

# MANGRUM ON EXPERT TESTIMONY

CREIGHTON UNIVERSITY  
SCHOOL OF LAW

December 8, 2017



# Mangrum on Expert Testimony in Nebraska

## Answers to Twenty-One Expert Evidentiary Questions

A CLE seminar presented by Professor R. Collin Mangrum

**Friday, December 8, 2017**

**8:00 a.m. to 4:00 p.m.**

**Creighton University**

**Harper Center**

**Room 3028**

**Registration:** Attorneys wishing to attend and receive CLE credit may register online via:  
<https://2017experttestimony.eventbrite.com>

**Fee:** \$185 if received by December 3, 2017. Walk-in registration is \$195.

**Parking:** The Harper Center is located on Creighton University's campus at 602 North 20th street in Omaha, Nebraska. The closest parking to the Harper Center is the surface lot immediately south of the Harper Center. This lot can be accessed via 20th Street. Guests should turn south onto 20th from Burt Street. Additional parking is available on the top deck of the law school parking structure, the Lied Education Center for the Arts Visitors Lot at 23rd and Cass streets, and the top deck of the 24th and California parking structure.

This seminar focuses entirely on Article Seven of the Rules of Evidence: The Opinions of Lay and Expert Witnesses. **6.5 hours of CLE credit is pending in both Nebraska and Iowa.**

## Syllabus of Twenty-One Questions for Expert Testimony:

### 8:00-8:20 Rules 701: Lay Opinions in both State and Federal Courts

#### First question: The admissibility and inadmissibility of lay opinions:

- When are lay opinions admissible?
  - **104(b)[2]** standard of admissibility for lay opinion: (1) helpful, (2) based on 1<sup>st</sup> hand knowledge
  - Compare, **State v. Jacobs**, 242 Neb. 176 (1993) to **State v. Smith**, 286 Neb. 856 (2013)
  - The meaning of code words or slang used in drug trafficking. **State v. Russell**, 292 Neb. 501 (2016).
  - The demeanor of a person as “nervous,” “sad,” “happy,” or “giving up” **U.S. v. Gyamfi**, 805 F.3d 668 (6<sup>th</sup> Cir. 2015).

- Industry standards: **Harmon Cable v. Scope Cable**, 237 Neb. 871 (1991)
- Authorship of handwriting: **In re Estate of Vilwok**, 226 Neb. 693 (1987)
- A treating physician as a lay witness:
  - Treating physician of facts observed; opinions require expert qualif.
  - Identifying marijuana: **State v. Campbell**, 260 Neb. 1021 (2001)
  - Opinion that someone is intoxicated: **State v. Falcon**, 260 Neb. 119 (2000);
  - What a canine alert suggests: **State v. Howard**, 282 Neb. 352 (2011)
  - Family members expressing “best interest” opinions: **Boamah-Wiafe v. Rahnleigh**, 9 Neb. App. 503 (2000)
- Lay opinions are inadmissible if they are not “helpful”:
  - “He could have avoided the accident”: **Jershin v. Becker**, 217 Neb. 645 (1984)
  - If the subject requires expert explanation: **U.S. v. Figueroa-Lopez**, 125 F.3d 1241 (9<sup>th</sup> Cir. 1997)
  - “He’s lying” : **State v. Beerman**, 231 Neb. 380 (1989); **U.S. v. Wallace**, 461 F.3d 15 (2006); **State v. Archie**, 273 Neb. 612 (2007)
  - “She’s telling the truth” unless opponent opens the door by asking the basis of an opinion: **State v. Gray**, 2015 UT App 106 (Invited error)

## 8:20-8:40 Rule 702: The Prima Facie Case Expert

### Second question: When do you need an expert as part of the prima facie case?

- Expert testimony required for professional malpractice:
  - Legal standard of care: **Guinn v. Murray**, 286 Neb. 584 (2013); **Govier & Milone**, 286 Neb. 224 (2013)
  - Medical standard of care: **Yoder v. Cotton**, 276 Neb. 954 (2008)
  - Dental standard of care: **Capps v. Manhart**, 236 Neb. 16 (1990)
- Experts sometimes required by statutory requirements:
  - Best interest and Indian Child Welfare Guidelines: **In re Zylenam**, 284 Neb. 384 (2012)(certified clinical psychologist qualified despite lack of “tribal” experience)
- In workmen compensation cases an expert may be necessary to establish work-related causation: **Potter v. McCulla**, 288 Neb. 741 (2014)
- Expert testimony required for breach of professional standard of care:

### Third question: When is expert testimony impermissible?

- Interpreting a statute: **State v. Merchant**, 285 Neb. 456 (2013)

