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## Admissions Online: Statements of a Party Opponent in the Internet Age

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## COMMENT

### Admissions Online: Statements of a Party Opponent in the Internet Age

#### *I. Introduction*

Returning home from a party, Susan drove her car through a red light and collided with John's pickup. John suffered severe injuries. After the accident, Susan went home and posted a status update on her Facebook page. In the post she briefly described what happened in the wreck, including the statement: "I knew I shouldn't have driven, I had too much wine!" In the comments section following Susan's post, her friend Jane responded, "Wow! You better get a good lawyer!" After reading Jane's post, Susan clicked a thumbs-up icon, indicating she "liked" Jane's comment. Several of Susan's friends, including Steve, a mutual friend of accident victim John, read the posts.

John subsequently brought a civil suit against Susan, and designated Steve as a trial witness who would testify regarding the posts on Susan's Facebook page. Specifically, John wants Steve to testify that Susan admitted she had too much to drink prior to the accident, his goal being to prove that Susan in fact *was* intoxicated at the time of the wreck. John also wants Steve to testify about Susan's "liking" of Jane's comment to show that defendant Susan thought she needed a lawyer due to her actions.

Susan objects to the admission of Steve's testimony, invoking the hearsay rule.<sup>1</sup> According to Susan, John cannot use her out-of-court statement for its truth in litigation. John argues that Susan's post about drinking is an admissible non-hearsay statement of an opposing party because it was Susan's own statement.<sup>2</sup> He also argues that Susan's "liking" of Jane's comment shows Susan approved the comment and thus Jane's words are admissible as the adopted statement of Susan.<sup>3</sup>

This hypothetical situation demonstrates the impact of the Internet on the admissibility of evidence, particularly in the context of hearsay. The Federal Rules of Evidence (FRE) generally exclude out-of-court statements if offered for their truth,<sup>4</sup> but FRE 801(d)(2) provides a method for

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1. *See* FED. R. EVID. 802.

2. *See id.* Rule 801(d)(2)(A) (designating statements of a party, offered against that party, as non-hearsay).

3. *See id.* Rule 801(d)(2)(B) (designating statements that a party has manifested adoption or belief in, when offered against that party, to be non-hearsay).

4. *Id.* Rule 802.

introducing such statements if made by an opposing party.<sup>5</sup> In the above hypothetical, John wants to demonstrate that the accident was caused by Susan's intoxication through evidence of her online statements. Having read the posts, Steve has the requisite personal knowledge needed to establish his competency as a witness.<sup>6</sup> However, in order for Steve to testify to the statements contained in the Facebook posts, John has to overcome the general hearsay exclusion. Susan's Facebook post was certainly made outside the courtroom, and John wants Steve to testify about that out-of-court statement. Because Susan is an opposing party in the litigation, FRE 801(d)(2) provides grounds for John to bring in certain out-of-court statements that would generally be excluded, but that rule provides no explicit guidance on its application to online activity.<sup>7</sup> The relatively recent emergence of the Internet as an avenue of communication<sup>8</sup> raises new evidentiary questions. Are Facebook posts "statements" as defined under the FRE? Does "liking" someone else's post sufficiently indicate adoption of the substance of the post? If one hosts a document on one's website, does that person "manifest" a belief in the truth of the words contained therein?

As new forms of Internet communication become more popular, answering these questions becomes more difficult. Technological innovation has led to new sources of out-of-court statements, making this

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5. *Id.* Rule 801(d)(2).

6. *See id.* Rule 602.

7. *See id.* Rule 801(d)(2).

8. While the Internet has been in existence since approximately 1991, recent developments have changed the way individuals interact with the Web. *See* Lev Grossman, *You—Yes, You—Are TIME's Person of the Year*, TIME (Dec. 25, 2006), <http://www.time.com/time/magazine/article/0,9171,1570810,00.html>. As one commentator noted, changes in the Internet, referred to as "Web 2.0," have turned the Web into a "massive social experiment" where individuals have the ability to contribute in new ways to society. *Id.* "[T]he essential difference between Web 1.0 and Web 2.0 is that content creators were few in Web 1.0 with the vast majority of users simply acting as consumers of content," while Web 2.0 allows anyone to create, thus democratizing online commentary. GRAHAM CORMODE & BALACHANDER KRISHNAMURTHY, AT&T LABS-RESEARCH, KEY DIFFERENCES BETWEEN WEB 1.0 AND WEB 2.0, at 2 (Feb. 13, 2008), <http://www2.research.att.com/~bala/papers/web1v2.pdf>. These changes are not truly technological; they relate to the "participatory nature of how a website's content is created and delivered." Seth P. Berman, Lam D. Nguyen & Julie S. Chrzan, *Web 2.0: What's Evidence Between "Friends"?*, 53 BOS. B.J. 5, 5 (2009). Web 2.0 allows users to interact and create content, as well as share information. *Id.* With virtually every individual possessing the capability to make online statements, the implications of the Internet's effect on electronic evidence are certainly increasing.

type of evidence increasingly important in litigation.<sup>9</sup> Because individuals are not likely to make online statements from the witness stand—at least not anytime soon—the hearsay rule is of particular import in this context.<sup>10</sup> Indeed, “[g]iven the near universal use of electronic means of communication,” courts have often applied FRE 801(d)(2) to electronic evidence.<sup>11</sup>

This comment analyzes the application of FRE 801(d)(2) to online situations in order to illustrate sources of uncertainty and identify possible solutions. The rapidly increasing use of the Internet,<sup>12</sup> along with the importance of electronic evidence in litigation,<sup>13</sup> requires an examination into the FRE’s applicability to the online world. Part II outlines the operation of the hearsay rule and illustrates the traditional application of FRE 801(d)(2). Part III introduces new issues in application of the hearsay rule and FRE 801(d)(2) brought about by the Internet, and how case law has developed in response. Part IV evaluates possible solutions to resolve the uncertainties regarding the hearsay rule and the Internet. Finally, Part V concludes that applying the existing FRE will provide the most satisfactory solution to the issues presented by developing Internet technologies.

## *II. The Operation of the Hearsay Rule, the Policy Behind It, and the Traditional Application of FRE 801(d)(2)*

### *A. The Hearsay Rule, Its Applicability to Online Situations, and Its Policy*

The FRE define hearsay as any “statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”<sup>14</sup> The FRE define a declarant as “the person who made the statement,” and a statement as “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.”<sup>15</sup> In general,

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9. Jonathan L. Moore, *Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation*, 50 JURIMETRICS J. 147, 148 (2010).

10. Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 42 (2009) (“[E]lectronic evidence clearly originates out-of-court . . .”).

11. Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence Under the Federal Rules of Evidence*, 17 RICH. J.L. & TECH. 5, ¶ 52 (2010) (quoting *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 568 (D. Md. 2007)).

12. *See infra* Part IV.A.

13. *See* Moore, *supra* note 9, at 148.

14. FED. R. EVID. 801(c).

15. *Id.* Rule 801(a)-(b).

hearsay statements are not admissible into evidence under the FRE.<sup>16</sup> The hearsay rule, while generally exclusionary, admits certain out-of-court statements, provided they qualify under an exception in the FRE, are permitted by other legislative or constitutional rules, or are declared not to be hearsay by legislative enactment.<sup>17</sup>

Evaluation of online hearsay necessarily involves the consideration of electronically stored information (ESI).<sup>18</sup> The FRE have been held to govern the admissibility of ESI in the same way they govern other forms of evidence.<sup>19</sup> While the FRE do not identify electronic evidence as a specific category, the rules are constructed to “address technical changes not in existence as of the codification of the rules themselves.”<sup>20</sup> Despite uncertainty surrounding *how* the FRE apply to online hearsay, it is clear they still control in this context.<sup>21</sup> Thus, it is important to consider traditional hearsay principles.

The general bar against hearsay is motivated by concerns for witness credibility, particularly with regard to four risks inherent in testimony: the declarant’s capacity to perceive accurately, inadequate memory, ambiguity, and fabrication.<sup>22</sup> When testimony is given in court, these risks are addressed in part because the statements are made under oath or affirmation, because the fact-finder may observe the demeanor of the

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16. *Id.* Rule 802.

17. *Id.*; *see id.* Rule 801(d).

18. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 538 n.5 (D. Md. 2007). As the advisory committee notes to the 2006 Amendments of the Federal Rules of Civil Procedure (FRCP) indicate, “[t]he wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information.” FED. R. CIV. P. 34(a) advisory committee’s notes. FRCP 34(a), which was amended in 2006 to explicitly authorize discovery of ESI, is intended to be interpreted expansively and identifies “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—*stored in any medium from which information can be obtained,*” as discoverable ESI. *Id.* Rule 34(a)(1)(A) (emphasis added); *see also* Argus & Assocs., Inc. v. Prof'l Benefits Servs., Inc., No. 08-10531, 2009 WL 1297374, at \*3 (E.D. Mich. May 8, 2009) (describing information stored on a claims processing website as “clearly . . . within the definition of electronically stored information”); Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443, 447-48 (C.D. Cal. 2007) (holding information stored in a computer’s random access memory was discoverable ESI).

19. *Lorraine*, 241 F.R.D. at 538 n.5 (citation omitted).

20. *Id.*

21. *Cf.* PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 403 (2d ed. 2008) (noting that the application of the hearsay rule does not differ when applied to electronic evidence, but is “made more difficult to apply because of the new context”).

22. 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801:1 (7th ed. 2012).

speaker, and, most importantly, because the opposing party has an opportunity to cross-examine the witness.<sup>23</sup> While the credibility risks are still present during in-court testimony, out-of-court statements increase those risks “because an out-of-court declarant is not subject to the reliability safeguards present with in-court testimony.”<sup>24</sup> Thus, the hearsay rule generally excludes out-of-court statements to eliminate the risk of inaccurate, misleading, or false testimony.<sup>25</sup>

### *B. Traditional Application of FRE 801(d)(2) and Its Justification*

#### *1. FRE 801(d)(2): Admitting Statements of Opposing Parties as Non-Hearsay*

The FRE provide exceptions to the hearsay rule for certain types of statements.<sup>26</sup> The advisory committee notes to FRE 803 indicate that certain hearsay statements have circumstantial guarantees of trustworthiness that negate the risk of using out-of-court statements for their truth.<sup>27</sup> FRE 804 outlines other exceptions to the hearsay rule for situations where a declarant is unavailable.<sup>28</sup> The advisory committee justified the exceptions because, where a declarant is unavailable to testify in court, hearsay evidence meeting a specified standard is better than no evidence at all.<sup>29</sup>

When considering the impact of the Internet on the hearsay rule, FRE 801(d)(2) is of particular relevance.<sup>30</sup> The rule admits the relevant statements of a party in litigation when used against that party by an opponent.<sup>31</sup> FRE 801(d)(2) does not outline exceptions to the hearsay rule, but defines a party’s out-of-court statements as “not hearsay.”<sup>32</sup> However, those same types of statements, if offered for their truth, fit under the

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23. *Id.* Cross-examination is “the ‘greatest legal engine ever invented for the discovery of truth.’” *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).

24. Moore, *supra* note 9, at 166.

25. *See id.* at 166-67.

26. *See* FED. R. EVID. 803-804.

27. *Id.* Rule 803 advisory committee’s notes.

