Rules of Engagement: Discovery, Authentication and Admissibility of Texts and Social Media

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*** Original Source Materials Courtesy of Peter D. Giglione, Esq.**

DISCOVERY – GENERAL PRINCIPLES

- Rule 4003.1
  - (a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.
  - (b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
  - (c) Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact.

DISCOVERY – GENERAL PRINCIPLES

- Rule 4009.11(b) Request Upon a Party for Production of Documents and Things
  - The request shall set forth in numbered paragraphs the items to be produced either by individual item or by category, and describe each item or category with reasonable particularity…

DISCOVERY – GENERAL PRINCIPLES

- Rule 4011
  - No discovery, including discovery of electronically stored information, shall be permitted which…
    - (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;

DISCOVERY – GENERAL PRINCIPLES

- In Re Thompson's Estate, 416 Pa. 249. 206 A.2d 21 (1965)
  - Discovery is to be liberally allowed and doubts should be resolved in favor of permitting discovery.
  - However, "fishing expeditions" are not permitted.
    - On the other hand, "While a limited degree of 'fishing' is to be expected with certain discovery requests, parties are not permitted 'to fish with a net rather than with a hook or a harpoon.'" Brownstein v. Philadelphia Transp. Co., 46 Pa. D. & C. 2d 463, 464 (Phila. Co. 1969).

DISCOVERY OF SOCIAL MEDIA EVIDENCE

- No appellate case law specific to the issue

DISCOVERY OF SOCIAL MEDIA EVIDENCE – PRIVILEGE?

- Distinction between public and "private" social media evidence
  - Principles pertaining to creating new privileges:
    - "Evidentiary privileges are not favored; ... exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth." Hutchison v. Luddy, 606 A.2d 905, 908-09 (Pa. Super. 1992) (quoting Herbert v. Lando, 441 U.S. 153, 175 (1979).
    - "Even in the arena of testimony, where the evidence will be publicly divulged, the courts sanction the application of privilege 'only to the very limited extent that [it] has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' " Koken v. One Beacon Ins. Co., 911 A.2d 1021, 1027 (Pa. Commw. Ct. 2006).
    - "The less public arena of discovery necessitates even greater latitude [than that afforded to testimonial privilege], for the purpose of allowing a broader standard is to ensure that party has in its possession all relevant and admissible evidence before the start of trial." Peppard v. TAP Pharmaceutical Products, Inc., 904 A.2d 986 (Pa. Commw. Ct. 2006).

SOCIAL MEDIA POSTS ARE NOT PRIVILEGED

- Hoy v. Holmes, 107 Schuylkill L. Rev. 19 (2013)
  - "There exists no constitutional right of privacy that prohibits the type of discovery sought concerning social media nor is such social media protected by an established privilege."
- Mazzarella v. Mount Airy #1, LLC, 2012 WL 6000678 (Monroe Co. 2012)
  - "Furthermore, Plaintiff's argument of an expectation of privacy regarding her use of social media is misplaced. Those who elect to use social media, and place things on the internet for viewing, sharing and use with others, waive an expectation of privacy."
- Simms v. Lewis, 2012 WL 6755098 (Indiana Co. 2012)
  - "By definition, the purpose of social networking sites is to share information. The Court finds that Plaintiff cannot maintain a reasonable expectation of privacy when she created the account and voluntarily posted this information, knowing that the information could become publicly available."
- Largent v. Reed, 2011 WL 5632688 (Franklin Co. 2011)
  - "Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information."
- Zimmerman v. Weis Markets, Inc., 2011 WL 2065410 (Northumberland Co. 2011)
  - "…the argument of Zimmerman that his privacy interests outweigh the discovery requests is unavailing."
- McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Jefferson Co. 2010)
  - "When a user communicates through Facebook or MySpace, however, he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate. That fact is wholly incommensurate with a claim of confidentiality."

SOCIAL MEDIA DISCOVERABLE – NO LIMITATION

- Gallagher v. Urbanovich, No. 2010-33418 (Montgomery County, J. Carpenter)
- P assaulted at soccer game; sought access to D's FB account
- P did not point to any evidence which suggested relevant information could be found on D's private page or what P expected to find there (per report, no opinion accompanied the order)
- HELD: Social Media Evidence Discoverable

THRESHOLD SHOWING REQUIRED

- The overwhelming majority of cases require that a party seeking to discover social media evidence must articulate some facts which demonstrate that pertinent information may be obtained from the non-public portions of the user's social media accounts.

