TRANSCRIPT OF PROCEEDINGS

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

Pages: 1 through 110

Place: Washington, D.C.

Date: January 29, 2026

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

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RE: PROPOSED AMENDMENTS TO)
RULE 609 AND NEW RULE 707)
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Suite 305
Heritage Reporting Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C.

Thursday,
January 29, 2026

The parties met remotely, pursuant to the notice, at 10:00 a.m.

EVIDENCE RULES COMMITTEE ATTENDEES:

HONORABLE JESSE M. FURMAN, Chair
PROF. DANIEL J. CAPRA
JAMES P. COONEY, III, Esquire
HONORABLE MARK S. MASSA
PROF. LIESA RICHTER
ELIZABETH SHAPIRO, Esquire
JOHN S. SIFFERT, Esquire

OTHER COMMITTEE AND JUDICIARY STAFF ATTENDEES:

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

WITNESSES:

MARK ABRAMOWITZ
CHRISTINA CAMBO
WILLIAM CARLUCCI
ROBERT FRIEDMAN
STEPHEN HERMAN
DAVID NAGDEMAN
NICOLE OWENS
JONATHAN REDGRAVE

JOHN ROSENTHAL
ANDREA ROTH
KAITLYN STONE
TAD THOMAS
LAUREN YU

P R O C E E D I N G S

(10:00 a.m.)

CHAIR FURMAN: All right. It is 10:00. Being a trial judge, I like to start on time, so we will get started with today's public hearing on the proposed amendments on the Rules of Evidence. As a reminder, the current published proposals out for public comment are to Rule 609 and new proposed Rule 707. At today's hearing, we will hear from -- I think we are down to 13 witnesses as two witnesses have dropped out, all of whom I gather will be testifying about the proposed new Rule 707. We look forward to hearing your testimony.

I also want to say that the Committee very much appreciates those who have submitted public comments and those who plan to do so before the end of the comment period, which ends on February 16, just a few weeks away, so if you haven't gotten a comment in, you still have time. That input and the testimony that we heard two weeks ago and we'll hear today are a vital part of the Committee's consideration and the rulemaking process.

A brief word about the plan today. Each

witness will have 10 minutes. Given the number of witnesses, I do plan to take a brief break approximately halfway through. I would ask that witnesses keep your remarks brief so that Committee members have ample time to ask questions and that you conclude your comments within 10 minutes so that we can continue with the next witness, and if you don't conclude, I will conclude for you and tell you you're done. Now Carolyn from the Rules Committee staff and/or I will be keeping time and will remind witnesses as needed, and just note that the timing on the schedule is approximate and will be adjusted as needed.

A few technical reminders before we get started. First, please leave your video off and microphones muted until you are called on to make your presentation. For Committee members, we'd welcome Committee members to have your videos on throughout the hearing if you wish, but please keep your audio muted when not speaking. That goes for everyone, including you, Dan. You're not muted at the moment. And we ask that you ask that you use the Raise Hand feature or physically raise your hand in your video to indicate if you wish to make a comment or ask questions.

Now a reminder to everyone that this hearing is being recorded for purposes of preparing a transcript which will be made available publicly on the U.S. Courts website, and, finally, a reminder that if you get disconnected, you should use the original Teams link to rejoin or the conference bridge number, which I think is located at the bottom of the meeting invitation to join by phone.

Now, with that, we will get started with the witness testimony, and we will begin with Mark Abramowitz. Are you on?

MR. ABRAMOWITZ: Yes, Your Honor, I am.

CHAIR FURMAN: Great. You may proceed.

MR. ABRAMOWITZ: Chair, members of the Committee, thank you for the opportunity to testify. My name is Mark Abramowitz and I'm the Chair of the ESI department at Dicello Levitt. In addition to that, I am also actively litigating mass tort cases, such as In re Hair Relaxer Marketing, Sales Practice, and Product Liability Litigation and In re Abbott Laboratories et al. Preterm Infant Nutrition Product Liability Litigation, both in the Northern District of Illinois. Further, at the firm, I'm part of the firm's focus group and trial team that secured a $102.6 million verdict against GM due to a defect in

the piston rings of certain GM engines that cause premature engine damage, stalling, and breakdowns.

At the heart of litigation in this country is fairness. It is understandable and, frankly, crucial that the rules of evidence be updated to keep up with how generative AI has become a mainstay within our jobs and daily life, and just like it has taken over most parts of our life, so too will it be coming to the courtroom, but the proposed rule as written does not accomplish the goals of justice, fairness, or efficiency. In my written testimony, I lay out several broad categories that I do not believe are adequately addressed or provide enough guidance for as it's written. Those categories include things such as what is a simple scientific instrument? What discovery will be required and permitted? How will third parties and contractors be viewed? And how will abuse of this rule be prevented?

In my limited time here today, I'm going to focus on how the rule does not address the lay witness or party witness. I want to use an example which is faced often in product liability cases regarding pharmaceutical drugs or in the makers of cosmetic products. It revolves around what is known as post-market surveillance, and that's where companies

collect and catalog complaints about their products, and the manner in which those calls are collected and organized have a disproportionately large impact on the knowledge a company may or may not have about the harm their product is causing once they've sold it.

Right now, this is a very heavily human process, but it will not surprise me if this task of answering and cataloging phone calls becomes machine-driven. In fact, several large companies in the pharmaceutical industry have said they're looking to actually bring in machine learning and generative AI to help handle these sort of inquiries and complaints, and at the heart of it, this sounds akin to an answering machine or, on the scientific side, a person gathering information, which might be seen as a simple scientific tool.

However, this is far from an ordinary answering machine or a person who's just collecting the information. The decision as to how to catalog the complaint will be handed over to the machine to generate that evidence that's used in our cases. So, for example, if through generative AI and the summarizing of the phone call or accepting of the complaint that the company receives it's cataloged incorrectly, the results would have a huge impact on

what we know.

So some of those examples I could think of is chest pain versus heartburn. I think everybody here understands the difference if something causes chest pain versus heartburn as to what that difference would be to a medical professional, or confusion versus memory loss. You know, confusion usually means a delirium red flag to something acute, where memory loss might mean something more chronic, and those distinctions would have huge ramifications in litigation as to what somebody knew or didn't know.

And if we don't get scrutiny into these sort of simple machines, which, you know, one could argue could be deemed as a simple scientific machine since this is part of the company's typical causal vigilance or their science teams, they could have a very disproportionate effect, and it would prevent the scrutiny that litigation needs to help ensure that it results in fairness, justness, and efficiency.

There are other examples I can point to as well, but I feel for today, in the time I have, this is what I can show, but, in conclusion, I wanted to thank the Committee for this opportunity to address you, and I hope the points I brought up will spur additional conversation and lead to a rule that

protects the litigation in this country, which I'm very happy and appreciative that the members of this Committee are trying to do and I think will ultimately do, but the rule as written right now I don't believe accomplishes those very noble goals.

I'm available for questions now.

CHAIR FURMAN: Thank you, Mr. Abramowitz. I have one question which responds more to something that is in your written submission, namely about discovery. It's a point that other witnesses today have also made, and so, to the extent that they're listening, they could also address this.

You know, one option would be to amend the Rules of Civil and Criminal Procedure, but those committees have not yet pursued that. In the alternative, I would love your thoughts if we were to incorporate into the rule some sort of notice requirement akin to the requirement in Rule 404. That would at least ensure that the proponent was required to give some form of notice and would sort of, you know, force disclosure perhaps. Do you think that would address the concern that you've raised?

MR. ABRAMOWITZ: In the exact situation that I laid out, no. The problem is that this would have happened prior to litigation ever starting, so it's

using something that would have been built and decisions that were made well before, so, for example, a better place for this to be disclosed hypothetically would be within a Rule 26(a) disclosure, where you have machine-generated evidence that is pertinent to this litigation, would be the more akin place to do that. The problem is, if it's too far into the litigation process, the efficiency that has been driven into and brought up many times, not just today but across the board in litigation in this country, would actually take away from that.

Also, I know, in the comments in the proposed rule, it talks about how, you know, disclosures at the same time as expert witnesses. I also think that's a bit too late to do this, and some of the discovery is vast. I mean, if, for example, In re Hair Relaxer Litigation, certain new databases were being discovered throughout litigation and it got to the point that as, you know, Judge Rowland, rightfully so, wanted this case to keep moving, but it cut out our ability to do certain discovery into those sort of areas.

And, you know, yourself being a trial judge, when you set your date for trial, you don't want to move it and understandably so because of all the work

and scheduling that's gone into it if something comes up too late where the parties do not have the time to adequately investigate through discovery, through motion practice, hopefully not, obviously, but if it's needed to deal with those issues.

CHAIR FURMAN: All right. Thank you.

Professor Capra? You're on mute.

PROF. CAPRA: Sorry. The problem that you addressed in your oral testimony, the reason you're saying that 707 doesn't apply is because it's actually lay witness testimony, it's not expert testimony. Is that what you're saying?

MR. ABRAMOWITZ: Correct.

PROF. CAPRA: So how would you deal with that in the absence of a rule?

MR. ABRAMOWITZ: Right now --

PROF. CAPRA: Like, on the current Federal Rules of Evidence, how are you going to deal with that?

MR. ABRAMOWITZ: That's why I need a rule, Professor Capra. I understand that.

PROF. CAPRA: Is this a problem that can't be figured out under -- I mean, it's just lay witness testimony.

MR. ABRAMOWITZ: No, it can be figured out.

It can be figured out right now. A lot of litigation goes into this. Right now, how it works out, you take, you know, the head of, the director of pharmacovigilance. You could probably use a 30(b)(6) to get in there as well to say, look, who is the most knowledgeable to understand the filters or settings used within that answering machine because that's -- if I'm on the defense, it's my client, I'm saying this is part of our scientific process of collecting and reviewing scientific issues, so I would have a 30(b)(6) to dig into the filters and decisions that the party or, in this case, the company made in setting up the system for collecting, cataloging this information. Right now --

PROF. CAPRA: If it's tantamount to lay witness testimony, then you would exclude it because it's unhelpful under Rule 701, right?

MR. ABRAMOWITZ: Correct, except that this is helpful because it goes to knowledge, and the problem becomes that this is at the heart of the case, right? Post-market surveillance shows, hey, you know, did you know this was a foreseeable use? Did you know that the harm was happening? It is very important and in the FDA regulatory world, I mean, signaling, understanding when the signals of a medical issue is

coming up are very, very pertinent to the cases, so they would come in through heavy discovery right now, but, right now, we have a human being in a chair who can answer why we did what we did. Here's a standard operating procedure that we worked within.

The problem becomes if that director now says, look, I printed out the information from the answering machine and I gave it up the chain, but no one knows why the answering machine did what it did, and we have to make sure it doesn't come in without the proper rules and guardrails on that.

A lot of times judges don't also have the appetite or the time to allow for the 30(b)(6)s and the technical testimony that's needed without guidance because time is valuable. Everybody only has limited time, and guidance through a rule to help push that properly would be very helpful.

CHAIR FURMAN: All right. Thank you very much, Mr. Abramowitz. Seeing no other questions and 10 minutes having elapsed, we will move to the next witness.

MR. ABRAMOWITZ: Thank you.

CHAIR FURMAN: Thank you for your testimony and your written submission.

So, Christina Cambo, I see you're on. If

you can put your camera on, you may proceed.

MS. CAMBO: Good morning. Thank you so much for the opportunity to talk and speak with you on this very important subject today. My name is Christina Cambo of Cambo Ferry, which is an insurance defense firm with offices throughout the State of Florida. I have been practicing for 15 years, and I serve on the Board of Directors for the Florida Defense Lawyers Association, and I'm also a member of DRI's Federal Task Force Committee.

Right now, the U.S. has no guardrails or brakes when it comes to AI, so I am very grateful that the Rules Committee is being proactive regarding AI and its expected evidentiary impact. As we work together to build the best framework to deal with this new class of evidence, I have three main concerns with the rule as it is currently drafted.

The first concern is that Rule 707 won't exist in a vacuum. It will likely impact other evidence rules and it may indirectly expand discovery obligations, so we should be approaching this holistically.

Secondly, I worry that if we are waiting to address AI-specific evidence at the Chapter 700 stage that it is too late in the game to effectively deal

with this type of evidence.

And, lastly, because we're dealing with an entirely new class of evidence that we have never seen before, I am concerned about whether the Daubert standard is stringent enough to allow the courts to sufficiently gatekeep. I've spoken with colleagues on both sides of the aisle and we all share the same concern.

