Evidence Is Hard

By David Paul Horowitz and Katryna L. Kristoferson

Readers may recall this column that ran in the Bar Journal from 2004 to 2018. After a five-year hiatus, corresponding to a period of significant changes in New York civil practice, occasioned in part by the pandemic but also by systemic changes, some pre-dating the pandemic, we pick up where the column left off.[1] Our goal, as before, is to focus on issues of interest and concern to civil litigators, focused on evidentiary and general civil litigation practice. And who are we? Katryna and David are partners both in practice and in writing this column and bring disparate experience to bear on writing on these issues. We hope you will find our sometimes-differing perspectives of interest and help to you in your day-to-day practice. We are in the trenches every day with you, and we all learn from each other.

Why Is Evidence Hard?

Once admitted to the New York bar, and just before or after hitting the trenches in New York State courts, new lawyers realize they aren't in Kansas anymore – Kansas being the place they learned about as a 1L, governed by the Federal Rules of Civil Procedure. And since most states' codes of procedure largely mirror the Federal Rules, prior experience in another jurisdiction is often of limited help. But the quirk in New York practice that likely most impacts a litigator's life is the absence of something the federal courts, and most state courts outside of New York (that we are aware of), have: a code of evidence.

Why no code of evidence, you ask? Don't. It is the result of myriad philosophical and political disputes among members of different branches of the bar, with a dose of aversion to change thrown in for good measure. So, on the civil side, with the exception of CPLR article 45 and other rules scattered about in diverse places, our rules of evidence are found in case law.

What Might a Code of Evidence Look Like?

There have been several draft Codes of Evidence proposed for adoption in New York, most recently in 1991. The structure is similar to that of the Federal Rules of Evidence, with the language of the proposed code followed by "Comment."

By way of example, Article 8 of the proposed 1991 Code, which addressed the topic that has bedeviled lawyers since the first common law trial – hearsay – starts with definitions:

> **§ 801. Definitions**
>
> For purposes of this article the following definitions are applicable:
>
> Statement. A "statement" is: (1) an oral or written assertion of a person; or (2) nonverbal conduct of a person if it is intended by such person as an assertion.
>
> Declarant. A "declarant" is a person who makes a statement.
>
> Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, proceeding, or hearing, offered in evidence to prove the truth of the matter asserted.

Followed by Comment (excerpted):

> (a) Statement. The definition of "statement" is important because of subdivision (c)'s definition of "hearsay" as being a "statement, other than one made by the declarant while testifying at the trial, proceeding, or hearing, offered in evidence to prove the truth of the matter asserted." Subdivision (a) recognizes three types of statements that are included within the hearsay definition as enunciated in subdivision (c): (1) an oral assertion; (2) a written assertion; and (3) nonverbal conduct intended as an assertion.
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> Oral and written assertions have long been subject to the hearsay rule. Prince, Richardson on Evidence § 200 (10th ed.). Similarly, nonverbal conduct intended as an assertion is considered to be hearsay. Thus, a statement made by sign language would be hearsay as would also be the act of a victim of a crime in pointing to identify the perpetrator of the crime in a police lineup. [. . .] Subdivision (a), by contrast, excludes from the operation of the hearsay rule nonverbal conduct not intended as an assertion, which some New York courts have characterized as hearsay [. . .]
>
> Nonverbal conduct not intended as an assertion is not regarded as hearsay for several reasons. First, a rule considering nonassertive conduct as hearsay is difficult to apply in the pressures of a trial, and is

> frequently overlooked. [. . .] Second, the principal reason for the hearsay rule-to exclude declarations where, inter alia, the veracity of the declarant cannot be tested by cross-examination-does not fully apply because such conduct, being nonassertive, does not involve the veracity of the declarant. Third, there is frequently a guarantee of the trustworthiness of the inferences to be drawn from such non assertive conduct because the actor has based an action on the correctness of a belief, i.e., actions speak louder than words [. . .].
>
> Accordingly, nonverbal conduct not intended as an assertion is not covered by the hearsay rule and its admissibility is governed by other rules of evidence. For example, evidence that ten people opened up their umbrellas when offered to prove that it was raining is not a statement and is not affected by the hearsay rule. It would be admissible if it were relevant under CE 401 and 402.
>
> The question of whether the conduct was intended as an assertion is one for the court to determine pursuant to CE 104(b). A Code of Evidence for the State of New York (citations omitted).

As you can see, the most recent proposed code furnishes the rule, the case law upon which it is based and helpful examples/explanations.

How Do the Rules of Evidence Develop in New York?

