ADVISORY COMMITTEE ON EVIDENCE RULES

Hearing on Proposed Amendments to Rule 609 and new Rule 707

January 15, 2026

ADVISORY COMMITTEE ON EVIDENCE RULES
January 15, 2026
10:00 a.m. – 11:30 a.m. (Eastern)

Hearing Schedule & Order of Witnesses

Please note that all times are Eastern. Timing is approximate and subject to change. Each witness will have 10 minutes. Please keep your remarks brief so there will be ample time for questions from committee members. Each witness should be prepared to start after the previous witness concludes and the Chair calls the next witness.

	Time Slot	Name	Organization	Rule(s)
Chair's Welcome and Opening Remarks at 10:00				
1	10:05–10:15	John Blume	Cornell Law School (Coalition for Prior Conviction Impeachment Reform)	Rule 609
2	10:15–10:25	Thomas Allman	Retired General Counsel, BASF Corporation	Rule 707
3	10:25–10:35	Mary D'Agostino	Hancock Estabrook	Rule 707
4	10:35–10:45	Alex Dahl	Lawyers for Civil Justice	Rule 707
5	10:45–10:55	Jeannine Kenney	Hausfeld LLP	Rule 707
6	11:10–11:20	Robert Levy	Exxon Mobil	Rule 707
7	11:20–11:30	Joseph Zaki	Loko AI	Rule 707
Final Questions & Closing Remarks at 11:30 (estimated)				

TAB 1

From: John H. Blume
Sent: Thursday, January 1, 2026 2:18 PM
To: RulesCommittee Secretary
Cc: Anna Roberts; Julia Simon-Kerr
Subject: Proposed Amendment to FRE 609

Dear Rules Committee:

I have asked to testify on January 15. I plan to speak in favor of the proposed amendment to FRE 609 maintaining that, although modest, it is a step in the right direction. My testimony will be based primarily on my empirical research which has established that the current version of FRE 609 prevents defendants, even those subsequently proven to have been wrongfully convicted, from testifying at trial.

Sincerely,

John H. Blume

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
Director, Cornell Death Penalty and Juvenile Justice Projects
112 Myron Taylor Hall
Ithaca, NY 14853
(607) 255-1030

TAB 2

To: Evidence Rules Advisory Committee

Re: Summary of Allman Testimony regarding Proposed FRE 707

From: Thomas Y. Allman, January 7, 2026

I appreciate the opportunity to share my observations about the Proposed Rule 707 as published for public comment.

Summary of Comments

The adoption of Rule 707 in its current form is premature for three reasons: (1) it seeks to solve a problem which may not exist, namely that parties will routinely offer generative AI without expert testimony and (2) a rule dealing with admissibility of such evidence should not be linked to Rule 702 but should be a (3) standalone rule focused on black-box evidence lacking reliability, including a presumption against admissibility, absent good cause.

Background

As former General Counsel, BASF Corporation (retired 2004), and Chair Emeritus, Sedona Conference Working Group One, I served on the E-Discovery Panel at the 2010 Duke Litigation Conference which advocated for replacement of an unsuccessful preservation "safe harbor" which had been enacted as part of the 2006 Amendments. As I noted in 2009, "[t]o say that [then] Rule 37(e) has been met with intellectual disdain is putting it "mildly" since it "seems to protect against sanctions only in situations where [they] were unlikely to occur." Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments,* 3 Fed. Cts. L. Rev. 25 (2009). Consistent with that recommendation, the current version of Rule 37(e), effective in 2015, decoupled the duty to preserve from its evidentiary roots and incorporated it into the Federal Rules, adopting a standard of care of reasonableness which has been successful. Something akin to that effort is required here.

No Need for Action Now

The motivation for enacting Rule 707 is said to be that it is possible that movants will offer machine generated output through either a non-expert or a certification of authenticity. As was noted in ***Federal Judicial Conference Evidence Rules Committee Releases Possible New Rule Pertaining to Artificial Intelligence***, June 2, 2025, however, this seems improbable:

> "Given the highly technical nature of artificial intelligence, machine learning, and the like we think these examples are unlike to ever occur, and would be risky for the proponent of the evidence even to try to present such evidence doing so through an expert. . . . [E]ven if the Committee's examples are theoretically possible, they are

> quite unlike to happen in practice. Any proponent that went through the trouble to put together such evidence would want the jury (or other factfinder) to give it the full weight that the proponent thinks it deserves, and expert validation would be much more persuasive than some lay witness who would be destroyed on cross examination by being unable to explain the technology."

This paper, as published as part of the **Drug & Device Law blog** is available at https://www.druganddevicelawblog.com/2025/06/federal-judicial-conference-evidence-rules-committee-releases-possible-new-rule-pertaining-to-artificial-intelligence.html#:~:text=So%20we%20think%20that%20limiting,nothing%20at%20all%20in%20practice.

My search of existing case law as of January 2026 was unable to locate any examples when such an attempt has been made to offer generative AI conclusions without an expert. [Something akin to that frustration has been expressed in the Reporter's Memorandum on Rule 901(c) at 21 in connection with Rule 901(c) Proposals. *See* Agenda Book, November 5, 2025 at 170 of 317 (finding no reported case discussing a proffered deepfake)].

Rule 707 Should be Independent of Rule 702

Rule 707 should concentrate on the unique forms of AI-generated output which involve unsupervised machine learning, as distinct from more traditional results of AI. Accepting that as the appropriate goal, there is no need to specify, as the current draft does, that it is applicable only when evidence is offered "**without an expert witness.**" As the Drug and Device Law Blog points out, "machine-generated evidence presents" issues of validity and other problems "no matter what witness presents it." Lawyers for Civil Justice makes a similar point in its Public Comment at 2 ("**Matching Text to Intent: Revising Proposed Rule 707 to Close the Rule 702 Gap and Define Reliability Standards for Machine Opinions**"), January 5, 2026, when recommending that "the new rule should be custom-made for its purpose, not a cross-reference to an existing rule. Further,

> "Rule 707 should not require each reader to interpret the language of Rule 702(a)-(d), the vocabulary of human expert witnesses, into the world of machines, models and algorithms. . . .The Advisory Committee is capable of defining admissibility standards for machine opinions, and it should do so. The additional time required to get the rule right is well worth it –and, in fact, the developing judicial experience will certain inform improvements to the rule."

The Reporter's Memorandum of October 1, 2025 to the Advisory Committee on Evidence Rules (hereinafter Rule 707 Memo) expressed concern that a Rule 707 "without an expert witness" precondition would create a "confusing system" in which a court must first evaluate

the machine learning under Rule 707 but then also deal with the expert testimony under Rule 702. Agenda Book, November 5, 2025 (pages 117-118 of 317). However, there is no reason to believe courts are not up to the task, as demonstrated in *Matter of Weber*, 220 N.Y.S. 3d 620 (N.Y. Sur. 2024), where a purported expert sought to rely on calculations generated by an AI program (Microsoft CoPilot) arguing that doing so was generally accepted in the field of fiduciary decisions. The court found the calculations could not be credited as they were unreliable both as to his efforts and because of the use of AI where the expert could not recall what input or prompts he had used and the responses to the court's inquiries were not repeatable. It concluded that when evidence has been generated by an artificial intelligence product or system, counsel had an affirmative obligation to provide advance notice of an intent offer it into evidence and the evidence sought to be admitted would be subject to a *Frye* hearing prior to its admission. *Id* . at 635.

Rule 707 Should Concentrate on Black Box Computerized Evidence

The rule should be directed specifically to black box computerized evidence whether an expert is used to introduce such evidence or not. An AI program can be self-taught through unsupervised machine learning and create its own operational rules that are not well understood even by the program's developers. Edward J. Imwinkelried, ***The Challenge That the Advent of Artificial Intelligence (AI) Tools Poses***, 108 Marq. L. Rev. 621, 627-48 (2025). The Author quoted Mssrs. Grimm, Grossman & Cormack as stating that:

> "If the proponent of the evidence cannot even explain how the AI operates in a way that can be understood by the trier of fact (including assuring them that it only is being used under the conditions for which it was designed and that there is sufficient confidence in its accuracy), then the evidence produced from it should not be admitted by the court." ***Artificial Intelligence as Evidence***, 19 NW. J. Tech. & Intell. Prop. 9, 16 (2021)

The Supreme Court in *Kumho Tire* made *Daubert* factors applicable not just to scientific evidence but to all other forms of expert testimony. *Kumo Tire Co. v. Carmicahael*, 526 U.S. 137, 149-150 (1999)(noting issues). A new Rule 707 could expand and alter the factors for AI use. However, the Reporter's Memorandum correctly stressed that if "machine learning is not explainable," it may be necessary to adopt a presumption against admissibility with the possible exception that the methodology is verified by testing and showing results that indicate a low rate of error." Rule 707 Memo, id at 6. Something akin to a presumption against admissibility without a showing of good cause should be considered when drafting the new Proposal.

