# PRIVILEGES, HEARSAY, AND OTHER MATTERS

G. Michael Fenner†

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Privileges</td>
<td>793</td>
</tr>
<tr>
<td>A. A Brief General Statement of the Federal Rules Regarding Privileges</td>
<td>793</td>
</tr>
<tr>
<td>B. Constitutional Privileges: The Fifth Amendment Privilege Against Self-Incrimination</td>
<td>794</td>
</tr>
<tr>
<td>1. Jaffee v. Redmond: The United States Supreme Court and the Psychotherapist-Patient Privilege</td>
<td>795</td>
</tr>
<tr>
<td>2. The Marital Privileges: The State of the Marriage</td>
<td>800</td>
</tr>
<tr>
<td>3. The Attorney-Client Privilege</td>
<td>802</td>
</tr>
<tr>
<td>4. Work Product</td>
<td>803</td>
</tr>
<tr>
<td>II. Hearsay</td>
<td>804</td>
</tr>
<tr>
<td>A. A Pet Peeve of My Own—in the Context of Nonhearsay Statements By Coconspirators</td>
<td>804</td>
</tr>
<tr>
<td>1. Statements By a Coconspirator Are Not Hearsay</td>
<td>804</td>
</tr>
<tr>
<td>2. Does It Matter?</td>
<td>805</td>
</tr>
<tr>
<td>3. Does It Matter Much?</td>
<td>807</td>
</tr>
<tr>
<td>B. An Example of How Hearsay Gets its Bad Name—in the Context of Whether or not a Statement is Offered to Prove the Truth of the Matter Asserted</td>
<td>807</td>
</tr>
<tr>
<td>C. Double Hearsay and the Business Records</td>
<td>809</td>
</tr>
<tr>
<td>Exception</td>
<td>809</td>
</tr>
<tr>
<td>1. The Metz Family</td>
<td>809</td>
</tr>
</tbody>
</table>

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### II. Hearsay

1. The Hearsay Definition: Offered to Prove the Truth of the Matter Asserted
2. The Excited Utterance As a Response to Someone Else's Inquiry
3. Statements for Purposes of Medical Diagnosis or Treatment
4. Records, and Absence of Records, of Regularly Conducted Activity
5. Public Records and Agency Findings
6. Market Reports and Commercial Publications
7. The Residual Exception

### III. Logical Relevance and Rule 403

A. The Relevance of Other Bad Acts and Rule 403
B. Impeachment with Evidence of Other Acts; Rule 404; and Rule 403
C. Impeachment by Prior Inconsistent Statement; Rule 613, But (In my Opinion) Really Rule 403
D. Closing Argument and Rule 403
E. Evidence of Custom

### IV. Character Evidence

A. Character as Substantive Evidence
B. Character as Impeachment Evidence

### V. Burdens

A. Evidentiary Burdens—A Switch on the Rule Requiring Timely and Specific Objection
B. Burdens of Proof and the Declaratory Judgment Act

### VI. Competency of Juror as Witness: Rule 606

### VII. Opinion Evidence: Expert and Lay; Daubert and Otherwise

A. Lay Witness Testimony
B. Expert Testimony on a Matter Within the Capability of Lay Jurors and on Legal Conclusions
C. Ineffective Assistance of Counsel

### VIII. Conclusion
I. PRIVILEGES

Let me start this update of the past year's activity in the law of Evidence, in the United States Court of Appeals for the Eighth Circuit and the United States Supreme Court, with the topic of privileges. There are two reasons for doing so. First, this is the subject of last year's only rules-of-evidence opinion from the United States Supreme Court. As the opinion of the nation's highest court, it will have an important impact in courtrooms throughout the Eighth Circuit. Second, an Eighth Circuit Court of Appeals decision from this past year, one that I consider most important, has to do with the definition of the privilege applied when one spouse is called to testify against the other.

A. A BRIEF GENERAL STATEMENT OF THE FEDERAL RULES REGARDING PRIVILEGES

There are constitutional privileges and evidentiary privileges. The former include the Fifth Amendment privilege against self-incrimination, the arguable First Amendment reporters privilege allowing news reporters to withhold the identity of confidential sources, and the like. The latter is federal common law developed under the minimal guidance of Rule 501 of the Federal Rules of Evidence.

The proposed Federal Rules of Evidence had 13 privilege rules, with a number of very specific privileges. Congress did not enact those rules. Instead, Congress enacted Rule 501, which establishes this general rule: The federal privileges are common-law privileges, as interpreted by the courts "in the light of reason and experience."1

Rule 501 of the Federal Rules of Evidence contains two kinds of exceptions to this general rule: "[e]xcept as otherwise required by" the United States Constitution, Act of Congress or Supreme Court Rule prescribed pursuant to statutory authority; and except in certain cases where "State law supplies the rule of decision, [in which cases] the privilege . . . shall be determined in accordance with State law."2 More than anything, this second exception means that state privilege law applies in most diversity cases in federal court.

There has always been a bit of a tug-of-war as regards the privileges. On the one hand, they promote certain values (privacy in some of our more intimate relationships and a higher quality in those relationships through a more complete exchange of information). On the other hand, they generally hamper the search for truth (with the increased cost of alternative means of proof and, where other proof is not available, perhaps unjust decisions).

2. Id.
This tug-of-war regarding privileges is reflected in their exalted place in the Federal Rules of Evidence and in the narrowness with which we are to interpret them. On the one side, Federal Rule of Evidence 104(a) says that when the judge is resolving "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence," the judge is free to ignore all of the rules of evidence except those with respect to privileges. On the other side, the United States Supreme Court has said that privileges should be strictly construed: "[S]ince the [attorney-client] privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." With that background, here is what has happened this past year in federal courts of the Eighth Circuit and in the United States Supreme Court, regarding the law of privileges.

B. CONSTITUTIONAL PRIVILEGES: THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCrimINATION

Regarding the intersection between the Fifth and Sixth Amendments, Reginald Carr argued before the United States Court of Appeals for the Eighth Circuit that witnesses at his first-degree murder trial, asserting their Fifth Amendment right against self-incrimination, should not have been so easily excused from testifying. Before the privilege was upheld, argued Carr, the court should have balanced the witnesses' Fifth Amendment right not to testify against his Sixth Amendment right to compulsory process. Quite correctly, quite unremarkably, and quite simply, the Eighth Circuit disagreed: "The defendant's Sixth Amendment right, however, does not include the right to compel a witness to waive his Fifth Amendment privilege."

In a second constitutional-privilege case, a lawyer refused to produce records under a grand jury subpoena duces tecum. The subpoena commanded him to "provide any and all records in your custody or control relating to any income, from whatever sources derived including the practice of law during [certain tax years]." It is vintage

3. FED. R. EVID. 104(a).
6. Carr, 67 F.3d at 176.
7. Id.
8. In re Grand Jury Subpoena Duces Tecum, 70 F.3d 521, 521 (8th Cir. 1995).
law that one may be ordered to produce documents voluntarily created; such an order does not compel testimonial evidence and, therefore, does not run afoul of the Fifth Amendment.\(^9\)

The lawyer whose documents were subpoenaed argued that these documents were not voluntarily created: Federal tax law compelled him to maintain certain of these records.\(^10\) He argued that the one-two punch — compelling him to keep records and then compelling him to turn them over — did violate his Fifth Amendment privilege.\(^11\)

The Eighth Circuit held that these were the kind of "general books and records that any business would normally maintain."\(^12\) The lawyer in question failed to prove that he would not have kept the records anyway, even if not compelled to do so by federal law.\(^13\) He failed to show that he kept these records only because of the federal-tax-law's threat of criminal sanctions.\(^14\) The Eighth Circuit rejected his assertion of a Fifth Amendment privilege.\(^15\)


1. Jaffee v. Redmond:\(^16\) The United States Supreme Court and the Psychotherapist-Patient Privilege

   The Case: This is a section 1983 action. A policewoman, Mary Lu Redmond, shot a person in the line of duty, resulting in his death. She subsequently sought counseling from a licensed clinical social worker. The administrator of the estate of the deceased brought a section 1983 action against Redmond and her employer. The administrator learned that Redmond had participated in about 50 counseling sessions with a licensed clinical social worker, and sought discovery of the counselor's notes concerning these sessions. Redmond asserted a psychotherapist-patient privilege.\(^17\)

   The Decision to Recognize the Privilege: The decision as to whether to recognize a new privilege turns on the private and the pub-
lic ends served by the privilege, that is, its value to the individuals who will be asserting it and its impact on the interests of the public. The United States Supreme Court considered these interests.

First, the Supreme Court noted the special ways in which psychotherapy is dependent on the patient's confidence and trust in her therapist, and stated that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." Second, the Court considered the public good from two angles. From the positive side, this privilege "facilitates the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." From the negative side, little would be accomplished by denying the privilege. The Court stated that "if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation." Litigants will seek evidence of what was said during therapy; without the protection of a privilege, however, little of consequence will be said during therapy; therefore, litigants are not much worse off with the privilege than they would be without it.

In addition to the individual and public interests promoted by the psychotherapist-patient privilege, the Court also discussed its history and tradition: "all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. . . . [C]onsensus among the states indicates that 'reason and experience' support recognition of the privilege."

The Extent of the Privilege: The next question is: Who counts as a psychotherapist? The court answered this question only this far: This privilege "covers confidential communications made to licensed psychiatrists and psychologists . . . [and] to licensed social workers in the course of psychotherapy."

