



**TOURO UNIVERSITY**  
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**Touro Law Review**

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Volume 28 | Number 1

Article 4

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July 2012

## **Social Media, The Sixth Amendment, and Restyling: Recent Developments in the Federal Laws of Evidence**

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### **Recommended Citation**

Jones Merritt, Deborah (2012) "Social Media, The Sixth Amendment, and Restyling: Recent Developments in the Federal Laws of Evidence," *Touro Law Review*: Vol. 28: No. 1, Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol28/iss1/4>

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**SOCIAL MEDIA, THE SIXTH AMENDMENT, AND  
RETYLING:  
RECENT DEVELOPMENTS IN THE FEDERAL LAW OF  
EVIDENCE**

*Deborah Jones Merritt\**

**I. INTRODUCTION**

The Federal Rules of Evidence affect lawsuits of all kinds, as well as the advice that lawyers give clients outside the courtroom. Any lawyer with an interest in the federal courts—or with a client who may one day appear in federal court—must keep abreast with the Federal Rules of Evidence.

What is new in the rules this year? Three developments dominated the federal law of evidence during the last twelve months. First, a fully restyled version of the federal rules took effect on December 1, 2011. The Advisory Committee assiduously avoided substantive changes throughout the restyling project, but the amendments affect language in every one of the Federal Rules.

Second, the Supreme Court further explored the Sixth Amendment's restraints on hearsay evidence offered against criminal defendants. Building on its controversial decision in *Crawford v. Washington*,<sup>1</sup> the Court examined two particularly challenging categories of statements: crime-scene declarations and laboratory reports. Both cases produced split decisions and vigorous dissents, fostering uncertainty in this key area of law.

Finally, social media raised new challenges in courtrooms across the country. Lawyers and their clients can gain surprising

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\* John Deaver Drinko/Baker & Hostetler Chair in Law, Moritz College of Law, The Ohio State University. This article is based on a continuing education seminar delivered in April 2011, but I have updated the material through December 1, 2011—just as the restyled Federal Rules of Evidence are taking effect.

<sup>1</sup> 541 U.S. 36 (2004).

amounts of information about adversaries from social media sites. These practices raise both ethical and evidentiary issues. How freely may lawyers trawl the internet for damaging information about opposing parties, witnesses, and jurors? If lawyers ethically obtain social media evidence, how do they authenticate that information in the courtroom? In this article, I highlight key concerns about each of these issues.

## II. THE RESTYLED RULES OF EVIDENCE

During the fall of 2007, the Advisory Committee on Evidence began a major project to restyle the Federal Rules of Evidence.<sup>2</sup> The project aimed to make the rules more user-friendly by adopting easily readable formats, reducing inconsistent references, replacing ambiguous words, and eliminating redundant or archaic expressions.<sup>3</sup> After four years of work, revisions, and public comment, the restyled rules took effect on December 1, 2011.

Many judges and practitioners view the new rules with mild trepidation. Some fear that the restyling has inadvertently changed the substantive law.<sup>4</sup> Others worry simply that they will have to learn a new vocabulary, eschewing phrases that have permeated the courtroom for decades. Both of these fears are largely unfounded. The Advisory Committee screened all changes carefully to avoid substantive alterations. As a safeguard, the committee appended a note to each rule declaring: “These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.”<sup>5</sup> The committee worked equally hard to maintain all sacred phrases of evidence law. Attorneys will continue arguing about the “truth of the matter asserted”<sup>6</sup> and objecting to

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<sup>2</sup> The Advisory Committee is a standing group that oversees changes in the Federal Rules of Evidence, including the Rules’ most recent restyling. See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 22-23 (Thomson/Reuters 2d ed. 2011) (describing the committee’s role).

<sup>3</sup> REP. OF THE JUDICIAL CONF. COMM. ON RULES OF PRAC. AND PROC. 29 (Sept. 2010) [hereinafter J.C.C. COMM. REP. 2010].

<sup>4</sup> Edward J. Imwinkelried, *Restyled Evidence Rules on Expert Testimony Coming*, NAT’L L. J., Sept. 27, 2011, available at <http://www.nlj.com>. Cf. Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 167 (2006) (describing arguments lawyers could have made to interpret the restyled Federal Rules of Civil Procedure differently).

<sup>5</sup> J.C.C. COMM. REP. 2010, *supra* note 3, at 30; see, e.g., FED. R. EVID. 801 advisory committee’s note.

<sup>6</sup> FED. R. EVID. 801(c)(2) (keeping the quoted language after restyling).

“subsequent remedial measures.”<sup>7</sup>

While avoiding these pitfalls, the restyling project achieved its goal of producing rules that are much easier to understand. Before restyling, for example, Rule 301 required readers to decipher this lengthy sentence:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.<sup>8</sup>

The restyled rule still expresses a complex concept, but is much easier to digest:

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.<sup>9</sup>

Both neophytes and seasoned trial lawyers should find the restyled rules much easier to apply than the older versions.

After closely reviewing the restyled rules, I have identified just two changes that may significantly affect substantive law. Practitioners should also note an intentional amendment to Rule 804(b)(3), the hearsay exception for statements against interest, that took effect in December 2010.<sup>10</sup> I examine each of these changes briefly below.

#### **A. Rule 801(d)(2): Statements of an “Opposing” Party**

The restyling project may have inadvertently altered the scope of Rule 801(d)(2), which creates a hearsay exemption for statements

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<sup>7</sup> FED. R. EVID. 407 (keeping the quoted language after restyling).

<sup>8</sup> FED. R. EVID. 301 (prior to restyling).

<sup>9</sup> FED. R. EVID. 301.

<sup>10</sup> FED. R. EVID. 804(b)(3).

offered against another party.<sup>11</sup> Before restyling, the rule broadly authorized admission of statements made by a party when “offered against a party.” The “against” caveat prevented litigants from introducing their own self-serving hearsay declarations in court. But as long as a statement was offered “against” some party by another party, the rule deemed the out-of-court statement fair game for the jury to consider.

Parties usually invoke Rule 801(d)(2) to introduce a statement made by a party on the other side of the litigation. Plaintiffs offer statements made by defendants, while defendants offer statements uttered by plaintiffs. Occasionally, however, a party has interests adverse to those of a party on the same side of the litigation. For example, criminal defendants in a joint trial may each blame the other.

Before restyling, courts split on the application of Rule 801(d)(2) to these “same side” statements. The First and Sixth Circuits admitted these statements.<sup>12</sup> These courts noted that Rule 801(d)(2) authorized admission of any statement “offered against a party.”<sup>13</sup> The rule’s text did not require parties to sit on opposite sides of the courtroom; it simply required a party to offer a statement “against” another party. These courts also stressed the policies underlying Rule 801(d)(2): Although the exemption “exclude[d] the introduction of self-serving statements by the party making them,” it supported admission of any statements “contrary to a party’s position at trial.”<sup>14</sup> If a party has made damaging statements outside the courtroom, these courts reasoned, any litigant with adverse interests should be able to offer those statements.

The Second and Eleventh Circuits, on the other hand, read Rule 801(d)(2) more narrowly; they barred statements offered against a party on the same side of the litigation.<sup>15</sup> These courts focused on

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<sup>11</sup> FED. R. EVID. 801(d)(2).

<sup>12</sup> *United States v. Horton*, 847 F.2d 313, 324 (6th Cir. 1988); *United States v. Palow*, 777 F.2d 52, 56 (1st Cir. 1985).

<sup>13</sup> *See Horton*, 847 F.2d at 324; *Palow*, 777 F.2d at 56.

<sup>14</sup> *Palow*, 777 F.2d at 56 (citing *Butler v. S. Pac. Co.*, 431 F.2d 77, 80 (5th Cir. 1970)).

