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Executive Director

The Honorable Jesse M. Furman, Committee Chair
Professor Daniel Capra, Reporter
Members of the Advisory Committee on the Evidence Rules

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Submitted online

Re: Proposed Federal Rule of Evidence 707

Dear Judge Furman, Professor Capra, and Members of the Advisory Committee on Evidence Rules:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed new Federal Rule of Evidence 707. Our organization has a nationwide membership of thousands of direct members, and up to 40,000 other members through state affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. The majority of our members are trial lawyers who are regularly litigating in both state and federal courts around the country. Thus, NACDL is in a unique position of having input from the ongoing experiences of lawyers with substantial experience with the challenges posed by artificial intelligence and other machine-generated evidence. Currently, NACDL's Fourth Amendment Center is litigating technologies that include, but are not limited to, automated license plate readers, geo-fence warrants, mass cell-site location information, facial recognition technology, ShotSpotter, and forensic genetic genealogy.

I. Introduction

Given our organization's experience with these issues, we are keenly aware that "machine-generated evidence" and how courts should address it are important to both the general public and the law. While NACDL is pleased that the Advisory Committee on Evidence Rules ("Advisory Committee") is taking steps to address this emerging area of the law, we have concerns about the proposed FRE 707 (P.F.R.E 707) as currently written and encourage the Advisory Committee to pause before adopting it. Given the quick pace of technological change, a pause would give the Advisory Committee ample time to consider the ramifications of this proposed rule, its impact in our courtrooms around the country and on determinations that affect life and liberty.

If the Advisory Committee is inclined to move forward with the proposed rule at this time, NACDL would like to offer suggestions to clarify the rule and ensure that it accurately reflects the Advisory Committee's intent.

II. The Advisory Committee should pause before moving forward with this proposal at this time.

History shows us that technology evolves faster than the law can keep up. Since the Advisory Committee began considering an amendment to address machine-generated evidence, it has been keenly aware that this technology has been evolving rapidly. Private companies currently developing artificial intelligence (AI) systems claim uncertainty about AI consciousness¹, while scholars caution that anthropomorphizing these technologies “*serves to obscure the actions and accountability of people building and using the systems.*”² We simply do not yet know how these technologies will be presented in court. As other commentators have noted, the rule, as currently proposed, raises serious issues about applicability and feasibility. Adopting this rule, as written, at this time, risks cementing outdated technological concepts in the Federal Rules of Evidence. Considering that the Advisory Committee disfavors amending the same rules multiple years in a row, adopting this proposal would leave federal practitioners with an outdated rule for several years.³

Additionally, states have historically adopted the Federal Rules of Evidence into their own evidence rules.⁴ Adopting proposed Rule 707 now would compound the problem and leave states with a rule that is difficult to modify as technology evolves. For these reasons, NACDL urges the Advisory Committee to act with caution before promulgating any amendment on machine-generated evidence.

III. If the Advisory Committee elects to go forward with promulgating a rule, NACDL would like to raise the following areas of concern:

A. This rule risks subsuming the Federal Rule of Evidence 702.

The current text of P.F.R.E 707 assumes that evidence will be presented without an expert. It doesn’t require expert testimony but rather explicitly envisions and creates a situation that governs the admissibility of evidence without experts. Lawyers for Civil Justice has called this a “pathway for admission” in their comments to the Advisory Committee. The presumption

¹ Frank Landymore, *Anthropic CEO Says Company No Longer Sure Whether Claude Is Conscious*, FUTURISM (Feb. 14, 2026), available at <https://futurism.com/artificial-intelligence/anthropic-ceo-unsure-claude-conscious>

² Emily M. Bender & Nanna Inie, *We Need to Talk About How We Talk About “AI”*, TECH POLICY PRESS (Jan. 7, 2026), available at <https://www.techpolicy.press/we-need-to-talk-about-how-we-talk-about-ai/>

