

The AI Frontier
Pros and Pitfalls for Expert Witnesses

2026 Fall Forensics Institute

NORTON ROSE FULBRIGHT

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Meet the Presenters



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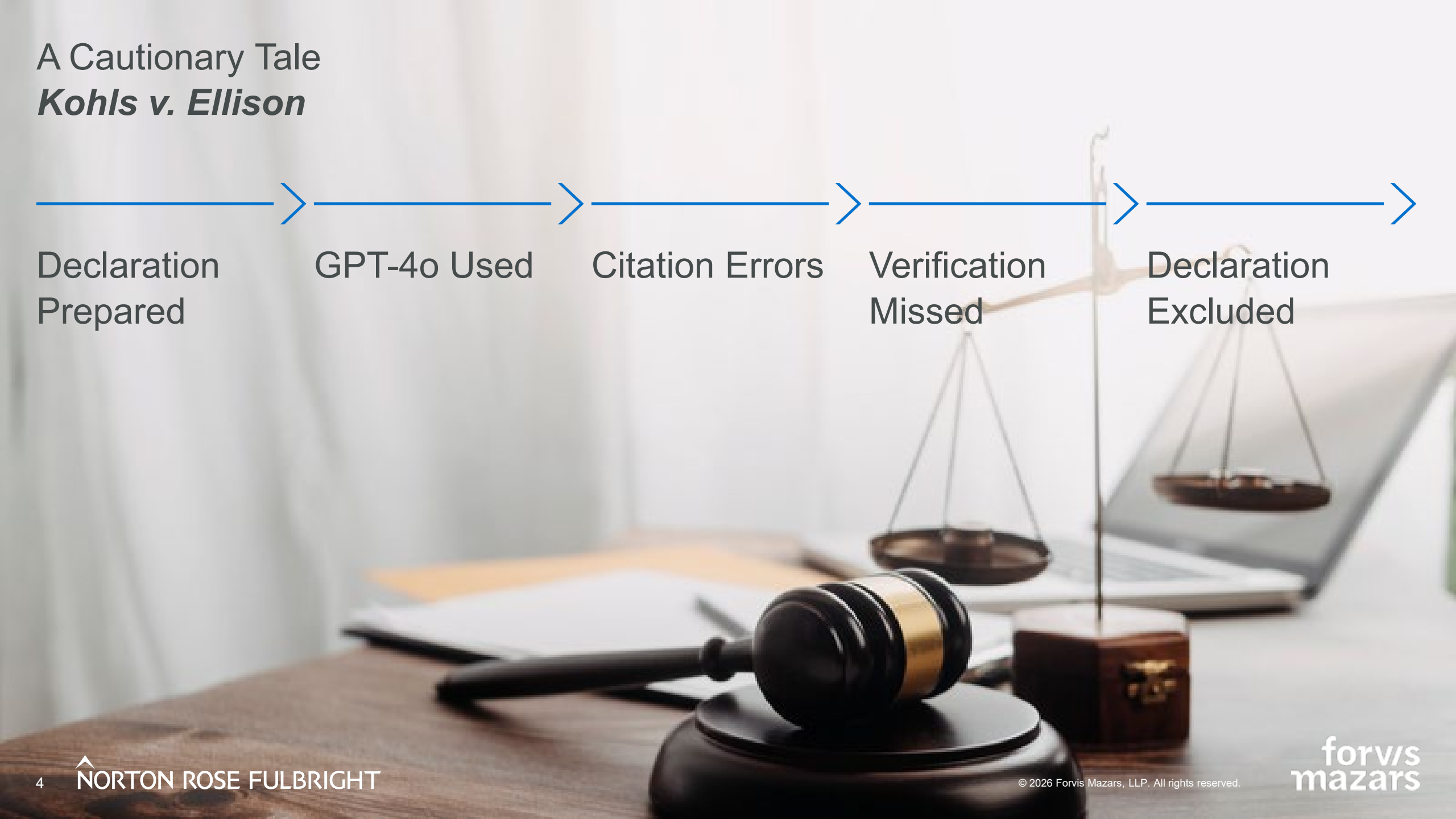
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Case Study: *Kohls v. Ellison*



