Evidence Update
2017 GENERAL PRACTICE REVIEW
Drake University Law School

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December 7, 2017

I. Introduction

This Update covers developments in evidence law that have occurred during the last year. The Update discusses recent and pending amendments to the Iowa and Federal Rules of Evidence, as well as recent evidence cases. The Update focuses primarily upon evidentiary decisions of the Iowa Supreme Court rendered during its 2016–2017 term.

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 PROC. 6.904(2)(c), while an unpublished opinion does not constitute controlling legal authority, it may be cited in a brief.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

Finally, many of the Iowa Rules of Evidence are patterned upon the Federal Rules of Evidence. The United States Supreme Court decided one significant evidence case during the period and the lower federal courts have issued many opinions construing the Federal Rules of Evidence. The Update discusses that U.S. Supreme Court opinion and briefly describes relevant evidence decisions of the U.S. Court of Appeals for the Eighth Circuit.

II. Rule Amendments

A. Iowa Rules of Evidence: 2017 Nonsubstantive Restyling Amendments

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

In 2015, the Iowa Supreme Court convened a working group to consider a similar restyling of the Iowa Rules of Evidence. The Court approved these nonsubstantive restyling amendments in order to bring the Iowa Rules "in line with their current federal counterparts" and to "achieve[ ] an internally more consistent, clearer, easier-to-use, and plain English-oriented set of rules." Iowa Supreme Court Order, In the Matter of Adoption of the Nonsubstantive Restyling

of the Iowa Rules of Evidence (Sept. 28, 2016). The restyled Iowa Rules of Evidence took effect on January 1, 2017.

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

B. Federal Rules of Evidence: December 1, 2017 Amendments

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

1. Ancient Documents Hearsay Exception—Fed. R. Evid. 803(16): Until its most recent amendment, the ancient documents hearsay exception in Fed. R. Evid. 803(16) admitted hearsay based solely on the age of the document in which it was contained—admitting statements in authenticated documents that were at least 20-years-old. In the fall of 2015, the Advisory Committee on the Federal Rules of Evidence proposed eliminating the ancient documents hearsay exception altogether. This recommendation arose from a concern about the digital longevity of electronically stored information and a fear that the ancient documents exception "could become a receptacle for *unreliable* hearsay" that is not otherwise admissible under a reliability-based hearsay exception. See Report of Jud. Conf. Comm. on Rules of Practice & Proc. To Jud. Conference (Sept. 2016) (emphasis in original). However, the recommendation to completely abrogate the ancient documents exception met with significant public criticism. The Rule was thus subsequently modified to limit Fed. R. Evid. 803(16) to documents "prepared before January 1, 1998, and whose authenticity is established." The Committee chose the 1998 date on the assumption that documents created after 1998 will generally be preserved in electronic form and thus will likely be easier to find and admit under other hearsay exceptions like the business records exception or the residual clause. The amendment leaves the ancient documents exception available for documents created before 1998 in order to accommodate concerns voiced by lawyers who rely upon the ancient documents exception to admit scarce "hard copy documents in cases involving latent illnesses or defects, land disputes, or toxic torts," where electronic documents might not otherwise exist.

The amended ancient documents hearsay exception in Fed. R. Evid. 803(16) now provides:

> **(16)** ***Statements in Ancient Documents***. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

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

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

2. <u>Authentication of Electronically Stored Information—New Federal Rules 902 (13) and 902(14)</u>:

Two new subdivisions have been added to Fed. R. Evid. 902 to permit self-authentication of electronic evidence through a certification procedure similar to that currently used for business records. New federal rules 902(13) and 902(14) provide:

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

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

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

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

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

A "qualified person" can then provide a certification containing "information that would be sufficient to establish authenticity" of the electronically-generated evidence "were that information provided by a witness at trial." Fed. R. Evid. 902(13) advisory committee note to 2017 amendment. For example, data copied from an electronic device is now frequently

authenticated by comparing the "hash values" of the original and the copy. "A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file." Fed. R. Evid. 902(14) advisory committee note to 2017 amendment. Under Fed. R. Evid. 902(14), a qualified person can now certify that the original and copy have identical hash values. However, "[t]he rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology." Id.

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

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

III. Iowa Supreme Court Evidence Decisions: 2016-2017 Term

A. Demonstrative Evidence: Rule 5.401

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

In **State v. McNeal, 897 N.W.2d 697 (Iowa 2017)**, a jury convicted the defendant McNeal of assault with intent to inflict serious injury. The State alleged that McNeal entered a tool shop where the victim was working and began working on a wheelchair that McNeal had earlier dropped off at the shop. The victim told McNeal that the shop owner did not want McNeal in the shop and asked McNeal to leave. According to the victim, McNeal refused to leave and asked the victim whether he had any drugs to share. The victim replied no and, again, in a raised voice and with a sledgehammer in hand, asked McNeal to leave. The victim woke up hours later with a fractured skull. The State alleged that McNeal assaulted the victim with a sledgehammer that had gone missing after the assault and that was never recovered.

The primary issue in the case concerned whether the trial court's postponement of the presentation of evidence at the State's request violated the defendant's right to a speedy trial. Id. at 703-708. The defendant also raised several evidentiary issues.

McNeal challenged the State's use of a replica sledgehammer as demonstrative evidence in the case. Generally, a trial court has broad discretion to allow the use of demonstrative aids to explain or illustrate testimony. The foundation generally required for admission of demonstrative evidence is that the item assist the fact-finder in understanding the evidence. The Court in *McNeal* held that the trial court did not abuse its discretion in allowing the prosecution to display to the jury a sledgehammer that was "very similar" to the kind used in the assault. The replica sledgehammer was never admitted into evidence and the trial court clearly admonished the jury that the sledgehammer used in the demonstration was not the original that went missing after the assault. Id. at 709.

B. Relevance and Unfair Prejudice: Rules 5.401-5.403

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

In the legal malpractice suit of **Stender v. Blessum, 897 N.W.2d 491 (Iowa 2017)**, the Court affirmed the exclusion of evidence that the defendant lawyer had violated the rules of professional ethics and had been disciplined for his prior sexual relationship with the plaintiff. In another part of its decision, the Court affirmed the trial court's directed verdict on those malpractice claims that were based solely on the defendant's violation of the ethics rules or on his sexual relationship with the plaintiff. Id. at 502-505. The only legal malpractice claims remaining concerned the distribution of assets made in the plaintiff's divorce and her potential assault and battery claim against her ex-husband. Neither of these two claims concerned the matters for which the defendant had been professionally disciplined. Thus, the disputed evidence offered by the plaintiff, including the grievance commission's findings of defendant's ethical violations, related disciplinary documents, the Iowa Supreme Court's ethics opinion sanctioning the defendant-lawyer, and the opinion of the plaintiff's expert concerning the ethical impropriety of an attorney-client sexual relationship, did not assist the jury in determining any fact that was legitimately at issue in the case. Id. at 510-12. See also Iowa R. Evid. 5.401 (relevant evidence must have tendency to make a "fact . . . of consequence in determining the action" more or less probable).

