Fundamentals of AI, Generative AI, and Deepfakes for Federal Public Defenders

Criminal Justice Act Seminar Eastern District of Missouri

> May 8, 2025 St. Louis, MO

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Agenda for Today

- What Artificial Intelligence and Algorithms Are and How They Work
- A Tutorial on Generative AI
- Ways Al-Generated Evidence Might Come to Court
- Evidentiary Challenges Related to *Acknowledged* AI-Generated Evidence
- Unacknowledged AI-Generated Evidence: A Tutorial on Deepfakes
- Why Unacknowledged Al-Generated Evidence Presents Particular Challenges
- Some Considerations for Dealing with AI-Generated Evidence
- Ethical Considerations
- [If there's any time left: Anticipated Changes to the Federal Rules of Evidence]
- Q & A

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What Al and **Algorithms Are** and How They Work

WHAT IS "ARTIFICIAL INTELLIGENCE"?

- Umbrella term first used at a conference in Dartmouth, NH, in 1956
- Computers doing intelligent things (*i.e.*, performing cognitive tasks) once thought to be the sole province of humans
- Not a particular technology or function; it's simply a generic tool
- Whatever computers can't do ... until they can
- Called "software" once we get used to it
- Slightly different than "automation" and "robotics"
- Generally involves algorithms, machine learning ("ML"), and/or natural language processing ("NLP")

WHAT'S AN "ALGORITHM"?



A set of instructions to complete a task. A recipe to bake a cake is an algorithm.

TYPES OF AI

Narrow (Weak) Al vs. General (Strong) Al





"Over the past decades, computers have broadly automated tasks that programmers could describe with clear rules and algorithms. Modern machine learning techniques now allow us to do the same for tasks where describing the precise rules is much harder."

Jeff Bezos' 2017 Letter to Shareholders

UNSUPERVISED MACHINE LEARNING



System looks for naturally occurring patterns, clusters, groupings, or anomalies

SUPERVISED MACHINE LEARNING





Training a system to distinguish between two or more categories by providing it with labeled examples from which it learns the rules

REINFORCEMENT LEARNING



Combines Exploration with Exploitation

System begins at random but learns goal based on reinforcement provided by human feedback

DEEP LEARNING





- Information from each layer is combined at the next layer (but creates a black-box problem!)
- Requires massive amounts of labeled training data to work

NATURAL LANGUAGE PROCESSING



Using a computer to "understand" human language as it is written or spoken, or to create a computer representation of language (including both syntax and semantics)

- **Tokenization** \rightarrow Splits longer strings into smaller pieces; determines word boundaries
- **Stemming** → Eliminates prefixes and suffixes from words
- **Bag of words** \rightarrow Looks for co-occurrences of words in a document
- Stop words → Removes words that are noise and don't add meaning
- **Tf-idf** \rightarrow Determines how important a word is to a document by its frequency
- **Disambiguation of content** \rightarrow Polisemy (*i.e.*, lead vs. lead)
- **Topic modeling** \rightarrow Statistical models to discover abstract concepts

A Tutorial on Generative Al

WHAT IS "GENERATIVE AI" ("GEN AI" OR "GAI")?

- A subset of AI that uses training on massive data sources primarily from the Internet—to generate new content in response to a user prompt. It can converse, replicate specific styles, and excels at creative tasks and synthesizing or summarizing content.
- Gen AI falls under the broad categories of machine learning and natural language processing.
- It leverages neural networks (*i.e.*, deep learning) to analyze the underlying patterns and structures of data, enabling it to predict what should come next, or to generate fresh and unique content. (This explains why it "hallucinates!")

BRIEF HISTORY OF GEN AI: PRECURSORS TO LARGE LANGUAGE MODELS ("LLMS")

- New or Not?
 - Claude Shannon (one of the founders of AI) wrote *Prediction and Entropy of Printed English* in 1951.
 - He would erase fragments of text and have humans guess what was erased (Mad Libs!).
 - Language models are statistical models applied to Shannon's prediction task. Historically used for things like data compression, information retrieval, author and spam detection.
 - In comes massive computing power + massive data + neural networks, convolutional neural nets, deep learning . . .

