



Mangrum On Nebraska Evidence 2021

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Mangrum on Nebraska Evidence
by
Richard Collin Mangrum
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Friday, September 10, 2021
8:00 a.m. – 4:00 p.m.
6.5 CLE Hours, 1.0 Ethics

Registration: \$225

Creighton University Harper Center
602 N 20th St
Omaha, NE

Presented by R. Collin Mangrum, JD, SJD

Professor and Endowed Chair, AA and Ethel Yossem Endowed Chair in Legal Ethics
While attending the University of Utah School of Law, Professor Mangrum was associate editor of the Law Review. He was in private practice in Salt Lake City from 1975-1977; was Rotary International Foundation Fellow in 1977 and in 1978; and he joined the Creighton law faculty in 1979. He received a visiting scholar appointment to the University of Edinburgh in the fall of 1986. He has taught as a visiting professor at the University of Utah law School in 1985, 1996, 2004, 2006 and 2013. He was a visiting professor for Touro Law School at Hebrew University in Jerusalem for the summer of 2008.

MANGRUM ON NEBRASKA EVIDENCE

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8:00 a.m. – 4:00 p.m.

MORNING SESSION

8:00-9:00: Article 8: Hearsay and Confrontation: Breaking Down Hearsay Problems

Step 1: Does the evidence include an out of court statement?

- Oral
- Written
- Assertive conduct

Step 2: By a person?

- Animals not subject to hearsay
- Equipment readouts not subject to hearsay unless orchestrated
- Signs not subject to hearsay

Step 3: Does the “statement” assert a fact? (Is it assertive?)

- Questions are seldom assertive
- Commands are seldom assertive
- Implied assertions or nonassertive conduct may not be assertive

Step 4: Is the statement offered for truth of the fact asserted?

- **State v. McCave**, 282 Neb. 500 (2011)(Verbal acts are nonhearsay)
- **In re Hla H.**, 25 Neb. App. 118 (2017): A letter offered to show that Hla and his family had been referred by the County to community-based resource)
- **Calmat v. U.S. Dept. of Labor**, 364 F.3d (9th Cir. 2004)(Effect on hearer)
- **State v. Howell**, 26 Neb. App. 842 (2019)(Statements of confidential informant admissible to demonstrate why Gratz went to the residence).
- **Bridges v. State**, 247 Wis. 350 (1945)(Independently established facts)
- **State v. Peeler**, 126 Ariz. 254 (Ct. App. 1980)(Independent rational significance)
- **State v. Rodriguez**, 272 Neb. 930 (2007)(Impeachment)
- **State v. Robinson**, 271 Neb. 698 (2006)(Falsity)

Step 5: Is there an 801 statutory nonhearsay category?

- Statements for In-Court Declarants of Prior Statements: (Available for cross examination, even though may not recall prior statement)
 - 801(4)(a)(1) Prior Inconsistent Statements:
 - Beware of the “no-artifice” rule

- **Nebraska 29-1917: State v. Castor**, 257 Neb. 572 (1999) (Inconsistent deposition testimony admissible only for impeachment in criminal cases)
- 801(4)(a)(2) Prior Consistent Statements:
 - **Tome v. U.S.**, 513 U.S. 150 (1995)
 - **State v. Morris**, 251 Neb. 23 (1996): The timing requirement
 - **State v. Smith**, 241 Neb. 311 (1992)(Consistent statement in diary cannot be offered on direct examination)
 - **Werner v. County of Platte**, 284 Neb. 899 (2013)(Cannot offer prior consistent statements until attacked)
 - **State v. Hibler**, 302 Neb. 325 (2019)(“The diary rebutted Hibler’s argument that J.H.’s report of sexual assault was recently fabricated.”)
- 801(4)(a)(3) Pretrial Identification: Recent Amendment in Nebraska
 - **State v. McCurry**, 296 Neb. 40,63-64 (2017)(The Court rejected the due process argument that defense should be able to get in, even if P cannot)
 - **Perry v. New Hampshire**, 132 S.Ct. 716 (2012)(In-court ID permissible, unless police misconduct in earlier pretrial ID may have affected reliability of in-court ID); see also, **State v. Nolan**, 283 Neb. 50 (2012).
 - **U.S. v. Telfaire**, 469 F.2d 552 (D.C. Cir. 1972)(Jury instruction on the issues of reliability of in-court identification testimony)
 - **U.S. v. Owen**, 484 U.S. 554 (1988)(Pretrial ID admissible even if the witness cannot make an in-court ID)
 - **State v. Fuentes**, 302 Neb. 919 (2019)(Approving an identification from a photo array of six individuals)
 - **State v. Cosey**, 303 Neb. 257 (2019)(An identification from a single photo in a controlled buy admissible)
- Admissions:
 - **Mahlandt v. Wild Canid Surv. & Research**, 588 F.2d 626 (8th Cir. 1978)(admissions need not be based on firsthand knowledge).
 - **Ficke v. Wolken**, 291 Neb. 482 (2016)(any act or conduct which may fairly be interpreted as an admission is admissible)
 - **State v. Britt**, 293 Neb. 381 (2016)(conspiracy does not extend to coverup unless the coverup was part of the original conspiracy)
 - **State v. Honken**, 25 Neb. App. 352 (2017)(A coconspirator’s continuing participation is presumed unless affirmative withdrawal).
 - **Jenkins v. Anderson**, 447 U.S. 231 (1980)(If D testifies, pre-arrest silence can be used for impeachment)
 - **U.S. v. Frazier**, 408 F.3d 1102 (8th Cir. 2005)(Unsolicited post-arrest, pre-Miranda silence may be admissible under limited circumstances)
 - **State v. Robinson**, 271 Neb. 698 (2006)(Personal admissions)
 - **Wisner v. Vandelay Investments**, 300 Neb. 825 (2018)(An unamended admission made in a pleading is a judicial admission.)
 - **State v. Momsen**, 210 Neb. 45 (1981)(Judicial admissions: bound by deposition answers)
 - **Kaiser v. Union Pacific RR. Co.**, 303 Neb. 193 (2019)(Deposition admission binding even against a supplemental “corrective” affidavit)
 - **TNT Cattle Co. v. Fife**, 304 Neb. 890 (2020)(“ A judicial admission must be unequivocal, deliberate, and clear); see also, **Western Ethanol Co. v. Midwest Renewable Energy**, 305 Neb. 1 (2020)

- **State v. Barber**, 28 Neb. App. 820 (2020) (“Judicial admissions also apply in criminal cases to the in-court admissions of the accused.”)
- **In re Interest of Donald B. & Deven B.**, 27 Neb. App. 126 (2019)(In court admission relative to pleadings binding in a parental rights case),
- **Ewers v. Saunders County**, 298 Neb. 944 (2018)(“[A] trial court is obligated to give effect to the provisions of § 6-336 which require that the matter be deemed admitted” if no denial to a request for admission)
- **Jackson v. Denno**, 378 U.S. 368 (1964) (pretrial voluntariness of a confession an issue for the court: See 104(3)(a))
- **Grace United Methodist Church v. City of Cheyenne**, 427 F.3d 775 (10th Cir. 2005)(Firsthand knowledge relaxed for admissions)
- **American Express Centurion Bank v. Scheer**, 25 Neb. App. 784, 788 (“Given the absence of any objection by Scheer for 3 years, the evidence was sufficient to establish an account stated and that the amount claimed was correct.”)
- **State v. Huston**, 302 Neb. 202 (2019)(Contextual statements by third persons are admissible with conversation with a party; see also **State v. Rocha**, 295 Neb. 716 (2017).
- **State v. Trice**, 292 Neb. 482, 494 (2016)(Adoptive admission from a jail call with his father regarding self-defense theory)
- **State v. Copple**, 224 Neb. 672 (1987)(Foundational element of co-conspirator’s statement can be established by a prima facie or threshold standard)
- **Bourjaily v. U.S.**, 483 U.S. 71(1987)(Each foundational facts for the exception has to be established by preponderance)
- **State v. Henry**, 292 Neb. 834 (2016)(Text messages in the context of a conspiracy to commit criminal acts are nonhearsay and the “in furtherance” requirement continues until the central purposes attained, but not a mere cover-up)
- **Orr v. Bank of America**, 285 F.3d 764 (9th Cir. 2002)(Discover response and “authorized statement”)
- **State v. Rocha**, 295 Neb. 716 (2017); **State v. Heng**, 25 Neb. App. 317 (2017)(Contextual Statements in Police Interrogations)
- **State v. Honken**, 25 Neb. App. 352, 361 (2017)(“a coconspirator’s continuing participation is presumed unless the conspirator demonstrates affirmative withdrawal from the conspiracy.”)

