

AMENDMENTS TO LB 39

Introduced by Judiciary.

1 1. Strike the original sections and insert the following
2 sections:

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

7 (a) Evidence offered to prove that any victim engaged in
8 other sexual behavior; and

9 (b) Evidence offered to prove any victim's sexual
10 predisposition.

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

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

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

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

22 (b) In a civil case, evidence offered to prove the sexual
23 behavior or sexual predisposition of any victim is admissible if it

1 is otherwise admissible under these rules and its probative value
2 substantially outweighs the danger of harm to any victim and of
3 unfair prejudice to any party. Evidence of a victim's reputation is
4 admissible only if it has been placed in controversy by the victim.

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

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

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

14 (b) Before admitting evidence under this rule the court
15 shall conduct a hearing in camera outside the presence of any jury
16 and afford the victim and parties a right to attend and be heard.

17 Sec. 2. For purposes of sections 3 and 4 of this act,
18 offense of sexual assault means sexual assault under section 28-319
19 or 28-320, sexual assault of a child under section 28-319.01
20 or 28-320.01, sexual assault by use of computer under section
21 28-320.02, sexual abuse of an inmate or parolee under sections
22 28-322.01 to 28-322.03, and sexual abuse of protected persons under
23 section 28-322.04.

24 Sec. 3. (1) In a criminal case in which the defendant
25 is accused of an offense of sexual assault, evidence of the
26 defendant's commission of another offense or offenses of sexual
27 assault is admissible if there is clear and convincing evidence

1 otherwise admissible under these rules that the defendant committed
2 the other offense or offenses. If admissible, such evidence may be
3 considered for its bearing on any matter to which it is relevant.

4 (2) In a case in which the prosecution intends to offer
5 evidence under this rule, the prosecuting attorney shall disclose
6 the evidence to the defendant, including statements of witnesses or
7 a summary of the substance of any testimony that is expected to be
8 offered, at least fifteen days before the scheduled date of trial
9 or at such later time as the court may allow for good cause.

10 (3) Before admitting evidence of the defendant's
11 commission of another offense or offenses of sexual assault under
12 this rule, the court shall conduct a hearing outside the presence
13 of any jury and afford the victim and parties a right to attend and
14 be heard. At the hearing, the rules of evidence shall apply and the
15 court shall apply a section 27-403 balancing and admit the evidence
16 unless the risk of prejudice substantially outweighs the probative
17 value of the evidence. In assessing the balancing, the court may
18 consider any relevant factor such as (a) the probability that the
19 other offense occurred, (b) the proximity in time and intervening
20 circumstances of the other offenses, and (c) the similarity of the
21 other acts to the crime charged.

22 (4) This rule shall not be construed to limit the
23 admission or consideration of evidence under any other rule.

24 Sec. 4. (1) In a civil case in which a claim for damages
25 or other relief is predicated on a party's alleged commission of
26 conduct constituting an offense of sexual assault, evidence of that
27 party's commission of another offense or offenses of sexual assault

1 is admissible if there is clear and convincing evidence otherwise
2 admissible under these rules that the party committed the other
3 offense or offenses. If admissible, such evidence may be considered
4 for its bearing on any matter to which it is relevant.

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

11 (3) Before admitting evidence of a party's commission of
12 another offense or offenses of sexual assault under this rule,
13 the court shall conduct a hearing outside the presence of any
14 jury and afford the victim and parties a right to attend and be
15 heard. At the hearing, the rules of evidence shall apply and the
16 court shall apply a section 27-403 balancing and admit the evidence
17 unless the risk of prejudice substantially outweighs the probative
18 value of the evidence. In assessing the balancing, the court may
19 consider any relevant factor such as (a) the probability that the
20 other offense occurred, (b) the proximity in time and intervening
21 circumstances of the other offenses, and (c) the similarity of the
22 other acts to the crime charged.

23 (4) This section shall not be construed to limit the
24 admission or consideration of evidence under any other section of
25 the Nebraska Evidence Rules.

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

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

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

7 (b) Evidence of a pertinent trait of character of the
8 victim of the crime offered by an accused or by the prosecution to
9 rebut the same, or evidence of a character trait of peacefulness
10 of the victim offered by the prosecution in a homicide case to
11 rebut evidence that the victim was the first aggressor. In the
12 case of sexual assault, reputation or opinion evidence of the past
13 sexual behavior of the victim of the sexual assault will not be
14 admissible; or

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

17 (2) Evidence of other crimes, wrongs, or acts is not
18 admissible to prove the character of a person in order to show
19 that he or she acted in conformity therewith. It may, however,
20 be admissible for other purposes, such as proof of motive,
21 opportunity, intent, preparation, plan, knowledge, identity, or
22 absence of mistake or accident.

23 (3) When such evidence is admissible pursuant to this
24 section, in criminal cases evidence of other crimes, wrongs, or
25 acts of the accused may be offered in evidence by the prosecution
26 if the prosecution proves to the court by clear and convincing
27 evidence that the accused committed the crime, wrong, or act. Such

1 proof shall first be made outside the presence of any jury.

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

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

8 27-1103 These rules and sections 1 to 4 of this act may
9 be known and cited as the Nebraska Evidence Rules.

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

12 28-318 As used in sections 28-317 to ~~28-321~~, 28-323,
13 unless the context otherwise requires:

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

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

17 (3) Past sexual behavior means sexual behavior other than
18 the sexual behavior upon which the sexual assault is alleged;

19 (4) Serious personal injury means great bodily injury or
20 disfigurement, extreme mental anguish or mental trauma, pregnancy,
21 disease, or loss or impairment of a sexual or reproductive organ;

22 (5) Sexual contact means the intentional touching of the
23 victim's sexual or intimate parts or the intentional touching of
24 the victim's clothing covering the immediate area of the victim's
25 sexual or intimate parts. Sexual contact shall also mean the
26 touching by the victim of the actor's sexual or intimate parts or
27 the clothing covering the immediate area of the actor's sexual or

1 intimate parts when such touching is intentionally caused by the
2 actor. Sexual contact shall include only such conduct which can be
3 reasonably construed as being for the purpose of sexual arousal or
4 gratification of either party. Sexual contact shall also include
5 the touching of a child with the actor's sexual or intimate parts
6 on any part of the child's body for purposes of sexual assault of a
7 child under sections 28-319.01 and 28-320.01;

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

15 (7) Victim means the person alleging to have been
16 sexually assaulted;

17 (8) Without consent means:

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

25 (b) The victim need only resist, either verbally or
26 physically, so as to make the victim's refusal to consent genuine
27 and real and so as to reasonably make known to the actor the

1 victim's refusal to consent; and

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

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

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

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

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

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

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

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

23 (4) When the Board of Parole is of the opinion that
24 a felony offender currently incarcerated in a Department of
25 Correctional Services adult correctional facility may benefit
26 from a brief and intensive period of regimented, structured, and
27 disciplined programming immediately prior to release on parole, the

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

11 Sec. 10. The Revisor of Statutes shall assign sections 1
12 to 4 of this act to Chapter 27, the Nebraska Evidence Rules.

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

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

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