Advisory Committee on Evidence Rules

Minutes of the Meeting of May 2, 2025
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 2, 2025, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Jesse M. Furman, Chair
Hon. Valerie E. Caproni
Hon. Mark S. Massa
Hon. Edmund A. Sargus, Jr.
John S. Siffert, Esq.
James P. Cooney III, Esq.
Rene L. Valladares, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Michael W. Mosman, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
JoAnn Kintz, Esq., Department of Justice
Elizabeth Wiggins, Esq., Federal Judicial Center
Timothy Lau, Esq., Federal Judicial Center
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff
Bridget Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff
Kyle Brinker, Esq., Rules Law Clerk
Samantha C. Smith, Esq., Supreme Court Fellow, Federal Judicial Center
Ebise Bayisa, Esq., Assistant Federal Public Defender
Kaiya Lyons, American Association for Justice
Susan Steinman, American Association for Justice

Present Via Microsoft Teams
Hon. Richard J. Sullivan, Member Evidence Advisory Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Tim Reagan, Esq., Federal Judicial Center
Alex Dahl, Lawyers for Civil Justice
Edith Beerdsen, Professor, Temple University School of Law
Jeffrey Bellin, Professor, William & Mary Law School

Sarah Brown-Schmidt, Professor, Vanderbilt University
Susan Provenzano, Professor, Georgia State University College of Law
Anna Roberts, Professor, Brooklyn Law School
Eileen Scallen, Professor, UCLA School of Law
Maggie Wittlin, Professor, Fordham Law School
John G. McCarthy, Federal Bar Association
Suzanne Monyak, Bloomberg Law
Jacqueline Thomsen, Bloomberg Law
Nate Raymond, Reuters
Sam Rahall
Sai

I. Welcome and Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees. He welcomed Judge Sullivan, who was participating remotely, and congratulated him on receipt of the Federal Bar Council's Learned Hand Medal the previous night and thanked him for his important work on judicial security. The Chair noted that Professor Coquillette was also participating remotely. He explained that Judge Lauck would not be participating due to attendance at a funeral and expressed condolences.

Judge Furman next welcomed Judge Bates, noting that this would be Judge Bates's last meeting as Chair of the Standing Committee. Judge Furman thanked Judge Bates for his extraordinary leadership and his many contributions to the federal judiciary. Judge Furman explained that it had been a great honor to work with Judge Bates and that he had learned a great deal from Judge Bates' excellent work on behalf of the Standing Committee. Judge Bates thanked Judge Furman and stated that it had been an honor and privilege to work with the Evidence Advisory Committee and all of its Chairs. He noted that the Committee had been extremely productive and had completed an amazing amount of work in the past 6-8 years. He thanked the Reporter and Academic Consultant for their many excellent agenda memos.

Judge Furman next welcomed Carolyn Dubay, the Rules Committees' Chief Counsel and expressed that the Committee was looking forward to working with her in her new role. He noted that Scott Myers, who staffs the Bankruptcy Procedure Advisory Committee, would be retiring in June. Lastly, Judge Furman welcomed members of the public in attendance and thanked them for their interest in the work of the Committee.

Next, Judge Furman asked if there was a motion to approve the Minutes of the Committee's Fall 2024 meeting. A motion was made and seconded and the minutes were unanimously approved. Judge Furman thanked the Academic Consultant for her work in preparing the minutes. Judge Furman noted that the Committee had only informational items before the Standing Committee at the January 2025 Standing Committee meeting and that the Committee had not received substantive feedback. Finally, the Chair directed the Committee's attention to the Rules Enabling Act and legislative updates behind Tabs 1.D. and 1.E. of the Agenda materials, noting that proposed Federal Rule of Evidence 801(d)(1)(A) was in the pipeline to take effect on December 1, 2026, pending final approvals and transmission to Congress.

II. Proposed Amendment to Rule 801(d)(1)(A)

The Chair directed the Committee's attention to Tab 2 of the Agenda book (page 100 of the materials) and to the proposed amendment to Federal Rule of Evidence 801(d)(1)(A) that would make the prior inconsistent statements of all testifying witnesses admissible over a hearsay objection. He explained that the public comment period had closed on February 15, 2025, that the Committee had received 8 total comments, and that the comments were overwhelmingly positive. He noted that the comments, including ones from the Federal Magistrate Judges' Association, the American College of Trial Lawyers, and the National Association of Criminal Defense Attorneys were summarized in the Agenda memo. The Chair explained that comments in favor of the proposed amendment noted that the amendment would eliminate the need for confusing limiting instructions regarding the limited admissibility of prior inconsistent statements, would bring inconsistent statements into alignment with prior consistent statements offered to rehabilitate, and would correct an arguable imbalance favoring the prosecution. In light of the favorable public comment, Judge Furman expressed his opinion that there was no need to modify the proposed amendment. He proposed minor edits to the draft Committee note on page 125 of the Agenda materials to change the word "thus" to "also" in the penultimate sentence of the first paragraph, to remove the hyphen in "well-addressed" in the second paragraph, and to add a sentence to the third paragraph reading: "The rule governs admissibility not sufficiency."

The Reporter then noted that the Department of Justice had abstained from voting on the publication of the amendment for notice and comment but had decided to vote in favor of the Rule. He thanked Betsy Shapiro for her work in obtaining support for the amendment. The Reporter then explained that 22 state jurisdictions have rules regarding the substantive admissibility of prior inconsistent statements that are broader than existing Federal Rule of Evidence 801(d)(1)(A). He noted that this is an unusual degree of variation from the federal model and explained that state practice further supports the amendment of the federal provision. He explained that some edits were made to the draft Committee note to respond to matters raised in public comment and directed the Committee's attention to a red-lined version of the note in the Agenda materials at page 26-27 of the Rule 801(d)(1)(A) memo.

First, the Reporter explained that he had re-inserted the modifier "confusing" in describing limiting instructions in the first paragraph of the note, due to multiple public comments emphasizing the confusing nature of the limiting instructions given under the current rule. Second, several public comments noted that the amendment would bring consistency to the treatment of both inconsistent and consistent witness statements used at trial to impeach and rehabilitate, and the Reporter explained that he had added two sentences to the end of the first paragraph of the Committee note to highlight this point. Lastly, the Reporter explained that public comment had raised the issue of evaluating whether a prior witness statement is truly inconsistent with trial testimony and that, at the suggestion of the Chair, he had added a sentence to the very end of the Committee note explaining that inconsistency depends upon context and that the issue is for the court.

The Chair reminded the Committee that the proposed amendment to Rule 801(d)(1)(A) was an action item and that they would be voting on whether to advance the proposal to the Standing Committee. He then opened the floor for discussion of the proposed amendment.

One Committee member suggested that most courts treat the question of whether a witness's prior statement is actually inconsistent with her trial testimony as one for the jury. He queried whether adding the new sentence to the end of the Committee note, stating that the question of inconsistency is for the trial judge, would shift the burden to the trial judge to decide *before* cross-examination whether a particular witness statement is inconsistent. The Reporter explained that there is case law reviewing a trial judge's determination that a witness's statement constituted a prior inconsistent statement for error. He suggested that there was no need to invite a problem with the addition to the Committee note if there is already case law regulating this area. The Committee member responded that there should not be a system in which the trial judge has to review all witness statements prior to cross-examination to determine inconsistency. According to this Committee member, the prevailing practice is to allow the lawyer to utilize the statement during cross and then to allow the jury to decide whether it is inconsistent with the trial testimony. The Reporter suggested deleting the portion of the final sentence of the Committee note after the word "context," such that it would simply read: "As under Rule 613(b), the determination of whether a prior statement is actually inconsistent with the witness's trial testimony is dependent on context." This would eliminate any reference to the role of the trial judge.