- Polygraph testimony on credibility: **Sturzenegger v. Father Flanagan's Boys Home**, 276 Neb. 318 (1989)
- Credibility of witness's testimony **State v. Smith**, 241 Neb. 311 (1992)
- Unreliability of Eye Witness may or may not be helpful:
  - Compare, **U.S. v. Langan**, 263 F.3d 613 (6<sup>th</sup> Cir. 2001)
  - With **State v. Clopten**, 2009 UT 84 (Factors relevant to the unreliability of eye witness testimony)

#### 8:40-8:50 Rule 702: The Consequences of Expert Deficiencies

##### Fourth question: What are the consequences of deficient expert testimony?

- Malpractice claim against expert witness: **Ellison v. Campbell**, 2014 OK 15

#### 8:50-9:00 Rule 702: The Consulting or Nontestifying Expert

##### Fifth question: What are the rules related to nontestifying (consulting) experts?

- **F.R.C.P. 26(b)(4)(D); Wright and Miller 2d 2032**: The non-testifying expert is largely beyond access to discovery except for "showing of exceptional circumstances."
- **Upjohn Co. v. U.S.**, 449 U.S. 83 (1981) (mental impressions protected)
- **Ager v. Jane C Stormont Hospital**, 622 F.2d 496 (10<sup>th</sup> Cir. 1980)(the consulting expert's identity and opinions protected)

#### 9:10-9:30 Rule 702: Procedural Issues that Arise with Experts

##### Sixth question: When should you object (and renew objections) to expert testimony?

- Disclosing Experts and their reports
- The **Daubert** Motion in Limine
- Motion for Summary Judgment if Expert's Opinion Inadequate
- Trial Objection (and Voir Dire on Daubert inadequacies)
- Motion for Judgment as a Matter of Law
- Renewed Motion for Judgment as a Matter of Law
- Appeal: **Weisgram v Marley Co.**, 528 U.S. 440 (2000)

#### 9:30-9:40 Rule 702: The Daubert Objection and Response

##### Seventh Question: What are the steps and burdens for expert testimony?

- **State v. Casillas**, 279 Neb. 820 (2010)
- 1<sup>st</sup> Step: The Opponent's Triggering Objection

- 2<sup>nd</sup> Step: The Proponent's **104(a)** Burden
- 3<sup>rd</sup> Step: The Opponent's Challenge to the **104(a)** Standard of Reliability
- Judge is a gatekeeper, not goal tender: **King v. Burlington**, 277 Neb. 203 (2009)
- Bench trial permits more flexibility in hearing expert testimony, subject to striking the testimony: **State v. Braesch**, 292 Neb. 930 (2016)
- Both sides should have opportunity to challenge or support expert testimony: **Proctor and Gamble v. Haugen**, 427 F.3d 727 (10<sup>th</sup> Cir. 2005).
- Judge cannot abdicate gatekeeping responsibilities: **Perry Lumber v. Durable Serv.**, 271 Neb. 303 (2006) (Judge is a gatekeeper, not a goal tender)
- Judge must make a record to get abuse of discretion review: **Zimmerman v Powell**, 268 Neb. 422 (2004)

#### **Eighth Question: What is the nature of the Daubert Questions?**

- **Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579 (1993)
  - Testable theory/methodology that has been tested
  - Testing has been subject to peer reviewed critique
  - Testing has yielded an established rate of error
  - The theory and methodology are generally accepted in relevant expert community

#### **Ninth Question: What is the Appropriate Objection to Expert Testimony?**

- Not "Lack of Foundation": **Ford v. Estate of Clinton**, 265 Neb. 285 (2003)
- Object with specificity: 702, Daubert as applied to competency, theory, methodology, and/or application

#### **9:40-10:00 Rule 702: The Criteria and Context for the Daubert Objection**

#### **Tenth Question: When Does Daubert not apply?**

- **Entm't Prods., Inc. v. Shelby County, Tenn.**, 721 F.3d 729 (6<sup>th</sup> Cir 2013)(**Daubert** does not apply to judicial notice of legislative facts, the Brandeis Brief)
- **In re Rebecca P.**, 266 Neb. 869 (2003)(**Daubert** does not apply to termination proceedings in juvenile court)
- **Veatch v. American Tool**, 267 Neb. 711 (2004)(**Daubert** does not apply to workmen compensation hearings)
- However, due process applies and Daubert reliability is relevant to due process

#### **10:00-10:15 Daubert and the Supreme Court**

#### **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 and Rule 703)
- **Cavosos v. Smith**, 132 S.Ct. 1077 (2012)(Daubert the finality of the jury)
- **Ohio v. Clark**, 135 S.Ct. 2173 (2015)(Experts and the Confrontation Clause)

### 10:15-10:30 Morning Break

### 10:30-10:45 Daubert and the Nebraska Supreme Court

#### 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 does not require “absolute certainty”, but reliable evidence on general and specific causation)
- **Perry Lumber v. Durable Serv.**, 271 Neb. 303 (2006)(Industrial standard; experts may critique basis of opposing expert’s opinion)