With regard to the first point, the Rules of Evidence, of course, are designed to be interconnected, and, right now, we're looking at a standalone rule on AI, but there are other rules that could act as effectively to operate as "escape hatches" to allow litigants to circumvent the heightened reliability and authentication requirements of Rule 707. For instance, Rule 703 allows an expert to base an opinion on facts or data in the case if that expert has been made aware of or has otherwise personally observed that fact or data, so if the expert would reasonably rely on those kinds of fact or data in forming an opinion, then those facts and that data set does not need to be admissible in order for the opinion to be admitted.

So, right now, a radiologist relying on an AI diagnostic tool to reach his or her conclusions

could use the current framework of Rule 703 to bypass the higher standard of Rule 707. There's nothing that I could tell anyway within the proposed Rule 707 that would override Rule 703 in this scenario. I think there is a foundational difference between an output versus an opinion, and as written, I can't see how the rule takes that into account, so I worry that something like 703 could be an easy workaround for litigants wanting to get around the heightened standard.

Rule 901, I know this has come up before, but, for instance, a party relying on an AI calculated risk score for stroke likelihood or other diagnostic tools could argue that the output is automated, it does not involve any human assessment at all and therefore would be admissible.

Turning to the Daubert standard itself, when we're looking at the way the rule is drafted, this rule pertains to machine-generated evidence, which is, as far as I can tell, an undefined term. There's nothing within the text of the rule that defines the term, and I don't see any reference to it or any other definition in other rules of civil procedure or evidence, and without a scientific definition or without a specific definition, sorry, who's to say

that an MRI is not machine-generated evidence or an EKG?

So my suggestion would be to specifically state that this rule applies to artificial intelligence. Daubert was designed to address human experts explaining scientific methodologies, not opaque, quickly changing, and exploitable systems like AI, so Daubert focuses on whether a method is scientifically reliable, not whether a piece of digital media is fabricated or authentic, and so, because Daubert is focusing on methodologies used by human experts to arrive at their conclusion, it relies on transparency and the scientific method and testable standards, and the problem is that there is no universally accepted standard for evaluating machine-generated evidence. Even the developers of these LLMs cannot tell you the error rate for the outputs or how AI arrives at these conclusions.

There's just simply no causal clear account for how these outputs are produced or generated, so I believe that the analysis for this type of evidence has to be more granular. We need access to the underlying data, the coding, validation studies because soon enough it will be nearly impossible to discern the difference between an AI-generated video

and a real one.

Right now, using the current framework of AI, I could just give ChatGPT a photo of me and I could record a very innocuous sentence like today is January 29, 2026, and then the AI would be able to generate an entire podcast using my actual image, my actual voice and likeness, to talk about all kinds of things that did not occur, I did not say, but it would be impossible to discern with the naked eye whether or not it's real.

So, when we're evaluating this type of evidence, I think we should be looking at not just it looks like them, but having technical evidence describing these systems, showing that it produces reliable results, seeing what versions of the AI were used, were there updates to the system, the model, what does the system's architecture look like, all of this should be part of disclosure requirements.

And because Daubert presumes a human expert can explain the theory and methodology, that simply doesn't necessarily translate to an AI system, where there are black boxes, where the developers don't even know and cannot give a clear account of how these outputs are produced.

So, in short, AI is a tremendously powerful

tool, but, ultimately, machines cannot be held accountable, so we need to use the framework of the Rules of Evidence and Procedure as a whole to act as checks and balances throughout the litigation in order to effectively weed out the fabricated, the deep fakes, versus the truly helpful AI-generated evidence.

CHAIR FURMAN: Thank you. Could you address the same question that I posed to Mr. Abramowitz? That is to say, unless there's a companion amendment to the Federal Rules of Civil and Criminal Procedure requiring disclosure, do you think a notice provision in our rule would be at least a step in the right direction?

MS. CAMBO: I think that would be a really helpful thing.

CHAIR FURMAN: All right. Jim Cooney, you want to -- I'll call on you first.

MR. COONEY: Thanks, and I may be stealing what Professor Capra's going to get at, but everything I heard in there really, I think, justifies the approach that the Committee's taken in terms of requiring machine testimony or opinion, however you want to put it, if offered by a human being, to be subject to the same rules, so all the complaints I heard about we need to get into the algorithms and the

underlying would absolutely apply under this rule because, if it's being offered without expert testimony, but if an expert was offering it, you would be able to delve into all those things.

You'd be able to delve into all those things in the rule. In fact, that's the point of the rule, is that we want to take machine opinions and make them subject to the same kind of scrutiny that expert opinions are subject to. So I didn't quite understand how no rule, you know, helps, and this rule doesn't get to where you want to get to.

MS. CAMBO: I guess what I'm trying to address is how the Daubert standard, it relies on purely humans to explain methodologies, and the AI-generated evidence is something that humans are unlikely to be able to explain in the same way that they're able to explain how they reach their methodologies in reaching their opinions as an expert. This is because, again, the software developers do not even know. They can't even explain how it's done, so it leads to concerns about how Daubert will be effective in weeding out this class of evidence when even the own developers, the owners of these AI companies, don't even understand themselves how these outputs are generated, what the error rates are, the

biases, the algorithmic processes used, and so it just needs to be more granular.

CHAIR FURMAN: All right. Dan, quick question so we can move on.

PROF. CAPRA: I just on the 703 question, I guess I just don't follow because I guess what you're trying to say is that you're going to get this information in through 703 basically because it would be the basis of the expert's opinion, but that's going to be prohibited by 703 because 703 has a balancing test that doesn't allow basis to get in under those circumstances, I would think, and I just don't see how evidence that wouldn't qualify under 702 somehow becomes admissible under 703. I mean, 702 and 703, you have to satisfy both. You know, if you haven't satisfied Daubert, you can't say, yeah, but I satisfied 703. That's not the way the system works.

MS. CAMBO: But, with 703, would the radiologist in my example be required to even disclose that they use an AI diagnostic tool? Would they even have to say to share that information at all? Why doesn't it work?

PROF. CAPRA: Then it doesn't it get, so -- but it doesn't get it in, so I guess I didn't know what the problem was there, right?

MS. CAMBO: So --

PROF. CAPRA: It doesn't get into evidence.

MS. CAMBO: So, right now --

CHAIR FURMAN: I think, unfortunately, we're going to have to --

PROF. CAPRA: I'm sorry. I didn't mean to take up too much time.

CHAIR FURMAN: That's okay, but I think we'll have to leave it there. Thank you very much, Ms. Cambo, and appreciate your written submission and your testimony.

William Carlucci is next. Mr. Carlucci?

MR. CARLUCCI: Yes. Good morning and thank you for your time here today. William Carlucci, an attorney in Barnes & Thornburg's New Jersey office. My comments today, time permitting, will focus on two main themes, the first being the difficulty in grafting the 702 analysis onto AI or machine-generated opinions, and second would be the ambiguity regarding the applicable burdens and what sufficient evidence must be adduced to support the admission of machine-generated opinions.

First, I'd like to address the grafting of 702, which regards testimonial expert opinions, onto machine-generated evidence, which is inherently non-

testimonial. Under 702(a), the analysis begins with looking to the expert's scientific, technical, or other specialized knowledge. However, in the context of machine-generated evidence, particularly through LLMs, they are inherently non-specialized. They're tools of general knowledge. That's what makes them widely accessible and inherently useful to the general public, is that they are not specialized, so looking under this analysis, it's not entirely clear how that would apply to a 707 analysis given that these tools are not specialized. They don't have the technical knowledge of a traditional expert.

Next, under 702(b) and (c), the testimony must be based on sufficient facts or data and the opinion must be the application of reliable principles and methods. However, it's not clear what the "testimony" would be under 707. Is it merely the opinion of the machine? Is it the entire output of the machine? By way of example, if a proponent of the evidence uses an AI tool to summarize lengthy medical records and, as part of that summary, the machine puts in there an opinion that, you know, given the diagnosis of the plaintiff, you know, seeing a doctor 12 times in six months is excessive, under that, is the entire summary and that last sentence opinion, is

that the testimony that must be analyzed? Is it just the last sentence, or does it also include the testimony of the witness on the stand through whom the proponent is seeking to introduce this machine-generated opinion?

And last, under 702(d), that requires that the expert's opinion reflect a reliable application of the principles and methods to the facts, which, as Ms. Cambo just said, even experts in this field aren't entirely sure how these AI algorithms are applied, so even if experts in the field can't testify to the reliable application of the AI algorithms, then it's not clear how any analysis under 707 would lead to the admission of any machine-generated opinion. If the goal is to have an exclusion of machine-generated opinion categorically, then that would be a different conversation than trying to create a Rule 707 that has a backdoor way of excluding all machine-generated opinions.

Then the second theme that I'd like to address is the silence on the burden of proof and the requisite showing under Rule 707. Rule 707 adopts merely 702 subsections (a) through (d), not the prefatory language in Rule 707, so it's not clear whether 707 is meant to incorporate the 2023

amendments reinforcing the gatekeeping function of the court or is there a lower standard or burden of proof that must be shown to introduce the machine-generated opinion.

And then, once that standard is identified, it's not clear what showing is required to meet that standard. Will it require merely an affidavit from an attorney? Will it require an expert in AI to satisfy these requirements? Will it require the programmer of that specific AI tool? Because, traditionally, under a 702 analysis, you look at the expert's report, their education, their, you know, potentially deposition testimony, things of that nature, where, under 707, the AI tool or the machine generating this output doesn't have those categories that are traditionally looked at in this analysis.

Then, looking at what would need to be introduced to support this, looking at the specialized knowledge and data that's relied upon, LLMs use vast troves of training data that would fill multiple, multiple libraries, so being able to assess whether sufficient facts or data are relied upon would cause financial and non-financial burdens on both courts and the litigants dealing with confidential information, privilege logs, things of that nature, particularly

since the creators of these AI tools and these LLMs aren't going to want to disclose their training data, as we've seen through lawsuits regarding copyright infringement and things of that nature related to AI tools. So there's a whole host of issues and ambiguities in 707 that would have real-world implications that aren't clear from the proposed current text of Rule 707.

CHAIR FURMAN: All right. Let me stop you, Mr. Carlucci. I don't know if you've read the written submissions of other witnesses. Your first point about the awkward fit of the 702(a) through (d) standards to machines is well taken. It's something the Committee has been, you know, cognizant of from the get-go and just had at least the initial view that the familiarity of those standards, you know, outweighed the disadvantages, but Professor Roth in her memo, and, again, I don't know if you've read it, raises the same issue and suggests essentially actually including variations on the language from 702(a) through (d) in Rule 707 itself.

That is to say, rather than just incorporating it by reference, kind of adapting the language in a way that would be, you know, less awkward, omitting the reference to knowledge and

testimony. Any thoughts about that? And perhaps, you know, even in doing so, it could include the prefatory, you know, sort of preponderance, more likely than not, component of Rule 702. Would that address your concerns?

MR. CARLUCCI: I think it would be a start, but also, at this stage, it isn't clear how proponents of machine-generated opinion testimony, how that's going to be attempted to be used in court, so I feel, at this stage, while I appreciate the proactive nature, it feels almost as if 707 is a solution in search of a problem rather than addressing a real-world impact that courts are having to address currently, so I think, without that baseline knowledge of how is machine-generated evidence going to be used, it's not clear what a best solution would be.

CHAIR FURMAN: Okay. Dan?

PROF. CAPRA: Every civil lawyer that we've heard says we're a solution in search of a problem. Every criminal lawyer that we hear from say that this is happening today. So I guess that's all I would say. With respect to the burden of proof, I mean, is it going to be that every amendment that we have after 2023 has to add more likely than not to it?

MR. CARLUCCI: I think it was just from the

text of Rule 707, it only specifically incorporates (a) through (d) rather than saying would be subject to a 702 analysis, it just says subject to 702(a) through (d), so I think, through that wording, it's ambiguous whether it is meant to also include that more likely than not language from 2023.

PROF. CAPRA: But I guess my point is that it inherently includes it without even having to refer to it. We made the emphasis because of the problems that were occurring under 702, but there's no need to think that that would happen in 707, but at any rate, it's an interesting question as to whether you have to do that with every single amendment you do now that you've done that in 2023.

