

# INSURANCE AND REINSURANCE

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*Litigation experts are relying on AI to support their work and reach conclusions. How will the courts apply Rule 702 to novel questions about reliability and admissibility of AI driven expert opinions?*

## AI and Experts - Can an Expert Rely on AI and Satisfy Rule 702?

### ABOUT THE AUTHORS



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The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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We just confronted an expert who relied on AI to generate part of his opinion. The dispute is a first-party claim for insurance coverage accompanied by a bad faith claim. The expert's opinion is intended to show the insurance company got it wrong; that their scope of loss, cost estimate and coverage decisions were so unfounded the insurance company should be penalized.

This was our first opportunity to examine the state of the law as to the intersection of Rule 702 and AI-generated opinions. We found only two cases that touch on the issue. In *Ferlito v. Harbor Freight Tools USA, Inc.*, 2025 U.S. Dist. LEXIS 77560, at \*9 (E.D.N.Y. 2025), an expert used ChatGPT as a tool to validate his independently generated opinions. The court found no problem with what he did (based on the facts of that case). However, the court noted: "***Daubert* issues arise only 'when ... experts abdicate their independent judgment and critical thinking skills in favor of ready-made AI-generated answers.'**" That is pretty much what the expert did in our case, he did not use AI to validate his opinion, he used AI to form the opinion.

In *Kohls v. Ellison*, 2025 U.S. Dist. LEXIS 4928, at \*3 (D. Minn. 2025), an expert cited to hallucinated scholarly articles from AI in support of his expert opinions. **Ironically, the witness was an expert on the dangers of AI.** The court said it cannot accept false statements – even if innocent (the expert did not intend to have AI make up stuff for his opinion) - in an expert's declaration. As a result, the court granted a motion in limine to strike the expert and his opinions. As part of its examination of the issue, the court noted that Rule 11 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.*" In our case, the expert did next to nothing to verify the AI results.

Though not directly on-point, several cases observe that it is widely recognized that AI systems are prone to "inaccurate predictions [and] hallucinations." *Wadsworth v. Walmart Inc.*, 348 F.R.D. 489, 493 (D. Wyo. 2025). The *Wadsworth* court noted that such hallucinations "are not unique to the legal profession" but that "many scientific fields experience the same issue." *See also In re Martin*, 670 B.R. 636, 648 (Bankr. N.D. Ill. 2025) (citing with approval a recent news article that explained, "[t]here have been a host of high-profile cases where the use of generative AI has gone wrong for lawyers and others filing legal cases .... It has become a familiar trend in courtrooms across the U.S.")

Other cases that address pre-AI evidentiary issues by analogy support the argument that non-human generated opinions/conclusions (whether it be AI or pre-AI software systems) including "science-based test results" are subject to *Daubert* and Rule 702. For instance, in *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021), the state utilized a "probabilistic genotyping software program" to analyze DNA evidence. The defendant challenged the software on *Daubert* grounds. In a lengthy opinion, the court explained that *Daubert* and its principles apply not only to expert opinions but to conclusions/results generated by such systems. It noted:

"Yet the mechanisms for obtaining [these expert conclusions]—the software, the science—are beyond the ken of most jurors and judges. If highly

consequential evidence emerges from what looks like an indecipherable computer program to most non-scientists, non-statisticians, and non-programmers, it is imperative that qualified individuals explain how the program works and ensure that it produces reliable information about the case. All of this explains why the courts have developed reliability standards for admitting evidence of this type and why a functioning adversarial system remains critical in handling it."

*Gissantaner*, 990 F.3d at 463. The court went on to apply each of the *Daubert* factors to the DNA-testing software applied in that case. The principles applied by the court in *Gissantaner* apply by direct extension to AI-generated opinions/conclusions.

Several instructive cases also explain that an expert's analytical process must be transparent, such that its error rate, etc., can be assessed. For instance, in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 644 F. Supp. 3d 1075, 1126 (S.D. Fla. 2022), the expert's opinion was in part predicated on a methodology that itself relied on the judgment calls of subordinate analysts whose decision-making process was opaque and not subject to or susceptible to scrutiny. Based on this, the court excluded the testimony. It noted: "The approach cannot withstand a *Daubert* challenge because it is not possible to assess the reliability of a methodology that simply leaves decisions to

the expert." In essence, the court found that the expert was unable to "show his work" and that as a result, it was not possible to assess the reliability of the methodology he employed and that this, in part, justified exclusion. *See also Lawrence v. Raymond Corp.*, 2011 U.S. Dist. LEXIS 85798, at \*20 (N.D. Ohio 2011) ("An expert is not a black box into which data is fed at one end and from which an answer emerges at the other; the Court must be able to see the mechanisms in order to determine if they are reliable and helpful."). These cases seem to support arguments excluding expert opinions that rely on AI for material conclusions when the expert has no knowledge of how the AI "decided" the issue it addressed.

**Takeaway:** courts face a vast, legal frontier of novel issues introduced by the use of AI. How to evaluate an expert opinion that relies on AI is a big one. It seems apparent to us that an expert who relied on AI to form opinions should: (1) disclose the use of AI just as an expert would disclose any information relied upon to form an opinion, (2) be able to explain in some fashion the process used by the AI, (3) demonstrate some form of verification of the AI's work, and (4) show that the expert did the critical thinking and used AI to verify or support the expert's conclusion, i.e. show the opinion was made independently by the expert.

*And, this article was NOT written by AI.*

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