IOWA EVIDENCE FIVE-YEAR UPDATE
2019 GENERAL PRACTICE REVIEW

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I. Introduction

This Update covers major developments in Iowa evidence law that have occurred during the last five years. The Update discusses recent and pending amendments to both the Iowa and the Federal Rules of Evidence. (See *infra* § II). The Update also discusses recent case law, focusing primarily upon evidentiary decisions of the Iowa Supreme Court rendered from 2014-2019.

(See *infra* § III). 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 also describes relevant evidence decisions of the United States Supreme Court decided during the Update period. (See *infra* § IV).

II. Rule Amendments

A. Iowa Rules of Evidence: 2017 Non-Substantive Restyling Amendments

Perhaps the most significant development in the last five years has been the comprehensive restyling of the Iowa Rules of Evidence. Many of the Iowa Rules of Evidence were patterned on the Federal Rules and, when the Iowa Rules were promulgated in 1983, most were identical in wording and substance to their federal counterparts. In 2011, however, the Federal Rules of Evidence underwent a non-substantive "style" revision that amended virtually every Federal Rule of Evidence. After the federal restyling, the Iowa Rules of Evidence differed in text and format from their federal analogs.

In 2015, the Iowa Supreme Court convened a working group to consider a similar restyling of the Iowa Rules of Evidence. The Court approved these non-substantive restyling amendments in order to bring the Iowa Rules "in line 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 restyled Iowa Rules of Evidence took effect on January 1, 2017.

The 2017 restyling made no substantive changes to the Iowa Rules. Indeed, the last substantive amendments to the Iowa Rules of Evidence occurred in 2009, and affected only a handful of rules. Accordingly, many of the Iowa Rules that were originally patterned on their federal counterparts have not kept pace with subsequent substantive amendments to the federal rules. The Iowa Supreme Court plans to create an advisory committee to consider whether Iowa should adopt any of these substantive federal amendments. See Id.

B. Federal Rules of Evidence:

The Federal Rules of Evidence have undergone a number of substantive changes during the Update period. The following discusses pending and effective amendments to the federal hearsay exceptions, including Fed. R. Evid. 801(d)(1)(B) (prior consistent statements); 803(6), (7), (8) (trustworthiness proviso to business and public records exceptions); 803(10) (certificate of no record); 803(16) (ancient documents), 804(b)(3) (statements against penal interest); and 807 (the residual exception). Additionally, the outline discusses two new authentication provisions governing electronically stored information, Fed. R. Evid. 902(13) and (14). Finally, the Update considers a pending amendment to the notice provision in Fed. R. Evid. 404(b) that governs "other bad act" evidence.

1. December 1, 2019 Amendment to Residual Hearsay Exception—Fed. R. Evid. 807

Significant amendments to Fed. R. Evid. 807, the residual or catch-all hearsay exception, became effective on December 1, 2019.

The prior version of the residual hearsay exception allowed a court to admit hearsay "not specifically covered" by an 803 or 804 exception if the statement has (1) "equivalent circumstantial guarantees of trustworthiness," (2) evidences a "material fact," (3) is more probative on a point than other evidence reasonably available to the proponent, and (4) will serve "the interests of justice." Fed. R. Evid. 807(a)(1)-(4) (prior to Dec. 1, 2019).

The revised "catch-all" exception no longer requires that a court find "equivalent circumstantial guarantees of trustworthiness." The Advisory Committee deemed the "equivalence" standard "difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all)." *See* Advisory Committee note to 2019 amendment to Fed. R. Evid. 807. Instead, the focus under the revised residual exception is on whether the hearsay statement is "supported by sufficient guarantees of trustworthiness," considering the circumstances under which the statement was made and the existence and strength of corroborating evidence. Fed. R. Evid. 807(a)(1) (effective Dec. 1, 2019). Although the amendment retains the necessity requirement of the former rule, it deletes both the materiality and the "interests of justice" requirements as redundant of existing rules such as Fed. R. Evid. 102 and 401. Finally, the amendment updates the current notice requirement in Fed. R. Evid. 807(b).

The amended federal residual exception now reads:

> **Rule 807. Residual Exception**
>
> (a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:
>
> (1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
>
> (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.
>
> (b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

2. December 1, 2017 Amendments: Ancient Documents Hearsay Exception and Authentication of Electronically Stored Information

a. Ancient Documents Hearsay Exception—Fed. R. Evid. 803(16)

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 was motivated by a concern with 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 authentication 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. Authentication of Electronically Stored Information—New Federal Rules 902 (13) and 902(14)

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).
>
> **(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).

3. December 1, 2014 Amendments: Prior Consistent Statements; Trustworthiness Proviso in Business and Public Records Hearsay Exceptions

a. Fed. R. Evid. 801(d)(1)(B): Prior Consistent Statements

Fed. R. Evid. 801(d)(1)(B) was amended to allow the use of a prior consistent statement "to rehabilitate the declarant's credibility as a witness when attacked on another ground. This federal amendment makes prior consistent statements of a declarant who testifies and is subject to cross-examination about that statement non-hearsay if offered:

> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

Fed. R. Evid. 801(d)(1)(B) 2014 amendment (underlined).

The amendment allows substantive use of prior consistent statements that rebut attacks on a witness's credibility for reasons other than recent fabrication or improper motive or influence. For example, the amendment would admit prior consistent statements to explain an apparent inconsistency in the witness's testimony or to rebut a charge of faulty memory. Under prior federal practice, such prior consistent statements were only admissible for the limited purpose of rehabilitating the witness. The amendment makes those prior consistent statements substantively admissible as well. *See* Fed. R. Evid. 801(d)(1)(B) advisory committee note to 2014 amendment.

Iowa has not adopted this federal amendment. Thus, prior consistent statements are admissible as substantive evidence in Iowa only to rebut a charge of recent fabrication or improper influence or motive.

b. Fed. R. Evid. 803(6) Business Records; 803(7) Absence of a Record of a Regularly Conducted Activity; and 803(8) Public Records

The December 1, 2014 amendment to the federal business records hearsay exception, Fed. R. Evid. 803(6), clarifies who bears the burden with respect to the trustworthiness of the record. Under that amendment, a business record will be admissible provided that the requirements of the rules are met and "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." The amended rule provides:

> **803(6)** ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, opinion, or diagnosis if:
>
> **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
>
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity;
>
> **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> **(E)** ~~neither~~ the opponent does not show that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6) 2014 amendment (struck-through & underlined). Thus, once the proponent of the record establishes the foundation requirements for the exception, the burden is on the opponent to show a lack of trustworthiness.

Similar amendments have been made to Fed. R. Evid. 803(7) (absence of a record of a regularly conducted activity) and Fed. R. 803(8) (public records enumerated in the rule are admissible if "opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness").

The Iowa business and public records hearsay exceptions incorporated these federal amendments as part of the 2017 restyling effort. Because the changes in the trustworthiness provisos mirrored existing practice, the amendments were deemed non-substantive in nature. See Iowa R. Evid. 5.803(6)(E); 5.803(7)(C); 5.803(8)(A).

4. Pending 2020 Amendment: Fed. R. Evid. 404(b)-Crimes, Wrongs, or Other Acts

The Advisory Committee on the Federal Rules of Evidence has been evaluating the frequently used and litigated federal rule 404(b) governing "crimes, wrongs, or other acts" for a number of years. The Committee was particularly concerned with the admission of such potentially prejudicial evidence against an accused in criminal cases. However, the Committee eventually decided against any substantive changes that would unduly complicate the trial court's decision whether to admit an accused's other crimes for a non-character purpose. Instead of recommending substantive amendments to rule 404(b), the Committee proposed strengthening the existing notice provision to protect defendants in criminal cases. Under the proposed amendment, prosecutors must provide advance written notice to the accused of "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." See May 14, 2018 Report of the Advisory Committee on Evidence Rules (revised July 16, 2018).

The Judicial Conference of the United States approved and transmitted the amendment to the United States Supreme Court this fall. If adopted by the Court and transmitted to Congress, the enhanced notice provision to federal rule 404(b) will take effect on December 1, 2020. Although Iowa's rule governing other bad acts mirrors the federal rule in substance, Iowa Rule 5.404(b) contains no notice provision whatsoever.

5. Other Potentially Relevant Federal Amendments Pre-Update Period:

a. Fed. R. Evid. 803(10): Certificate of No Record:. In 2013, Fed. R. Evid. 803(10), the hearsay exception for certificates of no record, was amended to alleviate potential Confrontation Clause problems posed by *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In 2017, Iowa's rule 5.803(10) was similarly amended as part of the non-substantive restyling amendments. Under the "notice and object" procedure in both the Iowa and Federal Rule, the prosecution can avoid Confrontation Clause problems by providing the accused written notice of its intent to offer a certification of no record at least 14 days before trial. The accused would then have 7 days to object. Presumably if the defendant does not object, he will be deemed to have waived his right to confront the person who searched the public records and signed the certification of no records. See Iowa R. Evid. 5.803(10)(B).

b. 2010 Amendment to Fed. R. Evid. 804(b)(3): Statements against Penal Interest. In 2010, the federal rule hearsay exception for statements against an unavailable declarant's interest was amended to require corroboration of all statements against penal interest [i.e., that expose a declarant to criminal liability] offered in criminal cases. Formerly, the rule required only the accused to corroborate exculpatory statements against penal interest. Now, the federal rule requires prosecutor and defendant alike to offer "corroborating circumstances that clearly indicate [the] trustworthiness" of all statements to that tend to expose any declarant to criminal liability. Iowa has not adopted this amendment and thus requires only the accused to demonstrate corroborating circumstances for statements against penal interest "offered to exculpate" (rather than inculpate) the defendant. Iowa R. Evid. 5.804(b)(3)(B).

III. Iowa Supreme Court Evidence Decisions: 2014-Present

A. Harmless Error and Substantial Rights: Rule 5.103

- **Hawkins v. Grinnell Regional Medical Ctr., 929 N.W.2d 261 (Iowa 2019).**

As a general rule, appellate courts will review a district court's decisions whether to exclude or admit evidence under an abuse of discretion standard of review. However, "challenges to hearsay and other evidence implicating the interpretation of a rule of evidence [are reviewed] for correction of errors at law." Hawkins v. Grinnell Regional Medical Ctr., 929 N.W.2d 261, 265 (Iowa 2019) (citations omitted). Moreover, "unless the record shows the contrary," the appellate court will "presume improperly admitted hearsay evidence is prejudicial to the nonoffering party." Id.

In *Hawkins*, that presumption of prejudice led the Court to reverse a $5 million judgment in an age/ disability employment discrimination case solely because the trial court improperly admitted an exhibit containing hearsay. Id. at 265. In that case, the former director of a hospital lab sued his long-time employer for age and disability discrimination when he was terminated while recovering from cancer. The hospital claimed that it had terminated Hawkins because he was "incompetent, unresponsive, and an unmotivated manager," and had failed to properly supervise the laboratory. Id. at 266. Hawkins sought to prove these purported reasons untrue by calling at least six employees and former co-workers to testify that Hawkins was a good supervisor and a competent, motivated, and responsive manager. Id. at 267. Additionally, the plaintiff introduced an exhibit consisting of seventeen cards and notes that he had received from friends and co-workers while recovering from cancer. Many of these cards offered appreciation and support for Hawkins and expressed disdain for the hospital and its decision to terminate Hawkins. Id. at 266. None of the well-wishers testified at trial.

The Iowa Supreme Court reversed the $5 million plaintiff's judgment and remanded for a new trial because this exhibit contained inadmissible hearsay, id., and "the record failed to rebut the presumption of prejudice associated with the admitted hearsay evidence." Id. at 266-67. The Court refused to consider the admission of the hearsay exhibit harmless even though six witnesses testified to the same matters contained in the improperly admitted cards and notes—that the plaintiff was a competent, responsive, and motivated manager and an effective supervisor. According to the Court, "this in itself [did] not establish the wrongfully admitted hearsay was merely cumulative" because the improperly admitted exhibit also contained additional inflammatory and prejudicial statements and opinions that went beyond the plaintiff's competence as a manager and supervisor. Id. at 267. The Court found the evidentiary error dispositive and reversed and remanded for a new trial. Id. at 265.

- ***State v. Ness*, 907 N.W.2d 484 (Iowa 2018)**.

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. 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. . . ."). However, even if other evidence of the defendant's intoxication was 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 case thus 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. The Court accordingly reversed Ness' OWI conviction and remanded for a new trial without the Alco-sensor test result. Id. At 489.

- ***State v. Webster*, 865 N.W.2d 223 (Iowa 2015).**

In ***State v. Webster*, 865 N.W.2d 223 (Iowa 2015)**, the Court applied the general rule that a motion in limine will not preserve an evidentiary issue for appellate review if the trial court does not definitively decide the underlying admissibility issue. The trial court in *Webster* had made a preliminary in limine ruling preventing Webster from supporting his claim of self-defense with evidence of the homicide victim's "felon status and prison mentality." Defense counsel did not make an offer of proof concerning this character evidence at trial. Instead, the defendant raised the issue for the first time after trial in his combined motion for new trial and arrest of judgment. The Court held that Webster had waived the right to complain on appeal of the trial court's in limine ruling. In order to preserve error, defense counsel should have pursued the matter again during trial and obtained a definitive trial court ruling concerning admissibility. Raising the objection in a post-trial motion will not suffice. Id. at 242.

See also State v. Derby, 800 N.W.2d 52 (Iowa 2011) (holding that a defendant must testify and confront prior conviction evidence at trial in order to preserve error concerning *in limine* ruling); **State v. Harrington, 800 N.W.2d 46 (Iowa 2011)** (concluding that a defendant may preserve error regarding a district court's in limine ruling by disclosing his prior conviction on direct examination).

B. Judicial Notice: Rule. 5.201

- ***Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014).**

In ***Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014)**, the Iowa Supreme Court discussed whether judicial notice could be used to establish the factual basis for a guilty plea to the crime of criminal transmission of the human immunodeficiency virus (HIV). The defendant Rhoades argued that his trial counsel had provided ineffective assistance of counsel by allowing him to plead guilty to that crime because the factual record failed to demonstrate that Rhoades intentionally exposed the victim to his bodily fluid in a manner that could reasonably result in the transmission of HIV. The case turned on whether judicial notice of this "adjudicative fact" could supply the necessary record support for the plea.

In three prior cases, the Iowa Supreme Court had already taken judicial notice that "HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus." *See* State v. Stevens, 719 N.W.2d 547, 550-51 (Iowa 2006); State v. Musser, 721 N.W.2d 734, 747 (Iowa 2006); State v. Keene, 629 N.W.2d 360, 365-66 (Iowa 2001). In *Rhoades*, however, the Court limited judicial notice of adjudicative facts (i.e., facts that concern the immediate parties) to the particular proceeding in which it is taken. Accordingly, "judicial notice of an adjudicative fact in one proceeding does not automatically apply to a future proceeding." Rhoades, 848 N.W.2d at 31. Instead, the same principles that supported judicial notice in the earlier cases must continue to support judicial notice of the same fact in the present prosecution. Id.

The Court noted that judicial notice under rule 5.201 requires a "high degree of

indisputability." Id. It further recognized the "great strides in the treatment and the prevention of the spread of HIV" that had occurred since its prior decisions in 2006 and 2001. Id. at 32. Those medical advances generated a reasonable dispute regarding whether "it was medically true a person with a nondetectable viral load [like Rhoades] could transmit HIV through contact with the person's blood, semen or vaginal fluid or whether transmission was merely theoretical." Id. at 33. Thus, because the essential causal link was no longer indisputable, judicial notice could not provide a factual basis for Rhoades' guilty plea. Id. The Court reversed the judgment and set aside Rhoades' sentence. It remanded the case so that the district court could enter judgment finding Rhoades' trial counsel ineffective and afford the State another opportunity to establish the factual basis for Rhoades' guilty plea. Id. at 33.

See also *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (distinguishing judicial notice of "adjudicative" facts from judicial notice of "legislative" facts and discussing the particularly significant role that legislative facts play in constitutional litigation).

C. Presumptions: Rule 5.301

- ***Weizberg v. City of Des Moines*, 923 N.W.2d 200 (Iowa 2019).**

***Weizberg v. City of Des Moines*, 923 N.W.2d 200 (Iowa 2019)** concerned a constitutional challenge to the City of Des Moines' automated traffic enforcement (ATE) program. The plaintiff argued that the ATE ordinance violated substantive due process because it created an irrebuttable presumption that the vehicle owner was driving the car. In rejecting that contention, the Court held that the ordinance did not actually create an irrebuttable presumption. Instead, the ordinance imposed vicarious liability on the owner of a vehicle caught speeding on the ATE system. A legislature can impose strict liability to achieve rational goals such as deterrence. Unlike other statutory presumptions that the Court had previously struck down as arbitrary, the ATE ordinance was based on the rational objective of affecting the driving habits of the vehicle's driver, as well as the owner's selection of drivers. Moreover, the vehicle owner was only subjected to a small civil fine, rather than significant monetary penalty or personal stigma, and could pass on any such loss to the actual driver. The ATE ordinance thus did not create an unconstitutional statutory presumption. Id. At 215-217.

- ***Westco Agronomy Co. LLC v. Wollesen*, 909 N.W.2d 212 (Iowa 2017).**

The statutory presumption at issue in ***Westco Agronomy Co. LLC v. Wollesen*, 909 N.W.2d 212 (Iowa 2017)** did not fare so sell. In *Westco Agronomy*, the Court discussed the operation and unconstitutionality 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. See I.C.A. See I.C. A. § 706A.2(5)(a) (making it 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.").

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 dram shop 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 dram shop 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 dram shop 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. The Court did not discuss *Westco Agronomy* in its most recent decision in *Weizberg v. City of Des Moines*, 923 N.W.2d 200 (Iowa 2019). *Weizberg* suggests, however, that a legislature "can assign economic losses without fault" to achieve rational goals such as deterrence. Weizberg, 932 N.W.2d at 217. See *supra*.

D. Relevance, Unfair Prejudice, and Specialized Relevance Issues: Rules 5.401-5.403

1. Demonstrative Evidence

Demonstrative evidence includes items that were not involved in the case but are offered to clarify or explain other evidence. In-court demonstrations appear readily accepted in Iowa courts and admissibility rests within the trial court's discretion. The offering party must establish that the demonstration will assist the jury by tending to prove a relevant issue or to explain testimony. The Iowa Supreme Court decided two cases "illustrating" these principles during the Update period.

- ***State v. Veal*, 930 N.W.2d 319 (Iowa 2019).**

In ***State v. Veal*, 930 N.W.2d 319 (Iowa 2019)**, a prosecution for murder and an attempted murder, the Court discussed the admission of demonstrative evidence to illustrate a witness's testimony. In that case, the State called a firearms expert to explain how the defendant's gun had jammed after he had shot the first victim. The expert illustrated his testimony by using a demonstration weapon from the DCI lab that was of the same make and model as the actual weapon, but with some design modifications. The expert did not use the actual firearm because it was tainted with carcinogenic dye. The Court held that the trial court did not abuse its discretion in permitting the expert to use the DCI firearm because the demonstration weapon had not been admitted into evidence, the jury was clearly informed that it was not the actual weapon, and the defendant was permitted to bring out on cross-examination any differences between the demonstration and actual weapons. Id. at 337. Moreover, even though the defendant never disputed how the weapon operated—he claimed instead that the attempted victim, rather than the defendant, pulled the trigger—this arguable lack of relevance minimized any potential prejudice from the demonstration. Id.

- ***State v. McNeal*, 897 N.W.2d 697 (Iowa 2017).**

In ***State v. McNeal*, 897 N.W.2d 697 (Iowa 2017)**, the Court held that the trial court did

not abuse its discretion in allowing the prosecution to display, as demonstrative evidence, a "very similar" replica of the sledgehammer that was used in the charged assault. The Court noted that the replica was never admitted into evidence and that the trial court had made it clear to the jury that the replica was not the original that had gone missing after the assault. Id. at 709.

2. Circumstantial Evidence as Proof of Intent

- ***State v. Kelso-Christy*, 911 N.W.2d 663 (Iowa 2018).**

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.

3. Prior OSHA Citations in Failure to Warn Case

- ***Kinseth v. Weil-McLain*, 913 N.W.2d 55 (Iowa 2018).**

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.

4. Lawyer's Ethics Violations and Related Grievance Commission Documents Inadmissible in Legal Malpractice Suit

- ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017).**

In the legal malpractice suit of ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017)**, the Court affirmed the exclusion of evidence that the defendant lawyer had violated the rules of professional ethics and had been disciplined for his prior sexual relationship with the plaintiff. In another part of its decision, the Court affirmed the trial court's directed verdict on those malpractice claims that were based solely on the defendant's violation of the ethics rules or on his sexual relationship with the plaintiff. Id. at 502-505. The only legal malpractice claims remaining concerned the distribution of assets made in the plaintiff's divorce and her potential assault and battery claim against her ex-

husband. Neither of these two claims concerned the matters for which the defendant had been professionally disciplined. Thus, the disputed evidence offered by the plaintiff, including the grievance commission's findings of defendant's ethical violations, related disciplinary documents, the Iowa Supreme Court's ethics opinion sanctioning the defendant-lawyer, and the opinion of the plaintiff's expert concerning the ethical impropriety of an attorney-client sexual relationship, did not assist the jury in determining any fact that was legitimately at issue in the case. Id. at 510-12. See also Iowa R. Evid. 5.401 (relevant evidence must have tendency to make a "fact . . . of consequence in determining the action" more or less probable).

