STATE BAR OF WISCONSIN
PINNACLE
Your Practice. Our Purpose.

AMC 2026

Session 3

Admissible or Not? Addressing Evidentiary Issues in the AI Age

Presented by:

Hon. Emily I. Lonergan
Outagamie County Circuit, Appleton

Hon. R. Michael Waterman
St. Croix County Circuit Court, Hudson

About the Presenters...

Hon. Emily Lonergan has been a Circuit Court Judge in Outagamie County since 2019. She presides over a general docket as well as a treatment court. She has been serving as a faculty member of the Wisconsin Judicial College since 2023, and was appointed Associate Dean of the Judicial College in 2025. Emily also serves on the Civil Jury Instruction Committee, and as a member of the Judicial Council. Emily previously served as Chair of the Wisconsin High School Mock Trial Program through the State Bar of Wisconsin. Prior to taking the bench, Emily was an attorney in private practice focusing her practice on personal injury and criminal defense. Emily received her BA and her JD from Marquette University. When Emily is not on the bench, she is most often found managing the mischief of her four young children.

Judge R. Michael Waterman was appointed to the St. Croix County Circuit Court in 2015. He received his undergraduate degree from Muhlenberg College in Allentown, Pennsylvania and his law degree from Hamline University School of Law in St. Paul, Minnesota. He currently chairs the Civil Jury Instruction Committee, and presides over the St. Croix County Family Treatment Court. He is a frequent presenter at judicial education programs. Prior to joining the bench, Judge Waterman had a civil litigation practice in Hudson, Wisconsin, and he taught appellate advocacy at William Mitchell College of Law

ADMISSIBLE OR NOT?
ADDRESSING EVIDENTIARY ISSUES IN THE AI AGE

Hon. Emily I. Lonergan
Outagamie County Circuit Court - Branch II
320 S. Elm Street
Appleton, WI 54911

Hon. R. Michael Waterman
St. Croix County Circuit Court – Branch IV
1101 Carmichael Rd, Suite 1600
Hudson, WI 54016

I. Introduction

Artificial intelligence is unlike anything that the legal system has ever faced. It can transcribe hours of body camera footage to assist litigators in reviewing discovery. It will draft difficult emails to clients and is able to use a measurable amount of "snark" in responding to contentious opposing counsel. It can also generate convincing evidence of an alibi to a defendant facing a homicide charge, constituting evidence of reasonable doubt. It can create screenshots of text messages to provide to a spouse in a custody battle action, portraying a husband as a dangerous domestic abuser. If the messages are dated far enough in the past, it is unlikely that the victim of such fake evidence would have any means of refuting it.

As of May of 2026, it's not possible to have artificial intelligence raise its right hand and be sworn in. We cannot cross examine chatGPT on the stand, and we are not able to observe the facial tics of Gemini to determine for ourselves the reliability of each response.

So how are the courts to respond to such an evolving bit of technology? Unsophisticated *pro se* litigants are now using it to submit pages upon pages of filings that clog the system and make court response time slower for all cases.

These materials and this presentation constitute the proposed approach of two individual circuit court judges at this moment in time under the guidance (or lack thereof) that currently exists. Our proposal is this: disclose, verify, and analyze. First, disclose the existence of generative AI in briefs and evidence (including expert reports). Second, verify the veracity of each piece of AI utilized (case cites, transcripts of discovery footage, etc.). Finally, for evidence, analyze it using the same evidentiary framework applicable to any other evidence. Courts can follow the same guidance by utilizing a scheduling order that demands disclosure of generative AI, requires litigants that use generative AI to certify that they have verified each data point or citation within, and by using the same evidentiary framework in analyzing admissibility of evidence.