Why extend the privilege to licensed social workers? I discuss my theory on this below. Pretty much all the Court said in support of

19. Id.
20. Id. at 1929.
21. Id. There is, oddly, it seems to me, no discussion of how we know this is so, and there is no use of judicial notice. As best I can tell, eight of the nine members of the court are using their collective intuition.
23. Id. at 1931.
24. See infra note 29 and accompanying text.
this extension is this: "Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist."25

As for other details of the privilege, the Court concluded that they can await other cases.26

Justice Scalia’s Dissent: In his dissent, Justice Antonin Scalia set forth these general rules: (1) Privileges are not to be lightly created and are to be narrowly construed; and (2) there is a judicial preference for the admission of reliable and probative evidence, a judicial preference for truth and justice.27

Regarding the individual and public good, Justice Scalia had no quarrel with the values discussed by the majority, but disagreed regarding the contribution of psychotherapy:

When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends and bartenders — none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.28

Justice Scalia’s dissent also takes the majority to task for not really addressing the questions it answers. First, if there is no privilege, will people really “be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure and litigation?”29 Second, “to what extent will the evidentiary privilege reduce that deterrent?”30

Justice Scalia stated that “[t]he Court does not try to answer the first of these questions; and it cannot possibly have any notion of what the answer is to the second, since that depends entirely upon the scope

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27. Id. (Scalia, J. dissenting). Justice Scalia noted that “[t]he Court has dismissed at some length the benefit that will be purchased by creation of the evidentiary privilege in this case: the encouragement of psychoanalytical counseling. It has not mentioned the purchase price: occasional injustice.” Id. at 1934 (Scalia, J., dissenting).
29. Id. (Scalia, J., dissenting).
30. Id. (Scalia, J., dissenting).
of the privilege, which the Court amazingly finds it 'neither necessary nor feasible to delineate.'

"The Court confidently asserts that... 'without a privilege, much of the desirable evidence to which litigants such as petitioner seek access... is unlikely to come into being.'... [I]t really true," wrote Justice Scalia, "that most, or even many, of those who seek psychological counseling have the worry of litigation in the back of their minds? I doubt that, and the Court provides no evidence to support it." 31

Regarding the majority's citation to the experience of the states and the District of Columbia, Justice Scalia argues this experience is counter-indicative: each of the 50 state and the District of Columbia privileges are statutory, not common law. 32

His dissent points out the significant differences between psychiatrists and psychologists, on the one hand, and social workers on the other. 33 In general, psychiatrists and psychologists have much more formal training than social workers. 34 Further, the job description of the psychiatrist and the psychologist is psychotherapy. 35 It is what they do, day in and day out. 36 The job description of social worker often includes helping people navigate the sea of red tape, helping people get job training, hot meals, or home nursing care, helping people with a myriad of social problems, sometimes including psychotherapy. If there is a reason to create a psychiatrist/psychologist-patient privilege, Justice Scalia still sees no reason to extend it to licensed social workers engaged in psychotherapy. His dissenting opinion discusses the differences in the professions in some detail, a topic he says the majority opinion discussed in "three sentences of reasoned analysis." 37

What is Left Unsaid in the Majority Opinion: Justice Scalia is right: the majority opinion says very little about why the privilege should extend to licensed social workers. A large part of what that opinion does say on the subject is this: "Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the

31. Id. (Scalia, J., dissenting).
32. Id. at 1935 (Scalia, J., dissenting). And, if it is so, "how come psychotherapy got to be a thriving practice before the 'psychotherapist privilege' was invented?" Id. (Scalia, J. dissenting).
34. Id. at 1937-40 (Scalia, J. dissenting).
35. Id. at 1937-38 (Scalia, J. dissenting).
36. Id. (Scalia, J. dissenting).
37. Justice Scalia stated: "[I]n their consultations with patients, [they] do nothing but psychotherapy. Social workers, on the other hand, interview people for a multitude of reasons." Id. at 1937 (Scalia, J., dissenting). However, if you ask psychiatrists and psychologists, they say that what they do all day, day in and day out is fight with and do paper work for government regulators and HMOs.
assistance of a psychiatrist or psychologist. . ."39 It seems to me that what the majority left unsaid is revealed in those two sentences. It is this: They will recognize a privilege for a patient's confidential communications during psychotherapy with a psychiatrist or a psychologist; once that is done, they will not then refuse to recognize a privilege for a patient's confidential communications during psychotherapy with a licensed social worker; to recognize the former privilege, but not the latter, would be to create a psychotherapy privilege for the therapy of the rich and deny it for the therapy of the poor, and that the Court was unwilling to do.

Why the Majority Opinion Gives Justice Scalia's Dissent Nary a Mention, When His Pays Theirs So Much Attention: The majority opinion does not deal with Justice Scalia's dissent, even in those places where it could more or less easily do so. I wonder if there are not two reasons: First, much of Justice Scalia's dissenting opinion is devoted to pointing out serious flaws in the majority's opinion, and it appears they did not have much of a response. Second, his dissenting opinion here (as is the case with so many of his separate opinions40)

39. Id. at 1931 (citations omitted).

40. See, e.g., Board of County Comm'n v. Umbehr, 116 S. Ct. 2361, 2361-62 (1996) (Scalia, J., dissenting) ("Taken together, today's decisions . . . demonstrate why this Court's Constitution-making process can be called 'reasoned adjudication' only in the most formalistic sense."); Morse v. Republican Party, 116 S. Ct. 1186, 1218 (1996) (Scalia, J., dissenting) (characterizing the majority opinion as "astonishing and regrettable beyond belief."); Board of Educ. Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481, 2507-15 (1994) (Scalia, J., dissenting) ("Justice Souter's steamrolling of the difference between civil authority held by a church, and civil authority held by a member of a church, is breathtaking," Justice Souter's conclusion is "facile," and "the Court's decision today is astounding."); Planned Parenthood v. Casey, 505 U.S. 833, 981-98 (1992) (Scalia, J., concurring) ("I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered," referring to "the joint opinion's verbal shell game," "The Imperial Judiciary lives" and "I cannot agree with, indeed I am appalled by, the Court's suggestion. . . ."); United States v. Fordice, 505 U.S. 717, 750-61 (1992) (Scalia, J., concurring) ("Before evaluating the Court's handiwork, it is no simple task simply to comprehend it" and referring to the majority opinion as "the Court's something-for-all, guidance-to-none opinion. . ."); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 645 (1991) (Scalia, J., dissenting) (stating that "today's decision neither follows the law nor produces desirable concrete results. . ."); Maryland v. Craig, 497 U.S. 836, 860-63 (1990) (Scalia, J., dissenting) ("Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion," and "The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here."); Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) ("Justice O'Connor's assertion . . . cannot be taken seriously."); Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 296, 265 (1987) (Scalia, J., concurring) ("It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.").

Justice Scalia has said this about dissenting opinions, which he defined as any opinion that disagrees with the Court's reasoning:
drips with sarcasm, condescension, and ridicule, and very nearly contempt. Even Justice Scalia’s “I respectfully dissent” seems more an effort at irony than politeness.41

2. The Marital Privileges: The State of the Marriage

The marital privileges in general: There are two “privileges” relating to marriage. One applies only in criminal cases and disqualifies one spouse from testifying against the other during the existence of the marriage. The United States Supreme Court has stated that “no other testimonial privilege sweeps so broadly.”42 This is in the nature of a rule of incompetency. In federal court, this privilege belongs to the witness-spouse: It may be invoked only by the witness-spouse, not by the defendant-spouse; and it may be waived by the witness-spouse alone, without the concurrence of the defendant-spouse. The witness-spouse may neither be forced to testify against the other spouse; nor prevented by the other spouse from testifying. This privilege is designed to preserve the marriage, and, as such, it does not survive the break-up of the marriage.

The second privilege, relating to marriage, says that one may not reveal communications made by one’s spouse, in confidence, during the marriage. This privilege cannot be waived except with the consent of both parties to the communication, the husband and wife, or the ex-husband and ex-wife. This privilege is designed to preserve the confidences shared during the marriage, and, as such, it does survive the break-up of the marriage.

In 1980, using Rule 501’s admonition to interpret the common-law privileges “in light of reason and experience,”43 the United States Supreme Court addressed the first of those privileges, stating “[W]e conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying.”44 Reason and experience told the Court that “[w]hen one spouse is willing to testify against the other in a criminal proceeding — whatever

41. I recall not responding to my children when they behaved that way. And I recall that sometimes they were right.
43. FED. R. EVID. 501.
the motivation — their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.”

Even with this change in the rule, the privacy of confidences shared during the intimate relationship of marriage is still in place: The testifying spouse cannot waive the other of the two marital privileges, the one blocking the revelation of private communications made during a marriage. So long as the communication was made in confidence and during the marriage, this privilege lasts forever. What *Trammel* changed is that the non-testifying spouse cannot keep the called-to-testify spouse off of the stand altogether.

An Important Case from the Eighth Circuit: In *In re Grand Jury Investigations*, the Eighth Circuit took one big step further down the trail blazed by *Trammel*. The district court found a woman in contempt for refusing to testify against her husband. The facts were these: “[S]he and her husband have been married since 1967. They separated for a year in the early 1970s, and again in June 1993.” In the summer of 1994, she “met with an attorney about obtaining a divorce.” There was evidence that the husband had been involved in a long term affair with another woman.

The wife (the called-to-testify spouse) asserted the privilege against being called as a witness. The government countered that this privilege does not apply because the couple is permanently separated. The wife countered that they were in fact married still, and they were seeking a reconciliation. The trial court “found that the testimony concerning reconciliation was not credible and that the marriage was not vital,” and “concluded that [the wife] could not assert a marital privilege concerning communications made after the couple separated in 1993.” The Eighth Circuit upheld what the trial court had done.

45. *Id.* at 53.
46. 67 F.3d 146 (8th Cir. 1995).
47. *In re Grand Jury Investigations*, 67 F.3d 146, 147 (8th Cir. 1995).
49. *Id.*
50. *Id.*
51. *Id.* at 147-48.
52. *Id.* at 148.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

56. The applicable federal statute states that she cannot be released on bond pending the appeal of this kind of contempt citation if the court finds that the appeal is frivolous, the district court found that the appeal was frivolous, and the Eighth Circuit upheld that finding. *In re Grand Jury Investigations*, 67 F.3d at 147-48 (citing 28 U.S.C. § 1826(b)).
WHY THIS CASE IS SO IMPORTANT: It is not just that the witness spouse can waive this particular privilege. If the trial court finds that the marriage is not vital, it can refuse to apply the privilege even when it is asserted by both the husband and the wife. When responding to the assertion of this particular privilege, the court can consider whether the marriage is over in fact, although not yet at law.

