Nebraska Criminal Defense Attorneys Association (NCDAA) Seminar

Mangrum on Evidence: Criminal Law

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Wednesday, October 17, 2018
Embassy Suites Hotel – La Vista Conference Center
Article 8: Hearsay and Confrontation: Breaking Down Hearsay Problems

8:30-9:15: The Concept of Hearsay and Nonhearsay Categories

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 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)
- Bridges v. State, 247 Wis. 350 (1945)(Independently established facts)

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:
    - 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. 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).


Admissions:

- Ficke v. Wolken, 291 Neb. 482 (2016)(any act or conduct which may fairly be interpreted as an admission is admissible)
- State v. Brit, 293 Neb. 381 (2016)(conspiracy does not extend to coverup unless the coverup 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. 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 nonhearsay and the “in furtherance” requirement continues until the central purposes attained, but not a mere cover-up)
- 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.”)

9:15:-10:00: Confrontation

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

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

- **803(2)**: Excited Utterance
  - Werner v. County of Platte, 284 Neb. 899 (2012)
  - State v. Smith, 286 Neb. 856 (2013)
- **803(3)**: Then Existing State of Mind
  - Fite v. Amco Tools, 199 Neb. 353 (1977)
  - Shepard v. U.S., 290 U.S. 96 (1933)
- **803(4)**: Medical Diagnosis and Treatment
  - Field v. Trigg County, 386 F.3d 729 (6th Cir. 2004)
- **803(5)**: Past Recollection Recorded
  - State v. Cervantes, 3 Neb. App. 95 (1994)
- **803(6)**: Business records
- **803(7)**: Public Records
- State v. Mills, 199 Neb. 295 (1977) (fingerprint records)

803(9)[8]: Vital Statistics
- Blake v. Pellegrino, 329 F.3d 43 (1st Cir. 2003)

803(10)[9]: Absence of public record:
- U.S. v. Harris, 557 F.3d 938 (8th Cir. 2009)

803(16)[15]: Ancient Writing
- U.S. v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004)

803(17)[16]: 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)[17]: Learned Treatise

803(22)[21]: Judgments of convictions:
- U.S. v. Nguyen, 465 F.3d 1128 (9th Cir. 2006)

803(24)[23]: Residual Exceptions

11:00-11:30 804 Unavailability Exceptions and Remaining Hearsay Rules

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)
- 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);
- 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
  - 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) (“I will kill you if I find you cheating on me”)

Step 9: Does the Residual Exception Apply? (FRE 807)
Step 10: Does the statement provide the Basis of an Expert Opinion

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

Step 13: Be careful of not opening the door to hearsay under the Rule of Completeness.
- State v. Sanchez, 2016 UT App 189;
- U.S. v. Lopez-Medina, 596 F.3d 716 (19th Cir. 2010)

Lunch: 11:30-1:00

1:00-1:45: Article 6: Character Evidence for Impeachment: 607-610, 613, 801(d)(1)(A)
- Rule 607: A party may call a witness and impeach them
- The Five Analytical Grounds for Impeachment, the Collateral Evidence Rule, the Voucher Rule:
- Impeachment on competency grounds*
- Impeachment on partiality grounds*
- 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
        - 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.”)
“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: 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)
  - 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’”)

**Propensity Rules:**
- Rule 404(1): The general exclusionary rule for character evidence
- Rule 404(1) The narrow 404(1) exceptions:
  - Accused’s offer of his own character:
    - Michelson v. U.S., 335 U.S.469 (1948)(Cross)
  - Accused’s offer of the victim’s character
    - The Confused cases of Self Defense
  - Character evidence relevant to credibility (Rule 607-609)
- Rule 404(2): Prior Bad Acts for Narrower Purposes
  - 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”)

1:45-2:45: Article 4: Character Evidence: 404-406, 412-415 (Propensity Evidence)
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 “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):

Rule 405(b): When character is part of the prima facie case
Rule 413: Exceptions to exclusion for specific sexual offenses

Break: 2:45-3:00
3:00-4:30: 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 nor Make 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
MANGRUM STEPS OF HEARSAY AND CONFRONTATION

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: Is the “statement” factually assertive? (Is it 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)
- 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)