<sup>15</sup> *United States v. Harwood*, 998 F.2d 91, 97 (2d Cir. 1993); *United States v. Gossett*, 877 F.2d 901, 906 (11th Cir. 1989); *see also* *United States v. Brown*, No. 08-CR-1009, 2011 WL 43038, at \*12 (N.D. Ill. Jan. 6, 2011) (following *Harwood* and *Gossett* in the face of no contrary authority offered by the defendant); *United States v. Ramirez*, No. 06 CR 809, 2008 WL 4344901, at \*2 (N.D. Ill. Mar. 18, 2008) (following *Harwood* and *Gossett* with no discussion), *aff’d*, 574 F.3d 869 (7th Cir. 2009).

Rule 801(d)(2)'s caption, which referred before restyling to an "Admission by party-opponent."<sup>16</sup> A party on the same side of the litigation, the courts concluded, could not be a "party-opponent."<sup>17</sup> In reaching this result, the courts did not address the broader language in the rule's text or the policies underlying the rule.

Restyled Rule 801(d)(2) alters the terms of this debate, favoring the latter rulings. The Advisory Committee revised the exemption's caption to refer simply to "An Opposing Party's Statement." This was a welcome change, eliminating the confusing reference to an "admission" and simplifying the awkward term "party-opponent." The committee also added the word "opposing" to the first sentence of the rule's text. The hearsay exemption now admits a statement "offered against an opposing party."<sup>18</sup>

The restyled rule's text makes the position of the First and Sixth Circuits more difficult to sustain. This is especially true because the Advisory Committee focused during the restyling project on the distinction between an "adverse party" and an "opposing party." In other rules, the committee purposely chose the terms "party" or "adverse party" to allow objections or evidence from parties on the same side of the litigation.<sup>19</sup>

When the committee reached Rule 801(d)(2), it noted the Second and Eleventh Circuit decisions construing the reference to "party" narrowly.<sup>20</sup> Relying in part on those decisions, the committee concluded that the exemption applied only to statements offered against a party on the other side of the litigation; to clarify this, it added the word "opposing" to the rule's text.<sup>21</sup> The committee, apparently, was unaware of the contrary decisions from the First and Sixth Circuits; this is understandable given the extraordinary number

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<sup>16</sup> FED. R. EVID. 801(d)(2) (prior to restyling).

<sup>17</sup> *Harwood*, 998 F.2d at 97.

<sup>18</sup> FED. R. EVID. 801(d)(2).

<sup>19</sup> See FED. R. EVID. 606(a) (allowing "a party" to object to juror testimony; before restyling, the rule referred to an "opposing party"); FED. R. EVID. 613 (substituting references to an "adverse party" and "adverse party's attorney" for references to "opposite party" and "opposing counsel"); Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules 10 (Sept. 16, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-10.pdf>, at 185.

<sup>20</sup> Memorandum from Daniel Capra, Reporter, to Advisory Committee on Evidence Rules 123-24 (Apr. 1, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2010-04.pdf>, at 193-94.

<sup>21</sup> *Id.*

of legal issues the committee researched during restyling.

The restyled language fully supports precedents in the Second and Eleventh Circuits, but it raises difficult issues outside those circuits. The decisions of the First and Sixth Circuits no longer fit comfortably within the rule's text: Will those courts adhere to their precedents on the ground that the restyling intended to make no substantive changes? In circuits that lack precedent in this area, how will courts decide? The restyled text strongly favors exclusion of statements offered against a party on the same side of the litigation, because courts usually do not deem those parties "opposing." On the other hand, proponents of these statements may cite the older rule language, persuasive authority from the First and Sixth Circuits, and the advisory committee note disclaiming any intent to alter the rule's substance. The restyling of this rule, in sum, may generate substantive controversy.<sup>22</sup>

#### **B. Rule 1101(d): When Do the Rules of Evidence Apply?**

Restyling may also have changed the substance of Rule 1101, which defines when and where the Rules of Evidence apply.<sup>23</sup> Sections (a) and (b) of that rule provide that the rules of evidence apply broadly to "cases and proceedings" in federal courts, but section (d) recognizes a number of situations in which the bulk of the rules do *not* apply. The privilege rules bind these section (d) proceedings,<sup>24</sup> but the other evidentiary rules do not. In hearings governed by Rule 1101(d), the decision maker may consider hearsay, character evidence, and other information barred by the rules of

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<sup>22</sup> FED. R. EVID. 801(d)(2). Some litigants may try to avoid this controversy by offering the statement under Rule 804(b)(3), the hearsay exception for statements against interest. FED. R. EVID. 804(b)(3). But this path is available only if the declarant is unavailable. *Id.* In criminal cases, moreover, the statement's proponent must demonstrate "corroborating circumstances that clearly indicate [the statement's] trustworthiness" if the statement incriminates the declarant. *Id.* These requirements are considerably harder to meet than the simple standard of Rule 801(d)(2). Indeed, *Harwood* and *Gossett*—the cases adopting a narrow interpretation of 801(d)(2)—also rejected admission of the statements under Rule 804(b)(3). *Harwood*, 998 F.2d at 98; *Gossett*, 877 F.2d at 906.

<sup>23</sup> FED. R. EVID. 1101. Rule 101 declares the rules' general application "to proceedings in United States courts," but the restyling shifted all scope details to Rule 1101. FED. R. EVID. 101(a); FED. R. EVID. 1101.

<sup>24</sup> See FED. R. EVID. 1101(c) ("The rules on privilege apply to all stages of a case or proceeding."); FED. R. EVID. 1101(d) ("These rules – except for those on privilege – do not apply to the following . . .").

evidence.

Section (d) opens by naming grand jury hearings and a trial judge's Rule 104(a) determinations as situations in which the evidentiary rules do not apply.<sup>25</sup> Provision (3) of section (d) then refers to a series of "miscellaneous proceedings" that similarly fall outside the rules. Before the restyling, section (d) of Rule 1101 read:

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.<sup>26</sup>

The language and format of the section suggested that the listed proceedings—including the specified "miscellaneous proceedings"—were exhaustive rather than illustrative. Except for the final two words of Rule 1101(d)(3), which modified only "release on bail," the rule's language offered no hint that the list was illustrative. It appeared, instead, to offer a complete list of hearings in which the rules did not apply. Policy concerns, furthermore, counseled a conservative interpretation of Rule 1101(d)'s exceptions: Since the Rules of Evidence are designed to promote the fair administration of

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<sup>25</sup> Under Rule 104(a), the judge makes factual determinations related to the admissibility of evidence. FED. R. EVID. 104(a). A judge, for example, may decide whether a statement was sufficiently excited to qualify for the excited utterance exception to the rule against hearsay.

<sup>26</sup> FED. R. EVID. 1101(d) (prior to restyling).

justice,<sup>27</sup> judges should hesitate to hold hearings outside the scope of those rules.

Before restyling, several courts embraced these reasons and construed Rule 1101(d) as an exhaustive list. The Ninth Circuit, for example, observed that “motion to suppress evidence proceedings are not enumerated in the exceptions to Rule 1101(b).”<sup>28</sup> “Therefore,” the court concluded, “the Federal Rules of Evidence are applicable to motion to suppress hearings.”<sup>29</sup> In a different context, a district court agreed that, “The federal rules make themselves applicable except as specifically exempted.”<sup>30</sup> Yet another stressed that Rule 1101(d)(3) should be “read . . . narrowly” and applied the federal rules to a bond forfeiture hearing.<sup>31</sup> Because they read Rule 1101(d)’s exceptions as an exclusive list, these courts applied the federal rules to any proceedings that did not appear on the list.

At the same time, however, numerous courts interpreted Rule 1101(d) more expansively. Some courts reached this result deliberately, examining the rule and concluding that section (d) was not an exhaustive list. One court in this camp buttressed its reasoning by pointing to Rule 1101(b), which stated before the restyling that the “rules apply generally to civil actions and proceedings, . . . to criminal cases and proceedings, to contempt proceedings . . . , and to [bankruptcy] proceedings and cases . . . .”<sup>32</sup> The word “generally,” this court suggested, signaled that the rules did not apply strictly to

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<sup>27</sup> FED. R. EVID. 102 (“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>28</sup> *United States v. Brewer*, 947 F.2d 404, 408 (9th Cir. 1991).

