Iowa Rules of Evidence Substantive Review Task Force

Proposed Amendments and Task Force Comments

I. Introduction

In 2017, the Iowa Rules of Evidence underwent a comprehensive, non-substantive restyling. The 2017 restyling amendments were intended to align the Iowa rules "with their current federal counterparts" and to "achieve[ ] an internally more consistent, clearer, easier-to-use, and plain English-oriented set of rules." Iowa Sup. Ct. Order, *In the Matter of Adoption of the Nonsubstantive Restyling of the Iowa Rules of Evidence* (Sept. 28, 2016). The 2017 restyling, however, made no substantive changes to the Iowa rules that were originally enacted in 1984 and patterned after the federal rules. Due to a series of amendments to the federal rules, many of the Iowa rules have diverged over time from their federal counterparts. In August of 2021, the Iowa Supreme Court established the Iowa Rules of Evidence Substantive Review Task Force (the "Task Force") and charged it with evaluating and recommending "substantive updates to the Iowa Rules of Evidence." Iowa Sup. Ct. Order, *In the Matter of Establishing the Iowa Rules of Evidence Substantive Review Task Force and Appointment of Members* (Aug. 31, 2021) ["August 31, 2021 Order"]. The Task Force is chaired by Iowa Supreme Court Justice Thomas Waterman as chair with Judge Sharon Greer of the Iowa Court of Appeals as Vice-Chair. Professor Laurie Doré is the Task Force Reporter. The Task Force consists of trial and appellate judges, a retired federal district court judge, evidence professors from both of Iowa's law schools, civil attorneys from both the plaintiff and defense bars, and criminal practitioners representing the prosecution and defense bars. A complete list of Task Force members is found in the attached August 31, 2021 Order (Exhibit A).

The Task Force held three full Task Force meetings on October 1 and December 17, 2021, and January 28, 2022, prior to making its initial recommendations to the Iowa Supreme Court. To formulate those recommendations, the Task Force divided itself into three committees (Hearsay, Civil, and Criminal) to evaluate the existing differences between the Iowa and federal rules and recommend whether the Iowa rules should be amended to align with its federal counterpart. The committees met separately and reported their recommendations for full Task Force consideration. The Task Force forwarded its Interim Task Force Report to the Iowa Supreme Court on February 3, 2022 (Exhibit B). The court considered the Interim Report and ordered that the contemplated amendments be published for public comment on February 15, 2022. Iowa Sup. Ct. Order, *Request for Public Comment on Proposed Amendments to the Iowa Rules of Evidence in Chapter 5 of the Iowa Court Rules* (Feb. 15, 2022). The public comment period ended on April 16, 2022. *Id.* The public comments received on the proposed amendments are attached as Exhibit C. On June 17, 2022, the full Task Force met to consider those public comments and to finalize its recommendations, which are contained in this report.

The Task Force operated with the understanding that the federal amendments it was considering have already been fully vetted at the federal level through the extensive rule-making process provided by the Rules Enabling Act, 28 U.S.C. § 2072. That process includes review by the federal Advisory Committee on the Rules of Evidence (the "advisory committee"), the

Standing Committee on the Rules of Practice and Procedure, the United States Judicial Conference, and the United States Supreme Court, together with notice, publication, and public comment. The advisory committee notes accompanying the various federal provisions thus greatly informed and assisted the work and recommendations of the Task Force and its committees.

The following are the Task Force's recommended amendments, along with Task Force Comments explaining its recommendations. A strikethrough version of the recommended amendment to each rule is followed by its Task Force Comment. The relevant federal advisory committee notes are also cited in support of the proposals. Most of the recommendations secured unanimous or near unanimous Task Force member support. A few proposals, however, provoked significant Task Force debate. Those disagreements are identified and discussed in the accompanying Task Force Comment.

II. Recommended Amendments and Task Force Comments

A. Victim Character Evidence under Rule 5.404(*a*)

Rule 5.404 Character evidence; crimes or other acts.

a. Character evidence.

(1) *Prohibited ~~acts~~ uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a defendant or victim in a criminal case*. The following exceptions apply in a criminal case:

> ~~(A) *In criminal cases.*~~
> ~~(i)~~ (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
>
> ~~(ii)~~ (B) subject to the limitations in rule 5.412, a defendant may offer evidence of the victim's pertinent trait, and if the evidence is admitted, the prosecutor may: ~~offer evidence to rebut it.~~
>
> > (i) offer evidence to rebut it; and
> >
> > (ii) offer evidence of the defendant's same trait; and
>
> ~~(iii)~~ (C) when the victim is unavailable to testify due to death or physical or mental incapacity, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

~~(B) *In civil cases.*~~

~~(i) Evidence of an alleged victim's character for violence may be offered on the issue of self-defense by a party accused of assaultive conduct against the victim.~~

~~(ii) If evidence of a victim's character for violence is admitted, any party may offer evidence of the victim's peaceful character to rebut it.~~

(3) *Exceptions for a witness*. Evidence of a witness's character may be admitted under rules 5.607, 5.608, and 5.609.

. . . .

Task Force Comment on Rule 5.404(*a*) Amendments

1. Defendant's "Same [Character] Trait" to Rebut Victim Character Evidence Offered by Accused: Under the 2000 amendment to the federal rule, if a criminal defendant offers evidence of the victim's pertinent trait, the prosecution can rebut with evidence of the "defendant's same trait," as well as evidence of the victim's peacefulness. Fed. R. Evid. 404(a)(2)(B). According to the advisory committee, the federal rule was so amended to make "clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused." Fed. R. Evid. 404 advisory committee note to 2000 amendment. The amendment permits "a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim." *Id.* In contrast, the Iowa rule still only permits the prosecution to rebut a defendant's victim character evidence with counter-evidence concerning the victim's character. *See* Iowa R. Evid. 5.404(*a*)(2)(A)(ii).

The Task Force recommends amending Iowa Rule of Evidence 5.404(*a*)(2) to provide that if the defendant offers evidence of the alleged victim's pertinent trait and that evidence is admitted, the prosecutor can rebut such evidence not only with victim character evidence, but also with "evidence of the defendant's same trait." The amendment would only apply to victim propensity evidence—when a defendant contends that the victim has an aggressive character and therefore acted aggressively in this encounter. In such circumstances, the amended rule would allow the prosecutor to show both that (a) the victim is peaceful and (b) that defendant similarly has an aggressive character. Importantly, rule 5.404(*a*) only governs the admissibility of victim character evidence, not the permissible methods of proving that character if admissible. Instead, rule 5.405 governs the methods of proving character when offered circumstantially to show propensity.

2. Homicide v. Unavailable Victim: Under Iowa Rule of Evidence 5.404(*a*)(2)(iii), if an accused claims that he acted in self-defense, but does not introduce victim character evidence to support the justification, the prosecutor may offer evidence of the victim's peaceful character whenever "the victim is unavailable to testify due to death or physical or mental incapacity." In contrast, under Federal Rule of Evidence 404(a)(2)(C), if an accused who claims self-defense does not open the door to victim character evidence, the prosecutor can offer evidence of the victim's peacefulness in homicide cases only. The Task Force rejects the federal limitation as unnecessarily restrictive; the State should be allowed to rebut a defendant's claim of self-defense with victim character evidence whenever "the victim is unavailable due to death *or physical or mental*

incapacity." Iowa R. Evid. 5.404(*a*)(2)(iii) (emphasis added). Again, however, rule 5.405 would limit the methods by which the prosecutor can prove the victim's character.