MR. CARLUCCI: I think just to reduce any of that ambiguity, if you want, it would be better to just say subject to 702 rather than specifically calling out (a) through (d).

PROF. CAPRA: Well, the problem with that then is you would complain about the fact that the machine would have to be qualified, and that's why we avoided that initial thing, and so we'd hear from you the next time around.

CHAIR FURMAN: All right.

MR. CARLUCCI: Might be not be the worst

thing.

CHAIR FURMAN: We welcome all testimony and comments. Any other questions for Mr. Carlucci?

(No response.)

CHAIR FURMAN: All right. Thank you very much, Mr. Carlucci. Appreciate your written and oral submissions.

MR. CARLUCCI: Thank you.

CHAIR FURMAN: Before I call on the next witness, I think it's a little awkward to interrupt somebody on Teams, so I think what I'm going to do going forward for all the witnesses who are on here is, at approximately the five-minute mark, just to give you a heads up, I'm going to use the Raise Hand feature myself just to signal to you that you should wrap up so that we can leave time for questions.

With that, I'll call on Robert Friedman to turn your camera on and proceed.

MR. FRIEDMAN: Thank you. Good morning, everyone. My name is, indeed, Robert Friedman. I'm a litigation partner at King & Spalding, and I thank the Committee for the opportunity to testify about Rule 707. Over my career, I've been fortunate to practice in many federal courts in both individual or single-plaintiff suits, as well as some of the largest multi-

district litigations, and so my primary comment is based more on years of fighting tactical battles rather than scholarly legal ones.

As many have mentioned, proposed Rule 707 rightly seeks to ensure reliability for machine opinions, and while it correctly identifies what I think is a gap in the rules, its current form creates more problems, I think, than it solves, and I do agree with my colleagues who have previously urged the Committee to refine the proposal before enactment, but even if the Committee were to solve all the substantive challenges that have been raised, I would nevertheless suggest that the Committee hold off on enactment until what I think has already been recognized today a little bit as the notice issue can be resolved.

As drafted, proposed Rule 707 creates what I think is a new pathway for admitting machine opinions without an expert witness, but by failing to provide a corresponding procedural framework for disclosure, it opens a vacuum that will generate inconsistency, inefficiency, and unfairness. You know, I'm hearing in the discussion so far today an opening for a notice provision it sounds like within the new rule, so, hopefully, my comments from here will be more

informative on the how notice is given, and I'll only briefly address the why.

The Committee note to propose Rule 707 acknowledges that Rule 702's notice principles that would be applicable to expert opinions and reports should apply to machine opinions, but it stops there. It doesn't specify disclosure content, timing, or format. Now, ideally, I think it's been noted today this would be done through a coordinated amendment to the Federal Rules of Civil Procedure, and I understand maybe there's already been a little bit of discussion about that within that body. Under those rules right now under Rule 26(a)(2), robust and early disclosures are tied to expert witnesses, but if a party doesn't use a human expert under Rule 707, then those expert disclosure requirements of 702 do not clearly apply.

Now, taking a step back, why is this express disclosure required and so important for opinions? It's because opinion evidence is typically generated for and during the litigation process. It doesn't exist until a lawyer decides to create it, and that same can and will be true of machine opinions. They may not exist until a lawyer decides to create it in preparation for trial, and just like Rule 702 evidence, clear disclosure requirements are needed. I

think this is the distinction between opinion evidence and the example that Mr. Abramowitz raised in his remarks.

The use of a machine to conduct drug safety surveillance as part of a company's business is known to litigants and can be explored in discovery if there's liability theories that are attached to it, but now, if a drug company sought to use that same tool for litigation purposes to generate an opinion about what it could or couldn't have done or should or shouldn't have identified as a risk early on, that would be different. That would raise new concerns about disclosure.

So, in the absence of a clear disclosure rule, courts and parties will likely fall into one of a few, I think, inconsistent approaches. First, of course, some will just treat machine opinions or machine evidence as non-expert exhibits, try to use Rule 902 authentication procedures, and in that instance, they may argue that they only need to give "reasonable written notice," argue that reliability goes to the weight of the evidence, and, as a practical matter, that means this evidence would probably have to be disclosed just before the end of discovery in most cases, which would lead to disputes,

frustrate the schedule that the court has been working to follow, introduce a whole other level potentially of hearings and discovery, and so could be problematic.

The second way, some judges will analogize to Rule 702, as the rule, the notes in the rule suggest, and so they'll do this through Rule 16 case management orders and impose expert-like disclosure requirements for machine opinions. Some will require early disclosure of the model identity, the configuration, validation, error rates, but others might not either because local practice is minimalist or the need for that in a Rule 16 order is not flagged early enough in the case, and so the result will be uneven requirements across courts, encouraging potentially forum shopping, raising a risk of Rule 37 sanction battles if disclosures aren't made when someone thinks they should be made, and all that's due to mismatched expectations about disclosure requirements.

And so, finally, what we'll see, I think, is a discovery-driven approach where parties simply will early on serve requests, broad requests, for, we'll just call it Rule 707-type evidence, which could invite more motion practice over whether requests are

premature, overbroad, or burdensome, but it's also problematic because, as I mentioned earlier, the evidence might not even exist at the time of the request, and now the responding party can think about delaying the creation of evidence in a tactical way to limit the amount of time that maybe the other side has to respond to it, which is a problem here because, obviously, the response in these cases, I say these cases with this type of evidence may require other expert testimony or other work to respond to it.

CHAIR FURMAN: All right.

MR. FRIEDMAN: So --

CHAIR FURMAN: Thank you. Mr. Friedman --

MR. FRIEDMAN: Yeah.

CHAIR FURMAN: -- let me cut you off --

MR. FRIEDMAN: Sure.

CHAIR FURMAN: -- just to leave time for questions, and Dan appears to have a question, so you may proceed.

PROF. CAPRA: Is the solution then as easy as pulling a 707 on the discovery rules? In other words, you write a rule which says that, you know, if you're introducing whatever we call it, you know, machine-generated, machine-learning evidence, you treat it just like you would expert opinion and,

therefore, everything gets folded under the existing rules on experts' opinions? And, by the way, when you speak of discovery, there's two systems, right? There's the civil rules and the criminal rules, so the idea that this Committee, you know, get together with the civil rules and write something up, we're really talking about three committees, not two, but anyway, is the solution that easy?

MR. FRIEDMAN: I think it is. I mean, I think, yeah. I think just expressly putting Rule 707 evidence under the same sort of disclosure framework as Rule 702 and making, you know, sort of the how to determine whether machine-generated evidence is opinion and not opinion will go a long way to solving this, yeah.

PROF. CAPRA: Okay. Thanks.

CHAIR FURMAN: Any other -- yep, John Siffert?

MR. SIFFERT: Yeah. You are introducing the idea that we're not only dealing with output or output that has evaluation in it by virtue of having been prompted, machine having been prompted, but also effectively attorney work product in anticipation of the trial, and am I hearing that you're saying that there ought to be a distinction in the rule between

the second and the third, between that opinion evidence which is essentially prepared for trial as opposed to that which pre-existed?

MR. FRIEDMAN: Well, my comments are kind of laser-focused on the use of a machine to generate opinion evidence that would be the same type of evidence that an expert would give under Rule 702, so I think the way I would analyze it, analogies are dangerous, is that the sort of work product issues would be the same as if you were -- I mean, if you're asking a machine to do something in lieu of you asking a human to do it, you know, there are going to be similar -- the work product protections which parties often stipulate around at least in the civil context should be fairly analogous. Is that answering your question? I'm not sure if I have.

MR. SIFFERT: Well, my point is that most of this rule, I think, was originally designed to deal with AI-type evidence that exists but not created for trial. You're raising --

MR. FRIEDMAN: Yes.

MR. SIFFERT: Most of your comments have to do with that AI-generated or, pardon me, Dan, the machine-generated output, which is generated by the lawyers.

MR. FRIEDMAN: Yeah, I think that's right, I mean, because, and others have raised the concern about suddenly holding machine-generated evidence that we've -- you know, lots and lots and lots of data is generated by companies and people every day that has been admitted into courts for a long time and not foisting some new standard onto that evidence, and so, yeah, I am, for purposes of my comments, focusing on the -- we've never applied Rule 702. I mean, well, I'm not going to say never, but I can't recall, you know, someone raising a Rule 702 challenge to the accounting output of a company in the past, so I interpreted this Rule 707 to incorporate 702 to be addressing an analogous use of machines the way humans are used under Rule 702.

CHAIR FURMAN: All right. Thank you.

MR. SIFFERT: Well, facial recognition is something that happens all the time and it's not generated for trial, it's generated for, you know, who's coming into the store.

CHAIR FURMAN: All right. Thank you. Yeah, John, we'll give you the final word there.

Mr. Friedman, thank you for your testimony and your written submission.

We'll proceed with the next witness, Stephen

Herman.

MR. HERMAN: Good morning. Thank you for the opportunity to appear. I echo many of the other comments, but my principal concern is this. I was, among other things, one of the lead counsel in the BP oil spill litigation, and on a drilling vessel like the Deepwater Horizon, you have a very sophisticated GPS system that maritime workers use on these thrusters to keep the drilling rig, which is a few thousand feet above the sea floor, "on station" over where they're drilling for oil. At the same time, you also have a lot of monitors that are gauges that are read by people for down-hole pressure so that people can try to determine whether there's a kick, either because there's very unusually high pressure or unusually low pressure.

Now the workers that are actually doing the monitoring and relying on this information probably don't know exactly how these machines work, what the "methodology" is, what the error rate is, if any, what training data the technology is based on, or the extent to which the output has been validated, and perhaps and hopefully, this type of evidence would come in under 602 or 701.

However, I could easily see the party for

whom this evidence isn't favorable, it could be either party, and, incidentally, I don't think this would happen in my experience until the very end of the case management process, shortly before trial, where people are objecting to exhibits on an exhibit list, they say, well, wait a second, these aren't facts, these are opinions. If you asked a human witness specifically where was the vessel at this exact moment in time or what was the down-hole pressure at this particular time, that would require scientific or technical knowledge to answer. In cases like Deepwater Horizon, where there's so much at stake, it's probably not that big of a deal. There's going to be tons of experts testifying for everybody and those experts can try to get the evidence in or refute it or whatever.

But what if we're talking about just a hundred thousand dollar Jones Act case? Now you've got to go and you've got to hire an expert, and then that expert would presumably be subject to attack under 702 because, arguably, he or she isn't sufficiently qualified, and all of this is wholly collateral to the proceeding, and not only would the parties have to spend a lot of time and money on this collateral issue, but the court is going to have to

spend a lot of time considering and resolving the issue just to get in evidence that one of the parties and its employees routinely utilize and rely upon.

That's my main concern. I've expressed some others in my written comments, and I echo the comments of some of the other people that have testified and submitted comments, and I'm happy to answer any questions. Thank you.

CHAIR FURMAN: Yes, Jim Cooney?

MR. COONEY: So the example you bring, the significance of that output isn't whether or not it's actually true, it's what the employees knew and how they reacted to it, but I do think it brings up a larger point that the line we're trying to distinguish between is simply machine-generated data versus a qualitative decision-making process that a machine might have to go through that renders an opinion and it be the difference between the pressure gauge in modern DNA analysis in which the machining is beginning to make decisions about background noise, what's secondary and what's not.

So help me understand how we can draw a line between those two things? One is plainly opinion and the other is plainly data.

MR. HERMAN: Well, I think it's very

difficult to do, particularly now without a lot of experience in dealing with these issues, but I would say that no, many cases, what the actual pressure would be or where the vessel was might be in and of itself relevant and material. It might not be the major issue in the case, but it might be something that has relevance and may be important, and, right now, I would just get that in by cross-examining the employee or a 30(b)(6) witness, or if it was my evidence, I would get it in through a lay witness, and now you're at least potentially, depending on whether you're able to define the scope in the way that you're talking about, creating a collateral process where someone could at least argue that the other side's got to go out and hire an expert to get it in.

CHAIR FURMAN: John Siffert?

MR. SIFFERT: But following up, aren't you saying that, as Jim was pointing out, that at one point, what you're offering into evidence is the fact that it was said, the fact that that was the output, the fact that that was what the employee heard? You independently would have to prove through non-hearsay that that was the truth. So I'm not quite sure I understand why this adds greater burden.