- **State v. Tipton, 897 N.W.2d 653 (Iowa 2017)**.

In **State v. Tipton, 897 N.W.2d 653 (Iowa 2017)**, a prosecution for tampering with lottery equipment, the trial court excluded defense evidence that the State's lottery computers showed no signs of tampering in 2011 and 2012. The charged acts of fraudulent redeeming and tampering by Tipton, however, concerned the December 2010 Hot Lotto draw and there was no allegation or evidence that anyone had tampered with or attempted to tamper with lottery computers after that date. Id. at 690-91. Thus, the trial court did not err in excluding "this highly attenuate and remote evidence." Id. at 691.

C. Character and Other Act Evidence: Rule 5.404

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

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

The victim's wife had made the 911 call to the police during the charged assault and the prosecution played a redacted recording of the call to the jury. Defense counsel moved for a mistrial after listening to the recording again that night and learning that it contained a reference to the defendant's status as a felon on probation. Specifically, the tape contained statements that Plain was wearing a GPS monitoring device and was not afraid to go "back to prison." Id. at 814.

The trial court denied the motion for mistrial and instead gave a cautionary instruction, also requested by the defendant, telling the jury to disregard the references in the recording to the defendant's criminal history.

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

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

As noted by the Court, the sufficiency of a curative instruction depends upon all the circumstances. However, a curative instruction should be sufficient to correct an evidentiary error and obviate the need for a mistrial "'in all but the most extreme cases.'" Id. at 815 (*quoting* State v. Breitbach, 488 N.W.2d 444, 448 (Iowa 1992)). The Court in *Plain* discussed three considerations as particularly important in "determining whether a cautionary instruction can adequately mitigate the prejudicial impact of inadmissible evidence"—(1) the ability of the defendant to "combat," without compounding, the prejudice from the inadmissible evidence; (2) the breadth of the inadmissible evidence and the promptness in addressing it; and (3) the prejudice from the challenged evidence, including the strength of the state's evidence of guilt. Id. (relying upon State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980)).

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

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

State v. McNeal, 897 N.W.2d 697 (Iowa 2017), discussed *supra*, also discussed the ban on character evidence and the admissibility of other crimes or wrongs when relevant to a non-character purpose under rule 5.404(b). In that case, a jury convicted the defendant McNeal of

assault with intent to inflict serious injury. The State alleged that McNeal assaulted the victim with a sledgehammer after the victim insisted that McNeal leave the premises and refused McNeal's request to share drugs with McNeal.

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

D. Custom, Usage, and Practice in Trade or Industry: Rule 5.406

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

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

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

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

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

Ludman, 895 N.W.2d at 918 (citations omitted). The custom or usage presented must also be sufficiently similar to "the type of conduct at issue in the litigation." Id. Moreover, a court should not admit custom or usage evidence if the relevant custom is itself "clearly careless or dangerous," or conflicts with a mandatory statute. Id.

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

E. Privileges

1. Morbidity and Mortality Statute and Patient Safety Net Reports

- **Willard v. State, 893 N.W.2d 52 (Iowa 2017).**

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

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

confidentiality of PSN reports to that protecting peer review records. Id. The Court construed the statutory privilege broadly, stating:

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

Id. at 64.

2. Patient-Litigant Exception to the Doctor-Patient Privilege

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

The facts of **Stender v. Blessum, 897 N.W.2d 491 (Iowa 2017)** are more fully described above. Essentially, the plaintiff sued her attorney Blessum for legal malpractice and assault arising out of the attorney's sexual relationship with her. The plaintiff sought compensatory and punitive damages against the attorney based on a broad spectrum of alleged past and future, physical and mental, injuries. Specifically, the jury was instructed on the following elements of the plaintiff's claimed damages: "past medical expenses, past physical and mental pain and suffering, past loss of use of the full mind and body, future medical expenses, future physical and mental pain and suffering, and future loss of use of the full mind and body." Id. at 515. Over plaintiff's objection, the trial court allowed hundreds of pages of her medical records to go to the jury during deliberations. The Iowa Supreme Court affirmed the trial court's decision to admit the redacted medical records, citing the patient-litigant exception to the physician-patient privilege.

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

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

redacted those portions of the records that were irrelevant or otherwise inadmissible. The court thus did not abuse its discretion in sending the redacted medical records to the jury. Id.

F. Impeachment of a Forgetful Witness with Prior Inconsistent Statements

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

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

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

Moreover, even if the witness recalls the underlying facts, the State may not call such a witness with the primary purpose of impeaching her with an otherwise inadmissible prior inconsistent statement. Id. at 315-16. In *Russell*, the Defendant argued that the State had called T.T. at trial for the primary purpose of impeaching her with her otherwise inadmissible prior inconsistent statements to police. The Court agreed with Russell that the State knew from her deposition and voir dire answers that T.T. claimed not to remember who kicked the victim and that she would provide no testimony of use in prosecuting Russell. According to the Court, the State's primary purpose in calling T.T., then, was to impeach her with her prior statements. Id. at 316.

The Court noted, however, that neither of these restrictions on impeachment with a prior inconsistent statement apply if the evidence is independently admissible. That is, the State is not barred from impeaching a forgetful witness with *admissible* evidence and "[p]rior statements of a witness that are admissible as substantive evidence may be freely employed to impeach a witness

on direct examination." Id. Thus, the State properly impeached T.T. with her prior statements to police if they were otherwise admissible as substantive evidence. As discussed below, the Court went on to hold that T.T.'s identification of Russell to the police was independently admissible under rule 5.801(d)(1)(C) as a non-hearsay statement of prior identification. See *infra*. No improper impeachment had thus occurred. Russell, 893 N.W.2d at 317.

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

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

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

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

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

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

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

H. Hearsay: Rules 5.801-5.807

1. Hearsay Statements of Motive

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

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

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

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

Morningstar out of a personal motive to "save his own skin," rather than at the behest or urging of Huser. In *Huser II*, the Court addressed the admissibility of Woolheater's incriminatory and exculpatory out-of-court statements of motive.

a. Backdoor Hearsay—Rule 5.801

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

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

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

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

closing argument and the short back-door exchange constituted a very small part of a 14-day trial that involved 45 witnesses. Thus, the backdoor hearsay was not so prejudicial as to deprive Huser of a fair trial. Huser, 894 N.W.2d at 499-500.