5. Custom, Usage, and Practice in Trade or Industry

- ***Ludman v. Davenport Assumption High School*, 895 N.W.2d. 902 (Iowa 2017).**

In ***Ludman v. Davenport Assumption High School*, 895 N.W.2d. 902 (Iowa 2017)**, a high school baseball player brought a premises liability lawsuit against Davenport Assumption High School ("Assumption") for injuries sustained when he was struck by a foul ball while he was standing in an unprotected part of the visitor's dugout at Assumption's baseball field. The primary issue in the case concerned whether Assumption owed any tort duty to the injured player and, if it did, whether the plaintiff had presented sufficient evidence to raise a jury question on whether Assumption breached that duty. Id. at 909-17. The evidentiary issue in the case concerned whether Assumption was required to submit expert testimony regarding the dugout's design or construction (as the plaintiff did), or whether Assumption could negate its negligence with factual evidence concerning custom or usage in the Mississippi Athletic Conference (to which Assumption belonged). Assumption offered pictures of dugouts from nine other high schools in the same athletic conference. Additionally, an architect familiar with those facilities sought to testify about the custom and standard practice for designing and constructing the visitors' dugouts at those other high schools. Id. at 918-919. The trial court excluded the photos and the architect's testimony, reasoning that whether other high schools follow regulations or play on non-regulated fields was irrelevant to Assumption's conduct or duty. Id. The Iowa Supreme Court held that the trial court abused its discretion in excluding this evidence. Id. at 919.

In so holding, the Court in *Ludman* discussed the admissibility of custom and usage to prove negligence. The Court confirmed that "parties can prove negligence by expert testimony or by custom," and that a party's compliance with a custom or usage in a particular trade or business is evidence of that party's lack of negligence. Id. at 918- 919. The Court noted that custom does not have to be established by expert opinion testimony. Rather, "the record must establish the custom as a matter of fact, not as a matter of opinion." Id. at 918.

To qualify as admissible custom evidence, a practice must be established as sufficiently widespread and "followed by at least a majority of relevant actors." Id. at 917, quoting Kenneth S. Abraham, Custom, Noncustomary Practice, and Negligence, 109 Colum. L. Rev. 1784, 1788 (2009).

> A witness may testify to the existence, as a fact, of a custom or usage, if he or she is qualified by knowledge and experience in any particular trade. To be qualified to testify as to custom and usage, the person testifying must have "adequate knowledge of the custom or usage as a fact" and "occup[y] such a position as to know of the existence of the custom as a fact." In other words, if a person knows what a custom is, that person is qualified to testify to the custom.

Ludman, 895 N.W.2d at 918 (citations omitted). The custom or usage presented must also be

sufficiently similar to "the type of conduct at issue in the litigation." Id. Moreover, a court should not admit custom or usage evidence if the relevant custom is itself "clearly careless or dangerous," or conflicts with a mandatory statute. Id.

In *Ludman*, however, no mandatory statute controlled the design or construction of baseball dugouts. According to the Supreme Court, Assumption was not required to counter the plaintiff's expert with another expert. Instead, Assumption could use a different method like custom to prove or disprove its negligence. Id. at 919. The architect called by Assumption had sufficient knowledge and experience to testify about the prevailing custom and practice throughout the athletic conference and thus should have been permitted to testify. Id. at 919.

6. Rule 402 and the Collateral Source Rule

- ***Giza v. BNSF Ry. Co.*, 843 N.W.2d 713 (Iowa 2014)**.

In ***Giza v. BNSF Ry. Co.*, 843 N.W.2d 713 (Iowa 2014)**, the Iowa Supreme Court examined the scope of the collateral source doctrine in actions brought under the Federal Employers' Liability Act (FELA). In that case, a railroad worker sued the employer railroad seeking damages for a permanent knee injury that he had sustained as a result of the railroad's negligence. The worker, who was 59-years-old at the time of his injury, sought damages for lost future earnings based on his asserted intention to work until age sixty-six. The defendant railroad sought to rebut damages by having its expert testify that railroaders like Giza with 30 years of service are eligible to retire with full benefits at the age of 60 and that over 62% of those workers do retire at that age. The trial court excluded the railroad's evidence under the federal collateral source rule. The Iowa Supreme Court reversed and ordered a new trial.

The Court described the collateral source rule as a common law rule of evidence that bars evidence that an injured party has received compensation for his injuries from collateral sources such as insurance. *See* Giza, 843 N.W.2d at 843. The Court noted that, "strictly speaking," retirement benefits are not collateral source payments because retirement benefits do not compensate injured parties for an injury. Id. Even assuming, however, that evidence of retirement benefits might unfairly influence the jury to award a plaintiff less than full lost wages, evidence as to *when* railroad workers typically retire is "several steps removed" from evidence of disability or retirement benefits. Id. at 723. Moreover, exclusion of such evidence would unfairly deprive the railroad of any "practical way for the railroad to challenge a plaintiff's claimed anticipated retirement date." Id. at 723-24. According to the Court, the collateral source rule does not bar evidence as to when employees with a certain level of experience typically retire "so long as the evidence does not directly or indirectly refer to retirement benefits." Id. at 724. Thus, the trial court had improperly prevented the railroad in *Giza* from introducing statistical evidence that Giza might have retired at age 60 even if he had not been injured, contrary to Giza's assertion and his expert's lost wages calculation. Id. at 726. In a dicta "caveat," the Court further noted that evidence of retirement or disability benefits might even be admissible if a plaintiff were to open the door by asserting that financial necessity required that he or she work until a certain age. In such a case, the defendant may be entitled to rebut that claim by "show[ing] that the plaintiff could make money by not working." Id. at 726.

Although the Iowa legislature has narrowed the collateral source rule by statute, *see* Iowa Code Ann. § 668.14 (liability in tort; comparative fault); Iowa Code Ann. § 147.136 (medical malpractice), the common law rule continues to have some applicability under these statutes and in cases not governed thereby. Thus, while *Giza* concerned the federal collateral source doctrine

in a federal case under the FELA, the Court's description of the collateral source doctrine and its scope could have more general relevance in state law cases as well.

E. Character and "Other Act" Evidence: Rules 5.404, 5.405, and 5.412

1. Victim's Character in Self-Defense Cases

- ***State v. Baltazar*, No. 18-0677, 2019 WL 6222088, slip op. (Iowa Nov. 22, 2019)**.

In ***State Balthazar*, No. 18-0677, 2019 WL 6222088, slip op. (Iowa Nov. 22, 2019)**, the Court applied the rule that it had recently clarified in *State v. Williams*, 9292 N.W.2d 621(Iowa 2019), discussed *infra*, regarding the methods of proving a victim's character in a criminal case where the defendant asserts the justification of self-defense. In *Baltazar*, the defendant who was charged with first-degree murder, claimed that the trial court erred in excluding two videos that depicted the deceased victim engaging in fights with other individuals the day before and day of the charged assault. The Court affirmed that evidentiary ruling because the defendant had failed to produce any evidence that he knew about either of the specific violent incidents in the excluded videos. Under *Williams*, a defendant asserting self-defense may not prove the victim's "aggressive or violent behavior through previously unkown specific conduct." Baltazar, 2019 WL 6222088, at *9.

- ***State v. Williams*, 929 N.W.2d 621 (Iowa 2019)**.

In ***State v. Williams*, 929 N.W.2d 621 (Iowa 2019)**, the Court addressed and clarified the admissibility and methods of proving a victim's character in a criminal case where the defendant asserts self-defense. Prior to this most recent opinion, the Court had issued several confusing and conflicting opinions concerning whether the violent or aggressive character of a victim can be established with specific act evidence. *Williams* clears up that confusion and holds "that a defendant asserting self-defense or justification may not prove the victim's aggressive or violent character by specific conduct of the victim *unless* the conduct was previously known to the defendant." Id. at 636 (emphasis in original).

The significance of *Williams* must be assessed against the backdrop of Iowa's character evidence rules—Iowa R. Evid. 5.404 and 5.405—and the conflicting case law construing those provisions. 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. That is, a defendant who asserts self-defense can admit evidence of a victim's pertinent character trait to prove that the victim acted in conformity with his violent character and was more likely to have been the first aggressor in a violent encounter. 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.

Under rule 5.405, when evidence of a victim's character is admissible, it can be proven by reputation or opinion evidence. See 5.405(a) ("When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of opinion."). However, unless the victim's "character or character trait is an essential element of a charge, claim or defense," id. 5.405(b), specific instances of conduct

can only be inquired into on cross-examination. Id. 5.405(a).

In federal court and a majority of state courts, a victim's character is NOT an essential element of self-defense. 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. Thus, under the language of rule 5.405, an accused who asserts the justification of self-defense may only prove the victim's violent or turbulent character through reputation and opinion evidence and should not be allowed to introduce extrinsic evidence of a victim's prior altercations or aggressive behaviors. See Laurie Kratky Doré, 7 Iowa Practice Series Evidence, §5.404:3 (2018-2019) (discussing victim character evidence offered by an accused).

Prior to *Williams*, however, the Iowa Supreme Court had issued conflicting opinions concerning whether an accused who asserts self-defense can prove a victim's character using extrinsic offense evidence. *Cf.* State v. Einfeldt, 914 N.W.2d 773, 783-84 (Iowa 2018) ("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."); State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015) (indicating that the trial court had correctly admitted the evidence of the homicide victim's prior assaults of his ex-wife to prove that the victim was the first aggressor in the charged homicide); State v. Dunson, 433 N.W.2d 676, 681 (Iowa 1988) (admitting specific acts occurring after the charged assault as "material to several elements of [defendant's] defense") *with* 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"); Klaes v. Scholl, 375 N.W.2d 671, 676 (Iowa 1985) (excluding evidence of specific instances of a victim's conduct in civil case involving self-defense).

Williams acknowledges and resolves this confusion. The defendant in that murder prosecution claimed that he had shot the victim in self-defense. Although the trial court allowed Williams to introduce evidence of the victim's aggressive reputation, Williams was not allowed to introduce evidence of the victim's prior specific acts of violence that were unknown to the defendant. Id. at 623, 633-34. In affirming that evidentiary decision, the Court confirmed that character is not an essential element of the justification. The self-defense statute, I.C.A. §704.3, requires that a defendant "reasonably believe" that reasonable force is necessary to defend against "actual or imminent" unlawful force. I.C.A. 704.3. Williams was allowed to introduce evidence of the victim's prior acts of violence that were known to him at the time of the shooting because pre-existing knowledge of a victim's prior behavior can affect whether a defendant acted reasonably in using defensive force. Id. at 635-36. The same cannot be said for prior conduct unknown to the accused because a reasonable belief in the need to defend oneself "may exist—or may not exist—regardless of the other person's character." Id. at 636. Because a victim's character is not essential to a claim of self-defense, a defendant raising that justification "may not prove the victim's aggressive or violent character by specific conduct of the victim *unless* the conduct was previously known to the defendant." Id. (emphasis in original). In so concluding, the Court adheres to the "plain text" of rule 5.405, id. at 635-36, and aligns Iowa with the position taken in its earlier precedents and a majority of jurisdictions. See also id. at 634-36 (affirming position taken in *Jacoby* and *Klaes*, rather than dicta in *Einfeldt*, *Webster*, and *Dunson*).

2. Curative Instruction v. Mistrial to Remedy Admission of Inadmissible Character Evidence

- ***State v. Plain*, 898 N.W.2d 801 (Iowa 2017).**

In ***State v. Plain*, 898 N.W.2d 801 (Iowa 2017)**, the defendant was charged with first degree harassment for getting into an altercation with his neighbor in their small apartment building and allegedly throwing a pair of bolt cutters at the neighbor's head. Although the case primarily concerned the defendant's Sixth Amendment challenge to the representativeness of the all-white jury pool, see id. at 821-829, Plain also raised several evidentiary issues. One such issue concerned whether a redacted recording of a 911 call that the prosecution played to the jury contained inadmissible character evidence under rule 5.404. Id. at 813-816.

The victim's wife had made the 911 call to the police during the charged assault and the prosecution played a redacted recording of the call to the jury. Defense counsel moved for a mistrial after listening to the recording again that night and realizing that it contained a reference to the defendant's status as a felon on probation. Specifically, the tape contained statements that Plain was wearing a GPS monitoring device and was not afraid to go "back to prison." Id. at 814. The trial court denied the motion for mistrial and instead gave a cautionary instruction, also requested by the defendant, telling the jury to disregard the references in the recording to the defendant's criminal history.

The Supreme Court first discussed whether the 911 call that referenced the GPS device and Plain's criminal history should have been excluded as inadmissible character evidence or whether there was a legitimate non-character purpose for that evidence under rule 5.404(b). Id. at 814. The Court noted that rule 5.404(b) generally "excludes evidence of other crimes not on grounds of relevance, but 'based on the premise that a jury will tend to give [such evidence] excessive weight and the belief that a jury should not convict a person based on his or her previous misdeeds." Id. (*quoting* State v. Nelson, 791 N.W.2d 414, 425 (Iowa 2010). Although rule 5.404(b) does admit evidence of a defendant's prior acts or crimes when offered for a pertinent "noncharacter theory of relevance" other than a "defendant's general criminal disposition," (and the evidence is not unfairly prejudicial), the prosecution in *Plain* had failed to articulate any non-propensity purpose for admitting the redacted 911 call. Id. Thus, the reference in the 911 call to Plain's criminal history was inadmissible character evidence. Id. at 815.

The Supreme Court nevertheless affirmed the trial court's refusal to grant Plain a mistrial because of this error. According to the Court, the trial court's cautionary instruction "adequately mitigated any prejudicial impact of the [otherwise] inadmissible evidence." Id. In so holding, the Court discussed the sufficiency of a curative instruction to disregard inadmissible evidence or evidence that has been stricken from the record.

As noted by the Court, the sufficiency of a curative instruction depends upon all the circumstances. However, a curative instruction should be sufficient to correct an evidentiary error and obviate the need for a mistrial "'in all but the most extreme cases.'" Id. at 815 (*quoting* State v. Breitbach, 488 N.W.2d 444, 448 (Iowa 1992)). The Court in *Plain* discussed three considerations as particularly important in "determining whether a cautionary instruction can adequately mitigate the prejudicial impact of inadmissible evidence"—(1) the ability of the defendant to "combat," without compounding, the prejudice from the inadmissible evidence; (2) the breadth of the inadmissible evidence and the promptness in addressing it; and (3) the

prejudice from the challenged evidence, including the strength of the state's evidence of guilt. Id. (relying upon State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980)).

In applying those considerations to the facts in *Plain*, the Court noted that neither the trial court nor the parties noticed the reference to Plain's criminal history until after the recording had been played to the jury. Id. at 814. Although the references in the 911 call were inadmissible character evidence, the Court recognized that they were "brief, inadvertent, and did not play a major part in the State's case." Id. at 815. Moreover, the brief statements caused minimal prejudice to Plain given the other strong evidence of his guilt. Id. The trial court thus did not abuse its discretion in giving a cautionary instruction, rather than declaring a mistrial. Id. at 815-816.

3. "Crimes, Wrongs, or Other Acts" under Rule 5.404(b)

- ***State v. McNeal,* 897 N.W.2d 697 (Iowa 2017).**

***State v. McNeal,* 897 N.W.2d 697 (Iowa 2017)**, discussed *supra*, also discussed the ban on character evidence and the admissibility of other crimes or wrongs when relevant to a non-character purpose under rule 5.404(b). In that case, a jury convicted the defendant McNeal of assault with intent to inflict serious injury. The State alleged that McNeal assaulted the victim with a sledgehammer after the victim insisted that McNeal leave the premises and refused McNeal's request to share drugs with McNeal.

McNeal claimed that his counsel was ineffective by not objecting to evidence that McNeal and the victim had shared drugs together several days before the assault and that McNeal had asked the victim to share drugs with him right before the assault. The Court rejected McNeal's claim that such evidence violated rule 5.404(b)'s ban on evidence of other crimes when used for propensity purposes. The Court noted that rule 5.404(b) permits the State to introduce evidence of a defendant's other crimes or wrongs when relevant to a legitimate non-character purpose. Although the Iowa courts are generally hesitant to admit a defendant's history of drug offenses, this was not a drug prosecution where the propensity risk would be strong. Moreover, McNeal's drug use provided a motive for the assault by explaining why McNeal assaulted the victim. Id at 708. Indeed, the Court found the normal prejudice from drug evidence to be "diminished" in this case because the evidence implicated both McNeal and the victim in drug use. Id.

- ***State v. Richards,* 879 N.W.2d 140 (Iowa 2016).**

In ***State v. Richards*, 879 N.W.2d 140 (Iowa 2016)**, the Iowa Supreme Court considered the admissibility of a defendant's prior assaults on a domestic abuse victim in cases where the defendant asserts the justification of self-defense—an issue on which the Iowa Court has given conflicting signals and on which courts from other jurisdictions differ. Id. at 145-51 (discussing case law from Iowa and other jurisdictions). In this case, Richards was convicted of domestic abuse assault of his girlfriend. At trial, Richards claimed that the girlfriend had initiated the confrontation and that he had acted in self-defense. Over Richards' objection, the trial court permitted the State to admit three prior incidents in which Richards had assaulted the same victim for the non-propensity purpose of demonstrating Richards' intent to commit the charged assault. Richards contended that his assertion of self-defense, however, essentially admitted the elements of the offense and eliminated the State's need to prove that he acted with specific intent toward the victim. Because intent was no longer a legitimate disputed issue in the case, Richards argued, his prior assaults should have been excluded under rule 5.404(b) as inadmissible propensity evidence. Id. at 142-44.

In a 4-3 decision, the Court held that Richard's prior violent acts toward the victim were "relevant and material to a legitimate issue in [the] case notwithstanding the justification defense," and that the prejudice arising from that evidence did not substantially outweigh its probative value in proving Richards' intent. Id. at 145. The Court re-affirmed that evidence of a defendant's prior acts toward the same victim is generally admissible to illuminate the relationship between the defendant and that victim and to prove the defendant's motive and intent concerning the charged offense. See Id. at 145-47 (citing State v. Richards, 809 N.W.2d 80 (Iowa 2012); State v. Newell, 765 N.W.2d 283 (Iowa 2009); State v. Taylor, 689 N.W.2d 116 (Iowa 2004); State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001); State v. Kellogg, 263 N.W.2d 539 (Iowa 1978)). However, other act evidence is only admissible "to prove intent if intent is legitimately disputed" in a case. Richards, 879 N.W.2d at 147. The issue in *Richards,* then, was whether a defendant's assertion of self-defense eliminates any legitimate dispute about the defendant's intent regarding the charged offense. Id. at 148.

In holding that self-defense does not "categorically remove the defendant's intent from dispute," the majority adopted what it considered a "narrow construction of the intent exception" to the general ban on other act evidence. Id. at 152, 151. Under this approach, a defendant who asserts self-defense contends that he acted with the intent to prevent harm to himself. The State legitimately disputes this intent when it claims that the defendant did not reasonably believe that force was necessary to protect himself from imminent death or injury at the victim's hands. Id. at 151-52. In *Richards*, the girlfriend's own testimony clearly proved Richards' other altercations with her and the trial court gave the jury a limiting instruction curtailing the danger of unfair prejudice from this evidence. Thus, the trial court did not abuse its discretion in admitting Richards' three prior assaults of the same victim in order to refute Richards' claim that he acted with the intent to protect himself from her. Id. at 152-53.

- ***State v. Wilson*, 878 N.W.2d 203 (Iowa 2016).**

In ***State v. Wilson*, 878 N.W.2d 203 (Iowa 2016)**, the Court discussed the admissibility of flight or concealment evidence. It is long-established in Iowa and elsewhere that evidence that a defendant fled from or otherwise attempted to avoid law enforcement may constitute circumstantial evidence of that defendant's consciousness of guilt, which itself can be probative of the defendant's actual guilt regarding the charged offense. See Id. at 211-12. In *Wilson,* the Court noted the potential unreliability and prejudicial impact of flight evidence and cautioned trial courts to admit extrinsic evidence of a defendant's flight or avoidance only if the facts and circumstances reasonably support an inference of consciousness of guilt for the *crime charged.* Id. at 213.

The crime charged in *Wilson* was forgery and falsifying a public document. The flight evidence at issue involved two attempts to avoid law enforcement that occurred while the defendant Wilson was free on bond awaiting the appeal of a prior theft conviction. The State argued that Wilson attempted to delay the disposition of that appeal and his impending incarceration with a forged motion to withdraw as counsel purportedly filed by his appellate defender in the Iowa Supreme Court; this forged court document was the subject of the charged offense.

The State began an investigation into the forged motion soon after Wilson's defense counsel discovered and alerted the Court to the false document. Wilson evaded the law enforcement officers who came to his home to execute arrest and search warrants concerning the forgery by speeding away in his vehicle and fleeing on foot after a high speed chase. One month

later, Wilson again avoided law enforcement officers who came to his home by hiding in a hole in his basement floor beneath a blue plastic bin. The trial court admitted both these instances of Wilson's flight and his later concealment. Id. at 207-10.

The Iowa Supreme Court held that the trial court properly admitted the flight evidence, but erred in admitting the subsequent act of hiding in the basement. Id. at 218. In so holding, the Court clarified that Wilson's attempts to avoid police should be analyzed under rule 5.404(b) as extrinsic evidence of other bad acts. Under that rule, evidence of other bad acts is not admissible for propensity purposes—to show that the defendant acted in conformity with his criminal character. Id. at 211. Instead, extrinsic acts of flight or concealment are only admissible if they are probative of the accused's consciousness of guilt for the crime charged. Id. at 213.

The probative value of flight evidence thus depends on whether the surrounding facts and circumstances demonstrate a sufficient "nexus" or "inferential chain" between the specific act of flight or avoidance and the accused's feelings of guilt regarding the crime charged. Id. In other words, the record must support an inference that defendant engaged in the flight behavior "out of fear of apprehension for the charged crime." Id. at 212-13.

The chronology of events can be an important factor in assessing the strength of this necessary inference. Id. at 214.

> The inference that flight was motivated by the defendant's desire to avoid prosecution for the crime charged is strongest when the defendant flees in its immediate aftermath or shortly after being accused thereof. The more remote in time the alleged flight becomes from the commission or accusation of the charged crime, "the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense."

Id. [citations omitted]. Such immediacy is not as critical in cases where the defendant engaged in the act of flight or avoidance at a time when the defendant knew that he or she was suspected of the charged offense. Id. at 214-15.

