ADVISORY COMMITTEE
ON
EVIDENCE RULES

May 7, 2026

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May 7, 2026 Meeting

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ADVISORY COMMITTEE ON EVIDENCE RULES

MEETING AGENDA

May 7, 2026 | Washington, D.C.

I. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Fall 2025 meeting.
- Report on the January 2026 meeting of the Standing Committee.
- Recognition of Judge Sullivan's contributions, as this will be his last meeting.
- Report on Advisory Committee's proposal on safeguards where a trial court allows jurors to pose questions to witnesses --- inclusion in the new Benchbook. (*See* attachment in the agenda book).

II. Proposal to Amend Rule 609

At its Spring 2025 meeting the Committee approved, for release for public comment, a proposed amended Rule 609 that would make two changes: 1. The balancing test in Rule 609(a)(1)(B) would provide that a non-falsity conviction is admissible against an accused only if its probative value *substantially* outweighs its prejudicial effect; and 2. The end-date for measuring whether a conviction is more than ten years old for purposes of Rule 609(b) is the date of trial.

The Standing Committee approved the proposed changes for release for public comment. The public comment was very favorable, uniformly so as to Rule 609(a)(1)(B). The question for the Committee at this meeting is whether to refer the proposal to the Standing Committee with the recommendation that it be given final approval. The Reporter's memo on Rule 609 is behind Tab II.

III. Machine Learning and Proposed Rule 707

At its Spring 2025 meeting the Committee approved, for release for public comment, a proposed new Rule 707 to address the evidentiary problems raised by machine learning systems. The proposal was approved by the Standing Committee, and the Committee received testimony at two hearings, as well as more than 70 written comments.

At this meeting, the Committee will consider the public input and determine whether the proposal should be revised, and if so whether it should be sent out for another round of public comment, or submitted for further study. Behind Tab III is the Reporter's memorandum on proposed Rule 707. Also attached are comments on the amendment from DOJ and the Public Defender.

IV. Deepfakes and the Federal Rules on Authenticity

At its last six meetings, the Committee has been working on a possible amendment to address the evidentiary challenges raised by "deepfakes." The Committee has prepared, but not approved, a new Rule 901(c) that would require the opponent to provide evidence sufficient to support a finding that a challenged item was a deepfake; if that happens, the proponent would then have to show that the item is more likely than not authentic.

Behind Tab IV is the Reporter's memorandum on deepfakes and possible Rule 901(c), which includes certain revisions in response to issues raised in the comment on Rule 707.

Also behind Tab III are the results of a survey of federal judges conducted by the Federal Judicial Center to determine whether judges are encountering deep fake issues.

V. Rule 902(1) and Indian Tribes and Nations

At its Spring 2025 meeting the Committee considered a proposal to add federally-recognized Indian Tribes and Nations to the list of public entities whose records would be self-authenticating under Rule 902(1). The Committee reviewed submissions by the DOJ and the Public Defender, and resolved to seek input from Tribal representatives. The Committee has now received submissions from a number of Tribal representatives.

Behind Tab V is a memorandum from Professor Richter, the Academic Consultant, on the possible amendment to Rule 902(1) to add Indian Tribes and Nations to Rule 902(1). Also behind Tab V are submissions by DOJ, the Public Defender, and certain Indian Tribes that responded to the Committee's request for input.

VI. Rule 703, *Smith v. Arizona,* and Constitutional Red Flags

In *Smith v. Arizona*, the Supreme Court held that the Confrontation Clause bars a testimonial forensic report from being admitted into evidence through the testimony of an expert who did not participate in making the report. The Court implied that the Confrontation Clause would be violated if the testifying expert *relied* on the report, even if the report was not admitted into evidence.

There are now many lower court cases that have interpreted *Smith,* and many of them read the case as prohibiting the testifying expert from relying on a testimonial report as a basis of the expert's opinion. That holding is in conflict with Rule 703, which explicitly allows an expert to rely on inadmissible hearsay as a basis for her opinion.

Behind Tab VI is a report by the Academic Consultant, Professor Richter, on whether an amendment to Rule 703 should be considered in light of *Smith* and its progeny, in order to raise a constitutional red flag about the application of the rule. It also considers whether a similar amendment should be proposed for Rule 606(b), in response to the Supreme Court's decision in *Pena-Rodriguez v. Colorado.*

VII. Possible Change to Rule 104(a) and (b)

Rule 104(a) and (b) set out the applicable standard of proof for evidentiary determinations. Under Rule 104(a), the standard of proof for most determinations is a preponderance of the evidence. Under Rule 104(b), if the relevance of a fact is conditioned on the existence of another fact, the standard of proof for the conditional fact is evidence sufficient to support a finding.

There are at least two problems that have been raised with respect to Rules 104(a) and (b). First, the preponderance standard mandated by Rule 104(a) is not actually in the text of the rule. Second, the conditional relevance standard of Rule 104(b) is grounded in illogic. If the relevance of one fact is conditioned on another, then the probative value of each is conditioned on the existence of the other.

Behind Tab VII is a memorandum by the Reporter, analyzing Rule 104(a) and (b) and suggesting possible amendments to rectify the problems that have been found.

TAB 1

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair	Reporter
Honorable Jesse M. Furman United States District Court New York, NY	Professor Daniel J. Capra Fordham University School of Law New York, NY

Members

Honorable Valerie E. Caproni United States District Court New York, NY	James P. Cooney III, Esq. Womble Bond Dickinson LLP Charlotte, NC
Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN	James McHenry, Esq. Acting Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Edmund A. Sargus, Jr. United States District Court Columbus, OH	John S. Siffert, Esq. Lankler Siffert & Wohl LLP New York, NY
Honorable Richard J. Sullivan United States Court of Appeals New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

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Professor Liesa Richter
University of Oklahoma School of Law
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Honorable M. Hannah Lauck (*Civil*) United States District Court Richmond, VA	

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Valerie E. Caproni	D	New York (Southern)	2023	2026
James P. Cooney III	ESQ	North Carolina	2022	2028
Mark S. Massa	JUST	Indiana	2022	2028
James McHenry*	DOJ	Washington, DC	---	Open
Edmund A. Sargus, Jr.	D	Ohio (Southern)	2023	2026
John S. Siffert	ESQ	New York	2023	2026
Richard J. Sullivan	C	Second Circuit	2021	2026
R.L. Valladares	FPD	Nevada	2022	2027
Daniel J. Capra Reporter	ACAD	New York	1996	Open

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Liaisons for the Advisory Committee on Evidence Rules	Honorable Thomas M. Durkin (*Criminal*) Hon. Edward M. Mansfield *(Standing)* Hon. M. Hannah Lauck (*Civil*)

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

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

The following members of the Committee were present:

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

The following individuals also participated in support of the Committee:

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

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

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

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

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

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Ben Tietjen, CJRI, UC Berkeley Law
Chloé M. Chetta, Esq.
Christian Fannin, Esq.
Crystal Denise Williams
Daniel Steen, Esq., LCJ
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Eileen Scallen, Professor, UCLA Law
Julia Simon-Kerr, Evangeline Starr Professor of Law, University of Connecticut Law
Susan Steinman, AAJ
Susan Ehrmann Provenzano, Professor of Law, Georgia State University Law
Jessica Tyler
William P. Keane, ACTL

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I. Welcome and Opening Business

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

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

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

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

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

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

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

II. Proposed New Rule 707

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Deepfake Evidence and Draft Rule 901(c)

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

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

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

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

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

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

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

IV. Proposed Amendment to Rule 609

The Chair next directed the Committee's attention to Tab 4 of the agenda materials and to the proposal to amend Federal Rule of Evidence 609. He explained that the discussion of Rule 609 would be brief because the proposed amendment remains out for public comment through February 16, 2026. He noted one comment that suggested changing the ending date for measuring the age of a witness's convictions for purposes of Rule 609(b) to the date of the indictment rather than the date of trial. The Reporter explained that the Committee had considered several ending dates to add to Rule 609(b) in its original deliberations, including the date of indictment. He reminded the Committee that it had decided that the date of trial is the optimal date, particularly because it is more closely connected to the rationale of Rule 609(b) of allowing the jury to use convictions to assess the witness's credibility at the time of his testimony. The Reporter thus explained that the Committee had considered and rejected the date of indictment. The Reporter also noted a comment of support for the addition of the word "substantially" in the Rule 609(A)(1)(B) balancing test from the Federal Public Defender for the District of Kansas. The Chair closed the discussion of Rule 609 by promising that the Committee would consider any additional comments or feedback at the Spring 2026 meeting after the close of the public comment period.

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

The Chair next directed the Committee's attention to Tab V of the agenda materials and a proposal to amend Federal Rule of Evidence 902(1), which allows self-authentication of the signed and sealed records of enumerated government entities. He reminded the Committee that it originally received a recommendation to consider an amendment that would add "federally recognized tribes" to the list of enumerated government entities whose records are self-authenticating from Judge Frizzell of the Northern District of Oklahoma on the eve of the Fall 2024 meeting in New York. The Chair noted that a similar proposal had been on the Committee's agenda over a decade ago and that no action had been taken on the matter at that time.

The Chair explained that the Committee had deferred consideration of the proposal in Fall 2024 pending input from the Department of Justice. He reminded the Committee that the DOJ had submitted a memorandum in support of an amendment to Rule 902(1) at the Spring 2025 meeting noting the reversal of a few convictions due to insufficient proof of a defendant's tribal affiliation. The Chair explained that there could be some reason to consider the need for an amendment due to increased federal prosecutions post *McGirt*. The Chair also reminded the Committee that it had discussed the proposal at the Spring 2025 meeting and had decided to seek input from tribal governments and organizations before proceeding with an amendment proposal. He explained that the Committee had received four submissions to date from tribal representatives, all strongly in support of an amendment and that the Committee had invited additional input from tribal leaders and hoped to receive more responses for the Spring 2026 meeting. The Chair reminded the Committee that five district judges with significant experience in federal prosecutions involving tribal victims or defendants submitted a letter in support of an amendment to Rule 902(1). He then called the Committee's attention to the proposed amendment supported by the DOJ on page 189 of the agenda materials. He noted that the Federal Public Defender had submitted a new letter in opposition to any amendment to Rule 902(1). If the Committee is inclined to propose an amendment to Rule 902(1), the Chair explained that the Federal Public Defender seeks to limit the amendment to permit self-authentication only of the records of tribal governments that honor public records requests from non-members. The Chair explained that the Committee would discuss the proposal today in anticipation of making a decision about the proposed amendment at the Spring 2026 meeting. The Chair then invited Ms. Shapiro from the DOJ and Ms. Jami Johnson, an experienced Assistant Federal Public Defender to make presentations regarding the proposal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Potential Amendments to Federal Rule of Evidence 104

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

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

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

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

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

IX. Incorporated Business Records & Production as Authentication

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

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

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

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

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

X. Closing Matters

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

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

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

Respectfully submitted,

Liesa L. Richter

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Benchbook

for United States District Courts

Seventh Edition

Federal Judicial Center

February 2026

5.07 Juror Questions During Trial

Fed. R. Evid. 611

[*Note:* This section has been added at the request of the Advisory Committee on Evidence Rules. Its purpose is to recommend a set of minimum procedural safeguards in the event a court allows jurors to ask questions of witnesses during a trial. The Advisory Committee and the *Benchbook* Committee neither endorse nor oppose the practice. Whether and how to allow juror questions is a matter of judicial discretion in light of the particular circumstances of each case and the case law and policy of each circuit.]

A. Introduction

While not as common as taking questions from a jury during its deliberations, the practice of allowing individual jurors to ask questions during trial is allowed—to varying extent—by every circuit court.[1] It is considered to be part of the inherent authority of a judge to manage a trial, as well as within the scope of Fed. R. Crim. P. 611(a): "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence." Courts have recognized the possible benefits of allowing jurors to ask questions:

> [I]t helps jurors clarify and understand factual issues, especially in complex or lengthy trials that involve expert witness testimony or financial or technical evidence. If there is confusion in a juror's mind about factual testimony, it makes good common sense to allow a question to be asked about it. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Indeed, there may be cases in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties as fact-finders. Moreover, juror questioning leads to more attentive jurors and thereby leads to a more informed verdict.[2]

The courts also recognize the potential pitfalls:

> [J]urors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies. In light of jurors' lack of knowledge of the rules of evidence, a juror question may be improper or prejudicial. When a court declines to ask a question, the questioning juror may feel that her pursuit of truth has been thwarted by rules she does not understand. Concern has also been expressed over a

1. *See* United States v. Rawlings, 522 F.3d 403, 407 (D.C. Cir. 2008) (agreeing "with our sister circuits" that questions are allowed, citing cases from all other circuits except the Tenth). The Tenth Circuit, in its Criminal Pattern Jury Instructions, Instruction 1.01 at 4 (revised July 14, 2023), provides an optional instruction telling the jury that, "in rare situations, a juror may believe a question is critical to reaching a decision on a necessary element of the case. In that exceptional circumstance, you may write out a question and provide it to the courtroom deputy while the witness is on the stand." The court will then determine whether it is "a proper and necessary question" to ask the witness. https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20revised%207-14-23.pdf.

2. United States v. Richardson, 233 F.3d 1285, 1290 (11th Cir. 2000).

> risk that a sense of camaraderie among jurors may lead them to attach more significance to questions propounded by fellow jurors than those posed by counsel.[3]

In criminal trials, it may complicate a defendant's decision whether to testify if there is the possibility of jurors asking questions.

"To minimize these risks, a district judge who decides to permit questioning by jurors in a given case should implement specific precautionary procedures."[4] Jurors should be instructed, for example, that any questions must be submitted in writing, and warned that their question may have to be rephrased by the judge—or perhaps cannot be asked—for legal or other reasons.

B. Advisory Standards and Jury Instructions

The following procedures are recommended when a court chooses to allow questions from jurors during a trial, whether civil or criminal.[5] They represent the minimum safeguards that should be employed and are not meant to be exclusive: Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, especially in criminal cases, or to assure that the jurors maintain their neutral role. Before any trial, judges should weigh the benefits of allowing juror questions in that particular case against the potential harm that it might cause. The court should also notify the parties in advance that it may allow juror questions and give them an opportunity to be heard in opposition to the practice or to suggest particular methods, limits, and safeguards.

(1) Instructions to Jurors If Questions Are Allowed

If the court allows jurors to submit questions for witnesses during trial, then the court should instruct the jury that:

(a) any question must be submitted to the court in writing;

(b) a juror must not disclose a question's content to any other juror;

(c) the court may rephrase or decline to ask a question submitted by a juror;

(d) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked;

(e) an answer to a juror's question should not be given any greater weight than an answer to any other question;

(f) juror questions should be for purposes of clarifying factual matters, and are not to be argumentative;

(g) while the court is permitting juror questions, it is not encouraging them; and

3. *Rawlings*, 522 F.3d at 408. Most of the other circuits have expressed similar concerns. *See, e.g.*, United States v. Feinberg, 89 F.3d 333, 337 (3d Cir. 1996) ("implicit in [the] exercise of discretion is an obligation to weigh the potential benefit to the jurors against the potential harm to the parties, especially when one of those parties is a criminal defendant. . . . In the vast majority of cases the risks outweigh the benefits."); United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992) ("Allowing jurors to pose questions during a criminal trial is a procedure fraught with perils.").

4. *Rawlings*, 522 F.3d at 408. *See also Richardson*, 233 F.3d at 1290 ("district courts have been directed to employ measures that will protect against these risks").

5. These procedures are derived from recommendations that were prepared for the Advisory Committee on Evidence Rules with the assistance of Professor Daniel J. Capra, Reporter to the Committee, and which were based on case law and studies and surveys of the practice of allowing juror questions in both federal and state courts.

(h) as the trial progresses, the court may decide to prohibit jury questions if they become excessive in number.

(2) Procedure If a Question Is Submitted

If a question is submitted by a juror, the court must, outside the jury's hearing:

(a) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and

(b) allow a party to object to it.

(3) Posing the Question to a Witness

If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so. The court may then allow counsel to re-examine witnesses after a juror's question is answered by the witness.

(4) Record

All questions submitted by the jurors must be entered into the record.

For Further Reference

- Seventh Cir. Bar Ass'n Am. Jury Project, Seventh Circuit American Jury Project: Final Report 13–24, 60–62 (September 2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report.pdf
- Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 Ariz. St. L.J. 481, 511–15 (2016)
- Marina Garcia Marmolejo, *Jack of All Trades, Masters of None: Giving Jurors the Tools They Need to Reach the Right Verdict*, 28 Geo. Mason L. Rev. 149 (2020) (includes sample "Cautionary Instructions" in the Appendix)
- Shari Seidman Diamond, Mary R. Rose, Beth Murphy, and Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1925 (2006)
- Kevin F. O'Malley et al., *Questions by Jurors—Permitted*, 3 Fed. Jury Prac. & Instr. § 101:20 (7th ed. October 2024 Update)

MINUTES

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

January 6, 2026

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) met in Washington, D.C., on January 6, 2026. The following members were present:

Judge James C. Dever III, Chair
Judge Paul J. Barbadoro
Elizabeth J. Cabraser, Esq.
Louis A. Chaiten, Esq.
Judge Colm F. Connolly
Judge Joan N. Ericksen
Judge Stephen Higginson
Justice Edward M. Mansfield
Dean Troy A. McKenzie
Andrew J. Pincus, Esq.
Judge Allison J. Rushing (attended remotely)
Elizabeth J. Shapiro, Esq.[1]
Bart H. Williams, Esq.

The following individuals also attended to support the work of the Standing Committee: Professor Catherine T. Struve, Reporter to the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee and Chief Counsel, Rules Committee Staff; Professor Daniel R. Coquillette, Consultant to the Standing Committee; and Professor Bryan A. Garner, and Professor Joseph Kimble (attended remotely), Style Consultants to the Standing Committee.

The following individuals attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules:
Judge Allison H. Eid, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules:
Judge Rebecca B. Connelly, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell, Associate Reporter

Advisory Committee on Civil Rules:
Judge Sarah S. Vance, Chair
Professor Richard L. Marcus, Reporter
Professor Andrew Bradt, Associate Reporter
Professor Edward H. Cooper, Consultant (attended remotely)

Advisory Committee on Criminal Rules:
Judge Michael W. Mosman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules:
Judge Jesse M. Furman, Chair
Professor Daniel J. Capra, Reporter

[1] Ms. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Todd Blanche.

Other attendees at the meeting included: Bridget M. Healy, Esq., and Sarah A. Sraders, Esq., Rules Committee Staff Counsel; Shelly Cox and Rakita Johnson, Rules Committee Staff; Laurie Spolidoro, Deputy General Counsel, Administrative Office of the U.S. Courts; Judge Robin L. Rosenberg, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC). Chief Judge Michael A. Chagares, on behalf of the Executive Committee of the Judicial Conference, attended remotely.

1. OPENING BUSINESS

A. Welcome and Opening Remarks

Judge James C. Dever III, Chair of the Standing Committee, called the meeting to order and welcomed the members, participants, and observers, including those attending remotely. Judge Dever noted that Judge D. Brooks Smith was unable to attend the meeting.

Judge Dever then welcomed the new members of the Committee: Judge Allison Rushing, who has served on the Fourth Circuit since 2019; Judge Colm Connolly, who has served as a district judge in the District of Delaware since 2018; and Bart Williams, a partner with the law firm Proskauer Rose in its Los Angeles office. He also welcomed two new Advisory Committee chairs: Judge Sarah Vance, the new chair of the Civil Rules Committee, from the Eastern District of Louisiana; and Judge Michael Mosman, the new chair of the Criminal Rules Committee, from the District of Oregon.

Judge Dever also informed the Committee that Sarah Sraders, who had been the Rules Law Clerk, had moved into a counsel position in the Rules Office and would be staffing the Civil Rules Committee. He also recognized Bridget Healy, counsel to the Bankruptcy Rules Committee and Appellate Rules Committee, for her twenty years of service in the judiciary. He concluded the welcoming remarks by noting that a recognition ceremony for Professor Catherine Struve, Joe Spaniol, and Professor Edward Hartnett would take place at the end of the meeting.

B. Discussion and Approval of the Meeting Minutes

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved the minutes of the June 10, 2025 meeting.

C. Comments on 2025 Strategic Plan for the Judiciary

Judge Dever informed the members of the request of Chief Judge Michael Chagares, on behalf of the Executive Committee of the Judicial Conference and in his capacity as Planning Coordinator, to identify up to three of the Judiciary's five priorities listed in the 2025 Strategic Plan for the Judiciary to be prioritized over the next two years. The 2025 Strategic Plan for the Judiciary is included in the agenda book beginning at page 56.

Judge Dever suggested that the Standing Committee identify the following goals: (1) providing fair and impartial justice; (2) efficiently and effectively managing public resources; and (3) realizing technology's full value and managing its risks. Judge Dever then invited comments from Chief Judge Michael Chagares, who appeared remotely. Judge Chagares noted that Priority 1.3, ensuring that court rules,

processes, and procedure meet the needs of lawyers and litigants in the judicial process, goes to the core of the Committee's jurisdiction.

After an opportunity for discussion and hearing no comments, upon motion and a second, with no opposition, the Standing Committee approved identifying the three goals set forth in the 2025 Strategic Plan as described by Judge Dever.

D. Status of Rule Amendments

Carolyn A. Dubay, Chief Counsel and Secretary to the Standing Committee, gave a brief report on the status of proposed rule amendments, referencing the chart of proposed amendments to the federal rules included in the agenda book beginning on page 90. Ms. Dubay drew the Committee's attention to the upcoming hearings on proposed rule amendments that the Standing Committee approved for publication and public comment at its June 2025 meeting. She further noted that final rule amendments approved by the Standing Committee at the June 2025 meeting were approved by the Judicial Conference and delivered to the Supreme Court in October 2025 for its review.

E. Legislative Update

Sarah Sraders, Counsel to the Civil Rules Committee, provided an update on pending legislation that directly or effectively amends the federal rules, referencing the chart of legislative proposals in the agenda book beginning on page 97. Ms. Sraders drew the Committee's attention to several bills involving third-party litigation funding, noting that the Protecting Our Courts from Foreign Manipulation Act had recently been reported favorably by the House Judiciary Committee. She also highlighted the Litigation Transparency Act, noting that no action has been taken on this bill since it was introduced.

F. Federal Judicial Center Update

Judge Robin R. Rosenberg, Director of the Federal Judicial Center, provided the Committee with an update on the FJC's activities relating to the work of the Rules Committees. The FJC Report is included in the agenda book beginning on page 120.

Judge Rosenberg began her report by highlighting a project for the Appellate Rules Committee to examine motions to intervene on appeal, both at the beginning and end of the case's time in the court of appeals. Judge Rosenberg also noted that the FJC has ongoing research regarding temporary administrative stays and attorney admissions, and is developing a collection of resources on complex criminal litigation at the suggestion of the Criminal Rules Committee.

Judge Rosenberg next provided an overview of other FJC projects. This includes projects involving case weights, a review of local rules relating to redaction of private information in public court filings, supplemental research on the prevalence of unredacted social security numbers in public court filings, and appeals of *sua sponte* remand orders after Class Action Fairness Act (CAFA) removals.

Other projects Judge Rosenberg described included a pilot program on comparative sentencing information for pre-sentence investigative reports, the privacy study regarding unredacted private personal information, a bankruptcy court case weights study, and the second edition of the FJC's publication on

consumer bankruptcy law. Judge Rosenberg noted a large number of inquiries for resources on artificial intelligence (AI), and that the FJC is working on a website of AI resources for judges, and an AI chapter in the new manual for scientific evidence. The FJC is also preparing a new edition of the Manual for Complex Litigation, which has not been updated since 2004. With respect to criminal cases, the FJC is preparing the seventh edition of its manual on recurring issues in criminal trials, and a new bench book for district court judges and magistrate judges.

Judge Rosenberg also noted the work of the FJC's History Division, which had developed an online series on managing cases with significant historical evidence, and had developed a program in partnership with the American Bar Association to provide professional development for teachers focusing on three famous historical trials. With respect to education efforts, Judge Rosenberg briefly noted the FJC's ongoing judicial education programs.

Judge Rosenberg concluded her remarks by thanking Judge Chagares for his work on the Judiciary's 2025 Strategic Plan and emphasized the importance of adhering to the core values and priorities outlined in the plan.

Judge Dever thanked Judge Rosenberg for her remarks and for the invaluable support the FJC provides to the Rules Committees.

2. JOINT COMMITTEE BUSINESS

Judge Dever then turned to Joint Committee Business.

A. Electronic Filing by Self-Represented Litigants

Professor Catherine Struve, Standing Committee Reporter, provided an update on the project on self-represented litigants. Professor Struve's memorandum appears on page 127 of the agenda book.

Professor Struve explained the two goals of the project: (1) eliminate the requirement for paper service of documents (after the initial filing) on litigants who already receive notice of case activity through the electronic filing system; and (2) adopt a rule that would presumptively permit self-represented litigants to file electronically, unless a court order or local rule bars them from doing so. On this last issue, the proposed rule would provide that if a court adopts a local rule that generally bars self-represented litigants from using the court's electronic filing system, it must include reasonable exceptions or allow the use of some other electronic method for filing.

Professor Struve informed the members that after considerable discussions among the four relevant Advisory Committees, which benefited greatly from the work of the Reporters, Advisory Committee members, FJC, and the clerk liaisons, the Advisory Committees are prepared to develop rule amendments for potential presentation to the Standing Committee in June 2026 for approval to publish for public comment. Professor Struve noted that among the relevant Advisory Committees, the Bankruptcy Rules Committee raised the most concern regarding the project because of the specifics of bankruptcy practice and would like the benefit of public comment before deciding whether to ultimately seek approval of such a rule.

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The members then discussed the project for electronic filing for self-represented litigants.

A judge member expressed his enthusiasm for the project and offered three points. First, he was not clear as to the default consequence if a filing is non-conforming. Second, he was not clear as to what happens if a recipient does not receive a document and whether it is considered not filed. Third, he expressed his view, in opposition to the Department of Justice's position, that this project should not be limited to parties and should address electronic filing by unrepresented non-parties, particularly victims and subpoena recipients.

Professor Struve answered the first question, noting that the question as to the default consequence for a non-conforming filing has been considered. There was some sentiment in the Advisory Committee meetings in the fall that this was an issue outside the scope of the current project, and that the Advisory Committees did not want to take on that issue at this time. However, some participants expressed interest in trying to work it into the current project, so the issue is still pending for discussion. As to the question (whether to retain existing rule provisions providing that electronic service is not effective if the filer learns that it did not reach the person to be served), Professor Struve responded that the project probably should maintain the approach taken by the current rules. Finally, as to the third question, Professor Struve noted that the question of non-parties has a different valence among the different sets of rules, and project participants would give the question close attention.

Judge Dever thanked the judge member for his comments and encouraged the members of the Committee to provide feedback on any of the items presented.

B. Report of Joint Subcommittee on Attorney Admission

Professor Struve next provided an oral report on the work of the Joint Subcommittee on Attorney Admission. The subcommittee was formed in late 2023 in response to a proposal by Associate Dean Alan Morrison and others with respect to the attorney admissions practices of the federal trial courts. At present, the subcommittee is in the information gathering process.

Dean Morrison's proposal pointed out that a number of federal district courts require, as a condition of admission to the district court bar, that the attorney be admitted to the bar of the encompassing state. Among such states, four require, as a condition of admission to the state bar, that the attorney seeking admission take the bar exam. The proposal suggested that a rule could be adopted providing that admission to any federal district court entitles a lawyer to practice before any other district court, or as an alternative, barring a district court from requiring as a condition of admission to the bar that the applicant reside in or be a member of the bar of the state in which the district court is located.

Professor Struve reported that the subcommittee had also been thinking about the Appellate Rule 46 model, which is considerably more open than the approach taken by the more restrictive district courts – but that the subcommittee has noted the differences between appellate and trial-level practice.

With no questions or comments from the members, Judge Dever thanked Professor Struve for her report. Judge Dever further noted that Judge Paul Oetken had been the chair of the subcommittee but his term on the Bankruptcy Rules Committee had ended. Judge Leigh May, who replaced Judge Oetken on the

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Bankruptcy Rules Committee, will join the subcommittee. The subcommittee also lost another member (from the Criminal Rules Committee), so a replacement will be added.

C. Privacy Rules and Redaction

Ms. Dubay provided an oral report on the privacy rules project, which focuses on two issues: (1) full redaction of social security numbers or other taxpayer identifying numbers in public court filings; and (2) use of pseudonyms instead of initials when referencing minors in public court filings. Ms. Dubay informed the members that each of the relevant Advisory Committees had considered a rule amendment to address the unique context of their proceedings, and planned to consider proposed language at their spring meetings, with the ultimate goal to present those proposed amendments to the Standing Committee in June 2026 for approval to publish for public comment.

With no questions or comments from the members, Judge Dever proceeded to the Advisory Committee reports.

3. ADVISORY COMMITTEE REPORTS

A. Advisory Committee on Appellate Rules – Judge Allison H. Eid, Chair

Judge Eid presented the report of the Advisory Committee on Appellate Rules, which last met on October 15, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning at page 130.

1. *Status of Public Comments on Draft Amendments to Rule 15*

Judge Eid reported on the status of the proposed amendments to Rule 15 regarding review of administrative agency decisions, which were published for public comment in August 2025. Judge Eid noted that two comments – both favorable– had been received and expressed hope that more comments would be received before the February 16, 2026, deadline.

Judge Eid explained that the proposed amendments were intended to address the "incurably premature doctrine," which arises if a motion to reconsider an agency decision renders the decision unreviewable and requires dismissal of the only petition for review. This sequence of events is a trap for the unwary of the kind that the 1993 amendments to Rule 4 addressed in the context of district court decisions. Judge Eid noted that, for some reason, the 1993 amendments did not include a similar fix for petitions for review of agency decisions. The amendment to Rule 15, if it becomes final, will parallel the fix from Rule 4. The hope is that the amendment to Rule 15 will be presented to the Standing Committee for final review at its June 2026 meeting.

2. *Status of Proposals Under Consideration*

Judge Eid next discussed the Advisory Committee's ongoing study of various issues, beginning with intervention on appeal.

Judge Eid explained that there is no current rule on intervention on appeal, and in the past, the Advisory Committee has been reluctant to draft a rule because members thought it would encourage intervention. In other words, if there is a rule, people will want to use it. Judge Eid stated that the Advisory Committee had moved past that concern and is working on a draft Rule 7.1, found on page 132 of the agenda book. Judge Eid then requested feedback on this draft, taking into account the draft's features as highlighted on page 134 of the agenda book.

Judge Eid described additional proposals under consideration. These include: (1) potential amendments to address reopening the time for appeal under Rule 4(a)(6) in light of the Supreme Court's decision in *Parrish v. United States*, with draft language appearing on page 138 of the agenda book; (2) ongoing study of administrative stays under Rule 8, with research assistance from the FJC; (3) ongoing study of a Uniform Rule of Bar Admissions to the Court of Appeals, with practitioners on the Advisory Committee noting difficulties posed by differing bar admission standards amongst the circuits; (4) the treatment of tribes under the appellate rules; (5) privacy amendments relating to redaction of social security numbers and reference to minors; and (6) expanding e-filing for self-represented litigants.

Judge Eid then invited Professor Hartnett to share anything he wished to add. Professor Hartnett noted two things. First, with regard to the possibility of a rule on intervention on appeal, he stated that it would be particularly valuable to receive feedback from the Standing Committee on two issues: (1) general feedback on whether the Advisory Committee is on the right track, and (2) whether the rule should specify the kinds of legal interests that count for intervention. On this issue, Professor Hartnett noted that greater specificity is helpful, but there is a risk that greater specificity risks considerable confusion and leaving out some important interests. Second, Professor Hartnett emphasized the interest in receiving feedback on the privacy amendments, found on page 142 of the agenda book. The general approach is to apply the rule applied in the district courts, but an extra layer of protection may also be appropriate in the courts of appeals because once on appeal, whatever good reasons there were for not redacting at the trial level (as to social security numbers, tax identification numbers, and the like) may not apply to a public filing in the court of appeals.

Judge Eid then noted that Professor Hartnett would be leaving his role as Reporter for the Advisory Committee to assume the role of Reporter for the Standing Committee. Judge Eid remarked on how amazing Professor Hartnett had been as the Appellate Reporter, with an incredible ability to take moving parts and get them to line up and make sense.

a. Proposed Rule 7.1 and Intervention on Appeal

Following Judge Eid's report, the members discussed intervention on appeal. A judge member expressed support for the efforts of the Advisory Committee and raised several questions relating to intervention on appeal. Specifically, the judge member asked if the Advisory Committee had drawn from Civil Rule 24 case law to draft the proposed rule, and suggested addressing the may/must distinction (with Rule 24 using the term "must permit" intervention if the criteria are met and the proposed Appellate Rule 7.1 using the term "may permit" intervention). This raises the issue of whether intervention would be as of right, or whether the appellate court would still have discretion (permissive intervention). The judge member also asked (1) would government motions be treated differently, and (2) what is the scope of the unfair

prejudice prong (subsection F in proposed Rule 7.1(b)(1)). On this latter issue, under Civil Rule 24, that determination goes to timeliness, but in proposed Rule 7.1, it is included as a factor. The judge member also pointed to line 19, page 133 of the agenda book with the proposed language in Rule 7.1(b)(1)(D), which as drafted states as a consideration that existing parties "will not" adequately protect the intervenor's interest, and suggested that this could be rephrased to loosen the language, such as "are not likely to protect" or "may not protect." Finally, the judge member raised the issue of the word "exceptional" in the language in Rule 7.1(a), found at line 4 on page 132 of the agenda book. On this point, the judge member asked if the Advisory Committee contemplated other words, such as "rare," which would still suggest that granting a motion would not be frequent, but would give more flexibility than the word exceptional.

Professor Hartnett addressed these questions. As to the word "exceptional," Professor Hartnett explained that the Advisory Committee is considering whether to stay with that "exceptional" language or to soften that a bit. As to Civil Rule 24, Professor Hartnett confirmed that it was considered, but in terms of the overall framing of the proposed rule, the draft language was driven by the case law in the courts of appeals that emphasizes how rare and exceptional intervention should be (although there is some dispute about whether every circuit articulates that point). On the unfair prejudice language, Professor Hartnett noted that phrasing undue prejudice broadly allows the rule to encompass other types of prejudice beyond that caused by untimeliness. Though the Advisory Committee had not found examples of such other types of prejudice, it did not want to close the door to those possibilities.

Another judge member raised a question about the draft language in Rule 7.1(b)(2), found on page 133 of the agenda book, relating to government intervention. Specifically, the judge member pointed to the language in proposed Rule 7.1(b)(2)(A), which permits a government to move to intervene to defend any "action it or one of its agencies or officers has taken," and Yes. noted that this may be broader than existing Civil Rule 24. Civil Rule 24 is framed in terms of government intervention where a claim or defense is based on a statute or executive order. Professor Hartnett explained that at the very least, the proposed language covers the United States's statutory right to intervene to defend the constitutionality of a federal statute. The proposed rule was drafted with the idea that there is no particular reason to not let the government defend its actions if the claim or defense raises a statutory rather than constitutional challenge to government action, but the Advisory Committee would look at that issue more closely.

A lawyer member noted that there was a lot of concern from the judges on the Advisory Committee that this rule could open the floodgates to intervention motions unless it was made clear that permission to intervene was the exception to the rule. This discussion is the source of the "exceptional" language. The unfair-prejudice prong is designed to provide a broad way to address the problem of non-parties coming in and raising arguments that were not raised below because they had failed to protect their interest in the district court.

Another judge member asked what problem the proposed rule was trying to solve and whether appellate courts could simply decide this according to case law and common sense. Professor Hartnett explained that one reason for drafting the rule is that these motions are being made frequently, as indicated in the FJC report. The Supreme Court has also noted the absence of a rule on intervention on appeal. Also, a rule would help lawyers to advise clients not to pursue intervention because they could point to the

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standard set forth in the rule. Professor Hartnett also noted that while there is momentum towards a rule, the DOJ was not represented at the fall 2025 meeting because of the government shutdown and its position is not clear. At this point, Ms. Shapiro, on behalf of DOJ, confirmed that their representative could not attend the fall meeting because of the lapse in appropriations, but also noted that DOJ is extremely skeptical that a rule is necessary, and is particularly concerned about opening the floodgates to intervention whenever people are unhappy with an agency action that is on appeal.

The lawyer member added that part of the impetus for the rule was situations in which a federal or state government litigant changed its position and decided not to defend a rule on appeal. This issue arose in a Supreme Court case involving a state rule.

A judge member, noting his disagreement with the DOJ, added that the biggest need for intervention, and for administrative stays on the emergency interim docket, was in agency cases. He further pointed out language on page 134 of the agenda book noting that based on the FJC report, the Advisory Committee did not think that the intervention rule should pertain to agency review cases. The judge member noted his strong disagreement with that conclusion, and disagreement with excluding agency actions from the administrative-stay project as well, discussed in the Advisory Committee minutes on page 158 of the agenda book.

A lawyer member clarified that the Advisory Committee was drawing a distinction between agency cases coming from the district courts and agency cases on direct review in the courts of appeals. He noted that there is a robust settled practice for dealing with intervention in connection with a petition in the court of appeals for review or enforcement of an agency order, and that the Advisory Committee wished to avoid unsettling that practice.

b. <u>Rule 25(a)(5)(C) and Privacy Considerations</u>

The members then discussed the proposed amendments on privacy. A judge member asked whether amendments to Rule 25(a)(5)(C) would address redactions relating to minors, or whether that issue would have its own separate rule. Professor Hartnett explained that the proposed amendment would carry forward current Rule 25(a)(5)'s approach, which is generally to incorporate by reference whatever privacy provision applied below. Accordingly, provisions in the Criminal, Civil, and Bankruptcy Rules concerning pseudonyms for minors will carry forward on appeal. The Advisory Committee does not think there is a need for a special appellate rule on minors or a differing rule on appeal. The judge member responded that the privacy of minors is often overlooked, and it is worth considering the additional layer of privacy with respect to identification of minors on appeal. She further noted that appellate decisions are read by more people, and these opinions are more accessible, and she is in favor of making sure that we protect the minors as much as possible.

Professor Sara Sun Beale, Reporter for the Criminal Rules Committee, noted that Criminal Rules has taken the lead on these privacy provisions, and commented that it appears that all of the Advisory Committees agree on the move from initials for minors to pseudonyms. The disagreement has to do with social security numbers. Given the expectation that the Bankruptcy Rules will not be amended to require full redaction of Social Security numbers, the draft Appellate Rule 25 amendment is designed to require such redaction on appeal. The judge member responded that in criminal cases in the district courts, there

can be submissions from victims that are filed, and the name of the minor might not be caught given the speed and emotion that goes into filings in the district court. For this reason, she supports addressing the issue of minors so that oversights in the district court do not get repeated in the appellate record.

c. Rule 4 and Reopening Time for Appeal

The members then discussed the issue of reopening time for appeal. A lawyer member noted that his firm represented Mr. Parrish in *Parrish v. United States*, but that he did not think this precluded him from commenting on the proposed amendment. He proposed omitting the second sentence in proposed Rule 4(a)(6)(B) relating to whether a document should be construed as a notice of appeal. Rule 3 tells litigants how to file a notice of appeal, and courts already take a more liberal attitude with filings by *pro se* litigants. Interpretation of the notice of appeal is an issue for the courts rather than the litigants.

With no further discussion or questions from the members, Judge Dever proceeded to the next Advisory Committee report.

B. Advisory Committee on Bankruptcy Rules – Judge Rebecca B. Connelly, Chair

Judge Connelly presented one action item and several information items from the Advisory Committee on Bankruptcy Rules, which last met on September 25, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 164.

1. *Retroactive Technical Amendment to Official Form 410C13-NR*

Judge Connelly first presented the Advisory Committee's request that the Committee approve technical amendments to Official Form 410C13-NR, retroactive to December 1, 2025. Judge Connelly explained that this form was part of a package of six new forms that were approved in connection with changes to Bankruptcy Rule 3002.1 and went into effect on December 1, 2025. Rule 3002.1 has a very active history and has been amended numerous times, including the recent amendment that included the addition of six new official forms.

To provide background on the need to correct Official Form 410C13-NR, Judge Connelly explained that Bankruptcy Rule 3002.1 applies only in Chapter 13, which is why the form has "C13" in its title. Judge Connelly then explained that one of the rights of a Chapter 13 debtor is to file a bankruptcy case, reinstate a mortgage that is in default, and use a three- to five-year time period to cure mortgage arrears. That cure occurs by making payments to a Chapter 13 trustee, who disburses those payments to a mortgage holder or mortgage servicer. During this three- to five-year period, however, there may be changes to the servicer, changes to the payments, or inconsistencies regarding timing. As a result, at the end of this three- to five-year period, the mortgage holder or servicer's records may show that the arrears were not cured, but the debtor's and trustee's records show that they were. The amendments to Rule 3002.1 provide more transparency and notice in order to avoid these problems at the end of the case.

As part of the Rule 3002.1 amendments, the Bankruptcy Rules Committee changed an official form regarding the notice that the trustee submits to the mortgage holder or servicer and the form response by

the holder or servicer. The reason these are done as official forms is because of the volume and because management of these mortgage claims is usually handled at the mortgage-holder level, not the attorney level. Having a form that is uniform, that can be automated, and that can be managed by non-attorney staff is critical to compliance. And the mortgage holder or servicer will need to input it into a software program.

Official Form 410C13-NR was approved to go into effect December 1, 2025—along with all of the other forms, and along with the changes to Rule 3002.1. After this approval, one of the mortgage services caught a scrivener's error. Official Form 410C13-NR, which the mortgage holder or servicer would file in response to the trustee's notice of the disbursements that the trustee made on the mortgage claim, referred erroneously to the information as of the date of this "notice" in two places. The form was clearly meant to indicate that the respondent was sending its information as of the date of its "response" and not the date of the "notice."

The servicer brought this to the attention of a member of the Bankruptcy Rules Committee, and the Advisory Committee was able to address this at its September 2025 meeting and approved changes to official Form 410C13-NR to change the word "notice" to "response" in two places. The approved, revised form appears in the agenda book at page 170. The Advisory Committee approved the changes with the expectation that it would come before the Standing Committee today to seek approval retroactive to December 1. The Advisory Committee determined that it was important for the changes to go into effect December 1, consistent with how the form should be used and applied, so that servicers and courts would have the correct form.

The Advisory Committee referred to authority that the Judicial Conference had issued in March of 2016, which specifically delegates authority to the Bankruptcy Rules Committee to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.

Judge Connelly, on behalf of the Bankruptcy Rules Committee, requested approval of the changes to Official Form 410C13-NR, retroactive to December 1, 2025. With no questions or comments from the members, and upon motion and a second, with no opposition, the Standing Committee approved the requested technical amendments.

2. *Status of Proposals Under Consideration*

Judge Connelly next presented information on the status of proposals under consideration by the Advisory Committee on Bankruptcy Rules.

a. Rule 9037 and Rule 8011 and Privacy Protections

Judge Connelly first addressed the privacy amendments focused on complete redaction of social security numbers. She explained that for many reasons, the Bankruptcy Rules Committee has determined that full redaction of social security numbers is not practicable at this time in bankruptcy cases, and that the Bankruptcy Rules should continue to permit filings to contain the last four digits in a social security number. For example, when a bankruptcy case gets filed, notice to those who are affected by the

bankruptcy is absolutely essential, including notice to creditors who must be able to identify the debtor accurately. For this reason, use of the last four digits of the social security number of the debtor in court filings is still necessary for the stakeholders to be able to identify the party who is in bankruptcy. The same issue of appropriate notice applies in bankruptcy cases involving an employer identification number (EIN), or an individual taxpayer identification number (ITIN). For those reasons, the Advisory Committee at this time will not pursue an amendment to Rule 9037 with respect to complete redaction of the social security numbers or other taxpayer identifying information.

The Bankruptcy Rules Committee supports changing the denotation of minors from initials to pseudonyms. As for what rule would apply when a bankruptcy case is appealed, the Bankruptcy Rules Committee believes that the appellate rule should be consistent for both bankruptcy appeals and non-bankruptcy appeals and that the need for the last four digits of the social security number does not continue at the appellate level. Judge Connelly anticipates that proposed amendments to Bankruptcy Rule 9037 (to address pseudonyms for minors) and Bankruptcy Rule 8011 (the appellate rule) will be presented to the Standing Committee at its June 2026 meeting.

b. Rule 2003 and Meetings of Creditors

Judge Connelly next raised potential amendments to Bankruptcy Rule 2003, related to meetings of creditors. Upon the filing of the case, a meeting of creditors is convened in which a trustee conducts an examination of the debtor and creditors are given the opportunity to attend. Rule 2003 contains language regarding the timing and place of holding the meeting and specifies it has to be in the district where the bankruptcy case is pending. Two suggestions have been received regarding changing that rule to reflect the current practice of holding these meetings remotely and that in such cases, it may not matter where the trustee is located. The proposals also raised the concern that the current number of days referenced in the statute has created some administrative problems for certain trustees. Judge Connelly further noted that a bankruptcy judge does not conduct these meetings or have authority over them – the DOJ Office for U.S. Trustees is primarily involved with appointing trustees and managing these meetings of creditors (or, in some states, there is a bankruptcy administrator involved). Because changing Rule 2003 would have an impact on how the Office for U.S. Trustees and the bankruptcy administrators manage these meetings, before going forward with a proposed amendment to Rule 2003, the Advisory Committee is awaiting the outcome of discussions between the Office for U.S. Trustees and representatives from trustee organizations to try to achieve a consensus.

c. Rule 9031 and Use of Special Masters

Judge Connelly then turned to potential amendments to Bankruptcy Rule 9031, which currently provides that Civil Rule 53 relating to the appointment of special masters does not apply in cases under the Bankruptcy Code. After the Advisory Committee received suggestions to authorize Bankruptcy Judges to appoint special masters, the FJC conducted research to help the Advisory Committee determine if there is a perceived need for the use of special masters in bankruptcy cases, and the FJC research indicated that there is. With that feedback, the Advisory Committee is in the process of drafting a proposed rule change to incorporate the applicable provisions of Rule 53 in bankruptcy cases. Judge Connelly commended Professor Elizabeth Gibson, Reporter for the Bankruptcy Rules Committee, for her extraordinary work on

this issue. The goal is to bring the proposed amendment to the Standing Committee in June 2026 for approval to publish for public comment. The next issue under consideration by the Advisory Committee is potential amendments to Bankruptcy Rule 8017, which parallels Appellate Rule 29 on amicus briefs. With the proposed amendments to Appellate Rule 29 in the process of final approval, there is a need for a conforming amendment to Rule 8017, as well as Rule 8015 regarding the certificate of compliance. The Advisory Committee plans to present the Standing Committee at its June 2026 meeting with a package of proposed amendments to Rule 8017 and Rule 8015 for approval to publish for public comment.

Judge Connelly concluded her report by noting that the Advisory Committee has decided not to proceed with potential amendments to Rule 9006's time-computation provision. This decision parallels the decision of the Appellate Rules Committee to remove a similar proposal from its agenda.

The members then discussed the use of special masters in bankruptcy proceedings.

A judge member asked why the Advisory Committee has decided to support the use of special masters when it had previously chosen not to make that change, especially in light of past allegations of cronyism in the appointment of special masters. Judge Connelly responded that the renewed consideration of the issue was driven by two suggestions made to the Advisory Committee simultaneously proposing this change. The Advisory Committee looked at the issue very deliberately and slowly, including gathering research, and asking for the FJC's assistance to hear from bankruptcy judges on the issue. Given that study, the Advisory Committee felt that the proposed amendment could benefit from public comments. Professor Gibson added that the American Bar Association submitted one of the suggestions, which is very unusual and that she believed the impetus comes from mass tort bankruptcy cases with lawyers experienced in multi-district litigation, in which special masters are available. Professor Gibson also noted that the FJC survey reported respondents' mixed feelings, but also that a significant number of judges said they would have used a special master if available.

The judge member suggested that it would be good to hear from creditors who would have to pay the expense of the special masters. He further suggested that the draft language should address the use of special masters as limited to rare and unusually complex cases. Professor Gibson added that publication for public comment would also allow creditors or other people concerned about the costs to provide feedback.

The academic member added some historical and contemporary context on the use of special masters in bankruptcy cases. The driving force behind the latest round of proposals is the complexity and sprawl of some mass tort cases and other types of broad disputes that end up in bankruptcy court, where the participants in the case could benefit from the flexibility to appoint a special master. Historically, the fear of cronyism in the bankruptcy context goes back to the change from the title bankruptcy referee to bankruptcy judge. The Bankruptcy Rules as promulgated in the early 1970s used the term "judges" for referees. This change raised concerns about whether cronyism could be an issue in the tight-knit bankruptcy community. The academic member concluded, however, by stating that this past concern should not inhibit the use of effective procedural tools that could be used in bankruptcy, especially in enormously complex types of matters.

C. Advisory Committee on Civil Rules – Judge Sarah S. Vance, Chair

Judge Vance began her report by welcoming Sarah Sraders as Counsel to the Civil Rules Committee and then proceeded to present the report of the Advisory Committee on Civil Rules, which last met on October 24, 2025, in Washington, D.C. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 194. Judge Vance also reminded the Committee that a number of proposed amendments had been published for publication (Rule 7.1, Rule 26, Rule 41, Rule 45 and Rule 81) and that a public hearing on those proposed amendments would take place on January 27, 2026.

1. *Request for Approval of Publication for Public Comment – Rule 55*

Judge Vance explained that the proposed amendments to Rule 55 are based on information learned in a comprehensive FJC study on default procedures in the district courts. The goal of the amendments is to conform the rule to actual practices in many districts. A draft of the proposed amendments to Rule 55 appears on page 218 of the agenda book.

The proposed amendment to Rule 55(a) governing entry of default by the clerk would change the term "must enter the party's default" to "may enter the party's default," and also expressly adds that the clerk "may refer the matter to the court for directions." This amendment addresses both the difficulties that clerks sometimes encounter in determining whether the requirements for a default have been met and the findings of the FJC study that such consultation with the court on default matters occurs in a number of districts.

The Advisory Committee also proposes amending Rule 55(b)(1) governing the clerk's entry of a default judgment. The amendments parallel the changes to Rule 55(a). They would change the term "must" to "may" enter judgment (on claims for a sum certain or a sum that can be made certain by computation), and would expressly provide the clerk the option to refer the matter to the court for directions.

The proposed amendments recognize that since Rule 55 was adopted in 1938, litigation has become more complicated and, consequently, determining whether a claim is for a sum certain or capable of being made certain can be a challenging determination for clerks to make, especially when calculating interest and attorney's fees. The FJC study further revealed that the reality is that the entry of default judgments by clerks is rare and they frequently exercise discretion to refer these applications to the district court. The FJC study also found considerable variation in other default procedures among the districts, some requiring notice of default, some requiring specific showings to be included in applications for defaults or default judgments, and at least one imposing a meet-and-confer requirement. The Advisory Committee was not persuaded that a nationwide rule amendment that would alter all of these local practices was warranted. Judge Vance also expressed the view of the Advisory Committee that default judgments do not play nearly as important a role in federal courts as they do in state courts, with default judgments in federal courts making up only two percent of all civil case terminations.

Judge Vance additionally noted two small revisions to the existing language in Rule 55. First, the proposed amendment to Rule 55(b)(2) changes the reference to "the party" to "a party" in the first line of

the rule. This change is for greater clarity and is not intended as a substantive change. Second, the draft adopts the Standing Committee Style Consultants' recommendation to add the word "either" after the word "may" in both places where "must" was changed to "may" in Rules 55(a) and (b)(1). (The addition of "either" is shown at page 321 of the agenda book.)

The members then discussed the proposed amendments to Rule 55.

A judge member raised concerns about the proposed language giving the clerk the ability to refer a matter to the court for directions. First, the change could be a way for a party to bypass the obligation to specifically request action from the court under current Rule 55(b)(2). Second, the language to seek "directions" from the court is vague. The judge member asked whether the Advisory Committee was open to removing the clerk's ability to enter default judgments, as mentioned in the Advisory Committee minutes.

Judge Vance explained that the Advisory Committee considered the option to refer all default-judgment requests to the court but determined that it would unsettle practices in some districts and that providing discretion to refer the matter was preferable. She noted that in a number of districts (about 32), all default judgments go to the district court under current practices, and in other districts (about 18), the clerk always get consultation or direction from the court. In light of this research, the Advisory Committee decided after discussion to add the option of referral to the court for direction. Professor Marcus added that there was a strong majority, maybe unanimity, among members of the Advisory Committee that abrogating Rule 55(b)(1) would forbid the current practice in certain districts. Additionally, "refer to the court for directions" is language that captures the various methods for getting default matters before the judge. During public comment, the Advisory Committee may also receive comments suggesting abrogation of Rule 55(b)(1) or raising questions about "refer to the court for directions." In many districts, under their local rules, clerks already refer matters to the court for directions (especially in complicated matters).

The judge member commented that none of the local rules cited state that the clerk may refer the matter to the court for directions. For example, the Northern District of New York and the District of Vermont have specific requirements that seem helpful. In Vermont, the clerk can "confer" with the district judge as opposed to an actual referral. Judge Vance added that sometimes a clerk may confer with chambers staff, such as a law clerk, which indicates there is a lot of variation in judges' preferences on how to handle default judgments.

As a historical reference, Professor Marcus added that there was an initial proposal before the Advisory Committee that would not have included those words "refer to the court" and would have only changed "must" to "may." An attorney member had reacted that merely changing "must" to "may" would have left the clerk's duty unclear. By saying that the clerk must "either" enter the judgment or refer the matter to the court, the draft rule provides both guidance and flexibility.

The judge member next asked the difference between the situation under the proposed revision to allow the clerk to refer the matter to the court for directions, and the process under Rule 55(b)(2) when the request for a default judgment comes directly to the court. Professor Marcus explained that presumably there is no difference, particularly since there are local rules in some places to say what happens when you ask the court to enter default judgment. There are also likely not many cases in which there really is

a sum certain or a sum that can be made certain by computation; all other cases would be addressed under Rule 55(b)(2).

The judge member predicted that public comment might raise the topic of the statutory protections concerning default judgments against military service members. Professor Marcus indicated that while the Advisory Committee discussed that issue at some length, the consensus was the downsides of adding the statutory reference would exceed the benefits. Judge Vance added that some districts have provisions for dealing with service members, that the Bar was aware of the service-member issue, and that adding a reference to that statute could cause a problem if references to other relevant statutes that were not put in the rule. More generally, the practice in rule-making is that it is not a good idea to refer to statutes in a rule because including a statutory reference in one rule might erroneously suggest that the statute does not apply under other rules that fail to refer to it.

A lawyer member wondered if using the term "consult" is better than "refer" because "refer" sounds like the judge is going to make the ultimate decision. What the amendment contemplates is that the clerk consults with the judge to get advice on what should be done, as opposed to referring it to the judge for the judge to act on the request.

Professor Marcus responded that the question actually shows the flexibility of the language in the proposal. Judges who are referred these matters can determine what they want to do with them. One judge might direct the clerk to enter the default, and another judge might direct the clerk to set it for hearing.

Another judge member raised concerns about using the word "consult" because it would suggest that the clerk can disregard whatever the district court judge says, and that "refer" was preferable. Professor Marcus agreed.

With no further questions or comments from the members, and upon motion and a second, with no opposition, the Standing Committee approved for publication and public comment on the proposed amendments to Rule 55, as shown in the agenda book at pages 218-221, with the addition of the edits from Professor Garner as reflected in Judge Vance's email (agenda book page 321).

2. *Status of Proposals Under Consideration*

a. <u>Rule 43 and Remote Trial Testimony</u>

Judge Vance first directed members to the issue of remote testimony, which is discussed at pages 202 to 203 of the agenda book. Judge Vance stated that the Rule 43/45 Subcommittee, chaired by Judge Hannah Lauck, is seriously considering amendment of Rule 43(a) on remote trial testimony to relax the requirement that remote testimony be permitted only in compelling circumstances. The subcommittee is also considering whether a similar amendment to Rule 43(c) is in order since it authorizes the use of affidavits, oral testimony, or depositions on motions but does not state whether oral testimony may be provided remotely.

Judge Vance explained that Rule 43(a) was amended in 1996 to permit remote trial testimony but only for "good cause in compelling circumstances and with appropriate safeguards." The amendment being

considered would delete "compelling circumstances" but would leave "good cause and with appropriate safeguards" in the rule. At the time of the 1996 amendments, the Advisory Committee noted that the justification for allowing remote trial testimony only in compelling circumstances was that the use of video depositions was superior to remote testimony for presenting absent witnesses. Since 1996, technology such as Zoom and Teams has changed the remote testimony landscape, and courts' experience during the pandemic has demonstrated that remote proceedings can be conducted efficiently and effectively. Judge Vance further noted that in response to these developments, the Bankruptcy Rules have been amended to relax the constraints on remote testimony in contested matters, although not in adversary proceedings.

To consider the proposed amendment to Rule 43(a), the Rule 43/45 Subcommittee heard the views of lawyer groups, as well as the experience of a number of judges with remote proceedings during the pandemic, and they all are of the view that the current rule is too restrictive and that remote proceedings should be liberalized for trial testimony. The Advisory Committee also considered a discussion draft presented at its October 2025 meeting, found on page 201 of the agenda book, and expressed no opposition to eliminating the "compelling circumstances" requirement for remote trial testimony. Some members did express a view, however, that the draft committee note may be too cautious about the use of remote testimony and that more latitude should be given to the court to allow it. Some members also suggested that perhaps similar provisions authorizing remote testimony for motion hearings should be added to Rule 43(c). Since the October 2025 meeting, the subcommittee has met again, and its emerging view is that while in-person trial testimony should remain the norm, the "compelling circumstances" requirement for remote trial testimony is too restrictive and that a relaxed standard should likewise apply to permit remote testimony at motion hearings.

Professor Marcus added that this is an ongoing effort, but a proposed amendment may be presented at the June 2026 Committee meeting as a proposal for publication for public comment. If it is published, Professor Marcus expects a great deal of public comment.

The members then discussed the potential amendment of Rule 43(a) and Rule 43(c) to remove the "compelling circumstances" language.

A judge member referenced line 51 on page 201 and line 100 on page 202 of the agenda book and suggested adding a comma after "good cause," because the "good cause" is separate from the "safeguards." Professor Garner noted that commas are discretionary, with the open style and the closed style of punctuation. The rules committees' style would be not to put a comma there.

The judge member also noted an inconsistency between reference in Rule 43(c) to "witness" testimony and subsection (a)'s reference to "oral" testimony. Professor Marcus thanked the judge member for pointing out that disjunction for the Advisory Committee's consideration.

Another judge member raised the concern that the reference to COVID-19 in the committee note, when entire trials were held remotely, could be read in conjunction with the proposed Rule 43 changes to allow an entire trial to happen remotely. The judge member also noted that there could also be constitutional or evidentiary objections to remote testimony, but that her primary concern is the potential use of this rule to increase the instances of entire trials being held remotely. Judge Vance responded that the proposed

amendments were not intended to do that, and would not, for example, apply to trial proceedings such as voir dire. Judge Vance would suspect, however, that if there is good cause to allow more than one witness to testify remotely in a very long trial, this would be available for the judge's consideration. The amendment just removes "compelling circumstances," which seems to suggest that it needs to be a rare occurrence when in practice remote testimony does occur in a lot of complex litigation.

A lawyer member then commented on his experiences with both witnesses testifying remotely and whole trials being done remotely, and that he was not a fan of either. He noted that remote testimony really does impact the ability of a trier of fact to assess witness credibility, and so anything that facilitates remote participation of a witness is not a good thing and should be carefully assessed by a court before the court permits it. Additionally, remote testimony can have a profound impact on cases, and removing the "compelling circumstances" language would increase the prevalence of remote testimony. For example, with such a change, anytime it is inconvenient for the witness, the lawyer can ask for remote testimony and state there is good cause and we can have appropriate safeguards.

Another judge member agreed with the lawyer member and expressed concern that deleting the words "compelling circumstances" will create mischief because good cause is a relatively low standard. He also anticipated being besieged by requests to have witnesses testify remotely. Further, removing "compelling circumstances" is entirely inconsistent with the views of the Advisory Committee (as indicated in the minutes on page 228 of the agenda book) that live in-person testimony should remain the norm. For this reason, there needs to be something more to give guidance to judges as to when a request should be allowed. Finally, the judge member noted that in his experience, the existing language did not unduly limit the use of technology to present trial testimony. Judge Vance thanked the judge member for his comments, but added that others believe that remote testimony is effective. The judge member clarified that it is not that credibility cannot be assessed with remote testimony, but that in-person testimony should be the general rule. In response to a suggestion by the judge member that the problem is with the committee note rather than the text of the Rule, Professor Marcus observed that the rules process does not allow for amendments to committee notes without amendments to the rule itself.

Another practitioner member commented that while she shares the concerns about potential expanded use of remote testimony, she endorses and encourages the proposed amendment to go forward for public comment to get the perspectives of practitioners and judges. This may yield improvements or refinements to the rule text and committee notes. But her bottom line is that we are in a world where remote testimony is being used increasingly, sometimes of necessity, other times for convenience, and adopting a rule on the topic would be timely and consistent with the goals of Rule 1.

A practitioner member raised one additional, practical concern that occurs when a remote witness may have materials to review that are off screen. One safeguard that was applied by a court was to suggest that the lawyer ask questions, such as "is there anything in front of you on the desk? Is your phone on or off?" In that case, however, the practitioner had genuine questions about whether the expert witness who appeared remotely was continuing to communicate with the lawyers on the other side via text or some other device during the testimony. While the quality of the video may be good for credibility assessment, the practitioner also found that there are all sorts of other credibility-related concerns that arise with remote appearances.

Draft

Another judge member added that his sense is that jurors may not like remote testimony. For example, jurors may ask why they are required to be present but the witness is not. He asked whether the rule should distinguish between instances when a party opts to accept that potential risk and instances when it is the witness who is asking to appear remotely. Judge Vance noted that one argument in favor of permitting remote testimony is that sometimes the alternative would be to put in the witness's deposition testimony, and jurors do not like hearing deposition testimony or watching video depositions. Professor Hartnett suggested that the Advisory Committee might consider building into the text of the rule guidance on the choice between remote live testimony or use of depositions.

A judge member then added, in response to the concerns raised by a practitioner about appropriate safeguards during remote testimony, that there could be a requirement to allow the opposing party to have someone present with the remote witness. For example, when you have a video deposition, the other side is represented, and this is something that could be suggested in a committee note. Another judge member added that a brief search for case law distinguishing "good cause" from "compelling circumstances" did not yield much. But he would still like to hear the empirical basis that this is a problem (e.g., that judges are not allowing remote testimony under the current rule) and if there is a way to distinguish between compelling versus good cause and how that change would play out.

Professor Coquillette added for the benefit of the members that as a matter of rule-drafting philosophy, any language relating to compelling circumstances should be in the rule, not in the note. Further, case law should not go in the committee notes. Many people do not read the notes carefully. If an issue is important, it ought to be in the text of the rule.

b. Third-Party Litigation Funding

Judge Vance next provided a report on the Advisory Committee's consideration of amendments related to third-party litigation funding (TPLF), discussed on pages 203 and 204 of the agenda book. Judge Vance noted that the TPLF subcommittee, chaired by Judge David Proctor, was formed in 2024, but this issue has been on the Advisory Committee agenda for some time. It is an area of increasing interest to lawmakers, academics, lawyers, and litigants. The subcommittee has spent the last year educating itself on these issues. Judge Vance reminded the Committee members that Ms. Srader's legislative report had noted a number of TPLF-related bills under consideration in both houses of Congress. The Advisory Committee continues to hear from proponents and opponents of a disclosure rule. Most recently, members of the subcommittee, as well as Judge Dever, attended a conference held by George Washington University Law Center on this issue, which was attended by industry participants and parties who favored and opposed a disclosure rule.

Judge Vance explained that in general, the subcommittee's questions include: How would a rule define the financing arrangements that trigger disclosure? What would be disclosed and to whom? What would the court do with the information disclosed? Should judges be concerned about the ethical implications if funders control settlement decisions? Does third-party funding prompt the filing of unvetted claims? And will disclosure lead to time-consuming discovery? Judge Vance then invited any views of the Standing Committee on these issues.

Draft

A judge member with experience in TPLF issues offered to make himself available to the Advisory Committee if they had questions about the standing orders he has issued. Judge Vance expressed her appreciation for the offer.

c. Cross-Border Discovery

Judge Vance then proceeded to the work of the cross-border discovery subcommittee, chaired by Judge Manish Shah. The subcommittee was formed in 2023 to study the complex issues that sometimes arise in obtaining discovery outside the U.S. for use in federal courts. As discussed in the agenda book, the subcommittee engaged in substantial outreach to get an understanding of these issues and whether rules amendments would be helpful. This outreach revealed a lack of enthusiasm for rulemaking in this area. To a significant extent, lawyers felt that they could work out problems, as they come up, under the existing rules. Judge Vance reported that ultimately, the cross-border discovery committee recommended that this topic be dropped from the Advisory Committee's agenda and the Advisory Committee voted to approve that recommendation. Judge Dever added for the benefit of new members in particular that it is not uncommon for a subcommittee to study a proposal for rulemaking and then to decide not to go forward with a change.

d. Rule 26(a) and Filing Under Seal

Judge Vance then provided a report on the Advisory Committee's consideration of the issue of filing under seal, discussed at pages 205 to 208 of the agenda book. As background, Judge Vance explained that for several years, the discovery subcommittee, chaired by Judge David Godbey, had been considering a proposal to recognize in the rules that granting a motion for a protective order does not of itself justify the filing of the discovery material in the record under seal. The proposal also included proposed amendments to impose national procedural standards for handling sealing motions.

At the October 2025 Advisory Committee meeting, the discovery committee discussed the alternatives it had been considering for addressing sealing issues, and these were (1) whether to amend Rule 26(c) and Rule 5(d) to provide when filing under seal could be ordered or (2) whether it would be sufficient to amend only Rule 26(c) to call attention to the divergent standards for protective orders and sealing court records or (3) whether no amendment was necessary given the general recognition that the standard for issuing a protective order is less stringent than the common law and First Amendment limits on sealing court records. The subcommittee reached the unanimous conclusion that the rules need not be amended and recommended that this item be removed from the Committee's agenda because national procedural directives would ignore real differences in dockets across districts and would raise undue difficulties in some districts. The subcommittee concluded that it was unnecessary to recite in the rules what was already recognized in the law – that the standard for sealing documents is more stringent than the good cause standard for the issuance of a protective order. Further, various circuits have their own statements of the common law and First Amendment standards for sealing court records, and the subcommittee sought to avoid unsettling this established case law by stating grounds for sealing in the rules. The Advisory Committee voted to accept the subcommittee's recommendation that this item be dropped from the agenda.

A judge member asked if the issue was being dropped entirely or whether it would remain on a study agenda. If not fully forever dropped, the judge member referenced the work of Professor Volokh pointing to a smaller issue that could still be valuable regarding requiring a waiting period. In other words, people file a motion to seal and then there is a waiting period such as courts these days have for transfers out of the district. A waiting period would give the media or the government a chance to object to the requested sealing on the ground of public rights of access. Professor Marcus responded that the original proposal from Professor Volokh had a waiting period (it provided that no motion to seal may be acted upon until seven days after it is posted publicly). Professor Marcus recalled that a number of the lawyers said that a waiting period would be unworkable because, in the meantime, they could be facing a filing deadline while not knowing what they could include in their filing. Professor Marcus noted that the difficulties with filing under seal are numerous; the Advisory Committee has not shut and locked the door on considering sealing-related issues in the future, but it decided that the specific proposal it had received did not seem worth pursuing further. The judge member responded that the appellate courts see many sealed documents that take a great amount of energy to unseal because the sealing was done by joint agreement and district court approval, with a large amount of information that should not have been sealed. Judge Vance noted that local provisions address sealing matters, and the judge member agreed that courts have internal operating procedures on the topic.

e. Rule 23 Proposals

Judge Vance then turned to the status of proposals to amend Rule 23, discussed at pages 208 to 211 of the agenda book. She noted that the Rule 23 issues are not yet under study by a specific subcommittee.

The first Rule 23 issue concerns incentive or service awards to class representatives for work they have done on behalf of the class. In 2020, a divided panel of the Eleventh Circuit held that such awards were prohibited by two 19th Century Supreme Court cases. Before that, the circuits were unanimous in permitting these awards, and since the Eleventh Circuit decision, no court of appeals has followed suit. Four circuits have issued published opinions that continue allowing service awards in appropriate cases. The Advisory Committee is considering whether rulemaking is worthwhile to address an outlier decision, whether the Advisory Committee has authority under the Enabling Act to resolve this issue, and whether this is a policy-driven question that it would not ordinarily address.

The second Rule 23 issue concerns the Rule 23(b)(3) superiority requirement. This topic was brought to the Advisory Committee by the Lawyers for Civil Justice. The superiority prong of Rule 23(b) provides that a court should evaluate whether a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The proponent submits that this reference to adjudication has been interpreted as excluding consideration of private remedial initiatives, such as recall campaigns and product refunds, and it submits that the rule should permit consideration of these alternatives in the superiority analysis. The Advisory Committee is considering that, on one hand, ensuring that a judge has discretion to consider these additional alternatives could provide faster or more effective relief to class members, but it may be, on the other hand, extremely difficult for the court to evaluate these alternatives at the early point in the litigation when class certification has to be decided, and some courts have taken

non-litigation alternatives into account under the adequacy prong of Rule 23, which could call into question whether a rule in this area is necessary.

The third Rule 23 issue concerns whether court approval should be required for the settlement or voluntary dismissal of claims by class representatives before class certification. Before 2003, most courts required judicial review for the pre-certification settlement or dismissal of a case filed as a class action, but as amended in 2003, Rule 23 includes no such requirement. The Advisory Committee is considering whether judicial scrutiny is needed in this area. The current approach has been criticized as possibly inviting a form of strike suits where cases are settled for no real relief to the class but accompanied by a payoff to counsel or the class representative. Something like this was involved in a case that Judge Easterbrook decided in 2024, and he pointed out the inability for the court to consider under the class action rules whether the payments to the class representatives were appropriate. This was a federal securities case governed by the Private Securities Litigation Reform Act and there was an ability to use Rule 11 to get at this issue in that case, but he did point out that Rule 23 did not provide for court scrutiny of settlements of cases not yet certified as class actions and he suggested that perhaps the rulemakers should take a look at this. Also cited is potential prejudice to putative class members who are relying on the suit but receive no notice of its settlement or dismissal. The Advisory Committee noted these concerns but also noted potential obstacles to restoring judicial review. For example, the customary evaluation of a class settlement under Rule 23(e) may not be well suited to evaluate individual settlements by class representatives, and another consideration is that Rule 23(e) requires notice to class members of settlements in certified classes. If notice is required for settlements before certification, who would pay for it, and would the benefits of notice be outweighed by the cost? And there's also a question of whether, if reliance is an issue, the court can already use Rule 23(d) to order some form of notice.

The Advisory Committee has concluded preliminarily that all three of these Rule 23 topics warrant continued study, but the Committee is very much aware that any new Rule 23 project would be a significant and resource-intensive undertaking. Judge Vance then invited Professor Bradt to add any additional observations.

Professor Bradt added that it is unclear whether any or all of these three issues could be handled discretely or whether they would open the door to a much broader reconsideration of much of Rule 23, which would be a consequential decision for the Advisory Committee.

Committee members were then invited to offer feedback on the Rule 23 issues.

A lawyer member suggested that there are other Rule 23 issues that may be a higher priority, such that addressing these narrow Rule 23 concerns without looking more broadly into Rule 23 would be difficult. Another lawyer member added that the Rule 23 issues presented did not seem to warrant a rule amendment.

f. Random Case Assignment

Judge Vance then proceeded to the last information item to update the Committee on the issue of random case assignment, which the Advisory Committee has been considering since 2023. In March 2024, the Judicial Conference issued its guidance that districts should apply district-wide assignment to civil cases

seeking injunctions barring or mandating nationwide enforcement of federal law or statewide enforcement of state law, and last summer the Supreme Court decided *Trump v. CASA*, 606 U.S. 831 (2025), which also affects this issue. The Advisory Committee is continuing to monitor the developments in this area.

D. Advisory Committee on Criminal Rules – Judge Michael W. Mosman

Judge Mosman presented the report of the Advisory Committee on Criminal Rules, which last met (virtually, due to the government shutdown) on November 6, 2025. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 242. Judge Mosman opened his remarks by noting that as a new Chair, he is grateful to attend the Committee meeting with Professors Beale and King, who are a tremendous help.

3. *Status of Proposals Under Consideration*

a. Rule 49.1 and Privacy Concerns

Judge Mosman began his report with the proposal to amend Rule 49.1 to require reference to minors by pseudonyms rather than initials as provided in the current rule. There still will be a sealed filing that will contain all the information that a litigant might need. Judge Mosman noted several issues that have been raised. One is, can someone who is a minor when the case starts age out of the rule's protection as the case goes on? The discussion and experience among members of the Advisory Committee was that both by case-by-case protective orders and by general practice in criminal cases, individuals do not tend to age out of the current rule's protection. This change would not alter that practice. Another question that came up was whether this change would cover not just victims in criminal cases, but witnesses. Judge Mosman stated that this subject is not currently a part of the effort that is being undertaken on Rule 49.1. There are statutes that do cover witnesses in criminal cases who are minors and grant them some protections, but these protections are not uniform across all criminal cases. Finally, the proposal currently on the table makes a point of referencing exhibits and attachments because experience shows that most the violations of this protection arise in that context and not indictments or other filings.

Professor Beale added in reference to an earlier question (during the Appellate Rules Committee's report on the privacy project) from a judge member about the inadvertent inclusion of a minor's name, that the FJC study on redaction of social security numbers highlighted that most often unredacted information appears in attachments or exhibits. The Criminal Rules Committee is coordinating with and will share drafts with all the other Advisory Committees addressing privacy.

Judge Mosman then turned to the proposal to amend Rule 49.1 to require complete redaction of social security numbers and other taxpayer identifying information. The Advisory Committee's consideration of this started with a recommendation from Senator Ron Wyden to consider changing the current rule (which permits inclusion of the last four digits of social security numbers in public filings) to require complete redaction of social security numbers. The Rule 49.1 Subcommittee started with that proposal, and there is widespread support for the idea (except in the bankruptcy context).

Judge Mosman also reported that the Advisory Committee undertook to determine if other taxpayer identifying numbers (ITINs, ATINs, and EINs - Individual Taxpayer Identification Numbers, Adoption

Taxpayer Identification Numbers, and Employer Identification Numbers) have the same risk of fraudulent use as social security numbers. This research indicated that fraud involving ITINs shows up fairly frequently, while the other two are less common – at least in criminal cases. Even so, the idea was that the Advisory Committee would, once on the path of increasing the protection for social security numbers, take a look at these numbers also. Judge Mosman noted that the Advisory Committee is still discussing what to do with these identifying numbers in a descending order of frequency, the least frequent being the ATIN, which is a number given to someone to effectuate adoption that disappears immediately when they are adopted and obtain a social security number. Judge Mosman also recognized that the DOJ had raised the concern that redaction runs counter to the general idea of a presumption of public availability of information. Judge Mosman expressed uncertainty as to whether that presumption attaches to private information the way it does to other information in indictments, for example, but the current recommendation of the Rule 49.1 Subcommittee is to treat all three of these other categories the same way we treat social security numbers and to not include them in public filings, with the caveat that they can be included as necessary in the court filing but not in the public filings.

Judge Mosman also stated that one other concern raised by the DOJ and others is the desire for some uniformity among the various Advisory Committees that are looking at this issue. That may not be possible with the Bankruptcy Rules Committee, but the Advisory Committees should at least look at whether different rules for different settings are appropriate.

Professor Beale added that the Style Consultants have been enormously helpful in working on the draft as well and that the Advisory Committee and Rule 49.1 Subcommittee is very well aware of the importance of uniformity that has traditionally been part of all of these rules, although the Bankruptcy Rules Advisory Committee has already decided that it is necessary to keep the last four digits of social security numbers in bankruptcy filings.

Professor Beale also addressed adding EINs, noting that the Advisory Committee began with the idea that even for EINS at least some of those are held by individuals (such as people who have household service providers) who would object to that number being in a public filing. While EINs are used by large corporations and may be public for other reasons, the Advisory Committee started from the idea that if there is no need for an EIN then it should be redacted, and on the criminal side it seems (subject to further consultation with the DOJ) that EINs are not needed, and there is some recognition that EINs are private. At the spring 2026 meeting, the Advisory Committee will take up the underlying policy question about whether to address not just ITINs, but also the ATINs and EINs.

Judge Mosman added that he wanted to extend his thanks to former Rules Law Clerk, Kyle Brinker, who researched the extent to which people engaging in fraud use SSNs versus ITINs or other identifying taxpayer information. That research indicated either little or no known cases involving ATINs.

Professor Gibson asked for clarification whether the Criminal Rules Committee would apply the EIN protection to corporations and individuals. Professor Beale responded that the rule would apply to both, as done in the U.S. Tax Court. Professor Gibson followed up with a question about privacy concerns given that EINs are fully available on bankruptcy petitions. Professor Beale acknowledged that

bankruptcy is likely to be different, but that for Criminal Rules, if the current rule refers to taxpayer identifying information, that includes social security numbers, ITINs, ATINs, and EINs.

b. Rule 40 and Out of District Arrest for Violation of Conditions of Release

Judge Mosman then reported on the work of the Rule 40 Subcommittee. He explained that three rules set out what the judge must tell the defendant in certain proceedings. Rule 5 applies to an initial appearance in the charging district, Rule 32.1 is a comprehensive rule that applies when someone is arrested in another district for violating their supervised release, and Rule 40 (which is less comprehensive) applies when someone is arrested outside of the charging district for violating the conditions of their release (or for failure to appear in the charging district). Rule 40 does not provide the same level of detail or guidance as Rule 32.1, and the focus of the Rule 40 Subcommittee is to consider amendments to create a more comprehensive checklist for the judge when a defendant appears in court under the circumstances covered in Rule 40.

The Advisory Committee considered and generally agreed with the Subcommittee on a number of policy decisions about what should and should not be included in Rule 40, including: (1) the person should be advised that they have the right to a detention hearing even though they are not in the district where they were charged, (2) the person should be able to contest identity in the non-charging district; (3) the person should be advised that there will not be another or new preliminary hearing in the non-charging district; and (4) the person should be advised again of the right to consult with an attorney (if their attorney is in another state, they should be able to consult with some attorney at that hearing). The subcommittee further believes that Rule 40 does not need to require the judge to repeat consular warnings or some of the other things that go into Rule 5 or Rule 32.1.

c. Rule 11 and Plea Agreements

Judge Mosman next reported on a suggestion from Judge Patricia Barksdale to consider amending Rule 11(b)(1)(M), which provides that when accepting a plea, the judge must ensure the defendant understands that in determining a sentence, the judge will calculate the applicable guideline range and consider possible departures and then other sentencing factors. The Sentencing Guidelines were amended effective November 1, 2025 to fold departures into the general catch-all that the judge will consider "other sentencing factors." Judge Barksdale suggested amending Rule 11 to conform to that change and delete the reference to departures as subsumed into the advice that the judge will consider "other sentencing factors." Judge Mosman noted that the DOJ raised an interesting issue regarding whether the amendments to the Sentencing Guidelines also implicate Rule 32(h), which provides that before departing from the Sentencing Guidelines on a ground not previously noticed or briefed, a judge must give notice to the parties. Judge Mosman reported that a subcommittee will look into what to do with Rule 32(h).

A judge member suggested that if the subcommittee plans to look into Rules 11 and 32, it might want to add a requirement that when judges describe the "terms" of an appeal waiver, they must also explain the consequences. Such consequences include situations in which post-plea, the conduct subject to the plea is ruled not to be a crime, but the defendant has already waived the right to appeal. Judge Mosman noted

the suggestion and stated that the Advisory Committee would take a look at that issue (although it might await the outcome of a case on appeal waivers currently pending in the Supreme Court).

d. Status of Proposals Relating to Rule 53 and Rule 15

Judge Mosman concluded with a report on two items on the study agenda. One item is a suggestion from Judge Edmond Chang, Chair of the Criminal Law Committee, relating to Rule 53. Judge Mosman reminded the Committee that the Advisory Committee had studied Rule 53 about a year ago and decided not to make any changes. The previous Rule 53 proposal was driven by news organizations who wanted to have the rule changed quickly so that they could broadcast the Trump trial or trials, particularly in New York. Judge Chang's suggestion is much narrower and has to do with the idea that Rule 53's broadcasting ban not only affects big news organizations but also bars narrowly broadcasting the trial to a victim or a group of victims who might be remote from the courthouse where the sentencing or the trial is occurring. Judge Mosman noted that some of those victim groups, such as the Lockerbie victims, are covered by specific acts of Congress. Judge Mosman advised the Committee that given the workload of the Advisory Committee and its recent look at Rule 53 (and the decision not to change it), the Advisory Committee has decided to focus more narrowly on Judge Chang's specific suggestion.

Finally, Judge Mosman reported that a number of proposals and letters have been received to amend Rule 15 to allow for pretrial depositions. The submissions show differing views on this issue, which was placed on the Advisory Committee's study agenda. Judge Mosman added that the states are doing different things with this issue, with about 20 states that have some sort of criminal depositions, with some of them very informal. A subcommittee will eventually be stood up to study this issue, which will be a massive undertaking.

With no further questions or comments, Judge Mosman concluded his report.

E. Advisory Committee on Evidence Rules – Judge Jesse M. Furman

Judge Furman presented the report of the Advisory Committee on Evidence Rules, which met (virtually, due to the government shutdown) on November 5, 2025. The Advisory Committee's report and the draft minutes of its last meeting are included in the agenda book beginning on page 282.

1. *Status of Proposed Amendments Published for Public Comment*

a. Proposed New Rule 707

Judge Furman began his report with proposed new Rule 707, which was published for public comment in August 2025. The Advisory Committee has spent several years studying issues relating to artificial intelligence and considering whether they warrant amendments to the Rules of Evidence. The Advisory Committee has focused on two concerns. The first is the issue of reliability, namely machine output that essentially functions like expert testimony, albeit without a human expert to cross-examine or test the reliability of the opinion, and the second is authenticity, namely whether audio/visual evidence is authentic or a deepfake.

Beginning with the first concern, which has advanced further on the rulemaking front, the Advisory Committee published for public comment a new Rule 707, which applies when machine output would be expert testimony if it were produced by a human. The new rule subjects that output to the requirements of Rule 702(a) through (d), but it explicitly excludes the output of "simple scientific instruments." The public comment period closes on February 16. As of today, there have been nine public comments, and public hearings will be held on January 15 and 29, 2026.

At the Advisory Committee's November meeting, the Advisory Committee discussed various potential changes to the committee note in light of some commentary on the issues, as well as input from members. These changes are noted on page 295 of the agenda book. The first change is to add a provision to emphasize the differences between human experts, who are subject to cross-examination, and machine-generated opinions. The change would encourage trial courts to consider limiting instructions, cautioning juries against over- or under-reliance on machine output given the absence of cross-examination. The second change responds to a concern that was expressed by the Standing Committee previously to strengthen the note to make clear that Rule 707 is not intended to circumvent Rule 702; the added language would emphasize that the requirements of the rule might actually be difficult to meet without an expert. The third change is to address the "black box" issue where no one can explain how the machine works and what it does. The sentiment is that in those circumstances, reliability is probably not something that can be shown unless it can be validated through error rates and the like. Finally, there are changes to clarify the relationship with Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence, namely that if the requirements of Rule 707 are satisfied, it would likely subsume the requirements of 901(b)(9).

