

A background image of the Chicago skyline, featuring prominent skyscrapers like the Willis Tower, set against a gradient from teal on the left to yellow on the right.

# Ctrl+Alt+Discover: How Generative AI Is Rewriting the Rules and Risks of Litigation

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NEAL GERBER EISENBERG

# Christopher D. Batdorf- Barnes

Associate | Litigation & Disputes

## OVERVIEW

Chris is an associate in the Litigation & Disputes practice group. He has experience representing clients in a range of litigation matters and at all stages of the litigation process. He handles complex litigation nationwide in state and federal courts and represents clients in significant arbitrations. His experience includes drafting and responding to written discovery, preparing witnesses, taking and defending depositions, and negotiating settlements and other pre-trial agreements. Chris has also briefed numerous motions at the trial and appellate levels.

Chris maintains an active pro bono practice representing prisoners in civil rights cases. Additionally, he has directed the briefing of multiple cases in the United States Court of Appeals for the Seventh Circuit, including successfully arguing several briefs before panels of that court. Before private practice, Chris completed a Public Interest Law Initiative Fellowship with the Chicago Appleseed Fund for Justice.

## RECOGNITIONS

- Thomas H. Morsch Award for Pro Bono Achievement, July 2023
- "Excellence in Pro Bono and Public Interest Service" from the United States District Court for the Northern District of Illinois, May 2023



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## EDUCATION

University of Michigan Law School  
(J.D., 2019)

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## Benjamin Boris

Associate | Litigation & Disputes

### OVERVIEW

Ben is an associate in the Litigation & Disputes practice group. He concentrates his practice on complex commercial litigation matters and insurance recovery for policyholders. He also has experience representing fiduciaries of trusts and estates in litigation regarding the management of assets and other administrative challenges. Ben assists in all aspects of litigation, mediation and arbitration and has experience arguing dispositive motions, taking and defending depositions, drafting pleadings and motion briefs, conducting legal research and performing discovery. Ben also provides strategic assistance regarding the insurance aspects of complex corporate transactions.

Ben has also been recognized as an NGE Pro Bono All-Star in 2020, 2022, and 2023. In 2020, Ben worked with Legal Aid Chicago to prepare a memorandum discussing First and Fourth Amendment claims protesters can assert to remedy protest-related police misconduct. In 2022 and 2023, Ben represented an individual incarcerated in an Illinois state prison in the preparation and litigation of his petition for writ of habeas corpus.

In addition to his experience litigating insurance coverage disputes, Ben has authored articles regarding recent developments in insurance coverage law, including coverage for BIPA lawsuits and the consideration of evidence for purposes of determining duty to defend. He also serves as a co-author of the "Duty To Defend" chapter of the IICLE Insurance Law guidebook and a Co-Chair of ABA ICLC Advertising/Intellectual Property Subcommittee.



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University of Notre Dame Law School  
(J.D. *cum laude*, 2021) *cum laude*

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## RECOGNITIONS

- *Best Lawyers: Ones to Watch in America*, "Insurance Law" since 2026

## NEWS & INSIGHTS

**August 21, 2025 Firm News**

70 NGE Attorneys Named in 2026 *Best Lawyers in America*

**March 7, 2025 Event**

NGE Attends the 2025 ABA Insurance Coverage Litigation Committee CLE Seminar

**October 10, 2024 Event**

Ben Boris Participates in Alumni Attorney Talks hosted by the University of Illinois


**04.22.22 Publication**


Six Rulings Reinforce BIPA Coverage for Illinois Policyholders


**March 29, 2022 Publication**


Client Alert: Recent Court Decisions Reinforce Coverage for BIPA Claims Under General Liability Policies


# Agenda

01 AI's Growing Impact on Discovery 

02 Potentially Discoverable AI-Generated Documents & Related Risks 

03 Privilege & Work Product Protection 

04 Minimizing AI Risk: Litigation & Pre-Litigation 

05 Key Takeaways & Action Items 

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## AI's Growing Impact on Discovery

