PERSPECTIVES

EXPERTISE IN THE AGE OF ALGORITHMS:
TRUST AND TRANSPARENCY IN AI-ASSISTED LITIGATION



Our perspectives feature the viewpoints of our subject matter experts on current topics and emerging trends.

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Legal advisors should read this article to:

- Spot legal and ethical risks of AI-generated evidence, including recent court sanctions and due diligence needs.
- Stay updated on proposed Rule 707 and its potential impact on the admissibility of machine-generated evidence in litigation.
- Apply best practices for supervising AI-using expert witnesses to ensure reliability and transparency in testimony.
- Prepare for cross-examination and challenges to AI-assisted evidence; develop strategies to defend or contest credibility.

Insurance professionals should read this article to:

- Identify ethical and legal risks of AI-generated evidence, including recent sanctions.
- Understand proposed Rule 707's potential impact on insurance claims litigation involving machine-generated evidence.
- Apply best practices for integrating AI tools while balancing transparency and compliance.
- Safeguard expert testimony through disclosure, verification, and reliance on human expertise.

EXPERT VOICES

James E. Malackowski



James illustrates how a forward-thinking IP practice can harness the capabilities of artificial intelligence to elevate value for its clients.

Dean Driskell III



Dean leverages his experience in forensic accounting and valuation to examine how experts can validate AI-assisted analyses and safeguard credibility in complex litigation.

Melissa Impastato



Melissa applies her expertise in analyzing complex builder's risk claims to explain why claimed costs, delays, and project records require expert interpretation and verification to produce reliable, defensible conclusions.

Chris Stewart, PE



Chris draws on his accident reconstruction and forensic engineering expertise to illustrate why technology-assisted evidence must still be grounded in reliable methods, careful analysis, and expert judgment to withstand scrutiny.

Executive Summary

Synthetic technologies are reshaping the legal landscape, presenting expert witness reporting with a pivotal challenge: integrating the innovation that artificial intelligence provides without compromising ethical standards or credibility. Amidst rising distrust, the legal system must redefine human expertise and establish transparent frameworks for artificial intelligence (AI)-assisted analysis. Ethical risks posed by opaque algorithms, deepfakes, and AI-generated evidence hallucinations are making it more difficult for expert witnesses. These new, nuanced risks and responsibilities confronting attorneys, forensic, scientific, and technical specialists, insurance professionals, and financial experts highlight the urgent need for defensible, accountable usage methodologies and ethical frameworks. This article examines how AI is reshaping litigation and recent cases that demonstrate why human expertise

remains essential to evaluating sources, drafting reports, and supporting credible expert witness testimony. In addition, readers will learn more about proposed Rule 707 and efforts to address the reliability and accuracy of machine-generated evidence offered without an expert witness.

Introduction

Expert witnesses play a crucial role in influencing the outcome of complex litigation and arbitrations, making it essential that they bring the requisite knowledge and insight to each case – whether authoring a report, being deposed, or testifying in court or before a tribunal. While experts are not advocates and do not provide legal advice, their early involvement in a matter can help build effective case strategies and identify the need for additional expert analyses and opinions. Increasingly, however, expert witnesses are being confronted with the question of whether to leverage artificial intelligence and machine learning to support their work product.

AI continues to make extraordinary advances at a rapid rate. Generative AI (Gen-AI), a type of machine learning that includes large language models (LLMs), produces original content, such as text, through programs like OpenAI's GPT series, Google's Gemini, and Anthropic's Claude. Other Gen-AI programs can create images, videos, lifelike audio and music, and even code to automate repetitive tasks. Agentic AI, which is more autonomous and can learn and adapt, can conduct more complex tasks, such as automating corporate insurance claims processing, conducting legal document reviews, and supporting supply chain optimization.

