Evidence Update
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Drake University Law School

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I. Introduction

This Update covers developments in evidence law that have occurred during the last year. The Update discusses recent and pending amendments to the Iowa and the Federal Rules of Evidence, as well as recent evidence cases. The Update focuses primarily upon evidentiary decisions of the Iowa Supreme Court rendered during its 2017–2018 term.

The Iowa Court of Appeals also issued many opinions during that period that address evidentiary issues. Most of those opinions have not been published. However, under IOWA R. APP. PROC. 6.904(2)(c), while an unpublished opinion does not constitute controlling legal authority, it may be cited in a brief. For that reason, this Update also identifies evidentiary opinions of the Iowa Court of Appeals decided during the Update period.

Finally, because many of the Iowa Rules of Evidence are patterned upon the Federal Rules of Evidence, Iowa courts frequently take guidance from federal precedent construing analogous federal provisions. This Update thus briefly describes relevant evidence decisions of the U.S. Court of Appeals for the Eighth Circuit.

II. Rule Amendments

A. Iowa Rules of Evidence: 2017 Nonsubstantive Restyling Amendments

As discussed in last year's Update, the Iowa Rules of Evidence underwent a comprehensive restyling in 2017. Those restyling amendments were intended to align the Iowa Rules "with their current federal counterparts" and to "achieve[ ] an internally more consistent, clearer, easier-to-use, and plain English-oriented set of rules." Iowa Supreme Court Order, In the Matter of Adoption of the Nonsubstantive Restyling of the Iowa Rules of Evidence (Sept. 28, 2016). The restyling amendments made no substantive changes to the Iowa Rules. Indeed, no substantive modifications have been made to the Iowa Rules of Evidence since 2009.

B. Federal Rules of Evidence

1. December 1, 2017 Amendments: The following amendments to the Federal Rules of Evidence became effective on December 1, 2017.

a. <u>Ancient Documents Hearsay Exception—Fed. R. Evid. 803(16)</u>: Until its most recent amendment, the ancient documents hearsay exception in Fed. R. Evid. 803(16) admitted hearsay based solely on the age of the document in which it was contained—admitting statements in authenticated documents that were at least 20-years-old. In the fall of 2015, the

Advisory Committee on the Federal Rules of Evidence proposed eliminating the ancient documents hearsay exception altogether. This recommendation arose from a concern about the digital longevity of electronically stored information and a fear that the ancient documents exception "could become a receptacle for *unreliable* hearsay" that is not otherwise admissible under a reliability-based hearsay exception. See Report of Jud. Conf. Comm. on Rules of Practice & Proc. To Jud. Conference (Sept. 2016) (emphasis in original). However, the recommendation to completely abrogate the ancient documents exception met with significant public criticism. The proposal was thus subsequently modified to limit Fed. R. Evid. 803(16) to documents "prepared before January 1, 1998, and whose authenticity is established." The Committee chose the 1998 date on the assumption that documents created after 1998 will generally be preserved in electronic form and thus will likely be easier to find and admit under other hearsay exceptions like the business records exception or the residual clause. The amendment leaves the ancient documents exception available for documents created before 1998 in order to accommodate concerns voiced by lawyers who rely upon the ancient documents exception to admit scarce "hard copy documents in cases involving latent illnesses or defects, land disputes, or toxic torts," where electronic documents might not otherwise exist.

> The amended ancient documents hearsay exception in Fed. R. Evid. 803(16) now provides:
> **(16)** ***Statements in Ancient Documents***. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

The amendment does not affect <u>authentication</u> of ancient documents, which remains governed by Fed. R. Evid. 901(b)(8). Under that provision, a party can authenticate an "ancient document" that is at least 20 years old if its condition creates no suspicion about its authenticity and it was found in a place where the document would likely be if authentic. Fed. R. Evid. 901(b)(8)(A)-(C).

Iowa has not amended its ancient documents evidence rules. The hearsay exception in Iowa R. Evid. 5.803(16) admits statements in documents that are "at least 30 years old and whose authenticity is established." (as restyled). The authentication provision in Iowa R. Evid. 5.901(b)(8) presumes authenticity of documents or data compilations that are at least 30 years old unless their condition or the location where they are found raises a question regarding their authenticity.

b. <u>Authentication of Electronically Stored Information—New Federal Rules 902 (13) and 902(14)</u>: Two new subdivisions have been added to Fed. R. Evid. 902 to permit self-authentication of electronic evidence through a certification procedure similar to that currently used for business records. New federal rules 902(13) and 902(14) provide:

> **(13)** ***Certified Records Generated by an Electronic Process or System*.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).
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> **(14)** ***Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with

the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

These new provisions eliminate the need to provide extrinsic evidence of authenticity for certified records "generated by an electronic process or system," as well as certified "[d]ata copied from an electronic device, storage medium, or file." See advisory committee note to the 2017 amendments to Fed. R. Evid. 902(13) and Fed. R. Evid. 902(14).

A party must give advance notice of its intent to self-authenticate digital evidence. Both provisions incorporate the business record provisions in rule 902(11), which provides:

> Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

Fed. R. Evid. 902(11). Thus, federal litigants can determine in advance of trial whether the authenticity of electronic evidence, such as spreadsheets, webpages, GPS devices, and cell phones, will be challenged. See Fed. R. Evid. 902(13) advisory committee note to 2017 amendment (indicating that "[t]he amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.").

A "qualified person" can then provide a certification containing "information that would be sufficient to establish authenticity" of the electronically-generated evidence "were that information provided by a witness at trial." Fed. R. Evid. 902(13) advisory committee note to 2017 amendment. For example, data copied from an electronic device is now frequently authenticated by comparing the "hash values" of the original and the copy. "A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file." Fed. R. Evid. 902(14) advisory committee note to 2017 amendment. Under Fed. R. Evid. 902(14), a qualified person can now certify that the original and copy have identical hash values. However, "[t]he rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology." Id.

Certifications under Federal Rules 902(13) and (14) establish only that an item of electronic evidence is authentic. Opponents remain free to object to the admissibility of such evidence on other grounds, such as hearsay, relevance, or the right to confrontation, and may still challenge its accuracy, reliability, ownership, or control. Fed. R. Evid. 902(13) and (14) advisory committee note to 2017 amendment.

Iowa has not yet adopted comparable rules concerning self-authentication of electronic records. Thus, an Iowa litigant must produce extrinsic evidence sufficient to demonstrate that digital evidence "is what the proponent claims it is." Iowa R. Evid. 901(a) (as restyled).

2. Proposed Amendment to FED. R. EVID. 807: Significant amendments to Fed. R. Evid. 807, the residual or catch-all hearsay exception, have been proposed and published for public comment. The public comment period expired in February 2018 and the Advisory Committee is currently considering those public comments. Rather than requiring "equivalent

circumstantial guarantees of trustworthiness," Fed. R. Evid. 807(1), the proposal would require that a statement be "supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement." Proposed Fed. R. Evid. 807(a)(2). The Advisory Committee regards the current "equivalence" standard as unworkable given that "there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions." Memorandum to Advisory Committee on Evidence Rules re: Amendment to Rule 807 (April 26, 2018) ["Advisory Committee Rule 807 Memorandum"]. The proposal additionally deletes both the materiality and the "interests of justice" requirements of the current federal rule as redundant of existing rules. See Fed. R. Evid. 402 (all evidence must be relevant); Fed. R. Evid. 102 (requiring that rules be construed "to the end of . . . securing a just determination." Finally, the amendment would update the current notice requirement in Fed. R. Evid. 807(b). See Advisory Committee Rule 807 Memorandum. If approved in their current iteration, the amendments to Fed. R. Evid. 807 would become effective, at the earliest, in December 2019.

