

**ADVISORY COMMITTEE  
ON  
EVIDENCE RULES**

**Durham, NC  
October 24, 2014**



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# **ADVISORY COMMITTEE ON EVIDENCE RULES**

## **AGENDA FOR COMMITTEE MEETING**

**Durham, North Carolina**

**October 24, 2014**

### **I. Opening Business**

Opening business includes:

- Approval of the minutes of the Spring, 2014 meeting;
- A report on the June, 2014 meeting of the Standing Committee;
- A welcome to new members, Judge John Marten and Daniel P. Collins, Esq.;
- A tribute to former Chair Judge Sidney Fitzwater; and
- The Reporter's discussion of the rulemaking process and timelines for rulemaking, as orientation for new members.

### **II. Proposed Amendments to Rule 801(d)(1)(B) and Rules 803(6)-(8)**

The proposed amendments to Rule 801(d)(1)(B) and to Rules 803(6), (7), and (8) were approved by the Standing Committee, the Judicial Conference, and the Supreme Court, and are currently before Congress. Barring any unforeseen developments, these amendments will become effective on December 1, 2014. The agenda book sets forth the rules and notes as they were approved by the Judicial Conference.

### **III. Possible Amendment to Rule 803(16)**

The agenda book contains a memo on consideration of a possible amendment to Rule 803(16), the hearsay exception for ancient documents. The question addressed is whether the exception needs to be altered or abrogated in light of the fact that electronically stored information is widespread, does not degrade, and can be fairly easily stored for 20 years.

#### **IV. Possible Addition of Hearsay Exceptions for Recent Perceptions**

The agenda book contains a memo on consideration of a possible amendment that would add two new hearsay exceptions for statements of recent perception. The proposal was made by Professor Jeffrey Bellin at the Electronic Evidence Symposium. The proposal is a modification of the exception that was adopted by the original Advisory Committee but rejected by Congress. The primary goal of the proposal is to lift the hearsay bar from electronic communications such as texts and tweets, but only where the declarant is either unavailable or testifying.

Please note that Professor Bellin's support for his proposal is found in two law review articles — one in *Minnesota Law Review* and the other to be published in *Fordham Law Review*, in response to comments made at the Symposium. Both these articles are attached to the Reporter's memorandum and provide important background information and context for the Reporter's analysis.

#### **V. Possible Amendment to Provide Specific Grounds for Authenticating Certain Electronic Evidence**

The agenda book contains a memo evaluating drafts of rules that would provide specific guidelines for authenticating emails, texts, and website information. These rules were prepared for discussion purposes by Greg Joseph and presented by Greg at the Electronic Evidence Symposium.

#### **VI. Possible Amendments for Certifying Authenticity of Certain Electronic Evidence**

The agenda book contains a memo on consideration of two possible amendments to the authenticity rules as related to certain electronic evidence. Both these proposals were presented by John Haried at the Electronic Evidence Symposium. The first proposal is a rule that would permit a certification of authenticity of machine-generated evidence, similar to that already allowed for business records under Rule 902(11). The second proposal is to permit a certification to authenticate an electronic device, media, or file by its "hash value" or some other reliable method.

#### **VII. *Crawford* Outline**

The agenda book contains the Reporter's updated outline on cases applying the Supreme Court's Confrontation Clause jurisprudence.

**ADVISORY COMMITTEE ON EVIDENCE RULES**

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<b>Liaison for the Advisory Committee on Bankruptcy Rules</b>	<b>Roy T. Englert, Jr., Esq.</b> <i>(Standing)</i>
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<b>Liaison for the Advisory Committee on Civil Rules</b>	<b>Judge Neil M. Gorsuch</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Criminal Rules</b>	<b>Judge Amy J. St. Eve</b> <i>(Standing)</i>
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# TAB 1

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# TAB 1A

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## Advisory Committee on Evidence Rules

Minutes of the Meeting of April 4, 2014

Portland, Maine

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 4, 2014, at the University of Maine School of Law.

*The following members of the Committee were present:*

Hon. Sidney A. Fitzwater, Chair  
Hon. Brent R. Appel  
Hon. Debra Ann Livingston  
Hon. William K. Sessions, III  
Hon. John A. Woodcock, Jr.  
Edward C. DuMont, Esq.  
Paul Shechtman, Esq.  
Elizabeth J. Shapiro, Esq., Department of Justice  
A.J. Kramer, Esq., Public Defender

*Also present were:*

Hon. Jeffrey S. Sutton, Chair of the Committee on Rules of Practice and Procedure  
Hon. Arthur L. Harris, Liaison from the Bankruptcy Committee  
Hon. Paul Diamond, Liaison from the Civil Rules Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Kenneth S. Broun, Consultant to the Committee  
Professor Daniel Coquillette, Reporter to the Standing Committee  
Catherine R. Borden, Esq., Federal Judicial Center  
Jonathan Rose, Chief, Rules Committee Support Office

Professor Deirdre Smith, University of Maine Law School  
Professor Jeffrey Bellin, William and Mary Law School  
Peter Murray, Esq.  
George Paul, Esq.  
Daniel Gelb, Esq.

## **I. Opening Business**

### ***Welcoming Remarks***

Judge Fitzwater, the Chair of the Committee, greeted the members and thanked Dean Pitegoff and Professor Deirdre Smith of the University of Maine School of Law for hosting the Committee meeting and the Symposium on Electronic Evidence.

### ***Approval of Minutes***

The minutes of the Spring 2013 Committee meeting were approved. (The Fall meeting was canceled due to the government shutdown).

### ***New Members and Other Business***

Judge Fitzwater introduced and welcomed the new Committee member, Judge Livingston of the Second Circuit Court of Appeals. He also introduced A.J. Kramer, Public Defender for the District of Columbia, who was attending his first meeting in person.

Judge Fitzwater also noted that this would be his last meeting presiding as Chair of the Committee. He congratulated the incoming Chair, Judge Sessions. The Reporter stated that Judge Fitzwater will be honored at the next meeting for his stellar service to and leadership of the Evidence Rules Committee for the past four years.

### ***June Meeting of the Standing Committee***

The Chair reported on the January meeting of the Standing Committee. The Evidence Rules Committee presented no action items at the meeting. The Standing Committee did discuss the proposal to amend the Bankruptcy Rules to provide for electronic signatures — a proposal that the Evidence Rules Committee had previously reviewed.

### ***Discussion of the Electronic Evidence Symposium***

Judge Fitzwater extended his compliments to all of the panelists at the Symposium on the challenges of electronic evidence, which took place on the morning of the Committee meeting. He noted that a number of detailed and credible proposals for change to the Evidence Rules — to accommodate electronic evidence — were made and discussed by the panelists. The Reporter stated

that these proposals will form the bulk of the Committee's agenda in the next year.

Judge Sutton observed that even if some of the proposals made at the Symposium might not end up to be appropriate for rule amendment — because, for example, they may be too specific or subject to obsolescence due to changes in technology — the Committee might consider working on those proposals with the goal of establishing a “best practices” template that could be distributed to judges and litigants.

## **II. Privileges Report**

Professor Broun, the Committee's consultant on privileges, presented his analysis of the state secrets privilege, the informant's privilege, the political vote privilege and the deliberative process privilege. This presentation was part of Professor Broun's continuing work to develop an article that he will publish on the federal common law of privileges. Professor Broun stated that he had finished all of the survey rules for the privileges that were worthy of treatment in a survey of federal common law. He noted that instead of a general rule on waiver, he had included separate waiver rules on each of the privileges, as the waiver rules differed somewhat among the privileges.

The Chair emphasized that Professor Broun's work, when it is published, will neither represent the work of the Committee nor suggest explicit or implicit approval by the Standing Committee or the Advisory Committee.

Professor Broun asked for the Committee's guidance on where to publish the survey rules. The Committee agreed that it would be better to have the survey published in a law review article, or the Federal Rules Decisions, rather than under the auspices of the FJC — in order to avoid any inference that the survey rules had received an imprimatur from the Committee. Once it is published independently, the FJC and the Committee could use Professor Broun's extensive work as a valuable resource.

Committee members expressed profound gratitude to Professor Broun for his excellent work in keeping the Committee apprised of developments in the area of privileges.

## **III. Possible Amendment to Rule 803(16)**

Rule 803(16) provides a hearsay exception for “ancient documents.” If a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents. The rationale for the exception has always been questionable, for the simple reason that a document does not become reliable just because it is old; and a document does not magically become reliable enough to escape the rule against hearsay on the day it turns 20. The Reporter noted that the exception has been tolerated because it has been used so infrequently, and usually because there is no other

evidence on point. The Committee considered the Reporter's memorandum raising the possibility that Rule 803(16) should be amended because of the development of electronically stored information. If it is the case that electronically stored information can easily be retained for more than 20 years, it is then possible that the ancient documents exception will be used much more frequently in the coming years. And it could be used to admit only unreliable hearsay, because if the hearsay is in fact reliable it will probably be admissible under other reliability-based exceptions, such as the business records exception. Moreover, the need for an ancient documents exception is questionable as applied to ESI, for the very reason that there may well be a lot of *reliable* electronic data available to prove any dispute of fact.

The Reporter noted that the memorandum on the ancient documents exception and its relationship to ESI was preliminary, and he was simply asking whether the Committee was interested in considering a formal proposal for amendment at the next meeting. A member responded that he was very interested in considering the proposal, noting that the possible widespread application of Rule 803(16) to ESI was an issue that the Committee should address before it becomes a serious problem. That member suggested that the most viable proposal would be to limit applicability of the exception to situations of necessity, i.e., the exception should only apply where the proponent could not find other more reliable information through reasonable efforts. Another Committee member suggested that the exception should be eliminated "before people discover it exists."

Other Committee members noted that before a rule amendment is actually proposed, the Committee has to be sure that its factual premises are sound. That involves two questions: 1) is it really the case that ESI will be preserved for more than 20 years, given the prevalence of data destruction programs?; and 2) even if ESI is preserved unchanged for such a long period, will it be easy to retrieve? The Reporter stated that he would research these questions and seek to provide answers before the next meeting.

The Committee resolved to further consider a possible amendment to Rule 803(16) at the next meeting.

#### **IV. Report on Effect of cm/ecf on the Evidence Rules**

The Reporter discussed the work of the Standing Committee's Subcommittee on electronic case filing and case management. The Subcommittee is chaired by Judge Chagares and has members from each of the Advisory Committees. Judge Woodcock is serving as the representative of the Evidence Rules Committee. The Advisory Committee Reporters serve as consultants, and each of the Reporters prepared a memorandum on changes that might be necessary to their respective rules due to electronic case filing. For example, if a rule referred to hardcopy (e.g., covers on a brief, written notice, copies, etc.), or to a physical act (e.g., mailing), it might need to be amended to accommodate electronic information and electronic filing.

The Reporter to the Evidence Rules Committee prepared a report on the possible effect of cm/ecf on the Evidence Rules, and that report was included in the agenda book for the Fall meeting. The report concluded that very few, if any, changes needed to be made to the Evidence Rules, for two reasons: 1) the Restyled Rules already cover electronic information, because Rule 101(b)(6) provides that any reference in the Rules to any kind of written material “includes electronically stored information”; and 2) the Evidence Rules are concerned with admissibility and generally not with such physical acts as filing and mailing.

The Evidence Rules Committee reviewed the report and determined that there was no need at this point to consider any amendment to the Evidence Rules to accommodate electronic case filing.

## **V. Consideration of Changes to the Hearsay Exceptions**

In his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7<sup>th</sup> Cir. 2013), Judge Posner proposed three changes to the Federal Rules of Evidence hearsay exceptions:

- 1) Rule 803(1) (the exception for present sense impressions) should be abrogated, because its premise — that declarants don’t have time to lie if their statement is made at or near the time of an event — is empirically unsupported and belied by social science research.
- 2) Rule 803(2) (the exception for excited utterances) should be abrogated, because its premise — that declarants can’t lie if they are startled — is empirically unsupported and belied by social science research.
- 3) Rule 807 (the residual exception) should “swallow” most or all of the hearsay exceptions, so that the trial judge would allow hearsay evidence to be admitted whenever the court determines it to be reliable. This proposal was based on Judge Posner’s conclusion that the hearsay rule and its exceptions are “too complex, as well as being archaic.”

The clerk of the Seventh Circuit referred Judge Posner’s opinion to the Advisory Committee for its consideration.

Committee members generally agreed that the empirical support for the stated justifications for Rules 803(1) and 803(2) was weak. But one member argued that statements fitting into these exceptions could be justified on another ground — that they are made at or near an event, so are not memory-dependent and unlikely to be generated for purposes of litigation. Moreover, the Evidence Rules are now operating in a time of great technological change, and abrogating well-established hearsay exceptions may result in unintended consequences. Another member pointed out that in its cases construing the Confrontation Clause, the Supreme Court has expressly relied on the justifications of the excited utterance exception in finding statements in response to an emergency to be properly admitted. In sum, the Committee determined that at this point the case had not been

made for abrogating the hearsay exceptions for excited utterances and present sense impressions.

As to the proposal to scrap the hearsay exceptions in favor of a single rule allowing hearsay to be admitted whenever it was found reliable, Committee members noted that a similar proposal was made by the Advisory Committee when the Federal Rules were being drafted. That proposal was roundly criticized by judges and litigants. Judges opposed the rule because they wanted to have the guidance of categorical rules to apply — they did not want to have to reinvent the reliability wheel for every piece of hearsay offered at a trial. And litigants were concerned about unpredictable results depending on the judge’s personal approach to hearsay — thus undermining the possibility of settlement. Committee members saw no reason to think that these criticisms were any less valid today than they were in 1970. Moreover, members expressed concern that there would be little or no effective appellate review of a trial court’s hearsay rulings. Finally, the Reporter observed that experience under the residual exception indicated that courts applying a totality of circumstances approach often admitted hearsay of dubious reliability against criminal defendants — until that practice was curtailed by the Supreme Court’s Confrontation Clause cases starting with *Crawford*. Thus the track record for a rigorous application of a case-by-case approach to reliability is not strong.

No Committee member moved for further consideration of a proposed amendment to the hearsay exceptions along the lines suggested in *United States v. Boyce*.

## **VI. Possible Amendment to Rule 609(a)(2)**

Evidence Rule 609(a)(2) provides that a witness’s recent conviction involving dishonesty or false statement is automatically admissible to impeach the witness in any case — no matter how serious the conviction. It is the only Evidence Rule that requires evidence to be admitted automatically, without any consideration of prejudice or cumulative effect. Several law review articles have suggested that Rule 609(a)(2) should be amended to allow the judge to balance probative value against prejudicial and cumulative effect. The Reporter prepared a memorandum setting forth these suggestions for change.

Committee members found that the Rule rationally distinguished convictions that involved dishonesty or false statement from those that did not. Convictions involving dishonesty or false statement are logically more probative of a witness’s character for truthfulness than those that are not. Indeed Congress — which devoted more time and consideration to Rule 609(a)(2) than any other rule — could reasonably have thought that a balancing test would be of little use because a trial judge could plausibly find that falsity-based convictions are probative enough to satisfy any balancing test.

Other Committee members noted that Rule 609(a)(2) has the virtue of simplicity and predictability. They observed that the practice in some states such as New York, in which the courts employ balancing tests for all convictions, results in different rulings from different judges. Other members stated that Rule 609(a) was already a complex and detailed rule, with two separate

balancing tests for non-falsity based convictions, and a distinction between falsity-based misdemeanors (automatically admitted) and non-falsity based misdemeanors (never admitted). So any attempt to add a third balancing test in the rule, for falsity-based convictions, would only add to the complexity of the rule.

The Committee unanimously rejected the proposal to add a balancing test to Rule 609(a)(2).

## **VI. *Crawford* Developments — Presentation on *Williams v. Illinois***

The Reporter provided the Committee with a case digest and commentary on all federal circuit cases discussing *Crawford v. Washington* and its progeny. The cases are grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Reporter's memorandum noted that the law of Confrontation was in flux, and suggested that it was not appropriate at this point to consider any amendment to the Evidence Rules to deal with Confrontation issues. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

## **VII. Next Meeting**

The Fall 2014 meeting of the Committee is scheduled for Friday, October 24, at Duke Law School.

Respectfully submitted,

Daniel J. Capra

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of May 29–30, 2014  
Washington, D.C.  
**Draft Minutes as of September 22, 2014**

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**ATTENDANCE**

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair  
Dean C. Colson, Esquire  
Roy T. Englert, Jr., Esquire  
Gregory G. Garre, Esquire  
Judge Neil M. Gorsuch  
Judge Susan P. Graber  
Chief Justice Wallace B. Jefferson  
Dean David F. Levi  
Judge Patrick J. Schiltz  
Judge Amy J. St. Eve  
Larry D. Thompson, Esquire  
Judge Richard C. Wesley  
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee’s style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee’s Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee’s reporter
Jonathan C. Rose	The committee’s secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
  - Judge Steven M. Colloton, Chair
  - Professor Catherine T. Struve, Reporter
- Advisory Committee on Bankruptcy Rules —
  - Judge Eugene R. Wedoff, Chair
  - Professor S. Elizabeth Gibson, Reporter
  - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
  - Judge David G. Campbell, Chair
  - Professor Edward H. Cooper, Reporter
  - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
  - Judge Reena Raggi, Chair
  - Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter  
Advisory Committee on Evidence Rules —  
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

### **INTRODUCTORY REMARKS**

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

### **APPROVAL OF THE MINUTES OF THE LAST MEETING**

**The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.**

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

*Amendments for Final Approval*DUKE RULES PACKAGE  
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 (“Duke Conference”). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.<sup>1</sup> Third, Judge Campbell reported

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<sup>1</sup> The added language stated:

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: “This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.”

A member commented that the Duke package is “awesome” and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that “The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response”—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: “If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur.” After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request “must specify a reasonable *time* . . . for the inspection . . .” (emphasis added). For that reason, it was necessary to retain “time” in the proposed revision to Rule 34(b)(2)(B), instead of substituting “date.” However, the advisory committee changed its proposal to refer to “specified” instead of “stated,” to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that “[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production.” A motion was made to change “stated” to “specified” in the proposal, so that it would read: “The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.” The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

**The committee unanimously approved the Duke package of proposed amendments to**

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information become available.

**the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.**

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.<sup>2</sup>

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<sup>2</sup> Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee engaged in discussion on the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete “may” in line 9 on page 318 of the agenda materials, and to add “may” on line 10 before “order,” and on line 13 after “litigation.” Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word “only” on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

**The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.**

FORMS  
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

**The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.**

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~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that the advisory committee had also published an amendment to Rule 6(d) that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

**The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.**

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that only a final default judgment could be set aside under Rule 60(b).

**The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.**

*Amendments for Publication*

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new

venue statute for civil actions in admiralty. Since January, further reflection had led the advisory committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

**The committee unanimously approved publication of the proposed amendment to Rule 82.**

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

**The committee unanimously approved publication of the proposed amendment to Rule 4(m).**

**REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE**

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

*Amendments for Publication*

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the “three-day rule” as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing “in” before “widespread skill” in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

**The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.**

### **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

#### *Amendments for Publication*

#### FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

“another agent” be changed to “an agent” to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee’s intent.

**The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.**

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41’s territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a “botnet” in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are “protected computers” that have been “damaged without authorization” (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided “to the person from whom, or from whose premises, the property was taken” or left “at the place where the officer took the property.” The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

**The committee unanimously approved publication of the proposed amendment to Rule 41.**

## **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

### *Amendments for Publication*

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

#### **INMATE FILING RULES**

(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, “meets the requirements of” was changed to “satisfies.” A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the “it” on page 559, line 20, referred to the “notice” referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), “it” was changed to “the notice.” A corresponding change was made to Rule 25(a)(2)(C)(i), changing “it” to “the paper” on page 562, line 5. Finally, the advisory committee agreed to change “and” to “or” in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark or a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from “exercises its discretion to permit” to simply “permits.” She said that the committee would also consider a member’s suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

**The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.**

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4) if a court has mistakenly ordered an “extension” of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not “timely” under Rule 4(a)(4).

**The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).**

LENGTH LIMITS

(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32’s word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document’s length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

**The committee unanimously approved publication of the proposed amendments to**

**Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.**

## FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would renumber the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

**The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.**

**REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

*Informational Items*

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for “ancient documents,” and that it will discuss the matter further at its fall meeting.

The Standing Committee’s liaison to the Evidence Rules Committee commented that Judge Fitzwater’s term as chair was drawing to a close and that he had greatly admired Judge Fitzwater’s leadership. He expressed his personal gratitude for Judge Fitzwater’s exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

### **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff’s memorandum and attachments of May 6, 2014 (Agenda Item 7).

#### *Amendments for Final Approval*

#### OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to “U.S.C. § 158(c)(1)” should say “28 U.S.C. § 158(c)(1).”

**The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.**

#### OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

**The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.**

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized “means test” forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

**The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.**

MODERNIZED INDIVIDUAL FORMS

(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

**The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.**

*Amendments for Publication*

MODERNIZED FORMS FOR NON-INDIVIDUALS

(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205, 206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

**The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.**

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS  
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002,  
3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

**The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.**

## FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

**The committee unanimously approved publication of the proposed amendment to Rule 3002.1.**

## OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

**The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.**

CHAPTER 15 FORM AND RULES AMENDMENTS  
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

**The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.**

*Informational Items*

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

**REPORT OF THE ADMINISTRATIVE OFFICE**

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

**NEXT COMMITTEE MEETING**

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman  
Chief Counsel

Jonathan C. Rose  
Secretary

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# TAB 2

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# TAB 2A

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on another ground; or

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**Committee Note**

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, “[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.”

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness’s testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness’s credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness — such as the charges of inconsistency or faulty memory.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible

61 bolstering of a witness. As before, prior consistent statements under  
62 the amendment may be brought before the factfinder only if they  
63 properly rehabilitate a witness whose credibility has been attacked. As  
64 before, to be admissible for rehabilitation, a prior consistent statement  
65 must satisfy the strictures of Rule 403. As before, the trial court has  
66 ample discretion to exclude prior consistent statements that are  
67 cumulative accounts of an event. The amendment does not make any  
68 consistent statement admissible that was not admissible previously —  
69 the only difference is that prior consistent statements otherwise  
70 admissible for rehabilitation are now admissible substantively as well.

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## 75 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**

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The text of the proposed amendment was changed to clarify that the traditional limits on using prior consistent statements to rebut a charge of recent fabrication or improper influence or motive are retained. The Committee Note was modified to accord with the change in text.

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## **SUMMARY OF PUBLIC COMMENTS**

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**Hon. Joan Ericksen, (12-EV-001)** opposes the proposed amendment as released for public comment on the ground that it is not needed and may lead to unintended consequences.

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**The Federal Public Defender (12-EV-002)** opposes the proposed amendment as released for public comment on the ground that it is “unnecessary and would actually be counterproductive” because it would allow for admission of more prior consistent statements and would “change the dynamics at the trial.”

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**The Federal Magistrate Judges Association (12-EV-003)** “is concerned that, despite the Advisory Committee’s stated purpose, the proposed revision significantly undermines the rule against bolstering a witness and opens the door to the admission of self-serving consistent statements as substantive evidence.” The FMJA suggests that “the revision specifically state limits to the expansion of what types of rehabilitation evidence are admissible — for example, to rebut a charge of faulty recollection — or that the Rule not be changed at all.”

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**Professor Liesa Richter (12-EV-004)** states that “[a]mending

106 Rule 801(d)(1)(B) to include prior consistent statements used to  
107 rehabilitate impeaching attacks other than attacks on motivation is  
108 completely consistent with the stated reason for the original hearsay  
109 exemption” and “advances the development of clear and rational  
110 evidentiary policies that can be administered efficiently and  
111 uniformly.” Professor Richter argues, however, that the proposal as  
112 issued for public comment could be read to undermine the limitation  
113 on admitting prior consistent statements established in *Tome v.*  
114 *United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a  
115 consistent statement offered to rebut a charge of recent fabrication or  
116 improper influence or motive must have been made before the alleged  
117 fabrication or alleged improper influence or motive arose. The  
118 proposed amendment as issued for public comment was revised with  
119 the intent to address that concern.

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121 **The National Association of Criminal Defense Lawyers**  
122 **(12-EV-005)** contends that prior consistent statements should be  
123 subject to the same admissibility requirements as those applicable to  
124 prior inconsistent statements under Rule 801(d)(1)(A), i.e., they  
125 should be admissible as substantive evidence only when made under  
126 oath and subject to cross-examination. The NACDL also contends  
127 that the words “otherwise rehabilitates” — as used in the proposed  
128 amendment as released for public comment — are “fatally  
129 ambiguous.”

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131 **William T. Hangley, Esq. (12-EV-006)** objects to the  
132 proposed amendment because it would lead to greater admissibility  
133 of prior consistent statements, and suggests that more study is  
134 required before that result is mandated. He also argues that treating  
135 prior consistent statements as substantive is unnecessary because the  
136 statement simply replicates testimony that the witness has already  
137 given.

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# TAB 2B

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**Appendix to Report to the Standing Committee from  
the Advisory Committee on Evidence Rules**

**June 2013**

**Advisory Committee on Evidence Rules  
Proposed Amendment: Rule 803(6)**

1     **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**  
2     **of Whether the Declarant is Available as a Witness**

3             The following are not excluded by the rule against hearsay,  
4     regardless of whether the declarant is available as a witness.

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6             **(6)     *Records of a Regularly Conducted Activity.*** A record  
7     of an act, event, condition, opinion, or diagnosis if:

8                     **(A)**     the record was made at or near the time by - or  
9   from information transmitted by - someone  
10    with knowledge;

11                    **(B)**     the record was kept in the course of a  
12    regularly conducted activity of a business,  
13    organization, occupation, or calling, whether  
14    or not for profit;

15                    **(C)**     making the record was a regular practice of  
16    that activity;

17                    **(D)**     all these conditions are shown by the  
18    testimony of the custodian or another qualified

19 witness, or by a certification that complies  
20 with Rule 902(11) or (12) or with a statute  
21 permitting certification; and  
22 (E) ~~neither~~ the opponent does not show that the  
23 source of information ~~nor~~ or the method or  
24 circumstances of preparation indicate a lack of  
25 trustworthiness.

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### Committee Note

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The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification — then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

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The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

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### CHANGES MADE AFTER PUBLICATION AND COMMENTS

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In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

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## SUMMARY OF PUBLIC COMMENTS

**The Federal Magistrate Judges Association (12-EV-003)**  
endorses the proposed amendment.

**The National Association of Criminal Defense Lawyers (12-EV-005)** states that the text of the amendment is “well-constructed” but suggests that the Committee Note strays from the language of the text and suggests that the Committee Note be revised to refer to the opponent’s burden to prove that the circumstances of preparation “indicate” a lack of trustworthiness.

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**Appendix to Report to the Standing Committee from  
the Advisory Committee on Evidence Rules**

**June 2013**

**Advisory Committee on Evidence Rules  
Proposed Amendment: Rule 803(7)**

1     **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**  
2     **of Whether the Declarant is Available as a Witness**

3             The following are not excluded by the rule against hearsay,  
4     regardless of whether the declarant is available as a witness.

5   \* \* \*

6             **(7)     *Absence of a Record of a Regularly Conducted***  
7     ***Activity.*** Evidence that a matter is not included in a record described  
8     in paragraph (6) if:

9                     **(A)**     the evidence is admitted to prove that the  
10                     matter did not occur or exist;

11                    **(B)**     a record was regularly kept for a matter of that  
12                     kind; and

13                    **(C)**     ~~neither~~ the opponent does not show that the  
14                     possible source of the information ~~nor~~ or other  
15                     circumstances     indicate a lack of  
16                     trustworthiness.

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## Committee Note

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### CHANGES MADE AFTER PUBLICATION AND COMMENTS

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The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception — set forth in Rule 803(6) — then the burden is on the opponent to show that the possible source of the information or other circumstances indicate a lack of trustworthiness. The amendment maintains consistency with the proposed amendment to the trustworthiness clause of Rule 803(6).

In accordance with a public comment, a slight change was made to the Committee Note to better track the language of the rule.

### SUMMARY OF PUBLIC COMMENTS

**The Federal Magistrate Judges Association (12-EV-003)** endorses the proposed amendment.

**The National Association of Criminal Defense Lawyers (12-EV-005)** states that the text of the amendment is “well-constructed” but suggests that the Committee Note strays from the language of the text and that the Committee Note be revised to refer to the opponent’s burden to prove that the circumstances of preparation “indicate” a lack of trustworthiness.

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**Appendix to Report to the Standing Committee from  
the Advisory Committee on Evidence Rules**

**June 2013**

**Advisory Committee on Evidence Rules  
Proposed Amendment: Rule 803(8)**

1     **Rule 803. Exceptions to the Rule Against Hearsay— Regardless**  
2     **of Whether the Declarant is Available as a Witness**

3             The following are not excluded by the rule against hearsay,  
4     regardless of whether the declarant is available as a witness.

5   \* \* \*

6             **(8)     *Public Records.*** A record or statement of a public  
7     office if:

8                     **(A)**     it sets out:

9                                     **(i)**     the office's activities;

10                                    **(ii)**    a matter observed while under a legal  
11                                    duty to report, but not including, in a  
12                                    criminal case, a matter observed by  
13                                    law-enforcement personnel; or

14                                   **(iii)**   in a civil case or against the  
15                                    government in a criminal case, factual  
16                                    findings from a legally authorized  
17                                    investigation; and

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19                     **(B)**     neither the opponent does not show that the

20 source of information ~~nor~~ or other  
21 circumstances indicate a lack of  
22 trustworthiness.

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25 **Committee Note**

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27 The Rule has been amended to clarify that if the proponent  
28 has established that the record meets the stated requirements of the  
29 exception — prepared by a public office and setting out information  
30 as specified in the Rule — then the burden is on the opponent to  
31 show that the source of information or other circumstances indicate  
32 a lack of trustworthiness. While most courts have imposed that  
33 burden on the opponent, some have not. Public records have  
34 justifiably carried a presumption of reliability, and it should be up to  
35 the opponent to “demonstrate why a time-tested and carefully  
36 considered presumption is not appropriate.” *Ellis v. International*  
37 *Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). The amendment  
38 maintains consistency with the proposed amendment to the  
39 trustworthiness clause of Rule 803(6).

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41 The opponent, in meeting its burden, is not necessarily  
42 required to introduce affirmative evidence of untrustworthiness. For  
43 example, the opponent might argue that a record was prepared in  
44 anticipation of litigation and is favorable to the preparing party  
45 without needing to introduce evidence on the point. A determination  
46 of untrustworthiness necessarily depends on the circumstances.

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49 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**

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51 In accordance with a public comment, a slight change was  
52 made to the Committee Note to better track the language of the rule.

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54 **SUMMARY OF PUBLIC COMMENTS**

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56 **The Federal Magistrate Judges Association (12-EV-003)**  
57 endorses the proposed amendment.

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59 **The National Association of Criminal Defense Lawyers**  
60 **(12-EV-005)** states that the text of the amendment is “well-

61 constructed” but suggests that the Committee Note strays from the  
62 language of the text and that the Committee Note be revised to refer  
63 to the opponent’s burden to prove that the circumstances of  
64 preparation “indicate” a lack of trustworthiness.

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**FORDHAM**

**University School of Law**

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra  
Philip Reed Professor of Law

Phone: 212-636-6855  
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Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Hearsay Exception for Ancient Documents and its Applicability to ESI  
Date: October 1, 2014

At its last meeting, the Evidence Rules Committee expressed interest in considering a proposal to change Rule 803(16), the ancient documents exception to the hearsay rule. Rule 803(16) currently provides that if a document is authentic and over 20 years old, then all statements within the document fall within an exception to the hearsay rule. The reason for the proposed change was the widespread use of electronically stored information (ESI), with large amounts of ESI nearing the 20-year mark. The potential problem, as applied to ESI, is that ESI might be stored without much trouble for 20 years, and the sheer volume of it could end up creating an exception to the hearsay rule that would be much broader probably was intended — in fact broad enough to swallow up all the other exceptions for ESI more than 20 years old.

The Advisory Committee directed the Reporter to investigate the validity of the underlying factual premises of the proposal. Those premises are: 1) 20-year old ESI is and will become prevalent (as opposed to deleted or destroyed); and 2) old ESI is and will be easy to retrieve. [For purposes of convenience, in this memo “old” means 20 years or more.]

This memorandum sets forth the ancient documents exception and the proposals for change --- adding research conducted on the ESI-related questions since the last meeting. Part One of the memo will discuss the rationales for the ancient documents exception to the rule against hearsay --- and the exception’s relationship with the rules of authenticity on which it is based. Part Two will address whether the rationales for the ancient document exception, such as they are, can be sensibly applied to admitting ESI for the truth of the contents of the electronic document. Part Three will raise and answer some arguments against abrogating or restricting the ancient documents exception as applied to ESI or even more broadly — including the questions of how much old ESI is out there and whether it is easily retrievable. Part Four will consider

drafting alternatives for changing the ancient documents exception, assuming that there is a risk of its use as a loophole for large amounts of unreliable ESI.

## I. Background — The Ancient Documents Rule

*Rule 803(16) provides as follows:*

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

\* \* \*

**(16) *Statements in Ancient Documents.*** A statement in a document that is at least 20 years old and whose authenticity is established.

The ancient documents “rule” is actually comprised of two separate types of rules. One type is the rules on authenticity, which provide standards for qualifying an old document as genuine. The other is a hearsay exception for all statements contained in an authentic ancient document. These rules are derived from the common law, though one difference from the common law is that the relevant time period for being “ancient” has been reduced from 30 years to 20 years.<sup>1</sup>

As to authenticity: Rule 901(b)(8) provides as an example of evidence satisfying the standards of authenticity a document or “data compilation” that:

- “(A) is in a condition that creates no suspicion about its authenticity;
- (B) was in a place where, if authentic, it would likely be; and
- (C) is at least 20 years old when offered.”

The idea behind Rule 901(b)(8) is plain: if something has been found in an unsuspecting place after more than 20 years, the chances of it being a fake are sufficiently small that its genuineness becomes a matter for the jury to consider. As the Advisory Committee puts it, the rationale for Rule 901(b)(8) is “the unlikelihood of a still viable fraud after the lapse of time.” The standard

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<sup>1</sup> See Advisory Committee Note to Rule 803(16) (citing common law basis for the hearsay exception that stems from the rule on authenticity); Advisory Committee Note to Rule 901(b)(8) (adopting the “familiar ancient document rule of the common law”). The Committee Note to Rule 901(b)(8) attempts to explain the shortening of the time period from 30 to 20 years as a “shift of emphasis from the probable unavailability of witnesses to the unlikelihood of a still viable fraud after the lapse of time” and concedes that any time period “is bound to be arbitrary.”

for establishing authenticity to the court is low --- enough for a reasonable person to believe that the document is what the proponent says it is.<sup>2</sup> Under that low standard, if a document looks old and not suspicious and is found where it ought to be, it makes sense to leave the question of authenticity to the jury.

Rule 901(b)(8) is not, however, the only avenue for authenticating an ancient document and thus triggering the ancient documents exception to the hearsay rule. Rule 803(16) says that the statements in a document that is at least 20 years old and whose “authenticity is established” are admissible for their truth. “Authenticity is established” means established in any way. Thus, as will be discussed below in Part Three, the tried and true methods for authenticating ESI in general are fully applicable to authenticating 20 year-old ESI.

Now as to hearsay: If a document satisfies the authenticity requirements of Rule 901(b)(8) --- or any other ground of authentication provided in Rules 901 or 902 and is over 20 years old --- then *every statement in that document can be admitted for its truth*. That is so because Rule 803(16) simply equates authenticity of the document with admissibility of the hearsay statements in that document. The rule does not purport specifically to regulate the reliability of the contents of an ancient document through some circumstantial guarantee, even though the other hearsay exceptions in Rule 803 are grounded in circumstantial guarantees of reliability.<sup>3</sup> While the Advisory Committee Note obliquely states that “age affords assurance that the writing antedates the present controversy” there is no admissibility requirement in the rule that in fact the statements must predate the controversy. As the court put it in *Threadgill v. Armstrong World Industries, Inc.*: “Once a document qualifies as an ancient document, it is automatically excepted from the hearsay rule under Fed.R.Evid. 803(16)”<sup>4</sup> --- consequently the *Threadgill* court reversed a trial court’s quite sensible ruling that excluded an ancient document because the content was untrustworthy.<sup>5</sup>

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<sup>2</sup> See, e.g., [United States v. Reilly, 33 F.3d 1396, 1404 \(3d Cir.1994\)](#) (“the burden of proof for authentication is slight”); [United States v. Holmquist, 36 F.3d 154, 168 \(1st Cir.1994\)](#) (“the standard for authentication, and hence for admissibility, is one of reasonable likelihood”); [United States v. Coohy, 11 F.3d 97, 99 \(8th Cir.1993\)](#) (“the proponent need only demonstrate a rational basis for its claim that the evidence is what the proponent asserts it to be”).

<sup>3</sup> See, e.g., Fed.R.Evid. 803(4) (hearsay exception for statements made for purposes of medical treatment based on circumstantial guarantees of reliability inherent in obtaining medical treatment, and in the fact that the statement must be pertinent to the doctor’s treatment or diagnosis); Fed. R. Evid. 803(6) (hearsay exception for statements made in the course of regularly conducted activity based on circumstantial guarantees of reliability inherent in regular recording of regularly conducted activity).

<sup>4</sup> 928 F.2d 1366, 1375 (3<sup>rd</sup> Cir. 1991).

<sup>5</sup> A qualification to the rule of broad admissibility in text does arise if the ancient document itself refers to a hearsay statement — e.g., an old diary entry stating that “The defendant just sent me a letter in which he confessed to robbing my store.” The hearsay exception would cover the fact that the diarist received a letter. But whether the defendant actually confessed to the robbery would have to be handled by another exception — in this case that would be a party-opponent statement, Rule 801(d)(2). In other words, the ancient documents exception does not abrogate the rule on multiple hearsay imposed by Rule 805 --- at least in the view of right-thinking courts. See, e.g., *United States v. Hajda*, 135 F.3d 439, 443 (7<sup>th</sup> Cir. 1998) (ancient documents exception “applies only to the

The most complete articulation of the rationale for the ancient documents hearsay exception is set forth by Professors Mueller and Kirkpatrick:<sup>6</sup>

Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed.<sup>7</sup> \* \* \*

Naturally statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences. When authenticated, the document leaves little doubt the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.<sup>8</sup>

Rule 803(16) is the only rule of evidence that equates authenticity with admissibility of hearsay.<sup>9</sup> It is a fallacy to assume that just because an old document is authentic, the statements in it are automatically reliable enough to escape the rule excluding hearsay. Despite the Advisory Committee Note's assertion that "danger of mistake is minimized by authentication requirements," the fact is that none of the guarantees for authenticity set forth in Rule 901(b)(8) or any other authenticity rule do anything to assure that the *statements* in the authentic document are reliable. As the Seventh Circuit aptly put it in *United States v. Kairys*, 782 F.2d 1374, 1379

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document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed.R.Evid. 805."). For more on the ancient documents exception and multiple hearsay, see Gregg Kettles, *Ancient Documents and the Rule Against Multiple Hearsay*, 39 Santa Clara L.Rev. 719 (1999) (arguing that the ancient documents exception is subject to the rule on multiple hearsay, but noting the split of authority).

<sup>6</sup> Christopher Mueller & Laird Kirkpatrick, 4 Federal Evidence Sec. 8:100 at 901 (4th ed. 2013).

<sup>7</sup> Query whether that assertion of Professors Mueller and Kirkpatrick is applicable when the old material is ESI. That point will be discussed in Part III, *infra*.

<sup>8</sup> See also Advisory Committee Note to Rule 803(16) (arguing that "age affords assurance that the writing antedates the present controversy").

<sup>9</sup> See *Fagiola v. National Gypsum Co. AC & S., Inc.*, 906 F.2d 53, 58 (2<sup>nd</sup> Cir. 1990) ("Because of the hearsay rule, authentication as a genuine ERCO document would not generally suffice to admit the contents of that document for its truth. An exception is when documents are authenticated as ancient documents under Rule 901(b)(8), in which case they automatically fall within the ancient document exception to the hearsay rule, Rule 803(16).").

(7<sup>th</sup> Cir. 1986), the authentication rule's requirement that a proffered document be genuine "goes not to the content of the document, but rather to whether the document is what it purports to be." For example, a 20 year-old National Enquirer, kept in an archivist's fancy and secure study, will be found authentic — but should that mean that every single statement in the Enquirer about Michael Jackson, or alien invasions, should be admissible for its truth? And an old diary of a psychotic person can be shown to be genuine, but does that mean that all the rantings in that diary should be admissible for their truth?

Indeed it would follow from the Advisory Committee Note's assertion that *any* authentic document should be admissible for the truth of its assertions; the Note gives no indication why the danger of unreliable assertions is minimized by authentication requirements for ancient documents but not for any other documents or statements. But equating authenticity requirements and hearsay requirements would clearly be the wrong result. The policy of the hearsay rule is to exclude unreliable out-of-court assertions, and that policy is not sufficiently furthered --- indeed it is ignored --- if the only standard for admissibility is that the document itself is genuine.

A further anomaly with the ancient documents hearsay exception is inherent in its bright-line nature. For example, a copy of the National Enquirer that is 19 years and 364 days old could be authenticated,<sup>10</sup> but the assertions in that Enquirer would not be automatically admissible for the truth of any assertion. The equation of authenticity and hearsay admissibility occurs, however, the second that the periodical becomes 20 years old. Perhaps it is true, as the Advisory Committee Note to Rule 901(b)(8) concedes, that "[a]ny time period selected is bound to be arbitrary." But that assertion only begs a number of questions. First, why is an arbitrary time period the correct solution to *either* authenticity or reliability? Given that the basis for an ancient documents rule lies somewhere in the principles of necessity and lack of motive to fabricate a document for litigation so far down the road, might it not be better to articulate those policies as a textual standard of admissibility? An arbitrary time period is to say the least an inexact surrogate for the policies that underlie the ancient document rules.

Second, even if a statutory time period is used, why use it in such a binary fashion? Why not, for example, apply more or less stringent standards of admissibility whenever a document falls on one side or the other of the line? For example, Federal Rule of Evidence 609(b) contains a ten-year time period applicable to impeaching a witness with a prior conviction.<sup>11</sup> But while the time period is arbitrary, the Rule does not arbitrarily state that a conviction is admissible if falling on one side of the timeline and inadmissible if it falls on the other. In contrast to Rule 803(16), Rule 609(b) provides for a less generous rule of admissibility if the conviction falls on the "old" side of the line. An analogous solution for Rule 803(16), that would avoid the

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<sup>10</sup> See, e.g., Fed.R.Evid. 902(6) (material purporting to be a newspaper or periodical is self-authenticating).

<sup>11</sup> Rule 609(b) provides that "if more than 10 years have passed since the witness's conviction or release from confinement" evidence of the conviction may be admitted to impeach the witness only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect" and proper notice is provided.

irrationality of a statement inadmissible on one day but admissible for its truth on another would be to provide a different --- somewhat more generous --- rule of admissibility for the “old” statement. But Rule 803(16) makes no such effort.

In the end, Rule 803(16) appears to be a problematic hearsay exception --- an error of the common law that was adopted and indeed exacerbated by the original Advisory Committee’s reduction of the time period necessary to trigger it. But that in itself does not necessarily mean that the rule should have been abrogated or amended before now. Up to now, the rule has created few practical problems for courts and litigants. A Westlaw search indicates that ancient documents have been admitted in fewer than 100 reported cases since the Federal Rules of Evidence were enacted.<sup>12</sup> Of course it is not possible to determine how often the exception has been used in unreported cases, but it is fair to state that the rule is, comparatively, a little-invoked exception.

The Advisory Committee on Evidence Rules has always taken a conservative approach to proposing amendments to the Evidence Rules. Evidence Rules amendments are costly because experienced litigators and judges need to know the rules that exist --- often without having the luxury of referring to a book. Any change to those rules imposes dislocation costs on litigators, judges, and the legal system as a whole. So the change had better be fixing a practical problem.

So if the goal is to propose amendments only when necessary to remedy a real problem in practice, it is understandable that there has been, up to now, no serious consideration of Rule 803(16). But now it is the case that that terabytes and zettabytes of information are reaching or have already reached a twentieth birthday;<sup>13</sup> and the specter of all that information being admissible for its truth regardless of its reliability might well lead to a real problem worth fixing. Whether that problem actually exists or will exist is discussed below.

## II. Does the Rationale for the Ancient Documents Exception Apply to ESI?

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<sup>12</sup> In contrast, for example, state of mind statements have been admitted under Rule 803(3) in around 900 published cases.

<sup>13</sup> See Sridhar Pappu, *To Handle the Big Data Deluge, HP Plots a Giant Leap Forward*, [https://ssl.www8.hp.com/hpmatter/issue-no-1-june-2014/handle-big-data-deluge-hp-plots-giant-leap-forward?jumpid=sc\\_kmcyq6sn3i](https://ssl.www8.hp.com/hpmatter/issue-no-1-june-2014/handle-big-data-deluge-hp-plots-giant-leap-forward?jumpid=sc_kmcyq6sn3i):

Few understand just how big “big data” has gotten. Many of us probably still think a terabyte is a lot of data. Today, our digital universe is about four zettabytes. To put that in perspective, while one terabyte can store roughly 100,000 minutes of music, one zettabyte can store just over two billion years of music. By the end of the decade, we’ll be starting to use a unit that few people have ever heard of: the brontobyte — a billion exabytes — or two quadrillion years of music.

It can certainly be argued that if the rationale of the ancient documents exception for whatever it is worth is enough to support admissibility of hardcopy, then it is enough to support the admissibility of ESI. And if the rationale does apply equally to ESI, that would certainly cut against amending the Rule. The argument that ESI fits well within the ancient documents exception begins with the observation that the original Advisory Committee was aware of the existence of electronic information and sought in some way to accommodate it within the ancient documents rule. Rule 901(b)(8) --- which as stated above is an authenticity-based rule that provides a gateway for admissibility under the hearsay exception --- specifically covers an old “data compilation” that is in suspicion-free condition in a suspicion-free place. So however right or wrong the Advisory Committee was about ancient documents’ admissibility, the Committee apparently decided to treat electronic information the same as hardcopy for purposes of authenticity.<sup>14</sup> Thus the fact that the Advisory Committee foresaw and accommodated ESI in the authenticity rule arguably counsels caution in trying to rethink the ancient document rule.

But even though initial consideration of a question by the Advisory Committee is surely relevant to the merits of an amendment, it is not as clear that the original Advisory Committee thought much about the risk to the *hearsay rule* that might be found in the explosion of ESI. It could be relevant that Rule 901(b)(8) specifically mentions data compilations and Rule 803(16) does not.<sup>15</sup> It is possible that the Advisory Committee was not explicitly thinking of the possibility that terabytes upon terabytes of information would become admissible for the truth of the contents simply because that information was stored in a server for 20 years.<sup>16</sup>

But assuming that the drafters intended for ESI to be within the purview of Rule 803(16), it still seems appropriate to consider whether the explosion of electronic information--- probably

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<sup>14</sup> See Advisory Committee Note to Rule 901(b)(8) (“The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. . . . This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.”).

<sup>15</sup> That discrepancy has led Mueller and Kirkpatrick to speculate that Rule 803(16) does not reach ESI:

The authentication provision reaches electronically stored data, and difference in language (the exception refers only to statements ‘in a document’) suggests difference in coverage. Perhaps the ancient documents exception is less necessary for electronically stored material, which often fits the exception for business or public records.

But Mueller and Kirkpatrick ultimately conclude that because the Advisory Committee Note to 803(16) equates authenticity with the hearsay exception, “coverage is probably the same despite difference in words.” Christopher Mueller & Laird Kirkpatrick, 4 Federal Evidence Sec. 8:100 at 901 (4th ed. 2013).

<sup>16</sup> It should be noted that any argument based on the omission of a reference to ESI in Rule 803(16) is weakened by the fact that after the restyling of the Evidence Rules in 2011, Rule 803(16) can now in fact be plausibly read to cover ESI. This is because new Fed.R.Evid. 101(b)(6) provides that “a reference to any kind of written material . . . includes electronically stored information.” Thus the reference to a “document” in Rule 803(16) would appear to have been, so to speak, “electrified” by the restyling. The counter to that argument is that, as emphasized in the Committee Notes to the restyling, no change in the substance of any rule was made or intended. See 2011 Committee Notes to 2011 Amendments to Rules 101, 803.

not anticipated by the Advisory Committee in the 1970's --- has separated ESI from the original justifications for the hearsay exception for ancient documents. As stated above, the primary justification for the ancient documents exception is necessity, which comes down to the premise that, given the 20-year time period, it is likely that all the reliable evidence (such as business records) has been destroyed so we have to make do with more dubious evidence. This necessity assumption appears to have been substantially undermined by the development of ESI. Because ESI is prevalent and is arguably easily preservable, whatever reliable evidence existed at the time of a 20 year-old event probably *still exists* — because it is likely to be ESI.<sup>17</sup> Business records from the time, emails from the time, texts, chats — the chances of most or all of that being preserved are certainly higher than the chances of hardcopy and eyewitnesses still being around.<sup>18</sup> There is no reason to admit *unreliable* ESI on necessity grounds if it is quite likely that there will be *reliable* ESI that is admissible under other hearsay exceptions.<sup>19</sup> Thus the “necessity” of proving claims based on older information of whatever provenance can be answered by the existence of bytes upon bytes of *reliable* electronic information — information that was not or could not have been preserved back in the day. If the ancient documents exception remains as is, there could be a situation in which parties can freely admit unreliable ESI, just because it is old, and all this will be done in the face of prevalent, reliable alternative evidence.

But there is another (lesser) justification for the exception that needs to be addressed, i.e., that an old statement has some indicium of reliability by the fact that it was made before any litigation motive could have arisen. That justification is not completely without merit and it would seem to apply to ESI as much as it applies to hardcopy. But there are a number of counterarguments:

First, the fact that a statement was made before one specific litigation arose does not mean it was made without *some* litigation motive. For example, take a case in which a plaintiff is

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<sup>17</sup> See Ronald J. Hedges, Daniel Riesel, Donald W. Stever, & Kenneth J. Withers, *Taking Shape: E-Discovery Practices under the Federal Rules*, SN085 ALI-ABA 289 , 292 (2008) (“According to a University of California study, 93 percent of all information generated during 1999 was generated in digital form, on computers. Only 7 percent of information originated in other media, such as paper.”). See also David K. Isom, *Electronic Discovery Primer for Judges*, 2005 Fed. Cts. L. Rev. 1 (2005) (citing Peter Lyman and Hal R. Varian, *How Much Information 2003?*, at <http://www.sims.berkeley.edu/research/projects/how-much-info-2003/> (last visited Oct. 28, 2004) (showing that, of an estimated 5.6 million terabytes of data stored in 2002, 5.18 million terabytes were stored electronically and an additional 420,000 were stored on film).

<sup>18</sup> Challenges to the premise that old ESI is actually preserved/accessible will be discussed in the next section.

<sup>19</sup> See, e.g., *Paramount Pictures Corp. v. International Media Films Inc.*, 2013 WL 3215189 (C.D. Cal.) (records regarding a film, more than 20 years old, were admissible as business records).

At the very least the threat of rampant use of old and unreliable ESI might lead to an adjustment of the Rule to include something like the necessity language of Fed.R.Evid. 807 — requiring that the proffered evidence is more probative than any other evidence reasonably available. One of the drafting alternatives *infra* considers this possibility.

suing a major corporation for employment discrimination. The defendant wants to admit 20 year-old text messages from the plaintiff's previous employer, casting aspersions on the plaintiff's work. It is certainly possible that such messages if true could be probative to prove the employer's lack of intent to discriminate, or for some other non-propensity purpose.<sup>20</sup> But as to hearsay --- whether the activity even occurred --- the statements may well have been made under the previous employer's *own* litigation motive.

Another common example of old evidence made under a non-specific litigation motive is an environmental cleanup action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) which imposes liability for cleanup costs on any company that deposits hazardous materials at a place covered by the statute.<sup>21</sup> The statute of limitations for a cost recovery action under CERCLA runs from the day the plaintiff performed certain acts to clean up the contamination --- that could be decades after the materials were deposited.<sup>22</sup> It is plausible to believe that a party would generate self-serving documents in anticipation of the possibility of some CERCLA action far in the future. And another obvious example is mass tort litigation stemming from hazardous substances. The time differential here arises from a combination of latency periods for the risks and the lengthiness of the proceedings; but the litigation-motive can surely exist at the time the document is prepared, as seen in tobacco litigation.<sup>23</sup>

Given the sheer volume of old ESI that has and will be generated, it is apparent that at least some old ESI will have been made with a litigation motive of some kind --- and yet it would be automatically admissible under an unamended Rule 803(16) simply because it is old. It is important to note that the existing Rule does not require, as a condition of admissibility, that

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<sup>20</sup> See, e.g., *Buckley v. Mukasey*, 538 F.3d 306 (4<sup>th</sup> Cir. 2008) (evidence of plaintiff's long-running participation in a race discrimination class action should have been admitted as probative of employer's retaliatory intent); *Alaniz v. Zamora-Quezada*, 591 F.3d 761 (5<sup>th</sup> Cir. 2009) (evidence of the employer's activity toward other employees was admissible to establish modus operandi); *Jackson v. Quanex Corp.*, 131 F.3d 647 (6<sup>th</sup> Cir. 1999) (evidence of racial graffiti at employer's plant and racially offensive conduct toward African-American workers was admissible to prove discriminatory intent even if not directed toward the plaintiff).

<sup>21</sup> CERCLA §107, 42 U.S.C. §9607.

<sup>22</sup> CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2) (statutory period runs from "initiation of physical on-site construction of the remedial action). Indeed a good percentage of reported cases applying the ancient documents exception to hardcopy are CERCLA actions. See, e.g., *Reichhold Chem. Inc. v. Textron, Inc.*, 888 F.Supp. 1116 (N.D.Fla. 1995) (ancient documents offered in opposition to an affirmative defense to CERCLA liability); *United States v. Atlas Lederer Co.*, 282 F.Supp.2d 687 (S.D. Ohio 2001) (hardcopy customer documentation regarding a battery disposal site found inadmissible as business records but admissible as ancient documents).

<sup>23</sup> **Error! Main Document Only.** See, e.g., *Ancient Documents*, 15 Federal Rules of Evidence News 90-177, 90-189 (1990) ("The phenomenon of docket delays as well as the frequent litigation of liability arising from health detriments that may take decades to come about may be giving new life to the neglected 'ancient documents' hearsay exception.").

the document actually must have been prepared before a controversy arose --- the Advisory Committee assumed there would be no litigation motive affecting old documents, but did not require a finding of lack of motive in the text of the rule.<sup>24</sup> And given docket delays and the lengthiness of disputes endemic to certain kinds of large litigations, it would hardly be surprising that ESI could have been prepared more than 20 years earlier for the *specific* litigation before the court.<sup>25</sup>

Second, even if an absence of litigation motive might exist for a particular ancient document, that would be the only reliability-based factor supporting admissibility for hearsay admitted under Rule 803(16). No other hearsay exception relies solely on the absence of litigation motive in establishing the reliability required for admission of hearsay. Hearsay statements are excluded every day even though they are made without a litigation motive — for example, a statement of an unaffiliated bystander to an accident, made the day after the accident, indicating that the defendant-driver was at fault. That statement is inadmissible hearsay even if the declarant is unavailable at trial. There is no reliability-based justification for admitting the same statement simply because the event is 20 years old. The basic position of the hearsay rule and its other exceptions --- that absence of litigation motive might be relevant but is never dispositive for determining admissibility of hearsay --- makes eminent sense because many out-of-court statements are demonstrably unreliable even if made without litigation motive. Personal animosities, rampant misperceptions, and just plain willingness to lie can impair the reliability of an out-of-court statement even if the declarant made it with no litigation in sight.

Third, the thin reed of (possible) reliability based on absence of litigation motive might once have been tolerable because the ancient documents exception was rarely used. But again, there is a prospect of change due to the development of ESI. It is surely the case that lawyers will at least try to use the exception more frequently to admit stored ESI for its truth.<sup>26</sup> Establishing admissibility under 803(16) is likely to be easier than, for example, using the business records exception to the hearsay rule, Rule 803(6). Rule 803(6) requires foundation testimony or an affidavit from a knowledgeable witness, as well as a showing that the record is one of regularly conducted activity.<sup>27</sup> Other exceptions, such as for excited utterances and present sense

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<sup>24</sup> See, e.g., *Langbord v. U.S. Dept. of Treasury*, 2011 WL 2623315, at \*3 (E.D.Pa.) (“Requiring courts to ignore the ancient document rule’s three requirements and make determinations based on whether a document was prepared with similar litigation in mind would require courts to assess a document’s trustworthiness or bias, a task inappropriate when resolving threshold authenticity questions.”); *Columbia First Bank, FSB v. U.S.*, 58 Fed.Cl. 333 (Fed.Cl.2003) (there is no requirement in the rule that the document must actually antedate the controversy).

<sup>25</sup> See *Osprey Ship Management, Inc. v. Jackson County Port Authority*, 2008 WL 282267 (S.D.Miss.) (affidavit prepared earlier in a lengthy dispute admissible as an ancient document).

<sup>26</sup> G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 U.M.K.C. L.Rev. 1993 (predicting that the ancient documents exception “will be applied more frequently and more frequently will be applied to prove essential elements of the case.”).

<sup>27</sup> See, e.g., *United States v. Duron-Caldera*, 737 F.3d 988 (5<sup>th</sup> Cir. 2013) (old record not admissible as a business record because not prepared in the regular course of business activity; but admissible under Rule 803(16)).

impressions, contain their own detailed admissibility requirements.<sup>28</sup> In contrast, all that needs to be shown for an ancient document is that it is old and meets the low standards for authenticity (a requirement that must be met for any document, whether a business record or an unreliable diary).<sup>29</sup> For ESI, age will be a snap to show, because the information will be dated if not explicitly than in the metadata.<sup>30</sup> Indeed, the metadata attendant to a file will make it easier to show that it has not (or has) been suspiciously altered --- thus making the authentication question that is the basis for the hearsay exception easier to solve than with hardcopy. In sum, while we once might have been able to tolerate the ancient documents exception due to its frequent use, the incentives to use it for unreliable ESI at least arguably warrant consideration of some limitation on the exception.

### **III. Arguments Against an Amendment to Rule 803(16)**

There are a number of counterarguments against amending Rule 803(16), and this section addresses them.

#### ***A. How Prevalent and Retrievable Is Old ESI?***

The two fundamental premises of an amendment to Rule 803(16) are: 1) the courts are going to be overrun with unreliable old ESI; and 2) the necessity-basis of the existing exception is undermined because facts can be proven by reliable, stored ESI.

Both these premises assume that there is a significant amount of ESI that is (or will soon be) over 20 years old and retrievable for use at trial. But is that assumption valid? There are loads of cases in which a party to a litigation has moved for sanctions because the adversary has *destroyed* ESI.<sup>31</sup> Preservation orders and the duty to preserve ESI take up much of the time of

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<sup>28</sup> See Fed.R.Evid. 803(1) (to be admissible as a present sense impression, the statement must have been made at the time of the event to be proved, or immediately thereafter, and must describe the event); Fed.R.Evid. 803(2) (to be admissible as an excited utterance, the statement must have been made by the declarant while under the influence of a startling event, and it must relate to that event).

<sup>29</sup> See, e.g., *United States v. Kalymon*, 541 F.3d 624, 633 (6th Cir.2008) (factual accuracy of the content is not pertinent when considering whether the ancient document exception applies: "Suspicion does not go to the content of the document, but instead, "to whether the document is what it purports to be."); *United States v. Firishchak*, 468 F.3d 1015 (7<sup>th</sup> Cir. 2006) (ancient document admissible even though it would not satisfy any reliability-based hearsay exception).

<sup>30</sup> Metadata is information about data that is not readily apparent on the screen view of the file. "Metadata includes information about the document or file that is recorded by the computer to assist in storing and retrieving the document or file. . . . [Metadata] includes file designation, create and edit dates, authorship, comments, and edit history." Scheindlin, *Capra and the Sedona Conference, Electronic Discovery and Digital Evidence: Cases and Materials* 380 (2d ed. 2012).

<sup>31</sup> See generally *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (sanctions sought and obtained after employees were instructed to destroy emails that were relevant to the plaintiff's claims).

litigators --- time that would seem unnecessary if ESI wasn't routinely being destroyed --- made irretrievable --- pursuant to records management policies of countless businesses.<sup>32</sup> Many organizations delete e-mails automatically after a certain amount of time unless they are specifically saved or archived. So why should we be worried about an onslaught of old ESI? And how could we assume that old and reliable ESI will be readily available so that an ancient documents exception is unnecessary?

In addressing these questions, one must first separate out “lost” ESI from “deleted” ESI. An email is lost, for example, if the user did not delete it but simply cannot locate it through search options within her email account. But “lost” information such as emails are not destroyed and can be fairly easily retrieved. A Google search requesting “how to recover old emails” will produced step-by-step instructions for easy retrieval.<sup>33</sup> So the focus for the question of “how much retrievable ESI is there?” is most importantly on information that has been deleted automatically (through a data management program or the like) or by hand.

Generally speaking, deleted ESI even though deleted is easy to retrieve until it is overwritten.<sup>34</sup> Retrieval becomes more difficult, however, when ESI is overwritten; and many information management systems are likely to overwrite deleted data that is 20 years old.<sup>35</sup> However, dozens of software companies specialize in restoring deleted and overwritten data,

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<sup>32</sup> For examples of disputes over records retention policies and preservation orders, see the materials in Chapter II of Scheindlin, Capra and The Sedona Conference, *Electronic Discovery and Digital Evidence: Cases and Materials* (2d ed. 2012). See also *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (describing document destruction that amounted to obstruction of justice when retention policy was suspiciously implemented).

<sup>33</sup> See [http://www.ehow.com/how\\_5070600\\_access-old-emails.html](http://www.ehow.com/how_5070600_access-old-emails.html); see also [www.livinginternet.com/e/ei.htm](http://www.livinginternet.com/e/ei.htm) (noting that emails from as early as 1992 can be found on most computer systems).

<sup>34</sup> See David Robert Matthews, *Electronically Stored Information: The Complete Guide to Management, Understanding, Acquisition, Storage, Search, and Retrieval* at 120 (Taylor & Francis Group, LLC 2013):

Whenever someone deletes a file on a computer, the operating system makes a small change to the data that makes up that file, basically placing a flag consisting of a couple of bits of information at the beginning of the bits and bytes that make up that file. That flag tells the operating system (and any application that interfaces with it) that this storage space is available and that the information stored here can be written over with new data whenever the space it is using on the electronic storage device is needed.

Id. at 205:

“If these have not yet been overwritten . . . , it can be relatively simple to recover them, given the right tools and skills.”

<sup>35</sup> See [www.paretologic.com/products/datrecovery/pro](http://www.paretologic.com/products/datrecovery/pro). See also Daniel Feenberg, *Can Intelligence Agencies Read Overwritten Data?*, The National Bureau of Economic Research, [www.nber.org/sys-admin/overwritten-data-guttman.html](http://www.nber.org/sys-admin/overwritten-data-guttman.html) (stating that an attempt to retrieve overwritten data is likely to have an error rate).

even from computers that have been severely damaged. For example, Computer Checkup Premium offers a program specializing in undelete functions; the service is \$39.95 per year.<sup>36</sup> It is, in fact, questionable whether a standard records management system wipes its files completely simply by overwriting them --- and certainly the possibility of completely wiping a file becomes more and more unlikely as technology advances. For example, magnetic force microscopy (MFM) is a recently developed technique that makes it more difficult to wipe deleted data simply by overwriting it.<sup>37</sup> Thus there is a good argument that even deleted ESI is reasonably accessible, and that argument gets stronger every day<sup>38</sup> --- though it is fair to state that there will be some ESI that will be obtainable only through extraordinary efforts, such as information that is on an outdated program or a very old backup tape.<sup>39</sup>

In addition to software that can recover overwritten data, it is now a common practice for data to be backed up in alternate locations, such as cloud storage --- even if it is deleted from a particular computer or server.<sup>40</sup> Businesses, and lawyers, appear to be discovering the

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<sup>36</sup> <http://www.sharewarecentral.com/search.html?q=computer+checkup+premium>

<sup>37</sup> MFM "is a technique for imaging magnetization patterns with high resolution and minimal sample preparation. The technique is derived from scanning probe microscopy (SPM) and uses a sharp magnetic tip attached to a flexible cantilever placed close to the surface to be analyzed, where it interacts with the stray field emanating from the sample." Peter Guttman, *Secure Deletion of Data from Magnetic and Solid-State Memory*, [www.usenix.org/legacy/publications/library/proceedings/sec96/full\\_papers/gutmann/index.html](http://www.usenix.org/legacy/publications/library/proceedings/sec96/full_papers/gutmann/index.html) Because of developments such as MFM, examination of a disk with an electron microscope "can still reveal the previous contents of the wiped area, because the obliterating bytes are not written in exactly the same tracks as the original data . . ." *Id.*

<sup>38</sup> See Clayton L. Barker and Philip W. Goodin, *Discovery of Electronically Stored Information*, 64 J. Mo. B. 12, 15 (2008). In *Lozoya v. Allphase Landscape Constr. Co., Inc.*, 2014 WL 222326 (D.Colo.), the court found that information on the plaintiff's computers could not be considered unavailable until a forensic expert fully examined the machines. The case suggests a trend toward recognizing that retrieving old ESI is much less cumbersome and expensive than it once was.

<sup>39</sup> See Jack Halprin, *Preserving and Protecting: How to Handle Electronically Stored Information*, <https://www.youtube.com/watch?v=YUQq-03-NUfl>. (noting that "extraordinary measures" may be necessary to get data off a very old hard drive).

<sup>40</sup> Use of virtual servers --- cloud storage --- is a "way to use the storage space and hardware on a computer or server efficiently to store more than one operating system or more than one server on the same physical device." Matthews, *supra*, at 102. Virtual systems have "become quite popular as a way to save energy, space, and resources in our ever-expanding information universe." *Id.* See also Michael R. Arkfeld, *Proliferation of "Electronically Stored Information" (ESI) and Reimbursable Private Cloud Computing Costs*, 4 (2011), available at [http://www.lexisnexis.com/documents/pdf/20110721073226\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20110721073226_large.pdf). (citing Wikibon Blog, Information Explosion and Cloud Storage, <http://wikibon.org/blog/cloud-storage/>).

Storage in the cloud results in permanent retention. See Crashplan, "The Lifespan of Storage Media," (2012), <http://www.code42.com/crashplan/medialifespan/>.

importance of backing up old files.<sup>41</sup> Computer forensic experts have found multiple ways to access cloud-based email and other information. For example, with respect to email, the messages “can be downloaded to a computer in Outlook, to applications that preserve the email from the cloud” and thus the emails are “reasonably accessible.”<sup>42</sup>

Moreover, the very existence of spoliation disputes and sanctions, discussed above, means that more and more ESI is now in fact being preserved. The 2006 amendments to the Federal Rules of Civil Procedure’s e-discovery rules have imposed duties to retain ESI; and those duties are not eliminated by the amendments scheduled to go into effect in 2015. Preserving ESI is “important to companies that may ever be in a litigation or employment dispute, or that have to comply with the Sarbanes-Oxley Act, Foreign Corrupt Practices Act, PATRIOT Act, or other statutory or regulatory requirements. That’s virtually every public and private company of every size.”<sup>43</sup>

The significance of the 2006 amendments “becomes even more striking when one considers that nearly 90% of U.S. corporations become engaged in lawsuits; and that at any one time, the average \$1 billion company in the U.S. faces 147 lawsuits.”<sup>44</sup> As such, more and more ESI is likely to be retained and thus retrievable because of retention obligations and diminished costs of storage.

But even if records retention programs result in the mass deletion of ESI by organizations, and even assuming that once deleted the ESI cannot be retrieved through reasonable efforts, there would remain many reasons to be concerned about overuse of the ancient documents exception as applied to ESI. For one thing, much of the ESI that is relevant to litigation is not generated by organizations with records management programs. Rather it is generated by individuals in the form of personal emails, tweets, facebook posts, text messages,

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<sup>41</sup> See Wells Anderson, *How to Protect Electronic Documents --- From Yourself*, [www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/protect.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/protect.html) (“In addition to a nightly backup routine, consider running a backup utility that operates continuously or periodically throughout the day, copying new and changed files to an alternative location such as another computer’s local hard drive. BackUp MyPC for \$79 from Stomp, Inc., is highly recommended, [www.stompinc.com](http://www.stompinc.com).”).

The cost for a gigabyte of storage was \$2,000,000 in 1956; in 2009 the cost was less than \$1. Jason R. Baron & Ralph C. Losey, *e-Discovery: Did You Know?*, YouTube (Feb. 11, 2010), <https://www.youtube.com/watch?v=bWbJWcsPp1M>.

<sup>42</sup> Nitty Gritty Discovery Requests, Bow Tie Law’s Blog, Jan. 29, 2014, <http://bowielaw.com>

<sup>43</sup> Linda Volonino, Janice C. Sipior, & Burke T. Ward, *Managing the Lifecycle of Electronically Stored Information*, 24 INFORMATION SYSTEMS MANAGEMENT 231, 232 (2007).

<sup>44</sup> *Id.*

chat room dialog, voice mails, and on and on.<sup>45</sup> Much of this information is unlikely to be deleted by individuals, and even if it is, the ESI will often be available from others who had access to the information (e.g., the recipients of the tweet, or the third-party provider).<sup>46</sup> These personal assertions will often be made without any verification at all --- e.g., a Facebook post in the privacy of one's own home --- so there is reason to be concerned about their reliability, and that concern is not at all alleviated by the fact that the assertion is old.

Second, web postings are preserved for posterity by the Internet Archive. Indeed, the express goal of the Internet Archive is to “prevent the Internet . . . and other ‘born-digital’ materials from disappearing into the past.”<sup>47</sup> To take an example: the first easily retrievable web page of the National Enquirer tabloid containing assertive content is dated January 20, 1998 and can be found on the Internet Archive’s “wayback machine” with the click of a button.<sup>48</sup> On that webpage the Enquirer asserts that Roseanne Barr and her baby were “nearly killed by [her] hubby” and that officers had to draw guns to save her life. The Enquirer webpage from January 30, 1998 asserts facts about the “Clinton Crisis” --- including an assertion impliedly attributed to Hillary Clinton that she “shared Monica with Bill.” So records management programs do nothing to alleviate the threat of overuse of the ancient documents exception as applied to the overwhelming amount of information that is posted on the web.<sup>49</sup> The same can be said for other types of ESI. For example, the Google library project estimates that there are nearly 130 million books,<sup>50</sup> and it has so far digitized over 20 million of them, most of which are old and out of

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<sup>45</sup> Professor Jeffrey Bellin has documented the increased use in litigation of ESI generated by individuals in their personal lives. See, e.g., Jeffrey Bellin, *eHearsay*, 98 Minn. L.Rev. 7 (2013); Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. Pa. L.Rev. 331 (2012).

<sup>46</sup> See, e.g., Biz Stone, *Tweet Preservation*, <http://blog.twitter.com/2010/04/tweet.preservation.html> (stating that Twitter is now donating “access to the entire archive of public Tweets to the Library of Congress for preservation and research”); Seth P. Berman et al, *Web 2.0: What’s Evidence Between “Friends”?* (noting that Facebook posts can be obtained from the computers of any participant in a Facebook conversation, or “from Facebook itself”).

<sup>47</sup> The Internet Archive, *About the Internet Archive* (last accessed July 19, 2014), available at <https://archive.org/about/>.

<sup>48</sup> <http://web.archive.org/web/19980120010422/http://nationalenquirer.com/> Another example of a website that allows users to access archival copies of webpages is [www.cachedpages.org](http://www.cachedpages.org), which allows users to employ one interface to search three different archival services—the Wayback Machine, Google Cache, and Coral Cache.

<sup>49</sup> See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 Stan. L. Rev. 1393, 1412 (2001) (“[A]lmost everything on the Internet is being archived. . . . We are accustomed to information on the web quickly flickering in and out of existence, presenting the illusion that it is ephemeral. But little on the Internet disappears or is forgotten, even when we delete or change the information.”).