<sup>29</sup> *Id.* See also *id.* at 410 (“We . . . conclude that the Federal Rules of Evidence apply in pretrial suppression proceedings pursuant to Rule 1101(d) because such evidentiary hearings are not expressly excluded under Rule 1101(d)(2) and Rule 1101(d)(3).”). The court suggested that its holding might be limited to “a procedural rule” rather than a rule “affecting the type of evidence that can be considered.” *Id.* This caveat, however, rested in part on the court’s confusion between motions to suppress and preliminary determinations governed by Rule 104.

<sup>30</sup> *United States v. Veon*, 538 F. Supp. 237, 249 (E.D. Cal. 1982) (applying the rules to a hearing on a criminal forfeiture restraining order).

<sup>31</sup> *United States v. Vaccaro*, 719 F. Supp. 1510, 1515-16 (D. Nev. 1989) (applying the rules to a hearing on bond forfeiture); see also *United States v. Honken*, 378 F. Supp. 2d 1010, 1023 (N.D. Iowa 2004) (confirming that the language at the end of subsection (d) “does not create a ‘catchall’ category of ‘miscellaneous proceedings’ to which the Rules of Evidence do not apply. Rather, that language modifies only conditions of release . . . .”); *id.* at 1018 (applying rules to hearing about whether to shackle defendant charged with capital murder).

<sup>32</sup> FED. R. EVID. 1101(b) (prior to restyling).

every courtroom proceeding.<sup>33</sup> Rule 1101(d)'s list, following 1101(b)'s "generally" caveat, could be read as illustrative.

These courts also cited policy concerns to support an expansive construction of the exceptions in Rule 1101(d). That section, for example, does not list hearings on the fairness of a proposed class action settlement; a strict construction of the rule would require courts to apply the full rules of evidence to those hearings.<sup>34</sup> But imposing hearsay and other restrictions on fairness hearings might require courts "to conduct a full trial in order to avoid one."<sup>35</sup> As one district court judge observed in refusing to construe 1101(d) narrowly in that context, "[T]he very point of compromise is to avoid determining sharply contested issues and the waste and expense of litigation."<sup>36</sup> Affirming that result, the Sixth Circuit declared, "[N]o court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement."<sup>37</sup>

In addition to these decisions, courts declined before restyling to apply the evidentiary rules to a variety of proceedings without directly considering the impact of Rule 1101(d). Many courts, for example, applied the evidentiary rules loosely in class action fairness hearings, accepting affidavits and other hearsay evidence, without noting the possible impact of Rule 1101(d).<sup>38</sup> These decisions, in both fairness hearings and other contexts, prompted the authors of a prominent treatise to conclude: "Subdivision (d) is not a complete list of the situations in which the Evidence Rules are inapplicable."<sup>39</sup>

During restyling, the Advisory Committee thus faced an

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<sup>33</sup> *UAW v. General Motors Corp.*, 235 F.R.D. 383, 386-87 (E.D. Mich. 2006), *aff'd*, 497 F.3d 615 (6th Cir. 2007).

<sup>34</sup> *See Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) ("Fairness hearings . . . are not among the proceedings excepted from the Rules of Evidence. No case of which we are aware holds that Rule 1101(d) suspends the usual rules of evidence for fairness hearings; no case expressly holds that affidavits are admissible in such hearings . . .") (dictum).

<sup>35</sup> *Handschu v. Special Servs. Div.*, 787 F.2d 828, 834 (2d Cir. 1986).

<sup>36</sup> *UAW*, 235 F.R.D. at 385.

<sup>37</sup> *Int'l Union v. Gen. Motors Corp.*, 497 F.3d 615, 636 (6th Cir. 2007).

<sup>38</sup> *Mars Steel Corp.*, 880 F.2d at 938 ("[S]everal cases mention [the use of affidavits in fairness hearings] without deciding the propriety of that use."); *UAW*, 235 F.R.D. at 387 ("Historically, courts have commonly relied on affidavits, declarations, arguments made by counsel, and other materials" in class action fairness hearings.).

<sup>39</sup> CHARLES ALAN WRIGHT ET AL., 31 FEDERAL PRACTICE & PROCEDURE § 8077 (Thompson/West ed. 2011).

unusual situation. Rule 1101(d)'s text seemed to create an exclusive list of proceedings exempt from the Federal Rules of Evidence, yet numerous courts had read the list as simply illustrative. The committee's Reporter advised: "It would seem useful to let the practitioner know that the rule is not exclusive."<sup>40</sup> The Reporter suggested, and the committee approved, adding the introductory phrase "such as" to the list of miscellaneous proceedings in Rule 1101(d)(3).<sup>41</sup> This addition changed the subsection to an illustrative list.<sup>42</sup>

In recommending this change, the Reporter reasoned that adding "such as" was "not a substantive change because it simply recognizes, and does not attempt to change, the substantive law."<sup>43</sup> The Reporter and committee may not have known about the judicial opinions construing Rule 1101(d)(3) more narrowly. Alternatively, they may have concluded that those decisions were not authoritative. Whatever the committee discussion, the restyled rule shifts the terms of a debate that was percolating in some courts. Rule 1101(d)(3) now clearly allows judges to contract the proceedings in which the full evidentiary rules apply. On the other hand, parties resisting that trend may cite the former rule's language and precedents predating the restyling; the committee's intent to avoid any substantive change gives life to those arguments. As with the shift in Rule 801(d)(2), the restyling of Rule 1101(d)(3) may provoke some controversy in the courts.

### C. Rule 804(b)(3): Corroboration for Some Statements Against Interest

Rule 804(b)(3), the hearsay exception for statements against interest, deserves special mention here. The Advisory Committee proposed a substantive change in this rule while it was engaged in the broader restyling project. The change was not a byproduct of

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<sup>40</sup> Memorandum from Daniel Capra, Reporter, to Advisory Committee on Evidence Rules 76 (Apr. 23-24, 2009), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2009-04.pdf>, at 171 [hereinafter Memorandum from Daniel Capra, Apr. 2009].

<sup>41</sup> *Id.*

<sup>42</sup> The relevant portion of the section now reads: "These rules – except for those on privilege – do not apply to the following: . . . miscellaneous proceedings such as . . ." FED. R. EVID. 1101(d)(3).

<sup>43</sup> Memorandum from Daniel Capra, Apr. 2009, *supra* note 40, at 171.

restyling; it rested on independent grounds and received separate public comment and review. Since the amendment took effect in December 2010, however, it has been overshadowed by the restyling project. The amendment merits attention as one of the notable changes of the last year.

Rule 804(b)(3) admits hearsay statements that:

a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability . . . .<sup>44</sup>

Until December 2010, a final sentence of the rule limited a criminal defendant's ability to invoke the exception. A criminal defendant could exculpate himself by offering a hearsay statement that exposed the third-party declarant to criminal liability—i.e., a statement against penal interest—only if “corroborating circumstances clearly indicate[d] the trustworthiness” of the statement.<sup>45</sup>

The rule imposed this limit to prevent abuses by criminal defendants.<sup>46</sup> The Department of Justice and Congress feared that defendants might coax friends or family members to claim credit for the defendant's crime.<sup>47</sup> An ally would run little risk of prosecution if he was, in fact, innocent, if no other evidence linked him to the crime, and if he avoided making the false confession under oath. The guilty defendant, meanwhile, could use the ally's “statement against interest” to create reasonable doubt about his own guilt. To avoid this manipulation, Rule 804(b)(3) imposed a special corroboration requirement on criminal defendants.<sup>48</sup>

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<sup>44</sup> FED. R. EVID. 804(b)(3)(A).

<sup>45</sup> FED. R. EVID. 804(b)(3) (prior to restyling). Note that the corroboration requirement only applied to statements that “expose[d] the declarant to criminal liability.” FED. R. EVID. 804(b)(3)(A). Rule 804(b)(3) authorizes admission of statements against other types of interest but those statements do not require corroboration—even in criminal cases.