Examples of Threshold Requirement

- McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Jefferson County, P.J. Foradora)
  - P, injured in stock car race, sued track owner, alleging permanent impairment of health, strength and vitality and inability to enjoy pleasures of life
  - ***Public*** portions of P's FB page showed evidence that plaintiff had taken a fishing trip, attending another car race in Florida
  - Private social media posts held discoverable

More Threshhold Cases – Threshold Met

- Zimmerman v. Weis Markets, Inc., 2011 Pa. Dist. & Cnty. Dec. LEXIS 187 (Northumberland County, J. Saylor)
  - P injured while operating a forklift, pled permanent injuries, embarrassment from scars (couldn't wear shorts)
  - ***Public*** FB profile: he enjoyed "bike stunts;" photos taken before and after injury showed him posing with a black eye and with motorcycle; photos of him wearing shorts with scar visible
  - Held: D entitled to see P's private posts because he publicly shared other relevant info (no privacy concerns), and placed his condition at issue

Threshold Met

- Largent v. Reed, 2011 WL 5632688 (Franklin County, J. Walsh)
  - P passenger on motorcycle that collided with D's van, alleged serious and permanent injuries (physical and mental) which require the use of a cane to walk
  - Formerly public portions of P's FB account showed her at the gym and engaging in other activities inconsistent with her claimed limitations.
  - Held: Private social media discoverable

THRESHOLD MET

- Simms v. Lewis, 2012 WL 6755098 (Indiana Co. 2012)
  - P alleged permanent and serious injuries to head, neck and back.
  - P had accounts with Facebook, MyYearbook and Myspace.
  - P posted to MyYearbook, after the accident, "Chillin with my girl tonight, were gonna do some Zumba Fitness ☺ so excited!!! :p,"
  - Held: D entitled to discovery of MyYearbook posts but not other social media

Threshold Not Met

- Arcq v. Fields, No. 2008-2430 (Franklin County, J. Herman); Martin v. Allstate, Case ID 1104022438 (Philadelphia County, J. Manfredi); and Kennedy v. Norfolk Southern Corp., Case ID 100201473 (Philadelphia County, J. Tereshko)
  - D sought access to P's FB page without providing any foundation as to why, or what they expected to find
  - Court: D failed to articulate a reasonable, good-faith basis for seeking access; mere fact that P had an account insufficient to allow D access

Threshold Not Met

- Kalinowksi v. Kirschenheiter, No. 2010-6779 (Luzerne County, J. Van Jura)
  - Auto case; P alleged injuries that limited his ability to work, drive long distances or engage in other daily activities
  - ***Public*** FB page had a pic of him sitting on a bar stool with one foot on another bar stool; D wanted full access to account
  - Held: Not discoverable (but no explanation why)

Threshold Not Met

- Piccolo v. Paterson, No. 2009-04979 (Bucks County, J. Cepparulo)
  - P sustained severe lacerations and resultant scarring to face as passenger in vehicle
  - Discovery: P disclosed numerous before and after photos
  - HELD: D failed to establish a threshold need for the information, or prejudice by not receiving it (photos already disclosed showing injuries)

THRESHOLD NOT MET

- **Brogan v. Rosenn, Jenkins & Greenwald, LLP**, 27 Pa. D. & C.5th 553 (C.P. 2013) (Lackawanna County, J. Nealon)
  - Legal mal and breach of contract case related to sale of real property; P sought the user name and password for the FB account of a paralegal in the claims department of the D title company after testimony showed she exchanged messages through FB with another employee.
    - P claimed that the paralegal's failure to identify a recipient of those messages as a Facebook "friend" in deposition testimony warranted the inference that she'd attempted to hide their FB relationship or was otherwise hiding relevant FB data and thus social media discovery was warranted.
  - Communications at issues ***were*** produced by title company to P
  - FB messaging does not require that participants be "friends"
  - Held: P failed to establish that social media discovery would produce relevant evidence or was reasonably calculated to lead to the discovery of relevant evidence.