The court must separately asses the probative value of each act of flight or concealment and must do so in light of the other evidence introduced at trial. Like all rule 5.404(b) evidence, the court must also weigh that probative value against the danger of unfair prejudice under rule 5.403. Id. at 215-16.

As to the two items of flight evidence introduced in Wilson's case, the Court held that the record did support an inference that Wilson knew law enforcement was investigating the forged motion when he fled from the police as they arrived at his home to execute the arrest and search warrants. Thus, the prosecution established the necessary nexus between that act of evasion and Wilson's consciousness of guilt regarding the forgery. Id. at 217. In contrast, Wilson's hiding in the basement one month later could have been motivated either by his desire to avoid apprehension for the forgery charge *or* to delay his incarceration for his prior theft conviction. Id. at 218. That concealment evidence thus had "marginal" probative value in establishing his consciousness of guilt for the charged crime that was outweighed by its unfair prejudice. Id. The cumulative nature of this concealment evidence, however, rendered its admission harmless error. Id. at 219.

- ***State v. Tyler*, 873 N.W.2d 741 (Iowa 2016).**

In ***State v. Tyler*, 873 N.W.2d 741 (Iowa 2016)**, the Court affirmed the trial court's admission of evidence concerning prior fighting by the defendant and others for the non-propensity purposes of knowledge and intent under Iowa R. Evid. 5.404(b). In that case, Tyler was prosecuted as both a principal and an accomplice for striking the first non-lethal blow that knocked the victim to the ground, where he was then stomped to death by others in the crowd. The trial court allowed a bystander to testify that she had seen Tyler and the others fight before and that she feared that something similar was going to happen the night of the deadly assault. Tyler argued that the bystander's testimony was inadmissible character evidence that permitted the jury to improperly conclude that because Tyler fought before, he was more likely to have fought on this occasion. The Iowa Supreme Court disagreed, holding that the bystander's testimony regarding the prior fights involving Tyler and the others helped to prove that Tyler knew or could reasonably expect that his first non-lethal blow would likely be followed by further violence by the others in the crowd. The State needed to prove this knowledge and intent in order to convict Tyler of aiding and abetting the homicide. Moreover, given the strong evidence that Tyler had, in fact, struck the first blow, there was little danger that the jury would use the prior fighting for improper propensity purposes. Id. at 754-56.

- ***State v. Putman*, 848 N.W.2d 1 (Iowa 2014).**

In ***State v. Putman*, 848 N.W.2d 1 (Iowa 2014)**, a divided (4-3) Iowa Supreme Court addressed whether and when possession of child pornography is admissible to prove motive or intent in a child sex abuse case. In that case, the defendant Putman was accused of sexually assaulting the two-year old daughter of a family friend. Putman denied the charge, claiming that the child's father, whom the defendant was visiting the night of the assault, was the actual perpetrator. Thousands of images and numerous videos depicting child pornography were found on the defendant's computers, but the trial court was careful to limit the prosecution's evidence to the titles of two videos that were "strikingly similar" to the sexual assault at issue. The DCI investigator was only permitted to mention the titles of the two videos—"Two YO [year old] getting raped" and "Two YO girl getting raped during diaper change"— and to confirm that that those titles matched their content by depicting adult men sexually assaulting 2- to 3-year old girls. No images were shown to the jury.

A majority of four Justices affirmed the trial court's admission of this testimony for the non-character purpose of proving identity. In so holding, the Court clarified the three-step prior bad acts analysis under rule 5.404(b), elaborated upon the non-character purposes of motive and identity, and discussed the balancing of probative value against prejudice associated with prior bad act evidence.

Three-Step Prior Bad Acts Analysis. In *Putman*, the Iowa Supreme Court amended the procedure for admitting other act evidence for a non-character purpose under rule 5.404(b). Prior to *Putman*, Iowa case law frequently described the procedure for admitting other act evidence as a two-step inquiry. *See* State v. Richards, 809 N.W.2d 80, 92 (Iowa 2012); State v. Elliott, 806 N.W.2d 660, 675 (Iowa 2011); State v. Nelson, 791 N.W.2d 414, 425 (Iowa 2010). In *Putman*, however, the Court added "clear proof" as a separate and independent component of the other act analysis. Putman, 848 N.W.2d at 8.

In a lengthy footnote, the Court acknowledged the "confusion" in its case law regarding whether "clear proof" is an independent component of the prior bad acts analysis or, instead, merely one factor in the prejudice versus probative value balancing. Id. at n. 2 at 7-9. After

examining how federal and other state courts address this issue, the Court confirmed that "clear proof" that the defendant committed the other bad acts is a separate and independent step in the rule 5.404(b) analysis. Id. at n. 2. Thus, no balancing of prejudice takes place without clear proof that the defendant committed the prior bad act(s). Only then, will the court engage in rule 5.403 balancing, where clear proof remains one of multiple factors examined by the court. Id. at 14. ("For purposes of clarity and consistency, whether clear proof exists should remain a part of the balancing process, in addition to being analyzed as an independent analytical step.").

After *Putman*, then, admissibility of other act evidence under rule 5.404(b) is governed by a three-step analysis. Id. First, is the prior bad act evidence relevant to a legitimate, disputed non-character purpose? Second, is there clear proof that the party against whom the evidence is offered committed the other bad act or crime? And, finally, does the danger of unfair prejudice from the bad act evidence substantially outweigh the probative value of that evidence? Id.

Step 1: Relevance to a Disputed Non-Character Purpose: Motive and Identity. The majority in *Putman* then applied the three-prong analysis to the trial court's decision to admit evidence of the titles of the two pornographic videos found on Putman's computers. The trial court had ruled those titles relevant to two non-character purposes—motive and identity. Although the majority upheld the decision with respect to identity, all members of the Court agreed that the trial court erred in admitting the evidence to prove motive. Id. at 10.

Motive: The Court defined motive as "the impetus that supplies the reason for a person to commit a criminal act." Id., *quoting* 2 Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE § 404.22[3], at 404-119 to 404-120 (Joseph M. McLaughlin ed., 2d. ed. 2014)). In *Putman*, however, the Court held that Putman's motive in sexually abusing the toddler was not in dispute because Putman's state of mind was not an element of the crime nor otherwise in issue. Id. at 10.

The Court may have been too quick to dismiss motive as a legitimate non-character issue in the case. As the Court pointed out, motive merely provides an explanation for why a defendant may have committed the offense. If the defendant says he did not do the act, his motive for doing so helps to establish that he, in fact, did. That is, motive would seem to be "in issue" in any case in which a person claims that he or she did not commit the alleged offense.

The question in *Putman*, then, was not whether motive was in issue, but whether the evidence used to establish motive was improper character evidence – that Putman likely molested the two-year old victim because he was an immoral or depraved person. That is a much more difficult question that the Court avoided. Although possession of pornography in general might not provide a specific enough motive to engage in the charged sexual abuse, the testimony admitted in *Putman* was narrower than general character evidence. That Putman was sexually aroused by pornography depicting adult men sexually molesting 2- to 3-year old girls gave him an unusual (to say the least) motive—a taste for or compulsion regarding this particular type of sexual abuse. As noted by Judge Posner in U.S. v. Cunningham, 103 F.3d 553 (7th Cir. 1996), motive and propensity

> overlap when the crime is motivated by a taste for engaging in that crime or a compulsion to engage in it (an 'addiction'), rather than by a desire for pecuniary gain or for some other advantage to which the crime is instrumental in the sense that it would not be committed if the advantage could be obtained as easily by a lawful route. Sex crimes

> provide a particularly clear example. Most people do not have a taste for sexually molesting children.

Id. at 556. Thus, contrary to the Court's holding, the evidence does appear to be at least arguably relevant to the disputed issue of motive.

Identity: The *Putnam* Court split 4-3 on whether the videos were admissible to prove identity. Identity was certainly in dispute because the defendant pointed the finger at the victim's father. Id. at 10-11. Identity, however, is not an automatic ticket to the admission of other crimes evidence. The evidence must support identity through an inference narrower than general propensity. That explains why Iowa courts impose "a more demanding test than the general relevance test" when prior bad acts are offered to show identity. One of the most common ways of proving identity with prior wrongs is arguing that the other acts and the current charge are sufficiently similar and unique to mark the prior act and the alleged offense as the "signature" or "handiwork" of the accused. This modus operandi argument, however, did not neatly fit the facts in *Putman* given that Putman's prior offense involved *possession* of child pornography, while the charged offense involved the arguably dissimilar act of child molestation. The majority, however, correctly refused to strictly apply the similarity requirement. Id at 11. Instead, the majority indicated that a court must look not only at the similarity between the two acts committed by the defendant, but also to the "similarities between the contents of materials possessed by the defendant and acts committed by the defendant." Id. The Court distinguished cases where there were "only general similarities" between the materials possessed and the act for which the defendant is being tried (usually inadmissible) and cases where the acts are "strikingly similar." Id. at 12. Striking similarity, according the Court, "requires drawing out and comparing the peculiar circumstances of the acts." Id. The two admitted video titles demonstrated much more than a "general preoccupation with child pornography," which the Court suggested may well be inadmissible in a sex abuse case. Id. Instead, out of the mass of pornography found on Putman's computer, the trial court only admitted "evidence of child pornography bearing a striking similarity to the crime for which Putman was on trial"—that is, adult men violently molesting 2- to 3-year old children. Id. Thus, according to the majority, the evidence helped establish that Putman, rather than the victim's father, was the perpetrator of the abuse and was "prima facie admissible, even though it illustrate[ed] the accused's bad character." Id. at 13.

Putman seems to assume that modus operandi is the only permissible way of establishing identity with other act evidence. However, there are other methods of proving identity with uncharged conduct that do not rely upon an improper character inference. Indeed, identity is frequently established through one of the other non-character purposes specified in rule 5.404(b). Motive or opportunity, for instance, can also help identify the perpetrator of an offense. Neither of those non-propensity purposes would necessarily require the striking similarity and unique circumstances needed for signature evidence. *See* U.S. v. Tyerman, 701 F.3d 552, 563 (8th Cir. 2012), cert. denied, 133 S. Ct. 1849, 185 L. Ed. 2d 852 (2013) (noting "the similar-in-kind requirement is less important when the evidence is used to establish motive").

The dissenters in *Putman* contended that "caselaw does not allow a court to use the mere fact of possession of pornography to establish identity, no matter how similar the pornography is to Putman's alleged act." Id. at 16 (Wiggins, J., dissenting). However, the argument in favor of admitting the evidence to prove motive also supports its admission for purposes of identity. Putman's fascination with pornography showing men sexually assaulting 2- to 3-year old girls

clearly makes it more likely that Putman, rather than the girl's father, molested this two-year old victim. That is, a jury could properly surmise that as between Putman and the girl's father, it could not be a coincidence that only one of them was a devotee of pornography showing this precise type of child rape.

Step 2: Clear Proof. As noted above, the *Putman* Court clarified that "clear proof" is a separate analytical step under rule 5.404(b). *See* Id. at 9 n.2. Putman argued that the State had failed to provide clear proof that he was responsible for downloading the videos on his computers. Id. at 13. However, as noted in *Putman*, clear proof does not require corroboration or proof beyond a reasonable doubt. Id. at 9. "[P]roof of prior bad acts is clear if it prevents the jury from speculating or inferring from mere suspicion." Id. at 13. The testimony of credible witnesses can satisfy this standard. Id. at 9. Clear proof existed in this case because the evidence tying Putman to the two videos found on his computer was sufficient to permit the jury to find that Putman possessed the videos "without speculating or inferring from suspicion." Id. at 13.

Notably, *Putman* appears to adopt a fairly minimal threshold for "clear proof," suggesting that clear proof exists so long as the evidence connecting an actor to the prior acts rests on more than mere suspicion or speculation. This would seem to be even lower than the federal standard that requires the trial court to determine whether a reasonable jury could find it more likely than not that the defendant committed the prior act before admitting it into evidence. *See* Huddleston v. U.S., 485 U.S. 681 (1988). Moreover, such a low burden of proof would seem inconsistent with the Court's rationale for making "clear proof" a separate, analytical element – to protect the defendant from unduly prejudicial bad act evidence and to make it "easier for trial courts and juries to apply." Id. at 9 n. 2. Moreover, the Court did not definitively resolve whether the question of clear proof is one of conditional relevance under rule 5.104(b), asking only whether a reasonable jury could find the actor committed the prior act using non-speculative evidence, or a preliminary question of admissibility under rule 5.104(a), requiring the trial court to find by clear proof that the defendant committed the prior bad act. The Court suggests, however, that like the Federal rules, the admissibility of prior bad acts is a question of conditional relevance. *See* Id. at 13 (approving the trial court's jury instruction that prior acts be shown by clear proof).

Step 3: 403 Balancing of Probative Value Against Prejudice. Finally, the *Putman* majority addressed the third step of the "other acts" analysis, determining that the likely prejudice from the pornographic video titles did not substantially outweigh their high probative value in proving identity. Id. at 16. In so holding, the Court outlined the factors that a trial court should consider in weighing the probative value of prior bad acts against their unfair prejudice. Although clear proof is now a separate prong of the prior acts analysis, it remains relevant to the third balancing step. Id. at 14. Thus, in evaluating the probative value of the evidence, a court should consider the existence and strength of the proof connecting the defendant to the other crime or bad act. In addition, the court should evaluate the need for the bad act evidence in light of evidentiary alternatives, the "strength or weakness of the evidence" in proving a relevant non-character purpose, and the tendency of the evidence to provoke the jury to decide the case on an emotional or otherwise improper basis. Id. at *13. *See also* Id. at 9-10. The trial court is given "a great deal of leeway" in making this "judgment call." Id. at 10

In applying these factors to the facts in *Putman*, the majority noted that the prosecution had a great need for the evidence given that identity was the principal issue in the case and that no forensic or eyewitness evidence linked Putman to the charged abuse. Id. at 14. Indeed, the majority characterized the two videos as the "most probative" evidence of identity given the

similarity between the alleged crime and the abuse depicted in the videos. Id. The majority acknowledged the prejudicial nature of the evidence, noting that even the titles of the two pornographic videos had a "strong tendency to produce intense disgust." Id. at 14-15 (*quoting* U.S. v. Loughry, 660 F.3d 965, 974 (7th Cir. 2011)). However, the trial court mitigated the possible prejudice by culling the mass of pornography found on Putman's computers, restricting the admitted testimony, and giving a limiting instruction that, except in extreme cases, acted as "an antidote for the danger of prejudice." Id. at 15. The trial court thus did not abuse its discretion in admitting the prior act evidence under rule 5.404(b). Id. at 16.

See also State v. Nelson, 791 N.W.2d 414 (Iowa 2010) (delineating the limited scope and applicability inextricably intertwined doctrine under which prior bad acts are admitted to complete the story of the charged crime and to avoid rule 5.404(b)).

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

- ***State v. Walker,* No. 0457, 2019 WL 6222902, slip op. (Iowa Nov. 22, 2019).**

In **State v. Walker, No. 0457, 2019 WL 6222902, slip op. (Iowa Nov. 22, 2019),** a prosecution for sexual abuse and lascivious acts with a child, the Court discussed the admissibility of evidence of prior sexual abuse perpetrated upon the minor victim. The defendant suggested that the victim may have "learned age-inappropriate sexual information" from her eight-year-old brother, who may himself have been sexually abused, or that the brother, rather than the defendant was the abuser. The trial court excluded that evidence as irrelevant. Id. at *2.

The Supreme Court acknowledged "'that a child victim's sexual knowledge [that] resulted from an encounter with someone other than the defendant may be relevant and material to a defendant's defense of mistaken identity or false accusation.'" Id. (citations omitted). However, the defendant in this case had failed to make any offer of proof beyond simple speculation that such prior sexual abuse had in fact occurred. Id. Moreover, even if the defendant had made such an offer of proof, evidence of a victim's prior sexual abuse qualifies as a victim's "other sexual behavior" under Iowa's rape shield rule, Iowa R. Evid. 5.412, and the defendant had failed to provide the required pretrial notice of his intent to offer the evidence. Id. at *3. See Iowa R. Evid. 5.412(c)(1)(A). Justice Appel specially concurred to discuss the potential relevancy of this type of evidence. Id. at *6-7 (Appel, J., concurring specially).

- ***State v. Trane,* No. 18-0825, 2019 WL 5089721, slip op. (Iowa Oct. 11, 2019).**

In **State v. Trane, No. 18-0825, 2019 WL 5089721, slip op. (Iowa Oct. 11, 2019)**, the Court considered the relationship between rule 5.412's pretrial notice requirement and a criminal defendant's right to a speedy trial. In that case, the former owner of a school for troubled youth was charged with sexually abusing and exploiting a 17-year-old female student. The defendant refused to waive his right to a speedy trial even though digital copies of voluminous school records were not produced to the defendant until two weeks before trial was set to commence. In her deposition, which was not taken until the afternoon before trial, the alleged victim testified that she had made prior allegations of sexual abuse against her foster parents and her adoptive parents. Id. at *4. Following the deposition, after conferring with the victim's adoptive mother and on the eve of trial, defense counsel filed a motion to admit evidence of the victim's false allegations of sexual abuse. Id. at *4. The defendant argued that the district court should excuse the rule's pretrial notice requirement because the evidence was newly discovered and could not

have been offered 14-days before the scheduled trial. (See Iowa R. Evid. 5.412(c)(1)(A) (requiring that motion be filed "at least 14 days before trial unless the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, ... "). The State contended the motion was untimely and could not be granted without violating the defendant's right to a speedy trial, which the defendant had declined to waive. The trial court denied the motion as untimely without holding a hearing.

The *Trane* Court held that the district court had abused its discretion in denying the defense motion as untimely in order to avoid a speedy trial violation. The State had apparently conceded that the defense could not have obtained the evidence needed to file the rule 5.412 motion before the eve of trial. Thus, the "escape valve for newly discovered evidence" applied and the 14-day pretrial deadline was excused. At the same time, the *in camera* hearing and screening process dictated by rule 5.412 likely could not have taken place without a continuance past the speedy trial deadline. Id. at *11. Rather than denying the motion as untimely, however, the trial court should have clearly notified the defendant that granting his evidentiary motion might push the trial past the speedy trial deadline. If the defendant insisted on pursuing his rule 5.412 motion, the court could have found good cause to extend the speedy trial deadline under Iowa R. Crim. P. 2.33(2)(b). Id. at *12. That is, rather than forcing the defendant to choose between his right to a speedy trial and the use of this evidence, the trial court should have balanced those two rights. Id. at *12.

The *Trane* Court thus remanded the case so that the trial court could hold an *in camera* hearing to determine, by a preponderance of the evidence, whether the victim had made the prior reports of sexual abuse by her adoptive or foster parents and if so, whether those accusations were false. Id. at *14. Such false reports of sexual abuse are not barred by rule 5.412 because they do not qualify as "other sexual behavior" of the victim. Id. at *8.

- ***State v. Powers*, 911 N.W.2d 774 (Iowa 2018).**

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.

- ***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014).**

In ***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014)**, the defendant Edouard was convicted of sexual exploitation by a counselor or a therapist of four women who were all members of a religious congregation of which Edouard was the pastor. The defendant admitted to engaging in sexual conduct with the women, but claimed that he was not their "counselor" as required by the statute. Edouard sought to admit evidence that one of the women had had an extramarital affair with a man other than Edouard after her sexual relationship with the defendant had ended, but before making allegations against Edouard. The Court affirmed the trial court's exclusion of that evidence because it fell within the scope and the protection of the rape shield rule. Id. at 449. The Court found it "highly questionable" whether the woman's sexual liaisons with others were relevant to the existence of a counseling relationship with Edouard. Id. Moreover, whatever marginal relevance that evidence had was outweighed by its "clear prejudicial effect." Id.

F. Privileges

1. Clergy Communications Privilege

- ***Bandstra v. Covenant Reformed Church*, 913 N.W.2d 19 (Iowa 2018)**.

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 a former pastor's sexual abuse and exploitation of the women. Id. at 30-36. 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. 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

- ***Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235 (Iowa 2018).**

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 responsibly acted to prevent workplace discrimination. To escape vicarious liability for supervisor harassment, an employer must demonstrate that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer" and that the employer exercised reasonable care "to prevent and correct" harassing or discriminatory behavior. Id. at 242. 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. See Id. at 246 ("Generally, if an employee fails to notify the employer of wrongdoing, courts have found that such failure, coupled with adequate preventative policies, is sufficient to prevail in the defense."). 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).

- ***Iowa Ins. Inst. v. Core Group of the Iowa Association for Justice,* 867 N.W.2d 58 (Iowa 2015).**

In ***Iowa Ins. Inst. v. Core Group of the Iowa Association for Justice*, 867 N.W.2d 58 (Iowa 2015),** the Iowa Supreme Court considered whether surveillance photos, videos, reports, and other investigative materials are protected from discovery as work product in workers compensations proceedings. The Court initially ruled that the statutory waiver of privilege in the workers compensation statute, Iowa Code Ann. § 85.27(2), applies only to health care provider records and does not affect the protection afforded work product and other litigation materials by Iowa R. Civ. P. 1.503(3). Core Group, 867 N.W.2d at 79. The Court further reiterated that while

work product must be prepared "in anticipation of litigation," litigation need not be the sole or even the primary purpose for preparing a document protected as work product. The Court noted: "If a document or tangible thing may fairly be said to have been prepared or obtained because litigation is foreseeable or ongoing, it constitutes work product; litigation need not be the primary reason for creating or obtaining the materials." Id. at 70-71.

Following the majority approach in other jurisdictions, the Court classified surveillance materials as ordinary work product that is protected from discovery absent a showing of substantial need and undue hardship. Id. at 71. However, if a party plans to use surveillance materials at a trial or hearing, the surveillance materials lose their status as work product. In such circumstances, a party may be permitted to withhold production of the surveillance materials until after the claimant has been deposed. Id. Although *Core Group* involved production of surveillance materials in workers compensation proceedings, the Court's description of the work product doctrine appears generally applicable to work product in all civil cases.