A Cautionary Tale
Kohls v. Ellison

Declaration Prepared → GPT-4o Used → Citation Errors → Verification Missed → Declaration Excluded

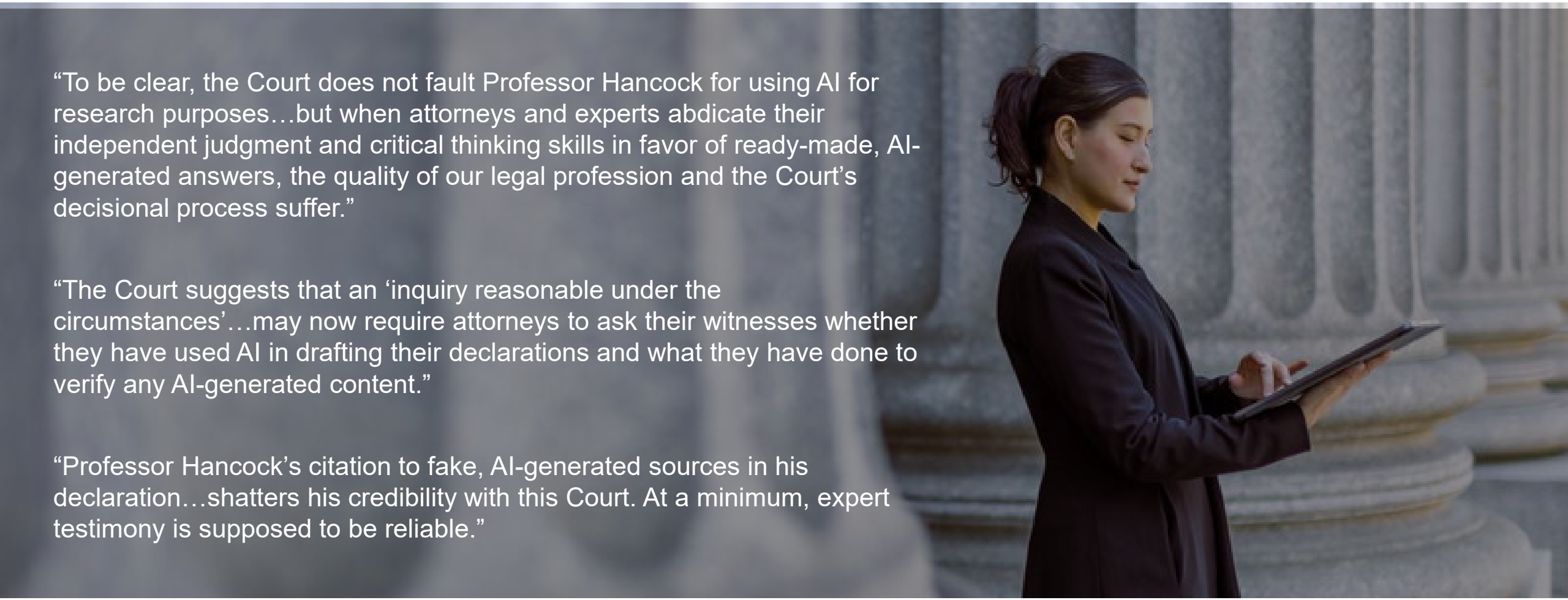


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Court Decision
Kohls v. Ellison



"To be clear, the Court does not fault Professor Hancock for using AI for research purposes…but when attorneys and experts abdicate their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers, the quality of our legal profession and the Court's decisional process suffer."

"The Court suggests that an 'inquiry reasonable under the circumstances'…may now require attorneys to ask their witnesses whether they have used AI in drafting their declarations and what they have done to verify any AI-generated content."

"Professor Hancock's citation to fake, AI-generated sources in his declaration…shatters his credibility with this Court. At a minimum, expert testimony is supposed to be reliable."

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Relevance
Kohls v. Ellison

What Failed?