The Chair asked whether any of the state evidence rules governing prior inconsistencies deal with the issue of context. The Reporter explained that the proposed amendment does not alter the nature or degree of any inconsistency. Rather it takes the statements that are already deemed to be "inconsistent" under existing law and renders them admissible for their truth whenever the witness is subject to cross concerning the statement. The Chair explained that he typically reviews witness statements before they are used to impeach to determine whether they are inconsistent. Another participant commented that the proposed addition at the end of the Committee note set forth only half the process surrounding prior inconsistent statements. He explained that *first*, the trial judge decides if a particular statement is sufficiently inconsistent for impeachment and then *second*, the jury evaluates the statement for inconsistency. This participant expressed concern that the suggested addition to the Committee note highlights only the judge's role and omits the role that the jury plays. Judge Bates noted that the difference was between the admissibility of a statement and its weight. He asked whether the Committee note could capture that the trial judge evaluates only admissibility and has no role in how the statement is ultimately weighed. The Chair queried whether it made sense to add a sentence to the note emphasizing that it is "ultimately up to the jury to weigh the statement." The Reporter reiterated his suggestion to end the final sentence at the word "context" and to eliminate any reference to the roles of the judge or jury. The Chair asked the Committee whether that edit would resolve concerns regarding the inconsistency determination.

Another Committee member opined that the note could have the unintended consequence of changing the approach to prior inconsistent statements and that it should expressly state that "no change" is intended. The Reporter noted that the very first sentence of the final paragraph of the Committee note expressly states that the amendment "does not change the Rule 613(b) requirements." Another Committee member expressed the view that there would be no harm in

referencing the role that the trial judge plays in assessing inconsistency and that there was no need to delete the part of the final sentence referring to the trial judge's discretion. Another Committee member agreed. Another Committee member asked whether the final (second) sentence of the last paragraph of the note was necessary at all. The Committee member argued that the first sentence of the final paragraph of the note was very clear that there would be no change in the existing practices around admitting prior inconsistencies and advocated for deleting the entire second sentence regarding context and judicial discretion. The Reporter agreed that deleting the entire final sentence would be optimal. The Chair noted that the concern about statements being taken out of context came from public comment. The Reporter responded that such concerns already exist and are handled by courts, and that the proposed amendment does nothing to affect those concerns.

The Committee member who originally raised a concern about the addition to the Committee note stated that deleting the final sentence of the proposed Committee note would alleviate that concern about the allocation of responsibility between judge and jury. The Chair noted the proposal to delete the final sentence of the draft Committee note and solicited Committee feedback. There were no objections from the Committee to deleting the final sentence.

Ms. Shapiro next stated that the Department of Justice has long viewed the proposed amendment as a close call, noting concerns that cross-examination delayed is not equivalent to contemporaneous cross-examination and about witnesses who deny having made a prior inconsistent statement. She further noted that the NACDL had changed its position since the Committee last considered an amendment to Rule 801(d)(1)(A) in 2018 and was supporting the proposal. She explained that the Department of Justice would accept the proposed amendment and would vote in favor of it.

The Chair solicited additional discussion on the proposal and another Committee member noted disapproval. That Committee member stated that he was not persuaded of the need for the amendment and that he expected defense counsel would come to regret supporting it. Although he views the amendment as problematic, he stated that he would not rehash old arguments. A motion was made and seconded to advance proposed Rule 801(d)(1)(A) to the Standing Committee for final approval with the friendly amendments to the Committee note and the Chair called for a vote. Eight members of the Committee voted in favor of advancing the proposal and one member voted against the proposed amendment.

III. Proposed Amendment to Rule 609

The Chair next directed the Committee's attention to Tab 4 of the Agenda materials and to the proposal to amend Federal Rule of Evidence 609. He noted that the Committee had been considering an amendment to Rule 609 for a number of years and that the Committee's consideration began with a presentation by Professor Jeff Bellin proposing the complete abrogation of Rule 609. The Chair explained that the Committee had rejected that proposal but was now considering a more modest amendment to add the single word "substantially" to the balancing test applicable in Rule 609(a)(1)(B) to impeachment of a criminal defendant with convictions not involving dishonesty or false statement, in order to make that test more protective. He explained that this amendment was designed to correct cases in which inflammatory offenses

or offenses very similar to the charged offense were being admitted to impeach testifying criminal defendants contrary to the intent expressed by Congress when it enacted Rule 609. The Chair explained that the Committee vote at the Fall 2024 meeting regarding retaining Rule 609 on the agenda was tied (with one member absent from the prior meeting voting to continue consideration of Rule 609) and that the proposal was now ripe for consideration. He called the Committee's attention to new Rule 609 cases decided since the Fall 2024 meeting and the summary of data regarding impeachment of criminal defendants with convictions in the Agenda memo behind Tab 4. The Chair noted the difficulty in obtaining any additional, meaningful data regarding Rule 609 impeachment.

The Chair explained that there were some concerns regarding the level of detail in the Committee note originally circulated by the Reporter and that the draft note had been significantly pared down with the help of the Justice Department. He called the Committee's attention to red-lined and clean versions of the modified draft Committee note that were circulated at the meeting. The Chair explained that the Department of Justice would support the proposed addition of the word "substantially" to the text of Rule 609 accompanied by the note as modified.

The Chair next explained that the Reporter had suggested that the Committee should also consider adding an end point to the 10-year limit on the use of convictions for impeachment under Rule 609(b). The Chair noted that Rule 609(b) contains an explicit starting date for assessing the age of convictions but includes no end date. He remarked that federal courts differ as to the ending point they utilize for measuring the age of Rule 609 convictions. The Chair explained that the Reporter had prepared two alternatives of a proposed amendment to Rule 609(b) to add an express ending point, one that uses the date upon which trial starts as the ending point and the other that uses the date of a witness's testimony. The Chair remarked that it would not make sense to propose an amendment to Rule 609 solely to include an ending point for Rule 609(b) but that it would make sense to include this as an add-on proposal if the Committee chose to propose an amendment to Rule 609(a). He called the Committee's attention to the two draft proposals for amending Rule 609(b) on page 246 of the Agenda materials, noting that the question before the Committee was whether to approve an amendment to Rule 609 for publication for notice and comment.

The Reporter informed the Committee that the changes to the draft Committee note proposed by the Department of Justice were acceptable to the Chair and to the Reporter and that they would recommend approval of the amendment with the note as edited by the Department of Justice. The Reporter raised the issue of trial judges admitting "sanitized" convictions through Rule 609 that withhold the nature of the conviction from the jury. He noted that the original draft Committee note included commentary on this practice but that the edited version says simply that sanitization is a "questionable practice." He suggested that this simplified reference would serve as a signal to trial judges to exercise caution in this area. He also noted that lawyers could try to use the acts underlying a conviction, that is itself inadmissible under Rule 609, to impeach a testifying defendant under Rule 608(b). Although the text of Rules 608(b) and 609 should be clear that Rule 609 is the sole provision that regulates the use of conviction conduct to impeach, the draft Committee note emphasizes that point and helps to harmonize Rules 608(b) and 609.

