MEMORANDUM

TO: Hon. James C. Dever, III, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2025

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") conducted a meeting on Microsoft Teams on November 5, 2025. The Committee reviewed several possible amendments, including amendments currently out for public comment on machine-generated evidence (Rule 707) and impeachment with convictions (Rule 609).

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Rule 707 on Machine Learning

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by Artificial Intelligence will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: 1) machine-generated evidence that would be subject to Rule 702 if propounded by a human expert; and 2) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake.

At its Spring meeting, the Standing Committee approved for release for public comment a proposal to add a new Rule 707 to the Federal Rules of Evidence to address the former concern. The rule is intended to regulate machine-generated evidence when it is offered without any expert testimony, when the output, if coming from a human, would be considered expert testimony:

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702. This rule does not apply to the output of simple scientific instruments.

The Committee Note explains that "if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability) Rule 702 is not obviously applicable" because no expert witness is testifying. In such situations, the Committee believes it is critical that the machine output must satisfy the standards that would be applicable if a human expert were to testify.

At its November 5 meeting, the Committee discussed a number of proposals — from commentators and from members of the Committee — for amending either the text or the Committee Note to Rule 707. The Committee made a number of tentative decisions:

- A provision should be added to the Committee Note to emphasize a distinction between human experts and machines at trial and to endorse an instruction analogous to that which a court may give in connection with expert testimony. The tentatively approved language is as follows:

  Under this rule, machine-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may

> well be a difference at trial when machine-generated evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable — or unreliable — simply because it was produced by a machine.

- The Committee Note should be fortified to emphasize that Rule 707 does not provide a way for the proponent to evade the requirements of Rule 702 by presenting machine-based evidence instead of an expert. The tentatively approved language, added to existing language in the Committee Note, is as follows:

> This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert. <u>It is anticipated that these reliability standards will be difficult to meet — and sometimes impossible to meet — without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.</u>

- The Committee Note should provide some guidance on what is to be done if it is not possible to explain how the machine reached its conclusion. The tentatively approved language is as follows:

> A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. *See* Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got

> trained and establishing, for example through validation studies, that the process leads to a low rate of error.

- The Committee Note should explain the relationship between Rule 707 and Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence. The Note should emphasize that the problem raised by machine-learning is one of reliability, not authenticity. The tentatively approved language is as follows:

> All questions regarding the reliability of machine-generated evidence are now regulated under Rules 702 and 707. Rule 901(b)(9)'s requirement that the process or system "produces an accurate result" is subsumed by the reliability requirements that must be established by a preponderance of the evidence under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine-generated evidence is qualified under Rule 707 or 702, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

In addition, the Committee tentatively rejected the following proposed changes:

- Changing "machine-generated" to "computer-generated" throughout the rule. This change was tentatively determined to be no improvement for interpreting the scope of the rule. Some machines are not computerized, but there is no information in such machines that raises a Rule 702-type concern.

- A change in the text and note that would focus on "machine learning" as opposed to "machine-generated" evidence. The Committee was concerned that the term "machine learning" is dynamic. Additionally, the output of sophisticated computer systems should be regulated by Rule 707 even if it is not the product of machine learning.

- A proposal to include expert testimony on the basis of machine learning within the coverage of Rule 707. This proposal was rejected because (as reflected in the draft Committee Note) expert testimony on the basis of machine learning is already covered by Rule 702, and it would only be confusing to shift that coverage to Rule 707.

- A proposal to change the last sentence of the rule, currently providing that the rule does not cover the output of "simple scientific instruments" to the following: "This rule does not apply when the type of machine that generated the evidence is accessible to, and the extent of its reliability is known to, the general public." This language was rejected because the Committee did not think it appropriate to cede the coverage of the rule to the general public, and also because a standard dependent on public opinion is too amorphous to be useful.
- A proposal to eliminate Rule 901(b)(9), which provides that machine-generated evidence can be admitted over an authenticity objection if the proponent provides evidence sufficient to support a finding that the process or system "produces an accurate result." The

Committee concluded, as noted above, that Rule 707 renders Rule 901(b)(9) irrelevant in the cases to which Rule 707 applies. And the Committee also concluded that Rule 901(b)(9) is an odd fit for an authenticity rule, because it is really trying to guarantee reliability as opposed to authenticity. But that said, the Committee concluded that eliminating Rule 901(b)(9) was not advisable at this time, as the impact of elimination on machine-generated evidence not covered by Rule 707 would need further consideration.

The Committee will review and process the public comment on Rule 707 and will provide a final report at the June 2026 Standing Committee meeting.

B. Admissibility of Deepfakes

When a video or audio is a deepfake and is offered for trial, it presents a challenge to the authenticity requirements under Rules 901 and 902 of the Evidence Rules. The existing standard of authenticity is a mild one. The proponent must establish that a reasonable person could believe that the item is what the proponent says it is. The Committee is of the view that this "sufficient to support a finding" standard may not be stringent enough to regulate deepfakes because they can be extremely hard to detect, and they can be generated easily and inexpensively by any member of the public. That said, the Committee is also of the view that a deepfake enquiry should not be made necessary simply by the opponent's bare assertion that the proffered item is a deepfake.

Over the course of three years, the Committee has worked on a proposal that would provide a stricter standard of authenticity to purported deepfakes, whenever the proponent can actually provide information that the item may in fact be fake. The Committee has tentatively approved a proposal that would add a new Rule 901(c) to the Rule of Evidence. The proposed text and Committee Note provide as follows:

Rule 901(c) Potentially Fabricated Evidence Created By Artificial Intelligence.

(1) ***Showing Required Before an Inquiry into Fabrication.*** A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.

(2) ***Showing Required by the Proponent.*** If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(3) ***Applicability.*** This rule applies to items offered under either Rule 901 or 902.

Committee Note

This new subdivision is intended to set forth guidance and standards when a party-opponent alleges that a proffered item of evidence is a "deepfake" --- i.e., that it has been prepared

by the use of generative artificial intelligence so that it is not an authentic item — not what the proponent says it is.

The term "artificial intelligence" can have several meanings. It is not a static term. In this rule, "artificial intelligence" means software used to perform tasks or produce output previously thought to require human intelligence. "Generative artificial intelligence" is used in this rule to cover technology that can produce various types of content, including text, imagery, audio and synthetic data. Generative artificial intelligence creates new content in response to a wide variety of user inputs.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been fabricated in whole or part by the use of generative artificial intelligence. Thus, a broad claim of "deepfake" is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by generative artificial intelligence. Second, if the opponent has shown enough to merit the inquiry, the proponent must then show to the court that the item is more likely than not authentic. While that Rule 104(a) standard is higher than what is ordinarily required for a showing of authenticity, it is justified because any member of the public now has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect by jurors. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

If the opponent satisfies its burden of going forward, the proponent will not establish authenticity simply by satisfying one of the illustrations of authenticity set forth in Rule 901(b). Rule 901(b) sets forth illustrations that "establish" the authenticity requirement — but that is in the context of the lower standard of proof set forth in Rule 901(a). So for example, testimony of a witness with knowledge (Rule 901(b)(1)) will establish evidence sufficient to support a finding that the item is authentic under Rule 901(a). But that knowledge will not necessarily prove more likely than not that the item is authentic, especially given the opponent's submission showing some likelihood of a deepfake. Requiring a stronger showing of authenticity is justified for the very reason that a person with "knowledge" may well think that the item is genuine when in fact it is a deepfake.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence — that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent evidence of such a broad point is proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the absence of the necessary foundation. *See United States v. Peterson,* 945 F.3d 144, 157 (4th Cir. 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under Rule 403; the proposed demonstration "was an attempt to prejudice the jury — an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."). And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that

is made without foundation in the evidence. *See Lee v. City of Troy*, 339 F.R.D. 346, 367-68 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without any basis, that the plaintiff's videos were "manufactured" and stating that "attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.").

The requirements of the rule apply to authentication under either Rule 901 or 902. The risk of deepfakes extends to many of the items designated in Rule 902 as self-authenticating — most obviously newspapers and publications.

Courts are encouraged to exercise their discretion over case management to establish notice requirements in order to limit the possibility that a battle of experts on admissibility of evidence under the rule will occur during a trial. The rule does not set forth notice requirements because the deepfake issue is likely to arise in different contexts, and the appropriate notice may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment.

The above proposal is being held in abeyance because the Committee is not yet convinced that deepfakes are being frequently offered into evidence in federal court; nor is it yet convinced that, if so offered, a court could not handle the deepfake challenge under the existing authenticity rules. At the meeting, the Committee was made aware of some anecdotal evidence that deepfake arguments were being made in some courts, but not reported in published opinions. The Committee resolved to ask the FJC to prepare a survey of courts to assess the extent to which deepfake arguments are being made and whether the Evidence Rules should be amended to address them. If deepfake arguments are being made, and if the Committee determines that courts can be assisted by applying the more stringent requirements of Rule 901(c), then the Committee will decide whether to recommend that the rule be sent out for public comment.

Finally, the Committee rejected an alternative proposal, submitted by two professors, for treating deepfakes. That proposal would provide that a court "may" rather than "must" find sufficient evidence of authenticity upon satisfaction of one of the illustrations in Rule 901(b). Purportedly, this would give the court discretion to exclude an item on deepfake grounds even though a witness with personal knowledge testified that the item is authentic. The Committee found that granting such discretion to the trial judge, without any structure or standard for determination, could lead to inconsistent results as well as confusion. It also concluded that the structure provided by proposed Rule 901(c) was preferable.

C. Rule 609

At its last meeting, the Standing Committee unanimously approved for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant-witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to

substantially outweigh its prejudicial effect. The amendment addresses the fact that many courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statement.

