Federation of Ontario Law Associations
Fédération des associations de barreau de l'Ontario

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731 9th Street West,
Owen Sound, ON
N4K 3P5

(519) 270-4001

www.fola.ca

The Honourable Justice Peter D. Lauwers
Chair, Artificial Intelligence Subcommittee, Civil Rules Committee
Court of Appeal For Ontario

Via Email (crc.secretary@ontario.ca)

Dear Justice Lauwers:

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

Introduction

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity to comment on the Artificial Intelligence Subcommittee's proposals for amendments to the Rules of Civil Procedure relating to AI-generated evidence. FOLA supports efforts to provide clarity to the profession and the courts regarding the admissibility of AI-related material while safeguarding fairness, procedural efficiency, and the integrity of the justice system. Your efforts will meaningfully help litigants and the courts, and we are thankful.

FOLA represents Ontario's 46 county and district law associations, and through them, their members. Our association is the only provincial legal organization representing LSO licensees at the front-lines of legal services in communities in all parts of the province. Our members regularly appear at all levels of court.

Overarching Position

FOLA recommends that lawyers should not face broad, mandatory disclosure obligations for any incidental or background use of AI tools in preparing submissions or analyzing evidence. Instead, the focus should be on ensuring the lawyer remains the responsible gatekeeper for any AI-derived content that is placed before the court. Expert witnesses should have a clear duty to disclose any reliance on AI-generated content that informs their opinion, given their special evidentiary role. Rules should be crafted narrowly to target substantive AI-generated content rather than administrative, drafting, or background research functions.

In the following we explore each of the subcommittee's proposals in turn, setting out our understanding of the proposal followed by commentary and suggested additions and revisions.

1. Definition of Artificial Intelligence

1.1 Support for Clarity but Need for Narrow Scope

FOLA recognizes the value in having a definition of "artificial intelligence" in the Rules for consistent application. The proposed definition — adapted from *The Sedona Canada Primer on Artificial Intelligence and the Practice of Law* — set out below is broad and captures a wide range of technologies, from complex generative models to basic language processing tools.

> *"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.*

While this breadth promotes flexibility, it also risks sweeping in low-risk, widely used tools (predictive text, basic search algorithms) that do not meaningfully raise evidentiary reliability concerns.

1.2 FOLA's Commentary

1. Refine the definition so that the Rules capture only those AI systems that materially contribute to the substance of evidence or argument presented in court.

2. Consider incorporating a "materiality threshold" or qualifier to exclude incidental, low-risk uses.

3. Provide guidance or examples in a practice direction or commentary to help practitioners determine when the definition applies.

1.3 FOLA Proposes Wording Addition:

> "For the purposes of these rules, 'artificial intelligence' refers to a collection of technologies that replicate human cognitive functions, including perceiving, learning, reasoning, problem-solving, and language generation, *where such technologies materially contribute to the creation, alteration, or analysis of evidence relied upon in a proceeding.*"

2. Identify AI generated Evidence – The Lawyer as Gatekeeper

2.1 Rationale

The consultation paper proposes the following obligations on parties in relation to evidence generated by artificial intelligence,

> *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.*

The identification of the artificial intelligence product used and evidence of the validity and reliability of said product's outputs is a baseline that should be established in the case of AI generated evidence.

2.2 FOLA's Commentary/Recommendation

Clause (b) that requires the identification of the categories of data used to train the AI Is likely to have unintended gatekeeping impacts due to the possible unwillingness of the owners of the artificial intelligence in disclosing all of their training data and keeping this disclosure up to date. What is meant by a category of data?

Depending on how “categories of data” is defined this risks creating a Rule that ignores the fact that artificial intelligence products are consistently updated and their data sets changing at a pace with which our court system will never keep up with. Any proposed disclosure of the training data for artificial intelligence needs to recognize the constantly evolving nature of the training data sets utilized by artificial intelligence and the rational business imperative to fight disclosure.

The key safeguard in our system is the lawyer’s professional and ethical duty to ensure that all material placed before the court is accurate, reliable, and compliant with existing evidentiary standards. The lawyer’s role as gate keeper needs to recognize the limitations of the profession when it comes to recognizing AI usage, especially in the context of an ever-increasing use of AI throughout business, cultural, and social enterprises.

It is worth noting that it would appear that much if not all of the AI generated evidence would already be subject to the demonstrative evidence regime. Consideration may want to be given to having the AI product generate a logic tree for anything they create that is being admitted into court that sets out its chain of reasoning as part of it’s admissibility requirements.

Disclosure should be required only where AI has generated substantive evidence or analysis that is directly relied upon in argument or evidence before the court.

Any disclosure obligation should not displace the pre-existing duties of competence, candour, and honesty under the Rules of Professional Conduct.

2.3 FOLA Proposes Wording Addition:

> “For greater certainty, nothing in these rules requires the disclosure of the incidental use of artificial intelligence tools that do not materially contribute to the substance of evidence or argument presented to the court. Lawyers remain responsible for the accuracy and reliability of any material filed or presented, regardless of the tools used in its preparation.”

3. Altered Evidence

3.1 Addressing Mis-leading AI generated evidence

The ability to identify misleading evidence such as deep fakes is vital to ensure justice in a world with AI. The consultation paper suggests that this could be addressed by reference to the governing standard for admissibility of otherwise relevant evidence where there is a risk of unfairness.

> *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.*

3.2 FOLA’s Commentary

The current wording of this proposal if read literally, creates a new, mandatory admissibility gait for all AI touched materials, even if the AI role was trivial (e.g. spell check, formatting). It would capture any evidence output from a system “that used AI,” even if the AI function was irrelevant to the creation of the actual exhibit. Non-AI computer outputs (e.g., GPS data, phone records,

surveillance cameras) wouldn't face the same mandatory balancing test — yet they can also be fabricated or misleading.

