

# Can you Depose Artificial Intelligence?

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Artificial intelligence's ("AI") impact on litigation is just beginning. One of the main impacts will be in discovery, and the extent parties may seek discovery about another party's use of AI. While it is impossible to quantify all of the potential impact, one criminal case in particular, begins to preview what may happen in civil discovery down the road.

*People v. Wakefield*

The case of *People v. Wakefield*, 38 N.Y.3d 367, 195 N.E.3d 19 (2022), explored the admissibility and reliability of DNA evidence that, was instrumental in linking John Wakefield to the crime for which he was convicted. The central issue in the case was the admissibility of DNA evidence generated by the TrueAllele Casework System.

The TrueAllele Casework System uses a continuous probabilistic genotyping approach to generate a statistical likelihood ratio. This method involves analyzing DNA mixtures by considering all the data generated in the electropherogram, including peaks that fall below a laboratory's stochastic threshold. The system applies mathematical probability principles, such as the Markov chain Monte Carlo (MCMC) method and Bayes' theorem, to infer genotypes and calculate likelihood ratios.

John Wakefield's defense argued that the TrueAllele Casework System's source code should be disclosed to allow for a thorough examination of its reliability and accuracy. The defense contended that without access to the source code, they could not effectively challenge the DNA evidence presented against Wakefield. They asserted that the source code was essential to understand the assumptions and parameters programmed into the system, which directly influenced the DNA interpretation and the resulting likelihood ratios.

Additionally, the defense claimed that the TrueAllele software used AI to make inferences about the DNA data. They argued that this AI component added a layer of complexity and potential bias that could only be understood by examining the source code. The defense maintained that without access to the source code, it was impossible to verify the accuracy and fairness of the AI-driven conclusions.

The court rejected Wakefield's request for the TrueAllele source code on several grounds. First, the court held that the source code itself is not a witness that can be cross-examined. The Confrontation Clause of the Sixth Amendment ensures the right to confront witnesses, but the source code, being a set of programmed instructions, does not qualify as a testimonial entity. The court emphasized that the purpose of the

Confrontation Clause is to allow the accused to test the recollection and credibility of human witnesses, not to scrutinize the internal workings of a machine.

Second, both the analyst who performed the electrophoresis on the DNA samples, and the developer of the TrueAllele software, testified at trial and were subject to cross-examination. The court found that this provided sufficient opportunity for the defense to challenge the DNA evidence and the methodology used by TrueAllele.

The court found that the TrueAllele methodology is generally accepted in the relevant scientific community. This conclusion was based on multiple validation studies, including those conducted by independent laboratories. The court noted that the foundational mathematical principles underlying TrueAllele are widely accepted, and the system's reliability has been demonstrated through empirical evidence.

The defense raised concerns about the proprietary nature of the TrueAllele technology and the involvement of developer in many of the validation studies. They argued that the lack of independent review and the potential for bias undermined the reliability of the DNA evidence. Despite these concerns, the court concluded that the empirical evidence

of TrueAllele's reliability and its acceptance in the scientific community were sufficient to establish its admissibility.

The concurring opinion highlighted the lack of independent review of the TrueAllele source code. It pointed out that the validation studies presented were primarily conducted by the developer, who had a vested interest in the acceptance of TrueAllele. This raised questions about the objectivity and reliability of the validation process.

The concurring opinion expressed skepticism about the proprietary nature of the TrueAllele technology. It argued that the lack of transparency and the involvement of interested parties in the validation studies undermined the claim of general acceptance within the scientific community. The concurrence emphasized the need for independent validation to ensure the reliability of such advanced forensic tools.

The concurrence also addressed the defense's claim that the TrueAllele software used artificial intelligence. It acknowledged that the use of AI in forensic analysis introduces additional complexities and potential biases. The concurrence argued that the lack of access to the source code prevented a thorough examination of how the AI algorithms operated and whether they were applied fairly and accurately.

The Wakefield decision underscores the complexities involved in the admissibility of advanced forensic evidence, especially those that involve the use of AI.

### Discovery Of AI In Insurance Coverage Litigation

Insurers have begun deploying AI for numerous tasks throughout the insurance life cycle, including underwriting, claims handling, customer service and fraud investigations. The insurance industry is expected to expand its use of AI in a manner which may well transform virtually all aspects of the insurance industry.

Policyholders, too, are likely to use AI in connection with various insurance-related matters. These include determining property values for commercial property policies, conducting company inquiries in connection with policy applications (think D&O applications, etc.), and responding to insurer data requests and inquiries in connection with claims.

Given the near ubiquitous use of AI in insurance, policyholders and insurers both are expected to make discovery requests seeking information related to a party's use of AI in connection with a coverage dispute. Among other issues, that discovery likely will include requests for AI source codes and algorithms to test the reliability of the AI engine. Such discovery likely

will come in the form of written discovery requests, depositions and third party subpoenas.

There is little, if any, case law addressing the discoverability of AI source codes and algorithms in the context of insurance coverage litigation. Thus, insurance coverage practitioners and judges will be embarking on a bold new course.

At least three sources of law may guide how parties and the courts may address discovery of AI in coverage disputes - the Federal Rules of Civil Procedure, The Sedona Principles, and a model bulletin recently issued by the National Association of Insurance Commissioners.

