MEMORANDUM

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

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

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 17, 2026

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 7, 2026, in Washington, D.C. The Committee reviewed proposed amendments to Rule 609 and a proposed new Rule 707, which were approved for publication by the Standing Committee at its June 2025 meeting. It also considered four other proposed amendments to the Evidence Rules.

The Committee now recommends (1) final approval of the proposed amendments to Rule 609 and (2) proposed amendments to Rule 902(1) and Rule 104(a) and (b) for public comment. The Committee does not recommend action on the proposed Rule 707 at this time. Instead, it has revised the proposed Rule and plans to conduct further study on it and another issue relating to artificial intelligence — the problems posed by "deepfakes" — at its next meeting.

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

II. Action Items

A. Proposed Amendments to Rule 609 — for Final Approval

The Committee recommends that proposed amendments to Rule 609 be forwarded to the Judicial Conference for final approval. In June 2025, the Standing 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 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 changes made to, and rejected by, the Committee in the last three years, including 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.

After extensively reviewing the case law, the Committee concluded that the amendment was warranted because a large number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory. This is especially problematic because appellate review of decisions to admit prior convictions for impeachment is rare. That is because, in *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court 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 rare.

Through its slightly more protective balancing test, the amendment would promote Congress's intent 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 statements.

In addition, the proposal released for public comment contained a slight change to Rule 609(b), which covers older convictions. Subdivision (b) 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, the date that trial begins, and the date that the witness to be impeached actually testifies. The proposal released for public comment provides that the ten-year period

would end on the date that the trial begins. The Committee determined that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

The Committee received fifteen public comments on the amendments to Rule 609. Save one, all commenters — including the Federal Magistrate Judges Association, the American College of Trial Lawyers, the New York City Bar Association, the National Association of Criminal Defense Lawyers, and the New York Council of Defense Lawyers — strongly supported the amendment. The one critical comment suggested a different endpoint for the Rule 609(b) time period; the Committee considered that suggestion and rejected it.

At its May 7th meeting, the Committee voted, by a margin of 7-2, in favor of recommending final approval of the proposed amendments to Rule 609. The Department of Justice voted in favor of the proposal. Accordingly, the Committee recommends that the proposed amendments, and the accompanying Committee Note — which are attached to this Report — be sent to the Judicial Conference for final approval.

B. Proposed Amendment to Rule 902(1) – for Publication

Before its Fall 2024 meeting, Judge Gregory K. Frizzell of the Northern District of Oklahoma suggested that the Committee consider adding federally recognized Indian tribes to Rule 902(1)(A), which provides that domestic public records that are sealed and signed are self-authenticating. Because Rule 902(1)(A) does not list Indian tribes, the government must use another route to authenticate proof of a defendant's (or a victim's) Indian status in federal prosecutions brought for crimes occurring in Indian country. There have been some recent cases in which the prosecution failed to prove Indian status by attempting, unsuccessfully, to meet the requirements of the business records exception to the hearsay rule, with authentication by certificate under Rule 902(11). The issue has arguably taken on more importance in light of the increase in relevant federal cases following the Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

The Committee sought and received input from Indian Tribes and Nations, as well as from the Federal Defenders. The Tribes and Nations that did weigh in strongly supported the change, on the ground that it would recognize the dignity and sovereignty of Indian tribes and Nations and would avoid the burden and expense of tribal officials traveling long distances to qualify tribal records. The Federal Defender's position is that it is relatively simple to qualify a tribal record through a certification under Rule 902(11) (meaning that the failures of proof in the recent cases were attributable to the Department of Justice, not to the rules), that recordkeeping among Indian tribes may not be uniform, and that generally Indian Tribes do not allow open access to their records to non-members of the Tribe.

After discussion, the Committee determined that it would be appropriate to add Indian Tribes and Nations to the list of entities in Rule 902(1)(A) whose public records are self-

authenticating. The Committee ultimately saw no reason to differentiate the Tribes and Nations from the many other government entities whose records are currently self-authenticating.

At its meeting, the Committee voted, by a margin of 8-1, to recommend approval of the proposal to amend Rule 902(1) for publication. The sole dissent was the Federal Defender representative on the Committee. The Committee therefore recommends that the proposed amendment to Rule 902(1)(A) and the accompanying Committee Note — which are attached to this Report — be released for public comment.

C. Proposed Amendments to Rule 104 — for Publication

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 evidence is admissible.

In *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), the Supreme Court held that the standard of proof for determinations of preliminary fact under Rule 104(a) is a preponderance of the evidence. But not having that standard in text has raised problems, some of which led to the amendment of Rule 702 in 2023 to set forth the preponderance standard in text (because many courts and litigants had been treating the admissibility requirements of the Rule as questions of weight rather than admissibility under Rule 104(a)). After the Rule 2023 amendment to Rule 702, some have argued that every subsequent amendment to the Evidence Rules will have to set forth the preponderance standard in text to avoid ambiguity.

By contrast, Rule 104(b) does set forth a standard of proof, one less stringent than Rule 104(a): evidence sufficient to support a finding. Per the Rule, that standard purportedly applies only to questions of "conditional relevance" — i.e., 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.) In *Huddleston v. United States,* 485 U.S. 681, 687 (1988), the Supreme Court held that Rule 104(b) requires a court to find only whether the finder of fact could reasonably find a fact by a preponderance of the evidence. But the problem with Rule 104(b) is that the standard covers only so-called "conditional" relevance, as distinct from all other questions of relevance (which some have called "logical" relevance). This leaves the standard of proof for other relevance questions undetermined. What's more, "conditional" relevance is a confusing concept, because it fails to recognize that *all* questions of relevance involve some condition. *See, e.g.*, Ron Allen. *The Myth of Conditional Relevance,* 25 Loyola L. Rev. 871, 879 (1992).

The Committee reviewed the case law on Rule 104(b) and found that there is some confusion about its application. Some courts have mistaken admissibility requirements (supposed to be covered by Rule 104(a)) as "conditions" and thus covered by the less demanding requirements of Rule 104(b). Some litigants have argued that the court must make a finding of "conditional" relevance when the proffered evidence is clearly relevant. Some courts have applied

Rule 104(a) to issues that are really questions of trial sequencing rather than conditional relevance. Moreover, even where cases get it right, there is often a substantial waste of resources litigating "conditions" that are virtually pointless to litigate. Relevancy questions should be quite straightforward determinations of reasonableness that do not require briefing and hearings.

After discussion, the Committee unanimously approved amendments to both Rule 104(a) and (b) for release for public comment. The amendment to Rule 104(a) is straightforward. It simply adds a sentence to the Rule:

> **(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.

The proposed amendment to Rule 104(b) would eliminate the unhelpful concept of "conditional" relevance and provide that the standard of proof for *all* questions of relevance is whether a jury could reasonably find that the evidence has a tendency to make a fact of consequence more or less probable than without 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.~~ To establish that evidence is relevant, the proponent must demonstrate to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making its relevance 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.

Beyond eliminating the confusing concept of "conditional" relevance, the proposed amendment to Rule 104(b) makes two further improvements:

- It sets forth a standard of proof for all relevant evidence, which was a question not specifically covered in the original Rule, meaning technically the question of "logical" relevance was covered by Rule 104(a) — thus creating the anomaly that questions of "conditional" relevance were subject to a lesser standard of proof than questions of "logical" relevance.

- It eliminates the confusing and problematic phrase "proof sufficient to support a finding." The fact is that questions of relevance may be determined without "proof" as they might be simple questions of logic and experience.

At its meeting, the Committee unanimously voted to recommend the proposal to amend Rule 104(a) and (b) for publication. Accordingly, the Committee recommends that the proposed

amendments to Rule 104, and the accompanying Committee Note — which are attached to this Report — be released for public comment.

III. Information Items

A. Artificial Intelligence

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by artificial intelligence ("AI") will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: (1) evidence that is an acknowledged product of AI, such as machine learning, which would be subject to Rule 702 if propounded by an expert witness; and (2) evidence that is not authentic because it is a difficult-to-detect deepfake.

1. Output of Artificial Intelligence

As to acknowledged AI (such as a machine-learning program that compares two works of art to determine similarity), the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The hearsay rule is likely to be inapplicable because the solution to hearsay is cross-examination, and an AI process cannot be cross-examined. The Committee's view is that the reliability issues attendant to AI are akin to those raised by experts under Rule 702. Indeed, Rule 702 is applicable to AI if it is used by a testifying expert to reach her conclusion. But Rule 702 is not clearly applicable if the AI output is admitted without any expert testimony — either directly (for example, under Rule 902(13)) or by way of a lay witness (such as where facial recognition testimony is proffered by a person who merely "pressed the button" and has no idea how the system works).

After extensive study and discussion, the Committee concluded that a new rule of evidence might be appropriate to regulate the admissibility of a product of AI that is introduced without the testimony of any expert. The Committee concluded that amending Rule 702 itself would not be workable, for two reasons: (1) that Rule was just amended in 2023; (2) it is a rule of general applicability, and a separate subdivision dealing with machine evidence would be inappropriately specific and difficult to draft. The Committee's solution was to draft a new Rule 707 providing 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.

That proposed Rule 707 was released for public comment last August. The Committee was of the view that the issuance for public comment did not mean that there was a presumption that the Rule would go forward. The Committee believed that, in this difficult and fast-developing area, public comment would be useful in sharpening the Rule and, indeed, in determining whether any Rule is even necessary.

The public comment on the proposed Rule 707 was mixed, but helpful. A few commentators were of the view that 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. (By contrast, many commentators, such as the ACLU and the New York City Bar Association, stated that the time is ripe and that the problem of AI being presented without expert testimony is occurring today, especially in criminal cases.) Most commentators thought that the term "machine-generated" was overbroad. Others contended that any rule should contain notice provisions, either in the rule text itself or as part of a joint project with the Civil and Criminal Rules Committees. Others thought that any rule should have its own independent requirements and should not tie into Rule 702 (even though this would lead to AI evidence being covered by one set of rules when an expert testifies and a different set when the expert does not).

Another important issue of dispute raised by public commentary was whether AI-produced evidence should ever be admissible without an expert foundation. Some argued that an expert foundation should always be required. Others argued that an "expert-only" foundation was unnecessarily strict and that AI could be shown to be reliable through evidence such as unbiased validation tests — or perhaps that, in the future, AI could be "self-validating," in which event an "expert-only" requirement would be outmoded.

The Committee reviewed all the public comments and considered several alternative redrafts of Rule 707 prepared by the Reporter. Committee members preferred the draft that provided a presumption that an expert foundation was required but also allowed for the possibility that other evidence might show that the AI is reliable. This redraft also includes a notice provision, and focuses on "artificial intelligence" rather than "machine-generated" information. The draft, and proposed Committee Note, provides as follows:

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:

(1) will help the trier of fact;

(2) is based on sufficient facts or data;

(3) is the product of reliable principles and methods; and

(4) 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 rely upon other proof to find that the output satisfies the requirements of (a)(2)-(4).

(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 attendant 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.

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At its May 7th meeting, the Committee agreed that the revised version of Rule 707 would require re-publication were it to go forward. But the Committee decided *not* to propose that the revised Rule 707 be released for a new period of public comment at this time. At the suggestion of Judge Dever, the Committee thought the more prudent course would be to have the proposed Rule vetted at the Committee's Fall meeting by technology experts and others in the field of AI and law. That input can help to sharpen and refine the proposed Rule and will also help the Committee to determine whether an amendment is necessary.

2. Deepfakes

As discussed above, one of the problems of AI is that deepfakes are easy to generate and difficult to detect. As a matter of evidence, deepfakes raise a problem of authenticity, which traditionally is governed by a low standard of admissibility under Rule 901(a): evidence sufficient to support a finding that the item is what the proponent says it is.

The Committee is of the view that, at least for now, an amendment to Rule 901 to address deepfakes is not warranted. This is because, despite extensive commentary on the subject, few examples exist of courts having to address the possibility of deepfakes. In making the decision to wait, the Committee also took into account a survey of District, Magistrate, and Bankruptcy Judges by the Federal Judicial Center, in which only fifteen respondents reported having dealt with deepfake issues.

