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Via regulations.gov

Honorable Jesse M. Furman
Chair, Advisory Committee on Evidence Rules
Thurgood Marshall Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Federal Rule of Evidence 707

Washington Legal Foundation (WLF) appreciates the opportunity to comment on Proposed Rule of Evidence 707. WLF is a public-interest law firm and policy center promoting free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF has a keen interest in ensuring that the evidence presented to a jury is sufficient, relevant, and reliable. So WLF regularly comments on proposed amendments to the Federal Rules[1] and files as amicus curiae to advocate for a proper interpretation of the district court's gatekeeping role.[2]

"Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name."[3] So it goes for the Federal Rules of Evidence. As this body's repeated need to clarify the scope of Rule 702 since the 2000 amendments—*we really mean it, folks*—informs us, the Judicial Conference's direction to the bar and the district courts must be pellucid. Ambiguity risks garbling the message—which risks accidental injustice.

No doubt, the rapid rollout and relatively comprehensive adoption of sophisticated computer programming, commonly referred to as "artificial intelligence" (AI), has unsettled expectations. Even those casually acquainted with those tools know that their output is sometimes incredible—in both the formal and informal sense of the word. So the concern that these tools may help generate smooth-sounding evidence where "unreliability is buried in the program and difficult to

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[1] *E.g.*, WLF Comment, Proposed Amendments to Federal Rule of Evidence 702 (Dec. 14, 2021).

[2] *Kumho Tire Co. v. Carmicheal*, 526 U.S. 137 (1999); *Gen'l Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Down Pharms.*, 509 U.S. 579 (1993).

[3] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

detect”[4] is certainly understandable. Junk data that could never survive if proffered by an expert shouldn’t become admissible because a lay witness, such as a “technician who enters a question and prints out the answer,”[5] can smuggle material past the judicial gatekeeper.

But as other commenters have already noted, the Proposed Rule’s text doesn’t get us there.[6] There are three significant problems with Rule 707 that counsel against adoption in its present form.

First, the term “machine-generated evidence” is not sufficiently aimed at the Advisory Committee’s concerns about AI. Second, the effort to graft Rule 702 into the Proposed Rule risks backfiring. Third, the introduction of the term “simple scientific instruments” courts misunderstanding and may jeopardize current protections against unreliable testimony.

Let’s take each in turn.

“Machine-Generated Evidence”

“Machine-generated” isn’t used elsewhere in the Federal Rules of Evidence. Perhaps we all know that this text is directed at the output of probabilistic, generative computer programs. But the Proposed Rule isn’t limited to that target. This isn’t the first time that the judiciary has struggled to “define the kinds of material . . . understood to be embraced within [a] shorthand description,” but that’s no excuse to create a vast and vague term that lets judges “know it when [they] see it.”[7]

To state the obvious: what is a “machine?” Black’s—concededly in the patent context—defines it as a “device or apparatus consisting of fixed and moving parts that work together to perform some function.”[8] Other dictionaries provide roughly similar definitions.[9] Taken literally, a computer printout is “machine-generated evidence.” It

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[4] Request for Comments on Proposed Amendments to Federal Rules and Forms at 102, Comm. on Rules of Practice & Procedure (Aug. 15, 2025).

[5] Proposed Rule 707, Advisory Comm. Note.

[6] *E.g.*, Lawyers for Civil Justice Comment (Jan. 5, 2026).

[7] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[8] “Machine,” Black’s Law Dictionary (12th Ed. 2024).

[9] *In re: Art & Architecture Books of the 21st Century*, 2023 WL 2048518, at *15 (C.D. Cal. Bankr. 2023) (“A plain language definition of the term, “machinery,” is set forth in the Merriam-Webster Dictionary that machinery, a noun, means ‘machines in general or as a functioning unit’ or ‘the working parts of a machine’ and that the word, ‘machine,’ referred to in the definition of

may be obvious to the Advisory Committee that's not what the Proposed Rule captures, but "machine" is too capacious a term to guarantee that it will be narrowly construed to modern AI.

The term "machine-generated" was doubtless chosen as a future-proofing measure. In the past, some local rules of procedure were updated to recognize fax machines, and technology has rendered those additions vestigial at best.[10] But anchoring the Proposed Rule on the generic word "machine" is worse than creating a Rule with planned obsolescence aimed at predictive AI tools. If we knew what the future of "machines" would be, we'd be billionaires—not nonprofit attorneys or members of the Judicial Conference. But the Proposed Rule assumes that future "machines" capable of generating evidence will neatly fit into the text. That's not necessarily going to be so.

In short, if the Committee is focused on the reliability concerns flowing from predictive, probabilistic, generative computer programs—it would be better to say so than implement a new Rule grounded in such a broad and generic definition.

Sweeping in Rule 702

WLF strongly supports the current iteration of Rule 702. It clarifies the judge's gatekeeping role and keeps junk science and bad data from distorting jury verdicts. But 702 doesn't smoothly graft onto the Proposed Rule.