In the beginning, the privilege could only be waived by both spouses; either spouse could assert the privilege, even over the objection of the other. In its second stage, the privilege could be waived by the testifying spouse; the testifying spouse could assert the privilege over the objection of the other spouse. Today, in the Eighth Circuit, this privilege has entered a third stage, where it can be waived by the trial court's determination that as a matter of fact the marriage is not vital; even if each spouse asserts it, the court can still find it inapplicable.

Although, if I may paraphrase what one federal judge told me when we were discussing this case, the circuit court can lead the trial court to water, but they can't make it drink. And it may be true that, with or without the Eighth Circuit ruling, most trial courts will not look past the fact of the marriage when deciding whether this privilege applies. But the trial court will have to allow the prosecutor to make a record; there will have to be some kind of hearing. And some judges may not be so reluctant.

It is also true that whatever some judges do, this new interpretation of the spousal-immunity privilege may provide a new card to be turned over during the plea bargaining session.

Certainly, federal prosecutors throughout the Eighth Circuit will want to be aware of this case.

3. The Attorney-Client Privilege

Fee Information and The Identity of the Client: “Although the federal common law of attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal representation, . . . it ordinarily does not apply to client identity and fee information.” There are three exceptional circumstances under which the privilege protects even this information:

- “The legal advice exception protects client identity and fee information when there is a strong probability that disclosure would

57. See supra note 44 and accompanying text.
58. See supra notes 43-45 and accompanying text.
59. See supra notes 46-56 and accompanying text.
60. United States v. Sindel, 53 F.3d 874, 876 (8th Cir. 1995) (citations omitted).
implicate the client in the very criminal activity for which legal advice was sought." 61

- "The last link exception . . . prevents disclosure of [this] information when it would incriminate the client by providing the last link in an existing chain of evidence." 62

- "The confidential communications exception . . . protects [this] information 'if, by revealing the information, the attorney would necessarily disclose confidential communications.'" 63

**Implied Waiver of the Privilege Regarding Some Documents, Created by the Express Waiver of the Privilege Regarding Others:** There was a question in *Medtronic, Inc. v. Intermedics, Inc.* 64 as to the interpretation of a settlement agreement. All parties agreed that the only persons with extrinsic knowledge of this matter were lawyers. The defendant had allegedly privileged documents related to this matter. The defendant wanted to waive the privilege as to documents that supported its position, but to assert the privilege as to documents that did not support its position.

The Eighth Circuit has "looked to two elements to determine if waiver of attorney-client privilege could be implied: (1) implied intention and (2) fairness and consistency." 65 If the defendant continues to waive the privilege as to some of the documents in question, then waiver will be implied as to the rest of the documents. "In this case, fairness requires that [the defendant] choose a single course of action — either complete waiver or complete protection." 66

4. **Work Product**

The defendant in *Cochran v. St. Paul Fire and Marine Insurance Co.*, 67 a medical malpractice action, resisted plaintiff's request for discovery of certain "medication incident reports" that had been prepared pursuant to the policy and procedures of the defendant-hospital. 68 The hospital's policy and procedures required a report be filed every

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61. *Sindel*, 53 F.3d at 878 (citation omitted).
62. Id.
63. Id. (citations omitted). The Eighth Circuit stated:
   After examining [the attorney's] in-camera testimony about his clients' special circumstances, we conclude that he could not release information about the payments on behalf of [one client] without revealing the substance of a confidential communication. We do not find any similar constraints upon the disclosure of information about the payments on behalf of [the other client].
64. 162 F.R.D. 133 (D. Minn. 1995).
time "medication is administered in a manner inconsistent with a physician's orders."69 Rule 26(b)(3) of the Federal Rules of Civil Procedure provides some protection from discovery for documents "prepared in anticipation of litigation."70 The United States District Court for the Western District of Arkansas stated that in its "experience [interpretation of Rule 26(b)(3)] almost always boils down to what was meant by the phrase 'prepared in anticipation of litigation.'"71

The district court recognized that a document is "gathered or prepared in anticipation of litigation only when the party investigating an incident put aside the routine investigation into such incident that is undertaken with respect to all such incidents and undertook a more thorough search or investigation because the prospect of litigation was identifiable and substantial."72 Although litigation may be anticipated "there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation."73

II. HEARSAY

Let me move next to hearsay, because I have a particular affinity for the subject. I find the rule so preposterous, that I just love it. I confessed my relationship with the rule three years ago, in my Article Law Professor Reveals Shocking Truth About Hearsay.74

A. A PET PEEVE OF MY OWN — IN THE CONTEXT OF NONHEARSAY STATEMENTS BY CONSPIRATORS

1. Statements By a Coconspirator Are Not Hearsay

Let me begin with this little pet peeve of my own: when courts blur the distinction between definitional exclusions from and exceptions to the hearsay rule. In Feingold v. United States,75 the United States Court of Appeals for the Eighth Circuit stated that "[t]here was sufficient testimony of the existence of a conspiracy between Feingold and Morehouse to allow the admission of these statements under the

70. Id. at 644 (quoting Fed. R. Civ. P. 26(b)(3)).
71. Id. at 644-45.
72. Id. at 645.
73. Id. (quoting 8 Charles A. Wright et al., Federal Practice & Procedure § 2024, at 343-46 (2d ed. 1994) (footnotes omitted)).
75. 49 F.3d 437 (8th Cir. 1995).
coconspirator exception to the hearsay rules." First question: What's wrong with that quotation? The cited rule is not an "exception to the hearsay rule." It is a definitional exclusion. That is, as defined in Federal Rule of Evidence 801, the statement of a coconspirator is not hearsay that is admissible under an exception. Rather, it is not hearsay in the first place.

2. Does It Matter?

Second question: Does it matter? This is a good question, because, either way, the out-of-court statement is admissible. I submit that it does matter. I expect — no, demand — precision of thinking from my students, and we should demand no less from lawyers and judges. As lawyers, we have an obligation to speak and write precisely. As lawyers, we have an obligation to get it right. As lawyers, we have an obligation to tell the truth. It matters whether we say it that way because saying it that way is not correct. That is a good enough reason all by itself.

It seems to me that the bane of judges must be lawyers (and legislators and regulation writers) who do not think or write clearly and precisely. It also seems to me that judges cannot expect lawyers to meet standards higher than their own.

Additionally, I think it matters because it is a mistake that can make a difference. Perhaps not often, but it can. The evidentiary burden of showing that a statement is hearsay is on the party opposing the admission of the evidence. The evidentiary burden of showing that a hearsay statement fits under an exception to the rule is on the proponent of the evidence. In theory, the opponent of the evidence must show that the evidence is an out-of-court statement offered to prove the truth of the matter asserted and does not fit under one of the definitional exclusions. This is basic evidence law. To say that the definitional exclusion for coconspirators' statements is an exception, misplaces this evidentiary burden. In practice, however, this is not what happens; for example, in United States v. Carr, the Eighth Circuit stated that

A statement is not hearsay if made "by a coconspirator of a party during the course and in furtherance of the conspiracy." To satisfy the rule, the government must demonstrate that a conspiracy existed of which Carr and the declarants

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77. Or, as the court so nicely put it in DCS Sanitation Management, Inc. v. Occupational Safety & Health Review Commission, 82 F.3d 812, 815 (8th Cir. 1996), it is a "carveout."
were a part and that the declarations were made during the
course and in furtherance of the conspiracy.\textsuperscript{79}

This opinion, gets it half right — "A statement is not hearsay if . . .", is
correct.\textsuperscript{80} It also gets it half wrong — "the government, [here the pro-
ponent,] must demonstrate . . .", places the evidentiary burden on the
wrong party.\textsuperscript{81}

Here is a case where it matters: In \textit{American Eagle Insurance Co. v. Thompson},\textsuperscript{82} the
insurance company brought an action against
John Thompson, seeking a declaration that Thompson was not an
employee of Arkansas Aircraft, Inc.\textsuperscript{83} If the jury determined he was not
an employee, then he was not covered under an aviation insurance
policy the company had issued to Arkansas Aircraft.\textsuperscript{84} One of the eviden-
tiary matters on appeal was this: The trial court admitted certain
out-of-court statements made to Mrs. Thompson (the in-court declar-
ant) by an insurance agent named Medlock (the out-of-court declar-
ant). The trial court admitted Medlock's statements as Rule
801(d)(2)(D) admissions by an agent of a party opponent.\textsuperscript{85} The trial
court found that Medlock was an agent of American Eagle
Insurance.\textsuperscript{86}

The Eighth Circuit reversed, and one of the reasons was this: "We
are constrained to conclude that Mrs. Thompson failed to meet her
burden of establishing the necessary agency relationship, [ ] and that
the district court erred in admitting Medlock's statements pursuant to
Rule 801(d)(2)(D).\textsuperscript{87} If the burden of establishing that the statement
is hearsay includes the burden regarding all parts of the definition,
including the definitional exclusions, then this sentence should read:
"We are constrained to conclude that [American Eagle] failed to meet
[its] burden of [refuting (or of establishing the nonexistence of) the]
agency relationship and that the district court [did not] err[ ] in admit-
ting Medlock's statements pursuant to Rule 801(d)(2)(D).\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{79} United States v. Carr, 67 F.3d 171, 174 (8th Cir. 1995), cert. denied, 116 S. Ct. 1285 (1996) (citations omitted).
\item \textsuperscript{80} Carr, 67 F.3d at 174.
\item \textsuperscript{81} Id. In \textit{United States v. Jackson}, 67 F.3d 1359, 1364 (8th Cir. 1995), cert. de-

\textsuperscript{82} 85 F.3d 327 (8th Cir. 1996).
\item \textsuperscript{83} American Eagle Ins. Co. v. Thompson, 85 F.3d 327, 328-29 (8th Cir. 1996).
\item \textsuperscript{84} Thompson, 85 F.3d at 329.
\item \textsuperscript{85} Id. at 332.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id. at 333.
\item \textsuperscript{88} See Thompson, 85 F.3d at 333. Given the state of the evidence in this case, it is
possible that, if the court put the burden on American Eagle, instead of saying that Mrs.
3. **Does It Matter Much?**

Does it matter much? Probably not. First, it is a losing battle. Even though I believe the burden here is on the opponent, courts will continue to require that the proponent show the foundational elements of the definitional exclusion for statements by coconspirators. Perhaps courts will create four categories of out-of-court statements:

- nonhearsay under the traditional common-law definition;
- nonhearsay under the “carveouts” in subpart (d) of Rule 801;
- hearsay that is admissible under the exceptions in either Rule 803 or Rule 804; and
- hearsay that is inadmissible.