In addition, the amendment includes a slight change to Rule 609(b), which covers older convictions. The rule is triggered when a conviction is over ten years old, but the current rule does not specify the end date of the ten-year period. The absence of any guidance in the rule has led courts to apply varying dates. The proposed amendment would end the ten-year period on the date that the trial begins. The Committee believes that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

To date, the Committee has received only two public comments on the proposed changes to Rule 609(b). The Committee will monitor and process the comments it receives and hopes to propose an amendment for final approval at the next Standing Committee meeting.

D. Rule 902(1) and Indian Tribes

The Committee is considering the important question of whether federally recognized Indian tribes should be added to Rule 902(1), which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1) does not list Indian Tribes, the government must use another route to authenticate proof of a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been a few cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception, which allows authentication through a certificate under Rule 902(11).

At the Fall 2025 meeting, the Committee invited and considered submissions by several Indian Tribes, other interested parties, as well as the Department of Justice, all supporting the inclusion of Indian Tribes under Rule 902(1). And it considered submissions by the Federal Defender opposing the change. The basic argument for amending Rule 902(1) is that it would recognize the dignity and sovereignty of Indian Tribes and Nations and would avoid the burden and expense of complying with other authenticity requirements. The Federal Defender's position is that allowing authenticity through a Tribal certificate will deprive Indian defendants of the opportunity to challenge authenticity as it is currently provided by Rule 902(11). The Defenders also argue that recordkeeping among Indian Tribes may not be uniform.

The Committee has sent requests for comment on the proposed change to Rule 902(1) to all federally recognized Indian Tribes and Nations. The Committee will review the returns and discuss at its next meeting whether to propose an amendment to Rule 902(1).

E. Rule 803(3)

At its November 5 meeting, the Committee considered possible changes to Rule 803(3), which provides that statements made by a declarant describing how the declarant is currently feeling — emotionally or physically — can be offered over a hearsay objection to prove that the declarant was actually feeling that way at the time of the statement. Two problems have arisen.

The more important problem arises most often when a criminal defendant makes a statement expressing innocence at a time when the statement appears suspect — but nonetheless on its face it is an expression of the defendant's state of mind. Many courts have held that to be admissible, a statement of a then-existing state of mind must be "spontaneous" or "trustworthy under the circumstances." These requirements are, however, not in the text of the rule itself and so have been rejected by other courts.

An amendment would rectify a split in the circuits, which is an important reason for amending a rule. In discussion, the Committee appeared to approve in principle an amendment that would emphasize that the rule means what it says: It does not impose an additional admissibility requirement of spontaneousness or trustworthiness. The rationale for rejecting these additional requirements is that the jury can give proper weight to a state of mind statement that is made under suspicious circumstances, and there is no justification for judicial oversight.

But Committee members were not convinced that an amendment was necessary. They sought more information on whether the spontaneity/trustworthiness requirement actually created a problem for defendants in criminal cases. If the defendant could find other ways to admit the statement, or if it made no forensic sense for the defendant to offer such a statement, then an amendment to Rule 803(3) would not be necessary. The Committee requested further information on the consequences of a possible change and will consider that information at the next meeting.

The second problem under Rule 803(3) is the possibility that a proponent will seek to use a statement of a declarant's state of mind to prove the conduct of another person: for example, using Joe's statement "I am going to do a drug deal with Jim" to prove that *Jim* did the drug deal with Joe. Most courts have correctly held that the state of mind exception does not extend to proving the conduct of a non-declarant because the rule is based on the presumption that the declarant has unique awareness of her *own* state of mind. Nothing in the state of mind exception justifies an assumption that the declarant has any special knowledge of the state of mind and conduct of another person.

The rule does not specifically provide that it is inapplicable to proof of the state of mind and conduct of a non-declarant. The Committee determined that an amendment prohibiting such use might be useful, but there was not a sufficient reason to propose such an amendment as an independent exception to Rule 803(3), as the courts are not really divided on the subject. The Committee concluded, however, that if it resolves to treat the problem of "spontaneity," it would then consider an amendment prohibiting the use of the state of mind exception to prove the state of mind and conduct of a non-declarant.

F. The Right to Confrontation and the Supreme Court's Decision in *Smith v. Arizona*

In 2024, the Supreme Court decided *Smith v. Arizona,* in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst — and the other analyst's findings were disclosed to the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its Fall 2025 meeting, the Committee considered whether the Court's confrontation analysis counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay, but strictly limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on Federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on Federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably rely.

The Academic Consultant to the Committee conducted a survey of lower court cases and presented her research, indicating that courts are split on whether *Smith* bars reliance on the testimonial report. The majority rule appears to be that *Smith* does in fact prohibit reliance by the expert on the testimonial hearsay. The Committee resolved to consider an amendment to Rule 703 that would provide a "red flag" indicating the possibility that Rule 703 might raise a constitutional concern in a criminal case. Such an amendment might look like this:

Rule 703. Bases of an Expert's Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. <u>An expert may not rely upon or disclose inadmissible facts or data if doing so would violate the constitutional rights of a defendant in a criminal case.</u>

The value of such a red flag is to alert lawyers to a possible constitutional concern of which they may not otherwise be aware. The Committee observed that Rule 412 includes similar "red flag" language — which is to say, there is precedent for adding such language to a rule that is uniquely susceptible to unconstitutional application.

The Committee also agreed to consider a similar red flag for Rule 606(b), which bars testimony from jurors about jury deliberations when a party is seeking to attack the verdict. The Supreme Court in *Pena-Rodriguez v. Colorado,* 580 U.S. 206 (2017), held that the defendant's Sixth Amendment right to fair trial was violated when Rule 606(b) was applied to exclude racially

biased statements of jurors. Thus, the same kind of cautionary language may be an appropriate addition to Rule 606(b).

G. Rule 104

Rule 104(a) and (b) set forth the applicable standards of proof to be employed by the court in determining preliminary questions on which admissibility of evidence is based. Rule 104(a) covers most questions of admissibility, while Rule 104(b) provides that if the relevance of one piece of evidence is conditioned on a fact, the burden of proof on that conditional fact is evidence sufficient to support a finding.

There are at least two problems with these provisions. As to Rule 104(a), the standard of proof has been declared by the Supreme Court to be a preponderance of the evidence. But that standard is nowhere to be found in the text of the rule. After discussion at the Fall meeting, the Committee has agreed to consider an amendment to Rule 104(a) that would read as follows:

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege. Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence.

As to Rule 104(b), the problem is that the concept of conditional relevance has no real meaning. There is no reason for special treatment of facts that are conditional to relevance because in almost *all* cases, the relevance of a particular fact is dependent on a showing of other facts and so relevance is always "conditional." Moreover, if the existence of one fact is conditionally relevant upon another, the result is that each fact is "conditionally relevant" to the other. And it is anomalous that there is a standard of proof for conditional relevance but not for questions of logical relevance (such as, is it relevant to a charge of armed bank robbery that the defendant possessed a gun ten years ago).

At the Fall meeting, the Reporter prepared a proposed change to Rule 104(b) that would eliminate the concept of conditional relevance and would treat all questions of relevance under the same standard of proof:

(b) Relevance ~~That Depends on a Fact~~. ~~When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist~~. Evidence is relevant only if the proponent introduces proof sufficient to support a finding that a fact of consequence is more or less probable than it would be without the evidence. The court may admit the proposed evidence on the condition that the proof be introduced later.

Committee discussion indicated that this proposal was an improvement and more straightforward than the current relevance distinctions that serve no purpose. But the Committee sought more information on whether courts and litigants were having problems with the current Rule 104(b). The Reporter will be conducting research on whether the current rule is problematic in practice, and the Committee will revisit the possibility of amendments to Rule 104(a) and (b) at its next meeting.

H. Rule 803(6) and Incorporated Records

The Committee invited some private practitioners to provide suggestions for changes to the Evidence Rules as applied in civil cases. One practitioner suggested that the Committee consider addressing whether the admissibility of an "incorporated business record" should be made explicit in Rule 803(6). The fact situation is fairly common. The records are proffered by one entity, but they were originally created by another. Examples include legal bills in the records of the client; toll receipts in the business records of the entity that paid the receipts; and situations where one company merges with another. In each of these cases, the foundation witness is from the company where the records currently are.

Rule 803(6) does not specifically treat the question of incorporated records. But the Committee has determined that the case law allows treatment of such records as business records of the receiving entity, so long as it is shown that the records have indeed been incorporated into the receiving entity's business records and that the receiving entity relies upon these records within the ordinary course of regularly conducted activity. Because this case law is uniform and straightforward, the Committee decided not to proceed at this time with an amendment addressing the admissibility of incorporated records.

I. Rule 901 and Production as Proof of Authenticity

The same practitioner also suggested that the Committee consider amending Rule 901 to provide that when a party produces a document in discovery, that production is a concession of authenticity that satisfies the standards of Rule 901. The Committee determined that it would be problematic to have a bright-line rule that production in discovery automatically constitutes a sufficient showing of authenticity. It would be a stretch to conclude that a party producing millions of documents in discovery is conceding the genuineness of each one. Moreover, it is possible that a document is produced not because it is genuine, but rather because it is fake. Or it is possible that the production was inadvertent and so unlikely to be a concession of authenticity. A more nuanced approach to production and its relationship to authenticity is required.

Courts have appropriately found that production in discovery is *some* evidence of authenticity. The question for the Committee was whether those holdings should be codified. One possibility considered by the Committee would be to add to Rule 901(b)(4), as follows:

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement [of authenticity]:

* * *

(4) ***Distinctive Characteristics and the Like.*** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances, including whether the item was produced in response to a valid discovery request [in civil cases].

The Committee considered this proposal and determined that it would not be necessary to proceed with it at this time. Courts already do consider production to be relevant, so codification about this narrow point does not appear warranted at this time. Moreover, an amendment would need to address the difficult question of whether production would be a concession of authenticity in criminal cases.

IV. Minutes of the Fall 2025 Meeting

The draft of the minutes of the Committee's Fall 2025 meeting is attached to this report. These minutes have not yet been approved by the Committee.