That said, the Committee is working to develop rule language that could be employed to assist courts in reviewing deepfake claims in the event that the Committee concludes that the existing rules are not adequate. The working rule is based on two agreed-upon principles. The first is that an opponent should not have the right to an inquiry into whether an item is a deepfake merely by claiming that it is a deepfake. Some initial showing of a reason to think the item is a deepfake should be required. The second principle is that, if the opponent does make an evidentiary showing that the item may be a deepfake, then the opponent must prove authenticity under a higher evidentiary standard than the prima facie standard ordinarily applied under Rule 901. Mindful that technology develops quickly and the rule-making process is slow, the Committee's objective is to fine tune a possible amendment to hold in abeyance until such time that it concludes an amendment is warranted, at which point the rule would be ready to go without delay.

The working draft of a new Rule 901(c), to address deepfakes, is as follows:

Rule 901(c) Potentially Fabricated Evidence Created by Generative 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.

(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).

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At its May 7th meeting, the Committee concluded that this issue should also be considered with the assistance of technological experts and lawyers in the field at the Committee's Fall meeting. The Committee is hoping to get input on whether an amendment should cover all AI as opposed to generative AI. In addition, the Committee hopes to get views on whether this amendment is necessary now, in the future, or at all.

C. Rules 703 and 606(b) and Constitutional Red Flags

In *Smith v. Arizona*, 602 U.S. 779 (2024), the Supreme Court addressed whether a forensic expert may testify to a positive drug test by relying on and disclosing to the jury the testimonial hearsay of another analyst. The Court held that an expert's disclosure to the jury of testimonial hearsay violated the defendant's right to confrontation, even if the purpose of the disclosure was purportedly to illustrate the basis of the testifying expert's opinion. At its May 7th meeting, the Committee considered whether the Court's holding counsels or mandates some amendment to Rule 703, which allows experts to rely on hearsay but strictly limits the disclosure of that hearsay to the jury. The Committee determined that, to the extent that the Court was concerned about *disclosure* of the report as the basis of the expert's testimony, there would be little to no impact on federal practice because Rule 703 already limits disclosure of inadmissible hearsay as the basis of the expert's opinion. But if the Court's decision is construed to apply also to the expert's *reliance* on the lab report, it could have a substantial effect on federal practice because Rule 703 specifically allows the expert to rely on inadmissible hearsay if it is the kind of information on which other experts in the field would reasonably rely.

The Academic Consultant to the Committee conducted a survey of lower court cases and presented her research, indicating that courts are split on whether *Smith* bars reliance on the testimonial report. The majority rule appears to be that *Smith* does in fact prohibit reliance by the expert on the testimonial hearsay. But the issue is still a live one, and it is an important enough question that it seems likely that the Supreme Court will resolve it in the not-too distant future. Therefore, the Committee voted to table any amendment to Rule 703.

The Committee also discussed whether to add a "red flag" to Rule 606(b), which bars testimony from jurors about jury deliberations when a party is seeking to attack the verdict. In *Peña-Rodriguez v. Colorado,* 580 U.S. 206 (2017), the Supreme Court held that the defendant's

Sixth Amendment right to a fair trial was violated when Rule 606(b) was applied to exclude racially biased statements of jurors. But after discussion, the Committee decided not to proceed with any amendment on this subject, and the question was taken off the Committee's agenda. As to *Peña-Rodriguez,* its holding is clear, and it can reasonably be expected that courts and litigants will know about it and apply it in preparing for any hearing to attack a verdict. Moreover, any attempt to codify the ruling in *Peña-Rodriguez* threatens to impinge on the important policies promoted by Rule 606(b).

IV. Minutes of the Spring 2026 Meeting

A draft of the minutes of the Committee's Spring 2026 meeting is attached to this Report. These minutes have not yet been approved by the Committee.

Attachments:

- Proposed amendments to Evidence Rule 609, with the recommendation that they be forwarded to the Judicial Conference for final approval.
- Proposed amendment to Rule 902(1), with the recommendation it be released for public comment.
- Proposed amendments to Rule 104(a) and (b), with the recommendation that they be released for public comment.
- Draft Minutes of the Spring 2026 meeting of the Advisory Committee on Evidence Rules.

Advisory Committee on Evidence Rules

Minutes of the Meeting of May 7, 2026
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 7, 2026, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

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

Also present were:
Hon. James C. Dever III, Chair of the Committee on Rules of Practice and Procedure
Professor Edward Hartnett, Reporter to the Standing Committee
Hon. Edward M. Mansfield, Liaison from the Standing Committee
Hon. Hannah Lauck, Liaison from the Civil Rules Committee
Hon. Thomas Durkin, Liaison from the Criminal Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Professor Joseph Kimble, Style Consultant to the Standing Committee (*via* Microsoft Teams)
Beth Wiggins, J.D., Ph.D., Federal Judicial Center
Timothy Lau, J.D., Ph.D., Federal Judicial Center
Carolyn Dubay, Esq., Chief Counsel, Rules Committee Staff
Bridget Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Management Analyst, Rules Committee Staff
Rakita Johnson, Administrative Analyst, Rules Committee Staff

Invited guests included (via Microsoft Teams):
Professor Andrea Roth, UC Berkeley School of Law
Professor Ronald Allen, Northwestern Pritzker School of Law
Nicole Owens, Federal Public Defender (Idaho)
Jami Johnson, Assistant Federal Public Defender (Arizona)

I. Opening Business

Judge Furman opened the meeting by welcoming the Committee and other participants and attendees. He noted that it was a pleasure to meet in person again following the virtual fall meeting that occurred during the government shutdown. He also welcomed Committee member Rene Valladares and Professor Cathie Struve, Academic Consultant to the Standing Committee, who both joined remotely. Judge Furman next welcomed two new regular attendees - Chief Judge Thomas Durkin of the U.S. District Court for the Northern District of Illinois, who will be serving as the liaison from the Criminal Rules Advisory Committee, and Professor Ed Hartnett, the newly appointed Reporter to the Standing Committee.

Next, Judge Furman recognized the invited guests who attended remotely. Professor Andrea Roth of the University of California Berkeley School of Law was present with regard to the Advisory Committee's work on new Rule 707 regarding AI. Professor Ronald Allen of Northwestern Pritzker School of Law was present to offer remarks on the Rule 104(b) conditional relevance issue. The Chair also welcomed two members from the Federal Defenders' community, Ms. Jami Johnson, Assistant Federal Public Defender from Arizona to offer feedback on the Indian Tribes issue under Rule 902, and Ms. Nicole Owens, Federal Public Defender from Idaho, who joined to provide insight with respect to potential new Rule 707 on machine-generated evidence.

Following general remarks and reminders on meeting logistics, Judge Furman informed the members about three items of interest. First, he advised members that in recognition of the 50th Anniversary of the Rules of Evidence in 2025, a short article was available on the USCourts.gov website to mark the event, and that additional materials will also soon be posted on the website. He also noted that there was a small celebration in New York during the November 2025 virtual meeting to share some cake to celebrate the occasion. Judge Furman thanked Ms. Dubay for her work to organize these events and projects.

Second, Judge Furman informed the Committee that a proposal to amend Rule 611, which was not ultimately adopted, did result in additions to the Federal Judicial Center's Benchbook for United States District Courts to give guidance to trial judges who allow jurors to ask questions of witnesses. An amendment to Rule 611 that would have offered safeguards for trial judges wishing to allow juror questions was not proposed due to concerns expressed by some Standing Committee members that a rule change might encourage the practice of allowing juror questions. At Professor Capra's suggestion, however, the Committee sent its draft proposal to the FJC for possible inclusion in the new Benchbook. The Benchbook excerpt on Rule 611 is found on page 36 of the agenda book and gives proper attribution to this Committee. Professor Capra commented that including the necessary safeguards for juror questions in the Benchbook was a very good result.

Third, Judge Furman offered his appreciation to Judge Richard Sullivan for his service on the Committee, which will end on September 30, 2026. Judge Furman commented that Judge Sullivan has been a stalwart member of the Committee since January 2021, despite extraordinary service also chairing the Judicial Conference Security Committee. He thanked Judge Sullivan for being an incredible member of the Committee during his time as Chair and noted that he would be missed and would leave big shoes to fill. Judge Sullivan thanked Judge Furman for the kind words

and said that it was a joy to be on the Committee even while serving on the Security Committee. With respect to security, Judge Sullivan remarked that it has been a difficult time for the security of judges, their families and our courthouses. Judicial security is also closely tethered to judicial independence, which is crucial for justice. Judge Sullivan also remarked on a quote on the state courthouse in New York. The quote from George Washington to Edmund Randolph, the first Attorney General of the United States, states that "the true administration of justice is the firmest pillar of good Government." Through this quote, Judge Sullivan observed, Washington recognized that the courts were going to play a very important role in our democracy. Judge Sullivan expressed his feeling that it takes more than just judges for the true administration of justice, and that the work and members of the Committee epitomizes that fact by bringing together judges from every level of the federal judiciary, judges from state courts, leading academics in the field, practitioners who are the best at what they do, and staff who ensure the process moves forward. Jury trials are also crucial for liberty, for dignity, and for checking Government overreach, and the Committee is dedicated to ensuring that trials are fair.

Next, Judge Furman asked if there was a motion to approve the Minutes of the Committee's Fall 2025 meeting, which are found at page 14 of the agenda book. A motion was made and seconded and the minutes were unanimously approved. Judge Furman also directed members to the draft minutes of the January 2026 Standing Committee meeting, found at page 40 of the agenda book. Judge Furman noted that the Committee had only informational items before the Standing Committee at the January 2026 Standing Committee meeting, including feedback on proposed Rules 707 and 609 that had been published for public comment. Judge Furman then asked Ms. Dubay to provide an update on the status of proposed amendments to the rules. Ms. Dubay called the Committee's attention to pages 91 and 92 of the agenda book, which cover the amendments that will go into effect December 1, 2026. She noted that Appellate Rules 29 and 32 and the Appendix of Length Limits were withdrawn for further consideration and were not delivered to Congress. Evidence Rule 801 was approved by the Supreme Court and was delivered to Congress on April 8, 2026, and, unless Congress acts, will go into effect on December 1, 2026. Ms. Dubay also provided a brief legislative update, referencing the legislative chart on page 95 of the agenda book, noting that there are no bills pending at this time would directly affect the Rules of Evidence.

II. Proposal to Amend Rule 609

The Chair next directed the Committee's attention to Tab 2 of the agenda book and consideration for final approval of the proposed amendment to Federal Rule of Evidence 609. Judge Furman reminded the Committee that two proposed amendments to Rule 609 had been approved for public comment at the Spring 2025 meeting. The first would make the balancing test under 609(a)(1)(B) somewhat more exclusionary by adding the word "substantially." The second would clarify that the ten-year period under Rule 609(b) ends on the date the trial begins. Both amendments were approved for publication and public comment by the Standing Committee with a few minor changes that are noted in the Reporter's memorandum. The comment period closed in February 2026, and the public comment was almost uniformly positive. A wide range of organizations, including the Federal Magistrate Judges' Association, the American College of Trial Lawyers, the New York City Bar Association, NACDL, and others strongly supported the amendment. There was only one slightly negative comment with respect to the 609(b) proposal,

which the Committee previously considered and rejected. There were a few comments that made relatively minor suggestions, but for reasons explained in the Reporter's memorandum, the Chair did not recommend changes in response to those comments. Judge Furman flagged one comment that suggested amending Rule 609 to respond to the Supreme Court's holding in *Luce v. United States*, which requires a defendant to testify and suffer impeachment before challenging a Rule 609 ruling on appeal. Judge Furman noted that he shared the Reporter's view that such a significant change to the Rule 609 proposal at this point would require republication. He noted that the Committee had previously considered the issue and had decided not to address it as part of this amendment package.

Judge Furman highlighted a couple of minor changes to the proposed committee note that came from the Standing Committee. These included changing "the date of trial" to "the date trial begins" and using "specific instances of conduct" instead of "bad acts," and adding "absent agreement of the parties" to the end. The Reporter further added that he was withdrawing a suggested addition to the end of the draft committee note in the agenda memorandum because it had not been vetted by the Department of Justice (DOJ). The Reporter also noted that the Standing Committee had suggested referencing the "existing rule" in the committee note instead of the "original rule." As explained in a footnote on page 111 of the agenda book, the language "original rule" was retained to make it clear that the note was referring to the previous rule and not the one then in force. Judge Furman added that the Reporter had included an appendix with recent Rule 609 rulings that suggested that some courts continue to misapply the rule.

Judge Furman then solicited questions and discussion. On hearing none, Judge Furman called the question of whether to recommend that the Standing Committee give final approval to the proposed amendments to Rule 609. Upon a motion and second, and with two members opposed, the Committee voted to recommend final approval of the amendments to Rule 609.

