ADVISORY COMMITTEE ON EVIDENCE RULES

Hearing on Proposed Amendments to Rule 609 and new Rule 707

January 29, 2026

ADVISORY COMMITTEE ON EVIDENCE RULES

Hearing Schedule
January 29, 2026
10:00 a.m. – 1:00 p.m. (Eastern)

Please note that all times are Eastern. Timing is subject to change. Each witness will have 10 minutes. Please keep remarks brief so there will be ample time for questions from committee members within the 10 minutes. 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	Mark Abramowitz	Dicello Levitt	Rule 707
2	10:15–10:25	Christina Cambo	Cambo Ferry	Rule 707
3	10:25–10:35	William Carlucci	Barnes & Thornburg	Rule 707
4	10:35–10:45	Robert Friedman	King & Spalding	Rule 707
5	10:45–10:55	Stephen Herman	Fishman Haygood LLP	Rule 707
6	10:55–11:05	Melissa Kotulski	International Attestations, LLC	Rule 707
7	11:05–11:15	David Nagdeman	Langer, Grogan & Diver (National Association of Consumer Advocates)	Rule 707
8	11:15–11:25	Nicole Owens	Federal Defender Services of Idaho	Rule 707
Break from 11:25–11:40 (estimated)				
9	11:40–11:50	Jonathan Redgrave	Redgrave LLP	Rule 707
10	11:50–12:00	John Rosenthal	Winston & Strawn	Rule 707
11	12:00–12:10	Andrea Roth	UC Berkeley School of Law	Rule 707
12	12:10–12:20	Daniel Smulian	Faegre Drinker Biddle & Reath	Rule 707

ADVISORY COMMITTEE ON EVIDENCE RULES

Hearing Schedule
January 29, 2026
10:00 a.m. – 1:00 p.m. (Eastern)

	Time Slot	Name	Organization	Rule(s)
13	12:20–12:30	Kaitlyn Stone	Barnes & Thornburg	Rule 707
14	12:30–12:40	Tad Thomas	Thomas Law Offices (American Association for Justice)	Rule 707
15	12:40–12:50	Lauren Yu	American Civil Liberties Union	Rule 707
Final Questions & Closing Remarks at 12:50 (estimated)				

TAB 1

Evidence 707 – Machine-Generated Evidence
Testimony from Mark Abramowitz

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

Chair and members of the Committee: thank you for the opportunity to testify. I speak for DiCello Levitt LLP, where we have been tracking the Advisory Committee's proposal closely and preparing comments and testimony. Our firm broadly supports the Committee's objective: ensuring that machine-generated outputs that function like expert opinion are tested for reliability before they reach juries.

At the heart of what makes the US legal system so strong is its ability to continue to evolve with the times. This is one of this crucial moves to help keep up with the ever changing landscape that is the machine generated evidence. Part of the core of the rules of discovery is fairness, scrutiny and preventing ambush at trial. This rule is an important first step in accomplishing those goals. However, the rule without safeguards and clarifications can be problematic.

The concerns I hope this committee will address before finalizing this rule would be to ensure the rule:

1. A definition for 'simple scientific instrument'?
2. What discovery will be required and permitted?
3. Handling third party 'vendors' or 'contractors'
    a. What is considered reliance material?
    b. What is considered reproduction?
    c. What additional discovery will be automatically provided during these challenges
4. Preventing abuse

I. A definition for 'simple scientific instrument'?

As I repeatedly read this new proposed rule, I am still at a loss as to what constitutes a simple scientific instrument. I understand for the pursuit of justice and reliable evidence, we need to be able to accept certain pieces of data and evidence, however what is truly envision here? What guidance do judges, lawyers and potential litigants have to fall within this safe harbor? For the devices that do fall within this category, how do we ensure these devices have not been altered or upgraded for a bespoke usage?

II. What discovery will be required and permitted?

Dockets across the country are rife with disputes over the scope and potential cost of discovery. The lack of an understanding here as to what is allowed here is concerning. There needs to be some understanding as to what this entails. Under the current 702 rule, discovery happens on all the basis for an opinion. Does that mean ALL the source code needs to be turned over? Further, the order of discovery is concerning as expert testimony happens after the close of fact discovery.

This needs to be turned over sooner than that – There needs to be notice of use earlier in the case – but it cant disrupt expert disclosures. These are just some of the issues that i am urging you to take into account.

III. Handling third party ‘vendors’ or ‘contractors’

What happens when the evidence comes from a third party? A contractor or vendor a business or party used for this information in the course and scope of their business/services at issue in this matter? Will there be discovery into that? ChatGPT is a sub-processor for many different programs out there. Will OpenAI (the makers of ChatGPT) be subject to full discovery regarding their reliability? Will they have to turn over their training materials or source code? These are the questions and concerns that courts and litigants will need guidance on.

IV. Preventing abuse

Discovery has been used as a shield from the truth. How do we ensure that doesn’t happen here?

Conclusion

Thank you for this opportunity to address the committee. I hope that the points I have brought up will spur additional conversation and lead to a rule that protects litigation in this country.

TAB 2

From: Cristina Cambo
Sent: Friday, January 23, 2026 3:54 PM
To: RulesCommittee Secretary
Subject: Witness Information - Jan 29 Evidence Rules Hearing

Good afternoon,

I sincerely apologize, as I misunderstood the deadlines and requirements for the written submissions for the upcoming testimony. To the extent this may still be helpful to the Rules Committee, below please find a brief outline of my anticipated testimony at the January 29, 2026 hearing on proposed Federal Rule of Evidence 707:

I. We should be taking a holistic approach in incorporating rules governing AI:

A. Rule 707, as drafted, will likely impact other evidence rules and may cause confusion as written.

i. This rule will also potentially indirectly expand discovery obligations, so we should be approaching integrating AI rules holistically.
ii. Otherwise, there are other rules of evidence that would act effectively as "escape hatches" to allow litigants to circumvent the heightened reliability and authentication requirements of proposed Rule 707.

B. Examples:

i. Rule 703: allows for an expert to base his or her opinion on facts or data of the case that the expert has been made aware of or has personally observed.

1. For instance, an expert radiologist could rely on an AI diagnostic tool to assist in rendering his opinion, and the AI tool's output in this scenario would be able to come in
2. Unless we take a more holistic approach to rules governing machine-generated evidence, Rule 703 could become an easy workaround for litigants seeking to avoid Rule 707's heightened reliability standard.

ii. Hearsay Rules: should a "declarant" as defined by the hearsay rules be modified to include AI in addition to "the person who made the statement", especially when considering machine-generated evidence to be introduced without an expert witness, as 707 is designed to allow?
iii. Rule 901: Does machine-generated evidence also include AI-enhanced evidence? If not, then Ai-enhanced evidence could be admitted under Rule 901 and would bypass the requirements of Rule 707.

II. The concern is that the waiting until the Chapter 700 series to introduce a rule that governs machine-generated evidence is too late in the litigation to effectively deal with this type of evidence.

A. Discovery, Pretrial Motions –

i. Rule 26: when will litigants be required to disclose their intended use of machine-generated evidence?
ii. Rule 34: production of ESI info – would that include raw AI data?

Thank you for the opportunity to present on this issue, and I appreciate the Rules Committee's time and consideration.

Respectfully submitted,

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Partner / Owner

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TAB 3

From: Carlucci, William
Sent: Thursday, January 15, 2026 8:41 PM
To: RulesCommittee Secretary
Subject: Testimony for 1/29/2026 Evidence Rules Hearings

Dear Advisory Committee:

Pursuant to your request, below please find an outline of my anticipated testimony at the January 29, 2026 hearing on proposed Federal Rule of Evidence 707.

I. The standard for admission is not clearly defined in the proposed rule
   a. Proposed Rule 707 does not include the language of rule 702 that comes before subsections (a)-(d)
      i. Is Rule 707 intended to incorporate the Rule 702 admissibility standards, particularly in light of the recent amendment to Rule 702?
   b. The showing required to satisfy the admissibility standard is likewise unclear
      i. What support must be advanced to support the admission of machine opinions
   c. If reliability is the concern, it is not apparent why different standards would apply to the same piece of machine opinion depending on whether it is introduced through a lay or expert witness.

II. The analysis for expert testimony under Rule 702 is not easily applied to machine opinions
   a. Many AI tools, such as LLMs are tools of general knowledge, not specialized in a particular field, thus applying Rule 702(a) would be difficult
   b. The "testimony" under Rule 702(b) and (c) is not defined
      i. Is the "testimony" to be analyzed the contents of the machine opinion itself, or is it the testimony of the lay witness through whom the machine opinion is sought to be introduced?
   c. An assessment of the "reliable application of the principles and methods to the facts of the case" would require an analysis of proprietary trade secrets of the AI tool's performance
      i. Determining how the algorithm synthesizes data from its training material and the user inputs to generate its output is highly protected and valuable to the creator of any AI tool

III. Proposed Rule 707 may lead to extensive discovery on discovery and the need to analyze unwieldy amounts of data
   a. Discovery of the full set of training materials is impractical due to volume and confidentiality
   b. Understanding how the AI tool's algorithm operates will lead to motion practice over the discoverability of such proprietary information
   c. AI tools can tailor inputs to specific users based on past inputs
      i. How will a court's analysis account for this potential

I look forward to the opportunity to discuss these topics and appreciate the Committee's consideration.

Respectfully submitted,
William M. Carlucci

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Salt Lake City | San Diego | Washington, D.C.

* * * * *

TAB 4

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January 15, 2026

Via Email

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

To the Members of the Committee:

My name is Robert Friedman, and I am a Partner at King & Spalding. I look forward to providing testimony to the Committee regarding the proposed new Federal Rule of Evidence ("FRE") 707 ("Proposed Rule 707"). Below is a summary of the testimony I plan to offer.

INTRODUCTION

Proposed Rule 707 creates a new path for admitting machine-generated evidence without specifying when or how related disclosures should occur, increasing the risk of inconsistency, inefficiency, and unfair pretrial practices.

The FRE and Civil Procedure ("FRCP") are designed to work in tandem. Proposed Rule 707 permits the admission of machine-generated outputs as evidence without requiring an expert witness if the standards of Rule 702 are met, but it fails to clarify what information must be disclosed, the timing of such disclosures, or the format in which disclosures should be made.

PRACTICAL CONCERNS

1. Background

Proposed Rule 707 provides that 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)." The Proposed Rule goes further to exclude "output of simple scientific instruments."

The Advisory Committee's Note highlights the goals of Proposed Rule 707 and addresses key concerns, as summarized below:

- Proposed Rule 707 does not aim to promote the use of machine-generated evidence over live experts. Rather, it seeks to impose Rule 702's reliability safeguards to machine outputs presented without an expert witness because machine-generated evidence may bury unreliability, and machines cannot be cross-examined.
- "Basic scientific instruments" are carved out to allow admission where reliability can be judicially noticed to avoid unnecessary litigation.
- Proposed Rule 707 applies the Rule 702's expert testimony requirements and the comments to Proposed Rule 707 acknowledge "the notice principles that would be applicable to expert opinions and reports."

Rule 707 establishes a pathway for admissibility but does not address the procedural requirements regarding the scope and timing of disclosures, nor the evidentiary record necessary for adversarial examination pursuant to Rule 104(a).