3. Victim Character Evidence in Civil Cases: Iowa Rule of Evidence 5.404(*a*)(2)(B) currently permits the parties in civil cases involving self-defense to offer evidence regarding the victim's character for violence (or peacefulness in rebuttal). Under the federal rule, character evidence is never admissible in civil suits when offered for propensity purposes. The exceptions to the ban on character evidence used for propensity purposes (including victim character evidence) are limited in federal cases to criminal cases. *See* Fed. R. Evid. 404(a)(2) ("Exceptions for a Defendant or Victim in a Criminal Case.").

The Task Force recommends adopting the federal approach and limiting the admissibility of victim character evidence to criminal cases only where the "mercy rule" applies. Under that rule, a criminal defendant is allowed to introduce pertinent character traits of the accused or the victim because the accused, "whose liberty is at stake, may need 'a counterweight against the strong investigative and prosecutorial resources of the government.'" Fed. R. Evid. 404 advisory committee note to 2006 amendment (quoting omitted). Such concerns do not apply in civil cases, even when the issues are closely related to criminal cases (i.e., civil assault case alleging self-defense). Introduction of propensity evidence in civil cases would confuse the issues and waste time with mini-trials about the parties' character.

This amendment would strip Iowa Rule of Evidence 5.404(*a*)(2)(B) from the rule. In a civil case, evidence of a victim's character would never be admissible to prove that the person acted in conformity with his or her character. Of course, this amendment does not affect civil cases where character is an essential element of a claim or defense, such as negligent entrustment or certain defamation cases. In such cases, character is an end in itself and is not being used circumstantially. *See* Iowa R. Evid. 5.405(*b*) (allowing specific instances of conduct when character "is an essential element of a charge, claim, or defense").

4. Minor Change to Heading in Rule 5.404(*a*)(1): The Task Force recommends conforming to the federal rule by amending the title to 5.404(*a*)(1) to "Prohibited uses," rather than "Prohibited acts." The character evidence rules turn on the purpose for which the evidence is offered—propensity versus noncharacter purposes—rather than the type of evidence.

B. Notice to Accused for Other Act Evidence under Rule 5.404(*b*)

Rule 5.404 Character evidence; crimes or other acts.

. . . .

b. Crimes, wrongs, or other acts.

(1) *Prohibited uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted uses*. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Task Force Comment on Rule 5.404(*b*) Amendments

1. Pretrial Notice in Criminal Cases: When originally drafted, Iowa Rule of Evidence 5.404(*b*) and Federal Rule of Evidence 404(b) were identical. In 1991, Federal Rule 404(b) was amended to require that a prosecutor, upon request by an accused in a criminal case, provide pretrial notice of intent to offer Rule 404(b) evidence. In 2020, the federal notice provision was further strengthened to protect defendants in criminal cases. Under that 2020 federal amendment, defendants no longer need to request pretrial notice from the prosecution concerning other bad act evidence. Instead, prosecutors must provide advance written notice of "the permitted purpose for which the prosecutor intends to offer [such] evidence and the reasoning that supports that purpose." Fed. R. Evid. 404(b)(3)(B) (effective Dec. 1, 2020); *see also* Fed. R. Evid. 404 advisory committee note to 2020 amendment. Iowa Rule of Evidence 5.404(*b*) currently does not require any advance notice of intent to offer "other act" evidence.

The Task Force recommends adding the federal pretrial notice provision to the Iowa rule governing other bad acts. Under the new provision, Iowa Rule of Evidence 5.404(*b*)(3), a prosecutor in a criminal case would need to provide written, pretrial notice of any other bad act evidence that it intends to offer at trial and articulate in that notice the permitted noncharacter purpose for which it will be offered "and the reasoning that supports the purpose." For "good cause," the trial court can excuse the lack of pretrial notice.

Although many prosecutors in Iowa already disclose a great deal of information to criminal defendants, the Task Force believes that the rule should explicitly articulate a baseline notice requirement for other bad act evidence specifically. Rule 5.404(*b*) is one of the most frequently litigated evidentiary rules and a large percentage of those cases involve other bad act evidence offered by the State against a criminal defendant. The exceptional and unique prejudice that other act evidence poses for a criminal accused (i.e., the danger that the jury would impermissibly use the evidence for propensity purposes), along with the power and resource imbalance between the government and the accused, support confining the notice requirement to prosecutors. The trial court retains the discretion to excuse pretrial notice for "good cause," such as when a prosecutor could not foresee the need to use other bad act evidence for impeachment or in rebuttal. Moreover, the advance notice requirement only applies to impeachment with other bad act evidence offered under rule 5.404(*b*), not to other forms of impeachment such as prior inconsistent statements, prior convictions, character for truthfulness, contradiction, or bias. Unless excused for good cause, the prosecution would be required to give notice of its intent to offer extrinsic offense evidence in all criminal cases governed by the Iowa Rules of Evidence, such as domestic abuse cases where an accused's other assaults on the same victim are routinely admitted for nonpropensity purposes.

2. Change to Iowa Rule of Evidence 5404(*b*)(1) subtitle to Prohibited Uses: This is a minor change that conforms the heading in the Iowa rule to its federal counterpart.

C. Compromise Offers under Rule 5.408

Rule 5.408 Compromise offers and negotiations.

a. Prohibited uses. Evidence of the following is not admissible—on behalf of any party—to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim ~~that was disputed on either validity or amount~~; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

b. Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Task Force Comment on Rule 5.408 Amendments

1. Impeachment: The federal rule was amended in 2006 to explicitly prohibit use of statements made in compromise negotiations when offered "to impeach by a prior inconsistent statement or a contradiction." Fed. R. Evid. 408(a). This amendment recognized that using settlement negotiations to impeach with a prior inconsistent statement "is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted." Fed. R. Evid. 408 advisory committee note to 2006

amendment. In contrast, the Iowa rule does not specifically preclude using settlement statements for "impeachment" purposes and thus may permit using relevant inconsistencies between statements made in compromise negotiations and trial testimony to impeach a witness. *See* Iowa R. Evid. 5.408(*b*) (allowing compromises and settlement negotiations when offered for "another purpose, such as . . . ."). Like the federal rule, Iowa Rule 5.408(*b*) does specifically allow using compromise negotiations to impeach for bias and prejudice—this may suggest (by negative implication) that compromise negotiations should *not* be admitted for other forms of impeachment. Iowa law on this issue, however, is unclear and could be clarified by the federal amendment.

The Task Force agrees that using settlement negotiations to impeach with a prior inconsistent statement or by contradiction would frustrate the rationale of the rule and permit an end run around the rule's exclusionary principle. The Task Force thus recommends amending rule 5.408(*a*) to explicitly prevent parties from using settlements and conduct or statements made during compromise negotiations "to impeach by a prior inconsistent statement or a contradiction."

2. Settlement Negotiations with Government Regulatory, Investigative, or Enforcement Agencies offered in a Criminal Case: Iowa Rule 5.408 bars using settlement negotiations to prove or disprove "the validity or amount of a disputed claim" and thus applies only to compromise negotiations of a civil dispute and not to plea negotiations in criminal prosecutions. Separate rules govern the admissibility of criminal plea negotiations. *See* Iowa R. Evid. 5.410; Fed. R. Crim. P. 11; Iowa R. Crim. P. 2.10. Existing Iowa Rule 5.408 leaves open the question of whether statements made during negotiations with a private party in a civil case are admissible against a party in a later criminal prosecution. Although the question remains open in Iowa, the federal rule clearly prohibits admitting civil settlement discussions between private parties to prove liability in subsequent criminal litigation. As noted by the advisory committee:

> When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

Fed. R. Evid. 408 advisory committee note to 2006 amendment. The Task Force concurs with the federal position that conduct or statements made during civil settlement discussions between private parties should not be admissible in criminal litigation.