THRESHOLD NOT MET

- Hunter v. PRRC, Inc., 2013 WL 9917150 (York Co. 2013)
  - P in personal injury action posted the quote "Don't Deny the Diagnosis Try to Defy the Vedict" – Norman Cousins
  - P was also associated with 1700 Facebook photos and had published 650 herself
  - Defendant argued that her diagnosis was an issue in her case and therefore the quote suggested the likelihood that relevant information could be found elsewhere. Also, she had so many photos that D argued they would be relevant to her claims of diminished "life's pleasures and impaired sense of well being."
  - Held: Not discoverable. The quote is well-known and merely suggests a positive attitude can help the afflicted. Moreover, "the bare and unsupported assumption that the multitude of photographs posted by or related to Ms. Hunter will necessarily contain relevant information is insufficient to establish the necessary threshold showing."

THRESHOLD NOT MET

- Trail v. Lesko, 2012 WL 2864004 (2012).
  - P alleged serious injuries that cause great pain, limit his activities and impaired his health, strength and vitality.
  - D produced pictures of P at a bar socializing and "drinking at a party."
  - Observing that P did not claim to be bedridden or unable to leave his home, the Court concluded that the pictures were not inconsistent with P's claims
  - Held: Social media discovery not permitted.

COMPETING ANALYTICAL STRUCTURES: RULE 4003.1 VS. RULE 4011

- Rule 4003.1 Analysis – Hunter v. PRRC, Inc., 2013 WL 9917150 (York Co. 2013).
  - Rule 4003.1 allows discovery only of relevant evidence or evidence reasonably calculated to lead to the discovery of admissible evidence.
  - Under Rule 4003.1, the proponent of discovery bears the burden of demonstrating relevance or reasonableness.
  - An objection to discovery of social media evidence will be sustained unless the proponent shows that there is information which leads to the reasonable probability that relevant information is contained in the private account

RULE 4011 ANALYSIS – TRAIL V. LESKO, 2012 WL 2864004 (ALLEGHENY CO. 2012).

- Rule 4011 bars discovery that would cause unreasonable annoyance, embarrassment, oppression, burden or expense
- The party objecting to discovery bears the burden of proving unreasonable annoyance, etc.
- In Trail, the Court observed that social media evidence necessarily gives an opposing party access to content that was intended to be available only to and from friends and information that has nothing to do with litigation and could be embarrassing if viewed by persons who are not "friends." Therefore, it is in inherently intrusive.
- However, the level of intrusion is low (the Trail court assigned it a value of "2" on a 10 point scale). Against this low level of intrusion, the court balanced the need for discovery. When the party seeking discovery shows that discovery is reasonably likely to furnish relevant evidence, not available elsewhere, then the discovery is warranted.

REMEDIES – GENERAL PRINCIPLES

- Generally, Courts recognize that, even when discovery is permitted, there nevertheless should be a limit on what the party may have access to, i.e., "In the context of social networking sites, a party 'does not have a generalized right to rummage at will through information that [another party] has limited from public view.'" Brogan, supra.
- See also, Rule 4009.11 (request for production of documents and things must identify "the items to be produced either by individual item or by category, and describe each or category with reasonable particularity).

REMEDIES CONTINUED…

- Frequently not the subject of litigation in PA Rulings
- Some rulings give the party seeking discovery of social media posts access to the user's account for a specified number of days and a concomitant spoliation order to user.
- Others, see, e.g., Brogan, supra, find that granting "carte blanche access…is overly intrusive…and not tailored with reasonable particularity…for example, the defense in personal injury litigation has the right to demand photographs portraying an allegedly disabled claimant engaging in unrestricted physical activity, but is not entitled to personally rifle through every photo…"

REMEDIES CONTINUED – FEDERAL CASES

- Ogden v. All-State Career School, 299 F.R.D. 446 (W. D. Pa. 2014)
  - Employment Gender Discrimination Case (hostile work environment/disparate treatment)
  - D seeks everything on SM: all posts made, all posts in which P is tagged, all messages sent and received, all groups joined, etc.
  - P objects as irrelevant and overly burdensome
  - Relief Granted: P counsel to review all the evidence and produce those that relate to underlying workplace conduct or P's state of mind during and after tortious conduct
    - "Ordering plaintiff to permit access to or produce complete copies of his social networking accounts would permit defendant to cast too wide a net and sanction an inquiry into scores of quasi-personal information that would be irrelevant and non-discoverable. Defendant is no more entitled to such unfettered access to plaintiff's personal email and social networking communications than it is to rummage through the desk drawers and closets in plaintiff's home."

