



# the smoking text:

## How to Authenticate Text Messages and Social Media in Child Custody Litigation

By Meredith Brennan

**I**t happens to family lawyers more and more frequently: you've just cleaned out your email inbox, only to be bombarded with dozens of screenshots of text messages between a client and her ex. You are then tasked with determining: (a) whether any of the text exchanges are relevant for purposes of the upcoming custody litigation; (b) if so, how to print them out in some legible format; and (c) how to authenticate the text messages for evidentiary purposes. Surprisingly, the most challenging aspect of this exercise may be printing the texts!

According to the Pew Research Center, texting is the number one method of communication for Americans under the age of 50. And according to Statistics Brain, the number of monthly text messages sent has increased by more than 7,700% over the past decade. Given the ubiquity of text messages, they can often prove to be a treasure trove of evidence in custody litigation. So, are they admissible, and how do you authenticate them?

As a preliminary matter, pursuant to Pa.R.E. 901, authentication is required prior to admission of evidence. The proponent of the evidence must introduce sufficient evidence that the matter is what it purports to be. Pa.R.E. 901(a). Testimony of a witness with personal knowledge can be sufficient. Pa.R.E. 901(b)(1). If no such testimony is available, the evidence may be authenticated by other means, including circumstantial evidence. Pa.R.E. 901(b)(4).

One of the challenges for Pennsylvania family law attorneys is that there are no reported family law cases addressing the authentication standards for electronic

communications or social media, but we can look for guidance in several appellate criminal cases. One Pennsylvania appellate court has noted that there can often be issues with proving authorship of an email, text message, or social media post, since "anybody with the right password can gain access to another's email account and send a message ostensibly from that person." In *re F.P., a Minor*, 878 A.2d 91, 95 (Pa. Super. 2005). Similarly, Facebook, Instagram, and other social media platforms can be accessed from any computer or smartphone with the appropriate user ID and password. *Commonwealth v. Mangel*, 181 A.3d 1154, 1162 (Pa. Super. 2018). That court noted that social media evidence is even more difficult to authenticate because social media accounts can be falsified, or an actual account can be hacked into by a third party. *Id.* With that said, Pennsylvania courts have rejected the position that electronic communications or social media evidence are "inherently unreliable," noting that the same issues can happen with written documents—a signature can be forged, or let-

terhead can be stolen. In *re F.P.*, 878 A.2d at 95.

Thus, notwithstanding the unique aspects of electronic communications and social media evidence, Pennsylvania courts have held that these communications can be properly authenticated within the existing framework of Pa.R.E. 901 and appellate case law. In the case of *In re F.P.*, 878 A.2d 91, the court addressed the authentication of instant messages where the defendant was accused of threatening the victim via instant messages. The Commonwealth introduced instant messages from a screen name "Icp4Life30." The contents of the instant messages referred to ongoing events involving the defendant, the victim, and school officials, and in one message, the defendant referred to himself by name. The court concluded that the circumstantial evidence sufficiently identified the defendant as "Icp4Life30" and authenticated the instant messages.

In *Commonwealth v. Koch*, 39 A.2d 996 (Pa. Super. 2011), *aff'd* by an equally divided court, 106 A.3d 705 (Pa. 2014), the Pennsylvania Supreme Court tackled the authentication of text messages. In that case, the Commonwealth attempted to introduce text messages taken from a cell phone during the execution of a search warrant at the defendant's home. The defendant admitted to owning one of the phones found, and there were 13 text messages with content involving the sale of drugs. There was no testimony from any person who had sent or received the text messages, nor any context

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that indicated the identity of the sender of the text messages. The court noted: “[T]he difficulty that frequently arises in email and text messages cases is establishing authorship. Often more than one person uses an email address and accounts can be accessed without permission. In the majority of courts to have considered the question, the mere fact that an email bears a particular email address is inadequate to authenticate the identity of the author . . .” The court concluded that the admission of the text messages without further circumstantial evidence was an abuse of discretion.

