

IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 07-0031

IN RE THE MONTANA RULES OF EVIDENCE

O R D E R

The Commission on Rules of Evidence has petitioned this Court to consider an additional comment on Montana Rule of Evidence 901(c). On May 18, 2026, we issued an order granting a 90-day comment period on proposed amendments to Rules 612, 803, 901, and 106.

IT IS THEREFORE ORDERED that all members of the bench and bar of Montana and any other interested persons are granted until August 18, 2026, to file with the Clerk of this Court appropriate comments and/or suggestions to the attached Proposed Revisions to Rule 901(c) of the Montana Rules of Evidence.

IT IS FURTHER ORDERED that this Order and attached petition shall be posted on the websites of the Montana Judicial Branch and the State Bar of Montana. The State Bar of Montana is requested to give notice of this Order and of its website posting of the petition to the membership by publication in the *Montana Lawyer* magazine and through other electronic and timely means.

IT IS FURTHER ORDERED that the Clerk of this Court shall provide copies of the Proposed Revisions to the State Bar of Montana and shall provide to each District Court Judge and each Clerk of the District Court a copy of this Order and attachments with a request that each Clerk of the District Court make the Order and proposed rule revisions available for public review in the Office of the Clerk of the District Court. The additional documents referenced in this Order may be viewed on the Court's electronic public view docket: <https://supremecourtdocket.mt.gov/case-info/active/11483>.

IN THE SUPREME COURT OF THE STATE OF MONTANA

	)	AF-07-0031
	)	PETITION FOR PUBLICATION OF
IN RE MONTANA COMMISSION)	)	COMMENT ON PROPOSED
ON RULES OF EVIDENCE	)	AMENDMENTS TO RULE 901
	)	

The Montana Supreme Court Commission on Rules of Evidence has petitioned for consideration of amendments to the Rules of Evidence and requested circulation for public comment, followed by a public hearing. Based on recent comments from the bar, the Commission attaches an additional Comment to proposed amendments to Rule 901.

The Evidence Commission respectfully requests that the Montana Supreme Court:

1. File the attached additional Comment; and
2. Order publication of the Comment (Exhibit A).

DATED this 16th day of July, 2026.



Elizabeth A. Best
District Court Judge
Chair of the Evidence Commission

cc: Hallie Bishop
Caitlin Boland Aarab
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FILED

07/16/2026

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 07-0031

Exhibit A

Comment on Proposed Montana Rule of Evidence 901(c)

The Montana Commission on the Rules of Evidence has petitioned the Montana Supreme Court to publish new proposed Rules, including a new proposed Rule 901(c) for public comment. The proposed rule is intended to address evidence that may have been fabricated or materially altered by generative artificial intelligence—also known as “deepfakes.” The Commission engaged in substantial debate about proposing this rule, and was divided. Because it poses many difficult questions, this additional comment is offered.

The rule has two steps. Subsection (c)(1) states:

If a party challenging the authenticity of an item of evidence demonstrates to the court that a jury reasonably could find that the item has been fabricated, in whole or in part, by generative artificial intelligence, the item is admissible only if the proponent demonstrates to the court that it is more likely than not authentic.

Subsection (c)(2) defines generative artificial intelligence broadly, describing technology that, in response to a prompt, creates or materially alters text, images, video, audio, or synthetic data. Subsection (c)(3) provides that Rule 901 and the self-authentication provisions of Rule 902 apply.

The proposed rule is intended to address two risks: (1) that posed when a party offers fabricated evidence, such as audio or video that looks and sounds genuine but is not; and (2) that posed if a party attempts to discredit genuine evidence with a conclusory assertion that it “could be a deepfake.” The first step is meant to screen out conclusory and speculative objections by requiring the opponent to present a *bona fide* basis before the party offering the evidence must meet another burden, while the second sets a standard for asserting a “deepfake” challenge.

The proposal is similar to a draft developed by the federal Advisory Committee on Evidence Rules. The federal Committee has not pursued its deepfake proposal to allow time to see whether deepfakes were causing problems in courtrooms. The Montana Commission decided to involve the bar and public in the discussions, by releasing a proposal for public comment.