III. Deepfakes and Federal Rule 901 Governing Authenticity

The Chair next directed the Committee's attention to Tab 4 of the agenda book and the issue of amending Rule 901 that governs authenticity to include a new subsection that would regulate claims that proffered evidence is a deepfake generated by Artificial Intelligence ("AI"). The Chair explained that it was appropriate to discuss a proposed deepfake amendment before discussing proposed Rule 707 governing machine-generated evidence because any decision on how to proceed with respect to Rule 901 might impact next steps for Rule 707.

Judge Furman summarized the Committee's work on AI that began in 2023. He noted that one area of focus had been authentication issues relating to deepfakes - audio and video evidence that can be now easily fabricated using generative AI and is increasingly difficult to detect. He noted that the Committee had largely coalesced on the substance of proposed Rule 901(c) that appeared on page 224 of the agenda book. Rule 901(c) would impose a burden on an opponent challenging an item as a deepfake to present evidence sufficient to support a finding of fabrication. If the opponent satisfies that burden, then the burden would shift to the proponent of the evidence to demonstrate by a preponderance of the evidence that the item is authentic. This Rule 104(a) preponderance standard is higher than the typical prima facie standard that applies to issues of

authentication. Judge Furman emphasized that the higher standard is the key innovation in proposed Rule 901(c), because it would establish a standard that would require the court to engage in a more rigorous gatekeeping role. The big question for the Committee is whether a proposed amendment is warranted.

Turning to the substance of the proposed rule and note, Judge Furman directed the Committee's attention to the Reporter's memorandum on pages 221-223 of the agenda book and to several changes made to the draft rule originally discussed by the Committee. The first change proposes to cover claims that evidence was fabricated by "generative AI," as opposed to simply "AI." The second change adds a notice provision to the text of the rule to ensure that deepfake claims are raised and resolved before trial. The third adds a definition of "generative artificial intelligence" to the text of the rule. Judge Furman noted that the language in the agenda book in subsection 4 of the draft rule on notice stated that ". . . the party claiming that an item is fabricated in whole or in part by generative artificial intelligence must . . ." Judge Furman suggested that this language could be simplified to refer to "a party challenging an item of evidence under this subdivision . . .". The Reporter noted that the original language was drawn from the notice provision in Rule 807 that was amended in 2019, but explained that Judge Furman's proposed change would be appropriate as it would be stylistic only. Judge Furman emphasized that the Rule 901(c) notice provision should be a flexible one that requires sufficient notice to respond to the evidence at trial, and not a rigid requirement to provide written notice as in Rule 807.

Judge Furman then invited discussion of draft Rule 901(c). One Committee member raised a question about limiting the proposal to "generative AI" and queried whether there are other ways of producing a deepfake that should also be covered by the proposed rule. The Reporter explained that the focus on "generative artificial intelligence" was intentional because other fakes are much more easily detectable. He explained that the current draft rule would apply only to items allegedly produced with generative AI and that standard authentication rules would continue to apply to other items of evidence.

The Committee member then asked about defining "generative artificial intelligence" to allow courts and litigants to distinguish between generative AI and non-generative AI. He suggested that tracking a legislative definition and having consistency between definitions that would apply to both Rules 707 and 901(c) makes good sense, but he stated that he was unable to discern what was meant to be covered by the draft definition simply by reading it. The Reporter explained that the draft definition would capture synthetic content created by a computer. The Committee member noted that generative AI also can take existing, genuine content and make something else out of it. The Reporter explained that the draft definition was based on language in the Executive Order on AI, and that the draft provides a starting point for discussion utilizing language that is already in the law. He suggested that public comment might offer useful ideas for improving or refining the definition. Judge Furman observed that there are slight differences between the proposed definition of "generative AI" in the draft of Rule 901(c) and the more general definition of artificial intelligence in proposed Rule 707. He agreed with the Reporter that it makes sense to start with a definition already developed by the legislative or executive branches and to refine the definition through input from members of the public and specialists in the area.

Another Committee member suggested that the language in the notice provision should refer to "all parties" rather than simply to "opposing parties" to account for situations (such as co-defendants) where parties are not technically *opposing* each other but may need notice of a deepfake claim. The Chair queried whether the language "all parties" would risk including parties who are no longer in the case. He noted upcoming changes to Civil Rule 41 to address parties who are no longer in the case. Another Committee member suggested that the most natural reading of the language "all parties" in the notice provision would be to reference existing parties only. Alternatively, the rule could refer to "all existing parties" or to "parties remaining in the case." The Chair then suggested shortening the notice provision to require "pretrial notice of the intent to present evidence of fabrication so that all other parties have a reasonable opportunity to respond." The Reporter and Committee members agreed that this language would best capture the intent of the notice provision.

Another Committee member noted that Rule 807 requires "written" pretrial notice and asked whether Rule 901(c) should also require notice to be in writing unless otherwise ordered by the court. Judge Furman opined that requiring "written" notice might be too inflexible for AI objections. He explained that a discussion of deepfakes at a pretrial conference could be sufficient to provide the requisite notice without any writing. The Reporter explained that Rule 807, which governs residual hearsay, raises distinct notice concerns. He agreed that more flexible notice would be appropriate for Rule 901(c). All agreed that draft Rule 901(c) should not require notice in "writing." The Reporter then read the updated notice language in subsection 4:

> Unless the court orders otherwise, a party challenging an item of evidence under this subdivision (c) must provide reasonable pretrial notice of the intent to present evidence of fabrication so that all other parties have a reasonable opportunity to respond to that evidence.

The Chair then called upon Ms. Shapiro to weigh in regarding draft Rule 901(c) on behalf of the DOJ. She explained that the DOJ does not believe Rule 901(c) is ready for publication. That position notwithstanding, Ms. Shapiro offered input on the existing draft. She first opined that the notice provision would not function appropriately in criminal cases where it provides that notice is required "unless the court orders otherwise." She predicted that notice would be routinely excused for criminal defendants because criminal defendants are unwilling to share trial strategy and judges are understandably reluctant to force them to do so. Ms. Shapiro also raised concerns about the definition of generative AI as applied to criminal matters, where evidence can be created through a combination of generative AI and other AI functions. She further highlighted situations in which the evidence against a criminal defendant is admittedly created through generative AI, such as in child exploitation cases where the government offers AI-generated images. She suggested that a defendant might seek to use Rule 901(c) to exclude such evidence as inauthentic. The Reporter explained that Rule 901(c) would not cover AI-generated images offered to prove an element of a child exploitation crime when the government concedes that the images are fabricated because this would not involve a deepfake being offered as something that it is not. Ms. Shapiro responded that prosecutors and the courts have been handling photo-shopped and edited evidence for many years. She opined that the existing Federal Rules of Evidence are adequate to

address the issue of potential deepfake evidence, and she suggested that the Committee has much more work to do before proposing a deepfake rule.

One Committee member suggested removing the requirement that notice be given "pretrial" in favor of a simple provision requiring sufficient notice to give other parties a "fair opportunity to respond." The judge would then be the arbiter of when that notice has to be given, and "fair" notice might not be given before trial in every instance. Ms. Shapiro reiterated her concern that, in criminal cases at least, a judge would be unlikely to enforce any notice provision against a defendant. The Reporter noted that the notice provision had been added to improve the draft at the DOJ's suggestion. Another Committee member suggested that deepfake objections could be easily handled through motions in limine, even in criminal cases.

Another Committee member expressed sympathy for the DOJ's concerns. She hypothesized that the government would generally not be the party seeking to admit deepfakes as genuine evidence, but that a criminal defendant might. She hypothesized a scenario involving a defense deepfake video depicting a cooperator in a damning situation. The Committee member opined that the government would not learn of the video until the defense pressed play at trial. The Committee member agreed that Rule 901(c) is premature, and suggested that it seeks to regulate a situation that has yet to arise with any frequency. She emphasized that a litigant would be committing a crime by proffering deepfake evidence, which remains a significant disincentive. She argued that the Committee could address the issue if it ever starts to arise in federal proceedings, armed with real-world examples. The Reporter asked what would happen under existing law if a defendant offered a deepfake video to incriminate a cooperator, suggesting that Rule 901(c) would afford the government *more protection* than it currently enjoys in such a scenario. The Committee member responded that the defense would be able to present the video under existing evidentiary standards, but that the obligations of the prosecution and defense remain symmetrical under existing law. She suggested that Rule 901(c) would create asymmetry between the prosecution and defense, Another Committee member added that the burden-shifting feature of draft Rule 901(c) is its principal innovation. He suggested that the government would obtain *more information* than it would currently under the proposed rule and ultimately would get the benefit of the higher standard of proof.

Ms. Shapiro next explained that the Committee note should not utilize the word "deepfake" because it is not definitionally appropriate where a "deepfake" may be created by generative or nongenerative AI. The Reporter responded that the term "deepfake" was used in the note colloquially as a term that everybody understands. Ms. Shapiro and the Reporter then discussed possible ways to define deepfakes created through generative AI as a way to narrow the types of fake evidence covered by the proposed rule. They also discussed the scope of the rule to clarify that it would include any item that can be generated by AI, images, photos, videos, reports, papers, and forgeries.

The Chair turned to the broader issue of whether the issue of deepfakes is ripe for rule-making. The Reporter referred to his agenda memorandum detailing case law indicating that these issues are already arriving in federal and state courts. He noted a New York appellate opinion excluding a video on the grounds that it was a deepfake and was insufficiently authenticated. The

dissent in that case objected that the court was shifting the traditional burden of proof regarding authenticity, requiring the proponent of the evidence to prove that it's not a deepfake in every instance. He noted a case in the Eastern District of Virgina in which the court held that witness testimony was sufficient to authenticate a video despite a credible deepfake challenge. He noted that draft Rule 901(c) would change both these results. He further referenced the FJC Survey of district, magistrate and bankruptcy judges regarding the incidence of deepfake arguments (page 226 of the agenda book).

Judge Furman thanked the FJC for conducting the survey and explained that the FJC surveyed all federal trial court judges (district, magistrate, and bankruptcy) on their experience with deepfake challenges. Mr. Lau, present on behalf of the FJC, thanked his colleague, Ashley Walters, for her work on the survey and noted that she could answer any questions from the Committee. The Chair also summarized the survey, noting that there was a 45 percent response rate. Of the 931 judges who responded, only 15 reported having encountered a deepfake challenge. Of those who had not yet encountered such a challenge, 82 percent said that they would require some initial showing before entertaining a claim of fabrication, as would proposed Rule 901(c). A narrow majority of respondents without prior deepfake experience also said that the rules should be amended to address deepfake issues. Judge Furman also pointed to one noteworthy anecdote in the survey results in which a defendant pleaded guilty to obstruction of justice for fabricating audio/visual evidence that resulted in the indictment of another person. Although the deepfake issue came up only at sentencing and was not adjudicated, the anecdote suggests that these issues are emerging. Judge Furman further added that AI capabilities are advancing very quickly, and while issues may start to appear more in state courts (in family court cases, for example), the Federal Rules of Evidence are a model for the state courts. Judge Furman also acknowledged the slow pace of rulemaking, and emphasized that Rule 901(c) would not go into effect until December 1, 2028 – even if published this summer. This could militate in favor of putting it out for public comment to gather information and feedback with respect to the definition of "generative AI" and an appropriate notice provision. The Reporter added that the public comments to Rule 707 provided a number of helpful insights from the Innocence Project and other government groups, and suggested that it is important for the Committee to start addressing deepfakes.

One Committee member then pushed back on the premise that the deepfake issue is unprecedented and cannot be handled using existing rules. He noted that forgeries have long been difficult to detect and that trial judges have ample experience using the existing Federal Rules of Evidence to address such concerns. He opined that the Committee is not political and that there is no need to propose a rule addressing deepfakes in response to some voices clamoring for it. The Committee member emphasized that it is a crime to present deepfake evidence, that there are other laws that regulate in this arena, and that the Committee should wait to see how these issues appear in federal court before proposing a new rule. The Federal Public Defender disagreed, opining that this problem is coming for the federal court system and that the Committee should get ahead of it by publishing Rule 901(c), especially if the Committee decides to republish Rule 707 for additional public comment.