28. *See id.* Rule 804.

29. *Id.* Rule 804 advisory committee’s notes.

30. *See* Frieden & Murray, *supra* note 11, ¶ 52.

31. 6 GRAHAM, *supra* note 22, § 801:15.

32. FED. R. EVID. 801(d).

general hearsay definition of FRE 801(c).<sup>33</sup> This is in contrast to FRE 803 and FRE 804, which are both classified as exceptions to the hearsay rule in their titles.<sup>34</sup> Some have argued that FRE 801(d)'s phrasing is confusing and inappropriate.<sup>35</sup> The words "not hearsay" as used in the context of FRE 801(d)(2) do not carry their usual meaning; any out-of-court statement offered for its truth is hearsay under FRE 801(c).<sup>36</sup> The term as used in Rule 801(d) simply excludes "statements which would otherwise literally fall within the definition" of hearsay from that definition under the FRE.<sup>37</sup> Thus, the rule has the practical effect of the hearsay exceptions enumerated in FRE 803 and FRE 804, but remains difficult to classify.<sup>38</sup>

The traditional application of FRE 801(d)(2) highlights areas where controversy may arise in cases of online admissions. Prior to evaluating the admissibility of online admissions for hearsay purposes, it is important to consider the relevance of the proffered evidence.<sup>39</sup> "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."<sup>40</sup> In addition to the requirement of relevancy, the evidence must also be authenticated as required by FRE 901(a): "To satisfy the

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33. See *id.* Rule 801(c); Sam Stonefield, *Rule 801(d)'s Oxymoronic "Not Hearsay" Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1, 2 (2011).

34. See FED. R. EVID. 803-804.

35. See generally Stonefield, *supra* note 33 (outlining the history of Rule 801(d) and advocating for amendment). "By labeling this admittedly hearsay evidence as something that it is not, Rule 801(d) creates an oxymoron." *Id.* at 2. While Professor Stonefield's comments are from before the 2011 "restyling" amendments to the FRE were enacted, his opinions regarding FRE 801(d)'s "not hearsay" phrasing remain relevant as this characterization survived in the amended rule. The primary change in rule 801(d)(2) was replacing the term "admission" with "statement." The word was replaced in the current version under the reasoning that "[t]he term 'admissions' is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it 'admitted' nothing and was not against the party's interest when made." FED. R. EVID. 801 advisory committee's notes. However, the advisory committee did not amend the "not hearsay" language. See *id.* Rule 801(d).

36. Stonefield, *supra* note 33, at 2; see FED. R. EVID. 801(c)-(d).

37. FED. R. EVID. 801(d) advisory committee's notes.

38. See Stonefield, *supra* note 33, at 51-52 (noting the United States Supreme Court has referred to the rule as an exemption, exception, and exclusion and has avoided the phrase "not hearsay").

39. See FED. R. EVID. 402 (making irrelevant evidence inadmissible); see also *United States v. Davis*, 826 F. Supp. 617, 620 (D.R.I. 1993) ("The initial inquiry in any evidentiary determination of admissibility is whether the evidence is relevant.").

40. FED. R. EVID. 401(a)-(b).

requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>41</sup> In the context of statements of a party opponent, there must be evidence that the party who is alleged to have made the statement actually did so.<sup>42</sup> Finally, determining the admissibility of an opposing party’s out-of-court statements requires careful consideration of the applicable hearsay rules.

Per FRE 801(d)(2), statements are not hearsay when:

The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.<sup>43</sup>

The text of FRE 801(d)(2) indicates that “there are specific foundational facts that must be established” in determining whether a non-hearsay statement exists.<sup>44</sup> The trial judge determines the existence of these facts under FRE 104(a).<sup>45</sup> First, there must be a statement as defined by FRE 801(a), and that statement must have been made out of court.<sup>46</sup> Second, the statement must be attributable to a party to the litigation as outlined in the five subparts of FRE 801(d)(2).<sup>47</sup> Third, a “party’s out-of-court-statement must be offered *against* that party.”<sup>48</sup> Finally, as with all out-of-court

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41. *Id.* Rule 901(a).

42. *See id.* Rule 801(d)(2).

43. *Id.*

44. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 567 (D. Md. 2007).

45. *Id.*; *see* FED. R. EVID. 104(a).

46. *See id.* Rule 801(d)(2).

47. *See id.* Rule 801(d)(2)(A)-(E).

48. *Lorraine*, 241 F.R.D. at 567 (emphasis added). A party may not rely on Rule 801(d)(2) to offer its own out-of-court statements into evidence. Rather, the rule permits one party to offer another party’s out-of-court statement against that party-declarant. *Id.*



statements, FRE 801(d)(2) is only implicated if the statement is “offer[ed] in evidence to prove the truth of the matter asserted.”<sup>49</sup>

Unlike other hearsay exceptions, “No guarantee of trustworthiness is required in the case of an admission.”<sup>50</sup> Because FRE 801(d)(2) concerns either a party’s own statement or a statement the rules attribute to him, a policy of fairness permits those statements to be used against that party: “Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”<sup>51</sup> The advisory committee notes to the FRE endorse a “generous treatment of this avenue to admissibility.”<sup>52</sup> Due to “a party’s ability to rebut the out-of-court statement by ‘put[ting] himself on the stand and explain[ing] his former assertion,’” this generous treatment is justified.<sup>53</sup>

## 2. Application of FRE 801(d)(2) in the Non-Internet Context

In *United States v. Atlas Lederer Co.*, a Southern District of Ohio case arising under the Comprehensive Environmental Response, Compensation, and Liability Act, the United States government sued to recover costs incurred in cleaning up pollution from a scrap company site.<sup>54</sup> In the course of that litigation, the United States wished to enter into evidence statements by a defendant taken both from an affidavit and from answers to interrogatories during the discovery stage of the litigation.<sup>55</sup> The defendant argued that the answers to the interrogatories and the affidavit statement could not be used against him, but the court held they were admissible non-hearsay statements under FRE 801(d)(2)(A).<sup>56</sup> Because a party made both

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49. FED. R. EVID. 801(c)(2).

50. *Id.* Rule 801(d)(2) advisory committee’s notes. While this portion of the advisory committee’s notes still uses “admission” in connection with rule 801(d)(2), this word has been amended and replaced with “statement” in the text of the rule. *See supra* note 35. Because both the committee and courts were still using “admission” when discussing FRE 801(d)(2) until late 2011, the term is featured in many of the sources quoted in this comment. It should be equated with the current phrasing, “[a]n [o]pposing [p]arty’s [s]tatement,” because the changes after the 2011 amendments were “intended to be stylistic only [with] no intent to change any result in any ruling on evidence admissibility.” FED. R. EVID. 801(d)(2) advisory committee’s notes.

51. FED. R. EVID. 801(d)(2) advisory committee’s notes.

52. *Id.*

53. *Harris v. United States*, 834 A.2d 106, 116 (D.C. 2003) (alterations in original) (quoting *Chaabi v. United States*, 544 A.2d 1247, 1248 (D.C. 1988)).

54. No. 3:91CV309, 2012 WL 89976, at \*1 (S.D. Ohio Jan. 11, 2012).

55. *Id.* at \*4.

56. *Id.*

statements, and because both statements were being offered against that party, the court applied FRE 801(d)(2) to admit them into evidence.<sup>57</sup>

In *Graves ex rel. W.A.G. v. Toyota Motor Corp.*, the Southern District of Mississippi disallowed admission of statements because the statements did not meet the standards of FRE 801(d)(2).<sup>58</sup> In a products liability action arising from a vehicle accident that caused the plaintiff severe injuries, the plaintiff filed a motion in limine to exclude statements from a post-accident medical record that included his pre-accident medical history.<sup>59</sup> The plaintiff contended that those statements were inadmissible hearsay because he had no recollection of the accident and, thus, the statements concerning his prior medical history must have come from someone else.<sup>60</sup> The defendant corporation countered that the statements were admissible non-hearsay statements of a party opponent because the plaintiff, or someone speaking on his behalf, must have outlined his medical history after the accident.<sup>61</sup> The court was not persuaded by the defendant's argument because the argument unjustly relied on an assumption that the statements were made by the plaintiff or his parents.<sup>62</sup> The defendant did not offer sufficient evidence to establish any source of the statements, much less that the statements were made by the plaintiff or his parents, and the court refused to admit the hearsay under FRE 801(d)(2) without further evidence that the plaintiff was the declarant.<sup>63</sup>

As the courts' evidentiary rulings in *Atlas Lederer Co.* and *Graves ex rel. W.A.G.* show, establishing the declarant of a purported 801(d)(2) statement is an essential determination in applying the rule. Identification in this regard, along with the even more fundamental question of whether there has been a statement at all, becomes further complicated in light of technological change.

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57. *Id.*

58. No. 2:09CV169KS-MTP, 2012 WL 73010, at \*3 (S.D. Miss. Jan. 10, 2012).

59. *Id.* at \*1-3.

60. *Id.* at \*1-2.

61. *Id.* at \*3.

62. *Id.* (“[W]ithout more direct evidence of where this information came from, the court will not assume that it was provided by [the plaintiff].”).

63. *Id.*

*III. New Issues in the Application of FRE 801(d)(2) Brought on by  
Developing Internet Technologies*

While the traditional operation of FRE 801(d)(2) seems well-settled, with “apparently prevalent satisfaction [in] the results,”<sup>64</sup> changes in the type of evidence being generated have raised issues in the application of this rule. Defining the point at which online activity becomes a statement for hearsay purposes and the method of determining that point becomes important because of the effect those conclusions have on the admissibility of evidence at trial.<sup>65</sup> As one court observed, “Hearsay issues are pervasive when electronically stored and generated evidence is introduced.”<sup>66</sup> The “mechanical recording of data on a Web page on the Internet does not create hearsay,” but when an online statement “could be affected by the human problems of perception, memory, sincerity, and ambiguity,” the hearsay rule is implicated.<sup>67</sup> If a statement is made online, by definition it was not made in court.<sup>68</sup> Thus, if online statements are offered into evidence for their truth, the hearsay rule governs.<sup>69</sup> Courts have had varied responses to the issues raised by electronic and online evidence.

*A. Courts’ Initial Reluctance to Accept Internet Evidence*

The Internet presents a “sizable bank of information, news, and other potentially valuable evidence to use in support of [a] case.”<sup>70</sup> However, many courts initially questioned the reliability of online information.<sup>71</sup>

One court addressed online evidence with what was later called “famous skepticism.”<sup>72</sup> In an early opinion rejecting electronic “evidence,” the Southern District of Texas stated that “any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules.”<sup>73</sup> In the case, the court

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64. FED. R. EVID. 801(d)(2) advisory committee’s notes.

65. *See id.* Rule 801(c) (hearsay governs “statements”).

66. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 562 (D. Md. 2007).

67. *RICE*, *supra* note 21, at 421.

68. *See United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000).

69. *See* FED. R. EVID. 801(c).

70. Theodore J. Koerth & Christopher E. Paetsch, *How to Admit E-Mail and Web Pages into Evidence*, 94 ILL. B.J. 674, 675 (2006).

71. *Id.* at 676; *see Jackson*, 208 F.3d at 637; *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999).

72. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 555 (D. Md. 2007) (citing *St. Clair*, 76 F. Supp. 2d at 774-75).