Judge Furman explained that the Advisory Committee also considered and rejected the following proposed changes to the proposed rule and the note: (1) to change machine-generated to computer-generated; (2) to limit the scope to machine learning, as that term is not clearly defined and is somewhat dynamic; (3) to cover expert testimony, because that is subject to the requirements of Rule 702; and (4) to change the sentence referring to "simple scientific instruments" to make it refer to machines that are generally understood by the public, because that change was too amorphous.

A judge member expressed concern about language from the proposed committee note, "If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable," and then, at the end of that paragraph, the sentence that "the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error." The judge member questioned how evidence could be put before a jury with no explanation of how output was produced. Professor Capra responded that the Advisory Committee considered the existence of validation studies that can show there is a very low rate of error for a particular machine even if no one can figure out how the machine actually reached the result it did. The alternative approach would be to not allow introduction of the output if it cannot be explained. Even with respect to experience-based experts, however, there are times when that expert can explain something but not the way actual way they came to the conclusion. The judge member asked Professor Capra to provide an example of output that could be introduced without an explanation of how it was produced, which could

be troubling if somebody's liberty were at issue in a trial. Professor Capra believed that instances will arise only rarely in which a black box/machine comes up with something that can be found to be reliable, but it has happened. For example, facial recognition technology may produce a conclusion as to identity, with no explanation of how it came to that conclusion, but there is corroborative evidence which indicates that the identification is correct. Though this is rare, Professor Capra suggested that it would be a big step to adopt a rule that such evidence can never be admitted. The Advisory Committee has not come to a formal decision on this issue. Professor Capra made a comparison to dog sniffs - you do not know how a dog came to the conclusion, but you can determine that the dog was trained properly and that the dog has been accurate in 800 particular situations and then the dog-sniff evidence is admissible. The judge member thanked Professor Capra for the helpful explanation and examples.

Judge Furman then brought to the attention of the Standing Committee, Civil Rules Committee, and Criminal Rules Committee that if Rule 707 is added to the Rules of Evidence, it would raise fairly important disclosure issues, for example regarding the algorithms underlying a machine. While this is not an issue for the Federal Rules of Evidence, it is an issue for the Civil and Criminal Rules Committees to consider in connection with their disclosure-related rules if Rule 707 is adopted.

Before moving to the next topic, another judge member noted that he had sent an edit regarding the notice and disclosure language raised in the proposed rule, pointing to lines 83 to 85 on page 297 of the agenda book. Professor Capra responded that he would look at it. Judge Furman concluded the discussion of proposed Rule 707 by restating his concern that at a minimum, if this rule is adopted, courts need to be alerted that they should be mindful of notice issues as they manage cases.

b. <u>Proposed Amendments to Rule 609</u>

Judge Furman then provided an update on public comments on Rule 609. Judge Furman reminded the Committee that the Advisory Committee had considered various proposals over the last few years regarding Rule 609 and settled on a relatively minor amendment to Rule 609(a)(1)(B), which makes the rule somewhat more exclusionary by adding the word "substantially" before "outweigh" in the balancing test on admissibility of prior convictions.

Judge Furman explained that the amendment was driven by the concern that district courts were misapplying the balancing test or applying it without regard for the similarity of the prior conviction to the charged conviction. The harm from this approach is compounded by the fact that under Supreme Court precedent, a ruling under Rule 609 is not appealable unless the defendant actually takes the stand, and this also leads to little court of appeals case law on the issue. While addressing this issue, the Advisory Committee also decided to draft an amendment to Rule 609(b) to address a circuit split as to when the 10-year period for older convictions ends. The Advisory Committee concluded that the date of trial is the appropriate date because it is the least subject to manipulation by the parties and unambiguous. As of the Committee meeting, three comments were received which are generally favorable.

Draft

2. *Status of Pending Proposals*

a. Rule 901(c) and Deepfake Evidence

Judge Furman next provided an update on the Advisory Committee's consideration of deepfake evidence. Judge Furman explained that the Advisory Committee had initially been of the view that there may not be a need for an amendment here because there was no evidence of deepfake problems in federal trials and because it is not clear that courts cannot address this issue under the existing rules, as they have dealt with forgeries, for example. Having said that, Judge Furman noted that the Advisory Committee also must be mindful of the fact that there may be an issue because the standard for authentication is so low. The Advisory Committee has tried to make progress on a rule that could be considered in the event that it decides that a rule change is warranted. To that end, the Advisory Committee has discussed a new proposed Rule 901(c), a working draft of which is at pages 286 to 288 of the agenda book. In brief, it would impose a burden on the opponent of the evidence to make a prima facie showing that there is reason (e.g., something suspicious about the item) for a reasonable person to conclude that it was fabricated. At that point, the burden would shift to the proponent of the evidence to show by a preponderance (that is, under the Rule 104(a) standard) that the item is authentic and not a fabrication.

Judge Furman added that at the Advisory Committee's last meeting, discussion of deepfakes continued, and there was some shift in sentiment in favor of publishing a proposed rule for public comment. He also noted that Professor Capra had gathered some anecdotal evidence that judges might be seeing these issues even if it is not showing up in case law or media reports. This information led the Advisory Committee to conclude that it might be helpful to enlist the FJC and conduct a survey of trial courts nationwide to see if they are encountering deepfake issues and whether they think a rule amendment is necessary.

Ms. Shapiro, on behalf of DOJ, noted that DOJ was the sole vote against publishing Rule 707 and also does not see the need for the deepfake rule. DOJ also intends to put in a public comment to lay out its arguments in full. Ms. Shapiro also noted that there is an Executive Order that prompted DOJ to perform an internal study on AI issues, and that she hopes to be able to report to the Advisory Committee on that as well.

A lawyer member asked why the proposal as drafted is limited to fabrications created by generative AI as opposed to other technological means. He noted that the Take It Down Act has a much broader scope than just generative AI. Professor Capra answered that if the manipulation is done by generative AI, it is almost impossible to discern. If there is manipulation done by other technical means, there are means of determining whether it is been fabricated. The Advisory Committee considered whether the rule should apply to electronic manipulation more generally, but Professor Capra was told by many that the rule should just be focusing on generative AI. Professor Capra thanked the lawyer member and appreciated the question, which is something that could come up if a proposed rule on deepfakes is issued for public comment.

b. Rule 902(1) and Federally Recognized Indian Tribes

Judge Furman next addressed the Advisory Committee's consideration of a suggestion to add federally recognized Indian tribes to Rule 902(1), which provides that certain domestic public records that are sealed

and signed are self-authenticating. Rule 902(1) does not currently include Indian tribes but does include a variety of other governmental entities. In criminal cases most notably, the government has to use another route to prove a defendant's Indian status in federal prosecutions brought for crimes occurring in Indian country, an issue that has become more prominent in the wake of the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

Judge Furman explained that the DOJ strongly supports changing the rule, but the Federal Defender on the Advisory Committee adamantly opposes it. In brief, DOJ favors amendment on the grounds that it would recognize the dignity and sovereignty of tribes and avoid unnecessary authentication hurdles, and further, that there is no meaningful distinction between tribes and the other entities that are currently in the rule. By contrast, the Federal Defender has expressed concerns about variability in tribal record-keeping and about losing the ability to challenge authenticity through an identified witness. Mindful of the dignitary issues involved, the Advisory Committee solicited input from tribal governments and Native legal organizations, and thus far has received comments from a number of tribes, all of which are very supportive of amending the rule. At its spring meeting, the Advisory Committee will consider whether to move forward with an amendment.

Professor Capra added that there can be a conflict in criminal cases between the tribe and an individual tribe member defendant. The defendant's interest is to challenge the certificate, and if the matter were treated under Rule 902(1) there would be no way to challenge the certificate, whereas under Rule 902(11) there is an opportunity to challenge the certificate. The Advisory Committee will consider this issue at the next meeting.

c. Rule 803(3) and Hearsay Exception for Declarant's State of Mind

Judge Furman reported on the Advisory Committee's consideration of amendments to Rule 803(3), which allows admission of a declarant's statement of then existing state of mind, i.e., intent, motive, emotion, or the like, to prove that mental condition. First, the Advisory Committee is considering whether the rule should require spontaneity or another reliability safeguard. There is no such requirement in the rule as written, but some courts have held that spontaneity or some other indicator of trustworthiness is required. There is a longstanding circuit split on the issue, which does seem to come up fairly frequently. Second, the Advisory Committee is considering amendments regarding whether a declarant's statement can be used to prove a non-declarant's intent or conduct. Judge Furman gave the example that if he said "I plan to go to lunch with Dan," this statement cannot be used as evidence that Dan intends to go to lunch or went to lunch. Most courts bar such use, but two circuits, the Ninth and the Second, have allowed it under some circumstances. Judge Furman noted that the issue does not come up as often as the spontaneity issue, and there are questions about whether the practical distinction between the different approaches is especially large. The Advisory Committee continues to study whether the spontaneity issue causes a problem in practice that warrants a rule amendment; if so, then it may also take up the second issue.

d. Rule 703 and the Impact of *Smith v. Arizona*

Judge Furman addressed potential amendments to Rule 703 in light of the Supreme Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024), in which a forensic expert testified to a positive drug test by relying on the testimonial hearsay of another analyst and that other analyst's findings were disclosed directly to

the jury. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right of confrontation even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. The Advisory Committee is generally of the view that to the extent that the Court was concerned about disclosure alone, there would be little to no impact on Rule 703, which limits disclosure of inadmissible hearsay as the basis of the expert's opinion. If the Court's decision is construed to also apply to reliance, not just disclosure, this interpretation could have a substantial effect on federal practice and raise serious questions about unconstitutional application of Rule 703 in some cases. Judge Furman noted that the Advisory Committee's consultant, Professor Liesa Richter, did a very thorough and helpful memo in which she surveyed decisions that addressed *Smith*, and there seems to be an emerging pattern where at least more than a majority have adopted the view that *Smith* prohibits reliance and not just disclosure. In light of this trend, the Advisory Committee's emerging view is that Rule 703 probably does warrant some sort of amendment to address the issues raised by *Smith.*

Judge Furman also commented that there are some difficulties with drafting an amendment, with possible language found in the Advisory Committee's report at page 291 of the agenda book. First, drafting an amendment to specifically address the concerns raised by *Smith* would be potentially complicated because it is limited to the criminal context and it is an evolving area of the law. At present, the Advisory Committee has gravitated toward a more modest amendment to the rule that would provide a "red flag" indicating that the rule might raise constitutional issues in criminal cases to alert practitioners and courts. Rule 412, which contains constitutional red flag language, provides a precedent for such an approach. On the flip side, Judge Furman stated that the Advisory Committee considered a similar issue after the Supreme Court's decision in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), which held that Rule 606(b), which bars testimony from jurors about juror deliberations, is unconstitutional in certain circumstances. The Advisory Committee decided not to amend the rule, but might revisit that decision in the event that the Advisory Committee considers adding red-flag language to Rule 703, on the theory that the two are similar.

Professor Coquillette advised the Committee that the problem with a red flag is that sometimes it is appropriate and sometimes it is not. The problem arises when a rule red flags some things, but not others. If a constitutional concern is raised in one rule, does that mean that other rules without the red flag are safe constitutionally. Professor Capra added that the rationale for rejecting a red flag in Rule 606(b) was that it would encourage lawyers to make more legal arguments.

Ms. Shapiro, on behalf of DOJ, added that the Solicitor General's Office anticipates that this issue will come back to the Supreme Court soon, which could impact the rulemaking process. Judge Furman agreed that this is an area the Court is very likely to revisit, which counsels proceeding with any amendment in more general terms rather than specifically addressing the issue in *Smith.*

e. Rule 104 and Preliminary Questions on Evidence

Judge Furman moved on to possible amendment of Rule 104, which governs the judge's role in deciding preliminary questions about evidence. Many evidence scholars, including Professor Dan Capra, consider Rule 104 to be one of the worst rules in the Federal Rules of Evidence. First, Rule 104(a), which the Supreme Court has held to establish a preponderance standard, does not include the relevant standard.

Second, Rule 104(b) codifies the concept of conditional relevance, but there is a question as to whether that concept has any real meaning. Judge Furman directed the Committee to Professor Capra's suggestions to improve each section of the rule, which appear at page 292 of the agenda book. The Advisory Committee does have concerns, however, whether there is a big enough problem to justify amending the rule. Professor Capra added that his research has uncovered problems because the rule is so opaque and the concept of conditional relevance does not have a meaning.

A judge member asked if the Advisory Committee would consider adding the preponderance language to subsection (a) even in the absence of a change to (b). Professor Capra responded that subsection (a) could be a freestanding change. Judge Furman agreed that amendments to (a) and (b) do not have to go in tandem.

f. Rule 803(6) and Rule 901

Judge Furman also informed the Committee that the Advisory Committee had considered and rejected two suggestions from a practitioner relating to Rule 803(6), although the suggestions were well received and quite helpful. The first was to clarify Rule 803(6) regarding business records to explicitly permit incorporated business records, that is, records created by one entity but kept and relied upon by another. The second suggestion was to amend Rule 901 to treat production and discovery as a form of authentication, at least in civil cases. The Advisory Committee decided not to proceed on either suggestion because a survey of case law suggested that courts were generally interpreting each rule consistently with the relevant suggestion, and thus the amendments were not necessary.

g. 50th Anniversary of the Federal Rules of Evidence

Following the end of the substantive report, Judge Furman took a moment to inform the Committee of efforts to recognize the 50th Anniversary of the Rules of Evidence in 2025. But for the government shutdown in November 2025, the Advisory Committee had planned to celebrate that milestone. Judge Furman described a small celebration of the anniversary in New York for those present for the virtual meeting and noted that Ms. Dubay has a photograph that can be shared with the Committee. Judge Furman also thanked Ms. Dubay for providing Advisory Committee members with small tokens of appreciation for their service on the Advisory Committee.

4. OTHER COMMITTEE BUSINESS

With the conclusion of the Advisory Committee reports, Judge Dever turned attention to the recognition of three people who have made a remarkable contribution to the rules process over a large number of years – Professor Cathie Struve, Mr. Joseph Spaniol, and Professor Ed Hartnett.

A. Recognition of Professor Struve

Judge Dever began the recognition portion of the meeting with thanks to Professor Cathie Struve, who is the David Kaufman and Leopold Glass Professor of Law at the University of Pennsylvania Carey School of Law. She served as the Appellate Reporter from 2006 to 2015, became the Associate Reporter for Standing from 2017 to 2019, has been the Standing Committee Reporter since then, and will transition to a role as a consultant in February 2026. In her role as the Appellate Reporter, she served with Judges Carl

Stewart, Jeffrey Sutton, and Steven Colloton. As the Standing Committee Reporter, she served with Judges David Campbell and John Bates. Judge Dever noted that while he has been Chair for only three months, in previous work as Chair of Criminal Rules and on that Committee over the past 11 years, it has been a privilege to work with her.

Judge Dever shared messages of appreciation to Professor Struve from Judges Campbell and Bates. Among other superlatives, Judge Campbell offered that he had "never met anyone who combines breadth of knowledge, wise judgment, attention to detail, and incisive analysis as well as Cathie Struve" and that she is "a consistently delightful colleague whose invaluable contributions will be greatly missed." Judge Bates offered additionally that Professor Struve's "contributions are always thoughtful and incisive yet unerringly fair and polite." Judge Dever concurred in these assessments, noting that Professor Struve has been a great resource, teacher, and friend to all involved in the rules effort. Judge Dever thanked Professor Struve again for her incredible contribution and invited Ms. Dubay to make remarks on behalf of the Rules Committee Staff.

Ms. Dubay shared her appreciation of Professor Struve's assistance and offered tokens of appreciation from the Rules Committee Staff. Ms. Dubay recognized the special camaraderie among the Reporters, and also the camaraderie Professor Struve developed with the Rules Committee Staff. Ms. Dubay commented that the job of the Rules Committee Staff is to ensure the rules process works well and to support not just the members, but the Reporters as an important part of the Rules Enabling Act process. Ms. Dubay thanked Professor Struve, not only on behalf of the staff, but personally for helping her learn the history, often oral, of the work of the Rules Committees.

Professor Hartnett spoke on behalf of the Reporters and Consultants, noting that he and Professor Struve had been colleagues in various contexts for over 25 years. Professor Hartnett presented Professor Struve with a gift from the Reporters and Consultants, along with the Rules Committee Staff - a membership to the Philadelphia Museum of Art. Professor Coquillette, former Reporter for the Standing Committee and involved in the rules process for 42 years, also shared generous remarks about Professor Struve.

Professor Struve offered her thanks for the remarks and gifts. She recalled that 25 years ago, she first attended (as a member of the public) a meeting of the Standing Committee, then chaired by Judge Anthony Scirica. Professors Dan Coquillette, Dan Capra, Ed Cooper, and Rick Marcus were already Reporters. She was struck not just by the rigor and dedication of those discussions, but the deep good fellowship among the participants. Professor Struve noted that the community of Reporters is an extraordinary group, and thanked in particular Professor Coquillette, who guided her in her role as Standing Committee Reporter. Professor Struve extended her appreciation to the judges with whom she worked, including not only those Judge Dever mentioned but also Judges David Levi, Lee Rosenthal, and Mark Kravitz. Professor Struve also thanked the unparalleled researchers who supported the committees, including Tim Reagan and his colleagues in the Federal Judicial Center. She also extended her gratitude to the Rules Committee Staff and expressed her appreciation for their work to support the rules process. Finally, Professor Struve gave thanks to the Style Consultants for their tutelage and friendly discussions about style.

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B. Recognition of Joe Spaniol

Judge Dever then recognized Joe Spaniol, Style Consultant to the Standing Committee. Mr. Spaniol, who just turned 100 years old, served in World War II in combat. After law school, he joined the Administrative Office of the U.S. Courts in 1951, rising to Deputy Director and then Acting Director. He served as Clerk of the Supreme Court from 1985 to 1991. Mr. Spaniol served as Style Consultant for the Standing Committee from 1991 to 2025, and is both an extraordinary person and an extraordinary contributor to the rules process.

Style Consultant Joe Kimble submitted a pre-recorded tribute to Mr. Spaniol that was played for the Committee. Professor Kimble noted that Mr. Spaniol is the only one of the three Style Consultants who has served continuously since the beginning of the Style work in 1991, participating in all five rule set restylings. Professor Kimble described him as an "ace drafter" with "an especially sharp eye for logic and consistency." He was an Editor and then Editor-in-Chief of both the *Federal Bar News* and the *Federal Bar Journal*. Mr. Spaniol served in the 86th Black Hawk Division in World War II. Mr. Spaniol has eight children, 15 grandchildren, and seven great-grandchildren. Above all, Professor Kimble noted that Mr. Spaniol is a kind and gracious man, and his children offered these kind words: "We are all proud of our father, amazed by his many accomplishments, and grateful for his help in our success. He is the epitome of unconditional love, and he is pretty darn smart too. That's our tribute to you, Dad, from all of us. We love you."

Bryan Garner, Style Consultant, echoed the remarks of Professor Kimble, and recalled that when Judge Keeton sought to create the Style Committee in the early '90s, nobody dreamed that it would overhaul all five rule sets. The success of the Style project was largely attributable to Mr. Spaniol and his steadfastness. Professor Garner described Mr. Spaniol as a very creative, audacious editor, often having to be reined in a bit. Professor Garner concluded by remarking how glad he was to see Mr. Spaniol getting this recognition.

Professor Capra commented that Mr. Spaniol was gracious and kind to Reporters. At one of Professor Capra's first meetings, the Evidence Rules Committee sought permission to publish for public comment a proposed amendment to Evidence Rule 103. In the Advisory Committee Chair's absence, Dan presented the proposal, which met with harsh criticism from two members of the Standing Committee. Shortly thereafter, Professor Capra received a note from Mr. Spaniol urging him not to worry about it because the Committee members did that to everybody. Professor Capra thanked Mr. Spaniol for his kindness.

C. Recognition of Professor Hartnett

Judge Dever then recognized Professor Hartnett for his service as Appellate Rules Committee Reporter and congratulated him on his next role as Standing Committee Reporter. Judge Dever thanked Professor Hartnett for his remarkable contributions as the Reporter to Appellate Rules since 2018. He described Professor Hartnett as someone who is "kind and thoughtful and detail-oriented and has an encyclopedic knowledge of the rules and the rules process."

Judge Eid, Chair of the Appellate Rules Committee, then extended her thanks to Professor Hartnett. She echoed her earlier remarks about Professor Hartnett's brilliance and amazing work for the Advisory

Committee, but also recognized Professor Hartnett's professional accomplishments. He is the Richard J. Hughes Professor for Constitutional and Public Law and Service at Seton Hall. Judge Eid thanked him warmly for his service, wished him well, and expressed confidence that he would be a great Standing Committee Reporter.

D. Closing Remarks and Adjournment

Judge Dever informed the members that the next meeting will be June 3-4 in Chicago at Northwestern School of Law.

Judge Dever concluded by thanking everyone for taking the time to do this very important work in support of the rule of law. The meeting was then adjourned.

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Agenda E-19 (Summary)
Rules
March 2026

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Appellate Procedure ..... p. 2
- Federal Rules of Bankruptcy Procedure ..... p. 3
- Federal Rules of Civil Procedure ..... p. 4
- Federal Rules of Criminal Procedure ..... p. 5
- Federal Rules of Evidence ..... pp. 6-7
- Judiciary Strategic Planning ..... p. 7

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NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 6, 2026. Member Judge D. Brooks Smith was unable to participate.

Representing the advisory committees were Judge Allison H. Eid (10th Cir.), chair; and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Rebecca Buehler Connelly (Bankr. W.D. Va.), chair; Professor S. Elizabeth Gibson, Reporter; and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Sarah S. Vance (S.D. La.), chair; Professor Richard L. Marcus, Reporter; Professor Andrew Bradt, Associate Reporter; and Professor Edward Cooper, consultant, Advisory Committee on Civil Rules; Judge Michael W. Mosman (D. Or.), chair; Professor Sara Sun Beale, Reporter; and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Jesse M. Furman (S.D.N.Y), chair; and Professor Daniel Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, Standing Committee Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Carolyn A. Dubay, Secretary to the Standing Committee; Bridget M. Healy and Sarah Sraders, Rules Committee Staff Counsel; Judge Robin L. Rosenberg, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

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Judicial Center; and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Department of Justice, on behalf of the Deputy Attorney General.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process, the Standing Committee received and responded to reports from the five advisory committees. The Committee also received brief updates on the work of the Standing Committee's subcommittee concerning attorney admissions and on two joint projects among the Bankruptcy, Civil, Criminal, and Appellate Rules Committees—one on electronic filing and service by self-represented litigants and one on privacy issues relating to Social Security numbers (SSNs) and the use of a minor's initials in public court filings. The Committee members were also asked to submit up to three goals from the *Strategic Plan for the Federal Judiciary* that should be prioritized over the next two years to the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d. Cir.), who also attended the relevant portion of the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee reported on the status of matters under consideration following its October 15, 2025 meeting. The Advisory Committee is considering several issues, including possible amendments to Rule 4 (Appeal as of Right—When Taken) concerning reopening of the time to appeal, and Rule 8 (Stay or Injunction Pending Appeal) to address the purpose and length of administrative stays. It is also considering suggestions for a new rule governing intervention on appeal, amendments to Rule 46(a) concerning admission to the bar of the court of appeals, and the treatment of tribes in the Appellate Rules. The Advisory Committee removed from its agenda a suggestion that Rule 3 be amended to provide that the district clerk, rather than the appellant, identify the court to which the appeal is taken.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Notice of Retroactive Technical Amendment

In March 2016, the Judicial Conference delegated authority to the Bankruptcy Rules Advisory Committee to make "non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Rules Committee and notice to the Judicial Conference." JCUS-MAR 2016, p. 24.

Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made)

The Advisory Committee on Bankruptcy Rules submitted for retroactive approval a technical amendment to Official Form 410C13-NR (Response to Trustee's Notice of Disbursements Made). Technical corrections are required to fix two erroneous references in Form 410C13-NR, which went into effect on December 1, 2025. Specifically, two items in Part 2 of the form referred to "the date of this notice" when it should have stated "the date of this response." The technical corrections conform Part 2 to the introductory language of that section. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee also reported on the status of matters under consideration following its September 25, 2025 meeting. In addition to the recommendation discussed above, the Advisory Committee considered proposed amendments to the privacy rules, suggestions to amend Rule 2003 (Meeting of Creditors or Equity Security Holders) regarding the location and timing of meetings of creditors, suggestions to allow the use of masters in bankruptcy cases and proceedings, and proposed amendments to Rule 8017 to conform with proposed amendments to Appellate Rule 29. It removed from its agenda a suggestion to amend Rule 2006 regarding time counting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 55 (Default; Default Judgment) with a recommendation that they be published for public comment in August 2026. The Standing Committee unanimously approved the Advisory Committee's recommendation, including minor style changes.

The proposed amendment to Rule 55 removes the commands in Rules 55(a) and (b)(1) that the clerk "must" enter a default or default judgment, respectively, whenever the rules empower the clerk to do so. Instead, the proposed amendment provides that the clerk "may either" enter default or default judgment, respectively, "or refer the matter to the court for directions." The proposed amendment also changes the reference to "the party" in Rule 55(b)(2) to "a party" for greater clarity.

Information Items

The Advisory Committee also reported on the status of matters under consideration following its October 24, 2025 meeting. In addition to the recommendation discussed above, the Advisory Committee continued to discuss proposals to amend Rule 43 (Taking Testimony) to relax the standards governing permission for remote testimony and heard an update concerning third-party litigation funding. The Advisory Committee also continues to study suggestions relating to Rule 23 (Class Actions) and random case assignment.

The Advisory Committee decided to remove from its agenda proposals concerning cross-border discovery, filing under seal, discovery cybersecurity risks, reimbursement of nonparties served with subpoenas for costs of compliance, permissive filing of discovery requests and responses, and time counting for responses to motions.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee reported on the status of matters under consideration following its November 6, 2025 meeting. The Advisory Committee continues to consider amendments to Rule 49.1 (Privacy Protection for Filings Made with the Court) to protect minors' privacy by requiring the use of pseudonyms and to require complete redaction of SSNs and other taxpayer identifying information. The Advisory Committee plans to consider the proposed amendments at its spring 2026 meeting with a view to proposing them at the Standing Committee's June 2026 meeting for publication and public comment. (Consideration of the privacy rules has been a coordinated project, and the Appellate, Bankruptcy, and Civil Rules Advisory Committees are also considering amendments to their privacy rules that may also be submitted to the Standing Committee in June 2026.) The Advisory Committee also reported on the activities of its subcommittee on Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District). The Advisory Committee also formed a new subcommittee to consider a suggestion on Rule 11 (Pleas) to remove "possible departures under the Sentencing Guidelines" from the factors a court must advise the defendant it must consider in determining a sentence, in light of the new amendments to the Sentencing Guidelines that took effect in November 2025. The suggestion also implicates Rule 32(h) concerning notice of possible departures from sentencing guidelines.

The Advisory Committee decided to remove from its agenda a recent proposal to amend Rule 53 (Courtroom Photographing and Broadcasting Prohibited) to allow broadcasting of criminal proceedings since it had already recently considered and declined to pursue a related proposal in 2024. The Advisory Committee continues to study potential amendments to Rule 15 (Depositions).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee reported on the status of matters under consideration following its November 5, 2025 meeting. The Advisory Committee reported on potential edits to the proposal for new Rule 707 regarding the admissibility of evidence generated by artificial intelligence, which has been published for public comment. Potential edits to the published preliminary draft include amending the proposed committee note to emphasize the distinction between expert opinions offered by humans (Rule 702) and opinions generated by machines (Rule 707). The Advisory Committee also discussed strengthening language in the committee note to (1) emphasize that Rule 707 does not provide a way for the proponent to evade the requirements of Rule 702 by presenting machine-based evidence instead of an expert; (2) provide guidance on what to do if it is not possible to explain how a machine reached its opinion or conclusion; and (3) explain the relationship between Rule 707 and Rule 901(b)(9), which provides a ground for authenticating machine-generated evidence.

The Advisory Committee also continued to discuss a proposal to add a new Rule 901(c) to establish a procedure to challenge the authenticity of evidence suspected to be a deepfake. Other items under the Advisory Committee's consideration include possible amendments to the following rules: Rule 902 (Evidence that is Self-Authenticating) to add a reference to federally recognized Indian tribes and nations; Rule 803(3) (Exceptions to the Rule Against Hearsay – Regardless of Whether the Defendant is Available as a Witness) regarding the state of mind exception; Rule 703 (Bases of an Expert's Opinion Testimony) in light of *Smith v. Arizona*; and Rule 104(a) and (b) (Preliminary Questions) to include applicable standards of proof.

The Advisory Committee also reported on its celebration of the 50th Anniversary of the enactment of the Federal Rules of Evidence in 2025 and noted that materials will be made available publicly to commemorate the anniversary.

JUDICIARY STRATEGIC PLANNING

At the request of the Judiciary Planning Coordinator, Chief Judge Michael A. Chagares (3d Circuit), the Committee reviewed the *Strategic Plan for the Federal Judiciary* for 2025-2030 and provided recommendations for aspects of the plan that should be prioritized over the next two years.

Respectfully submitted,

James C. Dever III, Chair

Paul J. Barbadoro
Todd Blanche
Elizabeth J. Cabraser
Louis A. Chaiten
Colm F. Connolly
Joan N. Ericksen
Stephen A. Higginson
Edward M. Mansfield
Troy A. McKenzie
Andrew J. Pincus
Allison J. Rushing
D. Brooks Smith
Bart H. Williams

Federal Judicial Center

Date: March 13, 2026

To: Advisory Committees on Rules of Practice and Procedure

From: Tim Reagan (Research)
Maureen Kieffer (Education)
Christine Lamberson (History)
Federal Judicial Center

Re: Federal Judicial Center Research and Education

This memorandum summarizes recent efforts by the Federal Judicial Center relevant to federal-court practice and procedure. Center researchers attend rules committee, subcommittee, and working-group meetings and provide empirical research as requested. The Center also conducts research to develop manuals and guides; produces education programs for judges, court attorneys, and court staff; and provides public resources on federal judicial history.

RESEARCH

Completed Research for Rules Committees

Intervention on Appeal

At the request of the Appellate Rules Committee, the Center examined motions to intervene on appeal (www.fjc.gov/content/394353/intervention-federal-courts-appeals). Intervention at the beginning of a case was studied in a two-year filing cohort, and intervention at the end of a case, such as after argument or judgment, was examined in a four-year termination cohort.

Current Research for Rules Committees

Deepfakes and Authenticity

The Evidence Rules Committee is exploring whether the authenticity standard should be made more stringent than it now is for potentially fabricated evidence created by artificial intelligence. The committee asked the Center to survey all federal judges to ascertain their experiences and views.

Temporary Administrative Stays in the Courts of Appeals

The Appellate Rules Committee has requested research on courts of appeals' issuing temporary administrative stays following motions for stays pending appeals.

Attorney Admissions

The Center provides the Standing Rules Committee's subcommittee on attorney admissions with occasional research support.

Complex Criminal Litigation

As suggested by the Criminal Rules Committee, the Center is developing a collection of resources on complex criminal litigation as one of its curated websites.

Completed Research for Other Judicial Conference Committees

Allocating District-Court Case-Weighting Credit for Motions Arising Under 18 U.S.C. § 3582(c)

At the request of the Judicial Resources Committee, the Center developed new case weights for motions to modify prison sentences. The Center periodically conducts empirical research to prepare quantitative weights for case types, which are used in the computation of weighted caseloads, which in turn are used when assessing the need for judgeships. The interim weights were approved by the Judicial Conference in September to be used until the next comprehensive district-court case-weighting study is conducted.

Current Research for Other Judicial Conference Committees

Harm to Cooperators

At the request of the Court Administration and Case Management Committee, the Criminal Law Committee, and the Committee on Defender Services, the Center is updating its 2016 research on harms and threats of harm to government cooperators in criminal prosecutions (www.fjc.gov/content/310414/survey-harm-cooperators-final-report).

Evaluation of a Pilot Program in Which Comparative Sentencing Information Is Included in Presentence Investigation Reports

At the request of the Committee on Criminal Law, the Center is evaluating a two-year pilot program in which selected districts incorporated comparative sentencing information from the Sentencing Commission's Judiciary Sentencing Information (JSIN) platform into presentence investigation reports.

The Privacy Study: Unredacted Sensitive Personal Information in Court Filings

At the request of the Committee on Court Administration and Case Management, the Center is conducting research on unredacted personal information in public filings.

Case Weights for Bankruptcy Courts

The Center has completed analyses for updating bankruptcy-court case weights. Case weights are used in the computation of weighted caseloads,

which in turn are used when assessing the need for judgeships. The research was requested by the Committee on Administration of the Bankruptcy System.

JUDICIAL GUIDES

Completed

Benchbook for U.S. District Courts

The Center has published a seventh edition of its compilation of information that federal judges have found useful for immediate bench or chambers reference in civil and criminal proceedings (www.fjc.gov/content/397447/benchbook-us-district-courts-seventh-edition). The benchbook contains sections on such topics as assignment of counsel, taking guilty pleas, standard voir dire questions, sentencing, and contempt.

Reference Manual on Scientific Evidence

The Center collaborated with the National Academies of Science, Engineering, and Medicine to prepare a fourth edition of the *Reference Manual on Scientific Evidence* (www.fjc.gov/content/396456/reference-manual-scientific-evidence-fourth-edition). The reference manual includes chapters on the admissibility of expert testimony and how science works and reference guides on forensic feature comparison evidence, human DNA identification evidence, eyewitness identification, statistics and research methods, multiple regression and advanced statistical models, survey research, estimation of economic damages, exposure science and exposure assessment, epidemiology, toxicology, medical testimony, neuroscience, mental health evidence, engineering, computer science, and artificial intelligence.

In Preparation

Manual for Complex Litigation

The Center is preparing a fifth edition of its *Manual for Complex Litigation* (fourth edition, www.fjc.gov/content/manual-complex-litigation-fourth).

Manual on Recurring Issues in Criminal Trials

The Center is preparing a seventh edition of what previously was called *Manual on Recurring Problems in Criminal Trials* (sixth edition, www.fjc.gov/content/manual-recurring-problems-criminal-trials-sixth-edition-0).

HISTORY

Resources for Public Speaking

These materials were developed for judges and court staff who wish to speak to groups about various aspects of federal-court history (www.fjc.gov/history/public-speaking-resources). The following units were added in 2026: "Defining the Boundaries Between Article III and Non-Article III Courts," "Differences Between Federal and State Courts," "Judicial

Administration," "Legal Interactions Between Federal and State Courts," "The Judiciary During the Gilded Age," "The Judiciary During the U.S. Civil War," "U.S. Bankruptcy Judges," and "U.S. Magistrate Judges."

Evaluating Historical Evidence

The Center offered judges a six-part interactive online series that provided tools for managing cases with significant historical evidence. Historians discussed historical methodology and provided practical tips for evaluating historical evidence, whether presented in the form of expert witnesses, amicus briefs, or litigant arguments.

EDUCATION

Specialized Workshops

Employment Law Workshop 2025

This two-day workshop, comprising small group discussions and presentations featuring federal judges and seasoned management-side and employment-side attorneys, included information on expeditious and fair case handling and remedies and an update on Supreme Court employment-law developments.

Immigration Law for U.S. District Courts

In this two-day seminar, judges discussed the rapidly changing area of immigration law.

Distance Education

Conducting Judicial Mediations and Settlement Conferences: Ethical Considerations for Bankruptcy Judges

Bankruptcy judges often are asked to mediate in the cases of other judges, and some judges conduct settlement conferences in their own cases. This program discussed navigating the intersection of these roles and activities with the Code of Conduct for U.S. Judges and other relevant sources.

Supreme Court Term in Review for Bankruptcy Judges

A September 2025 webcast discussed some of the most significant Supreme Court decisions, including key bankruptcy cases.

Court Web

This periodic webcast included as recent episodes "Federal Sentencing Update" (featuring Northern District of Ohio Judge Benita Pearson and U.S. Sentencing Commission Education Director Alan Dorhoffer) and "Supreme Court: October Term 2025" (featuring Erwin Chemerinsky and Paul Clement).

Term Talk

Each term, the Center presents video podcasts with the nation's top legal scholars discussing what federal judges need to know about the Supreme Court's most impactful decisions (www.fjc.gov/education/fjc-videos-podcasts?category=Supreme-Court).

Consumer Case-Law Update for Bankruptcy Judges

This quarterly webcast features consumer-bankruptcy case-law updates by retired Western District of Tennessee Bankruptcy Judge William H. Brown.

Business Case-Law Update for Bankruptcy Judges

This quarterly webcast features Professor Bruce Markell (a retired bankruptcy judge).

A Review of Ninth Circuit Bankruptcy Decisions

This annual webcast features judges on the Ninth Circuit Bankruptcy Judges Education Committee discussing significant decisions by the Supreme Court, the Ninth Circuit's court of appeals, and the Ninth Circuit's bankruptcy appellate panel.

General Workshops

National Workshops for Trial-Court Judges

Three-day workshops are held for district judges in even-numbered years and annually for magistrate judges and bankruptcy judges.

Circuit Workshops for U.S. Appellate and District Judges

The Center has recently put on a three-day workshop for Article III judges in the Eleventh Circuit.

Orientation Programs

Orientation Programs for New Trial-Court Judges

The Center invites newly appointed trial-court judges to attend two one-week conferences focusing on skills unique to judging. The first phase includes sessions on trial practice, case management, and judicial ethics. In addition, district judges learn about the sentencing process, magistrate judges learn about search warrants, and bankruptcy judges learn about the bankruptcy code. The second phase includes sessions on such topics as civil-rights litigation, employment discrimination, security, self-represented litigants, relations with the media, and ethics.

Orientation for New Circuit Judges

Orientation programs for new circuit judges include a three-day program hosted by the Center and a program at New York University School of Law for both state and federal appellate judges.

Orientation for New Term Law Clerks

The Center offers online orientation to new term law clerks. Phase I is offered before the clerkship begins, and phase II is offered after the clerkship has begun.

Effective December 1, 2025, unless otherwise noted

Current Step in REA Process:

- Effective December 1, 2025

REA History:

- Transmitted to Congress (Apr 2025)
- Transmitted to Supreme Court (Oct 2024)
- Approved by Standing Committee (June 2024 unless otherwise noted)
- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 6	The proposed amendments would address resetting the time to appeal in cases where a district court is exercising original jurisdiction in a bankruptcy case by adding a sentence to Appellate Rule 6(a) to provide that the reference in Rule 4(a)(4)(A) to the time allowed for motions under certain Federal Rules of Civil Procedure must be read as a reference to the time allowed for the equivalent motions under the applicable Federal Rule of Bankruptcy Procedure. In addition, the proposed amendments would make Rule 6(c) largely self-contained rather than relying on Rule 5 and would provide more detail on how parties should handle procedural steps in the court of appeals.	BK 8006
AP 39	The proposed amendments would provide that the allocation of costs by the court of appeals applies to both the costs taxable in the court of appeals and the costs taxable in the district court. In addition, the proposed amendments would provide a clearer procedure that a party should follow if it wants to request that the court of appeals to reconsider the allocation of costs.	
BK 3002.1 and Official Forms 410C13-M1, 410C13-M1R, 410C13-N, 410C13-NR, 410C13-M2, and 410C13-M2R	Previously published in 2021. Like the prior publication, the 2023 republished amendments to the rule are intended to encourage a greater degree of compliance with the rule's provisions. A proposed midcase assessment of the mortgage status would no longer be mandatory notice process brought by the trustee but can instead be initiated by motion at any time, and more than once, by the debtor or the trustee. A proposed provision for giving only annual notices HELOC changes was also made optional. Also, the proposed end-of-case review procedures were changed in response to comments from a motion to notice procedure. Finally, proposed changes to 3002.1(i), redesignated as 3002.1(i) are meant to clarify the scope of relief that a court may grant if a claimholder fails to provide any of the information required under the rule. Six new Official Forms would implement aspect of the rule.	
BK 8006	The proposed amendments to Rule 8006(g) would clarify that any party to an appeal from a bankruptcy court (not merely the appellant) may request that a court of appeals authorize a direct appeal (if the requirements for such an appeal have otherwise been met). There is no obligation to file such a request if no party wants the court of appeals to authorize a direct appeal.	AP 6
Official Form 410	The proposed amendments would change the last line of Part 1, Box 3 to permit use of the uniform claim identifier for all payments in cases filed under all	

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- Published for public comment (Aug 2023 – Feb 2024 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	chapters of the Code, not merely electronic payments in chapter 13 cases. The amended form went into effect December 1, 2024.	
CV 16	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 26
CV 16.1 (new)	The proposed new rule would provide the framework for the initial management of an MDL proceeding by the transferee judge. Proposed new Rule 16.1 would provide a process for an initial MDL management conference, submission of an initial MDL conference report, and entry of an initial MDL management order.	
CV 26	The proposed amendments to Civil Rule 16(b) and 26(f) would address the "privilege log" problem. The proposed amendments would call for development early in the litigation of a method for complying with Civil Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials.	CV 16

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025) (except *see* 2025 U.S. Supreme Court Package to view the March 10, 2026 request to withdraw proposed amendments to Appellate Rules 29 and 32 and the Appendix of Length Limits).

REA History:

- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 29	The proposed amendments to Rule 29 relate to amicus curiae briefs. The proposed amendments, among other things, would amend Rule 29(a) relating to amicus filings during a court's initial consideration of a case into renumbered Rule 29(a)-(e) and expand the disclosure obligations. Rule 29(f) (formerly Rule 29(b)) would relate to amicus filings during the rehearing stage. The length limit for amicus briefs at the initial stage as set forth in Rule 29(a)(5) would be amended to set a specific word limit of 6,500 words.	Rule 32; Appendix
AP 32	The proposed amendments to Rule 32 would conform to the proposed amendments to Rule 29.	Rule 29
AP Appendix	The proposed amendments to the Appendix would conform to the proposed amendments to Rule 29.	Rule 29
AP Form 4	The proposed amendments to Form 4 would simplify Form 4, with the goal of reducing the burden on individuals seeking in forma pauperis status (IFP) while providing the information that courts of appeals need and find useful when deciding whether to grant IFP status.	
BK 1007	The proposed amendments to Rule 1007(c)(4) eliminate the deadlines for filing certificates of completion of a course in personal financial management. The proposed amendments to Rule 1007(h) clarify that a court may require a debtor to file a supplemental schedule to report postpetition property or income that comes into the estate under § 115, 1207, or 1306 of the Bankruptcy Code.	
BK 3018	The proposed amendments to subdivision (c) would allow for more flexibility in how a creditor or equity security holder may indicate acceptance of a plan in a chapter 9 or chapter 11 case.	
BK 5009	The proposed amendments to Rule 5009(b) would provide an additional reminder notice to the debtors that the case may be closed without a discharge if the debtor's certificate of completion of a personal financial management course has not been filed.	
BK 9006	The proposed amendments conform to the proposed amendments to Rule 1007.	

Effective (no earlier than) December 1, 2026

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2025) (except *see* 2025 U.S. Supreme Court Package to view the March 10, 2026 request to withdraw proposed amendments to Appellate Rules 29 and 32 and the Appendix of Length Limits).

REA History:

- Approved by Standing Committee (June 2025 unless otherwise noted)
- Published for public comment (Aug 2024 – Feb 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 9014	The proposed amendments to Rule 9014(d) relaxes the standard for allowing remote testimony in contested matters to "cause and with appropriate safeguards." The current standard, imported from the trial standard in Civil Rule 43(a), which is applicable across bankruptcy (in both contested matters and adversary proceedings) is cause "in compelling circumstances and with appropriate safeguards."	
BK 9017	The proposed amendments to Rule 9017 removes the reference to Civil Rule 43 leaving the proposed amendment to Rule 9014(d) to govern the standard for allowing remote testimony in contested matters, and Rule 7043 to govern the standard for allowing remote testimony in adversary proceedings.	
BK 7043	Rule 7043 is new and works with proposed amendments to Rules 9014 and 9017. It would make Civil Rule 43 applicable to adversary proceedings (though not to contested matters	
BK Official Form 410S1	The proposed changes would conform the form the pending amendments to Rule 3002.1 that are on track to go into effect on **December 1, 2025,** and would go into effect on the same date as the rule change.	
EV 801	The proposed amendments to Rule 801(d)(1)(A) would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject to Rule 403.	

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 15	The proposed amendment to Rule 15 would remove a potential trap for the unwary in the current rule. The proposed amendment reflects the party-specific nature of appellate review of administrative decisions and would require a party that wants to challenge the result of agency reconsideration to file a new or amended petition.	
BK 2002	The proposed amendment to Rule 2002(o) would provide that the caption of a notice given under Rule 2002 must include the information that Official Form 416B requires.	
BK Official Form 101	The proposed amendment to Question 4 in Part 1 of Form 101 would modify the language to read: "EIN (Employer Identification Number) issued to you, if any. Do NOT list the EIN of any separate legal entity such as your employer, a corporation, partnership, or LLC that is not filing this petition."	
BK Official Form 106C	The proposed amendments would amend Form 106C to provide a total of the specific-dollar exemption amounts along with the addition of a space on the form for the total value of the debtor's interest in property for which exemptions are claimed.	
CR 17	The proposed amendments to Rule 17 relate to third-party subpoenas for documents and other items and address seven areas: application to proceedings other than trial; the standard for when such subpoenas are available; when a motion and order are required; when a party may make its request ex parte; the place of production; the preservation of Rule 16's disclosure policies; and which subparts of Rule 17 apply to different proceedings.	
CV 7.1	The proposed amendments to Rule 7.1(a) substitute "business organization" for the term "corporation" and require disclosure of business organizations that "directly or indirectly own 10% or more of" a party rather than disclosure based on ownership of "stock" in a party.	
CV 26	The proposed amendment to Rule 26 adds a pretrial disclosure requirement for parties to state whether any witness they expect to present at trial will testify in person or remotely.	Rule 45(c)
CV 41	The proposed amendments to Rule 41(a) would clarify that: (1) the rule permits the dismissal of one or more claims in an action rather than only allowing dismissal of the entire action; (2) only the signatures of active parties who remain in a case are required to sign a stipulation of dismissal.	
CV 45	The proposed amendments to Rule 45 include amendments to Rule 45(b) relating to service of subpoenas and Rule 45(c) relating to subpoenas for remote testimony. There is a correlating proposed amendment to Rule 26 relating to	Rule 26

Effective (no earlier than) December 1, 2027

Current Step in REA Process:

- Published for public comment (Aug 2025 – Feb 2026 unless otherwise noted)

REA History:

- Approved for publication by Standing Committee (Jan and June 2025 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	pretrial disclosures as to whether testimony at trial will be offered in person or by remote means. The proposed amendments to Rule 45(b) specify that the methods for service of a subpoena are personal delivery, leaving it at the person's abode with someone of suitable age and discretion who resides there, sending it by mail or commercial carrier if it includes confirmation of receipt, or another method authorized by the court for good cause. The amendment would also add a default 14-day notice period and provide that the tender of witness fees is not required to effect service of the subpoena so long as the fees are tendered upon the witness's appearance. The proposed amendments to Rule 45(c) adds a "place of compliance" for subpoenas for remote testimony and specifies that it is "the location where the person is commanded to appear in person."	
CV 81	The proposed amendment to Rule 81(c) clarifies whether and when a jury demand must be made after removal and makes clear that Rule 38 applies to removed cases. The proposed amendment also removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required.	
EV 609	There are two proposed amendments to Rule 609. First, the proposed amendment to Rule 609(a)(1)(B) clarifies the standard under which evidence of prior convictions not based on falsity may be introduced to attack a testifying criminal defendant's character for truthfulness by adding "substantially" before the word "outweighs." Second, the proposed amendment to Rule 609(b) clarifies that the 10-year time-period for the rule's applicability is measured from the date of conviction or end of confinement, whichever is later, until the "date that the trial begins."	
EV 707	Proposed new Rule 707 provides that if machine-generated evidence is introduced without an expert witness, and it would be considered expert testimony if presented by a witness, then the standards of Rule 702(a)-(d) are applicable to that output. The proposed rule further provides that it does not apply to the output of simple scientific instruments.	

Legislation That Directly or Effectively Amends the Federal Rules
119th Congress
(January 3, 2025–January 3, 2027)

Ordered by most recent legislative action; most recent first

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Prohibiting Political Prosecutions Act of 2026	**H.R. 7575** *Sponsor*: Goldman (D-NY) *Cosponsors*: Norton (D-DC) Gomez (D-CA) Larson (D-CT)	CR 6, 16, 48	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7575/BILLS-119hr7575ih.pdf **Summary:** Would amend Criminal Rules 6 (to require the government to inform the grand jury of exculpatory evidence and things that may impact a witness's credibility), 16 (to require the government to inform the defendant of the grand jury vote) and 48 (to allow dismissal based on politically-motivated prosecution).	• 2/13/2026: Introduced in House and referred to Committee on the Judiciary
Litigation Funding Transparency Act of 2026	**S. 3826** *Sponsor*: Grassley (R-IA) *Cosponsors*: Tillis (R-NC) Kennedy (R-LA) Cornyn (R-TX)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3826/BILLS-119s3826is.pdf **Summary:** Would require disclosure of third-party funding in MDL, class action, and other large litigations (100+ consolidated or coordinated cases). Disclosure of the identity of the funder and the agreement must be made to the court and the parties. Would also prohibit funders from exerting control over the litigation or viewing materials produced in discovery, unless ordered otherwise by the court.	• 2/11/2026: Read twice and referred to the Committee on the Judiciary
Protecting TPLF From Abuse Act	**H.R. 7015** *Sponsor:* Issa (R-CA) *Cosponsors*: Fitzgerald (R-WI) Baumgartner (R-WA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr7015/BILLS-119hr7015ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 1/12/2026: Introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Sunshine for Regulatory Decrees and Settlements Act of 2025	**H.R. 6622** *Sponsor*: Cline (R-VA) *Cosponsor*: Tiffany (R-WI)	CV 24, 41	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr6622/BILLS-119hr6622ih.pdf **Summary:** Would impose additional requirements for consent decrees or dismissals pursuant to settlement agreements in agency actions. Would also create additional considerations for the court for motions to intervene in agency actions.	• 1/8/2026: Ordered to be Reported (Amended) • 1/8/2026: Committee Consideration and Mark-up Session Held • 12/11/2025: Introduced in House; referred to Judiciary Committee
Back the Blue Act of 2025	**S. 3366** *Sponsor*: Cornyn (R-TX) *Cosponsors*: 38 Republican Cosponsors	§ 2254 Rule 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3366/BILLS-119s3366is.pdf **Summary:** Would amend Rule 11 of the Rules Governing Section 2254 Cases by adding: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	• 12/4/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Courts from Foreign Manipulation Act of 2025	**H.R. 2675** *Sponsor:* Cline (R-VA) *Cosponsors:* 19 bipartisan cosponsors	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr2675/BILLS-119hr2675ih.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/20/2025: Ordered to be Reported (Amended) • 11/20/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 4/7/2025: H.R. 2675 introduced in House; referred to Judiciary Committee
Litigation Transparency Act of 2025	**H.R. 1109** *Sponsor:* Issa (R-CA) *Cosponsors:* 24 Republican cosponsors	CV 5, 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1109/BILLS-119hr1109ih.pdf **Summary:** Would require a party or record of counsel in a civil action to disclose to the court and other parties the identity of any person that has a right to receive a payment or thing of value that is contingent on the outcome of the action or group of actions and to produce to the court and other parties any such agreement.	• 11/19/2025: Committee consideration and mark-up session held • 11/18/2025: Committee consideration and mark-up session held • 2/7/2025: H.R. 1109 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Protecting Our Courts from Foreign Manipulation Act of 2025	**S. 3180** *Sponsor*: Kennedy (R-LA)	CV 26	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s3180/BILLS-119s3180is.pdf **Summary:** Would require additional disclosures under Civil Rule 26(a) for any non-party foreign person, foreign state, or sovereign wealth fund that has a right to receive payment that is contingent on the outcome of a civil action. Would also prohibit third-party ligation funding by foreign states and sovereign wealth funds.	• 11/18/2025: Introduced in Senate; referred to Judiciary Committee
Protecting Our Democracy Act	**S. 2838** *Sponsor*: Schiff (D-CA) *Cosponsors*: 9 Democratic and Independent Cosponsors	CV – New Rule(s)	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s2838/BILLS-119s2838is.pdf **Summary:** Would require the Judicial Conference to create rules of procedure to ensure expeditious treatment of civil actions brought by Congress to enforce compliance with a subpoena.	• 9/17/2025: S. 2838 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs
Lawsuit Abuse Reduction Act of 2025	**H.R. 5258** *Sponsor*: Collins (R-GA) *Cosponsors*: Gill (R-TX) Tiffany (R-WI) Hageman (R-WY)	CV 11	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr5258/BILLS-119hr5258ih.pdf **Summary:** Would amend Civil Rule 11 to require the court to issue sanctions for Rule 11 violations, which shall consist of an order to pay the amount of the reasonable expenses incurred as a direct result of the violation.	• 9/10/2025: H.R. 5258 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2025	**H.R. 4678** *Sponsor*: Johnson (D-GA) *Cosponsors*: 20 Democratic cosponsors	EV 416	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr4678/BILLS-119hr4678ih.pdf **Summary**: Would create a new Evidence Rule (416, Limitation on Admissibility of Defendant's Creative or Artistic Expression) that would make a defendant's creative or artistic expression inadmissible unless the government proves by clear and convincing evidence that one of several exceptions applies.	• 7/23/2025: H.R. 4678 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Rape Shield Enhancement Act of 2025	**H.R. 3596** *Sponsor:* Mace (R-SC)	EV 412; CV 26; CR 16	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr3596/BILLS-119hr3596ih.pdf **Summary:** Would require the Judicial Conference to submit to Congress reports reviewing Evidence Rule 412, Civil Rule 26, and Criminal Rule 16. Would also require the Judicial Conference to identify potential rules amendments that further limit the admissibility of or scope of discovery regarding information of an alleged sexual assault victim and that increase privacy protections for sexual assault victims.	• 5/23/2025: H.R. 3596 introduced in House; referred to Judiciary Committee
Supreme Court Ethics, Recusal, and Transparency Act of 2025	**S. 1814** *Sponsor*: Whitehouse (D-RI) *Cosponsors*: 27 Democratic and Independent cosponsors	AP 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1814/BILLS-119s1814is.pdf **Summary:** Would require the Judicial Conference to prescribe rules of procedure requiring certain amicus disclosures and for prohibiting the filing of or striking an amicus brief that would result in the justice, judge, or magistrate judge's disqualification.	• 5/20/2025: S. 1814 introduced in Senate; referred to Judiciary Committee
Sunshine in the Courtroom Act of 2025	**S. 1133** *Sponsor:* Grassley (R-IA) *Cosponsors:* Klobuchar (D-MN) Durbin (D-IL) Blumenthal (D-CT) Markey (D-MA) Cornyn (R-TX)	CR 53	**Most Recent Bill Text:** https://www.congress.gov/119/bills/s1133/BILLS-119s1133is.pdf **Summary:** Would permit court cases to be photographed, electronically recorded, broadcast, or televised, notwithstanding any other provision of law, after JCUS promulgates guidelines.	• 3/26/2025: Introduced in Senate; referred to Judiciary Committee
Trafficking Survivors Relief Act of 2025	**H.R. 1379** *Sponsor:* Fry (R-SC) *Cosponsors:* 17 bipartisan cosponsors	CR 29	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr1379/BILLS-119hr1379ih.pdf **Summary:** Would permit a person convicted of certain federal offenses as a result of having been a victim of trafficking to move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references the arrest and criminal proceedings be expunged from official records.	• 2/14/2025: H.R. 1379 introduced in House; referred to Judiciary Committee

Name	Sponsors & Cosponsors	Affected Rules	Text and Summary	Legislative Actions Taken
Alexandra's Law Act of 2025	**H.R. 780** *Sponsor:* Issa (R-CA) *Cosponsors:* Kiley (R-CA) Obernolte (R-CA)	EV 410	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr780/BILLS-119hr780ih.pdf **Summary:** Would permit a previous nolo contendere plea in a case involving death resulting from the sale of fentanyl to be used as evidence to prove in an 18 U.S.C. § 1111 or § 1112 case that the defendant had knowledge that the substance provided to the decedent contained fentanyl.	• 1/28/2025: H.R. 780 introduced in House; referred to Judiciary and Energy & Commerce Committees
Protect the Gig Economy Act of 2025	**H.R. 100** *Sponsor:* Biggs (R-AZ)	CV 23	**Most Recent Bill Text:** https://www.congress.gov/119/bills/hr100/BILLS-119hr100ih.pdf **Summary:** Would add a requirement to Civil Rule 23(a) that a member of a class may sue or be sued as representative parties only if "the claim does not allege the misclassification of employees as independent contractors."	• 1/3/2025: H.R. 100 introduced in House; referred to Judiciary Committee

TAB 2

FORDHAM

University School of Law

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 609
Date: April 1, 2026

At its Spring 2025 meeting, the Committee approved for public comment two proposed amendments to Rule 609, the rule governing impeachment of witnesses with prior convictions: (1) to make the balancing test for convictions under Rule 609(a)(1)(B) — for convictions not involving dishonesty or false statement offered against a criminal defendant — somewhat more exclusionary; and (2) to clarify that the time period for measuring old convictions under Rule 609(b) ends on the date of trial. The proposed amendments were unanimously approved by the Standing Committee (with some minor changes described infra). The public comments were generally favorable.

This memorandum is in three parts. Part One briefly describes the Committee's rationales for proposing the amendments for public comment. Part Two summarizes recent developments, including the public comments and testimony. Part Three sets forth the proposed rule and committee note, for a Committee vote on whether it should be sent to the Standing Committee for final approval. An Appendix summarizes cases decided since the Committee's Spring 2025 meeting, the analysis and results of which could be improved by the amendment to Rule 609(a)(1).

I. Committee Rationales for the Amendments to Rule 609

Judge Furman's report to the Standing Committee succinctly summarizes the Committee's rationales for proposing amendments to Rule 609:

> The Committee approved for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment

approved by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness.

The Committee concluded that the amendment was warranted because a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory and because that error is not likely to be remedied through the normal appellate process. That is because the Supreme Court has held that a defendant may appeal an adverse Rule 609 ruling only if he or she takes the stand at trial, so appeals by defendants of adverse Rule 609 rulings are relatively rare.

The amendment, through its slightly more protective balancing test, would promote Congress's intent, which was to provide more protection to criminal defendants so that they would not be unduly deterred from exercising their rights to testify. The Committee believes that the tweak to the applicable balancing test would encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statement.

In addition, the Committee proposes a slight change to Rule 609(b), which covers older convictions. The rule is triggered when a conviction is over ten years old. That ten-year period begins running from the date of conviction or release from confinement, whichever is later. But the current rule does not specify the end date of the ten-year period. The absence of any guidance in the rule has led courts to apply varying dates, including the date of indictment for the trial at issue, the date that trial begins, and the date that the witness to be impeached actually testifies. The Committee approved a change to Rule 609(b) that would end the ten-year period on the date that the relevant trial begins. The Committee determined that the date of trial is the date that is most easily administered, the least susceptible to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

The memorandum in the Agenda Book for the Committee's Spring 2025 meeting contains a more thorough discussion of the rationales for the proposed amendments.

II. Recent Developments and Public Comments

A. Case Law

My earlier memos included lengthy summaries of relevant cases, showing that, while Rule 609(a)(1)(B) is intended to be protective, many courts have admitted convictions involving inflammatory acts or crimes identical to that charged, and even admitting multiple convictions. Since the Committee approved the amendments for public comments, there have been additional such decisions, which are summarized in the Appendix to this memo.

B. Public Comment

The public comment period closed on February 16, 2026. In addition, the Committee heard testimony on the proposed amendment from one witness at a hearing on January 15, 2026. Public comment on the proposed amendment to Rule 609(a)(1)(B) was uniformly positive. Notably, given some of the concerns expressed by Committee members in earlier meetings, no member of the public expressed concern that the amendment could operate to exclude convictions that should otherwise be admitted. There was one negative comment on the Rule 609(b) proposal, which the Committee already reviewed and dismissed at its last meeting (but which is discussed below).

What follows is a summary and discussion, where necessary, of each comment received and some salient testimony.

Bobby Levine, Esq., (USC-RULES-EV-2025-0034-0003) objects to the proposed amendment to Rule 609(b), contending that the date of indictment is preferable to the date of trial for assessing whether the conviction falls within the rule.

> **Note: The Committee considered, and rejected, Mr. Levine's comment at its November meeting for the reasons it had previously opted for the date of trial: that the date of trial is less subject to manipulation by the Government and more closely related to the reason that impeachment is allowed (i.e., to assess the witness's character for truthfulness *at the time she testifies*).**

Melody Brannon, Esq., (USC-RULES-EV-2025-0034-0004), writing on behalf of the Federal Defender and Community Defender members of Defender Services Advisory Group ("DSAG") strongly supports the proposed amendment to Rule 609(a)(1)(B). She states that "this modest amendment is warranted for at least five reasons. First, this Committee must amend the rule to address the judicial misapplication of the test, which is due in part to the appellate courts' standards of reviewing Rule 609 issues and evidence issues more broadly. Second, the rule as it stands now contributes to the unacceptable racial disparities present in our current criminal justice system. Third, the prevailing application of the test violates defendants' constitutional rights by chilling the right to testify, continuing to the "trial penalty," and eroding the presumption of innocence. Fourth, social science does not support the proposition that impeachment by prior convictions contributes to the truthseeking goal it seeks to serve. Fifth, this amendment would make Rule 609 internally and externally consistent."

Aspen Griffing, Esq. (USC-RULES-EV-2025-0034-0005) states that "[a]dding the necessity of evidence under 609(a)(1)(b) to be substantially more probative than prejudicial provides a much needed safeguard on defendants' rights" but that "the rule should calculate the time frame under 609(b) to extend to the date the defendant offers testimony."

Leah Brown, Esq. (USC-RULES-EV-2025-0034-0008) supports the proposed amendment to Rule 609(a)(1)(B) because it "better safeguards a defendant's right to testify." She notes that the risk of impeachment "discourages defendants from sharing their side of the story, even when their testimony is crucial for a fair trial." She also states that because a defendant must testify to preserve any appeal regarding a Rule 609 ruling, "many incorrect decisions go unchallenged. Therefore, strengthening the balancing test is necessary to ensure that impeachment serves its intended purpose rather than silencing a defendant's voice." Ms. Brown also agrees with the proposed endpoint in Rule 609(b), contending that "lack of clarity regarding the ten years creates unnecessary uncertainty for both defendants and their attorneys." She concludes that "[t]ogether, these revisions promote consistency, fairness, and transparency. Most importantly, they uphold the broader goals of the criminal justice system by ensuring that defendants feel empowered to testify without being unfairly burdened by convictions that do not accurately reflect their honesty."

Elliot Ashley, Esq., (USC-RULES-EV-2025-0034-0010) approves of the amendment but argues that the term "substantially" must be "better defined for the rule to have its intended effect."

> **Note: As the DOJ language added to the proposed note provides, courts have extensive experience in applying the term "substantially" to balancing tests. It seems that even if it were possible to define "substantially" it is unnecessary to do so in the Federal Rules of Evidence — unless the Committee wants to amend Rule 403 as well.**

Elizabeth Schultz, Esq., (USC-RULES-EV-0034-0011) approves of both proposed changes to Rule 609. As to the amendment to Rule 609(a)(1)(B), she states that the addition of the word "substantially" is "necessary because it gives more appropriate weight to the stakes involved when a defendant testifies in a criminal case, and it removes existing inconsistency within the Rules." Ms. Schultz argues that "[b]ecause jurors may place disproportionate weight on prior convictions, even when introduced for impeachment purposes, the danger of unfair prejudice is particularly acute in the criminal context where a defendant's constitutional right to a fair trial must be protected. In criminal matters, fears of prejudicial prior conviction evidence being admitted against the defendant may significantly deter them from testifying in their own defense." She concludes that the change "will encourage more careful judicial analysis and promote fairer trial outcomes for defendants." As to the proposed amendment to Rule 609(b), Ms. Schultz states that the "clarification is a welcome improvement" and that "[b]y explicitly defining the relevant time frame and anchoring it to the trial date, which is a clear and unambiguous endpoint, the amendment promotes uniformity and predictability in the measurement application."

The Federal Magistrate Judges Association, (USC-RULES-EV-2025-0034-0017), supports the proposed amendment to Rule 609 providing for more protection of criminal defendants from impeachment with prior convictions. The Association states: "The proposed

addition of 'substantially' is likely to have the effect of courts considering more carefully the admission of such evidence. The FMJA endorses this change because it minimizes the potential for prejudice to criminal defendants and focuses the jury on the conduct at issue in the trial rather than the individual's past conduct."

The American College of Trial Lawyers, (USC-RULES-EV-2025-0034-0030), supports the proposed changes to Rule 609. As to Rule 609(a)(1)(B), the College states that the amendment "will help effectuate Congress' intent to provide robust, but fair, protections for criminal defendants." The College concludes that the adjustment to the balancing test "should encourage federal courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence." As to the proposed amendment to Rule 609(b), the College "agrees with the Committee that the date of trial is the date that is most easily administered, the least susceptible to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial."

The New York City Bar Association, (USC-RULES-EV-2025-0034-0046), strongly supports the proposed amendment to Rule 609(a)(1)(B). It states that, as currently applied by courts, "Rule 609(a)(1) imposes an unwarranted burden on criminal defendants' right to testify and, ultimately, to a fair trial." It concludes that "[t]he proposal to raise the standard that must be satisfied before the admission of a prior conviction for the purpose of impeaching a defendant-witness's credibility will help reduce this burden, bring the rule in line with its original intent, and promote a fairer adversarial process." The Association notes that the Reporter for the Advisory Committee "enumerated numerous examples of courts admitting or upholding the admission of highly prejudicial prior convictions despite or in apparent violation of the balancing test under Rule 609(a)(1)(B)." It states that "[t]his flawed application of Rule 609(a)(1) is doubly prejudicial because trial court decisions that incorrectly permit the admission of prior convictions often avoid appellate review" and therefore "defendants faced with a court ruling that their past criminal convictions will be admitted at trial, but only if they testify, frequently choose not to take the stand in their own defense, wagering that their silence is less prejudicial than the jury hearing their version of events but also about their prior convictions." The Association concludes that the amendment "will hopefully restore the intended balance that Congress meant to strike when Rule 609 was enacted."

The National Association of Criminal Defense Lawyers, (USC-RULES-EV-2025-0034-0052), strongly supports the proposed amendment to Rule 609(a)(1)(B). It states that the amendment "marks an important step toward enhancing the fairness and integrity of our judicial system. By strengthening the threshold governing the admissibility of prior convictions for the purpose of impeaching a defendant-witness's credibility, we move closer to ensuring that every defendant receives a fair trial." NACDL suggests a tweak. The language currently in the rule, as amended, would provide that a non-falsity conviction "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant." NACDL contends that the rule sounds like one of admissibility ("must be admitted"), despite the more protective balancing test. It states:

> We understand the new wording to mean that evidence of a defendant's prior felony conviction is admissible *only* if the latter standard is met. To ensure that the Rule is not misunderstood as creating a mandatory rule of admissibility if the high standard is met and a permissive one otherwise, NACDL suggests that the proposed rule be modified by the addition of the words "and not otherwise" immediately after "to that defendant."
>
> **Note: As amended, it seems clear that the balancing test will be relatively hard to meet. There is nothing permissible about it. It seems unnecessary to add "and not otherwise" because it is clear that admissibility will *only* be allowed if the balancing test is met.**

The American Association for Justice, (USC-RULES-EV-2025-0034-0057), supports the proposed amendment to Rule 609 "as a small step toward greater fairness and recommends two minor changes to the Committee Note for ease of understanding and consistency." The first proposed change is to the paragraph in the Committee Note discussing the balancing test:

> That test is more protective <u>of defendants</u> so as not to infringe on the accused's constitutional right to testify. The amendment underscores the importance of applying a protective balance.
>
> **Note: This suggestion should be rejected as the section is all about criminal defendants. The balancing test applies only to them. It is obvious. The very sentence emphasizes the *accused's* constitutional right to testify. Moreover, simply referring to "defendants" may confuse a reader who might think somehow that civil defendants are getting some protection from this balancing test, which they are decidedly not.**

AAJ's second suggested change is to the Committee Note provision on sanitization of convictions:

> Absent agreement by the parties, that solution is problematic because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the ~~opportunity~~ <u>information necessary</u> to properly weigh the conviction's effect on the witness's character for truthfulness.
>
> **Note: The language of this paragraph was edited by the DOJ and approved by the Committee. The AAJ suggestion does not seem worth the change. The point is that the jury can't properly weigh the conviction if they don't know what it is for. But reasonable minds could probably differ, so this option will be set forth in the draft below.**

The Coalition for Prior Impeachment Reform, (USC-RULES-EV-2025-0034-0059), supports the proposed amendment to Rule 609(a)(1). It states that "[w]e know from our research and efforts that change is hard to achieve in the prior conviction impeachment sphere. We therefore express our appreciation for the fact that after years of work by the Reporter, Academic Liaison,

Committee, and invited experts (including Coalition member Jeffrey Bellin) a proposal has reached this stage." The Coalition concludes that the proposed amendment "has the potential to limit the extent to which Federal Rule of Evidence 609(a)(1)(B) detracts from ascertaining the truth." The Coalition makes two suggestions for additions to the proposed amendment:

1. The first suggestion is to abrogate the holding of the Supreme Court in *Luce v. United States,* 469 U.S. 38 (1984), which requires the defendant to testify at trial and be impeached before the defendant can challenge a pretrial ruling that prior conviction evidence is admissible. The Coalition states that "(i)nsulated from review, trial courts have used their discretion to misapply the balancing test and created the urgent need for the current proposed amendment. If the proposed balancing test is to ameliorate the problems it seeks to address, these impediments to appellate review should be tackled now." The coalition suggests adoption of the provision from Tennessee, which provides that "[i]f the court makes a final determination that [convictions are] admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination."

> **Note: Overruling a Supreme Court decision through the rulemaking process is not forbidden, but at the very least it needs substantial consideration. It is true that *Luce* has had negative effects in reducing appellate review over impeachment decisions, as was demonstrated in a prior memo to the Committee. But abrogation of *Luce* cannot be accomplished in this amendment to Rule 609(a)(1). Adding such an abrogation would require a new round of public comment, delaying this helpful amendment for a year, and (given the discussions of the Committee on Rule 609) possibly resulting in subverting the amendment. If there is sentiment on the Committee to abrogate *Luce,* Professor Richter will prepare a proposal for consideration at the next meeting. It is important to note that any abrogation of *Luce* does *not* necessarily require another amendment to Rule 609, so the Committee will not run into the problem of serial amendments of a single rule.**

2. The Coalition's second proposal is to add language to the Committee Note that while the amendment is directed toward erring courts, it should also be directed toward prosecutors. The Coalition suggests "that the Committee include within the Committee Note a reminder that prosecutors have a duty to do justice in this sphere."

> **Note: Adding an admonition to prosecutors in this amendment seems out of sync with the professed reason for the amendment — that courts are misapplying the current rule. Moreover, if courts apply the amended rule as intended, prosecutors will respond accordingly as it makes no sense to seek to admit a conviction that will not be admissible under the rule. It seems like an unnecessary reach to shake the prosecutor's tree at this stage of the amendment process.**

University of Connecticut Law School Students, (USC-RULES-EV-2025-0034-0066), "write to express our strong support for adding the word 'substantially' to Federal Rules of Evidence 609(a)(1)(B)'s balancing test." The students state that the current rule "derails Congress' intention to offer strong protections for defendants and serves to deter defendants with prior

convictions from testifying." They conclude that "[t]he addition of the word "substantially" will serve as a promising first step in creating a judicial system that protects defendants' rights and furthers the purpose of the Federal Rules of Evidence." The students go further and ask the Committee to propose abrogation of Rule 609, and state that "[j]ust as the 2020 amendment to Rule 404(b) became a barrier to meaningful reform of that Rule, we are concerned the 2026 Rule 609 amendment will become a barrier to true reform or elimination of the Rule."

The New York Council of Defense Lawyers, (USC-RULES-EV-2025-0034-0075), strongly supports the proposed amendment to Rule 609(a)(1)(B). The Council states that there is a "wide disparity" in the case law in applying the balancing test of the rule, with some courts applying it carefully "while others almost routinely admit prior convictions as impeachment evidence." The Council believes that the amendment "will not materially affect courts in the former category; it will signal to the latter courts that the Rule's balancing test is not to be taken lightly, with the result that fewer convictions that have little to do with a defendant's character for truthfulness are admitted."

C. Salient Testimony

The Committee previously discussed the likelihood that the threat of impeachment deters some criminal defendants who would otherwise testify from testifying. At the public hearing on January 15, 2026, Professor John Blume of Cornell Law School discussed empirical evidence that a significant number of defendants were deterred from testifying due to the threat of impeachment — including a number of defendants found guilty and subsequently exonerated. *See* John Blume, *The Dilemma of the Criminal Defendant with a Prior Record--Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 484-86 (2008) ("In almost all instances in which a defendant with a prior record did not testify, counsel for the wrongfully convicted defendant indicated that avoiding impeachment was the principal reason the defendant did not take the stand"; finding that 39% of the exonerated defendants did not testify, and 91% of that non-testifying group had prior convictions that would probably have been admissible, or were ruled to be admissible, under broad impeachment rules like Rule 609(a).). *See also* https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2023/12/31 (indicating that about 25% of all criminal defendants tried by jury testified in cases terminated in 2023; there were in excess of 1500 criminal defendants terminated after jury trials that year).

III. Amendment Proposed for Final Approval

It appears that nothing has happened in the year since the amendment was approved for public comment that affects the arguments supporting the amendments to Rule 609. As the Appendix reveals, decisions continue to allow similar or otherwise inflammatory convictions to be admitted against criminal defendants, despite the exclusionary intent of Rule 609(a)(1)(B). Also, no decision under Rule 609(b) has been uncovered that would change the analysis supporting the proposed amendment to that provision. And most importantly, the public comment is uniformly in strong support of the amendment to Rule 609(a)(1)(B), while the few critiques of the amendment to Rule 609(b) have already been thoroughly considered and rejected by the Committee.

For this reason, the proposed amendments for final approval are the same as those that were approved by the Committee for public comment, with three exceptions:

First, the Standing Committee, when it reviewed the amendment last year, made a few minor changes, noted with footnotes below.

Second, please review an addition to the paragraph in the Committee Note that cautions against admitting convictions without allowing the jury to know what the conviction was for. The Committee Note makes the argument that such a compromise undermines the jury's ability to assess probative value; the additional sentence adds the fact that the procedure can also be prejudicial to the defendant.

Third, AAJ's suggestion for a minor change to the Committee Note paragraph on sanitization is set forth in a footnote.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date that the trial begins.[1] Evidence of the conviction is admissible only if:

(1) the probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

[1] The Committee's proposal set the endpoint at "the date of trial." The Standing Committee changed the language to "the date trial begins."

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * * * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction is not admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1) but imposed a reverse balancing test when the witness was the accused. That test is more protective so as not to infringe on the accused's constitutional right to testify. The amendment underscores the importance of applying a protective balance. The amendment also makes the balancing test consistent with that in Rule 703. Courts are familiar with the formulation "substantially outweighs" as the same phrase is used throughout the rules of evidence to describe various balancing tests. cf. Rule 403.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the specific instances of conduct[2] underlying that conviction. Rule 608 permits impeachment by only those specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. See *United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus, the jury hears only that the defendant was convicted of a felony, not what the crime was. Absent agreement by the parties,[3] that solution is problematic because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity[4] to properly weigh the conviction's effect on the witness's character for truthfulness. Moreover, the failure to include the names and nature of prior offenses may prejudice the defendant because the jury is left to speculate as to the essential facts of prior convictions.

[2] The Committee Note referred to "bad acts"; the Standing Committee changed it to "specific instances of conduct."

[3] "Absent agreement of the parties" was added by the Standing Committee.

[4] AAJ would change "opportunity" to "information necessary".

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the original rule[5] has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. The rule provides for the date that trial begins[6] as the endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to analyze the truthfulness of witnesses.

[5] The Standing Committee changed "original" to "existing." Upon reflection, however, "original" seems better. First, if approved, the "existing" rule would be the rule as amended — i.e., not the rule meant by the Note. Second, "original" is the term the Committee has used previously, including the recent amendments to Rule 801, the 2023 amendment to Rule 1006, the 2016 amendment to Rule 803(16), the 2014 amendment to Rule 801, the 2006 Amendment to Rule 408, the 2000 amendment to Rule 702, and the 1994 Amendment to Rule 412. Though "existing" is used in the 2023 amendment to Rule 613(b), we can chalk that up to Reporter's oversight.

[6] This is a conforming change to what was made in text by the Standing Committee: from "the date of trial" to "the date trial begins."

APPENDIX

Recent Court Rulings Allowing Broad Impeachment Under Rule 609(a)(1)(B)

Courts continue to admit highly prejudicial convictions, as well as multiple convictions, under existing Rule 609(a)(1)(B). The following are additional examples decided since the Committee's Spring 2025 meeting:

- ***Drug conviction admitted in drug prosecution: United States v. Pettyjohn*, 161 F.4th 535 (8th Cir. 2025):** The court affirmed the defendant's drug and firearms convictions. It held that the trial judge did not abuse discretion in permitting the government to ask the defendant about his 2018 conviction for drug possession with intent to distribute. The court stated that prior convictions are highly probative of credibility because "one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath."

- ***Violence (and many other) convictions admissible in a murder prosecution: United States v. Lee*, 2025 WL 1490044 (E.D. Okla. May 16, 2025)**. The defendant was charged with murder in Indian country. The court admitted eight convictions for impeachment, including convictions for assault with a dangerous weapon. It reasoned as follows:

  > Each of the listed crimes has impeachment value – the convictions for possession of a stolen vehicle and eluding/attempting to elude having the most; the DUI conviction and the assault convictions having less. All of the convictions are from the past ten years,[7] and the Defendant's subsequent criminal history has been ongoing. None of the crimes are similar to the charged crime. The assault convictions are crimes of violence, but not similar to murder.

  Note: To say that crimes of violence are not "similar" to murder assumes that when a juror hears about the defendant's violent past, the juror will not draw a propensity inference about all violent activity, but rather will use it solely to assess character for truthfulness. It seems more likely that the propensity inference for violent activity goes more directly to murder than it does to perjury.

- ***Weapons conviction admissible in a weapons prosecution: United States v. Hill*, 2025 WL 1446383 (N.D. Ohio May 20, 2025).** The defendant was charged with felon-firearm possession. The court found that a prior weapons conviction would be admissible for impeachment, noting that while it was similar to the crime charged, a limiting instruction would suffice to diminish the prejudicial effect.

[7] Which they have to be for Rule 609(a) to be applicable.

- ***Five convictions admitted for impeachment: United States v. Goodbear*, No. 25-CR-176-JFH, 2025 WL 2838615 (E.D. Okla. Oct. 7, 2025).** The defendant was charged with assaulting and attempting to strangle his girlfriend. The government moved to admit five felony convictions if the defendant testified: (1) possession of a controlled substance, (2)-(3) unauthorized uses of a vehicle, (4) endangering others while eluding police, and (5) carrying or possessing a firearm as a convicted felon. The court conceded that the impeachment value of the convictions was not high but also noted that "none of his prior convictions require the use of force or violence against another" — so the prejudicial effect was low (which should mean that the convictions should be excluded under a test that requires probative value to outweigh prejudicial effect). The court concluded that *all five* of the convictions were admissible to impeach the defendant.

- ***All convictions admissible, and presumption is in favor of admissibility: United States v. Payne*, 2025 WL 2924660 (N.D. Okla. Oct. 15, 2025).** The defendant was charged with murdering a minor. The government sought to admit all of the following convictions for impeachment: 1. Driving a Motor Vehicle While Under the Influence of Alcohol; 2) Actual Physical Control While Intoxicated; and 3. Larceny of an Automobile, Aircraft or Other Motor Vehicle. The court noted that all the convictions were less than five years old and so are "presumptively admissible under Rule 609." (Which is not the case under the existing rule). The court relied heavily on the fact that the convictions were not similar to the crime charged. The court concluded that *all* of the defendant's convictions were admissible under Rule 609(a)(1).

- ***Identical conviction admitted, with impeachment improperly analyzed: United States v. Rivera,* 2025 WL 3237881 (D. Conn. Nov. 19, 2025).** The defendant was charged with felon-firearm possession related to drug activity, but no drug charges were brought. The government sought to impeach him with a prior felon-firearm conviction. The court found that the firearm offense was admissible for impeachment, using the following analysis:

> Impeachment by reference to this particular offense is highly probative of his knowledge, lack of mistake, and intent to possess the firearm and ammunition in question, while also knowing he was a felon (who, at the time of this crime, already stood charged with a violation of the same law). A jury reasonably could find that Defendant possessed the charged items (some of which have fingerprint or DNA evidence suggesting the same) and purposefully stored them in the garage in hopes of evading prosecution for their possession, as he knew he was a felon. Similarly, the jury could find such storage wholly inconsistent with home or personal defense, and instead consistent with the manner a felon might store items he knows the law prohibits him from possessing. And as the probative value of this evidence outweighs its prejudice to Defendant, it "must be admitted." Fed. R. Evid. 609(a)(1)(B).

Note: None of this analysis is about impeachment. It is about the possibility of admitting the evidence under Rule 404(b). In terms of impeachment, the conviction should definitely be excluded because the conviction is identical to the crime charged, and a firearms offense is only minimally probative of the defendant's character trait for truthfulness.

- ***Identical conviction excluded but very similar conviction admitted: United States v. Gamon*, No. 4:23-CR-00075, 2026 WL 35233 (M.D. Pa. Jan. 6, 2026):** In a prosecution for intent to distribute cocaine, the court held that a prior conviction for intent to distribute cocaine would be excluded, whereas a prior conviction for intent to distribute *crack* cocaine would be admissible, because the conviction was for a different, albeit related, substance.

TAB 3

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Artificial Intelligence and Proposed Rule 707
Date: April 5, 2026

Since its meeting in Fall 2023, the Committee has been considering the challenges posed by the development of artificial intelligence (AI) and its possible impact on evidence offered at a trial. As an important part of this effort, the Committee has approved release for public comment proposed Rule 707, which is designed to impose reliability requirements on AI-generated evidence when it is offered without the accompaniment of an expert.

This memorandum is in five parts. Part One sets forth recent developments in legal publications and case law addressing AI as evidence. Part Two sets forth proposed Rule 707, and summarizes the public comment received. Part Three discusses the major issues raised by the public comment, and analyzes whether proposed Rule 707 should be amended to account for that comment. Part Four provides drafting alternatives. Part Five is a short discussion about whether a revised rule should be issued for a new round of public comment this Fall, or whether the Committee should wait.