- **The substantive opinion?** Not necessarily the principal issue.
- **The drafting process?** AI-generated support survived into a sworn filing.
- **The verification control?** Citations were not independently checked.
- **The expert's credibility?** Damaged even if the error was unintended.
- **The attorney's process?** Raises the question of what counsel should ask an expert before filing a declaration.

An expert's credibility can be impaired by a seemingly small AI-assisted drafting error, even if AI did not generate the expert's ultimate opinion.



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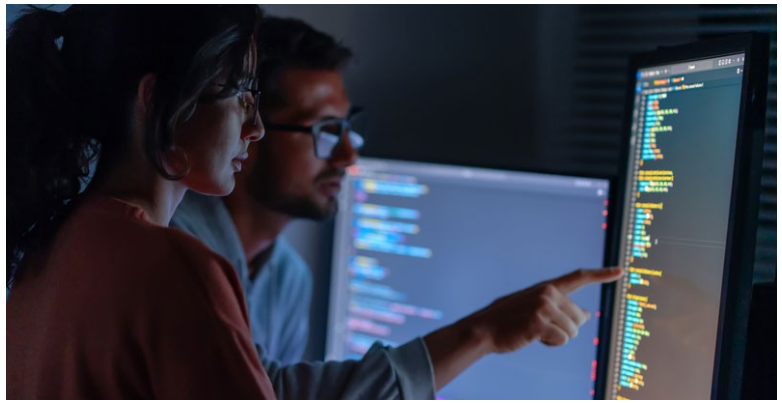
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Common AI Terms

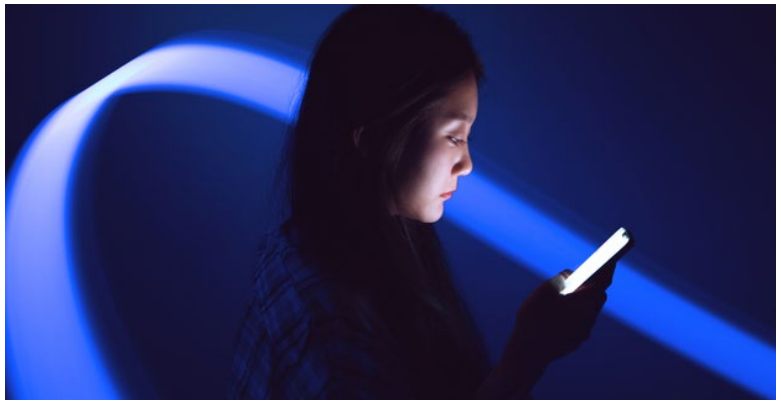


AI Terms



Generative AI

AI that produces new content, including text, images, audio, video, data, or code.



Large Language Models

AI that is trained on substantial volumes of language data to generate statistically probable text responses.



Machine Learning

Technology that identifies patterns or improves performance through analyzing data rather than relying solely on manually programmed rules.

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AI Terms



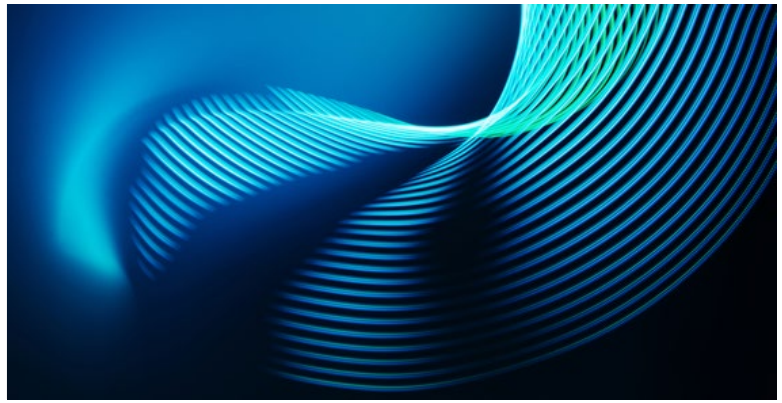
Hallucination

Plausible-sounding content that is false, unsupported, incorrectly attributed, or fabricated.



