



**AMERICAN COLLEGE
OF TRIAL LAWYERS**

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By Federal Express and by e-mail through the portal

The Honorable Jesse M. Furman, Chair of the
Advisory Committee on Evidence Rules
U.S. Judicial Conference Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20002

Re: Federal Rules of Evidence Committee of the American College of Trial
Lawyers (the "College") Comments on Proposed Amendments to Rule
609 of the Federal Rules of Evidence and Proposed New Rule 707

Dear Judge Furman:

This letter states the comments of the Federal Rules of Evidence Committee of the American College of Trial Lawyers (the "College") pertaining to the proposed Amendments to Federal Rule of Evidence ("FRE") 609 and the new proposed FRE 707. The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics and professionalism of the legal profession. Our Committee is charged by the College with monitoring the operation of the Federal Rules of Evidence generally, to determine the adequacy of the operation of the Rules in federal cases, and to evaluate proposed changes to the Rules. We submit these comments with the hope that they may prove useful to the Advisory Committee on Evidence Rules in the rulemaking process.

Our Committee has reviewed and analyzed the materials in the Agenda Book for the Advisory Committee on Evidence Rules dated November 5, 2025. William P. Keane, Esq., a Regent of the College, and I also attended virtually the Committee meeting on November 5, 2025.

In consultation with the leadership of the College, we are authorized to state on behalf of the College that the College is in favor of the proposed Amendments to FRE 609 and new proposed FRE 707.

Proposed Amendments to Federal Rule of Evidence 609, entitled Impeachment by Evidence of a Criminal Conviction

1. Proposed Amendment to FRE 609(a)(1)(B): The College believes that the addition of the word "substantially" to the balancing test contained within FRE 609(a)(1)(B) is a desirable amendment which will help effectuate Congress' intent to provide robust, but fair, protections for criminal defendants. The College agrees with the Committee's assessment that the inclusion of the word "substantially" will "provide more protection to criminal defendants so that they would not be unduly deterred from exercising their rights to testify." (May 15, 2025 Memorandum from the Hon. Jesse M. Furman to the Hon. John D. Bates).

The College also agrees that the adjustment to the balancing test language should encourage federal courts to "more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence." (Id.) Furthermore, the proposed Amendment to FRE 609(a)(1)(B) will create consistency within FRE 609. FRE 609(b)(1), entitled Limit on Using the Evidence after 10 Years, includes the word "substantially" in its balancing test. The adoption of the same balancing test for non-dishonesty prior convictions in FRE 609(a)(1)(B) that is used for convictions more than 10 years old in FRE 609(b) will ensure that the subparagraphs of FRE 609 are internally consistent. In our view, this is a logical and desirable outcome.

2. Proposed Amendment to FRE 609(b): The College agrees with the Committee's assessment that the inclusion of an end date for the ten-year period specified in FRE 609(b) is needed to provide uniformity in how federal courts measure the ten-year period. The College also agrees with the Committee "that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial." (Id.)

For all of these reasons, the College agrees with all of the proposed Amendments to FRE 609.



Proposed New Federal Rule of Evidence 707, entitled Machine-Generated Evidence

As to proposed FRE 707, the College wishes to acknowledge an instructive article entitled "AI Evidence Rule Tweaks Encourage Judicial Guardrails" published recently on December 9, 2025, in Law 360 by John S. Siffert, Esq., a founding partner of Lankler Siffert & Wohl LLP, Jillian Berman, Esq., a partner of the firm, and Cindy X Kuang, a law clerk at the firm. Mr. Siffert, a Member of the Judicial Advisory Committee on Evidence Rules, is an esteemed Fellow of the American College of Trial Lawyers. We have attached a copy of the article to this letter, and we adopt and incorporate it by reference.