Step 5: Is there an 801 statutory nonhearsay category?
- Is the witness in court, subject to cross examination?
  - 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:
    - State v. Morris, 251 Neb. 23 (1996)(The timing requirement)
  - 801(d)(1)(C) Pretrial Identification inadmissible in Nebraska (a mistake in justice)
    - State v. McCurry, 296 Neb. 40,63-64 (2017)(Due process does not override)
  - 801(d)(2)[4(b)]Admissions:
    - State v. Momsen, 210 Neb. 45 (1981)(Judicial admissions)
    - Jackson v. Denno, 378 U.S. 368 (1964) (Voluntariness of a confession: 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)(the conspiracy does not extend to attempts 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 America**, 285 F.3d 764 (9th Cir. 2002)(Discovery response)

• **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 does not extend to cover-up)

• **Chirnside v. Lincoln Tel.**, 224 Neb. 784 (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)

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

- **State v. Liebel**, 286 Neb. 725 (2013)(DMV records are nontestimonial)
- **State v. Foster**, 286 Neb. 826, 852 (2013)(To friends less likely testimonial)

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**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**
- **State v. Nolt**, 298 Neb. 910 (2018)(victim’s statement in ambulance related to shooting in response to questions from law enforcement)
- **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. Jedlicka**, 297 Neb. 276 (2018)(statements to forensic interviewer at Project harmony realted to diagnsosi or treatment)
  • **State v. Vaught**, 268 Neb. 316 (2004)(Identity in sexual assault of a child)
  • **State v. Vigil**, 283 Neb. 129 (2012)(Nebraska Child Advocacy Center interview)
  • **Ohio v. Clark**, 135 S. Ct. 2173 (2015)(Primary purpose test)
  • **Steele v. State**, 42 N.E.3d 138 (2015)(Identity through medical records)

**Step 8:** **Does the statement fall within Past Recollection Recorded: 803(5)[4]**
  • **State v. Cervantes**, 3 Neb. App. 95 (1994)(Past Recollection Recorded)
  • Compare Refreshing Memory: **Rule 612**

**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)
    • Firsthand knowledge: **Johnson v. Lutz**, 253 N.Y 124 (1930)
    • See also Rule 805
  • **803(8)[7]**: Public Records
  • **803(9)[8]**: Vital Statistics
    • **Blake v Pellegrino**, 329 F.3d 43 (1st Cir. 2003)(cause of death in death certificate)
  • **803(10)[9]**: Absence of Records (Confrontation Clause does not apply)
  • **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

**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”)

**Step 11:** **803(17)[16]**: **Industry Standards**
  • **Thone v. Regional West Medical**, 275 Neb. 238 (2008)(Protocol)

**Step 12:** **803(18)[17]**: **Learned Treatise**
**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: See Rule 405 and 608

**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

**Step 15: Does the Residual Exception Apply? 807 [803(23)]**


**Step 16: Is the witness “unavailable” for purposes of an 804 exception?**

- State v. Trice, 292 Neb. 482 (2016)(Issued and served subpoena sufficient)

**Step 17: When is former testimony admissible? 804(b)(1)[2](a)]**

**Step 18: 804(b)(2)[2(b)]: When are dying declarations admissible?**


**Step 19: 804(b)(3)[2(c)]: When do you have to redact statements?**


**Step 20: 804(b)(4)[2(d)]: When is family history admissible?**

**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)(“I will kill you if you cheat)

**Step 22: Does the statement provide the Basis of an Expert Opinion**


**Step 23: Is hearsay within a hearsay statement admissible? Rule 805**

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

**Step 24: Can Hearsay Declarants be Impeached as any other Witness? 806**

**Step 25: Do not open the door to hearsay (Rule 106, R. of Completeness)**

PROFESSOR MANGRUM ON CHARACTER EVIDENCE IN NEBRASKA

WHAT TYPE OF CASE? Criminal? Civil? Sexual Assault? Character at issue (405(2))? 
WHO IS OFFERING THE CHARACTER EVIDENCE? Crim. Def.? Pros? Civil party? 
WHAT FORM OF CHARACTER EVIDENCE? Reputation, Opinion, Specifics, Habit? 
WHEN IS THE CHARACTER EVIDENCE BEING OFFERED? Direct, Cross, Rebuttal? 
WHY ARE THEY OFFERING THE EVIDENCE? Propensity, Credibility, Narrow Purpose? 