73. *St. Clair*, 76 F. Supp. 2d at 775. It may be relevant to note that this opinion was rendered by Samuel B. Kent, who has since resigned his federal judgeship following a

addressed a plaintiff's claim that he suffered injury on a ship allegedly owned by the defendant.<sup>74</sup> The defendant disputed ownership of the vessel and the plaintiff sought to prove ownership through evidence obtained on the United States Coast Guard's Internet database; the court found this evidence "totally insufficient" to successfully counter a motion to dismiss.<sup>75</sup> The court presumed Internet information to be inherently untrustworthy because "[a]nyone can put anything on the Internet" and "[n]o web-site is monitored for accuracy."<sup>76</sup> In addition, the court viewed the Internet "as one large catalyst for rumor, innuendo, and misinformation," without sufficient indicia of authenticity.<sup>77</sup> The court pointed out that any individual with sufficient technological skill could alter online evidence remotely.<sup>78</sup>

In another early case dealing with Internet evidence, the Seventh Circuit also rejected the admissibility of online statements as hearsay.<sup>79</sup> In *United States v. Jackson*, the defendant appealed several criminal convictions and argued that the trial court erred by excluding web postings of white supremacist groups claiming responsibility for the crimes.<sup>80</sup> The proponent argued that the postings were business records of the Internet service provider and thus admissible under FRE 803(6).<sup>81</sup> The Seventh Circuit, however, found the web postings to be inadmissible hearsay because the business record exception did not apply and the postings' authenticity was not sufficiently established.<sup>82</sup>

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sexual abuse scandal that led to his imprisonment and the rare initiation of impeachment proceedings in Congress. See Martha Neil, *Federal Judge Samuel Kent Resigns, as Senate Impeachment Trial Looms*, A.B.A. J. (June 25, 2009, 5:05 PM), [http://www.abajournal.com/news/article/federal\\_judge\\_samuel\\_kent\\_resigns\\_as\\_senate\\_impeachment\\_trial\\_looms/](http://www.abajournal.com/news/article/federal_judge_samuel_kent_resigns_as_senate_impeachment_trial_looms/); Stewart Powell, *Judge Kent's Impeachment Came Fast and Furious*, HOUS. CHRON. (June 19, 2009), <http://www.chron.com/news/houston-texas/article/Judge-Kent-s-impeachment-came-fast-and-furious-1729616.php>.

74. *St. Clair*, 76 F. Supp. 2d at 774.

75. *Id.*

76. *Id.* at 774-75.

77. *Id.* at 774.

78. *Id.* at 775.

79. *United States v. Jackson*, 208 F.3d 633, 637-38 (7th Cir. 2000).

80. *Id.* at 637.

81. *Id.* at 637-38.

82. *Id.* (citing *St. Clair*, 76 F. Supp. 2d at 775). The proponent of the postings argued that they were admissible as the business records of the Internet service provider, but the court pointed out that just because the service provider could reproduce the postings did not make them the *service provider's* business records. *Id.* at 637. Further, regardless of the FRE 803(6) analysis, the proponent failed to offer sufficient evidence of authenticity to satisfy

The initial reluctance shown by these courts towards Internet evidence has received scrutiny in recent years, notably by the District of Maine: “[I]n the decade since *Jackson*, the Internet has become more familiar and ubiquitous and its potential significance as a critical source for evidence in some cases has escalated. A conclusion that all Internet postings are so inherently unreliable that they are never admissible seems unwise.”<sup>83</sup> The *Cameron* court criticized *Jackson* for its reliance on *St. Claire*:

Although *St. Clair* still accurately describes some parts of the Internet, the on-line world has matured in the eleven years since that Court’s observation, and this Court is less inclined to paint all websites with the same broad brush and exclude all Internet postings from the business records exception to the hearsay rule only because they are Web-based.<sup>84</sup>

Instead, the court advocated “periodic reevaluation” with reference to web-based content and the hearsay rule.<sup>85</sup> *Cameron* is indicative of courts’ increasing acceptance of Internet evidence.

*B. Proper Foundation: Courts’ Increasing Acceptance of Online Statements Under FRE 801(d)(2)*

Despite initial reluctance, recent cases dealing with the admissibility of Internet statements illustrate that courts are more willing to allow these statements into evidence.<sup>86</sup> While courts have applied other exceptions to the hearsay rule to admit Internet statements,<sup>87</sup> FRE 801(d)(2) is often considered when evaluating the admissibility of electronic evidence.<sup>88</sup> In

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FRE 901 because she did not show the postings were actually made by the white supremacist groups. *Id.* at 638.

83. *United States v. Cameron*, 762 F. Supp. 2d 152, 160-61 (D. Me. 2011), *aff’d in part, rev’d in part on other grounds*, 699 F.3d 621 (1st Cir. 2012).

84. *Id.* at 161.

85. *Id.*

86. *Koerth & Paetsch*, *supra* note 70, at 675-76 (citing *U.S. EEOC v. E.I. Du Pont de Nemours & Co.*, 65 Fed. R. Evid. Serv. 706, 708 (E.D. La. 2004); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002)).

87. *See, e.g.*, *United States v. Tank*, 200 F.3d 627, 630-31 (9th Cir. 2000) (admitting chat room log printouts, focusing on authenticity); *Microware Sys. Corp. v. Apple Computer, Inc.*, 126 F. Supp. 2d 1207, 1211 n.2 (S.D. Iowa 2000) (admitting emails under FRE 803(3) as statements of declarant’s then-existing mental, emotional, or physical condition), *aff’d*, 238 F.3d 989 (8th Cir. 2001); *State v. Erickstad*, 2000 ND 202, ¶¶ 33-34, 620 N.W. 2d 136, 145-46 (admitting online used car price guide under a market report or commercial publication exception to hearsay rule).

88. *Frieden & Murray*, *supra* note 11, ¶ 33.

light of the vast use of electronic communication, “[I]t is not surprising that statements contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent if offered against that party.”<sup>89</sup> However, courts’ willingness to apply FRE 801(d)(2) has varied depending on the format of the electronic statements.

*1. Emails Authored by Parties Classified as Non-Hearsay Admissions*

The most “ubiquitous” form of electronic evidence considered by courts is email: “[E]-mail evidence often figures prominently in cases where state of mind, motive and intent must be proved, [and] it is not unusual to see a case consisting almost entirely of e-mail evidence.”<sup>90</sup> While emails are “always subject to the limitations of the hearsay rule,”<sup>91</sup> courts have often admitted this type of online statement as a statement of a party opponent.<sup>92</sup>

In *Vermont Electric Power Co. v. Hartford Steam Boiler Inspection & Insurance Co.*, the District of Vermont classified emails of a party as non-hearsay statements.<sup>93</sup> In a suit by an insured party against its insurer to collect damages resulting from a defective product, the plaintiff objected to the defendant’s use of intra-company emails authored by the plaintiff’s employees.<sup>94</sup> The court rejected the plaintiff’s hearsay objection, finding those statements were “clearly admissions of a party, and therefore admissible as non-hearsay.”<sup>95</sup> The court’s reasoning was grounded in the fact that the emails were authored by the party and were being offered against that party.<sup>96</sup>

The admissibility of emails was also challenged in *Schaghticoke Tribal Nation v. Kempthorne*, a case concerning whether the Schaghticoke Tribal Nation qualified as an Indian tribe under federal law.<sup>97</sup> During a dispute over the extent of the case record on joint motions for summary judgment, the plaintiffs argued that certain emails should be considered.<sup>98</sup> However,

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89. *Id.* ¶ 34 (quoting *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 568 (D. Md. 2007)).

90. *Lorraine*, 241 F.R.D. at 554 (citation omitted).

91. *Bowe v. State*, 785 So. 2d 531, 533 (Fla. Dist. Ct. App. 2001).

92. *See, e.g.*, *United States v. Siddiqui*, 235 F.3d 1318, 1323 (11th Cir. 2000); Koerth & Paetsch, *supra* note 70, at 675.

93. 72 F. Supp. 2d 441, 449 (D. Vt. 1999).

94. *Id.* at 448-49.

95. *Id.* at 449.

96. *See id.* at 448-49.

97. *See* 587 F. Supp. 2d 389, 394, 398 (D. Conn. 2008), *aff’d*, 587 F.3d 132 (2d Cir. 2009).

98. *Id.* at 394-95, 398.

the District of Connecticut held that emails authored by a lobbying group opposing tribal designation were inadmissible hearsay because the group was not a party to the litigation and was not an agent of any party; thus, FRE 801(d)(2) did not apply.<sup>99</sup> In contrast, emails from staff members of the government bodies being sued by the tribe were admissible under FRE 801(d)(2)(D).<sup>100</sup> Unlike the authors of the lobbying group emails, the staffers were employees of opposing parties and thus could speak on the opposing parties' behalves.<sup>101</sup>

Email evidence was also challenged in a fraud action prosecuted by a corporation's shareholders against the corporation and its officers and directors.<sup>102</sup> The defendant chief executive officer objected to the plaintiffs' use of emails he authored as evidence.<sup>103</sup> The emails in question were authenticated because the parties produced them during discovery.<sup>104</sup> The Central District of California overruled the defendant's argument because "emails written by a party are admissions of a party opponent and admissible as non-hearsay under [FRE] 801(d)(2)."<sup>105</sup> Because the emails were written by the defendant and offered against him by the plaintiffs, they were admissible.<sup>106</sup> However, the court determined other emails to be inadmissible, including where the email merely referenced the need to speak with a person identified by first name only, even though it was the defendant's first name.<sup>107</sup> While the reference to the defendant could be inferred, nothing in the record conclusively connected the email to the defendant, and FRE 801(d)(2) did not apply, as the email was not shown to be his statement or adopted statement.<sup>108</sup>

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, a copyright infringement case brought by record companies, movie studios, and music publishers against the distributor of file-sharing software, the defendant objected to the use of emails as evidence.<sup>109</sup> Each email included the names of sender and recipient, as well as the date and time of sending.<sup>110</sup> The

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99. *Id.* at 398.

100. *Id.*

101. *Id.*

102. *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 776 (C.D. Cal. 2004).

103. *Id.* at 781.

104. *Id.*; see *infra* text accompanying note 110.

105. *In re Homestore.com, Inc.*, 347 F. Supp. 2d at 781.

106. *See id.*

107. *Id.* at 781-82.

108. *See id.*

109. 454 F. Supp. 2d 966, 970-71 (C.D. Cal. 2006).

