Attorneys Weigh In On Work Product, Attorney-Client Privilege In The AI Age

(May 5, 2026, 8:16 AM EDT) -- Three attorneys told Mealey's Publication that artificial intelligence is creating new questions about work product and attorney-client privilege protections, and all three indicated that their firms are taking steps to address the issues and create a playbook for both attorneys and clients in the wake of recent rulings.

Steven M. Puiszis, a partner and general counsel at Hinshaw & Culbertson, said: "While attorney-client privilege and work product protection are well established doctrines, their application to a client's potential use of generative artificial intelligence is a new development which courts are beginning to address. While the application of attorney-client privilege and work product are fact dependent, a client's use of a public, consumer grade generative AI tool, which uses the information submitted to it for training purposes, is particularly problematic. As a result, firms are considering how to effectively alert their clients about this risk. Suggestions which are starting to emerge have included the possible addition of a statement not to use such a tool in an engagement letter or via a stand-alone communication. Our clients' use of generative AI will generate new areas of discovery, and disputes, through which the parameters of these traditional protections to GenAI queries and outputs will be hammered out."

Questions

Kristen Swift, managing partner at Kaufman Dolowich's Delaware office, said: "We are in an age where the rise of artificial intelligence is creating new and interesting discovery challenges. Not surprisingly, there are manypractical questions that have sprung up and need to be answered. I've begun including in my representation agreements an acknowledgment and agreement by my clients that they will refrain from using the artificial intelligence platforms to input any information provided by my firm and that doing so could result in discovery of any information inputted into those programs and lead to a breach of their attorney-client privilege. My stance is that it is best to err on the side of caution and assume that any information entered into these models is discoverable. The old test about whether you would want whatever you're putting in writing to be blasted across the New York Times front page still applies — expect that whatever is inputted into these platforms will be available through a subpoena and not considered private. Although there are still a lot of unanswered questions, act as though the information entered into these models is on display.

"Our firm has also initiated updated discovery requests to investigate whether the party has used these platforms. We are especially interested in determining whether they're using these platforms in lieu of legal counsel and whether they're uploading any potentially confidential or protected information. Like in Archie Morgan v. V2X, Inc., No. 25-1991, D. Colo., 2026 U.S. Dist. LEXIS 67939, we have also considered updating protective orders to address and prevent confidential information from being submitted to these platforms. It's a changing landscape, and we need to adapt and be flexible as these decisions on privacy and confidentiality are introduced into law," Swift said.

Paul Brusati, partner and assistant general counsel at Armstrong Teasdale, said: "Courts are mixed about what is discoverable when it comes to a party's use of large language models. To guarantee nothing is discoverable, it's best for clients not to use large language models to discuss the specifics of a pending or threatened action. But if they do, the cautionary tale is to keep their inputs vague, assuming that what they enter is more likely to be deemed discoverable by the court than if an attorney were to do the same."

"We've seen a shift in how courts have approached the use of large language models in the legal profession. Originally, courts were, understandably, skeptical about the usefulness and risks of the tools. I believe there were even courts that required lawyers to certify that they did not use AI in drafting what was being submitted. Now, just like with the advent of electronic legal databases, courts understand LLMs will be used (by both attorneys and clients). They're acknowledging and accepting its use, but the burden of responsible usage falls onto the attorneys and their clients. Attorneys can start with an LLM, but to state the obvious, a lawyer should always be revising, fact-checking, and vetting what comes out before signature and submission."

The attorneys reached by Mealey's Publications were addressing recent case law created in three cases: Sohyon Warner v. Gilbarco, Inc., et al., No. 24-12333, E.D. Mich., 2026 U.S. Dist. LEXIS 27355; United States of America v. Bradley Heppner, No. 25-503, S.D. N.Y., 2026 U.S. Dist. LEXIS 32697; and the aforementioned Archie Morgan v. V2X, Inc., No. 25-1991, D. Colo., 2026 U.S. Dist. LEXIS 67939.