A more difficult question, however, concerns whether negotiations to settle a civil claim brought by a government regulatory, investigative, or enforcement agency should be excluded in criminal litigation involving the same or similar misconduct. Federal Rule 408, for instance, permits admission of conduct or statements made during compromise negotiations "when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." Fed. R. Evid. 408(a)(2). For example, a defendant's admission of fault in a civil securities enforcement proceeding could later be admitted against that defendant in a mail fraud prosecution—even if the admission was made in the course of settlement discussions with the federal agency. *See* Fed. R. Evid. 408 advisory committee note to 2006 amendment. The federal advisory committee explains that "[w]here an individual makes

a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government." *Id.* Although a federal court can still exclude settlement statements made in civil enforcement proceedings under Federal Rule 403, "there is no absolute exclusion imposed by [Federal] Rule 408." *Id.*

This "public office" exception, which was added to the federal rule at the urging of the United States Department of Justice, was controversial. Although the ultimate settlement, offer, or acceptance of a compromise are inadmissible in related criminal litigation, the prospect of admitting statements or conduct made during settlement negotiations with a public regulatory, investigative, or enforcement agency in a later, foreseeable criminal prosecution will undoubtedly chill unfettered and honest disclosures in the agency proceeding and undermine the strong public policy encouraging settlement—a policy that Iowa Rule 5.408 promotes. Such was the concern of Justice Waterman in his concurring opinion in *State v. Thoren*, 970 N.W.2d 611, 638–639 (Iowa 2022) (Waterman, J., concurring specially). Admission of such settlement conduct or statements could also present a trap for the unsophisticated or unrepresented litigant.

The Task Force was almost evenly divided (8 favored including the public office exception; 7 opposed) concerning whether statements or conduct during settlement negotiations with public regulatory or enforcement agencies (like the Department of Human Services, professional licensing or disciplinary boards, or the Department of Transportation), should be admissible in related criminal litigation. The Iowa Supreme Court will ultimately need to decide this thorny question.

3. Other Amendments to Rule 5.408: The Task Force recommends making two other minor amendments to conform the Iowa rule to its federal counterpart. First, Iowa Rule of Evidence 5.408(*a*) should clarify that settlement evidence is not admissible to prove *or disprove* the validity or amount of a disputed claim. Also, rule 5.408(*a*) already limits its scope to "disputed" claims. The reference in rule 5.408(*b*)(1) to a "claim that was disputed on either validity or amount" is thus redundant and potentially confusing, and the reference should be removed.

D. Rape Shield Rule under Rule 5.412

Rule 5.412 Sexual ~~abuse~~offense cases; the victim's ~~past~~ sexual behavior or sexual predisposition.

a. Prohibited uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual ~~abuse~~ misconduct:

~~(1) Reputation or opinion evidence offered to prove that a victim engaged in other sexual behavior.~~

~~(2) Evidence of a victim's other sexual behavior other than reputation or opinion evidence.~~

(1) Evidence offered to prove that a victim engaged in other sexual behavior; or

(2) Evidence offered to prove a victim's sexual predisposition.

b. Exceptions.

(1) *Criminal cases.* The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual ~~abuse~~ misconduct, ~~if the defendant offers it to prove consent~~t if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) *Civil cases.* ~~Rule 5.412(*b*) does not apply in civil cases.~~ In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

c. Procedure to determine admissibility.

(1) *Motion.* If ~~the defendant in a criminal sexual abuse case~~ a party intends to offer evidence under rule 5.412(*b*), the ~~defendant~~ party must:

~~(A) File a motion to offer the evidence at least 14 days before trial unless the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, or that the evidence relates to an issue that has newly arisen in the case, and the court sets a different time.~~

~~(B) Serve the motion on all parties and on the victim, or when appropriate, the victim's guardian or representative.~~

~~(C) File with the motion an offer of proof that specifically describes the evidence and states the purpose for which the evidence is to be offered.~~

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

~~If the court determines that the offer of proof contains evidence described in rule 5.412(*b*), the court must conduct a hearing in camera to determine if such evidence is admissible.~~

~~(A) At the hearing the parties may call witnesses, including the victim, and offer relevant evidence.~~

~~(B) Notwithstanding rule 5.104(*b*), if the relevance of the evidence depends on the fulfillment of a condition of fact, the court, during a hearing in camera, must accept evidence on whether the condition of fact is fulfilled.~~

~~(C) If the court determines that the evidence is relevant and that the probative value outweighs the danger of unfair prejudice, the evidence will be admissible at trial to the extent the court specifies, including the evidence on which the victim may be examined or cross-examined.~~

Task Force Comment on Rule 5.412 Amendments

1. Scope of Rule—"Sexual Misconduct" versus "Sexual Abuse:" The Iowa rape shield rule only applies in a criminal case formally charging sexual abuse, while the federal rule more broadly applies to both criminal and civil proceedings involving "alleged sexual misconduct." There is a wide range of other sexual offenses scattered throughout the Iowa Criminal Code. The policies of the rape shield rule (protecting victims' sexual privacy, preventing harassment, encouraging reporting, and excluding prejudicial and irrelevant information) apply equally to other crimes involving sexual misconduct that are not defined as sexual abuse under Iowa Code sections 709.1–709.4. *See, e.g.*, Iowa Code §§ 710.2 (first-degree kidnapping (sexual abuse alternative)); 710A.1(4)(*a*)(2) & 710A.2A (human trafficking cases (commercial sexual activity alternative)); 726.2 (incest). The Task Force thus recommends that the Iowa rape shield rule be broadened to apply in all criminal proceedings "involving alleged sexual misconduct."

2. Scope of Rule—Civil Cases: The current Iowa rape shield rule only applies to criminal cases and does not apply to civil proceedings alleging sexual misconduct, such as sexual harassment. In contrast, the federal rule explicitly covers civil proceedings involving "alleged sexual misconduct" and establishes different standards for admitting evidence of the alleged victim's "sexual behavior or sexual predisposition" in criminal versus civil cases. Fed. R. Evid. 412(b)(2). Because the policies underlying the rape shield statute apply as well to such civil proceedings, the Task Force recommends expanding coverage of Iowa Rule of Evidence 5.412 to civil proceedings involving sexual misconduct. *See generally* Jessica M. Donels, *Rape-Shield Laws and Third-Party Defendants: Where Iowa's Laws Fall Short in Protecting Victims*, 102 Iowa L. Rev. 793 (2017). The flexible balancing test (the reverse 403-balancing test) that the federal rule establishes for civil cases reflects the judgment that a trial court should have broader discretion in civil cases than in criminal cases because the victim and State's interests must only be balanced against the constitutional rights of the criminal accused in criminal proceedings—not civil. The constitutional exception in criminal cases would not apply in a civil case. The other criminal exceptions—physical evidence and consent—are well-defined due to the long-established use of the rape shield rule in criminal cases. In contrast, civil claims involving sexual misconduct are still evolving and thus require a more open-ended test for admissibility. *See* Fed. R. Evid. 412 advisory committee note for 1994 amendment. Because of the exclusionary nature of the rape shield policies, however, the burden in civil cases remains on the proponent: the trial court should admit evidence of the victim's other sexual behavior or sexual predisposition only if the proponent demonstrates that the probative value of such evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Fed. R. Evid. 412(b)(2). This is the reverse of Iowa Rule of Evidence 5.403 (which places the burden on the opponent) and requires the trial court to consider the interests of the victim in addition to the parties. *See* Fed. R. Evid. 412 advisory committee note to 1994 amendment (describing civil test for admissibility as "revers[ing] the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence").