3. Doctor/ Psychotherapist-Patient Privilege and Related Health Care Provisions

- ***Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793 (Iowa 2019).**

In **Slaughter v. Des Moines University College of Osteopathic Medicine, 925 N.W.2d 793 (Iowa 2019)**, a plaintiff who had been expelled from medical school because she had failed to meet academic requirements sued the medical school for failing to accommodate her mental disability. A staff psychologist at the medical school's student counseling center had treated the plaintiff for depression and anxiety and Slaughter sought to impute the therapist's knowledge of her mental disability to the medical school's academic decision-makers. The trial court refused to impute the therapist's knowledge to her employer, citing both the testimonial privilege for psychotherapist-patient communications in I.C.A. § 622.10(1) and the separate confidentiality requirements for mental health information codified in I.C.A. § 228.2(a).

The Court initially ruled the testimonial privilege inapplicable to the evidentiary motion to impute the therapist's knowledge to the medical school. The privilege in I.C.A. § 622.10(1) prohibits disclosure, whether at trial or in discovery, of physician–patient communications and medical records that might reflect those communications. Id at 802. The Court noted the importance of maintaining the confidentiality of mental health information and emphasized that courts should liberally construe the psychotherapist-patient privilege in order to promote free and full communication, "'so that the doctor will have the information necessary to competently diagnose and treat the patient.'" Id. (citations omitted). Moreover, this important privilege will not be "'waived by implication except under the clearest of circumstances.'" Id. (citations omitted). However, the physician-patient privilege in § 622.10 is "an evidentiary rule rather than a substantive right," and thus does not "mandate confidentiality of physician-patient communications" "outside of litigation." Id. Thus, the testimonial privilege did not prevent the staff therapist in *Slaughter* from disclosing the plaintiff's mental disability to her employer. Id.

However, absent patient consent (which Slaughter had not given), the broader confidentiality afforded mental health information by I.C.A. § 282.2 did prevent the therapist from disclosing the information she had learned while treating Slaughter. That statutory provision, as well as the federal HIPAA statute that also mandates confidentiality regarding mental health treatment, prevented unauthorized disclosure of the plaintiff's information regardless of who paid the therapist's salary. Id. at 802-803 ("A contrary holding would have a

chilling effect on the willingness of students to open up to psychotherapists employed by their university"). Moreover, these statutory disclosure restrictions trumped the "general principle of agency law imputing an employee's knowledge to the employer." Id. Thus, the trial court properly refused to impute the confidential information learned by the staff therapist while treating the plaintiff to the medical school and its academic decision-makers. Id. at 803-804.

- ***Willard v. State*, 893 N.W.2d 52 (Iowa 2017) - Morbidity and Mortality Statute and Patient Safety Net Reports.**

In **Willard v. State, 893 N.W.2d 52 (Iowa 2017)**, the plaintiff claimed that employees of the University of Iowa Hospital negligently handled and injured him while he was sedated during an abdominal CT scan. In a supplemental request for documents, the plaintiff requested that the Hospital produce any Patient Safety Net ("PSN") report or other incident report that referred or related to the plaintiff. A PSN is an electronic form that permits Hospital employees to report information about events that raise patient safety concerns. Id. at 57. The Hospital withheld the PSN regarding the Plaintiff, claiming that it was covered by the statutory privilege in I.C.A. §§ 135.40-.42 that protects morbidity and mortality studies. Id. at 58. That statute provides that morbidity and mortality studies required by law "shall not be used or offered or received in evidence in any legal proceedings of any kind or character." I.C.A. § 135.42. See Willard, 893 N.W.2d at 60.

The Iowa Supreme Court agreed with the Hospital and held that the morbidity and mortality privilege covers PSN reports and related documents. Id. at 61. Thus, the defendant hospital was not required to produce the PSN concerning the abdominal CT scan of the plaintiff in response to plaintiff's discovery requests. The Court held that the statutory privilege applies even though the patient, not a third party, requested the PSN. Moreover, the morbidity and mortality statute protects against disclosure of such studies in discovery, as well as their admissibility in evidence. Id. at 64. In so holding, the Court compared the policy supporting confidentiality of PSN reports to that protecting peer review records. Id. The Court construed the statutory privilege broadly, stating:

> The protection afforded by the confidentiality privilege allows hospital staff to feel comfortable reporting any and all safety concerns because those reports will remain confidential and not be subject to discovery in a legal proceeding. This confidentiality allows hospitals to reduce adverse patient safety events based on preventable medical errors. The protection [in the statute] is intended to apply to documents or communications that constitute "patient safety work product."

Id. at 64.

- ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017) - Patient-Litigant Exception to the Doctor-Patient Privilege.**

In ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017)**, the plaintiff sued her attorney Blessum for legal malpractice and assault arising out of the attorney's sexual relationship with her. The plaintiff sought compensatory and punitive damages against the attorney based on a broad spectrum of alleged past and future, physical and mental, injuries. Specifically, the jury was instructed on the following elements of the plaintiff's claimed damages: "past medical expenses, past physical and mental pain and suffering, past loss of use of the full mind and body, future medical expenses, future physical and mental pain and suffering, and future loss of use of the full mind and

body." Id. at 515. Over plaintiff's objection, the trial court allowed hundreds of pages of her medical records to go to the jury during deliberations. The Iowa Supreme Court affirmed the trial court's decision to admit the redacted medical records, citing the patient-litigant exception to the physician-patient privilege.

Under that exception, the patient-physician privilege does not apply "in a civil action in which the condition of the person in whose favor the [privilege] is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person." I.C.A. § 622.10(2). In *Stender*, the Court explained that this patient-litigant exception does not frustrate the underlying policy of the physician-patient privilege "because the patient still knows that his or her statements to mental health providers 'remain confidential unless he [or she] affirmatively and voluntarily chooses to reveal them' by raising the medical condition as a claim or defense." Stender, 897 N.W.2d at 515 (citations omitted).

The Court cautioned that the patient-litigant exception does not waive the privilege with respect to all of a patient's medical records and that a court must weigh a plaintiff-patient's right to privacy in her medical records against the defendant's "right to present a full and fair defense to her claims involving her medical conditions." Id. The plaintiff in *Stender*, however, had put her physical and mental condition in issue by seeking compensatory and punitive damages for the wide range of damages that were submitted to the jury. Thus, the "entire spectrum of [plaintiff's] medical conditions was relevant" to the jury's award of compensatory and punitive damages. Id. The trial court had properly weighed the competing interests in the case, had submitted only those records that were related to the damages sought by the plaintiff, and had redacted those portions of the records that were irrelevant or otherwise inadmissible. The court thus did not abuse its discretion in sending the redacted medical records to the jury. Id.

- ***Fagen v. Grand View University*, 861 N.W.2d 825 (Iowa 2015) - Psychotherapist-Patient Privilege.**

In ***Fagen v. Grand View University*, 861 N.W.2d 825 (Iowa 2015)**, a college student sued a fellow student for assault and battery in connection with an incident in which the plaintiff fell and shattered his jaw after being tackled, wrapped in a discarded carpet remnant, rolled and propped up in a corner by the defendant and other students. Fagen sought damages that included pain and suffering, "mental pain," and "mental disability." The defendant requested discovery of Fagen's mental health records, including records pertaining to anger management treatment that Fagen had received when he was in the fourth through sixth grades. After Fagen refused to execute the requested waiver for those records, the trial court ordered him to sign an unrestricted release covering all of his mental health records. Fagen, 861 N.W.2d at 828-29. The Iowa Supreme Court granted Fagen's request for interlocutory review and, in a 4-3 decision in which Justice Zager concurred only in the result, reversed the trial court's order. In so holding, the plurality discussed the patient-litigant exception to the physician-patient privilege and developed a protocol for the discovery of mental health records in civil cases where a litigant refuses to provide a patient's waiver. Fagen, 861 N.W.2d at 834-835.

The testimonial privilege statute, I.C.A. § 622.10(2), states that the physician-patient privilege does not apply "in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person." Under this patient-litigant exception to the psychotherapist-patient privilege, the patient "waives" the privilege by placing his physical or

mental condition in issue in civil litigation. As explained by the *Fagen* plurality, the patient-litigant exception "will not inhibit communication between a patient and his doctor because the patient knows his statements will remain confidential unless he affirmatively and voluntarily chooses to reveal them by raising his condition as an element or factor of any claim or defense the patient makes." Id. at 832, *quoting* Chung v. Legacy Corp., 548 N.W.2d 147, 151 (Iowa 1996). The privilege statute goes on to require a plaintiff whose mental or physical condition is in issue to execute a waiver releasing medical or mental health records and authorizing his or her treating physician to consult with the defendant's attorney. See I.C.A. § 622.10(3)(a)-(b).

As noted by the *Fagen* plurality, however, a party does not waive the physician-patient privilege with respect to all of his mental or medical records merely by filing a civil lawsuit. Nor does the patient-litigant exception provide "carte blanche access to a person's medical records or information" or require disclosure of confidential communications or records that are unrelated to the condition at issue in the patient's claim or defense. Fagen 861 N.W.2d at 833. To prevent the party seeking the waiver from going on "an unlimited fishing expedition" into the claimant's mental health records," the *Fagen* plurality developed a protocol to determine when a civil litigant has waived the physician-patient privilege and what records must be produced in discovery pursuant to that waiver. Fagen, 861 N.W.2d at 834-35. That protocol, derived from the Court's precedent in criminal cases, balances "a patient's right to privacy in his or her mental health records against a tortfeasor's right to present evidence relevant to the injured party's damage claims." Id. at 828.

Under the plurality's protocol, if a party refuses to execute a requested medical records release, the party requesting the records must demonstrate a reasonable, good faith, factual basis for believing that the records sought "are reasonably calculated to lead to admissible evidence germane to an element or factor of the [patient's] claim or defense." Id. at 835. To make this showing, the requesting party

> must show a nexus between the records sought and a specific claim or defense made in the case. If a party can make this showing, the patient-physician privilege is lost as to those records and the party requesting the waiver shall be entitled to the waiver to obtain those records within the scope of discovery.

Id. The produced records must be kept confidential and "are not admissible as evidence unless the party can show the records are necessary as evidence in the proceeding." Id.

The plurality in *Fagen* was unable to apply this new protocol to the facts in that case because it viewed the record as devoid of discovery documents, responses, or depositions that would clarify the nature of Fagen's mental distress claim or his prior mental health counseling. The plurality thus remanded the case so that the parties could present this evidence and the trial court could apply the new protocol and determine whether Fagen must sign a patient's waiver. Id. at 836.

Although Justice Zager concurred in this result, he did not join in the plurality's reasoning. Thus, only three Justices have explicitly endorsed this new protocol, which arguably applies in any case where a plaintiff seeks mental distress damages and refuses to execute a patient waiver. See Fagen, 861 N.W.2d at 841 (Mansfield, J., dissenting). As noted by the dissent, the plurality's protocol seems to require the defendant to engage in time-consuming and expensive discovery in order to demonstrate the nexus between the plaintiff's mental distress claim and the requested medical records. Id. at 841 (Mansfield, J., dissenting). This shift in burden, as further noted by the dissent, seems to conflict with the Court's newly adopted initial

disclosure rule that requires that any claimant who is seeking damages for personal or emotional injuries to automatically produce a waiver and release concerning his or her medical and mental health records for the preceding five years. See Iowa R. Civ. P. 1.500(1)(b)(3), (4). Fagen, 861 N.W.2d at 837-38 (Mansfield, J., dissenting). The Court will likely be called upon to reconcile the plurality's protocol with this initial disclosure obligation in a future case.

- ***In re A.M.*, 856 N.W.2d 365 (Iowa 2014).**

***In re A.M.*, 856 N.W.2d 365 (Iowa 2014)** was a child-in-need-of assistance (CINA) adjudicatory proceeding in which the guardian ad litem had requested, and the juvenile court had ordered, a mother's therapist to testify regarding the mother's mental health treatment. Id. at 368. The case presented an issue of first impression that required the Court to balance two "vitally important interests: (1) the juvenile court's need for relevant evidence of the mother's mental health to determine the best interests of the children and (2) the need for confidentiality for effective mental health counseling." Id. The Court held that the Iowa legislature had created a statutory exception to the psychotherapist-patient privilege in CINA adjudicatory hearings. See I.C.A. § 232.96(5) (providing that the "privilege attaching to confidential communications between a health practitioner or mental health professional and patient . . . shall [not] be ground for excluding evidence at an adjudicatory hearing."). That statutory exception, the Court held, trumps the privacy protections afforded mental health treatment under both Iowa and federal law. In particular, the specific statutory privilege waiver in CINA cases supersedes the more general confidentiality provisions of the federal "HIPAA" law, the Iowa testimonial privilege statute—I.C.A. § 622.10, and the infrequently interpreted Iowa Code chapter 228 (prohibiting mental health professionals from disclosing mental health information). In re A.M., 856 N.W.2d at 373-79. [As discussed *supra*, this statutory provision was discussed by the Court this term in *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793 (Iowa 2019)). Thus, the juvenile court possessed the authority to order the mother's mental health therapist to testify in the CINA adjudicatory hearing. Id. at 373, 380. The Court indicated that either the therapist or the patient could request the juvenile court to close the hearing to the public during the therapist's testimony. Id. at 380.

- ***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014).**

In ***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014)**, the Iowa Supreme Court addressed the issue it first addressed in *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), concerning the circumstances in which privileged mental health records can be disclosed to a defendant in a criminal case. In *Cashen*, the Court established a protocol to guide trial courts in balancing a patient's right to privacy in his or her mental health records against a criminal accused's right to present evidence that might influence a jury's determination of guilt. The Iowa legislature later revised and codified that protocol in Iowa's doctor-patient privilege statute—Iowa Code § 622.10(4)(a)(2)(a). This post-*Cashen* statutory protocol has become a frequent subject of dispute in Iowa criminal cases, including *State v. Neiderbach*, 837 N.W.2d 180 (Iowa 2013), *State v. Thompson*, 836 N.W.2d 470 (Iowa 2013), and *Edouard*.

In *Edouard*, the defendant was convicted of sexual exploitation by a counselor or a therapist of four women who were all members of a religious congregation of which Edouard was the pastor. The sexual exploitation statute made it a crime for any person, including a clergyman, who provides "mental health services" to a "patient or client" to engage in sexual conduct with that person while the mental health services are being provided and for one year

thereafter. Iowa Code §§ 709.15(1)(a), (2)(c). The statute further defined "mental health services" to include the "counseling of another person for a cognitive, behavioral, emotional, mental, or social dysfunction, including an intrapersonal or interpersonal dysfunction." Id. § 709.15(1)(d). The fighting issue in the case was whether Edouard, who admitted to engaging in sexual conduct with the women, provided the type of "counseling" required by the statute.

One of the women had undergone marriage counseling with her husband during the time she was seeing Edouard and shortly thereafter. Edouard sought access to those records under the post-*Cashen* statutory protocol. The trial court denied Edouard's request without ever conducting an *in camera* review of the counseling records. In reversing and remanding that issue to the trial court, the *Edouard* Court distinguished this case from *Thompson*, where the accused had failed to demonstrate any nexus between the victim's mental health records and any issue for trial. In contrast, the sexual exploitation statute required the State to prove that Edouard counseled the victim for an "emotional . . . or social 'dysfunction,'" including "an intrapersonal or interpersonal dysfunction." The fact that the victim in *Edouard* was seeing a marriage counselor during the time that she was seeing Edouard and shortly thereafter could potentially cast light on whether she was suffering from such a dysfunction during the relevant time period. Edouard, 854 N.W.2d at 442. The Court thus reversed and remanded the case as to this one victim so that the trial court could conduct an *in camera* review of her marriage counseling records. On remand, the trial court was to determine whether the records contained any exculpatory evidence and, if they did, decide whether Edouard should receive a new trial. Id. at 442-43.

4. Privileges based on Confidential Governmental Records and Information

- ***Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222 (Iowa 2019).**

In Iowa, a qualified privilege for official information has been established by statute in I.C.A. § 622.11: "A public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by the disclosure." Relatedly, the Iowa Freedom of Information Act provides qualified confidentiality for police investigative reports "unless otherwise ordered by a court." See I.C.A. § 22.7(5). In ***Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222 (Iowa 2019)**, the Court discussed the interplay between these statutory confidentiality provisions and Iowa's discovery rules.

In *Mitchell*, an African-American motorist was rendered a quadriplegic after a white Cedar Rapids police officer shot him in a late-night traffic stop. In their civil lawsuit against the officer and the City, the injured motorist and his wife sought discovery of any police investigative reports concerning the incident. The defendants refused to produce the police investigative reports without a protective order that prohibited their disclosure to the media or other nonparties. Id. at 224. The trial court determined that Iowa Code sections 622.11 and 22.7(5) required it to balance the interest in confidentiality concerning police investigative records against the policy favoring transparency of public records. The trial court denied the defendants' request for a protective order and compelled the defendants to produce any police investigative reports prepared within 96 hours of the shooting, excluding personnel records, medical records, and records of internal police investigations. Id. at 227. The Iowa Supreme Court affirmed the trial court's discovery ruling. Id. at 225.

The Court initially held that "police investigative reports do not lose their confidential status under section 22.7(5) when the investigation closes." Id. at 231-32. The statutory confidentiality is not absolute, however, and the trial court must balance the sensitive competing

interests at stake in deciding whether to order disclosure. Id. at 232-235. Police investigative records, unlike "confidential personnel records" do not "fall within a categorical exemption" to the Iowa Open Records Act. Id. at 234. Instead, the relevant statutes prescribe a legislative balancing test that asks whether "the public interest would suffer by disclosure." Id. at 232 (citing Hawk Eye v. Jackson, 521 N.W.2d 750, 753 (Iowa 1994)). In weighing competing interests, the court should consider the need to protect confidential informants or innocent suspects, whether the investigation is ongoing or complete, and any "heightened public interest in police use of force." Mitchell, 926 N.W.2d at 233. The Court held that the trial court properly balanced these considerations and did not abuse its discretion in ordering the appropriately limited disclosure of the police investigative reports at issue. Id. at 235-236.

G. Impeachment: Rules 5.607-609; 5. 801(d)(1)

1. Impeachment with Prior Inconsistent Statements under Rule 5.607

- ***State v. Russell*, 893 N.W.2d 307 (Iowa 2017).**

In ***State v. Russell*, 893 N.W.2d 307 (Iowa 2017)**, Russell was prosecuted for murder of a person who had been knocked to the ground and then kicked and stomped to death by members of the surrounding crowd. Russell was part of a large gathering of people who had been drinking and listening to music near the river in downtown Des Moines. The victim, a stranger who had intruded into the gathering, was allegedly struck and knocked to the ground by Tyler. Others in the crowd, including Russell and Shorter, then allegedly converged on the victim and kicked and stomped him to death. After trying Tyler separately, the State jointly tried Russell and Shorter as co-defendants. All parties hotly disputed identity, with both Russell and Shorter contending that they did not actually participate in the assault. Several witnesses who were at the gathering during the assault testified at Russell and Shorter's trial. The State called one such witness, a juvenile designated as T.T. In an interview with detectives two days after the assault, T.T. identified Russell as one of the persons who had kicked the victim. In her pre-trial deposition and at trial, however, T.T. claimed to not remember either what happened after the victim had been knocked to the ground or what she had told the detectives two days later. At trial, the State sought to impeach T.T.'s "I don't remember" answers with her prior statements to the police and the testimony of the detective who conducted that interview. Id. at 309-310. Russell argued that T.T.'s statements to the police constituted improper impeachment with inadmissible hearsay. Id. at 313-315.

The Court discussed impeachment of a forgetful witness who claims at trial not to remember any of the facts underlying the charged event. The Court noted that under rule 5.607, a party is generally permitted to use a prior inconsistent statement to impeach its own witness who testifies about an event, but does not remember making any prior inconsistent statement. Id. at 316-17. However, if the witness does not remember any of the facts underlying the prior inconsistent statement, "the only subject to be impeached is the witness's memory or ability to recollect." Id. at 317. The State can try and get the witness to admit that she remembers the underlying facts, but cannot admit the prior statement itself into evidence. Id.

Moreover, even if the witness recalls the underlying facts, the State may not call such a witness with the primary purpose of impeaching her with an otherwise inadmissible prior inconsistent statement. Id. at 315-16. In *Russell*, the Defendant argued that the State had called T.T. at trial for the primary purpose of impeaching her with her otherwise inadmissible prior inconsistent statements to police. The Court agreed with Russell that the State knew from her deposition and voir dire answers that T.T. claimed not to remember who kicked the victim and that

she would provide no testimony of use in prosecuting Russell. According to the Court, the State's primary purpose in calling T.T., then, was to impeach her with her prior statements. Id. at 316.

The Court noted, however, that neither of these restrictions on impeachment with a prior inconsistent statement apply if the evidence is independently admissible. That is, the State is not barred from impeaching a forgetful witness with *admissible* evidence and "[p]rior statements of a witness that are admissible as substantive evidence may be freely employed to impeach a witness on direct examination." Id. Thus, the State properly impeached T.T. with her prior statements to police if they were otherwise admissible as substantive evidence. As discussed below, the Court went on to hold that T.T.'s identification of Russell to the police was independently admissible under rule 5.801(d)(1)(C) as a non-hearsay statement of prior identification. See *infra*. No improper impeachment had thus occurred. Russell, 893 N.W.2d at 317.

- ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015).**

In ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015)**, the Iowa Court discussed the restriction on using a witness's prior inconsistent statement for the primary purpose of placing otherwise inadmissible evidence before the jury. In that domestic abuse prosecution, an upset victim had identified Tompkins as her assailant to the investigating officers who had arrived on the scene immediately after the alleged assault in response to a 911 call by neighbors. Prior to trial, however, the victim recanted her statements, denying that the defendant had ever assaulted her and claiming that she had tripped and fell on the stairs instead. At trial, the State called the victim for the sole purpose of establishing her domestic relationship with Tompkins. The State later called the responding officer to testify about the victim's out-of-court statements identifying Tompkins. Tompkins claimed that this testimony violated the rule in *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990).

