Creighton
UNIVERSITY
School of Law

Mangrum

All Day Hearsay and Confrontation 2022

Nebraska, Federal Rules of Evidence Statutory and Common Law Rules on Hearsay and Confrontation

by

Richard Collin Mangrum

Friday, December 16, 2022
8:00 a.m. – 4:00 p.m.

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

Richard Collin Mangrum, JD, BCL, SJD

Richard Collin Mangrum, JD, BCL, SJD, is the AA and Ethel Yossem Endowed Chair in Legal Ethics at the Creighton University School of Law.

Professor Mangrum graduated Magna Cum laude from Harvard University in 1972. He then attended the University of Utah School of Law, where Professor Mangrum was associate editor of the Law Review, graduating with his J.D. in 1975. He was in private practice in Salt Lake City from 1975-1977; was Rotary International Foundation Fellow in 1977 to Oxford, England where he received his B.C.L. in 1978; he received his S.J.D from Harvard Law School in 1983. Professor Mangrum joined the Creighton law faculty in 1979. Professor became the AA and Ethel Yossem Endowed Chair holder in 2000. Professor Mangrum received the Robert Kennedy Memorial Award for the Outstanding University Professor for Creighton University in 2001. Professor Mangrum received the Outstanding Professor Award for Creighton Law School in 2006. 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.

He has written over thirty articles and three books. His book Zion in the Courts: A Legal History of The Church of Jesus Christ of Latter-Day Saints, 1830-1900 (1988) (University of Illinois Press) won the National Alpha Sigma Nu Book Award for 1989. His treatise, Mangrum on Nebraska Evidence (Thomsen Reuters, annual 2003-2019), serves as a primary source for practitioners and is frequently cited by the Nebraska courts on evidentiary issues. His treatise, Mangrum and Benson on Utah Evidence (Thomsen Reuters, annual 2004-2019) also serves as a primary source for Utah practitioners and is frequently cited by the courts in Utah. He regularly lectures to practitioners and the judiciary on evidentiary issues in Nebraska and Utah. He has successfully coached trial teams for the Texas Young Lawyers Trial Competition (TYLA) or National Trial Competition and the American Association of Justice (formerly ATLA) every year since 1989. He has also successfully coached teams for the ABA Arbitration Competition since 2008.

MANGRUM ON HEARSAY AND CONFRONTATION

Mangrum on Nebraska Hearsay and Confrontation 2022
by
Richard Collin Mangrum
Friday, December 16, 2022
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 F.3d 637 (8th Cir. 2006)(Verbal harassment)
- State v. McCave, 282 Neb. 500 (2011)(Verbal acts-explicit permission to be on the premises-are nonhearsay to establish license to be on the property)
- In re Hla H., 25 Neb. App. 118 (2017)(Letter to juvenile verbal act of notice)
- Calmat v. U.S. Dept. of Labor, 364 F.3d (9th Cir. 2004)(Racist, threatening employment statements relevant to show effect on hearer)
- Bridges v. State, 247 Wis. 350 (1945)(Independently established facts)
- State v. Peeler, 126 Ariz. 254 (Ct. App. 1980)(Elderly victim's statement following a sexual assault admissible for an independent rational significance of showing consciousness following the assault)
- State v. Rodriguez, 272 Neb. 930 (2007)(Prior inconsistent statement offered for limited purpose of impeachment by inconsistent statement)
- State v. Robinson, 271 Neb. 698 (2006)(False statement about whereabouts admissible for nonhearsay purpose of consciousness of guilt)
- 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 of marijuana cultivation)
- U.S. v. Candoli, 870 F.2d 496 (9th Cir. 1989)(Cover-up)
- Baker-Heser v. State, 309 Neb. 979 (2021)(Internal documents to show nonretaliatory reason for termination)
- Arens v. NEBCO, Inc., 291 Neb.834 (2015)(letter to employer documenting disability relevant to show awareness of disability)
- State v. Martinez, 306 Neb. 516 (2020)(Admissions are nonhearsay under estoppel or waiver theory even through a translator)

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)(i)] 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)(ii)] 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) [(4)(a)(iii)]Pretrial Identification
  - 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, 565 U.S. 228 (2012)(In-court ID permissible, unless police misconduct in earlier pretrial ID may have affected reliability of in-court ID
  - 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)(i)] Personal Admissions:
  - State v. Robinson, 271 Neb. 698 (2006) (Personal admissions)
  - Lewison v. Renner, 298 Neb. 654 (2018)(Statements in answer qualifies as a judicial admission).