I. Recent Developments

A. Case Law

Case: *United States v. Gafford,* 149 F.4th 1002 (8th Cir. 2025): The defendant was convicted of delay and embezzlement of U.S. mail. As proof that mail was not delivered to one deliveree (Karen), Karen testified that she used an Apple AirTag device, which is GPS tracking device applied to mail. She conducted a "test run" by sending mail to her brother and it got there. Then she sent the device in an envelope to her own home, and tracked it to an address that was Gafford's residence. The defendant argued that the government did not lay a sufficient foundation for the Apple AirTag because Karen could not testify about how the device works. The court found that Karen's testimony sufficiently established the reliability of the device under the low standard of Rule 901(b)(9).

Comment: The only way that this foundation works is under the low standard of Rule 901(b)(9). This is exactly the kind of case that can happen if machine-learning is not regulated by Rule 702 standards, with the preponderance of the evidence standard being applied.

Case: *United States v. Gogic,* 2025 WL 3042350 (E.D.N.Y.): In a case involving international narcotics trafficking, the government offered spreadsheets and communications compiled by Skynet, without offering anyone from Skynet to provide a foundation. The defendant argued as follows:

> Defendant further asserts that European officers used multiple software programs and/or artificial intelligence tools to decrypt, organize, and analyze the intercepted data, including a program called "Chat-X" that rendered the messages "readable and searchable." Defendant has also filed reports and letters from three purported experts opining on the provenance, format, and reliability of the Sky Evidence. Defendant's experts assert, inter alia, that the Sky Evidence is not the "raw" or "original" data that was intercepted from France, that artificial intelligence was likely used to create the Chat Spreadsheets, and that metadata reveals the Sky Evidence was modified multiple times before it was produced to Defendant. Defendant has noticed the Government that he plans to call each of those experts to testify about the unreliability of the Sky evidence at trial.

The court looked at this solely as an authentication question, and found the foundation insufficient:

> Here, by contrast, the Government's only evidence describing the process by which the Sky Evidence was created is the Certificate of Authenticity that states, generically and in conclusory fashion, that the files were copied from an "electronic storage medium" that contains data and original records that were "collected" and "captured" by European law enforcement authorities in their investigation of SkyECC. The Government does not intend to elicit any additional testimony about the contents of that storage medium and disavows having technical knowledge of the underlying "capture or decryption process[es]." Standing alone, the Certificate of Authenticity merely supports the contention that that the Sky Evidence reflects an extraction of certain information maintained electronically in a European "electronic storage medium"; it does nothing to establish the origins or reliability of that information.

The court found the records inadmissible in the absence of a further showing of accuracy, for example, from a person with personal knowledge.

> **Note: It could be argued that the concerns of Rule 707 are being met because the court is finding that authenticity has not been established in the absence of an expert or any further showing. But it is risky to leave these concerns to the mild standards on authenticity, which are not even about reliability. In fact it can be argued that the court erred, by treating a reliability question as one of authenticity. But if that is so, the reason is probably that there actually is no rule of evidence that states "all**

evidence must be reliable"; and Rule 702, which does regulate one reliability problem is inapplicable because there is no expert.

Case: *Gatlin v. Welle*, 2025 WL 2926192 (E.D. Mo.): The plaintiff brought a 1983 claim against the St. Louis Police Department after he was arrested and incarcerated largely on the basis of an erroneous facial recognition match. The match was obtained from a database of largely persons of color who had been ticketed for traffic violations. The officers had not been trained in operating facial recognition software. The court, reviewing the defendants' motion to dismiss, held that the plaintiff had sufficiently pled a claim against the Department for failure to train.

Comment: This was a motion to dismiss, but it is addressed to the same problem that Rule 707 is designed to regulate: AI programs of dubious reliability (here, a skewed database), with the only foundation testimony from the lay persons who pressed the button on the computer.

B. Articles

ARTICLE: on Rule 707, by John Siffert, et.al.: John Siffert, Jillian Berman & Cindy Kuang, *AI Evidence Rule Tweaks Encourage Judicial Guardrails*, Law360 (Dec. 9, 2025), https://www.law360.com/articles/2417855/print?section=aerospace

The Judicial Conference's Advisory Committee on Evidence Rules has crafted a proposed Rule 707 that would permit courts to admit evidence that is machine-generated, including evidence created by artificial intelligence. If adopted, proposed Rule 707 would formalize how machine outputs —now increasingly common in both criminal investigations and civil litigation— may be used in the courtroom. * * * This article summarizes how proposed Rule 707 is expected to work, and analyzes how recent additions to the draft of the proposed committee note are designed to encourage judges to ensure sufficient guardrails for the admission and use of machine-generated evidence.

Proposed Rule 707 does not reinvent the wheel — even though AI appears to be poised to challenge whether the wheel will remain the most important human invention. Instead, it borrows from the existing Rule 702 to establish a reliability threshold for admitting machine-generated evidence.

However, the text of proposed Rule 707 does not address how machine-generated evidence should be treated at trial once it has been admitted, when there is no expert to cross-examine regarding the reliability of the machine output. This is a scenario that can be reasonably anticipated given that machine-generated evidence may be self-authenticating, or authenticated by lay testimony of a witness who is familiar only with the output of the machine.

To deal with that issue, at its Nov. 5 meeting, the Evidence Rules Committee proposed additions to the previously circulated committee note to proposed Rule 707 in the form of recommendations for judges to control how machine-generated evidence would be received and used.

How Proposed Rule 707 Operates

Proposed Rule 707 incorporates the reliability framework of Rule 702, which regulates expert testimony, but applies it to evidence generated by machines rather than human experts. Proposed Rule 707 permits machine-generated evidence to be admitted if the evidence satisfies the following four-part test governing expert witnesses:

(a) the [machine's] scientific, technical, or other specialized function will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the [machine's output] is based on sufficient facts or data;
(c) the [machine's output] is the product of reliable principles and methods; and
(d) the [machine's inference] reflects a reliable application of the principles and methods to the facts of the case.

Reliability would be determined at a *Daubert*-style hearing outside the jury's presence, where the proponent argues for admissibility and the court — acting as a gatekeeper — decides whether the threshold is met.

Once the evidence is admitted, the procedure contemplated by proposed Rule 707 would look substantially different than existing practice under Rule 702, where the expert who establishes reliability under *Daubert* factors before the judge also appears before the jury to be examined — and cross-examined — at trial.

Under Rule 707, by contrast, the machine-generated evidence could be presented directly to the jury, or perhaps accompanied only by a lay witness — for example, a technician who operated the system but lacks insight into its reasoning. No witness would necessarily take the stand to explain the machine's reasoning to the jury or be subjected to cross-examination, though the parties may still introduce reports and data, as well as expert testimony, to support or undermine the evidence.

The Challenge That Proposed Rule 707 Addresses in Committee Note

The possibility of limited adversarial testing of machine-generated evidence poses a challenge to the fairness of a trial when such evidence is admitted. Existing evidentiary rules and case law that prohibit hearsay and require confrontation do not apply, because machine-generated evidence is not testimonial. Still, there is a danger that the lack of symmetry between how machine-generated evidence and witness testimony are presented will inappropriately affect how much weight the jury will give to machine outputs.

The draft committee note, with tentatively approved changes, seeks to mitigate this danger in two ways. First, the draft committee note emphasizes that judges should not allow an end run around the adversarial process by the parties, stating: "This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed, the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert."

If approved, the note would clarify that proposed Rule 707 contemplates rigorous application of the *Daubert* factors before machine-generated evidence is admitted. The newly added language from the Nov. 5 meeting states:

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

In this way, the draft committee note would encourage judges to perform the critical gatekeeping function and decline to admit machine-generated evidence that has not been tested in a manner similar to that achieved through cross-examination.

Second, the Evidence Rules Committee also tentatively approved language in the note that recommends judges instruct the jury on how to treat machine-generated evidence and what weight to afford this evidence that has not been subjected to cross-examination. The dissimilarity between machine-generated evidence and witness testimony risks confusing jurors into accepting or rejecting machine evidence without independent evaluation. Machine-generated evidence can take a variety of forms, including aggregations of large datasets, evaluations of data based on probabilities or predictions of future outcomes. This type of evidence is different in nature than direct and circumstantial evidence, which is primarily admitted through witness testimony or documents authenticated by witnesses.

Jurors are currently instructed to use their common sense when evaluating testimony-based evidence, and not to accept a witness's testimony merely because the witness has been deemed or accepted as an expert. That guidance is not helpful in the case of machine-generated evidence, where no witness with firsthand knowledge of the inputs or outputs is necessarily called.
As articulated by the draft committee note:

> Under this rule, machine learning output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when machine-based evidence is found by the court to be admissible under this rule. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output.

Though the "opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output ... in the end, the inability to cross-examine is a concern," the note continues.

As such, the draft committee note recommends that judges "consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable — or unreliable — simply because it was produced by a machine."

Notably, the draft committee note in its current formulation does not prescribe what standard the jury should apply when evaluating machine-generated evidence. It leaves to the court's discretion whether to formulate a charge that suggests a particular standard, such as common sense-plus — e.g., corroboration — or care and caution. The expectation is that one size will not fit all, and over time, the courts will determine what standard is best in which situation.

Article on Expert's reliance on machine-learning, evaluated under Rule 702: Barrington Dyer, Jacob Karim & Curtis Park, *How Unchecked AI Exposes Expert Opinions To Exclusion,* Law360, (Dec. 3, 2025), https://www.law360.com/articles/2415409/print?section=consumerprotection

Blind Reliance Can Keep an Expert From Opining

Even if an expert's report is free of hallucinations, *it may contain analysis performed by AI that the expert cannot sufficiently explain — thereby abdicating the expert's role to AI.* Blind reliance on an AI tool without an understanding of how the tool reaches its output — either the analysis it applied or the sources it extracted — can lead to the exclusion of unsubstantiated opinions. Rule 702 of the Federal Rules of Evidence, for example, allows an expert witness to testify as to their opinion, provided that the testimony is a product of reliable principles and methods. *In federal court, where the Daubert standard applies and judges serve as gatekeepers over the reliability of an expert opinion, an expert who lacks an understanding of how the AI output was generated runs the risk of exclusion.* * * * Two cases exemplify this risk. In *Jackson v. Nuvasive Inc*., in the U.S. District Court for the District of Delaware, the defendant's damages expert relied on third-party tools to calculate damages on eight patents. One of the tools, Derwent, calculated "a 'Combined Patent Impact' score which represents the importance of a patent relative to others," while a second tool, IPLytics (billed as an AI-powered IP analytics tool), calculated a patent's competitive impact. Use of both of these tools by the expert was found to be unreliable in March by the District of Delaware. The expert's use of Derwent was *unreliable because he was unable to explain how the tool calculated the combined patent impact scores.* * * * Equally flawed was the expert's use of the IPLytics tool. Even though the expert had demonstrated an understanding of how IPLytics calculated a patent's competitive impact, he simply assigned equal values to IPLytics' input factors without any rationale connecting the factors to a patent's value. For example, a factor such as the number of inventors listed on a patent was, in the court's view, a "dubious" indicator of a patent's value. In the end, the lack of reliability associated with the expert's opinions led the court to grant the plaintiff's *Daubert* motion and exclude the expert's testimony.

The *Matter of Weber* illustrates a different, yet related, reliability issue: Not only can AI-performed analysis be opaque, but the data it draws from may be unknown, and the output it generates inconsistent. Add to that, if the prompts used with the AI tool are not recorded, the problem is compounded. In *In re: Weber*, the expert for a party challenging the fiduciary administration of a trust relied upon Microsoft Copilot to cross-check his calculation of damages, but could not recall what input or prompt he used to check his calculations. Nor could he state what sources Copilot relied upon, much less explain how Copilot works or how it arrives at a given output. In its own experimentation with Copilot, the New York Surrogate's Court, Saratoga County, noted on Oct. 10, 2024, that even the same prompt returned a different value each time.

And when presented with the question "are your calculations reliable enough for use in court," Copilot responded, "[w]hen it comes to legal matters, any calculations or data need to meet strict standards. I can provide accurate info, but it should always be verified by experts and accompanied by professional evaluations before being used in court." As such, the court found "the record ... devoid of any evidence as to the reliability of Microsoft Copilot in general, let alone as ... applied here," and unsurprisingly, the expert's damages calculations were determined to be untrustworthy.

Jackson and *Weber* show that experts should not overly depend on AI calculations without a firm understanding of how the calculations were reached. *Considerations for assessing the admissibility of AI-assisted expert opinions include the expert's comprehension of a tool's algorithm, reliability and acceptability in the field. In addition, experts who can neither recall the prompts they used nor the inputs they provided to reach their AI-assisted calculations are likely to find themselves unable to defend their opinions.*

> **Note: The cases discussed in the above article (both of which were included in prior memos) hold correctly that if an expert cannot explain why the AI is reliable, the opinion based upon the AI will not satisfy Rule 702. If proof of the reliability of the AI is required when an expert relies upon it, it seems pretty obvious that the same proof has to be required when the AI is entered directly and there is no expert at all. That is all that Rule 707 is intended to do.**
>
> **These cases also show the importance of tethering Rule 707 to the standards of Rule 702. It makes no sense to have different reliability standards apply to the underlying AI, depending on whether the expert testifies or not. As this article shows, the courts seem to be using *Daubert* quite well in regulating the underlying AI when the expert testifies. There is no showing in the case law of any difficulty of adapting *Daubert/702* to the reliability concerns presented by AI. Those who argue that the flexible *Daubert/*702 standards are a poor fit for regulating AI are underestimating the courts who are already doing that.**

ARTICLE: Rewald and Simon, *When Tech Disrupts Faster than Rules Adapt: Drafting Emergency Guidance for AI-Affected Evidence, OpinioiJuris, (Dec. 16, 2025), https://opiniojuris.org/2025/12/16/when-tech-disrupts-faster-than-rules-adapt-drafting-emergency-guidance-for-ai-affected-evidence/:*

To address the urgency created by developments in AI outpacing existing standard-setting initiatives, Fénix and Starling Lab have identified evidentiary pillars that fact-finders can use to fill lacunae in legal frameworks.

Evidentiary Pillars for the AI Era

This section [focuses] on the pillars that are built on broadly applicable (digital) evidence principles. Each pillar's description outlines our methodological approach to its development, where it: 1) identifies the evidentiary principle; 2) elucidates the principle in a digital evidence context; and 3) positions the principle in the context of AI-affected challenges.

1. Auditability: The 'Explainable-Enough' Standard. Auditability refers to the creation of a chronological record (an 'audit trail') that documents the evidence handling process how evidence was collected, processed, and stored, along with when, and by whom, evidence was accessed. The audit trail of digital evidence is often reflected in digital information's metadata, which can outline or validate the chain of custody of the digital evidence. A detailed audit trail has been crucial * * * for establishing the probative value of digital evidence. *For AI-affected evidence, the 'black box' nature of deep learning models – where reasoning pathways are opaque and training data is proprietary, massive, or contains biases – poses a direct challenge to the principle of auditability. If an investigator cannot explain why an AI tool flagged a specific video, can it be relied upon?* Translating the auditability pillar to an AI context may require the adoption of an *'explainable-enough'* standard. *Recognizing that total transparency is often technically impossible, an explainable-enough standard would focus on creating an audit trail of the tools used, with the aim of ensuring that the methodology is as reproducible as possible given technical constraints. The threshold for 'explainable-enough' could differ depending on the type of AI-affected evidence, and would adapt over time as efforts advance to make AI more transparent.*

2. Corroboration: The Ultimate Defense. Digital information is especially easy to manipulate compared to non-digital information. Consequently, external corroboration through varied and diverse sources, both digital and non-digital, has evolved as an essential method of verification. In an information environment polluted by synthetic media, corroboration demands are further heightened. Approaches to verifying the source of potential evidence typically depend on evaluating indicators that were once difficult and time-consuming to fabricate convincingly – e.g., for social media evidence, this would include account history, posting patterns, and internal consistency. * * * With that said, when positioning the corroboration pillar in an AI context, caution is needed to guard against over-correction. * * * [P]ractitioners may impose unduly high corroboration requirements on themselves and others — potentially straining time and resources, as well as risking probative evidence being left unused.

3. Provenance: Provenance identifies who the creator or author of a piece of evidence is and where it came from. Before international criminal courts and tribunals, judges prefer for the creator or author of evidence to testify in court. However, in a digital investigations context, and particularly in an open-source investigation, the author may be uncertain or unknown. On a more existential level, generative AI calls the very concept of authorship into question. While investigators have historically compensated for a lack of provenance for open-source evidence by relying on content-based verification, sophisticated deepfakes can now convincingly mimic genuine material, making these methods increasingly unreliable. The AI context may therefore require a pivot toward tools that are designed to identify and secure provenance of AI-affected evidence. One such tool, the Coalition for Content Provenance and Authenticity (C2PA) content credentials standard, can embed a digital asset with metadata (a cryptographically verified signature) that provides a transparent account of any alteration or tampering. Yet, the extent to which such cryptographically verifiable evidence satisfies admissibility requirements remains to be adequately tested in courtrooms.

Note: This article's principles are directed toward deepfakes as well as machine-learning. As to machine-learning, the idea of an "explainable enough standard" is one

that should be considered in the Committee's choice of a solution for whether AI output should be excluded if the process cannot be explained.

ARTICLE: Steven Friedland, *Evidence Law and Artificial Intelligence,* 61 No. 2 Article 4, Criminal Law Bulletin (2025)

After noting the problems of biased data and inexplicability that arise with machine-learning evidence, the author concludes that "AI substitutes for highly educated experts" and therefore must "meet the *Daubert* standards that apply under Rule 702." The author concludes as follows:

> The challenges [presented by AI] are beginning to come into focus and require foundational understanding about how AI operates and applies to evidentiary issues in such areas as risk-assessment, content generation, face recognition software, and other AI applications. Lawyers and judges need to start acquainting themselves with these issues to prepare for their use in just about every area of the practice of law.

ARTICLE: Xavier Rodriguez and Richard Lapp, *Recurring Discovery and Evidence Issues in Employment Cases,* CH201 ALI-CLE 927 (2025).

On Inexplicability

Another criticism that legal commentators frequently raise when discussing algorithmic selection tools is the "black box" problem, which results from the difficulty, or impossibility, of explaining why AI tools produced a particular outcome. This problem stems from the concern that if AI outcomes cannot be explained, there might be unknown biases underlying the outcomes.

This can be overcome in a number of ways, including through the testimony of software engineers explaining the underlying algorithm, vendor employees that developed the facts needed to demonstrate the data used as an input, data scientists who can explain how the AI model was trained, and any other number of individuals who worked on the AI model that could show that evidence derived from the model is relevant and reliable.

One important factor in evaluating whether AI evidence is admissible is whether the functioning of the AI system that produced the evidence can be explained to the trier of fact. When technical information is offered as evidence, the proponent of the evidence must demonstrate that it is sufficiently trustworthy for the trier of fact to credit it in making its decision. Accordingly, a proponent of AI evidence should be able to explain how the AI system operates in a way that can be understood by the trier of fact (including assuring them that it is only being used under the conditions for which it was designed, describing the system's error rate, and showing that there is acceptable confidence in its accuracy).

Uses of Machine-Learning

As GenAI technology develops, lawyers and investigators are likely to use it to uncover significant patterns in masses of documents, videos, and other data, and to create charts, timelines, and other summaries of those data. Expert witnesses are likely to use GenAI to perform forensic analyses, basing their opinions on what the technology has revealed. They will also use it to create computer reconstructions of events and processes. Forensic video analysts will likely use GenAI and other models to examine photos, videos, and audio, retrieve video and audio segments, and enhance them—exposing relevant facts by clarifying blurry images and amplifying muffled conversations. They may use GenAI to determine when events recorded by one source happened in relation to events recorded by others, and to synchronize video and audio of the same event originating from different sources. The technology may even be used to visualize the perception of an event hidden deep inside a witness's memory. And GenAI will likely enable lawyers to take all the disparate evidence in a case—including photos, videos, audio recordings, documents, forensic analyses, and more—and integrate it into coherent, comprehensive, and compelling multimedia presentations of their arguments.

Basic conclusion

Genuine images or audio enhanced using GenAI, as well as GenAI-assisted productions and presentations of forensic evidence, computer simulations purporting to reconstruct disputed facts, and even summaries of voluminous data offered as substantive evidence face a different sort of challenge. Under current rules of evidence, these types of evidence are admissible only if an authenticating witness can adequately explain their reliability and accuracy. Yet, the processes by which GenAI generates its outputs are essentially "black-boxed"—not even the developers of the models completely understand how the models do what they do. *If courts insist on thorough, mechanistic explanations of those processes, these types of GenAI-assisted evidence should face objections and will be excluded. If, however, courts apply relaxed standards for the explainability of the processes by which this evidence is produced, or if they accept satisfactory testing of the GenAI model in lieu of explanation as an adequate assurance of reliability, these GenAI-assisted demonstratives may be admitted.* In contrast, GenAI outputs such as charts, diagrams, and computer animations will often be permitted as illustrative aids because permissibility does not depend on the processes used to create them. It's the output, not the method of creation, that matters.

Using GenAI forensically

Parties will use GenAI to produce forensic evidence. Current examples and future possibilities abound: facial recognition and gait analysis to identify persons in videos, explain their recorded movements, and extrapolate to predict behaviors not recorded; lip-reading analysis to discern the spoken content of video footage lacking sound; audio analysis of recorded voices to identify speakers and gunshots to triangulate the location of shooters and victims; fingerprint, x-ray, and other imaging analysis; and lie detection—analyzing text, spoken words, and even facial

expressions to determine whether the target person is telling the truth. * * * Affectiva, for instance, claims to be able to "detect[] nuanced human emotions, complex cognitive states, activities, [and] interactions"—data that may suggest deceptive behavior. Other systems focus on facial expressions, micro-expressions, eye movement, pupil dilation, and other data to detect lies. Given the long history of inflated claims in this domain, we have reason to be skeptical; nevertheless, the tremendous leaps in data gathering, analysis, and application enabled by GenAI in other areas make these technologies intriguing possibilities for eventual courtroom use.

Admissibility as Expert Evidence

Another, more fundamental challenge will be persuading the court that the requirements for expert witness testimony as specified in Federal Rule of Evidence 702 and *Daubert,* * * * are satisfied. * * *

Under Rule 702 and *Daubert,* it may be difficult for experts who cannot adequately explain how GenAI produces its results to show that their testimony "is the product of reliable principles and methods" and that they "ha[ve] reliabl[y] appli[ed] the principles and methods to the facts of the case." * * * Roughly, a system is explainable if, when answering queries, it presents information to the user that provides a qualitative understanding of the connection between the input and the output.

We contend that, relative to the law of evidence, explainability has three key requirements: (1) Fidelity—the explanation must reasonably represent what the system did to produce the output; (2) Understandability—the explanation must be understandable to the person receiving it; and (3) Sufficiency—the explanation must be sufficiently detailed to justify its output relative to this inquiry. *Given the ultimately black-box nature of GenAI and other machine learning models, no expert witness will be able to explain exactly how the findings on which the expert bases his or her opinion were derived.* * * * And as the Supreme Court itself has stated, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Attempts to explain how a GenAI model generated particular results are likely to leave such a gap, falling short of both the fidelity and, potentially, the sufficiency requirements. Moreover, the complexity of machine learning models makes it more likely that the judge will fail to comprehend the expert's explanation, thereby falling short of the understandability criterion. **[Note: Again this shows that *Daubert* is, in fact, a proper regulator of AI evidence.]**

Even if the process by which a GenAI model produces its outputs cannot be entirely explained, it may be argued that the model can be sufficiently explained for all practical purposes, including adjudication. No system is wholly inscrutable. Systems can be understood in terms of their design goals and the mechanisms of their construction and operation. Additionally, systems can also be understood in terms of their inputs and outputs and the outcomes that result from their application in a particular context. Expert witnesses can convey to judges (and jurors, if the evidence is ruled admissible) how particular GenAI models work at a level of explanation that is higher than the intricacies of coding, yet specific enough to reasonably represent what the system did to produce the output. *The publication of manuals designed to assist judges in assessing the*

trustworthiness of AI-derived evidence suggests that policymakers and the judiciary are at least contemplating the possibility of legally adequate explanation. In any event, explainability is not the only way to establish sufficient trust in a machine learning model or to ensure that expert testimony based on GenAI-produced information reflects reliable principles and methods. Another approach is to test the system. Satisfactory testing can gauge both the validity of a model, its accuracy in describing or measuring what it purports to describe or measure, and its reliability or replicability, its capacity to produce consistent results, given the same inputs. If independent (and ideally peer-reviewed) testing can establish that a forensic technique produces reliable and valid results, expert testimony based on that technique should be admitted despite the model's black-box nature. Artificial intelligence scholars Stuart Russell and Peter Norvig pose a helpful question: "Which would you trust: an experimental aircraft that has never flown before but has a detailed explanation of why it is safe, or an aircraft that has safely completed 100 previous flights and has been carefully maintained, but comes with no guaranteed explanation?" Indeed, *Daubert* itself specifies testing and error rates as two of the five factors trial judges should consider in assessing the evidentiary reliability of proffered expert testimony.

Tests on GenAI models that would pass muster under *Daubert,* however, do not yet appear to have been performed, let alone published in peer-reviewed forums. Developers of machine learning models test them regularly, but there has been little independent evaluation of AI programs used in the justice system. One reason is that the code underlying some models is proprietary and thus unavailable for outside testing. The limited independent testing that has been conducted has yielded mixed results. * * * *Without credible test data showing that a GenAI model reliably produces accurate results within an acceptable error rate, the model probably should not be admissible, regardless of whether it can be adequately explained.* However, courts' willingness to accept adequate testing in lieu of a complete explanation, assuming the proponent of GenAI-derived forensic evidence can present satisfactory independent test results, would go a long way toward satisfying the *Daubert* standard.

Enhancing audios and videos

GenAI will be used to modify audio recordings, removing extraneous sounds or amplifying a particular voice so that the judge and jurors can better discern what is being said. This, too, has long been done using other audio software packages such as ProTools, Audacity, and Audition. However, these anticipated uses of GenAI to enhance existing video or audio raise several concerns. First, GenAI would yield deceptive and misleading outputs to the extent that the model adds pixels or otherwise creates data that are not in the original, indexical recording. * * * Second, certain modifications may produce images that are as photorealistic as the originals but are, in fact, less reliable evidence of reality. For example, using GenAI to change the point of view might be sufficiently grounded in physical reality, as are the variable camera angles in a 3D model created by point cloud data. But unlike point cloud-based models, the inscrutability of the GenAI model may allow the scene to be shown from perspectives that do not conform to the precise mathematics of standard 3D models. Third, the inability of the user or creators of a GenAI model to explain exactly how it functions is likely to undermine the proponent's ability to get the resulting image or video admitted—the same concern we have already discussed related to the admissibility of GenAI-produced forensic evidence presentations and voluminous data summaries.

ARTICLE: Andrew W. Jurs & Scott DeVito, Machines Like Me: A Proposal on the Admissibility of Artificially Intelligent Expert Testimony, 51 PEPP. L. REV. 591, 626 (2024).

Abstract

With the rapidly expanding sophistication of artificial intelligence systems, their reliability, and cost-effectiveness for solving problems, the current trend of admitting testimony based on artificially intelligent (AI) systems is only likely to grow. In that context, it is imperative for us to ask what rules of evidence judges today should use relating to such evidence. * * * We contend that evidence from only certain types of AI systems meet the requirements for admissibility, while other systems do not. The break in admissible/inadmissible AI evidence is a function of the opaqueness of the underlying computational methodology of the AI system and the court's ability to assess that methodology. * * * We offer several policy proposals that would address weaknesses or lack of clarity in the current system.

First, in light of the long-standing concern that jurors would allow expertise to overcome their own assessment of the evidence and blindly agree with the "infallible" result of advanced-computing AI, we propose that * * * *parties who draft instructions consider adopting a cautionary instruction for AI-based evidence. Such an instruction should remind jurors that the AI-based evidence is solely one part of the analysis, the opinions so generated are only as good as the underlying analytical methodology, and ultimately, the decision to accept or reject the evidence, in whole or in part, should remain with the jury alone.* Second, as we have concluded that the admission of AI-based evidence depends largely on the computational methodology underlying the analysis, we propose for AI evidence to be admissible, *the underlying methodology must be transparent because the judicial assessment of AI technology relies on the ability to understand how it functions.*

* * *

Note: The idea of jury instructions tracks the new addition to the committee note tentatively approved at the last meeting. The idea of explicability is one that is also addressed in a new committee note.

Example of machine learning getting the right answer but for the wrong reason

A visual identification system was fed a series of photos and asked to develop a methodology for identifying horses. It did so, but after close examination of why, it was discovered that the system was honing in on a copyright tag that appeared only in the bottom-left corner of horse pictures. Another system was trained using pictorial data that enabled the system to develop a reliable methodology for distinguishing huskies from wolves. The system did so not based on any differences between the animals but rather due to the presence of snow in the picture (husky pictures tended to have snow in the background while wolf pictures did not). Thus, our artificial intelligences, like animal intelligences, are capable of getting it right, while also getting it completely wrong.

Transparency and Explicability

This exposes the central weaknesses of an AI expert in our search for truth: how do we get it to explain its answers, and how do we investigate whether what it says it does is correct? These are the dual problems of explainability and transparency. And our rules of evidence will need to determine precisely when an AI system is sufficiently explainable and transparent.

Roughly, a system is explainable if, when answering queries, it presents information to the user that provides a qualitative understanding of the connection between the input and the output. We contend that, relative to the law of evidence, explainability has three key requirements: (1) Fidelity--the explanation must reasonably represent what the system did to produce the output; (2) Understandability--the explanation must be understandable to the person receiving it; and (3) Sufficiency--the explanation must be sufficiently detailed to justify its output relative to this inquiry. Transparency requires a system's algorithms, data, and models to be sufficiently open and accessible to review. In the context of the law of evidence, we contend that transparency has three key requirements: (1) Accessibility--whether the system has provided sufficient access to, and information about, its algorithms, models, data sources, and decision-making processes; (2) Understandability--whether the system produces output that is easily understood and interpreted by users; and (3) Data Provenance--whether the system provides information as to the origins and processing of the data, and by whom, used by the system.

Concluding point on explainability, noting that its lack can result in exclusion even if an expert testifies

The key to assessing reliability in the case of AI evidence is to assess the ability to review the computation that leads to a specific conclusion. Thus, when presented with evidence created using AI expert systems, a court should require expert testimony to trace the methodology that the system used to reach a specific conclusion. A judge should be able to connect the dots from the general system architecture to its application in a specific case and be convinced that the methodology represents a valid scientific process. If so, and due to the architecture of the systems in question, the evidence will likely satisfy the gatekeeping standard of *Daubert* and be admitted. On the other hand, if the proponent is unable to connect the dots, explain the system methodology, or discuss how a specific conclusion is reached, whether due to lack of expert testimony, vague expert testimony, or leaving "too great an analytical gap" for the judge, then gatekeeping has not been satisfied and the evidence should be excluded.

* * *

When assessing machine learning or neural networks for reliability, *Daubert* requires an assessment not of the result alone but instead the methodology that produces the result * * * . No matter how attuned a machine-learning system is to the data, at a fundamental level, it will frequently lack a clear connection of the input to the outcomes. For a neural network, this can be explained by the involvement of a hidden layer of perceptrons, or even multiple hidden layers in a "deep neural network." The same is true for machine learning, as the association of any individual factor to the end result will necessarily remain opaque. *A judge being offered a neural network-based assessment of a particular piece of evidence may, under certain circumstances, be shown*

that the network has concluded there is a "match," and thus, the evidence is probative of guilt, but what the judge will be unable to tell, in this example and in every example of machine learning, is how the AI reached the conclusion. On a fundamental level, admission of the evidence would equate to acceptance of results without their methodological foundation in science being confirmed; this is exactly what Daubert forbids.

[On Experts Testifying in Reliance on AI]

Admissibility Challenges Regarding Expert Testimony on AI Evidence

> Distinct from expert testimony regarding an at-issue AI technology is experts' use of AI in forming their opinion. **But the same legal principles apply**. An expert's failure to disclose the use of AI creates a credibility issue. The inability to replicate or test the methodology and to articulate how it determined its output, as is often the case with AI, creates validity and reliability issues.

ARTICLE: Discussion of Use of AI by Testifying Experts, and about Rule 707. 4C N.Y.Prac., Com. Litig. in New York State Courts § 79:15 (5th ed.), Chapter 79. Artificial Intelligence by The Hon. Katherine B. Forrest (Fmr.) § 79:15. AI and the courtroom—Federal approach to AI-related evidence and proposed rules

One recent case addressing the intersection of AI and expert testimony is *Ferlito v. Harbor Freight Tools USA, Inc*., 2025 WL 1181699 (E.D.N.Y. 2025). There, the plaintiff's expert testified that a splitting maul was defectively designed, and after completing his report, used ChatGPT to confirm his conclusions. The defendant moved to exclude the expert's opinion under FRE 702, arguing that reliance on generative AI rendered the testimony unreliable. The court rejected that argument, finding "little risk" that the AI use impaired the expert's methodology. The opinion noted that the expert's conclusions were rooted in his decades of engineering experience and independent analysis; ChatGPT was used only as *a corroborative check—not as a primary source*. The court therefore found no violation of FRE 702, and allowed the testimony.

By contrast, in *Kohls v. Ellison,* a federal court excluded an expert declaration after learning that the expert had relied on an AI tool to draft portions of the report, including fabricated legal citations.[1] The court held that the expert's failure to verify the accuracy of the AI's output fatally undermined the reliability of the testimony under FRE 702, and illustrated the danger of substituting machine output for expert reasoning.

Taken together, these cases illustrate the emerging contours of permissible AI use under the FRE. *Courts may tolerate limited use of generative AI for secondary verification, provided the expert retains independent judgment and applies reliable methods. But experts who defer to AI without scrutiny—or use it in lieu of personal expertise—risk exclusion under FRE 702.*

Looking beyond current case law, some scholars and policymakers have argued that traditional evidentiary standards may be inadequate for handling AI-derived outputs—particularly when the underlying processes are opaque or not readily subject to cross-examination. They have

[1] This case was set forth in a previous agenda book.

suggested that courts should require parties offering such evidence to demonstrate that the AI system has been tested for accuracy, consistent with the authentication principles of FRE 901.

Reflecting these concerns, the Federal Advisory Committee on Evidence Rules has proposed two significant reforms. The first, a potential amendment to FRE 901, would specifically address the authentication of AI-generated content, including so-called "deepfakes." The second, a proposed new FRE 707, would treat machine-generated outputs as a form of expert opinion evidence, requiring proponents to meet the reliability standards of FRE 702.

Although neither proposal has been adopted as of mid-2025, both signal a broader shift toward more formalized evidentiary treatment of AI technologies. * * *

Proposed FRE 707 would formalize a proposition that is currently being debated by courts: algorithmic outputs offered as evidence should be treated no differently than expert opinions. When a party relies on a forensic tool, predictive model, or valuation algorithm to support a claim or defense, the underlying methodology may need to be reliable through qualified testimony. *The rationale is that AI-generated content often raises the same concerns as human expert opinions—such as analytical error, incompleteness, bias, and lack of interpretability—but may be even more difficult to audit or explain*. Examples might include an AI-generated damages estimate in commercial litigation or a pattern-recognition system used to compare software code in a trade secrets case. In each instance, the proposed rule would require that an expert explain, defend, and contextualize the output—ensuring that "black box" logic does not enter the record without scrutiny.

II. Proposed Rule 707, and Summary of Public Comment

A. The Rule and Note

The proposed Rule 707 here includes the supplements to the Committee Note that the Committee approved at the last meeting.

Rule 707. Machine-Generated Evidence

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

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy

or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on such a method, that method—and the expert's reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly [or through a lay witness], where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

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

If the machine output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

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

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

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

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

A machine learning process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with

experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. See Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of machine learning output may overcome the problem of inexplicability by showing how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

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

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

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

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

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

B. Summary of Public Comments

Overview: Of the 59 comments addressing Rule 707, the positions break down as follows: Three commenters expressed unqualified support for the rule; 27 expressed support subject to revisions that ranged from minor to major; 27 opposed the rule; one comment was 18 pages long and hardly commented on the rule. The predominant themes among critics include the overbreadth of the term "machine-generated evidence;" the vagueness of the "simple scientific instruments" exception; concerns that the rule creates a pathway for admitting AI evidence without expert testimony rather than restricting it; arguments that the rule should not be tethered to Rule 702; demands that machine evidence could never be admitted without an expert; concerns about cost; and arguments that the rule is premature. Supporters emphasize the need for a structured framework addressing the reliability gap when machine-generated outputs substitute for expert analysis. They argue that the absence of a rule allows potentially unreliable AI evidence to be admitted through a gap in the Evidence Rules.

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Aspen Griffing, Esq., (USC-RULES-EV-2025-0034-0005) states that "the rule should be adopted in its entirety, so long as the committee adds more guidance on what 'simple scientific instruments' are" because "[t]his term seems too ambiguous to hold substantial meaning without litigation."

Maria Juarez, Esq., (USC-RULES-EV-2025-0034-0006) supports the addition of Rule 707, stating that it will "help judges and juries better assess the credibility and relevance of complex evidence."

Jessie Randazzo, Esq., (USC-RULES-EV-2025-0034-0007) supports the amendment, stating that "it offers much needed structure for admitting machine-generated evidence at a time when courts face rapidly evolving technologies such as AI systems, automated sensors, digital logs, and algorithmic outputs" and that the rule "provides a coherent framework by requiring proponents to show reliability through factors tailored to machine processes, which avoids forcing courts to stretch existing Rules 401, 403, and 702 beyond their intended scope." The comment states that it would be helpful for the Committee "to address how courts should treat proprietary or non-disclosable systems when defendants or civil litigants lack access to underlying code or training data, because meaningful adversarial testing depends on transparency." The comment concludes that "formalizing a rule specific to machine-generated evidence is an important step in promoting consistency, reducing litigation uncertainty, and safeguarding due process as automated systems become routine in both civil and criminal cases."

Diana Kajtazovic, Esq. (USC-RULES-EV-2025-0034-0009) contends that Rule 707 does not go far enough to regulate the reliability concerns raised by AI-generated evidence. She states that "[e]xpert testimony as to the original data subset used, frequency of errors, and common trends in the software's output needs to be tracked and explained before it can be admitted, which I believe goes beyond the scope of 702 (b), (c)."

Ashley Elliott, Esq. (USC-RULES-EV-2025-0034-0010) supports the intention behind Rule 707 but finds the term "simple scientific instruments" too vague, and states that the term
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"simple" requires further definition to avoid unintended impacts on algorithmic or arithmetic-based instruments not central to the concerns presented by machine-generated evidence.

Joseph Zaki, Esq. (USC-RULES-EV-2025-0034-0012) supports the proposed amendment, and states that the proposed Committee Note "correctly recognizes that authenticity mechanisms, including Rule 902(13), do not establish reliability." He suggests an improvement to the Committee Note. The proposed addition to the Committee Note is as follows:

> In applying Rule 702(a)-(d) to machine-generated evidence under Rule 707, courts may consider threshold integrity factors necessary for meaningful adversarial testing. Such factors may include whether the proponent can provide tamper-evident records sufficient to detect missing or altered inputs; identify the system, model version, and execution context that generated the output; and permit independent verification of completeness and provenance. If such integrity conditions are not satisfied, evaluation of inference validity under Rule 702 may be impracticable.

Mr. Zaki concludes as follows:

> Proposed Rule 707 addresses a real gap: machine-generated output can carry expert-like persuasive force without passing through Rule 702 scrutiny. Clarifying the two-step reliability framework in the Committee Note would improve judicial administrability and fairness by ensuring courts can require custody-grade integrity as a prerequisite to meaningful inference-validity analysis.

Lawyers for Civil Justice (LCJ) (USC-RULES-EV-2025-0034-0013) opposes the proposed amendment. LCJ complains that the text of the rule is too permissive, and that limiting language in the Committee Note cannot control the text. LCJ suggests that the Advisory Committee "should establish a default or presumption that machine opinions are admissible only though [sic] an expert and therefore Rule 702 governs." LCJ believes that a rule on machine opinions should not be tied to Rule 702, but should have freestanding requirements — even though the machine opinion that is the basis of an expert's testimony would remain controlled by Rule 702. LCJ suggests that the rule should use the term "machine opinions" rather than "machine-generated evidence." LCJ disapproves of the exclusion of "simple scientific instruments" on the ground that it is vague. Finally, LCJ concludes that "[a]lthough questions and problems concerning admissibility of machine opinions are likely to increase in frequency, the need for an appropriate rule vastly outweighs the utility of an immediate rule."

Jeannine Kenney, Esq. (USC-RULES-EV-2025-0034-0014) opposes the amendment on the ground that it is unnecessary, because proponents of machine learning evidence would never ever put it on without an expert. She contends that existing authentication requirements can, today, be applied to guarantee that machine output is reliable — without recognizing the fact that the standard of proof for authenticity is lower than a preponderance, and also that authentication is possible without a witness under Rule 902(13). She contends that the term "machine-generated evidence" is overbroad because virtually all evidence is machine-generated (the example given

being emails), while not acknowledging that the rule covers only machine-generated evidence that is the equivalent of expert opinion.

> **Note: To say that authentication under Rule 901 is already doing the work that Rule 707 would do ignores the fundamental point that the standard of proof under Rule 707 is much stricter than Rule 901. It also ignores the fact that Rule 901 is not about reliability but only about whether the evidence is what the proponent says it is. As Professor Imwinkelried notes in an article described in the last memo, Rule 901(b)(9) is misplaced, and it is the wrong fit for an authenticity rule. To rely on Rule 901(b)(9) as an alternative to Rule 707 is completely misguided.**

Maria S. Diamond, Esq. (USC-RULES-EV-2025-0034-0014) opposes the amendment, opining that the term "machine-generated" evidence is overbroad as it could encompass lay witness use of software. She also contends that the rule will add expense to litigation, and that judges will have difficulty applying it, as they may become confused about the distinction between reliability and authenticity.

Stephen J. Herman (USC-RULES-EV-2025-0034-0016) contends that the Rule violates the Seventh Amendment because it will impose costs on plaintiffs to qualify AI-generated evidence. He states that the rule could be applied to exclude routinely admissible machine-generated information such as electronic data recordings.

> **Comment: Routine data compilations are not covered by Rule 707. Yes, they are "machine-generated." But the common misconception is that the rule regulates *all* machine-generated evidence. It does not. It only covers machine-generated evidence that results in an opinion that, if coming from a person, would be expert testimony. Routine, non-evaluative data compilations do not do that.**

The Federal Magistrate Judges Association (FMJA) (USC-RULES-EV-2025-0034-0017) notes that "Magistrate Judges are frequently called upon to rule on FRE 702 applications and understand the concern about AI-generated evidence." However, "insofar as AI, and generative AI in particular, is fast evolving, the FMJA believes that it is more prudent to see how AI-generated materials are introduced and see what problems actually arise before creating a rule that may be unnecessary or become quickly outdated."

Chris Johnson, Esq. (USC-RULES-EV-2025-0034-0018) opposes the amendment, stating that "[w]e should be pushing hard against the introduction of AI evidence as much as possible, not making it easier for unreliable AI outputs to be offered into evidence."

> **Note: This was a common misconception of many practitioners – that Rule 707 was designed to make it easier to admit AI evidence. In fact it is designed to plug a gap in the rules, that currently render AI easier to admit than comparable expert testimony.**

Waters Kraus Paul & Siegel (USC-RULES-EV-2025-0034-0019) opposes Rule 707, arguing that it encourages proponents to rely on the output of AI models without a sponsoring expert witness by permitting the admission of such evidence without any showing that the AI tool

is properly designed to answer the questions put to it. The firm argues that the rule is overbroad because it will cover emails. The firm states that the Committee's focus should be on generative AI, which often hallucinates.

Jon Polenberg (USC-RULES-EV-2025-0034-0020) opposes proposed Rule 707, concluding that it "would alter how courts resolve foundational disputes by transforming technical reliability from a question that ordinarily informs weight and case-specific admissibility into a threshold gatekeeping determination. Rather than evaluating reliability through authentication, relevance, proportional balancing, and adversarial testing, courts would confront reliability as a preliminary admissibility barrier that the court must resolve before the jury can consider the evidence at all."

> **Note: That is exactly what Rule 702 does—it makes reliability a preliminary admissibility barrier for expert testimony. So why should it be easier for AI that is tantamount to expert testimony?**

Hon. Paul W. Grimm & Prof. Maura R. Grossman (USC-RULES-EV-2025-0034-0021) strongly support the amendment. They are "confident that with proper case management by judges, looking to Federal Rule 702 when addressing the admissibility of AI-generated evidence, as proposed new Rule 707 does, will not inevitably lead to the need for a *Daubert* hearing in every case. To the contrary, we believe that judges will instead build into their preliminary case management orders procedures calling for the early disclosure of AI-generated evidence that the parties intend to use, allowance for appropriate discovery for adverse parties to determine whether to challenge the AI generated evidence, and a pretrial opportunity for motions practice when the proposed AI generated evidence is challenged as invalid or unreliable."

They observe that "AI-generated evidence inherently involves scientific and technical subjects that are beyond the knowledge of lay juries and most judges," and that "Federal Rule 702, as embodied in proposed new Rule 707, puts the inquiry in the correct place—the underlying validity and reliability of the AI-generated evidence." They note that the proposed rule addresses a real problem because "it is not at all unusual for parties offering scientific and technical evidence to attempt to lay a foundation by calling the wrong person to lay that foundation."

Judge Grimm and Professor Grossman argue that "Proposed new Rule 707 makes it clear that when introducing AI-generated evidence, the proponent cannot avoid the requirements of Federal Rule 702 by attempting to lay the foundation for admissibility by an unqualified witness. In that manner, proposed new Rule 707 reinforces Federal Rule 701, which limits lay witnesses to evidence that does not fall within the scope of Federal Rule 702." They opine that the term "machine-generated" might be broad, but that could be fixed by using the term "artificial intelligence." They state that "[t]here is no need to agonize over the definition of 'AI' as there are ample existing definitions of that term that could be referenced in the Advisory Committee Note."

Grimm and Grossman conclude as follows:

> In sum, we believe that proposed new Rule 707 offers promising assistance with respect to one important aspect of AI-generated evidence: acknowledged AI-

> generated evidence. We remain convinced that there is more work to be done with respect to unacknowledged AI generated evidence (a/k/a deepfakes).

Hon. Kurtis Karnow, Esq. (USC-RULES-EV-2025-0034-0022) suggests that "[f]or ideas on how 'cross –examination' of an expert AI system or output might proceed, and related issues, please see my article, 'The Opinion of Machines,' XIX COLUMBIA SCIENCE & TECHNOLOGY LAW REVIEW 136 (2017-2018), republished & updated in CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS (2020)."

Jeffrey Fazio, Esq. (USC-RULES-EV-2025-0034-0024) supports the proposed amendment, stating that the rule "addresses a genuine gap in the evidentiary framework and will become increasingly important as AI capabilities advance." He argues that "rulemaking should anticipate where technology is heading, and verification-first AI architecture is how the reliability gap gets closed. The infrastructure to satisfy Rule 707 exists now." He claims that "Sigra—the platform I am developing—demonstrates how machine-generated evidence can meet Rule 702's reliability standards without requiring human sponsorship as a proxy for trustworthiness." Addressing concerns of others about the cost of complying with Rule 707, Mr. Fazio argues that "Rule 707 incentivizes development of tools that democratize access to reliable AI. Without reliability requirements, the legal AI market will continue optimizing for speed and convenience rather than trustworthiness. With Rule 707, vendors who invest in verification infrastructure will have a competitive advantage. The rule does not just protect courts from unreliable outputs; it redirects innovation toward tools that serve justice rather than merely efficiency." Addressing critiques that a rule is premature, Mr. Fazio responds as follows:

> Rulemaking that waits for perfect implementation waits forever. The Advisory Committee does not need to predict exactly how verification-first architecture will evolve; it needs only to establish that machine-generated evidence must meet reliability standards equivalent to expert testimony. The market will develop compliant solutions—indeed, that development is already underway.

Hon. John Facciola (USC-RULES-EV-2025-0034-0025) supports Rule 707. He notes that as a Magistrate Judge, "[o]ne needs the right tools to do the job." And he notes, as Professor Imwinkelried stated in a recent article submitted to the Committee, that Rule 901(b)(9) is a "poor fit" for regulating unreliable AI. He states that "Judge Grimm and Dr. Grossman certainly have established that the factors in Fed. R. Evid. 702 are the right tools for assessing the reliability of AI-generated data. They are speaking directly to the precise issues presented when AI-generated data is offered into evidence, for that data is the product of 'scientific, technical, or other specialized knowledge.' And, unlike Fed. R. Evid. 901(9), Fed. R. Evid. 707 will provide the judges with the specific factors they must weigh before the product of AI." Judge Facciola contends that applying the Rule 702 factors "is second nature to the federal judiciary and will be used instinctively by the judges. Fed. R. Evid. 707 will provide the judges with the familiar tools they need to rule on the admissibility of AI-generated evidence." Finally, he urges the Committee to move forward with a rule to regulate deepfakes.

Jeffrey Marion (USC-RULES-EV-2025-0034-0026) a plaintiffs' attorney, opposes the Rule on the ground that it would raise questions about the admissibility of certain machine-

generated evidence that is now routinely admitted. "For example: fetal heart monitors, dashcam videos, and automated electronic logs all could be challenged based on the date [sic] they provide."[2] He contends that "there are already safeguards in place to protect parties in litigation" because "[a]ny party may cross-examine an expert on whether the machine was in working order or properly calibrated."[3]

The Committee on Federal Courts, Litigation Section, California Lawyers Association (USC-RULES-EV-2025-0034-0027) believes that "further study is necessary." The Committee suggests that Rule 707 should contain its own admissibility standards and should not refer back to Rule 702.

The American Civil Liberties Union (USC-RULES-EV-2025-0034-0028) strongly favors Rule 707, but suggests that the rule be changed in one respect: to require an expert to establish the reliability of an AI application before it can be admitted. The ACLU states as follows:

> In criminal cases, prosecutors often seek to admit evidence via police officers testifying that they used an investigative tool as they were trained to do, even though the officers have no knowledge of how that tool works. The Advisory Committee correctly seeks to remedy the current practice of using uninformed witnesses such as these officers to lay the foundation for admissibility of the evidence generated by use of such a tool merely by testifying that they used the tool as they were taught to do. The ACLU agrees that if scientific, technical, or other specialized knowledge will help the trier of fact to understand the machine-generated evidence, the trier of fact must be presented with that specialized knowledge. The alternative is that the generated evidence could be misunderstood, to the detriment of determining the truth and the due process rights of litigants.

As to the requirement of an expert to establish the foundation for admitting AI, the ACLU argues as follows:

> Only an expert witness will have adequate knowledge and understanding. The proposed rule is unclear as to how the proponent of machine-generated information could present to the court that the information meets the reliability standards of Rule 702—that the information is based on sufficient facts or data, the product of reliable principles and methods, and reflects a reliable application of the principles and methods to the facts of the case. The lay witness does not know, and documents cannot be cross-examined or questioned by an opposing party or the court. Moreover, documentation often comes from the company that sells the device or software to law enforcement, or from some other entity with incentive to

[2] These examples are not covered by Rule 707 because their output would not constitute expert testimony. Nobody can argue that a dash cam video is providing expert testimony when it simply records what is happening.

[3] What this argument ignores is that testimony that the machine is in working order provides no information on how the machine actually operates, and whether it is reliable. And it also ignores that the Rule is inapplicable if there is an expert provided to establish the reliability of the machine-generated evidence.

preserve their relationships with the government, and thus may not represent the sober reflections of an independent and therefore qualified expert.

The ACLU "agrees with the Advisory Committee that machine-generated evidence should not be permitted to slip through the cracks simply because it is presented as a prediction or inference made by a computer. The solution should be to require an expert, dispensing with the potential confusion introduced by Rule 707's scheme of applying Rule 702's standards to lay witnesses or written records."

The ACLU suggests deletion of the sentence on "simple scientific instruments." It reasons that "Rule 201 adequately constrains the reach of Rule 707. If a proffered fact comes from a source 'whose accuracy cannot reasonably be questioned,' then the trier of fact may take judicial notice and avoid the need for an expert witness."

Stephen Herman, Esq. (USC-RULES-EV-2025-0034-0029) supplements his comment (0016) as well as his oral testimony, restating his concern that certain electronic methods of calculation would require a showing of reliability under Rule 707 that is not currently required.

The American College of Trial Lawyers (USC-RULES-EV-2025-0034-0030) acknowledges an article co-authored by John Siffert that evaluates Rule 707 and focuses on the fact that machine learning evidence cannot be cross-examined, and so it is important to note that fact in the Committee Note and to suggest the need for limiting instructions.[4] The College states that in light of the rapid proliferation of AI evidence, "Rule 707 is necessary and advisable to provide guidance to federal judges and trial attorneys." The College believes that "Rule 707 will provide an important safeguard to assure that machine-generated evidence, including evidence created by AI, will be subject to the same standards of admissibility under *Daubert* as traditional witness testimony." The College states that "the Committee Notes drafted by the Advisory Committee provide helpful guidance in the use and application of Rule 707. The key objective of Rule 707 is to require FRE 702-level scrutiny to machine-generated evidence, including evidence generated by AI. Therefore, the College believes that FRE 707 does not need to be more expansive at this time."

Robert Thies, Esq. (USC-RULES-EV-2025-0034-0031) supports proposed Rule 707. He states that "[t]he concern the Committee has identified is a real one. When a party offers a machine output directly, that evidence may gain the persuasive force of an expert-like conclusion without being subjected to the reliability scrutiny that would apply if a human expert testified. Rule 707 closes that gap by requiring machine-generated output offered without an expert to meet Rule 702's reliability requirements, with admissibility decided by the court under Rule 104(a)." He suggests that the Committee Note should organize the reliability review around three basic questions:

- Validation asks whether the system has been tested for the task it is being used for and whether it performs acceptably under similar conditions.
- Operation asks whether the system was used properly in this case and within the limits for which it was tested.

[4] John Siffert's article is set forth in Part One of this memo.

- Transparency asks whether enough information has been provided to allow meaningful testing of the output. Transparency does not require full public disclosure.

Mr. Thies suggests that the proponent of AI evidence "would typically need to be able to identify the following information early enough for meaningful review:

- the name of the system used, who developed or provided it, and the version that generated the output;
- what the system was used to do in this case, and any known limits on intended use;
- the data or information provided to the system in this case;
- the specific output being offered as evidence;
- any settings, thresholds, filters, or options that materially affect performance; and
- who ran the system, when it was run, and the key human steps that affected the output.
- information showing whether the system has been tested for the task at issue, including known limitations or error rates where available;
- intermediate results or changes made to outputs reflecting how the final result was produced;
- maintenance, updates, or calibration information where those factors affect reliability; and
- information about what records the system keeps, what is deleted, and whether the output can be reproduced or audited."

Joshua Moore (USC-RULES-EV-2025-0034-0032) opposes the amendment, stating that he has seen "how data analysis and pattern recognition tools help identify children who have fallen through the cracks of the child welfare system. These tools cross-reference public records, federal grant data, and missing persons databases to surface cases that human reviewers alone would miss. The results are verifiable, sourced, and transparent. Under the proposed rule, this type of evidence could be excluded or challenged not because it is inaccurate, but because it was generated with the assistance of a machine. That outcome would not serve justice — it would obstruct it." He argues that the term "machine-generated evidence" is too broad and that the rule should focus on generative AI. He states that any rule on machine-generated evidence should "[e]stablish a 'verifiable source' safe harbor. If machine-assisted analysis is based on publicly available data, uses transparent methodology, and produces results that can be independently verified, it should be presumptively admissible."

The National Health Law Program (USC-RULES-EV-2025-0034-0033) opposes the amendment on the ground that the term "machine-generated" is too broad. It "encourage[s] the Committee to provide a precise definition of machine-generated evidence and to clarify that the Rule applies only when the evidence is the equivalent of expert opinion testimony and should not preclude introduction of relevant factual evidence that is machine or computer-generated."[5]

[5] It must be noted that the Rule does exactly what the comment says it should. It applies only when the evidence is the equivalent of expert testimony. That is true whether you call the target "machine-based" or "computer-based" or "AI"

Casey Johnson, Esq. (USC-RULES-EV-2025-0034-0034) opposes the proposed amendment, arguing that the term "machine-generated" is "so broad as to potentially include any information printed through the use of computer software - even a letter such as this [comment] that is actually generated through a machine."[6] He states that "the new rule is likely to increase costs for litigants, create inefficiencies in most civil litigation, and burden judges with undertaking reliability analyses of highly technical and complex software and computer programs."

International Attestations (USC-RULES-EV-2025-0034-0035) submitted a 95-page comment, one paragraph of which addresses Rule 707 and suggests that the reliability standards for AI evidence should be untethered from Rule 702.

Dorothy Haraminac, Esq. (USC-RULES-EV-2025-0034-0036) a forensic practitioner, states that "Rule 707 is an important and timely response to the risk that machine-generated output will be introduced without an expert while carrying hidden reliability flaws that are difficult to detect; however, Rule 707 should not become a procedural shortcut that allows conclusory machine-generated outputs to enter evidence without the meaningful explanation, documentation, validation, reliability, and stability (in place of reproducibility) required to meet Rule 702(a)-(d) in practice." She states that "Rule 707 should be adopted only if revised so that parties cannot introduce persuasive machine-generated analysis and conclusions while withholding the inputs, configuration, methodology explanation, error and accuracy rates, and other measures of testing necessary for meaningful challenge." She also suggests that the Committee add language confirming that the proponent has the burden of establishing the reliability requirements. And she suggests that the following passage be added to the text:

> When machine-generated evidence reflects inferential, classificatory, or attributional analysis, reliability ordinarily should be supported by appropriate validation evidence, including known limitations and performance information (e.g., error rates or other accuracy measures) for the relevant use. If the proponent cannot provide information necessary to evaluate Rule 702(a)–(d), exclusion may be appropriate.

James Beck, Esq. (USC-RULES-EV-2025-0034-0037) states that, to the extent Rule 702 allows AI evidence to be admitted without providing foundation through an expert, it is "too permissive." He contends that "[w]ithout expert support, a lay factfinder required to evaluate computer-generated evidence would be entirely at sea." He contends that Proposed Rule 707 is inconsistent with the guidelines set forth in the section on AI published in the new FJC Manual on Scientific Evidence. These guidelines suggest that a court inquire into a number of reliability-based questions, such as:

- What is the AI trained to identify, how has it been weighted, and how is it currently weighted?

— or even "Evidence." Whatever you call it, the rule covers only that output that is the equivalent of expert testimony. Thus, it surely seems like the Program's concerns are misplaced.

[6] This comment ignores the fact that the only information covered is that which is the equivalent of expert testimony. The examples provided are clearly not covered.

- Does the system have a method to transparently identify these answers? If not, why not?
- Are the false positive and false negative rates known, if applicable, or hallucination rates? If so, how do these rates relate to the case at hand?
- How has AI accuracy been validated, and is the accuracy of the AI updated on a constant basis?
- What are the AI's biases?

He concludes that "in light of the new Reference Manual's chapters on these subjects, there is no plausible avenue (other than consent of the parties) for admitting computer-generated evidence – let alone AI-generated evidence − without supporting expert testimony capable of addressing the questions posed in these new chapters of the Reference Manual on Scientific Evidence."

Note: Proposed Rule 707 eschews the bright-line rule (that an expert is always required) on the ground that it will not stand the test of time — that there are now and will in the future be more ways to validate machine output even if the process cannot be explained by an expert. The proposed rule, and Committee Note, provides that an expert will *ordinarily,* but not always, be necessary. That position is one on which reasonable minds can differ, and remains one for the Committee. But that position is not in fact inconsistent with the new Manual, which provides as follows:

AI and the interpretation of AI outputs are complex. Courts will have to determine the appropriate means to verify AI outputs. This *might* involve expert testimony, or it might be done through technical means.

That said, it is certainly fair to read the Manual to say that validation without an expert would, at least at this point, be very unlikely.

The New York County Lawyers' Association (USC-RULES-EV-2025-0034-0038) supports proposed Rule 707, with a few suggested changes. Its first suggestion is that the rule include in text a definition of "machine-generated evidence" to mean "evidence generated by a machine-based process or system to make predictions or draw inferences from existing data." This suggestion would address concerns that the term "machine-generated" is too broad "because it would make clear that machine-generated materials that are not created by artificial intelligence are excluded." That definition "would exclude spreadsheets, emails, digital files of audio recordings like voicemails, computer-generated music in an audio or video file, and documents created using a word processor * * * which are machine-generated but not typically used to make predictions or draw inferences from existing data."

County Lawyers' second suggestion is that the rule require that the necessary foundation can be met only through expert testimony. Such a requirement "resolves concerns with unreliable methodologies and unreliable output by requiring an expert witness to testify in support of complex evidence whose reliability could not be established by a layperson operator or supervisor."

County Lawyers "applauds the Advisory Committee on Evidence Rules for its effort to establish rules governing this difficult technological area, especially given the speed with which machine learning and artificial intelligence technology have changed over time."

Melissa Sims (USC-RULES-EV-2025-0034-0039), a registered nurse, recommends that Rule 707 be strengthened to require expert testimony to establish admissibility. Her focus is on "deepfakes" as she was arrested on the basis of deepfake evidence; she points to other instances of deepfakes leading to arrests. She makes a case for the Committee moving on deepfakes. She states that "[t]his is not a future concern—it is a national, human crisis already unfolding. The damage caused by unverified machine-generated evidence is not speculative; it is measurable, ongoing, and irreversible. It happened to me. It is happening to others. And without immediate action, it can happen to anyone. The Committee has the power to stop it."

Teris Swanson, Esq. (USC-RULES-EV-2025-0034-0040) opposes the proposed amendment, contending that the term "machine-generated" is overbroad. She states that "[i]n practice, nearly all modern evidence, from cell phone extractions to forensic software analyses to business analytics, involves some level of automated processing, so the rule could unintentionally sweep in routine, widely accepted evidence and impose unnecessary 702 showings where reliability is already well established."[7]

Nicolle Snapp-Holloway, Esq. (USC-RULES-EV-2025-0034-0041) opposes the amendment, arguing that: "machine-generated" is too broad and can cover machine evidence that is traditionally admitted; "simple scientific instruments" is too fuzzy and will lead to litigation; requiring an expert to provide foundation will impose substantial costs; and assessing the reliability of machine evidence may be impossible where the system is proprietary.

The Washington Legal Foundation (USC-RULES-EV-2025-0034-0042) opposes proposed Rule 707, after importantly citing Karl Llewellyn on the need to have predictable rules. It has three objections. First, the term "machine-generated evidence" "is not sufficiently aimed at the Advisory Committee's concerns about AI." Second, "the effort to graft Rule 702 into the Proposed Rule risks backfiring." Third, the introduction of the term "simple scientific instruments" "courts misunderstanding and may jeopardize current protections against unreliable testimony."

As to the tethering of Rule 707 to Rule 702, the Foundation states that "because Rule 702 is focused on cross-examinable human witnesses providing an expert opinion, the sufficiency threshold for admission is that it is more likely than not the case that expert's testimony is relevant, reliable, and based in sufficient facts or data. Non-experts offering a computer-generated output should be held to a higher standard than that."

Leah Snyder, Esq. (USC-RULES-EV-2025-0034-0043) opposes proposed Rule 707, complaining that "[t]he rule facially encompasses every computer output from any piece of hardware or software ranging from pocket watches to taillights from keyboard inputs to word documents." She states that the real target should be Large Language Models and Generative AI,

[7] Again, the rule only covers machine-generated evidence if the output would be expert testimony if made by a human.

and as to those processes, they will never satisfy Rule 702 and so and rule should just bar their admissibility.

Ashlie Sletvold, Esq., (USC-RULES-EV-2025-0034-0044) opposes the rule, stating that its "most glaring problems" are the lack of definitions for "machine-generated evidence" and "simple scientific instruments" and concluding that "[t]he inclusion of such elastic terminology will predictably generate substantial threshold litigation without improving the fairness of federal trials." She also argues that no amendment is necessary, because "the federal judiciary knows how to evaluate the admissibility of evidence, including science stuff" and "the commissioned judges of the federal bench will be able to handle the adjustment to artificial intelligence as it develops."

Marsh Law Firm PLLC (USC-RULES-EV-2025-0034-0045) opposes the amendment. It argues that "machine-generated" could cover all digital information, and that a rule that is intended to apply to machine-learning should say so in text. It also argues that the exclusion for simple scientific instruments is misguided because "[t]he evidentiary concern is not whether a device is simple or complex; it is whether the device measures or infers."

The Firm also objects to the possibility that the foundation for machine learning evidence can be established without expert testimony. It states that any rule should "require expert testimony as the default whenever machine output functions as an opinion or analytical conclusion."

The New York City Bar Association, Federal Courts Committee (USC-RULES-EV-2025-0034-0046) supports the proposed Rule 707 but suggests changes. The Committee first "agrees that the time is ripe to consider a rule addressing the admissibility of machine-generated evidence, and particularly evidence derived from machine learning. Given both the increasing complexity of such evidence and the danger that it will be uncritically accepted by a finder of fact, there is a need to establish guidelines for its admissibility."

The Committee believes that the rule should make clear that its standards can only be met through a presentation by an expert. The Committee recognizes "that proposed Rule 707 would be the first rule to effectively require expert reliability showings for a specific type of evidence. But the uniquely challenging nature of machine learning warrants this innovation."

The Committee recommends that the rule specifically distinguish between machines that measure and machines that draw inferences. Specifically, the Committee recommends changing the language of the rule from "machine-generated evidence" to "machine-generated inferential evidence." It states that the change "would be more likely to permit admission of machine-generated measurements when their accuracy is not disputed. Inferential outputs would also be more likely to be admitted when they are supported by expert testimony that explains the underlying methodology, assumptions, validation, and limitations of the system. And such a rule would also tend to promote admission where the reliability of the inferential output is well established, error rates are understood, and the opposing party does not meaningfully contest the evidence's accuracy."

The Committee also recommends revisions to both Civil Rule 26 and Criminal Rule 16 to require disclosure of the machine-generated inferential evidence a party may use at trial as well as the facts or data considered in forming the machine-generated evidence.

Finally, the Committee observes that establishing the reliability of machine-learning output may raise *Daubert*-like issues that may require a different analysis than applied to human experts:

> For example, since large language models are probabilistic, they will not provide the same response to the same prompt every time. Will this be viewed as inherently unreliable, or will courts accept some level of uncertainty in defining reliability? At what point will a machine be considered sufficiently reliable that a court may take judicial notice such that expert testimony is unnecessary? These questions and others like them are significant and the answers will affect the outcome of specific admissibility determinations. They do not, however, undermine the value of a rule that focuses the parties and the court on the need to establish the reliability of machine-generated evidence and provides advance notice to the other parties of its proposed admission at trial.

Greg Kohn, Esq., USC-RULES-EV-2025-0034-0047 raises some questions about proposed Rule 707, including whether "machine-generated" is overbroad; whether "simple scientific instruments" is overbroad; whether a line can be drawn between lay witness use of software and testimony requiring an expert; and whether the Rule 702 factors are sufficient to regulate AI.

Students at Syracuse University Law School, USC-RULES-EV-2025-0034-0048, oppose the rule. They claim that "Rule 707 may become a low-friction pathway for admitting expert-like LLM outputs on paper." They conclude that if Large Language Model evidence is to be introduced, it must be in accompaniment with expert testimony. They state that "while artificial intelligence platforms do have a place within the legal industry as tools for research, drafting, or other clerical tasks, they should remain at arm's length from more effectual evidentiary demands." The students advocate a rule that "categorically excludes expert substitute generative machine opinions offered for inferences or conclusions unless presented through a qualified, testifying human expert who satisfies Rule 702."

The Department of Justice, USC-RULES-EV-2025-0034-0049, opposes the proposed Rule 707.[8] The DOJ makes six basic points:

1. The rule is premature: "Proposed Rule 707 reflects a proactive effort to address an unknown technological future, designed to be capacious enough to accommodate unknowns. But by addressing what is largely a prospective problem using a broad approach, the rule will only achieve uncertain future benefits at the present cost of additional uncertainty and confusion. To date there have been a handful of anecdotal cases and theoretical academic papers, but no real demonstrated need for the proposed rule."

[8] The DOJ's submission is attached in full to this memo. It is only briefly summarized here.

2. The terms "machine-generated" and "simple scientific instruments" are both vague, and interpreting them will lead to dispute and excessive litigation, which might result in coverage of machine data that is currently admitted without a problem.

3. Rule 707 might alter the use of AI information by testifying experts, if the expert giving the opinion cannot actually qualify the underlying AI as being reliable; the result would be to have to call two experts, one to provide foundation for the AI, and the other to draw the opinion on the basis of the AI.

4. Rule 707 lacks sufficient procedural guidance, particularly notice provisions; and simply adding "Rule 707" to the existing obligations under the Civil and Criminal Rules is inapt. DOJ concludes on the notice point as follows:

> At least, if the Committee moves forward with Rule 707, it should explicitly include procedures for ensuring disclosure sufficiently early in the process to allow the parties and the court to conduct the case in an orderly fashion. Including such a procedure would not be out of place in the evidence rules. Multiple other rules of evidence address disclosure requirements and timing. See, e.g., Fed. R. Evid. 404(b)(3); 412(c); 413(b); 807(b); 1006(b).

5. Because the review of AI is likely to be "tool-based" as opposed to a review of a particular expert opinion, there is a possibility that Rule 707 hearings will be subject to strategic activity — because a single ruling on the tool could have a consequence in subsequent cases.

6. Rule 707 will have nothing to do because all questions of admissibility of AI are handled under existing rules.

Professor Andrea Roth, USC-RULES-EV-2025-0034-0050, who had the original idea for the rule, answers a number of questions about Rule 707 that have been raised in public comment and at the public hearings:

- The rule should cover more than machine-learning, because "the target is any algorithm-generated conclusion that is sufficiently analytical/evaluative in nature."
- There is no reason to believe this rule will create additional expense and litigation about disclosure, "because any fights there are to be had along these lines are already occurring in *Daubert* hearings where human experts are relying on software output as their method." The rule "is intended to do no more than capture the status quo's level of scrutiny and ensure it cannot be evaded by eliminating the human expert from the loop."
- The rule is necessary to plug a hole that exists: where a computer "is doing most or all of the analytical work, and a human witness would not themselves be adding any additional conclusion that requires specialized knowledge." The program in that instance is doing the work that if done by a human would require specialized knowledge/expertise/training, and its conclusion if uttered by a human would be an expert opinion and would require *Daubert*.

- The rule does not at all provide an easy pathway to admit AI evidence without an expert. "On the contrary, the status quo already allows this, * * * and the point of a rule like PFRE 707 would be to add an additional admissibility requirement (that is, *Daubert* scrutiny) for such conclusions."
- Any argument that AI evidence should be subject to different or stricter scrutiny than expert testimony overlooks the fact that AI evidence is already subject to Rule 702 standards when an expert is testifying.
- The suggestion at the public hearing that Rule 707 could be evaded by offering AI evidence under Rule 703 is without merit. "Rule 703 is not a separate pathway for admissibility; it merely allows human experts to testify based on inadmissible evidence."

Finally, Professor Roth reiterates that the Committee Note add two factors that should be considered by judges under Rule 707:

- Whether the process or system has been subject to evaluation by entities independent of the developer, including whether research licenses are available to the parties.
- Whether the proprietor has disclosed to the parties sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were that of a human expert.

Jennifer Lawrence, Esq., USC-RULES-EV-2025-0034-0051, opposes the proposed Rule 707, "because it allows for introduction without expert testimony. Machine-generated evidence is not clearly defined, leaving it to interpretation without ample evidence of examples for the courts to follow. Likewise, basic scientific instruments is too vague and overbroad."

The Center for Democracy and Technology, USC-RULES-EV-2025-0034-0053, states that "the Committee should withdraw the current PFRE 707 because it is overbroad and does not guide judges to evaluate the reliability of AI-generated evidence based on appropriate criteria. The Committee should develop and propose a new rule that focuses more narrowly on circumstances where the probative value of AI-generated evidence depends on the reliability of the AI system to accurately make predictions or draw inferences from data." The Center complains that the proposal "is overbroad because the term 'machine-generated evidence' includes more forms of evidence than the rule is meant to address." And it states that the carveout for simple scientific instruments is too narrow and undefined.

The Center further argues that the rule should be untethered from Rule 702 because the factors that make an expert witness's opinion reliable differ from the factors that make AI reliable. Finally, the Center believes that expert testimony should be required for admission of AI evidence.

Daniel Linebaugh, Esq. (USC-RULES-EV-2025-0034-0054), opposes the amendment because it could cover "routinely admitted evidence, such as trucking logs," which would amount to "unnecessary gatekeeping."

Sean Domnick, Esq. (USC-RULES-EV-2025-0034-0055), opposes the amendment on the ground that "machine-generated" is overbroad, and "simple scientific instruments" is too

vague. He notes that "litigation depends heavily on data generated or processed by machines, including geolocation information, credit-card transaction records, text messages, mobile-phone photographs and videos, electronic health records, and even spreadsheets."[9]

Thomas Allman, Esq. (USC-RULES-EV-2025-0034-0056), supplements his testimony at the public hearing. He believes that the rule is premature and that the problem of AI evidence admitted without an expert can be handled under existing rules. He argues that the problem can be solved by amending Rule 901(b)(9) to require a particularized showing of how the AI led to the conclusion— without mentioning that admissibility under Rule 901(b)(9) is established by the very permissive Rule 104(b) standard; and also without mentioning that Rule 901(b)(9) has been attacked as out of place as an authenticity rule, because it confuses authenticity with reliability.

The American Association for Justice (USC-RULES-EV-2025-0034-0057), supplements its public hearing testimony opposing proposed Rule 707, stating that the term "machine-generated" encompasses "every type of machine imaginable—from appliances, common-place tools, and machinery, to software, mobile devices, and industry-specific equipment—most of which is readily accepted as reliable and frequently presented by lay witnesses or to lay a foundation in courts nationwide."[10] AAJ also states that "the prongs of 702(a)-(d) are not easily applied to AI or machine learning tools" so "[i]t would be better to draft a rule that doesn't require the application of another rule." AAJ further suggests that the Committee return to an earlier option of the proposed rule that was directly addressed to machine-learning.

The Center for Democracy & Technology and Five Other Civil Rights, Civil Liberties and Professional Organizations (USC-RULES-EV-2025-0034-0058), opposes the rule, because it ties admissibility of AI evidence to Rule 702. The groups state that "the appropriate criteria for assessing the reliability of AI-generated evidence differ from the criteria for assessing the reliability of an expert witness's testimony, making this an improper fit. For example, AI-generated information is more reliable if the system that produced it was trained on unbiased data of high quality. Nothing in Rule 702 assesses the training data, which instead focuses on the knowledge and experience of the expert."[11]

Joseph Remy, Esq. (USC-RULES-EV-2025-0034-0060), opposes the proposed Rule 707, declaring that "Federal Rules of Evidence 702, 901, 902, and 403 already provide a robust structure for evaluating expert-like evidence, authenticating digital outputs, and excluding unreliable or prejudicial material" and that "adopting a new rule now would be premature given the limited case law involving AI-generated evidence." He is also concerned about costly battles over the admissibility of "routine digital outputs."

Jonathan, Benjamin, and Timothy Redgrave (USC-RULES-EV-2025-0034-0061), are opposed to proposed Rule 707 because it ties the reliability inquiry for AI into Rule 702. They do,

[9] None of the examples provided would amount to expert testimony and so would not be covered by Rule 707.

[10] None of the examples are covered by the rule because they do not constitute expert testimony. And to the extent the complaint is about machine output that is "generally accepted as reliable" Rule 201 should apply.

[11] Clearly Rule 702 is flexible enough to cover AI that is based on biased data, just like it would cover an expert who relied on biased data.

however, agree that a rule is necessary to regulate AI evidence that is equivalent to expert testimony. They state that without a new rule, "courts will be confronted with a morass of potential uses of AI-generated outputs that either directly or indirectly impact expert witness testimony. This, in turn, will create a situation where conflicting approaches adopted in good faith by different judges in different jurisdictions will emerge and result in drastically different outcomes based on the admission or exclusion of AI-generated outputs." They conclude that the Advisory Committee should draft a new rule that: "(1) prohibits AI outputs from serving as expert testimony altogether; (2) recognizes that experts may appropriately rely on AI tools in forming their opinions, provided they can establish the reliability of that reliance under existing Rule 702 factors; and (3) acknowledges that AI-generated content may be admissible as ordinary fact evidence when relevant and properly authenticated under Rules 401, 403, and 901."

Their proposed alternative Rule 707 is set forth here in full:

Rule 707. Expert Testimony Considering or Relying on Artificial Intelligence System Outputs

(a) Definitions. For purposes of this rule, "Artificial Intelligence System" refers to any computational model, machine learning algorithm, or similar automated tool or process that produces outputs based on pattern recognition, prediction, or data analysis, and as it comes from a machine and not a person, is not capable of taking an oath, being cross-examined, or providing specialized knowledge in the manner contemplated by Rule 702.

(b) Expert Testimony by Artificial Intelligence Systems Prohibited. No outputs generated by an Artificial Intelligence System shall be admitted as expert testimony under Rule 702 or otherwise. Artificial Intelligence System outputs may not serve as substitutes for human expert witnesses and may not be offered as opinions requiring specialized knowledge, skill, experience, training, or education.

(c) Expert Use of Artificial Intelligence Systems Permitted. An expert witness may consider or rely on outputs of Artificial Intelligence Systems in forming their opinions, provided that:

(1) the expert independently satisfies the requirements of Rule 702(a)–(d) with respect to their own testimony;
(2) the expert demonstrates the reliability of the Artificial Intelligence System for the specific task, including providing appropriate foundation, qualified by knowledge, training, and experience, for the reliability, transparency, interpretability, and validation of the Artificial Intelligence System and its outputs generally and as applied to the facts of the case; and
(3) the expert is able to explain their methodology, reasoning, and the factual basis for their consideration and/or reliance on the Artificial Intelligence System.

(d) Artificial Intelligence System Outputs as Fact Evidence. Artificial Intelligence System outputs may be admitted as ordinary fact evidence when relevant and properly authenticated under Rules 401, 403, and 901. The party offering such evidence must establish its authenticity and relevance, and the court must ensure that the probative value is not substantially outweighed by any risk of unfair prejudice, confusion, or misleading the jury. Depending on the proposed use of the Artificial Intelligence System Outputs, the foundation may necessitate human testimony, qualified by knowledge, training, and experience, for the reliability, transparency, interpretability, and validation of the Artificial Intelligence System and its outputs generally and as applied to the facts of the case. In such circumstances, the testimony does not convert the output into expert testimony that is prohibited under subsection (b) and serves only to authenticate and provide context for the fact evidence being offered.

(e) No Impact on Other Computer or Machine Generated Outputs as Fact Evidence. Any other types of outputs from computers or other mechanical and/or electrical devices may be admitted as ordinary fact evidence when relevant and properly authenticated under Rules 401, 403, and 901. The party offering such evidence must establish its authenticity and relevance, and the court must ensure that the probative value is not substantially outweighed by any risk of unfair prejudice, confusion, or misleading the jury.

Under this proposal, AI can never be used as a substitute for expert testimony. The Redgraves opine that there is no need for disclosure rules "because the AI-generated content, standing alone, can never be offered directly or indirectly as an expert opinion that would need a separate disclosure regime. Of course, to the extent that a disclosed human expert is considering or relying on AI-generated outputs to form or support the opinion being proffered, then we expect that the rigor of existing Rule 702 will be applied to such proposed use."[12]

[12] I asked Professor Roth for her take on the Redgrave proposal and she saw three defects. Both Judge Furman and I agree with her assessment. Here is Professor Roth's summary:

1. Their 707(a) definition of "AI system" is too NARROW and would end up allowing in lots of AI output without any regulation. That's because the definition is explicitly limited to systems that "is not capable of ... being cross-examined." But many AI systems at this point are or will easily be capable of being "cross-examined" in the sense that they can answer questions/prompts posed to them. That phrase should be deleted if this proposal were adopted.

2. Their 707(b) is too broad in that it would presumptively exclude all AI system outputs, period, unless accompanied by a human expert, whether or not the output is itself akin to expert testimony or complex in any way (the "or otherwise" in the first sentence is super broad). That rule would thus exclude the readings of digital thermometers (or even mercury thermometers if they are seen as an "automated process" that engages in "data analysis"?) unless accompanied by an expert. Maybe you could deal with this by saying "unless an appropriate subject of judicial notice under FRE 201" but otherwise this presumptive rule would be pretty darn harsh.

3. On the other hand, the proposed section 707(d) then seems to completely undo this restriction and broadly let in any AI output that could be seen as "ordinary fact evidence," which will be the exception that swallows the rule. Perhaps "ordinary fact evidence" is meant to mean "output that if uttered by a human would not constitute an expert opinion" but that's not clear.

Deborah Waters, Esq. (USC-RULES-EV-2025-0034-0062), opposes proposed Rule 707, stating that definitions of "machine generated evidence" and of "basic scientific instruments" "would provide more clarity to language that is currently vague and ambiguous."

The National Association of Criminal Defense Lawyers (USC-RULES-EV-2025-0034-0063), states that "[a]dopting this rule, as written, at this time, risks cementing outdated technological concepts in the Federal Rules of Evidence." It argues that proposed Rule 707 "incentivizes the removal of experts from the trial process altogether." It suggests that proposed Rule 707 "would better be served by modifying the factors contained in F.R.E. 702 to properly apply to any such evidence admitted through either an expert or a lay person." NACDL also strongly recommends that any rule come with discovery provisions.

The American Board of Trial Advocates (USC-RULES-EV-2025-0034-0064) states that the rule is "premature" and that the problem of AI offered without an expert witness "is not one that happens frequently." It also expresses concerns about the costs of proving up AI-generated evidence under Rule 707.

Amy Keller, Esq. (USC-RULES-EV-2025-0034-0065) opposes the proposed rule. She is concerned about the lack of a definition for "machine-generated evidence." She is also concerned that the exclusion of simple scientific instruments might allow admission of evidence that should be subject to challenge.

Suzanne Clark, Esq. (USC-RULES-EV-2025-0034-0067) states that "proposed Rule 707 should be tabled until the Committee develops a fuller record about the technology it addresses and how courts are encountering it in practice. The terminology and scope at the heart of the proposal remain unsettled, and a premature, technology-specific rule risks confusion rather than clarity."

Joseph Camarlengo, Esq. (USC-RULES-EV-2025-0034-0068) opposes the rule, stating that "Proposed Rule 707 as drafted provides a platform for admitting machine-generated data without the expert testimony necessary to establish its accuracy, authenticity, and to explain how the data is relevant to the case and helpful to the issues before the finder of fact." He also states that the exclusion for simple scientific instruments is "fraught with peril" because it could be applied to admit the output of instruments whose reliability could be challenged.

Donald Slavik, Esq. (USC-RULES-EV-2025-0034-0069), opposes the amendment on the ground that the term "machine-generated evidence" "is so vague that it could cover electronic tools used commonly and frequently."

The Innocence Project (USC-RULES-EV-2025-0034-0070), "applauds the Advisory Committee's effort to recognize and respond to the need for guidelines on the admissibility of machine-generated evidence." It is concerned, however, "that the Rule and Note do not provide courts with enough concrete guidance to conduct the thorough analysis needed to properly evaluate the reliability of the machine-generated evidence, which the Committee aims to trigger."