The federal advisory committee notes indicate that Federal Rule of Evidence 412 only deals with the admissibility issue, not whether a victim's sexual history is discoverable. The notes do suggest, however, that the policy of the rape shield rule would probably justify a protective order concerning such discovery. *See id.* The Task Force agrees that this flexible balancing test should

be used to determine admissibility of rape shield evidence in civil cases. Courts might need to reconcile this amendment, if adopted, with related Iowa statutory provisions. *See, e.g.*, Iowa Code §§ 668.15(1) (providing for discovery of plaintiff's sexual conduct with third persons in civil cases involving sexual abuse, sexual assault, or sexual harassment); 668.15(2) (making evidence of victim's past sexual behavior per se inadmissible in action by victim against person accused of misconduct); 622.31A(1) (making Iowa Rule of Evidence 5.412 applicable to discovery conducted in criminal and postconviction relief cases). Although there may be some overlap, the amended Iowa Rule of Evidence 5.412 would serve as a safety net in cases that are not covered by narrower statutory provisions. Moreover, the Iowa rules anticipate that that they might need to be read in conjunction with statutes like these, as well as other rules, statutes, and constitutional provisions. *See* Iowa R. Evid. 5.402 (providing that relevant evidence is admissible unless "the United States Constitution or Iowa Constitution, statute, these rules, or other Iowa Supreme Court rule" provide otherwise).

3. Form of Evidence: The current Iowa rule excludes evidence of a victim's "reputation," "opinion," and "other sexual behavior." Iowa R. Evid. 5.412(*a*)(1)–(2). The federal rule presumptively excludes a victim's "other sexual behavior" and a "victim's sexual predisposition." Fed. R. Evid. 412(a)(1)–(2). The exceptions in the federal rule distinguish between these two types of evidence when limiting the evidence offered in criminal (permitting only victim's sexual behavior) and civil (permitting both sexual behavior and sexual predisposition) cases. The Task Force determined that "sexual predisposition" is a better description of the type of evidence that should be excluded under the rule than amorphous "reputation or opinion" evidence. The term would encompass evidence that has a sexual connotation, but does not involve sexual activity (i.e., nude modeling, skinny dipping, and sexual orientation). *See* Fed. R. Evid. 412 advisory committee note to 1994 amendment (describing sexual predisposition as "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder"). The Task Force also recommends following the federal approach that limits sexual predisposition evidence to civil cases.

4. Criminal Exception Regarding Consent: The current Iowa rule appears to permit evidence of sexual behavior between the victim and the accused only if offered by the defendant to prove consent. The federal rule additionally allows the prosecution to offer such evidence. *See* Fed. R. Evid. 412(b)(1)(B). The advisory committee note gives this example: "In a prosecution for child sexual abuse, . . . evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior." Fed. R. Evid. 412 advisory committee note to 1994 amendment.

The Task Force recommends adoption of this federal amendment and adding "or if offered by the prosecutor;" to Iowa Rule of Evidence 5.412(*b*)(1)(B). Task Force members indicated that the federal rule mirrors existing Iowa practice, which the current rule does not reflect. For instance, prosecutors currently introduce such evidence in human trafficking cases or to show a pattern of behavior in child sexual abuse cases.

5. Rape Shield Procedural Requirements: The Task Force recommends adopting the procedural requirements for notice, motion, and hearing set out in the federal rape shield rule. The notice and hearing provisions of the Iowa rule are based on the original version of the federal rape

shield rule. Those federal procedural requirements were significantly amended by the 1994 amendments to the federal rule. The Task Force examined and compared the procedural requirements of the Iowa and federal rule and concluded that the Iowa rule unduly restricts a trial court's discretion to excuse pretrial notice of rape shield evidence. For instance, the federal rule allows the trial court "for good cause" to excuse the 14-day notice period. Fed. R. Evid. 412(c)(1)(B). By contrast, the Iowa rule only permits the court to vary the 14-day period in situations involving newly discovered evidence or newly arisen issues. Iowa R. Evid. 5.412(*c*)(1)(A).

In addition to the "good cause" change, the Task Force recommends deleting the conditional relevance provision in Iowa Rule of Evidence 5.412(*c*)(2)(B). That provision appears to allow the trial court to decide questions of conditional relevance, rather than giving such questions to the jury if supported by sufficient evidence. This provision is confusing and potentially "raises questions of invasion of the right to a jury trial." *See* Fed. R. Evid. 412 advisory committee note to 1994 amendment (explaining elimination of this provision in the federal rule).

Finally, the balancing test in Iowa Rule of Evidence 5.412(*c*)(2)(C) should be deleted. The existing balancing test in rule 5.412(*c*)(2)(C) would be inconsistent with the newly recommended standard for admitting evidence in civil cases and suggest that a court can exclude rape shield evidence even if doing so would violate a criminal defendant's constitutional rights. A criminal defendant who offers rape shield evidence already has the burden of persuading the trial court that it falls within one of the very specific and narrow exceptions in rule 5.412(*b*)(1). And a trial court can still use rule 5.403 to exclude evidence that falls within the criminal exceptions for physical evidence and consent in rule 5.412(*b*)(1)(A) and (B). For those reasons, and in the interest of federal conformity, the majority of the Task Force recommends amending Iowa Rule of Evidence 5.412(*c*) to mirror the federal counterpart. Some members of the Task Force oppose deleting the enhanced balancing provision for fear of lessening victim protection and eliminating trial court guidance.

E. Impeachment with Convictions for Crimes of Dishonesty or False Statement under Rule 5.609(*a*)(2)

Rule 5.609 Impeachment by evidence of a criminal conviction.

a. In general. The following apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

. . . .

(2) For any crime regardless of the punishment, the evidence must be admitted if the ~~crime involved dishonesty or false statement~~ court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

Task Force Comment on Rule 5.609(*a*)(2) Amendments

Under both the Iowa and federal impeachment rules, a witness can be impeached with felony convictions and with convictions for crimes of dishonesty or false statement, regardless of punishment. *See* Iowa R. Evid. 5.609(*a*)(2); Fed. R. Evid. 609(a)(2). Importantly, a trial court has no discretion to prohibit impeachment of a witness with a conviction involving a crime of dishonesty or false statement. This holds true regardless of whether the witness being impeached is a criminal accused or a nonaccused witness in a criminal or civil case. In contrast, the trial court has discretion to allow impeachment with a prior felony conviction and must use a more protective balancing standard if the witness being impeached is the criminal accused. *See* Iowa R. Evid. 5.609(*a*)(1); Fed. R. Evid. 609(a)(1) (both distinguishing between using felony conviction to impeach an accused witness and other witnesses in civil and criminal cases).