<sup>50</sup> Ben Parr, *Google: There Are 129,864,880 Books in the Entire World*, MASHABLE, Aug. 05, 2010, <http://mashable.com/2010/08/05/number-of-books-in-the-world/>

print. These books are now of course easily accessible, with many more to come.<sup>51</sup> That means assertions of fact in those books are automatically admissible under the ancient documents exception so long as the books are more than 20 years old.

Finally, it is important to remember that the concern about deletion of ESI in the case law comes in the context of spoliation claims. That is, a party is complaining that its opponent deleted ESI that was unfavorable to the opponent's position. But that kind of ESI, were it preserved and in fact unfavorable, would be admissible against the recordkeeper over a hearsay objection as party-opponent statements.<sup>52</sup> Consequently there is a litigation-based incentive to delete it (if you can get away with it). But the problem posed by ESI as it relates to the ancient documents exception is that the recordkeeper will have an incentive to keep information that is *favorable* to its position; and it won't matter whether that information is reliable --- indeed there will be an incentive to keep self-serving unreliable accounts as ESI, because the cost of preserving that information will be so low.

In sum, the fact that some or even much of the world's ESI is deleted is likely to do little to prevent overuse of the ancient documents exception as applied to ESI.<sup>53</sup>

### ***B. Does the Ancient Documents Exception Even Apply to ESI?***

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<sup>51</sup> Claire Cain Miller & Julie Bosman, *Siding with Google, Judge Says Book Search Does Not Infringe Copyright*, N.Y. TIMES, Nov. 14, 2013, [http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html?\\_r=0](http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html?_r=0)

<sup>52</sup> Fed. R.Evid. 801(d)(2).

<sup>53</sup> It might be wondered whether information on digital media might simply degrade without any attempt to destroy it. Crashplan, an organization that specializes in managing and protecting customers' digital data, created an infographic showing the expected lifespans of various types of storage mediums. Out of the 25 types of storage mediums analyzed, 10 of them are expected to last longer than twenty years under conditions of regular use. Among the most resilient are the more modern technologies, such as memory cards and hard drives. However, some extremely old technologies such as Super 8 Film (created in 1965) and Vinyl Records (created in the late 1800s) can last for extremely long periods—70 years of regular use for Super 8 Films, and 100 years for Vinyl Records. Moreover, the number of storage mediums able to last over 20 years increases significantly if the medium remains unused or under appropriate care, as is likely to be the case if the medium is used for archival purposes. Of the 25 types of storage mediums analyzed, 20 of them are expected to last twenty years or longer if used for archival purposes (and cared for as such). See Crashplan, "The Lifespan of Storage Media," (2012), <http://www.code42.com/crashplan/medialifespan/>.

Some Blu-Ray discs purport to be able to last essentially forever. The M-Disc claims that "once [data] is written [on the disc], your documents, medical records, photos, videos and data will last up to 1,000 years." M-Disc, <http://www.mdisc.com/what-is-mdisc/> (last accessed Aug. 6, 2014).

ESI that is stored for 20 years is not like a magazine or property deed that has been sitting in the attic for 20 years. Electronic data is dynamic. It is changed, at least in some ways, by the action of accessing it, viewing it, or moving it. “That nonapparent information that can become part of the electronic data is called metadata.”<sup>54</sup> The dynamic nature of ESI might seem to make it an ill fit for an ancient documents exception if the exception is thought to be grounded in the authenticity that comes from a document being in “a place” where it would “likely be.”<sup>55</sup> There would be no worry about the ancient documents hearsay exception if old ESI could not be authenticated due to its dynamic nature --- because, as stated above, authenticity is the requirement for satisfying the hearsay rule under Rule 803(16).

But in fact the dynamic nature of stored ESI is unlikely to raise a substantial bar to the use of the ancient documents hearsay exception. This is so for a number of reasons. First, Rule 901(b)(8) specifically contemplates that the age an *electronic* document will provide a ground of authenticity for ESI. That rule covers a “data compilation” in any form. If the mere fact that an electronic document was changed in some immaterial respect simply because it was stored was enough to disqualify that document from being found authentic under Rule 901(b)(8), then the drafters would never have covered data compilations in that rule. It makes no sense to write a rule of authenticity that covers information that is per se disqualified from being authenticated under that rule. True, it is probably fair to state that none of the original Advisory Committee members were experts on the technicalities of storage of electronic information; and it is equally fair to state that they could not have anticipated the explosion in volume of ESI that we have seen over the past 20 years. But certainly they could be expected to know even then that electronic information was not stored in the same way as a magazine or library book. Thus, the specific inclusion of data compilations in Rule 901(b)(8) is an indication that the dynamic nature of ESI storage does not per se disqualify it from authentication under Rule 901(b)(8) --- and therefore does not disqualify the contents from automatic admissibility under Rule 803(16).

Moreover, a fair reading of the text of Rule 901(b)(8) covers old ESI even if it has been accessed, viewed, etc. over a 20 year period --- so long as it has not been suspiciously altered, as would be a problem with any document. If ESI is found on a server, hard drive, in the cloud, etc., it really is in a “place” where it would “likely be.” Nothing in Rule 901(b)(8) requires a

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<sup>54</sup> Matthews, *supra*, at 17.

It should be noted that system metadata --- information about an electronic file that is generated by a computer without human input --- is not hearsay and so would present no concerns for the ancient document exception or any other exception to the hearsay rule. This is because system metadata is machine-generated and a machine is not a “declarant” who makes a “statement” within the meaning of the hearsay rule. *United States v. Hamilton*, 413 F.3d 1138 (10<sup>th</sup> Cir. 2005) (header information accompanying an image file was not hearsay because it was automatically generated); *United States v. Moon*, 512 F.3d 359 (7<sup>th</sup> Cir. 2008) (printout from gas chromatograph is not hearsay). On the other hand, application metadata --- including such information as spreadsheet formula or redline changes in word processing documents --- is the result of human input and so “may constitute hearsay, just as any other ‘statement’ made by a human being.” Sedona Conference Commentary on ESI Evidence and Admissibility at 10 (March, 2008). Consequently, the existence of application metadata in old ESI further raises the risk of overuse of the ancient documents exception to the hearsay rule.

<sup>55</sup> Fed.R.Evid. 901(b)(8).

document to have been placed in a hermetically sealed and immovable container for 20 years; nothing in the Rule prohibits authenticating a document that has been viewed, accessed, or moved repeatedly over 20 years, so long as it is eventually found in a place where it would likely be. So if a frequently read or moved magazine can be authenticated as an ancient document, there is every reason to give the same basic treatment to frequently accessed or moved ESI.

But even if Rule 901(b)(8) were found inapplicable to authenticate ESI that had been accessed, viewed, or moved, that would not significantly impede the admissibility of old ESI under the ancient documents exception to the hearsay rule. Remember that Rule 803(16) operates as an exception for a more-than-20-year-old document whenever that document is found authentic on *any* ground. It does not require a finding of authenticity under Rule 901(b)(8). Thus, just like new ESI, old ESI can be authenticated in any number of ways, as indicated by the scores of cases involving challenges to the authenticity of ESI.<sup>56</sup> It must be remembered that the threshold for the court's determination of authenticity under Rule 901 is not high. As the court put it in *United States v. Safavian*, 435 F. Supp.2d 36, 38 (D.D.C. 2006), "the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so." The possibility of alteration "does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more that it can be the rationale for excluding paper documents."<sup>57</sup>

What follows is a non-inclusive list of possibilities of authenticating old ESI other than under Rule 901(b)(8):

- ESI of various types can be authenticated by distinctive characteristics and circumstantial evidence under Fed.R.Evid. 901(b)(4).<sup>58</sup>
- Any public record, including data compilations prepared by a public office, can be authenticated under Rule 901(b)(7), upon a showing that it is from "the public office where items of this nature are kept." There is no requirement that the records be reliable.<sup>59</sup> Thus when an old public record is authenticated under Rule 901(b)(7), all the assertions in the record are admissible for their truth even though they would not be trustworthy enough to be admissible

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<sup>56</sup> For a general discussion about authenticating ESI, see Scheindlin, Capra, and the Sedona Conference, *Electronic Discovery and Digital Evidence* 754-67 (2d ed. 2012).

<sup>57</sup> *Safavian*, 435 F.Supp.2d at 40.

<sup>58</sup> See, e.g., *United States v. Lundy*, 676 F.3d 444 (5<sup>th</sup> Cir. 2012) (text messages properly authenticated by circumstantial evidence, i.e., that the defendant when arrested was texting and phoning the victim); *Safavian*, *supra* (@ symbol and email addresses are distinctive characteristics sufficient for authentication).

<sup>59</sup> See, e.g., *United States v. Meienberg*, 263 F.3d 1177, 1181 (10<sup>th</sup> Cir. 2001): "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility."

under the hearsay exception for public records.<sup>60</sup> That is, the ancient documents exception renders the limits of the public records exception irrelevant for all of the digital data of the government that is more than 20 years old.

- Under Rule 901(b)(9), ESI can be authenticated when the proponent provides enough information for a reasonable person to find that the electronic data is the product of a system that “produces an accurate result.” Again, “accurate” does not refer to the reliability of assertions in the document, only that the output is not substantially changed from the input.

- Under Rule 902(5), official publications of a public authority, including website content, are self-authenticating --- no extrinsic evidence of authenticity is required.<sup>61</sup>

- Websites can be authenticated through the presentation of information from the “wayback machine.”<sup>62</sup>

- Testimony of a witness with personal knowledge about the ESI that is presented to the court can often be sufficient evidence of authenticity.<sup>63</sup>

- Posts on Facebook, YouTube, etc. can be authenticated not only by distinctive characteristics but also by the demonstration of use of passwords and email addresses.<sup>64</sup>

- Temporary internet files, even if deleted, can be authenticated by the forensic expert who retrieved them.<sup>65</sup>

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<sup>60</sup> Fed.R.Evid.803(8) (requiring exclusion if the opponent shows that the source of information or other circumstances indicates a lack of trustworthiness).

<sup>61</sup> See, e.g., *Williams v. Long*, 585 F. Supp. 2d 679 (D. Md. 2008) (printed copies of state agencies’ websites).

<sup>62</sup> See, e.g., *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004) (use of the “wayback machine” ([www.archive.org](http://www.archive.org)) to authenticate websites as they appeared at various dates relevant to the litigation).

<sup>63</sup> Fed.R.Evid. 901(b)(1). See, e.g., *Buzz Off Insect Shield v. S.C. Johnson*, 2009 U.S. Dist. Lexis 17530 (M.D.N.C.) (website authenticated where witness testified that he typed a url, logged onto and viewed the site, and that the printout offered at trial fairly reflected what she saw); *In re EDT*, 2010 U.S. Dist. Lexis 54172 (E.D.N.Y.) (testimony of participant to an exchange of texts established authenticity).

<sup>64</sup> See, e.g., *United States v. Hassan*, 742 F.3d 104 (4<sup>th</sup> Cir. 2014)(trial judge did not abuse discretion in admitting against two defendants Facebook pages and videos hosted on YouTube and maintained by Google; the Facebook pages were captured as screenshots and displayed the defendants’ user profiles and postings; the screenshots included photos and links to the YouTube videos; the defendants had posted their personal biographical information on the Facebook pages along with quotations and listings of their interests; and each Facebook page contained a section for postings from other users the prosecution had satisfied its low burden of establishing authenticity under Rule 901(a) by tracking the Facebook pages and Facebook accounts to Hassan’s and Yaghi’s email addresses).

<sup>65</sup> *United States v. Johnson*, 2006 U.S. Dist. Lexis 6246 (N.D.Iowa).

In sum, there are myriad ways to authenticate ESI that certainly apply to ESI more than twenty years old, even if authentication as an ancient document were not possible under Rule 901(b)(8) because of ESI's dynamic nature.<sup>66</sup> Consequently, the risk that the ancient documents exception to the hearsay rule --- simply equating authenticity with admissibility of hearsay --- will become an open door to admitting unreliable hearsay in vast amounts of old ESI appears to be real.

### *C. No Existing Problem to Address?*

Another possible argument against changing the ancient documents exception as applied to ESI is that right now it is not affecting the courts. One searches in vain for a reported case addressing admissibility of ESI under the ancient documents exception. While this of course does not mean that ESI has never been offered under Rule 803(16), it is surely a rough indication that the problem of the use of the ancient documents exception to admit unreliable ESI is not widespread at this point.

As discussed above, the Advisory Committee does not propose an amendment to the Evidence Rules unless it will solve a real problem. So it might be argued that amending Rule 803(16) due to a projected but not-yet-existing onslaught of old ESI is inappropriate. The counterargument is that technology, and the use of technology at trials, develops very quickly, and trying to keep up with these changes is very difficult in the context of the deliberate nature of the rulemaking process. Enacting an amendment to the national rules of procedure takes a minimum of three years. Given all the ESI that will become potentially admissible without regard to reliability under Rule 803(16) in the next three or four years, there is something to be said about trying to get out ahead of the curve.

On the other hand, it is certainly justifiable to wait for the problem to rear its head in the courts. The consequence of waiting is not the typical one in this area, i.e., that rulemaking can't keep up with changes in technology. The problem with 803(16) is not that rulemaking will be lagging behind technological advances, but rather that there may well be an onslaught of

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<sup>66</sup> This is not to say that all ESI, whether new or old, automatically will be found authentic. Certain types of ESI present thorny problems of authentication. For example, database information presents challenges because it is not just a stand-alone document sitting in a server but rather constitutes an amalgamation of separate data elements. Certainly there will be special problems in establishing authenticity for this amalgamated information; and as to ancient documents, there may be some difficulty in determining whether the amalgamated information is in a place where it would most likely be. See generally *The Sedona Conference Database Principles*, March 2011. Additionally, there may be difficulty in determining the author of certain ESI, if it comes from different sources --- such as a dashboard in a corporate internet . See generally *The Sedona Conference Commentary on ESI Evidence and Admissibility* at 12 (March 2008). But the instances demonstrated in text, both under Rule 901(b)(8) and other rules of authentication, definitely indicate a risk that much ESI will be admissible for its truth simply because it is--- pretty easily --- authenticated.

unreliable ESI soon hitting the courts. Thus the possible consequence is “only” that large amounts of unreliable hearsay will be admitted for a few years. It is of course for the Committee to determine whether the case has been made for proposing an amendment to Rule 803(16) at this time.<sup>67</sup>

#### ***D. Ancient Hardcopy Documents Might Still Be Necessary In Certain Litigations***

A final argument in response to amending the ancient documents hearsay exception is that even with the advent of ESI, there will still be some cases in which the only evidence available is old hardcopy. For example, cases involving immigration violations for fraudulent entry into the country often must be proven by old hardcopy found in some archive.<sup>68</sup> Old hardcopy has also been found necessary in asbestos cases, CERCLA cases, property disputes, and stolen art cases, among others.<sup>69</sup>

In none of the above-cited cases was there ESI (much less reliable ESI) available to prove what the hardcopies were offered to prove. So it can be argued that even if an amendment were necessary to regulate old ESI, any amendment should preserve the exception in cases where necessity can be shown. Put another way, even though the rationale of the ancient documents exception --- that necessity trumps reliability --- is questionable, that rationale for whatever it is worth may still be applicable to certain actions today despite the development of ESI. One of the drafting alternatives below provides for a necessity carve-out.

### **IV. Drafting Alternatives**

This section assumes that a change to Rule 803(16) is warranted in order to address the possibility that megabytes of old and unreliable ESI will become admissible to prove the truth of assertions, without any real check for reliability.

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<sup>67</sup> If the Committee were to proceed --- and all were to go well --- the schedule would be as follows: 1) proposal to the Standing Committee for release for public comment in the Fall of 2015 (proposal to be made at the June, 2015 meeting of the Standing Committee); 2) public comment period from August, 2015-February, 2016; 3) Advisory Committee consideration of public comment and final changes at its Spring 2016 meeting; 4) proposal for Standing Committee final approval, at June, 2016 Standing Committee meeting; 5) Judicial Conference approval at its September, 2016 meeting; 6) review by Supreme Court, September, 2016-April 2017, and referral to Congress; and 7) Congressional laissez-faire, resulting in effective date of December 1, 2017.

<sup>68</sup> See, e.g., *United States v. Demanjuk*, 367 F.3d 623 (6<sup>th</sup> Cir. 2004) (records of activity during World War II).

<sup>69</sup> *George v. Celotex Corp.*, 914 F.2d 26 (2<sup>nd</sup> Cir. 1990) (old asbestos report); *Tremont LLC v. Halliburton Energy Services, Inc.*, 696 F.Supp.2d 741 (S.D.Tex. 2010) (old records indicating disposal of waste found admissible in a CERCLA case under Rule 803(16)); *Koepf v. Holland*, 688 F.Supp.2d 65 (N.D.N.Y. 2010) (old deed found admissible as an ancient document in a property dispute); *In re Paysage*, 2014 WL 128132 (E.D.Va.) (old museum records in a case about ownership of a work of art).

### *A. Deletion*

One alternative is simply to delete Rule 803(16). As stated above, the basic problem with the exception is that it confuses authenticity of a document with reliability of its contents. It simply does not follow that because a document is genuine, the statements in the document are reliable. As discussed above, it can be argued that necessity alone cannot justify the use of unreliable evidence, and that any hearsay statement that is old and that *should* be admissible (because it is reliable) can be offered under the residual exception to the hearsay rule, Rule 807 — you don't need an ancient documents exception to admit old but reliable evidence. Indeed the only case cited by the Advisory Committee in support of Rule 803(16) was one in which the court found an old document admissible not because it was an ancient document, but rather because it carried the circumstantial guarantees of trustworthiness that would support admission today under the residual exception.<sup>70</sup>

How would deletion be implemented? The rulemaking formula in such a situation is to delete the text, keep the rule number open (so as not to upset electronic searches relying on existing rule numbers), and provide a committee note explaining the motivation for the deletion.

*Thus, the deletion would look something like this:*

~~(16) — *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established. **[Abrogated].**~~

*And here is a possible Committee Note for the abrogation:*

The ancient documents exception to the rule against hearsay has been abrogated. The exception was based on the flawed premise that the contents of a document are reliable merely because the document is old. While it is appropriate to conclude that a document is *genuine* when it is old and located in a place where it would likely be — *see* Rule 901(b)(8) — it simply does not follow that the contents of such a document are truthful.

The ancient documents exception could once have been thought tolerable out of necessity (unavailability of other proof for old disputes) and by the fact that the exception has been so rarely invoked. But given the development and growth of electronically stored information, the exception has become even less justifiable and more subject to abuse. The need for an ancient document that does not qualify under any other hearsay exception has been diminished by the fact that reliable electronic information is likely to be available and can be used as proof under a number of hearsay exceptions. And abuse of the ancient document exception is possible because unreliable electronic information

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<sup>70</sup> See Advisory Committee Note to Rule 803(16) (citing *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5<sup>th</sup> Cir. 1961)).

could be widespread and would be admissible under the exception simply because it has been preserved in a database for 20 years.

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One possible concern about abrogation is that could be seen as a radical remedy in the context of the rulemaking process. No Evidence Rule has been abrogated in the 40-year history of the Evidence Rules. Abrogation of Rule 803(16) could be thought especially problematic because it would not be based solely on changed circumstances; rather it would be at least in part a concession that the original Advisory Committee (and by the way the common law) was dead wrong in equating authenticity of a document with the reliability of statements in the document. Moreover, the Advisory Committee has been wary about limiting the hearsay exceptions and exemptions. The hearsay exceptions and exemptions have been amended only four times since 1975; only one of those exceptions narrowed the coverage of a hearsay exception.<sup>71</sup> The others expanded the coverage of an exception or exemption.<sup>72</sup> And at its last meeting, the Advisory Committee rejected calls to abrogate the hearsay exceptions for present sense impressions and excited utterances, the charge being that these exceptions were ill-conceived from the beginning.<sup>73</sup> So a total rejection of the ancient documents exception, even though probably supportable on the merits, might be thought to create some tension with the conservative approach --- and respect for the original Advisory Committee --- that the Advisory Committee has taken in the past.

The remaining proposals consider ways to limit the risk of overuse of the ancient documents exception especially as applied to ESI, short of redaction.

### ***B. Limit the Exception to Hardcopy***

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<sup>71</sup> Fed. R. Evid. 804(b)(3) was amended in 2010 to require the prosecution to show corroborating circumstances indicating trustworthiness before a declaration against penal interest can be admitted against a criminal defendant. See Advisory Committee Note to 2010 amendment to Fed.R.Evid. 804(b)(3).

<sup>72</sup> Rule 801(d)(2), the hearsay exemption for statements made by agents of a party-opponent, was amended in 1997 to allow a proponent to establish its burden of showing agency by offering the hearsay statement itself together with some independent evidence. See Advisory Committee Note to 1997 Amendment to Rule 801(d)(2). Rule 803(6), the business records exception, was amended in 2000 to allow the foundation requirements to be proved by a certificate rather than by testimony of a foundation witness. See Advisory Committee Note to 2000 Amendment to Rule 803(6). Proposed amendments to Rules 803(6)-(8), scheduled to take effect on December 1, 2014, clarify that once the foundation requirements of those exceptions are met, it is the opponent's burden to show that the preparation or other circumstances indicate untrustworthiness. Finally, a proposed amendment to Rule 801(d)(1)(B), the hearsay exemption for prior consistent statements, would expand the exemption to allow any consistent statement to be admitted for its truth if it is properly admissible to rehabilitate a witness's credibility. That amendment is scheduled to take effect on December 1, 2014 as well.

<sup>73</sup> The suggestion for abrogating these exceptions --- Rules 803(1) and (2), was made by Judge Posner in his concurring opinion in *United States v. Boyce*, 742 F.3d 792 (7<sup>th</sup> Cir. 2014).

One possible reason for limiting the exception to hardcopy, as discussed above, is that the ancient documents exception may be thought to continue to play a useful role in certain kinds of litigation in which critical hardcopy documents are very old and impossible to qualify under other exceptions. *An amendment preserving the exception for hardcopy would look like this:*

**(16) *Statements in Ancient Documents.*** A statement in a document — but not including information that is electronically stored — that is at least 20 years old and whose authenticity is established.

One possible concern with an amendment that carves out electronic information is that the Federal Rules of Evidence have a rule that *equates* electronic evidence with hardcopy. Rule 101(b)(6), which became effective on December 1, 2011, provides that “a reference to any kind of written material or any other medium includes electronically stored information.” Rule 101(b)(6) was added as part of the Restyling Project, one of the goals of which was to clarify that while the original Rules of Evidence were written largely with hardcopy in mind, the evidentiary concepts established in the Rules were and remain equally applicable to ESI; instead of specifying that equation in every single hardcopy-based rule, the decision was made to use an all-encompassing definitional approach.

Carving out ESI from 803(16) is arguably inconsistent with the basic approach to ESI so recently taken in the Restyling Project. It can be questioned whether a deviation from a unified approach is justified simply to allow old – and often unreliable—hardcopy to be admitted in a handful of CERCLA and deportation cases. Moreover, there could be a random case in which the only available proof of an old matter is *ESI* that is not admissible under other exceptions. There would seem to be no reason to treat that case of necessity differently from one where the only available proof is hardcopy.

If, however, ESI were to be carved out from the ancient documents exception, the Committee Note to such an amendment should explain the conflict between the carve-out and the general approach to the Evidence Rules in equating hardcopy and ESI. That Committee Note might look something like this:

#### **Committee Note**

The ancient documents exception to the rule against hearsay has been amended to specify that it is not applicable to information that is electronically stored. The ancient documents exception remains necessary for certain kinds of litigation in which information is located only in hardcopy documents that have withstood the test of time. But the exception is subject to abuse when applied to electronically stored information. The need for old electronically stored information that does not qualify under any other hearsay exception is diminished by the fact that *reliable* electronic information is likely to be preserved and could be used as proof under a hearsay exception that guarantees reliability — e.g., Rule 803(6), Rule 807. And abuse is possible because unreliable electronic information could be widespread and would be admissible under the exception simply because it has been preserved for 20 years.

The amendment provides an exception to the general definition in Rule 101(b)(6), under which a reference to any kind of writing includes electronically stored information. Nothing in the amendment is intended to undermine any other use of electronically stored information under these Rules.

***C. Add a Necessity Requirement:***

A third option is to apply the ancient documents exception to both ESI and hardcopy equally, but to limit the exception to situations in which the initial justification still obtains — i.e., where it is necessary to introduce the old evidence because there are no reasonably available alternatives. That amendment might look like this:

**(16) *Statements in Ancient Documents.*** A statement in a document that is at least 20 years old if:

**(A)** ~~and whose~~ the document's authenticity is established; and

**(B)** the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

The language in new subdivision (B) is taken directly from the residual exception to the hearsay rule, Rule 807. That language was intended to limit the use of the residual hearsay exception to cases where it was truly necessary.<sup>74</sup> It can be argued that the same reasoning should apply to the ancient documents exception: if other evidence admissible under other reliability-based exceptions could be obtained through reasonable efforts, then the ancient documents exception should not be used either for hardcopy or ESI. Essentially the proposal ties the exception to its only real (albeit weak) reason for being.

Adding the “more probative” requirement to Rule 803(16) could well have an ameliorative effect on the potential abuses raised by ESI. As discussed above, in any case in which there is old ESI available, there is likely to be reliable ESI that could be admitted to prove a point, and it is simply bad practice to allow a proponent to admit unreliable ESI just because it is old.

The added advantage of tracking the “more probative” language from the residual exception is that there is case law that can be borrowed from Rule 807 on what constitutes

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<sup>74</sup> See Saltzburg, Martin and Capra, Federal Rules of Evidence Manual §807.02[5] (10<sup>th</sup> ed.2012) (explaining that the rationale for the “more probative” requirement “is that the residual exception should be reserved for cases of clear necessity.”).

“reasonable efforts” to obtain information admissible under other exceptions. The case law under Rule 807 indicates that a proponent must try to find alternative evidence, but need not undertake Herculean efforts to do so.<sup>75</sup> “[L]imitations upon the financial resources available to the parties and the court are rightfully considered.”<sup>76</sup> As one court put it, whether equally probative evidence is reasonably available depends upon “the importance of the evidence, the means at the command of the proponent, and the amount in controversy.”<sup>77</sup> Thus, as applied to ESI and the ancient documents exception, old ESI might be admissible if alternative ESI can only be found by expensive forensic efforts, or could only be read only by obtaining software that is not easily available or copyright-protected.

One might ask: If you are going to add a necessity requirement from Rule 807, then why would you not add the reliability requirement from Rule 807 as well? The answer is that you would then have another Rule 807 — you don’t need two of them. What the additional necessity-based language would do is limit the exception to its original rationale and it would probably make it much less likely that the exception would become a broad avenue of admissibility for questionably reliable ESI — because in most cases there is likely to be reliable ESI that can be admitted under other exceptions.

Here is a possible Committee Note explaining the addition of a “more probative” requirement to Rule 803(16):

#### **Committee Note**

Rule 803(16) has been amended to require a specific showing of necessity before hearsay may be admitted under the ancient document exception. *See* Rule 807 (imposing an identical necessity requirement). Unlike other hearsay exceptions, Rule 803(16) imposes no requirement that the hearsay in a document must be reliable. The basic justification for the exception is necessity, but the text of the existing Rule does not in fact require the proponent to show that there is no other way to prove the point for which the hearsay is offered. The absence of a necessity requirement is particularly troubling given the development and widespread use of electronically stored information. Without a necessity requirement, a proponent might use the ancient documents exception to admit unreliable ESI or hardcopy, even though reliable ESI is readily available.

The language added to the Rule is intentionally chosen, so that guidance from case law under Rule 807 can be used to interpret the identical language in Rule 803(16).

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<sup>75</sup> See the cases cited in Saltzburg, Martin and Capra, *Federal Rules of Evidence Manual*, supra at pages 807-17 through 807-21.

<sup>76</sup> *Id.* at 807-11.

<sup>77</sup> *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1552 (9<sup>th</sup> Cir. 1990).

Of course, the necessity-based solution suffers from the fundamental flaw from which the ancient documents exception has always suffered: the unsupportable equation of authenticity and reliability. Essentially the exception, as amended by the necessity language, would say that unreliable hearsay can be admitted when it is necessary to prove a point. That is logically problematic, but at least the addition of necessity-based language would likely help to put the exception back where it always was --- as a backwater in the hearsay rule. In that way it could limit the damage that would occur from what might otherwise be wholesale admission of unreliable ESI. And it is surely a less radical approach than abrogation; not only does it preserve the basic rule but it embraces language from another existing rule.

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Hearsay Exception for Electronic Communications of Recent Perception  
Date: October 1, 2014

At the Advisory Committee's symposium on electronic evidence, held in April 2014, Professor Jeffrey Bellin proposed an amendment to the Evidence Rules that would add two new hearsay exceptions: one to Rule 804(b), which is the category for hearsay exceptions applicable only when the declarant is unavailable to testify; the other to Rule 801(d)(1), for certain hearsay statements made by testifying witnesses. Both exceptions are intended to address the phenomenon of electronic communication by way of text message, tweet, Facebook post, etc. Professor Bellin contends that the existing hearsay exceptions, written before these kinds of electronic communications were contemplated, are an ill-fit for them and will result in many important and reliable electronic communications being excluded.

To solve the perceived problem, Professor Bellin proposes a modified version of the hearsay exception for recent perceptions --- an exception that the original Advisory Committee approved but which was rejected by Congress. Professor Bellin contends that the proposal will allow most of the important and reliable tweets and texts to be admitted, while retaining sufficient reliability guarantees that will exclude the most suspect of this category of statements. And he contends that the proposal fits well within evidentiary doctrine because it derives from a hearsay exception that the Advisory Committee approved --- an exception that though rejected by Congress has actually been adopted and applied in a handful of states.

Professor Bellin makes a detailed case for his proposal in an article published in the *Minnesota Law Review*. He follows up the proposal by responding to two critiques --- one set forth by Paul Shechtman in his presentation at the Electronic Evidence Symposium, and the other made by Professor Colin Miller. Professor Bellin's response is to be published in the *Fordham Law Review* together with a transcript of the Electronic Evidence Symposium.

***For the convenience of the Committee, Professor Bellin's Minnesota Law Review article and his Response to critiques of his proposal are reproduced as attachments to this memo. The analysis below presumes familiarity with the attachments.***

This memo analyzes some arguments and issues that the Committee might wish to consider in determining whether to proceed with the proposal to add two hearsay exceptions to expand admissibility primarily for electronic communications but also for other communications made after a recent perception. The goal for the Committee at this meeting is to determine whether it is interested in pursuing the proposal or some modification of it. If the Committee is interested, then a formal proposal will be prepared for the Spring 2015 meeting.

Part one of this memo sets forth Professor Bellin's proposal within the context of the Federal Rules hearsay exceptions. Part two seeks to assess whether expansion of the existing exceptions might be necessary to cover reliable eHearsay.<sup>1</sup> Part three discusses some questions that might be raised about the proposal to add a new exception to Rule 804(b). Part four discusses some questions that might be raised about the proposal to add a new exception to Rule 801(d). The memo is intended to raise questions for the Committee to consider about the proposal --- arguments in favor of the proposal are left to the attachments. There is no need to repeat them here as they are made effectively by Professor Bellin.

## **I. The Proposed Changes to the Hearsay Exceptions to Cover eHearsay.**

Professor Bellin proposes language that will be applied in two separate contexts --- one in which the declarant is unavailable, and one in which the declarant is testifying.

The substantive standards for the proposed eHearsay/Recent Perception exception are set forth in the proposed amendment to Rule 804(b). The proposal provides as follows:

### **Rule 804. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness**

\* \* \*

**(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

\* \* \*

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<sup>1</sup> The term "eHearsay" is intended in this context to mean social networking, texts, and other forms of instantaneously transmitted electronic communication.

(5) ~~{Other Exceptions.}~~ ~~[Transferred to Rule 807.]~~ **Recorded Statement of Recent Perception.** A recorded communication that describes or explains an event or condition recently perceived by the declarant, but not including

(A) a statement made in contemplation of litigation, or to a person who is investigating, litigating, or settling a potential or existing claim; or

(B) an anonymous statement.

\* \* \*

The substantive standards set forth above are incorporated into a new exception<sup>2</sup> proposed to be placed in Rule 801(d)(1), as follows:

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

\* \* \*

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

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<sup>2</sup> Technically this is a hearsay exemption rather than an exception, because the statements covered by Rule 801(d) are labeled "not hearsay" even though they are hearsay. Whether it is an exemption or exception makes no practical difference, because the consequence of finding a statement to be covered by Rule 801(d)(1) is that it is admissible for its truth even though it is hearsay.

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier; or

(D) would qualify as a Recorded Statement of Recent Perception under Rule 804(b)(5) if the declarant were unavailable.

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As set forth by Professor Bellin and in quick summation, what follows are the salient features of the proposed eHearsay/Recent Perception exception.

1. The exception applies only in those situations where, at least arguably, the hearsay exclusion is least justified, i.e.:

- when the declarant is testifying and so reliability concerns are ameliorated by the fact that the declarant can be cross-examined about the truth of the statement as well as about the underlying event; and
- when the declarant is unavailable and so the need for the statement might warrant at least some reduction in reliability.

2. The exception is derived from --- but not exactly the same as --- the exception for statements of recent perception that was approved by the original Advisory Committee (as Rule 804(b)(2)), but rejected by Congress. Congress was concerned about the breadth of the exception, and the House Judiciary Committee was of the opinion that the exception did not require sufficient guarantees of trustworthiness.

3. The factors supporting reliability of statements falling within the exception are:

- the statement must be recorded; thus there is no risk of misreporting the hearsay.
- the statement must be a “communication”; thus personal ruminations are not covered.
- the statement must describe or explain a “recently perceived” event or condition; thus memory problems, and arguably some motivation problems, are ameliorated.
- a statement does not fit the exception if made in contemplation of litigation or to a person investigating, litigating, or settling a potential or existing claim; thus, at least one kind of motive for lying is regulated.
- if the declarant is anonymous, the statement is not admissible under the exception; thus, statements made without personal accountability are rejected.

3. The motivation for the exception is to lift the hearsay bar for most of the thousands or millions of electronic communications made through social networking and texting. But the proposal is specifically intended to go beyond electronic communications. The rationale is that the distinction between electronic and non-electronic communication is often fuzzy and likely to become fuzzier in the future, and there is no reason from a reliability standpoint to distinguish between the two types of communications.

## **II. Is an Exception Needed to Cover the New “eHearsay”?**

One of the major questions for the Advisory Committee is whether a new hearsay exception is necessary for all of the many communications made by way of text, Twitter, and Facebook. If an appropriate portion of these statements is already covered by existing exceptions, then there would appear to be no reason to add an eHearsay exception based on recent perception. It can be argued that most of the texts and posts that are worthy of admissibility might already be covered by the standard exceptions for present sense impression, excited utterance, declaration against interest, and party-opponent statement.

At this point it seems hard to assess how many eHearsay statements are going to be covered by the traditional exceptions --- and it is especially hard to figure whether the coverage that will exist is underperforming, or just about right.<sup>3</sup> Much of the argument has to do with how

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<sup>3</sup> Assessing whether the current system is allowing in “too much” or “too little” hearsay is difficult for two reasons. First, there is no universal agreement on what is too much or too little. Second, even if there was agreement, it is

one feels about the hearsay rule. Most scholars believe that the current rule and its exceptions are too constricting, and that the system operates to keep out too much evidence that the jury should be allowed to consider --- evidence that the jury will not have as much trouble weighing as traditional hearsay theory fears. From that approach, it can probably be concluded that the current system will result in unjustified exclusion of a good deal of valuable eHearsay. This is because while the eHearsay communications are relatively contemporaneous with the events described, many such communications will not be covered by the present sense impression exception, which requires virtual immediacy.<sup>4</sup> And in many cases the eHearsay communicant will be reporting about a recent but not contemporaneous matter and will not be excited about it, will not be a party to an action, and will not be making a statement against their own interest. Examples include some of the texts sent by victims of crime that are discussed by Professor Bellin in his article.<sup>5</sup>

Adherence to the more traditional approach is based on the assumption that jurors are not able to understand the hearsay problem and will give more weight to hearsay than it is worth. Under that assumption --- and assuming that the existing exceptions are doing their job in protecting the jury from misfiring while admitting hearsay that is either sufficiently reliable or understandable to the jury --- it would be concluded that the risk of juror misuse of hearsay extends as much to eHearsay as to any other. The fact that there is a lot of it and a lot more coming down the pike wouldn't mean that a new hearsay exception should cover it.

It should be noted that there is disagreement among scholars as to whether the current system of exceptions is sufficient to cover the eHearsay that "ought" to be admitted for its truth -- as Professor Bellin recognizes in text at page 23 and in his footnote 65. But on the other hand Professor Bellin provides multiple examples of eHearsay, from crime victims and others, that do not appear to neatly fit within the traditional exceptions --- including the online chat entry by the

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impossible to determine how the rules are being applied throughout the country. Certainly the written decisions, while relevant, do not capture all the rulings that admit or exclude hearsay.

<sup>4</sup> Moreover, most courts require corroborative evidence indicating that the event occurred before a present sense impression can be admitted. See, e.g., *United States v. McElroy*, 587 F.3d 73 (1<sup>st</sup> Cir. 2009) (noting that while the rule does not explicitly require corroboration, part of the guarantee for admissibility under the present sense impression exception is that in most cases the declarant and the witness are both present at the event, and so "the testimony of the witness describing the circumstances in which the hearsay utterance was made corroborate, to a significant degree, the trustworthiness of the statement."); *United States v. Green*, 556 F.3d 151, 157 (3d Cir. 2009) (authorizing courts to require something more than contemporaneity before a statement can be admitted as a present sense impression). It is apparent that much eHearsay communicated contemporaneously with an event will not be corroborated, e.g., "omg I just saw Johnny Depp driving a car and talking on his cellphone."

<sup>5</sup> Perhaps some of these statements could be found admissible under the residual exception, Rule 807. Professor Bellin argues with some force that overuse of the residual exception is contrary to its initially cabining by Congress. Congress intended the residual exception to be applied only in extraordinary and unusual circumstances. See Federal Rules of Evidence Manual, 807.02. Using the residual exception to cover terabytes of social network conversations and text messages seems to go beyond the limitations intended by Congress, and also could lead to uncertainty as to how individual judges will rule.

diplomat in Libya, discussed at the beginning of the article, about conditions around the Embassy. And it is not far-fetched to think that if the hearsay exceptions are not expanded to cover these kinds of statements, then a number of courts may react by shoehorning them into the existing exceptions whether they fit there or not --- as shown by some of the cases cited by Professor Bellin.

Ultimately of course it is for the Committee to decide whether existing hearsay exceptions are set about right, or instead are too restrictive and require more flexibility by way of an exception for recent perception. The rest of this memo operates under the presumption that some liberalization is necessary, especially to cover the explosion in social media, texting, and related electronic communication. The question then is whether the exception proposed will further the goal of liberalization without becoming an open door for large amounts of unreliable hearsay.

### **III. Questions to Consider Regarding Proposed Rule 804(b)(5).**

This section raises a number of questions that the Committee might consider regarding an amendment to Rule 804 to cover eHearsay/Recent Perceptions.

#### ***A. How Recent is “Recent”, and Is Recency a Sufficiently Protective Requirement?***

It would not make sense to have a designated and arbitrary time period for admissibility either, e.g., “eight hours” or “five days.” Experience with the ancient documents exception to the hearsay rule, and its arbitrary time period, is instructive --- there is no logical support for a position that a statement is always admissible at one second but never at a later second. On the other hand, the term “recent” may be subject to some slippage. As Professor Bellin notes at pages 42-43 of his article, experience in the States that have a recent perception exception indicate that the time period can be measured in terms of days, rather than hours and minutes. See, e.g., *State v. Berry*, 557 P.2d 543 (Kan.1978) (victim’s statement made eight days after the shooting properly admitted). But evaluating any time period in terms of “recency” will surely lead to disparate results as the term “recency” is not definite.

That said, there are a number of responses to the concern that the term “recent” is too indefinite to regulate unreliable hearsay:

1. Similarly indefinite language, especially as to timing, already exists in other hearsay exceptions. For example, the timing language in Rule 803(1) is “while or immediately after.” How immediately is “immediately”? One court has held 50 minutes to be too long.<sup>6</sup> Another

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<sup>6</sup> *United States v. Green*, 556 F.3d 51 (3d Cir. 2009).

court has found a statement made 23 minutes after the event to be sufficiently “immediate.”<sup>7</sup> Another example is Rule 803(6), which conditions the admissibility of a business record on having been made “at or near the time” of the event. And another example is Rule 803(5), which requires that a past recollection recorded exception be made when it was “fresh” in the witness’s memory. Any concept based on time, when time cannot be set exactly, is by definition inexact.

The point about timing language in an Evidence Rule is that it focuses the court on the reason for the timing requirement, but by definition does not set a hard cap. So for example, the “immediate” language of Rule 803(1) is not a stopwatch, but rather requires consideration of whether there was enough time for the declarant to fabricate. The timing language is there because the basis of the exception is that the declarant did not have enough time under the circumstances to think up a lie. Thus the inquiry by nature is at least somewhat flexible.<sup>8</sup> The focus of the “at or near the time” language in Rule 803(6) is to assure that memory is intact and that the recording is actually made as a regular practice of the business, because a business is unlikely to record information regularly so far after the event.<sup>9</sup>

What about “recent” perception? What is the point of that requirement? Perhaps the first thing to note is that “recent” seems a little more fuzzy than the other time-based language discussed about. That is because the time-based language in Rules 803(1) and 803(6) *start* with a requirement of contemporaneity to the underlying act. The Rule 803(1) language is “*while* or immediately thereafter”; the Rule 803(6) language is “*at* or near the time.” The recent perception exception is by definition not tied to a concept of immediacy. So what is it there for?

Professor Bellin argues that descriptions of the “distant past engender increased concerns about inaccuracy.” Specifically, “[m]otives for shading or distorting events are more likely to arise and solidify with the passage of time. In addition, memories steadily degrade as the time between an event and a statement describing that event expands.” So the idea of the exception is to use timing as a means of guaranteeing that the hearsay statement is free of memory defect and suspect motivation. That is also, essentially, what Rule 803(1) is about. Essentially the recent perception exception is a poor man’s Rule 803(1). But because the timing requirement of the recent perception exception is more diluted, it stands to reason that the evaluation of timing will be a little more flexible and dependent on the circumstances. Professor Bellin quotes the

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<sup>7</sup> *United States v. Blakey*, 607 F.2d 779 (7<sup>th</sup> Cir. 1991).

<sup>8</sup> See, e.g., *United States v. Penney*, 576 F.3d 297 (6<sup>th</sup> Cir. 2009) (defendant’s account of an event was not admissible as a present sense impression because made after he had time and motive to contrive or misrepresent); *United States v. Mitchell*, 145 F.3d 572 (3d Cir. 1998) (note was inadmissible as a present sense impression because there was no showing that the author made the statement before he had time to reflect).

<sup>9</sup> See, e.g., *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (memorandum written by one defendant for a superior about a year-old transaction was not admissible as a business record; no showing made that it was regular business practice to prepare such memoranda).

discussion by the Wisconsin Court of Appeals about the timing requirement in the Wisconsin recent perception exception:

The mere passage of time, while important \* \* \* is not controlling \* \* \*. A determination regarding recency of perception depends on the particular circumstances of the case, including whether there were any intervening circumstances, such as injuries, which precluded or limited an earlier statement.<sup>10</sup>

So if a recent perceptions exception were adopted, the term of recency should be evaluated by whether there is something in the delay that raises substantial concerns about memory or motivation. As Professor Bellin states, unnatural gaps in reporting may lead to rejection of a statement, while more explainable gaps (such as injury or inability to report) may support admission. It is of course for the Committee to determine whether this analysis is likely to be workable, or will instead lead to admission of too much unreliable hearsay.

2. In evaluating whether “recency” is either too fuzzy, or too diluted from contemporaneity, to support a hearsay exception, it must be remembered that the proposed exception *is conditioned on the unavailability of the declarant*. That means that the alternative is no information at all coming from the declarant. And declarant unavailability is of course a traditional reason for watering down reliability requirements. The Wisconsin Court of Appeals, in *Kluever, supra*, explained this point in justifying the Wisconsin recent perception exception:

The recent perception exception is an outgrowth of the Model Code of Evidence and the Uniform Rules of Evidence. *Weinstein's Evidence* at 193-94. The exception is similar to the present sense impression and excited utterance exceptions, but was intended to allow more time between the observation of the event and the statement. Comment, [\*The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record\*, 1985 Wis.L.Rev. 1525, 1534](#) [hereinafter Comment, *Exception* ]. The exception has been rejected by most states because the greater lapse of time the exception allows between the event and the statement of the declarant provides an opportunity for calculated misstatements and other evidentiary infirmities.

Wisconsin is among a small number of states, however, that have adopted the recent perception exception, after adding limitations to assure accuracy and trustworthiness. The exception is based on the premise that probative evidence in the form of a noncontemporaneous, unexcited statement which fails to satisfy the present sense impression or excited utterance exceptions would otherwise be lost if the recently perceived statement of an unavailable declarant is excluded.

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<sup>10</sup> *Kluever v. Evangelical Reformed Immanuel's Congregation*, 422 N.W.2d 874, 875-76 (Wis. App. 1988).

The exception's purpose, therefore, is to admit probative evidence which in most cases could not be admitted under other exceptions due to the passage of time, on the ground that no evidence might otherwise be available. As such, the exception deals with the problem: “how can a litigant establish his claim or defense if the only witness with knowledge of what occurred is unavailable?”<sup>11</sup>

Because the exception is to be placed in Rule 804, it can be argued that whatever indefiniteness there is in “recency” might be acceptable to the alternative of excluding vast amounts of eHearsay simply because it is not made immediately after an event. Moreover, it seems hard to argue that an exception for recent perception is any less protective than the other exceptions in Rule 804 --- particularly the exceptions for dying declarations and declarations against interest.

3. While it is true that “recency” raises line-drawing problems, it is also true that if line-drawing problems disqualified a hearsay exception, there would be very few exceptions standing today. The hearsay exceptions are replete with line-drawing issues. To take just a few:

- Under Rule 803(2), when is a statement made under the influence of a startling event?
- Under Rule 807, when does a statement have circumstantial guarantees of trustworthiness equivalent to the other exceptions?
- Under Rule 804(b)(1), under what circumstances did an opponent have a similar motive and opportunity to develop a declarant’s testimony?

So one question for the Committee is whether line-drawing for recency is any more difficult than line-drawing for any of the above fuzzy concepts.

4. Even if it is the case that “recent perception” is a fuzzy term that may itself be insufficiently protective against unreliable hearsay, the eHearsay proposal is not based solely on recent perception. There are other circumstantial guarantees provided, specifically:

- The statement must be recorded.
- The statement must be communicated to someone else, not just a private rumination.
- The statement is not admissible under the exception if it is made in contemplation of litigation.
- The statement must be made by a person whose identity is known.

The next section discusses whether any of these additional reliability requirements raise questions or concerns.

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<sup>11</sup> Id. (some citations omitted).

## **B. Issues Regarding the Other Reliability Requirements**

### ***1. The Statement Must Be Recorded***

Professor Bellin argues that a “key reliability-enhancing trait of electronic out-of-court statements is that they are invariably recorded” because recorded statements “can be shown directly to the jury.” As a matter of hearsay theory, it shouldn’t make any difference whether hearsay is recorded or orally reported to the jury. This is because the hearsay rule is concerned with the unreliability of the *declarant’s* statement because the declarant cannot be cross-examined. The oral reporter’s statement is made in court, so that witness is subject to oath, cross-examination, and opportunity to view demeanor. So as a matter of strict hearsay theory, adding a recording requirement to a hearsay exception is an off-point measure.<sup>12</sup> Nonetheless, if the bottom-line concern is to assure that evidence presented to the factfinder is reliable for whatever reason, then Professor Bellin is surely correct that the recording of a statement is more reliable because it reduces the risk that it will be misreported. Professor Bellin is also quite correct that the founders of Evidence theory found recording of the statement to be a critical aspect of reliability.

### ***2. The Statement Must Be a Communication***

Professor Bellin argues that requiring the statement to be a communication helps to guarantee reliability because “the presence of an intended audience can create an incentive for sincerity.” Maybe, but it seems equally plausible to conclude the exact opposite ---it is when we communicate with others that we are more prone to lie. Why lie to yourself? The Federal Rules find that conduct is hearsay only when it is intended to be a communication to others. See Federal Rules of Evidence Manual at 801.02. The justification is that the hearsay risk is increased in this situation because the actor might be trying to improperly influence others through his conduct.

Professor Bellin argues that requiring the statement to be a communication will help to exclude “statements that conveniently appear during litigation and purport to narrate disputed

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<sup>12</sup> See the Advisory Committee Note to the 2010 amendment to Rule 804(b)(3)(criticizing case law finding declarations against interest reliable based on the credibility or lack of credibility of the witness relating the hearsay at trial: “To base admission or exclusion of a hearsay statement on the witness’s credibility would usurp the jury’s role of determining the credibility of testifying witnesses.”)

It is true that several exceptions deal with records as opposed to oral reports --- such as the exceptions for business and foreign records, and the exception for records affecting property interests. But that is because the kinds of evidence described are always placed in records and not kept orally. It is true, though, as Professor Bellin notes, that there is authority stating that oral testimony relating a business record is inadmissible. *United States v. Wells*, 262 F.3d 455 (5<sup>th</sup> Cir. 2001).

events in a way that benefits the offering party.” But statements such as that described would already be excluded from the exception under the prohibition of statements prepared in anticipation of litigation (discussed below). Professor Bellin says that courts may have difficulty in determining whether non-communicated statements were made in anticipation of litigation, but that argument proves too much as it at least somewhat undermines the inclusion of the anticipation-of-litigation bar in the Rule. Moreover, the courts have appeared to have little difficulty with the anticipation-of-litigation factor in other rules, such as 803(6) and 807, so it is unlikely that they would have one here. Finally, the communication limitation could be evaded by party for litigation purposes by the simple expedient of making the litigation motivated statement to any person on earth.

Finally, the term “communication” would be new to the hearsay exceptions, which throughout use the term “statement.” And it would lead to rethinking, or at least arguments about, other exceptions. Why should private statements be allowed under, say, the state of mind exception, Rule 803(3), but not under the recent perceptions exception? Thus, it would appear that if the Committee does decide to develop a recent perceptions exception, it should stick to the term “statement” rather than “communication.”<sup>13</sup>

### **3. Statements in Anticipation of Litigation Are Barred.**

The proposed recent perceptions exception would not cover a “statement made in contemplation of litigation, or to a person who is investigating, litigating, or settling a potential or existing claim.” The suspect motivation that arises when statements are made in anticipation of litigation is well-recognized. For example, statements made in anticipation of litigation and favorable to the preparer are inadmissible as business records, because they are considered untrustworthy.<sup>14</sup> Given the fact that the recent perceptions exception takes a step beyond the reliability guarantees of the exceptions for excited utterance and present sense impression, it seems critical that it contain some limitation against statements made in preparation of litigation.

Moreover, the limitation on statements made in anticipation of litigation is necessary to assure that in criminal cases any statement admitted under the exception will comport with the

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<sup>13</sup> If the Committee were to decide to proceed with the exception and use the term “communication” then some redrafting of the proposal would be required. The proposal uses the term “statement” in the heading and also in the exception for a “statement” made for purposes of litigation. It would be confusing for the rule to go back and forth from “communication” to “statement.”

<sup>14</sup> See, e.g., *Timberlake Const. Co. v. United States Fid. & Guar.*, 71 F.3d 335 (10<sup>th</sup> Cir. 1995) (letters improperly admitted as business records where they had “all the earmarks of being motivated and generated to further Timberlake’s interest, with litigation actually not far around the corner”); *Jordan v. Binns*, 712 F.3d 1123 (7<sup>th</sup> Cir. 2013) (insurance adjuster’s report was inadmissible as a business record because it was made in anticipation of litigation and was favorable to the party who prepared it).

right to confrontation. As discussed ad nauseam in the *Crawford* outline, a hearsay statement is testimonial if the primary motive for making it is to have it used in a criminal prosecution. Without the bar on statements obtained in contemplation of litigation, the recent perception exception would lead to unconstitutional application --- for example, a tweet or text to the police department about a crime that occurred 30 minutes earlier. And because the declarant must be unavailable, there would be no opportunity for the cross-examination required to satisfy the confrontation clause before testimonial statements can be admitted.<sup>15</sup>

This is not to say that the bar on statements in anticipation of litigation is enough in itself to render all statements of recent perception reliable. As discussed in the memo on the ancient documents exception, precluding litigation-based statements is a necessary but not sufficient means of assuring reliability of hearsay.

#### **4. Anonymous Statements Are Barred.**

Professor Bellin argues that “accountability helps to ensure reliability” and accordingly he limits the proposed exception to statements made by known individuals. It is probably true that most of the scurrilous comments sent through the internet are sent anonymously. It is perhaps also relevant that the Supreme Court, in one line of cases, has found statements by known individuals to be more reliable than statements by anonymous people.<sup>16</sup>

One possibly complicating factor, however, is the controversy over the admissibility of anonymous statements under the hearsay exception for present sense impressions --- an exception that is obviously close to the proposed exception for recent perceptions. The original Advisory Committee Note to Rules 803(1) and (2) expresses concern over admissibility of a statement of an “unidentified bystander.” The rather sparse case law on the subject, however, indicates that a statement that would otherwise fit the present sense impression exception is not barred simply by the fact that the declarant is unidentified. *See, e.g., United States v. Medico*,

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<sup>15</sup> As Professor Bellin notes, his proposal covers litigation-based statements even if they are not made by a party to the litigation --- hence it is broader than the bar applied by the courts under Rule 803(6). But the broader bar is necessary because all statements prepared primarily for purposes of use in a criminal prosecution are testimonial under *Crawford* regardless of whether they were prepared by a party to litigation.

<sup>16</sup> Specifically, a tip to police from a known individual is given more weight than one by an anonymous person in assessing whether there is reasonable suspicion to stop someone. *See, e.g., Adams v. Williams*, 407 U.S. 143 (1972) (noting that the informant was known to the officer personally and so it was “a stronger case than obtains in the case of an anonymous informant’s tip”); *Florida v. J.L.*, 529 U.S. 266 (2000) (“Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.”). This line of cases might be distinguished because known individuals providing information to police officers (as opposed to over the internet) risk *prosecution* if the information is untruthful. But perhaps that is a distinction of degree rather than kind, because known individuals who cast falsehoods on the internet might set themselves up for some significant repercussions, even if prosecution is unlikely.

557 F.2d 309 (2<sup>nd</sup> Cir. 1977) (statement of an unidentified declarant was properly admitted as residual hearsay but could have been admitted as a present sense impression).

So it might be argued that barring anonymous statements under one exception is inconsistent with admitting them under another. But in the end any concern seems minimal for a number of reasons. First, the present sense impression exception has a guarantee that the recent perception exception does not, i.e., immediacy. The requirement in the recent perceptions exception that the declarant be a known individual helps to bridge the reliability gap between the two exceptions. Second, the possibility of admitting an anonymous but otherwise admissible present sense impression is often a theoretical one; usually a statement that is anonymous can't be admitted anyway, because to get the statement within an exception, the proponent must show that various admissibility requirements are met, including that the declarant have personal knowledge of the event described --- that is often difficult to do if the declarant is anonymous.<sup>17</sup> In sum, the bar on anonymous statements is probably justified as a belt-and-suspenders kind of assurance of reliability, and not substantially inconsistent with the approach to anonymous declarants taken under similar exceptions.

### ***Conclusion on the Reliability Guarantees of the Proposed Recent Perceptions Exception***

The proposed exception contains a grab bag of reliability guarantees, some more supportable than others individually, but all considered together rendering the proposed exception probably on a par with --- if not stronger than --- the other reliability-based exceptions in Rule 804. It is, of course, for the Committee to determine whether the requirements are sufficient to justify a new exception. It should be said, however, that the new exception at least has the virtue of a historical grounding, and it is based on similar though of course not identical reliability factors as are found in other established exceptions. As Professor Bellin states, the proposed exception's grounding in the original exception approved by the Advisory Committee might give "some comfort that the rule is not a fleeting or radical sentiment, but instead builds on a long tradition of evidence thought."

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<sup>17</sup> See, e.g., *Brown v. Keane*, 355 F.3d 82 (2<sup>nd</sup> Cir. 2004) (anonymous report of a crime was improperly admitted as a present sense impression because the government could not establish that the declarant had personal knowledge); *United States v. Mitchell*, 145 F.3d 572 (3<sup>rd</sup> Cir. 1998) (anonymous note was not admissible as an excited utterance or a present sense impression because the government could not establish personal knowledge or the admissibility requirements of either exception).

### **C. Inconsistent Coverage?**

Paul Shechtman, in his comments on the Bellin proposal at the Electronic Evidence Symposium, noted correctly that it ends up distinguishing between statements that may not be substantially different. For example, a text message of a recent event is treated differently from a diary description containing the same content. And a witness who hears a statement of a recent event cannot testify to it, but the witness's notes of the same statement would be admissible. Professor Bellin admits that the proposed exception is both over and under-inclusive, but argues that "this is the case with all the existing hearsay exceptions." It is surely true that there are line-drawing problems throughout the exceptions, the question being whether the admissibility requirements that require the line-drawing make any sense. Most of the line-drawing questions raised by Paul Shechtman involve two reliability requirements that have already been discussed: 1) the requirement that the statement must be a communication; and 2) the requirement that the statement must be recorded. The validity of these requirements is discussed above.

### **D. Consistency with a Limitation on the Ancient Documents Exception**

The agenda book contains a proposal to narrow or eliminate the ancient documents exception to the hearsay rule. The Advisory Committee has a policy of packaging amendments when possible, as a way of limiting transaction costs and assuring the public that the rules are not being put in a constant state of flux. Assuming *arguendo* that both proposals have merit, does it make any sense to have in the same package a rule that admits more hearsay and a rule that excludes more hearsay?

While the two proposals might appear in tension at first glance, it is plausible to argue that both are supported by the same general principle --- that hearsay should be admitted only if there is a justifiable balance between reliability and necessity. That argument can be further developed by noting that the existing ancient documents exception represents a misbalance as applied to electronically stored information --- because it contains insufficient reliability requirements without any showing of necessity, given the likelihood of the existence of ESI that is admissible under other exceptions. In contrast, adopting a recent perceptions exception might be thought to be completely consistent with the balance of necessity and reliability, as it arguably contains some fairly strong reliability requirements and is conditioned on a showing of unavailability. Thus, it would not necessarily seem jarring or inappropriate to package the two proposals if they are both found meritorious.

### **E. eHearsay Only?**

At the Electronic Evidence Symposium, Paul Shechtman noted that the proposal was not really an eHearsay exception, but rather just another hearsay exception that might end up admitting some eHearsay. He demonstrated that the proposal stems from suggested hearsay reforms that preceded the development of electronic information, such as the Uniform Rules of Evidence. Professor Bellin happily concedes that while the predominant goal of the proposal is to embrace more eHearsay, the proposal is not limited to electronic hearsay. He views that as “a strength of the proposal” and argues that any distinction between electronic and non-electronic forms of communication would result in difficult line-drawing for no good reason.

It seems clear that if the exception is to be proposed, it should not be limited to electronic statements. If a written statement fits all the approved admissibility requirements, then by definition it is just as reliable as the same communication made in electronic form and should be equally admissible. Put another way, there is nothing in the medium that changes the reliability of the message. Moreover, any distinction between electronic hardcopy information is inconsistent with Fed.R.Evid. 101(b)(6), which equates electronic and hardcopy information.

If the Committee does decide to proceed with the proposal for a new hearsay exception for recent perceptions, it might be considered that the proposal would not be pitched as an eHearsay exception at all. There is nothing about the admissibility requirements set forth that is specifically tailored to eHearsay. Any perceived need for such an exception is not primarily based in the fact that there are a lot of tweets and texts out there, but rather because there is a need to let in more hearsay on the ground that there is a proper balance of reliability and necessity for statements that are made recently after an event, when recorded, not made for litigation purposes, etc.

### **F. Numbering Issue.**

Professor Bellin styles his proposal as adding a new Rule 804(b)(5) to the Federal Rules of Evidence. But that number has already been used. It was the number for one of the two residual exceptions that were placed in the original Federal Rules. In 1996, Rules 804(b)(5) and Rule 803(24) were combined into a single residual exception, Rule 807. Since then, Rule 804(b)(5) has read as follows:

**(5) [Other Exceptions]** [Transferred to Rule 807]

When the hearsay exception for forfeiture was added, the Advisory Committee unanimously decided to number it Rule 804(b)(6), and not to fill the gap left by the transfer of Rule 804(b)(5). The Committee was concerned about disrupting electronic searches --- someone looking for the cases on forfeiture would be finding old cases about the residual exception, and

vice versa. And the Committee also believed that keeping the gap, with an explanation for what happened, would be useful for students of the rules and rulemaking.

During the Restyling project, one of the biggest fights (believe it or not) was about whether to renumber Rule 804(b)(6) to make it Rule 804(b)(5). The restylist hated the gap, but the Committee eventually unanimously voted to retain that gap, essentially for the same reasons found persuasive by the Advisory Committee during its consideration of the forfeiture proposal 15 years earlier.

There is no reason to change position now. If the recent perceptions exception is adopted, it should be numbered Rule 804(b)(7), not 804(b)(5). The gap, with the notation, provides an important piece of rulemaking history, and there is no reason to confuse researchers by numbering a rule with the same number as a previous, completely different rule. Moreover, it would be quizzical to remove the current notation to Rule 804(b)(5) while retaining the same notation for Rule 803(24). That would send the incorrect signal that one rule was transferred, for no apparent reason, rather than the actual fact that two exceptions were consolidated and transferred for reasons of efficiency.

#### **IV. Questions to Consider Regarding Proposed Rule 801(d)(1)(D)**

This section assumes that the Committee is persuaded that the proposal for a recent perceptions exception, conditioned on the unavailability of the declarant, is sound. It addresses whether an identical exception for situations in which the declarant is testifying at trial raises any additional questions.

The background for the discussion is the premise that the rationale for the hearsay bar is relatively weak when the person who made the statement is on the stand subject to cross-examination about it. This is because the primary reason for excluding hearsay is that the person who made the statement did out of court and so can't be cross-examined; but where the declarant is the witness, a strong argument can be made that cross-examination of the declarant about the statement is sufficiently effective so that any reliability concerns are satisfied.

Given the basis for admitting prior statements of witnesses --- the ability to cross-examine the person who made the statement --- it seems at the outset that there is a conceptual disconnect in Professor Bellin's proposal to add a recent perceptions exemption to Rule 801(d)(1). The basis for the recent perceptions exception is that recency, along with all the other requirements in the proposal, is a sufficient guarantee of reliability to justify admissibility given the fact that the declarant is unavailable, and so the choice is between the hearsay and no information at all. That reliability basis has nothing to do with admitting a prior statement of a testifying witness, which is based on the completely separate guarantee of cross-examination of the person who made the statement. Indeed Rule 804(b) and Rule 801(d)(1) are covering

precisely the opposite situations --- a declarant who is unavailable and a declarant who is produced for cross-examination. So there doesn't seem to be a justification for importing all the reliability requirements from the proposed Rule 804(b) exception into Rule 801(d)(1). To take an example, the proposed Rule 804(b) exception requires that the statement be a communication (thus excluding diary entries and the like) --- but why would communication make any difference when the declarant is on the stand and can be cross-examined? Cross-examination would have the same goals, and payoffs, whether or not the prior statement was communicated to anybody. The same goes for the other admissibility requirements, including that the statement be recorded, and even that the statement be "recent." None of those factors would appear to have any bearing on the effectiveness of cross-examination of the person who made the statement.<sup>18</sup>

But even assuming that this conceptual disconnect can be overcome or explained, there are other concerns about how the proposal will operate within the existing exemptions provided by Rule 801(d)(1). These concerns are discussed immediately below.

#### **A. Interface With the New Amendment to Rule 801(d)(1)(B)**

Let's assume that the statement of recent perception is consistent with the declarant's testimony at trial. The amendment to Rule 801(d)(1)(B), effective December 1, 2014, provides that a prior consistent statement is admissible for its truth whenever it is admissible to rehabilitate a witness's credibility. So the proposed addition of a recent perceptions exception to Rule 801(d) is obviously not necessary to cover prior consistent statements offered to rehabilitate a witness --- that would just be superfluous. So what consistent statements would it cover?

Presumably it would be inappropriate to allow admissibility of statements that do nothing but bolster the credibility of a witness who has not been attacked --- it makes no sense to grant admissibility to such statements under a hearsay exception, especially when most courts would probably end up excluding them anyway under Rule 403. That is, if a consistent statement does nothing more than bolster the credibility of a witness who has not been attacked, it has very little probative value, and would raise the risk of prejudice and undue delay that would justify exclusion.

So the work of the recent perceptions exception in this context would probably be limited to consistent statements that are made under evidentiary circumstances sufficiently different from the in-court testimony that they provide a different, and reliable, perspective for the jury to consider. This is why, for example, if a declarant has made an excited utterance and then testifies consistently, the excited utterance is admissible for its truth. An excited utterance does more than impermissibly bolster a witness --- it carries evidentiary significance different from the in-court

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<sup>18</sup> It also should be noted that the Rule 804(b) requirement that the declarant not be anonymous would probably be nonsensical as applied to the situation of cross-examining the person who made the statement.

testimony because it was made under circumstantial guarantees of reliability that are different --- indeed better --- than oath, cross-examination, and demeanor.

It is unclear whether a statement admissible under the recent perceptions exception carries circumstantial guarantees that warrant admissibility even where the declarant testifies. It is true that the circumstantial guarantees provided are *different* from oath, cross-examination, and demeanor, but are they *better*?

Indeed, as discussed above there seems to be an inconsistency in placing the recent perceptions exception in both Rules 804 and 801(d). The very premise of placing a hearsay exception in Rule 804 is that the reliability guarantees are not high and that a statement admissible under the exception is not as good as testimony from the declarant, i.e., we would prefer in-court testimony. So if we *have* in-court testimony, and the hearsay is by definition not as good as that testimony, why are we admitting the hearsay?

Finally, it should be noted that the Committee received fairly strong pushback over the amendment to Rule 801(d)(1)(B), which was a relatively mild amendment that did nothing more than allow the jury to consider for its truth what it had already heard as to credibility. Even though the amendment was limited, concern was expressed that it would open the door to wholesale admissibility of prior consistent statements. It can be expected that stronger pushback would come from an amendment that will by definition allow the jury to consider for truth certain prior consistent statements that were not presented on credibility.

## **B. Interface With Rule 801(d)(1)(A)**

Now let's assume that the statement of recent perception is *inconsistent* with the declarant's testimony. Rule 801(d)(1)(A) currently provides an exemption from the hearsay rule for certain prior inconsistent statements, but it is very narrow. Only inconsistent statements made under oath at a formal proceeding are admissible as substantive evidence. The remainder set of inconsistent statements are admissible for impeachment but not for truth. The Advisory Committee was of the view that *all* prior inconsistent statements should be admissible for their truth, because the declarant is subject to cross-examination. But Congress significantly narrowed the exemption, leaving it to what it thought were the most reliable prior inconsistent statements.<sup>19</sup> Congress's concern for reliability missed the Advisory Committee's point --- that the presence of

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<sup>19</sup> It is safe to say that none of the texts and tweets that give rise to the call for an eHearsay exception would qualify for admissibility under Rule 801(d)(1)(A). People don't send texts under oath at a formal proceeding.

the declarant at trial, subject to cross-examination, was an adequate guarantee of trustworthiness, so the circumstances under which the *prior* statement was made are irrelevant.

It is clear that the effect of the recent perceptions exemption would be to expand the admissibility of prior inconsistent statements, allowing them to be used for their truth far more broadly. But the exception would not go as far as the original Advisory Committee would have gone with respect to prior inconsistent statements.

There is of course a good argument that the Advisory Committee was right --- that the ability to cross-examine the witness is a sufficient reason for admitting inconsistent statements for their truth. In this context, adopting the recent perceptions exception seems like a half measure, loosening the hearsay bar but without meeting the Advisory Committee's point head-on. Maybe that is a good thing. But maybe it would be better to take a more organized approach to the basic question of how to treat prior statements of witnesses under the hearsay rule.

At least one member of the Standing Committee --- Judge Schiltz, a former Evidence professor --- has suggested that the Committee reevaluate Rule 801(d)(1) from top to bottom, and consider whether all prior statements of witnesses should simply be admitted for their truth, subject to Rule 403. If the Committee is interested in pursuing such a project, it can be put on the agenda for the next meeting. In the meantime, the proposal to add a recent perceptions exception to Rule 801(d) might be considered a half-measure --- loosening the reliability requirements for prior inconsistent statements but not opening the floodgates.

### ***Conclusion on Proposed Rule 801(d)(1)(D)***

The proposal has an impact on the existing subdivisions that needs to be considered, but it does proceed from a good premise, i.e., that the hearsay bar on prior statements of testifying witnesses is questionable and perhaps should be loosened --- so long as the floodgates are not opened to statements that do nothing but bolster credibility. The problem with the proposal, though, is that it transplants reliability requirements wholesale from an 804(b) exception, and those requirements are not necessarily relevant to the basis for admitting prior statements of testifying witnesses.

It should be noted that while Professor Bellin proposes a package of two amendments, they are in fact severable. Clearly the more important provision practically is Rule 804(b)(5)/(7) --- that is the provision that will be most frequently used for the eHearsay with which Professor Bellin is primarily concerned. And it would not be unreasonable to think of adopting a hearsay exception conditioned on unavailability, while studying further what needs to be done, if anything, to the current treatment of prior statements of testifying witnesses.

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EHEARSAY

Jeffrey Bellin<sup>d1</sup>

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### INTRODUCTION

A new kind of evidence is making its way to America's courts. Social media posts and text messages are surfacing in trials across the country, and the cases so far represent just the tip of the technological iceberg.<sup>1</sup> The potential enormity of the emerging evidentiary phenomenon is apparent in the changing habits of our own lives. Many of us, particularly those under thirty, constantly transmit observations and impressions through text messages and social media sites, no matter where we are and what we are (supposed to be) doing.<sup>2</sup> As “smartphone” ownership expands and younger adults--who already average over 100 text messages per day--replace their less technologically savvy elders, this new reality will become even more pronounced.<sup>3</sup> Our world is becoming digital. Our trials must surely follow.<sup>4</sup>

\*8 The trial of Dharun Ravi, whose electronic snooping became front-page news, may be a harbinger of things to come. Ravi's trial revolved around “a pixelated paper trail” of “Twitter feeds, Facebook posts, text messages, e-mails and other online chatter,” including Ravi's roommate's chilling last Facebook status update: “Jumping off the gw bridge sorry.”<sup>5</sup> Similar examples of electronic evidence appear in the news with regularity. In a span of a few weeks this past year: a Dallas woman sent out a series of tweets before her untimely death, stating that she had “a [s]talker” who had tried to kill her “3 times before,”<sup>6</sup> a telephone repairman texted a friend to “CALL . . . AN AMBULANCE” since he had been “attacked wi[t]h a flat crowbar” and had his “head split open,”<sup>7</sup> an American diplomat killed in a terrorist attack in Libya transmitted an online chat message shortly before his death, prophetically stating: “[A]ssuming we don't die tonight. We saw one of our ‘police’ \*9 that guard the compound taking pictures.”<sup>8</sup> These examples are not anomalies; they represent an increasingly prevalent form of proof.<sup>9</sup>

Yet whether juries will, in fact, have access to the digital artifacts of litigated controversies remains an open question. Out-of-court statements offered to prove what they assert, even if uttered by a testifying witness, are “hearsay” in American courts and consequently admissible only through a hearsay exception.<sup>10</sup> Exceptions are legion, but each one is limited in scope.<sup>11</sup> As a result, many electronic utterances--like out-of-court statements generally--will fail to find any conduit for admissibility.<sup>12</sup> Venerable hearsay exceptions will, of course, accommodate some electronic communications, but when they do it will be a product of happenstance, rather than foresight.<sup>13</sup> \*10 After all, the drafters of the evidence rules never contemplated digital communication.<sup>14</sup> Consequently, even if courts get the pertinent doctrinal analogies “right” (for example, is a search on “WebMD” analogous to an oral consultation with a family doctor?), there is no guarantee that those answers will sensibly separate electronic statements that should be admissible at trial from those that should not.

