TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
ADVISORY COMMITTEE ON)
EVIDENCE RULES:)
HEARING ON PROPOSED)
AMENDMENTS TO RULE 609 AND)
NEW RULE 707)
)

Pages: 1 through 50

Place: Washington, D.C.

Date: January 15, 2026

HERITAGE REPORTING CORPORATION
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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

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Suite 305
Heritage Reporting
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1150 Connecticut Avenue, N.W.
Washington, D.C.

Thursday,
January 15, 2026

The parties met remotely, pursuant to the notice,

at 10:05 a.m.

EVIDENCE RULES COMMITTEE ATTENDEES:

HONORABLE JESSE M. FURMAN, Chair
PROF. DANIEL J. CAPRA, Reporter
HONORABLE VALERIE E. CAPRONI
JAMES P. COONEY, III, Esquire
PROF. LIESA RICHTER
HONORABLE EDMUND A. SARGUS, JR.
ELIZABETH SHAPIRO, Esquire
JOHN S. SIFFERT, Esquire
HONORABLE RICHARD J. SULLIVAN

OTHER COMMITTEE AND JUDICIARY STAFF ATTENDEES

HONORABLE JAMES C. DEVER, III
HONORABLE M. HANNAH LAUCK
HONORABLE EDWARD M. MANSFIELD
CAROLYN A. DUBAY, Esquire

WITNESSES:

THOMAS ALLMAN
JOHN BLUME
ALEX DAHL
JEANNINE KENNEY
ROBERT LEVY
JOSEPH ZAKI

P R O C E E D I N G S

(10:05 a.m.)

CHAIR FURMAN: So apologies to everyone for keeping you waiting. I'm Jesse Furman, a Judge in the Southern District of New York and Chair of the Advisory Committee on Evidence Rules. I want to welcome and thank all Committee members, witnesses, and observers who are joining us for this public hearing on the proposed amendments to the Federal Rules of Evidence. There are two proposals out for public comment, one with respect to Rule 609 and one with respect to a proposed new rule, 707.

At today's hearing, we were supposed to hear from seven witnesses, but one dropped off this morning for scheduling reasons, so we will hear from six witnesses and look forward to hearing each of those witnesses' testimony. I also want to thank those who have submitted public comments on the two rules out for public comment and those who plan to do so before the end of the comment period on February 16. I would really encourage and invite comments since it's very

helpful to the Committee's consideration of these issues, and your input is a vital part of the rulemaking process.

For today's purposes, each of the six witnesses will have 10 minutes. I would leave some of that time for questions from members of the Committee. I would ask that you try to keep your remarks brief so that Committee members have time to ask those questions and also would ask that you listen to the comments, testimony of other witnesses so that you don't have to repeat things that others have said and you can just express your agreement. Carolyn Dubay from the Rules Committee staff and I will keep track of time and remind witnesses as needed, and we'll proceed from there.

A few technical matters. One, if you can mute yourselves, one of you is unmuted. Maybe that's you, Dan. That would be great.

PROF. CAPRA: Hopefully, that's me. Can you hear me?

CHAIR FURMAN: Yes, we can hear you.

PROF. CAPRA: Okay. Great. All right.

CHAIR FURMAN: But, if you can mute yourself, please do so and leave yourself muted until you're called upon to speak.

Committee members, you're welcome to have your videos on throughout the hearing if you want, but keep yourselves muted as well when not speaking. If you wish to ask a question or make a comment, please either raise your hand in the screen or use the Raise Hand feature on Teams so that I can call on you. This hearing is being recorded, in part, I think, to help facilitate making a transcript which will be made publicly available on the Court website.

It is obviously a public hearing. If you get disconnected, please use the original Teams link to rejoin or use the conference bridge number located at the bottom of the meeting invite to join by telephone. Without further ado, we will proceed with the witnesses, beginning with the first witness, Professor Blume, who I understand is on. I think all witnesses are on, but, Professor Blume, please proceed.

MR. BLUME: Okay. So my name is John Blume, and I'm the Samuel F. Leibowitz Professor of Trial Techniques at Cornell Law School. I appear today in my individual capacity and also as a member of the Coalition for Prior Conviction Impeachment Reform, which is basically a group of law professors who are interested in the fairness of evidence laws in general

but Rule 609 in particular. We're here to support the proposal. It's modest, but we believe it's an important first step.

There are a number of problems with 609, but given the time available, I'm going to focus on just one. Rule 609 in its current form, as it's currently applied, has the effect of silencing criminal defendants, even those who are factually innocent. Okay. So how do I know that? Well, so more than a decade ago, I did an empirical study to test the conventional wisdom that goes something like this. If it were me and I were accused of a crime and I didn't commit it, I put my hand on the Bible, I'd swear to tell the truth, I'd look the jury in the eye, and I tell everybody that I didn't do it.

So, in the study, what I did was I looked at the cases of 152 people who we know have been wrongfully convicted of crimes they didn't commit, the people who were exonerated by DNA evidence, and I decided to look and see what did these people testify. Did they, in fact, people we know they testified. And so I went out and I gathered the transcripts. I interviewed the defendants when I could. I interviewed the trial lawyers when I could. I got court records, and what did I find?

Okay. Well, criminal defendants in general testified in a little less than half the cases. Those without prior convictions testify a little more, about 60 percent of the time. Of the innocent defendants, the people we know were wrongfully convicted, 42 percent of those people had prior convictions, which is probably the reason, the round up the usual suspects problem, how they maybe got caught up in this thing to begin with. Of those people that had prior convictions, 91 percent did not testify at their trials.