MR. HERMAN: Because, if it's part of the

defendants, and I'll just take the point of view of the plaintiff, although it doesn't necessarily have to be, but if it's something that the employees relied on, a printout or whatever it is, it's basically the business records of the company or something that's validated by the witness. Now the jury can reject that at the end of the day, or whoever wants to challenge the evidence can come in with an expert and say, well, just because that's what the gauge said or just because that's what the worker saw, that doesn't mean that that's the location.

And I can tell you all the reasons why that's unreliable, et cetera, but just to get something routinely in, just to establish the facts of what occurred, not the mental impression of the worker, that may be relevant or may not, but just the underlying facts just because it's machine-generated, now, if someone wants to maybe spend time, money, and effort and make the court spend time to review that stuff, then, arguably, under this rule, they would be able to make me do that. That seems very wasteful and unnecessary.

CHAIR FURMAN: Thank you.

Any further questions for Mr. Herman?

(No response.)

CHAIR FURMAN: All right. Thank you very much, Mr. Herman. Appreciate your testimony and comments.

Our next witness, Melissa Kotulski, wasn't able to join us, so we will proceed to the one after her. Just giving fair warning, depending on where we stand, I may call an audible and move Mr. Redgrave, who was scheduled for after the break, to before our break, and I'll see where things stand, but we will proceed with David -- forgive me if I mispronounce this -- Nagdeman.

MR. NAGDEMAN: David Nagdeman. Thank you, Honorable Chairman and Committee members. My name is David Nagdeman. I am a partner at Langer, Grogan & Diver in Philadelphia, a boutique consumer protection and antitrust firm. I also teach remedies at Temple Law, and I'm appearing before you today as a representative of the National Association of Consumer Advocates, or NACA. NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. Thank you for the opportunity today to testify in front of the Committee about proposed Rule 707.

You know, as consumer advocates, we

recognize the fast-developing proliferation of machine-generated and particularly large language model generated materials, as well as issues with their reliability and issues with their capacity to be instruments of mistakes and of fraud. You know, for many years, we've been fighting issues over credit reporting, over discriminatory biases in loan decisioning software, and so we sort of see firsthand how often machine-generated materials can be unreliable, can express biases, and so we agree with the Committee. We share the Committee's regard that this information, when enters into court records, into the evidentiary record, should be reliable.

However, we are concerned with Rule 707 as it's presently drafted. In my written testimony, I proposed three points and I'll try to address all three of those briefly here. The first point is something that has been addressed repeatedly by my colleagues and I think it's also been raised here by members of the Committee in that machine-generated as it currently stands is sort of broad and undefined. It's not clear whether it's just applying to information for outputs that are generated after litigation has commenced, whether it's also applicable to machine-generated materials that were in existence

at the time of whatever alleged wrongdoings occurred, and we believe this over-inclusive rule creates many problems that my colleagues have noted.

And we also believe that up to the present at least, we think in the civil spaces, one won't pretend to speak for the criminal spaces, that courts, federal District Courts, have been handling these evidentiary issues with the rules available to them, whether that's through 702, whether that's through lay witness testimony and the use of what they're seeing in their machines, and so we don't believe at least until the rule is refined to define those distinct categories that it should go forward, and we're also concerned in terms of those definitions that the rule, that the Committee report suggests that it's really targeted at large language model based outputs, and at present, again, it just sort of over-inclusively includes any sort of machine-generated materials.

On the second point, we are concerned, particularly when it comes to materials that are often reported on by experts in the report, suggested loss causation analysis, various forms of copyright analysis. Those are traditionally matters that are presented by experts, and those various assumptions that the experts bring into their models can be tested

through rigorous cross-examination because the experts are the ones who develop the model. If you put a lay witness on who's going to speak about what happened when they pushed the button that said was there loss causation here, was there a copyright violation here, they're not going to have access to those data points as to, you know, what else was going on in markets that might correlate with a loss causation analysis, why did you choose to privilege certain assumptions rather than others.

And I think that kind of gets to our third point, which we're concerned with the suggested forms of testing the reliability of LLM-generated opinions, that there wouldn't be capacity to test their reliability by viewing their code, their training data. As other witnesses have testified, that's highly proprietary information. It's a huge amount of information. There would, no doubt, be extensive additional discovery and litigation battles, motion practice over what is sort of fully transparent and reliable and relying on judges who aren't necessarily experts in these technological spaces making these calls.

Again, while we appreciate the Committee's efforts to address large language model, in particular

information, as it's coming to be more prevalent in society and in the courts, we do think that, at present, the civil rule at least for purposes of civil litigation, the Federal Rules of Evidence are sufficient at present, and to the extent that the Committee does move forward on Rule 707, we do request that the Committee try to clarify precisely what evidence it's being applied to.

CHAIR FURMAN: Thank you. Quick question. The current version of the note sort of makes, I think, pretty clear that in general, you know, to meet the requirements of the rule, you may require an expert, you know, it may require expert testimony. I wonder what your thoughts are with respect to sort of moving that from the note to the rule itself and saying something to that effect, that, you know, usually this would require actually proffering an expert to explain the reliability of the tool even if an expert wouldn't testify at trial. What are your thoughts about that?

MR. NAGDEMAN: I mean, I certainly would be in favor of requiring expert testimony, some sort of hearing to determine that reliability, but I think we are also concerned, you know, whether it's Seventh Amendment, whether it's sort of more traditional

understandings of common law, that the jurors are fact finders, and Rule 702 in particular, courts, when they apply a Daubert challenge, understand that they're just doing a first step. They're making sure it's reliable enough to go before the jury, but the jury still needs to fulfill a role in the fact-finding process to weigh the credibility, to weigh the veracity of that model and the assumptions that went into it, so while it might address that first issue in terms of the initial reliability, it doesn't sort of solve the lack of the jury's participation in that.

CHAIR FURMAN: Thank you. I'm going to go in reverse order, John Siffert. Remember to unmute.

MR. SIFFERT: Yeah, I tried to unmute it. First question is with respect to the definition. I've been trying to come up with something that addresses everybody's concern, and the formulation that I keep coming back to is that there's a distinction between pure output, which is aggregated and then spit back, as opposed to something that's the result of prompting, so prompted output as opposed to output. Does that help in any way?

MR. NAGDEMAN: You know, I think there's some technical sort of issues that you might get into there because, when you write a program, when you

write a script, in theory, you're prompting it, and so all you're talking about when you're talking about, okay, is it something that's viable for prompting is a machine that has a user interface that permits the user to kind of, you know, toy with the machine, so it's, I think, kind of a spectrum where the interface of the prompting is happening, so I don't necessarily --

MR. SIFFERT: This is trying to address the thermometer, not using thermometer as an example, which a lot of people don't like, and I'm thinking that's an example of an unprompted output.

MR. NAGDEMAN: I mean, I think you're getting closer to sort of how large language model systems are used, and so I think I appreciate that direction that trying to target a rule at that is sort of targeted the way I'm understanding, you know, large language models as sort of really something that provides lay individuals access to some of these algorithms and some of these more powerful computing processes.

MR. SIFFERT: And very briefly, a second point is that you surmise that the computer might generate an opinion that something is a copyright violation. That might transcend what I think is

anticipated, and I think the way this is drafted, that would require -- that's an ultimate fact.

MR. NAGDEMAN: I mean, I may have been being glib, but the copyright issues were sort of the two examples, and I suppose what the machine might generate, and, you know, please correct me if I'm wrong, would be that there's a certain amount of similarity --

MR. SIFFERT: Yeah, right.

MR. NAGDEMAN: -- you know, a percentage of similarity between these two things --

MR. SIFFERT: Right.

MR. NAGDEMAN: -- but there's still a number of assumptions that are going to go into what's making this more similar. Is it the colors you're choosing? When it comes to code, you know, there's only so many functions that a computer program can utilize. Is it because you're using the same functions? Is it because the text is actually exactly similar? It's important to understand precisely what those assumptions are that would increase the percentage of similarity there between those, the lawyers.

MR. SIFFERT: I have more, but I have to yield to Dan.

CHAIR FURMAN: All right. Dan?

PROF. CAPRA: I have a couple, but instead of machine-generated evidence, what do you think about information generated by a process of artificial intelligence as controlling the rule?

MR. NAGDEMAN: I think that, again, gets closer to where we would need to see it or where we'd appreciate seeing it. You know, I'm hesitant to call it artificial intelligence. I think these are large language models that have different kinds of outputs, so, you know, I would recommend that the Committee be precise and consult a technical expert in terms of how to define that. That's sort of meeting more contemporary technical definitions because I do think this rule is trying to get into very weedy technical areas with broad brushes, which is, you know, what courts do every day.

PROF. CAPRA: Right.

MR. NAGDEMAN: But, given sort of the width, the breadth of the way that the definition can be applied at each of these levels, I think we do need to be careful about those definitions.

CHAIR FURMAN: All right. Thank you very much, Mr. Nagdeman. Appreciate it.

MR. NAGDEMAN: Thank you very much.

CHAIR FURMAN: I concur with John that

people seem to have strong feelings about thermometers. That is definitely clear.

We will proceed with the next witness, Nicole Owens. You can turn your camera on and join us. You may proceed.

MS. OWENS: Thank you. Thank you, Committee members. My name is Nicole Owens. I'm the Federal Defender in the District of Idaho. I'm a former chair and current member of the Defender Working Group on Technology, and that group has spent the last several years dealing with issues related to generative AI and machine learning. As Professor Capra noted, the witnesses that practice in the civil framework have suggested that Rule 707 will create a gap which would potentially allow machine-generated evidence to come in without expert testimony. But, because I practice in criminal law, I see it differently.

From my perspective, Rule 707 closes a gap that already exists and helps ensure that the reliability standards in Rule 702 apply even when evidence comes in without a human expert. Rule 707 addresses an issue that is fairly narrow but important, and these gaps that we're seeing do appear in trial court, where new technologies are introduced in ways that don't fit neatly within existing

evidentiary categories. I think some of the existing evidentiary rules help at the margins, but they don't fully address the problem, and Rule 707 ensures that Rule 702's reliability protections continue to apply when machines perform expert-like work.

We're already seeing this type of evidence come in in the trial court. As was noted earlier, facial recognition technology, license plate readers, shotspotter classifications, audio and video enhancements, and AI-generated transcripts and reports are increasingly utilized by law enforcement and other witnesses, often without triggering Rule 702. That typically happens because the government presents the machine's output through an officer or a custodian who can explain how they used the system but not how the system created the evidence.

These witnesses are not designated as experts. They don't claim to understand the methodology. They're simply reporting what the system told them, and, as a result, sometimes courts are treating this as technical output rather than expert analysis, and so the reliability inquiry that Rule 702 would normally require never happens. Rule 707 helps ensure that the reliability question gets asked based on what the system is doing and not how the evidence

is labeled.

Judges already conduct these hearings in appropriate cases. Rule 707 doesn't create a new kind of hearing. It simply extends a familiar one to situations where machines are doing the work that an expert would historically perform. In many cases, systems, like experts, will meet that standard without much difficulty. In other cases, the rule may prompt a review that would not otherwise happen, but that review is exactly what the evidence rules are meant to do, which is to keep unreliable or misleading evidence away from the jury.

I believe that that review is time well spent, especially when evidence carries a scientific or technical aura that can be very persuasive to jurors. I appreciate today's testimony and the Committee's interest in refining the rule's scope and clarifying terms. I believe that precision does matter, and we don't want to sweep in routine or purely mechanical tools, such as thermometers. At the same time, I would encourage caution about narrowing the rule too tightly to technical labels, such as artificial intelligence.

In practice, many of the systems that perform expert-like analytical work do not fit neatly

into categories and yet still produce conclusions that substitute for human expertise. My belief is that from a trial-level perspective, the more durable question is what the system is doing, not what it's called, so, as we talked about prompted types of inquiries, if an output is performing work that would historically require an expert, I believe Rule 707 should apply.

I would encourage the rule to focus on machine-generated evidence rather than reframing it around whether an output qualifies as an opinion. I think the language used to define what triggers this rule will shape the litigation that it does generate, and a term like opinion invites disputes over classification whether something is a fact, an inference, an opinion or a tool rather than focusing courts on the question the rule is meant to answer, whether the evidence is reliable. I think a neutral term like output or evidence keeps the emphasis on reliability rather than labels, avoids unnecessary line drawing, and reduces the risk of resource-intensive satellite litigation.

