EVIDENCE UPDATE

2023 GENERAL PRACTICE REVIEW
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I. Introduction

This Update discusses recent amendments to both the Iowa and the Federal Rules of Evidence that became effective in 2023. The Update also describes significant evidentiary decisions issued by the Iowa Supreme Court during its 2022-2023 adjudicative term (from June 30, 2022 to June 30, 2023).

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 PROC. 6.904(2)(c) provides that while an unpublished opinion does not constitute controlling legal authority, an unpublished opinion may be cited in a brief.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

Finally, because many of the Iowa Rules of Evidence are patterned upon the Federal Rules of Evidence, Iowa courts frequently take guidance from federal precedent construing analogous federal rules. This Update thus briefly describes recent evidence decisions from the federal Circuit courts, particularly the United States Court of Appeals for the Eighth Circuit.

II. Rule Amendments and Statutes

A. 2023 Amendments to the Iowa Rules of Evidence

In 2017, the Iowa Rules of Evidence underwent a comprehensive, non-substantive restyling. The 2017 restyling amendments were intended to align the Iowa rules with their previously restyled federal counterparts and to "achieve[ ] an internally more consistent, clearer, easier-to-use, and plain English-oriented set of rules." Iowa Sup. Ct. Order, *In the Matter of Adoption of the Nonsubstantive Restyling of the Iowa Rules of Evidence* (Sept. 28, 2016). The 2017 restyling, however, made no substantive changes to the Iowa rules that were originally enacted in 1984 and were patterned upon the federal rules. Prior to 2023, the most recent substantive changes, applicable to only a handful of Iowa rules, occurred in 2009. Due to regular amendments of the federal rules, many Iowa rules thus diverged over time from their originally identical federal counterparts. In August of 2021, the Iowa Supreme Court established a task

force to evaluate those intervening federal amendments and recommend whether the Iowa rules should be similarly updated. Iowa Sup. Ct. Order, *In the Matter of Establishing the Iowa Rules of Evidence Substantive Review Task Force and Appointment of Members* (Aug. 31, 2021). In September of 2022, after reviewing public comments and receiving the task force's final report, the Iowa Supreme Court approved amendments to a number of Iowa rules that differed from their federal correspondents. See Iowa Rules of Evidence Substantive Review Task Force, *Final Task Force Report* (July 2022) [Final Task Force Report]; Iowa Sup. Ct. Order, *In the Matter of Adopting Amendments to the Iowa Rules of Evidence in Chapter 5 of the Iowa Court Rules* (Sept. 14, 2022) [Iowa Sup. Ct. Order]. These amendments became effective January 1, 2023, and "apply in all actions filed on or after that date as well as in trials and evidentiary hearings conducted on or after January 1, 2023, in actions filed before that date." Iowa Sup. Ct. Order. The Court also declined to adopt a small number of additional federal amendments, leaving those Iowa Rules unchanged. See Iowa Sup. Ct. Order.

The following Iowa Rules of Evidence were amended in 2023:

- **Iowa R. Evid. 5.404(a) (victim character evidence):** The 2023 amendment makes two significant changes regarding the admissibility of victim character evidence. First, the amended rule provides that if a criminal defendant offers evidence of the alleged victim's pertinent trait (i.e., aggressive character) and that evidence is admitted, the prosecutor can rebut such evidence not only with counter-evidence regarding the victim's (peaceful) character, but also with "evidence of the defendant's same [aggressive] trait." Second, the amended rule now limits the admissibility of victim character evidence when used for propensity purposes to criminal cases. In a civil case, evidence of a victim's character is no longer admissible to prove that the alleged victim acted in conformity with their character.

- **Iowa R. Evid. 5.404(b) (notice for evidence of other bad acts in criminal cases**): The 2023 amendment requires prosecutors to provide criminal defendants pretrial written notice of their intent to offer other bad act evidence, along with "the permitted purpose for which the prosecutor intends to offer [such] evidence and the reasoning that supports that purpose."

- **Iowa R. Evid. 5.408(a)(1) (compromise negotiations, impeachment):** Iowa Rule 5.408 has always prohibited using settlement evidence to prove or disprove the validity or amount of a disputed claim. Under the 2023 amendment, the rule now also prohibits the use of statements made in compromise negotiations "to impeach by a prior inconsistent statement or a contradiction."

- **Iowa R. Evid. 5.412 (rape shield rule):** The 2023 amendments significantly changed and expanded Iowa's rape shield rule, Iowa R. Evid. 5.412. Like its federal

counterpart, the Iowa rule now broadly applies to both criminal and civil proceedings involving "alleged sexual misconduct." The rule no longer uses the ambiguous terms "reputation" or "opinion" evidence and instead now presumptively excludes a "victim's sexual predisposition," as well as the victim's "other sexual behavior." The rule allows the prosecution to offer evidence of sexual behavior between the victim and the accused in order to counter a consent defense. Finally, the rule makes important changes to the rule's notice and hearing procedural requirements, including allowing the trial court "for good cause" to excuse the 14-day pretrial notice obligation.

- **Iowa R. Evid. 5.703 (inadmissible bases for expert testimony):** Under rule 5.703, experts can rely upon even inadmissible facts and data in forming their opinions so long as that underlying information is of the type reasonably relied upon by experts in that particular field. Although the resulting opinion may be admissible, however, the otherwise inadmissible basis evidence now can be disclosed to the jury only if the court affirmatively finds that its "probative value in helping the jury evaluate the opinion substantially outweighs [its] prejudicial effect."

- **Iowa R. Evid. 5.706(a) (court-appointed expert on court's own motion):** The amendment permits the court, as well as the litigants, to initiate the process regarding court-appointed expert witnesses.

- **Iowa R. Evid. 5.801(d)(2) (party-opponent statements by authorized and unauthorized employees or agents or by co-conspirators):** Amended rule 5.801(d)(2) recognizes that the trial court can consider a hearsay statement itself in determining whether it qualifies as an authorized admission under rule 5.801(d)(2)(C), a statement of an opposing party's agent or employee under rule 5.801(d)(2)(D), or a statement of a co-conspirator under rule 5.801(d)(2)(E). However, the rule now states that the hearsay statement alone cannot establish the foundation for those three types of party-opponent statements. Rather, independent evidence is also required.

- **Iowa R. Evid. 5.803(16) (ancient documents hearsay exception):** The amended hearsay exception for ancient documents no longer provides for a prescribed temporal period, but instead limits the exception to documents "prepared before January 1, 1998, and whose authenticity is established." Documents prepared after that date need to qualify under another hearsay exclusion or exception that does not rely solely upon the document's age.

- **Iowa R. Evid. 5.804(b)(3) (statements against penal interest in criminal cases):** Under the 2023 amendment, all statements against penal interest offered in a criminal case must be supported by corroborating circumstances regardless of whether they

are inculpatory or exculpatory or whether they are offered by the prosecutor or the accused.

- **Iowa R. Evid. 5.807 (residual hearsay exception):** The 2023 amendment reduces the threshold requirements of the catch-all hearsay exception from four to only two: trustworthiness and necessity. Additionally, the amendment deletes the "equivalence" standard for trustworthiness and now focuses on whether the hearsay statement is supported by "sufficient guarantees of trustworthiness," considering the circumstances under which the statement was made and the existence, strength, and quality of corroborating evidence. The amendment also strengthens the notice provision of the residual exception. The rule requires the proponent to disclose "in writing" a sufficiently specific description of the "substance" of the hearsay statements "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."

- **Iowa R. Evid. 5.901(b)(8) (authentication of ancient documents):** Although litigants can still use a document's age to authenticate the record, the amendment substitutes the federal 20-year period in place of the prior Iowa 30-year requirement.

- **Iowa R. Evid. 5.902(13) (self-authentication of electronically generated records) and Iowa R. Evid. 5.902(14) (self-authentication of data copied from electronic devices):** The new Iowa rules permit self-authentication of certain computer generated evidence through a pretrial certification procedure similar to that previously allowed for business records. The provisions eliminate the need for 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," and thus permit litigants to resolve challenges to the authenticity of electronic evidence such as spreadsheets, webpages, GPS devices, and cell phones in advance of trial.

The Iowa Court considered, but ultimately declined to adopt, amendments to the following rules, which thus remain unchanged:

- Iowa R. Evid. 5.408(a)(2) (public office/ regulatory exception to compromise rule);

- Iowa R. Evid. 5.609(a)(2) (impeachment with conviction for crimes of dishonesty or false statement);

- Iowa R. Evid. 5.702 (expert); and

- Iowa R. Evid. 5.801(d)(1)(B) (non-hearsay use of prior consistent statements).

The Iowa Sup. Ct. Order adopting these amendments, the track-changes version of the 2023

amendments, and the Final Task Force Report explaining the changes, can be found on the Iowa Supreme Court's website.

B. Federal Rules of Evidence

The United States Supreme Court has approved amendments to three federal rules—Fed. Rs. Evid. 106 [the rule of completeness], 615 [the rule on witnesses], and 702 [expert testimony] that became effective on December 1, 2023. See https://nam11.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.supremecourt.gov%2Forders%2Fcourtorders%2Ffrev23_5468.pdf&data=05%7C01%7Claurie.dore%40drake.edu%7C83d8d41bbb84483d786c08db6ac3480d%7C6f028129009c4b33b633bbfc58bbd960%7C0%7C0%7C638221159322770540%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=2aYFsfkUe5rH6L1%2B%2F4LOIutpE0GqI2DfXqg882pGhdM%3D&reserved=0.

- **Fed. R. Evid. 106 (rule of completeness):** Prior to December 1, 2023, the federal rule of completeness explicitly covered only writings and recorded statements. In contrast, Iowa's rule 5.106 encompasses "all or part of an act, declaration, conversation, writing, or recorded statement" that is introduced by a party. The 2023 federal amendment expands Fed. R. Evid. 106 to align with Iowa's broader scope. The federal rule now applies when "a party introduces all or part of a *statement*," and thus covers all statements in any form, including oral unrecorded statements. A more significant change in Fed. R. Evid. 106 resolves the issue of whether the rule of completeness can trump otherwise applicable rules of evidence and make related information admissible, even if it would otherwise be excluded, if "fairness" requires that it be considered along with the primary evidence. The Iowa Court regards that question as still unresolved. See State v. Tucker, 982 N.W.2d 645, 659 (Iowa 2022). The amended Federal Rule 106 adopts the trumping position and permits any necessary completing statement to be admitted "over a hearsay objection."