3. Proposed Amendment to FED. R. EVID. 404(b): In August 2018, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States published for public comment draft changes to the notice provisions of Fed. R. Evid. 404(b)—the rule admitting other crimes, wrongs, or acts for non-propensity purposes. In its present form, rule 404(b) requires that, upon request by an accused in a criminal case, the prosecutor must provide "reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial" and that such notice must be given "before trial—or during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(2)(A) & (B). Under the proposed published amendment, the prosecutor must, absent good cause, provide this pretrial notice in writing and without waiting for a request by the defendant. More importantly, the proposal expands the notice obligation and would require prosecutors to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." The deadline for written public comments is February 15, 2019.

III. Iowa Supreme Court Evidence Decisions: 2017-2018 Term

A. Harmless Error and Substantial Rights: Iowa R. Evid. 5.103

In ***State v. Ness*, 907 N.W.2d 484 (Iowa 2018)**, the Court declined to find harmless error in the concededly erroneous admission of an Alco-sensor test result in a driving while intoxicated prosecution. In that case, the defendant Ness had driven himself to meet his probation officer, who determined that Ness was intoxicated (a parole violation) after observing him park and exit his vehicle, interacting with Ness, and administering a preliminary breath test using the Alco-sensor—which is often used by law enforcement as a preliminary breath screening device. Id. at 485. In the OWI prosecution, the trial court allowed the State to introduce the high Alco-sensor test results obtained by Ness' parole officer. Ness argued that the implied consent law barred the State from introducing the results of a preliminary breath screening test, but the trial court determined that the implied consent statute did not apply in Ness' case because his probation officer had used the device to determine whether Ness had violated his parole, not as a preliminary screening test. Id. at 486. Although there is apparently some question whether Iowa's implied consent statute, I.C. A. § 321J.5(2), renders the Alco-sensor results inadmissible

in this parole context, the State conceded the issue on appeal. See Ness, 907 N.W.2d at 487 (declining to resolve whether the implied consent law barred test results "because the State concedes for appeal purposes that the .130 test result should not have been admitted."). Instead, the State argued that the error in admitting the breath test results was harmless given the other strong evidence that Ness had been intoxicated when he drove to meet his probation office. That other evidence included the testimony of several witnesses who had observed and interacted with Ness and the booking video of Ness at the police station. Id. at 489.

The Iowa Supreme Court noted that generally it would not "overturn a conviction for an error in the receipt of evidence if the error was harmless." Id. at 487. See also Iowa R. Evid. 5.103(a) ("A party may claim error in ruling to admit or exclude evidence only if the error affects a substantial right of the party. . . ."). In determining whether evidence is sufficiently prejudicial to require reversal, the appellate court asks "'[d]oes it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice.'" Id. at 488 (citations omitted). The court will presume prejudice from an evidentiary error "unless the record affirmatively establishes otherwise." Id.

The Court in *Ness* noted that while the State's other evidence of Ness' intoxication was indeed strong, "there is something special about objective tests" like a blood-alcohol analysis that a jury might "seize in order to avoid the messy business of weighing the imprecision of mere observation." Id. at 489. The Court found the video evidence inconclusive and the prosecutor had emphasized the objective test results during her closing argument. Id. Thus, the case did not fall into "one of the relatively rare OWI cases where admission of a test showing a blood alcohol level in excess of the legal limit could be considered harmless." Id. at 485. Because the presumption of prejudice had not been rebutted, the Court reversed Ness's OWI conviction and remanded for a new trial without the Alco-sensor result. Id. at 489.

B. Judicial Notice and Proof of Municipal Ordinance: Iowa R. Evid. 5.201

In ***State v. Scheffert,* 910 N.W.2d 577 (Iowa 2018)**, the Court referenced a statutory rule of evidence, I.C.A. § 622.62, governing the admissibility of an ordinance at trial. A sheriff's deputy had found the defendant's vehicle parked in a county conservation area after closing time and, after searching the vehicle, discovered marijuana therein. The central issue in the case concerned whether the sheriff had had probable cause to stop and search Scheffert's vehicle because it had entered the county conservation area after hours. The court of appeals had reversed Scheffert's drug conviction because the State had failed to lay the foundation under I.C.A. § 622.62 for admitting the county regulation setting the closing time. Id. at 583. The Supreme Court held, however, that the defendant had waived any objection regarding the State's failure to introduce the regulation when he failed to to object to the deputy's testimony about the conservation area's closing time. Id. at 583-84. *Scheffert* illustrates that admissibility of some types of evidence may be governed by statute in lieu of or in addition to the Iowa Rules of Evidence.

C. Rebuttable Presumptions: Iowa R. Evid. 5.301

In ***Westco Agronomy Co. LLC v. Wollesen,* 909 N.W.2d 212 (Iowa 2017)**, the Court discussed the operation and (un)constitutionality of the rebuttable presumption created by Iowa's negligent empowerment statute, Iowa Code § 706A.2(5). This statute, known as the Ongoing

Criminal Conduct Act, authorizes the recovery of treble damages, attorneys' fees, and costs from a party that negligently permits its property or services to be used to facilitate a third person's unlawful activity. Specifically, the Act makes its unlawful for a person "to negligently allow property owned or controlled by the person or services provided by the person, . . . to be used to facilitate specified unlawful activity, whether by entrustment, loan, rent, lease, bailment, or otherwise." Id. § 706A.2(5)(a). The Iowa statute is "unique" and "quite broad" in that it encompasses far more offenses than the Model Act on which it is patterned. Id. at 223.

In *Westco Agronomy*, an agricultural cooperative sued one of its large farming customers claiming that the customer had conspired with a cooperative employee to obtain unauthorized special pricing for seed and chemicals. The farming customer denied that it had any knowledge of the employee's misdeeds and counterclaimed against the cooperative under the negligent empowerment statute, alleging that the cooperative was itself negligent in facilitating the employee's unlawful activities.

Under this statutory counterclaim, a plaintiff can recover treble damages merely by proving that the defendant's property or services "facilitated" another person to commit specified unlawful activity that injured the plaintiff. To avoid liability, a defendant must affirmatively demonstrate its own due care by a preponderance of the evidence. I.C.A. § 706A.2(5)(b)(4) (providing that "[t]he defendant shall have the burden of proof by a preponderance of the evidence as to circumstances constituting lack of negligence and on the limitations on damages. . . ."). In presumption lingo, once the plaintiff establishes that the defendant's property facilitated another to commit unlawful activity (the "basic fact"), a presumption of negligence (the "presumed fact") arises. Both the burden of production and persuasion then shift to the defendant to disprove its negligence. The trial court in *Westco Agronomy* held this burden-shifting presumption to be unconstitutional and dismissed the customer's negligent empowerment counterclaim. Westco Agronomy Co., 909 N.W.2d at 215-218.

A party opposing a rebuttable presumption like that at issue in *Westco Agronomy* may challenge the logical connection between the basic facts and the fact to be presumed. Torner by Torner v. State, 399 N.W.2d 381 (Iowa 1987). As in *Westco Agronomy*, such a challenge usually entails a constitutional attack under the due process clause of the federal or state constitutions. Westco Agronomy Co., 909 N.W.2d at 221. Although presumptions raise the most serious constitutional concerns in criminal cases, a presumption in a civil case can violate due process "if it is arbitrary or operates to deny a fair opportunity to rebut it." Id. at 221 *quoting* Hensler v. City of Davenport, 790 N.W.2d 569, 586 (Iowa 2010). For instance, the Iowa Supreme Court has found it arbitrary and irrational to use the mere occurrence of an incident to presume that a party negligently caused that occurrence. Westco Agronomy, 909 N.W.2d at 221.

In *Westco Agronomy*, the Court recognized that a presumption may be unconstitutional if it unconstitutionally shifts the burden of persuasion concerning a "multifaceted, mixed question of fact and law" such as negligence because an injury can occur in the absence of negligence and an incident can be caused by multiple factors. Id. at 222. The burden-shifting provision in Iowa's negligent empowerment statute did just that by relieving the plaintiff of its burden of proving negligence merely on a showing that property or services owned or controlled by a defendant facilitated a third party to commit unlawful activities. Thus, the rebuttable presumption in the

statute violated the due process clause of both the federal and Iowa constitutions. Id. at 219-223. The Court went on to hold, however, that that unconstitutional presumption could be severed from the statute so long as the claimant retained the ultimate burden of proving the defendant negligent. The customer's counterclaim for negligent empowerment thus should not have been dismissed. Id. at 223-24.