REMEDIES CONTINUED – FEDERAL CASES

- Manufacturer request for entire SM account info was overly broad and did not request info "with reasonable particularity." In re Milo's Kitchen Dog Treats, 397 F.R.D. 177 (W.D. Pa. 2015).
- D's request for username and password denied. Instead, D directed to serve IROGs and RFPs that seek relevant information and P's counsel will access the private account and provide responsive information. Howell v. Buckeye Ranch, Inc., 2012 WL 5265170 (SD OH 2012).
- D's request for access to P's entire account overly broad. Tompkins v. Detroit Metropolitan Airport, 278 F.R.D. 387 (E.D. Mich. 2012).
- "Plaintiff will not be required to provide defendant with any passwords or usernames to any social websites, so that defendant can conduct its own search and review. Just as the Court would not give defendant the ability to come into plaintiff's home or peruse her computer to search for possible relevant information, the Court will not allow defendant to review social media content to determine what it deems is relevant." Holter v. Wells Fargo, 281 F.R.D. 340 (D. Minn. 2011).

REMEDIES CONTINUED

- In camera review. See, e.g., Offenback v. L.M. Bowman, Inc., 2011 WL 2491371 (M.D. PA 2011).
- Special Master. Bro-Tech Corp v. Thermax, Inc., 2008 WL 5210346 (E.D.Pa. 2008).

WHAT ABOUT "PUBLIC" PROFILES, POSTS?

- No case law precluding ***discovery*** of publicly-posted information, pictures, etc.
  - Counsel should be able to easily get it on their own if it's public
  - Can use as a basis to get access to private accounts
  - Admissibility subject to relevance, authentication, hearsay rules

HOW DO YOU OBTAIN IT?

- If SM settings are "public," anyone can see posts (take screen shots)
- Lay foundation in depositions or IROGs, send RPDs; MTC if other side doesn't respond, attach depo transcripts
  - List SM accounts; did they post before and after incident; types of things they like to post now (Photos? Activities? Trips?)
  - Cell service provider name(s)
  - Did they exchange texts with anyone, post on SM about the incident, their injuries, current limitations, etc. ("I don't recall" doesn't hurt!)
- Subpoena (texts, phone records)

Admissibility

General overview:

- PA Courts rely on standard, rules-based authentication measures for the admissibility of texts and social media
- Most appellate case law: criminal cases

CASELAW PRIOR TO AMENDMENTS TO RULE 901

- Interest of F.P., 878 A.2d 91 (Pa. Super. 2005)
  - Instant messages from D to V which threatened V
    - V testified he believed they came from D
    - School officials testified that a mediation was conducted with D about the messages and D did not deny sending them
    - The content of the messages referred to specific events between D and V
    - One message referred to D by his first name

INTEREST OF FP HOLDING

- Not an abuse of Discretion to Admit the Instant Messages

CASELAW PRIOR TO 901 AMENDMENTS

- Commonwealth v. Koch, 39 A.3d 996 (Pa. Super. 2011), aff'd, 630 Pa. 374 (2014)
  - Police execute a warrant on D's home and seize drugs, paraphernalia and 2 phones on which texts were found indicating drug sale activity
  - D admits ownership of phones
  - It was admitted by Prosecution that at least some of the text messages on the phone were not written by D

COMMONWEALTH V. KOCH HOLDING

- Held: Admission of the text messages was an abuse of discretion
- Analysis: The difficulty that frequently arises in e-mail and text message cases is establishing authorship. Often more than one person uses an e-mail address and accounts can be accessed without permission. In the majority of courts to have considered the question, the mere fact that an e-mail bears a particular e-mail address is inadequate to authenticate the identity of the author; typically, courts demand additional evidence.
- Accordingly, authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required.

NOTE RE KOCH HOLDING

- The Supreme Court affirmed in an evenly divided opinion.
- Majority, however, would have reversed the Superior Court on the authenticity issue, i.e., the Supreme Court found sufficient evidence of authenticity despite absence of proof of authorship, writing:
  - This Court has not yet spoken on the manner in which text messages may be authenticated where, as here, there is no first-hand corroborating testimony from either author or recipient. We are mindful, however, that the burden for authentication is low, and we agree with the Justices writing in support of reversal that the trial court did not abuse its discretion in finding that the Commonwealth met the burden here, albeit we see the question as close, and we view authorship as a potentially relevant part of authentication analysis.
- Supreme Court affirmed because of hearsay objection to text evidence.
- However, subsequent caselaw and Rule 901 followed Koch holding that mere ownership insufficient to authenticate.