A BRIEF HISTORY OF GEN AI: 2010 – 2022

- In 2014, Generative Adversarial Networks ("GANs") took a huge leap forward in their ability to create authentic-looking content.
- GANs introduce a new way for algorithms to learn: One algorithm (the "generator") creates content, and the other algorithm (the "discriminator") evaluates it against real data in an effort to distinguish them. This approach creates more and more realisticlooking content (and also explains why detection of Gen AI content is so difficult).
- GANs revolutionized image, audio, and video generation.

A BRIEF HISTORY OF GEN AI: 2010 – 2022 (CONT'D)

- In 2015, Jascha Sohl-Dickstein introduced diffusion models, which used advanced ML to generate extremely high-quality images by progressively introducing noise to the dataset and then reversing the process (*i.e.*, gradually degrading data quality only to reconstruct in into something new and better.
- In 2017, Google researchers introduced the transformer architecture, a significant breakthrough in processing natural language which no longer required pre-labelled training data and allowed processing to occur in parallel (which is much faster).
- Another major change introduced with GPT-3 was the use of reinforcement learning, in which external (*i.e.*, human) feedback is used to modify and improve the output of the model.

GEN AI IN ACTION: TEXT-TO-TEXT (#1)

• MRG's Prompt:

Please write a short Shakespearean sonnet about the Ontario judiciary

• ChatGPT's Response:

Upon Ontario's bench, the judges sit, Dispensing justice with a learned grace, In robes of black, they ponder and commit, To navigate the law's intricate space.

With wisdom vast they weigh each legal claim, Their gavels sound, decisions fair and just, In courtrooms' hallowed halls, they play the game, Defending rights, in them, we place our trust. From Kingston's shores to Ottawa's great height, Through Toronto's bustling streets, they hold their sway, The judiciary's role, a beacon's light, Guiding the law through each and every day

Oh, Ontario's judges, noble and true, In justice's name, we salute all you do.

GEN AI IN ACTION: TEXT-TO-TEXT (#2)

• MRG's Prompt:

Please write a short Eminem-style rap about the Ontario judiciary"

• ChatGPT's Response:

Yo, let me tell you 'bout the Ontario crew, Judiciary game strong, yeah, they stay true In the courtroom battles, they wear the robe, Dispensing justice, man, they're in control.

From Toronto to Ottawa, they hold it down, Keeping order in the legal battleground, Ruling with wisdom, in that judge's chair, They make decisions, no one can compare. Legal minds sharp, like a razor blade, Analyzing cases, every move is weighed, No bias, just facts, they play it clean, In Ontario's courtrooms, it's a righteous scene.

So shout out to the judges, respect's due, In the land of Ontario, they're the crew, Making sure justice always prevails In the province's heart, their legacy sails.

GEN AI IN ACTION: Text-to-Image (#1)

• MRG's Prompt:

• "Picture of the Ontario judiciary in the style of Degas"

 DeepAl's Response (based on Stable Diffusion):



GEN AI IN ACTION: Text-to-Image (#2)

• MRG's Prompt:

• "Picture of the Ontario judiciary in the style of Picasso"

 DeepAl's Response (based on Stable Diffusion):



GEN AI IN ACTION: Text-to-Image(#3A & #3B)

- MRG's Prompt:
 - "Picture of [more] diverse Ontario judges"
- DeepAl's
 Response
 (based on
 Stable
 Diffusion):





GEN AI IN ACTION: Text-to-Speech ("TTS")

- MRG's Prompt:
 - President Obama, can you say hello to today's webinar attendees?

• FakeYou's Response:



APPLICATIONS OF GEN AI IN LEGAL

- Gen Al will:
 - Enhance delivery of legal services by providing lawyers with tools to increase their productivity
 - Enhance access to justice by providing tools to people unable to afford legal services or navigate the legal system

- Gen Al will not:
 - Replace a lawyer's or judge's reasoning, critical thinking, compassion, empathy, etc.