- Wood v. Bass, 30 Neb. App. 391 (2021)(Judicial admissions limited to the case being tried; use in other cases is limited to an evidentiary admission)).
- TNT Cattle Company v. Fife, 304 Neb. 890 (2020)(judicial admission confined by context and must be unequivocal)
- State v. Momsen, 210 Neb. 45 (1981)(Judicial admissions: bound by deposition answers)
- In re Donald B., 27 Neb. App. 126 (2019)(A parent's in-court admissions in a termination of parental rights case are binding on the parent)
- State v. Barber, 28 Neb. App. 820 (2020)(Judicial admissions apply in criminal cases-admitting to penetrating)
- State v. Baker, 298 Neb. 216 (2017)(Third party statements in a conversation with the party are admissible with the admissions if they give context to the admission.)
- Jackson v. Denno, 378 U.S. 368 (1964) (pretrial voluntariness of a confession an issue for the court: See 104(3)(a)
- Mahlandt v. Wild Canid Survival & Research Center, Inc., 588 F.2d 626 (8th Cir. 1978)
- 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 coverup their crime, 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)
- In re C.M., 215 Neb. 383 (1983)(adoptive admission)
- 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)
- 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)

- 801(d)(2)(b)[4(b)(ii)] Adoptive Admissions:
  - State v. Trice, 292 Neb. 482, 494 (2016)(Adoptive admission from a jail call with his father regarding self-defense theory)
  - State v. Dragnescu, 276 Neb. 448 (2008)(A party's possession of a document can be an adoptive admission of what its content reveals)

- State v. C.M., 2015 Neb. 383 (1983)("Everything is going perfect" and snuggling up to her husband is an adoptive admission that the two were not separated)

- 801(d)(2)(c)[4(b)(iii)] Authorized Admissions:
- 801(d)(2)(d)[4(b)(iv)] Admissions within scope of Agency:
  - Chirnside v. Lincoln Tel. & Tel. Co., 224 Neb. 784 (1987)(Driver's statement that his brakes were not working admissible against the Company)
  - Bump vv. Firemens Ins. Co., 221 Neb. 678 (1986)((Insurance company's adjuster's statement to the insured that they were covered).
  - Grace United Methodist v. City of Cheyenne, 427 F.3d 775 (10th Cir. 2005)(Bishop's letter that the daycare was more commercial than religious)
  - Mahlandt v. Wild Candid Survival, 588 F.2d 626 (8th Cir. 1978)(Statement that by the custodian of the wolf that Sophie (the wolf) had bitten a child)
- 801(d)(2)(e)[4(b)(v)] Statements by Coconspirators within Scope of Conspiracy:
  - Bourjaily v. United States, 483 U.S. 171 (1987)(Under FRE foundational facts must be established by a preponderance (104(a) level).
  - State v. Hansen, 252 Neb. 489 (1997)(Foundational facts only requiring "prima facie" evidence (104(b) language)
  - State v. Myers, 258 Neb. 300 (1999)(Prima facia facts establishing conspiracy must be independent to of the hearsay statement)
  - State v. Hudson, 279 Neb. 6 (2009)(Coconspirator's statement admissible even if a conspiracy has not been charged)
  - State v. Copple, 224 Neb. 672 (1987)((1) a conspiracy existed; (2) D and declarant were conspirators; (3) the acts were done during and furtherance)
  - State v. Honken, 25 Neb. App. 352 (2017)(Continued participation presumed unless coconspirator demonstrates affirmative withdrawal)
  - State v. Henry, 292 Neb. 834 (2016)(Conspiracy continues until central purposes have been achieved, failed or abandoned)
  - State v. Britt, 293 Neb. 381 (2016)(Conspiracy to conceal within conspiracy)
  - State v. Myers, 258 Neb. 300 (1999)(Threat to coconspirators not to say anything was admissible within conspiracy)