TAB 3

MARY L. D'AGOSTINO
(315) 565-4500

January 9, 2026

VIA E-MAIL

Rules Committee Staff, Office of the General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle NE
Room 7-300
Washington, DC 20544

Re. *Outline of Anticipated Testimony Concerning Proposed Federal Rule of Evidence 707*

To Whom It May Concern,

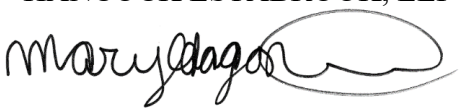
Please accept this letter as an outline of my anticipated testimony in connection with the January 15, 2026 hearing on the proposed amendments to Federal Rule of Evidence 707. I am a mid-level trial attorney with experience in civil litigation, including matters involving expert and technology-based evidence. My testimony is offered based on my professional experience and observations and does not reflect the position of any organization or client.

I. Introduction
   a. Identification and professional background
   b. Experience litigating in federal court
II. Strengths of the Proposed Federal Rule of Evidence 707
III. Practical Concerns or Areas Needing Clarification
   a. Increased pretrial proceedings focused on reliability issues
   b. Greater need for disclosures about AI systems, methodologies, and inputs
   c. Possible confidentiality and trade secret disputes around AI tools
   d. More frequent use of experts by both proponents (and challengers) of AI-generated evidence
   e. Potential complexity and costs similar to *Daubert*-type reliability hearings
   f. Litigation over the scope of the rule's exclusion for "simple scientific instruments" (or what machine-generated evidence encompasses).
IV. Questions?

I anticipate the my testimony will be brief, but I appreciate the opportunity to participate in the Committee's consideration of this proposed amendment.

Respectfully submitted,

HANCOCK ESTABROOK, LLP



Mary L. D'Agostino, Esq.

MLD/

TAB 4

PUBLIC COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES

MATCHING TEXT TO INTENT: REVISING PROPOSED RULE 707 TO CLOSE THE RULE 702 GAP AND DEFINE RELIABILITY STANDARDS FOR MACHINE OPINIONS

January 5, 2026

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Evidence Rules ("Advisory Committee") in response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on proposed new Federal Rule of Evidence ("FRE") 707 ("Preliminary Draft").[2]

INTRODUCTION

The Advisory Committee has identified important admissibility issues raised by artificial intelligence and machine learning. Machine outputs that reflect inferences, predictions, or conclusions pose serious reliability concerns. The Advisory Committee is rightly concerned about bias, analytical errors, the "black box" nature of AI systems, and that "a machine cannot be cross-examined." Ensuring that a proponent of such evidence cannot "evade the reliability requirements of Rule 702 by offering machine output directly"[3] is sound and necessary.

But the Preliminary Draft does not communicate what the Advisory Committee seems to intend. Although the Advisory Committee contemplates a rule making it "difficult" or "sometimes

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence*, 109-111 (Aug. 2025) ("Preliminary Draft"), https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf.

[3] Proposed Committee Note, Preliminary Draft at 110.

impossible"[4] to admit machine opinions without expert testimony, the Preliminary Draft reads as creating a new pathway for such admission. The proposed rule provides a mechanism for admission: *if* machine opinions satisfy Rule 702(a)-(d), *then* they may be admitted without human testimony. Courts and lawyers will read this as authorization, not as a hurdle or prohibition. The permissive language—"the court may admit"—signals achievability, not restriction. Nothing in the rule text indicates that adversarial testing through expert testimony is strongly preferred, that machine opinions are disfavored, or that satisfying the standards without expert witnesses is challenging and should be rare.

The draft Committee Note cannot override the rule text. Although the draft Note explains that "the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert"—and that the rule is "not intended to encourage parties to opt for machine-generated evidence over live expert witnesses"—the rule itself does not express these limitations. The proposed revisions discussed at the Advisory Committee October 2025 meeting, such as clarifying that the standards "will be difficult to meet—and sometimes impossible to meet—without presenting expert testimony"[5] or suggesting limiting instructions to address the inability to cross-examine machine opinions,[6] highlight the intended caution. Yet these additions cannot fix the rule's text, which does not convey that machine opinions should rarely, if ever, be admitted without expert testimony. The rule must function by virtue of its own text.

The new rule should be custom-made for its purpose, not a cross-reference to an existing rule. Rule 707 should not require each reader to interpolate the language of Rule 702(a)-(d), the vocabulary of human expert witnesses, into to the world of machines, models, and algorithms. Courts and lawyers will struggle with the linguistic mismatch. The Advisory Committee is capable of defining admissibility standards for machine opinions, and it should do so. The additional time required to get the rule right is well worth it—and in fact, the developing judicial experience will certainly inform improvements to the rule.

This comment provides several recommendations intended to assist the Advisory Committee in its important work to fashion a useful and appropriate rule.

I. THE PRELIMINARY DRAFT DOES NOT REFLECT THE ADVISORY COMMITTEE'S INTENT

A. The Committee's Intent Is Restrictive

The Advisory Committee's explanatory materials reveal an appropriately cautious, protective approach towards the admissibility of machine-generated evidence. The Advisory Committee memo explains that "the concern is that it might be unreliable, and yet the unreliability will be

[4] Memo from Daniel Capra to Jesse Furman, et al., Nov. 4, 2025 ("October Revisions"), available at https://www.uscourts.gov/sites/default/files/document/2025-11_evidence_rules_commitee_agenda_book_final.pdf, 318.
[5] *Id.*
[6] *Id.*

buried in the program and difficult to detect."[7] The draft Committee Note lists concerns about "analytical error or incompleteness, inaccuracy or bias built into the underlying data or formulas, and lack of interpretability of the machine's process."[8] The memo acknowledges that "the hearsay rule is likely to be inapplicable because...a machine cannot be cross-examined."[9]

The Advisory Committee's goal appears to be preventing parties from evading Rule 702's reliability requirements by offering machine-generated analysis directly rather than through expert witnesses. The Advisory Committee identified the potential gap: when a human expert uses machine learning to reach a conclusion, Rule 702 applies,[10] but if the same machine-generated analysis is offered directly—through a lay witness who merely operated the program, or with only authentication under Rule 902(13)—Rule 702 might not obviously apply.[11] The Advisory Committee wants to close this gap by requiring the same reliability scrutiny regardless of how machine-generated analysis is presented.

The October Revisions to the Committee Note are aimed at conveying this intent:

> It is anticipated that these reliability standards will be difficult to meet—and sometimes impossible to meet—without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.[12]

Similarly, Professor Siffert's proposed addition acknowledges the cross-examination problem:

> A human expert can be cross-examined, and the jury will be able to weigh the expert's testimony accordingly. But it may be more difficult to attack the weight of machine output...the inability to cross-examine is a concern. Accordingly, the court should consider providing a limiting instruction that machine-generated evidence is subject to error and that evidence should not be assumed to be reliable—or unreliable—simply because it was produced by a machine.[13]

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[7] Preliminary Draft at 102.
[8] Draft Committee Note, Preliminary Draft at 109.
[9] Preliminary Draft at 102.
[10] *See*, *e.g., In re Marriott International, Inc., Customer Data Security Breach Litigation*, 602 F. Supp.3d 767, 787 (D. Md. 2022) (expert's "data analysis," consisting of "Click[ing] 'Go'" on a set of AI "algorithms," excluded under Rule 702); *In re Celsius Network LLC*, 655 B.R. 301, 308-09 (Bankr. S.D.N.Y. 2023) (excluding, under Rule 702, an AI generated expert report); *Concord Music Group, Inc. v. Anthropic PBC*, 2025 WL 1482734, at *3 (Mag. N.D. Cal. May 23, 2025) (Rule 702 exclusion of paragraph of expert report containing AI hallucinated false citation); *Ferlito v. Harbor Freight Tools USA, Inc.*, 2025 WL 1181699, at *4 (E.D.N.Y. April 23, 2025) (allowing report that expert claimed had only been "confirmed," but not written by AI). *Cf. Matter of Weber*, 220 N.Y.S.3d 620, 633-34 (N.Y. Sur. 2024) (excluding AI-generated expert declaration under state *Frye*-based standard).
[11] LCJ has found no judicial decisions applying the Federal Rules of Evidence, or state equivalents, to AI-generated evidence without any expert support.
[12] *See supra* n. 4.
[13] *Id*.