### 10:45-11:00 A Template for Direct Examination for Experts

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

### 11:00-11:20 Rule 703: The Proper (and Improper) Bases for Expert Testimony

#### 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
- Use of learned treatises to establish the methodology of handwriting identification. **State v. Oliveira-Countinho**, 291 Neb. 294 (2016)

- 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**, 557 U.S. 305 (2009) and **Williams v. Illinois**, 132 S.Ct. 2221 (2012)

**11:20-12:00: Evidence Based Medicine and the Art of Identifying and Critiquing Learned Treatises in the Areas of Medicine and Toxicology**

**Fifteenth Question: What is the Methodology of Evidence-Based Medicine and How can it be used to enhance or critique Learned Treatises:**

- **Step One: Find the appropriate research study**
  - Formulating the question
  - Searching the literature
  - Identifying bias and statistical errors in the medical literature
- **Step Two: Critiquing the Research using journal quality and study type**
  - Ranking scientific journals
  - Ranking of levels of trustworthiness
    - Meta-analysis and systematic studies
    - Practice guidelines
    - Case-control studies
    - Cohort studies
    - Cross-sectional studies
    - Randomized controlled trials
    - Case report studies
- **Step Three: Critiquing study methodology**
  - Challenging the methodologies
  - Understanding and critiquing research studies
  - Confidence intervals
  - Using statistics to appraise diagnostic tests
  - True positive, false positive, true negative and false negative
  - Sensitivity and specificity
  - Likelihood ratios

**12:00-1:00 Lunch on your own**

**1:00-1:15 Rule 704: The So-Called Ultimate Issue Rule and Expert Testimony**

## Sixteenth Question: What is the Ultimate Opinion Rule and How Does it Work?

- **Rule 704(a)** The Ultimate Opinion Rule
- Inadmissible expert opinions stated in terms of the jury instruction
- Admissible statements related to the industry standard: State v. Larsen
  - **Rule 704(b)** The Special Limitations for Opinions on Mens Rea in a Criminal Case
  - **U.S. v. West**, 962 F.2d 1243, 1245 (7th Cir. 1992) (Schizoaffective disorder, not he understood right/wrong)
  - **State v. Braesch**, 292 Neb. 930 (2016)(Inadmissibility of expert testimony on volitional intent in a criminal case)
  - Voluntary Intoxication: no longer a defense to a specific intent crime: Ne. Rev. Stat. Section 20-122

### 1:15-1:20 Rule 706 Court Appointed Experts

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

- Court-Appointed Expert Testimony not Binding on the Court

### 1:20-1:50 Examples of Cutting Edge Issues of Daubert

## Eighteenth Question: What are Some Examples of Different Level Daubert Challenges?

### Qualifications:

- **State v. Briner**, 198 Neb. 766 (1971)(Burglar)
- **Perry Lumber Co. Inc. v. Durable Services Inc.**, 271 Neb. 303 (2006)(Qualification a gate keeping duty of the trial court which they cannot abdicate by asking the jury to decide whether the witness is an expert).
- **Hamilton v. Bares**, 267 Neb. 816 (2004)(Where locality rule applicable for an opinion on informed consent, a physician with no experience in the locality is not competent to testify).
- **Smith v. Colorado Organ Recovery System, Inc.**, 269 Neb. 578 (2005)(Emergency medicine expert with no experience in organ transplants not qualified to testify to issues related to organ transplants).

### Theory:

- Products Liability: A Seatbelt Case as Illustrative: **Dale v. G.M.**, 109 F.Supp.2d 1376 (D. Ga. 1999)
- A Shaken Baby Cases: **Cavosos v. Smith**, 132 U.S. 2 (2011)



- Theory of causal relationship of fibromyalgia and hormonal damage excluded: **Black v. Food Lion**, 171 F.3d 308 (5<sup>th</sup> Cir. 1999)
- Compare, **Epp v. Lauby**, 271 Neb. 640 (2006)(Fibromyalgia and trauma)

### Methodology:

- Epidemiological studies as a methodology for determining causation of cancer: **King v. Burlington Northern**, 277 Neb. 203 (2009)
- Fingerprint Testimony: the ACE-V Method: **State v. Sheehan**, 2012 UT App 62
- Patent royalty: **Micro Chemical, Inc. v. Lextron, Inc.**, 317 F.3d 1387 (Fed. Cir. 2003)
- Highway Engineering: **Paget v. UDOT**, 2013 UT App 161
- “Historical cell site analysis’ for cell phone use”: **State v. Parnell**, 294 Neb. 551 (2016)

### Application:

- **E.E.O.C. v. Freeman**, 778 F.3d 463 (4<sup>th</sup> Cir. 2015)(unfair extrapolation)
- **State v. Johnson**, 290 Neb. At 879 (DNA assessment of two conflicting inferences of equal probability is admissible because it does not help).
- **State v. Berries**, 297 Neb. 367 (2017)(DNA containing a possible mixture of two persons that is indeterminate renders the DNA opinion inadmissible).
- Compare, **Hintz v. Farmers Co-Op Assn.**, 297 Neb. 903 (2017)(permissible for a physician to rely on examinations and tests performed by other physicians).