The Innocence Project proposes that "machine-generated evidence" should be replaced with "machine opinions" and that the exclusion for simple scientific instruments be dropped. It states that the relevant question "is not so much whether a machine instrument or system itself can be considered 'simple,' but rather whether it is being used to produce outputs that cannot reasonably be questioned or doubted—or, on the other hand, whether it is producing inferences, conclusions, or predictions reasonably subject to uncertainty, error, or bias." It also suggests that "machine opinions" should be defined in text.

The Innocence Project additionally recommends that "Rule 707 should be presented as a stand-alone rule that expands on the reliability principles of 702, but it must be tailored specifically to machine opinions." According to the Project the primary focus of the rule should be "to assess (1) whether the system was developed and evaluated using data that is sufficiently representative of the population presented in the case before the court; (2) whether the methods for training and validating the system are adequate, fit-for-purpose, have been subjected to independent testing and peer review, and employ appropriate evaluation metrics; (3) whether the system was used in the domain where it has proven to perform accurately, (4) whether there were any errors in or inconsistencies associated with the specific run at issue; and (5) whether the documented evaluation, validation, and performance of the system provides a sufficient basis for the particular inference being drawn in this case."

In addition, the Innocence Project states that "the Rule must specify that machine opinions should not be admissible without expert witnesses who are able to speak to the machine's development, design, error rate, and validation in the use case at issue."

Finally, the Project strongly encourages the Advisory Committee to propose a rule regarding deepfakes, noting that "deepfake technology could be used to alter crime scene surveillance footage to place an innocent person at the scene of a crime–a new-age form of misconduct similar to the planting of contraband to incriminate an innocent suspect."

Bill Rossbach, Esq. (USC-RULES-EV-2025-0034-0071), states that "the technology is in rapid transition and given the time required to develop a new rule it seems that it would be better to pause this process until the field is more settled."

Brooklyn Law School Incubation and Policy Clinic (USC-RULES-EV-2025-0034-0072), opposes Proposed Rule 707 for four reasons: "First, the rule is premature given AI technology's rapid evolution and our still developing understanding of machine learning systems. Second, the rule lacks necessary human oversight requirements, creating misalignment with federal AI governance standards, particularly the NIST AI Risk Management Framework. Third, the rule is overbroad, using undefined terminology that could sweep in routine electronic evidence never intended to require expert testimony. Fourth, existing evidentiary rules already provide adequate tools to address reliability concerns without the problems this proposal introduces."

As to the adequacy of existing evidence rules, the Clinic relies upon Rule 901(b)(9), Rule 106 (?), and Rule 403. The Clinic concedes that these existing rules are not ideal and not very exclusionary (in fact Rule 106 is not exclusionary at all), but contends that they will do for the transition period in which AI is developing.

In addition, the Clinic suggests that the Committee consider "whether targeted guidance through Advisory Committee Notes to existing rules might better serve immediate needs. Such Notes could address authentication standards for AI outputs, human oversight requirements, transparency expectations, and evaluation factors, all while preserving flexibility as technology and understanding evolve.[13]

Carla Akins, Esq. (USC-RULES-EV-2025-0034-0073), opposes the proposed Rule 707, basically replicating the analysis of ALJ. She states that the rule "reads as a pathway for admission of machine opinions without expert testimony. Courts and litigants will treat this as authorization rather than restriction. The Committee Note cannot cure this mismatch. The rule text must communicate the limitation." She suggests that the applicable terms should be "machine opinions" and that the reliability requirements be untethered from Rule 702. She also recommends that AI should never be admitted without accompaniment of a expert witness.

Scott Blair, Esq. (USC-RULES-EV-2025-0034-0074), opposes the amendment, expressing concern that many devices, such as MRIs, would be subject to the requirements of Rule 707, meaning that an expert who knows how the MRI works would have to testify.

The Center for AI and Digital Policy (USC-RULES-EV-2025-0034-0076), supports the proposed rule and recommends modifications. CAIDP states that the rule is "necessary and timely because: 1. Rule 707 sets out a path for transparency and contestability for using generative AI in trial procedures; and 2. Rule 707 would require testing and validation of generative AI outputs which would improve the contextual integrity of the technology and trial process."

CAIDP notes, as a positive factor, that "machine-generated evidence from mass-market AI companies will rarely, if ever, satisfy the requirements of FRE 702." CAIDP suggests that the rule be limited to "machine-based systems that can, for a set of defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments."

CAIDP suggests that Rule 707 be enacted together with Rule 901(c), the proposal on deepfakes:

> Taken together, Rules 707 and 901(c) create a complementary framework for evaluating AI-related evidence: Rule 707 governs reliability when AI informs expert testimony, and Rule 901(c) safeguards authenticity when AI influences the creation or modification of evidence outside that expert context. For this framework to be effective, however, the Committee should combine the two proposals or clarify their interaction to eliminate the current gap and ensure consistent treatment of AI-generated evidence across contexts.

[13] This suggestion ignores the fact that Advisory Committee Notes to existing rules cannot be amended, nor can new notes be added in the absence of a textual amendment.

Testimony at the Public Hearings

Two public hearings were held and 13 witnesses testified. The transcripts of the testimony can be found at these links: January 15, 2026 hearing transcript and January 29, 2026 hearing transcript.

The written submissions filed in advance of the testimony can be found at these links: January 15, 2026 hearing written testimony and January 29, 2026 hearing written testimony.

With two important exceptions, all those who provided testimony also provided a written public comment that either replicated or expanded on their public testimony. One exception is the **Public Defender, Nicole Owens.** Her written submission for the public hearing is attached to this memo, together with the DOJ public comment. In short, the Public Defender strongly encourages proceeding on an amendment to regulate AI-generated evidence offered in the absence of expert testimony. She states that "machine-assisted analytical tools are already being used in criminal investigations and prosecutions" and "the outputs of these systems are increasingly introduced through law enforcement witnesses, custodians, or case agents who did not design, test, or validate the underlying systems and who cannot explain their analytical foundations." She states that:

> Rule 707 responds to this present and practical problem by providing courts with a consistent framework for determining when machine-generated evidence functions as expert analysis and must therefore satisfy established reliability standards. It promotes uniformity, predictability, and fairness in the treatment of evidence that is already appearing in courtrooms today.

The Public Defender disagrees with the DOJ that current rules adequately address the problem of AI evidence: Rule 702 applies only when an expert testifies; the authentication rules are subject to a low standard of proof and do not guarantee reliability; and Rule 403 "assumes admissibility and focuses on balancing prejudice rather than ensuring reliability in the first instance." The Public Defender concludes as follows:

> As machines increasingly perform analytical tasks once reserved for human experts, the Rules must ensure that reliability gatekeeping remains effective. Rule 707 does so in a limited, careful, and appropriate manner.

The other hearing testimony of note that did not result in a written public comment was that of Robert Friedman of King and Spalding. He argued that Rule 707 should not be enacted without corresponding changes to the discovery provisions of the Federal Rules of Civil and Criminal Procedure.

III. Analysis of Criticisms and Suggestions in the Public Comment

This section analyzes the major criticisms lodged against proposed Rule 707, with the goal of determining: 1. whether they have merit; and 2. If so, whether the rule and note can be modified to successfully address the complaints.

There were several basic objections to the proposed Rule 707:

- The time is not ripe for an amendment requiring that AI-generated evidence offered without an expert must be reliable, because at this point there is no problem to address, and the Committee should wait to see how AI develops.
- Current rules already demand that AI-generated evidence offered without an expert must be reliable.
- The term "machine-generated" evidence is overbroad and would lead to a reliability review of evidence that is currently admitted without fanfare.
- The exception in the rule for "simple scientific instruments" is vague and unhelpful, and also unnecessary because whatever is covered in that term is not the equivalent of expert testimony.
- The rule needs to contain notice provisions, either in the rule itself or as part of a joint project with the Civil and Criminal Rules Committee.
- The rule should have its own independent requirements and should not tie into Rule 702.
- The rule should require that AI-generated evidence may be admitted only if an expert testifies to provide a foundation for its admissibility — to avoid having the rule become a pathway to admissibility.

Each of these complaints is addressed in this section.

A. The Amendment is Premature

Of those commenters who opined on timeliness, 24 believed that a rule amendment is necessary now, while 12 argued that it was premature — apparently so early in the process that it will be premature three years hence, when the rule would be enacted. A few civil practitioners had never seen AI evidence admitted in the absence of an expert. But criminal practitioners beg to differ. And cases have been reported in previous memos where AI-generated evidence has been offered by a witness who operated the machine, but who knew nothing about how the machine actually operated – the most prominent example being evidence of a facial recognition match. (The case of *United States v. Gafford* in Part One is another example.)

It is obviously for the Committee to determine the question of timeliness and, certainly, reasonable minds can differ. But it should be remembered that if a new version of Rule 707 is released for a new round of public comment, the effective date will be December 1, 2028. Given the leaps in AI over the last year (including now the possibility that AI can program itself) it seems a fair bet that the courts will have AI-generated evidence to deal with by that time, potentially in many cases. Examples include AI that "improves" upon a video or audio; summaries of voluminous evidence where the summary is conducted by an AI program such as Claude; and AI-assisted forensic conclusions.

B. Current Rules are Sufficient

The next argument addressed in the comment is that a new rule is unnecessary not because it is premature, but rather because the existing rules of evidence will work just fine in regulating AI evidence that is offered without expert testimony. Only a few commentators made this point, but one of them was the DOJ, so the contention must be carefully considered.

What rules are in place that would regulate AI-generated evidence when an expert is not involved? Rule 702 is not available because, by definition, the problem addressed by Rule 707 arises only because an expert is not called to testify. Apparently the rules that currently do a sufficient job in regulating AI are Rules 901(b)(9), requiring a showing of authenticity, and Rule 403. The DOJ throws Rule 611(a) into the mix.

It seems clear, though, that the current rules are *not* sufficient to regulate the substantial unreliability problems that are attendant to AI-generated evidence. That is because the concern presented by AI evidence is one of *reliability, and none of the cited rules directly address that problem.*

There is no Federal Rule of Evidence providing that "all proffered evidence must be reliable." Rather, the Federal Rules focus on two types of evidence as creating special reliability problems, and attack them with specific rules requiring a showing of reliability. One targeted area is hearsay; the other is expert testimony. The fact that there is no reliability requirement outside these two confines is the very reason for Rule 707: machine learning evidence cannot be regulated by the hearsay rule as a machine can't be cross-examined, and such evidence is regulated by Rule 702 only if an expert is testifying.

The rules cited as sufficing to regulate reliability problems with AI are *definitely not up to the task*. First, Rule 403 is, maybe surprisingly to some, an inapt, improper tool for regulating reliability; Rule 403 was never intended to provide, and does not provide, authority to exclude evidence on the ground that it is unreliable. Pretty obviously, if Rule 403 was intended to regulate reliability, then you wouldn't need to have a hearsay rule. You wouldn't need to have a provision in Rule 803(6) allowing a judge in discretion to exclude an untrustworthy business record if Rule 403 regulated untrustworthiness anyway. Nothing in the Advisory Committee Note to Rule 403 indicates that there is an intent to exclude evidence on the ground of unreliability. The Note talks about "confusion of *issues*" — not confusion about whether a proffered piece of evidence is reliable. The note talks about "prejudice" but only in terms of decision on an "improper basis" — not on the misunderstanding that evidence is reliable when it is not.

Significant case law indicates that in assessing the probative value of evidence, the judge is not to determine its reliability. Rather, *probative value is assessed after assuming that the jury would believe the evidence*. *See Ballou v. Henri Studios,* 656 F.2d 1147, 1154 (5th Cir. 1981) (trial judge erred in finding test results irrelevant because they were unreliable; "Rather than discounting the probative value of the test results on the basis of its perception of the degree to which the evidence was worthy of belief, the district court should have determined the probative value of the test results *if true*, . . . leaving to the jury the difficult choice of whether to credit the evidence"); *United States v. Welsh,* 774 F.2d 670, 672 (4th Cir. 1985) ("The law does not consider credibility

as a component to relevance."); *United States v. Truman,* 688 F.3d 219 (2nd Cir. 2012) (probative value is assessed with the assumption that the evidence is true); *United States v. Moore,* 115 F. 3d 1348 (7th Cir. 1997) (rejecting an argument that evidence lacked probative value because it was unreliable).

The point was probably best made by the Ninth Circuit in *United States v. Evans,* 728 F.2d 953, 964 (9th Cir. 2013), where the district court concluded that Evans's birth certificate was inadmissible under Rule 403 because it was not, under the circumstances, trustworthy. The court found the exclusion to be "legal error." It explained as follows:

> "Weighing probative value against unfair prejudice under [Rule] 403 means probative value with respect to a material fact *if the evidence is believed, not the degree the court finds it believable*." *Bowden v. McKenna,* 600 F.2d 282, 284–85 (1st Cir. 1979) (citing 22 C. Wright & K. Graham, Federal Practice & Procedure: Evidence, § 5214, at 265–66 (1978)). The court may not exclude relevant evidence—or, in this case, assign it no probative value—on the ground that it does not find the evidence to be credible. * * * We rule that a trial judge may not refuse to admit evidence simply because he does not believe the truth of the proposition that the evidence asserts.

See also *Rainey v. Conerly,* 973 F.2d 321 (4th Cir. 1992). In *Rainey*, the trial court sua sponte excluded a prisoner's contemporaneous written account of an altercation with a prison guard on the ground that it was suspiciously dated and therefore was "not reliable." But the Fourth Circuit held that this was error. The court concluded:

> [W]hile the trial court may exclude relevant evidence under Federal Rule of Evidence 403 for certain reasons, the basis advanced by the trial court in this case, *that the document was 'not reliable,' is not a proper ground*. Issues of credibility are to be resolved by the jury, not the trial court, and in this case the jury should have been trusted to accord the evidence the proper weight in light of any date discrepancy.[14]

So if AI evidence is admitted, its probative value under Rule 403 is assessed by how far it resolves a matter in dispute, ***assuming it is reliable***. And any prejudicial effect or confusion of the issues does not include the possibility that the evidence is unreliable; and even if it did, the evidence would not be excluded, given its high probative value.

Finally, even if a court does misapply Rule 403 to consider issues of unreliability, it must be remembered that Rule 403 is *permissive.* Evidence is excluded only if its probative value is *substantially outweighed* by the risks of unfair prejudice, confusion and delay. Given the substantial reliability problems attendant to AI-generated information, the permissive 403 test is a particularly weak weapon, even if it is misapplied to consider questions of unreliability.

[14] See also Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?,* 41 Vand. L.Rev. 879, 886 (1988) ("Leading law review commentators and treatise writers have concluded that a judge may not consider the credibility of the source of the evidence in gauging probative value under rule 403.").

Rule 901(b)(9) fares no better. That is purportedly an authenticity rule, but it is pretty clearly useless in regulating the *reliability* of AI-generated evidence. True, it reads like a rule of reliability, in that the ground of authenticity is "evidence describing a process or system and showing that it produces an accurate result." But there are several problems with that standard as a solution to AI evidence. First, the standard confuses reliability with authenticity. As Professor Imwinkelried notes in an article that was included in the last memo, "[t]here is a strong case that 901(b)(9) does not belong in Rule 901 and that the validation of a process or system should not be governed by Rules 104(b) and 901(a)." Moreover, even though the rule uses the term "accurate," other rules indicate that Rule 901(b)(9) is not a frontline safeguard against unreliable AI. The Committee Note to Rule 902(13) — which allows authentication under Rule 901(b)(9) by way of a certificate, states as follows:

> [A] certification authenticating [under Rule 901(a)(9) a computer output . . . *does not preclude an objection that the information produced is unreliable* — the authentication establishes only that the output came from the computer.

Finally and most importantly, authentication is governed by the low Rule 104(b) standard — more permissive than Rule 707/702, under which the reliability requirements must be met by a preponderance of the evidence. So, to say that Rule 707 is not necessary, because Rule 901(a)(9) can do the job of regulating reliability of AI evidence, is simply unsupportable. As it is today, AI and other computerized evidence gets a pass on reliability *unless* it is part of an expert's testimony, and therefore covered by Rule 702. This is precisely the gap that Rule 707 intends to fill.

Now as to Rule 611(a): nobody in public comment other than the DOJ argued that Rule 611(a) could be used effectively to exclude unreliable AI evidence. It is true that courts under Rule 611(a) have considerable discretion to manage "the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth." But that should not mean that Rule 611(a) grants the court the power to exclude any evidence it deems unreliable. That would be contrary to the limitations on judicial power under Rule 403 governing reliability. The examples given in the Committee Note to Rule 611(a) are "whether testimony shall be in the form of a free narrative or responses to specific questions, the order of calling witnesses and presenting evidence, [and] the use of demonstrative evidence." None of these relate directly to reliability-based concerns.

In addition, at the Spring 2021 meeting the Committee considered a memorandum by the Reporter on all the reported uses of the Rule 611(a) power. The Reporter uncovered 25 separate kinds of actions taken by courts relying on Rule 611(a).[15] None of these actions involved excluding evidence because it was unreliable. Moreover, if Rule 611(a) is used to exclude reliable evidence, it suffers from a lack of standards and guidelines, so that there is likely to be inconsistent and unpredictable results from judge to judge.

Any cobbled-together combination of existing rules to exclude unreliable AI evidence is reminiscent of the rules governing illustrative evidence before Rule 107 was enacted. Some courts

[15] These included allowing jurors to ask questions of witnesses, realigning the parties, allowing rebuttal, and allowing dismissed defendants to remain at the table with the defendants still at trial.

used Rule 403, even though that rule requires an assessment of probative value, and illustrative aids have no probative value as they are not evidence. Some courts relied on Rule 611(a), but the results were inconsistent. The Advisory Committee determined that it would be a major improvement to have a rule directly applicable to illustrative aids. Given that the existing rules exhibit an obvious lack of a targeted approach to AI evidence offered without an expert, it seems that there is once again a compelling need for a specific rule.

C. "Machine-Generated"

All the negative comments, and even some of the positive comments, averred that "machine-generated" was too broad a term for the text of Rule 707. Some lawyers thought that the rule could apply to faxes, emails, and the very letter that they were sending to the Committee! That is an overheated critique, because the proposed rule does not say that it is applying to all evidence generated by a machine. Rather, it would apply to evidence generated by a machine *that would be considered expert testimony if it came from a human witness.* If you think about it, the rule could have just said "evidence" as opposed to "machine-generated evidence" and it would have had exactly the same application. For that reason, suggestions in the public comment to change the term to "machine opinions" or the like have no effect at all on the impact of the rule, because the rule as written covers only output that would be an *expert opinion.*

All that said, the politics of rulemaking, at this point, counsel a shift from the term "machine-generated." Moreover, having a narrower term at the outset of the rule will at least tell uncareful readers that the rule is not intended to regulate all information that comes from a machine.

So if the rule is to go forward, what term should be substituted for "machine-generated"? The Committee has previously rejected two alternatives: "machine-learning" (rejected twice) and "computer-generated" (rejected at the last meeting). There would appear to be no reason to revisit these terms. But after the public hearings, some of this Committee's members expressed interest in having the rule regulate "evidence that is the product of artificial intelligence." Grimm and Grossman agree that a rule specifically addressed to AI would be workable. On the other hand, Professor Andrea Roth thinks that the term "artificial intelligence" might be "underinclusive and be seen as including only deep neural networks, or machine learning, or some concept of 'intelligent' machines that would exclude basic software-driven systems like blood-alcohol software that has always been seen as requiring *Daubert* analysis (when used by an expert)."

Putting aside the argument that it might be better to be underinclusive as opposed to overinclusive, Professor Roth recognizes that coverage depends not on the term "AI" but rather on how AI is defined. AI is many things to many people. So assuming that the term "AI" is a workable starting point for regulation by Rule 707, how should it be defined?

There are simple definitions. The one that is most often used (in dictionaries, articles, etc.) is this one:

> As used in this rule "artificial intelligence" means software used to perform tasks or produce output previously thought to require human cognition.

It is possible that the above definition is appropriate for discourse, but it is pretty content-free and not as helpful as it could be as rule language. (Though, in its generality, it is likely to stand the time of further technological developments.)

Another, more detailed definition can be found in the National Artificial Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)), which defines artificial intelligence as follows:

> The term ''artificial intelligence'' means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.

This definition could be supplemented in the Committee Note with Congress's further elaboration on AI in the Act:

> Artificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action.

This definition, together with the elaboration in the Committee Note, should assure the public commenters that Rule 707 is not going after their faxes and emails. The above description of what artificial intelligence systems do could also be used to describe what human experts do: analyze and formulate opinions.

Section Four contains a redraft of Rule 707 that works with the Initiative Act definition of artificial intelligence, in place of "machine-generated."

D. "Simple Scientific Instruments"

Proposed Rule 707 excludes the output of "simple scientific instruments" from its coverage. That exclusion got no love in the public comment. The predominant critique was that it was vague, that the examples given in the Committee Note were not very helpful, and there would thus be a lot of litigation about what is covered by Rule 707 and what is not.

In retrospect, the exclusionary language was probably unnecessary, because the output of simple scientific instruments is either judicially noticeable, or not the equivalent of expert testimony if coming from a human witness. But it was a worthwhile experiment for purposes of public comment, as the goal was to get some help from the public in sharpening the coverage of the rule.

So there is no doubt that the sentence about simple scientific instruments must be dropped from any new proposal on Rule 707.

Fortunately, any proposal that narrows "machine-generated" is likely to render the "simple scientific instruments" exclusion *clearly* unnecessary. For example, if the rule is addressed to "artificial intelligence" — as defined above — it is unlikely to cover simple scientific instruments like thermometers, which either don't use AI or provide outputs that are judicially noticeable.

The drafts in Part Four of this memo do not include an exception for "simple scientific instruments."

E. Notice Requirement

A number of commentators, including the DOJ, suggest that enacting Rule 707 without any provision on pretrial notice will lead to confusion and disarray. As released for public comment, there was nothing in the text of the rule imposing a pretrial notice requirement; the matter was addressed in a Committee Note in general terms, suggesting the use of the same notice requirements that are applicable to experts and the reports of examinations and tests.

There is a good argument that something on notice should be provided in the text of Rule 707 if it goes forward. Certainly the opponent should have advance notice of important AI evidence that may be introduced in the absence of an expert. The reliability issues surrounding AI are substantial and various. Pretrial notice should be required so that these complicated reliability issues don't come up for the first time at trial. A general reference in the Committee Note to analogous disclosure requirements might work out fine (as Grimm and Grossman have concluded), but more affirmative guidance in the controlling text would probably be useful.

The question is, how best to impart a notice requirement? Some commentators thought that the only solution would be to have a joint project among the Civil, Criminal, and Evidence Rules Committees to add notice requirements to the Civil and Criminal Rules for AI evidence. That suggestion raises *significant* issues of implementation. It appears that neither the Criminal nor Civil Rules Committees are currently considering the possibility of amending their rules to accommodate AI. And the rulemaking process is slow enough with *one* Committee, much less three.

More importantly, the AI that would be offered under Rule 707 is very likely to be some kind of report, examination, or test. And there are already requirements in the Civil and Criminal Rules on *disclosure* of such material. The fact that the examination or test is produced by AI should not make any difference to those requirements. In other words, it appears that nothing needs to be done to cover an AI report with at least the production requirements applicable to similar non-AI evidence. See Fed. R. Civ. P. 26 (requiring disclosure of "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses"); Fed. R. Crim. P. 16 (provisions for disclosure of documents and examinations and tests).

It should also be noted that it won't only be the report that will be presented for admissibility. An expert will probably also be testifying to establish the reliability of the AI (and that may be a requirement of the rule, as discussed below). Surely if an expert is testifying, the disclosure requirements of the Civil and Criminal Rules will apply to that expert. The DOJ argues that this will not be so, because the discovery rules currently specify Rule 702, and of course do not mention Rule 707. But that seems like a formality, not something that a court will find preclusive, given the fact that Rule 707 absorbs the Rule 702 standards. And at any rate, that problem can be solved by simple amendments to the Civil and Criminal Rules that add "707" to the existing list of rules.[16]

Outside the Civil and Criminal Rules, there is plenty of precedent for having a notice requirement in an Evidence Rule covering important evidence that needs to be teed up pretrial. Two such rules are Rule 404(b) and Rule 807. Both rules have provisions that have been recently amended. (Rule 807 in 2019, Rule 404(b) in 2020). Both rules contain flexible provisions, requiring reasonable notice — enough time to give the opponent a fair opportunity to respond. There is no reason that the notice requirement for Rule 707 should take any different approach. A flexible, reasonableness-based notice provision is especially apt, because if the AI report contains difficult and complex expert-like opinions, the opponent may need more time for a fair opportunity to respond, and the court can so order. Indeed this flexibility would seem superior to any rigid requirements that currently exist in the Criminal and Civil Rules.

The remaining issue on disclosure is that opponents may want source codes and the like to challenge the AI evidence, and this may run into claims that such information is proprietary. Nothing in the Civil or Criminal Rules specifically covers this problem. The Evidence Rules Committee has decided on several occasions that the question of trade secrets and discovery is one for the Civil and Criminal Rules Committees to address. But the fact that resolution, if any, is far in the future should not in itself prevent Rule 707 from going forward. Courts are already considering claims of trade secrets when AI is being challenged. An article by Grimm and Grossman, discussed in a prior memo, reviews this case law and suggests that courts should generally resolve the discovery problem by allowing disclosure subject to a protective order:

> While trade-secret claims are legitimate and must be taken seriously, they seldom warrant a court order precluding the party against whom the evidence will be offered from having access to it to be able to examine and mount a challenge to the evidence. The better practice is for the court to allow reasonable discovery subject to a protective order that can be tailored to the facts of the particular case. Simply put, if a party intends to use AI-generated evidence, it cannot be allowed to do so while simultaneously objecting to any discovery by the opposing party and thereby preventing them from evaluating and challenging the evidence.[17]

[16] Technically it can be concluded that where Rule 707 requires an expert to testify, that testimony is then pursuant to Rule 702 anyway.

[17] Grimm and Grossman, *Judicial Approaches to Acknowledged and Unacknowledged AI Evidence,* 26 Columbia Sci & Tech. L. Rev. 110, 152 (2025).

That kind of reasoned resolution can occur without an amendment on the specific subject of proprietary information.

The redraft of Rule 707, in the next section, contains a flexible notice provision ala Rules 404(b) and 707.[18]

F. Tying Admissibility to the Standards of Rule 702

Several comments suggest that the reliability requirements of Rule 707 should be freestanding: not tied to the reliability requirements of Rule 702. The basic argument is that AI is not a human, and the reliability standards for human expert witnesses — sufficient facts/data, reliable methodology, and reliable application — are not a perfect fit for AI evidence.

The most important problem with this critique is that it will lead to two different reliability regimes for AI-generated evidence. If the AI is used by an expert to come to a conclusion, then the reliance on that AI will be governed by Rule 702 — as it already is. See the cases discussed in Part One of this memo in Barrington Dyer, Jacob Karim & Curtis Park, *How Unchecked AI Exposes Expert Opinions To Exclusion,* Law360, (Dec. 3, 2025). If the AI is found unreliable, the expert's opinion will be excluded because the expert has employed an unreliable methodology. But, if Rule 707 has different reliability requirements, it will be admitted under different standards—which makes little sense because the same piece of AI might be found excluded under one rule but not the other.

At the very least, the standards of reliability for the two rules, if they differ, will not differ much. It is likely that there will be significant confusion in applying two similar but different sets of rules, depending on whether an expert is going to be testifying. If the Committee decides to reject this solution, as it should, that result would be consistent with its rejection, in 2022, of a rule that would have subjected forensic experts to slightly more detailed standards of reliability than those applicable to all other experts.

Perhaps the other way to separate AI from the rest of expert testimony is to somehow take AI completely out of Rule 702, and review all AI from the separate reliability standards (whatever they are) of a revamped Rule 707. But that move will probably not work, for a number of reasons. First, taking AI out of Rule 702, when it is being used by a testifying expert, will have to be done by an amendment to Rule 702 itself. It would be very user-unfriendly to carve out AI from 702 by the use of language in Rule 707. A neophyte is going to go right to Rule 702, as the neophyte should. They may not think to go to the end of Article 7 to determine whether their testifying expert is going to be allowed to rely on AI. Also, the location of the AI carveout is important because it if has to be in Rule 702, any amendment will be years down the line, as Rule 702 was amended in 2023. Moreover, taking AI out of Rule 702 undermines that Rule as *the* Rule to cover all expert testimony.

[18] The DOJ states that "[a]t least, if the Committee moves forward with Rule 707, it should explicitly include procedures for ensuring disclosure sufficiently early in the process to allow the parties and the court to conduct the case in an orderly fashion. Including such a procedure would not be out of place in the evidence rules. Multiple other rules of evidence address disclosure requirements and timing. See, e.g., Fed. R. Evid. 404(b)(3); 412(c); 413(b); 807(b); 1006(b)." The drafts below fulfil the DOJ's request.

Another problem with independent standards for AI, even when it is being relied upon by a testifying expert, is that *both* Rule 702 and 707 would probably apply when an expert is testifying on the basis of AI. The judge would have to assess the reliability of the AI under Rule 707, but there will need to be a broader analysis of the expert's opinion under Rule 702. Maybe the expert is relying only partly on AI. Maybe, on the other hand, the AI is reliable but the expert has misapplied it to the facts. Expert opinions are hard enough to review without having to use two separate rules to do so.

Any argument that the expert witness rules in Rule 702 are not capable of regulating AI is really underestimating federal judges. As Judge Facciola stated in his comment, judges routinely apply the flexible Rule 702 standards to review all kinds of expert testimony, and there is no reason to think that they could not handle AI evidence in the same way.

What's more, the reliability requirements of Rule 702 do, in fact, match up well with the reliability concerns attendant to AI. As Grimm and Grossman state:

> The expert witness rules—which we argue should inform the decision of whether AI evidence is admissible—are probably the most helpful rules for evaluating the admissibility of AI evidence because they supply demanding standards: (i) whether there is a sufficient factual basis to support the evidence; (ii) whether the methods and principles used to generate the evidence were reliable; and (iii) whether they were reliably applied to the facts of the particular case. And the *Daubert* factors further focus the inquiry on the following: (i) whether the methodology was tested; (ii) whether there is a known error rate; (iii) whether the methods used are generally accepted as reliable within the relevant scientific or technical community that is familiar with the methodology; (iv) whether the methodology has been subject to peer review by others knowledgeable in the field; and (v) if standard procedures or protocols are applicable to the methodology, whether they were complied with.
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> * * *
>
> The usefulness of borrowing these [*Daubert*] factors in assessing whether AI evidence should be admitted is readily apparent. To authenticate AI technology, its proponent must show that it produces accurate, that is to say valid, results. And it must perform reliably, meaning that it consistently produces accurate results when applied in similar circumstances. When the accuracy and reliability of technical evidence has been verified through independent testing and evaluation of the AI system that produced it, the methodology used to develop the evidence has been published and subject to review by others in the same field of science or technology, when the error rate associated with the AI system use is not unacceptably high, when the standard testing methods and protocols have been followed, and when the methodology used is generally accepted within the field of similar scientists or technologists, then it has been [established as admissible]. * * * In contrast, when the validity and reliability of the system or process that

> produces AI evidence has not properly been tested, when its underlying methodology has been treated as a trade secret by its developer preventing it from being verified by others, when applying the method produces unacceptably high error rates, when corners were cut and standard procedures were not followed when it was developed or employed, or when the methodology is not accepted as reliable by others in the same field, then it is hard to maintain with a straight face that it does what its proponent claims it does, which ought to render it * * * inadmissible.[19]

For argument's sake, let's consider what would be required for a freestanding rule on AI-reliability, and see if there is any factor that would not be covered by the flexible Rule 702/*Daubert* standards. The Innocence Project, for example, suggests that the following factors need to be set forth in an independent rule:

> (1) whether the system was developed and evaluated using data that is sufficiently representative of the population presented in the case before the court; (2) whether the methods for training and validating the system are adequate, fit-for-purpose, have been subjected to independent testing and peer review, and employ appropriate evaluation metrics; (3) whether the system was used in the domain where it has proven to perform accurately, (4) whether there were any errors in or inconsistencies associated with the specific run at issue; and (5) whether the documented evaluation, validation, and performance of the system provides a sufficient basis for the particular inference being drawn in this case.

It is pretty clear that each of these factors can be properly evaluated under the reliability requirements of Rule 702. Factor 1 refers to sufficiency of facts or data; factor 2 is about reliable methodology; factor 3 is the *Daubert* fit requirement (and was applied by a Washington court to exclude AI that was not made for the purpose, in *Washington v. Puloka*, discussed in a prior memo); factor 4 is both reliable methodology (with rate of error being a specific *Daubert* factor) and reliable application; and factor 5 is reliable application. So, while it certainly would be useful to set out some AI-related reliability factors in the Committee Note (as is already done), there is nothing in them that supports the cost and disruption of an independent rule on AI.

In sum, it would appear that there is little to be gained from untethering Rule 707 from the Rule 702 reliability standards, and much to be lost in light of the confusion that would be wrought. Those who argue that Rule 702 cannot handle AI fail to recognize that the courts are doing that very thing when experts testify; and they underestimate the flexibility that is inherent in the Rule 702 reliability standards.

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[19] Grimm, Grossman and Cormack, *Artificial Intelligence as Evidence,* 19 Nw. Univ. J. of Technology and Intellectual Property 9, 99 (2001). See also Imwinkelried, *The Challenge that the Advent of Artificial Intelligence (AI) Tools Poses to the Procedures for Determining the Existence of the Preliminary Facts that Condition the Admissibility of Items of Evidence,* 108 Marquette Law Review 621 (2025) (arguing that AI should be regulated under the expert rules of Rule 702 and not Rule 901(b)(9)).

That said, the public comment on the subject suggests two changes that might improve the rule:

1. Instead of simply referring to Rule 702 in the text, the relevant language of that rule should be added to the text of Rule 707.
2. The Committee Note should include a more comprehensive list of reliability factors that affect AI.

Both these suggestions are implemented in the redraft to Rule 707, in Section Four, below.

G. Expert Testimony Required for a Foundation Under Rule 707

Rule 707 does not in text specify *how* the reliability factors supporting AI must be established. The Committee Note states that ordinarily an expert familiar with the AI will have to testify at a hearing, but that is in the Note, not text, and it leaves open the possibility that AI can be proven up other than through expert testimony. This led a number of commentators to jump to the conclusion that Rule 707 presented a pathway to admissibility without an expert, thus undermining the principles of Rule 702. Of course, that was not the Committee's intent and not a fair reading of the rule, but the Comment does warrant consideration of the question whether expert testimony should be *required* to establish that the proffered AI satisfies the reliability requirements of Rule 702.

Most of the Comments addressing this question supported the requirement of an expert foundation at an admissibility hearing. The rationale was that only an expert could establish that the AI was properly programmed, designed for the purpose it was used, with a database of appropriate scope, free of bias, etc. As LCJ stated, "[t]he reliability of AI technology is not sufficiently understood to contemplate admission of machine opinions without an expert." And as the ACLU states:

> Neither a lay witness, nor documents (which would probably be created by the manufacturer of the technology, an entity with every incentive to overstate the tool's accuracy and reliability) can provide the same information and opportunity for cross-examination than a testifying expert witness can. The ACLU believes that the proponent must lay a foundation for admissibility of machine-generated evidence by having an expert witness testify. And ordinarily an expert must testify in every case because even a technology that can be accurate may not be accurate in a particular instance because the device was not properly calibrated, the software was not updated, or for some other case-specific reason.

There are two concerns about *requiring* an expert to provide the necessary foundation for AI-generated evidence. The first is expense. A possible answer to the expense concern is that the very problem addressed by Rule 707 is that the proponent is seeking to avoid the expense of expert

testimony by offering the AI without it. Because the point of the rule is to prevent an end-run of Rule 702, it is arguably appropriate to require an expert foundation under Rule 707.[20]

The other concern is that there may be ways to establish reliability of AI other than through expert testimony. One of the Commenters, Jeffrey Fazio (0024), raises the possibility of "self-verifying AI" and states that "Sigra—the platform I am developing—demonstrates how machine-generated evidence can meet Rule 702's reliability standards without requiring human sponsorship as a proxy for trustworthiness." Perhaps self-validating AI is not currently a thing, and there is some doubt about the argument of a proponent with a personal interest in that concept. But if self-validating AI is a real possibility and becomes a thing, then a rule requiring expert testimony for foundation could be argued to be outdated (and unnecessarily expensive) at that point.

Beyond self-validating AI, some of the articles set forth in the beginning of this memo also mention ways that AI can be determined to be reliable without expert testimony. As one put it:

> Another approach is to test the system. Satisfactory testing can gauge both the validity of a model, its accuracy in describing or measuring what it purports to describe or measure, and its reliability or replicability, its capacity to produce consistent results, given the same inputs.

The ACLU's response to this is that the testing will probably be conducted by the proprietor of the AI and accordingly will be suspect.

At bottom, there is much to be said for a cautious approach to AI. As all the articles note (and as anyone who has used Claude can attest) AI has a long way to go to establish its reliability as trial evidence. Therefore a rule that requires expert testimony has much to commend it. In the next section, there are two versions of a redraft on the question of whether an expert must testify at the admissibility hearing on AI— one that requires an expert foundation and one that allows a limited alternative.

A Separate Question: Should the Rule Require Expert Testimony at the Trial?

Some of the commentators seem to be stating that the rule should provide that when AI is offered *at trial*, an expert witness is required. These commentators focus on the need for cross-examination at trial, as is done with expert testimony that relies on AI.

Having a rule that *requires* an expert to testify would be a first in the Federal Rules of Evidence. The problem is, one could write a rule, however novel, stating that an expert must testify at trial, but it would be difficult to describe *what they would have to say* in order for the AI to be admissible. If, after qualifying the AI at a Rule 104(a) hearing, an expert at trial simply says "I pushed the button and this report came out" has the expert testimony requirement been met? Maybe

[20] To the argument that the end result is that parties will never trod down the Rule 707 path, but will instead take a direct route to Rule 702, the answer is that this is the very point of Rule 707. The very hope behind Rule 707 is that Rule 707 will not be used. Thus, the DOJ's argument that Rule 707 will never be used misses the point of the Rule. The Rule is like a road sign that says "Go Back."

what must be said by the expert could be left to the good sense of the parties: if there is a requirement that an expert testify, presumably the proponent would use the expert to good effect — and therefore the simple requirement that an expert must testify would be enough.

In the end, any requirement that the expert must testify is not about the quality of that testimony, but rather about the availability of cross-examination. So the rule should be written to say simply that an expert must be "subject to cross-examination" about the proffered AI. (See Rule 801(d)).

It should be noted that if Rule 707 requires both that an expert testify at a Rule 104(a) hearing, and also that the expert be subject to cross-examination at trial, then the Rule has ***actually*** *become Rule 702. It leads to exactly the same result. That is not inherently problematic, because the point of Rule 707 is to funnel AI into Rule 702. But it is arguably a balky way of reaching that outcome.*

Whether Rule 707 should provide that an expert must testify at trial is a question for the Committee to determine. Draft #3 provides that alternative.

IV. Redrafts of Rule 707

These redrafts cover all the issues discussed in the previous section:

- Substituting "AI" for "machine-generated."[21]
- Deleting "simple scientific instruments."
- Adding a provision about notice in the text.
- Continuing the connection to Rule 702 but restating that language in Rule 707.
- Addressing whether an expert must provide foundation, and whether an expert should be required at trial.

There are three redrafts, with the difference being that the first requires an expert foundation and the second provides a limited exception to that requirement, while the third requires both an expert foundation and expert testimony at trial.

In addition, a new section is added to each draft to provide a definition of artificial intelligence. And a new section is also added to specifically refer to the possibility that if AI is subject to judicial notice, it is not covered by the rule.

The redrafts start on the next page.

[21] Professor Roth suggested use of the term "computer-generated." That term was rejected by the Committee at its last meeting, on the ground that it would be no improvement for interpreting the scope of the rule. Some machines are not computerized, but there is no information in such machines that raises a Rule 702-type concern.

Redraft One: Expert Required for Foundation

Rule 707. Evidence Produced by Artificial Intelligence

(a) **General Rules.** If evidence is a product of artificial intelligence and is offered without an expert witness, but would be subject to Rule 702 if testified to by a witness, the proponent must establish through an expert that the evidence:

(i) will help the trier of fact;
(ii) is based on sufficient facts or data;
(iii) is the product of reliable principles and methods; and
(iv) reflects a reliable application of the principles and methods to the facts of the case.

(b) **Notice.** The evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence — so that the party has a fair opportunity to meet it.

(c) **Judicial Notice.** This rule does not apply to facts that may be judicially noticed under Rule 201.

(d) **Definition.** In this rule, "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.

Committee Note

The admissibility of evidence generated by artificial intelligence (AI) raises questions about reliability. AI involves the use of a computer-based process or system to make predictions or draw inferences from existing data. The concerns about the reliability of that process are akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on AI, the validity of that reliance will be scrutinized under the reliability requirements of Rule 702. But if AI is proffered without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering AI output directly or through a lay witness, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if AI is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to requirements that are the same as imposed by Rule 702.

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

testifies on the basis of AI-generated information. Moreover, Rule 707 requires that the foundation must be established by an expert. That is because the reliability of AI technology is not sufficiently understood to contemplate admission of AI opinions without an expert to establish foundation before admission.

If the AI output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony — and of course applicable under Rule 707. See Adv. Comm. Note to Rule 902(13) (noting certification authenticating computer output "does not preclude an objection that the information produced is unreliable").

The rule is not intended to encourage parties to opt for AI evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer AI evidence instead of a live expert. These reliability standards will be impossible to meet without presenting expert testimony.

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

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for an AI process is sufficiently representative to render an accurate output for the population involved in the case at hand.
- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.
- Reviewing information about what records the system keeps, what is deleted, and whether the output can be reproduced or audited.
- Considering whether the process or system has been subject to evaluation by entities independent of the developer, and whether the opponent and independent evaluators have access to the system, e.g., through meaningfully available research licenses.
- Considering whether the opponent has received sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were that of a human expert.

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

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

Under this rule, AI-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when AI evidence is found by the court to be admissible under this rule, because while an expert is required to provide the foundation for admissibility, it would be possible for a proponent to offer that evidence at trial without an expert. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of AI output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. Or the opponent might be able to impeach the conclusion by showing prior inconsistencies or specific contradiction, akin to Rule 806. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable simply because it was produced by a machine.

The rule provides for pre-trial notice, as it is important that the significant reliability issues attend to AI evidence be handled before the trial. The notice provision is intentionally flexible. See the notice provisions in Rules 404(b) and 807. The proponent of AI evidence must also consult the Federal Rules of Civil and Criminal Procedure to determine pretrial obligations.

Rule 707(c) specifically provides that the rule is not applicable if the reliability of an AI process is subject to judicial notice.

The definition of "artificial intelligence" in Rule 707 is taken from the National Artificial Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)). That Act also notes that "[a]rtificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." This further elaboration by Congress should be considered in determining whether proffered computer-based information is subject to this rule.

Redraft Two: Expert testimony not absolutely required

Rule 707. Evidence Produced By Artificial Intelligence and Presented at Trial Without an Expert

(a) General Rules. If evidence is a product of artificial intelligence and is offered without an expert witness, but would be subject to Rule 702 if testified to by a witness, the proponent must establish that the evidence:

(i) will help the trier of fact;
(ii) is based on sufficient facts or data;
(iii) is the product of reliable principles and methods; and
(iv) reflects a reliable application of the principles and methods to the facts of the case.

(b) Establishing Admissibility. Admissibility under this rule ordinarily requires the proponent to provide an expert to explain how the system of artificial intelligence reliably produced the evidence; but in exceptional circumstances, the court may find other proof that the output satisfies the requirements of (a)(ii)-(iv).

(c) Notice. The evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence — so that the party has a fair opportunity to meet it.

(d) Judicial Notice. This rule does not apply to facts that may be judicially noticed under Rule 201.

(e) Definition. In this rule, "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.

Committee Note

The admissibility of evidence generated by artificial intelligence (AI) raises questions about reliability. AI involves the use of a computer-based process or system to make predictions or draw inferences from existing data. The concerns about the reliability of that process are akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on AI, the validity of that reliance will be scrutinized under the reliability requirements of Rule 702. But if AI is proffered without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering AI output directly or through a lay witness, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if AI is offered without the accompaniment of an expert, and where

the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to requirements that are the same as imposed by Rule 702.

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

If the AI output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony — and of course applicable under Rule 707. See Adv. Comm. Note to Rule 902(13) (noting certification authenticating computer output "does not preclude an objection that the information produced is unreliable").

This rule is not intended to encourage parties to opt for AI evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer AI evidence instead of a live expert. These reliability standards will ordinarily be impossible to meet without presenting an expert. It is possible, however, that the proponent can establish the requirements of the rule through other evidence, such as convincing validation tests and objective studies indicating a low rate of error.

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

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for an AI process is sufficiently representative to render an accurate output for the population involved in the case at hand.
- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.
- Reviewing information about what records the system keeps, what is deleted, and whether the output can be reproduced or audited.
- Considering whether the process or system has been subject to evaluation by entities independent of the developer, and whether the opponent and independent evaluators have access to the system, e.g., through meaningfully available research licenses..
- Considering whether the opponent has received sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were that of a human expert.

An AI process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion.

See Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of AI output may overcome the problem of inexplicability by showing through an expert how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

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

Under this rule, AI-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. But there may well be a difference at trial when AI evidence is found by the court to be admissible under this rule, because while an expert is ordinarily required to provide the foundation for admissibility, it would be possible for a proponent to offer that evidence at trial without an expert. A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of AI output. The opponent may be able to introduce reports and data, as well as expert testimony, to undermine the output. Or the opponent might be able to impeach the conclusion by showing prior inconsistencies or specific contradiction, akin to Rule 806. But in the end, the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable simply because it was produced by a machine.

The rule provides for pre-trial notice, as it is important that the significant reliability issues attend to AI evidence be handled before the trial. The notice provision is intentionally flexible. See the notice provisions in Rules 404(b) and 807. The proponent of AI evidence must also consult the Federal Rules of Civil and Criminal Procedure to determine pretrial obligations.

Rule 707(d) specifically provides that the rule is not applicable if the reliability of an AI process is subject to judicial notice.

The definition of "artificial intelligence" in Rule 707 is taken from the National Artificial Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)). That Act also notes that "[a]rtificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." This further elaboration by Congress should be considered in determining whether proffered computer-based information is subject to this rule.

Redraft 3: Expert Required for Foundation and at Trial

Rule 707. Evidence Produced by Artificial Intelligence

(a) General Rules. If evidence is a product of artificial intelligence and is offered without an expert witness, but would be subject to Rule 702 if testified to by a witness, the proponent must establish that the evidence:

(i) will help the trier of fact;
(ii) is based on sufficient facts or data;
(iii) is the product of reliable principles and methods; and
(iv) reflects a reliable application of the principles and methods to the facts of the case.

(b) Expert Foundation. The required foundation in (a) must be presented by an expert on the artificial intelligence process that generated the evidence.

(c) Expert at Trial. Evidence that is the product of artificial intelligence is not admissible unless a qualified expert on the process that generated it is subject to cross-examination at trial.

(d) Notice. The evidence is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the evidence — so that the party has a fair opportunity to meet it.

(e) Judicial Notice. This rule does not apply to facts that may be judicially noticed under Rule 201.

(f) Definition. In this rule, "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.

Committee Note

The admissibility of evidence generated by artificial intelligence (AI) raises questions about reliability. AI involves the use of a computer-based process or system to make predictions or draw inferences from existing data. The concerns about the reliability of that process are akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. New Rule 707 provides that if the product of AI would be treated as expert testimony if coming from a human expert, its admissibility is subject to requirements that are the same as imposed on human experts. That includes satisfying the requirements of Rule 702, and also that an expert will be subject to cross-examination at trial.

The rule applies when AI-generated evidence is offered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of AI-generated information. Moreover, Rule 707 requires that the foundation must be established by an expert, and that an expert must be subject to cross-examination at trial. That is because the reliability of AI technology is not sufficiently understood to contemplate admission of AI opinions without an expert to establish foundation before admission and at trial.

If the AI output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony — and of course applicable under Rule 707. See Adv. Comm. Note to Rule 902(13) (noting certification authenticating computer output "does not preclude an objection that the information produced is unreliable").

This rule is not intended to encourage parties to opt for AI evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer AI evidence instead of a live expert. These reliability standards will be impossible to meet without presenting expert testimony.

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

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for an AI process is sufficiently representative to render an accurate output for the population involved in the case at hand.
- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.
- Reviewing information about what records the system keeps, what is deleted, and whether the output can be reproduced or audited.
- Considering whether the process or system has been subject to evaluation by entities independent of the developer, and whether the opponent and independent evaluators have access to the system, e.g., through meaningfully available research licenses.
- Considering whether the opponent has received sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were that of a human expert.

An AI process can sometimes develop in such a way that nobody is able to explain how the system has reached a result, because the machine has developed the ability to program itself. If the process cannot be explained then the court should in most cases find that the proponent has not established more likely than not that the methodology is reliable. As with experience-based testimony, the proponent is required to show how the methodology leads to a reliable conclusion. See Committee Note to the 2000 amendment to Rule 702 ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion

reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). That said, the proponent of AI output may overcome the problem of inexplicability by showing through an expert how the machine got trained and establishing, for example through validation studies, that the process leads to a low rate of error.

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

Under this rule, AI-generated output will be regulated pre-trial by the court in essentially the same way as expert testimony. And, because an expert must also be presented at trial for cross-examination, the end result is that Rule 707 mandates the same outcome for AI evidence as provided by Rule 702.

The rule provides for pre-trial notice, as it is important that the significant reliability issues attend to AI evidence be handled before the trial. The notice provision is intentionally flexible. See the notice provisions in Rules 404(b) and 807. The proponent of AI evidence must also consult the Federal Rules of Civil and Criminal Procedure to determine pretrial obligations.

Rule 707(c) specifically provides that it is not applicable if the reliability of an AI process is subject to judicial notice.

The definition of "artificial intelligence" in Rule 707 is taken from the National Artificial Intelligence Initiative Act of 2020 (116 Pub. L. 283 (2021)). That Act also notes that "[a]rtificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." This further elaboration by Congress should be considered in determining whether proffered computer-based information is subject to this rule.

V. Next Steps

Assume that one of the drafts above, perhaps with some amendments, is acceptable to the Committee. What would the next step be if the Committee approves a draft?

These drafts are substantially different from the rule as issued for public comment. There might be a debate about whether the changes are so substantial as to require republication — especially because there is no solid, fully agreed upon standard for when a rule that is changed must be republished. But it seems clear as a matter of policy that the rule, if approved by the Committee, should be sent out for a new round of public comment. The rule covers a complex subject that is fast developing. It pays to get it right. The possible downside is that the same characters who misconceived the rule that was originally sent out will be the ones who comment on the redraft. Virtually every commenter that proposed a different solution had their own fix —

that few others agreed with. On the other hand, another year of AI developments might mean a number of new sources of comments. And of course, some of the public comments received were thoughtful and helpful, and actually led to the solutions in the redraft, and so comments from those same sources will be helpful.

Assuming another round of public comment is the prudent course, the question for the Committee is whether it should be proposed for this August or the next one. It seems that there is a pretty straightforward, rulemaking-based answer to the question of timing. As we all know, the Committee has also been working on, and has tentatively approved, a new Rule 901(c) to cover deepfakes. It makes eminent sense for the Committee to issue an "AI package" with both rules proposed together. So, when the Committee believes the time is right for the deepfake amendment, it would be ideal if it is proposed for a common public comment period with the revised Rule 707.

U.S. Department of Justice

950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

February 13, 2026

Via Electronic Submission
The Honorable Jesse M. Furman, Chair
Advisory Committee on Evidence Rules
One Columbus Circle Northeast
Washington, D.C. 20544

Re: Proposed Federal Rule of Evidence 707

Dear Judge Furman:

The Department of Justice is the nation's largest litigator, with cases that run the spectrum of criminal, civil, bankruptcy, antitrust and tax. Proposed Rule 707, in our view, is not necessary because courts have effectively dealt with machine-output for many years, and enacting Rule 707 could have profound and non-salutary impacts on litigation, including raising costs and making trials more complex and less affordable. In addition, there is no clear understanding of how the proposed rule would work in practice, which itself cautions against enactment.

The Department is not alone in urging caution. Public comment and testimony have overwhelmingly favored additional study and discussion, and civil litigators have overwhelmingly opposed the amendment in its current form. And while criminal defenders have expressed support, that support appears to be based on a misunderstanding of how the rule would function, at least as we read the proposal. Nor is there a simple fix that would not require revision and republication. While we appreciate the Advisory's Committee's continued work on these difficult issues, more work remains to be done.

I. There is Not Yet a Demonstrated Need for the Rule.

Proposed Rule 707 reflects a proactive effort to address an unknown technological future, designed to be capacious enough to accommodate unknowns. But by addressing what is largely a prospective problem using a broad approach, the rule will only achieve uncertain future benefits at the present cost of additional uncertainty and confusion. Before re-publishing, the Advisory Committee should better define the problem that the proposed rule seeks to solve.

To date there have been a handful of anecdotal cases and theoretical academic papers, but no real demonstrated need for the proposed rule. Nor has there been a meaningful showing that the existing Rules of Evidence and rigorous adversarial process are inadequate for dealing with machine-generated evidence. The current rules already require parties to authenticate machine outputs, demonstrate reliability when experts rely on them, and satisfy baseline competency and relevancy standards for any evidence. And courts routinely entertain objections to lay testimony on the grounds that specialized knowledge is required. Under Federal Rule of Evidence 611,

judges have wide discretion to control the "mode" of presenting evidence to effectuate a determination of the truth. Fed. R. Evid. 611(a). There are few to no concrete examples of where the Rules of Evidence, when applied to machine-generated outputs, have failed the parties or courts in actual litigation. Consistent with the common law tradition, it would be prudent to let courts and litigants address machine-generated evidence through disputes as they arise, rather than attempting to impose a sweeping solution to what remains a largely hypothetical concern.

Likewise, from an analytical perspective, the proposed rule suffers from a lack of real-world examples showing that the present framework is producing unreliable outcomes. Lacking such examples, there is no meaningful way to assess the magnitude or frequency of such problems, much less to scope the rule to solve those problems. As a result, there is no way to assess the net benefit of the proposed rule. In the absence of a demonstrated need, Proposed Rule 707 is largely a technology-centered solution in search of a problem. The benefit of a new and potentially impactful rule of evidence that would by its terms almost never apply seems outweighed by the unintended consequences it would certainly cause.

II. Proposed Rule 707 Will Cause Confusion in Practice.

A. How the Rule Would Be Applied is Unclear.

Although the proposed rule is concise, neither the courts nor parties are likely to understand when and how it applies. The proposed rule purports to apply if "machine generated evidence" is offered "without an expert witness" but would otherwise be subject to Rule 702 if it were offered by a human. By its terms, then, Rule 707 will only apply if the information would otherwise require an expert to admit it under Rule 702. The Advisory Committee's stated intention is that machine generated information that is commonly recognized as reliable – or subject to Rule 201 judicial notice as such – would not require an expert and thus would fall outside Rule 707. It was also the stated objective of the Advisory Committee not to change or interfere with the current application of Rule 702, a rule that was amended only recently after years of study and debate.

Accordingly, if Rule 707 is not intended to alter current practice under Rule 702, then the following examples of machine-generated outputs should not fall within Rule 707 because lay people accept and rely on their outputs, and they are routinely admitted in court and accepted by judges without expert testimony.

- *Audio-visual recordings and depictions***.** Security cameras, audio recording systems (like Securus for jail calls), handheld personal recording devices, and even basic cameras all save information about a historical event. The output from those systems — the resulting AV file that would be played in court — is a machine generated output created by the recording system. A party can generally introduce such evidence via a lay witness testifying to the location of, for example, the security cameras and the authenticity of the recordings. Because lay witnesses routinely admit this kind of machine-output, Rule 707 should not apply. Were the contrary true, the Committee would be changing Rule 702's requirement, such that a party would also have to routinely adduce evidence showing the reliability of whatever recording device was used.

- *User interaction logs***.** Many machine systems automatically log when and how a human interacts with the system. Machine-generated logs of user activity can have an important role in litigation. For example, access control readers can record when a particular security badge was used to open a locked door. Or a toll plaza, either via license plate capture or radio frequency identification, can record when a particular motor vehicle passed by. Likewise, computer systems record who accessed the system, when, and, if the user is remote, from what IP address. This sort of machine-generated information is then populated into a log or audit trail, which a human could later review and rely upon when attempting to determine historical events. While witnesses can testify about the meaning of these logs, very rarely can those same witnesses testify about the source code in the particular program or explain how the inner workings of the particular logging system make the system reliable.

- *Computer file metadata***.** Computer systems automatically generate substantial information about the files that a user creates. This information about a file is called metadata. For example, whenever a person creates or modifies a document in Microsoft Word, the computer automatically generates metadata, such as when the document was created or modified, the author, and where it was saved, among many other metadata fields. Likewise, mobile devices and many modern cameras automatically append to an image or video-file information such as when and where the image or video was captured. This sort of evidence can be highly probative. For example, a personal injury plaintiff might have taken post-accident photographs or videos that contradict the extent of their injury claims. Or the timestamp associated with an email might show that a party had notice before it acted in violation of a contract. Metadata often is so accessible that lay witnesses can look at it and explain its meaning to a case. Thus, it should not be subject to Rule 707.

- *Cellphone and other digital device extractions***.** In criminal matters, the United States often obtains search warrants that allow it to extract the contents of a digital device. This extraction essentially copies information out of the device, removing data from the device manufacturer's proprietary systems and allowing the information to be reviewed and presented in court. Courts routinely hold that the content of a Cellebrite cellphone extraction is non-opinion testimony that does not require an expert witness. *See, e.g.*, *United States v. Williams*, 83 F.4th 994, 996-97 (5th Cir. 2023) ("Every circuit that has addressed this question—whether evidence obtained with Cellebrite technology requires expert testimony for admission—has answered it in the negative."). Because courts routinely accept this evidence without an expert witness, Rule 707 would not apply.

- *Measurements from medical instruments***.** A hospital room is replete with scientific instruments that automatically monitor a patient's vital signs and, in many cases, automatically populate a patient's medical records with their outputs. These scientific instruments are complex tools, and a lay person cannot explain how they work. Nonetheless, their outputs are commonly accepted as establishing baseline facts in medical malpractice and many other types of personal injury or tort cases. If Rule 707 were to routinely apply to such evidence, parties could face insurmountable challenges of having to demonstrate the reliability of each such machine-generated output. This could be especially problematic for medical records originating from third parties (e.g., a treating provider in a personal injury case), as well as for the outputs from any device that was manufactured by an entity that is not a party to the case.

- *Accounting software***.** Modern accounting software produces an enormous amount of machine-generated data, including automated calculations, reports, and even AI-assisted classifications of transactions. These outputs function as business records, and companies rely on these tools without independently verifying every output from the system. As a business record, they do not require an expert, and Rule 707 would not apply. But if Rule 707 were to apply to such systems, it could turn routine financial statements into a multi-layered assessment of the reliability of the many inputs and different systems that the software uses to generate an output.

For all the machine output described above, Rule 707 should not apply because the output is not subject to Rule 702. On the other hand, if the Committee contemplates that Rule 707 would apply to the output described above, it is fundamentally broadening the scope of Rule 702's requirements and changing existing precedent. The paradox to the Rule 707 proposal is that either the output requires an expert to admit it, in which case Rule 702 already applies, or the output is not subject to 702, as in the examples above, and Rule 707 would not apply. *See* diagram, attached, (illustrating the Rule's apparent operation).

It is not clear, however, that proponents of Rule 707 view its operation in the same way. Take, for example, Cellebrite extraction. Every circuit court to address the admissibility of items contained within a Cellebrite report—including, for example, "any messages, videos, or emails sent, received, or recently deleted[,] along with the apps used on the phone"—through a lay witness has upheld it. *See Williams*, 83 F. 4th at 995-97; *United States v. Chavez-Lopez*, 767 F. App'x 431, 434 (4th Cir. 2019); *United States v. Marsh*, 568 F. App'x 15, 17 (2d Cir. 2014); *United States v. Ovies*, 783 F. App'x 704, 707 (9th Cir. 2019), cert. denied, 140 S. Ct. 820, (2020).[1] Yet, proponents of Rule 707 argue that Rule 707 *would* apply, because the Cellebrite extraction output is "not beyond reasonable dispute," irrespective of judicial findings admitting Cellebrite report results without applying Rule 702. Thus, the Rule's proponents necessarily view Rule 707 as a change to the existing law governing Rule 702. Rule 707's proposed Note hints at the same objective. Indeed, the Note explains that a technician who enters a question and prints out an answer from a tool would constitute a situation where a party must independently demonstrate the reliability of the underlying tool. This fundamental lack of consensus as to how Rule 707 would function in practice should raise a red flag, warranting a pause and additional study.

B. The Terminology of the Rule Will Create Confusion, Increasing Costs for Litigators and Burdens on the Court.

Broad and undefined terms such as "machine-generated evidence" and "output of simple scientific instruments," provide little guidance for litigators and are not defined in the Rule, and the Committee Note fails to fill the gap. The examples provided in the Committee Note all describe systems and processes. Whether they include software and algorithms embedded within a "machine" is not clear. Without a specific definition, the draft rule conflates distinct concepts by assuming that a "machine" generates evidence, when in fact, an algorithm embedded within the software is the generative application. Accordingly, courts could interpret "machine-generated"

[1] Many of these cases distinguish the admissibility of the contents of an extraction report from testimony analyzing the extracted information to form an opinion about the information's meaning, such as an opinion that a gap in a system log indicates deleted information. The government typically presents such testimony under Rule 702.

to include all software, algorithms, and models. The term "scientific instruments" is also not self-defining. Instruments, like a calculator or a thermometer, are not "*scientific* instruments" as is a GC/MS instrument for drug detection or a genetic analyzer for DNA. Rule 702 separates "scientific" from "technical or other specialized knowledge." Simple scientific instruments are derived from applied technology, not "science," as the draft rule assumes. At bottom, choosing workable terminology that will withstand the test of time is itself a daunting challenge. Technical terminology can mean different things in different contexts and will almost certainly change as technology advances.

Even the supposedly narrower term "machine-generated outputs" has an undefined scope. Such outputs are difficult to categorize as expert or lay, and it is all too easy to conflate common usage with technical simplicity. For instance, the digital cameras built into mobile devices are extremely sophisticated products, but the resulting videos and photographs are routinely admitted through lay witnesses even though a lay person could not describe how the camera reliably recorded the world, let alone do so with any degree of technical sophistication. Although the proposed rule attempts to remediate this issue by tying the rule of admissibility for machine-generated evidence to what a lay person (versus an expert) would be able to verify, this only invites line-drawing issues. For example, what if that same video were taken using an infrared home security camera, allowing the camera to "see" in the dark in a way that a human cannot? What if it were a thermal camera, revealing the world in ways that a human eye cannot see? What if the video were overlayed with a time and date stamp? What if the camera used frame-stabilization — either via physical features (such as moving the lens elements or shifting the camera sensor) or electronic features (such as digital processing or using more advanced AI-powered stabilization tools) — solely for the purpose of making the resulting image more clear?

If Rule 707 were adopted and applied as broadly as its terms permit, these sorts of issues could permeate any case. Indeed, although generative artificial intelligence is relatively new, modern society is replete with computers and sensors built into virtually every aspect of day-to-day life and business. Courts have long allowed litigants to introduce machine-generated information without forcing parties to demonstrate at length the data the machine relies upon, its reliability in the community, or the full details of the process by which that machine operates. If given a new rule for challenging such evidence, a shrewd lawyer could find complexity in the simplest of things, and the scope of this rule leaves much potential for confusion as well as for mischief.

Moreover, while the Advisory Committee attempts to cabin the rule by excising the output of "simple scientific instruments," this exception demonstrates how challenging the rule would be to apply. The Committee note states that the exception should apply to outputs from instruments "that are relied upon in everyday life," and then identifies three instruments that meet this carveout, two of which are different types of thermometers: a "mercury-based thermometer" and a "battery-operated digital thermometer." But this focus on particular types of thermometers illustrates a broader problem. There are many other types of simple thermometers (for example) that are built into consumer products and relied upon in everyday life: thermocouples and resistance temperature detectors (commonly found in household ovens), bimetallic strip thermometers (found in some older kitchen appliances), and thermistors (commonly found in household refrigerators) are all

commonly-relied-upon temperature-sensing devices. Some of these may operate in a particular device on a battery; others might draw power with the device itself. Are some or all of these intended to be included in the carveout that the Advisory Committee proposes or implicitly excluded because there is some facet of their operation that is considered less reliable or to which the proposed rule otherwise applies? Of course, thermometers by themselves are not the point. But for any type of outputs within the scope of the proposed rule there are numerous iterations, any of which might or might not be included in an ill-defined "simple scientific instrument" exception.

In addition, by including an exception for simple scientific instruments, the Advisory Committee is again encouraging an unwarranted expansion of the expert witness requirements of Rule 702. Under current law, a lay witness would be allowed to testify under Rules 602 and 701 to a reading of a simple scientific instrument, such as a digital thermometer—indeed, such testimony is not even an opinion or inference, it is merely a factual observation. Rule 702 simply would not apply. Thus, by suggesting that Rule 707 might apply to simple outputs (but for the Rule's exclusion of simple scientific instruments), the Advisory Committee is suggesting that Rule 702 should also be extended to cover such testimony. As explained above, if one excludes from the scope of Rule 707 evidence that courts currently admit without an expert, it is difficult to see what purpose Rule 707 serves. In other words, a simple thermometer is not now subject to Rule 702 (or even Rule 701), and thus Rule 707 would be inapplicable. It makes little sense to say that such evidence is "excepted" from Rule 707 when it does not fall within the Rule in the first instance. At minimum, the "simple scientific instrument" exception will only create more confusion, and litigation, about the differentiation between lay and expert testimony and between fact and opinion testimony.

C. The Proposed Rule Will Create Significant Uncertainties About Existing Expert Witness Litigation Practices Under 702.

Under current practices, expert witnesses often support the introduction of machine-generated evidence that they rely on in their field, even if the witness is not an expert in how the machine works. By its text, Rule 707 should not come into play once a Rule 702 expert is called to admit the evidence. Were Rule 707 adopted, however, one could foresee an argument that the proponent of this evidence must not only offer a witness who can interpret the meaning of the machine-generated output, but also a witness who can demonstrate that the machine-generated output is reliable. This would dramatically change and increase the cost of litigation. For example:

- The United States defends a significant amount of medical malpractice and other medico-legal litigation under the Federal Tort Claim Act. These cases invariably include machine-generated evidence (*e.g.*, fetal heartbeat monitoring strips; pulse oximeter recordings; electrocardiogram strips; images created by magnetic resonance imaging machines). While parties often retain expert witnesses to *interpret* these machine-generated outputs, the experts do so in their capacity as medical professionals who have used and relied on similar machine-generated outputs in their education, training, or practice. And the underlying documentary evidence is admitted by lay witnesses (*e.g.*, hospital records custodians). Parties rarely, if ever, engage experts who can competently testify to the intricacies of how the medical instruments work or explain how the outputs from those instruments are reliable. That is because the devices are widely used and relied upon in

the field, meaning that their reliability is commonly accepted. Indeed, because many of these medical devices are proprietary products created by companies that typically have no involvement in the litigation, it could be difficult for a party to demonstrate the reliability of the machine-generated output.

- The United States also defends a significant amount of litigation arising from transportation accidents under the Federal Tort Claims Act and, similarly, often investigates crimes that involve the use of vehicles or where potential evidence may be found in a vehicle's electronic systems. Modern transportation equipment is replete with sensors that record internal and external information about a vehicle (*e.g.*, event data recorders in motor vehicles; infotainment systems that can store communications and location data; flight data recorders in aircraft; voyage data recorders in vessels). In motor vehicle collision litigation, for example, an accident reconstructionist can download event data recorder information and use it to help determine the events and extent of an accident. While the expert can use the machine-generated data in an analysis, an accident reconstructionist's expertise generally would not include being able to explain how the machine-generated data was created or why the data is reliable.

- The United States enforces environmental laws and itself can face liability arising from environmental contamination. Many environmental laws are predicated upon the existence of scientific instruments to measure the environment (*e.g.*, emissions monitoring in 40 C.F.R. § 75.1 *et seq.*; water turbidity monitoring in 40 C.F.R. § 141.13 *et seq*.; and other procedures for pollution monitoring in 40 C.F.R. § 136.1 *et seq.*). While these lawsuits involve experts who can use these instruments and interpret the results of the machine-generated output, courts generally do not require that the parties adduce evidence demonstrating the internal reliability of those scientific instruments.

- The United States procures a substantial variety of products and services and, as part of the contracting process, often specifies standards that these products or services must meet (*e.g.*, ear protection must meet certain noise reduction standards; structural steel must meet certain chemical composition and mechanical properties; an information technology system must meet certain performance standards). If there is a contract dispute or False Claims Act investigation into whether a government contractor met its obligations, expert witnesses would almost certainly use scientific instruments that produce machine-generated outputs to measure the product or service and determine its compliance with specifications. As with the examples above, such an expert would have expertise in using such tools but may not have expertise in the exact inner workings of the tool.

For the machine output described above, it does not appear to be the Committee's intent that Rule 707 would apply because the evidence is already being offered through an expert qualified under Rule 702. But it is not entirely clear that this is how events will play out in practice. And, on the other hand, if the Committee does contemplate that Rule 707 would apply to test the reliability of the machines that generated the output, it would fundamentally broaden the scope of Rule 702's requirements in a burdensome—and often unworkable—way.

D. Proposed Rule 707 Does Not Resolve Hybrid Workflows Where Humans and Machines Generate Information Together.

Many generative artificial intelligence tools attempt to ensure the reliability of any machine-generated output by using a human-in-the-loop system. For example, an AI transcription tool might draft minutes of a business meeting but require that a human review the draft before it is saved. Or a radiologist might use an AI tool to help analyze a medical image, even though the radiologist ultimately signs the medical record. In these situations, the final record reflects a joint human-machine product. If proposed Rule 707 applies to any portion of a record that was, at one time, shaped by a machine-generated output, litigants could be forced to dissect workflows, determine the machine's role in the ultimate output, and then assess reliability of that portion of the output. In many cases, such after-the-fact dissection would be impossible. Under current rules, however, courts typically admit these outputs by virtue of the fact that a human was involved in the final output.

III. Proposed Rule 707 Lacks a Practicable Procedural Framework and as a Result Will Create Confusion and Increase Litigation Costs.

Proposed Evidence Rule 707 lacks the necessary procedural guidance for a party to comply with the rule. As proposed, Rule 707 would be out of sync with the rules of civil and criminal procedure. It will create traps even for sophisticated parties and may cause unresolvable timing issues under common civil and criminal case management practices.

To start, Rule 707 does not set forth any process that a party must follow when it intends to introduce evidence subject to the rule. The Advisory Committee's Note suggests that "the notice principles that would be applicable to expert opinions" under Rule 702 "should be applied to output offered under" Rule 707. But the Federal Rules of Civil and Criminal Procedure set forth their own framework for notice, objection, and resolution of challenges to expert evidence. For example, Civil Rule 26(a)(2) contains detailed procedural requirements for expert testimony presented under Rule 702, 703, 705, including rules regarding the timing and content of expert disclosures. Likewise, Criminal Rules 16(a)(1)(G) and (b)(1)(C) contain detailed disclosure requirements for expert evidence in criminal cases. Because these procedural rules refer only to Rules 702, 703, and 705, and because there is no accompanying effort to amend the Civil and Criminal Rules to include Proposed Rule 707, the current rules of procedure will not apply to Proposed Rule 707.

Nor can the lack of procedural guidance under Proposed Rule 707 be resolved by hoping that parties and courts will follow the existing rules by analogy. The differences between machine-generated evidence and expert evidence under Rule 702 are too great, and Proposed Rule 707 would require its own procedural rules. Parties who intend to introduce such evidence must understand their obligations; adverse parties must be assured that they will receive sufficient information to allow them to understand and respond to such evidence; and courts must be given a framework to reliably resolve disputes about the adequacy of a Rule 707 disclosure. Proposed Rule 707 does not currently address this issue. The resulting ambiguity will create confusion, invite costly disputes over whether a party has satisfied its obligations, and result in courts applying inconsistent requirements to disclosure of the same evidence.

Even if the parties to a case and a court were to agree to follow the existing notice and disclosure obligations for Rule 702 evidence by analogy, such efforts would quickly falter because the existing expert disclosure rules do not readily translate to Rule 707. For example, the Civil and Criminal Rules require that, for most experts, the proponent must produce information about the expert's qualifications. There is no machine equivalent to an expert witness' *curriculum vitae*, much less clarity on what other qualifications would need to be shown about the machine. Likewise, the Civil and Criminal Rules require that, for most experts, the proponent must list the prior four years of the expert's testimony. It may be impossible for parties to make a similar disclosure for machine-generated materials: if the machine-generated output comes from a third-party's tool, especially if such a tool is commercially available or widely used, there is no way for a party to know how many times that tool has been used in other litigation. In addition, while the Civil and Criminal Rules require that, for most experts, the expert provide a complete statement of their opinions and the basis and reasons for them, this requirement may not readily apply to machine-generated outputs. For example, when a scientific instrument is used to discern or measure some fact about the world — such as the use of gas chromatography-mass spectrometry to create a graph that can be used to identify an unknown chemical compound — the instrument produces an output that is unaccompanied by an explanation of how the machine generated that particular outcome.

The existing disclosure requirements in the Civil and Criminal Rules might also be underinclusive when applied to Rule 707. For example, Rule 707 is silent on whether a party must disclose all human-provided inputs into the machine; it is silent on whether a party must disclose any prior iterations of human-provided inputs (*e.g.*, efforts at "prompt engineering" for generative artificial intelligence); it is silent on whether or to what extent a machine's internal parameters or configurations would need to be disclosed; it is silent on the extent to which a party must disclose how the machine generated its output; and it is silent on the extent to which an opposing party could demand access to the machine or provide different inputs for the machine to then create outputs. Indeed, for machine learning, outputs can never be perfectly replicated because the machine is continuously learning.

Finally, the Advisory Committee appears to contemplate a level of disclosure for machine-generated outputs that could impose impossible burdens on a proponent of Rule 707 evidence. For instance, the Committee Note suggests that "the court should consider . . . the training data for a machine learning process." But if the tool at issue is created by a third-party or relies upon a vast amount of training data (such as databases of images or, in a real sense for many generative artificial intelligence tools, the contents of the internet), a party may not be able to readily produce such information, even though the party may have other, alternative means of validating the machine-generated output.

Proposed Rule 707 likewise does not resolve questions regarding the timing of disclosures under this rule. And if courts were to follow the Committee's suggestion that they adopt the same process as they would for Rule 702 evidence, this would create unavoidable negative impacts for case management and undermine the functioning of the proposed rule.

Civil case management orders typically set early deadlines for parties to disclose expert witnesses and, if applicable, produce their reports while discovery is open. These same orders typically set much later deadlines for *Daubert* or other challenges under Rule 702, often at or after

the close of discovery and during the time for dispositive motions or motions *in limine.* But it would be unworkable for Rule 707 to follow this procedural approach. The proponent of evidence under Rule 707 bears the burden of establishing admissibility. But an opponent's challenges to the reliability of machine-generated evidence could be lodged after expert disclosure deadlines have passed and likely after the close of discovery. By that point, the proponent can no longer add, substitute, or disclose any new expert or other evidence to address a reliability concern for the Rule 707 evidence (at least, not without modifying a case management order, resulting in substantial impacts on the overall progress of a case).

This creates a procedural no-win scenario. On the one hand, a party wishing to introduce Rule 707 evidence could disclose an expert under Rule 702 to testify to the reliability of the machine-generated evidence. But this would render Rule 707 superfluous by its terms because then Rule 702 would govern. Regardless, very few litigants can afford to hire an expert witness as a prophylactic or backup measure. On the other hand, a party could choose not to disclose an expert witness to testify to the output of the machine-generated evidence, but then the party would be unable to respond to an admissibility challenge by adducing new evidence to help carry their burden of establishing admissibility under Rule 707.[2] This circularity will arise whenever an opponent raises a challenge under Rule 707, and it defeats the rule's intended purpose.

At least, if the Committee moves forward with Rule 707, it should explicitly include procedures for ensuring disclosure sufficiently early in the process to allow the parties and the court to conduct the case in an orderly fashion. Including such a procedure would not be out of place in the evidence rules. Multiple other rules of evidence address disclosure requirements and timing. *See, e.g.*, Fed. R. Evid. 404(b)(3); 412(c); 413(b); 807(b); 1006(b).

IV. The Advisory Committee Note to Proposed Rule 707 Makes the Rule More Confusing and Arguably Raises the Bar on the Admission of Expert Testimony under Rule 702.

In its year 2000 amendments to Federal Rule of Evidence 702, the Advisory Committee recognized the need to provide "general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." The Advisory Committee did so, explaining that there are many ways in which a party could demonstrate the reliability of Rule 702 evidence and offering a non-exhaustive list of factors that a court could consider. Proposed Rule 707 intends to adopt Rule 702, but the note is far more rigid in how it envisions that reliability could be established. Machine-generated evidence is different from expert opinion testimony and the normal reliability assessments used under Rule 702 may not work for Rule 707. For example, for expert witnesses, a common approach is to assess the reliability of the expert's methodology and whether the expert reliably applied that methodology. *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 US. 579, 592-94 (1993). The Note to Rule 702 emphasizes the flexible nature of that inquiry.

[2] Because Rule 707 only applies if Rule 702 would apply to similar testimony, it is hard to conceive of a way in which a party could defend the admissibility of Rule 707 evidence that itself would not delve into technical or other scientific topics requiring expertise to explain.

The Note for Proposed Rule 707, however, envisions a much more restrictive test that would be impractical in many cases. The Rule 707 Note suggests, for example, that a reliability analysis might focus on aspects of the machine's internal processes. But there are many ways to validate machine-generated output that do not require a detailed examination of the machine's internal processes. The focus on internal processes and validation could be used as a wedge by an opposing party to demand access to proprietary tools (tools that even the party who is using them does not fully control or have access to if the tool came from a third-party vendor). This could hamstring parties who wish to introduce machine-generated evidence that is routinely relied upon in the real world. And this could drastically increase costs for third parties who supply such tools and then find themselves the subject of discovery requests seeking information about the reliability of their tools.

V. Proposed Rule 707 Creates Increased Risks of Strategic Behavior and Unfair Risks for Repeat Litigators.

As a general matter, the admissibility of expert testimony under Rule 702 is case-specific: did an expert properly apply scientific or technical principles to the facts of a case? But challenges under Rule 707 most likely will be directed at a tool as a whole: is this tool (that may be used in many cases) a reliable tool? The broader potential applicability of a court's ruling under Rule 707 could encourage deleterious behavior. For example, a company that produces a certain tool may look to invite a Rule 707 challenge, with the hopes that overcoming such a challenge could provide a marketing technique to distinguish itself from competitor products.

The tool-based nature of a Rule 707 ruling also presents unfairness for repeat litigants who rely on frequently challenged tools. For instance, tools that are repeatedly used by one party in litigation (*e.g.*, crime lab instruments), could be subject to challenges in every case where the party has a different opponent, such as individual criminal defendants. If the repeat player wins a challenge, it will not prevent a similar challenge in the next case. But if the repeat player loses even a single such challenge in any court in the nation, then future opponents would seek to invoke estoppel-type principles to bind the repeat player to that prior ruling. This changes litigation incentives, encouraging some parties to over-litigate Rule 707 disputes, in the hope that they win a ruling on a tool and not a ruling merely for their case.

VI. Rule 707 is a Mismatch with Forensic Science.

The proposed Committee Note suggests that a Rule 707 analysis will usually involve a validation process "in circumstances sufficiently similar to the case at hand." To the extent the Note intends to countenance providing the opponent access to the program or machine for purposes of independent validation, that is not a workable concept in forensic science. It is also not feasible for a laboratory to outsource the validation of its methods, instruments, or software. The validation conducted by each laboratory is specific to its environment, instruments, personnel, and the intended use of its applications or use of its outputs. A "general" or "independent" validation (by an academic institution, for example) to determine whether a forensic instrument or software "works" is meaningless because it does not test the application's fitness in a specific, operational testing environment with its own unique conditions, parameters, and intended use or application. This point is reflected in laboratory accreditation requirements.

International Standard ("ISO") 17025, for example, is the worldwide standard against which all accredited testing and calibration laboratories of any kind are assessed. Requirement 7.2.2.1 of that standard addresses validation *within* – not between – individual laboratories. In addition to accreditation requirements, arguments that "independent" validation should be required for admissibility under Rule 702 have been rejected in the numerous cases addressing the admissibility of probabilistic genotyping software. *See, e.g.*, *U.S. v. Gissantaner*, 990 F.3d 457 (6th Cir. 2021) (upholding reliability of STRmix based on lab's internal validation and low rate of false positives); *U.S. v. Anderson*, 2023 U.S. Dist. LEXIS 86810 (M.D. Pa) (The validity of peer-reviewed studies, for purposes of the *Daubert* reliability analysis, does not depend on whether journal reviewers had access to a software program's source code); *People v. Wakefield,* 2022 N.Y. LEXIS 819 (N.Y. Ct. App. 2022) (Independent validation of probabilistic genotyping software can be established by labs that use the software in-house); *People v. Davis*, 290 Cal.Rptr.3d 661 (Cal. Ct. App. 2022) ("[A] scientific technique or method need not be subject to testing and/or assessment by the scientific community at large to satisfy the requirement of general acceptance.")