The Chair pointed out that the draft of the proposed amendment to Rule 609 circulated at the meeting was the alternative that selected the date upon which trial begins as the ending point for measuring convictions offered as impeachment through Rule 609(b). He noted that the draft could be adjusted if the Committee wanted to choose a different date as the end point. One Committee member noted that a trial date might be set and later adjourned and inquired whether the proposed amendment to Rule 609(b) would maintain any flexibility for the trial judge to "freeze" the ending date for impeaching convictions in deciding to adjourn or continue a trial date. The Reporter explained that the risk of gamesmanship is inherent in any date selected as the end point for Rule 609(b). The Chair noted that the difference between the start of trial and any witness's actual date of testimony is not great in most cases and agreed that all dates are subject to some strategic manipulation. He suggested that the date that trial starts is the superior ending point because it is the only one that puts the timing squarely in the hands of the trial judge. The Committee member queried whether the trial judge could change the Rule 609(b) date when deciding to change a trial date. The Reporter acknowledged that the Committee could add text to the proposed rule to allow for this but opined that the problem was such a narrow one that it did not justify a change. The Committee member suggested adding something to the Committee note giving the trial judge discretion to freeze the Rule 609(b) ending point for adjournments of trial. The Reporter reminded the Committee that it would be voting to publish the proposed amendment for public comment and that it could be helpful to wait and see what feedback is received on this point before adding anything to the rule text or Committee note. The Committee member agreed, remarking on the amazing work of the Committee in addressing Rule 609, on the collaboration from the Department of Justice, and on the creativity and perseverance of the Reporter with respect to the project.

Another Committee member agreed, noting that an amendment to Rule 609 was long overdue. He asked whether any thought had been given to modifying the starting point for measuring convictions under Rule 609(b) which currently begins at the "release from confinement." He noted that some defendants may be impeached with a crime committed fifteen years earlier given the "bone-crushing" sentences handed down in federal court and queried whether a new starting point should be considered as well. The Reporter responded that modification of the starting point had not been considered because Rule 609(b) currently contains a clear starting point and that there is, therefore, no disagreement in the courts to be resolved on that issue. He opined that it would be a heavy lift to reconsider the express starting point in the rule at this point in the amendment process. Another Committee member suggested that public comment on the existing proposal might generate feedback on the starting date, as well as the ending point.

The Chair then thanked the Department of Justice and Ms. Shapiro for the collaboration with the Committee and the Reporter. Ms. Shapiro thanked Judge Furman and noted that the Justice Department had been opposed to a Rule 609 amendment since it first appeared on the Committee's agenda in 2018 and noted its strong opposition to the proposal to abrogate Rule 609. She explained that the original draft Committee note had been the most problematic component of the proposal currently before the Committee to add the word "substantially" to Rule 609(a)(1)(B). She expressed appreciation for the modified, pared-down draft Committee note that does not suggest to the many trial judges handling Rule 609 impeachment correctly that they have to change. She further noted the importance of reminding federal courts through the modified note

that they are familiar with balancing tests utilizing the "substantially outweighs" language being added to the text of Rule 609(a)(1)(B). Ms. Shapiro commented that she did not think that the Department of Justice could support tinkering with the start date already embodied in Rule 609(b) and that a proposal to do so could throw a wrench into the amendment process. She also emphasized that the Department prefers the start of trial as the ending date for Rule 609(b).

The Chair then reiterated his support for the start of trial as the appropriate end point for measuring convictions under Rule 609(b) because it is the date best controlled by the trial judge. He proposed publishing the amendment proposal utilizing that date for notice and comment. The Chair then asked whether there was a motion to approve the proposed amendment to Rule 609 using the trial date as the end point under Rule 609(b) for publication. Ms. Shapiro offered a friendly addition to the first paragraph of the Committee note to add a reference to Rule 107 as another provision with a balancing test. The Reporter opined that Rule 107 would not be a good reference point because it deals with the use of illustrative aids that are not evidence. Another Committee member noted that the Committee note currently references Rule 703 as containing the same balancing test proposed for Rule 609 and noted that Rule 412(b) also contains a similar balancing test for use in civil cases. The Reporter explained that the reference to Rule 703 was an example and opined that the note did not need to list all possible balancing tests. He further suggested that adding Rule 412 would be problematic because that balance differs from others by incorporating harm to a victim as a unique factor.

The Chair then called for a vote on the proposal to approve for publication the amendment to Rule 609 described as "Alternative 2" using the trial date as the Rule 609(b) end point, along with the revised Committee note. Eight Committee members voted in favor of the proposal, and one voted against it. The Committee member who did not support the proposal opined that there is a desire to abrogate Rule 609, and that this amendment is simply part of a two-step process toward that end. Because the concerns and objections of this Committee member had not been refuted, the Committee member could not support the proposal. The Chair stated that the proposal would be forwarded to the Standing Committee to approve publication.

IV. Adding Commas to Rule 801(d)(2)(E)

The Chair noted the proposal received from Sai to add two commas to the coconspirator exemption from the hearsay rule embodied in Rule 801(d)(2)(E) and called the Committee's attention to Tab 5 of the Agenda materials. The Chair informed the Committee that the stylists had opined that the two commas were unnecessary. The Chair noted that the federal courts are having no difficulty applying the coconspirator exception in the absence of the commas. The Committee unanimously voted to remove Rule 801(d)(2)(E) from the agenda.

V. Department of Justice Proposal to Add Tribes to Rule 902(1)

The Chair next directed the Committee's attention to Tab VI of the Agenda materials and a proposal to amend Federal Rule of Evidence 902(1), the provision that allows self-authentication of the signed and sealed records of enumerated government entities. He reminded the Committee

that it had received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities whose records are self-authenticating from Judge Frizzell of the Northern District of Oklahoma on the eve of the Fall 2024 meeting in New York. The Chair noted that a similar proposal had been on the Committee's agenda over a decade ago and that no action had been taken on the matter at that time. He explained that the Committee had deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice. He reminded the Committee that members had expressed an interest in evaluating whether such an amendment is necessary or whether there are alternate avenues for authenticating tribal records within existing Federal Rules of Evidence. Further, he noted that the Committee wished to consider whether adding tribes to Rule 902(1) would require an assessment of the rigor of tribal record-keeping across various tribes. The Chair then called the Committee's attention to a memorandum in support of the amendment by the Department of Justice on page 296 of the Agenda materials. The Department's draft amendment language on page 302 of the Agenda proposed adding "federally-recognized Indian tribe" to the list of enumerated entities whose records are self-authenticating. The Chair noted friendly amendments to add "or Nation" to the description and to remove the hyphen from the language. The Chair also noted that five federal district court judges with experience in tribal cases had submitted a letter in support of the amendment that had been shared with the Committee by email. He also noted that the Federal Public Defender had submitted a letter in opposition to the amendment at page 310 of the Agenda materials. The Chair then recognized Ms. Shapiro of the Department of Justice to explain the rationale for the proposed amendment to Rule 902(1).