In light of the rapid proliferation of machine-generated evidence, including evidence created by artificial intelligence ("AI"), the College believes that new FRE 707 is necessary and advisable to provide guidance to federal judges and trial attorneys. FRE 707 will better enable federal judges to regulate the use and admissibility of machine-generated evidence, particularly where such evidence functions similarly to expert witness testimony and raises parallel issues of reliability, authenticity, bias, and error. The College believes that FRE 707 will provide an important safeguard to ensure that machine-generated evidence, including evidence created by AI, will be subject to the same standards of admissibility under *Daubert* as traditional expert witness testimony. The College also agrees that the new Rule should "not apply to the output of simple scientific instruments," (FRE 707), such as thermometers.

Given the speed with which AI related technologies have progressed and will likely continue to evolve, we note the following practical questions and issues raised by FRE 707:

1. How will FRE 707 interface with the obligation of Fed. R. Civ. P. 26(a)(1)? Will such a disclosure of a "machine generated witness" be necessary and what will it look like?
2. How will FRE 707 affect the obligation of parties under Fed. R. Civ. P. 34? What kinds of inspections, objections, etc. will be deemed appropriate and how will they work?
3. Will a FRE 707 proffer of evidence work without an expert? Or if a lay witness is used, how will that work?
4. Will a new pattern jury instruction be necessary? What will it state? Will an array of more granular limiting instructions, general or specific, be needed? What will they state?



In looking ahead to further, potential implications of FRE 707, specifically in criminal cases, one consequential question is whether federal courts will need to revisit the long-held view that machine-generated evidence is not testimonial so as to trigger the Sixth Amendment's Confrontation Clause. *See, e.g., U.S. v. Hill*, 63 F.4th 335, 359 (5th Cir. 2023), *cert. denied*, 144 S.Ct. 207 (2023) (cell-phone extraction reports); *U.S. Waguespack*, 935 F.3d 322, 333-34 (5th Cir. 2019), *cert. denied*, 589 U.S. 1152 (2020) (downloaded computer images); *U.S. v. Lamons*, 532 F.3d 1251, 1265 (11th Cir. 2008), *cert. denied*, 555 U.S. 1009 (2008) (telephone records); *U.S. v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied*, 557 U.S. 934 (2009) (blood-sample test results).

According to U.S. Supreme Court precedent to date, the Confrontation Clause is triggered in connection with machine-generated evidence only when accompanied by evidence determined to be "testimonial," such as a forensic analyst report when its non-testifying author certified that testing procedures were properly followed, and no circumstances occurred to affect the integrity of the results, etc. *See Bullcoming v. New Mexico*, 564 U.S. 647, 569-660 (2011). Such "representations" are "testimonial" because they are "not revealed in raw, machine-produced data[.]" *Id.* at 660. In *U.S. v. Hill*, the Fifth Circuit agreed with the government that the cell-phone extraction reports at issue were not "testimonial" statements, but rather "raw, machine produced data that contained no independent analysis or opinion." *Hill*, 63 F.4th at 358-59. The Fifth Circuit noted that the government successfully argued in the trial court that the reports were "not opinion piece[s] in which someone was evaluating the evidence[.]" *Id.* at 357.

The published court decisions to date, however, do not appear to have addressed where machine-generated evidence is headed, if not already squarely there. How should such evidence driven by AI be addressed under the Sixth Amendment if it does, in fact, include "analysis," "opinion," or an "evaluation" or inferences extending well beyond "raw, machine-produced data?" Can it – should it? – be as simple as maintaining the current court-drawn line that any evidence strictly generated by a machine will *per se* never be "testimonial" triggering the Confrontation Clause? It will be incumbent upon the federal courts to navigate through a resolution of these difficult issues.

We recognize that FRE 707 is brief and contains only two sentences. However, the Committee Notes drafted by the Advisory Committee provide helpful guidance in the use and application of FRE 707. The key objective of Rule 707 is to require FRE 702-level scrutiny to machine-generated evidence, including evidence generated by AI. Therefore, the College believes that FRE 707 does not need to be more expansive at this time.