These suggestions reflect concern about a fundamental problem: machine opinions admitted under Rule 707 cannot be cross-examined. This is elemental; admitting substantive conclusions without any opportunity for cross-examination about those conclusions is a radical departure from adversarial process. When a human expert testifies, cross-examination can explore:

- Why this conclusion rather than alternatives?
- What factors were weighted and how?
- What assumptions underlie the analysis?
- Can the analysis be replicated, or could a different result be achieved using the same inputs?
- Does the tool that produced the output hallucinate?
- Has the tool been tested for bias (*e.g.* algorithm bias, learning bias, data collection bias, deployment bias, historical bias, user bias)? If so, has it been recalibrated based on those tests? Is the expert aware of such issues?
- Was the tool designed for this specific use case, or is it a non-standard or "off-label" use?
- Does the reasoning account for case-specific circumstances?
- What is the expert's track record? Potential biases? Financial interests?
- How certain is the expert about this conclusion?

None of these questions can be asked of a machine. Even if the machine process is validated as generally reliable, the opposing party has no opportunity to challenge the "reliable application of the principles and methods to the facts of the [specific] case."[14] The machine evaluates data and reaches a conclusion—but what data does it prioritize? What alternatives did it reject? How confident is the prediction? These matters cannot be probed without a human expert who adopts the conclusion and can explain and defend it, and often not even then.[15]

The October Revisions reflect that machine opinions should rarely, if ever, be admitted without expert testimony, and certainly not without good cause.[16] Moreover, "unexplainable" or "black box" results should not be admissible at all. But the proposed rule text does not adequately convey this meaning.

B. The Proposed Rule 707 Text Creates a Pathway for Admission

Proposed Rule 707 states: "When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d)." This is permissive language creating a pathway for admission. The structure is: IF machine-generated evidence satisfies Rule 702(a)-(d), THEN the court may admit it. This is a route, not a barrier. The rule provides a checklist—satisfy 702(a)-(d)—and checklists invite attempts to comply.

[14] Fed. R. Evid. 702(d).
[15] *See* cases cited in n.10, *supra*.
[16] Showings of good cause are required under several existing federal rules. *See* Fed. R. Evid. 107(b)(2); Fed. R. Civ. P. 5.2(e), 6(b)(1), 6(c)(1)(C), 16(b)(2, 4), 26(b)(2), 26(c)(1), 30(b)(4), 33(b)(4), 35(2)(a), 43(a), 47(a), 55(c), and 73(b)(3). The common theme is that the relief being sought is extraordinary and requires the movant to justify the request.

Lawyers will read proposed Rule 707 as an invitation to introduce machine opinions without expert testimony, and they will prepare evidence to satisfy Rule 702(a)-(d). They will argue: "We've satisfied the rule's requirements, so admission is warranted." Courts may feel obligated to admit if the proponent has checked the boxes. The rule implies that satisfaction of its requirements justifies admission. Without clear textual indication that such admission should be rare or disfavored, courts will apply the rule as written.

In contrast, restrictive language might say: "Machine opinions ordinarily shall not be admitted without testimony from a qualified expert who adopts such opinions as the expert's own." That conveys prohibition with a narrow exception. Or: "Machine opinions are admissible only in exceptional circumstances when expert testimony is unavailable and the reliability of the opinion is so clear that the lack of opportunity for cross-examination is not material."

The proposed rule does not communicate that the pathway for admission of machine opinions without an expert should be rare, difficult, or disfavored—and the Committee Note cannot establish that meaning.

C. The Committee Note Cannot Decree the Rule's Meaning

The draft Committee Note says the proposed rule:

> …is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert.

But the rule text *does* encourage this choice by making it available. A party considering whether to use machine opinions would have a clear rule telling them how to do it. The text authorizes what the Note disclaims.

The October Revisions to the Committee Note would add to the attempt to convey what the rule text does not. The proposed language stating that reliability standards "will be difficult to meet—and sometimes impossible to meet—without presenting expert testimony" is crucial information about how the rule should operate. But this idea is absent from the rule text that governs judges and lawyers.

A rule should be understandable on its own text. A Committee Note cannot dictate a meaning that the rule does not have; it cannot transform permissive text into a hurdle or prohibition. As a practical matter, some courts and lawyers do not consult Committee Notes, and even when they do, the text governs.[17] The Rules Enabling Act requires a committee note—not as a directive or

[17] *In re Sealed Case*, 141 F.3d 337, 343 (D.C. Cir. 1998) (Advisory Committee Note to Fed. R. Civ. P. 26(c) is not authoritative: if a rule and note conflict the rule must govern).

necessary interpretation, and not even as practice advice—but rather as a form of legislative history.[18] The rule text should be capable of standing on its own.

No doubt, some judges and lawyers would read and understand the Advisory Committee's protective intent from the explanatory materials and interpret the Preliminary Draft of Rule 707 restrictively. But others would apply the permissive text as written without the benefit of the Note and admit evidence whenever they conclude proponents have satisfied the stated requirements. This would create inconsistency and could incentivize forum shopping. The problem is predictable—and cannot be solved by suggesting a limiting instruction.

D. Suggesting a Limiting Instruction Does Not Remedy the Text

A prompt in the Committee Note for judges to issue limiting instructions to juries is another step further removed from the rule text. Although well-intended, the proposed October Revision acknowledging the cross-examination problem and suggesting a limiting instruction is a paltry work-around for a structural problem with rule text. As with Rule 702, a curative instruction is no substitute for judicial gatekeeping. A limiting instruction warning jurors that machine evidence "is subject to error" and "should not be assumed to be reliable...simply because it was produced by a machine" may be a good idea in a particular case, but making such a suggestion is not *rulemaking*—it cannot pinch hit for a rule establishing admissibility standards.

E. The Placement of Rule 707 Does Not Suffice to Inform Most Readers

The placement of Rule 707 in FRE Article VII ("Opinions and Expert Testimony") is, unfortunately, of limited value in communicating the rule's scope. Most courts and practitioners don't think structurally about the FRE; they focus on the text of the rules. The term "machine-generated evidence" will be viewed expansively even if the proposed rule appears in Article VII rather than Article IX. The following recommendations should help.

II. RECOMMENDATIONS

A. Rule 707 Should Make Expert Testimony the Default and Allow for Objection

Since the Advisory Committee intends Rule 707 to make it "difficult" and even "sometimes impossible" to admit machine opinions without an expert witness, the rule should say so. It should establish a default or presumption that machine opinions are admissible only though an expert and therefore Rule 702 governs. This makes sense because if a human expert adopts the machine's opinion, the proponent would be required to satisfy Rule 702, and if the court concludes that the standards are met, then the expert's explanation will be subject to cross-examination. The reliability of AI technology is not sufficiently understood to contemplate admission of machine opinions without an expert. A necessary component of such a default rule is a mechanism to object to admission of machine opinion without an expert. And the rule

[18] 28 U.S.C. § 2703 ("In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views.").

should expressly state that the court must find the machine opinion admissible (*i.e.*, the 104(a) standard) before it can go to the trier of fact.

B. The Rule Should Establish Standards for Machine Opinions Rather than Requiring *Ad Hoc* Extrapolations of 702(a)-(d)

The Preliminary Draft requires that machine-generated evidence "satisf[y] the requirements of Rule 702(a)-(d)." But Rule 702 is written for human expert testimony, and its language requires translation and extrapolation to apply it to machine output.