The opponent of the evidence must show that it is an out-of-court statement offered to prove the truth of the matter asserted, the traditional common-law definition of hearsay. If that is done, then the proponent must evidence the foundational elements of either an exception or a “carveout.” Courts will somehow say that when the statute carved out these statements from the common-law definition, it did not mean thereby to shift the common-law burden regarding who must prove, for example, the foundational elements for a statement by an agent of a party opponent. (Though, if that is the case, just what they did intend when they excluded these statements from the definition, rather than leaving them as exceptions, is anyone's guess.)

Second, in practice, it does not really change the outcome in very many cases: Though the burden is on the wrong party, that error will nearly always be harmless because the result will be the same whichever side has this evidentiary burden.

So I'll move on.

B. **AN EXAMPLE OF HOW HEARSAY GETS ITS BAD NAME — IN THE CONTEXT OF WHETHER OR NOT A STATEMENT IS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED**

*Barnes v. Prudential Insurance Co.*,⁸⁹ is the kind of hearsay case that gives the rule its deservedly bad name. Randal Barnes's life was insured for $500,000 against accidental death.⁹⁰ Randal Barnes and Patsy Lou Barnes divorced.⁹¹ It seems that, more than once, Randal

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⁸⁹. 76 F.3d 889 (8th Cir. 1996).
⁹¹. Barnes, 76 F.3d at 891.
Barnes asked his insurance agent to change the beneficiary on this policy to Therese Barnes, his sister and guardian for his children. The agent said he would take the necessary steps and get the necessary forms, but the agent was busy and did not get around to doing so. Nine weeks, or so, after the divorce, Randal Barnes died in an accident, and the beneficiary on his life-insurance policy was still his ex-wife.

The sister sued the insurance company in a negligence action, seeking damages for the negligence of the company's agent, Billy Volner. The United States District Court for the Eastern District of Missouri excluded the testimony of several witnesses — Randal Barnes's father, sister, and others — who would have testified that they had heard Randal Barnes state that he intended to change the beneficiary. It also excluded the agent's "deposition testimony to the effect that Barnes had asked him at least three times to change the beneficiary but that he had failed to get the change of beneficiary form to Barnes because he (Billy Volner) was very busy.

Is this testimony inadmissible hearsay? The trial court said yes, the Eighth Circuit said yes and no, some is and some isn't. The statements of the witnesses other than Volner, said the Eighth Circuit "are inadmissible hearsay, as they are only relevant to show that Barnes wished to change the beneficiary, or that he asked Volner to change the beneficiary. Thus, they are offered for the truth of the matter asserted." On the other hand, the Eighth Circuit stated:

Although Barnes's statements to Volner that he wanted to change the beneficiary would not be admissible to show that Barnes actually wanted to change the beneficiary, the statements are admissible to show that he made such statements to Volner. Admission of the statements to show Volner's knowledge of Barnes's wishes does not depend on the truth or falsity of whether Barnes wanted to make the change, but only upon whether he made the statements.

Barnes's statements are not admissible to show that Barnes actually wanted to change the beneficiary, but only to show that Volner knew Barnes wished to change his beneficiary. First of all, why aren't they admissible to show that Barnes actually wanted to change the beneficiary? Isn't the agent's deposition an out-of-court admission by

92. Id.
93. Id.
94. See id.
95. Id. The sister claimed damages of $100,000. Id.
96. Barnes, 76 F.3d at 891-92.
97. Id. at 891.
98. Id. at 892-93.
99. Id. at 892.
an agent of a party opponent?\textsuperscript{100} Under the rule in the Eighth Circuit, doesn't this cure any preceding levels of hearsay and render the evidence nonhearsay?\textsuperscript{101}

Second of all, if what the court said is correct, then such a rule is too complicated for me, too disingenuous, too cute. This is what makes the rule so hard to teach, so hard to apply, so hard even to understand. We will let into evidence the agent's deposition statement concerning what the client told him the client wanted done. We will not let it in to prove what the client actually wanted done, but only to show that he made such statements to the agent. From that, we can know not what the client wanted done but what the agent knew the client wanted done. What a rule! It's a little like saying this: "But the sales slips [signed by Glenn H. Hutchison] were not admitted to prove that Hutchison bought the vans. They were admitted to prove that someone using Hutchison's name bought the vans, from which the jury could infer that the person using Hutchison's name was Hutchison himself."\textsuperscript{102}

C. DOUBLE HEARSAY AND THE BUSINESS RECORDS EXCEPTION

1. The Metz Family

Just so you'll know I'm capable of saying so, recently there was, within the Eighth Circuit, a well-reasoned hearsay opinion, dealing with the sometimes difficult matter of double hearsay, and getting it perfectly right.

In Hoselton v. Metz Baking Co.,\textsuperscript{103} one half of the Metz Baking family (the founder's daughter's side; the plaintiffs' side) sold its 47% interest in Metz Baking to the other half of the family (the founder's son's side; the defendants' side), which had owned the other 53% of the shares.\textsuperscript{104} A month later, a company interested in buying both Metz Baking and another baking company, approached the sole owners, the defendants in this action.\textsuperscript{105} The purchaser wished to combine the two, and retain Metz management to run the new company.\textsuperscript{106} The sale was consummated.\textsuperscript{107} The original shareholders from the daugh-

\begin{thebibliography}{9}
\bibitem{100}See \textit{Fed. R. Evid.} 801(d)(2)(D).
\bibitem{101}Mahlandt v. Wild Canid Survival & Research Ctr., Inc., 588 F.2d 626, 630 (8th Cir. 1978).
\bibitem{102}United States v. Saint Prix, 672 F.2d 1077, 1083 (2d Cir. 1982); Fenner, 62 UMKC L. Rev. at 18, 50, 80.
\bibitem{103}48 F.3d 1056 (8th Cir. 1995).
\bibitem{104}Hoselton v. Metz Baking Co., 48 F.3d 1056, 1058 (8th Cir. 1995).
\bibitem{105}Hoselton, 48 F.3d at 1059.
\bibitem{106}Id. The purchaser wanted to retain Metz Management because it did not know how to run a baking company. \textit{Id}.
\bibitem{107}Hoselton, 48 F.3d at 1059.
\end{thebibliography}
ter's side of the family then sued the shareholders from the son's side, to whom they had sold their interest, claiming breach of fiduciary duty.\textsuperscript{108}

During the trial before the United States District Court for the Northern District of Iowa, the defendants offered into evidence certain notes made by the plaintiffs' accountant, regarding a part of the agreement selling plaintiffs' shares to defendants.\textsuperscript{109} The plaintiffs objected that the notes were hearsay.\textsuperscript{110}

The notes in question were the accountant's written recollections of what had occurred at a meeting, including what people at the meeting had said.\textsuperscript{111} The plaintiffs argued that the notes did not fall within the business records exception to the Hearsay Rule.\textsuperscript{112} In addressing this issue the United States Court of Appeals for the Eighth Circuit stated:

A business record is admissible under Rule 803(6) if "made at or near the time [of the events] by . . . a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record," unless other circumstances suggest a "lack of trustworthiness." Williams's notes meet all of these requirements.

Williams testified in his deposition, which was read at trial, that the notes in question were prepared by him in the course of his accounting and consulting business, that it was his practice to take notes at meetings, and that he initialed and dated meeting notes in the upper-right-hand corner. Nothing about the notes suggest that they lack trustworthiness.\textsuperscript{113}

So, the notes themselves fit under the business records exception. Now, what about the out-of-court statements recorded in the notes? What about the double hearsay? The plaintiffs argued that each level of hearsay must fit under the business records exception.\textsuperscript{114} The Eighth Circuit, quite rightly, says that is not so.\textsuperscript{115} Each level of out-

\begin{itemize}
  \item 108. \textit{Id.}
  \item 109. \textit{Id.}
  \item 110. \textit{Id.}
  \item 111. \textit{Id.} at 1060-61.
  \item 112. \textit{Id.} at 1061.
  \item 113. \textit{Id.} (citation omitted). During the trial the plaintiffs objected to the admission of the notes, but did not object to the use of the deposition to lay foundation. \textit{Id.} at 1062. Once the hearsay objection to the notes was overruled, the deposition was read into evidence in its entirety, at the plaintiffs' insistence. \textit{Id.}
  \item 114. \textit{Hoselton}, 48 F.3d at 1061.
  \item 115. \textit{See id.} (stating that "[t]he Hoseltons misstate the law . . . when they argue that each level of hearsay must satisfy the requirements of Rule 803(b) for the notes to be admissible.")
\end{itemize}
of-court statement must either be nonhearsay or fit under some exception to the hearsay rule. Multiple layers of hearsay are admissible if each layer fits under the business records exception. But there is no requirement that, when the business records exception is used for the final level of hearsay, it must be used for each preceding level. In the case at hand, the final level—the accountant's notes—fits under the business records exception. The preceding levels—the out-of-court statements recorded in those notes—are not offered to prove the truth of what was said, but only that it was said, and therefore are not hearsay in the first place.

2. Death at an Iowa Beef Plant

There is another well-reasoned hearsay opinion from the Eighth Circuit that deals with the sometimes even more difficult matter of triple hearsay, and gets it about as correct as possible.

