

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 39

Introduced by Flood, 19.

Read first time January 8, 2009

Committee: Judiciary

A BILL

1 FOR AN ACT relating to the Nebraska Evidence Rules; to amend
2 sections 27-404, 27-801, 27-1103, 28-318, 28-1010, and
3 83-4,143, Reissue Revised Statutes of Nebraska; to adopt
4 new rules of evidence relating to sexual offenses; to
5 change provisions relating to hearsay; to harmonize
6 provisions; to eliminate conflicting and repetitive
7 provisions; to provide a duty for the Revisor of
8 Statutes; to provide an operative date; to repeal the
9 original sections; and to outright repeal section 28-321,
10 Reissue Revised Statutes of Nebraska.
11 Be it enacted by the people of the State of Nebraska,

1 Section 1. (1) The following evidence is not admissible
2 in any civil or criminal proceeding involving alleged sexual
3 misconduct except as provided in subsections (2) and (3) of this
4 section:

5 (a) Evidence offered to prove that any alleged victim
6 engaged in other sexual behavior; and

7 (b) Evidence offered to prove any alleged victim's sexual
8 predisposition.

9 (2) (a) In a criminal case, the following evidence is
10 admissible, if otherwise admissible under these rules:

11 (i) Evidence of specific instances of sexual behavior
12 by the alleged victim offered to prove that a person other than
13 the accused was the source of semen, injury, or other physical
14 evidence;

15 (ii) Evidence of specific instances of sexual behavior
16 by the alleged victim with respect to the person accused of the
17 sexual misconduct offered by the accused to prove consent or by the
18 prosecution; and

19 (iii) Evidence the exclusion of which would violate the
20 constitutional rights of the defendant.

21 (b) In a civil case, evidence offered to prove the
22 sexual behavior or sexual predisposition of any alleged victim is
23 admissible if it is otherwise admissible under these rules and its
24 probative value substantially outweighs the danger of harm to any
25 victim and of unfair prejudice to any party. Evidence of an alleged

1 victim's reputation is admissible only if it has been placed in
2 controversy by the alleged victim.

3 (3) (a) A party intending to offer evidence under
4 subsection (2) of this section shall:

5 (i) File a written motion at least fourteen days before
6 trial specifically describing the evidence and stating the purpose
7 for which it is offered unless the court, for good cause, requires
8 a different time for filing or permits filing during trial; and

9 (ii) Serve the motion on all parties and notify the
10 alleged victim or, when appropriate, the alleged victim's guardian
11 or representative.

12 (b) Before admitting evidence under this rule the court
13 shall conduct a hearing in camera and afford the victim and parties
14 a right to attend and be heard. The motion, related papers, and the
15 record of the hearing must be sealed and remain under seal unless
16 the court orders otherwise.

17 Sec. 2. (1) In a criminal case in which the defendant
18 is accused of an offense of sexual assault, evidence of the
19 defendant's commission of another offense or offenses of sexual
20 assault is admissible if there is sufficient evidence to support a
21 finding by the jury that the defendant committed the other offense
22 or offenses. If admissible, such evidence may be considered for its
23 bearing on any matter to which it is relevant.

24 (2) In a case in which the prosecution intends to offer
25 evidence under this rule, the prosecuting attorney shall disclose

1 the evidence to the defendant, including statements of witnesses or
2 a summary of the substance of any testimony that is expected to be
3 offered, at least fifteen days before the scheduled date of trial
4 or at such later time as the court may allow for good cause.

5 (3) This rule shall not be construed to limit the
6 admission or consideration of evidence under any other rule.

7 (4) For purposes of this section and section 3 of this
8 act, offense of sexual assault means sexual assault under section
9 28-319 or 28-320, sexual assault of a child under section 28-319.01
10 or 28-320.01, sexual assault by use of computer under section
11 28-320.02, sexual abuse of an inmate or parolee under sections
12 28-322.01 to 28-322.03, and sexual abuse of protected persons under
13 section 28-322.04.

14 Sec. 3. (1) In a civil case in which a claim for damages
15 or other relief is predicated on a party's alleged commission of
16 conduct constituting an offense of sexual assault, evidence of that
17 party's commission of another offense or offenses of sexual assault
18 is admissible and may be considered as provided in section 2 of
19 this act.

20 (2) A party who intends to offer evidence under this
21 section shall disclose the evidence to the party against whom it
22 will be offered, including statements of witnesses or a summary of
23 the substance of any testimony that is expected to be offered, at
24 least fifteen days before the scheduled date of trial or at such
25 later time as the court may allow for good cause.

1 (3) This section shall not be construed to limit the
2 admission or consideration of evidence under any other section of
3 the Nebraska Evidence Rules.

