

The Chair invited Ms. Shapiro, on behalf of the DOJ, and Ms. Nicole Owens, on behalf of the Federal Defenders, to offer their thoughts. He also sought feedback from Professor Roth, who has been involved in developing Rule 707 from the beginning. Ms. Shapiro explained that some of the DOJ's concerns detailed in its letter regarding Rule 707 persist despite the revisions. She expressed concern about how Rule 707 would function in practice, as well as concern about the coverage of many machine-generated technologies commonly used in court that may depend upon some combination of AI and other technology. She further noted that the statutorily derived definition of "artificial intelligence" in the revised rule differs from the definition used by the DOJ. Ms. Shapiro appreciated the carve-out for judicially noticed artificial intelligence in the revised draft but opined that judicial notice is very subjective and not a reliable mechanism for exempting accepted technologies from Rule 707. The Reporter asked whether the DOJ would prefer nothing in the Rule to exempt reliable technologies. Ms. Shapiro stated that the DOJ would rather have no Rule 707 at all and suggested that trial judges currently are capable of regulating the need for experts and other information as a condition to presenting AI evidence under Rule 611. Ms. Shapiro explained that the DOJ believes that the issue of litigants presenting AI evidence in the absence of an expert witness remains an anticipatory problem that has yet to materialize in court. She stated that the DOJ favors consideration of Rule 707 at the Fall 2026 meeting alongside draft Rule 901(c).

Ms. Owens offered a different perspective, stating that a rule covering AI-generated evidence offered without an accompanying expert witness is not premature. She explained that federal defenders are already seeing this kind of evidence coming into cases. She cited examples of such evidence described in the Reporter's memorandum. Ms. Owens acknowledged that computers can assist in investigations and that certain machine-generated evidence may require no expert foundation. Still, she explained that concerns arise when generative AI is doing the work and analysis that normally an expert would do and that these concerns need to be addressed by a rule. Ms. Owens noted that a Cellebrite extraction that is simply a mirror of a phone or other device may not require an expert foundation. But she explained that, if the extracted information is fed into an AI tool to identify patterns or infer relationships, then this opinion output should be subject to a different analysis. For that reason, Ms. Owens opined that utilizing the Rule 702 reliability requirements, and allowing courts to require expert foundation for such output, is absolutely appropriate.

Professor Roth thanked the Committee for its work, stated that the revised versions of Rule 707 nicely addressed feedback received during public comment, and shared several observations. She first addressed the use of Cellebrite, and echoed Ms. Owens' comments that its admissibility depends upon whether it is simply being used to extract data from a phone or is instead being used to analyze information, for example, to determine who's a key contact and who's not. Second, Professor Roth observed that under the status quo, a judge could admit an analytical conclusion by Cellebrite technology through a lay witness without any Rule 702 scrutiny. As to the subjectivity of a judicial notice carve-out in Rule 707, Professor Roth predicted that there would be a period of transition in which courts would coalesce around technologies appropriate for judicial notice. But she opined that the option of admitting analytical AI input without Rule 702 scrutiny is untenable. Professor Roth also suggested that the notice provision in Rule 707 should include a good cause exception akin to those in Rules 404 and 807 because defendants, either civil or