Why didn't they testify? Because they were advised by their lawyers not to because of the prior conviction, and they were told that the lawyers believed even after the fact that, look, despite what the judge is going to tell them, if the impeachment comes in, the jury is going to draw the propensity inference and they're going to believe that if you committed that crime, then you likely committed this crime.

But the study also revealed that the rules of evidence matter. For example, in the small handful of states that don't have 609 or an equivalent, all the innocent defendants testified. The numbers are small, but they all testified. In the states with 609

equivalents that in every single case where the innocent defendant did testify, the judge did allow the prosecutor to impeach that person, so they exercised -- now some of these were crimes which would have been automatically impeachable because they were a crime of false statement, but most of them weren't. In every single case, the judge exercised their discretion in favor of allowing the prosecutor to impeach that.

So the net bottom line of all this is that 609 and its state counterparts, trials are losing highly probative evidence that might have spared innocent defendants from being wrongfully convicted and, in many cases, years of unjust imprisonment for crimes they didn't commit.

Will the proposed amendment to 609 fix all the problems that we believe are present in the rule? No, it won't, but making the balancing test at least somewhat more difficult for the prosecution to satisfy by adding the term "substantially" to the probative value prejudice calculus will, I think, and we think, lead to more defendants deciding to testify and minimize at least to some degree the silencing of criminal defendants generally and innocent ones particularly. Thank you. Those are my remarks. I'll

be happy to answer any questions that anyone has.

CHAIR FURMAN: Thank you very much, Professor Blume.

Members of the Committee, anyone have any questions for Professor Blume? Use the --

PROF. CAPRA: May I? May I, Judge?

CHAIR FURMAN: Yeah. Go ahead, Professor Capra.

PROF. CAPRA: Professor Blume, thanks for this very much. One question that was asked while this was going through is, if you add the "substantially," will there be cases in which convictions and maybe, you know, based on a priori views of this, but convictions that would be actually correctly admitted will no longer be so?

MR. BLUME: Well, I mean, I guess I'm not sure what you mean by correctly. I think that, you know, so --

PROF. CAPRA: I know, when I said correctly, it's a value judgment, but ones that would be properly admitted under the test today if you assume that there is a body of those, that it will be a smaller body, and I just want to know what your thoughts are. I have my own thoughts about it and I wrote about it in the memo, but I just didn't know what your thoughts

would be.

MR. BLUME: Well, I think, you know, the question I think would be how much work would "substantially" do in the calculus.

PROF. CAPRA: Yeah.

MR. BLUME: So it would add something to the equation. It would be a little closer maybe to 403, which judges are a little more used to applying in some cases excluding evidence, so I think the hope would be that, I mean, obviously, a judge could still exercise their discretion and find that the probative value substantially outweighed, that it wouldn't eliminate that. I think the hope is, though, that that word would at least lead to at least some judges exercising their discretion not to allow impeachment and thus allowing defendants to testify and the jury to hear from the defendant, and there probably are other matters they might be impeached upon in other cases for that, but this, I think, would be a modest but important first step.

PROF. CAPRA: Thank you.

CHAIR FURMAN: All right. Thank you, Professor Blume. Unless there are further questions, thank you for sharing your comments, and we'll move to the next witness, who is -- I think the remaining

witnesses are all planning to testify with respect to the proposed new rule, 707, and we'll begin with Thomas Allman. Mr. Allman?

MR. ALLMAN: Yeah. Thank you, Your Honor. First, let me pay tribute to the excellent preparation that your Reporter has done in his memoranda. I found them to be fascinating and very helpful. I'm testifying here today mainly as one who has been burned once before by supporting a rule that protected against sanctions which would occur in a situation that never occurred, and I therefore have three points to make, the first one being that it's premature. I do not believe that you have demonstrated or that the case law demonstrates that there is, in fact, a need for the Rule 707 as it's currently written.

I've given you an excellent quote from one of the articles that your Reporter also commented on in which he pointed out that it would be foolish on the part of someone to try to sneak in a Gemini or a ChatGPT piece of information without having an expert connected with it. So I really don't think that there is a need, a pressing need, at this time to go forward with your proposal.

In addition, I'm really quite impressed with how well the courts seem to be doing without having

any specific rule on this topic, although I must say, having searched diligently at least as a retired guy best can do relying on Westlaw, I can't find any cases where anybody really has tried this, with the possible exception of the Weber case from the State of New York, which I would recommend everyone read and think about because the court there really put it back to the AI ChatGPT and learned from them that it could not be reliable and it was not admissible.

My second point is that I believe that 702 really should be allowed to stand on its own and that 707 should not link to 702, and I say that because, really, 702, while you could have, and I understood you rejected the idea, you could have amended 702 to cover this subject, you chose not to do so, and I would recommend that you keep 702 separate, and I really don't think that the language of 702 really fits into what the underlying problem is that we're all afraid of here, and that is generative AI creating things that were not anticipated and certainly were not planned for.

So my third point is that in addition to keeping 707 separate, if you decide to go forward with 707, I believe that you should focus on where the real need is, and the need is how to handle the

explainability issue. When the people who put together the logarithms and other mechanisms that allow ChatGPT and Gemini and the others to create new information, when they can't explain to you as the gatekeeper or to the jury as the ultimate fact finder, I really question whether or not that evidence should be admitted at all.

And I have pointed out in my written testimony that there are hints of that in both an excellent piece that was in the *Marquette Law Review* and also in your own Reporter's notes, there is a hint that maybe a rule that regulates the reliability and has a presumption of inadmissibility unless they can be credibly explained. Thank you. Those are my three points. I'll be glad to elaborate on any of them.