* * *

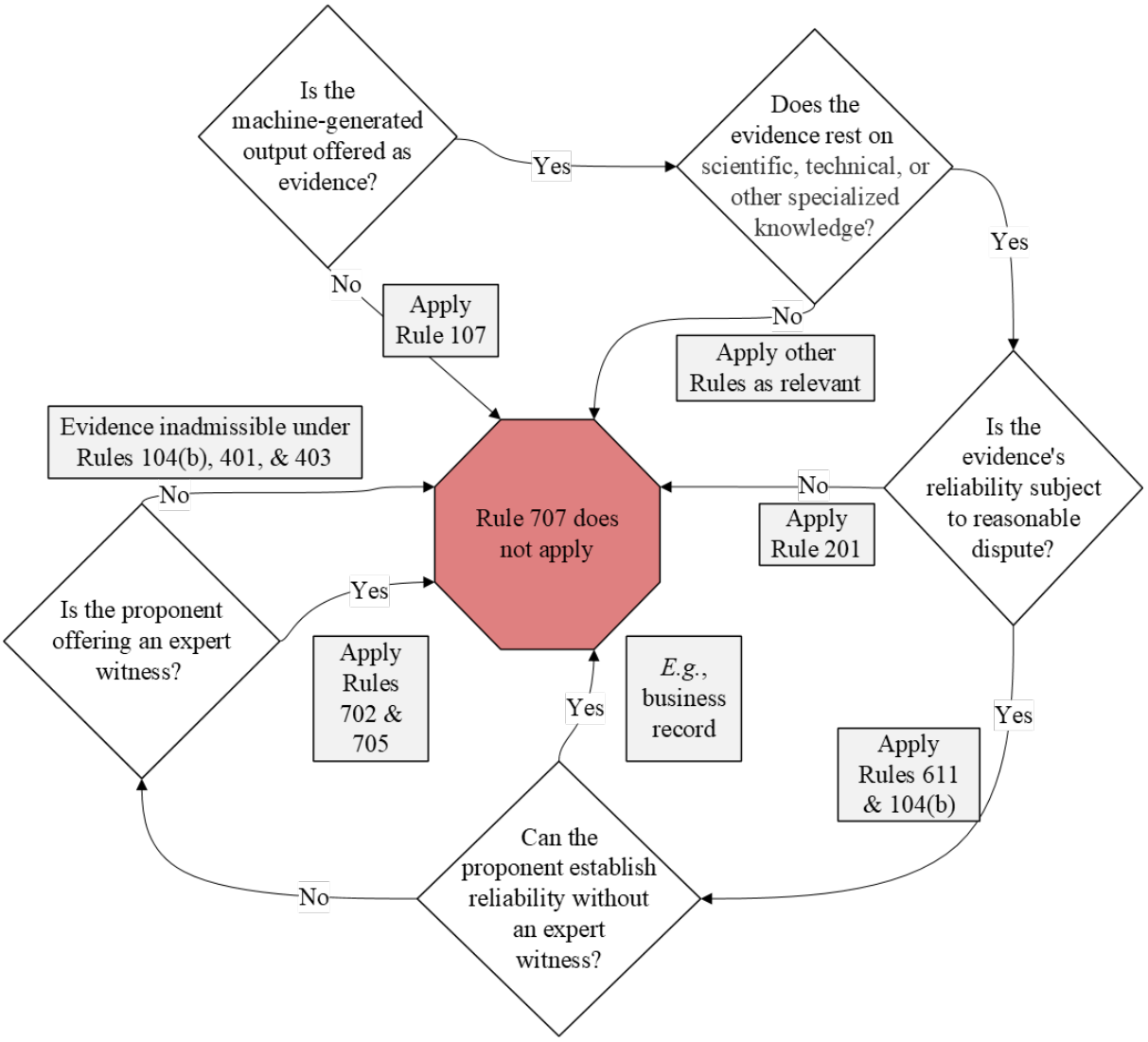
In short, Rule 707 is likely to create problems where few problems currently exist. Courts have the tools to require an expert witness where one is needed, and courts are accustomed to applying Rule 702, including to machine output. We recommend that the draft be tabled and revisited at a later time if a demonstrated need arises. At minimum, the current draft should not be adopted, and the Advisory Committee should continue its study of the issue.

Sincerely,

Brendan Chestnut

Brendan Chestnut
Principal Deputy Assistant Attorney General
Office of Legal Policy

This diagram shows how the current rules provide the necessary tools for courts to test and assess machine-generated output, and how proposed Rule 707 would serve little purpose:



January 15, 2026

To: Evidence Rules Advisory Committee
Re: Nicole Owens Written Testimony Regarding Proposed FRE 707
From: Nicole Owens, Executive Director, Federal Defender Services of Idaho

Dear Rules Committee,

Thank you for the opportunity to submit written testimony regarding proposed Federal Rule of Evidence 707. These comments are based on my experience defending criminal cases in federal court, where evidentiary reliability, adversarial testing, and the jury's ability to assess proof are essential to the fairness of proceedings.

I. Introduction

I support the Advisory Committee's core objective: preserving Rule 702's reliability requirements when machines perform expert functions. As machine learning and related technologies are increasingly used to generate analytical conclusions, the Rules of Evidence must ensure that these conclusions are subject to the same reliability safeguards that apply when those conclusions are offered by human experts.

My comments respond primarily to concerns raised by the Department of Justice that Rule 707 addresses a problem that is not occurring in practice and that existing evidentiary rules are sufficient to manage any issues related to machine-generated evidence. This is not true and the committee should pass Rule 707.

II. The Absence of Reported Cases Does Not Reflect Trial-Level Reality

The argument that Rule 707 is unnecessary because there are few reported appellate cases involving machine-generated evidence offered without expert testimony does not reflect the reality of current trial practice.

This issue is occurring now. Machine-assisted analytical tools are already being used in criminal investigations and prosecutions to perform tasks such as pattern recognition, probabilistic matching, classification, and the enhancement or interpretation of audio and visual evidence. In court, the outputs of these systems are increasingly introduced through law enforcement witnesses, custodians, or case agents who did not design, test, or validate the underlying systems and who cannot explain their analytical foundations.

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These evidentiary questions frequently arise at the trial level and are often resolved without written opinions or appellate review. As a result, the absence of reported decisions does not indicate that reliability scrutiny is occurring; rather, it reflects that courts are addressing these issues inconsistently and without clear guidance. That is the posture in which Rule 707 is proposed. Courts are currently left to decide, on an ad hoc basis, whether machine-generated conclusions trigger Rule 702, can be admitted through lay testimony, or should be treated as routine technical outputs. The result is uneven treatment of similar evidence across courts and cases.

Litigation incentives further exacerbate this problem. Machine-generated outputs often appear neutral or objective to jurors, even when their assumptions, limitations, or error rates are unknown. Without a clear rule, these conclusions may reach the jury without the reliability determinations that would be required if the same analysis were performed by a human expert.

Rule 707 responds to this present and practical problem by providing courts with a consistent framework for determining when machine-generated evidence functions as expert analysis and must therefore satisfy established reliability standards. It promotes uniformity, predictability, and fairness in the treatment of evidence that is already appearing in courtrooms today.

III. Existing Evidentiary Rules Do Not Fully Address the Issue

The Department of Justice suggests that Rules 702, 901, 902, and 403 adequately address the admissibility of machine-generated evidence. In practice, these rules leave a gap when a machine performs the work of an expert but no expert witness is offered.

Rule 702 applies only when a witness offers expert testimony. When a party introduces a machine-generated conclusion directly, without an expert adopting or explaining it, Rule 702 may not be triggered at all.

Authentication rules establish that a system produced an output, not that the output is reliable or appropriate for the task it purports to perform. Rule 403, while important, assumes admissibility and focuses on balancing prejudice rather than ensuring methodological reliability in the first instance.

Rule 707 fills this gap by requiring courts to evaluate reliability when machine-generated evidence functions as expert analysis, regardless of whether a human expert testifies.

IV. Proprietary Systems Increase the Importance of Judicial Gatekeeping

An additional concern is the growing reliance on proprietary machine-learning systems developed and maintained by third-party vendors. These systems often involve protected training data, undisclosed validation processes, and limited transparency regarding how conclusions are generated.

In such cases, litigants and courts may lack access to information necessary to assess whether the system was reliably designed, tested under conditions relevant to the case, or appropriately applied. The risk is not simply that the opposing party cannot challenge the evidence effectively, but that the court itself may be unable to determine whether reliability can be evaluated at all.

Rule 707 does not mandate disclosure of proprietary source code or eliminate the use of such systems. It ensures only that when a party seeks to introduce a machine-generated conclusion that substitutes for expert judgment, the court must first determine whether sufficient information exists to assess reliability. In the absence of such a rule, lack of transparency may inadvertently function as a reason to bypass expert scrutiny rather than a reason for careful evaluation.

V. Cross-Examination and Confrontation Values Support Rule 707

Although Rule 707 is not grounded directly in the Confrontation Clause, it reflects the same foundational principle: evidence carrying analytical or inferential weight should be subject to meaningful adversarial testing.

Cross-examination of expert witnesses allows inquiry into assumptions, methodological choices, limitations, and the application of general principles to specific facts. When a machine-generated output replaces a human expert, that function does not disappear, but it becomes more difficult to perform.

A witness who merely operated or received the output of a machine-learning system typically cannot explain how inputs were weighted, how uncertainties were resolved, or how conclusions were reached. Without reliability gatekeeping, juries may be presented with evidence that appears authoritative but cannot be meaningfully examined through cross-examination.

Rule 707 does not impose new confrontation requirements. It preserves the practical effectiveness of cross-examination by ensuring that expert-like conclusions are admitted only after a court has determined that they rest on reliable principles and methods and have been reliably applied.

VI. Conclusion

The Advisory Committee has identified a genuine and emerging evidentiary issue. Rule 707 does not discourage the use of new technologies, nor does it impose categorical exclusions. It preserves a longstanding principle of the Federal Rules of Evidence: expert-like conclusions should reach the jury only after a court has determined that they are reliable.

As machines increasingly perform analytical tasks once reserved for human experts, the Rules must ensure that reliability gatekeeping remains effective. Rule 707 does so in a limited, careful, and appropriate manner. I respectfully support its adoption.

Sincerely,

Nicole Owens
Executive Director
Federal Defender Services of Idaho

TAB 4

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Deepfakes and Draft Rule 901(c)
Date: April 11, 2026

Since 2023, the Committee has been considering how to assure that the Evidence Rules on authenticity will prevent hard-to-detect fake video and audio evidence --- "deepfakes --- from being admitted at trial. The Committee has been working on a potential rule amendment — a new Rule 901(c) — but has, to date, been unsure about the need for such an amendment. This memo further addresses the issue.

The memo is in three parts. Part One discusses new developments, articles, etc. since the last Committee meeting. Part Two discusses whether the draft Rule 901(c) should be issued for public comment and several issues that have been raised about the proposal. Part Three contains an amended draft Rule 901(c) and Committee Note. And attached to this memo is a report on the results of a survey of Federal judges regarded deepfakes, conducted by the Federal Judicial Center.

I. New Developments

A. Case Law

- **The New York Court of Appeals encounters deepfake possibilities: *Matter of M.S.*, 2026 WL 436359 (N.Y.Ct. App. February 17, 2026)**: In a family court proceeding, videos were offered that purported to show an adult having sex with a child. The Court of Appeals, in a 4-3 decision, held that the videos had not been properly authenticated. The majority was clearly concerned with the possibility that the videos were deepfakes. It pointed to the technical talents of a party who had custody of the videos. It held that the fact that the videos showed furniture and the like that were actually in the room was irrelevant, stating:

> The fact that much of the video apparently accurately depicted the home is not sufficient * * * to authenticate the video. * * * [T]he increasing prevalence of

> "deepfake" videos has only rendered the method of matching circumstantial details in a video to personal observations a more suspect form of authentication; most fabricated videos "leverage" real details from real photos and videos of real places and people, then alter the pieces the person wishes to alter to create a realistic, but manipulated, video.

According to the dissent, the majority essentially held that a party authenticating any video must convince the court that it is not a deepfake. Judge Singas explicitly contrasted this position with the result that would be reached under the **draft Federal Rule 901(c):**

> Taken to its logical conclusion, the majority's holding radically alters the authentication landscape, with unknown effects of which the majority appears entirely unaware. Precisely what type of expert testimony would the majority now require whenever a litigant cries "deepfake," regardless of whether that incantation has any evidentiary support? The majority's novel requirement of such testimony to rebut even this patently baseless deepfake defense—which must be given by "an expert ... in video authentication" is unreasoned, * * * and cannot be squared with black letter law recognizing other valid methods of evidentiary authentication.
>
> ***The majority's holding also marks a significant departure from other jurisdictions' thoughtful approach. The federal Advisory Committee on Evidence Rules (Advisory Committee), for one, has prepared a working draft of a new Federal Rule of Evidence 901(c) addressing authentication and deepfakes, requiring the exhibit's opponent to put forth evidence sufficient to find that such forgery occurred:***
>
> > "(c) Potentially Fabricated Evidence Created by Artificial Intelligence.
> >
> > "(1) Showing Required Before an Inquiry into Fabrication. A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence must present evidence sufficient to support a finding of such fabrication to warrant an inquiry by the court.
> >
> > "(2) Showing Required by the Proponent. If the opponent meets the requirement of (1), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic."
>
> The draft rule thus "sets out a two-step process for regulating claims of deepfakes" under which "the opponent must set forth enough information for a reasonable person to find that the item has been fabricated in whole or part by the use of generative artificial intelligence" ([draft Committee Note accompanying the rule]). This **eminently logical** proposal recognizes that "a broad claim of 'deepfake' is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated." Sister states and federal courts have likewise held, deepfake technology notwithstanding, that an exhibit's

proponent "need not rule out all possibilities that are inconsistent with authenticity, or prove beyond any doubt that the evidence is what it purports to be" (*Mooney v. State,* 487 Md. 701, 734–735, 321 A.3d 91, 111 [2024] [specifically discussing deepfakes]; see e.g. *Schram,* 128 F.4th at 926 ["(T)he government need not produce evidence to negate a speculative assertion that a child in an image is virtual.... On the nearly empty record here, (the defendant's) concern that images shown to the jury depicted virtual children is just speculation unsupported by any concrete facts"]; *People v. Gonzales*, 2019 COA 30, ¶ 29, 474 P.3d 124, 130 [Colo App 2019] ["the fact that the falsification of electronic recordings is always possible does not, in our view, justify restrictive rules of authentication that must be applied in every case when there is no colorable claim of alteration"]).[1]

As the Reporter to the Advisory Committee has observed, "a contention such as 'it might be a deepfake' or 'deepfakes are easy to do' has to be a nonevent" (Daniel J. Capra, *Deepfakes Reach the Advisory Committee on Evidence Rules*, 92 Fordham L Rev 2491, 2506 [2024]). Yet the majority rests its holding on sheer surmise that because B.W. had some "technical savvy," he might have created a deepfake. The majority identifies no legal authority supporting its reactionary approach.

See also the dissent of Judge Troutman:

The majority states that "the increasing prevalence of 'deepfake' videos has only rendered the method of matching circumstantial details in a video to personal observations a more suspect form of authentication" It seems that in the future, a party opposing the introduction of video evidence need only posit, with no evidentiary support whatsoever, that the video might be a deepfake. The party introducing the video then must disprove that unfounded accusation. How is the party seeking admission to do so, if circumstantial evidence is not a permissible method of authentication?

Note: This case certainly establishes that deepfake claims are starting to arise in courts, and that at least some courts could benefit from a rule, like Rule 901(c), that requires a specific foundation to be presented before the court is required to consider the possibility of a deepfake.

- **Case with a deepfake claim: *DeMissie v. Ford,* 2026 WL 446479 (D.Nev.):** A plaintiff sued a casino after a fracas with casino security. As part of a spoliation motion, he argued that the casino had used deepfake technology to alter the audio and video of the encounter. The court, *after viewing the material in camera*, ruled as follows:

Plaintiff alleges LVMPD BWC and Flamingo Surveillance footage were manipulated to include "deepfake insertions" of speech that Plaintiff says he never uttered. Plaintiff points to a 2.44 second jolt that can be seen in Flamingo's surveillance footage that he contends cannot occur naturally in footage and

[1] All the cases cited by Judge Singas have been previously been considered by the Committee in prior memos.

> therefore means footage was altered. Plaintiff goes so far as to allege this manipulated "jolt" calls into question the integrity of the video as a whole. In contrast, LVMPD and Caesars each submit declarations demonstrating the produced footage is in its raw, native form. LVMPD submits a declaration by its Systems Administrator stating in relevant part: "At no time, does the Las Vegas Metropolitan Police Department add or have the ability to add in any additional audio or video footage that did not exist in the original content." Similarly, Caesars submits a report from an Audio Video Forensic Analyst stating that the produced files "are authentic and trustworthy to what was originally recorded ... to a high degree of professional certainty." Plaintiff proffers no rebuttal to these well considered assertions. Moreover, the Court reviewed the submitted surveillance footage and finds no evidence of alteration. Plaintiff's personal belief is insufficient to establish by a preponderance that spoliation occurred.
>
> **Note: There was a lot of effort undertaken to dismiss this claim of deep fakery, including in camera examination by the court, and an expert affidavit by the defendant. The court might have benefited from a rule stating the requisite standard of proof that must be met before a deepfake argument is entertained.**
>
> **Also, because this was a motion seeking relief from spoliation, the standard of proof that must be met by the claimant is a preponderance of the evidence. So the fact that the claim was rejected does not mean it would have been found inauthentic under the permissive existing standards of Rule 901.**

- **Case with a deepfake claim: *United States v. Martinez,* 2026 WL 544719 (C.D. Cal.):** The defendant, challenging wiretaps, sought discovery under the Criminal Rules, on the ground that "some of these recordings and/or electronic communications were either fraudulent, altered and/or the product of Artificial Intelligence," and/or "fabricated and corrupted," and that "an inspection of the original wiretap capture equipment "will bolster his defense of actual innocence and fabrication claim, by establishing the fraudulent and altered nature of the recordings." The court denied the motion, on the ground that the government would be able to authenticate the recordings under Rule 901(b)(9), *and the defendant was free to bring his arguments to the jury*.

> **Note: This seems to be a less than ideal result. The point of a Rule 901(c)-type rule is to assure that bare arguments about manipulation are *not* brought to the jury.**

- **Case with a deepfake claim: *State v. Amyda,* 2026 WL 221375 (Iowa App.):** In a sex abuse prosecution, the defendant argued that a video showing him committing the act of abuse should have been excluded because it was a deepfake. The court of appeal found no error in admitting the video. It found that the video was properly authenticated through circumstantial evidence. As to the deepfake claim, the court states as follows:

> True, Amyda argued at the motion-in-limine hearing and throughout trial that the video may have been a "deepfake"—created through generative artificial intelligence when the underlying conduct never actually occurred. But Amyda

> pointed to no evidence in the record supporting this speculative theory. And nothing about the video gives even the slightest hint that it is an artificial creation. Bare conjecture is not enough to raise "a genuine question ... about the original's authenticity" or to make it "unfair to admit the duplicate."

The court did say, however, that the question of whether the video was a deepfake presented a question of weight, not admissibility: implying that a liar's dividend argument could be made at trial. And in fact the defendant did argue at the trial, without substantiation, that the video was fake.

> **Note: A number of points can be taken from this case. First, it indicates (along with other cases discussed in this section) that state courts are beginning to encounter deep fake arguments. So there is something to be said for releasing a proposed deepfake amendment. While this is a state case, there is nothing about the matter that indicates deepfakes would be exclusively a state problem. It involves a sex prosecution that could obviously arise in federal court.**
>
> **The second point might cut against an amendment: the court handled the question in exactly the way that the amendment would require. Under proposed Rule 901(c), the court does not address a deepfake argument unless the opponent makes some showing that it might be a deepfake. Here, where the defendant did not do so, the court treated the deepfake argument as a non-starter. (That said, the New York Court of Appeals took a contrary approach).**
>
> **Third, and on the other hand, this court did not encounter a case in which the opponent actually presented a foundation that the video was a deepfake. What happens when an opponent does that? Under the existing law of authentication, all that is required of the opponent is enough for a reasonable person to belief that the video is authentic --- that is, the standard that the proponent already met in the case above through circumstantial evidence. If that is all that is required, then legitimate arguments about deepfakes will have little effect on admissibility. That is why proposed Rule 901(c) requires the proponent to establish more likely than not that the item is authentic. To say that "courts can handle deepfakes under existing law" ignores the fact that existing law contains an insufficient standard of proof when a legitimate deepfake argument is made.**
>
> **Finally, to the extent that the defendant was allowed to make a liar's dividend argument, the trial court might have benefitted from the Committee Note to proposed Rule 901(c), that sets out ways to prevent a liar's dividend argument.**

- **Case: Dismissal due to deepfakes: *Mendones v. Cushman and Wakefield,* 2025 WL 2613764 (Cal.Super.).** The court dismissed an action against the plaintiffs as a sanction for admitting deepfakes. Here is the court's discussion:

> The Court finds that exhibits 6A and 6C are products of GenAI and do not capture the actual speech and image of Geri Haas. In other words, these exhibits are deepfakes. While the "person" depicted in exhibits 6A and 6C bears a passing

resemblance to the person depicted in exhibit 36, they are not the same person. The accent, cadence, volume, word choice, pauses, gestures, and facial expression, among other characteristics, of the person depicted in exhibit 36 are vastly different from those demonstrated by the "persons" depicted in exhibits 6A and 6C. The "persons" depicted in exhibits 6A and 6C lack expressiveness, are monotone, do not pause at moments where pauses are expected, use odd words choices, and appear generally robotic. Further, the mouth flap does not match the words being spoken. Juxtaposing these three videos together, it becomes clear that whoever the "persons" depicted in exhibits 6A and 6C are, they are not the person depicted in exhibit 36.

The oddities of exhibits 6A and 6C are typical features of videos created by GenAI. * * * The lighting, contrast, color, and sharpness of the man depicted in these pictures compared with the lighting, contrast, color, and sharpness of the background shows that the man was stitched into the photograph taken by the Ring camera. A close inspection shows that the background is in black and white, while the man is in color. * * *

The Court remains suspicious of the other evidentiary submissions, but it does not have the time, funding, or technical expertise to determine the authenticity of Plaintiffs' statements or conduct a forensic analysis of the suspect evidentiary submissions.

Sanctions:

The Court finds that a terminating sanction is appropriate. This sanction is proportional to the harm that Plaintiffs' misuse of the Court's processes has caused. A terminating sanction serves the appropriate remedial effect of denying Plaintiffs— and other litigants seeking to make use of GenAI to submit video testimonials—of the ability to further prosecute this action after violating the Court's and the Defendants' trust so egregiously. Further, a terminating sanction serves the appropriate deterrent effect of showing the public that the Court has zero tolerance with attempting to pass deepfakes as evidence.

This sanction serves the appropriately chilling message to litigants appearing before this Court: Use GenAI in court with great caution.

Note: Perhaps the court is right that the risk of dismissal will deter a lot of deepfakery, thus making an amendment less necessary. On the other hand, this appears to be one of the worst deepfakes ever, and the court recognizes that it doesn't have the tools to determine whether less obvious presentations are deepfakes or not. A rule of evidence would have helped the court as to these other presentations, because the opponent would have to provide a foundation to justify the enquiry, and if so the proponent would have to demonstrate that the evidence is not faked.

- **Case with a deepfake claim: *Burnley v. Valentin,* 2026 WL 767145 (E.D. Va.):** In an action to enforce a settlement agreement, the parties disputed the authenticity of an audio recording of a phone conversation. The plaintiff contended that the audio was of the defendant speaking, and the defendant denied this, contending it was a deepfake. In response to that claim, the court held an evidentiary hearing. If found that the plaintiff had established authenticity by presenting a person who had personal knowledge of the defendant's voice. Thus it was authenticated under Rule 901(b)(1).

> **Note: Personal knowledge might establish authenticity under the low Rule 104(b) standard. But that is too low if deepfakes are involved. Because the very problem of deepfakes is that they can fool people who have personal knowledge of someone's voice. The court could have benefited from the two-step approach of Rue 901(c) in this case.**

• Case: Defendant alleges a violation of constitutional rights when the prosecution offered deepfakes at trial: *Bryan v. City of Philadelphia,* 2026 WL 123291 (E.D.Pa.): The plaintiff alleged he was unlawfully prosecuted and convicted because the state used deepfake footage. Specifically, he alleged that the police body camera video taken of his arrest was manipulated by generative artificial intelligence. The court ultimately found that some claims were time-barred and others should have been brought as habeas corpus claims rather than under Section 1983. That said, this is one of the first cases reaching the federal courts arguing that deepfake evidence was presented at a trial.

B. Articles

ARTICLE: Reviewing devices used for detecting deepfakes: https://www.law.com/thelegalintelligencer/2026/01/13/86-fake100-admissible-rethinking-evidence-in-the-ai-era/

The Three Pillars for Trusting AI Evidence

Reproducibility

Many deepfake detection tools are still relatively untried and untested, particularly in the courtroom, making it difficult to assess their reliability in regards to legal evidence. Since the detection tools often rely on machine learning models, which are evolving rapidly due to the novelty of the progressing research, variations in results over time can pose serious concerns for reproducibility. For forensic findings to withstand legal scrutiny, experts should prioritize peer-reviewed, independently testable forensic software that allows for transparent validation.

In contrast, the manual analysis of metadata, hex, and binary structure * * * is part of a well-established, widely accepted forensic framework. Unlike AI-driven detection, these techniques operate at the raw data level, where file structures and forensic markers tend to remain consistent across media formats and decades of digital data. This stability makes traditional forensic methods more reproducible and defensible.

Verification and authentication

Courts must also understand and distinguish the purpose for which AI forensics is being used: forensic verification v. forensic authentication. Forensic verification is the process of confirming AI-generated and AI-manipulated content, allowing experts to determine whether content was generated, altered, or influenced by AI. We will likely see an uptick in the use of such experts in cases such as defamation, fraud, and family law. For example, methods used in forensic verification include:

> *Analysis of spectrographic features for synthetic voice cloning detection by identifying patterns which are hard for AI to mimic*. This encompasses examining pitch, intonation, or speaking rates and using machine learning models to compare against real human speech.
>
> *Stylistic, linguistic, and cohesive checks for AI-generated text.* Since AI-generated content frequently lacks the narrative-flow or nuanced context that aligns with human linguistics and etiquette, models are trained on a large volume of both AI-generated texts and human-written texts to determine differences in patterns of structure, perplexity and readability.
>
> *Scrutinizing media, such as videos and images, in deepfake analysis for inconsistencies in physiological markers (e.g., blinking) and audio-visual markers (e.g., shadows).* This is most commonly done by tools which detect oddities in textures, colour patterns, uniformity, and spatial anomalies.

Forensic authentication is used to prove the contents' origin and integrity. Authentication answers the following key questions which are essential for ensuring that digital evidence can be trusted and is admissible in legal contexts:

> Who created it? * * * Forensics experts examine artifacts such as digital signatures and embedded metadata to trace the content to its original source, additionally leveraging open-source intelligence and investigative techniques into the creator.
>
> When was it created? Confirm original creation dates, which serve as digital timestamps in legal proceedings.
>
> Is it what it claims to be? Ensure that the digital media has not been manipulated in order to misrepresent its nature is necessary to determine and maintain the integrity of the evidential source.
>
> Has it been altered in any way? If any discrepancies are identified in a file, it is important to understand if this is due to intentional tampering, or legitimate reasons such as file system transfers or formatting issues.

Could There Be Another Explanation?

In terms of legal frameworks for AI forensics, existing computer forensics principles * * * are being adapted to fit the emerging field of AI forensics. However, a universal legal standard has yet to be established. The lack of such standard presents a risk: AI forensic

methods could face challenges in court due to the absence of a standardized benchmark. Recent developments in the field highlight ongoing efforts to address these challenges. Internationally, research into AI forensics is gaining momentum. Initiatives like the European AI Act and various U.S. federal efforts aim to establish guidelines for the admissibility of AI-generated and AI-manipulated evidence in courtrooms. Meanwhile, the training of automated deepfake detection models is advancing, with AI-driven forensic tools continually honing their detection capabilities through extensive datasets.

*** * ***

From a technological perspective, many deepfake detection tools output a probability score (e.g., "86% likelihood that this video is a deepfake"). But these scores are often presented without context or alternative explanations. This contrasts with traditional digital forensics, where terms like "likely" are explained with supporting evidence. For example, internet browsing activity may show that an illicit website was accessed immediately after a user opened their email account. This could suggest a high likelihood that the user clicked on a link in an email that redirected them to the site. However, alternative explanations exist, such as a malicious pop-up, an auto-loaded advertisement, or an unintended background process.

In contrast, many AI-based deepfake detection tools fail to account for alternative explanations when assigning probability scores. They may classify a video as 86% likely to be fake without considering whether compression artifacts, post-processing effects, or natural inconsistencies in lighting and motion contributed to the classification. This lack of contextualization makes it more difficult to explain findings and assess the true evidentiary weight of AI-generated forensic conclusions in court

In the Age of AI, Is There a Call for Evidence and Policy Reform to Ensure Digital Trust?

Rebuilding trust in digital media is a must if the courts are to effectively rely on and evaluate digital evidence with confidence, ensuring fair and just outcomes in legal proceedings. One thing is clear: Neither lawyers nor technologists can solve this alone. AI and detection tool developers must learn the language of evidentiary standards, while lawyers must understand what makes an algorithm tick. * * *

Promising collaborations are underway. For example, The Coalition for Content Provenance and Authenticity (C2PA) is building on collaborations between major tech companies to develop technical standards and frameworks for content provenance and authenticity, such as requiring media files to be embedded with provenance data confirming their legitimacy. This cryptographic watermarking embeds information (a "mark") into cryptographic functions or digital content so it can be verified later without revealing the underlying information. Blockchain verification technology is also being used to record the origin and subsequent alteration of media so a provenance trail is in place for each file. This ensures a real-time verification of content authenticity and provides transparency to the changes of media files.

*But realizing a trustworthy evidentiary future also requires judicial leadership. Judges may need to embrace a more proactive gatekeeping role early in the litigation process, particularly in cases involving AI-generated or synthetic media. This includes applying Rules 104 and 901 at the outset to evaluate whether forensic conclusions meet basic thresholds for authentication and explanation, not merely relevance under Rule 401***.**

By intervening early to scrutinize digital exhibits, judges can prevent unreliable or misleading content from skewing legal outcomes. This proactive stance is crucial for safeguarding fairness and maintaining public confidence in judicial proceedings amid rapidly evolving AI capabilities. Only then can synthetic media be properly managed and the courtroom remain a place for truth—not just technological illusion.

Note: It can be argued that Rule 901(c) does in fact provide a way for courts to take a "proactive role" in regulating deepfakes.

ARTICLE: On Deepfake Detection and the Impending Effect of Deepfakes on Admissibility: Lars Daniel, *'Seeing is Believing' is Dead: AI Deepfakes Have Broken Visual Evidence*, Forbes (Feb 22, 2026), https://www.forbes.com/sites/larsdaniel/2026/02/23/seeing-is-believing-is-dead-ai-deepfakes-have-broken-visual-evidence/

In courtrooms, insurance offices and law enforcement agencies, we have built decision making processes around the assumption that photographs and video depict something that actually happened. That assumption is now dangerously outdated. Insurance is feeling it first. UK loss adjuster McLarens reported a 300 percent rise in suspected fake documents in its claims in the first quarter of 2023, and Allianz has warned of a similar threefold jump in manipulated images, video and documents across one of its reporting periods.

Swiss Re's 2025 SONAR report flags deepfakes and other synthetic media as an emerging risk for insurers, *with fabricated evidence and AI assisted fraud highlighted as a growing concern.* Claimants have submitted AI generated damage photos that passed initial review, manipulated CCTV with altered timestamps, and, in at least one documented case, a completely fabricated telehealth video to support a disability claim.

The courtroom is next. [The author discusses draft Rule 901(c).] Cases are already testing these boundaries.

One idea for detection is to build databases of known AI generated content, cataloging fakes using digital fingerprints the way child exploitation images are tracked. That system works for a redistribution problem, where the same image may be shared thousands of times. Fingerprint it once, catch it everywhere. AI generated images are the opposite kind of problem. Every prompt can produce a unique image with a unique fingerprint. You are not cataloging copies. You are trying to inventory an effectively infinite number of originals. The math does not work, and the content mills are only speeding up.

Then there is the C2PA standard and its "Content Credentials," essentially a cryptographic notary stamp embedded in media at the moment of capture. It can record which device took a

photo, when it was created and which edits followed. The National Security Agency endorsed content credential approaches in a January 2025 cybersecurity information sheet, and NIST's AI 100-4 report identifies provenance systems like C2PA as among the most promising methods available for tracking the origins of media. The concept is exactly right: verify the origin, not the output.

C2PA also has limits. It needs very broad adoption across cameras, phones, editing software and platforms to work at scale. Major camera makers, including Leica, Nikon, Sony and Canon, have joined the initiative or related content authenticity efforts. That is real progress. Yet the vast majority of photos submitted as evidence today carry no provenance data at all. The infrastructure is being built. It will not help the adjuster reviewing a suspicious claim this afternoon, or the prosecutor walking into a hearing next week.

What about detection tools? I wish I had better news. AI detection software can perform well in controlled lab settings on benchmark datasets, but accuracy drops sharply when the tools confront real world content created with techniques outside their training data or compressed and reposted on social platforms. NIST's AI 100-4 report and several independent evaluations have concluded that no single detection approach currently offers reliable, standalone performance across content types and attack methods. The tools are improving, but in many real world scenarios they struggle to keep up with the pace of new generative techniques.

That brings me to what I have seen hold up most consistently in more than sixteen years of examining digital evidence as a digital forensic expert: examination of the source device. Not the file. The device. When I examine a phone or computer in a case, I am not just looking at a single photo. I am looking at that photo *in context,* sitting in a camera roll alongside thousands of others, with consistent metadata, file system artifacts, application attribution and creation timestamps. The operating system tracks when files are created and which application generated them. Network logs, GPS coordinates and sequential file naming conventions build a web of corroborating details that either supports authenticity or exposes fabrication. If one "threatening message" screenshot appears out of nowhere with no matching entry in the messaging database, notifications or backups, that is a powerful sign the image was manufactured. A photo with that kind of provenance tells a story you can evaluate. A photo scraped from social media, or submitted by email with no chain of custody, is just pixels. You can argue about it, but without provenance and context it is very difficult to authenticate it with any real rigor, if possible at all. * * *

No method is perfect, and I will not pretend otherwise. Someone can photograph an AI generated image displayed on a monitor, and the source device will dutifully record it as a new, genuine looking photo. An experienced examiner can often spot traces of this, but there will always be edge cases. There is also a boundary that courts and investigators have to understand: the difference between enhancement and generation. Lawful enhancement means controlled operations that clarify existing pixels, such as adjusting contrast, reducing noise or using interpolation that does not invent new content. Generative edits are different. When software removes a mask, alters clothing, claims to "unblur" a face by hallucinating details, or fills in missing areas using a model's best guess, the result is no longer a record of what any camera saw. It is a synthetic reconstruction. Those outputs may be useful leads, but they have no business being treated as evidence of identity or action.

* * * In my experience, when authenticity is seriously disputed, a forensic examination of the source device is the only method that consistently provides a reliable basis for saying an image or video is genuine. Today, relying on anything less is building your evidentiary foundation on sand.

ARTICLE: Judge expresses concern about deepfakes: *https://www.law360.com/legal industry/articles/2437414/approach-the-bench-judge-yew-warns-of-deepfake-evidence*

> After decades on the bench of the Santa Clara County Superior Court, Judge Erica Yew began to regard the future of courtroom evidence with some trepidation, as the rapid evolution of artificial intelligence made it easier to falsify documents, photos and videos. Using AI to create demonstratives at trial is one thing, Yew said, because accident reconstruction videos or diagrams are introduced for illustrative purposes. But she worries about deepfakes, like doctored deeds or fabricated phone messages, being provided as proof. She thought about this at length while working with the National Center for State Courts, which has put out a bench card that lists questions judges should ask when they suspect evidence may be computer-generated to establish a chain of custody and determine whether a document can be corroborated.
>
> If deepfakes continue to proliferate in the courtroom, Yew said, it could have the effect of shifting the burden of proof — for example, requiring a defendant to prove a video is fake and that they were not in fact doing what it depicts. "This change in deepfakes and the detection of it and the question about whether it's reliable and whether it should be admissible, has the potential of actually changing that burden of proof without a legal thought process about that. In practicality, in effect, are we now having to prove the negative? And who has that burden?" [Note that this is the question that the New York Court of Appeals was arguing about in *M.S.,* above.]

• Essay by Professor Ed Cheng, arguing that there is no need for a new rule on deepfakes:

Mechanically or electronically produced evidence like images, video, and audio currently enjoy a strong presumption of trust because forgeries are (or at least previously were) difficult to fabricate. The danger of fabrication has of course always existed. * * * But high-quality fakes required specialized software, substantial expertise, and considerable time and effort. Low-quality fakes were easy to detect. Forgeries were thus relatively rare. Deepfake technology concededly has the potential to radically alter this landscape. The technology may enable anyone, with little effort and no expertise, to produce a passable forgery. But if that happens, then base rate estimates will simply adjust. Audiovisual evidence, which previously enjoyed a strong presumption of reliability, will suddenly become suspect --- a phenomenon dubbed the "liar's dividend" by Bobby Chesney and Danielle Citron. In such a world, trust in audiovisual evidence can derive only from the evidence's attributed source --- for example, the witness who presents it --- not from the nature of the medium itself.

Note that while deepfakes may provoke us to reassess the evidentiary weight to give audiovisual evidence, they do not require a change in the evidentiary rules. To be sure, in the short

term, jurors unaware or unfamiliar with deepfake technology may improperly assess the reliability of video or audio evidence. But that problem is scarcely different from other instances in which juries make mistakes. For example, psychologists have shown that eyewitness identifications are less reliable than laypersons think. They have also shown that people are detecting lies on the basis of demeanor, despite beliefs to the contrary. Yet, in general, no special evidentiary rules exist to address these problems. Cross-examination, the presentation of expert evidence, and in rare cases, the use of cautionary jury instructions are usually sufficient responses.* * *

If deepfake technology truly makes fabricated images costless to produce and nearly impossible to detect, then images will not only lose their special evidentiary value, they will potentially lack any independent evidentiary value at all. To be sure, one can imagine less extreme outcomes. For example, if detection technology keeps pace with the ability to fabricate, or if manufacturers embed cryptographic markers in the images captured on their smartphones, then images will retain some base rate of reliability. Perhaps the base rate of reliability will not be the same as digital images circa 2000, but it will not be zero either. History and logic thus argue against creating bespoke evidentiary schemes to deal with the deepfake threat. Just as they have handled other disruptive technologies, the authentication rules under Rule 104(b) are perfectly capable of handling deepfakes. If deepfakes do become pervasive, then the base rates with which jurors assess digital images will adjust.

> **Note: Assuming he is right, he nonetheless envisions what will undoubtedly be a lengthy period of jurors being fooled by deepfakes – a period in which courts applying the proposed Rule 901(c) can protect against such an abuse. And, after the system finally settles on a "base rate of reliability" for deepfakes, why would Rule 901(c) not continue to be helpful in allowing the courts to continue to regulate the possibility of deepfakes? The problem remains that a "base rate of reliability" for videos would presumably apply to both a video that is deepfaked and another that is not. Why would we stop distinguishing between the two? Finally, the article is nihilistic as it basically posits that the courts should throw up their hands and allow Liar's Dividend arguments to be routinely made.**

•Article on Deepfakes faking detection systems: ***AI Fools Itself: Top Chatbots Don't Recognize AI-Generated Videos*** **https://www.newsguardrealitycheck.com/p/ai-fools-itself-top-chatbots-dont**

OpenAI's new AI video-generating tool, Sora, has quickly gained a reputation for its ability to fool humans into thinking its videos are authentic. It turns out that Sora can also fool AI itself. A NewsGuard test found that three leading chatbots overwhelmingly failed to detect fake videos generated by Sora unless they were watermarked. (Sora watermarks all of its videos, but the videos can easily be un-watermarked; see below.) The three chatbots — xAI's Grok, OpenAI's ChatGPT, and Google's Gemini — did not identify non-watermarked Sora videos as AI-generated 95, 92.5, and 78 percent of the time, respectively, when prompted.

ChatGPT's failure rate of 92.5 percent is particularly notable, since the same company, OpenAI, created and owns both ChatGPT and Sora. OpenAI did not respond to NewsGuard's question about ChatGPT's apparent inability to recognize the company's own AI-produced videos.

Moreover, even with watermarked videos, two of the three chatbots sometimes stumbled. Grok failed to identify the watermarked videos as AI-generated 30 percent of the time and ChatGPT failed 7.5 percent of the time, NewsGuard found. Only Gemini succeeded in all tests.

DISAPPEARING WATERMARKS

OpenAI marks Sora videos with a watermark — a small Sora logo alongside the word Sora that bounces around the frame for the duration of a video — making it clear to users familiar with the company and the Sora name that the videos are AI-generated. However, soon after the product launched in February 2025, multiple companies began offering free Sora watermark removal tools.

For this report, NewsGuard used one of these free tools to remove watermarks from 20 Sora-generated videos advancing provably false claims drawn from NewsGuard's proprietary False Claims Fingerprints database. NewsGuard then ran both the watermarked and non-watermarked versions of the videos through the three major chatbots that allow users to upload images — Google's Gemini, OpenAI's ChatGPT, and xAI's Grok — to determine if they were capable of detecting that the videos were fabricated by AI.

The NewsGuard tests revealed that all three models were easily duped by Sora videos without watermarks. * * * All three models did significantly better in detecting AI-content when the videos contained visual watermarks. However, as noted above, even with watermarks, ChatGPT and Grok failed these tests 7.5 percent and 30 percent of the time respectively. In most tests, ChatGPT, Gemini, and Grok successfully pointed to the watermark as evidence that the video was AI generated, noting additional indicators of AI-generation, such as distortions and unnatural lighting. The watermark also appeared to prompt more thorough searches by the bots for fact checks of the videos' underlying claims.

Google's Gemini is the only one of the chatbots NewsGuard tested that explicitly promotes its ability to detect AI-generated content made by its own text-to-image generator, Nano Banana Pro. While Gemini did not fare well in NewsGuard's Sora tests, it did much better detecting AI images created by Nano Banana Pro. In five NewsGuard tests, the chatbot accurately identified Gemini images with removed watermarks as AI-generated in all cases.

• Article on Deepfakes: NBC News, https://www.nbcnews.com/tech/tech-news/ai-generated-evidence-deepfake-use-law-judges-object-rcna235976

Judge Victoria Kolakowski sensed something was wrong with Exhibit 6C.[2] Submitted by the plaintiffs in a California housing dispute, the video showed a witness whose voice was disjointed and monotone, her face fuzzy and lacking emotion. Every few seconds, the witness would twitch and repeat her expressions.

Kolakowski, who serves on California's Alameda County Superior Court, soon realized why: The video had been produced using generative artificial intelligence. Though the video claimed to feature a real witness — who had appeared in another, authentic piece of evidence — Exhibit 6C was an AI "deepfake," Kolakowski said.

[2] This case was discussed above.

The case, Mendones v. Cushman & Wakefield, Inc., appears to be one of the first instances in which a suspected deepfake was submitted as purportedly authentic evidence in court and detected — a sign, judges and legal experts said, of a much larger threat. * * *

With the rise of powerful AI tools, AI-generated content is increasingly finding its way into courts, and some judges are worried that hyperrealistic fake evidence will soon flood their courtrooms and threaten their fact-finding mission.

NBC News spoke to five judges and 10 legal experts who warned that the rapid advances in generative AI — now capable of producing convincing fake videos, images, documents and audio — could erode the foundation of trust upon which courtrooms stand. Some judges are trying to raise awareness and calling for action around the issue, but the process is just beginning.

"The judiciary in general is aware that big changes are happening and want to understand AI, but I don't think anybody has figured out the full implications," Kolakowski told NBC News. "We're still dealing with a technology in its infancy."

Prior to the Mendones case, courts have repeatedly dealt with a phenomenon billed as the "Liar's Dividend," — when plaintiffs and defendants invoke the possibility of generative AI involvement to cast doubt on actual, authentic evidence. But in the Mendones case, the court found the plaintiffs attempted the opposite: to falsely admit AI-generated video as genuine evidence.

Judge Stoney Hiljus, who serves in Minnesota's 10th Judicial District and is chair of the Minnesota Judicial Branch's AI Response Committee, said the case brings to the fore a growing concern among judges.

"I think there are a lot of judges in fear that they're going to make a decision based on something that's not real, something AI-generated, and it's going to have real impacts on someone's life," he said.

Many judges across the country agree, even those who advocate for the use of AI in court. Judge Scott Schlegel serves on the Fifth Circuit Court of Appeal in Louisiana and is a leading advocate for judicial adoption of AI technology, but he also worries about the risks generative AI poses to the pursuit of truth.

"My wife and I have been together for over 30 years, and she has my voice everywhere," Schlegel said. "She could easily clone my voice on free or inexpensive software to create a threatening message that sounds like it's from me and walk into any courthouse around the country with that recording."

"The judge will sign that restraining order. They will sign every single time," said Schlegel, referring to the hypothetical recording. "So you lose your cat, dog, guns, house, you lose everything."[3]

[3] It's a little weird, don't you think, that he has a scenario in which his wife sends him to jail on false evidence?

Judge Erica Yew, a member of California's Santa Clara County Superior Court since 2001, is passionate about AI's use in the court system and its potential to increase access to justice. Yet she also acknowledged that forged audio could easily lead to a protective order and advocated for more centralized tracking of such incidents. "I am not aware of any repository where courts can report or memorialize their encounters with deep-faked evidence," Yew told NBC News. "I think AI-generated fake or modified evidence is happening much more frequently than is reported publicly."

Though fraudulent evidence has long been an issue for the courts, Yew said AI could cause an unprecedented expansion of realistic, falsified evidence. "We're in a whole new frontier," Yew said.

Schlegel and Yew are among a small group of judges leading efforts to address the emerging threat of deepfakes in court. They are joined by a consortium of the National Center for State Courts and the Thomson Reuters Institute, which has created resources for judges to address the growing deepfake quandary. The consortium labels deepfakes as "unacknowledged AI evidence" to distinguish these creations from "acknowledged AI evidence" like AI-generated accident reconstruction videos, which are recognized by all parties as AI-generated.

Earlier this year, the consortium published a cheat sheet to help judges deal with deepfakes. The document advises judges to ask those providing potentially AI-generated evidence to explain its origin, reveal who had access to the evidence, share whether the evidence had been altered in any way and look for corroborating evidence.

Beyond this cadre of advocates, judges around the country are starting to take note of AI's impact on their work, according to Hiljus, the Minnesota judge.

"Judges are starting to consider, is this evidence authentic? Has it been modified? Is it just plain old fake? We've learned over the last several months, especially with OpenAI's Sora coming out, that it's not very difficult to make a really realistic video of someone doing something they never did," Hiljus said. "I hear from judges who are really concerned about it and who think that they might be seeing AI-generated evidence but don't know quite how to approach the issue."

To address the rise of deepfakes, several judges and legal experts are advocating for changes to judicial rules and guidelines on how attorneys verify their evidence. By law and in concert with the Supreme Court, the U.S. Congress establishes the rules for how evidence is used in lower courts.

* * *

The Trump administration's AI Action Plan, released in July as the administration's road map for American AI efforts, highlights the need to "combat synthetic media in the court system" and advocates for exploring deepfake-specific standards similar to the proposed Federal Evidence Rule changes.

Yet other law practitioners think a cautionary approach is wisest, waiting to see how often deepfakes are really passed off as evidence in court and how judges react before moving to update overarching rules of evidence.

Jonathan Mayer, the former chief science and technology adviser and chief AI officer at the U.S. Justice Department under President Joe Biden and now a professor at Princeton University, told NBC News he routinely encountered the issue of AI in the court system: "A recurring question was whether effectively addressing AI abuses would require new law, including new statutory authorities or court rules."

"We generally concluded that existing law was sufficient," he said. However, "the impact of AI could change — and it could change quickly — so we also thought through and prepared for possible scenarios."

* * *

Metadata — or the invisible descriptive data attached to files that describe facts like the file's origin, date of creation and date of modification — could be a key defense against deepfakes in the near future. For example, in the Mendones case, the court found the metadata of one of the purportedly-real-but-deepfaked videos showed that the plaintiffs' video was captured on an iPhone 6, which was impossible given that the plaintiff's argument required capabilities only available on an iPhone 15 or newer.

Courts could also mandate that video- and audio-recording hardware include robust mathematical signatures attesting to the provenance and authenticity of their outputs, allowing courts to verify that content was recorded by actual cameras. ***

The problem of deepfake evidence is being studied elsewhere in the legal community as well. One approach under consideration in the federal system would be to create a new Rule 901(c) in the Federal Rules of Evidence that would require the proponent of possibly AI-fabricated evidence to demonstrate to the court that it is "more likely than not" authentic. Policymaking efforts regarding deepfake evidence are also underway in New York, California, and Texas. There's even a suggestion that professional ethics rules should be changed to place a heightened ethical burden on attorneys to refrain from offering deepfake evidence in court.

The message for litigators seems clear. Both the promise and the dangers of computer-generated evidence are on trial judges' radar screen today. Expect that this type of evidence will receive searching – and well-informed – scrutiny by the trial judge prior to admission in court.

II. Whether to Proceed with Proposed Rule 901(c), and Other Issues

To date, the Committee has coalesced on a draft Rule 901(c) that sets forth a two-step approach: 1) The opponent must establish that an enquiry into deep fakery is justified; a simple claim of "fake" is insufficient. 2) If the opponent satisfies the burden of going forward, then the proponent must prove more likely than not that the item is authentic. A draft and a proposed Committee Note are set forth in the last section of this memo.

While the Committee has largely coalesced on what a rule amendment might look like, it has been less sure of the need for a rule amendment. This part addresses that question and some issues that have been raised with respect to a draft Rule 901(c).

A. Do We Need a Deepfake Amendment?

At the last meeting, the Committee approved a plan for the FJC to send a survey to Federal Judges to assess whether deepfakes are a problem warranting a rule amendment. That survey is submitted under separate cover, but in short summary, 15 of the responding judges have encountered deepfake issues; and the majority of respondents favored the issuance of a rule on deepfakes.

It should also be noted that five of the public comments on Rule 707 suggested that the Committee *propose a rule on deepfakes.* This seems notable because, of course, Rule 707 does not deal with deepfakes at all. Nonetheless, these commentators argue that deepfakes are a real and existing problem that needs treatment by the Advisory Committee. See the Comments of Judge Facciola; Grimm and Grossman; Melissa Sims; the Innocence Project (noting that "deepfake technology could be used to alter crime scene surveillance footage to place an innocent person at the scene of a crime–a new-age form of misconduct similar to the planting of contraband to incriminate an innocent suspect"); and the Center For AI and Digital Policy.

The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection "it's a deepfake" for every offered audio or visual presentation. One question for the Committee is whether those blanket claims present a problem that might be handled by the courts under the existing Rule 901. The New York Court of Appeals decision, set forth at the beginning of this memo, appears to indicate some doubt in the courts' ability to handle broad assertions of "deepfakes"; it appears that the court is putting the burden on the proponent to show that a video is *not* a deepfake, even in the absence of a foundation that the deepfake inquiry is necessary. And even at the Federal level, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law.

The other and probably more important reason for a new Rule 901(c) is to raise the standard of proof for authenticity when credible deepfake allegations have been made. If deepfakes are going to be flooding the courts, there is an excellent argument that courts are going to be better than jurors at figuring it out --- especially as repeat players --- and so a Rule 104(a) gatekeeping standard will be critical. The new Rule 901(c) does lift the standard of proof for admissibility to a preponderance, and so it will provide some important protection against widespread admissibility of deepfakes --- protection that does not exist under current law. Courts may very well need the higher Rule 104(a) standard to be effective in keeping deepfakes from the jury --- in the same way that they need the 104(a) standard to keep unreliable expert testimony from the jury.

In previous memos, I noted that "there would be little for Rule 901(c) to do" because I had found no reported cases raising deepfake issues. But that is no longer the case. The memo, above, sets forth a number of cases raising deepfake problems, one of which is an extensive opinion from

the New York Court of Appeals. Several of them are federal cases. And in the most important state case, the dissent in the New York Court of Appeals case explicitly invoked the Committee's work on Rule 901(c).

Moreover, it must be remembered that rulemaking is slow. If Rule 901(c) were approved for public comment at the Spring meeting, the earliest date of applicability would be December 1, *2028*. It seems likely that by that time, deepfakes will have more regularly reached the courts, and possibly in substantial numbers. Any further delay could be said to risk the possibility of admission of many deepfakes due to the low Rule 104(b) standard of proof that remains applicable until changed by Rule 901(c). One can argue that courts can handle claims of fakery under existing rules, but that might not actually be true when deepfakes are so easy to make and undetectable, *and the existing rule is so permissive*, leaving almost all authenticity questions to the jury.

The slowness of the rulemaking process might ironically be a factor that would justify approval of Rule 901(c) at the Spring 2026 meeting. The Committee could propose a rule for public comment at that meeting, and it would be another whole year before the Committee would revisit the rule. If there was no significant deepfake activity in the courts by the end of the comment period, that would be a reason to pause — the rule could be taken back after public comment.[4] On the other hand, if courts were having trouble with deepfakes during that year, that could be a reason to keep going. And the public comment on an AI proposal is sure to be massive and (hopefully) helpful. So there is much to be said for agreeing upon language and putting out a proposal at the Spring meeting.

B. Possible Revisions to the Draft Rule

Four questions have been raised about possible changes to the draft Rule 901(c). The first two were raised at the last Standing Committee meeting. The third and fourth were raised as a result of issues discussed in comments submitted on Rule 707.

1. Should the Rule's Coverage Be Limited to Generative Artificial Intelligence, as Opposed to All AI?

At the Standing Committee meeting, a member asked whether Rule 901(c) should be expanded to cover all uses of artificial intelligence to manufacture an inauthentic item. The member stated that AI systems, even if not "generative," might be used to make inauthentic videos.

Response: The Committee thought carefully about whether to cover artificial intelligence as opposed to *generative* artificial intelligence. It was persuaded by a report submitted by Professor Rebecca Delfino. Here is her take on covering "generative artificial intelligence" as opposed to "artificial intelligence":

[4] There is obvious, current precedent for the Committee's use of the public comment period for real education, rather than presumptive approval: that was the protocol for Rule 707.

> "Generative Artificial Intelligence" accurately identifies the specific type of AI technology responsible for creating fabricated content. This specificity is essential in avoiding ambiguity and unnecessary overbreadth in legal and regulatory discussions.
>
> Generative artificial intelligence refers to AI models that create new content, including synthetic videos, images, and audio, that can fabricate events that never occurred. Technologies such as deepfake generators, text-to-image models like DALL·E and Midjourney, AI voice cloning, and synthetic video editing tools fall within this category. The primary concern in authentication disputes is the ability of generative AI to create evidence that appears real but is entirely fabricated. Other AI-driven enhancements, such as AI-powered photo enhancement, voice amplification, and predictive text tools, do not pose the same risk. However, the term "artificial intelligence" used in other proposals under consideration could mistakenly encompass these legitimate AI tools, subjecting them to undue scrutiny. This proposal avoids unnecessary complications in authenticating digital evidence by specifically targeting generative AI.
>
> In comparison, the alternative phrase, "artificial intelligence" is broad and imprecise. "Artificial intelligence" broadly includes all machine-learning systems, even those that do not generate synthetic content. * * * This lack of specificity increases the risk of misapplication, leading to situations where AI-enhanced evidence, rather than AI-created evidence, is subjected to unnecessary scrutiny. For instance, a security camera video enhanced using AI-based sharpening filters could be wrongly challenged as synthetic evidence despite being legitimate. Similarly, AI-powered speech-to-text transcription of court proceedings could be mistakenly classified under this vague definition, imposing unnecessary authentication burdens on standard transcription evidence.
>
> Furthermore, judicial and legislative trends favor "generative artificial intelligence" as a distinct category. Courts and regulators are already differentiating between generative AI and other AI applications. * * * The Federal Trade Commission (FTC) has * * * issued guidance addressing generative AI fraud, demonstrating that "generative AI" is already well-established in legal and regulatory discussions. Aligning with these emerging legal and technological standards ensures consistency and clarity in judicial interpretation. * * * Using "generative AI" aligns with emerging legal frameworks that distinguish generative AI from other forms of AI, ensuring that courts apply the rule consistently and avoid evidentiary confusion.

Accordingly, the term "generative AI" seems preferable as a way to avoid over-inclusiveness. No term is perfect. But it would seem better to be perhaps somewhat underinclusive, to avoid unnecessary costs of proving up evidence at trial. This is particularly true because fakes prepared by good old AI (as opposed to generative AI) are going to be more easily found out by standard detection tools than fakes prepared by generative AI.

2. Is the reference to "deepfakes" in the proposed Rule 901(c) Committee Note consistent with other legislation such as the Take It Down Act?

A Standing Committee member asked whether the deepfake definition used in the proposed Rule 901(c) is consistent with that used in the Take It Down Act. The Take It Down Act, Public Law 119-12 (May 19, 2025) provides the following definition of "digital forgery":

> The term 'digital forgery' means any intimate visual depiction of an identifiable individual created through the use of software, machine learning, artificial intelligence, or any other computer-generated or technological means, including by adapting, modifying, manipulating, or altering an authentic visual depiction, that, when viewed as a whole by a reasonable person, is indistinguishable from an authentic visual depiction of the individual.

The definition of "deepfake" used in proposed Rule 901(c) is terse: the note defines a deepfake as "an inauthentic item prepared by software programs using generative artificial intelligence."

One reason for the brevity of the definition is that the term "deepfake" is not used in the text of the rule. It is only a term of convenience for the Note. Beyond that, the definition in the Take It Down Act is directed toward a somewhat different problem than that addressed by Rule 901(c). For example, the Take It Down Act refers to an "intimate visual depiction of an identifiable individual" because the harm to be addressed is the use of generative AI to depict pornography. Obviously, Rule 901(c) is directed more generally to any kind of deepfake. Moreover, the language in the Act "when viewed as a whole by a reasonable person" is completely out of place in a rule that requires the *court* to determine that the item is more likely than not a deepfake. All in all, the different goals of the two rules seem sufficient to explain why the language is different.[5]

3. Should there be a Notice Provision in the Text?

In public comments to Rule 707, a few commentators suggested that the Rule should not be approved until the discovery and notice provisions in the Civil and Criminal Rules are amended to address machine learning evidence offered under Rule 707. The memo on Rule 707, in this agenda book, addresses these suggestions and proposes some solutions. The question here is whether similar elaborate, multi-Committee notice provisions are necessary for Rule 901(c).

The current draft discusses notice issues in the last paragraph of the Committee Note. It reads as follows:

> Courts are encouraged to exercise their discretion over case management to establish notice requirements for parties who wish to provide evidence that an item is a deepfake, in order to limit the possibility that a battle of experts on admissibility of evidence under the rule will

[5] The Take it Down Act covers depictions "made by artificial intelligence, or any other computer-generated or technological means" which is broader coverage than "generative artificial intelligence." But for reasons previously stated, a focus on generative artificial intelligence seems more precise (while perhaps underinclusive) as applied to deepfakes.

occur during a trial. The rule does not set forth notice requirements because the deepfake issue is likely to arise in different contexts, and the appropriate notice that a party with a deepfake argument must provide may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment.

This language has a lot to commend it. It emphasizes the importance of notice, and the concern about a battle of experts. But it allows courts to exercise their own discretion through case management orders. It cautions that rigid requirements, as might be found in a rule, will be problematic because deepfakes are of various types, and the discovery of a possible defect will not be at the same time in every case. The question is whether a notice requirement in text will do a better job of teeing up the deepfake argument in enough time to resolve it before trial.

If a specific notice provision is to be adopted, the first question is, notice of what? There is no need for any rule on notice of intent to admit an item of evidence. So a deepfake video will be disclosed pursuant to the same requirements as apply to all video and documentary evidence. That is so, today, under the terms of the Civil and Criminal Rules. So a notice requirement in this rule cannot be about notice and production of a video, even where that video happens to be a deepfake. The item of evidence – video, audio recording, etc., will be disclosed pursuant to existing rules.

The concern about notice that is specific to deep fakery is: *what notice must the opponent give of its intent to present evidence that the item is a deepfake?* That question does not appear to be covered by the Civil and Criminal Rules. It appears that some notice requirement for presentation of a challenge to a deepfake would be useful, as it would not do to allow such an argument to be made on the eve of, or at, trial. (That concern is specifically mentioned in the proposed Committee Note).

So assuming notice would be useful to specify, what is the best way to do so? There appear to be four possibilities:

First. ***General language in the Committee Note of the need to have pretrial notice.*** This method has the virtue of emphasizing the importance of pretrial notice, but not setting requirements in stone when the circumstances of discovering the possibility of a deepfake are going to vary greatly. The language in the current note could simply be preserved because it does focus on the notice to be provided by the objecting party, and it encourages court involvement and flexibility.

Second. ***Specific notice requirement in the text.*** This method would result in a rule, for example, that "a party who claims that an item of evidence is inauthentic due to use of generative artificial intelligence must notify all opposing parties no later than [30] days before trial of the intent to provide evidence that the challenged item is inauthentic, unless the court, for good cause, allows notice at a later date." The problem with a specific time period is that the discovery of indications that an item may be a deepfake could occur at any time. Given the lack of predictability, a rule with a specific time period is likely to devolve into a rule in which good cause becomes the rule, not the exception. Moreover, none of the notice provisions prepared by the Evidence Rules Committee have included specific time periods.

Third. ***A flexible notice provision in the text.*** The last two notice requirements added to the Evidence Rules by the Committee are found in Rule 807 (notice provision amended in 2019) and 404(b) (notice provision amended in 2020). Both contain a flexible provision requiring notice within a reasonable time --- "reasonable" meaning enough time for the adversary to provide a response. As applied to proposed Rule 901(c), such a notice provision might look like this:

> **(4) Notice.** Unless the court orders otherwise, a party claiming that an item is fabricated in whole or part by generative artificial intelligence must provide reasonable pretrial notice to all opposing parties of the intent to present evidence of fabrication, so that the opposing parties have a reasonable opportunity to meet that evidence before trial.

This proposal raises the notice obligation to text, thus making it more likely to be followed. And it has the benefit of flexibility. "Unless the court orders otherwise" recognizes that in some situations, the opponent might not have the opportunity to investigate an item for deep fakery before trial. Examples include where a video is offered for rebuttal, or for impeachment, during the trial.

Last Option. ***Amendments to the Civil and Criminal Rules.*** There appears to be no reason to resort to the Civil and Criminal Rules for notice requirements about the intent to make an argument under Rule 901(c). The Rule 901(c) situation is not about discovery, nor is it about production. Rather it is just about giving the adversary enough time to respond to evidence that the challenged item is a deepfake. In that light, the proper analogies are Rules 404(b) and 807.

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Consequently, it appears that the most effective notice requirement is the flexible, Rule 404(b)-type notice of intent to present evidence of deepfakery — along with an accompanying Committee Note. That notice requirement, and accompanying altered Committee Note, are set forth in the Draft for the Committee's review, in the last section of this memo.

Plan B appears to be to make no change to the text and to rely on the language in the Committee Note that is currently in the working draft, as set forth above.

4. Should There Be a Definition of AI and "Generative AI" in the Text?

Currently, the definition of "generative AI" is in the Committee Note. The Note provides as follows:

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

In the working draft of possible changes to Rule 707 in response to public comment, a definitions subpart has been included in order to describe "artificial intelligence." So adding a text subdivision here for the definition would provide consistency. And at any rate there is value in defining a new term in text, so that people don't have to go looking for it in the Committee Note.

A definitions subdivision could look like this:

> **(5) Definitions.** In this rule, "generative artificial intelligence" means a computer system that emulates the structure and characteristics of input data in order to create derived synthetic content, including images, video, audio, text, and other digital content.

This definition is derived from Executive Order 14110. There is no definition of generative artificial intelligence that I could find in a federal statute.

No separate definition of "artificial intelligence" is required because that term is not used in this rule.

III. An Updated Draft Rule 901(c) and Committee Note

What follows is the draft of proposed Rule 901(c), with modifications as discussed in Part Two of this memo and some restyling. The proposal retains the basic two-step approach: 1) The proponent has the burden of going forward with a deepfake challenge: evidence sufficient to support a finding of fabrication is necessary before the court considers whether the item is a deepfake; and then 2) The item is inadmissible unless the proponent can prove, by a preponderance of the evidence, that the item is authentic. Additional subdivisions are added to the text to include a notice requirement and a definition of "generative artificial intelligence."

Even if the Committee decides that it is too early to proceed with a deepfake amendment, it will be important to receive any comments and suggestions from Committee members on the text and Committee Note --- so that when, if ever, the Committee decides to act, it will have a proposal ready to go.

After the updated draft, I set forth the previous draft that was reviewed by the Committee.

Rule 901(c). <u>POTENTIALLY FABRICATED EVIDENCE CREATED BY GENERATIVE ARTIFICIAL INTELLIGENCE.</u>

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

(2) ***Showing Then Required by the Proponent.*** If the opponent makes that showing, the item of evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

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

(4) ***Notice.*** Unless the court orders otherwise, a party claiming that an item is fabricated in whole or part by generative artificial intelligence must provide reasonable pretrial notice to all opposing parties of the intent to present evidence of fabrication, so that the opposing parties have a reasonable opportunity to respond to that evidence before trial.

(5) ***Definitions.*** In this rule, "generative artificial intelligence" means a computer system that emulates the structure and characteristics of input data in order to create derived synthetic content, including images, video, audio, text, and other digital content.

Committee Note

This new subdivision is intended to set forth guidance and standards when an opponent alleges that a proffered item of evidence is a "deepfake" — i.e., that it is an inauthentic item prepared by software programs using generative artificial intelligence.

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

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

reason that a person with "knowledge" may well think that the item is genuine when in fact it is a deepfake.

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence — that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent *evidence* of such a broad point is proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the absence of the necessary foundation. *See* United States v. Peterson, 945 F.3d 144, 157 (4th Cir. 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under Rule 403; the proposed demonstration "was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."). And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that is made without foundation in the evidence. *See* Lee v. City of Troy, 339 F.R.D. 346, 367–68 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without any basis, that the plaintiff's videos were "manufactured" and stating that "attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.").

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

The rule requires that an opponent pressing a deepfake argument must provide pretrial notice of the intent to present evidence of fabrication, so that the proponent of the item has a reasonable opportunity to respond. The purpose of the notice requirement is to assure that deepfake arguments under Rule 901 are resolved, if possible, before trial. The rule does not set forth specific time periods because the deepfake issue is likely to arise in different contexts, and the appropriate notice that a party with a deepfake argument must provide may well depend on whether it is a civil or criminal case and on whether the item of evidence is offered for impeachment. The rule provides that a court might excuse the lack of pretrial notice, as there may arise situations in which the opponent discovers that an item may be a deepfake after the trial has begun.

The term "generative artificial intelligence" applied in this rule is derived from Executive Order 14110 (Oct. 30, 2023).

Previous draft reviewed by the Committee

The major changes, leading to the current draft, are:

1. There is a notice provision in text (and a change to the passage in the previous Committee Note, to tie it to text.

2. There is a definition in text.

3. There is a focus on "generative artificial intelligence" as opposed to "artificial intelligence (starting in the rule heading and proceeding through the Note.

Rule 901(c). POTENTIALLY FABRICATED EVIDENCE CREATED BY ARTIFICIAL INTELLIGENCE.

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

(2) ***Showing Then Required by the Proponent.*** If the opponent makes that showing, the item of evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

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

Committee Note

This new subdivision is intended to set forth guidance and standards when a party-opponent alleges that a proffered item of evidence is a "deepfake" --- i.e., that it has been prepared by the use of generative artificial intelligence so that it is not an authentic item --- not what the proponent says it is.

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

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

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

This amendment covers specific proffered items as to which the opponent has presented a sufficient foundation of fabrication. It does not directly address another possible consequence --- that because of the background risk of deepfakes, juries might be led to think that no evidence can be trusted. This phenomenon has been called the "liar's dividend." But rules are in place to combat claims that "you can't believe anything you see." To the extent evidence of such a broad point is proffered, it is subject to exclusion under Rule 403 for being distracting and confusing in the absence of the necessary foundation. *See* United States v. Peterson, 945 F.3d 144, 157 (4th Cir. 2019) (finding that a demonstration of how easy it is to fake a text was properly excluded under Rule 403; the proposed demonstration "was an attempt to prejudice the jury—an attempt to confuse it by throwing the veracity of text message screenshots writ large into doubt, without any effort to identify a connection to Peterson's case."). And to the extent the point is expressed by lawyers in argument, it is subject to the court's inherent authority to regulate lawyer argument that is made without foundation in the evidence. *See Lee v. City of Troy*, 339 F.R.D. 346, 367–68 (N.D.N.Y. 2021) (reversing the judgment for the defendant after defense counsel argued, without any basis, that the plaintiff's videos were "manufactured" and stating that "attorneys may not make comments to the jury that are so inflammatory or so unsupported by the record as to affect the integrity of the trial.").

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

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

MEMORANDUM

TO: Judicial Conference Advisory Committee on Evidence Rules

FROM: Ashley Walters, Research Associate, Federal Judicial Center
Meghan Dunn, Senior Research Associate, Federal Judicial Center
Timothy Lau, Senior Research Associate, Federal Judicial Center

DATE: March 25, 2026

RE: Summary of Rule 901 Survey

In December 2025 the Judicial Conference Advisory Committee on Evidence Rules requested that the Federal Judicial Center survey all federal judges to help the committee consider whether a rule amendment was needed to address challenges to the authenticity of audiovisual evidence on grounds that the evidence was a "deepfake."[1]

The Center developed a survey instrument in consultation with the committee chair and reporter and on January 15 sent an invitation to complete the survey to all district, magistrate, and bankruptcy judges, as well as judges of the Court of International Trade and Court of Federal Claims. On January 26 a reminder was sent to judges who had not responded, and the survey closed on January 30.

This memorandum summarizes the results of the survey.

[1] The survey defined "deepfake" as follows: "A 'deepfake' is an inauthentic image, video, or audio created using artificial intelligence. It is realistic-looking and realistic-sounding but is unreal and conveys false information."

A. Survey Response Rates

A total of 931 judges responded to the survey, representing a response rate of 45%. Response rate varied by judge type (see Table 1).

Table 1. Response rate by judge type.

Q10. Please indicate your judicial role.		
	n	**Response rate**
District Judge	449	42%
Court of International Trade Judge	5	42%
Court of Federal Claims Judge	5	22%
Magistrate Judge	299	46%
Bankruptcy Judge	173	55%
TOTAL RESPONSES	931	

B. Experience with Deepfake Challenges

Nearly all respondents (98%) said they had not encountered a challenge by litigants to the introduction of a video, photograph, or audio item on the grounds that it was a deepfake (deepfake challenge) (see Table 2). Fifteen respondents said they had encountered such a challenge. Two respondents did not answer the question.

Table 2. Experience with deepfake challenges.

Q1. Have any litigants in your cases challenged the introduction of a video, photograph, or audio item on grounds that it is a deepfake?			
	Yes	**No**	**Total Responses**
District Judge	6	441	447
	1%	99%	
Court of International Trade Judge	0	5	5
	0%	100%	
Court of Federal Claims Judge	0	5	5
	0%	100%	
Magistrate Judge	7	292	299
	2%	98%	
Bankruptcy Judge	2	171	173
	1%	99%	
ALL JUDGES	15	914	929
	2%	98%	

The questions presented to each respondent in the remainder of the survey depended on their response to Q1, meaning that judges who responded "Yes" were presented with one set of follow-up questions, and judges who responded "No" with a different set of follow-up questions.[2] The results for the two groups are separately reported below.

1. Respondents Who Encountered Deepfake Challenges

Of the 15 respondents who said they had encountered deepfake challenges, 10 said they had encountered a challenge once (see Table 3). One respondent said they had encountered a challenge twice, and 4 respondents said they had encountered a challenge three or four times.

Table 3. Number of deepfake challenges.

Q2. Approximately how many such challenges have been raised in calendar years 2024 and 2025?		
	n	**%**
1	10	67%
2	1	7%
3–4	4	27%
TOTAL RESPONSES	15	

Note: This table excludes the two respondents who did not answer Q1 but did answer Q2 as "Don't recall."

Thirteen of the 15 respondents who had encountered a challenge were district and magistrate judges, and most of these 13 (9 respondents) said challenges occurred in civil cases (see Table 4).

Table 4. Deepfake challenges by case type for district and magistrate judges.

Q3. Were the challenges raised in criminal cases, civil cases, or both?		
	n	**%**
Civil Cases	9	69%
Criminal Cases	2	15%
Both Criminal and Civil Cases	2	15%
TOTAL RESPONSES	13	

Note: This table only reflects responses from district and magistrate judges and excludes the two respondents who did not answer Q1 but did answer Q3 as "Don't recall."

The 15 respondents who had encountered deepfake challenges were asked to provide the case number(s) or name(s) for the cases in which the challenges were made. Four respondents provided sufficient detail for us to locate the case and related documents on PACER.[3]

One respondent identified a dispute over whether audiovisual materials intended to be used as evidence were AI generated or manipulated. *See* Amended Order, *Freedman Normand*

[2] Two respondents who did not answer Q1 were presented with the same set of follow-up questions as those who responded "Yes".

[3] The judges who informed us of the specific cases described here gave us permission to include citations to those cases.

Friedland LLP v. Cyrulnik, No. 1:21-cv-01746 (S.D.N.Y. Apr. 5, 2023), ECF No. 380. However, because the expert report to support the challenge against the accused video was untimely, the court's order offers little insight into how similar challenges might be resolved on the merits.

Another respondent identified a dispute about whether a party may compile and use a "zoomed-in" clip of previously admitted audiovisual materials; this does not appear to be the type of manipulation of concern to the committee. *See* Jury Trial Transcript at 135-50, *United States v. Sheffler*, No. 3:19-cr-30067 (C.D. Ill. July 14, 2022), ECF No. 350.

The responses of the other two respondents suggest that disputes about whether audiovisual evidence was manipulated or generated by AI do not always result in party filings or court adjudication recorded in the docket.[4] One of these respondents noted a case where an informant pled guilty to obstruction of justice after providing false audiovisual evidence to the United States. The falsified evidence had resulted in an indictment of an innocent person in an earlier case. There was no court decision about the authenticity of the evidence in the docket of the earlier case, which was dismissed on a motion of the United States with no explanation. Instead, the details were only revealed in open court during the sentencing of the informant, at which point falsity was beyond dispute. See Audio Transcript of Sentencing Hearing, *United States v. Hernandez*, No. 3:25-cr-2384 (W.D. Tex. Jan. 21, 2026), ECF No. 28. The second of these respondents provided a case number, but we found no dispute about evidence on the docket, suggesting that the court learned of the dispute but was not called upon to adjudicate it or that the challenge was raised and resolved orally without docketing.

Respondents who indicated they had encountered deepfake challenges were asked whether they had required any initial showing by the challenger. Respondents were evenly split, with 8 saying they did and 9 saying they did not (see Table 5).

Table 5. Initial showing, respondents with experience with deepfake challenges.

Q5. Did you require any initial showing by the challenger before inquiring further into the charges of falsification of the audiovisual evidence?		
	n	**%**
Yes	8	47%
No	9	53%
TOTAL RESPONSES	17	

Note: This table includes the two respondents who did not answer Q1 but did answer Q5.

[4] In addition, two respondents who did not provide information sufficient for PACER follow-up reported that the concern about authenticity did not ripen into a challenge requiring adjudication.

The 8 respondents who said they had required an initial showing by the challenger were asked to describe the required showing. All 8 provided an answer.

- Regarding the level of showing required from the challenger, 3 judges (38% of 8 comments) said they required some reasonable basis or argument for the challenge (e.g., "the reason the Government thought the pictures and videos were fake"). Two judges (25% of 8 comments) said they required some kind of minimal evidence (e.g., "information regarding the legitimate/original content versus the "faked" version"), and 2 judges (25% of 8 comments) noted they required expert evidence.
- Regarding the nature of the showing, 3 judges (38% of 8 comments) mentioned a direct factual attack of the evidence, (e.g., "something doesn't look right, match up right, or otherwise make sense"), and one judge (13% of 8 comments) mentioned an indirect factual attack, such as an alibi that disproved the deepfake (e.g., "This is a picture of him in [location]; he has never been to [location]").

When asked whether the evidentiary rules concerning authenticity should be amended to address deepfake challenges, 5 of the 15 respondents who had experienced a deepfake challenge said the rules should be amended (see Table 6).

Table 6. Preference for amending evidentiary rules, respondents with experience with deepfake challenge.

Q9. Should the evidentiary rules concerning authenticity be amended to address challenges to audiovisual evidence as deepfakes?			
	Yes	**No**	**Total Responses**
District Judge	3	3	6
	50%	50%	
Magistrate Judge	2	5	7
	29%	71%	
Bankruptcy Judge	0	2	2
	0%	100%	
ALL JUDGES	5	10	15
	33%	67%	

Note: This table excludes the two respondents who did not answer Q1 but did answer Q9, one of whom said "Yes" to Q9, and one of whom said "No" to Q9.

2. Respondents Who Did Not Encounter Deepfake Challenges

The 914 respondents who said they had not encountered the issue of deepfake challenges were asked if they would require an initial showing before inquiring further into such challenges. Most (82%) responded that they would (see Table 7). Nine respondents did not answer the question.

Table 7. Initial showing, respondents without experience with deepfake challenges.

Q7. Would you require any initial showing by the challenger before inquiring further into the charges of falsification of the audiovisual evidence?			
	Yes	**No**	**Total Responses**
District Judge	361	75	436
	83%	17%	
Court of International Trade Judge	4	1	5
	80%	20%	
Court of Federal Claims Judge	3	2	5
	60%	40%	
Magistrate Judge	248	42	290
	86%	14%	
Bankruptcy Judge	129	40	169
	76%	24%	
ALL JUDGES	745	160	905
	82%	18%	

The 745 respondents who indicated they would require an initial showing by the challenger were asked to describe what that initial showing would be, with 679 respondents providing an answer.

Comments were classified along two axes: level of showing (e.g., the respondent would require the challenger to provide a reasonable basis for the challenge or would require expert testimony) and nature of showing (e.g., the respondent would require a factual basis directly attacking the proffered evidence or would require a factual basis indirectly attacking the evidence).[5]

- In terms of the level of showing, the most frequently mentioned answer was some type of minimal evidence from the challenger, such as "an affidavit addressing the dispute" or "technical evidence that the proffered evidence is not authentic" (283 comments, 42% of 679 comments). Another common showing respondents mentioned was an argument by the challenger for why they suspected the evidence to be a deepfake (240 comments, 35% of 679 comments), such as "a reason to doubt the authenticity other than speculation" or

[5] All comments received a coding category for level of showing, but not all comments mentioned the nature of showing; as a result, some comments did not receive a nature of showing code. The level of showing category was coded using the lowest bar of evidence the respondent would accept. For example, if a comment mentioned accepting either an affidavit or sworn testimony, the comment was coded based on the lower bar of an affidavit.

"a good faith reasonable basis for asserting falsification." Other respondents stated they would request the challenger to produce expert evidence to support their claim of a deepfake (22 comments, 3% of 679 comments) or would request the challenger provide sworn testimony (17 comments, 3% of 679 comments). Some respondents stated they would request the proponent, as opposed to the challenger, to provide more information to authenticate the evidence (26 comments, 4% of 679 comments). In addition, 41 comments (6% of 679 comments) indicated that the required showing would depend on the specifics of the case or evidence, and 36 comments (5% of 679 comments) noted the respondent was unsure.

- In terms of the nature of showing, 89 comments (13% of 679 comments) mentioned wanting a direct factual attack of the evidence, (e.g., a "tell" in the video), and 53 comments (8% of 679 comments) mentioned an indirect factual attack (e.g., the evidence showed someone in a place they had never been before).
- Comments by 14 respondents (2% of 679 comments) did not fall into any of the above categories.

All 914 respondents who had not encountered deepfake challenges were asked whether the evidentiary rules concerning authenticity should be amended to address such challenges. More than half of respondents (55%) responded "Yes" (see Table 8); 25 respondents did not answer the question.

Table 8. Preference for amending evidentiary rules, respondents without experience with deepfake challenges.

Q9. Should the evidentiary rules concerning authenticity be amended to address challenges to audiovisual evidence as deepfakes?			
	Yes	**No**	**Total Responses**
District Judge	231	198	429
	54%	46%	
Court of International Trade Judge	3	2	5
	60%	40%	
Court of Federal Claims Judge	3	1	4
	75%	25%	
Magistrate Judge	165	120	285
	58%	42%	
Bankruptcy Judge	85	81	166
	51%	49%	
ALL JUDGES	487	402	889
	55%	45%	

TAB 5

University of Oklahoma College of Law
300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
Floyd & Martha Norris Chair in Law
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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 902(1): Self-Authentication of the Records of Federally Recognized Indian Tribes and Nations
Date: April 1, 2026

The Evidence Advisory Committee is considering an amendment to Federal Rule of Evidence 902(1) to make the sealed and signed records of federally recognized Indian Tribes and Nations self-authenticating. Such an amendment would render such tribal documents and records self-authenticating without a trial witness or any additional certification from a records custodian.

This Agenda memorandum evaluates the proposal to amend Rule 902(1) in five parts. Part I traces the history of the proposal within the Committee and the rationale for amending Rule 902(1) to include federally recognized Indian Tribes and Nations. Part II summarizes the feedback that has been received from tribal leaders to date regarding the proposed amendment. Part III describes the process for admitting tribal records at trial under the existing Federal Rules of Evidence, addressing both the authentication and hearsay issues such records present. Part IV analyzes the effect of an amendment to Rule 902(1) on the process for admitting tribal records in future cases should such an amendment be adopted, as well as access to tribal enrollment records through tribal open records laws. Part V includes a draft amendment to Rule 902(1) and draft Committee Note for the Committee's consideration.

I. Committee's Consideration of Proposed Amendment to Federal Rule of Evidence 902(1)

The Committee initially received a recommendation from Judge Frizzell of the Northern District of Oklahoma to amend Rule 902(1)(A) to include federally recognized Indian tribes on the eve of the Fall 2024 meeting.[1] At the Fall 2024 meeting, the Committee deferred consideration of the proposal pending input from the Department of Justice (DOJ).[2] As described below, the DOJ thereafter proposed adoption of an amendment to Rule 902(1)(A) to address inefficiencies and proof problems in federal criminal cases requiring proof of the Indian status of a victim or of a defendant.

[1] *See* Minutes of the Evidence Advisory Committee Meeting on November 8, 2024, p. 19. A similar proposal had been on the Committee's agenda over a decade ago, but no action was taken on the matter at that time.
[2] *Id.*

A. Department of Justice Proposal to Amend Fed. R. Evid. 902(1)(A)

At the May 2025 meeting of the Evidence Advisory Committee, the DOJ proposed an amendment to FRE 902(1)(A) to "add federally-recognized Indian tribes" to the list of governmental entities that can provide sealed and signed documents that are self-authenticating.[3] The DOJ argued that there is no logical reason to exclude the documents of federally recognized tribes from those that are self-authenticating. The DOJ pointed out that federal criminal jurisdiction under the General Crimes Act, 18 U.S.C. § 1152, and under the Major Crimes Act, 18 U.S.C. § 1153, depends upon the Indian status of victims and defendants, and emphasized the need to utilize tribal government documents to establish this element essential to jurisdiction.

The DOJ noted that Rule 902(1)(A) currently includes an expansive list of governmental entities whose records are self-authenticating and that there is no logical reason to exclude federally recognized tribal governments (with whom the United States maintains a "government-to-government relationship") from that comprehensive list.[4] The DOJ further argued that potential variation among tribal record-keeping practices should not disqualify those records from self-authentication given the wide variation in record-keeping practices among currently listed municipal and territorial entities and the lack of any review of the record-keeping practices of currently recognized governmental entities. The DOJ urged that there is reason to trust the reliability of the records of federally recognized tribal governments given the important purposes those records serve.[5] The DOJ noted that the burden and cost of authenticating tribal records essential to federal criminal jurisdiction (on prosecutors, defendants, tribal governments, and federal courts) justify an amendment to Rule 902(1)(A) to add the records of federally recognized tribes and nations to the list of entities whose sealed and signed records are self-authenticating. Finally, the DOJ argued that respect for tribal sovereignty and dignity supports the addition of federally recognized tribes to the list of approved governmental entities in Rule 902(1)(A).