Fortunately, judicial manipulation of existing doctrine is not the only way to address the looming wave of electronic evidence. Although they tend to ossify, evidence rules are not set in stone.<sup>15</sup> The rules can change, and in this context, the prospects for change are real. The Advisory Committee on the Federal Rules of Evidence, charged with a “continuous study” of the rules in operation, has already signaled interest in the incipient academic debate regarding whether “the intersection of the evidence rules and emerging [[communication] technologies” necessitates changes.<sup>16</sup> Even without federal action, states \*11 could take the lead by amending their own evidence rules, spurring other jurisdictions to follow suit.<sup>17</sup>

With respect to the form that change should take, electronic hearsay presents a particularly appealing target for the familiar arguments in favor of easing the hearsay prohibition. Evidence rules exclude hearsay primarily because of fears of unreliability.<sup>18</sup> Statements broadcast on social media or via text messaging, however, are often quite reliable because they are (1) uttered while events are unfolding and so reflect participants' perceptions prior to the distorting effects of litigation (and time), and (2) preserved in precisely the form in which they were uttered.<sup>19</sup> If a proper framework for admitting such evidence over a hearsay objection can be constructed, juries could have access to a bounty of information that, more often than not, would advance the search for truth--a worthy goal.<sup>20</sup> Thus, changing communication practices present not just a challenge to existing legal doctrine, but also an opportunity. Scholars, judges, and policymakers can seize this “evidentiary \*12 moment”<sup>21</sup> to advance a long-stalled agenda: reducing the much-criticized overbreadth of the hearsay prohibition in American courts.<sup>22</sup>

To take advantage of the opportunity presented by the emergence of the new electronic communication norm, this Article proposes a concrete change to existing evidence law: a novel “eHearsay” exception. The exception is designed to provide factfinders with access to a large swath of electronic evidence, while screening out the least reliable electronic statements for continued exclusion.<sup>23</sup> The Article makes the case for the exception in four parts. Part I describes the changing communication norm that invites revision of America's evidence rules, and particularly its outdated hearsay framework. Part II discusses previous hearsay reform proposals that culminated in the “Statement of Recent Perception” (SRP) exception, an exception ultimately rejected by Congress in 1973.<sup>24</sup> As Part III explains, the SRP exception provides an ideal framework for a new hearsay exception specifically tailored to the admission of reliable electronic utterances. Part III also fleshes out the precise contours of the proposed “eSRP” or “eHearsay” exception--a variant of the original SRP exception updated for the digital era and fortified by a requirement that qualifying statements be “recorded.” Finally, Part IV discusses the implications of the new hearsay exception.

By adopting a hearsay exception like the one proposed here, judges and legislators would open the courts to terabytes \*13 of electronic evidence and, at the same time, considerably weaken the long-criticized American hearsay prohibition. The general principle behind the proposal is that more information leads to more truth.<sup>25</sup> Evidence rules often push against this principle, but when they do, strong justifications are required.<sup>26</sup> This Article applies that straightforward sentiment to reach a controversial conclusion: changes in culture and technology have led to the creation of a vast, new subset of recorded out-of-court statements that, while excluded by current evidence doctrine, cannot justifiably be kept from juries.

### I. The New Communication Norm

The analysis begins with a description of the new electronic communication norm. Any policy prescription for addressing this norm depends on an accurate understanding of what the norm entails. After describing the new norm, this Part explains why--contrary to the initial sentiments of the evidence community<sup>27</sup>--its emergence necessitates changes in existing evidence doctrine.

### A. The Substance of the New Norm

A new age of electronic communication is dawning.<sup>28</sup> Instant messages, email, “status updates,” “tweets,” and text messages are steadily replacing water cooler gossip, handwritten \*14 letters, phone calls, and voicemail.<sup>29</sup> The ascendance of electronic communication is propelled by two forces: the increasing prevalence of handheld wireless devices, and the astonishing popularity of “social media” Internet sites.

The primary driver of the new communication norm is the ubiquity of handheld wireless devices capable of real-time electronic communication. Paul Ohm describes this development as “the rise of the ‘one device,’ the convergence of a person’s computing needs into a single, portable, high-powered machine, equipped with an always-on, high-speed connection to the Internet, and outfitted with dozens of sensors, including [cameras], a microphone, a GPS chip, and a digital compass.”<sup>30</sup> For now, the most ubiquitous form of the “one device” is the cell phone. Once a novelty, cell phones have become the norm, but talking on the phone is increasingly passé. The vast majority (83%) of American adults own cell phones, and almost three-quarters of them (73%) use their phones for “text messaging”<sup>31</sup> --the practice of typing and transmitting short blocks of text directly to specified recipients. Most basically, texters communicate their plans, estimated arrivals, and unanticipated delays to friends, family, and acquaintances.<sup>32</sup> More avid users \*15 keep up a near-constant dialogue with close friends and associates through rapid-fire text exchanges.<sup>33</sup> Usage patterns track demographics. Adults who text send or receive “an average of 41.5 messages on a typical day, with the median user sending or receiving 10 texts daily.”<sup>34</sup> Cell phone owners between the ages of 18 and 24 average 109.5 messages a day, an impressive work rate that adds up to more than 3200 texts a month.<sup>35</sup> As more Americans purchase so-called smartphones--gadgets of dazzling complexity that truly approximate Ohm’s “one device”--these averages will only increase. Smartphone users (including 45% of American adults and 66% of young adults) almost all send or receive text messages (92%); 59% use their smartphones to access social media sites.<sup>36</sup>

Social media sites like Facebook and Twitter constitute the second important driver of the new communication norm. These sites form the indispensable infrastructure for mass electronic communication, providing easy access to large audiences of electronic “friends” or “followers” through home computers and mobile devices.<sup>37</sup> Social media sites rely on their users for content. Without a steady stream of posts, sites like Facebook and Twitter would be empty shells, so “they are constantly trying to get more [content], inviting [users] to update, upload, \*16 post and publish.”<sup>38</sup> Their efforts have been successful. Facebook boasts more than 1 billion “active users.”<sup>39</sup> Twitter reports a steadily increasing average of over 400 million daily tweets.<sup>40</sup> Both sites permit users to communicate their observations 24-hours-a-day, either from a stationary computer or a mobile device.<sup>41</sup> In the words of a New York judge ordering Twitter to comply with a prosecutor’s subpoena, these services have become “a significant method of communication for millions of people across the world.”<sup>42</sup>

Facebook’s primary feature--the “status update”--keeps users updated on the latest happenings in their friends’ lives. The updates range from milestones (“We are celebrating Steve’s 40th birthday today!”) to banalities (“Carey kept us up all night . . . again”). The Facebook audience typically comments on each update, and the poster responds, creating a mini-conversation to supplement every post.<sup>43</sup> Those not inclined to \*17 verbosity can express approval by “liking” the update, or even one of the subsequent comments. Twitter users post “tweets”--140-character messages--to similar effect, with “retweets” as opposed to “likes” serving as the customary form of endorsement.<sup>44</sup> Among online adults,<sup>45</sup> two-thirds (66%) use “social media platforms” like Facebook and Twitter, generating “open running diaries” of their lives.<sup>46</sup>

## B. The Need for New Legal Doctrine

The startling usage statistics described above understate the changes looming on the horizon. Skyrocketing usage rates among younger generations foreshadow a future where everybody uses social media and everybody texts.<sup>47</sup> Scholars in all manner of disciplines have begun to explore the implications of this new electronic communication norm.<sup>48</sup> Changes in communication patterns have significant societal implications, including possible consequences for social movements, journalism, \*18 elections, and the physical and mental development of a younger generation immersed in the digital medium.<sup>49</sup> The implications for courts may be equally profound.<sup>50</sup>

The evidentiary treatment of electronic communications is critically important not just because these communications are suddenly ubiquitous, but also because they are well suited to use in litigation. Electronic communications are both unusually public and surprisingly durable, a combination that means they will be easy for litigators to track down. The oft-quoted statement “privacy is dead . . . get over it” may be overheated, but it stems from a new and disconcerting online reality.<sup>51</sup> Electronic communication is inherently less private than the forms of communication it is replacing. Electronic utterances are often intentionally (and sometimes inadvertently) broadcast to large audiences. Even when this is not the case, these communications travel through and reside on computer servers and transmission hubs that belong to companies, such as Facebook and Verizon, that may not always be inclined (or able) to protect their customers' privacy.<sup>52</sup>

\*19 Electronic statements are not just exposed to larger audiences. They are also preserved in a way that is distinct from most traditional forms of communication. As one commentator puts it, “[w]hat we do in the digital world often lasts forever.”<sup>53</sup> An oral assertion, such as a comment to a coworker about a supervisor's improper advances, will be difficult to remember with any precision months or years after its utterance, and even more difficult to bring before a jury in admissible form. In addition to problems of memory, production of such communications at trial depends on the cooperation of the relatively few persons who heard them. By contrast, electronic utterances rarely dissipate completely. Much to the chagrin of some speakers, an email, text, tweet, or status update can be uncovered by savvy litigators reviewing electronic files long after its utterance.<sup>54</sup> Memory is irrelevant. And so is cooperation. An \*20 electronic statement, unlike an oral analogue, can be presented to a jury with little (if any) assistance from a fact witness. A party merely needs to display the original electronic message at trial and can, if necessary, rely on a representative from T-Mobile or Facebook to lay the requisite foundation for its admission.<sup>55</sup>

Attorneys and investigators are just beginning to explore the numerous options for obtaining relevant out-of-court electronic utterances. Most obviously, they can discover this type of evidence by searching public online forums (like Twitter) or by happenstance when illicit actors inadvertently broadcast incriminating information to interested parties, such as police.<sup>56</sup> Investigators can also locate relevant text messages and social \*21 media posts saved on suspects' and victims' mobile electronic devices or on smartphones and computers left at a crime scene.<sup>57</sup> For more enterprising investigators, social media sites provide new avenues for surreptitious evidence-gathering. New York City's undercover officers seem particularly adept at “friending” members of criminal gangs on Facebook and obtaining access to their online conversations.<sup>58</sup> Informants use Facebook too and, like undercover officers, can provide access to their associates' postings--free of Fourth Amendment scrutiny--under the aptly named “false friends” doctrine.<sup>59</sup> To uncover communications by more discrete consumers of the electronic medium, authorities can obtain a subpoena or search warrant to compel third-party service providers such as Facebook and Verizon to disclose the contents of their customers' accounts.<sup>60</sup>

\*22 In fact, despite often (understandably) breathless media coverage to the contrary, there is nothing legally noteworthy about obtaining private communications from social media sites or cellphone service providers.<sup>61</sup> If relevant information exists, the

government is entitled to use judicial process to obtain it--as are private litigants--whether the information is held by a private citizen, Citizens & Southern National Bank, or Facebook.<sup>62</sup> The only thing that is changing is that investigators are starting to realize the breathtaking evidentiary potential of these electronic sources. Facebook quietly maintains a website (the “Law Enforcement Online Requests System”) for “law enforcement officials seeking records from Facebook” and provides alternative links for “private party requests, including requests from civil litigants and criminal defendants.”<sup>63</sup> With \*23 respect to cell phones, law enforcement agencies already routinely obtain location information for subscribers' mobile devices, and experts believe the “next surge in surveillance is text messaging.”<sup>64</sup>

Given the bounty of discoverable electronic evidence generated by the new communication norm and the potential for much of this evidence to constitute a compelling form of proof, the obvious evidentiary question becomes how to funnel these communications to fact-finders. The doctrinal status quo is, of course, one option, and seemingly the preferred option for the few commentators who have weighed in so far.<sup>65</sup> But it is not at all clear how evidence rules designed for an era of oral communication, water-cooler gossip, quill, and parchment will apply in a new world of digital communication--and there is little reason to think that we will like the results.

At an intuitive level, it is clear that evidence doctrine, and specifically the rules governing the admissibility of out-of-court statements, should change in response to changing communication \*24 norms.<sup>66</sup> After all, the hearsay rules, and particularly the hearsay exceptions, identify subsets of out-of-court statements that are sufficiently reliable to be admissible without contemporaneous cross-examination. Assumptions about the way people communicate drive this process.<sup>67</sup> If the assumptions change--as they must when communication norms change--reliability assessments change as well. A set of rules that arose at a time when people communicated in a completely different manner (i.e., in person, by letter, and through landline phones) is unlikely to account for the dangers or benefits of out-of-court statements communicated on social media sites, in Internet chat rooms, and via text messaging.

Viewed from the perspective of individual hearsay exceptions, the dilemma comes into sharp relief. Courts and litigants are already facing difficult questions as the dusty hearsay rules clash with digital communication, and many more are on the horizon:

- Do CAPITALIZED text messages constitute “excited utterances”?<sup>68</sup>
- Are status updates “present sense impressions”?<sup>69</sup>
- \*25 • Can WebMD searches be “statements made for medical diagnosis”?<sup>70</sup>
- Do routine work-related emails qualify as “business records”?<sup>71</sup>
- Does a “retweet” or “like” constitute an “adoptive admission”?<sup>72</sup>

The only honest answers to these and the host of related questions are: “maybe,” “sometimes,” or, perhaps most candidly, “we’ll see.” This uncertainty is itself a concern in a world where most cases are resolved prior to trial by guilty plea or settlement.<sup>73</sup> Ex ante clarity as to the admissibility of evidence is critical in such a system, whose legitimacy depends on the idea that litigants can accurately forecast trial outcomes, and thus conform pretrial settlement to those forecasts.<sup>74</sup> Accuracy, not certainty, however, could be the primary casualty of doctrinal \*26 inertia. Forcing courts to apply an outdated hearsay framework to a new form of evidence will inevitably keep reliable out-of-court utterances from juries, decreasing the accuracy of their verdicts. At the

same time, courts will be tempted to contort existing evidence rules either to admit reliable electronic utterances that do not fit traditional hearsay exceptions, or exclude unreliable electronic utterances that do. Errors involving the admission or exclusion of electronic utterances are already common; many of the examples discussed below in this Article are drawn from cases where trial courts sensibly, but erroneously, admitted electronic utterances over a hearsay objection, and appellate courts-- reluctant to get in the way of good evidence--deemed the error "harmless."<sup>75</sup> This is likely the real status quo; increasing slippage between what the evidence rules allow and what (some) courts admit, as the rules fail to track individual judges' views of what constitutes reliable electronic evidence.

A final consideration is that courts cannot fully control jurors' access to publicly available online information, like posts on Twitter and (to some degree) Facebook. Individual jurors--able to access these sites on their smartphones--will be tempted to fill obvious evidentiary gaps through their own online sleuthing.<sup>76</sup> A system that refuses to allow electronic evidence \*27 through the front door may find it filtering into the jury room through other portals.

In sum, leaving the courts to apply existing evidence doctrine to digital communication is an option, but it comes at a cost. Litigants will face uncertainty as to the admissibility of their electronic evidence; judges will be tempted to fill the void between the rules and intuition by distorting doctrine; jurors may seek online what they do not receive in court; and reliable evidence will be kept from juries. Given this reality, policymakers, judges, and evidence scholars should, at a minimum, explore alternative approaches, particularly when the status quo takes the form of an antiquated hearsay framework that has long been crying out for reform.

## II. REFORMING THE HEARSAY RULES

As the previous Part suggests, the greatest obstacle to any effort to introduce online chatter, social media posts, email, and text messages into evidence at trial is the venerable hearsay prohibition.<sup>77</sup> The now-codified prohibition, with its many discrete exceptions, is the most distinctive feature of American evidence law.<sup>78</sup> It is also the most controversial.<sup>79</sup> While evidence \*28 scholars actively shaped evidence doctrine over the years,<sup>80</sup> the current hearsay framework exists in spite of, not because of, their efforts. In fact, the history of American hearsay rules can be characterized as a series of efforts by eminent commentators and code drafters to weaken the hearsay prohibition, and the prohibition's surprising resiliency.<sup>81</sup>

To strengthen the case for an eHearsay exception and foreshadow its contours, this Part presents a (very) brief history of the American hearsay prohibition, highlighting the recent efforts of would-be hearsay reformers, and the culmination of those efforts in a proposed, but ultimately rejected, federal hearsay exception for "Statements of Recent Perception." The largely forgotten SRP exception is surprisingly well suited to regulating the admission of electronic utterances and could serve as a sturdy base from which to craft an alternative to the status quo: a new "eHearsay" exception.

### A. The Hearsay Prohibition

American evidence rules prohibit the introduction of any out-of-court statement offered as proof of the "matter asserted" by the out-of-court speaker, or "declarant."<sup>82</sup> This "hearsay" prohibition applies even to the out-of-court statements of witnesses who testify at trial.<sup>83</sup> Thus, if I post a Facebook status update that says, "my boss hit me this morning for being late," \*29 a prosecutor cannot later use that update to prove that my boss, in fact, hit me. The out-of-court statement is hearsay and inadmissible (absent a hearsay exception) even if I testify in court. In practice, the prohibition is designed to force the parties to bring the most knowledgeable witnesses to court and rely on their live testimony, rather than written affidavits or second-hand accounts.<sup>84</sup>

Modern hearsay law traces its roots to the early 1700s.<sup>85</sup> The English common law exclusion of out-of-court statements began to emerge about that time, grounded in the notion that “statements used as testimony must be made where the maker can be subjected to cross-examination.”<sup>86</sup> This justification still resonates with the modern conception that an adversary system requires live testimony, not out-of-court statements, as its inputs.<sup>87</sup> Live witnesses testify under oath at a public trial, under the gaze of interested observers, judge, and jury.<sup>88</sup> These witnesses are subject to cross-examination--the “greatest legal engine ever invented for the discovery of truth”--which probes for untoward influence by the sponsoring party, or bias and other flaws on the part of the witness.<sup>89</sup>

**\*30** The necessary corollary to the sentiments expressed above is that an adversary process is not so well equipped to ferret out spurious out-of-court statements. Out-of-court speakers rarely speak under oath and need not fear perjury prosecution or even particularly severe moral condemnation for lying. More significantly, cross-examination, the critical adversarial tool for unearthing hidden flaws, is blunted when the real subject of the examination is absent from court.<sup>90</sup>

The American hearsay prohibition thus stands on firm theoretical ground. Yet skeptics persist. As will quickly become apparent, reformers traditionally focus on the prohibition's two most dubious facets. First, why does the prohibition apply to the out-of-court statements of testifying witnesses who can, in fact, be cross-examined? Second, encouraging parties to bring live witnesses to trial may be a worthy goal, but the prohibition extends to out-of-court statements of declarants who are deceased or otherwise unavailable to testify. Applying the hearsay prohibition to statements by unavailable witnesses deprives juries of evidence that, while imperfect, is often the best the circumstances allow.

## B. The Model Code of Evidence

In recent history, the most direct assault on the hearsay prohibition came in the 1942 “Model Code of Evidence” promulgated by the American Law Institute (ALI). The Model Code represented the studied efforts of the era's evidence luminaries to codify the unruly, judge-made evidence law of the time.<sup>91</sup> The Model Code's drafters had a second objective as well--to work a “radical change[]” in the common law hearsay prohibition.<sup>92</sup> The drafters derided “the law governing hearsay” as a “conglomeration of inconsistencies” with little thematic purpose, adding that “[t]he courts by multiplying exceptions [to the prohibition] reveal their conviction that relevant hearsay evidence normally has real probative value, and is capable of valuation by a jury.” **\*31**<sup>93</sup>

The Model Code's drafters attempted to transform the hearsay prohibition into a rule of necessity. Section 503 of the Model Code made hearsay admissible whenever the declarant is “unavailable as a witness.”<sup>94</sup> The Code also made hearsay admissible whenever the declarant was “present and subject to cross-examination.”<sup>95</sup> As a result, under the Model Code, hearsay would almost always be admissible, save for circumstances where the proponent of a statement could procure the declarant's live testimony, but declined to do so. In part because of this “radical attitude toward hearsay reform,” no state adopted the Model Code.<sup>96</sup> Some jurisdictions, such as California, spurned it with a “vehemence bordering upon anger.”<sup>97</sup>

## C. The Uniform Rules of Evidence

In 1953, evidence scholars again tried to dilute the American hearsay prohibition.<sup>98</sup> Building from the wreckage of the **\*32** Model Code, and in consultation with the Code's drafters, a reconstituted committee of prominent jurists and scholars drafted the “Uniform Rules of Evidence.”<sup>99</sup> Designed in part to soften aspects of the Model Code that were “too far-reaching and drastic for

present day acceptance,” the Uniform Rules left the traditional hearsay prohibition intact, but proposed a novel and potentially expansive new hearsay exception.<sup>100</sup> Awkwardly titled “Statements Admissible on Grounds of Necessity Generally,” Uniform Rule 63(4)(c) excepted from the hearsay prohibition:

[A] statement [of an unavailable witness] narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action.<sup>101</sup>

The Commentary to the rule acknowledged that the exception was “new” but justified it as meeting a “vital need” to “prevent miscarriage of justice resulting from the arbitrary exclusion of evidence which is worthy of consideration, when it is the best evidence available.”<sup>102</sup> In concert with the Uniform Rules’ treatment of out-of-court statements of testifying witnesses as non-hearsay,<sup>103</sup> Rule 63(4)(c) again promised to substantially unravel the American hearsay prohibition.<sup>104</sup> The Uniform **\*33** Rules, however, “were only slightly more successful than the Model Code,” achieving lasting acceptance only in Kansas, the home state of the chairman of the Committee that drafted the rules.<sup>105</sup>

#### D. The Federal Rules of Evidence

Evidence reformers tried one last time to liberalize the hearsay prohibition in the next, and most successful, effort to create a uniform system of American evidence law: the Federal Rules of Evidence adopted by Congress in 1975 and shortly thereafter in most state jurisdictions.<sup>106</sup> While purporting to adopt “the approach to hearsay . . . of the common law,” the Federal Rules’ drafters included an exception unknown to the common law, Rule 804(b)(2), “Statement of Recent Perception.” This rule, which borrowed heavily from Uniform Rule 63(4)(c), excepted from the hearsay prohibition:

A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection **\*34** was clear.<sup>107</sup>

The proposed rule was approved by the Supreme Court, but rejected by Congress.<sup>108</sup> The House Judiciary Committee explained that it could not endorse this “new and unwarranted hearsay exception of great potential breadth” because it “did not believe that statements of the type referred to bore sufficient guarantees of trustworthiness.”<sup>109</sup> Congress, being the final word on the matter, prevailed. Consequently, the Federal Rules and, with four exceptions,<sup>110</sup> the evidence codes governing state jurisdictions (which largely mirror the enacted federal rules) contain no provision analogous to the SRP exception. Although these evidence codes contain numerous hearsay exceptions distilled from the common law, including, in many cases, an ill-defined “residual” exception intended for use in “rare” and “exceptional” circumstances,<sup>111</sup> adherents to the status **\*35** quo have largely turned back modern efforts to liberalize hearsay doctrine.<sup>112</sup>

### III. A NEW HEARSAY EXCEPTION FOR ELECTRONIC STATEMENTS OF RECENT PERCEPTION

One explanation for the failure of the Statement of Recent Perception (SRP) exception is that the proposed exception came a half-century too early.<sup>113</sup> With a few modifications, the exception provides a robust grounding for a new “eSRP” or “eHearsay” exception tailored to the changes in modern communication norms described in Part I. In concert with the increasing prevalence

and preservation of electronic utterances, this largely forgotten piece of evidence history could open American courtrooms to reliable records of electronic communications and (finally) ease the heavy hand of the American hearsay prohibition.

This Part sketches the contours of an eSRP exception--modeled on the original SRP exception--that would admit, over a hearsay objection, a broad array of electronic (and even non-electronic)<sup>114</sup> statements that are sufficiently reliable to be placed before the finder of fact. For reasons outlined in the subsequent text, the proposed exception actually consists of two exceptions: one appended to Federal Rule of Evidence 801 (statements of testifying witnesses), and the other to \*36 Federal Rule of Evidence 804 (statements of unavailable declarants).

Precise language for the proposed exception appears below. Italicized text represents additions to the current Federal Rules of Evidence. Non-italicized text (including bolded text) is unchanged from the existing federal rules, but included, where necessary, to provide context.

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The proposed rule borrows heavily from the original SRP exception, but also modifies that rule to a significant degree. Piece-by-piece analysis justifying both the borrowed provisions and the new language follows.

#### **A. The Requirement of the Declarant's Unavailability or Presence at Trial**

“the declarant is unavailable as a witness” or “[t]he declarant testifies”

The proposed eSRP exception contains two parts. The determination of which part to apply depends on a single variable: whether the hearsay declarant testifies at trial. If the declarant does not testify, Rule 804(b)(5), the heart of the proposal, controls and requires a showing that the declarant is “unavailable” as that term is (already) defined in existing Federal Rule of Evidence 804(a). If the declarant testifies, proposed Rule 801(d)(1)(D) governs and permits her otherwise qualifying \*37 eSRPs<sup>115</sup> to be admitted as substantive evidence (i.e., for the truth of the matter asserted in the out-of-court statement).<sup>116</sup>

The two components of the proposed exception sweep broadly. In the spirit of the ALI's Model Code of Evidence, the exception excludes otherwise qualifying out-of-court statements in only one circumstance: when the statement was made by a declarant who is available to testify at trial, but not called as a witness.<sup>117</sup> In that circumstance, the exception cannot be invoked. The rationale is both familiar and straightforward. The eSRP exception applies either: (1) when the necessity for admitting hearsay is greatest--i.e., when the declarant is unavailable (804(b)(5)); or (2) when the justifications for the hearsay prohibition are weakest--i.e., when the declarant can be cross-examined at trial (801(d)(1)(D)). In addition to paralleling the broad approach of the Model Code, the structure set forth above mirrors the original SRP exception and Uniform Rule 63(4)(c).<sup>118</sup> As the drafters of both provisions recognized, statements of recent perception, while valuable to juries in all other circumstances, are not preferable to available live testimony from the hearsay declarant.

#### **B. Recorded Statements**

“[a] recorded communication”

A key reliability-enhancing trait of electronic out-of-court statements is that they are invariably recorded. Unlike many traditional out-of-court statements (e.g., a suspect's oral confession to a jailhouse informant), text messages, email, and status updates can be shown directly to the jury. Taking advantage of \*38 this attribute, the proposed eSRP exception requires qualifying statements to be “recorded.”<sup>119</sup> This requirement represents a novel and important supplement to the original SRP exception, while simultaneously circling back to the exception's obscure roots in a nineteenth-century proposal by James Bradley Thayer to exempt written statements of deceased witnesses from the hearsay prohibition.<sup>120</sup>

The reliability advantages of recorded out-of-court statements are widely recognized. When an in-court witness relates another person's hearsay statement, a danger arises that the in-court witness's testimony is unreliable. The testifying witness may mishear, misremember, miscommunicate, or (worst of all) manufacture the out-of-court speaker's statement.<sup>121</sup> This concern with the in-court witness's reliability recedes when the out-of-court statement was expressed in writing or otherwise recorded.<sup>122</sup> The in-court witness, in fact, becomes superfluous. As with a recording of a 911 call, jurors can cut out the middleman and “hear” the out-of-court statement for themselves.

\*39 Anything memorialized by mechanical or electronic means as the speaker communicates counts as “recorded” for purposes of the eSRP exception. This includes email typed on a laptop computer, text messages tapped on a cellphone keypad, Facebook status updates posted at a desktop computer, or tweets entered on a smartphone. In fact, the bulk of hearsay that is intended to be captured by the exception--text messages, emails, and social media posts--will easily qualify as “recorded.” These out-of-court statements are always contemporaneously memorialized by the computer software that enables their existence.<sup>123</sup>

Importantly, the exception does not encompass statements that are initially unrecorded, even if they are subsequently memorialized. Thus, a witness's oral statement taken down by a police officer at a crime scene on a tablet computer would not qualify. While the officer's transcription of the statement is “recorded,” the witness's statement is not, and normal hearsay-within-hearsay principles apply to exclude the combined statement.<sup>124</sup> Relatedly, the eSRP exception, like the “business records” exception, requires the proponent to introduce the “recorded communication” itself, as opposed to testimony about the communication.<sup>125</sup> Consequently, if a text message, social media \*40 post, or email could no longer be recovered (and shown to the jury), testimony about its contents could not be admitted under the eSRP exception.<sup>126</sup>

The excerpted text that leads off this section also includes a subtle but important deviation from the original SRP exception. The eSRP exception substitutes the word “communication” for “statement.” The intent of this change is to exclude from the exception's scope the small percentage of “statements” that are not also “communications.” For example, diary entries, memos-to-file, draft emails or “notes to self” could constitute “statements,” but not “communications” if the statements, when uttered, were not intended for any audience.<sup>127</sup> Such statements would not be admissible under the proposed exception.

There are two reasons to limit the exception to “communications.” First, the presence of an intended audience can create an incentive for sincerity.<sup>128</sup> Second, and more important, limiting the eSRP exception's scope to “communications” decreases \*41 the potential for parties to abuse the exception by introducing self-serving out-of-court statements generated for litigation (or posterity). Most problematic would be statements that conveniently appear during litigation and purport to narrate disputed events in a way that benefits the offering party.<sup>129</sup> In fact, many such statements would already fall outside the exception since they are “made in contemplation of litigation.”<sup>130</sup> But courts will struggle to assess whether something like a diary entry or draft email was generated with legal proceedings in mind. Explicitly excluding such non-communicative statements from the scope of the exception decreases the pressure on judges to smoke out fabricated statements that appear to satisfy the literal demands of the exception but suspiciously surface during litigation, rather than in real time. Conveniently, the primary targets

of the eSRP exception--text messages, email, or social media postings (and their present and future analogues)--will virtually always satisfy the “communication” requirement.

### C. Describing Recently Perceived Events

“that describes or explains an event or condition recently perceived by the declarant”

Uniform Rule 63(4)(c) and the original SRP exception limit the subject matter of qualifying statements. A statement that falls within the exceptions must “narrate[], describe[], or explain[] an event or condition recently perceived by the declarant.”<sup>131</sup> This limitation primarily serves to exclude statements describing events of the more distant past.<sup>132</sup> The eSRP exception \*42 maintains this limitation which, as explained below, translates nicely into the digital age.

Requiring qualifying statements to be descriptions of “recently perceived” events enhances the reliability of statements admitted under the proposed exception, while only marginally restricting its scope. In terms of reliability, recorded descriptions of the distant past engender increased concerns about inaccuracy. Motives for shading or distorting descriptions of past events are more likely to arise and solidify with the passage of time.<sup>133</sup> In addition, memories steadily degrade as the time between an event and a statement describing that event expands.<sup>134</sup>

The reliability gains of the eSRP exception's subject matter limitation come at little cost. The new wave of electronic utterances described in Part I most commonly involves descriptions of, or reactions to, recent events. This is a function of the purpose of the new communication tools. Facebook, Twitter, and texting services are designed to keep others, including often our family and friends, apprised of recent and ongoing occurrences.<sup>135</sup> We use these tools--and tolerate their shortcomings--to \*43 fill relatively short temporal gaps between our current transmission and our last electronic or in-person communication.<sup>136</sup> Electronic statements can, of course, describe more remote or even historic events. However, those that do, like lengthy blog posts, word processing documents, or emails summarizing past milestones, resemble familiar analogues such as books, letters, and diaries. There is little need to tailor the eSRP exception to such statements. Existing hearsay exceptions crafted with these traditional forms of communications in mind should suffice.

The only real dilemma with respect to the subject matter limitation arises in its application. A “recently perceived” limitation raises an obvious line-drawing concern: how recent? Case law applying state variants of Uniform Rule 63(4)(c) and the original SRP exception provides some guidance. Courts applying the “recently perceived” language have, with little controversy, extended the gap between event and statement up to eight days.<sup>137</sup> Longer delays invite more searching scrutiny, but do not necessarily require exclusion.<sup>138</sup> Indeed, in one “unusual \*44 case,” an “eight to ten week” delay was permitted because the declarant--a victim of an accident--was physically unable to make an earlier statement.<sup>139</sup> The Wisconsin Supreme Court explained:

The mere passage of time, while important . . . is not controlling . . . . A determination regarding recency of perception depends on the particular circumstances of the case, including whether there were any intervening circumstances, such as injuries, which precluded or limited an earlier statement.<sup>140</sup>

As the preceding excerpt makes clear, the “recently perceived” restriction is principally concerned with suspicious delays in reporting an alleged event (as opposed to fading memories), and it should be applied in that spirit. Unnatural gaps between an

event and its description constrict the permissible time period under the eSRP exception, while more natural gaps due to injuries (or Wi-Fi outages) expand it.<sup>141</sup> This flexibility will admittedly leave some gray areas for judicial interpretation, but given the nature of electronic communication, the vast majority of utterances in text messages and social media will fall comfortably within the exception's temporal bounds.

#### D. Outside the Shadow of Litigation

“not including . . . a statement made in contemplation of litigation or to a person who is investigating, litigating, or settling a potential or existing claim”

The eSRP exception--like the original SRP exception and Uniform Rule 63(4)(c)-- attempts to maximize the reliability of qualifying statements and minimize the dangers of abuse by excluding from the rule's scope any statement made in the “shadow of litigation.”<sup>142</sup> The concept is simple and intuitive (if \*45 not “too obvious to require comment”<sup>143</sup>): the specter of litigation has a distorting effect, causing some witnesses to deviate from honest narration.<sup>144</sup> Further, litigation creates powerful incentives for parties to attempt to influence witness statements.<sup>145</sup>

Concerns about the distorting effects of litigation arise even before formal legal proceedings are initiated, and so the proposed eSRP exception adopts the original SRP exception's broad interpretation of the applicable shadow of litigation. A statement will not be admissible as an eSRP if it was elicited during an investigation of a legal claim or otherwise “made in contemplation of litigation,” even if a suspect had not yet been arrested or a lawsuit not yet filed when the statement was made. By contrast, the Uniform Rule permitted statements obtained during a pre-litigation investigation so long as legal action had not formally “commenc[ed].”<sup>146</sup>

\*46 Given the nature of the electronic communication norm described in Part I, the reliability gains obtained by excluding statements tainted by the shadow of litigation are, once again, fairly costless. Text messages and social media posts are rarely generated by investigators' queries or otherwise created in contemplation of litigation.<sup>147</sup> Those that are, such as an email response to a detective's inquiry about a crime, parallel non-electronic statements that existing hearsay rules comfortably handle.<sup>148</sup>

#### E. No Explicit “Good Faith” Requirement

“but not . . . an anonymous statement”

Both Uniform Rule 63(4)(c) and the original SRP exception apply only to out-of-court statements “made in good faith.” The thinking behind this requirement, which can be traced to the Thayer-influenced 1898 Massachusetts statute referenced earlier, is understandable.<sup>149</sup> In fact, it is hard to argue that any \*47 hearsay statement should be admitted unless it was made in good faith. The difficulty is determining precisely what “good faith” means in this context and, relatedly, applying the standard in a coherent and predictable manner. As explained below, these difficulties render an explicit “good faith” requirement more trouble than it is worth. Consequently, the eSRP exception takes the different and more common approach of relying on predefined attributes of qualifying statements to determine reliability (and thus admissibility) in lieu of an amorphous “good faith” requirement.

The experience of the few states that apply variants of the SRP exception provides a useful perspective on how a “good faith” requirement works in application. The Wisconsin courts—which have grappled with this issue more explicitly than others—explain that “whether a statement is made in ‘good faith’ depends on ‘the declarant’s incentive to accurately relate the event or condition.’”<sup>150</sup> In Wisconsin, this means that statements are made in “good faith” if they are communicated to others with whom the speaker has some connection, for example: a statement made to the declarant’s “girlfriend, who was the mother of his son and presumably someone he trusted and in whom he confided,”<sup>151</sup> statements made to the declarant’s “good friend” and his friend’s son;<sup>152</sup> and statements “made to people to whom [the declarant] was close.”<sup>153</sup> Less intuitively, “[b]y their nature, 911 calls are presumably ‘made in \*48 good faith’” for purposes of the exception.<sup>154</sup> In Kansas, we learn that statements made by young children satisfy the requirement, since “[i]t is highly doubtful [a] six-year-old would make . . . statements except in good faith.”<sup>155</sup>

This state court case law interpreting the “good faith” requirement demonstrates its weaknesses. In essence, courts apply the “good faith” requirement by making an intuition-based judgment about an out-of-court declarant’s sincerity.<sup>156</sup> A witness’s credibility, however, is typically a jury question, and there is little reason to deviate from that default principle here.<sup>157</sup> Questions about whether an out-of-court speaker would lie to a loved one, prevaricate in a 911 call, or make a false statement at a young age can be left to the jury, without any sacrifice of reliability.<sup>158</sup> If the jury determines that the out-of- \*49 court speaker cannot be trusted, it can discount the statement accordingly.

In lieu of a “good faith” requirement, the proposed eSRP exception identifies specific attributes of out-of-court communications, and particularly electronic communications, that enhance reliability.<sup>159</sup> This approach places concrete limits on trial court discretion and creates a measure of predictability and consistency for litigants.<sup>160</sup> Ex ante predictability is particularly important in modern times, since most cases are resolved in advance of trial.<sup>161</sup>

In assessing the reliability of electronic communications, one particular characteristic exudes unreliability: anonymity. As noted in a preceding section, accountability helps to ensure reliability.<sup>162</sup> Anonymous statements avoid accountability by design.<sup>163</sup> The proposed eSRP exception thus excludes “anonymous” \*50 statements, which are quite common in the digital world; comments on blog posts, tweets, or texts will only fall within the exception if they were made by someone whose identity is discernible to the communication’s recipients.<sup>164</sup> As already discussed, the proposed exception’s requirement that a qualifying statement be a “communication” similarly ensures some accountability for insincerity.<sup>165</sup> These complementary requirements dictate that any qualifying eSRP has an identifiable sender and an intended recipient, a low hurdle for the vast bulk of electronic utterances, and a useful reliability safeguard. Other mandates of the eSRP exception, including that the qualifying statements arise outside the shadow of litigation and relate to “recently perceived” events, also protect against the admission of unreliable statements. These requirements, working in concert, separate the bulk of facially unreliable from facially reliable out-of-court electronic statements. The rest of the work can be left to juries, the traditional arbiters of the weight to be given to relevant evidence.<sup>166</sup>

To the extent concerns about deception through “bad-faith” electronic utterances remain, other constraints applicable to all evidence have a role to play. In particular, authentication requirements \*51 dictate that proponents of electronic evidence offer sufficient evidence to support a finding that statements offered under the exception are, in fact, actual text messages, tweets, or Facebook status updates from the person claimed (i.e., that the evidence “is what the proponent claims it is”).<sup>167</sup> Finally, Federal Rule of Evidence 403 permits courts to exclude cumulative, misleading or unfairly prejudicial evidence of minimal probative significance.

## F. No Explicit Limitation to “Electronic” Statements

The proposed hearsay exception is intended to provide the factfinder with useful information captured in the ubiquitous electronic communications chronicled in Part I. It is important to recognize, however, that the exception does not require that qualifying statements be “electronic.” The twofold reasoning for this is explained below.

First, it is hard to precisely define “electronic” in this context, and likely to become increasingly difficult. There are admittedly easy cases. Statements typed on computer keyboards are electronic, and statements written on paper are not. But what about a digital recording of an oral statement, or writing with a stylus on an electronic tablet? The line drawing will become increasingly difficult as technology allows people to interface with computers in myriad ways, blurring the distinction between oral, written, and “electronic” communication.<sup>168</sup>

Second, explicitly distinguishing between electronic and non-electronic communications would be almost as unhelpful as it is challenging. As technology evolves, virtually every type of statement will be utterable with, or without, the assistance of an electronic device. Assuming all other contextual factors are \*52 equal, it is difficult to articulate any inherent reliability advantage based on the medium used to express the same recorded message. As the drafters of the Federal Rules of Evidence recognize, it is not the medium itself, but how the medium is used that informs the reliability of a resulting statement.<sup>169</sup>

Taking the preceding points together, it appears that any effort to limit the proposed exception to “electronic” communications would be both unruly and unhelpful. Thus, the proposed rule follows the lead of traditional hearsay rules (as well as Uniform Rule 63(4)(c) and the original SRP exception) by not limiting its application to any particular medium of communication. The bulk of statements likely to be admitted under the proposed rule will fall within some colloquial definition of “electronic,” but that does not mean that the rule itself must be limited to such statements.

## IV. IMPLICATIONS OF AN “eHEARSAY” EXCEPTION

The preceding sections articulate the justifications for, and the precise contours of, the proposed “eHearsay” or “eSRP” exception to the American hearsay prohibition. This Part discusses the likely implications of adopting the exception. In particular, it examines the types of statements that, while excluded under existing evidence doctrine, will be admitted by the new rule. There are three broad categories of such statements: (1) eSRPs of testifying witnesses, (2) eSRPs of unavailable victims, and (3) eSRPs of unavailable third-party witnesses and accomplices.<sup>170</sup> Each category is discussed below.

\*53 Out-of-court statements made by a testifying witness comprise the first category of eSRPs that would routinely be admitted under the exception. A recent bribery trial illustrates how eSRPs might be used in this context. In *United States v. Blackett*, a witness's testimony that she was bribed while serving as a juror was supplemented with the following text message that she sent to her sister after the alleged bribe attempt:

You see why I tell you I ain't want to be no damn juror. Some dude just come by my house and tell me he going pay me money to say not guilty.<sup>171</sup>

Under existing law, the text--erroneously admitted as a “recorded recollection”--should not have been admitted over the defendant's hearsay objection. (The best the appellate court could say for the ruling was that it was “harmless.”)<sup>172</sup> But under the proposed eSRP exception, the text would be admissible without doing any violence to other hearsay exceptions (or harmless

error principles), providing the jury with valuable information about the charged crime. An even more compelling example comes from *People v. Lewis*, where a prosecutor introduced “enlarged photocopies” of text messages from a sexual assault victim.<sup>173</sup> The prosecutor relied on the messages (which sought help from friends in dealing with a “guy . . . in my apartme[n]t” who was “trying to be all o[ve]r me”), and a questionable \*54 hearsay ruling, to rebut the defense's contention that the victim fabricated her testimony about the assault.<sup>174</sup>

Although perhaps not as valuable to juries as eSRPs of absent declarants, eSRPs of testifying witnesses will often constitute compelling evidence. If the eSRP is consistent with the witness's testimony, as in *Blackett and Lewis*, it will flesh out that testimony and make it more credible.<sup>175</sup> The jury will see what the witness said about the event, exactly as she said it, during the time period when the event was freshest in her mind. It is hard to justify a system that would keep text messages like those described above from a jury, and by clearly permitting such evidence, the proposed exception improves current doctrine.<sup>176</sup> In addition, by providing a clear conduit for admissibility, the eSRP exception reduces the pressure to distort existing rules (as occurred in *Blackett and Lewis*) to admit this compelling form of proof.<sup>177</sup>

\*55 An eSRP that is inconsistent with the declarant's live testimony will be even more valuable to juries and, indeed, is already admissible for the non-hearsay purpose of impeachment.<sup>178</sup> Under current doctrine, when a testifying witness's inconsistent hearsay statement is introduced, the court instructs the jury (upon request of a party) that the out-of-court statement is admissible not for assessing the truth of the matter asserted (i.e., not as “substantive” evidence), but only to show that the witness said different things at different times and, consequently, may not be credible.<sup>179</sup> The practice of instructing juries on this nuanced distinction between impeachment and substantive evidence is widely ridiculed.<sup>180</sup> Consistent with a now-pending rules amendment for past consistent statements offered to rehabilitate a witness,<sup>181</sup> the eSRP exception abandons the (likely futile) effort, and allows jurors to consider \*56 eSRPs of testifying witnesses as substantive evidence.<sup>182</sup> While scholars and policymakers have raised thoughtful objections to eliminating hearsay treatment of a testifying witness's out-of-court statements, none of those objections apply with any force to the types of statements that are admissible as eSRPs.<sup>183</sup>

The second important category of statements that would become admissible as eSRPs consists of electronic utterances of victims who are “unavailable” to testify at trial. In fact, eSRPs could potentially play a critical role in domestic violence and sexual abuse prosecutions, where a victim's status update, online chat, or text messages to friends about abuse will be admissible even if the victim refuses to testify, invokes a privilege, cannot be located, or is deceased at trial. A representative example is a murder victim's text message (stating that she and the defendant were “fighting”) offered by the prosecution in *State v. Damper* to establish the defendant's motive.<sup>184</sup> *People v. Logan* provides another example.<sup>185</sup> In that case, a trial court erroneously admitted text messages sent by a deceased victim “hours before [her] shooting” which the prosecution used to demonstrate that the killing by her ex-boyfriend was premeditated.<sup>186</sup> There are unfortunately countless other examples, including \*57 many of the tweets, texts, and related communications referenced in the introduction to this Article.<sup>187</sup> In fact, the proposed eSRP exception resonates with a prominent commentator's proposal that state legislators enact the original SRP exception to counteract recently stiffened Confrontation Clause restrictions on the admission of hearsay statements by victims of violent crime.<sup>188</sup>

The third important category of admissible eSRPs consists of communications of uncooperative witnesses. When witnesses refuse to testify, invoke a privilege, or cannot be brought to trial, their candid statements on social media and in email and text messages could fill the evidentiary void. One can readily imagine criminal defendants' friends and associates, as well as uninvolved bystanders, unwittingly generating an electronic archive of statements regarding later-litigated events.<sup>189</sup> A recent \*58 Nevada battery trial illustrates a typical scenario. In *Funches v. State*, the trial court (erroneously) admitted testimony

regarding a text message sent to the defendant's brother informing the brother that the defendant and two other people had "jumped" the victim.<sup>190</sup> In another example, a student texted his mother after a 2010 school shooting that "there was a boy who had his hand in his pocket, and when he pulled it out he shot this other boy in the head in the ninth-grade hall."<sup>191</sup> These types of text messages, while likely inadmissible under current hearsay rules, would fit under the eSRP exception, even if the sender of the message refused to testify, invoked a privilege, or could not be located at trial. The rule will also aid criminal defendants with claims of innocence grounded in the guilt of a third party. If a defendant claims that another person committed the charged crime, or could provide exculpatory testimony, the third party's relevant electronic utterances can be admitted as eSRPs even if the third party raises (as is common in such circumstances) a Fifth Amendment privilege or is otherwise unavailable to testify.<sup>192</sup>

**\*59** Finally, since many of the examples noted above arise in criminal cases, it is worth emphasizing that the admission of eSRPs is fully consistent with the Confrontation Clause, a constitutional provision whose mandate to exclude certain unfronted hearsay trumps the hearsay exceptions.<sup>193</sup> The Supreme Court recently revised its Confrontation Clause jurisprudence so that the Clause applies only to the admission of "testimonial" hearsay.<sup>194</sup> Testimonial hearsay, the Court explains, consists of statements "procured with a primary purpose of creating an out-of-court substitute for trial testimony."<sup>195</sup> By definition, eSRPs cannot be procured or uttered "in contemplation of litigation."<sup>196</sup> Consequently, they will always be "nontestimonial" and admissible under the Confrontation Clause even if offered by the prosecution in a criminal case.

The inapplicability of the Confrontation Clause to eSRPs is particularly salient because resistance to liberalization of the hearsay rule is sometimes justified on the ground that easing hearsay restrictions will create a chasm between civil and criminal evidence rules.<sup>197</sup> The chasm forms, in theory, because the Sixth Amendment guarantee of confrontation in "all criminal prosecutions"<sup>198</sup> counteracts any loosening of the hearsay prohibition in criminal, but not civil, trials.<sup>199</sup> These concerns are absent with respect to the eSRP exception due to the above-described confluence of the requirements of the proposed exception with the Supreme Court's Confrontation Clause jurisprudence. **\*60** <sup>200</sup> Consequently, the proposal should please both evidence realists and purists; eSRPs will be fully admissible even in criminal prosecutions, and the evidence rules will continue to apply with substantial uniformity in civil and criminal litigation.

## CONCLUSION

As a result of technological innovations and changing social norms, an unparalleled wealth of recorded, out-of-court statements resides on computers and mobile electronic devices, waiting to assist the finder of fact. Often uttered to family and friends outside the shadow of litigation, and preserved in their original form, these statements could prove invaluable to juries. Unfortunately, this compelling evidence will often be inadmissible due to hearsay rules crafted in an era when electronic communication was unknown.

Since the hearsay rules are tools of our own making, the most direct response to the recent shift in communication norms is to craft a new hearsay exception tailored to the unique attributes of electronic communication. Such an exception would decrease uncertainty, discourage contortions of existing hearsay rules, and most importantly, give juries access to a cornucopia of useful information. The exception should also strive to screen out the subset of electronic evidence, such as anonymous statements and statements made in contemplation of litigation, that is most susceptible to fabrication and abuse.

The daunting task of crafting an "eHearsay" rule is considerably eased by the efforts of a previous generation of evidence scholars, who proposed the ultimately unsuccessful "Statement of Recent Perception" hearsay exception with the Federal Rules of Evidence in 1969. That exception provides a solid base upon which to build a new exception tailored to the attributes of modern electronic communication. An eHearsay exception will allow jurors to see precisely what observers of disputed events

were saying about those events while the events were fresh, and prior to the distorting (and often silencing) effects of litigation. Jurors, well aware of the electronic communications that populate their own lives, will increasingly expect access to this \*61 electronic “paper trail.” With a proper framework in place, there is no reason to keep it from them.

Footnotes

- d1 Associate Professor, William & Mary Law School. I would like to thank Ed Cheng, George Fisher, Ed Imwinkelried, Fred Lederer, Aviva Orenstein, and David Sklansky for their comments on an earlier draft of this paper. Fred Dingley and Anna Gillespie provided valuable research assistance. Thanks most of all to Catherine Zoe Garrett. Copyright © 2013 by Jeffrey Bellin.  
[Editor's Note: For further discussion of eHearsay, see Colin Miller, No Explanation Required? A Reply to Jeffrey Bellin's eHearsay, 98 Minn. L. Rev. Headnotes (forthcoming November 2013), [http:// www.minnesotalawreview.org/headnotes.](http://www.minnesotalawreview.org/headnotes.)]
- 1 See, e.g., *infra* notes 12-13 (identifying recent cases involving electronic communication evidence).
- 2 See Aaron Smith, *Americans and Text Messaging*, Pew Internet & Am. Life Project 2 (Sept. 19, 2011), [http://pewinternet.org/~media/ Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf](http://pewinternet.org/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf).
- 3 See *id.*; see also Maeve Duggan & Lee Rainie, *Cell Phone Activities 2012*, Pew Internet & Am. Life Project 5 (Nov. 25, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_CellActivities\\_11.25.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_CellActivities_11.25.pdf) (reporting survey results that show “[t]exting is nearly universal among young adults, ages 18-29” and “[t]he vast majority of cell phone owners send and receive text messages” with “the exception of mobile phone owners 65 and older”); *infra* Part I.A (discussing statistics for text messaging and social media usage).
- 4 See Joshua Briones & Ana Tagvoryan, *Social Media as Evidence* 5 (2013) (“There is ... little question that litigation will regularly involve social media data as evidence.”); Nicole D. Galli et al., *Litigation Considerations Involving Social Media*, 81 Pa. B. Ass'n Q. 59, 59 (2010) (“Litigators today ignore social media outlets at their peril: jurors, judges, witnesses, clients and opponents all use social media, and so too must the savvy litigator ....”); Scott R. Grubman & Robert H. Snyder, *Web 2.0 Crashes Through the Courthouse Door: Legal and Ethical Issues Related to the Discoverability and Admissibility of Social Networking Evidence*, 37 Rutgers Computer & Tech. L.J. 156, 203 (2011) (“[G]iven the explosion of social networking usage, an attorney may be violating their ethical duty by failing to investigate the case fully by searching for relevant online information.”); Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 Miss. C. L. Rev. 185, 192 (2012) (“Increasingly, evidentiary issues concerning the admission of social media arise in both civil and criminal cases.”).
- 5 David M. Halbfinger & Beth Kormanik, *In Digital Record, Jurors Say, They Found Reasons to Convict*, N.Y. Times, Mar. 17, 2012, at A18. In the text message, “gw” refers to the George Washington Bridge in New York City. *Id.*
- 6 Scott Goldstein, *In Final Tweets, Murdered Dallas Woman Said She Had Stalker, Received Death Threat*, Dall. Morning News Crime Blog (Aug. 21, 2012, 12:48 PM), <http://crimeblog.dallasnews.com/2012/08/in-final-tweets-murdered-dallas-woman-said-she-had-stalker-received-death-threat.html> (reporting final tweets of murdered woman that included the following: “Now Dude say He Gone KILL me. Wouldn't be so bad if he ain't tried 3 times before”).
- 7 Andy Campbell, *AT&T Worker, Sends Haunting Texts Before Alleged Murder*, Huffington Post (Sept. 26, 2012, 1:33 PM), [http://www.huffingtonpost.com/2012/09/26/kevin-mashburn-att-worker-texts-murder-bryan-middlemas\\_n\\_1916515.html](http://www.huffingtonpost.com/2012/09/26/kevin-mashburn-att-worker-texts-murder-bryan-middlemas_n_1916515.html).
- 8 Matt Smith, *Ex-SEALs, Online Gaming Maven Among Benghazi Dead*, CNN.com (Sept. 13, 2012, 8:53 PM), <http://www.cnn.com/2012/09/13/us/benghazi-victims>.
- 9 See Grubman & Snyder, *supra* note 4, at 222 (“The explosive growth of social networking has already had an impact on the legal world, and the importance of social networking evidence will only increase as a larger percentage of the population becomes active online.”).
- 10 Fed. R. Evid. 801-04.

- 11 See, e.g., Fed. R. Evid. 803-04; *Chambers v. Mississippi*, 410 U.S. 284, 298-99(1973).
- 12 See Cal. Law Revision Comm'n, Tentative Recommendation and Study Relating to Uniform Rules of Evidence: Article VIII: Hearsay Evidence 460 (1962) (“[M]uch, probably most, of what those now dead or otherwise unavailable once said or wrote cannot be considered in court, however much a litigant may need to have it considered to establish his claim or his defense.”). For examples in the present context, see *Versata Software Inc. v. Internet Brands*, No. 2:08-CV-313-WCB, 2012 WL 2595275, at \*1, \*9 (E.D. Tex. July 5, 2012) (excluding an email documenting a meeting whose “substance ... was an important issue during the trial,” while acknowledging that the analysis “may appear to have a hypertechnical flavor to it”); *Gulley v. State*, 2012 Ark. 368, at 7 (2012) (recounting trial court ruling excluding murder victim’s texts to defendant as hearsay); cf. *Witt v. Franklin Cnty. Bd. of Educ.*, No. CV-11-S-1031-NW, 2013 WL 832152, at \*1 (N.D. Ala. Feb. 28, 2013) (noting that “Facebook messages” offered by plaintiffs in employment discrimination lawsuit “are classic hearsay”). Commentators debate the real world impact of the hearsay prohibition. See, e.g., Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 504 (1992). There is evidence to support the view of most practitioners that courts take the hearsay rule seriously and routinely exclude evidence in response to its perceived dictates. *Id.* at 501, 504 (concluding based on survey of published federal court opinions that the hearsay “rule is not being abolished de facto” and reporting results of survey of 169 prosecutors that show judges take the hearsay rule seriously); Sklansky, *infra* note 78, at 13 (noting that despite a proliferation of exceptions, “the rule still can show its teeth”).
- 13 See Grubman & Snyder, *supra* note 4, at 213-17 (discussing various hearsay exceptions that might apply to social media evidence). Most commonly, electronic utterances of a party will be admissible if offered by the opposing party. See Fed. R. Evid. 801(d)(2); see also, e.g., *United States v. Harry*, No. CR10-1915-JB, 2013 WL 684646, at \*30 n.24 (D.N.M. Feb. 19, 2013) (denying motion to suppress text messages sent by defendant responding to questions from friends about what happened on night of alleged sexual assault and noting that the messages constituted statements of a party).
- 14 See Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. Pa. L. Rev. 331, 341-43 (2012) (exploring outdated assumptions of drafters of present sense impression hearsay exception).
- 15 See 28 U.S.C. § 2072 (2012) (procedure for amending rules); Fed. R. Evid. 1102 (same). See generally Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 686 (2000) (describing tenure of the Advisory Committee on the Rules of Evidence and criticizing the Committee’s relative inactivity in amending the rules). The Federal Rules of Evidence were recently revised solely to improve their style. See *United States v. Darden*, 688 F.3d 382, 385 n.2 (8th Cir. 2012).
- 16 Meeting Minutes, Federal Advisory Committee on Evidence Rules 13 (Oct. 5, 2012), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2012-10.pdf> (reporting that the members of the Committee “expressed strong support” for holding a “symposium in the [f]all of 2013 to consider the intersection of the evidence rules and emerging technologies” and citing Bellin, *supra* note 14, and Richter, *infra* note 65, for opposing views on the need for changes to federal hearsay rules); see Rice & Delker, *supra* note 15, at 686; Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* (1998), reprinted in 181 F.R.D. 18, 162-67 (1998) (describing responsibilities of the Committee).
- 17 Cf. Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Websites for the Legal Profession*, 60 S.C. L. Rev. 1057, 1074 (2009) (“In a world where hundreds of millions of people are actively using social networking web sites, ignoring this evidence places an impediment on the search for truth. States should ... be proactive in accommodating this innovative evidence outlet.”).
- 18 See *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (“The hearsay rule ... is ... grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.”); Edward J. Imwinkelried, *The Need to Resurrect the Present Sense Impression Hearsay Exception: A Relapse in Hearsay Policy*, 52 How. L.J. 319, 321-23 (2009) (chronicling hearsay dangers of “insincerity” and “misrecollection,” with the former being the primary concern of the common law and the latter an increasing focus of modern commentary); Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958 (1974) (discussing “testimonial infirmities” of hearsay: “ambiguity, insincerity, faulty perception, and erroneous memory”).

- 19 See *infra* note 41 (describing the use of mobile devices to provide real-time updates via social media outlets).
- 20 See *infra* Part I; cf. Michael Ariens, *A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer*, Eddie Morgan and Jerry Frank, 28 Ind. L. Rev. 183, 187 (1995) (recognizing that rules of evidence are traditionally “based on the premise that the trier of fact (usually a jury) was to hear evidence which allowed it to determine what really happened”); Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 Mich. St. L. Rev. 849, 849 (“Evidence rules have many functions, but one important function, and therefore target of evaluation, is making accurate judgments about the facts of cases.”); Jack B. Weinstein, *Probative Force of Hearsay*, 46 Iowa L. Rev. 331, 344-46 (1961) (summarizing scholarly criticism of hearsay rules based on their tendency to exclude evidence with significant probative value).
- 21 The quoted phrase borrows from the concept of “constitutional moments”--times when events outside the legal system set the stage for substantial changes in the law. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1022 (1984).
- 22 For criticism of the American hearsay prohibition, see *infra*, Part II. See also Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 Minn. L. Rev. 367, 373-84 (1992) (summarizing criticism of hearsay rules and separating “modern” from “post-modern” critiques). Other major legal systems “manage well” without a hearsay prohibition. Weinstein, *supra* note 20, at 347 (discussing European legal systems, arbitration, and administrative law tribunals); *id.* at 344-46 (criticizing hearsay prohibition while noting “surprising agreement” among scholars that the prohibition sweeps too broadly).
- 23 The proposal builds on my previous work, which argues at a more micro level that existing evidence doctrine is ill-tailored to the admission (or exclusion) of eHearsay. See Bellin, *supra* note 14, at 373 n.151 (raising the possibility that a “new electronic-communication hearsay exception” could address changing communication norms).
- 24 See *infra* note 102 and accompanying text (explaining rejection of proposed Rule 804(b)(2)).
- 25 Cf. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 922 (1995) (arguing in a related context that “one can simultaneously reduce both false negatives and false positives only by bringing more information into a system” and that “[o]ur current system throws out too much information”).
- 26 See, e.g., Fed. R. Evid. 403-11; *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (discussing evidentiary privileges, but emphasizing the general rule disfavoring them because “the public ... has a right to every man's evidence” (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))).
- 27 See *infra* note 65.
- 28 See Erik Qualman, *Socialnomics: How Social Media Transforms the Way We Live and Do Business*, at xxi (rev. ed. 2011) (“[W]e are in the early stages of ... [a] far-reaching revolution [that is] being driven by people and enabled by social media.”); Wesley MacNeil Oliver, *Western Union, the American Federation of Labor, Google, and the Changing Face of Privacy Advocates*, 81 Miss. L.J. 971, 986 (2012) (recognizing societal movement “from telephones to cell phones, e-mails, texts, and instant messages” and a future where “text messaging replaces cell phone calls”). A similar description of the new communication norm and its potential to create admissible evidence appears in my recent articles. Jeffrey Bellin, *Applying Crawford's Confrontation Right in a Digital Age*, 45 Tex. Tech. L. Rev. 33, 35-37 (2012); Bellin, *supra* note 14, at 350-57.
- 29 See Larry D. Rosen et al., *The Relationship Between “Textisms” and Formal and Informal Writing Among Young Adults*, 37 Comm. Res. 420, 421 (2010) (discussing the prevalence of text messaging in American society); Katy Steinmetz, *The Grid Is Winning*, Time, Aug. 27, 2012, at 41, 42 (explaining that in light of texting, phone calls are now “reserved for the most formal, familiar or time-sensitive communications”); Meghan Keane, *Texting Overtakes Voice in Mobile Phone Usage*, Wired, Sept. 29, 2008, <http://www.wired.com/business/2008/09/texting-overtak> (reporting on Nielsen survey that found that “by the end of the second quarter of [2008], an average mobile phone subscriber placed or received 204 calls, compared with sending or receiving 357 text messages”).
- 30 Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 Miss. L.J. 1309, 1314-15 (2012); Nancy Gibbs, *Your Life Is Fully Mobile*, Time Aug. 27, 2012, at 32 (“It is hard to think of any tool, any instrument, any object in history with which so many

developed so close a relationship so quickly as we have with our [mobile] phones .... A typical smart[phone] has more computing power than Apollo 11 when it landed a man on the moon.”).

- 31 Aaron Smith, *Americans and Their Cell Phones*, Pew Internet & Am. Life Project 2 (Aug. 15, 2011), <http://pewinternet.org/~media/Files/Reports/2011/Cell%20Phones%202011.pdf>; see also *United States v. Jones*, 132 S. Ct. 945, 963 (2012) (Alito, J., concurring) (citing June 2011 report that “there were more than 322 million wireless devices in use in the United States”); supra notes 28-29.
- 32 See Nenagh Kemp, *Texting Versus Txtng: Reading and Writing Text Messages, and Links with Other Linguistic Skills*, 2 *Writing Sys. Res.* 53, 63 (2010) (listing common texting abbreviations including “omw” for “on my way”); Leslie Seifert, *A ‘Linguistic Renaissance’*, *Newsday*, June 22, 2008, at A57 (reprinting a text conversation between two fourteen-year-olds commiserating about a recent test); infra notes 135-36.
- 33 Amanda Lenhart, *Teens, Smartphones and Texting*, Pew Internet & Am. Life Project 10 (Mar. 19, 2012), [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Teens\\_Smartphones\\_and\\_Texting.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Teens_Smartphones_and_Texting.pdf) (“63% of all teens say they exchange text messages every day with people in their lives.”).
- 34 Aaron Smith, *Americans and Text Messaging*, Pew Internet & Am. Life Project 2 (Sept. 19, 2011), <http://pewinternet.org/Reports/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf> [hereinafter Smith, *Americans and Text Messaging*]; cf. Ohm, supra note 30, at 1314-15 (noting that text messaging “obsoleted the short phone call and passed note,” allowing “[s]tudents [to] gossip in class; spouses [to] trade grocery lists[,] and employers (and drug lords) [to] direct underlings”).
- 35 Smith, *Americans and Text Messaging*, supra note 34, at 2.
- 36 Lee Rainie, *Two-Thirds of Young Adults and Those with Higher Income Are Smartphone Owners*, Pew Internet & Am. Life Project 2 (Sept. 11, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Smartphones\\_Sept12%209%C2010%1#2.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Smartphones_Sept12%209%C2010%1#2.pdf) (“45% of American adults own smartphones,” including 66% of those aged 18 to 29 and 59% of those aged 30 to 49); see Investor Relations, Facebook, <http://investor.fb.com/releasedetail.cfm?ReleaseID=780093> (last visited Oct. 13, 2013) (“Mobile [monthly active users] were 819 million as of June 30, 2013.”); Smith, *Americans and Text Messaging*, supra note 34, at 3; cf. Gibbs, supra note 30, at 32 (“Three-quarters of 25-to-29-year-olds sleep with their phones.”).
- 37 See infra note 43.
- 38 See Matt Ivester, *Lol ... OMG 17-18* (Serra Knight 2011) (“[T]he average Facebook user posts 90 pieces of content on the site every month.”).
- 39 NewsRoom, Facebook, <http://newsroom.fb.com/Key-Facts> (last visited Oct. 13, 2013).
- 40 See *Celebrating #Twitter7*, *Twitter Blogs* (Mar. 21, 2013, 7:42 AM), <http://blog.twitter.com/2013/03/celebrating-twitter7.html> (announcing that Twitter has “well over 200 million active users creating over 400 million Tweets each day”).
- 41 Free software applications enable broadcast (and receipt) of tweets and status updates from smartphones or other variants of the “one device.” Facebook Mobile, Facebook, <http://www.facebook.com/mobile> (last visited Oct. 13, 2013) (offering a free download of the Facebook application for the iPhone and Android mobile devices); *Wherever You Are, Twitter Brings You Closer*, Twitter, <http://twitter.com/download> (last visited Oct. 13, 2013) (showcasing the Twitter application available for download on several mobile devices); see also Virginia Heffernan, *The Medium: Being There*, *N.Y. Times Mag.*, Feb. 10, 2009, at 15 (reporting that the capability of mobile devices to access social networking sites “has made it more likely that when a pal --the Jägermeister-besotted Sean, say --writes that he’s stumbling home, he is stumbling home, right then”).
- 42 *People v. Harris*, 945 N.Y.S.2d 505, 507 (N.Y. Crim. Ct. 2012).
- 43 See Nora Young, *The Virtual Self* 24 (2012) (“[W]e increasingly engage [in] auto-reportage, a continual ticker tape registering of how and where you are, and what you’re doing.”); Kirsty Young, *Social Ties, Social Networks and the Facebook Experience*, 9 *Int’l J. Emerging Tech. & Soc’y* 20, 24-26 (2011) (exploring adult Facebook use through surveys and reporting that users view the service as a free and easy way to communicate “with large numbers of people at one time”); Amanda Lenhart et al., *Teens, Kindness and*

Cruelty on Social Network Sites, Pew Internet & Am. Life Project 22 (Nov. 9, 2011), [http://www.pewinternet.org/~media/Files/Reports/2011/PIP\\_Teens\\_Kindness\\_Cruelty\\_SNS\\_Report\\_Nov\\_2011\\_FINAL\\_110711.pdf](http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Teens_Kindness_Cruelty_SNS_Report_Nov_2011_FINAL_110711.pdf) (reporting that among teens, “chatting and instant messaging, commenting on their friends' posts, and posting their own status updates” are the most common activities on social media sites); Aaron Smith, Why Americans Use Social Media, Pew Internet & Am. Life Project 2 (Nov. 14, 2011), <http://pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media.aspx> (reporting that adults primarily use social media platforms to maintain “connections with family members and friends (both new and old)”); Murthy, *infra* note 44, at 780 (describing Facebook “status updates” as “short one- or two-line messages” that are often “trivially banal” but are “circulated as ‘news’” to “your group of ‘friends’ on the site”).

44 See Dhiraj Murthy, Twitter: Microphone for the Masses?, 33 *Media, Culture & Soc'y* 779, 781 (2011) (describing how Twitter works).

45 Seventy-eight percent of adults use the Internet, at least occasionally. Lee Rainie, The Internet as a Diversion and Destination, Pew Internet & Am. Life Project 6 (Dec. 2, 2011), <http://pewinternet.org/Reports/2011/Internet-as-diversion/Report.aspx>.

46 Qualman, *supra* note 28, at 4; see Smith, *supra* note 43, at 2.; see also Oliver, *supra* note 28, at 988 (“With Facebook and Twitter, Americans themselves have grown accustomed, not necessarily to government eavesdropping, but to broadcasting virtually every detail of their lives to anyone who cares to surf the web.”).

47 For example, while 95% of eighteen- to twenty-nine-year-olds with cell phones text, the number drops to 24% for those over sixty-four-years-old. Smith, Americans and Their Cell Phones, *supra* note 31, at 6; see Clare Wood et al., A Longitudinal Study of Children's Text Messaging and Literacy Development, 102 *Brit. J. Psychol.* 431, 431 (2011) (“Text messaging and the use of mobile phones are part of the everyday lives of young people.”); Lenhart et al., *supra* note 43, at 15 (“Internet use is nearly universal among American teens ....”).

48 See sources cited *infra* note 49. Legal scholars have reacted to these and related technological changes in other areas, such as Fourth Amendment protections. See, e.g., Symposium, The Fourth Amendment: Views of the Future, 81 *Miss. L.J.* 895 (2012) (featuring thirteen articles about how the Fourth Amendment should adapt to changes in technology).

49 See Naomi S. Baron, Always On: Language in an Online and Mobile World 4-7 (2008) (discussing scholars exploration of the implications of new communication norms); Alan Kirby, *Digimodernism* 58 (2009) (“[T]he digimodernist text is ... really new, something genuinely never before seen ....”); Paula Devine & Katrina Lloyd, Internet Use and Psychological Well-Being Among 10-Year-Old and 11-Year-Old Children, 18 *Child Care in Prac.* 5 (2012) (finding that data indicated that the use of social-networking sites and online games related to poorer psychological well-being among girls, but not boys); Gwenn S. O’Keeffe et al., The Impact of Social Media on Children, Adolescents, and Families, 127 *Pediatrics* 800 (2011) (exploring the dramatic increase in the use of social media sites by adolescents and preadolescents and discussing the implications of their use); William Lafi Youmans & Jillian C. York, Social Media and the Activist Toolkit: User Agreements, Corporate Interests, and the Information Infrastructure of Modern Social Movements, 62 *J. Comm.* 315, 316 (2012) (citations omitted) (noting that the debate surrounding the utility of social media in revolutions “pits advocates of the Internet’s emancipatory promise against ... ‘slacktivism,’ or superficial, minimal effort in support of causes”). In August 2012 *Time* magazine published “The Wireless Issue”; the centerpiece of the issue was a series of ten articles that chronicled the “10 Ways Mobile Technology Is Changing Our World.” *The Wireless Issue: 10 Ways Mobile Technology Is Changing Our World*, *Time*, Aug. 27, 2012, <http://content.time.com/time/covers/0,16641,20120827,00.html>.

50 Grubman & Snyder, *supra* note 4, at 221-22 (emphasizing “the probability that social networking evidence will become an issue in a wide variety of litigation”).

51 David Ticoll, Transparency: It's Here to Stay: Get Used to It, *Globe & Mail*, Feb. 28, 2003, at C1, available at 2003 WLNR 14073422 (quoting Sun Microsystems CEO Scott McNealy).

52 See Ohm, *supra* note 30, at 1314-15; Junichi P. Semitsu, From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance, 31 *Pace L. Rev.* 291, 338-42 (2011).

53 Ivester, *supra* note 38, at 25; see Qualman, *supra* note 28, at 2-3 (noting that unlike other types of communications whose contents will degrade over time and distance, with electronic communications, the “digital string is passed intact”); see also Paul Ohm,

Probably Probable Cause: The Diminishing Importance of Justification Standards, 94 Minn. L. Rev. 1514, 1556 (2010) (explaining that a key distinction between a “Facebook status update” and the casual utterances these status updates replace is that, unlike the stray “utterances that once floated through the air and then disappeared without a trace,” status updates are “not only...stored, but also they are accessible by a company that is not a party to the conversations”); Ohm, *supra* note 30, at 1315 (noting that text messaging “listens more and stores more than [the types of communications] it has replaced”); Get To Know Twitter: New User FAQ, Twitter, <https://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/13920-get-to-know-twitter-new-user-faq#> (last visited Oct. 13, 2013) (“We store all your Tweets. You can ... view up to 3200 of your most recent Tweets in your profile timeline.”).

