

# EVIDENCE IN FOCUS: A PRACTITIONER'S APPROACH

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## 2026 UPDATE

I offer the following updates on three proposed rules of evidence, two of which appear likely to be adopted and one which does not.

### I. AI and Authenticity (Proposed Rules 901(b) and 901(c))

Recent developments in generative Artificial Intelligence (AI) have brought issues regarding authenticity to the forefront. AI's availability across various law-related applications and platforms, and its accessibility to the general public, create opportunities for manipulation of evidence by parties, witnesses, and lawyers alike. The technology's capacity to edit documents and create fake photographs, videos, and audio that look and sound real has the potential to make the fact-finding process more difficult, creating dilemmas for the various stakeholders in the trial process. To combat the prospect of abuse, several scholars have proposed modifying the rules on authenticity to ensure that so-called "deep fakes" do not creep into the courtroom.

#### A. The Grimm and Grossman Proposal for Rule 901

One such proposal, by Professors Paul Grimm and Maura Grossman, went so far as to be considered for potential adoption by the Advisory Committee, though it was ultimately rejected. Grimm and Grossman suggested expanding 901(b), which already provides a non-exhaustive list of the ways a party can authenticate a piece of evidence. They also proposed adding a new provision numbered as 901(c) that

both shifted and modified the burden of proof when there is evidence of fabrication.

First, as to 901(b), they suggest the following amendment in italics:

**Rule 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 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.*<sup>1</sup>

The suggested edit to 901(b) thus places an additional hurdle on the offering party, requiring it to prove the system’s qualifications and reliability when that party acknowledges that AI generated the item. It is not clear, however, how much “additional evidence” would be needed to admit an AI-generated exhibit. It might also require that any party seeking to admit such evidence hire an expert witness to opine on the accuracy of the AI software at issue, a significant cost to be sure.

The same authors’ proposed new Rule 901(c) modifies the standard of proof when a question about an exhibit’s manipulation is raised:

**Rule 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

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<sup>1</sup> Proposed New Fed. R. Evid. 901 Submitted by Paul W. Grimm and Maura R. Grossman to the Advisory Committee on Evidence Rules - November 8, 2024; *see also* [https://www.quinnemanuel.com/the-firm/publications/adapting-the-rules-of-evidence-for-the-age-of-ai/#\\_ftn23](https://www.quinnemanuel.com/the-firm/publications/adapting-the-rules-of-evidence-for-the-age-of-ai/#_ftn23).

artificial intelligence, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.<sup>2</sup>

The last phrase was also proposed in a revised form as follows:

“[T]he evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.”<sup>3</sup>

This proposal thus places the initial burden on the objecting party to demonstrate that AI “altered or fabricated” the evidence pursuant to the conditional relevance standard of Rule 104(b) (“a jury reasonably could find...”). If the objecting party has done so, the burden then shifts to the offering party to prove that the probative value outweighs the danger of unfair prejudice, a sort of reverse 403 test similar to the (current) Rule 609 standard for admitting prior convictions against testifying criminal defendants.

The proposal in revised form suggests that the offering party should have the burden of proving to the court, under Rule 104(a), that the evidence is authentic. This means that the court must make a finding that it thinks the evidence is authentic, rather than the traditional standard which asks whether a reasonable jury could so find under 104(b).

## **B. The Delfino Proposal for Rule 901**

Professor Rebecca A. Delfino from LMU Loyola Law School, Los Angeles, also proposed adding a new Rule 901(c) in a slightly different form:

**901(c).** Notwithstanding subdivision (a), if a party challenging the authenticity of computer-generated or other electronic evidence presents evidence sufficient to support a factual finding that the challenged evidence

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

has been manipulated or fabricated, in whole or in part, by generative artificial intelligence, the proponent of the evidence must authenticate the evidence under subdivision (b) and provide additional proof establishing its reliability. The court must decide the admissibility of the challenged evidence under Rule 104(a).<sup>4</sup>

Delfino’s proposal starts with similar language that places the burden on the objecting party to make a threshold showing of a “deep fake,” which is a slightly more onerous requirement than just showing that evidence was “altered,” as suggested by Grimm and Grossman. This would also have to be proven to the conditional relevance standard of 104(b) (“sufficient to support a factual finding”).