Step 6: Is the statement testimonial (Confrontation)(criminal case)

- **Ohio v. Clark**, 135 S. Ct. 2173 (2015) (Primary purpose test)
- **State v. Britt**, 283 Neb. 600 (2012)(certificate of calibration for alcohol breath simulator solution does not violate confrontation)
- **State v. Krannawitter**, 305 Neb. 66 (2020)(Certificates of analysis of calibration verification are subject to confrontation challenge)
- **State v. Liebel**, 286 Neb. 725 (2013)(DMV records are nontestimonial to prove that he had a revoked license)
- **State v. Foster**, 286 Neb. 826, 852 (2013)(Statements outside justice system nontestimonial)
- **State v. Vaught**, 268 Neb. 316 (2004)
- **State v. Smith**, 302 Neb. 154 (2019)(Accused must be allowed to view the child victim testifying, but the observation may be remote)

Step 7: Does the Assertive Statement Fit within an 803 exception?

- 803(1): Present sense impression: **State v. Vaught**, 268 Neb. 316 (2004)
- 803(2): Excited Utterance
 - **Pantano v. American Blue Ribbon Holdings**, 303 Neb. 156 (2019)(In a slip and fall case a victim’s statement of the circumstances of the fall made while crying in pain admissible as an excited utterance).
 - **State v. Lindberg**, 25 Neb. App 515 (2018)(an on-scene police investigative interview of a domestic violence victim; defense calling the witness to have her recant waived Confrontation).
 - **State v. Nolt**, 298 Neb. 910 (2018)(Statements in an ambulance by victim to police qualified as excited utterance because made under the stress of being shot).
 - **State v. Hale**, 290 Neb. 70 (2015)(Excited utterance)
 - **State v. Pullens**, 281 Neb. 828 (2011)
 - **Werner v. County of Platte**, 284 Neb. 899 (2012)
 - **State v. Smith**, 286 Neb. 856 (2013)
- 803(3): Then Existing State of Mind
 - **Mutual Life v. Hillmon**, 145 U.S. 285 (1892)(I am going to Crooked Creek Colorado with Hillmon)
 - **Fite v. Amco Tools**, 199 Neb. 353 (1977): 909:77) (“I’m off to work” looking forward)
 - **Shepard v. U.S.**, 290 U.S. 96 (1933)(909:78)(“Dr. Shepherd has been poisoning me”—cannot look backwards to something remembered)
- 803(4): Medical Diagnosis and Treatment
 - **State v. Vigil**, 283 Neb. 129 (2012)(admitting a Nebraska Child Advocacy Center interview of Statement for diagnosis and treatment)
 - **State v. Herrera**, 289 Neb. 575 (2015)
 - **Ohio v. Clark**, 135 S. Ct. 2173 (2015)
 - **Steele v. State**, 42 N.E.3d 138 (2015)(Domestic violence)
 - **State v. Jedlicka**, 297 Neb. 276 (2017)(Statements to a forensic interviewer of a child abuse victim are admissible if partially, for purposes of medical diagnosis and treatment)
- 803(5): Past Recollection Recorded
 - **State v. Cervantes**, 3 Neb. App. 95 (1994)(Past Recollection Recorded foundation)
- 803(6): Business records
 - Regularly maintained: **Crowder v. Aurora**, 223 Neb. 704 (1986)
 - Regular course of business: **Palmer v. Hoffman**, 318 U.S. 109 (1943)
 - **In Re Interest of Cole J.**, 26 Neb. App. 951 (2019)(admitting school’s regularly kept truancy records)
- 803(8): Public Records
 - **Humphrey v. Nebraska Public Power Dist.**, 243 Neb, 872 (1993)(Firsthand knowledge may be required)
 - **Beech Aircraft v. Rainey**, 488 U.S. 153 (1988)
- 803(9): Vital Statistics
 - **Blake v Pellegrino**, 329 F.3d 43 (1st Cir. 2003)
 - **State v. Hood**, 301 Neb. 207 (2018)(“Nebraska has historically not followed the rule which permits a death certificate to be received in evidence as presumptive evidence of the facts stated therein”),
- 803(10): Absence of public record:

- **U.S. v. Harris**, 557 F.3d 938 (8th Cir. 2009)
- 803(16): Ancient Writing
 - **Brumley v. Brumley & Sons**, 2013 WL 4105842 (6th Cir. 2013)(“I’ll Fly Away”)
 - **U.S. v. Demjanjuk**, 367 F.3d 623 (6th Cir. 2004)
- 803(17) Market reports, commercial publications
 - **Thone v. Regional West Medical**, 275 Neb. 238 (2008)[955:197] (failure to follow the manufacturer’s instructions as relevant to standard of care)
- 803(18): Learned Treatise
 - **Breeden v. Anesthesia West**, 265 Neb. 356 (2003)
- 803(22) Judgments of convictions:
 - **U.S. v. Nguyen**, 465 F.3d 1128 (9th Cir. 2006)
- 803(24) Residual Exceptions
 - **State v. McBride**, 250 Neb. 974 (1996)
 - **State v. Phillips**, 286 Neb. 974, 995 (2013)

Step 8: Is the witness “unavailable” & within an 804 exception?

- 804(b)(1): Former Testimony: **State v. Trice**, 292 Neb. 482 (2016)(Issued and served subpoena sufficient to establish unavailability even if the state did not issue a bench warrant)
 - **State v. Neal**, 216 Neb. 796 (1984)(Opportunity to cross)
- 804(b)(2) Dying declarations
- 804(b)(3) Statements against Interest
 - **Williamson v. U.S.**, 512 U.S. 594 (1994)(Redact references to third party if not inculpatory of speaker); **Lilly v. Virginia**, 527 U.S. 116 (1999)
 - **State v. Stricklin**, 290 Neb. 542, 566 (2015)(vague statements that are not clearly against interest do not fit within the exception).
- 804(b)(4) Personal or Family History
- 804(b)(5) (Transferred to 807)
- 804(b)(6) Forfeiture by Wrongdoing

Step 9: Does the Residual Exception Apply? (FRE 807)

- **State v. McBride**, 250 Neb. 974 (1996)(rare in criminal cases)
- **State v. Phillips**, 286 Neb. 974, 995 (2013)
- **Holmes v. South Carolina**, 547 U.S. 319 (2006)

Step 10: Does the statement provide the Basis of an Expert Opinion

- **Williams v. Illinois**, 132 S. Ct. 2221 (2012)(The bases of expert testimony as a partial Confrontation by-pass)

Step 11: Remember 805: Hearsay within Hearsay

- **Johnson v. Lutz**, 257 N.Y. 124 (1930)