Under *Turecek*, while rule 5.607 permits a party to impeach its own witnesses, the State cannot call a witness that it expects to give unfavorable testimony for the sole purpose of impeaching that witness with an otherwise inadmissible prior inconsistent statement. In *Tompkins*, however, the Court clarified that this limitation on impeachment does not apply if the impeaching evidence falls within a hearsay exception or is otherwise properly admissible for its truth. The State had laid the necessary foundation to admit the victim's statements to police as excited utterances.

> When a witness's hearsay statement is admissible to prove the truth of the matter asserted, there is no *Turecek* violation. *Turecek* is a rule that prevents parties from unfairly *circumventing* the hearsay rule. Thus, once the State laid the proper foundation for the admission of A.H.'s hearsay statements under the excited utterance exception to the hearsay rule, they were admissible as evidence of the fact that Tompkins pushed her, and *Turecek* no longer applied.

Tompkins, 859 N.W.2d at 639 (citations omitted). Thus, no *Turecek* violation had occurred and the victim's hearsay statement was admissible for its truth, as well as for impeachment.

2. Impeachment with Conviction for Crime of Dishonesty or False Statement Over Ten-Years-Old under Rule 5.609(b)

- ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014).**

Iowa R. Evid. 5.609 governs impeachment of a witness with a prior conviction. That Rule differentiates between (1) a prior conviction that is more than ten years old, Iowa R. Evid. 5.609(b), (2) a prior conviction involving a crime of dishonesty or false statement, Iowa R. Evid. 5.609(a)(2), and (3) a prior conviction for any other type of crime that constitutes a felony. Iowa R. Evid. 5.609(a)(1). ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014)** involved impeachment with a conviction that falls within both of the first two categories—a conviction that is over ten years old *and* that, at least arguably, involves a crime of dishonesty or false statement.

In *Dudley*, a defendant attempted to impeach a government witness with a 20-year old conviction for theft. Under rule 5.609(a)(2), a conviction for a "crime of dishonesty or false statement" is admissible to impeach any witness regardless of the potential punishment; the trial court possesses no discretion to exclude such a conviction under rule 5.403. Although Iowa precedent currently characterizes theft and burglary as per se crimes of "dishonesty or false statement," the Iowa Supreme Court has previously suggested that it might be willing to reconsider this classification in light of contrary federal and state practice. See *State v. Harrington*, 800 N.W.2d 46, 52 n. 4 (Iowa 2011). In *Dudley*, however, the Court again stated that "theft is a crime of dishonesty," without discussing *Harrington* or the differing approach taken by federal and many state courts. Because the theft conviction at issue was older than ten-years-old, however, it was not automatically admissible under rule 5.609(a)(2). Instead, rule 5.609(b) governs and the conviction could not be used for impeachment unless the trial court affirmatively found that its probative value for impeachment substantially outweighed its prejudicial impact. The Court remanded to allow the trial court to conduct this necessary balancing.

3. Impeachment of Jury Verdict: Rule 5.606(b)

Both the Iowa and the U.S. Supreme Courts addressed when a criminal defendant can impeach a jury verdict with juror testimony. See ***Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (U.S. 2017)** (juror's racial prejudice); ***Warger v. Shaurers*, 135 S. Ct. 521 (2014)** (juror's dishonesty during voir dire); ***State v. Christensen*, 929 N.W.2d 646 (Iowa 2019)** (jurors' exposure to Facebook rumor about possible riot in community concerning the case); ***State v. Webster*, 865 N.W.2d 223 (Iowa 2015)** (juror's failure to disclose social media communications). The Iowa cases of *Christensen* and *Webster* are discussed here, while the two U.S. Supreme Court cases are discussed *infra* § IV).

- **State v. Christensen, 929 N.W.2d 646 (Iowa 2019).**

In ***State v. Christensen*, 929 N.W.2d 646, 661-68 (Iowa 2019)**, a high school track athlete was charged with the murder of a local college student who was dating Christensen's former girlfriend. The emotionally-charged case took place in the tight-knit community of Estherville and a large number of potential jurors who had some connection with or predisposition about the case were dismissed for cause. After Christensen's conviction for second degree murder, he moved for a new trial based on, among other things, jury misconduct and bias. Christensen claimed that at some point during jury deliberations, a juror or jurors learned of a hearsay rumor on Facebook about a possible riot or disturbance in the community if the jury didn't reach a certain verdict in the case. Christensen argued that the jury's exposure to this extraneous report deprived him of a fair and impartial trial and required that he be given a new trial. Id. at 662.

The Court ultimately held that "Christensen failed to show a reasonable probability that the verdict of the jury would have been different if the extraneous influence did not reach the

jury." Id. at 679. In reaching that conclusion, the *Christensen* Court extensively discussed "the proper legal framework for determining whether a reversible case of jury misconduct is present." Id. at 665. The Court acknowledged that any approach to this issue must "delicate[ly] balance" an accused's right to a fair and impartial jury against the countervailing interests in juror privacy and the finality of verdicts, a task that is complicated by the evidentiary rule prohibiting inquiry into jury deliberations and the increased risk that jurors might receive extraneous information from the Internet. Id. at 665-666, Justice Appel surveyed competing approaches and precedent from the United States Supreme Court, the lower federal courts, other jurisdictions, and Iowa only to conclude that the facts of Christensen's case did not justify adopting the heightened scrutiny approach urged by the defendant. Id. at 661-79. For example, the Court discussed, but left for another day, whether a defendant's constitutional right to a fair trial may justify a higher de novo standard of appellate review, id. at 676-78, or whether an irrebuttable or rebuttable presumption of prejudice should be applied in at least some cases of jury misconduct involving jury tampering or bribery by third parties. Id. at 678-79. While a presumption of prejudice might be appropriate in cases involving "more than innocuous interventions," however, the facts of *Christensen*—involving a "vague and generalized report on social media that some unknown persons might engage in a riot related to the trial"—did not rise to that level. Id. at 678.

In determining the question of prejudice, the Court applied the "reasonable probability," rather than the "reasonable possibility" test; looked at the "objective facts—who said what to whom and when and what specifically was injected into the jury discussion," rather than "juror assessments about the impact of the improper extraneous influence" (which are "off limits" under Iowa R. Evid. 5.606(b) in any event); and adopted a multi-factored and case-specific approach to jury misconduct. The Court dismissed the alleged threat of a community disturbance in the case as a vague, speculative, hearsay rumor that was not directed to any juror, had no objective support in the record, and that had garnered only brief attention by the jury. Id. at 679-80. Because Christensen had not demonstrated a reasonable probability that the verdict would have been different, the Court affirmed Christensen's conviction and the trial court's denial of a new trial.

The Court also dismissed Christensen's claim that "heightened community awareness . . . and the jurors' general knowledge thereof," created implied juror bias. Juror bias, according to the Court, differs from juror misconduct and "arises when a juror is unable to fairly engage in a determination of guilt or innocence based on the evidence at trial and the court's instructions." Id. at 661 (citations omitted). Christensen had failed to demonstrate that any of his jurors had a sufficiently "close connection" to the case or the community's response to the case to render them impliedly biased. Id at 681.

- ***State v. Webster*, 865 N.W.2d 223 (Iowa 2015).**

In **State v. Webster, 865 N.W.2d 223 (Iowa 2015)**, the Iowa Supreme Court addressed the increasingly common problem presented by jurors' use of electronic communications and social media. *Webster* was a homicide prosecution in which the defendant Webster claimed that he shot his long-time friend to protect the victim's girlfriend, whom Webster believed the victim was sexually assaulting. During trial, the trial court learned that one of the jurors was acquainted with the victim's family. In response to *in camera* questioning by the court and the parties, the juror affirmed that she could remain unbiased and she was allowed to remain on the jury without objection. After the jury convicted Webster of second degree murder, Webster's counsel learned that that juror had not fully disclosed the extent of her relationship with the victim's family during

voir dire or the *in camera* hearing. Specifically, Webster claimed that the juror had failed to disclose that her daughter was good friends with the victim's stepsister, that the juror had engaged in discussions about the case with third parties, and that the juror was Facebook "friends" with the victim's stepmother and had "liked" a posting that the stepmother had made on her Facebook wall during the trial. Id. at 226-31. Webster moved to vacate his conviction because of juror misconduct and juror bias. The Iowa Supreme Court held that the trial court had not abused its discretion in refusing to overturn the verdict because of juror misconduct or juror bias. Id. at 226-27.

In so holding, the Court indicated that juror misconduct is related to, but analytically distinct from, juror bias.

> Juror misconduct ordinarily relates to actions of a juror, often contrary to the court's instructions or admonitions, which impair the integrity of the fact-finding process at trial. . . . Juror bias, on the other hand, focuses on the ability of a juror to impartially consider questions raised at trial. A biased juror is simply unable to come to a fair decision in a case based upon the facts and law presented at trial. A juror may be biased without engaging in any kind of misconduct. Conversely, an impartial and fair-minded juror may nonetheless engage in juror misconduct.

Id. at 232 (citations omitted). The Court noted that a juror commits misconduct when she communicates with third parties about the merits of a case outside the jury room. Id. at 235. Likewise, juror misconduct can occur when a juror, *during trial*, investigates or researches the facts or law of a case outside "the rigors of the trial process." Id. at 236. In *Webster*, however, the juror had done her independent research after the verdict. Moreover, the record was inadequate to conclude that the juror's brief third-party communications were misconduct that improperly influenced the jury's verdict. Id. at 235-36.

The Court then discussed the more difficult and serious question of juror bias. The Court noted that juror bias can take the form of either actual bias or implied bias—either of which can prevent a defendant from receiving a fair trial. Id. at 236. *Webster*'s facts implicated implied bias, which "arises when the relationship of a prospective juror to a case is so troublesome that the law presumes a juror would not be impartial." Id. In most cases, the burden is on the parties themselves to ferret out juror bias during voir dire. This cannot occur, however, when a potential juror fails to fully and truthfully respond to voir dire questions aimed at uncovering potential bias. The Court expressed particular concern with jurors who conceal information during voir dire in order to avoid being removed from the jury panel. Id. at 237. The voir dire in *Webster* had not been transcribed, however, and there was no record evidence that anyone had ever directly asked the disputed juror about her relationship with the victim's family. Accordingly, there was no evidence that the juror had lied or provided false testimony during voir dire or the *in camera* hearing. Id. at 237-38.

More troubling to the Court were the juror's Facebook relationship with the victim's mother and her "liking" of the mother's "give me strength" Facebook post during trial. The Court noted that "[a] juror who directly violates the admonitions of the court and communicates with the mother of a crime victim about a case certainly raised questions about her ability to be an impartial juror." Id. at 239. Again, however, because the precise admonitions given to the jury were not transcribed, the Court could not determine whether the juror had violated any direct trial court instruction. Moreover, the juror testified that she did not consider one "click" of a computer button to be an improper "communication." Although the Court did not approve of the

juror's conduct in the case, it could not find that the trial court had abused its discretion in denying Webster a new trial. Id. The Court did issue a strong recommendation to trial courts in future cases to repeatedly and specifically instruct jurors of their obligations in an electronic world: "courts should frequently, as a matter of course, instruct jurors not to use social media to communicate about the trial and clearly explain what constitutes communication." Id. at 240.

H. Expert and Lay Opinion Testimony: Rules 5.701-5.706

1. Lay Opinion under Rule 5.701

- ***State v. Myers*, 924 N.W.2d 823 (Iowa 2019).**

The main issue in ***State v. Myers*, 924 N.W.2d 823 (Iowa 2019)** concerned whether an initial positive laboratory test could support a conviction for operating a motor vehicle based upon the presence of a controlled substance in a person's blood or urine. In the course of holding that a follow-up confirmatory test is required to support guilt beyond a reasonable doubt for this type of OWI, the Court confirmed that a lay person can opine whether another person is intoxicated at a particular time and "may even 'state how far another was affected by intoxication.'" Id. at 831 (citations omitted).

2. Expert's Reliance upon Hearsay under Iowa R. Evid. 5.703

- ***In re Detention of Tripp*, 915 N.W.2d 867 (Iowa 2018).**

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.

3. Legal Opinions and Conclusions

- ***Haskenhoff v. Homeland Energy Solutions*, 897 N.W.2d 553 (Iowa 2017).**

In ***Haskenhoff v. Homeland Energy Solutions*, 897 N.W.2d 553 (Iowa 2017)**, the Court discussed expert testimony proffered by the plaintiff in a sexual harassment/ hostile-work - environment case. The plaintiff's expert had reviewed the defendant employer's sexual harassment policies and procedures and opined whether those procedures met the accepted standards in the human resources field. The defendant challenged that expert testimony on the ground that it constituted an improper legal conclusion. Id. at 599.

The Iowa Supreme Court acknowledged that an expert cannot testify about legal standards or opine that a defendant violated the law. An expert, for instance, cannot testify about "whether a defendant was negligent or not negligent." Id. at 600. However, an expert may testify about recommended industry or professional standards and opine whether a defendant adhered to those standards. Id. The plaintiff's expert in *Haskenhoff*, a professor of psychology and gender and women's studies, thus could testify regarding recommended practices in the human resources industry for the prevention, investigation, and remediation of workplace sexual harassment. Id. at 566, 600-601. The expert could further permissibly opine whether the defendant's policies and procedures satisfied those accepted standards. The Court noted that while the expert's testimony "skirted close to the line prohibiting testimony on legal conclusions," the expert had not told the jury what the law prohibiting sexual harassment required, nor testified that the defendant violated any law or civil rights statute. Id. at 600. Thus, the trial court did not abuse its discretion in admitting the plaintiff's expert testimony. Id. at 599-601.

- ***Attorney Disciplinary Bd. v. Blessum*, 861 N.W.2d 575 (Iowa 2015).**

The Iowa Supreme Court has long distinguished between <u>proper</u> opinion testimony that uses popular parlance or commonsense terminology and <u>improper</u> opinion testimony reaching specialized legal conclusions. In ***Attorney Disciplinary Bd. v. Blessum*, 861 N.W.2d 575 (Iowa 2015)**, an attorney disciplinary proceeding, the Court again discussed this dichotomy.

In that case, the state attorney disciplinary commission found that Blessum had violated several rules of professional conduct. On appeal, Blessum argued that the disciplinary commission had improperly excluded proffered testimony by two of his expert witnesses. One of these experts offered an opinion that there was no "nexus" between Blessum's one-time commission of assault and Blessum's fitness to practice law. The other, a family law practitioner, offered to opine that Blessum acted "diligently" in a dissolution of marriage case. Blessum, 861 N.W.2d at 581.

The Supreme Court noted that expert testimony is not inadmissible merely because it goes to an ultimate issue in a case. Id. at 583. See Iowa R. Evid. 5.704. Nevertheless, an expert "cannot opine on a legal conclusion or whether the facts of the case meet a given legal standard." Id., quoting In re Det. Of Palmer, 691 N.W.2d 413, 419 (Iowa 2005). Thus, the commission had properly excluded the opinion regarding the "nexus" between the attorney's criminal act and his fitness to practice law because "[n]exus in this context is a legal term of art," and the expert would be testifying on that purely legal ultimate issue. Blessum, 861 N.W.2d at 584. In contrast, the family law expert's proposed opinion regarding whether the attorney exercised "diligence" in a domestic relations matter

presented "a closer call" because "diligence" has a "commonsense meaning" and does not have a specialized legal definition. Id. The Court did not definitively rule on the admissibility of that opinion, however, because its exclusion did not affect the proceeding. Id. at 585.

- ***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014).**

***State v. Edouard*, 854 N.W.2d 421 (Iowa 2014)** also concerned the admissibility of expert testimony that purports to define a crime in a specialized manner that does not comport with the statutory definition of the crime. As discussed above, the disputed issue in the case concerned whether the defendant pastor provided the type of "counseling" required by the sexual exploitation statute. Edouard sought to introduce expert testimony by a forensic psychiatrist who would explain the difference between "pastoral care" and "pastoral counseling" and who would opine that Edouard merely provided pastoral care, not counseling, to the women congregants. The trial court excluded the expert's testimony on the ground that it improperly usurped the court's duty to instruct the jury on the law applicable to the case and the jury's duty to determine whether Edouard's conduct fell within the statutory definition of mental health services. Edouard, 854 N.W.2d at 426.

The *Edouard* majority noted that Edouard's expert sought to testify about the specialized meaning of counseling within the theological community. However, even if Edouard had not provided "pastoral counseling" under the expert's specialized definition, his actions could still fall within the legislature's definition of mental health services under the statute. Id. at 436-37. The expert, in the words of the Court, improperly sought "to provide the defendant's own definition of the crime, and then to explain the defendant had not committed it." Id. at 436. The sexual exploitation statute itself defined mental health services in a broad and non-technical manner that differed from the narrow and specialized definition of pastoral counseling provided by the expert. Id. Thus, the expert did not "add something to the jury's determination of whether Edouard's actions fell within the legal definition of mental health services," and thus did not assist the jury in determining a fact in issue. Id. The Iowa Supreme Court thus held that the trial court did not abuse its discretion in excluding the expert's testimony. Id. at 437.

4. Opinions in Legal Malpractice Cases

- ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017).**

In ***Stender v. Blessum*, 897 N.W.2d 491 (Iowa 2017)**, the plaintiff sued her divorce attorney for legal malpractice based, in part, on his sexual relationship with her. The plaintiff sought to have her expert, a domestic relations lawyer, testify about whether a sexual relationship between an attorney and his client violates the Iowa Rules of Professional Conduct or breaches any fiduciary duty. In its substantive ruling in the case, however, the Supreme Court refused to recognize a claim for legal malpractice or breach of fiduciary duty based solely on a lawyer-client sexual relationship. Id. at 501-509. The expert's proffered testimony was thus not relevant to the remaining legal malpractice claims, which were not based upon the parties' sexual relationship. Id. at 509-510. Thus, while the expert could (and did) testify regarding the general standard of care required of attorneys in dissolution actions, the expert's opinions regarding attorney-client sexual relationships did not assist the jury in determining any fact properly in issue. Id. at 510 (holding that requirement that expert "assist" the trier of fact requires that the district court consider whether the proposed evidence is relevant").

Stender raised another issue related to expert testimony. The Supreme Court affirmed the

trial court's directed verdict on the plaintiff's legal malpractice claim that was based on the drafting of the plaintiff's will. The Court noted that with most claims of legal malpractice, a plaintiff must produce expert testimony on the standard of care required of "a similarly situated ordinary lawyer." Id. at 505-06. That is, "[i]n a claim for legal malpractice, 'unless the plaintiff's claim is based on standards of care and professionalism understood and expected by laypersons, the plaintiff will have to retain an expert to go forward.'" Id. at 505 (citations omitted). The legal malpractice claim in *Stender* involved "[t]he technicalities of drafting a will" and thus concerned questions of negligence and causation that were beyond the ken of ordinary laypersons. Id. at 506. Yet, Stender had failed to introduce any expert testimony regarding whether the defendant failed to exercise ordinary care in drafting her will. The trial court thus properly granted the defendant-lawyer judgment as a matter of law on that claim as well. Id.

5. Forensic Opinions and Opinions regarding Cause and Manner of Death

- **Linn v. State, 929 N.W.2d 717 (Iowa 2019).**

In **Linn v. State, 929 N.W.2d 717, 731-49 (Iowa June 2019)**, the Iowa Supreme Court extensively discussed the important role that expert witnesses play in trials involving domestic violence and battered woman syndrome ("BWS"). In that post-conviction proceeding, a woman who allegedly killed her abusive boyfriend in self-defense claimed that her trial counsel was ineffective in not adducing evidence of BWS. She additionally claimed that the trial court erred in denying her a court-appointed expert regarding BWS. The *Linn* Court held that the trial court abused its discretion in denying the woman a court-appointed BWS expert and erred in summarily dismissing the woman's ineffective assistance claim. Id. at 753-54.

- ***More v. State*, 880 N.W.2d 487 (Iowa 2016).**

In ***More v. State*, 880 N.W.2d 487 (Iowa 2016)**, the Iowa Supreme Court considered the admissibility of expert testimony regarding Compositional Bullet Lead Analysis ("CBLA"). The defendant in that case argued that the admission of that now scientifically discredited evidence violated his constitutional right to due process. The Iowa Supreme Court held that the admission of the expert testimony did not violate the murder defendant's due process rights under either the federal or Iowa constitutions. Id. at 511-13. The Court explained:

> For the admission of evidence to violate due process, it is not sufficient that the evidence is "merely untrustworthy," but the evidence must be "so inherently unreliable that to even allow a jury to consider it is a denial of due process." In other words, to find that the introduction of evidence violates due process, the evidence must be so inherently unreliable that it renders the trial fundamentally unfair.

More, 880 N.W.2d at 500 (citations omitted).

The *More* Court noted that while much of CBLA evidence is potentially misleading and scientifically invalid, such expert testimony is not per se inadmissible in its entirety. An expert can still testify that metals in bullets found at a crime scene contain the same trace elements as those in a defendant's possession. The expert may not, however, conclude that the bullets came from the same batch or box of ammunition or the same common source. The expert must also acknowledge the "very large number of potentially analytically indistinct bullets that could exist." Id. at 508.

- ***State v. Tyler*, 867 N.W.2d 136 (Iowa 2015).**

***State v. Tyler*, 867 N.W.2d 136 (Iowa 2015)** concerned a prosecution of a mother for drowning her newborn son. The medical examiner opined, in both his testimony and the autopsy report, that the infant had been born alive and then was drowned by homicide in a hotel bathtub. The medical examiner admitted that the physical and objective evidence from the autopsy examination of the newborn was inconclusive as to cause and manner of death—while consistent with drowning by homicide, that evidence was also consistent with intrauterine fetal death and death from natural causes immediately after birth. Tyler, 867 N.W.2d at 149-50. The medical examiner based his opinion that the baby died from drowning by homicide on the inconsistent and uncorroborated statements that the mother had made during questioning by investigators. Initially, the mother had contended that the baby had not moved or cried after birth. After being questioned for several hours, the mother admitted that the baby had moved and cried after birth and that she had placed him in the hotel bathtub in order to drown him. Id. at 146-47.