Given the sclerotic pace of change in our CPLR (friendly reminder: the 60th anniversary is this year!), perhaps the fact that our rules of evidence follow a natural evolutionary process is not such a bad thing. As the Court of Appeals noted in *People v. Price* in 2017:

> In our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts.[2]

People v. Price, a criminal case (obviously), addressed the authentication, and hence the admissibility, of a photograph of the defendant obtained from a social media profile page purportedly belonging to the defendant and concluded the People's proof "fell short of establishing the requisite authentication to render the photograph admissible in evidence."[3]

Notwithstanding the fact that the photograph in question was obtained from the defendant's social media page, the court held that traditional methods for admitting a photograph still applied:

> With respect to photographs, we have long held that the proper foundation should be established through testimony that the photograph "accurately represent[s] the subject matter depicted" (citations omitted). "Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify," or an expert may testify that the photograph has not been altered (citation omitted).[4]

A short time ago, citing *People v. Price*, the Court of Appeals, in *People v. Rodriguez*,[5] returned to the admissibility of electronic evidence, specifically screenshots taken from a cellphone:

> The trial court acted within its discretion determining that the People properly authenticated the screenshots. "[T]echnologically generated documentation [is] ordinarily admissible under standard evidentiary rubrics" and "this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated" (citation omitted). This Court recently held that for digital photographs, like traditional photographs, "the proper foundation [may] be established through testimony that the photograph accurately represents the subject matter depicted" (citation omitted). We reiterated that "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer" (citation omitted), which would be the boyfriend here. Rather, "any person having the requisite knowledge of the facts may verify" the photograph "or an expert may testify that the photograph has not been altered" (citation omitted).
>
> Here, the testimony of the victim—a participant in and witness to the conversations with defendant—sufficed to authenticate the screenshots. She testified that all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone on November 7. Telephone records of the call detail information for defendant's subscriber number corroborated that defendant sent the victim numerous text messages during the relevant time period. Moreover, even if we were to credit defendant's argument that the best evidence rule applies in

this context, the court did not abuse its discretion in admitting the screenshots.[6]

So, everything old is new again.

Of course, as with many "rules" found in case law (and some enunciated plainly in statutes), the stated foundation or trigger for the application of an evidentiary rule often raises more questions. So, if "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer," just how rare is rarely, and how does one know when one is that rare situation? What circumstances require the photographer, instead of a person with "requisite knowledge"? Well . . . it depends.

While we won't claim to always have the answers to questions like these (and we take refuge in the fact that the answer "it depends" is often the accurate answer), we will give it our best shot and endeavor to explain, when there is no definitive answer, the noteworthy shades of gray.

If Not a Code, What Do We Have?

First published online in 2017, Chief Judge Janet DiFiore explained the reason for the Guide to New York Evidence in her 2017 State of Judiciary speech:

> New York is one of the very few states that does not have a statutory code of evidence. Our law of evidence is scattered throughout thousands of judicial decisions, statutory provisions and court rules. For judges and lawyers, this is both frustrating and inefficient. This past July, I established an Advisory Committee on Evidence to create a single, definitive compilation of New York's law of evidence. Creating an accessible, easy-to-use guide for judges and lawyers will save research time, promote uniformity in applying the law, avoid erroneous rulings and improve the quality of legal proceedings.

The Evidence Guide is structured with the rule followed by a detailed explanatory note:

> **8.00 Definition of Hearsay**
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> Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.
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> The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.
>
> A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.
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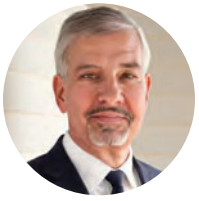
> Note
>
> This section sets forth the definition of hearsay which is generally applied by the courts. (*See People v Nieves*, 67 N.Y.2d 125, 131 [1986] [the statements in issue "constituted hearsay evidence, as they were made out of court and were sought to be introduced for the truth of what she asserted. Accordingly, they were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule" [. . .].
>
> Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. [. . .] However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. [. . .] The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within "the narrow class of mode of proceedings errors for which preservation is not required." [. . .] The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much less a general claim of error in the admission of evidence generally, is a "mode of proceedings" error.[7]

Conclusion

It's nice to be back, and we welcome your comments and suggestions. Feel free to email us (David at david@dphpllc.law; Katryna at katryna@dphpllc.law) and we hope you will visit us at PracticalNewYorkPractice.com for weekly updates on cases of interest on New York evidence and civil practice.



David Paul Horowitz of the Law Offices of David Paul Horowitz has represented parties in personal injury, professional negligence, and commercial litigation for over 30 years. He also acts as a private arbitrator and mediator and a discovery referee overseeing pre-trial proceedings and has been a member of the Eastern District of New York's mediation panel since its inception. He drafts legal ethics opinions, represents judges in proceedings before the New York State Commission on Judicial Conduct and attorneys in disciplinary matters, and serves as a private law practice mentor. He teaches New York Practice, Professional Responsibility, and Electronic Evidence & Discovery at Columbia Law School.

Katryna L. Kristoferson is a partner at the Law Offices of David Paul Horowitz and has litigation experience across many practice areas. She has lectured at CPLR Update, Motion Practice, and Implicit Bias CLEs, and will be teaching "Bias and the Law" at Pace Law School next year.

Endnotes

1. *See How Did We Get Here*, N.Y.L.J., May 16, 2023.
2. 29 N.Y.3d 472, 478 n. 3 (2017).
3. *Id.* at 474.
4. *Id.* at 477.
5. 38 N.Y.3d 151 (2022).
6. *Id.* at 155.
7. Guide to New York Evidence (citations omitted).