2. The Procedural Vacuum

Proposed Rule 707 allows machine-generated evidence to be admitted if it meets Rule 702's reliability requirements, but it does not address disclosure obligations. Under the current Federal Rules of Civil Procedure, early and detailed disclosures pertain to **expert witnesses**, not to machine-generated outputs presented without an expert. Specifically, Rule 26(a)(2) mandates comprehensive expert disclosures[1] and contains timing provisions,[2] but these provisions do not clearly apply to standalone machine opinions under Proposed Rule 707.

This creates significant uncertainty. Pretrial schedules are routinely built around the exchange of expert reports and Rule 702 motions, with the expectation that any opinions governed by Rule 702 will be disclosed well before trial. However, if Proposed Rule 707 allows machine opinions to be admitted without a testifying expert, and in the absence of a court-specific management order, disclosure may be limited to listing the exhibit and providing a generic authentication notice.

While the Committee Note suggests that notice obligations for machine-generated outputs should mirror those for expert opinions under Rule 702, the Note has no legal effect. Courts can disregard the suggestion. Proposed Rule 707 itself does not establish a uniform or sufficient timeline for disclosure, and currently there is no proposed amendment to the FRCP to address disclosure requirements. As a result, parties may only have to meet minimal notice requirements, increasing the risk that unreliability within the machine-generated evidence remains hidden—precisely the concern highlighted by the Committee.

Existing discovery rules—Rules 26(b), 34, and 26(c)—can be used to seek the data, logs, parameters, and validation materials necessary to test reliability, but without an upfront disclosure obligation, parties will predictably litigate scope, proportionality, and trade secret protections on an ad hoc timeline that may collide with or outlast Rule 702 deadlines or derail cases in the crucial weeks just before trial is to begin.

3. Divergent Paths Forward

Absent clear instructions on how machine-generated evidence—whether characterized as "opinion" or not—must be disclosed, parties may opt for one of several pathways.

[1] Fed. R. Civ. Pro. 26(a)(2)(B).
[2] Fed. R. Civ. Pro. 26(a)(2)(D).

(a) Courts and parties treat Rule 707 machine-generated outputs as non-expert evidence authenticated by certification.

In this scenario, a proponent uses Rule 902(13) or 902(14) for authentication, provides "reasonable written notice," and lists the output on the Rule 26(a)(3) exhibit list. The proponent might argue that reliability goes to weight because the evidence satisfies Rule 707's threshold and that no expert report is required. The consequence is compressed or impossible motion practice on reliability. Opponents will lack the records necessary to challenge inputs, error rates, training data representativeness, or reproducibility under Rule 702(b)–(d), and trial courts will be forced into Rule 403 balancing to manage the risk of undue weight from an unanalyzable machine conclusion.

(b) Courts analogize Proposed Rule 707 evidence to expert opinions and, through FRCP 16 case-management orders, impose expert-like disclosure on a judge-by-judge basis.

Many judges will require early disclosure of model identity, validation, error rates, and configuration to align Proposed Rule 707 practice with Rule 702 gatekeeping based on the Committee Note. Others will not, either because local practice is minimalist or because the parties do not flag the need. This lack of uniformity may encourage forum shopping, create issues with Rule 37(c)(1) sanctions due to varying disclosure requirements, and lead to disputes about excluding expert-like material even when no expert witness is present. The current absence of any guidance, let alone express criteria, for determining when machine-generated output becomes "opinion" makes disputes likely even when courts impose what appear to be clear deadlines.

(c) A discovery-driven approach in which opponents use Rules 26(b), 33, and 34 to discover machine-generated evidence and the underlying data, logs, and system details to mount a Rule 702 challenge.

A discovery-driven approach will likely begin with a dispute about the whether the request is premature, then ultimately devolve into fights over proportionality, burden, proprietary code and trade secrets, and the feasibility of reproducing outputs in a controlled environment. Protective orders under Rule 26(c) will be necessary but contested. Without a baseline disclosure requirement, courts will struggle to distinguish between essential integrity and inference materials from excessive requests for source code or training data. The pretrial calendar will become crowded as attorneys file motions to compel and seek protective orders, often on issues that could have been resolved earlier through organized and timely disclosure.

(d) Parties improperly frame inferential outputs as the products of regularly conducted business activity under Rule 803(6).

Much machine-generated evidence is already offered in courtrooms without incidence, in the form or records of regularly conducted business activities, and other commentors have expressed the important concern that Proposed Rule 707 will inadvertently impose new and unnecessary burdens on businesses. For the type of machine-generated *opinions* that Proposed Rule 707 targets, Parties may try to delay disclosure of such by inappropriately framing it as the products of regularly conducted activity under Rule 803(6), authenticated by certification under Rule 902(11), with the view that the reliability function is satisfied by Rule 707's textual cross-reference to Rule 702. Even if courts reject an effort to use hearsay doctrine to avoid Rule 707's reliability gatekeeping—consistent with the Committee's observation that the hearsay rule is generally inapplicable because a machine cannot be cross-examined—the

business-records framing reinforces the timing problem because Rule 902(11) only requires reasonable notice and availability for inspection.

RECOMMENDATIONS

1. Proposed Rule 707 should not be enacted without related amendments to the FRCP.

If Proposed Rule 707 is enacted now, courts would be asked to apply a new reliability screen without the procedural tools necessary to secure a stable, testable record in time for pretrial adjudication. The better course is for the Committee to work with the Civil Rules Committee to amend the FRCP to address the notice issues, and the amendments should take effect at the same time.

2. If Proposed Rule 707 is enacted, it should include clear, operational guidance about disclosure requirements.

At the very least, the Committee Note should include clear, operational guidance about disclosure and timing to mitigate the most acute pretrial problems. Specifically, the Proposed Rule should state that when a party intends to offer machine-generated outputs under Rule 707 without a testifying expert, notice principles analogous to Rule 26(a)(2) apply.

I look forward to appearing before the Committee.

Very truly yours,

Robert B. Friedman
Partner

TAB 5

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January 14, 2026

Committee on Rules of Practice and Procedure
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One Columbus Circle, NE
Washington, DC 20544
E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rule of Evidence 707

To the Advisory Committee on Evidence Rules:

I practice law in Federal and State courts around the country, representing both plaintiffs and defendants. I am, among other things, a member of the American Law Institute, a fellow of the International Academy of Trial Lawyers, and a past President of the Louisiana Association for Justice, the National Civil Justice Institute, and the New Orleans Bar Association. I teach the Advanced Civil Procedure course at Tulane Law School and an Advanced Torts Seminar on class actions at Loyola. I was appointed to serve as one of two Liaison and Lead Class Counsel for plaintiffs in the BP Oil Spill/*Deepwater Horizon* Litigation, and currently serve as the Chair of the Amerian Association for Justice Artificial Intelligence Task Force.

These comments are submitted in opposition to Proposed Federal Rule of Evidence 707, and in anticipation of my testimony on January 29th.

Proposed Rule 707 is Premature

I echo the comments of Thomas Allman and Jeannine Kenney in suggesting that the Proposed Rule feels premature. To the extent it may turn out to be the case that potentially unreliable machine-generated estimates, opinions or inferences begin to be employed by litigants to evade the safeguards that already exist under the Rules, the courts would not seem to currently have enough experience in dealing with these issues to formulate a Rule that precisely articulates the appropriate scope, predicts the likely challenges, or captures the most reasonable and effective gatekeeping tools.

The Proposed Rule Infringes on the Seventh Amendment, Threatens Access to Justice, and is Likely to Increase the General Burdens and Expense of Litigation

As with *Daubert* and 702, it is my view that the Seventh Amendment, litigation experience, and access to justice generally favor allowing the ultimate fact-finder to evaluate the strength and credibility of the evidence, subject to the rigors of the adversarial process, including fulsome cross-examination and competing evidence or testimony.[1]

While Rule 702 greatly increases the time and expense associated with the preparation, presentation, challenge and/or defense of proffered evidence in somewhat of a "collateral" process, at least the expert witness in question is, in the judgment of the parties, necessary to address directly merits issues in the case. With Proposed Rule 707, by contrast, the parties would appear to be required to obtain, prepare, present, challenge and/or defend experts whose testimony is never intended to actually go to the jury, but is wholly collateral to the proceedings. Depending on how Proposed Rule 707 were interpreted and applied, the transactional costs to your average litigant are likely to become prohibitively expensive in many low-dollar cases – and at the very least taxing in all cases.[2] Not only in terms of the time and money expended by litigants, but also as a matter of judicial economy.

[1] *See, e.g.,* In re Bair Hugger Forced Warming Prod. Liab. Lit., 9 F.4th 768, 778 (8th Cir. 2021) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596 (1993) ("respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence")); Von Duprin LLC v. Major Holdings LLC, 12 F.4th 751, 772 (7th Cir. 2021) ("Cross-examination, the presentation of contrary evidence, and an instruction on the burden of proof are the appropriate methods through which Von Duprin could have attacked Dr. Love's opinions"); Gorton v. Air & Liquid Systems Corp., No.17-1110, 2020 WL 4193649 at *2 (M.D.Pa. July 21, 2020) (quoting United States v. Mitchell, 365 F.3d 215, 244 (3d. Cir. 2004) ("As long as an expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversary process – competing expert testimony and active cross-examination – rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies")); Milward v. Acuity Specialty Products Group, 639 F.3d 11, 15 (1st Cir. 2011) (so long as an expert's testimony is reliable, it "should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities").

[2] As someone who, as President of the New Orleans Bar Association, has been involved with both the New Orleans *Pro Bono* Project and the New Orleans Bar Foundation, as well as also serving on the boards of both Southeast Louisiana Legal Services and Louisiana Appleseed, I am very concerned about the potential downstream effects that such a rule might have on litigants in child custody, divorce, criminal law, landlord-tenent, and other high-volume, low-dollar cases, which frequently involve *pro se* litigants. While these matters are rarely litigated in Federal Court, it is my impression that the Federal Rules of Evidence are routinely adopted in many States. For example, the recent amendments to Federal Rule of Evidence 702 were immediately adopted by the Louisiana Legislature and were actually incorporated into the Louisiana Rules of Evidence before the Federal amendments became effective.

Particulatly concerning is the Advisory Committee Note which indicates that:

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

Organizations and their employees frequently rely on "a computer-based process or system to make predictions or draw inferences from existing data" in the ordinary course of their operations without necessarily knowing or understanding "whether the training data for a machine learning process is sufficiently representative to render an accurate output" or "whether the process has been validated in circumstances sufficiently similar to the case at hand." I could see litigants making the argument, and some courts agreeing, that Proposed Rule 707 requires that party, or the opposing party, to hire an expert to validate the reliabilty of that instrument and/or output before such routine and inherently factual evidence can be admitted.

For example, trucking companies and their drivers routinely employ and rely upon GPS and other "black box" data, including electronic logging devices. Uber and Lyft drivers routinely employ and rely upon Google Maps or other machine-generated navigational information. The operators of drilling rigs like the *Deepwater Horizon* routinely employ and rely on complex vessel-positioning technology to remain "on station" and other systems to monitor the down-hole pressures. Hospitals and their staff members routinely employ and rely on fetal monitoring strips, blood and urine lab results, genetic marking, and the visual representation of radiological or magnetic imaging. In some cases, the people who utilize and rely upon those technologies and their indications may be qualified as experts under 702 and would be called to testify anyway. But much of this evidence is routinely introduced through the direct or cross-examination of non-expert parties, employees, third-party lay witnesses, and/or 30(b)(6) representatives.