Huser instructs courts to use a substance-over-form approach in deciding whether testimony constitutes inadmissible hearsay. A court should examine the substance of the witness's testimony, rather than the technical form of questioning that elicits that evidence. Even "yes or no" answers to "without telling me what [the out-of-court declarant] said" questions, can constitute "backdoor hearsay" if the testimony effectively communicates the existence or substance of otherwise inadmissible hearsay.

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

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

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

The Iowa Supreme Court discussed whether the admission of the exculpatory testimony offered by Huser would have opened the door to the admission of other statements that Woolheater had made to different people at different times indicating that he had killed Morningstar at Huser's behest or encouragement. The Court first noted the "imprecise" way in which litigants and courts alike use the "catchy phrase" "opening the door" to support the admission of evidence. The Court distinguished the pure notion of opening the door from the distinct doctrine of "curative" admissibility. Under a pure notion of opening the door, "[a] party opens the door by offering *admissible* evidence that in turn triggers admissibility of responsive evidence by an opposing party." Id. at 507 (emphasis added). The Court illustrated this concept with the scenario in which a criminal defendant properly introduces evidence of his good character under rule 5.404(a), and thus "opens

the door" for the prosecution to rebut that evidence with its own pertinent character evidence. Id. See Iowa R. Evid. 5.404(a)(2)(A)(i) (providing that "[a] defendant [in a criminal case] may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it."). In contrast, the doctrine of curative admissibility, colloquially known as "fighting fire with fire," "only applies when *inadmissible* evidence has been entered into the record and the other party seeks to admit further inadmissible evidence to cure the error." Huser II, 894 N.W.2d at 507 (emphasis added).

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

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

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

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

The Court in *Huser II* discussed another related issue regarding the scope of rule 5.106—"what, exactly, is being made complete under [that] rule. . . ." Id. at 508. Rule 5.106 pertains not only to the remainder of the primary evidence not fully introduced by the proponent, but also to "any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time." Iowa R. Evid. 106(a). The Court in *Huser II*

asked "in fairness, a clear understanding, or an adequate explanation of what exactly?" Huser II, 894 N.W.2d at 507. The *Huser II* Court clarified that the rule requires a demonstration that the additional evidence is necessary to a proper understanding of the admissible primary evidence. Id. at 508. This standard affords the trial court needed discretion and effectively limits the circumstances in which additional evidence will be permitted. Only evidence that helps to explain, clarify, or contextualize the proponent's evidence should constitute the "fair and reasonably complete unit of material" envisioned by rule 5.106(a). Id.

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

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

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

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

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

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

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

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

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

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

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

In *Russell*, Russell was accused of being part of a crowd that kicked and stomped the victim to death after he had been knocked to the ground. Two days after the assault, detectives

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

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

3. Non-Hearsay Statements to Explain Responsive Conduct

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

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

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

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

Although the trial court should have excluded the officer's testimony regarding his conversation with the victim and his wife, the Supreme Court held its admission to be harmless error. The State had introduced other strong evidence of the defendant's guilt, including physical evidence, photographs, and testimony from both the victim and his wife, that came into evidence without

objection. Id. at 813. Further, the trial court gave a limiting instruction to the jury that provided an "antidote" for any potential prejudice caused by the otherwise inadmissible hearsay. Id.

IV. U.S. Supreme Court Evidence Decision

A. Impeachment of Verdict with Jury Testimony regarding Racial Bias

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

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

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

Warger, 135 S. Ct. at 529 n.3. In its latest term, the U.S. Supreme Court took up that question.

In **Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (U.S. 2017)**, the Court addressed "whether there is a constitutional exception to the no-impeachment rule for instances of racial bias." Id. at 863. In that case, a Mexican-American defendant was charged with felony sexual assault. The jury deadlocked on the serious felony charge, but convicted Pena-Rodriguez of three lesser included misdemeanor offenses. The defense moved for a new trial based on sworn juror statements that a fellow juror made racially-biased remarks about the defendant during deliberations, saying things like "I think he did it because he's Mexican," and "Mexican men take whatever they want." The Colorado Court held that Colorado's version of rule 606(b) prevented the trial court from considering the juror affidavits because the rule unambiguously prohibited juror testimony "as to any matter or statement occurring during the course of the jury's deliberations." Pena-Rodriguez v. People, 350 P.3d 287 (Colo. 2015). The U.S. Supreme Court granted cert on the question whether a no-impeachment rule like Colorado's can constitutionally preclude juror testimony concerning a juror's racial bias offered to prove a violation of an accused's Sixth Amendment right to a fair and impartial jury.

The case pitted the Court's decisions condemning racial bias in the jury and justice system against the strong policy rationale of rule 606(b)'s no-impeachment rule. The *Pena-Rodriquez* majority acknowledged that the no-impeachment rule "promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule [also] gives stability and finality to verdicts." Pena-Rodriguez, 137 S. Ct. at 864. At the same time, however, the Court recognized that racial or ethnic juror bias implicates "unique historical, constitutional, and institutional concerns" that differ from those raised by the type of bias or prejudice at issue in its prior

cases—"anomalous behavior from a single jury—or juror—gone off course." Id. at 868. Moreover, traditional safeguards against juror prejudice or bias, such as voir dire, non-juror evidence, or pre-verdict jury reporting, are arguably less effective in "rooting out" racial or ethnic bias. Id. at 868-69. For these reasons, the Court held

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

Id. at 869.

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

In support of a limited constitutional exception, the majority pointed to the experience of the seventeen jurisdictions that have already recognized a racial bias exception to rule 606(b)'s no-impeachment rule. Contrary to the concerns voiced by the three dissenting Justices, the majority in *Pena-Rodriguez* noted that those jurisdictions have not reported any increase in juror harassment or decrease in juror engagement. Id. at 870. But see Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 871 (2017) (Thomas, J., dissenting); Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 874 (2017) (Alito, J., dissenting).

V. Iowa Court of Appeals Evidence Decisions

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

A. Judicial Notice under Rule 5.201

- *State v. Hopper*, 2017 WL 936085, 899 N.W.2d 739 (Iowa Ct. App. 2017) (Table) (mooting defendant's sentencing appeal after taking judicial notice that defendant had already satisfied his restitution obligation; zero balance reflected on Iowa Courts Online was an adjudicative fact and website's accuracy could not be reasonably questioned).