Prompt

Instruction, question, uploaded material, assignment, or other input provided to the AI system.



Agent

AI that can autonomously complete tasks.

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Common Uses of AI in Expert Witness Services



Common Uses of AI in Expert Witness Services



Administrative Assistance

1. Formatting
2. Preparing meeting or task lists
3. Searching for specific emails
4. Drafting emails

Content Assistance

1. Generating document summaries
2. Extracting data
3. Converting documents (e.g., PDF to Excel)
4. Creating chronologies
5. Identifying entities and relationships
6. Comparing documents
7. Editing grammar and making suggestions for improvement of reporting language

Research & Analytical Assistance

1. Identifying sources of information
2. Detecting tone in analysis of emails and other unstructured data
3. Searching for key-words or similar words in documents
4. Recognizing trends and patterns
5. Detecting anomalies
6. Generating charts and graphs
7. Generating formulas or code

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AICPA Guidelines for CPA Experts



AICPA Guidelines for Responsible Use of AI in Forensic & Valuation Engagements

"The member is responsible for the exercise of professional judgment and the choice of appropriate methodologies. The reasonableness of conclusions is not abdicated through the use of AI. Members may also wish to consider the following:

1. Whether the use of AI complies with engagement terms
2. Whether the security and confidentiality protocols of the chosen AI environment are consistent with requirements under protective orders, nondisclosure agreements, or similar agreements and confidentiality obligations
3. Whether rules, regulations, and norms in the relevant jurisdiction(s) influence how AI may be used and the need to preserve and/or disclose records evidencing the use of AI (e.g., prompts, responses, input/output data, etc.)
4. Whether points 1–3 above should be discussed with client and/or client's counsel prior to the use of AI
5. Whether the member possesses the knowledge, skills, and ability necessary to evaluate the output of the AI tool in the context of the engagement."



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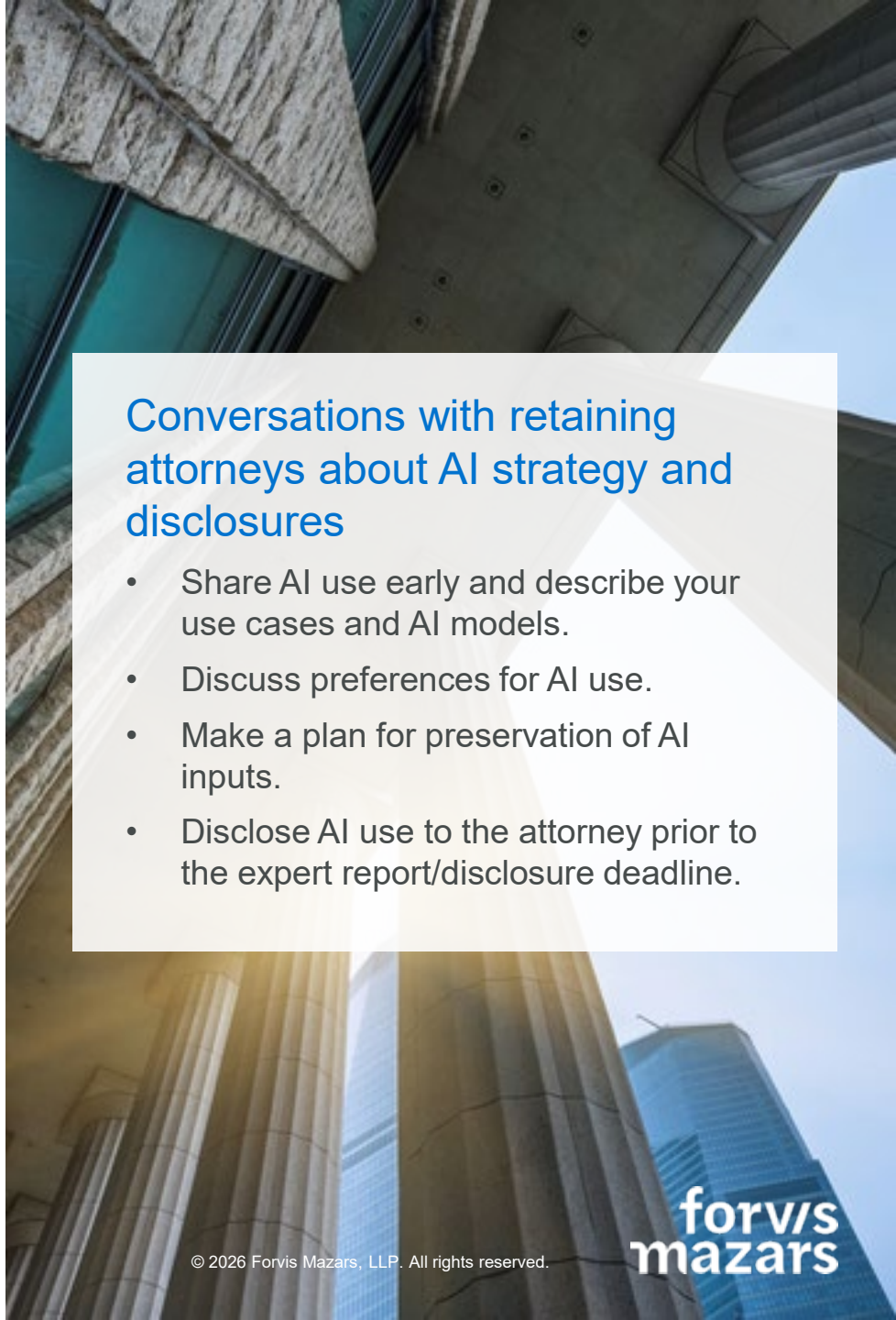
Expert Witness Disclosure Requirements