In 2006, the federal rule was amended to clarify how a court should determine whether a conviction involves a crime of dishonesty or false statement. Under the federal rule, misdemeanor and felony convictions are per se admissible to impeach any witness (accused or non-accused) only if the trial court "can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2). That is, federal courts require "that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement." Fed. R. Evid. 609 advisory committee note to 2006 amendment. The federal rule thus adopts an "elements of the offense" approach and does not examine whether the prior offense factually involved "dishonesty or false statement." Moreover, under federal practice, theft convictions are not per se admissible under Fed. Rule of Evidence 609(a)(2), since establishing the elements of crimes like larceny, shoplifting, or robbery does not require "proving—or the witness's admitting—a dishonest act or false statement," even if the witness exhibited dishonesty or made a false statement in the process of committing the theft. Fed. R. Evid. 609 advisory committee note to 2006 amendment; *see also* Fed. R. Evid. 609 advisory committee note to 1990 amendment (criticizing "decisions that take an unduly broad view of 'dishonesty' [and admit] convictions such as for bank robbery or bank larceny").

Iowa Rule 5.609(*a*)(2) does not specify how to determine whether "the crime involved dishonesty or false statement." Moreover, under long-standing Iowa precedent, convictions for theft, shoplifting, and burglary are traditionally regarded as "crimes of dishonesty" that are per se admissible to impeach under Iowa Rule of Evidence 5.609(*a*)(2). In *State v. Harrington*, the Iowa Supreme Court acknowledged the division among state and federal courts as to whether crimes of theft and burglary are crimes that per se involve dishonesty or false statement. 800 N.W.2d 46, 51–52 n.4 (Iowa 2011). The *Harrington* court recognized that the Iowa rule was modeled on the federal rule and quoted the federal advisory committee note stating that convictions of theft or robbery should not be per se admissible to impeach. *Id.* at 49 n.1, 51 n.4. Because the issue had not been raised in *Harrington*, however, the court "reserve[d] this potential issue for a case where it is properly argued." *Id.* at 52 n.4. Post-*Harrington* decisions of the Iowa Court of Appeals have continued to apply existing Iowa precedent that includes theft as a crime of dishonesty. *See, e.g.*, *Reed v. State*, No. 17–1680, 2018 WL 6659875, at*2 (Iowa Ct. App. Dec. 19, 2018). Adoption of the federal "elements of the offense" amendment, along with the federal advisory committee notes regarding theft and larceny convictions, might reverse this line of Iowa authority.

The Task Force vigorously debated whether Iowa should adopt the federal elements of the offense approach. A small majority oppose amending the Iowa rule and potentially upsetting established precedent. Those members believe that a witness's prior conviction for theft, regardless of punishment, should always be disclosed to the fact-finder as particularly probative of credibility. Other Task Force members, however, support the federal approach because it clarifies which convictions fall within rule 5.609(*a*)(2) and restores the trial court with discretion regarding impeachment with prior convictions. Public comments concerning this amendment were equivocal. The Iowa Supreme Court will thus need to decide whether to adopt, reject, modify, or solicit additional public comment concerning this impeachment provision.

F. Admissibility of Expert Testimony under Rule 5.702

Rule 5.702 Testimony by expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.;

b. the testimony is based on sufficient facts or data;

c. the testimony is the product of reliable principles and methods; and

d. the expert's opinion reflects a reliable application of ~~the expert has reliably applied~~ the principles and methods to the facts of the case.

Task Force Comment on Rule 5.702 Amendments

Iowa has not amended rule 5.702 to include the gate-keeping provisions in sections (b) through (d) of Federal Rule of Evidence 702. Those provisions were added in 2000 after the U.S. Supreme Court's *Daubert* trilogy. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The 2000 federal amendments "affirm[ ] the trial court's role as gatekeeper and provide[ ] some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702 advisory committee note to 2000 amendment. Additionally, in June 2022, the Standing Committee on the Rules of Practice and Procedure approved two additional changes to Federal Rule of Evidence 702 (revised after public comments and double-underlined above). *See* Report of the Standing Committee on Rules of Practice and Procedure 891 (June 7, 2022) ["June 2022 Standing Committee Report"]. If approved by the Judicial Conference in September and the United States Supreme Court the following spring, the additional amendments would become effective on December 1, 2023. The 2023 amendments would explicitly place the burden on the proponent of expert testimony to demonstrate to the trial court that each of Rule 702's gatekeeping requirements are "more likely than not." *See* Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure 7 (May 15, 2022) ["May 2022 Advisory Committee Report"]

(noting erroneous view that reliability and sufficiency of expert's opinion are questions of weight, not admissibility, and mistaken view that expert testimony is presumptively admissible). Additionally, the pending federal amendments focus attention on the expert's opinions and conclusions; requiring the proponent to demonstrate that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." *See* June 2022 Standing Committee Report, at 891. This would ensure that an expert's conclusions "stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." May 2022 Advisory Committee Report, at 6 (quoting omitted). Both the 2000 and the proposed 2023 federal amendments are reflected above.

Iowa courts generally take a liberal and flexible approach to the admissibility of expert opinions and, like many other state courts, the Iowa Supreme Court has not fully embraced *Daubert*. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 533 (Iowa 1999) (en banc) (rejecting *Daubert* as the definitive test concerning the admission of expert testimony); *see also Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 686–87, 691 (Iowa 2010) (applying *Daubert*-like rigor for complex scientific testimony).

The Task Force remains deeply divided on whether the court should adopt the gate-keeping provisions of the federal rule. Those opposed to the provisions argue that Iowa's liberal approach toward expert testimony works well in most cases and that we should not fix something if it's not broken. Opponents fear that the amendments would require expensive and time-consuming *Daubert* hearings, invade the jury's prerogative to determine the credibility and weight given to expert testimony, unnecessarily increase a trial court's burden when administering trials, and increase the risk of erroneously excluding expert testimony in criminal cases. Those in favor of the provisions argue that the federal rule does not require *Daubert* hearings, that the reliability provisions are appropriate considerations that Iowa law already requires, that the gatekeeping provisions were added to protect criminal defendants from unreliable forensic testimony, and that trial courts retain ample discretion regarding *how* they "gatekeep." Trial courts do, however, (at least according to amendment proponents) need further guidance as to *what* gets admitted under the guise of "expert" testimony and that such evidence should meet minimum standards of reliability before being presented to the jury, which the amended rule facilitates.

The Task Force did not reach a consensus concerning these amendments. Thus, the Iowa Supreme Court must decide whether to accept, reject, modify, or solicit further public input regarding the federal gatekeeping provisions. Given the likely future adoption of the 2023 federal amendments to Federal Rule of Evidence 702, the Task Force recommends the consideration of those pending federal proposals at this time as well.

G. Bases of Expert's Testimony under Rule 5.703

Rule 5.703 Bases of an expert's opinion testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the

opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Task Force Comment on Rule 5.703 Amendments

Under both the federal and state expert testimony rules, an expert can rely upon even inadmissible hearsay in forming the expert's opinion so long as "experts in the particular field would rely on those kinds of [otherwise inadmissible] facts or data in forming an opinion on the subject." Iowa R. Evid. 5.703; *see also* Fed. R. Evid. 703. In 2000, Federal Rule of Evidence 703 was amended to provide "a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Fed. R. Evid. 703 advisory committee note to 2000 amendment. Under the federal rule, although the facts or data on which an expert reasonably relies "need not be admissible for the opinion to be admitted" if the underlying facts or data are inadmissible, "the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. In other words, under the federal rule, an expert can base his opinion on otherwise inadmissible hearsay if it is of a type reasonably relied on by other experts in the field and then disclose that opinion or inference to the jury. The proponent of the opinion may not disclose inadmissible supportive data, however, unless the proponent convinces the trial court that such disclosure is necessary to assist the jury in evaluating the expert's opinion. If the otherwise inadmissible data is admitted under this balancing process, the trial court should give a limiting instruction cautioning the jury not to use the information for substantive purposes. *See* Fed. R. Evid. 703 advisory committee note to 2000 amendment. The limitation on disclosure of underlying facts or data does not apply if the basis information is otherwise admissible or if it is admitted for a purpose other than assisting the jury in evaluating the expert's opinion.