B. Relevance and Unfair Prejudice under Rules 5.401-5.403

- *NDA Farms, LLC v. City of Ames*, 2017 WL 935067, 899 N.W.2d 739 (Iowa Ct. App. 2017) (Table) (holding that trial court acted within its discretion in

excluding evidence of tax-assessed value of property in dispute when the fact of consequence was its fair market value).

- *State v. Bentley*, 2017 WL 1735639, 901 N.W.2d 838 (Iowa Ct. App. 2017) (Table) (holding that defendant's post-arrest use of profanity and derogatory comments regarding police department and police officers was relevant to show her specific intent to assault a peace officer after she claimed she did not know that victim was a police officer who intervened in high school fight involving defendant's brother)

- *State v. Cooke*, 2017 WL 108575, 895 N.W.2d 923 (Iowa Ct. App. 2017) (Table) (ruling that evidence of defendant's possession of stolen car was relevant to corroborate assault victim's identification of defendant as person who stole her car after attacking her with a knife).

- *State v. Ingram*, 2017 WL 514403, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (admitting child sexual abuse victim's diary entry to show her dislike of the sexual abuse and desire for it to end; "a victim's account of sexual abuse is not unfairly prejudicial simply because the nature of the crime itself is disturbing.").

- *State v. Ward*, 2017 WL 1278288, 900 N.W.2d 616 (Iowa Ct. App. 2017) (Table) (allowing prosecution to demonstrate the mechanism of a "pump action" shotgun to illustrate the pace between shots and assist jury in determining whether multiple shots were accidental; demonstration was carried out in limited manner to minimize prejudice).

- *Tibodeau v. CDI, LLC*, 2017 WL 2665107, 902 N.W.2d 592 (Iowa Ct. App. 2017) (Table) (affirming trial court's decision to exclude evidence that plaintiff in sexual harassment suit used marijuana while employed with defendant; while marginally relevant to plaintiff's perception of workplace conduct and her failure to mitigate her depression and anxiety, evidence of drug use in case unrelated to drugs was unduly prejudicial).

- *Marquez v. Lacina*, 2016 WL 6636763, 889 N.W.2d 244 (Iowa Ct. App. 2016) (Table) (holding that cell phone video of exterior apartment stairs covered in snow taken 11 months after plaintiff's slip and fall was irrelevant to condition of stairs on date of accident).

- *Parker v. Shatek*, 2016 WL 4801605, 886 N.W.2d 618 (Iowa Ct. App. 2016) (Table) (holding that decedent's criminal history was relevant to his future employment, earning potential, and loss of accumulation to deceased's estate).

- *State v. Foth*, 2016 WL 719044, 882 N.W.2d 873 (Iowa Ct. App. 2016) (Table) (holding that court did not abuse its discretion in excluding evidence of domestic abuse victim's prior false allegation of domestic abuse; even if evidence sufficient for jury to find prior allegations were false, complexity of evidence would confuse jury).

- *State v. Scarlett*, 2016 WL 1130039, 883 N.W.2d 536 (Iowa Ct. App. 2016) (Table) (holding that master-slave contract between defendant and assault victim was relevant to the nature of their relationship, defendant's intent, and victim's delay in reporting).

C. Character Evidence under Rule 5.404(a)

- *State v. Cusic*, 2017 WL 1278293, 900 N.W.2d 616 (Iowa Ct. App. 2017) (Table) (petition for further review pending) (allowing State to offer evidence of deceased mother's peacefulness even before accused offered evidence of self-defense in order to rebut claim that mother was first aggressor; State could rebut its own evidence of defendant's own statements that implicated his self-defense theory so long as State was not "merely 'set[ting] up a strawman scenario' while doing so.").

D. Other Crimes, Wrongs, or Acts under Rule 5.404(b) and Iowa Code § 701.11

- *State v. Turner*, 2017 WL 108304, 895 N.W.2d 922 (Iowa Ct. App. 2017) (Table) (holding, in multiple count prosecution involving the sexual abuse of three minor victims, that testimony of one victim was relevant to defendant's opportunity to commit crimes, his identity, and his modus operandi).

- *State v. Blaufuss*, 2016 WL 6396345, 888 N.W.2d 902 (Iowa Ct. App. 2016) (Table) (holding that defense counsel was not ineffective in failing to object to evidence that defendant had sexually assaulted same minor victim because such evidence was admissible to prove that defendant had a passion or propensity for illicit sexual relations with this particular victim, defendant had denied having any sexual contact with the victim, and prejudice from evidence was no greater than that from three charged sexual acts described by victim).

- *State v. Divis*, 2016 WL 4803749, 886 N.W.2d 618 (Iowa Ct. App. 2016) (Table) (reversing robbery conviction concerning incident where defendant showed an Ameristar Casino server a syringe and had her read a cell phone message on his phone threatening to inject her with unnamed substance if she did not give him money; trial court improperly admitted surveillance video and highly inflammatory and substantially different handwritten note seized from defendant at another casino 10 hours later that threated to inject reader with HIV-infected blood).

- *State v. Maxwell*, 2016 WL 6652361, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table) (assuming that defendant's sexually inappropriate act of asking 16-year-old victim to lift up her skirt and bra did not qualify as "sex abuse" under § 701.11, but holding such conduct was nevertheless admissible under rule 5.404(b) to show that defendant's other lascivious conduct with victim was for defendant's sexual gratification).

- *State v. Rolon*, 2016 WL 4384622, 886 N.W.2d 106 (Iowa Ct. App. 2016) (Table) (noting that defense counsel should have objected to evidence of defendant's prior violence toward domestic abuse victim because trial court must weigh the

probative value of such evidence for non-propensity purpose against its unfair prejudice to defendant).

- *State v. Royer*, 2016 WL 6652339, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table) (admitting police officer testimony and dashcam video showing officer pulling murder defendant's car over for a traffic violation weeks before charged murder; identity of the driver of green Honda with a loud muffler and spare tire on driver's rear side who was seen talking with victim on bike moments before shooting was at issue).

- *State v. Washington*, 2016 WL 6270269, 888 N.W.2d 902 (Iowa Ct. App. 2016) (Table) (holding that defense counsel was not ineffective in failing to object to evidence of defendant's violent acts toward murder victim one month before her death; defendant's self-defense claim did not eliminate relevance of intent in murder prosecution).

E. Compromise Offers and Negotiations under Rule 5.408

- *State v. Keys*, 2017 WL 1735617, 901 N.W.2d 837 (Iowa Ct. App. 2017) (suggesting that rule 5.408 was not applicable to post-arrest police interview with criminal drug suspect because it did not involve plea bargaining with the prosecutor; instead, case governed by the "promise of leniency" standard that only bars statements made after police offer benefit to defendant).