Most recently, in the case of *Commonwealth v. Mangel*, 181 A.3d 1154 (Pa. Super. 2018), the court addressed the issue of what proof is necessary to authenticate social media evidence—which was an issue of first impression in Pennsylvania. The court reviewed the *In re F.P.* and *Koch* decisions, holding that the same issues of proving authorship in electronic communications apply to social media evidence. Thus, authentication of social media evidence is to be evaluated on a case-by-case basis to determine whether an adequate foundation has been laid, and the proponent must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication, such as testimony from the person who sent or received the communication, or “contextual clues” in the communication tending to reveal the identity of the sender. *Id.* at 1162.

There has been at least one non-precedential decision in a child custody case tangentially addressing the issue of authenticating social media evidence. In *K.S. v. J.L.*, 2018 WL 4519846, the trial court found the father in contempt for violating a “no-contact” order entered in the parties’ custody matter. The Superior Court reversed the decision. The mother testified that the father had commented on a post she had made on her Facebook page. The court noted that the mother had no documentary evidence revealing the nature of the comment. The court first cited *Mangel* for the standard to authenticate a Facebook

post, and then noted that the mother’s “evidence” had consisted of attaching a photograph of a screenshot allegedly from her Facebook profile indicating that the father made a comment to her Facebook post, but the photograph did not show the alleged comment, nor was it clear on whose profile the post or comment had appeared.

Both parties testified that they were not Facebook “friends” and had “blocked” each other for years, although the mother testified that she occasionally unblocked the father so that she could view his posts. The mother did not explain how the father could have commented on a post of hers if they are not Facebook friends. The father acknowledged that he commented on a post by a mutual friend that included photographs of the parties’ children, but he stated that he is unable to see posts made by the mother herself. The trial court found that the father’s explanation as to how and why the comment allegedly appeared on the mother’s Facebook page was not credible.

On appeal, the Superior Court held that, based upon its review of the record, at most, the evidence showed that the father commented on a picture of the children that appeared on a third party’s Facebook page that had, perhaps, originally been posted by the mother. Accordingly, in the absence of further documentary proof that the father commented on a post made by the mother, including the nature of the comment, this behavior did not constitute “contact” in violation of the “no-contact” order. Thus, it is clear that simply introducing a text message purportedly from a party with just the evidence of the phone number or name in the text messages chain is insufficient, as is offering a party’s purported Facebook page or posts without testimony of a witness with personal knowledge or circumstantial evidence.

Assuming you can accomplish the “hard” part of authenticating electronic communications or social media, there is also the practical issue of how to physically introduce this evidence. While some family judges are willing to look at a party’s

phone and scroll through text messages, that is certainly not always the case, and the party is unable to offer such evidence into the record, which could be problematic in the event of an appeal. As noted above, most parties have the capability to take screenshots of their text exchanges, but this entails cutting and pasting the screenshots into a document and printing the pages, and the screenshots, more often than not, include duplicative “bubbles” so that the text chains are difficult to follow. However, there are apps, such as iExplorer, that transfer text messages (as well as music, photos and other files) from any iPhone, iPod, or iPad to any Mac or personal computer. A party can then print an entire text history with another person, and the texts will appear in chronological order with both parties’ names (or phone numbers) and the dates/times of the messages appearing over the text bubbles in a much more readable format.

In short, offering electronic communications or social media evidence requires an attorney to consider both practical and evidentiary issues. First, the evidence must be presented in a format that a judge can actually read and easily follow—e.g., which party is sending what messages without having to flip back and forth between pages of text bubbles that are often not in chronological order because of the limitations of screenshots. Second, notwithstanding the increasingly sophisticated ways to hack into and/or alter electronic communications and social media, this evidence can be authenticated by the same type of circumstantial evidence as any other document, and attorneys should not be daunted by the growing digital world of evidence. ■

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