Ms. Shapiro began by noting that defense counsel opposes the proposed amendment because the fact of Indian blood and tribal affiliation are part of the government's burden of proof in criminal cases and that it is defense counsel's obligation to favor obstacles to conviction because it is beneficial to their clients. She next noted that she had researched the Guam Sunshine Act (which was referenced in the Federal Public Defender's letter) and found that it was not enacted until 1999, many years after the records of Guam became self-authenticating pursuant to Rule 902(1). She explained that the government's ability to authenticate tribal records with a certificate under Rule 902(11) represented the most substantial argument against the amendment, but she argued that authentication under Rule 902(11) is substantially more difficult and can prove problematic. First, she noted that Rule 902(11) contains a pretrial notice requirement that can lead to reversal of a conviction even where there is no challenge to the authenticity of the tribal records. Second, she explained that use of Rule 902(11) ties to use of the business records exception to the hearsay rule in Rule 803(6) and that Rule 803(6) requires records made "at or near the time" of the events recorded and records that are routinely maintained as part of a regularly conducted activity. She explained that all of these elements of Rule 803(6) are being challenged by defendants with respect to tribal records. She further noted that the authenticity of tribal records was routinely subject to a stipulation prior to the Supreme Court's decision in *McGirt*, but that stipulations have become rare and challenges more frequent in the wake of that decision.

Further, Ms. Shapiro noted that all records from entities such as Guam are self-authenticating under Rule 902(1) but that the records of sovereign tribes are not afforded the same treatment. She argued that there is no rational reason to treat tribal records differently. She described the burden that the lack of self-authentication imposes on tribal governments, which have to send witnesses hundreds of miles to provide a few minutes of authenticating testimony for tribal records. She closed by arguing that the Committee need not conduct a review of the

reliability of tribal record-keeping to propose addition of tribal governments to Rule 902(1) because hundreds of municipalities and other entities are already included in the provision despite variations in their record-keeping practices and absent any review of the reliability of those practices.

The Chair noted that the letter in support of the amendment sent by the district court judges also mentioned the burden of needless travel on tribal officials. The Chair asked how often a witness is required to authenticate tribal records under existing rules and how frequently Rule 902(11) certificates are being used for authentication. Ms. Shapiro explained that witnesses are being used to authenticate tribal records most of the time because tribal officials actually carry the requisite records into court and because the records include information about the defendant's Indian blood and tribal affiliation, facts which may not be recorded "at or near the time" of underlying events as required by Rule 803(6) and hence Rule 902(11). The Reporter asked whether the "events" to be recorded would occur at birth or the time of enrollment, and so would be entered at or near the time of the relevant event. Ms. Shapiro suggested that she was unsure as to when the information would ultimately be recorded by tribal officials but that the time of enrollment would be most probable – which may or may not be close in time to a tribal member's birth. Ms. Kintz, the Deputy Director of the Office of Tribal Justice of the DOJ, explained that citizenship is rarely recorded at birth and that additional steps need to be taken to establish citizenship. The Reporter queried whether the obstacles to admissibility under the hearsay exception in Rule 803(6) are separate from the problem of authentication that would be solved by adding tribes to Rule 902(1). Ms. Shapiro responded that some cases admit tribal records and some currently reject them.

The Chair next asked how often the facts of Indian blood and tribal affiliation are genuinely in dispute in a criminal case and how frequently these issues represent a box-checking exercise for the government. Ms. Shapiro suggested that these issues mostly create a box-checking exercise because defendants are not contesting their requisite tribal affiliation but are simply refusing to stipulate to it, thus putting the government to its proof and then increasingly objecting to that proof. She suggested that the prosecution is being forced to authenticate tribal records in a complex manner inapplicable to the records of other government entities.

The Chair then recognized the Federal Public Defender to offer thoughts on the proposed amendment. Mr. Valladares thanked the Chair and told the Committee that his colleague Ebise Bayisa was in attendance and could answer any Committee questions about the letter submitted by the Federal Public Defender in opposition to the proposed amendment. He explained that the issue of proving a defendant's requisite tribal affiliation for purposes of criminal jurisdiction has been around for many years and is one that has been proven routinely by the government under existing evidence rules without any problems. He suggested that the few recent cases in which this issue had arisen represented a very localized problem that is not occurring more broadly throughout the country. Further, he opined that approval of the proposed amendment for publication would be premature given that the Committee was considering the issue for the first time. He suggested that the Committee host a symposium at its Fall 2025 meeting on the issue and invite judges and lawyers experienced in handling these cases to assess the need for an amendment to Rule 902(1).

A Committee liaison explained that he had volunteered in both Tulsa and Oregon to assist with these cases and has experience with the issue of proving tribal affiliation. He agreed that the

prosecution is able to prove these points under existing rules but offered that witnesses from tribes were forced to drive 200 miles over the mountains to appear in court to satisfy the government's burden of proof. He explained that the government can establish the requisite tribal affiliation but that it is unusually difficult.

A Committee member remarked that he understood the issues but was unsure what problem the proposed amendment would be solving. He questioned whether a rule change was truly needed and opined that the Committee lacked the data it would need to propose an amendment to Rule 902(1). Ms. Shapiro responded that there is no need for the government to have to jump over burdensome hurdles in proving largely undisputed points and that the omission of tribal government records from Rule 902(1) failed to afford tribes the requisite dignity consistent with their sovereign status. The Committee member responded that he was sensitive to the dignitary issues but queried whether tribal governments would support the change to Rule 902(1) in the name of sovereignty. The Committee member suggested that the Reporter or a subcommittee could invite input from affected tribes to ascertain tribal support for the proposal. Ms. Shapiro responded that the issue was not very complex and that the Department of Justice could obtain letters from tribal organizations supporting the amendment. She argued that the Committee would receive significant input from affected constituencies if it approved the proposed amendment for publication.

The Chair stated that the issue was a very local one that may not merit a national symposium. He suggested that publication could encourage tribes to submit commentary that would be helpful to the Committee. A Committee liaison noted that there is great variability in record-keeping across different tribal governments but that the same variation also exists across the municipalities currently recognized under Rule 902(1). Another Committee member agreed that record-keeping practices across the thousands of municipalities covered by existing Rule 902(1) is extremely variable. The Committee member opined that there is no rational explanation for excluding tribal records on the basis of record-keeping practices.

Mr. Lau of the FJC suggested that it would be relatively simple to collect data regarding how often the facts of Indian blood and tribal enrollment are actually disputed in federal criminal cases by looking at jury instructions in such cases. He noted that those instructions would reveal any stipulations as to those issues. The Chair explained that the question was not so much the frequency of stipulations but the percentage of prosecutions in which these issues are "genuinely disputed" with defendants arguing that they do not, in fact, have the requisite tribal connection to support criminal jurisdiction. He questioned whether a review of cases could answer that inquiry and noted that these issues may be submitted to the jury even where the defendant does not actively contest the requisite tribal affiliation.

Ms. Kintz explained that the issue was one of respecting tribal governments and their relationship with the federal government. She argued that there is no valid reason that tribal governments should not be afforded the same respect as municipalities. She further noted that tribal citizenship is a matter that is crucial to the operation of tribes and that there is no reason to question the reliability of tribal records on this critical point. Finally, she opined that the burden being placed on tribal governments to provide this testimony in support of federal prosecutions is unjustified and substantial.