F. Victim's Past Sexual Behavior under Rule 5.412

- *Banker v. State*, 2017 WL 108281, 895 N.W.2d 922 (Iowa Ct. App. 2017) (Table) (rejecting claim that defense counsel rendered ineffective assistance of counsel by withdrawing question regarding sexual assault victim's sexual activity with her boyfriend shortly before alleged assault because such testimony was not relevant to whether sexual assault "really happened" and did not fall within exception to rule).

G. Privileges

- *State v. Cunningham*, 2016 WL 7403724, 895 N.W.2d 486 (Iowa Ct. App. 2016) (Table) (assuming, without deciding, that hospital nurse's finding of packet of methamphetamine when she changed defendant's urine- and blood-soaked clothing for examination by doctor qualified as a "communication" for purposes of the physician-patient privilege, but affirming trial court's determination that such action was not necessary for treatment).

H. Competency under Iowa Rule 5.601

- *State v. Lucier*, 2016 WL 6902730, 889 N.W.2d 700 (Iowa Ct. App. 2016) (Table) (approving trial court's colloquy with 11-year-old child sex abuse victim to determine whether child could distinguish truth from lies).

I. Impeachment under Iowa Rules 5.607-5.610

- *Richter v. State*, 2017 WL 935064, 899 N.W.2d 739 (Iowa Ct. App. 2017) (Table) (concluding that even if it could be shown that expert witness offered untruthful testimony in an unrelated criminal trial, one specific instance of misconduct is insufficient to prove "character" for untruthfulness).

- *State v. Fierro*, 2017 WL 512475, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (declaring use of false names and identities in order to obtain employment highly relevant to sex abuse defendant's credibility).

- *State v. Reed*, 2017 WL 104939, 895 N.W.2d 923 (Iowa Ct. App. 2017) (Table) (noting that record did not show the nature of defendant's prior convictions for theft and burglary and preserving for post-conviction proceedings question whether defense counsel breached material duty by conceding their admissibility).

- *Wright v. State*, 2017 WL 936077, 899 N.W.2d 799 (Iowa Ct. App. 2017) (Table) ("[T]he record is not clear what charges [the jailhouse informants] faced, but we note that if either committed crimes of dishonesty, the jury would have been free to discount their statements.").

- *State v. Rogers*, 2016 WL 4384706, 886 N.W.2d 106 (Iowa Ct. App. 2016) (Table) (deferring to trial court's refusal to allow defendant to impeach State witness with 13-year-old convictions for theft and forgery; defendant had not given required advance notice or overcome rebuttable presumption that "antiquated" convictions are more prejudicial than probative).

J. Leading Questions under Iowa Rule 5.611

- *State v. Maxwell*, 2016 WL 6652361, 889 N.W.2d 243 (Iowa Ct. App. 2016) (holding, in sexual abuse prosecution, that defense counsel did not breach essential duty in not objecting to State's questions to investigating officer when questions merely directed witness's attention to "immediate subject with reference to which he [was] interrogated;" moreover, defense counsel did not breach essential duty in not objecting to State's questions to 16-year-old complaining witness given witness's young age and sensitive subject matter).

K. Lay and Expert Opinion Testimony under Iowa Rules 5.701-5.706

- *In re Estate of Boman v. Cramer*, 2017 WL 512493, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (holding that, though harmless error, trial court should have excluded expert's testimony in will contest case regarding whether testator possessed requisite "testamentary capacity" or was subjected to "undue influence").

- *First American Bank Group v. Iowa Dept. of Transportation*, 2017 WL 706199, 898 N.W.2d 203 (Iowa Ct. App. 2017) (Table) (affirming admission of expert testimony regarding valuation of bank's leasehold interest in condemned property).

- *Keys v. State*, 2017 WL 2684336, 902 N.W.2d 592 (Iowa Ct. App. 2017) (Table) (holding that police witness crossed the line when he opined that defendant was involved in "street level dealing" and held drugs for sale and distribution).

- *Kinseth v. Weil-McLain Co.*, 2017 WL 1400801, 900 N.W.2d 617 (Iowa Ct. App. 2017) (Table) (petition for further review pending) (asbestos case claiming damages from plaintiff's exposure to asbestos installing defendant's boilers; trial court did not abuse discretion in allowing Plaintiff's expert to testify regarding the level of asbestos fibers in the air from cutting asbestos rope based partly on otherwise inadmissible OSHA citation issued at manufacturer's plant).

- *Simpson v. State*, 2017 WL 1735615, 901 N.W.2d 837 (Iowa Ct. App. 2017) (Table) (concluding that expert's testimony was too closely tied to facts of case and that defense counsel breached an essential duty in failing to object to testimony regarding grooming and "core of truth" discussed in literature).

- *State v. Campbell*, 2017 WL 2464070, 902 N.W.2d 590 (Iowa Ct. App. 2017) (Table) (petition for further review pending) (holding that vehicle owner did not rely completely on hearsay statement of vehicle's insurer in estimating the cost of repairing his car windows).

- *State v. Cusic*, 2017 WL 1278293, 900 N.W.2d 616 (Iowa Ct. App. 2017) (petition for further review pending) (affirming admission of neuropsychologist's testimony that rebutted diminished capacity defense of minor defendant charged with killing his mother; even though the expert had not personally examined the defendant, he reasonably relied upon report of another examining physician and his failure to personally examine defendant went to the weight, not the admissibility of his opinion).

- *State v. Gillson*, 2017 WL 2181176, 901 N.W.2d 839 (Iowa Ct. App. 2017) (Table) (granting new trial because defense counsel failed to object to vouching testimony by investigating officer, forensic interviewer, and child's treating psychologist).

- *State v. Ingram*, 2017 WL 514403, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (petition for further review pending) (concluding that mental health therapist walked, but did not cross, the thin line between proper expert testimony and improper vouching for credibility of victim).

- *State v. Keys*, 2017 WL 1735617, 901 N.W.2d 837 (Iowa Ct. App. 2017) (Table) (concluding that trial court did not abuse discretion in allowing drug task force investigator who listened in on live wire during controlled drug buy to give opinion regarding interpretation of the voices on the audio recording played to the jury).

- *State v. Tjernagel*, 2017 WL 108291, 895 N.W.2d 922 (Iowa Ct. App. 2017) (holding that defense counsel breached essential duty in failing to object to expert's testimony on redirect—"[a]n expert witness is not entitled to opine that

the child in this case was not coached simply because the defendant argued coaching as a theory of defense").