**Rule 707 as issued for public comment,
showing changes to the Committee Note tentatively agreed to
by the Evidence Rules Committee**

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on such a method, that method—and the expert's reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly [or through a lay witness], where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

If the machine output is the equivalent of expert testimony, it is not enough that it is self-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.

This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when

a party chooses to proffer machine-generated evidence instead of a live expert. It is anticipated that these reliability standards will be difficult to meet — and sometimes impossible to meet — without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. *See* Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

All questions regarding the reliability of machine-generated evidence are now regulated under Rules 702 and 707. Rule 901(b)(9)'s requirement that the process or system "produces an accurate result" is subsumed by the reliability requirements that must be established by a preponderance of the evidence under Rule 702 or 707. Given the fact that the threshold requirement for authenticity is significantly lower than that for reliability, it follows that if machine-generated

evidence is qualified under Rule 707 or 702, then it automatically satisfies the lesser requirements of Rule 901(b)(9). In contrast, satisfying Rule 901(b)(9) does not suffice for admissibility.

Under this rule, machine-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-generated evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable — or unreliable — simply because it was produced by a machine.

Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinions and reports of examinations and tests should be applied to output offered under this rule.

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 5, 2025

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 5, 2025 via Microsoft Teams due to the ongoing shutdown of the federal government. The Chair, Reporter, and staff conducted the meeting from New York, where several members of the Committee were also present.

The following members of the Committee were present:

Hon. Jesse Furman, Chair (in New York)
Hon. Valerie E. Caproni (in New York)
Hon. Mark S. Massa (via Teams)
Hon. Edmund A. Sargus, Jr. (via Teams)
John S. Siffert, Esq. (in New York)
James P. Cooney III, Esq. (via Teams)
Rene L. Valladares, Esq., Federal Public Defender (via Teams)
Elizabeth J. Shapiro, Esq., Department of Justice (in New York)
Hon. Richard J. Sullivan (via Teams)

The following individuals also participated in support of the Committee:

Reporter and Consultant
Professor Daniel J. Capra, Reporter to the Committee (in New York)
Professor Liesa L. Richter, Academic Consultant to the Committee (via Teams)

Rules Committee Staff
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff (in New York)
Bridget M. Healy, Esq., Counsel, Rules Committee (via Teams)
Shelly Cox, Management Analyst, Rules Committee (via Teams)
Sarah Sraders, Esq., Rules Law Clerk (in New York)

Other Rules Committee Attendees (via Teams)
Hon. James C. Dever III, Chair of the Committee on Rules of Practice and Procedure
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Jami Johnson, Assistant Federal Public Defender
Andrea Roth, Professor of Law and Barry Tarlow Chancellor's Chair in Criminal Justice, UC Berkeley

The following members of the public also observed the meeting (via Teams):

Allison A. Bruff, Esq.
Alex Dahl, LCJ
Anna Roberts, Professor, Brooklyn Law School

Ben Tietjen, CJRI, UC Berkeley Law
Chloé M. Chetta, Esq.
Christian Fannin, Esq.
Crystal Denise Williams
Daniel Steen, Esq., LCJ
Dr. Sarah Brown-Schmidt
Hank Fellows, Esq.
Will Holstrom, Esq., AAJ
James Ulwick, Esq.
John Hawkinson
Jack Karp
Katherine E. Charonko, Esq.
Kaiya Lyons, AAJ
John G. McCarthy, Federal Bar Association
Suzanne Monyak, Bloomberg Law
Nate Raymond, Reuters
Samuel Tope-Ojo
Eileen Scallen, Professor, UCLA Law
Julia Simon-Kerr, Evangeline Starr Professor of Law, University of Connecticut Law
Susan Steinman, AAJ
Susan Ehrmann Provenzano, Professor of Law, Georgia State University Law
Jessica Tyler
William P. Keane, ACTL

I. Welcome and Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees via Microsoft Teams. He noted that the meeting was held via Teams (with a few Committee members, the Reporter, and Carolyn Dubay of the Rules Committee Staff together in New York) due to the ongoing shutdown of the federal government. He thanked Ms. Dubay and the Rules Committee Staff for working during the furlough and without pay for their perseverance in supporting the ongoing work of the Advisory Committee during a time of hardship.

Judge Furman offered a warm welcome to Judge Dever, the new Chair of the Standing Committee, and to Sarah Sraders, the new Rules Law Clerk. Judge Furman also welcomed members of the press and public and thanked them for their interest in the work of the Advisory Committee.

Judge Furman explained that 2025 marks the 50th anniversary of the Federal Rules of Evidence. He noted that this is a significant milestone and that there are plans to add content regarding the history of the Rules to the uscourts.gov website upon the reopening of the federal government to celebrate the important anniversary. He further noted that the Rules Committee Staff had graciously arranged for small tokens of appreciation to be sent to members of the Evidence Advisory Committee, past and present, as well as to other important contributors to the rulemaking process to show appreciation for their important work.

Next, Judge Furman asked if there was a motion to approve the minutes of the Committee's Spring 2025 meeting. A motion was made and seconded and the minutes were unanimously approved.

Judge Furman offered a brief report on the June 2025 meeting of the Standing Committee. First, he explained that the Standing Committee had given final approval to advance the proposed amendment to FRE 801(d)(1)(A) that governs the substantive admissibility of a testifying witness's prior inconsistent statements. He noted that the Standing Committee had also approved the publication of proposed FRE 707, as well as the proposed amendment to FRE 609 for public comment. Judge Furman explained that the Standing Committee had offered some minor feedback on both proposals and that the Advisory Committee would wait until its Spring 2026 meeting when it reviews public comment on both proposed amendments to consider and incorporate Standing Committee input.

Carolyn Dubay next updated the Committee on Federal Rules of Evidence currently in the Rules Enabling Act pipeline, informing the Committee that the proposed amendment to FRE 801(d)(1)(A) had been sent to the Supreme Court on October 16, 2025 and that the proposed amendment would be transmitted to Congress if approved by the Supreme Court this spring. She informed the Committee that the Rule 609 and 707 proposals had both been published for notice and comment, that the comment period will close on February 16, 2026, and that the Rules Committee staff is sharing responses with the Chair and Reporter for consideration at the Spring 2026 meeting. She further noted that public hearings on both proposals were scheduled for January 2026 and that some commenters had already requested to testify. The Chair noted that the public hearings are scheduled for January 15 and January 29, 2026.

Sarah Sraders then offered an update on pending legislation that could impact the Federal Rules of Evidence, directing the Committee's attention to page 98 of the agenda materials. She briefly described the Rape Shield Enhancement Act of 2025 and the Restoring Artistic Protection Act of 2025, explaining that no action had been taken on either bill since they were introduced.

II. Proposed New Rule 707

The Chair opened the discussion of proposed new Rule 707 governing the admissibility of "machine-generated evidence." He reiterated that the proposed provision had been released for public comment and that the comment period would close on February 16, 2026. He informed the Committee that no comments had yet been received and expressed his hope that the Committee would receive some helpful commentary given the importance of the issues raised by the proposed rule. Because the comment period remains open, the Chair explained that the Committee would take no action on the proposal until the Spring 2026 meeting. Still, he noted that the Reporter had offered some updates in the agenda materials on the status of machine learning and machine-generated evidence and that the Reporter and Professor Andrea Roth, who was invited to attend the meeting, would offer some suggestions for the Committee's consideration.

The Reporter called the Committee's attention to Tab 2 of the agenda materials and proposed Rule 707 on page 137. The Reporter explained that it was not atypical to have few, if any, public comments at this point in the comment period, noting that there is typically an influx of comments in the weeks and days prior to the end of the comment period. He further noted that commentary

on proposed amendments from academic quarters is almost always negative, meaning that no academic feedback to date is likely good news.

The Reporter noted that several articles had been published regarding the issue of machine or computer-generated evidence since the Committee last met that offered some helpful insights. The Reporter first called the Committee's attention to an article by Professor Ed Imwinkelried, explaining that Professor Imwinkelried is the foremost authority on Evidence law, having drafted countless influential articles. The Reporter explained that Professor Imwinkelried's article opined that the problem of machine-generated evidence is not one of "authenticity" to be handled under Article 9 of the Federal Rules of Evidence, but rather one of "reliability" that calls for *Daubert*-esque treatment under Article 7. The Reporter explained that Professor Imwinkelried had not analyzed proposed Rule 707 in the article because his article was published before proposed Rule 707 was issued. Even so, the Reporter opined that Professor Imwinkelried's article should give the Committee confidence that it is on the right track in treating the issue of machine-generated evidence as one of reliability. The Reporter pointed the Committee to other articles described in the agenda item on this issue, noting concerns regarding the difficulty in assessing error rates in connection with machine learning and the importance of explainability of outputs. The Reporter stated that explainability is a key component of reliability, noting that experience-based experts must be able to explain how they arrive at their opinions in order to testify pursuant to Rule 702. He noted that a similar explainability should be required of machine-learning and other machine-generated evidence. The Reporter explained that he would share a suggested addition to the committee note for proposed Rule 707 note to address the issue of explainability. The Reporter also alerted the Committee to an article suggesting that Rule 707 should apply even when an expert witness testifies, and not only when there is no expert on the stand. The Reporter opined that it would not be workable to apply Rule 707 when an expert testifies to machine-generated output because Rule 702 already controls in that situation and mandates that the expert both rely upon and reliably apply reliable principles and methods in offering testimony. He noted that he had circulated four proposed modifications to the published proposal for the Committee's consideration, though no action would be taken on any changes until after the expiration of the public comment period.