Discovery

A federal magistrate judge in Michigan on Feb. 10 concluded that work product protections apply to a pro se litigant's AI use. The defendant in Sohyon Warner's employment case had sought all documents and information about her use of third-party AIs in the case. U.S. Magistrate Judge Anthony P. Patti of the Eastern District of Michigan denied that motion, finding that the information the defendant sought was akin to documents and tangible items prepared in anticipation of litigation and therefore not discoverable. Even if the AI-usage evidence was marginally relevant, it is not proportional to the case, Magistrate Judge Patti said, citing Federal Rule of Civil Procedure 26(b)(1), Fed. R. Civ. P. 26(b)(1).

Magistrate Judge Patti also declined to overrule Warner's attorney-client privilege and work product objections to the motion. "Even if this information were discoverable, it is subject to protection under the work-product doctrine, which Plaintiff is permitted to assert. . . . Moreover, to the extent Defendants argue that Plaintiff waived the work-product protection by using [AI], the work-product waiver has to be a waiver to an adversary or in a way likely to get in an adversary's hand," Magistrate Judge Patti said. That is true even though an AI company might have employees working in the background who can see the inputs, Magistrate Judge Patti said.

That case is Sohyon Warner v. Gilbarco, Inc., et al., No. 24-12333, E.D. Mich.

'New Frontier'

In a second ruling filed Feb. 17, U.S. Judge Jed S. Rakoff of the Southern District of New York declined to apply attorney-client or work product protections to defendant Bradley Heppner's use of AI. While AI is a novel technology, and the issue appears to be one of first impression, the technology remains subject to long-standing legal principles, Judge Rakoff concluded.

"Generative artificial intelligence presents a new frontier in the ongoing dialogue between technology and the law. Time will tell whether, as in the case of other technological advances, generative artificial intelligence will fulfill its promise to revolutionize the way we process information. But AI's novelty does not mean that its use is not subject to longstanding legal principles, such as those governing the attorney-client privilege and the work product doctrine. Because Heppner's use of Claude fails to satisfy either of these rules, the AI Documents do not merit the protections Heppner has claimed," Judge Rakoff said.

In that case, Heppner used AI to investigate potential defenses and strategies after the United States indicted him on securities fraud. Heppner and his attorneys had argued that the evidence was protected because all the inputs were provided by his counsel.

But in rejecting those positions, Judge Rakoff said that not only was Heppner communicating with a third party but also that the AI he used specifically stated that it collects inputs and reserves the right to produce those inputs to third parties.

That case is United States of America v. Bradley Heppner, No. 25-503, S.D. N.Y.

Confronting

Finally, in the Morgan case mentioned by Swift, U.S. Magistrate Judge Maritza Dominguez Braswell of the District of Colorado said, "AI is forcing litigants and courts to confront difficult questions about how and to what extent longstanding protections will apply when parties use AI to assist them in the litigation process. In particular, courts are beginning to wrestle with practical questions surrounding confidentiality, work product, and privilege."

In that case, Magistrate Judge Braswell concluded that the pro se plaintiff was entitled to protections but limited the use of AI. Federal Rule of Civil Procedure 26(b)(3), Fed. R. Civ. P. 26(b)(3), protects mental impressions, documents and tangible materials related to litigation. The language of the rule would appear to apply to material created by a party prior to retaining a lawyer and even material created in anticipation of litigation where the party never retains a lawyer, Magistrate Judge Braswell explained.

"A reading of Rule 26(b)(3) that conditions work product protection over AI materials on the involvement of counsel finds no support in the rule's text and would further disadvantage unrepresented litigants. Pro se litigants are held to the same standard as represented litigants. . . . They should be afforded the same protections," Magistrate Judge Braswell said.

Ultimately, Magistrate Judge Braswell amended a protective order governing the case to ensure that no confidential information was entered into an AI tool absent evidence that the company behind the technology was contractually precluded from storing, using or disclosing the information. Judge Braswell acknowledged that the ruling would prevent pro se plaintiffs from using most, if not all, free versions of AI and that the burden would fall primarily on pro se plaintiffs. But the outcome was necessary to ensure the protection of confidential information, Magistrate Judge Braswell said.

Magistrate Judge Braswell issued the ruling March 30.

(Documents available. Morgan opinion. Document #46-260506-010Z. Warner order. Document #46-260304-053R. Heppner opinion. Document #46-260304-051R.)

Attached Documents

Morgan opinion

Warner order

Heppner opinion

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