I think, for similar reasons, anchoring the rule to 702's framework, focusing on outputs that would be expert testimony if offered by a human,

strikes me as the most practical and future-proof approach. It avoids tying the rule to technical definitions that may evolve while keeping the scope principled and limited. Put simply, I see Rule 707 as a modest but important clarification of existing law. It helps ensure that Rule 702's reliability protections continue to function as technology evolves. I appreciate the opportunity to share these thoughts and for your careful work, and I welcome your questions.

CHAIR FURMAN: Thank you, Ms. Owens.

Mark Massa?

JUDGE MASSA: Thank you, Ms. Owens. I have a question about the license plate recognition technology that you referenced. How in your view would the rule as proposed apply to to that kind of evidence specifically?

MS. OWENS: That's a great question. If it was going to be introduced through a law enforcement officer at trial, I would see either that the law enforcement officer needed to be designated as an expert and that some sort of Daubert-like inquiry go on into how that technology works, how the algorithm produces that result, how the technology is performing, and function, and whether it's reliable or

not, so, again, that very critical reliability assessment would happen either prior to the testimony coming in or simply through cross-examination or through direct examination through an expert-like inquiry.

JUDGE MASSA: If I could quickly follow up? Is that kind of inquiry occurring in the absence of a 707?

MS. OWENS: Your Honor, I believe that it is inconsistent and that it's happening in some courts but not in others, depending on whether the court believes that 702 should apply and whether the court believes that the law enforcement officer needs to be an expert in order to produce that kind of testimony, so, in some cases, yes, but, unfortunately, in some cases, no. They're simply saying, this is what happened. This is why I did what I did. This is why I pulled this car over. And we're never getting into the reliability of the technology itself.

CHAIR FURMAN: Thank you. Jim Cooney?

MR. COONEY: So let me pose one, another test that I think we're all familiar with, the breathalyzer in an intoxication standard. Obviously, it's usually presented through a technician who says it was calibrated, it had been tested, but that

technician generally has no idea whatsoever about the complexities of the science and the underlying data for the science, but we've accepted that for years, so I think the question is, do you see this rule as kind of reopening that so that things like a breathalyzer that, you know, the state or the United States would now have to present, you know, an expert testimony about the science underlying the breathalyzer?

MS. OWENS: I think that the breathalyzer may be the criminal equivalent of a thermometer. I would not see that this would change the way that courts treat breathalyzers. I think that they're typically understood to be a measuring instrument and they're not performing independent analytical work, so it's not doing the work of an expert, and I would not expect that Rule 707 would be triggered through a breathalyzer.

Now, for example, if somebody wanted to do a retrograde extrapolation and put into ChatGPT the time that their client was driving and that it had been two or three hours and, you know, have ChatGPT calculate what their BAC would have been at the time they were driving rather than three hours later and how much they had eaten, I think that that would trigger Rule 707.

CHAIR FURMAN: All right. Last question. Dan?

PROF. CAPRA: Yeah. Also, I just would add, with breathalyzers, there's a lot of jurisdictions that find them judicially noticed as being reliable, so that takes care of that. I was wondering, and I've been thinking about this, with respect to that language, you know, simple scientific instruments, the way you pitch the rule, it's kind of the way I've been thinking about the rule, you really don't need that, right, because, if it's something that an expert would provide, it's not going to be a simple scientific instrument, it's going to be something else, and so, in a way, it's kind of superfluous, that language.

MS. OWENS: I agree, and I think that we inherently understand that if something is being introduced that would historically have been testified to by an expert versus something like a breathalyzer or a thermometer, the rule wouldn't be triggered, so I do agree that that language is not needed.

CHAIR FURMAN: All right. Thank you, Ms. Owens. That brings us exactly to the halfway mark of our witnesses today, so I think we will take our break now. It's a little earlier than it had been scheduled, but I think it makes sense since we're

halfway. It is 11:13 Eastern Time at least according to Apple, which I go by. Let's take a 10-minute break. We'll keep it a little shorter, so we'll start promptly at 11:23. I would encourage people to turn off their cameras and mute their Teams devices during the break, and I'll come on again at 11:22 or so and we'll be ready to go. Thank you very much. See you shortly.

(Whereupon, a brief recess was taken.)

CHAIR FURMAN: All right. That brings us to 11:23. I try to keep my word on these things. So we will pick up where we left off with Jonathan Redgrave. Mr. Redgrave, if you are on, please join us.

MR. REDGRAVE: Good morning. I appreciate the opportunity to testify this morning, and I appreciate all the work the Committee has done on a very challenging issue, quite frankly. By way of background, I've been an attorney since 1991. I practice in state and federal courts around the country and have had quite an opportunity to engage in the development of technology and seeing the impact of technology on various rules, civil and otherwise. I will be submitting written comments by the February 16 deadline. I just haven't been able to get to that finality yet.

With respect to the task before the Committee, I recognize that you've been working at this for a number of years, and I see lots of promise in where the Committee has been headed with this rule. I think it is critical to address the advent of technology of new types and forms that we haven't seen before and the impact that that is going to have on our judicial system and trying to get our hands around how to deal with the outputs. I think the last speaker, Ms. Owens, was very apt to kind of state the expert-like opinions, right? So it's kind of this, what is the output? What are we actually looking at?

And I've seen the definitional issues be one where people are kind of raising the flag. I think Professor Roth's observations on this in her written submission, I know she's also testifying, are keen on this, and I really encourage the Committee to, despite the years of work that have gone into this, when you're listening to the comments from actually, quite frankly, both sides of the aisle and you've got this interesting mix that Professor Capra noted of the difference between criminal and civil, there are a lot of concerns raised here.

I don't want you to fall victim to the sunk-cost fallacy that with all the work done and as a rule

and we've got some familiarity with 702 that judges can apply, so 707, we should do something now. I really think a short pause to be able to see if we could address in a better rule some of the definitional elements and then ensure that we're not falling into the trap that a lot of people are falling or are noting with respect to the potential impact of opinions coming in or opinion-like evidence coming in without sufficient foundation because the courts are ill-equipped to really deal with what exactly is going on.

I do disagree with some of the folks that are saying we don't have enough anecdotal evidence on the civil side. I think this issue is in front of us right now. At the same time, I don't want the rule to suddenly be a artificial barrier to evidence that should come in otherwise, whether it's business records or some other means, and we were talking about breathalyzers just a few moments ago and we've also talked about license plate reading and comparisons. There are some things that really should continue to come in and be governed, and the judges around the country already know how to deal with evidentiary foundational issues.

And so I think there's a huge tension that

you're seeing in the comments, the comments that I've been reading, the testimony that I've heard so far, and I just encourage the Committee to be able to take a step back to say is it amending this rule right now and moving forward that'll be the best path, or would stepping back and saying do we need some sort of connective tissue with the civil rules or some of the other rules for disclosures if we're actually getting further towards allowing expert-like opinions from computer-generated outputs that are not tied to a specific human expert, right? I think that's a lot of what you're seeing on the tension on the side of the civil litigators that are making comments here on the rule itself.

I will say, I think, Professor Capra, on the last witness, you noted that perhaps just dropping that entire sentence might be the solution set. I would kind of agree with that if the rule was going forward. I don't think it's necessary. It is kind of superfluous in a sense, the simple scientific instrument, and it seems to get people hung up. I think you can accomplish the goal without that, but my more fundamental challenge with all of this is it's kind of going down the road of really quickly enabling in the litigation context.

I'm not talking about business as usual or government as usual or people as usual, how they may be using AI and how we have to sort out what was done or not done or what went wrong, right? Those are facts, and maybe we have to look at how the AI operated in the ordinary course of business. When we're in the litigation context and we start using the brain of AI to actually give us, well, what really was the causation, what really was the fault, and you're actually having it come to conclusions as if it was based on specialized knowledge when it's not.

AI tools, especially LLMs, are really predictive tools that really are guessing very well what you need to know, but no less than you would not qualify me, even if I had perfect memory of the Internet and I could perfectly predict what you want to hear, that would not make me an expert to be able to talk about medical causation or the like.

So I think the Committee is really dealing with this proactively, which I really encourage. I think the current formulation, however, is leaving too many questions on the table, especially with a lack of a definition, and I'm seeing everyone kind of rope around that here even in the discussion today, and I really think that we could get to a better rule with

maybe it's a year, maybe it's two, maybe it's just a year worth of additional input and thought.

And, again, I think this is terribly unfair to the Committee because you've had, you know, three years you've been working, at least three years or more, that you've been working at this, and a lot of us have, you know, come to the table maybe later than you were at the table, and I don't want you to take from this any lack of respect for the work you've done or disrespect for, I think, progress that's here. I just think more work needs to be done before we actually go out because of the potential of unintended consequences.

CHAIR FURMAN: All right. Thank you. Two comments. One, I see you're in a car. I hope and trust that you're not driving while you're speaking.

MR. REDGRAVE: I am not driving, sir. I am safe.

CHAIR FURMAN: Okay. Good. Glad to hear that. Second, no disrespect taken. Indeed, when we put this rule out for comment, we expressed that, you know, there was no assumption that it would be adopted, that we were very eager for the input, and this input has been very helpful, certainly to me, and I think we will have some thinking to do on that

front, so no disrespect taken.

Any questions for Mr. Redgrave?

(No response.)

CHAIR FURMAN: All right. Seeing no questions, thank you very much, Mr. Redgrave, you may now drive your car.

MR. REDGRAVE: Thank you very much. I will continue listening. Thank you.

CHAIR FURMAN: All right. Very good.

The next witness is John Rosenthal. My understanding, Mr. Rosenthal, is that you have switched firms since the schedule was -- well, that the schedule does not reflect your current firm. I'll put it that way, so you may want to clarify that, and you may proceed.

MR. ROSENTHAL: Thank you, Your Honor. Thank you, the Committee. You are correct. I am now at Shook, Hardy & Bacon after being at Winston & Strawn for the last 15 years. So thank you for the Committee for your tireless efforts here. I've been involved in the rules process since about 2000, so I know how much hard work is involved, and I appreciate the efforts.

Just by way of background, I'm a complex commercial litigator doing class litigation and MDL,

but I also have an extensive practice like Mr. Redgrave in e-discovery, information governance, and also artificial intelligence, so I think my practice gives me a unique perspective not only of the technology issue but its practical uses as we're seeing in the courtroom and in discovery.

I agree with Mr. Redgrave that the Committee has identified a real problem, and I think it is a problem. We are seeing this kind of evidence being offered in discovery, and we're going to see more of it offered in trials. I do agree with the Committee that there's a real gap between authenticity, which is a relatively low bar, versus reliability, and I don't believe there's a current mechanism in place under the rules to address reliability, so I do think the rule is important.

I would agree, you know, if you look, with the majority of the comments, that perhaps a pause should be taken and perhaps the rule refined rather than proceeding as is. I think proceeding as is, the current rule may create more problems than it solves, and I want to talk about a couple of those issues, and I think the first one really is language. The draft rule talks about machine-generated evidence, and we've heard testimony, and I read all the comments, and I

think the universal comments are it's vague and overbroad, and I believe it is because, when you look at the actual computer science underlying this, you have a whole variety of terms. You have artificial intelligence, you have machine learning, you have large language models.

Some version of those technologies have been around for decades, right, and we've seen a whole variety of those computer mechanisms being used to generate information which is often offered in court and admitted in court and sometimes excluded in court. I think what the rule is currently missing is the transformation in November of 2023 with the advent of generative AI.

Generative AI, while it may be a version of artificial intelligence, while it may be a version of machine learning, while it may be a version of large language models, it's tremendously different. It's different because it's designed to generate new information based upon a probabilistic calculation and training. That means it's necessarily likely to hallucinate and therefore may be inherently unreliable, and my concern with the current rule is, and even many of the solutions is, we're focusing on machine-generated evidence. That's far too broad, and

I think what we have to do is focus on what we're really concerned about, which is generative AI outputs, and let me give some examples, and I gave this to Judge Furman and Professor Capra in New York.

All right. Let's take a plaintiff in a case that is alleging a product causes cancer, right? So they take a scientific study, a medical study, and they offer a generative AI summary of that study. Is that what we're talking about? Probably not. They take 10 studies and they take the gen AI and say, summarize these 10 studies. Closer? Is that what we're talking about? They then take the 10 studies and they ask the generative AI to not only summarize the studies but come to a conclusion as to whether the 10 studies support a conclusion of cancer. Pretty close.