The Reporter then invited Professor Andrea Roth to share her thoughts and suggestions on Rule 707 and thanked her for her support of the Committee's work. Professor Roth first opined that proposed Rule 707 is a good rule. She noted that she had originally proposed additional conditions regarding access and discovery, but now appreciates that these issues are properly regulated outside the Evidence Advisory Committee. Although the courts have yet to see a wave of AI software outputs in the courtroom, Professor Roth explained that courts are regularly encountering sophisticated software outputs being proffered without an expert witness. She noted that the wave of AI outputs is surely on the horizon and that proposed Rule 707 would be important in ensuring the reliability of all of this machine-generated evidence. Professor Roth also noted that it makes sense to apply Rule 707 only when there is no expert on the stand because Rule 702 will serve as the governor on reliability when machine-generated output is relied upon by a testifying expert. She also suggested that the proposed committee note to Rule 707 would have an important guiding effect that would ensure proper regulation with or without an expert witness.

Professor Roth also offered some suggestions for improving proposed Rule 707. First, she recommended deleting the final sentence of the proposed rule making it inapplicable to "simple

scientific instruments." Although she acknowledged the concern of over-regulation of basic and well-accepted instruments such as thermometers, she expressed concern that litigants could seek to characterize more sophisticated proprietary software as "simple math" that would remain outside Rule 707 protection. She proposed deleting the final sentence of the proposed provision altogether, suggesting that Rule 201 (governing judicial notice) could serve to exempt the instruments whose reliability is truly beyond reasonable dispute. If the Committee preferred to retain a final limiting sentence, Professor Roth suggested that it should exempt machine-generated output, the reliability of which is well known to the "general public." She explained that the concern over machine-generated output is that those with proprietary licenses are often the only ones with information about reliability and that the key to admissibility should be that someone other than the owner has a sense of the limits of the output. She expressed willingness to work with the Committee to draft language for an appropriate exemption. Professor Roth also suggested that proposed Rule 707 be modified to clarify that it applies to machine output offered directly without an expert witness "or through a lay witness who authenticates the output." She further suggested that it would be critical to add commentary to the committee note about the importance of appropriate and representative training data as a factor affecting admissibility. She noted the importance of independent access to research licenses for non-law-enforcement personnel. Although she noted the right of the owner of proprietary software to deny research licenses, she urged that the note emphasize the importance of access in assessing the reliability of machine output.

The Chair thanked Professor Roth for her input and continuing support for the Committee's work on Rule 707. He raised the fact that Rule 707, as published, is applicable only when there is no expert testimony and emphasized that the proposed rule was not intended to incentivize parties to avoid calling experts. He noted that the Committee would consider adding language to the committee note explaining that it will be difficult, if not impossible, to satisfy the admissibility standard for machine-generated output without an expert witness. The proposed committee note could be amended – as indicated in underline – as follows:

> "This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert. <u>It is anticipated that these reliability standards will be difficult to meet - and sometimes impossible to meet - without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony</u>."

No Committee member raised concerns about the above addition to the proposed committee note. The Chair also noted an observation made by a Committee member that it is impossible to cross-examine or confront machine-generated output offered without an expert witness at trial (in the way that parties can challenge a testifying expert). He noted a suggestion to add a paragraph to the committee note that would flag the concern about the lack of cross-examination for trial judges and that would encourage courts to consider offering a limiting instruction about the potential unreliability of machine-generated output. The suggested addition to the committee note is as follows:

> Under this rule, machine learning output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-based evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable - or unreliable - simply because it was produced by a machine.

The Committee member who raised this issue noted that the concern is not one of the admissibility of machine-generated output, but rather about how a jury will weigh such output once they have it without a witness to confront. He noted that it may be challenging for a jury to decide how to weigh such evidence, particularly where it may offer probabilistic assessments rather than concrete determinations. The Committee member suggested that the additional paragraph in the committee note would encourage oversight by the trial judge once the evidence is admitted. The Chair noted that a limiting instruction regarding machine output would be analogous to the instruction given about expert witnesses to the effect that the jury is not to give an expert's testimony greater weight simply due to her status as an "expert." The Reporter explained that he would propose adding the paragraph to the Committee note for the Spring 2026 meeting unless Committee members had concerns about the language. He noted that the language would not tell a trial judge how to instruct the jury or handle such admitted output but would alert them to the issue. Committee members expressed no concerns and generally supported the addition of the paragraph.

The Reporter also suggested adding a factor proposed by Professor Roth to the list of considerations the trial judge to determine admissibility. This addition would add the following to the bullet point list in the committee note:

> Considering whether the process has been validated by independent researchers, and whether research licenses are available to independent researchers. The less available and familiar the tool and its reliability limits are to the public, the more critical it will be for the proponent to show independent validation studies and that licenses are available to independent researchers.

Ms. Shapiro, on behalf of the Department of Justice, objected to the proposed additional factor, contending that it would put a thumb on the scale against the admissibility of output produced by government proprietary software. She opined that this factor would suggest that anything that could not be shared should be inadmissible. Ms. Shapiro explained that the DOJ has greater overall concerns with the proposal to add a new Rule 707, with these concerns to be addressed by a comprehensive memorandum at the Spring 2026 meeting (once the government shutdown has ended and more detail can be gathered and presented). But she expressed immediate concern about adding a factor that would disadvantage government software on its face. Ms. Shapiro also noted that certain DNA software was referenced in the materials as involving "machine learning," but the government contends that such software does not rely upon machine learning at all. Professor

Roth agreed that two of the referenced DNA software programs do not use machine learning, but emphasized that those programs still generate complex software outputs that should be regulated. She noted that researchers pay a great deal of money for licenses to attain access to such proprietary software and that the proposed Committee note language will not place a thumb on the scale against admissibility unless the owners of the software continue to deny licenses to everyone except for law enforcement. The Chair proposed including the factor in brackets for full consideration by the Committee in the spring.

The Reporter next raised Professor Roth's proposed modification to the final sentence of the text of Rule 707, which would alter it, as follows:

> This rule does not apply ~~to the output of simple scientific instruments~~ when the machine that generated the evidence is accessible to, and the extent of its reliability well known to, the general public.

The Reporter noted that another possibility for limiting Rule 707 would be to substitute the term "computer-generated" for "machine-generated." Or he noted that the Committee could reconsider limiting the rule to "machine-learning" evidence. He noted that another possibility would be to delete the final sentence of the rule, leaving no defined limit in Rule 707. The Chair explained that the Committee had been concerned from the start about the possibility of wasteful *Daubert* hearings for thermometers and other basic scientific instruments. The Chair informed the Committee that the Standing Committee had suggested the change from "basic" scientific instruments to "simple" scientific instruments. He explained that the Committee would take no action to change the text of proposed Rule 707 until after the public comment period closes but that it is useful to discuss possibilities.

One Committee member argued that it would be counterproductive to wordsmith Rule 707 too much and favored leaving the straightforward and simple limitation in the final sentence of proposed 707 as it is for now. He noted that certain software or machine-generated output might be generally known and well-regarded by the general public but still be unreliable. The Committee member suggested starting with a simple rule that allows litigants and judges to work out its limits. The Reporter noted that the Committee cannot rewrite rules regularly and emphasized the importance of getting the text right the first time. Another Committee member agreed that proposed Rule 707 is a simple rule and that the Committee should not overcomplicate it with excessive wordsmithing. Ms. Shapiro reported that the DOJ would want to retain a textual limit in the final sentence of the rule (to avoid wasteful litigation over well-accepted machine output) but opined that the suggested language regarding reliability "well-known to the general public" would be too broad and could be too easily manipulated.

Professor Roth asked whether there is any distinction between instrument output that would be accepted under Rule 201 and the output intended to be exempt from Rule 707. She suggested that many basic instruments would be covered by Rule 201 and noted that the evidence rules are not meant to protect the fact finder from all unreliable information, but rather to ensure that the jury has the ability to evaluate the reliability of evidence. In response, Ms. Shapiro asked whether federal courts could take judicial notice of the output of DNA software that has been admitted in hundreds of prior cases under Rule 201. Professor Roth suggested that they could not. Ms. Shapiro responded that there is then a difference between the output that could be admitted through Rule

201 and the output that should be exempt from Rule 707 coverage. Another Committee member suggested retaining the final sentence of Rule 707 regarding "simple scientific instruments" as a placeholder until the Spring 2026 meeting when public comment will be available. The Chair agreed that was a sensible approach given the expectation that the Committee will receive rich public commentary on the proposed rule that could aid in crafting an appropriate limit. He expressed concern that a limitation tied to the knowledge of the general public could shift the focus of the rule away from reliability.

Another Committee member inquired about distinguishing between "machine-learning" output and "machine-generated" output and asked whether there are concrete examples of output that would fit one category but not the other. The Reporter suggested that facial recognition software represents a clear example of "machine-learning" and that more basic machines do not rely upon "machine-learning." Another Committee member noted that it is really difficult to distinguish the two categories with any precision. A Committee member suggested that Rule 707 could attempt to limit coverage by regulating "computer-generated" rather than "machine-generated" output. The Reporter suggested that, although "computer-generated" might represent a slight shift in the tone of the provision, the rule would still broadly cover most machine output and would need to be limited by a final sentence. The Reporter suggested dropping consideration of limiting the rule to "machine-learning" and to stick with "machine-generated" for the time being. Ms. Shapiro suggested that Rule 707 was originally drafted in an effort to regulate machines that are operating like witnesses do. She argued that the Rule was conceived as a way to regulate "machine-learning" but had been broadened to cover all machine output of any kind. The Reporter reiterated the difficulty in distinguishing between "machine-learning" output and "machine-generated" output more broadly and explained that the version of Rule 707 out for public comment erred on the side of being over-, rather than under-inclusive due to that difficulty. Professor Roth advocated retention of the broader "machine-generated" focus of Rule 707 because complex software capable of generating conclusions should be regulated whether or not it depends on what we would characterize as "machine-learning." No Committee member objected to taking the "machine-learning" and "computer-generated" versions of the rule off the table.

