



## Utah Supreme Court Rules of Evidence Committee

### Meeting Agenda

*Nicole Salazar-Hall, Chair*

Location: [WebEx Meeting](#)

Date: January 14, 2025

Time: 5:15 p.m. - 7:15 p.m. MST

<b>Action:</b> Welcome and approve November 12, 2024 Minutes	Tab 1	Nicole Salazar-Hall
<b>Action:</b> URE 1102 reference to H.J.R. 13 (public comments: none); vote re seeking final approval		Nicole Salazar-Hall
<b>Action:</b> URE 106 subcommittee report; vote re seeking final approval	Tab 2	Sarah Carlquist
<b>Discussion:</b> URE 408 redline; differences between FRE and Utah rule and need for subcommittee to consider possible amendments	Tab 3	Nicole Salazar-Hall
<b>Discussion:</b> URE 707 and 901 redlines; artificial intelligence amendments under consideration by FRE Committee	Tab 4	Nicole Salazar-Hall
<b>Discussion:</b> URE 702 redline; possible amendment to bring language of rule into conformity with practice re “blind experts”	Tab 5	Judge Leavitt
<b>Update:</b> URE 613 (going up to Supreme Court with any other amendment requests)		Nicole Salazar-Hall
<b>Fond Farewell:</b> Judge Leavitt (appointed to Judicial Council)		Nicole Salazar-Hall

## [Committee Web Page](#)

### **Meeting Schedule:**

January 14, 2025

February 11, 2025

March 11, 2025

April 8, 2025

May 13, 2025

June 10, 2025

October 14, 2025

November 11, 2025

### **Rule Status:**

URE 106 - Back from Supreme Court

URE 107 - In draft with subcommittee

URE 404 - Awaiting advice from Supreme Court

URE 408 - In draft

URE 507.1 - Awaiting DoH guidelines

URE 613 - Going up to Supreme Court

URE 702 - In draft

URE 707 - In draft

URE 801 - Awaiting further federal caselaw

URE 804 - In draft with subcommittee

URE 901 - In draft

URE 1006 - In draft with subcommittee

URE 1102 - Back from public comment

# TAB 1

**UTAH SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF EVIDENCE**

**MEETING MINUTES**

**DRAFT**

**November 12th, 2024**

**5:15 p.m.-6:40 p.m.**

**Via Webex**

<u>MEMBERS PRESENT</u>	<u>MEMBERS EXCUSED</u>	<u>GUESTS</u>	<u>STAFF</u>
Nicole Salazar-Hall Sarah Carlquist David Billings Teneille Brown Tony Graf Clint Heiner Hon. Linda Jones Hon. Michael Leavitt Scott Lythgoe Ryan McBride Hon. Richard McKelvie Adam Merrill Benjamin Miller Andres Morelli Rachel Sykes Dallas Young	Hon. David Williams		Jace Willard

**1. Welcome, Approval of Minutes, and Introductions to New Member**

Nicole Salazar-Hall welcomed everyone to the meeting. Scott Lythgoe moved for approval of the October meeting minutes. Sarah Carlquist seconded. The motion carried. Ms. Salazar-Hall welcomed new member Adam Merrill to the Committee and invited him and all Committee members present to introduce themselves.

**2. Update on URE Rules 702, 615, and 1102**

Ms. Salazar-Hall noted that the Supreme Court adopted the Committee's recommendation to take no action on URE 702, despite recent amendments to FRE 702. She further noted that the Court made final the Committee's proposed changes to URE 615, which took effect on November 1, 2024. The Court also approved the Committee's proposal to add a reference to URE 1102 to the legislation amending that rule. That proposed change is presently out for

public comment.

### **3. URE Rule 107 and Rule 1006 Subcommittee Formed**

The Committee considered several recent amendments to the federal rules and whether similar changes should be made to the Utah rules. The first rule considered was a new draft URE 107 modeled after new FRE 107. Judge Leavitt was generally supportive of the new rule, but suggested that the language “when practicable” in subparagraph (c) should be changed to something more definite. Others agreed. Ms. Carlquist, Mr. Young, and Professor Brown all spoke in favor of making any illustrative aids used at trial part of the record. Judge Jones suggested it might be helpful to consider UCJA Rule 4-206’s provisions regarding court custody of offered exhibits. Following discussion, a subcommittee was formed to consider draft URE 107 more closely. The subcommittee members include Judge Jones, Ms. Sykes, Professor Brown, and Mr. Lythgoe. Ms. Salazar-Hall invited the subcommittee members to select their own chair. As indicated below, this subcommittee will also consider potential changes to Rule 1006.

### **4. URE Rule 613 Redlines Recommended**

The Committee next considered draft amendments to URE 613(b) in line with recent federal amendments regarding extrinsic evidence of a witness’s prior inconsistent statement. Ms. Salazar-Hall and Ms. Sykes noted that the provision doesn’t seem to come up very often in civil cases. Mr. Heiner said it is frequently an issue in criminal cases, where victims or witnesses are not given a prior chance to explain or deny prior inconsistent statements. Mr. McBride, Mr. Young, Judge Leavitt, and Mr. Heiner all expressed support for the draft amendments. Ms. Carlquist moved to recommend adoption of the amendments. Mr. McBride seconded. The motion carried.

### **5. URE Rule 801 Redlines on Hold**

Potential changes to URE 801(d)(2) were also considered in light of recent changes to the corresponding federal provision. Ms. Salazar-Hall pointed out that the changes added to an existing provision in the federal rule that has not been adopted in the Utah version. Professor Merrill explained that the federal provision arises out of a Supreme Court case, *Bourjaily v. U.S.*, 483 U.S. 171 (1987), and concerns using coconspirator hearsay statements to bootstrap foundation for the statements as to the existence of a conspiracy. Given the absence in URE 801(d)(2) of the existing (pre-amendment) provision regarding bootstrapping in the federal version, Ms. Salazar-Hall suggested that it might be prudent to await the development of more federal law on the subject before pursuing changes to this rule. She called for a vote as to whether the Committee preferred putting the matter on hold or forming a subcommittee to consider adoption of the federal changes. A majority of those who voted supported waiting to see how federal caselaw develops.

### **6. URE Rule 804 Subcommittee Formed**

The Committee also considered potential changes to URE 804(b)(3)(B)’s exception to the

hearsay rule for statements tending to expose the declarant to criminal liability. Mr. Miller expressed support for the amendment as providing helpful guidance. Judge Leavitt countered that it might limit counsel's arguments regarding factors indicative of trustworthiness. Mr. McBride said the amendment calling for consideration of "the totality of the circumstances under which [the statement] was made and any evidence that supports or undermines it" seems redundant because the rule already requires the court to consider whether there are "corroborating circumstances that clearly indicate its trustworthiness." Professor Merrill suggested that some courts will only look at the circumstances under which the statement was made. Following discussion, a subcommittee was formed to consider the matter more closely. The members of the subcommittee are Mr. Billings, Professor Merrill, Mr. Miller, and Mr. Morelli.

#### **7. URE Rule 1006 Subcommittee**

Next, the Committee considered amending URE 1006 based on recent amendments to the federal rule regarding summaries. Ms. Salazar-Hall indicated that this rule comes up a lot in domestic cases but that practices for admitting summaries can vary greatly from judge to judge. Judge Jones suggested having this rule considered by the URE 107 subcommittee to promote the consistency of proposed changes. Judge Leavitt and others agreed. The URE 107 subcommittee will also consider changes to URE 1006.

#### **8. FRE Amendments for AI Evidence**

Ms. Salazar-Hall noted that efforts are presently underway to make expedited changes to the federal rules to address recent and ongoing developments in artificial intelligence. She has sent materials to Mr. Willard that he will forward to the Committee regarding the proposed changes.

#### **ADJOURN:**

**With no further items to discuss, Ms. Salazar-Hall adjourned the meeting. The next meeting will be January 14, 2025, at 5:15 pm, via Webex Webinar video conferencing.**

# TAB 2

## INTRODUCTION

On July 3, 2024, the Utah Rules of Evidence Advisory Committee (the Committee) submitted a letter asking this Court to give final approval to proposed amendments to Rule 106—the rule of completeness. The proposed amendments follow verbatim those approved for Federal Rule of Evidence 106 (the Federal Rule). At this Court’s July 10<sup>th</sup> conference, before voting on whether to give the proposed amendments final approval, Justice Hagen raised questions concerning the fairness language in the rule. Specifically, the rule states that if a statement is introduced, an adverse party may request introduction of the remainder of the statement “that in fairness ought to be considered at the same time.” Utah R. Evid. 106.

Justice Hagen identified two points for the Committee to consider. First, she asked the Committee to consider whether we should add clarifying language to the fairness requirement in the rule. She indicated that the Committee Notes for the Federal Rule provide clarification for the fairness requirement, but the Utah policy is to put clarifying language in the rule itself. Second, she asked how the rule is intended to operate. She suggested that it should not be used to admit a statement for "explanation"; and she disagreed with the notion that "fairness" would permit a defendant to introduce a completing remainder if the prosecution presented evidence that the defendant said, "I shot him," while the remainder supported that he said, "I shot him because he was about to shoot me."



In response to Justice Hagen’s concerns, the Committee formed a subcommittee (the Subcommittee) to research and address the issues. The Subcommittee<sup>1</sup> reviewed relevant materials relating to the Federal Advisory Committee on Evidence Rules (the Federal Committee), considered Utah’s current Rule 106 caselaw, and drafted this memorandum.

As explained below, the Subcommittee’s research supports that the proposed amendments to the Utah rule (and the amendments to the Federal Rule) do not change the text of the “fairness” requirement. Indeed, the Federal Committee declined recommendations to constrain the fairness requirement, and this Subcommittee agrees with that approach.

As such, the Subcommittee proposes that the Utah Supreme Court adopt the proposed amendments to the Utah rule for the following reasons: (I) the proposed amendments follow the Federal Rule, and they operate to give full effect to Rule 106’s already-existing fairness requirement, where the fairness requirement gives a trial court discretion to admit evidence for an appropriate reason under the rule of completeness; and in that regard (II) no change is necessary to clarify the fairness requirement. Also, the Supreme Court Advisory Committee on the Utah Rules of Evidence should include a new committee note to alert the courts and

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<sup>1</sup>The Subcommittee members are: Sarah Carlquist (Subcommittee Chair, Salt Lake Legal Defender Assoc.); Judge Linda Jones (Third District Court); Dallas Young (Utah County Public Defender Assoc.); and Clint Heiner (Salt Lake District Attorney’s Office).

practitioners to the fact that the rule has been amended in light of the amendments to the Federal Rule, and that the amended rule is the Federal Rule verbatim.

## DISCUSSION

### **I. The proposed amendments follow the Federal Rule, and they operate to give full effect to Rule 106’s already-existing fairness requirement, where the fairness requirement gives a trial court discretion to admit evidence for an appropriate reason.**

The proposed amendments to Utah Rule of Evidence 106 follow verbatim the amendments adopted by the Federal Committee. On November 13, 2020, the Federal Committee met to consider, among other things, “potential amendment[s] to Rule 106,” which “had been before the [Federal] Committee for several years.”<sup>2</sup> ADVISORY COMM. ON EVID. RULES, MINUTES OF THE MEETING (Nov. 13, 2020) at 12.<sup>3</sup> The proposed federal amendments purported to do two things: (A) the amendments would give a trial court discretion to admit a statement under the rule of completeness “over a hearsay objection,” and (B) the amendments would apply the rule of completeness to oral statements. Both amendments would demonstrate an intent to ensure fairness while maintaining a trial court’s discretion to admit or exclude evidence of a completing remainder.

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<sup>2</sup> The Utah Committee has likewise been considering potential amendments to Rule 106 for several years. The Committee first broached amending Rule 106 in October 2018, and since that time it has been a topic of discussion at approximately 22 Committee meetings. *See generally* SUPREME COURT’S ADVISORY COMMITTEE ON THE RULES OF EVIDENCE, *Category URE 106*, available at: <https://legacy.utcourts.gov/utc/rules-evidence/category/ure-106/> (last visited Nov. 20, 2024).

<sup>3</sup> Attached as Addendum A.

**A. The proposed amendments to Rule 106 would give a court discretion to admit a statement under the rule of completeness over a hearsay objection, where in fairness the statement ought to be considered.**

The first amendment to Federal Rule 106 addresses the issue of whether a remainder statement should be admitted under the rule of completeness “over a hearsay objection.” *See* Addendum A at 12. The amendment provides: “The adverse party *may* [invoke Rule 106] over a hearsay objection.” Fed. R. Evid. 106 (emphasis added). The Federal Committee minutes support that the committee “wrestled with the purpose for which such a remainder might be admitted over a hearsay objection—either for its truth or for the limited non-hearsay purpose of providing context.” Addendum A at 12.

Specifically, the Department of Justice (DOJ), “expressed a preference for an amendment to Rule 106 that would allow remainders only for their non-hearsay value in providing context . . . .” *Id.* at 13. But Federal Committee members raised concerns about admitting a completing remainder for a “non-hearsay context alone” where it would require “confusing limiting instructions.” *Id.* at 12.

In addition, committee members reasoned that the better approach would be to allow the trial court judge discretion “to decide on a case-by-case basis the purpose for which the remainder may be used once it is admitted to complete.” *Id.* That is, a remainder may be admitted for the non-hearsay purpose of context, for the truth of the matter asserted, or not at all. Fairness would dictate the purpose based on the circumstances of the case.

At the conclusion of the November 2020 meeting, 5 members of the Federal Committee and the Chair voted to amend Rule 106, in relevant part, to allow the remainder over a hearsay objection; 1 member voted for an amendment that would allow the completing remainder only for its non-hearsay context; and the DOJ “voiced opposition to any amendment.” *Id.* at 15.

At a subsequent meeting, after the proposed amendments were published for public comment, “the Reporter reminded the [Federal] Committee the amendment to Rule 106 would allow completion over a hearsay objection because a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay.” ADVISORY COMM. ON EVID. RULES, MINUTES OF THE MEETING (May 6, 2022) at 3.<sup>4</sup> At the conclusion of the meeting, the Federal Committee’s participating members unanimously approved the proposed amendment. *Id.* at 4.

This Subcommittee’s review of the materials from the Federal Committee supports that amending Rule 106 to allow a remainder “over a hearsay objection” is necessary to give full effect to the rule’s fairness requirement. The Subcommittee is persuaded that it would be unfair to use the rule against hearsay to exclude a completing remainder where the incomplete statement left a misleading impression. Indeed, “the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a

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<sup>4</sup> Attached as Addendum B.

proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression.” Fed. R. Evid. 106, Adv. Comm. Note, 2023 Amendments. During the Subcommittee meeting, Clint Heiner noted that if he elicits a defendant’s statement through a detective, the defendant’s statement is admitted for its truth, and he will argue the statement in closing for its truth. As such, he noted that if a defendant admitted the remainder statement under Rule 106, fairness supports that it too should be admitted for its truth.

Judge Jones noted that the amendment’s use of the discretionary term “may”—where the amendment states that “[t]he adverse party *may* [invoke Rule 106] over a hearsay objection” (emphasis added)—shows a preference for trial court judges to retain discretion to admit or exclude the evidence. And in that regard, the fairness requirement—rather than the rule against hearsay—is intended to guide that discretion. Thus, the fairness requirement allows a trial court judge to decide on a case-by-case basis whether fairness requires the remainder to be admitted for its truth; requires the remainder to come in for its limited non-hearsay purpose, that is, context; or requires exclusion of the remainder statement.

Finally, the Subcommittee notes that allowing completion over a hearsay objection not only promotes fairness but is consistent with the rule’s fairness requirement as articulated in Utah case law. Specifically, in *State v. LeLeae*, 1999 UT App 368, the court of appeals explained that under the rule of completeness then in effect, “A trial court need admit only those portions of a statement [that

are] relevant and necessary to qualify, explain, or place in context the portion already introduced.” *Id.* ¶ 43 (cleaned up); *see also State v. Cruz-Meza*, 2003 UT 33, ¶ 45 (stating the court of appeals in *LeLeae*, correctly interpreted Rule 106’s fairness standard). In that regard, the Subcommittee does not propose adding clarifying language to the fairness requirement in the rule. Rather, the proposed amendment gives appropriate force to the fairness requirement as articulated in Utah case law.

In sum, the Subcommittee stands by the Committee’s previous recommendation to this Court to give final approval to the proposed amendment to Rule 106 to allow the completing remainder over a hearsay objection. The Subcommittee agrees with the Federal Committee that in some cases, “a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay.” Addendum B at 3. The Subcommittee also believes that allowing a trial court discretion to admit a completing remainder over a hearsay objection is necessary to give full effect to the rule’s touchstone requirement of fairness. That is, the trial court should determine in the first instance what “fairness” requires in a given case. Because the amendments, as proposed, give discretion to the trial court under the fairness requirement, it is unnecessary to include clarifying language in the text or in a comment to the rule.

**B. The proposed amendments to Rule 106 would give a court discretion to apply the rule of completeness to oral statements where fairness supports such application.**

The Federal Committee adopted a second amendment to Federal Rule 106 that “would extend completion rights . . . to oral unrecorded statements,” where those statements previously were not covered by the text of Rule 106. Addendum A at 12. The Reporter for the Federal Committee explained that “many circuits currently admit oral statements when necessary to prevent unfair distortion, but that they do so under a confusing combination of residual common law and the broad power of the trial court to control the mode and order of interrogation under Rule 611(a).” *Id.* Also, some courts “end their analysis with Rule 106 and do *not* admit oral statements, probably because counsel does not think of Rule 611(a) or the common law.” *Id.* at 14 (emphasis in original). And “a few circuits appear to reject completion of oral statements altogether, simply because they are omitted from Rule 106’s coverage.” *Id.* at 12.

The Reporter pointed out that “leaving oral statements out of the rule would simply take advantage of litigants who don’t know about the common law and Rule 611(a), and would treat litigants differently depending on the quality and experience of counsel.” *Id.* at 14. He opined that if Rule 106 were *not* extended to include oral statements, the rule would “create[] a conflict in the courts” and “result[] in a trap for the unwary.” *Id.* In that regard, he noted a preference to bring all completing statements under the umbrella of Rule 106. *Id.*

The DOJ opposed the proposed amendment and took the position that including oral statements under the rule of completion “would make Rule 106 more susceptible to abuse by criminal defendants trying to admit unreliable exculpatory statements.” *Id.* at 13. It argued that “if Rule 106 is amended, criminal defendants would be limited only by their imagination in crafting exculpatory oral statements, and that a recording requirement would at least limit defendants to requesting additional portions of an authenticated recording to be played in court.” *Id.* at 14.

Members of the Federal Committee disagreed with the DOJ’s position. The Reporter questioned “why a government witness is permitted in the first place to testify about an unrecorded oral statement allegedly made by a defendant given the concern about manufactured oral statements.” *Id.* And members questioned how allowing oral statements “would ‘open Pandora’s box’ if most courts already admit[ted] them” under the law, *id.*; they considered anxiety about including oral statements to be “overblown,” *id.*; and they observed that it is “very rare” in a criminal case for statements to *not* be recorded. *Id.*

At the conclusion of the discussion, six Federal Committee members and the Chair informally voted to add oral statements to the rule, and the DOJ continued to voice its opposition. *Id.* at 15. Ultimately, the amendment to allow oral statements was unanimously approved. *See* Addendum B at 4.

After considering the Federal Committee’s materials on extending Rule 106 to oral statements, the Subcommittee noted that the Utah Attorney General’s



Office, through its Criminal Justice and Criminal Appeals Divisions (the AGs), expressed concerns similar to those of the DOJ. But because the Committee as a whole has already considered and rejected those concerns, they are not addressed here.<sup>5</sup> Moreover, this Court has already recognized that while oral statements are not covered by the pre-amendment text of Rule 106, oral statements may nevertheless be admitted under Utah Rule 611(a). *See State v. Cruz-Meza*, 2003 UT 33, ¶¶ 9, 10 (noting the appellant was correct in asserting “that the rule of completeness may be applied to oral statements through rule 611”). In addition, Utah law requires law enforcement officers to record a defendant’s statement. *See also* Utah R. Evid. 616(b) (providing that statements made during custodial interrogation shall not be admitted unless they are recorded or fall under an exception). Thus, applying Rule 106 to *unrecorded statements* is consistent with current Utah law as set forth in *Cruz-Meza*, and it would further incentivize officers to record statements.

Finally, because this Court has not identified concern about the proposed amendment regarding oral statements, this memorandum discusses the Federal Committee’s consideration of the oral-statements amendment only to the extent it speaks to operation of the rule and the fairness requirement. Moreover, as the Federal Committee noted, *see* Addendum A at 14, it is unfair that a written or

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<sup>5</sup> To the extent that this Court or any of its members have unvoiced concerns regarding the inclusion of oral statements in the proposed amendments, the Subcommittee hopes that its inclusion of the Federal Committee’s discussion on this point is helpful and adequately responds to those concerns.

recorded remainder may be treated differently than an oral remainder, particularly where the remainder is necessary to correct a distorted or misleading statement. As such, the Subcommittee is convinced that extending Rule 106 to oral statements is necessary to give full effect to the fairness requirement under Rule 106.

But, as with the amendment allowing completion over a hearsay objection, the amendment allowing the use of oral statements is stated in discretionary terms with use of the word, “may.” Specifically, the proposed amendment reads in part:

If a party introduces all or part of a statement, an adverse party *may* require the introduction, at that time, of any other part—or any other statement—that in fairness *ought* to be considered at the same time.

(Emphasis added.) As such, the Subcommittee believes that the amendment supports an intent to give proper force and deference to the fairness requirement, and to allow trial court discretion to consider whether *fairness* requires admission of a completing statement—oral or not.

In sum, the Subcommittee stands by the Committee’s previous recommendation to this Court to give final approval to the proposed amendment to Rule 106 to allow a completing remainder regardless of the form of the initial statement admitted in evidence. The Subcommittee believes the amendment is necessary to give full effect to Rule 106’s touchstone requirement of fairness, and that determining what fairness may require in any given case should be left, in the first instance, to the adversarial process and the discretion of the trial court.

**II. The Subcommittee stands by the Committee’s recommendation to give final approval to the proposed amendments without any alteration to the text. The Subcommittee also recommends that a new Committee Note be adopted and be given final approval.**

In light of the research discussed above, *supra* Part I, the Subcommittee does not believe it is necessary to alter the text of the proposed amendments to Rule 106. Because the Subcommittee has concluded that the proposed amendments are intended to give force to the rule’s already-existing fairness requirement, and are likewise intended to ensure that trial courts retain appropriate discretion to determine, on a case-by-case basis, what fairness requires, any attempt to clarify the meaning of fairness, either in the text of the rule or in a committee note, risks undermining the discretion of the trial court. For those reasons, the Subcommittee stands by the Committee’s recommendation that this Court give final approval to the proposed amendments to the text of the rule, as currently drafted.

That being said, the Subcommittee also believes that it would be helpful to adopt and approve a new Committee Note explaining that the proposed amendments were made in light of the recent amendments to the Federal Rule, and that this is the Federal Rule verbatim.<sup>6</sup> The Subcommittee believes that the proposed Committee Note will adequately alert the courts and practitioners that the intent of the amendments is to follow the Federal Rule, while letting the

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<sup>6</sup> Indeed, it appears to have been an oversight not to have proposed an amended Committee Note as part of the overall proposed amendments to the rule first submitted to this Court.

adversarial process and the discretion of the trial courts sort out, in the first instance, the details on a case-by-case basis.<sup>7</sup>

#### CONCLUSION

For the reasons discussed above, the Subcommittee stands by the recommendation of the Committee that this Court give final approval to the proposed amendments to Rule 106.

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<sup>7</sup> The text of the proposed Rule and Committee Note is attached as Addendum C.

**Advisory Committee on Evidence Rules**  
Minutes of the Meeting of November 13, 2020  
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on November 13, 2020 via Microsoft Teams.

*The following members of the Committee were present:*

Hon. Patrick J. Schiltz, Chair  
Hon. James P. Bassett  
Hon. J. Thomas Marten  
Hon. Shelly Dick  
Hon. Thomas D. Schroeder  
Traci L. Lovitt, Esq.  
Kathryn N. Nester, Esq., Federal Public Defender  
Hon. Richard Donoghue, Esq., Principal Associate Deputy Attorney General, Department of Justice  
Elizabeth J. Shapiro, Esq., Department of Justice

*Also present were:*

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure  
Hon. James C. Dever III, Liaison from the Criminal Rules Committee  
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee  
Hon. Sara Lioi, Liaison from the Civil Rules Committee  
Professor Daniel R. Coquillette, Consultant to the Standing Committee  
Professor Catherine T. Struve, Reporter to the Standing Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Liesa L. Richter, Academic Consultant to the Committee  
Elizabeth Shapiro, Department of Justice  
Ted Hunt, Esq., Department of Justice  
Timothy Lau, Esq., Federal Judicial Center  
Andrew Goldsmith, Esq., Department of Justice  
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel  
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure  
Brittany Bunting, Rules Committee Staff

Members of the public attending were:

Brian J. Kargus, OTJAG Criminal Law Division  
Sri Kuehnlenz, Esq., American College of Trial Lawyers  
Mark S. Cohen, Esq., American College of Trial Lawyers  
Amy Brogioli, American Association for Justice  
Abigail Dodd, Shell Oil Company  
Alex Dahl, Lawyers for Civil Justice  
Caitlin Gullickson, CLS Strategies  
Sam Taylor, CLS Strategies  
Julia Sutherland, CLS Strategies

John G. McCarthy, Federal Bar Association  
Susan Steinman, American Association for Justice  
Alex Biedermann, Associate Professor University of Lausanne  
Lee Mickus, Esq., Evans Fears & Schuttert LLP  
John Hawkinson, Freelance Journalist  
Jakub Madej  
Leah Lorber, GSK  
Aaron Wolf, FJC AAAS Fellow  
Kathleen Foley, FJC Fellow  
Habib Nasrullah, Esq., Wheeler Trigg O'Donnell LLP  
Gabby Gannon, Student, University at Buffalo  
Heather Abraham, Student, University at Buffalo

## **I. Opening Business**

The new Chair of the Evidence Advisory Committee, the Honorable Patrick J. Schiltz, opened the meeting by welcoming everyone and introducing himself. All Committee members and liaisons introduced themselves as well. The Chair then acknowledged and thanked the previous Committee Chair, the Honorable Debra A. Livingston, for her service on the Committee, noting that her new role as Chief Judge of the Second Circuit Court of Appeals had prevented her from continuing as Chair. The Chair then read a letter to the Committee from Judge Livingston in which she thanked committee members for their thorough, thoughtful, and collegial exchange. She gave special thanks to Judge Schroeder for chairing a subcommittee on FRE 702 and to Dan Capra for his excellent stewardship as Reporter. She closed by noting her pride in the important rulemaking work accomplished during her tenure as a committee member and as Chair.

Professor Capra then gave a special thanks and farewell to Judge Tom Marten, who is concluding his service as a member of the Committee. Professor Capra noted Judge Marten's profound contributions to the work of the Committee and the wealth of information and effort he provided during his tenure. Judge Marten thanked the Reporter for his kind words, and stated that he was grateful to have worked with a group of such brilliant people. Judge Marten noted the extraordinary thought and effort that goes into the rulemaking process, with attention given to every single word considered.

The Chair advised the Committee that two new members would be joining the Committee for the next meeting: Judge Richard J. Sullivan of the Second Circuit Court of Appeals and Arun Subramanian, Esq. of Susman Godfrey L.L.P.

## **II. Approval of Minutes**

Due to the covid-19 pandemic during the spring of 2020, the Advisory Committee on Evidence Rules did not hold a spring meeting. Therefore, the Chair moved approval of the Minutes of the Advisory Committee meeting from the Fall of 2019. The Minutes of the Fall 2019 meeting were approved by acclamation.

### **III. Report on June 2020 Standing Committee Meeting**

The Reporter gave a report on the June 2020 meeting of the Standing Committee. He reminded the Committee that the Evidence Advisory Committee presented no action items at the June meeting. The Reporter and Judge Livingston informed the Standing Committee on the Committee's continuing work on Rules 106, 615, and 702. They also reported on the potential need for an "emergency" evidence rule pursuant to the CARES Act that would enable the suspension of certain evidence rules during an emergency (such as the covid-19 pandemic). Based upon their careful research and review, they reported that there was no need for an emergency evidence rule. The Reporter noted that he had included a memorandum regarding the emergency rule issue in the Agenda materials and that the Committee would be given an opportunity to provide input on the issue later in the meeting.

### **IV. Potential Amendment to FRE 702**

The Chair opened the substantive agenda with a discussion of FRE 702. He noted that the Committee had been considering two potential amendments to FRE 702 for the past few years: 1) an amendment that would clarify the application of the FRE 104(a) preponderance standard of admissibility to FRE 702 inquiries and 2) an amendment that would prevent an expert from "overstating" her conclusions. The Chair proposed to discuss each potential amendment in turn, noting that no votes would be taken at the meeting. He explained that the goal of the discussion would be to narrow amendment alternatives and to have a proposal that could be voted upon at the Spring 2021 meeting.

#### **A. Amending FRE 702 to Clarify the Application of FRE 104(a)**

The Reporter reminded the Committee that the FRE 104(a) issue came to the Committee's attention through a law review article by David Bernstein & Eric Lasker. The Reporter's research --- as well as research provided by a number of parties who had submitted comments to the Committee --- reveals a number of federal cases in which judges did not apply the preponderance standard of admissibility to the requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury. In other cases, the Reporter noted wayward language by federal courts suggesting that FRE 702 inquiries were ones of weight, even where the judge appeared to apply the appropriate FRE 104(a) standard. The Reporter noted that based on the discussion at previous meetings, all Committee members were in agreement that the FRE 104(a) preponderance standard applies to a trial judge's admissibility findings under FRE 702, and that courts should state that they are applying that standard.

The Committee has been considering an amendment to FRE 702 to expressly provide that the trial judge must find the requirements of the Rule satisfied by a preponderance of the evidence. The Reporter noted that one concern about such an amendment might be that FRE 104(a) already applies to FRE 702 under existing rules. Indeed, he noted that express preponderance language likely would have been rejected in 2000 when Rule 702 was amended to reflect the *Daubert* opinion *because* the preponderance standard was already baked into the existing Rule. Twenty

years later -- when it is clear that federal judges are not uniformly finding and following the preponderance standard -- the justification for a clarifying amendment exists. He emphasized that the FRE 104(a) standard is not expressly stated in FRE 702. Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof. He further noted that the *Daubert* opinion included some language about "shaky" expert testimony being a question for the jury, further exacerbating confusion.