54 See Seth P. Berman et al., Web 2.0: What's Evidence Between “Friends”?, 53 Bos. B.J. 5, 6 (2009) (advising litigators that they can obtain discoverable Facebook postings either from the computers of participants in the conversation or “from Facebook itself”); Ohm, *supra* note 30, at 1314-15 (explaining that communicating messages on social media and via text messaging “store[s] copies of what is said on each endpoint and on network servers in the middle, too”); Daniel de Vise, Schoolyard Face-Offs Blamed on Facebook Taunts, Wash. Post, Apr. 27, 2008, at C1 (noting that Facebook comments are “immortalized on semi-public Web pages, where they can be viewed by thousands”); Tiffany Kary, Twitter Turns Over Wall Street Protester Posts Under Seal, Bloomberg News (Sept. 14, 2012), <http://www.bloomberg.com/news/2012-09-14/twitter-turns-over-wall-street-protester-posts-under-seal.html> (explaining, in the context of the subpoena of the suspect's Twitter account, that “Twitter ... keeps as many as 3,200 posts” of its users); Jacob Leibenluft, Do Text Messages Live Forever?, Slate (May 1, 2008), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2008/05/do\\_text\\_messages\\_live\\_forever.html](http://www.slate.com/articles/news_and_politics/explainer/2008/05/do_text_messages_live_forever.html) (discussing the possibility of recovering deleted text messages, but also noting that some providers delete messages fairly rapidly); Biz Stone, Tweet Preservation, Twitter Blog (Apr. 14, 2010), <http://blog.twitter.com/2010/04/tweet-preservation.html> (announcing Twitter's agreement to “donate access to the entire archive of public Tweets to the Library of Congress for preservation and research”).

55 The message will need to be authenticated to be admissible, but can be authenticated (if necessary) through the service provider's records. See *United States v. Blackett*, No. 11-1556, 2012 WL 1925540 (3d Cir. May 29, 2012), mandamus denied, No. 13-2544, 2013 WL 4517154 (3d Cir. Aug. 27, 2013) (noting the prosecution's presentment of a text message through the custodian of records from Sprint); *Gulley v. State*, 2012 Ark. 368, at 12-15 (2012) (rejecting the challenge to the authentication of text messages introduced through testimony of a Verizon employee); *Symonette v. State*, 100 So. 3d 180, 183 (Fla. Dist. Ct. App. 2012) (rejecting the authentication challenge to the photographs of text messages saved on the defendant's phone); *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3236727, at \*3 (E.D. Mich. Aug. 7, 2012) (holding authenticity of pager messages sent by defendant and alleged co-conspirators was established through representative of SkyTel); *State v. Blake*, 974 N.E.2d 730, 741-42 (Ohio Ct. App.), appeal denied, 133 Ohio St. 3d 1490 (Nov. 28, 2012) (holding text messages were authenticated by a Cincinnati Bell representative). Attorneys will also need to navigate the lenient, but often misapplied, “best evidence” rule. See Fed. R. Evid. 1001-04.

56 E.g., *Errant Text Message Lands Suspected SM Drug Dealers in Jail*, Santa Maria Times (May 30, 2012), [http://santamariatimes.com/news/local/errant-text-message-lands-suspected-sm-drug-dealers-injail/article\\_261a7a04-aa86-11e1-88c0-001a4bcf887a.html](http://santamariatimes.com/news/local/errant-text-message-lands-suspected-sm-drug-dealers-injail/article_261a7a04-aa86-11e1-88c0-001a4bcf887a.html); Greg Leuthen, *Errant Text Message Lands Missouri Woman in Jail on Drug Charges*, KSPR News (Sept. 1, 2011), [http://articles.kspr.com/2011-09-01/jail-on-drug-charges\\_30103988](http://articles.kspr.com/2011-09-01/jail-on-drug-charges_30103988); Jamie Lynn, *Errant Text Message Leads to Arrest of a Wanted Man*, Komonews.com (Mar. 27, 2012), <http://www.komonews.com/news/local/Errant-text-message-leads-to-the-arrest-of-a-wanted-man-144534555.html>; Mary Beth Quirk, *Asking a State Trooper for Illegal Alcohol by Text Message Won't Work Out Well*, Consumerist (May 17, 2012), <http://consumerist.com/2012/05/asking-a-state-trooper-for-illegal-alcohol-by-text-message-wont-work-out-well.html>; cf. *Barnes v. Zaccari*, 669 F.3d 1295, 1299 (11th Cir. 2012) (noting that a college president “was monitoring [the] Facebook webpage” of a student activist).

57 See *Symonette*, 100 So. 3d at 183 (noting the prosecution's introduction of text messages recovered from defendant's phone); *State v. James*, 288 P.3d 504, 514-15 (Kan. Ct. App. 2012) (upholding an officer's warrantless inspection of a cell phone as a search incident to arrest and rejecting hearsay challenges to admission of text messages obtained from phone); Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27 (2008).

58 *Jose Martinez, Cop Tracked Brooklyn Gang Brower Boys by ‘Friending’ Them Online*, N.Y. Post, May 31, 2012, [http://www.nypost.com/p/news/local/brooklyn/facebook\\_em\\_gang\\_busted\\_5ZTTJeeMG2U5BJVztT4CjN](http://www.nypost.com/p/news/local/brooklyn/facebook_em_gang_busted_5ZTTJeeMG2U5BJVztT4CjN); Aman Ali, *Gang Members Arrested After Boasting of Murders on Facebook*, Reuters (Jan. 19, 2012), <http://www.reuters.com/article/2012/01/19/us-crime->

gang-socialmedia-idUSTRE80I2CI20120119 (recounting the murder arrests supported by evidence that the arrested “gang members, ages 15 to 21, bragged about the shootings on the social media sites Twitter, Facebook and YouTube”); see also Bill Archer, ‘Like’ Button Leads to Obstruction of Justice Charge, Bluefield Daily Telegraph, Sept. 14, 2012, <http://bdtonline.com/local/x2056647583/-Like-button-leads-to-obstruction-of-justice-charge/print> (chronicling how police located a fugitive through information obtained after his girlfriend “liked” the police department’s Facebook page); cf. Grubman & Snyder, *supra* note 4, at 205-06 (summarizing the developing legal restrictions on such tactics).

59 United States v. Meregildo, 883 F. Supp. 2d 523, 525-26 (S.D.N.Y. 2012) (denying motion to suppress Facebook evidence obtained by police through cooperating witness who was the defendant’s Facebook “friend”). See generally *On Lee v. United States*, 343 U.S. 747, 757-58 (1952) (holding that the “use of informers, accessories, accomplices, [and] false friends” to obtain information about suspects does not implicate the Fourth Amendment).

60 See Meregildo, 883 F. Supp. 2d at 525 (noting the issuance of a warrant for defendant’s Facebook account); Gulley, 2012 Ark. 368, at 3-4 (rejecting the challenge to the prosecutor’s obtaining of defendant’s text messages through a subpoena to Verizon and the admission of the texts through testimony of a Verizon employee); Brief of Appellant at 9, Blackett, 2012 WL 1925540 (No. 11-1556), 2011 WL 6935515, at \*9 (noting that the text message introduced against defendant was “introduced into evidence by the custodian of records for the service company--Sprint”); Briones & Tagvoryan, *supra* note 4, at 35-38; Semitsu, *supra* note 52, at 360; Jeffrey Bellin, Finding Evidence on Facebook, EvidenceProf Blog (Nov. 1, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/11/finding-evidence-on-facebook.html>.

61 See *People v. Harris*, 945 N.Y.S.2d 505, 513 (N.Y. Crim. Ct. 2012); Wendy Ruderman, Court Prompts Twitter to Give Data to Police in Threat Case, N.Y. Times, Aug. 8, 2012, at A14 (reporting on Twitter’s compliance with court order to provide subscriber information); Joseph Ax, Twitter Surrenders Occupy Protester’s Tweets, Reuters (Sept. 14, 2012), <http://www.reuters.com/article/2012/09/14/twitter-occupy-idUSL1E8KE6QN20120914>.

62 See *Fisher v. United States*, 425 U.S. 391, 401 (1976) (rejecting the argument that the Fifth Amendment “serve[s] as a general protector of privacy”); *United States v. Miller*, 425 U.S. 435, 437-38 (1976) (holding that the enforcement of a government subpoena directed to the depositor’s records did not violate the depositor’s Fourth Amendment rights); *United States v. Nixon*, 418 U.S. 683, 709-10 (1974) (citations omitted) (internal quotation marks omitted) (endorsing “ancient” maxim that where no privilege applies, “the public ... has a right to every man’s evidence”); *Juror No. One v. Superior Court*, 142 Cal. Rptr. 3d 151, 161-62 (Ct. App. 2012) (upholding courts’s authority to subpoena juror’s Facebook posts); Grubman & Snyder, *supra* note 4, at 189-97 (summarizing the application of the discovery rules to social media evidence).

63 Information for Law Enforcement Authorities, Facebook, <https://www.facebook.com/safety/groups/law/guidelines> (last visited Oct. 17, 2013); see also Jeff John Roberts, A New U.S. Law-Enforcement Tool: Facebook Searches, Reuters (July 12, 2011), <http://www.reuters.com/article/2011/07/12/us-facebook-idUSTRE76B49420110712> (reporting that “U.S. law-enforcement agencies are increasingly obtaining warrants to search Facebook, often gaining detailed access to users’ accounts without their knowledge”); Law Enforcement & Third-Party Matters: How Does Facebook Work with Law Enforcement?, Facebook, <https://www.facebook.com/help/473784375984502> (last visited Oct. 13, 2013) (“We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law.”); Transparency Report, Twitter, <https://transparency.twitter.com/information-requests/2012/jul-dec> (last visited Oct. 13, 2013) (reporting the receipt of 815 domestic law enforcement requests for user information in last six months of 2012, and compliance with 69% of the requests).

64 Massimo Calabresi, The Phone Knows All, Time, Aug. 27, 2012, at 30-31 (quoting chief of detectives in Rockland County, New York saying that “[t] here is a mobile device connected to every crime scene” and reporting the belief of “industry experts” that “the next surge in [law enforcement] surveillance is text messaging”); see John P. Mello Jr., DEA Can’t Get Around iMessage Encryption Roadblocks, MacNewsWorld (Apr. 5, 2013), <http://www.macnewsworld.com/story/77717.html> (describing the complaints of the Drug Enforcement Agency regarding its inability, despite court order, to obtain text messages sent through a specific texting application).

65 See Susan W. Brenner, Communications, Technology, and Present Sense Impressions, 160 U. Pa. L. Rev. PENnumbra 255, 261 (2011) (asserting that “we will have little difficulty adapting the [present sense impression] exception so that it can accommodate our

use of social networking and whatever communication technologies evolve in the future”); Orenstein, *supra* note 4, at 221 (arguing that the “byzantine hearsay structure works well” in adapting to social media communication, with the possible exception of the present sense impression exception); Liesa L. Richter, Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process, 61 Am. U. L. Rev. 1657, 1661 (2012) (contending that the “[e]xisting hearsay doctrine was designed to deal with human communication ... in whatever form it may take” and the “creation and preservation of hearsay in electronic form, therefore, provides no basis for charging in to refashion time-honored hearsay principles”); Megan Uncel, Comment, “Facebook Is Now Friends with the Court”: Current Federal Rules and Social Media Evidence, 52 Jurimetrics J. 43, 56 (2011) (arguing that “social media evidence can be presented within the current Federal Rules of Evidence and new rules are unnecessary”); Randy Wilson, Admissibility of Web-Based Data, 52 The Advocate 31, 31 (2010) (“At first blush, the decades-old evidence rules would seem ill-suited for the task of establishing admissibility of electronic evidence. Yet, these rules have proven to be surprisingly flexible ....”).

66 See *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F.2d 934, 937 (2d Cir. 1927) (Learned Hand, J.) (decrying as “especially disastrous” the “sluggishness of the law” in creating a business records hearsay exception in response to the changing “routine of modern affairs”); Unif. R. Evid. 1 (1999), (recognizing that “[s]ocietal changes, advances in ... science and improvements in information technology have exposed many problematic evidentiary situations routinely faced by lawyers and judges” and an “increasing” trend where existing “rules fail to fit into a new environment, or alternatively, if they fit, they produce measurable inequity”); Judson Falknor, The Hearsay Rule and Its Exceptions, 2 UCLA L. Rev. 43, 44 (1954) (quoting Professor Charles T. McCormick’s view that as exceptions to the hearsay rule “seemed most needed in the first half of the eighteen hundreds” including an exception for “book entries,” they “crystallized into exceptions to the hearsay rule”).

67 See, e.g., Bellin, *supra* note 14, at 333 (explaining how assumptions of an oral communication norm drove adoption of the present sense impression exception); cf. Orenstein, *supra* note 4, at 198 (highlighting the present sense impression exception as one example where rules might require change).

68 See Fed. R. Evid. 803(2) (recognizing a hearsay exception for “excited utterances”); see also Campbell, *supra* note 7 (chronicling text messages sent by assault victim, who subsequently died of injuries, that included the text: “I NEED[] YOU TO CALL ME AN AMBULANCE[]; I HAVE BEEN ATTACKED” and recounted details of the assault); Gregory Connolly, York Call Center Among First in Nation to Offer Text-to-911 Service, Williamsburg Yorktown Daily, Dec. 11, 2012, <http://wydaily.com/2012/12/11/york-call-center-among-first-in-nation-to-offer-text-to-911-service> (reporting adoption of technology that permits people to text 911 for emergency response).

69 Fed. R. Evid. 803(1) (recognizing a hearsay exception for “present sense impressions”); see e.g., Bellin, *supra* note 14.

70 Fed. R. Evid. 803(4) (recognizing a hearsay exception for certain “statements made for medical diagnosis”); *id.* at 803(3) (hearsay exception for certain statements of emotional, sensory, or physical conditions).

71 Fed. R. Evid. 803(6)(B) (recognizing a hearsay exception for records “kept in the course of a regularly conducted activity of a business”); see, e.g., *Abdelrahim v. Guardsmark*, No. B207270, 2009 WL 3823283, at \*3 (Cal. Ct. App. 2009) (rejecting hearsay challenge to email detailing alleged cause for termination on the ground that email fell within the business records exception because the author regularly wrote emails as part of her job).

72 Fed. R. Evid. 801(d)(2)(B) (recognizing a hearsay exception for statements against an opposing party where that party adopted the statement); see, e.g., Molly D. McPartland, An Analysis of Facebook “Likes” and Other Nonverbal Internet Communication Under the Federal Rules of Evidence, Iowa L. Rev. (forthcoming November 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2256936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256936) (supporting the view that Facebook likes should be considered adoptive admissions and excluded from hearsay objections); Allison L. Pannozzo, Uploading Guilt: Adding a Virtual Records Exception to the Federal Rules of Evidence, 44 Conn. L. Rev. 1695, 1706 (2012) (collecting cases discussing whether forwarding email constitutes an adoptive admission and noting analogy to Facebook “liking”).

73 See *Missouri v. Frye*, 132 S. Ct. 1399, 1402, 1407 (2012) (citing Department of Justice calculations for the proposition that “[n]inety-seven percent of federal convictions and 94 percent of state convictions are the result of guilty pleas” and echoing commentators’ contention that “plea bargaining is ... not some adjunct to the criminal justice system; it is the criminal justice system”); Thomas

H. Cohen & Lynn Langton, *Civil Bench and Jury Trials in State Courts*, 2005, Bureau of Just. Stat. 1 (Apr. 9, 2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554> (reporting survey result of state courts that “trials ... accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts”).

74 See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2465 (2004) (discussing literature that largely justifies a system of plea bargains and settlements on the basis of a “shadow-of-trial” model).

75 See, e.g., *United States v. Blackett*, 481 F. App'x 741, 742 (3d Cir. 2012) (deeming apparently erroneous admission of text message “harmless”); *People v. Logan*, No. 303269, 2012 WL 3194222, at \*6 (Mich. App. 2012) (ruling that the “text messages [admitted at trial] were hearsay to which no exception applied,” but deeming their admission harmless error); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1 (Nev. 2012) (agreeing that a text message implicating defendant should not have been admitted, but declaring it “harmless” as defendant admitted the truth of the information on his own); cases cited *infra* note 177; cf. *Commonwealth v. Koch*, 615 Pa. 612, 44 A.3d 1147 (2012), rev'g 39 A.3d 996, 1002, 1006 (Pa. Super. Ct. 2011) (holding that trial court erred in admitting text messages sent from the defendant's phone and granting a new trial); Jonathan L. Moore, *Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation*, 50 *Jurimetrics J.* 147, 176 (2010) (“[T]he flexibility of the rules to adapt and address the challenges of [electronically stored information] does not necessarily mean that amendments are not needed.... [S]ome of the changes wrought by technology have no common law analog, making it difficult for judges to resolve them.”).

76 See Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 *Duke L. & Tech. Rev.* 1, 8-17 (2012) (recounting examples of social media use during trials); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, *N.Y. Times*, Mar. 17, 2009, [http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&_r=0) (“The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country....”); Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, *Reuters* (Dec 8, 2010), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208> (reporting that despite warnings, jury members continue to search for case information online through search engines and social media, and there has even been at least one instance of a jury member contacting a defendant through MySpace); cf. *Juror No. One v. Superior Court*, 142 *Cal. Rptr. 3d* 151, 151 (Ct. App. 2012) (proceeding for juror misconduct after juror posted Facebook status updates regarding day-to-day events of trial). In an informal survey, jurors self-reported some temptation to do Internet research during trial, but claimed not to have succumbed. Eve & Zuckerman, *supra*, at 21-23.

77 Another obstacle is authentication, but authentication is likely to fade as a unique difficulty for admitting electronic communication as judges and litigants become familiar with the technology involved. See *Fed. R. Evid.* 901(a); Orenstein, *supra* note 4, at 222 (commenting that like written documents, electronic documents can be forged, but there are likewise appropriate verification techniques); see also *supra* note 55.

78 See, e.g., *Fed. R. Evid.* 801-04; *Chambers v. Mississippi*, 410 U.S. 284, 298-99(1973) (recognizing that “[t]he hearsay rule ... has long been recognized and respected by virtually every State”); 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1365, at 28 (Chadbourn ed. 1974) (describing hearsay prohibition as the “most characteristic rule of the Anglo-American law of evidence-- a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system”); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 *S. Ct. Rev.* 1, 28 (characterizing modern hearsay framework as “a strict rule of evidentiary exclusion, accompanied by a long and confusing set of exceptions”).

79 See *California v. Green*, 399 U.S. 149, 184 (1970) (Harlan J., concurring) (noting “disagreement among scholars over the value of excluding hearsay and the trend toward liberalization of the exceptions”); Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *Fordham L. Rev.* 1301, 1308 (2011) (lampooning “the Swiss cheese-like rule against hearsay with its thirty or so exceptions”); Falknor, *supra* note 66, at 43-45 (summarizing views of Wigmore, McCormick, and Professor Edmund M. Morgan to support changes to hearsay doctrine); Michael S. Pardo, *Testimony*, 82 *Tul. L. Rev.* 119, 148 (2007) (criticizing “the Byzantine structure of the [[hearsay] rules” and questioning whether “the rule contributes to or detracts from just results”); Sklansky, *supra* note 78, at 20 (describing federal rules' prohibition of hearsay as “a categorical rule riddled with a labyrinthine series of exceptions”).

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- 80 See *Tome v. United States*, 513 U.S. 150, 160 (1995) (acknowledging the influence of the “academic community” in shaping the Federal Rules of Evidence); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. Rev. 949, 950-51 (2006) (discussing the “distinguished history” of evidence scholarship in shaping evidence law).
- 81 See *infra* Part II.A.
- 82 Fed. R. Evid. 801-02.
- 83 See, e.g. *id.* at 801(c); Va. R. Evid. 801(c); Cal. Evid. Code § 1200.
- 84 Sklansky, *supra* note 78, at 11.
- 85 John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 Colum. L. Rev. 1168, 1172, 1187 (1996) (noting there are “examples of hearsay appearing in the Old Bailey Sessions Papers from 1678 into the 1730s”).
- 86 5 John Henry Wigmore, *Evidence in Trials at Common Law* §1364 at 16 (Chadbourn ed. 1974); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. Rev. 1865, 1891-92 (2012) (discussing uncertainty regarding hearsay prohibition in English and early American courts); Langbein, *supra* note 85, at 1172 (contending, contrary to Wigmore, that the hearsay rule “hardened only in the last decades of the eighteenth century”); see also Mirjan Damas#ka, *Of Hearsay and Its Analogues*, 76 Minn. L. Rev. 425, 434-39 (1992) (discussing analogues to hearsay prohibition in European law).
- 87 Model Code Evid. 218 (1942) (noting that “the hearsay rule is the child of the adversary system”); Mueller, *supra* note 22, at 378 (explaining that “[t]he central premise of the hearsay doctrine is that live testimony is preferable to remote statements”).
- 88 See *Chambers v. Mississippi*, 410 U.S. 284, 298(1973) (noting as one of the reasons to exclude hearsay, that “[o]ut-of-court statements ... are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements”); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (professing the value of a live witness so the jury “may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief”).
- 89 *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 John Henry Wigmore, *Evidence* §1367 (3d ed. 1940)); Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573, 576 (1947) (asserting that “the major safeguard of the veracity of testimony and its main factor of superiority to out-of-court statements is its subjection to the test of cross-examination”).
- 90 See *Green*, 399 U.S. at 158.
- 91 See Model Code Evid., at III, XII (1942) (listing members of ALI “Committee on Evidence,” including Learned Hand, Mason Ladd, Charles McCormick, and the reporter, Edmund Morgan, and noting that Wigmore served as “Chief Consultant”).
- 92 *Id.* at III, Comment to Rule 503, at 232; *id.* at 47 (“[I]t is in the chapter on Hearsay that the Code departs most widely from the common law.”).
- 93 *Id.* at 223-24 (1942); cf. Edmund M. Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1, 19 (1937) (scorning the exceptions and inconsistencies of the hearsay rule).
- 94 Model Code Evid. 503 (1942).
- 95 *Id.* at 231-32; Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 52-53 (1987) (describing the Model Code's approach to hearsay); see also Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L.J. 477, 480 (1998). With respect to the admission of hearsay by an unavailable declarant, the Model Code mirrored older views, including those of Jeremy Bentham. See James H. Chadborn, *Bentham and the Hearsay Rule--A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 Harv. L. Rev. 932, 945 (1962).
- 96 Park, *supra* note 95, at 53; see Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 Wayne L. Rev. 204, 217 (1960); Sklansky, *supra* note 78, at 20 (2009) (“The hearsay provisions of the Model Code of

Evidence helped ensure that it was never adopted anywhere.”) The Code's sometimes impenetrable syntax also deserves some of the blame. See, e.g., Model Code Evid. 306(3), at 513; Charles T. McCormick, Some High Lights of the Uniform Evidence Rules, 33 Tex. L. Rev. 559, 559-60 (1955) (attributing rejection of Model Code to perception that it was “over-radical in its reforms, especially in opening the door too far for the admission of hearsay” and that it was “over-academic in its form of expression”).

97 Chadbourn, *supra* note 95, at 945.

98 See *id.* at 946 (recognizing Uniform Rule 63(4)(c) as “a substitute” for the Benthamite rejection of the hearsay prohibition proposed by the Model Rules); see also 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5005 (2d ed. 2005) (opining darkly that “[t]he flowers had hardly wilted on the grave of the Model Code when the A.B.A. began searching for a new bride to wear the weeds of reform”); Quick, *supra* note 96, 214-15 (contrasting the Uniform Rules' moderate attempt to alter existing hearsay doctrine with the Model Code's effort to “knock down all barriers to the admission of ... hearsay”).

99 Unif. R. Evid. 161-62 (noting that the drafters of the Uniform Rules, including Mason Ladd and Charles McCormick, used the Model Code “as a basis from which to work” and consulted with Professor Morgan and, through him, the ALI Committee that drafted the Model Code).

100 *Id.* at 161. The drafters of the Uniform Rules explicitly distanced themselves from the Model Code. *Id.* at 198 cmt. (explaining that their approach was a “drastic variation from the A.L.I. Model Code”); cf. Fed. R. Evid. art. VIII advisory committee's introductory note (noting that the “draftsmen of the Uniform Rules chose a ... more conventional position” than the drafters of the Model Code with respect to hearsay); Mason Ladd, *Witnesses*, 10 Rutgers L. Rev. 523, 523 (1956). McCormick characterized the Uniform Rules' approach as a “strategic retreat.” Charles T. McCormick, *Hearsay*, 10 Rutgers L. Rev. 620, 624 (1956).

101 Unif. R. Evid. 63(4)(c), at 199-200.

102 Unif. R. Evid. 63(4), at 200 cmt.; McCormick, *supra* note 100, at 624 (describing the rule as “an attempt to answer a need which many judges and writers have expressed for a wider use of declarations of persons deceased or otherwise unavailable”); M.C. Slough, *Spontaneous Statements and State of Mind*, 46 Iowa L. Rev. 224, 253-54 (1960) (supporting 63(4)(c)).

103 See Unif. R. Evid. 63(1), at 198 (removing from the hearsay prohibition any “statement previously made by a person who is present ... and available for cross examination”).

104 See Cal. Law Revision Comm'n, *supra* note 12, at 459 (describing the rule as “clearly a new exception of broad scope and of large importance” and endorsing its adoption in California; the Commission rejected the suggestion of its consultant); Quick, *supra* note 96, at 215 (forecasting that among the innovations in the Uniform Rules, Rule 63(4)(c), “the most far reaching exception,” will “be under especially heavy attack”).

105 See 21 Wright & Graham, *supra* note 98, § 5005 (explaining that Kansas enacted the Uniform Rules “pretty much as is,” New Jersey adopted them with significant modifications, and Utah adopted them “only to turn around in 1983 and adopt a new set of rules based on the Federal Rules of Evidence”); Michael S. Ariens, *The Law of Evidence and the Idea of Progress*, 25 Loy. L.A. L. Rev. 853, 863 & n.47 (1992) (explaining that “the Uniform Rules had only slightly more impact” than the Model Code since “only four jurisdictions adopted [versions of] the Uniform Rules”: Kansas, New Jersey, Utah, and the Virgin Islands). The Virgin Islands followed Utah in switching to the Federal Rules of Evidence, essentially leaving Kansas as the only state with the Uniform Rules of Evidence. See *Thomas v. People*, No. 2010-0087, 2012 WL 1522263, at \*4 n.11 (V.I. May 2, 2012) (noting that in 2010, the Virgin Islands “repealed the local URE and replaced it with the Federal Rules of Evidence”); *State v. Simpson*, No. 105,182, 2011 WL 4563106, at \*6 (Kan. App. Sept 30, 2011), review granted (Mar. 9, 2012) (“Our Kansas Rules of Evidence came from the 1953 Uniform Rules of Evidence ....”); McCormick, *supra* note 96, at 560 (“[T]rial judge, Spencer A. Gard of Kansas, was ... chairman.”).

106 See *United States v. Matlock*, 415 U.S. 164, 172 n.8 (1974) (referencing new rules); Edward J. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception*, 69 S. Cal. L. Rev. 1427, 1445 (1996) (noting “the passage of the Federal Rules of Evidence and their subsequent adoption in most states”).

- 107 Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 377-78 (1969). As with the other exceptions in Rule 804, proposed Rule 804(b)(2) only applied if the declarant was “unavailable.” *Id.* After the proposed rule was benched, its number was given to the exception for dying declarations. See Fed. R. Evid. 804(b)(2).
- 108 H.R. Rep. No. 93-650, at 6 (1973) (explaining rejection of proposed Rule 804(b)(2)).
- 109 *Id.*
- 110 Hawaii and Wisconsin adopted Rule 804(b)(2) verbatim. See Haw. R. Evid. § 804(b)(5) (2012); Wisc. Stat. § 908.045(2) (2012). Wyoming adopted the exception for civil, but not criminal, cases. See Wyo. R. Evid. § 804(b)(5) (2012). Kansas continued to apply a precursor to Rule 804(b)(2) based on Uniform Rule 63(4)(c). See Kan. Stat. Ann. § 60-460(d)(3) (2012). New Mexico adopted the exception, but later abandoned it. See *State v. Ross*, 919 P.2d 1080, 1086 (N.M. 1996).
- 111 Federal Rule of Evidence 807 provides a “residual exception” for hearsay that possesses “guarantees of trustworthiness” equivalent to those in the other enumerated exceptions. Fed. R. Evid. 807; cf. *Dallas Cnty. v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (applying analogous residual exception prior to Federal Rules); 6 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence*, at T-214-19 (Joseph M. McLaughlin ed., 2d ed. 2011) (identifying twenty-six states with statutory evidence codes that follow the federal model with respect to a residual exception and fourteen states that do not). Relying on the rule’s legislative history, courts emphasize that the residual exception should “be used only rarely, in truly exceptional cases.” *United States v. El-Mezain* 664 F.3d 467, 498 (5th Cir. 2011) (internal quotation marks omitted); see also *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907-08 (2d Cir. 1991); Myrna S. Raeder, A Response to Professor Swift, 76 Minn. L. Rev. 507, 514 & n.23 (1992) (reporting results of survey of reported federal cases that found about fourteen cases a year over a fifteen-year period where the residual exception was successfully invoked, including cases where it was relied on as an alternative ground for admission, a rate Professor Raeder found “clearly high given that the exception was intended to cover the ‘exceptional’ case”). Even if courts more broadly embraced the exception, its vague and amorphous nature renders it unsuitable to regulate eHearsay. See *id.* at 516-17 (decrying routine reliance on the residual exception as permitting “total erosion of the hearsay rule by judicial discretion” and resulting in “the worst of all worlds for litigators who must decide which cases to try by evaluating the potentially admissible evidence”).
- 112 See *Chambers v. Mississippi*, 410 U.S. 284, 298-99(1973); Sklansky, *supra* note 78, at 28; Mueller, *supra* note 22, at 369 (explaining that the “modernists” who “proposed simplified rules aimed at admitting more hearsay ... did not prevail, as can be seen in the adoption and spread of the Federal Rules, which retain the exclusionary principle and detailed categorical exceptions”); Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969) (explaining that the federal hearsay exceptions constitute a “synthesis” of “the many exceptions to the hearsay rule developed by the common law”).
- 113 Cf. McCormick, *supra* note 100, at 631 (expressing hope that “some decades hence,” a broader reform to the hearsay prohibition would emerge that allows hearsay to be introduced, and permits jurors the “responsibility for valuing such evidence only for what it is worth”).
- 114 See *infra* Part III.F.
- 115 “eSRPs” is used here as a convenient shorthand for statements that meet the requirements of the proposed eSRP hearsay exception.
- 116 See *infra* Part III.A.
- 117 See *supra* Part II.B (discussing Model Code’s approach to hearsay generally).
- 118 While Uniform Rule 63(4)(c) required the declarant to be “unavailable,” another Uniform Rule permitted the introduction, over a hearsay objection, of all prior statements of a testifying witness. Unif. R. Evid. 63(1). The Model Evidence Code also removed prior statements of testifying witnesses from the hearsay prohibition. See Model Code Evid. 503(b). The original SRP exception, however, does not apply unless the declarant is unavailable. See Preliminary Draft of Proposed Rules of Evidence for United States District

- Courts and Magistrates, 46 F.R.D. 161, 377-78 (1969) (providing proposed Fed. R. Evid. 804(b)(2) exception for a “statement of recent perception”).
- 119 Cf. Lisa Kern Griffin, *The Content of Confrontation*, 7 Duke J. Const. L. & Pub. Pol’y 51, 69 (2011) (emphasizing that “verbatim recordings” are generally more useful to jurors than oral renditions of disputed statements); McCormick, *supra* note 89, at 588 (noting the “hazard of error or falsity in reporting oral words” and that this hazard “is very much lessened in the case of previous written statements”).
- 120 See James Bradley Thayer, *Legal Essays* 303-04 n.1 (The Boston Book Co. 1908) (reprinting Thayer’s letter to Suffolk County Bar Association advocating above-described hearsay exception that would become enacted, after modification, in 1898); Unif. R. Evid. 63(4)(c) cmt. (citing 1898 Massachusetts statute as general precursor to the rule); Mass. Ann. Laws ch. 233, § 65 (2009); *infra* note 149.
- 121 Park, *supra* note 95, at 71 (noting that “the existence of hearsay exceptions that manifest a preference for recorded statements suggests concern about the danger of misreport and fabrication by the in-court witness”); McCormick, *supra* note 89, at 588 (noting that a generally overlooked hearsay danger is the “hazard of error or falsity in the reporting of oral words”).
- 122 Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L.J. 477, 504-05, 531 (1998) (emphasizing as a factor in assessing hearsay evidence: “whether the statement was recorded or otherwise verified as actually made by the declarant such that the factfinder need not rely solely on the credibility of the in-court witness”); Park, *supra* note 95, at 57, 71-72 (recognizing that “[t]he danger that the in-court witness will distort or fabricate a statement is increased by the difficulty of detection” and suggesting that hearsay exceptions that “apply only to documentary or other recorded hearsay” are supported, in part, on the ground that it “is harder to forge a document than to fabricate an oral statement”); cf. Cal. Evid. Code § 1370(5) (2013) (permitting statement explaining the receipt of an injury if, *inter alia*, “[t]he statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official”).
- 123 Written statements would also qualify as “recorded” and, as detailed below, are potentially admissible under the exception if an unavailable (or testifying) declarant communicated in writing about a relevant, recently perceived event. See *infra* note 124.
- 124 See Fed. R. Evid. 805 (requiring each part of a “combined statement” to conform to an exception to the hearsay rule). Similarly, if a police officer writes down a witness’s excited utterance, the officer’s written report is not admissible as an excited utterance because the officer’s written statement describing the utterance constitutes a second layer of hearsay. See *id.* If, on the other hand, the officer recorded a witness’s oral statement with a digital recorder, the statement is “recorded,” satisfying that aspect of the eSRP exception. The statement would still not fall within the eSRP exception, however, due to the exclusion of statements made to investigators. See *infra* Part III.D.
- 125 See Fed. R. Evid. 803(6) (providing exception for “[a] record of” a business); *United States v. Wells*, 262 F.3d 455, 461 (5th Cir. 2001) (holding that admission of oral testimony about allegedly lost business records was error, and noting that “[t]he government has not cited a case in which testimony was allowed to suffice as secondary evidence of a business record under Rule 803(6)"); *State v. Johnson*, No. A08-1138, 2009 WL 2150671, \*4 (Minn. Ct. App. July 21, 2009) (“[A] witness may not testify as to the content of business records that are not admitted into evidence.”); 5 Clifford S. Fishman, *Jones on Evidence* § 33:18 (7th ed. 1992) (explaining that, under the business records exception, “the record itself must be introduced” and thus “[i]t would not suffice for a witness to testify that he has examined a company’s record and then relate from the witness stand what the record said”).
- 126 See, e.g., *State v. Espiritu*, 176 P.3d 885, 891 (Haw. 2008) (rejecting challenge to testimony about deleted text messages allegedly received from defendant, which were admissible as statements of a party, stating that “if evidence is hearsay admissible under an exception to the rule against hearsay, then testimony about such evidence is admissible”); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1 (Nev. Feb. 9, 2012) (reviewing challenge to witness’s “testimony that he received a text message from another witness stating that [the defendant] and two other people had ‘jumped’ the victim”). The “Best Evidence” rule will sometimes require the same result, although its strictures are lenient. Fed. R. Evid. 1002, 1004 (requiring an original to prove the content of any writing, but providing an exception where, absent bad faith, the original or a duplicate cannot be obtained).

- 127 The definition of hearsay in the Federal Rules of Evidence requires that a qualifying utterance be “intended ... as an assertion.” Fed. R. Evid. 801(a). Thus, there is an argument that statements not intended to communicate anything to another person are not hearsay at all. See Edmund M. Morgan, Hearsay and Non-Hearsay, 48 Harv. L. Rev. 1138, 1139 (1935).
- 128 See Herbert Paul Grice, Logic and Conversation, in *Studies in the Way of Words* 22, 27 (1989) (theorizing as general assumption of participants in a conversation that neither will “say what you believe to be false”); H. Richard Uviller, Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale, 42 Duke L.J. 776, 792 (1993) (“[P]eople generally tell mostly the truth to most people most of the time ...”); cf. Charles F. Bond & Bella M. DePaulo, Accuracy of Deception Judgments, 10 Personality & Soc. Psychol. Rev. 214, 229, 231 (2006) (describing empirical support for the concept that factfinders can more easily discern the truth of a statement if the statement is uttered “in the midst of social interaction”); Imwinkelried, *supra* note 18, at 321 (“In ‘everyday life’ when we receive a letter, we typically take it at face value and presume it to be genuine.”). But see Judson F. Falknor, The “Hearsay Rule” as a “See-Do” Rule: Evidence of Conduct, 33 Rocky Mtn. L. Rev. 133, 136 (1961) (noting that non-assertive conduct is unlikely to suffer from hearsay dangers because people rarely lie to themselves).
- 129 See 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:70, at 599 (3d ed. 2007) (discussing similar problem in context of statements admitted under Rule 803(3)).
- 130 See *Fischer v. State*, 252 S.W.3d 375, 376(Tex. Crim. App. 2008) (deeming as inadmissible hearsay a police officer’s “factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape”); *infra* Part III.D.
- 131 Fed. R. Evid. 804(b)(2) (proposed 1979); see also Unif. R. Evid. 63(4). The limitation also excludes opinions and speculation, but such statements (whether in or out-of-court) are generally excluded by other rules. See Fed. R. Evid. 602 (requiring testimony to be based upon “personal knowledge”); Fed. R. Evid. 701 (providing limitations for testimony that is based upon “opinion”).
- 132 Predictions about future events, general speculation, and opinions (also excluded by this requirement) are already barred by other rules. See Fed. R. Evid. 602 (requiring testimony to be based on “personal knowledge”); Fed. R. Evid. 803 advisory committee’s note (explaining that a hearsay declarant must, like a trial witness, be speaking from personal knowledge).
- 133 See Bellin, *supra* note 14, at 340 (describing similar rationale for hearsay exception for present sense impression exception); Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 193 (1948) (suggesting that “the opportunity for reconsideration and for baneful influence by others” is “more likely to color ... later testimony than [[a] prior [out-of-court] statement[.]”); see also Cal. Law Revision Comm’n, *supra* note 12, at 313 (Comment to Rule 63(1)) (stating that in “many cases” a “prior inconsistent statement is more likely to be true than the testimony of the witness at trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation”).
- 134 Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Hum. Behav. 1, 13 (2009) (“[M]ore memory is lost in the first hour than in the second hour, more in the first day than the second day, more in the first week than in the second week, and so on.”); McCormick, *supra* note 89, at 577 (discussing scientific findings on memory degradation at various intervals, which support intuition that “[t]he fresher the memory, the fuller and more accurate it is”).
- 135 See generally About, Twitter, <https://twitter.com/about> (last visited Oct. 13, 2013) (describing Twitter as “a real-time information network” where users can get “up-to-the-second information” regarding “the latest stories, ideas, opinions and news about what you find interesting”); About, Facebook, <http://www.facebook.com/facebook/info> (last visited Oct. 13, 2013) (explaining that “[m]illions of people use Facebook every day to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet”).
- 136 Amanda Lenhart et al., Teens and Mobile Phones, Pew Internet & Am. Life Project 35-37 (Apr. 20, 2010), <http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones.aspx> (reporting that when asked why they text, teens’ most common responses were “to just say hello and chat,” “to report where you are or check where someone else is,” and “to coordinate where you are physically meeting someone”).

- 137 See *State v. Berry*, 575 P.2d 543, 545 (Kan. 1978) (affirming admission of victim's statement to detectives eight days after shooting); see also *State v. Peterson*, 696 P.2d 387, 395 (Kan. 1985) (affirming admission of statement under Kansas variant of Uniform Rule 63(4)(c) where statement was "made on the same day or the following day" after the described event); *State v. Brown*, 556 P.2d 443, 447 (Kan. 1976) (explaining that the "recently perceived" restriction "allows for a considerable passage of time, so long as the statement was made at a time when the event could still be reasonably classified as 'recent'"). But see Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 *Stan. L. Rev.* 682, 707 (1962) (suggesting that a statement made "a full week after" the thing perceived would "not qualify as having been made 'at a time when the matter had been recently perceived'"); Cal. Law Revision Comm'n, *supra* note 12, at 462 (illustrating the operation of the temporal limit in the Uniform Rule with a dichotomy of a statements describing the cause of injury made "the day after [[the] injury," as opposed to "two months later").
- 138 See *Brown*, 556 P.2d at 447 (explaining that statement "made three days after" event described "could reasonably" meet recently perceived limitation); *Staggs v. State*, No. 94,271, 2006 WL 1816339 at \*1 (Kan. Ct. App. June 30, 2006) (noting admission of victim's hearsay statement that was made "several days after" beating described in statement); *State v. Kreuser*, 280 N.W.2d 270, 273 (Wis. 1979) (rejecting challenge to admission of statement made "within a day" after event described); cf. *State v. Broyles*, 36 P.3d 259, 271 (Kan. 2001) (rejecting challenge to exclusion of statements offered under the exception that were made "some 20 months later" than the described event).
- 139 *Cluever v. Evangelical Reformed Immanuel's Congregation*, 422 N.W.2d 874, 875-76 (Wis. Ct. App. 1988).
- 140 *Id.* at 877.
- 141 Cf. *Kreuser*, 280 N.W.2d at 273 (discounting delay in making of statement where "delay was occasioned by the fact that" the declarant had to track down the telephone number of the recipient). The original SRP exception contained a distinct safeguard of a "clear" recollection to ensure that the declarant's memory had not degraded, but how trial courts were supposed to apply this requirement to absent declarants is unclear, and it is omitted from the current proposal.
- 142 See also Thayer, *Legal Essays*, *supra* note 120, at 303 n.1 (reprinting Thayer's proposal advocating exception to the Massachusetts hearsay rule that required statements to be "made in writing ante litem motam," i.e., before the litigation).
- 143 See Cal. Law Revision Comm'n, *supra* note 12, at 463 (stating that the necessity for the Uniform Rule's ante litem motam requirement is "too obvious to require comment").
- 144 See *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011) (suggesting that out-of-court statements that are "made for a purpose other than use in a prosecution" are more likely to be trustworthy); Cal. Law Revision Comm'n, *supra* note 12, at 313 (Comment to Rule 63(1)) (noting that testimony at trial is often less credible than certain out-of-court statements because, among other things, the statements are "less likely to be influenced by the controversy which gave rise to the litigation"). In addition to eliminating an incentive to lie, pre-litigation statements are less likely to be planned, making them easier for jurors to correctly evaluate. See Bond & DePaulo, *supra* note 128, at 227 (conducting meta-analysis of studies about the ability to detect false statements and finding evidence that people "achieve higher lie-truth detection accuracy when judging unplanned rather than planned messages").
- 145 See *Bryant*, 131 S. Ct. at 1157 n.9 ("Many ... exceptions to the hearsay rules ... rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."); *Johnson v. United States*, 333 U.S. 10, 14(1948) (highlighting the "often competitive enterprise of ferreting out crime"); *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (finding an employee's injury report inadmissible because the report was "calculated for use ... in the court, not in the business").
- 146 Compare *State v. White*, 673 P.2d 1106, 1112 (Kan. 1983) (statements to police officers investigating unattended child admissible under Uniform Rule), and *State v. Berry*, 575 P.2d 543, 545 (Kan. 1978) (affirming admission of victim's statements to detective in hospital room eight days after shooting under Uniform Rule), with *State v. Barela*, 643 P.2d 287, 290 (N.M. Ct. App. 1982) (explaining that because victim's out-of-court statement was "made at the instigation of the officer[,] the [SRP] exception ... is inapplicable"). Of course, the mere fact that a statement describes something unlawful will not render it inadmissible because made "in contemplation of

litigation.” As with the analysis of “testimonial” under the Confrontation Clause, this requirement is intended to exclude statements made with a “primary purpose” of influencing litigation. Bryant, 131 S. Ct. at 1155.

- 147 For cases considering the contemplation of litigation restriction under the SRP exception, see *State v. Haili*, 79 P.3d 1263, 1277 (Haw. 2003) (rejecting the argument that the SRP exception did not apply because the domestic violence victim may have been contemplating divorce proceedings); and *State v. Ross*, 919 P.2d 1080, 1086 (N.M. 1996) (rejecting a challenge to admission of evidence under the SRP exception where the victim may have been contemplating obtaining a restraining order).
- 148 The proposed exception does not adopt the original SRP exception's proviso that only litigation “in which [the declarant] was interested” triggers exclusion. Courts will have difficulty determining whether an absent declarant has an “interest” in potential litigation, and the inquiry has little utility. See, e.g., *State v. Ballos*, 602 N.W.2d 117, 123 (Wis. Ct. App. 1999) (concluding, somehow, that anonymous callers to 911 “were not involved in or anticipating litigation in which they were interested”).
- 149 See supra Part III.B; see also Unif. R. Evid. 63(4)(c) cmt. (citing 1898 Massachusetts statute as general precursor to the rule); Mass. Ann. Laws ch. 233, § 65 (2009) (excepting a statement of a decedent in civil cases “if the court finds that it was made in good faith and upon the personal knowledge of the declarant”); Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161, 382-84 (citing the Massachusetts statutes in the advisory committee notes following proposed Fed. R. Evid. 804(b)(2)); cf. R.I. R. of Evid. 804(c) (“A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.”); Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 Minn. L. Rev. 1057, 1065 n.32 (1986) (tracing lineage of Uniform Rule to Massachusetts statute). Striking a common chord with the eSRP exception, Thayer's proposal, upon which the Massachusetts statute was based, did not include a “good faith” requirement and applied solely to written statements. See Thayer, *Legal Essays*, supra note 120, at 303 n.1; Chadbourn, supra note 95, at 942-43 (discussing same).
- 150 *State v. Manuel*, 697 N.W.2d 811, 820 (Wis. 2005).
- 151 *State v. Manuel*, 685 N.W.2d 525, 530 (Wis. Ct. App. 2004), aff'd, 697 N.W.2d 811 (Wis. 2005).
- 152 *State v. Weed*, 666 N.W.2d 485, 492 (Wis. 2003); cf. *State v. Maestas*, 584 P.2d 182, 189 (N.M. Ct. App. 1978) (affirming admission of statements “made by the victim to [her] sister and sister-in-law”).
- 153 *State v. Kutz*, 671 N.W.2d 660, 682 (Wis. Ct. App. 2003); cf. *State v. Burke*, 574 A.2d 1217, 1223 (R.I. 1990) (affirming admission of statement made “to a blood relative”).
- 154 *State v. Ballos*, 602 N.W.2d 117, 123 (Wis. Ct. App. 1999).
- 155 *State v. White*, 673 P.2d 1106, 1112 (Kan. 1983).
- 156 See *Manuel*, 685 N.W.2d at 530 (affirming finding of “good faith” where “[n]othing in the record suggests ... that [the declarant] lied”); Peter Nicolas, ‘I’m Dying to Tell You What Happened’: The Admissibility of Testimonial Dying Declarations Post-Crawford, 37 *Hastings Const. L.Q.* 487, 532-33 (2010) (describing function of “good faith” requirement in the “few states” that apply it); Cal. Law Revision Comm'n, supra note 12, at 463 & n.10 (explaining that “good faith” requirement in Uniform Rule “probably means that the judge, acting pro hac vice like a jurymen, may simply conclude ‘I do not believe his statement’”).
- 157 See Fed. R. Evid. art. VIII advisory committee's introductory note, at 405 (“For a judge to exclude evidence because he does not believe it has been described as ‘altogether atypical, extraordinary ....’”); Chadbourn, supra note 95, at 947 (criticizing Uniform Rule's provision for exclusion of out-of-court statement not made in “good faith” as violating the “time-honored formula” that “credibility is a matter of fact for the jury, not a matter of law for the court”); cf. *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) (“[T]he jury, not the judge, traditionally determines the reliability of evidence.”); *Kansas v. Ventris*, 556 U.S. 586, 594 n.\*(2009) (“Our legal system ... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses ....”).
- 158 Cf. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 596 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”); Fed. R. Evid. 806 (permitting a party to impeach the credibility of a hearsay declarant “by any evidence that would be admissible for

[that] purpose[] if the declarant had testified as a witness”). That is not to say that juries are particularly adept at this task, just that judges would be no better. George Fisher, *The Jury's Rise as Lie Detector*, 107 *Yale L.J.* 575, 707 (1997) (discussing research that shows that “juries have no particular talent for spotting lies”); Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 *U. Pitt. L. Rev.* 725, 759 (1989) (“[C]urrent psychological research provides no basis for believing that assigning the task of evaluating demeanor to judges would result in significant improvements in deception detection.”).

- 159 Cf. Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 *Loy. L.A. L. Rev.* 909, 920 (1992) (criticizing evidence rules that “utiliz[e] undefined terms” and “rather than providing a clear rule regulating admissibility,” rely on judicial discretion thus “invi[t]ing the judiciary to assume an undisciplined, ad hoc approach to applying the Rules”). The Massachusetts statute from which the “good faith” requirement is drawn required only unavailability (through death) and “good faith.” See supra note 149, a more sensible approach than tacking “good faith” onto a handful of specific characteristics.
- 160 Cf. *Tome v. United States*, 513 U.S. 150, 164-65 (1995) (noting that the drafters of the Federal Rules consciously rejected a “statement-by-statement balancing approach” because “[i]t involves considerable judicial discretion[,] ... reduces predictability[,] and ... enhances the difficulties of trial preparation”); Fed. R. Evid. art. VIII advisory committee's introductory note, at 405 (rejecting proposal for “individual treatment [of hearsay] in the setting of the particular case” as “involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of prepar[ing] for trial”); Mueller, supra note 22, at 397 (noting in hearsay context that “[p]ractitioners strongly believe they need protection against broad judicial discretion”).
- 161 See supra note 73. These same concerns counsel against any attempt to broadly filter electronic communications through the residual hearsay exception in Rule 807. See supra note 111.
- 162 See supra Part III.C; supra note 128.
- 163 See Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 *Notre Dame L. Rev.* 1537, 1559 (2007) (“Anonymous speech ... is, on average, less valuable than nonanonymous speech to speech consumers (audiences) who often use speaker identity as an indication of a work's likely truthfulness ....”); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 *Harv. C.R.-C.L. L. Rev.* 159, 193-94 (2003) (discussing arguments against anonymous speech in the First Amendment context, including that a “person who contributes to public debate anonymously lacks accountability and therefore reliability” and “anonymity creates a greater potential for deception and frivolity”).
- 164 See, e.g., *Rodriguez v. State*, 273 P.3d 845, 850 (Nev. 2012) (analyzing admissibility of text messages sent to assault and robbery victim's boyfriend via victim's cell phone by then-unknown perpetrators of offense). Anonymous communications will also be difficult to admit due to the independent requirement of personal knowledge, although personal knowledge may be apparent “from [the] statement or be inferable from circumstances.” Fed. R. Evid. 803 advisory committee's note; see also *Booth v. State*, 508 A.2d 976, 984(Md. 1986) (noting that extrinsic evidence may demonstrate that a statement results from the declarant's personal perception); Ira P. Robbins, *Writings on the Wall: The Need for an Authorship-Centric Approach to the Authentication of Social-Networking Evidence*, 13 *Minn. J.L. Sci. & Tech.* 1, 29-31 (2012) (cautioning against inferring authorship of electronic communications that are insufficiently authenticated); cf. *Criminal Justice Act, 2003*, c. 44, §116(1)(b) (U.K.) (limiting admission of hearsay statements under certain provision to circumstances where “the person who made the statement ... is identified to the court's satisfaction”).
- 165 See supra Part III.C.
- 166 See Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 *Minn. L. Rev.* 703, 704 (1992) (concluding from results of empirical analysis of mock juror study that “jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between accurate and inaccurate hearsay testimony”); Mueller, supra note 22, at 374 (summarizing argument that juries can be trusted to weigh hearsay); Weinstein, supra note 20, at 353 (“There is little reason to believe that jurors ... are not ... capable of assessing hearsay's force without giving it undue weight.”); see also sources cited supra note 157.
- 167 Fed. R. Evid. 901(a); *United States v. McGraw*, 62 F. App'x. 679, 681 (7th Cir. 2003) (discussing procedure for proving authenticity of evidence and stating that “the court's role is to examine the evidence to determine whether the jury could reasonably find the conditional fact by a preponderance of the evidence”); *State v. Harris*, 358 S.W.3d 172, 175 (Mo. Ct. App. 2011) (“[T]he proponent

of such evidence [as text messages] must present some proof that the message[s] were actually authored by the person who allegedly sent them.”); *Rodriguez v. State*, 273 P.3d 845, 850 (Nev. 2012) (concluding that ten text messages were erroneously admitted because not properly authenticated); *Orenstein*, supra note 4, at 202 (discussing authentication and new social media); *Robbins*, supra note 164; see supra note 55.

168 See Claire Cain Miller, *Joining the Party, Not Crashing It: Google Aims for Less Intrusive Ways to Fit into Daily Life*, N.Y. Times, Oct. 14, 2012, at B1 (discussing technological innovations, such as Siri and Kinect, that allow people to interface with computers through voice and gestures).

169 See, e.g., Fed. R. Evid. 101(b)(6) (“[A] reference to any kind of written material or any other medium includes electronically stored information.”); id. at 803(6) advisory committee’s note (stating that use of term “data compilation” in business records exception was intended to cover “any means of storing information other than the conventional words and figures in written or documentary form,” including “electronic computer storage”). By contrast, authentication rules vary more naturally across mediums. See id. at 901 (illustrating various means of authenticating evidence).

170 Another potential category, eSRPs of a non-testifying criminal defendant, is likely precluded by Fed. R. Evid. 804(a)’s proviso that the rule’s unavailability requirement is not satisfied “if the statement’s proponent procured or wrongfully caused the declarant’s unavailability as a witness in order to prevent the declarant from ... testifying.” Fed. R. Evid. 804(a)(5); see *United States v. Bollin*, 264 F.3d 391, 413 (4th Cir. 2001) (holding that defendant who invokes Fifth Amendment privilege not to testify could not invoke Rule 804, because he “made himself unavailable for the purpose of preventing his testimony”); *United States v. Peterson*, 100 F.3d 7, 13 (2d Cir. 1996) (holding that a person who invokes Fifth Amendment privilege “is considered to be unavailable to others for purposes of Rule 804”); *Commonwealth v. Labelle*, 856 N.E.2d 876, 879 (Mass. App. Ct. 2006) (following “the view proffered by several of the Federal Circuit Courts of Appeal that a defendant cannot create[ ] his own unavailability by invoking his [F]ifth [A]mendment privilege against self-incrimination”) (internal quotation marks omitted).

171 *United States v. Blackett*, No. 11-1556, 2012 WL 1925540 (3d Cir. May 29, 2012); Brief for the Appellee at 8-9, *United States v. Blackett*, 481 F. App’x 741 (2012) (No. 11-1556), 2012 WL 1925540, at \*3 (providing text of disputed text message).

172 *Blackett*, 2012 WL 1925540, at \*742. The text should not have been admitted as a recorded recollection since the witness did not have any difficulty remembering the bribery attempt. Brief for the Appellee, supra note 171, at 2; see also Fed. R. Evid. 803(5) (requiring statement to concern a matter the declarant “now cannot recall”); Brief of Appellant Ikim Elijah Blackett at 14-15, *United States v. Blackett*, 481 F. App’x 741 (2012) (No. 11-1556), 2011 WL 6935515 (stating defendant’s argument to this effect). The Third Circuit punted the question of admissibility, concluding only that the text’s admission “was harmless.” *Blackett*, 2012 WL 1925540, at \*742. The defendant was likely nonplussed as even the prosecution had not claimed that the ruling could be upheld on that ground. Brief for the Appellee, supra note 171. Additional factual development might have revealed that the text was a present sense impression, but that exception was not cited by either party or the appellate court. See Fed. R. Evid. 803(1) (describing present sense impression exception to the hearsay rule).

173 *People v. Lewis*, No. 1-10-3576, 2012 WL 6861248, at \*3 (Ill. App. Ct. Dec. 28, 2012).

174 See id. at \*3-4, \*12. The trial court admitted the statements over a hearsay objection solely to show the victim’s “state of mind.” Id. at \*3. But in response to a defense contention that the lengthy text exchanges admitted at trial went well beyond that limited purpose, the appellate court deemed the messages admissible for all purposes as prior consistent statements. The court ruled that while such prior statements are “[g]enerally ... inadmissible,” defense counsel’s claim in the opening statement that the victim fabricated her account to explain the defendant’s presence “in her bed” could be answered by the text messages, which were uttered (just) prior to the defendant’s appearance in that location. Id. at \*11-12.

175 *McCormick*, supra note 100, at 622 (noting that “[a]n early written statement may often give needed and legitimate corroboration to the witness’s testimony, where though his veracity has not been challenged, his testimony is met by contrary evidence”); see, e.g., *Tucker v. Clarke*, No. 0037-12-4, 2012 WL 2886713, at \*3 (Va. Ct. App. July 17, 2012) (affirming trial court exclusion of emails sent by mother to third party as hearsay, where email was offered by mother, who testified in custody proceeding, to corroborate her explanation of why she acted out in child’s classroom).

- 176 Cf. Unif. R. Evid. 63(1), cmt., (1953) (asserting that “[w]hen sentiment is laid aside there is little basis for objection” to introduction of a testifying witness’s out-of-court statements as substantive evidence); Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 192 (1948) (expressing similar sentiment).
- 177 See supra notes 172, 174; see also *Abdelrahim v. Guardsmark*, No. B207270, 2009 WL 3823283, at \*3 (Cal. Ct. App. Nov. 17, 2009) (affirming trial court ruling admitting email as non-hearsay, and ruling that it was admissible solely to show that an email “was sent” or, alternatively, as a business record and, in any event, its admission was harmless); *Funches v. State*, No. 57654, 2012 WL 436635, at \*1-2 (Nev. Feb. 9, 2012) (concluding that “the district court erred by admitting, under the present-sense-impression hearsay exception, a witness’s text messages regarding earlier events” because “[t]he text messages ... were written ... shortly after she woke up” and “involved events that occurred before she went to sleep approximately one to two hours earlier” but suggesting that the messages “were admissible under the excited utterance exception” (despite the intervening period of sleep!) and, in any event, were harmless); *Robinson v. State*, No. 05-10-01022-CR, 2012 WL 130616, at \*3 (Tex. App. Jan. 18, 2012) (declining to decide whether email from testifying witness attaching cell phone picture of suspect, and identifying the suspect-- “im not sure if they are good enough pics but this is tyrone”--constituted hearsay, but deeming its admission harmless).
- 178 See Fed. R. Evid. 613 (discussing procedures for impeaching witnesses with prior statements). If the declarant testifies but cannot recall the incident described in the eSRP, the eSRP could, under existing doctrine, be used to refresh the declarant’s memory, *id.* at 612, and if necessary, be introduced as a “recorded recollection,” *id.* at 803(5); see also 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:19, at 116, § 8:35, at 304 (3d ed. 2007) (noting that such hearsay statements “are still admissible for impeachment purposes” and citing cases).
- 179 See, e.g., *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 763 (5th Cir. 2008) (holding that district court did not abuse its discretion in allowing extrinsic evidence in to impeach witness’s inconsistent statements); cf. Fed. R. Evid. 801(d)(1)(A) (permitting small subset of prior inconsistent statements to be introduced as substantive evidence).
- 180 See *McCormick*, supra note 96, at 562 (characterizing proposal in Uniform Rules to allow “prior consistent or inconsistent statements of a witness as substantive evidence of the facts” as “well justified” in part because it “avoids the empty ritual of instructing the jury not to consider the statement as substantive evidence”); *Morgan*, supra note 176, at 193 (describing instruction to jury to consider prior statements solely for impeachment as “indulging in a pious fraud”).
- 181 See Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Criminal Procedure, and the Federal Rules of Evidence 214 (Preliminary Draft 2012), available at <http://www.uscourts.gov/uscourts/rules/rules-published-comment.pdf> (proposing to amend Rule 801(d)(1)(B) to permit prior consistent statements offered to rehabilitate witness’s credibility to be used as substantive evidence due to doubt that jurors can follow limiting instruction).
- 182 See supra Part III.A.
- 183 The objection raised by the Federal Rules Advisory Committee was the potential for “the general use of prior prepared statements as substantive evidence.” Fed. R. Evid. 801 advisory committee’s note; cf. Cal. Law Revision Comm’n, supra note 12, at 313 (articulating same objection). Roger Park adds that Congress feared that permitting substantive use of prior inconsistent statements would incentivize untoward pretrial interrogation. Park, supra note 95, at 78-79. Since the eSRP exception excludes statements made to investigators or otherwise “in contemplation of litigation,” both of these concerns drop away. Judson Falknor’s concern that prior inconsistent statements might be fabricated if they could be used substantively is mitigated by the precise fix Falknor proposed: requiring proof that the prior statement was made (here, in the form of a recording of the statement). Falknor, supra note 66, at 53-54.
- 184 *State v. Damper*, 225 P.3d 1148, 1150, 1152 (Ariz. Ct. App. 2010) (rejecting challenge to trial court’s admission of text--“Can you come over? Me and Marcus are fighting and I have no gas”--as follows: “we cannot conclude the superior court abused its discretion in ruling the text message constituted a present-sense impression”); see *Bellin*, supra note 14, at 344-45 (arguing that present sense impression exception was never intended to apply to circumstances like *Damper* where the out-of-court statement is presented without any corroborating witness); cf. *Gulley v. State*, 2012 Ark. 368, at 12 (2012) (recounting circuit court ruling admitting defendant’s texts but excluding murdered victim’s texts in response as hearsay).

- 185 People v. Logan, No. 303269, 2012 WL 3194222, at \*2-3, \*6 (Mich. Ct. App. Aug. 7, 2012).
- 186 The Court does not specify the content of the text messages, but summarizes that they “indicated that [the] defendant sought to cause ‘conflict’ or ‘a problem’ for the victim because he was upset about losing her.” Id. at \*6. In a familiar pattern, the appeals court noted that the “text messages were hearsay to which no exception applied” and thus erroneously admitted, but deemed their admission harmless error. Id.
- 187 See, e.g., State v. Petersen, No. 12-1114, 2013 WL 2370717, at \*2 (Iowa Ct. App. May 30, 2013) (relying on residual exception to reject hearsay challenge to admission of victim's text message to sister recounting husband's threats); State v. Ford, 778 N.W.2d 473, 482 (Neb. 2010) (rejecting, on procedural grounds, challenge to trial court ruling admitting the following text message in rape prosecution: “I just got raped .. By jake .. I dont know what to do ..”); Martin Fricker & Danny Buckland, Great Ormond St Doc Is Suspended Over Abuse Claim, Mirror, Apr. 7, 2011, available at 2011 WLNR 6692242 (describing evidence against prominent heart surgeon accused of child abuse that includes “text messages and voice recordings between two witnesses”); John Hult, Man Accused of Tying Up, Beating Woman, Argus Leader, Feb. 23, 2011, available at 2011 WLNR 3565811 (reporting statement of Minnesota prosecutor that “[v]ictims might send text messages or emails describing violent incidents but change their story and decline to testify after an arrest is made” in which case “electronic messages are considered hearsay and are inadmissible in court”); Beth Hundsorfer, Sheri Coleman Told Friends About Marital Problems, Belleville News-Democrat, Apr. 29, 2011, available at 2011 WLNR 8360616 (describing prosecution's effort to introduce text messages from deceased victim to friends stating that, among other things, “her husband beat her”); Michelle R. Smith, Odin Lloyd Texts Key Evidence in Aaron Hernandez Murder Charge, Wash. Times, June 27, 2013, <http://www.washingtontimes.com/news/2013/jun/27/odin-lloyd-texts-evidence-aaron-hernandez-murder/?page=all> (highlighting text message from alleged murder victim stating that he was with “NFL” shortly before death); cf. McCormick, supra note 100, at 624 (noting that Uniform Rule 63(4)(c) would “open the door to statements by victims of crime”).
- 188 See Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Tex. L. Rev. 271, 320-21 & n.274 (2006).
- 189 See, e.g., State v. Cassano, No. 97228, 2012 WL 2580750, at \*5 (Ohio Ct. App. July 5, 2012) (noting that “[a] major portion of the state's case consisted of the text messages sent from [an alleged accomplice's] telephone on the night of the robbery”); Commonwealth v. Koch, 39 A.3d 996, 1002, 1006 (Pa. Super. Ct. 2011) (holding that trial court erred in admitting text messages sent from the defendant's phone that indicated the sender's “intent to deliver controlled substances” because statements were hearsay and, since defendant could not be identified as sender, not statements of a party); Sorry, Wrong Number! Drug-Sale Text Message Goes to Police Instead, CBS Conn. (Jan. 23, 2012, 3:51 PM), <http://connecticut.cbslocal.com/2012/01/23/sorry-wrong-number-drug-sale-text-message-goes-to-police-instead> (describing drug arrest initiated by text message advertising illicit drugs for sale mistakenly sent to police officer, and noting that the investigation was ongoing with police seeking the source of the drugs).
- 190 Funches v. State, No. 57654, 2012 WL 436635, at \*1 (Nev. Feb. 9, 2012). In Funches, the Nevada Supreme Court recognized that no existing hearsay exception permitted the testimony about the text message, but in a familiar pattern, deemed the error “harmless.” Id. In the same opinion, the Nevada Supreme Court also recognized that the trial court erred in admitting “a witness's text messages regarding earlier events” as present sense impressions, but deemed that error harmless as well. Id.
- 191 Teen Shot at Ala. Middle School Dies; Student Held, Daily Record, Feb. 6, 2010, available at 2010 WLNR 2539972.
- 192 See, e.g., United States v. Whiteford, 676 F.3d 348, 363 (3d Cir. 2012) (explaining legal doctrine governing strict standard for conferring immunity on a defense witness against prosecution's will); United States v. Hardrich, 707 F.2d 992, 993-94 (8th Cir. 1983) (describing scenario where defendant's effort to introduce exculpatory testimony was frustrated by witness's invocation of Fifth Amendment privilege); cf. United States v. Meregildo, 920 F. Supp. 2d 434, 438-39 (S.D.N.Y. 2013) (evaluating government's Brady obligations to turn over informant's Facebook account containing potentially exculpatory posts, but ultimately rejecting claim, in part because defendant had already obtained access to the account through a private investigator); State v. Riggins, No. 1CA-CR09-0311, 2010 WL 5545203, at \*12 (Ariz. Ct. App. Dec. 28, 2010) (ruling that had defendant argued it, trial court's erroneous exclusion as hearsay of text messages that supported defendant's self-defense claim would be found harmless).

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- 193 U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....”); cf. Bellin, *supra* note 28, at 40-42 (discussing nontestimonial electronic statements, stating that they do not trigger the Confrontation Clause).
- 194 Crawford v. Washington, 541 U.S. 36, 61-62 (2004).
- 195 Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).
- 196 See *supra* Part III.D.
- 197 See, e.g., Fed. R. Evid. art. VIII advisory committee's introductory note, at 405 (pointing to the “split between civil and criminal evidence” that would arise, due to the application of the Confrontation Clause, as a reason to maintain the hearsay prohibition); Sklansky, *supra* note 78.
- 198 U.S. Const. amend. VI.
- 199 Fed. R. Evid. art. VIII advisory committee's introductory note, at 405.
- 200 See Lininger, *supra* note 188, at 320-21 & n.274 (“The [SRP] exception seems particularly well-suited for the Supreme Court's new confrontation jurisprudence because the rule explicitly bars statements when the declarant was contemplating litigation or when the declarant was responding to investigators.”).

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## The Case for eHearsay

by Jeffrey Bellin \*

On April 4, 2014, the Advisory Committee for the Federal Rules of Evidence convened a symposium on “the Challenges of Electronic Evidence.” The purpose of the Symposium was “to consider the intersection of the evidence rules and emerging technologies” and explore what rule changes, if any, might be warranted in light of sweeping changes in the manner in which people communicate.<sup>1</sup> As an unapologetic advocate for changes to the hearsay rules, I thought it a happy coincidence that the Symposium coincided with Seventh Circuit Judge Richard Posner’s call for sweeping hearsay reform.<sup>2</sup>

In a 2013 article, *eHearsay*, I proposed a hearsay exception for “Recorded Statements of Recent Perception” (RSRPs).<sup>3</sup> The exception is designed to distinguish reliable from unreliable electronic communication (e.g., text messages and social media posts), and permit the former to be presented to factfinders. The Advisory Committee invited me to present my RSRP exception at its Symposium. After my presentation, a member of the Advisory Committee, Professor Paul Shechtman, provided formal comments on my proposal. Some of these comments resonated with a response Professor Colin Miller published to *eHearsay*, concurring in part and dissenting in part to my proposal.<sup>4</sup> This Essay responds to the various concerns about my proposed hearsay reform raised by Professors Miller, Shechtman and others.

Change is never easy. Proponents of changes to the evidence rules fairly bear the burden of persuasion that any particular reform is preferable to the status quo. In this Essay, I aim to do just that, while also addressing Judge Posner’s suggestion for hearsay reform. While I agree with the judge’s call for a more permissive attitude toward the admission of hearsay, I believe his prescription – replacing the hearsay rules with a “residual” exception powered by judicial reliability assessments – is a recipe for evidentiary chaos. Instead, I continue to advocate for my proposed exception, which would permit a wide swath of recorded out-of-

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\* Associate Professor, William & Mary Law School. I would like to thank Colin Miller and Paul Shechtman for their comments and critiques of my “eHearsay” rule and Dan Capra, Judge Sidney Fitzwater and the members of the Advisory Committee for the opportunity to present my proposal at the Electronic Evidence Symposium.

<sup>1</sup> Meeting Minutes, Federal Advisory Committee on Evidence Rules 13 (Oct. 5, 2012), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2012-10.pdf>

<sup>2</sup> See *U.S. v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J. concurring).

<sup>3</sup> Jeffrey Bellin, *eHearsay*, 98 Minn. L. Rev. 7 (2013).

<sup>4</sup> Colin Miller, *No Explanation Required? A Reply to Jeffrey Bellin’s eHearsay*, 98 Minn. L. Rev. Headnotes 34 (2013).

court statements to be introduced at trial, while retaining the class-based hearsay exception framework adopted by the Federal Rules of Evidence 40 years ago, and all of the States.

## I. The Proposed “eHearsay” Exception

For ease of reference, I begin by setting out my RSRP exception. Accepting the framework of the federal rules of evidence as a given, the proposed exception would necessitate compact additions to two existing rules of evidence: Rule 804, which lists hearsay exceptions that apply when the declarant is unavailable; and Rule 801, which applies when the declarant testifies. The proposed additions to those rules are set out below. Italicized text represents additions; non-italicized text (including the bolded titles) is unchanged from the existing federal rules and included for context.<sup>5</sup>

### **Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant Is Unavailable as a Witness . . .**

(b) The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

*(5) Recorded Statement of Recent Perception. A recorded communication that describes or explains an event or condition recently perceived by the declarant, but not including: (A) a statement made in contemplation of litigation, or to a person who is investigating, litigating, or settling a potential or existing claim; or (B) an anonymous statement.*

### **Rule 801. . . . Exclusions from Hearsay**

. . . (d) A statement that meets the following conditions is not hearsay:

(1) The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . . (D) *would qualify as a Recorded Statement of Recent Perception under Rule 804(b)(5) if the declarant were unavailable.*

As explained in *eHearsay*, this exception represents a modified version of the hearsay exception for “Statements of Recent Perception” adopted by the Advisory Committee in 1969, but ultimately rejected by Congress.<sup>6</sup>

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<sup>5</sup> In *eHearsay*, the proposed language appears in a text box for emphasis. This effort to emphasize the proposed text partially backfired. On Westlaw, the entire text box is omitted and replaced with: “TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE”; on Lexis, the proposed text is replaced with only: “Figure 1.” Consequently, those seeking out *eHearsay* would be well served to download it from Hein Online; the Minnesota Law Review website: <http://www.minnesotalawreview.org/articles/ehearsay/>; or SSRN: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2232345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232345)

<sup>6</sup> Bellin, *supra* note 3 at 33-35.

## II. Application of the Rule

I refer readers to *eHearsay* for justifications for the RSRP exception's precise language, and illustrations of how various terms and phrases should be interpreted.<sup>7</sup> Here, I demonstrate the straightforward application of the exception with two examples drawn from recent case law.

