

American College of Coverage Counsel 2024 Insurance Law Symposium

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Ethics, Deep Fakes, and AI, Oh My: Navigating the New Frontier of Insurance Fraud

Mark Lanterman, Computer Forensic Services

Neil Posner, Much Shelist, P.C.

Stacy Broman, Meagher + Geer PLLP

Christopher Yetka, Larkin Hoffman Daly & Lindgren, Ltd.



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Ethics and Artificial Intelligence

with Neil Posner



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How does AI Relate to the Law?

- ▶ How and when can you use generative AI?
- ▶ What are the ethical considerations and risks when using Generative AI?
- ▶ What should you look for in your practice when it comes to others' use of AI?
- ▶ What generative AI tools are accessible to everyone, and can they be used fraudulently?



Generative Artificial Intelligence

On May 31, 2024, the *Harvard Business Review* published an article titled, “AI And Machine Learning: 4 Types of Gen AI Risk and How to Mitigate Them.” The article identifies four types of risk:

- ▶ **Misuse**, which refers to the unethical or illegal exploitation of Gen AI capabilities for harmful purposes such as scams and misinformation campaigns.
- ▶ **Misapplication**, which the article posits, is a well-known issue, saying that Gen AI “prioritizes plausibility over accuracy and can create inaccurate outputs—a problem known as ‘hallucination.’”



Generative Artificial Intelligence

- ▶ **Misrepresentation**, which refers to situations where Gen AI output created by a third party is purposefully used and disseminated despite questions about credibility or authenticity. This includes “deepfakes.”
- ▶ **Misadventure**, which refers to content that may be accidentally consumed and shared by users who are not aware of its inauthenticity. One example is a situation in which several Twitter users shared a deepfake of an explosion at the Pentagon. Stocks on Wall Street temporary dipped as many thought the image to be a real photo.



Risks of Generative AI in the Law

1. Loss of Confidentiality

- ▶ *Samsung Software Engineers Busted for Pasting Proprietary Code into ChatGPT* (In search of a bug fix, developers sent lines of confidential code to ChatGPT on two separate occasions, which the AI chatbot happily feasted on as training data for future public responses.”), PC Magazine, April 7, 2023. As a follow up, Samsung is now restricting the use of so-called generative artificial intelligence tools such as Chat GPT for employees after the company discovered such services were being misused. Bloomberg News, May 2, 2023.



Risks of using Generative AI in the Law

2. Hallucinations and Other Forms of Inaccurate Results

- ▶ *New York lawyers fined \$5000 after they submitted legal briefs using bogus case citations invented by ChatGPT.* Courthouse News Service, July 3, 2023.
- ▶ *Mata v. Avianca, Inc.*, No. 1:2022cv01461 (S.D.N.Y. 2023): Judge finds that the lawyers acted in bad faith and made “act of conscious avoidance and false and misleading statements to the court.”
- ▶ *AI Drafts a Losing Closing Argument:* Rapper Pras Michel has said that his former lawyer used an experimental generative AI program to draft his closing argument in his criminal conspiracy case. Michel claims that his lawyer’s closing argument was “frivolous” and “botched the trial.”



Risks of using Generative AI in the Law

2. Hallucinations and Other Forms of Inaccurate Results

- ▶ *Michael Cohen's Lawyer Cited Cases That May Not Exist, Judge Says*, N.Y. Times Dec. 13, 2023.
- ▶ Do Westlaw and Lexis Hallucinate? The June 2024 Stanford Study.
https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf
- ▶ Always check the work of AI



Risks of using Generative AI in the Law

3. Copyright Infringement

- ▶ *New York Times Sues Microsoft, OpenAI for Copyright Breaches*, IP Law Dec. 27, 2023.



What does the ABA have to say...?

In its July 29th release of **Formal Opinion 512**, the American Bar Association released guidelines and suggestions for how lawyers can use Generative Artificial Intelligence to assure ethical conduct in line with its existing Model Rules



What does the ABA have to say...?

How do the existing rules apply to the new circumstances presented by Generative AI?

- ▶ Competence - ABA MR 1.1
- ▶ Confidentiality - ABA MR 1.6
- ▶ Communication - ABA MR 1.4
- ▶ Claims and Candor - ABA MR 3.1, 3.3, 8.4(c)
- ▶ Fees - ABA MR 1.5



What does the ABA have to say...?