Step 12: Do not Forget the Impeachment of Hearsay Witness: 806

9:00-9:30: Article 9: Authentication

- **State v. Pangborn**, 286 Neb. 363, (2013); **State v. Ramirez**, 287 Neb. 356 (2014)(Demonstrative aids may be given to the jury during deliberations with safeguards)
- **Richards v. McClure**, 290 Neb. 124 (2015)(Authentication of letters)
- **State v. Grant**, 293 Neb. 163 (2016)(Chain of custody authentication: Cell phones and social media)
- **State v. Grant**, 293 Neb. 163 (2016)(Chain of custody)
- **State v. Oliveira-Countinho**, 291 Neb. 294, 338 (2016)(Handwriting expert to authenticate handwriting)
- **State v. Anglemeyer**, 269 Neb. 237, 244 (2005)(readily identifiable)
- **State v. Blair**, 300 Neb. 372, 388 (2018)(authentication of physical evidence, such as a gun, can be established by testimony that it is readily identifiable and “that the gun appeared to be in generally the same condition as it was when he found it.”)
- **State v. Elseman**, 287 Neb. 134, 142-43(2014)(Testimony by the accused’s girlfriend provided foundation for the distinctiveness of the contents of a cell phone message)
- **State v. Savage**, 301 Neb. 873, 886 (2018)(“The proponent of the text messages is not required to conclusively prove who authored the messages.”)
- **State v. Mrza**, 302 Neb. 931 (2019)(“[A]uthentication did not require the State to offer all of the Snapchat messages in evidence.”).
- **State v. Ferris**, 212 Neb. 835 (1982)(An in-court voice identification)
- **Transport Indemnity Co. v. Seib**, 178 Neb. 253 (1965)(the court admitted the computer printouts of the business of premiums received)
- **State v. Pullens**, 281 Neb. 828 (Neb. 2011)(the court explained: “Computer forensic expert may identify the particular emails that were being used on particular computers belonging to suspected persons.”)
- **Neb. Rev. Stat. Section 60-6,192** (authentication by statute)
- **State v. Mangelsen**, 207 Neb. 213 (1980)(held that pursuant to this statute “Any judicial record of Nebraska may be proved by producing original or by copy thereof certified by clerk or person having legal custody thereof, authenticated by his seal of office.”)
- **State v. Britt**, 283 Neb. 600 (2012); **State v. Fischer**, 272 Neb. 963 (2007)(“calibration certifications of alcohol breath simulator solutions,” and certifications for “tuning forks for an officer’s radar unit.”)
- **State v. Liebel**, 286 Neb. 725 (2013), the Court held that the Department of Motor Vehicle (DMV) driving records are within 902(4) and are nontestimonial, because “[t]he creation and maintenance of driving records is a ministerial duty for the benefit of the public, utilized by drivers for many purposes, including the procurement of insurance or of commercial driving licenses.”)
- **State v. Draganescue**, 276 Neb. 448 (2008)(the court held that an “airlines distinctive logotype on both sides”)
- **State v. Ramirez**, 287 Neb. 356, 374 (2014)(the court upheld the use of a demonstrative exhibit that identified the location of calls made at the times designated in the exhibit)
- **State v. Castaneda**, 287 Neb. 289 (2014)(Cell phones; videotapes)
- **State v. Henry**, 292 Neb. 834 (2016)(the authorship of text messaging need not be established conclusively; the possibility of alteration or misuse by another goes to weight, not admissibility)

- **State v. Vandever**, 287 Neb. 807 (2014)(corrected Dixon: “the heightened procedures outlined in *Dixon* should apply only when the recording at issue contains testimonial evidence. The heightened procedures should not apply to nontestimonial evidence merely because such evidence is verbal in nature and is contained in an audio or video recording.”)
- **State v. Casterline**, 293 Neb. 41 (2016)(distinctiveness of jailhouse letters)
- **State v. Burries**, 297 Neb. 367, 415 (2017)(“the identity of a participant in a telephone conversation may be established by circumstantial evidence such as the circumstances preceding or following the telephone conversation.”)
- **State v. Jasa**, 297 Neb. 822 (2017)(Authenticating DUI evidence: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied).

9:30-9:45: Article 10: Original Writing

- **1001:** Definition of a Writing
- **1002:** The “Best Evidence” or Original Writing Rule
 - **State v. Martin**, 198 Neb. 811 (1977)(tape recording of a statement)
 - **U.S. v. Bennett**, 363 F.3d 947 (9th Cir. ‘04)(GPS mapping of where the ship had traveled)
 - **State v. Decker**, 261 Neb. 382 (2001)(N/A if firsthand knowledge of event)
 - **State v. Savage**, 301 Neb. 873, 886 (2018)(a printout of a text message satisfies the “best evidence,” or “original writing” rule).
- **1003:** Duplicates unless unfair
- **1004:** Exceptions
 - Lost or destroyed in good faith: **Seiler v. Lucasfilm**, 808 F.2d 1316 (9th Cir. 1986)
 - Not obtainable
 - In possession of opponent: **Montgomery v. Quantum Labs**, 198 Neb. 160 (1977)
 - Collateral matter: **State v. Roenfeldt**, 241 Neb. 30 (1992)(dates of hospital stay document collateral)
- **1005:** Public records: **State v. Smith**, 213 Neb. 446 (1983)(Certified copy of a conviction record)
- **1006:** Summaries: **Crowder v. Aurora Co-op**, 223 Neb. 704 (1986); **U.S. v. Lemire**, 720 F.2d 1327 (D.C. Cir. 1983)(In-court summary charts); Compare, **Westgate Recreation Ass’n v. Papio-Missouri River**, 250 Neb. 10 (1996)
- **1007:** Admissions
- **1008:** Gatekeeping responsibilities by issue: **Montgomery v. Quantum Labs, Inc.**, 198 Neb. 160 (1977):

9:45-10:00: Judicial Notice: Article 2:

- Generally known in the community:

- What a snowman looks like? **Eden Toys v. Marshall Field**, 675 F.2d 498 (2nd Cir. 1982)
- Flammability of lighter fluid: **Goodman v. Stalfort, Inc.**, 411 F. Supp. 889 (D.N.J. 1976)
- Not based on judicial knowledge:
 - **State v. Torres**, 28 Neb. App. 758, 771 (2020)(“[T]he court’s knowledge of the bailiff’s typical procedures is more akin to extrajudicial or personal knowledge. Such information is not appropriate for judicial notice.”).
 - **In re Tresnak**, 297 N.W.2d 109 (Iowa 1980)(Trial judge improperly took judicial notice based upon his own experience that the best interest of a male child would be with the father, rather than a woman in law school.
 - **In re National Airlines**, 434 F. Supp. 269 (S.D. Fla. 1977)(Trial judge improperly took judicial notice based upon his flying the airline that National Airline had a business-related reason for choosing to have a “lean, lithe corps” rather than a “stocky, robust” flight attendants).
- Refusing to take judicial notice a street address in Beatrice is within Beatrice for purposes of establishing venue without a reference to the city or county. **State v. Laflin**, 23 Neb. App. 839 (2016)
- Resort to sources whose accuracy cannot be questioned
- Judicial records: **In re Michael N.**, 25 Neb. App. 476 (2018)(“[W]hen a fact is judicially noticed by a trial court, papers requested to be judicially noticed must be marked, identified, and made a part of the record.”).
- Judicial records: **Western Ethanol Co. v. Midwest Renewable Energy**, 305 Neb. 1 (2020)(the court took judicial notice on appeal of the proceedings, judgments, and briefs filed in appeal in a separate action involving a party)
- Sociological basis of common law: **Trammel v. U.S.**, 445 U.S. 40 (1980)

10:00-10:15: Presumptions

Presumptions: Article 3

- The burden-allocating theory of presumptions:
- The burden shifting theory of presumptions:
- **State v. Jones**, 307 Neb. 809, 813, ___ N.W.2d ___ (2020)(“We have long held that a letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.”); **State v. Parnell**, 301 Neb. 774, 776 (2018)
- **In Re Skrdlant**, 305 Neb. 635, 641 (2020)(“By reasoning similar to *Hess*, we determine that the file stamp of an agency such as the PSC is afforded a presumption of regularity”)
- A custodial parent presumptively receives the tax exemption: **Anderson v. Anderson**, 290 Neb. 530 (2015)
- The “Presumption” of Undue Influence is not a Presumption: **In re Estate of Clinger**, 292 Neb. 237 (2015)
- Statutory presumptions may not require a burden shifting effect: **Hopkins v. Hopkins**, 294 Neb. 417 (2017)

- No presumption of vindictiveness where a defendant was sentenced by two different judges after an appeal. **State v. Castaneda**, 295 Neb. 547 (2016)
- **In re Estate of Clinger**, 292 Neb. 237 (2015)(The “presumption of undue influence” in probate cases is not a presumption at all).
- Nebraska has developed a “negative presumption against suicide.” **Michael B. v. Northfield Retirement Communities**, 24 Neb. App. 504(2017) (“Here we similarly find that Kena’s statement indicated a sense of hopelessness and emotional instability, which supports a finding of suicide”)
- **Cain v. Custer Cty. Bd. Of Equal.**, 298 Neb. 834, 851 (2018)(“the presumption of validity afforded to the Assessor’s valuation disappears once competent evidence to the contrary is presented.”)
- **Wisner v. Vandelay Investments**, 300 Neb. 825, 839 (2018)(“A county treasurer’s tax deed is presumptive evidence” of valid sale)
- **State v. Pryce**, 25 Neb. App. 792, 796-97 (2018)(“ A court will normally not presume unconstitutional juror partiality because of media coverage”)
- **Wiedel v. Wiedel**, 300 Neb. 13, 22, ___ N.W.2d ___ (2018)(“an alimony award which drives the obligor’s net monthly income below the basic subsistence limitation set forth in the Nebraska Child Support Guidelines is presumptively an abuse of discretion.”)
- **State on Behalf of Mia G v. Julio G.**, 303 Neb. 207 (2019)(“[a] notarized acknowledgment of paternity creates a rebuttable presumption of paternity”).
- **In re Guardianship of Issaabela R.**, 27 Neb. App. 353 (2019)(“The presumption of parental preference does not extend to biological grandparents”)