Mr. Valladares commented that he has the utmost respect for tribal sovereignty but that one of the authors of the letter in opposition to the proposed amendment is an enrolled member of the Choctaw Nation of Oklahoma. He suggested that she could speak to the issues raised by the government at a symposium and demonstrate that problems have arisen in only a couple of bad cases where the government could have successfully authenticated the tribal records at issue under existing rules. He argued that bad outcomes in a handful of cases should not justify a rule change and that no harm would be done by pausing any decision on publication to allow experts in the field to offer valuable input.

Judge Bates stated that he was interested to know the view of tribes with respect to the proposal. He questioned whether it is optimal to have the Department of Justice speak for tribes in light of the long history of the federal government taking action in connection with tribes without their input or consent. He suggested that it would benefit the Committee to have the views of the tribal governments themselves in the record given the tribal sovereignty and dignity rationale for the proposed amendment. Judge Bates opined that a symposium would not be necessary and that letters from tribal representatives would be sufficient but that the Committee should obtain tribal government input prior to recommending an amendment for publication. FJC representatives offered their support in obtaining tribal input on the proposal. Ms. Shapiro further noted that the Office of Tribal Justice has important relationships and could reach out for letters regarding the proposed amendment.

The Chair asked whether the Department of Justice was withdrawing its proposal to vote to publish the proposed amendment for notice and comment pending the solicitation of tribal input. Ms. Shapiro responded that the Department wished to advance the proposal for a vote to publish to obtain public comment and to develop tribal feedback for the record during and as part of the public comment process. A Committee member stated that the only issue to be decided is whether tribes should be treated like other government entities for purposes of Rule 902(1). He suggested that the Committee should not make that determination without first hearing from affected tribes.

The Chair noted that all Committee members were in agreement that the Committee should obtain input and feedback from tribes but that the open question was when to obtain that feedback – before publication of a proposed amendment to Rule 902(1) or during the public comment period following publication. One Committee member predicted that tribes would overwhelmingly favor the amendment and suggested publishing it for notice and comment with the option to pull back from the proposed amendment if there proved to be inadequate tribal support. The Chair then raised two points about the draft proposal. First, he noted that Federal Rule of Criminal Procedure 6(i) contains a definition of "Indian Tribe" in connection with the disclosure of grand jury information and questioned whether a reference needed to be included in the text of the proposed rule or could be included in a Committee note. The Reporter opined that a Committee note would be appropriate. The Chair then noted an issue raised in the memorandum submitted by the Federal Public Defender regarding the dates upon which certain tribes are "federally recognized." Committee members agreed that an amended Rule 902(1) would apply to the records of all tribes currently federally recognized regardless of the date of recognition. Ms. Shapiro agreed that the amendment would self-authenticate the records of tribes federally recognized on the date of trial.

The Reporter to the Standing Committee pointed out that the question of affording tribal governments sovereign dignity under Rule 902(1) arises in the unique context of federal criminal jurisdiction. While all tribes might agree on the general desire for dignity and sovereignty writ large, there could be varying views on tribal recognition for purposes of creating federal criminal jurisdiction. She suggested that the question of tribal dignity in this unique context is complicated and momentous. A Committee member agreed, opining that the Committee should take additional time to collect data before proceeding to publish a proposed amendment to Rule 902(1) for public comment. He suggested that the Committee would be rushing if it approved the proposal without obtaining more feedback and data and stated that he would have to vote against publication at this point out of respect for process. A representative from the FJC agreed that the implications for federal criminal jurisdiction could lead to differing views among tribes. She suggested reaching out to the National Congress of American Indians advocacy group to explain the issue and seek feedback.

The Reporter emphasized the importance of asking the right questions in order to get meaningful feedback. The Chair stated that it would be appropriate to ask tribal governments for their views before proceeding to publish a proposed amendment and suggested that proceeding without asking could be perceived as paternalistic. Mr. Valladares reiterated that an important issue remains how frequently problems of proof are actually occurring in federal trials and how significant the burden is on tribal governments to address proof problems. He noted that the issue is elemental for criminal defendants, that the Committee had not yet received a memorandum from the Reporter on the issue, and that there was no reason to rush through the amendment process.

The Chair then expressed his view that the Committee should hear from tribal governments before proceeding with publication if tribal dignity is an animating rationale for the proposal. He suggested that the Committee discuss with the FJC the ability to gather data regarding the proof problems in the cases, solicit the views of the tribes, and revisit the proposal at the Fall 2025 meeting. Ms. Shapiro stated that the Department would reach out to tribes and solicit feedback such that the proposal could be an action item for the Fall 2025 meeting. The Reporter suggested that it would be superior to include the proposal as an action item for the Spring 2026 meeting to align with the notice and comment period that runs from August through February. He suggested that the Department work with the Academic Consultant to develop a protocol for soliciting tribal input. Committee members agreed to maintain the Rule 902(1) proposal on the agenda and to await feedback and data before proceeding.

VI. Report on Federal Rule of Evidence 706 and Court-Appointed Experts

The Chair next recognized Samantha Smith, the Supreme Court Fellow at the FJC, to describe her study of Federal Rule of Evidence 706 and court-appointed expert witnesses. Ms. Smith thanked the Chair and the Committee for making time for her on the agenda. She explained that her interest in Rule 706 emanated from her time as a law clerk and in private practice where she saw expertise inaccurately relayed to the court on multiple occasions and questioned what could be done to better translate expertise to courts. Although Rule 706 authorizes federal judges to appoint expert witnesses, Ms. Smith explained that the literature on the provision suggests that this tool has little value because very few judges make such appointments and because such

appointments are seen as posing threats to the adversarial process. Nonetheless, Ms. Smith noted that court-appointed experts can assist in the search for truth that is at the heart of the trial process.

Ms. Smith explained that she undertook an update of a 1993 FJC study on Rule 706 through surveying and interviewing active and senior district court judges regarding their use of Rule 706. Ms. Smith found that the usage of court-appointed experts had declined since 1993, with 20% of surveyed judges reporting use of court-appointed experts in 1993 compared to only 10% today. She also noted that the judges who reported making appointments under Rule 706 had not asked them to testify and had deployed them as advisors akin to technical advisors and special masters. She explained that Rule 706 offered a more streamlined procedure for accessing such advisory support than Federal Rule of Civil Procedure 53 that requires a more complicated process for appointing a special master. Ms. Smith further noted that trial judges utilizing Rule 706 did not compensate court-appointed experts as set forth in Rule 706. She explained that most courts had used court funds rather than party funds to compensate court-appointed experts even though Rule 706 does not provide for use of court funds in civil cases. Finally, Ms. Smith stated that the majority of federal judges who had not used a court-appointed expert cited concerns regarding the adversarial process as a rationale for avoiding an appointment. Judges expressed reluctance to interfere with party autonomy and were loath to be perceived as placing a thumb on the scale of one side or the other and risk reversal.

As a result of her research, Ms. Smith offered ideas about amendments to Rule 706 that might be explored to promote the use of court-appointed experts. First, she suggested that Rule 706 might be updated to expressly authorize use of bench and bar funds to support court-appointed experts for judges who are reluctant to charge the parties. Due to the infrequent utilization of the tool, Ms. Smith predicted that this would not overtax funding or drive up the use of Rule 706 to a significant degree. She further suggested that a Committee note to any Rule 706 amendment might highlight for trial judges other mechanisms for obtaining expertise such as technical advisors and special masters. Ms. Smith also opined that Rule 611 might be amended to provide a concrete source of authority for the use of concurrent expert proceedings (also known as "hot-tubbing" the experts). She noted that federal judges expressed significant interest in such proceedings but wanted clear authority for them.