The Reporter next reiterated the importance of adding language to the Committee note to reinforce that Rule 707 is not designed to discourage expert testimony and that the Rule 707 standard may be difficult if not impossible to satisfy without a testifying expert to validate machine-generated output. The Chair agreed that the added commentary would be helpful and noted that the Committee could continue to wordsmith it during the comment period. Ms. Shapiro inquired whether a trial judge could use Rule 611(a) to refuse to admit machine-generated output unaccompanied by an expert witness, essentially querying whether a judge could require that expert testimony accompany machine-generated output. The Reporter suggested that courts had admitted machine-generated output without requiring accompanying expert testimony and it isn't clear courts would or could use Rule 611(a) to demand expert testimony. The Reporter next noted that Rule 707 intentionally makes it difficult to admit machine-generated output on its own, suggesting that there may be few ways of validating output without an expert. Professor Roth argued that Rule 707 is a very simple, and modest gap-filling provision. She explained that machine-generated output should already be subject to the requirements of Rule 702 and that Rule 707 would allow a lay witness to authenticate such output if those same requirements are satisfied. The Federal Public Defender member suggested that cross-examination remains important when machine-generated output is admitted, and that Rule 707 would properly encourage parties to use

expert witnesses who may be cross-examined when presenting such output. Another Committee member emphasized the difficulty for jurors in weighing machine output that may reflect a probabilistic assessment that has been admitted on a preponderance of the evidence standard. This Committee member suggested that Rule 707 would create important guardrails that would ensure the reliability of any output sent to a jury to weigh.

The Chair reminded the Committee that a decision to publish a proposed rule for public comment is typically seen as a sign of support for its eventual enactment. He also reminded the Committee that in the case of Rule 707, it was published because the Committee wanted to stay ahead of issues related to machine-generated evidence and that its publication does not mean that it will be enacted at all or in its current form. The Chair emphasized the Committee's desire to receive public comment to aid in consideration of the provision.

In concluding the discussion, the Reporter noted that it is unworkable to make Rule 707 applicable when an expert witness is on the stand due to the overlap with Rule 702. He also noted the impracticability of including regulation of machine-generated output within Rule 702 because it is a rule of general application and also was recently amended. The Chair agreed, noting that the committee note regarding expert witness testimony was quite clear. The Reporter next emphasized the importance of including language in the committee note regarding the explainability of machine-generated output. He noted that machine-learning output would reach a point where it is not explainable, making a cautionary note about the importance of explainability critical. He explained that machine output that cannot be explained should not be admitted unless the proponent can find another method of validating it. Committee members offered no objections to adding language to the committee note on the importance of explainability.

Finally, the Reporter noted Professor Imwinkelried's proposal to abrogate Rule 901(b)(9) regarding authentication of a process or system by showing that it produces an "accurate result." The Reporter explained that requiring a showing of "accuracy" is different from requiring authenticity. He noted that Rule 901(b)(9) would be inapplicable to machine-generated output if Rule 707 is adopted because that output would have to be shown to be reliable under a Rule 104(a) preponderance standard (as opposed to merely authentic under the Rule 104(b) standard currently applicable to Rule 901). The Reporter reminded the Committee that some more basic instruments would not be covered by Rule 707 and that Rule 901(b) would remain useful in authenticating their output. He suggested tabling any proposal to abrogate Rule 901(b) and Committee members agreed.

III. Deepfake Evidence and Draft Rule 901(c)

The Chair next introduced the topic of draft Rule 901(c), a burden-shifting provision designed by the Committee to help trial judges evaluate claims of deepfake evidence. He explained that the issue for the Committee is whether any rule change to deal with the prospect of deepfake evidence is warranted where there has not been a wave of deepfake evidence entering the court system and where existing rules may be sufficient to address such issues when they do arise. He noted that there has been a lot of commentary about the dangers of deepfake evidence, but little evidence that this issue has become a significant problem in the courts. The Chair noted that the Reporter had collected anecdotal evidence from some trial judges that such issues are being presented in court but the resolution of the issue does not appear in reported opinions.

The Chair explained that the question is whether the Committee is on the right track in regulating the deepfake problem through a provision such as draft Rule 901(c), found on page 167 of the agenda materials. The Chair also noted that the Reporter suggested a new paragraph for the committee note cautioning that the proponent of the alleged deepfake evidence could not rely upon Rule 901(b) for authentication if the opponent of such evidence satisfied its burden under draft Rule 901(c) (e.g., by presenting evidence sufficient to support a finding of fabrication to warrant the court's inquiry. This is because Rule 901(c) requires the judge to make a finding of authenticity by a preponderance of the evidence under Rule 104(a) after the opponent has satisfied its deepfake burden and the lower Rule 104(b) standard generally applicable under Rule 901(b) will no longer apply.

The Reporter then described recent commentary on the deepfake problem, noting that the administration's guidance on AI mentions draft Rule 901(c) putting the Advisory Committee's work on this issue at the forefront of the AI conversation. Ms. Shapiro noted that the DOJ was going to develop its own guidance on the problem of deepfake evidence, but that such work had yet to begin. The Reporter emphasized that the deepfake problem was likely to worsen given a recent article suggesting that its authors had developed technology capable of eliminating watermarks designed to embed authentication data into media. He also noted conversations with trial judges about this issue in which they reported fielding deepfake arguments frequently notwithstanding that those issues are not appearing in reported opinions. Ms. Shapiro suggested that this feedback shows that the existing Rules of Evidence are sufficient for dealing with deepfake arguments.

The Reporter opined that draft Rule 901(c) offers trial judges a helpful roadmap for resolving deepfake claims effectively. Further, Rule 901(c) would require a finding of authenticity by a preponderance of the evidence under Rule 104(a) once the appropriate showing has been made, rather than the lower Rule 104(b) standard under the existing rules. Ms. Shapiro raised a concern about deepfake claims being made for the first time in the heat of trial, making it difficult to respond effectively and inquired about the possibility of adding a notice requirement to any deepfake rule, as the Committee had previously discussed. The Reporter pointed out language on page 169 of the agenda materials for a proposed committee note which would encourage trial judges to establish notice requirements for deepfake disputes. He argued that there would need to be flexibility in a notice standard that would allow for case-by-case treatment and that the question for the Committee would be whether it is better to have that flexible standard in rule text or within the committee note. The Chair agreed that notice is an important issue to address and that deepfake challenges made halfway through trial could prove problematic. One Committee member queried whether the DOJ wanted to treat a deepfake challenge like an alibi defense for purposes of advance notice, rather than as a typical evidence issue. Ms. Shapiro suggested that a notice requirement could be characterized as an important case management tool that would prevent a wasteful minitrial on deepfake issue in the middle of a trial. The Committee member suggested that most trial judges want to resolve such issues in limine and that a committee note suggesting as much would likely be optimal.

The Reporter noted that his conversations with trial judges about increasing deepfake arguments offer purely anecdotal information that may not be representative. He queried whether it would make sense to ask the FJC (once the federal government reopens and they are able to come back to work) whether they can conduct a judicial survey to assess the true incidence of

deepfake arguments in a more scientific fashion. One Committee member suggested that there have long been arguments of fakery, as well as litigants presenting fake email chains and the like and that the existing evidence rules are sufficient to deal with such arguments pretty quickly during in limine proceedings. The Chair agreed that courts have been dealing successfully with forgeries for ages under existing standards. Still, he suggested that an FJC survey would be helpful in providing the Committee with additional information on the scope of the deepfake problem. Because the rulemaking process is so slow and deliberate, the Chair noted that it may make sense for the Committee to publish a deepfake proposal in the spring to gather commentary and move the proposal forward. Alternatively, he explained that the Committee could elect to keep the deepfake draft rule under development to be published when a need arises. Some Committee members expressed the view that the Committee should move forward with publication of a proposal in the spring to gather commentary and to remain at the forefront of the issue. Other Committee members expressed a desire to have an FJC survey for the spring to help the Committee determine the need to publish a proposal, acknowledging some skepticism about the degree of the danger currently presented by deepfake evidence.

The Chair stated that he would work on requesting an FJC survey regarding deepfake evidence for the spring meeting if possible. He also explained that proposed Rule 901(c) would be on the agenda as an action item for the Spring 2026 meeting, meaning that the Committee will decide whether to publish the proposed provision. The Reporter closed the discussion by suggesting that the Committee reject a proposal that appeared on pages 173-174 of the agenda materials to amend the illustrations of proper authentication in Rule 901(b) to say that the illustrations "may satisfy" the authenticity standard to avoid automatic authentication of potential deepfakes. Everyone agreed that such a change would make Rule 901(b) essentially standardless and that proposed Rule 901(c) would be a much more structured and effective manner of dealing with deepfake issues. Any change to Rule 901(b) was thus rejected and the Committee closed the discussion of deepfake proposals.

IV. 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 explained that the discussion of Rule 609 would be brief because the proposed amendment remains out for public comment through February 16, 2026. He noted one comment that suggested changing the ending date for measuring the age of a witness's convictions for purposes of Rule 609(b) to the date of the indictment rather than the date of trial. The Reporter explained that the Committee had considered several ending dates to add to Rule 609(b) in its original deliberations, including the date of indictment. He reminded the Committee that it had decided that the date of trial is the optimal date, particularly because it is more closely connected to the rationale of Rule 609(b) of allowing the jury to use convictions to assess the witness's credibility at the time of his testimony. The Reporter thus explained that the Committee had considered and rejected the date of indictment. The Reporter also noted a comment of support for the addition of the word "substantially" in the Rule 609(A)(1)(B) balancing test from the Federal Public Defender for the District of Kansas. The Chair closed the discussion of Rule 609 by promising that the Committee would consider any additional comments or feedback at the Spring 2026 meeting after the close of the public comment period.

