Client Use of AI Tools May Not Be Privileged

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Overview

In a case of first impression, a district court ruled in *United States v. Heppner* (2026) that correspondence between an AI tool and a defendant during a criminal case was not protected by the attorney-client privilege or the attorney work product protection, and ordered that the correspondence be turned over to the government. The basis of the ruling may apply to AI correspondence made in relation to patent prosecution and litigation matters, potentially making client-initiated AI correspondence discoverable during patent litigation. Clients should proceed with caution when using these tools.

Background

Defendant Bradley Heppner, who is awaiting trial on securities and wire fraud charges, communicated with a consumer version of the AI model "Claude" to prepare documents outlining defense strategy and potential factual and legal arguments that Heppner might employ in the case. These documents were prepared once Heppner had become aware that he was the target of an investigation and were subsequently seized by the FBI in executing a search warrant of Heppner's home.

Heppner asserted that, although his use of Claude was not at the direction of counsel, the documents were generated in anticipation of a potential indictment and were protected by privilege, arguing that: (1) Heppner's inputs to Claude included information Heppner had learned from counsel during the course of representation; (2) Heppner had generated the documents for the purpose of speaking with counsel to obtain legal advice; and (3) Heppner had shared the contents of the documents with counsel.

Opinion

Judge Rakoff of the Southern District of New York ruled that the documents were not protected by either attorney-client privilege or the work product doctrine.

The court found that the claims to privilege failed for three reasons. First, Claude is not an attorney, and therefore the documents reflect communications between two non-attorneys. Second, the communications were not confidential because, like many consumer AI platforms, Anthropic (the company that operates Claude) collects data on user's communications and uses that data in training Claude and reserves the right to disclose the data to certain third parties. Third, Heppner did not communicate with Claude for the purpose of obtaining legal advice because the communication was not done at the direction or suggestion of counsel and Claude, when asked by government lawyers, stated that it is not a lawyer and could not give legal advice.

Heppner's work product claims also failed. The court found that, even assuming the AI documents were prepared in anticipation of litigation, they were not prepared at the direction of counsel and did not reflect defense counsel's strategy. The defense had argued that the AI documents did affect its defense strategy going forward, but the court was not persuaded, focusing instead on whether the documents reflected counsel's strategy at the time they were created.

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Practical Guidance

Even though *Heppner* was a criminal case, the basis of the court's decision may apply in other contexts and may have significant ramifications for clients engaged in patent matters. Clients should exercise caution toward using AI tools in patent matters.

For patent prosecution, clients should not use consumer AI tools that lack assurances of confidentiality in any part of the invention disclosure or patent prosecution processes, as it is possible that none of the correspondence with the AI tool will be privileged or protected. Even if the client is working with and at the direction of an attorney to prepare AI-assisted outputs, under the district court's holding, it is likely that no privilege or protection would apply: the attorney-client privilege may be waived because the client corresponded with a third party, and the attorney work product protection may not apply because the client did not generate the outputs in anticipation of litigation. In addition, clients should bear in mind the duty to disclose to the USPTO known information that may be "material to patentability", and whether use of consumer AI prior to filing a patent application may constitute a prior public disclosure of the invention.

In addition, clients should be advised to not use consumer AI tools to assist in determining the "invention," in generating responses to patent office communications, or in searching for potential prior art. For the same reasons explained above, the correspondence with a consumer AI tool in these circumstances may not be considered privileged or protected. Similar considerations apply toward using AI in performing freedom-to-operate searches. Clients should moreover consider the possibility that enterprise or consumer AI tools may use prompts, which may contain valuable or sensitive client information, for model training.

By contrast, *Heppner* leaves open whether the use of enterprise or in-house AI tools with appropriate privacy policies to perform these tasks under the direction of counsel may be protected by the attorney-client privilege because in that situation, the correspondence would not be with a third party. *Heppner* suggests that the AI tool could be viewed as acting as "a lawyer's agent within the protection of the attorney-client privilege."

In litigation, clients should be advised to avoid using AI tools to assist in the litigation process. For example, clients should be advised to not use AI to obtain basic information about the litigation process in general or about specific aspects of the litigation, such as when a witness is facing a deposition. In addition, clients should also be advised to not use AI tools in an attempt to develop case strategy or to perform other litigation tasks, such as developing a damages model. If the client does perform these tasks of their own volition, the documents generated as a result may not be privileged or protected, and may need to be turned over in discovery.

In conclusion, clients should consider that any correspondence with consumer AI tools during the patent prosecution or litigation process may be subject to discovery. As AI technologies and related law develop, careful attention should be given to the use of AI tools, with emphasis on educating potential users and developing and implementing AI usage (or non-usage) policies and best practices.