- **Rule 702(a)** refers to "the expert's scientific, technical, or other specialized knowledge."[19] The machine cannot be an "expert" and does not have "knowledge" in this sense—it has programming, algorithms, and training data. How do courts and parties determine whether "the machine's knowledge will help the trier of fact"?[20] The draft Committee Note attempts to translate the words of Rule 702 into the 707 context, but the rule should *be* the translation rather than require every reader to concoct their own translations.

- **Rule 702(b) and (c)** require that "the testimony" is "based upon sufficient facts or data" and "the product of reliable principles and methods."[21] But machine output is not "testimony."[22] The draft Committee Note says this requirement should focus on "whether the training data for a machine learning process is sufficiently representative to render an accurate output,"[23] which is a good interpolation and should be in the rule text.[24]

- **Rule 702(d)** requires that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."[25] Machine output is not an "expert's opinion." Who applies the principles and methods—the programmer? The user? The machine itself?[26]

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[19] FED. R. EVID. 702(a).

[20] "Algorithms are not omniscient, omnipotent, or infallible. They are nothing more than a systematic method of performing some particular process from a beginning to an end. If improperly programmed, if the analytical steps incorporated within them are erroneous or incomplete, or if they are not tested to confirm their output is the product of a system or process capable of producing accurate results (a condition precedent to their admissibility), then the results they generate cannot be shown to be relevant, reliable, helpful to the fact finder, or to fit the circumstances of the particular case in which they are used." *Marriott International*, 602 F. Supp.3d at 787.

[21] FED. R. EVID. 702(b) and (c).

[22] Thus, the AI aspect must be "separately evaluate[d]" from the expert testimony itself. *Celsius Network*, 655 B.R. at 308.

[23] Draft Committee Note, Preliminary Draft at 111.

[24] *See Celsius Network*, 655 B.R. at 308 (evaluating "the underlying source material" used by AI, the expert's familiarity with that material, any "standards controlling the operation of the [AI],"and any "errors" in the AI-generated output).

[25] FED. R. EVID. 702(d).

[26] *See Weber*, 220 N.Y.S.3d at 634 (citing "due process issues" that "arise when decisions are made by a software program, rather than by, or at the direction of a [human]").

Courts will struggle with the linguistic mismatch between "expert," "testimony," "opinion," and "knowledge" on the one hand, and machine algorithms on the other.[27] The two bullet points in the draft Committee Note are simultaneously inadequate and over-reaching for a Note. The Advisory Committee is capable of defining admissibility standards for machine opinions, and it should do so *in the rule*. A revised draft Rule 707 might include:

- **Training data sufficiency and bias**: What underlying data was used? Is that data representative? How much is enough? What if bias exists?
- **Validation adequacy**: Has the process been validated for the specific purpose to which it is being applied? What constitutes proper validation? Must it be independent? In similar circumstances?
- **Reliability**: Can the process be repeated with similar results?
- **Error rates**: How are error rates established? What rates are acceptable?
- **Explicability**: Is the underlying methodology sufficiently transparent or explainable? How explainable must the process be? What about "black box" systems?[28]
- **Proprietary systems**: How can courts assess trade secret algorithms?

Courts and lawyers need and will appreciate this type of rule guidance. The rule should focus courts and parties on the reliability of the analysis, not the source. It should make clear that "unexplainable" results are not admissible.

There's an additional *rulemaking* reason for Rule 707 to stand on its own rather than incorporate Rule 702 by reference. If the Advisory Committee were to promulgate the current draft Rule 707, and then return to it at some future date to examine its operation, it would likely find that caselaw and practice concerning machine opinions have developed *under Rule 702*. Thus, any future adjustments of Rule 707 would inevitably pose the question—and the temptation—of altering Rule 702. At that point, the Advisory Committee would once again ask: should we write a new rule? But by then, there will be years of opinions and practice under the Rule 707-incorporation-of-Rule 702 rubric, which would complicate both options. In other words, if structuring Rule 707 to incorporate Rule 702(a)-(d) is motivated in part by the goal of protecting Rule 702, then it could prove to be a Pyrrhic act that instead causes a greater need for a Rule 702 amendment in the future.

[27] *See Concord Music*, 2025 WL 1482734, at *3 ("attorneys and experts [may not abdicate] their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers").

[28] Even without AI, experts are quite capable of designing biased algorithms capable of generating the desired result no matter what inputs are used. *See In re Avandia Marketing, Sales Practices & Products Liability Litigation*, 2024 WL 4582876, at *8 (E.D. Pa. Oct. 25, 2024) (describing a "falsification analysis" that established that a purported "regression analysis" generated "positive and statistically significant relationship[s]" even when completely irrelevant inputs – "monthly beef production, Colorado River flows, U.S. carbon emissions, and Hershey's expenditures" – were substituted).

C. Rule 707 Should Use the Words "Machine Opinions" Rather than "Machine-Generated Evidence"

The phrase "machine-generated evidence" declares a far broader scope than the Advisory Committee intends for Rule 707. "Machine-generated evidence" includes:

- Emails, letters, memos, and other documents drafted by LLMs[29]
- Raw data (GPS coordinates, timestamps on photos)
- Simple measurements (thermometer readings, electronic scale weights)
- Basic calculations (spreadsheet formulas, database queries)
- Computer-generated visual aids and accident reconstructions
- Opinions and analysis (AI predictions, algorithmic inferences, machine conclusions)

Only this last category is within the intended scope of a new Rule 707—inferences, predictions, and conclusions. These are "machine opinions," analogous to expert opinions, and should be referred to as such in the rule. This terminology:

- Focuses on inferential, analytical, or predictive outputs rather than all machine-generated evidence
- Parallels "expert opinions" from Rule 702, making the connection clear
- Could suggest a title parallel to the titles of Rules 701 and 702, such as "Opinions from Machines"
- Excludes routine measurements and calculations that don't raise Rule 702-type concerns
- Eliminates confusion about the rule's scope

The distinction between machine-generated evidence and machine opinions is functional: thermometers measure; spreadsheets calculate; databases retrieve stored information. None of these machine-generated outputs involve drawing inferences or making predictions. In contrast, AI analysis of whether a doctor breached the standard of care, whether stock price movements establish causation, or whether a copyright has been infringed are "opinions" requiring the type of scrutiny Rule 702 provides for human expert opinions.

Using "machine opinions" would engender less uncertainty than the phrase "machine-generated evidence," and would also obviate the need to expressly exclude "basic scientific instruments," the definition of which is very likely to engender new and needless motion practice on the introduction of evidence that has traditionally been largely unquestioned outside authenticity.[30]

D. Consider Incorporating a Tailored Version of Rule 703

Rule 703 defines what information may be the basis of an expert's testimony. Like Rule 702, it is written for human witnesses and uses terms that apply to humans, not to machines or algorithms. However, rule guidance on questions concerning the basis for machine opinions will probably be even more important than for human experts because machines have the capacity to

[29] Many such documents would and should be treated as "business records" under FED. R. EVID. 803(6).
[30] *See infra* II. E.

analyze and synthesize vastly more data much more quickly. Perhaps a revised proposed Rule 707 could address this topic, or perhaps a new stand-alone rule is preferable to the Advisory Committee.[31] Either way, guidance for courts and parties may be equally if not more important than Rule 703.

E. The Rule Should Omit Reference to "Simple Instruments"

The Preliminary Draft's final sentence attempts to address overbreadth: "This rule does not apply to the output of simple scientific instruments."[32] But this concept, and this wording, are so vague that the rule would function better if it were omitted. The draft Committee Note explains that this sentence is "intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer."[33] Professor Roth's proposed revision tries to clarify: "This rule does not apply to the output of simple scientific instruments when the machine that generated the evidence is accessible to, and the extent of its reliability well known to, the general public."[34] Neither version makes it clear—in fact, both make it more likely that parties will raise the question.[35] Limiting Rule 707 to "machine opinions"—as suggested above—would define the scope of the rule more clearly and thereby lessen the need for an express disclaimer.

III. TIMING

Although questions and problems concerning admissibility of machine opinions are likely to increase in frequency, the need for an appropriate rule vastly outweighs the utility of an immediate rule. An incomplete or inadequate rule is certain to cause more harm than allowing courts to address emerging issues as the Advisory Committee works to refine its proposal. In fact, some development of actual issues in the courts would likely to lead to a better rule. If revising the Preliminary Draft and incorporating some actual judicial experience takes another year or even longer, the benefits would be well worth the price.