110. *Id.* at 971.

emails came to light in the discovery process and were voluntarily submitted by the defendants; thus, the court found no problem with authenticity.<sup>111</sup> The Central District of California admitted these emails as statements of an opposing party under FRE 801(d)(2).<sup>112</sup> Because the defendant admitted to employing certain individuals, the court found all emails sent by those employees admissible as non-hearsay under FRE 801(d)(2)(D).<sup>113</sup> That subsection treats the statements of a “party’s agent or employee on a matter within the scope of that relationship and while it existed,” as statements of the party.<sup>114</sup> In addition, after the defendant admitted that the email address “info@musiccity.com” was a corporate email address, the court found “[a]ll emails sent from that address [to be] admissible non-hearsay” under FRE 801(d)(2).<sup>115</sup>

Emails have also been admitted as adopted statements of a party.<sup>116</sup> In *Metro-Goldwyn-Mayer Studios, Inc.*, emails were also admitted as adoptive statements under FRE 801(d)(2)(B): “To the extent other content is incorporated into these emails, and to the extent the [defendant’s] agent expresses approval thereof, the incorporated content is admissible as vicarious adoptions.”<sup>117</sup>

Ruling on an appeal from the district court’s ruling in a suit concerning a shipping contract dispute, the Ninth Circuit found an abuse of discretion in the exclusion of an email from evidence.<sup>118</sup> An employee of the plaintiff authored the email in question, which implicated the plaintiff’s liability for a counterclaim arising out of a delayed railroad shipment, and a second employee subsequently forwarded it to the defendant.<sup>119</sup> The Ninth Circuit found that the initial composition of the email was a statement by the plaintiff’s agent acting within the scope of employment and thus “not hearsay” under FRE 801(d)(2)(D).<sup>120</sup> The court of appeals also found that the email was admissible as an adoptive admission based on the second

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111. *Id.* at 972; see *John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000) (noting that a party’s self-production of documents “implicitly authenticate[s]” them).

112. *Metro-Goldwyn-Mayer Studios, Inc.*, 454 F. Supp. 2d at 973-74.

113. *Id.* at 971.

114. FED. R. EVID. 801(d)(2)(D).

115. *Metro-Goldwyn-Mayer Studios, Inc.*, 454 F. Supp. 2d at 974.

116. Koerth & Paetsch, *supra* note 70, at 675.

117. *Metro-Goldwyn-Mayer Studios, Inc.*, 454 F. Supp. 2d at 973 (citing FED. R. EVID. 801(d)(2)(B)).

118. *Sea-Land Serv., Inc. v. Lozen Int’l, LLC*, 285 F.3d 808, 812, 822 (9th Cir. 2002).

119. *Id.* at 813, 821.

120. *Id.* at 821.



employee's actions.<sup>121</sup> The second employee copied the body of the original email "and prefaced it with the statement, 'Yikes, Pls [sic] note the rail screwed us up . . . .,'" which the court found sufficient to manifest the second employee's adoption or belief in the truth of the original email.<sup>122</sup>

Additionally, *United States v. Safavian*, a federal criminal prosecution for obstruction of justice, involved the use of numerous emails as evidence.<sup>123</sup> In response to the defendant's objection on hearsay grounds, the court determined admissibility based on different categorizations of the emails.<sup>124</sup> The court applied FRE 801(d)(2)(A) to admit the emails "attributed directly to [the defendant]."<sup>125</sup> The court also found emails admissible when "[t]he context and content of certain e-mails demonstrate[d] clearly that [the defendant] 'manifested an adoption or belief' in the truth of the statements of other people" by forwarding them.<sup>126</sup> However, when the defendant forwarded other emails but did not "clearly demonstrate his adoption of the contents," the district court did not find any adopted statements.<sup>127</sup>

Emails typically fit neatly into the admissions doctrine.<sup>128</sup> "[W]ritten assertion[s]" are inherent in the composition of emails, and that clearly makes emails "statements" under the FRE.<sup>129</sup> Emails function much like a conversation between sender and recipient, clearly conveying the former's statement in a manner that asserts a particular position.<sup>130</sup> When considering adopted statements, the same logic holds true. If an individual relays another's email without qualification or modification, it might be fair to find the forwarder to have "manifested that [the forwarder] adopted or

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121. *Id.*

122. *Id.* (second alteration in original).

123. 435 F. Supp. 2d 36, 42 (D.D.C. 2006).

124. *See id.* at 43.

125. *Id.*

126. *Id.* (quoting FED. R. EVID. 801(d)(2)(B) (1997) (repealed 2011)); *see supra* notes 35, 50.

127. *Safavian*, 435 F. Supp. 2d at 44.

128. *See, e.g.,* *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973-74 (C.D. Cal. 2006); *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 781 (C.D. Cal. 2004).

129. *See* FED. R. EVID. 801(a).

130. Goode, *supra* note 10, at 43 ("When someone writes an e-mail that asserts, 'My supervisor ordered me to cancel the contract,' that person has made a statement . . . . For analytical purposes, it is no different from a person handwriting or typing a letter that asserts the same thing.").

believed [the original email] to be true.”<sup>131</sup> On the other hand, forwarding an email without an expression of approval may be insufficient to indicate adoption.<sup>132</sup> If the forwarder does not indicate any adoption and merely forwards the message, the intent may not be clear; he may simply be pointing out another’s position to the recipient.

In these situations, courts should examine the facts on a case-by-case basis.<sup>133</sup> To determine adoption, the court should “read each of the e-mails with care” and determine “the context in which [the emails] should be considered or who the senders or recipients were.”<sup>134</sup>

## 2. *Classifying Non-Email Online Statements*

While the admissions doctrine’s applicability to emails appears relatively clear, the analysis becomes less straightforward when addressing non-email online statements. Unlike emails, online statements like website postings do not always function as proxies for direct communication. A primary hurdle courts face in dealing with this type of evidence in the hearsay context involves determining whether there was a statement at all.<sup>135</sup> The use of FRE 801(d)(2) in the non-email context is relevant because controversy over the admissibility of this type of evidence often arises in litigation.<sup>136</sup>

In *Van Westrienen v. Americontinental Collection Corp.*, the District of Oregon considered the admissibility of statements on the website of a defendant to a Fair Debt Collection Practices Act violation.<sup>137</sup> Plaintiffs, the alleged debtors, and defendants, a collection agency and the agency president, moved for partial summary judgment; the admissibility of statements contained on the agency’s website was at issue.<sup>138</sup> The plaintiffs alleged the collection agency placed misrepresentations on its website in violation of federal law, and the defendants challenged the statements as inadmissible hearsay.<sup>139</sup> As an initial matter, the court found the defendants’ website to contain “a wealth of misinformation” and, as such,

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131. See FED. R. EVID. 801(d)(2)(B); see also *Metro-Goldwyn-Mayer Studios, Inc.*, 454 F. Supp. 2d at 973 (noting FRE 801(d)(2)(B) permits “content created by individuals other than the creator of an email [that] is incorporated into the email,” to be admitted).

132. See *Safavian*, 435 F. Supp. 2d at 43-44.

133. See *id.*

134. *Id.* at 43.

135. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007).

136. *Id.* at 555 (“Courts often have been faced with determining the admissibility of exhibits containing representations of the contents of website postings . . .”).

137. 94 F. Supp. 2d 1087, 1093, 1109 (D. Or. 2000).

138. *Id.* at 1094, 1109.

139. *Id.* at 1108-09.

to be relevant.<sup>140</sup> The court ultimately found “the representations made by [the] defendants on the website [to be] admissible as admissions of the party-opponent under FRE 801(d)(2)(A)” because the defendants created the website and were opposing parties.<sup>141</sup>

In deciding *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, the Central District of California also applied the admissions doctrine to allow printouts from a third-party website to be admitted into evidence.<sup>142</sup> In this copyright-infringement case, the plaintiff sought to use online evidence to show that the defendants were affiliated with certain websites containing the alleged infringement.<sup>143</sup> The plaintiff sought to admit into evidence printouts from a third-party website indicating that the defendants were associated with those websites, which were alleged to infringe the plaintiff’s copyrights.<sup>144</sup> The court found the printouts admissible for that purpose because they were non-hearsay statements of an opposing party.<sup>145</sup> The court justified this finding under FRE 801(d)(2)(D),<sup>146</sup> which admits statements “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.”<sup>147</sup> Based on the reference to FRE 801(d)(2)(D), it seems the court concluded that statements on the third-party websites proved the existence of an agency or employment relationship between the defendant and the third parties, although this connection is not explicitly outlined in the opinion.<sup>148</sup>

In *TIP Systems, LLC v. SBC Operations, Inc.*, a patent infringement action, the Southern District of Texas admitted printouts from a party’s own website.<sup>149</sup> Plaintiffs owned a patent for an inmate telephone and alleged that the defendants’ similar device infringed on their existing patent.<sup>150</sup> To prove the defendants were infringing based on the presence of their product in the marketplace, plaintiffs wished to use statements from the defendant’s website to show the defendants were in the inmate telephone business.<sup>151</sup>

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140. *Id.* at 1109.

141. *See id.*

142. 213 F. Supp. 2d 1146, 1155 (C.D. Cal. 2002).

143. *See id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. FED. R. EVID. 801(d)(2)(D).

148. *See Perfect 10, Inc.*, 213 F. Supp. 2d at 1155.

149. 536 F. Supp. 2d 745, 749, 756 n.5 (S.D. Tex. 2008).

150. *Id.* at 750-51.

151. *Id.* at 756.

Because the printouts contained statements made by a party on its own website, the court admitted them under FRE 801(d)(2).<sup>152</sup>

Finally, *United States v. Cameron* included a discussion of the applicability of FRE 801(d)(2) to images of child pornography found on a criminal defendant's computer.<sup>153</sup> The court first concluded that possession of the images was a substantive element of the crime as opposed to evidence of it, thus negating any hearsay implications.<sup>154</sup> The court then considered the merits of the defendant's hearsay arguments.<sup>155</sup> Although the discussion was not dispositive in the outcome of the appeal, the court illustrated the difficulties of applying FRE 801(d)(2) in online situations.<sup>156</sup> While the court stated that "the possession of these images could constitute an admission by the Defendant of the commission of the crime of possession of child pornography," it also acknowledged uncertainty as to whether the images were "statements" at all.<sup>157</sup> In a footnote, the court again pointed out the "considerable uncertainty that surrounds how to apply the rules of evidence to Web-based postings."<sup>158</sup> This discussion sheds light on the difficulties courts face concerning the hearsay rule, FRE 801(d)(2), and new Internet forms of communication.

A major distinction between emails and websites is that while emails typically embody clear "written assertion[s],"<sup>159</sup> the composition of a website is not always an obvious assertion as required by FRE 801(a).<sup>160</sup> Courts have generally accepted that emails contain statements.<sup>161</sup> However, as the court pointed out in *Cameron*, classifying online content under the

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152. *See id.* at 756 n.5.

153. 762 F. Supp. 2d 152, 162 (D. Me. 2011) (focusing on the testimonial nature of reports submitted to tip-off the Internet service provider regarding defendant's suspected child pornography activity in the context of the Confrontation Clause), *aff'd in part, rev'd in part on other grounds*, 669 F.3d 621 (1st Cir. 2012).

154. *Id.* at 158-60.

155. *See id.* at 159-62.

156. *See id.* at 162.

157. *See id.*

158. *Id.* at 162 n.6.

159. *See* FED. R. EVID. 801(a).

160. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007) ("Cases involving electronic evidence often raise the issue of whether electronic writings constitute 'statements' under Rule 801(a).").