Section 1: Introduction

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## The New Reality



### Expanding Discovery Universe

AI is generating new categories of records subject to discovery in litigation



### Increasing Privilege Risk

Simultaneously creating new pathways for inadvertent waiver of privilege and protection



### Unfiltered & Candid

AI-generated materials can be more revealing than traditional records

## Case Study: *Krafton v. Unknown Worlds*

Krafton acquired Unknown Worlds Entertainment; the founders/CEO were protected by a for-cause termination provision

Krafton's CEO consulted ChatGPT about how to fire the founders anyway

ChatGPT communications became "Exhibit A", so plaintiffs prevailed on breach of contract

**KEY LESSON: AI conversations ARE discoverable records.**

## AI Is Lowering the Barrier to Litigation

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motions, subpoenas &  
demands filed by a single  
pro se plaintiff using ChatGPT

### *Nippon Life Insurance Co. v. OpenAI*

- Nippon Life sued OpenAI for unauthorized practice of law
- Pro se plaintiff used ChatGPT to generate all filings
- AI empowering unrepresented litigants to file more sophisticated, higher-volume claims

## Potentially Discoverable AI-Generated Documents & Related Risks



Section 2: Document Categories

## Proprietary AI Systems

### Microsoft Copilot | Custom GPT Integrations | Enterprise AI Platforms

- Generate summaries, reports, and recommendations based on company data
- Retain logs of prompts and outputs. Semi-autonomously create recurring reports, creating a large volume of discoverable material that companies may not realize exists
- Unlike email/Slack: AI inputs reflect unfiltered thought process (evaluating options, assessing risk, developing strategy, making recommendations)

**Risk: Unfiltered prompts reveal thought processes in ways traditional email never did**

## AI Notetaking Tools

### Otter.ai | Microsoft Teams Transcription | Fireflies

#### Automatic Documentation

Detailed transcripts of meetings that were previously undocumented

#### Privileged Content at Risk

May capture attorney-client discussions, strategy, and personnel matters

#### Vendor-Accessible Storage

Often stored in cloud environments accessible to the vendor

#### Uninformed Participants

Employees may enable AI notetakers without informing others

## Personal AI Account Usage

- Employees use personal ChatGPT, Claude, Gemini accounts for work, often without employer knowledge or authorization
- Public AI platforms' ToS permit providers to retain, review, and use inputs for model training, meaning that sharing sensitive information may be considered a disclosure to a third party
- Employers cannot search, preserve, or produce materials from individual employee AI accounts

**Creates significant litigation hold compliance challenges**



## Privilege & Work Product Protection



Section 3: The Emerging Case Law

# The Emerging Case Law Landscape

Three key 2026 decisions addressing AI and privilege

## *U.S. v. Heppner*

S.D.N.Y.  
Feb. 17, 2026

Privilege DENIED

## *Warner v. Gilbarco*

E.D. Mich.  
Feb. 10, 2026

W/P PROTECTED

## *Morgan v. V2X*

D. Colo.  
Mar. 30, 2026

W/P PROTECTED

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## *U.S. v. Heppner* (S.D.N.Y., Feb. 17, 2026)

*District Judge Hon. Jed S. Rakoff*

- Criminal defendant used publicly available Claude to analyze legal exposure prior to indictment
- Government seized the materials and sought to use them in prosecution
- Defense claimed both attorney-client privilege and work product protection

**Court rejected both claims**



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## Heppner: The Court's Holding

### Attorney-Client Privilege

No communication between "attorney" and client, as AI is not an attorney

Not confidential, as ToS allows use of inputs for training and disclosure to third parties

Not "for purpose of obtaining legal advice," as it was done on defendant's own volition

### Work Product Protection

No counsel involvement or direction

Done entirely on defendant's own initiative without attorney guidance

Cursory analysis, so different standards may apply in a civil context

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## Heppner: Important Caveats