10:15-10:30: Morning Break

10:30-11:00: Article 6: Witnesses: Control over Mode of Presentation of Evidence

Article 6: Competency: Rules 601-606

- Rule 601: Competency:
 - Infancy: **In re M.L.S.**, 234 Neb. 570 (1990): no age minimum; each child
 - Psychiatric history of memory deficiencies: **U.S. v. Phibbs**, 999 F.2d 1053 (6th Cir. 1993)
 - Hypnotized witness: **State v. Palmer**, 224 Neb. 282 (1986); **State v. Patterson**, 213 Neb. 686 (1983)
 - Impaired while testifying: **U.S. v Van Meerbeke**, 548 F.2d 415 (2d Cir. 1976); reprimand for taking a plea of an intoxicated Defendant.
 - Discovery violations: **Norquay v. U.P.**, 225 Neb. 527 (1987)
 - Lacks necessary permit: **McGuire v. Department of Motor Vehicles**, 253 Neb. 92 (1997)
- Rule 602 and Firsthand Knowledge: **State v. Jacob**, 264 Neb. 420 (2002); **State v. Smith**, 286 Neb. 856 (2013)(“It was D-Wacc”).
- Rule 603: Oath or affirmation: **State v. Pedersen**, 3 N.C. App. 279 (1993)(oath of all witnesses (including a 4-year-old) required)
- Rule 604: Interpreters: **U.S. v. Bell**, 367 F.3d 452 (5th Cir. 2004)

- Nebraska law requires the appointment of an interpreter when the defendant is unable to communicate in English.: **Neb. Rev. Stat.** §§ 25-2401 to 25-2407.
- Rule 605: Incompetency of judges to act as witnesses when presiding: **U. S. v. Nickl**, 427 F.3d 1286 (10th Cir. 2005)(“I took her plea”)
- Rule 605: **State v. Rodriguez**, 244 Neb. 707 (1993): (“He was not coaching the witness”)
 - The Court cannot alert the State of a defect in the prima facie case: **State v. Bol**, 288 Neb. 144 (2014)
- Rule 606(a)[1] Juror incompetence as a witness when serving as a juror
 - **Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.**, 298 Neb. 777, 789 (2018)(“Pursuant to § 27-606(2), juror affidavits cannot be used for the purpose of showing a juror was confused, as that would relate directly to the juror’s mental processes in rendering the verdict.”)
- Rule 606(b)[2] Juror incompetence and Extrinsic Evidence
 - **Pena-Rodriguez v. Colorado**, 137 S.Ct. 855 (2017)
 - **Warger v. Shauers**, 135 S. Ct. 521 (2014): Juror Incompetency:
 - **State v. Cardeilhac**, 293 Neb. 200 (2016) (juror’s reenactment of strangulation not extrinsic evidence)
 - **State v. Stricklin**, 290 Neb. 542 (2015)(The juror’s moral dilemma when voting under pressure not extrinsic evidence)

Rule 611-612: Control and the Mode and Order of Interrogation: Form of the Question Objections

- **Brown v. Morello**, 308 Neb. 968 (2021)(“Speculation” is an appropriate form of the question objection if the witness is testifying about matters “over which there is no certain knowledge.”)
- **State v. Smith**, 292 Neb. 434 (2016)(The prohibition of “leading questions on direct is that a witness already giving favorable testimony to facts suggested to the witness, rather than those personally known by the witness.”
 - Objections during depositions and waiver
 - Article I, § 27, of the Nebraska Constitution: Court proceedings must be conducted in English.
 - **Thomas v. Kiewit Bldg. Group**, 25 Neb. App. 818, 832 (2018)(A computer-generated depiction of the “mechanism of injury” relied upon by the expert at the deposition, was excluded at trial on a foundation objection even though the remainder of the deposition was played to the jury because no foundation was provided for offering the demonstrative at trial).
 - Use of demonstratives discretionary with the court: **Benzel v. Keller Indust.**, 253 Neb. 20, 28 (1997).
 - If an exhibit fairly illustrates a controverted issue it is admissible: **Moore v. Moore**, 302 Neb. 588 (2019)
 - Demonstratives may be admissible: **State v. Pangborn**, 286 Neb. 363 (2013)
 - Synthesizing demonstratives within court’s discretion: **State v. Ramirez**, 287 Neb. 356, 376 (2014)
 - Court has broad discretion to allow jury to take nontestimonial exhibits to the jury room for deliberations: **State v. Henry**, 292 Neb. 834 (2016).

- A trial court “has inherent power to sanction” for discovery violations under Discovery Rule 37(d)”: **Charles Sargent Irr. V. Pohlmeier**, 27 Neb. App. 229 (2019)
- Heightened scrutiny for testimonial evidence: **State v. Vandever**, 287 Neb. 807 (2014).
- Heightened scrutiny does not apply to substantive evidence, such as video recording of the interrogation: **State v. Cheloha**, 25 Neb. App. 403 (2018):
- Stipulations will be respected by the courts: **Moore v. Moore**, 302 Neb. 588 (2019)
- 612: Refreshing Memory and Opening the Door: **Werner v. County of Platte**, 284 Neb. 899 (2012), citing this treatise for proper refreshing memory
- 612: Do not cheat in the guise of refreshing memory: **Rush v. Illinois Central**, 399 F.3d 705 (6th Cir. 2005)
- 614: The court calling and/or questioning witnesses: **State v. Bjorkland**, 258 Neb. 432 (2000)(Sparingly)
- Rule 615: Sequestration appropriate unless the witness is a party or essential witness, such as an expert: **State v. Jackson**, 231 Neb. 207 (1989)

11:00-11:45: Impeachment Character Rules: 607-610, 613, 801(d)(1)(A), 806

- Rule 607: A party may call a witness and impeach them
 - **State v. Steven**, 290 Neb. 460 (2015); **State v. Dominguez**, 290 Neb. 477 (2015) (The “affirmative damage” and the “no artifice” rules)
 - **U.S. v. Owens**, 484 U.S. 554 (1988)
 - **State v. Foster**, 300 Neb. 883, 903 (2018)(“the scope of § 27-607 is limited where a party knows or should know that its witness will not testify consistent with the witness’ prior statement and utilizes impeachment as ““mere subterfuge.””)
- The Five Analytical Grounds for Impeachment, the Collateral Evidence Rule, the Voucher Rule:
 - Impeachment on competency grounds*
 - Memory: **U.S. v. Owens**, 484 U.S. 554 (1988)
 - Impeachment on partiality grounds*
- Rule 610: **U.S. v. Abel**, 469 U.S. 45 (1984)
 - Impeachment on Character grounds
 - The No Voucher Rule:
 - Rule 608: The Variant Modes for Offering Character Evidence
 - Rule 608(a)[1]: Opinion and reputation testimony on credibility
 - **Michelson v. U.S.**, 335 U.S. 469 (1948)(Cross on specifics)
 - Rule 608(a)
 - Rule 608(a): Prior bad acts that go to truthfulness
 - **U.S. v. Shinderman**, 15 F.3d 5 (1st Cir. 2008)(questions on cross examination about past lies denying any criminal record when filling out an application for a medical license)
 - **State v. Stricklin**, 290 Neb. 542 (2015)(“Rule 608(2) permits questioning during cross-examination only on specific instances of conduct not resulting in a criminal conviction”)
 - **State v. Beermann**, 231 Neb. 380(1989)(“Improper for one witness to testify as to the credibility of another witness.”)

