



VCEO0628

Generative AI in Legal Practice: What It Is and How Lawyers Use It

June 28, 2023 | Webcast

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Study Materials

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THE AMERICAN LAW INSTITUTE
Continuing Legal Education

**Generative AI in Legal Practice:
What It Is and How Lawyers Use It**

June 28, 2023
Webcast

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PROGRAM June 28, 2023

Program Schedule	Eastern	Central	Mountain	Pacific/Arizona	Alaska	Hawaii
National Webcast	12:00 p.m.	11:00 a.m.	10:00 a.m.	9:00 a.m.	8:00 a.m.	6:00 a.m.
Adjournment	1:30 p.m.	12:30 p.m.	11:30 a.m.	10:30 a.m.	9:30 a.m.	7:30 a.m.

Generative artificial intelligence (“GenAI” or “GAI”), such as ChatGPT, first appeared in late 2022, and quickly turned into a technology sensation. GAI is embedded in the popular imagination and, increasingly, in products available to attorneys and their clients. If you’re wondering how GAI works and what role it might have in legal practice, this webcast is for you!

In just 90 minutes, an expert faculty will examine what GAI is being used for – now and in the foreseeable future; and how it might be integrated into the private practice of law, as well as best practices for doing so. Join us and ensure you are staying up-to-date in this rapidly-evolving, cutting-edge area at the intersection of law and technology!

Join a panel of lawyers with technology expertise as they discuss:

- How GAI works: Understanding the technology and how it performs
- What GAI can do: How is the technology being used and what it might be used for
- When GAI might be used by attorneys (legal research, document review, drafting, and more) and how to go about integrating it into the practice of law, whether a firm or in-house
- Opportunities and risks of GAI and the future of the practice of law
- Judicial responses to ChatGPT, including imposing sanctions and conditions of use

Don’t miss this practical and thought-provoking GAI webcast. Questions will be submitted live to the faculty and all registrants will receive downloadable course materials to accompany the program.

Program

All times Eastern

12:00 p.m. **Generative AI in Legal Practice: What It Is and How Lawyers Can Use It**

1:30 p.m. Adjournment

Total 60-minute hours of instruction: **1.5**; total 50-minute hours of instruction: **1.8**

Level of Instruction: Basic to intermediate

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The members of the faculty and authors for this program and study materials are contributing their services to further the continuing legal education of their fellow members of the Bar.

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FACULTY BIOGRAPHIES



Ronald J. Hedges, Principal, Ronald J. Hedges LLC, Hackensack, NJ; former U.S. Magistrate Judge, District of New Jersey (*moderator/planning chair*)

Ronald J. Hedges is the principal of Ronald J. Hedges LLC. He served as a United States Magistrate Judge in the District of New Jersey from 1986 to 2007. He has extensive experience in e-discovery and in the management of complex litigation and has served as a special master, arbitrator and mediator. He also consults on management and discovery of electronically stored information (“ESI”). Mr. Hedges is a frequent writer and speaker on various topics related to, among other things, electronic information and is the lead author of *Managing Discovery of Electronic Information: A Pocket Guide for Judges, Third Edition* (Federal Judicial Center: 2017). He is also the Co-Senior Editor of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary, Third Edition*, and is the Editor of *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials*, hosted by the Massachusetts Attorney General’s Office. Mr. Hedges is widely engaged in the legal community, including as a member of the Founders’ Circle of the Georgetown Advanced eDiscovery Institute planning board; is a life member of the American Law Institute; a Fellow of the New York Bar Foundation; and Chair of the ABA JD Court Technology Committee for the 2022-2023 association year.



Catherine (“Cat”) Casey, Chief Growth Officer, Reveal-Brainspace, Chicago

Catherine “Cat” Casey is responsible for creating new opportunities for AI adoption by leveraging Reveal’s powerful technology platform. She is a frequent keynote speaker and outspoken advocate of legal professionals embracing technology to deliver better legal outcomes. Casey has over a decade and a half of experience assisting clients with complex eDiscovery and forensic needs that arise from litigation, expansive regulation, and complex contractual relationships. Casey has an A.L.B. from Harvard University and attended Pepperdine School of Law.



Marissa J. Moran, Professor, Department of Law & Paralegal Studies, New York City College of Technology - CUNY, Brooklyn, NY

Marissa is currently a professor at the City University of New York, New York City College of Technology, Department of Law and Paralegal Studies, where she teaches Legal Technology, Forensic Science & The Legal Process, Legal Ethics and Professional Responsibilities, and Theatre of Law. She received her B.A. in Economics from Fordham University and her law degree from Brooklyn Law School. Marissa has written articles for the *Legal Educator*, a publication of the American Association of Paralegal Educators, and has spoken at several Paralegal Educator National and Local conferences on such topics as Legal Technology, Artificial Intelligence, Cybersecurity and Data Privacy, and Forensic Science & Law.



Stephanie Wilson, Reed Smith LLP, Princeton, NJ

Stephanie has a national practice that consists primarily of litigating and handling cases concerning, whistle-blower claims, retaliation, unfair competition claims, the FCRA, ADA compliance, and discrimination for financial services, life sciences, higher education and publicly traded companies. Stephanie provides training, counseling and advice on compliance issues, diversity and inclusion programs, implicit bias and internal investigations of complaints. She is a member of the New Jersey and New York State Bar Associations. Stephanie was named One of New Jersey's Top 50 Female Lawyers in *New Jersey Law Journal*. She earned her B.A. at Yale University and her J.D. at Columbia.