II. Artificial Intelligence in the Courts

Very little statutory authority exists addressing how courts should handle AI, given the evolving nature of the technology and the slow nature of statutory drafting. The federal Advisory Committee on Evidence Rules has proposed two rules to address AI but neither has yet been finalized or made law. The first would

be a proposed new Rule 707 addressing machine-generated evidence.[1] The proposed new rule would require AI evidence offered without an expert witness to satisfy the requirements of Rule 702.[2] The rule would not apply to "simple scientific instruments."[3]

The second proposal would create a new Rule 901(c) to create a standard of admissibility regarding alleged deepfakes.[4] This new rule proposes a burden-shifting methodology: first, the party alleging that the evidence is fabricated must make a showing sufficient to justify the inquiry, and second, if the initial showing is made, then the proponent of the evidence must satisfy the court that the evidence is more likely than not authentic.[5] The proposed rule 901(c) requires a higher showing than what is ordinarily required for authenticity under Rule 901, which is merely "evidence sufficient to support a finding that the item is what the proponent claims it is."

While these proposals are relevant to the discussion regarding how courts may handle AI evidence in the future, neither has been adopted as of yet. There are not yet many cases that pertain to admissibility of AI evidence at trial, but those that exist support the application of the current rules of evidence as the framework of admissibility. In *Matter of Weber as Trustee of Michael S. Weber Trust*, for example, an expert utilized Microsoft Copilot to cross-check his calculations.[6] The expert was unable to recall the prompts he input into Copilot or the sources that the AI system relied upon.[7] He was also unable to describe how Copilot works.[8] The court in that case utilized Copilot to illustrate the point of how unreliable it actually is, and imposed an affirmative duty on counsel to disclose future generative AI use.[9] The court also required a hearing on AI evidence in order to determine reliability and admissibility prior to the evidence being used at trial.[10]

In another example, a bankruptcy court in New York excluded an expert report that was generated by artificial intelligence, finding that it did not meet the standard set forth by Rule 702.[11]

Far more frequently than admissibility of AI evidence at trial, courts are addressing use of generative AI in briefing. Case law is beginning to develop, particularly on the topic of AI "hallucinations," in which AI

---

[1] *See* Advisory Comm. On Evidence Rules, Memorandum from Hon. Jesse Furman, Chair, to Comm. on Rules of Practice and Procedure (December 1, 2025), https://www.uscourts.gov/sites/default/files/document/2025-12-01_evidence_rules_committee_report.pdf.

[2] *Id*. at 2.

[3] *Id.*

[4] *Id*. at 5.

[5] *Id.*

[6] *Matter of Weber as Trustee of Michael S. Weber Trust*, 85 Misc. 3d 727, 220 N.Y.S.3d 620 (Surrogate's Court, New York, 2024).

[7] *Id.*

[8] *Id*.

[9] *Id.*

[10] *Id.*

[11] *In re Celsius Network LLC*, 655 B.R. 301, 309 (Bankr. S.D.N.Y. 2023).

generates fictitious or inaccurate case or record citations.[12] Courts in some jurisdictions have imposed harsh sanctions on attorneys who included falsified citations in their submissions, including fines, dismissal, and/or referrals to various offices of lawyer regulation.[13]

It is this developing case law that has produced the first two recommendations included in this presentation: disclose and verify. With the disclosure of generative AI, courts and counsel are alerted that the words on the page should be viewed with additional scrutiny. This way, the court and counsel alike avoid the added embarrassment (and additional sanctions) that would accompany having a court rely upon a hallucination and repeat it in a written decision and order or oral ruling from the bench. The second piece of this is similarly obvious: generative AI is simply not as reliable as having a trained legal professional draft a submission to the court. The growing body of case law sanctioning lawyers across the country supports the proposition that AI-generated briefs are not perfect written representations of the law. If generative AI is utilized as a time-saving method, the lawyer must take the extra step of looking up every case and record cite in the submission and confirm its accuracy. The courts have the ability to enforce this by way of scheduling order and/or local rule requiring a certification that the citations are accurate.

III. Admissibility Framework

As to the third recommendation, unless and until new rules instruct otherwise, evidence should be analyzed under the same evidentiary framework as already provided in the rules of evidence. Our framework for evidence includes authenticity, foundation, relevance and hearsay. Below is a quick reference guide to the Wisconsin rules of evidence that may be relevant from an AI evidentiary perspective.

