

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

REPORT

Proposed Amendment of Pa.R.E. 901

The Committee on Rules of Evidence is considering amendment of Rule 901 to add a new paragraph (b)(11) to provide an example of evidence for the authentication of a writing, posting, communication, or image on an electronic device or medium. The Committee's consideration of this issue arose from its review of *Commonwealth v. Koch*, 106 A.3d 705 (Pa. 2014) and the lack of rules-based guidance for resolving authentication questions involving electronic communications.

The Committee acknowledges that there is often a lack of direct evidence of authentication absent an admission or eyewitness. Rather, authentication is frequently proven by circumstantial evidence. The Committee found that the same circumstantial evidence used to establish the authenticity of writings, see *Commonwealth v. Brooks*, 508 A.2d 316 (Pa. Super. 1985), have been used to authenticate electronic communications, see, e.g., *U.S. v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000) and *Massimo v. State*, 144 S.W.3d 210 (Tex. App. 2004).

The Committee deliberated whether ownership, access, or possession of a device or to an account should be considered for authenticating whether an electronic communication was sent from or received by the person having ownership, access, or possession of the device or access to the account. Members expressed concern that mere possession of or access to a device or account does not equate to exclusive possession or access to support the inference that the person sent or received the communication.

Therefore, the Committee has included ownership, access, or possession of a device or to an account as a factor to be considered, but qualifies it by reference to exclusivity. Therefore, to permit ownership, access, or possession to be the sole means of authentication of an electronic communication, the proponent should demonstrate by *prima facie* evidence that ownership, access, or possession was exclusive.

All comments, concerns, and suggestions concerning this proposal are welcome.