Expert Witness Disclosure Requirements

Federal vs. State

- **No standard across courts.** This is a developing area. We have isolated cases compelling disclosure or preventing disclosure of experts' AI use and prompts.
- **Federal Rule of Civil Procedure 26(a)(2)** – requires disclosure of "the facts or data considered by the witness in forming [opinions]."
  - For example, in the District of Connecticut, the court determined that an expert's use of AI prompts to "cull" through millions of documents was discoverable as part of the expert's methodology. The court reasoned that the expert's prompts to the AI shaped what evidence the expert considered.
- **State rules differ.**
  - For example, Texas Rule of Civil Procedure 195.5 requires the disclosure of "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony."
    - Debatable whether an expert's AI prompts fit into the required disclosure category. No cases exactly on this point.
  - In New York Surrogate Courts (probate), counsel have an affirmative duty to disclose AI use in generating evidence, including by experts.



Conversations with retaining attorneys about AI strategy and disclosures

- Share AI use early and describe your use cases and AI models.
- Discuss preferences for AI use.
- Make a plan for preservation of AI inputs.
- Disclose AI use to the attorney prior to the expert report/disclosure deadline.

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Discoverability Considerations



Discoverability Considerations

Splitting Hairs Over Minute Differences in Words

- *Conservation Law Foundation v. Shell Oil*
- Prompt vs. Tool
  1. Conservation Law Foundation's ("CLF") expert used AI to "cull" millions of documents. Shell sought to compel the disclosure of the prompts used to filter the documents.
  2. CLF argued disclosure was unnecessary partly because the expert used AI as a tool, not as a methodology and did not "prompt" AI. However, the expert's declaration in a previous filing said "prompt"—not "tool"—so the Court didn't take CLF's word that no AI records existed.

Lawyers will have to argue about whether the AI use at issue fits the language of the rules.

- State and Federal disclosure rules were not built with AI in mind.
- Different courts will come to different opinions.
- Likely that a standard will emerge, but that is not the current landscape.

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Exclusion Considerations



Exclusion Considerations

Consider the main requirement for an expert witness: reliability.

Failure to disclose or preserve AI prompts deprives parties of proper opportunity to evaluate AI's role in opinion.

As a practical consideration, AI use before an opinion is formed may receive greater scrutiny than limited confirmatory use after the expert has independently developed the opinion.