Morning Break: 10:00-10:15

10:15-10:45: Confrontation

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

- Tennessee v. Street, 471 U.S. U.S. 409 (1985)(Conceptual nonhearsay is not subject to Confrontation Clause)
- Ohio v. Roberts, 448 U.S. 56 (1980)(Firmly rooted or circumstantial guarantees of trustworthiness)
- Crawford v. Washington, 541 U.S. 36 (2004)(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?)

- 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)
- Williams v. Illinois, 567 U.S. 50 (2012)(Rule 703 and Confrontation)
- U.S. v. Owens, 484 U.S. 554 (1988)(Opportunity to cross examine regardless of effectiveness)
- Giles v. California, 554 U.S. 353 (2008)("Forfeiture by wrongdoing an exception to Confrontation)
- State v. Lindberg, 25 Neb. App. 515 (2018)(By calling a "recanting" victim of an alleged victim of domestic violence, Defendant waived Confrontation challenge to out-of-court incriminating statement)

10:45-11:15: The Res Gestae Exceptions: 803(1-4)

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

- FRE 803(1): Present Sense Impression
  - Newly enacted exception
  - Houston Oxygen Co. v. Davis, 139 Tex. 1 (1942)
- Nebraska 803(2): Excited Utterance
  - Pantano v.American Blue Ribbon Holdings, 303 Neb. 156 (2019)(Startling event following stressful slip and fall)
  - State v. Pullens, 281 Neb. 828 (2011) ("Observations of emotional state)
  - 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")
  - State v. Nolt, 298 Neb. 910 (2018)(victim's statements in an ambulance related to the shooting in response to questions from law enforcement)
  - State v. Sullivan, 236 Neb. 344 (199)(Spontaneous, not questioned)
  - State v. Plant, 236 Neb. 317 (1990)(Outcome different if occurs today)
- Nebraska 803(3): 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): 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).
- State v. Jedlicka, 297 Neb. 276 (2017)((Assist in medical diagnosis or treatment)
- State v. Rowe, 210 Neb. 419 (1982)(Truth serum administered not for medical treatment, but for evidentiary purpose of recalling memory).

11:15-11:30: Rule 803(5) 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

11:30-12:00: Step 9: The Records Exceptions: 803(6)-803(18)

- 803(6): Business records
  - Crowder v. Aurora, 223 Neb. 704 (1986)(Regularly maintained):
  - Palmer v. Hoffman, 318 U.S. 109 (1943)(Regular course of business)
  - Johnson v. Lutz, 253 N.Y 124 (1930)(Firsthand knowledge:)
  - State v. Robinson, 272 Neb. 582 (2006)(Trustworthiness arises from how the records are kept, maintained and used)
  - Arens v. NEBCO, Inc. 291 Neb. 834 (2015)(The proponent of a medical record has "to redact" inadmissible evidence)
  - State v. Walker, 26 Neb. App. 292 (2021).
  - See also **Rule 805**
- 803(7): Absence of business record:
- 803(8): 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)
  - State v. Leibel, 286 Neb. 725 (2013)(Driving records are nontestimonial)
  - Sacco v. Carothers, 257 Neb. 672 ((1986)(Prior police incident reports relevant to foreseeability (and notice?)
  - In re Cole J., 26 Neb. App. 951 (2019)(School's attendance records admissible for truancy)
- 803(9): Vital Statistics

- Blake v Pellegrino, 329 F.3d 43 (1st Cir. 2003)(cause of death in death certificate admissible)
- State v. Hood, 301 Neb. 207 (2018)(Death certificate not presumptive evidence of the facts stated therein)

- 803(10): 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): Religious Records
  - Hall v. C.I.R., 729 F.2d 632 (9th Cir. 1984)(Religious records does not include charitable contributions, because not the traditional "religious facts" of birth, death, marriage)
- 803(12): Religious Certificates
- 803(13): Family History Records
- 803(14): Documents Recording an Interest in Property
- 803(15): Statement in Property Document
  - Silverstein v. Chase, 260 F.3d 142 (2d Cir. 2001)(Deeds)
  - U.S. v. Boulware, 384 F.3d 794 (9th Cir. 2004)(Judgment establishing ownership including the recital of facts)