In DCS Sanitation Management, Inc. v. Occupational Safety and Health Review Commission, an OSHA Compliance Officer had investigated working conditions at an Iowa Beef Packing plant. Part of his investigation involved use of an interpreter to interview Spanish-speaking employees. The investigator asked questions and the translator interpreted them into Spanish. The employees then responded, in Spanish, and the translator interpreted their responses into English. Then the investigator wrote the responses down and the translator interpreted the writing back into Spanish, for the employees to verify.

The employer argued that the written records of the responses were inadmissible triple hearsay. First putative level: The oral statements from the employees to the investigator "fall within the carveout" for employee admissions concerning matters within the scope of their employment and offered against their employers.

Second putative level: The employer argued that "the translations of the employee's original statements from Spanish constitute another level of impermissible hearsay." The translator was merely a language conduit, who was available at the hearing so that

116. 82 F.3d 812 (8th Cir. 1996).
117. DCS Sanitation Management, Inc. v. Occupational Safety & Health Review Comm'n, 82 F.3d 812, 814 (8th Cir. 1996).
118. DCS Sanitation, 82 F.3d at 814.
119. Id.
120. Id.
121. Id.
122. Id. at 814-15.
123. Id. at 815.
125. DCS Sanitation, 82 F.3d at 815.
her biases and abilities could be questioned, and, as such, presents no separate out-of-court statement.\footnote{126}

Third putative level: "Finally, DCS argues that the writings prepared by [the investigator] represent yet another level of inadmissible hearsay. This argument is without merit. See [Rules] 803(5) (recorded recollection) and 803(6) (records of regularly conducted activity)."\footnote{127} I would add one more exception to this list, Rule 803(1) (present sense impression). The investigator was writing down the answers as he was hearing them. The writing was, in the words of Rule 803(1), "[a] statement describing . . . an event . . . made while the declarant was perceiving the event . . . , or immediately thereafter."\footnote{128}

D. INTERPRETERS AND THE HEARSAY RULE

Regarding in-court testimony as to the out-of-court translations, in the OSHA Iowa Beef case discussed just above, the United States Court of Appeals for the Eighth Circuit stated:

[T]he rule in the Second Circuit is [that] an interpreter is "no more than a language conduit" and therefore his translation [does] not create an additional level of hearsay. By comparison, the Ninth Circuit has chosen a more guarded approach under which the interpreter's biases and qualifications are examined to determine whether the translated statements can fairly be considered to be those of the speaker.\footnote{129}

In the case at bar, noted the Eighth Circuit, the out-of-court "translator was available at the hearing for inquiry into her skill, any bias, or the accuracy of the translation."\footnote{130} Under either approach, in this case the out-of-court translation itself is not inadmissible hearsay; the translations in question can be attributed directly to the out-of-court declarant whose statements were being translated. The statements made by the Spanish-speaking out-of-court declarant to the bilingual interpreter and in turn to the English-speaking in-court-declarant investigator, is only one level of hearsay, not two.

In any event, a simultaneous translation would fit under the first exception in Rule 803, the present sense impression exception.\footnote{131}

\begin{footnotes}
\footnote{126. Id. (citing United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989)). This is discussed in somewhat more detail in the next part of this paper.}
\footnote{127. DCS Sanitation, 82 F.3d at 816 (citing FED. R. EVID. 803(5) & 803(6)).}
\footnote{128. FED. R. EVID. 803(1).}
\footnote{129. DCS Sanitation, 82 F.3d at 815-16 (citation omitted).}
\footnote{130. Id. at 816.}
\footnote{131. FED. R. EVID. 803(1). \textit{See supra} notes 127-28 and accompanying text.}
\end{footnotes}
E. HEARSAY MISCELLANY

1. The Hearsay Definition: Offered to Prove the Truth of the Matter Asserted

*United States v. Aikens*, 132 is a case where the nature of the defendant’s defense allowed the prosecutor to get in particularly damaging, and perhaps otherwise inadmissible, hearsay. On more than one occasion, a police undercover officer asked the defendant to sell her some crack cocaine and, on more than one occasion, he did so. 133 Each time, the defendant took powder cocaine and made crack cocaine. 134 He was convicted on four charges of crack cocaine distribution and one firearms offense. 135 His defense was sentencing entrapment. 136 The defendant claimed that the police entrapped him “into selling crack cocaine instead of powder cocaine” because of the much more substantial sentence for selling crack cocaine. 137

The evidence in question was this: The prosecutor offered the undercover officer’s testimony “that the police had received anonymous complaints about [defendant’s] crack dealing. . . .” 138 The defendant’s objection was hearsay. 139 The United States District Court for the Western District of Missouri admitted the testimony, and the United States Court of Appeals for the Eighth Circuit affirmed. 140 The Eighth Circuit concluded that “[t]he testimony concerning anonymous complaints was offered to show [the undercover officer’s] motive for requesting crack cocaine, and not to prove the truth of the matter asserted.” 141

Is the reason the officer asked for crack cocaine relevant? It certainly is once the defendant asserted sentencing entrapment as a defense. It was not entrapment to ask for crack because crack was what the police had been told the defendant sold.

2. The Excited Utterance As a Response to Someone Else’s Inquiry

In *United States v. Martin*, 142 the United States Court of Appeals for the Eighth Circuit revisited the issue of putative excited utter-

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134. *Aikens*, 64 F.3d at 374.
135. *Id.*
136. *Id.* at 376.
137. *Id.*
138. *Id.* at 374.
139. *Id.*
140. *Id.*
141. *Id.*
142. 59 F.3d 767, 769 (8th Cir. 1995).
ances made in response to inquiries, rather than just blurted out from excitement alone. The Eighth Circuit restated that when deciding whether a statement fits under the excited utterance exception, one factor to consider is "whether the statement was made in response to an inquiry, . . ."\textsuperscript{143} This is one of many factors that may affect whether the statement was made while the declarant was under the stress of the excitement. A question in the nature of, What happened?, or What's wrong?, generally does not destroy the "excitement" required by this exception.\textsuperscript{144}

3. Statements for Purposes of Medical Diagnosis or Treatment

To be admissible under Rule 803(4), [the statement for purposes of medical diagnosis or treatment exception,] the statement must satisfy two tests. First, the declarant's motive in making the statement must be consistent with the purpose of promoting treatment. Second, the content of the statement must be such as is reasonably relied upon by health care providers in treatment or diagnosis.\textsuperscript{145}

Nothing new there. Nothing new, with this one possible exception. It is true that there are two components to this exception, two foundational elements. One focuses on the out-of-court declarant and the other focuses on the hypothetical reasonable health-care provider. The truth is that under the exception the out-of-court declarant must have in mind either treatment or diagnosis and the information must be of a sort that a reasonable health-care provider would find relevant to treatment or diagnosis. The above quotation suggests that while the health-care provider can have in mind either treatment or diagnosis, the out-of-court declarant must have in mind treatment. There is nothing in the rule, Rule 803(4), that says the declarant's purpose must be treatment, as opposed to diagnosis. And, it seems to me, that

\textsuperscript{143} United States v. Martin, 59 F.3d 767, 769 (8th Cir. 1995) (citation omitted). The Eighth Circuit explained:

In determining admissibility under [the excited utterance] exception, "we 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."

\textit{Id.} (citation omitted).

\textsuperscript{144} Martin, 59 F.3d at 770. The "exciting" out-of-court telephone conversation in this case was relayed by the out-of-court declarant to the in-court declarant immediately after it occurred. \textit{Id.} at 779. This out-of-court declarant was sixteen, and was scared and nervous; and the out-of-court statement responded to a question, a question in the nature of "What's wrong?" \textit{Id.} at 769-70. On the other hand, the out-of-court declarant testified and there was "other record evidence," supporting the conviction. \textit{Id.} at 770. If there was error, it was harmless. \textit{Id.}

\textsuperscript{145} Lovejoy v. United States, 92 F.3d 628, 632 (8th Cir. 1996). See infra notes 161-73 and accompanying text.
this case should not be read as establishing that as the rule but simply as a case where the context was that the statement was made in aid of treatment. The quotation is not accurate as a statement of general law, but is accurate as a statement of the foundational elements of this exception, given the facts of this case.

This case's main value is what it says about the residual exceptions, which is discussed below.\textsuperscript{146}

4. Records, and Absence of Records, of Regularly Conducted Activity

The record of a regularly conducted activity exception, Rule 803(6), and the exception for the absence of entry in such records, Rule 803(7), both depend on what occurred "in the course of a regularly conducted business activity, and ... was the regular practice of that business activity."\textsuperscript{147} The question, in \textit{Brodersen v. Sioux Valley Memorial Hospital},\textsuperscript{148} regarding the issue of what "was the regular practice of that business activity,"\textsuperscript{149} was this: Is the standard in question an industry-wide standard or is it just the standard of the particular business entity in question? \textit{Brodersen} affirms that the answer is the latter: What was the regular practice of the particular business entity whose records are at issue?\textsuperscript{150}

The Advisory Committee Note for Rule 803(6) states "[t]he element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."\textsuperscript{151} Each of these checks on accuracy is a business-specific measure, not an industry-wide measure.

5. Public Records and Agency Findings

The Federal Rules of Evidence provide that "public records and agency findings are not admissible if circumstances indicate a lack of trustworthiness."\textsuperscript{152} Regarding the reason for and the importance of this "trustworthiness" requirement, Judge Mark Bennett, for the
United States District Court for the Northern District of Iowa, had this to say:

[The trustworthiness inquiry is the primary limitation and safeguard against the admission of unreliable evidence in public reports . . . once a report is conclusively shown to be governed by Rule 803(8)(C) because it is comprised of findings of a public agency made pursuant to an investigation authorized by law, the essential inquiry becomes whether the report is trustworthy.]

6. Market Reports and Commercial Publications

In Crane v. Crest Tankers, Inc.,154 the plaintiff "offered into evidence a 'Future Damage Calculator' . . . a slide rule-type device which has life expectancy and work life expectancy tables on one side, and a 'present value' table on the other."155 I picture this exhibit as having been purchased with a credit card and a phone call to a late-night infomercial on Court TV. "The Exhibit was offered without being identified or sponsored by any witness."156 It was received over the defendant's multiple objections.

