

# Artificial Intelligence in Practice: Expert Witness Use of AI

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By now, most lawyers have heard of the horror stories of lawyers citing fake cases, or "hallucinations", generated by artificial intelligence (AI).<sup>1</sup> These cases are all staunch warnings that AI-generated work must be verified by a human prior to submitting it to a court. Hallucinations have even led to some courts mandating that if lawyers use AI in the preparation of their submissions that it must be disclosed.<sup>2</sup> A similar, but less discussed issue, is an expert's use of AI in preparing an expert report. How should lawyers, both external and in-house, manage an expert's use of AI?

## An example of AI-use gone wrong by an expert

In the recent Minnesota case of *Kohls v. Ellison*,<sup>3</sup> a judge rejected an expert's report as it contained three non-existent, AI-generated citations. The irony was that the expert report was tendered as evidence on the *dangers* of AI and misinformation, to support a Minnesota law prohibiting the dissemination of AI-"deepfakes" to influence an election. The Court stated: "a credentialed expert on the dangers of AI and misinformation, has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less."<sup>4</sup> You read that correctly: an expert witness, retained for their opinion on the "dangers of AI and misinformation" did not verify the AI-generated parts of their report and submitted an expert report containing misinformation.

Beyond the fatal consequence to the expert's credibility,<sup>5</sup> the Court noted that citing fake sources results in many harms, including wasting lawyers' time, court resources, and public confidence in the legal system as a whole.<sup>6</sup> These statements echo warnings from Canadian case law: "Competence in the selection and use of any technology tools, including those powered by AI, is critical. The integrity of the justice system requires no less."<sup>7</sup>

## Experts' obligations to disclose the use of AI in the preparation of their report

The *Kohls* case serves as a caution for both external and in-house legal counsel that they should be aware of whether an expert has used AI in preparing their report. While most jurisdictions have not explicitly amended their court rules to require disclosure of any AI use, such use is likely already captured by experts' current obligations to the courts.

For example, an expert report submitted to The Court of King's Bench of Alberta must contain, at a minimum, "the information and assumptions on which the expert's opinion is based,"<sup>8</sup> which arguably could encompass the use of AI. In the Federal Court, an expert's disclosure obligations go further, and an expert must provide a "summary of the *methodology* used, including any examinations, tests or other investigations on which the expert has relied".<sup>9</sup> The Federal Court considers that the summary of methodology "ought to require disclosure of the use of AI".<sup>10</sup>

<sup>1</sup> See for example: *Zhang v Chen*, 2024 BCSC 285 [Zhang].

<sup>2</sup> See for example: Federal Court, "The Use of Artificial Intelligence in Court Proceedings" (7 May 2024), online: <https://www.fct-cf.gc.ca/Content/assets/pdf/base/FC-Updated-AI-Notice-EN.pdf>.

<sup>3</sup> *Kohls v Ellison*, No 24-cv-3754 (D Minn, Jan 10, 2025) [*Kohls*].

<sup>4</sup> *Kohls v Ellison*, No 24-cv-3754 (D Minn, Jan 10, 2025) at para 8.

<sup>5</sup> *Kohls* at para 10.

<sup>6</sup> *Kohls* at para 11.

<sup>7</sup> *Zhang* at para 46.

<sup>8</sup> Alberta Rules of Court, Alta Reg 124/2010, r 5.34; Alberta Rules of Court, Alta Reg 124/2010, Sched A, Form 25.

<sup>9</sup> Federal Courts Rules, SOR/98-106, Sched, s 3; Federal Court, "The Use of Artificial Intelligence in Court Proceedings" (7 May 2024), online: <https://www.fct-cf.gc.ca/Content/assets/pdf/base/FC-Updated-AI-Notice-EN.pdf>.

<sup>10</sup> Federal Court, "The Use of Artificial Intelligence in Court Proceedings" (7 May 2024), online: <https://www.fct-cf.gc.ca/Content/assets/pdf/base/FC-Updated-AI-Notice-EN.pdf>.



## Takeaways

In sum, both in-house and external legal counsel should be aware of whether their experts are using AI when preparing their expert reports. More likely than not (depending on the jurisdiction) an expert's use of AI should be disclosed to the court. An easy way to put this advice into practice is to ensure your expert retainers include a provision that require experts to advise when, and how, AI was used in creating their report. Counsel can then work with the expert to determine whether the specific uses warrant disclosure to the court.

BD&P's team of forward-thinking lawyers is here to assist you in navigating the novel legal landscape of AI.