CASELAW PRIOR TO 901 AMENDMENTS

- **Commonwealth v. Mangel**, 181 A.3d 1154 (Pa. Super. 2018) – Erie County!
  - Evidence = Screenshots of FB Chat Messages and Pic of bloody hands
  - Expert Testimony:
    - There is only one FB account attached to the name "Tyler Mangel"
    - The screenshots bore the name "Tyler Mangel"
    - The FB account listed the owner as living in Meadville
    - Some of the pics in the screenshots were the same as the FB account
    - The FB account indicated the owner attended Meadville HS
    - The username for the FB account was "Mangel17"

COMMONWEALTH V. MANGEL CONTINUED

- The e-mail addresses attached to the account used names similar to Tyler Mangel
- The phone used to verify the FB account was Tyler's Mother's phone
- Expert would NOT state that Tyler Mangel was the author of the chats or the pic within a reasonable degree of certainty
- Defense introduced evidence of 5 other FB accounts with the name "Tyler Mangel"

COMMONWEALTH V. MANGEL HOLDING

- HELD: It was not an abuse of discretion to exclude the evidence because mere fact that the account bore defendant's name, hometown and high school was insufficient to authenticate
- BUT…what if there had been evidence that the content of the posts was linked to Defendant?

PA.R.E. 901

- **Authenticating or Identifying Evidence**
  - (a) *In General.* Unless stipulated, to satisfy the 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.
  - (b) *Examples.* The following are examples only – not a complete list – of evidence that satisfies the requirement:
    - (4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
    - (11) *Digital Evidence. To connect digital evidence with a person or entity:*
      - *(A) direct evidence such as testimony of a person with personal knowledge; or*
      - *(B) circumstantial evidence such as:*
        - *(i) identifying content; or*
        - *(ii) proof of ownership, possession, control, or access to a device or account at the relevant time when corroborated by circumstances indicating authorship.*

PA.R.E. 901(B)(11)

- **Comments:**

- ***Pa.R.E. 901(b)(11) has no counterpart in the Federal Rules of Evidence. "Digital evidence," as used in this rule, is intended to include a communication, statement, or image existing in an electronic medium. This includes emails, text messages, social media postings, and images.*** The rule illustrates the manner in which digital evidence may be attributed to the author. The proponent of digital evidence is not required to prove that no one else could be the author. Rather, the proponent must produce sufficient evidence to support a finding that a particular person or entity was the author. *See* Pa.R.E. 901(a).
- Direct evidence under Pa.R.E. 901(b)(11)(A) may also include an admission by a party-opponent.

Pa.R.E. 901(b)(11) - comments

- Circumstantial evidence of identifying content under Pa.R.E. 901(b)(11)(B)(i) may include self-identification or other distinctive characteristics, including a display of knowledge only possessed by the author. ***Circumstantial evidence of content may be sufficient to connect the digital evidence to its author.***
- ***Circumstantial evidence of ownership, possession, control, or access to a device or account alone is insufficient for authentication of authorship of digital evidence under Pa.R.E. 901(b)(11)(B)(ii).*** *See, e.g.,* Commonwealth v. Mangel*, 181 A.3d 1154, 1163 (Pa. Super. 2018)* (social media account bearing defendant's name, hometown, and high school was insufficient to authenticate the online and mobile device chat messages as having been authored by defendant). However, this evidence is probative in combination with other evidence of the author's identity.