  Fed. R. Evid. 106 (as amended) reads:

  Rule 106. Remainder of or Related Statements

  If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part—or any other statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

- **Fed. R. Evid. 615 (the rule on witnesses):** Three changes have been made to the federal "rule on witnesses." First, under Fed. R. Evid. 615, exclusion of witnesses, other than those listed in the rule, is mandatory when requested by counsel. *Cf.*

Iowa R. Evid. 615 "the court *may* order witnesses excluded. . . ." Although Federal Rule 615 requires mandatory sequestration of witnesses, a trial court does have discretion to allow testimony by a witness who has violated the rule. Second, under the text of both the Iowa and the federal rule, sequestration orders only seem to exclude prospective witnesses from the courtroom. Indeed, Iowa courts seem to distinguish between a sequestration order that excludes witnesses from the trial until after they have testified and an order that instructs a witness not to discuss their testimony with other witnesses or counsel. Questions have arisen in other jurisdictions about whether a rule 615 order prevents prospective witnesses from being provided or obtaining access to trial testimony. The federal amendment explicitly gives the trial court discretion "to (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." The federal amendment does not address whether counsel can prepare witnesses with trial testimony. Finally, the federal proposal clarifies that an entity-party is entitled to designate only one officer or employee to be exempt from exclusion.

Fed. R. Evid. 615 (as amended) provides:

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) one officer or employee of a party that is not a natural person if that officer or employee has been designated as the party's representative by its attorney;

(3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

- **Fed. R. Evid. 702 (expert testimony):** In 2000, Fed. R. Evid. 702 was amended to add the so-called "Daubert" gatekeeping provisions to the federal expert testimony rule. Those provisions required the district court to allow expert testimony only if the expert's opinion was sufficiently grounded and reliable. Under the December 1, 2023 amendment, Fed. R. Evid. 702 explicitly places the burden on the proponent of the expert's testimony to demonstrate to the trial court that each of rule 702's gatekeeping requirements are "more likely than not." See Fed. R. Evid. 702 advisory committee note to 2023 amendment. Additionally, the 2023 federal amendment focuses rule 702(d) on the expert's opinions and conclusions. That provision requires the proponent to demonstrate that the "expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702(d) (2023 amendment). The Iowa Supreme Court recently considered and declined to adopt these 2000 and 2023 federal gatekeeping provisions. Iowa Sup. Ct. Order, *In the Matter of Adopting Amendments to the Iowa Rules of Evidence in Chapter 5 of the Iowa Court Rules* (Sept. 14, 2022).

  Fed. R. Evid. 702 (as amended) provides:

  > **Rule 702. Testimony by Expert Witnesses**
  >
  > A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
  >
  > **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  >
  > **(b)** the testimony is based on sufficient facts or data;
  >
  > **(c)** the testimony is the product of reliable principles and methods; and
  >
  > **(d)** the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

C. Iowa Statutes Implicating Evidence

The Iowa legislature enacted two statutes in 2022 that raise evidentiary issues.

1. I.C.A. § 622.31A(1) (making Iowa R. Evid. 5.412 applicable to discovery conducted in criminal and post-conviction relief cases).

622.31A Evidence — victims of sexual abuse.

1. The provision of **rule of evidence 5.412** involving a victim of sexual abuse shall apply to discovery conducted in a criminal case or in a postconviction relief proceeding under chapter 822 including but not limited to depositions.

2. If a defendant in a criminal action or an applicant for postconviction relief wishes to conduct discovery involving evidence subject to **rule of evidence 5.412**, the defendant or applicant shall comply with substantially the same procedural requirements for evidence sought to be offered at trial including timelines, offers of proof, service, purpose of proposed discovery, in camera hearings, relevancy, and the balancing of the probative value of the evidence with the danger of unfair prejudice.

3. Discovery, by deposition or otherwise, shall not be permitted for evidence that would not be admissible at trial under **rule of evidence 5.412**.

2022 Acts, ch 1095, §1

2.` I.C.A. § 622.31B (creating hearsay exception in prosecution for physical abuse or a sexual offense upon or against a child, person with an intellectual disability, person with a cognitive impairment, or person with a developmental disability).

622.31B Admissibility of evidence in certain physical abuse and sexual offense cases.

1. As used in this section:

a. *"Child"* means a person under fourteen years of age.

b. *"Cognitive impairment"* means a deficiency in a person's short-term or long-term memory; orientation as to person, place, and time; deductive or abstract reasoning; or judgment as it relates to safety awareness.

c. *"Developmental disability"* means the same as defined under the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, Pub. L. No. 106-402, as codified in 42 U.S.C. §15002(8).

d. *"Intellectual disability"* means a disability of children and adults who as a result of inadequately developed intelligence have a significant impairment in ability to learn or to adapt to the demands of society.

2. In a prosecution for physical abuse or a sexual offense including but not limited to sexual offense in violation of section 709.2, 709.3, 709.4, 709.11, 709.12, 709.14, 709.15, 709.16, or 709.23, upon or against a child, a person with an intellectual disability, person with cognitive impairment, or person with a developmental disability, the following evidence shall be admitted as an exception to the hearsay rule if all of the requirements in subsection apply:

a. Testimony by the victim concerning an out-of-court statement, whether consistent or inconsistent, made by the victim to another person that is an initial disclosure of the offense.

b. Testimony by another concerning an out-of-court statement, whether consistent or inconsistent, made by the victim that is an initial disclosure of an offense charged for physical abuse or a sexual offense against the victim.

3. The testimony described in subsection 2 shall be admitted into evidence at trial as an exception to the hearsay rule if all of the following apply:

a. The party intending to offer the statement does all of the following:

(1) Notifies the adverse party of the intent to offer the statement.

(2) Provides the adverse party with the name of the witness through whom the statement will be offered.

(3) Provides the adverse party with a written summary of the statement to be offered.

b. The court finds, in a hearing conducted outside the presence of the jury, that the timing of the statement, the content of the statement, and the circumstances surrounding the making of the statement provide sufficient safeguards of reliability.

c. The child, person with an intellectual disability, person with a cognitive impairment, or person with a developmental disability testifies at the trial.

4. If a statement is admitted pursuant to this section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given to the statement, and in making that determination, the jury shall consider the age and maturity of the child or the disability of the person with an intellectual disability, person with a cognitive impairment, or person with a developmental disability; the nature of the statement; the circumstances under which the statement was made, and any other relevant factors.

5. This section shall not prevent the admission of any evidence based upon forfeiture by wrongdoing.

2022 Acts, ch 1095, §2

III. Iowa Supreme Court Evidence Decisions

During its 2022-2023 adjudicative term, the Iowa Supreme Court rendered several decisions addressing evidentiary issues.

A. Preservation of Error under Rule 5.103.

In *State v. Trane*, 984 N.W.2d 429 (Iowa 2023), the Iowa Supreme Court reiterated the importance of error preservation regarding evidentiary objections:

> "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we decide them on appeal." We will not consider an evidentiary complaint unless the complaining party made their "specific objection" to the evidence "known" in the district court, and the court had the "opportunity to pass upon the objection and correct any error." When an evidentiary concern is "not adequately raised by proper specific objection" before the district court, we consider it "waived." And even when an objection is properly raised, failure "to obtain a ruling on the[ ] objection" generally "constitutes[s] a waiver of any error."

Id. at 434-35 (citations omitted).

B. Rule of Completeness under Rule 5.106.

State v. Tucker, 982 N.W.2d 645 (Iowa 2022), addressed, but left unresolved, the question of whether the rule of completeness serves a "trumping," as well as "timing" function. 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 rule 5.106 merely concern the timing of when completing evidence is admitted to prevent misunderstanding the primary evidence? Although the *Tucker* Court did not reach that issue, it did note that litigants cannot use rule 5.106 to circumvent relevance and that the trial court has significant discretion to exclude irrelevant and prejudicial information even when the rule of completeness may apply.

In *Tucker*, the defendant was convicted of possession of a controlled substance with intent to deliver. The State introduced an edited version of an arresting officer's bodycam video that depicted the defendant yelling and protesting the search of his person. The district court refused to allow Tucker to admit the three-minute-longer unedited video that showed one officer identifying Tucker to another officer as the person previously shot by police on a different occasion. 982 N.W.2d at 658 n.3. The Iowa Supreme Court held that the trial court did not abuse its significant discretion in refusing to admit the unedited video under the rule of completeness. The Court reasoned that the State's edited video did not present an incomplete or misleading impression of the charged encounter and that the unedited footage mentioning the prior shooting was irrelevant and inadmissible. As stated by the Court, "[i]rrelevant evidence will not further the purpose of rule 5.106 and its common law counterpart because evidence that

has no tendency to make a consequential fact more or less probable cannot possibly supply additional information that will stop partial or incomplete evidence from misleading or confusing the jury." Id. at 659.

C. Relevance and Unfair Prejudice under Rules 5.401, 5.402, and 5.403.

1. Relevance in Contested Agency Proceedings:

In *Environmental Law & Policy Ctr. v. Iowa Utils. Bd.*, 989 N.W.2d 775 (Iowa 2023), the Court reviewed the statutory requirements governing contested proceedings before the Iowa Utilities Board. In ruling that evidence submitted by the intervening environmental organizations and the Office of the Consumer Advocate was relevant and should have been considered by the Board. According to the Court, relevance under the statutory framework does not hinge on the identity of the party offering the evidence.

2. Evidence of Similar Occurrences and Investigative Notes in Discrimination Suit:

In *Valdez v. West Des Moines Community Schools*, 992 N.W.2d 613 (Iowa 2023), the Court noted that other similar acts of discriminatory conduct may be relevant evidence of discriminatory atmosphere or motive in a discrimination action. In that case, a former special education associate sued the school district and her supervising teacher for constructive discharge and hostile work environment, claiming that the school district had refused to remedy the harassment and racial discrimination that she had complained about.

The plaintiff challenged the district court's exclusion of evidence that her former teacher-supervisor allegedly pinched a Hispanic student two months after plaintiff had left her position with the school district. The *Valdez* Court noted that "[a]s a general matter, '[e]vidence of a discriminatory atmosphere is relevant in considering a discrimination claim, and it is 'not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment.'" Id. at 640, *quoting* Hamer v. Iowa C.R. Comm'n, 472 N.W.2d 259, 262-63 (Iowa 1991). The relevance of this type of "similar act" or "me too" evidence in discrimination suits will depend on how closely related the other discriminatory incidents are to the plaintiff's claim and circumstances. The Court listed relevant factors to include "'whether such past discriminatory behavior by the employer is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witness and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated." Id. Ultimately, the Court affirmed the trial court's exclusion of the subsequent pinching incident as too disconnected from the events at issue in plaintiff's discrimination suit. Id.

