

MANGRUM ON HEARSAY AND CONFRONTATION

Mangrum on Nebraska Hearsay and Confrontation 2017
by
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Thursday, October 19, 2017
8:00 a.m. – 4:00 p.m.

MORNING SESSION

8:00-9:00: Hearsay/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?

- 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?

- *Wilson v. Des Moines*, 442, 637(8th Cir. 2006)(Verbal harassment)
- *State v. McCave*, 282 Neb. 500 (2011)(Verbal acts are nonhearsay)
- *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)
- *Lexington v. W. Penn. Hosp.*, 423 F.3d 318 (3d Cir. 2005)(Questions not assertive)
- *Wright v. Tatham*, 1838 WL 5540 (HL)(Implied assertions)
- *U.S. v. Snow*, 517 F.2d 441 (9th Cir. 1975)(Mechanical traces)
- *Bridges v. State*, 247 Wis. 350 (1945)(Independently established facts)
- *State v. Tolisano*, 136 Conn. 210 (1949)(Nature of establishment)
- *U.S. v. Emmons*, 24 F.3d 1210 (10th 1994)(Insider knowledge)

- **U.S. v. Candoli**, 870 F.2d 496 (9th Cir. 1989)(Cover-up)

9:00-10:00 Nonhearsay by Statutory Definition

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(d)(1)(A)[(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 in criminal cases only admissible for impeachment)
- **801(d)(1)(B)[(4)(a)(2)]** Prior Consistent Statements:
 - **Tome v. U.S.**, 513 U.S. 150 (1995)(Timing and impeachment requirements)
 - **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)
- **801(d)(1)(C)** Pretrial Identification inadmissible in Nebraska (a mistake in justice)
 - **State v. Salamon**, 241 Neb. 878 (1992)(Pretrial ID hearsay)
 - **State v. McCurry**, 296 Neb. 40,63-64 (2017)(Due process argument does not override Nebraska’s choice to omit pretrial identification)
 - 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)
- **801(d)(2)[4(b)]** Admissions:
 - **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)
 - **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)
- **In re C.M.**, 215 Neb. 383 (1983)(adoptive admission)
- **State v. Trice**, 292 Neb. 482, 494 (2016)(Adoptive admission from a jail call with his father regarding self-defense theory)
- **Bourjaily v. U.S.**, 483 U.S. 71(1987)(Each foundational facts for the exception has to be established by preponderance)
- **Orr v. Bank of American**, 285 F.3d 764 (9th Cir. 2002)(Discover response and “authorized statements”)
- **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)
- **Chirside v. Lincoln Tel.**, 224 Neb. 784 (1987)
- **Bourjaily v. U.S.**, 483 U.S. 71 (1987)
- **State v. Copple**, 224 Neb. 672 (1987)(Foundational element of co-conspirator’s statement can be established by a prima facie or threshold standard)
- **State v. Henry**, 292 Neb. 834 (2016)(Text messages)

Morning Break: 10:00-10:15

10:15-11:00: Confrontation

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

- **Crawford v. Washington**, 541 U.S. 36 (2004)(Introduction to the “Testimonial” paradigm)
- **Hammond v. Indiana**, 546 U.S. 976 (2005)(911 call v. battery affidavit)
- **Davis v. Washington**, 546 U.S. 975 (2005)(911 calls and “Testimonial”)
- **Michigan v. Bryant**, 562 U.S. 344 (2011)(Evaluative factors for “Testimonial”)
- **Melendez-Diaz v. Mass.**, 557 U.S. 305 (2009)(Certificate of analysis for cocaine)
- **Bullcoming v. N.M.**, 564 U.S. 647 (2011)(Affidavits in lieu of expert testimony?)
- **Williams v. Illinois**, 567 U.S. 50 (2012)(Rule 703 and Confrontation)
- **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. Jacobsen**, 273 Neb. 2889 (2007)(certificate for tuning fork)
- **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 more likely to be nontestimonial)

11:00-11:45: The Res Gestae Exceptions: 803(1-3)

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

- FRE 803(1)[]: Present Sense Impression
 - **Houston Oxygen Co. v. Davis**, 139 Tex. 1 (1942)

- **Nebraska 803(2)[1]: Excited Utterance**
 - **Werner v. County of Platte**, 284 Neb. 899 (2012)(“was going too fast”)
 - **State v. Hale**, 290 Neb. 70 (2015)(Excited utterance)(“He did it”)
 - **State v. Smith**, 286 Neb. 856 (2013)(“It was D-Wacc”)
- **Nebraska 803(3)[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)(“Honey, I am off to work”)(looking forward)
 - **Shepard v. U.S.**, 290 U.S. 96 (1933)(909:78)(“Dr. Shepard has been poisoning me”—cannot look backwards to something remembered)
- **803(4)[3]: Medical Diagnosis and Treatment**
 - **State v. Vaught**, 268 Neb. 316 (2004)(testimony of identity in sexual assault of a child)
 - **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)(Primarily for diagnosis or treatment?)
 - **Field v. Trigg County**, 386 F.3d 729 (6th Cir. 2004)(Does not extend to statements made by consulting expert to treating physician)
 - **Ohio v. Clark**, 135 S. Ct. 2173 (2015)(Primary purpose test of questions & answers)
 - **Steele v. State**, 42 N.E.3d 138 (2015)(When is the identity of assailant admissible through medical records in domestic violence cases?)
 - **U.S. v. Joe**, 8 F.3d 1488 (10th Cir. 1993) (same as Steele)
 - **Compare, State v. Beeder**, 270 Neb. 799 (2006)(If physician does not need identity of assailant for diagnosis or treatment)