Once that is done, the Delfino proposal, like Grimm and Grossman’s revised one, shifts the offering party’s burden of proof to a 104(a) standard, requiring it to prove authenticity to the court by a preponderance of the evidence, rather than providing sufficient evidence, under 104(b), from which a reasonable jury could find the evidence to be authentic. Delfino then adds a requirement of “additional proof establishing its reliability.” How much proof is “additional” and what would suffice to satisfy ‘reliability’ would apparently be left to individual judges, perhaps incorporating the Rule 702 standard by reference.

### **C. A Different Approach to AI evidence**

Both of these Rule 901 proposals attempt to make it harder to introduce AI-modified evidence and put the court in the position of gatekeeper, as with objections

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<sup>4</sup> See DEEPFAKES ON TRIAL 2.0: A REVISED PROPOSAL FOR A NEW FEDERAL RULE OF EVIDENCE TO MITIGATE DEEPFAKE DECEPTIONS IN COURT, [https://www.uscourts.gov/sites/default/files/2025-04/25-ev\\_a\\_suggestion\\_from\\_prof\\_rebecca\\_delfino\\_rule\\_901.pdf](https://www.uscourts.gov/sites/default/files/2025-04/25-ev_a_suggestion_from_prof_rebecca_delfino_rule_901.pdf) (or Delfino, Rebecca, DEEPFAKES ON TRIAL 2.0: A REVISED PROPOSAL FOR A NEW FEDERAL RULE OF EVIDENCE TO MITIGATE DEEPFAKE DECEPTIONS IN COURT (February 15, 2025). Loyola Law School, Los Angeles Legal Studies Research Paper No. 2025-10, DOI: 10.13140/RG.2.2.12632.61447, Available at SSRN: <https://ssrn.com/abstract=5188767>)

involving hearsay, witness competence, and expert opinion. But this framework raises several concerns.

First, requiring an initial showing of AI modification under a 104(b) standard followed by a 104(a) determination of authenticity raises practical hurdles. By rule, a judge deciding a 104(b) question puts themselves in the jury's shoes. And since per 104(b) evidence can be introduced upon a promise to later establish the condition necessary to make it relevant or authentic, this showing is most often made in front of the jury during the trial. Yet, given that these proposals require this initial showing to be followed by a judge's own 104(a) determination, the entirety of these proceedings would have to be outside of the jury's presence to avoid exposing it to AI evidence that is later excluded. While 104(b) showings are sometimes done this way with particularly sensitive information, these Rules would in essence mandate that it be done this way across the board.

Second, it is not clear to me that tasking the court with these authenticity issues exclusively will actually make it more difficult for "deep fakes" to obscure the truth, regardless of whether an additional "reliability" test is added, or if the typical 403 balancing test is inverted. Plus, even if the court were deemed adequate for the task, I am not sure it is the appropriate role for the judge to undertake.

Moreover, all these proposals seem geared towards the unethical use of AI. But do we need new rules to deal with the surreptitious use of "deep fakes"? If an opposing party were to become aware of such an attempt, surely any judge would allow them to explore the issue and would not permit manufactured evidence to go

to the jury. Existing ethical and procedural guidelines, along with our current evidence rules, provide a sufficient deterrent to all but the most unscrupulous and adept. And it would be difficult to design a system to catch the worst offenders.

It is more important, in my view, to design the rules to deal with the admitted use of AI in scenarios that are reasonably likely to occur in a trial. The biggest area of dispute will not be in the wholesale faking of photos; rather, it is likely to involve slight modifications—think enhancement of lighting or facial features in surveillance video, or cleaning up background noise and static on a recording. In those admitted instances of AI use, the risk is that the modified version is too far removed from the original.

