidence burden in both civil and criminal cases. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987).

Here is what the proponent must evidence at the *Daubert* hearing. Rule 702 allows expert scientific testimony where "scientific . . . knowledge will assist the trier of fact."[166] This means, according to *Daubert*, that the district or magistrate judge must assess the reliability and the relevance both of the general scientific theory and methodology and of the application of the theory and methodology to the facts of the case (this is how we decide if the evidence is both "scientific" and "knowledge," and "will assist the trier of fact").

Here are some of the things the judge is to consider. Among other things, the trial judge will focus on: whether the scientific knowledge can be and has been tested; whether the theory and methodology has been subjected to peer review, including through publication; the known or potential rate of error; the maintenance of standards controlling the methodology; and, the old *Frye*-stand-by, the general acceptance of the theory and methodology.[167] As noted, this list is not exclusive. The limits on what will be considered at this hearing are the limits of what is relevant to the reliability of the general theory and methodology and the application of both in the particular case.

Beyond Rule 702, in an appropriate case the hearing will also deal with Rule 703: if the expert opinion is based on otherwise inadmissible evidence, then it is "to be admitted only if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.' "[168] This part of the hearing will be particularly important when dealing with novel scientific testimony based on inadmissible data; here reliance on this kind of data by other experts in the field, and the reasonableness of such reliance, will be all the more disputable.

Beyond Rules 702 and 703, in an appropriate case the hearing will also deal with Rule 403: is probative value " 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' "[169] Here is what Judge Weinstein had to say about this: "Expert evidence can be both powerful and quite misleading because of the difficulty of evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses."[170]

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166. FED. R. EVID. 702.

167. *Daubert*, 113 S. Ct. at 2798.

168. *Id.* at 2798 (quoting FED. R. EVID. 703).

169. *Id.* (quoting FED. R. EVID. 403).

170. *Id.* (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

And, finally, *Daubert* notes that Rule 706 allows the trial court to secure its own expert.[171] The court stated that "[g]iven the trial court's expanded function in evaluating the reliability of expert evidence, it is now more important than ever for the trial court to take an active role in the presentation of expert evidence."[172] One way for the judge to be more active is through using Rule 706.[173]

And Now, Cutting Through All of that Fine Language, Hereeeee's the Real Holding: Or, at least, here is a way to summarize the holding: The test is no longer whether the theory, the methodology, and their application to the facts meet a standard of "general acceptance." Instead, the test is whether the evidence is "scientific knowledge," whether it will assist the trier of fact, and whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The trial judge must assess the reliability and the relevance of the theory and methodology. This involves assessing each of them both in general and as applied by these witnesses to this case.

Commentary: *Daubert* was such a significant decision that it received a lot of attention even outside legal circles. My own hometown newspaper, for example, did its own editorial on the case: "Ridding Courts of 'Junk Science.'" The editorial defined junk science, in the courtroom context, as "testimony from expert witnesses who operate outside the mainstream of scientific thought."[174] The first paragraph of the editorial reads:

> "Junk science" has had too much influence in the legal arena in recent years. The United States Supreme Court, commendably, has acted to get it out of the courtroom.[175]

This is exemplar of the widespread misunderstanding of *Daubert*. The *Omaha World-Herald* was saying that the Supreme Court held the district court's test to be too lenient. What the Supreme Court really held was that the district court's test was too restrictive. The trial judge decided that the evidence was not sound enough to be allowed in court. The Supreme Court reversed. The Court sent the case back to the trial court to see if the testimony of the plaintiffs' eight experts is admissible under the new standard, admissible even though

171. *Id.*

172. *In re* Joint Eastern & Southern Dist. Asbestos Litig., 151 F.R.D. 540, 545 (E.D.N.Y. 1993) (opinion by Weinstein, J.).

173. In that same Memorandum and Order, Judge Weinstein also suggests that the *Daubert* hearing might replace the depositions of the experts involved. This "may result in necessary education of the court and parties with respect to critical scientific issues without extensive deposition practice." *Asbestos Litig.*, 151 F.R.D. at 545.

174. *Ridding the Courts of Junk Science*, OMAHA WORLD HERALD, July 12, 1993, at A10.

175. *Id.*

their methods are not generally accepted in the scientific community. Contrary to this and other editorials, the Court really made it *easier* for litigants to get in "testimony from expert witnesses who operate outside the mainstream."[176]

The seventy-year-old *Frye* rule that preceded *Daubert* is that scientific testimony is admissible only when the scientific technique on which it is based is "generally accepted" in the relevant scientific community. Such a requirement tends to steer scientific testimony towards the mainstream.

Daubert held that the statute that is the Federal Rules of Evidence changed that seventy-year-old rule. Under the statute, said the Court, scientific evidence is admissible if the trial judge determines it is in some sense "scientific knowledge" (though it needn't be generally accepted scientific knowledge) and it will "assist the trier of fact." *Daubert* loosened the standard: general acceptance is no longer required.

As Justice Harry A. Blackmun says in his opinion for the Court, the trial judge is to act as 'gatekeeper' for the admission of scientific evidence. The trial judge as gatekeeper is nothing new; it is just that now the gate is bigger — much more can fit through and the gatekeeping trial judge's job is that much more difficult. More difficult as regards novel scientific evidence, at least, for if the evidence is not novel, the trial judge may be able to take judicial notice of the scientific theory, the methodology, and their application to the facts of the case (and, if the evidence is not novel, *Daubert* might not apply at all. Part VII(B)(3), *Commentary*.).[177] In the end, *Daubert* gives trial judges more discretion to allow into evidence new and novel scientific theories.