11:45-12:00: Rule 803(5)[4] Step 8: Does the statement fall within Past Recollection Recorded

- **State v. Cervantes**, 3 Neb. App. 95 (1994)(Past Recollection Recorded)
- Compare Refreshing Memory: **Rule 612**

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

AFTERNOON SESSION:

1:00-1:45: Step 9: The Records Exceptions: 803(6)-803(15)[5-14]

- **803(6)[5]: Business records**
 - Regularly maintained: **Crowder v. Aurora**, 223 Neb. 704 (1986)
 - Regular course of business: **Palmer v. Hoffman**, 318 U.S. 109 (1943)
 - Firsthand knowledge: **Johnson v. Lutz**, 253 N.Y 124 (1930)
 - The proponent of a medical record has “to redact” inadmissible evidence, or the trial court may reject the exhibit: **Arens v. NEBCO, Inc.** 291 Neb. 834 (2015)
 - See also Rule 805
- **803(8)[7]: Public Records**

- **Humphrey v. Nebraska Public Power Dist.**, 243 Neb, 872 (1993)(Firsthand knowledge may be required)
- **State v. Mills**, 199 Neb. 295 (1977)(fingerprint records)
- **Beech Aircraft v. Rainey**, 488 U.S. 153 (1988)(Factual findings)
- **Guerra v. North East Indep. School Dist.**, 496 F.3d 415 (5th Cir. 2005)(Excluding EEOC findings that lacked trustworthiness)
- **U.S. v. Spano**, 421 F.3d 599 (7th Cir. 2005)(untrustworthy town meeting minutes not within public records exception)
- **803(9)[8]: Vital Statistics**
 - **Blake v Pellegrino**, 329 F.3d 43 (1st Cir. 2003)(cause of death in death certificate admissible)
- **803(10)[9]: Absence of Records:**
- **U.S. v. Harris**, 557 F.3d 938 (8th Cir. 2009)(probation officer testified that all his meetings with the probationer and he reviewed the notes and did not see any meeting note). The Confrontation Clause does not apply because the absence of a record is not testimonial
- **E. Howard Hunt v. Liberty Lobby**, 720 F.2d 631 (11th Cir. 1983)(admitted affidavit of search of CIA files to look for disputed fact in records)
 - **803(11)[10]: Religious Records**
 - **803(12)[11]: Religious Certificates**
 - **803(13)[12]: Family History Records**
 - **803(14)[13]: Documents Recording an Interest in Property**
 - **803(15)[14]: Statement in Property Document**

1:45-1:55: Step 10: 803(16)[15]: The Ancient Writing Rule

- **U.S. v. Demjanjuk**, 367 F.3d 623 (6th Cir. 2004)(Nazi death camp records)
- **Brumley v. Brumley & Sons**, 2013 WL 4105842 (6th Cir. 2013)(“I’ll Fly Away”)

1:55-2:05: Step 11: 803(17)[16]: Industry Standards

- **Thone v. Regional West Medical**, 275 Neb. 238 (2008)(Protocol)

2:05-2:15: Step 12: 803(18)[17]: Learned Treatise

- **Breeden v. Anesthesia West**, 265 Neb. 356 (2003)

Afternoon Break: 2:15-2:30

2:30-2:40: Step 13: 803(19-21) [18-20]: Reputation Exceptions

- **803(18): Reputation amongst family members related to family relationships**
- **803(19): Reputation related to boundaries, or matters of general history**
- **803(20): Reputation of a person’s character among his associates in the community:**
See Rule 405 and 608 (when reputation is admissible relevant to character)

2:40-2:50: Step 14: 803(22-23)[21-22]: Judgment Exceptions:

- **803(21): Felony judgement upon a guilty plea or conviction to prove dependent facts**
- **803(22): Judgments of personal, family, general history or boundaries**

2:50-3:00: Step 15: Does the Residual Exception Apply? 807 [803(23)]

- **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)

3:00-3:10: Step 16: Is the witness “unavailable” for purposes of 804 exception consideration?

- **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)
- **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).

3:10-3:15: Step 17: When is former testimony admissible? 804(b)(1)[2(a)]

3:15-3:20: Step 18: 804(b)(2)[2(b)]: When are dying declarations admissible?

- **U.S. v. Lawrence**, 349 F.3d 109 (3d Cir. 2003) (No expectation)
- **State v. Jacob**, 242 Neb. 176 (1993)

3:20-3:30: Step 19: 804(b)(3)[2(c)]: When do you have to redact 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)(redact non-inculpatory Statements)

3:30-3:35: Step 20: 804(b)(4)[2(d)]: When is family history admissible?

3:35-3:40: Step 21: 804(b)(6): Forfeiture by Wrong Doing

- **U.S. v. Rivera**, 412 F.3d 562 (4th Cir. 2005)(cutting throat to keep her from testifying)
- **Giles v. California**, 554 U.S. 353 (2006)[1005:92] (“I will kill you if I find you cheating on me”)

3:40- 3:45: Step 22: 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)

3:45-3:50: Step 23: Is a hearsay statement within a hearsay statement admissible? Rule 805

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

3:50-3:55: Step 24: Can Hearsay Declarants be Impeached as any other Witness? 806

- Inconsistent Statements: 613 and 801(d)(1)(A)
- Character evidence: Rules 608-609
- Remember you cannot impeach one witness with another hearsay recorded statement from the third party.

3:55-4:00: Step 25: Be careful of not opening the door to hearsay under the Rule 106, the Rule of Completeness.

- **State v. Sanchez**, 2016 UT App 189; **U.S. v. Lopez-Medina**, 596 F.3d 716 (19th Cir. 2010)