On Competence

ABA MR 1.1 requires lawyers to provide competent representation to their clients, this includes understanding the benefits and risks of technologies used to deliver legal services to clients.

- ▶ This entails a “reasonable understanding of the capabilities and limitations” of a specific GAI tool
- ▶ Knowing the risks we have discussed and perform due diligence on any GAI tool you may use
- ▶ GAI is not perfect, if you choose to use it, you must independently verify any and all produced work
- ▶ Judge each use of GAI on a CASE BY CASE basis



What does the ABA have to say...?

On Confidentiality

Governed by ABA MR 1.6, lawyers must keep information relating to a client confidential

- ▶ Inputting client information into GAI can raise the risk of it being read or seen by the wrong person
- ▶ GAI models which rely on user input can inadvertently share data with others inside of a firm to whom it should not be disclosed, or others outside the firm
- ▶ On a CASE BY CASE basis, obtain **informed consent** from a client to use GAI depending on how you are using the GAI



What does the ABA have to say...?

On Communication

A lawyer has a duty to communicate with their clients according to ABA MR 1.4

- ▶ If the rules of confidentiality (1.6) do not suggest obtaining informed consent, the rules of communication may require you to inform clients of your use of GAI
- ▶ The facts of each case determine whether or not disclosure of GAI use is necessary
 - How important and to what extent was GAI used?
- ▶ If the output of a GAI tool will influence a significant decision in representation, consultation with the client is necessary
- ▶ If asked, you must disclose your use of GAI



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What does the ABA have to say...?

On Meritorious Claims and Candor Toward the Tribunal

Several rules relate to these considerations, ABA MRs 3.1, 3.3 and 8.4(c)

- ▶ Consider the situation where a GAI hallucinates, rules 3.3 and 8.4(c) prohibit lawyers from making false statements (3.3 knowingly, 8.4(c) unknowingly)
- ▶ GAI may make arguments that prompt lawyers to bring a claim that could be frivolous, barred in rule 3.1
- ▶ Some courts have begun requiring the disclosure of GAI use
- ▶ Make sure to independently review the accuracy of any information from GAI



What does the ABA have to say...?

On Fees

ABA MR 1.5 explains what should or should not be included in client fees

- ▶ On a CASE BY CASE basis, GAI use could be included in client fees
- ▶ If the GAI is used regularly by a firm, it is likely a part of a firm's overhead fees and therefore not billable to a client
- ▶ Discuss fees with a client before the representation process begins officially
- ▶ See ABA Formal Opinion 93-379 for more information



What does the ABA have to say...?

On Supervisory Responsibility

How do ABA MR 5.1 and 5.3 relate to the rise of AI?

- ▶ These rules which address the ethical duties of lawyers charged with managerial roles suggest that supervisory lawyers must establish clear policies regarding GAI
- ▶ Supervisors have a responsibility to train their subordinate lawyers and non-lawyers in the technology they may be using
- ▶ Ensure that you are aware of outside service providers who use GAI and the effects of this use on your work



What does the ABA have to say...?

On its Overall Suggestions

- ▶ “Ensure that the [GAI tool] is configured to preserve the confidentiality and security of information... and that the lawyer will be notified in the event of a breach”
- ▶ “Investigate the [GAI tool’s] reliability, security measure and policies, including limitations”
- ▶ “Determine whether the [GAI tool] retains information submitted by the lawyer before and after discontinuation of serviced or asserts proprietary rights to the information”
- ▶ “Understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks”
- ▶ Your use of GAI and its effect on the client must be judged on a CASE BY CASE basis



An Example: The Stanford Study

- ▶ Researchers from Stanford tested commonly used Legal Generative AI platforms to test for hallucination (Magesh et al., 2024)
- ▶ Lexis+ AI, a legal research tool put out by LexisNexis and Westlaw AI-Assisted Research as well as Ask Practical Law AI from Thompson Reuters were studied
- ▶ Researchers found that with the most current model of Lexis+ AI and Westlaw's **non-premium** version that the AI models hallucinated between 17% and 33% of the time
- ▶ If these models were relied on without verification, we could see a violation of one of the rules we discussed similar to the example in New York




An Example: The Stanford Study

Input Query

Are the deadlines established by the bankruptcy rules for objecting to discharge jurisdictional?


Westlaw AIAR Response

[A] **paragraph from the Federal Rules of Bankruptcy Procedure**, Rule 4007 states that the deadlines set by bankruptcy rules governing the filing of dischargeability complaints **are jurisdictional**. [...] 