4 Sec. 4. Section 27-404, Reissue Revised Statutes of
5 Nebraska, is amended to read:

6 27-404 (1) Evidence of a person's character or a trait of
7 his or her character is not admissible for the purpose of proving
8 that he or she acted in conformity therewith on a particular
9 occasion, except:

10 (a) Evidence of a pertinent trait of his or her character
11 offered by an accused, or by the prosecution to rebut the same;

12 (b) Evidence of a pertinent trait of character of the
13 victim of the crime offered by an accused or by the prosecution to
14 rebut the same, or evidence of a character trait of peacefulness
15 of the victim offered by the prosecution in a homicide case to
16 rebut evidence that the victim was the first aggressor; or - In the
17 case of sexual assault, reputation or opinion evidence of the past
18 sexual behavior of the victim of the sexual assault will not be
19 admissible; or

20 (c) Evidence of the character of a witness as provided in
21 sections 27-607 to 27-609.

22 (2) Evidence of other crimes, wrongs, or acts is not
23 admissible to prove the character of a person in order to show
24 that he or she acted in conformity therewith. It may, however,
25 be admissible for other purposes, such as proof of motive,

1 opportunity, intent, preparation, plan, knowledge, identity, or
2 absence of mistake or accident.

3 (3) When such evidence is admissible pursuant to this
4 section, in criminal cases evidence of other crimes, wrongs, or
5 acts of the accused may be offered in evidence by the prosecution
6 if the prosecution proves to the court by clear and convincing
7 evidence if there is sufficient evidence to support a finding by
8 the jury that the accused committed the crime, wrong, or act. Such
9 proof shall first be made outside the presence of any jury.

10 (4) Regarding the admissibility in a civil or criminal
11 action of evidence of a person's commission of another offense or
12 offenses of sexual assault under sections 28-319 to 28-322.04, see
13 sections 2 and 3 of this act.

14 Sec. 5. Section 27-801, Reissue Revised Statutes of
15 Nebraska, is amended to read:

16 27-801 The following definitions apply under this
17 article:

18 (1) A statement is (a) an oral or written assertion or
19 (b) nonverbal conduct of a person, if it is intended by him as an
20 assertion;

21 (2) A declarant is a person who makes a statement;

22 (3) Hearsay is a statement, other than one made by the
23 declarant while testifying at the trial or hearing, offered in
24 evidence to prove the truth of the matter asserted; and

25 (4) A statement is not hearsay if:

1 (a) The declarant testifies at the trial or hearing and
2 is subject to cross-examination concerning the statement, and the
3 statement is (i) inconsistent with his testimony and was given
4 under oath subject to the penalty of perjury at a trial, hearing,
5 or other proceeding, or in a deposition, or (ii) consistent with
6 his testimony and is offered to rebut an express or implied charge
7 against him of recent fabrication or improper influence or motive,
8 or (iii) one of identification of a person made after perceiving
9 the person, or

10 (b) The statement is offered against a party and is (i)
11 his own statement, in either his individual or a representative
12 capacity, or (ii) a statement of which he has manifested his
13 adoption or belief in its truth, or (iii) a statement by a person
14 authorized by him to make a statement concerning the subject, or
15 (iv) a statement by his agent or servant within the scope of his
16 agency or employment, or (v) a statement by a coconspirator of a
17 party during the course and in furtherance of the conspiracy, or-

18 (c) The statement is made by a child who is the alleged
19 victim of sexual abuse, the statement is about the alleged sexual
20 abuse, and the child is available for cross-examination in court.
21 For purposes of this section, child is a person fourteen years of
22 age or younger.

23 Sec. 6. Section 27-1103, Reissue Revised Statutes of
24 Nebraska, is amended to read:

25 27-1103 These rules and sections 1 to 3 of this act may

1 be known and cited as the Nebraska Evidence Rules.

2 Sec. 7. Section 28-318, Reissue Revised Statutes of
3 Nebraska, is amended to read:

4 28-318 As used in sections 28-317 to ~~28-321~~, 28-323,
5 unless the context otherwise requires:

6 (1) Actor means a person accused of sexual assault;

7 (2) Intimate parts means the genital area, groin, inner
8 thighs, buttocks, or breasts;

9 ~~(3) Past sexual behavior means sexual behavior other than~~
10 ~~the sexual behavior upon which the sexual assault is alleged;~~

11 ~~(4)~~ (3) Serious personal injury means great bodily
12 injury or disfigurement, extreme mental anguish or mental trauma,
13 pregnancy, disease, or loss or impairment of a sexual or
14 reproductive organ;

15 ~~(5)~~ (4) Sexual contact means the intentional touching of
16 the victim's sexual or intimate parts or the intentional touching
17 of the victim's clothing covering the immediate area of the
18 victim's sexual or intimate parts. Sexual contact shall also mean
19 the touching by the victim of the actor's sexual or intimate parts
20 or the clothing covering the immediate area of the actor's sexual
21 or intimate parts when such touching is intentionally caused by the
22 actor. Sexual contact shall include only such conduct which can be
23 reasonably construed as being for the purpose of sexual arousal or
24 gratification of either party. Sexual contact shall also include
25 the touching of a child with the actor's sexual or intimate parts

1 on any part of the child's body for purposes of sexual assault of a
2 child under sections 28-319.01 and 28-320.01;