- *State v. Vulich*, 2017 WL 363234, 896 N.W.2d 784 (Iowa Ct. App. 2017) (Table) (concluding that defense counsel was not ineffective in failing to object to forensic interviewer's testimony regarding 16-year-old victim).

- *State v. Westmoreland*, 2017 WL 512479, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (upholding admission of testimony from forensic interviewer concerning fact that children may delay reporting and not fully disclose all the details of sex abuse; testimony did not improperly link victim's behavior to that observed in other sex abuse victims).

- *Barker v. Union Pacific Railroad Co.*, 2016 WL 6652345, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table) (permitting plaintiff's treating kidney specialist to testify that severe on-the-job exertion caused plaintiff's rhabdomyolysis).

- *State v. Benson*, 2016 WL 7393891, 895 N.W.2d 487 (Iowa Ct. App. 2016) (Table) (holding that investigating officer was qualified to testify about defendant's location based upon cell phone records; officer's lack of up-to-date knowledge or training regarding 4G technology or how new technology would affect cell tower communication went to weight, not admissibility).

- *State v. Gridley*, 2016 WL 5930002, 888 N.W.2d 682 (Iowa Ct. App. 2016) (Table) (concluding that state trooper did not need to be a forensic pathologist in order to opine that defendant was driver of vehicle based on trooper's observation of injuries on both defendant and victim).

- *State v. Lusk*, 2016 WL 4384672, 886 N.W.2d 106 (Iowa Ct. App. 2016) (Table) (allowing forensic interviewer to give generalized testimony regarding child sexual abuse, including "testimony about delayed disclosure, how children of different ages react to sexual abuse, interfamilial victimization, and grooming").

- *State v. Maxwell*, 2016 WL 6652361, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table) (preserving for post-conviction review defense counsel's failure to object to expert testimony concerning grooming of child sex abuse victims).

- *Walton v. Prunchak*, 2016 WL 4543780, 886 N.W.2d 616 (Iowa Ct. App. 2016) (Table) (affirming admission of testimony by biomechanical engineer that collision did not cause plaintiff's rotator cuff tear).

L. Hearsay under Rules 5.801- 5.807

1. Definition of Hearsay under Rule 5.801

- *State v. Church*, 2017 WL 2461429, 902 N.W.2d 590 (Iowa Ct. App. 2017) (Table) (concluding that police officer's testimony was not hearsay because it referenced, but did not disclose contents, of text messages found on defendant's

phone and text messages supported officer's opinion that defendant possessed drugs found in his car with intent to distribute).

- *State v. Richter*, 2017 WL 935064, 899 N.W.2d 739 (Iowa Ct. App. 2017) (Table) (holding that State had not offered pink notebook found in victim's car to prove the truth of matter asserted in diary– that defendant's ex-husband had hired the victim to kill the defendant – but to show that defendant had staged the home invasion with the victim in order to win a custody dispute by demonstrating that the defendant knew of the notebook's publicly unavailable contents, which the State contended were false).

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

- *State v. Gantt*, 2017 WL 706306, 898 N.W.2d 204 (Iowa Ct. App. 2017) (Table) (witness who denied previously identifying the defendant in an out-of-court-statement was confronted at trial with that prior identification is not excluded by the rule against hearsay; the testimony at issue fits within the 5.801(d)(1)(C) exception because the statement identified a person the witness perceived earlier, the witness testified about the statement in court and was subject to cross examination about the statement).

- *State v. Harris*, 2016 WL 4801444, 886 N.W.2d 617 (Iowa Ct. App. 2016) (admitting pretrial photo identification of defendant's alibi witness by three of robbery victims, who also testified at trial).

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

- *State v. Ward*, 2017 WL 1278288, 898 N.W.2d 204 (Iowa Ct. App. 2017) (Table) (characterizing murder defendant's statements to jailhouse informant that he intended to threaten witnesses as "admissions by conduct" that helped establish the defendant's connection to the crime).

4. Excited Utterances under Rule 5.803(2)

- *State v. West*, 2016 WL 5930629, 888 N.W.2d 681 (Iowa Ct. App. 2016) (Table) (holding that police officer's general questions about what happened did not prevent dashcam audio of mother's brief statements to officer about shooting from being admitted as excited utterance when mother was crying and upset after physical altercation in which her son was shot and was being treated in ambulance at the time of her statements).

5. Statements of Then-Existing Mental State under Rule 5.803(3)

- *State v. Ingram*, 2017 WL 514403, 898 N.W.2d 202 (Iowa Ct. App. 2017) (Table) (petition for further review pending) (upholding admission of 12-year-old's diary detailing instances where her stepfather sexually abused her; diary indicated that, at time she wrote entries, she was scared of the defendant, feared for the safety of

her family and herself, wanted to run away from home to get away from him, and was afraid that she would sexually abuse her younger sisters).

- *State v. Wade*, 2017 WL 2181450, 901 N.W.2d 839 (Iowa Ct. App. 2017) (Table) (affirming admission of domestic abuse victim's statements to nurse practitioner at hospital regarding her fear of defendant under rule 5.803(3)).

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

- *State v. Overstreet*, 2016 WL 7403728, 895 N.W.2d 487 (Iowa Ct. App. 2016) (Table) (Potterfield, J., specially concurring) (questioning whether child sex abuse victim's statements of identification to doctor at Child Protection Response Clinic qualified under rule 5.803(4) because doctor was not a treating physician and child neither expected, nor received, treatment from her).

7. Past Recollection Recorded under Rule 5.803(5)

- *State v. Garrison*, 2017 WL 2181506, 901 N.W.2d 839 (Iowa Ct. App. 2017) (Table) (holding that 30-second videotaped recording of witness' police interview in which witness remembered seeing blood on victim's T-shirt did not qualify as recorded recollection because witness expressed doubts regarding accuracy of statement because of her alcohol and drug use that night and admitted that she did not review the recording or its transcript to determine its accuracy).

8. Unavailability of Declarant under Rule 5.804(a)

- *State v. Harris*, 2016 WL 4801444, 886 N.W.2d 617 (Iowa Ct. App. 2016) (Table) (admitting deposition of robbery victim who had moved with his family back to South Korea to begin a mandatory 2-year stint in Korean Army; reasonableness did not require State to contact South Korean government).

- *State v. Virgil*, 2016 WL 6652347, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table), aff'd in part, 895 N.W.2d 873 (Iowa 2017) (describing State's multiple efforts to subpoena domestic abuse victim to testify in retrial as "reasonable and sufficient" to deem her "unavailable" and admit her former testimony).