161. *See, e.g., Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 973-74 (C.D. Cal. 2006); *United States v. Safavian*, 435 F. Supp. 2d 36, 42-43 (D.D.C. 2006); *Koerth & Paetsch, supra* note 70, at 675.

existing rules is more difficult.<sup>162</sup> This ambiguity increases when considering content generated on social networking sites.<sup>163</sup>

### 3. *Lack of a Clear Rule for Internet Hearsay and Social Networking*

Large portions of the population regularly use social networking websites.<sup>164</sup> These types of online portals “are effective for facilitating communication, conveying autobiographical information, and consequently, collecting evidence.”<sup>165</sup> Despite the sites’ wide use, “federal case law regarding the admissibility of social networking web sites is limited,” and no clear rule has emerged regarding this type of electronic evidence.<sup>166</sup> Courts addressing social networking sites have been skeptical, in part due to hearsay concerns.<sup>167</sup>

Content on social networking sites differs from that of emails or traditional website postings.<sup>168</sup> The primary distinction between these types of online statements can be found in the directness of the communication. On a spectrum between communications limited in scope and those with unlimited reach, emails fall more in line with the former. Emails represent direct communications from senders, who “generally know with whom they are communicating” because senders address messages to exclusive lists of recipients.<sup>169</sup> Traditional websites occupy the opposite end of the spectrum because they are widely viewable by anyone with Internet access. To access a traditional website, “[a] user may either type the address of a known page or enter one or more keywords into a commercial ‘search engine’ in an effort to locate sites.”<sup>170</sup>

Social networking posts fall somewhere between emails and traditional websites on this spectrum: “Social networking sites and blogs are sophisticated tools of communication where the user voluntarily provides

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162. See *Cameron*, 762 F. Supp. 2d at 162 n.6.

163. See Kathrine Minotti, *The Advent of Digital Diaries: Implications of Social Networking Web Sites for the Legal Profession*, 60 S.C. L. REV. 1057, 1060-61 (2009).

164. See *infra* Part IV.A.

165. Minotti, *supra* note 163, at 1058.

166. *Id.* at 1066.

167. *Id.*

168. See Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 4 (2011) (“[S]ocial media is a catch phrase that describes technology that facilitates interactive information, user-created content and collaboration.”).

169. See *Indep. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 436-37 (Md. 2009).

170. *Id.* at 436 n.1 (quoting *Reno v. ACLU*, 521 U.S. 844, 852-53 (1997)).

information that the user wants to share with others.”<sup>171</sup> Users can choose who, among other users, has access to their postings. However, the average Facebook user has 120 “friends” who have access to his postings.<sup>172</sup> While a social networking profile is not typically viewable to the world like a traditional website, the number of people with access to postings is far greater than the typically limited recipients of an email.

The unique type and scope of communications on social networking sites make these communications distinguishable from emails and website postings. Approaches taken by courts to determine admissibility of hearsay on websites or in emails are not easily applied to social networking, a new category of online communication. These distinctions are one reason that no clear rule applicable to social networking hearsay has been established.<sup>173</sup> The Supreme Court’s holding in *Janus Capital Group, Inc. v. First Derivative Traders*<sup>174</sup> increased the uncertainty surrounding the admissibility of these different forms of online hearsay.<sup>175</sup>

### C. *The Impact of Janus Capital Group, Inc. v. First Derivative Traders*

#### 1. *The Court’s Opinion*

*Janus* involved an action for violation of the Securities and Exchange Commission’s Rule 10b-5.<sup>176</sup> This rule “prohibits ‘mak[ing] any untrue statement of a material fact’ in connection with the purchase or sale of securities.”<sup>177</sup> Janus Capital Group, Inc. (JCG), a publicly-traded mutual fund manager, organized its mutual funds into a business trust entitled the Janus Investment Fund (JIF), a separate legal entity owned by shareholders.<sup>178</sup> The controversy in *Janus* arose after the shareholder-

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171. *Id.* at 438 n.3; *see supra* note 8.

172. *See Primates on Facebook*, THE ECONOMIST (Feb. 26th, 2009), [http://www.economist.com/node/13176775?story\\_id=13176775](http://www.economist.com/node/13176775?story_id=13176775).

173. *Cf.* Minotti, *supra* note 163, at 1057, 1059 (noting the absence of a clear rule for social media, as well as the presence of “complicated discovery requests and unique admissibility hurdles” presented by the “latest Internet developments”).

174. 131 S. Ct. 2296 (2011).

175. *See* Gregory P. Joseph, *Internet and Email Evidence (Part 1)*, PRAC. LAW., Feb. 2012, at 19, 29 [hereinafter Joseph, *Internet Evidence*] (noting that in light of *Janus*, “the fact that a litigant posts on its website material from another website may not constitute an admission as to the contents of the second website, depending on the purpose of the posting”); Gregory P. Joseph, *Supreme Court on Civil Practice 2011*, 80 U.S.L.W. 250, 251 (Aug. 23, 2011) [hereinafter Joseph, *Supreme Court 2011*].

176. 131 S. Ct. at 2299.

177. *Id.* (alteration in original) (quoting 17 C.F.R. § 240.10b-5 (2010)).

178. *Id.*

owners of JIF hired JCG's wholly owned subsidiary, Janus Capital Management LLC (JCM), to advise and administer JIF's investments.<sup>179</sup> At issue in the case were prospectuses issued by JIF "describing the investment strategy and operations of its mutual funds to investors."<sup>180</sup> JCG shareholders sued both JCG and JCM, alleging that prospectuses issued by JIF materially misled the public in violation of SEC Rule 10b-5 and that JCM was responsible because it advised JIF to issue those statements.<sup>181</sup> After concluding that, "[f]or purposes of [SEC] Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement," the Court found that JIF was responsible for making the statements because it filed the prospectuses with the SEC, regardless of the fact that JCM may have advised JIF on the contents of the statements.<sup>182</sup>

In holding for JCG, the Court also rejected the shareholders' argument that JCM made the misleading statements by hosting JIF's prospectuses on its website.<sup>183</sup> The Court found that "[m]erely hosting a document on a Web site does not indicate that the hosting entity adopts the document as its own statement."<sup>184</sup> In hosting JIF's prospectuses, JCM did not "make" any of the statements found in those documents, just as the SEC does not "make" any of the statements found in documents hosted on its website.<sup>185</sup> Ultimately, the Court held "that only a speaker or person with ultimate authority for content of an allegedly fraudulent statement may be held liable for damages under Securities and Exchange Commission Rule 10b-5 for 'making' the statement."<sup>186</sup>

## *2. Possible Impact of Janus on the Application of FRE 801(d)(2) to Online Statements*

Hearsay is not directly addressed in *Janus*.<sup>187</sup> The Court's holding was primarily a substantive one relating to the charged securities fraud.<sup>188</sup>

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179. *Id.*

180. *Id.* at 2300.

181. *Id.* at 2300-01. First Derivative Traders argued that, as the parent company of JCM, "JCG should be held liable for the acts of JCM as a 'controlling person.'" *Id.* at 2301 (quoting 15 U.S.C. § 78t(a) (Supp. V 2011)).

182. *Id.* at 2302, 2304.

183. *Id.* at 2305 n.12.

184. *Id.*

185. *Id.*

186. Joseph, *Supreme Court 2011, supra* note 175, at 251.

187. *Id.* ("[T]he Supreme Court addressed a securities-specific issue . . ."); see *Janus Capital Grp. Inc.*, 131 S. Ct. 2296.

188. Joseph, *Supreme Court 2011, supra* note 175, at 251.

However, the Court's determination that hosting documents on a website is not equivalent to the host adopting the content of those documents may influence evidentiary rulings regarding the admissions doctrine and online statements. "*Janus* teaches that, depending on the circumstances, the fact that a litigant posts on its website material from another source may not constitute an adoption of the contents of the posted material."<sup>189</sup> This case raises questions about the application of FRE 801(d)(2), particularly in the context of adoptive admissions.

While the ruling centered on who was ultimately responsible for the prospectuses, the Court explicitly addressed the question of whether JCM "adopt[ed] the document[s] as its own statement," and ruled that hosting did not constitute making a statement.<sup>190</sup> When considering the Court's holding in the context of FRE 801(d)(2)(B), the implication is that JCM's hosting of documents may not have been a "statement" for hearsay purposes<sup>191</sup> or, in the alternative, that merely hosting documents on a website is insufficient to manifest adoption or a belief in the truth of those documents.<sup>192</sup>

*Janus* highlighted the difficulties courts experience when determining whether a statement was made online. Under similar facts in *Van Westrienen*, the District of Oregon held that fraudulent statements were made when "a wealth of misinformation" was placed by a defendant-debt collections company on its website and admitted those statements under FRE 801(d)(2).<sup>193</sup> The *TIP Systems* court also admitted statements from a website under FRE 801(d)(2) because it found the statements to have been made by the party.<sup>194</sup> In both cases, information on a party's website was found to be a statement; yet, in *Janus*, the Court found no statement had been made when JCM hosted documents on its website.<sup>195</sup>

In addition, the Court's analysis in *Janus* raises questions about online adoption of another's statements.<sup>196</sup> Courts have recognized adoption in cases where individuals have forwarded emails, so long as there was

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189. *Id.*

190. *Janus Capital Grp., Inc.*, 131 S. Ct. at 2302, 2304, 2305 n.12.

191. *See* FED. R. EVID. 801(a) ("Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.').

192. *See id.* Rule 801(d)(2)(B).

193. *Van Westrienen v. Americontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1109 (D. Or. 2000).

194. *TIP Sys., LLC v. SBC Operations, Inc.*, 536 F. Supp. 2d 745, 756 n.5 (S.D. Tex. 2008).

195. *Compare Janus Capital Grp., Inc.*, 131 S. Ct. at 2305 n.12, with *TIP Sys., LLC*, 536 F. Supp. 2d at 756 n.5, and *Van Westrienen*, 94 F. Supp. 2d at 1109.

196. Joseph, *Supreme Court 2011*, *supra* note 175, at 251.



sufficient manifestation of the forwarder's adoption or belief in the truth of the original message.<sup>197</sup> When forwarding an email, the forwarder typically takes a message created by another and relays that message from his email account. This process is analogous to linking or hosting another's document on a website; in the hosting context, the host places another's content in an area the host controls. Yet in *Janus*, the hosting conduct was not given the same treatment applied by other courts to email adoptions.<sup>198</sup> The Court's grounds for this distinction are not exceptionally clear, likely due to the ancillary nature of this particular inquiry to the case; but, as the *Safavian* court found in the email context, without clear demonstration of intent to adopt, there is no adoption.<sup>199</sup>

While the *Janus* Court did not speak explicitly in the context of hearsay or FRE 801(d)(2), the holding implicates evidentiary concerns.<sup>200</sup> The Court's restrictive view of Internet statements and adoptions in the online context contrasts with several lower court opinions that permit such evidence as non-hearsay admissions.<sup>201</sup> The limited federal case law on the issue, the absence of clear admissibility rules, the silence of the FRE regarding online hearsay, and the *Janus* holding all point to the necessity of considering the implications of Internet communications on FRE 801(d)(2), and what approaches could be taken to address these uncertainties.

#### *IV. Impact of Changes in Online Communication Technologies on the Applicability of FRE 801(d)(2) to Online Statements*

The two primary issues concerning the application of FRE 801(d)(2) to Internet activity are: (1) defining what online conduct constitutes a statement for hearsay purposes and (2) deciding how to determine what is sufficient to indicate adoption of statements online. The development of Internet technology has already prompted numerous discussions regarding

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197. See, e.g., *United States v. Safavian*, 435 F. Supp. 2d 36, 43 (D.D.C. 2006).