In reaching its holding, the Court took care to distinguish the rebuttable presumption struck down in *Westco Agronomy* from other civil presumptions that it had previously validated. The Court noted that unlike the negligent empowerment presumption, those other valid presumptions were confined to particular regulated industries or could be rebutted "by narrow, concrete proof relating to a specific time and place." Id. at 222-23. For instance, the Court has upheld the constitutionality of an automated traffic enforcement ("ATE") ordinance that presumed that the owner of a vehicle caught speeding on camera was the person responsible for that traffic violation. City of Sioux City v. Jacobsma, 862 N.W.2d 335, 346-347 (Iowa 2015). The Court has also validated the presumption created by Iowa's dramshop statute, I.C.A. 123.92(1)(b), that provides that once the plaintiff establishes intoxication and provision of intoxicating liquors by the defendant (the basic facts), the burden shifts to the defendant to prove that the intoxication was not the cause of the act causing injury (the presumed fact). In distinguishing the dramshop presumption from the one created by the negligent empowerment statute, the Court stated that "a presumption that intoxication *did* contribute to an injury committed by a drunk person seems rational and defensible, not arbitrary." Westco Agronomy, 909 N.W.2d at 223 (emphasis in original). Moreover, the dramshop presumption is "limited to a particular regulated industry" and can be rebutted by "narrow, concrete proof relating to a specific time and place." Id.

Westco Agronomy illustrates that while "rational connection" is certainly a liberal and forgiving standard, civil presumptions are not immune from constitutional challenge. It remains to be seen what effect (if any) *Westco Agronomy* may have on the legislature's ability to impose strict liability or to create an affirmative defense that shifts the burden of persuasion on an issue to the defendant.

D. Relevance and Unfair Prejudice: Rules 5.401-5.403

The Court decided two cases that addressed the relevance of evidence and the balancing of probative value against the risk of unfair prejudice.

1. Circumstantial Evidence as Proof of Intent

In ***State v. Kelso-Christy***, 911 N.W.2d 663 (Iowa 2018), the Court acknowledged the difficulty of proving intent and reaffirmed that intent can be established through both direct and circumstantial evidence, including "inferences reasonably to be drawn from the conduct of the defendant and from all the attendant circumstances, in the light of human behavior and experience." Id. at 668. The Court applied this well-established tenet in this case where the defendant posed as another person on Facebook and deceived the blindfolded victim into believing that she was engaging in sexual intercourse with that other person. Id. at 664-666. The Court held that the circumstances surrounding the sexual encounter demonstrated that the defendant had entered the victim's home with the specific intent to have sexual intercourse without the victim's consent. Id. at 673.

2. Prior OSHA Citations in Failure to Warn Case

In ***Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018)**, the estate of a deceased former boiler installer who had died from mesothelioma brought a product liability action against a number of companies that had manufactured, distributed, and sold asbestos-containing products. An evidentiary issue in the case concerned whether the district court had erroneously admitted evidence that one of the defendant boiler manufacturers had been cited by OSHA for violating a number of asbestos regulations that OSHA had promulgated two years beforehand. Specifically, the evidence showed that the manufacturer had failed to affix warnings on its asbestos products (including products like those used by the decedent) until after it had been cited by OSHA. Id. at 77. The Iowa Supreme Court held that the OSHA citation evidence was relevant to the issue of punitive damages—the manufacturer's failure to place warnings on its products until after it had been cited by OSHA, "despite having knowledge of asbestos' risks, clearly has a tendency to make it more or less probable that [the manufacturer] acted with willful disregard for the rights and safety of others." Id.

E. Character and "Other Act" Evidence: Rules 5.404 and 5.412

The Court decided two cases discussing the admissibility and proof of a victim's character in criminal cases.

1. Victim's Character in Self-Defense Case

In ***State v. Einfeldt*, 914 N.W.2d 773 (Iowa 2018)**, the Court briefly discussed the admissibility and methods of proving a victim's character in a criminal case where the defendant asserts self-defense. In that case, the defendant Einfeldt and her two daughters were convicted of willful injury causing bodily injury arising out of a physical altercation that occurred after the three women went to the home of the victim, a woman with whom one of the daughters was feuding, and verbally and physically assaulted her. Einfeldt asserted self-defense in justification of her actions. Id. at 775-76.

The primary issue in *Einfeldt* concerned whether the trial court erred when it refused to grant the mid-trial request of Einfeldt's attorney for a competency evaluation of his client, who had exhibited erratic behavior during the trial. Id. at 776-78. The Iowa Supreme Court reversed Einfeldt's conviction on this ground and remanded for a new trial. Id. at 783.

Einfeldt also claimed, however, that the trial court erroneously prevented her from supporting her claim of self-defense with evidence that the assault victim had committed two felony assaults as a juvenile over ten years earlier and had verbally threatened a defense witness because the victim and the witness were dating the same man. Id. at 775-776. Although the Court was reversing Einfeldt's conviction on the competency issue, it addressed Einfeldt's attempt to introduce this victim character evidence because the issue was likely to arise on retrial. Id. at 783.

The Court addressed this evidentiary question by stating: "While ordinarily evidence of a victim's prior violent or turbulent character is immaterial and not admissible at trial, if the accused asserts he or she acted in self-defense, specific instances of the victim's conduct may be used to demonstrate his or her violent or turbulent character." Id. at 783-84. This statement, however, conflates admissibility of victim character evidence with methods of proving victim character.

Under Iowa R. Evid. 5.404(a)(2)(A), an accused who claims that the victim was the first aggressor may offer evidence of the victim's turbulent, quarrelsome or violent disposition to show conduct in conformity with that character. Rule 5.404, however, only addresses the admissibility of victim character; it does not provide the method by which an accused may prove the victim's character (i.e., reputation, opinion, or specific instances of conduct). For methods of proving character, a court must look to rule 5.405. Although the *Einfeldt* decision does not discuss rule 5.405, that rule suggests that the victim's character can only be established using reputation or opinion testimony.

Specific instances of conduct are only admissible "[w]hen a person's character or character trait is an essential element of a charge, claim, or defense." Iowa R. Evid. 5.405(b). A claim of self-defense, however, does not require proof of character or a trait of character *as an essential element of the justification*. Self-defense can be proven in many instances without introduction of any character evidence. Indeed, a victim can possess a peaceful character and still be the aggressor in a confrontation. Likewise, a victim can possess a violent character and not be the aggressor in a particular violent encounter.

Generally, then, unless a defendant claims to have knowledge of a victim's specific violent conduct, a defendant who asserts self-defense is using the victim's character circumstantially—to show that the victim had a violent character and therefore was more likely to have acted in conformity with that violent character as the first aggressor. Although this circumstantial use of a victim's character is permitted under rule 5.404(a)(2), a defendant should be limited to reputation and opinion evidence in proving that character. Iowa R. Evid. 5.405(a). Such a position is consistent with prior Iowa caselaw and the federal majority approach on the issue. See State v. Jacoby, 260 N.W.2d 828, 838 (Iowa 1977) (noting that "[i]t is the rule in Iowa and the majority of jurisdictions" that a homicide victim's violent character "cannot be established by proof of specific acts"). See also U.S. v. Smith, 230 F.3d 300 (7th Cir. 2000) (noting that under Fed. R. Evid. 405, specific acts of conduct are not elements of a self-defense claim unless the defendant claims to be aware of the prior acts). However, *Einfeldt* and at least two other decisions of the Court now hold otherwise. See Einfeldt, 914 N.W.2d at 784. See also State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015); State v. Dunson, 433 N.W.2d 676, 681 (Iowa 1988).