Authenticity:

- Is there enough for an evidentiary finding that the matter is what the proponent says it is? §909.01
- Exhibits can be authenticated be author, witness who observed creation of document, by stipulation of the parties or another method. §909.015
- Best evidence rule – original required §910.02. Screenshot can be considered "original" - *State v. Giacomantonio*, 2016 WI App 62; duplicate permitted if no issue as to authenticity §910.03.
- Summaries are permitted. §910.06. AI evidence has already and will continue to be utilized in the form of demonstrative evidence, which will likely prove to be a positive and efficient use of the technology, provided the inputs are accurate and the output is reliable.

Foundation:

- **Personal knowledge** required. §906.02

---

[12] *See*, *e.g.*, *Dec v. Mullin*, 171 F.4th 940, 947 (7th Cir. 2026), *Jones v. Kankakee Cnty. Sheriff's Dep't*, 164 F.4th 967, 969 (7th Cir. 2026), *Prososki v. Regan*, 321 Neb. 38, 32 N.W.3d 593, 607 (Neb. Sup. Ct. 2026), *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 495 (D. Wyo. 2025), *ByoPlanet Int'l, LLC v. Johansson*, 792 F. Supp. 3d 1341, 1356 (S.D. Fla. 2025), *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024), *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

[13] *ByoPlanet Int'l, LLC v. Johansson*, 792 F. Supp. 3d 1341, 1356 (S.D. Fla. 2025).

- **Character for truthfulness**/untruthfulness may be attacked by opinion or reputation Wis. Stat §906.08(1) or specific instances of conduct, subject to the limitations of §906.08(2)
- Evidence of bias of a witness is admissible. §906.16. Keep in mind as well that certain AI models may have a skewed result based upon the bias of the individual feeding the input data.
- **Lay opinion** 1) Rationally based on the perception of the witness, 2) Helpful to a clear understanding, 3) Not expert testimony. §907.01
- **Expert** opinion test is (1) whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; (2) whether the expert is qualified as an expert by knowledge, skill, experience, training, or education; (3) whether the testimony is based upon sufficient facts or data; (4) whether the testimony is the product of reliable principles and methods; and (5) whether the witness has applied the principles and methods reliably to the facts of the case. §907.01, *In re Commitment of Jones*, 2018 WI 44, ¶29.
- We anticipate that experts may begin to testify about using AI in confirming their own results. Caution should be exercised here prior to allowing that evidence of "confirmation" to come in front of a jury. Is the expert able to identify the inputs that were utilized? Is the expert able to describe how the technology worked? Can the work be replicated? Do experts in that field regularly rely upon AI?

Relevance

- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. §904.01
- Relevant evidence can be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, or if the evidence is misleading, confuses, or wastes time. §904.03
- We expect that §904.03 may play a role in AI evidence in the future. If the burden on authenticity remains the same (i.e. quite low), then deepfakes would likely meet the burden of authenticity. However, if the opponent of the evidence credibly argues it was falsified, then the danger of unfair prejudice (i.e. allowing a jury to see a video that portrays a falsified prior bad act, for example) would substantially outweigh the danger of unfair prejudice.

Hearsay

- 1) Does the evidence constitute a statement as defined by §908.01(1)? 2) If so, was the statement made by a declarant as defined by §908.01(2)? 3) Is the statement offered to prove the truth of its contents as required by § 908.01(3)? 4) Is the statement excluded from the definition of hearsay by §908.01(4)? 5) If the statement is hearsay, does it come within one of the exceptions to the hearsay rule?
- Exclusions to hearsay under §908.01(4): prior inconsistent/consistent statement under §908.01(4)(a), and admission by a party opponent under §908.01(4)(b).

- Exceptions to hearsay, availability of declarant immaterial: (1) present sense impression, (2) excited utterance, (3) present sense impression, (4) statements for medical diagnosis or treatment, (5) recorded recollection, (6) records of regularly conducted activity, (6m) patient healthcare records… (24) statements of comparable circumstantial guarantees of trustworthiness, etc. §908.03.
- A computer is not a "declarant" – however – there may still exist layers of hearsay as it pertains to AI depending upon the input.

IV. Conclusion

Courts have a long history of adjusting – albeit sometimes not quickly – to emerging science and technology. Utilizing common sense (disclosing generative AI and verifying citations) along with our existing framework for the admissibility of evidence, courts and litigants alike will adjust to this developing technology and find ways to embrace the advances while avoiding the pitfalls.