The Task Force agrees that a litigant should obtain trial court approval before disclosing otherwise inadmissible evidence for the purpose of assisting the jury to evaluate the opinion of an expert who has relied upon that inadmissible evidence in forming the expert's opinion.

H. Court-Appointed Experts under Rule 5.706(*a*)

Rule 5.706 Court-appointed expert witnesses.

a. Appointment process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

. . . .

Task Force Comment on Rule 5.706(*a*) Amendments

Iowa Rule of Evidence 5.706 substantially mirrors its federal counterpart, except that the federal provision permits the court, as well as the litigants, to initiate the appointment process. *Compare* Fed. R. Evid. 706(a) (permitting "[o]n a party's motion or on its own"), *with* Iowa R.

Evid. 5.706(*a*) (requiring "a party's motion"). It is generally accepted that courts possess inherent power to appoint and call expert witnesses. *See* Fed. R. Evid. 706 advisory committee note (noting that "inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned"). The Task Force agreed that the rule on court-appointed experts should explicitly permit a trial court to initiate the appointment process "on its own" without a party motion.

The Iowa and federal rules also differ slightly regarding compensation of court-appointed experts. *Compare* Fed. R. Evid. 706(c) (separating criminal cases and civil cases involving just compensation under the Fifth Amendment from "any other civil cases"), *with* Iowa R. Evid. 5.706(*c*) (using same compensation standard for all cases). The Task Force does not believe it necessary to distinguish between the compensation paid to court-appointed experts in different criminal and civil cases and thus recommends retaining the compensation provisions of Iowa Rule of Evidence 5.706(*c*).

I. Prior Consistent Statements under Rule 5.801(*d*)(1)

Rule 5.801 Definitions that apply to this Article; exclusions from hearsay.

. . . .

d. Statements that are not hearsay. A statement that meets the following conditions is not hearsay:

(1) *A declarant-witness's prior statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

Task Force Comment on Rule 5.801(*d*)(1)(B) Amendments

Both the federal and Iowa hearsay rules exclude certain prior consistent statements made by testifying witnesses from the definition of hearsay. *See* Iowa R. Evid. 5.801(*d*)(1)(B); Fed. R. Evid. 801(d)(1)(B). Prior to 2014, both rules applied only to prior consistent statements offered "to rebut an express or implied charge that the declarant recently fabricated [the declarant's testimony] or acted from a recent improper influence or motive in so testifying." *See* Iowa R. Evid. 5.801(*d*)(1)(B)(i); Fed. R. Evid. 801(d)(1)(B)(i). In 2014, however, the federal rule was

amended to permit nonhearsay use of a prior consistent statement "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Fed. R. Evid. 801(d)(1)(B)(ii). Federal practice thus now permits substantive use of prior consistent statements that rebut attacks on a witness's credibility for reasons other than "recent fabrication or improper motive or influence." *See* Fed. R. Evid. 801 advisory committee note to 2014 amendment. For example, the federal rule would now admit prior consistent statements to explain an apparent inconsistency in the witness's testimony or to rebut a charge of faulty memory. Under the federal practice, those prior consistent statements are now admissible as non-hearsay (i.e., for the truth of the matter asserted) and not just for the limited purpose of rehabilitating the witness. *See* Fed. R. Evid. 801 advisory committee note to 2014 amendment.

A majority of the Task Force recommends amending the Iowa rule to allow this additional nonhearsay use of a prior consistent statement made by a testifying witness whose credibility has been attacked on grounds other than recent fabrication or improper motive. The amendment arguably would have given the Iowa Supreme Court a more straightforward path to its recent decision in *State v. Fontenot*, 958 N.W.2d 549, 555–65(Iowa 2021). The amendment would allow Iowa courts to admit such statements for the truth of the matter asserted, rather than, under current practice, only for the limited nonhearsay purpose of rehabilitating the witness.

The amendment would eliminate the pre-motive timing requirement for prior consistent statements that rebut attacks on a witness's credibility for reasons other than recent fabrication or improper influence or motive. Importantly, the prior statement must still be consistent with the witness's trial testimony, it can be used only if and after a witness's credibility has been attacked, and it can be used as non-hearsay only if the prior consistent statement does really rebut the specific attack on the witness's credibility. A prior consistent statement cannot be used just to show that the witness repeated the same inaccurate or biased statements on prior occasions. It could, however, be used to show that the witness said the same thing when the witness did not have a motive to fabricate (hence, the premotive requirement). Additionally, a prior consistent statement could be used to put a prior inconsistent statement in context and demonstrate that it really was not inconsistent with the witness's testimony. Or, it could show that a witness whose memory has been attacked said the same thing when the matter was still clearly fresh in the witness's mind. See Federal Rule of Evidence 801 advisory committee note to the 2014 amendment for further explanation of the recent prior consistent statement provision.

J. Bootstrapping: Statements of Party-Opponent under 5.801(*d*)(2)

Rule 5.801 Definitions that apply to this Article; exclusions from hearsay.

. . . .

d. Statements that are not hearsay. A statement that meets the following conditions is not hearsay:

. . . .

(2) *An opposing party's statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy. ~~Prior to admission of hearsay evidence under rule 5.801(d)(2)(E), the trial court must make a preliminary finding, by a preponderance of evidence, that there was a conspiracy, that both the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy.~~

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Task Force Comment on Rule 5.801(*d*)(2) Amendments

1. Bootstrapping: This amendment does not affect the types of or foundation for the various statements of a party-opponent listed in Iowa Rule of Evidence 5.801(*d*)(2). Instead, the amendment recognizes existing Iowa practice and explicitly states that the trial court can consider the alleged hearsay statement itself in ruling on whether a statement qualifies as a statement of a party-opponent. *See* Iowa R. Evid. 5.104(*a*) (providing that trial courts are not bound by evidence rules, except those on privilege, in deciding preliminary questions of admissibility); *see also Bourjaily v. United States*, 483 U.S. 171, 181 (1987) (holding that court could consider co-conspirator's statement itself in deciding whether it should be admitted as a statement of a party-opponent under Federal Rule of Evidence 104(a)). The recommended amendment to rule 5.801(*d*)(2) recognizes that the trial court can consider the hearsay statement itself in determining whether it qualifies as an authorized admission under Iowa Rule of Evidence 5.801(*d*)(2)(C), a statement of an opposing party's agent or employee under Iowa Rule of Evidence 5.801(*d*)(2)(D), or a statement of a co-conspirator under Iowa Rule of Evidence 5.801(*d*)(2)(E). However, the provision explicitly states that the hearsay statement alone cannot establish the foundation for those three types of party-opponent statements. Rather, additional independent evidence is required. *See* Fed. R. Evid. 801 advisory committee note to 1997 amendment.