Should the Committee favor an amendment, the Reporter noted that the next issue to be discussed is the placement of the preponderance requirement. There are two possibilities. First, it could be added to the opening paragraph of the Rule, and the expert qualification requirement could be moved out of the opening paragraph to the end of the Rule in a new subsection (e). The Reporter explained that a draft of this potential amendment could be found on page 154 of the Agenda materials. The principal benefit of this approach is that the preponderance standard would expressly cover *all* Rule 702 requirements, including the expert's qualifications. The downside of that approach is that it would significantly disrupt the structure of the existing Rule and would place an expert's qualifications (typically the first question) as the last requirement. The second approach would add preponderance of the evidence language to the Rule 702 introductory paragraph after the existing and well-known language regarding an expert's qualifications. This would clarify its application to the Rule 702(b)-(d) requirements, which many courts are currently missing. Although the new language would not specifically apply to the finding of an expert's qualification, Rule 104(a) still governs that determination and courts uniformly understand that the issue of an expert's qualifications is for the judge and not the jury. Any potential negative inference that might be drawn could be addressed in a Committee note. The Reporter alerted the Committee that this second drafting option appeared on page 152 of the Agenda. He explained that it would be helpful to get the Committee's thoughts on whether to propose a 104(a) amendment and, if so, which draft is preferred.

Committee members expressed substantial support for a preponderance amendment. All agreed that the existing circuitous path through *Daubert*, Rule 104(a), and *Bourjaily* to get to the preponderance standard for Rule 702 was challenging for lawyers and judges. Committee members opined that a trial judge ought to be able to open the Federal Rules of Evidence and understand the rule to be applied from the text. One Committee member observed that the federal cases and comments from members of the public had revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight. Another Committee member agreed that trial courts can be tempted to kick difficult Rule 702 questions to the jury. Committee members noted that courts routinely conduct a preponderance of the evidence inquiry with respect to admissibility requirements in other evidence rules, but that such a methodical analysis is rare in applying Rule 702. Committee members expressed confidence that adding an express preponderance requirement to the language of Rule 702 would provide a clear signal to judges that would improve consideration of expert opinion testimony. Another Committee member noted that



more methodical consideration of Rule 702 by trial judges would aid courts reviewing the admissibility of expert testimony on appeal.

With respect to the form of a potential amendment to Rule 702, Committee members were in agreement that the draft amendment on page 152 of the Agenda that would add the preponderance requirement after the existing language regarding an expert's qualifications would be superior, because it would address the problem found in the cases and yet would retain the existing structure of Rule 702. The Department of Justice agreed that a preponderance amendment would be a helpful clarification to the Rule and expressed support for the draft amendment on page 152. The Department suggested that it may favor some modifications to the proposed Advisory Committee note and reiterated its strong opposition to any amendment to Rule 702 to regulate overstatement of expert testimony. The Federal Public Defender also expressed support for an amendment to add a preponderance standard as reflected in the draft on page 152 of the Agenda, noting that such an amendment would make it clear that the trial judge is supposed to act as the gatekeeper with respect to expert opinion testimony.

One Committee member inquired whether adding a preponderance standard would impose an obligation upon a trial judge to police Rule 702 requirements *sua sponte*. The Reporter explained that the amendment would not impose such an obligation – as with other rules, a trial judge operating under an amended Rule 702 could act *sua sponte* if she so chose, but would not need to act without objection. The Chair agreed with the Reporter's interpretation of the potential amended language. The Federal Defender inquired about whether a preponderance amendment would affect a litigant's ability to attempt to elicit a new expert opinion during cross examination and whether the court would have to pause the trial to conduct a preponderance inquiry anew. The Reporter explained that the amendment would not affect the procedure trial judges already follow when this happens at trial. The Chair noted that this issue is unlikely to arise in civil cases due to pretrial discovery obligations and the exclusion of undisclosed opinions. If it comes up in the criminal arena where there are currently fewer discovery obligations, the trial judge has to have a recess or hearing to resolve *Daubert* questions. An amendment to add a preponderance requirement would not alter that process.

The Chair rounded out the discussion, thanking the Committee for its thoughtful comments and noting his desire to have the Committee focus on the preponderance issue closely, because prior discussions had focused largely on the issue of overstatement. He described his initial disinclination to amend Rule 702 to add an express preponderance requirement. He confessed trepidation about sending an unusual amendment clarifying an existing rule to the Supreme Court and expressed sympathy for complaints about constant amendments to the Federal Rules. But the Chair explained that despite initial reservations, he had come to favor the proposal. The Chair stated that Circuit court language at odds with the language of Rule 702 presents a serious concern. He further noted being struck by Judge Campbell's comment at a prior meeting that attorneys and trial judges often do not discuss Rule 702 issues in Rule 104(a) preponderance terms. Because the Rule lacks an express reference to the preponderance standard, the Chair observed that the Rule may indeed be a part of the problem. He further stated that unintended consequences seemed unlikely for an amendment adding an express preponderance standard to the Rule.

Hearing unanimous approval from the Committee to move forward with a preponderance amendment akin to the one on page 152 of the Agenda materials, the Chair asked the Reporter to prepare that draft for the spring meeting, along with a draft Advisory Committee note. The Chair explained that the Committee could discuss the details of the note at the spring meeting, but emphasized that an Advisory Committee note would need to state that a preponderance amendment in the text of Rule 702 was not intended to create a negative inference about applying the standard to other rules.

Judge Bates commented that the Standing Committee shared the Chair's reluctance to advance unnecessary amendments, but opined that a preponderance amendment sounded like a needed clarification that would aid practice. Accordingly, Judge Bates anticipated no resistance from the Standing Committee to such a proposal.

The Reporter notified the Committee that some federal courts have also added an intensifier to the Rule 702(a) requirement that an expert's opinion "will help" the trier of fact. These courts have required that an expert's opinion will "appreciably help." The Reporter explained that this misstatement of the Rule 702 standard by some courts did not by itself justify an amendment to the Rule, but noted that he had included language in brackets in the draft Advisory Committee note to the proposed preponderance amendment to emphasize that expert opinion testimony need only "help" and need not "appreciably help" under Rule 702. The Chair asked the Reporter to leave that bracketed language in the draft note to be taken up and considered by the Advisory Committee at its spring meeting.

## **B. Regulating Overstatement of Expert Opinions**

The Chair then turned the Committee's discussion to a potential amendment to Rule 702 that would prevent an expert from "overstating" the conclusions that may reasonably be drawn from a reliable application of the expert's principles and methods. The Chair noted that the overstatement proposal originated from concerns regarding forensic testimony in criminal cases. Because the Department of Justice had filed a letter with the Committee opposing an overstatement amendment, the Chair first recognized the Department of Justice to describe its opposition.

Elizabeth Shapiro summarized the Department's objections to an overstatement amendment. She argued that the PCAST Report, which launched the Committee's review of Rule 702, was obsolete already due to the rapidly evolving nature of forensic examination. She highlighted the Department of Justice's work developing uniform language governing the testimony of forensic experts in numerous disciplines to control the risk of overstatement. She opined that the DOJ's uniform language was a healthier and more nimble response to concerns about forensic testimony than a rule change. She also noted that national organizations with expertise in forensics have been examining and adopting the Department's uniform language. She described recent opinions by district courts in the District of Columbia and the Western District of Oklahoma referencing the Department's uniform language in ruling on *Daubert* motions. Finally, she opined that the Committee should not propose an amendment to Rule 702 to regulate expert overstatement because the existing requirements of the Rule already permit such regulation, and that such an amendment could be thought to be an excuse for a lengthy Advisory Committee note on forensic evidence --- that would be obsolete before it could take effect.

Ted Hunt, the Department's expert on forensic testimony, next argued that existing Rule 702 is being applied effectively by federal courts to police forensic testimony, and that no rule change should be made. He described tremendous change in the forensics community since 2009. In particular, he noted studies completed since the PCAST Report revealing false positive error rates of less than 1% in forensic disciplines such as fingerprint identification and ballistics. He noted that even these low rates of error failed to account for the fact that a second reviewing examiner required by protocols in forensic laboratories would catch even these few errors (though he did not mention whether those second reviewers knew the results of the original test). He emphasized that pattern comparison testimony is a skill-based, experience-based method and that courts are appropriately treating it as such. He acknowledged the difficulty in extrapolating error rates to all forensic examiners in all disciplines, making the identification of general error rates challenging. Still, he highlighted the Department's work in developing and publishing uniform language for 16 forensic disciplines. This language prohibits overstatement by experts and eliminates problematic legacy language (such as "zero error rate" or "infallible"). He emphasized that concessions of fallibility are now routinely made by forensic experts. He suggested that the federal caselaw may not have entirely caught up with this rapid progress, but that courts were starting to reference and utilize the uniform language appropriately. In sum, he opined that existing Rule 702 is working optimally with respect to forensic testimony and should not be amended.

One Committee member asked whether the uniform language adopted by the Department applies to forensic examiners from state laboratories who testify in federal cases. The Department acknowledged that the uniform language is not binding on state witnesses, but described movement in national organizations to adopt the Department's uniform language, leading to the hope that state and local labs will not make claims at odds with that uniform language going forward.

Next, the Federal Defender voiced her strong support for an overstatement amendment to Rule 702. She reminded the Committee that erroneous forensic testimony could lead and has led to false convictions. She called attention to the voluminous digest of federal cases collected by the Reporter in the Agenda materials, illustrating the many times that forensic (and other) experts had been permitted to make clear overstatements about the conclusions that may reliably be drawn from their methods. She acknowledged the Department's frustration with the PCAST Report but pointed out that the Department may make the same arguments it is making about the reliability of its forensic testimony in court before a trial judge to overcome an objection based upon overstatement. She further noted that forensic testimony in state courts is particularly problematic and that even perfect adherence by the Department to its uniform language would be inadequate to fix the problem in state courts --- a problem that might be solved by the promulgation of a federal model. She noted the importance of adding a specific prohibition on overstatement to Rule 702 to alert courts to focus on that point. An amendment to Rule 702 would prevent the issue of overstatement from being ignored or overlooked and would signal to courts that they have a gatekeeping responsibility with respect to an expert's ultimate conclusions on the stand. In sum, she opined that an amendment would not prevent the government from presenting and defending reliable forensic testimony, but would prevent egregious overstatements by testifying experts.

The Chair asked the Federal Defender whether the problem with overstated expert testimony was really a “Rules” problem or whether it represents more of a lawyering problem. He expressed skepticism that trial judges don’t realize they have power to regulate expert conclusions and suggested that an amendment to Rule 702 will not solve the problem if defense lawyers fail to challenge expert testimony and bring concerns to the attention of the trial judge. The Federal Defender responded that a Rule change would put everyone – trial judges and defense attorneys alike – on notice that expert testimony overpromising on conclusions that can be drawn from a forensic examination should be challenged and regulated. She stated that nothing in the current Rule signals the need for an inquiry into the form or extent of the expert’s conclusions and urged the need for an amendment to make such an inquiry express and mandatory.

Rich Donoghue, Principal Associate Attorney General for the Department of Justice, argued that the problem with forensic expert testimony, if any, was more of a lawyering issue and not so widespread as to warrant an amendment. Elizabeth Shapiro argued that an amendment to the Federal Rules of Evidence would not fix a problem largely existing in state courts, and that national forensic organizations were working to resolve issues at both the federal and state level. Judge Kuhl noted that California courts do not use *Daubert* but that it has nonetheless had a significant effect on state court handling of expert testimony. She suggested that an amendment to Federal Rule of Evidence 702 would be looked to in the state courts. The Reporter agreed, explaining that the Federal Rules are a model for state evidence rules and are even adopted automatically in some states.

The Federal Defender suggested that the issue was a simple and clear cost/benefit analysis. She urged that the benefit of an amendment would be to protect people from going to prison unnecessarily by signaling an important inquiry into forensic testimony, and that the only cost associated with the amendment might be to require prosecutors to do the work of defending their forensic experts in the face of an objection armed with the arguments and information that the Department has presented to the Committee. She suggested that human liberty balanced against additional work for prosecutors was a clear “no-brainer.”

Judge Schroeder, Chair of the Subcommittee on Rule 702, agreed that the problems with forensic testimony are greatest in state courts, but emphasized that state courts aren’t the exclusive source of problematic testimony. He commended the Department for its work on uniform language, but opined that such language ought to apply to a state forensic examiner presented as a witness by a federal prosecutor. Lastly, he noted that the problem of “overstatement” is a multifaceted one that can mean different things. An expert’s conclusion of a “match” might be an overstatement of her conclusion, whereas a statement about her degree of confidence in a conclusion might be a slightly different problem. The overarching concern is to prevent a witness, once qualified as an expert, from having free reign to testify to anything. He inquired as to how the Committee could draft an amendment to Rule 702 to capture the multifaceted issue of overstatement without exceeding the problem and causing unintended consequences.

Ted Hunt responded that forensic experts do not testify to a “match” in court. The modern approach is to admit fallibility as is done in the Department’s uniform language. He opined that dated cases are problematic and that there has been a paradigm shift to more tempered and qualified forensic testimony. He challenged the assumption that a forensic expert’s “identification” is an

overstatement. According to Mr. Hunt, “source identifications” can be done with a high degree of reliability, according to the forensic literature. He further opined that jurors largely *undervalue* forensic evidence due to high profile exonerations and advocacy, and that good lawyering can and does address any issues that exist.

The Chair asked the Reporter about his case digest, inquiring how often courts allow overstatement because courts think they lack authority to regulate it and how often they allow overstatement due to lawyering oversights. The Reporter responded that the federal cases overwhelmingly rely upon precedent to admit forensic testimony in a particular discipline. For example, federal courts admit ballistics opinions because ballistics opinions have always been allowed in prior cases. The Chair suggested that federal courts do not state that they lack authority to regulate a conclusion per Rule 702. The Reporter replied that the issue of regulating an expert’s conclusions is much like the preponderance issue discussed earlier – even if Rule 702 already authorizes it, that authority is embedded and hidden in the Rule and it is overlooked by courts.

The Chair then turned to the many drafting alternatives of an overstatement amendment presented for the Committee’s review and suggested that the draft on page 142 of the Agenda book --- modifying existing subsection (d) slightly to provide that an expert’s opinion should be “limited to” or should “reflect” a reliable application of the principles and methods to the facts of the case-- could resolve any issues without adding a new subsection (e) regulating “overstatement” per se. The Chair asked the Department of Justice what harm could be done by adopting such a minimalist change to subsection (d) (assuming an accompanying Advisory Committee note that would not seek to provide guidelines on forensic testimony). Elizabeth Shapiro responded that the draft change to subsection (d) would rearrange words as a “Trojan horse” to justify an expansive Committee note on forensic evidence, which would be inappropriate. The Chair reiterated that any concerns about the language of the Committee note could be addressed later, and that the question was whether the minor, clarifying changes to subsection (d) in keeping with the proposal on page 142 of the Agenda would cause particular harms or unintended consequences. The Reporter noted that the slight change to subsection (d) would not be simply rearranging words as a “Trojan horse” – instead, the modification would be one of emphasis designed to focus the judge on the expert’s conclusions --- in keeping with the Supreme Court’s decision in *Joiner*.

Elizabeth Shapiro expressed concern that a slight change in emphasis in the text would signal some change to courts, but not exactly what degree of change is intended. The Federal Defender disagreed, arguing that there could be no negative consequence to alerting the trial judge to focus on the expert’s reported conclusions to ensure that they are not exaggerated. She emphasized that overstated expert opinions can be devastating to a criminal defendant and disagreed with the Department’s earlier suggestion that jurors undervalue forensic testimony. Instead, she noted longstanding studies from the Innocence Project and others showing that jurors assume the trial judge approves of things an expert is permitted to testify to.

Judge Kuhl, who originally suggested a change to subsection (d) (instead of the addition of a new subsection (e) on overstatement) explained that she proposed a minimalist change to the requirements already in the Rule to shift the emphasis slightly without creating the unintended consequences that might exist with an entirely new subsection. The Reporter noted that the cases reveal a lack of focus on whether an expert’s particular trial testimony is allowable once the

decision is made that the expert's methodology is reliable, and that the amendment to subsection (d) could help to rectify that problem.

The Chair once again asked the Department of Justice what harm there could be in a focus-clarifying amendment to subsection (d) if it were accompanied by a scaled-down Advisory Committee note. Rich Donaghue suggested that the Department was concerned about any amendment and the signal that would send. Nonetheless, he stated that the Department did not object to the proposal to amend the language of subsection (d) to clarify that courts must regulate the expert's conclusion as well as the methodology. He concluded that the proposed language in (d) could be useful to courts and litigants. He explained that the content of any Advisory Committee note would be of much greater concern to the Department. The Chair then asked the Reporter to prepare a working draft amendment to Rule 702 for the spring meeting that combines the addition of a preponderance standard with an amendment to subsection (d) akin to the draft on page 142 of the Agenda, with a scaled down draft Committee note explaining the emphasis on an expert's testimonial conclusions, with a reference to concerns about conclusions by forensic experts.

Another Committee member asked the Reporter about the effect of prior amendments designed to clarify existing requirements. In particular, he queried whether such modest amendments were effective in combatting prior inaccurate precedent. The Reporter acknowledged that some federal courts getting Rule 702 wrong were relying on pre-*Daubert* precedent that should be superseded. He noted that clarifying amendments are often important in toning up a provision that is operating sub-optimally, and that they have usually worked. He listed as an example the 2003 amendment to Rule 404(a) emphasizing the pre-existing rule that circumstantial evidence of character was inadmissible in civil cases.

Another Committee member opined that a modest amendment to subsection (d) of Rule 702 would not go far enough in correcting the problem with existing federal precedent. She suggested that such a minimalist approach would not get to the heart of the issue -- that trial judges may not know they have the authority to police an expert's expressed conclusions. She opined that trial judges should be able to open the Federal Rules of Evidence on the bench during trial and have the Rules expressly direct them where to focus. She suggested that an amendment adding a new subsection (e) to Rule 702 that tells a trial judge to regulate "overstatement" would be far more effective. The Reporter noted his agreement that a subsection (e) amendment would be more effective. Still he acknowledged that optimal amendments, like recent proposals to amend Rule 404(b) significantly, may not garner enough support to get passed. In the case of Rule 404(b), an amended notice provision was a fallback compromise. The question with respect to Rule 702 is whether there is support for a new subsection (e) and, if not, whether a modified subsection (d) is a helpful fallback alternative.

The Chair then took a non-binding, informal straw poll to see which approach to amending Rule 702 to address the issue of overstatement Committee members would favor. The Chair noted three options: 1) no amendment directed to overstatement; 2) the modest modification to the language of subsection (d); or 3) the more substantial addition of a new subsection (e). One Committee member expressed a desire to hear from the Department of Justice with respect to the addition of a new subsection (e). The Chair stated that the Department clearly prefers no

amendment to Rule 702 to address overstatement, draws a red line at an amendment that would add express “overstatement” regulation in a new subsection (e), and could live with the modest modification to subsection (d) depending on the content of the accompanying Committee note. The Department agreed with the Chair’s characterization of its views.

One Committee member stated definite support for an amendment to subsection (d) and confessed to being “on the fence” about the addition of a subsection (e). That Committee member expressed an inclination to support (e) as well due to the problems in the existing Rule 702 precedent, but expressed concerns about adding a subsection (e) on overstatement to civil cases.

Another Committee member expressed clear support for a new subsection (e), but stated support for a modification to (d) as a compromise, if necessary. Another Committee member agreed with those preferences and priorities. The Federal Defender agreed with the position that a new (e) is critical to address the testimony that comes out of an expert’s mouth on the stand, but noted that modifications to subsection (d) would be better than nothing.

Another Committee member stated a preference for the modification to subsection (d) only, expressing doubt that a new subsection (e) would fix the problems that do exist in the precedent and concerns about drafting in a manner that would avoid unintended consequences. That Committee member noted pending amendments to criminal discovery requirements in Fed. R. Crim Proc. 16 that will give more notice to criminal defendants about expert testimony and will allow them to challenge and exclude undisclosed testimony. Another Committee member stated opposition to the addition of a new subsection (e), arguing that it would represent too dramatic a change and that it was not needed to address what is essentially a lawyering issue in light of evolving forensic standards. This Committee member was also concerned about adding complexity to already extensive *Daubert* proceedings in civil cases, but had no objection to the language proposed to alter existing subsection (d). The Committee member confessed to being somewhere between “doing nothing” and modifying subsection (d) depending on the content of an accompanying Committee note.

The Chair rounded out the straw poll by expressing agreement with those Committee members who opposed a new subsection (e), articulating concerns that it was too substantial a change that could have unintended collateral effects. He suggested that the real problem in the expert testimony arena is not caused by Rule 702 and may not be solved by an amendment to Rule 702. He opined that the new criminal discovery rules would help fix problems with expert testimony, as would the Department of Justice’s efforts to craft uniform testimonial language. In closing, the Chair said he would not vote for (e), could support (d), but could live with doing nothing with respect to overstatement.

Judge Bates commended the Reporter and the Committee for a very thoughtful dialogue and encouraged them to present all sides of the issue and the conflicting opinions of Committee members to the Standing Committee to obtain useful input. Judge Bates also inquired about the effect of a modification to subsection (d) to focus on the expert’s actual “opinion” on expert testimony *not* in the form of opinion. The Reporter explained that Rule 702 allows an expert to testify in the form of an opinion “or otherwise” to allow for expert testimony on background information, such as the operation of a human heart. He explained that Rule 702(d) was always

focused on opinion testimony more than such background testimony. Still, he noted that an amendment to subsection (d) might focus on an expert's "testimony" rather than an expert's "opinion" to clearly accommodate expert testimony not in the form of an opinion.

In closing, the Chair asked the Reporter to prepare two draft alternatives of Rule 702 for the Committee's consideration at its spring meeting:

- 1) A draft including preponderance language in the opening paragraph of Rule 702 and a slightly modified subsection (d). This draft should be accompanied by a "skinny" Advisory Committee note that includes some brief reference to forensic evidence and the PCAST Report in brackets.
- 2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be accompanied by a more comprehensive Advisory Committee note.

The Chair asked whether the incoming Committee members could listen to the discussion of Rule 702 from today's meeting before the Spring meeting. Both the Administrative Office and the Reporter promised to have new Committee members apprised of preceding discussions.

## **V. Proposed Amendment to Federal Rule of Evidence 106**

The Reporter reminded the Committee that a potential amendment to Rule 106, the rule of completeness, had been before the Committee for several years. He noted that the Rule permits a party to insist upon the presentation of a remainder of a written or recorded statement if its opponent has presented a part of that statement in a fashion that has unfairly distorted its true meaning. The Reporter emphasized that the narrowly applied fairness trigger for the Rule was not being changed by any of the amendment proposals before the Committee. Instead, two potential amendments were being considered.

First, the Committee has been exploring an amendment that would permit a completing remainder to be admitted "over a hearsay objection." The Reporter noted that the Committee had wrestled with the purpose for which such a remainder might be admitted over a hearsay objection – either for its truth or for the limited non-hearsay purpose of providing context. The Reporter noted problems with an amendment limiting the use of a completing remainder to non-hearsay context alone, due to the need for confusing limiting instructions, and suggested the possibility of allowing the trial judge to decide on a case-by-case basis the purpose for which the remainder may be used once it is admitted to complete. Second, the Reporter reminded the Committee that it has been exploring an amendment that would extend completion rights in Rule 106 to oral unrecorded statements, which are not currently covered by the text of Rule 106. He explained that many circuits currently admit oral statements when necessary to prevent unfair distortion, but that they do so under a confusing combination of residual common law evidence principles and the broad power of the trial court to control the mode and order of interrogation under Rule 611(a). He further noted that a few circuits appear to reject completion of oral statements altogether, simply because they are omitted from Rule 106's coverage. He explained that it could be helpful to bring oral statements under the Rule 106 umbrella, so that all aspects of completeness are covered in one



place. And it would also be very useful to provide in a Committee note that there is no more common law of completion, once a comprehensive Rule 106 has been adopted. The Reporter noted that the Agenda materials contained several draft proposals for amending Rule 106 and solicited Committee input as to its Rule 106 preferences, explaining that the goal of the discussion was to narrow the drafting alternatives for consideration at the spring meeting.

One Committee member expressed support for an amendment that would allow a completing remainder over a hearsay objection and that would add oral statements akin to the one on page 588 of the Agenda materials. The Committee member opined that the trial judge should decide on a case-by-case basis whether to admit the remainder for its truth or for context only and that an amendment should not limit the use to non-hearsay context. The Chair also expressed support for the amendment proposal on page 588 of the Agenda Book. He reasoned that some evidence rules are *in limine* rules, while some are “on the fly” rules that come up in the heat of trial. He noted that Rule 106 is an “on the fly” rule that often comes up in the heat of trial action, and that trial judges do not have time to research the common law or Rule 611(a). He stated that it is very unusual for a Federal Rule of Evidence not to supersede the common law and that he would favor a Committee note expressly providing that the common law is superseded by the amendment. The Chair expressed support for the inclusion of oral statements, seeing no conceptual distinction between oral and recorded statements and the need for completion. He acknowledged disagreement that a remainder would have to be admitted for its truth to repair distortion but thinks the draft amendment elegantly elides the purpose for which a remainder is admitted by providing only that it is admissible “over a hearsay objection.” Such an amendment would take no position on the use to which a completing remainder could be put.

Justice Bassett agreed that the amendment covering both oral statements and allowing remainders over a hearsay objection would be optimal. He noted that New Hampshire had long allowed oral statements to be completed and had recently amended its evidence rule to reflect that practice. He reported no problems with the amendment of the New Hampshire rule to replace the common law and supported a similar amendment for Federal Rule 106. Judge Kuhl noted that California does not distinguish between recorded and oral statements for purposes of completion, and similarly has experienced no difficulties with oral statements. She also opined that the fairness concerns addressed by Rule 106 overcome any hearsay concerns about the remainder, and that the trial judge should have discretion to admit the remainder with or without a limiting instruction.

The Department of Justice expressed opposition to the draft proposal on page 588 of the Agenda materials, arguing that completion was not as rarely applied as suggested in the appellate opinions. The Department suggested that prosecutors are routinely interrupted at trial with requests to complete, particularly when playing a recording. The Department suggested that trial judges do not apply the Rule 106 standard narrowly and are inclined to allow completion liberally to avoid an appellate issue. The Department expressed a preference for an amendment to Rule 106 that would allow remainders only for their non-hearsay value in providing context and that would continue to omit oral statements. The Department emphasized that the Advisory Committee that originally drafted Rule 106 in 1973 omitted oral statements purposely and that including them now would make Rule 106 more susceptible to abuse by criminal defendants trying to admit unreliable exculpatory statements. The Chair noted that the Department’s criticisms of Rule 106 were of the “fairness” trigger for applying it, and no change to that standard is under consideration. He further

noted that opposition to oral statements is misplaced, because most federal courts *already allow* completion with oral statements -- they just do it under a confusing combination of common law and Rule 611(a). Another Committee member similarly inquired of the Department how adding oral statements to Rule 106 would “open Pandora’s box” if most courts already admit them. The Reporter noted that a few federal courts end their analysis with Rule 106 and do *not* admit oral statements, probably because counsel does not think of Rule 611(a) or common law. So the current state of affairs regarding oral statements creates a conflict in the courts and results in a trap for the unwary.

Another Committee member disagreed with the draft Committee note suggesting that a completing remainder should be admitted for its truth and suggested that an amendment would undermine the hearsay rule if unreliable oral statements could be admitted for their truth. The Chair agreed that a completing remainder need not necessarily be true to complete, but expressed concern about a context-only amendment, because that would require a limiting instruction impossible for jurors to follow. Another Department of Justice representative contended if Rule 106 is amended, criminal defendants would be limited only by their imagination in crafting exculpatory oral statements, and that a recording requirement would at least limit defendants to requesting additional portions of an authenticated recording to be played in court. The Reporter noted that there is no difference between oral statements admitted to complete and all the other oral, unrecorded statements found admissible under the evidence rules. He queried why a government witness is permitted in the first place to testify about an unrecorded oral statement allegedly made by a defendant given the concern expressed about manufactured oral statements. He reiterated that most circuits already permit completion with oral statements, so an amendment confirming that existing practice would not open the floodgates to new evidence. Another Committee member opined that anxiety about adding oral statements to Rule 106 was overblown and larger in anticipation than in reality. That Committee member suggested that oral statements were very rare in criminal cases and that most statements were recorded, and that an amended Rule 106 should cover both recorded and unrecorded statements.

Rich Donaghue expressed concern that including oral statements in the Rule would create a “wild west” approach to completion and that trial judges would be even more inclined to allow completion with unreliable oral statements by defendants after seeing an expansive amendment to Rule 106. The Chair again expressed confusion about the Department’s opposition to adding oral statements given that most circuits already allow completion of unfairly presented oral statements. He queried why the Department would oppose a uniform rule on point. Mr. Donaghue responded that adding oral statements to Rule 106 would suggest an expansive approach to the Rule. The Reporter commented that leaving oral statements out of the Rule would simply take advantage of litigants who don’t know about the common law and Rule 611(a), and would treat litigants differently depending on the quality and experience of counsel. He further reiterated that most courts already allow completion with oral statements and that there is no “wild west” culture in completion practice. The Reporter also addressed expressed concerns about the reliability of a completing remainder allowed in for its truth. He explained that completion is allowed to level the playing field after an unfair partial presentation of a statement, so reliability is a red herring. He observed that party opponent statements of defendants, which are the most common targets of completion, are not admitted because they are reliable --- so why should the completion have to be reliable?

The Chair closed the discussion of Rule 106 by asking for an informal, non-binding straw vote about an amendment to Rule 106 to help narrow alternatives to be discussed at the spring meeting. The Chair noted four alternatives: 1) no amendment to Rule 106; 2) an amendment to allow completion over a hearsay objection only (leaving out oral statements); 3) an amendment to add oral statements only (leaving out the hearsay fix); and (4) an amendment that adds oral statements and allows completion over a hearsay objection.

Five Committee members and the Chair expressed a preference for the fourth option that would add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements and admit completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

The Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting.