Step 10: 803(16): The Ancient Writing Rule

- U.S. v. Demjanjuk, 367 F.3d 623 (6th Cir. 2004)(Nazi death camp records)
- Brumley v. Brumley & Sons, 727 F.3d 574 (6th Cir. 2013)("I'll Fly Away")

Step 11: 803(17): Industry Standards

- Thone v. Regional West Medical, 275 Neb. 238 (2008)(Protocol)
- Rawlings v. Anderson, 195 Neb. 686 (1976)(Life expectancy tables)

Step 12: 803(18): Learned Treatise

- Hill v. Hill, 10 Neb. App. 570 (2001)(Videotape of a seminar on fibromyalgia properly excluded because it was not offered through an expert).
- Jackson v. Brotherhood's Relief and Compensation Fund, 273 Neb. 1013 (2007)(Reversed because the court permitted a lay person to use a treatise)
- Breeden v. Anesthesia West, 265 Neb. 356 (2003)("To the extent called to the attention of an expert witness upon cross examination or elide upon by the expert witness in direct examination.")
- Reilly v. Pinkus, 338 U.S. 269 (1949)(Learned treatise may be referenced even not relied upon by the expert in forming an opinion)
- Daubert v. Merrell Dow, 509 U.S. 579 (1993)(Daubert four criterial for admissibility anticipate learned treatises and include (1) testing; (2) peer reviewed; (3) established rate of error; (4) generally accepted in scientific community)
- See Evidence Based Medicine Pyramid

AFTERNOON SESSION:
1:00-1:10: Step 13: 803(19-21): Reputation Exceptions

- 803(19): Reputation amongst family members related to family relationships
- 803(20): Reputation related to boundaries, or matters of general history
- 803(21): Reputation of a person's character among his associates in the community
  - Rule 405 and 608 (when reputation is admissible relevant to character)

1:10-1:20: Step 14: 803(22-23): Judgment Exceptions:

- 803(22): Felony judgement upon a guilty plea or conviction to prove dependent facts
- U.S. v. Nguyen, 465 F.3d 1128 (9th Cir. 2005)(803(22) does not apply to pleas of nolo contendere)
- Stenson v. Wright, 273 Neb. 789 (2007)(Evidence of conviction for a traffic infraction is not admissible in a civil suit for damages arising out of the same traffic infraction")(Due to Neb. Rev. Stat. § 60-693).
- Rand v. Stanosheck, 2019 WL 95647, at *2 (D. Neb. 2019)("No evidence of the conviction of any person for any violation of any provision of the Nebraska Rules of the Road shall be admissible in any court in any civil action." Neb. Rev. Stat. § 60-693 (Nebraska Revised Statute § 60-693 provides: "No evidence of the conviction of any person for any violation of any provision of the Nebraska Rules of the Road shall be admissible in any court in any civil action.")
- Diaz v. Kelm, 2018 WL 3448268, at *1–2 (D. Neb. 2018)(DUI conviction inadmissible)
- 803(22): Judgments of personal, family, general history or boundaries.

1:20-1:25: Step 15: Does the Residual Exception Apply? 807 [803(24)]

- **State v. McBride**, 250 Neb. 974 (1996)(rare in criminal cases)
- **State v. Epp**, 278 Neb. 683 (2009)(admissibility depends upon a finding that the statement's (1) trustworthiness; (2) materiality; (3) probative value; (4)interests of justice; (5) if notice given)
- **State v. Toney**, 243 Neb. 237 (1993)(Trustworthiness depends upon such factors as (1) oral or written; (2) motive; (3) oath; (4) spontaneous; (5) cross examination; (6) affirmed or recanted)
- **Drew v. Walkup**, 240 Neb. 946 (1992)(Refusing to even consider a residual question unless pretrial notice).
- **State v. Phillips**, 286 Neb. 974, 995 (2013)(Statement tended to reduce, not enhance, culpability and impacted trustworthiness).
- **Holmes v. South Carolina**, 547 U.S. 319 (2006)

1:25-1:30: Step 16: Is the witness "unavailable" for purposes of 804(a)[1] exception consideration?