³ Memorandum from Daniel J. Capra on Amendments to Rule 609(a)(1) to Advisory Comm. on Evidence Rules (Oct. 1, 2024), in ADVISORY COMM. ON EVIDENCE RULES NOV. 8, 2024 AGENDA BOOK at 320, available at, [2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf](https://www.nacdl.org/2024-11-evidence-rules-committee-meeting-agenda-book-final-10-24.pdf)

⁴At this writing, Arizona, Kentucky, Louisiana, Michigan, and Ohio have adopted their own rules on expert testimony to match the amendment to Rule 702, which was made effective in December 1, 2023.

underlying the rule is that evidence will be presented in court by non-expert witnesses. The rule provides that, in this scenario, a judge must determine whether the evidence presented meets the requirements of F.R.E. 702 without the assistance of an expert witness. The rule incentivizes the removal of experts from the trial process altogether.

A major consideration for governmental agencies, including investigative agencies and prosecutors, is cost reduction. The logic of efficiency and convenience often undergirds the introduction of technology and tech solutions. The logic of cost-cutting is likely to apply to the expensive process of hiring expert witnesses. While the rule is not intended to encourage parties to opt for machine-generated evidence over expert witnesses, such a rule would inevitably result in encouraging cutting the cost of expert witnesses in favor of machine-generated evidence and lay witnesses.

Experts are vital where technology is concerned, particularly in the criminal legal system, where technologies known to produce unreliable results often continue to be used. Where novel technologies are concerned, experts become even more important.

For example, new complex technologies like AI applications are not created by a single person “*possessing personal knowledge of all the facts that are needed to demonstrate that the technology and its output are what its proponent claims them to be. Data scientists may be required to describe the data used to train the AI system. Developers may be required to explain the features and weights that were chosen for the machine-learning algorithm.*” (Grimm, Grossman, and Cormack)⁵. Witnesses who operate these technologies, or lay witnesses who present the result and output in court, are likely to have limited knowledge as to how they are created and the testing that measures their reliability. When such witnesses present evidence, the burden is likely to fall on defense counsel to challenge the reliability of the technology. This extra burden disproportionately affects under-resourced individuals and places a heavy burden on public defenders, who regularly face budgetary crises and may not have the resources to retain experts for every criminal case.

B. Instead of reversion to F.R.E. 702, proposed F.R.E. 707 should include the factors outlined in F.R.E 702(a)-(d) with modifications more appropriate to evidence instead of human expert analysis.

Proposed F.R.E. 707, which contemplates the types of evidence produced by some kind of scientific, machine, or computing process, would better be served by modifying the factors contained in F.R.E. 702 to properly apply to any such evidence admitted through either an expert or a lay person.

⁵ See Paul W. Grimm, et al., *Artificial Intelligence as Evidence*, 19 Nw. J. Tech. & Intell. Prop. 9 (2021).available at, <https://scholarlycommons.law.northwestern.edu/njtip/vbattery-operated-digital-thermometers-vary-widely-in-complexitybattery-operatedol19/iss1/2>)

While there is still danger inherent in creating a rule that allows evidence to be admitted which should require an expert⁶, if this rule change does go forward, proposed F.R.E. 707 should not simply refer back to the factors of F.R.E. 702, as 702 applies to evaluation of a human expert – not a computational output. As such, Proposed F.R.E. 707 should spell out with specificity the type of evaluation courts should apply when acting as the gatekeepers of the admission of such evidence.

F.R.E. 702 provides a good foundation for the types of inquiries the court must make but runs into hurdles when applied to a computational output. The Committee Note, at 48-55, states the following:

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

The Advisory Committee is indeed addressing the right concerns about the attempts to admit computer-generated outputs through lay witnesses; however, the proposed evaluation of this evidence type through F.R.E. 702(a)-(d) by the courts requires refinement. Taking the example of the lay technician who does not have the requisite expertise in the validity of the output, the rule does not explain how the technician, or the party seeking to admit the evidence, should apply the factors in 702(a)-(d) to make a showing of reliability as it relates to the generated output they seek to admit.