The jury convicted Tyler of second degree murder and the Iowa Supreme Court granted review to consider a question of first impression in this State: "[w]hether a medical examiner may opine on cause or manner of death when his or her opinions are based largely on uncorroborated witness statements or information obtained through police investigation. . . ." Id. at 155. The Iowa Supreme Court held that the State Medical Examiner should not have been permitted to opine as to the cause or manner of the newborn's death because the forensic pathologist's opinion was based primarily, if not exclusively, on the expert's selective acceptance of the mother's statements to investigators. The Court reversed Tyler's conviction and remanded for a new trial. Id. at 167, 177.

The *Tyler* Court gave several reasons for its holding. First, when an expert relies primarily upon witness statements or other information obtained through police investigation, the expert's opinion will not be sufficiently based upon the expert's scientific, technical, or other specialized knowledge and thus will not assist the jury in evaluating the evidence. Id. at 163-165. The Court acknowledged that no "bright-line rule" exists "for determining whether a medical examiner may opine on cause or manner of death when his or her opinions are based, in whole or in part, on such information." Id. at 162. When a medical examiner primarily bases his or her opinion on the autopsy findings, that opinion may well assist the fact-finder to determine cause or manner of death, even when the opinion is also partly based upon statements and information obtained by investigators. On the other hand, when autopsy findings do not support any conclusion regarding cause or manner of death and the forensic pathologist bases his or opinion instead on witness statements and materials procured through police investigation, the opinion will not be admissible under rule 5.702 because it will not assist the jury. Id. at 162-63.

Second, the Court concluded that the medical examiner's opinion in *Tyler* improperly commented on the credibility of a witness—Tyler herself. The pathologist in the case admitted that he had based his opinion that the child had drowned by homicide on the mother's admissions to police. The mother, however, had given investigators two inconsistent versions of the child's birth. By crediting some of the mother's statements and discrediting others, the expert had indirectly and improperly commented on the mother's credibility. Id. at 165-66. Thus, under the "unique facts" of the case, the expert's opinion as to the cause and manner of death "crossed that very thin line between testimony that assists the trier of fact and testimony that vouches for a witness's credibility." Id.

Lastly, the medical examiner admitted that the autopsy results were inconclusive concerning these issues and that he reached his conclusion only after viewing Tyler's police interview. The Court thus expressed its "serious doubts" whether the medical examiner's opinion was based upon a reasonable degree of medical certainty. Id. at 166

The Court's decision in *Tyler* may be limited to expert testimony by medical examiners whose opinions are based solely, or at least primarily, upon witness statements or other information obtained from investigators. However, as noted by Justice Waterman in his partial dissent, the decision in *Tyler* may affect the admissibility of other types of expert testimony that relies upon statements of the parties themselves or other witnesses. Id. at 187 (Waterman, J., dissenting in part). For example, *Tyler* could result in the exclusion of medical testimony that relies upon patient self-reporting or disputed witness statements, even though experts have long been permitted to base their opinions on otherwise inadmissible hearsay so long as it is "reasonably relied upon by experts in the particular field." Iowa Evid. R. 5.703. See Id. at 188-89. Moreover, courts may have difficulty determining whether an expert's opinion is based on specialized expertise that could assist the jury or, instead, relies "primarily, if not exclusively" on disputed witness accounts that the jury can evaluate for itself. Finally, *Tyler's* concern with improper vouching could affect any expert opinion that relies upon disputed testimony, divergent witness accounts, or a party's own admissions. Id. at 193. Whether *Tyler* will result in these "unintended consequences" remains to be seen.

6. Expert Opinions that Improperly Bolster Witness Credibility

- ***State v. Dudley,* 856 N.W. 668 (Iowa 2014).**
- ***State v. Brown,* 856 N.W.2d 685 (Iowa 2014).**
- ***State v. Jaquez,* 856 N.W.2d 663 (Iowa 2014).**

In a trilogy of cases issued the same day, the Iowa Supreme Court clarified the "very thin line" between permissible expert testimony regarding the general symptoms or behaviors exhibited by victims of sexual abuse and impermissible expert testimony that a particular victim manifests symptoms of sexual abuse or exhibits behaviors "consistent with" sexual abuse trauma. The Court, in each of these child sex abuse prosecutions, stated:

> Although we are committed to the liberal view on the admission of psychological evidence, we continue to hold expert testimony is not admissible merely to bolster credibility. Our system of justice vests the jury with the function of evaluating a witness's credibility. The reason for not allowing this testimony is that a witness's credibility is not a fact in issue subject to expert opinion. Such opinions not only replace the jury's function in determining credibility, but the jury can employ this type of testimony as a direct comment on defendant's guilt or innocence. Moreover, when an expert comments, directly or indirectly, on a witness's credibility, the expert is giving his or her scientific certainty stamp of approval on the testimony even though an expert cannot accurately opine when a witness is telling the truth. In our system of justice, it is the jury's function to determine the credibility of a witness. An abuse of discretion occurs when a court allows such testimony.
>
> We again reaffirm that we are committed to the legal principle that an expert witness cannot give testimony that directly or indirectly comments on the child's credibility. We

> recognize there is a very thin line between testimony that assists the jury in reaching its verdict and testimony that conveys to the jury that the child's out-of-court statements and testimony are credible.

Dudley. 856 N.W.2d at 689; Jaquez, 856 N.W.2d at 665, Brown, 856 N.W.2d at 689. Under these principles, an expert can still testify about the physical and psychological symptoms displayed by victims of child sexual abuse. An expert crosses the line, however, if she opines that a child is truthful, displayed symptoms of sexual abuse trauma, or had symptoms consistent with child abuse. Dudley, 856 N.W.2d at 676.

Thus, in *Dudley*, the Court held that the trial court abused its discretion in permitting a child's treating therapist to testify that the child's physical manifestations and symptoms were "consistent with a child dealing with sexual abuse trauma." Such "consistent with" expert testimony, according to the Court, improperly bolsters the credibility of the victim and comments on the guilt or innocence of the defendant. Dudley, 856 N.W.2d at 676-78. The *Dudley* opinion also evaluated the testimony of a forensic interviewer that had interviewed the alleged victim at the request of the police. The Court held that the forensic interviewer could properly tell the jury that the child's statements were consistent throughout the interview and that the child's participation in therapy did not mean that the child had been coached. Id. at 678. That testimony could assist the jury in evaluating the child's credibility and provide "insight into the victim's memory and knowledge of the facts." Id. at 678. In contrast, the forensic interviewer should not have been permitted to further testify that she recommended that the child should receive therapy and be kept away from the defendant. That testimony indirectly (and improperly) vouched for the credibility of the child by communicating that the interviewer believed the child's statement that she had been sexually abused by Dudley. Id.

In *Jaquez*, the Court similarly examined the expert testimony of a forensic interviewer who testified that the alleged victim's demeanor was "completely consistent with a child who has been traumatized, particularly multiple times." Jaquez, 856 N.W.2d at 665. Applying the principles announced in *Dudley*, the Court held that that testimony impermissibly vouched for the credibility of the child and improperly commented on defendant's guilt or innocence. According to the Court, while an expert may "testify generally that victims of child abuse display certain demeanors," this expert crossed the line by effectively testifying that the alleged victim's "demeanor means the child suffered a sexual abuse trauma, therefore the child must be telling the truth." Jaquez, 856 N.W.2d at 665-66.

Finally, in *Brown*, the Court carefully parsed the written report of the physician who examined the alleged victim at the Child Protection Response Center. The Court first addressed the portions of the report recounting that the child gave the examiner a clear and consistent history and did not hesitate to show the physician where Brown had allegedly touched her. Brown, 856 N.W.2d at 689. The Court upheld admission of these statements because they merely gave the jury a factual description of the child's behavior during the examination. These statements, like similar ones made by the forensic interviewer in *Dudley*, gave "the jury insight into the witness's memory and knowledge of the facts." Id. In contrast, the portion of the expert's report characterizing the child's disclosure as "significant" and concluding "that an investigation was warranted," were improper indirect comments that the child was telling the truth about the alleged abuse "because the authorities should conduct a further investigation into the matter." Id. at 689.

In two of these cases, the State argued that the defendants were not prejudiced by the admission of the experts' opinions vouching for the credibility of the child victims. The Court rejected that contention, noting that the children's credibility in each case had been hotly contested. The experts' opinions "put a stamp of scientific certainty" on the alleged victims' testimony. Brown, 856 N.W.2d at 689. See also Jaquez, 856 N.W.2d at 666 (noting conflicts in victim's testimony).

In a concurring opinion, Justice Waterman suggested that the State may be permitted to admit otherwise inadmissible "consistent with" expert testimony in rebuttal. Dudley, 856 N.W.2d at 683-684 (Waterman, J., concurring). If the defendant opens the door by claiming that the victim's behavior was inconsistent with that of an abused child or sex abuse victim, "consistent with" expert opinions may be admissible to rehabilitate the victim. Id. That is, if a defendant attacks the credibility of a witness by contending that a victim of abuse would not act like this witness did, a court may allow the prosecutor to rebut this defense with otherwise inadmissible opinion testimony like that at issue in *Dudley*, *Jaquez*, and *Brown*.

The *Dudley* trilogy has arguably triggered an increase in "improper bolstering" challenges to expert testimony, as well as ineffective assistance of counsel claims. See Laurie Kratky Doré, 7 Iowa Practice Evidence § 5.702:2 (discussing numerous and arguably inconsistent "bolstering" cases that have been decided in the Iowa Court of Appeals in the short period since the *Dudley* trilogy). Further, the Court's decision in *State v. Tyler*, 867 N.W.2d 136 (Iowa 2015), see *supra*, suggests that claims of improper bolstering can extend beyond child sex abuse cases or expert syndrome testimony. The Court thus may need to further clarify "the very thin line" that it established in the *Dudley* trilogy.

7. Experts in Bench Trials

- ***Metropolitan Prop. & Cas. Ins. Co. v. Economy Premier Ass. Co.*, 924 N.W.2d 833 (Iowa 2019).**

***Metropolitan Prop. & Cas. Ins. Co. v. Economy Premier Ass. Co.*, 924 N.W.2d 833 (Iowa 2019)** concerned an insurance coverage dispute regarding the reasonableness of a settlement involving a fatal accidental shooting at the insured's premises. The Court characterized the cases as one involving a "battle of experts" regarding the insured's potential liability under a premises liability theory. In rejecting an objection that the testimony of an attorney-expert (former Iowa Chief Justice Marsha Ternus) was not helpful to the trier of fact, the Court acknowledged the trial court's wide discretion to accept expert testimony in a bench trial. Id. at 845.

I. Hearsay: Rules 5.801-5.807

1. Non-Hearsay Statements to Explain Responsive Conduct: Rule 5.801(c)

Out-of-court statements that are used to explain the responsive conduct of the person who heard those statements are not hearsay because they are not being offered to prove the truth of the matter asserted in the statement. The Iowa Supreme Court has repeatedly instructed trial courts to carefully scrutinize this non-hearsay purpose to determine whether, under the facts of the specific case, all the details of the proffered statement are really necessary to understand why the listener did what he or she did.

- ***State v. Plain*, 898 N.W.2d 801 (Iowa 2017).**

In ***State v. Plain*, 898 N.W.2d 801 (Iowa 2017)**, the defendant was prosecuted for harassment for allegedly throwing bolt cutters at a neighbor in his apartment complex. The investigating officer testified about what he learned from his conversation with the victim and the victim's wife about what caused the mark on their apartment wall. Id. at 811. The State argued that those out-of-court statements were non-hearsay because they were offered to explain the responsive conduct of the officer, not to prove the truth of the matter asserted. Id. at 812. The Court, however, rejected this argument on appeal.

The Court recognized that statements offered to explain responsive conduct are not hearsay. Id. However, before admitting an out-of-court statement for that non-hearsay purpose, the trial court must determine whether the testimony is really being offered to explain responsive conduct or whether, instead, it constitutes an improper attempt to admit otherwise inadmissible hearsay. Id. Moreover, even if a statement is offered to explain responsive conduct, the court must limit its scope to only that portion necessary to achieve the non-hearsay explanation. Id.

The State in *Plain*, however, had not offered the investigating officer's testimony to explain the conclusion the officer had reached after speaking with the victim and his spouse or why he took the bolt cutters into evidence. Instead, the officer improperly put inadmissible hearsay before the jury by relaying the substance of his conversation with the victim and his spouse. Id. at 812-13. The jury was thus likely to use those out-of-court statements for the impermissible purpose of proving the truth of the matters asserted by the couple. Id.

Although the trial court should have excluded the officer's testimony regarding his conversation with the victim and his wife, the Supreme Court held its admission to be harmless error. The State had introduced other strong evidence of the defendant's guilt, including physical evidence, photographs, and testimony from both the victim and his wife, which came into evidence without objection. Id. at 813. Further, the trial court gave a limiting instruction to the jury that provided an "antidote" for any potential prejudice caused by the otherwise inadmissible hearsay. Id.

- ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015).**

In the domestic abuse prosecution in ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015)**, the trial court permitted a police officer to recount a statement that a bystander made to him indicating that she had seen the defendant Tompkins push his wife during an argument. The State argued that it was not offering the statement to prove that Tompkins pushed his wife, but rather to explain why the police officer investigated the incident and why the State did not call the witness at trial. Tompkins, 859 N.W.2d at 642. The Supreme Court held that Tompkins' counsel could have objected to the bystander's statements because the specifics of the statement were not necessary to explain the investigation. Instead, the officer was asked to recount what the witness said to him in order to rebut the defendant's theory that someone else had pushed his wife. When offered for that purpose, the statement was hearsay. Id. at 642-43. The record was insufficient, however, to permit the Court to determine whether this failure to object was ineffective assistance of counsel. Id. at 643.

2. Non-Hearsay Statements of An Opposing Party: Rule 5.801(d)(2)

- ***Iowa Supreme Court Attorney Disciplinary Board v. Noel*, 923 N.W.2d 575 (Iowa 2019).**

Under Iowa Rule 5.801(d)(2)(B), a statement is not hearsay if it offered against an opposing party and "[i]s one the party manifested that it adopted or believed to be true." In **Iowa Supreme Court Attorney Disciplinary Board v. Noel, 923 N.W.2d 575 (Iowa 2019)**, the Court applied this adoptive admission rule to minutes of testimony admitted against an attorney being professionally disciplined for overcharging the State Public Defender for mileage and legal services. The attorney had previously pled guilty to fourth degree theft in connection with that conduct. The attorney argued that the grievance commission should not have admitted the minutes of testimony from his criminal case as evidence in the disciplinary proceeding. Id. at 584. The Court held that the Commission did not err in admitting the minutes of testimony as an adoptive admission under rule 5.801(d)(2)(B). The attorney "clearly and unambiguously" adopted the minutes of testimony as his own when he explicitly requested that the court accept the minutes as "true" and when he signed the guilty plea acknowledging the statements therein as "true and correct." Id.

3. Hearsay Statements of Motive

- ***State v. Huser*, 894 N.W.2d 472 (Iowa 2017).**

In ***State v. Huser*, 894 N.W.2d 472 (Iowa 2017),** the Court examined the admissibility of a declarant's conflicting out-of-court statements concerning his motive for killing the murder victim. Although the facts in the case are complex, they are necessary to understand the number of evidentiary issues implicated by these hearsay statements, including the subject of "backdoor" hearsay, the related concepts of "opening the door," "curative admissibility," and the rule of completeness, and the hearsay exceptions for statements of co-conspirators and statements against interest. In that case, the defendant Huser was accused of soliciting or encouraging another person, Louis Woolheater, to murder Lance Morningstar because Morningstar had had an affair with Huser's former wife. Woolheater was convicted in a separate trial of fatally shooting and then burying Morningstar.

Huser was twice tried and convicted of aiding and abetting Woolheater's murder of Morningstar. The court of appeals overturned Huser's first murder conviction ("*Huser I*") because the trial court had erroneously admitted prejudicial hearsay statements made by Woolheater that implicated Huser in Morningstar's murder. On retrial, a second jury again convicted Huser. On appeal in that second case ("*Huser II*"), the Iowa Supreme Court again found evidentiary error, reversed Huser's conviction, and remanded for yet another (third) trial.

The critical evidence at issue in *Huser II* involved a number of statements that the killer Woolheater had made about his alleged motive for killing Morningstar. Woolheater had made these statements to various friends and acquaintances at different times, both before and after Morningstar's disappearance. In one group of statements, Woolheater separately told three friends that Huser wanted Woolheater to rough up or kill Morningstar because Morningstar was "messing around" with Huser's wife. These inculpatory statements thus provided a link between Huser's motive and Woolheater's actions. In other statements made before and after the shooting, Woolheater told a girlfriend that he had to take care of Morningstar because Morningstar had information against Woolheater, who was on probation, that could send him back to prison. These exculpatory statements suggested that Woolheater may have killed Morningstar out of a personal motive to "save his own skin," rather than at the behest or urging of Huser. In *Huser II*, the Court addressed the admissibility of Woolheater's incriminatory and exculpatory out-of-court statements of motive.

a. Backdoor Hearsay—Rule 5.801

The *Huser II* Court first addressed the problem of "backdoor hearsay"—hearsay that is elicited through questions that suggest the existence of out-of-court statements (that may otherwise be inadmissible hearsay) without directly asking the witness to relate the substance of those statements. In *Huser I*, a girlfriend of Woolheater's testified for that State that she had driven Woolheater to his Quonset hut just before Morningstar disappeared. She observed Woolheater exit the vehicle and meet, out of her earshot, with a man that Woolheater later identified as Huser. When Woolheater returned to the vehicle, the girlfriend asked Woolheater what he and Huser had talked about. Woolheater replied that Huser wanted Woolheater to "rough up" Morningstar because Morningstar was "messing around" with Huser's wife. Both the Court of Appeals in *Huser I,* and the trial court on retrial in *Huser II,* ruled that Woolheater's statements to his former girlfriend were inadmissible hearsay.

On retrial in *Huser II,* the State attempted to avoid this hearsay ruling by instructing the girlfriend NOT to relay the substance of what Woolheater had told her. Instead, immediately after the girlfriend testified about Woolheater's Quonset hut meeting with Huser, the prosecutor asked her three "without telling me what Woolheater said" questions that queried only whether Woolheater had ever mentioned Morningstar, Huser, or Huser's wife. The witness answered "yes" to each question. Id. at 484.

The Court in *Huser II* held that this form of questioning constituted "backdoor hearsay" that violated the hearsay rule and the trial court's in limine order. Although the State's questions did not literally ask the witness to communicate what Woolheater had said to her, the timing of the questions left the jury with the impression that Woolheater had talked to Huser about Morningstar and Huser's wife. The Court criticized the use of this "without telling me what the declarant said" strategy, and admonished that the prosecutor "is not permitted by means of the insinuation or innuendo of incompetent and improper questions to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevent the defendant from having a fair trial." Id. at 497 (citations omitted).

The Court then turned to the appropriate remedy for this error. The defense had refused the trial court's offer to admonish the jury with a curative instruction to disregard the questions that elicited this backdoor hearsay for fear that it would pour gasoline on fire and only draw the jury's attention to the inadmissible evidence. Instead, the defense requested that the trial court either strike the witness's entire testimony or grant a new trial. The trial court denied the mistrial request, but prohibited the State from referencing the improper testimony in closing argument. The Supreme Court noted that while it was not condoning the State's "hide-the-ball" conduct, the trial court did not abuse its discretion in refusing a mistrial. Id. at 499. Although the prosecutor's questions had permitted the jury to infer that Huser and Woolheater discussed both Morningstar and Huser's ex-wife at the meeting witnessed by the girlfriend, the questions did not disclose that Huser had wanted Woolheater to "rough up" Morningstar because he was "messing around" with Huser's wife. Moreover, the State had not referenced the disputed testimony in closing argument and the short back-door exchange constituted a very small part of a 14-day trial that involved 45 witnesses. Thus, the backdoor hearsay was not so prejudicial as to deprive Huser of a fair trial. Huser, 894 N.W.2d at 499-500.

Huser instructs courts to use a substance-over-form approach in deciding whether testimony constitutes inadmissible hearsay. A court should examine the substance of the

witness's testimony, rather than the technical form of questioning that elicits that evidence. Even "yes or no" answers to "without telling me what [the out-of-court declarant] said" questions, can constitute "backdoor hearsay" if the testimony effectively communicates the existence or substance of otherwise inadmissible hearsay.

b. "Fighting Fire (Hearsay) with Fire (Hearsay)" under the Doctrines of Opening the Door, Curative Admissibility, or the Rule of Completeness

The Court then turned to whether Huser should have been permitted to introduce Woolheater's statements to another girlfriend that exculpated him by suggesting that he killed Morningstar to save himself, rather than at the urging or solicitation of Huser. That girlfriend had wanted to spend her birthday with Woolheater the night of the murder and had driven Woolheater to a location near the victim's home and dropped him off. The witness later returned to pick Woolheater up and wound up helping Woolheater load Morningstar's body into the trunk of her car. Woolheater had told the girlfriend before and after the shooting that Morningstar possessed information about Woolheater's past that could send Woolheater back to prison.

Huser sought to admit the girlfriend's testimony about Woolheater's personal motive as a statement of a co-conspirator under rule 5.801(d)(2)(E) or a statement against penal interest under rule 5.804(b)(3). Rather than argue about the applicability of those exceptions, however, the State contended that if the trial court allowed Huser to admit the exculpatory statements regarding Woolheater's personal motive for killing Morningstar, the State should be allowed to "fight fire with fire" and introduce the otherwise inadmissible incriminatory statements that Woolheater had made about roughing up Morningstar because of his affair with Huser's wife. The trial court agreed with the State and indicated that if Huser offered Woolheater's exculpatory statements of motive, it would open the door to the State's introduction of the contrary and otherwise inadmissible evidence about Woolheater killing Morningstar because of the victim's affair with Huser's ex-wife. Because the trial court had conditioned the defense evidence on the prosecution being able to admit the conflicting motive testimony, Huser never offered the girlfriend's testimony about Woolheater's personal motive for killing Morningstar.