Moreover, FRE 707 provides a reasoned, well-balanced framework to assist federal judges and practitioners in addressing the evidentiary aspects of machine-generated evidence. FRE 707 will prevent litigants in federal court from using machine-generated evidence or evidence generated by AI to bypass human expert witness standards. The College strongly believes that if a human must satisfy the *Daubert* admissibility standards embodied in FRE 702 to present expert witness testimony, then so too must the AI that creates the equivalent output.

Although the College recognizes that the implementation of FRE 707 may well evolve as judges and trial attorneys gain more experience in the use of machine-generated evidence, the College believes that the time has come for FRE 707 to ensure that federal courts maintain rigorous standards for the admissibility of reliable and authentic machine-generated evidence in civil and criminal cases pending in the federal courts.

In conclusion, the College is pleased to have this opportunity to comment on the proposed Amendments to FRE 609 and new FRE 707 and appreciates the efforts undertaken by the Advisory Committee on Evidence Rules to amend and update the Federal Rules of Evidence.

Sincerely,



Henry D. Fellows, Jr., Esq.
Chair of the Federal Rules of Evidence
Committee of the American College of Trial
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cc: William P. Keane, Esq., Regent of the College
John A. Day, Esq., President of the College



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AI Evidence Rule Tweaks Encourage Judicial Guardrails

By **John Siffert, Jillian Berman and Cindy Kuang** (December 9, 2025)

The Judicial Conference's Advisory Committee on Evidence Rules has crafted a proposed Rule 707 that would permit courts to admit evidence that is machine-generated, including evidence created by artificial intelligence.

If adopted, proposed Rule 707 would formalize how machine outputs — now increasingly common in both criminal investigations and civil litigation — may be used in the courtroom. The Evidence Rules Committee has asked trial lawyers and others to submit comments by Feb. 16, 2026.[1]

Rule 707 has been under consideration for several years, and after preliminary approval by the Evidence Rules Committee, the Standing Committee overseeing all judicial advisory committees gave its approval in June to proceed to the next phase of the rulemaking process. The proposed rule is scheduled for a vote at the next meeting of the Evidence Rules Committee on May 7, 2026.

This article summarizes how proposed Rule 707 is expected to work, and analyzes how recent additions to the draft of the proposed committee note are designed to encourage judges to ensure sufficient guardrails for the admission and use of machine-generated evidence.

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

However, the text of proposed Rule 707 does not address how machine-generated evidence should be treated at trial once it has been admitted, when there is no expert to cross-examine regarding the reliability of the machine output. This is a scenario that can be reasonably anticipated given that machine-generated evidence may be self-authenticating,[2] or authenticated by lay testimony of a witness who is familiar only with the output of the machine.[3]

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

How Proposed Rule 707 Operates

Proposed Rule 707 incorporates the reliability framework of Rule 702, which regulates expert testimony, but applies it to evidence generated by machines rather than human experts.[4]



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Proposed Rule 707 permits machine-generated evidence to be admitted if the evidence satisfies the following four-part test governing expert witnesses:

- (a) the [machine's] scientific, technical, or other specialized function will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the [machine's output] is based on sufficient facts or data;
- (c) the [machine's output] is the product of reliable principles and methods; and
- (d) the [machine's inference] reflects a reliable application of the principles and methods to the facts of the case.[5]

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

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

Under Rule 707, by contrast, the machine-generated evidence could be presented directly to the jury, or perhaps accompanied only by a lay witness — for example, a technician who operated the system but lacks insight into its reasoning.[6] No witness would necessarily take the stand to explain the machine's reasoning to the jury or be subjected to cross-examination, though the parties may still introduce reports and data, as well as expert testimony, to support or undermine the evidence.

The Challenge That Proposed Rule 707 Addresses in Committee Note

The possibility of limited adversarial testing of machine-generated evidence poses a challenge to the fairness of a trial when such evidence is admitted. Existing evidentiary rules and case law that prohibit hearsay and require confrontation do not apply, because machine-generated evidence is not testimonial.[7]

Still, there is a danger that the lack of symmetry between how machine-generated evidence and witness testimony are presented will inappropriately affect how much weight the jury will give to machine outputs.