What happens under the Proposed Rule when an adverse party seeks to utilize the evidence to cross-examine a lay witness or a corporate representative? Or to make a *prima facie* showing? Or to carry his or her burden on an affirmative defense and/or case-in-chief?

If there is a basis to question the reliability of an instrument generally or the particular output generated in a particular case, then a party should be free to hire an expert with the knowledge and experience to call those inferences or conclusions into question, and even to challenge their admissibility.

But a party should not be able to force an opponent to waste the time and money to go out and hire an expert in order to offer machine-generated evidence that the party and its employees utilize and rely upon every day.[3]

The Scope of the Rule – and its Exception – are Unclear

While some of these concerns may be ameliorated somewhat by the last sentence of the Proposed Rule, the distinction between a "simple scientific instrument" and "machine-generated evidence" is unclear. The specific examples that appear in the Committee Notes – *i.e.* a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer – are extremely narrow. It is possible that courts will limit the application of Proposed Rule 707 to what is conventionally thought of as "artificial intelligence" or AI.[4] But even that term is subject to broad interpretation and is rapidly evolving. Moreover, and more importantly, the Proposed Rule is not, on its face, limited to AI, or even machine-learning. The Proposed Rule potentially applies to anything that is "machine-generated" – a term that could arguably apply to a wide host of commonly accepted and routinely admissible forms of evidence, including conceivably anything that is originated, processed, extracted, imaged and/or printed on or from a computer, a smart phone, a digital camera, the Internet, or the World Wide Web.

The Proposed Rule is Susceptible to Abuse

It may be that these concerns are unwarranted, and that courts will routinely admit accepted forms of machine-generated evidence under Rules 602 and/or 701, while reserving the Proposed Rule 707 process and analysis for only those significant and material opinions and conclusions that are generated by complicated machine-learning systems or AI. But even if the courts were to interpret and apply the Proposed Rule exactly as the Committee intends, some litigants will no doubt sieze upon the opportunity to challenge various pieces of evidence in an attempt to force the other side to expend time and money, to delay the proceedings, and/or to create issues for appeal.[5] This is not how Federal Courts should be spending their time.

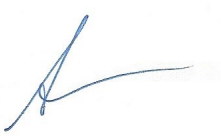
[3] Not to mention the time that the Court will have to spend hearing, considering, and ruling on the issue.

[4] In terms of existing Large-Language Models (LLMs) like ChatGPT and other platforms that are generally considered to constitute forms of "artificial intelligence", it is frankly difficult to see how machine-generated output that would be subject to Rule 702 if testified to by a witness would be offered into evidence untethered to the testimony of an expert. (At least to the extent that it fell within one of the hearsay exceptions and was offered for the truth of the conclusion, opinion, or inference asserted.)

[5] Indeed, it is not hard to imagine a further set of collateral 702/*Daubert* challenges to the expertise and/or methodology of these collateral experts who might be retained solely to satisfy Proposed Rule 707.

I appreciate the opportunity to appear before the Committee. Thank you for your time and consideration.

Respectfully submitted,



Stephen J. Herman, Esq.

TAB 6

From: Melissa Kotulski
Sent: Tuesday, January 13, 2026 3:24 PM
To: RulesCommittee Secretary
Subject: Re: Testimony

Hi all:

Below please find my outlines for presentations for Civil (January 27) and Evidence (January 29).

Best wishes,

Melissa

INTERNATIONAL ENCOURAGEMENTS (CIVIL)
(January 27, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Civil Procedure

BIOGRAPHICAL STATEMENT

RULES TO CONSIDER IN THE INTERNATIONAL CONTEXT

- Nongovernmental Business Organization (Rule 7.1)
- Narrowing Voluntary Dismissal to Claims Rather than Entire Action (Rule 41)
- Remote Testimony/Technological

1. Express Statement on Remote or In Person Testimony (Rule 26)
2. Place for Remote Testimony (Rule 45)

ENCOURAGEMENTS (EVIDENCE)
(January 29, 2026)

International Encouragements for Proposed Changes to the Federal Rules of Evidence
Machine-Generated Evidence Admissibility (Rule 707) Outline: No Rule At All?

a. Biographical Statement (Self, International Attestations, cyber/tech law expertise)
b. Litigation, confusion, controversy
c. No Rule at All? Comment

The Honorable Melissa A. Kotulski
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* * * * *

TAB 7

January 15, 2026

Committee on Rules of Practice and Procedure
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E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

Re: **Proposed Rule of Evidence 707**

To the Advisory Committee on Evidence Rules:

On behalf of the National Association of Consumer Advocates, I intend to present the following testimony at the January 29, 2026, hearing of the Committee on Rules of Evidence.

My name is David Nagdeman. I am a partner at the law firm Langer, Grogan & Diver P.C. in Philadelphia, Pennsylvania. And I appear before you today in my capacity as a member and representative of the National Association of Consumer Advocates or NACA. NACA, its members, and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. We appreciate this opportunity to comment on the proposed amendments to the Federal Rules of Evidence and specifically Proposed Rule 707.

We understand, based on the report and comments to the proposed rule, that Proposed Rule 707 permits a party to introduce broadly defined "machine-generated" outputs into the evidentiary record without a subject-matter expert to testify to the material. The proposed rule purports to ensure the reliability of such materials through a technical expert declaration that otherwise meets the criteria set forth in Rule 702. The Committee's notes provide limited guidance about how courts should apply these reliability requirements, absent a testifying subject matter expert as would otherwise be required.

We recognize and support the Committee's desire to address the fast-developing proliferation of machine-generated materials in federal courts and to ensure any such materials in the evidentiary record are subject to rigorous reliability tests. As consumer advocates, we regularly see how consumers are harmed by unreliable machine-generated output. For instance, credit-assessment and loan-underwriting algorithms can exhibit racially discriminatory biases by using data, such as zip code data, that highly correlate with race. Meanwhile, credit-reporting systems often incorporate mistaken identity data or scriveners'

errors that harm consumers and prove difficult to remove because no one wants to take responsibility for the operation of the software systems.

Although we agree that federal courts would benefit from guidance regarding the admissibility of machine-generated materials, we are concerned that Proposed Rule 707 undermines its very purpose to ensure reliability in machine-generated evidence or testimony at trial. In our view, Rule 702 sufficiently addresses the concerns outlined by the Committee at the present time.

Our principal objections are threefold. First, Proposed Rule 707 and the accompanying Comment introduce undeveloped terms and concepts that warrant elaboration, especially the core term of "machine-generated" itself. Second, we fear that by removing the requirement of a testifying expert, the proposed rule will undermine a jury's ability to weigh the veracity of machine-generated analysis. Third, we are concerned that the reliability standards set forth in Rule 702 cannot practically be assessed as to "machine-generated" materials as envisaged by the Committee's notes.

On the first point, the Proposed Rule's use of vague, overinclusive terms is bound to engender confusion and costly litigation. This is especially apparent to the Proposed Rule's core term: "machine-generated." On the one hand, the Proposed Rule appears to be motivated to deal with recent advances in Large Language Model (LLM) technologies, often referred to as "AI," and their potential use in litigation. But the notes and comments assume that "machine-generated" materials include any evidence extracted through an automated process. In the context of consumer litigation, this might include vehicle reports, consumer credit reports, and all manner of routine business records stored in an electronic format. While LLM technologies may be relatively novel, courts have been managing the admission of other "machine-generated" evidence for decades. If the Committee believes that additional rules are necessary to manage the reliability of LLM generated materials, the rules should be narrowly tailored to those materials in order to address the specific reliability concerns they raise.

On the second point, for evidence subject to Rule 702, the reliability requirements are only a preliminary step before a jury weighs the veracity of the models and analyses through the process of adversarial testimony. Rule 702 assumes the presence of an expert capable of defending such models and analyses on the stand and subject to rigorous cross-examination. We fear that removing the testifying expert deprives the jury of a critical opportunity to weigh the veracity of expert-like analyses. This deprivation undermines the purpose of both Rule 702 and Proposed Rule 707, to the extent that such materials are solely admissible to "help the trier of fact to understand the evidence or to determine a fact in issue." Indeed, in the use examples identified in the Committee Report—stock trading causation analysis and copyright analysis for works of art or software—an expert's testimony

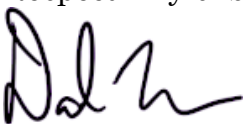
is crucial to understanding the assumptions that went into the models and how the models produced the results.

Third, we are concerned with the practicality and precision of Proposed Rule 707. The Committee suggests that courts may take judicial notice that machine output is reliable, but it provides no context or examples when it would be appropriate to do so, leaving the scope of this exception up for debate. In situations where the judicial notice exception does not apply, the Committee recommends a process for analyzing reliability that involves assessment of the output's training data and system. This recommendation presents several core impracticalities. Most notably, the underlying mechanics of Large Language Model systems, including both their programming and their training data, are closely guarded intellectual property in a highly competitive industry. If the systems' owners believe the inner working of their machines are trade secrets, they likely will refuse to disclose sufficient information about their operation to permit the reliability inquiry suggested by the Comment. It is also understood that the nature of these systems' operations, after training on the data, is largely a "black box," meaning, even the programmers don't know exactly how or why the software is producing certain output. This lack of transparency not only heightens the concern for latent biases and unintended errors, which we continue to see in existing machine-generated output, but also undermines the possibility of a meaningful reliability inquiry as set forth in the Comment.

Again, while we appreciate the Committee's efforts to address the widely touted use of Large Language Models in contemporary legal practice, NACA believes that Rule 702 adequately permits the use of machine-generated materials at trial while protecting the jury's critical and constitutional role as the finder of facts in our legal system. Alternatively, the Committee may find it appropriate to revisit and clarify Proposed Rule 707 by, for example, defining "machine-generated" to apply solely to outputs generated by machine-learning software. The Committee could also elaborate further on the scope of the exceptions for "simple scientific instruments" and "judicial notice." Given the ever-evolving state of technology, the prudent approach would be to draft a narrow rule limited in scope to address the evidentiary concerns specific to "machine-learning" and Large Language Models that prompted the Committee to propose the rule in the first place.

Thank you for your time and consideration.

Respectfully submitted,



David A. Nagdeman, Esq.

TAB 8

January 15, 2026

To: Evidence Rules Advisory Committee
Re: Nicole Owens Written Testimony Regarding Proposed FRE 707
From: Nicole Owens, Executive Director, Federal Defender Services of Idaho

Dear Rules Committee,

Thank you for the opportunity to submit written testimony regarding proposed Federal Rule of Evidence 707. These comments are based on my experience defending criminal cases in federal court, where evidentiary reliability, adversarial testing, and the jury's ability to assess proof are essential to the fairness of proceedings.

I. Introduction

I support the Advisory Committee's core objective: preserving Rule 702's reliability requirements when machines perform expert functions. As machine learning and related technologies are increasingly used to generate analytical conclusions, the Rules of Evidence must ensure that these conclusions are subject to the same reliability safeguards that apply when those conclusions are offered by human experts.