To say that *Daubert*, in theory, will allow more science into evidence than did *Frye* is not to say that *Daubert*'s test is an easier test. It is more lenient in that it allows more, and more novel, science into evidence, but it can be much more difficult in that, absent judicial notice, it requires a much more difficult, expensive, and time consuming foundation.

B(1). Post-*Daubert* Judicial Review of the Admissibility of Scientific Expert-Testimony; Rule 702 (Mostly): *United States v. Martinez*.[178]

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176. *Id.*

177. *See* R. Collin Mangrum, *A New Expert Evidence Standard*, CREIGHTON LAWYER, Fall 1994, at 14-15 (suggesting that the area of novel science may encompass more than what one would expect at the onset, and the only noteworthy question left unanswered by *Daubert* is how a court should proceed in a truly novel scientific evidence case).

178. 3 F.3d 1191 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994).

Black-Letter Law: The *Daubert* test for admissibility of scientific evidence can include judicial notice.

Facts: This opinion addresses the validity of the DNA profiling that had been used against defendant at his trial for the rape of a fourteen-year-old girl.

Held: There are two questions: (1) the reliability of the general theory and methodology of DNA testing; (2) the reliability of the application of the theory and methodology to the facts of this case.

First, the Eighth Circuit took judicial notice of "the reliability of the general theory and techniques of DNA profiling."[179] This judicial notice is based on a thorough examination of the matter in the Second Circuit which, in a pre-*Daubert* opinion, took a post-*Daubert* approach.

Second, the Eighth Circuit found that this district court held a hearing at which it determined that the testing protocols and procedures used are generally accepted by the scientific community as reliable "and the [Federal Bureau of Investigation] . . . properly followed the protocol, accurately performing the prescribed procedures."[180] The *Daubert*-Rule 703 test is satisfied.

The court "further balanced the probative value against the prejudicial effect of DNA profiling evidence."[181] Rule 403 is satisfied.

Commentary: Doesn't this all sound a lot like the cases involving the first uses of radar to measure automobile speed, cases we all had (and perhaps even read) in our law school Evidence casebook?

B(2). Post-*Daubert* Judicial Review of the Admissibility of Scientific Expert-Testimony; Rule 702 (Mostly): *Gier v. Educational Service Unit No. 16*.[182]

Black-Letter Law: The *Daubert* hearing focuses on relevance and reliability.

Facts: This was a Memorandum and Order by Magistrate Judge Piester, prepared after a *Daubert* hearing, responding to the defendants' Motion in Limine to exclude the testimony of certain expert witnesses. The case involved the alleged sexual abuse of seven mentally retarded individuals. The hearing was on the admissibility of the expert testimony of one psychiatrist and two psychologists who had examined the seven mentally retarded individuals, and determined they had been sexually, physically, and emotionally abused. The plaintiffs

179. United States v. Martinez, 3 F.3d 1191, 1197 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 734 (1994).

180. *Id.* at 1198.

181. *Id.*

182. 845 F. Supp. 1342 (D. Neb. 1994).

intended to offer the testimony of these witnesses as experts in the detection of such abuses.

Held: The focus of the required hearing will be on whether the proffered testimony is both relevant and reliable. The court must determine whether the general scientific theory and the methodology are reliable and whether that theory and methodology properly can be applied to the facts in issue here.

The decision in this case is rendered more difficult by reason of the fact that a decision must be made for three experts, seven children, and three separate types of abuse.

Magistrate Judge Piester engaged in an extensive and well-considered review of the evaluations the witnesses had prepared for this case, the general questions of admissibility involved with regard to this type of expert testimony, the reliability of these experts' methodologies, and the reliability of these experts' testimony. Judge Piester stated that: "I conclude plaintiffs have failed to demonstrate by a preponderance of the evidence that the witnesses' opinions about the plaintiffs' purported abuse is reliable."[183] The techniques used were essentially untestable; the plaintiffs did not show that the error rate using this methodology is low; the plaintiffs did not show that the methodologies used in this particular case are reliable for the purposes for which the plaintiffs sought to use them.

Commentary: With regard to process, this is a perfect example of what any judge has to do in a *Daubert*-controlled situation.

B(3). Post-*Daubert* Judicial Review of the Admissibility of Scientific Expert Testimony; Rule 702 (Mostly): *Sorenson v. Shaklee Corp.*[184]

Black-Letter Law: The *Daubert* test asks whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact. The proponent of the evidence must show that its subject matter is "scientific knowledge."

Facts: The plaintiffs in this case had suffered mental retardation since birth, allegedly caused by their parents ingestion of Shaklee alfalfa health food tablets. Through their mother, the plaintiffs filed this suit, claiming that the chemical treatment residue on the vitamin tablets caused their birth defects, and the trial court granted summary judgment for the defendants on the issue of causation. On appeal, the question was whether, under *Daubert*, the plaintiff had presented "relevant admissible evidence to establish a jury question on causation."[185]

183. Gier v. Educational Serv. Unit No. 16, 845 F. Supp. 1342, 1351 (D. Neb. 1994).
184. 31 F.3d 638 (8th Cir. 1994).
185. Sorenson v. Shaklee Corp., 31 F.3d 638, 639 (8th Cir. 1994).