So then, two questions: How do we guard against the potentially misleading use of AI and who should be our guardian against it? To me, it makes sense for questions of audiovisual manipulation to be put to the jury, as this presents as more of a “weight of the evidence” issue than as one of pure admissibility. Analysis of whether a photo has been enhanced is not a question of law, nor does it require any particular expertise. Instead, a visual comparison, along with some broad testimony about how the changes were made, would be enough for the average juror to determine whether the use of AI is misleading or not. But to ensure fairness, we need to require the production of the original and, if requested by the opposing party, its introduction. The best way to do this is to amend (and reinvigorate) the now almost obsolete best evidence rules as follows, with changes in italics:

## **Rule 1001. Definitions That Apply to This Article**

- (a)** A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
- (b)** A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c)** A “photograph” means a photographic image or its equivalent stored in any form.
- (d)** An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
- (e)** A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.
- (f)** *“AI enhanced” means any of the above, or any other exhibit, which has been altered or modified in any way by a system of Artificial Intelligence.*

## ***Rule 1008. Admissibility of AI Enhanced Evidence and the Original; Disclosure***

*An AI enhanced writing, recording, photograph, or other exhibit is admissible to the same extent as the original unless a genuine question is raised about its authenticity or the circumstances make it unfair to admit the AI enhanced version. Where the original has been AI enhanced, the original must be produced to the opposing party and must be admitted into evidence if offered by the opposing party unless such introduction would cause substantial prejudice.*

## **Rule ~~1008~~ 1009. Functions of the Court and Jury**

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines — in accordance with Rule 104(b) — any issue about whether:

- (a)** an asserted writing, recording, or photograph ever existed;
- (b)** another one produced at the trial or hearing is the original; ~~or~~
- (c)** other evidence of content accurately reflects the content; *or*
- (d)** *an AI enhanced writing, recording, photograph, or other exhibit is more, less or as equally probative as the original.*

Amended Rule 1001 would create a new category of non-original exhibits that were modified by AI. It is intentionally worded broadly, to encompass any exhibit in any form that is so modified. Because these rules are designed to deal with admitted use of AI, I have purposely not included a standard of proof as to whether an exhibit is “AI enhanced.”

New Rule 1008 would treat AI enhanced exhibits in the way that the Rules treat duplicates under Rule 1003. New Rule 1008 would also add a mandate that any party seeking to use an AI enhanced exhibit disclose the original evidence upon which it is based. It would also require the court, absent exceptional circumstances, to allow the admission of the original for comparison purposes, similar to the privilege extended to the opposing parties under Rules 612 and 803(5). The Court would thus retain a gatekeeping function for demonstrably fake or unfairly prejudicial evidence, but, per new Rule 1009, the primary burden would be placed on the litigants to demonstrate to the jury that the AI enhanced version of the evidence is either more or less compelling than the original.

#### **D. Conclusion**

In sum, while we need to be mindful of potential “deep fakes” being used by litigants at trial, existing rules are sufficient to deal with the unethical use of AI. New rules should be targeted at the most likely and common uses of AI in litigation. My proposals maintain the existing legal frameworks for the admission of exhibits which are not “original,” while recognizing the potential for both the use and abuse of this emerging technology.

Now consider the following problems and think about how these proposed rules would guide your analysis.