2. Co-Conspirator Preliminary Findings: The Task Force recommends deleting the preliminary foundation for co-conspirator's statements currently set out in Iowa Rule of Evidence 5.801(*d*)(2)(E). None of the other hearsay exceptions or exclusions, including other types of party-opponent statements, dictate what preliminary questions of fact a trial court must find before admitting hearsay. That question is generally governed by rule 5.104(*a*). The amendment does not make any substantive change in the preliminary foundation required for the co-conspirator exclusion.

K. Ancient Documents Hearsay Exception and Authentication under Rules 5.803(16) and 5.901(*b*)(8)

Rule 5.803 Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness. The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . . .

(16) *Statements in ancient documents*. A statement in a document that ~~is at least 30 years old~~ that was prepared before January 1, 1998, and whose authenticity is established.

. . . .

Rule 5.901 Authenticating or identifying evidence.

a. In general. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

b. Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

. . . .

(8) Evidence about ancient documents or data compilations. For a document or data compilation, evidence that it:

(A) Is in a condition that creates no suspicion about its authenticity;

(B) Was in a place where, if authentic, it would likely be; and

(C) Is at least ~~30~~ 20 years old when offered.

. . . .

Task Force Comment on Rule 5.803(16) and Rule 5.901(*b*)(8) Amendments

1. Ancient Documents Hearsay Exception: Iowa and the federal courts have always differed concerning the period of time required for a record to qualify under the "ancient" documents hearsay exception. *Compare* Iowa R. Evid. 5.803(16) (30-years-old), *with* former Fed. R. Evid. 803(16) (20-years-old) [pre-2017 rule]. A 2017 amendment to the federal ancient documents hearsay exception, however, resulted in an even more dramatic difference in the state and federal exceptions.

In today's age of electronically stored information, documents likely exist in multiple digital formats that outlive their authors and can be accessed in virtual perpetuity. The federal advisory committee was concerned that excluding a record from the hearsay rule based on nothing more than its age could turn the hearsay exception into a repository for old, yet unreliable, hearsay. *See* Fed. R. Evid. 803 advisory committee note to the 2017 amendment. The federal rule has thus been amended to remove the absolute 20-year period and instead limit the hearsay exception to documents "prepared before January 1, 1998, and whose authenticity is established." Fed. R. Evid.

803(16). The federal amendment thus preserves the ancient documents exception for certain cases, such as those involving environmental pollution, toxic torts, or some sexual assaults, where it might be more difficult to obtain relevant information from sources other than older documents that might not exist in electronic form. There is arguably no similar need for an ancient documents exception after electronically stored information became more prevalent and easily retrievable. The advisory committee selected January 1, 1998, as the cut-off date for when electronically stored information became prevalent.

The digital longevity and increasing prevalence of electronic records convinced the Task Force to recommend a similar amendment to the Iowa ancient documents hearsay exception. Using the cut-off date will prevent litigants from evading hearsay scrutiny of a document based solely on the record's age. Instead, for documents prepared after January 1, 1998, litigants will need to rely upon one of the other hearsay exceptions or exclusions (which are often based upon reliability and necessity rationales) to admit a record for the truth of the matter asserted.

2. Authentication of Ancient Documents: Litigants can still use a document's age to authenticate the record under Iowa Rule of Evidence 5.901(*b*)(8) provided the "ancient" document "[i]s in a condition that creates no suspicion about its authenticity," and "[w]as in a place where, if authentic, it would likely be." *Id.* Authentication is and should be a minimal threshold—only requiring "evidence sufficient to support a finding that [an] item is what the proponent claims it [to be]." Iowa R. Evid. 5.901(*a*). The temporal requirements in the Iowa and federal authentication provisions for ancient documents currently differ. *Compare* Iowa R. Evid. 5.901(*b*)(8) (document must be at least 30 years old), *with* Fed. R. Evid. 901(*b*)(8) (document must be at least 20 years old). In the interest of uniformity, the Task Force recommends conforming the Iowa authentication rule to the federal 20-year period.

L. Statements against Penal Interest and Corroborating Circumstances under Rule 5.804(*b*)(3)

Rule 5.804 Exceptions to the rule against hearsay—when the declarant is unavailable as a witness.

. . . .

b. The exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

. . . .

(3) *Statement against interest*. A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to

expose the declarant to criminal liability ~~and is offered to exculpate the defendant~~.

. . . .

Task Force Comment on Rule 5.804(*b*)(3) Amendments

Iowa Rule 5.804(*b*)(3) is identical to Federal Rule 804(b)(3) except with respect to the corroborating circumstances required for statements against penal interest (i.e., that expose the declarant to criminal liability). The federal rule requires corroborating circumstances for all statements against penal interest offered in criminal cases, whether exculpatory or inculpatory. *See* Fed. R. Evid. 804(b)(3)(B) (requiring "corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability"). The federal rule thus puts the accused and the prosecution on an even playing field concerning statements against penal interest. As explained by the federal advisory committee, "[a] unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception." Fed. R. Evid. 804(b)(3) advisory committee note to 2010 amendment. In contrast, Iowa Rule of Evidence 5.804(*b*)(3) currently requires corroboration of statements against penal interest only when offered by the accused for exculpatory purposes. Under the existing Iowa rule, a prosecutor seeking to offer a statement against penal interest that inculpates the accused (including statements of co-conspirators) need not present any corroboration.

The Task Force recommends adopting the federal approach. All statements against penal interest offered in a criminal case should be supported by corroborating circumstances regardless of whether they are inculpatory or exculpatory or whether they are offered by the prosecutor or the accused. Moreover, this corroborating circumstances amendment will have limited applicability—applying only to statements against *penal* interest offered in *criminal* cases.

M. Residual Hearsay Exception under 5.807

Rule 5.807 Residual exception.

a. In general. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~ admissible under a hearsay exception in rule 5.803 or 5.804:

(1) The statement ~~has equivalent circumstantial guarantees of trustworthiness;~~ is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

~~(2) It is offered as evidence of a material fact;~~

(~~3~~2) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~.

~~(4) Admitting it will best serve the purposes of these rules and the interests of justice.~~

b. Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Task Force Comment on Rule 5.807 Amendments

1. Threshold Requirements: The 2019 federal amendment reduces the threshold requirements of the catch-all hearsay exception from four to only two: trustworthiness and necessity. The 2019 amendment deleted both the materiality and the "interests of justice" requirements because they are redundant of existing rules such as Federal Rules 102 and 401. The Task Force recommends a similar streamlining of the foundation requirements for Iowa's residual hearsay exception—Iowa Rule of Evidence 5.807. Cases construing the Iowa rule have consistently viewed trustworthiness and necessity as the two core requirements of the exception (along with the procedural notice requirement) and give the materiality and justice requirements scant attention. *See, e.g.*, *State v. Veverka*, 938 N.W.2d 197, 203–04 (Iowa 2020). Other Iowa rules already require that evidence be "material" and serve the ends of justice. *See* Iowa R. Evid. 5.102 (requiring evidence rules be construed "to the end of ascertaining the truth and securing a just determination"); *id.* r. 5.401 (requiring that relevance concern a fact "of consequence in determining the action").

2. Trustworthiness: As to **"**trustworthiness" the amended federal residual exception no longer requires that a court find "equivalent circumstantial guarantees of trustworthiness." The federal advisory committee deemed the "equivalence" standard "difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all)." *See* Fed. R. Evid. 807 advisory committee note to 2019 amendment. Instead, the streamlined residual exception now focuses on whether the hearsay statement is supported by "sufficient guarantees of trustworthiness," considering the circumstances under which the statement was made and the existence, strength, and quality of corroborating evidence. *See* Fed. R. Evid. 807(a)(1). The amendment adopts "a uniform approach [that] recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this [residual] exception." Fed. R. Evid. 807 advisory committee note to 2019 amendment. The Task Forces agrees and recommends adopting this federal iteration of trustworthiness.