<sup>46</sup> See FED. R. EVID. 804 advisory committee's note (indicating that “statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness”).

<sup>47</sup> For discussion of Rule 804(b)(3)'s legislative history, see Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981).

<sup>48</sup> See FED. R. EVID. 804(b)(3) (prior to restyling).

The 2010 amendment preserved this requirement, but extended it to statements against penal interest offered by *prosecution* witnesses.<sup>49</sup> Numerous courts had reached this result before 2010, finding the one-way corroboration requirement unfair, inconsistent with other rules, and possibly unconstitutional.<sup>50</sup> The Advisory Committee proposed amending the rule to extend the corroboration requirement to the prosecution and, despite earlier struggles over this change, the 2009 proposal took effect without opposition.<sup>51</sup> Since December 1, 2010, prosecutors have had to show “corroborating circumstances that clearly indicate [the] trustworthiness” of statements against penal interest when those statements are offered under Rule 804(b)(3).<sup>52</sup> The change, however, does not affect civil cases.

### III. THE CONFRONTATION CLAUSE

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>53</sup> The Confrontation Clause thus restricts the prosecution’s power to offer hearsay evidence against criminal defendants. Read literally, in fact, the clause seems to forbid *all* hearsay statements by declarants who fail to appear in the courtroom. How can a defendant confront a witness who is not present at trial? Yet some types of hearsay, such as business records compiled independent of any criminal investigation, do not seem to threaten the harms that the Sixth Amendment was designed to avoid.<sup>54</sup>

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<sup>49</sup> FED. R. EVID. 804(b)(3)(B) advisory committee’s note.

<sup>50</sup> See, e.g., *United States v. Franklin*, 415 F.3d 537, 547 (6th Cir. 2005) (relying upon Confrontation Clause); *United States v. Barone*, 114 F.3d 1284, 1300 n.10 (1st Cir. 1997) (summarizing cases); *United States v. Alvarez*, 584 F.2d 694, 699-702 (5th Cir. 1978) (discussing legislative history of the exception and relying upon the Confrontation Clause). For an excellent overview of these developments, see Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409 (2005).

<sup>51</sup> See REP. OF THE JUDICIAL CONF. COMM. ON RULES OF PRAC. AND PROC. 29 (Sept. 2009) [hereinafter J.C.C. COMM. REP. 2009]. (noting that public hearings on the proposed amendment “were canceled because no one asked to testify” and that “[t]he Department of Justice does not oppose the amendments”). For discussion of the difficulties confronting earlier attempts to amend Rule 804(b)(3), see Capra, *supra* note 50.

<sup>52</sup> FED. R. EVID. 804(3)(B).

<sup>53</sup> U.S. CONST. amend. VI.

<sup>54</sup> For further discussion of this concept, see MERRITT & SIMMONS, *supra* note 2, at 699-

The Supreme Court has struggled for more than thirty years to draw a manageable line between hearsay that violates a defendant's confrontation rights and hearsay that accords with those rights.<sup>55</sup> The Court's current formula stems from its 2004 decision, *Crawford v. Washington*.<sup>56</sup> In that case and its immediate progeny, the Court held that: (1) The Sixth Amendment gives criminal defendants a right to cross-examine witnesses who make statements against them, but (2) that right applies only to "testimonial" statements.<sup>57</sup> The Court, in other words, interpreted the Sixth Amendment to read: "In all criminal prosecutions, the accused shall enjoy the right . . . to cross-examine witnesses who make testimonial statements against him." Nontestimonial statements do not raise any Sixth Amendment concerns.<sup>58</sup> Testimonial statements, on the other hand, are admissible only if (a) the defendant has an opportunity to cross-examine the declarant at trial or (b) the declarant has become unavailable, and the defendant had an adequate prior opportunity to cross-examine that declarant.<sup>59</sup>

Under this formula, the admissibility of hearsay statements against criminal defendants depends primarily on whether a statement was "testimonial." A half dozen Supreme Court opinions—and hundreds of lower court ones—have grappled with this issue. In

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700. Much of the discussion in this section of the article appears in chapter 58 of that book.

<sup>55</sup> Near the beginning of this journey, the Court wrote:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay . . . ; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

*Dutton v. Evans*, 400 U.S. 74, 81-82 (1970). The Court has replaced *Dutton*'s approach with the *Crawford* standard discussed in text, but the difficulties remain the same. *Id.*

<sup>56</sup> 541 U.S. 36 (2004).

<sup>57</sup> *Id.* at 51; *Davis v. Washington*, 547 U.S. 813, 821-23 (2006).

<sup>58</sup> *Davis*, 547 U.S. at 823-24. *But see* *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 n.13 (2011) ("Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. . . . [T]he Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.").

<sup>59</sup> *See Davis*, 547 U.S. at 821; *Crawford*, 541 U.S. at 53-54; *cf. Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding that the prosecution must make a good faith effort to secure a witness's attendance; it cannot simply declare that the witness is unavailable).

2011, the Supreme Court issued two important new decisions in its *Crawford* series: *Michigan v. Bryant*<sup>60</sup> and *Bullcoming v. New Mexico*.<sup>61</sup>

### A. *Michigan v. Bryant*

The Court's most provocative Sixth Amendment case of the year, *Michigan v. Bryant*, addressed the troubling question of crime-scene statements. Detroit police received a call that a man had been shot and was lying in a gas station parking lot. The officers found the victim, Anthony Covington, seriously injured and in severe pain. As the officers arrived at the scene, they each asked Covington "what had happened, who had shot him, and where the shooting had occurred."<sup>62</sup> Covington explained that "Rick" had shot him about twenty-five minutes earlier through the door of a house located several blocks away.<sup>63</sup> Covington also described how he used his car to drive to the gas station after the shooting.

The officers spoke only briefly to Covington; ambulance workers arrived and Covington died several hours later at the hospital. The police used Covington's information to locate the original crime scene and gather circumstantial evidence tying Richard Bryant to the murder.<sup>64</sup> Even with that evidence, Covington's hearsay statements remained crucial to the prosecution; without those words, the jury probably would not have convicted Bryant.<sup>65</sup>

Bryant's attorney argued that Covington's statement was testimonial so that its admission violated the Sixth Amendment. But the Supreme Court, in an opinion written by Justice Sotomayor, rejected Bryant's claim. Following its earlier decision in *Davis v. Washington*,<sup>66</sup> the Court held that a statement is testimonial only if its

<sup>60</sup> 131 S. Ct. 1143 (2011).

<sup>61</sup> 131 S. Ct. 2705 (2011).

<sup>62</sup> *Bryant*, 131 S. Ct. at 1150.

<sup>63</sup> *Id.*

<sup>64</sup> Police, for example, found blood and a bullet on Bryant's back porch. They also found "an apparent bullet hole in the back door," and Covington's wallet lying outside the house. *Id.*

<sup>65</sup> See *People v. Bryant*, 768 N.W.2d 65, 76 (Mich. 2009) ("[I]n our judgment, [admission of Covington's statement] clearly prejudiced defendant. The evidence against [Bryant] was far from overwhelming and the victim's statement indicating that defendant was the one who shot him was obviously extraordinarily damaging. . . . Further evidence . . . is the fact that defendant's first trial resulted in a hung jury."), *vacated*, 131 S. Ct. 1143 (2011).

<sup>66</sup> 547 U.S. 813 (2006).