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

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

The Chair 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 the DOJ had submitted a memorandum in support of an amendment to Rule 902(1) at the Spring 2025 meeting noting the reversal of a few convictions due to insufficient proof of a defendant's tribal affiliation. The Chair explained that there could be some reason to consider the need for an amendment due to increased federal prosecutions post *McGirt*. The Chair also reminded the Committee that it had discussed the proposal at the Spring 2025 meeting and had decided to seek input from tribal governments and organizations before proceeding with an amendment proposal. He explained that the Committee had received four submissions to date from tribal representatives, all strongly in support of an amendment and that the Committee had invited additional input from tribal leaders and hoped to receive more responses for the Spring 2026 meeting. The Chair reminded the Committee that five district judges with significant experience in federal prosecutions involving tribal victims or defendants submitted a letter in support of an amendment to Rule 902(1). He then called the Committee's attention to the proposed amendment supported by the DOJ on page 189 of the agenda materials. He noted that the Federal Public Defender had submitted a new letter in opposition to any amendment to Rule 902(1). If the Committee is inclined to propose an amendment to Rule 902(1), the Chair explained that the Federal Public Defender seeks to limit the amendment to permit self-authentication only of the records of tribal governments that honor public records requests from non-members. The Chair explained that the Committee would discuss the proposal today in anticipation of making a decision about the proposed amendment at the Spring 2026 meeting. The Chair then invited Ms. Shapiro from the DOJ and Ms. Jami Johnson, an experienced Assistant Federal Public Defender to make presentations regarding the proposal.

Ms. Shapiro explained that the DOJ strongly supports an amendment to Rule 902(1) to add federally recognized tribes and nations to the list of entities whose records are self-authenticating. She explained that she would like to be in a position to present additional information in support of the amendment but that all employees of the federal Office of Tribal Justice are currently furloughed and unable to provide support and expertise. She explained that she expects to present additional information in support of the amendment at the Spring 2026 meeting when the federal government is open.

The Federal Public Defender member then invited Jamie Johnson, an assistant federal public defender, to highlight the concerns of the federal defender community regarding the proposed amendment, explaining that she had participated in a number of the cases in which the convictions had been reversed due to the government's failure to prove the defendant's tribal affiliation. Ms. Johnson explained that an amendment to Rule 902(1) is unnecessary because the government may

already authenticate tribal records without a witness using a Rule 902(11) business records certification. She explained that she regularly represents tribal defendants and has significant difficulty accessing records because many tribes have no public records access equivalent to the Freedom of Information Act (FOIA). Ms. Johnson explained that when a Rule 902(11) business records certification is used to authenticate tribal records, defense counsel is able to identify a current tribal records custodian who is able to attest to the authenticity of the tribal records at issue. As an example, Ms. Johnson displayed her own tribal enrollment card which would become self-authenticating under an amended Rule 902(1) without the need for such a certification. She explained that the two tribal representatives whose names are auto-penned on her enrollment card would have no recollection or personal knowledge of her enrollment or of the authenticity of the card if they were to be called as witnesses, and both may be deceased (as may often be the case) and could not be called in any event. Under existing law, the government would need a Rule 902(11) certification listing a current custodian with personal knowledge of tribal record-keeping practices who can attest to the authenticity of the same enrollment card. When the defense has concerns with any tribal records, it has the name of a live custodian who can be subpoenaed to testify at trial regarding the record. If the tribal enrollment card becomes self-authenticating under Rule 902(1) without any certification, the defense will lose that important check on authenticity.

The Chair noted that it had been suggested that all entities whose records are currently self-authenticating under Rule 902(1) have the open records laws that would allow defense access to those records that some tribal governments may lack. He asked whether it is true that all entities currently listed in Rule 902(1) are subject to open records requests. Ms. Johnson stated that it is true that all entities currently listed in Rule 902(1) are subject to open records laws. She explained that all states are subject to open records laws, as are all current zones and territories. Ms. Johnson noted that all municipalities (even one with one resident described in the DOJ materials) are subject to the public records requirements of the states within which they operate. The Reporter queried whether the proposed amendment to Rule 902(1) creates tension between tribal sovereignty and dignity on the one hand and the rights of criminal defendants to access information important to their defense on the other. Ms. Johnson agreed with that characterization but opined that there is no tribal dignity in having forged or faked records falsely attributed to a tribe admitted into evidence in federal court. She explained that the policy animating Rule 902(1) is the practical impossibility of forgeries of the records of the listed entities and that the same policy does not apply to the records of all federally recognized tribes and nations. Ms. Johnson suggested that the tribal dignity and sovereignty interests that exist are offset by the rights of criminal defendants to challenge evidence against them. Ms. Shapiro suggested that the concern about a lack of uniform tribal FOIA protections is a red herring because FOIA did not exist at the time that Rule 902(1) was originally enacted.

The Chair suggested that the Committee would benefit from a Reporter's memorandum on the issue of amending Rule 902(1) to add federally recognized Indian tribes and nations, weighing the pros and cons of an amendment. He explained that such a memo could explore whether any amendment should be limited to tribes that offer open records access to non-members. In addition, he noted that such a memo could address whether the date of a tribe's federal recognition should impact self-authentication under an amended Rule 902(1). He opined that the issue of the timing of federal recognition would be best addressed in a committee note to an amendment and that his instinct would be to allow self-authentication of the records of any tribes that are federally recognized on the date that the record is admitted into evidence. The Chair noted that the

Committee hopefully will have additional tribal input on the proposal and that the Rule 902(1) amendment would be an action item for the Spring 2026 meeting.

One Committee member noted that tribal records are outcome-determinative in federal criminal prosecutions and that it is hard to think of other records that are currently self-authenticating under Rule 902(1) that are outcome-determinative in the same way. Another Committee member noted that Dr. Timothy Lau of the FJC had done some helpful preliminary research on the prevalence of contested tribal affiliations in federal prosecutions and asked whether he could collect additional data that would aid the Committee. The Chair noted that Dr. Lau had been furloughed and that he would be asked whether there was more data to be gathered as soon as he was able to return to work. The Reporter suggested that it would be helpful to research reported cases regarding the use of Rule 902(11) certifications to authenticate records to determine whether such certifications afford criminal defendants more avenues for contesting evidence.

The Chair closed the discussion of Rule 902(1) by reiterating that the Rule 902(1) proposal will be an action item for the Spring 2026 meeting, promising a Reporter's memorandum on the issue, and inviting additional input from both the DOJ and the Federal Public Defender member, and Ms. Johnson.

VI. Potential Amendments to Federal Rule of Evidence 803(3): The State-of-mind Hearsay Exception

The Chair next directed the Committee's attention to Tab 6 on page 247 of the agenda materials and to a Reporter's memorandum regarding two potential amendments to Rule 803(3), the hearsay exception for statements of a declarant's own existing state of mind. The Chair explained that there are two circuit splits regarding the state-of-mind exception being presented to the Committee to determine whether the Committee wants to add Rule 803(3) to the Committee's Spring 2026 agenda. He emphasized that Rule 803(3) is not currently an action item for the Committee.

The Chair explained that the first issue with Rule 803(3) is that some courts read a "spontaneity" requirement into the provision where none exists in order to ensure the reliability of admitted statements and to exclude self-serving statements. He explained that other courts apply the exception as written and do not exercise discretion to exclude otherwise qualifying statements due to a lack of trustworthiness. The Chair noted that this was a longstanding circuit split and that the issue comes up with some frequency in the cases. He explained that the Committee could consider whether the problem was in need of a rulemaking solution and why the Supreme Court had yet to address the split.

The Chair explained that the second split involving Rule 803(3) was the *Hillmon* issue of a state-of-mind statement by one declarant being used to prove the future conduct of a third party. He noted the Reporter's research showing that most courts reject this use of a state-of-mind statement, while the Ninth Circuit allows it with an accompanying limiting instruction and the Second Circuit permits it if there is adequate corroborating evidence of the third-party conduct. The Chair informed the Committee that the *Hillmon* issue does not arise as frequently as does the "spontaneity" issue and would likely not warrant rulemaking on its own. He explained that it could be a useful companion amendment if the Committee were to propose a change to deal with the Circuit split on the admissibility of "spontaneous" statements only.

The Reporter explained that he thought it would be somewhat unlikely for the Supreme Court to resolve the longstanding split of authority in both these areas, noting that the Supreme Court had once denied certiorari in a case involving the spontaneity issue. The Reporter informed the Committee that the spontaneity issue most often comes up when criminal defendants attempt to admit their own self-serving statements about an innocent state of mind. For example, a defendant arrested in possession of a large quantity of illegal drugs might exclaim "I feel so innocent right now" or "I thought these were all legal" to show a lack of mens rea. The Chair emphasized that defense counsel will need a hearsay exception to elicit the fact that the defendant made such a statement from a testifying law enforcement agent because the defendant may not admit his own statements against the government under Rule 801(d)(2)(A). The Reporter agreed and noted that many federal courts read a "spontaneous" limitation into the hearsay exception that is not there in order to exclude these self-serving statements. He explained that the original Advisory Committee found no need for such a limitation because a jury can easily weigh a suspiciously timed state-of-mind statement and appreciate its lack of trustworthiness. He analogized the situation to one where a court admits a plaintiff's a self-serving statement made to a medical expert for purposes of a litigation diagnosis under Rule 803(4). There too, jurors can appreciate the declarant's incentives to falsify.

The Reporter noted that the first question is whether the spontaneity issue merits an amendment to Rule 803(3), suggesting that rulemaking would be necessary to resolve this longstanding split of authority. He explained that there are two potential directions that could be taken to resolve the spontaneity circuit split. First, the Committee could reinforce the absence of any "spontaneity" requirement under Rule 803(3), leaving the exception without any trustworthiness limit. He emphasized that an amendment would be required to achieve this in order to reverse the courts that currently graft a spontaneity requirement onto the provision (where the text does not include one). This could be done by adding "whether or not spontaneous" to Rule 803(3) to remove the limit that some courts have added. Alternatively, the Committee could propose an amendment to expressly *add* a spontaneity or trustworthiness requirement to the hearsay exception. He called the Committee's attention to potential draft amendments on pages 256-257 of the Agenda materials that would achieve both outcomes. The Reporter stated that should the Committee want to add a trustworthiness limit to Rule 803(3), there are two possible ways to do that. The first would be to add a "spontaneity" requirement to be satisfied by the proponent of a state-of-mind statement, as has been required by some courts. Conversely, the Reporter explained that the Committee could add a trustworthiness escape clause to Rule 803(3) like those currently available under Rules 803(6)-(8). This would place the burden on the opponent of a state-of-mind statement to show that circumstances surrounding the statement render it untrustworthy. Should the Committee want to add some limit to Rule 803(3), the Reporter opined that the trustworthiness escape clause would be the superior alternative because it could capture a broader array of reliability concerns than a "spontaneity" requirement would.