- Gen Al can:
 - Analyze and summarize lengthy documents, e.g., complex statutes or regulatory codes; witness transcripts to identify key people, events, or inconsistencies
 - **o** Brainstorm ideas
 - Help with marketing
 - Create outlines and draft documents and presentations
 - o Conduct research???
 - o Respond to emails???

RISKS OF GEN AI IN LEGAL

- Gen AI does not respect confidentiality or privacy; anything you enter may be used for training or other purposes unless you contract otherwise
- Gen Al does not guarantee the accuracy of its output
 - It sounds very confident and compelling
 - But, . . . it hallucinates
 - It reinforces stereotypes (as you saw!)
 - It is predicting things based on Internet content; your mileage may vary
 - It can be biased, toxic, and defamatory
- Gen AI is not secure and is subject to jailbreaking and other adversarial attacks
- Gen AI content is likely not subject to copyright protection and may infringe on others' IP

Ways Al-Generated Evidence Might Come to Court

Ways Al-Generated evidence might come to court

Acknowledged AI-Generated Evidence

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- The parties agree the evidence is the product of an AI system; the dispute concerns the validity, reliability, or bias of the AI system
- One of the parties' experts reveals they used an AI system to assess the evidence; the dispute concerns the validity, reliability, or bias of the expert's use of the AI system
- One of the parties wants to enhance the evidence using AI or prepare an exhibit or demonstrative (e.g., simulation) using an AI system; the dispute concerns the nature and propriety of the changes to the evidence and whether they have a tendency to mislead or prejudice the trier of fact
- A pro se litigant wants to present their argument to the Court using an Al avatar

<u>Unacknowledged AI-Generated Evidence</u>

• One party claims the evidence is genuine and the other claims it has been manipulated or is a deepfake; the dispute concerns the **authenticity of the evidence**

Evidentiary Challenges Related to Acknowledged AI-**Generated Evidence**

What characteristics should we demand of *acknowledged* Al-generated evidence?

- "Accuracy" is a word with multiple meanings; beware!
- "Accuracy" is generally thought to include two components:
 - o <u>Validity</u>

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- Does the AI measure or predict what it purports to measure or predict?
- <u>Reliability</u>
 - Does the AI measure or predict consistently in substantially similar circumstances?
- Because it is often used as a summary measure, accuracy does not take into account the distribution of <u>false-positive</u> and <u>false-negative</u> errors.
- Evidence can be accurate yet still be biased!

VALIDITY (A.K.A. ACCURACY) VERSUS RELIABILITY (A.K.A. CONSISTENCY)





ValidUnreliable





InvalidUnreliable

How are false positives and false negatives distributed?

COMPAS Prediction Fails Differently for Black People Than for White People BLACK PEOPLE

WHITE PEOPLE

Labeled Higher Risk, 23.5% **But Did Not Re-Offend**

47.7% Labeled Lower Risk, 28.0% Yet Did Re-Offend

* Overall, COMPAS correctly predicts violent crime 20% of the time, and general recidivism 61% of the time, but Black people are almost twice as likely as White people to be labeled a higher risk but not actually re-offend. It makes the opposite mistake with White people: They are much more likely than Black people to be labeled lower risk but go on to commit other crimes. False positives and false negatives are distributed differently by race.

44.9%

How can bias come into play?

