Entering Emojis Into Evidence — Overcoming Objections in the Smartphone

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Hearsay is a statement made out of court, offered for its truth inside the four walls of the courtroom. This rule arose out of spoken statements, since for eons humanity primarily spoke. Now, as a practical matter, we don't really speak anymore; we text, e-mail, instant-message and Facebook chat.

Many times clients will have text messages on their phone which they wish to introduce in evidence at trial, i.e., in a custody case, one parent has texted the other parent statements that implicate their mental health status: "I am going to kill myself!" or a key admission as to equitable distribution: "I spent our savings account money in Atlantic City! Sorry!"

Armed with these black-and-white statements, we stride into court where we will no doubt be able to use them in our case in chief, or on cross. But evidence rules become elastic from courtroom to courtroom, because of judicial discretion or misapplication of the rules of evidence.

Ex-wife A testifies she always paid child support timely. Your client, ex-husband B, reminds you that you have a copy of a text from his ex-wife, stating "I won't be paying any child support for August – October." You rise up to cross:

"You just told us that you always paid your child support on time, correct?

A: Yes.

Q: And that was a true statement, am I correct?

A: Yes.

Decision time: Ex-wife A is a party to the action, so no foundation needs to be laid as to the time, date, and place she made the statement. Statements can be both oral and written and if they are statements by a party they are treated as admissions and received as primary evidence against the party.[1] You go right for the jugular:

"Isn't it true, madam that you told your husband in a text message that 'I won't be paying any child support for August–October' — isn't that true?

Opposing Counsel: "Objection, hearsay."

This is incorrect; you argue that this is cross-examination, the witness is a

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party, and therefore any statement made to her ex-husband is a) an admission and b) no foundation as to the time, place, or the specific language had to have been made.

The judge agrees. Opposing counsel objects again on "best evidence" grounds. This is likewise oft misused since you are not trying to prove the contents of the writing, but eliciting if, on a prior occasion, the witness made a different statement to someone else (your client) than she just made on the stand.

The judge sustains. You attempt to cure by marking the document for identification. You offer it to the witness for identification. The savvy witness gives you the worst-case scenario answer: "I don't recognize this document."

The text message failed to make impact. You ask the witness a different question:

"Do you deny ever having advised your husband that you would not be paying child support for August-October?" or "Do you deny sending your husband a text message wherein you advised him that you would not be paying child support for August-October, in sum and substance?"

This sets up the stage for you to call your client to a) testify that he did receive the text message; b) it also gives you one more shot at getting what you came for, in an inverse manner — if the witness does not deny sending the text message, it's an admission.

Introducing the text message into evidence can be tricky. Laying the foundation involves eliciting through your client that he or she received the text message on their phone and that their phone was their typical/primary mode of communication, and the name and number saved in their phone was and is the "digital identity" of the other party; that they transferred or printed out the text message by transferring it to their computer or some other similar process without altering it (how much foundational testimony is needed varies from judge to judge).

Opposing counsel may block this document via voir dire, arguing that a) the text message is an isolated communication/incomplete document; or b) the witness may have altered the text message between the time it appeared on their phone and the time it was printed out on the document; c) there are other persons with the same name saved in the witness' phone (i.e., there are two "Michelles"); or d) there is no time, date, or other method of identifying the date on the text message; or e) renewing the hearsay objection (improper but done anyway).

The easiest trial short-circuit to all of this is to have your witness take a "screen shot" of the text message or of the phone with the text message on it. The text message has just become a photograph, which can be easily authenticated:

Q: And when you received that text message, what did you do?

A: I took a picture of it.

Q: And how did you do that?

A: I took a picture of it with my phone (witness demonstrates).

Q: And is the document you are looking at now that photograph?

A: Yes.

Q: And is that a true, correct, and accurate representation of the way the text message first appeared on your phone?

A: Yes it is.

Counsel: I offer it."

Now, there can be no objection to the admissibility of the photograph (not even the oft-improperly used photographer-as-witness objection, as it is well-settled that the photographer need not be called; all that is required is a witness who is familiar with the original scene or item photographed and can testify that the subject matter in the photograph is a correct representation of the person, place, or thing portrayed.[2] In this case the witness is the photographer. The text message is in evidence and even if the trial judge forecloses further questions on it, such as asking your client to read from it, you can still read it into the record at summation.

What about emoticons or emojis (ideograms) — either amplifying their text messages: "I'm so mad (angry face)" or a text message that contains nothing but emojis: four angry faces and a lightning bolt? Speculation as to what the emojis were meant to mean, since the same emojis may mean different things to different people and the witness is being (tangentially) asked to speculate as to the intent of the sender, is the proper objection here. A variation on this theme is abbreviations like "lol" or "gfy" which can mean (according to whom you ask) either laugh out loud or lots of love; "gfy" can mean good for you, or the other much more crass invite to perform an anatomical impossibility, etc.

Both of these scenarios can be overcome if the offer of proof is to show what effect they had on the mind of the receiving party (i.e., not for their truth); or, as above, by the short-circuiting method of taking a picture and then moving the photograph of the emoji or text message into evidence.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

[1] *Blossom v. Barrett*, 37 NY 434, 438, see Prince, Richardson on Evidence

[2] *People v. Byrnes*, 33 NY2d 343, 347, 352 NYS 2d 913