My comments respond primarily to concerns raised by the Department of Justice that Rule 707 addresses a problem that is not occurring in practice and that existing evidentiary rules are sufficient to manage any issues related to machine-generated evidence. This is not true and the committee should pass Rule 707.

II. The Absence of Reported Cases Does Not Reflect Trial-Level Reality

The argument that Rule 707 is unnecessary because there are few reported appellate cases involving machine-generated evidence offered without expert testimony does not reflect the reality of current trial practice.

This issue is occurring now. Machine-assisted analytical tools are already being used in criminal investigations and prosecutions to perform tasks such as pattern recognition, probabilistic matching, classification, and the enhancement or interpretation of audio and visual evidence. In court, the outputs of these systems are increasingly introduced through law enforcement witnesses, custodians, or case agents who did not design, test, or validate the underlying systems and who cannot explain their analytical foundations.

These evidentiary questions frequently arise at the trial level and are often resolved without written opinions or appellate review. As a result, the absence of reported decisions does not indicate that reliability scrutiny is occurring; rather, it reflects that courts are addressing these issues inconsistently and without clear guidance. That is the posture in which Rule 707 is proposed. Courts are currently left to decide, on an ad hoc basis, whether machine-generated conclusions trigger Rule 702, can be admitted through lay testimony, or should be treated as routine technical outputs. The result is uneven treatment of similar evidence across courts and cases.

Litigation incentives further exacerbate this problem. Machine-generated outputs often appear neutral or objective to jurors, even when their assumptions, limitations, or error rates are unknown. Without a clear rule, these conclusions may reach the jury without the reliability determinations that would be required if the same analysis were performed by a human expert.

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

III. Existing Evidentiary Rules Do Not Fully Address the Issue

The Department of Justice suggests that Rules 702, 901, 902, and 403 adequately address the admissibility of machine-generated evidence. In practice, these rules leave a gap when a machine performs the work of an expert but no expert witness is offered.

Rule 702 applies only when a witness offers expert testimony. When a party introduces a machine-generated conclusion directly, without an expert adopting or explaining it, Rule 702 may not be triggered at all.

Authentication rules establish that a system produced an output, not that the output is reliable or appropriate for the task it purports to perform. Rule 403, while important, assumes admissibility and focuses on balancing prejudice rather than ensuring methodological reliability in the first instance.

Rule 707 fills this gap by requiring courts to evaluate reliability when machine-generated evidence functions as expert analysis, regardless of whether a human expert testifies.

IV. Proprietary Systems Increase the Importance of Judicial Gatekeeping

An additional concern is the growing reliance on proprietary machine-learning systems developed and maintained by third-party vendors. These systems often involve protected training data, undisclosed validation processes, and limited transparency regarding how conclusions are generated.

In such cases, litigants and courts may lack access to information necessary to assess whether the system was reliably designed, tested under conditions relevant to the case, or appropriately applied. The risk is not simply that the opposing party cannot challenge the evidence effectively, but that the court itself may be unable to determine whether reliability can be evaluated at all.

Rule 707 does not mandate disclosure of proprietary source code or eliminate the use of such systems. It ensures only that when a party seeks to introduce a machine-generated conclusion that substitutes for expert judgment, the court must first determine whether sufficient information exists to assess reliability. In the absence of such a rule, lack of transparency may inadvertently function as a reason to bypass expert scrutiny rather than a reason for careful evaluation.

V. Cross-Examination and Confrontation Values Support Rule 707

Although Rule 707 is not grounded directly in the Confrontation Clause, it reflects the same foundational principle: evidence carrying analytical or inferential weight should be subject to meaningful adversarial testing.

Cross-examination of expert witnesses allows inquiry into assumptions, methodological choices, limitations, and the application of general principles to specific facts. When a machine-generated output replaces a human expert, that function does not disappear, but it becomes more difficult to perform.

A witness who merely operated or received the output of a machine-learning system typically cannot explain how inputs were weighted, how uncertainties were resolved, or how conclusions were reached. Without reliability gatekeeping, juries may be presented with evidence that appears authoritative but cannot be meaningfully examined through cross-examination.

Rule 707 does not impose new confrontation requirements. It preserves the practical effectiveness of cross-examination by ensuring that expert-like conclusions are admitted only after a court has determined that they rest on reliable principles and methods and have been reliably applied.

VI. Conclusion

The Advisory Committee has identified a genuine and emerging evidentiary issue. Rule 707 does not discourage the use of new technologies, nor does it impose categorical exclusions. It preserves a longstanding principle of the Federal Rules of Evidence: expert-like conclusions should reach the jury only after a court has determined that they are reliable.

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

Sincerely,

Nicole Owens
Executive Director
Federal Defender Services of Idaho

TAB 9

No written testimony outline or comment was submitted by the requested January 15, 2026 deadline.

TAB 10

No written testimony outline or comment was submitted by the requested January 15, 2026 deadline.

TAB 11

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January 15, 2026

Re: Proposed Federal Rule of Evidence 707

Thank you for the opportunity to comment on Proposed Federal Rule of Evidence 707 ("PFRE 707") and for taking on the difficult task of amending the rules to better address reliability concerns with computer-generated conclusions offered as substantive evidence at trial. I plan to testify on January 29, summarizing the points below, and to submit a comment by February 16.

A modified version of the proposed rule and advisory committee note, along the lines of the suggested edits below, would be a significant improvement over the status quo, although tabling the issue to allow it to further percolate in the courts is a reasonable step as well. I make several points below that I hope will clarify some confusion among commentators that seems to surround the proposed rule. I then suggest several concrete edits that I think are necessary to ensure the rule's application aligns with its intended purpose.

I. Point of clarification: PFRE 707 is not a new path to admissibility; under existing rules, a party can already potentially introduce computer-generated conclusions without an expert and without meaningful reliability scrutiny.

Some commentators appear concerned that PFRE 707 offers a new, streamlined, and potentially problematic way of introducing computer-generated conclusions without a human expert. On the contrary, the status quo already allows this, and the point of a rule like PFRE 707 would be to add an additional admissibility requirement (that is, *Daubert* scrutiny) for such conclusions.

Under existing law, a computer-generated conclusion (such as blood-alcohol level, a FitBit reading, a ChatGPT prompt answer, or a likelihood ratio reported by probabilistic genotyping software) is admissible without a human expert so long as it is relevant and properly authenticated as being what the proponent claims it to be. That is because relevant evidence is presumptively admissible (FRE 402) and there often will be no other rule of exclusion keeping it out). Such conclusions are not hearsay because they are not uttered by a human declarant or witness, and they are not subject to FRE 702 because they are not testimony of an expert witness. In turn, relevance and authentication are low bars. It is true that a machine opinion (like the Intoxilyzer reporting blood-alcohol level) is arguably irrelevant unless it is at least minimally likely to be accurate. But that was precisely the drafters' thinking in writing FRE 901(9), which allows the results of a "process or system" to be "authenticated" (which is really a special circumstance of conditional relevance) simply by evidence sufficient to persuade a reasonable juror that it "produces an accurate result." This language was added in 1968 to address IBM counting machines and computerized business records,[1] but in 2026 it would allow a proponent to bring in much more complicated algorithms without an expert so long as they passed the

[1] *See* Andrea Roth, *Machine Testimony*, 126 Yale L.J. 1972, 2012 & n. 199 (2017) (quoting the 1968 advisory committee minutes to show the drafters' reasons for including the "accurate result" language in 901(9)).

minimal 901(9) threshold. Indeed, as of 2017, a proponent need not even bring in a live witness to make the 901(9) showing; the addition of FRE 902(13) allows the proponent to show that the process or system produces an accurate result by a certificate of a person with knowledge.

Some commentators appear to assume that all judges would by necessity impose *Daubert* scrutiny on any process or system the result of which is offered and proven "authentic" through 901(9) or 902(13). But the rules do not require such scrutiny, and a judge sympathetic to admission of such results is not bound by any case law I know of to apply *Daubert* in the absence of a human expert using the software as their "method" (thus requiring the expert's own opinion to pass muster under FRE 702).

That said, in line with the concern that PFRE 707 will be perceived (rightly or wrongly) as creating a new path to admissibility of computer-generated conclusions, some have suggested that PFRE 707 should include a requirement that a computer-generated result meeting the Rule's criteria (i.e., it would be expert testimony if uttered by a human) always be accompanied by a human expert. I think this would be an appropriate addition, with a caveat. Judges should be reminded that an expert's in-court assertion that a method is reliable, and summary of how the method works, is insufficient by itself for *Daubert* purposes. Meaningful scrutiny of computer-generated conclusions akin to expert testimony, whether under 702 (because it is the expert's "method") or otherwise, instead requires scrutiny of the process itself (e.g. through research licenses allowing access to the program, training data, validation data, evaluation data, prior output on the same subject matter, and in some cases, potentially source code). I do not foresee other unintended consequences. For example, while such a requirement could in theory pose a hardship on litigants who cannot afford an expert, the rule would only cover conclusions that really should require an expert; a low-income litigant would still be able to introduce, say, Google Earth data or WebMD lists of common symptoms if they could fairly be the subject of judicial notice under FRE 201. *See generally* Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 N.W. L. Rev. 1137 (2014) (noting that some computerized results are properly within FRE 201's scope).

II. Point of clarification: Experts are already often bordering on "mere scriveners" when relying on computer methods in coming to their opinions; it is thus not hard to contemplate parties eliminating the expert entirely from the process and relying on lay witnesses and/or a certificate to authenticate the results.

Another key reality that some commentators seem to be missing, in suggesting that PFRE 707 is unnecessary or that any lawyer worth their salt will always bring in a human expert, is that even now, experts who use computerized methods to reach a conclusion are often somewhat of a side show; the process itself is often the main event. *See generally* Edward Cheng & Alex Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 Tex. L. Rev. 1077 (2019). This is precisely the point made by the FBI itself in a recent case where the government attempted to bring in Cellebrite software results through a lay witness. *See United States v. Daniels* (S.D. Cal. 2023). In *Daniels*, the government submitted an affidavit from a FBI examiner stating that "[b]asic mobile phone extraction and processing is a user level task that takes about 5 minutes of instruction and minimal guidance. The software does all the work." *Id.* While the *Daniels* court ultimately disallowed the lay testimony, one could imagine a district judge ruling differently, or the government trying to introduce Cellebrite results through 902(13).

See also United States v. Gafford (8th Cir. 2025) (allowing a lay witness to testify to having used an Apple "AirTag" to track a piece of undelivered mail to the defendant mail carrier's house, and to discuss its accuracy in a "test run" she performed).

The ultimate point here is that even now, the software itself is often the real "expert" in terms of what needs to be scrutinized. Of course, the act of putting a human expert on the stand triggers 702 scrutiny, such that the underlying computer method has to be shown to be reliable and reliably applied. But the act of putting a human expert on the stand to bring in such software is no longer critical, precisely because so many "experts" are really just people who understand the software in broad strokes and are "pushing a button," so to speak. The ultimate concern addressed by PFRE 707 is that when litigants realize this (as the government in *Daniels* did), they will realize they can evade *Daubert* scrutiny entirely by leaving out the expert-scrivener.

III. Point of clarification: Neither this rule, nor FRE 702 as applied to computer methods underlying human expert testimony, specifically targets only generative AI or "machine learning."