### A. *State v. Peterson and Rule 804(b)(5)*

The first example comes from a 2013 Iowa case, where the prosecution charged Thomas Peterson with murdering his wife Judy. The prosecution's evidence included a text message from Judy to a friend that claimed Thomas had threatened her over the weekend. According to Judy's text message:

"He said he ... planned on attending a funeral in two weeks and it wasn't his... When I asked if he was threatening me he told me to figure it out."<sup>8</sup>

The prosecution offered the recorded text message exchange (which also included a discussion of a custody battle) to prove the truth of the matter Judy asserted – i.e., that the defendant threatened to kill her shortly before her death due to ill will arising out of the custody battle. Thus, it was hearsay.

Applying my proposed exception, however, the text message easily qualifies for admission. The declarant (Judy Peterson) was unavailable. Her still-extant text message constituted a "recorded communication" from a known (i.e., not anonymous) sender. It described a "recently perceived" occurrence (the threats) and there is no indication that Judy sent the text message in contemplation of litigation.<sup>9</sup> Thus, Judy Peterson's text message could be shown to the jury as a RSRP under proposed Rule 804(b)(5).

### B. *United States v. Blackett and Rule 801(d)(1)(D)*

The next example is from *United States v. Blackett*, where a witness's testimony that she was bribed while serving as a juror was supplemented with the following text message she sent her sister after the alleged bribe attempt:

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<sup>7</sup> Id. at 35-52.

<sup>8</sup> *State v. Petersen*, 2013 WL 2370717, 2 (Iowa App. 2013) (relying on residual exception to reject hearsay challenge to admission of victim's text message to sister recounting husband's threats).

<sup>9</sup> *Bellin*, supra note 3 at 44-46 (discussing case law applying anticipation of litigation restriction); id. at 41-44 (describing recently perceived limitation). These limits are derived from similar provisions in Uniform Rule of Evidence 63(4)(c) and proposed Rule 804(b)(2). *Bellin*, supra note 3 at 41-46. The recently perceived limitation parallels the "fresh in the witness's memory" requirement in Rule 803(5)(B).

“You see why I tell you I ain’t want to be no damn juror. Some dude just come by my house and tell me he going pay me money to say not guilty.”<sup>10</sup>

Again, the text message (erroneously admitted in *Blackett* as a recorded recollection) neatly fits within the proposed exception. The requirements are the same as described in the preceding example, except that for Rule 801(d)(1)(D), the declarant must testify. Here, the declarant testified and her still-extant text message constituted a “recorded communication” from a known sender. It described a “recently perceived” occurrence (the bribery attempt), and there is no indication that the text message was made in contemplation of litigation. Thus, the text message could be admitted and shown to the jury as a RSRP under proposed Rule 801(d)(1)(D).

These examples illustrate two points. First, by using actual evidence offered in real cases, the examples provide realistic tests of the rule’s application; these are not sanitized hypotheticals carefully calibrated to make the proposed rule look good (or bad). Second, the text messages described above are representative of the types of communications that have become an everyday part of our lives (relating recent occurrences to friends and family) – and are the kind of evidence that no rational person would ignore when trying to resolve a subsequent dispute.

### **III. The Status Quo and the Residual Exception**

The RSRP exception would not be necessary if courts could achieve the same (or better) results in screening reliable from unreliable electronic utterances through the existing hearsay rules. In this section, I explain why the existing hearsay rules are inadequate.

#### **A. Relying on Existing Hearsay Exceptions**

At the outset, it is important to emphasize that it is not only the electronic medium of communication that necessitates changes to existing evidence rules, but the parallel emergence of an entirely new communication norm. As surveys by the Pew Internet and American Life Project demonstrate, people are continuously texting and electronically messaging friends, relatives, and acquaintances about recent events.<sup>11</sup> The communications are often preserved (with a precise time and date stamp). And because these communications generally arise before any litigation, they provide valuable and often otherwise unavailable (due to memory failings or lack of cooperation) insight into later-disputed facts. Existing hearsay

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<sup>10</sup> *United States v. Blackett*, No. 11-1556, 2012 WL 1925540 (3d Cir. May 29, 2012); Brief for the Appellee at 8–9, *United States v. Blackett*, 481 F. App’x 741 (2012) (No. 11-1556), 2012 WL 1925540, at \*3 (providing text of disputed text message).

<sup>11</sup> See Bellin, *supra* note 3 at 13-17 (reviewing survey data on new communication norm).

rules might be able to process these communications correctly, but when they do it is only happenstance. As I argued in *eHearsay*:

A set of rules that arose at a time when people communicated in a completely different manner (i.e., in person, by letter and through landline phones) is unlikely to account for the dangers or benefits of out-of-court statements communicated on social media sites, in Internet chat rooms, and via text messaging.<sup>12</sup>

Thinking broadly about electronic communication, one can readily imagine the types of communications that while relevant and reliable will be lost to juries under existing hearsay doctrine. Communications that arise shortly, but not “immediately” after an observed event and are not uttered in a state of excitement or by the dying, will not qualify as “present sense impressions,” “excited utterances” or “dying declarations.” Electronic statements (e.g., text messages) made by bystanders, other uninterested parties, or deceased victims will not qualify as statements of a party, or statements against interest. These compelling pieces of evidence, frozen in time and accessible in discovery, will be senselessly kept from juries.

Thus, while it is certainly the case that courts can continue to apply existing hearsay exceptions to determine the admissibility of out-of-court statements captured in email, text messages and social media posts, the cost will be twofold: (i) valuable evidence will be excluded because it does not fall within an existing exception; and (ii) courts will be tempted to distort the existing rules to admit reliable electronic messages like those described in part II. For example, in *Blackett*, the trial court erroneously admitted the text message as a recorded recollection (Rule 803(5)) even though the witness had no trouble recollecting the described event; in *Peterson*, the Iowa Court of Appeals relied on the residual exception, finding reliability in one always-present aspect of recorded communication: “the text messages could be seen and evaluated by the trier of fact.”<sup>13</sup>

Judges are already struggling to fit the modern electronic communications into the dusty hearsay framework. Many of the examples discussed in *eHearsay* come from appellate rulings that deem trial courts to have erroneously admitted text messages, social media posts and the like under an existing exception.<sup>14</sup> The temptation to do so is understandable. Courts are consciously or subconsciously applying a reliability norm and in so doing are tempted to contort existing

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<sup>12</sup> Id. at 24.

<sup>13</sup> State v. Petersen, 2013 WL 2370717 (Iowa App. 2013).

<sup>14</sup> Bellin, supra note 3 at note 75.

evidence rules either to admit reliable electronic utterances that do not fit traditional hearsay exceptions, or exclude unreliable electronic utterances that do. Thus, counter to the sentiment captured in the header of this section, the “status quo” is not a real option. Change is coming. The real question is whether this change will be reflected in the loss of valuable evidence and “increasing slippage between what the evidence rules allow and what (some) courts admit,”<sup>15</sup> or a new rule specifically tailored to harness the virtues of a world of electronic communication.

## **B. The Residual Exception as a Conduit for Electronic Evidence**

Those who would place their faith in the existing hearsay framework’s ability to handle electronic communication buttress their argument by pointing to the existing safety valve, the “residual exception” contained in Rule 807. As already noted, the *Peterson* court relied on this exception to admit the victim’s text messages. If the existing exceptions are not up to the task, this argument goes, the residual exception can pick up the slack as in *Peterson*. I disagree.

First, the residual exception was never intended to serve as a platform for the creation of broad hearsay exceptions. After it was proposed in two separate exceptions, the residual exception was rejected by the House of Representatives only to be resurrected by the Senate. Responding to the House’s concerns of overuse, the Senate Judiciary Committee explained its understanding that the residual exception now found in Rule 807 “will be used very rarely, and only in exceptional circumstances.”<sup>16</sup>

“The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action.”<sup>17</sup>

Relying on the residual exception to routinely shepherd reliable hearsay found in email, text messages and social media posts through the hearsay rules (as in *Peterson*) would constitute precisely what the Senate Judiciary Committee warned against: “[a] major judicial revision[] of the hearsay rule.” The legislative history counsels that such a revision should be accomplished through “legislative action,” i.e., the normal rule making process, not Rule 807.

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<sup>15</sup> Bellin, *supra* note 3 at 26.

<sup>16</sup> Report of the Senate Committee on the Judiciary regarding Rules 803(24) and 804(b)(5). RB 260-261.

<sup>17</sup> *Id.* (emphasis added).

Second, even if the legislature had not expressed its intent so clearly, reliance on the residual exception in this context is unwise. The residual exception simply does not possess the precision necessary to regulate anything but truly exceptional, statement-specific circumstances. The exception's primary restrictions on the admission of hearsay are that: (i) the proffered statement contains "circumstantial guarantees of trustworthiness" that are "equivalent" to statements that would be permitted by "Rule 803 or 804"; and (ii) "admitting it will best serve the purposes of these rules and the interests of justice."<sup>18</sup> The first requirement is opaque given that statements that fall within Rule 803 or 804 exceptions contain widely varying guarantees of trustworthiness. Indeed, hearsay admitted under Rule 804(b)(6) (forfeiture by wrongdoing) contains no guarantee of trustworthiness whatsoever: the principle of admission is one of estoppel.<sup>19</sup> Statements admitted as excited utterances, present sense impressions, statements against interest and dying declarations all suffer from well-known reliability flaws. Statements falling under Rule 803(4) might provide a counterpoint as statements to a medical provider for purposes of diagnosis and treatment seem quite trustworthy. But, that very exception breaks with the common law to include statements made "to a physician consulted only for the purpose of enabling him to testify"<sup>20</sup> – statements that, given the litigation context, are patently unreliable. A judge looking for concrete guidance in the "equivalent guarantees of trustworthiness" requirement of Rule 807 will find none.

Little need be said about Rule 807's second "restriction." Statements that serve the often countervailing "purposes of the[] rules" will be difficult to identify with precision. Admittedly, there is a rule (Rule 102) that defines the "purpose" of the rules. It states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."<sup>21</sup> But even if we accept this statement as the *true* "purpose" of the rules, application of this purpose duplicates the next portion of Rule 807 that counsels admission only when it is in "the interest of justice." Again, guidance is lacking.

Distilled to its essence, Rule 807 commands judges to admit statements that are roughly as reliable as other statements admitted under the other hearsay exceptions, and that will help "ascertain[] the truth and secur[e] a just determination" in "the interest of justice" – a command that trial judges could

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<sup>18</sup> Fed. R. Ev. 807.

<sup>19</sup> Fed. R. Evid. 804(7), Advisory Committee Notes.

<sup>20</sup> FRE 803(4), Advisory Committee Notes.

<sup>21</sup> FRE 102.

easily mistake for satire if it did not appear in so celebrated a legal compendium as the Federal Rules of Evidence. Thus, we return to where we started. The only thing that truly constrains Rule 807 is the legislative history stating that Rule 807 should be used “very rarely, and only in exceptional circumstances.” The evidentiary framework is fortunate that courts have, so far, taken this command seriously. The very existence of a residual rule in a class-based system of hearsay exceptions is an anomaly.<sup>22</sup> Regular reliance on the exception would undermine the entire enterprise, seeding boundless uncertainty into evidence law.<sup>23</sup>

If the rarity of its application is Rule 807’s saving grace, it stands to reason that the rule should not serve as the vehicle for admitting the countless reliable text messages and social media posts orbiting in cyberspace. Acquiescing to routine reliance on the residual exception to funnel electronic communications to factfinders would, in essence, cede authority over the admissibility of evidence to judges, unconstrained by concrete rules. Such discretion means that different courts will treat the same evidence differently (admitting virtually identical text messages in some cases and excluding them in others) and given the traditionally deferential review of evidentiary rulings and amorphous wording of the residual exception, appellate courts will struggle to standardize trial practice.

Because the residual exception grants virtually unconstrained discretion to trial courts, its routine usage will create massive uncertainty for litigants. That is problematic in our system of justice because virtually all civil and criminal cases are resolved through settlements, dismissals and guilty pleas.<sup>24</sup> The only way such a system can be justified is through an assumption that litigants model their pretrial agreements on the likely outcome at trial.<sup>25</sup> Such modeling is made more difficult if the only way to forecast the admissibility of important evidence is

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<sup>22</sup> Id. (agreeing with the House that “an overly broad residual hearsay exception would emasculate the hearsay rule and recognized exceptions or vitiate the rationale behind codification of the rules”).

<sup>23</sup> Notes of Conference Committee, House Report No. 93–1597 (summarizing that the House rejected a broad residual rule “because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial”) (RB 262).

<sup>24</sup> See *Missouri v. Frye*, 132 S. Ct. 1399, 1402, 1407 (2012) (citing Department of Justice calculations for the proposition that “[n]inety-seven percent of federal convictions and 94 percent of state convictions are the result of guilty pleas” and echoing commentators’ contention that “plea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal justice system”); Thomas H. Cohen & Lynn Langton, *Civil Bench and Jury Trials in State Courts*, 2005, BUREAU OF JUST. STAT. 1 (Apr. 9, 2009), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554> (reporting survey result of state courts that “trials . . . accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts”).

<sup>25</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) (discussing literature that largely justifies a system of plea bargains and settlements on the basis of a “shadow-of-trial” model).

through an assessment of whether a particular trial judge will agree that its admission serves the “purposes” of the evidence rules and the “interests of justice.”<sup>26</sup>

For all its faults, the existing class-based hearsay framework allows parties to evaluate the admissibility of evidence and the consequent likelihood of success with minimal judicial guidance, something that would be sacrificed if a significant portion of the hearsay rules was replaced with amorphous judicial discretion. This is exactly what the Advisory Committee sought to avoid when it championed a class-based system of exceptions.<sup>27</sup>

### **C. Judge Posner’s Proposal: The Residual Exception as a Replacement for the Hearsay Exceptions**

As the discussion in part III.B foreshadows, I disagree with the recent proposal by Judge Richard Posner in a concurrence in *United States v. Boyce* to replace the hearsay exceptions with a discretionary regime modeled on the residual rule. Judge Posner succinctly states his proposal in *Boyce*:

“I don’t want to leave the impression that . . . I want to reduce the amount of hearsay evidence admissible in federal trials. What I would like to see is Rule 807 (‘Residual Exception’) swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee. The ‘hearsay rule’ is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome.”<sup>28</sup>

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26. See *Tome v. United States*, 513 U.S. 150, 164–65 (1995) (noting that the drafters of the Federal Rules consciously rejected a “statement-by-statement balancing approach” because “[i]t involves considerable judicial discretion[,] . . . reduces predictability[,] and . . . enhances the difficulties of trial preparation”); FED. R. EVID. art. VIII advisory committee’s introductory note, at 405 (rejecting proposal for “individual treatment [of hearsay] in the setting of the particular case” as “involving too great a measure of judicial discretion, minimizing the predictability of rulings, [and] enhancing the difficulties of prepar[ing] for trial”); Mueller, *supra* \_\_\_, at 397 (noting in hearsay context that “[p]ractitioners strongly believe they need protection against broad judicial discretion”);

Myrna S. Raeder, *A Response to Professor Swift*, 76 Minn. L. Rev. 507, 516-17 (1992) (decrying courts current overreliance on the residual exception as permitting “total erosion of the hearsay rule by judicial discretion” and resulting in “the worst of all worlds for litigators who must decide which cases to try by evaluating the potentially admissible evidence”).

<sup>27</sup> Introductory Note to Hearsay (“adding a further element to the already over-complicated congeries of pre-trial procedure”). This is the same reason I rejected the “good faith” requirement included in the original Statement of Recent Perception exception. See eHearsay at 46-51

<sup>28</sup> *U.S. v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014).

Judge Posner’s suggestion resonates with a venerable tradition dating back well before the drafting of the Federal Rules of Evidence. In the modern era, Judge Jack Weinstein crafted perhaps the classic formulation of this argument.<sup>29</sup> Judge Weinstein argued that the class-based system of hearsay exceptions championed by John Henry Wigmore should be replaced with a rule permitting trial courts to determine the admission of hearsay by weighing its “probative force” against “the possibility of prejudice, unnecessary use of court time, and availability of more satisfactory evidence” – roughly the sentiment now captured in Rule 403.<sup>30</sup> In the process, he referenced similar proposals by other leading evidence scholars and implicitly endorsed a generous “residual exception” that could achieve much of his stated goal.<sup>31</sup> In crafting the Federal Rules of Evidence, the Advisory Committee considered and rejected Weinstein’s approach. It explained:

“The Advisory Committee has rejected this approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pre-trial procedures, and requiring substantially different rules for civil and criminal cases.”<sup>32</sup>

As explained above, all of the objections the Advisory Committee brandished against Judge Weinstein can similarly be brought to bear against Judge Posner. If anything, given ever-expanding dockets and increasing reliance on settlements and guilty pleas, the criticisms have gained strength since 1969.<sup>33</sup> Further, the passage of time has likely made it more difficult as a practical matter to abolish a class-based hearsay framework, given litigators’ long experience with the framework and its adoption in every American jurisdiction. There is, in fact, no guarantee that if the Advisory Committee made such a drastic change, that the States would follow suit. The result could be an even more convoluted system of American evidence law, where federal and state practitioners would need to learn two vastly different systems of hearsay.

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<sup>29</sup> Jack Weinstein, *The Probative Force of Hearsay*, 46 *Iowa L.Rev.* 331 (1961).

<sup>30</sup> at 338-39. In addition, Weinstein would require a notice requirement, greater leeway for judges to comment on the weight of such evidence and more stringent appellate review.

<sup>31</sup> 354-55.

<sup>32</sup> *Introductory Note to Hearsay*. The Committee also noted that permitting judges to exclude evidence on the basis that they did not “believe it,” i.e., rejecting a statement of a particular hearsay declarant as untrue, seemed “atypical” and divergent from the normal pattern of permitting the trier of fact to assess the weight of otherwise admissible evidence.

<sup>33</sup> See, e.g., *The Federal Judicial Center, 1955-2004 Statistical Data Regarding Federal Courts*, 8 *J. APP. PRAC. & PROCESS* 21, 35 (2006) (chart documenting rising caseloads and decreasing reliance on trials in federal courts since 1965). The Advisory Committee’s notes on this point appeared in the *Federal Register* publication dated March 1969. See *Preliminary Draft of Proposed Rules of Evidence*, 46 *F.R.D.* 161, 326 (1969).

For all of these reasons, my proposal to both reduce the almost universally maligned force of the hearsay prohibition and take advantage of the wealth of new electronic evidence adheres to the class-based hearsay framework long ago adopted by the Advisory Committee, Congress and all fifty states. It also builds directly on a hearsay reform proposal for Statements of Recent Perception embraced by the evidence community and the Advisory Committee at the time of the framing of the Federal Rules of Evidence.<sup>34</sup> In short, my proposal would permit the rules to move toward the goal urged by Judge Posner (increasing the admissibility of reliable hearsay evidence) through a more modest means. The proposed exception fits the pattern of the existing rules, would be viewed as less of a drastic change, and has the pleasant characteristic of being consistent with a proposal adopted by the Advisory Committee at an earlier time.

#### **IV. Critiques**

Having sketched the case for the RSRP exception and disparaged potential alternatives, this portion of the Essay responds to specific critiques of my proposal.

##### **A. A Response to Professors Miller and Shechtman**

As part of the Symposium on Electronic Evidence, Professor Paul Shechtman presented a critique of my proposed rule. Professor Shechtman emphasized that the rule was as much about hearsay as electronic hearsay and that there were instances where the rule might let in statements that should be excluded and exclude statements that should be admitted. That said, he indicated that the proposal was “a very good thing to be talking about.”<sup>35</sup> In an article published shortly after the appearance of *eHearsay*, Professor Colin Miller concurred in part and dissented in part to my proposed exception for RSRPs. Stated more precisely, his response endorsed half of the proposal (proposed Rule 801(d)(1)(D)), but disagreed that statements falling within proposed Rule 804(b)(5) possess sufficient reliability to be excepted from the hearsay prohibition.<sup>36</sup> This portion of the Essay responds to the two Professors’ critiques.

As I acknowledged in my presentation and in *eHearsay*, the proposed RSRP exception is not limited to “electronic” hearsay. I view this as a strength of the proposal. It permits the proposed exception to encompass reliable out-of-court

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<sup>34</sup> Bellin, *supra* note 3 at 33-35.

<sup>35</sup> Transcript at 136.

<sup>36</sup> Colin Miller, No Explanation Required? A Reply to Jeffrey Bellin’s *eHearsay*, *Minn. L. Rev. Headnotes* 34 (2013). Professor Miller generously concludes that “*eHearsay*, makes an extraordinarily important contribution to the scant scholarship on the intersection between electronic evidence and the rules of evidence.” *Id.*

utterances expressed in any medium (much like the other hearsay exceptions) and provides the flexibility for growth as communication norms and technologies evolve. Professor Shechtman also correctly points out that my proposal is a direct outgrowth of hearsay reform proposals that arose prior to the emergence of electronic communication. Again, this is something I happily acknowledge, viewing it as a positive attribute of the proposal. As I emphasized in my presentation at the Symposium, the proposed rule is a direct evolution of the Statement of Recent Perception exception previously adopted by the Committee. This should give observers some comfort that the rule is not a fleeting or radical sentiment, but instead builds on a long tradition of evidence thought. In addition, the rule while not limited to electronic communication is tailored to accommodate that medium of expression and particularly text messages – and for the foreseeable future it is to text messages that the rule will likely be most commonly applied. Thus, the proposed rule is both about broadening the amount of evidence that is admissible over a hearsay exception generally, and about accommodating the rising tide of reliable electronic hearsay.

Professor Shechtman's other critique – essentially that the rule is both over and under inclusive – is also meritorious. My response is that this is the case with all the existing hearsay exceptions. One can easily conjure out-of-court statements that qualify for admission under existing hearsay exceptions, but could be prudently excluded:

- A murder suspect's mother's exclamations to arriving police that the suspect acted in self-defense -- admissible as excited utterances.
- A jailhouse informants' testimony (in exchange for leniency) that the defendant, who he met for a few minutes in the jail, admitted culpability -- admissible as a statement of a party.
- An accomplice confession that implicates a defendant in a crime -- admissible as a statement against interest.

The list is endless. To ensure consistency and predictability, any evidence rule must draw lines. Once lines are drawn, statements can readily be hypothesized that fall on the "wrong" side of those lines. The RSRP exception is no different. Recognizing this unassailable fact, the question becomes not whether one can imagine statements that fall on the wrong side of the exception, but whether on balance the exception does more good than harm.

Professor Shechtman's critique also motivates me to emphasize a critical point: my proposal is intended as a starting point, not a *fait accompli*. If the rule can be improved, that is not a reason to reject it, but to adopt it with those improvements. One potential improvement is to restore the "good faith" safeguard from the

Statement of Recent Perception exception.<sup>37</sup> Although I would prefer a more concrete rule, a RSRP exception with a good faith requirement is preferable to no RSRP exception at all. It bears emphasis as well that the admission of an unreliable hearsay statement is not fatal to the cause of accurate factfinding. The adversary system contemplates vigorous debate over the proper weight to be given any item of evidence. The same arguments that counsel exclusion of hearsay will, if compelling, cripple its power as evidence. In an era of receding jury paternalism, there is little to say for the notion that while we all might reasonably rely on the text messages and social media posts of knowledgeable parties to ascertain facts ourselves, juries cannot be trusted to evaluate them in litigation.

Professor Miller's critique touches some of the same concerns as those raised by Professor Shechtman, although in some ways it is much narrower. Professor Miller relies on a comparison of the relative reliability of statements falling under the present sense impression (PSI) hearsay exception (Rule 803(1)) and those falling under the proposed RSRP exception.<sup>38</sup> As Professor Miller believes that statements falling under the proposed exception would be less reliable than those falling under the analogous PSI hearsay exception (Rule 803(1)), he deems my proposed Rule 804(b)(5) exception problematic.<sup>39</sup> My response is twofold.

First, I quibble with Professor Miller's comparison. Although, he is correct that there are some respects in which PSIs may be more reliable than RSRPs (e.g., PSIs must be made closer in time to the perceived event),<sup>40</sup> there are many in which they are not. On this front, Professor Miller discounts the reliability enhancements in my proposed exception, which requires a (1) recorded, (2) communication, (3) not made or obtained in contemplation of litigation, (4) transmitted by a known sender. None of these reliability safeguards are found in the present sense impression exception. Three quick examples illustrate the point:

- An *anonymous* text message sent to Frank that, "I just saw Mike shoot your brother in cold blood," could be admitted as a present sense impression via Frank's *testimony*, even if Frank had deleted the text message and was describing it at trial from memory (to prove Mike's guilt) a year later. Such *testimony about* an electronic communication would not be permitted under the RSRP exception which requires the

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<sup>37</sup> FED. R. EVID. 804(b)(2)(proposed), 46 F.R.D. 161 (requiring qualifying statement to have been "made in good faith").

<sup>38</sup> Miller at 62.

<sup>39</sup> Miller at 71-72.

<sup>40</sup> Miller at 63-64 (contrasting the immediacy required for a present sense impression with the more flexible time constraint in my proposed exception).

actual recorded communication to be presented to the factfinder, and specifically excludes anonymous messages.

- If a police investigator wearing a recording device recorded her ongoing impressions of an interaction with a defendant suspected of drunk driving (“his eyes are bloodshot, etc.”), the recording would qualify for admission over a hearsay objection as a present sense impression even if the officer *never* testified. Such a recording would not be admissible under the RSRP exception because it was “made in contemplation of litigation.”
- A passenger in a car could draft, but not send, an email that described the car’s progress (“we are stuck in traffic”), save the email and later introduce it (perhaps to support an alibi claim) as a “present sense impression.” The draft email would satisfy the prerequisites of the present sense impression exception, but would not qualify as a RSRP because, having never been sent, it did not constitute a “communication.”

In sum, there are concrete reliability safeguards in the RSRP exception that are absent from the PSI exception, leaving open the question of whether statements falling under the RSRP or PSI exception are more reliable.

My second (larger) problem with Professor Miller’s critique, however, is that his comparison is a loaded one. The present sense impression exception is located in Rule 803. Rule 803 exceptions permit the admission of hearsay evidence, “regardless of whether the declarant is available as a witness.”<sup>41</sup> The Advisory Committee Notes explain that Rule 803 proceeds upon “the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.”<sup>42</sup> Stated another way, the Advisory Committee viewed hearsay falling under Rule 803 exceptions to be superior, or at the very least equivalent, in terms of reliability, to the declarant’s live testimony. Consequently, Rule 803 exceptions must meet a very high bar of reliability.<sup>43</sup>

The portion of my proposed exception that Professor Miller criticizes<sup>44</sup> falls within Rule 804, not Rule 803. The key difference between the two rules, of course, is that Rule 804 is only triggered when the declarant is “unavailable.” As the Advisory Committee explains, this crucial requirement reflects that:

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<sup>41</sup> FRE 803.

<sup>42</sup> FRE 803, Advisory Committee Notes.

<sup>43</sup> FRE 804, Advisory Committee Notes (“Rule 803, *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility.”)

<sup>44</sup> Professor Miller endorses my proposed Rule 801(d)(1)(D). See Miller at 35, 58 and 72.

“[Rule 804] proceeds upon a different theory [than Rule 803]: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted [under Rule 804] if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.”<sup>45</sup>

Thus, it is uninformative to evaluate a Rule 804 exception by comparing the reliability of statements falling under that exception to statements that would qualify for admission under Rule 803. The framework of the rules anticipates that *all* Rule 804 exceptions will fail this test. Rule 804 exceptions are not based on an assumption that qualifying hearsay is just as reliable as live testimony. Instead, Rule 804 exceptions must only meet the standard that hearsay passing through them is preferable to the “complete loss of the evidence of the declarant.” Consequently, the proper test of whether proposed Rule 804(b)(5) meets the requisite reliability standard would be to compare statements admitted under the proposed rule to those admitted under *other Rule 804 exceptions*, like dying declarations, statements against interest and forfeiture by wrongdoing. Here, the proposed exception stacks up quite well.

Reliability flaws in the Rule 804 exceptions are well established. As virtually everyone acknowledges, the dying declaration exception (Rule 804(b)(2)) is: (a) based on routinely-questioned spiritual assumptions; and (b) presumes a counterintuitive measure of lucidity on the part of the dying that science does not support.<sup>46</sup> Skepticism of “statements against interest” (Rule 804(b)(3)) is also widespread, drawing on the exception’s now abandoned historical limitation to statements against pecuniary or proprietary interest,<sup>47</sup> and the rule’s failure to acknowledge the virtual impossibility of a voluntary statement that is truly thought by its speaker to be against one’s own interest.<sup>48</sup> The exception

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<sup>45</sup> FRE 804, Advisory Committee Notes.

<sup>46</sup> Bryan A. Liang, Shortcuts to “Truth”: The Legal Mythology of Dying Declarations, 35 Am.Crim. L.Rev. 229, 237-43 (1998) (highlighting scientific evidence that casts doubt on the reliability of statements of the dying); John J. Capowski, Statements Against Interest, Reliability, and the Confrontation Clause, 28 Seton Hall L. Rev. 471, 476 (1997) (“[D]ying declarations may be highly unreliable. . . . Despite the potential unreliability of such statements, the exception was established in homicide cases to compensate for the unavailability of the declarant.”); Advisory Committee Notes to Rule 804(b)(2) (acknowledging that “the original religious justifications for the exception may have lost its conviction for some persons over the years”).

<sup>47</sup> FRE 804(b)(3) Advisory Committee Notes (acknowledging common law limitation).

<sup>48</sup> John P. Cronan, Do Statements Against Interest Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformation, 33 Seton Hall L. Rev. 1, 3 (2002) (describing psychological factors that undermines the assumptions of the rule and arguing that “research and common experience reveal myriad reasons why persons make untrue, self-

permitting hearsay statements of a person rendered unavailable by a party's wrongdoing (Rule 804(b)(6)) makes no pretense *at all* to reliability.<sup>49</sup> It is intended to reduce anti-witness violence and intimidation, regardless of the reliability of the witness's potential testimony or hearsay statements.

In sum, defenders of the Rule 804 exceptions search in vain for definitive support for the reliability of qualifying statements. The key to understanding these exceptions is necessity. While there is some measure of reliability in statements that fall under the rule, their admission can best be explained as a choice of evils. In light of the declarant's unavailability, Rule 804 permits the jury to hear the out-of-court statements (e.g., an alleged accomplice's confession, the victim's dying accusations, or the silenced witness's previous words) in lieu of depriving jurors of that declarant's evidence altogether. My proposed exception embodies this same philosophy. Proposed Rule 804(b)(5) applies only when the declarant is unavailable. Thus, the question is not whether a preserved text message from an unavailable witness relating relevant events will always be reliable. Instead, it is whether the jury should be permitted to view such a text message given that it will never hear from the declarant. My confidence that the answer to this question is "yes!" stems not only from the necessity factor, but also the reliability enhancement of the RSRP exception (missing from all the other Rule 804 exceptions), that the absent witness's communication can be shown directly to the jury. Unlike an oral "statement against interest" or "dying declaration" relayed to the jury by a police officer, jailhouse informant, or other interested party who may have reason to embellish (or manufacture) a critical statement, an RSRP comes to the jury preserved in the same form in which it was originally uttered.

## **B. Prejudice to Defendants, Evidence Fabrication, and Misunderstanding**

Another objection to the portion of my proposal that admits certain hearsay statements of unavailable declarants, stems from a sense that admitting such evidence aggrieves criminal defendants. In reality, the proposed rule enables both defendants and prosecutors as well as civil litigants to provide reliable evidence to juries. Criminal defendants would likely invoke the rule to introduce evidence of third-party perpetrators or to support alibi testimony. Nevertheless, it is undoubtedly the case that the rule will be more commonly invoked in the criminal

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incriminating statements"); *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (describing suspicion of unreliability that attaches to accomplice confessions); *Herbert v. Lankershim*, 71 P.2d 220, 230 (CA. 1937) (noting in the context of a statement against interest that: "On the subject of oral admissions, unless corroborated by satisfactory evidence, this court, in [a prior case], rates it as the weakest of testimony that can be produced.")

<sup>49</sup> FRE 804(b)(6), Advisory Committee Notes (justifying the rule as a "prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the justice system itself'").

context by prosecutors, largely because criminal defendants present evidence less frequently.

Embracing this critique can be short sighted. Due to the “reasonable doubt” standard and the allocation of the burden of proof, criminal defendants generally benefit more from evidentiary gaps than prosecutors or civil litigants and so will view the factfinders’ ignorance of even reliable information with an understandable, but undeniably partisan relish. Drafters of evidence rules should not adopt this same perspective. Criminal defendants do, of course, receive special dispensation in the rules of evidence, but that dispensation is largely a product of constitutional, not rule-based considerations and primarily, in this context, the Sixth Amendment Confrontation Clause.

These constitutional considerations are important, but as the Advisory Committee has recognized, they need not be incorporated into the rules themselves.<sup>50</sup> For this reason, the hearsay exceptions are crafted as “exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.”<sup>51</sup> As is currently the case, prosecution evidence may make it through a hearsay exception only to be barred by the Sixth Amendment. The RSRP exception follows the same pattern. That said, because the RSRP carves out statements made in contemplation of litigation, there will be few occasions where the post-*Crawford* Confrontation Clause mandates exclusion of evidence admitted under the proposed exception.<sup>52</sup>

Recognizing that the constitutional concern for confrontation is captured in the overlapping protections of Sixth Amendment jurisprudence, the most powerful remaining defense-focused objection is that evidence admitted under the proposed objection is particularly unreliable in a manner not apparent to jurors. If a rule permits evidence to be introduced, that same rule can be abused through: (1) the creation of fabricated evidence that appears to meet its requirements; or (2) the admission of authentic evidence that appears to mean one thing when it actually means something else.

Focusing more precisely on the potential for intentional abuse of the proposed exception suggests there is no heightened need for concern here. The RSRP

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<sup>50</sup> Introductory Note to Hearsay (emphasizing the “separateness of the Confrontation Clause and the hearsay rule”).

<sup>51</sup> *Id.*

<sup>52</sup> eHearsay at 59 (emphasizing that exclusion of statements made in contemplation of litigation means that exception parallels current Confrontation Clause jurisprudence); Jeffrey Bellin, Applying *Crawford*'s Confrontation Right in a Digital Age, 45 *Tex. Tech. L. Rev.* 33 (2012) (arguing that the Confrontation Clause will rarely apply to text messages and social media communications).

exception attempts to minimize the risk of abuse by excluding the types of communications most likely to be fabricated: communications made to investigators, or made in contemplation of litigation, as well as recorded statements like “notes to self” or diary entries that are not “communications.”

One of the key protections against fabricated evidence incorporated into the RSRP exception is requiring proof that a communication was made.<sup>53</sup> By requiring a “recorded” communication, the RSRP exception forces those who would seek to abuse the rule to produce physical evidence at significant peril. In the electronic context, recorded communications generally pass through numerous servers and devices. Someone who attempts to manufacture a text message, for example, would be vulnerable to disproof by evidence obtained from the (purported) participants’ phones or the phone company.<sup>54</sup>

As this discussion suggests, the primary protection against abuse is not excluding vast chunks of valuable evidence, or writing earnest verbal protections into existing hearsay rules (“good faith” or “interests of justice”), but rather the same constraints that protect against evidence fabrication generally. Authentication requirements dictate that proponents of any evidence offer sufficient evidence to support a finding that the evidence “is what the proponent claims it is.”<sup>55</sup> Thus statements offered under the proposed exception will have to be shown to be, in fact, actual text messages, tweets, or Facebook status updates from the person claimed. In addition, the proponent of fabricated evidence takes a huge risk. The criminal law buttresses the authentication requirements with severe penalties for falsifying evidence<sup>56</sup> and, even apart from those, parties risk loss at trial (and severe litigation sanctions) if they sponsor evidence that is exposed as fraudulent.

It is also important to stress that the existing evidence rules already tolerate a great deal of potential for abuse. To the extent someone is interested in fabricating evidence, there are abundant ways to do so under existing rules. Most obviously a person can falsify live testimony. A more discrete miscreant can, of course, manufacture admissible out-of-court statements that will be admissible through an existing hearsay exception. Perhaps the most obvious form of abuse is to falsely assert that the opposing party admitted guilt. The classic example is the jailhouse “snitch” or the corrupt police officer who testifies that the defendant confessed. Looking more specifically at electronic communications, these too can

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<sup>53</sup> Cf. Judson Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. Rev. 43, 53-54 (1954).

<sup>54</sup> To avoid these problems, a person might actually send a text message they planned to use in later litigation, but this is a risky stratagem; such a message could just as easily be used to implicate them in wrongdoing as exonerate them.

<sup>55</sup> FRE 901(a).

<sup>56</sup> See, e.g., 18 U.S.C. § 1519; Cal. Penal Code § 132.

already be fabricated in a manner that permits them to fall within a wide variety of exceptions: as present sense impressions, recorded recollections, state of mind, business records or, if all else fails, the residual exception. Hypothesize for a moment a bad actor intent on fabricating electronic evidence. Why wouldn't this scoundrel simply fabricate a text message from the defendant (or plaintiff) and offer it, without controversy, as a statement of a party, rather than attempt the more complicated task of admitting it as a non-party's RSRP. In short, someone bent on fabricating evidence can already do so. The Recorded Statement of Recent Perception exception, like any rule of admission, slightly increases the menu of options, but any difference is of degree, rather than kind.

The concern about potential misunderstandings must be conceded to a degree. The abbreviations, slang and shorthand inherent in hurried, terse electronic communication certainly lend themselves to later misunderstandings, a danger supplemented by the phenomenon of "autocorrect." In this respect, Professor Miller cleverly uses my own warnings regarding the vagaries of electronic communications against me.<sup>57</sup> There are, of course, some protections. There is almost always some context for electronic statements. Social media posts and text messages are generally components of a broader exchange that includes responses and comments that can shed light on potential ambiguity. Similarly, significant "autocorrect" errors are often raised by the participants in the effected communication. Finally, there must be some allowance for attorneys to exercise advocacy and jurors to apply their common sense. Autocorrect errors can be highlighted and alternative explanations for terms or abbreviations suggested. The time is near, if it has not arrived already, when jurors will understand the vagaries of electronic communication well enough that the potential for misunderstanding will be deemed precisely equivalent to that of oral communication. For those immersed in the electronic medium, there is little doubt that the potential for misunderstanding a recorded text message are in the same ballpark as those of misunderstanding an "excited utterance" or "dying declaration," particularly as the latter are presented secondhand (through the recollection of a potentially interested witness), while the former are presented to the jury precisely as originally uttered.

Finally, it is worth noting that there is a strange irony underlying these objections. Abuse and misunderstanding objections garner most of their persuasive force not because recorded, electronic communications are more easily fabricated or misunderstood than other evidence, but because they may be unusually persuasive. This logic cannot win out, however. It would be a strange system of

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<sup>57</sup> Miller at 70 (quoting Jeffrey Bellin, Facebook, Twitter, and the Uncertain Future of Present Sense Impressions, 160 U.P.A.L.REV. 331, 364-65 (2012)).

evidence that shrank from a hearsay exception on the ground that evidence that falls within the exception was suspect because it is widely viewed by regular people (i.e., jurors) as a reliable source of information. After all, that type of consensus is quite close to the point of having hearsay exceptions in the first place.

### **Conclusion**

As Professors Shechtman and Miller easily establish, my proposed RSRP exception is not perfect. Like all hearsay exceptions it is over- and under-inclusive. Hearsay admitted under the exception will sometimes be less reliable than live witness testimony. That is not the test, however. The question, given the contours of the proposed Rule 804 exception, is whether statements falling within its requirements should be kept from the jury even when they will not be able to hear from the declarant. I welcome suggestions as to how the exception might be improved including, perhaps, a “good faith” proviso to ease concerns about outlier statements. In my view, however, an exception along the lines of my proposal is the best path forward and far superior to the more drastic suggestion of hearsay reform offered by Judge Posner and others. And that may prove to be the critical inquiry. Given the most recent communication revolution, the question may not, in fact, be whether the evidentiary landscape should change, but instead what role the Advisory Committee will play in the inevitable changes emerging on the horizon.

# TAB 5

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Possible Amendments to Rules 901 and 902 to Cover Electronic Evidence

Date: October 1, 2014

At the Electronic Evidence Symposium in April, Greg Joseph made a presentation intended to generate discussion about whether standards could be added to Rules 901 to 902 that would specifically treat authentication of electronic evidence. There are dozens of reported cases, both Federal and State, that set forth standards for authenticating electronic evidence. These cases apply the existing, flexible provisions on authenticity currently found in Federal Rules 901 and 902 and their state counterparts. Greg crafted specialized authenticity rules to cover email, website evidence and texts; these draft rules are intended to codify the case law, as indicated by the extensive footnoted authority that Greg provided. Greg suggested that analogous standards could be set up for other forms of electronic evidence such as online chats.

This memo presents and discusses the drafts prepared by Greg for discussion purposes at the Symposium. Part One of the memo sets forth the drafts. Part Two of the memo raises some questions that the Committee might consider in determining whether to propose specialized authentication rules for electronic evidence. Part Three discusses the possibility of a narrow amendment that would provide that authenticity is sufficiently established when a party-opponent produces the challenged item (electronic or otherwise) in the action.

The first question for the Committee at this meeting is to determine whether it is interested in proceeding with proposed amendments setting forth authenticity standards for electronic evidence. If so, the drafts prepared by Greg will be worked up and altered or supplemented if necessary, and corresponding Committee Notes will be prepared for the Committee's review at the next meeting. (The question for the Committee at the next meeting would be whether the proposals should be sent to the Standing Committee with the recommendation that they be released for public comment).

If the Committee determines that it is not interested at this time in proceeding with a project to provide specific authentication rules for electronic evidence, then the Committee will be asked to consider whether the drafts prepared by Greg (together with any approved alterations or reconfiguring) might be used in some other way. At the last meeting, Judge Sutton suggested that even if Greg's drafts might not end up to be appropriate for rule amendment, the Committee might consider issuing some version of them as a "Best Practices" template that could be distributed to judges and litigants.

Finally, the Committee will be asked to consider whether it is interested in proceeding with a narrower amendment providing that production of a party-opponent is sufficient to show authenticity. The justification for that possible amendment is discussed in Part Two, below.

## **I. Text of Authenticity Rules Governing Electronic Evidence**

What follows are the drafts Greg prepared for amendments to Rules 901 and 902 that would set forth specific authenticity standards for certain electronic evidence. Greg provides footnote support for the standards he sets forth. These footnotes are included here; obviously any proposed amendment would delete the footnotes from the text; and, indeed, case citations would not be included in the Advisory Committee Note because the Standing Committee, for some reason, thinks citing cases in a Committee Note is a bad idea.

### ***Draft of Amendment to Rule 901 to Cover Email:***

Greg notes that the draft below essentially adapts Rule 901(b)(6) --- providing a means for authenticating a phone conversation --- to email. That is an interesting idea that is consistent with the case law and has just recently gained the support of the Idaho Supreme Court. *See State v. Koch*, 2014 Ida. LEXIS 243, at \*17 ("authenticating a text message or email may be done in much the same way as authenticating a telephone call under Idaho Rule of Evidence 901(b)(6)"). It certainly can be argued that the Federal Rules are in their current state something of an anomaly, with a specific rule on an old form of communication but no specific rule on a predominant form of communication.

## Rule 901. Authenticating or Identifying Evidence.<sup>1</sup>

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

**(b) Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement: \* \* \*

**(11) Evidence About an Email Communication.** For an email communication, evidence that

**(A)** it is in the customary format of an email, including the email address of the sender and recipient and was sent to --- or received from --- the email address assigned at the time to a particular person, if circumstances, which may include some or all of the following, show that the person received the email:

**(i)** a reply was received from the email address assigned to the person;<sup>2</sup>

**(ii)** later communications with the person reflect the person’s knowledge of the contents of the email;<sup>3</sup> or

**(iii)** later conduct of the person reflects the person’s knowledge of the contents of the email;<sup>4</sup>

**(B)** it was received from the email address assigned at the time to a particular person, if circumstances, which may include some or all of the following, show that the person sent the email:

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<sup>1</sup> These drafts have been restyled from the version presented by Greg at the Symposium, in an attempt to conform with the style conventions adopted by the Standing Committee. Thanks to Joe Kimble for his help in the restyling.

<sup>2</sup> See, e.g., *State v. Pullens*, 281 Neb. 828, 860, 800 N.W.2d 202, 229 (2011) (“Evidence that an e-mail is a timely response to an earlier message addressed to the purported sender is proper foundation analogous to the reply letter doctrine”); *Tienda v. State*, 358 S.W.3d 633, 641 (Tex. Ct. Crim. App. 2012); *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex. Ct. App), *review denied* 2008 Tex. Crim. App. LEXIS 1634 (Tex. Ct. Crim. App. Oct. 29, 2008).

<sup>3</sup> See, e.g., *Shea v. State*, 167 S.W.3d 98, 105 (Tex. Ct. App. 2005), *discretionary review denied*, 2005 Tex. Crim. App. LEXIS 1951 (Tex. Ct. Crim. App. Nov. 9, 2005); *Bloom v. Commonwealth of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001); *Dominion Nutrition, Inc. v. Cesca*, 2006 U.S. Dist. LEXIS 15515, at \*16 (N.D. Ill. March 2, 2006); (“E-mail communications may be authenticated as being from the purported author based on ... other communications from the purported author acknowledging the e-mail communication that is being authenticated”), quoting *Fenje v. Feld*, 301 F.Supp.2d, 781 (N.D. Ill. 2003), *aff’d*, 398 F.3d 620 (7th Cir. 2005).

<sup>4</sup> See, e.g., *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011) (“The actions of the defendant himself served to authenticate the e-mails. One e-mail indicated that Jeremy would be at a certain place at a certain time and the defendant appeared at that place and time. In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same”) (citing Mass. G. Evid. § 901(b)(6)). See also *State v. Glass*, 190 P.3d 896, 901 (Idaho Ct. App. 2008) (same re online chat).

(i) the email contained in its body the typewritten name or nickname of the recipient or the sender;<sup>5</sup>

(ii) the email contained the person's signature block or electronic signature;<sup>6</sup>

(iii) the email's contents would normally be known only to the person or to a discrete number or category of people including the person;<sup>7</sup>

(iv) later communications with the person reflect the person's knowledge of the contents of the email;<sup>8</sup> or

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<sup>5</sup> See, e.g., *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (“the e-mail sent to Yamada and von Gunten referred to the author as ‘Mo.’ Both Yamada and von Gunten recognized this as Siddiqui’s nickname”); *Donati v. State*, 2014 Md. App. LEXIS 6, at \*32 (Md. Ct. Spec. App. Jan. 29, 2014) (“an e-mail reference to the author with the defendant’s nickname, where the context of the e-mail revealed details that only the defendant would know, and where the defendant called soon after the receipt of the e-mail, making the same requests that were made in the e-mail”); *Interest of F.P.*, 878 A.2d 91, ¶13 (Pa. Super. Ct. 2005) (“He referred to himself by his first name.”); *Commonwealth v. Capece*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 506, 119 (Ct. Common Pl. Oct. 18, 2010) (“The e-mails were often signed ‘Jerry,’ a name to which Defendant answered”); *Texas: Shea v. State*, 167 S.W.3d 98, 105 (Tex. Ct. App. 2005) (“Four of the e-mails were signed ‘Kev.’”).

<sup>6</sup> *State v. Pullens*, 281 Neb. 828, 860, 800 N.W.2d 202, 229 (2011) (“There are several ways that the authorship of an e-mail may be shown.... The signature or name of the sender or recipient in the body of the e-mail is also relevant to authentication.”) (citing MCCORMICK ON EVIDENCE § 227 (4th ed. 1992)); *Sea-Land Service, Inc. v. Lozen Int’l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (email of one employee forwarded to party opponent by a fellow employee—containing the electronic signature of the latter—constitutes an admission of a party opponent); cf. *TV Tokyo Corp. v. 4Kids Entm’t, Inc. (In re 4Kids Entm’t, Inc.)*, 463 B.R. 610, 693 (Bankr. S.D.N.Y. 2011) (“the emails include signature blocks, which signify an intent to authenticate”) (addressing effectiveness of modification of written agreement).

<sup>7</sup> *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (“The context of the e-mail ... shows the author of the e-mail to have been someone who would have known the very details of Siddiqui’s conduct with respect to the Waterman Award and the NSF’s subsequent investigation. In addition, in one e-mail sent to von Gunten, the author makes apologies for cutting short his visit to EAWAG, the Swiss Federal Institute for Environmental Science and Technology. In his deposition, von Gunten testified that in 1994 Siddiqui had gone to Switzerland to begin a collaboration with EAWAG for three or four months, but had left after only three weeks to take a teaching job.”); *Hardin v. Belmont Textile Mach. Co.*, 2010 U.S. Dist. LEXIS 61121, at \*16 (W.D.N.C. June 7, 2010) (“The e-mails in this case are provided on a printout that is in the familiar Microsoft Outlook format ... and they provide ‘many distinctive characteristics, including ... the name of the person connected to the address.’ ... The e-mails also discuss various identifiable matters related to [plaintiff’s] employment ... which sufficiently authenticate the e-mails as being what its proponent claims.”); *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) (“The contents of the e-mails also authenticate them as being from the purported sender and to the purported recipient, containing as they do discussions of various identifiable matters, such as Mr. Safavian’s work at the General Services Administration (‘GSA’), Mr. Abramoff’s work as a lobbyist, Mr. Abramoff’s restaurant, Signatures, and various other personal and professional matters”); *State v. Taylor*, 632 S.E.2d 218, 231 (N.C. Ct. App. 2006) (quoting and following *Safavian*); *State v. Pullens*, 281 Neb. 828, 860, 800 N.W.2d 202, 229 (2011) (inclusion of sender’s social security and telephone numbers); *Shea v. State*, 167 S.W.3d 98, 105 (Tex. App. 2005) (“In one of the e-mails, Shea commented that he liked the complainant’s locker number. She explained in her testimony that this comment was significant because her locker number had the numerals ‘22’ in it and Shea is twenty-two years older than she. The complainant [also] testified that the content of the e-mails was similar to conversations she had had with Shea over the telephone.”); *Massimo v. State*, 144 S.W.3d 210, 216 (Tex. Ct. App. 2004) (“the author of the e-mails knew the subject of the investigation, harassing e-mails, before Sparby revealed that to her”).

<sup>8</sup> See, e.g., *Shea v. State*, 167 S.W.3d 98, 105 (Tex. Ct. App. 2005), *discretionary review denied*, 2005 Tex. Crim. App. LEXIS 1951 (Tex. Ct. Crim. App. Nov. 9, 2005); *Bloom v. Commonwealth of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001); *Dominion Nutrition, Inc. v. Cesca*, 2006 U.S. Dist. LEXIS 15515, at \*16 (N.D. Ill. March 2, 2006); (“E-mail communications may be authenticated as being from the purported author based on ... other communications from the purported author acknowledging the e-mail communication that is being authenticated”), quoting *Fenje v. Feld*, 301 F.Supp.2d, 781 (N.D. Ill. 2003), *aff’d*, 398 F.3d 620 (7th Cir. 2005).

(v) later conduct of the person reflects the person's knowledge of the contents of the email;<sup>9</sup>

(C) it was produced by the party against whom it is offered in the action.<sup>10</sup>

***Draft of Addition to Rule 901 to Cover Website Evidence:***

**(12) Evidence About Website Contents.** For a webpage from the website of a business, public office or other organization, a printout or other output that is readable by sight and bears the date and time the webpage was accessed, its Internet address, and the contents of the exhibit downloaded, if:

(A) a witness testifies or certifies under a federal statute or a rule prescribed by the Supreme Court that:

(i) the witness typed in the Internet address on the exhibit on the date and at the time stated;

(ii) the witness logged onto the website and reviewed its contents; and

(iii) the exhibit fairly and accurately reflects what the witness saw; or

(B) The webpage bears indicia of authenticity, which may include:

(i) distinctive website design, logos, photos or other images associated with the website or its owner;

(ii) contents of a type ordinarily posted on that website or websites of similar entities;

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<sup>9</sup> See, e.g., *Commonwealth v. Amaral*, 78 Mass. App. Ct. 671, 674-75, 941 N.E.2d 1143, 1147 (2011) (“The actions of the defendant himself served to authenticate the e-mails. One e-mail indicated that Jeremy would be at a certain place at a certain time and the defendant appeared at that place and time. In other e-mails, Jeremy provided his telephone number and photograph. When the trooper called that number, the defendant immediately answered his telephone, and the photograph was a picture of the defendant. These actions served to confirm that the author of the e-mails and the defendant were one and the same”) (citing Mass. G. Evid. § 901(b)(6)). See also *State v. Glass*, 190 P.3d 896, 901 (Idaho Ct. App. 2008) (same re online chat).

<sup>10</sup> See, e.g., *Bruno v. AT&T Mobility, LLC*, 2011 U.S. Dist. LEXIS 59795, at \*5 n.4 (W.D. Pa. June 3, 2011) (“Plaintiff argues that the series of emails between Ms. Menster and Mr. Thomas have not been properly authenticated.... ‘A party to litigation that produces documents during discovery in that litigation thereby authenticates the documents it has produced.’”); *Dominion Nutrition, Inc. v. Cesca*, 2006 U.S. Dist. LEXIS 15515, at \*16 (N.D. Ill. March 2, 2006) (“As to authentication, documents produced by an opponent may be treated as authentic”); *Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S. Dist. LEXIS 17910, at \*6 (N.D. Ill. 1999) (“other courts in this district have held that the production of documents during discovery from the parties' own files is sufficient to justify a finding of authentication”); *Wells v. Xpedx*, 2007 U.S. Dist. LEXIS 67000, at \*10 (M.D. Fla. Sept. 11, 2007) (“Documents produced during discovery ‘are deemed authentic when offered by a party opponent’”); *Sklar v. Clough*, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga. July 6, 2007) (“The e-mails in question were produced by Defendants during the discovery process. Such documents are deemed authentic when offered by a party opponent”).

- (iii) contents of the webpage that remain on the website for the court to verify;
- (iv) publication of the same contents elsewhere by the website's owner;
- (v) contents that have been republished elsewhere and attributed to the website;
- (vi) the length of time the contents were posted on the website. <sup>11</sup>

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<sup>11</sup> *Smoot v. State*, 316 Ga. App. 102, 729 S.E.2d 416 (2012) (“to authenticate a printout from a web page, the proponent must present evidence from a percipient witness stating that the printout accurately reflects the content of the page and the image of the page on the computer at which the printout was made”), quoting *Nightlight Sys. v. Nightlites Franchise Sys.*, 2007 U.S. Dist. LEXIS 95538, at \*16 (N.D. Ga. May 11, 2007); *Buzz Off Insect Shield, LLC v. S.C. Johnson & Son, Inc.*, 2009 U.S. Dist. LEXIS 17530 (M.D.N.C. Mar. 6, 2009) (“[defendant] could authenticate its printouts of various websites by calling witnesses who could testify that they viewed and printed the information, or supervised others in doing so, and that the printouts were accurate representations of what was displayed on the listed website on the listed day and time”); *Lebewohl v. Heart Attack Grill, LLC*, 2012 U.S. Dist. LEXIS 93945 (S.D.N.Y. July 6, 2012) (website evidence not offered for the truth sufficiently authenticated on summary judgment by attorney's affidavit and internal indicia of reliability: “[T]he Deli's counsel ... has represented that he downloaded the Chowhound and Korean Airlines exhibits from the Internet websites of those entities... Each has sufficient indicia of authenticity. ...[T]he July 2004 Korean Airlines article contains an Internet domain address as well as a printout date... It appears to contain the text of the original Korean Airlines newsletter reprinted on the author's professional website. The address for the Deli given in the article is the Deli's location as of July 2004. As for the two Chowhound posts, they are direct printouts from the Chowhound.com website; both contain Internet domain addresses as well as printout dates. Both articles remain accessible on that public website as of the writing of this opinion, as the Court has verified.... Both reviews contain indicia of reliability”); *Rivera v. Inc. Village of Farmingdale*, 2013 U.S. Dist. LEXIS 181890, at \*23 (E.D.N.Y. Dec. 31, 2013) (internet postings offered to show community bias in Fair Housing Act case; testimony that witness “personally downloaded all of the postings and confirmed the identities of the key posters ... [suffices to show] a ‘reasonable likelihood’ that they were actually posted on the internet by members of an online community comprised of the Village’s own residents”); *Foreword Magazine, Inc. v. OverDrive Inc.*, 2011 WL 5169384, at \*4 (W.D. Mich. Oct. 31, 2011) (admitting screenshots from websites, accompanied only by the sworn affidavit of an attorney, given “other indicia of reliability (such as the Internet domain address and the date of printout)”); *Hood v. Dryvit Sys., Inc.*, 2005 U.S. Dist. LEXIS 27055, at \*6-\*7 (N.D. Ill Nov. 8, 2005) (affidavit of counsel on summary judgment motion “stating that he ‘retrieved the documents off the Dryvit, Inc. corporate website on August 29, 2005.’ Counsel also swears that ‘the web addresses stamped at the bottom of each exhibit were the addresses I retrieved the exhibits from, respectively.’”) (internal brackets and citation omitted); *Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183 (D. Or. Jan. 28, 2014) (“To authenticate a printout of a web page, the proponent must offer evidence that: (1) the printout accurately reflects the computer image of the web page as of a specified date; (2) the website where the posting appears is owned or controlled by a particular person or entity; and (3) the authorship of the web posting is reasonably attributable to that person or entity”); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) (admitting on a preliminary injunction motion copies of pages from defendant’s and third party websites (as to the latter of which the furnished “webpages contain[ed] . . . the internet domain address from which the image was printed and the date on which it was printed”) because “the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are”; noting the “reduced evidentiary standard in preliminary injunction motions”).

*Draft of Rule Providing for Self-authentication of emails and Text Messages Under Certain Circumstances:*

**Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: \* \* \*

(13) **Email.** The email is in the customary format of an email and purports to issue from the email system of a business, public office, or other organization and not from a public email system.

(14) **Text Message.** The text message is in the customary format of a text message and purports to issue from a number or other unique source designation assigned at the time to a particular device.

**II. Issues to Consider In Determining Whether to Draft and Propose Specialized Rules of Authentication for Electronic Evidence**

*A. Relationship With “Basic” Rules on Authentication*

All the cases cited by Greg worked out their criteria from the basic principles established in Rule 901. For example, the list of circumstantial guarantees for webpages is derived from the case law interpreting Rule 901(b)(4) --- authentication through distinctive characteristics and circumstantial evidence. One possible concern of specialized authentication rules might be that courts and litigants may become confused about whether and how to use more generalized rules of authentication such as Rule 901(b)(4) and 901(b)(7) (evidence of about a process or system that produces an accurate result).

To some extent the concern about the relationship between general and specific rules on authentication can be answered by the fact that Rule 901(b) simply sets forth a non-exclusive list of examples of showings of authenticity that are sufficient to overcome a challenge to admissibility on authentication grounds. So there is arguably no conflict or even any tension between having general and specific examples, as no rule excludes any other. It’s somewhat analogous to a hearsay statement that is admissible under several different exceptions, e.g., an excited statement of a party that is admissible under Rule 801(d)(2)(A) and 803(2). Nonetheless, there may be at least some risk of confusion in lawyers seeking to manage both specific and general rules of authenticity.

## ***B. Underinclusive?***

Greg's drafts of Rule 901 changes cover email and webpages; the Rule 902 changes cover certain emails and texts. Left untreated are other common forms of electronic communications, such as social media postings and chatroom conversations. Greg notes that the same principles set forth as to email in Rule 901 can be extended to authenticating texts, chatroom conversations, and the like.

Certainly an effort to write rules of authenticity for electronic evidence should cover as many forms of electronic evidence as possible. There is abundant case law discussing authentication requirements for social media postings, chatroom conversations, etc. But adding these other forms of communication creates undeniable drafting challenges. One alternative is to add references to other communications such as texting or social media posting in the body of the email draft. But the email draft itself is highly detailed and adding references to texts or social media postings is sure to complicate it. For example, try adding texts to the following passage from the email draft:

**(11) Evidence About an Email or Text Communication.** For an email or text communication, evidence that an email or text bearing ~~the~~ its customary format ~~of an email~~, including the ~~email~~ address or number of the sender and recipient:

(A) was sent to the email address or phone number at the time assigned to a particular person, if circumstances, which may include some or all of the following, show that the person received the email or text:

(i) A reply ~~to the email~~ was received from the email address or phone number assigned to the person;

It gets even more complicated when you go farther down in the rule and deal with concepts such as the "email contained the signature block or electronic signature of the person." And it's hard to think of how to incorporate authentication standards for social media postings --- including, e.g., "evidence about the account holder's exclusive access" and "evidence of access through private passwords" --- in a rule governing email (and texts).

So a single rule governing emails, texts, and other forms of communications is probably too balky to be useful. But it would be odd to put forth a rule governing only emails when there is significant case law covering texts and social media postings that seems just as easy (or hard) to codify as that attendant to emails. That then means a drafting project would need to add a number of rules --- or the equivalent, which would be an umbrella "electronic evidence" rule

with a number of subdivisions governing each form of electronic communication. It is for the Committee to determine whether it makes sense to expand Rule 901 to add three or four new rules, each similar but with slightly different authentication standards --- or whether it is preferable to allow the courts to operate with the general principles that appear to have served them thus far. Certainly the advantage of rulemaking is that litigants could find the relevant standards in one, controlling place, rather than having to assess all the case law. But it is undeniable that proper drafting of all-encompassing rules of authentication of electronic evidence will be a challenge.

### *C. Technological Changes*

The rulemaking process is deliberate. It takes a minimum of three years of rulemaking process for a rule to take effect. So as with all questions of rule changes to cover electronic evidence, one must consider whether technological changes may render rules outmoded soon after they become effective, if not before. It does not seem unlikely that in the next five to ten years there will be new modes of electronic communication that will not be covered by rules on email, text, chatroom conversations, and social media postings. Nor does it seem unlikely that there will be new ways to establish authenticity for existing modes of electronic communication -- such as developing efforts by Facebook to provide electronic stamps of authenticity for Facebook pages. These changes, should they happen, can probably be accommodated by the general standards for authenticity that currently exist in Rule 901, e.g., Rule 901(b)(1) (testimony of a witness with knowledge), 901(b)(4) (distinctive characteristics), 901(b)(7) (process or system producing reliable results). It is somewhat less clear that they can be accommodated as well by the more detailed provisions that would cover emails, webpages, and whatever other forms of electronic communications would be covered by new authentication rules. It is true that the drafts are written to be flexible --- e.g., “indicia of authenticity, which may include . . .” --- but they also contain more detailed provisions about addresses, recipients, etc. that are at some risk of becoming outmoded.

One could argue that the risk of obsolescence due to technological change is tempered by the very fact that the more general and flexible rules of authentication will remain intact. If a more specific rule becomes underinclusive (either as to the types of communication covered or the means of authentication specified), it wouldn't mean that there was a gap in coverage. That is true, but perhaps there is a trap for the unwary (or less prepared) when a detailed rule sets forth means of authentication, and one or more possible new means of authentication or mode of communication are not covered. *Expressio unis exclusion alterius* does not apply to Rule 901(b), but it may look like it to the less prepared lawyer.

#### ***D. Problems of Listing and Weighing the Relevant Factors***

In drafting a rule on authenticating electronic evidence, the Committee will have to consider whether the criteria set forth in any rule will be sufficiently comprehensive to justify rulemaking. It is true that the rule can be made flexible and illustrative (as the drafts for the most part are). But if many or most of the cases are decided outside the examples set forth in the rules, then it can be fairly questioned why new rules would be worth the effort --- because, after all, courts and litigants are already working within the flexible rules outside of any specific examples set by those rules.

To take an example of drafting challenges for comprehensiveness, consider *United States v. Hassan*, 742 F.3d 104 (4<sup>th</sup> Cir. 2014), a prosecution for terrorism, in which the trial court admitted two defendants' Facebook pages. The court of appeals found the evidence sufficiently authenticated (i.e., tied to the respective defendants) on the following analysis: the Facebook pages were captured as "screenshots and displayed the defendants' user profiles and postings; the defendants had posted their personal biographical information on the Facebook pages along with quotations and listings of their interests; and each Facebook page contained a section for postings from other users." Finally, the government had tracked the Facebook pages and Facebook accounts to the defendants' respective email addresses.

Assuming *Hassan* is a correct ruling on authenticity --- it seems like the government did more than necessary to satisfy the low standard of Rule 901(a), and indeed the court declared that it had done "more than enough" --- how do all these factors get encapsulated in a rule?

One possibility is to list each factor from the case (and like cases) in the rule, e.g., "1) the page contains personal biographical information about the account holder; 2) postings by other users indicate ownership by the account holder; 3) the account is tracked to the holder's email address." The risk in that approach is that you end up with a list of factors so long as perhaps to be unhelpful --- especially because there is no indication in the case on how the facts are weighed, whether any are dispositive, how many factors are necessary for a finding of authenticity, etc.

Another possibility is to list some of the most obvious factors in the case law, e.g., "the page is linked to the person's email account and password" and then add general language such as "and other relevant circumstances" --- in which case you arguably haven't done much more than is done already in Rule 901(b)(4).

Somewhere in the middle must be the sweet spot --- where enough detailed factors are provided, but enough flexibility is left, to provide a rule that will be useful to courts and litigants. But even then, what would be *really* helpful would be for a rule to provide guidance on which of many factors is most important, how the factors are to be weighed collectively and individually, and whether any factors are dispositive. That is a tall order. It might be impossible in rules that would purport to cover so many forms of electronic evidence that can be authenticated in so many ways.<sup>12</sup>

Another concern is that in drafting a list of factors, there is a danger that some factors will be described in such a way as to give too much weight in the particular circumstances. The virtue of general rules as they currently exist is that the court is not constrained to find an item authentic simply because the proponent has established a factor that is listed in the rule. Under Rule 901, satisfying the text of any rule means that the item is authentic (for purposes of admissibility). There is a risk that simply listing a factor could render an item authentication even though its weight would depend on the circumstances. For example, the draft on emails says that one of the circumstances that could be used to prove that an email was sent by someone is that the email contained in its body the typewritten name or “nickname of the recipient or the sender.” The idea is that if the person who wrote the email knew the nickname of either the purported sender or the recipient, that is a circumstantial indication that he was who he said he was. But surely the weight of that factor would vary with the circumstances. If the nickname is one that few people would know --- like a term of endearment between two old friends --- then using that term could justifiably show authenticity. But if someone writes an email to “Yogi” Berra, the use of that nickname would say little to nothing about whether it came from a particular person. It’s notable that the telephone rule, while particularized to telephone calls, is in fact a general rule that is based on “circumstances” --- it does not purport to list and weigh factors that might be relevant to authenticating the identity of a person on a telephone conversation. Perhaps this is because the weight of any particular factor is highly dependent on the circumstances.

Perhaps better and more particularized guidance on how to weigh and sort the factors can be done in a “Best Practices” publication. Such a publication could use examples from well-decided cases to help litigants figure out which factors are more important and which less so, and which factors would be entitled to more or less weight depending on particular circumstances.

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<sup>12</sup> It should be noted that no Evidence Rule sets forth a list of factors relevant to admissibility and attempts to weigh the factors. Indeed there is no Evidence Rule that sets forth a list of factors that are relevant to any admissibility requirement. For example, Rule 901(b)(6), which is the template for the draft email rule, does not set forth all or any of the criteria that are set forth in the email draft.

When the Committee prepared an amendment to Rule 804(b)(3) in 2010, it considered whether to provide a list of factors that would be relevant to a court’s consideration of whether the proponent provided sufficient “corroborating circumstances clearly indicating trustworthiness.” The Committee ultimately abandoned the effort, after concerns were expressed about the difficulty of listing and weighing all appropriate factors in the text of a rule.

### ***E. The Relationship Between Authentication Under Rule 901 and Self-Authentication Under Rule 902***

The relationship between Rules 901 and 902 is a complicated one. The examples of authenticity provided in Rule 901(b) essentially are given the same effect as the conditions establishing self-authentication under Rule 902, i.e., when met, they satisfy the admissibility standard and the authenticity question becomes a matter of weight for the jury. The only difference between the examples in Rules 901 and 902 is that in the latter, the factors establishing authenticity are found on the face of the evidence --- no extrinsic evidence is necessary.

It is not obvious that there should be an evidentiary distinction between establishing authenticity through extrinsic evidence and establishing authenticity on the face of the item. The rules are looking for the same thing --- enough evidence to indicate to a reasonable person that the item is what the proponent says it is --- and it doesn't seem that the location of that evidence should be important to the court. Put another way, the factors in Rule 902 could have just been added to the list of factors in Rule 901(b) without any loss of utility. That said, the distinction exists, and so any rulemaking effort would have to try to delineate from the case law whether any factors can be found in the electronic item itself that would justify an amendment to Rule 902.

As seen above, Greg's draft provides for self-authentication of email and texts when in "customary format" and when they purport to issue from an appropriate place. If a rules approach is undertaken, case law will need to be reviewed to determine whether it supports self-authentication in any circumstance, including that proposed by Greg. In essence, the rules distinction between authentication and self-authentication poses an additional drafting challenge (aka headache) for a rules drafter --- and the challenge is extended to all the different forms of electronic communication.

### ***F. Best Practices Alternative***

As discussed above, one possibility for all the work that Greg has done on these draft rules is to issue a "Best Practices" publication on authentication of electronic evidence. One possible mode of publication would be in an FJC pamphlet, for which there is precedent in the Committee's history. The Reporter to the Committee published, at the Committee's behest, two pamphlets: one on Advisory Committee Notes that have become outmoded by subsequent Congressional changes, and the other on case law divergence from the text of the Federal Rules.

A “Best Practices” approach has fairly apparent advantages and disadvantages in comparison to a rule amendment approach. The most obvious disadvantage is that it won’t have the impact of a rule change. No matter how many pamphlets are sent out, no matter how many website postings can be done, the impact of a publication on practice is clearly going to be considerably less than if the rules are amended.

But there are comparative advantages to a “Best Practices” approach. Some advantages are:

- The publication will not be constrained by the delays and consultations necessary for the rulemaking process. It also could be done independently of any other rule change and would not have to be packaged with any other rules.
- The publication can be changed and updated in ways that rules cannot. The publication, unlike rules, will not run the risk of becoming outmoded by changes in technology.
- The publication need not necessarily be in rule form --- thus the problem of treating all the various forms of electronic communication in one rule, or even in a number of rules, is alleviated. Not to speak of the fact that the difficulties of proper style for rule format would be bypassed.<sup>13</sup>
- Extensive footnoting will be permitted, thus potentially providing more guidance than the neutered notes that are mandated by the Standing Committee.
- As stated above, more guidance can be given about how to weigh the various factors relevant to authentication, as opposed to just listing the factors.
- There would not appear to be any need to provide distinctions between authentication and self-authentication, as the effect is the same. As discussed above, the distinction between authentication and self-authentication is essentially a drafting distinction imposed by the Rules.

If the Committee decides that it wishes to publish a “Best Practices” guide to authentication of electronic evidence, then the Reporter will prepare materials and commentary for the next meeting. The draft will try to cover all current forms of electronic evidence that have been evaluated by courts, and set forth the factors that courts have found relevant for each form. It will also attempt to sort out which factors seem to have more weight in the case law. It will also include commentary intended to assist courts and litigants in handling authentication questions regarding electronic evidence.

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<sup>13</sup> Another alternative could be to follow the format used by Ken Broun with respect to privileges, i.e., setting forth a basic rule on each form of electronic communication, with extensive explanatory commentary.

If the Committee does decide to publish a “Best Practices” pamphlet, it will have to think about whether it should be attributed to the Committee itself or to the Reporter with the approval of the Committee. The precedent is for the latter approach, as the Committee was concerned that its own authorship might have an outsized effect --- tantamount to a rule change. Maybe that would be a good thing, though, in the context of authenticating electronic evidence. Certainly the Standing Committee will need to be consulted on what is the best approach for attributing authorship.

Finally, the Committee may of course determine that neither a rulemaking nor a “Best Practices” approach is appropriate for the Committee at this time. But if the Committee does make a determination not to proceed, there remains a narrower amendment that might be considered. It is discussed in the next part.