Input Query

What standard of review applies to abortion regulations under the U.S. Constitution?

Lexis+ AI Response

Currently, the “undue burden” test, as established in *Planned Parenthood of Southeastern Pa. v. Casey*, is the governing standard. [Planned Parenthood of the Heartland, Inc. v. Reynolds](#), [...]. This test stipulates that an abortion regulation is unconstitutional if it places a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. [...] 

Input Query

Why did Justice Ginsburg dissent in Obergefell?


Practical Law Response

Justice Ginsburg dissented in Obergefell because she believed that the court’s interpretation undermined Congress’s intent under Section 601(a) (1) to protect copyright owners against unauthorized importation of low-priced, foreign-made copies of copyrighted works. She argued that the text of the Copyright Act clearly applies to works governed by the statute. [...] 

Input Query

Do any special requirements apply to online dating services in Connecticut?

GPT-4 Response

Yes, Connecticut has specific legal requirements that apply to online dating services. Under Connecticut law, particularly **Conn. Gen. Stat. § 42-290**, online dating services that charge a fee and have members who reside in Connecticut must provide their users with specific safety awareness notifications. These notifications must include: [...] 



What's the point?

- ▶ You have responsibilities if you use AI
 - ▶ Confidentiality
 - ▶ Communication
 - ▶ Competence
 - ▶ Accuracy
- ▶ Be aware of the risks, such as hallucinations, to maintain ethical conduct
- ▶ Do not rely solely on artificial intelligence in your work



Artificial Intelligence and Evidentiary Issues

With Stacy Broman



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Authentication and Admissibility

- ▶ What rules potentially govern the authentication and admissibility of potential evidence generated by artificial intelligence?
- ▶ What can we take from existing law and apply it to this growing field?



Daubert v. Merrell Dow Pharmaceuticals

509 U.S. 579 993

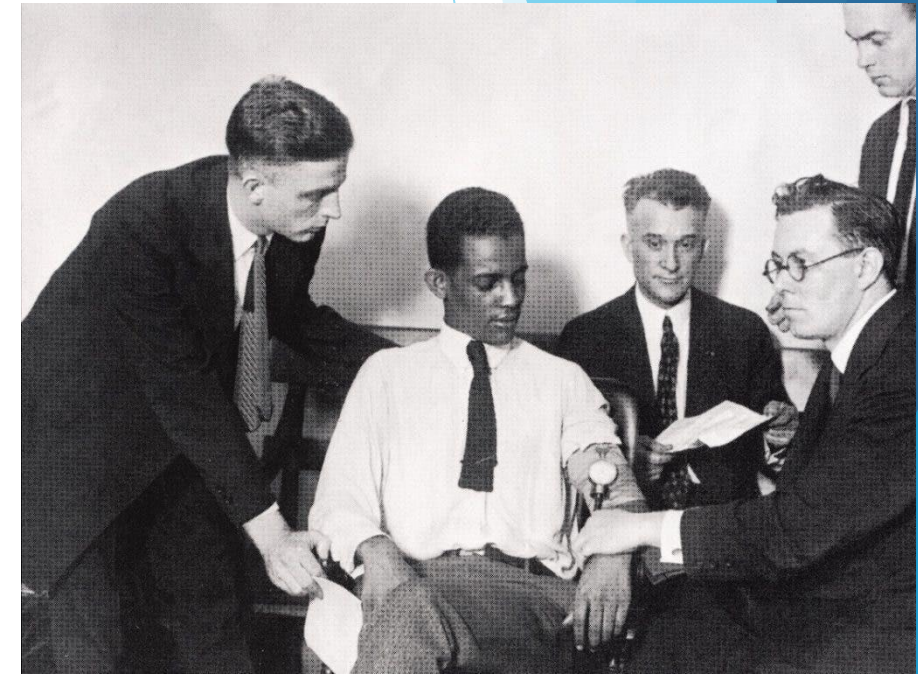
- ▶ To determine if **scientific knowledge** is admissible SCOTUS established the following test:
 - ▶ Whether the technique or theory had been tested
 - ▶ Whether it has been published and subjected to peer review
 - ▶ What is the known error rate?
 - ▶ Whether there exists or is an updated standard controlling its operation; and
 - ▶ Whether it has attracted widespread acceptance within a scientific community