The factors in F.R.E. 702(a)-(d) state the following:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

⁶ Committee Note acknowledges that this rule does not intend to discourage expert testimony, nor does it anticipate that those intending to introduce such evidence without an expert will be able to overcome the hurdle of the analysis required by this rule. With this being the case, it would seem that such a rule is indeed unnecessary and that any such evidence should require an expert or be otherwise entered through stipulation. *See Committee Note*, at 61-73,

Those factors assume that there is a person who intends to admit the evidence and who has specialized knowledge to answer the questions posed in the evaluation of the evidence. Further, what kinds of information would the courts need to see to feel comfortable that the computer-generated outputs are not only reliable but also could be properly understood by the fact-finders if presented by such a lay technician?

The Committee Note provides some examples but does not entirely contemplate the problem of how such information would be produced and conveyed. Who would produce and explain evidence relating to the training data sets used by the algorithmic program in question? What kinds of reliability data would be provided and by whom? Ultimately, it seems that it would be impossible for any lay witness to meet the standards anticipated by this rule and such evidence would require some form of expert testimony.

C. Clarity of terms is necessary because the term “machine-generated” is so broad that it would apply to most evidence introduced in courts today.

As other commenters have noted, the term “machine-generated” is so broad as to apply to a huge array of evidence being introduced in the criminal legal system. Because of the broadness of the term, P.F.R.E. 707 risks becoming the default for admission of evidence that is generated by machines, is the output of machines, or even has machines involved in the process at any step. Any rule attempting to define evidence that is the result of a computational or scientific process should use industry-standard terminology that is widely accepted and understood.

1. The addition of language intending to exclude “the output of simple scientific instruments” as a means of clarity and efficiency, instead creates further confusion about the application of this rule.

The text of the proposed rule includes a caveat relating to the “output of simple scientific instruments” in an attempt to define the types of evidence the rule seeks to apply to and avoid unnecessary litigation in the courts. While the Advisory Committee note provides examples of what a “simple scientific instrument” might constitute⁷ this phrase could still be interpreted by the courts very broadly. Simplicity is in the eye of the beholder. As our society and technology evolve, what was once considered “complex” may later be deemed simplistic and basic.

The example in the Advisory Committee Note of a “battery-operated digital thermometer” clearly demonstrates this issue. First, battery-operated digital thermometers vary widely in complexity. A “battery-operated digital thermometer” could refer to a household device that measures a limited temperature range in both Fahrenheit and Celsius. Or it could refer to an instrument that measures a much wider range, including the Kelvin scale, and is used across various scientific industries. Or it could be a weather thermometer with humidity readings. Though these are all examples of a “battery-operated digital thermometer,” they vary widely in their purpose and complexity.

⁷ See *F.R.E. 707 Committee Note* at 106-114.

Even assuming the rule only contemplates the first example of a household device that has a limited range, these instruments should still be subject to inquiry regarding their accuracy and reliability. How was the device calibrated? Does it include a manual that specifies its accuracy range? Has it been tested? Do different environmental factors, such as moisture or extreme temperatures, change this reliability? How does it operate? Does it take temperatures of objects from a distance, or must the thermometer touch the object? What is the thermometer’s intended use case?

Any evidence, which is an output of a scientific or computational process, should be subject to these evaluations unless otherwise stipulated by the parties.

IV. Risk of Bias

If evidence, which is the output of a computer-generated process, is admitted without expert testimony that clearly explains the limitations of such evidence, there is a risk that factfinders will apply outsized bias to the weight of that evidence.