A Committee member followed up on whether federal judges could handle deepfake claims under existing rules. He queried whether the same burden-shifting approach embodied in Rule

901(c) could be applied to regulate claims of deepfake evidence without an amendment. Another Committee member pointed out that the current authentication rules require only a showing "sufficient for a jury to find" an item authentic – the low prima facie standard of Rule 104(b). Under the proposed Rule 901(c) draft, a trial judge would have to find an item of evidence authentic by a preponderance of the evidence before passing it on to the jury (once a credible deepfake showing is made by the opponent of the evidence). Rule 901(c) would thus make the trial judge the gatekeeper and raise the standard of proof above the existing standard. The Reporter added that, under current law, if there's a credible charge of a deepfake video, for example, the proponent could simply respond with a witness who testifies that he "recognizes" the people in the video and that this would be sufficient to authenticate and send the potentially fabricated video to the jury. Under the Rule 901(c) proposal, the judge would determine, using the more likely than not standard, that the item is authentic before sending it to the jury. And a witness who recognizes people in the video would be insufficient to defeat a credible deepfake claim under that standard of proof. Judge Furman agreed, noting that the jury would not be able to discern whether the hypothetical video was a deepfake based on a witness's testimony that he recognizes the people depicted in the video.

The Chair next turned to Ms. Shapiro to report on efforts by the DOJ to evaluate AI issues. Ms. Shapiro introduced Ms. Kira Antell from the Office of Legal Policy to discuss the issue. Ms. Antell explained that a beta version of a survey had been sent to the administrative law judge (ALJ) community to determine the importance of the type of technology used to create fake evidence. DOJ is working on the survey with the Bureau of Justice Statistics, and they are working through the Institutional Review Board. The goal is to receive results back in September. The survey covers a broad array of evidence and surveys ALJs regarding their needs in handling potentially fabricated evidence, whether it be a rule or additional training. A Committee member asked why the DOJ is surveying ALJs, rather than the litigating federal lawyers who deal with the presentation of evidence. Ms. Antell explained that the directive under the American Action Plan was to talk to the ALJ community and potentially to issue guidance to ALJs. The ALJ community deals with many unrepresented individuals and there is aa question as to whether forged documents are coming from these parties or even from represented parties. For example, many people are looking for SSI benefits or veterans' benefits and may use AI or just traditional Microsoft Word to create fake reports or fake results. The goal of the survey is to better understand what ALJs are experiencing and does the mode of creation of the fake evidence matter to judges. Ms. Antell agreed that a useful follow-up to the ALJ survey would be one directed at litigators.

The Reporter suggested that the surveys and work being done by the DOJ would not help trial judges resolve claims of fabricated evidence. He explained that the unique undetectability of fabrications created by generative AI was the justification for Rule 901(c). He reminded the Committee that even the technology companies that develop AI tools cannot find a reliable discriminator that can detect fabrications created by generative AI. Ms. Antell asked whether the proposed rule would cover only audio/visual evidence or whether it would apply to other types of evidence. She cautioned that the rule as drafted may produce different outcomes depending on the type of evidence allegedly fabricated. For example, she suggested that an allegation about a forged signature created by ChatGPT may not be covered by Rule 901(c) if it is limited to "audio/visual" forgeries only. The Reporter responded that the rule as written applies to any item of evidence

created by generative AI and would not be limited to audio/visual evidence. Ms. Shapiro queried how an opponent could ever make the prima facie showing of fabrication required to trigger the higher preponderance standard under Rule 901(c) if deepfakes created by generative AI are completely undetectable. The Reporter acknowledged this difficulty but suggested that there are certain indicia of fakery that could satisfy the prima facie standard – such as the origin of the evidence on a particular device, or its placement among other genuine items. In any event, he explained that lay jurors are not equipped to detect deepfakes and that the draft rule would put trial judges, who are repeat players and who will gain experience, in charge of the authentication determination when a credible deepfake claim is made.

Judge Dever suggested that the Committee should consider first whether there is a problem that needs to be addressed by the proposed rule, whether the rule needs to include this burden shifting framework, and if so, why the burden shifting framework should be applicable only to fakes allegedly made with generative AI as opposed to all alleged forgeries. The Reporter answered that deepfakes created by generative AI are becoming much more prevalent and are easier to generate and much harder to detect than traditional forgeries. Another Committee member added that the premise of Rule 901(c) is that deepfakes created by generative AI present a question akin to expert testimony where the trial judge needs to act as the gatekeeper before sending the evidence to the jury. Another Committee member responded that he remained unconvinced that the issues presented by alleged deepfakes in the courtroom are materially different from the issues presented by more traditional forgeries. He suggested that litigants have had to call experts to authenticate signatures after claims of forgery and that such issues were not simply handed off to juries to decide unassisted under current law. Another Committee member strongly disagreed, arguing that generative AI is here now with people creating fabricated content every day. He suggested that publishing a rule on deepfakes would not be a public relations exercise but an important step toward protecting the integrity of the justice system given the inevitability of this content reaching the courtroom. The Committee member opined that it would be a mistake for the Committee not to be vigilant.

The Chair acknowledged the point that courts have capably handled claims of forgery under current law. Still, he suggested that there is something fundamentally different about AI-generated deepfakes because: 1) they are very easy to create; 2) they are very difficult to detect; and 3) they can have an outsized impact on the jury when they are in audio/visual form. For example, if a jury sees or hears a recording of a defendant doing something, this is very impactful evidence that is difficult to disregard. He queried whether it may make sense to broaden the rule to cover all claims of fakery and not just generative AI, which would have the added benefit of eliminating the need for a definition of "generative AI." The Reporter responded that the Committee could consider broadening Rule 901(c) but expressed reservations. He noted that such a change would alter the law in many settled areas, including authentication of social media evidence. The Reporter also explained that the justification for Rule 901(c) is the special problem presented by generative AI that calls for a change to authentication standards.

A Committee member asked whether an opponent of evidence under Rule 901(c) would still be permitted to present evidence of deepfakery to the jury once the trial judge evaluates the allegation and determines under the preponderance standard that the evidence is authentic and

admits it. The Reporter responded that this would be permitted and is allowed in connection with authenticity disputes even under current rules. The Chair agreed, noting that it would be similar to the handling of allegedly coerced confessions, where the court plays a gatekeeping role but a defendant may argue coercion before the jury. The Committee member queried whether it would make sense to apply Rule 901(c)'s burden shifting framework more broadly beyond just generative artificial intelligence. The Reporter responded that the distinct question with respect to generative AI is whether you need the trial judge to act as a gatekeeper before the evidence is sent to the jury. Once it gets past the gatekeeper, the opponent would remain free to present evidence on authenticity as can be done with respect to other evidence.

Another Committee member pointed to a case identified in the Reporter's memorandum in which a criminal defendant argued that a video of him committing a sexual assault was simply a deepfake. The Committee member suggested that the government might benefit from the notice provision and the threshold showing required by Rule 901(c) in such circumstances. The Reporter noted that the court in that case held that the defendant's deepfake allegation was a question of weight and not admissibility, and that Rule 901(c) would require a finding of authenticity by a preponderance if the defendant made a prima facie showing of deepfakery. Another Committee member pointed out that Criminal Rule 16(b) has a notice provision already that should provide the DOJ with appropriate notice in criminal cases. The Chair responded that, to DOJ's point, notice is not always enforced as rigorously against criminal defendants as it is against the Government.

Ms. Shapiro suggested that a criminal defendant might raise a deepfake allegation at the last minute, forcing the Government to stop trial to come up with an expert. The Reporter countered that the Government would have only the burden of presenting prima facie evidence of authenticity unless the defendant first made the requisite showing of deepfakery – enough evidence for a reasonable person to believe the Government's evidence is a deepfake. A bare defense allegation of a deepfake would not suffice. Judge Furman suggested that it might be fairly easy for a defendant to make the requisite showing to shift the burden to the Government. For example, the defendant could produce a sworn statement or affidavit that he was not the person depicted in a Government video. The Reporter suggested that the judge would have to find such evidence sufficient under Rule 104(b), but a simple claim deepfake would not shift the burden.

Ms. Shapiro added that the FJC survey results show that judges are dealing with deepfake issues in the absence of a bespoke rule. She suggested that Rule 901(c) might also encourage parties to raise deepfake claims, which will delay trials and force the Government to retain experts routinely. She suggested that having the trial judge act as gatekeeper may not improve the situation with respect to generative AI deepfakes given that they are so difficult to detect. She further emphasized that AI might be in a new and presently unforeseeable place in two years' time given the race between content generators and content detectors and urged the Committee to await more technological development before taking action. The Federal Defender countered that he did not see the harm in going forward with publication for public comment that could add a lot of beneficial information for the rulemaking process.

The Chair then asked the Committee to consider the threshold question of whether to proceed with publication and public comment on Rule 901(c). Although the Committee may not

be ready to propose an amendment at this time, he suggested that public comment might provide important data on what is happening in the court system and from technological experts that could advance the Committee's work on a deepfake rule. One Committee member expressed concern about publication for the purpose of gathering data. He noted that the Committee's practice has traditionally been to publish a proposal when it is ready to propose a rule change. The Committee member opined that a decision to publish to gather data may not match public expectations surrounding publication of an amendment proposal. He suggested that there are other avenues for obtaining information other than the public comment process. Judge Furman noted that, according to Judge Dever, the Criminal Rules Committee had hosted a mini-conference that included subject-matter experts to aid its work on Criminal Rule 17. Judge Furman suggested that such a conference could assist in formulating a deepfake rule. He added that if the decision was to not proceed with publication today, the Committee could devote time at its Fall meeting to such a mini-conference to delve further into these issues. He suggested thinking carefully about whom to bring, to include both litigators and technical experts to discuss the reality on the ground and how a rule could help. Judge Dever explained that the Criminal Rules Committee held a mini-conference after creating a workable draft of Rule 17 because concerns still existed. The Criminal Rules Committee used the mini-conference to explore the language of the working draft before publication. Judge Dever noted that while this takes a little longer, deliberation is a feature and not a bug of this whole process as we try to get it right.

The Reporter reminded Committee members that they had hosted two symposia on the problems of AI (one in Minneapolis and one in Washington DC), and that legal and technological experts had reported that generative AI is a real problem that needs to be addressed. One Committee member expressed support for the idea of another mini-conference, explaining that the earlier symposia had focused on understanding the world of AI, particularly for those who did not use it, and that a mini-conference in Fall 2026 could include input from lawyers to ask if AI presents a problem in the courtroom and how they encounter it. Judge Furman agreed that the earlier symposia were more educational and noted that a Fall 2026 symposia could provide concrete feedback on the Rule 901(c) working draft. He also noted that ChatGPT was introduced in 2023 and that there has been much progress since these earlier symposia. The DOJ expressed support for a mini-conference and Ms. Shapiro said she could assist with finding panelists.

Judge Furman suggested that, in light of the amount of disagreement on the Committee, and notwithstanding the fact that it would mean a delay of another year, the better course would be to have a mini-conference at the Fall 2026 meeting. Judge Furman stated that there would be no need for a Committee vote regarding public comment now given that plan, and that the issue of deepfakes would remain on the agenda. A mini-conference will allow for a deeper dive concerning the prevalence of deepfake issues, the need for a rule regulating those issues, and the merits of draft Rule 901(c). The Reporter suggested that the mini-conference would take place during the morning session of the Fall 2026 meeting and would involve two panels. The first panel would include AI experts who can opine as to the evolving operation of AI and the optimal terminology to be used in a rule regulating deepfake evidence. A second panel would include both criminal and civil litigators regarding their experience with deepfake issues in the courtroom. The Committee would then discuss the feedback and data received in the afternoon session. One Committee member expressed support for this plan of action, urging the Committee to include the

plaintiff's bar in civil cases. The Federal Public Defender urged the Committee to keep the issue of deepfakes on the agenda, and emphasized the importance of including practitioners as part of a mini-conference.

Judge Furman stated that the issue of deepfakes would be kept on the agenda and that hearing no opposition, the Committee would host a mini-conference focused on this issue at the fall meeting. He then invited suggestions concerning the optimal structure for the mini-conference and regarding participants, including a mix of tech people and litigators in both civil and criminal cases.

IV. Artificial Intelligence and Proposed Rule 707

The Chair next directed the Committee's attention to Tab 3 of the agenda book and a proposal to create new Federal Rule of Evidence 707, which is designed to impose reliability requirements on AI-generated evidence when it is offered without the testimony of an expert. Judge Furman stated that this proposed new rule would typically be considered for final approval because it had been through the publication and public comment process. But Judge Furman explained that, in contrast to the favorable comments received regarding the proposed amendment to Rule 609, the comments concerning proposed Rule 707 provided some cause to potentially hold off on final approval of Rule 707. He noted that the Committee could choose to revise and republish it now or could choose to combine consideration of Rule 707 with the deepfake draft and reevaluate both together at the Fall 2026 meeting.