“ ‘primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.’ ”<sup>67</sup> If a statement has another primary purpose, such as “ ‘to enable police assistance to meet an ongoing emergency,’ ” then the statement is nontestimonial.<sup>68</sup> The Court stressed that the primary-purpose test is an objective one focusing on what a reasonable person would have believed under the circumstances.<sup>69</sup> In *Bryant*, the Court added a new clarification: The judge must consider the perspectives of both the declarant and any other participant in the exchange when construing the statement’s purpose.<sup>70</sup>

Applying this formula to Covington’s statement, the Court concluded that the primary purpose of the police questioning was to address an ongoing emergency. When the police arrived at the scene, they did not know that the shooting had occurred earlier at a different place; they questioned Covington in part to determine the degree of immediate danger. The questioning was “disorganized,” and “the situation was fluid and somewhat confused.”<sup>71</sup> Covington himself was mortally injured and had difficulty speaking; the circumstances did not allow him to offer the type of “deliberately recounted” statements that were found testimonial in earlier cases.<sup>72</sup> For these reasons, the Court held that Covington’s statement was not testimonial.

Justice Scalia delivered a scathing dissent, denouncing the Court as the “obfuscator of last resort” and declaring that the majority opinion “distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”<sup>73</sup> Scalia further accused the majority of intending to overrule *Crawford* “by a thousand unprincipled distinctions.”<sup>74</sup>

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<sup>67</sup> *Bryant*, 131 S. Ct. at 1154 (quoting *Davis*, 547 U.S. at 822).

<sup>68</sup> *Id.* at 1150 (quoting *Davis*, 547 U.S. at 822).

<sup>69</sup> *Id.* at 1156 (“[T]he relevant inquiry is . . . the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”).

<sup>70</sup> *Id.* at 1160-62. As the Court conceded, previous rulings on this issue had been—at best—ambiguous. *Id.* at 1160 n.11.

<sup>71</sup> *Bryant*, 131 S. Ct. at 1160, 1166.

<sup>72</sup> *Id.* at 1154 (quoting *Davis*, 547 U.S. at 830). Although Covington was mortally wounded, the prosecutor abandoned any reliance on the “dying declaration” exception in the lower courts; therefore, the Court did not consider whether the Sixth Amendment recognized a special exception for testimonial statements fitting that exception. *See id.* at 1151 n.1; *id.* at 1176, 1177 (Ginsburg, J., dissenting).

<sup>73</sup> *Id.* at 1168 (Scalia, J., dissenting).

<sup>74</sup> *Bryant*, 131 S. Ct. at 1175.

Some commentators have sounded the same alarm, characterizing *Bryant* as a significant retreat from *Crawford*'s principles.<sup>75</sup>

Several Justices undoubtedly are hostile to *Crawford*; over time, the decision may succumb to their efforts. But *Bryant* itself does not sound *Crawford*'s death knell. Despite the case's dramatic facts, it builds upon the Court's earlier rulings. In *Davis v. Washington*, the Court approved admission of key information gathered by a 911 operator *after* the operator had already ascertained the victim's circumstances and dispatched police assistance. The victim had reported her location and assured the operator that her assailant was unarmed.<sup>76</sup> The operator responded, "Okay, sweetie. I've got help started," and then asked the victim for the assailant's full name—including his middle initial.<sup>77</sup> The victim provided that information and when she failed to testify at trial, the state offered the transcript of the 911 identification.

The Court in *Davis* found that the police needed the perpetrator's identity so that they could determine whether he was a violent felon; that information would help them better respond to the emergency.<sup>78</sup> That justification undoubtedly is true: Knowing an assailant's identity helps the police tailor their response to an ongoing threat. But the information also provides critical evidence to convict at trial. *Davis*, decided five years before *Bryant*, had already entered the murky waters of admitting victim identification statements gathered (1) while the victim was suffering distress, (2) through affirmative requests from law enforcement agents, and (3) during the initial stages of police response to an emergency call.

*Bryant* certainly expands the circle of statements admissible under the Sixth Amendment: Several officers questioned Covington, and they continued their examination after Covington indicated that the assault had occurred several blocks away. The decision gives

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<sup>75</sup> See, e.g., Kenneth W. Graham, Jr., *Michigan v. Bryant: The Counter-Revolution Begins* 1, 1 (UCLA School of Law Research Paper No. 11-07, 2011), available at <http://escholarship.org/uc/item/5965p8g3#> ("[T]he majority of the court . . . effectively overruled *Crawford* . . ."); Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, THE CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html> ("The approach that emerges is remarkably mushy, unjustified by any sound reasoning and virtually incoherent. . . . [T]his decision strikes me as a giant step backwards towards a morass like that of *Ohio v. Roberts* . . .").

<sup>76</sup> *Davis*, 547 U.S. at 817.

<sup>77</sup> *Id.* at 817-18.

<sup>78</sup> *Id.* at 827.

police significant freedom to stabilize a crime scene while also gathering evidence for trial. *Bryant*, however, may mark the outer limits of police freedom rather than a turning point in Sixth Amendment law. A recent New York decision suggests that at least some courts will refuse to expand state power beyond *Bryant*. On facts quite similar to the ones in *Bryant*, the court held that a dying victim's identification of his assailant was testimonial because a police officer pushed for the response.<sup>79</sup> After the victim failed to answer initial inquiries, the officer told him: "I don't think you're going to make it. Who shot you?"<sup>80</sup> The next few years will tell whether other courts impose similar limits on *Bryant*.

### B. *Bullcoming v. New Mexico*

The Supreme Court's second Sixth Amendment opinion of 2011, *Bullcoming v. New Mexico*,<sup>81</sup> addressed the admissibility of laboratory reports prepared for use in criminal prosecutions. Just two years ago, in *Melendez-Diaz v. Massachusetts*,<sup>82</sup> the Court held that these reports are testimonial. The report in *Melendez-Diaz* was an affidavit describing the composition and weight of an illegal substance seized from the defendant. The Sixth Amendment, the Court ruled, gave the defendant a right to cross-examine the laboratory technician who prepared the report; the state could not introduce the bare report unless the defendant waived his confrontation rights.

In this year's case, *Bullcoming*, the Court first confirmed the testimonial status of laboratory reports prepared as part of a criminal investigation.<sup>83</sup> The Court then rebuffed the state's attempt to send a surrogate witness—someone with no connection to the original analysis—to testify at trial. The majority held that testimony from "an analyst who did not sign the certification or personally perform

<sup>79</sup> *People v. Clay*, 926 N.Y.S.2d 598 (App. Div. 2011).

<sup>80</sup> *Id.* at 600. The court nonetheless admitted the statement as a dying declaration, finding that the Sixth Amendment created a "founding era" exception for testimonial statements fitting that exception. *Id.* at 608. The record in *Bryant*, unfortunately, prevented the Supreme Court from pursuing this possible ground of decision. *Bryant*, 131 S. Ct. at 1151 n.1. The result in *Clay* suggests that lower courts might interpret *Bryant* as a decision strongly influenced by the dying-declaration exception and that they might limit the precedent accordingly. See *Clay*, 926 N.Y.S.2d at 608.

<sup>81</sup> 131 S. Ct. 2705 (2011).

<sup>82</sup> 129 S. Ct. 2527 (2009).

<sup>83</sup> 131 S. Ct. at 2709.

or observe the performance of the [reported] test” could not satisfy the defendant’s confrontation rights.<sup>84</sup>

*Bullcoming* signals the continued vitality of *Crawford*—at least until the Court speaks again. The opinion also affirms application of the Sixth Amendment to laboratory reports, a common category of evidence in criminal prosecutions. The decision, however, also highlights several open issues related to those reports. Justice Sotomayor, whose vote was necessary to support the majority, noted that *Bullcoming* did not involve testimony from a “supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test” documented in the report.<sup>85</sup> Justice Sotomayor signaled that she might accept testimony from any of these witnesses to satisfy the Confrontation Clause.<sup>86</sup>

More important, Justice Sotomayor observed that *Bullcoming* raised none of the special evidentiary rules that govern testimony by expert witnesses.<sup>87</sup> Rule 703 allows any expert witness to base an opinion on inadmissible evidence—as long as “experts in the field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”<sup>88</sup> Justice Sotomayor’s observation thus suggests that, rather than introduce lab reports directly in criminal cases, prosecutors might rely upon expert witnesses to offer opinions related to matters addressed in the reports. Few laboratory scientists work in isolation; most of them rely upon the work of other scientists when drawing conclusions. Under Rule 703, therefore, a laboratory supervisor or other witness might be able to offer an expert opinion about matters reflected in another scientist’s laboratory report. The result, however, seems to violate the confrontation principles articulated in *Crawford*.<sup>89</sup>

The Supreme Court will address this conflict during the current Term. It has granted certiorari in *People v. Williams*,<sup>90</sup> an

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<sup>84</sup> *Id.* at 2713.