Held: "Faced with a proffer of expert scientific testimony," concluded the court, "the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[186]

The appellate court reviewed the plaintiffs' evidence at length and found numerous flaws, including that: no published scientific literature supported the plaintiffs' proposition and none of the experts had submitted their findings to peer review prior to the trial; there was no evidence of a statistically significant link between ingestion of the tablets and mental retardation; and the plaintiffs' most supportive expert witness was unable to testify with the same degree of certainty at his depositions as he had in prior affidavits (by contrast the defendants presented four expert witnesses who concluded "to a reasonable degree of scientific certainty" that the parent's ingestion of the tablets could not have caused the birth defects).[187] The court applied *Daubert* and concluded that the plaintiffs had not presented sufficient evidence to get their expert's testimony to the jury.[188]

B(4). Post-*Daubert* Judicial Review of the Admissibility of Scientific (Medical) Expert-Testimony; Rule 702 (Mostly): *Carroll v. Morgan*.[189]

Black-Letter Law: In some cases of expert scientific-testimony, *Daubert* will make no difference at all. *Daubert* replaced *Frye*; *Daubert* applies to all scientific evidence; *Frye* applied only to novel scientific evidence; when the evidence is not novel, its foundation need not be novel either.

Facts: This is a medical malpractice, wrongful death action. The defendant-doctor relied on the testimony of two medical experts, and the jury rendered a verdict in his favor. The plaintiff objected that the testimony of one of the defendant's experts, a cardiologist, did not satisfy *Daubert*.

Held: This cardiologist had thirty years of experience as a practicing, board-certified cardiologist; he had reviewed the relevant medical records and the corner's records; and he had studied a broad spectrum of published materials. His testimony satisfied *Daubert*.[190]

186. *Id.* at 648 (footnote omitted) (quoting *Daubert*, 113 S. Ct. at 2796).

187. *Id.* at 642-50.

188. *Id.* at 651.

189. 17 F.3d 787 (5th Cir. 1994). This is not an Eighth Circuit case, but *Daubert* is such an important case that it is worth stretching the jurisdiction of this article for an extra page or two on the subject.

190. Carroll v. Morgan, 17 F.3d 787, 790 (5th Cir. 1994).

Commentary: In this case and the next, because *Daubert* is so new and so important, I have gone outside of the Eighth Circuit for circuit courts of appeals' interpretations of *Daubert*.

In some cases, *Daubert* will make no difference at all. Foundation for expert scientific opinion (here an expert opinion from medical science) will be laid in the way with which we all have become so familiar, and that will still be good enough.

One way of looking at this is that it is judicial notice that an opinion on cardiology based on the witness' thirty years of experience as a practicing, board-certified cardiologist, his review of the relevant medical records and the corner's records, and his study of a broad spectrum of published materials makes his theory and methodology, and his application of it to the facts of the case, all reliable. As a caveat, see the *O'Connor* case, Part VII(B)(4), immediately below.

Another way of looking at it is that the foundational evidence, presented on the stand, in front of the jury, satisfies *Daubert*. It makes enough of a record of reliability and relevance.

Daubert replaced *Frye*. *Daubert* applies to all scientific evidence. *Frye* applied only to novel scientific evidence. When the evidence is not novel, its foundation need not be novel either.

B(5). Post-*Daubert* Judicial Review of the Admissibility of Scientific Expert-Testimony; Rule 702 (Mostly): *O'Connor v. Commonwealth Edison Co.*[191]

Black-Letter Law: Even the treating physician's testimony in a personal injury action can be subject to *Daubert* testing . . . and can fail.

Facts: The plaintiff was a pipefitter who performed work at a nuclear facility. He alleged he was overexposed to radiation and that this caused his cataracts. His treating physician was Dr. Karl Scheribel. The court stated that:

> It is Dr. Scheribel's opinion that the cataracts were caused by radiation because radiation-induced cataracts are so unique that they can be identified merely by observation. However, all experts agree that the minimum dose necessary to cause cataracts is 200 rems, well above the .045 rem dose that [plaintiff] received.[192]

The district court ruled Dr. Scheribel's testimony inadmissible. The plaintiff challenged this ruling on appeal.

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191. 13 F.3d 1090 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

192. O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1093 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

Held: The United States Court of Appeals for the Seventh Circuit has "interpreted *Daubert* to require that the district court undertake a two-step inquiry."[193]

- First: does the expert's testimony pertain to scientific knowledge, *i.e.*, has it been subjected to the scientific method. The court "must rule out 'subjective belief or unsupported speculation.' "[194]
- Second, will the testimony assist "the trier of fact in understanding the evidence or in determining a fact in issue, [*i.e.*, the proposed] scientific testimony must 'fit' the issue to which the expert is testifying."[195]

Dr. Scheribel's testimony did not meet at least the first of these requirements. The doctor testified that "I know what cataracts look like when they've been induced by radiation, [whatever the dosage]," but none of the sources he cited supported the theory that radiation cataracts can be identified by mere observation.[196] In fact, the articles cited by the doctor establish that his methodology has *no* basis in scientific fact.

