

## Foster, Denise

---

**From:** Peter Nicolas [pnicolas@uw.edu]  
**Sent:** Wednesday, April 24, 2013 4:15 PM  
**To:** Foster, Denise  
**Subject:** Comments on Proposed Changes to Evidence Rule 901

I write to express my concern that the Proposed Amendment to Evidence Rule 901, denominated Rule 901(b)(10), is unduly restrictive in its requirements for authenticating electronic mail. It imposes additional requirements for the authentication of electronic mail that, as Karl Tegland has noted, is inconsistent with the case law nationwide. Indeed, as written, it seems to require electronic mail to simultaneously satisfy the requirements of Rules 901(b)(1), 901(b)(4), as well as the requirement that it be sent from an e-mail address associated with the particular sender or the sender's agent.

The rule as proposed would thus exclude much electronic mail evidence that would otherwise be admissible under Rule 901 in its present form. For example, under Rule 901(b)(1), testimony by a person who observed someone else typing and sending an email would suffice to authenticate the message as coming from that person. Yet under proposed Rule 901(b)(10), the evidence would be inadmissible if it was sent from an anonymous email address and did not contain distinctive characteristics. Similarly, under Rule 901(b)(4), an electronic message would be admissible if it contained information known uniquely by a particular sender, but under proposed Rule 901(b)(10), the evidence would be inadmissible absent first-hand evidence that it was sent by a particular individual and/or if it was sent from an anonymous email address.

It is worth noting that the drafters of the Federal Rules opted, after discussion, not to treat electronic evidence any differently than traditional forms of evidence. See Federal Rule of Evidence 101(b)(6).

I agree with Mr. Tegland that the Supreme Court should refer the proposed amendment back to the WSBA for further discussion.

Respectfully Yours,

Peter Nicolas  
Jeffrey & Susan Brotman Professor of Law and Adjunct Professor of Gender, Women & Sexuality  
Studies University of Washington School of Law William H. Gates Hall Box 353020 Seattle,  
Washington 98195-3020  
(206) 685-2459

<http://www.law.washington.edu/faculty/nicolas>