Ultimately, the Court's approval of specific act evidence to prove a victim's violent disposition mattered little to the defendant in *Einfeldt*. The *Einfeldt* Court acknowledged the trial court's wide discretion under rule 5.403 to exclude victim character evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Id. at 784. The Court noted that Einfeldt's victim character evidence included felony convictions that were over ten-years-old and which the victim had committed when she was just sixteen- and nineteen-years-old. That remote evidence carried minimal probative value given that "an adolescent's character is frequently not formed, and such adolescents often develop into adults with completely different characters." Id. Likewise, the trial court acted within its discretion in excluding the defense witness's testimony that the victim had verbally threatened her over an ex-boyfriend because "[v]erbal threats are not very probative . . . of a person's tendency toward physical confrontations and violence." Id. Finally, the Court affirmed the trial court's exclusion of evidence that shots had been fired in the defendant's apartment complex the night of the charged assault because the

defendant had not sufficiently linked those shots to the victim or established that they targeted the defendant or her daughters. Id. The trial court thus acted within its discretion in excluding the irrelevant and prejudicial character evidence. Id.

2. Victim's Past Sexual Behavior and False Sexual Assault Claims

In the post-conviction proceeding in ***State v. Powers*, 911 N.W.2d 774 (Iowa 2018)**, a defendant convicted of child sexual abuse several years earlier attempted to subpoena police reports that reflected the victim's allegedly false claims of sex abuse by gang members that had occurred after Powers' trial and conviction, but before his sentencing. Id. at 782. The trial court granted the city's motion to quash and denied the defendant access to the investigative reports. On interlocutory appeal, the Supreme Court held that the trial court had abused its discretion when it denied Powers discovery of the reports. Id. at 782.

Significantly, the Court confined its decision to the question whether the police reports fell within the broad scope of discovery and did not decide whether the disputed evidence would be admissible in the defendant's post-conviction proceeding. Id. at 781. The Court held that Powers had satisfied the "low threshold" for demonstrating how the evidence of false sexual assault claims were "reasonably calculated to lead to the discovery of admissible evidence." Id. Evidence tending to show that the victim had made false complaints of sexual abuse against others spoke to the credibility of the complainant and was especially important in a case like Powers,' where the evidence of guilt was "not overwhelming." Id. 781-82. The Court thus ordered disclosure of the reports "under appropriate conditions determined by the district court" so that the defendant could develop the record. On remand, the trial court could then decide whether the report was admissible in the post-conviction proceeding. Id. at 783-84.

F. Privileges

1. Clergy Communications Privilege

In ***Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19 (Iowa 2018)**, former female members of a Pella congregation of the Dutch Reformed Christian Church sued the Church's Board of Elders for negligence, negligent supervision, and defamation in connection with their sexual abuse and exploitation by a former pastor of the church. Id. at 30-36. Again, the central issues in the case were non-evidentiary—whether all or any of the plaintiffs' claims were barred by the Religion Clauses of the State and Federal Constitutions or by the statute of limitations. Id. at 36-50.

The evidentiary issue in *Bandstra* concerned the applicability and scope of the clergy communications privilege. Again, discovery, rather than admissibility, was at issue. The plaintiffs sought to discover documents, including minutes of the Board of Elders meetings, relevant to the Board's alleged failure to supervise the pastor and the Board's response to the women's accusations. Id. at 51. The trial court, however, held that those documents were protected from discovery by the clergy privilege. Id.

The *Bandstra* Court began by reiterating the elements and rationale of the clergy communications privilege codified by statute in Iowa Code § 622.10(1). To fall within the privilege, a communication to a clergy member must be: "(1) confidential; (2) entrusted to a person in his or her professional capacity; and (3) necessary and proper for the discharge of the

function of the person's office." Id. at 52. This privilege exists, explained the Court, to facilitate the "long-standing public policy that 'the human being does sometimes have need of a place of penitence and confession and spiritual discipline.'" Id. (citation omitted).

The statutory privilege protects eligible communications with "members of the clergy." I.C.A. § 622.10(1). Although the defendant Elders in *Bandstra* had not received any formal theological training, the Court noted that they were "formally regarded as spiritual leaders" in the Church with authority over "matters of doctrine and spirituality." Id. at 52. The Elders thus could qualify as "members of the clergy" for purposes of the privilege. Id.

At the same time, the Elders were "more than spiritual leaders" because they performed administrative, as well as spiritual, duties for the Pella congregation. Id. at 52; 30-31. Thus, the clergy privilege would not necessarily protect all communications with and among those Church officials. Id. at 52. The Court in *Bandstra* explained:

> The clergy privilege ensures members of the Church may confide in an elder without fear of a subsequent disclosure in a judicial proceeding. It does not, however, encompass administrative or otherwise secular communications that happen to be uttered by an elder with some religious duties.

Id. Importantly, the Court characterized the Elders' supervision of Church ministers as "a purely secular task." Id.

Thus, on remand, the plaintiffs could petition the trial court to reconsider its ruling concerning previously withheld documents in light of the Court's clarifications of the clergy privilege. Id. at 53. That privilege would only protect communications necessary to the discharge of the Elders' duties as "religious counselors." Id. It would not encompass secular matters such as governance, administration, or supervision of the minister. Id.

2. Attorney-Client Privilege

In the employment discrimination case of ***Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018)**, the Court addressed "a significant issue regarding the boundaries of attorney-client privilege and work-product protection" requiring the Court to "decide whether plaintiff's counsel may depose defense counsel and obtain counsel's prelawsuit work product." Id. at 238. The Court held that a party may impliedly waive both attorney-client privilege and work product protection if it uses an attorney to conduct a pre-suit investigation into a complaint and then relies upon the reasonableness of that investigation to support its defense in a subsequent lawsuit. Id.

In this case, Fenceroy, a former employee of Gelita, claimed that he had been constructively discharged due to a supervisor's racial harassment. After leaving the defendant's employment, Fenceroy filed an administrative complaint claiming racial discrimination with the Iowa Civil Rights Commission. The employer hired an attorney to investigate and respond to Fenceroy's administrative complaint. The attorney interviewed multiple Gelita employees, drafted witness statements, and filed the company's response to the ICRC complaint. Gelita retained the same attorney to defend the company in Fenceroy's subsequent employment discrimination lawsuit. Id. at 238-41.

In both the administrative agency and the ensuing lawsuit, the employer asserted what is known as the Faragher-Ellerth affirmative defense. That defense relieves an employer of vicarious liability for discrimination by supervisors if the employer can demonstrate *either* that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer," *or* that the employer exercised reasonable care "to prevent and correct" harassing or discriminatory behavior. Id. at 242. That is, under the affirmative defense, an employer can escape vicarious liability by relying on the conduct of the employee (failure to use reporting procedures), the conduct of the employer (taking reasonable preventive or corrective actions), or both. Id. Gelita relied primarily on Fenceroy's alleged failure to take advantage of the flexible reporting procedures established by Gelita's published anti-harassment policy. However, Gelita also filed documents referencing the adequacy of its post-employment investigation of Fenceroy's complaint and the company's subsequent termination and discipline of responsible Gelita employees. Id. at 244-246. The plaintiff sought to depose the defense attorney and obtain her notes and other documents regarding that post-employment, pre-suit investigation. Id. at 240-241.

In rejecting Gelita's privilege claim, the Iowa Supreme Court held that the employer could not rely on the thoroughness of its pre-suit investigation without putting that investigation into issue. In order to adequately challenge the defense, the plaintiff must be allowed to probe the nature, content, and scope of that investigation by deposing the investigator-attorney and obtaining her investigatory notes and documents. Id. at 244. Thus, while an employer does not impliedly waive its attorney-client privilege "merely by using an attorney to investigate a complaint of workplace discrimination," the employer will waive privilege if it subsequently relies upon the investigation as proof that it exercised reasonable care to correct or prevent discriminatory conduct. Id. at 245.

Such waiver applies as well to non-opinion work product generated in anticipation of litigation. Id. at 246-47. See also Iowa R. Civ. P. 1.503(3) (trial-preparation materials). To the extent that a party grounds its defense on the thoroughness of its investigation, it "opens the door to discovery of the facts and process of its investigation." Fenceroy, 908 N.W.2d at 246-47. Opinion work product, however, would remain protected because "an attorney-investigator's mental impressions, conclusions, and legal theories" are "not germane to the objective reasonableness of [the party's] investigation." Id. at 247-48.