The court stated that "we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony regarding causation."[197]

Commentary: Even the treating physician can have novel scientific theories (here, about causation). Even the treating physician's testimony may be excluded by *Daubert* testing.

B(6). A Gang Member as an Expert on Gang Activity; Expertise Gained Through Experience; Rule 702: *United States v. Johnson*.[198]

Black-Letter Law: Experience may qualify a person as an expert witness under Rule 702. Gang members may be qualified to testify as experts on the activities of their gangs.

Facts: Two of the defendants in this case were sentenced to life in prison, having been convicted for their participation in a crack distribution conspiracy involving a "crack house [that] apparently serviced several hundred people each day."[199] The court stated that:

> The government's first witness for its case-in-chief was Keith Johnson, a member of the Crenshaw Mafia Bloods gang (the Bloods) and an unindicted coconspirator. Keith Johnson

193. *Id.*
194. *Id.*
195. *Id.* at 1106.
196. *Id.* at 1105 n.14.
197. *Id.*
198. 28 F.3d 1487 (8th Cir. 1994), *cert. denied*, — S. Ct. —, 63 U.S.L.W. 3516 (1995).
199. United States v. Johnson, 28 F.3d 1487, 1492 (8th Cir. 1994), *cert. denied*, — S. Ct. —, 63 U.S.L.W. 3516 (1995).

> testified about the drug trafficking business, gang membership, and the Bloods, and about the associations between the defendants.[200]

Keith Johnson testified as an expert on the particular gang involved on these facts, his gang. Keith Johnson was qualified as an expert in front of the jury. The defendants argued the trial court erred when it did not hold a Rule 104 hearing (a *Daubert* hearing) outside the hearing of the jury. They also argued that Keith Johnson's testimony was inadmissible under Rule 403.[201]

Held: The gang member's testimony was admissible as expert testimony under Rule 702. The court determined that the relevant inquiry was whether his testimony would be " 'helpful' to the jury's understanding of the evidence" (citing Rule 702 and *Daubert*).[202] Because the testimony was helpful, it was therefore admissible.[203]

As regards allowing the expert to be qualified in front of the jury, the court said only this: "We hold the district court did not err in making its determination in this manner."[204] As regards Rule 403, the court stated that "[i]n this context, 'unfair prejudice' . . . means an undue tendency to suggest decision on an improper basis."[205] The court then discussed the relevant testimony and concluded "that the evidence was not substantially more prejudicial than probative."[206] No abuse of discretion.

C. Expert Opinions; Validity of Underlying Factual Assumptions Is Question of Fact: *Norton v. Caremark, Inc.*[207]

Black-Letter Law: As a general rule, the question of the validity of the factual assumptions underlying an expert's opinion is a question of fact (credibility), not a question of law (admissibility). It is for the jury, not the judge.

Facts: The defendant complained, on appeal, about some of the factual assumptions made by plaintiff's expert, a CPA who testified as an expert on lost-pay damages.

Held: No abuse of discretion. The court stated that "as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."[208]

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200. *Id.* at 1496.
201. *Id.*
202. *Id.* at 1496-97.
203. *Id.* at 1497.
204. *Id.* at 1496.
205. *Id.* at 1497 (quoting FED. R. EVID. 403 advisory committee's note).
206. *Id.* at 1498.
207. 20 F.3d 330 (8th Cir. 1994).
208. Norton v. Caremark, Inc., 20 F.3d 330, 340 (8th Cir. 1994).

D. Impeaching Product-Safety Expert Witness With Evidence of Other Accidents Involving Similar Products: *Drabik v. Stanley-Bostich, Inc.*[209]

Black-Letter Law: The admissibility of similar happenings evidence depends on the Rule 403 balance, as described above, in Part IV(B). Regarding using the similar happenings to impeach the expert, the court stated that "[t]o hold that an expert who simply offers his opinion that a product is 'generally safe' opens the door to all other accident evidence would create an exception which would swallow the general rule."[210] This is not a valid way around Rule 403.

Facts: One carpenter accidently shot another in the head with a "pneumatic nailing tool." The carpenter on the receiving end of the nail filed a products liability action against the manufacturer of the tool.[211] The defendant's expert testified that the tool was generally safe. The plaintiff tried to impeach the expert with examples of other incidents involving other non-similar nail-gun accidents.[212]

Held: See Black-Letter Law, immediately above, and Part IV(B), above.

E. Opinions on the Ultimate Issue; Rule 704: *United States v. Van Dyke*.[213]

Black-Letter Law: "It is well settled that an expert may express an opinion even if it embraces an ultimate issue to be decided by the fact finder."[214]

Facts: See Part VI(F)(1), above.

Held: The prosecutor's expert was allowed to summarize banking regulations, and to give his opinion that the defendant had violated them. The defendant's expert witness was not allowed to give her opinion or her explanation of the regulations (but just to read them aloud). Though the trial court's decision to exclude expert testimony is accorded broad discretion, here it was reversible error. The trial court's ruling was inconsistent with Rule 704 and it was additionally troubling both because the judge allowed the other side's expert to do just this and in light of other aspects of the judge's treatment of this witness.[215]

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209. 997 F.2d 496 (8th Cir. 1993).

210. Drabik v. Stanley-Bostich, Inc., 997 F.2d 496, 509 (8th Cir. 1993).

211. *Id.* at 498-99.

