



Mangrum On Nebraska Evidence 2017

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Mangrum on Nebraska Evidence
by
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Friday, June 2, 2017
8:00 a.m. – 4:00 p.m.

Creighton University – Room 124
21st and Cass Streets
Omaha, NE

MANGRUM ON NEBRASKA EVIDENCE

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by

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8:00 a.m. – 4:00 p.m.

MORNING SESSION

8:00-8:45

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. 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. 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)

8:45-9:45:

Article 4 and 6: Relevancy and Character Evidence for Propensity Rules:

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?”

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)
- Deporting a potential witness in a criminal case neither violates the right to compulsory process nor is objectionable under Rule 403 unless the defendant “(1) make[s] an initial showing that the government has acted in bad faith and (2) make[s] a plausible showing that the testimony of the deported witness would have been both material and favorable to his or her defense.” **State v. Oliveira-Countinho**, 291 Neb. 294 (2016)

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):

(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)
- **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. Parnell**, 294 Neb. 551 (2016)(Defendant’s prior threats admissible to show a coherent picture of the shooting)

Rule 405: Method by which character evidence is admissible: opinion or reputation

- **State v. Faust**, 265 Neb. 845 (2003)

Rule 406: Habit: Particular; Invariable

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

Rule 413: Exceptions to exclusion for specific sexual offenses

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

Policy Based Relevancy Rules:

Rule 407: Subsequent remedial measures

Rule 408: Offers to settle in civil cases

Rule 409: Good Samaritan Rule

Rule 410: Plea bargaining

Rule 411: Insurance

Character Evidence for Impeachment or Credibility

Rules 607-09, 613: The Five Analytical Grounds for Impeachment and the Collateral Evidence Rule:

- Rule 607:
 - **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)
- Impeachment on competency grounds*
- Impeachment on partiality grounds*
 - **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(1): Opinion and reputation testimony on credibility
 - **Michelson v. U.S.**, 335 U.S. 469 (1948)(Cross on specifics)
 - Rule 608(2): Prior bad acts that go to truthfulness
 - **U.S. v. Shinderman**, 15 F.3d 5 (1st Cir. 2008)(a Medicaid fraud case, the court upheld 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. Carpenter**, 293 Neb. 860, 867 (2016) (The doctrine of specific contradiction. Carpenter involved charges of drug dealing. The accused took the stand and testified on direct and cross examination that “he did not ‘deal, sell, [or] give away methamphetamine’”) Rule 609 Prior Convictions
 - 609 rather than 608(2), applies to impeachment for a prior criminal conviction: **State v. Stricklin**, 290 Neb. 542 (2015)
 - Rule 609: Impeachment by conviction: **State v. Castillo-Zamora**, 289 Neb. 382 (2014) (“We see no reason to reconsider our prior Section 27-609 jurisprudence and no reason why the rule 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)
 - **State v. Ballew**, 291 Neb. 577 (2015) (When is a statement inconsistent)
 - **U.S. v. Almonte**, 956 F.2d 27 (2d Cir. 1992) (Third party account cannot provide the basis of impeachment by inconsistent statement)
- 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)
- Rule 610 Religious Beliefs

9:45-10:00: Morning Break

10:00-10:45: Witnesses: Article 6

- Rule 601: Competency
- Rule 602 and First Hand Knowledge
- Rule 603: Oath or affirmation
- Rule 604: Interpreters
- Rule 605: Incompetency of judges to act as witnesses when presiding
- Rule 606(1) Juror incompetence as a witness when serving as a juror
- Rule 606(2) Juror incompetence and Extrinsic Evidence
 - **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)
 - **State v. Cardeilhac**, 293 Neb. 200 (2016)
 - Jurors reenacting the scene is appropriate: (reenactment of strangulation)

- Rule 611 and the Mode and order of Interrogation: Form of the Question
Objections
- The Court Cannot Alert the State of a Defect in the Prima Facie Case after the State has Rested and then Allow the State to Withdraw its Rest: **State v. Bol**, 288 Neb. 144 (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).
- 612: Refreshing Memory and Opening the Door
- 614: The court calling and/or questioning witnesses

10:45-12:00: Article 7: Brief Answers to Lay and Expert Opinion Questions:

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. Rabsleigh**, 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. Beerman**, 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)
- Dental malpractice: **Capps v. Manhart**, 236 Neb. 16 (1990)
- Best interest & Indian Child Welfare: **In re Zylenam**, 284 Neb. 384 (2012)
- 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)

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: **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).

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
- 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 Implications 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)
- 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:

12:00-1:00 Lunch on your own

AFTERNOON SESSION

1:00-1:15: Article 5: Privilege

- Lawyer-client
- Physician-patient
- Spousal disqualification
- Spousal confidentiality
- Penitent-Priest
- Statutory privileges:
 - Mediation privilege and exceptions: Neb. Rev. Stat. Ann. § 25-2935 provides a privilege for communications during the mediation, but also provides an exception if the claimant has injected the issue through 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
- Fifth: The state cannot orchestrate a witness claiming the Fifth in front of the jury: *State v. Draper*, 289 Neb. 777 (2015)

1:15-2:15: Hearsay/Confrontation: Article 8: Breaking Down Hearsay Problems

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

- Oral
- Written
- Assertive conduct

Step 2: By a person?