**AI Evidence, Applications to Practice:**

1. A Defendant has been accused of breaking and entering into a home at nighttime. The Defendant seeks to establish an alibi by submitting doorbell security camera video that shows the Defendant at their friend's house in a different county at the time the break-in occurred. To make clear that the doorbell security camera video shows the Defendant in another location at the time the crime occurred, the Defendant used an AI tool to include a time and geo tag on the video. Under the proposed Rules, is the video with the time and geo tag admissible?
2. A Plaintiff has brought a lawsuit against her local supermarket after she fell and sustained an injury to her hip that requires surgery to fix. Her fall was caused by a puddle left behind by a crew member who had dropped a gallon of milk on the floor while stocking shelves and failed to mark the puddle as a slipping hazard prior to cleaning it up. The Plaintiff's daughter provided pictures to her mother's attorney to introduce at trial which show the extent of the bruising caused by the fall. If the defense suspects that these pictures had been altered by an AI tool, how would they challenge the introduction of the photographs at trial, and what factors should a court consider when determining whether the photographs are admissible?
3. A Plaintiff was injured in a car accident when the Defendant ran through a red light and struck the Plaintiff's car. The Plaintiff has gathered various pictures and videos of the intersection and has successfully created a video model using generative AI that shows a vehicle, substantially similar to the one allegedly driven by the Defendant, failing to stop at a red light and striking a model of the Plaintiff's car. Under the proposed Rule 901(c), is the model likely to be admissible, and what factors should a court consider when making such a determination?
4. A state is seeking to prosecute an individual for a string of bank robberies that occurred over a period of two months. During the investigation of these robberies, an independent contractor working with law enforcement used an AI-assisted data processing system that surveyed surveillance footage from all the affected banks during the relevant time frame to identify the vehicle likely to be driven by the robber. The report identified 3 possible suspects, one of which is the individual which the state is seeking to prosecute for this crime. Is the report produced by the AI-assisted data processing system admissible? What arguments would be made pursuant to the proposed rules?

## II. Proposed New Rule 609

A Rule very likely to be adopted is an amended form of Rule 609. It contains two small changes, at least one of which could have a significant impact on the contours of a trial.

### A. A New Balancing Test for Testifying Defendants

The first and most significant amendment alters the applicable balancing test when the prosecution seeks to admit a testifying criminal defendant's prior conviction for impeachment purposes.<sup>5</sup> Whereas, under the current Rule 609(a)(1)(B), it can do so if the probative value outweighs the prejudicial effect, the amended rule adds the modifier "substantially." Thus, the balancing test is akin to the one applicable to convictions that are more than 10 years old. This amendment will likely result in the exclusion of a significant number of prior convictions, thus making it more palatable for a criminal defendant to take the stand because the risk of the jury learning about their record is now gone.

### **Rule 609. Impeachment by Evidence of a Criminal Conviction.**

**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
  - (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
  - (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence **substantially** outweighs its prejudicial effect to that defendant; ...

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<sup>5</sup> According to the Reporter's Notes, this amendment has no effect on the admission of convictions for some other purpose pursuant to a Rule other than 609, like 404.

## **B. The Ten-Year Rule Clarified**

The second change is more technical. It clarifies the appropriate date to begin the ten-year lookback period to determine whether an older conviction ought to be admitted. Specifically, it is the date the trial begins that controls, rather than the date of the witness's testimony, the indictment, or the offense. So, if trial begins on 1/1/2026, then the ten-year lookback period begins 1/1/16. If the witness was released from confinement before that 2016 date, or if there was no confinement and the conviction was finalized before that date, then the stricter 609(b) ten-year rule applies to the admission of the prior conviction:

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since between the witness's conviction or release from confinement for it, (whichever is later) **and the date that the trial begins.** Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect...

Now let's look at a few problems applying this new Rule 609.

### **Amended Rule 609: Applications to Practice**

1. In 2023, after his son was shot and killed by police in 2021, the Plaintiff brought a lawsuit in federal court raising various claims under 42 U.S.C. 1983 and state law grounds. At trial in 2026, the Plaintiff testified about his personal background and relationship with the decedent. The Defendants sought to introduce evidence of Plaintiff's prior convictions from 2015. Admissible? *Ball-Bey v. Chandler*, 2026 WL 322754, \*1 (Feb. 6, 2026 E.D. Missouri).
2. A Defendant is on trial for drug distribution. It is alleged that the Defendant operated a multimillion-dollar drug production and distribution operation out of her backyard shed. The Defendant testifies that she is a model citizen and has never sold drugs. In response, the prosecution seeks to introduce evidence of her drug distribution conviction from five years earlier. What would be the applicable balancing test?