This article explores the nuanced risks and responsibilities confronting attorneys, forensic, scientific, technical, and financial experts, as well as insurance professionals, highlighting the urgent need for defensible, accountable usage methodologies and ethical frameworks. This article also discusses the proposed Federal Rule of Evidence 707 and its potential impact on the admissibility of machine-generated evidence in legal proceedings and insurance claims litigation.

Risks for Experts in the Use of AI

AI is also posing significant risks to the legal industry, particularly in relation to how testifying experts can or cannot utilize this new technology in their work product, such as processing relevant data. While both lawyers and experts have faced issues with AI-generated inaccuracies, experts must be especially vigilant, as attorneys rely upon their specialized knowledge and analysis.

In the US federal court system, Rule 702 of the Federal Rules of Evidence[1] governs the admissibility of expert testimony. The rule states that an expert witness may testify if several conditions are met, including that the "testimony is the product of reliable principles and methods." We are left with the question: How reliable are the conclusions provided by testifying experts when AI tools are utilized in their research?

Reliability is just one of the key characteristics that courts look for when evaluating potential evidence. The lack of transparency and repeatability in AI processes is another major challenge. Since AI works as a "black box,"[2] its systems may not be clearly examined or explained. The opacity that accompanies proprietary AI systems often means that the method by which the conclusion was reached is unclear and may be riddled with errors or biases.

[1] https://www.law.cornell.edu/rules/fre/rule_702
[2] https://www.ibm.com/think/topics/black-box-ai

Human expertise traditionally presents its ethics and defensibility by following the rules set forth in Rule 702. Humans can present all the facts, data, analysis, and results in a way that eliminates the "black box," allowing an expert's work to be reviewed and questioned. The expert can elaborate on and defend his or her work upon request.

One of the biggest challenges for experts seeking to utilize AI in their reports to clients and in litigation is the technology's susceptibility to hallucinations and the potential for providing false references and citations. In fact, several courts have sanctioned lawyers for relying on AI to cite cases and other information that did not exist.[3]



[3] https://cases.justia.com/federal/district-courts/utah/utdce/2:2020cv00372/120354/253/0.pdf?ts=1732726260
https://cases.justia.com/utah/court-of-appeals-published/2025-20250188-ca.pdf?ts=1748025697
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https://abovethelaw.com/wp-content/uploads/sites/4/2026/04/Letter.pdf

Additionally, three pending AI-related cases involving health insurers alleged that the insurance companies violated policy terms by using AI or automated algorithms to make coverage determinations. Furthermore, the cases allege that the use of AI or automated decision support systems in claims administration was inconsistent with plan terms, fiduciary obligations, or representations concerning individualized medical review. The cases – Estate of Gene B. Lokken v. UnitedHealth Group[4]; Barrows v. Humana[5]; and Kisting-Leung v. Cigna[6] were filed in federal courts in Minnesota, Kentucky, and California, respectively. Although the allegations remain contested and the cases have not produced final determination on the merits, they illustrate an important AI-governance issue: an insurer's actual use of automated tools should be evaluated against the governing plan documents, representations to insureds, applicable fiduciary obligations, and requirements for individualized clinical review. Depending on that language and the applicable law, the use of an automated system may also raise questions about human oversight, the explanation of adverse decisions, and whether the system's role must be disclosed.

The importance of human oversight cannot be overstated. AI-generated reports often lack the nuanced understanding that expert analysis provides; they often cannot substitute for expert judgment or provide insight into the reasoning behind AI's conclusions. Without the benefit of an expert's specialized knowledge and experience, prompts can result in incomplete or misleading outputs that fail to address the specific complexities of the subject matter.

The best experts have an earned reputation in their industry, technical knowledge, the skills to digest and retain large quantities of documents and data, an unmatched work ethic, a keen eye for detail, the ability to effectively describe complex technical matters, and the capacity to withstand cross-examination.

If a report uses sources developed through AI, a best practice is to require a hard copy of all those sources before publishing the report. This ensures that those sources are in the possession of the expert who will verify that the information is relevant, reliable, and unbiased.