To briefly recap the Committee's work on proposed new Rule 707, Judge Furman recounted that the Committee had approved proposed Rule 707 for public comment at the Spring 2025 meeting. The rule would apply the Rule 702 reliability requirements on AI-generated evidence offered without an accompanying expert witness. The Standing Committee approved Rule 707 for public comment in 2025, and the comment period closed on February 16, 2026. There were two public hearings concerning the proposal and the Committee received 59 written comments by the deadline. The comments were mixed: only 3 comments expressed unqualified support; 27 supported the rule subject to revisions; and 27 opposed it. Themes among the criticisms included the overbreadth of the term "machine-generated evidence" utilized in the proposed provision, the vagueness of the "simple scientific instruments" exception, and the possibility that the rule would provide a pathway to admit AI-generated evidence without an expert. There were also some objections to tethering Rule 707 to the Rule 702 requirement, and there were a number of objections that the rule is premature. The Reporter's memorandum addresses each of the major criticisms and concludes that the criticisms do not warrant abandonment of the rule.

Judge Furman then explained potential changes to the published version of Rule 707 based on the public comments. These included the suggestion to use the term "artificial intelligence" instead of "machine-generated" to describe the coverage of the rule to be more precise and to make clear that the provision does not cover things like faxes, emails, cellphone extractions, and the like. A second change would be to delete the "simple scientific instruments" exception altogether. The third would add a notice requirement to the rule text. The issue of notice had previously been discussed only in the Committee note, based on concerns expressed by the DOJ and others. A

revision of proposed Rule 707 completed before the meeting included a flexible notice provision modeled on Rules 404 and 807. Although there were some suggestions that Rule 707 should be untethered from Rule 702 and that distinct standards should be applied to AI evidence, the Reporter recommended no change based upon these suggestions. He explained that applying different standards to expert opinion testimony and to AI-generated conclusions would be problematic because in many instances this evidence would be presented with an expert, making expert testimony based upon AI-generated information subject to two distinct standards. The Reporter acknowledged that it could be helpful to incorporate the relevant language from Rule 702 directly into Rule 707 rather than simply cross-referencing it. He explained that one big question remaining is whether an expert should be required to present this evidence to the jury or, at least, for purposes of demonstrating reliability to the trial judge.

Judge Furman then directed the Committee's attention to the Reporter's memorandum at page 170 of the agenda book, explaining that it included three different versions of a revised rule 707 for the Committee's consideration. Version One would require an expert to establish reliability and therefore admissibility. Version Two would ordinarily require an expert to establish admissibility, but it would allow for exceptional circumstances in which the court could rely upon another source to show reliability, such as convincing validation studies that establish the foundation for the AI opinion. Version Three would require an expert, not only for admissibility, but also at trial to ensure there is a witness subject to cross-examination. This version would effectively collapse Rule 707 into Rule 702 insofar as it would require an expert in all cases.

The Reporter added that the issue of expert foundation was the most important reason for offering the Committee three versions of a revised Rule 707. He explained that there were a number of public comments that advocated for an expert witness requirement, at least for the foundation for AI-produced evidence. The Reporter noted that there might be ways to ensure that AI-generated evidence is reliable without having to produce an expert, such as validation tests, unbiased studies, and the like. As things proceed technologically, it may be more likely that an expert is not necessary to establish the reliability of some AI output. He explained that Version Two, on page 173 of the agenda book, offers a middle ground on this issue by providing that admissibility is ordinarily established through an expert but doesn't necessarily need to be. He explained that the notice requirement in the revised draft was taken from Rule 807, and that the draft included a carve-out for AI that can be judicially noticed. He offered the example of evidence of distances through Google Maps that is already judicially noticed by courts under Rule 201. Finally, he explained that the revised drafts include a definition of "artificial intelligence" taken from a statute.

The Chair then thanked those who submitted public comments and testified at the hearings and noted that he found it quite helpful. As all agreed that the changes to proposed Rule 707 made after public comment were substantial, Judge Furman explained that the question for the Committee was whether to republish a revised version of Rule 707 for additional public comment, or to table further consideration of Rule 707 for now and make the Fall 2026 meeting focused on both AI rules together. Judge Furman acknowledged that Version Two of the revised Rule 707 was likely the leading contender for republication if the Committee chose to take that route.

The Chair invited Ms. Shapiro, on behalf of the DOJ, and Ms. Nicole Owens, on behalf of the Federal Defenders, to offer their thoughts. He also sought feedback from Professor Roth, who has been involved in developing Rule 707 from the beginning. Ms. Shapiro explained that some of the DOJ's concerns detailed in its letter regarding Rule 707 persist despite the revisions. She expressed concern about how Rule 707 would function in practice, as well as concern about the coverage of many machine-generated technologies commonly used in court that may depend upon some combination of AI and other technology. She further noted that the statutorily derived definition of "artificial intelligence" in the revised rule differs from the definition used by the DOJ. Ms. Shapiro appreciated the carve-out for judicially noticed artificial intelligence in the revised draft but opined that judicial notice is very subjective and not a reliable mechanism for exempting accepted technologies from Rule 707. The Reporter asked whether the DOJ would prefer nothing in the Rule to exempt reliable technologies. Ms. Shapiro stated that the DOJ would rather have no Rule 707 at all and suggested that trial judges currently are capable of regulating the need for experts and other information as a condition to presenting AI evidence under Rule 611. Ms. Shapiro explained that the DOJ believes that the issue of litigants presenting AI evidence in the absence of an expert witness remains an anticipatory problem that has yet to materialize in court. She stated that the DOJ favors consideration of Rule 707 at the Fall 2026 meeting alongside draft Rule 901(c).

Ms. Owens offered a different perspective, stating that a rule covering AI-generated evidence offered without an accompanying expert witness is not premature. She explained that federal defenders are already seeing this kind of evidence coming into cases. She cited examples of such evidence described in the Reporter's memorandum. Ms. Owens acknowledged that computers can assist in investigations and that certain machine-generated evidence may require no expert foundation. Still, she explained that concerns arise when generative AI is doing the work and analysis that normally an expert would do and that these concerns need to be addressed by a rule. Ms. Owens noted that a Cellebrite extraction that is simply a mirror of a phone or other device may not require an expert foundation. But she explained that, if the extracted information is fed into an AI tool to identify patterns or infer relationships, then this opinion output should be subject to a different analysis. For that reason, Ms. Owens opined that utilizing the Rule 702 reliability requirements, and allowing courts to require expert foundation for such output, is absolutely appropriate.

Professor Roth thanked the Committee for its work, stated that the revised versions of Rule 707 nicely addressed feedback received during public comment, and shared several observations. She first addressed the use of Cellebrite, and echoed Ms. Owens' comments that its admissibility depends upon whether it is simply being used to extract data from a phone or is instead being used to analyze information, for example, to determine who's a key contact and who's not. Second, Professor Roth observed that under the status quo, a judge could admit an analytical conclusion by Cellebrite technology through a lay witness without any Rule 702 scrutiny. As to the subjectivity of a judicial notice carve-out in Rule 707, Professor Roth predicted that there would be a period of transition in which courts would coalesce around technologies appropriate for judicial notice. But she opined that the option of admitting analytical AI input without Rule 702 scrutiny is untenable. Professor Roth also suggested that the notice provision in Rule 707 should include a good cause exception akin to those in Rules 404 and 807 because defendants, either civil or

criminal, may not know prior to trial that they are going to need to call an expert. Finally, Professor Roth noted that Version Two of revised Rule 707 talks about "providing" an expert. She explained her assumption that this language was chosen deliberately and would not require that an expert would need to testify in all circumstances. She noted that litigants may offer an expert's conclusions through an affidavit in current *Daubert* hearings.

After hearing these perspectives, the Chair invited discussion of next steps. He explained that the Committee could either republish one of the revised versions of Rule 707 for another round of public comment or fold further consideration of Rule 707 into the Fall 2026 meeting. Committee members expressed a preference for Version 2 of revised Rule 707 and agreed that they would appreciate receiving additional feedback on that draft at the Fall meeting. Committee members expressed an interest in feedback from technological experts with respect to an appropriate definition of "artificial intelligence, as well as a desire for additional information about how litigants may demonstrate the reliability of AI-generated conclusions. The Chair of the Standing Committee also supported further study to obtain additional feedback on the revised draft of Rule 707 from both AI experts and practicing lawyers. Committee members then unanimously agreed that discussions regarding Rule 707 should continue at the Fall 2026 mini-conference with a focus on Version 2 of revised Rule 707. The Chair concluded the discussion, stating that Rule 707 would be taken up at the Fall 2026 mini-conference. He noted that combining the consideration of Rules 707 and 901(c) would create helpful synergy and would allow for potential publication of both proposed AI rules together.

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

The Chair next directed the Committee's attention to Tab 6 of the agenda book and the proposal to amend Federal Rule of Evidence 902(1), the provision that allows self-authentication of the signed and sealed records of enumerated domestic government entities. The proposal would add federally recognized Indian Tribes and Nations to the list of entities whose sealed and signed documents are self-authenticating. Judge Furman provided a brief recap of the proposal's history, noting that it was originally made by Judge Frizzell of the Northern District of Oklahoma and was briefly taken up by the Committee in the Fall of 2024. The Committee deferred consideration of the issue pending input from the DOJ. At the Spring 2025 meeting, the DOJ formally proposed amending Rule 902(1) to add federally recognized Indian Tribes and Nations to the list of covered entities. Judge Furman also noted that the Federal Public Defender community has consistently opposed the amendment and that both the DOJ's and the Federal Defender's memoranda have done an excellent job of squarely presenting the issues for the Committee's consideration. After extensive discussion of the proposal at the last two meetings, the Committee solicited input from the Tribes on this issue. Judge Furman sent a letter to all federally recognized Indian Tribes and Nations, as well as to other representative groups and entities, explaining the proposal and seeking input. Judge Furman explained that a summary of the responses received were included in the agenda book. Judge Furman commented that the responses received were relatively small in number but were very supportive of amending the rule to add Indian Tribes and Nations.

The Chair then directed Committee members to the Consultant's memorandum prepared by Professor Richter at page 253 of the agenda book, which summarized the issues for the

Committee's consideration. He then asked Professor Richter to offer remarks. Professor Richter thanked Judge Furman and focused on the feedback received from the Indian Tribes. She stated, as Judge Furman noted, that while sparse, the feedback was unanimously supportive and identified some additional factors supporting an amendment to Rule 902(1). Professor Richter explained that tribal leaders emphasized the value of self-authentication in civil litigation, as well as in the criminal context previously explored by the Committee. She informed the Committee that tribal leaders also emphasized the burdens on tribal governments in supporting and cooperating with criminal prosecutions as a result of the lack of self-authentication. Professor Richter explained that the responding Indian Tribes and Nations also emphasized the importance of tribal sovereignty and dignity and of allowing their records to be self-authenticating along with the records of other government entities.

Professor Richter reported that she also evaluated the impact of the proposed amendment on criminal prosecutions. She concluded that the amendment would allow the Government to present a sealed and signed tribal record to prove the Indian status of either a defendant or a victim without any accompanying witness or certification, so long as the record satisfied a hearsay exception. The Government would not need to provide a live witness to authenticate tribal records. Nor would the Government need to provide a certification under Rule 902(11), the business records certification, if it were to rely on a different hearsay exception such as the public records exception. Thus, Professor Richter explained that an amendment would alter the status quo by allowing a tribal record alone to establish Indian status in a criminal case. Lastly, Professor Richter reviewed the open records statutes and codes of tribal Nations and governments discussed in her agenda memorandum. Professor Richter explained that she was unable to perform a comprehensive review of the open records acts of all 578 federally recognized Indian Tribes and Nations, but that she did locate sophisticated open records acts in several tribal Nations. She described the common features of the open records laws she reviewed, explaining that the Navajo Nation and the Cherokee Nation, for example, do not provide access to any information about individual members without their consent, and provide little access to other tribal records to non-tribal members. Judge Furman also flagged the portion of the memorandum noting that five states have already changed their self-authentication rules or statutes to include Indian Tribes and Nations (Arizona, New Mexico, Wyoming, Oregon, and Washington). He noted that the proposed amendment to Rule 902(1) appeared on page 253 of the agenda book, along with a helpful Committee note on page 254.