Frye v. United States

293 F1013 (D.C. Cir. 1923)

- ▶ “Whether the scientific knowledge expressed by an expert gained general acceptance in the scientific field to which it belongs”
- ▶ An expert’s opinion is admissible if the scientific technique on which the opinion is based is “generally accepted as reliable in the relevant scientific community”



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Minnesota's Frye-Mack Test

- ▶ The standard of admissibility of novel scientific evidence in Minnesota:
 1. Is it generally accepted in the relevant scientific community?
 2. Is there foundational reliability?
 3. Does the evidence comply with Minn. R. Evid. 402 and 702 - asking if it's relevant, helpful to the trier of fact, and given by a witness qualified as an expert?
 4. And did the proponent of the scientific evidence establish proper foundation for admissibility? (Proponent bears the burden of proof)



Federal Rules of Evidence

The Federal Rules of Evidence provide the current framework for authenticating evidence in court

- ▶ FRE 901: Evidence Authenticating of Identifying Evidence
 - ▶ (a) ...the proponent must provide evidence sufficient to support a finding that the item is what the proponent claims
 - ▶ (b) Examples of evidence that satisfies the requirement
 - ▶ Testimony of a Witness with Knowledge
 - ▶ Non-expert Opinion about Handwriting
 - ▶ Comparison by an Expert Witness or the Trier of Fact
 - ▶ Distinctive Characteristics and the Like
 - ▶ Opinion about a voice
 - ▶ Evidence about a Process or System



Federal Rules of Evidence

FRE 901(b)(9)

*“Evidence about a process or system:
Evidence describing a process or system and
showing that it produces an accurate result”*



AI and Evidentiary Issues

So the question becomes...

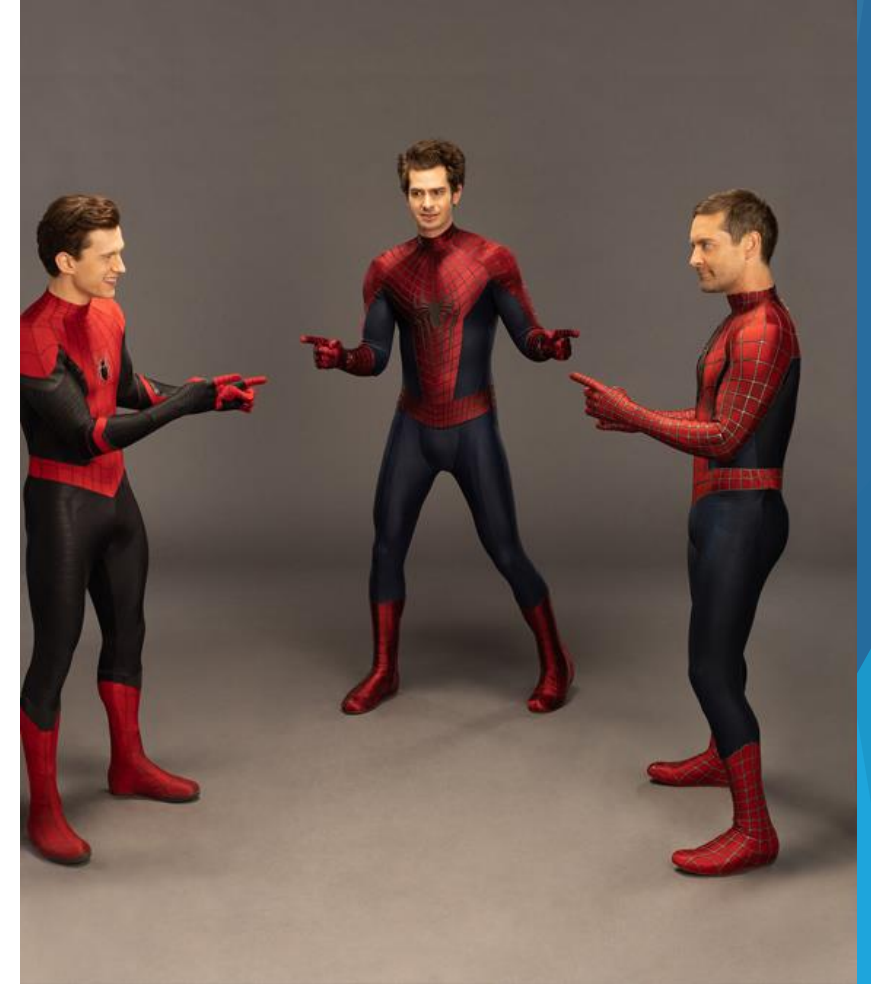
Do the traditional methods of authentication fall short when we apply them to AI generated evidence - particularly deep fakes?