- Rule 609 rather than 608(b), applies to impeachment for a prior criminal conviction: **State v. Stricklin**, 290 Neb. 542 (2015)
- “An expectation of leniency on the part of a witness, absent evidence of any expressed or implied agreement, need not be revealed to the jury.” **State v. Patton**, 287 Neb. 899 (2014)
- Rule 609: Impeachment by conviction: **State v. Castillo-Zamora**, 289 Neb. 382 (2014)(Rule 609 “should not be extended to redirect examination as well.”)
- Rule 609: Counsel cannot even ask whether the crime was a felony or a crime of dishonesty: **State v. Henry**, 292 Neb. 834 (2016)
- Impeachment by inconsistent statements: 613
 - **State v. Herrera**, 289 Neb. 575 (2014)(Must offer only the inconsistent statements not the entire record; proponent has the burden to redact)
 - **State v. Ballew**, 291 Neb. 577 (2015)(When is a statement inconsistent and who has to author the inconsistent statement?)
 - **U.S. v. Almonte**, 956 F.2d 27 (2d Cir. 1992)(Third party account cannot provide the basis of impeachment by inconsistent statement)
 - Opening the door to otherwise inadmissible evidence: **State v. Lessley**, 257 Neb. 903 (1999)
 - No artifice rule: **State v. Stevens**, 290 Neb. 460 (2015); **State v. Dominguez**, 290 Neb. 477 (2015)
 - A named **party** changing their testimony at trial is treated differently from any other inconsistent statement): **State v. Dallard**, 287 Neb. 231 (2014)
- Impeachment by factual contradiction and omission
 - **State v. Ballew**, 291 Neb. 577 (2015)(when is impeachment by omission appropriate?)
 - **State v. Gregory**, 220 Neb. 778 (1985)(Impeachment by contradiction “well coached” questions opens the door to corroborative testimony)
 - **State v. Carpenter**, 293 Neb. 860, 867 (2016)(The doctrine of specific contradiction allows contradictory evidence that “he did [not] ‘deal, sell, [or] give away methamphetamine”)
 - Rule 610 Religious Beliefs: **U.S. v. Abel**, 469 U.S. 45 (1984).
- Rule 806: Impeaching “Hearsay” Declarants

11:45-12:00: Articles 1, 11: Procedural Rules

- Rule 101, 1101: Scope of the Rules of Evidence
- Rule 102: Purpose: Truth, Justice, Efficiency
- Rule 103: Timely and specific objection required, plus substantial right: **State v. Grant**, 293 Neb. 163 (2016)
- **State v. Lowman**, 308 Neb. 482 (2021)(Rather than renewing a suppression motion for the incriminating evidence, counsel “imposed objections based on such matters as foundation, authentication, and chain of custody.”)
- Rule 103: No dragnet objections: **O’Dell v. Godsell**, 152 Neb. 290 (1950)
- Object to improper closing: **State v. McSwine**, 292 Neb. 565, 579 (2016)
- Golden rule argument improper by asking the jurors to be in the plaintiff’s shoes: **Anderson v. Babbe**, 204 Neb. 186 (2019)
- Counsel may not express a personal opinion: **State v. Duckworth**, 29 Neb. App. 27 (2020).

- Counsel must object at trial after losing a pretrial motion: **State v. Cox**, 307 Neb. 762 (2020); **State v. Herrera**, 289 Neb. 575 (2014)
- Rule 103: papers must be marked, and offered in a motion for summary judgment: **Bohling v. Bohling**, 304 Neb. 968 (2020),
- Per Se Rules requiring reversal: right to counsel, prosecutorial misconduct, and biased judge: **Arizona v. Fulminate**, 499 U.S. 279 (1991)
- Summary judgments and offers of proof: **Controlled Environments v. Key Industrial**, 266 Neb. 927 (2003): Mark, offer, and have received into evidence for summary judgment evidence relied upon.
- Offer of proof necessary if excluded: **State v. Cruz**, 23 Neb. App. 814 (2016)
- **TansCanada Keystone Pipeline v. Nicholas Family**, 299 Neb. 276, 283 (2018)(“Affidavits are generally admissible in collateral matters, and a motion for attorney fees but [b]ecause the landowners’ affidavits did not allege the amount each had actually incurred ... we find that the county courts’ awards were in error.”).
- Offer stipulations and judicial admissions into evidence: **In re Estate of Radford**, 297 Neb. 748 (2017)
- Renew Motions in Limine objection at trial to preserve: **State v. Martinez**, 306 Neb. 516, 533 (2020); **State v. Cox**, 307 Neb. 762 (2020); **State v. Herrera**, 289 Neb. 575, 599 (2014)
- Attorney comments at side bar are not evidence: **Mumin v. Nebraska Department of Correctional Services**, 25 Neb. App. 89 (2017)
- Formally offer (by affidavit) attorney fees and object if objectionable: **Stewart v. Heineman**, 296 Neb. 262, 302-303 (2017)
- **State v. Said**, 306 Neb. 314, 348, __N.W.2d __ (2020)(“Opening the door’ is a rule of expanded relevancy which authorizes admitting evidence that would otherwise be irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.”
- Rule 104(a): the court’s gate-keeping responsibility: preponderance
- Rule 104(b): threshold conditional relevancy
- Assessing Standards of Review: **State v. Stricklin**, 290 Neb. 542 (2015)
- Trial court should not reserve an evidentiary ruling: **Gandara-Moore v. Moore**, 29 Neb. App. 101 (2020).
- Rule 106: The “rule of completeness” does not permit the admission of noncontextual text messages found on the same phone addressed to other recipients about other matters. **State v. Henry**, 292 Neb. 834 (2016)
- Rule 106: **State v. Savage**, 301 Neb. 873, 889 (2018)(a redacted version of the text messages would not offend Rule 106’s “rule of completeness” unless the opponent explains how “how the redactions created a danger of admitting a statement out of context.”)
- **State v. Sanchez**, 2016 UT App 189 (“Even if the [statement] would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted.”)
- **Tchikobava v. Albatross Express**, 293 Neb. 223 (2016)(“The compensation court is not bound by the usual common law or statutory rules of evidence, but its discretion to admit evidence is subject to the limits on constitutional due process”)
- Rule 1101: The rules of evidence do not strictly apply in pretrial hearings: **State v. Piper**, 289 Neb. 364; (2014); **State v. Pullens**, 281 Neb. 828 (2011)

- Rule 1101: The rules of evidence do not apply in post-trial proceedings: sentencing: **State v. Arizola**, 295 Neb. 477 (2017), but better practice to mark exhibits and move into evidence anything available relied upon, such as a court file.
- **State v. Johnson**, 287 Neb. 190, 201 (2014)(Due process often applies when rules of evidence do not)
- **Bower v. Eaton Corp.**, 301 Neb. 311, 327 (2018)(**Nebraska’s Workers’ Comp. Ct. R. of Proc. 10 (2018)** allows for medical reports from physicians (but not physician assistants) to be admitted.)
- Rules of Evidence may be excluded or included by statute:
 - Nebraska Rev. Stat. Section 71-1226, Nebraska’s Sex Offender Commitment Act invokes rules of evidence

Box-Lunch Break: 12:00-1:00

AFTERNOON SESSION

1:00-1:45: Article 4: Relevancy and Character Evidence Rules: 401-415

Article 4: Relevancy: Rules 401-403

Rule 401: Definition: Relevancy: “Any tendency to make a fact of consequence more likely”

Rule 402: Relevancy the minimal threshold for all evidence: “How is it relevant counselor?” **O’Brien v. Cessna Aircraft Company**, 298 Neb. 109 (2017): Proponent must first establish that there is a substantial similarity of conditions to be helpful)

Rule 403: Unfairly prejudicial

- Celebratory photographs: **State v. Hinrichsen**, 292 Neb. 611 (2016)
- Gruesome photographs: “gruesome crimes produce gruesome photographs.” **State v. Grant**, 293 Neb. 163 (2016)
- Gruesome photograph decisions subject to abuse of discretion: **State v. Stelly**, 304 Neb. 33 (2019)
- Expert testimony on blood spatter testimony admissible: **State v. Munoz**, 303 Neb. 69 (2019)
- Deporting a potential witness: **State v. Oliveira-Countinho**, 291 Neb. 294 (2016)
- Headlong flight as circumstantial evidence of guilt: **State v. Hill**, 288 Neb. 767 (2014)
- Spoliation: **Allied Concrete v. Lester**, 285 Va. 295 (Va. 2013)
- **Old Chief v. U.S.**, 519 U.S. 172 (1997) (Prosecution required to accept stipulation).
- **State v. Kibbee**, 284 Neb. 72 (2012)(partial stipulation not sufficient to require the exclusion of prior sexual molestation).
- **State v. Stubbendieck**, 302 Neb. 702 (2019)(“Stubbendieck’s tactical trial strategy [offer to stipulate that the death was suicidal] to prevent the introduction of evidence,” ineffectual where evidence connected to the elements charged.”).
- **Holmes v. S. C.**, 547 U.S. 319 (2006) Due process provides a constitutional standard for 403)
- **Olden v. Kentucky**, 488 U.S. 227 (1988)(overriding the rape shield law as applied to the facts)

- **State v. McSwine**, 292 Neb. 565 (2016)(inferentially culpable text)
- **State v. Jenkins**, 294 Neb. 475, 485 (2016)(Threatening statement inferentially culpable: “she would `pop that bitch like I [Jenkins] popped that nigga.”)