Courts and Legislatures Are Reacting

Currently, there are no federal or state rules that categorically prohibit attorneys from using AI to support depositions live, provided they comply with professional conduct obligations — including competence, confidentiality, and supervision — and ensure that AI use does not compromise client confidentiality or privilege.

Yet state courts are starting to impose some guardrails. California recently enacted[7] its first state law on the use of Generative AI (Gen AI) by attorneys and arbitrators. The law, which goes into effect January 1, 2027, states that attorneys cannot delegate the practice of law to Gen AI and cannot input "personally identifying information" into Gen AI unless access to the system "is restricted to the attorney and persons authorized by the attorney under obligations to protect the confidentiality of the information." The law also states that if attorneys use Gen AI, they must take reasonable steps to verify the accuracy of Gen AI outputs, including all case citations and statutory citations, and must correct any erroneous or hallucinated output in any material they use. They must also disclose to the court the use of Gen AI for all documents they submit.

[4]https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/11/Estate-of-Gene-B.-Lokken-et-al_20231114_COMPLAINT.pdf
[5]https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/12/Barrows_2023.12.12_COMPLAINT.pdf
[6]https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/08/Kisting-Leung_2024.06.14_THIRD-AMENDED-COMPLAINT.pdf
[7]https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260SB574

A new AI-use rule went into effect on June 1, 2026, in New York State. Part 161 of the Rules of the Chief Administrator of the Courts[8] permits the use of AI tools in preparing submissions to a court and does not require the disclosure of such use. However, it does require attorneys using such tools to "carefully review" each submission and "independently ensure" that it does not contain "fabricated or fictitious cases, statutes, or other material."

The state of Louisiana's Article 371[9] requires attorneys to avoid knowingly presenting false, artificially generated, or artificially manipulated evidence and prohibits misleading or deceiving the court. Attorneys must also use reasonable diligence to verify that the evidence is authentic before submitting it. If a lawyer knew, or reasonably should have known, that evidence was false or manipulated and failed to disclose that fact, they may face contempt of court or other disciplinary action.

How AI Can Reshape Expert Testimony

AI is increasingly used during depositions and trials to challenge the validity of expert opinions. Attorneys utilize AI tools to identify inconsistencies and guide questioning in real time. As AI becomes more integrated into legal proceedings, it's reshaping how expert testimony is scrutinized.

Experts use facts to support their opinions. For instance, they tell the story of what the documents say, what the pictures reveal, and what's happening with a commercial building project. While counsel is familiar with that information, they're not commercial builders. So, they are relying on the expert for what should have been done, when it should have been done, and what the schedule comparisons say. Sometimes, it is necessary for the expert to visit the site to make observations. At other times, enough information can be gleaned from photos. At the same time, drones and AI can be used to inspect sites that are physically difficult to reach, making analysis more complete.

Proposed Rule of Evidence 707

While Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony, AI has complicated that standard.

Considering AI's vulnerabilities, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed Rule of Evidence 707[10] to address the admissibility of "machine-generated evidence," when it is offered without the testimony of an expert. The committee noted that the rule is not intended to encourage parties to choose machine-generated evidence over live expert witnesses, but rather, the goal is reliability.

Under the proposed rule, to be admissible, the party offering the evidence must show that the AI output is based on sufficient facts or data, produced through reliable principles and methods, and demonstrates a reliable application of the principles and methods to the facts.

The Proposed Rule 707 that was distributed for public comment and subsequently decided for further study stated:

"When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments."[11]

[8] https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/AdministrativeOrder-CAJ-75-2026-ArttificialIntelligence-032526r.pdf
[9] https://legis.la.gov/Legis/law.aspx?d=111184
[10] https://www.uscourts.gov/sites/default/files/document/advisory_committee_on_evidence_rules_may_2026.pdf, pages 6 - 11
[11] https://www.steptoe.com/a/web/mfVW1ZxAuBkvow2pShnt2X/proposed-rule-707.pdf

According to the draft agenda for the October 2026 committee meeting,[12] three revised versions of the rule were debated, but no final decision was reached on adopting the proposed rule.