Deepfakes

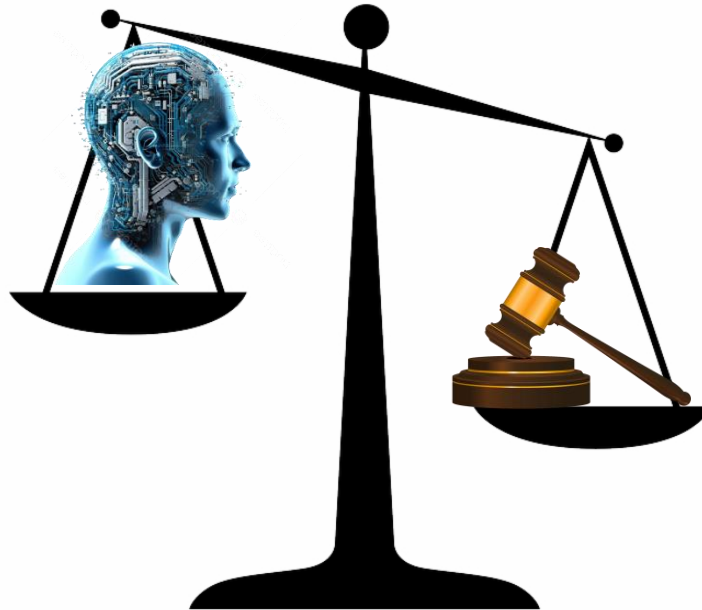
Defined by Merriam-Webster as:

“An image or video or audio recording that has been edited using an algorithm to replace the person in the original with someone else (especially a public figure) in a way that makes it look authentic.”



AI and Evidentiary Issues

The concern: Can juries distinguish real vs. AI generated evidence?



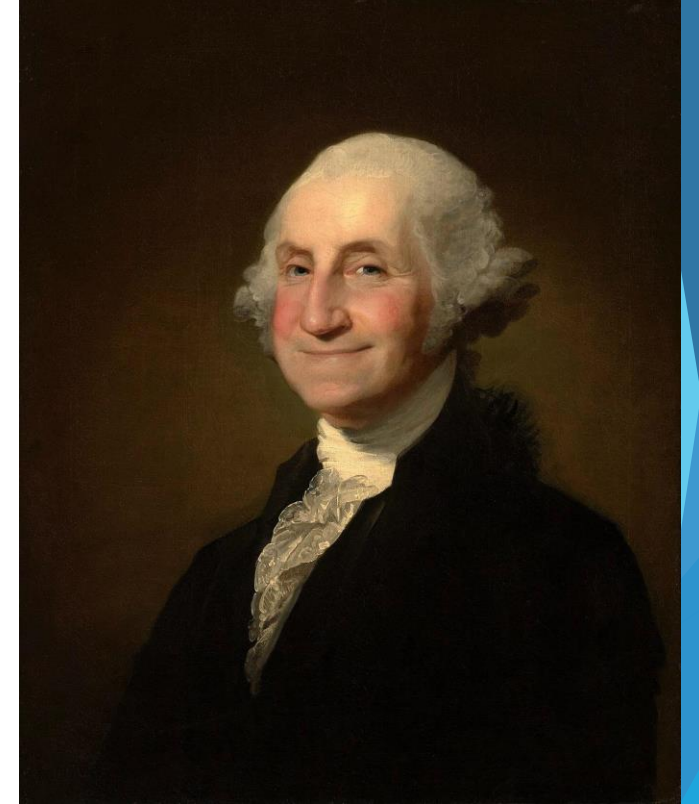
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Real Life Examples

- ▶ Voice Spoofing CEO Fraud (2019)
 - ▶ Criminals used AI-generated audio to mimic voice of a CEO in Germany instructing executive to transfer \$243,000 dollars to a fraudulent account
- ▶ Barack Obama PSA (2018)
 - ▶ Researchers at BuzzFeed and filmmaker Jordan Peele create deepfake video of President Obama making statements he never said



AI Image of Famous Portrait of George Washington edited to have him smiling



AI and Evidentiary Issues

April 2024 Advisory Committee

- ▶ A possible amendment to FRE 901(b)(9)
- ▶ Adding rules about AI generated evidence
- ▶ Specifically adding requirements about validity in addition to accuracy