3 ~~(6)~~ (5) Sexual penetration means sexual intercourse in
4 its ordinary meaning, cunnilingus, fellatio, anal intercourse,
5 or any intrusion, however slight, of any part of the actor's
6 or victim's body or any object manipulated by the actor into
7 the genital or anal openings of the victim's body which can be
8 reasonably construed as being for nonmedical or nonhealth purposes.
9 Sexual penetration shall not require emission of semen;

10 ~~(7)~~ (6) Victim means the person alleging to have been
11 sexually assaulted;

12 ~~(8)~~ (7) Without consent means:

13 (a) (i) The victim was compelled to submit due to the
14 use of force or threat of force or coercion, or (ii) the victim
15 expressed a lack of consent through words, or (iii) the victim
16 expressed a lack of consent through conduct, or (iv) the consent,
17 if any was actually given, was the result of the actor's deception
18 as to the identity of the actor or the nature or purpose of the act
19 on the part of the actor;

20 (b) The victim need only resist, either verbally or
21 physically, so as to make the victim's refusal to consent genuine
22 and real and so as to reasonably make known to the actor the
23 victim's refusal to consent; and

24 (c) A victim need not resist verbally or physically where
25 it would be useless or futile to do so; and

1 ~~(9)~~ (8) Force or threat of force means (a) the use of
2 physical force which overcomes the victim's resistance or (b) the
3 threat of physical force, express or implied, against the victim or
4 a third person that places the victim in fear of death or in fear
5 of serious personal injury to the victim or a third person where
6 the victim reasonably believes that the actor has the present or
7 future ability to execute the threat.

8 Sec. 8. Section 28-1010, Reissue Revised Statutes of
9 Nebraska, is amended to read:

10 28-1010 A person commits indecency with an animal when
11 such person subjects an animal to sexual penetration as defined in
12 ~~subdivision (6)~~ of section 28-318. Indecency with an animal is a
13 Class III misdemeanor.

14 Sec. 9. Section 83-4,143, Reissue Revised Statutes of
15 Nebraska, is amended to read:

16 83-4,143 (1) It is the intent of the Legislature that
17 the court target the felony offender (a) who is eligible and
18 by virtue of his or her criminogenic needs is suitable to be
19 sentenced to intensive supervision probation with placement at the
20 incarceration work camp, (b) for whom the court finds that other
21 conditions of a sentence of intensive supervision probation, in
22 and of themselves, are not suitable, and (c) who, without the
23 existence of an incarceration work camp, would, in all likelihood,
24 be sentenced to prison.

25 (2) When the court is of the opinion that imprisonment is

1 appropriate, but that a brief and intensive period of regimented,
2 structured, and disciplined programming within a secure facility
3 may better serve the interests of society, the court may place an
4 offender in an incarceration work camp for a period not to exceed
5 one hundred eighty days as a condition of a sentence of intensive
6 supervision probation. The court may consider such placement if the
7 offender (a) is a male or female offender convicted of a felony
8 offense in a district court, (b) is medically and mentally fit
9 to participate, with allowances given for reasonable accommodation
10 as determined by medical and mental health professionals, and (c)
11 has not previously been incarcerated for a violent felony crime.
12 Offenders convicted of a crime under sections 28-319 to ~~28-321~~
13 28-323 or of any capital crime are not eligible to be placed in an
14 incarceration work camp.

15 (3) It is also the intent of the Legislature that the
16 Board of Parole may recommend placement of felony offenders at
17 the incarceration work camp. The offenders recommended by the
18 board shall be offenders currently housed at other Department
19 of Correctional Services adult correctional facilities and shall
20 complete the incarceration work camp programming prior to release
21 on parole.

22 (4) When the Board of Parole is of the opinion that
23 a felony offender currently incarcerated in a Department of
24 Correctional Services adult correctional facility may benefit
25 from a brief and intensive period of regimented, structured, and

1 disciplined programming immediately prior to release on parole, the
2 board may direct placement of such an offender in an incarceration
3 work camp for a period not to exceed one hundred eighty days as
4 a condition of release on parole. The board may consider such
5 placement if the felony offender (a) is medically and mentally fit
6 to participate, with allowances given for reasonable accommodation
7 as determined by medical and mental health professionals, and (b)
8 has not previously been incarcerated for a violent felony crime.
9 Offenders convicted of a crime under sections 28-319 to ~~28-321~~
10 28-323 or of any capital crime are not eligible to be placed in an
11 incarceration work camp.

12 Sec. 10. The Revisor of Statutes shall assign sections 1
13 to 3 of this act to Chapter 27, the Nebraska Evidence Rules.

14 Sec. 11. This act becomes operative on January 1, 2010.

15 Sec. 12. Original sections 27-404, 27-801, 27-1103,
16 28-318, 28-1010, and 83-4,143, Reissue Revised Statutes of
17 Nebraska, are repealed.

18 Sec. 13. The following section is outright repealed:
19 Section 28-321, Reissue Revised Statutes of Nebraska.