Generative technology is inexpensive and widely available, and authenticity disputes may be raised which the existing rules did not contemplate. A clear, predictable standard may help courts and parties to more consistently address these problems. At the same time, several members raised concerns about the workability of the rule in practice and the consequences of assigning a fact-finding role to the judge.

This comment is offered to provide additional context for the bar, the public, and the Supreme Court to consider in deciding whether to adopt the proposed rule.

The Montana foundations of the proposed rule

Montana law has long imposed heightened, alteration-focused obligations on the proponents of certain evidence. Section 26-1-106, MCA, provides that a party producing a writing purporting to be genuine, that “has been altered or appears to have been altered,” in a part material to the dispute, and in offering it, “shall account for the appearance or alteration.” This is analogous to proposed Rule 901(c): if there are objective facts suggesting that offered evidence may not be what it appears to be triggers the proponent’s duty to show authenticity as a condition of admission. The proposed rule extends the principle stated in § 26-1-106, MCA from visible alteration of tangible evidence or documents to invisible alteration by generative technology.

Sound recordings have been subjected to similar authenticity requirements. In *State v. Warwick*, 158 Mont. 531, 494 P.2d 627 (1972), the Court expressly required a showing of the authenticity and correctness of the recording and the absence of changes, additions, or deletions. In *McCormick v. Brevig*, 2004 MT 179, 322 Mont. 112, 96 P.3d 697, an intentionally altered recording which captured only selected phrases, where the original was unavailable, was excluded. Montana law already directs the proponent’s foundation to the question of alteration and already permits the court to exclude evidence when alteration is established and unexplained.

Montana’s chain-of-custody precedent likewise applies this burden-shifting template. To oppose chain-of-custody evidence, a bare suggestion that tampering was possible is not enough. The opponent must show affirmative evidence of tampering or substantial change. *State v. Grant*, 221 Mont. 122, 133, 717 P.2d 562, 570 (1986)(citing *State v. Wells*, 202 Mont. 337, 356, 658 P.2d 381, 391(1983)). If

that burden is met, the proponent must demonstrate “to the court’s satisfaction” that no “substantial change” occurred before the item is admitted. *State v. McCoy*, 2012 MT 293, ¶ 13, 367 Mont. 357, 361, 291 P.3d 568, 571. A deepfake allegation is likewise a tampering allegation, and the two steps in proposed Rule 901(c)—a threshold against conclusory or bare assertions, followed by a proponent’s showing to the court—is chain-of-custody logic applied to a new method of tampering.

Proposed Rule 901(c) differs from those precedents, however. Proposed Rule 901(c) is broader, covering a wide variety of evidence categories. The proposed rule defines the standard of proof for admissibility as “more likely than not,” whereas neither the chain-of-custody cases nor § 26-1-106, MCA defines a standard of proof. The chain-of-custody cases require a showing “to the court’s satisfaction,” while § 26-1-106, MCA requires that the proponent “account for” the alteration. The standard of proof is arguably higher than those, and higher than the standard for authentication under Rule 901(a)(evidence sufficient to support a finding).

From screening to finding: what the proposed rule changes

Under the Federal Rules of Evidence, authenticity is described by the federal Advisory Committee’s Note as, “a special aspect of relevancy”: an item is relevant if it is what its proponent claims and irrelevant if it is not. Federal law assigns the ultimate question of genuineness to the jury under Rule 104(b). The judge’s role is limited to screening the proponent’s foundation for sufficiency, asking only whether a reasonable juror could find the item genuine.

Montana, in adopting Rule 104, chose *not* to follow the federal concept of conditional relevancy. Under Rule 104(a) and § 26-1-201, MCA, every preliminary question of admissibility, including authentication, is decided by the court, with no admissibility questions reserved to the jury. But Montana did not reject the federal *standard* for authentication. Montana Rule 901(a) is identical to the federal authentication requirement, which, “is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

That is a screening standard, asking whether a reasonable factfinder could find the item genuine; it does not direct the court to weigh credibility and determine whether the item is genuine. *See* MONT. R. EVID. 901(a), Commission Comment (citing *State v. Davis*, 60 Mont. 426, 199 P. 421 (1921)) (“the standard for

authenticity of a physical object is a prima facie showing of a connection between the object and the offense and [] ‘clear, certain, and positive proof is not required’’).