212. *Id.* at 503-04.

213. 14 F.3d 415 (8th Cir. 1994). For further discussion, see Parts I(A)(3) and VI(F)(1)).

214. United States v. Van Dyke, 14 F.3d 415, 422 (8th Cir. 1994).

215. *Id.* at 422-23. Regarding other aspects of the judge's treatment of this witness, see Part VI(F)(1).

VIII. HEARSAY

A(1). Definition of Hearsay; If An Out-of-Court Statement Is Not Offered To Prove the Truth of the Matter Asserted, Then It Is Not Hearsay; Rule 801(c): *United States v. Swanson*.[216]

Black-Letter Law: "A threat offered to attack credibility [of threatener] or to prove propensity [of threatener] is not offered for the truth of the matter asserted and, therefore, is not hearsay."[217]

Facts: Johnson pleaded guilty, cooperated with the government, and testified against the defendant here. The defense is that Johnson coerced the defendant's participation in the crime. Johnson testified that he had never threatened anyone, ever. The defendant offered a woman's testimony that Johnson had threatened her. The trial court excluded it as inadmissible hearsay.[218]

Held: Threats offered either to impeach the one who made them or to show propensity on the part of the one who made them are not offered to prove the truth of the words asserted and, thus, are not hearsay. That does not, however, mean they are admissible.

In so far as this threat was offered to attack credibility: even though Johnson testified that he had never threatened anyone, the woman's testimony is inadmissible under Rule 608(b) — the Rule against impeachment with extrinsic evidence of specific instances of the conduct of a witness.

In so far as this threat was offered to prove propensity: It was character evidence and is only admissible if, under Rule 405, the violent character of the coercer is an essential element of the coercion defense, and it was not.

Though not hearsay, as the trial court had found, evidence of the threat was nonetheless inadmissible. Had the defendant known of the threat, "the evidence might be admissible to demonstrate the 'well grounded' nature of his fear."[219] There was, however, no evidence that he had known.[220]

Commentary: My evidence instincts tell me that this evidence should be admissible. The defense is that witness Johnson threatened the defendant into going along with the crime. Witness Johnson's response is that he has never threatened anyone. Should he be able to lie and get away with it? Should the rules of evidence provide the cover for his lie? Should the rules of evidence be the one thing that

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216. 9 F.3d 1354 (8th Cir. 1993). For related discussion, see Parts I(A)(2), I(E), VI(C), and VIII(A).

217. United States v. Swanson, 9 F.3d 1354, 1358 n.7 (8th Cir. 1993).

218. *Id.* at 1356-58. For additional facts, see Part VI(C).

219. *Swanson*, 9 F.3d at 1359 n.10.

220. *Id.*

makes it possible for Johnson to take the stand and, with a cute little getting-away-with-murder smile on his face, lie under oath while the defendant holds evidence he is lying — evidence the rules prevent the defendant from using?

"Should" is the wrong word when applying statutory rules. The real question is: "Is this the result the legislature has called for?" In so far as testimony about Johnson's previous threat is impeachment evidence, the answer is yes, this is the result the legislature has called for. This case points out the rigidity of the Rule 608(b) rule against the use of extrinsic evidence to prove impeaching specific-instances of witness conduct.

The prohibition against extrinsic evidence is meant to prevent waste of time, confusion of issues, and the like. Rule 608 enacts a categorical solution to these problems (and a categorical approach is always more rigid than an ad hoc approach). Why not just let the judge control these things under the ad hoc (and less rigid) approach of Rule 403; the rule that applies generally to all evidence, and seems to work quite well on its own?

In so far as testimony about Johnson's previous threat is substantive evidence, perhaps the defendant could take the woman's testimony that Johnson had threatened her and offer it as similar happening evidence. The questions, then, would be these: has there been a sufficient showing of similarity of circumstances between the other events and the one on trial (probative value); will the other evidence lead the jury to lose interest in the particulars of the case at trial and base its verdict on the notion that where there is smoke, there is fire (dangers of confusion of the issues resulting in the jury putting Johnson on trial rather than the defendant, and unfair prejudice); and will too much time and effort go into the proof and counterproof of the other events (undue delay, waste of time, and needless presentation of cumulative evidence)?[221]

It is just as if the plaintiff sued a theater for a defective staircase and, as evidence that the problem was with the theater and not with the plaintiff, offered evidence that others had fallen at the same place. Similar happenings evidence relevant to defective stairs; similar happenings evidence relevant to threatening behavior. Then this evidence would be admissible if sufficiently similar; if its probative value is not substantially outweighed by the danger of unfair prejudice or jury confusion; if proof of the threat and counterproof denying the threat or explaining its circumstances does not consume too much time.

221. For further discussion, see the discussion of similar-happenings evidence in Part IV(B).

For the defense counsel in the situation presented in this case, offering this evidence as similar happenings evidence has these advantages: if it comes in, it comes in and can be used as substantive evidence, not just impeachment evidence. It gets the matter out from under the rigid, categorical rule of Rule 608(b). If the judge is inclined to rule in the defense counsel's favor, using Rule 403 puts the matter to the trial judge's discretion; if the trial judge is inclined to rule for the defendant and thinks the evidence is sufficiently important to be worth the time, then all the defense counsel has to do is convince the judge that the other happening is sufficiently similar.[222]

A(2). Definition of Hearsay; If An Out-of-Court Statement Is Not Offered To Prove the Truth of the Matter Asserted, Then It Is Not Hearsay; Credibility Evidence; Rule 801(c): *United States v. White*.[223]

Cross Reference: See Part VIII(C)(2), below.