CHAIR FURMAN: Thank you, Mr. Allman. Let me start first on the first point. I think that's certainly a valid point and something the Committee has grappled with, and I think reasonable minds could disagree about whether we're properly getting ahead of a problem or not, and some of it is the tension between how fast technology is moving and how slow the rulemaking process is, but the Committee will definitely have to take that under advisement.

I want to clarify as to your second point

about 702 and 707. As you know, we are not proposing to amend 702 and for two reasons. I think principally one is it was amended relatively recently, and we tend to avoid wanting to amend rules, you know, repeatedly. The second is it's a rule of general applicability and it would require a wholesale rewrite. Then it's a rule that is frequently applied. So I guess I don't quite understand what your suggestion is since we aren't proposing to change 702 but rather reference it, you know, incorporate it by reference, if you will, in 707. Is it that that you think is a bad idea? Can you clarify?

MR. ALLMAN: Yes. Yes, I do not believe that the issues that you need to face with this new world are those that embrace every form of machine-generated learning, so I think that as currently written, 707 is far too broad and, therefore, I think it should be trimmed back down to what really counts and should not be linked over to 702, which has its own very fine and useful Daubert-related test, and I am really confident that you folks can draft a rule in a new 707, if you feel it has to be done, that will deal with the really tough parts of the machine learning and the abuses that are risked by it.

PROF. CAPRA: What do you then, though, if I

may ask, Tom? What do you do then if an expert testifies on the basis and not maybe completely but on part of the basis of machine learning and, therefore, would be regulated under 702, whereas somebody seeks to admit machine learning without an expert and would be regulated under 707? How does that work? Aren't they an option? Shouldn't there be similar standards for both or actually identical standards for both?

MR. ALLMAN: Not necessarily, no. I think that if somebody brings an expert, I think 702 is marvelous. I think it handles everything you're going to need to do. If they don't come with an expert, they're a fool because, on cross-examination, they're going to be taken apart when they cannot explain how the doggone system works or what the inputs were or what the error rates are, so I really think they're two different matters.

PROF. CAPRA: And yet today, even things are happening, like in criminal cases, facial recognition data is introduced by the police officer who pressed the button, and, seemingly, that's being done now. There's actually reported cases in that respect. So maybe they're fools, but it seems to be working.

MR. ALLMAN: No, no, I'm quite in favor of that, and I think we should not overlook the

possibility of taking judicial notice of the acceptability of these things as proven by time. You have that authority to do that, and that's why I'm saying that if you're going to write a new 707, it should be trimmed back and focus only on where the really problems are, and I agree with you that in the forensic world, there's a lot of tests out there which are acceptable and reliable and don't require, maybe don't even require much more than the introductory experts that we see in so many of these cases.

PROF. CAPRA: Well, I guess -- well, all right. Well, that's what I would disagree with. It seems to me that facial recognition technology does need to be explained, but I'm sorry, I just didn't -- I'm sorry if you misunderstood my point.

MR. ALLMAN: No, no. I'm sorry I wasn't clear.

CHAIR FURMAN: Let me interject and see if any other members of the Committee have any questions for Mr. Allman. Yes, John Siffert?

MR. SIFFERT: Thank you. My question is I assume you've looked at the other comments that have been submitted by other people because I think there's some overlap. You don't seem to address some of them expressly, but what I'm hearing is that there is some

objection to treating agglomerations, compilations of data, that would come within the proposed 707 without much difficulty, and those where there are opinions or predictions involving algorithms, that that is the area where I think I'm hearing the folks who are talking making a distinction. Do I have that right?

MR. ALLMAN: Yes, you do, and let me just -- I didn't want to bog down on this, but just I want to say that when you get a chance to hear Jeannine later, you're going to find that I think she believes pretty much like I do that it's premature to move forward, and I want to also highlight that both lawyers for Civil Justice and Robert Levy make the important point that there is a lot of machine-generated things, such as Excel and so on, that really don't need to be subject to a special rule, and that's why I say that if you're going to write a rule, it ought to be trimmed back down to the things that really have a problem with them.

MR. SIFFERT: That's what I want to understand, is that the objection with respect to the -- that I'm hearing, and I don't mean to preempt others, but I don't want to just have you talk and someone else and not have you address it. The areas where I think people are saying there is no objection

to a rule either because it already exists and things work or because this rule would be fine when it's just a compilation as opposed to where there are algorithms and opinions involved, and am I correct that you're not objecting to Rule 707 insofar as the proffered machine-learning evidence or machine evidence or someone had a different characterization of it is of that nature, that Rule 707 as drafted works just fine for the aggregation?

MR. ALLMAN: I'm not sure I agree with that. I think what I'm trying to say is that it's not needed, that the tools are already there for the judges to deal with that problem. And I'm really -- I was burned by Rule 37(e), which I spent many years of my life working on, and we overdid it. We jumped the gun in 2006 and we wrote something without totally anticipating where we were going, and we had to redo it at the 2010 conference and then later in the 2015 amendments, and I'd like to help you folks avoid that trap.

CHAIR FURMAN: All right. Thank you, Mr. Allman. I want to keep things moving, and as you noted, some of the later witnesses, I think, echo some of your comments, so let's move on to the next witness. Thank you very much for sharing your

thoughts. The next witness is the one who dropped out, Ms. D'Agostino, so we'll proceed to Alex Dahl from Lawyers for Civil Justice. Mr. Dahl, are you on?

MR. DAHL: Yes. Good morning.

CHAIR FURMAN: Excellent. Please proceed.

MR. DAHL: Thank you. Thank you, Judge Furman, and thank you to all members of the Rules Committee for allowing me to speak. My name is Alex Dahl, and I'm the General Counsel of Lawyers for Civil Justice. I think the Committee is correct to try to get ahead of what is almost certainly an impending issue in the courts about the admissibility of machine-generated evidence, as you phrase it, but my view is that the current draft should not be adopted and the Committee should continue to work on fashioning a rule.