Each of the 10 studies have data attached to them. Now take the 10 studies, the data, and create a meta analysis, right? Are we talking about that? Probably. Well, let's take the meta analysis, review the meta analysis, and identify whether there's a correlation between the data, the product, and the cancer. Clearly, we're talking about that, right? So, you know, part of the problem is, what are we really trying to identify? I'm not sure we're trying

to identify or solve a problem about simple summaries or even simple data.

I think we're trying to talk about opinions that would normally be offered through an expert, and my suggestion here is that we really need to focus on that and we need to focus on generative AI output, and while I appreciate a lot of the suggestions in terms of solutions output of a process of machine learning, machine learning outputs, machine opinions, and even Professor Capra's proposed solution in his October writing on the alternative output of a process of machine learning, in all those, we're still focused on machine learning, and it's far too broad.

I see you have a question, Judge Furman.

CHAIR FURMAN: Yeah. I was just doing what I --

MR. ROSENTHAL: Okay.

CHAIR FURMAN: -- said I'd do earlier, which was signaling that you should wrap up so we could leave time for questions, but if you're open to questions, I --

MR. ROSENTHAL: Okay. I will quickly wrap up. So I believe, if we're going to solve this, we really need to focus on what the issue is at hand. I have a second concern, which is I know we put in the

Committee notes that there's a favor or predilection towards expert testimony. I think that that should be stronger, more clearly stated, that there actually should be a presumption in favor of expert testimony.

I'm also concerned that the rule does not have any mechanisms or set forth any mechanisms about how a judge is supposed to apply a reliability standard here, and while I appreciate the comments that there should be coordination among the various committees, I realize how complex that is. While I'm not aligned with Professor Roth on a lot of her opinions in her proposed comment or her comment, I think the Committee should seriously consider her proposal to import certain components of 702 into this rule. I think that it is problematic to have the reference to 702. Still, I would import the factors that are going to be there.

And my last comment is, you know, the rule almost flips the evidentiary burden on its head. It doesn't specify under what circumstances where you cannot satisfy your obligations through not producing an expert when do you have an obligation to put forth an expert. Instead, it appears to put the burden on the opponent to come forward with an expert and prove that the evidence is unreliable. That seems to be

flipping itself on the head. It seems to me there has to be some kind of litmus test in there or some vehicle upon which the judge or the opponent can ask or the judge can insist that expert testimony is required before the evidence can be admitted.

CHAIR FURMAN: All right. I have a question about that, but why don't I call on Dan first.

PROF. CAPRA: I'll leave that question, which I would have too, to Judge Furman. I was just going to say that if we use the term "generative AI," and I don't want to steal Professor Roth's thunder from her, but I know what she would say, that that's not broad enough, that there's a lot of sophisticated algorithms out there that are tantamount to expert testimony, but they don't constitute generative AI, that would then still fall within the cracks.

MR. ROSENTHAL: I would say you are probably right. I was trying to identify the majority of the problems and a practical solution here. There have been machine-generated algorithms out there for years that have done that. They haven't tended to be a problem to date. I think the difference is the ease and use of generative AI, which is going to be commonplace, and I would think a majority of computer-generated information coming out of organizations is

going to be generated in some way with generative AI.

CHAIR FURMAN: On the flipping the burden point, can you just explain that because, certainly, that, I don't think, is the Committee's intention, and I think the Committee, you know, thought that in writing the rule as it did that it would put the burden on the proponent of the evidence to show that the evidence satisfies the requirements of Rule 702(a) through (d), so what makes you think that courts would construe it the opposite way?

MR. ROSENTHAL: Well, my concern is that, as drafted, 707 is going to be a huge hole which I think a lot of people will try and drive a truck through to try and get evidence admitted without an expert. I think at some point it's going to become obvious that an expert would be needed, but the question is, where is that burden? Is it my burden opposing the evidence to come in with an expert? I think at some point it's got to be clear that it's the proponent's burden to come forward with an expert, and, right now, there's no litmus test or no relationship between 702 and 707 as to when an expert would be required.

CHAIR FURMAN: All right. Thank you. Appreciate your comments and appreciate your comments.

Next is Professor Roth, my law school

classmate and someone who has worked with the Committee since the very beginning of our thinking about this subject. Thank you for your thorough and helpful written submission and the help you've given us in the past, but with that, you may proceed.

PROF. ROTH: Thanks, and thanks so much to the Committee. So I'm not going to regurgitate my written testimony, but I thought maybe I would say a few points of clarification based on the discussion thus far and then hopefully leave some time for any questions you might have.

So I think the key with respect to some of these comments and what the rule does and doesn't do is twofold. First of all, it does not create a new loophole in any way. It recognizes that there's a loophole in the status quo, and that is that when you do not have a human expert attached to a computer conclusion, if you will, then there's nothing other than authentication requirements, maybe Rule 403, et cetera, that really puts any sort of brakes on that and no reliability requirements, so it would just impose Daubert on that if someone decided to go forward without a human expert.

I think a lot of this can come out in the wash, that if you really need an expert to explain to

a judge's satisfaction why something's reliable, then you'll use an expert and we can use 702 just like we have. This really is a loophole. Maybe it's a small loophole, but it just closes it.

On the other hand, at the same time, all of these concerns about, well, how do you apply Daubert to machines and, you know, what about notice requirements and what type of data will you have to disclose, the beauty or curse, if you will, of the status quo is that judges are already having to deal with that. They are applying Daubert to machine conclusions all the time. It's just that it's as a method of a human expert and they're doing it under 702.

So all of these questions on, you know, do you need the source code, you know, do we need to look at the evaluation data, et cetera, those are all questions that judges are currently dealing with under 702 when a human expert uses a computer method as their method, so there's no new problems here that I see. It's simply pointing out that Daubert should apply even in the absence of a human expert.

I won't belabor other points on that because I think Ms. Owens, you know, very artfully said along the lines of what I would say a lot of these points.

Let me just make a couple more very specific points. Number one is, with respect to the question of terminology, I think this has already been said. Professor Capra, you did Roth better than Roth can do Roth, but I think I completely agree with you that this is not about generative AI. This is not about machine learning. This is about any sort of black box process, if you will, that should be subject to Daubert that otherwise wouldn't be. We can't see, we can't look under the hood, if there's not a human expert attached, and, again, like TrueAllele, for example, is a DNA computer software program. It's got 170,000 lines of code. It's very complex. It doesn't involve machine learning and it doesn't involve generative AI.

The reason that this will not blow up I think is what Mr. Cooney said, which is that the elegance of the rule, if you will, is that it only applies to conclusions of machines that would be subject to 702 if uttered by a human, and so the whole point is that it's only dealing with those sort of analytical conclusions that are of the type that an expert would make.

Okay. So the other thought is that with respect to the concern about the 2023 amendments to

Rule 702, I think you could very easily -- I think there were some allusions to, in my written testimony, you know, just much more explicitly just using the language of 702 instead of just alluding to it. You could just add, instead of the court must find, you could say proponent must demonstrate to the court that it's more likely than not that the conclusion a) will help the trier of fact, et cetera, just like what it says at the beginning of 702. I think that would be pretty easy.

And the only other two things I wanted to say before opening it up would be, with respect to Rule 703, Professor Capra, I think you're absolutely right. Rule 703 is not an additional pathway to admissibility. It also only applies to expert opinions, by the way, so if there isn't a human expert, Rule 703 doesn't help you or hurt you, so I just don't see that as an issue in any way. It's really about getting around the hearsay issue and potentially the confrontation clause issue, as the Supreme Court has said in Smith v. Arizona, so happy to talk more about that.

And I think the rest, I'm hoping to see where the Committee's concerns are. I could definitely talk for five more minutes, but, if it's

more helpful to have a conversation, I would love that, so let me stop there for now.

CHAIR FURMAN: Yeah, thank you. I have one question which pertains to the disclosure issue that a number of commentators have referenced or brought up. You say that courts are already dealing with that at least where these issues are arising under 702. I wonder if you could speak to whether that has -- you know, we've seen the problems that some speakers have suggested would occur in the absence of a disclosure rule in those cases, and then, relatedly, I mentioned earlier the possibility of adding at least a notice requirement to Rule 707 in the absence of a companion amendment to the civil and criminal rules. Any thoughts about that?

PROF. ROTH: Yes. It's my understanding that it would be a non-starter to have some sort of collaboration among committees, and so I recognize that, you know, this Committee's role is to do what they can with the rules of evidence, and maybe it has a salutary effect on conversations in other rules committees, but, yes, I think a notice requirement would be appropriate and would go a long way towards dealing with those concerns, but I also want to say the concerns, again, don't seem to understand the

extent to which the loophole exists in the status quo.

And so, if the concern is, hey, somebody will put on this machine opinion or this, you know, ChatGPT result or whatever without a human expert and I'm not going to know about it before trial when I'm engaged in settlement negotiations, instead I'm not going to know about it until the Daubert hearing, I think the idea is, in the status quo, they could do that and not even have a Daubert hearing and not tell you about it under Rule 26 because it's not an expert, and in the criminal rules, Rule 16.

And so the whole idea here is that you don't need an expert for a lot of these things under the status quo, and so there's already no notice requirement, no Daubert, no this, no that when people realize this more and more, and so it's true maybe we can only do something about Daubert.

And the only other thing I would say is that as I said in my written testimony, I think it's completely appropriate for judges to consider the extent to which these very key pieces of information have been disclosed to the other party in determining whether the proponent has met their burden under Daubert even if they're not "discovery" requirements.

CHAIR FURMAN: Thank you. A brief

clarifying question about one thing and then I'll turn to John Siffert. You had previously suggested in lieu of the simple scientific evidence or instruments lying sentence a sentence that talked about sort of, you know, generally known by the public to be reliable or something of that nature. I think you know that the Committee considered and rejected that at the last meeting. I take it from your current submission that even without that, you think that deleting the simple scientific instrument sentence is warranted and would be an improvement?

PROF. ROTH: I do, and I think it sounds like there's a pretty clear consensus on that from the commentators. I agree with all of that, and I also think that, as I said in my written comments, Rule 201, I think, will deal with this quite nicely, and I quoted a recent *Law Review* article by Jeff Bellin and Andrew Guthrie Ferguson on this point, and I think it does a really nice job of laying out why judicial notice is actually a decent tool for these purposes.

CHAIR FURMAN: All right. Thank you.

John Siffert? Unmute.

MR. SIFFERT: You alluded to the fact that you could speak more about Smith against Arizona and the impact of conflicts. Understanding that Judge

Furman has extreme limits on how much I can let you say, tell me what you can in the time that he will let you about that because, I mean, the Seventh Amendment stuff, the Sixth Amendment stuff are all issues for me.

CHAIR FURMAN: I asked Professor Roth two questions, so I'm going to give her a little extra time and let Dan ask his question after as well, so go ahead. Don't worry.

PROF. ROTH: Thank you, Mr. Siffert. I would say I love the jury. I care deeply about the Sixth and Seventh Amendments. I think the concern, again, is that under the status quo, I think they're giving the status quo too much credit. The concern is that already you can bypass Daubert, you can bypass this and that, the jury's determination of whether this is reliable, by simply never opening up the hood at all, and so this does not provide a new pathway for bypassing adversarial scrutiny in any way if it just adds Daubert.

With respect to Smith v. Arizona, you know, the Supreme Court has made clear that Rule 703, which only applies to human expert testimony, can't be used to bypass the confrontation clause by somehow suggesting that the basis for an opinion is not coming

in for its truth, which is the legal fiction underlying Rule 703, which we all need to be able to put on expert testimony, but the idea is, when that underlining hearsay is testimonial, you've got to put on some more witnesses. So nothing about this proposal changes that in any way, you know, increases or decreases the scope of the Sixth or Seventh Amendment in any way. I'm happy to talk more about that in public comments if it's something that's still on the mind of the Committee.

CHAIR FURMAN: Thank you. Dan, last question.

PROF. CAPRA: Well, first, I wanted to thank you for all your help and actually for answering all my emails. I thank you, Professor Roth.

PROF. ROTH: Thank you.

PROF. CAPRA: That's very nice. It's a Herculean task. Just a couple thoughts. One is, you know, we hear a lot about how expensive this is all going to be, you know, where everybody's going to have to litigate about the algorithms, and I guess, I think I know what your answer is going to be, but you want to talk about that, you know, this rule is going to just create a lot of additional expenses?

