



Expert Witnesses' AI Usage Exposed in Discovery and Sinks a Defense Case at Trial

Lawyers are trained to navigate a litany of legal and real-life roadblocks while attempting to resolve complicated issues for the clients they represent. Now, with the advent of Artificial Intelligence (“AI”) and the recent explosion in new consumer AI tools that lawyers, and almost every other working professional, are expected to be familiar with (e.g., Claude, ChatGPT, Microsoft Co-Pilot), lawyers have seemingly inherited a new responsibility - *i.e.*, gaining expertise in the “do’s” and “don’t’s” of AI. This is, in large part, because clients, peers, and competitors are using these tools with increased regularity and sophistication. While the massive increase in both consumer and professional usage of AI chatbots and platforms has undoubtedly given rise to more efficient outcomes for the user, from where lawyers sit (or stand, if in court), it has also given rise to a host of other very troubling revelations that lawyers must all be mindful of as they navigate this new landscape.

For those who have followed the news reports of attorney faux pas and court-issued sanctions levied upon lawyers and law firms for their unscrupulous usage of AI (e.g., filing briefs that cite to hallucinated case law that does not exist in reality), every new story published on this subject reads like a different chapter of the same cautionary tale. Indeed, when Federal District Court Judge Jed S. Rakoff of the Southern District of New York issued his decision of first impression in *United States v. Heppner* (No. 25-cr-00503-JSR (S.D.N.Y. Feb. 17, 2026)) in February 2026, wherein the Court held that a party had waived the attorney-client privilege by inputting information derived from that party’s “confidential” communications with his counsel into an AI chatbot, there was a collective “gasp” from lawyers nationwide. Given Judge Rakoff’s holding, best practices mandate that lawyers be informed on how their clients may be using AI, since such information may have an impact on how an attorney would choose to best represent that client.

As AI usage becomes the focus of increasingly more legal drama, whether inside or outside the courtroom, it should come as no surprise that this week the legal community has learned of yet another cautionary tale. This time, the faux pas was delivered by an expert witness retained by lawyers representing defendant 3M in a mass-tort litigation brought by various victims and family members for wrongful death and other damages suffered from an explosion in Houston, Texas that was allegedly caused, in part, by 3M’s negligence.^[1]

[1] The cases are part of a multi district litigation (“MDL”), comprising of hundreds of individual cases which have been consolidated before the Harris County District Court and are collectively referred to In re: Watson Grinding Explosion Litigation (Cause No. 2020-05505-A). The lawsuit that is relevant to this article is one of several that arise out of the same explosion, to which different “bellwether trial groups” within the MDL are separated by different classes of plaintiffs.

During the expert discovery phase of the case, plaintiff's counsel identified within certain files produced by 3M a short five-page AI-generated artifact titled "Citation Overlay," which indicated that ChatGPT had been used by 3M's expert in some form or fashion. From there, plaintiff's counsel made demands for, and ultimately procured, 3M's production of the prompts that the expert had used in ChatGPT, together with the stream of AI-generated conversations the expert had engaged in with the chatbot on the subject matter for which he was retained as an expert. In those conversations, all of which were produced, the expert quite literally inputted his professional credentials into the chatbot and asked it to create a report that would defend 3M's standard of care, with queries and prompts such as "create an exceptional expert witness report defending the standard of care at 3M" and "show how 3M is 0% at fault for the explosion." Testimony elicited at trial established that the lion's share of the expert's final report was generated by ChatGPT. Ultimately, in early August 2026, the plaintiffs in the case were awarded a \$61.5 million jury verdict against the defendants (with 30% responsibility being attributed to 3M). Clearly, the court was not persuaded by 3M's argument that such prompts and AI-generated conversations should be protected as privileged or that they should otherwise fall within the disclosure protections contemplated by the Kovel doctrine^[2] and be deemed non-discoverable.

The takeaway is, again, a cautionary one; and the lesson, once again, remains the same. To avoid the potentially embarrassing, costly, and reputationally damaging disclosures that have been reported in the litigation space, attorneys must become informed about their clients'- and *now their* retained experts' - usage of AI. What is more, to the extent any lawyer's client or retained expert uses AI to query issues that are in any way relevant to an ongoing litigation dispute, it is fair (and best practice) to assume that whatever AI prompts are used, and whatever information is generated or published therefrom, may constitute discoverable information that will end up in the hands of the opposition.

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^[2] The Kovel doctrine refers to the legal rule that arose out of the decision in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), which dictates that the attorney-client privilege can extend to communications between a lawyer and a retained expert who is working under the direct supervision and direction of counsel.