Some commentators have suggested that *Daubert* scrutiny is generally unnecessary for computer programs that have already been routinely used and that do not involve generative AI or "machine learning." To clarify, many complex algorithms reporting conclusions, such as likelihood ratios reported by probabilistic genotyping software, are currently subject to *Daubert* when they underlie a human expert's method, and *should be* subject to *Daubert* (whether or not accompanied by an expert). Yet they do not involve "machine learning" or what the public commonly thinks of as "generative AI." "Machine learning" is a subset of algorithms in which a program "learns" how to classify items based on an initial set of training data. Many complex algorithms do not involve machine learning. Nor do they all involve generative AI, which creates original content based on massive datasets (think ChatGPT and Sora).

IV. The incorporation into PFRE 707 of the language and requirements of FRE 702 is appropriate.

Some commentators have suggested that because human expert opinions and computer-generated opinions are qualitatively different, it makes no sense to simply import the requirements of 702 into a rule like 707. Instead, these commentators urge the committee to start from scratch and create a new rule specifically geared toward machines rather than humans.

These critiques do make an important point, which is that FRE 702(a)'s requirement that an expert's "specialized knowledge" will help the jury, and FRE(b)'s references to the expert's "testimony" being based on sufficient facts or data, is awkward as applied to non-humans, who do not possess "knowledge" per se and do not "testify." But there are two answers to this concern. First, judges know how to deal with these logistical issues when the purpose of the rule is clear. *See, e.g.*, FRE 806 (applying all forms of impeachment available for live witnesses to absent hearsay declarants, even though declarants cannot be cross-examined). Where an issue proves too awkward, minor amendments can be made. *See, e.g.*, FRE 613, 806 (noting that an absent hearsay declarant need not be confronted with an inconsistency to be impeached with a prior inconsistent statement). Second, any confusion in this regard could presumably be fixed by

simply amending PFRE 707 to import the language of 702 without using the words "knowledge" or "testimony":

> If a computer-generated conclusion is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court must find that the conclusion (a) will help the trier of fact to understand the evidence or to determine a fact in issue; (b) is based on sufficient facts or data; (c) is the product of reliable principles and methods; and (d) reflects a reliable application of the principles and methods to the facts of the case.

V. The committee should consider tabling PFRE 707 for 12 to 24 months to allow the issue to further percolate in the courts, now that publication of PFRE 707 has focused the legal community on this important issue.

As noted above and in previous agenda books, some litigants have already attempted to introduce computer-generated opinions without an expert. That said, it is true that this scenario is rare, and that PFRE 707 is somewhat anticipatory in its reach. A reasonable approach would be to table the issue for 1-2 years to allow the committee to incorporate public comments and to see how the issue plays out in courts. The advantage of having drafted and published PFRE 707 for comment, regardless of how the process proceeds, is that the legal community will now be more focused on the problem of allowing computer-generated opinions to be admitted without *Daubert* scrutiny if unaccompanied by an expert, as well as the question of which sorts of disclosures about the computer process itself are critical to meaningful *Daubert* scrutiny.

VI. If the committee moves forward on PFRE 707, two key changes are needed to ensure it fulfills its purpose without triggering unintended consequences.

A. "Simple scientific instruments" should be deleted from the rule.

As other commentators have already noted, the phrase "simple scientific instruments" will likely create unnecessary mischief and confusion about what counts as "simple." On the one hand, even a digital thermometer is not "simple"; unlike a sextant or barometer of old, modern instruments are computerized and far beyond most peoples' ability to understand what makes them work. Thus, keeping the language as is would surely create needless litigation about the introduction of digital thermometers and the like. On the other hand, even complex probabilistic genotyping software (PGS) might be called "simple" in the sense that it uses well-known statistical techniques as part of its analysis. Yet PGS is already subject to *Daubert* when underlying an expert's testimony, and should be subject to 707 if offered without an expert.

Fortunately, the phrase is unnecessary, given FRE 201. If a digital thermometer or a basic Excel function (like the "average" of 100 rows) is truly "simple" in the sense intended by the rule's drafters, its general reliability will surely be judicially noticeable. *See generally* Bellin & Ferguson (2014), *supra.* If the method's reliability is *not* the proper subject of FRE 201, i.e., it *is* subject to reasonable dispute, then presumably it should be subject to *Daubert* scrutiny, just as it would be if it were the "method" underlying a human expert's testimony.

B. The advisory committee note must include additional key factors that judges should consider in determining the reliability of a computer-generated conclusion.

One key advantage of PFRE 707 is the potential for its advisory committee note to give needed guidance about the factors judges should consider in determining whether a computerized process is reliable. Of course, this problem already exists, as judges already need to consider this question under 702, when a human expert uses a computerized method as the basis for their opinion. But given that the committee disfavors amendments to advisory committee notes alone without a corresponding rule amendment, the advisory note to 707 could be a place to give such additional guidance (with a note that this guidance is also relevant to a similar determination under 702 of a computerized method's reliability).[2]

To be sure, the PFRE 707 advisory note does list two important considerations in this regard: whether the "training data" (relevant only to "machine-learning" processes) and "validation" data (which I assume is meant to encompass at least the developer's initial validation and independent external evaluation for reliability) is sufficiently representative of the case at hand.

But the following are key additional factors that judges should consider if the scrutiny of the software is to be meaningful:

1. *Whether the process or system has been subject to evaluation by entities independent (financially and otherwise) of the developer, including, critically, whether research licenses are meaningfully available to the parties as well as to independent researchers*. (These licenses may reasonably require a fee, and do not require disclosure of source code; but some developers refuse to allow independent researchers beyond law enforcement laboratories even to pay for a research license, or the developers theoretically allow licenses but impose impossible restrictions on them, such as veto power over whether results are made public).

2. *Whether the proprietor has disclosed to the parties sufficient information about how and why the process works, including information analogous to that which would be disclosed if the conclusion were uttered by a human expert*. (A human expert who testifies in a criminal case is subject to the disclosure requirements of the Jencks Act and Fed. R. Crim. P. 16. In civil cases, experts are subject to even broader discovery. In both civil and criminal cases, the expert will also take the stand at trial and be subject to cross-examination and other potential impeachment. Where an opposing party establishes that analogous disclosures are conspicuously absent with respect to a computerized method, the judge should consider their absence in reaching a reliability determination).

To be clear, these two factors are not disclosure *requirements*. Instead, they simply note the absence of key information relevant to determining foundational reliability and reliability as

[2] For illustrations of the Committee's common practice of addressing the application or interpretation of other rules in the advisory committee notes, see, for example, Fed. R. Evid. 106 advisory committee's note to 2011 amendment (referencing Rule 502(a), 410(b)(1), and 804(b)(6)); Fed. R. Evid. 502 explanatory note (explaining that the language concerning subject matter waiver was taken from Rule 106 because of the same animating principles of the rules); Fed. R. Evid. 609 advisory committee's note to 1990 amendment (noting that Rule 403 and Rule 611(a) sufficiently fill a gap not contemplated by the 1990 Amendment to protect against disruptive modes of proof regarding evidence of prior convictions).

applied. They are akin to a judge considering the extent to which an expert method has been subject to peer review, testing, or is generally accepted by the relevant scientific community. The absence of information on these fronts is already relevant to a *Daubert* inquiry, and the absence of analogous information about a computerized method is similarly relevant.

VII. Changing "machine-generated evidence" to "computer-generated conclusion" or similar phrasing would be appropriate.

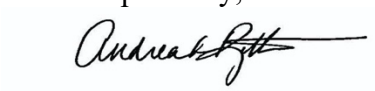
Some commentators have expressed concern that the phrase "machine-generated evidence" is too broad and could generate confusion. The point is well taken, and substitution of another phrase, such as "computer-generated conclusion," would work for the rule's purposes. It is true that, in theory, a machine result might still merit *Daubert* scrutiny even if not computerized, such as the "Drunk-o-meter" of the 1930s and "Breathalyzer" of the 1950s, and might be introduced through a lay witness. But realistically speaking, all modern technologies contemplated by this rule are computer-generated, in that all use digital data processing to some significant extent. But I would caution against use of a human-centric term like "opinion," for fear that a proponent will avoid scrutiny by saying that an "opinion," like a hearsay "assertion," can inherently only be uttered by a human. Also, FRE 702 itself is not limited to opinions.

VIII. A jury instruction to the effect that computer-generated conclusions are potentially fallible is in no way a substitute for *Daubert* scrutiny or consideration of the key factors listed above.

In prior committee meetings, and in the proposed committee note, there has been a suggestion that lingering questions about a process's reliability, as well as the fact that a machine cannot be cross-examined, can be dealt with through a jury instruction. The rule and committee note should make clear that such an instruction, while certainly accurate, is not a substitute for meaningful scrutiny of the computer's conclusions through the requirements discussed above.

Thank you again for the opportunity to address the committee and for your work on this important issue.

Respectfully,



Andrea Roth
Professor of Law and Barry Tarlow Chancellor's Chair in Criminal Justice
UC Berkeley School of Law

TAB 12

No written testimony outline or comment was submitted by the requested January 15, 2026 deadline.

TAB 13

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January 15, 2026

VIA E-MAIL

The Advisory Committee on Evidence

RE: Response to the Judicial Conference Committee on Rules of Practice and Procedure's Request for Comments on Proposed New Federal Rule of Evidence 707

Dear Committee Members:

I write in advance of the January 31, 2026 hearing regarding the Judicial Conference Committee on Rules of Practice and Procedure's request for comments on proposed new Federal Rule of Evidence 707. I would like to address one issue within the proposed new rule which appears inconsistent with what the Advisory committee seems to intend.

In particular, I would like to consider the importance of the role of cross examination in this context. Admitting machine-generated opinions without expert testimony raises a fundamental evidentiary problem: machine opinions cannot be cross-examined. Cross examination is the principal means by which our adversarial system tests the reliability and case-specific application of substantive conclusions. It is undisputed that inquiries typically made on cross examination cannot be directed to a machine. Even if a machine process is generally reliable, the opposing party has no opportunity to challenge how the process produced the particular conclusion offered in the case.

This deficiency is central to Rule 702(d), which requires that an expert opinion reflect a reliable application of principles and methods to the facts of the case. When machine output is offered directly (i.e., without an expert), there is simply no witness who can explain or defend that application. The machine reaches a conclusion, but the court cannot assess what data was prioritized, what alternatives were rejected, or whether the analysis meaningfully accounted for case-specific circumstances. These questions go to admissibility, not weight, and cannot be answered without a human expert who adopts the opinion and is subject to examination.

It is essential to think about this issue pragmatically, within the context of how it will play out in courtrooms across the country. Limiting instructions are unlikely to be sufficient to remedy this problem. We know that the critical role of judicial gatekeeping cannot be replaced by a cautionary instruction to the jury. Warning jurors that machine-generated evidence may be subject to error does not supply a mechanism to test the reliability or application of the opinion itself. The inability to cross-examine machine opinions is therefore a problem of admissibility, not juror perception. The rule text should reflect that machine opinions should rarely, if ever, be admitted without expert testimony, rather than relying on Committee Notes or limiting instructions to address this fundamental gap.

The Advisory Committee has identified a concrete problem worthy of being addressed: machine opinions raise legitimate reliability concerns that need uniform admissibility standards. While the Committee's goal of seeking to prevent evasion of Rule 702's requirements is sound, proposed Rule 707 as drafted will not accomplish that goal.