- **Worth v. Kolbeck**, 273 Neb. 163 (2007)("Unavailability" within the discretion of the trial court)
- **State v. Trice**, 292 Neb. 482 (2016)(Considerable coordination, including issuing 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).

1:30-1:35: Step 17: When is former testimony admissible? 804(b)(1)[2(a)]

- **Maresh v. State**, 241 Neb. 496 (1992)(Overruled by 25-1273.1)
- **Walton v. Patil**, 279 Neb. 974 (2010)(Rules of Civil Procedure provide an alternative basis for establishing unavailability (100 miles from the trial and outside court's subpoena power)

1:35-1:40: 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)

1:40-1:50: 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)

1:50-1:55: Step 20: 804(b)(4)[2(d)]: When is family history admissible?

1:55-2:00: Step 21: 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)[1005:92]("I will kill you if I find you cheating on me")

2:00-2:15: Afternoon Break

2:15-2:25: 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)

2:25-2:30: Step 23: Is a hearsay statement within a hearsay statement admissible? Rule 805

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

2:30-2:35: 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.

2:35-3:00: Miscellaneous:

Step 25: Has the Opponent Waived an Hearsay Objection? (Rule 103, 106, 612)

- State v. Sanchez, 2016 UT App 189; U.S. v. Lopez-Medina, 596 F.3d 716 (9th

Step 26: Does the statement provide the Basis of an Expert Opinion

- Williams v. Illinois, 132 S. Ct. 2221 (2012)(The bases of expert testimony)

Step 27: Reliable Hearsay Admissible in Specified Proceedings subject to Due Process

Step 28: Hearsay in Juvenile Dispositional Hearings

- "Dispositional" juvenile courts proceedings are not subject to the Strict Rules of Evidence: Section 43-283
- Santosky v. Kramer, 455 U.S. 745 (1982) Due Process does apply:

Step 29: Hearsay not Strictly Applied in Miscellaneous Criminal Proceedings:

(1) Extradition or Rendition
(2) Preliminary and Post-Trial Criminal Proceedings
    a. Suppression hearings
    b. Motions to Transfer to Juvenile Court
    c. Criminal Summons, Arrest, and Search Warrants
    d. Sentencing
    e. Probation Proceedings

Step 30: Administrative Proceedings

a. Workers' Compensation
b. Medical and Vocational Rehabilitation
c. Small Claims

Step 31: If offered for truth and not within a Hearsay Exception, or Waiver, then Inadmissible Hearsay

3:00-4:00: Professionalism and Civility: Do not Misuse Hearsay in Closing Arguments