• <u>Data</u>

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- Historical data contains bias
- The data is insufficiently representative of the population to be measured or predicted
- <u>Algorithms</u>
 - What the developer decides to measure and how
 - > Features and weights
 - > Improper predictor variables
 - **Proxy variables**

• <u>Humans</u>

- Algorithm aversion
- Automation bias
- Confirmation bias
- Lots of other cognitive biases
"Borrow" from Daubert

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- The familiar "*Daubert* Factors" can be useful in demonstrating Al evidence was produced by a system or process that produces valid and reliable results:
- Was the AI **TESTED**? Was that testing independent?
- Is there a known **ERROR RATE** associated with use of the AI (and is it an acceptable error rate, depending on the risk of the adverse consequence of a ruling based on invalid/unreliable information)? Is there any bias in the data or the AI system or process?
- Is the methodology <u>GENERALLY ACCEPTED</u> as valid and reliable in the relevant scientific/technical community?
- Has the methodology been subject to <u>PEER REVIEW</u> by people other than the AI developer?
- Were **STANDARD PROCEDURES** used to operate the AI system?

Related issues

- Pretrial discovery: A tale of two cases
 - *Wisconsin* v. *Loomis*, 881 N.W. 2d 749 (Wis. 2016)

VS.

Houston Federation of Teachers, Local 2415 v. Houston Independent School District, 215 F. Supp. 3d 1168 (S.D. TX 2017)

[See also N.J. v. Pickett, 246 A.3d 279 (N.J. App. Div. 2021)]

Beware of the consequences of claims of proprietary
information/trade secrets

The Real Problem is Unacknowledged AI-**Generated Evidence:** A **Tutorial on Deepfakes**

What are "deepfakes"?

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- Al's answer to photoshopping → Al-generated fake videos
- **First appeared in 2017**, when a Reddit user of the same name posted doctored porn clips mapping faces of celebrities (*e.g.*, Gal Godot, Taylor Swift, Scarlett Johansson, et al.) onto the bodies of porn stars
 - > Next moved to **non-consensual intimate images** (a/k/a "revenge porn")
 - Then, in 2018, used for spoof, satire, and other mischief like putting words into a politician's mouth (*e.g.*, President Obama video)
 - And finally, in 2019, used for fraud and other crimes (e.g., head of a UK subsidiary of a German energy firm paid nearly £200,000 into a Hungarian bank account after being phoned by a fraudster mimicking the German company's CEO's voice)

What are "deepfakes"? (cont'd)

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 The term has since been expanded to include fictional photos, fake social media accounts, fake reviews, voice clones, and other fake evidence.

• *Cf.* "**cheap fakes**," which are photos, videos, and voice clones that are made or altered with readily available and affordable tools, requiring little to no time, effort, or skill.

• *Cf.* "**shallow fakes**," which are videos presented out of context or doctored with simple editing tools (*e.g.*, the audiovideo showing Nancy Pelosi with what appeared to be slurred speech).

How are deepfakes made?

• Uses deep learning

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- Only takes a few steps to make the face-swap
- First, you run a bunch of face shots of the two people through an Al algorithm called an encoder. The encoder finds and learns similarities between the two faces and reduces them to their shared common features, compressing the images in the process.
- A second algorithm called a **decoder** is then **taught to recover the faces from the compressed images**. You train one decoder to recover the first person's face and another to recover the second person's face.
- To perform the face swap, you simply **feed the encoded images into the "wrong" decoder**, *i.e.*, the compressed image of person A's face is fed into the decoder trained on person B. The decoder then reconstructs the face of person B on the body of person A, with all the expressions and orientation of person A.
- Another way deepfakes are made uses **GANs**, where **two Al algorithms** (the generator and the discriminator) **are pitted against each other**.

How to create a free deepfake video in a minute or less



https://grossman.uwaterloo.ca/deepfakes.mp4

Can we make a decent deepfake of Judge Paul Grimm for free? (Photo taken from the Internet)



Judge Paul Grimm: Real or Fake?



Can we make a decent angry voice clone of Maura Grossman for free using Speechify?

Input Recording:

Can we make a decent angry voice clone of Maura Grossman for free using Speechify (cont'd)?

Output Recording:

A real picture of Justice Sotomayor and me in 2013



Why Unacknowledged AI-**Generated Evidence Presents Particular** Challenges

What makes deepfakes different from other forms of past forgery?