The Federal Public Defender for the District of Nevada ("FPD") also submitted a memorandum to the Committee in May 2025, urging the Committee to reject the amendment to Rule 902(1)(A) proposed by the DOJ.[6] First and foremost, the FPD argued that an amendment is unnecessary because the Federal Rules of Evidence provide multiple mechanisms for proving Indian status that the government has used successfully for decades. The FPD pointed out that issues of authentication have arisen only in a few cases in a district relatively new to federal prosecutions of Indian defendants. Furthermore, the FPD argued that the proposal failed to take the diversity of Indian tribes and tribal record-keeping into account: "Without a more nuanced understanding of the universe of tribes and tribal documents potentially affected by the amendment, the amendment risks introducing uncertainty into a system that is, at the present

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[3] *See* Memorandum to Judge Furman from the U.S. Dep't of Justice (March 28, 2025) (recommending the amendment to Rule 902(1)), available at 2025-05_evidence_rules_committee_agenda_book_final.pdf.
[4] *See* Federally Recognized Indian Tribe List Act of 1994, P.L. 103-454 (Nov. 2, 1994).
[5] *See* Memorandum to Judge Furman from the U.S. Dep't of Justice, at 4 (March 28, 2025) ("Tribes set criteria for enrollment and maintain related records, which are critical to their government-to-government relationships with the United States and for determining the benefits to which tribes and their members may be entitled."), available at 2025-05_evidence_rules_committee_agenda_book_final.pdf (Tab 6A).
[6] *See* Memorandum to Judge Furman from the Federal Public Defender, District of Nevada (April 3, 2025), available at 2025-05_evidence_rules_committee_agenda_book_final.pdf (Tab 6B).

time, easily understood by all parties." Finally, the FPD argued that action should not be taken in the name of tribal dignity and sovereignty without consultation with Indian tribes and nations whose records are at issue and whose citizens may be affected by the change.

B. Advisory Committee's Consideration of the Proposed Amendment to Rule 902(1)(A)

After considering the materials submitted by both the DOJ and the FPD and after lengthy discussion at the Spring 2025 meeting, the Committee resolved to seek input from tribal leaders regarding the possibility of amending Rule 902(1)(A) to include federally recognized tribes.[7] The Administrative Office of the United States Courts circulated a letter from Judge Furman addressed to Tribal Leaders on May 23, 2025, describing the proposal to amend Rule 902(1). The letter attached the memoranda in support of and in opposition to the proposed amendment from the DOJ and the FPD and solicited feedback by September 5, 2025. The letter was sent to twenty-three entities that represent tribal interests on May 23, 2025.[8] Judge Furman's letter requesting feedback was then emailed and faxed to 585 federally recognized tribal governments on September 15, 2025 to expand outreach and participation.

The Committee again discussed the potential amendment to Rule 902(1)(A) at the Fall 2025 meeting and the tribal feedback that had been received to date. The DOJ continued to express strong support for the amendment and promised to provide additional information in support at the Spring 2026 meeting. The Federal Public Defender community continued to object to the proposed amendment, explaining that under existing law, defense counsel is able to identify a current tribal records custodian who can attest to the authenticity of the tribal records at issue when a Rule 902(11) business records certification is used to authenticate them. The FPD argued that defense counsel would lose this important check on authenticity were records to become self-authenticating in the absence of such a certification. In the event that the Committee decided to proceed with an amendment nonetheless, the FPD sought to limit the amendment to permit self-authentication of the records of only those tribal governments that honor public records requests from non-members. The Committee discussed the potential amendment but resolved to gather additional tribal feedback and information regarding the operation of an amended Rule 902(1)(A) as it would apply to tribal records, and to vote on the amendment as an action item at the Spring 2026 meeting.

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[7] *See* Minutes of the Evidence Advisory Committee Meeting on May 2, 2025, p. 12 available at 2025-05-02_evidence_committee_meeting_minutes_final.pdf.

[8] The letter went to the following organizations on May 23, 2025: National Congress of American Indians; United South and Eastern Tribes; Midwest Alliance of Sovereign Tribes; Great Plains Tribal Chairmen's Association; Inter-Tribal Association of Arizona; Inter-Tribal Council of Nevada; National American Indian Court Judges Association; Tribal In-House Council Association; Alaska Federation of Natives; National Native American Bar Association; Native American Rights Fund; Indian Law Resource Center; Minnesota American Indian Bar Association; Affiliated Tribes of Northwest Indians; Federal Bar Association Indian Law Section; American Indian Law Center; Navajo Nation Bar Association; California Indian Law Association ; Native American Bar Association of Arizona; Northwest Indian Bar Association; Oklahoma Indian Bar Association; New Mexico Indian Bar Association; Native American Bar Association of DC.

II. Feedback from Tribal Governments Regarding the Proposed Amendment to Rule 902(1)(A)

The Committee received four responses to its request for feedback from tribal governments, representatives, and other interested parties in time for the Fall 2025 meeting which were summarized in a Fall 2025 Agenda memorandum.[9] All of the feedback received in Fall 2025 strongly supported the proposed amendment to Rule 902(1)(1), as follows:

- **The Chickasaw Nation** stated that it is "wholly supportive" of the proposal to add federally recognized tribes and nations to Rule 902(1), opining that there is no "logical reason for requiring the sealed and signed documents of federally recognized tribes to be extrinsically authenticated" and that the amendment would "place federally recognized tribes on the same evidentiary footing as states, territories, and insular possessions." The Chickasaw Nation also noted the significant burden placed on tribes to authenticate tribal records both in federal courts and in other tribal courts that follow the Federal Rules of Evidence since the uptick in federal and tribal prosecutions following the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

- **The Navajo Nation** opined that, as sovereign governments that regulate their own affairs, federally recognized tribes "should be empowered to provide signed and sealed documents for self-authentication." The Navajo Nation claimed that an amendment to Rule 902(1) would "eliminate[] administrative burden while putting the Navajo Nation on equal footing with other governments" and would be a "welcome change."

- **The Quapaw Nation** stated that the amendment to Rule 902(1) would "better recognize[], respect[], and uphold[] the principles of tribal sovereignty than the currently enacted Rule 902, which inequitably, concedes as self-authenticating the sealed and signed documents of all government entities except tribal nations." The Quapaw Nation opined that some of the concerns about the amendment stem from "long-standing misconceptions and implicit biases about the professionalism of tribal nations and the details of their administrative operations."

- **Northern Plains Indian Law Center, University of North Dakota School of Law**, expressed strong support for the amendment, explaining that Indian tribes possess inherent government authority and sovereignty that makes them similarly situated to other governmental entities whose records are self-authenticating under Rule 902(1). The Center further opined that the diverse histories and record-keeping practices of the various federally recognized tribes do not justify excluding them from Rule 902(1), noting that Rule 902(1) not only allows self-authentication of documents from

[9] *See* Memorandum from Liesa L. Richter to Evidence Advisory Committee Regarding Rule 902(1): Self-Authentication of the Records of Federally Recognized Indian Tribes and Nations (September 19, 2025), available at 2025-11_evidence_rules_commitee_agenda_book_final.pdf

"the sovereign State of Nebraska and of its largest municipality, Omaha, but also of Monowi, Nebraska, 'the only incorporated place in the US with just one resident.'"

Five district judges, all of whom are citizens of federally recognized Indian Tribes and Nations, with significant experience in federal prosecutions involving tribal victims or defendants also submitted a letter in support of an amendment to Rule 902(1).[10] And Dr. Timothy Lau of the Federal Judicial Center submitted some preliminary statistics on trial disputes regarding the Indian status of either a criminal defendant or of a victim. These statistics suggested that the Indian status of either a defendant or victim is disputed in an extremely small percentage of federal prosecutions.[11]

The Committee has received six additional responses to Judge Furman's letter from tribal governments since the Fall 2025 meeting. All of these responses strongly support the amendment and urge the Committee to propose its adoption, as follows:

- **The Alaska Native Justice Center** offered strong support for the proposed amendment, contending that it "would enhance efficiency and the administration of justice by the federal courts." The Center further noted that a similar amendment was proposed in Alaska in 2024 to increase efficiency and to afford tribal records the same dignity and recognition enjoyed by other public documents and records. The Center's Response is attached hereto as **Exhibit A**.

- **The Catawba Indian Tribe of South Carolina** also strongly supported the proposed amendment and "urged the Committee to move forward" with it. The Catawba Tribe stated that the amendment would affirm the dignity and sovereignty of tribal governments by placing their records on equal footing with those of other public entities currently listed in Rule 902(1)(A). It further stated that an amended Rule 902(1) "would reflect the reality that tribes are longstanding governments with reliable established processes for issuing and maintaining official records." The Tribe's Response is attached hereto as **Exhibit B**.

- **Elk Valley Rancheria, California**, is a federally recognized Indian Tribe that offered strong support for the proposed amendment. EVR opined that the proposed amendment to Rule 902(1)(A) is "a modest, targeted amendment" that "promotes parity among sovereigns, preserves all existing hearsay and relevance safeguards, and reduces avoidable costs and delays associated with authenticating routine Tribal records." EVR recognized the significant benefits of an amendment for purposes of federal criminal prosecutions but also noted advantages in the context of civil litigation: "Beyond criminal cases, federal civil litigation frequently requires authenticating Tribal ordinances, resolutions, court judgments, or certified copies. Self-authentication will streamline proceedings, reduce motion practice on undisputed authenticity questions, and conserve judicial and party resources–especially for rural Tribes whose recordkeepers would otherwise appear or prepare certifications under

[10] *See* Letter to Judge Furman (April 29, 2025), available at 25-ev-d_suggestion_from_5_federal_district_judges_-_rule_902.pdf.
[11] *Id.*

tight deadlines." EVR also discounted many of the stated concerns regarding the proposed amendment: "Concerns about varying Tribal record systems, FOIA inapplicability, or subpoena limits do not undermine the narrow authenticity rationale of Rule 902(1). A seal and authorized signature are objective indicia of authenticity; hearsay and foundation rules still police reliability; and parties remain free to challenge authenticity upon a genuine showing of dispute." The Tribe's Response is attached hereto as **Exhibit C**.

- **Federated Indians of Graton Rancheria** is a federally recognized Indian Tribe in Sonoma County, California, that also urged the Committee to move forward with the proposed amendment to Rule 902(1)(A). The Tribe explained that "[t]he proposed change would bolster tribal sovereignty by placing tribes on clear, equal footing with other types of covered governmental entities and avoid unwarranted scrutiny of qualifying tribal documents." The Tribe further noted that "it is critically important to adopt the proposed rule as an example for California state courts" because there are 109 federally recognized Tribes within the State whose records currently require extrinsic authentication in the California state courts. The Tribe suggested that a federal change would encourage a change in California, thus greatly improving the handling of Indian Child Welfare Act cases in the state courts. The Tribe's Response is attached hereto as **Exhibit D**.

- **Modoc Nation** also expressed "strong support" for the proposed amendment. The Tribe opined that the rule change is "necessary to correct an inconsistency that undermines tribal sovereignty, burdens judicial efficiency, and fails to reflect the reality of government-to-government relations between the United States and Indian tribes." The Modoc Nation characterized concerns about variations in tribal record-keeping practices as "outdated and unfounded," noting that "Indian tribes have equal, if not greater, reasons to maintain accurate, official records, especially given the direct impact those records have on their legal relationship with the United States and on eligibility for federal programs." The Modoc Nation stated that the amendment would be a "long overdue step toward consistency, uniformity, and meaningful recognition of Tribal sovereignty." The Tribe's Response is attached hereto as **Exhibit E**.

- **Morongo Band of Mission Indians** also urged adoption of the proposed amendment to Rule 902(1)(A), emphasizing the financial and administrative burdens of extrinsic authentication of tribal records: "This requirement is time-consuming for all concerned: the Tribe must furnish documentation satisfying the evidentiary requirements, the Department of Justice must accommodate the evidentiary burdens into its litigation, and federal judges must engage in lengthy analyses of the sufficiency of extrinsic evidence." The Tribe further noted the financial burden on federally recognized Tribes who must assist with authentication efforts. The Tribe's Response is attached hereto as **Exhibit F**.

The Committee has now solicited feedback from twenty-three organizations and entities representing tribal interests, as well as from all federally recognized Indian Tribes and Nations. And the feedback received from these governments and organizations unanimously supports the

proposed amendment. The comments received note the importance of tribal sovereignty, as well as the significant burdens and inefficiencies of the existing authentication requirements. They emphasize that several states (as discussed further below) have already made tribal records self-authenticating. Finally, the comments reject concerns about variations in tribal record-keeping or in tribal open records laws as inadequate to undermine the self-authentication of sealed and signed tribal documents.

The Committee also invited updated submissions from the DOJ and the Public Defender, and they are attached to this report after the submissions from the Indian Tribes.

III. Admission of Tribal Enrollment Records Under the Existing Federal Rules of Evidence

Federally recognized Indian Tribes and Nations routinely issue a variety of documents and records in carrying out their sovereign government affairs. As noted by Elk Valley Rancheria, California, such records are often important to proceedings in federal court: "federal civil litigation frequently requires authenticating Tribal ordinances, resolutions, court judgments, or certified copies." And tribal records have grown increasingly important in federal criminal prosecutions. Under the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act 18 U.S.C. § 1153, federal criminal jurisdiction depends upon the Indian status of the defendant or victim. Indeed, Indian status is an "essential element that the government must allege in the indictment and prove beyond a reasonable doubt."[12] To establish this essential element, the government must prove two things: (1) that the defendant has some degree of Indian blood and (2) the defendant's enrollment in or affiliation with a federally recognized Indian Tribe or Nation.[13]

The Certificate of Degree of Indian Blood (CDIB) is an official U.S. document, issued by the Bureau of Indian Affairs, which certifies an individual has a specific degree of Native American blood of a federally recognized Indian tribe, band, nation, pueblo, village or community.[14] It does not establish tribal citizenship, however.[15] CDIB Records from the Bureau of Indian Affairs are currently self-authenticating under Rule 902(1)(A) because they are domestic public documents of the United States that contain the requisite seal and signature.[16] When they exist, these records will suffice to establish a defendant's or victim's degree of Indian blood, although they will not establish the requisite tribal affiliation.[17]

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[12] *See* United States v. Prentiss, 273 F.3d 1277, 1280-81 (10th Cir. 2001).
[13] United States v. Diaz, 679 F.3d 1183, 1187 (10th Cir. 2012).
[14] United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025) (CDIB "is a card certifying the defendant's quantum of Indian blood and which generally bears a seal from the United States Department of the Interior.").
[15] United States v. Walker, 85 F.4th 973, 982 (10th Cir. 2023) ("Ms. Dirickson's CDIB card was sufficient for the jury to determine that she satisfied the first element of Indian status: "some Indian blood.""); *see also* Choctaw Nation, *The Difference Between CDIB and Tribal Membership* (explaining that CDIB establishes Native American Ancestry and that Tribal Enrollment demonstrates both Native American ancestry and official tribal enrollment), available at cdib-and-tribal-membership-differences.pdf.
[16] United States v. Walker, 85 F.4th 973, 981 (10th Cir. 2023) ("The district court did not err in admitting Ms. Dirickson's CDIB card because the card was self-authenticating under Rule 902.")
[17] *Id.*

Thus, the government in a criminal case will also often need to introduce tribal records establishing a person's tribal enrollment in order to prove an offense under the General Crimes Act or under the Major Crimes Act.[18] To admit such a record at trial, therefore, the government will first need to authenticate the record — offer evidence sufficient to show that it is an official record generated by the particular tribe.[19] To rely on the truth of a tribal record to establish the fact of a person's tribal enrollment and the date of enrollment, the government will also need a hearsay exception that applies to the document.[20] Tribal enrollment records establishing a person's tribal affiliation are not presently self-authenticating because Indian tribes are not a listed government entity under Rule 902(1)(A).[21] Therefore, the government may authenticate a tribal enrollment record under Federal Rule of Evidence 901(b)(1) by calling a witness employed by or otherwise affiliated with the tribe who has personal knowledge of the record's authenticity to testify that it is genuine.[22] Alternatively, the government may authenticate a tribal record without calling a trial witness by offering a certification that complies with Federal Rule of Evidence 902(11).[23]

A. Testifying Witness Authenticates a Tribal Record

Under Rule 901(a), "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[24] Pursuant to Rule 901(b)(1), testimony from a witness with knowledge that an item is what it is claimed to be satisfies this requirement. Therefore, to authenticate a tribal enrollment record, the government may call a witness employed by or otherwise affiliated with the particular tribe who has personal knowledge of the authenticity of the record to testify at trial. Testimony by a witness with personal knowledge that a tribal record is genuine satisfies the authentication requirement.

Once the authentication requirement is satisfied, the government will need to rely upon a hearsay exception to admit the tribal record for the truth of the enrollment status and of the date

[18] The government may skip this proof if the defendant agrees to stipulate to the requisite Indian status. The FJC's empirical research suggests that that is often the case.
[19] *See* Fed. R. Evid. 901(a) ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").
[20] *See* United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025) ("Authentication alone is not enough, however. Tribal documents and records generally constitute hearsay because they consist of out-of-court statements that are "offer[ed] in evidence to prove the truth of the matter asserted" therein—that is, to prove the fact of the defendant's Indian status. Fed. R. Evid. 801(a), (c). Thus, in order to establish a tribal document's admissibility when offered to prove a defendant's Indian status, the government must also demonstrate that the tribal document falls under an exception to the bar on hearsay.").
[21] *Id.* ("Ms. Dirickson's Cherokee Nation registration card did not contain a seal. It therefore cannot be self-authenticating under Rule 902. Even if it had contained a seal, the document would still not be self-authenticating because tribal governments are not listed among those entities whose seals satisfy Rule 902."); *see also* United States v. Alvirez, 831 F.3d 1115, 1122-23 (9th Cir. 2016) (tribal records not self-authenticating under Rule 902(1)).
[22] Fed. R. Evid. 901(b)(1) ("testimony of a witness with knowledge" that "an item is what it is claimed to be" satisfies the requirement).
[23] *See* Fed. R. Evid. 902(11) (providing for self-authentication of "certified domestic records of a regularly conducted activity").
[24] Fed. R. Evid. 901(a).

of enrollment that it reports.[25] Two hearsay exceptions are most likely to apply. First, the business records exception set forth in Rule 803(6) could be relied upon to admit a tribal enrollment record if the testifying witness can supply the requisite foundation.[26] To admit a tribal record for its truth through a testifying tribal custodian, the witness needs to establish all of Rule 803(6)'s foundational requirements in her testimony, explaining when the record would have been made in relation to the enrollment, who the tribal source of the information regarding tribal affiliation and enrollment would typically be, and that the record was created in the regular course of the tribe's activities.

Alternatively, the public records exception to the hearsay rule could be utilized to admit the enrollment record of a tribal nation if a testifying witness appears at trial to authenticate it. The contents of a record may serve to satisfy the requirements of the public records hearsay exception without additional foundation testimony from the authenticating witness. Rule 803(8) admits:

> A record or statement of a public office if:
>
> (A) It sets out:
> (i) The office's activities;
> (ii) A matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel;
> (iii) In a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
> (B) The opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.[27]

Tribal records qualify as public records for purposes of the exception.[28] And the enrollment of persons in the tribe could constitute the "activities" of the tribe under subsection (i). A person's familial tribal affiliation or degree of Indian blood could be "matters observed" while under a legal duty to report.[29] Thus, with a testifying witness to authenticate the enrollment record, the public records exception could be used to overcome any hearsay objection. [30]

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[25] United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025) ("Specifically, we first hold that the government was required to prove Hatley's Indian status at the time of the offense.").
[26] Fed. R. Evid. 803(6).
[27] Fed. R. Evid. 803(8).
[28] *See* United States v. Fryberg, 854 F.3d 1126, 1131–32 (9th Cir. 2017) (tribal return of service qualified for admission under Rule 803(8)).
[29] It is possible that a defendant could try to argue that tribal officials cannot "observe" familial tribal affiliation or degree of Indian blood, rendering these matters "factual findings" that are not admissible against a defendant in a criminal case. I could locate no cases applying Rule 803(8) in a Major Crimes Act or General Crimes Act case or any defendant making such an argument.
[30] It may be possible to make an argument that an authentic tribal enrollment document may be treated as non-hearsay when offered solely to prove tribal enrollment or affiliation. It would seem that an authentic enrollment record would have legally operative consequences vis a vis the tribe or nation because the official record would have the *effect* of enrolling a person. The jury would still need to rely on the truth of the enrollment document to establish the degree of Indian blood (if that is listed and is not otherwise established by a CDIB) but an authentic "tribal enrollment" record may operate to enroll the person regardless of the truth-telling of the signatory.

B. Self-Authentication of Tribal Records with a Rule 902(11) Certificate

Under existing Evidence Rules, the only way in which the government can authenticate tribal records without a testifying witness is under Rule 902(11), as the certified domestic records of a regularly conducted activity. Rule 902(11) provides, as follows:

> Rule 902. Evidence That Is Self-Authenticating
>
> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> (11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.[31]

To satisfy Rule 902(11), a certification must demonstrate that the tribal record satisfies all the requirements of the business records exception. Thus, the tribal official who signs the certificate must attest that the record was made in the regular course of the tribe's regularly conducted activities, that it was made near in time to the enrollment (or other) events recorded, that the source of the information regarding the individual's tribal affiliation and enrollment had personal knowledge of the matters recorded, and was an insider to the tribe. A certificate must be signed by a tribal records custodian with sufficient personal knowledge of record-keeping practices to support such representations. A party who seeks to use a Rule 902(11) certification must also give pre-trial written notice of the certification and record to allow the opponent to raise appropriate challenges.

A proper certificate under Rule 902(11) addresses both authentication and hearsay concerns by admitting the record for its truth through the business records exception.[32] When the government uses a Rule 902(11) certification to admit a tribal record, the defense will receive not only the signature of the tribal official who signed the original enrollment record, but also the signature (and identity) of a current tribal records custodian who is qualified to attest to tribal record-keeping practices. The court in *United States v. Wood* included the following photographs of the tribal enrollment record proffered by the government, as well as the accompanying Rule 902(11) certification to illustrate the information that a defendant can glean from having both.[33]

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[31] Fed. R. Evid. 902(11).

[32] *See* 31 Fed. Prac. & Proc. Evid. § 7145 (2d ed.) ("Other subdivisions of Rule 902 only establish that the evidence in question is self-authenticating. Those subdivisions do not resolve any other objections to admissibility, such as hearsay. But Rule 902(11) typically applies only if the evidence in question would qualify as admissible over a hearsay objection based on Rule 803(6). Thus, the conclusion that evidence is self-authenticating under Rule 902(11) also usually means that that evidence falls within the business records exception to the hearsay rule.").

[33] United States v. Wood, 109 F.4th 1253, 1259 (10th Cir. 2024).

Seneca-Cayuga Nation
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Phone: (918) 787-5452
Email: lmccoy@sctribe.com
Website: www.sctribe.com

Friday, July 23, 2021

Certificate of Indian Blood

Name: Craig Wallace Wood

Date of Birth: [redacted]1989 Enrollment Status: Enrolled

Resolution Number: Enrollment Number: 3307-196

Resolution Date:

Mother: Lisa Ann Ford Father:

Address (Mailing): [redacted]
City: Prue, OK 74060 County: Osage

Address (Street): [redacted]
City: Prue, OK 74060 County: Osage

Ethnic Affiliation/Blood Quantum Enrollment Date: 4-29-1995

Total Quantum All Tribes: 1/32

Ethnicity: Seneca-Cayuga Nation - (R) Blood Quantum: 1/32
Culture: Seneca

Enrollment Officer
Leslie McCoy

Authorizing Signature

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page 1 of 1

Seneca-Cayuga Nation
PO Box 453220
Grove, OK 74345-3220
Phone: (918) 787-5452
Email: lmccoy@sctribe.com
Website: www.sctribe.com

CERTIFICATE OF AUTHENTICITY
Pursuant to 28 U.S.C. § 1746
This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902(11).

I, Leslie McCoy, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am a United States citizen and I am over eighteen years of age.
2) I am employed by Seneca-Cayuga Nation.
3) My official title is Enrollment Officer.
4) I am a custodian of records for Seneca-Cayuga Nation.
5) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of Seneca-Cayuga Nation, and I am a custodian of the attached records.
6) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
7) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
8) Such records were kept in the course of a regularly conducted business activity of Seneca-Cayuga Nation.
9) Such records were made by Seneca-Cayuga Nation as a regular business practice.

The records are (include names, account numbers and/or phone numbers):

I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct. I further state that this certification is intended to satisfy Rules 803(6) and 902(11), Federal Rules of Evidence.

10-20-21
Date

Signature

C. Recent Appellate Scrutiny of the Admissibility of Tribal Records

The government has experienced some recent difficulty in authenticating and admitting tribal records under existing standards in criminal cases alleging violations of the Major Crimes Act and General Crimes Act, particularly in the Tenth Circuit. Criminal convictions have been reversed in cases where the government has called a tribal official to testify to authenticate tribal enrollment documents and where the government has attempted to admit tribal records using the Rule 902(11) certification procedure.

In *United States v. Hatley*, the government failed to properly admit tribal documents establishing the defendant's Indian status despite calling a tribal official to testify.[34] The defendant was charged with manslaughter in connection with a car accident under the Major Crimes Act. At trial, the government offered two forms of proof to establish Hatley's Indian status: (1) the testimony of the records custodian for the Cherokee Nation and (2) a tribal verification letter stating that defendant had been an enrolled member of the Cherokee tribe since 1984.[35] The unsigned tribal verification letter, dated March 24, 2021, was on letterhead of the "Cherokee Nation, Office of the Attorney General" and stated that "Hatley 'is a registered citizen of the Cherokee Nation as of October 31, 1984.'" It further stated that: "[t]he response in this letter is based on information exactly as provided by the requesting party. Any incorrect or incomplete information may invalidate the above determination."[36] The verification letter was admitted at trial over Hatley's objections to lack of foundation and hearsay.

The government also produced a witness who was the interim Tribal Registrar for the Cherokee Nation who testified that he was the "custodial person for all of [the] Cherokee Nation records," which "include[s] information about who's a member of the Cherokee Nation." Over Hatley's objection for lack of foundation, he further testified that Hatley "was a blood member of the Cherokee Nation."[37] The tribal official also explained the verification process for membership in the Cherokee Nation and stated that Hatley had submitted the required documentation to become a tribal member, and that Hatley's grandmother was an original member of the tribe.

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[34] United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025) ("district court's error in admitting tribal verification letter and interim tribal registrar's testimony about defendant's Indian status was not harmless"); *see also* United States v. Alvirez, 831 F.3d 1115, 1118 (9th Cir. 2016) (holding that the district court abused its discretion when it admitted the unauthenticated Certificate of Indian Blood purportedly issued by the Colorado River Indian Tribes; testifying officer could not authenticate tribal record); United States v. PMB, 660 F. App'x 521, 522 (9th Cir. 2016) (finding plain error when FBI special agent testified that a document presented by the government was a certificate of tribal enrollment purporting to show that PMB had some quantum of Indian blood and was affiliated with the Navajo Nation).

[35] United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025). The government also pointed to a record that Hatley had admitted in a state court proceeding to establish his own tribal enrollment, as well as Hatley's admission on cross-examination that he was a member of the Cherokee Nation. The Tenth Circuit found that neither of these items of evidence were sufficient to establish Hatley's Indian status on the date of the offense, however.

[36] *Id.*

[37] When asked when Hatley formally enrolled in the tribe, the registrar replied that he could not recall the precise day but that he thought "it was in November of 2013." *Id.* at 1119. After the government asked him to refresh his recollection by reading the verification letter, he testified that Hatley enrolled as a member of the Cherokee Nation "on October 31, 1984." *Id.*

Following his conviction, Hatley appealed to the Tenth Circuit. The court noted that "defendant's "Indian status is an essential element" of Major Crimes Act offenses and that "the government was required to prove Hatley's Indian status *at the time of the offense*."[38] Finding that the government failed to prove Hatley's Indian status, the Tenth Circuit reversed. First, the court explained that, to use a tribal document or record to establish a defendant's Indian status, the government must not only authenticate the tribal document, but must identify a hearsay exception that allows the document to be admitted for its truth:

> Authentication alone is not enough, however. Tribal documents and records generally constitute hearsay because they consist of out-of-court statements that are "offer[ed] in evidence to prove the truth of the matter asserted" therein — that is, to prove the fact of the defendant's Indian status. Fed. R. Evid. 801(a), (c). Thus, in order to establish a tribal document's admissibility when offered to prove a defendant's Indian status, the government must also demonstrate that the tribal document falls under an exception to the bar on hearsay.[39]

The Tenth Circuit held (and the government conceded) that the tribal verification letter could not be used to establish Hatley's Indian status as the time of the offense because it did not satisfy the business records exception to the hearsay rule. The letter was not prepared in the ordinary course of business but was prepared for litigation:

> Vann also suggested that the tribal verification letter was a document prepared specifically for purposes of litigation, testifying that the letter was the "standard document that we give for anyone asking — any legal team asking for citizenship information on a citizen."[40]

And the court held that the testimony of the records custodian for the Cherokee Nation that Hatley was a blood member of the tribe through his grandmother could not be used to establish Hatley's enrollment date and status either because the registrar had no first-hand, personal knowledge of the defendant's status. Finding that the trial court's errors in admitting the tribal verification letter and the testimony to establish Hatley's Indian status at the time of the offense were not harmless, the Tenth Circuit reversed.[41]

The Tenth Circuit similarly rejected a tribal verification letter under the business records exception one year earlier in *United States v. Harper*.[42] The court explained:

> The Government also cannot establish that the verification letter was created in the regular course of business and not for the purpose of litigation. Indeed, the letter was issued on January 18, 2023, and the trial commenced on February 6, 2023. Nor did Oakes's testimony establish that the verification letter was a business record because her

[38] *Id.* at 1123 (clarifying for the first time within the Tenth Circuit that the government must establish Indian status as of the date of the offense) (emphasis added).
[39] *Id.* at 1124.
[40] *Id.* at 1129.
[41] *Id.*
[42] United States v. Harper, 118 F.4th 1288, 1296–97 (10th Cir. 2024) (rejecting tribal verification letter where it did not satisfy the business records exception).

> testimony was derivative of the letter itself, of which there was a preserved hearsay objection.[43]

The defendant's conviction in *United States v. Wood* was also overturned by the Tenth Circuit in 2024 due to the government's failure to give appropriate notice of its intent to utilize a Rule 902(11) certification to authenticate defendant's tribal enrollment records.[44] The government in that case sought to prove the defendant's Indian status at trial through a "Certificate of Indian Blood" purportedly maintained by the Seneca-Cayuga Nation. After the jury was impaneled on the first day of trial, the government proffered a "Certificate of Authenticity" pursuant to Rule 902(11) to authenticate and admit the tribal record for its truth. The Tenth Circuit described the series of events that led to the proffer of the certification after the defendant refused to stipulate to his Indian status:

> On the morning of trial, albeit untimely, the government announced it would use a live, unnamed, witness to authenticate the Indian Blood Certificate. Although Wood objected to the belated addition of a new witness, the district court overruled the objection and voir dire commenced. Thereafter, the district court recessed the proceedings to allow the government "to get the name" of the authentication witness so the district court could inquire whether any venire members knew that person. After the recess, the government disclosed three potential names for the witness and voir dire continued.
>
> After the jury was selected and its members excused for lunch, the government stated it just received the Authenticity Certificate and was "now tendering a copy to defense counsel."[45]

The defendant objected that he had not received adequate pretrial notice of the government's intent to rely upon a certification, leaving him without fair opportunity to examine and verify the certificate and its contents.[46] The district court overruled the objection where the defendant had received the tribal record itself during discovery and where the same tribal official signed both the Seneca-Cayuga Nation's Certificate of Indian Blood and the Rule 902(11) certification.

Following his conviction, Wood appealed, arguing that the trial court erred in admitting the Rule 902(11) certification in the absence of the requisite notice. The Tenth Circuit agreed and reversed, explaining the importance of pretrial notice to the Rule 902(11) procedure:

> [T]he kinds of records subject to Rule 803(6) were, prior to 2000, generally admissible only upon the testimony of a live foundation witness. To save the time and expense of producing such witnesses, the rules committee innovated by creating the certificate

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[43] *Id.*

[44] United States v. Wood, 109 F.4th 1253, 1255 (10th Cir. 2024).

[45] *Id.* at 1260.

[46] *Id.* Wood also objected on the ground that the Rule 902(11) certificate failed to address discrepancies in the Indian Blood Certificate. *Id.* ("For example, Wood contended the unexplained presence of a "handwritten enrollment date" on the otherwise typewritten Indian Blood Certificate raised the following question: was the enrollment date part of an authentic record or was it, instead, added later to help the government prove that Wood was enrolled at the time the offense was committed? Additionally, the Indian Blood Certificate was dated July 23, 2021, some four months after the crimes charged, raising questions about Rule 803(6)(A)'s close-in-time requirement.").

> system set out in Rule 902(11). To ensure this resource-saving endeavor did not serve to unfairly disadvantage litigation opponents, however, the rules committee required the introducing party provide timely, written pretrial notice and access to such certificates. Thus, opponents could do at pre-trial what they would have previously done by cross-examining foundation witnesses during trial. By essentially treating Rule 902(11)'s notice requirement as a nullity, and by doing so in a case where Wood raised nonfrivolous questions as to whether the Indian Blood Certificate was a valid Rule 803(6) document, the district court erred as a matter of law.

The court also explained the value of a live foundation witness for the defendant:

> As Wood correctly notes in his appellate briefing, a live foundation witness from the Seneca-Cayuga Nation could have provided significantly more information than that set out in the Authenticity Certificate. A live witness might have explained the exact nature of the tribal record, digital or analog; when and how it was created given the three different dates on its face; and why crucial information was handwritten onto an otherwise-typewritten document. Unfortunately, Wood could not explore these questions once the government, with the district court's imprimatur, reversed its decision to rely on a live witness in favor of the late-filed Authenticity Certificate.
>
> The notice requirements of Rule 902(11) are in place precisely to ensure that evidence to be accompanied by an affidavit can be vetted for objection or impeachment in advance.[47]

As these cases illustrate, it may be difficult to satisfy the Rule 803(6) business records exception and Rule 902(11) self-authentication requirements for certain tribal records. A tribal enrollment record that was created long after the actual enrollment it documents may not have been made "at or near the time" of the events recorded. When tribal records are relied upon to prove a defendant's degree of Indian blood, as well as his enrollment, it may be difficult to demonstrate that the source of the information was a tribal official who had "personal knowledge" of such information. When the government offers a tribal "verification letter" created to verify a person's enrollment status for purposes of litigation in place of an actual enrollment record maintained by the tribe, such a letter is not regularly created and maintained in the course of the tribe's regularly conducted activity and may fail the business records foundation for that reason.

Finally, the Rule 902(11) certification process requires written pretrial notice. As illustrated by the *Wood* case, the government may seek a stipulation from the defense regarding Indian status to avoid the need to admit any evidence of tribal affiliation and may delay notice in the hopes of reaching a stipulation. In *Wood*, however, the government's delay in providing written notice of its intent to rely upon a Rule 902(11) certificate resulted in reversal of the defendant's conviction. If there are problems with the business records foundation for a particular tribal record, the government may not utilize the Rule 902(11) procedure. Nor can it admit the record with authenticating testimony from a live witness under Rule 803(6). Assuming that the record sets forth the "activities" of the tribe or "matters observed" by tribal officials while under a legal

[47] *Id.* at 1264.

duty to report, the government could call an authenticating witness at trial and seek to admit the record under the Rule 803(8) public records exception under these circumstances.

IV. Admission of and Access to Tribal Enrollment Records Under an Amended Rule 902(1)(A)

In considering an amendment to Rule 902(1)(A), it is important to evaluate how the avenues of admissibility for tribal enrollment records may change under an amended provision. As outlined below, a sealed and signed tribal enrollment record alone – without either a live tribal official who testifies as a witness or an accompanying certification from a current records custodian – will be admissible to establish an essential element of the government's case in General Crimes and Major Crimes Act cases if the amendment is adopted. Thus, criminal defendants will likely lose in most cases the live witness or certification by a current tribal official that they now receive under existing Rules.

In addition, the Committee has expressed concern about open records access to tribal enrollment records in the event that such records become self-authenticating. As outlined below, it appears that the open records laws that do exist restrict access to tribal members, and otherwise limit access to information regarding individual tribal citizens.

A. Admission of Tribal Enrollment Records Following an Amendment

Should the Committee decide to amend Rule 902(1) to add federally recognized Indian Tribes and Nations to the list of approved entities, the signed and sealed records of federally recognized tribes will become self-authenticating without the need to call a witness *or* file a Rule 902(11) certification of a current tribal records custodian. If the record contains the appropriate seal and signature (attestation or execution), it will be accepted as genuine without more even though it may be decades old and signed by a deceased official or one who no longer is employed by the tribe. This means that a defendant seeking to contest the enrollment status in the tribal record will not have either: 1) a live tribal official testifying at trial subject to cross-examination or 2) a certification from a current tribal records custodian who might be interviewed or subpoenaed by the defense in an effort to challenge Indian status. Under existing authentication rules, the criminal defendant is guaranteed to receive one of these in the absence of a defense stipulation to Indian status.

Self-authentication of the tribal record will not resolve the hearsay issues that arise when a record is offered for the truth of the enrollment status it asserts, however. Even if the records of federally recognized Indian tribes and nations become self-authenticating under Rule 902(1), the government will need to identify an applicable hearsay exception if a tribal record is offered for its truth. Of course, the government could elect to rely upon the business records exception for tribal records that satisfy the foundational requirements of Rule 803(6). But Rule 803(6) requires either live testimony from a custodian to establish the foundation for admissibility or a Rule 902(11) certification. Under a business records exception avenue, a criminal defendant would still have a live witness to confront or a certificate from a current tribal official to investigate. Thus, an amended Rule 902(1) would not simplify admission of tribal records at all if the government elected to rely upon the business records exception, and the amendment would

make no difference whatsoever in the admission of tribal records in Major Crimes Act and General Crimes Act prosecutions.

An amended Rule 902(1) would alter the manner in which tribal records are currently admitted in General Crimes Act and Major Crimes Act cases, however, if the government elected to rely upon the public records exception in Rule 803(8) to admit tribal records over a hearsay objection. Currently, the government must call a tribal official for purposes of authenticating a tribal record offered under the public records exception. Under an amended Rule 902(1)(A), a signed and sealed record of a federally recognized tribe would be self-authenticating without the need to call a witness or file a certificate signed by a current tribal official. And Rule 803(8) requires no foundational testimony or certification to establish its requirements. So long as the proffered tribal record — on its face — documents the "activities" of the tribe or "matters observed" by tribal officials while under a legal duty to observe and report, the record becomes admissible for its truth.[48]

In a scenario in which the government relies upon the public records hearsay exception, therefore, the tribal enrollment record alone may satisfy both authenticity and hearsay requirements. For example, assuming that the Seneca-Cayuga Nation Certificate of Indian Blood proffered in the *Wood* case included an appropriate seal and signature, the government could argue that it is self-authenticating under an amended Rule 902(1)(A) and admissible for its truth under Rule 803(8). And the defendant would receive no pretrial notice, have no witness to confront at trial, or certification to examine and challenge. Thus, the amendment would eliminate protections that criminal defendants currently enjoy in General Crimes Act and Major Crimes Act prosecutions, would allow the government to establish an essential element of a crime by presenting a single document, and shift the burden to the defense to identify, interview, and perhaps subpoena a current tribal official if necessary to contest Indian status.

As has been discussed previously by the Committee, there is significant variation in tribal record-keeping practices and norms. Rule 902(1) does require an appropriate seal and signature.[49] An unsigned tribal document would not be self-authenticating even if an amendment were to be adopted.[50] It is also possible that the enrollment records of some federally recognized tribes may not contain the requisite seal and would not be self-authenticating under an amended Rule 902(1).[51] Rule 902(2) provides that "domestic public documents that are not sealed but are signed and certified" are also self-authenticating.[52] Rule 902(2) self-authenticates unsealed documents that "bear[] the signature of an officer or employee of an entity named in Rule 902(1)(A)" if "another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the

[48] *See* Gentry v. U.S. Treasury Dep't (Internal Revenue Serv.), No. 318CV00581MMDCBC, 2019 WL 5839253, at *1 (D. Nev. Nov. 7, 2019) (combining Rule 902(1) authentication with Rule 803(8) hearsay exception: "Further, this document is admissible under Fed. R. Evid. 803(8), and self-authenticating under Fed. R. Evid. 902(1).").
[49] Fed. R. Evid. 902(1).
[50] *See* United States v. Hatley, 153 F.4th 1112 (10th Cir. 2025) ("unsigned tribal verification letter on letterhead of the "Cherokee Nation, Office of the Attorney General" inadmissible).
[51] *See* United States v. Walker, 85 F.4th 973, 981 (10th Cir. 2023) ("Ms. Dirickson's Cherokee Nation registration card did not contain a seal. It therefore cannot be self-authenticating under Rule 902. Even if it had contained a seal, the document would still not be self-authenticating because tribal governments are not listed among those entities whose seals satisfy Rule 902.").
[52] Fed. R. Evid. 902(2).

signature is genuine."[53] By amending Rule 902(1)(A) to include federally recognized Indian Tribes and Nations, the Committee would also make Rule 902(2) applicable to tribal records. Thus, the government could use a Rule 902(2) certification (that has fewer foundational requirements than Rule 902(11)) to self-authenticate a tribal enrollment record even if it does not bear the appropriate seal.[54] A Rule 902(2) certification would give a defendant the name of a current tribal official who could be questioned about the enrollment record, however.

Five states have amended their counterparts to Rule 902(1)(A) to include the records of federally recognized Indian tribes. Evidence rules in Arizona, New Mexico, and Wyoming all make sealed and signed tribal documents self-authenticating.[55] And both Oregon and Washington have accomplished the same result by statute.[56] I could locate no reported cases in any of these jurisdictions analyzing application of these self-authentication provisions to tribal records.

B. Tribal Open Records Laws

The Federal Public Defender and other Committee members have expressed concern about a criminal defendant's ability to access tribal records in the event that Rule 902(1)(A) is amended to make such records self-authenticating.[57] Although several federally recognized Indian Tribes and Nations have enacted open records laws, such measures often limit access to tribal records to tribal members. Even for tribal members, access to information about another individual's status may be prohibited, absent that individual's consent.[58]

The first tribal open records act was adopted in 1999 by the Navajo Nation.[59] The Act was "designed to allow the general public access to information regarding the operation of the Navajo

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[53] *Id*.
[54] Federal Rule of Evidence 902(4) renders certified copies of public records self-authenticating as well if they are certified as correct by "the custodian or another person authorized to make the certification; or a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court."
[55] Ariz. R. Evid. 902(1)(A) (including the public documents of "a Federally Recognized American Indian Tribe or Nation"); N.M. R. Evid. 11-902 (including the records of "a Federally Recognized American Indian Tribe or Nation"); Wyo. R. Evid. 902(a)(1) (including the documents of "an Indian tribe recognized by the United States").
[56] *See* Oregon Revised Statutes §40.510 (Rule 902(1)(k)(A) making "a document bearing a seal purporting to be that of a federally recognized Indian tribal government or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution" self-authenticating); Washington Revised Statutes § 5.44.040 ("Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States or any federally recognized Indian tribe, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, must be admitted in evidence in the courts of this state.").
[57] A criminal defendant should have access to any such records that the government intends to admit at trial to prove his Indian status through the criminal discovery rules. *See* United States v. Wood, 109 F.4th 1253, 1255 (10th Cir. 2024) (although defendant did not receive proper pretrial notice of the government's Rule 902(11) certificate of authenticity, he had received a copy of the tribal record the government sought to use to prove his status).
[58] There are 574 federally recognized tribes and nations, and I was unable to search for and locate the codes of all 574. In this memorandum, I provide an overview of several code provisions authorizing open records requests. But this is an area in which the Committee could commission a comprehensive survey if such additional information is needed in assessing the viability of an amendment to Rule 902(1)(A).
[59] Navajo Nation Privacy and Access to Information Act, 2 N.N.C. Subchapter 4 , §§ 81-91 (1999), available at NNPrivacy___Access_to_Information_Act.pdf and 1-5.pdf; *see also* Christopher Dodd, *FOIA in Indian Country: A*

Nation while preserving the privacy interests of individuals and entities."[60] The Act divides Navajo records into two categories: those publicly available and those that are private. The list of records does not specifically reference "enrollment" or "membership" records in either category. However, section 85.A.1 makes private any record "concerning an individual's eligibility for social services, welfare benefits, or the determination of benefit levels." Furthermore, section 84.A.11 makes public "data on individuals that would otherwise be protected under this subchapter if the individual who is the subject of the record has given the governmental entity written permission to make the records available to the public." Section 86.A makes records that are otherwise protected available for "criminal and civil law enforcement for prosecution purposes" and as a result of "a court order." Section 86.C. authorizes the release of individual information to "third parties with the written permission by means of a notarized release of the individual who is the subject of those records." Thus, it appears that tribal enrollment records would be available to non-members based upon a court order, for law enforcement purposes, or with the consent of the subject person.

The Cherokee Nation enacted a Freedom of Information and Rights of Privacy Act in 2001 that was designed to allow citizens of the Cherokee Nation to access a range of information within the tribe, including public documents, meetings and records and to ensure transparency of tribal operations.[61] While the Act originally allowed any individual, corporation, partnership, firm, organization or association to request records regardless of whether that person was a tribal member, a 2014 amendment limited access to tribal records to Cherokee Nation citizens.[62]

A 2015 article in the University of New Mexico School of Law *Tribal Law Journal* offers a survey of then-existing tribal open records acts.[63] According to the article, eight Tribes had enacted open records acts as of 2015: the Navajo Nation, the Cherokee Nation, the Eastern Band of Cherokee Indians the Oneida Nation, the Osage Nation, the Pokagon Band of Potawatomi Indians, the Yurok Tribe of California, and Oglala Sioux. None of these open records laws granted non-Indians and non-tribal members rights to access tribal documents. Several Tribes and Nations allowed non-members access to tribal records based upon approval by a tribal council or other governing body.[64]

Since 2015, the St. Regis Mohawk Tribe and the Kaw Nation have both enacted open records laws. One subsection of the St. Regis Mohawk Tribal Code of Law makes certain records

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Brief Survey of Tribal Open Records Statutes, Tribal Law Journal (January 12, 2015), available at FOIA in Indian Country A Brief Survey of Tribal...

[60] *Id.*

[61] *See* Cherokee Nation FOIA process allows access for public records | Services | cherokeephoenix.org.

[62] *See* Christopher Dodd, *FOIA in Indian Country: A Brief Survey of Tribal Open Records Statutes*, Tribal Law Journal (January 12, 2015), available at FOIA in Indian Country A Brief Survey of Tribal...

[63] *Id.*

[64] According to the Yurok Tribe of California Freedom of Information Act of 2006, for example: "Members of the Tribe have a right to access tribal records. Non-members and Non-Indians do not have a right of access, except by the written permission of the Tribal Council; however, non-members and non-Indians are allowed access to Tribal ordinances, resolutions, and other non-confidential materials needed to ensure compliance with Tribal law." Christopher Dodd, *FOIA in Indian Country: A Brief Survey of Tribal Open Records Statutes*, Tribal Law Journal (January 12, 2015), available at FOIA in Indian Country A Brief Survey of Tribal...

available only to tribal members (not including enrollment records).[65] Another subsection makes other records available to the general "public" (also not including enrollment records).[66] Thus, it appears that enrollment records of the type commonly utilized in federal criminal prosecutions are not freely accessible to tribal members or non-members. The purpose of the Kaw Nation Open Records Act "is to provide Kaw Nation Citizens reasonable access to Public Records, while protecting rights to privacy and the proprietary interests of the Kaw Nation and its operations."[67] Open records access under this code is, thus, also limited to tribal members. In sum, the open records laws enacted by several federally recognized Indian Tribes and Nations do not allow routine access to enrollment or other records to non-Indians and non-members.

V. Draft Amendment and Advisory Committee Note

An amendment that would add federally recognized Indian Tribes and Nations to Rule 902(1)(A) would be straightforward to draft. The potential amendment that has been discussed by the Committee to date reads as follows:

(1) Domestic Public Documents That Are Sealed and Signed.
A document that bears:
(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a federally recognized Indian Tribe or Nation[68]; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

Committee Note

The rule has been amended to provide that a sealed and signed document from a federally recognized Indian Tribe or Nation is entitled to the same presumption of authenticity as a comparable document from the government entities currently listed in Rule 902(1)(A). The amendment thus recognizes the sovereignty of Indian Tribes and Nations. [*Cf.* Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii), and 2002 Committee Note (amendments recognize "the sovereignty of Indian tribes and the possibility that it would be necessary to disclose grand-jury information to appropriate tribal officials in order to enforce federal law.").][69] Furthermore, self-authentication of the public documents of Indian Tribes and Nations

[65] St. Regis Mohawk Tribal Code of Law Section 1.01.110(f)(3)(a), available at Section 1.01.100(f)(3) | Saint Regis Mohawk Tribe Law Library.
[66] *Id.* at 1.01.110(f)(3)(b).
[67] Kaw Nation Open Records Act: Section 1-103.C, available at Open Records Act | Kaw Nation Tribal Code.
[68] This language, including the capitalization of both "Tribe" and "Nation" was recommended by the Elk Valley Rancheria, California Tribe.
[69] The Department of Justice proposed the citation to Fed. R. Crim. P. 6(e)(3)(A)(ii) and (iii) and to its 2002 Committee Note. The Committee discussed the distinction between the *disclosure to* tribal officials required by Fed. R. Crim. P. 6(e) and the authentication of records *received from* Indian tribes or nations authorized by the proposed amendment. Still, to the extent that both are supported by important notions of tribal sovereignty, the citation seems apt. I have changed the signal to "Cf." to connote that the support is purely analogous and not direct. I have placed the entire citation in brackets so that the Committee can consider whether to retain or delete it.

will allow for more efficient proof of tribal records in federal court and will conserve the valuable resources of tribal officials who often had to appear in court to authenticate documents prior to the amendment.

Under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454), the Secretary of the Interior publishes a list of all federally recognized Indian tribes in the Federal Register, through which courts may identify covered Tribes and Nations. The amendment permits self-authentication of the qualifying sealed and signed documents of any Indian Tribe or Nation that is federally recognized as of the date that the document is offered into evidence. [The amendment concerns authenticity only; other evidentiary requirements continue to apply. As with other 902(1) documents, parties may still challenge the authenticity of the covered public documents at trial where authenticity is genuinely disputed.][70]

The counterparts to Rule 902(1)(A) in Arizona and New Mexico make the documents of a "federally recognized *American* Indian Tribe or Nation" self-authenticating.[71] While the Committee could consider adding the modifier "American" to the proposed amendment language, it seems unnecessary and potentially confusing. First, it would seem to be unnecessary where the rule covers "federally recognized Indian Tribes and Nations" and the Committee note makes clear that the tribes recognized under the Federally Recognized Indian Tribe List Act of 1994 (P.L. 103-454) are the ones whose documents are self-authenticating under the amendment. Accordingly, only the tribes listed in the Federal Register as federally recognized will be included and there is no need to include rule language limiting application of the amendment to "American" Indian tribes. And it could create some uncertainty, allowing litigants to argue about which of the recognized tribes or nations should be classified as "American" Indian tribes or nations. In sum, the current draft that omits the modifier "American" seems superior to the provisions in Arizona and New Mexico.

[70] Including the bracketed material at the conclusion of the draft Committee note was suggested by the Elk Valley Rancheria, California Tribe. The EVR suggested that the final sentence of the bracketed material state that "courts may require additional proof if authenticity is genuinely disputed" that I did not include in the draft Committee note. If the documents are self-authenticating under the amended provision, courts cannot require additional evidence of authenticity. That is the meaning of "self-authentication." The document is admitted over a foundation objection if it satisfies the requirements of the Rule. Parties may still challenge authenticity and offer evidence at trial to undermine it, however. I modified the bracketed language accordingly.

[71] Ariz. R. Evid. 902(1) and N.M. R. Evid. 11-902.

U.S. Department of Justice

950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

April 6, 2026

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Evidence 902

Dear Judge Furman:

We write to underscore our support for an amendment to Federal Rule of Evidence 902(1) that would add federally recognized tribes ("Tribes") to the list of governmental entities that can provide sealed and signed documents for self-authentication. As we have explained in earlier correspondence, reattached here, there is no reason to exclude the sealed and signed documents of Tribes from the other categories of domestic public documents that are self-authenticating. The proposed amendment—which is consistent with both the sovereign status of Tribes and the purpose of the existing Rule—has received strong support from Tribes.[1] The objections posed by the public defender services ("Defenders") are unpersuasive.

[1] *See* responses to Dear Tribal Leader Letter from Hon. Jesse M. Furman (May 23, 2025), from the Catawba Indian Tribe (Feb. 27, 2026) ("Catawba Letter"); Federated Indians of Graton Rancheria (Feb. 18, 2026) ("Graton Letter"); Morongo Band of Mission Indians (Sept. 25, 2025) ("Morongo Letter"); Modoc Nation (Sept. 17, 2025) ("Modoc Letter"); Elk Valley Rancheria (Sept. 17, 2025) (Elk Valley Letter); Chickasaw Nation (Sept. 5, 2025) (Chickasaw Letter); Navajo Nation (Sept. 5, 2025) (Navajo Letter); Quapaw Nation (Aug. 28, 2025) (Quapaw Letter) ("Tribal Submissions"). *See also* Letters to Hon. Jesse M. Furman from Alaska Native Justice Center (Feb. 23, 2026) (ANJC Letter); Northern Plains Indian Law Center at the University of North Dakota School of Law (Sept. 5, 2025) (NPILC Letter); and the Hon. Ada Brown (Dist. Judge N.D. Tex.), Sara Hill (Dist. Judge N.D. Okla.), Diane J. Humetewa (Dist. Judge D. Ariz.), Lauren King (Dist. Judge W.D. Wash.), and Sunshine Sykes (Dist. Judge C.D. Cal.) (Apr. 29, 2025) ("Letter from Federal District Court Judges") ("Letters of Support").

I. There is No Valid Reason to Distinguish Between Tribes and Other Sovereigns

The Defenders describe Federal Rule of Evidence ("FRE") 902 as providing "a list of narrow exceptions" to the general rule of proving authenticity.[2] But, as the committee note makes clear, the "acceptance of documents bearing a public seal and signature . . . is of broad application." FRE 902(1), Advisory Committee Note (1972). Indeed, FRE 902(1) is exceptionally broad: it provides for self-authentication of the sealed and signed documents of every conceivable sovereign entity of the United States -- any state, district, commonwealth, territory, or insular possession of the United States; a political subdivision of any of these entities; or a department, agency, or officer of any [such] entity. FRE 902(1)(A).[3] Federally recognized Tribes are the lone omission from the list, despite their sovereign status. There is no explanation for this, and there is no valid reason for deliberately retaining this ignominious exclusion. As the Tribes have stressed in their support for this amendment, the time has come to treat federally recognized Tribes with the respect accorded to every other sovereign listed in FRE 902(1)(A).[4]

The Defenders attempt several justifications for this disparate treatment. They suggest (without evidence) that Tribes are more likely to engage in forgery, or less likely to stop it, than *any* of the entities listed in FRE 902(1); argue that Tribes should have to jump through evidentiary hoops that other sovereigns need not because the burden is "minimal;" and imply that, because tribal membership and Indian blood are elements of some criminal offenses, Tribal documents should not be self-authenticating. But each of these arguments is a red herring.

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[2] *See* Letter to Hon. Jesse Furman from Public Defenders ("Defender Letter"), undated, at 4.

[3] As amended over the years, FRE 902(1) expressly includes governmental entities that no longer exist, such as the "former Panama Canal Zone" and the "Trust Territory of the Pacific Islands." The Defenders ignore this—as well as the fact that there have been significant historic changes in the status of many of the sovereign entities listed in FRE 902(1)—in suggesting that the "diverse histories" of Tribes presents a unique obstacle to their inclusion in FRE 902(1). Defendants Letter at 10-11. As several of the Tribes have explained, though, the "stories of states and territories also differ," and the "varied history of tribes" is "not a rational basis" for treating tribal records as unreliable. Chickasaw Letter, at 4; *see also* NPILC Letter, at 2-4 (describing disparities among entities already covered by FRE 902(1)).

[4] *See* NPILC Letter, at 2 ("While this may have been an oversight when Rule 902 was drafted, it is no longer excusable and must be remedied."); Quapaw Letter, at 2 ("Whatever the suggested justifications to exclude tribal nations from uniform consideration under the original iteration of this Rule, the Business Committee applauds the Proposed Amendment as an opportunity to correct an obvious wrong with a straightforward fix."); Chickasaw Letter, at 1-2 (discussing federal failures to support tribal sovereignty and mid-1970s start of "new era of tribal self-determination").

Fraud. Fraud is no more a concern for federally recognized Tribes than it is for any other sovereign. FRE 902(1) provides for self-authentication of records from a broad range of governmental entities because the "public seal and signature" of such entities provides objective indicia of reliability. *See* FRE 902, 902(1), and 902(2) Advisory Committee Notes (1972). Beyond that, "practical … considerations" support accepting these records as authentic because "forgery is a crime and detection is fairly easy and certain."[5] Because sovereign entities are not expected to engage in criminal conduct, and third parties who submit records in court under falsified government seals are at risk of discovery and prosecution, concerns about authenticity are reduced to "a very small dimension." *Id*. So too for sovereign Tribes. The Defenders provide no evidence, and cite no case, suggesting that Tribes are somehow more likely to forge records, or to permit third-party forgeries of their governmental records to go unchallenged, than any other entity listed in FRE 902(1). Nor do they dispute that, even for self-authenticating documents under FRE 902, "[i]n no instance is the opposite party foreclosed from disputing authenticity." FRE 902 Advisory Committee Note (1972).

Rather than confront the illogic of their position, the Defenders claim that Tribes stand apart because they are not subject to the Freedom of Information Act ("FOIA") and some do not have their own open records laws. But whether a sovereign was subject to open records laws was never a consideration of the original drafters of the rule. Neither the Rule nor the committee notes reference open records laws. And the Defenders do not purport to—and could not—argue that FRE 902(1) or the historical cases that informed the Rule turned on the existence of such laws.[6] FRE 902(1)'s inclusion of the sealed and signed records of any "political subdivision …, department, agency, or officer" of states and territories—without regard to whether those

[5] The Defenders note that the "[t]echnologies for creating forgeries has improved substantially since the Rules were first promulgated in 1975." Defender Letter (undated) at 5. That is true. But that is true equally for every entity included within FRE 902(1)(a).

[6] FRE 902 recognizes that "case law and statutes have, *over the years*, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence." Advisory Committee Notes FRE 902 (1972) and sources cited therein (emphasis added); *see also* *Federal Judicial Center - FRE History* (describing development of FRE). Because sealed public records were widely recognized as self-authenticating well before 1972, the Defenders' reference to the 1967 enactment of the FOIA actually undercuts their claim that FOIA is part of the justification for FRE 902(1). Defender Letter at 5. Nor can the Defenders' citation of the *present-day* open records laws of various jurisdictions covered by FRE 902(1) support their argument. *Id*. Indeed, it appears that the Defenders cite several laws that were not enacted until well after the jurisdictions were included in FRE 902(1). *Id.* at 5 nn. 27, 28 (citing Sunshine Reform Act of 1999 (5 GCA Chapter 10) (Guam) and N. Mar. I. Pub. L. 23-24 (enacted June 25, 2024)); *see also* Open Government Act of 1992 (Public Law 8-41), effective May 23, 1994 (Northern Mariana Islands).

subdivisions, departments, agencies, or officers are subject to any state or territorial open records law—further undermines the Defenders' claim that the drafters understood open records laws as relevant to self-authentication under FRE 902(1).[7] Clearly, then, the rule's drafters did not link propensity to commit, detect, or permit fraud with the availability of open records law through which to verify an absence of fraud. To the contrary, the premise for FRE 902(1) was that the signed and sealed records of sovereign governments submitted in court are likely to be authentic. And as the many tribal letters in support of the proposed amendment point out, Tribes have every incentive to keep accurate records, perhaps more so than entities currently included within FRE 902(1)(A). *See, e.g.*, Chickasaw Letter, at 5-6 (noting federal scrutiny of tribal recordkeeping and increased tribal authority for prosecuting non-Indian offenders for crimes committed on Indian land); Modoc Letter, at 1 ("Indian tribes have equal, if not greater, reasons to maintain accurate, official records, especially given the direct impact those records have on their legal relationship with the United States and on eligibility for federal programs.").

Against this, the Defenders' unsupported claim that "the potential prejudice to defendants is quite large" rings hollow. Indeed, after noting the Department of Justice's expected assertion that "the risk of forgery *by the United States* is probably zero," the Defenders make no attempt to show how or under what circumstances forged tribal records might be introduced in a federal prosecution or otherwise used against a federal defendant.[8] Instead, they note that tribal records may be introduced outside the criminal context. *Id*. This is true but does not demonstrate any potential for prejudice, much less potential prejudice to *criminal defendants*. Nor has any entity (other than the Defenders) voiced any concerns about self-authentication of tribal records in the civil context. Far from it, many of the other submissions emphasize the value of the proposed amendment in the civil context.[9]

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[7] This shows that the Defenders are mistaken in claiming that Tribes differ from the "other entities named in Rule 902(1) regarding public records access." Defender Letter at 5. Congress, for example, is a "political subdivision" of the United States covered by FRE 902(1), but Congressional records are not publicly available under FOIA. 5 U.S.C. §§ 552(b), 551(1).

[8] Defender Letter, at 4-5. The cases in which this has arisen are all cases in which the government sought to introduce tribal records to establish a defendant's Indian status. *United States v. Hatley*, 153 F.4th 1112 (10th Cir. 2025); *United States v. Harper*, 118 F. 4th 1288 (10th Cir. 2024); *United States v. Wood*, 109 F. 4th 1253 (10th Cir. 2024); *United States v.* Alvirez, 831 F.3d 1115 (9th Cir. 2016); *United States v. PMB*, 660 Fed. Appx. 521 (9th Cir. 2016). It is implausible to suggest that public defenders may not know if tribal records purporting to establish their client's Indian status have been forged, given the client's likely knowledge of his or her own enrollment status.

[9] Elk Valley Letter; Chickasaw Letter; Graton Letter; Modoc Letter; Morongo Letter; ANJC Letter.

Burden. The Defenders present no justification for subjecting federally recognized Tribes to authentication burdens greater than those of any sovereign entity included within FRE 902(1)(A). Instead, they argue that tribal records can still be admitted through other means without unreasonable or undue burden. But that reasoning fails to answer the question of why Tribes should be treated differently than other sovereigns, and it is wrong in any event.

The Defenders would relegate Tribes to FRE 902(11), which is intended to cover business records and not governmental records. That Tribes are the *only* sovereigns who must employ a "workaround" to establish the authenticity of their records is sufficient to show that this is not a reasonable substitute for self-authentication under FRE 902(1). Under FRE 902(1), it is the signature and seal of a sovereign government that establishes the presumed authenticity of its records. By contrast, FRE 902(11) accords no respect to either sovereign or seal. It looks to entirely different indicia of reliability, turning on when and how a record was created, maintained, and produced. Regardless of how difficult or easy it is to authenticate business records, treating tribal records as akin to business records denies Tribes their sovereign status. Tribes should "enjoy the same level of trust to prepare, maintain, and produce accurate records to federal courts that [] coordinate sovereigns and their political subdivisions do." Chickasaw Letter, at 2; *see also* Letter from Federal District Court Judges ("Based on our experience, we emphasize that treating tribal public documents the same way federal courts treat the public documents of other sovereigns is not only consistent with tribes' status as sovereign governments, but it will also alleviate the burden and cost of requiring tribal officials to travel from often remote locations to provide testimony that is not required of any other sovereign's officials.").

In addition, it is plain that FRE 902(11), both by its own terms and by incorporating 803(6)(A)-(C), imposes numerous timing, notice, and procedural requirements that FRE 901(1) does not. Those requirements alone make FRE 902(11) a more cumbersome and less convenient process than self-authentication under FRE 902(1). Under FRE 902(11), but not FRE 902(1), a proponent must address how and why records were made, maintained, and produced, and records may be excluded on bases that are irrelevant to self-authentication under FRE 902(1). And while the Defenders insist that witnesses are unnecessary under FRE 902(11),[10] use of a "business record" certificate without a witness carries the risk of a confrontation clause objection. *See, e.g.*, *Rainbow v. United States*, 813 F.3d 1097 (8th Cir.), *cert. denied*, 580 U.S. 997 (2016). While a preexisting record would not offend the confrontation clause, a certificate created to use in a prosecution could be viewed as testimonial.[11] *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305

[10] Defender Letter at 7. The Defenders do not—and cannot—explain why their purported concerns about tribal records apply only if the records are introduced under FRE 902(1), not FRE 902(11).

[11] Although the Defenders argue that the use of certificates of Indian blood from the Department of the Interior helps to circumvent the need for tribal records, that is not always true, and in any

(2009). Accordingly, in the later instance, the creator of the record would need to testify to admit the document and be subjected to cross-examination. By contrast, the sealed records of a sovereign government are properly admitted under FRE 902(1) regardless of whether the sovereign handles the records as a "regular business" would. That is the appropriate test for Tribes as for other sovereigns.[12]

As described in our earlier correspondence, having tribal officials travel vast distances to testify is indeed a burden and a waste of resources – particularly when, after appearing, the defense may stipulate to authenticity. Multiple Tribal Submissions and other Letters of Support confirm the significance of these burdens, on courts as well as on Tribes.[13] Adding federally recognized Tribes to FRE 902(1)(A) would relieve the burden on tribal officials, conserve resources, and put sovereign Tribes on the same footing as every other sovereign entity included within FRE 902(1)(A).

Element of the Offense. At the fall meeting of the Evidence Committee, a question was raised as to whether the exclusion of federally recognized tribes from FRE 902(1)(A) could be justified because membership in a tribe and Indian blood were elements of crimes on which the government bears the burden of proof. In other words, the argument goes, where an element of a crime is at issue, self-authentication of the required proof should not be permitted. But this too makes little sense. There are countless examples of crimes where a self-authenticating record is used to establish an element of the offense. For example, 18 U.S.C. § 922(g)(1) makes it a crime for a convicted felon to possess a firearm or ammunition. An element of the offense is proving

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event should not foreclose the use of tribal records. The Defenders misunderstand certificates of Indian blood (CDIBs). "BIA officials issue certificates 'so that individuals may establish their eligibility for . . . programs and services based upon their status as American Indians.'" *Rainbow*, 813 F.3d at 1103 (quoting Certificate of Degree of Indian or Alaska Native Blood, 65 Fed. Reg. 20775-01 (proposed Apr. 18, 2000)).

[12] There may, of course, be other evidentiary rules that are relevant as to the admissibility and permissible use of self-authenticating records, regardless of whether those records are covered by FRE 902(1) or FRE 902(11). But this cannot justify requiring Tribes to meet additional hurdles that other sovereigns need not face: "The amendment is limited to authenticity (that an official sealed document is what it purports to be). It does not exempt such documents from hearsay, confrontation, or other evidentiary rules. Courts will retain full authority to exclude unreliable statements or require additional foundation." Elk Valley Letter, at 1-2. If there are grounds to question the authenticity of a sealed public document (if, say, it appears there may have been tampering after a seal was affixed) or its relevance or accuracy (if, say, the defendant alleges that it relates to someone else or questions the information it contains), such a challenge can still be brought. Advisory Committee Notes FRE 902 (1972).

[13] *See*, *e.g.*, Letter from Federal District Court Judges; Graton Letter; Elk Valley Letter.

that that the defendant was a convicted felon. The government has established that element through the submission of state conviction records, which are self-authenticating under FRE 902(2) and/or (4). *See, e.g.*, *United States v. Watson*, 650 F.3d 1084, 1089-91 (8th Cir. 2011) (finding defendant's "penitentiary packet," which contained evidence of his prior conviction, self-authenticating under Fed. R. Evid. 902 in a prosecution under 18 U.S.C. § 922(g)(1)); *United States v. Weiland,* 420 F.3d 1062 (9th Cir. 2005) (same).

Another example: 18 U.S.C. § 2113(d) makes it a crime to steal property or money from a bank. The statutory definition of "bank" requires that the deposits of the institution at issue be insured by the Federal Deposit Insurance Corporation ("FDIC"). *See* 18 U.S.C. § 2113(f). Accordingly, an element of the crime of bank robbery requires the government to prove that the bank at issue was FDIC insured. This can be accomplished through the admission of an FDIC Certificate bearing a seal and attesting to pre-existing insurance. The FDIC certificate is self-authenticating under FRE 902(1) as a domestic public document. *See, e.g.*, *United States v. Frauendorfer*, 2008 WL 3539272, at *4 (D. Neb. Aug. 11, 2008).

Similarly, 18 U.S.C. § 2252(a)(4)(B) requires that to prove the crime of possessing child pornography, the government must prove that the visual depictions the defendant possessed had been transported in interstate or foreign commerce or had been produced using materials transported in interstate or foreign commerce. To satisfy that element of the offense, the government can rely on trade inscriptions on a computer hard drive to show, for example, that the computer hard drive was "Made in Malysia." *United States v. Brown*, 2009 WL 2090193, at *10 (S.D. Ind. July 13, 2009). The trade inscription is self-authenticating under FRE 902(7). *Id*; *see also United States v. Scott*, 2014 WL 2808802, at *2 (E.D. Va. June 20, 2014) (holding that mechanical imprints are self-authenticating under 902(7) and can be used in lieu of a witness to satisfy the jurisdictional element of traveling in interstate commerce). The government also routinely uses self-authenticating inscriptions on firearms to satisfy the element of 18 U.S.C. § 922(a) that requires transporting or receiving firearms in interstate or foreign commerce. *See, e.g.*, *United States v. Murillo-Lopez*, WL 2799712, at *6 (E.D. Va. Apr. 5, 2023), *aff'd*, 151 F.4th 584 (4th Cir. 2025).

In short, there is no rational distinction between the use self-authenticating records to establish elements of gun and child pornography crimes, including jurisdictional elements, and the use of self-authenticating records to establish tribal membership and Indian blood. As FRE 902 itself makes clear, and cases underscore, self-authentication does not prevent a party from opposing the evidence. The notion that the self-authentication of tribal records to establish an element of proof works an injustice on criminal defendants is fallacious and should be rejected.

II. The Proposed Amendment Is Necessary to Correct an Omission that, Whether Intentional or Not, is Out of Step With the Times

Rule 902(1)'s legislative history reflects no explanation or discussion of its omission of federally recognized Tribes. This may reflect the assumptions or biases of the day. Today, however, we can see plainly that there is no justification for this omission, and that maintaining the discriminatory status quo would be an injustice.[14] There is no valid reason to continue a system in which federally recognized Tribes are required to jump through authenticity hoops not required for the smallest subdivisions of the smallest municipality in the smallest U.S. territory. The relatively small number of cases reversing convictions on authentication grounds is not, as the Defenders argue, grounds to maintain the status quo.[15] Defender Letter at 7-9. To the contrary, the numbers suggest that an amendment will not result in the doomsday scenario that the Defenders apparently envision. Authentication of Tribal documents will continue to "succeed," Defender Letter at 10, but with less burden and expense, and with the parity long overdue to federally recognized Tribes.

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[14] The Defenders mischaracterize the rules and policies of the Transportation Security Agency ("TSA") in an attempt to justify singling out Tribes based on their alleged lack of "reliability." Defender Letter at 13. In fact, TSA accepts photo identification cards of *all* federally recognized Tribes for travel within the United States. The Defenders are confusing the identification required for domestic travel with that required for compliance with the Western Hemisphere Travel Initiative (WHTI) standards for entry *into the US* from other countries in the Western Hemisphere. Like a passport, a WHTI-compliant document is used to establish citizenship and not just identification. While Tribes can work with TSA to develop WHTI-compliant identifications (known as "enhanced tribal cards" or ETCs), ETCs are not required for domestic travel. TSA makes this same distinction as to state identification: REAL ID-compliant state driver's licenses/IDs can be used for domestic travel, but entry into the United States requires an Enhanced Driver's License (EDL)/ID, which only a few states produce. Contrary to the Defenders' claim, Defender Letter at 13, TSA does not treat tribal identification as "similar to … no acceptable identification at all." Tribal IDs that cannot be scanned are manually inspected, and TSA will look at the list of federally recognized Tribes in the Federal Register to make sure that the Tribe that issued the identification is, in fact, federally recognized. On the other hand, when someone has "no REAL ID or Acceptable ID," TSA must verify their identity, for a fee. *Compare* *TSA Travel - Acceptable Forms of Identification* *with* *CBP Travel - Western Hemisphere Travel Initiative FAQs*; *See generally* *TSA ConfirmID FAQs*; https://nativenewsonline.net/currents/tsa-announces-tribal-ids-are-real-id-compliant/; https://www.gsa.gov/technology/it-contract-vehicles-and-purchasing-programs/federal-credentialing-services/get-appointment-help/bring-required-documents.

[15] The Tenth Circuit recently reversed another case due to the government's failure to properly admit Tribal records, holding that neither testimony nor proffered documentation of tribal membership sufficiently satisfied evidentiary requirements to show tribal membership at the time the crime was committed. *United States v. Hatley*, 153 F.4th 1112 (10th Cir. 2025).

Nor should the issue be viewed as one of "defense" versus "prosecution." As one commentator noted, criminal defendants also have an interest in the self-authentication of Tribal records. *See* Henry Oostrom-Shah, *"Authentic" From Time Immemorial*, 58-AUG Ariz. Att'y 40 (2022) ("When a mother cannot prove her daughter's tribal affiliation, courts might sever the bonds of parenthood under the Indian Child Welfare Act. When a criminal defendant cannot prove his tribal citizenship, a judge may transfer his case from a tribal legal system to the Anglo-American courts, where he may face harsher penalties in front of non-Native judge and jury."). *See also* Crispin South, *Unjustifiable Expense: Tribal Nations Should be Included in FRE 902(1)*, Ariz. State L. J. (2024) ("[I]f federal prosecutors charge an Indian defendant with a crime committed within a reservation, the defendant can prevail by showing that the victim was also an Indian, and that the case must be heard in the tribal court. In such a circumstance, a defendant could have their argument thwarted because of difficulties authenticating tribal documents demonstrating the victim's Indian status.")[16] Victims of crimes committed on Indian land have an interest in the self-authentication of Tribal documents, as do litigants in civil litigation. States are amending their rules of evidence to accord federally recognized Tribes the same treatment as other sovereign entities.[17] There is no reason not to move forward with an amendment to FRE 902(1) that does the same.

Respectfully submitted,

Attachment

/s/*Gina Allery*
Gina Allery
Director, Office of Tribal Justice

[16] The Defenders disparage this article as a "blog posting" from a "second-year law student," Defender Letter at 7, but never dispute the substantive point that criminal defendants also have good reasons to support an amendment that eases the burden of authenticating tribal identity records.

[17] *See., e.g.*, Ariz. R. Evid. 902(1)(A); N.M.R. Evid. 11-902(1)(A); Or. Rev. Stat. Ann. § 40.510(k)A); Wis. Stat. Ann. § 806.245(2); Wash. Rev. Code Ann. §§ 5.44.010, 5.44.050.

April 6, 2026

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman:

Thank you for the opportunity to respond to the most recent submissions concerning the proposed amendment to Federal Rule of Evidence 902, which now include letters of support from eight federally recognized Indian tribes. Each of the tribes who has submitted a letter is a sovereign that is worthy of respect and whose views are worthy of consideration. However, the overall low response rate—from eight tribes, collectively representing only approximately 1.3% of the Nation's 574 federally recognized tribes, as well as two interest groups—suggests that this amendment is not a priority for Indian Country. Contrast the number of submissions here with, for example, the 497 Indian tribes and 62 tribal and Indian organizations who recently joined as *amici curiae* in *Haaland v. Brackeen*, 599 U.S. 255 (2023).[1]

This issue is, however, an important one for criminal defendants in Indian Country. Tribal recognition is a prerequisite to the exercise of federal jurisdiction over Indian persons under 18 U.S.C. § 1153, or over non-Indian persons charged with crimes against Indian victims under 18 U.S.C. § 1152. It is an element of each of these statutes. Documents purporting to originate from a tribe, bearing a signature and a seal of that tribe, are sometimes the only evidence of Indian status that the government introduces at trial for the purpose of proving that element.

Rule 902(11) already provides a pathway for the government to admit these documents without testimony from a live witness. This existing rule appropriately minimizes costs and burdens for tribes, while still safeguarding the ability of criminal defendants to challenge documents in the unusual case in which there is a genuine dispute about their reliability or authenticity. This protection is particularly important in cases charged under 18 U.S.C. § 1152 on the basis that the victim—but not the defendant—is an Indian person. In such cases, the non-Indian defendant may have no personal knowledge of the tribal status of the victim and no access to or pathway for receiving the records that would be necessary for investigation. Adoption of the proposed rule may in such cases function, as a practical matter, as an irrebuttable presumption that the government has met its burden as to the element of Indian

[1] Brief available at https://sct.narf.org/documents/haaland_v_brackeen/amicus_497_tribes.pdf.

status so long as the government is able to produce some document bearing a seal and a signature.

In sum, this issue is important for the rights of both Indian and non-Indian criminal defendants in Indian country, and I urge the committee not to move forward with the proposed amendment.

Sincerely,

Jami Johnson

Jami Johnson (Choctaw Nation of Oklahoma)
Assistant Federal Public Defender
District of Arizona

Exhibit A

ALASKA NATIVE JUSTICE CENTER

February 23, 2026

Sent via email to
RulesCommittee_Secretary@ao.uscourts.gov

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Federal Rule of Evidence 902

Dear Judge Furman:

We write to support an amendment to Federal Rule of Evidence 902(1) that would add federally recognized Tribes to the list of governmental entities whose sealed and signed documents are self-authenticating. The amendment would enhance efficiency and the administration of justice by the federal courts.

The Alaska Native Justice Center ("ANJC") was party to a cooperative agreement with the Office of Violence Against Women to implement the Alaska Special Tribal Criminal Jurisdiction Technical Assistance Project. The project helps Alaska Tribes plan, implement, and exercise Special Tribal Criminal Jurisdiction over non-Native offenders in Alaska Native villages pursuant to 25 U.S.C. § 1305(d). We appreciate the opportunity to provide a tribal government perspective on the proposed rule change.

Amending Rule 902(1) is one way to promote Congress's goal "to empower Indian Tribes to effectively respond to cases of domestic violence, dating violence, stalking, sex trafficking, sexual violence, and missing or murdered Alaska Natives through the exercise

of special Tribal criminal jurisdiction."[1] Alaska Native Tribes have civil and criminal authority over their citizens and non-member Natives,[2] and jurisdiction over non-Native people for violent crimes committed in their villages.[3] And Tribes rely on tribal court orders, enrollment documents, and other records to exercise their inherent jurisdiction.

Federal courts will operate more efficiently by granting the same level of deference to the public documents of tribal governments that the courts already afford to the public documents of their state and territorial counterparts. Challenges to Alaska Tribes' jurisdiction in federal court will likely increase as Tribes begin exercising jurisdiction over non-Natives.[4] Streamlining admission of tribal documents in the U.S. District Court for the District of Alaska could provide for quicker resolution of disputes at the district court for nearly half of the nation's federally recognized Tribes. It will also make it less burdensome for Tribes to authenticate their own records. Indeed, the State of Alaska and other jurisdictions have either adopted or are considering similar amendments.[5]

Therefore, amending Federal Evidence Rule 902 would be efficient, promote fairness, and eliminate unjustifiable expense and delay in determining the authenticity of tribal documents.

Sincerely,

Gloria O'Neill Digitally signed by Gloria O'Neill Date: 2026.02.24 08:17:32 -09'00'

Gloria O'Neill
President/Chief Executive Officer

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1 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 905 § 811(b) (Mar. 15, 2022).

2 25 U.S.C. § 1305(a). The definition of non-member Natives is that used in the Major Crimes Act. Pub. L. No. 117-103, 136 Stat. 905, § 812(2).

3 25 U.S.C. § 1305(b) & (d); Pub. L. No. 117-103, 136 Stat. 906-09.

4 *See, e.g.*, 25 U.S.C. § 1303.

5 See attachment.

Geoffrey Bacon
8967 Dry Creek Loop
Anchorage, AK 99502

Stacy Steinberg, Court Rules Attorney
Alaska Court System
820 W. 4th Ave.
Anchorage, AK 99501

Sent via email to:
ssteinberg@akcourts.gov

January 10, 2024

Dear Ms. Steinberg,

Pursuant to Rule of Administration 44(b), I write to propose a change to Alaska Rule of Evidence 902(1).

I. Proposed Rule Change (Additions in underline; deletions in brackets)

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or a federally recognized tribe, or the former Panama Canal Zone, or the former Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) -(11) No change

II. Reason for Suggested Rule Change

The suggested rule change to add federally recognized Alaska Native and American Indian Tribes or Nations (Tribes) to the list of governmental entities whose

sealed and signed documents are self-authenticating would both enhance efficiency and the administration of justice by the Alaska Court System.[1]

Currently, in Alaska courts for an item of evidence to be admitted, it must be authenticated or identified "by evidence sufficient to support a finding that the matter in question is what its proponent claims."[2] This standard can be met using extrinsic evidence under Rule 901, or by offering an item that is self-authenticating under Rule 902. Among the documents that are self-authenticating are those signed and sealed by a governmental entity.

The Alaska Rule of Evidence 902 Commentary "heavily relied upon" the Advisory Committee's Note to the Federal Rule. In that Note, the Advisory Committee explained that:

> Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension.[3]

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1 Adding "former" in reference to both the Panama Canal Zone and Trust Territory of the Pacific Islands is a minor edit to reflect the fact that both entities have ceased to exist. 22 U.S.C. § 3602(d)(1) (transfer date of Panama Canal from United States to Panama December 31, 1999); U.N. S.C. Res. 956 (Nov. 10, 1994) (ending trusteeship).

2 Alaska R. Evid. 901.

3 Fed. R. Evid. 902, Notes of Advisory Committee on Proposed Rules.

The Wright and Miller treatise also counsels that extrinsic evidence is not needed to authenticate public documents because "the type of writings described by Rule 902 are almost always exactly what they seem to be."[4]

Currently public documents from the following governmental entities, including their political subdivisions, departments, agencies, or officers, can be self-authenticating under Rule 902(1):

- The United States;
- Any state, district, commonwealth, territory, or insular possession of the United States;
- The former Panama Canal Zone; and
- The former Trust Territory of the Pacific Islands.[5]

Tribes are presently omitted from this list.

Two-hundred twenty-seven Tribes are located within Alaska. I am a Tribal citizen of one of them, the Native Village of Tanana.[6] As a tribal citizen I can use my Tribal Identification (ID) Card bearing my Tribe's seal to fly on an airplane[7] and verify

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4 31 FED. PRAC. & P. EVID. § 7132 (2d ed.).

5 Alaska R. Evid. 902(1).

6 U.S. Dep't of Interior, Bureau of Indian Affs. (BIA), *Indian Entities Recognized by and Eligible to Receive Servs. from the United States Bureau of Indian Affs.*, 87 Fed. Reg. 4636 (Jan. 12, 2023). The BIA must publish a list of federally recognized Alaska Native and American Indian Tribes and Nations annually. 25 C.F.R. § 83.6(a).

7 U.S. Dep't of Homeland Sec., Transp. Sec. Admin., *Identification*, https://www.tsa.gov/travel/security-screening/identification (accessed on Nov. 25, 2023).

my employment eligibility.[8] Indeed, if I lived in the village of Tanana, the State of Alaska would accept my tribal ID card as proof of my residential address to receive an Alaska ID card.[9] But I would still need an affidavit or in-court testimony for an Alaska court to consider my Tribal ID to be authentic.