First off, I think the rule should be a stand-alone customized rule for the discrete purpose that the Committee is intending rather than as a cross-reference to 702. There's several reasons why. Number one is that the language of 702 is about human beings who are acting as expert witnesses giving testimony. Those words are all in the rule. They talk about the knowledge of the expert, the testimony. And what this cross-reference does in the proposed

rule is it makes every reader responsible for interpolating those words into the area of machine-generated evidence. I think the rule should be that interpolation rather than should require that interpolation.

I think the Committee has the ability to write a rule with specific provisions about machine-generated evidence and should do so, including I mentioned in the written comment several categories, training, data validation, reliability, error rates, explicability, the proprietary nature of the system. I think that all of those things and probably more that the Committee's already thought about should be in the rule.

Another reason it should be its own rule, you were just talking about the standards. It seems that the standards should be higher than Rule 702. The Committee has made it clear that the intent of this is to make it difficult if not impossible to meet the standards. Well, that's not true of 702, but you're trying to do it by a cross-reference to 702. There's a good reason why the standards should be higher and that's because machines can't be cross-examined. That's the fundamental problem that the evidence rules need to confront in this case, in this

topic.

I think that the reliability of AI technology is not sufficiently understood to contemplate at this point admissibility without an expert, and so that standard needs to be higher than the expert. Also, writing the rule in that way would avoid creating an incentive to try to get the evidence in without an expert, which I think the Committee intent is in line with.

And, finally, I'd say that the unexplainable problem really should be clear in the evidence rules that unexplainable results are just not admissible. You know, maybe someday, you know, my understanding, the technology is advancing toward where it may well be able to explain, and that would be beneficial for evidence, but in the meantime, you know, under today's Rule 702, there's no way a court would admit the expert testimony of someone who just says I don't know how I got to my conclusion. That would be completely inadequate, so I don't know why a rule would contemplate doing that for a machine.

PROF. CAPRA: May I interrupt for a second about that point, Mr. Dahl?

MR. DAHL: Sure.

PROF. CAPRA: But I think today a judge

could say, well, I don't know how you come to that conclusion, but I see that there's a lot of corroborating evidence which indicates that what you say is valid, and there's a lot of training data which indicates what you say is valid, and there's a lot of -- you know, you can demonstrate objectively a low rate of error, so maybe I don't know exactly how you did it because that's experience-based experts as well, and yet we admit them kind of on a case-by-case basis, so I don't know that it's necessarily true that everything has to be completely explainable under 702.

MR. DAHL: Professor, you know a lot more about the case law than I do, so I concede the point. However, my point is reading the language of the rule, 702 requires that the testimony be based on sufficient facts and data, the product of reliable principles and methods and the reliable application of those. I would imagine that an expert being proffered who says "I don't know how I came to my conclusion" would run afoul of those ideas, that the opinion has to be based on facts and principles and an application of those.

CHAIR FURMAN: Let me jump in and ask a question on your first point, namely that the rule shouldn't incorporate by reference the 702(a) through (d) standards and should sort of articulate its own.

MR. DAHL: Yes.

CHAIR FURMAN: I think two potential responses to that. One is, you know, the 702 standards are very familiar to judges and litigants, and so, while maybe they don't fit perfectly, I think, you know, the Committee was of the view that the need for, you know, application -- that the disadvantages of sort of need to translate for machines were outweighed by the advantages of familiarity. That's one point.

The second is the point that Dan made in response to Mr. Allman, which is, you know, this rule is intended to apply when there's machine-generated evidence offered without an expert testifying in the case like Weber, you know, where an expert is testifying and seeking to introduce machine-generated evidence. That could be subject to standard analysis under 702, so what do you do? If that's correct, then you have 702 that applies when you have an expert, 707 that applies when you don't have an expert, and if you have different standards, then, in theory, they, you know, could result in sort of different outcomes for the same evidence, which doesn't seem like it would make sense. So what's your response to that?

MR. DAHL: Sure. Let me start if I may with

what I think is kind of the rulemaking principle, which is I honor highly the idea that you should not amend the rules too frequently or change them, and you've just amended 702. I think there are a lot of reasons not to amend 702, but what I would suggest to you is that this cross-reference is taking almost the same risk that you're trying to avoid of affecting Rule 702. You know, what you just said, that courts and parties are going to go to the proposed 707 for a different question. Should we admit this evidence without an expert?

And you're referring them to the standards for admission of expert testimony, and what's going to happen is that case law is going to develop, but that case law is going to be interpretations of Rule 702, and so someday you're going to come back to, you know, how is 707 working? And I think what you're probably going to find is that the case law is interpreting 702 to make it work in this other context and you've caused the very problem that you're trying to avoid, which is affecting the case law and the meaning of Rule 702 in this other context. So I think that a new stand-alone rule is the answer.

Now, to your first point, you talked about, you know, I guess my point about extrapolation. Let's

just look at 702(a) as an example, refers to the expert's scientific, technical, and specialized knowledge, so you're asking every reader, every court, every party to think about the knowledge of the machine, the algorithm, and, you know, my understanding is that some of these processes we're trying to get at, they have read every sentence that has ever been written in history. How do you take that and say, well, is the expert's knowledge helpful in this case? I mean, it's just a different idea than looking at whether the expert -- what the expert is bringing to the table is relevant.

I see you looking at your watch. I want to make one final point, and that is that I think that the rule ought to focus on machine opinions. I'm not so married to the word other than I don't know what else to say. I think what your Committee is struggling with is the differentiation between what is new and what is not new. It is not new to have machine-generated evidence. You know, all of the examples that you've raised in the Committee discussion are applicable.