- Dogs excepted
- Equipment readouts excepted
-

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 non-hearsay)
- *Calmat v. U.S. Dept. of Labor*, 364 F.3d (9th Cir. 2004)(Effect on hearer)
- *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)
- 801(4)(a)(2) Prior Consistent Statements:
 - *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)
- Pretrial Identification inadmissible in Nebraska (a mistake in justice)
 - *State v. Salamon*, 241 Neb. 878 (1992)(Pretrial ID hearsay)
 - Compare, FRE: *U.S. v. Owen*, 484 U.S. 554 (1988)(Pretrial ID admissible even if the witness cannot make an in-court ID)
 - *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)
- Admissions:
 - **Ficke v. Wolken**, 291 Neb. 482 (2016)(any act or conduct on the part of a party which may fairly be interpreted as an admission against interest on a material issue may be shown in evidence against him or her)
 - **State v. Britt**, 293 Neb. 381 (2016)(after the central purposes of the conspiracy end, the conspiracy will not extend simply because the coconspirators attempt to cover up their crime, unless the cover up was part of the original conspiracy)
 - **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
 - **State v. Momsen**, 210 Neb. 45 (1981)(Judicial admissions: bound by deposition answers)
 - **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)
 - **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 non-hearsay and the “in furtherance” requirement continues until the central purposes attained, but not a mere cover-up)
 - **Orr v. Bank of American**, 285 F.3d 764 (9th Cir. 2002)(Discover response and “authorized statement”)

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. 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)

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

- 803(1): Excited Utterance
 - **State v. Hale**, 290 Neb. 70 (2015)(Excited utterance)
- 803(2) Then Existing State of Mind

- **Mutual Life v. Hillmon**, 145 U.S. 285 (1892): 908:71(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(3): 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)
- 803(4): Past Recollection Recorded
 - **State v. Cervantes**, 3 Neb. App. 95 (1994)(Past Recollection Recorded foundation)
- 803(5): Business records
 - Regularly maintained: **Crowder v. Aurora**, 223 Neb. 704 (1986)
 - Regular course of business: **Palmer v. Hoffman**, 318 U.S. 109 (1943)
 - the proponent of a medical record has “to redact”
- 803(7): Public Records
 - **Humphrey v. Nebraska Public Power Dist.**, 243 Neb, 872 (1993)(Firsthand knowledge may be required)
- 803(8): Vital Statistics
 - **Blake v Pellegrino**, 329 F.3d 43 (1st Cir. 2003)
- 803(15): Ancient Writing
 - **Brumley v. Brumley & Sons**, 2013 WL 4105842 (6th Cir. 2013)(“I’ll Fly Away”)
- 803(17): Learned Treatise
 - **Breeden v. Anesthesia West**, 265 Neb. 356 (2003)

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

- **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 to compel attendance; unavailability can also be established by good faith effort to serve the witness a subpoena, even without actually serving the subpoena.)
- **State v. Neal**, 216 Neb. 796 (1984)(Opportunity to cross)
- **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 were only against interest if you assumed a specific and controverted understanding of the context of the statements do not fit within the exception).

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

2:15-2:30: Procedural Rules: Article 1 & 11

- Rule 103: Timely and specific objections
 - Objecting after losing a pretrial motion: **State v. Herrera**, 289 Neb. 575 (2014)
- Rule 104(1): the court's gate-keeping responsibility: preponderance
- Rule 104(2): threshold conditional relevancy
- Assessing Standards of Review: **State v. Stricklin**, 290 Neb. 542 (2015)
- 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)
- "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." **State v. Sanchez**, 2016 UT App 189
- **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")

2:30-2:45: Judicial Notice and Presumptions

Judicial Notice: Article 2

- Generally known in the community
- 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

Presumptions: Article 3

- The burden-allocating theory of presumptions:
- The burden shifting theory of presumptions:
- 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)

2:45-3:00: Afternoon Break

3:00-4:00: Professional Ethics: The Thou Shalt Not's of Closings

- First Principle:** Thou Shalt Not Offer Improper Closing Arguments
Second Principle: Thou Shalt Not Refrain from Objecting to Improper Closing
Third Principle: Thou Shalt Not Argue Facts not Offered or Unfair Inferences
Fourth Principle: Thou Shalt Not Infringe Constitutional Rights in Argument
Fifth Principle: Thou Shalt Not Inflame either the Jury's Passions or Prejudices
Sixth Principle: Thou Shalt Not Express Counsel's Personal Opinions on the Merits
Seventh Principle: Thou Shalt Not Misuse Evidence Admitted for a Limited Purpose
Eighth Principle: Thou Shalt Not Take Unreasonable Artistic License with Evidence
Ninth Principle: Thou Shalt Not Make Disparaging Remarks about Opposing Counsel
Tenth Principle: Thou Shalt Not Argue Religious Doctrine as a Reason for a Decision
Eleventh Principle: Thou Shalt Not Violate the Golden Rule or Variation in Argument
Twelfth Principle: Thou Shalt Not Create Invited Error by your Argument

The program will be held at Creighton University School of Law, Room 124. Parking is available in the lot east of the Law School at 21st and Cass Streets or the visitors' lot either south of the Harper Center or west of the Law School at 24th and Cass Streets. There will be a 60-minute break for lunch **on your own** starting at 12:00 noon.

Registration will begin at 7:30 a.m.