B. Nonhearsay Coconspirator Statements; Rule 801(d): *United States v. Clay*.[224]

Black-Letter Law: Before admitting evidence under the coconspirator definitional exclusion to the hearsay rule, the trial court must find by a preponderance of the evidence that the defendant knowingly participated in the conspiracy. In making this preliminary factual determination, the court may consider the text of the out-of-court statements sought to be admitted.

The Rest of the Story: Part I(B)(1).

Commentary: Throughout its opinion, the court refers to 801(d)(2)(E) as the coconspirator exception to the hearsay rule. This is not an exception, but a definitional exclusion. That is, a coconspirator's statement is not "admissible hearsay;" rather, it is "not hearsay" in the first place. Does it matter? I argue that it does, in two regards:

- First, as attorneys, I believe we have an obligation to use language with precision; as attorneys who are judges, we have an obligation to honor statutes unless they are unconstitutional, and the statute that is the Federal Rules of Evidence is honored by recognizing that it treats admissions as nonhearsay.[225]

222. Additionally, were this a civil case, or were it the prosecutor who was trying to use Rule 403, then if the trial court bought the Rule 403 argument and there was an appeal, the appellate court review would be for abuse of discretion.

223. 11 F.3d 1446 (8th Cir. 1993).

224. 16 F.3d 892 (8th Cir. 1994). See discussion in Part I(B)(1)).

225. I say this even though I have written that treating this "as a definitional exclusion, rather than an exception, is . . . awkward, confusing, and often counter-intuitive." G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 101 (1993).

- Second, it affects who has what burden, it affects who wins the point if the evidence on each side is equal. If evidence is relevant and competent, then it is presumptively admissible; it is admissible unless there is another rule that keeps it out. The proponent of evidence must show that it is relevant and competent and then the opponent must show there is another rule that keeps it out. If the opponent does this, then the proponent must establish an exception to the rule of exclusion.
- If the statement by a coconspirator is definitionally excluded from the concept of hearsay, then it is part of the opponent's burden — the burden of establishing the evidence is hearsay. If the statement is, instead, an exception to the hearsay rule, then it is part of the proponent's burden — the burden of establishing an exception to the hearsay rule.

C(1). The Excited Utterance Exception to the Hearsay Rule, Rule 803(2): *United States v. Moses*.[226]

Black-Letter Law: To determine whether the out-of-court declarant was still under the stress of excitement as required by the excited utterance exception:

> [w]e must consider the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement.[227]

Facts: The defendant was convicted of assaulting and seriously injuring a fellow inmate. The trial court admitted a hearsay statement identifying the defendant as the assailant: A guard testified that as he approached the fight, another prisoner pointed at the defendant and said "[t]hat's the [expletive] that did it."[228] At trial, the guard was allowed to repeat this out-of-court statement to the jury. On appeal, the defendant argued it was inadmissible hearsay.

Held: The out-of-court statement falls within Rule 803(2), the excited utterance exception to the hearsay rule. The scene was chaotic; the out-of-court declarant was running and, without any inquiry from the guard, blurted out the obscenity of identification; the wound that led to the chaos was serious; and only a brief time had elapsed between the assault and the statement. There was an exciting event, the out-of-court declarant was excited by it, the out-of-court declarant was still under the stress of that excitement when he made the state-

226. 15 F.3d 774 (8th Cir. 1994).
227. United States v. Moses, 15 F.3d 774, 777-78 (8th Cir. 1994), *cert. denied*, 114 S. Ct. 2691 (1994).
228. *Id.* at 777.

ment in question, and the statement does relate to the startling event.[229]

C(2). Statements for Purposes of Medical Diagnosis and Treatment, Rule 803(4): *United States v. White*.[230]

Facts: The defendant was convicted of sexually abusing two of his wife's grandsons. The defendant's wife, the boys' grandmother, had custody of one of the boys. The grandsons had told many people about the abuse: their mother, their grandmother, two investigators, and a school counselor. Additionally, the grandmother relayed to her daughter, the boys' mother, what the boys had told her.[231]

At trial, the boys gave first-hand testimony describing the abuse. Then the out-of-court statements began filling the courtroom air: the boys testified about telling their mother and grandmother about the abuse; the grandmother and the mother testified to what the boys had told them; and the mother testified to what the grandmother had told her. As part of the government's rebuttal, the investigators testified to what they were told by the boys and by many of the people the boys had told; and the school counselor testified to what one boy had told him. Some of these out-of-court statements were admitted without objection, some were admitted over objection.

The defense was that the boys were making up the story at the request of their mother who hoped to regain custody.[232]

Held: (1) Regarding the grandmother's statements to one of the investigators: on direct examination, the grandmother testified she had not made a statement to the investigator. The investigator's testimony was not hearsay: it was not offered for its truth, but as a prior inconsistent statement. [The prosecutor was impeaching his own witness, which is allowed under Rule 607.]