The Iowa Supreme Court discussed whether the admission of the exculpatory testimony offered by Huser would have opened the door to the admission of other statements that Woolheater had made to different people at different times indicating that he had killed Morningstar at Huser's behest or encouragement. The Court first noted the "imprecise" way in which litigants and courts alike use the "catchy phrase" "opening the door" to support the admission of evidence. The Court distinguished the pure notion of opening the door from the distinct doctrine of "curative" admissibility. Under a pure notion of opening the door, "[a] party opens the door by offering *admissible* evidence that in turn triggers admissibility of responsive evidence by an opposing party." Id. at 507 (emphasis added). The Court illustrated this concept with the scenario in which a criminal defendant properly introduces evidence of his good character under rule 5.404(a), and thus "opens the door" for the prosecution to rebut that evidence with its own pertinent character evidence. Id. See Iowa R. Evid. 5.404(a)(2)(A)(i) (providing that "[a] defendant [in a criminal case] may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it."). In contrast, the doctrine of curative admissibility, colloquially known as "fighting fire with fire," "only applies when *inadmissible* evidence has been entered into the record and the other party seeks to admit further inadmissible evidence to cure the error." Huser II, 894 N.W.2d at 507 (emphasis added).

Neither doctrines, however, applied in *Huser II*. The pure notion of opening the door didn't fit because the prosecution had not demonstrated that its proffered responsive evidence was admissible under a hearsay exception. (Indeed, *Huser I* had already ruled the incriminatory motive statements offered by the State to be inadmissible hearsay). Id. at 507. Nor did curative admissibility apply because at least some of the evidence offered by Huser was admissible as a statement against Woolheater's penal interest. Id. at 506. See *infra* for a discussion of the Court's holding regarding that hearsay exception. That is, the State had not demonstrated that it needed to use inadmissible hearsay to "fight" equally inadmissible hearsay introduced by Huser. Id. at 509.

Although neither party raised the argument, the Court also examined whether the "rule of completeness" in rule 5.106 might have justified the trial court's "all-or-nothing" ruling regarding Woolheater's conflicting statements regarding his motive. The rule of completeness now provides that

> if a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other pat or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.

Iowa R. Evid. 5.106(a) (as restyled). As noted by the Court in *Huser II*, a question currently exists whether the rule of completeness serves a "trumping," as well as a "timing" function. *Huser II,* 894 N.W.2d at 508. That is, does rule 5.106 trump other applicable evidence rules and make related information admissible, even if it would otherwise be excluded, if "fairness" requires that it be considered along with the primary evidence? Or, does the rule of completeness concern only the timing of proof, permitting related evidence that is independently admissible to be considered contemporaneously with the primary evidence? The question is muddied by the difference in the rule's wording before and after the 2017 restyling. Although the current Iowa rule, like its federal counterpart, merely authorizes "the introduction" of related evidence needed for a fair understanding of the primary evidence, the pre-restyled language (construed in *Huser II)* made the related evidence "admissible." The Court in *Huser II*, however, appears to clear up the question by suggesting that rule 5.106 concerns only the order of proof and cannot "trump the ordinarily applicable rules of evidence" or "be simply used as an 'end run around' the usual rules of admissibility.'" Huser II, 894 N.W.2d at 509 (citations omitted).

The Court in *Huser II* discussed another related issue regarding the scope of rule 5.106—"what, exactly, is being made complete under [that] rule. . . ." Id. at 508. Rule 5.106 pertains not only to the remainder of the primary evidence not fully introduced by the proponent, but also to "any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time." Iowa R. Evid. 106(a). The Court in *Huser II* asked "in fairness, a clear understanding, or an adequate explanation of what exactly?" Huser II, 894 N.W.2d at 507. The *Huser II* Court clarified that the rule requires a demonstration that the additional evidence is necessary to a proper understanding <u>of the admissible primary evidence</u>. Id. at 508. This standard affords the trial court needed discretion and effectively limits the circumstances in which additional evidence will be permitted. Only evidence that helps to explain, clarify, or contextualize the proponent's evidence should constitute the "fair and reasonably complete unit of material" envisioned by rule 5.106(a). Id.

Under this interpretation, then, the rule of completeness did not authorize the trial court to condition admission of Woolheater's statements suggesting that he had a personal motive for

shooting Morningstar with the introduction of his statements to others that suggested Huser's involvement in the killing. According to the Court, rule 5.106 does not permit the admission of evidence having "no bearing" on the particular "act, declaration, conversation, writing, or recorded statement" being completed. Although both groups of disputed statements broadly concerned Woolheater's motive in shooting Morningstar, the statements offered by the State did not complete, clarify, explain, or contextualize the statements offered by the defendant—that Morningstar possessed damaging information about Woolheater that could send Woolheater back to jail. Thus, the trial court erred in linking admission of the exculpatory statements to the introduction of the separate inculpatory ones. Huser, 894 N.W.2d at 509.

It is unclear whether the Court's discussion of rule 5.106 in *Huser II* qualifies as dicta given that neither party raised the rule of completeness before the trial or appellate courts. Id. at 507 (noting that "[h]ad rule 5.106 been raised, there might be interesting issues regarding whether the requirement of necessity had been met and whether the scope of the rule allowed introduction of all, some, or none of the [disputed evidence]"). Moreover, neither the hearsay statements of motive offered by the defense, nor the contrary statements of motive offered by the State in response to the door allegedly opened by the defendant, were ever admitted into evidence. Finally, because the State relied exclusively upon the opening-the-door argument that was ultimately rejected by the Court, the Court never determined whether the hearsay statements proffered by the State were independently admissible under rule 5.804(b)(3). Id. at 509 (indicating that burden of advocacy was upon the State "to raise a coherent theory for the admissibility" of hearsay statements). See also Id. at 512 (Mansfield, J., dissenting) (suggesting that statements of motive linking Woolheater to murder exposed the declarant to criminal liability under rule 5.804(b)(3)). Even if dicta, however, the Court's interpretation of the rule of completeness, as well as the related doctrines of opening the door and curative admissibility, should provide guidance in future cases raising those issues.

c. Statement of Co-Conspirator—Rule 5.801(d)(2)(E)

The Court quickly dismissed Huser's argument that Woolheater's statements of personal motive made to his girlfriend before and after the shooting qualified as statements of a co-conspirator made in furtherance of a conspiracy under rule 5.801(d)(2)(E). The Court found no record evidence of an agreement to perform an unlawful act between the convicted killer and his girlfriend. Although the girlfriend may have aided and abetted the murder by driving Woolheater to the vicinity of the victim's house and helping him load the victim's body into trunk of her vehicle, the Court noted that "aiding and abetting and conspiracy are different concepts." Id. at 504.

d. Statements Against Interest—Rule 5.804(b)(3)

The *Huser II* Court divided on whether a declarant's statement of motive to commit a crime, standing alone, can qualify as a statement against penal interest. The majority held that at least some of the statements made by Woolheater to his girlfriend were statements of motive that could expose him to criminal liability. Three Justices disagreed with this portion of the opinion. According to the partial dissent, most statements of motive that qualify as against penal interest include *both* a statement that exposes the declarant to criminal liability *and* a statement of potential motive. In contrast, the exculpatory statements at issue in *Huser II* involved only "a stand-alone statement of motive" that did not expose the hitman to criminal liability at the time they were made. Id. at 511-513 (Mansfield, J., concurring in part and dissenting in part).

The majority in *Huser II* also discussed the corroboration required for an exculpatory

statement against penal interest. Applying the multi-factor test enunciated in *State v. Paredes* 775 N.W.2d 554 (Iowa 2009), the majority found sufficient corroboration for at least those statements that Woolheater made to his girlfriend after the crime. Huser II, 894 N.W.2d at 505-506. First, the declarant Woolheater had made the statements of motive to his girlfriend in a non-coercive environment. Id. Of course, this factor could also cut against admissibility because a reasonable person might not believe that statements made to a girlfriend or close associate could expose him to criminal liability. Second, the "[c]loseness of the declaration to the crime and its spontaneity" corroborated the killer's statements. Id. Most importantly, overwhelming evidence connected the declarant to the murder. Id. The only factor cutting against admission was the timing of some of the statements. The Court acknowledged that Woolheater's statements made prior to the murder may not have exposed Woolheater to criminal liability. Id. at 506. The Court dismissed this concern, however, because at least some of the statements made after the crime inculpated the hitman. Id.

Thus, at least some of Woolheater's statements to his girlfriend appeared to be against his penal interest. However, Huser declined to offer those statements in evidence because of the trial court's incorrect assumption that if Huser did so, he would be opening the door to Woolheater's other statements that implicated Huser. See *supra*. Id. at 502-03. Because that defense testimony was the only evidence that Woolheater "acted to save his own skin rather than at the direction or encouragement of Huser," the *Huser II* Court reversed Huser's conviction and remanded for yet a third trial. Id. at 509-510.

4. Statements of Prior Identification under Rule 5.801(d)(1)(C)

- ***State v. Russell*, 893 N.W.2d 307 (Iowa 2017).**

In ***State v. Russell*, 893 N.W.2d 307 (Iowa 2017)**, discussed above, the Court discussed the hearsay exclusion in Iowa Rule 5.801(d)(1)(C) regarding statements of prior identification. Under that rule, a witness' out-of-court identification statement is deemed non-hearsay if (1) that the witness testifies at the trial and is subject to cross-examination about the identification statement and (2) the statement identifies a person after perceiving the person. Id. at 317.

In *Russell*, Russell was accused of being part of a crowd that kicked and stomped the victim to death after he had been knocked to the ground. Two days after the assault, detectives interviewed T.T., a minor who was present during the assault. After being shown Facebook photos of persons who were in the area of the crime, T.T. identified Russell as a person who had kicked the victim. At trial, however, T.T. denied remembering what had happened at the assault or what she had told the police. The State sought to introduce her prior statements to police through impeachment of T.T.'s "I don't remember" answers and through the testimony of the detective who conducted her interview. Id. at 309-312.

The Court held that the detective's testimony relating the minor's identification of Russell, based on the Facebook photograph, qualified as a nonhearsay statement of identification under rule 5.801(d)(1)(C). Id. at 317. Russell argued, however, that while that provision may have covered T.T.'s identification of Russell, her statements after the identification itself (i.e., that Russell was one of the people who had kicked the victim) were inadmissible. Id. at 312. The Court rejected that narrow reading of the rule, noting that statements of prior identification encompass the actual identification of the person, along with the details of an event or offense, "to the extent necessary to make [the] identification understandable to [the] jury." Id. at 317 (citations omitted).

5. Excited Utterances—Rule 5.803(2)

- ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014).**

In ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014)**, a child sexual abuse prosecution, the trial court admitted statements that the alleged victim had made to her neighbor. The child made the disputed statement after she had disclosed the alleged abuse to her mother and the mother had sent the child over to the neighbor's home to see if the neighbor could coax the child into providing more details. Thirty-six hours after the alleged abuse and in response to the neighbor's repetitive and prompting questions, the child described the abuse to her neighbor. The trial court admitted that description under the excited utterance hearsay exception in rule 5.803(2).

The Iowa Supreme Court held that the trial court had abused its discretion in admitting the child's statements as an excited utterance. Dudley, 856 N.W.2d. at 679-80. In so holding, the Court reiterated the factors a court should consider in determining whether a statement qualifies as an excited utterance:

> "(1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement."

Id. at 679, *quoting* State v. Harper, 770 N.W.2d 316, 219 (Iowa 2009); State v. Atwood, 602 N.W.2d 775, 782 (Iowa 1999).

The Court first addressed the 36-hour lapse in time between the alleged abuse and the disclosures to the neighbor. While that factor, in itself, is not determinative, it is relevant to whether the statements are spontaneous and "not the product of conscious thought or reflection." Id. at 679-80. And, while a trial court may allow a greater lapse in time when dealing with children who may need to wait a longer time before they believe it is safe to disclose the abuse to a parent or other "safe adult," the child victim in *Dudley* had time to reflect on the event during the time between when she disclosed the abuse to her mother and her statements to the neighbor the next day. Moreover, the child's statements were made in response to the neighbor's persistent questions, which were "calculated to elicit information which would otherwise have been withheld." Id. at 679. Thus, the child's statements did not qualify as spontaneous utterances reflexively made in reaction to a startling event or condition. Instead, they were the product of "an upset child telling her story to a neighbor and friend after she no longer felt the urgent need to disclose the information to someone safe." Id. at 680.

6. Statements for Purposes of Medical Diagnosis or Treatment—Rule 5.803(4)

- ***State v. Walker*, No. 0457, 2019 WL 6222902, slip op. (Iowa Nov. 22, 2019).**

In ***State v. Walker*, No. 0457, 2019 WL 6222902, slip op. (Iowa Nov. 22, 2019),** the Court affirmed the trial court's admission of the four-year-old victim's statements regarding sexual abuse and identifying the defendant as her abuser that the child had made to a physician at the Child Protection Response Center a little more than two weeks after the alleged assault. The child's mother had taken her daughter to see the doctor for treatment after being referred there by a sexual assault nurse at the emergency room. The Court noted that while there is "no categorical rule" governing such statements, the State had met its burden of demonstrating both that the

child's motive in making the statements was to obtain medical treatment and that the abuser's identity was reasonably relied upon by the provider in providing that treatment. Id. at *4-5. The Court noted that "[i]n cases of child sexual abuse, ascertaining the identity of the abuser is important for medical purposes because the child's age prevents her from implementing self-care and because parents are often ill-equipped to elicit the abuser's identity." Id. at *4. Moreover, the information elicited from the child was the type of information the doctor would rely upon in diagnosing and treating the child's emotional trauma. The Court did not regard the eighteen-day delay between the assault and the child's statements as material given that "emotional and psychological injuries may linger longer than physical injuries." Id. at *5. Thus, the child's statements to the doctor satisfied the hearsay exception in Iowa R. Evid. 5.803(4). Id.

- ***State v. Smith*, 876 N.W.2d 180 (Iowa 2016).**

In ***State v. Smith*, 876 N.W.2d 180 (Iowa 2016)**, an adult victim of domestic violence was taken to the hospital emergency room by police who responded to the victim's 911 call. The victim, in response to mandatory medical screening questions by the emergency room nurse and doctor, identified the defendant, the father of her baby, as the perpetrator of the assault. Later, at trial, the victim recanted her statements and testified for the defendant that she received her injuries when she fell off a trampoline. The trial court admitted her earlier statements to the ER nurse and doctor under Iowa R. Evid. 803(4)—the hearsay exception for statements made for purposes of medical diagnosis or treatment.

In order to qualify under that exception, a statement must be made for the purposes of medical diagnosis or treatment and concern a matter that is "reasonably pertinent" to such diagnosis or treatment. See Id. at 185 (discussing exception's two requirements that examine (1) the purpose or motive of the declarant and (2) the content or description of the statement). While statements that describe <u>how</u> an accident or injuries occurred are often considered reasonably pertinent to medical diagnosis or treatment, statements regarding <u>who</u> caused an injury are generally not admitted under rule 5.803(4) because the identity of a perpetrator is not usually necessary to diagnosis or treatment. Iowa courts, however, have recognized a limited exception to this "how versus who" distinction in child abuse cases—frequently admitting statements of identification made by child abuse victims to doctors and other health care providers as reasonably necessary for the diagnosis and treatment of the victim's psychological and physical injuries. In *Smith*, the State urged the Court to rely upon this precedent in child abuse cases and likewise create a per se rule regarding statements of third party identification made by adult victims of domestic violence to health care professionals. The State argued that the unique dynamics of intimate violence justified treating the identity of the perpetrator of domestic violence as similarly "pertinent" to the treatment and diagnoses of those adult victims.

In a 4-3 decision, however, the majority in *Smith* refused to adopt any "categorical exception for victims of child abuse or domestic abuse." Id at 187. Noting the complex variables surrounding domestic violence and the competing interests of both the victim and the accused in these cases, the Court held the prosecution, as the proponent of the evidence, to its burden of laying the appropriate foundation for the exception on a case-by-case basis. Id. at 187-89.

Although this foundation "need not be elaborate," the record must contain evidence, usually in the form of doctor testimony, that "establishes why the identity of the assailant is important in a domestic abuse case, as opposed to stranger assault, and what effect that identity has on [the] diagnosis and treatment" of the victim's physical, mental, and emotional injuries. Id.

at 189. That is, the State must introduce evidence regarding the declarant's motive in making the statement of identification to the health care provider and the relevance of the identification in her diagnosis or treatment. In *Smith*, the majority found no record evidence that the victim understood that the identity of her abuser was important to her treatment or diagnosis or that the doctor or nurse used the identity of the perpetrator to treat the victim's injuries. Id. at 190. Without evidence demonstrating its medical pertinence, the trial court should not have allowed the emergency room nurse and doctor to testify that the victim identified Smith as her assailant. The majority remanded for a new trial at which the State could attempt to lay a sufficient foundation for the victim's statement under rule 5.803(4). Id.

The *Smith* dissenters disagreed with the majority in several respects. First, the dissent believed it was time to follow the lead of other courts and "adopt a categorical rule to allow healthcare providers to testify as to the adult domestic abuse victim's identification of an intimate partner as the assailant." Id. at 196 (Waterman, J., dissenting). Second, even without such a per se rule, the dissent would have held the record in that case sufficient to admit the doctor and nurse's testimony under rule 5.803(4) because the victim's identification was made in response to standard questions used by the medical community in diagnosing and treating patients. Id. at 193-94 (Waterman, J., dissenting). Finally, the dissent would have affirmed the trial court's admission of the victim's statements in the emergency room on the alternative ground that they qualified as excited utterances under rule 5.803(2). Id. at 199-200 (Waterman, J., dissenting). The majority refrained from addressing this alternative ground for admitting the hearsay because the State had not argued the excited utterance exception at trial, nor briefed the alternative evidentiary ground on appeal. Id. at 183-84, 189 n. 2.

- ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014).**

In ***State v. Dudley*, 856 N.W.2d 668 (Iowa 2014)**, a prosecution for child sex abuse, the Court recognized that a child's statements regarding alleged sexual abuse made to a "trained professional for the purposes of diagnosis or treatment" may be admissible under the medical diagnosis hearsay exception in rule 5.803(4). The Court cautioned, however, that the expert relating the child's statements should not couple the testimony "with a professional opinion as to whether the child was truthful, had symptoms of sexual abuse trauma, or whether the symptoms of the child were consistent with child abuse." Id. at 676. See *supra* (discussing improper expert testimony that bolsters the credibility of a witness).

J. The Confrontation Clause and the Admission of Hearsay Evidence

1. Child Hearsay

- ***In the Interest of J.C.*, 877 N.W.2d 447 (Iowa 2016).**

In ***In the Interest of J.C.*, 877 N.W.2d 447 (Iowa 2016),** a 12-year-old juvenile was adjudicated delinquent after being found guilty of sexually abusing his friend's 4-year-old niece. The 4-year-old was deemed incompetent to testify at trial and the trial court allowed the forensic interviewer at the Child Protection Response Center (the "CPRC") and that organization's medical director to testify about the victim's identification of J.C. as her abuser. On appeal, the juvenile argued that the admission of the child's statements to the CPRC interviewer and its doctor violated his right of confrontation under both the federal and Iowa Constitutions. Id. at 449-451. In a 4-3 decision, the Iowa Supreme Court held that the admission of the child's statements to the CPRC physician did not violate the confrontation clause. Id. at 458. Moreover,

although the child's statements to the forensic interviewer were testimonial, the Court held their admission to be harmless beyond a reasonable doubt given the other overwhelming evidence of J.C.'s guilt. Id. at 458-59.

Although the Iowa Supreme Court had previously addressed the admissibility of child hearsay under the Confrontation Clause back in 2007 in *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007), *In the Interest of J.C.* is the first Iowa Supreme Court case dealing with the subject since the United States Supreme Court's 2015 decision in *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173 (2015), a case that also addressed child hearsay under the Confrontation Clause. In affirming J.C.'s delinquency adjudication, the majority in *J.C.* discussed and distinguished both *Bentley* (holding that 10-year-old's statements regarding child abuse made to forensic interviewer in presence of law enforcement were testimonial) and *Clark* (holding that 3-year-old's identification of abuser to his preschool teachers was not testimonial and thus did not violate the accused's federal right of confrontation). *In the Interest of J.C.*, 877 N.W.2d at 452-56.

The facts of *J.C.* are essential to understanding its holding. The alleged abuse of the 4-year-old victim occurred on July 2, 2013. Her parents reported the abuse to the police and took the victim to the hospital emergency room for examination the next day on July 3. At the referral of the police, the parents took the child for a forensic interview at the CPRC on July 10. While police observed, a CPRC forensic interviewer talked to the child to check for suspected abuse. The trial court allowed the forensic examiner to testify about the child's statements of identification. Id. at 449-51.

Several weeks later, on July 31, the medical director of the CPRC conducted a medical assessment of the child. The record was "less clear" as to how this second interview came about, but the police were not present at the doctor's examination. Id. at 454. The trial court admitted the doctor's report (addressed to the prosecutor) and her testimony relaying the child's statements to her under the hearsay exception in Iowa R. Evid. 5.803(4) covering statements made for medical diagnosis or treatment. Id. at 451, 459.

The juvenile did not appeal the decision to admit the child's statements under this particular hearsay exception. He did, however, contend that because the child declarant was incompetent to testify, the doctor should not have been permitted to relay the child's statements to the jury. Id. at 459. The Iowa Court had not yet addressed the question of "whether out-of-court statements made by incompetent witnesses may be admissible under exceptions to the hearsay rule." Id. Relying on *Ohio v. Clark* and the holdings of other courts, the Iowa Court in *In the Interest of J.C.* held that the child's incompetence to testify did not render her statements made for purposes of diagnosis or treatment inadmissible. Id. at 459-60.

J.C.'s primary arguments centered on the Confrontation Clause. JC argued that the testimony of both the forensic examiner and the doctor violated his rights under the federal and state confrontation clauses. Because J.C. did not suggest that the Court apply any different approach to the two clauses, however, the Court chose not to interpret the Iowa Confrontation Clause any differently than the federal provision. The Court reserved the right, however, to adopt an independent interpretation of Iowa's Confrontation Clause if presented with such briefing in a future case. Id. at 452.