As to the hearsay objection, the plaintiff defended the receipt of the exhibit under the market reports and commercial publications exception.157 This exception covers "market quotations, tabulation, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."158 There was no evidence that "the exhibit is generally used or relied upon by the public or persons in the legal or other professions."159 Thus, this exception does not apply because its foundational elements were not established.

7. The Residual Exception

The residual or catch-all exceptions "apply only in 'rare and exceptional circumstances.'"160 One of these "rare and exceptional cir-
cumstances” can be found in *Lovejoy v. United States*. The short version is that Lovejoy was convicted of the attempted sexual assault of his 13-year-old daughter. His daughter was partially blind, could not speak more than a few words, and could not write. The jury accepted this version of the facts: The victim’s mother (Lovejoy’s common-law wife) interrupted the assault, got Lovejoy out of the room, and preserved the victim’s clothing for evidence. The next day, the mother took the victim to a nurse and told the nurse what had happened to her daughter.

At Lovejoy’s trial, the mother testified, but recanted her out-of-court statements. The court admitted the nurse’s testimony regarding the mother’s out-of-court statements. As discussed above, the evidence was admitted under the hearsay exception for statements for purposes of medical diagnosis or treatment. The Eighth Circuit, as sort of an after thought — as though to say to Lovejoy that he will get no break — said the evidence would also have been admissible under the residual or catch-all exception.

The United States Court of Appeals for the Eighth Circuit stated: the statements by the mother were trustworthy. [The testimony was offered as evidence of] a material fact in this case. This testimony was more probative on the conduct of Lovejoy than any other evidence because the mother testified differently at trial, the victim could not testify and no other persons witnessed the attempted assault.

The interesting part of the court’s residual-exception rationale is this: The exception requires that the out-of-court statement be “more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.” The victim-daughter could not testify and the defendant-father could not be made to testify. The only other person with personal knowledge

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FED. R. EVID. 804(b)(5), but there is no reason the quotation in the text would not apply to both. The Judiciary Committee Report does apply to both. 161. *92 F.3d 628 (8th Cir. 1996).* 162. *Lovejoy v. United States, 92 F.3d 628, 630 (8th Cir. 1996).* 163. *Lovejoy, 92 F.3d at 630.* 164. *Id.* 165. *Id. at 630-31.* 166. *Id. at 631-32.* 167. *Id.* 168. *Id. at 631. See FED. R. EVID. 803(4). See supra note 145 and accompanying text.* 169. *Id. at 632. See FED. R. EVID. 803(24).* 170. *Lovejoy, 92 F.3d at 632.* The evidence would, of course, have been admissible to impeach the mother, but, in this case, it had to be admissible as substantive evidence. Otherwise, there was no substantive evidence of the identity of the perpetrator and very little, if any, evidence of the crime. 171. *FED. R. EVID. 803(24).*
was the mother, and she did testify; she gave her evidence. How can it be said that her out-of-court statement was "more probative on the point for which it [was] offered" than her in-court testimony? Only by saying she is lying now, and was telling the truth then, but is that the kind of "more probative" analysis the rule contemplates?

In this case, the day after the alleged sexual assault, the mother took her daughter, the alleged victim, along with certain physical evidence of the assault, to a nurse and told the nurse her common-law husband had sexually assaulted the girl. Later, at trial, she recanted and testified in support of her common-law husband. Everyone suspects that, for the most part, such a next-day statement is more likely to be true than the later recanting testimony. But the exception calls for probative value, and aren't probative value and credibility two different things? Is the former statement more probative because we suspect it is more credible?

Professor Norman M. Garland suggests it is not. He has stated that "[i]f the declarant is available to testify, the argument is that the declarant's live testimony is more probative than an out-of-court, hearsay statement." The United States Court of Appeals for the Fifth Circuit likewise suggests it is not:

The live testimony of the available witness, whose demeanor the jury would have been able to observe and whose testimony would have been subject to cross-examination, would have been of more probative value in establishing the truth than the bare statements transcribed by the ATF agents. . . . Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements into evidence under the last subsection of rule 803 because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved.

Likewise, the United States Court of Appeals for the Fourth Circuit stated that "as a general rule, the credibility of a witness has nothing to do with whether or not his testimony is probative with respect to the fact which it seeks to prove."

172. Lovejoy, 92 F.3d at 630-32.
173. Id. at 631.
175. United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir. 1977).
When I first read the opinion in Lovejoy, I did not think that because I find the former statement more credible, I could say it is more probative. Instinctively, I distinguished probative value and credibility: The former is a question of law for the judge and the latter is a question of fact for the jury. I stayed on that track as I read the works just cited. I held firm until my research assistant, Cristy Carbon-Gaul, challenged me.

Rule 803(24) requires that the evidence exhibit circumstantial guarantees of trustworthiness: This element of the exception concerns credibility. Then, in addition, it requires that the evidence be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts. This element of the exception seems to concern the situation where, without the out-of-court statement, there is not admissible evidence of sufficient consequence, of sufficient mass, on the subject. The relevant consideration, according to the authorities cited above, seems to be not whether the out-of-court declaration is more true, but more testable.

On the other hand, the dictionary definition of probative has to do not with whether the item is testable, but with whether the item contributes to testing the proposition to be proved. Probative is defined as “[h]aving the quality or function of proving or demonstrating; affording proof or evidence; demonstrative, evidential.”177 The probative value of evidence, then, seems to have to do with both whether the evidence is testable and whether it is credible. It seems to have to do with the mass or consequence of the evidence, the testability of the evidence, and the credibility of the evidence. The trial judge has to decide whether the out-of-court evidence is more probative than any other reasonably available evidence. This seems to allow room for the trial judge to consider, among other things, the relative credibility of the out-of-court evidence versus that of the other available evidence.

If “[t]he probative value of testimony is determined upon the assumption that the testimony is true[,]”178 then when the judge assesses the probative value of the “true” live testimony and the “true,” but contradictory, out-of-court statement, which of these two “true” but contradictory statements is more probative? The one that can be cross-examined? The one that is live? The one that is not hearsay?

The answer to these questions might well be yes: Cross-examination is the pig that roots out the truth. The witness who constructs a lie can be cross-examined, but the one too frightened to testify or the one who has no memory cannot.

I see no reason, however, why, in service of the lying witness, we must give such a narrow reading to the rule, to the residual exceptions.

- If the prosecutor were able to put on evidence that, at the time of trial, the witness was frightened and unable to testify meaningfully, then her out-of-court statements would be the most probative evidence.\textsuperscript{179} This witness, however, gave testimony that was “meaningful;” she told a completely different story, one that, if left unrebutted, destroys the prosecutor’s case. Does the defendant gain greater benefit from the witness who affirmatively lies, than from the witness who is frightened?

- If the witness lacked memory at trial, then her out-of-court statements would be the most probative evidence.\textsuperscript{180} This witness, however, testified that she remembered; it’s just that she remembered a completely different story than the one she had told out-of-court and, the one she remembered, if left unrebutted, destroyed the prosecutor’s case. A whole new story seems a greater lie than “I don’t remember.” The greater the lie, the less admissible the rebuttal evidence?

The interpretation that would keep this evidence out from under the residual exception seems to focus on credibility and to say that credibility is someone else’s concern, not the judge’s. The better interpretation may be the one that focuses on probative value and recognizes that if the judge is called upon to assess the relative probative values of two pieces of evidence, that comparison includes many things, including, sometimes, a bit of a nod to credibility. Credibility standing alone is for the trier of fact; probative value, including sometimes an element of credibility, is for the trier of law. The conditions of admission under the residual exception include not an assessment of probative value standing alone, but an assessment of relative probative value as measured against other available evidence.\textsuperscript{181}

This interpretation is in service of the guiding principles of the rules: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion

\textsuperscript{179} United States v. Dorian, 803 F.2d 1439, 1444-45 (8th Cir. 1986) (discussing that an out-of-court statement made by a 5-year-old victim of sexual abuse was unable to testify meaningfully because she was frightened).

\textsuperscript{180} United States v. Lyon, 567 F.2d 777, 783-84 (8th Cir. 1977).

\textsuperscript{181} Perhaps Professor Eleanor Swift put her finger on the problem when she said that “the same term — probative value — should not be used to denote the different acts that are performed by the judge and by the jury.” Swift, 14 CARDOZO L. REV. at 111. She would use probative value for “the mental operation and data that the judge uses” and persuasive value for “the mental operation and data that the jury — or any factfinder — uses. . . .” Id. Still, that does not mean that “probative value” cannot sometimes contain an element of credibility.
of growth and development of the law of evidence to the end that the
truth may be ascertained and proceedings justly determined." 182

The truth is that this definition of "probative" has not gotten
much attention; perhaps the United States Court of Appeals for the
Eighth Circuit has stumbled onto something here. It also may be that
the court is simply loading it on this child abuser in service of one of
my eight truths about the hearsay rule: "When the subject is child
abuse, none of the [hearsay] rules (such as they are) apply." 183 Today,
evidence rules tend to be thrown out the window when the subject is
child abuse and the evidence stands in the way of convicting someone
who anyone looking at the case knows is guilty of the crime of sexual
abuse of a child. 184

If the Eighth Circuit is serious about this piece of dicta, and per-
haps serious-about-it is the right way to be, it greatly expands the
residual exception and provides prosecutors with a terrific weapon to
combat hearsay in the case of a witness who gives a statement and
then recants. 185

III. LOGICAL RELEVANCE AND RULE 403

This past year, there were some quite typical cases affirming
trial-court discretion in the area of relevance.