PROF. ROTH: Yes. I don't think it will for

two reasons. First of all, again, I think what isn't being talked about is the fact that judges are already having to subject all of this stuff to Daubert scrutiny. It's just that it typically involves a human expert, and so any of these concerns about, oh, we're going to have to get the underlying data and disclose it and we're going to have to put on an expert or whatever, nothing more or less than what would be required normally if you put a human expert on it.

All this is doing is taking analytical opinions that are akin to human expert testimony, and if you decide to sneak around Daubert by putting that on without a human expert, we're saying no, actually, Daubert still applies. That's all. And so it shouldn't increase expenses, and, again, the beauty of this is that since it only applies to those types of opinions that are akin to human expert testimony, if what you're doing is putting on electronically stored information or something that is not akin to that sort of analytical conclusion, or if you're putting on something that's not subject to reasonable dispute under 201, like the geolocation data example that's in somebody's written testimony, it's not going to add to the burden.

PROF. CAPRA: Okay. And then I just -- sorry. Just a quick follow-up if I may, Judge?

CHAIR FURMAN: You may.

PROF. CAPRA: About the 201 thing which you've been talking about a lot, I've been doing some work on 201 and looking at it in certain states, and there's certain states, Florida and New York has it, that have actually identified, for example, geolocation data as in their rule, in other words, added to 201, and to say, you know, this is something that you take judicial notice. It's written in the rule, and it occurs to me that, you know, turning to 201 actually might be a way, kind of a coordinated effort, to actually put the two rules together if you know what I mean, right? Like, if you've got a 201 exception in 707 and then you add more detail to what could be covered by 201 in 201, that would actually be helpful. Just a thought.

PROF. ROTH: That's a great point, and, you know, I don't know how long the 201 amendment process takes, but in the meantime, you could also put something in this advisory note that adds a little more meat to the bones of what we would anticipate would come in under 201. Absolutely. Yeah.

CHAIR FURMAN: All right. Thank you,

Professor Roth, not only for responding to all of Dan's many, I'm sure, emails but for your help throughout this process. We appreciate it.

PROF. ROTH: Thank you.

CHAIR FURMAN: All right. Our next witness also dropped out, Daniel Smulian, so we will proceed with the witness after that, who is Kaitlyn Stone. Ms. Stone?

MS. STONE: Hello, everyone. My name is Kate Stone. I'm a litigation partner with Barnes & Thornburg. I sincerely thank all of you for giving me a portion of your time today, and we've already heard from a number of illustrious practitioners that covered some of the points that I had considered addressing during my time today, so I'll avoid repetition for all of our sakes and I'll endeavor to be brief.

As an initial matter, I share the concerns that have been shared by Mr. Redgrave and by Mr. Rosenthal and others today that 707 may act as an unintentional barrier to the admissibility of what is reasonably considered routine evidence today, but with my time, what I really want to look at is some of the practical and potentially unintended consequences of Rule 707 rooted in the day-to-day realities of

litigating a case and the nuts and bolts of how these AI technologies work.

In my view, as drafted, Rule 707 could require extensive reliability hearings, expert disclosures, and, as noted by others, including Mr. Friedman today, discovery on a scale that is much greater than what is currently the norm, and while some of the intent here is to foster transparency and fairness, my fear is that the reality might ultimately be a significant expansion of litigation overhead.

So, as this group is more than aware, AI tools rely on vast amounts of training data, right? This is much more vast than, say, what an expert might review when rendering an opinion. Our experts are thorough, but they aren't engaged in scraping and training on a scale that these LLMs are capable of achieving, and that training data that's used in these AI models is often proprietary and confidential, and so, for purposes of this discussion, let's say that the AI tool involved is an LLM, and given their extensive popularity, I think that's a good example.

LLM developers are loath to disclose their training information for a variety of reasons, ranging from IP protection to fears of inviting litigation, as we've seen in the numerous trademark infringement

cases and other types of lawsuits that are currently happening in the courts, and yet, under 707, the proponent for machine-generated evidence created through an LLM would need to establish that the LLM output relied on sufficient facts and data, and, pragmatically, that would be that training data, so then the question becomes what discovery mechanisms would permit the proponent of this evidence to make the requisite showing.

A subpoena to the LLM developer would obviously invite objections and most likely result in motion practice. There can be little doubt the information would not be given voluntarily, so the proponent is left with little to no recourse to demonstrate the requirements of 702(b), and the motion practice will impose heavy burdens, both financial and non-financial, on both the litigants involved and ultimately on the courts.

Relatedly, the LLM developers are not going to otherwise grant access to their proprietary algorithmic models. Therefore, the proponent of the evidence won't be able to demonstrate that the outputs, right, that that machine-generated evidence represents a reliable application of principles and methods to the facts of the case. But putting all

that aside, even assuming that the proponent could gain access to the algorithms of an LLM, they may still be unable to meet the requirements of 702(d).

The understanding of how LLM algorithms work even by experts in the field as we sit here today is not complete. We all know about the black box problem. We know that humans cannot always fully explain all of the links in the chain between the user input and the LLM's output, and this will only serve to further hinder a proponent's ability to meet the 702(d) requirements.

And, finally, mindful of my time, indulge me on one key point about how this technology functions. We have to remember that many AI platforms respond to their users. The developers of these AI tools are in business and they rely on user satisfaction to drive continued use of these models to generate revenue to ensure customer satisfaction. The reality is that some models tailor their outputs to what they learn over time and over the course of various inputs what the user wants to hear.

This user-introduced bias could arguably implicate the reality of the outputs of the model, so, therefore, the scope of discovery into these issues could be expansive to the point of being pragmatically

infeasible. If the opponent of machine-generated evidence seeks to discover all the prompts ever put into the LLM by the user in an effort to to show that the AI model has created a form of a profile on the user knowing what drives that user's use of the model, ultimately, you could argue that the outputs are not objectively reliable.

And if every piece of machine-generated evidence requires the disclosure of hundreds of thousands or tens of thousands of chat histories, courts and litigants are going to be bogged down in disputes over the scope, over confidentiality designation issues, over privilege logs and what have you, and, ultimately, my fear is that this could be tantamount to discovery on discovery or trial within a trial, distracting the court and the parties from the true substance of the case.

And so, for those reasons, mindful of my time, seeing that there are some hands up, I would urge the Committee to take the time to ensure that the text of 707 matches the intent behind it.

CHAIR FURMAN: Thank you. Dan?

PROF. CAPRA: So your solution then would just be to allow in all this LLM material because it's so hard to actually litigate? Is that the solution?

MS. STONE: That, I do --

PROF. CAPRA: It's so hard to regulate and that therefore --

MS. STONE: It is hard to regulate it, but I do not think the solution is to throw up our hands and say that it all necessarily comes in, but I do think and I think somebody said this --

PROF. CAPRA: Well, what is the solution then?

MS. STONE: I would say --

PROF. CAPRA: If it's -- sorry.

MS. STONE: No, no. That's all right. That's all right. I think part of what we've seen in some of the submissions where we start drawing the line between what type of evidence we're really getting to, right? Are we talking about are these machine-generated opinions versus standard types of evidence that we're already seeing, that delineation starts to draw the line in between what some of these complications might be and try to avoid some of these unintended consequences.

CHAIR FURMAN: Jim Cooney?

MR. COONEY: Yeah, it seems to me that a lot the problems you're describing in general is what gets litigated at anyway in a lot of expert contexts, you

know, for instance, an expert on class and trying to make some assumptions, so we're used to litigating that anyway, and if we run into a situation where, indeed, the large language model is tailoring, you know, in general is capable of tailoring a response to a small group of people and that affects reliability, that needs to be put in front of a court and a court can decide.

I mean, I've got a lot of confidence in our judges to be able to decide (a) reliability and (b) what the limits on discovery are going to be because all the issues you're pointing out are, in general, you don't need 10,000 outputs or inputs to know that this large language model is going to tailor itself to the kinds of inputs it gets. Nobody's talking about a granular examination that we don't even do under Rule 702. I think the idea is to take opinions and make sure we're treating opinions, whether by human beings or by machine, in the same way, so I'd just like to hear your response to that.

MS. STONE: Absolutely, and I do, I share your faith in our judiciary's ability to navigate this. I think the difference in what's happening today versus what would happen when we get into these AI-generated types of evidence is the scale, right?

Let's go back to the training as a specific example. There is no expert on Earth who has the capability or the lifespan to go and review and rely on in making an opinion a scope of data that these LLMs are, and so, when it comes to the court's ability to address these issues, we absolutely have the skill sets and we have the ability, and you're right that it's happening today in another context.

The difference is the scale on which it needs to happen, the scale of the analysis and all that not only the LLM, for example, might be considering but then, by extension, the judge has to consider in reaching these conclusions, so I would say in the simplest of answers to what is ultimately a really complex question, I would say that the difference I see is the scale, and we need a rule that is nuanced enough to account for the difference in that scale that we're seeing.

CHAIR FURMAN: Thank you. Unless there are further questions, I want to thank you for your thoughtful remarks, and we will turn to the next and second-to-last witness, Tad Thomas.

MR. THOMAS: Thank you. Thank you for the opportunity to comment on the proposed rule. My name is Tad Thomas, and I am a past president of the

American Association for Justice, and I'm the current Chair of AAJ's Legal Affairs Committee, which oversees our positions on the rules amendments as well as our amicus curiae program. I'm also the founder of Thomas Law Offices. My law firm tries trucking, nursing home, medical malpractice, and other personal injury cases all across the country. I also frequently lecture to attorneys in CLEs on technology and the practice of law, including AI.

AAJ appreciates the Committee's thoughtful work in identifying what could potentially be an emerging evidentiary issue, but like many of the witnesses today, our concern is not with the stated objectives but whether the current draft of Rule 707 is the most effective way to achieve those objectives. As written, the rule may reach beyond the specific category of machine learning while still leaving the courts with uncertainty of how and when the rule should apply. I want to briefly highlight a couple of concrete trial examples just to illustrate why this matters in practice.

In modern litigation, almost all evidence is machine-generated in some sense. The Committee's explanatory materials focus on outputs that draw inferences or make predictions, but the rule itself

does not draw that same line. For example, in trucking litigation, one of the most common categories of evidence we use is electronic logging data. These logs track a driver's hours of service and their compliance with federal safety regulations. The data is generated by a combination of both driver input and automated electronic recording, but it's routinely admitted in courts through lay witnesses, whether it's drivers, safety directors, or corporate records custodians.

Under the proposed rule, we believe that parties and courts may reasonably ask whether those electronic logs are now considered machine-generated evidence and subject to Rule 707. If so, the courts could be faced with arguments that expert testimony is required to establish the reliability of logs that have long been treated as ordinary business records or foundational evidence. That is not because the data has changed but because the rule's terminology potentially sweeps it in.

Another similar example, and it was given earlier today, is medical records. Modern medical records are almost entirely electronic. Whether it's vital signs, medication administration records, lab results, time stamps, and monitoring data, they're all

generated and stored by computerized systems. These records are routinely introduced through custodians or treating providers without the need for expert testimony on how the software for the provider, how their systems function.

Again, it's not whether that evidence is reliable, but the breadth of the term machine-generated evidence could invite challenges to records that courts have generally treated as reliable in the past. The exception for simple scientific instruments may not clearly cover these systems because they are, in fact, very complex.

Finally, courts already have the tools to address situations where technical or analytical output crosses the line into expert opinion. Rules 701 and 702 prevent parties from offering opinions requiring specialized knowledge through lay witnesses. Authentication rules often require a qualified witness when accuracy depends on a technical process.

In both trucking and medical cases, courts routinely distinguish between factual records generated in the ordinary course of business and expert opinion derived from analyzing those records, and that distinction has worked well. We're afraid that proposed Rule 707 may blur that, particularly if

courts feel compelled to conduct new reliability analyses for ordinary electronic records.

AAJ urges the Evidence Committee to reconsider what type of rule is needed to address concerns regarding machine learning and AI and focus the rules specifically on those issues.

I'm happy to answer any questions.

CHAIR FURMAN: Thank you. I wanted to ask a question about an example that you give in your written submission which I think also points to what I think may be a problem with your alternative language about routinely used to produce or generate an output. You referenced the fact that GPS -- well, you cite that rideshare services sometimes think that a rider is inside a building or a couple blocks away or what have you because geolocation data isn't necessarily reliable.

You seem to presume then that that should come in without the need to show reliability or have a hearing, but why is that the case? That is to say, the fact that it's routine -- we also, as the comment reflects, that routinely has reliability problems. Why shouldn't that be subject to some sort of reliability scrutiny before it's admitted in court?