1. IF A PARTY OFFERS CHARACTER EVIDENCE TO PROVE PROPENSITY:
   
   (i) The evidence is inadmissible under Rule 404(1) unless the evidence fits an exception: 404(1)(a-c), 404(2), 405(2), 406, 412-413. 
   
   (ii) If relevant to show the CREDIBILITY of a witness (who may or may not also be an actor), then look to Rules 608-09 for issues of credibility and 404 for propensity. 

2. IF THE EVIDENCE IS RELEVANT TO SHOW CONFORMING BEHAVIOR OF AN ACTOR IN THE CASE, THEN LOOK TO RULES 404-406, 413-415 AND ASK:
   
   (i) if a civil case, (other than sexual assault covered by Rules 415), then the evidence is inadmissible unless it (1) fits within Rule 404(2)(narrower purpose such as knowledge, motive, intent, modus operandi); (2) Rule 405(2) character in issue, (3) Rule 406 habit, or 412-415 sexual assault or child molestation. 
   
   (ii) if offered by the prosecution in a criminal case the same result as above unless the issue involves a crime involving sexual assault covered by Rules 413-415. 
   
   (iii) in a criminal case if offered by the accused, then (a) look to Rule 404(1)(a) (character of an accused and Rule 404(1)(b) (victim) for admissibility; (b) also look to Rule 405(1) for the form of the testimony (reputation or opinion, not specifics on direct examination); and (c) worry about opening the door to a Michelson cross and 405(1) rebuttal evidence. (Faust). 

3. IF THE EVIDENCE IS RELEVANT FOR A NARROW NON-GENERAL CONFORMING BEHAVIOR PURPOSE, see Rule 404(2) and if in a criminal case the evidence is offered by the prosecution, then pretrial notice (required if the defense requests) regarding why the evidence is specifically (not generally) relevant. This will commonly be the subject of a pretrial motion in limine. Be prepared to answer the 403 unfairly prejudicial question. Offer should be outside jury. 

4. IF THE EVIDENCE GOES TO HABIT OR BUSINESS ROUTINE, look to Rule 406 and consider whether the action is (1) particular and (2) invariable? 

5. IF CHARACTER IS AN ELEMENT OF THE PRIMA FACIE CASE mostly in civil cases such as child custody, libel, negligent hiring, negligent entrustment, etc., then rely on Rule 405(2) which allows the admissibility of reputation, opinion, or specifics. 

6. IF THE EVIDENCE IS RELEVANT TO THE WITNESS’S CREDIBILITY, a form of character, but narrower in scope, then Rule 608 applies (which also limits the form to reputation and opinion on direct, unless specifics regarding lying of the witness asked on cross), or prior convictions Rule 609. 

7. IF GENERAL CHARACTER EVIDENCE IS ADMISSIBLE ON DIRECT under Rule 404 or 608 (opinion or reputation form (Rule 405), then the opponent may cross-examine on specifics. (Michelson). 

8. COLLATERAL EVIDENCE RULE: Following a Michelson cross, the opponent cannot introduce extrinsic proof of the fact denied on cross unless under the doctrine of specific contradiction Walder v. U.S., 347 U.S. 62 (1954); State v. Carpenter, 293 Neb. 860 (2016)(If a W offers on direct testimony then the W opens the door to extrinsic evidence). 

9. IF THE CHARGE SEXUAL ASSAULT OR CHILD MOLESTATION, then Rules 413-415 apply and propensity is at issue and can be proven by reputation, opinion or specifics; 15-day notice required. 

10. IF THE VICTIM IS A SEXUAL ASSAULT VICTIM, then Rule 412 (15 day), not 404(1)(b). 

11. IF AN HEARSAY OBJECTION TO THE REPUTATION EVIDENCE, then 803(21). 

12. IF CHARACTER GOES TO CREDIBILITY, then look to Rules 607-610. 609 overrides 608(2) 

13. REMEMBER THE COMMON LAW VOUCHER RULE: W 1 cannot vouch for a W 2 until the W 1 is impeached; judge cannot vouch for the credibility of a W by body language, behavior or adversarial examination; counsel cannot vouch for the credibility of a W or express personal belief in the cause.
PROFESSOR MANGRUM

12 CLOSING ARGUMENT “THAT SHALT NOT” PRINCIPLES


11th Principle: Thou Shalt Not Argue Religious Beliefs: Cunningham v. Zant, 928 F.2d 1006, (11th Cir. ‘91).