The critical issue in determining whether a party has impliedly waived attorney-client privilege or work product protection, then, is whether the party intends to rely upon the attorney's pre-suit investigation in support of its defense. Id. at 246. If an employer opts to focus its defense exclusively on the period of employment and rely solely upon the plaintiff's failure to take advantage of its anti-harassment reporting procedures, its attorney-client privilege would remain intact. If, however, the employer decides to bolster its defense by additionally showing the reasonableness of its investigation and its responsive remedial actions, attorney-client privilege and work product protection would be waived. Id. at 246-48. Ultimately, the employer determines whether the pre-suit investigation is sufficiently important to its defense to waive the privilege. Id. at 246 ("When confronted with a discovery request, the employer controls the outcome of the waiver issue.").

The Court remanded the case to allow the employer to "clearly and unequivocally" establish whether the investigatory materials created by its attorney were important enough to its defense to waive the attorney-client privilege. Id. at 246. If the employer failed to recant its reliance on the attorney's investigation, the plaintiff could depose the defendant's attorney and obtain her investigatory notes. Id. at 238. But see Id. at 253-255 (Waterman, J., dissenting) (arguing for heightened showing to depose opposing counsel).

G. Expert Testimony: Expert's Reliance upon Hearsay under Iowa R. Evid. 5.703

In ***In re Detention of Tripp*, 915 N.W.2d 867 (Iowa 2018)**, a case reviewing the civil commitment of the defendant as a sexually violent predator, the Court re-affirmed the restrictions placed upon an expert's reliance on otherwise inadmissible hearsay. Specifically, the Court cautioned that even if the State's expert reasonably relied on an inadmissible criminal complaint to assess the defendant's dangerousness, and even if that basis could be disclosed to and used by the factfinder in evaluating the expert's opinion, the underlying hearsay itself was not admissible to prove the truth of the facts asserted in the complaint. Id. at 874-875.

In *Tripp*, the defendant claimed that he had been unlawfully committed as a sexually violent predator and that the civil commitment proceedings should have been dismissed for lack of substantial evidence that Tripp had committed a "recent overt act." Id. at 874-75. The Iowa Supreme Court combed the record to determine whether the State had presented sufficient admissible evidence on this issue, focusing, in particular, on evidence surrounding a dismissed sexual offense charge and the subsequent revocation of Tripp's parole. Id. at 874. The Court noted that the dismissed criminal complaint containing the details of that sexual offense constituted inadmissible hearsay that could not be used to prove the truth of the allegations in that complaint. Id. at 875. Moreover, even if the State's expert could have reasonably relied upon the dismissed charge in assessing Tripp's dangerousness, that hearsay could be disclosed to the jury, if at all, only for use in evaluating the expert's opinion. Id. The Court explained:

> even if the hearsay evidence may be used by an expert to support an opinion, and, under certain circumstances, might even be disclosed to the factfinder to show the basis of the expert's opinion, any hearsay evidence that is admitted under rule 5.703 is not admissible for proving the fact of the matter asserted.

Id. Thus, the complaint itself, even if relied upon by the State's expert, could not be used as substantive evidence that Tripp had committed a recent overt act. Id. The Court went on to find the State's other evidence equally insufficient to support Tripp's civil commitment. Id. at 875-77.

IV. Iowa Court of Appeals Evidence Decisions

The following briefly summarizes selected (largely unpublished) decisions decided by the Iowa Court of Appeals during the Update period. Although these unpublished decisions do "not constitute controlling legal authority," they may be cited in a brief as persuasive authority under IOWA R. APP. PROC. 6.904(2)(c).

A. Preservation of Evidentiary Error

Estate of Casteel v. Wray, 2018 WL 4635695, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (ruling that plaintiffs in wrongful death suit had failed to preserve error concerning the admission

of evidence that the decedent lacked the endorsement necessary to drive a motorcycle on a public highway and that the motorcycle lacked turn signals and headlights; the trial court's denial of plaintiffs' motion in limine was not unequivocal and instead alerted the parties that the court would rule on challenged evidence when it was actually presented at trial).

Hyten v. HNI Corp., 2018 WL 348091, 912 N.W.2d 855 (Iowa Ct. App. 2018) (Table) (noting that purpose of offer of proof is to provide adequate information for informed decision by trial court and an adequate record for appeal and holding interrogatory answers offered by plaintiff to be a "wholly inadequate" offer of proof).

B. Judicial Notice

State v. Hopper, 2017 WL 936085, 899 N.W.2d 739 (Iowa Ct. App. 2017) (Table) (taking judicial notice on appeal that Iowa Courts Online records showed that the defendant had satisfied his financial obligations and holding that his appeal regarding whether the district court had imposed an illegal sentence requiring payment of restitution was thus moot).

C. Relevance and Unfair Prejudice

State v. Chaney, 2018 WL 3650307, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (trial court did not erroneously assess prejudice from portion of police video displaying defendant's conduct and language in the aftermath of his arrest for assault on a police officer and interference with official acts; fact that jury returned a mixed verdict that acquitted the defendant on three charged crimes indicated that the video that the defendant wished to exclude did not provoke jury to convict him on emotional or irrational grounds).

Reed v. State, 2018 WL 3471590, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding, in race discrimination and retaliatory discharge employment case, that trial court erroneously limited the plaintiff from introducing relevant evidence of the defendant's different treatment of similarly situated employees; such evidence supported inference that intentional discrimination and/ or retaliation were motivating factors in defendant's termination of the plaintiff).

Christensen v. Good Shepherd, 2018 WL 2731626, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding, in nursing home negligence case involving death of resident, that plaintiff laid proper foundation to admit evidence of nursing home's prior regulatory citations concerning same issues with other residents in same facility; such evidence was "obviously relevant" to punitive damages and jury charge instructed jury that punitive damages may not punish defendant for harm to others).

State v. Hayes, 2018 WL 2722782, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding, in prosecution for attempted murder, assault, and robbery where identity was at issue, that trial court properly admitted video of defendant's police interview conducted after his arrest several weeks after assault that showed the defendant in handcuffs; defendant's hairstyle, which was similar at the time of interview and the assault, had changed by the time of the trial and the jury already knew that the defendant had been arrested and handcuffed).

State v. Chaney, 2018 WL 1433546, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (trial court abused its discretion in admitting alcohol-related evidence when the defendant was not charged

or tested for operating his vehicle while intoxicated and alcohol was not even marginally relevant to charges of driving while barred and under suspension; error, however, was not prejudicial).

State v. Frakes, 2018 WL 1433581, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (admitting, in drug prosecution, testimony, documents, and photographs of a sex room in basement of defendant's home where drugs were found; even though evidence cast defendant in a bad light as "kinky," evidence had probative value in showing "ongoing and inter-related drug and sexual activity" in defendant's home).

State v. Frakes, 2018 WL 1433581, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (admitting, in drug prosecution, financial documents showing that defendant had no legitimate source of income to explain large amounts of cash hidden throughout defendant's house).

State v. Lee, 2018 WL 2084908, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (upholding trial court's refusal under rule 5.403 to allow defendant to cross-examine his daughter (whom he was accused of sexually abusing) about her drug and alcohol use in order to show her motive for fabricating allegations to avoid living with the defendant because he did not allow her to use drugs and alcohol in his home; defendant was permitted to ask general questions of his daughter regarding her preference for living with her mother and challenged questions regarding her illegal drug and alcohol habits raised a "real concern" that the jury would consider the daughter as "not a person worthy of belief").

B&F Jacobson Lumber & Hardware, L.L.P. v. Acuity, 2017 WL 6513961, 912 N.W.2d 500 (Iowa Ct. App. 2017) (holding, in bad faith litigation regarding insurer's adjustment of property damage claim, that trial court erroneously excluded all of insurer's post-filing conduct as unduly prejudicial; instead trial court should have carefully balanced whether post-filing conduct related to litigation strategy (which would be unfairly prejudicial) or to adjusting decisions required by parties' contractual relationship (which would be probative and admissible under rule 5.403)).

