July 17, 2025
Sent by e-mail

Allen Wynperle
Chair, Federation of Ontario Law Associations
25 Main Street West, Suite 1700
Hamilton, ON L8P 1H1

Dear Mr. Wynperle,

I am writing to you in my capacity as Chair of the Artificial Intelligence Subcommittee[1] of the Civil Rules Committee. The Artificial Intelligence Subcommittee was struck to analyze and make proposals with respect to the use of artificial intelligence and technology in the litigation process.

The Subcommittee is seeking feedback on a set of potential *Rule* proposals relating to evidence and artificial intelligence. The goal of these proposals is to give guidance to the judiciary and the bar on the procedure for receiving evidence generated by Artificial Intelligence.

In brief, the proposed AI *Rules* would: (1) define "artificial intelligence" for the purpose of these *Rules*; (2) impose requirements on parties putting forward evidence generated by a computer system using artificial intelligence; (3) provide a process for challenging the authenticity of potentially fabricated or altered computer-generated evidence; and (4) address the admissibility of expert evidence generated by a computer system using artificial intelligence.

Please find enclosed a Consultation Report for your review and feedback. To aid with your review, appendix A of the report sets out the current relevant *Rules of Civil Procedure* and appendix B sets outs the US Federal Advisory Committee's proposed Rules.

Questions about the consultation may be directed to <u>crc.secretary@ontario.ca</u>.

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[1] The Subcommittee consists of the following 21 bench and bar members: Justice Lauwers (chair), Regional Senior Justice Tzimas, Justice Myers, Justice Presser, Justice Sharma, Small Claims Court Administrative Justice Ntoukas, Abdi Aidid, Charles Gluckstein, Maura Grossman, Luke Kilroy, Jennifer Leitch, Kathryn Manning, Crystal O'Donnell, Darcy Romaine, Amy Salyzyn, Greg Sullivan, Susan Wortzman, Calie Adamson, Trevor Guy, Farzin Yousefian, and Damon Usborne.

Any feedback is requested to be submitted by September 12, 2025. Please submit the response to crc.secretary@ontario.ca.

Thank you in advance for your contributions.

Yours sincerely,

Peter D. Lauwers
Justice, Court of Appeal for Ontario

Civil Rules Committee

Consultation on proposals for *Rules of Civil Procedure* relating to evidence and Artificial Intelligence

Consultation Paper

Proposal 1: Defining Artificial Intelligence

Summary:

In order to know what below proposals 2 to 4 apply to, the Subcommittee proposes including a definition of "artificial intelligence" for the purpose of these proposed rule amendments. This proposed definition is adapted from "The Sedona Canada Primer on Artificial Intelligence and the Practice of Law"

Proposal:

"Artificial intelligence" refers to a collection of technologies that replicate human intelligence in processing information by performing tasks that are considered to be cognitive, such as perceiving, learning, reasoning, problem-solving, and understanding and generating language.

Do you agree with this proposed definition? Why or why not?

Proposal 2: Identification of evidence generated by a computer system using AI

Summary:

This proposal seeks to provide requirements for parties who seek to put forward evidence generated by a computer system using artificial intelligence. This proposal aims to supplement the Ontario *Evidence Act* and the *Canada Evidence Act* as this is not addressed in either *Act*.[2]

Proposal

A party who puts forward evidence generated in whole or in part by a computer system using artificial intelligence shall:

   (a) Identify the software or program that was used in the generation of the evidence;
   (b) Identify the categories of data used to train the software or program; and
   (c) Provide supporting evidence to show that the output or results of the software or program are valid and reliable.

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[2] In *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 ONCA 264, at paras. 35-38, the Court of Appeal recognized that parts of the Ontario *Evidence Act* are rules of practice and procedure.[2] The Court went on to observe that there is overlap between the *Evidence Act* and the *Rules,* and, that it would be open to the Civil Rules Committee to make rules touching on matters dealt with in the *Evidence Act,* so long as the two did not conflict.

Do you agree with this proposal? Why or why not?