## **VI. Federal Rule of Evidence 615 and Witness Sequestration**

The Reporter reminded the Committee that it had been discussing potential amendments to Rule 615 governing witness sequestration to clarify the scope of a district court's Rule 615 order. He explained that it is very clear that a district court may extend sequestration protections beyond the courtroom, but that the circuits are split on the manner in which a trial judge must extend protection. Some circuits hold that a trial judge's order of sequestration per Rule 615 *automatically* extends beyond the courtroom and prevents sequestered witnesses from obtaining or being provided trial testimony. These courts find that Rule 615 orders must extend outside the courtroom to provide the protection against testimonial tailoring the Rule is designed to provide --- if witnesses can simply step outside the courtroom doors and share their testimony with prospective witnesses, Rule 615 provides little meaningful protection. Other circuits hold that a Rule 615 order operates only to physically exclude testifying witnesses from the courtroom, and that a trial judge must enter a further order if there is an intent to prevent access by excluded witnesses to trial testimony. According to these circuits, a Rule 615 order can do no more than exclude witnesses physically because that is all the plain language of the Rule provides. Further, these circuits highlight problems of notice if a terse Rule 615 order is automatically extended beyond the courtroom doors, leaving witnesses and litigants subject to sanction for extra-tribunal conduct not expressly prohibited by the court's sequestration order. The question for the Committee is how to amend Rule 615 to reconcile this conflict and reach the best result for the trial process.

The Reporter explained that the Committee had previously discussed a purely discretionary approach to protection beyond the courtroom, with an amended Rule 615 continuing to mandate physical exclusion from the courtroom only, but expressly authorizing the trial judge to extend or not extend protection further at the judge's discretion. A draft of such a discretionary amendment was included in the Agenda materials at page 660. The Reporter noted that another amendment alternative requiring extension beyond the courtroom at a party's request had been included in the Agenda materials at page 662, at Liesa Richter's suggestion. The Reporter explained that physical sequestration currently in Rule 615 was made *mandatory* upon request both because sequestration

is crucial to accurate testimony and because the trial judge lacks information about potential tailoring risks upon which to exercise discretion. As noted by the many circuits that already extend sequestration protection beyond the courtroom automatically, the right to sequestration is meaningless without some extra-tribunal protection. Therefore, it can be argued that a party should have a right to demand some protection beyond the courtroom doors upon request (as they do with physical sequestration currently). Under this version of an amended Rule 615, the trial judge would not have discretion to deny completely protections outside the courtroom if a party asked for them. Importantly, such an amendment would leave the details and extent of protections afforded outside the courtroom to the trial judge's discretion based upon the needs of the particular case.

The Reporter noted additional issues raised by sequestration that the Committee should consider in its review of Rule 615. First, he noted the question of whether sequestration prohibitions on conveying testimony to witnesses should be binding on counsel --- a question that has been discussed previously by the Committee. He reminded the Committee that this issue of counsel regulation raised complicated constitutional issues concerning the right to counsel, as well as issues of professional responsibility, beyond the typical ken of evidence rules. For that reason, the Committee had previously discussed potential amendments to Rule 615 that would not seek to control counsel, leaving any such issues that arise to trial judges in individual cases. Finally, the Reporter noted a possible dispute in the courts about the exception to sequestration in Rule 615(b) for representatives of entity parties. The Reporter explained that the purpose of the entity representative exception was to place entity parties on equal footing with individual parties who are permitted to remain in the courtroom. Accordingly, it would seem that an entity party would be entitled to a single representative in the courtroom to create parity with individual parties. Some courts, however, have suggested that trial judges have discretion to permit *more than one* agent or representative of an entity to remain in the courtroom under Rule 615(b) – particularly in criminal cases where the government seeks to have more than one agent remain in the courtroom. The Reporter noted that Judge Weinstein has suggested that trial courts have discretion to allow more than one entity representative under Rule 615(b); but the Reporter questioned what basis exists for exercising such discretion when the exception in (b) is as of right. He suggested that the superior approach would be to allow a single entity representative to remain in the courtroom under Rule 615(b) as of right, and for the trial judge to exercise discretion under Rule 615(c) to allow additional representatives to remain if a party bears the burden of demonstrating that they are “essential to presenting the party’s claim or defense.” The Reporter noted that such a result could easily be accomplished with a minor amendment to Rule 615(b). He emphasized that the Rule 615(b) issue was not important enough to justify an amendment to the Rule in its own right, but that it could be a useful clarification if the Committee were to propose other amendments to the Rule.

One Committee member suggested that counsel do not always invoke Rule 615 and may not want sequestration protection at all or at least none beyond the courtroom. For that reason, the Committee member expressed a preference for the purely discretionary amendment proposal on page 660 of the Agenda book, as it would not require protections beyond the courtroom. He agreed that the issue of regulating counsel was a “can of worms” beyond the scope of evidentiary considerations, so the Committee should not address it. As to the entity representative issue, he noted that entity parties often have only one representative remain in the courtroom under Rule 615(b) at any one time, but sometimes swap out representatives throughout the trial, particularly

in long trials. He suggested that such swapping out of representatives should be sanctioned in an Advisory Committee note should the Committee clarify that Rule 615(b) is limited to a single representative.

The Chair also noted that parties may not want sequestration orders to extend beyond the courtroom and that the Rule should not require something the parties do not want. The Reporter noted that sequestration protection is essentially pointless without some extended protection and that a mandatory amendment would extend protection beyond the courtroom only “at a party’s request.” Still, the Chair expressed a preference for a discretionary amendment such as the one on page 660 of the Agenda book, that would permit “additional orders” adding extra-tribunal protection but would not require a court to issue such protections upon request. To clarify the scope of a succinct order that simply invokes “Rule 615”, the Chair suggested adding language to subsection (a) of the draft discretionary amendment on page 660 of the Agenda materials stating that an order affirmatively *does not* extend any protection beyond the courtroom unless it expressly states otherwise. He noted that this would be important to avoid punishing parties for extra-tribunal sequestration violations without adequate notice.

The Department of Justice expressed support for a discretionary approach to Rule 615, but questioned the proposal to limit entity representatives to just one under Rule 615(b). The Department queried why it should not be permitted to have two case agents sit in the courtroom notwithstanding sequestration. The Reporter again noted the purpose of Rule 615(b) was to put entity parties on par with individuals --- not to give entities an advantage. Therefore, the government should get a single representative under Rule 615(b) as of right without showing any justification, and could qualify additional agents under Rule 615(c) if they can show them to be “essential.” The Department asked whether there would be a limit on the number of agents it could qualify as “essential” under Rule 615(c), expressing concern that an amendment could be read to limit the judge’s discretion with respect to subsection (c). The Reporter replied in the negative, affirming that subsection (c) would permit as many persons to remain in the courtroom as were shown to be “essential.” He suggested that an Advisory Committee note could clarify that point should the Committee advance an amendment limiting the number of representatives permitted under subsection (b), as well as acknowledging the propriety of swapping out representatives under subsection (b).

The Chair noted that the Rules are amended very infrequently and that there are limited opportunities to clarify issues. He asked that the Reporter retain a proposed amendment to Rule 615(b) in the draft for the spring meeting to afford the Committee more time to consider it.

The Federal Public Defender noted the expanding opportunities for witness-tailoring outside the courtroom in light of technological advances and the covid-19 pandemic. She noted that trials are being conducted on Zoom or streamed from one courtroom into another to allow for social distancing. Because such measures increase concerns about witness access to testimony, she suggested that an amended rule should be proactive about regulating access to trial testimony by witnesses who have been sequestered. Another Committee member suggested that a draft allowing, but not requiring, protections beyond the courtroom would suffice and noted the counsel issue potentially raised by protections beyond the courtroom. That Committee member also thought a clarification to Rule 615(b) would be helpful.

The Chair closed the discussion of Rule 615 by requesting that the Reporter prepare the discretionary draft of an amendment to the Rule akin to the one on page 660 of the Agenda materials, with an express addition to subsection (a) providing that a Rule 615 order does not extend beyond the courtroom doors unless it says so expressly. He also asked the Reporter to include a clarification of Rule 615(b) allowing only one entity representative at a time, with a Committee note explaining that swapping of representatives under (b) is permissible and that subsection (c) allowing exceptions for “essential” persons is not changed by the amendment and is not numerically limited.

## **VII. CARES Act and an Emergency Evidence Rule**

Pursuant to the CARES Act, all of the federal rulemaking committees have been considering the need for the addition of an “emergency rule” that would allow the suspension of federal rules to account for emergency situations such as the covid-19 pandemic. The Judicial Conference asked the Reporter and the former Chair, Judge Livingston, to evaluate the need for an emergency rule of evidence to suspend the regular rules in times of crisis. After careful consideration, the Reporter and Judge Livingston agreed that there is no need for an emergency rule of evidence because the existing Evidence Rules are sufficiently flexible to accommodate emergency circumstances.

First, the Reporter documented his exhaustive examination of the Rules of Evidence to ascertain whether any of them demand that “testimony” occur in court (as opposed to virtually as has been done during the pandemic). He reported that none of the Rules require that testimony be given in a courtroom. He further explained that Rule 611(a) gives trial judges broad discretion to control the “mode of examination” and that many federal judges have utilized that authority during the pandemic to authorize virtual testimony. He acknowledged that remote testimony raised important issues of confrontation in the criminal context, but observed that it is the Sixth Amendment – and not the Evidence Rules – that control confrontation. Accordingly, an emergency evidence rule would not resolve confrontation concerns. In sum, the Reporter and Judge Livingston concluded that there was no need for an emergency evidence rule. The Reporter solicited thoughts and comments from Committee members as to the need for an emergency evidence rule. Committee members thanked the Reporter for his exhaustive work on the topic and concurred with the conclusion that there is no need for an emergency rule of evidence.

## **VIII. Future Agenda Items**

The Reporter reminded Committee members that he had included a memorandum on a number of existing circuit splits with respect to the application of the Federal Rules of Evidence in the Agenda materials. He explained that his goal was to acquaint the Committee with potential problems that may lend themselves to rulemaking solutions and to solicit the Committee’s feedback as to whether it would like to see any of the identified splits prepared for consideration at a future meeting. The Chair suggested that Committee members could email the Reporter or the Chair if they wished to discuss any of the circuit splits further. One Committee member commended the Reporter for his thorough work in identifying so many circuit splits.

The Chair then explained that there were a number of evidentiary issues he had asked the Reporter to place on the Agenda for the Committee's consideration, noting that two of them had been considered by the Committee within the last 5-7 years.

First, the Chair suggested that it is not clear why a witness's prior statement should be considered hearsay when the witness testifies at trial subject to cross-examination. He noted that some states do not include a testifying witness's prior statements in their definitions of hearsay. The Chair explained that he would like the Committee to consider whether to amend FRE 801 to permit witness statements to be admissible for their truth when the witness testifies at trial subject to cross-examination. He suggested that there was no justification for the existing rule and that a change would save much needless inquiry and analysis. The Chair acknowledged the Committee's past consideration of the issue, and that such a project could wind up allowing only prior *inconsistent* witness statements to be admissible for truth, but expressed his desire for the Committee to consider the issue anew.

The Chair next discussed the potential for a rule of evidence governing the admissibility of illustrative and demonstrative evidence. He noted that such evidence is presented in virtually every case tried in federal court and yet there is no rule of evidence that even mentions the subject. Courts and litigants must look to the common law with cases all over the map in their regulation of demonstrative evidence and illustrative aids. The Chair noted that the cases do not agree about: 1) the nomenclature used to describe such evidence; 2) when it may be used; 3) whether it may go to the jury room during deliberations; or 4) how to create a record of it for appeal. The Chair noted that he had asked the Reporter to prepare materials on the topic for the Committee's consideration.

The Chair next noted an issue regarding the use of English language transcripts of foreign language recordings in federal court. Here again, he noted that the Rules are silent, and that case law appears divided. The Chair noted a recent drug prosecution in which there were relevant Spanish language recordings. Both the government and the defense agreed that English transcripts of the recordings were accurate, and the government admitted only the transcripts without admitting the underlying Spanish language recordings (presumably because the jury could not have understood them in any event). The Chair explained that the Tenth Circuit – over a dissent – had reversed the conviction, finding that the Best Evidence rule required the admission of the Spanish recordings. He noted that both the majority and dissent had cited conflicting cases in support of their respective positions and suggested that a clear rule regarding English transcripts of foreign language recordings could be helpful.

The Chair also noted that trial judges utilize their broad discretion in Rule 611(a) to support many different interventions. For example, a trial judge might order all parties to ask their questions of an out-of-town witness on a single day. As the Reporter noted earlier, trial judges have used Rule 611(a) during the pandemic to justify remote trials. The Chair explained that he had asked the Reporter to examine the federal cases to see what types of specific actions trial judges are using Rule 611(a) to support, with the idea being to consider an amendment to Rule 611(a) to list more specific measures that cover what trial judges actually do with the Rule.

The Chair finally suggested that the Committee might consider resolving a circuit split on the use of a decedent's statements against her estate at trial. He noted that some courts allowed such

use, essentially equating the decedent and her estate for hearsay purposes. Other courts have declined to allow such statements against an estate, however, essentially giving the estate a better litigating position than the decedent would have had at trial. The Chair noted that there was a useful law review note on the topic in the *N.Y.U. Law Review* and suggested that this issue might be a useful component of a package amendments should others be considered.

The Chair closed by emphasizing that Committee members should feel no pressure to agree on any of these matters but expressed his view that they are worthy of discussion and consideration.

## **IX. Closing Matters**

The Chair thanked everyone for their contributions and noted that the spring meeting of the Committee will be held on April 30, 2021 – hopefully in person at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., depending upon the public health situation, with a Committee dinner to be held the night before. The meeting was adjourned.

Respectfully Submitted,

Liesa L. Richter, Academic Consultant



**Advisory Committee on Evidence Rules**  
Minutes of the Meeting of May 6, 2022  
Thurgood Marshall Federal Judiciary Building  
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 6, 2022 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

*The following members of the Committee were present:*

Hon. James P. Bassett  
Hon. Thomas D. Schroeder  
Elizabeth J. Shapiro, Esq., Department of Justice  
Arun Subramanian, Esq.  
Hon. Richard J. Sullivan  
Rene Valladares, Esq., Federal Public Defender

*The following members of the Committee were present Via Microsoft Teams:*

Hon. Patrick J. Schiltz, Chair  
Traci L. Lovitt, Esq.

*Also present were:*

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure  
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee  
Hon. Sara Lioi, Liaison from the Civil Rules Committee  
Professor Daniel J. Capra, Reporter to the Committee  
Professor Liesa L. Richter, Academic Consultant to the Committee  
Andrew Goldsmith, Esq., Department of Justice  
Bridget M. Healy, Counsel, Rules Committee  
Scott Myers, Rules, Counsel, Rules Committee  
Brittany Bunting, Rules Committee Staff  
Allison Bruff, Rules Committee  
Burton Dewitt, Rules Clerk  
Timothy Lau, Esq., Federal Judicial Center

*Present Via Microsoft Teams:*

Hon. Carolyn B. Kuhl, Liaison from the Standing Committee  
Professor Daniel R. Coquillette, Consultant to the Standing Committee  
Professor Catherine T. Struve, Reporter to the Standing Committee  
Joe Cecil, Berkeley Law School  
Sri Kuehnlenz, Esq., Cohen & Gresser LLP  
Abigail Dodd, Senior Legal Counsel Shell Oil Company  
Alex Dahl, Strategic Policy Counsel  
John G. McCarthy, Esq., Federal Bar Association

Lee Mickus, Esq., Evans Fears & Schuttert LLP  
Mark Cohen, Esq., Cohen & Gresser LLP  
Leah Lorber, Esq., GSK  
John Hawkinson, Freelance Journalist  
Joshua B. Nettinga, Lt. Colonel, Judge Advocate General's Group  
Nate Raymond, Reuters Legal Affairs  
James Gotz, Esq., Hausfeld

## **I. Opening Business**

### ***Announcements***

The Chair welcomed everyone to the meeting and stated that he wished he could be present but that he was recovering from COVID. He thanked the Reporter and the Academic Consultant for the extraordinarily high caliber of the materials in the agenda book. The Chair then invited all participants to introduce themselves.

After the introductions, the Chair noted that two members of the Committee were rotating off of the Committee after six years of devoted service. He thanked Justice Bassett and Traci Lovitt for their invaluable contributions to the work of the Committee and invited each to share remarks. Justice Bassett thanked the Chair and the Committee for the opportunity of a lifetime to contribute to the work of the Committee. He stated that he wished every judge and lawyer could witness the careful deliberative process of the Committee and the thought and attention to detail that goes into every word chosen for a rule or committee note. He further noted the importance of comity between federal and state courts and the importance of including state court judges in the work of the Committee. Traci Lovitt stated that it was a sincere honor to be a part of the Committee's work. She praised the intellectual firepower around the table and stated that she was in awe of the extraordinary work that goes into the rulemaking process.

The Chair then gave a brief report on the January, 2022 Standing Committee meeting, explaining that the Evidence Rules Advisory Committee had only informational items regarding work on several potential amendments to share with the Standing Committee. He noted that there was a great deal of interest in proposals regarding illustrative aids and safeguards for juror questions.

### ***Approval of Minutes***

A motion was made to approve the minutes of the November 5, 2021 Advisory Committee meeting. The motion was seconded and approved by the full Committee.

## **II. Rules 106, 615 and 702 Published for Comment**

The Reporter opened a discussion of the three Rules that had been released for public comment, explaining that the public comment period had closed in February, 2022. He explained that the issue for the Committee was whether to approve the three proposed amendments to be transmitted to the Standing Committee and the Judicial Conference.

## A. Rule 106

The Reporter called the Committee's attention to the published proposal to amend Rule 106, the rule of completeness. That proposal appeared on page 98 of the agenda book. He reminded the Committee that the proposal would make two changes to the existing rule. First, it would allow completion of all statements in any form. This would be a change from the current rule that applies only to written or recorded statements and would permit completion of unrecorded, oral statements. He noted that many jurisdictions already permit completion of oral statements through Rule 611(a) and the common law and that the amendment would bring completion of all statements under one rule. Second, the Reporter reminded the Committee that the amendment to Rule 106 would allow completion over a hearsay objection because a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay. He lauded the Committee for its unanimous approval of an amendment to Rule 106 after many years of work.

The Reporter explained that there were few public comments on the proposed amendment to Rule 106, but that the comments that were received were largely positive. Even so, the Committee decided to make small changes to the language of the rule text that was published for comment. First, the published amendment would have covered "written or oral statements." But it was pointed out that some statements may be neither written nor oral. Assertive conduct is considered a statement and American Sign Language represents a form of communication that contains assertive statements that are not oral or written, but that should be subject to completion. For that reason, the Committee at its last meeting determined to remove the modifiers "written or oral" from the text of the amendment, such that Rule 106 would cover "statements" in any form. The Reporter noted that a version of the amendment deleting "written or oral" from rule text appeared on page 106 of the agenda book. The Reporter further noted that some corresponding changes would need to be made to the committee note to reflect that alteration. He directed the Committee's attention to page 107 of the agenda book where the language of the paragraph that began "Second, Rule 106 has been amended" had been revised to reflect that the amendment would apply to statements "in any form – including statements made through conduct or sign language." A Committee member noted that the modifiers "written or oral" would also need to be deleted from line 180 on page 108, and the Reporter made the change. Another Committee member inquired whether the modifier "oral" should also be deleted from line 140 on page 107 of the agenda book that read "Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded." The Reporter responded that the modifier "oral" should remain in that sentence of the note as an example of what the amendment would permit. He noted that the completion of oral statements through Rule 106 was a principal innovation of the amendment and that, while it was important to include assertive conduct, the amendment would be used much more commonly to allow completion of oral statements. The Chair agreed that he would prefer to leave the word "oral" in line 140 on page 107 of the committee note to reflect the fact that most of the practical impact of the expansion to all statements would be with respect to the coverage of oral statements.

The Reporter suggested one additional change to the committee note. He proposed deleting a sentence in the committee note on page 100 of the agenda book that stated that "the results under this rule as amended will generally be in accord with the common-law doctrine of

completeness at any rate.” The Reporter explained that this sentence was unnecessary to explain the operation of the amended rule and that the common law included various iterations of the rule of completeness before it was codified in Rule 106. Thus, he recommended deleting the entire sentence. By consensus, the Committee agreed with the recommendation.

The Chair then sought the Committee’s vote on whether to approve an amendment to Rule 106 and the accompanying note reflecting these changes (appearing on pages 106-108 of the agenda book), with the added change to line 180 on page 108 to delete the words “written or oral.” Participating Committee members unanimously approved the proposed amendment to Rule 106 and the accompanying note.

## **B. Rule 615**

Next, the Reporter called the Committee’s attention to the proposal to amend Rule 615, the rule of witness sequestration. He explained that there was a deep division in the courts about the scope of a Rule 615 order. Some courts hold that a Rule 615 order extends only to the courtroom doors and does not protect against witness access to testimony outside the courtroom. The Reporter explained that this is problematic because sequestration is not effective if witnesses may access testimony from outside the courtroom. For that reason, other courts hold that a Rule 615 order automatically extends beyond the courtroom to control witness access to information. The Reporter explained that this approach is also problematic because Rule 615 does not extend so far on its face. For this reason, the Committee published a proposed amendment to Rule 615 that would clarify that a Rule 615 order automatically covers only access to testimony inside the courtroom, but that a trial judge may extend protection outside the courtroom in her discretion. The proposal also addressed a subsidiary issue regarding how many representatives an entity party may designate as exempt from sequestration under Rule 615(b). While the vast majority of courts recognize that an entity party may designate only one representative under Rule 615(b) to provide parity with individual parties, some courts allow multiple designations. The proposed amendment would clarify that an entity party may designate only one representative as of right under subsection (b) and must show that any additional exempt witnesses are “essential to presenting the party’s claim or defense” under Rule 615(c).

The Reporter explained that public comment on the proposal was sparse but positive and that the Magistrate Judge’s Association thought the amendment would be a useful addition. The Reporter asked that the Committee consider two minor changes to the committee note based on the public comment. First, he explained that the AAJ helpfully suggested that all references to an “agent” in the committee note should be changed to “representative” to track the text of the rule. He called the committee’s attention to page 117 of the agenda book to see the proposed change. He further noted that the NACDL suggested elimination of the citation to the *Arayatanon* case in the committee note. The Reporter explained that the case did support the proposition for which it was cited -- that a court may approve multiple exemptions from sequestration for witnesses “essential” to prove a party’s case – but that the case also suggested that the opponent of the exemption had to disprove essentiality. Because the burden of proof is on the party seeking the exemption, including this citation in the committee note could muddle the proper burden of proof. The Reporter recommended deletion of the citation for that reason.

The Chair then sought the Committee’s approval of the proposed amendment to Rule 615 with no changes to the rule text and two minor changes to the note – to replace the word “agent” with the word “representative” and to eliminate the case citation. Participating Committee members unanimously approved the proposed amendment to Rule 615. The Reporter opined that the amendment was a perfect one for the Committee to advance because the courts are deeply divided and because the amendment will offer concrete and practical clarification for courts and litigants.

### **C. Rule 702**

The Reporter reminded the Committee that it had been considering clarifying amendments to Rule 702 since 2016 and that the project had culminated in two proposals. First, the proposed amendment published for comment would seek to limit overstatement by testifying experts by emphasizing that trial judges must determine that the opinions expressed by an expert reflect a reliable application of the expert’s principles and methods to the facts of the case. Second, the amendment would emphasize that Rule 104(a) applies to Rule 702, requiring a trial judge to find the admissibility requirements satisfied by a preponderance of the evidence before submitting expert opinion testimony to the trier of fact over objection.

The Reporter explained that there was a large volume of public comment. Although there was substantial support for the amendment, a large volume of public comments were negative. Upon close inspection, many of the comments appeared to be “cut and paste” comments quoting identical phrases and talking points. The Reporter further noted that the negative comments were reminiscent of – and sometimes virtually identical to -- the comments received in opposition to the 2000 amendment to Rule 702. Predictably, the comments fell along party lines. The defense bar generally favors the amendment, and the plaintiffs’ bar generally opposes it. He explained that a division of opinion about an amendment along party lines does not necessarily suggest that an amendment should not be approved so long as the amendment is the product of sound and neutral rulemaking principles. The Reporter noted that many successful amendments, such as the recent amendment to the notice provision of Rule 404(b), were favored by one side and not the other. Finally, the Reporter noted that the negative commentary about the proposed amendment usurping the role of the jury actually demonstrates the need for the amendment, as such comments reflect a fundamental misunderstanding that a jury decides the admissibility of expert opinion testimony. Rule 104(a) already applies to the admissibility requirements of Rule 702, demanding that the judge alone determine whether those requirements are satisfied. Comments arguing for a role for the jury reflect the very misunderstanding that underscores the need to emphasize the applicable Rule 104(a) standard. The Reporter nonetheless noted that several minor changes to the rule text and committee note could be considered to address some of the concerns raised in the public comment.

The Reporter explained that the negative public commentary took issue with the use of the phrase “preponderance of the evidence” in the text of the proposed amendment. He noted that the requirements of Rule 702 are undoubtedly preliminary questions of admissibility governed by Rule 104(a). He further noted that it was the Supreme Court in *Bourjaily v. United States* that held that the “preponderance of the evidence” standard applies to the judge’s Rule 104(a)

findings. So, the preponderance of the evidence standard already governs. And the point of the amendment is to emphasize and clarify that fact for the courts that have missed it.

Still, the Reporter explained that many of the commenters opined that the preponderance of the evidence standard carries with it a connotation of fact-finding by the jury. The Reporter suggested that the phrase “more likely than not” describes the preponderance of the evidence standard and could be employed in rule text instead. The Chair noted that some commenters also expressed concern that “preponderance of the evidence” language could suggest that the trial judge is limited to admissible evidence in considering the requirements of Rule 702, which is inconsistent with Rule 104(a). He explained that it was not necessary to trade “preponderance of the evidence” language for “more likely than not” language, but that it could be beneficial to avoid what appeared to be a term that was a lightning rod for negative public comment. Some Committee members suggested that there was no need to make a change because all competent lawyers and judges understand that the preponderance of the evidence standard is not restricted to juries. If the public comment on the point appeared to be a “talking points campaign” rather than constructive feedback, perhaps there is no need to modify accurate rule language in response to it. Another Committee member suggested that the amendment might require a finding “by a preponderance” and avoid the remainder of the phrase “of the evidence.” The Reporter suggested that such language might be too abrupt and may not satisfy the commenters concerned about “preponderance” language in any event. The committee consensus was to change the language in the text of the amendment from “preponderance of the evidence” to “more likely than not.” Though the Committee felt that this change was unnecessary and would not alter the standard of review employed by the trial court in evaluating the admissibility of expert testimony, the Committee ultimately concluded that there was value in making a modification to respond to the public comment.

Some Committee members expressed concern that the change might be interpreted to signal a substantive change in the governing standard when no change is intended because the “preponderance of the evidence” standard and the “more likely than not” standard are equivalent. The Reporter responded that changes could be made in the Advisory Committee’s note to ensure that the change would not be misconstrued. The Chair noted that several changes to the note suggested prior to the meeting would actually increase the risk of a misunderstanding, as they eliminate virtually all references to “preponderance of the evidence.” He argued that, if the phrase “preponderance of the evidence” was replaced by “more likely than not” in the rule text, then the committee note should be crystal clear that the two phrases were equivalent. The Reporter noted that the note includes a citation to the Supreme Court’s decision in *Bourjaily* that does articulate the preponderance of the evidence standard, but he suggested that the Committee might wish to add a sentence to the note directly stating that “more likely than not” means a “preponderance of the evidence.” The Chair proposed adding the following sentence to the first paragraph of the note immediately after the citation to Rule 104(a): “This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules.” Committee members agreed that this sentence should be added to avoid any inference that the Committee intended to alter the applicable standard by switching the language of the text from “preponderance of the evidence” to “more likely than not.” Judge Kuhl explained that she had suggested switching to “more likely than not” in the note to avoid using the term “by a preponderance” without “of the evidence.” She agreed that using “preponderance

of the evidence” in the note was appropriate. She also pointed out that she had suggested a citation in the note to the 2000 committee note to Rule 702 that cited the Supreme Court’s opinion in *In re Paoli* to distinguish the court’s preliminary findings regarding the admissibility of an expert from merits findings with respect to the expert’s opinion.

One Committee member queried whether the second paragraph of the note was superfluous in light of the added sentence equating the more likely than not standard with the preponderance of the evidence standard. The Reporter responded that the second paragraph of the note was important to eliminate any negative inference about the application of the Rule 104(a) standard to other evidence rules that do not explicitly reference it. Rule 104(a) applies to preliminary findings of admissibility without being articulated in every evidence rule. An amendment to Rule 702 articulating the standard expressly was necessary because courts were failing to apply it in this context.

Next, the Reporter explained that there were several public comments urging the Committee to reinsert the language “if the court finds” into the text of the amendment. These comments noted that the reason for the amendment is confusion about the respective roles of judge and jury in deciding admissibility of expert testimony. These commenters argued that the text of the amendment should specify that it is “the court” that must “find” the requirements of Rule 702 satisfied before submitting the opinion to the jury, lest courts continue to defer to juries about the sufficiency of an expert’s basis and the reliable application of principles and methods to the facts of the case even after the amendment. The Reporter explained that some Committee members had concerns about the language “the court finds” and that an alternative that would achieve the same purpose could be to require that “the proponent demonstrates to the court that it is more likely than not that.” One Committee member stated that the amended text should not require the proponent to demonstrate the Rule 702 requirements in every case because no demonstration is necessary in the absence of an objection from the other side. The Committee member suggested that such language could be read as a pre-clearance requirement for all expert testimony even without any objection and that this would be an unintended change in well-established practice. The Reporter stated that it is implicit in all of the evidence rules that the court is not required to rule in the absence of objection and that no pre-clearance requirement would be inferred due to that fundamental norm. Still, he noted that language might be added to the committee note clarifying that no finding would be necessary in the absence of objection.

Judge Bates inquired whether adding the caveat requiring an objection would make a substantive change to the amended rule in the note. The Reporter explained that the caveat in the note about an objection would not change the text of the rule but would instead underscore a generally applicable principle. The Reporter for the Standing Committee concurred that it is important to avoid adding substantive material to notes but agreed with the Reporter that this particular addition to the note would simply bring to light an underlying assumption, and that such a change would be appropriate. A Committee member then suggested a sentence in the note clarifying that there is no gatekeeping obligation in the absence of objection. Several judges objected, noting that plain error review requires a level of gatekeeping in all circumstances – even in the absence of an objection. They argued that it would be more accurate to state that *the amendment* does not require the court to make findings of reliability in the absence of objection, rather than to say that judges have no obligation whatsoever to consider whether expert

testimony is reliable in the absence of an objection. The Committee ultimately decided to add a sentence to the second paragraph of the note stating that: “Nor does the rule require that the court make a finding of reliability in the absence of objection.” This sentence avoids any notion that the rule imposes a pre-clearance requirement without undermining a court’s duty to avoid plain error.