The Chair queried whether an amendment to Rule 706 was necessary to allow for use of court funds to compensate court-appointed experts where some judges already reported such use under the existing provision. Ms. Smith responded that some trial judges reported a reluctance to authorize use of court funds where Rule 706 does not appear to permit such use in civil cases. The Chair then inquired whether issues with Rule 706 were ones that could be resolved through improved judicial education as opposed to rulemaking. He suggested that it may be appropriate for the FJC to offer more training around Rule 706. Ms. Smith agreed that education was important and expressed her hope that her study had served an educational, as well as a research function. That said, Ms. Smith noted that several of the judges she surveyed reported looking directly to Rule 706 to determine their authority such that rulemaking might also serve an important function. Judge Furman thanked Ms. Smith for her research and for sharing it with the Committee.

VII. Proposed Amendments to Address Machine-Generated Evidence and Artificial Intelligence

The Chair directed the Committee's attention to Tab 3 of the Agenda materials and to the final issues for consideration – the authentication and admissibility of machine-generated and AI evidence. He reminded the Committee that these issues had been on the Committee's agenda since 2023 and that the Committee had been evaluating two concerns. First, the Committee had been exploring the deepfake problem and the issues around authenticating information that might be generated by artificial intelligence. Second, the Committee had been evaluating concerns regarding the admission of machine-generated evidence. The Chair reminded the Committee that members had agreed to consider a new Federal Rule of Evidence 707 regarding the admissibility of machine-generated evidence for publication. He also reminded the Committee of their agreement not to publish proposed Rule 901(c) regarding authentication of evidence potentially generated by AI but to continue developing an appropriate provision in case an emergent need arises to add a rule to keep pace with evolving technology in the courtroom. The Chair commended the Reporter for his Agenda memorandum on these subjects which he described as another tour de force. The Chair noted that the Committee had been criticized for not moving quickly enough on AI and opined that the Committee was proceeding with appropriate care and actually leading the charge on the development of rules around this challenging technology. The Chair noted that no state is as far along in the development of provisions to respond to AI.

The Chair directed the Committee's attention to page 198 of the Agenda materials and to the proposed new Rule 707 that would require "machine-generated" evidence to satisfy the requirements of Rule 702. He noted that an alternate, narrower version of Rule 707 that would regulate only "machine-learning" evidence appeared on page 202 of the Agenda materials. The Chair noted that the proposed rule regulating machine-generated evidence originally exempted "the output of basic scientific instruments or routinely relied upon commercial software" from coverage. The Chair explained that the draft rule had been altered since the Committee last reviewed it to eliminate an exception for "routinely relied upon commercial software" for fear that it was too broad an exclusion that could exempt even Chat GPT output from coverage. He noted that the draft Committee note had also been sharpened to address concerns raised by the Department of Justice.

The Reporter pointed to two additional changes to the Committee note in a handout circulated to the Committee at the meeting: 1) a new sentence acknowledging that Rule 707 would not apply in circumstances in which the court can take judicial notice of the reliability of machine-generated evidence; and 2) a new sentence at the conclusion of the note providing that parties should adhere to notice requirements for expert testimony in admitting machine-generated evidence. The Reporter explained that notice of machine-generated evidence would be important but noted that fashioning a notice provision in rule text could prove problematic as it did in the Rule 107 rulemaking process. He opined that a Committee note reminding parties of the existing notice obligations around expert witnesses would better serve courts and litigants. The Reporter explained that the challenge in drafting Rule 707 was to demand reliability for important machine-generated evidence without being overinclusive and needlessly slowing the trial process. The Reporter predicted that federal trial judges would exercise good common sense in demanding the

requisite showing in appropriate cases without requiring *Daubert* hearings for well-accepted and understood machine output.

Ms. Shapiro stated that she had conferred with many Department of Justice experts regarding electronic evidence and artificial intelligence. She reported universal concerns about a new Rule 707. First, she noted that Rule 707 would be necessary only when machine-generated evidence is offered in the absence of an expert witness. If an expert witness testifies based upon machine-generated output, that testimony would be subject to Rule 702 and Rule 707 would be unnecessary. The only time Rule 707 would serve an important function would be when such output was proffered without an accompanying witness. She noted that DOJ experts questioned when and how machine-generated data would be conveyed to a jury in the absence of a trial witness. The Reporter responded that it can happen frequently through the use of a Rule 902(13) certification. Another Committee member suggested that a summary offered as evidence through Rule 1006 might summarize voluminous machine-generated data. The Chair suggested that such evidence may be accompanied by a lay witness but could be offered without an expert on the stand. The Reporter agreed that it was probable and not just possible. Ms. Shapiro stated that Department practice is to utilize an expert witness and expressed concern that an expert conveying machine-generated data would have to satisfy both Rules 702 and 707, requiring a two-step admissibility inquiry. The Reporter suggested that only one step would be required where proposed Rule 707 simply incorporates the requirements of Rule 702. Another Committee member suggested a hypothetical in which a lay witness, such as a government agent, might testify about using facial recognition software to identify a defendant who was captured on video during a crime. He noted that this would be a lay witness relying upon AI to support his testimony.

Ms. Shapiro stated that it is the Department's view that Rule 702 already covers the use of machine-generated evidence and that proposed Rule 707 seeks to anticipate and regulate future needs. She further noted concerns that Rule 707 is overly broad and could require a Rule 702 showing for almost anything. Department experts sought to categorize output as "machine generated" or "AI" and had difficulty drawing clear lines. Ms. Shapiro noted that people are not always aware that certain devices (such as cell phones) rely upon machine learning to generate output. She argued that a rule covering all machine-generated evidence would extend beyond the AI concerns that generated the project. She noted that the DNA examples provided in the draft Committee note do not rely upon AI.

The Chair explained that the intent of Rule 707 would be to address the circumstance in which machine-generated, expert-like conclusions are offered without an accompanying expert witness. He queried whether adding language to the text of the proposed provision to expressly state that it applies only when the output is "offered without an expert witness" would alleviate some of the concerns around the proposal. Ms. Shapiro responded that such an addition would be an improvement but would be inadequate to address all of the Department's concerns. The Reporter explained that there is significant expertise in the scientific community regarding machine-generated output and that the question for the Committee was how best to access that expertise to improve the proposed provision. He reminded the Committee that it had already hosted two symposia on these issues. He suggested that the Committee could invite more speakers to share their expertise but that it would be more productive to publish proposed Rule 707 for public comment and obtain expert feedback.

A Committee member asked that the Reporter help the Committee understand the concern to be addressed by the proposed provision. This Committee member reported never having seen machine-generated output offered without an accompanying witness and asked for concrete examples. The Reporter posited a trial in which the defense disputes what is portrayed on a video and applies artificial intelligence to alter the focus of the video but applies an AI tool that is not appropriate to the task. He suggested that this would constitute unreliable machine output that would be regulated by Rule 707. Ms. Shapiro asked whether that hypothetical posed a problem of authenticity. The Reporter replied that the issue would not be one of authenticity because the proffered video would be exactly what the defense claims it to be – an augmented version of the video. The question, the Reporter explained, would be about the reliability of the method of augmentation. The Chair noted that an article summarized by the Reporter on page 16 of the Agenda memo offered four examples of how machine-generated evidence might be offered at trial without a testifying expert.