Valdez also appealed the exclusion of notes pertaining to an investigation by the defendant school district into the plaintiff's complaints of harassment and racial discrimination.

Although the trial court excluded the notes as inadmissible hearsay, the *Valdez* Court upheld the exclusion of the notes under rule 5.403. Id. at 638-639. The Court noted that while "reliability is not directly relevant" to the rule 5.403 balancing of probative value and unfair prejudice, the probative value of evidence can be "substantially diminished because of its unreliable nature." Id. at 638. The notes, which did not clearly identify their author, were apparently made by a human resources employee who had died by the time of trial. The notes did not identify when the described interviews took place or whether the notes documented direct statements by the witnesses or merely the author's overall impressions of the interviews. Id. at 638. Admission without the author's help in interpreting the notes would have left jurors "to their own devices" and embarked on a confusing, "potentially lengthy detour." Id. at 639. These "legitimate concerns" decreased the probative value of the notes, especially given the cumulative alternative evidence, including the investigative report itself, that had been admitted. Id.

3. Remoteness and Relevance:

In *State v. Thompson*, 982 N.W.2d 116, 125 (Iowa 2022), a murder prosecution involving the defendant's mother, the Court held that the passage of three months between the mother's murder and her earlier posting of a Facebook video in which she expressed her fear of her son did not negate the posting's relevance in demonstrating the mother's ongoing fear of the defendant.

D. Flight Evidence and the Inference of Guilt under Rule 5.404(b).

In *State v. Sallis*, 981 N.W.2d 336 (Iowa 2022), the Court discussed the inference of guilt that might be drawn from evidence that a party fled from law enforcement and acknowledged Iowa precedent restricting this type of evidence. The *Sallis* Court, however, distinguished those authorities from the case at bar where a police officer ordered the defendant to immediately exit his car after a traffic stop because of the officer's concern that the defendant was a "flight risk." In contrast to other cases discussing flight and concealment evidence, the defendant in *Sallis* never fled the scene and the State was not arguing that any inference of guilt should be drawn from the circumstances surrounding the traffic stop. Id. at 352 (distinguishing State v. Wilson, 878 N.W.2d 203, 212-13 (Iowa 2016)).

E. Admissibility of Settlement Evidence for Non-Liability Purposes under Rule 5.408.

The Court's recent decision in *Valdez v. West Des Moines Community Schools*, 992 N.W.2d 613 (Iowa 2023), illustrates the difficulty of determining whether compromise negotiations are offered for a purpose other than proving or disproving the validity of a party's claim. In that case, the Court upheld the admission of settlement evidence to rebut an element of the plaintiff's constructive discharge claim, upholding the trial court's discretion to admit offers of compromise for purposes other than those prohibited by rule 5.408(a). Id. at 638,

In that case, a former special education associate sued her former employer for constructive discharge and hostile work environment, claiming that the school district had

refused to remedy the harassment and racial discrimination she had suffered at the hands of a supervising teacher. The plaintiff herself had offered her initial settlement demand to demonstrate that the district had failed to correct the harassment after she complained—an element of constructive discharge. Id. at 634-35. The trial court had permitted the school district to rebut this element with its responsive offer to work with the plaintiff to obtain the plaintiff's desired reassignment. Id. at 621, 635.

The Iowa Supreme Court upheld the admission of that settlement correspondence for a non-liability purpose. Id. at 634-638. The Court acknowledged that while the school district's settlement evidence did "invalidate" the plaintiff's claim, "the concept of 'validity"" should not be read so broadly as to completely swallow the "other purpose" exception Id. at 635-36. Rule 5.408 excludes evidence "only when it is tendered as an admission of weakness of the other party's claim or defense, not when it is tendered to prove a fact other than liability." Id. at 636, *quoting* Miller v. Component Homes, Inc., 365 N.W.2d 213, 215 (Iowa 1984). Thus, while the school district could offer the settlement letters to rebut an element of the plaintiff's claim, it could not use the exhibits to show that the plaintiff was "setting up" a sham lawsuit or knew her claim was weak. Valdez, 992 N.W.2d at 636-37. "But where there was also a permissible use for the exhibit, parsing the permissible from the impermissible [purposes under rule 5.408] falls to the district court's discretion." Id. at 637. Accordingly, the Court upheld the trial court's "wide discretion" to admit the settlement evidence. Id. at 637-38.

F. Victim's Prior False Claims of Sexual Abuse under Rule 5.412

In *State v. Trane*, 984 N.W.2d 429 (Iowa 2023), the Court held that the district court did not abuse its discretion on remand in concluding that the defendant had failed to prove by a preponderance of the evidence that the alleged victim had made prior false allegations of sexual abuse concerning her adoptive and foster parents. The trial court thus did not abuse its discretion in excluding that evidence in that sexual abuse prosecution. Id. at 437.

G. Privileges

1. Attorney-Client Privilege and the Crime-Fraud Exception:

In *Konchar v. Pin*s, et al., 989 N.W.2d 150 (Iowa 2023), the Court discussed the showing an adversary must make to obtain *in camera* review of allegedly privileged communications under the crime-fraud exception to the attorney-client privilege. In *Konchar*, a former principal of a Catholic elementary school who had been terminated after nineteen years in the position sued the parish priest, the church, and the Catholic Diocese for fraud, defamation, and breach of contract. After the trial court dismissed Konchar's fraud, breach of contract, and one of her defamation claims before trial, the jury returned a defense verdict on her remaining defamation claims. Id. at 157. On appeal, Klonchar argued that the trial court abused its discretion when it refused to conduct an *in camera* review of certain attorney-client defense communications before determining that the crime-fraud exception did not apply. Id. at 159.

Communications made in contemplation of a fraud or criminal act are not privileged. Id. at 159. Though the Iowa courts have recognized the crime-fraud exception, very little Iowa precedent discussing the exception exists. Id. Given the parties' mutual understanding, however, the *Konchar* Court assumed, without deciding, that "Iowa's exception is equivalent to the federal version." Id.

The Restatement (Third) of the Law Governing Lawyers outlines the parameters of the crime-fraud exception as follows:

> § 82. Client Crime Or Fraud
>
> The attorney-client privilege does not apply to a communication occurring when a client:
>
> (a) Consults a lawyer for the purpose, later accomplished, or obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
>
> (b) Regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud.

RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 82. "'Because the attorney-client privilege benefits the client, it is the client's intent to further a crime or fraud that must be shown.'" Konchar, 989 N.W.2d at 159, *quoting* In re BankAm. Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

The procedure for applying the crime-fraud exception has generated some division among the courts. Precedent suggests that to overcome a claim of privilege, the adversary needs to make a prima facie showing that the client was involved in or contemplating a criminal or fraudulent scheme when seeking the advice of counsel, and that some relationship existed between the communications in question and the scheme. The *Konchar* Court discussed the related question of what showing the adversary must make to obtain *in camera* review of allegedly privileged attorney-client communications. Citing federal precedent, the Court stated:

> "Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, 'the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." Even if this showing is made, the district court still has discretion in determining whether *in camera* review is appropriate. When exercising discretion, the court should consider "the facts and circumstances of the particular case," including "the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply."

Konchar, 989 N.W.2d at 159-160 (Iowa 2023), *quoting* U.S. v. Zolin, 491 U.S. 554, 572 (1989). Merely arguing that a fraud occurred and that attorney-client communications facilitated that fraud does not satisfy the required prima facie showing. Instead, an adversary must make a "specific showing" that the particular attorney-client communications at issue were made to further the client's alleged fraud or crime. Konchar, 989 N.W.2d at 160. Finally, the *Konchar* Court declined to consider whether the exception should be expanded "to torts other than fraud" because the trial court "only ruled on whether the traditional crime-fraud exception applied" and thus the issue had not been preserved below for appeal. Id. Although contrary non-Iowa opinions exist, the prevailing view appears to limit the exception to crimes and frauds and not extend it to other wrongs such as intentional torts. RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 82, cmt. d.

2. Fifth Amendment Privilege against Self-Incrimination:

State v. Ellison, 985 N.W.2d 473 (Iowa 2023), held that the Iowa statute requiring persons using deadly force not to "destroy, alter, conceal, or disguise physical evidence," I.C.A. § 704.2B(2), did not violate defendant's Fifth Amendment rights.

H. Opinion Testimony

1. Necessity of Expert Testimony: In *Butterfield v. Chautauqua Guest Home*, 987 N.W.2d 834 (Iowa 2023), the Court discussed the circumstances where expert testimony is and is not required to prove standard of care and breach of duty in a professional negligence claim against a healthcare provider.

2. Expert Testimony regarding Cause and Manner of Death:

In *State v, Stendrup*, 983 N.W.2d 231 (Iowa 2022), the Court held that a district court improperly redacted an autopsy report and should not have limited a medical examiner's testimony about the cause and manner of the victim's death when that helpful testimony was based upon objective medical evidence and assumed facts that were supported by the record evidence.

In that first degree murder and felony murder based upon robbery prosecution, the defendant sought to prohibit the medical examiner from testifying about the cause and manner of death based on the Iowa Supreme Court's prior anti-vouching decision in State v. Tyler, 867 N.W.2d 136 (Iowa 2015). Relying upon *Tyler*, the trial court prohibited the medical examiner from testifying about the cause of death and similarly redacted the autopsy report. Stendrup, 983 N.W.2d at 237. The trial court instead restricted the expert to answering hypothetical questions based on facts admitted into evidence. Id.

On appeal after the defendant's conviction, the Iowa Supreme Court held that the trial court had erroneously restricted the medical examiner's testimony. The Court first distinguished *Tyler* as a "unique case" involving "unique circumstances" in which the medical examiner's

opinion was "not based on objective, scientific, or medical evidence but instead was based 'exclusively' or almost exclusively on crediting one side of Tyler's 'inconsistent and uncorroborated statements to the police.'" Id. at 239-240 (Iowa 2022), *quoting* Tyler, 867 N.W.2d at 144). Unlike the "unique circumstances" presented in *Tyler*, the expert in *Stendrup* based his helpful cause and manner testimony upon objective medical evidence concerning how a physical assault could trigger a physiological response such as a potentially fatal heart arrhythmia in victims with underlying medical conditions or who, like the victim in *Stendrup*, were under the influence of methamphetamine. Likewise, the patient history relied upon by the medical examiner, came from multiple consistent sources, unlike the "single disputed source" relied upon in *Tyler*. Id. at 240. Thus, the defendant received "more than [he] was entitled to" when the district court prevented the medical examiner from giving a direct opinion on the cause and manner of the victim's death and, instead, limited the expert to answering hypothetical questions based on evidence in the record. Id. at 240-41. Moreover, those hypothetical questions properly asked the expert to offer his opinion based on facts supported by record evidence and allowed the fact-finder (the district court in this bench trial) "to determine whether the assumed facts were true and to what extent the assumed facts supported the expert opinion." Id. at 240.