The draft committee note, with tentatively approved changes, seeks to mitigate this danger in two ways.[8]

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

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

It is anticipated that these reliability standards will be difficult to meet — and sometimes impossible to meet — without presenting expert testimony. For example, without expert testimony it may be very difficult for a proponent to establish that the data used in the process is not biased and is sufficient for the task performed. Likewise, it may be difficult to establish a rate of error, and the explicability of the process, in the absence of expert testimony.[9]

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

Second, the Evidence Rules Committee also tentatively approved language in the note that recommends judges instruct the jury on how to treat machine-generated evidence and what weight to afford this evidence that has not been subjected to cross-examination.

The dissimilarity between machine-generated evidence and witness testimony risks confusing jurors into accepting or rejecting machine evidence without independent evaluation.

Machine-generated evidence can take a variety of forms, including aggregations of large datasets, evaluations of data based on probabilities or predictions of future outcomes. This type of evidence is different in nature than direct and circumstantial evidence, which is primarily admitted through witness testimony or documents authenticated by witnesses.

Jurors are currently instructed to use their common sense when evaluating testimony-based evidence, and not to accept a witness's testimony merely because the witness has been deemed or accepted as an expert.[10] That guidance is not helpful in the case of machine-generated evidence, where no witness with firsthand knowledge of the inputs or outputs is necessarily called.

As articulated by the draft committee note,

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

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

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

Notably, the draft committee note in its current formulation does not prescribe what standard the jury should apply when evaluating machine-generated evidence. It leaves to the court's discretion whether to formulate a charge that suggests a particular standard, such as common sense-plus — e.g., corroboration — or care and caution.[11]

The expectation is that one size will not fit all, and over time, the courts will determine what standard is best in which situation.

Conclusion

Proposed Rule 707's structure for the admissibility of, and guardrails for, machine-generated evidence will be ripe for the Evidence Rules Committee to act in May 2026 at its spring meeting.

The request for public comment on proposed Rule 707 offers an important opportunity for practitioners and judges to give input on whether the rule should be adopted, modified or rejected.

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Jillian Berman is a partner at the firm. She previously served as a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York.

Cindy X. Kuang is a law clerk at Lankler Siffert & Wohl.

Disclosure: Siffert is a member of the Judicial Advisory Committee on Evidence Rules.

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[1] Comments can be submitted at: <https://www.uscourts.gov/forms-rules/proposed-amendments-published-public-comment>.

[2] Fed. R. Evid. 902(13) (Evidence That Is Self-Authenticating—Certified Records Generated by an Electronic Process or System).

[3] Fed. R. Evid. 901(b)(9) (Authenticating or Identifying Evidence—Evidence About a Process or System).

[4] Proposed Fed. R. Evid. 707 (Aug. 2025) (Machine-Generated Evidence).

[5] See *id.*; Fed. R. Evid. 702 (Testimony by Expert Witnesses).

[6] Draft Committee Note to Proposed Fed. R. Evid. 707.

[7] See, e.g., *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007); *United States v. Lamons*, 532 F.3d 1251, 1265 (11th Cir. 2008) (holding that machines are not witnesses within the meaning of the Confrontation Clause).

[8] The draft of the Committee Note to Proposed Rule 707 that was tentatively approved during the Evidence Rules Committee's November 5, 2025 meeting includes additional language not previously published. The newly added language is expected to be included when the Draft Committee Note comes up for a final vote in May 2026.

[9] Draft Committee Note to Proposed Fed. R. Evid. 707.

[10] See e.g., Sand, Modern Federal Jury Instructions—Criminal § 7.01[5], instr. 7-21 providing, in part: "You may give the opinion evidence whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you."

[11] To craft jury instructions addressing machine-generated evidence, courts can adapt established principles from existing jury instructions. In the case of accomplice testimony, for example, jurors are told that such evidence should be "scrutinized with great care and viewed with particular caution." *Id.*, instr. 7-6.