The Chair then asked the Committee whether all members were supportive of the proposed changes discussed thus far: 1) a change to the text of the rule to state: “if the proponent demonstrates to the court that it is more likely than not that”; 2) a new sentence in the first paragraph of the note equating the preponderance of the evidence standard and the more likely than not standard; and 3) a new sentence in the second paragraph of the note clarifying that the amendment does not require the court to make findings in the absence of objection. All Committee members agreed to these changes.

The Reporter next called the Committee’s attention to the paragraph in the note describing the reason for the change to Rule 702(d) to avoid expert overstatement. He explained that some of the public comment suggested that the note language was insulting to jurors because it stated that jurors “may be unable to evaluate” and “unable to assess” expert methodology and conclusions. The Reporter explained that there was certainly no intent to insult jurors and suggested that the note might provide that jurors lack the “background knowledge” necessary to assess expert methodology and conclusions. Another participant queried whether “background knowledge” was the best terminology to describe jurors’ ability to assess expert methodology. He suggested using the term “specialized” knowledge as that language is already used in Rule 702 to describe the type of knowledge that experts possess and laypersons do not. The Committee agreed to use the term “specialized” knowledge in the seventh paragraph of the note.

The Reporter then noted that additional changes to the first two sentences of the seventh paragraph of the note regarding overstatement had been suggested to emphasize the trial judge’s “ongoing” gatekeeping authority with respect to the opinions expressed by an expert witness during trial testimony. Other Committee members questioned whether a trial judge has an “ongoing” obligation with respect to Rule 702 after finding expert testimony admissible. The Reporter explained that this was the purpose of the amendment to Rule 702(d) – to emphasize the trial judge’s ongoing obligation to prevent an admitted expert from testifying to unsupported overstatements like a “zero error rate.” The Chair suggested combining the first and second sentences of the seventh paragraph of the note – which essentially say the same thing – and avoiding the term “ongoing.” The combined sentence would read: “Rule 702(d) has also been amended to emphasize that each expert’s opinion must stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.” All agreed that this was a constructive change. The Committee also agreed to remove the word “extravagant” from the final sentence of the note. The Chair also proposed deleting the words “of course” from the third paragraph of the note and adding numbers 1) and 2) to the sections of the note discussing the two features of the amendment. Another Committee member suggested that the third paragraph of the note should say that: “the fact that the expert has not read every single study that exists *may* raise a question of weight” instead of “*will* raise a question of weight.”



A Committee member then moved to approve the amendment to Rule 702 with the changes to the rule text and note agreed upon at the meeting. The rule text would be changed to read “if the proponent demonstrates to the court that it is more likely than not that” with corresponding changes to the note to equate the “more likely than not” standard with the “preponderance of the evidence” standard. The note would also include a sentence clarifying that the amendment does not require findings of reliability in the absence of objection. It would use “specialized knowledge” to describe the foundation that jurors lack. It would add organizing numbers, would condense the first two sentences of the seventh paragraph, and eliminate the words “of course” from the note. It would also eliminate the word “extravagant” and include a citation to the 2000 Advisory Committee’s note to Rule 702. The motion was seconded and unanimously approved by all participating Committee members. The Reporter reminded the Committee of the almost six years of work on the amendment to Rule 702 and recognized its approval as a breathtaking moment. He thanked Committee members and liaisons for their important and helpful contributions. The Chair agreed, stating that the amendment would leave evidence law better than the Committee found it.

### **III. Proposed Amendments for Publication**

The Reporter explained that there were several proposals to publish amendments for notice and comment before the Committee.

#### **A. Rule 611(d)/Rule 1006**

The Reporter introduced proposals to amend Rule 611 to add a new subsection (d) and to update Rule 1006, explaining that the Committee would be voting on whether to approve these amendments for publication. He reminded the Committee that the amendment to Rule 611 would add a provision regulating the use of illustrative aids at trial, noting that illustrative aids are used routinely but that no provision regulates them specifically. He explained that the separate companion amendment to Rule 1006 would help resolve court confusion about the difference between summaries used as illustrative aids and summaries offered into evidence to prove the content of voluminous records.

##### **1. Illustrative Aids**

The Reporter called the Committee’s attention to the proposed amendment to Rule 611 appearing on page 234 of the agenda book to note two minor suggested changes to the draft previously reviewed by the Committee. The term “jury” in proposed Rule 611(d)(1)(A) would be changed to “factfinder” because the factfinder might be the judge and not a jury in a bench trial, which would also be governed by the new rule. The verb “are” in line 44 on page 235 of the agenda book would be changed to “is” to conform to the singular tense used earlier in the sentence. A Committee member suggested that the term “trier of fact” be used in subsection (d)(1)(A) instead of factfinder to track the use of that language in Rule 702 and all agreed.

The Reporter explained that there were questions raised at the Standing Committee meeting about the notice provision in the rule that would require advance disclosure of an illustrative aid to the opposing party. The concern was that some lawyers would object to

showing the power point presentation to be used in their closing arguments to their opponents in advance. The Reporter noted that the notice provision was a flexible one that might make 5-minute advance notice adequate in a circumstance such as that, but queried whether the Committee wanted to make notice discretionary to allow the judge to dispense with notice altogether in certain circumstances. He also suggested that the Committee might publish the proposal with the existing notice provision to collect public input on the appropriate notice for illustrative aids. The Reporter also highlighted the bracketed material in the sixth paragraph of the committee note discussing notice “at a jury trial” and queried whether the Committee wished to so limit the reach of the rule. The Chair noted that notice would be appropriate in a bench trial as well and suggested deleting the bracketed material. The Chair also noted that line 82 of the note on page 236 of the agenda book discussed “use of the aid by the jury” and proposed changing it to “consideration of the aid by the jury.”

Another participant asked why subsection (d)(3) of the proposed rule would require that an illustrative aid be marked as an exhibit when it is not evidence. The Chair responded that having illustrative aids in the record is crucial for appellate review in case the appellant argues that the trial judge erred by allowing use of the illustrative aid. The participant asked how a trial judge should handle impermanent aids like chalks or dry erase boards or layered aids that change as testimony comes in. She queried how a trial judge would mark aids such as these to be included in the record. The Chair observed that there would be a notice problem with illustrative aids that were created in “real time” (such as writing on a dry erase board), as well as a problem marking them for the record. The Reporter suggested modifying Rule 611(d)(3) to read: “Where practicable, an illustrative aid that is used at trial must be entered into the record.” This would allow flexibility for developing aids such as chalk or dry erase drawings. He noted that lines 87-88 of the committee note on page 236 of the agenda Book would also need to be modified to read: “While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record where practicable.”

For the same reason, the Reporter opined that the text of the notice provision in Rule 611(d)(1)(b) should also be altered to read: “all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use, unless the court for good cause orders otherwise.” He also noted that the committee note would need to be changed as well, such that lines 65-67 of the note on page 236 of the agenda book would now provide: “The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection unless the court for good cause orders otherwise.” The Chair noted that line 30 of the note on page 235 of the agenda book needed a comma inserted after “to study it” and that line 39 should read “a source of evidence” and not “another source of evidence” (as an illustrative aid is not evidence). The Chair also questioned the reference in the note to use of an aid as substantive evidence as “the most likely problem” with illustrative aids, suggesting that misleading the jury might be a bigger problem. The Reporter responded that use of illustrative aids as substantive evidence is certainly a significant problem that the amendment is seeking to correct and suggested that the note say “one problem being” instead of “the most likely problem.” Another Committee member pointed out that line 75 of the note on page 236 of the agenda book incorrectly stated that illustrative aids are “admissible only in accompaniment with testimony” when illustrative aids aren’t admissible

evidence at all. All agreed that the note should say that illustrative aids are “used only in accompaniment with testimony.”

Judge Bates asked whether the amendment as drafted would require lawyers to reveal their closing argument power point presentations to opposing counsel in advance. He explained that his sense was that different judges currently handle that issue differently and inquired whether the rule change would now require all judges to order disclosure. The Reporter suggested that lawyers will still be able to argue about whether a power point is an illustrative aid regulated by the rule. The Chair opined that the amendment would set forth general principles but that it was inevitable that trial judges would differ in the way they interpreted and applied those guiding principles. A Committee member asked whether the term “argument” in the rule text might be interpreted to require advance notice of a closing argument power point. He suggested that such a power point is argument and that perhaps it should not be subject to the guidelines imposed by the amendment. The Reporter observed that such a power point would still qualify as an “illustrative aid” even if it illustrated the closing argument only. The Committee member responded that illustrative aids used with witnesses should be subject to notice, but that lawyers should be able to use a power point in closing without advance clearance. Judge Bates commented that he shared the same concern and did not think that the good cause flexibility added to the notice requirement would be sufficient to address that circumstance.

The Reporter queried whether the Committee wanted to remove the language “or argument” in the text of the rule and the committee note. The Chair noted that the Committee could include the words “or argument” in the amendment published for comment in brackets to solicit input on how best to handle the problem of aids used to illustrate argument. Another Committee member opined that the Committee should determine in advance of publishing the amendment what it is intended to regulate. He stated a preference for eliminating “argument” from the proposal so that it would cover aids used with witnesses but not aids used in opening or closing. The Reporter noted that a visual aid used during closing might summarize evidence and still be regulated by the amendment even if the words “or argument” are eliminated. The Chair agreed, pointing out that something that is an illustrative aid when exhibited to a witness does not cease being an illustrative aid when it is exhibited to the jury during a closing argument. Ultimately, the Committee agreed to take out the words “or argument” and concluded that public comment could help the Committee be more specific in distinguishing illustrative aids that are subject to the rule and summaries of argument that are not.

A Committee member then moved to approve Rule 611(d) for publication with all of the modifications agreed upon. The motion was seconded and unanimously passed.

## **2. Rule 1006 Summaries**

Professor Richter then introduced the proposed amendment to Rule 1006 that would serve as a companion to the amendment to Rule 611 by clarifying the foundation necessary for admitting a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter called the Committee's attention to the proposed amendment to Rule 1006 on page 256 of the agenda book that would seek to correct the confusion in the cases. She highlighted changes to the draft rule and questions for the Committee. She explained that the Chair and Reporter had agreed that the word "substantive" should be deleted from Rule 1006(a), such that the amendment would simply provide that Rule 1006 summaries are to be admitted "as evidence." She noted that the modifier "substantive" remained in the committee note due to the common use of that term to differentiate evidence offered for a limited purpose from evidence offered to prove a fact. Professor Richter also explained that the proponent of a Rule 1006 summary must demonstrate that it "accurately" conveys the content of the underlying voluminous materials and that it is not argumentative or prejudicial in order to earn an exception to the best evidence rule – a rule that typically requires originals or duplicates of writings, recordings, or photographs to be admitted to prove their content. The terms "accurate and non-argumentative" were included in the text of the proposed amendment because some courts confused Rule 1006 summaries with illustrative summaries and allowed argumentative and inaccurate content. Professor Richter noted that a comma would need to be added after the words "in court" in the final line of proposed Rule 1006(a). Professor Richter also pointed out minor changes to the committee note to eliminate the bracketed paragraph regarding the use of symbols or shortcuts in Rule 1006 summaries and to add the correct tense to the final paragraph of the note.

The Chair stated that he was uneasy about the inclusion of the terms "accurate and non-argumentative" in the text of the amendment due to the concern that they would increase disputes about the admissibility of Rule 1006 summaries. For example, almost all Rule 1006 summaries are "argumentative" in the sense that the proponent summarizes only some, and not all, of the underlying data. The Chair opined that Rule 403 could serve to control the admission of an inaccurate or argumentative Rule 1006 summary. Another Committee member opined that the term "accurate" would introduce a new standard of uncertain meaning to Rule 1006 and that the terms "accurate and non-argumentative" should be removed from rule text and that language about Rule 403 should be added to the committee note. Professor Richter explained that Rule 1006 is a powerful one that permits a "summary" of voluminous writings, recordings, or photographs to be introduced in lieu of originals or duplicates. She noted that the proper foundation for admission of a Rule 1006 summary in the caselaw has long included the requirements that the summary be accurate and non-argumentative. While there may be arguments for judges to resolve in evaluating those elements of the foundation, they are part of the foundation necessary to earn an exception to the best evidence rule and not simply a Rule 403 issue. The Federal Public Defender agreed that Rule 1006 is a potent rule and opined that language should be included in the committee note at the very least to emphasize the proper foundation. The Chair stated that that the terms "accurate and non-argumentative" should be cut from the text of the rule, but that language should be added to the committee note emphasizing that Rule 403 may keep out an inaccurate or prejudicial summary.

A Committee member next inquired about the language of proposed Rule 1006(c), suggesting that its reference to a "summary" that is regulated only by Rule 611(d) seemed circular in a rule about the admission of summaries. Committee members noted that the purpose of subsection (c) was to convey that if a summary does not meet the standards set forth in Rule 1006(a), it is an illustrative aid covered by Rule 611(d). The Chair suggested that subsection (c)

should read: “A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).” Committee members agreed that this language better conveyed the intent of the provision.

A Committee member pointed out that the proposed draft would require a “written” summary and questioned whether that would include a photographic summary. The Reporter explained that Rule 101(b)(6) provides that any reference to any kind of “written” material or any other medium includes electronically stored information. The Committee member queried whether this would capture photographs.

The Department of Justice representative asked whether limiting Rule 1006 to written summaries would prevent testimony by a case agent helping to organize a case and suggested additional language in the committee note addressing the proper use of a summary witness. Professor Richter pointed out the limited purpose of a Rule 1006 summary to prove the content of material too voluminous to be considered in court. The amendment would prohibit a witness from orally describing voluminous underlying documents to prove their content to the jury and would require a chart or spreadsheet or some sort of accompanying writing to demonstrate that content. Any other use of a summary witness is not regulated by Rule 1006 and would not be regulated under the amendment. Professor Richter explained that litigants often point to Rule 1006 to support other uses of summary witnesses, however, simply because it is the only provision in the existing rules that expressly permits a “summary.” The draft amendment was designed to eliminate the use of Rule 1006 for such purposes. She further noted that a writing summarizing voluminous content would likely be more effective than oral testimony about that content alone and could easily be created to comply with a “written” limitation. The Chair suggested that the Committee could publish the proposal with the “written” limitation to determine whether there would be any unforeseen consequences to adding such a restriction. The Reporter suggested that the word “written” might be published in brackets to invite commentary about it.

Another Committee member added that the committee note should discuss the proper use of a summary witness. Judge Bates inquired what the intent of the amendment would be regarding summary witnesses and whether the amendment would change the status quo. He expressed concern that the amendment might foreclose testimony from summary witnesses that is now routinely admitted. A Committee member disagreed that an amendment to Rule 1006 would make any summary witness inadmissible. It would simply provide that a purely testimonial summary could not be offered to prove the content of voluminous documents without a writing and that any other use of a summary witness would have to be justified under other provisions. He opined that this was a helpful clarification. After this discussion, the Chair proposed eliminating the “written” limitation in the draft amendment due to the Committee’s concerns, and Committee members agreed.

The Chair then raised the fact that Rule 1006 does not require advance disclosure of the summary to the opponent. The provision requires production of the underlying voluminous materials but not the summary itself, which presumably the opponent needs to review before it is presented. The Chair noted that the lack of notice in Rule 1006 is arguably at odds with the notice requirement in proposed Rule 611(d) governing illustrative aids. One Committee member

suggested that a Rule 1006 summary would have to be disclosed in advance when all trial exhibits are disclosed anyway. The Reporter also suggested that Rule 1006 summaries are different than illustrative aids – because Rule 1006 summaries are “evidence,” they will be disclosed when mere aids will not. The Chair pointed out that trial exhibits are often exchanged on the eve of trial, which might give an opponent two days to verify the accuracy of a summary of 500,000 documents. The Reporter stated his preference not to add a new notice provision to Rule 1006 because notice provisions in the evidence rules are generally reserved for significant matters such as Rule 404(b) evidence. The Chair relented.

Judge Bates queried whether the reference to production of the “originals or duplicates” in subsection (b) of the proposed amendment referred to the underlying voluminous documents or the summary. The Reporter responded that it referred to the underlying documents and noted that this had become less clear after the production obligation was put into a new subsection (b). The Reporter suggested adding the term “underlying” to subsection (b) to clarify the “originals or duplicates” intended. The Committee agreed.

A Committee member moved to approve the amendment to Rule 1006 for publication with the deletion of “substantive,” “accurate and non-argumentative,” and “written” from the text of the rule; with the addition of “underlying” to subsection (b); and with subsection (c) to read: “A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).” The Committee member also moved to approve a committee note reflecting those changes. The committee note would eliminate any discussion of “accurate and non-argumentative” summaries in favor of language stating that: “A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.” The note would also eliminate any discussion of limiting Rule 1006 to “written” summaries and would eliminate the bracketed paragraph about symbols and shortcuts. The motion was seconded and unanimously approved.

## **B. Safeguards for Jury Questions: Rule 611(e)**

The Reporter introduced the proposal to add a new subsection (e) to Rule 611 to provide procedures and safeguards for judges who wish to allow jurors to pose questions for witnesses. He noted that the practice of allowing juror questions has been somewhat controversial and that the amendment would take no position on whether a judge should allow the practice. Instead, the rule would offer uniform procedures and safeguards that would apply whenever a judge chose to allow juror questions. The Reporter directed the Committee’s attention to the working draft of the rule on page 266 of the agenda book. He explained that subsection (e)(1) would better capture the intent of the rule if it stated: “If the court allows jurors to submit questions for witnesses...” instead of “If the court allows jurors to ask questions of witnesses...” This is because the rule would not allow jurors to question witnesses directly and would require that the court or counsel pose the questions. Subsection (e)(1)(C) would also be changed to conform. (“the court may rephrase or decline to ask a question *submitted* by a juror”). The Reporter also noted that lines 45-46 of the committee note on page 269 of the agenda book would prohibit the court from disclosing to the parties or to the jury which juror submitted a particular question. He

explained that there had been a question raised about whether counsel should be permitted to learn which juror asked a particular question. The Reporter voiced concerns that this could lead to mischief and stated his preference to leave the note intact. Finally, the Reporter explained that the new provision regarding illustrative aids would appear in Rule 611(d) and that the safeguards and procedures for jury questions would appear below it in Rule 611(e). He explained that this order is appropriate given how commonly illustrative aids will be used and the relative rarity of juror questions.

One participant at the meeting opined that it would be obvious to all in the courtroom which juror asked a question, such that the prohibition on disclosure in the committee note would mean little. The Chair suggested that whether it is obvious which juror asked a question depends upon how the trial judge handles juror questions; some of his colleagues allow jurors to submit questions in a way that preserves anonymity. The Reporter also suggested that the committee note cautions against disclosure of a questioning juror's identity by the court even if the parties are able to infer that identity on their own.

The Chair suggested several small changes. He suggested that a comma be added after the word "rephrased" in subsection (e)(1)(D). He suggested that the word "neutral" be inserted before the word factfinders in subsection (e)(1)(F). He also voiced concern that the words "appropriate under these rules" in subsection (e)(2)(A) were too imprecise (what is "appropriate"?) and suggested new language stating: "the court must, outside the jury's hearing: (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked."

A Committee member then moved to approve the amendment to add a new subsection 611(e) for publication, with all of the agreed-upon changes to the rule and accompanying committee note. The motion was seconded and unanimously approved.

### **C. Party Opponent Statements offered against Successors/ Rule 801(d)(2)**

The Reporter introduced the proposal to amend Rule 801(d)(2), the hearsay exemption for party opponent statements. The Reporter explained that party opponent statements admissible against a declarant or the declarant's principal are sometimes excluded when a successor party stands in the shoes of the declarant or the declarant's principal due to an assignment of a claim. He offered the example of an individual suing for personal injuries whose own statements would be admissible against her. If the individual dies before trial and her estate pursues the personal injury claim on her behalf, some courts would exclude the decedent declarant's statements when offered against the estate. The amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant's principal. The Reporter explained that the amendment would appear at the bottom of Rule 801(d)(2), noting that the style consultants had approved the placement despite their typical disdain for hanging paragraphs.

The Reporter called the Committee's attention to the draft amendment providing for admissibility when "a party's claim or defense is directly derived from a declarant or a declarant's principal." He noted that the Reporter to the Standing Committee had raised a question about the word "defense" in the amendment and invited Professor Cathie Struve to

elaborate. Professor Struve explained that a successor party -- who should be bound by the statements of the predecessor -- might have an independent defense to the claims, such as the successor liability defense. She suggested that the amendment should replace the term “defense” with the terms “potential liability” to provide for admissibility of predecessor statements even in circumstances in which the successor enjoys an independent defense. The Reporter noted that the committee note would not need to be changed if this alteration were made. Committee members agreed to use the terms “potential liability” instead of “defense.” The Committee thereafter unanimously voted to approve the amendment to Rule 801(d)(2) as modified for publication.

#### **D. Rule 804(b)(3) and Corroborating Circumstances**

Professor Richter introduced the proposal to amend Rule 804(b)(3). The amendment would clarify that, in assessing whether corroborating circumstances clearly indicate the trustworthiness of a statement against penal interest, courts should consider not only the totality of the circumstances under which the statement was made, but also any other evidence corroborating it. She called the Committee’s attention to the draft of the proposal circulated in a supplemental memorandum. She explained that the restylists had suggested replacing “corroborating the statement” in subsection (B) of the amendment with “corroborating it.” She further noted that Judge Schroeder had suggested a helpful modification to the first sentence of the committee note to make it more direct. Finally, Professor Richter explained that an example had been added to the note to illustrate the type of information the court should consider in evaluating the corroborating circumstances requirement under the amendment.

The Chair pointed out that a judge should consider *all* independent evidence about the credibility of a declarant’s statement – i.e., not only evidence that corroborates it, but also evidence that undermines it. He suggested adding language to the first sentence of the note so that it would instruct a judge to consider evidence “corroborating or contradicting” a statement. The Chair also suggested stating in the note that the “court *must* consider not only the totality of circumstances...” He also asked to change “like” in the example in the note to “such as.” Judge Bates noted that a comma should be inserted after the citation to the *Donnelly* case in the note. One Committee member suggested that the opening phrase of subsection (B) of the rule text is awkward because it begins with the caveat that a statement must be one that exposes the declarant to criminal liability and must be offered in a criminal case to trigger the corroborating circumstances requirement. The Reporter explained that there was no other place to put that caveat that would make the rule read more smoothly.

The Committee unanimously voted to approve the proposed amendment and committee note to Rule 804(b)(3) as modified for publication.

#### **E. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement**

Professor Richter directed the Committee’s attention to the proposal to amend Rule 613(b) to require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness’s prior inconsistent statement. She explained that the proposed amendment would require a prior foundation but would retain the trial court’s discretion to delay



or forgo the foundation under appropriate circumstances. Professor Richter noted that a supplemental draft of the proposal had been circulated that added illustrations of circumstances that might justify departure from the prior foundation requirement in the committee note.

The Federal Public Defender suggested that his only concern with the proposal might be one raised in Professor Richter's Agenda memo that the amendment could be a solution in search of a problem. The Reporter responded that public comment would help clarify that point. And Professor Richter noted that the amendment could help the neophyte trial lawyer who reads the current rule to allow flexible timing for a witness's opportunity to explain or deny a prior inconsistent statement, only to learn after cross-examination has concluded that the trial judge requires a prior foundation. The Chair agreed, noting that every one of the federal judges whom he had asked about this issue reported requiring a prior foundation despite the flexible timing allowed under current Rule 613(b). Judge Bates suggested deleting "Of course" from the second and final paragraph of the committee note. He also recommended deleting the bracketed "in the interests of justice" language in the second paragraph of the note. Finally, Judge Bates expressed concern about citing a concurring opinion in the committee note. The Reporter responded that the concurring opinion cited was the clearest and most persuasive explanation of the virtues of the prior foundation rule and had been included for that reason. The Reporter then suggested that the note could employ a similar defense of the prior foundation requirement without citing the concurrence directly. The Committee agreed to that solution.

The Committee voted unanimously to approve the proposed amendment to Rule 613(b) and accompanying note with the agreed-upon modifications for publication.

#### **IV. Closing Matters**

The Chair thanked the Committee and all participants for their patience and for their contributions. He announced that the fall meeting would take place on October 28, 2022 in Phoenix, Arizona.

Respectfully Submitted,

Liesa L. Richter

1 **Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements.**

2 If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may  
3 require the introduction, at that time, of any other part — or any other ~~writing or recorded~~  
4 statement — that in fairness ought to be considered at the same time. The adverse party  
5 may do so over a hearsay objection.

6 \_\_\_\_\_  
7 2025 Advisory Committee Note. This rule has been amended to reflect amendments  
8 recently made to Federal Rule of Evidence 106. This is the federal rule, verbatim.

9 **2011 Advisory Committee Note.** The language of this rule has been amended as part of  
10 the restyling of the Evidence Rules to make them more easily understood and to make  
11 class and terminology consistent throughout the rules. These changes are intended to be  
12 stylistic only. There is no intent to change any result in any ruling on evidence  
13 admissibility. This rule is the federal rule, verbatim.

14 **Original Advisory Committee Note.** This rule is the federal rule, verbatim. Utah Rules  
15 of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah  
16 practice.

# TAB 3

Possible need to amend Rule 408:

A recent opinion, [Small v. Small, 2024 UT App 173, ¶ 13 n.2](#), notes a difference between FRE 408 and the Utah rule. This difference appears to have given rise to conflicting caselaw from the appellate courts. See [Anderson v. Thompson, 2008 UT App 3, ¶¶ 29-32, 176 P.3d 464](#) (evidence of settlement negotiations could not be used for impeachment purposes, although Utah has not adopted the federal rule's express prohibition against such use) and [Matter of Est. of Osguthorpe, 2021 UT 23, ¶ 143 n.40, 491 P.3d 894](#) (settlement negotiations could be used for impeachment purposes; noting that Utah has not adopted prohibition in federal rule) (not mentioning but impliedly overruling *Anderson*).

Assuming a subcommittee is formed to look at making changes, below is a draft redline changing Utah's rule to conform more closely to FRE 408.

1 **Rule 408. Compromise Offers and Negotiations.**

2 (a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any  
3 party— either to prove or disprove ~~liability for or~~ the validity or amount of a disputed  
4 claim or to impeach by a prior inconsistent statement or a contradiction:

5 (a)(1) furnishing, promising, or offering — or accepting, promising to accept, or  
6 offering to accept — a valuable consideration in ~~order to compromise~~  
7 compromising or attempting to compromise the claim; and

8 (a)(2) conduct or a statement made during ~~in~~ compromise negotiations about the  
9 claim — except when offered in a criminal case and when the negotiations related  
10 to a claim by a public office in the exercise of its regulatory, investigative, or  
11 enforcement authority.

12 (b) **Exceptions.**

13 (b)(1) The court may admit this evidence for another purpose, such as proving a  
14 witness’s bias or prejudice, negating a contention of undue delay, or proving an  
15 effort to obstruct a criminal investigation or prosecution.

16 (b)(2) The court is not required to exclude evidence otherwise discoverable merely  
17 because it is presented in the course of compromise negotiations.

**Commented [JW1]:** This provision is not in the federal rule.

18  
19 **2011 Advisory Committee Note.** The language of this rule has been amended as part of  
20 the restyling of the Evidence Rules to make them more easily understood and to make  
21 class and terminology consistent throughout the rules. These changes are intended to be  
22 stylistic only. There is no intent to change any result in any ruling on evidence  
23 admissibility.

24 **Original Advisory Committee Note.** This rule is the federal rule, verbatim, and is  
25 comparable to Rules 52 and 53, Utah Rules of Evidence (1971) but is broader to the extent  
26 that it excludes statements made in the course of negotiations.

# TAB 4

# Judiciary Advisers Back Development Of AI Evidence Rules

By **Jeff Overley**

Law360 (November 8, 2024, 10:23 PM EST) -- The federal judiciary's advisory panel for evidentiary issues agreed Friday to develop rules aimed at strengthening scrutiny of testimony and materials derived from artificial intelligence systems, saying AI-generated information should meet the same reliability standards that apply to expert witnesses.

At a meeting in New York City, the Judicial Conference's Advisory Committee on Evidence Rules supported the drafting of two rules — one covering AI-manipulated video or audio clips known as "deepfakes" and another covering "machine-generated evidence" that can consist, for example, of an advanced software program's conclusions about DNA samples.

The rules are expected to be presented at the committee's next meeting on May 2 in Washington, D.C. Of the two incipient rules, the one covering deepfakes is less formal, with panelists generally agreeing that existing safeguards are sufficient to prevent fake footage from affecting trials or even being introduced in the first place.

"It seems to me that the greatest safeguard ... is the fact that lawyers are admitted to a bar, and if they knowingly try to introduce deepfakes, they will be disbarred," U.S. Circuit Judge Richard J. Sullivan of the Second Circuit, a panel member, said during Friday's hourlong discussion of AI policymaking.

Some observers have **agitated for action** in recent months, and the panelists Friday reviewed multiple proposals before settling on a modest approach to deepfakes — essentially, creating a rule that will indefinitely remain in draft form, ensuring the committee isn't caught off guard if a deepfakes rule ends up actually being needed.

"There's always the concern that we're in a different world next year or the year after — technology changes, deepfakes [could] get better," Elizabeth J. Shapiro, a representative of the U.S. Department of Justice, said at Friday's meeting. "So I think it's worth having something that we're working on — to have, so to speak, in the bullpen."

There is more urgency, however, behind the rule for machine-generated evidence and "machine learning," where computer systems evolve somewhat independently. Committee members Friday fretted about powerful software systems making predictions or inferences that are converted into trial testimony without facing the typical Daubert analysis of reliability and relevance.

"If it were a real witness, and they would be subject to Daubert, then the machine should be subject ... to a Daubert requirement as well. That's the basic idea," Fordham University School of Law professor Daniel J. Capra, a scholar of criminal procedure who assists the committee, said Friday.