Compare expert's use of AI after report is written to test their conclusions and gather additional thoughts vs. expert's use of AI prior to opinion drafting

- Clear inference that AI had more influence, so failure to disclose is more significant
- Compare *Matter of Weber to Ferlito v. Harbor Freight Tools*



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Case Studies



Acceptable Use of AI
Ferlito v. Harbor Freight Tools

1 Plaintiff was using a maul that broke and injured him and sued Harbor Freight Tools, claiming that it had a defective design.

2 Plaintiff's expert opined that the maul was defective because the handle and head were weakly bound with adhesive instead of using an aluminum pin to connect the head and handle.

3 Plaintiff's expert identified other products that were manufactured using the aluminum pin design.

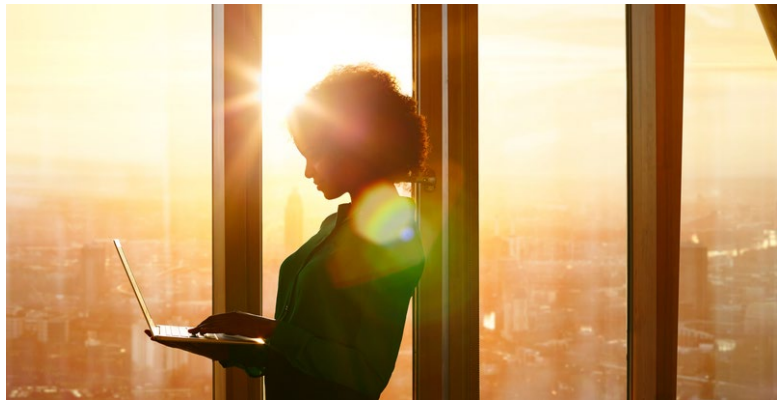
4 After he completed his report, the plaintiff's expert asked ChatGPT about the best way to secure a hammer head to a hammer. Its answer was consistent with his expert opinion.

5 The Defendants' Daubert motion included the plaintiff's expert's use of ChatGPT.

6 The plaintiff's expert was not excluded.

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Court Decision
Ferlito v. Harbor Freight Tools



The judge cited *Kohls v. Ellison* in his opinion, stating, “Daubert issues arise only ‘when attorneys and experts abdicate their independent judgment and critical thinking skills in favor of ready-made AI-generated answers.’ Here, there is little risk that [plaintiff’s expert’s] use of ChatGPT impaired his judgment.”



The plaintiff’s expert testified that he did not rely on ChatGPT to reach his conclusions.



The plaintiff’s expert used AI to confirm his opinions, not develop them.

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Relevance of *Ferlito v. Harbor Freight Tools*

The most important lesson from *Ferlito v. Harbor Freight* is that a court may permit limited AI use by an expert when:

1. The expert independently develops the opinions.
2. AI is used only as a supplementary or confirmatory tool.
3. The expert discloses the use of AI.
4. The expert remains able to explain and support the opinions through his/her own expertise.

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Considerations for Use of AI

Matter of Weber as Trustee of Michael S. Weber Trust



The trustee was sued for breach of fiduciary duty related to the retention of a property on Cat Island in the Bahamas.



The expert claimed lost profits in the form of the value of the sale proceeds from the sale of the Cat Island Property and their subsequent reinvestment in traditional securities.



The expert's report was flawed for numerous reasons unrelated to AI, but he used Microsoft Copilot to "cross-check" his calculations.



The expert's testimony was excluded for the pre-existing problems in his report, but the Court's decision provided important considerations for the use of AI.