Article 4: Character Evidence: 404-406, 412-415 (Propensity/Conforming Behavior)

Propensity Rules:

Rule 404(1): The general exclusionary rule for character evidence

Rule 404(1) The narrow 404(1) exceptions:

(a) Accused’s offer of his own character:

- **State v. Faust**, 265 Neb. 845 (2003):
- **Michelson v. U.S.**, 335 U.S.469 (1948)(Cross)

(b) Accused’s offer of the victim’s character

- The Confused cases of Self Defense

(c) Character evidence relevant to credibility (Rule 607-609)

Rule 404(2): Prior Bad Acts for Narrower Purposes

- **Huddleston v. U.S.**, 485 U.S. 681 (1988)
- **State v. Kofoed**, 283 Neb. 767 (2012)(Compare: Nebraska’s clear and convincing standard: “is that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved”)
- **State v. Kofoed**, 283 Neb. 767 (2012)(Absence of mistakes)
- **Pullens v. State**, 281 Neb. 828 (2011)(Prior threats to rebut accident)

Character evidence beyond 404(2)

- **State v. Oldson**, 293 Neb. 718, 757-58 (2016)(Prior bad acts revealed in journal entry relevant as circumstantial evidence of consciousness of guilt)
- **State v. Cullen**, 292 Neb. 30 (2015)(“Inextricably intertwined” category includes pattern of abuse with children)
- **State v. Lee**, 304 Neb. 252 (2019)(“R.W.’s testimony of the Iowa [sexual] incident forms the factual setting of the charged) **State v. Parnell**, 294 Neb. 551 (2016)(Defendant’s prior threats admissible to show a coherent picture of the shooting “bound up”)
- **State v. McManus**, 257 Neb. 1 (1999)(Doctrine of chances)
- **State v. Kuehn**, 273 Neb. 219 (2007): (“The man who wins the lottery once is envied; the one who wins it twice is investigated.”)
- **State v. Burries**, 297 Neb. 367, 397 (2017)(Inextricably bound up):
- **State v. Lierman**, 305 Neb. 289, 298 (2020)(a prior acquittal of the facts is a factor to be considered, but in itself does not preclude admissibility of the facts alleged).

Rule 405(a): Method by which character evidence is admissible: opinion/ reputation:
State v. Faust, 265 Neb. 845 (2000)

Rule 405(b): When character is part of the prima facie case

Rule 406: Habit/Business routine: (1) Particular; (2) Invariable: **Borely Storage v. Whitted**, 271 Neb. 84 (2006)

Scheumann v. Menard, Inc., 27 Neb. App. 977 (2020)(“he did not think he would have told a customer that the customer had to help him load a shed box onto a cart, because doing so would not be consistent with how he treated his guests [customers].”

Rule 412: Rape Shield: **Olden v. Kentucky**, 488 U.S. 227 (1988)

State v. Lee, 304 Neb. 252 (2019)(Other sexual acts to show “knowledge” of sexual matters unlikely)

Rule 413: Exceptions to exclusion for specific sexual offenses

Rule 414: Sexual propensity: **State v. Valverde**, 286 Neb. 280 (2013)

Article 4: Policy-Oriented Relevancy Rules

Rule 407: Subsequent remedial measures

- Feasibility of alternative design: **Kurz v. Dinklage Feed Yard**, 205 Neb. 125 (1979)(snow fences impractical)
- **Walker v. BNSF Railway Co.**, 306 Neb. 559 (Miller-Lerman, J., concurring)(“ The view I would find applicable and would adopt is that evidence of a post-accident investigation which is distinguishable from a remedial undertaking is not excluded by § 27-407.”).

Rule 408: Offers to settle in civil cases

Rule 409: Good Samaritan Rule

Rule 410: Plea bargaining:

- 410 only applies if the discussion is truly within a “plea bargain context”:
State v. Fieeiki, 2007 UT App 62

Rule 411: Insurance:

- References improper: **Ventura v. Kyle**, 825 F.3d 876 (8th Cir. 2016)
- **Bank v. Mickels**, 302 Neb. 1009 (2019)(“[t]he reference [to] deductibles” did not telegraph to the jury” ... “health insurance”)

1:45-2:30: Article 7: Lay and Expert Opinions:

First Question: The admissibility and inadmissibility of lay opinions:

Admissible lay opinions: Examples

Firsthand Knowledge: **State v. Smith**, 286 Neb. 856 (2013)

Industry standards: **Harmon Cable v. Scope Cable**, 237 Neb. 871 (1991)

Authorship of handwriting: **State v. In re Estate of Vilwok**, 226 Neb. 693 (1987)

Identifying marijuana: **State v. Campbell**, 260 Neb. 1021 (2001)

Intoxication: **State v. Falcon**, 260 Neb. 119 (2000)

Canine alert: **State v. Howard**, 282 Neb. 352 (2011)

Best interest of Child: **Boamah-Wiafe v. Rashleigh**, 9 Neb. App. 503 (2000)

The meaning of drug slang code: **State v. Russell**, 292 Neb. 501 (2016)

Description of a person’s demeanor: **U.S. v. Gyamfi**, 805 F.3d 668 (6th Cir. 2015)

Inadmissible lay opinions:

Fault: **Jershin v. Becker**, 217 Neb. 645 (1984)

He’s lying: **State v. Beermann**, 231 Neb. 380 (1989)

When the issue requires and expert opinion: **U.S. v. Figueroa-Lopez**, 125 F.3d 1241 (9th Cir. 1997)

Voluntary intoxication as a defense in a specific intent crime: **State v. Braesch**, 292 Neb. 930 (2016)

Second Question: When do you need an expert as part of prima facie case?

All “professionals”: **Bixenmann v. Dickinson Land Surveyors**, 294 Neb. 407 (2016)

Legal standard of care: **Guinn v. Murray**, 286 Neb. 584 (2013); **Govier & Milone**, 286 Neb. 224 (2013); **Balames v. Ginn**, 290 Neb. 682 (2015)

Medical malpractice: **Yoder v. Cotton**, 276 Neb. 954 (2008)

- Standard of care established by statute as ordinary care of health care providers: **Hemsley v. Langdon**, 299 Neb. 464 (2018), quoting Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801
- **Anderson v. Babbe**, 304 Neb. 186 (2019)(If a physician defendant in a standard of care case moves for a directed verdict at the end of the plaintiff's case and the court denies the motion, the defendant waives the motion if the defendant thereafter introduces evidence establishing the standard of care)
- **Bank v. Mickels**, 302 Neb. 1009 (2019)(Informed consent does not have to be in writing).

Dental malpractice: **Capps v. Manhart**, 236 Neb. 16 (1990)

Best interest & Indian Child Welfare: **In re Zyleneam**, 284 Neb. 384 (2012)

Malfunctioning of a mechanical device likely requires expert testimony: **Pitts v. Genie Indus.**, 302 Neb. 88 (2019).

Expert testimony required in toxic tort cases: **McNeel v. Union Pacific RR. Co.**, 276 Neb. 143 (2018).

