



U NEED 2 AUTHENTIC8 TMs @ TRIAL

By Daniel E. Cummins

The Internet age continues to have a dramatic impact in civil litigation matters across the nation. At the forefront are issues pertaining to the discoverability of information on the parties involved that may have been shared on social media sites such as Facebook, Myspace and YouTube.

The ever-changing technological innovations in the world of communications have brought on yet another new issue to be considered in the courtroom. Now that more and more communication is conducted electronically via email or text messaging, the novel question of how to authenticate these electronic messages, along with information on social media sites, so they can be properly admitted into evidence at trial has come before the highest court in the Commonwealth of Pennsylvania.

Now that more communication is completed electronically, the question of how to authenticate these electronic messages has come before the highest court in the Commonwealth of Pennsylvania.

In its decision in *Commonwealth v. Koch*, the Pennsylvania Superior Court faced down the authentication issue in a criminal case simply by applying the rules of authentication that were in place in terms of paper-written evidence. Then, in May 2012, the Pennsylvania Supreme Court granted allocatur in the *Koch* case so that it now may review and provide guidance on this novel issue of law.

While the authentication of electronic messages is currently being litigated in a criminal court matter, the eventual decision by the Pennsylvania Supreme Court in *Koch* will surely provide guidance to the civil courts as well.

For example, now that text messaging while driving an automobile has been outlawed in Pennsylvania, it is anticipated that pleadings and evidence pertaining to texting while driving will come into play more and more in automobile accident personal injury matters. Whether and how that evidence can properly be authenticated and admitted in a civil trial may turn on how the Supreme Court rules in *Koch*.

A case of first impression

The case of first impression in *Commonwealth v. Koch*, 2011 WL 4336634 2011 PA Super 201, No. 1669 MDA 2010 (Pa.Super. Sept. 16, 2011, Bowes, Freedburg, Colville, JJ.) (Opinion by Bowes, J.), involved an appeal by the defendant from a Cumberland County conviction for drug offenses.

The Pennsylvania Superior Court ruled that text messages are not admissible in court unless they are properly authenticated, i.e., unless there is evidence presented



that the messages did indeed come from the alleged sender.

In *Koch* the defendant's cell phone had been seized by the police during a search and the text messages discovered on the phone were transcribed, offered at trial by the prosecutor and allowed in by the trial court judge over the defendant's objections as to hearsay and authentication.

The defendant in the criminal case asserted that there was no evidence to establish that she had sent any of the drug-related texts. She also asserted that it had not been established that the drug-related texts received on the phone were specifically directed to her, as there was other evidence that the defendant's cell phone was also being used by someone else at the time.

On appeal, the Superior Court found that the text messages were not properly authenticated and, therefore, should not have been admitted. The criminal conviction was overturned.

As further support for its ruling, Superior Court pointed to the prior prescient Pennsylvania Superior Court decision in *In the Interest of F.P., A Minor*, 878 A.2d 91 (Pa.Super. 2005), in which the court dealt with the authentication of evidence of instant messages.

In that case the Superior Court rejected the argument that emails or text messages are inherently unreliable because of their relative anonymity and the difficulty sometimes attendant with connecting a message with its author.

The court in *F.P.* noted that these issues were no different from letters or other documents that could be forged or denied by the alleged writer. The court found that electronic messages could be properly authenticated within the framework set forth under Pennsylvania Rule of Evidence 901, ruling that this framework could be applied on a case-by-case basis to determine if there had been an adequate foundation laid out as to the document's relevance and authenticity.

The Superior Court reiterated this analysis in the more recent case of *Commonwealth v. Koch*, noting that "electronic writings typically show their source, so they can be authenticated by contents in the same way a communication by postal mail can be authenticated."

Koch also emphasized that while text messages and emails can almost always be electronically traced back to the source cell phone or computer, the sender of such messages is not always thereby automatically identified. In other words, particular cell phones and computers

can arguably be utilized by anyone at any time to send the messages.

As such, the Superior Court held that there must also be “[c]ircumstantial evidence, which tends to corroborate the identity of the sender,” before an electronic message may be authenticated and admitted.

Impact in civil matters

This emerging evidentiary issue could obviously also come into play in civil litigation matters not only with respect to authenticating text messages but also tweets, emails and commentary, photos and video on social media sites such as Facebook, Myspace, YouTube, LinkedIn and Google+.

According to the Superior Court’s rationale in *Koch*, such items can be authenticated in the same manner as any other “writing” or documentary evidence. It remains to be seen whether the Pennsylvania Supreme Court will adopt the same analysis.

Until then it appears that when faced with this novel issue, litigators and the trial courts should not be distracted by the fact that this issue involves a new form of evidence because the same basic Pennsylvania Rules of Evidence apply.

More specifically, under Pennsylvania Rule of Evidence 901 pertaining to authentication, “[t]he required degree of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.” See Pa.R.E. 901(a).

Pennsylvania Rule of Evidence 902(b) lists examples of methods to establish authentication. Evidence may be authenticated:

- By testimony from a witness with knowledge that the matter is what it is claimed to be.
- With evidence establishing distinctive characteristics of the document to con-

firm its authenticity (perhaps the phrasing in the text will match how the sender speaks, etc.).

- By other relevant, circumstantial evidence to show that the writing is what the proponent purports it to be (i.e., references to related places, things or names in the text message).

As the Pennsylvania and Federal Rules of Evidence largely mirror each other, it can be anticipated that the analysis for the authentication of electronic messages would be similar in the federal court system once the issue is finalized by the Pennsylvania Supreme Court’s decision in *Koch*.

Conclusion

While the issue of authentication of electronic messages remains unsettled in Pennsylvania, the trend to date has been to treat this new form of evidence in the

same manner as paper evidence has been treated in the past. Until the Pennsylvania Supreme Court finally rules on the matter, a litigant faced with the issue of the authenticity of an email, text message or information from a social media site may consult the Superior Court’s decisions in *EP* and *Koch* and in Pennsylvania Rule of Evidence 901. ♦



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