Judge Bates noted that the draft of Rule 707 covered output that would be subject to Rule 702 if testified to by a "human" witness. He questioned whether the provision meant to cover circumstances where there is no "expert witness" and whether the word human could be replaced with the word "expert" to better capture the intent of the Rule. Second, Judge Bates noted that the title of proposed Rule 707 is "Machine-generated Evidence" but that the text of the provision does not utilize the term "machine-generated evidence" and that the Evidence Rules never provide a title that is not used in the text of the rule. Ms. Shapiro queried whether the title of the provision might be changed to "Expert-like Machine-Generated Evidence" but the Reporter noted that this terminology did not appear in the rule text either. The Chair commented that Rule 807 is titled the "Residual Exception" even though that terminology appears nowhere in the text of the rule.

The Chair then noted that he had not yet seen this type of evidence being used in his courtroom in the absence of an accompanying expert but that it was likely that he would soon. Ms. Shapiro reported that a defendant in a Florida stand-your-ground state prosecution had offered virtual-reality evidence of the underlying events from the defendant's perspective and that the trial judge had taken admissibility under advisement after experiencing the virtual-reality presentation. She noted that the judge was deciding whether to admit the evidence using existing evidentiary rules.

Another Committee member asked whether Rule 707 ought to demand "accuracy" as opposed to the "reliability" required by Rule 702. He noted that the defendant in the virtual reality scenario may or may not be using a "reliable method" to create his virtual reality but that the question for the jury was whether it revealed an "accurate" depiction of the underlying events. The Reporter responded that the issues with machine-generated output mirror those under Rule 702 which requires reliability. Another Committee member opined that the Committee would need to address machine-generated evidence in the future but that a new rule was still premature. He noted that parties are building large language models that can be asked to identify, for example, the circumstances that correlate with bad outcomes for labor and delivery. He suggested that such large language models are capable of identifying "shift changes" or even certain personnel with bad outcomes. This Committee member predicted that litigants would try to admit such evidence in the future and that machines could very well be asked to "testify." He suggested that the

Committee should continue developing a rule to regulate such evidence, but that adoption of a rule needed to await future developments.

The Reporter responded that the Committee needed to craft a provision that would be sufficiently general to accommodate future developments and opined that the Rule 707 proposal to incorporate the Rule 702 standard could achieve that. The Chair agreed that rulemaking is challenging in this space because technology develops at lightning speed and rulemaking proceeds very slowly. He suggested that it would take several years to launch a helpful rule if the Committee waits to take action. The Reporter emphasized the importance of obtaining public comment on the proposal. Another Committee member expressed concern about machine-generated output offered by a lay witness who cannot explain the process followed to generate the output. He opined that the Rule 707 proposal addresses that concern by applying Rule 702 to evidence that otherwise might slip through. The Reporter also reminded the Committee that a decision to publish the provision would generate public hearings as well as public comment. He predicted that the Committee would receive significant, helpful information from subject matter experts in the course of public hearings. Professor Coquillette remarked that he had never seen a rulemaking issue as important or difficult or a better Agenda memorandum. He strongly suggested approval of the draft to obtain public comment.

Judge Bates then inquired about the interaction between Rule 902(13) and proposed Rule 707, asking whether a litigant would have to satisfy both provisions to admit machine-generated evidence. The Reporter answered that litigants would have to satisfy both. Judge Bates then opined that the Committee note to proposed Rule 707 should address that interaction. The Chair suggested adding commentary to the note regarding application of Rule 707 when machine-generated output is introduced without a witness through Rule 902(13). Another Committee member noted that Rule 902(13) is often used to prove a defendant's Google search terms or the like without resort to any AI. Judge Bates expressed concern that any litigant seeking to utilize Rule 902(13) would need to satisfy Rule 707 even though the litigant is not using an expert. The Chair clarified that Rule 707 would apply to machine-generated output certified through Rule 902(13) only if that output would constitute expert testimony if testified to by an expert witness. The Reporter agreed and noted that Rule 707 would distinguish the Rule 104(a) reliability standard from the Rule 104(b) authenticity standard. Ms. Shapiro called attention to the exemption from Rule 707 for "basic scientific instruments" and expressed concern about the ambiguity of that exemption and about *Daubert* hearings for every piece of machine-generated evidence. The Reporter responded that there will be problems of designation that will need to be worked out under the provision, that trial judges are unlikely to hold *Daubert* hearings to assess the admissibility of thermometer readings, and that obtaining public comment on the proposal is critical for that line-drawing to be done right.

A Committee member expressed concern that the proposed addition to the Committee note to suggest that Rule 707 applies when a Rule 902(13) certification is used will subject output that is not expert in nature to Rule 707. Another Committee member asked whether it would help to modify the note to specify that Rule 707 applies to only a subset of Rule 902(13) certifications where the output is expert-like. Judge Bates then asked whether a reference to Rule 702 is the best way to regulate machine output that effectively is acting as an expert witness. He expressed continuing concern that Rule 707 could have the unintended consequence of regulating all Google search results certified under Rule 902(13). Another Committee member agreed, noting that a

defendant may search "where can I buy a gun?" and the fact of the search is admitted through Rule 902(13). The Reporter stated that Rule 707 would not govern because such output would not be expert in nature. Another Committee member agreed that Rule 707 would not cover such output because it would regulate machines offering opinions that cannot be cross-examined and would not apply to the fact that a particular internet search was conducted. The Reporter proposed a new paragraph for the Committee note to address the interaction with Rule 902(13) that would read: "If the machine output is the equivalent of expert testimony, it is not enough that it is authenticated under Rule 902(13). That rule covers authenticity but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony."

Judge Furman then noted that the draft text of Rule 707 had been modified to require Rule 702 to be satisfied whenever output is offered "that would be subject to Rule 702 if testified to by an expert witness." He noted the tautological problem of requiring Rule 702 to be satisfied whenever an expert would have to satisfy its requirements because *all* expert witnesses have to satisfy Rule 702. Judge Bates agreed that *everything* an expert witness testifies to is subject to Rule 702. The Reporter queried whether the text should be modified to govern when machine-generated output "yields an opinion" that would be subject to Rule 702. Ms. Shapiro asked whether the rule would regulate only AI and machine learning since only AI can offer an "opinion."

The Reporter reiterated the importance of obtaining public comment on the proposal and argued that the addition of the word "expert" in place of the word "human" had created the tautology in the rule text. He suggested that simply removing the word "expert" such that the rule would regulate output that "would be subject to Rule 702 if testified to by a witness" would resolve any difficulty. The Reporter suggested that the relationship between Rule 707 and 902(13) could be addressed by the addition of the language previously discussed to the committee note.