<sup>85</sup> *Id.* at 2719, 2722 (Sotomayor, J., concurring in part).

<sup>86</sup> *Id.* (“It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.”).

<sup>87</sup> *Id.* (“We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”).

<sup>88</sup> FED. R. EVID. 703.

<sup>89</sup> For further discussion of this conflict, see MERRITT & SIMMONS, *supra* note 2, at 794-97.

<sup>90</sup> 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011).

Illinois decision reviewing an expert's use of DNA laboratory reports. The case will be decided by June 2012, so the coming year undoubtedly will bring still more Sixth Amendment developments.

#### IV. SOCIAL MEDIA EVIDENCE

Trial evidence reflects the world outside the courtroom. In the nineteenth century, litigants relied upon paper documents and memories of oral discussions; in the twentieth, they introduced audiotapes of telephone conversations and videotapes from surveillance cameras. All of those types of evidence are still with us, but the twenty-first century has added emails, web pages, text messages, and other electronic media. The courts have already adapted evidentiary rules to many of those media,<sup>91</sup> but new challenges arise each year. I focus here on some of the issues generated by the newest wave of electronic communications: social media.

Social media sites generate an enormous number of communications. Facebook today claims more than 800 million users worldwide; in one day, the site hosted visits by more than 500 million of those users.<sup>92</sup> Twitter enjoys "100 million active users," who produce over 200 million tweets per day.<sup>93</sup> And the internet hosts more than 174 million blogs, with more than 120,000 blogs added daily.<sup>94</sup>

The sheer number of social media messages has made those communications an important force in the courtroom.<sup>95</sup> In addition to the abundance of social media messages, four other factors have

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<sup>91</sup> See, e.g., *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (offering a comprehensive overview of treatment of electronic media under the Federal Rules of Evidence).

<sup>92</sup> *Facebook F8: Redesigning and Hitting 800 Million*, L.A. TIMES, Sept. 22, 2011, <http://latimesblogs.latimes.com/technology/2011/09/facebook-f8-media-features.html>.

<sup>93</sup> *Twitter Reaches 100 Million Active Users*, N.Y. TIMES, Sept. 8, 2011, <http://latimesblogs.latimes.com/technology/2011/09/facebook-f8-media-features.html>.

<sup>94</sup> See *BlogPulse Stats*, BLOGPULSE, <http://www.blogpulse.com/> (last visited Oct. 16, 2011).

<sup>95</sup> See Peter S. Kozinets & Aaron J. Lockwood, *Discovery in the Age of Facebook*, 47 ARIZ. ATT'Y 42, July/August 2011, at 43 ("Social networking sites . . . have become an increasingly useful source of evidence in litigation."); Leita Walker & Joel Schroeder, *Eureka! Discovering (and Using) Social Media in Litigation*, CORP. COUNS., March 7, 2011; Walker & Schroeder, *Making Your Case with Social Media in Litigation*, INTERNET L. & STRATEGY, Apr. 1, 2011, at 2 (noting wide range of cases in which social media evidence may be useful).

made these statements particularly significant items of courtroom evidence. First, users of social media are surprisingly indiscrete. Members of online communities have revealed their sadomasochism and illegal drug use,<sup>96</sup> violation of probation terms,<sup>97</sup> possession of stolen loot,<sup>98</sup> and other incriminating facts. These statements bear on a wide range of civil and criminal claims.

Second, social media statements are easy to find: The messages reach wide audiences and they persist. People have always said outrageous things, but they whispered those things to a small circle of friends or family. Today, electronic tracks remain long after human memories of a statement have faded.<sup>99</sup> For litigants who know where to look, electronic trails lead to juicy admissions by opposing parties.<sup>100</sup>

Third, many of these statements are easy to admit into evidence. Although social media communications are out-of-court statements qualifying as hearsay, Rule 801(d)(2) creates an exemption for statements “offered against an opposing party.”<sup>101</sup> If a litigant made the out-of-court statement and another party introduces the statement against that litigant, the rule against hearsay imposes few obstacles.<sup>102</sup> Even if a non-party made the statement, social

<sup>96</sup> See, e.g., *Dexter v. Dexter*, No. 2006-P-0051, 2007 WL 1532084, at \*1, \*6 (Ohio Ct. App. May 25, 2007).

<sup>97</sup> *State v. Pressley*, No. 1CA-CR-08-0160, 2009 WL 2343139, at \*1 (Ariz. Ct. App. July 30, 2009). Ironically, one term of probation was refraining from internet use without advance written permission. *Id.*

<sup>98</sup> *Dumb Crooks Boast on Facebook, Busted*, HINDUSTAN TIMES, Nov. 22, 2010, <http://www.hindustantimes.com/Cops-use-Facebook-to-nab-dumb-crooks/Article1-629487.aspx>. See generally Kozinets & Lockwood, *supra* note 95, at 43 (“Many users of these popular sites catalogue their lives with surprising honesty and detail, without regard for the possible legal ramifications of their posts.”).

<sup>99</sup> See, e.g., Walker & Schroeder, *Making Your Case with Social Media in Litigation*, *supra* note 95, at 1 (“The internet’s not written in pencil[;] . . . [i]t’s written in ink.” (quoting THE SOCIAL NETWORK (Columbia Pictures 2010))); Nicolas P. Terry, *Physicians and Patients Who “Friend” or “Tweet”: Constructing a Legal Frame-work for Social Networking in a Highly Regulated Domain*, 43 IND. L. REV. 285, 298 (2010) (noting the persistence of content even when deleted by the original author).

<sup>100</sup> See, e.g., Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 374 (2010) (“Facebook can be a treasure trove of information, not only for those with whom users intend to share, but also with outside entities, like employers and even legal authorities.”).

<sup>101</sup> FED. R. EVID. 801(d)(2).

<sup>102</sup> One exception occurs when a party attempts to introduce a statement against another party on the same side of the litigation. See *supra* Part II(A) for discussion of recent developments on this issue.

media messages may qualify as excited utterances,<sup>103</sup> present sense impressions,<sup>104</sup> then-existing mental states,<sup>105</sup> or another type of admissible hearsay.<sup>106</sup>

Finally, social media evidence carries special weight in the courtroom because jurors take notice when one party catches another “in the act.” Seeing is believing, and social media evidence can dramatically illustrate guilt or liability. Facebook photos, YouTube videos, and other social media allow the jury to witness directly an unfaithful spouse’s romantic weekend, a defendant’s malicious prank, or a personal injury plaintiff’s malingering.<sup>107</sup>

Facebook’s primary founder, ironically, may have suffered from “gotcha” evidence of this type. Mark Zuckerberg and Facebook faced several lawsuits from people who claimed to have partial ownership of the company.<sup>108</sup> According to the movie *The Social Network*,<sup>109</sup> a somewhat fictionalized version of the Facebook story, Zuckerberg’s opponents planned to introduce evidence of offensive blog comments that Zuckerberg posted during college; in that blog, Zuckerberg compared some of his classmates to farm animals.<sup>110</sup> Since the blog comments related to one of Facebook’s predecessors, the comments might have been admissible in court. Their brashness surely would have offended a jury; one of the lawyers in *The Social Network* suggests that Zuckerberg paid a premium to settle the lawsuits because of his indiscrete blogging.<sup>111</sup>

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<sup>103</sup> See FED. R. EVID. 803(2).

<sup>104</sup> See FED. R. EVID. 803(1).

<sup>105</sup> See FED. R. EVID. 803(3).