The Chair then asked the DOJ to offer comments on the proposal. Ms. Shapiro thanked Professor Richter for her fantastic memorandum and noted that the DOJ has written extensively on this issue and believes that an amendment is long overdue to respect tribal sovereignty and to treat the records of federally recognized Indian Tribes and Nations like the records of other government entities already included in Rule 902(1). She argued that there is no reason to require tribal records to surmount the many hurdles necessary to establish reliability under the business records exception to the hearsay rule. In addition, Ms. Shapiro noted that issues of Indian status are arising much more frequently now that Indian land covers much of the State of Oklahoma. She suggested that the amendment would also help Indian defendants who want to be tried by their Tribes, by making it easier for them to prove Indian blood. Ms. Shapiro further suggested that certifications satisfying Rule 902(11) that are currently utilized to authenticate tribal records may

present confrontation clause issues in criminal cases. The Reporter replied that every Circuit has rejected a confrontation clause challenge to Rule 902(11) certifications and that there is no confrontation problem for such certifications that do no more than authenticate an existing record.

The Chair then invited Jami Johnson, Assistant Federal Public Defender for the District of Arizona, to offer feedback on the proposed amendment. Ms. Johnson thanked the Committee for the opportunity to speak and informed the Committee that, in addition to being an Assistant Federal Public Defender, she is an enrolled citizen of the Choctaw Nation of Oklahoma. Ms. Johnson raised a concern about the DOJ's potential misunderstanding of the relevant statutes and stated that an amendment to Rule 902(1) would in no way help Indian defendants. For example, Ms. Johnson noted that the DOJ's letter in support of the amendment stated that an Indian defendant potentially would need to prove the status of a victim to have a criminal case moved to tribal court and away from federal court. Ms. Johnson stated that this is incorrect because an Indian defendant may always be tried in tribal court for crimes committed on federal land, regardless of whether the victim is Indian or not Indian. Only where there is a non-Indian victim and the case does not involve a major crime, as defined by the Major Crimes Act, would there be a need for such proof. Ms. Johnson also noted that in her 11 years practicing federal criminal law in Indian country, she had never seen the federal Government attempt to charge a non-major crime committed on federal land, regardless of whether the victim was Indian or non-Indian. Even if this type of case did occur where the victim's Indian blood was at issue, Ms. Johnson stated that there may be difficulty in accessing the records, whether self-authenticating or not. Based on this experience, Ms. Johnson did not see a benefit to this rule for Indian defendants.

On the other hand, Ms. Johnson reported significant downsides with respect to criminal defendants' ability to identify witnesses who may be called at trial to challenge tribal records that establish an element of the offense. For example, she noted that once the federal Government presents a tribal record with a signature and a seal, that essentially will end the inquiry into Indian status in most instances due to the lack of open records laws and the inapplicability of FOIA to the tribal Nations. Ms. Johnson emphasized that allowing tribal records alone to establish federal criminal jurisdiction would be particularly significant in Oklahoma, where many individuals with mixed tribal status live on reservations. Ms. Johnson also added that the status quo on authentication does not impair the Government's ability to prove its cases and at the same time maintains important safeguards for the rights of criminal defendants.

With regard to the supportive feedback received from some Tribes, Ms. Johnson also expressed concern about the very limited response rate regarding the proposed amendment. She noted that, while every one of the eight responding Tribes is a sovereign nation worthy of dignity and respect, only one of the respondents is a large Tribe: the Navajo Nation. She further noted that the Chickasaw Nation was the only medium-sized Tribe to respond to the Committee's request for feedback. She explained that all other responding Tribes are small, having fewer than 10,000 members with some having fewer than 1,000 members. Given that feedback was solicited from 578 Tribes, Ms. Johnson emphasized that the positive response received was very limited in nature. She further suggested that a Tribe may be reluctant to express opposition to a proposal rooted in respect for tribal sovereignty even if it had concerns about its application.

Judge Furman thanked Ms. Johnson for her comments and invited Committee members to ask questions. One Committee member asked Ms. Johnson for clarification regarding the significance of mixed occupancy of tribal land for the accuracy of tribal records. Ms. Johnson explained that such mixed occupancy does not affect the accuracy of tribal records but sweeps more criminal defendants and victims into federal court whose status is unclear or ambiguous. She explained that when a party's identity is an element of an offense, it becomes much more important to adequately investigate and produce evidence of status when that status is unclear or ambiguous. Judge Furman asked whether this status element is more likely to be contested or potentially contested in those circumstances. Ms. Johnson responded that uncertainty may not lead to a contest if there was adequate investigation on the front end. For example, she noted that defendants do not contest status in the large majority of these cases currently, because the defender has access to reliable documents and can interview custodians if necessary. She suggested that allowing these documents to be self-authenticating could increase instances in which a defender has legitimate doubts concerning Indian status but has no avenue to dispel those doubts in advance of trial.

Judge Furman then asked about the certification that the Government currently must present under Rule 902(11) to self-authenticate tribal records as business records. He suggested that, in his experience, the Government obtains this certification relatively close to trial. Judge Furman asked when defendants typically receive those certifications, and what kind of investigation is typically conducted in that scenario. Ms. Johnson explained that timing depends on the circumstance, and that in the vast majority of these cases, there's no dispute regarding Indian status that requires an investigation. She suggested that there is no consistent timing for receiving these certifications but that they are typically received a week before trial, which allows defense counsel to interview the tribal custodian to understand the recordkeeping practices and to subpoena the tribal custodian to testify if there are genuine concerns.

A Committee member then asked Ms. Johnson whether she was suggesting that the Committee should infer that tribal Nations are critical of the proposed amendment from the low rate of response to the request for feedback. Ms. Johnson responded that she did not intend to suggest that Tribes are critical of the proposed change based on the lack of widespread response. Still, she suggested that tribal Nations that harbored concerns about the proposal could reasonably conclude that abstaining from comment was superior to offering affirmative criticism of a proposal grounded in tribal sovereignty. She wanted to highlight for the Committee that 98% of tribal Nations offered no response and that the positive feedback received did not reveal a groundswell of support from tribal leaders. Ms. Johnson added that she does not view self-authentication as a matter of dignity or sovereignty, but as a matter of forgery. She suggested that there is nothing respectful or dignified about having inauthentic documents purporting to emanate from your Tribe admitted into evidence.

Ms. Shapiro highlighted for the Committee many instances in which self-authenticating documents currently are used to establish an element of a criminal offense and explained that allowing self-authenticating tribal records to establish the necessary status element of a criminal offense would be no different. Moreover, she emphasized that a defendant may always challenge authenticity, even if a tribal record is admitted. Ms. Shapiro reiterated that there is no rational reason for allowing the many entities already listed in Rule 902(1) to present self-authenticating

documents while denying the same treatment to sovereign Tribes. One Committee member asked whether it was appropriate for the Committee to determine the status of tribal documents given the treaties that govern relationships with tribal Nations. He asked whether the sovereign Tribes should retain full control over the status of their own records. The Chair noted that only records that a Tribe chose to sign and seal would become self-authenticating under an amended rule. The Committee member agreed that the Tribes could prevent self-authentication by declining to sign or seal particular records and was satisfied that the Tribes would retain control over the status of their own records even under an amended Rule 902(1).

The Chair then called the Committee's attention to the draft of the proposed amendment and Committee note on pages 253 and 254 of the agenda book. He suggested two separate Committee votes: 1) regarding approval of the rule text and 2) regarding the content of the Committee note. The Committee first voted to approve publication of the text of Rule 902(1) for public comment, with only the Federal Public Defender opposing.

The Committee next considered the language of the proposed Committee note. Professor Richter explained two bracketed items in the proposed Committee note for the Committee to consider. She directed the Committee's attention to the first bracketed item appearing on lines 14 through 17 on page 253 of the agenda book that contained a reference to Federal Rule of Criminal Procedure 6(e) that the DOJ included in its original Rule 902(1) proposal. Professor Richter reminded the Committee that it had previously discussed whether Rule 6(e) – which addresses the disclosure of grand jury information to tribal officials – offers an apt comparison for Rule 902(1) (which addresses the admissibility of tribal records). She noted that the draft Committee note utilized a "cf.*"* cite to indicate that Rule 6(e) offers a distinct but helpful analogy. Professor Richter noted that the second bracketed section appeared on page 254 of the agenda memo at lines 27 through 30. She explained that this bracketed material was added as a result of tribal feedback and emphasizes that the amendment concerns authenticity only, that other evidentiary requirements continue to apply (such as hearsay rules, relevance, and Rule 403), and that parties may still challenge the authenticity of the covered public documents at trial if there is a genuine dispute. The Reporter suggested that the second bracketed section should be its own paragraph and that he favored cutting out the final five words ("where authenticity is generally disputed"). He noted that a defendant can always challenge authenticity, and the Committee note should not appear to add a condition for doing so. With that change, the Reporter stated his support for including the material in the second bracketed section. Judge Furman recognized those suggestions as friendly amendments with respect to the second bracketed section on page 254, making the section a new paragraph, and striking the words "where authenticity is genuinely disputed."

As to the first bracket, the Reporter stated that using a "cf." signal to indicate the distinction between Criminal Rule 6(e) and Rule 902(1) was helpful. Judge Furman offered that he did not think the reference was necessary but saw no harm in it. Judge Furman suggested that the points made by the second bracketed section should go without saying because Rule 902(1) covers only authentication, but stated that he saw no harm in including the language and some potential benefit in underscoring the point that authenticity can be challenged at trial even if tribal records are admitted. Ms. Shapiro questioned whether the "cf." suggestion in the first bracket came from the DOJ, and Professor Richter stated that it was included in the draft Committee note accompanying

the DOJ's original proposal in May 2025 to show that tribal sovereignty was otherwise recognized within the Federal Rules. Ms. Shapiro opined that this was intended as a point of argument, and that the citation did not need to be included in the Committee note. The Chair recognized this as a friendly amendment to remove the first bracketed citation, which was accepted by the Committee. Ms. Shapiro confirmed that the DOJ was fine with including the second bracketed section, as modified by the Committee's discussion.

Judge Furman then called for a vote regarding approval of the proposed Committee note for publication, as amended to remove the first bracketed section with the "cf." citation and with the second bracketed section modified in the two ways proposed by the Reporter. Upon a motion and second, the Committee voted to accept the changes to the Committee note and to publish it for publication, with one objection.

VI. *Smith v. Arizona* and Rule 703/ *Peña-Rodriguez* and Rule 606(b)

The Chair next raised the issue of the Supreme Court's decision in *Smith v. Arizona* and whether amendments to Rule 703 are needed to reflect that decision. He referred members to Professor Richter's excellent memorandum on this issue, found at Tab 6 of the agenda book, at page 295.

Judge Furman provided the Committee with a recap of the issue, stating that in *Smith,* the Supreme Court held that a prosecution expert's testimony violated the confrontation clause of the Sixth Amendment when the expert conveyed the testimonial statements of an absent forensic analyst to support the testifying witness' opinion. The question for the Committee is whether that decision warrants an amendment of Rule 703, which permits experts to rely on otherwise inadmissible information in forming an opinion, and in certain circumstances, subject to a stringent balancing test, to disclose that information to the jury. Thus far, the Committee has been of the view that an amendment to Rule 703 is not needed in the event that *Smith* is construed to prohibit only the disclosure of testimonial hearsay by an expert because Rule 703 already prohibits such disclosure absent satisfaction of a stringent balancing test. On the other hand, Judge Furman noted that if *Smith* is interpreted more broadly to prohibit expert reliance on testimonial hearsay as well, that would pose a bigger problem for Rule 703, which authorizes expert reliance on inadmissible information when other experts would reasonably rely upon the information. Judge Furman observed that there is an emerging and deepening split on the issue of whether *Smith* regulates expert reliance on testimonial hearsay, and that many courts have construed the ruling to reach expert reliance upon testimonial hearsay, as well as disclosure of that information to the jury.

In light of that developing case law, Judge Furman reminded the Committee that it had requested a Reporter's memo proposing a "red flag" amendment to Rule 703 that would at least signal that inadmissible basis information may not be relied upon or disclosed under to Rule 703 when doing so would violate the Constitution. He acknowledged that the rules can never be applied in a way that violates the Constitution, but noted the concern that an unwary litigant or court might apply Rule 703 in an unconstitutional manner. Judge Furman also emphasized, as set forth in Professor Richter's memorandum, that there had been 88 decisions citing *Smith* in the six-month period between the Committee's last meeting and the completion of the agenda memorandum. He

highlighted that the Massachusetts Supreme Court held that its state law counterpart to Rule 703 "no longer comports with the right of confrontation." Judge Furman also noted that in light of the deepening split, it seems very likely that the Supreme Court will return to this issue in the near future and resolve the question of whether *Smith* applies beyond disclosure to expert reliance on testimonial hearsay. If the Supreme Court were to extend *Smith* to prohibit all reliance on testimonial hearsay, Judge Furman stated that the argument in favor of amending Rule 703 would be much stronger. Conversely, he noted that there would be a weaker case for an amendment if the Court were to clarify that the holding forecloses only the disclosure of testimonial hearsay.

