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Hearsay in a Wireless World

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I. Hearsay Defined.

Texas Rule of Evidence 801(a) through (d) provides the basic definition of hearsay. Rule 801(e) then exempts from this definition certain statements even though they are offered to prove the truth of the matter asserted: some prior statements of witnesses who testify at the trial; statements by a party opponent; and certain deposition testimony.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.
(b) Declarant. "Declarant" means the person who made the statement.
(c) Matter Asserted. "Matter asserted" means:
  (1) any matter a declarant explicitly asserts; and
  (2) any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.
(d) Hearsay. "Hearsay" means a statement that:
  (1) the declarant does not make while testifying at the current trial or hearing; and
  (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Hearsay is defined more broadly in the Texas rules than in the Federal Rules of Evidence. Both rules state that hearsay is an out-of-court "statement" offered "to prove the truth of the matter asserted in the statement." Texas Rule 801(d); Federal Rule 801(c). The difference in the two rules derives from the different way in which they define "statement" and from Texas adding a definition of "matter asserted" to its version of the rule.

The federal rule restricts "statements" to verbal "assertions" or nonverbal conduct intended as an "assertion." Federal Rule 801(a). The Texas rule replaces "assertion" with "verbal expression" and nonverbal conduct intended as a substitute for "verbal expression." Texas Rule 801(a). As a result, in Texas verbal expression that is not an assertion is a statement and so may be hearsay.

The famous case of *United States v. Zenni*, 492 F.Supp. 464 (E.D. Ky.1980), illustrates the difference. Zenni was prosecuted for illegal bookmaking. The prosecution called government agents to testify that while searching defendant's premises pursuant to a warrant, they answered the telephone several times, and unknown callers stated directions for placing bets on sporting events. The callers all said something along the line of, "Put $10 down on Seabiscuit." Although the probative value of these utterances flowed from an inference that the declarants believed that the defendant was a bookmaker, the court held that what they said did not qualify as "statements." Had the callers said "Zenni is a bookmaker," they would have made assertions. But since they were simply giving commands, they did not assert anything. Since they did not assert anything, under Federal Rule 801, they did not make a statement. And since they did not make a statement, there could be no hearsay.

In Texas, however, "Put $10 on Seabiscuit" is verbal expression and, therefore, qualifies as a statement. It is hearsay because it is offered for the truth of the matter asserted. This second step is accomplished through the definition of "matter asserted" in Texas Rule 801(c). In addition to anything the speaker explicitly asserts (*e.g.*, "Zenni is a bookmaker"), the definition includes "any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter." The verbal expression "Put $10 on Seabiscuit" implies that the declarant believes that he is speaking to a bookmaker, and the probative value of the utterance flows from the accuracy of his belief.

Another example – of the type that might show up in a text message – would be the verbal expression, "can I get a 40?" when offered to prove the recipient is dealing drugs. This would not be hearsay under the federal rule; this is a question, not an assertion. *See Garner v. State*, 995 A.2d 694 (Md. Ct. App. 2010) (holding this was not an assertion and so not hearsay). But it is hearsay in Texas. It is verbal expression and is offered to prove the speaker (or texter) believed the recipient was dealing drugs.

The Texas definition of matter asserted also brings within the hearsay rule another category of out-of-court statements that fall outside the federal definition. A verbal assertion may be offered, not for its truth, but to prove that the speaker believed something else, and that this something else is true. In *Mosely v. State*, 141 S.W.3d 816 (Tex.App.—Texarkana 2004, pet. ref'd), the defendant was charged with sexually assaulting the declarant's daughter. The prosecution offered a statement made by the declarant that referred to the defendant and her daughter: "Well, I can't watch them all the time." The prosecution argued it was not offering the statement for its truth – to prove the declarant was not capable of watching the defendant and her daughter continuously. The court of appeals rejected this argument. Acknowledging that the result would be different under the federal rules, the court held that this was hearsay under Texas rules. The prosecution offered the statement because it implied that the declarant believed something else – that the defendant and her daughter were alone together and that she knew he was sexually assaulting her. "This is an implied 'matter asserted' under the Rules of Evidence and was, therefore, hearsay." *Id.* at 830.

One further observation about the definition of "statement" is warranted here, and this applies to both the federal and Texas rule. Both limit "statements" to the utterances or nonverbal acts of a person. Data generated by a machine is ordinarily not a "statement" and, therefore, does not qualify as hearsay. A time and date stamp on an email or text message is automatically inserted. Unlike an old-fashioned letter writer's inscription of the date, the time and date stamp are not hearsay. (That is not to say, however, that they are free from fraud or inaccuracy.)

Nonverbal conduct intended as a substitute for verbal expression (under the Federal Rule, intended as an assertion) also qualifies as a statement. That means that an emoticon included in a text message may qualify as hearsay.

In several cases, parties have argued that emoticons included within emails, text messages, and other social media must also be admitted to give context to the statement or that they prove the statement was meant jokingly and should not be given its literal meaning.

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