<sup>106</sup> Note, however, that many social media messages contain statements by people other than the message’s author. These third-party statements constitute hearsay within hearsay, complicating admissibility. See FED. R. EVID. 805 (stating that hearsay within hearsay is admissible only “if each part of the combined statements conforms with an exception to the rule”).

<sup>107</sup> See also Thomas C. Frongillo & Daniel K. Gelb, *It’s Time to Level the Playing Field—The Defense’s Use of Evidence from Social Networking Sites*, 34 CHAMPION 14 (August 2010) (Noting that “in a murder case, a Michigan appellate court upheld the trial court’s admission of photos of the defendant from his MySpace page in which he was holding a gun and displaying a gang sign”).

<sup>108</sup> See, e.g., Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034 (9th Cir. 2011); ConnectU LLC v. Zuckerberg, 482 F. Supp. 2d 3 (D. Mass. 2007), *rev’d*, 522 F.3d 82 (1st Cir. 2008).

<sup>109</sup> THE SOCIAL NETWORK (Columbia Pictures 2010).

<sup>110</sup> Mark Zuckerberg’s Online Diary, Oct. 28, 2003, available at <http://www.scribd.com/doc/538697/Mark-Zuckerbergs-Online-Diary> (last visited Oct. 18, 2011).

<sup>111</sup> THE SOCIAL NETWORK (Columbia Pictures 2010).

Less famous litigants have left even more damaging (although perhaps less expensive) social media trails.<sup>112</sup> Parties who pursue those trails, however, must understand both the ethical constraints on gathering online evidence and the rules for authenticating that evidence in the courtroom. In this section, I briefly explore both of these matters.<sup>113</sup>

### A. Professional Responsibility When Gathering Social Media Evidence

Litigants and their attorneys have long gathered evidence outside formal discovery channels. Ethically, lawyers are free to scout public venues for acts and statements that may benefit a client in court.<sup>114</sup> Attorneys may also hire detectives to do that work.<sup>115</sup> If a personal injury plaintiff plays tennis at a public park, the defendant's lawyer and agents are free to capture that action on film. The same ethical rules apply to the online world: Litigants and their attorneys may scour data posted publicly on the internet for information that might be useful in court.<sup>116</sup>

Damaging information is surprisingly easy to find on public

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<sup>112</sup> See, e.g., *State v. Bell*, No. CA2008-05-044, 2009 WL 1395857, at \*3 (Ohio Ct. App. May, 18, 2009) (upholding conviction based in part on "on-line conversations and email messages that took place through MySpace.com"), *appeal denied*, 914 N.E.2d 1064 (Ohio 2009); *People v. Clevestine*, 891 N.Y.S.2d 511, 513 (App. Div. 2009) (admitting evidence of defendant's "[mis]conduct [which] was discovered when his wife accidentally found, on their computer in defendant's MySpace account saved instant message communications between defendant and the younger victim revealing sexually explicit discussions and indicating that the two had engaged in sexual intercourse").

<sup>113</sup> For discussion of other evidentiary issues related to social media, see Wendy K. Akbar, *Evidence That Bytes: E-Discovery in the Age of Hidden Data, Clouds, Facebook, Twitter, and the Digital Family*, 15 J. INTERNET L. 1 (2011); Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366 (2010); Timothy J. Fallon, *Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935, 935-36 (2010); Jaclyn S. Millner & Gregory M. Duhl, *Social Networking and Workers' Compensation Law at the Crossroads*, 31 PACE L. REV. 1 (2011); Kathrine Minotti, Comment, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057 (2009); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579 (2011).

<sup>114</sup> William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1919 (1993) ("Antideception rules do not apply to tactics such as videotaping the public behavior of an opposing party or seeking out witnesses who might disclose things the opposing party reasonably assumed would remain secret").

<sup>115</sup> Millner & Duhl, *supra* note 113, at 11.

<sup>116</sup> *Id.*

sites. Many users of social media do not understand the privacy settings on these sites; they may not realize that their posts are public.<sup>117</sup> This misunderstanding does not taint evidence gathered by an opposing party. Litigants who post carelessly on the internet are responsible for their words—just like litigants who speak too loudly in a restaurant or other public place.

Parties can also lose control of communications shared through social media. Social media contacts, like Facebook friends, may forward statements to people outside the author's immediate circle. If the "friend" holds a grudge against the statement's author, or sympathizes with an adversary's lawsuit, he may even forward statements directly to the opposition. Users of social media cannot control their electronic statements any more than they control their oral ones; recipients of information can, and often do, share that information with others. If information falls into a litigant's hands through voluntary acts of third parties, ethical rules usually allow the litigant to use the information.

The Model Rules of Professional Conduct, on the other hand, clearly forbid lawyers from using deception to gather evidence.<sup>118</sup> That prohibition includes misrepresentations used to gather social media information. An attorney, for example, may not pretend to be an adverse witness's high school classmate to gain "friend" status on the witness's Facebook page.<sup>119</sup> Lies online are just as unethical as lies face-to-face.<sup>120</sup>

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<sup>117</sup> See Leora Maccabee, *Professional Facebook Privacy in Under 10 Minutes*, LAWYERIST.COM, <http://lawyerist.com/professional-facebook-privacy-in-under-10-minutes> (last visited Nov. 2, 2011) (observing that many social network users are unaware of how to properly use the privacy settings on Facebook).

<sup>118</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1 (2011) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . ."); MODEL RULES OF PROF'L CONDUCT R. 8.4 (2011) ("It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .").

<sup>119</sup> New York City Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2 (2010), available at <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>.

<sup>120</sup> Some commentators have advanced thoughtful arguments supporting deception in at least some forms of evidence gathering. See, e.g., David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995); Stuntz, *supra* note 114. In-person lies, in other words, may not always be wrong. I put those nuanced arguments aside here, however, to address the basic principles governing the ethics of gathering evidence online.

What if the lawyer uses her true identity to seek friend status with an adversary's witness, but omits information about her connection to the lawsuit? Does the lawyer have an affirmative obligation to disclose her litigation interest? The Philadelphia Bar Association recently advised that a lawyer must disclose the litigation connection.<sup>121</sup> Omitting that information, the committee concluded, was "deceptive" conduct violating the state bar's version of Model Rule 8.4(c).<sup>122</sup> The attorney's connection to the lawsuit, the committee reasoned, is "a highly material fact" that a lawyer may not omit to "induc[e] the witness to allow access" to a social media site.<sup>123</sup>

But the New York City Bar Association interprets an attorney's ethical responsibilities differently. That bar's Committee on Professional and Judicial Ethics concluded that an attorney may withhold strategic information when seeking litigation-related information through social network sites.<sup>124</sup> "[A]n attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website," the New York committee advised.<sup>125</sup> As long as the attorney speaks truthfully and avoids contact with individuals represented by counsel, she may withhold material information from online contacts.

Stephen Gillers, a prominent scholar of legal ethics, agrees with the New York committee's conclusion.<sup>126</sup> The truthful friend request, Gillers observes, "is no different than if a lawyer or investigator learns that a witness typically hangs out at a bar on Saturday nights, and the investigator sidles up to the witness and starts a conversation. If the investigator doesn't misrepresent himself or his purpose, then it's OK."<sup>127</sup>

Practicing lawyers will take little comfort from these

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<sup>121</sup> Phila. Bar Ass'n Comm. on Prof'l Guidance, Op. 2009-02 (2009).

<sup>122</sup> *Id.* at 2.

<sup>123</sup> *Id.* at 3.

<sup>124</sup> New York City Bar Ass'n Comm., *supra* note 119.

<sup>125</sup> *Id.*

<sup>126</sup> Steven Seidenberg, *Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous*, A.B.A. J., Feb. 1, 2011, at 48, available at [http://www.abajournal.com/magazine/article/seduced\\_for\\_lawyers\\_the\\_appeal\\_of\\_social\\_media\\_is\\_obvious\\_dangerous](http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous).