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Proposed Amendment to FRE 901(b)(9)

Evidence about a process or system. For an item generated by a process or system:

- a) evidence describing it and showing that it produces a valid and reliable result; and
- b) If the proponent concedes that the item was generated by artificial intelligence, additional evidence that:
 - i) Describes the software or program that was used; and
 - ii) Shows that it produced valid and reliable results in this instance



AI and Evidentiary Issues

- ▶ This amendment would align more closely with the Daubert v. Merrell Dow standard
- ▶ Daubert emphasizes both **validity** (whether the tool, technique or methodology measures what it claims to) and **reliability** (whether the tool, technique or methodology consistently produces the same results)
- ▶ Would the image to the right hold up as proof of what cats look like?



An AI Image of a Cat



Proposed Amendment

901(c): *Potentially Fabricated or Altered Electronic Evidence*. If a party challenging the authenticity of a computer-generated or other electronic evidence demonstrates to the court that it is more likely than not either fabricated, or altered in whole or in part, the evidence is admissible only if the proponent demonstrates that its probative value outweighs its prejudicial effect on the party challenging the evidence.



An example application

Let's say Tyler sues Aimee and Kenny for defamation and Aimee attempts to enter a video into evidence...



...Tyler claims the video was altered! With the amended rule, she'd only have to prove by a preponderance of the evidence that the video was changed in some way to get it excluded.



AI and Evidentiary Issues

- ▶ This amendment would set a higher standard for admitting potentially fabricated evidence
- ▶ Federal Judiciary Rules Committee met this month and voted to work further on these proposals to address deep fakes and the reliability of AI generated evidence
- ▶ US District Judge Jesse Furman - the committee chair - said they would sideline the suggestions at this time as the issue is not yet a prominent one in the courts



AI and Evidentiary Issues

- ▶ This means that the Federal Rules of Evidence remain unchanged
- ▶ If deepfakes become an issue, the committee will have somewhere to start
- ▶ The committee will however work to address how courts should handle a challenge from a party over the authenticity of evidence and whether it may be artificially generated
- ▶ Other proposals would deal with testimony by experts based on machine generated evidence
- ▶ Both rules will be discussed at the next committee meeting in May



Decisions

Washington v. Puloka (Super. Ct. Kings Co. Washington 2024)

- ▶ Issue was admissibility of enhanced AI video
- ▶ Homicide involving shooting
- ▶ Bystander recorded on iPhone and shared to SnapChat
- ▶ Video quality was fuzzy, low quality, motion blurred
- ▶ Defendant's expert used AI to improve the quality and moved to admit the altered video
- ▶ State's expert argued AI tool didn't just enhance video, it modified it



Decisions

- ▶ The court excluded the defendants expert and the enhanced video in one of the first cases dealing with the admissibility of AI modified evidence
- ▶ The Best Evidence was the source video, blurry or not
- ▶ The court applied the Frye test, making clear if you want AI evidence admitted, it must satisfy that standard



Decisions

Huang et al. v. Tesla

- ▶ Wrongful death lawsuit against Tesla in California
- ▶ Musk's lawyers argued recordings of him touting Tesla's autopilot's safety could be deepfakes
- ▶ The judge required that Elon Musk testify under oath as to which statement he made, and which statements were fabricated



Conclusions

- ▶ Be aware of authentication standards and the Rules of Evidence
- ▶ Understand Daubert and Frye
- ▶ Experts and expert analysis may be required if asserting or defending a claim of a deepfake piece of evidence
- ▶ Additional witnesses may be required to investigate deepfake claims
- ▶ This isn't a hypothetical issue anymore



Thank you for your time!
Questions?



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Image Sources

For non-public images

- ▶ [The Frye Standard - Linda Hall Library](#)
- ▶ [George Washington smiling : r/Presidents](#)
- ▶ [Tom Holland Tobey Maguire And Andrew Garfield Recreate A Classic Spider-Man Meme But One Is Apparently Lying About His Butt Size | Know Your Meme](#)
- ▶ [King County, Washington Genealogy • FamilySearch](#)
- ▶ [Used Electric Tesla for sale](#)



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Other Sources

- ▶ [Fraudsters Used AI to Mimic CEO's Voice in Unusual Cybercrime Case - WSJ](#)
- ▶ [Bing Videos](#)