### Bad facts make bad law?

Criminal context with an unsympathetic defendant

### Cursory W/P analysis

Different standards apply to evidence from lawful search/seizure vs. FRCP discovery

### Kovel doctrine hint

Court hinted attorney use of AI (particularly closed-loop systems) would NOT destroy privilege, which is analogous to extending privilege to necessary third-party agents

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## **Warner v. Gilbarco (E.D. Mich., Feb. 10, 2026)**

### **Work Product Protection APPLIES — No Attorney Required**

*FRCP 26(b)(3)(A): documents "prepared in anticipation of litigation...by another party, or its representative"*

**No waiver: W/P waiver requires disclosure to an adversary (not merely to a third party)**

**Did not reach A/C question; noted stricter waiver standards (disclosure to any third party outside the control group)**

## **Morgan v. V2X, Inc. (D. Colo., Mar. 30, 2026)**

### **Expressly DISAGREES with Heppner; adopts Warner approach**

*"Today, nearly all electronic interaction passes through third-party systems. Google, for example, hosts millions of accounts, and by extension, has access to millions of messages, emails, ... and more."*

Pragmatic reasoning: Lawyers already share info with cloud storage, email servers, e-discovery platforms, and legal research tools without creating a waiver

Why should AI be different?

## Privilege Takeaways



### Work Product Likely Available

AI materials created in anticipation of litigation are likely protected. Won't apply to pre-dispute (restructuring, employment)



### No A/C for Public AI

AI is not a lawyer. Inputting privileged info into public AI can waive otherwise protected material



### Enterprise AI Passes Muster

Proprietary/enterprise/close d-loop AI at counsel's direction should satisfy both privilege and work product requirements

## Minimizing AI Risk



Section 4: Litigation & Pre-Litigation Guidance

## Legal Holds in the AI Era

**A legal hold that does not contemplate AI-generated material is INADEQUATE**

Document retention policies must account for:

- AI transcription services
- Communications with proprietary AI software
- AI-generated reports and summaries

Must consider what employees AND third parties may have AI-generated materials to preserve

Same as requiring texts to be preserved, one must preserve AI prompts and outputs

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## Protective Orders: Evolving Approaches

### **Fiorito (D. Minn.)**

Blanket ban on inputting into AI platforms

**Most Restrictive**

### **W.D. Wash.**

Prohibit where data rights retained by AI platform

**Vendor-Dependent**

### **Morgan (D. Colo.)**

No upload unless provider bars training + disclosure; can delete on request

**No Training**

### **Jeffries (D. Kan.)**

Morgan + requires disclosure of the AI tool to the opposing parties

**Transparency**

**No one-size-fits-all, but must adopt BEFORE discovery exchange**

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## Pre-Litigation Best Practices



Establish written AI Acceptable Use Policy: approved tools, authorized users, permitted purposes



Expressly prohibit inputting privileged communications, trade secrets, or confidential strategy into non-enterprise AI



Frequent employee training on AI risks, especially HR, finance, regulatory, M&A teams etc.



Work with IT: tool whitelisting, usage monitoring, centralized logging, litigation hold compliance

## Vendor Management & Insurance

### Vendor Due Diligence

Review ToS, data retention, training usage, and confidentiality commitments

#### Key contract provisions include:

1. No input used for model training
2. Confidentiality of inputs/outputs
3. Cooperation with litigation preservation

### Insurance Landscape

Quiet coverage in traditional policies; exclusions emerging

#### AI-specific coverage emerging but:

- Expensive
- Highly tailored
- Not comprehensive substitutes

## Key Takeaways

1

### Adopt Clear AI Use Policies

Memorialize company policies governing AI use; prohibit AI-generated legal advice absent in-house counsel direction

2

### Ensure Preservation Capability

Work with IT to ensure AI-generated materials can be preserved for legal holds

3

### Review Vendor Contracts and Capabilities

Thoroughly investigate vendor AI protections, as “Enterprise” and “Secure” are buzzwords that demand deeper scrutiny

## Questions?

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