Sincerely,

s/Kaitlyn E. Stone

Kaitlyn E. Stone

TAB 14

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Statement of Tad Thomas

Past President, American Association for Justice
Chair, AAJ Legal Affairs Committee
Founder, Thomas Law Offices

Before the Advisory Committee on Evidence Rules
January 29, 2026

Thank you for providing an opportunity to comment on proposed FRE 707 on machine-generated evidence. My name is Tad Thomas, and I am a past president of the American Association for Justice (AAJ) and the current chair of AAJ's Legal Affairs Committee, which oversees the association's positions on rules amendments, as well as its amicus curiae program. AAJ is the world's largest plaintiff trial bar association whose core mission is to protect the Seventh Amendment right to trial by jury. I am also the founder of Thomas Law Offices, with offices across the Midwest in Louisville, Cincinnati, Cleveland, Des Moines, Chicago, and Columbia, Missouri. My law firm of 21 lawyers tries trucking, nursing home, medical malpractice, and other personal injury and wrongful death cases around the country.

As a practicing trial lawyer, I appreciate the role that lay witnesses play in explaining basic facts to a jury. While AAJ understands that there may be a need for a rule of evidence to address the reliability of AI-generated evidence or more specifically, machine-learning, the proposed rule misses the mark as it is over-inclusive, resulting in satellite litigation over the use of evidence that is routinely admitted while leaving courts without sufficient tools to handle questionable evidence generated through machine learning and artificial intelligence.

Importantly, it is unclear whether a rule is even needed at this time. While there may eventually be a need for a rule regarding AI or machine learning, technology is changing so fast, it is doubtful whether the proposed rule truly solves the concerns raised by the Advisory Committee on Evidence Rules (Evidence Committee). Should the Evidence Committee decide to proceed with a rule, alternative rule text should be considered, including a rule focused specifically on machine-learning. Any rule considered should *not* apply routinely used technology, a much more applicable category than "simple scientific instruments." In addition to my testimony today, AAJ will file a public comment.

I. The Proposed Rule is Overly Broad and Still Hard to Understand

Originally, the Evidence Committee seemed focused on evidence challenges related to machine-learning. However, the proposed amendment text, with its use of "machine-generated" evidence, is much broader, sweeping in every type of machine imaginable, from appliances and common-place tools or machinery, to software, mobile devices, and industry-specific equipment—most of which is readily accepted by courts as reliable and frequently presented by lay witnesses or to lay a foundation.

This overreach problem could be avoided either by using more specific terminology *or* by providing a definition in the rule. The Committee Note indicates that the rule applies to all types of machines and will lead parties and courts to conclude that the rule is to be broadly applied. The first paragraph of the Committee Note implies that the proposed rule is about generative AI, yet the paragraph outlining examples of exempted "simple scientific instruments" indicates broad application. While it is likely that courts will not require Daubert hearings for "simple scientific instruments" others might require them for instruments that are routinely used but are technically more than "simple" given the rule text.

Rather than addressing the scope of evidence covered by rule, the Committee Note itself begins in a perplexing manner. The first sentence states that "Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information." Not only is this a complicated start to explaining a rule that is *not* an amendment to FRE 702 and does *not* apply to experts, but "machine-based conveyances of information" include basic technology devices that businesses and individuals routinely use. Many of these devices have both machine-generated and human-generated components. For instance, mobile phone, text and email messages, as well as photos and videos, would have inputs provided by the user, but the device's metadata tracking when the content was created, modified, sent, received, stored, or deleted is all machine-generated. Machines or tools used in the workplace are similar. Data— such as a truck driver's identification number entered into an electronic logging device or a record of the medication dispensed to a patient in a hospital—may be inputted by a human, but the information on the device or computer program is all electronically maintained, sorted, and stored, and is generally considered reliable.

Adding to the confusion is that courts may differ in their opinions on the reliability of these routinely used technologies. While geolocation data is routinely admitted, it can be less than precise.[1] This is why ride-share services sometimes think the rider is still inside the building or down the street, when the rider is located at the designated pickup point. A Daubert hearing seems misplaced for geolocation technology, but it also clearly is outside the scope of a "simple scientific instrument."

Additionally, the use of judicial notice does not lessen the confusion for courts and parties. While the Committee Note later provides that the rule "does not apply when the court can take judicial notice that the machine output is reliable," it is easy-to-miss this prompt, as it is located after the section on simple scientific instruments and towards the end of the note. This placement makes it seem like an afterthought rather than an essential component of the rule's application. It would be useful to provide a reminder of judicial notice earlier, perhaps with a prompt to Rule 201, especially since time and date stamps are important elements of machine-generated data.

II. The FRE 702 Reliability Construct Should Not Be Used on Machines

AAJ believes that it may be too early to craft an appropriate rule, since courts are not yet grappling with the reliability of truly independent machine-generated testimony outside the context of experts. Technology data provided by lay witnesses is hybrid data, where the witness used a

[1] Geolocation accuracy can be affected by several factors, including IP addresses, weak satellite signals, VPNs, and device settings.

device to engage in an activity. The lay witness may not understand how the technology works in detail, but can describe, share, or read to the jury text messages sent or received, photos or videos that captured an event, or the time and date of a phone call.

With proposed FRE 707, courts could easily become bogged down with gatekeeping over whether generally accepted technology or the machines used to capture that information are reliable. Absent specific evidence regarding a data breach or that the machine was subjected to manipulation by a third party, there should be no reason for a party—particularly a lay witness—to explain why the time and date stamps of text messages on their phone, their digital calendar appointments, or a digital record of banking transactions are reliable. Lay witness testimony can address a wide range of information and that witness may be responsible for reporting, collecting, investigating, or simply providing eyewitness testimony—none of which fall under the purview of "expert" testimony. Yet, it is also unclear whether the proposed Rule 707, and by extension Rule 702, applies.

Proposed Rule 707's exemption for "the output of simple scientific instruments" would not apply either. For example, a mobile device recording would *not* be considered "simple," nor would it fall into the category of examples provided in the Committee Note.[2] Further, if this rule were to be adopted as written, courts may treat these recordings differently. While some judges may decide that these items are inherently reliable absent evidence to indicate otherwise, other judges may read the rule as text is written and apply the Rule 702 factors.

The 702(a)-(d) factors do not easily apply to machines. Not only is the machine unable to explain how it is reliable, but the factors themselves are incompatible with algorithms and machine learning. For a court reviewing the rule text, it may be very challenging to determine if "the testimony is the product of reliable principles and methods" (FRE 702(c)) and whether "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case" (FRE 702(d)), especially when the technology can't explain how it works.

III. How to Improve the Proposed Rule

AAJ believes that it would be best to draft a different, more specific rule to address AI and machine learning. Should the Evidence Committee choose to proceed with a rule, AAJ makes the following recommendations:

1. Adopt the alternative on "Output of a Process of Machine-Learning."[3]

This alternative meaningfully limits the proposed amendment by focusing on the concerns that have been brought to the attention of the Evidence Committee and which are the impetus for moving a draft rule to public comment. Unlike the proposed amendment in public comment, a

[2] The Committee Note states that examples "might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer."

[3] Memorandum from Professor Capra to Advisory Committee Regarding Machine-Learning and Proposed Rule 707 (Oct. 1, 2025), *in* Advisory Committee on Evidence Rules Agenda Book 141 (Nov. 2025).

detailed definition of machine learning is provided in the first sentence of the draft's Committee Note, complete with descriptions of how these systems work and relate to artificial intelligence.[4]

2. Provide a definition of the rule's application

If the Committee decides to proceed with the current version of the amendment, it should provide a definition of "machine-generated," preferably in the text of the rule but, at a minimum, in the Committee Note. As drafted, there is no definition of "machine-generated" provided in either, and the discussion of the proposed rule seems to indicate that it should be given a broad interpretation, thus resulting in much of AAJ's objection to the rule.

3. Exempt routinely used instruments

The sentence that excludes simple scientific instruments would barely limit the number of items judges would have to evaluate. By using both the words "simple" and "scientific" in the caveat, the exception could even prompt some parties to question the reliability of date and timestamp data from mobile phones and other electronic devices. At a minimum, both the rule text and the Committee Note's examples need to be crafted in a more sophisticated manner, as all these examples are items that a court could take judicial notice of as reliable under Rule 201. Should the Evidence Committee decide to move forward with a final rule, it would be beneficial to remove the second sentence. However, it may be clearer for both parties and courts to rewrite the second sentence with the aim of exempting routinely relied upon instruments:

> This rule does not apply to instruments routinely used to produce [generate] the output.

At its fall meeting, the Evidence Committee thought it should not cede coverage of the rule to the general public, which this sentence would not do, but the court would still be required to evaluate whether an instrument is routinely used. Machines that are routinely used but are *not* generally used for the function employed would not be exempted. The word "generate" would be preferable to the word "produce" only if the Evidence Committee adopts a construct other than "machine-generated" evidence.

AAJ urges the Evidence Committee to reconsider what type of rule is needed to address concerns regarding machine learning and AI and focus on a rule to specifically address those issues. The proposed rule applies to all sorts of machines that pose no reliability concerns but the rule text exempting simple scientific instruments is very limited. More promising approaches include limiting the rule to machine-learning, providing a clear definition of the rule's application, and exempting routinely used instruments.

Thank you, and I would be happy to answer any questions.

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[4] "Machine learning is an application of artificial intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed. Machine learning involves artificial intelligence systems that are used to perform complex tasks in a way that is similar to how humans solve problems." Draft Committee Note, *supra* note 3, at 141.

TAB 15

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

MEMORANDUM

To: Members of the Advisory Committee on Evidence Rules
From: American Civil Liberties Union
Date: January 15, 2026
Re: ACLU Comment on Proposed Rule 707 Concerning the Admissibility of Machine Generated Evidence

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The American Civil Liberties Union (ACLU) writes to offer its perspective on the proposed Federal Rule of Evidence 707 concerning the admissibility of "machine-generated" evidence.[1] The ACLU supports the Advisory Committee's objectives in crafting Rule 707 and offers some edits, as we believe that a modified version of the rule would better achieve those objectives and avoid facilitating exactly the situation the Advisory Committee seeks to prevent.

I. Summary

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

However, the currently proposed Rule 707 suggests that machine-generated evidence could be admissible without proffering an expert witness. This should not be the case. Neither a lay witness, nor documents (which would probably be created by the manufacturer of the technology, an entity with every incentive to overstate the tool's accuracy and reliability) can provide the same information and opportunity for cross-examination than a testifying expert witness can. The ACLU believes that the proponent must lay a foundation for admissibility of machine-generated evidence by having an expert witness testify. And ordinarily an expert must testify in every case because even a technology that *can* be accurate may not be accurate *in a particular instance* because the device was not properly calibrated, the software was not updated, or for some other case-specific reason.

[1] The ACLU agrees with other commentators that have expressed concerns about the term "machine-generated evidence," and supports suggestions to adopt alternatives such as "computer-generated evidence" or "machine opinions." For ease, the term "machine-generated evidence" is used in this comment.