Workmen Compensation and causation: **Damme v. Pike Enters.**, 289 Neb. 620, 630 (2014); **Potter v. McCulla**, 288 Neb. 741 (2014)

Expert Testimony Impermissible on certain subjects:

- Interpreting a statute: **State v. Merchant**, 285 Neb. 456 (2013)
- Credibility: **State v. Smith**, 241 Neb. 311 (1992)

Trier of fact not bound by expert testimony: **Lewison v. Renner**, 298 Neb. 654 (2018)

Third Question: What are the consequences of deficient expert testimony?

- Expert malpractice claims: **Ellison v. Campbell**, 2014 OK 15

Fourth Question: What are the rules related to nontestifying (consulting) experts?

- F.R.C.P. 26(b)(4)(D) The Non-Testifying Expert
- **Upjohn**, 449 U.S. 83 (1981) (mental impressions protected)
- **Ager**, 622 F.2d 496 (10th Cir. 1980): protect even identity
- Wright and Miller 2d § 2032: Work product protection of identity 26(b)(4)(B) a party can discover "facts known or opinions held" by a nontestifying expert only upon a "showing of exceptional circumstances."

Fifth Question: What are the procedural differences for expert testimony?

- Discovery Obligations
- The Daubert Motion in Limine
- The increased flexibility with Daubert issues in a bench trial: **State v. Braesch**, 292 Neb. 930 (2016)

Sixth Question: What are the 702 Burdens: State v. Casillas, 279 Neb. 820 (2010)

- 1st Step: The Opponent's Triggering Objection
- 2nd Step: The Proponent's 104(1) Burden
- 3rd Step: The Opponent's Challenge to the 104(1) Standard of Reliability
- Judge is a gatekeeper (not goal tender): **King v. Burlington**, 277 Neb. 203 (2009)

- Both sides should have opportunity to challenge or support: **Proctor and Gamble v. Haugen**, 427 F.3d 727 (10th Cir. 2005)
- Judge cannot abdicate admissibility: **Perry Lumber**, 271 Neb. 303 (2006)
- Judge must make a record to get abuse of discretion review: **Zimmerman v Powell**, 268 Neb. 422 (2004)
- **In re Christopher T.**, 281 Neb. 1008 (2011) (“the expert psychological testimony given in this case satisfied the ‘reasonable degree of certainty’ standard even though that specific phrase was not used by the testifying expert.”)

Seventh Question: How to (and not to) Object to Expert Testimony:

- Do not object “Lack of Foundation”: **Ford v. Estate of Clinton**, 265 Neb. 285 (2003)
- Do Object with Particular 702 Specificity

Eighth Question: Objecting Early, Often, & Late to Expert Testimony

- **Weisgram v Marley Co.**, 528 U.S. 440 (2000)

Ninth Question: What is the content of the Daubert Questions?

- **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993)

Tenth Question: Does Daubert always apply to Evidentiary Questions?

- **Entm’t Prods., Inc. v. Shelby Cnty, Tenn**, 721 F.3d 729 (6th Cir. 2013)(**Daubert** does not apply to judicial notice of legislative facts)
- **In re Rebecca P.**, 266 Neb. 869 (2003)
- **Daubert** does not apply to termination proceedings
- **Daubert** does not apply strictly to workmen compensation hearings: **Veatch v. American Tool**, 267 Neb. 711 (2004)

Eleventh Question: What are the Significant SCOTUS Cases on Expert Testimony?

- **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993)(the standard)
- **G.E. V. Joiner**, 522 U.S. 136 (1997) (abuse of discretion standard)
- **Kumho Tire v. Carmichel**, 526 U.S. 137 (1999)(the experiential expert)
- **Weisgram v Marley Co.**, 528 U.S. 440 (2000)(Post-trial Rule 50 Motion)
- **Melendez-Diaz v. Mass.**, 557 U.S. 305 (2009)(Experts and Confrontation)
- **Bullcoming v. N.M.**, 131 S. Ct. 2705 (2011)(Experts and Confrontation)
- **Williams v. Illinois**, 132 S. Ct. 2221 (2012)(Confrontation & Rule 703)
- **Cavosos V. Smith**, 132 S. Ct. 1077 (2012)(Daubert & the jury)

Twelfth Question: What are the Significant Nebraska Supreme Court Cases?

- **Schafersman v. Agland**, 262 Neb. 215 (2001)(adopting **Daubert/Kumho**)
- **Epp v. Lauby**, 271 Neb. 640 (2006)(fibromyalgia and differential etiology)
- **Carlson v. Okerstrom**, 267 Neb. 397 (2004)(Differential diagnosis toss up)
- **Heistand v. Heistand**, 267 Neb. 300 (2004)(**Daubert** and family law)
- **King v. Burlington Northern**, 277 Neb. 203 (2009)(Toxic torts and probability)
- **Perry Lumber v. Durable Serv.**, 271 Neb. 303 (2006)(Industrial standard; experts may critique basis of opposing expert’s opinion)
- **State v. Herrera**, 289 Neb. 575 (2014)(child abuse: the psychosocial short stature (PSS): differential diagnosis and etiology of emotional child abuse case)
- **Roskop Dairy v Geo Farm Tech.**, 292 Neb. 148 (2015): rejecting the “malfunction theory” of product liability causation

- **Hynes v. Good Samaritan Hosp.**, 291 Neb. 757 (2015): (“[a]n appellate court is not a super-expert”)
- **State v. Parnell**, 294 Neb. 551 (2016): (“historical cell site analysis’ using call detail records provided by cellular carriers.”).
- **State v. Oliveira-Countinho**, 291 Neb. 294 (2016)(Handwriting analysis admissible even though more subjective than DNA)
- **State v. Parnell**, 294 Neb. 551 (2016)(Location of a caller based upon cell tower overlap).
- **Hemsley v. Langdon**, 299 Neb. 464, 477 (2018)(“Here, the witnesses’ testimony on the standard of care was not based on clinical practice guidelines, physician surveys, or any other scientific methodology or theory. Rather, it was empirical testimony based on their personal knowledge of the ordinary care, skill, and diligence commonly exercised by cardiac surgeons in Nebraska under similar circumstances and the actual care, skill, and diligence they exercise during operations.”).
- **In re Interest of K.M.**, 299 Neb. 636, 649 (2018)(“ No evidence was given about D.F.’s own ability to resist or understand sexual acts” which was required if lack of ability to consent is argued).
- **Freeman v. Hoffman-LaRoche, Inc.**, 300 Neb. 47, 53 (2018)(The Nebraska Supreme Court accepted the “weight-of-the evidence methodology” as sufficiently reliable to be admissible.)
- **Lombardo v. Sedlacek**, 299 Neb. 400, 418, ___ N.W.2d ___ (2018)(“[O]nce the defendant physician in a malpractice case states that he or she has met the standard of care, the plaintiff must normally present expert testimony to show that a material issue of fact exists preventing summary judgment.”)
- **Larsen v. 401 Main Street**, 302 Neb. 454 (2019)(“NFPA Guidelines” controls methodology of experts).

Thirteenth Question: Is there a Rule-based Template for Direct Examination of an Expert?

Fourteenth Question: What are the Acceptable Bases of an Expert’s Opinion?

- Use of Statutory Provisions to Establish Reliable Theory/Methodology
- Use of Judicial Notice to Establish Reliable Theory/Methodology
- Use of Learned Treatise 803(18) to Establish Theory/Methodology
- Use of 803(17) (industry standards): **Thone v. Regional West Medical Center**, 275 Neb. 238 (2008)
- Use of Expert Testimony to Establish Theory/Methodology: **Wayne L. Ryan Revocable Trust v. Ryan**, 308 Neb. 851 (2021)(“It is entirely proper for a trial court to adopt one expert’s model, methodology, and calculations if they are supported by credible evidence and the judge analyzes them critically on the record.”)
- Use of a Hypothetical Question in Expert Testimony
- Extrapolating from Theory/methodology to the Facts of the Case
- Rule 703, Expert Testimony and the Right of Confrontation
- Reconciling **Melendez-Diaz v. Massachusetts** (2009) and **Williams v. Illinois** (2012)

Fifteenth Question: Ultimate Issues and 702/704

- **U.S. v. West**, 962 F.2d 1243, 1245 (7th Cir. 1992) (It is permissible to opine “schizoaffective disorder,” but not that he understood right from wrong)

- Opinion on intent and psychological conditions (and role of impairment): **State v. Braesch**, 292 Neb. 930 (2016)
- Professional Malpractice: **Balames v. Ginn**, 290 Neb. 682 (2015)

Sixteenth Question: What are the Discovery Requirements for Experts?