This year marks 25 years since the Alaska Supreme Court announced its path-marking decision *John v. Baker* that held Alaska courts must respect Tribal court decisions under the principles of comity.[10] Comity would also generally suggest that Alaska courts should recognize Tribal documents as self-authenticating too.

For decades now Alaska courts have routinely been tasked with receiving Tribal documents in court proceedings. This occurs primarily in Child in Need of Aid (CINA) proceedings subject to the Indian Child Welfare Act (ICWA).[11] Under ICWA only the Tribe of an Indian child in a CINA proceeding can determine that child's eligibility for citizenship (membership) or their parent's citizenship in that Tribe.[12]

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[8] U.S. Dep't of Homeland Sec., Citizenship and Immigration Servs., *Form I-9 Acceptable Documents*, (Jul. 28, 2023) https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents (accessed on Nov. 25, 2023).

[9] State of Alaska, Dep't of Admin., Div. of Motor Vehicles, *Alaska Identification (ID) Card*, https://doa.alaska.gov/dmv/akol/stateid.htm, (accessed on Nov. 25, 2023).

[10] 982 P.2d 738, 763 (Alaska 1999) ("courts should strive to respect the cultural differences that influence tribal jurisprudence").

[11] 25 U.S.C. §§ 1901-1923.

[12] *See* 25 C.F.R. § 23.108(b) ("The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.").

Adopting the proposed rule change would alleviate the need for a Tribe to verify its determination with an affidavit or in-court testimony.

In the past 25 years the State of Alaska's relationship with Tribes has dramatically improved. In 2022 the Alaska Legislature passed, and the governor signed, HB 123, which provided for the state recognition of federally recognized tribes.[13] The legislative findings and intent of HB 123 observed, "Indigenous people have inhabited land in the state for multiple millennia, since time immemorial or before mankind marked the passage of time."[14] Such language supports the conclusion that Tribe are inherently authentic and so too are their records.

The need for Tribal documents to be easily received by Alaska courts is likely to increase now that Congress has affirmed Alaska Native Tribes have inherent civil and criminal authority over their citizens and non-member Natives in their village.[15] Federal law also affirms that Tribes can issue protective orders against non-Natives, and some Alaska Tribes are starting to move forward with the Pilot Project made available in the Violence Against Women Act Reauthorization Act of 2022 that will recognize their ability to criminally prosecute non-Native people for violent crimes committed within the village.[16]

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13 Ch. 42, § 2, SLA 2022.

14 *Id.* at § 1.

15 25 U.S.C. § 1305(a).

16 25 U.S.C. § 1305(b) & (d); Pub. L. No. 117-103, 136 Stat. 906-09.

Other jurisdictions have similarly recognized the sovereignty of Tribes and made corresponding changes to their state's rules recognizing Tribal documents as self-authenticating. For over a decade the New Mexico Supreme Court has included Alaska Native and American Indian Tribes and Nations among government entities whose records are self-authenticating.[17] Recently Arizona adopted the same approach.[18] Oregon's court rule requires an attestation or execution.[19] Washington enacted its rule statutorily in 2019.[20] When the Arizona Advisory Committee commented in support of amending Rule 902 it noted, "[i]ndeed, a neighboring state has had this particular change in its rules for more than a decade without any noted ill effects."[21]

Yet Federal Rule of Evidence 902(1)(A) the analogue to Alaska Evidence Rule 902(1), does not include Tribes.[22] Back in 2013 the federal Advisory Committee on Evidence Rules considered a proposal to add Tribes. "Following a wide-ranging discussion," the federal Advisory Committee on Evidence Rules "concluded that it should

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17 N.M. R. Evid. Rule 11-902.

18 *In re Rule 901(1)(A), Rules of Evid.*, No. R-23-0015, *Order Amending Rule 902 of the Ariz. Rules of Evid.* (Ariz. Aug. 24, 2023).

19 Or. Rev. Stat. § 40.510.

20 Wash. Rev. Code § 05.44.010 (court records and proceedings); *Id.* § 05.44.040 (records with seal); *Id.* § 05.44.050 (foreign statutes).

21 *Comment by the Advisory Committee on the Ariz. Rules of Evid. In Support of Petition R-23-0015 to Amend Rule 902 of the Ariz. Rules of Evid.*, at 5 (Apr. 30, 2023).

22 *United States v. Alvirez*, 831 F.3d 1115, 1122-23 (9th Cir. 2016). The prior 2013 opinion was withdrawn for other reasons. 2013 WL 1503702 (9th Cir. Apr. 15, 2013).

not proceed . . . to consider an amendment to Rule 902."[23] A list of the Committee's concerns included the need for consultation with Tribes, rigor by Tribes of maintaining public documents, opening the list to other public entities, Confrontation clause issues in criminal proceedings, the existence of other procedural workarounds, and the need for a holistic review of all rules.[24] All the reasons listed are the same issues that had to be considered when the Advisory Committee originally drafted Rule 902. Such concerns did not stop the inclusion of every small town and county in the United States and remote isolated communities in the former Trust Territories of the Pacific Islands.[25] The Advisory Committee concluded that "it would await the direction of the Standing Committee."[26] It has been waiting for over 10 years without any further consideration.

Recently the Ninth Circuit has not foreclosed a federal court's ability to admit tribal records without extrinsic evidence. In an unpublished opinion, that court took judicial notice of a Tribe's constitution and bylaws, and the enrollment certificate it issued one if its citizens.[27] The Alaska Rules of Evidence Commentary notes that judicial notice likely is the legal foundation for self-authenticating records from government

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23 Report of the Advisory Committee on Evidence Rules, May 7, 2013, at 5, available at https://www.uscourts.gov/sites/default/files/fr_import/EV05-2013.pdf.

24 Minutes of the Advisory Committee on Evidence Rules, May 7, 2023, at 11-12, available at https://www.uscourts.gov/sites/default/files/fr_import/2013-05-Evidence-Minutes.pdf.

25 Fed. R. Evid. 902(1)(A); Alaska R. Evid. 902(1).

26 Advisory Committee Minutes, *supra* note 24, at 12.

27 *United States v. Mancha*, 773 F. App'x 447, 448 n.1 (9th Cir. 2019)

entities.[28] It is also worth highlighting that Alaska Evidence Rule 902 does not strictly adhere to its federal counterpart as Alaska includes documents "purporting . . . [t]o bear the seal of state of a nation recognized by the executive power of the United States" without an accompanying certification by a United States embassy secretary or consular officer.[29]

Amending Alaska Evidence Rule 902(1) as proposed would be efficient, promote fairness, and eliminate unjustifiable expense and delay in determining the authenticity of Tribal documents. Parties would still be free to dispute a record's authenticity. But "[w]hen evidence is introduced to dispute the authenticity of an official seal or signature, the jury will determine its validity unless the trial judge finds that reasonable minds could not differ on the question, in which case a directed verdict or peremptory instruction should result in a civil case."[30]

Under Rule 44, the proposed change will be categorized as either major or minor.[31] This is a minor change because it is technical in nature. After all, Tribes, like other entities excluded from the authentication requirement, are governments that provide services to their citizenship, many of which are larger than towns that would currently

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28 Alaska R. Evid. cmt. 902(1).

29 Alaska R. Evid. 902(3); Federal R. Evid. 902(3). Alaska's Evidence Rule 902(3) follows California Evidence Code § 1452 and "some common law authority." Alaska R. Evid. 902(3) cmt. (citing 7 Wigmore, Evid. § 2163, at 645).

30 Alaska R. Evid. 902(1) cmt. For criminal cases it would be left to the jury. *Id.*

31 Alaska Admin. R. 44.

benefit from Alaska's self-authentication rule.[32] In addition Tribes already routinely interact with Alaska courts,[33] and Alaska courts routinely receive Tribal records.[34]

I thank you in advance for your consideration of this proposal.

Sincerely,

/s/
Geoffrey Bacon
ABA 2311117

[32] Peter Salter, *Monowi, Nebraska, is still a one-person town, despite what 2020 Census says*, LINCOLN JOURNAL STAR, May, 24, 2023, https://omaha.com/news/state-and-regional/monowi-nebraska-is-still-a-one-person-town-despite-what-2020-census-says/article_06850f37-9c28-543b-8240-fc9274f363e7.html (accessed Nov. 25, 2023).

[33] CINA Rule 26 (Intervention by Tribe).

[34] CINA Rule 24 (Registration of Tribal court order).

Exhibit B

CARROLL
LAW OFFICES, P.A.

February 27, 2026

Hon. Jesse M. Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Dear Judge Furman,

On behalf of the Catawba Nation a.k.a. the Catawba Indian Tribe of South Carolina (the "Nation"), and as an attorney for the Nation, I write to express support for the proposed amendment to Rule 902 of the Federal Rules of Evidence that would recognize documents sealed and signed by federally recognized tribes as self-authenticating in federal court.

This change would affirm the dignity and sovereignty of tribal governments by placing their official documents on equal footing with those of states and other recognized entities. It would also reflect the realty that tribes are longstanding governments with reliable established processes for issuing and maintaining official records.

We respectfully urge the Committee to move forward with this important amendment. Thank you for considering our views and for your continued efforts to strengthen the administration of justice.

Sincerely,

Dionè Carroll

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Exhibit C

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California

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September 17, 2025

VIA EMAIL ONLY
RulesCommittee_Secretary@ao.uscourts.gov

Hon. Jesse M. Furman
Chair, Judicial Conference Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment Supporting Amendment to Federal Rule of Evidence 902(1): Self-Authentication for Sealed Tribal Documents

Dear Judge Furman and Members of the Advisory Committee:

On behalf of Elk Valley Rancheria, California (EVR), a federally recognized Indian Tribe, we support amending Rule 902(1) to add "a federally recognized Indian Tribe or Nation" to the list of entities whose sealed and signed public documents are self-authenticating. This modest, targeted amendment promotes parity among sovereigns, preserves all existing hearsay and relevance safeguards, and reduces avoidable costs and delays associated with authenticating routine Tribal records.

The Amendment Promotes Parity and Respects Tribal Sovereignty

Rule 902(1) already treats sealed documents from the United States, states, territories, and their political subdivisions as self-authenticating. EVR and other federally recognized Tribes exercise inherent governmental authority and routinely issue sealed public documents—e.g., enrollment certificates, court judgments, ordinances, and certified copies—that serve the same authenticating function. Extending 902(1) treatment to Tribes recognizes their comparable sovereign status without altering substantive admissibility standards.

Efficiency Gains with Reliability Intact

The amendment is limited to authenticity (that an official sealed document is what it purports to be). It does not exempt such documents from hearsay, confrontation, or other

evidentiary rules. Courts will retain full authority to exclude unreliable statements or require additional foundation. In practice, 902(1) status will eliminate rote custodian declarations and witness travel where a seal and authorized signature already provide strong indicia of authenticity.

Practical Need Shown by Recent Litigation Experience

Following McGirt, federal prosecutions requiring proof of Indian status have increased, and recent appellate reversals have turned on authentication or notice pitfalls for Tribal records. In cases such as *Harper*[1] (2024) and *Wood*[2] (2024), authentication mechanics or Rule 902(11) notice issues were dispositive. A 902(1) amendment would prevent reversals based solely on authentication mechanics for sealed Tribal documents—without changing any element of proof or hearsay requirements.

Civil-Side Benefits for EVR and Other Tribes

Beyond criminal cases, federal civil litigation frequently requires authenticating Tribal ordinances, resolutions, court judgments, or certified copies. Self-authentication will streamline proceedings, reduce motion practice on undisputed authenticity questions, and conserve judicial and party resources—especially for rural Tribes whose recordkeepers would otherwise appear or prepare certifications under tight deadlines.

Addressing Concerns Raised in Opposition

Concerns about varying Tribal record systems, FOIA inapplicability, or subpoena limits do not undermine the narrow authenticity rationale of Rule 902(1). A seal and authorized signature are objective indicia of authenticity; hearsay and foundation rules still police reliability; and parties remain free to challenge authenticity upon a genuine showing of dispute. The amendment aligns Tribes with other sovereigns while preserving all existing protections.

Suggested Text and Clarifications

• Text: Amend Rule 902(1) to add: "a federally recognized Indian Tribe or Nation."

• Committee Note (clarification): "Federally recognized" refers to Tribes listed by the Department of the Interior in the *Federal Register* pursuant to the Federally Recognized Indian Tribe List Act of 1994 or subsequent law. The amendment concerns authenticity only; other evidentiary doctrines continue to apply. As with other 902(1) documents, courts may require additional proof if authenticity is genuinely disputed.

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[1] *United States v. Elga Eugene Harper*, decided by the United States Court of Appeals for the Tenth Circuit on October 3, 2024, held that the district court erred by admitting the verification letter from the Choctaw Nation of Oklahoma as it was inadmissible hearsay and did not qualify as a business record.

[2] *United States of America v. Craig Wallace Wood*, decided by the United States Court of Appeals for the Tenth Circuit on July 23, 2024, the appellate court addressed significant procedural errors related to the authentication of tribal records under the Federal Rules of Evidence.

Conclusion

Elk Valley Rancheria, California respectfully urges the Committee to adopt the amendment. Treating sealed Tribal public documents as self-authenticating enhances fairness, judicial economy, and sovereign parity while preserving all existing admissibility safeguards.

Respectfully submitted,

Dale A. Miller
Chairman

Exhibit D

February 18, 2026

The Honorable Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Comments on Amendments to Federal Rule of Evidence 902(1)

Dear Judge Furman:

On behalf of the Federated Indians of Graton Rancheria (the "Tribe"), a federally recognized Tribe, with our Reservation in Rohnert Park, Sonoma County, California, I submit the following comments in support of amending Federal Rule of Evidence 902(1) to add federally recognized tribes to the current list of governments and government entities from which a sealed and signed document would be self-authenticating if offered as evidence in court. Doing so will support tribal sovereignty and encourage state adoption of a similar rule to strengthen the Indian Child Welfare Act ("ICWA") protections.

Rule 902(1): Current Impacts

Under the current rule, documents bearing a seal and signature from various federal, state, and territorial governments, including their subdivisions and agencies, are presumptively authentic. However, sealed and signed documents from tribal governments are not. The failure to include tribes under Rule 902(1) denies them the same respect that is awarded to other governments in presuming authenticity and fails to acknowledge tribes' status as sovereign nations. Rather, the burden is on tribes, the court, and other parties to produce and review extrinsic evidence to confirm the authenticity of tribal government documents.

There are several alternatives for admitting qualifying tribal documents into evidence, but none are as direct or efficient as Rule 902(1), nor do those approaches accord appropriate respect to tribes as governments. One alternative is that tribal documents can be admitted under Rule 902(11) as a certified record of a regularly conducted activity, but the certification of a custodian

or other qualified person must be provided *and* the hearsay exception for "Records of a Regularly Conducted Activity" under Rule 803(6) must be met. This alternative can be highly inefficient and burdensome because the tribe must make a tribal custodian or qualified individual available to testify in court, imposing real costs on the tribe. Furthermore, the hearsay exception pertains to a "business, organization, occupation, or calling,"[1] but tribes as sovereigns demand more respect than being treated the same as a business or organization. Another alternative is that a court may take judicial notice of certain tribal government documents,[2] like a tribal constitution or bylaws, but judicial notice is not guaranteed.[3] These alternatives are not sufficient, and the current rule should be amended.

Tribal Sovereignty

Tribes are distinct, independent political communities with inherent sovereignty.[4] The current rule creates a hierarchy between the listed federal, state, and territorial governmental entities and tribes by treating tribal documents as less authoritative than those of the federal government, states, and territories. One of the most important aspects of tribal sovereignty is the ability of a tribe to determine its own citizenship, but under the current rule, enrollment certifications and other documents issued by a tribe do not qualify as self-authenticating.[5]

The proposed change would bolster tribal sovereignty by placing tribes on clear, equal footing with other types of covered governmental entities and avoid unwarranted scrutiny of qualifying tribal documents. Additionally, adopting the proposed rule supports the unique government to government relationship tribes have with the federal government. Finally, just as different states and governmental subdivisions have different types of recordkeeping practices, so too do tribes. The rule would allow for these differences in recordkeeping while still allowing appropriately signed and sealed tribal documents to be self-authenticating.

California Evidentiary Rules and ICWA

California currently has no evidentiary rule that acknowledges tribal documents bearing a seal and signature as self-authenticating, and with 109 federally recognized tribes within the state, including the Tribe, it is critically important to adopt the proposed rule as an example for California state courts. California courts have more readily granted judicial notice of certain tribal documents, but judicial notice is not guaranteed in every case.[6] Therefore, the federal rule

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[1] Fed. R. Evid. 803(6).
[2] *Evans Energy Partners, LLC v. Seminole Tribe of Fla., Inc.*, 561 F. Supp. 3d 1171, 1173 (M.D. Fla. 2021), *aff'd*, No. 21-13493, 2022 WL 2784604 (11th Cir. July 15, 2022); *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1265, n.5 (D.C. Cir. 2008); *United States v. Mancha*, 773 F. App'x 447, 448, n.1 (9th Cir. 2019).
[3] *See, e.g., United States v. Alvirez*, 831 F.3d 1115, 1122-23 (9th Cir. 2016).
[4] *Worcester v. State of Ga.*, 31 U.S. 515, 559 (1832).
[5] *Alvirez,* 831 F.3d at 1123.
[6] *See Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 135 Cal. Rptr. 3d 42, 50, n.6 (2011); *Big Valley Band of Pomo Indians v. Superior Ct.*, 35 Cal. Rptr. 3d 357, 362 (2005).

change would have significant positive impacts for California tribes by encouraging the state to adopt similar changes, particularly in the context of ICWA proceedings.[7]

ICWA proceedings are normally heard in state court, but the change at the federal level can encourage states to amend their rules to minimize hurdles to invoking ICWA's protections. For ICWA to apply, the child must be an "Indian child." An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[8] This is regularly proven through a tribe's enrollment records. When an Indian parent or relative cannot readily prove that a child is an Indian child because enrollment or membership documents are not self-authenticating, the risk that a child may be distanced from their tribe is greater because the protections of ICWA may not be invoked.

There is "no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[9] Furthermore, states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[10] By including tribes within the list of covered governments under the federal rule, states would be encouraged to treat enrollment documentation bearing the seal and signature of the tribal government as self-authenticating without any need for extrinsic evidence. This would help ensure the greatest coverage of ICWA protections to Indian children. It would also make the ICWA dependency process more efficient by allowing tribal records into evidence without extra steps and resources to authenticate it.

Conclusion

The Tribe encourages the Committee to adopt the proposed rule to reinforce tribal sovereignty and encourage California to adopt a similar rule to support the provisions of ICWA.

Sincerely,

Greg Sarris

Greg Sarris
Chairman

[7] 25 U.S.C. §1901 et seq.
[8] 25 U.S.C. § 1903(5).
[9] 25 U.S.C. § 1901(3).
[10] 25 U.S.C. § 1901(5).

Exhibit E

MODOC NATION
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918-542-1190 • FAX 918-542-5415

September 17, 2025

The Honorable Jesse Furman, Chair
Advisory Committee on Rules of Evidence
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Support for Amendment to Federal Rule of Evidence 902

Dear Judge Furman,

On behalf of Modoc Nation, a federally recognized Indian tribe, we write to express strong support for the proposed amendment to the Federal Rule of Evidence 902 to add federally recognized tribes to the list of entities from which a sealed and signed document would be self-authenticating if offered as evidence in federal court. This amendment is necessary to correct an inconsistency that undermines tribal sovereignty, burdens judicial efficiency, and fails to reflect the reality of government-to-government relations between the United States and Indian tribes.

Like states and territories, federally recognized Indian tribes regularly issue official documents in the exercise of their inherent sovereign powers. These include records related to membership, governance, enrollment, land use, and governmental services. These documents are no less vital or reliable than those issued by any other sovereign government. Yet, unlike states or territories, Indian tribes are excluded from the scope of Rule 902.

Concerns once raised about variations in recordkeeping practices are outdated and unfounded. Indian tribes have equal, if not greater, reasons to maintain accurate, official records, especially given the direct impact those records have on their legal relationship with the United States and on eligibility for federal programs. Indeed, multiple states, including Arizona, New Mexico, Oregon, Washington, and Wisconsin, have already amended their evidentiary rules to recognize tribal government documents as self-authenticating without making arbitrary distinctions between Indian tribes.[1]

The failure to recognize tribal documents under Rule 902 imposes real legal and symbolic consequences. It creates unnecessary evidentiary burdens, generates avoidable litigation expenses, and perpetuates a framework that inconsistently acknowledges the sovereign status of tribal governments. This outcome is contrary to the federal trust responsibility and inconsistent

[1] Ariz. R. Evid. 902(1)(A); N.M.R. Evid. 11-902(1)(A); Or. Rev. Stat. Ann. § 40.510(k)(A); Wis. Stat. Ann. § 806.245(2); Wash. Rev. Code Ann. §§ 5.44.010, 5.44.050.

with the principle that tribal sovereignty is inherent, predating the U.S. Constitution and statehood.

Lastly, part of our ancestral homelands are located in Oregon, one of the states that has already amended its evidentiary rules to recognize tribal documents as self-authenticating. It would be inconsistent and inefficient for documents issued by the Modoc Nation to be given full evidentiary effect in Oregon state courts, yet be denied the same recognition in federal courts sitting within the same jurisdiction. Amending Rule 902 to include federally recognized Indian tribes would be a long-overdue step toward consistency, uniformity, and meaningful recognition of Tribal sovereignty.

For these reasons, Modoc Nation respectfully urges the Committee on Rules of Evidence to adopt the proposed amendment. Thank you for your consideration of this important matter.

Sincerely,

Robert Burkybile
Chief, Modoc Nation

Exhibit F

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September 25, 2025

VIA E-Mail Rules Committee Staff (RulesCommittee_Secretary@ao.uscourts.gov)

Hon. Jesse Furman
Chair, Advisory Committee on the Rules of Evidence
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rule of Evidence 902

Judge Furman:

Forman Shapiro & Rosenfeld LLP serves as general counsel to the Morongo Band of Mission Indians ("Morongo" or "Tribe"), the federally recognized Indian Tribe exercising sovereign authority over the Morongo Indian Reservation in Banning, California. At Morongo's request, we write to express the Tribe's support of an amendment to Federal Rule of Evidence 902(1) that would add federally recognized tribes to the list of governmental entities that can provide sealed and signed documents for self-authentication.

Our firm litigates on behalf of Morongo in both federal court and the Morongo Band of Mission Indians' own Tribal Court, which exercises jurisdiction over a variety of matters consistent with Morongo Tribal law and federal law. In addition, Morongo is occasionally asked to assist federal law enforcement in their prosecution of civil and criminal matters by providing documents and other materials generated by an arm of the Tribe.

Under current Ninth Circuit case law, otherwise properly certified Morongo documents are not self-authenticating. *See United States v. Alvirez*, 831 F.3d 1115, 1123 (9th Cir. 2016) ("Because Indian tribes are not listed among the entities that may produce self-authenticating documents, the district court abused its discretion in admitting the Certificate pursuant to Federal Rule of Evidence 902(1) as a self-authenticating document.") As a result, Morongo, whether as a litigant or the source of documents used by the Department of Justice, must rely on extrinsic evidence to authenticate its documents. This requirement is time-consuming for all concerned: the Tribe must furnish documentation satisfying the evidentiary requirements, the Department of Justice must accommodate the evidentiary burdens into its litigation, and federal judges must engage in lengthy analyses of the sufficiency of extrinsic evidence. *See, e.g., Manzano v. S.*

Indian Health Council, Inc., No. 20-cv-02130-BAS-BGS, 2021 U.S. Dist. LEXIS 126475, at *9–14 (S.D. Cal. July 7, 2021). Moreover, the current Rule can impose significant financial costs if circumstances require the Tribe to send a custodian to court to furnish in-person authentication. The proposed amendment to Rule 902(1) allowing federally recognized tribes to provide sealed and signed documents for self-authentication would alleviate these burdens. For that reason, Morongo strongly supports the adoption of the proposed amendment.

Please feel free to contact the undersigned if you have any questions or if Morongo can be of any assistance in finalizing this important amendment to Rule 902.

Very truly yours,

FORMAN SHAPIRO & ROSENFELD LLP

Jay Shapiro

Jay B. Shapiro

Cc: Morongo Band of Mission Indians Tribal Council

TAB 6

University of Oklahoma College of Law
300 Timberdell Rd., Norman OK. 73019

Liesa L. Richter
George Lynn Cross Research Professor
Floyd & Martha Norris Chair in Law
liesarichter@ou.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Potential Amendments to FRE 606(b) and 703 to Ensure Constitutional Application
Date: April 1, 2026

The Committee has been considering the Supreme Court's 2024 decision in *Smith v. Arizona* that has created the possibility of unconstitutional application of Federal Rule of Evidence 703, which governs the basis for expert opinion testimony. At the Fall 2025 meeting, some Committee members expressed interest in a generic constitutional "red flag" amendment that would alert counsel and judges to the constitutional issues lurking within Rule 703 and that would accommodate any further developments in the law. The Committee previously considered and rejected a similar "red flag" amendment to Federal Rule of Evidence 606(b) in the wake of the Supreme Court's 2017 decision in *Peña-Rodriguez v. Colorado*. At the Fall 2025 meeting, Committee members expressed interest in reconsidering that decision and in exploring an amendment to Rule 606(b) to prevent unconstitutional application of that provision as well.

This Agenda memorandum addresses Rules 606(b) and 703, the constitutional issues underlying these Rules, and potential drafting alternatives for proposed amendments in turn. While the Constitution and the Federal Rules of Evidence operate independently of one another and *all* Rules are subject to the Constitution, it is important to ensure that the Rules do not result in a constitutional violation when applied as drafted. The Federal Rules of Evidence should not expressly approve evidence that the Constitution plainly excludes. Nor should they exclude evidence that the Constitution requires to be admitted.

And the Rules have been adapted and amended specifically to avoid unconstitutional application. For example, Rule 412 excludes evidence of the sexual history or predisposition of an alleged victim of sexual assault. In criminal cases, however, FRE 412(b)(1)(C) provides an exception to the exclusionary rule, authorizing in rule text the admission of evidence "whose exclusion would violate the defendant's constitutional rights."[1] Thus, FRE 412 specifically prevents the exclusion of evidence that the Constitution mandates.

Conversely, FRE 803(10) authorizes the admission of a certification of the absence or nonexistence of a public record.[2] After the Supreme Court decided the *Melendez-Diaz* case, it became clear that such a certification would be considered testimonial if offered against a

[1] Fed. R. Evid. 412(b)(1)(C).
[2] Fed. R. Evid. 803(10).

criminal defendant and would violate confrontation rights in the absence of an opportunity to cross-examine the person who made the search and certified the absence of the record. The hearsay exception authorizing the certification was thereafter amended to include a "notice and demand" procedure that entitles a defendant in a criminal case to demand the appearance of the person making the certification.[3] Only if the defendant fails to make such a demand after appropriate notice is the certification admissible against him. Thus, FRE 803(10) was amended to ensure that the hearsay exception did not authorize the admission of a certification that would violate the confrontation rights of a criminal defendant.[4]

Federal Rules of Evidence 606(b) and 703 are both currently capable of unconstitutional application as drafted. In 2017, the Supreme Court decided *Peña-Rodriguez v. Colorado* and held that a criminal defendant's Sixth Amendment right to a fair and impartial jury demands that a court allow post-verdict juror testimony regarding clear juror statements suggesting that racial animus played a role in the decision to convict.[5] But Rule 606(b) continues to exclude post-verdict juror testimony regarding "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[6] If applied as written, therefore, Rule 606(b) would exclude the testimony that *Peña-Rodriguez v. Colorado* requires.

Conversely, Rule 703 authorizes the admission of evidence that the Constitution excludes. Rule 703 permits expert witnesses to rely upon otherwise inadmissible information in forming an opinion for trial so long as other experts in their field would reasonably rely on such information.[7] In addition, Rule 703 contemplates the disclosure of such inadmissible basis information by the proponent of the expert when the probative value of the information (in assessing the expert's opinion) substantially outweighs its prejudicial effect (being misused by the jury for its truth).[8] In *Smith v. Arizona*, the Supreme Court made it clear that when an expert reveals the information upon which her opinion is based *and the information must be true to support the opinion*, that information is admitted for its truth.[9] If the underlying "basis" information consists of testimonial hearsay, its disclosure through the Rule 703 balancing test violates a criminal defendant's confrontation rights. The expert in *Smith* conveyed testimonial hearsay to the jury as "basis," resulting in a constitutional violation. It remains to be seen whether a prosecution expert's partial reliance on testimonial hearsay (also authorized by Rule 703) even without disclosure to the jury also violates the Constitution.

Neither Rule 606(b) nor Rule 703 contains any notice of the constitutional issue that may arise when the rule is applied as intended. The question for the Committee is whether to amend Rules 606(b) and 703 to provide a clear signal regarding the underlying constitutional issues and to prevent their unconstitutional application. This Agenda memorandum addresses each

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[3] *Id.*
[4] And the public records exception to the hearsay rule in Rule 803(8) forecloses admissibility of law enforcement reports or factual findings against a criminal defendant to prevent confrontation violations. Fed. R. Evid. 803(8).
[5] 580 U.S. 206 (2017).
[6] Fed. R. Evid. 606(b)(1).
[7] Fed. R. Evid. 703.
[8] *Id.*
[9] 602 U.S. 779 (2024).

provision, the constitutional issues underlying it, and potential drafting alternatives for proposed amendments in turn.

I. Federal Rule of Evidence 606(b) and the Supreme Court's Decision in *Peña-Rodriguez v. Colorado*

A. FRE 606(b) and Post-Verdict Juror Testimony

Federal Rule of Evidence 606(b)(1) excludes juror testimony "during an inquiry into the validity of a verdict or indictment" regarding the jury's deliberations, including "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[10] In *Tanner v. United States*, the Supreme Court explained the important policies behind this exclusionary rule, including protecting the finality of verdicts, encouraging free and frank communication by deliberating jurors, and insulating jurors from post-verdict harassment.[11] In order to preserve the integrity of the jury system, however, Rule 606(b)(2) does offer narrow exceptions to the exclusionary rule. Post-verdict juror testimony may be offered on three subjects. Jurors may testify that: (1) extraneous prejudicial information was improperly brought to the jury's attention; (2) an outside influence was improperly brought to bear on any juror; and (3) a mistake was made in entering the verdict on the verdict form.[12]

Courts have historically interpreted these exceptions narrowly in order to protect the finality of verdicts. In *Tanner v. United States*, the Supreme Court held that post-verdict juror testimony about juror intoxication (and drug sales) during the trial process reflected "internal" matters excluded by Rule 606(b)(1).[13] The Court also rejected the defense argument that the Sixth Amendment right to a fair and impartial jury mandates the admission of post-verdict juror testimony regarding such juror misconduct. The Court explained that many mechanisms are available before and during trial to uncover such misconduct, and that alternative sources of evidence exist to expose such juror misfeasance.[14]

The Supreme Court rejected a similar challenge in a civil action in *Warger v. Shauers* in 2014.[15] In *Warger*, the plaintiff sued for serious physical injuries arising out of a motorcycle accident. The plaintiff moved for a new trial following a defense verdict based on a juror affidavit averring that the jury foreperson made statements during deliberations that an automobile accident "would have ruined her daughter's life" if she had been sued.[16] The plaintiff argued that this remark revealed that the foreperson had lied during voir dire when asked whether she could be "a fair and impartial juror on this kind of case."[17] The Supreme Court again held that the affidavit revealed an internal matter within the FRE 606(b)(1) prohibition and rejected a constitutional challenge. Although *Warger* was a civil case, the Supreme Court wrote that "[t]he Constitution

[10] Fed. R. Evid. 606(b)(1).
[11] Tanner v. United States, 483 U.S. 107 (1987).
[12] Fed. R. Evid. 606(b)(2).
[13] Tanner v. United States, 483 U.S. 107 (1987).
[14] *Id.*
[15] 574 U.S. 40 (2014).
[16] *Id.*
[17] *Id.*

guarantees both criminal and civil litigants a right to an impartial jury."[18] Still, the Court found that *Tanner* foreclosed the constitutional challenge, holding that "a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased."[19]

B. *Peña-Rodriguez v. Colorado*

In 2017, however, the Court created a constitutional exception to the "no impeachment" rule in *Peña-Rodriguez v. Colorado*.[20] In that case, the Court found the exclusion of post-verdict testimony by a juror revealing a "clear statement" indicating that another juror relied on "racial stereotypes or animus" to convict a criminal defendant violated the defendant's Sixth Amendment right to a fair and impartial jury. In that case, a juror revealed anti-Hispanic bias during deliberations, stating, in essence, that he thought the defendant was guilty of the charged sexual offense *due to* his ethnicity.[21] The Colorado courts upheld the exclusion of juror testimony on these points under Colorado's identical counterpart to Federal Rule of Evidence 606(b), finding that juror testimony would reflect the "mental processes" of jurors foreclosed by the Rule.

The Supreme Court reversed in a 6-3 decision, finding that the juror's overtly racist comments in the jury room violated the defendant's Sixth Amendment right to a fair and impartial jury.[22] The Court reinforced the importance of prohibiting post-verdict juror testimony to protect the finality of verdicts as a general matter, but found the racially motivated statements by Peña-Rodriguez's juror to be constitutionally distinct from the juror misconduct at issue in prior cases like *Tanner* and *Warger*. In so doing, the Court emphasized the unique threat to justice associated with racial discrimination and also noted that alternative methods for uncovering juror misconduct (such as voir dire or pre-verdict reporting) may be less effective in uncovering racial bias. The Court held that:

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[23]

The constitutional exception to the Rule 606(b)(1) prohibition on juror post-verdict testimony announced by the Court is a narrow one, however. The Court was careful to explain that the Sixth Amendment requires post-verdict juror testimony only in clear cases in which racial animus appears to have affected the verdict:

[18] *Id.* at 50.
[19] *Id.*
[20] 580 U.S. 206 (2017).
[21] *Id.*
[22] *Id.*
[23] *Id.* at 225.

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.[24]

In the wake of *Peña-Rodriguez*, therefore, courts *must allow* post-verdict testimony by jurors when it would reveal clear statements of racial bias or animus that appear to have infected the jury's deliberations and that were a "significant motivating factor" in the vote to convict. But Federal Rule of Evidence 606(b)(1), on its face, continues to prohibit such testimony because it would expose "a statement made," or an "incident that occurred" during deliberations that sheds light on the "mental processes" of jurors. And none of the exceptions under Rule 606(b)(2), as they have historically been interpreted, provides an avenue for admitting such testimony because racist statements by jurors do not constitute "extraneous prejudicial information," "an outside influence," or a "mistake in entering the verdict on the verdict form." If applied as written, therefore, Rule 606(b) excludes the very juror testimony constitutionally mandated by *Peña-Rodriguez*. And a judge, prosecutor, or defense lawyer who consulted Rule 606(b) alone to determine the admissibility of post-verdict juror testimony about overt racist remarks in the jury room would conclude that the juror testimony is inadmissible.

C. Evidence Advisory Committee's 2017-2018 Consideration of *Peña-Rodriguez v. Colorado*

In the wake of the *Peña-Rodriguez* decision, at meetings in 2017 and 2018, the Evidence Advisory Committee explored the possibility of amending Rule 606(b) to resolve the disconnect between the Evidence Rules and the Sixth Amendment. After discussing amendment alternatives that would add a constitutional exception to Rule 606(b)(1) at several meetings, the Committee tabled the issue due to concerns that any amendment designed to reflect the narrow *Peña-Rodriguez* holding might have the unintended consequence of *expanding* the exception to the no-impeachment rule.

The Committee considered and rejected potential amendment alternatives that: (1) would purposely and expressly expand the constitutional exception to the Rule 606(b)(1) ban on post-verdict juror testimony beyond *Peña-Rodriguez* to allow testimony about any "constitutional violation" during deliberations; (2) would seek to codify the "racial animus" exception from *Peña-Rodriguez* narrowly in rule text; or (3) would add a generic exception for "evidence required by the Constitution."[25] The Committee rejected the first two alternatives as unworkable. Because the Supreme Court has repeatedly affirmed the importance of safeguarding verdicts and of the general ban on post-verdict juror testimony, the Committee determined that a

[24] *Id.* at 225-26.

[25] *See* Minutes of the Evidence Advisory Committee Meeting, p. 17-18 (April 26-27, 2018) (describing the amendment alternatives considered), available at ev_minutes_april_2018_final_0.pdf.

purposeful expansion of the constitutional exception would be ill-advised. And the Committee concluded that a narrowly tailored exception tied to the "clear statements of racial animus" identified in *Peña-Rodriguez* would be difficult to draft with the necessary precision and would require serial amendments to Rule 606(b) in the event that the Court further expanded the constitutional exception in future cases.

Although Committee members agreed that the third option -- a generic "constitutional" exception to Rule 606(b)(1) -- would be the most prudent amendment alternative, several Committee members expressed concern that even a generic exception could invite courts to admit post-verdict juror testimony more freely than *Peña-Rodriguez* contemplates. For example, Committee members noted that the Fifth Amendment prohibits jurors from drawing an inference of guilt from a defendant's refusal to testify. They expressed concern that lower courts might allow post-verdict juror testimony about comments regarding the defendant's failure to testify during deliberations where it has historically been foreclosed under a generic exception for "constitutionally required" testimony. Committee members considered the possibility of borrowing the standard from the AEDPA to allow juror testimony about deliberations when "excluding the testimony would violate clearly established constitutional law as determined by the Supreme Court of the United States" to avoid such expansion. But the Reporter explained that this amendment would be problematic due to its substantive restriction on the inherent authority of the lower federal courts.

During the Committee's consideration of Rule 606(b) in 2017 and 2018, the Reporter repeatedly emphasized the dangers of retaining an evidence rule that may violate the Constitution when applied as intended. He urged the Committee to explore amendment language that could at least signal the constitutional issue in rule text without suggesting any expansion of *Peña-Rodriguez*. At its Spring 2018 meeting, however, the Committee resolved to table the issue for at least one year to "to observe the case law developing in the wake of *Peña-Rodriguez*."[26]

D. Cases Interpreting and Applying *Peña-Rodriguez*

In the eight years since the Committee last considered the issue, both federal and state courts have almost uniformly continued to interpret and apply the holding in *Peña-Rodriguez* very narrowly and have yet to expand the exception to the no-impeachment rule beyond the clear expression of racial animus identified by the Supreme Court.

For example, in *United States v. Nucera*, the Third Circuit rejected the defendant's bid to admit juror affidavits demonstrating intense racial tension and discord during deliberations that led to his conviction.[27] *Nucera* was a prosecution of a white police officer for a hate crime involving a black victim. According to juror reports, racial tensions were extremely high on the jury and included threats and intimidation based upon race in the jury room. One juror reported that some jurors were calling others "racist" in the jury room prior to the verdict:

[26] *Id.*
[27] 67 F.4th 146, 151 (3d Cir. 2023).

> four affiants—all of whom are White—said they shared a belief that Nucera was innocent of any crime, but each said they yielded to pressure from other jurors to convict him of something so they would not be painted as a racist.[28]

The defendant argued that *Peña-Rodriguez* applied due to the "pervasive, general racial animus in the deliberations" that "tainted the verdict and denied him a fair trial."[29] The Third Circuit disagreed, emphasizing the narrow nature of the *Peña-Rodriguez* exception to the no-impeachment rule: "[t]he historical sweep of the Court's decision may be wide but the exception it announced is narrow, and the dissenting opinions convince us the exception is likely to remain that way."[30] The Third Circuit explained that *Peña-Rodriguez* only requires Rule 606(b)(1) to give way when a juror makes "a clear statement that a juror voted for conviction based on racial animus toward, or stereotypes about, *the defendant.*"[31] Notwithstanding the racial divide on the jury, the Third Circuit found no evidence that any juror voted to convict the defendant because of his race:

> But we agree that none of Nucera's evidence shows that a juror voted to convict *because of Nucera's race.* Nor do the juror affidavits show that "Juror Richardson's racial animus was a 'significant motivating factor' in her vote to convict." Richardson said nothing about Nucera being White, let alone that she would vote to convict him *because* he was White. Instead, the evidence shows she believed Roohr and Guido were telling the truth about what happened: Nucera had done what Roohr and Guido said he did. As the District Court concluded, in so reasoning, she drew on her life experiences. She also found it troubling that her White colleagues did not share that viewpoint. The level and vehemence of her "trouble"—even outrage—is of no consequence at this point. Jury deliberations can be heated, but that is not a concern of the courts after the fact. Similarly, we decline to hold that expressions of racial animus among jurors are enough to invoke the *Peña-Rodriguez* exception.[32]

In rejecting the defendant's claim, the Third Circuit noted that its sister Circuits have similarly refused to expand the narrow exception announced by the Supreme Court in *Peña-Rodriguez*.[33]

The Sixth Circuit's decision in *United States v. Robinson* similarly rejected a *Peña-Rodriguez* challenge notwithstanding significant racial tension and dissension in jury deliberations that resulted in the conviction of African-American defendants.[34] Defendants in that case were tried for defrauding a charter school and a racial divide emerged during jury deliberations:

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[28] *Id.* at 168.
[29] *Id.*
[30] *Id.*at 166.
[31] *Id.*
[32] *Id.* at 168.
[33] *Id.* at 166 ("The Court's insistence on a narrow exception has counseled our sister courts to decline invitations to stretch the exception beyond its narrow boundaries. *See, e.g.,* United States v. Brooks, 987 F.3d 593, 603 (6th Cir. 2021); United States v. Norwood, 982 F.3d 1032, 1057 (7th Cir. 2020); United States v. Robinson, 872 F.3d 760, 771 (6th Cir. 2017) (finding that the exception did not apply to evidence of White foreperson's accusation that Black jurors' view of the evidence showed they were beholden to Black defendants).").
[34] United States v. Robinson**,** 872 F.3d 760, 768 (6th Cir. 2017).

> The jury foreperson—a white woman—reportedly told A. R. and M. S. that she "[found] it strange that the colored women are the only two that can't see" that the defendants were guilty, and accused A. R. and M. S. of deliberately trying to hang the jury. M. S. reported being so angered by this remark that her "eyes started watering" and she wanted to "smack the shit out of" the foreperson. A verbal confrontation ensued, which required the marshal to enter the jury room to broker peace. After things calmed down, the deputy clerk persuaded the foreperson to apologize to A. R. and M. S. The foreperson did apologize for her remarks, but then said that she still felt A. R. and M. S. were protecting the defendants because they felt they "owed something" to their "black brothers." Again, the foreperson's words prompted a confrontation, and, again, the deputy clerk intervened, ultimately persuading A. R. and M. S. to return to deliberations. A few hours later, the jury delivered its unanimous guilty verdict.[35]

The Sixth Circuit found that the racist remarks that the foreperson directed at fellow jurors did not rise to the level required by *Peña-Rodriguez* because they did not indicate that the race of the *defendants* was a motivating factor in any juror's decision to convict: "none of the foreperson's remarks here come close to the *Peña-Rodriguez* juror's level of stereotyping or animus, and the foreperson's remarks were not directed against Robinson, Martin, or Floyd in the same way that the *Peña-Rodriguez* juror's remarks were directed against the defendant in that case."[36] Judge Donald filed a strong dissent in which she opined that *Peña-Rodriguez* applied to the juror statements at issue:

> This commitment to eliminating racial bias in the jury deliberation process, expressed so forcefully by the *Peña-Rodriguez* Court, applies equally to the present case, where the jury foreperson injected her racial biases explicitly into the deliberative process. It is hardly a strained inference that, where a juror displays racial bias towards another juror of the same race as the defendant, that juror is incapable of impartially judging the guilt of the defendant.[37]

As noted by the Third Circuit in *Nucera*, several Circuit cases have rejected *Peña-Rodriguez* challenges based upon alleged racial biases on the jury.[38] And state courts have similarly refused

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[35] *Id.* at 768.
[36] *Id.* at 771.
[37] *Id.* at 787 (Donald, J. dissenting).
[38] *See, e.g.*, United States v. Brooks, 987 F.3d 593, 604 (6th Cir. 2021) (rejecting challenge based upon email from the lone African-American juror alleging that other jurors pressured her into voting to convict; the juror's email did not even mention race, let alone suggest that other jurors made race-based remarks: "We instead take *Peña-Rodriguez* at its word: to require *express* statements of racial animus, not *neutral* statements that may suggest unexpressed racial biases."); United States v. Norwood**,** 982 F.3d 1032, 1057 (7th Cir. 2020) (rejecting challenge where juror called court to express unease about her participation in deliberations and to state that she wanted to go her own way, rather than follow other jurors: "*Peña-Rodriguez*, moreover, requires a clear statement of overt racial bias. Juror #3's post-verdict statements did not mention race at all;" defendant's speculation that race may have played a role in black juror's discomfort was insufficient to warrant further inquiry); United States v. Baker, 899 F.3d 123, 134 (2d Cir. 2018) ("Juror No. 10's allegation that an unnamed juror said, "he knew the defendant was guilty the first time he saw him," without more, does not constitute clear, strong, and incontrovertible evidence that this juror was animated by racial bias or hostility."); United States v. Birchette, 908 F.3d 50, 53–54 (4th Cir. 2018) (one African-American juror's unexplained request to be excused from the jury and remarks by another juror to defense counsel that a white juror had told two African-American jurors "this is a race thing for you" did not provide

to extend the reach of *Peña-Rodriguez* even in cases alleging racial bias.[39]

One panel of the Sixth Circuit did extend *Peña-Rodriguez* to allow a juror's affidavit to impeach a verdict in a civil §1983 action based upon racial stereotyping even without statements directly showing that racial animus motivated the verdict in favor of the defendant police officer.[40] In *Harden v. Hillman*, an African-American plaintiff sued an African-American police officer for excessive force during an arrest.[41] The jury found for the defendant and the lone African-American juror alleged racial stereotyping and bias against the black plaintiff by white jurors. The juror's post-verdict affidavit alleged that her fellow jurors "discounted and totally disregarded Mr. Harden's testimony in particular and his case in general because they believed he was a crack addict, and that his intent was to start trouble with Officer Hillman so he could sue the police department and get some money."[42] Jurors allegedly commented that the plaintiff was a "crack addict" and that his partner looked like she was on "heroin," speculated that the plaintiff was "taking swigs during breaks to stay calm," and referred to the plaintiff's African-American counsel as the "Cosby show."[43] The district court assumed without deciding that *Peña-Rodriguez* applies to civil cases but held that the plaintiff failed to make "a sufficient showing that one or more jury members made statements exhibiting overt racial bias thus, casting serious doubt on the fairness and impartiality of the jury's deliberations and verdict."[44]

A panel of the Sixth Circuit reversed, finding that the district court abused its discretion in excluding the juror's affidavit pursuant to FRE 606(b)(1). First, the court held that the *Peña-Rodriguez* exception to the Rule 606(b)(1) prohibition on juror post-verdict testimony applies in civil actions, as follows:

> Although *Peña-Rodriguez's* holding cited the Sixth Amendment, which only applies to criminal prosecutions, the Supreme Court's reasoning and precedent demonstrate that the holding applies equally to civil cases.

"good cause" to interview jurors under *Peña-Rodriguez*; comment was an "offhand comment" that did not reflect racial bias against the defendant and did not satisfy threshold showing that racial animus was a significant motivator in the decision to convict).

[39] *See* Batiste v. State, 337 So. 3d 1013, 1030 (Miss. 2022) (juror's internal remarks expressing concern that the jury included no African-American jurors and suggesting that African-American jurors were less comfortable serving in a death penalty case did not fall within *Peña-Rodriguez* exception: "no showing was made that Cranford and Rowan's concerns about the composition of the jury "and their belief that African-Americans should have been on the jury cast serious doubt on the fairness and impartiality of their deliberations and resulting verdicts."); Orellana v. State, 487 P.3d 390 (Nev. 2021) (unpublished) (rejecting *Peña-Rodriguez* challenge: "Juror Seven's declaration did not allege that one or more jurors voted to convict Orellana because of his race. To the contrary, the declaration stated that another juror accused Juror Seven of not wanting to convict Orellana because the victim was black and alleged *Juror Seven* was racist against black people. Juror Seven's declaration did not state that the verdict was influenced by racial animus directed at Orellana nor did it disclaim the guilty verdict.").

[40] Harden v. Hillman, 993 F.3d 465, 479 (6th Cir. 2021).

[41] *Id.*

[42] *Id.* at 473.

[43] *Id.* at 482.

[44] *Id.*

> Moreover, because the *Warger* Court held that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury," we see no principled basis for limiting *Peña-Rodriguez*'s holding to criminal cases.
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> Therefore, because *Peña-Rodriguez* held that the no-impeachment rule has no place when it comes to evidence of racial bias, and considering the Supreme Court's precedent establishing the need to eliminate racial discrimination from the civil courtroom, we hold that the no-impeachment rule must give way to evidence of racial bias in civil cases.[45]

The court went on the find that the racist remarks made by the jurors fell within the *Peña-Rodriguez* constitutional exception. The court noted that the jurors' statements did not directly discuss the plaintiff's race or directly tie their votes to race in the same way that the *Peña-Rodriguez* juror did. Still, the court explained that alleged juror statements "were egregious and unmistakable in their reliance on racial bias" and showed that racial stereotypes about African Americans and drugs were a "significant motivating factor" in the jury's verdict.[46] Thus, the court found that the juror's post-verdict affidavit showed "one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."[47] One member of the panel dissented from the majority opinion, finding that the alleged comments did not rise to the level required by the Supreme Court in *Peña-Rodriguez*.[48]

Outside the context of alleged racial and ethnic bias, however, both federal and state courts have steadfastly declined to extend *Peña-Rodriguez*. Courts have rejected post-verdict juror testimony alleging other jury biases or constitutional infirmities in the jury's deliberations. In *United States v. Brown*, for example, the Eleventh Circuit rejected defense efforts to rely upon *Peña-Rodriguez* to admit post-verdict juror testimony regarding alleged "anti-police bias" and "gender bias" on the jury.[49] One juror suggested that some jurors harbored anti-police bias and bullied her into voting to convict through pressure and teasing. She also claimed that teasing by other jurors that she "had a crush on defendant" revealed "gender bias" against her on the jury. The Eleventh Circuit found that these allegations did not fall with the limited constitutional exception provided by *Peña-Rodriguez*, as follows:

> Because allegations that some jurors had improper motives or that they failed to meaningfully deliberate do not fall within the limited exceptions to the no-impeachment rule, the district court did not abuse its discretion in declining to investigate them further.

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[45] *Id.* at 481.
[46] *Id.* at 485.
[47] *Id*.
[48] *Id.* at 487 (Suhrheinrich, J. dissenting) ("Certainly, these statements exhibit predilections unfavorable to Harden. But they are all based on Harden's perceived *vices*—addictions and greed—not his *race*. Although the Cosby Show comment comes somewhat closer to the racial bias bullseye, it does not directly reference the jurors' beliefs about Harden: one must infer that because the jurors thought that Harden's African-American legal team was comical, they also thought Harden was not credible because of his race. This is clearly not the type of *overt* racial bias the Supreme Court condemned in *Pena-Rodriguez*, but rather the type of "off-hand comment" the Court said did not meet the threshold.").
[49] United States v. Brown, 934 F.3d 1278, 1303 (11th Cir. 2019).

> And outside of racial bias, Rule 606(b) prohibits inquiries into alleged improper motives or prejudices of the jury.
>
> Neither this Court nor the Supreme Court has ever suggested that gender bias warrants an exception to the no-impeachment rule; we have never held that bias of one juror *against another juror* constitutes an exceptional circumstance to the no-impeachment rule; and the statement suggesting that the juror had a crush does not present "clear, strong, substantial and incontrovertible evidence" that any juror actually harbored gender bias against Antico.[50]

Similarly, in *Caylao-Do v. Logue,* a Colorado appellate court declined to extend the constitutional exception to Colorado Rule 606(b) to admit a juror affidavit suggesting that another juror harbored anti-police bias that may have been a motivating factor in his decision to hold the city liable in a case in which an officer ran over a pedestrian in an alleyway.[51] The defense argued that *Peña-Rodriguez* should extend to bias based on a person's "individual characteristics" and that the defendant's characteristic of being a "police officer" was the source of juror bias against him. The Colorado appellate court held that *Peña-Rodriguez* was limited to racial animus due to the "systemic injury" such bias does to the administration of justice and that personal characteristics include only immutable characteristics, such as race, and do not extend to the job that a person holds.[52] In rejecting the juror's affidavit, the Colorado appellate court noted: "*The City does not direct us to, and we have not found, a single case in any jurisdiction that extends the constitutional exception beyond its original application to racial bias."*[53]

In an unpublished opinion, a panel of the Sixth Circuit rejected post-verdict juror testimony indicating that the jury had violated the defendant's constitutional right to the presumption of innocence.[54] In *United States v. Ewing*, jurors allegedly applied the wrong standard of proof and improperly inferred the defendant's guilt from the lack of defense witnesses, from the allegedly lackluster defense lawyering, and from the fact that the case was prosecuted federally. The court refused to extend *Peña-Rodriguez* to juror statements showing violations of defendant's constitutional right to be presumed innocent and to be convicted by evidence beyond a reasonable doubt:

> The allegations of juror misconduct in Ewing's case are indeed "troubling and unacceptable." But they do not fall into the exception for racial bias, nor do they rise to the extreme level contemplated in *Warger*. Considering the limitations of binding precedent and the specific circumstances of this case, application of Rule 606(b) to Ewing's case is not unconstitutional.[55]

The Ninth Circuit also rejected the defendant's argument that the Constitution requires an exception to FRE 606(b)(1) for juror statements reflecting that jurors took defendant's failure to

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[50] *Id.* at 1304.
[51] 571 P.3d 909 (Colo. App. 2025).
[52] *Id.*at 918.
[53] *Id.* (emphasis added).
[54] United States v. Ewing, 749 F. App'x 317, 324 (6th Cir. 2018).
[55] *Id.* at 326.

testify into account in assessing guilt in an unpublished opinion in *United States v. Springfield*.[56] A Colorado appellate court similarly rejected a defendant's argument that *Peña-Rodriguez* justifies admission of juror affidavits showing that the jury took defendant's refusal to testify into account during deliberations. In *People v. Burke*, the trial court sent the jurors anonymous evaluations following defendant's conviction.[57] One juror wrote "[h]ard to believe a client when they choose to remain silient [sic]." The trial court granted the defendant a new trial based upon jury misconduct and the prosecution appealed.

On appeal, the defendant argued that *Peña-Rodriguez* supported admissibility of the juror's statement because the "juror's statement reflects a bias against the defendant for the exercise of a fundamental constitutional right."[58] The Colorado appellate court disagreed and reversed, finding the juror's post-verdict statement excluded by Colorado's counterpart to FRE 606(b). The Colorado appellate court rejected a constitutional exception based upon *Peña-Rodriguez*, noting that part of the reason for the exception was the difficulty courts may have in uncovering evidence of odious racial bias during voir dire.[59] The Colorado court explained that the same stigma did not attach to considerations of a defendant's silence and that no constitutional exception applied. One concurring judge disagreed: "In my view, the Supreme Court's decision in *Peña-Rodriguez* should be extended to those circumstances where a juror demonstrates bias against a defendant who exercises a fundamental constitutional right, such as the right to remain silent."[60]

In sum, both federal and state courts have continued to interpret the constitutional exception to the FRE 606(b)(1) prohibition on post-verdict juror testimony announced by the Supreme Court in *Peña-Rodriguez* narrowly to permit only "clear statements" indicating that jurors relied on racial stereotypes or animus in reaching a verdict.

E. Drafting Alternatives

Almost a decade has passed since the Court's decision in *Peña-Rodriguez*. Although experienced judges and lawyers are likely aware of the constitutional mandate created by that decision, retaining an evidence rule that is clearly capable of violating the constitutional rights of a criminal defendant when applied as written remains problematic. After all, the principal rationale for the codification of evidence rules was to provide a concise but comprehensive collection of applicable evidence standards close at hand. A neophyte prosecutor or green criminal defense lawyer might reasonably interpret Rule 606(b)(1) as foreclosing the very testimony constitutionally required by *Peña-Rodriguez*. This is especially true given that *other Federal Rules of Evidence*, such as Rule 412(b)(1)(C), give clear notice of the constitutional ramifications for the evidence they regulate. And the public records exception in Rule 803(8)

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[56] United States v. Springfield, No. 22-50031, 2023 WL 4261366, at *2 (9th Cir. June 29, 2023). *See also* United States v. Laffitte, 121 F.4th 472 (4th Cir. 2024) ("The assertions made within the affidavit by the juror are not within the narrow exception created to rule 606(b)(1) because they related to her reason for sending jury notes about her anxiety and difficulty deliberating, not a demonstration of bias. Thus, the trial court did not abuse its discretion in excluding affidavits.").
[57] People v. Burke, 452 P.3d 124, 125 (Colo. App. 2018).
[58] *Id.* at 128-29.
[59] *Id.* at 129.
[60] *Id.* at 132 (Taubman, J. concurring).

and the absence of public records exception in Rule 803(10) are specifically drafted to avoid unconstitutional application. The lack of any constitutional signpost in Rule 606(b) could create a negative inference that could lead lawyers astray.

Although the Committee could continue to await further guidance from the Supreme Court regarding the full import of *Peña-Rodriguez*, it would seem the better course to add a proviso to Rule 606(b)(2) to signal the existence of a constitutional right to post-verdict testimony. Two amendment options seem possible: (1) an amendment that specifically tracks the racial and ethnic bias standard announced in *Peña-Rodriguez* or (2) a generic exception for "constitutionally required" post-verdict juror testimony.

1. Racial Animus Exception

In 2018, the Committee rejected the possibility of amending Rule 606(b) to authorize post-verdict juror testimony only about "clear statements indicating that a juror relied on racial stereotypes or animus to convict a criminal defendant." A specific racial animus amendment was rejected due to the difficulty of drafting concise rule text that captures the *Peña-Rodriguez* standard with precision and due to the risk that Rule 606(b) would need to be amended repeatedly in the event that the Court extends the constitutional exception to other types of juror misconduct or bias.

The rulemaking process is cumbersome and time-consuming, and it would certainly be sub-optimal to amend Rule 606(b) to add a specific "racial animus" exception only to have the Court announce an additional exception shortly thereafter. The rulemaking process is ill-suited to routine rule maintenance of this sort. But given that the Supreme Court (and lower courts) have shown no appetite for expanding the *Peña-Rodriguez* exception beyond the racial bias that was the cornerstone of the Court's opinion, a specific racial animus standard may be more appealing than it was in 2017 when the decision was brand new. And the Committee may want to at least consider an amendment to Rule 606(b) that tracks the precise holding of *Peña-Rodriguez* because it best addresses the Committee's stated concerns about inadvertent expansion of the exception through rulemaking.

The three state jurisdictions that have amended their counterparts to FRE 606(b) to signal the Supreme Court's holding in *Peña-Rodriguez* have taken this course. Counterparts to Rule 606(b) in Maryland, Virginia, and in the Massachusetts Guide to Evidence all contain specific exceptions for juror statements showing "racial," "ethnic," or "national origin" bias, as follows:

Md. Rule 5-606

> **(b) Inquiry Into Validity of Verdict.**
>
> (1) Except as provided in subsection (b)(2) of this Rule, in any inquiry into the validity of a verdict, a sworn juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict.

(2) In any inquiry into the validity of a verdict, a sworn juror may testify as to a clear statement made by a juror indicating that the juror relied on a racial or other unconstitutional stereotype or animus.[61]

Va. Sup. Ct. R. 2:606

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(i) *Prohibited testimony or other evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(ii) *Exceptions for extraneous information; outside influence; mistake; racial/national origin bias.* A juror may testify--and a juror's affidavit may be considered--about whether:

(a) extraneous prejudicial information was improperly brought to the jury's attention;

(b) an outside influence was improperly brought to bear on any juror;

(c) a mistake was made in entering the verdict on the verdict form; or

(d) *during the trial a juror made one or more statements exhibiting overt racial/national origin bias--tending to show that a racial/national origin stereotype or animus was a significant motivating factor in the juror's vote and casting serious doubt on the fairness and impartiality of the jury's deliberations or the verdict.*[62]

MASS R EVID § 606 (Mass. Guide to Evidence)

(b) During an Inquiry into the Validity of a Verdict. During an inquiry into the validity of a verdict, the court may ask the jurors individually to affirm publicly that the verdict as recorded represents their decision. However, a juror may not testify about any statement made or incident that occurred during the jury's deliberations, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning a verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(c) Permitted Testimony. A juror may testify about whether

(1) extraneous prejudicial information was improperly brought to the jury's

[61] MD. R. Ev. 5-606 (emphasis added).
[62] Va. Sup. Ct. R. 2:606 (emphasis added).

attention;

(2) any matter, including an outside influence improperly brought to bear on any juror, is impairing or has impaired any juror's ability to serve impartially;

(3) information provided by the juror as part of the empanelment process was inaccurate or incomplete;

(4) *the juror or any other juror made a statement that reasonably demonstrates racial or ethnic bias; or*

(5) a mistake was made in entering the verdict on the verdict form.[63]

Of these, the Virginia version most closely tracks the Supreme Court's opinion in *Peña-Rodriguez* by requiring "overt" statements of "racial" or "national origin bias." Maryland Rule 5-606(b) allows statements of racial or *other unconstitutional stereotype or animus*, suggesting possible expansion of the exception beyond race and ethnicity. And the Massachusetts Guide to Evidence requires only statements that "*reasonably demonstrate*" racial or ethnic bias – whether or not they "tend to show that racial animus was a significant motivating factor in the juror's vote to convict" as required by *Peña-Rodriguez*. Notably, the Virginia amendment requires statements that suggest that "racial/national origin stereotype or animus was a significant motivating factor in the juror's vote" and that "cast[] serious doubt on the fairness and impartiality of the jury's deliberations or the verdict." While narrowly tailored to the holding in *Peña-Rodriguez*, the Virginia amendment is broad enough to capture civil cases because it references the fairness and impartiality of a jury's "verdict" rather than the fairness of a "conviction."

A *Peña-Rodriguez*-specific amendment to Federal Rule of Evidence 606(b) similar to the Virginia alternative might be drafted as follows:

RULE 606. Juror's Competency as a Witness

(b) During an Inquiry into the Validity of a Verdict or Indictment

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

[63] Massachusetts Guide to Evidence § 606.

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror;

(C) a mistake was made in entering the verdict on the verdict form; or

(D) any juror made clear statements that indicate that racial [or ethnic] bias was a significant motivating factor in the juror's vote [and that cast serious doubt on the fairness and impartiality of the jury's deliberations or the verdict].

This draft reveals several of the drafting challenges that the Committee confronted in 2017 when the *Peña-Rodriguez* case was newly decided. First is the challenge of describing the type of bias implicated. The Supreme Court noted that the bias in the *Peña-Rodriguez* case was based upon the defendant's "Hispanic identity" and that the parties referred to the specific bias displayed as based upon "ethnicity."[64] Although the Court recognized that such a characterization was "instructive" and "relevant," it ultimately characterized the bias as "racial" in its holding.[65] Thus, it may be best to use the term "racial bias" in an amendment that seeks to capture the *Peña-Rodriguez* holding precisely. Recognizing the anti-Hispanic bias that was the source of the constitutional violation in *Peña-Rodriguez*, however, the states that have codified constitutional exceptions have included ethnic and national origin bias in rule text. The term "ethnic" is placed in brackets in the draft for that reason.

Furthermore, the Court required both "clear statements" indicating that racial bias was a significant motivating factor in a juror's vote to convict *and* that "cast serious doubt on the fairness and impartiality" of the jury's deliberations or the verdict in describing the constitutional exception to the no-impeachment rule. The Virginia exception includes all this language in describing the exception. That makes for a lengthy and verbose exception. And the Committee could elect to omit the bracketed information in the interests of brevity. It would seem evident that a juror's "clear statement indicating that racial bias was a significant motivating factor in her vote" also casts "serious doubt on the fairness and impartiality of the jury's deliberations or the verdict." Or the Committee could elect to utilize all of the language to better reflect the Court's holding in *Peña-Rodriguez*.

Finally, there is the unresolved issue of applying the exception in civil cases. A racial animus exception would be designed to track the *Peña-Rodriguez* decision exactly and to avoid expansion of the constitutional exception to the no-impeachment rule. But a precise exception has to describe *precisely* the cases to which it applies. The amendment could apply only in criminal cases, as does *Peña-Rodriguez*, in which case the rule language would need to be modified to apply only to criminal "convictions," rather than to "verdicts." But the Court in *Warger* stated in dicta that the right to a fair and impartial jury extends to civil cases, and a panel of the Sixth Circuit has already applied the exception in civil cases. And expressly limiting the exception to criminal cases would appear to present a serious risk that the amendment quickly

[64] *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 214 (2017).
[65] *Id.* at 215 ("This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.").

becomes outdated. The draft above applies to all jury "verdicts" and "deliberations," leaving the issue of application in civil cases to be addressed in a Committee note.

A Committee note to such an amendment might read as follows:

Draft Committee Note

Rule 606(b)(2) has been amended to reflect the Supreme Court's decision in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017). In that case, the Court held that: "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Rule 606(b)(2)(D) has been added to enshrine in rule text the constitutional exception to the no-impeachment rule announced in *Peña-Rodriguez*.

The Supreme Court made clear that the constitutional exception is a narrow one, explaining that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." To be exempt from the prohibition on post-verdict juror testimony, the Court stated that "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." The Court stated that the trial court enjoys significant discretion in determining whether this threshold has been met: "Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence."

[In finding post-verdict juror testimony constitutionally required in *Peña-Rodriguez*, the Court relied upon the Sixth Amendment right to a fair and impartial jury that applies only in criminal cases. Although it denied relief, the Court stated in *Warger v. Shauers*, 574 U.S. 40 (2014) that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury." Rule 606(b)(2)(D) is therefore sufficiently broad to apply in civil actions when constitutionally required.]

2. Generic Constitutional Signpost

Alternatively, the Committee could consider an amendment that simply adds a generic "constitutional" exception to Rule 606(b)(2) akin to the one in Rule 412 discussed above. This would avoid the need to amend Rule 606(b) repeatedly in the event that the Court expands the constitutional exception to the no-impeachment rule beyond racial and ethnic animus in the future.

A generic "constitutional" exception would clearly be the better course if the Committee anticipates further expansion of the *Peña-Rodriguez* exception. On one hand, the Court has made no move to expand the exception in the past nine years, and lower courts have steadfastly

refused to expand the exception beyond racial and ethnic bias. And the Third Circuit expressed doubt that the exception would be expanded in *United States v. Nucera*: "[t]he historical sweep of the Court's decision may be wide but the exception it announced is narrow, and the dissenting opinions convince us the exception is likely to remain that way."[66] And the only three states to amend their Evidence Rules to account for *Peña-Rodriguez* have bet against future expansion and have confined their respective exceptions to the statements of racial animus targeted by the Court. This could suggest that maintaining flexibility to account for future expansion of the constitutional right to post-verdict juror testimony is unnecessary.

On the other hand, at least three sitting Supreme Court Justices have indicated that the constitutional exception should be expanded. In a dissent from the denial of certiorari in the context of federal habeas petition, Justices Kagan, Jackson and Sotomayor, suggested that the no-impeachment rule may have violated defendant's right to a fair and impartial jury where one juror lied on *voir dire* about her experience as a victim of a similar crime and then disturbed and upended the deliberations with bad behavior and bullying:

> She yelled, cursed, and screamed that she would "stay [t]here till forever if" that is "what it took for [Humphreys] to get death." She threw the victims' photos across the table and demanded, "[D]o you want this to happen to someone you know?" She reminded the jurors of the similar details of her own attack, and told them that "they had to reach a unanimous decision or [Humphreys] would be paroled," which was not true under Georgia law. She then levied personal attacks against the jurors and refused to engage in any debate.[67]

Therefore, at least three justices would seem to favor the expansion of *Peña-Rodriguez* beyond the narrow confines of racial animus established in that decision. While not necessarily indicative of the direction the Court will take in the future, this may suggest that constitutional expansion is not improbable and that a flexible constitutional exception should be added to Rule 606(b) to avoid the possibility of serial amendments to accommodate evolving precedent.

Moreover, although courts have held the line to date, it is not hard to imagine them applying the exception to other contexts and forms of discrimination, much like they did with the Supreme Court's decision in *Batson v. Kentucky*. In *Batson*, of course, the Court held that it was unconstitutional for a prosecutor to use peremptory challenges to exclude jurors based on race.[68] In subsequent cases, however, the Court extended *Batson*'s reach: first to civil cases,[69] then to peremptory strikes by criminal defendants,[70] and then to peremptory challenges based on sex.[71] Federal and state courts have further extended the doctrine to bar peremptory strikes based on national origin and religion.[72] It remains to be seen whether the Supreme Court would expand

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[66] United States v. Nucera, 67 F.4th 146, 166 (3d Cir. 2023).
[67] Humphreys v. Emmons, 146 S. Ct. 28, 29, 223 L. Ed. 2d 137 (2025).
[68] *See* 476 U.S. 79, 95-97 (1986).
[69] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).
[70] Georgia v. McCollum, 505 U.S. 42, 59 (1992).
[71] J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 128-29 (1994).
[72] *See, e.g.*, United States v. Parada, 134 F.4th 188, 200 n.4 (4th Cir. 2025) (noting there is "little issue" in "extend[ing] *Batson* to prohibit peremptory challenges made on the basis of national origin."); United States v. Brown, 352 F.3d 654, 668-69 (2d Cir. 2003) ("Exercising peremptory strikes simply because a venire member

the reach of *Peña-Rodriguez* in similar fashion. The Court had fully extended *Batson* to reach civil cases and peremptory strikes based on sex within 8 years of its initial holding.[73] *Peña-Rodriguez* turns 9 years old this year and has yet to be extended. Further, the policy behind the no-impeachment rule may have more significant implications for the effective operation of the jury system than the policy behind peremptory challenges. Still, expansion of the *Peña-Rodriguez* exception is certainly not implausible.

The clear downside of adding a generic "constitutional" exception to Rule 606(b) is that it would risk the unintended expansion of the *Peña-Rodriguez* exception through rulemaking that stalled the Committee's consideration of an amendment back in 2018. For example, an exception that allows post-verdict juror testimony showing the violation of a "constitutional right" could open the door to juror testimony about understanding instructions regarding the burden of proof or about consideration of a criminal defendant's silence. Such testimony has historically been blocked by the no-impeachment rule in the interests of protecting the jury system and the finality of verdicts. If an amendment to Rule 606(b) were to be interpreted to allow such post-verdict juror testimony, the *Peña-Rodriguez* exception would be greatly extended, not by the Supreme Court, but inadvertently through the rulemaking process. A generic constitutional exception might be drafted to attempt to avoid this possibility, as follows:

RULE 606. Juror's Competency as a Witness

(b) During an Inquiry into the Validity of a Verdict or Indictment

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify ~~about whether~~:

(A) that extraneous prejudicial information was improperly brought to the jury's attention;

(B) that an outside influence was improperly brought to bear on any juror;

(C) that a mistake was made in entering the verdict on the verdict form; or

(D) when post-verdict juror testimony is constitutionally required.

affiliates herself with a certain religion is . . . a form of 'state-sponsored group stereotype[ ] rooted in, and reflective of, historical prejudice.'" (quoting J.E.B., 511 U.S. at 128)).

[73] *See* Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

Draft Committee Note

Rule 606(b)(2) has been amended to reflect the Supreme Court's decision in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017) which recognized a constitutional right to post-verdict juror testimony. The Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Rule 606(b)(2)(D) has therefore been added to provide for an exception to the no-impeachment rule when post-verdict juror testimony is constitutionally mandated.

The amendment does not create any new right to post-verdict juror testimony. Instead, it adds an exception in rule text for post-verdict juror testimony that is found to be constitutionally required. The Supreme Court has recognized a constitutional right to post-verdict juror testimony only in the narrow circumstance outlined in *Peña-Rodriguez*. The Court explained that: "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." To be exempt from the prohibition on post-verdict juror testimony, the Court stated that "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." The trial court enjoys significant discretion in determining whether this threshold has been met. The Supreme Court explained: "[w]hether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence."

An amendment that adds a generic constitutional exception could be altered slightly to more closely track the existing constitutional exception in Rule 412, as follows:

RULE 606. Juror's Competency as a Witness

(b) (2) Exceptions. A juror may testify ~~about whether~~:

(A) that extraneous prejudicial information was improperly brought to the jury's attention;

(B) that an outside influence was improperly brought to bear on any juror;

(C) that a mistake was made in entering the verdict on the verdict form; or

(D) when exclusion [of juror testimony] would violate a party's constitutional rights.

The draft Committee note above could also accompany this amendment alternative.

Although this verbiage is more in line with existing constitutional language within the Federal Rules of Evidence, it may be subject to greater risk of inadvertent expansion than the first drafting alternative. An exception that permits post-verdict juror testimony when exclusion would "violate a party's constitutional rights" may be more easily interpreted to allow juror testimony about any "violations" of a party's "constitutional rights" during deliberations. This might be read to allow testimony about jurors who treated a defendant's silence as evidence of guilt, for example. The Committee note would explain that the amendment does not create any new right to post-verdict juror testimony but subtle rule text that must be restricted and clarified by a Committee note is not ideal.

It is for the Committee to decide: (1) whether to amend Rule 606(b) to account for the limited constitutional right to post-verdict juror testimony and, if so, (2) which drafting alternative best captures *Peña-Rodriguez* and the Committee's intent.

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

As the Committee has discussed, the Supreme Court's 2024 decision in *Smith v. Arizona* also has created the possibility of unconstitutional application of Federal Rule of Evidence 703 in criminal cases.[74] Although Rule 703 discourages expert witnesses from disclosing inadmissible basis information to the jury through a stringent balancing test, it does permit such disclosure when that balancing test is satisfied. And Rule 703 always permits expert witnesses to rely upon inadmissible information in forming opinions for trial when other experts in the field would reasonably rely on the information. The *Smith* opinion held that a prosecution expert's disclosure of inadmissible testimonial hearsay at trial (even as "basis") violates a criminal defendant's confrontation clause rights when the hearsay must be true to support the expert's opinion.[75] While the Court did not hold that a prosecution expert's mere *reliance* on some testimonial hearsay (without disclosure to the fact finder) violates confrontation rights, some federal and state courts have found that such reliance also violates a criminal defendant's Sixth Amendment rights. Others have held that some reliance on testimonial hearsay remains constitutionally permissible.

Federal Rule of Evidence 703 contains no language warning that compliance with its requirements may violate a criminal defendant's constitutional rights. As explained above, it is suboptimal for a Federal Rule of Evidence to be drafted in a manner that permits a foreseeable unconstitutional result and other Rules have been adapted and amended to avoid unconstitutional application. At the Fall 2025 meeting, some Committee members expressed a preference to await further clarification from the Supreme Court regarding confrontation rights in the context of prosecutorial expert testimony before proposing any amendment to Rule 703.[76] Other Committee members favored moving forward with a generic constitutional "red flag" amendment that would simply alert counsel and judges to the constitutional issues lurking within

[74] Smith v. Arizona, 602 U.S. 779 (2024).
[75] Smith v. Arizona, 602 U.S. 779 (2024).
[76] Minutes of the November 5, 2025 Meeting of the Evidence Advisory Committee, p. 15.

Rule 703 and that would accommodate any eventual resolution of the confrontation question.[77] The question for the Committee is whether to propose a generic "constitutional red flag" amendment to Rule 703 to account for the holding in *Smith*.

A. FRE 703 Operation and Rationale

Federal Rule of Evidence 703 frees expert witnesses from the traditional personal knowledge requirement, allowing them to testify based upon information learned before or during trial.[78] Rule 703 expressly authorizes expert witnesses to rely upon information in forming an opinion for trial that would not satisfy the admissibility standards of the Federal Rules of Evidence so long as other experts in the same field would reasonably rely upon the information. Rule 703 thus recognizes the important distinction between traditional fact witnesses and expert witnesses, who bring years of training and experience to bear in forming opinions that assist the fact finder. It frees experts from rigid constraints and cumbersome hypothetical questions that would hamper their utility at trial. Rule 703 prevents expert witnesses from acting as conduits for inadmissible information by prohibiting them from disclosing inadmissible basis information except when the probative value of that information in assessing the expert's opinion substantially outweighs the risk that the jury will depend upon that inadmissible information in evaluating the case. Rule 703, as presently drafted, provides as follows:

> **Rule 703. Bases of an Expert's Testimony**
>
> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[79]

B. *Smith v. Arizona*, 602 U.S. 779 (2024)[80]

Under *Crawford v. Washington*, the prosecution may not offer testimonial hearsay for the truth of the matter asserted against a criminal defendant unless the defendant has an opportunity to cross-examine the declarant, either at trial or prior to trial if the declarant is unavailable.[81] In *Melendez-Diaz v. Massachusetts*, the Court held that the reports of a forensic analyst qualify as testimonial statements and that the defense has a Sixth Amendment right to confront the analyst who authored the report when the prosecution offers the report into evidence.[82] In *Bullcoming v. New Mexico*, the Court held that the prosecution could not satisfy the defendant's right to confront the analyst who authored a forensic report admitted against him by calling a "surrogate"

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[77] *Id.* at 16 ("Committee members were supportive of proceeding and the Reporter stated that an amendment to Rule 703 would be an action item for the Spring 2026 meeting.").
[78] Fed. R. Evid. 703.
[79] Fed. R. Evid. 703.
[80] This section appeared in large part in the Fall 2025 Agenda Memorandum regarding Rule 703 and *Smith v. Arizona*.
[81] 541 U.S. 36 (2004).
[82] 557 U.S. 305 (2009).

analyst who had no involvement in the report or the testing that produced it.[83] In *Smith v. Arizona*, the Court considered whether the defendant's confrontation rights were violated when the prosecution expert offered an "independent opinion" but revealed the testing and findings of an absent analyst as the "basis" for his trial opinion.

1. The *Smith* Opinion

In *Smith v. Arizona*, Smith was charged with multiple drug offenses after law enforcement found a large quantity of what appeared to be drugs and drug-related items in his possession.[84] The substances recovered from Smith's property were sent to a state crime lab for analysis. Analyst Elizabeth Rast conducted the analysis and prepared a set of typed notes and a signed report documenting her lab work and her results. She found that the substances seized from Smith contained both methamphetamine and marijuana.

By the time of Smith's trial, Rast no longer worked for the crime lab. Prosecutors instead called a different analyst, Greggory Longoni to testify. Though he had no prior connection to Smith's case and had no personal knowledge of the testing of the substances seized from Smith, Longoni was called to provide his "independent opinion" regarding the substances seized from Smith. Longoni prepared for his testimony by reviewing the notes and report authored by Rast and when he took the stand, "he referred to those materials and related what was in them, item by item."[85] After reviewing Rast's methods and findings on the stand, Longoni offered his "independent opinion" that the substances contained methamphetamine and marijuana. Smith objected and ultimately appealed his conviction on the ground that he was entitled to cross-examine Rast and that calling Longoni as a substitute expert to present her findings violated his confrontation rights. The Arizona Court of Appeals rejected Smith's appeal, holding that Longoni was entitled to offer his "independent opinion" at trial and to rely upon Rast's findings as the "basis" for that opinion. According to the Arizona appellate court, Rast's statements were not admitted for their truth because Longoni relied upon Rast's statements as "basis" only.[86]

The Supreme Court accepted certiorari and reversed Smith's conviction due to the violation of his right to confront the absent forensic analyst. In a majority opinion authored by Justice Kagan, the Court held that the absent analyst's statements were admitted at trial for their truth: "If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts."[87] The Court emphasized that Longoni reviewed and read from Rast's notes

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[83] 564 U.S. 647 (2011). In *Williams v. Illinois,*567 U.S. 50 (2012), the Court held that the defendant's confrontation rights were not violated when a testifying expert relied upon a DNA analysis done by a Cellmark analyst who did not testify to support her own opinion that the DNA found on the victim was the defendant's. But no rationale for the holding garnered a majority of the Court. Four affirming justices found that the Cellmark DNA analysis was used as part of the "basis" for the testifying expert's opinion and not for its truth, and therefore, did not violate confrontation rights. Justice Thomas, the fifth affirming justice, found that the DNA analysis *was* offered for its truth where the validity of the testifying expert's opinion depended upon its accuracy but deemed the DNA analysis nontestimonial because it was not sworn.

[84] 602 U.S. 779 (2024).

[85] *Id.* at 791.

[86] State v. Smith, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *1 (Ariz. Ct. App. July 14, 2022), *vacated and remanded,* 602 U.S. 779, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024).

[87] Smith, 602 U.S. 779, 783.

and report on the stand and offered his "independent opinion" dependent entirely on the truth of Rast's statements and findings. The Court noted that permitting this type of substitute testimony would make an end run around the confrontation clause: "every testimonial lab report could come into evidence through any trained surrogate, however remote from the case. And no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted."[88]

In holding that Longoni's testimony violated Smith's Sixth Amendment rights, the Court emphasized repeatedly that Longoni had relayed the absent analyst's findings to the jury during his testimony. At the outset of the majority opinion, the Court stated:

> When an expert *conveys an absent analyst's statements* in support of his opinion, and the statements provide that support only if true, then the statements *come into evidence* for their truth. As this dispute illustrates, that will generally be the case when an expert *relays* an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.[89]

In a later portion of the opinion, Justice Kagan explains:

> Here, the State used Longoni to *relay what Rast wrote down* about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece. He testified to the precautions (*she said*) she took, the standards (*she said*) she followed, the tests (*she said*) she performed, and the results (*she said*) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth.[90]

Again, at the conclusion of the opinion, Justice Kagan emphasized the disclosure of the absent analyst's statements:

> A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U.S., at 68, 124 S.Ct. 1354; *Melendez-Diaz*, 557 U.S., at 311, 129 S.Ct. 2527. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*, 564 U.S., at 663, 131 S.Ct. 2705. And nothing changes if the surrogate—as in this case—*presents the out-of-court statements* as the basis for his expert opinion. Those statements, as we have explained, *come into evidence* for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.[91]

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[88] *Id.* at 799.
[89] *Id.* at 783 (emphasis added).
[90] *Id.* at 800 (emphasis added).
[91] *Id.* at 802-03 (emphasis added). Justice Gorsuch's concurrence also emphasized the presentation of the absent analyst's statements: "I am pleased to join the Court's opinion holding that, when an expert *presents another's statements* as the "basis" for his own opinion, he is offering those statements for their truth." *Id.* at 805. (emphasis added).

Justice Alito, joined by Chief Justice Roberts, concurred in the opinion because he found that Longoni had repeatedly attested to the "truth" of Rast's out of court statements during his testimony, but he objected to the majority's conclusion that all basis information that is necessary to an expert's opinion is necessarily offered for its truth:

> Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast's report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion. He could have also disclosed the information in the report, if the court found that the probative value of that information substantially outweighed the risk of prejudice. See Fed. Rule Evid. 703. But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith. Longoni did not have personal knowledge of any of these facts, and it is unclear what "reliable" scientific "methods" could lead him to intuit their truth from Rast's records.
>
> The strictures of the Federal Rules here track the requirements of our Confrontation Clause precedents. If Longoni testified to the truth of the fact that Rast actually performed the tests indicated in her report and notes and that she carried out those tests properly, he violated the Confrontation Clause—assuming, of course, that the notes were "testimonial," a question that the Court does not reach. But he would also violate the Federal Rules, which do not allow experts to testify to the truth of inadmissible hearsay. In other words, except for the question whether Rast's report was "testimonial," the Federal Rules and the requirements of the Confrontation Clause are the same. This case thus offers no occasion to blow up the Federal Rules. [92]
>
> As it happens, I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab. He also testified that Rast used certain "scientific method[s]" to analyze the samples, such as performing certain tests or running a "blank." By asserting these facts as true, Longoni effectively entered inadmissible hearsay into the record, thus implicating the Confrontation Clause. The Court could have said that—and stopped there.[93]

2. "Disclosure of" vs. "Reliance on" Testimonial Hearsay

Smith's impact on prosecutorial expert testimony and on Federal Rule of Evidence 703 depends upon whether it is interpreted to foreclose expert *reliance* on testimonial hearsay altogether, or whether it is limited to prohibiting surrogate expert witnesses and expert *disclosure* of testimonial hearsay.