Judge Furman reminded the Committee that it had also decided to reconsider whether to amend Rule 606, which prohibits post-verdict juror testimony regarding jury deliberations, to add a constitutional exception reflecting the Supreme Court's 2017 decision in *Peña-Rodriguez*. In *Peña-Rodriguez*, the Court held that the Sixth Amendment right to a fair and impartial jury requires post-verdict juror testimony when a juror makes a clear statement indicating that racial animus was a significant motivating factor in the decision to convict. Judge Furman noted that Rule 606 clearly conflicts with *Peña-Rodriguez* as written because it prohibits post-verdict juror testimony to impeach a verdict and offers no exception for such racially biased statements. Judge Furman also commented that most courts have narrowly construed *Peña-Rodriguez* to be limited to circumstances where there are clear statements of racial or ethnic animus. He explained that the argument for amending Rule 606(b) to include a constitutional "red flag" would be similar to the argument for amending Rule 703. On the other hand, Judge Furman emphasized that Rule 606 applies to a post-verdict situation in which courts generally are not having to make snap judgments about admissibility. He further noted that courts and litigants appear to be pretty familiar with the law in this area. Judge Furman concluded his introduction by noting that if the Committee is going to amend Rule 703 to provide a constitutional red flag, there's an argument for doing the same with respect to Rule 606.

Professor Richter added that Rules 606(b) and 703 stand on slightly different footing because it is clear that Rule 606(b)(1) as drafted is inconsistent with the Constitution as interpreted in *Peña-Rodriguez*. She noted that the extent to which Rule 703 may be capable of unconstitutional application in a criminal case remains unclear. She echoed Judge Furman, noting that most courts have narrowly construed the *Peña-Rodriguez* exception to Rule 606(b)'s no impeachment rule. She highlighted one notable exception — a Sixth Circuit opinion that extended the ruling to the civil context. Professor Richter directed the Committee's attention to one proposed amendment alternative for the Committee's consideration that appeared on pages 309 and 310 of the agenda book that would track the language in *Peña-Rodriguez* specifically to avoid any potential expansion of the constitutional exception through rulemaking. She noted that concerns about the unintended expansion of the constitutional exception to the no-impeachment rule through rulemaking was a significant factor in the Committee's decision to table a Rule 606(b) constitutional amendment in 2018. Given that the case law has not shown any significant expansion of the exception in the nine years since *Peña-Rodriguez* was decided and given that three states have amended their versions of Rule 606 to include specific language tracking *Peña-Rodriguez*, Professor Richter explained that the Committee may wish to consider this narrow amendment alternative. She explained that a second, more generic, amendment alternative was also provided on pages 313 and 314 of the agenda book for the Committee's consideration. She

explained that this generic alternative would offer more flexibility in case of future expansion of the constitutional exception to the no impeachment rule.

Judge Furman then opened the issue up for discussion. One Committee member supported the Rule 606(b) narrow fix but expressed the view that Rule 703 was not ripe for amendment. Judge Dever added that he believed that the Supreme Court would grant review on the Rule 703 issue. Judge Dever noted that the Standing Committee was generally skeptical of red flags in the rules. He offered examples, such as Rule 16 of the Federal Rules of Criminal Procedure that does not address *Brady* and *Giglio* and Rule 47 of the Civil Procedure Rules that does not mention *Batson* challenges. He opined that judges and lawyers are well aware of the constitutional issues underlying these rules despite the lack of red flags in rule text. As to Rule 606, Judge Dever also noted that there is no indication in the case law that judges are misapplying Rule 606 to exclude testimony required by *Peña-Rodriguez*. He also emphasized the Supreme Court's lengthy defense of the no-impeachment rule in *Peña-Rodriguez* and the policy choice that Congress made to prohibit post-verdict juror testimony in most circumstances. Judge Dever also opined that the proposed language in the narrow amendment alternative did not accurately track the holding in *Peña-Rodriguez.* He cautioned that the broader, more flexible amendment alternative would broadly expand the decision in a way that is inconsistent with the policy choice that Congress made. Judge Dever noted a similar issue that came up with respect to Criminal Rule 23 at the height of COVID regarding the defendant's ability to ask for a bench trial over the government's objection. He stated that he believed that the Committee was wise nine years ago in tabling amendments to Rule 606, and that there had been no problems in applying Rule 606(b) in the intervening nine years that warranted any fix.

Professor Richter agreed with Judge Dever that there was no indication in the case law that that judges or lawyers are missing the *Peña-Rodriguez* issue. She further acknowledged the difficulty in drafting an amendment that tracks the decision exactly. For example, she noted that the draft on page 310 of the agenda book would apply in the civil context because it covers "verdicts" and not only "convictions" and that the holding in *Peña-Rodriguez* applied only in the criminal context.

The Reporter then commented that the idea of the red flag is not that judges are unaware of the law, but that unschooled defense attorneys might not know that there is a constitutional argument out there because the Rule does not address it. He explained that it is also suboptimal to have a rule of evidence that is unconstitutional when applied as written and that this amendment would resolve that problem. But the Reporter also agreed that a line has to be drawn because there's a potential constitutional argument in every single case, and where to draw that line is difficult. Judge Furman noted that if the Committee were drafting Rule 606 today, it may proceed differently, but the question for the Committee is whether to revisit the issue nine years later.

Judge Furman then returned to consideration of potential amendments to Rule 703 and asked if anyone was aware of any cert petitions on the proper interpretation of *Smith*. Ms. Shapiro responded that she had not checked but that in all likelihood, one would be filed soon. With that context, Judge Furman then suggested that the Committee hold off on addressing Rule 703 to await a decision by the Supreme Court.

After hearing no objection to holding off on amendments to Rule 703 until the Supreme Court weighs in, Judge Furman then asked for the Committee's thoughts on moving forward with an amendment to Rule 606. On the one hand, he noted that there is an argument for an amendment because the rule on its face is unconstitutional. On the other hand, he acknowledged that an amendment may be a solution in search of a problem. Judge Dever then reiterated the concern that the Standing Committee might wish to see a much stronger argument for revisiting Rule 606, especially because many rules may have case law that calls their application into question and because tracking the language, as Professor Richter noted, would be very difficult to do in the rule. Judge Dever also emphasized that a Rule 606 inquiry comes after trial, and that the Court in *Peña-Rodriguez* described the many mechanisms in place to prevent juror issues during a trial, such as voir dire, juror misconduct being reported during a trial, and polling.

The Reporter also commented that an amendment may sometimes be appropriate after a Supreme Court decision to make a rule operable, such as the amendments to Rule 803(10) that Professor Richter noted in her memorandum. He offered that this change was not a red flag because it was necessary to make the rule operable. Judge Dever agreed that Rule 803(10) was a good example of a needed amendment. Judge Furman also agreed, remarking that if there were an easy way to conform Rule 606(b) to the Constitution, as was done with Rule 803(10), then there would be a stronger argument for an amendment. But he acknowledged that even the narrow approach proposed for Rule 606 could not be completely coextensive with *Peña-Rodriguez*.

Following this discussion, the Chair asked the Committee to vote on whether to keep Rule 606 on the agenda, noting that the Committee would continue to monitor Rule 703 to see if the Supreme Court weighs in. Judge Furman suggested that, unless there's a strong argument for revisiting it, Rule 606 should be removed from the agenda. One Committee member asked if the Standing Committee would oppose an amendment to Rule 606, and Judge Dever responded that he spoke only for himself but rested on the issues he raised. Another Committee member also asked if an amendment with general introductory language such as "unless otherwise provided" would be helpful, and Judge Dever again suggested that the Standing Committee may have the same concerns. With no more comments, and upon a motion and second, and with no opposition, Rule 606 was removed from the agenda.

VII. Possible Changes to Rules 104(a) and (b)

The Chair next addressed the last issue on the agenda, potential amendments to Rule 104. He directed the Committee's attention to the Reporter's memorandum found behind Tab 7, starting at page 333 of the agenda book. Judge Furman explained that Rule 104 governs the court's role in deciding preliminary questions about the admissibility of evidence. The first provision for the Committee's consideration is Rule 104(a), which provides that the court must decide preliminary questions about whether evidence is admissible. This rule, however, does not actually specify the standard of proof that the court must apply. Judge Furman explained that the Supreme Court held in the *Bourjaily* case that the standard for admissibility is preponderance of the evidence, but that standard does not appear in the rule. Judge Furman then explained that the Committee is also considering amendments to Rule 104(b), which governs "conditional relevance," that is, when the

relevance of certain evidence depends on whether a fact exists, then proof must be introduced sufficient to support a finding that the fact does exist. He explained that some commentators, most notably Professor Allen who was an invited guest at the meeting, have criticized the idea of conditional relevance as distinct from relevance generally. In the *Huddleston* case, the Supreme Court construed the Rule 104(b) standard to require sufficient evidence for a reasonable juror to find that a conditional fact exists.

Judge Furman then summarized the two recommended amendments, noting that if the Committee were drafting the rules in the first instance, it could do better than the existing rules. The first recommended change would be to add the preponderance-of-the-evidence standard explicitly to Rule 104(a), thus codifying the Supreme Court's holding in *Bourjaily*. The second recommended change would be to eliminate the concept of conditional relevance in Rule 104(b) and replace it with a uniform standard applicable to all relevance questions.

Judge Furman noted that one of the principal questions was whether to proceed with any amendment at all, with the case for amending Rule 104(a) fairly straightforward. Judge Furman observed that this issue arose in connection with the amendment of Rule 702 in 2023. In addition, one of the comments in connection with proposed Rule 707 also flagged that that rule contained no reference to the standard of proof. Judge Furman noted that the absence of an express burden of proof can also cause problems, as the Reporter's memo indicated with respect to the standard applicable to party opponent statements under Rule 801(d)(2)(A). Judge Furman added that while widespread evidence of problems may not exist, there are salutary reasons for an amendment to clear up the rule. The Reporter added that part of the reason to amend Rule 104(a) to add the standard of proof is to cut off potential arguments that its absence is significant where other rules address it. Adding the standard of proof would also be helpful to the unschooled lawyer because there is no way to discern the standard without legal research.

As to Rule 104(b), Judge Furman stated that he would give Professor Allen an opportunity to speak as one of the leading experts on the issue of conditional relevance, noting that there is an argument that the whole notion of conditional relevance is incoherent, unnecessary, and complicated. He reminded the Committee that it had discussed whether this rule is causing problems at its Fall 2025 meeting, which he explained was certainly something that should be considered in deciding whether to proceed. Judge Furman also pointed out that the Reporter's memo catalogued cases showing that courts have been confused by the concept of conditional relevance, most notably a 10th Circuit case from just this last year, which made the observation that conditional relevance is "very blurry and that a savvy lawyer can basically turn any question of relevance into a 104(b) conditional relevance question." Having said that, Judge Furman also commented that one question that he would like to address to Professor Allen and the Reporter is whether the confusion is impacting outcomes in cases.

Professor Allen then thanked the Committee for inviting him to speak and began his remarks by acknowledging the influence of the Federal Rules of Evidence. That said, Professor Allen opined that some mistakes were made in the original drafting of the Rules and that the understanding of certain issues had changed since the original enactment. Professor Allen then explained that part of the problem with Rule 104(b) is that the Rules as written suggest a difference

between relevancy under Rule 401 and conditional relevancy under Rule 104(b). But he noted that there is always a reason why evidence is relevant, whether that reason is found in the record itself, or simply in the mind of the decision-maker. For example, Professor Allen explained that if you try a case in Iowa involving nitrogen fertilizer, you don't need to put in evidence that nitrogen fertilizer is a dangerous commodity because jurors in Iowa are well aware of the properties of nitrogen fertilizer. In New York, you do. As another example, Professor Allen referenced a case in his casebook about a prison fight in which the disputed issue was who was the first aggressor. The defendant wanted to introduce evidence that when the guards came to his cell, they were putting on leather gloves. This prison was in a town where the prison was the main employer, and everybody knew that when the guards went to a cell putting on gloves, they intended to have a fight. The evidence of the gloves obviously increases the probability that the defendant was acting in self-defense. But if you try that case in New York or Chicago, people don't know that custom or practice in the prison. The only difference in these cases is the source of the knowledge necessary to connect this evidence by a chain of logic to the consequence. The evidence connecting the facts may be in the record or may be general knowledge already in the mind of the decision-maker.