Friday's agenda included Capra's draft of a machine-generated evidence rule, which is envisioned as Rule 707 of the Federal Rules of Evidence. The draft rule would place certain types of AI-derived evidence, such as a statistical analysis produced with AI-equipped software, under an existing section of the Federal Rules of Evidence. The existing section, Rule 702, applies to expert witnesses and has a four-part test for whether witnesses are likely to be helpful and reliable.

"When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses," according to an agenda note

provided to committee members on Friday. "But if machine or software output is presented on its own, without the accompaniment of a human expert, Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly."

Although Judge Sullivan voiced skepticism about the dangers of deepfakes, he voiced concerns about sophisticated-sounding evidence not being substantiated.

"It sounds like the technology is [now] getting to a point where there's no witness who's able to explain how the machine can learn. This doesn't mean it's not reliable, but it means that it's not going to be able to be subjected to the traditional Daubert analysis," Judge Sullivan said. "I am more confident that we do need a rule for this one."

The judiciary's rulemaking process is notoriously slow even for relatively straightforward matters, and experts have said that the process will be **especially difficult in the context of AI tools** that are complex and rapidly evolving. But advisory committee members signaled that it's crucial to start tackling the challenge in earnest.

"I think ... we do need to address this," U.S. District Judge Jesse Furman of the Southern District of New York, chair of the evidence panel, said Friday. "It's a real problem and will become an even bigger problem."

--Editing by Michael Watanabe.



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Memorandum To: Advisory Committee on Evidence Rules  
From: Daniel J. Capra, Reporter  
Re: Artificial Intelligence, Machine-Learning, and Possible Amendments to the Federal Rules of Evidence  
Date: October 1, 2024

Beginning in Fall 2023, the Committee has been considering the challenges posed by the development of Artificial Intelligence and its possible impact on evidence offered at a trial. The Committee has convened two separate panel discussions to obtain information from experts in the field. The Committee has focused on two separate concerns: 1) the problem of “deepfakes” and how to assure that the Evidence Rules on authenticity will work to prevent hard-to-detect fake video and audio evidence from being admitted at trial and 2) The problem of machine learning and how to assure that machine learning output is reliable, if such evidence is admitted without the testimony of an expert.

While recognizing the legitimate concerns posed by AI and machine-learning, Committee members have expressed the concern that, given the length of the rulemaking process, there is a risk that any proposed amendments to deal with AI could become outmoded before they even go into effect --- and that any amendment written in terms so general as to avoid being outmoded might add little to the already general and flexible language in the Federal Rules of Evidence. On the other hand, the unprecedented interest in the Committee’s work on AI, even at this preliminary stage, counsels against inaction unless it is clear that a rule will not be helpful.

This memorandum is in four parts. Part One discusses some of the recent cases and developments since the last meeting, including the public focus on the Committee’s work. Part

Two presents a discussion of possible amendments suggested by various experts and scholars.<sup>1</sup> Part Three provides background information on the problem of deepfakes, the rules on authenticity, and prior Committee review of authentication of social media evidence.<sup>2</sup> Part Four sets forth two specific proposals for addressing AI and machine learning --- really a mix and match of the best parts of the proposals considered in Part Two.

It should be noted that there is no action item, for this meeting, on any of the matters discussed in this memo.

## **I. New Information**

Here is a list of new information and data points that have come to my attention since the last meeting.

### **A. Articles and Reports**

- **Law Review Article:** Myhand, *Once the Jury Sees it, the Jury Can't Unsee it: The Challenge Trial Judges Face When Authenticating Video Evidence in the Age of Deepfakes*, 29 *Widener L. Rev.* 171 (2024):

The author, like many others, sounds an alarm about deepfakes and considers the problem to be qualitatively different from that imposed by forgeries in the past. In his view, no amendment to the Evidence Rules will solve the problem, because neither judges nor juries are in any position to assess whether an item is a deepfake.

He recommends that all proponents of video evidence be required to submit with their proffered evidence an Affidavit of Forensic Analysis (AFA) from a qualified expert. An AFA would be used to assist the trial judge in performing the gatekeeping function under Rule 104(b). He describes the procedure as follows:

Before the trial or hearing, a party offering video evidence must submit an affidavit from an expert whose testimony regarding forensic video analysis would be admissible at the trial or hearing under Federal Rule of Evidence 702. The expert's affidavit must state an opinion regarding the authenticity of the proffered video evidence, the method used to analyze the video, and the chain of custody of the video as reported by the proffering party.

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<sup>1</sup> Some of this section was included in the AI memo for the Spring meeting, but there are revised proposals, and the Committee has never gone through these proposals one by one.

<sup>2</sup> But for a few changes, this section was included in the AI memo for the Spring meeting.

The AFA would be provided only as a tool to assist the trial judge in deciding whether there is sufficient evidence to support a reasonable jury's finding that the video evidence is what the proponent purports it to be. The AFA would not be admissible at trial.

The proposal is modeled after the Affidavit of Merit statutes that some states have required in professional malpractice claims, purportedly to screen out fraudulent claims.

**Reporter's Comment:** The biggest problem with this proposal is expense and delay. Proponents will need an expert affidavit for *every piece of video evidence*. And that affidavit must itself comport with Rule 702, which means a potential *Daubert* hearing for every affidavit. The rule probably needs to be further extended to *audio* evidence as well, thus adding to the delay and expense imposed by the proposal.

The other problem is that this affidavit is not presented to the jury --- so the jury remains ill-equipped to root out a possible deepfake.

If this proposal is thought promising, it would have to be implemented through a change to Rule 901 (or maybe a new freestanding rule 901(c) or (d). Congress likely won't impose such a rule, and the courts are unlikely to do so en masse. So if the Committee is interested in this proposal, it can be considered as a possible amendment to Article 9 at the next meeting.

• **Article: Daniel Seng, *Artificial Intelligence and Evidence*, 33 Singapore Law Journal 241 (2024):**

The author describes a good process for regulating allegations of deepfakery:

[The opponent] should be required to provide advance warning to the trial judge that the authenticity of identified aspects of the evidence will be questioned, and to set out the grounds upon which the challenge is made. If this first hurdle is overcome, it will be for the trial judge to decide whether a trial within a trial is necessary, and if so, to set out the scope and parameters of the hearing, including the standard of proof, for which a ruling is required.

The author also discusses potential advancements in the means to detect deepfakes:

While software tools are readily available to allow an end user to test various hypotheses in the analysis of image manipulation, it remains, for the time being, the domain of the expert to interpret the test results and form a conclusion. One day, technologies might

be available to perform a set of tests, which can be weighted, and used to draw informed conclusions about the image being manipulated.

He finally concludes that the evidentiary principles needed to cover deepfakes are already in place:

[T]he evidential treatment of the issue of manipulated digital data is no different from any other electronic evidence that needs authentication. \* \* \* [I]ssues with digital data that is manipulated requires the court to develop a set of clear procedures for managing authentication issues, a healthy appreciation of the limits of the presumption of reliability, and a robust approach towards disclosure of discovery.

Finally, the author analyzes and summarizes the controversy over disclosure of source codes to the opponent, when the proprietor of the software invokes trade secret protection. He notes the “brouhaha” involving breathalyzers, where defense lawyers sought inspection of their codes and were rebuffed, until discovery was granted in a particular case and it was determined that there were calibration and calculation errors in the coding of the machines that resulted in results that were 20% to 40% too high. He also notes coding errors discovered by adversaries in cases involving Toyotas that cause sudden acceleration, and in the environmental sensors in Uber self-drive cars. The author concludes that it is important to provide disclosure of source codes, and that access by the adversary can be controlled by in camera proceedings and protective orders. He notes that Professor Imwinkelried has suggested that an alternative to disclosure of source codes is for the opponent to be given access to the validation studies that support the AI process. He states, however, that validation studies are unlikely to be useful “for complex systems such as those used in AI systems, and their use may raise additional questions such as the number of validation tests required, the assumptions made as to the number of such tests, the procedures used to conduct the tests and how these can be conducted within a practical period of time.”

**Reporter’s Comment:** The source codes controversy is a hot button topic. It is arguably better placed in the civil and criminal discovery rules. Although there are of course notice requirements in the Evidence Rules, none of them require the disclosure of anything like source codes and metadata. One would probably look in the civil and criminal rules for regulations on disclosure of information like a source code. That is especially true because the provision would probably have to provide for a balancing process and procedural regulations, all of which seems to go beyond admissibility of evidence.

If anything is to be done about source codes in the Evidence Rules, it should probably be by way of a suggestion in a Committee Note, as was done in the Committee Note to the 2000 amendment to Rule 701 (providing that the Rule needed to be amended to assure that the expert disclosure requirements in the Civil and Criminal Rules would not be evaded).

• **Short Article: Laura Lorek, *Artificial Intelligence: Real Problem* » ABA Journal, September 2024:** Besides going over the now well-trod scares about AI wreaking havoc with the legal system, the article does add two points:

1) It quotes the Vice President of a global intelligence program as predicting “a new class of video verification experts” that will be part of virtually every case; and

2) Contrarily, it reports that “Google is creating watermarks to identify deepfake videos and has placed information in the metadata of photos and documents that reveal AI created them.”

**Reporter’s Comment:** As to the second point, it is at least possible that sometime in the future, watermarking and related security efforts will make it very difficult or impossible to sneak in a deepfake. And if that is so, it would not be ideal if a rule addressed to deepfakes comes into effect just as, or after, the problem has been substantially diminished.

• **Article: Law360.com, *Deepfake Proposals Navigate Perfect Evidentiary Storm***

This is an article about the Advisory Committee’s Work on Deepfakes. Here are some excerpts:

As federal judiciary officials explore how to handle evidence faked by artificial intelligence, attorneys are divided over the need to change evidence rules, with some worried that current rules are not up to the challenges posed by deepfakes, and others fearful that altering them might do more harm than good. The current rules don’t contemplate the ease with which AI can now fake photographs, audio and video, and are more intended to decide admissibility rather than authenticity, say some attorneys, who warn of the “evidentiary storm” this issue has created.

But the rules, which have long been able to handle false evidence, are perfectly capable of handling AI-generated photos and recordings as well, other experts say. Changing those rules could harm courtroom efficiency and access to justice, and the better approach may be to give judges more education and resources so they can apply the existing rules to deepfakes, those experts contend.

The Judicial Conference’s Advisory Committee on Evidence Rules is now wading into the issue, having met in April to hear from both sets of academics and consider potential rule changes to handle the possibility of AI-generated evidence being introduced in court. The panel is expected to issue a report on those proposals, but is unlikely to come to any decisions and probably won’t for several years, experts told Law360. Some

of those scholars say that caution is for the best, while others worry that delay will create serious problems, given that disputes over allegedly fake evidence are already finding their way into court. \* \* \*

### **The Coming “Evidentiary Storm”**

Generative AI’s ability to create realistic-seeming photographs, audio and video, often referred to as “deepfakes,” makes it urgent to change the federal rules of evidence now, say some experts. That’s because the current rule governing evidence authentication, Rule 901(a), dictates that the party seeking to introduce that evidence must only show enough proof “to support a finding that the item is what the proponent claims it is,” a standard the committee itself called low. Litigants hoping to introduce a voicemail or photograph into court only have to offer proof that the voice on the recording or the person in the image is the person it’s said to be, according to experts.

“And that was not particularly difficult or challenging for the courts or for juries to understand,” said Loyola Law School, Los Angeles professor Rebecca Delfino, who has recommended a rule change being considered by the evidence rules committee. “But the whole concept of AI generative technology and deepfakes has sort of upended this because the prior modes of having evidence authenticated and presented really don’t work as easily as they used to,” Delfino told Law360. Those methods were designed for traditional evidentiary disputes, when parties agree on the nature of the evidence — that something is a voicemail or a photograph — and are only at odds over its admissibility.

“We disagree on whether the evidence should come in, but we’re not disagreeing about what it is,” said Former Federal Judge Paul Grimm, who posed several rule changes currently before the committee. But once alleged deepfakes come into court, “now you’ve got a dispute about the very nature of what the evidence is.”

The fact that deepfakes can now be created so easily, cheaply and convincingly, and that the technology has improved to the point that even computer experts have difficulty discriminating between real and fake, creates a “perfect evidentiary storm,” according to Grimm. That storm is already coming ashore, according to Delfino, who points out that Tesla lawyers recently claimed in court that videos of CEO Elon Musk making statements about the safety of the company’s self-driving cars could be deepfakes in an attempt to shield Musk from being deposed in a wrongful death suit. “That’s not an argument he could have made five years ago,” Delfino said. \* \* \* “The number of cases where the underlying claim will be deepfakes — something about a deepfake — that’s coming,” Delfino said. “There’s going to be new tort claims that didn’t previously exist, new crimes that didn’t previously exist.”

So federal courts should change the rules of evidence now, both Grimm and Delfino insist. “For this particular type of evidence, which has the unique ability to so dramatically affect the outcome of a case, the evidence rules just simply don’t seem to work,” Grimm said.

### **Proposed Changes**

Grimm, along with professor Maura Grossman, who teaches at the University of Waterloo and Osgoode Hall Law School in Canada, have proposed a new rule — Rule 901(c) — which would govern “potentially fabricated or altered electronic evidence,” according to the committee. \* \* \* “The existing rules of evidence, which are technology-agnostic, make it too easy to get this kind of high-technology evidence introduced to a jury, because it only has to be more likely than not that it is what it purports to be,” Grimm said.

Delfino instead suggests changing Rule 901 to mandate that evidence’s authenticity be decided by judges rather than juries. Under the current evidentiary rules, a judge makes an initial assessment about whether or not a reasonable jury could find that a piece of evidence is authentic. Once the court determines that a jury can find something authentic, the ultimate decision about whether it actually is real goes to the jury, Delfino explained. But juries aren’t equipped to make that determination, she said. A study done by the Max Planck Institute in 2021, for instance, found that even after people are taught to detect deepfakes, they still aren’t able to. The study found that people generally lean toward thinking deepfakes are authentic and overestimate their ability to detect faked images, Delfino said.

“People are really susceptible to being influenced by deepfake content and can’t really figure out what is real and what is not,” Delfino said. But judges spend years dealing with evidence and questions of admissibility and authenticity, so they are “slightly better” able to make those decisions, according to her. “This is what they do. This is their job. This is why they’ve been appointed to the bench, is that they’re really good at sort of holding at bay any of those biases that everybody else applies,” Delfino said.

Not everyone agrees with those changes, or with changing the rules of evidence at all. It places too much of a burden on judges to expect them to decide questions of authenticity, as Delfino’s proposed rule would, according to Bruce Hedin, president of Hedin B Consulting and a legal technology expert. What courts could be doing is providing judges with more resources and education about AI, said Hedin, who envisions

a “resource hub” or “help desk model” for judges making evidentiary decisions. Judges could also turn to special masters or consultants in some cases, according to Hedin. “If they were given greater access to resources and encouraged to draw on experts when they were confronted with these technical questions, then they would be in a position to make better decisions,” Hedin said. He isn’t opposed to changing the rules of evidence, but says any modifications are likely to take far longer than educating judges would. \* \* \*

Changes in the rules aren’t even necessary, according to Riana Pfefferkorn of the Stanford Internet Observatory, who is a former associate in the internet strategy and litigation group at Wilson Sonsini. The existing rules of evidence are perfectly capable of handling deepfakes, she said. “The courts have had hundreds of years to develop their immune system against fake evidence, since well before the codification of the federal evidence rules, and it’s endured through successive generations of new technologies,” Pfefferkorn said. Attorney ethics rules, which forbid the introduction of evidence a lawyer suspects is false, offer “another speed bump” to deepfakes in court, Pfefferkorn added. “Lawyers have their own skin in the game when it comes to keeping deepfakes out of evidence,” she said. Raising the authentication bar could actually do more harm than good by slowing the courts, creating more work for litigants and judges, and putting litigants with fewer resources at a disadvantage, affecting access to justice, according to Pfefferkorn. “The trend has been to streamline authentication, not to throw up more roadblocks,” Pfefferkorn said. “Absent a compelling showing of an epidemic of litigants trying to sneak deepfakes into evidence, I don’t see a need to reverse that trend.”

### **At Least a Few Years Away**

Experts may disagree about whether changes to the rules of evidence are necessary, but they agree that any potential shifts aren’t likely soon. “If everybody in the room raised their hand and agreed, ‘Let’s change the rule,’ we’re talking three to five years,” Grimm said. He pointed out that changes made to the rule governing expert evidence that went into effect in December 2023 were 20 years in the making. \* \* \* Members of the committee evaluating the proposals are likely concerned that any change they make will quickly become obsolete as the technology evolves, Delfino said.

The judiciary is more likely to take a wait-and-see approach, allowing courts to use the existing rules to make decisions that will then be appealed. From those appeals will come a body of common law the judiciary can look to in deciding if new rules are necessary, according to Delfino. “I think this is what the committee thinks,” Delfino said. “The common law will develop, it will point the way where the need actually is, and then maybe the rule change will follow.”



That caution in the face of evolving technology is warranted, according to Hedin, who said, “We want these rules to be robust and durable and long-lasting.” But Delfino worries that delay could create a patchwork of different interpretations of the rules of evidence in different courts. “My personal opinion is we should be changing these rules now,” said Delfino, who indicated that she’s encountered skepticism about the urgent need for rule changes from judiciary officials, who don’t seem to agree with her.

The committee hasn’t said no to any of the proposed rule changes, according to Grimm. “They just said, ‘We’re not ready to do it now,’” so changes could still be coming, he said.

But federal courts will have to take action in the near future, whether that action involves rule changes or other approaches, according to Hedin.

• **New York State Bar Association Task Force on AI, April 2024** (excerpt on use of AI-generated evidence, discussing, among other things, the Advisory Committee’s work):

Judges face challenges in evaluating the admissibility of AI-generated or compiled evidence. Concerns include the reliability, transparency, interpretability and bias in such evidence. These challenges become even more pronounced with the use of generative AI systems. A discussion follows regarding two recent proposals to address these challenges.

*Federal Law --- a Proposal to Amend Rule 901(b)(9)*

\* \* \*

The Advisory Committee for the Federal Rules of Evidence is considering a proposal by former U.S. District Judge Paul Grimm and Dr. Maura R. Grossman of the University of Waterloo to amend Fed. R. Evid. 901(b)(9). That proposal initially changes the “accurate” standard as it currently exists for any evidence about a process or system and replaces it with a requirement that the proponent provide evidence that the process or system produces a “reliable” result. For evidence generated by AI, the proponent must also (a) describe the software or program that was used and (b) show that it has produced reliable results in the proposed evidence.

*New York: Proposed Amendments to the Criminal Procedure Law and CPLR*

New York State Assemblyman Clyde Vanel has introduced a bill, A 8110, which amends both the Criminal Procedure Law and the CPLR, regarding the admissibility of evidence created or processed by artificial intelligence. As stated in the bill, evidence is

“created” by AI when AI produces new information from existing information. Evidence is “processed” by AI when AI produces a conclusion based on existing information.

Simplified greatly, the bill requires that evidence “created” by AI would not be received at trial unless independent admissible evidence establishes the reliability and accuracy of the AI used to create the evidence. Evidence “processed” by AI similarly requires the proponent of the evidence to establish the reliability and accuracy of the AI used. The bill does not yet have a cosponsor in the Assembly and does not have a sponsor in the Senate.

The goals of both the proposal to amend Fed. R. Evid. 901 and the Vanel bill are laudable. The “black box” problem of AI is of great concern to lawyers and judges and has significant due process concerns in the criminal justice area. These proposals thus attempt to address AI-generated “deepfakes” that could be passed off as authentic evidence. *Nevertheless, given the intricacies and time involved in the legislative and rule-amending processes, it may well be that the common law at the trial court level provides at least an interim roadmap for how judges should consider these issues. Indeed, this approach was largely employed to develop the law regarding discovery and admissibility of social media evidence when those issues first took hold.* (emphasis added)

**Reporter’s Comment:** The New York proposed legislation is complicated and detailed, much more so than what one would find in the Federal Rules of Evidence. One aspect of complication is that the statute distinguishes between evidence “created” by AI and evidence “processed” by AI, even though the standards of admissibility are basically the same for both types of evidence.

• **Short Article: Sherman & Howard, *Addressing Challenges of Deepfakes and AI - Generated Evidence*, JDSupra.com, September 18, 2-24**

This article describes and evaluates the Grimm-Grossman proposal to amend Rule 901 to regulate deepfakes. That proposal is set forth, as modified, later in this memo.

The driving force behind these proposed changes is the fear that the existing rules may be inadequate for handling the unique issues posed by AI and machine learning. Unlike traditional manufactured evidence, deepfakes are harder to detect, making it easier to pass off fabricated content as real. Furthermore, the low threshold for authenticity under FRE 901(a) only requires “evidence sufficient to support a finding.” This standard might allow deepfakes to be admitted without scrutiny.

The [Advisory] committee recognized that as AI technologies evolve, they will be used to create evidence for both legitimate and illegitimate purposes. Therefore, it is

essential to update the rules to ensure that AI-generated evidence meets higher standards of reliability and authenticity before being presented in court.

### What's Next

The committee has not formally adopted these proposed changes, and discussions are ongoing about whether they should be applied only to AI-generated evidence or more broadly to other forms of digital content. The proposal to modify Rule 901(b)(9) and introduce 901(c) represents a proactive approach to addressing the potential misuse of AI and deepfakes in the courtroom. It will be interesting to see how the legal industry evolves to address the rapid advancements in AI, particularly as courts and practitioners adapt to new challenges in evidence authentication.

• **Article: Ralph Losey, *The Problem of Deepfakes and AI-Generated Evidence: Is it Time to Revise the Federal Rules of Evidence?***

This is an article about the Grimm-Grossman proposal to amend Rule 901 to address deepfakes. It is a stinging, and hopefully misguided, critique of the Reporter's memo to the Committee on AI that was submitted at the last meeting. Excerpts follow:

From the record it appears that Grimm and Grossman were not given an opportunity to respond to [the Committee's] criticisms. So once again the Committee followed Professor Capra's lead and all of the rule changes they proposed were rejected. Again, with respect, I think Dan Capra missed the point again. Authentic evidence can already be withheld as too prejudicial under current Federal Evidence Rule 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons). But the process and interpretation of existing rules is what is too complex. That is a core reason for the Grimm and Grossman proposals.

Moreover, in the world of deepfakes things are not as black and white as Capra's analysis assumes. Often authenticity of audio visuals is a gray area question, a continuum, and not a simple yes or no. It appears that the Committee's decisions would benefit from the input of additional technology advisors, independent ones, on the rapidly advancing field of AI image generation.

The balancing procedure Grimm and Grossman suggested is appropriate. If it is a close question on authenticity, and the prejudice is small, then it makes sense to let it in. If authenticity is a close question, and the prejudice is great, say even outcome determinative, then exclude it. And of course if the proof of authenticity is strong, and the probative value strong, even outcome determinative, then the evidence should be allowed. The other side

of the coin, if that if the evidence is strong that the video is a fake, it should be excluded, even if that decision is outcome determinative.

\* \* \*

### **Capra's Questionable Evaluation of the Danger of Deepfakes**

Naturally the Committee went with what they were told was the cautious approach. But is doing nothing really a cautious approach? In times of crisis inaction is usually reckless, not cautious. Professor Capra's views are appropriate for normal times, where you can wait a few years to see how new developments play out. But these are not normal times. Far from it.

We are seeing an acceleration of fraud, or fake everything, and a collapse of truth and honesty. Society has already been disrupted by rapid technical and social changes, and growing distrust of the judicial system. Fraud, propaganda and nihilistic relativism are rampant. What is the ground truth? How many people believe in an objective truth outside of the material sciences? How many do not even accept science? Is it not dangerous under these conditions to wait longer to try to curb the adverse impact of deepfakes?

There is little indication in Professor Capra's reports that he appreciates the urgency of the times, nor the gravity of the problems created by deep fakes. The "Deepfake Defense" is more than a remote possibility. The lack of published opinions on deepfake evidence should not lull anyone into complacency. It is already being raised, especially in criminal cases.

Consider the article of Judge Herbert B. Dixon Jr., Senior Judge with the Superior Court of the District of Columbia. *The "Deepfake Defense": An Evidentiary Conundrum* (ABA, 6/11/24). Judge Dixon is well known for his expertise in technology. For instance, he is the technology columnist for The Judges' Journal magazine and senior judicial adviser to the Center for Legal and Court Technology

Judge Dixon reports this defense was widely used in D.C. courts by individuals charged with storming the Capitol on January 6, 2021. The Committee needs more advisors like Judge Dixon. He wants new rules and his article *The "Deepfake Defense"* discusses three proposals: Grimm and Grossman's, Delfino's and LaMonica's. [These proposals are all discussed in Part Two of this memo.] Here is Judge Dixon's conclusion in his article:

As technology advances, deepfakes will improve and become more difficult to detect. Presently, the general population is not able to identify a deepfake created

with current technology. AI technology has reached the stage where the technology needed to detect a deepfake must be more sophisticated than the technology that created the deepfake. So, in the absence of a uniform approach in the courtroom for the admission or exclusion of audio or video evidence where there are credible arguments on both sides that the evidence is fake or authentic, the default position, unfortunately, may be to let the jury decide.

Judge Herbert B. Dixon Jr., The “Deepfake Defense.”

Professor Capra addressed the new issues raised by electronic evidence decades ago by taking a go-slow approach and waiting to see if trial judges could use existing rules. That worked for him in the past, but that was then, this is now.

Courts in the past were able to adapt and used the old rules well enough. That does not mean that their evidentiary decisions might have been facilitated, and still might be, by some revisions related to digital versus paper. But Capra assumes that since the courts adapted to digital evidence when it became common decades ago, that his “wait and see” approach will work once again. \* \* \* Professor Capra will only say that the past decision to do nothing is “not necessarily dispositive” on AI. That implies it is pretty close to dispositive. The Professor and Committee do not seem to appreciate two things:

1) The enormous changes in society and the courts that have taken place since the world switched from paper to digital. That happened in the nineties and early turn of the century. In 2024 we are living in a very different world. 2) The problem of deepfake audio-visuals is new. It is not equivalent to the problems courts have long faced with forged documents, electronic or paper. The change from paper to digital is not comparable to the change from natural to artificial intelligence. AI plays a completely different role in the cases now coming before the courts than has ever been seen before.

Is it really prudent and cautious for the Evidence Rules Committee to take the same approach with AI deepfakes as they did many years ago with digital evidence? AI now plays a completely new role in the evidence of the cases that now come before them. The emotional and prejudicial impact of deepfake audio-visuals is an entirely new and different problem. Plus, the times and circumstances in society have dramatically changed. The assumptions made by Committee Reporter Capra of the equivalence of the technology changes is a fundamental error. With respect, the Committee should reconsider and reverse its decision.

The assumption that the wait and see approach will work again with AI and deepfakes is another serious mistake. It is based on wishful thinking not supported by the

evidence that the cure for deepfakes is just around the corner, that new software will soon be able to detect them. It is also based on wishful thinking that trial judges will again be able to muddle through just fine. Judge Grimm who just recently retired as a very active District Court trial judge disagrees. Judge Dixon who is still serving as a reserve senior trial judge in Washington D.C. disagrees. So do many others. The current rules are a muddled mess that needs to be cleaned up now. With respect, the Committee should reconsider and reverse its decision.

\* \* \*

What are the consequences of continued inaction? What if courts are unable to twist existing rules to screen out fake evidence as Professor Capra hopes? What will happen to our system of justice if use of fake media becomes a common litigation tactic? How will the Liar's Dividend pay out? What happens when susceptible, untrained juries are required to view deep fakes and then asked to do the impossible and disregard them? How can courts function effectively without reliable rules and methods to expose deepfakes? Should we make some rule changes right away to protect the system from collapse? Or should we wait until it all starts to fall apart?

If we cannot reliably determine what is fake and what is true in a court of law, what happens then? Are we not then wide open and without judicial recourse to criminal and enemy state manipulation? Can law enforcement and the courts help stop deepfake lies and propaganda? Can we even have free and fair elections? How can courts function effectively without reliable rules and methods to expose deepfakes? Should we make some rule changes right away to protect the system from collapse? Or should we wait until it all starts to fall apart?

I expect the Rules Committee will follow Capra's advice and do nothing. But 2024 is not over yet and so there is still hope.

### **What Comes Next?**

The next Advisory Committee on Evidence Rules is scheduled for November 8, 2024 in New York, NY and will be open to the public both in-person and online. While observers are welcome, they may only observe, not participate. In addition, we have just learned that Paul Grimm and Maura Grossman have submitted a revised proposal to the Committee, which will be discussed first. This was presumably done at the request of Professor Daniel Capra after some sort of discussion, but that is just speculation.

[This revised proposal is set forth in Part Two of this memo, *infra*. Obviously, Mr. Losey author favors adoption of the proposal at the earliest possible opportunity.]

## Conclusion

The upcoming Evidence Committee meeting is scheduled for November 8th, three days after election day on November 5th. What will our circumstances be? What will the mood of the country be? What will the mood and words be of the two candidates? Will the outcome even be known in three days after the election? Will the country be calm? Or will shock, anger and fear prevail? Will it even be possible for the Committee to meet in New York City on November 8th? And if they do, and approve new rules, will it be too little too late?

*Reporter's comment:* If only the Reporter had the power that the overheated author subscribes to him. But it is good to know that an immediate amendment to Rule 901 is sufficient to prevent the end of litigation as we know it.

**Article: Grimm, Grossman, et. al., *Deepfakes in Court: How Judges: How Judges Can Proactively Manage Alleged AI-Generated Material in National Security Cases*, *Northwestern Law & Econ Research Paper No. 24-18*, *Northwestern Public Law Research Paper No. 24-26*, available at <https://ssrn.com/abstract=4943841> or <http://dx.doi.org/10.2139/>**

The authors provide a step-by-step approach for judges to follow when they grapple with the prospect of alleged deepfakes. They recommend that judges go beyond a showing that the evidence is merely more likely than not what it purports to be. Instead, judges must balance, under Rule 403, the risks of negative consequences that could occur if the evidence turns out to be fake. They recommend that courts schedule a pretrial evidentiary hearing far in advance of trial, where both proponents and opponents can make arguments on the admissibility of the evidence in question. They recommend that a judge order a “science day” for experts to school the judge about AI and deepfakes. They conclude that the judge should only admit evidence, allowing the jury to decide its disputed authenticity, after considering under Rule 403 whether its probative value is substantially outweighed by danger of unfair prejudice to the party against whom the evidence will be used. They conclude: “Our suggested approach thus illustrates how judges can protect the integrity of jury deliberations in a manner that is consistent with the current Federal Rules of Evidence and relevant case law.”