What's new is that the machines are actually getting into what we call opinions if they were human, and there isn't a word for that, I guess, but I think

that the utility of using that word is that it communicates to the reader, the courts and parties, that we're talking about something different here than a thermometer or a spreadsheet or a calculator. We're talking about when a machine is going to opine on, you know, the ultimate issue in the case, which is the whole reason for all of the 700s, right, that that is a different thing than a witness, and what is new here is that now machines may be able to do that or are able to do that and that should be contemplated with admissibility standards.

So I think that using that word or its equivalent, maybe conclusions or something, would suffice, but opinions is what you're getting at, and that's what that chapter of the rules gets at, and that's the concept that I think the rule needs to communicate.

I also think, you know, one other benefit is that if you use that word, opinions or something equivalent, it would allow you to delete the sentence about simple scientific instruments. In my view, writing the disclaimer of simple scientific instruments is going to be a lightning rod that draws the very problem that you're trying to avoid by putting it in there. It is going to open up lots of

settled case law on other instruments because just machine-generated evidence doesn't make clear that you're getting to this new thing, the opinion idea.

CHAIR FURMAN: All right. Let me cut you off, Mr. Dahl, especially since you submitted a lengthy and thorough and very helpful comment for which we thank you.

PROF. CAPRA: I'm sorry, Judge, I do have a question if I can just quickly?

CHAIR FURMAN: Yeah, I was going to just see if anyone had any quick questions for Mr. Dahl before we move forward, but go ahead, Professor Capra.

PROF. CAPRA: I take it that you disagree with Mr. Allman that our rule is not timely?

MR. DAHL: I never disagree with Tom Allman, but --

PROF. CAPRA: But you seemed to at the very beginning. You said that now is the time to write a rule.

MR. DAHL: Yes.

PROF. CAPRA: Okay. Thanks.

MR. DAHL: Well, yes, I suppose that's correct. This is how I would nuance it, is that I think that this is going to be an issue and the Committee is right to focus on it. I think I agree

with Tom that it is not so imminent today that any rule is better than no rule. I think the Committee has time to get it right. I think the case law that will develop in the meantime will be helpful to the Committee to understand both the technology and how the issues are going to be presented in courts. It'll make a better rule if you spend more time getting it right.

CHAIR FURMAN: All right. Any other questions from members of the Committee?

(No response.)

CHAIR FURMAN: Great. Mr. Dahl, thank you very much, and, again, thank you for your thorough and helpful comment. We appreciate it.

MR. DAHL: Thank you.

CHAIR FURMAN: And we will proceed with the next witness, Jeannine Kenney from Hausfeld. Ms. Kenney?

MS. KENNEY: Thank you so much. Hello, everyone. I am a litigator at Hausfeld, LLP. We are predominantly a plaintiffs' class action firm and we do predominantly antitrust cases. We have other practice areas, but I would say that's probably what we're known for, and we're fairly large for our size, and we have a global competition practice as well,

with a presence in several countries.

All of our cases involve expert evidence. I can't think of a single one, regardless of the nature of the practice area, that hasn't involved experts, and, you know, we have our own, and the defense have theirs and we challenge them, and that's a huge component, particularly of antitrust cases, where we rely on economic experts and experts in industrial organization, often industry, subject matter experts.

So, you know, from the practical standpoint of a litigator, I just want to echo from personal experience the point that Tom Allman made, which is it's hard for me to conceive of a litigator taking the approach of just trying to introduce machine, at least in the civil context, trying to introduce machine-generated evidence without an expert because you always want an expert to give context to that opinion, someone who is well-credentialed, someone who generates trust, and, hopefully, someone who is personable and that the jury really likes and credits so that they give that output weight, whether it's, you know, economic opinion or, you know, some other type of opinion.

We always want a human to vouch for that evidence, whether it's, you know, the result of a

multi-variant regression analysis or something else, and so I think it would be a poor litigation strategy, indeed, to try to do this, and I think that's probably why, at least in the civil context, you don't see it much. I also think that most of us don't think you could do it for the reasons I outline in my comments because we don't think you could get it authenticated, and I do share, and you might never have thought you'd hear a plaintiffs' lawyer say they agree with LCJ, but I do agree with LCJ's concern that particularly in the context of rules that, at least to me, say you can't do this, that the new rule may create a pathway, so I share that concern.

And as I mentioned, you know, fairly extensively in my comments, I do think the authentication rules are sufficient, and I know the Committee has considered them and thinks they're not, but let me just give you my quick 30-second view on this. Authentication in the case of computer output requires a statement of accuracy from an affiant or the authenticating witness on the stand, and in the case of AI, that's always going to be an opinion. It can't be based on personal knowledge, and so any litigator worth their salt is going to challenge that because there are notice requirements, of course, is

going to challenge that under 702, and I think it's going to automatically trigger a Daubert challenge.

I also question whether, because AI-generated output, at least to my knowledge, at least right now, is never a hundred percent accurate, whether you could ever actually attest to the accuracy, right? I mean, 902(13), you know, like, I can attest to the accuracy of my database output because I know how it was entered and I know what the input was, right, and it's just a plug and chug.

Someone testifying to the accuracy of AI output really can't do that. I mean, that's an opinion, and that would require scientific expertise, and because it can't be a hundred percent accurate, I don't think you can ever get it in under 902 or 901, you know, and I have sort of expanded on those thoughts in my comments.

And, lastly, you know, you've heard a lot of comments already and I know others have commented in writing about the breadth of the rule and I don't want to restate those points, but I do want to reiterate a concern that I raised in the comments that I think is a very, very real one, particularly in the context of civil litigation, which is this rule, even if you limited it to machine opinion, as LCJ suggests, or AI-

generated output, which I think you should, absolutely, it still doesn't address how the evidence is being used and the purpose for which it was generated.