3. Necessity: The Task Force also agrees with the decision to retain the necessity requirement of the federal and Iowa rules. Thus, to be admissible under the residual hearsay exception, the proponent must demonstrate that the evidence is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a)(2); Iowa R. Evid. 5.807(*a*)(3) (5.807(*a*)(2) (if amended)). The necessity requirement "prevent[s] the residual exception from being used as a device to erode the categorical exceptions,"

Fed. R. Evid. 807 advisory committee note to 2019 amendment, and continues to ensure that it is used "very rarely, and only in exceptional circumstances." Fed. R. Evid. 803(24) advisory committee note to 1974 enactment.

4. Near Misses: The Iowa catch-all exception still ambiguously applies to statements "not specifically covered by a hearsay exception in rule 5.803 or 5.804." Iowa R. Evid. 5. 807(*a*). This same language in the former federal residual exception created some confusion regarding whether "near misses"—hearsay that is arguably covered by, but not admissible under, a standard exception—can still be admitted under the federal residual exception. For example, can a court admit grand jury testimony under the residual exception even if it is "specifically covered by" and inadmissible under the former testimony exception because the party against whom it is offered had no opportunity to cross-examine the grand jury witness? *See* Iowa R. Evid. 5.804(*b*)(1) (requiring that party-opponent have "opportunity and similar motive to develop" prior testimony). The federal rule would affirmatively answer this question, providing that the residual exception can be used "even if the statement is *not admissible under* a hearsay exception in Rule 803 or 804." Fed. R. Evid. 807(a) (emphasis added); *see also* Fed. R. Evid. 807 advisory committee note to 2019 amendment (stating that amendment "clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a 'near miss,'" and "take into account the reasons that the hearsay misses the admissibility requirements of the standard exception"). There is little Iowa precedent discussing this near miss controversy and the Task Force recommends eliminating potential confusion by adopting the 2019 federal amendment.

5. Notice: The 2019 amendments to the residual exception updated the notice requirement in Federal Rule of Evidence 807(b) by requiring that the proponent disclose "in writing" a sufficiently specific description of the "substance" of the hearsay statement to be offered under Rule 807. This written (including electronic) notice must be given "before the trial or hearing unless the court for good cause excuses the lack of advanced notice. The Task Force recommends that the notice provision of the Iowa rule be similarly strengthened, while also explicitly recognizing a "good cause" excuse for failure to provide such advanced notice.

N. Self-Authentication of Electronically Stored Information

Rule 5.902 Evidence that is self-authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity to be admitted:

. . . .

(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 5.902(11) or (12). The proponent must also meet the notice requirements of rule 5.902(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 5.902(11) or (12). The proponent also must meet the notice requirements of rule 5.902 (11).

Task Force Comment on New Iowa Rules 5.902(13) and 5.902(14)

Federal Rules of Evidence 902(13) and 902(14), which were added to the federal rules in 2017, permit self-authentication of computer-generated evidence through a certification procedure similar to that now allowed for business records. Those 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." Like the business record provisions in Rules 902(11) and (12), these new rules permit litigants to 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. Rs. Evid. 902(13) & (14) advisory committee note to 2017 amendment.

Under these new provisions, a party must give advance notice of its intent to self-authenticate digital evidence. 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. Rs. Evid. 902(13) & (14) advisory committee note to 2017 amendments. Certifications under 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. *See* Fed. Rs. Evid. 902(13) & (14) advisory committee note to 2017 amendment.

The Task Force recommends adopting these self-authentication provisions for electronically stored and generated information as new Iowa Rules of Evidence 5.902(13) and 5.902(14). The new provisions would expedite and simplify the process of authenticating an increasingly common form of evidence. The provisions would not apply to all electronically stored information, but only to records "generated by an electronic process or system" or "copied from an electronic device, storage medium, or file." The certification must contain information sufficient to authenticate the records if offered at trial and opponents retain the ability to challenge that evidence. *See* Iowa R. Evid. 5.901(11) (providing opponent "fair opportunity to challenge" certified records); *see also* Fed. Rs. Evid. 902(13) & 902(14) advisory committee note to 2017 amendment.

III. Conclusion

The Task Force presents the above proposed amendments, along with the explanatory Task Force Comments, for the Iowa Supreme Court's consideration. The proposals concerning Iowa Rules of Evidence 5.404(*a*) [victim character evidence], 5.404(*b*) [pretrial notice of extrinsic offense evidence], 5.408(*a*)(1) [compromise statements], 5.412 [rape shield rule], 5.703 [disclosure of expert's inadmissible basis], 5.706 [court-appointed expert], 5.801(*d*)(1)(B) [prior consistent statement], 5.801(*d*)(2) [bootstrapping regarding party-opponent statements], 5.803(16) [ancient documents hearsay exception], 5.804(*b*)(3) [statements against penal interest exception],

5.807 [residual exception], 5.901(*b*)(8) [ancient documents authentication], 5.902(13) [self-authentication of electronically generated information], and 5.902(14) [self-authentication of electronically copied information], received unanimous or near unanimous Task Force support. The Task Force disagreed concerning Iowa Rules 5.408(*a*)(2) [settlement negotiations with public office], 5.412(*c*)(2)(c) [rape shield's procedural balancing test], 5.609(*a*)(2) [impeachment with convictions involving dishonesty or false statement], and 5.702 [expert gate-keeping provisions]. The court may wish to adopt, table, reject, or gather additional public comment regarding those more controversial amendments.

The Task Force does not recommend amending several other Iowa rules that currently differ from their federal counterparts—Iowa Rules of Evidence 5.407 [subsequent remedial measures], 5.409 [offers to pay expenses], 5.704 [ultimate opinion on accused's mental state], 5.803(8) [public records hearsay exception], 5.804(*a*)(5) [deposition requirement for declarant's unavailability], or 5.804(*b*)(2) [dying declaration exception]. Unlike many of the other rules that the Task Force recommends changing, these rules reflect well-established and considered policy differences, rather than inattention or inertia. Similarly, the Task Force declined to revisit the controversial federal rules that admit, for any relevant purpose, similar offenses in sexual assault or child molestation criminal and civil cases. *See* Fed. Rs. Evid. 413–415.

Finally, in addition to the pending amendments to Federal Rule of Evidence 702 [expert testimony], the Standing Committee on the Rules of Practice and Procedure has approved amendments to two other federal rules—Federal Rules of Evidence 106 [completeness] and 615 [witnesses]. See 2022 Standing Committee Report for the text and explanation of those proposals. If approved by the Judicial Conference and the U.S. Supreme Court, those amendments would also become effective December 1, 2023. The Task Force suggests that the Iowa Supreme Court consider the 2023 amendments to Federal Rule of Evidence 702 while deciding whether to adopt the related *Daubert* gate-keeping provisions. However, the Task Force believes it prudent to wait until the other federal proposals become effective before considering any changes to Iowa Rules of Evidence 5.106 and 5.615. In any event, the court should consider reconstituting its advisory committee on the Iowa Rules of Evidence to evaluate future amendments.

The Task Force appreciates the opportunity to assist in this important rule-making project of the Iowa Supreme Court. It remains available to answer any of the court's questions or to conduct further study of these or other future amendments.