In her 2018 book, *Artificial Unintelligence: How Computers Misunderstand the World*, data journalist and New York University Professor Meredith Broussard, introduces the concept of “technochauvinism.”⁸ Broussard describes technochauvinism as “the belief that tech is always the solution,”⁹ and that “smart and well-intentioned people act like technochauvinists when they are blind to the faults of computational decision making or they are excessively attached to the idea of using computers to the point at which they want to use computers for everything, including things for which the computer is not suited.”¹⁰ Broussard further describes that as computers and other computational devices have become so ubiquitous in our everyday lives, society at large has developed a bias towards the belief that outputs from computers are correct, and that when found to be incorrect, it is because the user has made a mistake rather than the error resulting from issues in the coding or hardware - which was designed and built ultimately by other human beings.¹¹ “Technochauvinism” becomes more problematic with what award-winning scholar Professor Ruha Benjamin calls the “New Jim Code”; the “*employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the discriminatory systems of a previous era.*”¹²

Just as the Advisory Committee is concerned with bias or errors in the underlying data sets of these computational processes, it should also be concerned about the bias that exists on the part of courts or juries when reviewing outputs from these programs without any explanation from an

⁸ Broussard, 2018

⁹ Broussard, 2018 at p. 7

¹⁰ Broussard, 2018 at p. 12

¹¹ Broussard, 2018 at p. 8

¹² Ruha Benjamin, *Introduction*, in *Race After Technology: Abolitionist Tools for the New Jim Code* 1 (Polity 2019), p. 5

expert regarding the information about the design, testing, reliability, and accuracy of these programs. There is a higher risk that computational outputs will be absorbed by fact-finders with greater weight as absolute facts than other types of evidence.

V. Other Considerations

The Advisory Committee's intent is to ensure mechanisms to test the reliability of machine-generated evidence. Challenging the reliability of technology requires disclosing underlying information, such as training data, the technology's development, and its operation, without which the party opposing its introduction cannot adequately challenge it or make the technology explainable to a judge or jury. The Advisory Committee has also recognized this in its comment formulated to accompany P.F.R.E. 707. A rule of this nature would require discovery obligations, without which it is likely to be ineffective.

In the criminal legal system, the use of new technologies has proliferated at the investigation stage, often even to establish probable cause or reasonable suspicion. The results of these technologies have not yet been introduced into evidence, and their use is sometimes not disclosed to the defense. Defense lawyers are at a disadvantage when the government refuses to disclose information necessary to test the validity of black-box technologies.

Facial recognition technology ("FRT") is one such example that the NACDL has repeatedly litigated. While facial recognition technology appears to be a monolith, it can be broken down into steps including choosing a "probe photo" which is to be compared with a database, selecting the database with which the image is compared, how the probe photo is edited and processed, which algorithm is used to compare images, and a final review conducted by a human being.¹³

Discovery obligations for each step are required to meaningfully challenge the reliability of this technology. In our amicus brief to the Superior Court of New Jersey, the NACDL argued that where a defendant was identified using facial recognition technology, the prosecution had a *Brady* obligation to provide discovery related to each of the various steps involved in performing facial recognition (including the database used, the original photo placed into the database, the algorithm used, etc.). The Court found that:

“[d]efendant's request for the identity, design, specifications, and operation of the program or programs used for analysis, and the database or databases used for comparison are relevant to [facial recognition technology's] reliability.”¹⁴

¹³ See Garvie, C. (2023, May). *What defense counsel should know about facial recognition technology. The Champion*, (52). National Association of Criminal Defense Lawyers. Accessed at: <https://www.nacdl.org/Document/What-Defense-Counsel-Should-Know-About-Facial-Reco>.

¹⁴ *State v. Arteaga*, 476 N.J. Super. 36, 61 (App. Div. 2023)

The court went on to hold that, considering the novelty of facial recognition technology, the court could not “reasonably conclude without the discovery whether the evidence is exculpatory or ‘merely potentially useful evidence.’”¹⁵

NACDL’s Fourth Amendment Center is also counsel on a growing number of “forensic genetic genealogy” cases. This novel investigative technique purports to identify suspects in criminal cases by combining DNA analysis, consumer genealogical databases, and online research. The process starts with an old or degraded DNA sample, which is then manipulated by a third-party lab to mimic the sophisticated biomedical DNA tests used by commercial genealogy databases. A third party then uses that algorithmically generated DNA profile, uploads it to genealogy websites, and seeks to identify a suspect or close relatives. FGG relies entirely on third-party companies whose procedures and techniques are unknown, usually even to law enforcement. Their analysis is frequently opaque, conclusory, and unverifiable, yet law enforcement continues to rely on it to establish probable cause for search and arrest warrants. Moreover, the government routinely fails to disclose, or seemingly have any documentation of, how these third parties conducted their analysis, despite well-documented concerns about their reliability¹⁶ and cases of wrongful identification including the case of the “Golden State Killer” where the use of FGG initially led police to investigate an innocent man and a judge to issue a search warrant to collect his DNA.¹⁷ Reliance on FGG, despite its unreliability, even led to the incarceration of an innocent man for three years after he was falsely identified.¹⁸