II. Discussion

In drafting Rule 707, the Advisory Committee has taken an important step toward addressing challenges posed by artificial intelligence (AI) and machine learning, specifically around determining the reliability of outputs generated by machine learning or AI systems as it relates to the admissibility of machine-generated evidence. The Advisory Committee's note correctly observes that "it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly [or through a lay witness], where the output would be subject to Rule 702 if rendered as an opinion by a human expert."[2] In order to interrogate reliability of predictions and inferences made by a computer, there needs to be an opportunity to ask questions of someone with the adequate knowledge and understanding to explain how the computer produced its output. Only an expert witness will have adequate knowledge and understanding. The proposed rule is unclear as to how the proponent of machine-generated information could present to the court that the information meets the reliability standards of Rule 702—that the information is based on sufficient facts or data, the product of reliable principles and methods, and reflects a reliable application of the principles and methods to the facts of the case. The lay witness does not know, and documents cannot be cross-examined or questioned by an opposing party or the court. Moreover, documentation often comes from the company that sells the device or software to law enforcement, or from some other entity with incentive to preserve their relationships with the government, and thus may not represent the sober reflections of an independent and therefore qualified expert.

The ACLU has long advocated against the adoption of unreliable technologies by law enforcement. We are concerned that the proposed rule as phrased would smooth the way for the admissibility of information generated these unreliable technologies and encourage law enforcement agencies to continue adopting and employing these unreliable technologies.

To achieve the goals articulated in the Advisory Committee Notes, the ACLU recommends that the Advisory Committee revise the text of Rule 707 so that it explicitly requires the proponent to use an expert witness to introduce "machine-generated evidence," placing the burden on the proponent to establish the reliability of the evidence, subject to Rule 702's standards.

A. Confirming a requirement for an expert witness would help mitigate the effects of police misuse of unreliable technologies.

Law enforcement agencies' speedy adoption of unreliable technologies illustrates why the Federal Rules should require expert testimony for machine-generated evidence. The inherent unreliability of these technologies is not necessarily obvious from a basic description of the way that such machines work, which is all a lay witness might be able to offer, and a law enforcement

[2] *Attachment B to the Evidence Rules Committee Report to the Standing Committee, January 2026*, at 2 [hereinafter Rule 707 Draft].

officers' claims of accuracy may in reality be a repetition of misleading marketing provided by the company that sells the technology to the government.

For example, many law enforcement agencies use facial recognition technology when they seek to identify an unknown suspect from an image captured by surveillance video or another source. However, independent research shows that these facial recognition tools are unreliable and often generate false matches. Additionally, officers often do not understand what the outputs of a face recognition search mean. Only with an expert witness who has the relevant technical knowledge would the defendant have the opportunity to properly question, and the trier of fact the opportunity to assess, the reliability of the evidence. And indeed, to our knowledge, where the government has sought to introduce facial recognition search results via expert testimony, adversarial testing has properly resulted in exclusion of that proffered evidence as unreliable. *See State v. Archambault*, No. 62-CR-20-5866 (Minn. 2d Dist. Ct. Sept. 13, 2024).

Facial recognition systems used by police are not designed to (and do not) return a definitive match in response to an image of an unknown suspect (the "probe image").[3] Rather, they are probabilistic systems that return a number of potential candidates based on an "algorithmic best guess."[4] These systems compare a faceprint extracted from the probe image to each image in a database of faceprints and generate a similarity score for each comparison before outputting a "candidate list" of possible matches. Although higher scores indicate the algorithm's calculation that the candidate appears more similar to the probe image than candidates with lower scores further down the list, the person in question may appear anywhere in the candidate list, if they appear at all.

The number of possible-match candidates returned by a facial recognition system can be high, up to hundreds of candidates.[5] Naturally, only one of the many candidates can be the true suspect. The rest will be innocent "false positives."[6] Furthermore, a true match to the suspect photo often will not appear in the results at all, either because the quality of the probe image is low, or because the database of images being searched does not include the true match, or for other reasons.[7] And although a small database for comparison risks not including the true match,

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[3] Expert Witness Report of Dr. Michael C. King at 9–12, *Williams v. City of Detroit*, No. 21-cv-10827 (E.D. Mich. May 26, 2023), https://perma.cc/Q5J3-YMGF; *see also Woodruff v. Oliver*, No. 23-cv-11886, 2025 WL 2231045, at *12 (E.D. Mich. Aug. 5, 2025) ("[S]earches conducted through today's facial recognition technology may be fundamentally unreliable due to serious flaws in the technology itself and human operator errors.").
[4] Eyal Press, *Does A.I. Lead Police to Ignore Contradictory Evidence?*, New Yorker (Nov. 13, 2023), https://perma.cc/TH4E-2A5L.
[5] *See, e.g.*, Deposition of Joseph Dablitz at 18:17–18, *Oliver v. Bussa*, No. 2:20-cv-12711 (E.D. Mich. Apr. 3, 2023), ECF No. 51-3 ("anywhere up to 10 to 100 or 500"); Deposition of Krystal Howard at 23:9–14, *Williams*, No. 21-cv-10827, ECF No. 50-11, https://perma.cc/H8T5-3UZR (50 or 243 results).
[6] *Archambault*, No. 62-CR-20-5866, slip op. at 18 ("At best, any one of th[e] results is potentially a false positive. At worst, all results are undeniably false positives.").
[7] *See* Patrick Grother et al., Nat'l Inst. of Standards & Tech., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects* 5 (2019), https://perma.cc/7L99-A2QJ.

the possibility of a mismatch increases with the number of individuals in the database because many people share similar-looking facial characteristics.[8]

In addition, facial recognition technology is often less reliable in real-world applications than it is in the lab. Generally, these systems perform most reliably on high quality images, with good lighting, high resolution, and a fully visible face that is facing straight toward the camera (e.g., mugshots).[9] Real-world probe images, however, rarely resemble these photos. The probe images may be blurry or grainy, the suspect may be wearing a hat, or the photo may capture only a side profile of the suspect. Lighting, shadow, angle, facial expression, and partial occlusion of the face all affect accuracy.[10]

Even where probe image quality is ideal, facial recognition systems have a higher rate of false matches when used on people of color, women, and young adults than on white people, men, and older people.[11] Additional bias is introduced when police conduct a search against a database of images that overrepresents people of color, such as an arrest photo database.[12]

Without an expert witness, this kind of information about the unreliability of facial recognition technology likely could not be presented. Police are unlikely to know much about how facial recognition technology works. As the Advisory Committee notes, "the technician who enters a question and prints out the answer might have no expertise on the validity of the output."[13] In the ACLU's lawsuit against the Detroit Police Department for a wrongful arrest due to a faulty facial recognition result, the ACLU observed this very phenomenon. Detectives' knowledge of the technology did not go much further than knowing that they could receive an investigative lead if they submitted surveillance footage to the Detroit Police Department's Crime Intelligence Unit (CIU).[14] Even within the CIU, crime analysts responsible for performing facial recognition searches did not have detailed knowledge about the software. In one

[8] Nat'l Acads. of Scis., Eng'g, & Med., *Facial Recognition Technology: Current Capabilities, Future Prospects, and Governance* 53 (2024) [hereinafter National Academies Report], https://perma.cc/WKB5-H924.
[9] *See, e.g.*, Patrick Grother et al., Nat'l Inst. of Standards & Tech., *Face Recognition Vendor Test (FRVT) Part 2: Identification* 2, 9–10, 15–16 (2019), https://perma.cc/BR6Y-6X6D.
[10] *See, e.g.*, *id.* at 9–10; U.S. Dep't of Homeland Sec., DHS/ICE/PIA-054, Privacy Impact Assessment for the ICE Use of Facial Recognition Services 26 (2020), https://perma.cc/2TMV-JMGH; Aman Bhatta et al., *Impact of Blur and Resolution on Demographic Disparities in 1-to-Many Facial Identification*, 2024 Proc. of the IEEE/CVF Winter Conf. on Applications of Comput. Vision (WACV) Workshops 412, https://perma.cc/MCQ3-QV5V.
[11] *See, e.g.*, National Academies Report, *supra* note 8, at 55–57; Grother et al., *supra* note 7, at 7–8; K.S. Krishnapriya et al., *Issues Related to Face Recognition Accuracy Varying Based on Race and Skin Tone*, 1 IEEE Transactions on Tech. & Soc'y 8, 8–20 (2020), https://perma.cc/NF7Z-WCMK.
[12] Thaddeus L. Johnson et al., *Facial Recognition Systems in Policing and Racial Disparities in Arrests*, Gov't Info. Q., Oct. 2022, at 2, 7.
[13] Rule 707 Draft, *supra* note 2, at 2.
[14] *See, e.g.*, Deposition of Donald Bussa at 32:13–15, 57:25–59:11, *Williams*, No. 21-cv-10827, ECF No. 49-4 , https://perma.cc/2B5X-CPJR; Deposition of Franklin Hayes at 19:2–8, 29:4–22, 30:18–31:3, 45:7–22, *Williams*, No. 21-cv-10827, ECF No. 50-3, https://perma.cc/3E6A-66UZ; Deposition of Rodney Cox at 36:21–37:11, 49:13–50:1, 79:17–82:12, *Williams*, No. 21-cv-10827, ECF No. 49-9, https://perma.cc/6QLR-SB4B; *see also, e.g.*, Deposition of John Fennessey at 18:10–21, *Williams*, No. 21-cv-10827, ECF No. 50-5, https://perma.cc/A658-YBFH.

deposition, a crime analyst testifying on behalf of the Detroit Police Department did not know which facial recognition algorithms were used.[15] He also lacked a full understanding of the information displayed by the software; one exchange suggests that the officer did not understand that the software did not return a "match" but a probability. The officer's testimony shows he was not sure whether the software displayed the similarity score (which was referred to as a "confidence score" during the deposition):

> Q: So, does the DataWorks interface display a confidence score for each image that is returned as a possible match[?]
>
> [clarification by opposing counsel]
>
> A: Oh, I don't know. Based on [the provided] definition, if it does.
>
> Q: Okay, in general, does it?
>
> A: There's a number beneath the photos.
>
> Q: What is that number?
>
> A: I'm going to assume it's this confidence thing, but I don't, I never knew if that's what it was called.[16]

Similar lack of understanding of how the technology works has featured in other cases.[17]

In that lawsuit, the ACLU was unable to learn information like what version of facial recognition software had been used by the Detroit Police Department, despite extensive discovery that included five 30(b)(6) deponents designated to answer questions about the department's use of facial recognition.[18] And Detroit Police Department personnel were unaware of the ways in which facial recognition technology is inherently unreliable.[19] We are concerned that under the current proposed text of Rule 707, the government could potentially claim to meet the standards of Rule 702 by proffering untested evidence of the software's accuracy. For example, marketing materials that the Detroit Police Department received from a vendor touted

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[15] Deposition of Nathan Howell 11:12–25, *Williams*, No. 21-cv-10827, ECF No. 50-4, https://perma.cc/EW4U-R6AE.
[16] *Id.* at 35:25–36:3.
[17] *See, e.g.*, Amici Curiae Brief of American Civil Liberties Union et al. in Support of Petitioner, at 3 & n.1, *Lynch v. State*, No. SC2019-0298 (Fla. Mar. 11, 2019), https://perma.cc/3RQP-ZY5Q (analyst testified that the system returned a "star rating" for each possible match, but did not know what number of stars is possible or what they mean).
[18] *See* Plaintiff's Motion for Sanctions for Failure to Produce a Prepared Rule 30(b)(6) Deponent at 2–6, *Williams*, No. 21-cv-10827, ECF No. 50.
[19] *See, e.g.*, Deposition of Donald Bussa 106:3–109:16, *Williams*, No. 21-cv-10827, ECF No. 49-4, https://perma.cc/BY37-WQN9; Deposition of Rodney Cox 80:2–82:3, *Williams*, No. 21-cv-10827, ECF No. 49-9, https://perma.cc/6QLR-SB4B.

accuracy rates around 90 percent, but did not go into detail about how the accuracy rate was measured.[20] Without an expert witness to cross examine, there would be no opportunity to properly interrogate the claimed reliability of a facial recognition search result.