The *J.C.* majority initially confirmed that the Confrontation Clause applies to juvenile delinquency proceedings, and that the burden is on the State to prove, by a preponderance of the evidence, that a hearsay statement is non-testimonial under *Crawford*. Id. A hearsay statement is

testimonial if, based upon the totality of the circumstances, the primary purpose of the statement, viewed from the perspective of both the interviewer and the declarant, is to create a substitute for trial testimony. Id. at 452-57. The Court unanimously concluded that the 4-year-old's statements to the forensic interviewer, made at the direction and under the supervision of law enforcement, were clearly testimonial under its prior holding in *Bentley*. However, because the record contained ample evidence of J.C.'s guilt, the majority considered the admission of this hearsay to be harmless error. Id. at 458-59.

The Court fractured concerning the testimonial status of the child's statements to the CPRC medical director. The four-Justice majority acknowledged that the child's statement to the physician presented a "closer question" than the 3-year-old's statements to his preschool teachers in *Clark* because, unlike *Clark*, there was no arguable "ongoing emergency" when the doctor in *J.C.* conducted the medical assessment weeks after the suspected abuse. Id. at 457 & n.6. Moreover, the majority recognized that the doctor in *J.C.* had dual motives—evaluating the child's medical condition and memorializing her story (as suggested by the doctor's addressing his report to the county prosecutor). Id. at 457-58. Nevertheless, the majority considered the child's relationship to the physician more akin to the child's relationship to his teachers in *Clark* than to the police-supervised forensic interview in *Bentley*. The doctor had conducted a standard screening assessment in an informal setting that was not recorded or attended by police. More importantly, the very young age of the 4-year-old child prevented her from having any testimonial purpose whatsoever. The totality of these circumstances suggested that the primary purpose of the statements to the doctor was not to create an out-of-court substitute for trial testimony and that the doctor's testimony thus did not violate either the federal or Iowa Confrontation Clause. See Id. at 456-58; see also Id. at 460 (Cady, C.J., concurring) (agreeing that the child's statements to the CPRC doctor were non-testimonial under the totality of the circumstances and the primary purpose test). The majority, however, did offer some "words of caution" to prosecutors in future cases.

> Under a primary-purpose test, we do not believe an interview whose primary purpose is testimonial generally can be salvaged just because it is wedged inside a medical exam. The primary-purpose test applies to 'the interrogation' that is at issue. In addition, we do not believe that arranging a prior recorded forensic interview necessarily insulates a subsequent less-formal interview from attack under the Confrontation Clause.

Id. at 458.

Interestingly, three of the Justices in the majority might have relied solely on the age of the child to settle the constitutional question. Justice Mansfield, who authored the majority opinion, suggested that statements of very young, unavailable children may not raise any confrontation problems because such hearsay was routinely admitted in 18th century English criminal trials. According to Justice Mansfield, this historical pedigree, by itself, might justify admitting the 4-year-old's statements, even if they were considered testimonial under the primary purpose test. Id. at 458 & n. 5. This historical exception to the Confrontation Clause, however, has never been explicitly adopted by the United States Supreme Court. Indeed, the only historical exception ever even suggested by the Court is the dying declaration exception. Moreover, five Justices of the Iowa Court appear to have rejected Justice Mansfield's originalist argument. See Id. at 460 (Cady, C.J., concurring) (refusing to place "any weight on the [18th] century practice of admitting statements of very young children"); Id. at 461-62 (Wiggins, J.,

dissenting) (disagreeing that *Clark* created any historical exception regarding statements of young children).

2. Domestic Abuse and Excited Utterances

- ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015).**

The Sixth Amendment right of confrontation bars the admission of "testimonial" hearsay against a criminal accused unless (1) the declarant is made available for cross-examination or (2) the declarant is "unavailable" at trial and the defendant had an earlier "opportunity to cross-examine" the declarant about the statement. Crawford v. Washington, 541 U.S. 36 (2004). In ***State v. Tompkins*, 859 N.W.2d 631 (Iowa 2015)**, the Iowa Supreme Court discussed when a hearsay declarant is available for cross-examination under the Confrontation Clause.

Tompkins was a domestic abuse prosecution in which the victim recanted the statement that she gave to the police before trial. The prosecution called the victim to testify at trial, but only questioned her about her domestic relationship with Tompkins and not about the alleged assault or her earlier statement to police. Instead, the trial court allowed the investigating officer to relate the victim's accusation at the scene that Tompkins had pushed her. Tompkins did not cross-examine the victim or attempt to recall her even though she remained subject to subpoena.

Tompkins contended the admission of the victim's excited utterance violated his right of confrontation. Even though the victim testified at trial, Tompkins argued that he could not cross-examine her regarding her accusation because the State had limited its direct examination to her relationship with Tompkins. Nor, argued Tompkins, should he be forced to recall her to the stand and forfeit his right to have the State prove its case against him. Id. at 639-40.

The Iowa Supreme Court held that the Confrontation Clause was not violated by the admission of the victim's statement because Tompkins could have cross-examined her during her initial testimony, requested that the State recall her after the police officer testified so that she could be cross-examined, or called her as a witness during his defense case-in-chief. Id. at 640-42. The Court acknowledged the "Catch-22" in which Tompkins had been placed, but that the victim was nevertheless subject to cross-examination for purposes of the Confrontation Clause:

> We agree with Tompkins that the State's decision not to question A.H. [the victim] about the statement she made to Officer Jurgensen, or the events surrounding the night in question, placed Tompkins in the unenviable position to weigh the advantages and disadvantages of cross-examining A.H. during her initial testimony or calling her as a witness for the defense. However, Tompkins's Confrontation Clause rights were not violated based on this choice. The choice whether and to what extent to cross-examine a witness always requires a cost-benefit analysis. But where the witness takes the stand and is available for cross-examination, the Confrontation Clause places no constraints on the use of the witness's prior testimonial hearsay statement.

Tompkins, 859 N.W.2d at 640.

3. Public Records

- ***State v. Kennedy*, 846 N.W.2d 517 (Iowa 2014).**

In ***State v. Kennedy*, 846 N.W.2d 517 (Iowa 2014)**, the Iowa Supreme Court addressed whether the admission of a certified abstract of the defendant's driving record and an affidavit of mailing of suspension notices in a prosecution for driving while revoked violated the Confrontation Clauses of the United States and Iowa Constitutions. Id. at 520. The State introduced these two arguably different public records to prove that Kennedy's license was in fact revoked at the time he was caught driving. The certified abstract of Kennedy's driving history reflected records of the Department of Transportation showing that Kennedy's license had previously been revoked for OWI chemical testing refusal, for OWI chemical testing failure, and for OWI conviction. In addition to the certified abstract, the State submitted an "affidavit of mailing" with supporting attachments in which the manager of the Department's Office of Driver Services attested to the process the Department uses to mail sanction notices and to the fact and dates that the Department mailed three such notices to Kennedy.

The Court held that the certified abstract of driving record was not "testimonial" and therefore its admission did not violate the Confrontation Clause. Id. at 524-25. In contrast, the affidavit of mailing was "testimonial" and should not have been admitted into evidence without producing the manager-declarant for cross-examination. Id. at 527. The error concerning the affidavit of mailing was harmless, however, because the properly admitted certified abstract contained the same information regarding the effective dates of Kennedy's license revocations. Id. at 528.

In reaching these differing conclusions regarding the two types of public records, the *Kennedy* Court noted that the relevant inquiry concerned whether they were "testimonial" under the U.S. Supreme Court's seminal decision in *Crawford v. Washington*, 541 U.S. 36 (2004). That question, in turn, hinged on whether the certified abstract of driving record or the affidavits of mailing contained "statements made in circumstances that would lead witnesses to objectively believe the statements might be used at trial." Kennedy, 846 N.W.2d at 523.

With respect to the certified abstract of driving record, the Iowa Supreme Court was not writing on a blank slate. Indeed, in its 2008 decision in *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008), the Court had previously held that a certified abstract of a driving record contained in the public records of the Iowa Department of Transportation did not violate the defendant's right of confrontation because the certification merely authenticated copies of public records that pre-dated the criminal prosecution and that were generated for purposes other than prosecution. Shipley, 757 N.W.2d at 237-239. Kennedy urged the Court to revisit *Shipley*, however, because of two subsequent United State Supreme Court decisions dealing with certificates of forensic analyses. Kennedy, 846 N.W.2d at 523. The *Kennedy* Court easily distinguished the certified abstract of driving record at issue in both *Kennedy* and *Shipley* from the certified drug and blood alcohol forensic reports at issue in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (forensic certificate of analysis showing content and quantity of drugs seized from defendant) and in *Bullcoming v. New Mexico*, 564 U.S. ___, 1431 S.Ct. 2705 (2011) (certified blood alcohol lab report):

> We hold the rulings in *Melendez-Diaz* and *Bullcoming* do not overrule or undermine our decision in *Shipley*. A certified abstract of a driving record is significantly different from a forensic report analyzing drugs or blood alcohol content. A certified abstract of a driving record encompasses the information contained in the IDOT records. That information existed well before the alleged criminal act. The compiling of the record does not require a scientist or technician to do any tests in order to report what already exists

> in the IDOT record. In other words, the certified abstract of a driving record is nothing more than a historical report of what is contained in the records of the IDOT.

Kennedy, 846 N.W.2d at 524-25. As noted in *Kennedy*, this holding is consistent with dicta in *Melendez-Diaz* that suggests that a certificate of authenticity regarding otherwise admissible public records is not testimonial. Melendez-Diaz, 557 U.S. at 322-23.

In contrast, the affidavits of mailing of revocation notices did not pre-date the criminal charges against Kennedy. Instead, the affidavits of mailing were not prepared until after Kennedy had been arrested. Further, the affidavits made factual attestations concerning the departmental process of mailing sanction notices and noted that the IDOT mailed three such notices to Kennedy on certain dates. The affidavits of mailing, in other words, contained testimony because they were created under circumstances that would lead an objective witness to believe that the affidavits would be available for use at a later trial. Kennedy, 846 N.W.2d at 527 (citing Commonwealth v. Parenteau, 460 Mass. 1, 948 N.E.2d 883, 885-86, 891 (2011) with approval). Importantly, the Court suggested that it would have reached a contrary conclusion if the Department of Transportation had created the certificate of mailing contemporaneously with its mailing of the notices to Kennedy and had maintained that certificate of mailing in its official records regarding Kennedy's driving record. In such a case, the certificate of mailing would have been created for administrative reasons and not exclusively to generate evidence for trial. Id. at 526-27 (citing People v. Nunley, 491 Mich. 686, 821 N.W.2d 642, 643 (2012) with approval). The *Kennedy* holding may thus have limited practical impact if the Department of Transportation can modify its operating procedures and contemporaneously document and certify the mailing of its sanctions notices.

Moreover, the holding had little actual impact on the result in *Kennedy* itself. Although the Court held that the affidavits of mailing should not have been admitted (at least without giving Kennedy an opportunity to cross-examine the manager who made the attestations), the error was ruled harmless given that the properly admitted certified abstract of Kennedy's driving record contained the necessary information regarding the revocations' effective dates. The Court thus affirmed Kennedy's conviction. Kennedy, 846 N.W.2d at 528.

IV. United States Supreme Court Evidence Decisions

A. Impeachment of Verdict with Jury Testimony regarding Racial Bias

- ***Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (U.S. 2017).**

Under Fed. R. Evid. 606(b), a party cannot impeach the validity of a verdict with jury testimony about internal jury deliberations. Fed. R. Evid. 606(b). In the 2014 case of Warger v. Shaurers, 135 S.Ct. 521, 524-25 (2014) (discussed *infra*), the United States Supreme Court held that Fed. R. Evid. 606(b) prohibits "juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire." Warger, 135 S.Ct. at 524-25. Importantly, the *Warger* decision left open the question of whether Rule 606(b) applies in cases of more extreme racial, ethnic, or religious juror bias. The *Warger* Court suggested that

> [t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider the question, however, for those facts are not presented here.

Warger, 135 S. Ct. at 529 n.3. In In ***Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (U.S. 2017)**, the U.S. Supreme Court took up that question and addressed "whether there is a constitutional exception to the no-impeachment rule for instances of racial bias." Id. at 863.

In *Pena-Rodriguez*, a Mexican-American defendant was charged with felony sexual assault. The jury deadlocked on the serious felony charge, but convicted Pena-Rodriguez of three lesser included misdemeanor offenses. The defense moved for a new trial based on sworn juror statements that a fellow juror made racially-biased remarks about the defendant during deliberations, saying things like "I think he did it because he's Mexican," and "Mexican men take whatever they want." The Colorado Court held that Colorado's version of rule 606(b) prevented the trial court from considering the juror affidavits because the rule unambiguously prohibited juror testimony "as to any matter or statement occurring during the course of the jury's deliberations." Pena-Rodriguez v. People, 350 P.3d 287 (Colo. 2015). The U.S. Supreme Court granted cert on the question whether a no-impeachment rule like Colorado's can constitutionally preclude juror testimony concerning a juror's racial bias offered to prove a violation of an accused's Sixth Amendment right to a fair and impartial jury.

The case pitted the Court's decisions condemning racial bias in the jury and justice system against the strong policy rationale of rule 606(b)'s no-impeachment rule. The *Pena-Rodriquez* majority acknowledged that the no-impeachment rule "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule [also] gives stability and finality to verdicts." Pena-Rodriguez, 137 S. Ct. at 864. At the same time, however, the Court recognized that racial or ethnic juror bias implicates "unique historical, constitutional, and institutional concerns" that differ from those raised by the type of bias or prejudice at issue in its prior cases—"anomalous behavior from a single jury—or juror—gone off course." Id. at 868. Moreover, traditional safeguards against juror prejudice or bias, such as voir dire, non-juror evidence, or pre-verdict jury reporting, are arguably less effective in "rooting out" racial or ethnic bias. Id. at 868-69. For these reasons, the Court held

> that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869.

The Court limited its holding, however, to "rare" criminal cases in which one or more juror's statements reveal "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" and where such "racial animus was a significant motivating factor in the juror's vote to convict." Id. Additionally, the trial court has "substantial discretion" in determining whether this showing has been made, in light of all the surrounding circumstances, "including the content and timing of the alleged statements and the reliability of the proffered evidence." Id.

In support of a limited constitutional exception, the majority pointed to the experience of the seventeen jurisdictions that have already recognized a racial bias exception to rule 606(b)'s no-impeachment rule. Contrary to the concerns voiced by the three dissenting Justices, the majority in *Pena-Rodriguez* noted that those jurisdictions have not reported any increase in juror

harassment or decrease in juror engagement. Id. at 870. But see Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 871 (2017) (Thomas, J., dissenting); Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 874 (2017) (Alito, J., dissenting).

B. Impeachment of Verdict with Juror Testimony That Juror Lied During Voir Dire

- ***Warger v. Shaurers*, 135 S.Ct. 521 (2014).**

In ***Warger v. Shaurers*, 135 S.Ct. 521 (2014)**, the U.S. Supreme Court affirmed an Eighth Circuit decision that refused to permit a party to attack a jury verdict with evidence of statements made during jury deliberations that tended to show that a juror had lied during voir dire. The plaintiff in that case, who had lost his leg in a motorcycle – truck accident, sought a new trial contending that the jury forewoman had lied during voir dire about her ability to remain impartial and to award damages. The plaintiff supported the motion for new trial with another juror's affidavit describing statements that the forewoman had made during jury deliberations disclosing that the forewoman's own daughter had wrongfully caused a fatal vehicle accident and admitting that a lawsuit would have "ruined" her daughter's life. Warger, 135 S.Ct. at 524-25.

The trial court denied the new trial motion, ruling that Fed. R. Evid. 606(b) prevented the plaintiff from attacking the validity of the defense verdict with the juror's affidavit. Both the Eighth Circuit and the United States Supreme Court agreed.

The Supreme Court first held that a hearing to determine whether a juror lied during voir dire was "an inquiry into the validity of the verdict" that is generally barred by rule 606(b)(1). The Court stated:

> We hold that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire. In doing so, we simply accord Rule 606(b)'s terms their plain meaning. The Rule, after all, applies '[d]uring an inquiry into the validity of a verdict.' A post verdict motion for new trial on the ground of voir dire dishonesty plainly entails 'an inquiry into the validity of [the] verdict': If a juror was dishonest during voir dire and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.

Id. at 525 (citations omitted).

The Court next considered whether a juror's dishonesty concerning her own personal bias fell within the exception in Rule 606(b) that permits a party to impeach a jury verdict with evidence that "extraneous prejudicial information . . . was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). The Court held that it did not, explaining:

> Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room.

Warger, 135 S.Ct. at 529 (citations omitted). Although the jury forewoman may have held personal views about negligence liability for car crashes because of her daughter's accident, she brought no specific knowledge about the litigated collision into the jury room. Therefore, the juror's personal bias fell "on the 'internal' side of the line." Id.

C. Child Hearsay and the Confrontation Clause

- ***Ohio v. Clark*, 135 S.Ct. 2173 (2015).**

In ***Ohio v. Clark*, 135 S.Ct. 2173 (2015)**, a unanimous Court held that the responses of a non-testifying three-year-old boy to his preschool teachers identifying the defendant as the person who injured him were not "testimonial" because neither the teachers nor the child had the primary purpose "to gather evidence for [the defendant's] prosecution." Clark, 135 S. Ct. at 2177, 2181. In so holding, the Court addressed for the first time the applicability of the Confrontation Clause to hearsay statements made *by* children *to* persons other than law enforcement. Id. at 2181. Both issues—whether a child's accusation of abuse is testimonial and whether the Confrontation Clause regulates statements to private persons—have divided state and federal lower courts.

Out-of-court accusations of abuse made by children to medical personnel, social workers, teachers, forensic interviewers, day care providers, and other witnesses are frequently admitted into evidence under state hearsay exceptions for excited utterances, statements for purposes of diagnosis or treatment, the residual exception, or specialized hearsay exceptions crafted specifically for child abuse. In many such cases, the alleged victim may be too young or frightened to testify. In *Clark*, for example, the trial court found the three-year-old incompetent to testify under Ohio law that presumptively barred testimony by children younger than ten. 135 S.Ct. at 2178. The trial court admitted the teachers' testimony recounting the student's identification of the defendant as his abuser under Ohio's residual hearsay exception for statements bearing "sufficient guarantees of trustworthiness." Id.

In *Clark*, the Court refused to adopt a "categorical rule" excluding from the reach of the Confrontation Clause either statements made by young children or statements to persons other than law enforcement. Rather, the Court reiterated that the "testimonial" status of such statements depends upon whether their primary purpose is to assist in a future prosecution. Primary purpose, in turn, must be determined by the totality of objective circumstances, including the actions and statements by both the person asking questions and the child-declarant. Id. at 2180. "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony." Id. (quoting *Michigan v. Bryant*). The Court then discussed several factors that courts should consider in determining whether the admission of child hearsay violates the Confrontation Clause.

Ongoing Emergency. One important, although not dispositive, factor is the existence of an ongoing emergency. Id. at 2180. In *Clark,* the Court ruled that the preschool teachers had questioned the boy "in the context of an ongoing emergency involving suspected child abuse." Id. at 2181. The teachers had questioned the boy immediately upon discovering his injuries in order to identify and end a potential threat and to determine to whom the boy could be safely released at the end of the school day. The teachers' purpose was to "protect a vulnerable child who needed help," not to "gather evidence for Clark's prosecution." Id.

Identity of Questioner/ Mandatory Reporting Laws. The primary purpose inquiry requires that a court "evaluate the challenged statements in context, and part of that context is the questioner's identity." Id. at 2182. Thus, the *Clark* Court found it "highly relevant," although again not dispositive, that the child's statements were made to preschool teachers and not to the police. Id. While statements to private persons are not categorically excluded from the Sixth

Amendment, "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement." Id. at 1280, 1282.

The Court rejected Clark's contention that the teachers were agents of law enforcement because Ohio law required the teachers to report suspected child abuse to police. The Court noted that the teachers would have acted as they did to protect the child even if they did not have any statutory duty to report; "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution." Id. at 1283.

Identity and Age of Declarant. The very young age of the declarant in *Clark* also proved important to the Court's conclusion that the child's statements were not testimonial.

> Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. . . . [I]t is extremely unlikely that a 3-year-old child in [the victim's] position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all."

Id. at 1282 (citing research concerning children's lack of understanding regarding the legal system and prosecution).

Formality/ Informality of Encounter. Finally, the Court again viewed formality as a relevant factor in assessing the primary purpose of challenged statements. The teachers in *Clark* asked the three-year-old about his injuries immediately after they discovered them. The questioning occurred in the preschool lunchroom and a classroom. The Court characterized the challenged conversations as "informal and spontaneous"—a far cry from "formalized station-house questioning" or "police interrogation." Id. at 2180, 2181.

Because the *Clark* Court did not adopt any categorical rule regarding child hearsay or statements to persons other than police, future cases will depend upon their unique factual circumstances. In particular, *Clark's* impact on forensic interviews of children by social workers or medical personnel remains to be seen. Certainly, the factors emphasized in *Clark* will be important. For instance, there may be no ongoing emergency if a forensic interview occurs after the alleged perpetrator has been identified and apprehended. Likewise, the involvement of the police in the forensic interview or the questioner's objective to collect evidence might render the interview testimonial. Finally, the age of the alleged victim and the victim's understanding that his or her accusations could subject the perpetrator to punishment will undoubtedly prove relevant. The inquiry becomes even more complicated in the common scenario where a forensic interviewer harbors multiple or mixed motives in questioning a child about suspected abuse. That is, how should a court determine the primary purpose of an interview designed both to provide a child necessary medical and mental health services and to collect evidence for a future prosecution? As discussed *supra*, the Iowa Supreme Court grappled with many of these questions in the recent case of *In the Interest of J.C.*, 877 N.W.2d 447 (Iowa 2016).