3. The Defendant is on trial for money laundering. Against the advice of his lawyer, the Defendant has elected to testify in his own defense. On cross-examination, the prosecution seeks to introduce evidence of the Defendant's past criminal convictions. The Defendant's criminal history includes a conviction for kidnapping six years prior and a conviction for mortgage fraud from 15 years prior. Is the prosecution permitted to use evidence of either of these convictions to impeach the Defendant on cross-examination?

### **III. AI and Expert Testimony: Proposed Rule 707**

The other Rule almost certain to be adopted is new Rule 707, which applies *Daubert* and Rule 702 standards to machine-generated opinion evidence:

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

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

According to the Advisory Committee, this Rule was drafted because

“[M]achine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data..[and] [w]hen a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses.” Thus, the Committee thought it necessary to ensure that litigants don't attempt to “evade the reliability requirements of Rule 702 by offering machine output” without the testimony of a live expert.

The Committee “anticipated that a Rule 707 analysis will usually involve the following:

- 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.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.”

Further explanation of these considerations would be useful, but have not yet been provided.

The final sentence of the rule (it “does not apply to the output of simple scientific instruments”) is intended to clarify that an output that is not a machine-generated conclusion based on data or a summary of data is still admissible without an expert or a reliability analysis. The purpose of including this provision was to “give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life.” Examples of such simple instruments “might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer.”

Finally, the Committee states that “[t]he 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.” This clause would suggest that 702(b) questions will be decided based on the so-called “prompt” that the human enters into the AI system, rather than some complicated analysis of the source code or the sources of information.

And, importantly, the notice requirements in the Rules of Criminal and Civil Procedure that apply to experts also “should be applied to output offered under this

rule.” This is in line with my proposed new Rule 1008 requiring disclosure of an original whenever an exhibit has been altered by AI.

Now consider the following problems under new Rule 707.

***Rule 707: Applications to Practice:***

1. A class of employees are seeking to bring a lawsuit against their employer after being diagnosed with a terminal illness caused by exposure to dangerous chemicals that were not properly stored. Rather than hiring an expert to testify to the toxic effects of the chemical at issue, the class of employees has produced an AI-generated report in which the AI tool surveyed all the literature and data and produced a conclusion that it was definitely the exposure to the chemical that caused the illness in the class members. What factors should a court consider in evaluating the admissibility of the AI-generated report, and what is the likely outcome of that analysis?
2. A criminal defendant has been accused of murder and is seeking to pursue an insanity defense. Rather than going through the onerous process of finding a qualified expert with the relevant experience, licensure, and availability, the Defendant has instead elected to use an AI tool to produce the necessary psychological report. In preparing the report, the AI tool relied on materials uploaded by the Defendant as well as available open-source medical data. It includes a summary of various medical records and concludes that the defendant lacked the capacity to follow the law. Is the report produced by the AI tool likely to be admissible to prove insanity in whole or in part?
3. When her husband and two children are killed in a fire due to an exploding water heater, a *pro se* Plaintiff brings a lawsuit against the water heater manufacturer. The Plaintiff is seeking to introduce a picture of a thermometer reading showing that the heater was warmer than it should have been. Admissible?
4. The Plaintiff has brought a claim for copyright infringement alleging that his work of fiction was appropriated by another author. To prove the claim, the Plaintiff submits an AI-generated report which highlights numerous similarities in grammar style, grammar mistakes, and syntax. It also concludes that the similarities are not coincidental. Admissible?
5. In a prosecution for murder, the government seeks to admit a recording in which the defendant is said to have made incriminating statements. Because the quality was so poor, the district attorney hired a forensic audiology expert

who used an AI tool to enhance the audio. Is the recording admissible with and/or without the testimony of the expert?