CONCLUSION

The Advisory Committee has identified a real problem that should be addressed: machine opinions raise legitimate reliability concerns that need uniform admissibility standards. The Committee's goal—preventing evasion of Rule 702's requirements—is sound.

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[31] *See Celsius Network*, 655 B.R. at 308 (AI generated a "172-page Report" "within 72 hours" that "would have taken over 1,000 hours to complete" if it had been "human authored"; "it took [the expert] longer to read [the] report than to generate it"; report excluded because the expert "did not review the underlying source material…nor d[id] he know what his team did (or did not do) to review and summarize those materials").

[32] Preliminary Draft at 109.

[33] Draft Committee Note, Preliminary Draft at 111.

[34] *See supra* n. 4.

[35] "Simple" and "well known to the general public" are so vague as to invite litigation, and these terms focus on accessibility rather than function. A better distinction is between measurements/calculations (which don't raise opinion-reliability concerns) and inferences/predictions (which do). A thermometer doesn't opine; it measures. An AI medical diagnostic system doesn't measure; it infers and concludes.

But proposed Rule 707 doesn't accomplish that goal. The text is permissive; it enables rather than restricts the admission of machine opinions without expert witnesses. Although the Advisory Committee intends restriction, the Preliminary Draft communicates that intent in the Note but not the rule text, which is insufficient. The solution is to make the rule text match the intent. The rule should require expert testimony as the default. It should establish reliability factors—training data, validation, error rates, explicability—rather than require each judge and lawyer to extrapolate these ideas from the language of Rule 702(a)-(d). The rule should explicitly require the proponent to establish the foundation for machine opinions. And it should use "machine opinions" instead of "machine-generated evidence" to define the rule's scope. The rule must work without the Note, whose purpose is to provide rulemaking context and history rather than necessary definition.

The importance of this effort justifies the time required to draft a customized rule, and the judicial experience that emerges during this process will help inform it.

TAB 5

HAUSFELD

January 5, 2026

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Via Electronic Submission
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle Northeast
Washington, D.C. 20544

Re: Request for Comments on Proposed Federal Rule of Evidence 707

Dear Members of the Committee:

Thank you for the opportunity to comment on the Committee's proposed new Federal Rule of Evidence 707 regarding machine-generated evidence.

I am a partner at Hausfeld LLP, a global claimants' law firm with a focus on private enforcement of competition laws, with nearly 250 attorneys worldwide. Within the United States, Hausfeld's practice comprises predominantly large, complex, class actions focusing on antitrust matters but also including consumer, technology, privacy, data breach, environmental, and human rights class actions. Our practice universally involves expert testimony—whether legal, scientific, economic, or technical—including offensive use and defending challenges to our experts, as well as challenging the reliability of expert testimony offered by the opposing party. I am a member of the Committee in Support of the Antitrust Laws (COSAL), the American Association of Justice, and Working Group 1 on electronic evidence of the Sedona Conference.

Although the proposed Rule is a thoughtful, well-intended, and thoroughly studied effort to address the brave new world of artificial intelligence, I recommend that the Committee suspend consideration of adopting proposed Rule 707 to: (1) evaluate whether use of machine-learning output in litigation materializes in the manner the Committee anticipates and to assess whether the existing rules are up to the task of preventing attempts to circumvent Rule 702; and (2) if the Committee decides to advance the proposed Rule, substantially narrow it to better target the type of evidence that appears to animate the proposed Rule.

What I understand the Committee to intend by the Rule is that machine generated output that is generated for a litigation, is introduced to prove the truth of that output, and is predictive or inferential in nature akin to the types of conclusions, inferences, estimates, and predictions experts make, then the output must be assessed under Rule 702. But the existing Federal Rules of Evidence provide sufficient authority for Courts and litigants to challenge the qualifications of any witness or affiant offered to authenticate the output of artificial intelligence tools and thus the underlying methodology and

technology of the tool generating that output. The Rules have demonstrated marked robustness as new technology has rapidly developed over the last two decades. The advent of artificial intelligence is likely to be no exception.

Additionally, the proposed Rule, as drafted, is also so vastly overbroad that it is likely to result in confusion and delay from unnecessary side litigation over otherwise ordinary testimony and evidence admissible under other Rules as well as evidence that has long been accepted as capable of generating reliable results.

1. **The Current Rules Are Up to the Task of Ensuring That Predictive or Analytical Output is Assessed Under Rule 702.**

The proposed Rule was driven by concern that "Rule 702 is not clearly applicable if the machine output is admitted without any expert testimony – either directly or by way of a lay witness." And the committee note expresses the concern that:

> Where a testifying expert relies on such a method [one that makes predictions or draws inferences], that method—and the expert's reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable.
> . . . .
> If the machine output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

I disagree.

The existing Rules of Evidence require that, whether introduced by a witness to authenticate the evidence or directly using self-authentication, any opinion about the accuracy of machine-generated evidence (and, consequently, the reliability of the evidence itself) would be subject to Rule 702 when drawing that opinion requires scientific, technical, or specialized knowledge. And that would assuredly be the case if output from a machine-learning tool were the evidence at issue.

The rules regarding opinion testimony and authenticity work together to prevent parties from circumventing Rule 702 in the way the Committee fears. As the Committee knows, Courts regularly

exclude purportedly lay opinion offered under Rule 701 when the opinion requires scientific, technical, or other specialized knowledge beyond the ken of a layman. *See, e.g.*, *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir.2004) (affirming district court decision to analyze lay testimony under Rule 702's requirements where the testimony was based on a predictive model of profits that was not within a lay person's understanding). Indeed, Rule 701 was amended in 2000 specifically to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 2000 Advisory Committee Note.

The conclusion above holds true even when a witness or affiant is not offering an opinion *equivalent* to the output of machine learning tools but is instead *authenticating* the output of machine-learning that draws those conclusions.

That is because authentication under Rule 901(b)(9) or 902(13)[1] necessarily requires a witness or affiant to render an *opinion* about the accuracy of the result of a computer generated process or system. 902(13) also requires that the certification of accuracy be made by a "qualified" person. And when attesting to accuracy "requires specialized knowledge about the technology involved, the certification should establish that the person signing the certification qualifies as an expert in such matters" and must "recite facts to establish that the accurate-result opinion satisfies Rule 702." *See, e.g.*, *Magee v. Noe*, No. 20-cv-183, 2023 WL 116349, at *5 (S.D. Miss. Jan. 5, 2023) (excluding data output certified under 902(13) because the "accurate-result" opinion did not comply with Rule 702); *Lorraine v. Markel Am. Ins. Co*., 241 F.R.D. 534, 561 (D. Md. 2007) (Grimm, J.) ("[T]there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which gets into the realm of scientific or technical evidence under Rule 702."). *See also* Paul W. Grimm & Kevin Brady, 19 Sedona Conf. J. 707, 720 ("Although Rule 902(13) and (14) do not refer to Rule 702, careful lawyers would be wise to ensure that the affiant providing the certificate meets the requirements of an expert witness under Rule 702 if the underlying facts to be authenticated involve scientific, technical, or specialized knowledge, as the underlying facts often do.").

While "accuracy" may not overtly require that the systems be "reliable," those Rules still bring the reliability of machine-generated output into the ambit of Rule 702. While accuracy is a different standard than reliability (e.g., an outcome may be accurate but the model that generated it may not be reliably so, or a model may be reliably *in*accurate), for purposes of applying Rule 909(b)(9) and 902(13) to machine-learning tools, this distinction is irrelevant. Where the underlying computer process is a model or machine-learning tool that offers "predictions or draws inferences," accuracy necessarily

[1] Thus, the authenticity foundation that satisfies Rule 901(b)(9) can be established by a certification under Rule 902(13) rather than the testimony of a live witness.

requires a determination of reliability.[2] 901(b)(9) was designed for situations in which the "accuracy of a result is dependent upon a process or system which produces it." Fed. R. Evid. 901(b)(9) Advisory Committee Note. While "accuracy" may not overtly require that the systems be "reliable," because of the nature of AI output, those Rules bring the reliability of machine-generated output into the ambit of Rule 702. And in the case of machine-learning tools, a determination of accuracy would require a finding of *both* that the system used valid methods to produce an accurate result and that it did so in a particular instance.