198. Compare *Janus Capital Grp., Inc.*, 131 S. Ct. at 2305 n.12, with *Safavian*, 435 F. Supp. 2d at 43.

199. See *Safavian*, 435 F. Supp. 2d at 44.

200. Joseph, *Supreme Court 2011*, *supra* note 175, at 251.

201. Compare *Janus Capital Grp., Inc.*, 131 S. Ct. at 2305 (finding no statement made for purposes of fraud on party's website), with *United States v. Cameron*, 762 F. Supp. 2d 152, 162 (D. Me. 2011) (discussing that possession of child pornography on a party's computer could be an admission of committing the crime of possession), *aff'd in part, rev'd in part on other grounds*, 699 F.3d 621 (1st Cir. 2012), and *TIP Sys., LLC v. SBC Operations, Inc.*, 536 F. Supp. 2d 745, 756 n.5 (S.D. Tex. 2008) (holding that a statement had been made by the party on its website that constituted an admission).

the general admissibility of online evidence.<sup>202</sup> However, in light of the expanding ability of individuals to contribute to online communities and the resulting new forms of statements, further consideration of FRE 801(d)(2) is required.

*A. The Proliferation of Internet Use and Its Effect on Hearsay Evidence*

The proliferation of Internet use will undoubtedly lead to a surge in attempts to use electronic evidence. The Internet is used in connection with business transactions and, increasingly, with social relationships. One area of major growth in online activity is in social networking: “The world has embraced social networking with a fervor rarely seen.”<sup>203</sup> As of December 2012, one billion people were considered “active users” of Facebook, with over half of those users logging on every day,<sup>204</sup> and Twitter had 200 million monthly active users.<sup>205</sup> With online conduct occurring at such a high rate, there is an increasing probability that Internet content will come under courts’ scrutiny.

A number of recent cases illustrate the impact of wide Internet use on litigation.<sup>206</sup> This effect is strong in the evidentiary context “as social networking sites so often offer up gold nuggets of evidence.”<sup>207</sup> Cross-examination was permitted regarding a Facebook profile, a personal injury claim was called into question because of photos indicating physical fitness, a child-custody battle was lost due to inappropriate online posts, and a husband’s position in a divorce case was compromised by a profile post stating he was single.<sup>208</sup>

Online statements are also utilized in criminal prosecutions.<sup>209</sup> Internet profiles repeatedly cause increases in lengths of criminal sentences when they show convicted persons being unremorseful.<sup>210</sup> In addition, “police

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202. See, e.g., Frieden & Murray, *supra* note 11; Goode, *supra* note 10; Joseph, *Internet Evidence*, *supra* note 175.

203. Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 1 (2009-2010).

204. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Mar. 10, 2013). Approximately 82% of “monthly active users are located outside the U.S. and Canada.” *Id.*

205. @twitter, TWITTER, <https://twitter.com/twitter/status/281051652235087872> (last visited Mar. 10, 2013).

206. See generally Nelson et al., *supra* note 203.

207. *Id.* at 11.

208. *Id.* at 11-13 (summarizing cases).

209. *Id.* at 12.

210. See *id.* at 12-13.

often use social networking sites in their investigations.”<sup>211</sup> In one case, a witness identified a first-degree murder suspect through a photograph posted online; additionally, police have used fake names to collect evidence from possible criminals.<sup>212</sup>

These examples illustrate the impact of increased Internet use in the legal field. As a result, the uncertainty regarding admissibility of online hearsay is a pressing issue.<sup>213</sup> Indeed, “[s]ocial networking has often outpaced . . . amendments to the Federal Rules of Evidence,”<sup>214</sup> including FRE 801(d)(2); the changes in Internet use increase the need to reexamine how FRE 801(d)(2) applies to online hearsay.

### *B. The Increased Outlets for Making Online Statements*

The hearsay rule is concerned with out-of-court statements, and online statements are certainly ones made outside a courtroom.<sup>215</sup> The value of social networking can be found in the “new ways to communicate and share information” that these sites create.<sup>216</sup> Implicit in this new form of communication is a new method of making statements online, and Web 2.0 has given this ability to the general public.<sup>217</sup> Facebook allows individuals to make online posts, upload photos, share links, and “like” posts.<sup>218</sup> Twitter allows individuals to post “tweets” consisting of 140 characters or less to share information.<sup>219</sup> Twitter also allows users to “retweet” another user’s posts, which effectively re-posts what the other user posted on the

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211. *Id.* at 13.

212. Vesna Jaksic, *Litigation Clues Are Found on Facebook*, NAT’L L.J. (N.Y.C.), Oct. 15, 2007, at 1, available at [http://vesnajaksic.com/?page\\_id=35](http://vesnajaksic.com/?page_id=35).

213. Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 373 (2010) (“As the legal field grapples with the growth and prevalence of social networking, there do not yet seem to be bright lines clarifying the legal issues involved and social networking often outpaces and changes the law itself.”).

214. *Id.* at 373 n.70.

215. See FED. R. EVID. 802; Goode, *supra* note 10 (“[E]lectronic evidence clearly originates out-of-court . . .”).

216. See Vinson, *supra* note 213, at 356 n.2.

217. See *supra* note 8 and accompanying text.

218. See *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/132371443506290/> (last visited Mar. 10, 2013); *Like*, FACEBOOK, <https://www.facebook.com/help/110920455663362/> (last visited Mar. 10, 2013).

219. *About*, TWITTER, <http://twitter.com/about> (last visited Mar. 10, 2013).

“retweeting” user’s profile.<sup>220</sup> The “retweet” feature and the ability to post links or “like” posts on a Facebook page implicate the adopted statements provision in FRE 801(d)(2)(B).

While some instances of online postings may present obvious statements for hearsay purposes, such as a party authoring an email or posting his own statement on his own website,<sup>221</sup> there are many other circumstances where the line is unclear. When an individual shares a link on Facebook, “likes” another’s post, or “retweets” another’s post on Twitter, the admissibility of that out-of-court statement will depend on whether a court treats that act as “making” a statement, adopting a statement, or neither. The Supreme Court’s holding in *Janus* illustrates that “[p]osting, alone, may be insufficient to manifest adoption.”<sup>222</sup>

While “lawyers [are] always slower than the general public to adopt new technology,”<sup>223</sup> justice requires development of an even and defined process for determining the admissibility of online hearsay under FRE 801(d)(2). The current state of the law in this area threatens uneven application of FRE 801(d)(2) in online circumstances. Several approaches could be undertaken to ensure consistent application of FRE 801(d)(2) to online hearsay.

### C. Approaches to Applying FRE 801(d)(2) to Online Communications

Developing Internet-communication technologies have raised two issues as to admissibility of online statements under FRE 801(d)(2). First, there is ambiguity in identifying what constitutes a statement in the online context. This question is often raised in courts’ evaluation of admissibility,<sup>224</sup> yet no clear answer has emerged. Under the current definition of a statement in the FRE, a court must determine whether there was an “oral assertion, written assertion, or nonverbal conduct . . . intended [to be] an assertion.”<sup>225</sup> This analysis becomes muddled when applied to new forms of online statements.<sup>226</sup> Going forward, the evidentiary analysis relating to Internet hearsay and FRE 801(d)(2) should take into account the distinction between

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220. *FAQs About Retweets (RT)*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-what-is-retweet-rt> (last visited Mar. 10, 2013).

221. *See supra* Part III.B.

222. Joseph, *Supreme Court 2011*, *supra* note 175, at 251.

223. Nelson et al., *supra* note 203, at 1.

224. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007).

225. FED. R. EVID. 801(a).

226. Moore, *supra* note 9, at 168 (citing RICE, *supra* note 21, at 403).

clear statements such as emails and online conduct not as easily defined as an assertion.

Once an effective definition of an online statement is settled on, the second issue to be addressed is determining when an individual has, in fact, made or adopted an online statement for purposes of the admissions doctrine. While the Supreme Court indicated that posting alone might not suffice to indicate adoption, it offered no direct guidance as to when an online statement *is* made or adopted.<sup>227</sup> The admissibility of online hearsay can be properly evaluated only when both the definition of an Internet statement is settled and the point at which an online statement has been made or adopted is articulated.

One way to handle the new challenges posed by the proliferation of Internet use and the resulting online-hearsay implications is to maintain the status quo by liberally interpreting the existing FRE when applying them to online statements.<sup>228</sup> Another approach is to amend the FRE to accommodate the changing environment.<sup>229</sup>

*1. Option One: Maintaining the Status Quo by Applying the Current Rules to Online Situations*

When determining the admissibility of online evidence, some courts have simply applied the existing FRE.<sup>230</sup> In such cases, courts have not seen a significant difference between online statements and traditional statements in their admissibility, and have simply applied the existing hearsay rules.<sup>231</sup> In the context of FRE 801(d)(2), this approach is widely used when dealing with emails.<sup>232</sup> As a form of communication, emails are analogous to older practices such as letter-writing or one-on-one

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227. *Cf.* *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2305 (2011) (finding an online posting was not a statement for purposes of securities fraud).

228. *See Moore, supra* note 9, at 168 (noting that some courts “recognize how commonplace electronic information is and . . . liberally interpret the hearsay rules to ensure its admissibility”).

229. *Cf. id.* at 186 (arguing for amendment of the business records exception to the hearsay rule).

230. *See id.* at 168.

231. *See Microware Sys. Corp. v. Apple Computer, Inc.*, 126 F. Supp. 2d 1207, 1211 n.2 (S.D. Iowa 2000) (admitting emails under FRE 803(3) as statements of declarant’s then-existing mental, emotional, or physical condition), *aff’d*, 238 F.3d 989 (8th Cir. 2001); *Van Westrienen v. Americontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1109 (D. Or. 2000) (admitting online statements as admissions of a party opponent); *State v. Erickstad*, 2000 ND 202, ¶¶ 32-34, 620 N.W. 2d 136, 145 (admitting online used car price guide under a market report or commercial publication exception to hearsay rule).

232. *See supra* Part III.B.1.

conversing; thus, courts have little difficulty applying the current FRE to this type of online statement.<sup>233</sup>

This approach is supported in a number of legal commentaries.<sup>234</sup> In *The Admissibility of Electronic Evidence*, Professor Steven Goode argues “that the current framework provided by the rules of evidence is adequate to the task” of accommodating electronic evidence.<sup>235</sup> Professor Goode notes that despite the FRE being drafted “in the 1960s, well before computers, e-mail, the internet, and digital cameras became commonplace in American life,” they surprisingly “provide a fairly good evidentiary framework for addressing the admissibility issues raised by the proliferation of new technologies.”<sup>236</sup> To support his conclusion, Professor Goode first provides insight into courts’ “predictable pattern” when evaluating the admissibility of evidence generated through new technology, noting historic examples of “initial judicial intransigence eventually yield[ing] to grudging acceptance” and ultimately resulting in courts’ comfort with admissibility.<sup>237</sup> To illustrate this pattern playing out with Internet evidence, Professor Goode points to the “judicial recalcitrance” exhibited by the *St. Clair* court and the less antagonistic approach of other courts, concluding that “admissibility decisions concerning this type of evidence will follow the same trajectory” as those of the past.<sup>238</sup>

Regarding hearsay, Professor Goode argues that the “issues that arise in connection with electronic evidence are much simpler” and the analysis should function in the same way as it does with other out-of-court statements.<sup>239</sup> After pointing to the frequent use of FRE 801(d)(2) to admit Internet evidence, attention is drawn to the ambiguity surrounding who makes or adopts statements online; Professor Goode advises that “[c]ontext

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233. *See id.*

234. *See, e.g.*, Goode, *supra* note 10, at 43; Joseph, *Internet Evidence*, *supra* note 175, at 19.