Federal Rules of Civil Procedure: The entire panoply of discovery rules set forth in Rule 26 will apply to AI discovery. Of particular importance will be the proportionality rule set forth in Rule 26(b)(1) which provides in pertinent part:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . .

Factors to examine include:

- Importance of the issues at stake in the action;
- Amount in controversy;
- Parties' relative access to relevant information;
- Parties' resources;

- Importance of the discovery in resolving the issues; and
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

How the various factors impact discovery of AI in coverage disputes is beyond the scope of this paper given the myriad arguments which can be made with respect to the importance of the discovery to the issues in the case and the potentially enormous cost associated with drilling down deep into AI algorithms and the like. But practitioners and the courts can expect substantial arguments over the costs and benefits of AI discovery in any individual case.

Sedona Principles: The Sedona Conference has not yet issued any formal guidance on discovery of AI in litigation. However, the Conference has a draft in progress entitled “Core Principles in Artificial Intelligence System Design”. Information regarding the draft can be found at [https://thesedonaconference.org/forthcoming/Core\\_Principles\\_in\\_Artificial\\_Intelligence\\_System\\_Design](https://thesedonaconference.org/forthcoming/Core_Principles_in_Artificial_Intelligence_System_Design).

That said, the Sedona Principles applicable to ESI likely apply equally to AI discovery. AI is, at its core, electronically stored information. As such, the Sedona Principles should apply to AI discovery matters.

While all of the Sedona Principles apply to AI discovery, the following are certain principles that may be particularly relevant to AI discovery in



insurance coverage litigation. For purposes of this paper, “ESI” has been replaced with “AI”:

- Principle 1: ESI is subject to the same preservation and discovery requirements as other relevant information
- Principle 2: ESI is subject to the proportionality standard set forth by FRCP 26(b)(2)(C)
- Principle 4: Requests for ESI should be specific; responses and objections should make clear what will be produced
- Principle 5: Parties must make reasonable and good faith efforts to keep ESI that could be relevant to a claim or defense
- Principle 6: Responding parties are in the best position to decide how to preserve and produce their own ESI
- Principle 12: ESI should be produced in the form it is normally kept or a reasonably usable form
- Principle 13: In general, a responding party should bear the cost of preserving and producing ESI

NAIC Model Bulletin: On December 4, 2023, the National Association of Insurance Commissioners adopted a Model Bulletin entitled “Use Of Artificial Intelligence Systems By Insurers.” The Bulletin can be found here: [https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin\\_Adopted\\_0.pdf](https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin_Adopted_0.pdf).

The Bulletin’s preamble states its purpose as:

This bulletin is issued by the [] (Department) to remind all Insurers that hold certificates of authority to do business in the state that decisions or actions impacting consumers that are made or supported by advanced

analytical and computational technologies, including Artificial Intelligence (AI) Systems (as defined below), must comply with all applicable insurance laws and regulations. This includes those laws that address unfair trade practices and unfair discrimination. This bulletin sets forth the Department's expectations as to how Insurers will govern the development/acquisition and use of certain AI technologies, including the AI Systems described herein. This bulletin also advises Insurers of the type of information and documentation that the Department may request during an investigation or examination of any Insurer regarding its use of such technologies and AI Systems.

The Bulletin provides 9 pages of guidance to insurers detailing the type of information insurers must maintain with respect to AI used in the insurance life cycle. The Bulletin's core is the requirement that insurers maintain a written "AIS Program" which addresses the insurer's governance, risk management controls and internal audit functions with respect to the use of AI. The Bulletin also requires places insurer responsibility for the AIS Program with "senior management accountable to the board or an appropriate committee of the board."

The Bulletin's requirements are quite extensive and specific. Insurers and their counsel are well advised to study and understand those requirements. Policyholder counsel also is well advised to study and understand the Bulletin's requirements as those requirements provide

fertile ground for establishing insurer duties and the basis for seeking discovery related to those duties.

According to the NAIC website. To date, 11 states have adopted the Bulletin:

- Alaska: Bulletin B 24-01 - Adopted February 1, 2024
- Connecticut: Bulletin No. MC-25 - Adopted February 26, 2024
- Illinois: Company Bulletin 2024-08 - Adopted March 13, 2024
- Kentucky: Bulletin No. 2024-02 - Adopted April 16, 2024
- Maryland: Bulletin No. 24-11 - Adopted April 22, 2024
- Nevada: Bulletin 24-001 - Adopted February 23, 2024
- New Hampshire: Bulletin Docket #INS 24-011-AB - Adopted February 20, 2024
- Pennsylvania: Insurance Notice 2024-04, 54 Pa.B. 1910 - Issued April 6, 2024
- Rhode Island: Insurance Bulletin No. 2024-03 - Issued March 15, 2024
- Vermont: Insurance Bulletin No. 229 - Adopted March 12, 2024
- Washington: Technical Assistance Advisory 2024-02 - Adopted April 22, 2024

### Conclusion

*People v. Wakefield* highlights some of the difficulties courts and parties will face in addressing the discoverability of AI. Rule 26's proportionality rule, the Sedona Principles and the NAIC Bulletin may assist courts and parties in navigating these complex issues. Currently, however, there is

little to no on point case law to guide coverage practitioners or courts in handling coverage-related AI discovery disputes. Thus, practitioners and the courts are about to embark on new mission to boldly go where no coverage practitioners or courts has gone before.