Thus, it is premature to conclude that evidence reflecting the output of machine-learning tools that predict outcomes, provide estimates, or draw inferences would evade Rule 702 given the protections already provided under the Rules. Indeed, non-AI *predictive* tools have been available to lay persons for more than a decade (e.g., Excel's Analysis ToolPak, which allows lay person to run multiple regressions and other complex data analysis) and courts have effectively managed admissibility of such evidence as science and technology has evolved without need of a new rule to prevent their misuse in litigation. At best, the question whether potential use of artificial intelligence in litigation necessitates a new Rule is unclear.

If the Committee believes it must take action now, at the very most, it should merely clarify that under Rules 901(b)(9) and 902(13), where attesting to the accuracy of a computer/electronic process or system or its results requires scientific, technical, or specialized knowledge, Rule 702 applies to both the affiant/witness and the process or system.

2. The Proposed Rule is Vague and Vastly Overbroad

If the Committee moves forward with a new Rule 707, it must be far more narrowly tailored. As drafted, it is likely to sow confusion, generate side litigation, disrupt the civil process, and prejudice litigants.

Although the Committee's concern seems to be animated by the increasing availability and adoption of artificial intelligence tools/machine learning—those that conduct analysis, provide predictions, or draw inferences from a data set much like a testifying expert—and the risk they may be used to circumvent Rule 702, the Rule sweeps in *all machine-generated* evidence, without defining that term. Today,

[2] In the Reporter's memo presented at the April 19, 2024 Committee Meeting, the Reporter commented on the relationship between accuracy and reliability with respect to AI, observing that: "[T]here is a good deal of material on machine learning that emphasizes accuracy [of AI]." Apr. 1, 2024 Reporter's Mem. at 7 (Apr. 19, 2024 Agenda Book Tab 1A) (citing https://www.evidentlyai.com/classification-metrics/accuracyprecision-recall ("Accuracy is a metric that measures how often a machine learning model correctly predicts the outcome. You can calculate accuracy by dividing the number of correct predictions by the total number of predictions. In other words, accuracy answers the question: ***how often the model is right***?" (emphasis added)).

virtually *all* evidence in a civil case is machine generated: emails, text messages, word documents, excel spreadsheets, voicemails, powerpoint presentations, electronic logs of any type, instrument readings, databases and extractions thereof, medical records and health systems, medical monitors and meters, medical imaging devices, speedometers, and so on. Although only machine-*learning* output is the target of the rule, "machine-generated evidence" would capture virtually everything. Such broad scope is likely to raise unnecessary challenges about whether, say, a routine database-generated extraction or the output of a regularly calibrated cardiac monitor must also satisfy Rule 702, requiring a data scientist or a medical engineer rather than the person whose job it is to use and rely on the data.

The exclusion of "simple scientific instruments" and the examples of the same identified in the Committee Note doesn't resolve this problem, it only exacerbates it. That narrow exception suggests, together with the Committee's rejection of an exception for "routinely relied upon software," that (1) the scope of the "machines" covered by the Rule is extremely broad; and (2) even simple scientific instruments fall into the category of mimicking expert opinion but have been excepted from the Rule.

The "Draft Alternative – Machine Learning," discussed in the Reporter's Memorandum in the November 5, 2025 Agenda Book solves some of these problems and is superior to proposed Rule 707 by limiting the Rule to AI, but still sweeps in AI output that is not the focus of the Rule. While I understand the Committee's reluctance to limit the Rule because of the difficulty of defining AI, technology has evolved while existing Rules have been in effect. And there is no evidence that courts cannot readily identify what is expert opinion masquerading as ordinary evidence.

The limiting feature of the proposed Rule—that the evidence "would be subject to Rule 702 if testified to by a witness"—does not cure the overbreadth. It addresses only the *nature* of the output not who produced it, why and when it was generated, by whom, and the purpose for which it is introduced at trial.

Based on the Committee's deliberations and the proposed Committee Note, the Committee's principal concern appears to be about the output of machine-learning tools that, much like an expert opinion, not only offers analysis or predictions but is (1) generated *for purposes of the litigation* (not pre-litigation output), (2) is both generated and offered into evidence by its proponent or an agent of the proponent, and (3) is *offered to prove the truth of a fact* relevant to the outcome of the case. This is what experts do and why they are used.

Yet the proposed Rule isn't limited to those uses. It instead sweeps in *all* machine-generated output regardless of who created it, when and why it was created, who is seeking to offer it, and the purpose for which it is introduced at trial. It focuses *only* on the nature of the output. There are many types of machine-generated evidence that would fall within the scope of the Rule that were generated *before* the

litigation began, produced in discovery by a party, and introduced into evidence *and* used against the producing party that are commonly used as fact evidence. Application of the Rule to such evidence, or even side litigation over whether the Rule applies, may result in delay in the litigation, prejudice to the proponent of that evidence, and produce absurd results.

For example, many companies use advanced models and algorithms in the ordinary course of their businesses to regularly generate predictions about or analyze sales, profits, losses, prices, supply, demand, and other market characteristics. Where relevant, a company will produce those machine generated results to its opponent. Once authenticated, the receiving party may seek to admit them into evidence at trial as business records, as party-opponent admissions, as evidence not offered for the truth, and so on. But because the *output* is generated by a machine and is predictive or analytical in nature, it falls under the scope of Rule 707, prompting a challenge *from the party who created the output* and forcing the receiving party to establish the reliability of its opponent's own tool and the qualifications of a hostile sponsoring witness or affiant—an obviously impossible task. This is not the Committee's intent and may seem an absurd outcome, but the Rule does not preclude it.

And, as the Committee knows, increasingly it is the algorithms or models *themselves* that are subject matter of the litigation and thus their output will be used as evidence at trial. [3] For example, algorithmic pricing is a rapidly developing area of antitrust law and is the target of public enforcement as well as civil lawsuits, including *In re RealPage Inc. Rental Software Antitrust Litigation*, which involves an AI-driven "revenue management" service allegedly used to restrict supply and inflate rent (and in which my firm serves as co-lead counsel). Such algorithms and their output, though predictive in nature, may be liability evidence in an action. And yet, *solely* because of their nature, they would fall under Rule 707. This is clearly not what the proposed Rule intends to capture, but as written, it is squarely within its scope.

3. Recommendations

a. Because there is no evidence the existing Rules of Evidence are not up to the task preventing machine-learning output generated for purposes of the litigation from passing as ordinary evidence, the Committee should suspend promotion of it to evaluate how courts are evaluating use of AI.

[3] The Committee acknowledged that it is not the intent to apply Rule 707 where the case is about machine learning. *See* November 2025 Agenda Book at 136 ("If the case is about the use of machine learning . . . it would seem that the basic rules of evidence are applicable. If someone is run over by a self-driving Tesla, then any evidence about the algorithms, biases, etc. would clearly be provable at trial subject to standard evidentiary principles.")

b. If the Committee determines there is an urgent need to address AI generated output, it should consider modest clarifications to the Rules 901(b)(9) and 902(13) to ensure the accuracy (read, liability) of AI is testified to by a qualified affiant or sponsoring witness.

c. If the Committee determines to move forward with Rule 707, it should apply only to:

- "Machine-learning output." This is the clear purpose of the Rule and the only subject of the proposed Note. Reaching more broadly to any machine-generated output will only create confusion and delay;
- Output generated for purposes of the litigation. The Committee's deliberations make clear that it is not intending to cover pre-existing machine learning output that is liability or damages evidence (i.e., the subject matter of the action or proof of fact relevant to the elements of the claim); and
- Output generated by the proponent of the evidence or its agent, just as expert opinion is.

I appreciate the deliberative process the Advisory Committee has undertaken to develop proposed Rule 707 and the opportunity to submit these comments.

Respectfully,

Jeannine Kenney

TAB 6

Draft Outline of Planned Testimony on Proposed FRE 707
Date: January 1, 2026 (Scheduled to testify on January 15, 2026)
Witness: Robert L. Levy, Executive Counsel, Exxon Mobil Corporation (Spring, Texas)
Subject: Proposed FRE 707 — Machine-Generated Evidence

I. Purpose & Position

Purpose: To support careful rulemaking on machine-generated evidence and to recommend targeted revisions to FRE 707 that preserve clarity, prevent misapplication, and maintain the functionality of existing evidentiary rules.