235. Goode, *supra* note 10, at 2.

236. *Id.* at 2-3.

237. *Id.* at 4. Professor Goode outlines courts’ initial reluctance to accept photographs, recorded conversations, and motion pictures based both on concerns for inaccurate or misleading evidence and on the absence of applicable case law dealing with those technologies. *Id.* (citing *Cunningham v. Fair Haven & Westville R.R.*, 43 A. 1047, 1049 (Conn. 1899); *State v. Simon*, 174 A. 867, 872 (N.J. Sup. Ct. 1934), *aff’d*, 178 A. 728 (N.J. 1935); JORDAN S. GRUBER, ELECTRONIC EVIDENCE § 8:1 (1995)).

238. *Id.* at 5-6.

239. *Id.* at 42. Using email as an example, Professor Goode asserts that the hearsay analysis is no different from that of a handwritten or typed letter. *Id.* at 42-43.

will often be important in determining whether” a statement has been made or adopted on a website.<sup>240</sup>

In another commentary supporting application of the current FRE, Gregory P. Joseph acknowledges the changes brought about by the Internet: “The explosive growth of the Internet, electronic mail, text messaging, and social networks is raising a series of novel evidentiary issues.”<sup>241</sup> Joseph’s response is to point out that “[t]he novelty of the evidentiary issues arises out of the novelty of the media—thus, it is essentially factual,” as opposed to legal, novelty.<sup>242</sup> In light of this distinction, Joseph argues that any issues raised by Internet evidence “can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.”<sup>243</sup> With regard to FRE 801(d)(2), Joseph states that “[w]ebsite data published by a litigant comprise admissions of that litigant when offered by an opponent.”<sup>244</sup> Joseph seems to agree with Professor Goode’s propositions that the current FRE provide the necessary tools to evaluate the admissibility of Internet hearsay and that, as a result, the current evidentiary regime should be maintained.<sup>245</sup>

Applying the current rules to newly emerging technology also finds support in the FRE themselves. Specific to the issue of defining a statement online, the advisory committee’s notes to FRE 801(a) may provide guidance: “The key to the [‘statement’] definition is that nothing is an assertion unless intended to be one.”<sup>246</sup> Under the advisory committee’s current interpretation of the rules, “all evidence of conduct, verbal or nonverbal, not intended as an assertion” is excluded.<sup>247</sup> As to adoption online, the text of FRE 801(d)(2)(B) specifically references a manifestation of intent to adopt.<sup>248</sup> Thus, FRE 801 may provide sufficient guidance for application of the existing rules to online situations, so long as the “factual

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240. *Id.* at 45-47.

241. Joseph, *Internet Evidence*, *supra* note 175, at 19.

242. *Id.* Joseph notes that “[t]he applicable legal principles are familiar—[electronic] evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns.” *Id.*

243. *Id.*

244. *Id.* at 29.

245. Compare *id.* at 19, with Goode, *supra* note 10, at 43.

246. FED R. EVID. 801(a) advisory committee’s notes.

247. *Id.*

248. See *id.* Rule 801(d)(2)(B).

novelty” identified by Joseph<sup>249</sup> does not cause deviation from the rules’ traditional applications.<sup>250</sup>

In addition, FRE 102, which outlines the purpose of the rules, advises that “[t]hese rules should be construed so as to . . . promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>251</sup> One commentator on the general nature of the rules observed: “[T]he drafters intended that the Federal Rules’ generality and flexibility should perpetuate. . . . [T]he Advisory Committee intended to give trial courts the maneuverability to craft [their] rulings to do individual justice.”<sup>252</sup> Part of the flexibility entrenched in the rules is “the unique position of the trial judge, who observes the context in which particular evidentiary issues arise and who is therefore in the best position to weigh the potential benefits and harms accompanying the admission of particular evidence.”<sup>253</sup> When applying these flexibility principles in the context of the Internet and FRE 801(d)(2), the rules contemplate that trial judges will be able to overcome difficult admissibility questions by applying the general policies of truth-seeking and justice.<sup>254</sup>

Inherent in the rules’ flexibility, however, is a possibility of inconsistency in application.<sup>255</sup> Because of the general phrasing of the rules, “[I]t is sometimes hard to predict just how much proof a particular judge will require to admit a particular piece of electronic evidence.”<sup>256</sup> Some courts have struggled with applying the current rules to online situations.<sup>257</sup> In light of *Janus*, there is a possibility that these struggles may increase. While the *Van Westrienen* court applied the current rules to admit webpage

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249. Joseph, *Internet Evidence*, *supra* note 175, at 19.

250. See Goode, *supra* note 10, at 45-47.

251. FED. R. EVID. 102.

252. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 457-58 (1989) (footnote omitted) (“The Committee was comprised of former and practicing trial lawyers who understood the nature of jury trials and believed that drafting acceptable specific rules to answer most evidence questions was impossible.” (footnote omitted)).

253. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 956-57 (1990).

254. See FED. R. EVID. 102.

255. See Goode, *supra* note 10, at 6-7.

256. *Id.*

257. See, e.g., *United States v. Cameron*, 762 F. Supp. 2d 152, 162 n.6 (D. Me. 2011) (noting that classifying conduct under existing rules is difficult), *aff’d in part, rev’d in part on other grounds*, 699 F.3d 621 (1st Cir. 2012); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007) (discussing the difficulty in determining whether online posts are statements for hearsay purposes).



postings as statements of an opposing party, the Supreme Court found that no statement was made by hosting documents online.<sup>258</sup> Further, applying the current rules may become even more difficult as new technologies emerge.<sup>259</sup> These new situations cause judges “to resolve evidentiary concerns in contexts they have not seen before.”<sup>260</sup> Professor Goode explains that courts have been faced with this difficulty before and satisfactory solutions have nonetheless emerged;<sup>261</sup> but these solutions, at least in light of defining online statements and adoptions, have yet to come into clear focus.

With the flexibility of the rules as designed, the questions of what online conduct constitutes a statement for hearsay purposes, and what is sufficient for adoption online, remain somewhat unanswered. If this approach is adopted going forward, it must be premised on the assumption that courts will adapt to new technologies and develop clear and uniform admissibility rules for new Internet hearsay.

### *2. Option Two: Amending the FRE to Accommodate Internet Communications*

Another approach to solving the new issues presented by online hearsay is to amend the FRE.<sup>262</sup> In *Time for an Upgrade: Amending the Federal Rules of Evidence to Address the Challenges of Electronically Stored Information in Civil Litigation*, Jonathan L. Moore begins by observing that there have been no changes to the FRE in response to ESI, while the Federal Rules of Civil Procedure (FRCP) have been amended to address concerns over e-discovery.<sup>263</sup> Moore prefaces his argument by detailing the “vast technological and societal changes” brought on by the increased influence of computer technology.<sup>264</sup> Moore argues that, in the absence of

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258. See *supra* Parts III.B.2, III.C. Compare *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2305 n.12 (2011), with *Van Westrienen v. Americontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1093, 1109 (D. Or. 2000) (illustrating contrasting results in evaluations of online postings as statements).

259. See RICE, *supra* note 21, at 492.

260. *Id.*

261. Goode, *supra* note 10, at 4; see *supra* note 237.

262. Moore, *supra* note 9, at 186.

263. *Id.* at 147.

264. *Id.* at 147-48. “The changes brought by this technology pervade all aspects of modern life, ‘chang[ing] almost everything about our relationship with information: how we create it, how much of it we create, how it is stored, who sees it, [and] how and when we dispose of it.’” *Id.* at 148 (alterations in original) (quoting James Gibson, *A Topic Both Timely and Timeless*, 10 RICH. J.L. & TECH. 49, ¶ 2 (2004)).

relevant changes to the FRE, “[F]ederal courts have used vastly differing admissibility standards” when dealing with electronic evidence; thus, amendments to the FRE are necessary “to provide clarity and uniformity.”<sup>265</sup> While pointing out that the existing FRE “are flexible enough to accommodate the changes brought by ESI,”<sup>266</sup> Moore ultimately concludes amendments are necessary:

Even with this flexibility, some of the changes wrought by technology have no common law analog, making it difficult for judges to resolve them. Additionally, the current rules are premised on the concept of written, physical evidence, a concept that technological changes have significantly altered in the new millennium. These changes necessitate the reconsideration of the traditional rules of evidence.<sup>267</sup>

In his article, Moore provides textual changes to a number of rules, but does not directly address changes to FRE 801(d)(2).<sup>268</sup> However, his observations regarding the sweeping societal changes brought on by technology, and the accompanying judicial uncertainty,<sup>269</sup> are equally present with regard to FRE 801(d)(2).<sup>270</sup> Thus, his suggestion of amendment may still be applicable.

As Moore observes, amending federal rules to accommodate technology is not unprecedented.<sup>271</sup> In 2006, the FRCP were amended in response to increasing concerns over the discoverability of ESI.<sup>272</sup> The primary issues surrounding electronic discovery prior to the 2006 FRCP were the sheer volume of ESI and the resulting increase in the cost of litigation.<sup>273</sup> The

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265. *Id.*

266. *Id.* at 175.

267. *Id.* at 176 (footnotes omitted).

268. *See id.* at 175-93.

269. *See id.* at 147-48.

270. *See supra* Part III.

271. Moore, *supra* note 9, at 177.

272. Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 10, ¶ 6 (2011); *see also* Moore, *supra* note 9, at 149.

273. *See, e.g.*, John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 563 (2010) (“The volume and costs of discovery in the electronic age amount in some cases to billions of pages and millions of dollars.”); Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, ¶ 5 (2007) (“The sheer magnitude and diversity of ESI that must be dealt with creates significant difficulties and costs for lawyers and litigants.”); George L. Paul & Jason R. Baron,

inherent characteristics of ESI contributed to the burdens on the litigation system: ESI is (1) “dynamic” in that it can be easily modified, (2) “persistent” because attempts to destroy it can often be undone, (3) “dependent upon the technology that created it,” and (4) available in many different forms, making discovery difficult.<sup>274</sup>

The burdens of ESI discovery on the efficiency and cost of litigation directly conflicted with FRCP 1, which requires that the FRCP “be construed and administered to secure the just, speedy, and inexpensive determination of every action.”<sup>275</sup> Without clear guidance from procedural rules, courts applied local rules and case law, rather than meeting the mandate of FRCP 1; this led to inconsistent results “and a confusing and debilitating federal civil judicial system.”<sup>276</sup>

In response, “the Advisory Committee first proposed the Amendments ‘to reduce the costs of [electronic] discovery, to increase [discovery’s] efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management.’”<sup>277</sup> Further, “[t]he Advisory Committee solicited extensive input from ‘bar organizations, attorneys, computer specialists, and members of the public,’”<sup>278</sup> and concluded that amendment of the FRCP was needed because, without uniform rules, “a patchwork of rules and requirements [was] likely to develop” in courts across the country.<sup>279</sup> Without top-down change “to accommodate the distinctive features of electronic discovery . . . similarly situated litigants will . . . be treated differently depending on the federal

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*Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶ 1 (2007) (noting that the inflation of the quantity of information “has stressed the legal system and indeed, it is becoming prohibitively expensive for lawyers even to search through information”).