An article in JDSupra summarizes the Grimm et. al. article with the following points:

1. “While technological solutions such as watermarking have been proposed, they need to be more reliable. AI experts warn that adversaries, including state actors, are creating deepfakes sophisticated enough to evade current detection

methods. For cybersecurity professionals, this presents a direct challenge: ensuring the authenticity of digital content in legal proceedings becomes a more intricate, ongoing battle.”

2. “The paper emphasizes the role of expert witnesses in helping courts distinguish between real and AI-generated evidence. However, given the current limitations in AI detection technologies, human experts may still struggle to accurately authenticate evidence.”

3. “A concept known as the “Liar’s Dividend” presents another critical challenge for the judiciary and eDiscovery experts. As the public becomes more aware of the existence of deepfakes, there is a growing risk that individuals will claim genuine evidence is fake to avoid accountability. This phenomenon, where real evidence is dismissed as AI-generated manipulation, complicates efforts to authenticate digital materials in court.”

4. “To mitigate the risks posed by deepfakes, the authors suggest that legal professionals, alongside cybersecurity and eDiscovery specialists, must adopt a more collaborative and technologically informed approach. This risk mitigation includes \* \* \* investing in AI forensics [and] ongoing training.

5. “Cybersecurity experts, legal scholars, and AI researchers must work together to refine best practices for authenticating evidence in a world where deepfakes are increasingly common.”

6. “The paper concludes that while AI technology presents new challenges for the legal system, it also offers an opportunity for the courts, supported by cybersecurity and eDiscovery professionals, to evolve. By implementing robust frameworks and staying vigilant, the judicial system can preserve the integrity of trials in the face of rapidly advancing technology.”

**Reporter’s Comment:** The obvious question is, if this can be handled under existing rules, how do amendments improve the situation?

• **Article:** *Courts Remain Skeptical About Lawyers’ Use of ChatGPT in Litigation*, Bloomberg News, September 20, 2024:

Generative artificial intelligence is making a bad first impression in the courts. Manhattan federal judge Edgardo Ramos recently described ChatGPT as an “unreliable resource,” and he’s not alone in expressing such concern about AI. The recent decisions



addressing use of generative AI by lawyers in New York federal courts demonstrate a persistent skepticism of the technology among the judiciary.

US District Judge Kevin Castel sanctioned lawyers in *Mata v. Avianca* last year for “abandon[ing] their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT.” The case made national headlines.

Since that time, some Manhattan federal judges have shone a bright line against any use of ChatGPT, repeatedly underscoring its purported unreliability beyond the context of basic legal research and citations.

For example, in the aforementioned case of *Z.H. v. N.Y.C. Dep’t of Educ.*, Judge Ramos admonished a law firm for submitting questions and answers posed to and generated by ChatGPT as evidence of reasonable attorney hourly rates in support of an application by the firm for attorneys’ fees.

Ramos afforded no weight to the ChatGPT Q&A and noted that US Magistrate Judge Robyn Tarnofsky in *D.S. v. N.Y.C. Dep’t of Educ.* Declined to credit a similar submission by the same lawyers “because ChatGPT has been shown to be an unreliable resource.”

Tarnofsky, in turn, supported her conclusion by citing to a line of cases where ChatGPT generated fake legal authorities, among which was *Park v. Kim*, a recent medical malpractice dispute, where the US Court of Appeals for the Second Circuit described how certain technologies that “may produce factually or legally inaccurate content” shouldn’t replace “the lawyer’s most important asset—the exercise of independent legal judgment.”

*In JG. V. NYC. Dep’t of Educ.* Earlier this year, US District Judge Paul Engelmayer took exception to the lawyers’ failure to identify the “inputs on which ChatGPT relied” or to address “whether ChatGPT anywhere considered” key legal precedents.

Courts aren’t inclined to impose a bright-line rule prohibiting attorneys’ use of generative AI. In *Sillam v. Labaton Sucharow*, US Magistrate Judge Ona Wang expressed skepticism about attorneys’ use of generative AI tools for brief writing, but maintained that attorneys have a “gatekeeping role” to “ensure the accuracy of their filings.” Wang was also critical of the quality of the writing produced by generative AI tools, noting they resulted in “repetitive language” that “only restates general principles of law without making argument.”

Likewise, in *Mata*, Judge Castel rejected the application of a bright-line rule against generative AI tools, noting that “[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.”

- **Article: *Fake Cases, Real Consequences*, ABA Journal, October/November 2024, at 13:**

The article is about generative AI hallucinating cases, citations, etc. It notes that a study conducted at Stanford found that “hallucination rates are alarmingly high for a wide range of verifiable legal facts.” Moreover, “these models often lack self-awareness about their errors and tend to reinforce incorrect beliefs, the study found. They exhibit contrafactual bias --- the tendency to assume that a premise in a query is true even if it is flatly wrong.”

## **B. Case Law**

- **New Case Rejecting AI-Enhanced Video *Washington v. Puloka***, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024). The defendant wanted to present a video that was AI-enhanced. The source video had “motion blur” and the defense expert used a Topaz Labs AI program to increase its resolution, add sharpness and definition, and smooth out the edges of the video images. The trial judge excluded the enhanced video. The court found that the expert was not a forensic video technician and conceded that he was not sure whether the Topaz Labs AI program was used in the forensic video analysis community. The expert could not point to any testing, publications or discussions within the group of users he identified that evaluated the reliability of Topaz. The expert testified that Topaz’s AI used machine learning to enhance videos based on images in its training library, but “did not know what videos the AI-enhancement models are ‘trained’ on, did not know whether such models employ ‘generative AI’ in their algorithms, and agreed that such algorithms are opaque and proprietary.”

The prosecution’s expert, a certified forensic video analyst, testified that his focus is on image integrity, rather than the smoothness or attractiveness of the image, and that Topaz added approximately sixteen times the number of pixels than contained in the original source image. The expert demonstrated that Topaz creates “false image detail” which changed the meaning of portions of the video, including altering the shape and color of certain objects. He testified that Topaz removed information from the source video and replaced it with information not contained in it, which prevented the ability to forensically analyze the video. He further noted that Topaz “used an algorithm and enhancement method unknown to and unreviewed by any forensic video expert.”

The court stated that, given the “novelty” of the technique, the proponent of the party using such an AI tool must make a “showing that the expert’s opinion or theory is based on a methodology accepted in the relevant community” (because Washington is a *Frye* state) and, in this case, the AI technology is not generally accepted by that community. The court stated that the AI-enhanced video “does not show with integrity what actually happened but uses opaque methods to represent what the AI ‘thinks’ should be shown.”

**Reporter’s Comment:** The court is obviously not saying that “AI is inadmissible.” Rather, AI, to be admissible, must be properly validated like any other expert evidence. The big problem here was that the software was being used for a purpose for which it was not really intended --- a problem called “function creep.” There is ample authority in Rule 702 to exclude such misapplied expertise. There are many cases in which an expert has been excluded when applying a methodology to an inquiry for which the methodology was not intended. *See, e.g., Braun v. Lorillard, Inc.*, 84 F.3d 230 (7th Cir. 1996) (expert testimony properly excluded where the expert applied tests to human tissues when the test was designed to detect asbestos in building materials).

● **Cases Rejecting ChatGPT-based Evidence:**

A number of recent courts have rejected evidence that was generated by ChatGPT. For example, the court in *J.G. v. New York City Dept. of Educ.*, 2024 WL 728626 (S.D.N.Y. Feb. 22, 2024) rejected the use of AI to substantiate hourly rate data in order to support an attorneys’ fee application, stating:

In claiming here that ChatGPT supports the fee award it urges, the Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers. The Court therefore rejects out of hand ChatGPT’s conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications.

*See also S. v. New York City Dept. of Educ.*, 2024 WL 2159785 at \*6 (S.D.N.Y. Apr. 29, 2024), (report and recommendation) (“Specifically, CLF references the artificial intelligence tool “ChatGPT.” CLF relies on ChatGPT’s feedback to demonstrate what a client’s search may provide when attempting to determine hourly rates for IDEA litigation. Here, CLF’s reliance on ChatGPT is inappropriate, because ChatGPT has been shown to be an unreliable resource.”).

• **Copyright Case Applying Rule 702 to AI: *Bertuccelli v. Universal City Studios LLC*, 2020 WL 6156821 (E.D. La. Oct. 21, 2020).** This is a case in which facial recognition technology was used to determine whether competing Mardi Gras masks were substantially similar. The court allowed the AI-based testimony.

The Court also finds Dr. Griffor is qualified to testify as an expert. Dr. Griffor is the Associate Director for Cyber-Physical Systems at the National Institute of Standards and Technology (NIST) in Washington, DC, and holds a Ph.D. in Mathematics from the Massachusetts Institute of Technology, and a Habilitation/European Doctor's Degree in Electrical Engineering and Mathematics from the University of Oslo. Dr. Griffor has experience with algorithmic reasoning for artificial intelligence-enabled driving systems, including facial recognition technology and is considered an expert in the field of facial target recognition. The Court finds Dr. Griffor's methodology reliable given that he conducted an artificial intelligence assisted facial recognition analysis of the King Cake Baby and Happy Death Day mask to determine whether the use of mathematics and target facial recognition algorithms comparing the two works would find that human perception would view the works as substantially similar. Accordingly, the Court finds Dr. Griffor is qualified to testify as an expert in this case.

• **Court Rejects Deeper Inquiry into AI Program: *United States v. Nelson*, 533 F. Supp. 3d 779, 798 (N.D. Cal. 2021):** In a racketeering case, the defendant challenged an expert's testimony on cell-site location. The particular program used was called "Enterprise Sensor Processing Analytic" (ESPA). The defendant argued that he was entitled to a more detailed description of, and access to, the software. The court rejected the challenge. It stated that "the apparent absence of any inaccuracies in Ms. Sparano's presentation strongly suggests that even if ESPA operates like a 'black box,' the defendants have not been harmed by their lack of direct access to the program." It concluded that the demand for more information about the AI program would essentially open the floodgates:

Informing the Court's conclusion are the sweeping and counterintuitive implications of Defendants' position on the ESPA issue. If courts required expert witnesses to possess expert knowledge of "the software used to generate" demonstrative exhibits such as maps, as Defendants suggest they should, then law-enforcement and intelligence officials would almost always be barred from relying on such commonplace exhibits at trial. Similarly, anyone who testifies using any basic software such as Excel to provide financial analysis would be required to be an expert in the algorithms by which Excel codes its formula and calculations. As a result, no expert utilizing any technological tools would be permitted to testify without also being an expert software engineer. The Federal Rules of Evidence do not mandate such an absurd result.

## II. Proposals for Rule Amendments

There are several proposals for AI-related rules amendments for the Committee's consideration. Some of these have already been set forth in the memo for the Spring meeting; but because they were not formally and specifically considered, they are included here again. Others are revisions in response to the Committee's prior review of the proposal.

The question for the Committee is whether any or these proposals merits further development and formal presentation with a proposed Committee Note at a later meeting.

### A. REVISED Proposed Modification of Current Fed. R. Evid. 901(b)(9) for AI Evidence and Proposed New Fed. R. Evid. 901(c) for Alleged “Deepfake” Evidence

Submitted by Paul W. Grimm and Maura R. Grossman

[901](b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

(9) *Evidence about a Process or System.* For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a valid and reliable** result; and

**(B) if the proponent acknowledges that the item was generated by artificial intelligence, additional evidence that:**

**\_\_\_\_\_ (i) describes the training data and software or program that was used;**

**and**

**\_\_\_\_\_ (ii) shows that they produced valid and reliable results in this**

**instance.**

***Proposed New Rule 901(c) to address “Deepfakes”:***

**901(c): Potentially Fabricated or Altered Evidence Created By Artificial Intelligence.**

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence<sup>3</sup>, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.**

**Supporting Statement by Grimm and Grossman**

***Amendment to Rule 901(b)(9)***

Given the complexities and challenges presented by using AI-generated evidence, rule changes that set a standard for what is sufficient to authenticate such evidence would be extremely helpful. Because AI-generated evidence is, by definition, evidence produced by a system or process, the proposal adds a subsection (B) to existing Fed. R. Evid. 901(b)(9) to set a standard for authenticating evidence that the proponent acknowledges is AI-generated. The proposed revision substitutes the words “valid” and “reliable” for “accurate” in existing Rule 901(b)(9), because evidence can be “accurate” in some instances but inaccurate in others (such as a broken watch that “accurately” tells the time twice a day, but is otherwise not a reliable means of ascertaining the time). In addition, the terms “valid” and “reliable” are less vague and ambiguous than the term “accurate,” and are the terms used in the relevant scientific community. Similarly, “reliability” of scientific, technical, and specialized methodology is the standard required by Fed. R. Evid. 702 for admissibility of expert evidence.

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<sup>3</sup> “There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience.” ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 512. Generative Artificial Intelligence Tools, July 29, 2024, at note 1 (internal citations omitted). Generative AI “(GAI) . . . can create various types of new content, including text, images, audio, video, and software code in response to a user’s prompts and questions.” *Id* at 1 (citing George Lawton, *What is Generative AI? Everything you Need to Know*, TechTarget (July 12, 2024), <https://techtarget.com/searchenterpriseai/definition/generative-ai/>).

For acknowledged AI-generated evidence, the proposed rule change would identify a sufficient means for authentication of that evidence. It would require the proponent to (i) describe the training data and software or program that was used to create the evidence, and (ii) show that it produced *valid* and *reliable* results in the particular case setting in which it is being offered. *Valid* evidence is evidence that produces accurate results, meaning that the AI system or process measures or predicts what it is designed to measure or predict, and *reliable* evidence is that which produces consistently accurate results when applied to similar facts and circumstances. Both are necessary to ensure authenticity of AI-generated evidence, but the terms “accurate” or “reliable” alone do not clearly convey that.

### ***Addition of New Rule 901(c)***

A separate, new rule is required to address the relatively recent phenomenon of AI-generated “deepfakes,” which, due to rapidly improving generative AI software applications, are capable of altering existing or producing fabricated images, videos, audio recordings, or audiovisual recordings that are so realistic that it is becoming increasingly difficult to differentiate between authentic evidence and altered or fabricated evidence. A separate, new rule is needed for such altered or fake evidence, because when it is offered, the parties will disagree about the fundamental nature of the evidence. The opposing party will challenge the authenticity of the evidence and claim that it is AI-generated material, in whole or in part, and therefore, fake, while the proponent will insist that it is not AI-generated, but instead that it is simply a photograph or video (for example, one taken using a “smart phone”), or an audio recording (such as one left on voice mail), or an audiovisual recording (such as one filmed using a digital camera). Because the parties fundamentally disagree about the very nature of the evidence, the proposed rule change for authenticating acknowledged AI-generated evidence will not work.

Our proposal creates a new Fed. R. Evid. 901(c), as opposed to an addition to Rule 901(b)(9). The proponent of evidence challenged as AI-generated material may choose to authenticate it by many means other than Rule 901(b)(9), which focuses on evidence generated by a “system or process.” For example, the proponent might choose to authenticate an audio recording under Fed. R. Evid. 901(b)(5) (opinion as to voice) or Fed. R. Evid. 901(b)(3) (comparison of evidence known to be authentic with other evidence the authenticity of which is questioned). The new Rule 901(c) would cover all deepfake disputes regardless of how the item is purportedly authenticated.

The proposed new rule does not use the word “deepfake,” because it is not a technical term, but rather describes evidence that is either “computer-generated” (which encompasses AI-generated evidence) or “electronic evidence,” which encompasses other forms of electronic evidence that may not be AI-generated (such as digital photographs or recordings).

The proposed new rule places the burden on the party challenging the authenticity of computer-generated or electronic evidence as AI-generated material to make a showing to the court that a jury reasonably could find (but is not required to find) that it is either altered or fabricated, in whole or in part. This approach recognizes that the facts underlying whether the evidence is authentic or fake may be challenged, in which case the judge’s role under Fed. R. Evid. 104(a) is limited to preliminarily evaluating the evidence supporting and challenging authenticity, and determining whether a reasonable jury could find by a preponderance of the evidence that the proffered evidence is authentic. If the answer is “yes” then, pursuant to Fed. R. Evid. 104(b), the judge ordinarily would be required to submit the evidence to the jury under the doctrine of relevance conditioned upon a finding of fact, *i.e.*, Fed. R. Evid. 104(b).

But because deepfakes are getting harder and harder to detect, and because they often can be so graphic or have such a profound impact that the jury may be unable to ignore or disregard the impact even of generative AI shown to be fake once they have already seen it, a new rule is warranted that places more limits on what evidence the jury will be allowed to see. *See generally* Taurus Myhand, *Once The Jury Sees It, The Jury Can’t Unsee It: The Challenge Trial Judges Face When Authenticating Video Evidence in The Age of Deepfakes*, 29 *Widener L. Rev.* 171, 174-5 (2023) (“The dangerousness of deepfake videos lie in the incomparable impact these videos have on human perception. Videos are not merely illustrative of a witnesses’ testimony, but often serve as independent sources of substantive information for the trier of fact. Since people tend to believe what they see, ‘images and other forms of digital media are often accepted at face value.’ ‘Regardless of what a person says, the ability to visualize something is uniquely believable.’ Video evidence is more cognitively and emotionally arousing to the trier of fact, giving the impression that they are observing activity or events more directly.”) (Internal citations omitted).

If the judge is required by Fed. R. Evid. 104(b) to let the jury decide if image, audio, video, or audiovisual evidence is authentic or fake when there is evidence supporting each outcome, the jury is then in danger of being exposed to evidence that they cannot “un-remember,” even if the jurors have been warned or believe it may be fake. This presents an issue of potential prejudice that ordinarily would be addressed under Fed. R. Evid. 403. But Rule 403 assumes that the evidence is “relevant” in the first instance, and only then can the judge weigh its probative value against the danger of unfair prejudice. But when the very question of relevance turns on resolving disputed evidence, the current rules of evidence create an evidentiary “Catch 22” --- the judge must let the jury see the disputed evidence on authenticity for their resolution of the authenticity challenge (*see* Fed. R. Evid. 104(b)), but that exposes them to a source of evidence that may irrevocably alter their perception of the case even if they find it to be inauthentic.



The proposed new Fed. R. Evid. 901(c) solves this “Catch 22” problem. It requires the party challenging the evidence as altered or fake to demonstrate to the judge that a reasonable jury could find that the challenged evidence has been altered or is fake. The judge is not required to make the finding that it is, only that a reasonable jury could so find. This is similar to the approach that the Supreme Court approved regarding Fed. R. Evid. 404(b) evidence (*i.e.*, other crimes, wrongs, or acts evidence) in *Huddleston v. United States*, 108 S. Ct. 1496, 1502 (1988) and the Third Circuit approved regarding Fed. R. Evid. 415 evidence (*i.e.*, similar acts in civil cases involving sexual assault or child molestation) in *Johnson v. Elk Lake School District*, 283 F. 3d 138, 143-44 (3d. Cir. 2002).

Under the proposed new rule, if the judge makes the preliminary finding that a jury reasonably could find that the evidence has been altered or is fake, the judge would be permitted to exclude the evidence (without sending it to the jury), *but only if the proponent of the evidence cannot show that its probative value exceeds its prejudicial impact*. The proponent could make such a showing by offering additional facts that corroborate the information contained in the challenged image, video, audio, or audiovisual material. This is a fairer balancing test than Fed. R. Evid. 403, which leans strongly towards admissibility. Further, the proposed new balancing test already is recognized as appropriate in other circumstances. *See, e.g.*, Fed. R. Evid. 609(a)(1)(B) (requiring the court to permit a criminal defendant who testifies to be impeached with a prior felony conviction only if “the probative value of the evidence outweighs its prejudicial effect to that defendant”).

The proposed new rule has other advantages as well. While it requires the party challenging the evidence as a deepfake to demonstrate facts (not conclusory or speculative arguments) from which the judge could find that a reasonable jury *could* find the evidence to be altered or fake, this does not require them to persuade the judge that it actually has been altered or is fake, which lessens the burden on the challenging party to make a sufficient initial challenge. Under an approach already recognized in *Huddleston* and *Johnson*, the proposed new rule only requires the judge to determine whether a jury reasonably could find that the evidence was altered or fake, at which time the proponent would then be required to show that the probative value of the evidence is greater than its potential prejudicial impact. This determination would be made by the judge.

Finally, the proposed new rule also has the benefit of not imposing any initial obligation on the proponent of the evidence to authenticate the evidence in any particular way. The proponent can choose from any of the authentication methods illustrated in Fed. R. Evid. 901(b) and 902, or any other means of showing that the evidence is what it purports to be. If, under the new proposed rule, the party challenging the evidence as a deepfake then succeeds in making the showing that the trier of fact reasonably could find the challenged evidence to be altered or fake, the proponent would then have an opportunity to corroborate or bolster the authenticating

evidence, and the judge would then apply the new balancing test. This fairly allocates the competing burdens on the proponent and challenging parties and outlines the role of the judge in screening for unfair prejudice without the need to send the disputed facts and potentially misleadingly prejudicial evidence to the jury.

### **Reporter’s Comment on the Grimm/Grossman Revised Proposal:**

The proposal addresses the two major evidentiary concerns posed by AI: 1. The proposal to amend Rule 901(b)(9) addresses the reliability of machine learning output; and 2. New Rule 901(c) provides a process for dealing with deepfakes, and gives the court a means for handling a blanket “it’s a deepfake” claim for every audio and video. If the Committee decides to address AI, the Grimm/Grossman proposal has a lot of merit. It is concise, it sets forth a structure, and it is well-crafted. It is, at the very least, a great starting point.

#### **There are some questions to answer in reaching agreement on this rule, however:**

**1) General Point About Coverage.** There is a problem in defining the coverage of the proposal. Originally the proposal was written to cover all “computer-generated” evidence. My response to that proposal was that it would cover a lot of evidence that is not deepfake-related or machine-learning created. For example, over the last 20 years there have been hundreds of examples of litigants arguing that “somebody hacked into my Facebook account”; “somebody faked my text”, etc. *See, e.g., United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (Facebook posts found authentic over an unsubstantiated claim by the defendant that his account was hacked); *United States v. Peterson*, 945 F.3d 144 (4th Cir. 2019) (defendant may not demonstrate to the jury how easy it is to fake a text, where there was no indication that the defendant was a victim of text manipulation). All of the social media/text/email evidence is “computer-generated” and charges of “faking” have been well-handled by the courts. It could be disruptive to apply a new standard to social media-type evidence when the goal is to address AI deepfakes. That is true both for Rule 901(b)(9) and 901(c) --- but especially for 901(c), which would apply an extra step of having to find that probative value outweighs prejudice, which the courts are definitely not doing for claims of Facebook hacking.

That means that the coverage of the rule should be specifically addressed to AI-generated evidence. But that creates a new problem, because there is some dispute about what the term “Artificial Intelligence” covers --- and the term is dynamic. It’s an umbrella term that may cover different processes in the future. (For example, what we have now is “Narrow AI” developed as an aid to human thought. But what is in the offing is “Artificial General Intelligence” which greatly exceeds the cognitive performance of humans.)

The problem of describing proper coverage is not fatal, though. AI could be defined well enough in a Committee Note, and the term “artificial intelligence” is used sufficiently frequently

in discourse, that it may be workable for a rule. The fact that computer nerds might quibble with the term does not mean it is unworkable for courts and litigants. In the end, it seems important to limit the amendment to AI-generated evidence, as opposed to all computerized evidence, as that broader term is likely to be disruptive of existing case law. Whether the term “artificial intelligence” is used, and whether an alternative term is better, is the kind of question that might well benefit from public comment.

It is notable that the proposed AI legislation in New York uses the term “artificial intelligence” throughout. It also uses, as a kind of equivalent, the term “automated system.” Perhaps that is an alternative that can be used if the Committee goes forward with an amendment (although “automated system” would seem to cover social media as well).

The proposed amendments set forth below use the term “artificial intelligence” as an alternative, with an explanation in the Committee Note of what is intended by the term.

**2) Rule 901(b)(9):** The proposal to amend Rule 901(b)(9) essentially seeks to impose reliability guarantees on machine learning outputs. One problem with adding reliability requirements to *authentication* standards is that you are stuck with the low Rule 104(b) standard -- unless you want to specifically change it, which Grimm and Grossman do not suggest. More importantly, *authenticity is not about reliability*. It is about whether the item is what you say it is. If I wanted to admit a document that is probative *because* it is false and unreliable, I would authenticate by showing that it was prepared in an unreliable manner. If I wanted to admit a ChatGPT transmission *because* it was a hallucination, I would not be trying to show a system that leads to reliable results.

When we think of reliability problems inherent in machine learning, the better analog is surely Rule 702. There, the proponent must satisfy a preponderance standard. And Rule 702-type principles are obviously pertinent because the jury will treat machine learning output as the equivalent of expert testimony. And those 702-type standards are the ones being applied by courts to machine learning evidence today.<sup>4</sup> That 702 analysis works well when there is a live expert testifying to the machine learning output. While Rule 702 refers to “witnesses” and machines are not really witnesses, the solution for admitting machine-learning evidence without witness accompaniment could be to have an independent rule specifically about machine learning that incorporates the reliability requirements of Rule 702. That alternative --- a new Rule 707 --- is discussed below.

Thus, it seems like amending Rule 901(b) is not the optimal solution for machine learning evidence. It could be argued, though, that the specific reliability requirements of the Grimm-

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<sup>4</sup> See, e.g., *Washington v. Puloka*, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024) (applying expert reliability requirements to machine learning outputs).

Grossman proposal might be useful as a kind of belt and suspenders regulation of machine learning evidence. Though it seems complex to have two separate reliability requirements covering the same piece of evidence, one applying Rule 104(a) and the other applying Rule 104(b).

But let's assume that Rule 707 is not proposed, and let's assume the Committee wants to propose a rule to regulate machine-learning evidence. If all that is so, then some reliability standards to cover machine evidence could be placed in Rule 901(b)(9). The Grimm-Grossman proposal is a good starting point because it helpfully requires a description of the software and a demonstration of how it reached a reliable result in this instance.

But some questions remain. First, the proposal distinguishes the terms “validity,” “reliability,” and “accuracy.” Those distinctions are complicated. As to validity and reliability, the current rules --- most importantly Rule 702 --- use the term reliability. Certainly there are those who can draw a distinction between validity and reliability, but is it worth it? As Grimm and Grossman describe it above, the term “validity” is just a subset of “reliability” and there would be little payoff in making that distinction.

The term “validity” is used in the Evidence Rules only in the context of “validity of the claim” as in Rule 408. In this proposal, validity is used as a scientific term and it does not appear that it adds much to the rule. Thus the Committee may wish to *delete the reference to validity* and stay with “reliability.”

As to “accuracy,” the proposal rejects the term, but in fact there is a good deal of material on machine learning that emphasizes “accuracy.” *See, e.g.,* <https://www.evidentlyai.com/classification-metrics/accuracy-precision-recall> (“Accuracy is a metric that measures how often a machine learning model correctly predicts the outcome. You can calculate accuracy by dividing the number of correct predictions by the total number of predictions. In other words, accuracy answers the question: how often the model is right?”). Grimm and Grossman say that a broken clock is accurate twice a day, but all that means is that it has a low rate of accuracy. That doesn't seem on its own to be a reason to delete the term “accuracy” from the existing text. It is notable that the definition of “validity” and “reliability” propounded by Grimm and Grossman above both use the term “accurate.”

On the other hand, using “accuracy” and “reliability” as different terms in the same rule may well result in confusion. The goal is to describe the requirement in a way that is basically correct and commonly understood by lawyers and judges. The whole area is complicated enough without adding distinctions that may not make a difference.

Probably the best result is to stick with the single term “reliable” throughout. That is certainly the best connection to Rule 702-type principles. That is the solution employed in the drafting alternatives at the end of this memo.

**3) The Need for Rule 901(c):** The proposed Rule 901(c) addresses an important problem: how to regulate an automatic objection “it’s a deepfake” for every offered audio or visual presentation. The question is whether those blanket claims present a problem that might be handled by the courts under the existing Rule 901. As discussed below, a similar concern arose during the rise of texts and social media: the concern that every opponent would argue “my Facebook post was hacked, my text was hacked” and so on. It turned out that courts handled that wave of objections by holding that something more than a mere assertion was necessary before an inquiry would be taken into the authenticity of texts and social media. Courts have specifically rejected blanket claims like “my account was hacked” --- because such an argument can always be made. Thus, courts have consistently held that “the mere allegation of fabrication does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents.”<sup>5</sup> Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information.<sup>6</sup> The opponent has a burden of going forward.

The question is whether courts will similarly be able to handle blanket claims of “it’s a deepfake” under the existing rule. There are good arguments on both sides. The argument for no change is that courts handled the previous wave just fine, so there is no need to be concerned about such blanket arguments when it comes to deepfakes. The argument for a new rule is that deepfakes are extremely hard to detect, and while hacking Facebook posts might be a rare occurrence, the potential use of deepfakes could well be broader and wider. Moreover, a concrete standard for justifying an inquiry --- such as that set forth in the proposal --- could be more useful to the court than the general standards that can be found only in the case law. Grimm and Grossman set forth a specific standard necessary to trigger a deepfake enquiry (i.e., a prima facie case of AI distortion); the courts currently do not use a specific uniform standard to trigger an enquiry into fakery.

One could argue that resolving the argument about the necessity of the rule should be delayed until courts actually start dealing on a regular basis with deepfakes. At that point it can be determined how necessary a rule amendment really is. Moreover, the possible prevalence of deepfakes might be countered in court by the use of watermarks and hash fingerprints that will assure authenticity. Again, the effectiveness of these countermeasures will only be determined after a waiting period.

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<sup>5</sup> *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

<sup>6</sup> See Grimm, Capra and Joseph, *Authenticating Digital Evidence*, 69 Baylor L. Rev. 1, 3-5 (2017) (reviewing the showing necessary for an inquiry into falsification of digital evidence).

That said, the slowness of the rulemaking process might ironically be a factor that would justify action at the next meeting. The Committee could propose a rule for public comment at the next meeting, and it would be another whole year before the Committee would revisit the rule. If there was no significant deepfake activity in the courts by then, that would be a reason to pause. If courts were having trouble with deepfakes during that year, that could be a reason to keep going. And the public comment on an AI proposal is sure to be massive and hopefully helpful. So there is much to be said for agreeing upon language and putting out a proposal at the next meeting.

