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THE COMING USE AND MISUSE OF ARTIFICIAL
INTELLIGENCE IN THE COURTROOM: A JUDICIAL
PERSPECTIVE AND PROPOSAL

*William Matthewman**

Abstract

While attorneys, litigants, and judges have always had to be on alert for attempts to introduce improperly enhanced or fabricated evidence in court proceedings, the rise of Artificial Intelligence (AI) and its subset, Generative Artificial Intelligence (GAI), has substantially raised the stakes. The task of ferreting out and identifying such fake or improperly enhanced AI evidence has become much more problematic. The current Federal Rules of Evidence and Federal Rules of Civil and Criminal Procedure are insufficient to effectively address the coming onslaught of AI-generated or AI-enhanced evidence. The rules must be amended, in certain respects, to provide attorneys, litigants, and judges with the tools and guardrails necessary to handle issues arising during pretrial and trial proceedings concerning deepfakes and AI-generated or enhanced evidence. This includes addressing pretrial discovery related to such AI evidence, notice requirements when a party seeks to rely on AI-generated or AI-enhanced evidence, procedures for pretrial challenges to admission of such evidence, respective burdens of proof, trial procedures, and even jury instructions. Lawyers and litigants must become adept at discerning and challenging unacknowledged deepfakes and other improperly AI-generated or AI-enhanced evidence, while simultaneously learning to effectively utilize properly acknowledged AI evidence or AI-enhanced evidence for potentially legitimate purposes. Judges must take a gatekeeping role when it comes to AI-generated or enhanced evidence, ensuring that only legitimate, properly authenticated evidence is admitted. Procedures are needed to guide judges in dealing with challenges to admission of AI-generated or enhanced evidence during both pretrial and trial proceedings, and to ensure that jurors are not led astray by deepfakes or false claims of deepfakes. The rise of AI creates

* J.D. 1983, University of Florida College of Law. Judge Matthewman is the Chief United States Magistrate Judge in the United States District Court for the Southern District of Florida, and he sits in the West Palm Beach Division. While in law school, Judge Matthewman served as a Research Editor on the *Florida Law Review*. Prior to his appointment to the federal bench in 2012, Judge Matthewman was a very active trial lawyer and was Board Certified by The Florida Bar as a criminal trial attorney.

unique issues and challenges in legal proceedings, requiring the courts to be ready to meet those new challenges.

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INTRODUCTION

The rapid rise and development of AI, and its subset GAI, will have profound and widespread effects in courtrooms and upon our entire legal system. The use of this new technology by attorneys and parties has

already created a plethora of hallucinated, false, and fabricated submissions in filings in state and federal courts, and courts have been struggling to deal with these new issues. These hallucinations are just the tip of the iceberg and serve as a preview of some of the negative effects that AI and GAI will have in the courtroom and in legal proceedings. But there is also the potential for positive uses of AI and GAI in the courtroom, so long as such uses are properly acknowledged and authenticated. This Article addresses the anticipated use and misuse of AI-generated or enhanced evidence in the courtroom and legal proceedings.

The author takes a practical approach intended to aid lawyers, litigants, and judges who find themselves contending with evidence generated or enhanced by AI or GAI in the courtroom and in legal proceedings. Part I discusses how deepfakes and fabricated AI evidence have already recently invaded some courtrooms and legal proceedings, as well as concerns regarding what the future may hold in this area. Part II discusses the fact that not all AI evidence is bad; that is, acknowledged AI evidence for certain purposes may potentially have a place in court. The role of AI evidence will depend upon proper authentication, relevance, and notice. Part III discusses the role of lawyers and litigants in guarding against the use of deepfakes and other fabricated AI evidence in court proceedings. This part also discusses how lawyers and litigants must seek creative and proper ways to utilize AI in the courtroom and legal proceedings. Part IV discusses the role of judges in addressing deepfakes and fabricated AI evidence in court proceedings. Judges must take an active, gatekeeping role to prevent the unfair prejudice that can arise from the introduction or mention of fabricated or improperly enhanced AI evidence. Part V discusses the need for additional rules and procedures, including a discussion of the newly proposed Federal Rule of Evidence 707, to manage and address AI and GAI evidence in court proceedings. Part VI addresses the “liar’s dividend” and its effect on jurors. Specifically, in light of the public’s knowledge of deepfakes and fabricated AI evidence reported in the media, procedures must be implemented to guard against a party’s false denial of legitimate evidence by cavalierly claiming without any support that it is AI-fabricated evidence. Part VII concludes with some suggestions and proposals to allow courts to properly and effectively deal with AI and GAI evidence in trials and legal proceedings. It is a brave new world when it comes to AI and GAI evidence in court and legal proceedings. Attorneys, litigants, and judges must be properly educated and informed to rise to the challenges created by this new technology.