(2) Regarding an investigator's and the school counselor's testimony as to what one of the boys had told them, this testimony was offered during the government's rebuttal, to rehabilitate the testimony of the boy. The boy had testified that he had told the investigator and the counselor that he had been abused and defendant attempted to impeach him, suggesting he had fabricated the story. The district court ruled the testimony was admissible and instructed "the jury that it was admissible only for determining whether R.H had said he had been abused, not for whether in fact he had been abused."[233] The court ruled that "[w]hen a trial court gives an instruction to the jury

229. *Id.* at 777-78.
230. 11 F.3d 1446 (8th Cir. 1993).
231. United States v. White, 11 F.3d 1446, 1447-48 (8th Cir. 1993).
232. *Id.* at 1448.
233. *Id.* at 1449.

that the out-of-court statements that are being related are admissible only to buttress the credibility of a witness, the statements are not hearsay."[234]

(3) Regarding other testimony from the two investigators, the district court admitted the testimony under the hearsay exception for statements for purposes of medical diagnosis or treatment. The government argued additionally, on appeal and during the trial, that the statements were admissible as substantive evidence under Rule 801(d)(1)(B).[235] The court stated that:

- The statement for purposes of medical diagnosis or treatment exception does not work here because there is nothing in the record to suggest that the boy knew he was speaking to a trained professional for purposes of medical diagnosis or treatment.[236]
- Rule 801(d)(1)(B) does not work. This is the definitional exclusion for an out-of-court statement by a declarant who testifies at the hearing and is subject to cross-examination, where the declarant's out-of-court statement is consistent with the his in-court testimony and is offered to rebut the charge that he recently fabricated his in-court testimony. First, this definitional exclusion can only be used after the declarant's in-court testimony has been challenged; it cannot be used in anticipation of such a challenge; this is but an application of the larger rule that a witness may not be rehabilitated until the witness has been impeached. These rules were satisfied here. Second, the out-of-court prior consistent statement must have been made before the out-of-court declarant's alleged motive to fabricate came into existence. This rule was not satisfied here.[237]

This testimony could have been admitted as credibility evidence only, with a limiting instruction, as in subparagraph (2) of this holding, above, but that was not done in this case: It was admitted as substantive evidence. Admission of this hearsay as substantive evidence was error, but it was harmless error.[238]

Commentary: (1) The holding described in "(1)," above, seems correct. However, if the prosecutor called the grandmother to the stand knowing that she was going to testify she had made no such statement — if the prosecutor called the grandmother to the stand just to impeach her, just so he could argue that her direct testimony

234. *Id.*
235. *Id.* at 1449-50.
236. *Id.*
237. *Id.* at 1450-51. Regarding Rule 801(d)(1)(B) and the timing of the prior consistent statement as compared with the motive to lie, as this article was going to press, the United States Supreme Court adopted this same interpretation of the rule: Tome v. United States, 115 S. Ct. 696 (1995).
238. *Id.* at 1451. See G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 51-55, 64-69 (1993).

was not true — then this part of her direct examination arguably is irrelevant. Perhaps, with proper objection, the direct examiner should not be allowed to ask the set-up question, the one that sets-up the impeachment, just so he can argue that the answer is not credible.[239]

(2) Regarding the holding described in "(2)," the district court had ruled the testimony was admissible and instructed "the jury that it was admissible only for determining whether R.H. had said he had been abused, not for whether in fact he had been abused."[240] The Eighth Circuit ruled that "[w]hen a trial court gives an instruction to the jury that the out-of-court statements that are being related are admissible only to buttress the credibility of a witness, the statements are not hearsay."[241] This is just not true, this statement by the Eighth Circuit. Take this example: My brother is a witness; I take the stand and I testify: "Mom said Gary always tells the truth"; the judge instructs the jury that this out-of-court statement is "admissible only to buttress the credibility of a witness," my brother; the out-of-court statement is offered to prove the truth of the matter asserted and is hearsay, even though admissible only to buttress credibility.

I realize that I have stretched this quotation from the court far beyond anything that the court ever intended. It is true, though, that this kind of language has a way of showing up in later cases, out of context, asked to stand for what the court said, rather than what it intended.

(3) Regarding the holding described in "(3)," the court said that the statement for purposes of medical diagnosis or treatment exception does not work here because there is nothing in the record to suggest that the boy knew he was speaking to a trained professional for purposes of medical diagnosis or treatment. Rule 803(4) does require that the boy know he is speaking for purposes of medical diagnosis or treatment, but there is no requirement either that he be speaking to a trained professional or that he know he is speaking to a trained professional.[242]

C(3). Statements for Purposes of Medical Diagnosis and Treatment; Rule 803(4): *United States v. Yellow*.[243]

Black-Letter Law: The statement for purposes of medical diagnosis and treatment exception to the hearsay rule includes psychological diagnosis.

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239. G. Michael Fenner, Commentary, *Handling the Turncoat Witness Under the Federal Rules of Evidence*, 55 THE NOTRE DAME LAWYER 536 (1980).

240. *White*, 11 F.3d at 1449.

241. *Id.*

242. FED. R. EVID. 803(4); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4)[01], at 803-152 (1994).

243. 18 F.3d 1438 (8th Cir. 1994).

Facts: The defendant was convicted of raping his younger sister and disabled brother. The alleged victims had been treated by a clinical psychologist who testified as to what the victims had told him about the charged offenses.[244] See Part IV(D)(1), above.