When questioned about his use of AI, the expert could not:

1. Recall the inputs he provided to Copilot
2. Recall the prompts he used in Copilot
3. Could not state the sources Copilot relied upon
4. Could not explain how Copilot works or how it came to its conclusions

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Court Decision



"In what may be an issue of first impression, at least in Surrogate's Court practice, this court holds that due to the nature of the rapid evolution of artificial intelligence and its inherent reliability issues that prior to evidence being introduced which has been generated by an artificial intelligence product or system, **counsel has an affirmative duty to disclose the use of artificial intelligence and the evidence sought to be admitted should properly be subject to a Frye hearing prior to its admission**, the scope of which should be determined by the court, either in a pretrial hearing or at the time the evidence is offered"

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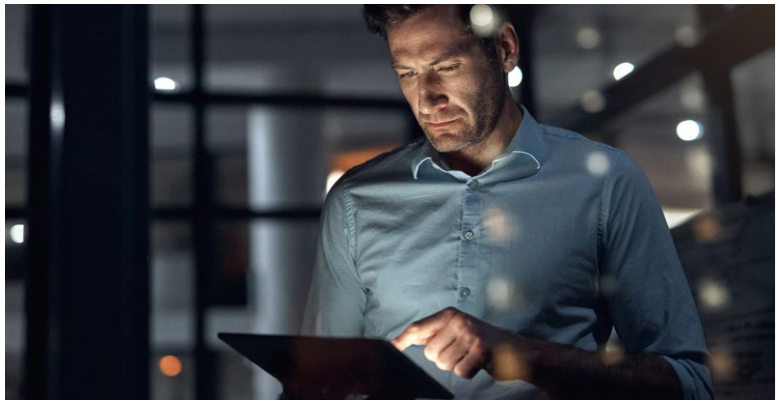
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Relevance of *Matter of Weber as Trustee of Michael S. Weber Trust*



Experts should be prepared to explain how AI was used.



Experts should understand and verify the underlying methodology.



Experts should avoid relying on AI outputs they cannot independently explain or support.

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Comparison of *Matter of Weber and Ferlito v. Harbor Freight*

AI use was an ancillary consideration in the Court's decisions on whether to admit or exclude the experts' testimonies.

In *Ferlito v. Harbor Freight*, the expert's methodology was sound, and he did not rely on AI.

In *Matter of Weber*, the expert's methodology was flawed, and he could not explain how he used AI to cross-check his calculations.

The decision of whether or not to exclude the expert was ultimately based on the reliability of the experts' opinions absent AI.



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Inappropriate Use of AI
The ChatGPT Expert

There was a gas leak at manufacturing facility which caused a massive explosion in Houston. Three people died, and hundreds of homes were damaged.

3M was sued for not properly servicing the gas-detection system at the manufacturing facility.

3M's expert used ChatGPT to write substantial portions of his expert report. The plaintiffs' lawyers obtained 365 pages of prompts and ChatGPT's answers.

His prompts were biased.

He was not excluded, but his credibility was damaged at trial.

3M's expert's prompts included, but were not limited to the following:

1. "I need to show that 3M met the standard of care and why."
2. "Show how 3M is 0% at fault for the explosion…and how my background and experience is well suited to render this professional opinion."
3. "Create the expert witness report draft now."
4. "What am I basing my standard of care on as an expert witness?"

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Dangers of Biased Prompting

From an optics perspective, biased prompting can cause the trier of fact to perceive the expert as an advocate, rather than a neutral expert.

The prompting process can embed confirmation bias into the AI's outputs.

Some research has identified a tendency for certain AI models to agree with or reinforce the framing of a user's prompt.[1]

If you use a biased prompt to bring certain documents to your attention, you might overlook other relevant documents that might influence your opinions.



[1] Mrinank Sharma, et. al. *Towards Understanding Sycophancy in Language Models.* International Conference on Learning Representations. 2024.

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Deposition Preparation (Illustrative Examples)



Denial of AI Use

Q: Did you use AI during your work on this case?

A: No.

Q: Are you familiar with Microsoft Copilot?

A: Yes, generally.

Q: What do you use it for generally?

A: Notes, generally.

Q: Did you take notes in this case and then use Copilot to organize your notes?

A: Yes, but I would not call that “using” AI during my work on this case.

Conclusion

The inconsistent answers may undermine credibility and may suggest that the expert cannot clearly explain the scope of the AI use.

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Explaining AI Use

Q: Did you use AI during your work on this case?

A: Yes.

Q: How did you use AI?