- Basically, it boils down to <u>scope</u> and <u>scale</u>
 - Cheap and easy to make; no talent required
 - All you need is a device and access to the Internet → democratizes fraud
 - Ubiquitous and growing exponentially

• But there's more ...

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Spotting deepfakes has become a lot harder!

• Early tell-tale signs:

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- May not blink properly
- Lip synching may be slightly off
- Skin tone may be patchy
- Flickering around the edges of transposed faces
- Fine details such as hair strands, jewelry, teeth, ears, and fingers are off
- Strange lighting or shadow effects *e.g.*, inconsistent illumination and reflections on the iris
- Has gotten much much harder as the technology has improved and the distinctions are subtle and often exceed human perception; experts are typically needed

Deepfakes have deep influence!

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• They have an outsized impact on the trier of fact

- Studies have shown that jurors who hear oral testimony along with video testimony are <u>650</u>% more likely to retain that information.
- Video evidence powerfully affects human memory and perception of reality.
- Even when jurors are aware that audiovisual evidence could be fake, it can still have an undue impact on them because they tend to align their perceptions and memories to coincide with what they saw and heard on the recording despite their skepticism.
- See, e.g., Tarus Myhand, Once the Jury Sees It, The Jury Can't Unsee It: The Challenge Trial Judges Face When Authenticating Video Evidence in the Age of Deepfakes, 29 Widener L. Rev. 171 (2023).

The two-fold risk of deepfakes on the justice system

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 Undermining of public trust → leading to a zero-trust society where people either cannot or no longer bother to distinguish truth from falsehood

• Makes it easier to raise doubts about real events → the "liar's dividend," where actual reality becomes plausibly deniable

Some Considerations for Dealing with AI-Generated Evidence

Tip #1: Start early!

Consider discussing this issue at early meet and confers and getting it included in the Initial Scheduling Order

Tip #2: Consider the need for relevant fact discovery (which may be very intrusive)

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- Production of the training data or source code
- Native format production of the image or audio / video media with all metadata intact
- Production of the original device alleged to been used to create the disputed evidence or a forensic copy of it

Tip #3: Address the issues of trade secrets and protective orders

- Beware of claims of proprietary information / trade secrets or privacy
- Pretrial discovery: A tale of two early cases
 - > *Wisconsin* v. *Loomis*, 881 N.W. 2d 749 (Wis. 2016)

VS.

Houston Federation of Teachers, Local 2415 v. Houston Independent School District, 215 F. Supp. 3d 1168 (S.D. TX 2017)

[See also N.J. v. Pickett, 246 A.3d 279 (N.J. App. Div. 2021)]

Tip #4: Consider the need and plan for expert witness discovery

- Enter the **battle of the party experts**
- Cost and delay???

- Who is going to pay for all this stuff, especially in criminal trials?
- > Is there now going to be a trial-within-a-trial in every case?

Tip #5: Consider the need for technical assistance for the court

• Fed. R. Evid. 706 Court-Appointed Expert Witness

VS.

- Technical Advisor to the Court
 - See In Re: Marriott Int'l, Inc. v. Customer Data Security Breach Litig., 602 F. Supp. 3d 767, 770 n.4 (citing TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1377 (Fed. Cir. 2002); Ass'n of Mexican-Am. Educators v. Calif., 231 F.3d 572, 590 (9th Cir. 2000); Reilly v. U.S., 863 F.2d 149, 156 (1st Cir. 1988); Intellectual Ventures I LLC v. Capital One Fin. Corp., 280 F. Supp. 3d 691, 695 n.1 (D. Md. 2017, aff'd 937 F.3d 1359 (Fed. Cir. 2019)).

VS.