I. Hearsay and Statements of Homicide Victims

In *State v. Thompson*, 982 N.W.2d 116 (Iowa 2022), the Court discussed the admissibility of prior accusatory statements made by a decedent in a homicide prosecution. The Court noted that while a homicide victim's statements of fear or present intent frequently fall within the hearsay exception for then-existing state of mind, admissibility will turn on whether the victim's state of mind is relevant to a disputed issue in the case other than the occurrence of the event that produced that mental state.

The defendant in *Thompson* was charged with the premeditated murder of his mother. At trial, witnesses testified to the mother's out-of-court statements that she was afraid of her son and that she planned to stop financially supporting him. The trial court also admitted testimony about the mother's Facebook video stating that if anything happened to her, her son did it. In affirming the defendant's conviction, the Iowa Supreme Court extensively discussed the admissibility of the mother's prior statements under the state of mind hearsay exception in rule 5.803(3). The Court held that the mother's fear of Thompson and her plan to stop supporting him were probative of the mother's "contentious relationship" with the defendant that may have motivated him to kill his mother. Id at 121, 123. The statements reflecting the mother's fear of her son were not used to prove that the defendant had previously done something (i.e., prior threats or assaults) to cause the victim's fear, which would not be admissible because backward-looking statements "of memory or belief" are not admissible "to prove the fact remembered or believed." Iowa R. Evid. 5.803(3). Instead, the evidence provided a possible motive for Thompson killing his mother after she told him that he needed to move out and that she would no longer financially support him. Id. at 124-25. The statements similarly rebutted Thompson's

contention that he acted impulsively out of rage, rather than premeditation. Id. at 123. The Court supported its holding by noting the abundance of other direct, admissible evidence of the defendant's combative relationship with his mother, including the defendant's own admissions. Id. at 123-124 (noting that mother's out-of-court statements were "interwoven with admissible direct evidence" demonstrating her relationship with her son).

In his concurring opinion, Justice Mansfield advised that courts should "exercise caution in admitting prior statements of a decedent in a murder case" and ensure that the statements are actually offered to demonstrate the *victim's* state of mind or present intent and not to "raise an inference as *to what the defendant must have done to bring about that state of mind*." Id. at 125, 128 (Mansfield, J., concurring) (emphasis in original). Courts should "separately and carefully" examine "[e]ach statement, and the reasons for which its admission is sought" to ensure that apparently admissible hearsay is not used "so that jurors will draw an improper hearsay inference." Id. at 128, 126 (Mansfield, J., concurring). Justice Mansfield questioned whether the mother's statements about what she had said or done fell within any hearsay exception. Id. at 126. Moreover, he questioned whether the victim's fear, by itself, was really relevant. Id. He concurred, however, because of the abundant non-hearsay evidence that corroborated the relationship between the defendant and his mother. Id. at 128 (Mansfield, J., concurring).

Thus, as discussed in *Thompson*, prior statements of decedents in homicide cases are clearly relevant where the defendant claims self-defense, accidental death, suicide, or consent. In such cases, the declarant's existing mental state or present intent rebuts the defense by showing that the victim likely acted in conformity with that mental state and contrary to the defendant's claim. For example, in self-defense cases, a victim's fear of the defendant makes it less likely that the victim was the first aggressor or did anything to incite the attack. A victim's hatred of the defendant may also demonstrate a lack of consent in a prosecution charging that the death occurred in the course of a rape or kidnapping. See State v. Thompson, 982 N.W.2d 116, 126 (Iowa 2022) (Mansfield, J., concurring) (noting the relevance of a victim's fear of the defendant where consent was an issue in a case). A statement reflecting a victim's mental state may also be relevant to rebut a defendant's claim that he had a loving relationship with the deceased. See Thompson, 982 N.W.2d at 122-123. Or, as in *Thompson*, a victim's feelings of fear or animosity toward the defendant may be probative of the victim's acrimonious relationship with the defendant and the defendant's possible motive for harming the victim. Id. However, because a victim's out-of-court accusations present a significant risk that the fact-finder might disregard any limiting instruction and consider the evidence as inadmissible proof of the defendant's prior acts, a court can still exclude that evidence under rule 5.403 if the risk of unfair prejudice substantially outweighs its probative value.

IV. Iowa Court of Appeals Evidence Decisions

A. Preservation of Error

State v. Howland, 995 N.W.2d 520, 2023 WL 3613259, at *15 (Iowa Ct. App. 2023) (Table) ("Where, . . . , an objection is made after the answer to the question is in the record, in order to preserve error, the objecting party must make a motion to strike the answer and ask that the objection precede the answer or offer an excuse for the delay in objecting.").

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *13 (Iowa Ct. App. 2023) (Table) (holding that because the trial court definitively overruled nursing home's motion in limine seeking to exclude testimony about abuse perpetrated against plaintiff's decedent, defendant nursing home did not need to renew its objection during trial).

State v. Curtis, 996 N.W.2d 122, 2023 WL 4104116, at *6-8 (Iowa Ct. App. 2023) (Table) (considering whether a defendant preserved her in limine objection to the introduction of portions of a police body cam video showing her arguing with police officers and using racial slurs and holding that the trial court's repeated use of "at this time" in its in limine ruling required the defendant to object again when the video was offered at trial).

B. Relevance and Unfair Prejudice

1. Photos.

State v. Perez, 991 N.W.2d 176, 2023 WL 152524, at *3 (Iowa Ct. App. 2023) (Table) (affirming admission of graphic photographs of victims' injuries before they had been cleaned up by medical staff in assault causing serious injury case; photographs fairly depicted the seriousness of the victim's injuries when found by the police soon after the assault).

State v. Hunter, 989N.W.2d 663, 2022 WL 10827449, at *6-7 (Iowa Ct. App. 2022) (Table) (holding, in case where defendant was convicted of violently murdering his roommate with a coconut machete, that trial court did not err in admitting 25 autopsy photos of victim's injuries; although some of the photos documented the same injuries, the perpetrator and cause of death were not contested, and the medical examiner also described the injuries, the photos documented the extent and nature of the injuries and were probative of whether the defendant acted in self-defense).

State v. Sassman, 988 N.W.2d 733, 2022 WL 4361785, at *4 (Iowa Ct. App. 2022) (Table) (holding in second-degree murder prosecution where defendant drove truck into the victim and her dog, that trial court properly admitted twenty photos of the victim's body because they were probative of the victim's "devastating" injuries and the defendant's intent, illustrated the medical examiner's findings, and rebutted defendant's claim of accident).

2. Similar Occurrences.

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *15 (Iowa Ct. App. 2023) (Table) (holding that plaintiff suing nursing home for her mother's death offered only non-specific rumors from unidentified sources about nursing assistant's physical and verbal

abuse of unnamed residents such that court could not determine whether reports related to one or many incidents; trial court thus properly excluded evidence absent "foundational support that the prior incidents occurred under substantially the same circumstances").

3. Unfair Prejudice.

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021 (Iowa Ct. App. 2023) (Table) (noting that defendant nursing home failed to demonstrate that evidence of verbal and physical abuse of nursing home residents was unfairly prejudicial, but "simply state[d] that it was;" but holding that nursing home was unfairly prejudiced by testimony that government inspection report was consistent with conclusions of plaintiff's experts).

C. Character Evidence

State v. Hunter, 989 N.W.2d 663, 2022 WL 10827449, at *6 (Iowa Ct. App. 2022) (Table) (upholding exclusion of evidence of murder victim's methadone use and prison record for bad checks because defendant failed to show "a correlation between the evidence of prison time and methadone use and a propensity for violence" that could justify defendant's violent attack of victim with coconut-splitting machete).

D. Other Act Evidence

State v. Howland, 995 N.W.2d 520, 2023 WL 3613259, at *15-16 (Iowa Ct. App. 2023) (Table) (holding that testimony that defendant served as "disciplinarian" for abused child did not constitute an "other act" prohibited by rule 5.404(b), especially in absence of any evidence suggesting that discipline was excessive).

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *21-22 (Iowa Ct. App. 2023) (Table) (holding that trial court erred in admitting hearsay rumors regarding former nursing assistant's abusive behavior toward other nursing home residents, but properly admitted eyewitness testimony concerning that verbal and physical abuse).

State v. Mootz, 992 N.W.2d 882, 2023 WL 2396014, at *3-4 (Iowa Ct. App. 2023) (Table) (admitting, in prosecution for neglect and abandonment of a minor, evidence that defendant had previously kicked son out of his home in order to rebut father's contention that son was mistaken about whether defendant had again thrown son out of defendant's home; "when the issue is actually disputed, it can provide the leverage necessary for prior acts evidence to clear the first [admissibility] hurdle").

State v. Moss, 991 N.W.2d 172, 2023 WL 152480 (Iowa Ct. App. 2023) (Table) (affirming admission of uncharged act of child sexual abuse that occurred after the charged sexual abuse to show nature of relationship between defendant and the same victim).

State v. Wilde, 987 N.W.2d 486 (Iowa Ct. App. 2022) (holding, in sexual abuse and indecent contact bench trial involving defendant's sons, that the trial court committed harmless error in

admitting anthropomorphic cartoons retrieved from the defendant's cell phone that depicted father and son animals engaging in sexual acts for the non-character purposes of showing defendant's motive, sexual purpose, or identity because "child pornography cannot be admitted to prove the alleged perpetrator's motive," the defendant did not contest the specific intent element of indecent contact charge, and identity was not a disputed issue in the case given that the children clearly identified their father as the abuser and the father generally denied the charges and never attempted to shift blame onto another person) (citing State v. Putman, 848 N.W.2d 1, 10 (Iowa 2014) and State v. Thoren, 970 N.W.2d 611 (Iowa 2022)).