A: I used Copilot to convert PDF financial statements to Excel and then present the financial data by year. My staff manually confirmed that the Excel output matched the PDF financial statements.

Q: Is that all you used it for?

A: No, I also used it for research. To address a disputed issue related to the 1997 acquisition, I used Copilot's Researcher Agent to identify the accounting standards in effect at the time. Its summary pointed me to specific paragraphs, which I read in the original standards. I confirmed the standards applied by checking their effective dates.

Conclusion

Specificity and a clear explanation of the verification process may help the expert describe the work performed.

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Only Used It to Check Work + No Records

Q: You mentioned you used ChatGPT to verify your damages calculations. What prompt did you enter?

A: I don't remember exactly. Something like "check this calculation."

Q: Did you save the prompt?

A: No.

Q: Did you save the output?

A: No.

Q: So we have no record of what you asked the AI, and no record of what it told you?

A: That's correct.

Q: And you relied on that output to confirm your damages figure of $4.2 million?

A: I used it as one of several checks, yes.

Q: But you can't tell us what you asked it, what it said, or whether it gave you the same answer every time you asked?

A: Not specifically, no.

Conclusion

The lack of preserved records and the inability to describe the AI interaction may create additional questions about reliance, verification, and disclosure.

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Inability To Explain the AI Tool

Q: You testified that you used an AI tool to analyze the document set in this case. Which tool did you use?

A: It was a large language model. A chatbot.

Q: Which one?

A: I believe it was GPT-4. Or possibly GPT-4o. I'm not certain.

Q: Do you know the difference between those two models?

A: Not specifically.

Q: Do you know whether the version you used had access to documents outside of what you provided to it?

A: I'm not sure.

Q: So you don't know whether the AI may have drawn on outside sources — sources you didn't review and didn't disclose in your reliance materials?

A: I suppose that's possible.

Q: And you can't rule it out?

A: No.

Conclusion

Variation could be whether you know the confidentiality standards for the tool and whether your model is closed or open-sourced; concern here is that the tool used outside sources to skew its review of documents or outputs.

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Ability To Explain the AI Tool

Q: You testified that you used an AI tool to analyze the document set in this case. Which tool did you use?

A: Microsoft Copilot.

Q: Do you know whether the version you used had access to documents outside of what you provided to it?

A: I have used Copilot to access sources on the internet in the past, but in this case, I asked it to only analyze the documents I uploaded. I also asked it to cite the source documents it used. I compared its outputs to the source documents and didn't see anything that wasn't in the source documents I provided to it.

Q: How does Copilot work?

A: Well, I'm not a software engineer, and Microsoft's algorithms are proprietary. My understanding is that it uses algorithms, language models, and machine learning to generate its outputs.

Q: If you don't know how the algorithms work, how can you trust it?

A: I'm not trusting it. I verified its outputs before I used them in my report. I didn't use it to perform complex calculations or tell me how to set up my damages model.

Conclusion

Confirming that the output is accurate using the source documents mitigates risk. Discuss strategy for answering this question with your attorney.

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Key Takeaways



The Three-Question Framework

Before using AI, ask:

1. May We Use It?
2. Should We Use It?
3. Can We Defend How We Used It?



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Risk Control Matrix

Risk	Effect on Expert's Work	Safeguard
Hallucination	False facts, citations, or quotations	Verify against original documents
Citation Drift	Source exists, but does not support the proposition	Verify against original documents
Biased Prompting	One-sided evidence collection; Perceived as advocate rather than neutral	Use neutral prompts and contradictory evidence searches
Incomplete Document Review	Relevant evidence excluded before review	Examine all documents, not only those flagged by AI
Confidentiality Breach	Exposure of client or protected information	Use only approved environments and data classes
Black-box Analysis	Expert cannot explain the methodology behind the result	Limit use; be prepared to explain all prompts used
Inadequate Supervision	Team's use is unknown by the expert	Be informed as to your team's use of AI

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Don’t Miss the Next Session of the

2026 Fall Forensics Institute

Making the Complex Clear: Communicating Expert Opinions

Monday, November 9 at 3:00-4:00 p.m. ET

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