Parties could weaponize the provision to demand a voir dire on any exhibit with a digital origin and some minimum threshold needs to be established.

3.3 FOLA Suggests Minimum Threshold Amendment and Revised Proposed Rule:

To avoid constant challenges, FOLA recommends a two-step framework:

1. Triggering Challenge

   A party may challenge the authenticity of evidence generated or materially modified by an artificial intelligence system where there is a real and substantial concern that the system's operation affected the reliability of the evidence.

   This requires the challenger to raise more than a speculative objection — they must point to a real risk of AI manipulation.

2. Court's Response

   If such a concern is established, the court shall consider whether the evidence is both reasonably capable of belief and reasonably capable of fabrication, and may exclude it unless the proponent establishes, on a balance of probabilities, that its probative value outweighs its prejudicial effect.

   This aligns with how demonstrative evidence is already handled: presumptive admissibility, subject to balancing when risk is shown.

   A refined proposal such as that set out below should address some of these issues:

   Proposed Rule

   A party may challenge the authenticity of evidence generated or materially modified by an artificial intelligence system where there is a real and substantial concern that the system's operation affected the reliability of the evidence.

   Where such a challenge is established, the court shall determine whether the evidence could reasonably be believed by the trier of fact and could reasonably be fabricated in whole or in part.

   If both conditions are met, the evidence is inadmissible unless the proponent demonstrates, on a balance of probabilities, that the evidence's probative value outweighs its prejudicial effect.

   For the purpose of this rule, evidence is considered "generated or modified by an artificial intelligence system" only where the artificial intelligence functions were directly applied to create, alter, or present the content of the exhibit. The mere fact that a computer system containing artificial intelligence functions was used does not, by itself, engage this rule.

FOLA's proposal would,

1. preserve the existing demonstrative evidence framework (probative vs. prejudicial), and
2. add a minimum threshold so courts aren't clogged with speculative challenges,

3. ensure scope is limited to situations where AI actually created or altered the exhibit.

4. Admissibility of Expert AI Evidence

4.1 Importance of Disclosure in Expert Context

Expert witnesses occupy a special position under Rules 4.1 and 53.03, with a duty to the court to provide fair, objective, and non-partisan evidence. The proposal suggests the following in relation to AI use in expert evidence,

> *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:*
> *(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.*

4.2 FOLA's Commentary

The proposal as worded, contemplates AI outputs as stand-alone evidence without a human witness sponsoring same. It is unclear the circumstances in which the role of expert evidence in assisting the court would be usurped by an AI output without a human witness to provide context and details. FOLA reads the current proposal as ambiguous on this point, and recommends clarifying that expert evidence derived from AI must be human-sponsored.

4.3 FOLA's Revised Proposed Rule and Wording Addition:

FOLA suggests the Revised Proposed Rule:

> Where the output of a computer system using artificial intelligence, in whole or in part, materially contributes to expert opinion evidence that would otherwise be subject to Rule 4.1.01 and Rule 53.03(2.1), the following requirements apply:
>
> The evidence must be:
> (a) relevant and material;
> (b) necessary in assisting the trier of fact;
> (c) not subject to exclusion by another evidentiary rule;
> (d) based on sufficiently valid and reliable facts or data;
> (e) the product of valid and reliable principles and methods; and
> (f) a valid and reliable application of those principles and methods to the facts of the case.
>
> The AI output must be sponsored by a qualified expert who accepts responsibility for the opinion and attests to the fairness, objectivity, and reliability of the evidence in accordance with Rule 4.1.01.

> To the extent reasonably possible, the proponent shall disclose the inputs, assumptions, limitations, and known error rates of the AI system relied upon. Admission remains subject to the discretion of the court, which may exclude the evidence if its probative value is outweighed by its prejudicial effect.

The above could be assisted by a requirement for disclosure being incorporated into the expert report contents under Rule 53.03(2.1).

Proposed Wording Addition:

> "Where an expert relies, in whole or in part, on an artificial intelligence system in forming their opinion, the expert's report shall identify the system, describe the input data or assumptions provided to it, and explain the extent to which the output informed the expert's conclusions."
> This could also be incorporated into the Expert's Acknowledgment of Duty form.

Comparative Insights from the U.S. and EU

United States

The proposed U.S. Federal Rule 707 targets AI-generated evidence **only where the AI system materially generates substantive content**, and it does not apply to "basic scientific instruments or routinely relied upon commercial software."

This approach aligns with FOLA's position to avoid over-regulating low-risk AI use.

European Union

The EU AI Act (expected to come into force by 2026) focuses regulation on high-risk AI systems, including those used in the administration of justice, but leaves routine, low-risk AI uses largely unregulated.

The EU also emphasizes human oversight — reinforcing the lawyer's gatekeeping role — as the primary safeguard.

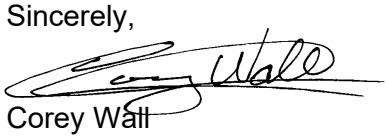
Key Takeaway: Both U.S. and EU approaches limit disclosure and regulation to material or high-risk AI use, rather than imposing blanket obligations.

Conclusion

FOLA supports rules that protect the integrity of the trial process while fostering innovation. Narrow, targeted AI disclosure obligations, combined with the existing professional duties of lawyers and an enhanced disclosure duty for experts, will achieve these goals without imposing unnecessary procedural burdens.

Should you have any questions please do not hesitate to contact Ian Hu, FOLA Director of Policy & Advocacy, at ian.hu@fola.ca.

Sincerely,



Corey Wall
FOLA Treasurer and Chair of Ad Hoc AI Committee