CASE LAW RE: 901(B)(11)

- **Commonwealth v. Watkins**, 2024 Pa. Super. 77, 2024 Pa. Super. LEXIS 141 (Pa. Super. 2024) ***most recent case interpreting Rule 901****
- D convicted of receiving stolen property after tree services company's equipment stolen, posted for sale on Facebook Marketplace under account with D's name
- Company employee saw the post, took screen shots, identified unique markings on equipment.
- State police interviewed D, who admitted creating the post

CASE LAW RE: 901(B)(11)

- Cmwlth. v. Watkins, cont'd.
- Trial:
  - FB post screen shots admitted after tree company employees testified about seeing the post, same type of equipment stolen, unique markings identified
  - One employee testified that it was their company's equipment in the post because of color-coded bands that the company used to show that equipment was inspected for safety (same colored bands appeared on the equipment in the FB post)
  - Trooper testified that D admitted making the post
- D Argument: FB posts not properly authenticated because there were no marking on them showing that they had come from FB

COMMONWEALTH V. WATKINS HOLDING

- Not an abuse of discretion to admit

CASE LAW RE: 901(B)(11)

- **Commonwealth v. Jackson**, 2022 Pa. Super. 156, 283 A.3d 814 (Pa. Super. 2022)
  - Homicide case, conviction; trial court admitted into evidence posts from three Instagram accounts showing money, guns, video of defendant holding guns in the vicinity of the shooting before the murder
  - Prosecution introduced evidence that:
    - pics on accounts were of Defendant and several of them were selfies
    - Accounts used nicknames associated with Defendant
    - bio sections were materially similar and matched D's bio
    - various hashtags, location tags, phrases, captions, and acquaintances matched with D
    - Defendant admitted that he owned and controlled at least one of the accounts in controversy.

COMMONWEALTH V. JACKSON HOLDING

- Held: Not an abuse of discretion to admit.

Case law re: 901(b)(11)

- **Commonwealth v. Orr**, 2021 PA Super 136, 255 A.3d 589 (Pa. Super. 2021)
  - Evidence = threatening text messages to murder victim on night of murder and throughout month prior
  - Authentication:
    - D's girlfriend purchased and gave defendant cell phone used to send the message
    - Phone was found with defendant's other belongings at time of arrest
    - D and V were involved in custody dispute over children and content of messages focused on custody dispute

COMMONWEALTH V. ORR HOLDING

- Held: Not an abuse of discretion to admit.
- In the present case, while there was no direct testimony concerning the text messages, numerous circumstantial clues demonstrate that Appellant sent them. It is clear that Appellant owned the cell phone. The phone was found with Appellant's other belongings where Appellant was apprehended. Furthermore, as in Talley and Bry'Drick Wright, the content of the messages indicates that Appellant wrote them. Appellant and the victim were embroiled in an ongoing custody dispute, and multiple texts focused on this subject.

Case law re: 901(b)(11)

- **Commonwealth v. Reed**, 292 A.3d 601, 2023 Pa. Super. 56 (Pa. Super. 2023)
  - D convicted of corruption of minors, indecent assault, for sexually assaulting live-in girlfriend's daughter; apologized to both via group text messages to both, admitted at trial
  - Mother of V emailed screen shots of texts to police; later authenticated them at trial (pictures of both V and D were in profile pics in texts)
  - Content of texts included information and language unique to D and the circumstances shared with recipients
    - "let me start by thanking you! You brought so much joy in my life and I will never forget the memories we have. Now let me apologize to you from the deepest depths of my heart... I put you through things that no child should ever be put through! Although we all know I was thinking it was your mother, that is no excuse and your mother is 1000% right for getting out... and—never ever think that the hard times we are all going through right now is in anyway your fault... never!!! I feel it's better for your brother if me and your brother if me and your mother cut all ties and never speak again. So sadly this is a good bye to you also. I have loved you since the first time you came to Blossburg and I will never stop loving you, I know your going to do great things in life and I wish you all the best, you truly are an amazing young woman and I'm a better man for knowing you... I love you always. And I'm sorry I said those things about your dad in front of you!! I'm sure he's a great guy, he seemed it the two times I met him. Please forgive me for that!

COMMONWEALTH V. REED HOLDING

- Not an abuse of discretion to admit.

Case law re: 901

- **Commonwealth v. Scarborough**, 2024 Pa. Super. Unpub. LEXIS 632 (Pa. Super. 2024) ***non-precedential decision****
  - Sexual assault of a minor; screenshots of D's texts between him and V's mother (former girlfriend):
    - V's mother texts accusation of molestation and question "What were you thinking?" Text response was: "[He] really [didn't] know…[he was] going thru a lot mentally…[he was] beyond wrong…the guilt was eating at [him]…he wanted it to come out along (sic) time ago but [victim] didn't want to tell…[he wished he could] take it back…[he'd done] the worst thing."
  - Phone later destroyed by V's mother
  - Police took no measure to preserve phone or forensically examine phone
  - V's mother testified that:
    - She used this number frequently to communicate with D, including calls and texts
    - She recognized his voice on calls
    - She would request things via text and he would show up with the things requested
  - Police detective: D answered the phone and stated identity when she called that number

COMMONWEALTH V. SCARBOROUGH HOLDING

- Not an abuse of discretion to admit texts
  - Mom's testimony established D as author
  - Content consisted of knowledge unique to D

Federal Court – no 901(b)(11), but . . .

