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Privacy, Privilege and Artificial Intelligence

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Today more than 800 million people worldwide use OpenAI every week. (1) Over 50% of households in the US have adopted some form of AI platform. (Ref 1, p59) In my own home, we have used generative AI applications for a myriad of tasks ranging from planning trips to birthday parties, editing images and seeking clarification of income tax laws. While most of the world is dabbling with Artificial Intelligence (AI) based applications, the implications of AI for the law are only beginning to be explored. One recent case out of the Southern District of New York illustrated the privacy and confidentiality related concerns associated with excessive reliance on AI based applications.

In *US v Heppner* (S.D.N.Y., Feb. 2026) the federal district court addressed a question of first impression - whether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by attorney client privilege or the work product doctrine? (2)

Mr. Bradley Heppner was charged with securities fraud and related charges. The government alleged that Heppner defrauded investors of $150 million by making false representations about a company that he controlled. On the day of his arrest, November 5, 2025, FBI agents executed a search warrant for Mr. Heppner's home and seized numerous documents and electronic devices. This included approximately 31 documents that memorialized communications that Heppner had with the generative AI platform 'Claude' which is operated by a private company – Anthropic.

According to Mr. Heppner's counsel, the documents represented communications between Mr. Heppner and Claude that took place in 2025, after Mr. Heppner had received a grand jury subpoena and knew that he was the target of investigation. Mr. Heppner obtained reports from Claude that outlined a legal strategy and what he might argue with respect to the facts and the law.

Mr. Heppner asserted privilege over these documents arguing that he had inputted into Claude, information that he had obtained from his counsel, created the AI documents for

the purpose of speaking with counsel to obtain legal advice, and that he had subsequently shared the contents of AI documents with counsel. Mr. Heppner's counsel conceded, however, that counsel had not directed Mr. Heppner to run Claude searches. The Government argued that AI documents are protected neither by Attorney-Client privilege not work-product doctrines.

The court explained that attorney-client privilege protects communications: (1) between a client or his or her attorney; (2) that are intended to be, and in fact were, kept confidential; (3) for the purpose of obtaining or providing legal advice. The court determined that Mr. Heppner's communication with Claude did not meet at least two out of these three criteria.

Firstly, the communications were not between Mr. Heppner and his attorney because Claude is not an attorney. The court noted that some commentators have argued that it is irrelevant if Claude is an attorney or not, since the user's inputs are not communications, but are more like the use of other internet-based software. However, the court noted that the use of such applications is not intrinsically privileged because all recognized privileges require a trusted human relationship with a licensed professional who owes fiduciary duties and is subject to discipline. (Ref. 2, p6)

Second, the court noted that the communications memorialized in the AI documents were not confidential "because the written privacy policy to which users of Claude consent provides that Anthropic collects data on both users' inputs and Claude's outputs" (Ref 2, p6). Anthropic uses such data to "train" Claude and reserves the right to disclose such data to a host of third parties, including in connection with claims, disputes or litigation. The court noted that AI users do not have substantial privacy interests in their conversations with a publicly accessible AI platform, and that "Heppner could have no reasonable expectation of confidentiality in his communication with Claude." (Ref 2, p7)

Finally, the court noted that Mr. Heppner did not communicate with Claude at the suggestion or direction of his counsel, but of his own volition. Moreover, Claude disclaims providing legal advice. Thus, the communications were not privileged and were "not somehow alchemically changed into privileged ones upon being shared with counsel." (Ref 2, p8) The court noted that for the same reasons the communications also did not fall under the related work product doctrine since the doctrine provides qualified protection only for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.

This opinion has some important takeaways. For me the most important one is that communication with AI should be treated in the same basket as posting information online on public social media platforms. When it comes to discovery, it is 'fair game' and not protected by privilege. The opinion also serves as a stark reminder that we all sign away our

privacy rights to private companies that operate these AI platforms. As has been noted by many, forensic psychiatrists need to be doubly sure that they are not feeding protected information to any cloud-based internet application. This opinion serves as a stark reminder of the consequences of any such errors that all of us must pay heed to.

Elsewhere in this issue of The Examiner - the program chairs have provided a preview of great things to come at the annual meeting in Tampa in October. Their article provides the perfect segway to the President's column on Epistemic Injustice. Next, the Medical Director's column focuses on the AAPL Practice Resource Document (previously Practice Guidelines) process. Also featured are our regular columns, reports from committees and AAPL sessions, and two featured articles – one on the future of online safety and the other on assessing risk for violence in Transitional Age Youth (TAY). I hope you enjoy reading many if not all of these as much as I did. Tada!

References

1. BOND. Trends – Artificial Intelligence (AI). [Internet] May 30, 2025. Available at: https://www.bondcap.com/report/pdf/Trends_Artificial_Intelligence.pdf. Accessed April 18, 2026
2. United States v. Heppner, 1:25-cr-00503, (S.D.N.Y. Feb 17, 2026) Available at: https://www.courtlistener.com/docket/71872024/27/united-states-v-heppner/ Accessed April 18, 2026