Bastion Capital Group, Inc. v. Matthews, 2017 WL 1405909, 900 N.W.2d 617 (Iowa Ct. App. 2017) (Table) (finding no reversible error in the admission of marginally relevant evidence of defendant's net worth where the jury could infer the defendant's wealth from other evidence).

State v. Ward, 2017 WL 1278288, 900 N.W.2d 616 (Iowa Ct. App. 2017) (Table) (holding that evidence that defendant had discussed threatening witnesses relevant to prove defendant's guilt and connection to the crime).

D. Other Crimes and Wrongs under Rule 5.404

State v. Brownlee, 2018 WL 1099260, 913 N.W.2d 275 (Iowa Ct. App. 2018) (Table) (holding, in arson prosecution, that reference to drugs in defendant's recorded police interview indicating that defendant owed a drug debt to the person who solicited him to commit arson, was relevant to defendant's motive; evidence could not be sanitized to a general debt because fact that defendant owed money for drugs established the strength of his motive).

State v. Shawhan, 2017 WL 6513522, 912 N.W.2d 500 (Iowa Ct. App. 2017) (Table) (holding rule 5.404(b) jury instruction superfluous and unnecessary because defendant's acts in absconding from residential correctional facility and using methamphetamine at victim's

apartment were part of events leading up to his striking of victim with baseball bat and were thus necessary to complete the story of the murder).

Gailey v. State, 2017 WL 3077915, 906 N.W.2d 205 (Iowa Ct. App. 2017) (Table) (defense counsel did not render ineffective assistance by failing to object to evidence of telephone conversation between defendant and his wife discussing defendant's sexual abuse of stepdaughter because conversation was part of downward spiral that precipitated his kidnapping, arson, and burglary of wife and another daughter).

State v. Brown, 2017 WL 3065148, __ N.W.2d __ (Iowa Ct. App. 2017) (Table) (affirming admission, in prosecution involving stabbing at house party, evidence of defendant's involvement in other stabbings that occurred at the same party to show that defendant possessed a knife before victim's stabbing).

State v. Lepon, 2017 WL 4049829, 908 N.W.2d 880 (Iowa Ct. App. 2017) (Table) (admitting girlfriend's testimony that defendant used methamphetamine the day before and day of murder to explain defendant's otherwise irrational decision to shoot the victim because he took the girlfriend's side in an argument).

State v. Gordon, 2017 WL 6039993, 912 N.W.2d 499 (Iowa Ct. App. 2017) (Table) (affirming admission of defendant's prior domestic abuse of victim to show why victim feared the defendant and did not physically resist his assault).

State v. Kula, 2017 WL 3283285, 908 N.W.2d 539 (Iowa Ct. App. 2017) (Table) (allowing officer to testify, in bench trial for sexual abuse and exploitation of three children, that 200 videos seized from defendant's home showed other minor children dressing and undressing in multiple locations connected to the defendant; strikingly similar evidence demonstrated defendant's knowledge and prurient intent and established that it was the defendant, rather than his 14-year-old son who was living with him at the time, who recorded the children and committed the charged offenses).

Fox v. Rechkemmer, 2017 WL 4315037, 908 N.W.2d 882 (Iowa Ct. App. 2017) (Table) (refusing to allow plaintiff in wrongful death civil action to introduce evidence of defendant's unrelated acts of negligence—including his failure to affix sticker on Terra Gator warning that tires might fail if equipment was operated above a certain speed and his failure to wear a seat belt—to show that defendant acted in conformity with that reckless character on day of accident).

E. Privileges

1. Marital Privilege

State v. Williams, 2018 WL 1099159, 913 N.W.2d 275 (Iowa Ct. App. 2018) (Table) (noting that while the marital privilege is "very broad," it does not apply to crimes committed by one spouse against the other; privilege thus did not prohibit wife from testifying about telephone conversation in which husband threatened her).

2. Doctor-Patient Privilege

State v. Retterath, 2017 WL 6516729, 912 N.W.2d 500 (Iowa Ct. App. 2017) (Table) (holding, in prosecution for solicitation of murder, that trial court construed "exculpatory" too narrowly

when it denied accused's request to access psychological records of key State witnesses and remanding for *in camera* review of counseling records to determine if they contained information that could undermine witnesses' credibility).

3. Attorney-Client Privilege

B&F Jacobson Lumber & Hardware v. Acuity, 2017 WL 6513961, 912 N.W.2d 500 (Iowa Ct. app. 2017) (addressing issue of first impression concerning the scope of the attorney-client privilege in a lumber yard's bad faith suit against its property insurer and holding that the trial court had improperly denied the insured discovery regarding why the defendant insurer had resisted an appraisal and delayed further payments on the claim; while privilege protects a client from revealing the advice that its attorney had given the client, the privilege does not prevent a party from asking why the client took a particular action).

B&F Jacobson Lumber & Hardware v. Acuity, 2017 WL 6513961, 912 N.W.2d 500 (Iowa Ct. App. 2017) (addressing issue of first impression concerning implied waiver of attorney-client privilege in bad faith suit against property insurer; insurer impliedly waived privilege by asserting that it relied upon the advice of counsel for every decision it made after the filing of the lawsuit).

F. Mode of Examination

State v. Reeves, 2018 WL 3650300, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (defining question as objectionably leading "when it suggests the answer to it, and not when it merely directs the attention of the witness to the immediate subject with reference to which he is interrogated," and indicating that trial court has "considerable discretion in admitting or excluding answers to leading questions" and to allow leading questions when necessary to develop witness' testimony such as when witness is a young child or witness is testifying about sexual abuse).

G. Impeachment

State v. Reeves, 2018 WL 3650300, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that trial court did not abuse its discretion when it prevented defense counsel from cross-examining robbery victim about his statements to officers during interview that he had walked from Kalamazoo, Michigan to Maquoketa, Iowa; witness's untruthfulness during interview was minimally probative of his truthfulness concerning robbery).

State v. Ingram, 2018 WL 1870417, 918 N.W.2d 503 (Iowa Ct. App. 2018) (Table) (affirming State's impeachment of defense witness with two minor theft convictions that occurred over 17 years before trial; although remote theft convictions are not automatically admissible, they are probative of non-accused witness' honesty).

State v. Chinberg, 2017 WL 6026718, 909 N.W.2d 444 (Iowa Ct. App. 2017) (Table) (finding no prejudice from State's use of drug conviction to impeach defense witness; drug offenses are not as prejudicial to non-accused witness and another defense witness corroborated defendant's version of events).

H. Opinion Testimony

State v. Garcia, 2018 WL 3913668, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (disagreeing about whether defense counsel in first-degree murder prosecution breached an essential duty in failing to specifically object to police detective's qualifications to testify about cellphone technology, but finding no prejudice from any such breach).

State v. Boutchee, 2018 WL 3302010, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that doctor's testimony that the injuries to assault victim's pelvis and spleen were consistent with an assault corroborated the circumstantial evidence and did not improperly vouch for assault victim's credibility).

State v. McCann, 2018 WL 1182766, 913 N.W.2d 627 (Iowa Ct. App. 2018) (Table) (affirming admission of police officer's testimony that the defendant must have known about drugs found in trailer; opinion was based on facts perceived by officer, such as location of drugs and paraphernalia within the trailer).

State v. Vandekieft, 2018 WL 2727720, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that expert did not testify specifically about child or "directly or indirectly compare [child's] behavior to a child abuse victim").

State v. Tran, 2018 WL 739320, 913 N.W.2d 274 (Iowa Ct. App. 2018) (Table) (defense counsel not ineffective for failing to object to doctor's testimony that 9-year-old victim was a "lovely little girl" who was "comfortable" talking to her).