One Committee member asked whether a defendant's statements "Oh gee, I didn't know there were drugs in my backpack!" could be admitted under Rule 803(3) in the absence of a spontaneity or trustworthiness requirement. The Reporter answered in the affirmative, noting that the Second Circuit would admit the statement. Another Committee member responded that admitting the statement was not problematic because the jury could see that the defendant was lying.

The Chair noted two issues to be resolved by the Committee: 1) whether the circuit split on the spontaneity issue merits a rulemaking solution and 2) if so, which amendment alternative to pursue. One Committee member asked whether it is the Committee's role to resolve circuit splits and the Reporter responded that resolving splits is a key component of the Advisory Committee's function. Another Committee member inquired how much of a difference an amendment would make with respect to the statements of criminal defendants given that all or most statements that the defense would seek to admit would not be spontaneous. The Federal Public Defender member expressed support for an amendment proposal that would remove any spontaneity requirement from Rule 803(3) and that would resolve the *Hillmon* issue to prevent offering one person's state-of-mind statement to prove the conduct of another. Another Committee member suggested that there are avenues outside of Rule 803(3) for admitting truly spontaneous statements, such as the excited utterance exception in Rule 803(2). He suggested that the Committee may be trying to solve a problem that does not exist. The Reporter explained that the federal courts ordinarily do not admit the self-serving statements of criminal defendants under any exception. He noted a recent case in which a defendant's explanation for shooting a police officer who entered his home, "I thought he was an intruder," was excluded as not fitting within the excited utterance exception.

Judge Dever suggested that the Committee should explore whether there is a problem meriting an amendment with respect to the self-serving statements of criminal defendants, noting that many such statements are actually offered by the government as false exculpatory statements. Another Committee member agreed, suggesting that criminal defense lawyers were not advocating a change to Rule 803(3) to admit the self-serving statements of defendants. The Federal Public Defender member stated that he believed something should be done to address Rule 803(3) and that he would favor an amendment that eliminates any trustworthiness or spontaneity requirement. He further noted that he would be very concerned about any proposal to add a trustworthiness requirement to Rule 803(3). A Committee member suggested reaching out to the criminal defense community to see whether there is a real problem to be addressed by an amendment. The Chair promised to reach out to DOJ and to the criminal defense community. He also noted that the Reporter could do a deeper dive into the caselaw to explore the need for an amendment, and the Reporter agreed.

The Chair opined that nobody would view the *Hillmon* issue within Rule 803(3) as a problem justifying an amendment on its own but that it could be a companion proposal if the Committee were to propose an amendment to resolve the spontaneity circuit split. The Reporter agreed that the *Hillmon* issue is straightforward and that state-of-mind statements should not be admissible to prove third party conduct. He noted that most courts already exclude such statements. The Chair also encouraged Committee members to solicit any helpful input on the need for a Rule 803(3) amendment and explained that Rule 803(3) would be on the Committee's Agenda at the Spring 2026 meeting.

VII. *Smith v. Arizona* and Federal Rule of Evidence 703

The Chair directed the Committee's attention to Tab 7 of the agenda materials and to a memorandum regarding the Supreme Court's 2024 confrontation clause decision in *Smith v. Arizona* and its potential impact on Rule 703, which governs the permissible basis for expert opinion testimony. He reminded the Committee that this topic had been addressed at the Fall 2024 Advisory Committee meeting. In *Smith*, the Court held that the defendant's confrontation clause rights were violated when a prosecution expert who had not tested the drugs found on the defendant related an absent forensic expert's procedure and findings with respect to the substances contained in the absent expert's notes and report. Although the testifying expert offered his "independent opinion" that the substances were illegal drugs, the Court noted that he relayed the testimonial hearsay of the absent analyst as the "basis" for his opinion. Because the statements of the absent analyst had to be true to support the opinion of the testifying expert, the Court found that those statements had been admitted for their truth in violation of the defendant's Sixth Amendment right to confront the absent analyst.

The Chair explained that the question is whether *Smith* requires an amendment to Rule 703 because the rule permits expert witnesses to rely upon inadmissible information reasonably relied upon by other experts in the field in forming an opinion for trial and even permits disclosure of that inadmissible basis, albeit in very limited circumstances. He emphasized that if *Smith* prohibits only the *disclosure* of inadmissible basis information to the jury, an amendment to Rule 703 may be unnecessary because Rule 703 already prohibits such disclosure except when the probative value of the information to show the basis for the expert's opinion substantially outweighs the risk of it being relied upon for its truth. Alternatively, if the *Smith* opinion is interpreted to mean that prosecutorial experts may not *rely* upon any testimonial hearsay in forming a trial opinion, then Rule 703 needs to be amended because it expressly authorizes such reliance as currently drafted. He directed the Committee's attention to a memorandum from Professor Richter in the agenda materials reviewing the cases interpreting *Smith* since the Committee was last updated in Fall 2024. He explained that approximately 167 reported cases had interpreted or cited *Smith* in the intervening fifteen months, revealing an emerging tension (if not a full split of authority) regarding the ability of a prosecution expert to rely upon testimonial hearsay under Rule 703.

Professor Richter described some federal and state cases broadly interpreting *Smith* to prohibit any reliance on testimonial hearsay by a prosecution expert. She then noted conflicting federal and state cases that prohibit a prosecution expert from parroting the opinion of an absent expert or from disclosing testimonial hearsay, but that permit a prosecution expert with a truly independent opinion to rely to some extent on the testimonial statements of an absent analyst. These courts are receptive to expert testimony from supervisors and technical reviewers who oversee the work of other analysts and who review the reports and notes of those analysts, as well as raw data produced by testing run by those analysts, to develop an independent opinion for trial.

Professor Richter called the Committee's attention to potential amendments to Rule 703 to account for the Court's holding in *Smith* on pages 285-287 of the agenda materials. She explained that an amendment to Rule 703 could be considered premature where the Supreme Court is likely to have to resolve the split of authority sooner rather than later given the ubiquity and importance of prosecution expert testimony. Professor Richter opined that it would certainly be premature to amend Rule 703 to prohibit prosecutorial expert reliance on testimonial hearsay because the Court

could clarify that some reliance remains constitutional, in which case Rule 703 would be more restrictive than constitutionally necessary. One option is for the Committee to hold off on any amendment and to await further case development and a potential Supreme Court resolution of the issue. On the other hand, Professor Richter noted that it is problematic for a Federal Rule of Evidence to be capable of unconstitutional application and that judges and lawyers should be aware of the constitutional issues underlying Rule 703. She explained that *disclosure* of testimonial hearsay as the basis for a prosecutorial expert opinion is clearly unconstitutional after *Smith* but remains at least technically possible to be allowed under the Rule 703 balancing test. She suggested that a generic amendment noting that an expert "may not rely upon or disclose inadmissible facts or data when doing so would violate the constitutional rights of a defendant in a criminal case" could flag the issue for courts and counsel. Professor Richter explained that a generic amendment like this one would be sufficiently flexible to accommodate any eventual resolution of the disclosure/reliance dichotomy by the Supreme Court. If the Sixth Amendment allows reliance on some testimonial hearsay, Rule 703 would continue to do so. Professor Richter noted that Rule 412 utilizes a similar constitutional catchall to highlight that some evidence otherwise excluded by that provision may be constitutionally required when offered by a defendant in a criminal case.

Ms. Shapiro stated that she agreed that the Supreme Court was going to have to resolve the split of authority regarding the meaning of *Smith* sooner rather than later. She opined that this is a real problem that will have to be addressed. The Reporter noted that the Supreme Court decided the *Williams* case in 2012, leaving the question of whether basis information is offered for its truth unresolved, and only returned to the issue 12 years later in 2024. He suggested that this split of authority could stick around for a long time. Ms. Shapiro responded that the Court is likely to take up the issue if the government seeks certiorari. She noted her preference to wait to see how the Supreme Court resolves the issue but agreed that there would be some merit in a generic constitutional proviso, although she acknowledged that the same could be said for every Federal Rule of Evidence. Another Committee member agreed that there is an excellent chance that the Supreme Court returns to the issue soon. He noted that Rule 703 can be interpreted in a constitutional manner as things now stand and that the Committee should wait to amend the rule until the constitutional parameters are clearer.

The Chair opined that there was an argument for proceeding with a generic "red flag" amendment to highlight the issue for courts and litigants without impacting the eventual resolution of the constitutional issue. He further commented that there is already a disconnect between *Smith* and Rule 703 where the rule permits disclosure of inadmissible basis information upon satisfaction of a stringent balancing test. The Chair suggested that he was playing devil's advocate in noting that a generic amendment would align Rule 703 with the confrontation clause regardless of how the Supreme Court ultimately resolves the *Smith* split. A Committee member expressed support for a potential generic constitutional red flag amendment but opposed adding any specific limit to Rule 703 in advance of Supreme Court resolution of the *Smith* issue. Another Committee member agreed, noting that rulemaking is slow and that it could take 2+ years to advance a generic Rule 703 amendment and that it could take the Supreme Court longer than that to weigh in on the *Smith* issue again. He proposed going forward with a generic amendment to Rule 703 now. Another Committee member emphasized that a generic constitutional proviso would not resolve the conflict about the proper interpretation of *Smith* but would simply "flag" the problem for courts and counsel. The Chair noted the similar flag in Rule 412 that provides precedent for such an amendment. He asked whether any Committee members opposed moving forward with a proposal

for a generic constitutional amendment to Rule 703. Committee members were supportive of proceeding and the Reporter stated that an amendment to Rule 703 would be an action item for the Spring 2026 meeting.