And at least the way I interpret the Committee's deliberations over the last two years is that there really -- it seems like you're really concerned about when somebody says, all right, I'm just going to run these -- as I'm litigating, right, I'm going to run these inputs and I'm going to get a favorable opinion and I'm going to use that at trial as opposed to evidence, AI-generated evidence that existed prior to the litigation and which is merely evidence in the case, and in that latter case, we shouldn't have to abide by a rule that requires us to prove the accuracy of our opponent's own output where it's admissible, for example, as a business record, and particularly in the antitrust case, algorithmic price-fixing is sort of the new thing, sort of the new area of litigation.

And so these outputs are not only sometimes the very topic of litigation but very often are relevant to the litigation. Many businesses, in our experience, in the cases that we litigated, a lot of businesses are using algorithms to predict demand and,

therefore, to project what their prices and supply should be and so forth. You may not even be offering this evidence for the truth, and the rule still encompasses it because of the way it's written, so --

PROF. CAPRA: I'm sorry, that's not true. I mean, the rule doesn't encompass that. It encompasses testimony that's the equivalent of expert testimony, which is not what you're talking about. You're talking about testimony that's substantive in the case, right, or evidence that's substantive in the case.

MS. KENNEY: But it doesn't -- but the rule -- I don't think the rule makes that distinction when -- it's whether the output mimics --

PROF. CAPRA: Oh, it clearly does because it relies on --

MS. KENNEY: May I finish?

PROF. CAPRA: Sorry. Yes. Sure.

MS. KENNEY: It's whether the output mimics an expert opinion, not the purpose for which it's being offered, right? And that's the distinction I think the Committee has to make, right? If I am introducing my opponent's AI-generated price predictions, right, that still is -- those price predictions are still -- is still an output that if

testified to by a witness would require, you know, would be very expert-like, right, I mean?

And so I think there's probably a way to deal with it, and I've suggested -- I've made some suggestions in my comments, but I think it's a real problem that you have to -- if you're going to do any rule, and I don't think you need to do one yet. If you're going to do any rule, you really have to hone in on, you know, who generated it, why did they generate it, when was it generated, and how is it intended to be used so that you aren't including ordinary evidence, which I know, based on the Committee's discussion, is really not the intent, but I believe it is captured, and even if the Committee doesn't intend to capture it, I can guarantee you this will result in litigation arguing that very thing. That's sort of the gist of my views if there are any questions.

CHAIR FURMAN: Thank you, Ms. Kenney. Any questions from members of the Committee?

(No response.)

CHAIR FURMAN: All right. Thank you very much, Ms. Kenney. I'm grateful for your input. The next witness is Robert Levy from Exxon Mobil. Mr. Levy?

MR. LEVY: Yes, thank you so much. I appreciate the opportunity to speak with you. My name is Robert Levy.

PROF. CAPRA: Can you hear that?

MR. LEVY: Can you hear me?

MALE VOICE: I'm having trouble hearing him.

MR. LEVY: Let me speak more loudly. I apologize for that. Is this better?

CHAIR FURMAN: Yeah, you're definitely better when you're closer, so keep your voice up and closer to the mic, please.

MR. LEVY: Okay. Thank you. My name is Robert Levy, and I am Executive Counsel at Exxon Mobil Corporation, and along with Tom Allman, I've been a follower of the rules process for many years and appreciate the chance to speak with you about proposed Rule 707. The issue that I see as one of the challenges with this rule as drafted is really exemplified by some of the questions that were discussed earlier, including the discussion about machine-generated algorithms.

The challenge with the rule as it is worded is there's no clarity in terms of what would constitute an output from a machine that would require 707 incorporating 702 into consideration. The

concerns that I wanted to discuss with you is the fact that in corporate America we deal with technology obviously all the time. We are now communicating on a technology platform called Teams. Teams generates data to enable us to communicate, and that can include the visual and audio. It also will include the recording of this session, and that is machine-generated output.

The question becomes what part of that machine-generated output is information that will require being proven up under a 702 analysis, and the rule does not provide any, as I see it, sufficient clarity to understand that. The concern is that this rule would then be used to try to challenge the introduction of what otherwise would be considered business records, information that is machine-generated that is produced in the regular course of a company's business. If some of that data is conclusory or developed through algorithms or other applications that include what might be considered artificial intelligence, whether that is machine learning or otherwise, will create uncertainty and the potential that people will try to object to that data because of the language of Rule 707.

There are some issues that 707 does get

right, and I do want to point that out. The concern is, and I think Alex Dahl spoke to this, that there are going to be, as the rule identifies, situations where parties might try to use conclusory types of opinions that summarize and analyze various pieces of information. It could be medical reports, it could be accounting reports, it could be data from the operation of an oil and gas well and providing conclusion, conclusory types of considerations that arguably are opinions. Although, obviously, it is challenging to characterize machine output or artificial intelligence output as opinions, it is the result of the tool using its large language model technology to provide what it thinks is the best answer even though it doesn't have opinions per se.

The other issues deal with some of the ambiguities in terms of the way the rule is drafted. The use of the term "machine-generated" is not the type of term of art that I think that people in the technology world are going to really understand or be able to identify what is and is not machine-generated. I also think that the carve-out that the current rule has is also of concern because there are certain items that are accepted. A thermometer is accepted as generally accurate, but it depends on the thermometer

in terms of how accurate it is, and so there are going to be questions even at that level.