State v. Simmons, 989 N.W.2d 802, 2022 WL 16631198 (Iowa Ct. App. 2022) (noting that "well-established law" supported admission of prior acts of domestic abuse toward same victim),

State v. Bassett, 989 N.W.2d 797, 2022 WL 16630788, at *4 (Iowa Ct. App. 2022) (Table) (holding that prior acts of domestic abuse were admissible to show defendant's intent and motive in strangling his girlfriend; intent was contested issue after defendant claimed victim died from positional asphyxiation, not strangulation).

State v. Alvarenga, 990 N.W.2d 318, 2022 WL 16985659, at *2-3 (Iowa Ct. App. 2022) (Table) (holding, in prosecution for enticing a minor and indecent contact with a child, that trial court properly admitted evidence that the defendant evaded arrest because officers' prior contact with defendant to obtain a DNA sample and request a follow-up interview inferentially placed defendant on notice that he was a suspect in charged matter).

E. Compromise and Settlement Evidence under Rule 5.408

Ingram v. Iowa Interstate R.R., Ltd., 990 N.W.2d 681, 2022 WL 17481851 (Iowa Ct. App. 2022) (Table) (holding, in breach of contract and wage payment collection case, that trial court erred in excluding railroad's rejected offer of settlement because purpose was not to demonstrate weakness of former employee's claim, but to show that railroad did not intentionally withhold wages from plaintiff).

F. Privileges

State v. Howland, 995 N.W.2d 520, 2023 WL 3613259, at *4-8 (Iowa Ct. App. 2023) (Table) (holding that trial court did not abuse its discretion in failing to conduct *in camera* review of child sex abuse victim's therapy records; possible harm to child from mother's dysfunction would not have shown that defendant had not abused the child).

State v. Ash, 991 N.W.2d 534, 2023 WL 381191, at *3-4 (Iowa Ct. App. 2023) (Table) (denying domestic abuse defendant's request for *in camera* inspection of victim's old medical records in case that was not "close" given that defendant failed to demonstrate any nexus between the victim's alleged mental health issues and the incident at issue and the case was not dependent on the victim's credibility).

G. Competency

State v. Dean, 991 N.W.2d 789, 2023 WL 1810033 (Iowa Ct. App. 2023) (Table) (ruling that inconsistencies in 5-year-old's testimony went to credibility and weight, rather than admissibility; trial court "should focus on whether other rules of evidence prevent the [child's] testimony").

H. Impeachment

State v. Harper, 991 N.W.2d 537, 2023 WL 382984 (Iowa Ct. App. 2023) (Table) (affirming cross-examination of defendant about criminal arrest that occurred one month before the current harassment and felon-in-possession charge at same residence after defendant suggested on direct that he rarely stayed at the residence where gun was found and that defendant had been free from trouble since 2014).

I. Opinion/Expert Testimony

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *24 (Iowa Ct. App. 2023) (Table) (holding, in suit against nursing home, that trial court abused its discretion in allowing plaintiff's experts to testify that their conclusions were consistent with an investigative report concerning the nursing home by the Iowa Department of Inspection and Appeals).

State v. Harrison, 995 N.W.2d 304, 2023 WL 4105468 (Iowa Ct. App. 2023) (Table) (holding, in child sex abuse prosecution, that testimony by clinical psychiatrist explaining his experience performing psychological evaluations of sex offenders was not unduly prejudicial because it helped establish his qualifications as an expert on grooming behaviors of sexual offenders).

Estate of Anderson v. Prasad, 995 N.W.2d 125, 2023 WL 3092578, at *9 (Iowa Ct. App. 2023) (Table) (holding that I.C.A. § 688.11 did not prohibit defendant general surgeon from testifying that he acted appropriately during gall bladder removal surgery because doctor did not "comment on whether he deviated from or acted consistently with accepted standards of care," but rather testified about his opinions and mental impressions formed in treating the deceased patient).

Estate of Grove v. Clinic Bldg. Co., Inc., 992 N.W.2d 234, 2023 WL 2148253 (Iowa Ct. App. 2023) (Table) (holding that affidavit by professor of architecture opining on unsafe condition of clinic parking lot should not have been admitted absent a showing that plaintiff's recorded phone call with insurance adjuster upon which architect relied was the type of information on which other experts in his field would rely).

State v. Howland, 995 N.W.2d 520, 2023 WL 3613259, at *8-10 (Iowa Ct. App. 2023) (Table) (holding that child forensic interviewer did not indirectly vouch for child victim when witness testified that she was not allowed to testify about the child's credibility; expert did not impermissibly cross "admittedly thin line" when she testified "in generalities about behaviors of sexually-abused children").

State v. Moss, 991 N.W.2d 172, 2023 WL 152480 (Iowa Ct. App. 2023) (Table) (rejecting "improper bolstering" claim by father convicted of sexually abusing his daughter concerning general testimony by child protective worker about her experience with children reporting sex abuse because witness did not tie testimony specifically to the victim).

Olds v. State, 989 N.W.2d 662, 2022 WL 10827355 (Iowa Ct. App. 2022) (Table) (holding in a child sex abuse case that defense counsel was not ineffective for failing to object to testimony by CPC interviewer recommending therapy because witness never indicated that she believed the child and made it clear that it was not her decision to investigate the child's allegations).

State v. Bassett, 989 N.W.2d 797, 2022 WL 16630788 (Iowa Ct. App. 2022) (Table) (holding, in prosecution for murder of defendant's girlfriend, that trial court properly admitted medical examiner's testimony because even though examiner relied in part on surrounding circumstances and the testimony of friends and family concerning the victim's relationship with the defendant, expert relied primarily on the autopsy report, did not change her conclusion on the manner of death after speaking with witnesses, and did not comment on the credibility of the information provided by those individuals).

J. Hearsay

1. Non-Hearsay Purpose.

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *17 (Iowa Ct. App. 2023) (Table) (holding that swear words directed at nursing home resident prior to her death by former nursing assistant were not offered to show the truth of those insults, but "to show the tenor of the conversation and their impact on [the resident]").

State v. Winterfeld, 991 N.W.2d 796, 2023 WL 1812850 (Iowa Ct. App. 2023) (Table) (holding, in murder prosecution, that voicemail messages from victim's girlfriend to defendant were not hearsay because they were not offered to show the truth of girlfriend's statements—that victim abused her, that she wanted to leave the relationship and wanted the victim dead—but to show the defendant's understanding of the dynamics of that relationship and how voicemails may have motivated the defendant).

State v. Krogmann, 992 N.W.2d 874, 2023 WL 2395429 (Iowa Ct. App. 2023) (Table) (holding that defendant offered video of his police interview following shooting for the non-hearsay purpose of showing that his demeanor demonstrated his mental instability and diminished capacity at time of shooting, not for the truth of his statements).

State v. Hurdel, 989 N.W.2d 662, 2022 WL 10827368 (Iowa Ct. App. 2022) (Table) (holding trial court properly admitted text messages from defendant's ex-wife to defendant one month prior to her murder stating her feelings and plans for their relationship for the non-hearsay purpose of providing context for the defendant's responsive messages).

State v. Simmons, 989 N.W.2d 802, 2022 WL 16631198, at *4 (Iowa Ct. App. 2022) (Table) (text messages sent by victim-wife to defendant-husband gave context to text messages sent by husband and were not offered for their truth).

State v. Vice, 989 N.W.2d 802, 2022 WL 16631196 (Iowa Ct. App. 2022) (Table) (noting that it was clear that "explaining the officer's responsive conduct was not the State's true purpose" in offering cousin's statement to officer that he saw the defendant hiding in his garage after the attack because other evidence already explained the officer's responsive conduct; this inadmissible hearsay, however, was not central to the issue of identification and was cumulative of other unobjected to evidence).

2. Statements of a Party-Opponent under Rule 5.801(d)(2).

Timely Mission Nursing Home v. Arends, 996 N.W.2d 119, 2023 WL 4104021, at *16 (Iowa Ct. App. 2023) (Table) (holding that plaintiff suing nursing home for the death of her mother failed to lay "explicit foundation" that "unnamed staff members were speaking within the scope of their employment or even what purpose existed behind the spread of the rumors" regarding CNA's physical and verbal abuse of other residents; however, plaintiff did establish that the CNA's interactions with the decedent and another employee's report of the CNA's abuse to her superiors were necessary to accomplish the purpose of their employment of working with nursing home residents).

State v. Flores, No. 21-1676, 995 N.W.2d 298, 2023 WL 3335385, at *11-12 (Iowa Ct. App. 2023), application for further review granted, oral argument Oct. 11, 2023) (holding that mother's statements to witness were made in furtherance of conspiracy to obstruct sexual abuse prosecution by attempting to obtain return of child victim so that she and defendant could abscond with the child).

3. Confrontation Clause.

Olds v. State, 989 N.W.2d 662, 2022 WL 10827355 (Iowa Ct. App. 2022) (Table) (holding, in child sex abuse prosecution, that defense counsel was not ineffective for failing to raise state Confrontation Clause objection to the admission of CPC interviews, in addition to objections under federal law; defendant could not point to any cases where the Iowa Constitution provided more protection than the federal Sixth Amendment).

State v. Bassett, 989 N.W.2d 797, 2022 WL 16630788 (Iowa Ct. App. 2022) (Table) (in second degree murder case involving the defendant's girlfriend, statements made by victim to deputies following a fight with the defendant were nontestimonial even in the absence of an ongoing emergency; although statements were made after the altercation and concerned "what happened," as opposed to "what is happening," girlfriend's contact with police was accidental and informal, girlfriend did not want to give them information or identify the defendant, and her primary purpose of enlisting the officers was to retrieve her belongings and obtain a ride out of town).

4. Present Sense Impression under rule 5.803(1).

State v. Wilde, 987 N.W.2d 486, 499-500 (Iowa Ct. App. 2022)(reversing defendant's conviction for indecent contact with a child and remanding for a new trial because the trial court erroneously admitted under rule 5.803(1) the child's statements to a caregiver that he couldn't use the bathroom because "his father had put his pee pee in his butt and it hurt;" statement did not "explain" the child's present pain and inability to have a bowel movement, but instead reflected the child's "belief that the abuse *caused* his current physical condition" and thus reflected his mental process, not a sensory impression).

State v. Michael, 989 N.W.2d 796, 2022 WL 16630316, at *4 (Iowa Ct. App. 2022) (Table) (holding that police bodycam video in which defendant tells officer his version of parking lot altercation with fellow shopper did not qualify as present sense impression; although the record did not indicate the exact length of time between the altercation and the video, sufficient time had elapsed to permit defendant to collect himself, reflect, and formulate a favorable description).