A. THE RELEVANCE OF OTHER BAD ACTS AND RULE 403

Charged with crack cocaine crimes, the defendant in United
States v. Jackson 186 argued that admitting evidence of firearms seized

182. Fed. R. Evid. 102 (emphasis added).
183. Fenner, 62 UMKC L. Rev. at 64. And a final truth on this matter may be that
my interpretation of the "probative value" condition of the residual exception is not
much more than a reflection of my belief that the hearsay rule is in serious need of a
major overhaul, and, in the meantime, we should generally favor interpretations that
allow the judge flexibility to escape the confines of the rule. Id. at 94-105.
184. Fenner, 62 UMKC L. Rev. at 64.
Each generation has its own set of cases where the rules do not accomplish
what we want to accomplish—they don't favor the government over the Com-
munist; they don't favor the civil rights worker over the red-neck city adminis-
tration; they don't favor the government and the child over the one charged
with beating, sexually abusing, or murdering the child. So we simply do not
apply them, at least not in any recognizable fashion. In these cases, the hear-
say rules be damned if they stand in the way of convicting Communists and
child molesters, and acquitting civil rights workers.
Id. (citations omitted).
185. It will be a powerful weapon in cases where the out-of-court statement can be
gotten around the Confrontation Clause, which should not be a problem when the out-
of-court statement is used in a case where the out-of-court declarant testifies but re-
cants: That person is available to confront. See generally Idaho v. Wright, 497 U.S. 805
from the business he managed was reversible error. Jackson argued the firearms were irrelevant and that their admission violated Federal Rule of Evidence 403. The prosecution disagreed and presented expert testimony "that drug traffickers commonly use firearms for protection." The United States Court of Appeals for the Eighth Circuit found that this satisfies the minimal requirements of logical relevance. Further, "we find no abuse of discretion in the district court's determination that the prejudicial effect of the firearms evidence did not outweigh its probative value."

Though it may be that the reversals are the ones judges and lawyers remember, the truth is that most often these kinds of evidentiary decisions are affirmed.

B. IMPEACHMENT WITH EVIDENCE OF OTHER ACTS; RULE 404; AND RULE 403

In United States v. Carr, the defendant argued that the United States District Court for the Eastern District of Missouri erred in refusing to receive evidence that a witness against him (an alleged coconspirator in the crime charged) and a third person (the initial suspect for the crime charged) had committed a robbery together a week earlier. He argued the evidence was relevant in that it indicated a frame up by showing that the motive of the witness against him was to protect this third person. The United States Court of Appeals for the Eighth Circuit found "that the trial court did not abuse its discretion in refusing to allow the evidence." The court stated:

Although the defense may present evidence of other acts to prove the motive of a witness under Federal Rule of Evidence 404(b), or to attack the credibility of a witness under Federal Rule of Evidence 608(b), the court has discretion under Federal Rule of Evidence 403 to exclude the evidence.

188. Jackson, 67 F.3d at 1366.
189. Id.
190. Id. Also in this case, the defendant had offered an audiotape recording of a conversation. The trial court refused to admit it because it as "so inaudible that it lacked probative value." Id. at 1366-67. There was no abuse of discretion in the trial court refusing to admit the tape as "inaudible," "confusing," and "of no probative value." Id. at 1367. The Eighth Circuit stated, "[s]hould the garbled portions [of an audiotape] be so substantial, in view of the purpose for which the tapes were offered, as to render the recording as a whole untrustworthy, admissibility will be denied." Id. (quoting United States v. Young, 488 F.2d 1211, 1214 (8th Cir. 1973)).
193. Carr, 67 F.3d at 175.
194. Id. at 175.
The court could have reasonably found that the unrelated criminal actions taken by Stroud and Belger [the coconspirator and the third party] a week earlier would invite unwarranted speculation and could confuse the issues and mislead the jury, given the tenuous link between Stroud and Belger. . . . [And since there was other evidence of Stroud's lack of credibility, the evidence in question] would have merely been cumulative to impeach his credibility and would have resulted in delay and confusion.¹⁹⁵

C. IMPREACHMENT BY PRIOR INCONSISTENT STATEMENT; RULE 613, BUT (IN MY OPINION) REALLY RULE 403

Though the words are nowhere in Federal Rule of Evidence 613, cases have continued the common law rule that one may not use extrinsic evidence of a prior inconsistent statement to impeach a witness on a collateral matter. Here is a good explanation of the "collateral matter" thing:

Extrinsic evidence of prior inconsistent statements may not be used to impeach a witness under Rule 613(b) unless the witness is given the opportunity to explain or deny the statements. Harrison was given such an opportunity and both denied and explained the prior inconsistent statement. However, under Rule 613(b) a witness may not be impeached on a collateral matter by use of extrinsic evidence of prior inconsistent statements. Contradiction of a witness by prior inconsistent statement may be shown only on a matter material to the substantive issues of the trial. A prior inconsistent statement contains collateral matter and is therefore inadmissible if the facts referred to in the statement could not be shown in evidence for any purpose independent of the contradiction.

Harrison's statement to [the impeaching witness] involved matters which were material to the charges . . . and could have been offered in evidence independent of the contradiction.¹⁹⁶

Where is this "collateral matter" limitation lodged in the rules? I say it is lodged in Rule 403. Impeachment with extrinsic evidence of a prior inconsistent statement on a collateral matter will generally cause undue delay, be a waste of time, and have the potential to confuse the issue or mislead the jury, and these are all Rule 403 considerations.

¹⁹⁵. Id.
D. The Bells and Whistles of Closing Argument, and Rule 403

First, by way of background, within the past year, the Eighth Circuit said that "the propriety of closing argument in federal court is a procedural question to be determined under federal law. "Under federal law, considerable discretion is given to the trial court to control arguments." 197

In a later case, however, the Eighth Circuit gave this rather stern warning against the use of transparencies and like devices in closing argument:

Though we conclude that the use of transparencies in closing argument in this case was not reversible error, we do not encourage the use of such devices in the future. . . . Because the very purpose of a visual aid of this type is to heighten the persuasive impact of oral argument, we will necessarily be more inclined to reverse in a close case if the testimony has been unfairly summarized or the summary comes wrapped in improper argument. 198

E. Evidence of Custom

The question in Institute of London Underwriters v. Eagle Boats, Ltd., 199 was whether a bailee had exercised due care, a question of fact. 200 The property in question was a boat and trailer that the defendant failed to return to the plaintiff's insured. 201 The plaintiff alleged that the bailee was negligent because, among other things, he failed to apply "locking devices or a simple lock and chain" to the property. 202 The bailee offered evidence that what he did, i.e., not chaining down and locking up this kind of property, "was not uncommon in the industry." 203 "Evidence of customs and usage," said Judge Ste-
phen Limbaugh, from the United States District Court for the Western District of Missouri, "are generally admissible to show what others engaged in a particular business do in comparison to the conduct of the defendant alleged to have acted in a negligent manner." 204

IV. CHARACTER EVIDENCE

A. CHARACTER AS SUBSTANTIVE EVIDENCE

This past year, the United States Court of Appeals for the Eighth Circuit has confirmed the admissibility of character evidence when offered not to prove conforming behavior, but to prove anything else, so long as (1) the other issue is material to the case at hand; (2) the character evidence is sufficiently relevant to that other issue, whatever it is; and (3) admission of the character evidence does not run afoul of Rule 403. The first and third numbered elements include considerations such as the similarity and closeness in time between the bad act evidenced and the "other issue" to which it is relevant. 205

B. CHARACTER AS IMPEACHMENT EVIDENCE

The general rule is that character evidence is inadmissible to prove conforming character (unless, of course, character is in issue in the case). 206 One exception is this: If a party puts on a witness to testify to that party’s truthful character, then, on cross-examination, the opposing counsel may ask that reputation witness about specific acts committed by the party and relating to that party’s character for untruthfulness. 207 Pretty much all the opposing counsel needs before she will be allowed to ask the impeaching, character-for-untruthfulness questions is a good faith basis for asking them.

Everyone knows that the good-faith-basis requirement means opposing counsel must have a good faith basis for believing that the party actually committed the act that is the subject of the inquiry. 208 Not everyone knows that it means more than that.

This kind of cross-examination of the reputation witness is allowed not to prove that the party committed one act or another, but

204. Id. Judge Limbaugh also pointed out that “such evidence does not set the legal standard of care. It is no different from any other evidence to be considered in adjudicating the defendant's negligence.” Id. (citation omitted).


206. FED. R. EVID. 404.

207. FED. R. EVID. 608.

208. We do not let the depraved mind of opposing counsel run wild with suggestions of possible bad acts the party may have committed, but only with suggestions of those which counsel believes, in good faith, that the party actually did commit.
rather to test the credibility, including the knowledge, of the reputation witness. Therefore, at least in the Eighth Circuit, inquiring counsel not only must have a good faith factual basis for the incident inquired about, but also must have a good faith belief that the incident inquired about was general knowledge in the relevant community.

V. BURDENS

A. EVIDENTIARY BURDENS — A SWITCH ON THE RULE REQUIRING TIMELY AND SPECIFIC OBJECTION

In a switch on the general rule that error may not be raised on appeal unless there was a timely and specific objection at the trial, in *Church of God in Christ, Inc. v. Graham* the United States Court of Appeals for the Eighth Circuit heard an appeal where the following happened at trial: The plaintiff offered evidence, the defendant objected that it was hearsay, and the plaintiff did not explain how the evidence was admissible in spite of its hearsay nature. The Eighth Circuit concluded that “because the [plaintiff] did not offer the district court any explanation as to the statements' admissibility when they were objected to at trial, however, it cannot now show that the district court abused its discretion in excluding the hearsay evidence...” It wasn’t that there was no timely and specific objection, but that there was no timely and specific counter-argument to the objection.