Another point I wanted to address is that the language of the rule I think should be more specific in terms of how it is trying to address the situation where the use of technology to summarize or, in effect, opine about data versus just making the reference to machine-generated information in 707, you understand obviously that the 7 series deals with expert opinions, but the language of the rules as I understand it or as I see it does not necessarily make that specifically clear so that if somebody sees Rule 707, they might interpret that to apply to all machine-generated testimony and that, therefore, to introduce that testimony, you will have to have a separate witness that can go into the detail of how that information was derived and the reliability of the underlying computing systems, and that I want to emphasize is an extraordinarily impossible task for most --

PROF. CAPRA: So I'm sorry. Can I interrupt you?

MR. LEVY: Please.

PROF. CAPRA: So you're saying that the heading could create some misdirection, that the

heading should be altered in some way to make it more specific to the problem that the rule is intending to address?

MR. LEVY: Yes. Yes, Professor Capra.

PROF. CAPRA: Thanks. I get it.

MR. LEVY: Yeah.

PROF. CAPRA: Okay.

MR. LEVY: And one other issue that I want to point out, and I don't want to be duplicative, but the reference back to 702, I think, creates some potential problems because, as I read 702, it's written with the context of human experts, and incorporating the 707 concept of machine-generated information and applying the 702 human, for lack of a better term, factors that need to be considered to determine whether it's admissible is not always going to work well.

And, additionally, another point is that under Rule 705 also has to be brought into play because, if you incorporate 702, then you also are, by reference, incorporating Rule 705, and the concern there is that 705 is going to create an even more difficult challenge for a party that seeks to introduce general business record-type data that is machine-generated, and that's why I think that a

stand-alone rule on this issue is the better course because of the complexity of trying to utilize the 702 construct.

CHAIR FURMAN: All right. Thank you, Mr. Levy. Let me pose one question, which is on an issue that other witnesses have disagreed about, whether it's premature for the Committee to be adopting any rule or we should be moving forward. I recognize you think that it should take a different form than the current proposal, but putting that question aside, do you have a view on the prematurity question? I take it you think we should --

MR. LEVY: I've got mixed feelings about this. I absolutely applaud the Committee's engagement on this issue. It is a very challenging, fascinating area, one that will continue to develop and present, and the fact that you are moving forward on this now suggests really an engaging and proactive approach.

I've been working this issue on the Texas rules side. I serve on the Texas Supreme Court Advisory Committee and we have been looking at similar issues as well, and I do think that providing guidance will be beneficial, but the landscape of artificial intelligence technology and how that will affect civil justice or criminal justice cases is still being

developed, so I like the idea you're moving forward with this and your open mind about it, and I think there is some benefit to continuing the discussion.

I think, though, if there are going to be other types of rulemaking that you're thinking about, and I think you've had some discussions, it might be better to do it all together in kind of a package discussion about rulemaking related to AI, and that could include either the deep fake issue or other issues related to authentication. On that point, by the way, I think there is a fascinating challenge, and Professor Capra will be able to clean my clock on this, but is output from an AI tool a declaration? Could it even be a hearsay rule exception as an output that has no one speaking?

CHAIR FURMAN: Got you. All right. Thank you for that and we appreciate that, and we are, as you probably know, continuing to look at and think about the deep fake issue, and, actually, on that score, I think a survey is going out to every federal trial judge in the country today to solicit their experience and views on that. Any other questions from Committee members for Mr. Levy?

(No response.)

CHAIR FURMAN: All right. Thank you very

much, Mr. Levy. And we'll move to our final witness, Joseph Zaki of Loko AI. Mr. Zaki?

MR. ZAKI: Yes. Thank you, Judge and members of the Committee, for the opportunity to testify today. My name is Joseph Zaki and I'm a technical practitioner working on evidence integrity and independent verification workflows. I support the objective of the proposed Rule 707. If machine-generated outputs are offered without an expert, they should not evade reliability scrutiny. The courts should be able to apply Rule 702 in a coherent, administratable way.

Really, you know, I'm focused on a narrow point that I believe that determines whether Rule 707 works in practice. In real cases, reliability disputes often do not start with model theory. They start with a simpler, more fundamental question. What exactly did the system process, and is that record intact enough that the other side can test it? So it seems that courts cannot meaningfully apply Rule 702 to machine outputs if the underlying record is incomplete, altered, selectively exported, or otherwise not independently testable.

If the opponent cannot check whether inputs are missing, reordered, truncated, or transformed, the

reliability inquiry becomes a contest of assertions rather than the evidence, and that's not a theoretical concern. You know, it's a structural mismatch in a way. 702 presumes we can ask what facts or data underlie this, and was the method reliably applied to those facts. But, with machine outputs, if the inputs and transformations are not custody-grade, the court is being asked to evaluate reliability without a stable substrate.

And then there's a second mismatch that motivates Rule 702 in the first place, cross-examination. You can cross-examine a human expert about what they did and what they relied on and what they might have missed. You cannot cross-examine a machine, so if the record layer is not independently testable, the adversarial process is weakened at the moment the output is most persuasive.

The most practical improvement I can offer is a technology-neutral two-step reliability sequence for the Committee note. It's not a rewrite. It's not new doctrine. It's simply an order of operations anyone could use to keep the inquiry grounded. And so I put this in my written testimony as well.

Step 1 is integrity and independent testability of the underlying record. Step 2 is the

validity of the inference under Rule 702. So, you know, step 1 there would be can the proponent provide objective testable information sufficient to show what the system processed and what material transformations occurred such that meaningful adversarial testing is possible, and then the step 2, once the record is independently testable, the court can evaluate inference reliability under 702, including fit validation, known sources of error, and sources of variability or non-determinism.