Similarly, the gunshot detection technology ShotSpotter has been relied upon by law enforcement despite the unreliable nature of the technology. ShotSpotter involves a network of microphones that are typically installed on poles or rooftops and are always listening and recording, and a sound detection system like this one also needs regular, site-specific calibration and testing.[21] When a loud noise is detected, audio snippets from these microphones are run through an audio-screening algorithm that attempts to classify the noise and determine its location.[22] Then, call-center-style, ShotSpotter staff listen to disembodied, isolated, and contextless audio snippets to decide, based on their subjective impression of the sound and a visual waveform generated by the software, whether to trigger a gunshot alert.[23] The entire process typically takes less than a minute.[24]

ShotSpotter boasts that the system is 97 percent accurate with a false positive rate of less than 0.5 percent across its customers,[25] but these marketing statements are deeply misleading and scientifically meaningless. The figures are not based on actual testing of the system. Instead, ShotSpotter calculates these "accuracy" figures by simply assuming that every alert was triggered by actual gunfire unless a police customer affirmatively flags an error.[26] The figures are simply tallies of voluntary customer complaints with no known effort by ShotSpotter to collect information on misidentified or mislocated gunshots. Outside reports have also contradicted ShotSpotter's purportedly high accuracy rates; in Chicago, the inspector general found that 90.9 percent of ShotSpotter alerts led police to find no gun-related incident of any kind at the scene.[27]

Courts are starting to recognize what kind of information is needed to interrogate reliability. The New Jersey Supreme Court has held, in a ruling on a discovery motion in a criminal case, that the "identity, design, specifications, and operation of the program or programs used for analysis, and the database or databases used for comparison are relevant to [facial recognition technology]'s reliability." *State v. Arteaga*, 476 N.J. Super. 36, 61 (N.J. 2023). In Illinois, in a case where a ShotSpotter alert was the sole cause for police to stop the defendant, an

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[20] *Face Recognition Vendor Solicitations (2017)* 9–10, *Williams*, No. 21-cv-10827, https://perma.cc/4NG4-DG8L.
[21] Helen Webley-Brown et. al., Surveillance Technology Oversight Project, *ShotSpotter and the Misfires of Gunshot Detection Technology* 3–5 (2022) [hereinafter STOP Report], https://perma.cc/3X76-HU8B.
[22] *ShotSpotter Frequently Asked Questions*, ShotSpotter [hereinafter *ShotSpotter FAQ*], https://perma.cc/7SF4-BKLX; City of Chi. Off. Inspector Gen., *The Chicago Police Department's Use of ShotSpotter Technology* 4 (2021) [hereinafter Chicago OIG Report], https://perma.cc/68HK-Q9NJ.
[23] Chicago OIG Report, *supra* note 22, at 4; *see also* Chris Mills Rodrigo, *Gunshot Detection Firm ShotSpotter Expands with New D.C. Office*, Hill (July 14, 2021), https://perma.cc/HW4T-BXJD.
[24] *ShotSpotter FAQ*, *supra* note 22.
[25] *Id.*
[26] Edgeworth Analytics, *Independent Audit of the ShotSpotter Accuracy* 2 (2022), https://perma.cc/4TNR-UWL7 ("Information on potential errors relies on clients reporting those potential errors to ShotSpotter.").
[27] Chicago OIG Report, *supra* note 22, at 3.

appellate court affirmed the trial court's ruling to allow the defendant to seek discovery from ShotSpotter to challenge the tool's reliability. *People v. Jones*, 220 N.E.3d 475, 490 (Ill. App. Ct. 2023).[28] The Advisory Committee should use Rule 707 to make clear that a witness who can explain such information is needed to determine reliability when a court is considering whether to admit such machine-generated information into evidence.

B. The kind of information needed to interrogate reliability of machine-generated evidence is best presented by an expert witness.

Computer systems that might produce machine-generated evidence include the artificial intelligence systems that are increasingly common today. As the Advisory Committee notes,"[m]achine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data."[29] There are multiple steps involved in building these systems, from designing the system to training the underlying computer models, to preparing the system for real-world usage. Ascertaining the reliability of these systems, in turn, requires information about these various steps.

As the examples of facial recognition and gunshot detection technology described above show, the kind of information that could be relevant to determining reliability of a computer system that uses models for prediction or inference includes:

- *Information about the system design.* As the Advisory Committee note points out, reliability problems may arise when there is "function creep"—that is, a system is used for a purpose it was not intended to handle. As described above, facial recognition technology is not designed to return a single, definitive "match" for a probe image but rather to present a list of *possible* match candidates, yet its output may be presented to investigating officers as the former rather than the latter.

- *Data used for building and refining a computer model.* Artificial intelligence models learn from data, and potential biases in that data may influence the resulting model. For example, if a gunshot detection model is trained on a dataset where all the examples of gunshots include sirens in the background and all the non-gunshot examples do not have any sirens audible, the model may learn simply that the sound of a siren indicates a gunshot. But before even training a model, how the data is collected and how it is processed also has an impact on the resulting model. For a dataset of images with faces, the source of the images (e.g. arrest photos, photos posted on social media), as well as how the images were cropped or if the images'

[28] *See also, e.g.*, *Commonwealth v. Arrington*, 226 N.E.3d 851, 861–67 (Mass. 2024) (affirming a trial court's order denying the admission of a cell phone "frequent location history" data because the expert testimony presented had not established the reliability of the technology); *Woodruff*, 2025 WL 2231045, at *12 (considering studies, reports, and expert testimony and recognizing that facial recognition technology today "may be fundamentally unreliable due to serious flaws in the technology itself and human operator errors").
[29] Rule 707 Draft, *supra* note 2, at 2.

brightness or color were adjusted, may also impact the model's reliability. Issues might arise if data was originally collected for a different purpose, like advertising data that tracks a cell phone's location being repurposed for geofences.

- *Algorithms used to build the model.* What methods are used to train a computer model and refine it have an impact on the model's reliability. For example, different facial recognition algorithms perform differently,[30] so knowing which algorithms are being used is helpful for determining reliability.

- *How the model was tested, and the results of those tests.* Touting accuracy statistics provides little, if any, useful information without an explanation of the methodology behind how accuracy was measured. In examining any studies, how the test setup compares to real-world usage may be important, such as if a facial recognition system is tested with photos from surveillance footage or drivers' licenses. Upon a closer look, ShotSpotter's claims of accuracy were actually a measure of voluntary customer reports of failure rather than actual performance. The lack of independent testing might also weigh against the reliability of the technology.[31]

- *What processes were used to improve the model.* The initial training of a model is never the final product, and so just as it might be important to know how a model is refined after it has been tested. It may also be helpful to know whether data from real-world usage is incorporated into improving the model, or if nothing is updated after a police department has installed the software.

- *How the system is deployed for real-world applications.* When a police department sets up a new technology, how it is configured is important to the question of reliability. For example, facial recognition searches may be configured to return the same number of images with every search or to return only those whose similarity scores meet a certain threshold, and that may be a choice given to the police department (as opposed to dictated by the software vendor). If the search is configured to return the same number of images every time, then images with lower similarity scores may be included in the result.

- *Updates, calibration, other instance-specific information*. Even with the same software or technology, different police departments may have different setups. ShotSpotter microphones must be calibrated to the specific location. Some police departments may be more proactive in updating their software versions, while others

[30] *E.g.*, Grother et al., *supra* note 10.
[31] *See also, e.g.*, *Arrington*, 226 N.E.3d at 864 (noting that frequent location history data outputs generated by cell phones "are not ipso facto reliable, especially where there is not scientific literature or adequate testing to support reliability").

> choose to run older versions. These kinds of instance-specific differences may also impact the reliability of an output.[32]

This is not an exhaustive list, but examples of what kinds of questions need to be asked to determine the reliability of the output of a machine. But if this information were presented merely through lay witnesses or records, as proposed Rule 707 appears to contemplate, the factfinder is not equipped to understand how this additional information impacts reliability. The ability to parse through that would likely require "scientific, technical, or other specialized knowledge" within the scope of Rule 702. Knowing what algorithms were used says little about the reliability without knowledge of how well those algorithms operate for the given situation.

C. Proposed changes to the text

The ACLU believes that changes to the text of Rule 707 are necessary. Our suggestion for the text of Rule 707 is as follows (new text is underlined):

> 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 <u>is limited to evidence not based on scientific, technical, or other specialized knowledge or if expert testimony in support of the evidence</u> satisfies the requirements of Rule 702(a)-(d). ~~This rule does not apply to the output of simple scientific instruments.~~

This proposal is intended to address a few concerns. Most importantly, it would require an expert if the evidence would otherwise require an expert, and if determining the reliability of the evidence would require an expert. Machine-generated evidence should not be scrutinized less than other scientific, technical, or specialized evidence; if anything, it deserves more scrutiny as sophisticated tools such as artificial intelligence and predictive algorithms become less comprehensible to jurors and judges. The ACLU agrees with the Advisory Committee that machine-generated evidence should not be permitted to slip through the cracks simply because it is presented as a prediction or inference made by a computer. The solution should be to require an expert, dispensing with the potential confusion introduced by Rule 707's scheme of applying Rule 702's standards to lay witnesses or written records.

The requirement of an expert witness is also intended to put the burden on the party offering the evidence to demonstrate the reliability of the evidence. If Rule 702's standards have not been met, the presumption should be that the machine-generated evidence being offered is not reliable and therefore inadmissible. And by eliminating any option to introduce the evidence

[32] *See also, e.g.*, *Commonwealth v. Davis*, 168 N.E.3d 294, 304 (Mass. 2021) ("It is not sufficient to show merely that GPS technology is, in general, reliable without making any showing pertaining to the reliability of a particular model or device.").

without an expert, this proposal does not risk encouraging parties to opt for machine-generated evidence over live witnesses.

Finally, this proposal dispenses with the language "simple scientific instruments," which the ACLU believes creates more confusion than clarity. Tying the expert requirement to the standards set forth by Rules 701 and 702 mitigates the need to label or categorize evidence that is technically generated by a machine but not "machine-generated evidence" in the way that the phrase is presented under the current proposed Rule 707. As for the concern that Rule 707 could be misinterpreted to apply to evidence from electronic devices that may not require an expert witness, such as a digital thermometer or electronic scale, Rule 201 adequately constrains the reach of Rule 707. If a proffered fact comes from a source "whose accuracy cannot reasonably be questioned," then the trier of fact may take judicial notice and avoid the need for an expert witness.

* * *

Thank you for your consideration of these comments and the opportunity to testify.

Respectfully,

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