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# Memorandum: Hearsay Exception for Electronic Communications of Recent Perception

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**MEMORANDUM**

**HEARSAY EXCEPTION  
FOR ELECTRONIC COMMUNICATIONS  
OF RECENT PERCEPTION**

*Daniel J. Capra\**

INTRODUCTION

At the Advisory Committee's Symposium on Electronic Evidence, held in April 2014, Professor Jeffrey Bellin proposed an amendment to the Federal Rules of Evidence 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 the exclusion of many important and reliable electronic communications.

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 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*.<sup>1</sup> He follows up the proposal by responding to two critiques<sup>2</sup>—one set forth by Paul Shechtman in his

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1. Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013) [hereinafter Bellin, *eHearsay*].  
2. Jeffrey Bellin, *The Case for eHearsay*, 83 FORDHAM L. REV. 1317 (2014) [hereinafter Bellin, *Case for eHearsay*].

presentation at the Electronic Evidence Symposium,<sup>3</sup> and the other made by Professor Colin Miller.<sup>4</sup>

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 I of this Memo sets forth Professor Bellin's proposal within the context of the Federal Rules hearsay exceptions. Part II assesses whether expansion of the existing exceptions might be necessary to cover reliable eHearsay.<sup>5</sup> Part III raises some questions about the proposal to add a new exception to Rule 804(b). Part IV raises some questions about the proposal to add a new exception to Rule 801(d). This Memo is intended to raise questions for the Committee to consider about the proposal—arguments in favor of the proposal have been made effectively by Professor Bellin elsewhere.

#### 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:

...

**(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:

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3. *Symposium on the Challenges of Electronic Evidence*, 83 FORDHAM L. REV. 1163, 1211–15 (2014).

4. Colin Miller, *No Explanation Required? A Reply to Jeffrey Bellin's eHearsay*, 98 MINN. L. REV. HEADNOTES 34 (2013).

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

(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>6</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:

(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.

As set forth by Professor Bellin and in quick summation, what follow 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,

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6. 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.

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.

(4) 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 nonelectronic 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>7</sup> Much of the argument has to do with how one feels about the

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7. 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 were agreement, it is 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.

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>8</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>9</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.<sup>10</sup> But on the other hand Professor Bellin provides multiple examples of eHearsay, from crime victims and others, that do not appear to neatly fit

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8. 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, 85 (1st 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) (instructing 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.”

9. 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 initial cabining by Congress. Bellin, *Case for eHearsay*, *supra* note 2, at 1322. Congress intended the residual exception to be applied only in extraordinary and unusual circumstances. *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* § 807.02 (10th ed. 2011). 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.

10. Bellin, *eHearsay*, *supra* note 1, at 23 & n.65.

within the traditional exceptions—including the online chat entry by the diplomat in Libya about conditions around the embassy.<sup>11</sup> 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 shoe-horning 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 part 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,<sup>12</sup> 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.<sup>13</sup> 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. First, 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 fifty minutes to be too long.<sup>14</sup> Another court has found a statement made twenty-three minutes after the event to be sufficiently “immediate.”<sup>15</sup> Another example is Rule 803(6), which conditions the admissibility of a

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11. *Id.* at 8–9.

12. *Id.* at 42–43.

13. *See, e.g.,* State v. Berry, 575 P.2d 543, 545 (Kan. 1978) (holding that the victim’s statement made eight days after the shooting was properly admitted).

14. United States v. Green, 556 F.3d 151, 156–57 (3d Cir. 2009).

15. United States v. Blakey, 607 F.2d 779, 785–86 (7th Cir. 1979).

business record on it 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>16</sup> The focus of the “at or near the time” language in Rule 803(6) is to ensure 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>17</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 above. 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*.”<sup>18</sup> 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.”<sup>19</sup> Specifically, “[m]otives for shading or distorting descriptions of past 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.”<sup>20</sup> 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 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 discussion by the Wisconsin

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16. *See, e.g.,* United States v. Penney, 576 F.3d 297, 313–14 (6th Cir. 2009) (holding that the defendant’s account of an event was not admissible as a present sense impression because it was made after he had time and motive to contrive or misrepresent); United States v. Mitchell, 145 F.3d 572, 577 (3d Cir. 1998) (holding that a note was inadmissible as a present sense impression because, among other reasons, there was no showing that the author made the statement before he had time to reflect).