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[92] *Id.* at 819 (Alito, J., concurring).
[93] *Id.* at 819-20.

The majority in *Smith* emphasized the trial expert's actual disclosure of the inadmissible testimonial hearsay of the absent analyst during his trial testimony in holding that this basis information had been admitted for its truth. Because the trial expert's opinion depended on the truth of that basis information, the Court held that the disclosed basis information was "offered" for its truth. If *Smith* signals that prosecutorial experts may not disclose inadmissible, testimonial basis information to the jury, the opinion is not entirely inconsistent with Rule 703. Indeed, Rule 703 provides that inadmissible basis should *not* be disclosed by the proponent of the expert unless its probative value in helping the jury assess the expert's opinion substantially outweighs its prejudicial and improper substantive use. This onerous balancing test, in effect, means that the proponent of an expert witness should not be disclosing inadmissible basis information to the jury as was done in *Smith*.[94]

If, however, the *Smith* opinion means that a prosecutorial expert may not *rely upon* the truth of inadmissible testimonial hearsay in developing an opinion for trial, that is inconsistent with Rule 703 and would require an amendment to the Rule to bring it into alignment with confrontation clause jurisprudence. Of course, Rules 702 and 703 do not currently allow a "surrogate" trial expert to rely *only* on the ultimate opinion of an absent expert in testifying; such a surrogate expert has no "independent opinion" that is based upon "sufficient facts or data" to offer into evidence.[95] Instead, such an expert acts as a mouthpiece for the absent expert, in effect relaying the opinion of the absent analyst for its truth in place of his own opinion.[96] The prosecution in *Smith* may have presented such a surrogate expert, who merely read the report of the absent expert and offered her opinion as his own during trial testimony. This type of testimony should be excluded under Rules 702 and 703 as currently drafted.

Rule 703 does permit a testifying expert to rely upon inadmissible hearsay in developing his *own* independent opinion for trial, however. Rule 703 would permit a prosecutorial trial expert to review raw data and testing developed by a third party, along with findings and reports of others to help formulate a truly independent opinion for trial. So long as other experts in the same field would reasonably rely upon such information, the trial expert may depend upon it for its truth and utilize it to form the basis for his own independent expert opinion.[97] Under Rule 703, the trial expert would not reveal or disclose inadmissible underlying basis information during his direct testimony. As the Reporter pointed out in his Fall 2024 agenda memorandum regarding *Smith v. Arizona*, this has happened in many federal cases before *Smith*. Experts have been allowed to testify to conclusions based on testimonial hearsay, so long as they have reached their own conclusions, are not simply parroting the hearsay, and the hearsay is never disclosed to the

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[94] *See* Memorandum to Advisory Committee on Evidence Rules from Daniel J. Capra Regarding *Smith v. Arizona* and Federal Rule 703 (October 1, 2024), available at 2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf (Tab 9) ("The intent of [Rule 703] is to all but prohibit the disclosure of the basis information on direct examination when it is hearsay; it's a reverse 403 test. The Committee thought it very unlikely that the hearsay's value in illustrating the expert's basis would substantially outweigh the risk of misuse.").

[95] *See* Mueller, Kirpatrick & Richter, Evidence, § 7.10 at p. 693 (Wolters Kluwer 2018) ("While an expert may consider remote statements that are not admitted and may be inadmissible, he cannot properly act as a conduit by presenting an opinion that is not his own opinion but that of someone else.").

[96] *Id.*

[97] *See* Fed. R. Evid. 703.

jury.[98] Of course, it is not always possible for an expert to testify meaningfully without disclosing a testimonial basis. But as the cases cited above make clear, it is certainly possible in some cases. If *Smith* is interpreted broadly to mean that a prosecutorial expert must have first-hand personal knowledge of all underlying information and may not rely to any extent upon the truth of testimonial hearsay, it is incompatible with Rule 703.

C. Interpretation of *Smith v. Arizona* in the Lower Courts

The Agenda memorandum regarding *Smith v. Arizona* prepared for the Committee's Fall 2025 meeting included a case digest surveying numerous federal and state cases interpreting the *Smith* holding.[99] As noted in that Agenda memorandum, many courts appear to be interpreting Smith broadly to prevent prosecutorial expert testimony that is *based on* testimonial hearsay even when the testimonial out-of-court statements are not conveyed to the jury. Still, other courts have interpreted *Smith* more narrowly to permit some expert reliance on the hearsay statements and work of an absent analyst where the testifying analyst has served as a "technical reviewer" on the case or has developed a truly "independent opinion" based on raw data from underlying testing performed by others.[100] Thus, the cases decided prior to the Fall 2025

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[98] See, e.g., United States v. Law, 528 F.3d 888 (D.C. Cir. 2008) (The court found that an expert's testimony about the typical practices of narcotics dealers did not violate Crawford. While the testimony was based on interviews with informants, "Thomas testified based on his experience as a narcotics investigator; he did not relate statements by out-of-court declarants to the jury."); United States v. Ramos-Gonzalez, 664 F.3d 1 (1st Cir. 2011) ("Where an expert witness employs her training and experience to forge an independent conclusion, albeit on the basis of inadmissible evidence, the likelihood of a Sixth Amendment infraction is minimal. Where an expert acts merely as a well-credentialed conduit for testimonial hearsay, however, the cases hold that her testimony violates a criminal defendant's right to confrontation."); United States v. Ayala, 601 F.3d 256 (4th Cir. 2010) (no violation of the Confrontation Clause where the experts "did not act as mere transmitters and in fact did not repeat statements of particular declarants to the jury."); United States v Palacios, 677 F.3d 234 (4th Cir. 2012) (expert testimony on operation of a criminal enterprise, based in part on interviews with members, did not violate the Confrontation Clause because the expert "did not specifically reference" any of the testimonial interviews during his testimony, and simply relied on them as well as other information to give his own opinion); United States v. Rios, 830 F.3d 403 (5th Cir. 2016) (in a prosecution of gang members it was not error to allow a law enforcement officer to testify as an expert about the organization of the gang; the testimony was based in large part on listening to jail conversations and interviewing former members; the court found no violation of the Confrontation Clause to the extent the underlying statements were not transmitted to the jury; the one instance in which a statement was related to the jury was found to be harmless error); United States v. Turner, 709 F.3d 1187 (7th Cir. 2013) ("the government could establish through Block's expert testimony what the data produced by Hanson's testing revealed concerning the nature of the substances that Turner distributed, without having to introduce either Hanson's documentation of her analysis or testimony from Hanson herself; and because the government did not introduce Hanson's report, notes, or test results into evidence, Turner was not deprived of his rights under the Sixth Amendment's Confrontation Clause simply because Block relied on the data contained in those documents in forming his opinion."); United States v. Huether, 673 F.3d 789 (8th Cir. 2012) (an expert testified in part on the basis of a report by the National Center for Missing and Exploited Children; the court found no confrontation violation because the NCMEC report was not introduced into evidence and the expert drew his own conclusion and was not a conduit for the hearsay); United States v. Holguin, 51 F.4th 841 (9th Cir. 2022) (expert testimony on gangs relied on testimonial hearsay; but there was no confrontation problem, because the statements were the type of information upon which other experts in the field rely, and the expert "applied his training and experience to the sources before him and reached an independent judgment without directly repeating what someone told him").

[99] *See* Agenda Memorandum from Liesa L. Richter to Evidence Advisory Committee on *Smith v. Arizona* and Federal Rule of Evidence 703 (October 1, 2025). https://www.uscourts.gov/sites/default/files/document/2025-11_evidence_rules_commitee_agenda_book_final.pdf at 268.

[100] *Id.*

Committee meeting revealed an emerging tension (if not a full split of authority) regarding the ability of a prosecution expert to rely upon testimonial hearsay in accordance with Rule 703.

The cases decided between September 2025, and March 2026 reflect the same pattern, continuing to reveal disagreement regarding the import of *Smith*. First, it is important to note that there continues to be a large volume of cases analyzing and applying the *Smith* holding.[101] The sheer volume of cases grappling with *Smith* could make it more likely that the Supreme Court grants certiorari to provide additional guidance sooner rather than later. Some decisions simply correct confrontation errors in cases very similar to *Smith*, in which a surrogate expert relies upon *and discloses* the content of an absent analyst's testimonial report.[102] But others have addressed the reliance/disclosure dichotomy left unresolved by *Smith*. Several courts have recently interpreted *Smith* broadly to foreclose reliance on testimonial hearsay by a prosecution expert — even absent disclosure of that hearsay to the jury, while others have held that some reliance remains constitutionally permissible so long as testimonial hearsay is not disclosed to the jury.

1. Reliance on Testimonial Hearsay Forbidden

In *Commonwealth v. Lujan*, a Massachusetts appellate court found that a testifying expert's reliance on the testimonial findings and statements of analysts — who performed the underlying testing and did not appear at trial — to develop his own independent opinion violated the confrontation clause.[103] In finding the constitutional violation, the court focused on the testifying expert's reliance on testimonial hearsay, rather than on its disclosure to the jury:

> Similar to *Gordon*, the testimony of both substitute analysts in this case violated the defendant's confrontation rights: the testifying analysts had no personal knowledge of the testing at issue, and *relied instead* on the truth of the absent analysts' testimonial hearsay in arriving at their respective opinions. Specifically, Waite's testimony that a screening test (performed by Kronin) on the vaginal swabs was positive for semenogelin violated

[101] My Westlaw search found 88 decisions citing *Smith v. Arizona* in the preceding 6 months.

[102] *See, e.g.*, Commonwealth v. Walker, 350 A.3d 54, 81 (Pa. 2026) ("Thus, because the rape kit reports at issue here were offered into evidence for their truth, and their primary purpose was to provide evidence for a (potential) later criminal prosecution, Walker was entitled to confront the nurse examiners who completed the sexual assault examinations and signed the reports."); State v. West, 2023-0286 (La. App. 1 Cir. 1/9/26) (finding a confrontation error where one pathologist testified to the autopsy findings of another: "Dr. Defatta conveyed an expert analyst's statement in support of his opinion, and the statement provided support only if true."; error harmless); People v. Holmes, 2025 WL 3628669 (Ill. App 2025) (finding a confrontation violation under *Smith* where "peer reviewer" testified to her "own" conclusion, as well as to deceased analyst's conclusion that substance was cannabis and deceased analyst's lab report was admitted into evidence: "Under *Smith*, the State may not introduce the testimonial out-of-court statements of a forensic analyst at trial through a surrogate analyst who did not participate in their creation and use the testimonial out-of-court statements as the basis for the expert opinion."); State v. K.W., 349 A.3d 758, 774–75 (N.J. App. 2025) ("Unlike the expert in *Michaels*, Verdino's testimony exceeded her expert opinion and included inadmissible testimony regarding Sechrist's findings in her absence. Because Verdino repeated Sechrist's findings and conclusions and parroted Sechrist's testimonial hearsay, her testimony violated defendant's right to confrontation.").

[103] Commonwealth v. Lujan, 272 N.E.3d 1101 (Mass. App. Ct. 2025).

> the confrontation clause because Waite's opinion was *based on* an absent analyst's test results that depends also on the truth of the analyst's testimonial hearsay as to the processes and protocols she said she followed to obtain those results. Like the substitute analyst in *Smith*, Waite had no personal knowledge of how the test was performed or whether there was an error in handling the swabs; instead, she could opine that there was a positive result on the vaginal swabs only because *she accepted* Kronin's notes and reports as true.[104]

Similarly, in *State v. Dodson*, a Washington appeals court found a confrontation violation when a testifying expert who was the "reviewer" on the case when the original testing was conducted, who performed some testing himself, and authored the final "report" on the case *relied upon* testimonial statements by another toxicologist who performed the majority of the testing to support his trial opinion regarding the substances present in defendant's blood.[105] The court emphasized the expert witness's reliance on the testimonial statements of another: "Andrew Gingras *relied on* Kelly Daniel's confirmation in her notes that she followed standard protocol during the testing. Gingras would not have testified to the blood test results without the confirmation from Daniel."[106] And the court characterized *Smith* as prohibiting such reliance: "In *Smith v. Arizona*, the United States Supreme Court clarified that the confrontation clause bars a testifying expert from *relying on the work prepared by a nontestifying expert* when the testifying expert renders an opinion for the jury."[107] The court rejected the State's argument that there was no confrontation violation because the testimonial statements of the absent toxicologist were never conveyed to the jury and because the testifying expert supervised the absent analyst's work from the start of the case and also reviewed the sample testing before approving the release of the test results: "During her trial testimony, Harris referred to the toxicology test report. Harris *relied* on Krantz's test results and Krantz's confirmation that she followed standard protocol during the testing."[108] These opinions suggest that a prosecution expert's reliance on testimonial hearsay, as authorized by Rule 703, is unconstitutional.

2. Some Reliance on Testimonial Hearsay Without Disclosure Constitutionally Permissible

The Mississippi Supreme Court found no confrontation violation, however, when a testifying analyst offered an opinion about the substances sold by the defendant based upon testing performed exclusively by an absent analyst. In *Busby v. State*, the Mississippi Supreme Court approved testimony by a "technical reviewer" and the admission of a lab report that she "co-signed" showing that the substance the defendant sold was methamphetamine, even though the testifying technical reviewer did not perform the testing on the substance, never saw or

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[104] *Id.* at * 3 ("We agree and hold that substitute analyst testimony *dependent on* the original, nontestifying analysts' notes and reports was erroneously admitted in violation of the defendant's confrontation rights.") (emphasis added).
[105] State v. Dodson, 583 P.3d 659 (Wash. Ct. App. 2026).
[106] *Id.*
[107] *Id.* (emphasis added) (citation omitted).
[108] *Id. See also* State v. Creighton, 923 S.E.2d 285 (N.C. Ct. App. 2025) (reliance on testimonial statements of another analyst who conducted testing reflected in BAC report by testifying analyst violated defendant's confrontation rights: "Here, Defendant was known to law enforcement as the person who caused the accident. The BAC report was prepared as part of the investigation *of him.* And the testifying expert *relied upon the statements in the report* by the absent analyst. Accordingly, we conclude Defendant's constitutional rights under the Confrontation Clause were violated by the testimony of the substitute analyst.") (error harmless) (emphasis added).

handled it, and relied on a different analyst's testing and representations to develop her independent opinion.[109] The majority distinguished *Smith* because the testifying technical reviewer was "intimately involved" with the testing and the creation of the report and did not attempt to reveal the absent analyst's statements as "basis" — the practice rejected by *Smith:*[110]

> But this Court's precedent has been clear and consistent—technical reviewers like Cothern may testify about testing results without violating the Confrontation Clause if the reviewer "was actively involved in the production of the report and had intimate knowledge of analyses even though she did not perform the tests first hand." And here, the record shows Cothern was actively involved in the production of the lab report and had intimate knowledge of the analysis. So even though she did not physically perform the tests, she could testify about the results.[111]

The majority distinguished *Smith* as follows:

> And what the Court in *Smith* did was head off an attempted end-run around *Bullcoming*'s prohibition of surrogate testimony by labeling it independent expert testimony. What *Smith* does not appear to address, just as *Bullcoming* did not address, is the question presented here—when does a testifying analyst become sufficiently involved in the process to give her *own* testimony based on the report she co-signed.[112]

The interpretation of *Smith* split the Mississippi Supreme Court, however. Three justices filed an opinion arguing that the testimony in *Busby* violated the defendant's confrontation rights pursuant to *Smith;* they concurred in the result only because they found the error to be harmless.[113] The concurrence explained that the testimony by the technical reviewer did violate the constitutional edict in *Smith* because the testifying witness had no personal knowledge of any of the testing and was offering an opinion solely in reliance on the testimonial hearsay statements of the absent analyst:

> Pursuant to the above-quoted testimony, the testifying witness, Cothern, had no personal knowledge of the vast majority of the facts that were admitted into evidence through her testimony, including, *inter alia*, the following:
>
> > 1. That the substance was subjected to two different types of testing, a secondary amine test and a gas chromatograph mass spectrometer;
> >
> > 2. That the secondary amine test resulted in a blue color that indicated methamphetamine;
> >
> > 3. That the testing analyst, Roy, received the methamphetamine, cut it open, and made observations regarding its appearance; and

[109] Busby v. State, 422 So. 3d 974, 975 (Miss. 2025) (petition for cert. docketed February 24, 2026).
[110] *Id.*
[111] *Id.*
[112] *Id.* at 979.
[113] *Id.* at 980 (Coleman, J. concurring).

4. The weight, color, and other physical characteristics of the methamphetamine.

> Because Cothern neither saw the substance nor participated in testing it, the only way in which she could testify regarding the above-listed facts was to learn them from the one person identified in the record who did have personal knowledge of them, the absent testing analyst, Roy.[114]

According to the concurrence, trial testimony *based upon* such testimonial hearsay runs afoul of *Smith* regardless of the disclosure of the underlying information: *Smith* "mak[es] clear that the testifying expert must have personal knowledge of testimonial facts that come into evidence in support of the witness's opinion."[115]

A Texas appellate court also characterized the Supreme Court's holding in *Smith* narrowly in *Davis v. State*.[116] In that case, the testifying analyst offered his opinion based upon the work of three other analysts who handled and tested appellant's blood. The court described the testing process in helpful detail, showing that the testifying analyst relied upon statements made by absent analysts in forming his opinion for trial:

> Multiple people were involved with this process. Specifically, in appellant's case, Rachel Beemer was the person who actually performed the chemical extraction; Beemer was followed by Tayla Parker who pulled the data from the instrument once the machine had run overnight; and finally, Samantha Curran acted as a second reviewer, overlooking Parker's review to make sure that all the quality assurance measures passed and the batch could be accepted. Anderson [the testifying witness] came into the process next, looking at the sample in its totality—making sure the demographic information had been input correctly, making sure all the tests had been run as expected, and screening and confirming results prior to issuing the final report. Anderson looked at the chromatography of the instrument—how the sample looked on the instrument, whether the retention time was correct—along with other variables he evaluated in the data to ensure that he agreed with it. Anderson had the option of asking the laboratory to repeat the case to see how the results compared, as it is his conclusion that is put in the final report. Without the other analysts doing the work at the lab in Pennsylvania, Anderson would not be able to give an opinion. … On voir dire, Anderson testified that in addition to Beemer, Parker, and Curran, there was an additional person called a sampler that sampled up appellant's blood into a clean test tube and handed it over to Beemer.

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[114] *Id.* at 981.

[115] *Id.* The Nevada Supreme Court also appeared to characterize *Smith* narrowly in *Matadamas-Serrano v. State*. 2026 WL 620300 (Nev. March 5, 2026) ("*Smith* does not, however, impose a categorical rule that a substitute expert may not testify or that any degree of exposure to testimonial hearsay necessarily renders the testifying expert's opinion inadmissible. … *Smith* addresses the admissibility of the *basis* for an expert's opinion—not the opinion itself."). The Nevada Supreme Court was careful to point out, however, that the testifying expert had not relied upon the truth of any testimonial hearsay in forming an opinion for trial. *Id.* ("Consistent with the district court's ruling on the pretrial motion in limine, the record does not show that Dr. Simons' testimony depended on the truth of the original autopsy report or that she merely conveyed the absent expert's testimonial statements, as was problematic in *Smith*."). *Id.* at *5. Therefore, though the court characterized *Smith* as restricting only the disclosure of testimonial hearsay by a testifying witness, it remains unclear whether some reliance upon testimonial hearsay by a testifying expert will be deemed to be a confrontation violation in Nevada.

[116] No. 05-24-01085-CR, 2025 WL 2906172, at *2 (Tex. App. Oct. 13, 2025).

> *Anderson was not present for any of the work the sampler, Beemer, Parker, or Curran conducted. Anderson received all the data from the instrument and electronic notes. After review, Anderson drew his final conclusions on appellant's case in October of 2023. Anderson did not do any of the hands-on work on appellant's blood.*[117]

The Texas court found that the testifying analyst's independent opinion based upon the raw data generated by testing performed by the absent analysts was admissible over the defendant's confrontation clause objection. The court characterized *Smith* as follows:

> Thus, the admission of a forensic lab report created solely by a nontestifying scientist violates the Confrontation Clause. The Confrontation Clause is also offended by an expert's merely explaining a nontestifying scientist's report when the expert has no personal knowledge of how the testing was conducted even though familiar with how the analysis is customarily performed. However, an expert's testimony based on a scientific forensic analysis that was performed by a nontestifying scientist is admissible if (1) the expert independently analyzes the data generated by the nontestifying scientist and develops her own conclusions from the data and (2) the lab report created by the nontestifying scientist is not offered into evidence. … Here, only Anderson's own report—not the reports of any of the nontestifying analysts—was offered into evidence.[118]

The court specifically addressed the reliance/disclosure dichotomy and the Texas counterpart to Rule 703 in a footnote:

> Appellant further complains that Anderson *relied on notes the analysts made while they generated the raw data from the blood sample*. Appellant asserts that these notes amount to testimonial statements, which renders the admission of Anderson's conclusion a violation of the Confrontation Clause. But these "statements" *were never admitted* at trial—there is no admission to complain of. *See Crawford*, 541 U.S. at 53-54 (Confrontation Clause prohibits the admission of certain out-of-court testimonial statements). An expert is *allowed to base his or her opinion on inadmissible hearsay*. TEX. R. EVID. 703; *Allison v. State*, 666 S.W.3d 750, 763 (Tex. Crim. App. 2023). Even if Anderson *relied on* the notes to form his opinion, *he never testified to their contents*. Therefore, no out-of-court statement was admitted and there was no Confrontation Clause violation with respect to any of the analysts' notes.[119]

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[117] *Id.* at *2 (emphasis added).
[118] *Id.* at *4 (citations omitted).
[119] *Id.* at n. 2 (emphasis added). The Pennsylvania Supreme Court corrected a clear error under *Smith* in *Commonwealth v. Walker*, a case in which the underlying reports of sexual assault nurse examiners were admitted into evidence without their testimony. Commonwealth v. Walker, 350 A.3d 54, 81 (Pa. 2026). In so doing, the court appeared to distinguish the circumstance in which a technical reviewer testifies *based upon* information derived from testing performed by others. In *Walker*, the Pennsylvania Supreme Court distinguished its 2013 holding in *Commonwealth v. Yohe* in which the court found that testimony of the supervisor "who examined [the raw] data [supplied by the lab technicians] and formed his own independent expert opinion, which he expressed in both his report and live testimony, was sufficient to protect Yohe's Confrontation Clause rights. *Yohe*, 79 A.3d at 539. Indeed, the testifying supervisor was "**the analyst** whose statements in the [forensic report] constitute[d] the testimony triggering the right to confrontation." *Id.* This suggests that some reliance on testing performed by another analyst

A North Carolina appeals court found no confrontation violation when the testifying analyst did not run the tests or handle the evidence personally on the theory that his independent opinion was based solely upon the "machine-generated" data produced by the underlying tests run by other analysts:

> Here, we acknowledge Dr. Brower relied on drug test results produced by other forensic chemists. However, the forensic chemists did not use their judgments or independently opine on the quantity of each drug in Starner's system; rather a machine-produced chromatograph provided the data. The output of the drug screening results, produced by liquid chromatography, is not an out-of-court statement barred by the Confrontation Clause. Furthermore, Dr. Brower analyzed all of the data himself and testified about the drugs in Starner's body based on the machine-generated data. Since Dr. Brower's testimony did not come from out-of-court statements made by forensic chemists, the trial court's allowance of Dr. Brower's testimony was not error.[120]

It is true that machine-generated data does not constitute hearsay for purposes of the confrontation clause. As other courts have acknowledged, however, a reviewing analyst like the one who testified in this case would have to depend upon some representations by the testing analysts regarding their handling of the samples and performance of the tests in order to accept the machine-generated results as reflecting the defendant's screening results.[121]

Thus, there remains an active split of authority regarding whether a prosecution expert may rely upon testimonial hearsay in accordance with Federal Rule of Evidence 703.

D. Amending FRE 703 to Reflect Confrontation Issue

The question for the Committee is whether to recommend an amendment to FRE 703 that would serve as a "red flag" to alert courts and litigants to the potential for unconstitutional application. Such an amendment would alleviate the existing disconnect between the Court's holding in *Smith* and the Rule 703 balancing test that has the potential to admit inadmissible testimonial hearsay as "basis." If drafted carefully, the amendment could avoid taking any position on the constitutionality of a prosecution expert's reliance on testimonial hearsay and could accommodate any eventual resolution of the reliance issue by the Court. A generic

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may remain constitutionally viable according to the Pennsylvania court as well. Indeed, following the Supreme Court's decision in *Smith*, a Pennsylvania appellate court in *Commonwealth v. Douglas*, in reliance on *Yohe*, found no confrontation violation when a testifying analyst relied on testing done by other absent analysts:

> Nearly the same facts are present in the instant case: Mr. Lamb testified that after another analyst tested Appellant's blood sample, Mr. Lamb ensured compliance with chain of custody procedures, reviewed the underlying raw data, checked for any errors, compared the results of the original testing with the results of the re-test, determined that the numbers were "within precision" under certain criteria which he specified, and made an independent conclusion to report the lower of the two numbers based on the data.

346 A.3d 825, 835–36 (2025).

[120] State v. Robinson, No. COA25-199, 2026 WL 156649, at *5 (N.C. Ct. App. Jan. 21, 2026).

[121] *See* Commonwealth v. Lujan, 272 N.E.3d 1101 (Mass. App. Ct. 2025) (testifying analyst's independent opinion was "based on an absent analyst's test results that depends also on the truth of the analyst's testimonial hearsay as to the processes and protocols she said she followed to obtain those results.").

amendment signaling the constitutional issues surrounding prosecution expert testimony in criminal cases could be drafted as follows:

Rule 703. Bases of an Expert's Testimony

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

Draft Committee Note

Rule 703 has been amended to reflect the Supreme Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024) and to avoid unconstitutional application of the Rule in a criminal case. In *Smith v. Arizona*, the Court held that: "When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth … And if those statements are testimonial too … the Confrontation Clause will bar their admission."

Rule 703 generally provides that the proponent of an expert opinion may not disclose inadmissible facts or data to the fact finder unless their probative value in assessing the opinion of the expert substantially outweighs their prejudicial effect. The amendment makes clear that the disclosure of inadmissible basis information is prohibited altogether in a criminal case when such disclosure would violate the constitutional rights of a criminal defendant. The Court has not decided whether and to what extent a prosecution expert may rely upon inadmissible facts or data in forming an opinion for trial absent disclosure of those facts or data to the fact finder. And the amendment takes no position on whether, or under what circumstances, a prosecution expert's reliance on inadmissible facts or data violates a defendant's constitutional rights. Instead, the amendment provides that reliance on inadmissible facts or data by a prosecution expert in a criminal case is forbidden only to the extent that it violates a defendant's constitutional rights.

The benefits of a generic amendment like this one were highlighted in the Fall 2025 Agenda memo:

> First, an amendment like this one retains crucial flexibility for all expert opinion testimony outside the prosecutorial context and allows all other experts to continue reliance on inadmissible basis information as appropriate. But an amendment like this one would serve as a signal to judges and lawyers that prosecutorial experts may not rely upon or disclose inadmissible basis information to the same extent that other experts may. It would lead them to the caselaw in their jurisdictions to determine whether and under what circumstances, prosecutorial expert testimony violates a defendant's confrontation rights. It would also act as a constitutional signpost that is sufficiently flexible to follow

> Supreme Court decisions in this area wherever they may lead, without requiring successive amendments to adapt to evolving confrontation precedent. Should the Supreme Court ultimately clarify that prosecution experts *may*, in some circumstances, rely upon testimonial hearsay in developing opinions for trial, this amended version of Rule 703 would continue to permit such constitutional reliance. If, however, the Supreme Court ultimately prohibits *all* expert reliance on testimonial hearsay, Rule 703 would prohibit it as well. And if the Supreme Court alters the confrontation clause standard developed in *Crawford v. Washington*, an amended Rule 703 with this general constitutional admonition would remain viable.[122]

It is important to ensure that the amendment does not foreclose prosecutorial reliance on inadmissible facts or data to a greater degree than the Constitution requires. The text of the proposed amendment prohibits such reliance only to the extent that it violates the constitutional rights of a criminal defendant without taking any position as to whether that reliance does, in fact, violate the Constitution. The draft Advisory Committee note seeks to clarify that point. The question for the Committee is whether this generic amendment will serve as a valuable signal regarding the constitutional issues underlying Rule 703 in criminal cases without influencing the ability of prosecution experts to rely upon inadmissible facts or data when constitutionally permissible.

Some states have adopted variations on Federal Rule of Evidence 703 that address the problem of reliance on inadmissible information in a different, more restrictive manner. Massachusetts, Michigan, and Ohio require that all expert opinion testimony be based upon an expert's personal knowledge, facts in evidence, or evidence that is admissible (or that will be admitted).[123] An amendment along these lines would upset the longstanding and necessary flexibility for expert opinion testimony in federal court and would limit experts in civil, as well as in criminal cases. Virginia's counterpart to Rule 703 distinguishes between civil and criminal

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[122] Memorandum from Liesa L. Richter to Evidence Advisory Committee Regarding Rule 703 and *Smith v. Arizona* (October 1, 2025).

[123] MASS Guide to EVID § 703

> The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence *if the facts or data are independently admissible in evidence* and are a permissible basis for an expert to consider in formulating an opinion.

Michigan R. Evid. 703

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The *facts or data must be in evidence*--or, in the court's discretion, be *admitted in evidence later*.

Ohio Evid. R. 703

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those *perceived by the expert or admitted in evidence* at the hearing.

cases, adopting the federal flexibility with respect to the basis of expert testimony for civil cases but restricting criminal experts to admitted evidence or facts within their personal knowledge, as follows:

Va. Sup. Ct. R. 2:703

> **(a) Civil Cases.** In a civil action an expert witness may give testimony and render an opinion or draw inferences from facts, circumstances, or data made known to or perceived by such witness at or before the hearing or trial during which the witness is called upon to testify. The facts, circumstances, or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> **(b) Criminal Cases.** In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

Although more narrowly tailored to the criminal context, this alternative also seems too restrictive to be considered at the federal level. An amendment along these lines would foreclose reliance on even nontestimonial hearsay by prosecution experts if it is not in evidence, and would foreclose reliance on testimonial hearsay even if the Court ultimately holds that some reliance is constitutionally permissible.

Minnesota's version of Rule 703 allows reliance on inadmissible facts or data in both civil and criminal cases, but prohibits disclosure of inadmissible information by an expert in a criminal case, as follows:

Minn. R. Evid. 703

> (a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> (b) Underlying expert data *must be independently admissible in order to be received upon direct examination;* provided that when *good cause is shown in civil cases* and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

Experts in criminal cases are limited to disclosing admissible basis information on direct examination out of concern for a defendant's confrontation rights.[124] A specific amendment like Minnesota's would resolve the "disclosure" problem identified in *Smith* but would not address a

[124] Minn. Advisory Committee Note ("In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation.").

prosecution expert's *reliance* on testimonial hearsay should the Court ultimately hold that such reliance is unconstitutional. Rule 703 would have to be amended again to adjust to evolving Supreme Court precedent.

Finally, California provides for cross-examination of any declarants upon whom an expert relies in offering an opinion at trial:

Cal. Evid. Code § 804

> (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

The commentary to the California provision explains: "Section 804 is designed to provide protection to a party who is confronted with an expert witness who relies on the opinion or statement of some other person. In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else." Of course, a requirement of cross-examination of hearsay declarants upon whom an expert relies would resolve any confrontation problems in criminal cases, but would drastically curtail expert opinion testimony in civil cases and even in criminal cases beyond what may be constitutionally necessary.

In sum, it appears that a generic constitutional signpost akin to the draft outlined above would address the confrontation issues underlying Rule 703 in the least restrictive and most flexible manner possible. It is for the Committee to determine whether to propose such a generic "constitutional red flag" amendment.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 104(a) and (b)
Date: April 1, 2026

At the last meeting the Committee considered possible amendments to Rule 104. Rule 104(a) and (b) regulate the court's evaluation of proffered evidence before it can be submitted to the jury. Currently these provisions state as follows:

> **Rule 104. Preliminary Questions**
>
> **(a) In General.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
>
> **(b) Relevance That Depends on a Fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

Rule 104(a) makes the important point that in deciding preliminary issues of fact, the trial judge is ordinarily not bound by the rules of admissibility. But one failing of Rule 104(a) is that it does not specify the *standard of proof* required for the court to find that the evidence is admissible. For example, a statement is admitted as an excited utterance only if the declarant was under the influence of the startling event. That is a fact question for the court — but how convinced must the court be before finding that the declarant was under the influence of the startling event?

The question of the applicable standard of proof for Rule 104(a) determinations was answered in *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), where the court stated that "[]the preponderance standard ensures that before admitting evidence, the court will have found it more

likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." But, in the run-up to the 2023 amendment to Rule 702, the Committee found that litigants and courts often failed to recognize that the preponderance standard applied to the reliability requirements of Rule 702. The Committee found that the problem was, in part, that if you looked at the text of Rule 104(a), you saw nothing about a standard of proof. So the Committee, at its last meeting considered whether the preponderance standard should be added to the text of Rule 104(a).

Rule 104(b), in contrast, does set forth a standard of proof, one less stringent than Rule 104(a) — evidence sufficient to support a finding. That standard purportedly applies only for questions of "conditional relevance" — when the probative value of one piece of proffered evidence depends on the existence of another. (For example, when a statement is offered to prove someone's state of mind, it is conditioned on that person having heard it.) The Supreme Court described how the "sufficient to support a finding" standard is to work, in *Huddleston v. United States,* 485 U.S. 681, 687 (1988):

> In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

Essentially, Rule 104(b) leaves the finding of the preliminary fact to the jury, except when it would simply be a waste because there is not enough evidence for anyone to find a fact. This low, Rule 104(b) standard is also explicitly applied in three specific Evidence Rules: Rule 602 (personal knowledge); 901(a) (authenticity); and 1008 (best evidence rule, fact questions about secondary evidence).

There are two ways that Rules 104 might be usefully amended.

1. The easiest amendment for the Committee to consider is simply to add the preponderance of the evidence standard to the text of Rule 104(a) — so courts and litigants don't have to go looking beyond the text to find the applicable standard of proof for preliminary issues other than those found in Rule 702.

2. The Committee could go further and amend Rule 104(b) to reject the concept of "conditional relevance," by applying the lower standard of proof to *all* questions of relevance — and leaving all other deviations from the preponderance standard to specific rules.

The arguments supporting this amendment to Rule 104(b) are:

- Conditional relevance is a confusing concept; it does not actually help anyone figure out *when* the standard of proof for a preliminary question should be governed by a standard of proof lower than a preponderance;

● The rule promotes a fallacy that conditional relevance is somehow different from relevance — it's a fallacy especially because most courts apply the same "the jury could reasonably find" standard to *all* questions of relevance; and
● The language of "condition" leads courts and litigants to think that it applies *any* time there is any condition to admitting a piece of evidence, which leads to erroneous rulings.

The Committee's reaction to the two proposals is described in the Minutes of the last meeting:

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

This memorandum is in four parts. Part One discusses the possibility of adding the preponderance standard to the text of Rule 104(a); it is modified from the prior memo. No new research has been conducted specifically on Rule 104(a), as the question is straightforward: does the Committee want to add a provision that will not change many results, but will rather provide clarification and make the rule more user-friendly? Part Two discusses the possibility of going further and amending Rule 104(b) to eliminate the language of "condition" and apply the lower standard of proof to all questions of relevance; this section is slightly modified from the prior memo. Part Three, which is completely new, works through extensive case law in which courts have had some trouble with the concept of "conditional relevance." Part Four provides possible drafts.

I. Adding the Preponderance Standard to Rule 104(a)

The rationale for adding the preponderance standard to the text of Rule 104(a) is pretty simple: it's an important rule of law, and it is not in the text of the rule itself. You have to go through case law to find it.[1]

Surely, good lawyers will be able to find the appropriate standard of proof under the current rule. But as Judge David Campbell (the former Chair of the Standing Committee) has said, the rules are not for good lawyers. The rules are for lawyers who come to them unprepared, without experience. That is why it is important to have the basic rules in text (as opposed to in the Committee Notes or case law). The Committee has already determined that much of the confusion about *Daubert* and Rule 702 derived from the fact that the preponderance standard was not in the text of the rules. The whole idea of the 2023 amendment was to make that explicit in the text, as to Rule 702. So why not go further and establish, in text, the standard of proof for all other preliminary questions of fact (other than relevance and those specifically covered by other rules)?

[1] At the Standing Committee meeting in January, the possible changes to Rule 104 were presented as an information item. In the discussion, one member suggested that even if the Committee decided not to proceed with the amendment to Rule 104(b), it should still propose the amendment to Rule 104(a).

The lack of a standard in Rule 104(a) was a prime reason for the necessity to amend Rule 702 in 2023. Many courts and lawyers understood the admissibility requirements of Rule 702 to be questions of weight under Rule 104(b); that conclusion would have been directly belied if the preponderance standard had been set forth in Rule 104(a).

It is notable that one of the public comments on proposed Rule 707 was that it contained no explicit statement that the admissibility requirements were to be decided by a preponderance of the evidence. An amendment to Rule 104(a), providing that *all* preliminary facts (other than relevance) are governed by the preponderance standard directly answers that critique. Without an amendment to Rule 104(a), there is an argument that *every* amendment to an Evidence Rule will have to include a preponderance standard in the text of that rule.

The Committee Note to the 2023 amendment recognizes the anomaly of adding the preponderance standard to the text of Rule 702 alone. It states that:

> There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule.

Adding the preponderance standard to the text of Rule 104(a), now, can be thought to work in tandem with that Committee Note.

As always, the Committee should consider whether an amendment to the Evidence Rules will solve a real problem. Beyond the aforementioned problem of an assumption by some that a preponderance standard must be stated henceforth in every evidence rule, there is some problematic case law with respect to party-opponent statements under Rule 801(d)(2)(A) that has resulted in a split in the circuits. The fact situation is that the government seeks to admit the defendant's inculpatory statement against him, and the defendant argues that the statement was not made by him: it's not his handwriting, it's not him in the recording, etc. One court has found that the statement is admissible if the government provides a prima facie showing — essentially looking at the question as one of authenticity. *See United States v. Gil,* 58 F.3d 1414 (9th Cir. 1995) (it's for the jury to decide whether it was the defendant who made the statement). But Rule 801(d)(2)(A) provides that a hearsay statement is admissible against the adversary if it "was made by the party in an individual or representative capacity"; the preliminary fact on which admissibility is based is that the party-opponent made the statement. Thus, other courts have properly found that the government must prove to the court by a preponderance that the defendant made the statement. See *United States v. Brinson,* 772 F.3d 1314 (10th Cir. 2014) (government was required to, and did, establish that the defendant more likely than not made the proffered statements); *United States v. Harvey,* 117 F. 3d 1044 (7th Cir. 1997) (suggesting that a preponderance standard applies, but finding it unnecessary to decide because the government satisfied the preponderance standard). So this is one of the problems that might be corrected by an amendment to Rule 104(a).

Yet it could be argued that the rule should be amended even if court have not deviated from the preponderance standard in preliminary determinations. The addition of the preponderance standard in the text can be justified as a good housekeeping rule — codifying an important ruling from the Supreme Court on a very important evidentiary issue. (Indeed, the other holding in *Bourjaily*, about the use of the hearsay statement itself to prove agency, *was* codified in 1996). Arguably, even if there is no large problem, the amendment does no harm, and makes the evidence rules easier to apply going forward.

Part Four sets forth a possible amendment, and Committee Note, if the Committee is interested in an amendment that would add the preponderance of the evidence standard to Rule 104(a).

II. Eliminating the Concept of "Conditional Relevance"

Rule 104(b) distinguishes facts that are "conditionally relevant" from those that are "relevant." If a fact is conditionally relevant, proof of it requires only sufficient evidence to support a finding that the fact exists. As stated above, in *Huddleston v. United States*, 485 U.S. 681, 690 (1988) the Court described the trial court's approach to conditional relevance as follows:

> In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact * * * by a preponderance of the evidence.

In contrast, simple questions of relevance do not appear to fall under Rule 104(b). So presumably, proof of a fact that is relevant appears to be covered by Rule 104(a).

The Advisory Committee does not explain why facts that are conditionally relevant are to be treated differently from facts that are, simply, relevant. The Committee Note makes the distinction but does not explain why it is necessary:

> In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy." Problems arising from it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.[2]

The Committee thus found a distinction but doesn't really say why it should be important.

[2] Note that in the example, the relevance of the gun purchase is itself conditioned on the fact that some people in the community do not have that kind of gun. Each fact is conditioned on the other.

Many commentators have concluded that the very concept of "conditional relevance" is confusing and unnecessary. There is no special reason to hold that proof of a fact should be treated differently because the fact is conditionally relevant.

The most prominent critic of the "conditional relevance" construct is Professor Ron Allen. In his article, *The Myth of Conditional Relevance,* 25 Loyola L. Rev. 871-884, 879 (1992), Professor Allen notes that evidence is either relevant or is not. The fact that it is "conditional" in some cases does not call for different treatment. He explains as follows:

> No evidence is simply relevant in its own right. Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy.

The fact is, when the relevance of one fact is conditioned on another, the concept of "conditional relevance" applies, unhelpfully, to *both* facts; they are conditional on each other, so the term takes you nowhere. Professor Allen considers a contract action in which there are two factual disputes: whether there was an offer and acceptance, and whether one of the parties had the authority to execute the contract. He states that "[t]he received wisdom says evidence of offer and acceptance is conditionally relevant upon proof of authority, but of course the reverse is also true. Evidence of authority is conditionally relevant upon proof of offer and acceptance." (i.e., authority means nothing in itself; it is only relevant if there was an offer and acceptance.) Similarly, if the question is whether the defendant heard an accusation and whether he adopted it, the relevance of each fact is dependent on the other: you can't adopt what you don't hear, but also, the relevance of hearing it is "conditioned" on whether he adopted it. There is no reason at all to impose a different standard of proof to facts that are "conditionally" relevant.

The confusing treatment of conditional relevance is not just a theoretical problem. Rule 104(b) is explicitly limited to relevancy conditioned on fact. The obvious implication is that the drafters believed that there was some other kind of relevancy not conditioned on fact. The only other kind of relevancy is that defined in Rule 401, called "logical" relevance in the Committee Note. So, is relevancy under Rule 401 a Rule 104(a) question? It would seem to be so, but that is a poor result, because the lower standard is provided for conditional relevance, which presumably would be the more problematic evidence. Another possibility is that relevancy is neither a Rule 104(a) nor a Rule 104(b) question. This might be what the Advisory Committee intended, but it doesn't square with Rule 104(a) and (b), which purport to cover all preliminary questions. And there is nothing in Rule 401 about a standard of proof. It is anomalous to read the Federal Rules of Evidence as failing to provide a standard of proof for the most fundamental requirement of all evidence.

There is evidence in the case law that courts treat all questions of relevance under the same low standard of proof as that set forth for conditional relevance. That is, "logical" relevance and "conditional" relevance are treated the same way: the standard of proof is evidence that could persuade a reasonable person, aka sufficient to support a finding. A recent example is *Palin v. New York Times,* 113 F.4th 245, 272 (2d Cir. 2024). In this libel case, one of the disputed issues was the

admissibility of certain articles that debunked assertions made by the Times concerning the effect of Palin's positions on the shooting of a Congresswoman. The trial judge excluded the articles, finding that there was insufficient evidence that Bennet, the Times editor, had heard about or read the articles. The Second Circuit found that the articles were "conditionally relevant" and all that Palin had to show was evidence sufficient to support a finding that Bennet was aware of the articles. The Second Circuit concluded that "the district court abused its discretion in concluding that a reasonable juror could not find by a preponderance of the evidence that Bennet read and remembered the Excluded Articles." So the court applied the sufficient to support a finding standard to the "conditionally relevant" fact.

After that, the *Palin* court considered the trial court's exclusion of evidence that Bennet's brother was a Democratic presidential candidate, who had been threatened. This was not a question of conditional relevance. Bennet was aware of all this evidence. The question was whether that awareness made a disputed fact more or less likely. The trial court found the evidence irrelevant under Rule 401. The Second Circuit disagreed in the following passage:

> This evidence was relevant. A *reasonable juror* could infer that the aforementioned evidence gave Bennet a reason to personally dislike Palin and that it was therefore more likely that he intentionally or recklessly, rather than inadvertently, connected her to the Loughner shooting. Furthermore, to *a reasonable juror*, the threat to Senator Bennet just prior to the Loughner shooting might have heightened James Bennet's sensitivity to stories about political shootings, making more likely the possibility that he learned of the crosshairs map controversy. Were the jury to draw such an inference, it would likely bear upon the credibility of Bennet's assertions that he was unaware of the controversy when drafting the challenged statements. [Emphases added.]

This "reasonable juror" test is in fact an application of Rule 104(b). The issue to the *Palin* court is whether a reasonable juror could have found it to be relevant, even though its relevance was not dependent on a conditional fact. The Court concluded that the jurors' background knowledge and experience was satisfactory to provide "evidence sufficient to support a finding" that Bennet's actions were intentional or reckless. If this analysis is correct, there is no need to have a separate analysis for conditional relevance. That only confuses matters. But also, if this is the right approach, it should actually be in rule text, because, as stated above, there is no specific guidance in the rule on the standard for determining questions of basic relevance.

Should There Be an Amendment?

It is fair to state that the concept of conditional relevance is at least confusing — not that it can't be understood as a concept, just that it can't be understood why it makes a difference. Is that enough to justify an amendment? Perhaps this is one of the situations in which a change that would have made a lot of sense in 1975 is not as optimal after 50 years. If courts are essentially dealing with conditional relevance as a concept that makes a difference, but in fact it really doesn't make a difference because all relevance questions are decided under the same standard, why rock the boat?

An answer could be that putting all questions of relevance under the same standard of proof would make Rule 104 determinations more understandable and uniform. It would certainly be easier for students and new lawyers seeking to master the Federal Rules of Evidence. It's not great for the integrity of the rules when the message is, "don't worry about conditional relevance, it is meaningless, just understand the lower standard of proof where the ultimate determination is and should be made by the jury."[3]

But if ease of confusion is not enough to justify an amendment, the fact is that at least some courts — and many parties — are having trouble sorting out Rule 104(b), and the "conditional" language of the rule has been problematic in some cases. The next section describes some of the problems created by Rule 104(b) in the case law — problems that might be remedied if the rule is amended to take out the "conditional" language and specifically state that the standard of proof for *all* relevance questions is whether a reasonable person could find the evidence to be relevant.

III. Problems Caused by the Conditional Relevance Standard

Here are some cases showing that courts and parties have encountered difficulty with the concept of "conditional relevance."

• ***Court notes that the conditional relevance standard is vague and could lead to abuse: United States v. Paycer,*** **154 F.4th 1261 (10th Cir. 2025):** The defendant argued that the conditional *Huddleston* fact (that the defendant actually committed the prior bad act) must be unanimously found by the jury before it can proceed on the 404(b) issue. The court rejected this argument, partly because the concept of "conditional" relevance is so fuzzy that it can be exploited, *because every question of relevance could be reframed as one of conditional relevance:*

> Commentators have noted the very blurry nature of the line between evidence relevant under Rule 401 and evidence relevant under 104(b) only upon the finding of a condition precedent. *See, e.g.,* George Fisher, Evidence 36-37 (2d ed. 2008) ("In erecting a distinct standard to govern questions of conditional relevance, the rule-writers almost surely made a logical error. Every chain of inferences has potential missing links."). ***A savvy lawyer can potentially turn any question of Rule 401 relevance into a Rule 104(b) conditional question.***
>
> Given the potential breadth of its application, it is not difficult to imagine the confusion Paycer's unanimity rule could spawn. If the jury were required to begin its deliberations by unanimously working though a list of what evidence jurors can consider in deciding whether the government has proven the elements of the charged crime, deliberations will become interminably complex and protracted. *Attorneys would be incentivized to make every evidentiary issue a conditional one and always request a slew of unanimity instructions in the hope they can preclude*

[3] That's a quote from me to my Evidence classes. My experience indicates that Rules 104(a) and (b) are the rules that cause the most confusion for those trying to master Evidence. Small wonder, because neither of them provide sufficient, or accurate, information as to how they apply.

> *all jurors from considering evidence* of guilt by convincing a single juror a condition precedent is absent. [emphasis added]

Note: The court notes the "very blurry" line between logical relevance and conditional relevance. If any lawyer can turn any relevance question into a conditional one, why have a rule that distinguishes between them?

• ***Trial court errs in failing to recognize a question of conditional relevance: United States v. Evans*, 728 F.3d 953 (9th Cir. 2013).** The question in dispute was whether the defendant's birth certificate was valid. The trial court found that it was not, and did so by believing the government's witnesses and not the defendant's. The court found this to be error, noting that the court "erred in its application of Rule 104(b)" — even though the trial court never mentioned Rule 104(b) and did not note any aspect of conditional relevance.

> Here, although the district court did not specifically cite to Rule 104(b), its conclusion that no "reasonable person" could "determine that the Defendant's Idaho birth certificate is substantively genuine" *draws its language and reasoning from Rule 104(b).* But in reaching the conclusion that no reasonable person could find that Evans's birth certificate was substantively genuine, the district court erroneously weighed the credibility of the government's witnesses against the credibility of the official state document. Indeed, it expressly found that "all three of the Government's witnesses were credible." This was error. The fact that the birth certificate was an official document, issued by the Idaho Bureau of Vital Records and Health Statistics, provided a sufficient basis upon which a juror could conclude that the birth certificate was "substantively genuine."

Note: The trial court apparently did not see the "condition" to relevance, apparently seeing the admissibility question of one of just plain relevance, which the court might have thought to be covered by Rule 104(a)'s preponderance standard. If that was the error made, it is certainly understandable, because there is nothing in Rule 104 specifically covering the standard of proof for general relevance questions.

• ***Court finds a conditional relevance question — the "condition" being that the defendant offers evidence*: *United States v. Hamzeh*, 986 F.3d 1048 (7th Cir. 2021):** The defendant was charged with possessing a machine gun and he interposed an entrapment defense. The defendant sought to present evidence of the expense and rarity of machineguns, to show the unlikelihood that he would be possessing one. The government countered with evidence that acquiring parts and assembling a machine gun was easy, and the defendant objected to the admissibility of the government's evidence. The trial court excluded the government's evidence as irrelevant. The court reasoned that a question of conditional relevance was present:

> When relevance depends on a fact, also known as "conditional relevance," "proof must be introduced sufficient to support a finding that the fact does exist." This case presents a less common application of the rule, in that the relevance of the Government's machinegun evidence depends on Hamzeh's introduction of facts

(that machineguns are rare and expensive), not the Government's introduction of its own facts.

If Hamzeh's evidence is introduced at trial, he puts at issue his ability to commit the offense, making evidence that bears on ability relevant. The Government's evidence that the acquisition of parts to assemble machineguns and assembly itself is easy makes a fact of consequence—ability (as raised by Hamzeh)—more likely. Stated otherwise, Hamzeh's evidence creates a fact in issue, laying the foundation for admission of the Government's evidence. The Government's evidence is conditionally relevant; once Hamzeh's evidence is admitted, the Government may admit its evidence in rebuttal. Thus, the district court erred.

Note: The concept of "conditional" relevance is only confusing here. And in fact as written, Rule 104(b) is inapplicable. That rule talks about proof of a "fact." Here, the condition is whether the defendant presents evidence. There is nothing remarkable about the principle that one party's evidence is relevant only if the other party presents certain evidence. This is what rebuttal is all about, for example. Rule 104(b) adds nothing but confusion. Alternatively, it could be said that the government's evidence is relevant without regard to what the defendant presented, because it showed how easy it was to commit the crime. In which case, the conditional relevance analysis is not just confusing, it is inaccurate.

• ***Court considers Rule 104(a) admissibility standards as conditional relevance issues: United States ex rel. Miller v. Bill Harbert Intern. Const.,*** **2007 WL 861113, at *2 (D.D.C. 2007).** The court found that the trial court did not err in admitting hearsay statements under the coconspirator exception, subject to proof at trial. This is a procedure allowed in all federal courts. But, contrary to the court's assertion below, it does not raise a conditional relevance question:

In order to demonstrate that a statement is admissible under Rule 801(d)(2)(E), the proponent must show by a preponderance of the evidence that: (1) a conspiracy existed; (2) that the declarant and defendant were members of this conspiracy; and (3) that the statement was made during the course and in furtherance of the conspiracy. Though a court may consider the contents of the statement being offered in determining whether the proponent of the evidence has satisfied its burden under 801(d)(2)(E), the statement is "not alone sufficient to establish ... the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement was offered." Fed.R.Evid. 801(d)(2), 1997 Advisory Comm. Notes. In light of this requirement under the Federal Rules of Evidence, defendants move to preclude introduction of this evidence on the grounds that there is insufficient additional evidence to establish the existence of the conspiracy. * * * Naturally, unless the government has additional evidence —which was not revealed earlier in the criminal case or in discovery in this case — the plaintiffs will fail to meet the requirements under 801(d)(2)(E). As relator's counsel pointed out, however, the plaintiffs are prepared to produce both testimonial and documentary evidence in support of the existence

of the conspiracy, of which the statements at issue were allegedly made in furtherance. If the plaintiffs meet this burden by the introduction of corroborating evidence, then the statements are clearly admissible under 801(d)(2)(E).

Therefore, as defendants correctly point out, this *is* a matter for the Court to decide under Rule 104. Contrary to the defendants' contentions, however, the section of Rule 104 that this issue falls under is Rule 104(b): Conditional Relevance. * * * Inherent in this Rule is the notion that, if the proponent of the evidence conditionally admitted fails to establish the fulfillment of the condition, then the proffered evidence shall be excluded from the jury's consideration. In this case, the Court will allow the admission of the testimony at issue, upon the condition that the plaintiffs satisfy the requirements of Rule 801(d)(2)(E) by a preponderance of the evidence. If the plaintiffs fail to meet this burden, then the testimony will be excluded.

Note: This clearly is not a question of conditional relevance — the establishment of the admissibility requirements of Rule 801(d)(2)(E) are clearly governed by the Rule 104(a) preponderance standard, after *Bourjaily.* There is no "conditional" fact to be proven before the hearsay becomes relevant. The hearsay statement is clearly *relevant* evidence of the defendant's guilt; the admissibility question is whether it satisfies the standards of the hearsay exception.

The court seems to feel the need to shoehorn the problem into Rule 104(b) in order to invoke the "connecting up" provision of that rule. But other courts allowing the government to "connect up" in conspiracy cases hold that courts have inherent power to structure the trial, and so connecting up is allowed to avoid duplication of effort in deciding whether evidence of conspiracy has been proven. *See, e.g., United States v. McCarthy,* 961 F.2d 972 (1st Cir. 1992) (there was no error in admitting coconspirator hearsay subject to connecting up, where a previous trial of other coconspirators indicated that the foundation would likely be met). There is no need to misuse Rule 104(b) to allow connecting up.

If "connecting up" really is only available for conditional relevance questions, that is all the more reason to take "conditional" out of Rule 104(b), so that the connecting up possibility applies to *all* questions of relevance. There is no reason to limit the flexibility of the connecting up procedure to questions of conditional relevance. *See also U.S. v. Balogun*, 971 F. Supp. 1215, 1230 (N.D. Ill. 1997), in which connecting up was allowed, and shoehorned into Rule 104(b) by the court reasoning that the relevance of the evidence of conspiracy was conditioned on the government's ability to prove it. Note that the draft amendment, below, extends the connecting up provision to all questions of relevance.

• ***Defendant confuses conditional relevancy and relevancy: United States v. Montoya-Gaxiola*, 2013 WL 11311240, at *1-2 (D. Ariz. 2013):** The government alleged that Border Patrol agents observed the defendants walking in the desert carrying something. Upon seeing the agents, the defendants fled and were subsequently found hiding in the desert. Agents recovered a .40

caliber handgun near the location where the defendants were first seen. Other items pertinent to firearms violations were found. The defendants argued that all the items were relevant only if the Government could first establish a conspiracy or that a particular defendant possessed the item. The defendants reasoned that the relevance was conditional upon a finding of conspiracy or actual possession, but the court disagreed. It stated that:

> Rule 104(a) [sic] is not implicated here. The weapons and ammunition are direct evidence of the crimes charged. Each Defendant has been charged with possession of a firearm in furtherance of a drug offense and conspiracy to possess a firearm in furtherance of a drug offense. To prove that a defendant possessed a firearm in furtherance of a drug offense, the Government must show that (1) the defendant participated in a drug trafficking crime; (2) the defendant possessed the firearm; and (3) the defendant's possession of the firearm was in furtherance of the drug crime. Each Defendant had a particular type of ammunition on his person when he was apprehended that corresponded to a weapon that was later discovered in close proximity to where Defendants were arrested. The ammunition found on each Defendant's person is direct evidence that each Defendant possessed the corresponding weapon found in the desert. The ammunition not found on Defendants' person was discovered in the desert either where Defendants were initially spotted or where they were apprehended. There is no question of conditional relevance.
>
> **Note: The court is right that there was no question of "conditional" relevance. (Though it cited the wrong provision to make the point).There was a question of relevance, in that the guns were not found on the defendants, and so inferences had to be drawn. But the relevance is clear given the circumstances, and given the fact that only constructive, and not actual, possession needed to be shown. It's always easy to think of some "condition" that must be met before evidence is admitted, and that is the problem that this defendant had with the notion of conditional relevance. The court got it right, but defense counsel was confused.**

• ***Confusion of a party over when a conditional relevance question is present: United States v. Maddox*, 944 F.2d 1223, 1229-30 (6th Cir. 1991):** In a case involving a threat, the witness testified that the defendant threatened her. The defendant argued that the trial court erred in failing to make a preliminary finding that the threat was made, as its probative value was "conditioned" upon it being made. The court analyzed this argument, correctly, as follows:

> The claim that the district court was required to make a finding that the threat occurred before admitting the evidence is without merit. There is no general rule that a judge must believe evidence to be true prior to allowing evidence in. Rule 104(b) applies only to the situation where the relevancy of evidence depends on the truth of a fact other than the truth of the evidence being introduced. Otherwise, Rule 104(b) would require the trial judge to make factual findings regarding every piece of evidence introduced at trial.
>
> **Note: Again, a party seems to think that any "condition" gives rise to a Rule 104(b) analysis.**

• ***Confusing conditional relevance with a legal requirement: Wolf by Wolf v. Proctor & Gamble Co.***, 555 F. Supp. 613, 620 (D.N.J. 1982): In a case involving allegations of punitive damages, the defendant offered evidence of its financial condition. The court considered this to raise a question of conditional relevance:

> As previously stated, plaintiffs propose to introduce evidence that will raise a genuine factual issue as to whether defendants' conduct warrants an award of punitive damages. When they do, evidence of Procter & Gamble's financial condition will be relevant and admissible. Pursuant to Fed.R.Evid. 104(b), the Court will admit such evidence upon a finding that plaintiffs have established a prima facie case of entitlement to punitive damages.
>
> **Note: It would seem that "conditional relevance" has no place in this question. There is no factual condition that needs to be met before evidence of financial condition is relevant. Rather it is a legal question: whether there has been a sufficient showing under the law of entitlement to punitive damages. And there is no need to sequence the proof unless the court chooses to do so. Otherwise, Rule 104(b) would apply in every case where there are multiple legal requirements. E.g., proof of damages is conditioned on a finding of liability, and so forth. Clearly, Rule 104(b) does not govern proof of legal requirements, nor the order of proof, yet confusion is created by the concept of "conditional."**

• ***Confusing questions of law with conditional relevance: Hoai v. Sun Refining & Marketing Co.*, 1991 WL 530756, at *7 (D.C. 1991**): The court, in analyzing proof of contractual damages, relied on Rule 104(b) to conclude that proof of damages was conditionally relevant to proof of foreseeability. This confuses questions of law with conditional relevance. The court stated as follows:

> Damages for breach of contract should place the plaintiff in the position he would have been in if the contract had been fulfilled. The proper test for such damages is whether the plaintiff's loss "was foreseeable as a probable result of a breach." Restatement (Second) of Contracts, § 351(2). Accordingly, in order to establish the relevance of any evidence of damage, Hoai must present evidence that those damages were foreseeable at the time the parties entered into the franchise relationship. See Fed.R.Evid. 104(b).
>
> **Note: This would mean that Rule 104(b) would apply in every case in which there are multiple legal requirements. Which is every case. And by the way, proof of foreseeability is conditionally relevant to proof of actual damages. Each factor is conditionally relevant to the other. If you use Rule 104(b) this way, then the ruling amounts to a bifurcation order. This could not have been the intended result of the rule.**

• ***Again confusing conditional relevance with multiple legal requirements for recovery: Johnson v. Inland Steel Co.,* 1992 WL 396296, at *2 (N.D. Ill. 1992):** In a wrongful death action, the plaintiff under the law is required to be a dependent in order to recover. The court treats dependency, which it does say is a question of law, under Rule 104(b), because it is a condition.

> The standard for dependency under the Wrongful Death Statute is as follows: "Proof of dependency must show a need or necessity for support on the part of the dependent ... coupled with the contribution to such support by the deceased." Partial dependency is compensable under the statute. The degree of dependency and amount of contribution are factual issues for the jury.
>
> Although dependency is a factual issue for the jury, evidentiary determinations on relevance are questions for the Court. That determination is governed by Rule 104(b) of the Federal Rules of Evidence. Here, the relevancy of Yolanda Johnson's testimony of her injury, tangible and intangible, depends upon whether she was the decedent's dependent. The Court will admit her testimony, for ultimate factual resolution by the jury, if that testimony and other evidence would support a finding by the jury that she was Mr. Johnson's dependent.
>
> **Note: The court says that evidentiary determinations are for the court, but then applies Rule 104(b). A Rule 104(b) determination is "for the court" in only a technical sense, given the limited screening power the court has under Rule104(b).**

• ***Confusing Rule 104(b) and admissibility requirements under Daubert:* Isley v. Capuchin Province, 877 F.Supp. 1055, 1066 (E.D. Mich. 1995)**: The court, in discussing its responsibilities under *Daubert,* relies on Rule 104(b):

> Under *Daubert,* the Court perceives its role with respect to the admissibility of expert testimony as being a "screener" of expert testimony, similar to its role under Fed.R.Evid. 104(b) of screening conditionally relevant evidence. Under Rule 104(b), if the relevance of evidence depends upon the truth, or fulfillment, of a fact or condition, it is the court's function only to insure that there is sufficient evidence in the record from which a jury could infer or find support for the truth of those facts or fulfillment of the condition. Once that measure of evidence is found to exist to support the condition or fact, it is up to the jury to ultimately determine whether the factual condition is fulfilled and whether the evidence is relevant.
>
> **Note: This judge taught Evidence, and yet there is confusion caused by the "conditional" concept. The court looks at truthfulness as a "condition" to admissibility, which of course it is, but that is because the court must make certain findings of fact — by a preponderance — before the expert is allowed to testify. If "condition" is taken out of the equation, it is unlikely that a court would consider using Rule 104(b) when reviewing preliminary facts necessary to admissibility of an expert's testimony. Clearly the expert's testimony is "relevant" if it is about any of the contested matters. But that doesn't mean it is admissible. The "conditional" language can lead one to think that *every* condition is a Rule 104(b) question.**

***• Conditional relevance used against the defendant to exclude evidence that was actually relevant: United States. v. Matta-Ballesteros,* 71 F.3d 754, 767 (9th Cir. 1995):** The defendant offered record evidence to prove the nonexistence of a marriage and a birth, as well as a death certificate, as a way to disprove a government witness's assertion that the defendant was at the wedding and the birth. The court, applying Rule 104(b), held the evidence irrelevant because the defendant could not provide evidence sufficient to support a finding that the events occurred in the region from where the records were obtained. The court reasoned as follows:

> However, Matta–Ballesteros cannot establish the absence of public records under Fed.R.Evid. 803(10) because he failed to show as a preliminary matter under Fed.R.Evid. 104(b) that the events necessarily occurred in one of the four Guadalajara municipalities. There are 2,800 other municipalities in Mexico where the marriage and birth could have occurred. Furthermore, if only a religious marriage occurs or if parents do not register a child after birth, there may be no records at all. Finally, there was no legal requirement for prior marriages to be recorded on a death certificate, even if both were registered within the same municipality. Therefore, the district court did not abuse its discretion in determining that the conditional relevance requirements had not been met and in excluding the records from these four municipalities.
>
> **Note: There is no question that the records proffered by the defendant are relevant. The fact that the records come from a particular (large) area *tends* to prove that the acts did not occur. The defendant is not required to disprove other possibilities before relevant evidence is admitted. Disproving those other possibilities is not a "condition" to admitting otherwise relevant evidence. That would be like saying that when a defendant is charged with armed robbery, evidence that he possessed a gun is conditioned on the government showing that the defendant used the gun for a criminal act. Again, "conditional" gets in the way of a proper analysis of relevance. The proper analysis is that the evidence was relevant, but its probative value was low.**

***• Confusing conditional relevance and basic relevance: Hardy v. Chemetron Corp.,* 870 F.2d 1007, 1010 (5th Cir. 1989)**: In a personal injury case involving the wiring of a machine, the plaintiff argued that defense testimony was dependent on a condition and so Rule 104(b) applied, and the court agreed and held that Rule 104(b) had not been satisfied:

> Hardy's next argument reflects a basic misunderstanding of the law of evidence. The district court excluded a statement by Andrew Murnyak that only one of Chemetron's machines was wired as Hardy's was wired because Murnyak had submitted an affidavit asserting that this remark had referred to an aspect of the wiring not relevant to this case. Hardy claims that the jury might have disbelieved Murnyak's affidavit concerning the context of his statement, that questions of credibility should be left to the jury, and consequently, that Murnyak's statement should have been admitted.

> Hardy's argument must be rejected. "When the relevancy of evidence depends upon the fulfillment of a condition of fact," Federal Rule of Evidence 104(b) provides, "the court shall admit it upon ... the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Thus the jury is called upon to judge the credibility of evidence whose relevance is conditioned on fact only after the party offering the evidence has made a threshold showing of relevance to the court. In this case, no credible evidence was presented to support Hardy's claim that Murnyak's statement concerned the wiring fault that allegedly caused her injury. Hardy's brief mentions no such evidence, and Michael Stevens, the man to whom the statement was made, conceded that he would not contest Murnyak's affidavit that his statement did not concern the alleged wiring defect at issue.
>
> **Note: The easier answer is that the evidence is just not relevant because, on the showing you have made, there is no logical connection to a machine with different wiring and this case. Again, "conditional" relevance is of no help to the court.**

● ***Rule 104(b) relied upon to find trial court error, but the court of appeals found no need to rely on the "conditional" language: United States v. Koontz,*** **143 F.3d 408, 412-13 (8th Cir. 1998):** The evidence question involved the admission of a booking report. The defendant argued that it had to be a report about a particular person to be relevant. The trial court made the determination that the report was of the correct person. The court of appeals held that whether the report was of the correct person was for the jury under Rule 104(b), but found it unnecessary to rely on any concept of conditional relevance:

> On voir dire of the federal drug agent, the government pointed out that the subject of the booking report was "Asian," was 22 years old, had a previous address on a certain street, and was booked to serve time on a probation revocation. Mr. Koontz argues that more than one person could have the name of the son's friend and therefore that it is risky to assume that the booking report that was offered is actually a record for the son's friend rather than for someone else. The trial court also expressed some concern in this regard, but concluded that the son's friend and the subject of the booking report were "the same person," and admitted the report.
>
> We believe that the trial court erred in taking the responsibility for determining this matter of fact. The question of whether the subject of the report and the son's friend were the same person was for the jury. The trial court's duty was simply to determine whether there was evidence in the record sufficient to support a jury finding that the report concerned the son's friend. See Fed.R.Evid. 104(b).

● ***Misapplication of Rule 104(a)and (b): Griffin v. Hickson*****, 2002 WL 988006, at *4 (E.D. Pa. 2002):** In assessing the admissibility of experiments, the court states that the question of relevance is for the court, but then applies Rule 104(b) to say that the relevance of the experiments is conditioned on their similarity to the actual event:

> Defendants probably are correct in arguing that expert evidence is necessary to establish the "relevance" of the experiments. While relevance is a threshold determination properly made by the court, see Fed.R.Evid. 104(a), such is not the case "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact ..." Fed.R.Evid. 104(b). In this case, the relevance of the experiments turns on whether the conditions under which the Holmesburg experiments were conducted were substantially similar to those in the basement at the time of the shooting. Indeed, in general terms, a party attempting to establish the relevance of any experiment must "prove that the experiment or demonstration was conducted under substantially similar circumstances as the actual event." As explained below, it is probable that an expert's knowledge of the properties of GSR is necessary to establish whether such similarity exists between the conditions in the range and those in the basement on the morning of September 26, 1997. Accordingly, expert testimony likely will be necessary to demonstrate the relevance-and thus the admissibility-of the tests.
>
> **Note: The court's distinction between relevancy decided under Rule 104(a), and conditional relevancy decided under Rule 104(b), makes no sense. The relevance of all circumstantial evidence is dependent on certain "conditions." The better analysis is surely that the probative value of the experiments is higher when done under substantially similar circumstances, and decreases as the similarity decreases. "Conditions" helps not at all. And there is no reason to have two separate provisions on relevant evidence. The court states that relevance questions are for the court, but not when relevance is conditional. Why should that be?**

● ***Court errs when finding that an admissibility requirement is a question of conditional relevance under Rule 104(b): Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.,* 262 F. Supp. 2d 251, 261 (S.D.N.Y. 2003):** The court considered whether a hearsay statement was admissible as a statement of a party-opponent under Rule 801(d)(2)(D):

> Whether a statement concerns a matter within the scope of employment/agency under Fed.R.Evid. 801(d)(2)(C) or (d)(2)(D), is a preliminary matter to be determined by the trial court. The trial judge's scrutiny of the evidence is a Fed.R.Evid. 104(b) inquiry and the standard that should be used is whether or not a juror could reasonably find that the admission was made within the scope of employment/agency or within the speaking authority.
>
> **Note: The court makes a wrong statement of the law. Agency is an admissibility requirement that needs to be proven by a preponderance — just like conspiracy under Rule 801(d)(2)(E). Agency is not a condition to the relevance of the statement. The statement is relevant, surely, and the "condition" is that, even if it is relevant, it is not admissible over a hearsay objection unless it is made by an agent and concerns a matter within the scope of the agent's authority. That is a preliminary question of fact for the court, under Rule 104(a). It seems that a mistake like this happens because the "conditional" language in Rule 104(b) sounds like it covers *any* condition to admissibility. But of course that would swallow up Rule 104(a). It's much easier to**

think of all relevance questions to be decided under Rule 104(b) and all other questions (not specifically covered in other rules) to be decided under Rule 104(a). That is what the proposed amendment does.

***See also Leser v. United States Bank Nat. Ass'n,* 2012 WL 6738402, at 4 (E.D.N.Y. 2012)** (making the same error as above, stating that the existence of agency is a preliminary matter to be determined by the court, but "the purported authority of a witness with respect to his or her purported principal is a Fed.R.Evid. 104(b) inquiry and the standard that should be used is whether or not a juror could reasonably find that the admission was made within the scope of employment/agency or within the speaking authority."). ***Contra, and correct*, *Rashad v. Jetyd Corp.*, 2013 WL 12124093, at *2 (C.D. Cal. 2013)** ("Whether a statement may be admitted under Fed. R. Evid. 801(d)(2)(D) based on the existence of an agency relationship is a question for the judge under Rule 104(a). Agency must be proven by the party seeking to admit the hearsay by a preponderance of the evidence.").

● ***Court finds incorrectly that whether the proffered party-opponent statement was made by the defendant is governed by Rule 104(b): United States v. Tann,* 425 F. Supp. 2d 26, 35 (D.D.C. 2006)**: The court considered whether certain checks were admissible against the defendant as party-opponent statements. The defendant argued that the government needed to prove, under Rule 104(a), that the defendant was the person who wrote the checks:

> Defendant is requiring that the Government meet a level of proof regarding admissibility not contemplated by the Federal Rules of Evidence. Rather than the extremely high burden of proof for admission contemplated by Plaintiff, the Federal Rules of Evidence simply provide that the Court is to make a threshold determination. First, the Court must determine the possible admissibility of the evidence by looking to its relevance prior to any consideration of the rules of evidence. Federal Rule of Evidence 104(b) [sic] provides:
>
> > Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> Second, the Court must determine whether a reasonable juror may find that the matter in question is what the Government claims—i.e., could a reasonable juror find that the "payee" and "memorandum" sections on Defendant's checks are statements of Defendant? See Fed.R.Evid. 104(b) advisory committee's note ("The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition.").

Note: The court says "Rule 104(b) provides" and then reproduces the entirety of Rule *104(a).* The confusion over the application of (a) and (b) is due in part to the "conditional" language in (b). It can sound like Rule 104(b) applies whenever there is a condition to admissibility. Here the important fact — the defendant's involvement

— is necessary to satisfy a hearsay exception requirement. All hearsay exception requirements are distinct and independent from relevance requirements. That would be easier for everyone to understand if Rule 104(b) were amended to specifically cover all *relevance* questions, but no other questions.

● ***Using 104(b) to evaluate a "condition" for admitting unexplained wealth evidence, when it is really a question of basic relevance: United States v. Cardena,* 842 F.3d 959, 984 (7th Cir. 2016):** The court considered the admissibility of unexplained-wealth evidence as proof of drug activity, in an elaborate analysis generated by the term "conditional relevance":

> [F]or unexplained-wealth evidence in drug cases to be "relevant" under Rule 401, the government must lay the foundation by meeting the following three requirements: (1) the evidence presented creates an inference that the defendant was involved in drug trafficking; (2) the unexplained wealth was acquired during the period in which the drug crime allegedly occurred; and (3) the government presents other evidence to support the charge, including evidence that the income was not obtained through legitimate means.
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> * * * That means, however, that the relevance of unexplained-wealth evidence depends on a fact—namely, the "fact" that the income was not obtained through legitimate means. As Federal Rule of Evidence 104(b) explains: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." This means that the district court must determine that sufficient evidence exists to find that the wealth was not derived from legitimate sources, but after that, the jury evaluates whether the fact exists. Thus, in order to introduce evidence of unexplained wealth, the government must introduce sufficient evidence upon which a reasonable fact finder could conclude that the wealth was not from a legitimate source.
>
> That does not mean that lack of a legitimate source of income must be undisputed. A dispute as to the legitimacy of the employment goes to the weight, not the admissibility of the government's unexplained-wealth evidence.
>
> **Note: The factors for admissibility are not ones of "conditional relevance" — rather they affect the probative value of the evidence. The more likely that the money comes from a legal source, the less probative the evidence is as unexplained wealth. It makes it excessively complicated to have a series of facts that must be proven before the evidence can even be considered relevant—especially when the fact becomes disputed, and then if the standard is met, the court *still* has to evaluate the degree of probative value under Rule 403. It would be far easier to consider the probative value directly without thinking in terms of "conditions."**

● ***Conditional relevance applied even though each fact is conditional on the other: Femco Acquisition, L.L.C. v. Allied Gator, Inc.,* 2009 WL 10714990, at *4 (N.D. Oh. 2009):** The court finds evidence of the reasonableness of fees to be conditioned on a finding of a contract. But, of course, the contract is only relevant if the fees are reasonable:

> Next, assuming that the jury finds that the parties entered a contract with target pricing terms, Defendant is still entitled to introduce evidence of reasonableness of Plaintiff's fees as probative toward the issue of target pricing. Federal Rule of Evidence 104(b) provides that "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Operating under the above assumption, evidence of the reasonableness of Plaintiff's pricing is relevant conditioned on the introduction of evidence that the parties entered a contract with market pricing terms. Defendant has presented that evidence in the form of the written purchase orders. Accordingly, evidence of reasonableness of Plaintiff's pricing may be admissible under Federal Rule of Evidence 104(b).
>
> **Note: The relevance of the reasonableness of pricing is conditioned on a contract. But the contract is not probative of anything unless the pricing is reasonable. Each is conditioned on the other.**

● ***Court incorrectly applies Rule 104(b) to the admissibility of business records: Summit Elec. Supply Co., Inc. v. International Business Machines Corp.,*** **2009 WL 9087259, at *10 (D.N.M. 2009):** The court notes that the admissibility of a record under Rule 803(6) presents a question for the court under "Rule 104" but then proceeds to apply the Rule 104(b) standard of proof:

> The admissibility of such evidence presents a preliminary question of law that the Court must answer pursuant to Fed.R.Evid. 104, rather than a factual question for the jury that is reviewed within the parameters of Fed.R.Civ.P. 56. Under Fed.R.Evid. 104, the Court shall admit the screenshot if the evidence used to lay the foundation for its admission is sufficient to support a finding that the conditions of the business-records exception are fulfilled. See Fed.R.Evid. 104(b).
>
> **Note: Arguably, this error would not be rectified by an amendment to Rule 104(b). The court simply chose the wrong standard of proof to evaluate proffered business records. We don't know why. It's not implausible, though, to think that the "conditional" language of Rule 104(b) might have tripped up the court into thinking that admissibility was "conditioned" on satisfying the Rule 803(6) admissibility requirements. That is less likely to happen if the conditional language is taken out and the rule is specifically retooled to cover only questions of relevance.**

IV. Drafts

A. Adding the Preponderance of the Evidence Standard to Rule 104(a)

Rule 104. Preliminary Questions

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

Committee Note

The amendment codifies the holding in *Bourjaily v. United States,* 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a) are to be determined by a preponderance of the evidence. The Committee has determined that codification would be useful because there has been some confusion about the applicable standard of proof for preliminary questions. See the 2023 amendment to Rule 702.

Some situations call for a lower standard of proof for a preliminary question, ordinarily because on those questions, the jury is in as good a position as the court to determine the contested fact, and there is little to no risk that the jury will be misled or subject to unfair prejudice in making the determination. See Rules 104(b), 602, 901 and 1008.

B. Adding the Preponderance Standard to Rule 104(a) *and* Eliminating Conditional Relevance in Rule 104(b)

Rule 104. Preliminary Questions

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

(b) Relevance ~~That Depends on a Fact~~. ~~When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist~~. Evidence is relevant if the court determines that the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making that determination, the court may consider the evidence itself, other evidence, and common knowledge and experience. The court may admit proposed evidence on the condition that ~~the~~ further proof be introduced later.

Note: This iteration has advantages over the current language requiring that "proof must be introduced sufficient to support a finding." Specifically:

1. **It is not accurate to say that evidence is relevant only if there is *proof* presented. A court might find evidence is relevant based on judgment, experience, and common sense. The revision makes this point. In other words, the current language is incorrect.**

2. **Whether the trier of fact "could reasonably find" is more understandable than evidence "sufficient to support a finding." Yes, we know what sufficient to support a finding means, but that's because we learned it. It's meaning is not evident. "Could reasonably find" seems clearly to be more understandable. Indeed, in *Huddleston,* the court defined the Rule 104(b) standard as whether a juror could reasonably find.**

3. **It is also necessary to scuttle "proof sufficient to support a finding" because provision would read "Evidence is relevant if the court determines that the requirements of Rule 401 have been met by the standard of sufficient to support a finding." Which is not ideal. Once you take the words "proof of" out of the phrase, the only way it reads right is to use the "could reasonably find" language.**

Committee Note

Two changes are made to Rule 104. First, the amendment codifies the holding in *Bourjaily v. United States,* 483 U.S. 171, 175 (1987), that preliminary questions of fact under Rule 104(a) are to be determined by a preponderance of the evidence. The Committee has determined that codification would be useful because there has been some confusion about the applicable standard of proof for preliminary questions. See the 2023 amendment to Rule 702.

Some situations call for a lower standard of proof for a preliminary question, ordinarily because on those questions, the jury is in as good a position as the court to determine the contested fact, and there is little to no risk that the jury will be misled or subject to unfair prejudice in making the determination. See Rules 104(b), 602, 901 and 1008.

Second, the amendment to Rule 104(b) eliminates the concept of "conditional relevance." There is no reason for special treatment of facts that are conditionally relevant, because in almost all cases, the relevance of a particular fact is dependent on a showing of other facts and so the relevance is "conditional." Moreover, if the existence of one fact is conditionally relevant upon another, the result is that both facts are "conditionally relevant." See Ronald Allen, *The Myth of Conditional Relevance,* 25 Loyola L. Rev. 871-884, 879 (1992) ("Evidence is relevant only because there is an intermediate premise or set of premises that connects the evidence to some proposition involved in the litigation. But if determining the relevance of evidence always requires relying on some intermediate premise, no distinction can be drawn between relevancy and conditional relevancy."). Providing a uniform approach to all questions of relevance avoids confusion, especially because most courts currently use the same permissive approach to all relevant evidence, conditional or not. All questions of relevance should be governed by the same

"a reasonable person could find" standard of proof, because the jury is in as good a position to determine relevance as is the court.

The rule 104(b) test that "proof must be introduced sufficient to support a finding" has been revised, because a court's preliminary determination of relevance is not limited to proof submitted to it. A court could find evidence relevant under Rule 104(b) by considering the evidence itself, as well as common knowledge and experience. For example, if the proffered evidence is that the defendant was carrying a gun, its relevance to a charge of armed robbery can be determined without any further proof. The standard has been changed to whether the factfinder "could reasonably find" the evidence to be relevant. That standard is the same as "sufficient to support a finding." *See Huddleston v. United States,* 485 U.S. 681, 687 (1988) (in determining whether the proponent has introduced sufficient evidence to meet Rule 104(b), the trial court decides whether "the jury could reasonably find" the contested fact).

In deciding whether evidence is relevant, the judge must not only take into account the evidence formally in the record, but also the likely background knowledge and experience of a reasonable juror from the area where trial is being held. For example, suppose a trial concerns the cause of a large explosion and fire. The plaintiff claims that the defendant mishandled nitrogen fertilizer containing ammonium nitrate. A witness is asked whether such a fertilizer was stored on the premises and an objection on relevancy is made. If the trial is in a rural state with a large farming population, the trial judge would overrule the objection because a reasonable person from that population would likely know the dangerous properties of the material. If, by contrast, the trial were held in an urban area, the judge would likely conclude that evidence of the dangerous properties must be entered into the record to satisfy the requirement of relevancy.

Note: If Rule 104(b) is changed, there is a question as to whether a conforming change will have to be made to Rule 1008, which specifically refers to Rule 104(b).[4] If so, the change would not be substantive.

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

[4] All other rules applying the "sufficient to support a finding" standard are unaffected by a change to Rule 104(b), because each sets forth the standard without referring back to Rule 104(b). See Rules 602 and 901(a).