The Proposed Rule expressly does not apply to expert testimony, but where "evidence is offered without an expert witness."[11] Yet the Proposed Rule applies if the "machine-generated evidence . . . would be subject to Rule 702 if testified to by a witness."[12] That seems to cabin the scope of Proposed Rule 707 to machine-generated "testi[mony] in the form of an opinion" or specialized knowledge.[13]

The Advisory Committee seems to be trying to get at circumstances where a non-expert punches in a bunch of, say, economic data into a sophisticated computer program and asks it to analyze its effect on consumer welfare. The machine spits out

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'machinery' means 'a mechanically, electrically, or electronically operated device for performing a task.'").

[10] *E.g.*, Cal. R. Del Norte Super. Ct. R. 2.3 ("Facsimile Filing"); 1 Mo. Code of State Regs. 50-2.020(4)(B) ("For purposes of the rule, the parties may agree to electronic transmission of a pleading or motion by means of facsimile or e-mail").

[11] Proposed Rule 707.

[12] *Id.*

[13] FRE 702.

an analysis that a proposed merger or business practice is anti-competitive. Then a plaintiff's attorney either introduces that output directly or throws the human prompter on the stand (far cheaper than hiring an actual expert)—but leaves the jury without knowledge that the predictive, probabilistic functions of the program didn't calculate the numbers correctly. The appearance of expertise. The reality of hallucinated math.

The Proposed Rule tries to solve this by using Rule 702 as a heuristic. By referencing 702, the Proposed Rule seems to ask a court to decide whether the AI tool produces helpful results "based on sufficient facts or data" that are "the product of reliable principles and methods," "reflect[ing] a reliable application of the principles and methods to the facts of the case."[14]

So far, so good. But running that solely through Rule 702 suffers from the problem that, because Rule 702 is focused on cross-examinable human witnesses providing an expert opinion, the sufficiency threshold for admission is that it is "more likely than not" the case that expert's testimony is relevant, reliable, and based in sufficient facts or data.[15] Non-experts offering a computer-generated output should be held to a higher standard than that.

As written, the Proposed Rule instructs a court to allow for introducing AI-generated evidence if the judge thinks there's 60 percent confidence that the output will be 100 percent accurate. That will incentivize, not deter, the recourse to unreliable AI-assisted opinion testimony.

"Simple Scientific Instruments"

Another peril lurks in the Proposed Rule's final sentence, which excludes "the output of simple scientific instruments" from its scope. Frankly, it's unclear what that phrasing means. The proposed Committee Note suggests that it's designed to carve out an exception for tools like thermometers.[16] The problem is that "simple scientific instruments" goes far beyond rudimentary tools for checking temperatures.[17]

An "instrument" could be a physical tool—like a calculator or the forementioned thermometer. But in the research field, "instrument" can take on a far broader meaning. As just one example, the American Psychological Association's dictionary defines an "instrument" as "any tool, device, or other means by which

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[14] *Id.* (a–d).

[15] *Id.*

[16] Proposed Rule 707, Advisory Comm. Note.

[17] *See* Lawyers for Civil Justice Comment at 5 ("The text authorizes what the Note disclaims").

researchers assess or gather data about study participants."[18] Are surveys "instruments" under the Proposed Rule?

"Scientific" is likewise unbounded. The term might conjure up learned professionals in lab coats, but economics has long been known as the "dismal science." Are the outputs of basic econometric tools now an end-run around the strictures of Rule 702?

"Simple," meanwhile, suffers from a fatal relativity problem. "Simple" compared to what? A TI-83 calculator is simple compared to a Cray supercomputer, but it's complicated compared to an abacus. Over time, will the very AI tools that the Proposed Rule is aimed at slip from being "machine-generated evidence" into "simple, scientific instruments" as generative technology scales?

Another problem: introducing this term necessarily beckons the negative implication canon. By naming "simple scientific instruments," the Proposed Rule plausibly implies that what isn't "machine-generated evidence" *is* a "simple scientific instrument" and may be directly introduced or testified to by a lay witness. Assuming that the Committee's understanding of "machine-generated" is properly limited to AI risk (granted, no sure thing) does that mean that non-AI-compiled data sets may now be testified to by lay witnesses—outside the strictures of Rule 702? Given the hesitancy with which the lower courts complied with the 2000 and 2011 amendments to Rule 702, it would seem to behoove the Advisory Committee not to provide an opportunity to evade the surly bonds of 702 by allowing data-driven opinion testimony to be introduced through a non-expert.

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In sum, WLF understands and appreciates the Advisory Committee's concerns about junk testimony backed up by charts, graphics, video, text, or other outputs that may well be predicated on hard-to-find computer-generated errors and omissions. But, like some technology the Proposed Rule is directed at, the text of Proposed Rule 707 isn't ready for widespread adoption.

If it's necessary to bar the outputs of probabilistic, predictive, generative, computer programs from the well of the courtroom unless they are verified free from substantial error and stand on sufficient and reliable inputs, there's a better way to do that. Require the proponent to provide, preferably through expert testimony, clear and convincing evidence of the program's sufficiency, reliability, and relevance to the case before a judge may allow the products of that program's work to be introduced—full stop. That's a "reckonable" rule that constructs a fence and puts the judge at the gate.

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[18] Am. Psych. Ass'n, "Instrument," https://dictionary.apa.org/instrument (last visited Feb. 12, 2026).

The Committee should not adopt Proposed Rule 707.

Respectfully submitted,

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