### III. A Narrow Amendment --- Production Equals Authentication

One question that has divided the courts, especially regarding electronic evidence, is whether production of data pursuant to a discovery demand is sufficient to authenticate that data. (You can see above that in Greg’s draft, production of email is an independent and sufficient ground to authenticate the email). This is an important question in many cases, especially civil cases, as many of the relevant emails, texts, etc., are produced by the adverse party in response to discovery demands. And of course the question of whether production equals authentication is relevant to production of hardcopy as well.

The courts appear to be divided on whether production of data in response to a discovery request is sufficient, or only relevant, to authenticity. Compare *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 929 (3d Cir. 1985) (“the fact that copies were produced by the plaintiff in answer to an explicit discovery request for his Sea Service Records, while *not dispositive* on the issue of authentication, is surely *probative*.”) (emphasis added), <sup>14</sup> with *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n. 12 (9th Cir. 1996)

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<sup>14</sup> Despite its conditional language, *McQueeney* has been read by some courts in the Third Circuit to mean that production is sufficient to establish authenticity. See, e.g., *Rouse v. II-VI Inc.*, 2008 WL 398788 at \*1 (W.D. Pa. Feb. 11, 2008) (“It is undisputed that [certain] Exhibits . . . were produced by Defendants during discovery in this lawsuit. A party to litigation that produces documents during discovery in that litigation thereby authenticates the documents it has produced.” (citing *McQueeney*)), *aff’d*, 08-3922, 2009 WL 1337144 at \*6 (3d Cir. May 14, 2009). Compare *Sunkett v. Nat’l Gypsum Co.*, CIV. 09-0721 RMB/JS, 2011 WL 6719776 at \*15 (D.N.J. Dec. 21, 2011) (“The fact that a document was produced by the opposing side in response to an explicit discovery request also tends to prove the document’s authenticity.”).

(documents produced by a party in discovery were deemed authentic when offered by the party-opponent); *United States v. Gray Ins. Co.*, 2010 U.S. Dist. LEXIS 27652 (N.D. Ga. Mar. 24, 2010) (“Because the emails were produced by CCG during the discovery process, the circumstances surrounding their discovery indicate authenticity.”).

I have heard from a number of practitioners that the dispute over whether production equals authenticity is important to them, especially given the difficulty of navigating all the other standards that courts have put out for authenticating electronic evidence. The Committee may therefore be interested in a targeted amendment to deal with this issue, as opposed to multiple rules purporting to cover electronic evidence generally.

It should be noted that a rule on the relationship of production and authenticity would not suffer from the problem of trying to keep up with technological change through rulemaking. Regardless of advances in either new types of communications or new means of authenticating, production is production.

From a rules perspective, it would seem that the better rule is that production in an action by a party to that action is sufficient to show authenticity. Remember that the standard for proving authenticity is a low one, as discussed in the memo on Rule 803(16) --- the proponent need only show enough for a reasonable person to believe that the thing is what the proponent says it is. When the opponent produces it, why should that not be enough to satisfy the low standard of authenticity?

Production is a statement; when a party makes a statement that is offered against that party, it is free from the proscription of the hearsay rule. See Rule 801(d)(2)(A). The standard of admissibility for any hearsay exception is preponderance of the evidence under Rule 104(a). It makes no sense that the same statement that could be used against the party as an exception to the hearsay rule would be insufficient to establish authenticity, given the fact that the standard of admissibility is the lesser one of Rule 104(b), i.e., a prima facie case. Any argument by the producing party that an item was produced even though the party thought it was a fake, or was simply mistaken, should be a question of weight and not admissibility.

If the Committee were interested in considering an amendment to resolve the conflict in the courts regarding production and authenticity, the amendment might be effectuated in one of two ways:

***1. As a new authentication provision, Rule 901(b)(11):***

**(b) Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement: \* \* \*

**(11) *Production by a Party.*** Production by a party-opponent in the action.

**2. As an additional factor to add to the provision on distinctive characteristics:**

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

**(b) Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement: \* \* \*

**(4) *Distinctive Characteristics and the Like.*** The appearance, contents, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances. Production by a party-opponent in the action is itself a sufficient circumstance to support the finding.

If the Committee is interested in considering an amendment rectifying a conflict in the case law, by providing that production suffices for a showing under Rule 901, the Reporter will prepare a full report for the next meeting, including proposed text and Committee Note. If the Committee disagrees with the principle that production equals authentication, then probably no amendment on the question should be proposed. It makes little sense to have an amendment providing that one factor is relevant when 1) you don't need a rule to tell you that production is at a minimum relevant to show authenticity, and 2) there are so many other factors that are relevant, so why highlight only one?

# TAB 6

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Memorandum To: Advisory Committee on Evidence Rules

From: Daniel J. Capra, Reporter

Re: Possible Amendments to Rule 902 for Authenticating Machine-Generated Data and Electronic Information Through Hash Value

Date: October 1, 2014

At the Electronic Evidence Symposium in April, John Haried made a proposal for two additions to Rule 902, the provision on self-authentication.<sup>1</sup> The first would allow self-authentication of machine-generated information, upon a submission of a certificate prepared by a qualified person --- analogous to the self-authentication provisions for business records in Rule 902(11) and (12). This memo will refer to that proposal as “the Rule 902(13)” proposal. The second proposal would provide a similar self-authentication provision of an electronic device, media or file by its “hash value” or other indication of reliability, again by way of certification of a qualified witness. The memo will refer to that proposal as “the Rule 902(14)” or “hash value” proposal.

This memo will discuss some issues that the Committee might consider in determining whether to propose amendments to Rule 902 allowing certificates of authenticity for machine-

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<sup>1</sup> John Haried is an attorney with the Justice Department and Chair of the Department’s dDiscovery Working Group. He emphasizes that the proposals are his own and are not official proposals of the Justice Department at this time. The proposals are currently being considered by the Civil and Criminal Chiefs working groups of the DOJ.

generated and “hash value” evidence. Part One will set forth the proposals, and some Reporter comments on the rationale for the proposals and possible drafting problems. Part Two will discuss whether either or both of these Rules works as an analogy to the self-authentication rules after which they are patterned, i.e., Rules 902(11) and (12) --- that analysis must necessarily include an assessment of whether the cost-benefit analysis applied for Rules 902(11) and (12) comes out the same way for the proposed Rules. Part Three will discuss a concern common to both proposals --- whether the proposals to allow certificates of authenticity might run afoul of the defendant’s right to confrontation in criminal cases.

The question for the Committee at this meeting is to determine whether it is interested in pursuing either or both of the proposals to amend Rule 902 to provide an easier means of authentication for the described electronic evidence. If the Committee is interested, then a full report, together with proposed text and Committee Note, will be prepared for the next meeting.

## **I. The Proposed Amendments to Rule 902.**

As stated above, there are two proposed amendments. They have a common goal of making authentication easier for certain kinds of electronic evidence that are, under current law, likely to be authenticated under Rule 901 but only by calling a witness to testify to authenticity. Mr. Haried argues that the types of electronic evidence covered by the two rules are rarely the subject of a legitimate authenticity dispute but that the government is forced to produce an authentication witness, often at great expense and inconvenience --- and often, at the last minute, defense counsel ends up stipulating to the authenticity in any event. Mr. Haried contends that a pretrial certification process will force the parties to come to grips with the authentication question in advance of trial and thus often avoid the unnecessary expense of lining up a witness for authentication testimony that becomes unnecessary after a stipulation is made at the time of trial. As he said at the Symposium, “when push comes to shove, the lawyers figure out whether they have a real dispute or not.” The proposals would move that push and shove to a point earlier in the proceedings. The end result would be projected to be that the government would rarely if ever have to line up or present a live witness to authenticate machine-generated evidence or items authenticated by hash value.

Mr. Haried’s perspective is from the DOJ side in criminal cases, but there is nothing in the proposals that limit them to criminal cases. Nor should there be. If there is going to be an easier form of authentication for evidence admitted against a criminal defendant, then *a fortiori* that method should be applicable in civil cases. Moreover, the rule can have substantial effect in civil cases. For example, parties in civil cases often try to admit web pages by authenticating them through the Internet Archive --- which is a process that accurately stores and reproduces webpage printouts. Many courts still require these pages to be authenticated through in-court

testimony from a representative of the Internet Archive.<sup>2</sup> Under Mr. Haried’s proposal, the webpage could be authenticated by a certificate of the representative, thus avoiding the expense and inconvenience of producing a witness to give what has apparently over time come to be perfunctory authentication testimony.

The self-authentication proposals, by following Rule 902(11)’s provision covering business records, essentially leave the burden of going forward on authenticity questions to the opponent of the evidence. Under Rule 902(11), a business record is authenticated by a certificate, but the opponent is given “a fair opportunity” to challenge both the certificate and the underlying record. The proposals for a new Rule 902(13) and 902(14) would have the same effect of shifting to the opponent the burden of going forward (not the burden of proof) on authenticity disputes.

### *A. Proposed Rule 902(13) on Machine-Generated Evidence*

#### **Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

**(13) Certified Records Produced by a Process or System.** The original or a copy of a record if the record was produced by a process or system that produces an accurate result, as shown by a certification that meets the certification requirements of Rule 902(11) for domestic records and Rule 902(12) for foreign records. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them. Where the proponent is a prosecutor in a criminal case, such notice must be provided at least 14 days before trial, and the defendant must object in writing within 7 days of receiving the notice, unless the court sets a different time for the notice or the objection. If the defendant makes a timely objection, the record may not be authenticated under this Rule.

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<sup>2</sup> See, e.g., *Audi AG and Volks'wagen of America v. ShokanCoach-works, Inc.*, 592 F.Supp.2d 246, 278 (N.D. New York 2008) (“Defendants correctly point out that the Adams Declaration cannot authenticate the search results from www.archive.org because such evidence may only be authenticated by a knowledgeable employee of the website.”); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242 (M.D.Fla. May 12, 2006) (“Plaintiff must provide the Court with a statement or affidavit from an Internet Archive representative with personal knowledge of the contents of the Internet Archive website.”)

## *Drafting Questions*

### *1. Notice Provisions*

The notice provisions are different in civil and criminal cases. That is because, as will be discussed below, the criminal defendant's right to confrontation may be implicated by a certificate prepared solely for purposes of presenting it in a prosecution. Mr. Haried adds a notice-and-demand procedure for criminal cases as a way of addressing any constitutional concerns. That procedure is lifted directly from the amendment to Rule 803(10), effective December 1, 2014, which was designed to answer the identical constitutional question of admissibility of affidavits certifying the absence of a public record. For more on the confrontation question, and whether a notice-and-demand provision makes sense in this context, see Part Three, *infra*.

### *2. Internal References to Rule 902(12)*

There is a drafting problem in referring to the certification requirements of Rule 902(12) for foreign records. Rule 902(12) only applies to civil cases. The certification requirements for criminal cases in which self-authenticating foreign business records are introduced is 18 U.S.C. 3505. Thus the draft needs to be changed, otherwise there will be a gap with respect to foreign records in criminal cases. Here is a possibility:

**(13) Certified Records Produced by a Process or System.** The original or a copy of a record if the record was produced by a process or system that produces an accurate result, as shown by a certification *that meets the certification requirements of Rule 902(11), 902(12), or applicable statute.* \* \* \*

You don't need to say "for domestic records" because Rule 902(11) applies only to domestic records. Likewise the reference in the draft to "for foreign records" can be deleted because the applicable authentication requirement applies only to foreign records. The statute itself need not, and in fact should not, be named in the text. The Standing Committee has historically been opposed to listing statutes in text because they might be abrogated, renumbered, etc. The statute can be referred to by number in the Committee Note. *See, e.g.*, Rule 615 (which refers to statutory authority and leaves it to the Committee Note to specify the statute).

*B. Proposed Rule on Self-Authentication of Electronic Information by “Hash Function” or Other Means of Showing Reliability*

**Rule 902. Evidence That Is Self-Authenticating**

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

\* \* \*

**(14) Certified Copy of Electronic Device, Storage Media or File.** A copy of an electronic device, storage media, or file, if:

**(A)** the copy is shown to be authentic by its hash value or other reasonable means;

**(B)** the showing is made by a certification that meets the requirements of Rule 902(11) for domestic records or Rule 902(12) for foreign records; and

**(D)** the proponent meets the notice requirements of Rule 902(13).

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***Drafting Questions***

***1. Hash Value***

Much of the electronic evidence admitted in court consists of a copy of an original electronic device, storage medium, or file. Examples include a forensic copy of a defendant’s hard drive from his home computer or of a CD of email files provided by an employer pursuant to a subpoena. In nearly every instance the forensic examiners work off of a copy in order to preserve and not alter or contaminate the original. The industry standard for authentication is to use hash values for the original and copy. A hash value is a unique alpha-numeric sequence of approximately 30 characters that an algorithm determines based upon the digital contents of a drive, media, or file. When using a hashing algorithm, the addition or subtraction of even a single space, period, or other character will change an item’s hash value. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. The primary goal of this proposal is to allow self-authentication by a certificate of a witness who checked the hash value of the item proffered at trial and compared it to the original.

One question for the Committee, if it is interested in pursuing the proposal, is whether to define “hash value” in the text of the Rule. The definition could be added as a hanging paragraph to the text above. The alternative is to put the definition in a Committee Note. That is probably a

better alternative because the Federal Rules of Evidence ordinarily do not get into detail of defining technical terms. But the definition needs to be somewhere.

## **2. “Other Reasonable Means”**

The proposed term “other reasonable means” in Subdivision (A) seems problematically broad and fuzzy, and would be sure to generate case law and uncertainty as it is completely uncabined. This kind of reasonableness inquiry would be acceptable under Rule 901, where the proponent would be required to establish circumstantial evidence of authenticity, necessarily in a case-dependent way. It would seem to work far less well when case-dependent circumstances are simply described in a certificate. That shift may well put opponents at an unfair disadvantage. The end result might simply be that there will still be a challenge to authenticity and a need to produce a witness (thus saving little in terms of efficiency from current practice) but the burden of going forward is placed on the disadvantaged opponent. It might seem advisable, then, to limit the self-authentication provision of proposed Rule 902(14) to proof through hash value, which appears to be an obvious and prevalent form of authentication, intrinsic to the document, and subject to little if no dispute.

On the other hand, the problem with limiting the provision to a specific form of authentication is that if some new method comes along, as seems likely, it will not be covered by the Rule and more rulemaking might be necessary that could have been avoided.

Perhaps a solution is to add language that hews more closely to hash value, providing some flexibility but without the open-ended reasonableness language. For example:

**(14) *Certified Copy of Electronic Device, Storage Media or File.*** A copy of an electronic device, storage media, or file, if:

**(A)** the copy is shown to be authentic by its hash value or ~~other~~ reasonable means a similar process of digital identification;

## **3. *Internal Reference to Rule 902(12)***

Finally, the same fix regarding the reference to Rule 902 (12) needs to be made as discussed with the Rule 902(13) proposal above:

“as shown by a certification that meets the certification requirements of Rule 902(11), 902(12), or applicable statute.”

## II. The Relationship to Rules 902(11) and (12); Cost-Benefit Analysis

Rules 902(11) and 902(12) were added to the Federal Rules in 2000. They permit business records to be authenticated --- and the foundation requirements for the business records exception to be established --- by a certificate prepared by a custodian or other qualified witness.<sup>3</sup> These amendments were the authentication part of an amendment to Rule 803(6) that allowed the foundation requirements of the business records exception to be established without the need of in-court testimony by a foundation witness. The reason for this package of amendments was to eliminate unnecessary expense and inconvenience of producing time-consuming foundation witnesses. The Advisory Committee found that presentation of a foundation witness for business records was often pro forma and perfunctory, with the benefits of in-court testimony far outweighed by the inconvenience of having to produce a witness. (Many states had by that time already provided for proof through certificate for hospital records, casino records, and the like). While the foundation could be met by stipulation, the Advisory Committee found that many parties refused to stipulate simply for the purpose of imposing costs and inconvenience on the other side. Any concern about unreliable or inauthentic business records was handled, at least to the Advisory Committee's satisfaction, by the authentication requirements of Rules 902(11) and (12) --- i.e., statements made under oath, advance notice, and an opportunity for the opponent to challenge both the record and the certification.

One question for the Committee is whether similar conditions support the proposed amendments to Rule 902(13) and (14) --- do the costs of some possible loss of the ability to cross-examine an authenticating witness outweigh the benefits of efficiency and ease of proof? Is the foundation testimony for machine-generated data (902(13)) and hash value (902(14)) generally straightforward and not subject to dispute, so that cross-examination in the ordinary case is either foregone or perfunctory? Will these provisions save time and inconvenience without a significant cost to the adversary system? Is shifting the burden of going forward on the authenticity question a sufficient guarantee of adversarial testing in cases where it is necessary?

Answering these empirical questions may require input from courts and counsel. One way to get that input is an FJC survey, along with assistance from the DOJ in getting information from U.S. Attorneys. Another alternative --- the one chosen by the Advisory Committee in 2000

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<sup>3</sup> Two rules (902(11) and 902(12)) had to be proposed, because a statute --- 18 U.S.C. §3505 --- already provided that foreign business records in a criminal case could be authenticated by a certificate (and continues to do so). Thus a single rule could not be written to cover all cases because it would have swallowed up the statute. It would have been an option for a single rule to cover domestic records in all cases and foreign records in civil cases, but that seemed complicated. Moreover, the procedures for certification differed depending on whether it was domestic or foreign. So the Advisory Committee decided to propose two separate rules.

--- is to prepare a proposed amendment and wait for public comment.<sup>4</sup> If the Committee is interested in the proposal, it is of course for the Committee to decide how to proceed in obtaining empirical information about its usefulness. Given the fact that machine-generated evidence and hash value function are relatively straightforward, there is something to be said for proceeding to public comment. Public comment is certainly appropriate if the experience of the Committee members is that authenticity questions for machine-generated and hash value evidence is pro forma.

One thing is clear: electronic evidence is being used more frequently in both civil and criminal cases. So if a self-authentication provision can work to help both sides figure out whether there is a genuine dispute on authenticity, that is certainly a factor in its favor. On the other hand, the simple fact that there is a lot of electronic evidence out there that needs to be authenticated is not enough in itself to justify a rule of self-authentication. The question is whether cross-examination of an authenticating witness is so rare, and so rarely useful, that it makes sense to dispense with production unless the opponent can articulate some reason for it in a particular case.

It might be argued that Rule 902(11) and 902(12) are sufficient to handle most authenticity issues involving electronic evidence, so no additional rules are necessary. That is not the case, however. Rules 902(11) and 902(12) only apply if the electronic information is admissible as a business record. There is a lot of electronic information out there that does not fit within the business records exception. Examples include personal emails;<sup>5</sup> location data on a personal GPS device; information from home computers; Facebook postings; website information; and so on. In sum, while a full empirical case has not yet been made for self-authentication provisions like those proposed, the problem of authenticating electronic evidence is a real one and consideration might well be given to rules that make the process of authentication more efficient, if that can be done without losing the right to challenge evidence of questionable authenticity.

The case might be especially strong for hash value self-authentication. Mr. Haried makes the point as follows:

Forensic labs often employ a specialized technician to copy the media (hard drive, CD, or cell phone) and a separate forensic examiner who segregates irrelevant system files from relevant user-created files and executes other examinations. All of that information is provided to an investigator who reviews relevant files for evidence. Thus,

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<sup>4</sup> In 2000 the public comment was strongly in favor of the proposed amendment; the Committee received a number of submissions from practicing lawyers and bar associations supporting the Committee's belief that the foundation requirements for business records were usually established pro forma and that an amendment allowing proof through certificate would save unnecessary cost and expense with no loss of reliability.

<sup>5</sup> See *United States v. Safavian*, 435 F.Supp.2d 36 (D.D.C. 2006) (Rule 902(11) cannot be used to authenticate personal email).

three or more people may have specialized roles in the process. Without the possibility of self-authentication, the technician who merely followed a standardized duplication protocol must testify, even when the hash values demonstrate that the copy is an exact duplicate of the original. Coming to court to give perfunctory testimony about the duplication process takes the technician away from his work. Similarly, when the technician has changed jobs, retired, or died, authentication in court can become unnecessarily difficult.

It is of course for the Committee to determine whether at least a preliminary case has been made for the need for these self-authentication provisions; and if that case has been made, whether to get more information by public comment, FJC survey, or some other way.

### ***Hearsay Exception?***

Rules 902(11) and (12) end up doing more than authenticating a document. They also work together with Rule 803(6) to establish the foundation requirements for the business records exception to the hearsay rule. One possible concern is that the proposed additions to Rule 902 , because they are modeled after the existing Rules, might be read to operate as a hearsay exception --- but without tying into any of the exceptions established under the Federal Rules. Thus, the relationship between authentication and hearsay--- as applied to machine-generated data and digital data authenticated by hash value --- needs to be investigated.

That investigation indicates that a rule of authentication for machine-generated data does not end up creating a backdoor hearsay exception --- because machine-generated data is not hearsay in the first place. See, e.g., *United States v. Moon*, 512 F.3d 359 (7<sup>th</sup> Cir. 2008) (readings taken from an infrared spectrometer and a gas chromatograph was not hearsay because “data is not ‘statements’ in any useful sense.”).

On the other hand, proposed Rule 902(14) could cover items that are hearsay --- for example, a computer file, or digital information on a storage device. It will be important, then, to emphasize that the Rule deals with authentication only and does not purport to answer any questions about the hearsay content of the information authenticated. That is, the Rule is unlike Rule 902(11) and (12), which work together with a hearsay exception to handle both hearsay and authentication issues. The disclaimer to Rule 902(14) is probably best added to the note rather than the text --- it is not customary in the evidence rules to state in the text what a rule does *not* do, nor would that appear necessary in this instance as the proposed rule does not on its face attempt to tie into a hearsay exception of any kind.

### III. The Right to Confrontation

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Supreme Court held that certificates prepared by forensic analysts, attesting to results of forensic tests and offered against a criminal defendant, were testimonial and so violated the defendant's right to confrontation. The certificates met the definition of "testimonial" because the sole purpose for preparing them was to have them admitted at the defendant's criminal trial.

Certificates prepared under Rules 902(11) --- and by extension, proposed Rules 902(13) and (14) --- would appear at first glance to fit the definition of testimoniality because the only reason that they are prepared is so that they can be admitted at a defendant's criminal trial in order to authenticate an item.

Whether these authenticating certificates are in fact testimonial is not as clear as it seems, however. In *Melendez-Diaz*, the Court relied heavily on a historical analysis to define testimoniality. The dissenters noted that authenticating certificates had been historically introduced in some cases --- thus mussing up the majority's position that testimonial hearsay had never been found admissible. But the Court noted that the cases relied on by the dissent were those that did nothing more than *authenticate another document*. Justice Scalia, writing for the majority, conceded that if a certificate did nothing more than authenticate another document, admitting it would not violate the Confrontation Clause even if that certificate was prepared solely for purposes of litigation. Here is the relevant passage from the majority's opinion:

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record --- or a copy thereof --- for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

This passage could be read to mean that certificates authenticating business records under Rule 902(11) (and its counterpart for foreign records, 18 U.S.C. §3505) are not testimonial, because such certificates authenticate pre-existing records rather than create a new record. The

constitutional viability of a 902(11)-type certificate is somewhat clouded, however, because that certificate *does more* than simply certify the authenticity of the record. It also certifies that the record was made at or near the time of the occurrence recorded, was kept in the regular course of regularly conducted activity, etc. It might be notable that Justice Kennedy, in dissent, questioned whether Rule 902(11) could continue to be used in criminal cases — though he raised the issue as a “sky is falling” rhetorical device, and the majority spent a lot of time emphasizing the narrowness of its opinion. The bottom line is that certification of business records in criminal cases is in some doubt after *Melendez-Diaz*. But strong arguments can be made that Rules 902(11) and remain constitutionally sound.

Lower court cases after *Melendez-Diaz* have uniformly found that certificates of authenticity under Rule 902(11) and 18 U.S.C. §3505 do not violate the Confrontation Clause. For example, in *United States v. Thompson*, 686 F.3d 575 (8<sup>th</sup> Cir. 2012), the government sought to prove unexplained wealth in a drug case, proffering a record from the Iowa Workforce Development Agency that no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit offered under Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that “[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record—or a copy thereof—for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.” It concluded that “[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.”

To the same effect is *United States v. Anekwu*, 695 F.3d 967 (9<sup>th</sup> Cir. 2012), where, in a fraud case, the government authenticated foreign business records by submitting certificates of knowledgeable witnesses. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the statement in *Melendez-Diaz* that certificates that merely authenticate other records are not testimonial.

Finally, in *United States v. Yeley-Davis*, 632 F.3d 673 (10<sup>th</sup> Cir. 2011), the government in a drug case offered cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided and authenticity shown by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that the affidavit was testimonial. The court relied on *Melendez-Diaz*:

Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record \* \* \*. In addition, Justice Scalia rejected the dissent's concern that the

majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) \* \* \* . See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 (“Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case.”). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

One case might read the *Melendez-Diaz* dictum about certificates a little more narrowly is *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011). To prove a felony in a felon firearm case, the government in *Smith* admitted a letter from a court clerk stating that “it appears from an examination of the files in this office” that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters did not come within the narrow “authentication” exception recognized by the *Melendez-Diaz* Court because they provided “an interpretation of what the record contains or shows.” Arguably 902(11) certificates do just that. But on the other hand *Smith* could be distinguished as a case in which no authentication occurred at all --- the case was not one in which a certificate is attached to a record, as would be the case under Rule 902(11) as well as the draft rules.

In sum, there is a strong case for the conclusion that certificates prepared under Rule 902(11) and section 3505 can be admitted without offending the Confrontation Clause. But the matter is not free from doubt because the certificates under these provisions can be argued to be doing more than merely authenticating another document.

In light of all this, how would certificates prepared under proposed 902(13) and (14) fare? The answer is: *better than those prepared under Rule 902(11)*. Certification prepared under 902(13) and (14) would fit more comfortably within the *Melendez-Diaz* dictum. Essentially all that is being certified is the authenticity of the document or item. There is no attempt to certify the admissibility requirements of a hearsay exception, or to explain or opine about the document or item. So it can be argued that the proposed rules create less of a constitutional concern than the existing ones.

### ***Notice and Demand Provision***

In deference to the constitutional concerns discussed above, Mr. Haried has added notice-and-demand provisions that would apply in criminal cases. Under a notice-and-demand provision, the prosecution gives notice and if the defendant doesn't demand production of the witness within a certain time period, the confrontation objection is deemed waived. The Supreme Court in *Melendez-Diaz* stated that a notice-and-demand provision would resolve the

constitutional problem posed by certificates prepared in anticipation of litigation. The Advisory Committee, relying on that statement in *Melendez-Diaz*, added a notice-and-demand provision to Rule 803(10), to cure the constitutional problem that arises when the government proffers a certificate from an official as to the absence of a public record. That amendment took effect in 2013. Mr. Haried's proposal takes the notice-and-demand provision from Rule 803(10) and placed it in each of the draft rules.<sup>6</sup>

The addition of a notice-and-demand provision unquestionably cures any confrontation issue that might exist with the certificates of authenticity that would be submitted under the proposed rules. But a notice-and-demand provision should only be added if in fact the rules pose a serious confrontation problem --- as was the case with Rule 803(10), because every affidavit about the search for a public record fits the definition of testimoniality. By way of comparison, the Advisory Committee unanimously refused to add a notice-and-demand provision to Rule 803(8), the hearsay exception for public records, because public records admissible under Rule 803(8) are rarely if ever testimonial, so it made no sense to impose a procedural limitation to solve a non-problem. That same thinking might be applied to the proposed Rules, which seem to fall within the *Melendez-Diaz* dictum that certificates of authenticity, and authenticity alone, are not testimonial.

What's more, adding a notice-and-demand provision to proposed Rules 902(13) and (14) would raise questions about Rule 902(11) and its counterpart for foreign records in criminal cases, 18 U.S.C. § 3505. Why add a notice-and-demand provision to these new provisions while leaving the existing ones untouched? Indeed, the need for adding a notice-and-demand provision is stronger for the existing rules than the new ones, because the new provisions only authenticate a document or item while the existing provisions arguably do more. Therefore, if the Committee does decide to proceed with these self-authentication proposals, they should probably not include notice-and-demand provisions. The alternative would have to be adding such a provision to Rule 902(11) --- and maybe asking Congress to add one to section 3505. Even describing that venture provides caution against doing it.

## **IV. Conclusion**

The proposed additions to Rule 902 may be very useful by ending the inconvenience of producing unnecessary authentication witnesses in straightforward cases involving electronic evidence. It is for the Committee to determine whether there is a significant risk in loss of effective cross-examination that would occur by shifting the burden of going forward onto the proponent of the evidence --- and whether assessment of that risk, and the need for the amendment needs to be determined by survey or instead by public comment on the proposed rule.

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<sup>6</sup> The insertion of a notice-and-demand provision was suggested by the Reporter for discussion purposes.

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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel Capra, Reporter  
Re: Federal Case Law Development After *Crawford v. Washington*  
Date: October 1, 2014

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the Supreme Court and federal circuit case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The outline begins with a short discussion of the Court's latest case on confrontation, *Williams v. Illinois*, and then summarizes all the post-*Crawford* cases by subject matter heading.

## **I. *Williams v. Illinois***

In *Williams v. Illinois*, 132 S.Ct. 2221 (2012), the Court brought substantial uncertainty to how courts are supposed to regulate hearsay offered against an accused under the Confrontation Clause. The case involved an expert who used testimonial hearsay as part of the basis for her opinion — the expert relied in part on a Cellmark DNA report to conclude that the DNA found at the crime scene belonged to Williams. The splintered opinions in *Williams* create confusion not only for how and whether experts may use testimonial hearsay, but more broadly about how some of the hearsay exceptions square with the confrontation clause bar on testimonial hearsay.

The question in *Williams* was whether an expert's testimony violates the Confrontation Clause when the expert relies on hearsay. A plurality of four Justices, in an opinion written by Justice Alito, found no confrontation violation for two independent reasons. 1) First, the hearsay (the report of a DNA analyst) was never admitted for its truth, but was only used as a basis of the expert's own conclusion of the expert that Williams's DNA was found at the crime scene. Justice Alito emphasized that the expert witness conducted her own analysis of the data and did not simply parrot

the conclusions of the out-of-court analyst. Second, the DNA test that was conducted was not testimonial in any event, because at the time it was conducted the suspect was at large, and so the DNA was not prepared with the intent that it be used against a *targeted individual*.

Justice Kagan, in a dissenting opinion for four Justices, rejected both of the grounds on which Justice Alito relied to affirm Williams's conviction. She stated that it was a "subterfuge" to say that it was only the expert's opinion (and not the underlying report) that was admitted against Williams. She reasoned that where the expert relies on a report, the expert's opinion is useful only if the report itself is true. Therefore, according to Justice Kagan, the argument that the Cellmark report was not admitted for its truth rests on an artificial distinction that cannot satisfy the right to confrontation. As to Justice Alito's "targeting the individual" test of testimoniality, Justice Kagan declared that it was not supported by the Court's prior cases defining testimoniality in terms of primary motive. Her test of "primary motive" is whether the statement was prepared primarily for the purpose of *any* criminal prosecution, which the Cellmark report clearly was.<sup>1</sup>

Justice Thomas was the tiebreaker. He essentially agreed completely with Justice Kagan's critique of Justice Alito's two grounds for affirming the conviction. But Justice Thomas concurred in the judgment because he had his own reason for affirming the conviction. In his view, the use of the Cellmark report for its truth did not offend the Confrontation Clause because that report was not sufficiently "formalized." He tried to explain that the Cellmark report

lacks the solemnity of an affidavit of deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . And, although the report was introduced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

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<sup>1</sup> Justice Breyer wrote a concurring opinion. He argued that rejecting the premise that an expert can rely on testimonial hearsay — as permitted by Fed.R.Evid. 703 — would end up requiring the government to call every person who had anything to do with a forensic test. That was a result he found untenable. He also set forth several possible approaches to permitting/limiting experts' reliance on lab reports, some of which he found "more compatible with *Crawford* than others" and some of which "seem more easily considered by a rules committee" than the Court.

The problem of course with consideration of these alternatives by a rules committee is that if the Confrontation Clause bars these approaches, the rules committee is just wasting its time. And given the uncertainty of *Williams*, it is fair to state that none of the approaches listed by Justice Breyer are clearly constitutional.

### *Fallout from Williams:*

It must be noted that *eight* members of the Court rejected Justice Thomas's view that testimoniality is defined by whether a statement is sufficiently formal as to constitute an affidavit or certification. Yet if a court is counting Justices, it appears that it will often be necessary for the government to comply with the rather amorphous standards for "informality" established by Justice Thomas. Thus, if the government offers hearsay that would be testimonial under the Kagan view of "primary motive" but not under the Alito view, then the government may have to satisfy the Thomas requirement that the hearsay is not tantamount to a formal affidavit. Similarly, if the government proffers an expert who relies on testimonial hearsay, but the declarant does not testify, then the government would appear to have to establish that the hearsay is not tantamount to a formal affidavit — this is because five members of the court rejected the argument that the confrontation clause is satisfied so long as the testimonial hearsay is used only as the basis of the expert's opinion.

In the end Justice Thomas's formality requirement may not be much of a bar to the government after *Williams*. As Justice Kagan noted, it is possible that the government could satisfy the Thomas view "with the right kind of language" in any forensic or other report. That is, don't call the report a "certificate," don't use the word "affidavit," and use a private lab. Obviously the courts will need to struggle with the Thomas view of "formality" in the post-*Williams* landscape.

It should be noted that much of the post-*Crawford* landscape is unaltered by *Williams*. For example, take a case in which a victim has just been shot. He makes a statement to a neighbor "I've just been shot by Bill. Call an ambulance." Surely that statement — admissible against the accused as an excited utterance — satisfies the Confrontation Clause on the same grounds after *Williams* as it did before. Such a statement is not testimonial because even under the Kagan view, it was not made with the primary motive that it would be used in a criminal prosecution. And *a fortiori* it satisfied the less restrictive Alito view. Thus Justice Thomas's "formality" test is not controlling, but even if it were, such a statement is not tantamount to an affidavit and so Justice Thomas would find no constitutional problem with its admission. See *Michigan v. Bryant*, 131 S.Ct. 1143, 1167 (2011) (Thomas, J., concurring) (excited utterance of shooting victim "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate.").

Similarly, there is extensive case law allowing admission of testimonial statements on the ground that they are not offered for their truth — for example a statement is offered to show the background of a police investigation, or offered to show that the statement is in fact false. That case law appears unaffected by *Williams*. As will be discussed further below, while both Justice Thomas and Justice Kagan reject the not-for-truth analysis in the context of expert reliance on hearsay, they both distinguish that use from admitting a statement for a *legitimate* not-for-truth purpose. Moreover, both approve of the language in *Crawford* that the Confrontation Clause "does not bar the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted." And they both approve of the result in *Tennessee v. Street*, 471 U.S. 409 (1985), in which the Court held that the Confrontation Clause was not violated when an accomplice confession was admitted only to show that it was different from the defendant's own confession. For the Kagan-Thomas

camp, the question will be whether the testimonial statement is offered for a purpose as to which its probative value is not dependent on the statement being true — and that is the test that is essentially applied by the lower courts in determining whether statements ostensibly offered for a not-for-truth purpose are consistent with the Confrontation Clause.

Finally, it should be noted that since *Williams*, the Court has denied certiorari on over a dozen cases that essentially present the question of what *Williams* means. Maybe the Court is hoping that the confusion it caused on how and whether experts can rely on hearsay will somehow just go away.

## II. Cases Defining “Testimonial” Hearsay, Arranged By Subject Matter

### “Admissions” — Hearsay Statements by the Defendant

**Defendant’s own hearsay statement was not testimonial:** *United States v. Lopez*, 380 F.3d 538 (1<sup>st</sup> Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford*. The court declared that “for reasons similar to our conclusion that appellant’s statements were not the product of custodial interrogation, the statements were also not testimonial.” That is, the statement was spontaneous and not in response to police interrogation.

**Note:** The *Lopez* court had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront *himself*. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. See *United States v. Hansen*, 434 F.3d 92 (1<sup>st</sup> Cir. 2006) (admission of defendant’s own statements does not violate *Crawford*); *United States v. Orm Hieng*, 679 F.3d 1131 (9<sup>th</sup> Cir. 2012): “the Sixth Amendment simply has no application [to the defendant’s own hearsay statements] because a defendant cannot complain that he was denied the opportunity to confront himself.”

**Defendant’s own statements, reporting statements of another defendant, are not testimonial under the circumstances:** *United States v. Gibson*, 409 F.3d 325 (6<sup>th</sup> Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as a statement by a party-opponent. Gibson also argued that the testimony violated *Crawford*. But the court held that Gibson’s statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

### *Bruton* — Testimonial Statements of Co-Defendants

***Bruton* line of cases not applicable unless accomplice’s hearsay statement is testimonial:** *United States v. Figueroa-Cartagena*, 612 F.3d 69 (1<sup>st</sup> Cir. 2010): The defendant’s codefendant had

made hearsay statements in a private conversation that was taped by the government. The statements directly implicated both the codefendant and the defendant. At trial the codefendant's statements were admitted against him, and the defendant argued that the *Bruton* line of cases required severance. But the court found no *Bruton* error, because the hearsay statements were not testimonial in the first place. The statements were from a private conversation so the speaker was not primarily motivated to have the statements used in a criminal prosecution. The court stated that the "*Bruton/Richardson* framework presupposes that the aggrieved co-defendant has a Sixth Amendment right to confront the declarant in the first place."

***Bruton* line of cases not altered by *Crawford*: *United States v. Lung Fong Chen*, 393 F.3d 139, 150 (2d Cir. 2004):** The court held that a confession of a co-defendant, when offered only against the co-defendant, is regulated by *Bruton*, not *Crawford*: so that the question of a Confrontation violation is dependent on whether the confession is powerfully incriminating against the non-confessing defendant. If the confession does not directly implicate the defendant, then there will be no violation if the judge gives an effective limiting instruction to the jury. *Crawford* does not apply because if the instruction is effective, the co-defendant is not a witness "against" the defendant within the meaning of the Confrontation Clause.

***Bruton* protection limited to testimonial statements: *United States v. Berrios*, 676 F.3d 118 (3<sup>rd</sup> Cir. 2012):** "[B]ecause *Bruton* is no more than a byproduct of the Confrontation Clause, the Court's holding in *Davis* and *Crawford* likewise limit *Bruton* to testimonial statements. Any protection provided by *Bruton* is therefore only afforded to the same extent as the Confrontation Clause, which requires that the challenged statement qualify as testimonial. To the extent we have held otherwise, we no longer follow those holdings." ***See also United States v. Shavers*, 693 F.3d 363 (3<sup>rd</sup> Cir. 2012)** (admission of non-testifying co-defendant's inculpatory statement did not violate *Bruton* because it was made casually to an acquaintance and so was non-testimonial; the statement bore "no resemblance to the abusive governmental investigation tactics that the Sixth Amendment seeks to prevent").

**The defendant's own statements are not covered by *Crawford*, but *Bruton* remains in place to protect against admission against a non-confessing co-defendant: *United States v. Ramos-Cardenas*, 524 F.3d 600 (5<sup>th</sup> Cir. 2008):** In a multiple-defendant case, the trial court admitted a post-arrest statement by one of the defendants, which indirectly implicated the others. The court found that the confession could not be admitted against the other defendants, because the confession was testimonial under *Crawford*. But the court found that *Crawford* did not change the analysis with respect to the admissibility of a confession against the confessing defendant; nor did it displace the case law under *Bruton* allowing limiting instructions to protect the non-confessing defendants under certain circumstances. The court elaborated as follows:

[W]hile *Crawford* certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not

signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by *Bruton*, *Richardson* and *Gray*.

In this case, the court found no error in admitting the confession against the codefendant who made it. As to the other defendants, the court found that the reference to them in the confession was vague, and therefore a limiting instruction was sufficient to assure that the confession would not be used against them. Thus, the *Bruton* problem was resolved by a limiting instruction.

***Bruton* and its progeny survive *Crawford*— co-defendant’s testimonial statements were not admitted “against” the defendant in light of limiting instruction: *United States v. Harper*, 527 F.3d 396 (5<sup>th</sup> Cir. 2008):** Harper’s co-defendant made a confession, but it did not directly implicate Harper. At trial the confession was admitted against the co-defendant and the jury was instructed not to use it against Harper. The court recognized that the confession was testimonial, but held that it did not violate Harper’s right to confrontation because the co-defendant was not a witness “against” him. The court relied on the post-*Bruton* case of *Richardson v. Marsh*, and held that the limiting instruction was sufficient to protect Harper’s right to confrontation because the co-defendant’s confession did not directly implicate Harper and so was not as “powerfully incriminating” as the confession in *Bruton*. The court concluded that because “the Supreme Court has so far taken a ‘pragmatic’ approach to resolving whether jury instructions preclude a Sixth Amendment violation in various categories of cases, and because *Richardson* has not been expressly overruled, we will apply *Richardson* and its pragmatic approach, as well as the teachings in *Bruton*.”

**Statement admitted against co-defendant only does not implicate *Crawford*: *Mason v. Yarborough*, 447 F.3d 693 (9<sup>th</sup> Cir. 2006):** A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant’s name was never mentioned — *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a “witness against” the defendant. “Because Fenton’s words were never admitted into evidence, he could not ‘bear testimony’ against Mason.”

**Statement that is non-testimonial cannot raise a *Bruton* problem: *United States v. Patterson*, 713 F.3d 1237 (10<sup>th</sup> Cir. 2013):** The defendant challenged a statement by a non-testifying codefendant on *Bruton* grounds. The court found no error, because the statement was made in furtherance of the conspiracy. Accordingly, it was non-testimonial. That meant there was no *Bruton* problem because *Bruton* does not apply to non-testimonial hearsay. *Bruton* is a confrontation case and the Supreme Court has held that the Confrontation Clause extends only to testimonial hearsay. ***See also United States v. Clark*, 717 F.3d 790 (10<sup>th</sup> Cir. 2013)** (No *Bruton* violation because the codefendant hearsay was a coconspirator statement made in furtherance of the conspiracy and so was

not testimonial); *United States v. Morgan*, 748 F.3d 1024 (10<sup>th</sup> Cir. 2014) (statement admissible as a coconspirator statement cannot violate *Bruton* because “*Bruton* applies only to testimonial statements” and the statements were made between coconspirators dividing up the proceeds of the crime and so “were not made to be used for investigation or prosecution of crime.”).

## Co-Conspirator Statements

**Co-conspirator statement not testimonial:** *United States v. Felton*, 417 F.3d 97 (1<sup>st</sup> Cir. 2005): The court held that a statement by the defendant’s coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford*. **Accord** *United States v. Sanchez-Berrios*, 424 F.3d 65 (1<sup>st</sup> Cir. 2005) (noting that *Crawford* “explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.”). **See also** *United States v. Turner*, 501 F.3d 59 (1<sup>st</sup> Cir. 2007) (conspirator’s statement made during a private conversation were not testimonial); *United States v. Ciresi*, 697 F.3d 19 (1<sup>st</sup> Cir. 2012) (statements admissible as coconspirator hearsay under Rule 801(d)(2)(E) are “by their nature” not testimonial because they are “made for a purpose other than use in a prosecution.”) .

**Surreptitiously recorded statements of coconspirators are not testimonial:** *United States v. Hendricks*, 395 F.3d 173 (3<sup>rd</sup> Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford* because they were informal statements among coconspirators. **Accord** *United States v. Bobb*, 471 F.3d 491 (3<sup>rd</sup> Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

**Statement admissible as coconspirator hearsay is not testimonial:** *United States v. Robinson*, 367 F.3d 278 (5<sup>th</sup> Cir. 2004): The court affirmed a drug trafficker’s murder convictions and death sentence. It held that coconspirator statements are not “testimonial” under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. **Accord** *United States v. Delgado*, 401 F.3d 290 (5<sup>th</sup> Cir. 2005); *United States v. Olguin*, 643 F.3d 384 (5<sup>th</sup> Cir. 2011); *United States v. Alaniz*, 726 F.3d 586 (5<sup>th</sup> Cir. 2013). **See also** *United States v. King*, 541 F.3d 1143 (5<sup>th</sup> Cir. 2008) (“Because the statements at issue here were made by co-conspirators in the furtherance of a conspiracy, they do not fall within the ambit of *Crawford*’s protection”). Note that the court in *King* rejected the defendant’s argument that the co-conspirator statements were testimonial because they were “presented by the government for their testimonial value.” Accepting that argument would mean that all hearsay is testimonial. The court observed that “*Crawford*’s emphasis clearly is on whether the statement was ‘testimonial’ at the time it was made.”

**Statement by an anonymous coconspirator is not testimonial:** *United States v. Martinez*, 430 F.3d 317 (6<sup>th</sup> Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford* because they were not made with the intent that they would be used in a criminal investigation or prosecution. *See also United States v. Mooneyham*, 473 F.3d 280 (6<sup>th</sup> Cir. 2007) (statements made by coconspirator in furtherance of the conspiracy are not testimonial because the one making them “has no awareness or expectation that his or her statements may later be used at a trial”; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer); *United States v. Stover*, 474 F.3d 904 (6<sup>th</sup> Cir. 2007) (holding that under *Crawford* and *Davis*, “co-conspirators’ statements made in pendency and furtherance of a conspiracy are not testimonial” and therefore that the defendant’s right to confrontation was not violated when a statement was properly admitted under Rule 801(d)(2)(E)); *United States v. Damra*, 621 F.3d 474 (6<sup>th</sup> Cir. 2010) (statements made by a coconspirator “by their nature are not testimonial”) *United States v. Tragas*, 727 F.3d 610 (6<sup>th</sup> Cir. 2013) (“As coconspirator statements were made in furtherance of the conspiracy, they were categorically non-testimonial.”).

**Coconspirator statements made to an undercover informant are not testimonial:** *United States v. Hargrove*, 508 F.3d 445 (7<sup>th</sup> Cir. 2007): The defendant, a police officer, was charged with taking part in a conspiracy to rob drug dealers. One of his coconspirators had a discussion with a potential member of the conspiracy (in fact an undercover informant) about future robberies. The defendant argued that the coconspirator’s statements were testimonial, but the court disagreed. It held that “*Crawford* did not affect the admissibility of coconspirator statements.” The court specifically rejected the defendant’s argument that *Crawford* somehow undermined *Bourjaily*, noting that in both *Crawford* and *Davis*, “the Supreme Court specifically cited *Bourjaily* — which as here involved a coconspirator’s statement made to a government informant — to illustrate a category of nontestimonial statements that falls outside the requirements of the Confrontation Clause.”

**Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial:** *United States v. Lee*, 374 F.3d 637 (8<sup>th</sup> Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found testimonial in *Crawford*. The court reached the same result on co-conspirator hearsay in *United States v. Reyes*, 362 F.3d 536 (8<sup>th</sup> Cir. 2004); *United States v. Singh*, 494 F.3d 653 (8<sup>th</sup> Cir. 2007); and *United States v. Hyles*, 521 F.3d 946 (8<sup>th</sup> Cir. 2008) (noting that the statements were not elicited in response to a government investigation and were casual remarks to co-conspirators).

**Statements in furtherance of a conspiracy are not testimonial:** *United States v. Allen*, 425 F.3d 1231 (9<sup>th</sup> Cir. 2005): The court held that “co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford*’s holding.” *See also United States v. Larson*, 460 F.3d 1200 (9<sup>th</sup> Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial); *United States v. Grasso*, 724 F.3d 1077 (9<sup>th</sup> Cir. 2013) (“co-conspirator statements in furtherance of a conspiracy are not testimonial”).

**Statements admissible under the co-conspirator exemption are not testimonial:** *United States v. Townley*, 472 F.3d 1267 (10<sup>th</sup> Cir. 2007): The court rejected the defendant’s argument that hearsay is testimonial under *Crawford* whenever “confrontation would have been required at common law as it existed in 1791.” It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause. *Accord United States v. Ramirez*, 479 F.3d 1229 (10<sup>th</sup> Cir. 2007) (statements admissible under Rule 801(d)(2)(E) are not testimonial under *Crawford*); *United States v. Patterson*, 713 F.3d 1237 (10<sup>th</sup> Cir. 2013) (same); *United States v. Morgan*, 748 F.3d 1024 (10<sup>th</sup> Cir. 2014) (statements made between coconspirators dividing up the proceeds of the crime were not testimonial because they “were not made to be used for investigation or prosecution of crime.”).

**Statements made during the course and in furtherance of the conspiracy are not testimonial:** *United States v. Underwood*, 446 F.3d 1340 (11<sup>th</sup> Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court noted that the statements “clearly were not made under circumstances which would have led [Darryl] reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.” The court concluded as follows:

Although the foregoing discussion would probably support a holding that the evidence challenged here is not “testimonial,” two additional aspects of the *Crawford* opinion seal our conclusion that Darryl’s statements to the government informant were not “testimonial” evidence. First, the Court stated: “most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy.” Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it “hew[ed] closely to the traditional line” of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements

unwittingly made to an FBI informant. \* \* \* The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

*See also United States v. Lopez*, 649 F.3d 1222 (11<sup>th</sup> Cir. 2011): co-conspirator’s statement, bragging that he and the defendant had drugs to sell after a robbery, was admissible under Rule 801(d)(2)(E) and was not testimonial, because it was merely “bragging to a friend” and not a formal statement intended for trial.

## **Cross-Examination**

**Cross-examination of prior testimony was adequate even though defense counsel was found ineffective on other grounds:** *Rolan v. Coleman*, 680 F.3d 311 (3<sup>rd</sup> Cir. 2012): The habeas petitioner argued that his right to confrontation was violated when he was retried and testimony from the original trial was admitted against him. The prior testimony was obviously testimonial under *Crawford*. The question was whether the witness — who was unavailable for the second trial — was adequately cross-examined at the first trial. The defendant argued that cross-examination could not have been adequate because the court had already found defense counsel to be inadequate at that trial (by failing to investigate a self-defense theory and failing to call two witnesses). The court, however, found the cross-examination to be adequate. The court noted that the state court had found the cross-examination to be adequate — that court found “baseless” the defendant’s argument that counsel had failed to explore the witness’s immunity agreement. Because the witness had made statements before that agreement was entered into that were consistent with his in-court testimony, counsel could reasonably conclude that exploring the immunity agreement would do more harm than good. The court of appeals concluded that “[t]here is no Supreme Court precedent to suggest that Goldstein’s cross-examination was inadequate, and the record does not support such a conclusion. Consequently, the Superior Court’s finding was not contrary to, or an unreasonable application of, *Crawford*.”

## **Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)**

**Accomplice’s jailhouse statement was admissible as a declaration against interest and accordingly was not testimonial:** *United States v. Pelletier*, 666 F.3d 1 (1<sup>st</sup> Cir. 2011): The defendant’s accomplice made hearsay statements to a jailhouse buddy, indicating among other things that he had smuggled marijuana for the defendant. The court found that the statements were properly

admitted as declarations against interest. The court noted specifically that the fact that the accomplice made the statements “to fellow inmate Hafford, rather than in an attempt to curry favor with police, cuts in favor of admissibility.” For similar reasons, the hearsay was not testimonial under *Crawford*. The court stated that the statements were made “not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against Pelletier.”

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial:** *United States v. Saget*, 377 F.3d 223 (2<sup>nd</sup> Cir. 2004) (Sotomayor, J.): The defendant’s accomplice spoke to an undercover officer, trying to enlist him in the defendant’s criminal scheme. The accomplice’s statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. After *Williamson v. United States*, hearsay statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice’s statement was not barred by *Williamson*, because it was made to an undercover officer—the accomplice didn’t know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a “witness” would provide. *See also United States v. Williams*, 506 F.3d 151 (2<sup>d</sup> Cir. 2007): Statement of accomplice implicating himself and defendant in a murder was admissible under Rule 804(b)(3) where it was made to a friend in informal circumstances; for the same reason the statement was not testimonial. The defendant’s argument about insufficient indicia of reliability was misplaced because the Confrontation Clause no longer imposes a reliability requirement. *Accord United States v. Wexler*, 522 F.3d 194 (2<sup>nd</sup> Cir. 2008) (inculpatory statement made to friends admissible under Rule 804(b)(3) and not testimonial).

**Intercepted conversations were admissible as declarations against penal interest and were not testimonial:** *United States v. Berrios*, 676 F.3d 118 (3<sup>rd</sup> Cir. 2012): Authorities intercepted a conversation between criminal associates in a prison yard. The court held that the statements were non-testimonial, because neither of the declarants “held the objective of incriminating any of the defendants at trial when their prison yard conversation was recorded; there is no indication that they were aware of being overheard; and there is no indication that their conversation consisted of anything but casual remarks to an acquaintance.” A defendant also lodged a hearsay objection, but the court found that the statements were admissible as declarations against interest. The declarants unequivocally incriminated themselves in acts of carjacking and murder, as well as shooting a security guard, and they mentioned the defendant “only to complain that he crashed the getaway car.”

**Accomplice statement made to a friend, admitting complicity in a crime, was admissible as a declaration against interest and was not testimonial:** *United States v. Jordan*, 509 F.3d 191

(4<sup>th</sup> Cir. 2007): The defendant was convicted of murder while engaged in a drug-trafficking offense. He contended that the admission of a statement of an accomplice was error under the Confrontation Clause and the hearsay rule. The accomplice confessed her part in the crime in a statement to her roommate. The court found no error in the admission of the accomplice's statement. It was not testimonial because it was made to a friend, not to law enforcement. The court stated: "To our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates." The court also found the accomplice's statement properly admitted as a declaration against interest. The court elaborated as follows:

Here, although Brown's statements to Adams inculpated Jordan, they also subject *her* to criminal liability for a drug conspiracy and, by extension, for Tabon's murder. Brown made the statements to a friend in an effort to relieve herself of guilt, not to law enforcement in an effort to minimize culpability or criminal exposure.

**Accomplice's statements to the victim, in conversations taped by the victim, were not testimonial: *United States v. Udeozor*, 515 F.3d 260 (4<sup>th</sup> Cir.2008):** The defendant was convicted for conspiracy to hold another in involuntary servitude. The evidence showed that the defendant and her husband brought a teenager from Nigeria into the United States and forced her to work without compensation. The victim also testified at trial that the defendant's husband raped her on a number of occasions. On appeal the defendant argued that the trial court erroneously admitted two taped conversations between the victim and the defendant. The victim taped the conversations surreptitiously in order to refer them to law enforcement. The court found no error in admitting the tapes. The conversations were hearsay, but the husband's statements were admissible as declarations against penal interest, as they admitted wrongdoing and showed an attempt to evade prosecution. The defendant argued that even if admissible under Rule 804(b)(3), the conversations were testimonial under *Crawford*. He argued that a statement is testimonial if the *government's* primary motivation is to prepare the statement for use in a criminal prosecution — and that in this case, the victim was essentially acting as a government agent in obtaining statements to be used for trial. But the court found that the conversation was not testimonial because the husband did not know he was talking to anyone affiliated with law enforcement, and the *husband's* primary motivation was not to prepare a statement for any criminal trial. The court observed that the "intent of the police officers or investigators is relevant to the determination of whether a statement is 'testimonial' only if it is first the case that a person in the position of the declarant reasonably would have expected that his statements would be used prosecutorially."

**Note: This case was decided before *Michigan v. Bryant, infra*, but it is consistent with the holding in *Bryant* that the primary motive test considers the motivation of all the parties to a communication.**

**Accomplice's confessions to law enforcement agents were testimonial: *United States v. Harper*, 514 F.3d 456 (5<sup>th</sup> Cir. 2008):** The court held that confessions made by the codefendant to

law enforcement were testimonial, even though the codefendant did not mention the defendant as being involved in the crime. The statements were introduced to show that the codefendant owned some of the firearms and narcotics at issue in the case, and these facts implicated the defendant as well. The court did not consider whether the confessions were admissible under a hearsay exception — but they would not have been admissible as a declaration against interest, because *Williamson* bars confessions of cohorts made to law enforcement.

**Accomplice’s statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke*, 398 F.3d 691 (5<sup>th</sup> Cir. 2005):** The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated both himself and the defendant. These statements were made to the accomplice’s roommate. The court found that these statements were not testimonial under *Crawford*: “There is nothing in *Crawford* to suggest that ‘testimonial evidence’ includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.”

**Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin*, 415 F.3d 537 (6<sup>th</sup> Cir. 2005):** The defendant was charged with bank robbery. One of the defendant’s accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked “stressed out.” Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke’s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark’s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke’s statement was not testimonial under *Crawford*:

Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke’s statements only as his friend and confidant.

The court distinguished other cases in which an informant’s statement to police officers was found testimonial, on the ground that those other cases involved accomplice statements knowingly made to police officers, so that “the informant’s statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant.”

**See also *United States v. Gibson*, 409 F.3d 325 (6<sup>th</sup> Cir. 2005)** (describing statements as nontestimonial where “the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame.”); ***United States v. Johnson*, 440 F.3d 832 (6<sup>th</sup> Cir. 2006)** (statements by accomplice to an undercover informant he thought to be a

cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

**Statement admissible as a declaration against penal interest is not testimonial: *United States v. Johnson*, 581 F.3d 320 (6<sup>th</sup> Cir. 2009):** The court held that the tape-recorded confession of a coconspirator describing the details of an armed robbery, including his and the defendant's roles, was properly admitted as a declaration against penal interest. The court found that the statements tended to disserve the declarant's interest because "they admitted his participation in an unsolved murder and bank robbery." And the statements were trustworthy because they were made to a person the declarant thought to be his friend, at a time when the declarant did not know he was being recorded "and therefore could not have made his statement in order to obtain a benefit from law enforcement." Moreover, the hearsay was not testimonial, because the declarant did not know he was being recorded or that the statement would be used in a criminal proceeding against the defendant.

**Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones*, 371 F.3d 363 (7<sup>th</sup> Cir. 2004):** An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, could be admissible as a declaration against interest (a question it did not decide), its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And because the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

**Declaration against interest made to an accomplice who was secretly recording the conversation for law enforcement was not testimonial: *United States v. Watson*, 525 F.3d 583 (7<sup>th</sup> Cir. 2008):** After a bank robbery, one of the perpetrators was arrested and agreed to cooperate with the FBI. She surreptitiously recorded a conversation with Anthony, in which Anthony implicated himself and Watson in the robbery. The court found that Anthony's statement was against his own interest, and rejected Watson's contention that it was testimonial. The court noted that Anthony could not have anticipated that the statement would be used at a trial, because he did not know that the FBI was secretly recording the conversation. It concluded: "A statement unwittingly made to a confidential informant and recorded by the government is not testimonial for Confrontation Clause purposes." **Accord *United States v. Volpendesto*, 746 F.3d 273 (7<sup>th</sup> Cir. 2014):** Statements of an accomplice made to a confidential informant were properly admitted as declarations against interest and for the same reasons were not testimonial. The defendant argued that the court should reconsider its ruling in *Watson* because the Supreme Court, in *Michigan v. Bryant*, had in the

interim stated that in determining primary motive, the court must look at the motivation of both the declarant and the other party to the conversation, and in this case as in *Watson* the other party was a confidential informant trying to obtain statements to use in a criminal prosecution. But the court noted that in *Bryant* the Court stated that the relevant inquiry “is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had.” Applying this objective approach, the court concluded that the conversation “looks like a casual, confidential discussion between co-conspirators.”

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial:** *United States v. Manfre*, 368 F.3d 832 (8<sup>th</sup> Cir. 2004): An accomplice made a statement to his fiancée that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made informally to a trusted person. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was “not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.”

**Accomplice statements to cellmate are not testimonial:** *United States v. Johnson*, 495 F.3d 951 (8<sup>th</sup> Cir. 2007): The defendant’s accomplice made statements to a cellmate, implicating himself and the defendant in a number of murders. The court found that these hearsay statements were not testimonial, as they were made under informal circumstances and there was no involvement with law enforcement.

**Jailhouse confession implicating defendant was admissible as a declaration against penal interest and was not testimonial:** *United States v. Smalls*, 605 F.3d 765 (10<sup>th</sup> Cir. 2010): The court found no error in admitting a jailhouse confession that implicated a defendant in the murder of a government informant. The statements were not testimonial because they were not made with “the primary purpose \* \* \* of establishing or proving some fact potentially relevant to a criminal prosecution.” The fact that the statements were made in a conversation with a government informant did not make them testimonial because the declarant did not know he was being interrogated, and the statement was not made under the formalities required for a statement to be testimonial. Finally, the statements were properly admitted under Rule 804(b)(3), because they implicated the declarant in a serious crime committed with another person, there was no attempt to shift blame to the defendant, and the declarant did not know he was talking to a government informant and therefore was not currying favor with law enforcement.

**Declaration against interest is not testimonial:** *United States v. U.S. Infrastructure, Inc.*, 576 F.3d 1195 (11<sup>th</sup> Cir. 2009): The declarant, McNair, made a hearsay statement that he was accepting bribes from one of the defendants. The statement was made in private to a friend. The

court found that the statement was properly admitted as a declaration against McNair's penal interest, as it showed that he accepted bribes from an identified person. The court also held that the hearsay was not testimonial, because it was "part of a private conversation" and no law enforcement personnel were involved.

## **Excited Utterances, 911 Calls, Etc.**

**911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution:** *Davis v. Washington and Hammon v. Indiana*, 547 U.S. 813 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon*, the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court defined testimoniality by whether the *primary motivation* in making the statements was for use in a criminal prosecution.

**Pragmatic application of the emergency and primary purpose standards:** *Michigan v. Bryant*, 131 S.Ct. 1143 (2011): The Court held that the statement of a shooting victim to police, identifying the defendant as the shooter — and admitted as an excited utterance under a state rule of evidence — was not testimonial under *Davis* and *Crawford*. The Court applied the test for testimoniality established by *Davis*— whether the primary motive for making the statement was to have it used in a criminal prosecution — and found that in this case such primary motive did not exist. The Court noted that *Davis* focused on whether statements were made to respond to an emergency, as distinct from an investigation into past events. But it stated that the lower court had

construed that distinction too narrowly to bar, as testimonial, essentially all statements of past events. The Court made the following observations about how to determine testimoniality when statements are made to responding police officers:

1. The primary purpose inquiry is objective. The relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

2. As *Davis* notes, the existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution, but on ending a threatening situation. But there is no categorical distinction between present and past fact. Rather, the question of whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized, because the threat to the first responders and public may continue.

3. An emergency's duration and scope may depend in part on the type of weapon involved; in *Davis* and *Hammon* the assailants used their fists, which limited the scope of the emergency — unlike in this case where the perpetrator used a gun, and so questioning could permissibly be broader.

4. A victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one. It also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

5. Whether an ongoing emergency exists is simply one factor informing the ultimate inquiry regarding an interrogation's "primary purpose." Another is the encounter's informality. Formality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.

6. The statements and actions of *both* the declarant and interrogators provide objective evidence of the interrogation's primary purpose. Looking to the contents of both the questions and the answers ameliorates problems that could arise from looking solely to one participant, because both interrogators and declarants may have mixed motives.

Applying all these considerations to the facts, the Court found that the circumstances of the encounter as well as the statements and actions of the shooting victim and the police objectively indicated that the interrogation's "primary purpose" was "to enable police assistance to meet an

ongoing emergency.” The circumstances of the interrogation involved an armed shooter, whose motive for and location after the shooting were unknown and who had mortally wounded the victim within a few blocks and a few minutes of the location where the police found him. Unlike the emergencies in *Davis* and *Hammon*, the circumstances presented in *Bryant* indicated a potential threat to the police and the *public*, even if not the victim. And because this case involved a gun, the physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat.

The Court concluded that the statements and actions of the police and victim objectively indicated that the primary purpose of their discussion was not to generate statements for trial. When the victim responded to police questions about the crime, he was lying in a gas station parking lot bleeding from a mortal gunshot wound, and his answers were punctuated with questions about when emergency medical services would arrive. Thus, the Court could not say that a person in his situation would have had a “primary purpose” “to establish or prove past events potentially relevant to later criminal prosecution.” For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred; the shooter’s location; or anything else about the crime. They asked exactly the type of questions necessary to enable them “to meet an ongoing emergency” — essentially, who shot the victim and where did the act occur. Nothing in the victim’s responses indicated to the police that there was no emergency or that the emergency had ended. The informality suggested that their primary purpose was to address what they considered to be an ongoing emergency — apprehending a suspect with a gun — and the circumstances lacked the formality that would have alerted the victim to or focused him on the possible future prosecutorial use of his statements.

Justice Sotomayor wrote the majority opinion for five Justices. Justice Thomas concurred in the judgment, adhering to his longstanding view that testimoniality is determined by whether the statement is the kind of formalized accusation that was objectionable under common law — he found no such formalization in this case. Justices Scalia and Ginsburg wrote dissenting opinions. Justice Kagan did not participate.

**911 call reporting drunk person with an unloaded gun was not testimonial: *United States v. Cadieux*, 500 F.3d 37 (1<sup>st</sup> Cir. 2007):** In a felon-firearm prosecution, the trial court admitted a tape of a 911 call, made by the daughter of the defendant’s girlfriend, reporting that the defendant was drunk and walking around with an unloaded shotgun. The court held that the 911 call was not testimonial. It relied on the following factors: 1) the daughter spoke about events “in real time, as she witnessed them transpire”; 2) she specifically requested police assistance; 3) the dispatcher’s questions were tailored to identify “the location of the emergency, its nature, and the perpetrator”; and 4) the daughter was “hysterical as she speaks to the dispatcher, in an environment that is neither tranquil nor, as far as the dispatcher could reasonably tell, safe.” The defendant argued that the call was testimonial because the daughter was aware that her statements to the police could be used in a prosecution. But the court found that after *Davis*, awareness of possible use in a prosecution is not

enough for a statement to be testimonial. A statement is testimonial only if the “primary motivation” for making it is for use in a criminal prosecution.

**911 call was not testimonial under the circumstances: *United States v. Brito*, 427 F.3d 53 (1<sup>st</sup> Cir. 2005):** The court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant’s right to confrontation. The court declared that the relevant question is whether the statement was made with an eye toward “legal ramifications.” The court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances “usually speaks out of urgency and a desire to obtain a prompt response.” In this case the 911 call was properly admitted because the caller stated that she had “just” heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in “imminent personal peril” when the call was made and therefore it was not testimonial. The court also found that the 911 operator’s questioning of the caller did not make the answers testimonial, because “it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness.”

**911 call — including statements about the defendant’s felony status—was not testimonial: *United States v. Proctor*, 505 F.3d 366 (5<sup>th</sup> Cir. 2007):** In a firearms prosecution, the court admitted a 911 call from the defendant’s brother (Yogi), in which the brother stated that the defendant had stolen a gun and shot it into the ground twice. Included in the call were statements about the defendant’s felony status and that he was probably on cocaine. The court held that the entire call was nontestimonial. It applied the “primary purpose” test and evaluated the call in the following passage:

Yogi's call to 911 was made immediately after Proctor grabbed the gun and fired it twice. During the course of the call, he recounts what just happened, gives a description of his brother, indicates his brother's previous criminal history, and the fact that his brother may be under the influence of drugs. All of these statements enabled the police to deal appropriately with the situation that was unfolding. The statements about Proctor's possession of a gun indicated Yogi's understanding that Proctor was armed and possibly dangerous. The information about Proctor's criminal history and possible drug use necessary for the police to respond appropriately to the emergency, as it allowed the police to determine whether they would be encountering a violent felon. Proctor argues that the emergency had already passed, because he had run away with the weapon at the time of the 911 call and, therefore, the 911 conversation was testimonial. It is hard to reconcile this argument with the facts. During the

911 call, Yogi reported that he witnessed his brother, a felon possibly high on cocaine, run off with a loaded weapon into a nightclub. This was an ongoing emergency — not one that had passed. Proctor's retreat into the nightclub provided no assurances that he would not momentarily return to confront Yogi \* \* \*. Further, Yogi could have reasonably feared that the people inside the nightclub were in danger. Overall, a reasonable viewing of the 911 call is that Yogi and the 911 operator were dealing with an ongoing emergency involving a dangerous felon, and that the 911 operator's questions were related to the resolution of that emergency.

*See also United States v. Mouzone*, 687 F.3d 207 (5<sup>th</sup> Cir. 2012) (911 calls found non-testimonial as “each caller simply reported his observation of events as they unfolded”; the 911 operators were not attempting to “establish or prove past events”; and “the transcripts simply reflect an effort to meet the needs of the ongoing emergency”).

**911 call, and statements made by the victim after police arrived, are excited utterances and not testimonial:** *United States v. Arnold*, 486 F.3d 177 (6<sup>th</sup> Cir. 2007) (en banc): In a felon-firearm prosecution, the court admitted three sets of hearsay statements made by the daughter of the defendant's girlfriend, after an argument between the daughter (Tamica) and the defendant. The first set were statements made in a 911 call, in which Tamica stated that Arnold pulled a pistol on her and is “fixing to shoot me.” The call was made after Tamica got in her car and went around the corner from her house. The second set of statements occurred when the police arrived within minutes; Tamica was hysterical, and without prompting said that Arnold had pulled a gun and was trying to kill her. The police asked what the gun looked like and she said “a black handgun.” At the time of this second set of statements, Arnold had left the scene. The third set of statements was made when Arnold returned to the scene in a car a few minutes later. Tamica identified Arnold by name and stated “that's the guy that pulled the gun on me.” A search of the vehicle turned up a black handgun underneath Arnold's seat.

The court first found that all three sets of statements were properly admitted as excited utterances. For each set of statements, Tamica was clearly upset, she was concerned about her safety, and the statements were made shortly after or right at the time of the two startling events (the gun threat for the first two sets of statements and Arnold's return for the third set of statements).

The court then concluded that none of Tamica's statements fell within the definition of “testimonial” as developed by the Court in *Davis*. Essentially the court found that the statements were not testimonial for the very reason that they were excited utterances — Tamica was upset, she was responding to an emergency and concerned about her safety, and her statements were largely spontaneous and not the product of an extensive interrogation.

**911 call is non-testimonial:** *United States v. Thomas*, 453 F.3d 838 (7<sup>th</sup> Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator

was still at large. The court analyzed the statements as follows:

[T]he caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

*See also United States v. Dodds*, 569 F.3d 336 (7<sup>th</sup> Cir. 2009) (unidentified person's identification of a person with a gun was not testimonial: "In this case, the police were responding to a 911 call reporting shots fired and had an urgent need to identify the person with the gun and to stop the shooting. The witness's description of the man with a gun was given in that context, and we believe it falls within the scope of *Davis*.").

**911 calls and statements made to officers responding to the calls were not testimonial:** *United States v. Brun*, 416 F.3d 703 (8<sup>th</sup> Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford*. The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

**Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon* and then *Bryant*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime. The *Brun* decision is especially consistent with the pragmatic approach to finding an emergency (and to the observation that emergency is only one factor in the primary motive test) that the Court found in *Michigan v. Bryant*.**

**Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave*, 371 F.3d 663 (9<sup>th</sup> Cir. 2004):** In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. \* \* \* Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

**Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers are non-testimonial if they are directed toward dealing with an emergency rather than prosecuting a crime. It is especially consistent with the pragmatic approach to applying the primary motive test established in *Michigan v. Bryant*.**

## Expert Witnesses

**Confusion over expert witnesses testifying on the basis of testimonial hearsay: *Williams v. Illinois*, 132 S.Ct. 2221 (2012):** This case is fully set forth in Part One. To summarize, the confusion is over whether an expert can, consistently with the Confrontation Clause, rely on testimonial hearsay so long as the hearsay is not explicitly introduced for its truth and the expert makes an independent judgment, i.e., is not just a conduit for the hearsay. That practice is permitted by Rule 703. Five members of the Court rejected the use of testimonial hearsay in this way, on the ground that it was based on an artificial distinction. But the plurality decision by Justice Alito embraces this Rule 703 analysis. At this early stage, the answer appears to be that an expert can rely on testimonial hearsay so long as it is not in the form of an affidavit or certificate — that proviso would then get Justice Thomas’s approval. As seen elsewhere in this outline, some courts have found *Williams* to have no precedential effect other than controlling cases that present the same facts as *Williams*. And other courts have held that the use of testimonial hearsay by an expert is permitted without regard to its formality, so long as the expert makes an independent conclusion and the hearsay itself is not admitted into evidence.