5. Excited Utterance under rule 5.803(2).

State v. Howland, 995 N.W.2d 520, 2023 WL 3613259, at *12 (Iowa Ct. App. 2023) (Table) (declining to admit as excited utterance statement that child sex abuse victim made to her mother about boyfriend's sexual abuse that had occurred years earlier even though victim disclosed only after she learned at school that what previously happened to her constituted abuse).

State v. Harrison, 995 N.W.2d 304 2023 WL 2908650 (Iowa Ct. App. 2023) (Table) (holding that trial court properly admitted as excited utterances statements a 3-year-old sexual assault victim made to her mother the same day as the assault and at likely the first safe opportunity for the child to tell an adult; statements were either spontaneous or volunteered in response to mother's general questions about whether the defendant had touched the child anywhere else).

State v. Magang, 991 N.W.2d 786, 2023 WL 1809816 (Iowa Ct. App. 2023) (Table) (admitting unprompted statement of injured and visibly confused robbery victim made to police less than ten minutes after robbery).

State v. Loyd, 990 N.W.2d 817, 2022 WL 17826935 (Iowa Ct. App. 2022) (Table) (holding, in sex abuse prosecution, that trial court did not err in admitting police body camera footage of victim recounting what happened that may have been made to officer up to 90 minutes after attack).

6. Declarant's Then-Existing State of Mind under rule 5.803(3).

State v. Hurdel, 989 N.W.2d 662, 2022 WL 10827368 (Iowa Ct. App. 2022) (Table) (holding that ex-wife's text messages to defendant a month prior to her murder stating her feelings and plans concerning their relationship were statements of victim's present mental state).

State v. Hatfeld, 988 N.W.2d 446, 2022 WL 3907738 (Iowa Ct. App. 2022) (Table) (admitting mother's testimony that daughter promised that she would never again try to kill herself made after her failed suicide attempt as the daughter's present intent not to attempt suicide in the future).

7. Statements for Purposes of Medical Diagnosis or Treatment under rule 5.803(4).

Estate of Grove v. Clinic Bldg. Co., Inc., 992 N.W.2d 234, 2023 WL 2148253 (Iowa Ct. App. 2023) (Table) (holding, over dissent, that slip and fall plaintiff's statements to doctors that he tripped on the curb and fell were not medically pertinent; while fact that plaintiff tripped may have been pertinent, it was not necessary to know what plaintiff tripped over in order to treat his fractured hip).

State v. Adams, 989 N.W.2d 203, 2022 WL 5068010 (Iowa Ct. App. 2022) (Table) (statements made by children to licensed, certified sexual assault nurse examiner regarding what happened, who did it, and how it affected them were admissible under rule 5.803(4) after nurse explained why the information was medically necessary to guide her treatment decisions and ensure the physical safety of the children).

8. Past Recollection Recorded under Rule 5.803(5).

State v. Noggle, 990 N.W.2d 820, 2022 WL 17829123 (Iowa Ct. App. 2022) (Table) (holding, in sex abuse case, that trial court did not err in admitting two pages from victim's journal made nine days after abuse as recorded recollection; witness could not fully remember the details of the events to testify about them, the journal was made while sufficiently fresh in victim's memory, and witness testified that she tried to be accurate when writing the recollection).

9. Residual Exception under rule 5.807.

Estate of Grove v. Clinic Bldg. Co., Inc., 992 N.W.2d 234, 2023 W: 2148253 (Iowa Ct. App. 2023) (Table) (holding, in slip and fall case, that victim's statements to insurance adjuster made years after the plaintiff fell in clinic parking lot lacked sufficient trustworthiness for residual exception because statements were vague, inconsistent with more recent-in-time statements to plaintiff's doctors, and likely motivated by monetary personal interest).

State v. Maldonado, 993 N.W.2d 379, 2023 WL 2395892 (Iowa Ct. App. 2023) (Table) (holding, in sexual abuse case, that child's forensic interview was more probative of what happened to victim than her "reluctant and troubled" trial testimony that lacked sufficient detail regarding critical issues).

State v. Harrison, 995 N.W.2d 304, 2023 WL 2908650, at *9 (Iowa Ct. App. 2023) (Table) (holding that statements a 3-year old sexual assault victim made to her mother were sufficiently trustworthy because they were not vague, they described conduct beyond the ordinary

knowledge of 3-year-olds, and nothing suggested that either child or her mother held an improper motive; statements were necessary because child was not competent to testify and thus her out-of-court statements were the only way to introduce child's account of the abuse).

K. Authentication

State v. English, 987 N.W.2d 441, 2022 WL 3052322, at *5 (Iowa Ct. App. 2022) (Table) (holding that State did not need to explain all the circumstances surrounding a jailhouse note purportedly sent by the defendant to a co-defendant; instead, State met the low bar for admission with co-defendant's testimony about the circumstances surrounding her receipt of the note, as well as the note's contents suggesting its author had been charged in a similar "robbery-turned-killing").

V. Federal Evidence Decisions

A. Rule of Completeness under Fed. R. Evid. 106

U.S. v. Farrington, 42 F.4th 895, 900-01 (8th Cir. 2022), cert. denied, 143 S. Ct. 505 (2023) (holding that trial court did not err in refusing to admit additional 1-1/2 seconds of admitted twelve second recording of jail video call between defendant and his cohort because defendant failed to establish how the additional material was necessary "to explain or contextualize the admitted portion, correct a misleading impression, or ensure a fair and impartial understanding;" excluded portion, in fact, reinforced government's characterization of the call).

U.S. v. Ali, 47 F.4th 691 (8th Cir. 2022) (holding that trial court did not abuse its wide discretion in refusing to admit the entirety of recorded jailhouse call between the defendant and his former girlfriend; court admitted portion in which defendant attempted to intimidate and dissuade her from testifying against him).

B. Judicial Notice under Fed. R. Evid. 201

Avilez v. Garland, 69 F.4th 525, 527 n.3 (9th Cir. 2023) (appellate court reviewing immigration ruling has discretion to take judicial notice of judicial proceedings in other courts, including courts outside federal system, if relevant to the dispute at issue).

Duke v Gastelo, 64 F.4th 1088, 1092 n.3 (9th Cir. 2023) (taking judicial notice of docket in habeas petitioner's state resentencing proceeding).

U.S. v. Canty, 37 F.4th 775, 792 n.5 (1st Cir. 2022) (taking judicial notice of prosecutor's extensive experience in evaluating impropriety of closing argument).

Fosnight v. Jones, 41 F.4th 916, 922 (7th Cir. 2022) (holding that court could take judicial notice of search warrant in considering motion to dismiss for failure to state a claim).

GeoMetWatch Corp. v. Behunin, 38 F.4th 1183, 1205 (10th Cir. 2022) (taking judicial notice of docket proceedings in another court).

Luong v. House, __ F.Supp.3d __, at n.3, 2023 WL 2890196 (S.D. Iowa 2023) (taking judicial notice of geographical location of various landmarks at issue in the case and the distance between them for purposes of parties' cross-motions for summary judgment); Sahr v. City of Des Moines, __ F.Supp.3d, __ n. 2, 2023 WL 2729436 (S.D. Iowa 2023) (same).

C. Character Evidence

U.S. v. Armajo, 38 F.4th 80, 84-85 (10th Cir. 2022) (holding that while specific instances of assault victim's prior assaults, if known to the defendant, may be admitted to show the defendant's state of mind in using self-defense, trial court acted within its discretion in excluding unduly prejudicial evidence under rule 403).

D. Other Act Evidence under Fed. R. Evid. 404(b)

Howard v. City of Durham, 68 F.4th 934, 956 (4th Cir. 2023) (holding, in former inmate's §1983 suit against city and individual police officers seeking damages for two decades of wrongful incarceration, (1) that evidence of former inmate's drug use and dealing was intrinsic to underlying criminal case and necessary to tell both the prosecutor's and the inmate's story of why the defendant was at public housing where the charged double murder occurred; (2) trial court did not abuse its discretion in admitting inmate's prior arrests at crime scene for non-character purposes of showing identity and opportunity; and (3) trial court properly admitted evidence that inmate had been ambushed and shot multiple times in order to show possible alternate cause of defendant's traumatic injuries).

U.S. v. Meyer, 63 F.4th 1024, 1041-42 (5th Cir. 2023) (affirming admission of defendant's prior assault on his girlfriend in prosecution arising out of the defendant's participation in drug trafficking organization to show the reason his girlfriend may have been afraid of the defendant and to explain inconsistencies in her grand jury and trial testimony).

U.S. v. Arias, 60 F.4th 1138, 1143 (8th Cir. 2023) (upholding admission of prior arrest for possession of methamphetamine in drug prosecution to demonstrate defendant's knowledge of drugs and intent to commit drug offenses).

U.S. v. Tinsley, 62 F.4th 376, 383-84 (7th Cir. 2023) (affirming admission of text messages referencing drug purchases and sales that defendant sent before and after the charged armed robbery as evidence of defendant's motive to commit the robbery in order to buy and sell drugs; although evidence could also have been used to show defendant's propensity to commit drug offenses for which defendant was also being tried, trial court had discretion to admit for the permissible limited purpose).

U.S v. Abarca, 61 F.4th 578, 581 (8th Cir. 2023) (upholding admission of testimony of witness who began selling methamphetamine with defendant several months after charged drug conspiracy ended to show defendant's knowledge of drug trafficking and intent to participate in drug conspiracy).

U.S. v. Caruso, 63 F.4th 1197, 1203 (8th Cir. 2023) (affirming admission, in child pornography prosecution, of defendant's Pintrest profile, his creation of sexually suggestive message boards, and his pinning of sexually suggestive images, as evidence of his plan or preparation "to trade in child pornography; "just like the stolen car used in the bank-robbery example, [defendant's] Pinterest profile was the vehicle driving his child-pornography offenses").

U.S. v. Verdeza, 69 F.4th 780, 791 (11th Cir. 2023) (affirming admission, in prosecution for healthcare fraud committed with co-conspirator at clinic, of prior health care fraud that defendant committed with same co-conspirator at different clinic in order to rebut claim that defendant just happened to work again with the co-conspirator at this clinic and had no knowledge of charged healthcare fraud).

U.S. v. Valenzuela, 57 F.4th 518, 522-23 (5th Cir. 2023) (affirming admission of defendant's prior conviction for cross-border drug smuggling between same locations to show defendant's knowledge that the car she was driving contained hidden drugs; prior crime was sufficiently similar to charged smuggling and fact that it was 17-years-old did not render it less probative).