1. **ABA 3-6.8: The prosecutor [attorneys] should not knowingly misstate the evidence or argue inferences that the prosecutor knows have no good faith support in the record.** But, while [the prosecutor] he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. U. S., 295 U.S. 78, 88 (1935)
2. **Object to Improper Closings that Rely on Inadmissible Hearsay: ABA Standard 3.5.8(a):**
3. **Do not argue "Hearsay" facts that were alluded to on cross, but never admitted.**
   - State v. Alarid, 2022 UT App 84 ("We agree with Alarid that the prosecutor made improper statements" … that Alarid had "told [Daughter] what he wants her to say.")
   - State v. King, 2010 UT App 396, ¶¶ 23-39 (Simply stated, the prosecutor improperly urged the jury to consider "matters not in evidence.").
   - State v. Babich, 68 Wash. App. 438, 445–46 (1993)(The format of the prosecutor's questions was, "And then you said ..." and "You don't remember that?" Mr. Franco specifically denied saying that Ms. Babich was a cocaine dealer, but the prosecutor never introduced extrinsic evidence of the conversation to rebut that denial. Then, he improperly argued to the jury in closing argument that Ms. Babich was a known cocaine dealer, citing the body wire conversations which were never introduced into evidence.
   - State v. Yoakum, 37 Wash.2d 137 (1950)(during cross examination the prosecutor quoted extensively from a transcript of a taped interview of the defendant conducted by law enforcement officers. When the prosecutor asked the defendant if he had made those statements, the defendant answered, "I don't know.")
   - Thurmond v. State, 57 Okla. Crim. 388, 48 P.2d 845 (1935)("Public prosecutors should not be allowed to state facts not proven
   - United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984)(Thus, a prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact.
   - State v. Babich, 68 Wash. App. 438, 443–47 (1993)("[H]e improperly argued to the jury in closing argument that Ms. Babich was a known cocaine dealer, citing the body wire conversations which were never introduced into evidence.")
   - State v. Yoakum, 37 Wash.2d 137 (1950)(During cross examination the prosecutor quoted extensively from a transcript of a taped interview of the defendant conducted by law enforcement officers. When the prosecutor asked the defendant if he had made those statements, the defendant answered, "I don't know". The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, *as evidence*, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness.)
4. **Do not Argue Innuendos suggested under Rule 612 but never admitted**
   * Rush v. Illinois Cent. R. Co., 399 F.3d 705. 718 (6th Cir. 2005)("We thus reach the inescapable conclusion that defense counsel impermissibly utilized the 'guise of refreshing-of-court statements.").

* U.S. v. Shoupe, 548 F.2d 636, 642 (6th Civ. 1977)("If a party can offer a statement previously given statement to substitute for a witness' testimony under the guise of `refreshing recollect' the whole adversary system of trial must be revised.")

5. Do not Refer to Hearsay Evidence not introduced in Evidence

* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 284–85 (5th Cir. 1975)("In closing argument, plaintiff's counsel told the jury that a Sears representative, George Vaught, had stated that the claims and recommendations in Sears' manuals had been recognized by the company to be false, and that Sears had therefore taken them off the market after George Edwards' death. … Where placing material facts not in evidence before the jury in final argument substantially prejudices a party, reversal is required."
* Ayoub v. Spencer, 550 F.2d 164, 170 (3d Cir. 1977)

6. Do not Refer to Deposition Testimony not Offered in Evidence

* Rommel-McFerran Co. v. Local Union No. 369, 361 F.2d 658 (6th Cir. 1966)

7. Do not Misuse 105 Limited Use Hearsay Evidence (E.g., Impeachment argued for truth)

* State v. Hairston, 133 Idaho 496, 507-08 (1999)("The Martin tape was admitted solely for the purpose of impeaching Martin's testimony" but argued the statement for its truth").
* State v. Clinkenbeard, 130 Wash. App. 552, 568–72 (2005)("Despite the fact that the proper use of M.Q.'s prior inconsistent statements was for impeachment purposes only, the State used them as substantive evidence of guilt at trial. In its closing statements to the jury, the prosecution asserted that M.Q.'s statements to Sergeant Hall and Ms. Gall were proof of sexual intercourse between M.Q. and Mr. Clinkenbeard. Therefore, we hold that this was an improper use of impeachment testimony as substantive evidence."

8. Do not Argue "Artistic License" Hearsay

* U.S. v. Moore, 651 F.3d 30, 53 (D.C. Cir. 2011):
* Whittenburg v. Werner Enterprises Inc., 561 F.3d 1122, 1127 (10th Cir. 2009).

9. Remember the Doctrine of Invited Error.

* **U.S. v. Young**, 470 U.S. 1, 4-5 (1985)(When defense argued that the prosecution "has been presently unfairly by the prosecution" "to poison your minds unfairly," and "I submit to you that there's not a person in this courtroom including those sitting at this table who that Billy Young intended to defraud Apco," the prosecution responded in rebuttal , "If we are allowed to give our personal impressions since I was asked of me" "I don't know what you call that, I call it fraud."

10. Ethical Duty to Know What is an Improper Closing:

* **Luce v. State**, 642 So.2d 4 (Fla. Dist. Ct. App. 1994(Concurring)("If attorneys dop not recognize improper argument, they should be in in a courtroom.")