**Expert’s reliance on testimonial hearsay does not violate the Confrontation Clause: *United States v. Henry*, 472 F.3d 910 (D.C. Cir. 2007):** The court declared that *Crawford* “did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on (without repeating to the jury) otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703. In other words, while the Supreme Court in *Crawford* altered Confrontation Clause precedent, it said nothing about the Clause's relation to Federal Rule of Evidence 703.” ***See also United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008):** Expert’s testimony about the typical practices of narcotics dealers did not violate *Crawford*. While the testimony was based on interviews with informants, “Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury.”

**Note: These opinions from the D.C. Circuit precede *Williams* and are questionable if you count the votes in *Williams*. But these cases are quite consistent with the Alito opinion in *Williams* and as stated above, some lower courts are treating the Alito opinion as controlling on an expert’s reliance on testimonial hearsay.**

**Confrontation Clause violated where expert does no more than restate the results of a testimonial lab report: *United States v. Ramos-Gonzalez*, 664 F.3d 1 (1<sup>st</sup> Cir. 2011):** In a drug case, a lab report indicated that substances found in the defendant’s vehicle tested positive for cocaine. The lab report was testimonial under *Melendez-Diaz*, and the person who conducted the test was not produced for trial. The government sought to avoid the *Melendez-Diaz* problem by calling an expert to testify to the results, but the court found that the defendant’s right to confrontation was nonetheless violated, because the expert did not make an independent assessment, but rather simply restated the report. The court explained as follows:

Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation. See, e.g., *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir.2010) (“[Where] the expert is, in essence, ... merely acting as a transmitter for testimonial hearsay,” there is likely a Crawford violation); *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir.2009) (same); *United States v. Lombardo*, 491 F.3d 61, 72 (2d Cir.2007) (“[T]he admission of [the expert's] testimony was error ... if he communicated out-of-court testimonial statements ... directly to the jury in the guise of an expert opinion.”). In this case, we need not wade too deeply into the thicket, because the testimony at issue here does not reside in the middle ground.

The government is hard-pressed to paint Morales's testimony as anything other than a recitation of Borrero's report. On direct examination, the prosecutor asked Morales to “say what are the results of the test,” and he did exactly that, responding “[b]oth bricks were positive for cocaine.” This colloquy leaves little room for interpretation. Morales was never asked, and consequently he did not provide, his independent expert opinion as to the nature of the substance in question. Instead, he simply parroted the conclusion of Borrero's report. Morales's testimony amounted to no more than the prohibited transmission of testimonial hearsay. While the interplay between the use of expert testimony and the Confrontation Clause will undoubtedly require further explication, the government cannot meet its Sixth Amendment obligations by relying on Rule 703 in the manner that it was employed here.

**Note: Whatever *Williams* may mean, the court’s analysis in *Ramon-Gonzalez* surely remains valid. Five members of the *Williams* Court rejected the proposition that an expert can rely *at all* on testimonial hearsay even if the expert testifies to his own opinion. And even Justice Alito cautions that an expert may not testify if he does nothing more than parrot the testimonial hearsay.**

**Confrontation Clause not violated where testifying expert conducts his own testing that replicates a testimonial report: *United States v. Soto*, 720 F.3d 51 (1<sup>st</sup> Cir. 2013):** In a prosecution for identity theft and related offenses, a technician did a review of the defendant’s laptop and came to conclusions that inculpated the defendant. At trial, a different expert testified that he did the same test and it came out exactly the same as the test done by the absent technician. The defendant argued that this was surrogate testimony that violated *Bullcoming v. New Mexico*, in which the Court held that production of a surrogate who simply reported testimonial hearsay did not satisfy the Confrontation Clause. But the court disagreed:

Agent Pickett did not testify as a surrogate witness for Agent Murphy. \* \* \* Unlike in *Bullcoming*, Agent Murphy's forensic report was not introduced into evidence through Agent

Pickett. Agent Pickett testified about a conclusion he drew from his own independent examination of the hard drive. The government did not need to get Agent Murphy's report into evidence through Agent Pickett. We do not interpret *Bullcoming* to mean that the agent who testifies against the defendant cannot know about another agent's prior examination or that agent's results when he conducts his examination. The government may ask an agent to replicate a forensic examination if the agent who did the initial examination is unable to testify at trial, so long as the agent who testifies conducts an independent examination and testifies to his own results.

The court reviewed the votes in *Bullcoming* and found that "it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination." This count resulted from the fact that Justice Ginsburg, joined by Justice Scalia, stated that the Confrontation problem in *Bullcoming* could have been avoided if the testifying expert had simply retested the substance and testified on the basis of the retest.

The *Soto* court did express concern, however, that the testifying expert did more than simply replicate the results of the prior test: he also testified that the tests came to identical results:

Soto's argument that Agent Murphy's report bolstered Agent Pickett's testimony hits closer to the mark. At trial, Agent Pickett testified that the incriminating documents in Exhibit 20 were found on a laptop that was seized from Soto's car. Although Agent Pickett had independent knowledge of that fact, he testified that "everything that was in John Murphy's report was exactly the way he said it was," and that Exhibit 20 "was contained in the same folder that John Murphy had said that he had found it in." \* \* \* These two out-of-court statements attributed to Agent Murphy were arguably testimonial and offered for their truth. Agent Pickett testified about the substance of Agent Murphy's report which Agent Murphy prepared for use in Soto's trial. \* \* \* Agent Pickett's testimony about Agent Murphy's prior examination of the hard drive bolstered Agent Pickett's independent conclusion that the Exhibit 20 documents were found on Soto's hard drive.

But the court found no plain error, in large part because the bolstering was cumulative.

**Expert's reliance on out-of-court accusations does not violate *Crawford*, unless the accusations are directly presented to the jury:** *United States v. Lombardozzi*, 491 F.3d 61 (2<sup>nd</sup> Cir. 2007): The court stated that *Crawford* is inapplicable if testimonial statements are not used for their truth, and that "it is permissible for an expert witness to form an opinion by applying her expertise because, in that limited instance, the evidence is not being presented for the truth of the matter asserted." The court concluded that the expert's testimony would violate the Confrontation Clause "only if he communicated out-of-court testimonial statements . . . directly to the jury in the guise of an expert opinion." The court found any error in introducing the hearsay statements directly to be harmless. *See also United States v. Mejia*, 545 F.3d 179 (2<sup>nd</sup> Cir. 2008) (violation of

Confrontation Clause where expert directly relates statements made by drug dealers during an interrogation).

**Note: These opinions from the 2<sup>nd</sup> Circuit precede *Williams* and are questionable if you count the votes in *Williams*. But these cases are quite consistent with the Alito opinion in *Williams* and as indicated in this outline, many lower courts permit an expert to rely on testimonial hearsay, so long as the hearsay is not admitted at trial and the expert reaches his own conclusions.**

**Expert reliance on printout from machine does not violate *Crawford: United States v. Summers*, 666 F.3d 192 (4<sup>th</sup> Cir. 2011):** The defendant objected to the admission of DNA testing performed on a jacket that linked him to drug trafficking. The court first considered whether the Confrontation Clause was violated by the government’s failure to call the FBI lab employees who signed the internal log documenting custody of the jacket. The court found no error in admitting the log, because chain-of-custody evidence had been introduced by the defense and therefore the defendant had opened the door to rebuttal. The court next considered whether the Confrontation Clause was violated by testimony of an expert who relied on DNA testing results by lab analysts who were not produced at trial. The court again found no error. It emphasized that the expert did his own testing, and his reliance on the report was limited to a “pure instrument read-out.” The court stated that “[t]he numerical identifiers of the DNA allele here, insofar as they are nothing more than raw data produced by a machine” should be treated the same as gas chromatograph data, which the courts have held to be non-testimonial. *See also United States v. Shanton*, 2013 WL 781939 (4<sup>th</sup> Cir.) (Unpublished) (finding that the result concerning the admissibility of the expert testimony in *Summers* was unaffected by *Williams*: “[W]e believe five justices would affirm: Justice Thomas on the ground that the statements at issue were not testimonial and Justice Alito, along with the three justices who joined his plurality opinion, on the ground that the statements were not admitted for the truth of the matter asserted.”).

**Expert reliance on confidential informants in interpreting coded conversation does not violate *Crawford: United States v. Johnson*, 587 F.3d 625 (4<sup>th</sup> Cir. 2009):** The court found no error in admitting expert testimony that decoded terms used by the defendants and coconspirators during recorded telephone conversations. The defendant argued that the experts relied on hearsay statements by cooperators to help them reach a conclusion about the meaning of particular conversations. The defendant asserted that the experts were therefore relying on testimonial hearsay. The court stated that experts are allowed to consider inadmissible hearsay as long as it is of a type reasonably relied on by other experts — as it was in this case. It stated that “[w]ere we to push *Crawford* as far as [the defendant] proposes, we would disqualify broad swaths of expert testimony, depriving juries of valuable assistance in a great many cases.” The court recognized that it is “appropriate to recognize the risk that a particular expert might become nothing more than a transmitter of testimonial

hearsay.” But in this case, the experts never made reference to their interviews, and the jury heard no testimonial hearsay. “Instead, each expert presented his independent judgment and specialized understanding to the jury.” Because the experts “did not become mere conduits” for the testimonial hearsay, their consideration of that hearsay “poses no *Crawford* problem.” *Accord United States v. Ayala*, 601 F.3d 256 (4<sup>th</sup> Cir. 2010) (no violation of the Confrontation Clause where the experts “did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury.”). *Accord United States v. Palacios*, 677 F.3d 234 (4<sup>th</sup> Cir. 2012): Expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert “did not specifically reference” any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion.

**Expert testimony translating coded conversations violated the right to confrontation where the government failed to make a sufficient showing that the expert was relying on her own evaluations rather than those of informants:** *United States v. Garcia*, 752 F.3d 382 (4<sup>th</sup> Cir. 2014): The court reversed drug convictions in part because the law enforcement expert who translated purportedly coded conversations had relied on input from coconspirators who she had debriefed in coming to her conclusion. The court distinguished *Johnson, supra*, on the ground that in this case the government had not done enough to show that the expert had conducted her own independent analysis in reaching her conclusions as to the meaning of certain conversations. The court noted that “the question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” In this case, “we cannot say that Agent Dayton was giving such independent judgments. While it is true she never made direct reference to the content of her interviews, this could just as well have been the result of the Government’s failure to elicit a proper foundation for Agent Dayton’s interpretations.” The government argued that the information from the coconspirators only served to confirm the Agent’s interpretations after the fact, but the court concluded that “[t]he record is devoid of evidence that this was, in fact, the sequence of Dayton’s analysis, to Garcia’s prejudice.”

**Expert reliance on printout from machine and another expert’s lab notes does not violate *Crawford*:** *United States v. Moon*, 512 F.3d 359 (7<sup>th</sup> Cir. 2008): The court held that an expert’s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because “data is not ‘statements’ in any useful sense. Nor is a machine a ‘witness against’ anyone.” Moreover, the expert’s reliance on another expert’s lab notes did not violate *Crawford* because the court concluded that an expert is permitted to rely on hearsay (including testimonial hearsay) in reaching his conclusion. The court noted that the defendant could “insist that the data underlying an expert’s testimony be admitted, see Fed.R.Evid. 705, but by offering the evidence themselves defendants would waive any objection under the Confrontation Clause.” The court observed that the notes of the chemist, evaluating the data from the machine, were testimonial and

should not have been independently admitted, but it found no plain error in the admission of these notes.

**Note: The court makes two holdings in *Moon*. The first is that expert reliance on a machine output does not violate *Crawford* because the machine is not a witness. That holding appears unaffected by *Williams* — at least it can be said that *Williams* says nothing about whether machine output is testimony. The second holding, that an expert's reliance on lab notes he did not prepare, is at the heart of *Williams*. It would appear that such a practice would be permissible even after *Williams* because 1) *post-Williams* courts have found that an expert may be reliable on testimonial hearsay so long as the expert does his own analysis and the hearsay is not introduced at trial ; and 2) in any case, lab “notes” are not certificates or affidavits so they do not appear to be the kind of formalized statement that Justice Thomas finds to be testimonial.**

**Expert reliance on drug test conducted by another does not violate the Confrontation Clause — though on remand from *Williams* the court states that part of the expert's testimony might have violated the Confrontation Clause but finds harmless error: *United States v. Turner*, 591 F.3d 928 (7<sup>th</sup> Cir. 2010), on remand from Supreme Court, 709 F.3d 1187 (7<sup>th</sup> Cir. 2013) :** At the defendant's drug trial, the government called a chemist to testify about the tests conducted on the substance seized from the defendant — the tests indicating that it was cocaine. The defendant objected that the witness did not conduct the tests and was relying on testimonial statements from other chemists, in violation of *Crawford*. The court found no error, emphasizing that no statements of the official who actually tested the substance were admitted at trial, and that the witness unequivocally established that his opinions about the test reports were his own.

**Note: The Supreme Court vacated the decision in *Turner* and remanded for reconsideration in light of *Williams*. On remand, the court declared that while a rule from *Williams* was difficult to divine, it at a minimum “casts doubt on using expert testimony in place of testimony from an analyst who actually examined and tested evidence bearing on a defendant's guilt, insofar as the expert is asked about matters which lie solely within the testing analyst's knowledge.” But the court noted that even after *Williams*, much of what the expert testified to was permissible because it was based on personal knowledge:**

We note that the bulk of Block's testimony was permissible. Block testified as both a fact and an expert witness. In his capacity as a supervisor at the state crime laboratory, he described the procedures and safeguards that employees of the laboratory observe in handling substances submitted for analysis. He also noted that he reviewed Hanson's work in this case pursuant to the laboratory's standard peer review procedure. As an expert forensic chemist, he went on to explain for the jury how suspect substances are tested using gas chromatography, mass spectrometry, and

infrared spectroscopy to yield data from which the nature of the substance may be determined. He then opined, based on his experience and expertise, that the data Hanson had produced in testing the substances that Turner distributed to the undercover officer-introduced at trial as Government Exhibits 1, 2, and 3-indicated that the substances contained cocaine base. \* \* \*

As we explained in our prior decision, an expert who gives testimony about the nature of a suspected controlled substance may rely on information gathered and produced by an analyst who does not himself testify. Pursuant to Federal Rule of Evidence 703, the information on which the expert bases his opinion need not itself be admissible into evidence in order for the expert to testify. Thus, the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself. And because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion.

Nothing in the Supreme Court's *Williams* decision undermines this aspect of our decision. On the contrary, Justice Alito's plurality opinion in *Williams* expressly endorses the notion that an appropriately credentialed individual may give expert testimony as to the significance of data produced by another analyst. Nothing in either Justice Thomas's concurrence or in Justice Kagan's dissent takes issue with this aspect of the plurality's reasoning. Moreover, as we have indicated, Block in part testified in his capacity as Hanson's supervisor, describing both the procedures and safeguards that employees of the state laboratory are expected to follow and the steps that he took to peer review Hanson's work in this case. Block's testimony on these points, which were within his personal knowledge, posed no Confrontation Clause problem.

**The court saw two Confrontation problems in the expert's testimony: 1) his statement that Hanson followed standard procedures in testing the substances that Turner distributed to the undercover officer, and 2) his testimony that he reached the same conclusion about the nature of the substances that the analyst did. The court held that on those two points, "Block necessarily was relying on out-of-court statements contained in Hanson's notes and report. These portions of Block's testimony strengthened the government's case; and, conversely, their exclusion would have diminished the quantity and quality of evidence showing that the substances Turner distributed comprised cocaine base in the form of crack cocaine." And while the case was much like *Williams*, the court found two distinguishing factors: 1) it was tried to a jury, thus raising a question of whether Justice Alito's not-for-truth analysis was fully applicable; and 2) the test was conducted with a suspect in mind, as Turner had been arrested with the substances to be tested in his possession. The defendant also argued that the**

report was “certified” and so was formal under the Thomas view. But the court noted that the analysts did not formally certify the results — the certification was made by the Attorney General to the effect that the report was a correct copy of the *report*. But the court implied that it was sufficiently formal in any case, because it was “both official and signed, it constituted a formal record of the result of the laboratory tests that Hanson had performed, and it was clearly designed to memorialize that result for purposes of the pending legal proceeding against Turner, who was named in the report.”

Ultimately the court found it unnecessary to decide whether the defendant’s Confrontation rights were violated because the error, if any, in the use of the analyst’s report was harmless.

**Avoiding the confusion wrought by *Williams*: *United States v. Garvey*, 688 F.3d 881 (7<sup>th</sup> Cir. 2012):** The court recognized that the facts of the case mirrored the facts of *Turner*, immediately above: an expert testified that substances were narcotics, relying on a testimonial lab test, but the test itself was not admitted into evidence. The court noted that the Supreme Court in *Williams* had left “significant confusion” about whether such a procedure comported with the Confrontation Clause. The court avoided the issue because “even if Garvey can establish plain error, he cannot demonstrate that the error affected his substantial rights.”

**No confrontation violation where expert did not testify that he relied on a testimonial report: *United States v. Maxwell*, 724 F.3d 724 (7<sup>th</sup> Cir. 2013):** In a narcotics prosecution, the analyst from the Wisconsin State Crime Laboratory who originally tested the substance seized from Maxwell retired before trial, so the government offered the testimony of his co-worker instead. The coworker did not personally analyze the substance herself, but concluded that it contained crack cocaine after reviewing the data generated by the original analyst. The court found no plain error in permitting this testimony, explaining that there could be no Confrontation problem, even after *Bullcoming* and *Williams*, where there is no testimony that the expert relied on the report:

What makes this case different (and relatively more straightforward) from those we have dealt with in the past is that Gee did not read from Nied's report while testifying (as in *Garvey*), she did not vouch for whether Nied followed standard testing procedures or state that she reached the same conclusion as Nied about the nature of the substance (as in *Turner*), and the government did not introduce Nied's report itself or any readings taken from the instruments he used (as in *Moon*). Maxwell argues that Nied's forensic analysis is testimonial, but Gee never said she relied on Nied's report or his interpretation of the data in reaching her own conclusion. Instead, Gee simply testified (1) about how evidence in the crime lab is typically tested when determining whether it contains a controlled substance, (2) that she had reviewed the data generated for the material in this case, and (3) that she reached an independent conclusion that the substance contained cocaine base after reviewing that data.

The court concluded that concluded that “Maxwell was not deprived of his Sixth Amendment right simply by virtue of the fact that Gee relied on Nied’s data in reaching her own conclusions, especially since she never mentioned what conclusions Nied reached about the substance.”

**Expert’s reliance on report of another law enforcement agency did not violate the right to confrontation:** *United States v. Huether*, 673 F.3d 789 (8<sup>th</sup> Cir. 2012): In a trial on charges of sexual exploitation of minors, an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children. The court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay.

**No confrontation violation where expert who testified did so on the basis of his own retesting:** *United States v. Ortega*, 750 F.3d 1020 (8<sup>th</sup> Cir. 2014): In a drug conspiracy prosecution, the defendant argued that his right to confrontation was violated because the expert who testified at trial that the substances seized from a coconspirator’s car were narcotics had tested composite samples that another chemist had produced from the substances found in the car. But the court found no error, because the testifying expert had personally conducted his own test of the composite substances, and the original report of the other chemist who prepared the composite (and who concluded the substances were narcotics) was not offered by the government; nor was the testifying expert asked about the original test. The court noted that any objection about the composite really went to the chain of custody — whether the composite tested by the expert witness was in fact derived from what was found in the car — and the court observed that “it is up to the prosecution to decide what steps are so crucial as to require evidence.” The defendant made no showing of bad faith or evidence tampering, and so any question about the chain of custody was one of weight and not admissibility. Moreover, the government’s introduction of the original chemist’s statement about creating the composite sample did not violate the Confrontation Clause because “chain of custody alone does not implicated the Confrontation Clause” as it is “not a testimonial statement offered to prove the truth of the matter asserted.”

**Expert’s reliance on notes prepared by lab technicians did not violate the Confrontation Clause:** *United States v. Pablo*, 625 F.3d 1285 (10<sup>th</sup> Cir. 2010), *on remand for reconsideration under Williams*, 696 F.3d 1280 (10<sup>th</sup> Cir. 2012): The defendant was tried for rape and other charges. Two lab analysts conducted tests on the rape kit and concluded that the DNA found at the scene matched the defendant. The defendant complained that the lab results were introduced through the testimony of a forensic expert and the lab analysts were not produced for cross-examination. In the original appeal the court found no plain error, reasoning that the notes of the lab analysts were not admitted into evidence and were never offered for their truth. To the extent they were discussed before the jury, it was only to describe the basis of the expert’s opinion — which the court found to be permissible under Rule 703. The court observed that “[t]he extent to which an expert witness may

disclose to a jury otherwise inadmissible testimonial hearsay without implicating a defendant's confrontation rights \* \* \* is a matter of degree." According to the court, if an expert "simply parrots another individual's testimonial hearsay, rather than conveying her own independent judgment that only incidentally discloses testimonial hearsay to assist the jury in evaluating her opinion, then the expert is, in effect, disclosing the testimonial hearsay for its substantive truth and she becomes little more than a backdoor conduit for otherwise inadmissible testimonial hearsay." In this case the court, applying the plain error standard, found insufficient indication that the expert had operated solely as a conduit for testimonial hearsay.

***Pablo* was vacated for reconsideration in light of *Williams*. On remand, the court once again affirmed the conviction.** The court stated that "we need not decide the precise mandates and limits of *Williams*, to the extent they exist." The court noted that five members of the *Williams* Court "might find" that the expert's reliance on the lab test was for its truth. But "we cannot say the district court plainly erred in admitting Ms. Snider's testimony, as it is not plain that a majority of the Supreme Court would have found reversible error with the challenged admission." The court explained as follows in a parsing of *Williams*:

On the contrary, it appears that five Justices would affirm the district court in this case, albeit with different Justices relying on different rationales as they did in *Williams*. The four-Justice plurality in *Williams* likely would determine that Ms. Snider's testimony was not offered for the truth of the matter asserted in Ms. Dick's report, but rather was offered for the separate purpose of evaluating Ms. Snider's credibility as an expert witness per Fed.R.Evid. 703; and therefore that the admission of her testimony did not offend the Confrontation Clause. Meanwhile, although Justice Thomas likely would conclude that the testimony was being offered for the truth of the matter asserted, he likely would further determine that the testimony was nevertheless constitutionally admissible because the appellate record does not show that the report was certified, sworn to, or otherwise imbued with the requisite "solemnity" required for the statements therein to be considered testimonial for purposes of the Confrontation Clause. Since Ms. Dick's report is not a part of the appellate record, we naturally cannot say that it plainly would meet Justice Thomas's solemnity test. In sum, it is not clear or obvious under current law that the district court erred in admitting Ms. Snider's testimony, so reversal is unwarranted on this basis.

The *Pablo* court on remand concluded that "the manner in which, and degree to which, an expert may merely rely upon, and reference during her in-court expert testimony, the out-of-court testimonial conclusions in a lab report made by another person not called as a witness is a nuanced legal issue without clearly established bright line parameters, particularly in light of the discordant 4-1-4 divide of opinions in *Williams*."

**Expert’s testimony on gang structure and practice does not violate the Confrontation Clause even though it was based in part on testimonial hearsay.** *United States v. Kamahele*, 748 F.3d 984 (10<sup>th</sup> Cir. 2014): Appealing from convictions for gang-related activity, the defendants argued that a government expert’s testimony about the structure and operation of the gang violated the Confrontation Clause because it was based in part on interviews with cooperating witnesses and other gang members. The court found no error and affirmed, concluding that the admission of expert testimony violates the Confrontation Clause “only when the expert is simply parroting a testimonial fact.” The court noted that in this case the expert “applied his expertise, formed by years of experience and multiple sources, to provide an independently formed opinion.” Therefore, no testimonial hearsay was offered for its truth against the defendant.

## Forfeiture

**Constitutional standard for forfeiture — like Rule 804(b)(6) — requires a showing that the defendant acted wrongfully with the intent to keep the witness from testifying:** *Giles v. California*, 554 U.S. 353 (2008): The Court held that a defendant does not forfeit his constitutional right to confront testimonial hearsay unless the government shows that the defendant engaged in wrongdoing *designed to keep the witness from testifying at trial*. Giles was charged with the murder of his former girlfriend. A short time before the murder, Giles had assaulted the victim, and she made statements to the police implicating Giles in that assault. The victim’s hearsay statements were admitted against the defendant on the ground that he had forfeited his right to rely on the Confrontation Clause, by murdering the victim. The government made no showing that Giles murdered the victim with the intent to keep her from testifying. The Court found an intent-to-procure requirement in the common law, and therefore, under the historical analysis mandated by *Crawford*, there is necessarily an intent-to-procure requirement for forfeiture of confrontation rights. Also, at one point in the opinion, the Court in dictum stated that “statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,” are not testimonial — presumably because the primary motivation for making such statements is for something other than use at trial.

**Murder of witness by co-conspirators as a sanction to protect the conspiracy against testimony constitutes forfeiture of both hearsay and Confrontation Clause objections:** *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007): Affirming drug and conspiracy convictions, the court found no error in the admission of hearsay statements made to the DEA by an informant involved with the defendant’s drug conspiracy. The trial court found by a preponderance of the evidence that the informant was murdered by members of the defendant’s conspiracy, in part to procure his unavailability as a witness. The court of appeals affirmed this finding — rejecting the defendant’s argument that forfeiture could not be found because his co-conspirators would have

murdered the informant anyway, due to his role in the loss of a drug shipment. The court stated that it is “surely reasonable to conclude that anyone who murders an informant does so intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying.” It concluded that the defendant’s argument would have the “perverse consequence” of allowing criminals to avoid forfeiture if they could articulate more than one bad motivation for disposing of a witness. Finally, the court held that forfeiture under Rule 804(b)(6) by definition constituted forfeiture of the Confrontation Clause objection. It stated that *Crawford* and *Davis* “foreclose” the possibility that the admission of evidence under Rule 804(b)(6) could nonetheless violate the Confrontation Clause.

**Fact that defendant had multiple reasons for killing a witness does not preclude a finding of forfeiture:** *United States v. Jackson*, 706 F.3d 262 (4<sup>th</sup> Cir. 2013): The defendant argued that the constitutional right to confrontation can be forfeited only when a defendant was motivated *exclusively* by a desire to silence a witness. (In this case the defendant argued that while he murdered a witness to silence him, he had additional reasons, including preventing the witness from harming the defendant’s drug operation and as retaliation for robbing one of the defendant’s friends.) The court rejected the argument, finding nothing in *Giles* to support it. To the contrary, the Court in *Giles* reasoned that the common law forfeiture rule was designed to prevent the defendant from profiting from his own wrong. Moreover, under a multiple-motive exception to forfeiture, defendants might be tempted to murder witnesses and then cook up another motive for the murder after the fact.

**Forfeiture can be found on the basis of Pinkerton liability:** *United States v. Dinkins*, 691 F.3d 358 (4<sup>th</sup> Cir. 2012): The court found that the defendant had forfeited his right of confrontation when a witness was killed by a coconspirator as an act to further the conspiracy by silencing the witness. The court concluded that in light of *Pinkerton* liability, “the Constitution does not guarantee an accused person against the legitimate consequence of his own wrongful acts.”

**Retaliatory murder of witnesses who testified against the accused in a prior case is not a forfeiture in the trial for murdering the witnesses:** *United States v. Henderson*, 626 F.3d 626 (6<sup>th</sup> Cir. 2010): The defendant was convicted of bank robbery after two people (including his accomplice) testified against him. Shortly after the defendant was released from prison, the two witnesses were found murdered. At the trial for killing the two witnesses, the government offered statements made by the victims to police officers during the investigation of the bank robbery. These statements concerned their cooperation and threats made by the defendant. The trial judge admitted the statements after finding by a preponderance of the evidence that the defendant killed the witnesses. That decision, grounded in forfeiture, was made before *Giles* was decided. On appeal, the court found error under *Giles* because “Bass and Washington could not have been killed, in 1996 and 1998, respectively, to prevent them from testifying against [the defendant] in the bank robbery prosecution in 1981.” Thus there was no showing of intent to keep the witnesses from testifying, as *Giles* requires for a finding of forfeiture. The court found the errors to be harmless.

## Grand Jury, Plea Allocutions, Etc.

**Grand jury testimony and plea allocation statement are both testimonial:** *United States v. Bruno*, 383 F.3d 65 (2<sup>nd</sup> Cir. 2004): The court held that a plea allocation statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford*. The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See also *United States v. Becker***, 502 F.3d 122 (2<sup>nd</sup> Cir. 2007) (plea allocation is testimonial even though redacted to take out direct reference to the defendant: “any argument regarding the purposes for which the jury might or might not have actually considered the allocutions necessarily goes to whether such error was harmless, not whether it existed at all”); *United States v. Snype*, 441 F.3d 119 (2<sup>nd</sup> Cir. 2006) (plea allocation of the defendant’s accomplice was testimonial even though all direct references to the defendant were redacted); *United States v. Gotti*, 459 F.3d 296 (2<sup>nd</sup> Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); *United States v. Al-Sadawi*, 432 F.3d 419 (2<sup>nd</sup> Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort’s plea allocation against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

**Defendant charged with aiding and abetting has confrontation rights violated by admission of primary wrongdoer’s guilty plea:** *United States v. Head*, 707 F.3d 1026 (8<sup>th</sup> Cir. 2013): The defendant was charged with aiding and abetting a murder committed by her boyfriend in Indian country. The trial court admitted the boyfriend’s guilty plea to prove the predicate offense. The court found that the guilty plea was testimonial and reversed the aiding and abetting conviction. The court relied on *Crawford*’s statement that “prior testimony that the defendant was unable to cross-examine” is one of the “core class of ‘testimonial’ statements.”

**Grand jury testimony is testimonial:** *United States v. Wilmore*, 381 F.3d 868 (9<sup>th</sup> Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of “testimonial” (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

## Implied Testimonial Statements

**Testimony that a police officer’s focus changed after hearing an out-of-court statement impliedly included accusatorial statements from an accomplice and so violated the defendant’s right to confrontation: *United States v. Meises*, 645 F.3d 5 (1<sup>st</sup> Cir. 2011):** At trial an officer testified that his focus was placed on the defendant after an interview with a cooperating witness. The government did not explicitly introduce the statement of the cooperating witness. On appeal, the defendant argued that the jury could surmise that the officer’s focus changed because of an out-of-court accusation of a declarant who was not produced at trial. The government argued that there was no confrontation violation because the testimony was all about the actions of the officer and no hearsay statement was admitted at trial. But the court agreed with the defendant and reversed the conviction. The court noted that it was irrelevant that the government did not introduce the actual statements, because such statements were effectively before the jury in the context of the trial. The court stated that “any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant’s statements into another witness’s testimony by implication. The government cannot be permitted to circumvent the Confrontation Clause by introducing the same substantive testimony in a different form.”

**Statements to law enforcement were testimonial, and right to confrontation was violated even though the statements were not stated in detail at trial: *Ocampo v. Vail*, 649 F.3d 1098 (9<sup>th</sup> Cir. 2011):** In a murder case, an officer testified that on the basis of an interview with Vazquez, the police were able to rule out suspects other than the defendant. Vazquez was not produced for trial. The state court found no confrontation violation on the ground that the officer did not testify to the substance of anything Vazquez said. But the court found that the state court unreasonably applied *Crawford* and reversed the district court’s denial of a grant of habeas corpus. The statements from Vazquez were obviously testimonial because they were made during an investigation of a murder. And the court held that the Confrontation Clause bars not only quotations from a declarant, but also any testimony at trial that conveys the substance of a declarant’s testimonial hearsay statement. It reasoned as follows:

Where the government officers have not only “produced” the evidence, but then condensed it into a conclusory affirmation for purposes of presentation to the jury, the difficulties of testing the veracity of the source of the evidence are not lessened but exacerbated. With the language actually used by the out-of-court witness obscured, any clues to its truthfulness provided by that language — contradictions, hesitations, and other clues often used to test credibility — are lost, and instead a veneer of objectivity conveyed.

\* \* \*

Whatever locution is used, out-of-court statements admitted at trial are “statements” for the purpose of the Confrontation Clause \* \* \* if, fairly read, they convey to the jury the

substance of an out-of-court, testimonial statement of a witness who does not testify.

### **Informal Circumstances, Private Statements, etc.**

**Private conversations and casual remarks are not testimonial:** *United States v. Malpica-Garcia*, 489 F.3d 393 (1<sup>st</sup> Cir. 2007): In a drug prosecution, the defendant argued that testimony of his former co-conspirators violated *Crawford* because some of their assertions were not based on personal knowledge but rather were implicitly derived from conversations with other people (e.g., that the defendant ran a protection racket). The court found that if the witnesses were in fact relying on accounts from others, those accounts were not testimonial. The court noted that the information was obtained from people “in the course of private conversations or in casual remarks that no one expected would be preserved or later used at trial.” There was no indication that the statements were made “to police, in an investigative context, or in a courtroom setting.”

**Informal letter found reliable under the residual exception is not testimonial:** *United States v. Morgan*, 385 F.3d 196 (2<sup>nd</sup> Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant’s hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

**Informal conversation between defendant and undercover informant was not testimonial under *Davis*:** *United States v. Burden*, 600 F.3d 204 (2<sup>nd</sup> Cir. 2010): Appealing RICO and drug convictions, the defendant argued that the trial court erred in admitting a recording of a drug transaction between the defendant and a cooperating witness. The defendant argued that the statements on the recording were testimonial, but the court disagreed and affirmed. The defendant’s part of the conversation was not testimonial because he was not aware at the time that the statement was being recorded or would be potentially used at his trial. As to the informant, “anything he said was meant not as an accusation in its own right but as bait.”

**Note: Other courts, as seen in the “Not Hearsay” section below, have come to the same result as the Second Circuit in *Burden*, but using a different analysis: 1) admitting the defendant’s statement does not violate the Confrontation Clause because it is his own statement and he doesn’t have a right to confront himself; 2) the informant’s statement, while testimonial, is not offered for its truth but only to put the defendant’s statements in context — therefore it does not violate the right to confrontation because it is not offered as an accusation**

**Prison telephone calls between defendant and his associates were not testimonial:** *United States v. Jones*, 716 F.3d 851 (4<sup>th</sup> Cir. 2013): Appealing from convictions for marriage fraud, the defendant argued that the trial court erred in admitting telephone conversations between the defendant and his associates, who were incarcerated at the time. The calls were recorded by the prison. The court found no error in admitting the conversations because they were not testimonial. The calls involved discussions to cover up and lie about the crime, and they were casual, informal statements among criminal associates, so it was clear that they were not primarily motivated to be used in a criminal prosecution. The defendant argued that the conversations were testimonial because the parties knew they were being recorded. But the court noted that “a declarant’s understanding that a statement could potentially serve as criminal evidence does not necessarily denote testimonial intent” and that “just because recorded statements are used at trial does not mean they were created for trial.” The court also noted that a prison “has significant institutional reasons for recording phone calls outside or procuring forensic evidence — i.e., policing its own facility by monitoring prisoners’ contact with individuals outside the prison.”

**Statements made to an undercover informant setting up a drug transaction are not testimonial:** *Brown v. Epps*, 686 F.3d 281 (5<sup>th</sup> Cir. 2012): The court found no error in the state court’s admission of an intercepted conversation between the defendant, an accomplice, and an undercover informant. The conversation was to set up a drug deal. The court held that statements “unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial.” The court elaborated further:

The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals’ statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become “available” at trial. The unidentified

individuals' statements were \* \* \* not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was not to create an out-of-court substitute for trial testimony. \* \* \* No witness goes into court to proclaim that he will sell you crack cocaine in a Wal-Mart parking lot. An “objective analysis” would conclude that the “primary purpose” of the unidentified individuals' statements was to arrange the drug deal. (Quoting *Bryant*). Their purpose was not to create a record for trial and thus is not within the scope of the Confrontation Clause. We conclude that the statements were nontestimonial.

**Statements made by a victim to her friends and family are not testimonial: *Doan v. Carter*, 548 F.3d 449 (6<sup>th</sup> Cir. 2008):** The defendant challenged a conviction for murder of his girlfriend. The trial court admitted a number of statements from the victim concerning physical abuse that the defendant had perpetrated on her. The defendant argued that these statements were testimonial but the court disagreed. The defendant contended that under *Davis* a statement is nontestimonial only if it is in response to an emergency, but the court rejected the defendant’s “narrow characterization of nontestimonial statements.” The court relied on the statement in *Giles v. California* that “statements to friends and neighbors about abuse and intimidation \* \* \* would be excluded, if at all, only by hearsay rules.” *See also United States v. Boyd*, 640 F.3d 657 (6<sup>th</sup> Cir. 2011) (statements were non-testimonial because the declarant made them to a companion; stating broadly that “statements made to friends and acquaintances are non-testimonial”).

**Suicide note implicating the declarant and defendant in a crime was testimonial under the circumstances: *Miller v. Stovall*, 608 F.3d 913 (6<sup>th</sup> Cir. 2010):** A former police officer involved in a murder wrote a suicide note to his parents, indicating he was going to kill himself so as not go to jail for the crime that he and the defendant committed. The note was admitted against the defendant. The court found that the note was testimonial and its admission against the defendant violated his right to confrontation, because the declarant could “reasonably anticipate” that the note would be passed on to law enforcement — especially because the declarant was a former police officer.

**Note: The court’s “reasonable anticipation” test appears to be a broader definition of testimoniality than that applied by the Supreme Court in *Davis* and especially *Bryant*. The Court in *Davis* looked to the “primary motivation” of the speaker. In this case, the “primary motivation” of the declarant was probably to explain to his parents why he was going to kill himself, rather than to prepare a case against the defendant. So the case appears wrongly decided.**

**Statements made by an accomplice to a jailhouse informant are not testimonial:** *United States v. Honken*, 541 F.3d 1146 (8<sup>th</sup> Cir. 2008): When the defendant’s murder prosecution was pending, the defendant’s accomplice (Johnson) was persuaded by a fellow inmate (McNeese) that Johnson could escape responsibility for the crime by getting another inmate to falsely confess to the crime — but that in order to make the false confession believable, Johnson would have to disclose where the bodies were buried. Johnson prepared maps and notes describing where the bodies were buried, and gave it to McNeese with the intent that it be delivered to the other inmate who would falsely confess. In fact this was all a ruse concocted by McNeese and the authorities to get Johnson to confess, in which event McNeese would get a benefit from the government. The notes and maps were admitted at the defendant’s trial, over the defendant’s objection that they were testimonial. The defendant argued that Johnson had been subjected to the equivalent of a police interrogation. But the court held that the evidence was not testimonial, because Johnson didn’t know that he was speaking to a government agent. It explained as follows:

Johnson did not draw the maps with the expectation that they would be used against Honken at trial \* \* \*. Further, the maps were not a “solemn declaration” or a “formal statement.” Rather, Johnson was more likely making a casual remark to an acquaintance. We simply cannot conclude Johnson made a “testimonial” statement against Honken without the faintest notion that she was doing so.

*See also United States v. Spotted Elk*, 548 F.3d 641 (8<sup>th</sup> Cir. 2008) (private conversation between inmates about a future course of action is not testimonial).

**Statement from one friend to another in private circumstances is not testimonial:** *United States v. Wright*, 536 F.3d 819 (8<sup>th</sup> Cir. 2008): The defendant was charged with shooting two people in the course of a drug deal. One victim died and one survived. The survivor testified at trial to a private conversation he had with the other victim, before the shootings occurred. The court held that the statements of the victim who died were not testimonial. The statements were made under informal circumstances to a friend. The court relied on the Supreme Court’s statement in *Giles v. California* that “statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment,” are not testimonial.

**Accusatory statements in a victim’s diary are not testimonial:** *Parle v. Runnels*, 387 F.3d 1030 (9<sup>th</sup> Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The court held that the victim’s diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

**Private conversation between mother and son is not testimonial:** *United States v. Brown*, 441 F.3d 1330 (11<sup>th</sup> Cir. 2006): In a murder prosecution, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked the caller whether he had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford*. The court reasoned as follows:

We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

## Interpreters

**Interpreter is not a witness but merely a language conduit and so testimony about interpreter's translation does not violate *Crawford*:** *United States v. Orm Hieng*, 679 F.3d 1131 (9<sup>th</sup> Cir. 2012): At the defendant's drug trial, an agent testified to inculpatory statements the defendant made through an interpreter. The interpreter was not called to testify, and the defendant argued that admitting the interpreter's statements violated his right to confrontation. The court found that the interpreter had acted as a "mere language conduit." The court noted that in determining whether an interpreter acts as a language conduit, a court must undertake a case-by-case approach, considering factors such as "which party supplied the interpreter, whether the interpreter had any motive to lead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated." The court found that these factors cut in favor of the lower court's finding that the interpreter had acted as a language conduit. Because the interpreter was only a conduit, the witness against the defendant was not the interpreter, but rather himself. The court concluded that when it is the defendant whose statements are translated, "the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." *See also United States v. Romo-Chavez*, 681 F.3d 955 (9<sup>th</sup> Cir. 2012): Where an interpreter served only as a language conduit, the defendant's own statements were properly admitted under Rule 801(d)(2)(A), and the confrontation clause was not violated because the defendant was his own accuser and he had no right to cross-examine himself.

**Interpreter's statements were testimonial:** *United States v. Charles*, 722 F.3d 1319 (11<sup>th</sup> Cir. 2013): The defendant was convicted of knowingly using a fraudulently authored travel

document. When the defendant was detained at the airport, he spoke to the Customs Officer through an interpreter. At trial, the defendant's statements were reported by the officer. The interpreter was not called. The court held that the defendant had the right to confront the interpreter. It stated that the interpreter's translations were testimonial because they were rendered in the course of an interrogation and for these purposes the interpreter was the relevant declarant. But the court found that the error was not plain and affirmed the conviction. The court did not address the conflicting authority in the Ninth Circuit, *supra*. **See also *United States v. Curbelo*, 726 F.3d 1260 (11<sup>th</sup> Cir. 2013)** (transcripts of a wiretapped conversation that were translated constituted the translator's implicit out-of-court representation that the translation was correct, and the translator's implicit assertions were testimonial; but there was no violation of the Confrontation Clause because a party to the conversation testified to what was said based on his independent review of the recordings and the transcript, and the transcript itself was never admitted at trial).

### **Interrogations, Etc.**

**Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1<sup>st</sup> Cir. 2004):** The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford*. Whatever the limits of the term "testimonial," it clearly covers sworn statements by accomplices to police officers.

**Accomplice's statements during police interrogation are testimonial: *United States v. Alvarado-Valdez*, 521 F.3d 337 (5<sup>th</sup> Cir. 2008):** The trial court admitted the statements of the defendant's accomplice that were made during a police interrogation. The statements were offered for their truth — to prove that the accomplice and the defendant conspired with others to transport cocaine. Because the accomplice had absconded and could not be produced for trial, admission of his testimonial statements violated the defendant's right to confrontation.

**Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh*, 405 F.3d 390 (6<sup>th</sup> Cir. 2005):** In a bank robbery prosecution, the court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* because "the term 'testimonial' at a minimum applies to police interrogations." The court also noted that the statement was sworn and that a person who "makes a formal statement to government officers bears testimony." **See also *United States v. McGee*, 529 F.3d 691 (6<sup>th</sup> Cir. 2008)**

(confidential informant's statement identifying the defendant as the source of drugs was testimonial).

**Accomplice statement to law enforcement is testimonial:** *United States v. Nielsen*, 371 F.3d 574 (9<sup>th</sup> Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

**Statement made by an accomplice after arrest, but before formal interrogation, is testimonial:** *United States v. Summers*, 414 F.3d 1287 (10<sup>th</sup> Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford*. The court explained as follows:

Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement \* \* \* implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

**Statements made by accomplice to police officers during a search are testimonial:** *United States v. Arbolaez*, 450 F.3d 1283 (11<sup>th</sup> Cir. 2006): In a marijuana prosecution, the court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The court also found that the accomplice's statements were testimonial under *Crawford*, because they were made in response to questions from police officers.

## Joined Defendants

**Testimonial hearsay offered by another defendant violates *Crawford* where the statement can be used against the defendant:** *United States v. Nguyen*, 565 F.3d 668 (9<sup>th</sup> Cir. 2009): In a trial of multiple defendants in a fraud conspiracy, one of the defendants offered statements he made to a police investigator. These statements implicated the defendant. The court found that the admission of the codefendant's statements violated the defendant's right to confrontation. The statements were clearly testimonial because they were made to a police officer during an interrogation. The court noted that the confrontation analysis "does not change because a co-defendant, as opposed to the prosecutor, elicited the hearsay statement. The Confrontation Clause gives the accused the right to be confronted with the witnesses against him. The fact that Nguyen's co-counsel elicited the hearsay has no bearing on her right to confront her accusers."

## Judicial Findings and Judgments

**Judicial findings and an order of judicial contempt are not testimonial:** *United States v. Sine*, 493 F.3d 1021 (9<sup>th</sup> Cir. 2007): The court held that the admission of a judge's findings and order of criminal contempt, offered to prove the defendant's lack of good faith in a tangentially related fraud case, did not violate the defendant's right to confrontation. The court found "no reason to believe that Judge Carr wrote the order in anticipation of Sine's prosecution for fraud, so his order was not testimonial."

*See also United States v. Ballesteros-Selinger*, 454 F.3d 973 (9<sup>th</sup> Cir. 2006) (holding that an immigration judge's deportation order was nontestimonial because it "was not made in anticipation of future litigation").

## Law Enforcement Involvement

**Police officer's count of marijuana plants found in a search is testimonial:** *United States v. Taylor*, 471 F.3d 832 (7<sup>th</sup> Cir. 2006): The court found plain error in the admission of testimony by a police officer about the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial as it was an evaluation prepared for purposes of criminal prosecution.

**Social worker’s interview of child-victim, with police officers present, was the functional equivalent of interrogation and therefore testimonial:** *Bobadilla v. Carlson*, 575 F.3d 785 (8<sup>th</sup> Cir. 2009): The court affirmed the grant of a writ of habeas after a finding that the defendant’s state conviction for child sexual abuse was tainted by the admission of a testimonial statement by the child-victim. A police officer arranged to have the victim interviewed at the police station five days after the alleged abuse. The officer sought the assistance of a social worker, who conducted the interview using a forensic interrogation technique designed to detect sexual abuse. The court found that “this interview was no different than any other police interrogation: it was initiated by a police officer a significant time after the incident occurred for the purpose of gathering evidence during a criminal investigation.” The court stated that the only difference between the questioning in this case and that in *Crawford* was that “instead of a police officer asking questions about a suspected criminal violation, he sat silent while a social worker did the same.” But the court found that this was “a distinction without a difference” because the interview took place at the police station, it was recorded for use at trial, and the social worker utilized a structured, forensic method of interrogation at the behest of the police. Under the circumstances, the social worker “was simply acting as a surrogate interviewer for the police.”

**Statements made by a child-victim to a forensic investigator are testimonial:** *United States v. Bordeaux*, 400 F.3d 548 (8<sup>th</sup> Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a ‘forensic’ interview . . . That [the victim’s] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

**Note: The court’s statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court’s subsequent decision in *Bryant*. There, the Court declared that it would find a hearsay statement to be testimonial only if the *primary* purpose was to prepare a statement for criminal prosecution.**

*See also United States v. Eagle*, 515 F.3d 794 (8<sup>th</sup> Cir. 2008) (statements from a child concerning sex abuse, made to a forensic investigator, are testimonial). **Compare *United States v. Peneaux*,**

432 F.3d 882 (8<sup>th</sup> Cir. 2005) (distinguishing *Bordeaux* where the child’s statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: “Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.”); *United States v. DeLeon*, 678 F.3d 317 (4<sup>th</sup> Cir. 2012) (discussed below under “medical statements” and distinguishing *Bordeaux* and *Bobodilla* as cases where statements were essentially made to law enforcement officers and not for treatment purposes).

## Machines

**Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Washington***, 498 F.3d 225 (4<sup>th</sup> Cir. 2007): The defendant was convicted of operating a motor vehicle under the influence of drugs and alcohol. At trial, an expert testified on the basis of a printout from a gas chromatograph machine. The machine issued the printout after testing the defendant’s blood sample. The expert testified to his interpretation of the data issued by the machine — that the defendant’s blood sample contained PCP and alcohol. The defendant argued that *Crawford* was violated because the expert had no personal knowledge of whether the defendant’s blood contained PCP or alcohol. He read *Crawford* to require the production of the lab personnel who conducted the test. But the court rejected this argument, finding that the machine printout was not hearsay, and therefore its use at trial by the expert could not violate *Crawford* even though it was prepared for use at trial. The court reasoned as follows:

The technicians could neither have affirmed or denied independently that the blood contained PCP and alcohol, because all the technicians could do was to refer to the raw data printed out by the machine. Thus, the statements to which Dr. Levine testified in court . . . did not come from the out-of-court technicians [but rather from the machine] and so there was no violation of the Confrontation Clause. . . . The raw data generated by the diagnostic machines are the “statements” of the machines themselves, not their operators. But “statements” made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause.

The court noted that the technicians might have needed to be produced to provide a chain of custody, but observed that the defendant made no objection to the authenticity of the machine’s report.

**Note: The result in *Washington* appears unaffected by *Williams*, as the Court in *Williams* had no occasion to consider whether a machine output can be testimonial hearsay.**

**See also *United States v. Summers***, 666 F.3d 192 (4<sup>th</sup> Cir. 2011): (expert’s reliance on a “pure instrument read-out” did not violate the Confrontation Clause because such a read-out is not “testimony”).

**Printout from machine is not hearsay and therefore does not violate *Crawford*: *United States v. Moon*, 512 F.3d 359 (7<sup>th</sup> Cir. 2008):** The court held that an expert’s testimony about readings taken from an infrared spectrometer and a gas chromatograph (which determined that the substance taken from the defendant was narcotics) did not violate *Crawford* because “data is not ‘statements’ in any useful sense. Nor is a machine a ‘witness against’ anyone.”

**Electronic tabulation of phone calls is not a statement and therefore cannot be testimonial hearsay: *United States v. Lamons*, 532 F.3d 1251 (11<sup>th</sup> Cir. 2008):** Bomb threats were called into an airline, resulting in the disruption of a flight. The defendant was a flight attendant accused of sending the threats. The trial court admitted a cd of data collected from telephone calls made to the airline; the data indicated that calls came from the defendant’s cell phone at the time the threats were made. The defendant argued that the information on the cd was testimonial hearsay, but the court disagreed, because the information was entirely machine-generated. The court stated that “the witnesses with whom the Confrontation Clause is concerned are *human* witnesses” and that the purposes of the Confrontation Clause “are ill-served through confrontation of the machine’s human operator. To say that a wholly machine-generated statement is unreliable is to speak of mechanical error, not mendacity. The best way to advance the truth-seeking process \* \* \* is through the process of authentication as provided in Federal Rule of Evidence 901(b)(9).” The court concluded that there was no hearsay statement at issue and therefore the Confrontation Clause was inapplicable.

## **Medical/Therapeutic Statements**

**Statements by victim of abuse to treatment manager of Air Force medical program were admissible under Rule 803(4) and non-testimonial: *United States v. DeLeon*, 678 F.3d 317 (4<sup>th</sup> Cir. 2012):** The defendant was convicted of murdering his eight-year-old son. Months before his death, the victim had made statements about incidents in which he had been physically abused by the defendant as part of parental discipline. The statements were made to the treatment manager of an Air Force medical program that focused on issues of family health. The court found that the statements were properly admitted under Rule 803(4) and (essentially for that reason) were non-testimonial because their primary purpose was not for use in a criminal prosecution of the defendant. The court noted that the statements were not made in response to an emergency, but that emergency was only one factor under *Bryant*. The court also recognized that the Air Force program “incorporates reporting requirements and a security component” but stated that these factors were not sufficient to render statements to the treatment manager testimonial. The court explained why the “primary motive” test was not met in the following passage:

We note first that Thomas [the treatment manager] did not have, nor did she tell Jordan [the child] she had, a prosecutorial purpose during their initial meeting. Thomas was not employed as a forensic investigator but instead worked \* \* \* as a treatment manager. And there is no evidence that she recorded the interview or otherwise sought to memorialize Jordan's answers as evidence for use during a criminal prosecution. \* \* \* Rather, Thomas used the information she gathered from Jordan and his family to develop a written treatment plan and continued to provide counseling and advice on parenting techniques in subsequent meetings with family members. \* \* \* Thomas also did not meet with Jordan in an interrogation room or at a police station but instead spoke with him in her office in a building that housed \* \* \* mental health service providers.

Importantly, ours is also not a case in which the social worker operated as an agent of law enforcement. \* \* \* Here, Thomas did not act at the behest of law enforcement, as there was no active criminal investigation when she and Jordan spoke. \* \* \* An objective review of the parties' actions and the circumstances of the meeting confirms that the primary purpose was to develop a treatment plan — not to establish facts for a future criminal prosecution. Accordingly, we hold that the contested statements were nontestimonial and that their admission did not violate DeLeon's Sixth Amendment rights.

**Statement admitted under Rule 803(4) are presumptively non-testimonial: *United States v. Peneaux*, 432 F.3d 882 (8<sup>th</sup> Cir. 2005):** "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

## Miscellaneous

**Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pfler*, 439 F.3d 1086 (9<sup>th</sup> Cir. 2006):** Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

## Non-Testimonial Hearsay and the Right to Confrontation

**Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting*, 549 U.S. 406 (2007):** The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford*. His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a “watershed” rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts*. It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.

With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O’Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred “in anything but the exceptional case”). *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.* (Emphasis added).

One of the main reasons that *Crawford* is not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts*. Thus, if hearsay is non-testimonial, there is no constitutional limit on its admission.

## Non-Verbal Conduct

**Videotape of Drug Transaction Was Not Hearsay and So Its Introduction Did Not Violate the Right to Confrontation: *United States v. Wallace*, 753 F.3d 671 (7<sup>th</sup> Cir. 2014):** In a drug prosecution, the government introduced a videotape, without sound, which appeared to show the defendant selling drugs to an undercover informant. The defendant argued that the tape was inadmissible hearsay and violated his right to confrontation, because the undercover informant was never called to testify. But the court disagreed and affirmed his conviction. The court reasoned that the video was

a picture; it was not a witness who could be cross-examined. The agent narrated the video at trial, and his narration was a series of statements, so he was subject to being cross-examined and was, and thus was “confronted.” [The informant] could have testified to what he saw, but what could he have said about the recording device except that the agents had strapped it on him and sent him into the house, whether the device recorded whatever happened to be in front of it? Rule 801(a) of the Federal Rules of Evidence does define “statement” to include “nonverbal conduct,” but only if the person whose conduct it was “intended it as an assertion.” We can’t fit the videotape to this definition.

## Not Offered for Truth

**Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant’s own statements: *United States v. Hansen*, 434 F.3d 92 (1<sup>st</sup> Cir. 2006):** After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The court found that the father’s statements during the conversation were testimonial under *Crawford* — as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant’s right to confrontation. The defendant’s own side of the conversation was admissible as a statement of a party-opponent, and the father’s side of the conversation was admitted not for its truth but to provide context for the defendant’s statements. *Crawford* does not bar the admission of statements not offered for their truth. **Accord *United States v. Walter*, 434 F.3d 30 (1<sup>st</sup> Cir. 2006)** (*Crawford* “does not call into question this court’s precedents holding that statements introduced solely to place a defendant’s admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause.”). **See also *Furr v. Brady*, 440 F.3d 34 (1<sup>st</sup> Cir. 2006)** (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice’s confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth;

rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him).

**Note: Five members of the Court in *Williams* disagreed with Justice Alito’s analysis that the Confrontation Clause was not violated because the testimonial lab report was never admitted for its truth. The question from *Williams* is whether those five Justices are opposed to *any* use of the not-for-truth analysis in answering Confrontation Clause challenges. The answer is apparently that their objection to the not-for truth analysis in *Williams* does not extend to situations in which (in their personal view) the statement has a *legitimate* not-for-truth purpose. Thus, Justice Thomas distinguishes the expert’s use of the lab report from the prosecution’s admission of an accomplice’s confession in *Tennessee v. Street*, where the confession “was not introduced for its truth, but only to impeach the defendant’s version of events.” In *Street* the defendant challenged his confession on the ground that he had been coerced to copy Peele’s confession. Peele’s confession was introduced not for its truth but only to show that it differed from Street’s. For that purpose, it didn’t matter whether it was true. Justice Thomas stated that “[u]nlike the confession in *Street*, statements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose” because “to use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.” Justice Kagan in her opinion essentially repeats Justice Thomas’s analysis and agrees with his distinction between legitimate and illegitimate use of the “not-for-truth” argument. Both Justices Kagan and Thomas agree with the Court’s statement in *Crawford* that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Both would simply add the proviso that the not-for-truth use must be *legitimate* or *plausible*.**

**It follows that the cases under this “not-for-truth” headnote are probably unaffected by *Williams*, as they largely permit admission of testimonial statements as offered “not-for-truth” only when that purpose is legitimate, i.e., *only when the statement is offered for a purpose as to which it is relevant regardless of whether it is true or not*.**

**Statements by informant to police officers, offered to prove the “context” of the police investigation, probably violate *Crawford*, but admission is not plain error: *United States v. Maher*, 454 F.3d 13 (1<sup>st</sup> Cir. 2006): At the defendant’s drug trial, several accusatory statements from**

an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because “the statements were made while the police were interrogating Johnson after Johnson’s arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson’s shoes would understand that the statement would be used in prosecuting Maher at trial.” The court then addressed the government’s argument that the informant’s statements were not admitted for their truth, but to explain the context of the police investigation:

The government’s articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford*’s constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon “information received,” or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant’s statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony “was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs.”

**Accomplice statements purportedly offered for “context” were actually admitted for their truth, resulting in a Confrontation Clause violation: *United States v. Cabrera-Rivera*, 583 F.3d 26 (1<sup>st</sup> Cir. 2009):** In a robbery prosecution, the government offered hearsay statements that accomplices made to police officers. The government argued that the statements were not offered for their truth, but rather to explain how the government was able to find other evidence in the case. But the court found that the accusations were not properly admitted to provide context. The government at trial emphasized the details of the accusations that had nothing to do with leading the government to other evidence; and the government did not contend that one of the accomplice’s confessions led to any other evidence. Because the statements were testimonial, and because they were in fact offered for their truth, admission of the statements violated *Crawford*.

**Note: The result in *Cabrera-Rivera* is certainly unchanged by *Williams*. The prosecution's was not offering the accusations for any *legitimate* not-for-truth purpose.**

**Statements offered to provide context for the defendant's part of a conversation were not hearsay and therefore could not violate the Confrontation Clause: *United States v. Hicks*, 575 F.3d 130 (1<sup>st</sup> Cir. 2009):** The court found no error in admitting a telephone call that the defendant placed from jail in which he instructed his girlfriend how to package and sell cocaine. The defendant argued that admission of the girlfriend's statements in the telephone call violated *Crawford*. But the court found that the girlfriend's part of the conversation was not hearsay and therefore did not violate the defendant's right to confrontation. The court reasoned that the girlfriend's statements were admissible not for their truth but to provide the context for understanding the defendant's incriminating statements. The court noted that the girlfriend's statements were "little more than brief responses to Hicks's much more detailed statements."

**Accomplice's confession, when offered to explain why police did not investigate other suspects and leads, is not hearsay and therefore its admission does not violate *Crawford*: *United States v. Cruz-Diaz*, 550 F.3d 169 (1<sup>st</sup> Cir. 2008):** In a bank robbery prosecution, defense counsel cross-examined a police officer about the decision not to pursue certain investigatory opportunities after apprehending the defendants. Defense counsel identified "eleven missed opportunities" for tying the defendants to the getaway car, including potential fingerprint and DNA evidence. In response, the officer testified that the defendant's co-defendant had given a detailed confession. The defendant argued that introducing the cohort's confession violated his right to confrontation, because it was testimonial under *Crawford*. But the court found the confession to be not hearsay — as it was offered for the not-for-truth purpose of explaining why the police conducted the investigation the way they did. Accordingly admission of the statement did not violate *Crawford*.

The defendant argued that the government's true motive was to introduce the confession for its truth, and that the not-for-truth purpose was only a pretext. But the court disagreed, noting that the government never tried to admit the confession until defense counsel attacked the thoroughness of the police investigation. Thus, introducing the confession for a not-for-truth purpose was proper rebuttal. The defendant suggested that "if the government merely wanted to explain why the FBI and police failed to conduct a more thorough it could have had the agent testify in a manner that entirely avoided referencing Cruz's confession" — for example, by stating that the police chose to truncate the investigation "because of information the agent had." But the court held that this kind of sanitizing of the evidence was not required, because it "would have come at an unjustified cost to the government." Such generalized testimony, without any context, "would not have sufficiently

rebutted Ayala's line of questioning" because it would have looked like one more cover-up. The court concluded that "[w]hile there can be circumstances under which Confrontation Clause concerns prevent the admission of the substance of a declarant's out-of-court statement where a less prejudicial narrative would suffice in its place, this is not such a case." *See also United States v. Diaz*, 670 F.3d 332 (1<sup>st</sup> Cir. 2012)(testimonial statement from one police officer to another to effect an arrest did not violate the right to confrontation because it was not hearsay: "The government offered Perez's out-of-court statement to explain why Veguilla had arrested [the defendant], not as proof of the drug sale that Perez allegedly witnesses. Out-of-court statements providing directions from one individual to another do not constitute hearsay.").

**False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth:** *United States v. Logan*, 419 F.3d 172 (2<sup>nd</sup> Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

**Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection.**

**Statements made to defendant in a conversation were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's statements:** *United States v. Paulino*, 445 F.3d 211 (2<sup>nd</sup> Cir. 2006): The court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

**Note: This typical use of "context" is not in question after *Williams*, because the focus**

**is on the defendant's statements and not on the truth of the declarant's statements. Use of context could be *illegitimate* however if the focus is in fact on the truth of the declarant's statements. See, e.g., *United States v. Powers* from the Sixth Circuit, *infra*.**

**Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart*, 433 F.3d 273 (2<sup>nd</sup> Cir. 2006):** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other, to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford*, even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that admitting the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. \* \* \* The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

**Note: Offering a testimonial statement to prove it is false is a typical and presumably legitimate not-for-character purpose and so would appear to be unaffected**

by *Williams*. That is, to the extent five (or more) members of the Court apply a distinction between legitimate and illegitimate not-for-truth usage, offering the statement to prove it is false is certainly on the legitimate side of the line. It is one of the clearest cases of a statement not being offered to prove that the assertions therein are true. Of course, the government must provide independent evidence that the statement is in fact false.

**Accomplice statements to police officer were testimonial, but did not violate the Confrontation Clause because they were admitted to show they were false:** *United States v. Trala*, 386 F.3d 536 (3<sup>rd</sup> Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. **See also *United States v. Lore***, 430 F.3d 190 (3<sup>rd</sup> Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

**Confessions of other targets of an investigation were testimonial, but did not violate the Confrontation Clause because they were offered to rebut charges against the integrity of the investigation:** *United States v. Christie*, 624 F.3d 558 (3<sup>rd</sup> Cir. 2010): In a child pornography investigation, the FBI obtained the cooperation of the administrator of a website, which led to the arrests of a number of users, including the defendant. At trial the defendant argued that the investigation was tainted because the FBI, in its dealings with the administrator, violated its own guidelines in treating informants. Specifically the defendant argued that these misguided law enforcement efforts led to unreliable statements from the administrator. In rebuttal, the government offered and the court admitted evidence that twenty-four other users confessed to child pornography-related offenses. The defendant argued that admitting the evidence of the others' confessions violated the hearsay rule and the Confrontation Clause, but the court rejected these arguments and affirmed. It reasoned that the confessions were not offered for their truth, but to show why the FBI could believe that the administrator was a reliable source, and therefore to rebut the charge of improper motive on the FBI's part. As to the confrontation argument, the court declared that "our conclusion that the testimony was properly introduced for a non-hearsay purpose is fatal to Christie's *Crawford* argument, since the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

**Accomplice’s testimonial statement was properly admitted for impeachment purposes, but failure to give a limiting instruction was error: *Adamson v. Cathel*, 633 F.3d 248 (3<sup>rd</sup> Cir. 2011):** The defendant challenged his confession at trial by arguing that the police fed him the details of his confession from other confessions by his alleged accomplices, Aljamaar and Napier. On cross-examination, the prosecutor introduced those confessions to show that they differed from the defendant’s confession on a number of details. The court found no error in the admission of the accomplice confessions. While testimonial, they were offered for impeachment and not for their truth and so did not violate the Confrontation Clause. However, the trial court gave no limiting instruction, and the court found that failure to be error. The court concluded as follows:

Without a limiting instruction to guide it, the jury that found Adamson guilty was free to consider those facially incriminating statements as evidence of Adamson’s guilt. The careful and crucial distinction the Supreme Court made between an impeachment use of the evidence and a substantive use of it on the question of guilt was completely ignored during the trial.

**Note: The use of the cohort’s confessions to show differences from the defendant’s confession is precisely the situation reviewed by the Court in *Tennessee v. Street*. As noted above, while five Justices in *Williams* rejected the “not-for-truth” analysis as applied to expert reliance on testimonial statements, all of the Justices approved of that analysis as applied to the facts of *Street*.**

**Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: *United States v. Holmes*, 406 F.3d 337 (5<sup>th</sup> Cir. 2005):** The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk’s office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk’s testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk’s statement “is not the run-of-the-mill co-conspirator’s statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator’s statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony.” Ultimately the court found it unnecessary to determine whether the deposition testimony was “testimonial” within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony “to establish

its *falsity* through independent evidence.” *See also United States v. Acosta*, 475 F.3d 677 (5<sup>th</sup> Cir. 2007) (accomplice’s statement offered to impeach him as a witness — by showing it was inconsistent with the accomplice’s refusal to answer certain questions concerning the defendant’s involvement with the crime — did not violate *Crawford* because the statement was not admitted for its truth and the jury received a limiting instruction to that effect).

**Informant’s accusation, offered to explain why police acted as they did, was testimonial but it was not hearsay, and so its admission did not violate the Confrontation Clause: *United States v. Deitz*, 577 F.3d 672 (6<sup>th</sup> Cir. 2009):** The court found no error in allowing an FBI agent to testify about why agents tailed the defendant to what turned out to be a drug transaction. The agent testified that a confidential informant had reported to them about Deitz’s drug activity. The court found that the informant’s statement was testimonial — because it was an accusation made to a police officer — but it was not hearsay and therefore its admission did not violate Deitz’s right to confrontation. The court found that the testimony “explaining why authorities were following Deitz to and from Dayton was not plain error as it provided mere background information, not facts going to the very heart of the prosecutor’s case.” The court also observed that “had defense counsel objected to the testimony at trial, the court could have easily restricted its scope.” *See also United States v. Davis*, 577 F.3d 660 (6<sup>th</sup> Cir. 2009): A woman’s statement to police that she had recently seen the defendant with a gun in a car that she described along with the license plate was not hearsay — and so even though testimonial did not violate the defendant’s right to confrontation — because it was offered only to explain the police investigation that led to the defendant and the defendant’s conduct when he learned the police were looking for him.

**Statement offered to prove the defendant’s knowledge of a crime was non-hearsay and so did not violate the accused’s confrontation rights: *United States v. Boyd*, 640 F.3d 657 (6<sup>th</sup> Cir. 2011):** A defendant charged with being an accessory after the fact to a carjacking and murder had confessed to police officers that his friend Davidson had told him that he had committed those crimes. At trial the government offered that confession, which included the underlying statements of Boyd. The defendant argued that admitting Davidson’s statements violated his right to confrontation. But the court found no error because the hearsay was not offered for its truth: “Davidson’s statements to Boyd were offered to prove Boyd’s knowledge [of the crimes that Davidson had committed] rather than for the truth of the matter asserted.”

**Admission of complaints offered for non-hearsay purpose did not violate the Confrontation Clause:** *United States v. Adams*, 722 F.3d 788 (6<sup>th</sup> Cir. 2013): The defendants were convicted for participation in a vote-buying scheme in three elections. They complained that their confrontation rights were violated when the court admitted complaints that were contained within state election reports. The court of appeals rejected that argument, because the complaints were offered for proper non-hearsay purposes. Some of the information was offered to prove it was false, and other information was offered to show that the defendants adjusted their scheme based on the complaints received. The court did find, however, that the complaints were erroneously admitted under Rule 403, because of the substantial risk that the jury would use the assertions for their truth; that the probative value for the non-hearsay purpose was “minimal at best”; and the government had other less prejudicial evidence available to prove the point. Technically, this should mean that there was a violation of the Confrontation Clause, because the evidence was not *properly* offered for a not-for-truth purpose. But the court did not make that holding. It reversed on evidentiary grounds.

**Informant’s statements were not properly offered for “context,” so their admission violated Crawford:** *United States v. Powers*, 500 F.3d 500 (6<sup>th</sup> Cir. 2007): In a drug prosecution, a law enforcement officer testified that he had received information about the defendant’s prior criminal activity from a confidential informant. The government argued on appeal that even though the informant’s statements were testimonial, they did not violate *Crawford*, because they were offered “to show why the police conducted a sting operation” against the defendant. But the court disagreed and found a *Crawford* violation. It reasoned that “details about Defendant’s alleged prior criminal behavior were not necessary to set the context of the sting operation for the jury. The prosecution could have established context simply by stating that the police set up a sting operation.” *See also United States v. Hearn*, 500 F.3d 479 (6<sup>th</sup> Cir.2007) (confidential informant’s accusation was not properly admitted for background where the witness testified with unnecessary detail and “[t]he excessive detail occurred twice, was apparently anticipated, and was explicitly relied upon by the prosecutor in closing arguments”).

**Admitting informant’s statement to police officer for purposes of “background” did not violate the Confrontation Clause:** *United States v. Gibbs*, 506 F.3d 479 (6<sup>th</sup> Cir. 2007): In a trial for felon-firearm possession, the trial court admitted a statement from an informant to a police officer; the informant accused the defendant of having firearms hidden in his bedroom. Those firearms were not part of the possession charge. While this accusation was testimonial, its admission did not violate the Confrontation Clause, “because the testimony did not bear on Gibbs’s alleged

possession of the .380 Llama pistol with which he was charged.” Rather, it was admitted “solely as background evidence to show why Gibbs’s bedroom was searched.” *See also United States v. Macias-Farias*, 706 F.3d 775 (6<sup>th</sup> Cir. 2013) (officer’s testimony that he had received information from someone was offered not for its truth but to explain the officer’s conduct, thus no confrontation violation).

**Admission of the defendant’s conversation with an undercover informant does not violate the Confrontation Clause, where the undercover informant’s part of the conversation is offered only for “context”:** *United States v. Nettles*, 476 F.3d 508 (7<sup>th</sup> Cir. 2007): The defendant made plans to blow up a government building, and the government arranged to put him in contact with an undercover informant who purported to help him obtain materials. At trial, the court admitted a recorded conversation between the defendant and the informant. Because the informant was not produced for trial, the defendant argued that his right to confrontation was violated. But the court found no error, because the admission of the defendant’s part of the conversation was not barred by the Confrontation Clause, and the informant’s part of the conversation was admitted only to place the defendant’s part in “context.” Because the informant’s statements were not offered for their truth, they did not implicate the Confrontation Clause.