Position (summary): The Committee's goal is sound, but FRE 707's placement, scope, and cross-reference to FRE 702—as currently drafted—will confuse application and invite inappropriate objections to routine business records.

II. Background & Corporate Context

Modern enterprises depend on integrated technology ecosystems (ERP, CRM, SCM, EAM, HCM, BI and advanced analytics, including AI).

These systems generate voluminous data (transaction logs, audit trails, sensor data, telemetry, cybersecurity alerts, communications, automated reports) that routinely appear in litigation and investigations.

Rules governing technology-derived information must distinguish routine data from expert-type opinions produced by machines.

III. What FRE 707 Gets Right

Recognizes the policy issue: Fact finders could presume that some machine outputs have the weight of expert opinions and could mislead if admitted without appropriate scrutiny similar to Rule 702 standards.

Seeks to promote reliability: A legitimate objective that aligns with the Evidence Rules' commitment to trustworthy proof.

IV. Risks & Gaps in the Current Draft

A. Scope Ambiguity:

The draft's broad phrasing risks being read to cover all machine-generated data, not just machine-generated opinions.

Potential consequence: Collateral attacks on routine records (e.g., ERP logs, automated compliance reports) that should be evaluated under Rules 803(6), and 403, not 707.

B. Placement Problem (Article VII):

Locating 707 in Article VII ("Opinions and Expert Testimony") limits its application to expert-type opinions, yet the rule's title and text does not say it applies only to expert opinions.

This mismatch could cause misunderstanding and encourage objections to business records.

C. Incorporation of Rule 702:

Rule 702 governs human experts. Importing 702 into 707 conflates human judgment with the integrity of data systems and complicates the development and interpretation of both rules over time.

D. Definitions Missing:

No clear distinction between "machine-generated opinion" (analytical or inferential output) and "machine-generated data" (observed, recorded, or routine system outputs).

V. Recommendations (Targeted Textual Revisions)

<u>Define Key Terms</u>

Machine-Generated Data: Information automatically recorded by a device or system (e.g., sensor readings, time stamps, transaction logs), without inferential analysis.

Machine-Generated Opinion: An inferential or analytical conclusion produced by an automated system (including AI/ML) that interprets or models facts beyond simple recording (e.g., predictive risk scores, fault diagnosis, anomaly classifications).

<u>Clarify Scope</u>

707 applies only to machine-generated opinions.

Express carve-out: 707 does not govern admissibility of routine machine-generated data; such data remains subject to 803(6), 901, 1001–1003, 403, and other applicable rules.

Keep 707 Standalone (Do Not Incorporate 702 by Reference)

Provide fit-for-purpose criteria for machine-generated opinions (e.g., transparency of method, validation evidence, known limitations, error rates, versioning and change-control, auditability).

Placement & Commentary

If retained in Article VII, state in the text that 707 applies only to expert-type opinion evidence produced by machines.

Include Committee Note explaining: (a) the carve-out for routine data; (b) the continued application of other Evidence Rules; and (c) that 707's standards do not convert data integrity issues into expert-admissibility issues.

TAB 7

Written Testimony for Proposed Federal Rule of Evidence 707 (Machine-Generated Evidence)

Date: January 5, 2026
Hearing Date: January 29, 2026
Submitted by: Joseph Zaki (individual technical commenter)
Affiliation: Founder & CEO, Loko AI

Position

I support the objective of proposed Rule 707: machine-generated outputs offered without an expert should not evade reliability scrutiny and should be evaluated under Rule 702(a) through (d) as appropriate.

Narrow issue

Rule 707 will be harder to administer if reliability disputes immediately become debates about model theory while the foundational record is not sufficiently intact to permit meaningful adversarial testing. Courts cannot meaningfully apply Rule 702(b) and Rule 702(d) to machine outputs when the underlying record is incomplete, altered, selectively exported, or otherwise not independently testable.

Proposed clarification for the Committee Note

I respectfully suggest a concise, technology-neutral sequencing concept that helps courts apply existing Rule 702 reliably in the Rule 707 context:

Two-step reliability sequence

1. **Integrity and independent testability of the underlying record.** Whether the proponent can provide objective, testable information sufficient to show what the system processed and what material transformations occurred, such that meaningful adversarial testing is possible.
2. **Validity of the inference under Rule 702.** Once the record is independently testable, the court can assess inference reliability under Rule 702, including sufficiency of data and reliable application to the facts.

Hard boundary (where Step 1 stops): Step 1 is not a demand for full system transparency, not a deep dive into model theory, and not a perfection standard. Step 1 is satisfied when the

proponent provides objective records that make missing inputs, material edits, or material transformations detectable and allow an opposing party to test the proponent's claims. Once that condition is met, the court should proceed to the ordinary Rule 702 reliability inquiry.

No new doctrine: This is not a proposal to modify authentication doctrine (Rules 901 to 903) or to create new discovery obligations. It is a practical sequencing concept intended to make Rule 702 analysis coherent when applied through Rule 707.

Scalability across different categories of machine outputs

This approach is technology-neutral and scales by materiality. For simple automated outputs, Step 1 may be satisfied with minimal documentation (source, time, basic provenance, and basic chain-of-custody indicators). For more complex machine outputs, Step 1 may require additional objective artifacts, but still only to the extent needed to make the offered output independently testable. The court can calibrate what is "sufficient" to what is actually in dispute, without mandating disclosure of proprietary architecture.

Non-exclusive integrity factors courts may consider

To determine whether integrity is sufficient for meaningful adversarial testing, courts may consider non-exclusive factors such as:

- **Input completeness and tamper-evidence.** Whether there are objective indicators sufficient to detect missing, reordered, or altered inputs that materially affect the output.
- **Provenance and binding.** Whether the offered output can be traced to specific inputs, time intervals, and material transformations, including segment or interval binding where relevant.
- **System and execution identity.** Whether the proponent can identify the system or model version and execution context that could materially affect results, at a level sufficient for independent testing (not full disclosure).
- **Reproducibility and variability disclosure.** Whether outputs are reproducible, or whether sources of variability are identified in a way that is relevant to reliability.
- **Separation from human modification.** Whether post-processing, edits, or presentation-layer changes that could affect interpretation are distinguished from the machine-generated output.

These are not requirements and should be applied proportionally to the case and the category of output.

Suggested Committee Note insertion (draft)

"In applying Rule 702(a) through (d) to machine-generated evidence under Rule 707, courts may consider threshold integrity conditions necessary for meaningful adversarial testing. Such conditions may include whether the proponent can provide objective records sufficient to detect missing or altered inputs, identify material transformations, and identify the system or model

version and execution context at a level sufficient to permit independent testing. This sequencing concept is intended to assist courts in applying Rule 702, not to modify authentication requirements or to create new discovery obligations. What is sufficient may vary with the nature of the machine-generated output and the issues in dispute."

Respectfully submitted,
Joseph Zaki
Founder & CEO, Loko AI
joseph@loko.ai

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PUBLIC SUBMISSION

Comment from Zaki, Joseph

Posted by the **United States Courts** on Dec 30, 2025

Docket (/docket/USC-RULES-EV-2025-0034)
/ Document (USC-RULES-EV-2025-0034-0001) (/document/USC-RULES-EV-2025-0034-0001) / Comment

Comment

This comment addresses proposed Federal Rule of Evidence 707 (Machine-Generated Evidence).

The attached submission supports the rule's objective and proposes a narrow, administrable clarification for the Committee Note: a two-step reliability framework under which courts first assess the integrity of the underlying record (completeness, tamper-evidence, provenance sufficient for adversarial testing) before evaluating inference validity under Rule 702(a)–(d).

The comment does not propose new authentication doctrine or discovery obligations. Rather, it explains why Rule 702(b) and (d) cannot be meaningfully applied to machine-generated output unless record integrity is established as a predicate, and offers technology-neutral factors courts may consider to make Rule 707 workable in practice.

Please see the attached PDF for the full analysis and proposed Committee Note language.