Intersection of AI and Intellectual Property

AI is a tool and not a solution, says James E. Malackowski, the Chief Intellectual Property Officer (CIPO) at J.S. Held and co-founder of Ocean Tomo. While AI contributes to the work product of the Intellectual Property (IP) practice, every item is ultimately reviewed by a managing director and traced back to the original, reliable evidence.

The IP practice is developing models that start with its own private sandbox, ensuring that any data placed in the AI engine will not be disclosed to third parties. In this protected environment, the model is trained using industry data, such as patent analytics, economics, or the IP group's own prior work experience. Then, the model is queried for specific outputs for document review, data requests, and summarization. At the same time, the practice is double-checking all the analyses using traditional methods to compare and determine whether the AI is providing answers, the same answers, or lower-quality answers. The IP group has amended its standard form engagement letter to inform all clients that it will use AI tools in its work unless they request to opt out.

"What's unique about our practice is that 70% of our work is associated with patents, whether it be litigation, valuation, or transactions," Malackowski says. "Patents are complex documents that form part of a comprehensive collection of other patents. Therefore, when studying a patent for any purpose, we review it in detail and examine a small subset of related patents, which may include those by the same inventor, or the same technology, or involving similar transactions. With AI, we can greatly expand the set of data that we're reviewing, which would be impossible to do on a time- or cost-efficient basis without it. It becomes a valuable search tool for enhancing the quality of our practice."

Conclusion: The Imminent Future of AI and Expert Testimony

The path forward for expert testimony in the age of AI requires a careful balance between technological innovation and the rigorous standards of reliability and ethical responsibility demanded by the courts. AI is advancing rapidly, but it is unlikely to replace experts, at least not in the near future. Litigation is replete with nuanced issues that AI, at its current level of sophistication, cannot fully comprehend. Context and issues, such as motive in fraud cases, are difficult to uncover, even for experienced experts. Additionally, if the proposed Rule 707 is adopted, opposing counsel will likely bring motions challenging any expert who uses AI, arguing that the work was not conducted with sufficient control or quality.

The heightened attention to the accuracy and reliability of evidence highlights practical considerations for the use of AI. While more experts are likely to integrate AI tools into their work to improve quality and efficiency, the potential benefits depend heavily on independently verifying AI outputs and exercising sound professional judgment. Experts must also factor in the possibility that opposing counsel may use AI to identify flaws or errors in their analysis. In response, experts need to critically review their own work before presenting it and be prepared to explain their use of AI during legal proceedings.

[12] https://www.uscourts.gov/sites/default/files/document/2026-10-evidence-rules-agenda-book.pdf, pages 13 - 16

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J.S. Held thanks James E. Malackowski, F. Dean Driskell III, Melissa Impastato, and Chris Stewart for their expertise and insights, which greatly assisted this research.

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In 2025, the Licensing Executives Society International (LES) recognized Mr. Malackowski with its highest honor in the business of intellectual property – the LES Gold Medal. Mr. Malackowski is only the 31st recipient of the LES Gold Medal, first awarded in 1971. In 2022, along with Supreme Court Justice Stephen Breyer, Mr. Malackowski was inducted as the 87th member of the IP Hall of Fame, chosen by the IP Hall of Fame Academy from a long list of nominees put forward by the global IP community. Mr. Malackowski was further recognized by the Academy with the Q. Todd Dickinson Award, which honors those who have made significant contributions to IP as a business asset. Notably, Mr. Malackowski is only the seventh person to be recognized both with the LES Gold Medal and inclusion in the IP Hall of Fame, a combination generally regarded as the ultimate recognition in the IP services industry.

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