U.S. v. Smart, 60 F.4th 1084, 1091-92 (8th Cir. 2023) (affirming admission in gun prosecution of jailhouse call in which defendant directed his girlfriend to ask her brother to tell the police that he lost his weapon).

U.S. v. McClellan, 44 F.4th 200, 206 (4th Cir. 2022) (in civil forfeiture action, government failed to establish non-propensity purpose for admitting prior drug charges and cash forfeited to show that defendant was likely dealing drugs when cash was seized from his vehicle).

U.S. v. Armstrong, 39 F.4th 1053, 1058-1059 (8th Cir. 2022) (trial court did not obviously err in permitting co-conspirator to testify that defendant supplied her with the methamphetamine found during a 2015 traffic stop in order to show defendant's knowledge and intent with respect to charged drug conspiracy that began two years later).

U.S. v. Doak, 47 F.4th 1340, 1359 (11th Cir. 2022), cert. denied, 143 S. Ct. 623 (2023) (upholding, in prosecution of defendant and his wife for multiple acts of sexual abuse of their three adopted daughters, admission of video showing defendant violently slapping their brother in order to complete the story of the crime by explaining why the adopted children silently endured years of sexual abuse because they were afraid of defendants' threats and physical abuse).

U.S. v. Graham, 51 F.4th 67, 81-82 (2d Cir. 2022), cert. denied, 143 S. Ct. 1754 (2023) (in prosecution for using fraudulent financial techniques to discharge mortgage debts, the trial court properly admitted other similar financial schemes that defendant committed at the same time using similar techniques in order to show defendant's fraudulent intent).

U.S. v. Atkins, 52 F.4th 745, 753-54 (8th Cir. 2022) (upholding admission, in prosecution for sex trafficking of a minor, of cellphone videos and screenshots that that defendant made mere

months before he enticed minor victim in order to demonstrate defendant's plan to employ women for prostitution through the use of words commonly used in sex trafficking; prejudice arising from inflammatory and derogatory language used in videos did not substantially outweigh videos' probative value to charged sex trafficking).

U.S. v. Bragg, 44 F.4th 1067 (8th Cir. 2022), cert. denied, 143 S. Ct. 1062 (2023) (noting that because prior similar and non-remote gun possession offenses are admissible to prove knowing possession of firearm by felon, trial court did not abuse its discretion in admitting defendant's 5-year-old armed robbery conviction and 9-year-old willful injury conviction to show that defendant knowingly possessed the gun found in car's map pocket inches in front of him).

U.S. v. Taylor, 44 F.4th 779, 791-92 (8th Cir. 2022), cert. denied, 143 S. Ct. 843 (2023) (in prosecution for sex trafficking of minors, district court did not err in allowing witness to testify about defendant's uncharged sexual assault in order to show defendant's knowledge, intent, and plan of operating a massage business involving commercial sexual activity; defendant claimed to have no knowledge that women were engaging in commercial sex acts in his business and uncharged acts were similar and close in time to charged conduct).

U.S. v. Nyah, 35 F.4th 1100 (8th Cir. 2022), cert. denied, 143 S. Ct. 389 (2023) (holding, in felon-in-possession prosecution, that music video showing defendant possessing a gun were relevant to defendant's later knowing possession of a firearm).

Fresquez v. BNSF Railway Co., 52 F.4th 1280 (10th Cir. 2022) (upholding admission of supervisor's illegal dumping of toxic materials that occurred after railroad terminated plaintiff in retaliation for engaging in protected activities under Federal Railroad Safety Act to show the railroad's culture of disregarding safety violations under that manager's supervision).

U.S. v. Vaca, 38 F.4th 718, 722-23 (8th Cir. 2022) (admitting 20-plus-year-old conviction for aggravated battery for non-propensity purpose of showing that defendant lied in the police interview in order to avoid felon-in-possession charge and to demonstrate defendant's consciousness of guilt).

U.S. v. Cox, 54 F.4th 502 (7th Cir. 2022) (holding, in "reverse 404(b)" case, that trial court did not deprive defendant of a meaningful opportunity to present a complete defense by excluding evidence of another suspect's modus operandi and sextortion activities to support defense that another person committed the charged sextortion because the other crimes were not "'sufficiently alike to make it likely that the same person committed both crimes, so that if the defendant did not commit the other crime he probably did not commit this one").

E. Habit under Fed. R. Evid. 406

Howard v. City of Durham, 68 F.4th 934, 950-51 (4th Cir. 2023) (holding, in former inmate's §1983 suit against city and individual police officers arising out of two decades of wrongful incarceration, that testimony from prosecutor assigned to innocence proceeding about his general

practice of showing court-ordered disclosure obligations to the police and other relevant agencies raised an admissible inference that prosecutor acted in accordance with that routine practice eight years earlier and created a genuine fact issue whether the defendant officers knew about and intentionally violated disclosure order).

F. Other Acts of Sexual Abuse and Child Molestation under Fed. Rs. Evid. 413-415

U.S. v. Brandon, 64 F.4th 1009, 1023-24 (8th Cir. 2023) (trial court did not abuse discretion in admitting defendant's prior conviction for similar offense of indecent contact with child in prosecution of defendant for kidnapping and transportation of minors across state lines for sexual purposes to show defendant's propensity to commit current charge).

U.S. v. Arce, 49 F.4th 382, 394 (4th Cir. 2022) (noting that "child molestation" includes child pornography offenses and that unlike rule 404, the less specific notice provision of rule 414 only requires that the prosecution disclose the evidence it intends to offer in advance of trial).

G. Guilty Pleas and Plea Discussions under Fed. R. Evid. 410

U.S. v. Hahn, 58 F.4th 1009, 1011-12 (8th Cir. 2023) (noting that federal criminal defendants can knowingly and voluntarily waive Federal Rule 410 and that trial court did not err in admitting unaccepted plea agreement).

H. Rape Shield Rule under Fed. R. Evid. 412

U.S. v. Greaux-Gomez, 52 F.4th 426, 435 (1st Cir. 2022) (in prosecution of teacher/athletic coach for enticing 15-year-old student to engage in unlawful sexual activity, trial court properly excluded evidence that another coach had previously sexually abused same victim; constitutional exception to rape shield rule did not apply because the sexual predisposition evidence was not relevant to victim's motive or credibility).

I. Privileges

U.S. v. White Owl, 39 F.4th 527, 530-32 (8th Cir. 2022) (discussing, in prosecution for arson and felony murder in Indian territory, the rationale of the federal marital communications privilege and holding that husband's statements to wife that he poured gasoline around cabin in order to kill wife fell within the third person/spousal-victim exception for statements made in the course of victimizing the spouse).

Isonova Technologies LLC v. Rettig, 2023 WL 3741632, at *3 (N.D. Iowa 2023) (ordering production in discovery of emails that included senders or recipients other than the plaintiff and his wife, but holding that spousal privilege protected emails between plaintiff and his wife when no other parties were included on communications).

Salmon v. Lang, 576 F.4th 296, 326-27 (1st Cir. 2022) (discussing showing necessary to find subject matter waiver of attorney client privilege with respect to privileged emails inadvertently disclosed in response to plaintiff's discovery requests).

J. Impeachment of Jury Verdict under Fed. R. Evid. 606(b)

U.S. v. Nucera, 67 F.4th 146, 167 (3d Cir. 2023) (noting that rule against impeachment of jury verdict applies to internal jury matters and thus did not allow juror evidence of one juror's charge of racism against another or juror's intimidation of another juror).

Mammone v. Jenkins, 49 F.4th 1026, 1045-46 (6th Cir. 2022), cert. denied, 2023 WL 3696177 (U.S. 2023) (in appeal of denial of habeas relief to state death row inmate, holding that state court did not disregard well-established law in refusing to consider juror affidavit indicating that jury prayed before beginning penalty phase deliberations; Supreme Court has not ruled on whether juror prayer is an extraneous influence).

K. Impeachment of Witnesses under Fed. Rs. Evid. 606-609

U.S. v. Smart, 60 F.4th 1084, 1092 (8th Cir. 2023) (noting that theft is not a crime involving an act of dishonesty or false statement under Fed. R. Evid. 609(a)(2)).

U.S. v. Bodnar, 37 F.4th 833, 844 (2d Cir. 2022), cert. denied, 143 S. Ct. 389 (2022) (noting that while government can ask its witnesses on direct about the existence of a cooperation agreement to avoid any inference of bias, it cannot introduce cooperation agreement itself on direct without improperly vouching for witness in violation of rule 608(a); defense counsel, however, waived objection).

U.S. v. Greaux-Gomez, 52 F.4th 426, 437-38 (1st Cir. 2022) (upholding trial court's discretion to allow prosecution to ask some leading questions of minor victim in prosecution of defendant coach/teacher charged with enticing 15-year-old victim to engage in unlawful sexual activity; although witness was not an adverse party and had turned 18-years-old by the time of trial, she was "hostile" to answering questions given her apparent nervousness and discomfort testifying in the presence of the defendant and the leading questions helped her maintain her composure while testifying about the underlying events).

L. Opinion/Expert Testimony under Fed. Rs. Evid. 701-706.

Mathis v. Terra Renewal Services, Inc., 69 F.4th 236, 247 (4th Cir. 2023) (upholding trial court's exclusion of testimony and report of investigator from state department of labor relating to tanker truck pressure explosion as inadmissible lay opinion because investigator did not actually perceive the events, but relied upon contradictory witness statements made to her during investigation).

U.S. v. Hill, 63 F.4th 335 (5th Cir. 2023) (affirming admission of FBI agent's lay opinion regarding meaning of coded words used in wiretapped conversations; agent properly drew upon

his personal familiarity investigating particular case and provided helpful testimony regarding the meaning of "opaque terms and phrases" that jury would have difficulty understanding on its own).

National Oilwell Varco v. Auto-Drill, Inc., 68 F.4th 206, 220-21 (5th Cir. 2023) (holding, in suit for breach of settlement agreement, that district court abused its discretion in allowing licensee's founder to testify as lay witness that licensee ceased paying licensing fees because licensee was fraudulently induced to enter into settlement; opinions constituted inadmissible legal conclusions and were not "a mere explanation of the [witness's] analysis of facts").

U.S. v. Turner, 61 F.4th 866, 889 (11th Cir. 2023) (trial court abused its discretion in allowing psychologist to testify that defendant had ability to appreciate the nature and quality or the wrongfulness of his conduct, but error was harmless).