**4) The Rule 901(c) Trigger:** Assuming that courts could use help to deal with blanket claims of “deepfake,” the *first step* provided by Grimm and Grossman is a very good one: the opponent must provide evidence sufficient for a reasonable person to find that the item is a deepfake. That prima facie standard is part of the revision of the proposal previously submitted to the Committee. At the last meeting, the proposal required the proponent to show *more likely than not* that the item is a deepfake, and the Committee found that that standard was too high. Reducing the standard to a prima facie case makes sense as an accommodation between the parties. It means that enquiries will not be automatic, but also that they will not be too hard to trigger. That’s a big step forward.

**5) The Rule 901(c) Balancing Test:** The balancing test in the proposal --- applied when the burden-shifting trigger is met --- is that the “probative value” must outweigh the “prejudicial effect.” It seems, though, that importing this standard confuses authenticity with the probative value and prejudicial effect attendant to the item itself. Authenticity is a question of conditional relevance, whereas probative value is about assessing how far the content of the item advances the case *once it has been found authentic*. If a picture shows a defendant punching a victim, in an assault prosecution, it is undeniably highly probative and not prejudicial at all. What about if it is fake? That is a question of authenticity, which is one of *conditional relevancy*. It is relevant only if it is authentic. Does it work to then make this question of conditional relevance dependent on a showing that probative value substantially outweighs the prejudice? It arguably confuses matters. Put another way, the probative value of the evidence can only logically be assessed *after* it is determined to be authentic. Having authenticity depend on probative value is a pretty complicated endeavor. A court should not have to balance probative value and prejudicial effect as part of the deepfake inquiry, and then apply Rule 403 to the content of the item.

In fact it is hard to see what the court is to consider when balancing probative value and prejudicial effect at the authenticity level. What exactly would be prejudicial? Presumably it would be something independent of the content of the item. Perhaps the prejudice is that the jury would find something to be authentic when in fact it was a deep fake. But isn’t that exactly what the court is determining when it decides that the item is authentic? Maybe the response would be that the decision is made at the low Rule 104(b) level. But surely the more direct solution is to ratchet up the standard of proof so as to reduce the “prejudice,” not to worry about prejudicial effect that will

occur when the jury sees the evidence and thinks it is authentic when it is not. And what exactly is the probative value that is evaluated at the authenticity level? It is not about the content itself, as that would be a separate Rule 403 question. Rather it must be the strength of the inference that the item is not a deepfake. But again, this is what is to be decided at the authenticity level; there is no point in talking about “probative value” in this way, independent of the content of the item.

At any rate, there is nothing in the text of the proposal which helps the court to figure out what probative value and prejudicial effect is supposed to mean at the authenticity level. So a Committee Note will have to try to explicate what is a very complicated, two-level use of probative value and prejudicial effect --- once as to authenticity and then once as to the content of the item.

**An alternative that stays within the confines of authenticity is to provide that once the opponent makes a showing sufficient to justify an inquiry, i.e., “enough for the jury to find that the item was generated by artificial intelligence” then the proponent has the burden of showing the court, under Rule 104(a), that it is *more likely than not that the item is authentic*. Such a proposal would read as follows:**

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.**

This burden-shifting alternative on the question of authenticity --- once the opponent has made a prima facie case, the proponent has to establish authenticity more likely than not --- may be questioned because it imports a Rule 104(a) standard for an authenticity question, while all other authenticity questions are decided under Rule 104(b). But that differentiation may be justified by the problems inherent in detecting deepfakes. And heightening the standard makes sense after the opponent has provide a prima facie case of fakery. After that triggering requirement is met, the proponent should have to show *something* more than the Rule 104(b) standard of authenticity. The logical conclusion is that the proponent must show authenticity by a preponderance of the evidence. Note that the Rule 104(a) standard only applies if the opponent makes the initial showing of fakery. If that showing is not made, then the proponent authenticates under the Rule104(b) standard.

## **B. Professor Roth’s Proposed Amendments to Address Machine Learning Evidence**

At a Committee meeting last year, Professor Andrea Roth proposed changes to the Federal Rules to give courts the tools to regulate machine-learning output. In broad summary, her basic

concern is that now many machines are thinking like people, and are making out of court statements like people would. For real people, the solution to such out of court statements is cross-examination. But the hearsay rule does not work well for machine-based outputs, because machines cannot be cross-examined. So in the absence of hearsay regulation, what can be added to the rule that would regulate the reliability problems inherent in machine-generated information? (Those problems include subjective selection and interpretation of data, contextual bias, applying learning to areas not originally envisioned, and inaccessibility to source codes and data collection practices).

Professor Roth initially proposed an addition to Rule 702, as seen below. After discussions with the Reporter, another alternative was put forth --- a new Rule 707. Both proposals are discussed immediately below.

**1. Proposed amendment to Rule 702 (and in the alternative, a free-standing rule incorporating Rule 702 standards for machine-learning).**

Professor Roth recommends as one alternative an addition to Rule 702. It would be a new subdivision, independent from the current rule. This would require some stylistic reconstruction of the existing rule. The proposed addition is as follows:

2) Where the output of a process or system would be subject to part (1) if testified to by a human witness, the proponent must demonstrate to the court that it is more likely than not that:

(A) The output will help the trier of fact to understand the evidence or to determine a fact in issue;

(B) The output is based on sufficient and pertinent inputs and data, and the opponent has reasonable access to those inputs and data;

(C) The output is the product of reliable principles and methods; and

(D) The output reflects a reliable application of the principles and methods to the facts of the case, based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case.



(3) The output of basic scientific instruments and tools are not subject to the requirements of this rule.

### **Reporter's Comment**

1. The proposal addresses what appears to be a gap in the rules. Expert witnesses must satisfy reliability requirements for their opinions, but it is a stretch, to say the least, to call machine learning output an “opinion of an expert witness.” Machine output is explicitly regulated today, as a matter of authenticity, by Rule 901(b)(9): the proponent must show that evidence of a machine process “produces an accurate result.” But that authenticity standard is the mild one of Rule 104(b). And nothing in Rule 901(b) specifically requires the kind of showing on reliability that must be made with respect to a human expert under Rule 702. The goal of the proposal is to apply *Daubert*-like requirements to machine learning evidence.

2. Professor Roth's proposal basically applies the existing Rule 702 to machine learning. The additions are that: a) facts or data is now “inputs and data”; b) the opponent must have reasonable access to those inputs and data; and c) the reliable application prong must be evaluated “based on the process or system's demonstrated reliability under circumstances or conditions substantially similar to those in the case.” There is a good argument that these are helpful tweaks, but perhaps they are sufficiently well-placed in the Note if the payoff is a less complicated drafting solution. See possible Rule 707 below for the simpler alternative. (Also, as discussed elsewhere in this memo, a requirement of reasonable access to inputs and data may raise questions of jurisdiction with the Criminal and Civil Rules Committees.)

3. There is a rulemaking problem in amending Rule 702 so soon after the 2023 amendment. Generally it is a bad idea to keep tinkering with a rule. That could be explained here by the fact that AI-related evidence is a concept that exploded only recently --- after the 2023 amendment had been proposed for public comment. All that said, if the Committee is interested in a Rule 702-type solution to AI evidence, then the better path is probably to add a completely new rule to govern machine-learning evidence. *See* draft Rule 707, below.

4. The new rule alternative would incorporate the Rule 702 standards whenever a machine makes a statement that would be expert testimony if coming from a human. The basis for such a rule would be that the concerns about machine-learning are reliability-based. Ben Studdard, in the Georgia Handbook on Criminal Evidence, puts it this way:

The issues implicated in AI-generated evidence are remarkably similar to those raised by Rule 702, which governs the admissibility of expert opinion testimony. \* \* \* It would seem logical for courts to apply a similar analysis to AI-generated evidence. Perhaps in the future an analogous rule will be written to cover what will undoubtedly become a common category of evidence.

*Here is what a new rule could look like:*

### **Rule 707. Machine-generated Evidence**

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

#### **Reporter's Comment:**

It doesn't help to restate all the Rule 702 requirements in this new rule. And if different standards were articulated, questions would be created about how to handle an overlap. Thus a simple absorption of Rule 702 avoids difficult textual problems of either repeating or subtly changing the Rule 702 requirements as applied to machine-learning.

You could add guidance in the Committee Note to describe just how the machine data should be evaluated at a *Daubert* hearing --- including, if Committee members agree, a statement that the opponent must get reasonable access to the inputs and data.

The last sentence of the text is to assure that the rule is not needed when the output is simple machine data, (e.g., an altimeter) or basic software (e.g. Excel). Though it might be sufficient to make that statement in the Committee Note rather than text, because it seems extremely unlikely for a court to look at this rule and say, “yes, let’s do a *Daubert* hearing on the thermometer reading.”

*Here is a draft Committee Note for the Rule 707 alternative.<sup>7</sup>*

#### ***Draft Committee Note***

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information, from software-driven blood-alcohol concentration results to probabilistic genotyping software. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine’s process. Where an expert relies on such a method, the method – and the expert’s reliance on it – will be scrutinized pursuant to Rule 702. But if machine or software output is presented on its own, without the accompaniment of a human expert, Rule 702 is not obviously applicable. Yet

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<sup>7</sup> Thanks to Professor Andrea Roth and Dr. Timothy Lau for their assistance in correcting my mistakes in the first draft of this Note.

it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered directly, it is subject to the requirements of Rule 702 (a)-(d).

It is anticipated that a Rule 707 analysis will involve the following, where applicable:

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

- [Ensuring that the opponent has been provided sufficient access to the program, and that independent researchers have had sufficient access to the program, to allow both adversarial scrutiny and sufficient peer review beyond simply validation studies conducted by the developer or related entities. Where a developer has declined to make a research license or equivalent access widely available to independent researchers, courts should be wary of allowing output from such a process.]

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity of DNA, the software should be shown to be valid in those circumstances before being admitted.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over machine output that is regularly relied upon in commercial contexts outside litigation and that, as a result, is not likely to render output that is invalid for the purpose it is offered. Examples might include the results of a mercury-based thermometer, battery-operated digital thermometer, or automated averaging of data in a spreadsheet, in the absence of evidence of untrustworthiness.

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



**2. Proposed amendment to Rule 806.** Professor Roth suggests that Rule 806 be amended to allow opponents to “impeach” machine output in the same way as they would impeach hearsay testimony from a human witness. She proposes an additional subsection to Rule 806:

(2) When output of a process or system has been admitted in evidence, and would be a hearsay statement if uttered by a human declarant, the output’s accuracy may be attacked, and then supported, by any evidence that would be admissible for those purposes if the output had been uttered by a human declarant. The court may admit evidence of the process or system’s inconsistent output, or prior false output where probative of the admitted output’s accuracy, for these purposes as well.

**Reporter’s Comment:** The goal here is to treat machine learning --- which is thinking like a human --- the same way that a human declarant may be treated. But not all forms of impeachment are properly applicable to machine learning. For example, it would seem that a machine doesn’t have a character for truthfulness; prior convictions and bad acts of a machine do not exist. Presumably the machine could make a prior inconsistent statement. A machine output could be contradicted. A machine output can definitely be impaired by bias, at least speaking broadly, if it is relying on data that is affected by bias. And finally, it seems unlikely that a machine can be impeached by incapacity (ability to recall and relate).

The question is whether a confusing signal is given by applying Rule 806 wholesale to machine-learning evidence, when in fact not all the forms of impeachment are workable as applied to machines. There is a good argument that any type of “impeachment” of machines that can occur is already governed as to human witnesses by Rule 403. If, for example, the opponent wants to admit prior inconsistent or false output of a machine, that is certainly relevant evidence and the court doesn’t need a special rule to admit it. (It’s not barred by the hearsay rule because it is offered to show inconsistency or falsity, not underlying truth.) And impeachment of a witness for bias and contradiction are already covered by Rule 403 anyway, and so, by analogy, that rule should apply to bias and contradiction evidence with respect to machine learning. In sum, it seems that Rule 403 provides all the necessary tools to impeach machine output, as all the methods that are applicable to machines would be the ones currently governed by Rule 403. Moreover, it is not ideal to place the rules on impeaching machines in Article 8 as the whole point is that the hearsay rule is not directed to machine-based evidence, because you can’t cross-examine a machine.

**3. Rule 901(b)(9).** Professor Roth suggests adding standards to the basic authentication rule for machine-based evidence.

**(9) Evidence About a Process or System.** Evidence describing a process or system and showing that it produces a ~~an accurate~~ reliable result, including, with the exception of basic scientific instruments, all of the following:

(A) that the opponent had fair pretrial access to the process or system;

(B) in a criminal case, the proponent has disclosed all previous output of the process or system that, if the process or system were a human witness, would be disclosable under 18 U.S.C. §3500;

(C) that the process or system has been shown through testing by a financially and otherwise independent entity to produce an accurate result under conditions substantially similar to the instant case;

(D) that the process or system, or a license to use it, is accessible to independent research bodies, including the National Institute of Standards and Technology and accredited educational institutions, for purposes of conducting audits of the process or system;

(E) that the process or system is either open source or the proprietor has given the National Institute of Standards and Technology access to its source code;

(F) that, in a criminal case, the proponent has not invoked a trade secrets privilege to block access or disclosure to the process or system or its source code.

### **Reporter's Comments:**

1. If Rule 702 is applied to machine learning evidence, the admissibility factors will have to be shown by a preponderance of the evidence. If that happens, it should make it unnecessary to add the same or similar standards at the authenticity level, which is governed by the Rule 104(b) standard. It should be noted that Professor Roth is not necessarily suggesting changes to Rule 901(b)(9) *in addition to* Rule 702 --- rather that if Article 7 changes somehow don't work out, changes to Rule 901(b)(9) could be usefully considered. In other words, if changes are made to require a *Daubert*-like review of machine data, *then there is no need to add anything to Rule 901(b)(9)* to cover machine learning evidence.

2. Several of the requirements are about accessibility --- e.g., the provisions on trade secrets, pretrial access, and the Jencks Act alternative. As discussed above, such disclosure requirements are probably within the jurisdiction of the Criminal and Civil Rules Committees, not the Evidence Rules Committee. If anything is done about source codes in the Evidence Rules, it should probably be by way of a suggestion in a Committee Note, as was done in the Committee Note to the 2000 amendment to Rule 701 (providing that the Rule needed to be amended to assure that the expert disclosure requirements in the Civil and Criminal Rules would not be evaded). Moreover, in terms of the politics of rulemaking, these disclosure obligations are likely to be a flashpoint. It would be unfortunate if a good rule faltered because of controversy over a disclosure requirement.

3. Rule-drafting concerns exist with respect to two provisions. Subdivision (B) includes the citation to the Jencks Act. But proper rulemaking does not include citations in text --- for fear that the citation will change and then the rule would need to be amended. So if that provision were to be approved, it should say something like “under federal statute” and then the Committee Note could refer to the Jencks Act. *See* the 1998 amendment to Rule 615, adding “by statute” to the text, and referring to a specific statute in the Note. Another rule-drafting concern is the reference to NIST. A more general reference would be preferable.

### **C. Proposal Giving the Trial Court the Sole Responsibility to Review Deepfake Challenges**

Professor Rebecca Delfino argues that the danger of deepfakes demands that the judge decide authenticity, not the jury.<sup>8</sup> She contends that “[c]ounteracting juror skepticism and doubt over the authenticity of audiovisual images in the era of fake news and deepfakes calls for reallocating the factfinding authority to determine the authenticity of audiovisual evidence.” She contends that jurors cannot be trusted to fairly analyze whether a video is a deepfake, because deepfakes appear to be authentic, and “seeing is believing.” Professor Delfino suggests that Rule 901 should be amended to add a new subdivision (c), which would provide:

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**901(c). Notwithstanding subdivision (a), to satisfy the requirement of authenticating or identifying an item of audiovisual evidence, the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b). The court must decide any question about whether the evidence is admissible.**

.....

She explains that the new Rule 901(c) “would relocate the authenticity of digital audiovisual evidence from Rule 104(b) to the category of relevancy in Rule 104(a)” and would “expand the gatekeeping function of the court by assigning the responsibility of deciding authenticity issues solely to the judge.”

The proposed rule would operate as follows: After the pretrial hearing to determine the authenticity of the evidence, if the court finds that the item is more likely than not authentic, the court admits the evidence. The court would instruct the jury that it *must accept as authentic* the evidence that the court has determined is authentic. The court would also instruct the jury not to

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<sup>8</sup> Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 *Hastings L.J.* 293 (2023).

doubt the authenticity, simply because of the existence of deepfakes. This new rule would take the jury out of the business of determining authenticity, “thereby avoiding the problems invited by juror distrust and doubt.” (Her concern is about the “liar’s dividend” --- that juries will mistrust even authentic items given the prevalence of deepfakes.) Finally, “the court would address the threat of counsel exploiting juror doubts over the authenticity of evidence using the deepfake defense by ordering counsel not to make such arguments.”

### **Reporter’s Comment:**

The Delfino proposal applies to *all* audiovisual evidence --- including the video evidence that courts have been dealing with for more than 100 years. Query whether the threat of deepfakes warrants such a dramatic change with respect to all video (and audio) evidence. Assuming that any amendment is necessary, the better remedy is to set out procedures, and higher standards, *only after the opponent specifically brings a credible deepfake argument*. That is what is done in the Grimm-Grossman proposal.

Another concern is about how the jury will react when it is instructed to presume authenticity. Given the presence of deepfakes in society, it may well be that jurors will do their own assessment, regardless of the instruction --- and under this proposal, that juror assessment will be done without the foundation for authenticity laid by the proponent in the admissibility hearing. It could become especially confusing when the jury is told that authenticity is a question primarily for jurors when it comes to telephone calls, diaries, and physical evidence, but when it comes to videos and audios --- hands off.

One can argue that the Delfino proposal could be improved by applying the Rule 104(a) standard to the authenticity of visual and audio evidence, but then, if the court finds authenticity, allow the jury to make its own assessment. In other words, to treat the authenticity of visual evidence the same way we treat expert testimony. Delfino would object, though, due to her belief that jurors will not be able to assess the genuineness of the evidence, given that deepfakes are getting harder and harder to detect. But this half-proposal would at least address arguments that deepfakes will be too easily admitted under the mild standard that now exists for showing authenticity to the court, and it would not set up artificial constructs to try to keep the jury from assessing authenticity.

One broader concern that is spurred by the Delfino proposal: Some of the AI apocalypse believers maintain that at some point deepfakes will be *impossible* to detect. If that is so, then it would seem that no rule of authenticity can do an adequate job of regulating deepfakes. Giving all the authority to the judge seems quite empty if *nobody* can detect a deepfake. Indeed *no rule can provide a solution if deepfakes are undetectable*.

One final point on the Delfino proposal. Delfino’s idea is that the court is to use the Rule 104(a) standard --- a preponderance of the evidence. Assuming that is appropriate, it should be

added to the text of the rule. That is a lesson learned by the Committee in the amendment to Rule 702. This means that the last sentence of the proposal should read something like:

“The court must decide whether it is more likely than not that the item is authentic.”

Such an explication is especially important because the proposal does not actually explicitly say that admissibility is governed by Rule 104(a). It states that “the proponent must produce evidence that the item is what the proponent claims it is in accordance with subdivision (b).” But the illustrations of subdivision (b) are, as discussed above, decided on the less rigorous, prima facie proof standard of Rule 104(b).

The Delfino proposal is usefully compared to the Reporter’s proposed modification of the Grimm-Grossman proposal discussed above. The Reporter’s proposal would read as follows:

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.**

The differences between the two proposals are: 1. The Delfino proposal applies the preponderance of the evidence standard to every item of audiovisual evidence, whereas the above proposal applies that higher standard only when there has been a prima facie showing of fakery; and 2) The Delfino proposal takes the authenticity question completely away from the jury, whereas the above proposal does not. It seems that the above proposal gets the better of both of these differences.

#### **D. The Proposal to Add a Corroboration Requirement for Possible Deepfakes**

John Lamonica argues for a more stringent standard of authenticity with respect to deepfakes.<sup>9</sup> He contends that the traditional means of authentication --- by a person with knowledge under Rule 901(b)(1) --- will no longer work with deepfakes because a witness cannot reliably testify that the video accurately represents reality. He states that “[b]ecause witnesses will no longer be able to meet the legacy standard of Rule 901(b)(1)’s knowledgeable witness by attesting that a video is a fair and accurate portrayal, courts need to look elsewhere for a sufficient finding that photographic evidence is what its proponent claims it is.” He argues for a proposed new Rule 901(b)(11) that would specifically govern “the unique challenges that digital photography in the modern age present.”

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<sup>9</sup> John P. Lamonica, *A Break from Reality: Modernizing Authentication Standards for Digital Video Evidence in the Era of Deepfakes*, 69 Am. U.L. Rev. 1945, 1984 (2020).



The new Rule 901(b)(11) would provide:

**Before a court admits photographic evidence under this rule, a party may request a hearing requiring the proponent to corroborate the source of information by additional sources.**

Lamonaca explains that the new rule “essentially codifies an existing means of authentication and requires it for photographic evidence.” There is no proposal to change the existing allocation of authority between the court and the jury. Rather, what it essentially does is 1) change the “distinctive characteristics” ground of Rule 901(b)(4) into a foundation *requirement*; and 2) state that the classic ground of authentication under Rule 901(b)(1) --- that the video accurately represents what it purports to show --- is never a sufficient ground of admissibility. Lamonaca concludes that “a preliminary hearing process [requiring corroboration] would bolster the confidence in video evidence for a jury to consider, rather than allowing all photographic evidence to pass the foundational stage with a testimonial witness who lacks the requisite personal knowledge to attest to the evidence’s validity.”

This is an interesting proposal, in that one of the major ways that deepfakes can be *debunked* is actual evidence casting doubt on what is portrayed --- e.g., “the video shows me at the bank but I was in the hospital that day.” So it might not be asking too much for a proponent to provide some corroboration of the event --- but only *if there is a legitimate question of authenticity*, and the Lamonaca proposal does not require that. So a major problem is that, like the Delfino proposal, it applies to *all* visual evidence, including video evidence that has been well-handled by the courts for 100 years. It seems unwarranted to require the proponent to go to the expense of providing corroboration for every surveillance video and every wedding photograph, simply because of the potential risk of deepfakes. Courts have not required an advance showing of corroboration for digital evidence, and while deepfakes present new challenges, the case has not been made as yet to justify an automatic corroboration requirement for all audio visual evidence.

The better solution is that the court should enter a deepfake inquiry only when the opponent provides some evidence indicating the possibility of a deepfake: either some electronic analysis or a showing through evidence that the event presented is implausible. And then, at that point, the proponent might be required to provide corroboration or some other additional showing before the court can find it authentic. That solution is essentially the modification to the Grimm Grossman proposal, discussed above. That solution is essentially employed today with regard to electronic evidence --- the “it is hacked” claim is not treated seriously until the opponent comes up with something to indicate that an inquiry is warranted.<sup>10</sup> And that solution --- placing the burden of

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<sup>10</sup> See Grimm, *et al.*, *Authentication of Social Media Evidence*, 36 Am. J. of Trial Advoc. 433, 459 (2013) (“A trial judge should admit the evidence if there is plausible evidence of authenticity produced by the proponent of the evidence and only speculation or conjecture—not facts—by the opponent of the evidence about how, or by whom, it ‘might’ have been created.”).

going forward on the opponent --- is what was employed in one of the few court cases that have discussed the deepfake possibility. The Colorado state appeals court in *People v. Gonzales*, 2019 COA 30, ¶ 29 opined that while software has made it easy for laypeople to manipulate recordings, “the fact that the falsification of electronic recordings is always possible does not, in our view, justify restrictive rules of authentication that must be applied in every case *when there is no colorable claim of alteration.*”<sup>11</sup> The court explained that “[w]hen a plausible claim of falsification is made by a party opposing the introduction of a recording, the court may and usually should apply additional scrutiny” to determine whether a reasonable jury could conclude that the item is what it purports to be.

Three more rulemaking points about the Lamonica proposal:

1. It should not be placed as a new Rule 901(b)(11). Rule 901(b) provides examples of authenticated items. This new provision is requiring an extra admissibility requirement for evidence that will be offered under an existing provision --- such as 901(b)(9). It is not a new example of authentication. So it is better placed as separate subdivision, such as Rule 901(c), as is the Grimm-Grossman proposal.

2. The proposed rule refers to “photographic” evidence, which seems too narrow to cover all deepfakes. A term such as “audiovisual” is preferable. The Grimm-Grossman proposal simply ties into Rule 901(b)(9) --- items resulting from a process or system, which is probably the best tie-in to deepfakes.

3. The proposal as written is not actually a rule of admissibility. All it specifically requires is a hearing. So it should probably read as follows:

Before a court admits photographic evidence under this rule, ~~a party may request a hearing requiring~~ the proponent must ~~to~~ corroborate the source of information by additional sources.

In essence, a solution that requires a foundation from the opponent and then a showing by the proponent is what has been discussed above at several points:

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.**

This proposal differs from a corroboration requirement in this sense: it is more flexible, because the proponent can establish authenticity in any way, not just by corroboration. As such,

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<sup>11</sup> See also Shannon Bond, *People Are Trying To Claim Real Videos Are Deepfakes. The Courts Are Not Amused*, <https://www.npr.org/2023/05/08/1174132413/people-are-trying-to-claim-real-videos-are-deepfakes-the-courts-are-not-amused> (noting that courts in the January 6 prosecutions have rejected out of hand broad, unsupported claims that videos could be deepfakes).

the above proposal seems to be a better approach. It also, importantly, requires a preliminary showing, which the Lamonica proposal does not.

### III. The Problem of Deepfakes

A deepfake is an inauthentic audiovisual presentation prepared by software programs using artificial intelligence. Of course, photos and videos have always been subject to forgery, but developments in AI make deepfakes much more difficult to detect.<sup>12</sup> Software for creating deepfakes is already freely available online and fairly easy for anyone to use.<sup>13</sup> As the software's usability and the videos' apparent genuineness keep improving over time, it will become harder for computer systems, much less lay jurors and judges, to tell real from fake.<sup>14</sup>

Generally speaking, there is an arms race between deepfake technology and the technology that can be employed to detect deepfakes. Deepfakes involve machine learning algorithms that are simultaneously pitted against one another.<sup>15</sup> One of these programs is a generative model that creates new data samples; the other, known as a discriminator model, evaluates this data against a

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<sup>12</sup> Robert Chesney & Danielle Keats Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Calif. L. Rev. 1753, 1760 (2019). Some of the famous deepfakes are pretty easy to root out with minimal inquiry. The Nancy Pelosi video was debunked simply by playing it slower. The Pope picture, upon scrutiny, shows up as a fake because his medal is not sitting on his chest, and his fingers are not accurate. But it is very likely that future developments will make deepfakes harder to detect.

<sup>13</sup> See *12 Best Deepfake Apps and Websites That You Can Try for Fun*, <https://beebom.com/best-deepfake-apps-websites>.

<sup>14</sup> MIT has provided a checklist that can be used to help detect a deepfake, though MIT makes no promises:

When it comes to AI-manipulated media, there's no single tell-tale sign of how to spot a fake. Nonetheless, there are several DeepFake artifacts that you can be on the lookout for:

1. Pay attention to the face. High-end DeepFake manipulations are almost always facial transformations.
2. Pay attention to the cheeks and forehead. Does the skin appear too smooth or too wrinkly? Is the agedness of the skin similar to the agedness of the hair and eyes? DeepFakes may be incongruent on some dimensions.
3. Pay attention to the eyes and eyebrows. Do shadows appear in places that you would expect? DeepFakes may fail to fully represent the natural physics of a scene.
4. Pay attention to the glasses. Is there any glare? Is there too much glare? Does the angle of the glare change when the person moves? Once again, DeepFakes may fail to fully represent the natural physics of lighting.
5. Pay attention to the facial hair or lack thereof. Does this facial hair look real? DeepFakes might add or remove a mustache, sideburns, or beard. But, DeepFakes may fail to make facial hair transformations fully natural.
6. Pay attention to facial moles. Does the mole look real?
7. Pay attention to blinking. Does the person blink enough or too much?
8. Pay attention to the lip movements. Some deepfakes are based on lip syncing. Do the lip movements look natural?

<https://www.media.mit.edu/projects/detect-fakes/overview/>

<sup>15</sup> Chris Nicholson, *A Beginner's Guide to Generative Adversarial Networks (GANs)*, PATHMIND, <https://pathmind.com/wiki/generative-adversarial-network-gan> [https://perma.cc/JEY9-K283].

training dataset for authenticity. The discriminator model estimates the probability that the sample came from the generative model (a machine creation) or sample data (a real-world original). These two models operate in a cyclical fashion and learn from each other. The generative model program is learning to create false data, and the discriminator model is learning to identify whether the data is artificial. The generative model constantly improves its ability to create data sets that have a lower probability of failing the detection algorithm as the discriminator model learns to keep up, a process that continuously improves the apparent genuineness of the creation. So anytime new software is developed to detect fakes, deepfake creators can use that to their advantage in their discriminator models. A New York Times reporter reviewed some of the currently available programs that try to detect deepfakes. The programs varied in accuracy. None was accurate 100% of the time.<sup>16</sup>

It is important to note that various digital tools have been introduced for authenticating video recordings that a party has prepared. These tools allow the proffering party to vouch for video recordings' authenticity through an electronic seal of approval.<sup>17</sup> While the use of such methods increases the costs of litigation, they do appear, generally, to answer most "deepfake" claims from the opponent. While watermarks can be evaded, Professor Hany Farid states that the use of watermarks together with an identifying fingerprint is an effective way to combat the threat of deepfakes.<sup>18</sup> The limitation on the software is that the electronic stamp of genuineness occurs

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<sup>16</sup> See *How Easy Is it to Fool A.I. Detection Tools?* <https://www.nytimes.com/interactive/2023/06/28/technology/ai-detection-midjourney-stable-diffusion-dalle.html?smid=nytcore-ios-share&referringSource=articleShare>. See also *Another Side of the A.I. Boom: Detecting What A.I. Makes*, <https://www.nytimes.com/2023/05/18/technology/ai-chat-gpt-detection-tools.html> ("Detection tools inherently lag behind the generative technology they are trying to detect. By the time a defense system is able to recognize the work of a new chatbot or image generator, like Google Bard or Midjourney, developers are already coming up with a new iteration that can evade that defense. The situation has been described as an arms race or a virus-antivirus relationship where one begets the other, over and over.").