17. *See, e.g.,* United States v. Lemire, 720 F.2d 1327, 1350–51 (D.C. Cir. 1983) (holding that a memorandum written by one defendant to a superior about a year-old transaction was not admissible as a business record, and that no showing was made that it was regular business practice to prepare such memoranda).

18. FED. R. EVID. 803(1), (6) (emphasis added).

19. Bellin, *eHearsay*, *supra* note 1, at 42.

20. *Id.* (footnote omitted).



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>21</sup>

So if a recent perception 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.<sup>22</sup> 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.

A second response is that 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 v. Evangelical Reformed Immanuel's Congregation* 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. 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. 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.”<sup>23</sup>

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.<sup>24</sup>

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

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21. *Kluever v. Evangelical Reformed Immanuel's Congregation*, 422 N.W.2d 874, 877 (Wis. Ct. App. 1988).

22. Bellin, *eHearsay*, *supra* note 1, at 44.

23. *Kluever*, 422 N.W.2d at 877 (citations omitted) (quoting Kenneth E. Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 WIS. L. REV. 1525, 1528).

24. *Id.* (citations omitted).

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>25</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.

Third, 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?<sup>26</sup>
- Under Rule 807, when does a statement have circumstantial guarantees of trustworthiness equivalent to the other exceptions?<sup>27</sup>
- Under Rule 804(b)(1), under what circumstances did an opponent have a similar motive and opportunity to develop a declarant’s testimony?<sup>28</sup>

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.

Fourth, 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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25. *Id.* (citations omitted) (quoting JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE 194 (1985)).

26. FED. R. EVID. 803(2) (“A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”).

27. *Id.* 807(a)(1) (“[T]he statement has equivalent circumstantial guarantees of trustworthiness . . .”).

28. *Id.* 804(b)(1) (“Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”).

## 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.”<sup>29</sup> 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>30</sup> Nonetheless, if the bottom-line concern is to assure that evidence presented to the fact-finder 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.”<sup>31</sup> 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.<sup>32</sup> 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 events in a way that benefits the offering party.”<sup>33</sup> But statements such as those described

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29. Bellin, *eHearsay*, *supra* note 1, at 37.

30. See FED. R. EVID. 804(b)(3) advisory committee’s note (2010 amendment) (criticizing case law finding declarations against interest reliable based on the credibility or lack of credibility of the witness relating the hearsay at trial, because “[t]o 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, 461 (5th Cir. 2001).

31. Bellin, *eHearsay*, *supra* note 1, at 40.

32. See SALTZBURG, MARTIN & CAPRA, *supra* note 9, § 801.02.

33. Bellin, *eHearsay*, *supra* note 1, at 41.

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 noncommunicated 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 Rules 803(6) and 807, so it is unlikely that they would have one here. Finally, the communication limitation could be evaded by a 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 perception exception? Thus, it would appear that if the Committee does decide to develop a recent perception exception, it should stick to the term “statement” rather than “communication.”<sup>34</sup>

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

The proposed recent perception 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.”<sup>35</sup> 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>36</sup> Given the fact that the recent perception 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 ensure that in criminal cases any statement admitted under

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34. 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.”

35. Bellin, *eHearsay*, *supra* note 1, at 44.

36. *See, e.g.*, *Jordan v. Binns*, 712 F.3d 1123, 1136 (7th Cir. 2013) (finding an 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); *Timberlake Const. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 342 (10th Cir. 1995) (finding that letters were 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”).

the exception will comport with the right to confrontation. As discussed *ad nauseam* in the *Crawford*<sup>37</sup> 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 thirty 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>38</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,<sup>39</sup> precluding litigation-based statements is a necessary but not sufficient means of ensuring the 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.<sup>40</sup> It is probably true that most of the scurrilous comments sent through the internet are sent anonymously. It is perhaps also relevant that the U.S. Supreme Court, in one line of cases, has found statements by known individuals to be more reliable than statements by anonymous people.<sup>41</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

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37. *Crawford v. Washington*, 541 U.S. 36 (2004).