The proponent of the evidence must show that it is relevant and that the witnesses are competent. Once that is done, the opponent of the evidence must show that there is some rule that keeps it out, for example, by showing it is hearsay. If the opponent shows it is hearsay, then the evidentiary burden shifts back to the proponent to show

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209. In *United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996), the defendant in the criminal trial, put on a witness, who had worked with defendant (as a firefighter) for almost twenty years, who “testified that the defendant possessed a good community reputation for truthfulness and lawfulness.” *Monteleone*, 77 F.3d at 1088. On cross-examination, the prosecutor asked the reputation witness if he had heard “that in the early 1970s [defendant] had perjured himself before a federal grand jury.” *Id.* The United States Court of Appeals for the Eighth Circuit stated “Here, we cannot say that the Government had a good faith basis for believing that [defendant’s] conduct before a federal grand jury was likely to have been known in the relevant community.” *Id.* at 1090. This is particularly so since the prosecutor no doubt knows that grand jury testimony “is protected by an obligation of secrecy under court supervision.” *Id.* (citation omitted). The Eighth Circuit concluded that the error was prejudicial and reversed the conviction. *Id.* at 1091.

210. Evidentiary burdens are also discussed above, in Part II(A).

211. 54 F.3d 522 (8th Cir. 1995).


213. *Graham*, 54 F.3d at 528.
that it fits under an exception. It is the proponent's burden to offer an exception, and it is at the proponent's risk that none is offered.

B. **BURDENS OF PROOF AND THE DECLARATORY JUDGMENT ACT**

In *American Eagle Insurance Co. v. Thompson*,214 American Eagle Insurance had issued an aviation insurance policy to Arkansas Aircraft, Inc.215 An Arkansas Aircraft plane piloted by John Thompson crashed.216 Thompson survived.217 If Thompson was an employee of Arkansas Aircraft at the time of the plane crash in question, then American Eagle had a duty to defend and indemnify Thompson in two lawsuits that were filed against him, as a result of the crash.218

Thompson had a full-time job outside of aviation, but sometimes accepted piloting jobs from various companies in order to keep up his pilot's license.219 The insurance company filed a declaratory judgment action seeking a judicial determination that, at the time of the crash, Thompson was not an employee of Arkansas Aircraft, Inc.220

The question facing the Eighth Circuit on appeal was this: Which party has the burden of proving Thompson was or was not an employee of Arkansas Air? The district court placed the burden on the plaintiff, American Eagle Insurance; the trial judge instructed the jury that American Eagle had the burden of proving that Thompson was not an employee of Arkansas Air.221

In the more routine insurance case, "a party who files suit seeking to benefit from insurance coverage generally bears the burden of proving coverage. Once that person seeking insurance coverage has met his burden, the burden shifts to the defendant insurance company to prove any applicable exclusion to coverage."222 In the declaratory judgment action the roles of plaintiff and defendant are reversed. The question is whether the burden flows to the party who files the suit.223

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214. 85 F.3d 327 (8th Cir. 1996).
216. Thompson, 85 F.3d at 329.
217. Id.
218. Id. at 328-29.
219. Id.
220. Id.
221. Id. at 330.
222. Id. (citations omitted). The burden in this diversity action is a question of state law. These statements directly concern Arkansas law. The principles, however, have general application.
223. The Eighth Circuit noted that "American Eagle argue[d] that the burden placed traditionally on the party seeking coverage should not be shifted to the insurer merely because the insurer is the nominal plaintiff. Supporting the contrary view is the argument that the burden of proof should not be placed on an unsuspecting defendant who has been hailed into court." Thompson, 85 F.3d at 330 (citations omitted).
Generally, said the Eighth Circuit, the burden of proof can be assigned by asking this question: Which party loses if no evidence at all is introduced?\textsuperscript{224} In the case at hand, we find that Thompson asserted the affirmative of the question asked of the jury and that Thompson would lose in the absence of any evidence on the issue. American Eagle seeks only a declaration of non-liability; . . . it does not[, for example,] seek to apply a policy exclusion . . . Stripped of its procedural posture, this action is, at base, a claim by Thompson that he is covered under an insurance policy and a denial by the insurer that coverage properly exists.\textsuperscript{225}

This opinion says that if the insurance company files suit seeking a declaration that Thompson was not an employee of Arkansas Aircraft, and if no one puts on any evidence on this question at all, then the insurance company wins. Though, in the procedural posture of the case, the insurance company has brought the question to court, the burden is on the other side to answer the question. And this seems fair: If no one ever sues the insurance company, they will never have to defend or to indemnify, and will never have to prove anything. If Thompson responds to their refusal to defend or indemnify by suing them, then he most certainly has the burden of proof. The declaratory judgment action does not change rights, only remedies. It does not change substance, only procedure.\textsuperscript{226} It is a new procedure for answering the same question, and the burden should be in the same place.

VI. COMPETENCY OF JUROR AS WITNESS: RULE 606

Federal Rule of Evidence 606 deals with using a juror to impeach a verdict.\textsuperscript{227} A verdict may not be impeached with testimony, affidavits, or statements of jurors regarding anything occurring during deliberations, regarding the effect of anything on any juror’s mind, or regarding a juror’s mental processes, “except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.”\textsuperscript{228}

United States v. Hall,\textsuperscript{229} gives some guidance as to what juror testimony fits into which category under this Rule. At the sentencing

\begin{itemize}
  \item \textsuperscript{224} American Eagle, 85 F.3d at 331.
  \item \textsuperscript{225} Id.
  \item \textsuperscript{227} See Fred. R. Evid. 606.
  \item \textsuperscript{228} Fed. R. Evid. 606(b).
  \item \textsuperscript{229} 85 F.3d 367 (8th Cir. 1996).
\end{itemize}
hearing, the defense presented the court with the following affidavit from the jury foreperson:

During the course of the trial I heard the Judge's comments concerning whether there would be evidence of chop shop, prostitution and murder admitted at the trial.

From these statements, I felt that the Defendant[s] were involved in more than they were on trial for. I am also aware that the jury was apprehensive and fearful of retaliation from the Defendants or the Defendant[s'] family, so much so that some jurors took different routes to and from the courthouse during the trial.

The comments relating to evidence of a chop shop, prostitution, and murder were heard on several occasions. These comments were heard by other members of the jury and were discussed by the jury panel during recesses. Discussion of the comments occurred at times when all the jurors were present and on other occasions by fewer than all jurors.230

The comments referred to in the affidavit were made at bench conferences. They were not intended to be overheard and, until this juror came forward, neither any party nor the judge was aware they had been overheard.

The United States Court of Appeals for the Eighth Circuit held that it was appropriate for the lower court to consider the first and third paragraphs of the affidavit, but not the second. The first and third paragraphs fit under the exception to Rule 606; they deal with "the question whether extraneous prejudicial information was improperly brought to the jury's attention." In the second paragraph, "the foreperson reveals what impact the extraneous information had on him . . . He then goes on to expose the thought processes of the other jurors."231

Query: How often does the jury overhear the bench conference? Anecdotal evidence suggests to me that both judges and lawyers think it happens quite often, particularly in some of the smaller courtrooms.

VII. OPINION EVIDENCE: EXPERT AND LAY; DAUBERT AND OTHERWISE

To perhaps your great relief, and certainly to mine, Daubert is a topic I do not intend to say much about here.232 I have said very nearly all I have to say about it already, earlier this year, in this same

231. Hall, 85 F.3d at 370.
232. This Article grew out of a speech I gave this past summer to United States Magistrate Judges from the Eighth Circuit. The judge who contacted me about speaking said "Mike, you can talk about anything you'd like, so long as it has to do with the
Just a couple of things, however, by way of an Eighth Circuit update.

A. LAY WITNESS TESTIMONY

The United States District Court for the District of Minnesota said this of lay witnesses:

[The] fact that the witness, by virtue of his education, training or experience, is capable of being qualified as an expert, does not serve as a valid objection to his expression of lay opinion testimony. . . . "The essential difference [between lay and expert testimony] . . . is that a qualified expert . . . may not only testify from 'facts or data *** perceived by him,' but also from what is 'made known to him at or before the hearing.'"234

The witness in question, however, was not an expert, thus "he is not the proper witness to respond to hypothetical facts or circumstances, nor is he the witness who would be competent to review documents that are extraneous to [his employer's] business records, or his own industry experience, merely so he would have a basis to form opinion testimony."235

B. EXPERT TESTIMONY ON A MATTER WITHIN THE CAPABILITY OF LAY JURORS AND ON LEGAL CONCLUSIONS

The central issue to the question of the admissibility of expert testimony is whether the expert's testimony will assist the trier of fact. Using the argument that such testimony will not help the jury, "expert testimony may be excluded if the jury is equally able to draw the asserted conclusion."236

Same result — evidence excluded — if an expert's testimony is not fact based, but rather a statement of a legal conclusion: such testimony is in no way "helpful" to the trier of fact.237 This is so even if the witness is an expert on the law: "As a general rule, 'questions of law are the subject of the court's instructions and not the subject of expert testimony.'"238
C. Ineffective Assistance of Counsel

On a related matter, in Driscoll v. Delo, the defendant was convicted and sentenced to death. The case included important blood evidence. Defense counsel admitted “he did not take any steps to adequately inform himself about the specific serology tests performed or the conclusions one could logically draw from the laboratory results.” The Eighth Circuit concluded that this was ineffective assistance of counsel.

VIII. CONCLUSION

With the possible exception of the United States Supreme Court’s recognition of a psychotherapist privilege, this has been a pretty good year for prosecutors in the Eighth Circuit. The Eighth Circuit has narrowed the spousal privilege that keeps a spouse off the stand in the criminal case against the other spouse. It has rather liberally allowed evidence of other bad acts. Additionally, it has made a very interesting statement about the application of the residual exception’s application to out-of-court statements made by witnesses who later recant. If the Eighth Circuit stands by what was a bit of a throwaway line in one of this past year’s cases — the out-of-court statement was more probative than any other evidence on the point; the only other evidence on the point was the in-court testimony of the out-of-court declarant, and it contradicted her out-of-court statement — then it has given the residual exception quite an expansive reading and has made such out-of-court statements much more easily admissible.

241. Id. at 708.
242. Id. at 715.
243. See supra notes 16-41 and accompanying text.
244. See supra notes 46-59 and accompanying text.
245. See supra notes 186-95 and accompanying text.
246. See supra notes 160-85 and accompanying text.