<sup>17</sup> *Ticks or It Didn't Happen: Confronting Key Dilemmas in Authenticity Infrastructure for Multimedia*, at 6, WITNESS (December 2019), <https://lab.witness.org/ticks-or-it-didnthappen/> ("The idea is that if you cannot detect deepfakes, you can, instead, authenticate images, videos and audio recordings at their moment of capture."); Riana Pfefferkorn, *Deepfakes in the Courtroom*, 29 Public Interest L.J. 245, 259 (2020) ("So-called verified media capture technology can help to ensure that the evidence users are recording is trusted and admissible to courts of law. For example, an app called eyeWitness to Atrocities allows photos and videos to be captured with information that can firstly verify when and where the footage was taken, and can secondly confirm that the footage was not altered, all while the company's transmission protocols and secure server system create a chain of custody that allows this information to be presented in court. That information, paired with the app-maker's willingness to provide a certification to the court or send a witness to testify if needed, could satisfy a court that the video is admissible, even if the videographer is unavailable.").

<sup>18</sup> See Hany Farid, *Artificial Intelligence: A Primer for Legal Practitioners* at 17 ("Therefore, in addition to embedding watermarks, a creator can extract an identifying fingerprint from the content and store it in a secure centralized ledger. . . . The provenance of a piece of content can then be determined by comparing the fingerprint of any image or video to the fingerprint stored in the ledger. Both watermarks and fingerprints can be made cryptographically secure, making it difficult to forge.").

during the process in which the video is being generated; it does not work with videos, say, taken off the internet.<sup>19</sup>

Besides the challenge of determining whether a video or audio is faked, many commentators are concerned about a “reverse CSI effect.” Jurors, knowing about deepfakes, “fake news,” etc., may start expecting the proponent of a video to use sophisticated technology to prove to their satisfaction that the video is not fake.<sup>20</sup> The other concern expressed is that over time, skepticism over video evidence may undermine the use of perfectly authentic videos --- called “the Liar’s Dividend” --- though how that concern is to be addressed in an Evidence Rule remains a mystery.

### **A. Basic Rules on Authenticity**

Under Rule 901(a), the standards for authenticity are low. The proponent must only “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Under the rule, the question of authenticity is one of conditional relevance --- an item of evidence is not relevant unless it is what the proponent purports it to be. (For example, a sexually harassing statement in an email, purportedly sent from the plaintiff’s supervisor, is probative only if it is the supervisor who sent it.) As a question of conditional relevance, the admissibility standard under Rule 901 is the same as that provided by Rule 104(b): Has the proponent offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is. This is a mild standard --- favorable to admitting the evidence. The drafters of the rule believed that authenticity should generally be a jury question because, if a juror finds the item to be inauthentic, it just drops from the case, so no real damage is done; Rule 901 basically operates to prevent the jury from wasting its time evaluating an item of evidence that clearly is not what the proponent claims it to be.

The structure of the Rule is as follows: 1) subdivision (a) sets the general standard for authenticity --- enough admissible evidence for a juror to believe that the proffered item is what the proponent says it is; 2) subdivision (b) provides examples of sufficient authentication; if the standard set forth in any of the illustrations is met, then the authenticity objection is overruled and any further question of authenticity is for the jury; and 3) the illustrations are not intended to be independent of each other, so a proponent can establish authenticity through a single factor or combination of factors in any particular case. Finally, it should be noted that Rule 902 provides

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<sup>19</sup> See, e.g., *A New Tool Protects Videos from Deepfakes and Tampering*, <https://www.wired.com/story/amber-authenticate-video-validation-blockchain-tampering-deepfakes/> (“Called Amber Authenticate, the tool is meant to run in the background on a device as it captures video. At regular, user-determined intervals, the platform generates ‘hashes’—cryptographically scrambled representations of the data—that then get indelibly recorded on a public blockchain. If you run that same snippet of video footage through the algorithm again, the hashes will be different if anything has changed in the file’s audio or video data—tipping you off to possible manipulation.”).

<sup>20</sup> Rebecca Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 *Hastings L.J.* 293 (2023).

certain situations in which the proffered item will be considered self-authenticating --- no reference of any Rule 901(b) illustration need be made or satisfied if the item is self-authenticating.

In order for the trier of fact to make a rational decision as to authenticity, the foundation evidence must itself be admissible. If the opponent still contests authenticity at trial, the proponent will need to present admissible evidence of the authenticity of the challenged item. This means that the judge's role when an authentication issue arises differs from the judge's role when other issues arise involving the admissibility of evidence at a Rule 104(a) hearing (under which the rules of evidence other than privilege are inapplicable). When authentication evidence is offered, a jury must be provided sufficient admissible evidence for it to find that it is what the proponent claims, or the requirement of authentication is not satisfied. A judgment as to whether a reasonable jury will find evidence to be authentic can only be made by examining the evidence that the jury will be permitted to hear.<sup>21</sup>

Applying the current authentication rules to deepfakes raises at least two concerns: 1. Because deepfakes are hard to detect, many deepfakes will probably satisfy the low standards of authenticity; and 2. On the other hand, the prevalence of deep fakes will lead to blanket claims of forgery, requiring courts to have an authenticity hearing for virtually every proffered video.

## **B. Prior Committee Decision on Special Authentication Rules for Electronic Evidence.**

The rise of deepfakes is not the only technological advancement that has challenged the existing rules on authentication. In 2014, the Advisory Committee undertook a project to consider whether rules should be added to Article 9 to address digital communications and social media postings. The proposal considered was to have special rules on authenticating emails, texts, social media postings, and so forth. After significant discussion, the Committee decided not to proceed with the project. According to the Minutes of the Fall 2014 meeting, the reasons for rejection were as follows:

1. The current rules are flexible enough to handle questions about the authenticity of digital communications. For digital evidence, the most useful authentication rules within Rule 901(b) are: 901(b)(1) (a witness with personal knowledge that the evidence is what it purports to be); 901(b)(3) (comparison of the evidence with an authenticated specimen by an expert witness or the finder of fact); 901(b)(4) (the appearance, contents, substance, internal patterns or other distinctive characteristics of the item, taken together with all the circumstances); 901(b)(5) (for audio recordings, an opinion identifying a person's voice, whether heard firsthand or through electronic transmission or recording, based on having heard that voice in the past); and 901(b)(9) (evidence

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<sup>21</sup> See *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010) (records could not be authenticated where the only basis for authentication was a hearsay statement not admissible under any exception); *Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534, 537 (D. Md. 2007) ("Because, under Rule 104(b), the jury, and not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible under the rules of evidence.").

describing a process or system of showing that it produces an accurate result). These rules give the court all the tools it needs to determine the authenticity of digital evidence.

2. Any rules directed specifically toward digital communications would likely overlap with the provisions already in Rule 901(b). Certainly distinctive characteristics would be important for authenticating digital evidence; and authentication of, say, email would use analogous principles of authenticating telephone conversations. This overlap, between new and old rules, would likely cause confusion.

3. Listing factors relevant to authentication would run the risk of misleading courts and litigators into thinking that all of the listed factors can or should be weighed equally, when in fact a case-by-case approach is required.

4. Given the deliberateness of rulemaking --- three years minimum --- there was a risk that any rule on digital communications could be dead on arrival. I called it the MySpace problem.<sup>22</sup>

In hindsight, it is fair to state that the Committee’s decision to forego amendments setting forth specific grounds for authenticating digital evidence was the prudent course. Courts have sensibly, and without extraordinary difficulty, applied the grounds of Rule 901 to determine the authenticity of digital evidence.<sup>23</sup> Courts have specifically rejected blanket claims like “my account was hacked” --- because such an argument can always be made. Courts properly require some showing from the opponent before inquiring into charges of hacking and falsification of digital information. Thus, courts have consistently held that “the mere allegation of fabrication

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<sup>22</sup> It should be noted that the Committee did propose two new rules to deal with authenticating digital evidence --- Rules 902(13) and (14), which became effective in 2017. But these rules do not add or change any grounds of authentication for digital evidence. Rather they allow the existing grounds to be established by a certificate of a person with knowledge, thus dispensing with the requirement of in-court testimony.

<sup>23</sup> See, e.g., *United States v. Fluker*, 698 F.3d 988 (7th Cir. 2012) (the court, in outlining the variety of ways in which an email could be authenticated, stated that testimony from a witness who purports to have seen the declarant create the email in question was sufficient for authenticity under Rule 901(b)(1)); *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015) (government laid a proper foundation to authenticate Facebook and text messages as having been sent by the defendant; the defendant was a quadriplegic, but the witness who received the messages testified she had seen the defendant use Facebook, she recognized his Facebook account, and the Facebook messages matched the defendant’s manner of communicating: “[a]lthough she was not certain that Hall [the defendant] authored the messages, conclusive proof of authenticity is not required for admission of disputed evidence”); *United States v. Lundy*, 676 F.3d 444 (5th Cir. 2012) (testimony by one party to chat that the chats are as he recorded them is enough to meet the low threshold for authentication); *United States v. Needham*, 852 F.3d 830, 836 (8th Cir. 2017) (“Exhibits depicting online content may be authenticated by a person’s testimony that he is familiar with the online content and that the exhibits are in the same format as the online content. Such testimony is sufficient to provide a rational basis for the claim that the exhibits properly represent the online content. . . [The witness] testified that he personally viewed the [webpages] and that the screenshots accurately represented the online content of both sites. Thus, the district court did not abuse its discretion by admitting the screenshots.”); *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018) (the government sufficiently tied the “Facebook User” to the defendant by showing that: (1) the user name associated with the account was Larry Recio; (2) one of the four email addresses associated with the account was larryrecio20@yahoo.com; (3) more than 100 photos of Recio were posted to the account, and (4) one of the photos posted to the user timeline was accompanied by the text “Happy Birthday Larry Recio”).

does not and cannot be the basis for excluding ESI as unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents.”<sup>24</sup>

It is true that litigators have to know what they are doing when they try to authenticate digital evidence, and it is also true that authenticating digital evidence can be costly, but no rule of evidence would change that.<sup>25</sup> Moreover, some costs of proving authenticity can be saved by the affidavit procedures established for authentication of digital evidence in Rules 902(13) and (14).<sup>26</sup>

The fact that the Committee decided not to promulgate special rules on digital communication is a relevant data point, but it is not necessarily dispositive of amending the rules to treat deepfakes.<sup>27</sup> While a special rule setting forth the grounds for possible authentication of audiovisual evidence runs a similar risk of overlap, perhaps a rule of procedure (such as the requirement of a special showing made to the court), or a higher standard of proof, could be useful. And a rule may be necessary because deepfakes may present a true watershed moment and might require a new approach.

### **C. Arguments Against an Amendment for Deepfakes**

Not all commentators believe that a change to the rules is necessary for dealing with deepfakes. Riana Pfefferkorn notes that the courts have previously handled technological changes under the existing rules, and deepfakes can be handled in the same way.<sup>28</sup> She asserts that the courts are “no stranger to doctored photographs” and that “generations of technologies with truth-subversive potential have become commonplace in society over the years. While the resulting fakes have inevitably gained traction at times in the public consciousness, the sky has not fallen.” She states that “[t]he existence of the mere possibility of manipulation, without more, does not call for a high bar of authentication today any more than it did 150 years ago.” She concludes that “the nation’s courts are robust institutions that have shown themselves capable of handling each new variant of the age-old problem of fakery” and that the courts’ “track record of resilience should

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<sup>24</sup> *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

<sup>25</sup> See Jeffrey Bellin and Andrew Guthrie Ferguson, *Judicial Notice in the Information Age*, 108 Nw. U.L. Rev. 1137, 1157 (2014) (“Although much is made of [the authentication] hurdle in the Information Age, it is ... an easy one to surmount. Success generally depends not on legal or factual arguments, but rather the amount of time and resources a litigant devotes to the problem.”).

<sup>26</sup> Tara Vassefi, “A Law You’ve Never Heard of Could Help Protect Us From Deceptive Photos and Videos,” UC Berkeley School of Law Human Rights Center (Nov. 30, 2018), <https://medium.com/humanrightscenter/a-law-youve-never-heard-of-could-help-protect-us-from-fake-photos-and-videos-df07119aaeec> (noting that Rules 902(13 and (14) “streamlin[e] authentication for those with limited legal resources”).

<sup>27</sup> For one thing, it is not *stare decisis*. The Committee has proposed amendments to rules that it rejected in the first instance. The amendments to Rule 106 and new Rule 107 are just two examples. Also, perhaps the dangers of fakery are greater with respect to deepfakes than were presented by digital evidence in 2014.

<sup>28</sup> Riana Pfefferkorn, *Deepfakes in the Courtroom*, 29 Public Interest L.J. 245, 259 (2020).



assuage” much of the concerns about deepfakes.<sup>29</sup> Pfefferkorn’s view is that the rise of deepfakes will probably increase the costs of authentication, perhaps by requiring expert testimony in more cases than previously. But that does not mean that the rules need to be amended.

Similarly, Grant Fredericks, the president of Forensic Video Solutions and a pioneer in the field of deepfake technology, is confident that fake videos will be kept out of evidence, both because they can be discovered using the advanced tools of his trade and because the video’s proponent would be unable to answer basic questions to authenticate it (who created the video, when, and with what technology).<sup>30</sup>

Finally, Professor Rebecca Wexler, in her presentation to the Committee last Fall, made a compelling presentation arguing that the courts have extensive experience with forgeries, and that no special rule is needed to deal with deepfakes.



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<sup>29</sup> See also Russell Brandom, Deepfake Propaganda is not a Real Problem, THE VERGE (Mar. 15, 2019), <https://www.theverge.com/2019/3/5/18251736/deepfake-propaganda-misinformation-troll-video-hoax> (“We’ve had the tools to fabricate videos and photos for a long time. . . . AI tools can make that process easier and more accessible, but it’s easy and accessible already. . . . [D]eepfakes are already in reach for anyone who wants to cause trouble on the internet. It’s not that the tech isn’t ready yet. It just isn’t useful.”); Jeffrey Westling, *Deep Fakes: Let’s Not Go Off the Deep End*, TECHDIRT (Jan. 30, 2019), <https://www.techdirt.com/articles/20190128/13215341478/deep-fakes-lets-not-gooff-deep-end.shtml>.

<sup>30</sup> Mark J. Pescatore, *Forensic Video Experts: Fake Videos Not Threat to Courtroom Evidence*, PIPELINE COMM. (June 24, 2019), <https://www.pipcomm.com/2019/06/24/forensic-video-experts-fake-videos-not-threat-to-courtroom-evidence/>.

## IV. Conclusion and Drafting Alternatives

This memo has covered a number of possible changes to address deepfakes and machine learning. Assuming, again, that any change is necessary, the most straightforward and effective changes are the following:

### 1. *Changes to Rule 901(b)*: [ASSUMING NO ADDITION OF RULE 707]

[901](b) **Examples**. The following are examples only—not a complete list—of evidence that satisfies the requirement [of Rule 901(a)]:

(9) *Evidence about a Process or System*. For an item generated by a process or system:

(A) evidence describing it and showing that it produces ~~an accurate~~ **a reliable** result; and

**(B) if the proponent acknowledges that the item was generated by artificial intelligence, additional evidence that:**

**(i) describes the training data and software or program that was used; and**

**(ii) shows that they produced reliable results in this instance.**

### 2. *Proposed New Rule 901(c) to address “Deepfakes”*:

**901(c): Potentially Fabricated or Altered Evidence Created By Artificial Intelligence [By an Automated System].**

**If a party challenging the authenticity of computer-generated or other electronic evidence demonstrates to the court that a jury reasonably could find that the evidence has been altered or fabricated, in whole or in part, by artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.**

#### Draft Committee Note

This new subdivision is intended to set forth guidance and standards when the opponent alleges that an audio or video item is a “deepfake” --- i.e., that it has been altered by artificial intelligence so that it is not what the proponent says it is.

The term “artificial intelligence” can have several meanings, and it is not a static term. In this rule, “artificial intelligence” means software used to perform tasks or produce output previously thought to require human intelligence.

The rule sets out a two-step process for regulating claims of deepfakes. First, the opponent must set forth enough information for a reasonable person to find that the item has been altered by the use of artificial intelligence. Thus, a broad claim of “deepfake” is not enough to put the court and the proponent to the time and expense of showing that the item has not been manipulated by artificial intelligence. Second, assuming that the opponent has shown enough to merit the enquiry, the proponent must show to the court that the item is more likely than not genuine. While that Rule 104(a) standard is higher than ordinarily required for a showing of authenticity, it is justified given that any member of the public has the capacity to make a deepfake, with little effort and expense, and deepfakes have become more difficult to detect. It is therefore reasonable for the court to require a showing, by a preponderance of the evidence, that the item is not a deepfake, once the opponent has met its burden of going forward.

### **3. New Rule 707**

#### **Rule 707. Machine-generated Evidence**

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

#### *Draft Committee Note*

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information, from software-driven blood-alcohol concentration results to probabilistic genotyping software. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine’s process. Where an expert relies on such a method, the method – and the expert’s reliance on it – will be scrutinized pursuant to Rule 702. But if machine or software output is presented on its own, without the accompaniment of a human expert, Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered directly, it is subject to the requirements of Rule 702 (a)-(d).

It is anticipated that a Rule 707 analysis will involve the following, where applicable:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training

data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- [Ensuring that the opponent has been provided sufficient access to the program, and that independent researchers have had sufficient access to the program, to allow both adversarial scrutiny and sufficient peer review beyond simply validation studies conducted by the developer or related entities. Where a developer has declined to make a research license or equivalent access widely available to independent researchers, courts should be wary of allowing output from such a process.]

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand. For example, if the case at hand involves a DNA mixture of several contributors, likely related to each other, and a low quantity of DNA, the software should be shown to be valid in those circumstances before being admitted.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over machine output that is regularly relied upon in commercial contexts outside litigation and that, as a result, is not likely to render output that is invalid for the purpose it is offered. Examples might include the results of a mercury-based thermometer, battery-operated digital thermometer, or automated averaging of data in a spreadsheet, in the absence of evidence of untrustworthiness.

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



1 **Rule 901. Authenticating or Identifying Evidence.**

2 **(a) In General.** To satisfy the requirement of authenticating or identifying an item of  
3 evidence, the proponent must produce evidence sufficient to support a finding that the  
4 item is what the proponent claims it is.

5 **(b) Examples.** The following are examples only – not a complete list – of evidence that  
6 satisfies the requirement:

7 **(b)(1) Testimony of a Witness with Knowledge.** Testimony that an item is what  
8 it is claimed to be.

9 **(b)(2) Nonexpert Opinion About Handwriting.** A nonexpert's opinion that  
10 handwriting is genuine, based on a familiarity with it that was not acquired for  
11 the current litigation.

12 **(b)(3) Comparison by an Expert Witness or the Trier of Fact.** A comparison with  
13 an authenticated specimen by an expert witness or the trier of fact.

14 **(b)(4) Distinctive Characteristics and the Like.** The appearance, contents,  
15 substance, internal patterns, or other distinctive characteristics of the item, taken  
16 together with all the circumstances.

17 **(b)(5) Opinion About a Voice.** An opinion identifying a person's voice – whether  
18 heard firsthand or through mechanical or electronic transmission or recording –  
19 based on hearing the voice at any time under circumstances that connect it with  
20 the alleged speaker.

21 **(b)(6) Evidence About a Telephone Conversation.** For a telephone conversation,  
22 evidence that a call was made to the number assigned at the time to:

23 **(b)(6)(A)** a particular person, if circumstances, including self-identification,  
24 show that the person answering was the one called; or

25 **(b)(6)(B)** a particular business, if the call was made to a business and the  
26 call related to business reasonably transacted over the telephone.

27 **(b)(7) Evidence About Public Records.** Evidence that:

28 **(b)(7)(A)** a document was recorded or filed in a public office as authorized  
29 by law; or

30 **(b)(7)(B)** a purported public record or statement is from the office where  
31 items of this kind are kept.

32 **(b)(8) Evidence About Ancient Documents or Data Compilations.** For a  
33 document or data compilation, evidence that it:

34 **(b)(8)(A)** is in a condition that creates no suspicion about its authenticity;

35 **(b)(8)(B)** was in a place where, if authentic, it would likely be; and

36 **(b)(8)(C)** is at least 20 years old when offered.

37 **(b)(9) Evidence About a Process or System.** For an item generated by a process  
38 or system:

39 **(b)(9)(A)** ~~E~~evidence describing ~~a process or system~~it and showing that it  
40 produces ~~an accurate~~a reliable result; and

41 **(b)(9)(B)** if the proponent acknowledges that the item was generated by  
42 artificial intelligence, additional evidence that:

43 (b)(9)(B)(i) describes the training data and software or program  
44 that was used; and

45 (b)(9)(B)(ii) shows that they produced reliable results in this  
46 instance.

47 **(b)(10) Methods Provided by a Statute or Rule.** Any method of authentication or  
48 identification allowed by court rule or statute of this state.

49 (c) Potentially Fabricated or Altered Evidence Created By Artificial Intelligence

50 [By an Automated System]. If a party challenging the authenticity of computer-  
51 generated or other electronic evidence demonstrates to the court that a jury reasonably

**Commented [JW1]:** The proposed changes to (b)(9) assume no addition of rule 707.

52 [could find that the evidence has been altered or fabricated, in whole or in part, by artificial](#)  
53 [intelligence \[by an automated system\], the evidence is admissible only if the proponent](#)  
54 [demonstrates to the court that it is more likely than not authentic.](#)

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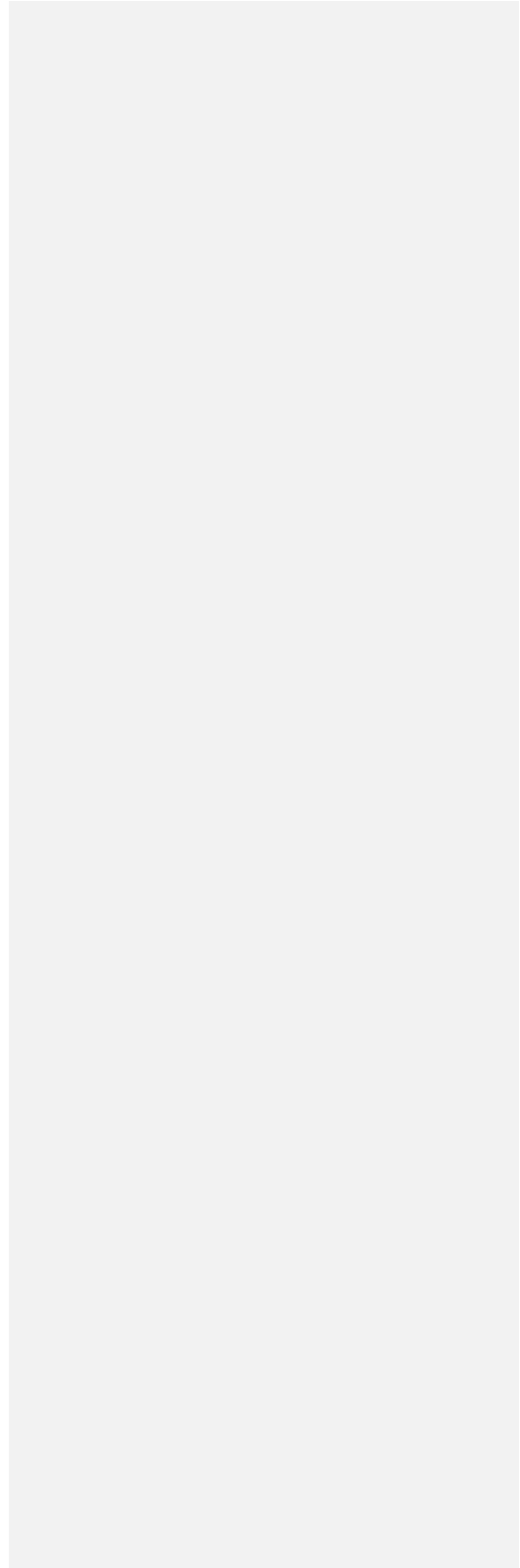
56 **2011 Advisory Committee Note.** The language of this rule has been amended as part of  
57 the restyling of the Evidence Rules to make them more easily understood and to make  
58 class and terminology consistent throughout the rules. These changes are intended to be  
59 stylistic only. There is no intent to change any result in any ruling on evidence  
60 admissibility. This rule is the federal rule, verbatim.

61 **Original Advisory Committee Note.** Subdivision (b)(2) is in accord with State v.  
62 Freshwater, 30 Utah 442, 85 Pac. 447 (1906). Subdivision (b)(8) is comparable with Rule  
63 67, Utah Rules of Evidence (1971), except that the former rule imposed a 30-year  
64 requirement. Subdivision (b)(10) is an adaptation of subdivision (10) in the comparable  
65 federal rules to conform to state practice.

66

URE 901. Amend. Redline.

Draft: January 2, 2025





1 **Rule 707. Machine-Generated Evidence.**

2 Where the output of a process or system would be subject to Rule 702 if testified to by a  
3 human witness, the court must find that the output satisfies the requirements of Rule  
4 702(a) and (b). This rule does not apply to the output of basic scientific instruments or  
5 routinely relied upon commercial software.

6

# TAB 5

1 **Rule 702. Testimony by Experts.**

2 **(a)** Subject to the limitations in paragraph (b), a witness who is qualified as an expert by  
3 knowledge, skill, experience, training, or education may testify in the form of an opinion  
4 or otherwise if the expert’s scientific, technical, or other specialized knowledge will help  
5 the trier of fact to understand the evidence or to determine a fact in issue.

6 **(b)** Scientific, technical, or other specialized knowledge may serve as the basis for expert  
7 testimony only if there is a threshold showing that the principles or methods that are  
8 underlying in the testimony

9 **(b)(1)** are reliable,

10 **(b)(2)** are based upon sufficient facts or data, and

11 **(b)(3)** have been reliably applied to the facts, [or if not applied to the specific facts](#)  
12 [of the case, are intended to educate the factfinder about general principles relevant](#)  
13 [to the case.](#)

14 **(c)** The threshold showing required by paragraph (b) is satisfied if the underlying  
15 principles or methods, including the sufficiency of facts or data and the manner of their  
16 application to the facts of the case, are generally accepted by the relevant expert  
17 community.

18 \_\_\_\_\_

19 [2025 Advisory Committee Note. The language of subparagraph \(b\)\(3\) has been amended](#)  
20 [to make express allowance for the possibility of so-called “blind experts,” which are](#)  
21 [already permitted under existing Utah practice and caselaw. See, e.g., State v. Clopten,](#)  
22 [2009 UT 84, ¶ 36, 223 P.3d 1103.](#)

23 **2011 Advisory Committee Note.** The language of this rule has been amended as part of  
24 the restyling of the Evidence Rules to make them more easily understood and to make  
25 class and terminology consistent throughout the rules. These changes are intended to be

26 stylistic only. There is no intent to change any result in any ruling on evidence  
27 admissibility.

28 **Original Advisory Committee Note.** Apart from its introductory clause, part (a) of the  
29 amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in  
30 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The  
31 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c).  
32 Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule.  
33 Although Utah law foreshadowed in many respects the developments in federal law that  
34 commenced with Daubert, the 2007 amendment preserves and clarifies differences  
35 between the Utah and federal approaches to expert testimony.

36 The amended rule embodies several general considerations. First, the rule is intended to  
37 be applied to all expert testimony. In this respect, the rule follows federal law as  
38 announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal  
39 counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out  
40 unreliable expert testimony. In performing their gatekeeper function, trial judges should  
41 confront proposed expert testimony with rational skepticism. This degree of scrutiny is  
42 not so rigorous as to be satisfied only by scientific or other specialized principles or  
43 methods that are free of controversy or that meet any fixed set of criteria fashioned to test  
44 reliability. The rational skeptic is receptive to any plausible evidence that may bear on  
45 reliability. She is mindful that several principles, methods or techniques may be suitably  
46 reliable to merit admission into evidence for consideration by the trier of fact. The fields  
47 of knowledge which may be drawn upon are not limited merely to the "scientific" and  
48 "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not  
49 in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or  
50 education". Finally, the gatekeeping trial judge must take care to direct her skepticism to  
51 the particular proposition that the expert testimony is offered to support. The Daubert  
52 court characterized this task as focusing on the "work at hand". The practitioner should

53 equally take care that the proffered expert testimony reliably addresses the “work at  
54 hand”, and that the foundation of reliability presented for it reflects that consideration.

55 Section (c) retains limited features of the traditional Frye test for expert testimony.  
56 Generally accepted principles and methods may be admitted based on judicial notice.  
57 The nature of the “work at hand” is especially important here. It might be important in  
58 some cases for an expert to educate the factfinder about general principles, without  
59 attempting to apply these principles to the specific facts of the case. The rule recognizes  
60 that an expert on the stand may give a dissertation or exposition of principles relevant to  
61 the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony  
62 that seeks to set out relevant principles, methods or techniques without offering an  
63 opinion about how they should be applied to a particular array of facts will be, in most  
64 instances, more eligible for admission under section (c) than case specific opinion  
65 testimony. There are, however, scientific or specialized methods or techniques applied at  
66 a level of considerable operational detail that have acquired sufficient general acceptance  
67 to merit admission under section (c).

68 The concept of general acceptance as used in section (c) is intended to replace the novel  
69 vs. non-novel dichotomy that has served as a central analytical tool in Utah’s Rule 702  
70 jurisprudence. The failure to show general acceptance meriting admission under section  
71 (c) does not mean the evidence is inadmissible, only that the threshold showing for  
72 reliability under section (b) must be shown by other means.

73 Section (b) adopts the three general categories of inquiry for expert testimony contained  
74 in the federal rule. Unlike the federal rule, however, the Utah rule notes that the  
75 proponent of the testimony is required to make only a “threshold” showing. That  
76 “threshold” requires only a basic foundational showing of indicia of reliability for the  
77 testimony to be admissible, not that the opinion is indisputably correct. When a trial  
78 court, applying this amendment, rules that an expert's testimony is reliable, this does not  
79 necessarily mean that contradictory expert testimony is unreliable. The amendment is  
80 broad enough to permit testimony that is the product of competing principles or methods

81 in the same field of expertise. Contrary and inconsistent opinions may simultaneously  
82 meet the threshold; it is for the factfinder to reconcile - or choose between - the different  
83 opinions. As such, this amendment is not intended to provide an excuse for an automatic  
84 challenge to the testimony of every expert, and it is not contemplated that evidentiary  
85 hearings will be routinely required in order for the trial judge to fulfill his role as a  
86 rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be  
87 determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26,  
88 deposition testimony and memoranda of counsel.

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