274. Mazza et al., *supra* note 273, ¶ 4.

275. *Id.* ¶ 1 (quoting FED. R. CIV. P. 1).

276. See Borden et al., *supra* note 272, ¶ 7 (citing COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE 22-24 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>).

277. *Id.* ¶ 8 (first alteration in original) (quoting Letter from Lee H. Rosenthal, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure, to David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 27, 2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>).

278. *Id.* ¶ 6 (quoting COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 276, at 22).

279. COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 276, at 23.

forum.”<sup>280</sup> Upon approval by the Supreme Court, the amendments were incorporated in 2006.<sup>281</sup>

The substantive changes to the discovery rules included, among others, defining ESI as discoverable information, limiting the discoverability of certain sources of ESI absent good cause, defining appropriate formats for the delivery of ESI, and establishing who pays for electronic discovery.<sup>282</sup> The 2006 amendments focused the scope of discovery by requiring discovering parties “to consider the evidence they need, where it is located, and how to acquire it in a way that is fair and proportional to the needs of the case.”<sup>283</sup> The burden imposed by vast quantities of available information was mitigated under the 2006 amendments because parties are now encouraged “to seek only the information that is necessary for the resolution of the case.”<sup>284</sup> As a result, courts and attorneys are becoming “increasingly adept at using the tools the Amendments provide to craft discovery protocols that are reasonable, iterative, and proportional to the needs of the case,” thus meeting FRCP 1’s call for speedy and inexpensive litigation.<sup>285</sup>

If amending the FRE to address changes brought on by Internet evidence is an appropriate response, the process and reasoning by which the FRCP were amended would provide valuable guidance. However, no concrete proposals to amend FRE 801(d)(2) have emerged to address the issues of what online conduct constitutes a statement for hearsay purposes and when an online statement has been adopted. Given the explicit purpose of the FRE and the expectancy by the drafters that the rules would remain general and flexible,<sup>286</sup> it is difficult to imagine creating particular rules to define what online conduct constitutes a statement or at what point an adoption has been made online. To answer these questions in the text of a rule, amendments would have to be extremely issue specific, which would contravene the rules’ underlying policy of adaptability. Adding additional Internet-specific hearsay rules may conflict with the recent streamlining amendments to the FRE.

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280. *Id.* at 24.

281. Borden et al., *supra* note 272, ¶ 6.

282. See Steven S. Gensler, *Some Thoughts on the Lawyer’s E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 521 (2009) (citing FED. R. CIV. P. 26(b)(2)(B), 34(a)(1)(A), 34(b)(1)(C), (2)(E); FED. R. CIV. P. 26(b)(2) advisory committee’s notes).

283. See Borden et al., *supra* note 272, ¶ 10.

284. *Id.*

285. *Id.* ¶ 11.

286. See *supra* Part IV.C.1.

While amending the FRE might provide a more concrete answer to the admissibility issues presented by Internet hearsay, doing so may directly conflict with the designed adaptability of the rules. While, in the short-term, amending the FRE may provide a clear and concise definition of an online statement or adoption, any such change could become obsolete with further technological advancement. Amending the FRE to reflect the current state of technology could lead to an endless stream of changes that would ultimately lead to more confusion in the future.

*D. The Appropriateness, Despite Technological Change, of Maintaining the Current Approach to FRE 801(d)(2)*

*1. Sufficiency of the Evidentiary Status Quo to Developing Adequate Definitions Applicable to Online Conduct and FRE 801(d)(2)*

The expansion of online communication methods is particularly impactful with regard to the hearsay rule and the admissions doctrine.<sup>287</sup> As one court pointed out, “Given the near universal use of electronic means of communication, it is not surprising that statements contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent.”<sup>288</sup> Because this new type of evidence proves apt for application of FRE 801(d)(2), these technological changes require important consideration.

Ultimately, maintaining the evidentiary status quo by liberally interpreting existing rules in the case of Internet statements provides the most efficient and satisfactory response to new admissibility concerns. As history has shown, the FRE were designed to be flexible to new technological changes. Thus, amending them to adapt to new technology would contravene their stated purpose.

Professor Goode’s explanation of courts’ past responses to technological change provides compelling support to the proposition that any current difficulty with the admissibility of Internet evidence may be relatively short-lived.<sup>289</sup> While the current definition for what online conduct constitutes a statement for hearsay purposes may be unclear to courts, FRE 801 provides sufficient guidance to eventually develop such a definition. The key is whether the online conduct was intended as an assertion. For adoptions, the online conduct must manifest belief in the truth of the adopted statement. While *Janus* may have clouded the issue of online

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287. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 563 (D. Md. 2007).

288. *Id.* at 568.

289. Goode, *supra* note 10, at 4; see *supra* note 237.

adoptions, the Court's decision still reflects the spirit of FRE 801(d)(2)(B): "Posting, alone, may be insufficient to manifest adoption."<sup>290</sup> Rule 801(d)(2)(B) supports this conclusion by requiring not only posting, but also clearly indicated intent to adopt. Courts today may struggle with how to determine such intent, but history shows that as technology becomes more familiar, admissibility rules will catch up.

While "[t]he evidentiary issues posed by electronically stored information may be difficult to resolve effectively,"<sup>291</sup> undertaking the effort to apply the existing rules is preferable to attempts to amend the rules to reflect the current state of technology. There is little doubt that new forms of Internet communication, or other forms of technology not yet imagined, will soon emerge. Amending the FRE would result in at best a temporary answer and at worst a constantly changing set of rules. The best method to resolve admissibility issues under FRE 801(d)(2) in the Internet age is to apply well-defined admissibility doctrines, thus furthering the flexibility of the FRE.

## *2. Accelerating the Process of Resolving Internet Hearsay Admissibility Issues Through Education*

As Joseph notes, the admissibility issues courts have struggled with in applying FRE 801(d)(2) to Internet evidence reflect factual novelty, not unclear legal standards.<sup>292</sup> Indeed, the traditional operation of FRE 801(d)(2) has been clearly established.<sup>293</sup> Yet courts dealing with newly emerging Internet evidence seemed weary of accepting the evidentiary value of online content.<sup>294</sup> This reflects the pattern of initial reluctance Professor Goode identified; thus, as history tells us, the solution to any admissibility issue can be found through greater understanding and acceptance of, in this case, Internet technology.<sup>295</sup>

Given the increasing importance of Internet evidence in litigation,<sup>296</sup> it is appropriate to implement educational measures to familiarize attorneys and judges with new forms of Internet communication. These technologies present vast opportunities for nearly anyone to generate out-of-court statements; thus, it will be helpful for judicial officers to be aware of some

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290. See Joseph, *Supreme Court 2011*, *supra* note 175, at 251.

291. Moore, *supra* note 9, at 193; see *supra* Part IV.C.1.

292. See Joseph, *Internet Evidence*, *supra* note 175, at 19.

293. See *supra* Part II.B.

294. See *supra* Part III.A.

295. See Goode, *supra* note 10, at 4.

296. See Moore, *supra* note 9, at 148.

of the intricacies involved. Specifically, they should receive instruction on how users of specific technologies communicate with each other, how profiles are organized, and how to evaluate the context of posts on a given platform. Because of the services' overwhelming popularity, Facebook and Twitter instruction should feature prominently.<sup>297</sup> To maintain effectiveness in the future, this educational process should be revisited from time to time to address any developments in technology. As the *Cameron* court indicated, Internet technology and hearsay must be periodically reevaluated to ensure proper evidentiary determinations are made.<sup>298</sup>

By instituting educational efforts to familiarize judges and lawyers with new sources of out-of-court statements, hearsay determinations under the existing FRE will be made with more consistency and clarity. The current rules are "adequate to the task" of accommodating electronic evidence.<sup>299</sup> All that is needed to resolve uncertainty surrounding online statements is to provide courts with sufficient understandings of the underlying technology to apply the current, well-defined legal standards for the admissibility of online hearsay.

#### V. Conclusion

The dawning of the Internet age has had a resounding effect in the legal world. The presence of ESI has caused sweeping changes to the way lawyers practice. This new form of evidence has already led to the amendment of the FRCP. The more recent proliferation of online avenues of communication implicates concerns for the applicability of the current FRE in the context of hearsay and the admissions doctrine. While it is clear that the current FRE govern online evidence in the same way they govern all other types of evidence, this comment attempts to point out the difficulties presented by Internet communication and the application of FRE 801(d)(2).

When examining the existing jurisprudential applications of the current FRE to online situations, it might seem that courts have had little trouble adapting. Despite early reluctance to accept online evidence, courts have increasingly found online out-of-court statements admissible under the current exceptions to the hearsay doctrine. Further, courts often apply FRE 801(d)(2) to admit online statements as non-hearsay. Case law has clearly

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297. See Part IV.A.

298. *United States v. Cameron*, 762 F. Supp. 2d 152, 160-61 (D. Me. 2011), *aff'd in part, rev'd in part on other grounds*, 699 F.3d 621 (1st Cir. 2012).

299. Goode, *supra* note 10, at 2.

established email to be an acceptable form of non-hearsay admission, and courts also have routinely applied the admissions doctrine to other types of online content, albeit with more difficulty.

The issues in application of the current FRE emerge when dealing with new forms of online communication that do not present neat analogies to pre-Internet evidence. While an email can be easily compared to a physical letter, content generated through website postings, social networks, and other non-email online mediums does not readily lend itself to such comparison. These issues are particularly relevant due to the proliferation of such new outlets. Despite near ubiquitous use of social media, no clear rule concerning the admissibility of this type of evidence has emerged. This speaks to the difficulty presented in applying the current FRE in the online context. The Supreme Court's ruling in *Janus Capital Group, Inc. v. First Derivative Traders* has also called into question the applicability of the current FRE to online out-of-court statements.

The result leaves uncertain both the definition of an online statement and the point at which such a statement has been made. To resolve this uncertainty, there are two possible approaches: maintaining the status quo by continuing to apply the current rules or evaluating the possibility of amending the FRE to accommodate online conduct. Amending the FRE is not a satisfactory solution. Adding another rule, particularly one as specific as would be required to address changing technology, would complicate the FRE and conflict with recent simplification and streamlining efforts. Also, no change could account for future developments in Internet technology. Because of the rapid expansion seen in the last ten years, a new rule addressing today's concerns would almost certainly be outdated in the near future.

Despite the changes in outlets for out-of-court statements, the current FRE remain adequate to determine the admissibility of hearsay as the statement of an opposing party. Every evidentiary determination requires a fact-intensive analysis, factoring in the form, context, and meaning of the evidence. In evaluating the admissibility of Internet evidence in the admissions context, this same fact-intensive analysis will be required. While technological changes make this analysis more complicated and nuanced, amending the rules is unwarranted. Keeping the current rules intact while updating courts' and attorneys' understandings of technology will adequately address the present and future difficulties in the application of the admissions doctrine to online statements.

*Dylan Charles Edwards*