9. Statements Against Interest under Iowa Rule 5.804(b)(3)

- *State v. Shears*, 2017 WL 702367, 898 N.W.2d 204 (Iowa Ct. App. 2017) (Table) (excluding, in driving while barred prosecution, statement made by defendant's friend to defendant alone while defendant recorded it in which friend admitted driving the car; circumstances suggested that defendant pressured friend into making the statement and thus lacked corroborating circumstances).

10. Forfeiture by Wrongdoing under Rule 5.804(b)(6)

- *State v. Gordon*, 2016 WL 6636792, 889 N.W.2d 244 (Iowa Ct. App. 2016) (Table) (determining that State had established by preponderance of evidence that defendant intended to prevent his ex-girlfriend from testifying in domestic abuse prosecution

when he called her from jail and told her that the best way to get the charges dropped would be to not come to court and to tell prosecution that she was moving; trial court thus properly admitted victim's statement of identification made to police officers who responded to 911 call and her statements refusing to cooperate).

M. Authentication under Iowa Rules 5.901 and 5.902

- *State v. McBride*, 2016 WL 6902744, 889 N.W.2d 700 (Iowa Ct. App. 2016) (Table) (holding that defendant in assault prosecution had waived her objection to the foundation laid for admission of screenshot of Facebook status update inviting friends to "like" status if they wanted to see "sum action," as well as a screenshot of a video of the assault; although defendant contended that posts did not accurately portray the assault, she admitted on cross-examination that posts came from her Facebook account).

N. Best Evidence Rule under Iowa Rules 5.1001-1008

- *State v. Hickman's Egg Ranch*, 2017 WL 2182728, 901 N.W.2d 840 (Iowa Ct. App. 2017) (Table) (holding that trial court abused its discretion in admitting exhibit that summarized the plaintiff's damages because plaintiff failed to demonstrate that the underlying documents would be admissible if offered).

- *State v. Schenk*, 2016 WL 6652314, 889 N.W.2d 243 (Iowa Ct. App. 2016) (Table) (affirming admission of photograph of Walmart receipt that was destroyed by fingerprint testing; defendant did not show that receipt was destroyed in bad faith; receipt was cumulative of other evidence linking defendant to scene of murder; and defendant made no showing that he could not obtain another receipt from Walmart).

O. Confrontation Clause

- *Iowa v. Cusic*, 2017 WL 1278293, 900 N.W.2d 616 (Iowa Ct. App. 2017) (Table) (no confrontation clause violation when expert relies on a report prepared by a different expert to rebut a defendant's defense of diminished capacity when the defendant is charged with first degree murder but is convicted of second degree murder).

- *State v. Lucier*, 2016 WL 6902730, 889 N.W.2d 700 (Iowa Ct. App. 2017) (Table) (no confrontation clause violation in admitting child's medical statements under the medical treatment and diagnosis exception to hearsay and no confrontation clause violation under *In re J.C.* precedent).

- *State v. Turner*, 2017 WL 108304, 895 N.W.2d 922 (Iowa Ct. App. 2017) (Table) (indicating that defendant's right of confrontation was not violated because prosecutor had made reasonable good faith effort to secure witness's attendance at second retrial).

- *Trowbridge v. State*, 2017 WL 2461545, 902 N.W.2d 501 (Iowa Ct. App. 2017) (Table) (telephonic rebuttal testimony does not violate a defendant's right to confront witnesses against him).

VI. Eighth Circuit Evidence Decisions

A. Relevance and Undue Prejudice under Fed. R. Evid. 401, 402, and 403

- *Davis v. White*, 858 F.3d 1155, 1160 (8th Cir. 2017) (excluding evidence of racist emails sent by a police officer not present for the alleged use of excessive force because the evidence would have minimal probative value that would be substantially outweighed by the potential unfair prejudice to the defendant officers, who were not associated with the emails).

- *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 425-26 (8th Cir. 2017) (affirming, in action for sex-based wage discrimination in which the defendant employer asserted an affirmative defense that the female employees were paid less than their male counterparts based on seniority and education, admission of evidence that non-party female employees were paid less even when they had more seniority and education; evidence tended to demonstrate the employer did not uniformly pay wages based on seniority and education, and was probative of whether the explanation for paying female employees less was merely pretextual).

- *United States v. Hellems*, 866 F.3d 856, 862 (8th Cir. 2017) (finding that where a defendant refuses to stipulate, the government may introduce the name and nature of multiple prior convictions to prove an element of the current felon in possession charge).

- *United States v. Kelley*, 861 F.3d 790, 798-99 (8th Cir. 2017) (As agents executed a search warrant pertaining to possession of child pornography, the defendant admitted to downloading and viewing adult role-playing pornography, using search terms such a "young teen" to look for pornography on a file-sharing program, and downloading an image of a person with underdeveloped features. Testimony about these admissions was admissible, as "none of these facts [were] unnecessarily inflammatory or offensive to the point of encouraging the jury to find guilt from improper reasoning.").

- *United States v. Novak*, 866 F.3d 921, 924 (8th Cir. 2017) (FBI agent's testimony briefly summarizing images of "deviant forms" of adult pornography found on the defendant's computer was far less prejudicial than alternatives, such as showing the jury the images).

- *United States v. Ramos*, 852 F.3d 747, 756 (8th Cir. 2017) (finding the district court erred in admitting defendant's waiver of parole revocation hearing form, as any probative value was substantially outweighed by the danger of unfair prejudice; the official seal, legal terminology, and multiple signatures, including the signature of the hearing judge, created a strong possibility the jury would give

the form more weight than it deserved and form may have been signed for reasons other than factual guilt).

B. Prior Bad Acts under Fed. R. Evid. 404(b)

- *United States v. Buckner*, 868 F.3d 684, 689 (8th Cir. 2017) (admitting prior conviction of reckless use of firearm causing bodily injury to show defendant's knowledge and intent to possess a firearm; defendant denied both knowledge and intent by asserting a "mere presence" defense).

- *United States v. Gaines*, 859 F.3d 1128, 1132 (8th Cir. 2017) (holding that evidence of the defendant's gang affiliation was properly admitted to give context to his arrest and to establish his knowledge, intent, opportunity, and motive to possess a gun).

- *United States v. Jackson*, 856 F.3d 1187, 1191 (8th Cir. 2017) (allowing evidence of prior dismissed drug distribution charges because the jury could reasonably conclude the act happened and the defendant was the actor; and admitting evidence of a prior drug arrest and drug use to show the defendant's plan, knowledge, and intent because the defendant put his state of mind at issue by advancing a general denial of his participation in a conspiracy to distribute heroin).

- *United States v. Jackson*, 852 F.3d 764, 774 (8th Cir. 2017) (affirming exclusion of prior violent acts of victim where the defendant failed to provide the court with sufficient proof that the victim committed the prior acts).