Held: "[S]tatements made to psychologists or trained social workers [fit under the medical diagnosis or treatment exception], provided that the declarant was seeking treatment, the statements were relevant to diagnosis or treatment, and the statements were not coached."[245]

Commentary: The court stated that the statements fit under the exception "provided that the declarant was seeking treatment."[246] That was the common-law rule, but it is not the statutory rule. The declarant can be seeking either treatment or diagnosis. Rule 803(4) was meant, in part, to do away with hearsay's different treatment of the physician hired to treat versus the physician hired only to diagnose (and, depending on the diagnosis, perhaps to testify).[247]

C(4). Statements for Purposes of Medical Diagnosis and Treatment; Rule 803(4): *United States v. Barrett*.[248]

Black-Letter Law: "In cases involving very young children, who do not seek medical treatment by themselves but instead are brought to the physician by someone else, there must be evidence that the child understood the physician's role in order to trigger the motivation to provide truthful information."[249] That evidence can come from the child or from the physician.

The Rest of the Story: Part VIII(E), below.

D. The Residual Exception to the Hearsay Rule; 804(b)(5): *Stokes v. City of Omaha*.[250]

Facts: The defendant, the City of Omaha, challenged a $2,700 jury verdict entered against it, on a charge of age discrimination, for failure to promote within the police department. The City contended that the district court erred when, using the residual exception, it allowed into evidence the affidavit of a former deputy chief of police who had died by the time of the trial. The two-paragraph affidavit contained damaging remarks allegedly made by the chief of police con-

244. United States v. Yellow, 18 F.3d 1438, 1439-40 (8th Cir. 1994).

245. *Id.* at 1442.

246. *Id.*

247. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4)[01], at 803-152 (1994).

248. 8 F.3d 1296 (8th Cir. 1993).

249. United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993).

250. 23 F.3d 1362 (8th Cir. 1994).

cerning his philosophy to "weed out" old employees and promote younger ones.[251]

Held: The judgment of the lower court was reversed. The affidavit did not have the requisite guarantees of trustworthiness required by Rule 804(5). The court stated that "we do not find that [the affidavit] falls within the rare and exceptional circumstances required by our cases applying [the residual exception]."[252] The affidavit was conclusory and unsubstantiated. The part in question was a rambling one-sentence paragraph. It did not include the context, times, or locations of the out-of-court declarant's alleged out-of-court statements. And, of course, there was no opportunity for cross-examination.[253]

Though the death of the deputy chief was untimely, it was not unexpected. If the plaintiff's attorney believed Swanson's testimony to be important, he should have deposed him. Furthermore, the chief of police who is alleged to have made the statements was available to testify, and was not called to do so.[254]

Commentary: Regarding the residual exceptions, see my own recent article, Law Professor Reveals Shocking Truth About Hearsay, published in the law review of my alma mater.[255]

Had the plaintiff's attorney deposed the deputy chief, then the plaintiff's attorney could have availed himself of one of the greatest hearsay exceptions of them all, one that is not even in the rules of evidence, but in the rules of civil procedure: Rule 32 of the Federal Rules of Civil Procedure.[256]

E. Attacking and Supporting the Credibility of the Out-of-Court Declarant; Rule 806: *United States v. Barrett*.[257]

Black-Letter Law: Out-of-court declarants of hearsay statements that are allowed into evidence are, in effect, witnesses, and their credibility may be attacked and supported as though they had testified in person.

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251. Stokes v. City of Omaha, 23 F.3d 1362, 1366 (8th Cir. 1994).

252. *Id.*

253. *Id.* at 1366-67.

254. *Id.*

255. *See* G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 33-34 (1993).

256. The deposition of a witness may be used for any purpose if the court finds that the witness is dead, that, through no fault of the proponent, the witness is over 100 miles from the place of trial, that the witness is unable to testify because of age, illness, infirmity, or imprisonment, or that other exceptional circumstances exist. Such a deposition is admissible as though the witness were an in-court declarant. FED. R. CIV. P. 32(a)(3). *See* G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. REV. 1, 36-37 (1993).

257. 8 F.3d 1296 (8th Cir. 1993). Regarding this case, see Part VIII(C)(4).

Facts: The defendant's four-year-old daughter claimed defendant burned her with cigarettes. Before the trial, the district court judge questioned the little girl and determined that she could not testify because she did not know the difference between right and wrong. The government was allowed to use some of the child's out-of-court statements. The defendant tried to put on testimony from a witness who was present at the competency hearing — testimony that the child said she did not know the difference between lying and telling the truth. The district court did not allow this testimony; the defendant was convicted; and this appeal followed.[258]

Held: Rule 806 specifically codifies the right to impeach an out-of-court declarant's reputation for truthfulness. The little girl's testimony at the hearing that she did not know what it meant to tell the truth was relevant to her truthfulness at the time the hearsay statements were made. The fact that there are "other ways" to impeach the witness should not operate to exclude these statements.[259] The Eighth Circuit's main problem with the exclusion of the evidence was on Sixth Amendment grounds.[260] The judgment was vacated and the case remanded for further proceedings.[261]

IX. AUTHENTICATION AND IDENTIFICATION

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258. *Barrett*, 8 F.3d at 1298-99.
259. *Id.* at 1299.
260. *Id.* at 1299-300.
261. *Id.* at 1301.

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