The Chair then asked whether there was a motion to publish Rule 707 with an assumption that the provision is not necessarily proceeding to final approval due to many remaining questions. He added that the Committee would not be committing itself to adding Rule 707 to the Federal Rules of Evidence by publishing it for notice and comment. A Committee member commented that the public would likely perceive Rule 707 as on track for final approval despite those Committee assumptions. Another Committee member asked whether it would be helpful to replace the words "output of a process or system" in rule text with "machine-generated evidence" to signal that Rule 707 would be narrower than Rule 902(13). Judge Bates asked whether the text should also be clarified to state that it applies when machine-generated evidence is offered without any witness. The Chair responded that it should apply whenever machine-generated evidence is offered without an "expert witness" because such output could be offered through a lay witness. Committee members agreed that Rule 707 would be improved by modifying it to read:

> Rule 707. Machine-Generated Evidence
>
> Where machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court must find that the evidence satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of basic scientific instruments.

Ms. Shapiro then asked whether the bullet point in the draft Committee note on page 74 of the Agenda materials offering DNA software as an example could be deleted. Committee members agreed. The Chair then asked if there was a motion to publish Rule 707 as edited, along with new note material on Rule 902(13) and with the bullet point about DNA software deleted. Eight members of the Committee voted in favor of a motion to publish, and the Department of Justice representative voted against the proposal. One Committee member stated that his vote in favor was to publish the draft to invite comment but not for ultimate adoption. The Chair commented that that was true for his vote as well. The Reporter stated that the Committee's report to the Standing Committee would highlight the provisional nature of the proposal.

The Chair next turned to the issue of deepfake evidence and the draft Rule 901(c) that the Committee had developed but had decided not to publish for notice and comment. The Chair asked Committee members whether the intention to hold Rule 901(c) for consideration remained, whether the Committee wished to propose publication of that provision alongside Rule 707, or whether the Committee wished to remove the deepfake issue from its agenda. The Chair also noted that the Reporter's Agenda memo described a new, but similar proposal regarding deepfakes submitted by Professor Delfino. He pointed the Committee to the proposal on page 180 of the Agenda materials and noted that the Reporter preferred Professor Delfino's use of the term "generative AI" in Rule 901(c) and had drafted an updated version of Rule 901(c) appearing on page 196 of the Agenda materials.

The Reporter agreed that the term "generative AI" better captured the concerns regarding deepfakes because it is generative AI that is capable of creating such fake evidence. Therefore, the new draft eliminates the reference to "electronic evidence" and tailors the draft provision to an "item of evidence" that has been fabricated by "generative artificial intelligence." The Reporter also explained that the problem of the "liar's dividend" (or arguments about deepfake evidence targeted to genuine evidence) could be addressed effectively in the Committee note given the existing mechanisms for preventing unfounded arguments about deepfakery. He also noted that unfounded generic demonstrations about the creation of deepfake evidence could also be excluded through Rule 403. The Reporter also explained that the deepfake problem could apply to evidence that is self-authenticating under Rule 902 and pointed out that text was added to draft Rule 901(c) to clarify its application to self-authenticating evidence under Rule 902. The Reporter reminded the Committee that proposed Rule 901(c) utilizes a burden-shifting mechanism that requires the *opponent* of evidence to provide sufficient information for a reasonable jury to find fabrication under Rule 104(b) before shifting the burden to the *proponent* of the evidence to show that it is genuine by a preponderance of the evidence pursuant to Rule 104(a). The Reporter explained that there had not been much development in the caselaw since the Fall 2024 meeting and that most courts reject deepfake claims made without support.

The Chair thanked the Reporter and identified several questions for the Committee's consideration. First, he asked Committee members whether a flood of deepfake evidence was on the horizon since that flood had yet to arrive. Second, he queried whether the existing rules are adequate to address the problem of deepfakes given that trial judges appear to be handling the deepfake claims that have been made capably. Finally, he sought the Committee's input as to whether to continue developing Rule 901(c) as a draft to keep in reserve in the event that deepfake evidence or arguments begin flooding the courts, or whether to publish the proposal for comment

along with Rule 707. The Reporter distinguished proposed Rule 707 and proposed Rule 901(c), explaining that the Committee had a great deal to learn about the use of machine-generated evidence but that there was not a great deal more to examine regarding the problem of deepfakes. He suggested that there was less need to invite public comment on the deepfake issue and that the Committee had developed a useful provision it could deploy quickly if a problem were to arise. One Committee member commented that he liked the burden-shifting aspect of proposed Rule 901(c) and would like to see it published for comment. Another Committee member opined that the Reporter had offered a helpful procedural framework but that he did not think publication was necessary. He advocated for holding the rule in abeyance until a problem arises that necessitates rulemaking.

Another Committee member agreed that holding the rule in abeyance made sense but asked why the draft proposal requires the opponent to demonstrate to the court "that a jury reasonably could find" an item of evidence fabricated. The Committee member suggested that the language seemed needlessly clunky. The Reporter explained that the Rule 104(b) standard is evidence "sufficient to support a finding" and that this might be a reasonable alternative. Ms. Shapiro also noted that the burden-shifting approach of the proposed rule would require extrinsic evidence and likely expertise. She suggested that a notice requirement would be necessary to avoid disrupting trials with such objections. The Reporter asked whether the notice would come from opponents of evidence who are advancing deepfake challenges. Ms. Shapiro responded in the affirmative, explaining that it should be pretrial notice of the intent to make a deepfake allegation. She argued that exhibits would be exchanged by a certain date, facilitating such notice. The Reporter promised to work on an appropriate notice provision to hold in abeyance with the draft rule.

Ms. Shapiro further asked if Rule 901(c) would require the proponent's intent to fabricate evidence. She noted that evidence in a child pornography case could consist of materials in a defendant's possession that had been generated or created by AI. If the government offered that evidence, it would be "generated" or "created" by AI but not fabricated within the meaning of the rule. The Reporter promised to think through those issues as well. He noted that publishing both Rules 707 and 901(c) would generate a veritable tsunami of public comment and that it would make sense for the Committee to hold off on publication of Rule 901(c) to consider these issues and to better evaluate the comment generated by Rule 707. Another Committee member asked the Reporter to consider referencing the Rule 901(a) standard in a Committee note, suggesting that the burden-shifting mechanism of Rule 901(c) would not necessarily apply when a witness will confirm events related by evidence claimed to be a deepfake.

The Chair then asked whether Committee members wanted to publish proposed Rule 901(c) alongside proposed Rule 707. He noted that the likely flood of public comment might militate against publication of both but that the economies of scale achieved by publishing both rules together could be beneficial. The Chair then noted that the Committee consensus was to hold off on publishing Rule 901(c). The Chair then asked the Reporter to work on a notice provision akin to those in Rules 404(b) and 807 for the bullpen Rule 901(c) proposal. A Committee member stated that a notice provision could prove constitutionally problematic if it required a criminal defendant to show his hand with respect to impeachment of deepfake evidence before trial. Ms. Shapiro suggested that a notice requirement could be excused for "good cause." The Committee agreed to keep proposed Rule 901(c) on the agenda for the Fall 2025 meeting.

VIII. Closing Matters

The Chair thanked the Committee and all participants for a productive session. He announced that the Fall 2025 meeting would be held on either November 6th or 7th and that Committee members would be notified of the date as soon as it could be finalized. The Chair reported that the Committee could consider inviting experienced federal and state practitioners for a symposium at the Fall meeting to share insights about evidentiary provisions that are problematic or could be helpful. He solicited thoughts and ideas from Committee members for such a panel, as well as other ideas or interests. The meeting was then adjourned.

Respectfully submitted,
Liesa L. Richter