38. 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.

39. Memorandum from Daniel J. Capra, Reporter to the Advisory Comm. on Evidence Rules (Sept. 15, 2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2013-10.pdf>.

40. Bellin, *eHearsay*, *supra* note 1, at 49–50.

41. 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.*, *Florida v. J.L.*, 529 U.S. 266, 270 (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.’” (citations omitted) (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990))); *Adams v. Williams*, 407 U.S. 143, 146 (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 telephone tip”). 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.

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.”<sup>42</sup> 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.<sup>43</sup>

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—immediacy. The requirement in the recent perception 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 has personal knowledge of the event described, which is often difficult to do if the declarant is anonymous.<sup>44</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.

### *C. Conclusion on the Reliability Guarantees of the Proposed Recent Perception 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

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42. FED. R. EVID. 803(1)–(2) advisory committee’s note (1972) (“However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, a result which would under appropriate circumstances be consistent with the rule.” (citations omitted)).

43. *See, e.g.*, *United States v. Medico*, 557 F.2d 309, 315 (2d Cir. 1977) (holding that the statement of an unidentified declarant was properly admitted as residual hearsay, but noting that it also met the requirements for admission as a present sense impression).

44. *See, e.g.*, *Brown v. Keane*, 355 F.3d 82, 84 (2d Cir. 2004) (holding that an 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, 576–77 (3d Cir. 1998) (holding that an 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).

might give “some comfort that the rule is not a fleeting or radical sentiment but instead builds on a long tradition of evidence thought.”<sup>45</sup>

*D. 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.<sup>46</sup> 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.”<sup>47</sup> It is surely true that there are line-drawing problems throughout the exceptions, but the question is 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.

*E. 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 for argument 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 (ESI)—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 perception 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

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45. Bellin, *Case for eHearsay*, *supra* note 2, at 1328.

46. Paul Shechtman, Advisory Comm. on Evidence Rules, Remarks at the Symposium on the Challenges of Electronic Evidence (Apr. 4, 2014), *supra* note 3, at 1214–15.

47. Bellin, *Case for eHearsay*, *supra* note 2, at 1328.

necessarily seem jarring or inappropriate to package the two proposals if they are both found meritorious.

#### *F. 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.<sup>48</sup> 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 nonelectronic forms of communication would result in difficult line-drawing for no good reason.<sup>49</sup>

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 Rule 101(b)(6), which equates electronic and hardcopy information.<sup>50</sup>

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.

#### *G. 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 803(24) were combined into a single residual exception, Rule 807. Since then, Rule 804(b)(5) has read as follows:

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48. Paul Shechtman, Advisory Comm. on Evidence Rules, Remarks at the Symposium on the Challenges of Electronic Evidence (Apr. 4, 2014), *supra* note 3, at 1211.

49. Bellin, *Case for eHearsay*, *supra* note 2, at 1327.

50. FED. R. EVID. 101(b)(6) (“[A] reference to any kind of written material or any other medium includes electronically stored information.”).



(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) as 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 fifteen years earlier.

There is no reason to change position now. If the recent perception 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 part assumes that the Committee is persuaded that the proposal for a recent perception 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. This is because the primary reason for excluding hearsay is that the person who made the statement did so out of court and thus can't be cross-examined. Where the declarant is the witness, however, 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 perception exemption to Rule 801(d)(1). The basis for the recent perception 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 Rules 804(b) and 801(d)(1) cover 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>51</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) 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 perception 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 perception 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

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51. 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.

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 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 perception 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 perception 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>52</sup> Congress's concern for reliability missed the Advisory Committee's point—that the presence of the declarant at trial, subject to cross-examination, was an adequate guarantee of trustworthiness,

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52. 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.

so the circumstances under which the *prior* statement was made are irrelevant.

It is clear that the effect of the recent perception 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 perception 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 perception exception to Rule 801(d) might be considered a half-measure—loosening the reliability requirements for prior inconsistent statements without opening the floodgates.

### *C. 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.