U.S. v. Williams, 41 F.4th 979, 984 (8th Cir. 2022) (holding that detective's testimony that a muzzle flash indicated the firing of a firearm was admissible lay opinion because it was based upon witness's experience in law enforcement and assisted the jury in understanding a video exhibit).

U.S. v. Eaden, 37 F.4th 1307, 1312-13 (7th Cir. 2022) (holding, in mail and wire fraud prosecution, that testimony by tire company's representative that the many factual inaccuracies in defendant's online submissions to the company's reward program were "fraudulent" and not likely the result of mere negligence constituted proper lay testimony, rather than legal conclusions, because witness used a layperson's vernacular and testimony did not go to defendant's mental state or the ultimate issue of fraud).

U.S. v. Davis, 53 F.4th 833, 848-49 (5th Cir. 2022) (holding that trial court did not err in admitting testimony of forensic auditor at Veterans Administration as proper lay opinion in prosecution for wire fraud and money laundering; witness reviewed thousands of records and performed simple addition and subtraction to trace disputed funds and even though the witness performed a large volume of calculations, there was nothing about witness's math that could only be mastered by experts with specialized knowledge).

Vincent v. Nelson, 51 F.4th 1200, 1213-15 (10th Cir. 2022) (in personal injury suit involving collision between two coal-hauling trucks, distinguishing between lay and expert testimony given by coal mining company's accident investigators whom defendant had designated as non-retained experts; witnesses' lay testimony about the location and width of the road was based on their personal experience investigating the collision and their personal knowledge of the location of two landmarks at the mine, as opposed to their expert testimony based on mining operations that required specialized knowledge and technical expertise).

U.S. v. Soler-Montalvo, 44 F.4th 1, 14-15 (1st Cir. 2022) (holding, in prosecution for inducing or enticing minor to engage in criminal sexual activity, that trial court erred in excluding "not-a-

typical-predator" testimony by clinical psychologist specializing in internet sexual behaviors; testimony that defendant's actions were consistent with role-play, rather than those associated with sexual predators, did not cross the line established in rule 704(b)).

Petrone v. Werner Enters., Inc. 42 F.4th 962, 969 (8th Cir. 2022) (holding, in truck drivers' wage and hour class action against employer trucking company, that trial court erred in refusing to consider plaintiffs' rule 706 request to appoint an expert; although court has discretion whether to appoint an expert, it cannot decline to decide the issue).

Stevenson v. Windmoeller & Hoelscher Corp., 39 F.4th 466, 469-470 (7th Cir. 2022) (noting that although rule 706 allows a party to move for a court-appointed expert, it envisions a neutral appointed expert who serves the interests of the court, rather than those of any party; court may appoint expert for many purposes, including "'to resolve the clash of ... warring party experts, to help the court evaluate the admissibility of a party's proffered expert opinion, to address ambiguities, confusion, or contradictions within the parties' opinion evidence, to supply an additional, independent viewpoint when one party has, whether for lack of resources or another reason, omitted to present expert opinion in support of its case, resulting in an incomplete or inadequate exposition of the issues, or to supply expert guidance that the parties themselves have neglected to provide on points that are material to the court's decision.") (citations omitted).

M. Hearsay under Fed. Rs. Evid. 801-807

1. Non-Hearsay and the Confrontation Clause.

U.S. v. Hillie, 39 F.4th 674, 693 (D.C. Cir. 2022) (holding, in prosecution for sexual exploitation of a minor, that several out-of-court statements that were admitted to provide context for why law enforcement began investigating defendant, why a witness recounted details to grand jury that she had not earlier divulged; and why victim's mother cooperated in investigation were not hearsay and thus did not violate the confrontation clause).

U.S. v. Harrison, 54 F.4th 884, 887-88 (6th Cir. 2022) (holding that admission of video taken by confidential informant recording defendant selling drugs did not violate confrontation clause; although informant's statements were testimonial, they were offered to provide context for defendant's statements on video, not for their truth).

U.S. v. Graham, 51 F.4th 67, 83 (2d Cir. 2022), cert. denied, 143 S. Ct. 1754 (2023) (holding that red flag emails sent between fraud defendant, her co-conspirators, and outside counsel in which attorney warns of the illegality of defendant's financial schemes were not offered for the truth of the matter asserted by attorney, but rather to show defendant's knowledge that scheme was illegitimate).

2. Prior Consistent Statements under Fed. R. Evid. 801(d)(1)(B).

U.S. v. Chiu, 36 F.4th 294 (1st Cir. 2022), cert. denied, 143 S.Ct. 336 (2022) (refusing to admit, in prosecution for receipt and possession of child pornography, text messages between defendant and an associate that were consistent with defense claim that associate had occasional access to defendant's computer and passwords because government never argued that defendant recently fabricated claim that another person could have had access to defendant's computer and generalized attacks on a witness's credibility lacked the necessary "fit" between the prior consistent statement and a specific charge of fabrication that the evidence is offered to rebut).

3. Statements of a Party-Opponent under Fed. R. Evid. 801(d)(2).

U.S. v. Cantwell, 64 F.4th 396, 407-408 (1st Cir. 2023) (holding that defendant's portion of conversation with former girlfriend was admissible under 801(d)(2)(A), but that girlfriend's statements in conversation were only admissible for the limited purpose of providing context for defendant's own statements and that government thus erred in using girlfriend's statements for their truth).

U.S. v. Hankton, 51 F.4th 578, 600-01 (5th Cir. 2022), cert. denied, 143 S. Ct. 839 (2023) (holding that trial court did not err in admitting rap video implicating a co-defendant in a murder as an adoptive admission of that co-defendant; co-defendant voluntarily appeared on the video during the few seconds when rapper mentioned co-defendant by nickname as the perpetrator, pointed at the camera, and gestured to keep quiet while being embraced by the rapper).

Cruz v. Farmers Ins. Exchange, 42 F.4th 1205, 1211-1215 (10th Cir. 2022) (holding, in race discrimination suit by terminated insurance agent, that district court improperly granted insurer summary judgment because telephone statements made by defendant insurer's district manager to the plaintiff's wife were admissible under rule 801(d)(2)(D) and provided direct evidence of racial animus; although district manager was classified as an independent contractor and not an employee and did not have ultimate decision-making authority, he was still an "agent" of the insurer carrying out his superior's instructions to inform plaintiff that the insurer was considering terminating him).

U.S. v. Saelee, 51 F.4th 327, 342-43 (9th Cir. 2022) (holding that text messages sent by accomplice to defendant, together with independent evidence, provided sufficient independent evidence to establish defendant's participation with accomplice in charged drug conspiracy and that text messages were thus admissible against defendant under rule 801(d)(2)(E)).

U.S. v. Iossifov, 45 F.4th 899. 917-18 (6th Cir. 2022), cert. denied, 143 S. Ct. 812 (2023) (statements between co-defendants explaining defendant's role in money laundering conspiracy involving Bitcoin were not mere casual conversation, but were made in furtherance of conspiracy).

4. Statements Made for Medical Diagnosis or Treatment under Fed. R. Evid. 803(4).

U.S. v. Griffith, 65 F.4th 1216, 1219-20 (10th Cir. 2023) (noting 10th Circuit's rejection of presumption against admitting children's statements to physician identifying perpetrator without proof that child's motive in making that identification was to aid in treatment or diagnosis).

U.S. v. Latu, 46 F.4th 1175 (9th Cir. 2022) (affirming admission under rule 803(4) of assault victim's statements to medical providers only hours after receiving traumatic injuries that he had been assaulted and that his pain level was an 8 out of 10).

5. Business Records under Fed. R. Evid. 803(6).

U.S. v. Kimble, 54 F.4th 538, 544-45 (8th Cir. 2022) (holding that officer's testimony that he routinely accesses online driving records managed by the Missouri Department of Revenue did not properly authenticate defendant's online driving record; "focus of the business record exception is on the process by which the record is created, not the process by which it is accessed").

Picard Trustee for SIPA Liquidation of Bernard L Madoff Invest. Secs. V. JABA Assocs., 49 F.4th 170, 182 (2d Cir. 2022) (holding that investors failed to meet their burden of demonstrating the untrustworthiness of form submitted by Madoff to SEC; fact that perpetrator of fraud may be untrustworthy, does not necessarily make form itself untrustworthy since otherwise documents submitted in fraud trials would not be admitted as business records merely "because the person at the center of the fraud committed duplicitous acts").

6. Former Testimony under Fed. R. Evid. 804(b)(1).

Askew v. Lindsay, 2022 WL 17748623 (2d Cir. 2022) (holding that former girlfriend's testimony given in preliminary hearing in prior domestic violence prosecution of defendant was not admissible under rule 804(b)(1) because defendant had failed to demonstrate that witness was unavailable to testify at subsequent civil trial against police officers for false arrest and excessive force; defendant failed to take "standard measures" for procuring trial attendance such as calling witness at phone number she had during their relationship, hiring process server to serve her with a trial subpoena, or seeking court intervention).

7. Forfeiture by Wrongdoing under Fed. R. Evid. 804(b)(6).

U.S. v. Hankton, 51 F.4th 578, 597-99 (5th Cir. 2022), cert. denied, 143 S. Ct. 839 (2023) (holding, in prosecution of gang members for a number of violent gang-related crimes, that trial court properly admitted deceased witness' recorded police statement and state grand jury testimony identifying defendant as shooter under rule 804(b)(6); defendant's imprisonment at time of witness's own murder did not preclude trial court from finding, by a preponderance, that defendant wrongfully caused or acquiesced in the revenge killing of the witness in order to prevent witness from testifying).

N. Authentication

U.S. v. Perez, 61 F.4th 623, 626-27 (8th Cir. 2023) (holding, in child pornography prosecution, that government produced sufficient circumstantial evidence to properly authenticate records of online social media platform; while authentication of social media evidence presents "special challenges" and certification by a social media platform is alone insufficient, circumstantial evidence linked records to defendant sufficient to meet low authentication bar).

U.S. v. Kimble, 54 F.4th 538, 546-550 (8th Cir. 2022) (discussing factors relevant to authentication of audio and video recordings and holding that government properly authenticated recordings of defendant's drug deals even though not all factors may have been satisfied and some of the authenticating evidence came after the recordings were already admitted).

U.S. v. Khatallah, 41 F.4th 608, 622-23 (D.C. Cir. 2022), cert. denied, 2022 WL 17852617 (U.S. 2023) (holding that government properly authenticated Libyan telephone records and that defendant's argument that jury should not credit the records went to the weight, not admissibility of records in prosecution for providing material support and resources to terrorists).