MR. THOMAS: I think only where it needs to

be challenged. I think, in the instance of GPS data specifically, you know, I specifically have not dealt with GPS data. That was an example given by one of our members, but we believe that the GPS data, to your example, it is not routine. It should only come in when challenged, when there is some question as to whether or not there is a reliability analysis.

CHAIR FURMAN: Okay. Other questions?

(No response.)

CHAIR FURMAN: All right. Thank you very much. And that brings us to our last and final witness, Lauren Yu.

MS. YU: Thank you for the opportunity to testify today regarding the proposed new Rule 707. My name is Lauren Yu, and I'm here on behalf of the American Civil Liberties Union. As laid out in our written testimony, the ACLU supports the Committee's objectives in crafting Rule 707 and taking on the task of addressing challenges posed by determining the reliability and therefore admissibility of outputs generated by machine learning or artificial intelligence systems.

We agree that if scientific, technical, or other specialized knowledge will help the trier of fact understand the machine-generated evidence that is

being offered, then the trier of fact must be presented with that specialized knowledge. But, like many of the other commentators today, we believe that a modified version of the rule would better achieve those objectives. The current version of proposed Rule 707 contemplates the possibility of admitting machine-generated evidence without expert testimony, and although the Committee's note says that it is expected to be very difficult, if not impossible, to not use an expert, the proposed rule's text may not be interpreted that way in practice.

So our suggestion is to make clear that an expert witness is required if the machine-generated evidence would otherwise require an expert or if determining the reliability of the evidence would require an expert, and there should be no suggestion that machine-generated evidence could be admissible without proffering an expert witness. I'll note here that Professor Capra did email me yesterday to point out that the proposed language in our written testimony may introduce some redundancy, so I just want to make clear that the crux of our suggestion is the requirement for an expert witness.

The need for this can be seen, as others have noted, in criminal cases when prosecutors seek to

admit evidence through police officers testifying that they have used an investigative tool even though they have no knowledge of how that tool works or similarly, in civil rights cases, if the government seeks to admit that kind of evidence to argue that there was probable cause as defense to, say, a Fourth Amendment claim.

In our written testimony, we focused on facial recognition and gunshot detection as examples of unreliable technologies where, under the current language of proposed Rule 707, the use of lay witnesses or marketing materials might allow a party to bypass the standards of Rule 702.

In our experience, law enforcement personnel, including personnel that operate the technology or IT personnel, have limited knowledge of how the underlying technology works when it comes to tools that use machine learning or otherwise generate machine-based predictions. All they can testify to is that they use the device as they were trained, and then the only other information that's available is potentially unreliable advertisements from the for-profit company that sold the software to law enforcement.

And, of course, those aren't the only

technologies that illustrate this concern. The ACLU's litigation and advocacy have raised concerns about other examples. You know, take cell phone location data, which has come up a few times today already. Cell phones and other devices have several methods at their disposal for estimating a device's location, but that resulting location information may not be accurate. Skyscrapers can block GPS signals, network conditions can affect cell towers, and users can use VPNs to mask their location when surfing the Internet, and just because that location information might be sufficiently accurate enough for advertisers doesn't mean it's accurate for law enforcement, and yet police still continue to present this kind of information as fact when it's not.

You can also think about automated license plate readers that also have accuracy problems. The list goes on and on. We also agree with the other commentators that the simple scientific instruments language is unnecessary and creates more room for confusion. We think that Rule 702's language around scientific, technical, and other specialized knowledge is sufficient to determine when an expert witness should be required for proffering machine-based evidence instead of introducing new terms to draw that

line, and we also think that the suggestions that came out earlier after Professor Roth's testimony about maybe an amendment to Rule 201 could be appropriate here.

Thank you, and I welcome the Committee's questions.

CHAIR FURMAN: All right. Dan?

PROF. CAPRA: Yeah, I just wanted to articulate this discussion that we had for the record, Ms. Yu, with the idea of, like, an absolute expert requirement. I was concerned that, you know, the rule's got to stand the test of time and at some time there might be situations in which you could, I mean, as things develop, in which AI could be, I don't know, self-verifying or something. I mean, who knows? I don't know, and so you would be saddled with a rule that required an expert where it wouldn't be required. I wanted to know if you could give your thoughts on that.

MS. YU: Yeah, I am skeptical about there being self-verifying AI that would be good enough for the purposes of being confident that evidence would actually be reliable. I think even in the cases of if there are numerous studies or something showing that a technology may seem reliable, still trying to

understand how the study was conducted, the methodology behind that study, whether or not the way that accuracy is calculated or the setup that they used to test the technology, all of that is information that I think, in most cases, a fact finder would want an expert to help bridge the gap of what do, you know, these potential, like, mathematical calculations mean or the scientific methodology behind sort of written or, you know, pre-written verification material.

And then there's also just bridging the gap too of, even if the technology -- like, if, say, the software is implemented in a way that accurately performs mathematical calculations, that doesn't necessarily speak to whether that is an appropriate use for the situation at hand, so kind of talking about, like, you know, with location information, sure, it might be good enough for marketers, apparently not good enough for Lyft. Is it good enough then for police to use as a basis for probable cause?

And I'll admit that I haven't, you know, looked too deeply into some of the newer models that claim to be self-verifying. I know, Professor Capra, you sent me an example that was in a different written

submission from another commentator where they talk about, like, the cryptographic proof that the model executed what it did, like, as it said it did, and to me, that kind of proof, if we can call it proof, would go more to the question of authenticity rather than reliability. Like, it's still not answering whether or not the use of that technology was appropriate because of its reliability to whatever situation is at hand.

PROF. CAPRA: Thanks.

CHAIR FURMAN: Thank you. Other questions for Ms. Yu?

PROF. CAPRA: Well, if they don't, I just guess I would say, you know, from your perspective, it makes sense for everybody to have an expert. I guess, from a plaintiff's perspective, what they would be concerned about is, you know, expense, so there's a lot of interests around that have to be thought about, right?

MS. YU: Yeah, I mean, absolutely. You know, I think that others have brought up concerns with, you know, how this might increase expenses and, you know, access-to-justice concerns around that, but I also think the earlier discussion of, you know, that this isn't -- it's not new, right? Like, we already

require experts for all kinds of other evidence too, and so just the mere introduction of a requirement or, like, bolstering this requirement for an expert isn't some kind of new burden that has never been encountered before from that perspective and that having experts or counter-experts as well to hash out, trying to think like maybe drug evidence or something like that, that, like, this has come up before.

And I think also the point that one of the Committee members brought up earlier about how, you know, like, I think we can also rely on our judges to constrain the scope of discovery as well. You know, obviously, yes, like, machine learning takes lots of data, and training data could be useful to interrogating reliability, but also, there might be other indicators too, especially if you think about independent studies or audits that look at these models. They don't necessarily have to look at the data. I mean, you know, a large part of what we care about in terms of reliability and accuracy is how these models perform, right, and you don't necessarily need to review thousands upon thousands of documents that no one would ever have the amount of time to review.

There might also be other ways too of

getting sort of the relevant information about a training data set, right? Maybe through interrogatories and through depositions, understanding sort of categories of what kinds of documents went into the training data or other relevant metrics that might be relevant to, like, for example, with facial recognition. If knowing that all of the faces in the training database were white, like, that says something versus if it's a more diverse group of faces, but you wouldn't have to review, you know, a million pictures to be able to get that information.

CHAIR FURMAN: Thank you. I think the final question goes to Betsy Shapiro, who has raised her hand. Go ahead, Betsy.

MS. SHAPIRO: Hi. Thanks. I just had two quick questions to try to understand better the scope of the perceived problem. I guess, if a lay witness comes in and tries to testify to the output of, let's say, facial recognition technology, like, wouldn't you object or do you object?

MS. YU: I mean --

MS. SHAPIRO: Why don't you object and argue to the court that an expert is required?

MS. YU: I think we would, but I think that just sort of -- like, we think that making sure or

bolstering this -- I think -- so sorry. Our position would be that even under the current rules, an expert should be required. Like, we don't think that this kind of -- especially in the case of facial recognition, which we've long argued is highly unreliable for many reasons, you know, we don't think that that should be admitted, period, but --

MS. SHAPIRO: So let me just ask you a follow-up. Like, so you object, and let's say the judge says, I think this is a common thing that is accepted and can come in, you know, with a lay witness. Under that circumstance, 707 wouldn't apply, right, because it's not something that's required. The judge has determined it doesn't require an expert, so 707 doesn't apply. I mean, it sounds to me circular, so I'm just trying to understand what gap we're actually closing.

MS. YU: Yeah, I think the gap we're closing is that if we have a rule that says that an expert witness is required, then the judge wouldn't be able to rule in that case then that a lay witness could just proffer that evidence.

MS. SHAPIRO: Why?

MS. YU: Well, if the rule requires it, then that would be --

MS. YU: But wouldn't the judge be able to decide that he could take judicial notice of that technology and, therefore, it doesn't require an expert and, therefore, 707 doesn't apply?

MS. YU: But I think that would be after invoking -- so that decision then would be the result of probably invoking 707. We say we object. Under Rule 707, we think that this kind of output requires scientific, technical, or other specialized knowledge to understand either the output itself or, probably more relevantly to this, the reliability, like the underlying reliability of the technology. We present those arguments, and then, yeah, and then, I guess, in your scenario, the judge at the end of that would rule that they think that no expert is necessary, Rule 707 doesn't apply. I think you're right. In that scenario, Rule 707 doesn't apply. I think we would probably then appeal and say, oh, we think that ruling is incorrect, right? I mean --

MS. SHAPIRO: But you could do that now. I guess, that's what I'm -- I mean, I'm just thinking through what -- I know Professor Roth and others talked about this being a very narrow rule that bridges, you know, a small gap, and I'm just trying to identify what that gap is.

MS. YU: Yeah. I think our intent is to just -- again, like, I think we believe under the current rules that, like, this should -- like, this kind of evidence should have an expert, but just we want to shore up that gap in which, you know, people might not think it does, and also, I think part of our suggestion too is, you know, not only if scientific or specialized knowledge is needed to understand the output but also to understand determining the reliability, and so, like, yeah, looking at those scientific studies, like, we're just -- I think, you know, we want to bring more attention to that and just shore up the requirement for an expert where, under the current rules, people might be interpreting it in ways that, you know, we disagree with as the ACLU, but I'm not going to say that no one's interpreting it differently than we are.

MS. SHAPIRO: Thank you.

CHAIR FURMAN: All right. Thank you. Thank you, Ms. Yu. That concludes all of our witnesses today. A few things in closing, first and foremost, just want to give some thanks. I want to thank the Rules Committee staff for all their assistance in ensuring that this hearing and the hearing a couple weeks ago went smoothly and for all the work they do,

especially Shelly Cox, who I think is participating today despite being under the weather, so thank you all.

Second, I want to thank members of the Committee for participating, and those who were not able to participate today I'm sure will read the transcript so that they can get the input from our witnesses as well.

And, finally, I really want to thank the witnesses for your helpful and thoughtful remarks. I will reiterate what I said before, which is, when we put this out for public comment, I mean, in general, putting things out for public comment is, you know, intended to elicit comments and helpful thoughts for our consideration and all the more so here because we're dealing with a complicated and new area and changing area and there's a lot to think about, so I think the witnesses today, both in their written submissions and oral testimony, have given us a lot to think about.

We will certainly be thinking about it and take it up at our spring meeting, which is scheduled for May 7 in Washington, D.C. That, as with all of our meetings, is public, so those who testified or otherwise, you're certainly welcome to observe and see

where we are at that time.

Carolyn, I think that's all that I needed to say by way of wrapping up, but let me check with you.

MS. DUBAY: Yes, yes, absolutely.

CHAIR FURMAN: Wonderful. So stay safe and warm. Some bad weather coming to some parts of the country in the next couple days. So, with that, we are adjourned. Thank you all for joining. Bye-bye.

(Whereupon, at 12:26 p.m., the meeting in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

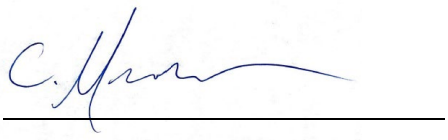
CASE TITLE: Meeting of the Advisory Committee on Evidence Rules Re: Proposed Amendments to Rule 609 and New Rule 707

HEARING DATE: January 29, 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 29, 2026



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