<sup>127</sup> *Id.*; see also *The Ethics of Using a Facebook Mole*, ETHICS ALARMS, <http://ethicsalarms.com/2010/07/13/the-ethics-of-using-a-facebook-mole/> (July 13, 2010, 12:51 PM) (discussing lawyer reactions to these ethics opinions).

conflicting ethical opinions—unless, perhaps, they live in New York City. The dispute reveals our uncertainty about social media contacts. Are these communications just like face-to-face ones in local bars? Or do they carry different connotations and risks? Controversy will continue until we are more comfortable with both the use and ethics of social media statements.

## B. Authentication

Authentication is the first step to admitting evidence in the courtroom. The proponent of the evidence “must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>128</sup> This standard is a low one—it does not require parties to offer proof beyond a reasonable doubt or even by a preponderance of the evidence.<sup>129</sup> Instead, authentication imposes a simple *prima facie* standard: The proponent only needs to introduce evidence “sufficient to support a finding” of authenticity.<sup>130</sup>

Authentication is straightforward for most types of courtroom evidence. Rule 901 offers an extensive list of ways to authenticate evidence, while Rule 902 describes twelve categories of documents that are self-authenticating. These lists are not exclusive: Parties may choose any reasonable method to show that an “item is what [the party] claims it is.”<sup>131</sup>

Despite these liberal standards, judges approach social media evidence with trepidation. The anonymity of the internet, combined with the ephemeral nature of some communications, makes some judges wary of accepting social media statements at face value.<sup>132</sup> Judges worry about hackers, impersonators, and other virtual interference that may compromise the integrity of social media evidence.<sup>133</sup>

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<sup>128</sup> FED. R. EVID. 901(a).

<sup>129</sup> MERRITT & SIMMONS, *supra* note 2, at 884.

<sup>130</sup> *See id.* This section draws generally upon chapter 69 of that book.

<sup>131</sup> FED. R. EVID. 901(a); *see* MERRITT & SIMMONS, *supra* note 2, at 885.

<sup>132</sup> Judge Samuel B. Kent of the United States District Court for the Southern District of Texas registered one of the most colorful reservations about electronic evidence: “Anyone can put anything on the Internet. . . . Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is . . . voodoo information . . . .” *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

<sup>133</sup> *But see* *Commonwealth v. Koch*, 2011 PA Super. 201 (Sept. 16, 2011) (“[W]e rejected the argument that e-mails or text messages are inherently unreliable due to their relative

The key to overcoming this reluctance lies in recognizing that most pieces of social media evidence consist of two parts: the content and the tangible download. Content refers to the original communication. Most often, that content exists in the internet cloud; it can be viewed only through a computer, cell phone, or other electronic device. Trial attorneys, however, rarely offer fact finders a direct glimpse of that cloud. It would be cumbersome—and inconvenient—to admit a computer or cell phone, programmed to show a relevant social media message, into evidence.

Most often, litigants introduce a tangible download of the original message. This download is a snapshot of the social media communication. It may be a printout of a text message, a downloaded copy of a video, or a literal screenshot of a website. The tangible download of a social media message is analogous to a photo of an accident scene: It depicts relevant content at a particular time.

*Both* components of social media evidence must be authenticated: The proponent must introduce evidence “sufficient to support a finding” (1) that the original communication is what the proponent claims and (2) that the tangible download accurately reflects the original message. A plaintiff offering evidence of a defendant’s blog post, for example, must offer proof “sufficient to support a finding” that the defendant was the person who posted the information *and* that a screenshot of the blog accurately reflects the post. Sometimes the same evidence will accomplish both ends, but a litigant must focus on meeting both goals.

To meet the first authentication task, parties may invoke a large number of methods. One way to authenticate evidence is to present testimony from a “Witness with Knowledge.”<sup>134</sup> A libel plaintiff could authenticate a defamatory Facebook message, for example, by obtaining the defendant’s admission that he made the post; the defendant is someone who knows what he posted. If another person saw the defendant make the offending post, that person is also a “Witness with Knowledge” who can authenticate the post as one made by the defendant.

When a “Witness with Knowledge” is not available, parties

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anonymity and the difficulty in connecting them to their author. We reasoned that the same uncertainties exist with written documents: ‘A signature can be forged; a letter can be typed on another’s typewriter; distinct letterhead stationary can be copied or stolen.’ ” (quoting *In re F.P.*, 878 A.2d 91, 95 (Pa. Super. 2005)).

<sup>134</sup> FED. R. EVID. 901(b)(1).

often turn to “Distinctive Characteristics” of the evidence for authentication. Rule 901(b)(4) recognizes that litigants may authenticate evidence by pointing to “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”<sup>135</sup> If a social media user publishes a message under her own name, the name itself may be a “distinctive characteristic[]” sufficient to authenticate the message.<sup>136</sup>

Even when a social media user adopts a screen name, distinctive characteristics may help authenticate the communication. The user’s geographic location, birthday, educational degrees, and other posted information may offer prima facie evidence sufficient to identify the individual.<sup>137</sup> The message’s content may also contribute to authentication. If a social media user employs idiosyncratic expressions or recounts information known only to a particular person, those characteristics may also authenticate the message.

Methods like these will satisfy the first authentication step, tying the message to a particular person, time, and place. To satisfy the second step, the proponent must establish that a particular download accurately represents the electronic communication. Parties often satisfy this requirement by presenting a written affidavit from the person who made the download.<sup>138</sup> That person is a “Witness with Knowledge” of the download process. If an opponent challenges the affidavit, the person who created the download may also testify live.

In many civil cases, parties use pretrial stipulations to satisfy both levels of authentication. The Federal Rules of Civil Procedure require civil litigants to disclose both evidence and objections before

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<sup>135</sup> FED. R. EVID. 901(b)(4).

<sup>136</sup> Cf. *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) (emails may be authenticated by “distinctive characteristics” such as “the name of the person connected to the address, . . . the name of the sender or recipient in the bodies of the e-mail, in the signature blocks at the end of the e-mail, . . . and by signature of the sender”).

<sup>137</sup> See Michelle Sherman, *The Anatomy of a Trial with Social Media and the Internet*, 14 J. Internet L. 1, 14 (2011) (giving example of authentication based on a photo, nickname, and family circumstances). Farsighted counsel often seeks this type of background information during discovery, because it will help authenticate any social media communications. *Id.* at 9.

<sup>138</sup> See *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782–83 (C.D. Cal. 2004) (finding that mere “[p]rintouts from a web site” are not enough for authentication purposes; rather, a “statement or affidavit from someone with knowledge is required”); David I. Schoen, *The Authentication of Social Media Postings*, PROOF, May 2011, at 6 (discussing affidavits and other methods of authenticating social media).

trial.<sup>139</sup> These provisions, combined with the trial judge's admonitions to streamline the presentation of evidence, encourage many civil litigants to stipulate authenticity. Stipulations are less common in criminal trials, although the government and defense sometimes agree to authenticity before trial. In either context, familiarity with authentication processes is essential to evaluate the wisdom of stipulations and, if necessary, to authenticate the evidence in the courtroom.<sup>140</sup>

## V. CONCLUSION

Evidence law reflects the text of the formal rules, the constraints of constitutional law, and the conventions of everyday life. All three of these forces modified the federal law of evidence during 2011. The tectonic shifts of the last year, moreover, will reverberate through the year to come. In 2012, courts will apply the restyled rules of evidence, interpret the Supreme Court's latest Sixth Amendment cases, and continue to grapple with social media evidence. These trends undoubtedly will make 2012 another lively year for the federal law of evidence.

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<sup>139</sup> FED. R. CIV. P. 26(a)(3)(B).

<sup>140</sup> For further discussion of authentication of electronically stored information, including social media messages, *see generally* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007); State v. Thompson, 777 N.W.2d 617 (N.D. 2010); Commonwealth v. Koch, 2011 PA Super. 201 (Sept. 16, 2011); Paul W. Grimm et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 AKRON L. REV. 357 (2009).