

AUTHENTICATION OF DIGITAL EVIDENCE

“The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it is.”
Commonwealth v. Purdy, 459 Mass. 442, 447 (2011), citing Mass. G. Evid. § 901(a) (2011);
Commonwealth v. Nardi, 452 Mass. 379, 396 (2008).

Finding of authenticity by the judge (out of the presence of the jury) if authenticity is contested.

I find by a preponderance of the evidence that there is sufficient evidence for a jury to find by a preponderance of the evidence that the person alleged to have (authored or caused to be authored) (created or caused to be created) (transmitted or caused to be transmitted) the electronic communication in question did, in fact, do so.

Commonwealth v. Purdy, 459 Mass. 442, 447 (2011), citing *Commonwealth v. Leonard*, 428 Mass. 782, 785-786 (1999).

Instruction when the digital evidence is essential to proof of an element of the offense.

In order to prove the _____ element of this offense, the Commonwealth must prove beyond a reasonable doubt that the defendant (authored or caused to be authored) (created or caused to be created) (transmitted or caused to be transmitted) the electronic communication.

Instruction when the digital evidence is not contested and not essential to proof of an element of the offense.

Before you consider any electronic communication in your deliberations, you must first find that it is more likely true than not that the person who (authored or caused to be authored) (created or caused to be created) (transmitted or caused to be transmitted) (it) (them) was, in fact, (insert name). If you do not find it is more likely true than not that (insert name) was the person who (authored or caused to be authored) (created or caused to be created) (transmitted or caused to be transmitted) (it) (them), then you may not consider the electronic communication in deciding the case.

Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 364 (2014); *Commonwealth v. Purdy*, 459 Mass. 442 (2011).

NOTES:

1. **Authorship as an element of the offense.** In *Commonwealth v. Alden*, 93 Mass. App. Ct. 438, 444 (2018), the Appeals Court “acknowledge[d] that . . . there is a fine line between the (1) preliminary determination of the authenticity of the text messages and (2) proof of the defendant’s identity as the perpetrator of the threats.” The Court suggested that, where authorship of a digital communication is an element of the offense, the judge should make clear to the jury, when instructing on the elements of the offense, that authorship of a digital communication is an element that has to be proved beyond a reasonable doubt. *Id.* at 443-44.