LAW360™ Canada

Law360 Canada | 2 Sheppard Avenue East, Box 54 | Toronto, Ontario, M2N 5Y7 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

U.S. decision suggests using generative AI may endanger privilege

By **Stephen A. Thiele**

Law360 Canada (April 8, 2026, 2:22 PM EDT) --

> *Only three years after its release, one prominent AI platform is being used by more than 800 million people every week. — Justice J.S. Rakoff, United States District Court*

Stephen A. Thiele

The use of generative artificial intelligence to conduct legal research or to obtain or double-check legal opinions is a growing trend and is plaguing our justice system. Every week, there seems to be a decision in which self-represented litigants and lawyers have used hallucinated cases or hallucinated propositions of law in court-filed materials to support their arguments. Anecdotally, clients are also beginning to use AI to double-check the opinions of their lawyers or telling their lawyer that they used AI to understand the law or test the strength of their own case. In essence, clients are using AI like a pseudo-lawyer.

AndreyPopov: ISTOCKPHOTO.COM

However, as seen in *United States of America v. Heppner*, 25 Cr. 503 (Feb. 19, 2026, U.S. District Judge Jed S. Rakoff), doing so risks endangering the protections afforded to clients by the doctrines of solicitor-client and litigation privilege.

In this case, a New York court was required to assess the potential ramifications of an accused's exchanges with "Claude," a generative AI platform developed by Anthropic.

On Oct. 28, 2025, a grand jury had indicted the accused on charges of securities fraud, wire fraud, conspiracy to commit securities and wire fraud, making false statements to auditors and falsifying corporate records. The accused was a corporate executive of several corporations, including GWG Holdings Inc., a public company, and it was suggested that he had defrauded GWG's investors of over US$150 million in dealings between GWG and two privately held companies he controlled.

Although the accused had a lawyer, following the receipt of the grand jury's subpoena, he also began to communicate with Claude about their investigation into his conduct. These communications were

done independently. They were not done at the direction of the accused's lawyer.

A week after the release of the indictment, the Federal Bureau of Investigation arrested the accused, and a search warrant was executed at his home. In the search, the FBI seized documents and electronic devices, including 31 documents that memorialized the accused's exchanges with Claude.

The exchanges included reports outlining defence strategy and potential legal arguments.

Lawyers for accused asserted privilege over the exchanges. However, government prosecutors wanted to inspect them. Accordingly, prosecutors sought a court ruling that the exchanges were not protected from inspection by either the attorney-client (solicitor-client) privilege or the work product doctrine (litigation privilege).

While the accused contended that the exchanges were privileged because i) he had inputted into Claude information that he learned from his lawyers, ii) he had created the documents for the purposes of obtaining legal advice from his lawyers, and iii) he had subsequently shared the documents with his lawyers, the court ruled that the exchanges were not protected by either the attorney-client or work product privilege.

In both the United States and Canada, attorney-client (solicitor-client) privilege protects from disclosure i) all communications between a client and their lawyer ii) that is intended to be kept confidential and iii) is for the purpose of providing legal advice. In Canada, solicitor-client privilege is nearly absolute and, as stated by the Supreme Court of Canada in *R. v. Fox*, 2026 SCC 4 at para. 37, has evolved from a mere rule of evidence to a substantive right, to a right with constitutional dimension. In general, the solicitor-client privilege is "the strongest privileged protected by law."

In *Heppner*, the court found that the attorney-client privilege was inapplicable because at least two of its three elements could not be met.

Critical to the court's analysis was that Claude was not a lawyer. Therefore, the exchanges were not communications between the accused and his lawyer.

The court also explained that the exchanges were not confidential because:

- the accused had communicated with a third-party AI platform;
- the privacy policy of the platform permitted Anthropic to collect "inputs" and "outputs" for training purposes; and
- Anthropic reserved the right to disclose the data collected to "third parties," including government regulatory authorities.

Lastly, despite the accused's contention that he had used Claude for the purposes of obtaining legal advice and that he had intended to share the exchanges with his lawyers, the court rejected the accused's arguments because Claude expressly disclaimed providing legal advice and "it [was] black-letter law that non-privileged communications are not somehow alchemically changed into privileged ones upon being shared with counsel." (United States v. Heppner, 2026 U.S. Dist. LEXIS 32697.)

The court also rejected the accused's arguments that the exchanges were protected by work-product (litigation) privilege. The court noted that this privilege provided a zone of privilege to the mental processes of a lawyer, including a lawyer's legal analysis and preparation of client's case. However, this privilege did not protect from discovery "materials in an attorney's possession that were prepared neither by the attorney nor his agents."

In Canada, it has been explained that the litigation privilege is tied directly to the litigation process and is anchored in the need to facilitate investigation and to prepare a case for trial. In this regard, the litigation privilege is distinguishable from the solicitor-client privilege. While the litigation privilege aims to facilitate a process, the solicitor-client privilege aims to protect the lawyer and client relationship.

In *Lizotte v. Aviva Insurance Co. of Canada*, [2016] S.C.J. No. 52, the Supreme Court of Canada

stated that the litigation protects from disclosure documents and communications whose dominant purpose is preparation for litigation and that it applies to both a lawyer's file and a lawyer's oral and written communications with third parties, such as witnesses or experts.

In *Heppner*, the court found that this privilege did not apply because the exchanges were not produced at the direction of his lawyer. The court stated that his lawyer "did not direct [him] to run Claude searches" and that "[b]ecause the AI Documents were not prepared at the behest of counsel and did not disclose counsel's litigation strategy, they do not merit protection as work product."

The key takeaway from this case is that the growing use of AI by clients both before and after they engage a lawyer is raising significant issues about privilege. At discovery, opposing lawyers are beginning to probe whether a party has exchanged any communications about a case with a generative AI platform and demanded transcripts of those exchanges. In this regard, lawyers should warn their clients that the use of generative AI as a pseudo-lawyer to either seek "legal advice" or to double-check the opinions of their own lawyers could be harmful to their case because those exchanges may not be protected by either the solicitor-client privilege or the litigation privilege. Those exchanges could contain detrimental factual admissions or other information that otherwise would have been protected by a privilege if simply disclosed to the client's lawyer.

In Bradley Heppner's case, it remains to be seen what he "discussed" with Claude and how the government will use these exchanges in the prosecution of the criminal charges.

(This article was not prepared with the assistance of generative artificial intelligence.)

Stephen A. Thiele is the director of legal research at Gardiner Roberts LLP. He primarily works closely with dispute resolution lawyers, providing advice, value-added analysis and opinions on a wide range of litigation matters. He is the co-author of A Practical Guide to the Law of Defamation *(2024: LexisNexis).*

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.

All Content © 2003-2026, Law360 Canada