This is another example of the need to challenge relatively new technologies in the criminal legal system and to ensure meaningful discovery. A developing field is the use of artificial intelligence in forensic pathology. At a conference organized by NACDL in February¹⁹ board-certified forensic pathologist Dr. Jay Stahl-Herz explained issues related to the use of artificial intelligence in forensic pathology. Dr. Stahl-Herz explained that currently artificial intelligence is being used for transcription, narrative generation or postmortem examination measurements, Co-Pilot tools to suggest report inclusions/conclusions, generation of diagnoses and/or opinions from objective data, and pattern analysis using machine vision. Dr. Stahl-Herz explained that AI is particularly unreliable for the generation of diagnoses and opinion. The use of AI by medical examiners is largely opaque and undisclosed. The software, its testing, logs that show which

¹⁵ *Id.* at 62.

¹⁶ See Jennifer Lynch, “Forensic Genetic Genealogy Searches: What Defense Attorneys & Policy Makers Need to Know,” Electronic Frontier Foundation (July 26, 2022), available at <https://www.eff.org/wp/forensic-genetic-genealogy-searches-what-defense-attorneys-need-know>

¹⁷ DNA Used in Hunt for Golden State Killer Previously Led to Wrong Man,” NBC News (Apr. 28, 2018), <https://www.nbcnews.com/news/us-news/dna-used-hunt-golden-state-killer-previously-led-wrong-man-n869796>.

¹⁸ Mike Carter, “Washington State Man Release as Cold-Case Murder Suspect Sues Detective,” *The Chronicle* (March 4, 2024), available at, <https://www.chronline.com/stories/washington-state-man-released-as-cold-case-murder-suspect-sues-detective,335766> (detailing story of innocent man jailed for three years on rape and murder charges based on FGG).

¹⁹ NACDL Conference titled “Code, Culpability, and Constitutional Law: AI in the Criminal Legal System”, February 5, 2026

portions of reports or examination are machine-generated, and original files are not also disclosed. Without such disclosure, unreliable technology is being used for critical functions in criminal trials. Discovery obligations for such technologies should include notification when such software/programs are used, auditing history, model parameters and inference code, known error rates and examples, or notification that testing doesn't exist, underlying training data, source codes, amongst other necessary information.²⁰²¹

Any change to the rules of evidence would have a far-reaching impact on trial practice. Changes to the rules of evidence are likely to be strengthened by a joint effort between committees working on procedure, discovery rules, and even instructions to juries. Modifying discovery requirements for technological evidence, along with the addition of evidentiary rules, would meet the Advisory Committee's intent.

Defendants who are faced with the criminal legal system are often society's most marginalized and impoverished. Our members include public defenders who work with offices with limited resources that cannot challenge unreliable technology in every case. With the requirement for expert witnesses removed, it is possible that the proponent of evidence under P.F.R.E. 707 will place the full burden of challenging new technologies on defense counsels without the resources to hire expert witnesses in every case. Parallel discovery reform would allow counsel with fewer resources to have greater access to vital information to shape how novel technologies are tested before the courts.

VI. Conclusion

For the reasons stated in this letter, NACDL encourages the Advisory Committee to pause before promulgating P.F.R.E. 707. Thank you for your time and attention to this matter. Please do not hesitate to reach out if you have any questions or if we can be of further assistance.

Respectfully Submitted,

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²¹ We believe that the use of AI is proliferating so rapidly that there might be greater, more pervasive uses of AI by the time the committee meets next.

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