## 1:50-2:00 Examples of Theory and Methodology in cases Involving Physicians

### Nineteenth Question: Can you give examples and explain methodologies for physicians?

- **SOAP** (Subjective, Objective, Assessment and Plan)
- **Differential Diagnosis**
- **Differential Etiology**
- **GAMSOC** (Generally Accepted Medical Standard of Care)

## 2:00-2:45 Cross Examination of Experts

### Twentieth Question: Can you Provide Suggestions for Preparing for Cross of an Expert?

- A Template of Cross Examination of Experts: Knowing What & How to Attack
- Preparing your Witness for Cross Examination
- Trick Questions, Form of the Question Objections, and Witness Preparation

2:45-3:00 Break

3:00-4:00 Professionalism and Ethical Responsibilities in Discovery with Experts

### Twenty-first Question: What are the Ethical and Professional Issues Related to the Discovery of Expert Opinions in both State and Federal Courts?

- Rule 705 depends the professionalism of attorneys in discovery?
- Professionalism requires respect for discovery obligations under the rules
  - **F.R.C.P. 26(a)(1)** “Initial disclosures” requires names of witnesses
  - **F.R.C.P. 26(a)(2)** requires disclosure of expert testimony
  - (A) Identity any expert who will give testimony under 702, 703, & 705
  - (B) Written report signed by the expert, including (i) opinions, (ii) factual basis; (iii) exhibits to support opinions; (iv) witness’s qualifications; (v) prior cases during 4 years the expert has testified in trial or by deposition; (vi) statement of compensation
  - (C) if the expert is not required to file a report but will give testimony under 702, 703, or 705 (i) the subject matter of the testimony; (ii) the summary of facts and opinions
  - (D) Timing: Pursuant to court scheduling order or 90 days before trial; or 30 days for rebuttal testimony (must supplement)
  - **F.R.C.P. 26(a)(4)** Trial Preparation: Experts
    - (A) Party may depose an expert
    - (B) Protection for drafts: Rules 26(b)(3)(A) and (B) protect drafts of any report or required disclosure unless (i) compensation; (ii) facts provided by attorney that were relied upon by the expert; (iii) assumptions relied upon by the expert supplied by the attorney. [Compare state requirements]
  - **F.R.C.P. 26(a)(4)(D)**: Protected consulting (nontestifying) expert
- Compare Nebraska discovery requirements
- Deposition testimony of “unavailable” experts is admissible under Nebraska and Federal Rules of Civil Procedure: **Mareh v. State**, 241 Neb. 496 (1992)/**Neb. R. Stat. 25-1273**.
- Be aware of ethical issues in discovery and expert testimony?
  - Be careful about being an avatar who writes the expert report: **Numatics, Inc. v. Balluf**, 66 F. Supp. 3d 934, 941 (E.D. Mich. 2014): (F.R. Civ. P. 26(a)(2)(b) requires the report be “prepared and signed by the witness.”);
  - Be aware of confidentiality obligations and expert testimony

- Do not postpone discovery responses: **Norquay v. U.P.**, 225 Neb. 527 (1987)(Postponing response may disqualify witness)
- Respect the Progression Order and expert discovery obligations
- Do not fail to respond to admissions requests related to experts
- Do not fail as a prosecutor to disclose relevant expert testimony in response to discovery requests or obligations
- Know when expert discovery requirements are required
- Do not seek to avoid expert discover requirements by calling a non-retained expert: **Smith v. Ford**, 626 F.2d 784 (10<sup>th</sup> Cir. 1980); **Simon v. Drake**, 285 Neb. 784 (2013)
- Be aware of report requirements for experts in criminal cases: **State v. Parnell**, 294 Neb. 551 (2016)(Written reports: **29-1912(1)(e)**)
- Be aware of when an accused may obtain an independent expert report in criminal cases: **State v. Jasa**, 297 Neb. 822 (2017)(Police cannot hamper independent BAC testing).
- Be aware of ethical responsibilities related to child victim and their confidential records? **State v. Armstrong**, 290 Neb. 991 (2016)
- Seeking tactical advantages by incomplete expert reports may backfire: **Rembrandt Vision Technologies v. Johnson & Johnson**, 725 F.3d 1377 (2013)(Failure to disclose methodology relied upon)