Off-the-Record "Science Day"

Ethical Considerations

APPLICABLE MODEL RULES OF PROFESSIONAL CONDUCT

- Rule 1.1 Duty of Competence
- Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer (*i.e.*, Duty to consult with the client about the means by which the client's objectives are to be accomplished)
- Rule 1.4 Duty of Communication
- Rule 1.5 Duty to Charge Reasonable Fees and Disbursements
- Rule 1.6 Duty to Protect Confidential Information
- Rules 1.7 & 1.9 Duty to Avoid Conflicts of Interest With Current and Former Clients

APPLICABLE MODEL RULES OF PROFESSIONAL CONDUCT (CONT'D)

- Rule 3.3 Duty of Candor Toward the Tribunal
- Rule 3.4 Duty of Fairness to Opposing Party and Counsel
- Rule 4.1 Duty of Truthfulness in Statements to Others
- Rule 5.1 Duty of Supervision of Subordinate Lawyers
- Rule 5.3 Duty of Supervision of Non-Lawyer Assistants
- Rules 5.5 Duties Regarding Unauthorized Practice of Law and Multijurisdictional Practice of Law

APPLICABLE MODEL RULES OF PROFESSIONAL CONDUCT (CONT'D)

- Rule 5.7 Duties Regarding the Provision of Law-Related Services
- Rule 7.1 Duties Regarding Communications Concerning a Lawyer's Services
- Rule 8.4 Duties Regarding Avoiding Misconduct

AMERCIAN BAR ASSOCIATION FORMAL OPINION 512 (JULY 29, 2024)

- To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including duties to:
 - provide competent legal representation,
 - protect client information,
 - o communicate with clients,
 - o supervise their employees and agents,
 - o advance only meritorious claims and contentions,
 - ensure candor toward the tribunal, and
 - charge reasonable fees.
- Full Opinion Here.

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Anticipated Changes to the Federal Rules of Evidence

Grimm and Grossman proposed revision to FRE 901(b)(9) for acknowledged Al-generated evidence

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[901](b) **Examples**. The following are examples only — not a complete list — of evidence that satisfies the requirement [of 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 produced an accurate <u>a valid</u> and <u>reliable</u> result; and

(B) if the proponent concedes 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.

Grimm and Grossman Proposed New FRE 901(c) for disputed or potentially fabricated evidence

<u>901(c): Potentially Fabricated or Altered Electronic</u> <u>Evidence.</u>

If a party challenging the authenticity of computergenerated 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, using 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.

Precedent for Grimm and Grossman's approach

• Huddleston v. US, 108 S. Ct. 1496, 1502 (1988)

- The Supreme Court set forth the evidentiary standard judges must apply when determining whether to admit "other crimes, wrongs, or acts" evidence pursuant to Fed. R. Evid. 404(b)
- Johnson v. Elk Lake School District, 283 F.3d 238, 143-33 (3d Cir. 2002)
 - The Third Circuit follows Huddleston when determining whether, in a civil case seeking damages for sexual assault, evidence that the defendant had previously committed an "offense of sexual assault" should be admitted pursuant to Fed. R. Evid. 415.

Federal Rules Advisory Committee proposed new FRE 707

Rule 707. Machine-generated Evidence

<u>Where machine-generated evidence is offered</u> <u>without an expert witness and would be subject to Rule</u> <u>702 if testified to by a witness, the court must find that</u> <u>the evidence satisfies the requirements of Rule 702 (a)-</u> (d). This rule does not apply to the output of basic <u>scientific instruments.</u>

Current FRE 702

Rule 702. Testimony by Expert Witness

- 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.

Federal Rules Advisory Committee possible new FRE 901(c) for disputed or potentially fabricated evidence

<u>901(c): Potentially Fabricated Evidence Created By Artificial Intelligence.</u>

(a) Showing Required Before an Inquiry into Fabrication. A party challenging the authenticity of an item of evidence on the ground that it has been fabricated, in whole or in part, by generative artificial intelligence, must present evidence sufficient to support a finding to warrant inquiry by the court.

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(b) Showing Required of the Proponent. If the opponent meets the requirement of (a), the item of evidence will be admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

(c) Applicability. This rule applies to items offered under either Rule 901 or 902.
Questions? Thank you!

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