So that's really the entire thing there. It's not really complicated, but it matters because it allows judges to avoid, you know, being forced into abstract model debates when the record itself is unstable. But there is a boundary to this. You know, it's not, you know, a demand for full system transparency. It's not a perfect standard. It's definitely not a deep dive into model theory, and it's not an attempt really to modify, you know, Rules 901 through 903 or to create any kind of new discovery obligations.

It's really to satisfy when the proponent provides objective records that make missing inputs, edits, or any kind of transformations detectable and allow an opposing party to test the proponent's

claims, and I think, once that condition is met, the courts proceed to the ordinary Rule 702 inquiry, and that can be, again, implemented in a technology-neutral way. Courts are already doing this thing all the time. You do not prescribe how you built your accounting system. They ask whether can you produce reliable business records. And they don't prescribe how you built your lab equipment. They're asking whether the methodology is reliable and was applied reliably. The same approach here.

CHAIR FURMAN: Thank you, Mr. Zaki. Can I ask you one question given your technical background? Some of the other witnesses have suggested different terminology, either machine learning or computer-generated versus what we are currently using, which is machine-generated. I don't know if you have any views on that, whether you think one or the other is preferable?

MR. ZAKI: I think there is a distinction between, you know, machine-generated and machine-learning type model generated outputs. You know, a gentleman that spoke just before me was, you know, in that kind of direction of any output could be considered, you know, machine-generated in a sense now in our world, that there has to be a distinction, a

higher tier when we're talking about, if you're going to replace a human with, you know, evidence, a expert witness, that witness has to have the same, at least, you know, the same kind of underlying -- it has to be able to -- beyond what it's outputting, it has to be trusted for integrity first, and so it's a higher tier.

I think it's definitely a higher tier sort of benchmark rather than just any kind of machine-generated output. It's more the machine learning generated from machine learning-type outputs, which is kind of a lot to put in a mouthful, you know, generated outputs, things that have been trained when we start relying on the algorithm more than the human, you know, and that line is blurring, so be careful, but I do think it is a higher tier.

CHAIR FURMAN: Thank you.

PROF. CAPRA: Mr. Zaki, I have a couple of questions. One is there's some dispute about whether, if the process is inexplicable, whether that means it could never be admitted, and the Committee is currently taking the position that while experts should ordinarily be required to testify and explain the way the machine works, there might be some alternatives. And it seems to me that the things

you're talking about are actually those alternatives, that you might not know exactly how the machine works, but you know that it has output that is reliable. Am I wrong about that?

MR. ZAKI: You're absolutely correct. Where I sit in technology and the type of things that we're working on are deterministic workflows that where's the data created? The second, not even the second, the millisecond, the nanosecond that the data is created, can you prove it and can you chain that data all the way from capture to package to replay to sitting in a courtroom? And so, previously, this was not possible. There was a lot of limitations, but now it is possible to absolutely capture seal from the second that data has been generated all the way through replay, and that is significant in terms of how that affects, you know, defense-type systems, things where there's a much higher tier of what is admissible and what is going to be admissible if it ever gets audited or pulled into court.

And, you know, what I'm suggesting is not at everything. This is like a much higher tier of evidence integrity that's happening and transforming.

PROF. CAPRA: But, I mean, the bottom line is then, at least in your view, that machine-generated

information, even though inexplicable in how it came about, can still be validated within the context of 702 when without an expert?

MR. ZAKI: Absolutely.

PROF. CAPRA: Is that right?

MR. ZAKI: Yes.

PROF. CAPRA: Okay. I have another question about your note, which is very helpful. You say courts may consider threshold integrity conditions necessary for meaningful -- shouldn't it be courts must? I mean, don't they have to consider these threshold integrity conditions necessary for meaningful adversarial testing?

MR. ZAKI: They must, yeah. That's a good point. I agree with you. Yeah.

PROF. CAPRA: That was a friendly amendment to your suggested Committee note, which I found very helpful.

CHAIR FURMAN: Thank you. Any questions for Mr. Zaki from members of the Committee?

(No response.)

CHAIR FURMAN: All right. Thank you very much, Mr. Zaki. Appreciate your helpful comment and testimony.

MR. ZAKI: Yes, thank you.

CHAIR FURMAN: All right. That concludes our hearing for today. Let me say first of all we have another public hearing scheduled for January 29, I believe, also starting at 10 a.m., and we'll hear from additional witnesses on the two proposed rules that we have published. I really, a), want to thank on behalf of the Committee, I want to thank the Rules staff, Carolyn Dubay and Shelly Cox and their team, for their help and effort in organizing today's hearing. I also want to thank those who joined us both to testify and also just to observe.

As I said at the outset, the comments we receive, the testimony we receive are incredibly helpful in the Committee's consideration of all rulemaking, and I would say on 707, which was the principal topic of today's testimony, especially helpful there given the complicated issues that we're grappling with, so extremely helpful.

Finally, we just want to remind folks listening that the comment period for the two things that are out for comment, that is, Rule 609 and Rule 707, doesn't close until February 16, and we would welcome additional comments to facilitate our consideration of both those issues, which will be on our agenda at our spring meeting for further

discussion.

That concludes today's hearing. I want to thank every Committee member who appeared, especially John Siffert, who I think is joining us from Europe, and safe travels to everyone. Thank you. And we are adjourned. Have a wonderful day.

(Whereupon, at 11:13 a.m., the meeting in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

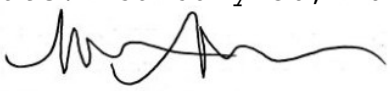
CASE TITLE: Meeting of the Advisory Committee on Evidence Rules: Hearing on Proposed Amendments to Rule 609 and New Rule 707

HEARING DATE: January 15, 2026

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 30, 2026



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