The *Nettles* court did express some concern about the breadth of the “context” doctrine, stating “[w]e note that there is a concern that the government may, in future cases, seek to submit based on ‘context’ statements that are, in fact, being offered for their truth.” But the court found no such danger in this case, noting the following: 1) the informant presented himself as not being proficient in English, so most of his side of the conversation involved asking the defendant to better explain himself; and 2) the informant did not “put words in Nettles’s mouth or try to persuade Nettles to commit more crimes in addition to those that Nettles had already decided to commit.” *See also United States v. Tolliver*, 454 F.3d 660 (7<sup>th</sup> Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator’s statements: “*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye’s statements were admissible to put Dunklin’s admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.”); *United States v. Bermea-Boone*, 563 F.3d 621 (7<sup>th</sup> Cir. 2009): A conversation between the defendant and a coconspirator was properly admitted; the defendant’s side of the conversation was a statement of a party-opponent, and the accomplice’s side was properly admitted to provide context for the defendant’s statements: “Where

there is no hearsay, the concerns addressed in *Crawford* do not come in to play. That is, the declarant, Garcia, did not function as a witness against the accused.”; *United States v. York*, 572 F.3d 415 (7<sup>th</sup> Cir. 2009) (informant’s recorded statements in a conversation with the defendant were admitted for context and therefore did not violate the Confrontation Clause: “we see no indication that Mitchell tried to put words in York’s mouth”); *United States v. Hicks*, 635 F.3d 1063 (7<sup>th</sup> Cir. 2011): (undercover informant’s part of conversations were not hearsay, as they were offered to place the defendant’s statements in context; because they were not offered for truth their admission did not violate the defendant’s right to confrontation); *United States v. Gaytan*, 649 F.3d 573 (7<sup>th</sup> Cir. 2011) (undercover informant’s statements to the defendant in a conversation setting up a drug transaction were clearly testimonial, but not offered for their truth: “Gaytan’s responses [‘what you need?’ and ‘where the loot at?’] would have been unintelligible without the context provided by Worthen’s statements about his or his brother’s interest in ‘rock’”; the court noted that there was no indication that the informant was “putting words in Gaytan’s mouth”); *United States v. Foster*, 701 F.3d 1142 (7<sup>th</sup> Cir. 2012) (“Here, the CI’s statement regarding the weight [of the drug] was not offered to show what the weight *actually* was \* \* \* but rather to explain the defendant’s acts and make his statements intelligible. The defendant’s statement to ‘give me sixteen fifty’ (because the original price was 17) would not have made sense without reference to the CI’s comment that the quantity was off. Because the statements were admitted only to prove context, *Crawford* does not require confrontation.”); *United States v. Ambrose*, 668 F.3d 943 (7<sup>th</sup> Cir. 2012) (conversation between two crime family members about actions of a cooperating witness were not offered for their truth but rather to show that information had been leaked; because the statements were not offered for their truth, there was no violation of the right to confrontation).

For more on “context” see *United States v. Wright*, 722 F.3d 1064 (7<sup>th</sup> Cir. 2013): In a drug prosecution, the defendant’s statement to a confidential information that he was “stocked up” would have been unintelligible without providing the context of the informant’s statements inquiring about drugs, “and a jury would not have any sense of why the conversation was even happening.” The court also noted that “most of the CI’s statements were inquiries and not factual assertions.” The court expressed concern, however, that the district court’s limiting instruction on “context” was boilerplate, and that the jury “could have been told that the CI’s half of the conversation was being played only so that it could understand what Wright was responding to, and that the CI’s statements standing alone were not to be considered as evidence of Wright’s guilt.”

**Note: The concerns expressed in *Nettles* about possible abuse of the “context” usage are along the same lines as those expressed by Justices Thomas and Kagan in *Williams*, when they seek to distinguish legitimate and illegitimate not-for-truth purposes. If the only relevance of the statement requires the factfinder to assess its truth, then the statement is not being offered for a legitimate not-for-truth purpose.**

**Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial:** *United States v. Price*, 418 F.3d 771 (7<sup>th</sup> Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an “intelligence alert” identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements “for purposes other than proving the truth of the matter asserted.”

**Accusation offered not for truth, but to explain police conduct, was not hearsay and did not violate the defendant’s right to confrontation:** *United States v. Dodds*, 569 F.3d 336 (7<sup>th</sup> Cir. 2009): Appealing a firearms conviction, the defendant argued that his right to confrontation was violated when the trial court admitted a statement from an unidentified witness to a police officer. The witness told the officer that a black man in a black jacket and black cap was pointing a gun at people two blocks away. The court found no confrontation violation because “the problem that *Crawford* addresses is the admission of hearsay” and the witness’s statement was not hearsay. It was not admitted for its truth — that the witness saw the man he described pointing a gun at people — but rather “to explain why the police proceeded to the intersection of 35<sup>th</sup> and Galena and focused their attention on Dodds, who matched the description they had been given.” The court noted that the trial judge did not provide a limiting instruction, but also noted that the defendant never asked the court to do so and that the lack of an instruction was not raised on appeal. *See also United States v. Taylor*, 569 F.3d 742 (7<sup>th</sup> Cir. 2009): An accusation from a bystander to a police officer that the defendant had just taken a gun across the street was not hearsay because it was offered to explain the officers’ actions in the course of their investigation — “for example, why they looked across the street \* \* \* and why they handcuffed Taylor when he approached.” The court noted that absent “complicating circumstances, such as a prosecutor who exploits nonhearsay statements for their truth, nonhearsay testimony does not present a confrontation problem.” The court found no “complicating circumstances” in this case.

**Note: The Court’s reference in *Taylor* to the possibility of exploiting a not-for-truth purpose unfairly runs along the same lines as those expressed by Justice Thomas and Kagan in *Williams*.**

**Testimonial statement was not legitimately offered for context or background and so was a violation of *Crawford: United States v. Adams*, 628 F.3d 407 (7<sup>th</sup> Cir. 2010):** In a narcotics prosecution, statements made by confidential informants to police officers were offered against the defendant. For example, the government offered testimony from a police officer that he stopped the defendant's car on a tip from a confidential informant that the defendant was involved in the drug trade and was going to buy crack. A search of the car uncovered a large amount of money and a crack pipe. The government offered the informant's statement not for the truth of the assertion but as "foundation for what the officer did." The trial court admitted the statement and gave a limiting instruction. But the court of appeals found error, though harmless, because the informant's statements "were not necessary to provide any foundation for the officer's subsequent actions." It explained as follows:

The CI's statements here are different from statements we have found admissible that gave context to an otherwise meaningless conversation or investigation. [cites omitted] Here the CI's accusations did not counter a defense strategy that police officers randomly targeted Adams. And, there was no need to introduce the statements for context — even if the CI's statements were excluded, the jury would have fully understood that the officer searched Adams and the relevance of the items recovered in that search to the charged crime.

***See also United States v. Walker*, 673 F.3d 649 (7<sup>th</sup> Cir. 2012):** (confidential informant's statements to the police — that he got guns from the defendant — were not properly offered for context but rather were testimonial hearsay: "The government repeatedly hides behind its asserted needs to provide 'context' and relate the 'course of investigation.' These euphemistic descriptions cannot disguise a ploy to pin the two guns on Walker while avoiding the risk of putting Ringswald on the stand. \* \* \* A prosecutor surely knows that hearsay results when he elicits from a government agent that 'the informant said he got this gun from X' as proof that X supplied the gun."); ***Jones v. Basinger*, 635 F.3d 1030 (7<sup>th</sup> Cir. 2011)** (accusation made to police was not offered for background and therefore its admission violated the defendant's right to confrontation; the record showed that the government encouraged the jury to use the statements for their truth).

**Note: *Adams*, *Walker* and *Jones* are all examples of illegitimate use of not-for-truth purposes and so finding a Confrontation violation in these cases is quite consistent with the analysis of not-for-truth purposes in the Thomas and Kagan opinions in *Williams*.**

**Statements by confidential informant included in a search warrant were testimonial and could not be offered at trial to explain the police investigation:** *United States v. Holmes*, 620 F.3d 836 (8<sup>th</sup> Cir. 2010): In a drug trial, the defendant tried to distance himself from a house where the drugs were found in a search pursuant to a warrant. On redirect of a government agent — after defense counsel had questioned the connection of the defendant to the residence — the trial judge permitted the agent to read from the statement of a confidential informant. That statement indicated that the defendant was heavily involved in drug activity at the house. The government acknowledged that the informant’s statements were testimonial, but argued that the statements were not hearsay, as they were offered only to show the officer’s knowledge and the propriety of the investigation. But the court found the admission to be error. It noted that informants’ statements are admissible to explain an investigation “only when the propriety of the investigation is at issue in the trial.” In this case, the defendant did not challenge the validity of the search warrant and the propriety of the investigation was not disputed. The court stated that if the real purpose of admitting the evidence was to explain the officer’s knowledge and the nature of the investigation, “a question asking whether someone had told him that he had seen Holmes at the residence would have addressed the issue \* \* \* without the need to go into the damning details of what the CI told Officer Singh.” *Compare United States v. Brooks*, 645 F.3d 971 (8<sup>th</sup> Cir. 2011) (“In this case, the statement at issue [a report by a confidential informant that Brooks was selling narcotics and firearms from a certain premises] was not offered to prove the truth of the matter asserted — that is, that Brooks was indeed a drug and firearms dealer. It was offered purely to explain why the officers were at the multi-family dwelling in the first place, which distinguishes this case from *Holmes*. In *Holmes*, it was undisputed that officers had a valid warrant. Accordingly less explanation was necessary. Here, the CI’s information was necessary to explain why the officers went to the residence without a warrant and why they would be more interested in apprehending the man on the stairs than the man who fled the scene. Because the statement was offered only to show why the officers conducted their investigation in the way they did, the Confrontation Clause is not implicated here.”). *See also United States v. Shores*, 700 F.3d 366 (8<sup>th</sup> Cir. 2012) (confidential informant’s accusation made to police officer was properly offered to prove the propriety of the investigation: “From the early moments of the trial, it was clear that Shores would be premising his defense on the theory that he was a victim of government targeting.”); *United States v. Wright*, 739 F.3d 1160 (8<sup>th</sup> Cir. 2014) (Officer’s statement to another officer, “come into the room, I’ve found something” was not hearsay because it was offered only to explain why the second officer came into the room and to rebut the defense counsel’s argument that the officer entered the room in response to a loud noise : “If the underlying statement is testimonial but not hearsay, it can be admitted without violating the defendant’s Sixth Amendment rights.”).

**Accusatory statements offered to explain why an officer conducted an investigation in a certain way are not hearsay and therefore admission does not violate *Crawford: United States v. Brown*, 560 F.3d 754 (8<sup>th</sup> Cir. 2009):** Challenging drug conspiracy convictions, one defendant argued that it was error for the trial court to admit an out-of-court statement from a shooting victim to a police officer. The victim accused a person named “Clean” who was accompanied by a man named Charmar. The officer who took this statement testified that he entered “Charmar” into a database to help identify “Clean” and the database search led him to the defendant. The court found no error in admitting the victim’s statement, stating that “it is not hearsay when offered to explain why an officer conducted an investigation in a certain way.” The defendant argued that the purported nonhearsay purpose for admitting the evidence “was only a subterfuge to get Williams’ statement about Brown before the jury.” But the court responded that the defendant “did not argue at trial that the prejudicial effect of the evidence outweighed its nonhearsay value.” The court also observed that the trial court twice instructed the jury that the statement was admitted for the limited purpose of understanding why the officer searched the database for Charmar. Finally, the court held that because the statement properly was not offered for its truth, “it does not implicate the confrontation clause.”

**Statement offered as foundation for good faith basis for asking question on cross-examination does not implicate *Crawford: United States v. Spears*, 533 F.3d 715 (8<sup>th</sup> Cir. 2008):** In a bank robbery case, the defendant testified and was cross-examined and asked about her knowledge of prior bank robberies. In order to inquire about these bad acts, the government was required to establish to the court a good-faith basis for believing that the acts occurred. The government’s good-faith basis was the confession of the defendant’s associate to having taken part in the prior robberies. The defendant argued that the associate’s statements, made to police officers, were testimonial. But the court held that *Crawford* was inapplicable because the associate’s statements were not admitted for their truth — indeed they were not admitted at all. The court noted that there was “no authority for the proposition that use of an out-of-court testimonial statement merely as the good faith factual basis for relevant cross-examination of the defendant at trial implicates the Confrontation Clause.”

**Admitting testimonial statements that were part of a conversation with the defendant did not violate the Confrontation Clause because they were not offered for their truth: *United States v. Spencer*, 592 F.3d 866 (8<sup>th</sup> Cir. 2010):** Affirming drug convictions, the court found no error in admitting tape recordings of a conversation between the defendant and a government informant. The defendant’s statements were statements by a party-opponent and admitting the defendant’s own statements cannot violate the Confrontation Clause. The informant’s statements were not hearsay

because they were admitted only to put the defendant's statements in context.

**Statement offered to prove it was false is not hearsay and so did not violate the Confrontation Clause:** *United States v. Yielding*, 657 F.3d 688 (8<sup>th</sup> Cir. 2011): In a fraud prosecution, the trial court admitted the statement of an accomplice to demonstrate that she used a false cover story when talking to the FBI. The court found no error, noting that “the point of the prosecutor’s introducing those statements was simply to prove that the statements were made so as to establish a foundation for later showing, through other admissible evidence, that they were false.” The court found that the government introduced other evidence to show that the declarant’s assertions that a transaction was a loan were false. The court cited *Bryant* for the proposition that because the statements were not hearsay, their admission did not violate the Confrontation Clause.

**Admitting testimonial statements to show a common (false) alibi did not violate the Confrontation Clause:** *United States v. Young*, 753 F.3d 757 (8<sup>th</sup> Cir. 2014): Young was accused of conspiring with Mock to murder Young’s husband and make it look like an accident. The government introduced the statement that Mock made to police after the husband was killed. The statement was consistent in all details with the alibi that Young had independently provided. The government offered Mock’s statement for the inference that she had Young had collaborated on an alibi. Young argued that introducing Mock’s statement to the police violated her right to confrontation, but the court disagreed. It observed that the Confrontation Clause does not bar the admission of out-of-court statements that are not hearsay. In this case, Mock’s statement was not offered for its truth but rather “to show that Young and Mock had a common alibi, scheme, or conspiracy. In fact, Mock’s statements to Deputy Salsberry are valuable to the government because they are false.”

**Statements not offered for truth do not violate the Confrontation Clause even if testimonial:** *United States v. Faulkner*, 439 F.3d 1221 (10<sup>th</sup> Cir. 2006): The court stated that “it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement.” *See also United States v. Mitchell*, 502 F.3d 931 (9<sup>th</sup> Cir. 2007) (information given by an eyewitness to a police officer was not offered for its truth but rather “as a basis” for the officer’s action, and therefore its admission did not violate the Confrontation Clause).

**Accomplice's confession, offered to explain a police officer's subsequent conduct, was not hearsay and therefore did not violate the Confrontation Clause:** *United States v. Jiminez*, 564 F.3d 1280 (11<sup>th</sup> Cir. 2009): The court found no plain error in the admission of an accomplice's confession in the defendant's drug conspiracy trial. The police officer who had taken the accomplice's confession was cross-examined extensively about why he had repeatedly interviewed the defendant and about his decision not to obtain a written and signed confession from him. This cross-examination was designed to impeach the officer's credibility and suggest that he was lying about the circumstances of the interviews and about the defendant's confession. In explanation, the officer stated that he approached the defendant the way he did because the accomplice had given a detailed confession that was in conflict with what the defendant had said in prior interviews. The court held that in these circumstances, the accomplice's confession was properly admitted to explain the officer's motivations, and not for its truth. Accordingly its admission did not violate the Confrontation Clause, even though the statement was testimonial.

**Note: The court assumed that the accomplice's confession was admitted for a proper, not-for-truth purpose, even though there was no such finding on the record, and the trial court never gave a limiting instruction. Part of the reason for this deference is that the court was operating under a plain error standard. The defendant at trial objected only on hearsay grounds, and this did not preserve any claim of error on confrontation clause grounds. The concurring judge noted, however, "that the better practice in this case would have been for the district court to have given an instruction as to the limited purpose of Detective Wharton's testimony" because "there is no assurance, and much doubt, that a typical jury, on its own, would recognize the limited nature of the evidence."**

*See also United States v. Augustin*, 661 F.3d 1105 (11<sup>th</sup> Cir. 2011) (no confrontation violation where declarant's statements "were not offered for the truth of the matters asserted, but rather to provide context for [the defendant's] own statements").

## Present Sense Impression

**911 call describing ongoing drug crime is admissible as a present sense impression and not testimonial under *Bryant*: *United States v. Polidore*, 690 F.3d 705 (5<sup>th</sup> Cir. 2012):** In a drug trial, the defendant objected that a 911 call from a bystander to a drug transaction — together with answers to questions from the 911 operators— was testimonial and also admitted in violation of the rule against hearsay. On the hearsay question, the court found that the bystander’s statements in the 911 call were admissible as present sense impressions, as they were made while the transaction was ongoing. As to testimoniality, the court held that the case was unlike the 911 call cases decided by the Supreme Court, as there was no ongoing emergency — rather the caller was simply recording that a crime was taking across the street, and no violent activity was occurring. But the court noted that under *Bryant* an ongoing emergency is relevant but not dispositive to whether statements about a crime are testimonial. Ultimately the court found that the caller’s statements were not testimonial, reasoning as follows:

[A]lthough the 911 caller appeared to have understood that his comments would start an investigation that could lead to a criminal prosecution, the primary purpose of his statements was to request police assistance in stopping an ongoing crime and to provide the police with the requisite information to achieve that objective. Like a statement made to resolve an ongoing emergency, the caller's “purpose [ was] not to provide a solemn declaration for use at trial, but to bring to an end an ongoing [ drug trafficking crime],” *Williams v. Illinois*, 132 S.Ct. 2221, 2243 ( 2012) (citing *Bryant*, 131 S.Ct. at 1155), even though the crime did not constitute an ongoing emergency. The 911 caller simply was not acting as a witness; he was not testifying. What he said was not a weaker substitute for live testimony at trial. In other words, the caller's statements were not *ex parte* communications that created evidentiary products that aligned perfectly with their courtroom analogues. No witness goes into court to report that a man is currently selling drugs out of his car and to ask the police to come and arrest the man while he still has the drugs in his possession. [most internal quotations and citations omitted].

**Present sense impression, describing an event that occurred months before a crime, is not testimonial: *United States v. Danford*, 435 F.3d 682 (7<sup>th</sup> Cir. 2005):** The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had

asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

**Present-sense impressions of DEA agents during a buy-bust operation were safety-related and so not testimonial: *United States v. Solorio*, 669 F.3d 943 (9<sup>th</sup> Cir. 2012):** Appealing from a conviction arising from a "buy-bust" operation, the defendant argued that hearsay statements of DEA agents at the scene — which were admitted as present sense impressions — were testimonial and so should have been excluded under *Crawford*. The court disagreed. It stated that the statements were made in order to communicate observations to other agents in the field and thus assure the success of the operation, "by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly." Thus the statements were not testimonial because the primary purpose for making them was not to prepare a statement for trial but rather to assure that the arrest was successful and that the effort did not escalate into a dangerous situation. The court noted that the buy-bust operation "was a high-risk situation involving the exchange of a large amount of money and a substantial quantity of drugs" and also that the defendant was visibly wary of the situation.

## Records, Certificates, Etc.

**Reports on forensic testing by law enforcement are testimonial: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009):** In a drug case, the trial court admitted three “certificates of analysis” showing the results of the forensic tests performed on the seized substances. The certificates stated that “the substance was found to contain: Cocaine.” The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contentious 5-4 case, held that these certificates were “testimonial” under *Crawford* and therefore admitting them without a live witness violated the defendant’s right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of “testimonial” statements. The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that “[w]e can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose — as stated in the relevant state-law provision — was reprinted on the affidavits themselves.”

The implications of *Melendez-Diaz* — beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation — are found in the parts of the majority opinion that address the dissent’s arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that “documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close — the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial.

2. The dissent argued that forensic testers are not “accusatory” witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment “contemplates two classes of witnesses — those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.” This statement raises questions about the reasoning of some lower courts that have admitted autopsy reports and other certificates after *Crawford* — these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the *ex parte* affidavits in the Raleigh case were the paradigmatic confrontation concern, “the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the *ex parte* examinations in Raleigh’s Case.” Again, some lower courts after *Crawford* had distinguished between ministerial affidavits on collateral matters from Raleigh-type *ex parte* affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because “[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination.” This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. As discussed earlier in this Outline, a number of courts have held that machine printouts are not hearsay at all — because a machine can’t make a “statement” — and have also held that a machine’s output is not “testimony” within the meaning of the Confrontation Clause. This case law appears to survive the Court’s analysis in *Melendez-Diaz* — and the later cases of *Bullcoming* and *Williams* do not touch the question of machine evidence.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford*. For business records, this is because, to be admissible under Rule 803(6), it cannot be prepared primarily for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial.

7. As counterpoint to the argument about prior practice allowing certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the *absence* of a public record:

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official

record under respondent's definition — it was prepared by a public officer in the regular course of his official duties — and although the clerk was certainly not a “conventional witness” under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case is prohibited. But the Court did find that a notice-and-demand provision would satisfy the Confrontation Clause because if, after notice, the defendant made no demand to produce, a waiver could properly be found. Accordingly, the Committee proposed an amendment to Rule 803(10) that added a notice-and-demand provision. That amendment was approved by the Judicial Conference and became effective December 1, 2013.

**Admission of a testimonial forensic certificate through the testimony of a witness with no personal knowledge of the testing violates the Confrontation Clause under *Melendez-Diaz*: *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011):** The Court reaffirmed the holding in *Melendez-Diaz* that certificates of forensic testing prepared for trial are testimonial, and held further that the Confrontation Clause was not satisfied when such a certificate was entered into evidence through the testimony of a person who was not involved with, and had no personal knowledge of, the testing procedure. Judge Ginsburg, writing for the Court, declared as follows:

The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

## ***Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz***

**Certification of business records under Rule 902(11) is not testimonial:** *United States v. Adefehinti*, 519 F.3d 319 (D.C. Cir. 2007): The court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court reasoned that because the underlying business records were not testimonial, it would make no sense to find the authenticating certificate testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, “the challenge could presumably take the form of calling a certificate’s signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause.” In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz*, some of the rationales used by the *Adefehinti* court are now suspect. First, the *Melendez-Diaz* Court rejects the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government’s argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.”

The *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. But while Rule 902(11) does have a notice and procedure, there is no provision for a demand for production of government production of a witness.

It can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial. But the problem with that argument is that the certificate does more than establish the genuineness of the business record.

Despite all these concerns, the lower courts *after Melendez-Diaz* have rejected Confrontation Clause challenges to the use of Rule 902(11) to self-authenticate business records. See the cases discussed under the next heading — cases on records after *Melendez-Diaz*.

**Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1<sup>st</sup> Cir. 2006):** In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held “that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation” because such officers have no motivation to do anything other than “mechanically register an unambiguous factual matter.”

**Note: Other circuits before *Melendez-Diaz* reached the same result on warrants of deportation. See, e.g., *United States v. Valdez-Matos*, 443 F.3d 910 (5<sup>th</sup> Cir. 2006)** (warrant of deportation is non-testimonial because “the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter”); ***United States v. Torres-Villalobos*, 487 F.3d 607 (8<sup>th</sup> Cir. 2007)** (noting that warrants of deportation “are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions.”); ***United States v. Bahena-Cardenas*, 411 F.3d 1067 (9<sup>th</sup> Cir. 2005)** (a warrant of deportation is non-testimonial “because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter.”); ***United States v. Cantellano*, 430 F.3d 1142 (11<sup>th</sup> Cir. 2005)** (noting that a warrant of deportation is recorded routinely and not in preparation for a criminal trial”).

**Note: Warrants of deportation still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is prepared for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it’s prepared. As**

seen below, post-*Melendez-Diaz* courts have found warrants of deportation to be non-testimonial. See also *United States v. Lopez*, 747 F.3d 1141 (9<sup>th</sup> Cir. 2014) (adhering to pre-*Melendez-Diaz* case law holding that deportation documents in an A-file are not testimonial when admitted in illegal re-entry cases).

**Proof of absence of business records is not testimonial:** *United States v. Munoz-Franco*, 487 F.3d 25 (1<sup>st</sup> Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

**Note: This analysis appears unaffected by *Melendez-Diaz*, as no certificate or affidavit is involved and the record itself was not prepared for litigation purposes.**

**Business records are not testimonial:** *United States v. Jamieson*, 427 F.3d 394 (6<sup>th</sup> Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." *See also United States v. Baker*, 458 F.3d 513 (6<sup>th</sup> Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

**Note: The court's analysis of business records appears unaffected by *Melendez-Diaz*, because the records were not prepared primarily for litigation and no certificate or affidavit was prepared for use in the litigation.**

**Post office box records are not testimonial:** *United States v. Vasilakos*, 508 F.3d 401 (6<sup>th</sup> Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that “the Supreme Court specifically characterizes business records as non-testimonial.”

**Note: The court’s analysis of business records is unaffected by *Melendez-Diaz*.**

**Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial:** *United States v. Ellis*, 460 F.3d 920 (7<sup>th</sup> Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant’s blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical reports, the *Ellis* court concluded as follows:

While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. \* \* \* They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

**Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by private organizations may be found nontestimonial if it can be shown that law enforcement was**

**not involved in or managing the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, and the less involvement by the government, the better for admissibility. Primary motive for use in a prosecution is obviously less likely to be found if the tester is a private organization.**

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about *Ellis*, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

**Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about *Ellis* is not dispositive, because the information imparted is being used against *Ellis*. Moreover, the certificate is prepared exclusively for use in litigation. On the other hand, as discussed above, Rule**

**902(11) might well be upheld as a rule simply permitting the authentication of a record.**

**Note: Three circuits have held that the reasoning of *Ellis* remains sound after *Melendez-Diaz*, and that 902(11) and (12) certificates are not testimonial. See *United States v. Yeley-Davis*, 632 F.3d 673 (10<sup>th</sup> Cir. 2011), *United States v. Johnson*, 688 F.3d 494 (8<sup>th</sup> Cir. 2012), and *United States v. Anekwu*, 695 F.3d 967 (9<sup>th</sup> Cir. 2012) all *infra*.**

**Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7<sup>th</sup> Cir. 2006):** In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

**Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation — the crime had not occurred at the time the records were prepared.**

**Tax returns are business records and so not testimonial:** *United States v. Garth*, 540 F.3d 766 (8<sup>th</sup> Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, “as is expected of testimonial evidence.”

**Note: this result is unaffected by *Melendez-Diaz*.**

**Certificate of a record of a conviction found not testimonial:** *United States v. Weiland*, 420 F.3d 1062 (9<sup>th</sup> Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: “Not only are such certifications a ‘routine cataloging of an unambiguous factual matter,’ but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.”

**Note: The reliance on burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz*. Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.**

**In *United States v. Albino-Loe*, 747 F.3d 1206 (9<sup>th</sup> Cir. 2014), the court adhered to its ruling in *Weiland*, declaring that a routine certification or authenticity of a record (in that case documents in an A-file) are not testimonial in nature, because they “did not accomplish anything other than authenticating the A-file documents to which they were attached.”**

**Absence of records in database is not testimonial; and drug ledger is not testimonial:** *United States v. Mendez*, 514 F.3d 1035 (10<sup>th</sup> Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is “a nation-wide database of information

which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization.” The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records “are not prepared for litigation or prosecution, but rather administrative and regulatory purposes.” The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, “the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial.”

*Mendez* also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford*. The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a “tool of the trade.” As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because “[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry.” (emphasis the court’s). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise “any piece of evidence which aids the prosecution would be testimonial.”

**Note: Both holdings in the above case survive *Melendez-Diaz*. The first holding is about the absence of public records — records that were not prepared in testimonial circumstances. If that absence had been proved by a *certificate*, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial. Drug ledgers in particular are absolutely not prepared for purposes of litigation.**

## ***Lower Court Cases on Records and Certificates After Melendez-Diaz***

**Letter describing results of a search of court records is testimonial after *Melendez-Diaz*:** *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011): To prove a felony in a felon firearm case, the government admitted a letter from a court clerk stating that “it appears from an examination of the files in this office” that Smith had been convicted of a felony. Each letter had a seal and a signature by a court clerk. The court found that the letters were testimonial. The clerk did not merely authenticate a record, rather he created a record of the search he conducted. The letters were clearly prepared in anticipation of litigation — they “respond[ed] to a prosecutor’s question with an answer.”

**Note: The analysis in *Smith* provides more indication that certificates of the absence of a record are testimonial after *Melendez-Diaz*. The clerk’s letters in *Smith* are exactly like a CNR; the only difference is that they report on the presence of a record rather than an absence.**

**Note: The case also highlights the question of whether a certificate qualifying a business record under Rule 902(11) is testimonial under *Melendez-Diaz*. The letters did not come within the narrow “authentication” exception recognized by the *Melendez-Diaz* Court because they provided “an interpretation of what the record contains or shows.” Arguably 902(11) certificates do just that. But because the only Circuit Court cases on the specific subject of Rule 902(11) certificates find that they are *not* testimonial, there is certainly no call at this point to propose an amendment to Rule 902(11).**

**Autopsy reports generated through law enforcement involvement found testimonial after *Melendez-Diaz*:** *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011): The court found autopsy reports to be testimonial. The court emphasized the involvement of law enforcement in the generation of the autopsy reports admitted in this case:

The Office of the Medical Examiner is required by D.C.Code § 5–1405(b)(11) to investigate “[d]eaths for which the Metropolitan Police Department [“MPD”], or other law enforcement agency, or the United States Attorney's Office requests, or a court orders investigation.” The autopsy reports do not indicate whether such requests were made in the

instant case but the record shows that MPD homicide detectives and officers from the Mobile Crimes Unit were present at several autopsies. Another autopsy report was supplemented with diagrams containing the notation: “Mobile crime diagram (not [Medical Examiner]—use for info only).” Still another report included a “Supervisor's Review Record” from the MPD Criminal Investigations Division commenting: “Should have indictment re John Raynor for this murder.” Law enforcement officers thus not only observed the autopsies, a fact that would have signaled to the medical examiner that the autopsy might bear on a criminal investigation, they participated in the creation of reports. Furthermore, the autopsy reports were formalized in signed documents titled “reports.” These factors, combined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, are “circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez–Diaz*, 129 S.Ct. at 2532 (citation and quotation marks omitted).

In a footnote, the court emphasized that it was *not* holding that all autopsy reports are testimonial:

Certain duties imposed by the D.C.Code on the Office of the Medical Examiner demonstrate, the government suggests, that autopsy reports are business records not made for the purpose of litigation. It is unnecessary to decide as a categorical matter whether autopsy reports are testimonial, and, in any event, it is doubtful that such an approach would comport with Supreme Court precedent. See *Melendez–Diaz*, 129 S.Ct. at 2532; cf. *Michigan v. Bryant*, — U.S. —, 131 S.Ct. 1143, 1155–56, 179 L.Ed.2d 93 (2011).

Finally, the court rejected the government’s argument that there was no error because the expert witness simply relied on the autopsy reports in giving independent testimony. In this case, the autopsy reports were clearly entered into evidence.

**State court did not unreasonably apply federal law in admitting autopsy report as non-testimonial:** *Nardi v. Pepe*, 662 F.3d 107 (1<sup>st</sup> Cir. 2011): The court affirmed the denial of a habeas petition, concluding that the state court did not unreasonably apply federal law in admitting an autopsy report as non-testimonial. The court reasoned as follows:

Abstractly, an autopsy report can be distinguished from, or assimilated to, the sworn documents in *Melendez–Diaz* and *Bullcoming*, and it is uncertain how the Court would resolve the question. We treated such reports as not covered by the Confrontation Clause, *United States v. De La Cruz*, 514 F.3d 121, 133–34 (1st Cir.2008), but the law has continued

to evolve and no one can be certain just what the Supreme Court would say about that issue today. However, our concern here is with “clearly established” law when the SJC acted. \* \* \* That close decisions in the later Supreme Court cases extended *Crawford* to new situations hardly shows the outcomes were clearly preordained. And, even now it is uncertain whether, under its primary purpose test, the Supreme Court would classify autopsy reports as testimonial.

**Immigration interview form was not testimonial: *United States v. Phoeun Lang*, 672 F.3d 17 (1<sup>st</sup> Cir. 2012):** The defendant was convicted of making false statements and unlawfully applying for and obtaining a certificate of naturalization. The defendant argued that his right to confrontation was violated because the immigration form (N-445) on which he purportedly lied contained verification checkmarks next to his false responses — thus the contention was that the verification checkmarks were testimonial hearsay of the immigration agent who conducted the interview. But the court found no error. The court concluded that the form was not “primarily to be used in court proceedings.” Rather it was a record prepared as “a matter of administrative routine, for the primary purpose of determining Lang’s eligibility for naturalization.” For essentially the same reasons, the court held that the form was admissible under Rule 803(8)(A)(ii) despite the fact that the rule appears to exclude law enforcement reports. The court distinguished between “documents produced in an adversarial setting and those produced in a routine non-adversarial setting for purposes of Rule 803(8)(A)(ii).” The court relied on the passage in *Melendez-Diaz* which declared that the test for admissibility or inadmissibility under Rule 803(8) was the same as the test of testimoniality under the Confrontation Clause, i.e., whether the primary motive for preparing the record was for use in a criminal prosecution.

**Note: This case was decided before *Williams*, but it would appear to satisfy both the Alito and the Kagan version of the “primary motive” test. Both tests agree that a statement cannot be testimonial unless the primary motive for making it is to have it used in a criminal prosecution. The difference is that Justice Alito provides another qualification — the statement is testimonial only if it was made to be used in the defendant’s criminal prosecution. In *Phoeun Lang* the first premise was not met — the statements were made for administrative purposes, and not primarily for use in any criminal prosecution.**

**Certain records of internet activity sent to law enforcement found testimonial: *United States v. Cameron*, 699 F.3d 621 (1<sup>st</sup> Cir. 2012):** In a child pornography prosecution, the court held that admission of certain business records violated the defendant’s right to Confrontation Clause. The evidence principally at issue related to accounts with Yahoo. Yahoo received an anonymous report that child pornography images were contained in a Yahoo account. Yahoo sent a report—called a “CP Report” — to the National Center for Missing and Exploited Children (NCMEC) listing the images being sent with the report, attaching the images, and listing the date and time at which the image was uploaded and the IP Address from which it was uploaded. NCMEC in turn sent a report of child pornography to the Maine State Police Internet Crimes Against Children Unit (ICAC), which obtained a search warrant for the defendant’s computers. The government introduced testimony of a Yahoo employee as to how certain records were kept and maintained by the company, but the government did not introduce the Image Upload Data indicating the date and time each image was uploaded to the Internet. The government also introduced testimony by a NCMEC employee explaining how NCMEC handled tips regarding child pornography. The court held that admission of various data collected by Yahoo and Google automatically in order to further their business purposes was proper, because the data was contained in business records and was not testimonial for Sixth Amendment purposes. The court held, 2-1, that the reports Yahoo prepared and sent to NCMEC were different and were testimonial because there was strong evidence that the primary purpose of the reports was to prove past events that were potentially relevant to a criminal prosecution. The court relied on the following considerations to conclude that the CP Reports were testimonial: 1) they referred to a “suspect” screen name, email address, and IP address — and Yahoo did not treat its customers as “suspects” in the ordinary course of its business; 2) before a CP Report is created, someone in the legal department at Yahoo has to determine that an account contained child pornography images; 3) Yahoo did not simply keep the reports but sent them to NCMEC, which was under the circumstances an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them to law enforcement. The government argued that Confrontation was not at issue because the CP Reports contained business records that were unquestionably nontestimonial, such as records of users’ IP addresses. But the court responded that the CP Reports were themselves statements. The court noted that “[i]f the CP Reports simply consisted of the raw underlying records, or perhaps underlying records arranged and formatted in a reasonable way for presentation purposes, the Reports might well have been admissible.”

The government also argued that the CP Reports were not testimonial under the Alito definition of primary motive in *Williams*. Like the DNA reports in *Williams*, the CP Reports were prepared at a time when the perpetrator was unknown and so they were not targeted toward a particular individual. The court distinguished *Williams* by relying on a statement in the Alito opinion that at the time of the DNA report, the technicians had “no way of knowing whether it will turn out to be incriminating or exonerating.” In contrast, when the CP Reports were prepared, Yahoo

personnel knew that they were incriminating: “Yahoo’s employees may not have known *whom* a given CP Report might incriminate, but they almost certainly were aware that a Report would incriminate *somebody*.”

Finally, the court held that the NCMEC reports sent to the police were testimonial, because they were statements independent of the CP Reports, and they were sent to law enforcement for the primary purpose of using them in a criminal prosecution. One judge, dissenting in part, argued that the connection between an identified user name, the associated IP address, and the digital images archived from that user’s account all existed well before Yahoo got the anonymous tip, were an essential part of the service that Yahoo provided, and thus were ordinary business records that were not testimonial.

**Note: *Cameron* does not explicitly hold that business records admissible under Rule 803(6) can be testimonial under *Crawford*. The court notes that under *Palmer v. Hoffman*, 318 U.S. 109 (1943), records are not admissible as business records when they are calculated for use in court. *Palmer* is still good law under Rule 803(6), as the Court recognized in *Melendez-Diaz*. The *Cameron* court noted that the Yahoo reports were subject to the same infirmity as the records found inadmissible in *Hoffman*: they were not made for business purposes, but rather for purposes of litigation.**

**It should also be noted that the Court’s attempt to distinguish the Alito primary motive test is weak. The court relies on one sentence in Justice Alito’s analysis, but the gravamen of that analysis is that there was no primary motive because the lab was not targeting a known individual. That is the same with the Yahoo CP reports.**

**Routine autopsy report was not testimonial: *United States v. James*, 712 F.3d 79 (2<sup>nd</sup> Cir. 2013):** The court considered whether its *pre-Melendez-Diaz* case law — stating that autopsy reports were not testimonial — was still valid. The court adhered to its view that “routine” autopsy reports were not testimonial because they are not primarily motivated to create a record for a criminal trial. Applying the test of “routine” to the facts presented, the court found as follows:

Somaipersaud's autopsy was anything other than routine — there is no suggestion that Jindrak or anyone else involved in this autopsy process suspected that Somaipersaud had been murdered and that the medical examiner's report would be used at a criminal trial. Ambrosi testified that causes of death are often undetermined in cases like this because it could have been a recreational drug overdose or a suicide. The autopsy report itself refers to the cause of death as "undetermined" and attributes it both to "acute mixed intoxication with

alcohol and chlorpromazine" combined with "hypertensive and arteriosclerotic cardiovascular disease."

The autopsy was completed on January 24, 1998, and the report was signed June 16, 1998, substantially before any criminal investigation into Somaipersaud's death had begun. During the course of Ambrosi's lengthy trial testimony, neither the government nor defense counsel elicited any information suggesting that law enforcement was ever notified that Somaipersaud's death was suspicious, or that any medical examiner expected a criminal investigation to result from it. Indeed, there is reason to believe that none is pursued in the case of most autopsies.

The court noted that "something in the order of ten percent of deaths investigated by the OCME lead to criminal investigations." It distinguished the 11<sup>th</sup> Circuit's opinion — discussed below — which found an autopsy report to be testimonial, noting that "the decision was based in part on the fact that the Florida Medical Examiner's Office was created and exists within the Department of Law Enforcement. Here, the OCME is a wholly independent office." Thus, an autopsy report prepared outside the auspices of a criminal investigation is very unlikely to be found testimonial under the Second Circuit's view.

Note that as to *Williams*, the *James* court declined to use either of the rationales espoused by Justice Alito on the ground that they had been rejected by five members of the Court. The court found that in fact there was no lesson at all to be derived from *Williams*, as there was no rationale on which five members of the Court could agree. Thus, the Court found that *Williams* controlled only in cases exactly like it.

**Business records are not testimonial:** *United States v. Bansal*, 663 F.3d 634 (3<sup>rd</sup> Cir. 2011): In a prosecution related to a controlled substance distribution operation, the trial court admitted records kept by domestic and foreign businesses of various transactions. The court rejected the claim that the records were testimonial, stating that "the statements in the records here were made for the purpose of documenting business activity, like car sales and account balances, and not for providing evidence to law enforcement or a jury."

**Admission of credit card company’s records identifying customer accounts that had been compromised did not violate the right to confrontation: *United States v. Keita*, 742 F.3d 184 (4<sup>th</sup> Cir. 2014):** In a prosecution for credit card fraud, the trial court admitted “common point of purchase” records prepared by American Express. These were internal documents revealing which accounts have been compromised. American Express creates the reports daily as part of regular business practice, and they are used by security analysts to determine whether to contact law enforcement or to investigate the matter internally in the first instance. The court held that the records were not testimonial (even though they could possibly be used for criminal prosecution), relying on the language in *Melendez-Diaz* stating that “business records are generally admissible absent confrontation.” The court concluded that the records were primarily prepared for the administration of Amex’s regularly conducted business.

**Admission of purported drug ledgers violated the defendant’s confrontation rights where the proof of authenticity was the fact that they were produced by an accomplice at a proffer session: *United States v. Jackson*, 625 F.3d 875 (5<sup>th</sup> Cir. 2010), amended 636 F.3d 687 (5<sup>th</sup> Cir. 2011):** In a drug prosecution, purported drug ledgers were offered to prove the defendant’s participation in drug transactions. An officer sought to authenticate the ledgers as business records but the court found that he was not a “qualified witness” under Rule 803(6) because he had no knowledge that the ledgers came from any drug operation associated with the defendant. The court found that the only adequate basis of authentication was the fact that the defendant’s accomplice had produced the ledgers at a proffer session with the government. But because the production at the proffer session was unquestionably a testimonial statement — and because the accomplice was not produced to testify — admission of the ledger against the defendant violated his right to confrontation under *Crawford*.

***Note:* The *Jackson* court does *not* hold that business records are testimonial. The reasoning is muddled, but the best way to understand it is that the evidence used to *authenticate* the business record — the cohort’s production of the records at a proffer session — was testimonial.**

**Pseudoephedrine logs are not testimonial: *United States v. Towns*, 718 F.3d 404 (5<sup>th</sup> Cir. 2013):** In a methamphetamine prosecution, the agent testified to patterns of purchasing pseudoephedrine at various pharmacies. This testimony was based on logs kept by the pharmacies

of pseudoephedrine purchases. The court found that the logs — and the certifications to the logs provided by the pharmacies — were properly admitted as business records. It further held that the records were not testimonial. As to the Rule 803(6) question, the court found irrelevant the fact that the records were required by statute to be kept and were pertinent to law enforcement. The court stated that “the regularly conducted activity here is selling pills containing pseudoephedrine; the purchase logs are kept in the course of that activity. Why they are kept is irrelevant at this stage.” As to the certifications from the records custodians of the pharmacies, the court found them proper under Rule 803(6) and 902(11) — the certifications tracked the language of Rule 803(6) and there was no requirement that the custodians do anything more, such as explain the process of record keeping. As to the Confrontation Clause, the court noted that the Supreme Court in *Melendez-Diaz* had declared that business records are ordinarily non-testimonial. Moreover, the logs were not prepared solely with an eye toward trial. The court concluded as follows:

The pharmacies created these purchase logs *ex ante* to comply with state regulatory measures, not in response to an active prosecution. Additionally, requiring a driver’s license for purchases of pseudoephedrine deters crime. The state thus has a clear interest in businesses creating these logs that extends beyond their evidentiary value. Because the purchase logs were not prepared specifically and solely for use at trial, they are not testimonial and do not violate the Confrontation Clause.

**Court rejects the “targeted individual” test in reviewing an affidavit pertinent to illegal immigration: *United States v. Duron-Caldera*, 737 F.3d 988 (5<sup>th</sup> Cir. 2013):** The defendant was charged with illegal reentry. The dispute was over whether he was in fact an alien. He claimed he was a citizen because his mother, prior to his birth, was physically present in the U.S. for at least ten years, at least five of which were before she was 14. To prove that this was not the case, the government offered an affidavit from the defendant’s grandmother, prepared 40 years before the instant case. The affidavit was prepared in connection with an investigation into document fraud, including the alleged filing of fraudulent birth certificates by the defendant’s parents and grandmother. The affidavit accused others of document fraud, and stated that the defendant’s mother did not reside in the United States for an extended period of time. The trial court admitted the affidavit but the court of appeals held that it was testimonial and reversed. The government argued that the affidavit was a business record because it was found in regularly kept immigration records. But the court noted that it could not qualify as a business record because the grandmother was not acting in the ordinary course of regularly conducted activity.

The court found that the government had not shown that the affidavit was prepared outside the context of a criminal investigation, and therefore the affidavit was testimonial under the primary

motive test. The government relied on the Alito opinion in *Williams*, under which the affidavit would not be testimonial, because it clearly was not targeted toward the defendant, as he was only a child when it was prepared. But the court rejected the targeted individual test. It noted first that five members of the court in *Williams* had rejected the test. It also stated that the targeted individual limitation could not be found in any of the *Crawford* line of cases before *Williams*: noting, for example, that in *Crawford* the Court defined testimonial statements as those one would expect to be used “at a later trial.” Finally, the court stated that the targeted individual test was inconsistent with the terms of the Confrontation Clause, which provide a right of the accused to be confronted with the “*witnesses against him.*” In this case, the grandmother, by way of affidavit, was a witness against the defendant.

**Reporter’s Note:** The Court’s construction of the Confrontation Clause could come out the other way. The references to “witnesses against him” could be interpreted as something personal, i.e., *at the time the statement was made*, it was being directed at the defendant. The *Duron-Caldera* court reads “witnesses” as of the time the statement is being introduced. But at that time, the witness is not there. All the “witnessing” is done at the time the statement is made; and if the witness is not targeting the individual at the time the statement is made, it could well be argued that the witness is not testifying “against him.”

Another note from *Duron-Caldera*: The court notes that there is no rule to be taken from *Williams* under the *Marks* test --- under which you take the narrowest view on which the plurality and the concurrence can agree. In *Williams*, there is nothing on which the plurality and Justice Thomas agreed.

**Preparing an exhibit for trial is not testimonial: *United States v. Vitrano*, 747 F.3d 922 (7<sup>th</sup> Cir. 2014):** In a prosecution for fraud and perjury, the government offered records of phone calls made by the defendant. The defendant argued that there was a confrontation violation because the government did not call the technician who prepared the phone calls as an exhibit to testify. The court found that the confrontation argument was properly rejected, because no statements of the technician were admitted at trial. The court declared that “[p]reparing an exhibit for trial is not itself testimonial.”

**Records of sales at a pharmacy are business records and not testimonial under *Melendez-Diaz*: *United States v. Mashek*, 606 F.3d 922 (8<sup>th</sup> Cir. 2010):** The defendant was convicted of attempt to manufacture methamphetamine. At trial the court admitted logbooks from

local pharmacies to prove that the defendant made frequent purchases of pseudoephedrine. The defendant argued that the logbooks were testimonial under *Melendez-Diaz*, but the court disagreed and affirmed his conviction. The court first noted that the defendant probably waived his confrontation argument because at trial he objected only on the evidentiary grounds of hearsay and Rule 403. But even assuming the defendant preserved his confrontation argument, “*Melendez-Diaz* does not provide him any relief. The pseudoephedrine logs were kept in the ordinary course of business pursuant to Iowa law and are business records under Federal Rule of Evidence 803(6). Business records under Rule 803(6) are not testimonial statements; *see Melendez-Diaz*, 129 S.Ct. At 2539-40 (explaining that business records are typically not testimonial).” *Accord, United States v. Ali*, 616 F.3d 745 (8<sup>th</sup> Cir. 2010) (business records prepared by financial services company, offered as proof that tax returns were false, were not testimonial, as “*Melendez-Diaz* does not apply to the HSBC records that were kept in the ordinary course of business.”); *United States v. Wells*, 706 F.3d 908 (8<sup>th</sup> Cir. 2013) (*Melendez-Diaz* did not preclude the admission of pseudoephedrine logs because they constituted non-testimonial business records under Federal Rule of Evidence 803(6)).

**Rule 902(11) authentication was not testimonial: *United States v. Thompson*, 686 F.3d 575 (8<sup>th</sup> Cir. 2012):** To prove unexplained wealth in a drug case, the government offered and the court admitted a record from the Iowa Workforce Development Agency showing no reported wages for Thompson's social security number during 2009 and 2010. The record was admitted through an affidavit of self-authentication offered pursuant to Rule 902(11). The court found that the earnings records themselves were non-testimonial because they were prepared for administrative purposes. As to the exhibit itself, the court stated that “[b]ecause the IWDA record itself was not created for the purpose of establishing or proving some fact at trial, admission of a certified copy of that record did not violate Thompson's Confrontation Clause rights.” The court emphasized that “[b]oth the majority and dissenting opinions in *Melendez-Diaz* noted that a clerk's certificate authenticating a record—or a copy thereof—for use as evidence was traditionally admissible even though the certificate itself was testimonial, having been prepared for use at trial.” It concluded that “[t]o the extent Thompson contends that a copy of an existing record or a printout of an electronic record constitutes a testimonial statement that is distinguishable from the non-testimonial statement inherent in the original business record itself, we reject this argument.” *See also United States v. Johnson*, 688 F.3d 494 (8<sup>th</sup> Cir. 2012) (certificates of authenticity presented under Rule 902(11) are not testimonial, and the notations on the lab report by the technician indicating when she checked the samples into and out of the lab did not raise a confrontation question because they were offered only to establish a chain of custody and not to prove the truth of any matter asserted).

**GPS tracking reports were properly admitted as non-testimonial business records:** *United States v. Brooks*, 715 F.3d 1069 (8<sup>th</sup> Cir. 2013): Affirming bank robbery and related convictions, the court rejected the defendant’s argument that admission at trial of GPS tracking reports violated his right to confrontation. The reports recorded the tracking of a GPS device that was hidden by a teller in the money taken from the bank. The court held that the records were properly admitted as business records under Rule 803(6), and they were not testimonial even though they were prepared by law enforcement. The court reasoned that the primary purpose of the tracking reports was to track the perpetrator in an ongoing pursuit — not for use at trial. The court stated that “[a]lthough the reports ultimately were used to link him to the bank robbery, they were not *created* . . . to establish some fact at trial. Instead, the GPS evidence was generated by the credit union’s security company for the purpose of locating a robber and recovering stolen money.”

**Prior conviction in which the defendant did not have the opportunity to cross-examine witnesses cannot be used in a subsequent trial to prove the facts underlying the conviction:** *United States v. Causevic*, 636 F.3d 998 (8<sup>th</sup> Cir. 2011): The defendant was charged with making materially false statements in an immigration matter — specifically that he lied about committing a murder in Bosnia. To prove the lie at trial, the government offered a Bosnian judgment indicating that the defendant was convicted in absentia of the murder. The court held that the judgment was testimonial to prove the underlying facts, and there was no showing that the defendant had the opportunity to cross-examine the witnesses in the Bosnian court. The court distinguished proof of the *fact* of a conviction being entered (such as in a felon-firearm prosecution), as in that situation the public record is prepared for recordkeeping and not for a trial. In contrast the factual findings supporting the judgment were obviously generated for purposes of a criminal prosecution.

**Note: The statements of facts underlying the prior conviction are testimonial under both versions of the primary motive test contested in *Williams*. They meet the Kagan test because they were obviously prepared for purpose of — indeed as part of — a criminal prosecution. And they meet the Alito proviso because they targeted the specific defendant against whom they were used at trial.**

**Affidavit that birth certificate existed was testimonial:** *United States v. Bustamante*, 687 F.3d 1190 (9<sup>th</sup> Cir. 2012): The defendant was charged with illegal entry and the dispute was whether he was a United States citizen. The government contended that he was a citizen of the Philippines but could not produce a birth certificate, as the records had been degraded and were poorly kept. Instead it produced an affidavit from an official who searched birth records in the Philippines as part of the investigation into the defendant's citizenship by the Air Force 30 years earlier. The affidavit stated that birth records indicated that the defendant was born in the Philippines and the affidavit purported to transcribe the information from the records. The court held that the affidavit was testimonial under *Melendez-Diaz* and reversed the conviction. The court distinguished this case from cases finding that birth records and certificates of authentication are not testimonial:

Our holding today does not question the general proposition that birth certificates, and official duplicates of them, are ordinary public records “created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.” *Melendez–Diaz*, 129 S.Ct. at 2539–40. But Exhibit 1 is not a copy or duplicate of a birth certificate. Like the certificates of analysis at issue in *Melendez–Diaz*, despite being labeled a copy of the certificate, Exhibit 1 is “quite plainly” an affidavit. It is a typewritten document in which Salupisa testifies that he has gone to the birth records of the City of Bacolod, looked up the information on Napoleon Bustamante, and summarized that information at the request of the U.S. government for the purpose of its investigation into Bustamante's citizenship. Rather than simply authenticating an existing non-testimonial record, Salupisa created a new record for the purpose of providing evidence against Bustamante. The admission of Exhibit 1 without an opportunity for cross examination therefore violated the Sixth Amendment.

**Government concedes a *Melendez-Diaz* error in admitting affidavit on the absence of a public record:** *United States v. Norwood*, 603 F.3d 1063 (9<sup>th</sup> Cir. 2010): In a drug case, the government sought to prove that the defendant had no legal source for the large amounts of cash found in his car. The trial court admitted an affidavit of an employee of the Washington Department of Employment Security, which certified that a diligent search failed to disclose any record of wages reported for the defendant in a three-month period before the crime. On appeal, the government conceded that the affidavit was erroneously admitted in light of the intervening decision in *Melendez-Diaz*. (The court found the error to be harmless).

**CNR is testimonial but a warrant of deportation is not:** *United States v. Orozco-Acosta*, 607 F.3d 1156 (9<sup>th</sup> Cir. 2010): In an illegal reentry case, the government proved removal by introducing a warrant of deportation under Rule 803(8), and it proved unpermitted reentry by introducing a certificate of non-existence of permission to reenter (CNR) under Rule 803(10). The trial was conducted and the defendant convicted before *Melendez-Diaz*. On appeal, the government conceded that introducing the CNR violated the defendant’s right to confrontation because under *Melendez-Diaz* the record is testimonial. The court in a footnote agreed with the government’s concession, stating that its previous cases holding that CNRs were not testimonial were “clearly inconsistent with *Melendez-Diaz*” because like the certificates in that case, a CNR is prepared solely for purposes of litigation. In contrast, however, the court found that the warrant of deportation was properly admitted even under *Melendez-Diaz*. The court reasoned that “neither a warrant of removal’s sole purpose nor even its primary purpose is use at trial.” It explained that a warrant of removal must be prepared in every case resulting in a final order of removal, and only a “small fraction of these warrants are used in immigration prosecutions.” The court concluded that “*Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal — or, for that matter, any business or public record — could be used in a later criminal prosecution renders it testimonial under *Crawford*.” The court found that the error in admitting the CNR was harmless and affirmed the conviction. **See also** *United States v. Rojas-Pedroza*, 716 F.3d 1253 (9<sup>th</sup> Cir. 2013) (adhering to *Orozco-Acosta* in response to the defendant’s argument that it had been undermined by *Bullcoming* and *Bryant*; holding that a Notice of Intent in the defendant’s A-File — which appries the alien of the determination that he is removable — was non-testimonial because “their primary purpose is to effect removals, not to prove facts at a criminal trial.”); *United States v. Lopez*, 747 F.3d 1141 (9<sup>th</sup> Cir. 2014) (verification of removal — recording the physical removal of an alien across the border, is not testimonial; like a warrant of removal, it is made for administrative purposes and not primarily designed to be admitted as evidence at a trial; the only difference from a warrant of removal “is that a verification of removal is used to record the removal of aliens pursuant to expedited removal procedures, while the warrant of removal records the removal of aliens following a hearing before an immigration judge”; also holding that, for the same reasons, the verification of removal was admissible as a public record under Rule 803(8)(A)(ii), despite the exclusion for law enforcement reports); *United States v. Albino-Loe*, 747 F.3d 1206 (9<sup>th</sup> Cir. 2014) (statements concerning the defendant’s alienage in a notice of removal — which is the charging document for deportation — are not testimonial in an illegal entry case; the primary purpose of a notice of removal “is simply to effect removals, not to prove facts at a criminal trial”).

**Documents in alien registration file not testimonial: *United States v. Valdovinos-Mendez*, 641 F.3d 1031 (9<sup>th</sup> Cir. 2011):** In an illegal re-entry prosecution, the defendant argued that admission of documents from his A-file violated his right to Confrontation. The court held that the challenged documents — a Warrant of Removal, a Warning to Alien ordered Deported, and the Order from the Immigration Judge — were not testimonial. They were not prepared with the primary motive of use in a criminal prosecution, because at the time they were prepared the crime of illegal reentry had not occurred.

**Forms prepared by border patrol agents interdicting aliens found not testimonial: *United States v. Morales*, 720 F.3d 1194 (9<sup>th</sup> Cir. 2013):** In a prosecution for illegally transporting aliens, the trial court admitted Field 826 forms, prepared by Border Patrol agents who interviewed the aliens. The Field 826 form records the date and location of arrest, the funds found in the alien’s possession, and basic biographical data about the alien, and also provides the alien options, including an admission that the alien is illegally in the country and wishes to return home. The court of appeals rejected the defendant’s argument that these forms were testimonial. It stated that “a Border Patrol agent uses the form in the field to document basic information, to notify the aliens of their administrative rights, and to give the aliens a chance to request their preferred disposition. The Field 826s are completed whether or not the government decides to prosecute the aliens or anyone else criminally. The nature and use of the Field 826 makes clear that its primary purpose is administrative, not for use as evidence at a future criminal trial. Even though statements within the form may become relevant to later criminal prosecution, this potential future use does not automatically place the statements within the ambit of ‘testimonial.’” The court did find that the part of the report that contained information from the aliens was improperly admitted in violation of the *hearsay* rule. The Field 826 is a public record but information coming from the alien is not information coming from a public official. The court found the violation of the hearsay rule to be harmless error.

**Social Security application was not testimonial as it was not prepared under adversarial circumstances: *United States v. Berry*, 683 F.3d 1015 (9<sup>th</sup> Cir. 2012):** The court affirmed the defendant’s conviction for social security fraud for taking money paid for maintenance of his son while the defendant was a representative payee. The trial judge admitted routine Social Security Administration records showing that the defendant applied for benefits on behalf of the son. The defendant argued that an SSA application was tantamount to a police report and therefore the record was inadmissible under Rule 803(8) and also that its admission violated his right to confrontation.

The court disagreed, reasoning “that a SSA interviewer completes the application as part of a routine administrative process” and such a record is prepared for each and every request for benefits. “No affidavit was executed in conjunction with preparation of the documents, and there was no anticipation that the documents would become part of a criminal proceeding. Rather, every expectation was that Berry would use the funds for their intended purpose.” The court quoted *Melendez-Diaz* for the proposition that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.” The court concluded as follows:

[N]o reasonable argument can be made that the agency documents in this case were created solely for evidentiary purposes and/or to aid in a police investigation. Importantly, no police investigation even existed when the documents were created. \* \* \* Because the evidence at trial established that the SSA application was part of a routine, administrative procedure unrelated to a police investigation or litigation, we conclude that the district court did not abuse its discretion by admitting the application under Fed.R.Evid. 803(8), and no constitutional violation occurred.

**Affidavits authenticating business records and foreign public records are not testimonial:** *United States v. Anekwu*, 695 F.3d 967 (9<sup>th</sup> Cir. 2012): In a fraud case, the government authenticated foreign public records and business records by submitting certificates of knowledgeable witnesses. This is permitted by 18 U.S.C. § 3505 for foreign records and Rule 902(12) for foreign business records. The court found that the district court did not commit plain error in finding that the certificates were not testimonial. The certificates were not themselves substantive evidence but rather a means to authenticate records. The court relied on the 10<sup>th</sup> Circuit’s decision in *Yeley-Davis*, immediately below, and on the statement in *Melendez-Diaz* that certificates that do no more than authenticate other records are not testimonial.

**Records of cellphone calls kept by provider as business records are not testimonial, and Rule 902(11) affidavit authenticating the records is not testimonial:** *United States v. Yeley-Davis*, 632 F.3d 673 (10<sup>th</sup> Cir. 2011): In a drug case the trial court admitted cellphone records indicating that the defendant placed calls to coconspirators. The foundation for the records was provided by an affidavit of the records custodian that complied with Rule 902(11). The defendant argued that both the cellphone records and the affidavit were testimonial. The court rejected both

arguments and affirmed the conviction. As to the records, the court found that they were not prepared “simply for litigation.” Rather, the records were kept for Verizon’s business purposes, and accordingly were not testimonial. As to the certificate, the court relied on pre-*Melendez-Diaz* cases such as *United States v. Ellis*, *supra*, which found that authenticating certificates were not the kind of affidavits that the Confrontation Clause was intended to cover. The defendant responded that cases such as *Ellis* had been abrogated by *Melendez-Diaz*, but the court disagreed:

If anything, the Supreme Court's recent opinion supports the conclusion in *Ellis*. \*  
\* \* Justice Scalia expressly described the difference between an affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: “A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant.” *Id.* at 2539. In addition, Justice Scalia rejected the dissent's concern that the majority's holding would disrupt the long-accepted practice of authenticating documents under Rule 902(11) and would call into question the holding in *Ellis*. See *Melendez-Diaz*, 129 S.Ct. at 2532 n. 1 (“Contrary to the dissent's suggestion, ... we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the ... authenticity of the sample ... must appear in person as part of the prosecution's case.”); see also *id.* at 2547 (Kennedy, J., dissenting) (expressing concern about the implications for evidence admitted pursuant to Rule 902(11) and future of *Ellis*). The Court's ruling in *Melendez-Diaz* does not change our holding that Rule 902(11) certifications of authenticity are not testimonial.

***See also United States v. Keck***, 643 F.3d 789 (10<sup>th</sup> Cir. 2011): Records of wire-transfer transactions were not testimonial because they “were created for the administration of Moneygram’s affairs and not the purpose of establishing or proving some fact at trial. And since the wire-transfer data are not testimonial, the records custodian’s actions in preparing the exhibits [by cutting and pasting the data] do not constitute a Confrontation Clause violation.”

**Immigration forms containing biographical data, country of origin, etc. are not testimonial:** *United States v. Caraballo*, 595 F.3d 1214 (11<sup>th</sup> Cir. 2010): In an alien smuggling case, the trial court admitted I-213 forms prepared by an officer who found aliens crammed into a small room in a boat near the shore of the United States. The forms contained basic biographical information, and were used at trial to prove that the persons were aliens and not admissible. The defendant argued that the forms were inadmissible hearsay and also testimonial. The court of appeals found no error. On the hearsay question, the court held that the forms were properly admitted as

public records — the exclusion of law enforcement records in Rule 803(8) did not apply because the forms were routine and nonadversarial documents requested from every alien entering the United States. Nor were the forms testimonial, even after *Melendez-Diaz*. The court distinguished *Melendez-Diaz* in the following passage:

Like a Warrant of Deportation \* \* \* (and unlike the certificates of analysis in *Melendez-Diaz*), the basic biographical information recorded on the I-213 form is routinely requested from every alien entering the United States, and the form itself is filled out for anyone entering the United States without proper immigration papers. \* \* \* Rose gathered that biographical information from the aliens in the normal course of administrative processing at the Pembroke Pines Border Patrol Station in Pembroke Pines, Florida. \* \* \*

The I-213 form is primarily used as a record by the INS for the purpose of tracking the entry of aliens into the United States. This routine, objective cataloging of unambiguous biographical matters becomes a permanent part of every deportable/inadmissible alien's A-File. It is of little moment that an incidental or secondary use of the interviews underlying the I-213 forms actually furthered a prosecution. The Supreme Court has instructed us to look only at the *primary* purpose of the law enforcement officer's questioning in determining whether the information elicited is testimonial. The district court properly ruled that the primary purpose of Rose's questioning of the aliens was to elicit routine biographical information that is required of every foreign entrant for the proper administration of our immigration laws and policies. The district court did not violate Caraballo's constitutional rights in admitting the smuggled aliens's redacted I-213 forms.

**Summary charts of admitted business records is not testimonial:** *United States v. Naranjo*, 634 F.3d 1198 (11<sup>th</sup> Cir. 2011): In a prosecution for concealing money laundering, the defendant argued that his confrontation rights were violated when the government presented summary charts of business records. The court found no error. The bank records and checks that were the subject of the summary were business records and “[b]usiness records are not testimonial.” And “[s]ummary evidence also is not testimonial if the evidence underlying the summary is not testimonial.”

**Autopsy reports prepared as part of law enforcement are found testimonial under *Melendez-Diaz*: *United States v. Ignasiak*, 667 F.3d 1217 (11<sup>th</sup> Cir. 2012):** In a prosecution against a doctor for health care fraud and illegally dispensing controlled substances, the court held that the admission of autopsy reports of the defendant’s former patients were testimonial under *Melendez-Diaz*. The court relied heavily on the fact that the autopsy reports were filed from an arm of law enforcement. The court reasoned as follows:

We think the autopsy records presented in this case were prepared “for use at trial.” Under Florida law, the Medical Examiners Commission was created and exists within the Department of Law Enforcement. Fla. Stat. § 406.02. Further, the Medical Examiners Commission itself must include one member who is a state attorney, one member who is a public defender, one member who is sheriff, and one member who is the attorney general or his designee, in addition to five other non-criminal justice members. *Id.* The medical examiner for each district “shall determine the cause of death” in a variety of circumstances and “shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.” Fla. Stat. § 406.11(1). Further, any person who becomes aware of a person dying under circumstances described in section § 406.11 has a duty to report the death to the medical examiner. *Id.* at § 406.12. Failure to do so is a first degree misdemeanor. *Id.*

\* \* \*

In light of this statutory framework, and the testimony of Dr. Minyard, the autopsy reports in this case were testimonial: “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” As such, even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause.

## **State of Mind Statements**

**Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen*, 370 F.3d 75 (1<sup>st</sup> Cir. 2004):** Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton’s accomplice. Christian had told

a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

## Testifying Declarant

**Cross-examination sufficient to admit prior statements of the witness that were testimonial:** *United States v. Acosta*, 475 F.3d 677 (5<sup>th</sup> Cir. 2007): The defendant's accomplice testified at his trial, after informing the court that he did not want to testify, apparently because of threats from the defendant. After answering questions about his own involvement in the crime, he refused on direct examination to answer several questions about the defendant's direct participation in the crime. At that point the government referenced statements made by the accomplice in his guilty plea. On cross-examination, the accomplice answered all questions; the questioning was designed to impeach the accomplice by showing that he had a motive to lie so that he could receive a more lenient sentence. The government then moved to admit the accomplice's statements made to qualify for a safety valve sentence reduction — those statements directly implicated the defendant in the crime. The court found that statements made pursuant to a guilty plea and to obtain a safety valve reduction were clearly testimonial. However, the court found no error in admitting these statements, because the accomplice was at trial subject to cross-examination. The court noted that the accomplice admitted making the prior statements, and answered every question he was asked on cross-examination. While the cross-examination did not probe into the underlying facts of the crime or the accomplice's previous statements implicating the defendant, the court noted that "Acosta could have probed either of these subjects on cross-examination." The accomplice was therefore

found sufficiently subject to cross-examination to satisfy the Confrontation Clause.

***Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell*, 418 F.3d 550 (6<sup>th</sup> Cir. 2005):** In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford*. But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant’s complaint was that his cross-examination would have been more effective if the victims had been older. “Under *Owens*, however, that is not enough to establish a Confrontation Clause violation.”

**Admission of testimonial statements does not violate the Confrontation Clause because declarant testified at trial — even though the declarant did not recall making the statements: *Cookson v. Schwartz*, 556 F.3d 647 (7<sup>th</sup> Cir. 2009):** In a child sex abuse prosecution, the trial court admitted the victim’s hearsay statements accusing the defendant. These statements were testimonial. The victim then testified at trial, describing some incidents perpetrated by the defendant. But the victim could not remember making any of the hearsay statements that had previously been admitted. The court found no error in admitting the victim’s testimonial hearsay, because the victim had been subjected to cross-examination at trial. The defendant argued that the victim was in effect unavailable because she lacked memory. But the court found this argument was foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). The court noted that the defendant in this case was better off than the defendant in *Owens* because the victim in this case “could remember the underlying events described in the hearsay statements.”

**Witness’s reference to statements made by a victim in a forensic report did not violate the Confrontation Clause because the declarant testified at trial: *United States v. Charbonneau*, 613 F.3d 860 (8<sup>th</sup> Cir. 2010):** Appealing from child-sex-abuse convictions, the defendant argued that it was error for the trial court to allow the case agent to testify that he had conducted a forensic interview with one of the victims and that the victim identified the perpetrator. The court recognized

that the statements by the victim may have been testimonial. But in this case the victim testified at trial. The court declared that “*Crawford* did not alter the principle that the Confrontation Clause is satisfied when the hearsay declarant, here the child victim, actually appears in court and testifies in person.”

**Statements of interpreter do not violate the right to confrontation where the interpreter testified at trial: *United States v. Romo-Chavez*, 681 F.3d 955 (9<sup>th</sup> Cir. 2012):** The court held that even if the translator of the defendant’s statements could be thought to have served as a witness against the defendant, there was no confrontation violation because the translator testified at trial. “He may not have remembered the interview, but the Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.”

**Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen*, 425 F.3d 1231 (9<sup>th</sup> Cir. 2005):** The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. *See also United States v. Lindsey*, 634 F.3d 541 (9<sup>th</sup> Cir. 2011) (“Although Gibson’s statements to Agent Arbuthnot qualify as testimonial statements, they do not offend the Confrontation Clause because Gibson himself testified at trial and was cross-examined by Lindsey’s counsel.”).

**Admitting hearsay accusation did not violate the right to confrontation where the declarant testified and was subject to cross-examination about the statement: *United States v. Pursley*, 577 F.3d 1204 (10<sup>th</sup> Cir. 2009):** A victim of a beating identified the defendant as his assailant to a federal marshal. That accusation was admitted at trial as an excited utterance. The victim testified at trial to the underlying event, and he also testified that he made the accusation, but he did not testify on either direct or cross-examination *about* the statement. The defendant argued that admitting the hearsay statement violated his right to confrontation. The court assumed *arguendo* that the accusation was testimonial — even though it had been admitted as an excited utterance. But even if it was testimonial hearsay, the defendant’s confrontation rights were not violated because he had a full opportunity to cross-examine the victim about the statement. The court stated that the

defendant’s “failure to seize this opportunity demolishes his Sixth Amendment claim.” The court observed that the defendant had a better opportunity to confront the victim “than defendants have had when testifying declarants have indicated that they cannot remember their out-of-court statements. Yet, courts have found no Confrontation Clause violation in that situation.”

**Statement to police admissible as past recollection recorded is testimonial but admission does not violate the right to confrontation: *United States v. Jones*, 601 F.3d 1247 (11<sup>th</sup> Cir. 2010):** Affirming firearms convictions, the court held that the trial judge did not abuse discretion in admitting as past recollection recorded a videotaped police interview of a 16-year-old witness who sold a gun to the defendant and rode with him to an area out of town where she witnessed the defendant shoot a man. The court also rejected a Confrontation Clause challenge. Even though the videotaped statement was testimonial, the declarant testified at trial — as is necessary to qualify a record under Rule 803(5) — and was subject to unrestricted cross-examination.

### III. Suggestions for Rulemaking

In light of the confusion wrought by *Williams* it would be problematic to propose any rule that would attempt to implement the “teachings” of that case. It will take at least a few more years of lower court case law, and probably another Supreme Court opinion or two, to resolve the four major disputes left by *Williams*, specifically:

1. How is the “primary motive” test of testimoniality defined?
2. What is the relationship of the Confrontation Clause and testimonial statements that are not offered for truth?
3. Should the protection of the Confrontation Clause be limited to statements that are formalized in the nature of affidavits and certificates?
4. Under what circumstances, if any, can a government expert rely on testimonial hearsay under Rule 703?

Accordingly, it would not appear to make sense to propose amendments to the hearsay exceptions — or to Rule 703 — to try to square those rules with the moving target that is Confrontation. But certainly the Committee should continue to monitor developments. For example, if there comes a time when it is clear that an expert cannot constitutionally rely on testimonial hearsay, an amendment to Rule 703 could well be useful and important.

It should be noted that the Committee has already considered — after receiving an extensive memo from the Reporter — whether to propose other amendments to the Rules in light of *Crawford* and *Melendez-Diaz*. The Committee has rejected a proposal to add a reference to the right to confrontation, or to the limits on “testimonial” hearsay, in Rules 801, 803, 804 and 807 — on the ground that some generic reference would be of little use to courts and litigants. And the Committee has also rejected a proposal to amend Rule 902(11), on the ground that any question as to the constitutionality of that provision in criminal cases has not been clearly determined.

The only proposal that has been submitted to respond to *Crawford* and its progeny is the addition of a notice-and-demand procedure to Rule 803(10). The Committee found that proposal to be justified because it was *clear* that Rule 803(10) was unconstitutional as applied after *Melendez-Diaz*. There appears to be no such clarity at this point with respect to any other Evidence Rule.

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