Proposal 3: Potentially Fabricated or Altered Computer-generated or Other Electronic Evidence

Summary:

This proposal aims at preventing misleading AI-generated evidence, such as deep fakes, from benefiting from the presumption of authenticity. This proposal similar aims to supplement the evidence acts. Section 34.1(4) of the Ontario *Evidence Act* provides that, in order to authenticate an electronic record, the person seeking to introduce it must call evidence "capable of supporting a finding that the electronic record is what the person claims it to be".[3] This proposal supplements the practice and procedure for this requirement by creating a process for a party to challenge the authenticity of evidence that might have been generated by AI, such as a deep-fake image – which is, by definition, not what it claims to be.

Proposal:

A party may challenge the authenticity of evidence generated or modified by a computer system that used artificial intelligence. If the court finds that the evidence could both reasonably be believed by the trier of fact and could reasonably be fabricated in whole or in part, then it is not admissible unless the proponent demonstrates on the balance of probabilities that the evidence's probative value exceeds its prejudicial effect.

Do you agree with this proposal? Why or why not?

Proposal 4: Admissibility of Expert AI Evidence

Summary:

This proposal seeks to provide a process for the admissibility of outputs of a computer system using artificial intelligence in an expert report. Like the other proposals, this proposal aims to supplement the Ontario *Evidence Act* and the *Canada Evidence Act* as this is not addressed in either *Act*.

Proposal:

Where the output of a computer system using artificial intelligence, either in whole or in part, would be subject to rule 4.1.01 and 53.03 (2.1) if testified to by a human witness, the court must find that the output satisfies the following requirements:

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[3] Section 31.1 of the *Canada Evidence Act* is substantially similar and so this section will focus on the Ontario *Evidence Act.*

(a) the evidence must be relevant and material;

(b) the evidence must be necessary in assisting the trier of fact;

(c) no other evidentiary rule would apply to exclude the evidence;

(d) the evidence is based on sufficiently valid and reliable facts or data;

(e) the evidence is the product of valid and reliable principles and methods; and

(f) the evidence reflects a valid and reliable application of the principles and methods to the facts of the case.

The admission of expert evidence generated in whole or in part by a computer system using artificial intelligence is ultimately within the discretion of the judge in determining whether the evidence's probative value exceeds its prejudicial effect.

Do you agree with this proposal? Why or why not?

Do you have any other feedback to provide?

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

  (a) to provide opinion evidence that is fair, objective and non-partisan;
  (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
  (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Evidence by Witnesses

Oral Evidence as General Rule

53.01 (1) Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination.

Evidence by Affidavit

With Leave of Court

53.02 (1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination.

Expert Witnesses
Experts' Reports
53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
   i. a description of the factual assumptions on which the opinion is based,
   ii. a description of any research conducted by the expert that led him or her to form the opinion, and
   iii. a list of every document, if any, relied on by the expert in forming the opinion.
6.1 A statement signed by the expert certifying that the expert is satisfied as to the authenticity of every authority or other document or record referred to in the report, other than,
   i. a document or record consisting of evidence or potential evidence in the action that the expert analyzed or interpreted in the report, if the document or record was provided to the expert by or on behalf of the party intending to call the expert as a witness,
   ii. an authority or other document or record cited by the expert in the report only because it was referenced in a report prepared by another expert witness in the action and the expert is commenting on the reference, and
   iii. an authority or other document or record referred to in the report the authenticity of which the expert doubts.
6.2 Details of the doubts the expert has respecting the authenticity of an authority, document or record described in subparagraph 6.1 iii, and of any doubts the expert may have respecting the authenticity of an authority, document or record described in subparagraph 6.1 i or ii.
7. An acknowledgment of expert's duty (Form 53) signed by the expert.

(2.1.1) An authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic for the purposes of paragraph 6.1, absent evidence to the contrary.

Appendix B: US Federal Advisory Committee's Proposed Rules

Rule 702: Testimony by Expert Witnesses

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.

Rule 707: Machine-generated Evidence

Where the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a) – (d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software.

Rule 901(c): Deepfakes

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 artificial intelligence [by an automated system], the evidence is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.