Attachments 1

Comment on FRE 707 (Joseph Zaki)

Download (https://downloads.regulations.gov/USC-RULES-EV-2025-0034-0012/attachment_1.pdf)

Give Feedback

Comment on Proposed Federal Rule of Evidence 707 (Machine-Generated Evidence)

Submitted by: Joseph Zaki (individual technical commenter)
Topic: Committee Note clarification to make Rule 707 administrable in practice

1. Executive summary

I support proposed Federal Rule of Evidence 707 and its goal: ensuring that machine-generated outputs offered without an expert witness are subject to the reliability protections of Rule 702(a)-(d), rather than admitted through a procedural loophole. The Committee Note correctly recognizes that authenticity mechanisms, including Rule 902(13), do not establish reliability.

This comment proposes one narrow, high-impact improvement: an explicit “two-step” framing for courts applying Rule 702 through Rule 707.

Step 1: Integrity of the record. The court must be able to determine that the inputs, transformations, and outputs are complete, untampered, and traceable in a way an independent verifier can check.

Step 2: Validity of the inference. Only after Step 1 is satisfied does it become meaningful to assess the inference itself under Rule 702, including fit, testing, error rates, and validation.

This framing is not a rewrite of the rule text. It is a proposed clarification for the Committee Note so judges can administer Rule 707 without being forced into abstract model debates when the underlying record is not custody-grade.

2. Why Step 1 is necessary for Rule 707 to function as intended

Rule 707 incorporates Rule 702 standards when machine output is offered without a human expert. In practice, reliability disputes will often collapse into an unresolvable posture if the proponent cannot establish the integrity of the record that produced the output.

The Committee Note already anticipates this reality. It highlights that machine-generated evidence may be unreliable in ways that are “buried” in the program and difficult to detect, and that cross-examination is not available for a machine. The same logic applies to the record layer: if the opposing party cannot independently test whether the underlying inputs were altered, incomplete, or selectively exported, then Rule 702’s reliability inquiry becomes a contest of assertions rather than evidence.

A workable Rule 707 practice requires an administrable threshold concept: whether the proponent has supplied sufficient integrity and provenance information to enable adversarial testing.

This comment does not propose a new authentication or chain-of-custody requirement, and it does not modify Rules 901–903. The point is narrower: where Rule 707 applies Rule 702 to machine output, the court cannot meaningfully evaluate Rule 702(b) ("sufficient facts or data") or Rule 702(d) (reliable application to the facts of the case) unless the proponent supplies a record that is complete and tamper-evident enough to permit adversarial testing.

3. The two-step reliability framework

Step 1: Integrity of the record (custody-grade).
The threshold question is whether the court and the opposing party can determine what exactly the system processed and whether that record has been altered or selectively presented. This is a separate question from whether the system's inference is valid.

A technology-neutral integrity showing can be supported through objective mechanisms that are well understood in digital evidence practice and can be implemented across vendors and domains. Examples include:

- **Deterministic segmentation of time-series inputs** so that the boundaries of "what was processed" are stable and reviewable (for example, fixed windows or deterministic event rules).
- **Capture-time sealing** or equivalent mechanisms that bind cryptographic digests to the data at the point of capture or capture-path processing.
- **Chain continuity** capable of detecting missing, reordered, or inserted segments.
- **Manifest-level integrity protection** so a verifier can detect tamper or partial export.
- **Independent verification tooling or procedures** that allow third parties to validate a package without relying on vendor services.

Nothing in these integrity examples is intended to impose a general disclosure regime or to require exposure of proprietary implementation details. They describe the kinds of case-specific, minimum evidentiary artifacts and verification hooks that may be necessary for the proponent to carry its burden under Rule 702 when the output is offered under Rule 707.

This is consistent with an evidence architecture principle: the "minimal structure" needed so an independent verifier can reconstruct and check what happened.

Step 2: Validity of the inference (Rule 702-grade).
Once integrity is established, the court can evaluate the inference itself using Rule 702(a)-(d), consistent with the Committee Note's focus on inputs and validation.

A technology-neutral inference-validity showing can include:

- **Model identity and versioning** (for example, immutable model references or hashes) so the output is not a moving target.
- **Execution context identity** (runtime environment identifiers) because materially different environments can produce materially different results.
- **Input binding** to connect any inference artifact back to exact input segments and timestamps.
- **Parameter disclosure** for inference-time settings relevant to determinism and meaning.
- **Reproducibility mode or a non-determinism statement**, so the court can understand whether repeated runs should match and why not.

4. Why this is administrable for judges

The purpose of Rule 707 is not to force judges to become machine learning experts. It is to prevent reliability evasion and provide a structure for admissibility decisions.

The two-step framework helps the court by:

- Allowing early resolution of cases where the proponent cannot establish integrity (Step 1), without litigating model theory.
- Narrowing the issues for Rule 702 reliability analysis (Step 2) to the inference itself, once the record is stable.
- Encouraging predictable litigation conduct, including the Committee Note's statement that notice principles applicable to expert opinions should also apply to machine output offered under the rule.

5. Concrete illustration (hypothetical)

A party offers machine output stating that a specific person or license plate appears in a video at a specific time interval. The output is introduced through a technician who operated the system but cannot explain model or training reliability, and the output is accompanied by a certification of authenticity, without a testifying expert.

Because the output asserts identity, the reliability inquiry cannot be reduced to authenticity of the file or operation of the device.

- If the opposing party challenges whether the underlying video was truncated, re-encoded, selectively exported, or otherwise altered, the court cannot meaningfully evaluate the inference unless it first resolves whether the input record is complete and tamper-evident.
- Step 1 focuses on objective integrity checks: whether missing segments or reordering would be detectable, whether there is a tamper-evident manifest tying outputs to specific inputs, and whether an independent verifier can validate completeness and provenance.
- Step 2 then evaluates inference validity under Rule 702: identification of the model/system version, material configuration and parameters, whether the process was

validated in sufficiently similar circumstances, and whether the proponent can explain relevant sources of non-determinism affecting reliability.

This sequencing avoids turning reliability into a narrative contest.

6. Proposed Committee Note addition (suggested text)

I respectfully suggest adding a short paragraph to the Committee Note for Rule 707, along these lines:

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

This paragraph is offered as guidance for applying Rule 702 through Rule 707 and is not intended to alter authentication doctrine under Rules 901–903 or to create independent disclosure obligations beyond what is necessary for admissibility in the case.

This language is technology-neutral, aligns with the Committee Note's observation that authenticity is distinct from reliability, and supports Rule 707's core objective.

7. Closing

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

Appendix A: Proposed Committee Note Language and Reliability Factors

Proposed Federal Rule of Evidence 707 (Machine-Generated Evidence)

A.1 Two-step reliability framework for Rule 707 administration

Step 1: Integrity of the record (custody-grade). Before a court can meaningfully evaluate the reliability of machine-generated output, the proponent should establish that the underlying inputs, transformations, and outputs are complete, tamper-evident, and traceable in a manner that permits adversarial testing and independent verification.

Step 2: Validity of the inference (Rule 702-grade). Only after integrity is established should the court evaluate whether the machine-generated output satisfies Rule 702(a)-(d), including fit to the case, validation, and known sources of error or non-determinism.

A.2 Non-exclusive factors courts may consider (technology-neutral)

In applying Rule 702(a)-(d) to machine-generated evidence under Rule 707, courts may consider whether the proponent provides information sufficient to enable meaningful adversarial testing. These factors are non-exclusive and should be applied in a case-specific manner consistent with judicial discretion under Rule 104(a).

1. **Input completeness and tamper-evidence:** Whether the proponent can detect missing, reordered, or altered inputs that materially affect the output.
2. **Provenance and binding:** Whether outputs can be traced back to the specific inputs, time intervals, and transformations that produced them.
3. **System, model, and execution identity:** Whether the proponent identifies the system/model version and relevant execution context (including materially relevant configuration and parameters).
4. **Reproducibility and non-determinism disclosure:** Whether the proponent provides a reproducibility mode or explains sources of non-determinism relevant to evaluation of reliability.
5. **Separation of machine output from human modification:** Whether post-processing, human edits, or review actions that affect interpretation are distinguishable from the machine-generated output and accounted for.

A.3 Suggested Committee Note insertion (proposed text)

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

Respectfully submitted,
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