- The Rules of Discovery/Hearsay and Experts
 - **Maresh v. State**, 241 Neb. 496 (1992)/**Neb. R. Stat. 25-1273.01**
 - Experts must be disclosed as an expert under 26(a)(3)(A) if they are to testify as an expert
 - Expert Reports and Treating Physicians: **Simon v. Drake**, 285 Neb. 784 (2013)
 - Incomplete opinions: **Rembrandt Vision Technologies v. Johnson & Johnson**, 725 F.3d 1377 (2013)
 - **State v. Parnell**, 294 Neb. 551 (2016) “[o]ral, unrecorded opinions do not fall within the scope of ...” 29-1912(1), which requires the disclosure of written reports: Sanctions for Discovery Violations
 - **State v. Henry**, 292 Neb. 834 (2016): Criminal discovery rights do not extend to the testing of the body of the deceased.
 - **Norquay v. U.P.**, 225 Neb. 527 (1987)
 - **Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.**, 298 Neb. 777, 794 (2018) (“If FCMG wished to expand the scope of Purdy’s expert testimony in the second trial to include opinions regarding the proper interpretation of § 11.2, it should have supplemented its interrogatory answer accordingly”)
 - **State v. Williams**, 26 Neb. App. 459, 476 (2018) (“If an accused either seeks discovery from the state or moves to depose the state’s expert, then the defense, upon the state’s motion, must provide a copy of the accused’s expert report, including any basis of the expert’s opinion, or permit the state to depose the defendant’s expert).
 - **Gandara-Moore v. Moore**, 29 Neb. App. 101 (2020) (“ a judge has inherent power to waive the prior disclosure requirement...”).
- Failing to Designate an Expert
- The Rules of Privilege and Work Product and Experts
- **State v. Armstrong**, 290 Neb. 991 (2016): The videotape deposition of a child witness cannot be disclosed to anyone outside the court order
- Confidential Information and Expert Reports

Seventeenth Question: When Can (Should) You Use Court-Appointed Experts?

- Court-Appointed Expert Testimony not Binding on the Court:

2:30-2:45: Afternoon Break

2:45-3:00: Article 5: Privilege

- **501**: Privileges generally
 - Common law privileges: “Judicial decision-making process.” **State ex rel. Veskrna v. Steel**, 296 Neb. 581 (2017)
 - **State v. Blair**, 300 Neb. 372, 914 N.W.2d 28 (2018) (“The doctrine of absolute privilege bars claims for libel or slander involving statements made in judicial... [or] quasi-judicial proceedings”)
 - Statutory privileges:

- Public ignominy: 25-1210: **State v. Riensche**, 283 Neb. 820 (2012)(Does not apply in criminal cases)
- Mediation privilege and issue-injection exceptions: Neb. Rev. Stat. Ann. § 25-2935: **Shriner v. Friedman Law Offices, P.C., L.L.O.**, 23 Neb. App. 869 (2016)
 - Issue injection by questioning a malpractice claim about settlement. **Shriner v. Friedman Law Offices, P.C., L.L.O.**, 23 Neb. App. 869 (2016).
 - Presentence Report Privilege: Nebraska Revised Statutes Section 29-2261: **State ex rel. Unger**, 293 Neb. 549 (2016)
- **502**: Required Reports Privileged by Statute
- **503**: Lawyer-client
- **504**: Physician-patient: **Jaffee v. Redmond**, 518 U.S. 1 (1996)
- **505(1)**: Spousal disqualification: **Trammel v. U.S.**, 445 U.S. 40 (1980)
 - Exception: “Against family”; “Crimes of violence” **State v. Palmer (III)**, 224 Neb. 282 (1986)
- **505(2)**: Spousal confidentiality: **State v. Johnson**, 236 Neb. 831 (1991) (Waiver)
- **506**: Penitent-Priest: Waiver: **U.S. v. Webb**, 615 F.2d 828 (9th Cir. 1980)
- **507**: Political Vote: **U.S. v. Executive Committee of the Democratic Party**, 254 F. Supp. 543 (N.D. Ala. 1966)
- **508**: Trade Secrets: **App. of Northwestern Bell**, 223 Neb. 415 (1986)
- **509**: State Secrets: **Reynolds v. U.S.**, 345 U.S. 1 (1953); **U.S. v. Nixon**, 418 U.S. 683 (1974)
- **510**: Identity of Informers: **Roviaro v. U.S.**, 353 U.S. 53 (1957)
 - **State v. Blair**, 300 Neb. 372 (2018)(“the judge must determine whether it appears that the confidential informant may be able to give testimony necessary to a fair determination of the issue of guilt or innocence of the pending charges.”)
 - **United States v. Bigesby**, 685 F.3d 1060 (D.C. Cir. 2012)(The informer privilege applies notwithstanding a Due Process argument because the CIs ““were neither participants nor eyewitnesses to th[ose] crimes.””).
 - Surveillance Location Privilege: **United States v. Green**, 670 F.2d 1148 (D.C. Cir. 1981)(Hidden observation post privilege).
- **511**: Waiver: **League v. Vanice**, 221 Neb. 34 (1985); **State v. Roeder**, 262 Neb. 951 (2001)
- **512**: Involuntary Disclosure
- **513**: Comment on Invocation of Privilege
 - **Namet v. U.S.**, 373 U.S. 179 (1963)
 - **State v. Draper**, 289 Neb. 777 (2015)(The state cannot orchestrate a witness claiming the Fifth in front of the jury)
 - **State v. Munoz**, 303 Neb. 69 (2019)(Privilege misconduct applies only if the party knows in advance that witness would invoke the Fifth)

3:00-4:00: Objections, Ethics and Professionalism in Closing Arguments

THE TEN COMMANDMENTS IN CLOSING ARGUMENTS

1st Com: Thou Shalt Not Offer Improper Closing Arguments

“[W]hile [a prosecutor] he may strike hard blows, he is not at liberty to strike foul ones. **Berger v. U. S.**, 295 U.S. 78, 88 (1935); **State v. Cotton**, 299 Neb. 650, 688 (2018).

2nd Commandment: Thou Shalt Not Ignore Improper Closing Arguments by Opposing Counsel

U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *State v. Cotton*, 299 Neb. 650, 688 (2018)

3rd Commandment: Thou Shalt Not Express One's Personal Belief:

Nebraska Ethical Duties 3-503.4; *U.S. v. Young*, 470 U.S. 1 (1985); *State v. Duckworth*, 29 Neb. App. 27 (2020); *State v. Price*, 306 Neb. 38 (2020), *State v. Cotton*, 299 Neb. 650 (2018); *State v. Gonzales*, 294 Neb. 627 (2016)

4th Commandment: Thou Shalt Not Misstate or Misuse Evidence that has been admitted:
Standard 3-6.9

5th Commandment: Thou Shalt Not Infringe Constitutional Rights in Closing Arguments:

Standard 3-6.8: *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976); *Jenkins v. Anderson*, 447 U.S. 231, 231 (1980)

6th Commandment: Thou Shalt Not Inflammate the Jury's Passions or Prejudices:

Standard for Prosecutors 3-5.8(c); *Darden v. Wainwright*, 477 U.S. 168 (1986); *State v. Barfield*, 272 Neb. 502, 512-16 (2006); *Ventura v. Kyle*, 825 F.3d 876 (8th Cir. 2016).

7th Commandment: Thou Shalt not Violate the Golden Rule

8th Commandment: Thou Shalt Not Personally Attack Opposing Counsel:

U.S. v. Young, 470 U.S. 1 (1985); *State v. Barfield*, 272 Neb. 502 (2006)

9th Principle: Thou Shalt Not Argue Religious Beliefs

10th Principle: Thou Shalt Not Create Invited Error in Response to Improper Argument:

Lawn v. U.S. 355 U.S. 339 (1958); *Viereck v. U. S.*, 318 U.S. 236, 248 (1943). ; *U.S. v. Young*, , 470 U.S. 1, 4-5 (1985); *Darden v. Wainwright*, , 477 U.S. 168, 182 (1986).