Smart Experts, Smarter Challenges: Dealing with Daubert and Your Liability Experts

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Attorneys are familiar with the pitfalls of using AI and running afoul of the nondelegable responsibility to validate the truth and legal reasonableness of papers filed pursuant to Federal Rule 11. AI also has implications for experts and the admissibility of their opinions pursuant to *Daubert* and Federal Rule 702 which requires judges to evaluate the admissibility of expert testimony to ensure that it is relevant and reliable.

Federal Framework When Addressing AI Misconduct

Federal courts presently balance three core factors to confront filings prepared with the use of generative artificial intelligence. This framework is rooted in Rule 11 and 28 USA §1927.

1. Verification and Inquiry — Whether counsel conducted a reasonable, human-based verification of every cited authority before filing. A reasonable inquiry requires more than reliance on an automated tool; it demands independent confirmation through recognized primary legal sources. The signature of an attorney certifies human diligence, not mechanical output.

2. Candor and Correction — Whether counsel promptly disclosed the use of AI and corrected the record once inaccuracies were discovered. Candor after filing weighs heavily in mitigation; concealment or minimization aggravates the violation. The duty of candor extends beyond the moment of signature, it continues for as long as the filing remains before the Court.

3. Accountability and Supervision — Whether supervising or associated attorneys exercised oversight consistent with Model Rules 5.1 and 5.3 and whether firm-level safeguards existed to prevent recurrence. The inquiry extends beyond the drafter to the institutional culture that permitted unverified authority to reach the docket. A firm's silence or absence of policy does not immunize it; it implicates it.

Mattox v. Prod. Innovations Rsch., LLC, 807 F. Supp. 3d 1341, 1348 (E.D. Okla. 2025)

Although this framework was announced in 2025, this may soon change with the introduction of a new Federal Rule.

The US Judicial Conference’s Advisory Committee on Evidence Rules released the Proposed Federal Rule of Evidence 707 for public comment in August 2025. That comment period closed on February 16, 2026. This Rule would subject AI content to the same standards for reliability as Rule 702. The proposed Rule is:

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of simple scientific instruments.

Courts are grappling with the intersection of experts and their use of AI. The cases below demonstrate some recent examples of how courts are handling experts using AI.

<u>Kohls v. Ellison</u>, No. 24-cv-3754 (LMP/DLM), 2025 BL 7956, 2025 WL 66514 (D. Minn. Jan. 10, 2025)

This is a First Amendment challenge to a Minnesota statue that prohibits the dissemination of "deepfakes" with the intent to injure a political candidate or influence the results of an election. Plaintiffs were seeking a preliminary injunction prohibiting its enforcement. The Attorney General submitted an opposition, including two expert declarations. One of the declarations ("Hancock Declaration") contained citations to two non-existent articles and incorrectly cited the author of a third article due to the expert's use of generative AI. Plaintiff moved to exclude both declarations. With respect to the Hancock Declaration, Plaintiff argued that it was conclusory and contained fabricated material. The Attorney General's office acknowledged being unaware of the fake and incorrect citations. Since the deadline already passed for the opposition to the preliminary injunction, the Attorney General requested leave to file an amended expert declaration, citing excusable neglect.

Ironically, the expert declaration at issue was authored by an expert in the dangers of deepfakes to free speech and democracy.

The Court ruled that it would exclude the expert declaration, holding that the fake citations "shatter(ed) his credibility." Even assuming that the mistake was innocent, as the expert assured the Court, it was troubling to the Court that the declaration was submitted under penalty of perjury with fake citations.

As it relates to *Daubert* standards, fake citations also called into question the reliability of the opinion which is a hallmark of *Daubert*. More importantly to this Court is the fact that a declaration given under penalty of perjury should carry the "indicia of truthfulness" but the Court held that the trust was broken.

This decision did not denounce the use of AI and, in fact, opined that AI has the potential to revolutionize legal practice for better, but if attorneys and experts abdicate their independent judgment and thinking in favor of AI generated content, the quality of the legal profession will suffer.

<u>Ferlito v. Harbor Freight Tools USA, Inc.</u>, No. 20-5615 (GRB) (SIL), 2025 BL 137435 (E.D.N.Y. Apr. 23, 2025)

This is a product liability matter related to a defective splitting maul (axe for splitting wood). Plaintiff's expert, Mark Lehnert's, qualifications included experience designing and manufacturing power tools, holding patents, and management positions in engineering departments. Mr. Lehnert was not an engineer.

Defendant moved to exclude Mr. Lehnert under Rule 702 as an expert due to his lack of engineering experience and because his opinion was unreliable due to using ChatGPT for a query about securing a hammer to a handle which elicited a response that was consistent with his expert report.

The Court did not exclude Mr. Lehnert as an expert. As it relates to his ChatGPT use, the Court held that there was "little risk that Lehnert's use of ChatGPT impaired his judgment" because he used it after he wrote his report to confirm his findings. The Court specifically held that there was no indication that ChatGPT created a report with fake citations or that it would render his testimony less reliable.

Washington v. Puloka, No. 21-1-04851-2 (Super. Ct. Kings Co. Wash. 2024)

Washington is a *Frye* state, however the analysis is still helpful for this discussion. This is a criminal matter where the defense sought to admit an AI enhanced version of a video recorded by a civilian witness on their iPhone. The purpose of the AI use was to add sharpness and definition to the objects in the video.

The State's forensic video analyst testified that the AI method created false image detail which is not acceptable in the forensic video community. The AI tools further removed information from the original images and added information that was not contained in the original images, making proper forensic analysis of the video impossible.

Because this technique was not accepted in the forensic video analysis community and the method had not been peer reviewed, the AI enhanced video was not permitted to be shown to the jury.

In conclusion, although there is limited Daubert case law related to AI use, what we can see from above is that Courts *may* allow AI use in limited circumstances.

Sanctions for AI use

Lexos Media IP, LLC v. Overstock.com, Inc., No. 22-2324-JAR, 2026 WL 265581, at *1 (D. Kan. Feb. 2, 2026): This is a patent infringement matter. Overstock filed a motion for summary judgment and two Daubert motions. The response filed by Lexos contained nonexistent citations, as well as incorrect and misrepresented citations. The Lexos attorneys admitted to the use of generative AI without confirming the accuracy. The Court directed each Lexos attorney to show cause about why they should not be sanctioned. Subsequently, the Court struck language from the Lexos response and fined several attorneys. The Court further required certain attorneys to file certificates outlining internal procedures to ensure future firm filings will be accurate.

Ryan Lee, Plaintiff, v. Cap. One Bank (USA), N.A.; Johnson Mark, LLC; ABC Legal Servs., Defendants., No. 2:25-CV-540 TC DBP, 2026 WL 689920, at *1 (D. Utah Feb. 24, 2026), report and recommendation adopted sub nom. This is a matter involving a *pro se* plaintiff related to alleged debt collection practices. Although *pro se* litigants are typically held to a less stringent standard than attorneys but still must follow the rules of procedure. This matter reiterates that *pro se* litigants are not immune from sanctions.