- *United States v. LaFontaine*, 847 F.3d 974, 981 (8th Cir. 2017) (holding testimony that the defendant had previously threatened a government official was properly admitted to show he intended his statements to be threatening or knew they would be perceived as threatening, a key issue in the current charge).

- *United States v. LeBeau*, 867 F.3d 960, 979 (8th Cir. 2017) ("evidence of a prior drug conviction can be used to prove a defendant's intent to enter into a conspiracy to distribute drugs, even if the defendant has not asserted a defense that puts his state of mind at issue").

- *United States v. Rembert*, 851 F.3d 836, 839 (8th Cir. 2017), cert. denied, 2017 WL 3980949 (U.S. 2017) (holding that a video the defendant posted to his Facebook page that depicted the defendant holding a gun and smoking a blunt was relevant to show his knowing and intentional possession of a firearm, as well as to show his fingerprints on the gun were not the result of mistake or accidental touching).

- *United States v. Riepe*, 858 F.3d 552, 560 (8th Cir. 2017) (in prosecution for attempted enticement of a minor, evidence of the defendant's contacts with two other teenage girls properly admitted to show his knowledge, planning, preparation, and intent to pursue a sexual relationship).

- *United States v. White Plume*, 847 F.3d 624, 629 (8th Cir. 2017) (in prosecution for assault causing serious bodily injury concerning the grandson of the defendant's wife, trial court did not err in excluding evidence of wife's past acts of child abuse; evidence was not admissible to show intent because the wife's state of mind was not in issue; nor was evidence admissible to show identity because the past child abuse involved "different victims, different injuries, and different degrees in severity," and thus did "not show they were carried out in an 'unusual and distinctive manner'").

- *United States v. Wright*, 866 F.3d 899, 905 (8th Cir. 2017) (pleading not guilty to drug conspiracy charge places the defendant's knowledge and intent at issue).

- *United States v. Fang*, 844 F.3d 775, 780 (8th Cir. 2016) (holding that the defendant put his state of mind at issue by making a general denial of the charge of possession with intent to distribute methamphetamine, and as such, evidence of two prior convictions of possession of methamphetamine were relevant to prove knowledge).

- U.S. v. Lomas, 826 F.3d 1097 (8th Cir. 2016), cert. denied, 137 S.Ct. 315 (U.S. 2016) (affirming, in bank robbery prosecution, admission of evidence of defendant's prior bad of discarding a pistol five weeks earlier to show defendant's knowledge of that type of weapon, which was similar to the toy pistol used in bank robbery, and to establish a link between the defendant and the getaway driver's vehicle).

C. Prior Acts of Sexual Abuse or Child Molestation under Fed. R. Evid. 413-415

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

- *United States v. Oldrock*, 867 F.3d 934, 938 (8th Cir. 2017) ("Prior bad acts constituting sex offenses may be admitted to prove any relevant matter 'including the defendant's propensity to commit such offenses;'" government's evidence of defendant's sexual abuse of another minor was admissible to show defendant's "propensity to touch young girls inappropriately while they sleep").

- *U.S. v. Emmert*, 825 F.3d 906 (8th Cir. 2016), cert. denied, 137 S.Ct. 1349 (U.S. 2017) (affirming admission of evidence of prior conviction for sexual assault of a minor and alleged sexual assault of different minor in trial for possession of child pornography; although conviction was over 20-years-old, it showed a propensity to sexually exploit girls and connected the defendant to the child pornography on his computer).

- *U.S. v. Luger*, 837 F.3d 870 (8th Cir. 2016) (notwithstanding 25-year gap between the charged conduct (aggravated sexual assault of minor) and the propensity evidence (rape of a minor) and the fact that the propensity conduct was more "serious" than the charged conduct, trial court properly admitted evidence because all the victims were between the ages of 13 and 16 and the defendant was in a position of power or authority over them).

D. Cross-Examination under Fed. R. Evid. 611 and the Confrontation Clause

- *United States v. Wright*, 866 F.3d 899 (8th Cir. 2017) (within district court's discretion to limit language used by defense attorney on cross-examination of cooperating co-defendant when asking about co-defendant's potential life sentence because defense's line of questioning and use of the words "life imprisonment" would essentially reveal in advance to the jury what the defendant's sentence would be if found guilty).

E. Lay Opinion Testimony under Fed. R. Evid. 701

- *United States v. Oldrock*, 867 F.3d 934, 938 (8th Cir. 2017) (allowing forensic interviewer to testify about her lay perceptions of her interview with a child sexual abuse victim; she relied exclusively on her personal experience interviewing other sexually abused children).

F. Expert Testimony under Fed. R. Evid. 702-706

- *Adams v. Toyota Motor Company*, 867 F.3d 903 (8th Cir. 2017) (admitting other similar instances of unintended acceleration admissible in products liability case against car manufacturer; no abuse of discretion in allowing experts to testify).

- *United States v. Johnson*, 860 F.3d 1133 (8th Cir. 2017) (stating that no Daubert hearing is necessary before admitting expert testimony from a social worker with 30 years of experience who specialized in domestic violence and sexual assault concerning expert's general knowledge in the Duluth Model and the cycle of violence in domestic relationships).

G. Hearsay and the Hearsay Exceptions

- *United States v. Delgrosso*, 852 F.3d 821 (8th Cir. Mar. 30, 2017) (a co-conspirator affidavit's offered in motion for new trial of another defendant must have sufficient corroboration to be admissible, especially when the co-conspirator refuses to testify at the motion for new trial hearing).

- Dunn v. Bank of America, 844 F.3d 1002 (8th Cir. 2017) (in Truth-in-Lending Act suit against mortgage lender, finding that warranty deed fell within exceptions for public records and records of documents affecting an interest in property under Fed. R. Evid. 803(8) and 803(14).

- U.S. v. Melton, 870 F.3d 830 (8th Cir. 2017) (in mail fraud prosecution, admitting as business records minutes of company's emergency board meetings after CEO testified that it was company's regular practice to prepare and keep board minutes prepared by company's outside counsel; trial court gave limiting instruction that jury should not use the references in the minutes to illegal conduct as evidence that illegal conduct took place, but to demonstrate what was brought to board's attention and to explain subsequent conduct).

H. Hearsay and the Confrontation Clause

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

I. Authentication under Fed. R. Evid. 901 and 902

- *United States v. Needham,* 852 F.3d 830 (8th Cir. 2017) (Detective who investigated defendant in child pornography case could authenticate the 11 screenshots offered into evidence because the website itself had been disabled by time of trial and detective had first-hand knowledge of the website).