- **United States v. Browne**, 834 F.3d 403 (3d Cir. 2016)
  - Social media posts/chats are neither self-authenticating nor business records; cannot be authenticated under F.R.E. 902 – proof of ownership of an account is not, by itself, sufficient.
  - However, "authorship may be established for authentication purposes by way of a wide range of extrinsic evidence."
  - Authentication Evidence:
    - Recipients of chat messages (Vs) made plans to meet D via chat and D showed up as planned.
    - D admitted ownership of the accounts and admitted he had conversed with Vs
    - Bio information on accounts matched D

U.S. v. Browne Holding

- Evidence was sufficient to authenticate chat messages

Other considerations

- **Relevance**
  - Just because the posts and chats can be authenticated doesn't make them relevant
    - Social media postings in general, such as routine status updates and/or communications, are not relevant to a plaintiff's claim for emotional distress damages…The fact that an individual may express some degree of joy, happiness, or sociability on certain occasions shed little light on the issue of whether he or she is actually suffering emotional distress…the relationship of routine expressions of mood to a claim for emotional distress damages is ... Tenuous…a severely depressed person may have a good day or several good days and choose to post about those days and avoid posting about moods more reflective of his or her actual emotional state. On this score, we tend to agree with those courts that hold that routine social media posts are not relevant to a plaintiff's claim of emotional distress. Indeed…simply because an individual posts some snippets of his or her life on social media does not mean that he or she is not suffering from any emotional distress. Thus, the relevance factor weighs heavily against allowing use [of] these documents. R.D. v. Shohola, Inc., 2019 WL 6211243 (M.D. Pa. 2019)(citations omitted).
    - Important to pair relevance objection with prejudice argument.
  - Possible relevance: location, admissions, state of mind/intent, elements of a charged crime (i.e. terroristic threats, conspiracy, etc.), damages/harm (mainly to rebut), admissions, knowledge/notice, impeachment, bias

Other considerations

- **Hearsay**
  - Even if properly authenticated, posts, texts and chats may contain inadmissible hearsay
  - Possible ways around it (exceptions and exclusions): not offered for truth (text conversation – one side's texts may be for affect on reader; state of mind; intent); present sense impression (see Pa.R.E. 803(1)); party admission (see Pa.R.E. 803(25));then-existing mental, emotional, or physical condition (see Pa.R.E. 803(3)); prior inconsistent statement (see Pa.R.E. 803.1(1)); prior statement of identification (see Pa.R.E. 803.1(2)); recorded recollection (see Pa.R.E. 803.1(3))

Other Considerations

- Best Evidence Rule - Rule 1002 – Requirement of the Original. An original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.
  - But see, Commonwealth v. Talley, 265 A.3d 485 (Pa. 2021)(Screenshots of text messages are duplicates (Rule 1001) and therefore not violative of rule).
    - But…if "closely related" to a controlling issue and genuine question of authenticity or if admission of the duplicate is otherwise unfair then proponent may be required to produce original.

Other considerations

- Type of cases could impact authentication, admissibility
  - Civil lawsuits: lay foundation, authenticate in depositions, Request for Admissions, Interrogatories
  - Family law cases: spouse, witnesses, children may have to authenticate
  - Criminal cases: police, prosecutors must do their homework (ensure witnesses available for trial to authenticate, subpoena from SM media companies, etc.)

Self-incrimination

- Advice: don't shoot fireworks at a Lamborghini from a helicopter and post the video on your social media accounts (you will be charged with causing the placement of explosive or incendiary device on an aircraft)
  - https://lawandcrime.com/crime/bro-i-got-double-tapped-youtuber-faces-federal-charges-for-attack-helicopter-shooting-fireworks-at-speeding-lamborghini-in-social-media-stunt/