Professor Allen characterized Rule 104 as a "mess" for all the reasons the Reporter described in his agenda memo and argued that forcing litigants and courts to distinguish between Rule 401 and Rule 104(b) relevance was a waste of resources. Professor Allen acknowledged that the issue of whether Rule 104(b) is worth changing is up to the Committee, and that the conceptual mess as he described it may not be a sufficient reason to amend the rule. Still, Professor Allen opined that all of the litigation efforts currently required to address Rule 104(b) issues could be avoided if the rule provided a simple, straightforward, reasonableness determination about the relevancy of evidence. Professor Allen also drew from personal experience as a consultant to law firms in complex cases and described a tremendous amount of effort and resources used to evaluate these questions. He explained that a reasonableness inquiry under Rule 104(b) would allow the trial judge to determine if a reasonable factfinder could see the connection between the evidence and the fact of consequence, and, if not, the judge could tell the litigants that they have to produce evidence. Professor Allen concluded his remarks by expressing the hope that the Committee would take this issue further and dig into the real transaction costs created by Rule 104(b) that are hidden by the cases.

Judge Furman thanked Professor Allen for his presentation and noted that the Reporter had identified Rule 104(b) as the worst rule in the Federal Rules of Evidence and the one he would most like to change. Judge Furman then directed Committee members to the proposal to amend Rule 104 on page 353 of the agenda book. Judge Furman explained that when he presented this issue to the Standing Committee at the January 2026 meeting, he had suggested that it would be a question of whether to proceed with both amendments or neither. He reported that there was some sentiment on the Standing Committee that there would be some virtue in continuing to move forward with Rule 104(a) even if the Committee decided not to address Rule 104(b). He explained that adding the preponderance standard to Rule 104(a) would be helpful for lawyers unfamiliar with *Bourjaily* and, further, that the Committee would likely include a standard of proof if it were writing Rule 104 today. The Reporter supported the idea of seeking Committee feedback and then

holding a vote regarding Rule 104(a) first. He also noted that the case law indicates problems applying Rules 104(a) and 104(b) that amendments could address.

The members then discussed the proposed amendment to Rule 104(a) to add the preponderance standard of proof. One Committee member commented that he had always found the distinction between Rule 104(a) and (b) and the necessary standards of proof in various circumstance unnecessarily confusing. Ms. Shapiro added that the DOJ supports the change to Rule 104(a) to add the standard of proof.

Based on this feedback, and with no other comments, Judge Furman called the question about whether to approve the amendments to Rule 104(a) for publication and public comment. This would involve the proposed language on page 353 of the agenda book and would add a sentence "Unless otherwise provided in these rules, the proponent must establish the existence of a preliminary fact by a preponderance of the evidence." Upon a motion and a second, and with no objection, the Committee approved the amendment to Rule 104(a) for publication and public comment, along with the draft Committee note.

Judge Furman then moved on to consideration of amendments to Rule 104(b), the so-called conditional relevance rule, calling the Committee's attention to the proposed amendments on page 253 of the agenda book. The Reporter explained the benefits of eliminating the concept of dependency created by the concept of "conditional relevance." He explained that this concept is problematic and confusing because the relevance of every item of evidence is dependent upon everything else. Another benefit of the proposed amendment is that it would no longer require "proof" that must be introduced sufficient to support a finding. This is helpful where the relevance question is not only about "proof" of relevance but also about logic and experience — somebody can determine that evidence is relevant without "proof." Under the new formulation, the Reporter explained that evidence would be relevant if the court determines the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making that determination, the amendment would allow the court to consider "the evidence itself, other evidence, and common knowledge and experience." The Reporter opined that this new language would also be helpful because Rule 401 currently contains no standard of proof.

Committee members then discussed the proposed amendments to Rule 104(b). One Committee member expressed support for the new language in the first sentence of the proposed amendment, arguing that it tracks the argument that lawyers must make to the judge on relevance issues. He expressed some concern about the "common knowledge and experience" language in the second sentence — suggesting that jurors are already reminded to rely upon common sense in their instructions and that it would be odd for an Evidence rule to direct a judge to use common sense. Another Committee member did not fully support the changes because judges routinely consider the issue of relevance with no problems. The Reporter explained that the change would address the standard of proof that the judge must apply in determining a relevance question, language that could also be added to Rule 401. The Committee member responded that this change is not needed in either place. Another Committee member expressed concern that the proposed amendment appears to define relevance in a slightly different manner than Rule 401. In addition, the Committee member observed that the proposed amendment would seem to change the purpose

of Rule 104(b), which could lead to more confusion. The Reporter responded that the amendments were not intended to change Rule 401, only to provide guidance for a judge in determining whether the standards of 401 have been met. Judge Furman interjected that the Committee might have added the amended language to Rule 401 if it were drafting from scratch, but that it was important to preserve the architecture of the existing rules in crafting amendments and that placement in Rule 104(b) would make more sense at this point in the history of the Rules.

Another Committee member asked whether Rule 104(a) would apply to all preliminary questions of admissibility except relevance under the proposed amendments, with Rule 104(b) covering only questions of relevance and deferring to the jury in appropriate circumstances. The Reporter agreed, explaining that the reason for that allocation is the idea that judges are no better at determining relevancy than juries are, but that judges are superior arbiters of other admissibility requirements, such as whether an expert's testimony is reliable. Another Committee member asked if the problem with the current rule is that it generates confusion between the concepts of "conditional relevancy" and "conditional admissibility." The Reporter agreed, explaining that courts sometimes apply the lower Rule 104(b) standard of proof to questions of conditional admissibility — such as the coconspirator exception — when those questions do not raise relevancy concerns and should be handled by the higher preponderance standard of proof. The Reporter opined that an amendment would alleviate some of this confusion, though it would need to retain language about "connecting up" admissibility requirements with later proof.

The Chair then referenced Professor Allen's remarks that substantial resources are wasted in trying to figure out the concept of conditional relevance and the necessary "conditions." He asked if trial judges or litigators were seeing resources wasted on litigating some of these issues or experiencing the confusion that we see in some of these cases. One Committee member responded that she had not seen problems with these rules in all the time she has litigated and presided over trials and sees the proposed amendment as a fix in search of a problem. She opined that people understand the idea that A is relevant only if B also can be proven. The Reporter noted that the cases did not reveal problems with judges so much as the parties who misconceive conditional relevance, although some cases did indicate that judges had made mistakes in this regard as well. Another Committee member argued that the amendment would be helpful because it would give the litigator language to explain to the judge why evidence should, or should not, be admitted. And while judges can instinctively make relevance decisions, this language has been missing from the dialogue and arguments in court. Ms. Shapiro added that DOJ practitioners do not seem to have a problem with this although it does come up. She added that the proposed amendments set out two different standards, a preponderance standard for preliminary questions of admissibility, and a lower sufficiency standard for relevance. She suggested that the way in which the amended rule would divide these concepts could be confusing and suggested a general preponderance standard for admissibility determinations with an "exception" for relevance determinations all in Rule 104(a). The Reporter responded that the Committee could not eliminate Rule 104(b) altogether without damaging the architecture of the Rules.

Although the Committee had been considering the amendment to Rule 104(b) separately from the previously approved amendment to Rule 104(a), Judge Furman asked whether both Rules 104(a) and 104(b) have to be amended together to avoid making Rule 401 questions subject to a

preponderance standard under an amended Rule 104(a). The Reporter agreed that an amendment to Rule 104(a) without a corresponding change to Rule 104(b) could be read to impose a preponderance standard for all relevance determinations that are not "conditional." The Federal Public Defender opined that both provisions should be amended because the concept of conditional relevance is extremely confusing and unnecessary.

Based on this discussion, Judge Dever made some suggested changes to the proposed Rule 104(b) language. To avoid any conflict with Rule 401, he suggested that Rule 104(b) could be amended to read that: in deciding relevance, "the court determines whether the trier of fact could reasonably find that the requirements of Rule 401 have been met." The Reporter noted this change as a friendly amendment. Another Committee member offered another friendly amendment to structure Rule 104(b) in exactly the same way as subsection (a). This would add language providing that to establish that evidence is relevant, "the proponent must demonstrate to the court that a trier of fact could reasonably find . . ." The Reporter suggested that Judge Dever's language was more direct and stated that it was not clear how this change was structured like (a). The Committee member explained that (a) says "the proponent must establish the existence of a preliminary fact by a preponderance of the evidence" and that (b) could also say that "the proponent must demonstrate, et cetera" to establish that evidence is relevant. At this point, the Chair suggested a break to coalesce around proposed changes to the draft amendments to Rule 104(b). Committee members then offered feedback on the changes and the Federal Public Defender member noted that he had to leave the meeting but would vote to move forward to publication and public comment for amendments to both (a) and (b) as a package.

Following the break, the Chair reconvened the meeting to share a revised version of the proposed changes to Rule 104(b) for discussion. This included a change to the first sentence in Rule 104(b) so that it reads: "To establish that evidence is relevant, the proponent must demonstrate to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met." Ms. Shapiro confirmed that she had withdrawn an earlier suggested revision to include the word "information" as foundation for a relevance finding because a jury could consider only "evidence" and not outside information available only to the judge in determining relevance. With these changes to the draft amendment, the Chair asked the Committee to vote on whether to amend Rule 104(a) and (b) together, or do nothing at all. Another Committee member suggested that the language in the second sentence of the proposed amendment to Rule 104(b) that read "In making its determination" was awkward because the first sentence no longer discussed the court making a determination. The reporter agreed and asked whether modifying the second sentence to read: "In making its relevance determination, the court may…" All agreed that this was a good fix. With this change, and upon a motion and a second, and with no opposition, the Committee voted to recommend amendments to Rule 104(a) and (b) to be published for public comment. (The Chair confirmed with the Federal Public Defender member after the meeting that he too supported the proposal as modified.)

VIII. Closing Matters

The Chair closed the meeting by inviting Committee members and liaisons to offer suggestions for panelists to participate in the Fall 2026 mini-conference regarding draft Rules 707 and 901(c), which will include a panel of technical experts to help the Committee understand the technology and refine definitions, and a panel of judges and practitioners to address the AI issues they are confronting and to comment on whether the proposed rules would provide a solution.

Judge Furman then thanked Judge Sullivan again for his service on the Committee and observed that the work of the Rules Committees shows government at its best. Although the rule-making process can be lengthy, he noted that it is a sign that the Committee is being appropriately cautious and considerate. Judge Furman also thanked the members of the Rules Committee Staff for their assistance and reminded the members that the next meeting will be in Boston, Massachusetts on October 15, 2026. The meeting was then adjourned.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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

[1] New material is underlined in red; matter to be omitted is lined through.

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. Evidence of the conviction is admissible only if:

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

(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 should not be 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 underlying that conviction. Rule 608 permits impeachment only by 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, 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 to properly weigh the conviction's effect on the witness's character for truthfulness.

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 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 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.

Changes Made After Publication and Comment

The Committee Note was slightly altered to emphasize the prejudice that may occur if a court allows the jury to hear that the accused committed a felony, but not tell the jury what the felony was.

Summary of Public Comment

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.

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 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." She also states that the prevailing application of the current test "violates defendants' constitutional rights by chilling the right to testify" and that "social science does not support the proposition that impeachment by prior convictions contributes to the truthseeking goal it seeks to serve."

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." 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."

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 the amendment "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." 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 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."

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."

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 . . . 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."

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."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 902. Evidence That Is Self-Authenticating

* * * * *

(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; 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

[1] New material is underlined in red.

(B) a signature purporting to be an execution or attestation.

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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. Furthermore, self-authentication of the public documents of Indian Tribes and Nations 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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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.~~ To establish that evidence is relevant, the proponent must demonstrate

[1] New material is underlined in red; matter to be omitted is lined through.

to the court that the trier of fact could reasonably find that the requirements of Rule 401 have been met. In making its relevance determination, the court may consider the evidence itself, other evidence, and common knowledge and experience. The court may admit the proposed evidence on the condition that ~~the~~ further proof be introduced later.

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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 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.

The amendment retains the provision allowing proof to be introduced later. It should be noted that allowing proof to be introduced later is within the discretion of the court under Rule 104(a) as well.