Proposed Rule 901(c) does not change who decides, but it would change what deciding means. The court’s role shifts from asking whether a reasonable juror could find the item genuine to determining whether the item is more likely than not genuine—from screening the dispute to resolving it, by weighing competing experts, assessing credibility, and finding facts. This reverses the default rule: under the screening standard, an item the court is unsure about is admitted for the jury’s assessment, whereas under the proposed rule, the court’s uncertainty results in exclusion.

The case for the rule

The Commission was sharply divided on proposing the new rule. Historically, courts have admitted questionable evidence because they could trust the normal adversary process to expose alterations and other flaws. Convincing fake evidence was rare because producing it generally required time, skill, or specialized equipment. The adversary process is effective at exposing forged letters, doctored ledgers, spliced tapes, and the like. Juries had the experience to be sufficiently skeptical of claims of forgery and to make rational decisions about trustworthiness in contested cases.

Generative artificial intelligence challenges those assumptions. Fabricated evidence can be difficult or impossible to distinguish by visual or auditory inspection alone. In the absence of a screening mechanism, disputes over whether an item of evidence is a deepfake will happen in front of the jury. Authentication then becomes a highly-technical battle of the experts on a collateral matter that the jurors must resolve *while also* deciding the merits, with the additional risk that “you can’t trust anything these days” rhetoric will infect the jury’s assessment of evidence that is not genuinely contested.

Proposed Rule 901(c) attempts to respond by shifting the fight over potentially fabricated evidence from trial to pretrial. A party challenging an item of evidence as fake must show evidence sufficient to support a finding that the item was fabricated. That requirement discourages spurious deepfake challenges, while providing an opportunity for the proponent of genuine evidence to establish authenticity before

trial, avoiding the risk of deepfake insinuations infecting the jury's decision-making. The judge can focus on the authentication issue with a full record. Then, with the fabrication theory already tested, the jury can focus on the admitted evidence without the need to sort genuine from fake evidence during the flow of trial.

Concerns raised by the proposed rule

The Commission recognized that the proposed rule raises concerns that might ultimately outweigh the benefits described above. One important concern is cost. For cases that could have been tried with a genuine authenticity dispute, pretrial resolution of deepfake disputes shifts costs from trial to pretrial, while making the trial itself more efficient. However, the costs of pretrial resolution of this issue may be prohibitive. The proposed rule creates the need for yet another hearing in cases that otherwise would have settled without ever addressing the authenticity dispute, potentially raising costs for both parties and further clogging already busy courtrooms, thus jeopardizing the right to access to the courts.

Costs are particularly significant when the proponent of challenged evidence is a criminal defendant. Defending a recording against a fabrication charge may require expensive forensic analysis at the pretrial stage, and the current state of the art means the analysis is frequently inconclusive. *See* Nuria Alina Chandra et al., "Deepfake-Eval-2024: A Multi-Modal In-the-Wild Benchmark of Deepfakes Circulated in 2024," available at <https://arxiv.org/pdf/2503.02857>; Kaylee Williams, "What Journalists Should Know about Deepfake Detection in 2025," *Columbia Journalism Review*, March 11, 2025. A defendant who cannot afford a competing expert, or whose expert can say only that fabrication cannot be excluded, may be unable to carry the preponderance burden for genuine evidence. Further, the proposed process removes a dispositive issue from the jury.

These issues raise obvious constitutional concerns. The State must prove every element in criminal cases beyond a reasonable doubt. Evidence that cannot meet the more-likely-than-not test for authenticity may be sufficient to raise reasonable doubt for the jury. Excluding such evidence raises concerns under Article II, § 24 of the Montana Constitution. The United States Supreme Court has held that rules of evidence may not be applied to exclude defense evidence where they are "arbitrary" in the sense that they "do not rationally serve the end . . . the rules were designed to further." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

The constitutional analysis may turn on whether the proposed rule strikes the right balance between the defendant's right to put on a case, the risk that the jury will base its decision on fabricated evidence, and the risk that the jury will disregard genuine evidence based on a bogus deepfake defense. The Commission believes the Court, with input from the bench and bar, is best situated to assess that balance, as well as the other competing concerns addressed in this comment.

Respectfully submitted,



Elizabeth A. Best
District Court Judge
Chair, Montana Commission on Evidence