The Reporter explained that Rule 606(b) that prohibits post-verdict juror testimony regarding deliberations contains a similar constitutional defect because the Supreme Court decided *Pena-Rodriguez v. Colorado* in 2017 in which it found post-verdict juror testimony that was barred under Rule 606(b) was constitutionally required to be admitted if it involved a report about overtly racist remarks made during deliberations. He explained that the Committee had considered but rejected a "red flag" amendment to Rule 606(b) to account for *Pena-Rodriguez* at that time out of concern that an amendment might expand the constitutional exception to Rule 606(b) beyond *Pena-Rodriguez* and that the Supreme Court might revisit the issue. He noted that Rule 606(b) on its face is capable of unconstitutional application as it now stands and recommended a similar generic amendment to Rule 606(b) as part of a package to be addressed alongside Rule 703. He proposed a single agenda memo on generic amendments to both Rules 606(b) and 703 to address constitutional infirmities. The Chair agreed that the Committee would consider both proposals at the Spring 2026 meeting.

VIII. Potential Amendments to Federal Rule of Evidence 104

The Chair next raised two potential changes to Rule 104 discussed in Tab 8 on page 290 of the agenda materials. First, he noted that trial judges are to make preliminary findings regarding the admissibility of evidence under Rule 104(a) by a preponderance of the evidence, according to the Supreme Court's decision in the *Bourjaily* case. Oddly, however, Rule 104(a) itself nowhere mentions the standard of proof that applies to such preliminary findings. The Chair explained that the Federal Rules of Evidence are supposed to be easy to use and apply and that one possible amendment would add the preponderance of the evidence standard of proof to Rule 104(a). Second, the Chair explained that Rule 104(b) deals with the concept of conditional relevance – when the relevance of a particular item of evidence is conditioned on the existence of another fact. He noted that significant scholarship demonstrates that there is no logical distinction to be drawn between basic relevance and conditional relevance and that the same standard of proof should apply to both. He emphasized that it is not clear that there is any practical problem to be addressed in Rule 104(b) and that an amendment making all relevance determinations subject to the Rule 104(b) prima facie standard may be unnecessary. The Chair also opined that it may be wise to leave well enough alone after 50 years of the successful operation of the Federal Rules of Evidence and that it may not be the time to make such changes.

The Reporter offered that 50 years old is a great time to learn new things. He urged that Rule 104(a) should contain the preponderance of the evidence standard that already applies to findings under that provision. He explained that the most significant problems dealt with by the 2023 amendment to Rule 702 were caused by a lack of an express preponderance standard in Rule 104(a). He called the Committee's attention to the proposal on page 296 of the Agenda materials to add a sentence to Rule 104(a) to express the preponderance standard. The Reporter recognized that an amendment to Rule 104(b) would be more complicated because it would make a change and would not simply add an existing standard to the text of the rule. He explained that Rule 104(b) currently applies when the relevance of evidence depends on the existence of another fact. He stated that it was not clear why a different, lower standard of proof applies to those relevance

questions. The Reporter offered examples of both conditional and basic relevance. He explained that the relevance of a particular statement uttered outside of court might depend upon whether a party actually heard the statement, making it an issue of conditional relevance. Conversely, the Reporter explained that evidence that a defendant owned the weapon used in a crime presents a question of basic relevance. It has some tendency to make the defendant's participation in the crime more likely than it would be without the evidence. He opined that both relevance questions should be governed by the same prima facie standard of admissibility that now applies under Rule 104(b) – evidence sufficient to support a finding of relevance. The Reporter noted a recent Second Circuit case described in the agenda materials in which the court treated both basic and conditional relevance questions under the prima facie standard. The Reporter suggested that streamlining Rule 104(b) to make its prima facie standard applicable to all relevance questions was worthy of consideration.

One Committee member opined that this is an issue that troubles Evidence professors more than judges and lawyers. The Chair queried whether courts are getting relevance questions wrong because of the distinct standards of admissibility and whether there truly is a problem that needs to be solved by an amendment. The Reporter opined that it is a "no-brainer" to add the preponderance standard to Rule 104(a) which would help courts addressing preliminary questions. Another Committee member opined that both amendments to Rule 104(a) and (b) would be salutary, noting he had stopped teaching Rule 104(b) in courses and trainings because it makes no sense. Another Committee member asked whether the Supreme Court's opinions in *Bourjaily* and *Huddleston* cause confusion because they do not reference one another and set different standards of admissibility in circumstances that could be viewed in the same way. The Reporter explained that the change to Rule 104(b) would adopt the *Huddleston* standard for all relevance questions and would not alter *Huddleston*. Another Committee member suggested that she had encountered no problems with relevance issues at trial, noting that she had seen courts admit evidence on the condition that it be connected later.

The Reporter stated that he had not heard real objections to making both proposals action items for the Spring 2026 meeting. The Chair opined that there would be little reason to amend Rule 104(b) in particular if courts are not getting it wrong and suggested that the Reporter do additional research to be presented at the Spring 2026 meeting. The Committee decided to await additional research before deciding whether to make amendments to Rule 104 an action item.

IX. Incorporated Business Records & Production as Authentication

The Chair explained that the Committee had hoped to host a practitioner panel about helpful modifications to the Federal Rules of Evidence, but the panel could not be convened for various reasons. In connection with those efforts, he reported that the Committee had received thoughtful suggestions for potential amendments from practitioner Chloe Chetta that appear on page 301 of the agenda materials. The Chair explained that the question for the Committee was whether to proceed with additional study of those suggestions.

First, Ms. Chetta noted the problem of admitting the business records of one entity that incorporate or adopt the business records of a separate entity. She noted that Rule 803(6) does not specifically address the issue of embedded business records and that courts take different approaches to the problem. Some courts admit such records upon a finding that they have been

incorporated by another entity whose records satisfy Rule 803(6), while others appear to evaluate the trustworthiness of the incorporated records. Ms. Chetta offered a proposal for amending Rule 803(6) to deal with the issue of incorporated records that appears on page 304 of the Agenda materials. The Reporter explained that there is a lot of caselaw on this and that courts appear to be handling the issue well without an express provision in the Rule. He noted that there is no true split of authority on this point that could be addressed by an amendment.

A Committee member queried how an incorporating entity can establish the requisite Rule 803(6) requirements for the records of a different entity. She noted that the incorporating entity is ultimately trusting someone else's records. The Reporter suggested that the caselaw is stable on this point and that there is no urgent need for an amendment. The Chair agreed that the Committee appreciated the thoughtful suggestion but would not pursue the issue of incorporated business records further.

The Chair explained that the second suggestion was to treat the production of records in discovery in a civil case as *per se* authentication of those records. He noted that courts already point to the production of records as authenticating in some circumstances and that a Texas Rule of Civil Procedure operates to make the act of production authenticating. The Reporter directed the Committee's attention to alternatives for incorporating this into Federal Rule of Evidence 901 on page 308 of the agenda materials. One option would be to add production as an indicator of authenticity in Rule 901(b)(4) and the other would be to add a new Rule 901(b)(11) to address the issue separately. The Reporter opined that any such amendment would probably have to be limited to civil cases and that such a limitation would be a matter for the Committee to consider of it decided to proceed with such a proposal. The Reporter further noted that the courts take a nuanced approach to the issue and that production is not necessarily sufficient alone to authenticate the records produced in all circumstances. One Committee member explained that Rule 502 had been enacted to permit parties to produce vast amounts of electronically stored information without reviewing every record produced to save time and money and opined that a provision making production per se authenticating could encourage more careful review that would undermine the goal of Rule 502. The Reporter informed the Committee that most courts treat production as one factor indicating authenticity and suggested that Rule 901(b)(4) dealing with distinctive characteristics would be the better place to put language regarding production. But he questioned whether any express reference to production as part of the authentication analysis is necessary given that courts are already analyzing it as a Rule 901(b)(4) characteristic that is relevant to authenticity. The Chair concluded the discussion by explaining that courts appear to be handling the issue of production as authentication well without an express provision and by expressing gratitude to Ms. Chetta for excellent suggestions. The Committee concluded not to proceed with further consideration of the issue of production of records as authenticating them.

X. Closing Matters

The Chair thanked the Committee and all participants for a productive session. He announced that the Spring 2026 meeting will be held in Washington, D.C.[1]

[1] The original date set for April 28, 2026 was modified to May 7, 2026 following the adjournment of the meeting.

Judge Dever thanked the Committee for an excellent session and stated that he wished to thank Professor Cathie Struve for her extraordinary contributions to rulemaking in her roles as Reporter to the Appellate Rules Committee, Associate Reporter to the Standing Committee, and Reporter to the Standing Committee. Judge Dever informed the Committee that Professor would be stepping down as Reporter to the Standing Committee in February 2026 and would transition to a consultant role at that time. He thanked Professor Struve for her scholarship and incredible work on behalf of the Standing Committee since this would be her last meeting with the Evidence Advisory Committee as the Reporter to the Standing Committee. Professor Struve thanked Judge Dever and the Committee, stating that it had been a privilege to learn and work with the Advisory Committee. She offered a special thanks to Dan Capra, who she said had taught her much of what she knows about serving as an effective Reporter. The Chair also thanked Professor Struve for her excellent contributions and noted that it was fitting to celebrate her work, as well as the 50th anniversary of the Federal Rules of Evidence in 2025. He offered his sincere thanks as well to Carolyn Dubay and the rest of the Rules Committee staff who organized and supported the Committee meeting notwithstanding the shutdown of the federal government that was requiring them to work without compensation. The meeting was then adjourned.

Respectfully submitted,

Liesa L. Richter