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The Evidentiary Significance of “Tweets,” Texts and Status Updates (starring Justin Bieber)

Jeffrey Bellin

William & Mary Law School, jbellen@wm.edu

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September 12, 2011

The Evidentiary Significance of "Tweets," Texts and Status Updates (starring Justin Bieber)

Internet blogs recently lit up with reports of a minor traffic collision involving a Honda Civic and a Ferrari driven by pop sensation Justin Bieber (see, e.g., [here](#)). The next day, bloggers reported an interesting development (see, e.g., [here](#)): according to these blogs, another celebrity— "Everlast"— sent out the following electronic message (i.e., "tweet") on Twitter "moments before the crash":

OGEverlast I just raced [@justinbieber](#) down Ventura in his Ferrari I won but a fedex truck got in his way . . .

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What is particularly interesting about this sequence of events from an evidentiary perspective is the potential admissibility of Everlast's "tweet" in any subsequent litigation.

Of course the tweet, if offered for its truth, is hearsay. At the same time, as with many tweets (which are intended to communicate "what's happening" at any given moment, see [twitter.com](#)), Everlast's tweet may fall within the hearsay exception for present sense impressions.

Under Federal Rule of Evidence 803:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: **(1) Present sense impression.** A statement

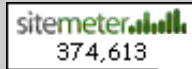
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describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

Everlast’s tweet describes an event Everlast perceived (according to Everlast) and was uttered, it appears, “just” after he perceived it. Interestingly, California is one of the few jurisdictions that does not recognize a present sense impression exception along the lines of Rule 803(1) and so Bieber will escape the evidentiary force of the tweet so long as any litigation takes place in state, not federal court.

Even if Bieber is out of the woods, the evidentiary implications of electronic present sense impressions (e-PSIs as I call them) are potentially ground shaking. Tweets, electronic text messages, Facebook status updates and the like are increasingly becoming a dominant form of communication – particularly among the younger generation. Twitter claims that 200million tweets are sent out every day. Facebook has 750million users. Text messaging is ubiquitous (**ykwm,LOL!**). If even a small portion of these communications are admissible as present sense impressions, their impact on the judicial system will be significant.

A more serious case that demonstrates how litigants can use the present sense impression exception to admit e-PSIs is *State v. Damper*, 225 P.3d 1148 (Ariz.App. 2010), where a victim used her cellphone to text a friend just prior to her murder: “Can you come over? Me and Marcus are fighting and I have no gas.” An Arizona appeals court upheld the admission of the text, which suggested a motive for the killing (by Marcus), as a present sense impression. *Id.* at 1150, 1153. The court also ruled that the text message was “nontestimonial” and thus not barred by the Confrontation Clause. *Id.* at 1151.

One might interject that these tweets and texts are not particularly reliable (see, for example, damnyouautocorrect.com) and thus not the kind of evidence that should be admitted without the declarant’s testimony (or even any showing of the declarant’s unavailability). In fact, initial reports of the Bieber collision do not seem to fit with any suggestion that it resulted from street racing

(see [here](#)). Further, the Evidence scholars who originally advocated for the adoption of the present sense impression hearsay exception almost certainly never intended for it to apply to statements like the ones described above. But new technologies and social mores have rendered the assumptions of these scholars obsolete, and the modern present sense impression exception seems tailor-made for the admission of e-PSIs like those described above, with potentially disastrous results.

The disconnect between the historical rationale for the present sense impression exception and the modern admission of e-PSIs may be the most fascinating piece of this analysis, but that story is long, complex, and does not involve Justin Bieber, Everlast or, for that matter, anyone flashier than Edmund Morgan. So I will stop here for today so as not to lose my Bieber-related readership. But for those interested, this topic – which I believe will become an increasingly important one – is covered in detail in a forthcoming article, [Facebook, Twitter, and the Uncertain Future of Present Sense Impressions](#) (starring Justin Bieber)*

* actually that last bit is not part of the title . . .

Jeff Bellin

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