State v. Basquin, 2018 WL 1858378, 918 N.W.2d 502 (Iowa Ct. App. 2018) (Table) (upholding testimony by nurse practitioner that domestic abuse victim's injuries were consistent with what victim told her at hospital, while acknowledging that injuries could also be consistent with the fall testified to by the victim).

State v. Barnhardt, 2018 WL 2230938, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (allowing forensic interviewer to provide jury with general information regarding behavior of child sex abuse victims even though testimony tracked specific weaknesses in State's case; jury was left to determine for itself whether complaining witness acted in accordance with that behavior).

In re C.W., 2017 WL 5185433, 909 N.W.2d 442 (Iowa Ct. App. 2017) (Table) (reversing delinquency adjudication of juvenile accused of sex abuse because of inadmissible vouching testimony by school counselor that victim had no reason to lie to her and that counselor had not heard a false story by a child in her 27 years working in the field).

State v. Simonich, 2017 WL 5179004, 909 N.W.2d 443 (Iowa Ct. App. 2017) (Table) (affirming admission of testimony by forensic interviewer that 10-year-old victim's statements were consistent with interviewer's "knowledge and experience in this field," as well as nurse practitioner's presentation of medical facts regarding the lack of injury in most anal penetration cases).

State v. Lepon, 2017 WL 4049829, 908 N.W.2d 880 (Iowa Ct. App. 2017) (Table) (affirming admission of medical examiner's conclusion that shooting was a homicide; although medical examiner had been told of girlfriend's account of incident, the expert tested that story against "medical and scientific evidence the doctor had already observed," including the coroner's comparison of the gun muzzle to a hard contact wound found on the victim's face).

State v. Arneson, 2017 WL 4049324, 908 N.W.2d 880 (Iowa Ct. App. 2017) (Table) (holding that law enforcement officer did not vouch for credibility of 14-year-old sex abuse victim by testifying that child was "hesitant to come forward" and "genuinely hurt").

Tyson v. State, 2017 WL 4315045, 908 N.W.2d 883 (Iowa Ct. App. 2017) (Table) (granting new trial because of cumulative effect of defense counsel's failure to object to expert's conclusion that child was "credible").

State v. Kozak, 2017 WL 6034639, 912 N.W.2d 499 (Iowa Ct. App. 2017) (Table) (holding that trial court did not err in admitting statements made by the defendant during his police interview that he had committed "premeditated murder," meaning that he had given some serious thought to his deliberate act; defendant's own characterization of what he was thinking at time of shooting was extremely probative of his state of mind and trial court mitigated any potential confusion from defendant's use of legal terminology by instructing jury to rely upon definitions provided in court's final jury instructions).

I. Hearsay

1. Definition of Hearsay under Rule 5.801(c)

State v. Mills, 2018 WL 3913778, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (characterizing records received from Google in response to subpoena requesting verification of defendant's Gmail account as non-hearsay because affidavit from Google custodian established that records were automatically generated by computer with no human declarant; in contrast, records from cell phone and text message providers contained no such certification and thus constituted inadmissible hearsay).

State v. Banes, 910 N.W.2d 634 (Iowa Ct. App. 2018) (affirming admission of burglary victims' testimony about rumors heard by their son that defendant was involved in burglary of victims' auto store; son's statements explained why victims pursued defendant in a high speed chase that ultimately led to the discovery of the stolen goods in the vehicle driven by the defendant).

State v. Vandekieft, 2018 WL 2727720, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that mother's testimony relating child's out-of-court statement concerning specifics of what defendant did to child went beyond what was necessary to explain why mother went to the authorities and why she left the defendant; error, however, was not prejudicial).

2. Prior Consistent Statement under Rule 5.801(d)(1)

State v. Kramer, 2018 WL 345454, 912 N.W.2d 855 (Iowa Ct. App. 2018) (Table) (upholding admission in bench trial of sexual abuse victim's consistent deposition testimony to rebut implication made on cross-examination that witness had changed her story since her deposition).

3. Statement of Party-Opponent under Rule 5.801(d)(2)

State v. Garcia, 2018 WL 3913668, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (disagreeing about whether defense counsel in first-degree murder prosecution breached an essential duty in failing to specifically object to instruction telling jury that it could treat defendant's unsworn out-of-court statements "just as if they had been made at this trial," but finding no prejudice from any such breach).

4. Confrontation Clause and Hearsay

State v. Pogwizd, 2018 WL 1442680, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (holding that the accused failed to preserve his Confrontation Clause argument by objecting solely on hearsay grounds).

State v. Pace, 2018 WL 1629894, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (characterizing as non-testimonial statements that 4-year-old child of domestic abuse victim made to police one minute after police arrived at apartment in response to 911 call that defendant tried to kill his mother);

State v. Lucier, 2017 WL 4570531, 909 N.W.2d 228 (Iowa Ct. App. 2017) (Table) (holding that 5-year-old's identification of defendant to doctor specializing in child sex abuse did not violate Confrontation Clause given that case involved "virtually identical facts and the same physician" as *In re J.C.*).

State v. Kissel, 2017 WL 6032585, 909 N.W.2d 444 (Iowa Ct. App. 2017) (Table) (finding admission of video of child sexual abuse victim's forensic interview did not violate defendant's Sixth Amendment right to confrontation where the child and interviewer testified at trial).

5. Excited Utterances under Rule 5.803(2)

State v. Pogwizd, 2018 WL 1442680, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (admitting assault victim's excited utterances made to school nurse and to detective before ambulance arrived; crying, shaking, trembling, and frightened girl arrived at school seeking a safe place within minutes of boyfriend's assault and detective arrived approximately 5 minutes later asking general "what happened" questions).

State v. Anderson, 2018 WL 1442629, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (admitting 6-year-old sex abuse victim's statements to her mother made "some hours" after defendant had touched child; record demonstrated that statement was made after the defendant had left and at a time when child was shaking, crying, and in pain).

State v. Sallis, 2017 WL 6040002, 912 N.W.2d 500 (Iowa Ct. App. 2017) (Table) (applying five factors to admit domestic abuse victim's report of assault to police at station).

6. Statements Made for Medical Diagnosis or Treatment under Rule 5.803(4)

State v. McBride, 2018 WL 3650299, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that State properly laid foundation for nurse to testify about 13-year-old's statements identifying defendant as perpetrator of sex abuse; nurse explained the medical pertinence of whether abuser is a member of a young child's household).

State v. Pogwizd, 2018 WL 1442680, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (holding that domestic abuse victim's identification of defendant as person who tried to drown her provided treating physician at hospital with "the mechanism of injury the girlfriend complained of and provided insight into injuries she may have sustained that were less immediately apparent, such as to her lungs or skull").

State v. Basquin, 2018 WL 1858378, 918 N.W.2d 502 (Iowa Ct. App. 2018) (Table) (distinguishing *Smith* because court limited nurse practitioner's testimony to nature of victim's

injuries and medical procedures taken in response to those injuries and did not allow nurse to relay victim's identification of perpetrator).

State v. Ramirez-Ruiz, 2018 WL 739246, 913 N.W.2d 273 (Iowa Ct. App. 2018) (Table) (holding that nurse practitioner's testimony did not violate parameters of *Smith* because it concerned what happened, rather than identity of perpetrator).

State v. Brodersen, 2017 WL 4049527, 908 N.W.2d 881 (Iowa Ct. App. 2017) (Table) (affirming admission of sexual abuse victim's statements to sexual assault nurse examiner at hospital that victim had been sexually abused by defendant; although victim's statements were used to determine what forensic evidence to obtain, all her statements were "made for purposes of medical diagnosis, if not for medical treatment").

7. Past Recollection Recorded under Rule 5.803(5)

State v. Sallis, 2017 WL 6040002, 912 N.W.2d 500 (Iowa Ct. App. 2017) (Table) (affirming admission under rule 5.803(5) of videotape of statement given to police at police station by sister of domestic violence victim even though sister testified that she could not remember giving a statement to the police and could not be sure that her statements were accurate due to her intoxication; sister acknowledged that she had no reason to mislead or lie to police and that any statement she would have made would have been true).

8. Business Records under Rule 5.803(6)

State Farm Insurance v. Warth, 2018 WL 4635692, __ N.W.2d __ (Iowa Ct. App. 2018) (reversing trial court's property damage award regarding custom horse trailer because subrogee insurer failed to lay foundation to admit as business records an invoice estimating repair costs or a letter stating the pre-collision value of the trailer; records were created by third parties and neither the insurance adjuster nor the trailer owner who testified for insurer could demonstrate that the exhibits were created by someone with knowledge or from information transmitted by a person with knowledge, who had knowledge about how businesses created or kept the records, possessed any duty with respect to such records, or could testify that businesses relied on the records' accuracy).

9. Residual Clause under Rule 5.807

State Farm Insurance v. Warth, 2018 WL 4635692, __ N.W.2d __ (Iowa Ct. App. 2018) (reversing trial court's property damage award regarding custom horse trailer because subrogee insurer failed to lay foundation for exhibits—an invoice estimating repair costs and a letter stating the pre-collision value of the trailer—under the residual hearsay exception; trial court failed to make specific findings demonstrating that exhibits met the exacting requirements of the catch-all exception and court's "terse statement" about "circumstantial guarantees of trustworthiness" did not suffice).

State v. Jarrett, 2018 WL 1099268, 913 N.W.2d 275 (Iowa Ct. App. 2018) (Table) (holding that even if accused had given requisite notice required by residual exception, sexual abuse victim's recorded statement to DHS denying abuse was not admissible because defendant could not demonstrate necessity of introducing that statement when child testified and was subject to cross-examination at trial).

J. Authentication

State v. Akok, 2018 WL 4362065, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that State properly authenticated incriminating Facebook message with circumstantial evidence demonstrating that message had been sent from the Facebook account of a person identifying himself as defendant and from an internet protocol address at the University of Iowa Hospitals and Clinics during a time when the defendant was being diagnosed and treated there).

State v. Mills, 2018 WL 3913778, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that police detective properly authenticated spreadsheet listing call records for blocked number from which victim received calls by testifying that he had received the records after he had subpoenaed them from cell phone provider; however, photograph of repair bill from Firestone showing cost of tire repairs had not been properly authenticated because record failed to demonstrate that the witness who attempted to authenticate the invoice was the person who had received it or paid it or had personal knowledge of amount paid by her boyfriend whose tires had been slashed).

State v. Martinez, 2018 WL 3650325, __ N.W.2d __ (Iowa Ct. App. 2018) (Table) (holding that police officers properly authenticated photograph of closet where firearm and ammunition was found by testifying that photograph fairly and accurately depicted the condition of the closet during their search; fact that officers had searched the closet and moved and cleared the round of the firearm before the photo was taken only affected the evidentiary weight to be given the photo by the fact-finder).

State v. Stickrod, 2018 WL 1433065, 913 N.W.2d 628 (Iowa Ct. App. 2018) (Table) (holding that State established chain of custody for jail inventory and boxer shorts).

State v. Caston, 2017 WL 2875689, 906 N.W.2d 204 (Iowa Ct. App. 2017) (Table) (police officer properly authenticated video footage from four different cameras depicting interior of bar the evening of riot; both officer and defendant were at the scene at the same time, officer testified that the film accurately depicted what he observed that night, and officer identified the defendant as someone officer knew).

V. Eighth Circuit Evidence Decisions

A. Relevance and Unfair Prejudice

U.S. v. Cross, 888 F.3d 985 (8th Cir. 2017), cert. denied 2018 WL 4283416 (U.S. 2018) (finding no reversible error in admitting a recorded phone call made by the defendant where the probative value was not outweighed by the possibility of revealing that the defendant was calling from jail; no unfair prejudice though the defendant sounded distressed and used profanity during the call).

B. Other Crimes or Wrongs; Other Acts of Sexual Abuse/Child Molestation

United States v. Oldrock, 867 F.3d 934 (8th Cir. 2017) ("Prior bad acts constituting sex offenses may be admitted to prove any relevant matter 'including the defendant's propensity to commit such offenses;'" government's evidence of defendant's sexual abuse of another minor was admissible to show defendant's "propensity to touch young girls inappropriately while they sleep").

U.S. v. Furman, 867 F.3d 981 (8th Cir. 2017) (in prosecution for child pornography involving defendant's granddaughters, admitting evidence of the defendant's prior conviction for sexually assaulting his then ten-year-old daughter to demonstrate "his intent and motive for purposes of the counts relating to producing, distributing, receiving, and possessing child pornography . . [and his] propensity to sexually assault young female family members").

C. Impeachment

U.S. v. Peebles, 883 F.3d 1062 (8th Cir. 2018), cert. denied 2018 WL 3633210 (U.S. 2018) (noting that while cross-examination of police officers about their involvement in a scandal may have had probative value, prohibiting such questioning did not violate the Confrontation Clause).

Rosales-Martinez v. Ludwick, 893 F.3d 558 (8th Cir. 2018) (affirming trial court's decision to place defendant behind a one-way mirror during deposition of child sexual abuse victim and to allow the child victim to testify by closed-circuit television at trial).

U.S. v. Babb, 874 F.3d 1027 (8th Cir. 2017) (finding no reversible error in exclusion of government witness' prior convictions that were over ten-years-old because witness had already admitted having a prior felony conviction that would have enhanced his punishment if convicted of drug crime and that likely motivated him to cooperate with government in current prosecution).

D. Opinion Testimony

Kirk v. FAG Bearings, LLC, 887 F.3d 376 (8th Cir. 2018) (holding medical causation opinion based on differential etiology to be acceptable causation testimony).

U.S. v. Lopez, 880 F.3d 974 (8th Cir. 2018) (affirming admission of DEA agent's testimony regarding the effect of drug purity on user quantity).

E. Hearsay

1. Confrontation Clause and Hearsay

U.S. v. Lundstrom 880 F.3d 423 (8th Cir. 2018) (admitting reports created by examiners with Office of Thrift Supervision for the purpose of administration of the agency's affairs and not for the purpose of establishing facts at trial).

U.S. v. LeBeau, 867 F.3d 960 (8th Cir. 2017) (co-conspirator's outbound phone calls from prison did not implicate the Confrontation Clause because the primary purpose of the calls was to further the drug conspiracy, not to create a record for prosecution).

2. Excited Utterance

U.S. v. Dean, 823 F.3d 422, 428 (8th Cir. 2018) (concluding that victim's 911 call that described assault in detail was made with sufficient contemporaneity to the underlying event because victim made call while still bleeding from assault).

3. Business Records

U.S. v. Hunter, 862 F.3d 725 (8th Cir. 2017) (in prosecution for conspiracy to file false tax returns, admitting as business records government exhibits containing Internet Protocol

addresses used after IRS investigator laid foundation by testifying from personal knowledge that an IRS database contains all filed income tax returns and an IP address from which an electronically filed return originated, that such database was maintained in the regular course of business, that the records were created when returns were filed, and that the investigator had personally prepared the trial exhibits).

U.S. v. Melton, 870 F.3d 830 (8th Cir. 2017) (admitting minutes from company's emergency board meetings in prosecution of company's CFO for mail fraud and failure to pay employment taxes after company's CEO testified that it was regular practice to keep minutes taken at board meetings, that minutes were prepared by outside corporate counsel, and that minutes were correct and accurate based on his personal recollection).

4. Public Records/Interests in Land

Dunn v. Bank of America, 844 F.3d 1002 (8th Cir. 2017) (admitting, in Truth in Lending Act suit, warranty deed granted to plaintiff borrowers by prior owners of property at issue under hearsay exceptions in Fed. R. Evid. 803(8) and 803(14)).

F. Authentication

U.S. v. Needham, 852 F.3d 830 (8th Cir. 2017) (holding that Government had properly authenticated screenshots of profile pages of social media groups on which child pornography was uploaded; online content can be authenticated "by a person's testimony that he is familiar with the online content and that the exhibits are in the same format as the online content" and government investigator testified that he personally viewed the profile pages and that the screenshots accurately represented the content of online sites).