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**Generative Artificial Intelligence in Practice:
What It Is and How Lawyers Can Use It – Presentation Slides**

By

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GENERATIVE ARTIFICIAL INTELLIGENCE ("GAI") IN PRACTICE: WHAT IT IS AND HOW LAWYERS USE IT

ALI CLE

JUNE 28, 2023

NOON – 1:30 PM ET

FACULTY CATHERINE "CAT" CASEY

- Chief Growth Officer, Reveal Data
- Head of eDiscovery, Gibson Dunn & Crutcher
- National SME Computer Forensics & eDiscovery KPMG & PWC
- Advisory Board Member ACEDS & EDRM
- Co-author, "Handbook of Legal Technology", 2023
- Contributing author, "The Human Cloud" 2021
- Frequent Author on AI, Legal Tech News, ABA, ACC, National Law Journals
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FACULTY

RONALD J. HEDGES

- Principal, Ronald J. Hedges LLC
- United States Magistrate Judge, District of New Jersey, 1986-2007
- Co-Senior Editor, *Sedona Conference Cooperation Proclamation: Resources for the Judiciary Third Edition* (June 2020)
- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Chair of Court Technology Committee of the ABA Judicial Division

FACULTY

MARISSA J. MORAN

- Professor, City University of New York, New York City College of Technology, Law and Paralegal Studies Department
- Bankruptcy Associate at Kaye Scholar Fireman Hays & Handler and Emmet Marvin and Martin
- Law Clerk to the Honorable Chief Bankruptcy Judge Burton R. Lifland
- Authored several articles for the American Association of Paralegal Educators publication the *Legal Educator*, on topics such as Artificial Intelligence & the Law and Forensic Science & The Legal Process; Recent article on biometrics and facial recognition technology appears in May/June 2023 NYSBA Journal
- Vice Chair of the NYSBA Committee on Technology and the Legal Profession
- Member of the NYSBA Committee on Continuing Legal Education and Committee on Committees
- Member of the ABA International Law Section (ABA-ILS), Privacy, Cybersecurity and Digital Rights Committee, and the ABA-ILS Legal Education and Specialist Certification Committee

FACULTY STEPHANIE WILSON

- Senior Counsel, Reed Smith, LLP
- Member of Financial Industry Group where practice consists of litigating, advising, and counseling on regulatory and discrimination issues impacting financial services clients
- Frequent speaker and author concerning issues related to AI
- Chair of the Labor and Employment Law Section of the New Jersey State Bar Association
- Fellow, College of Labor and Employment Lawyers

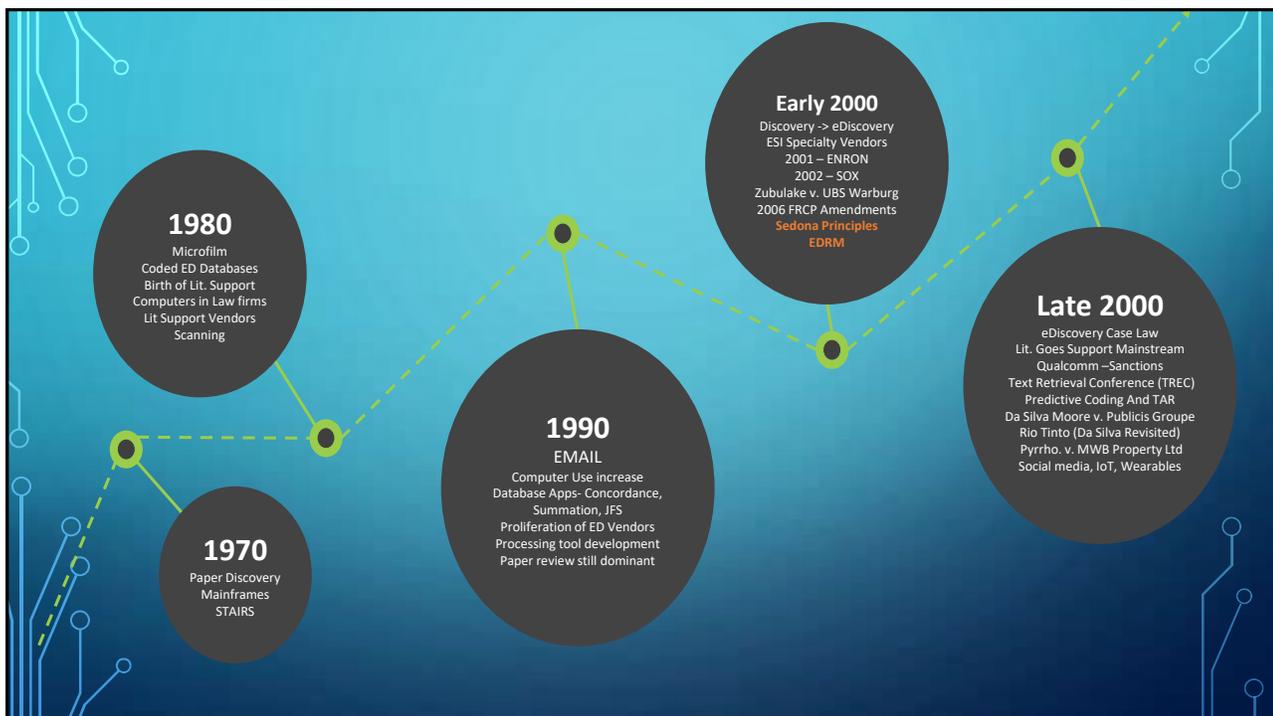
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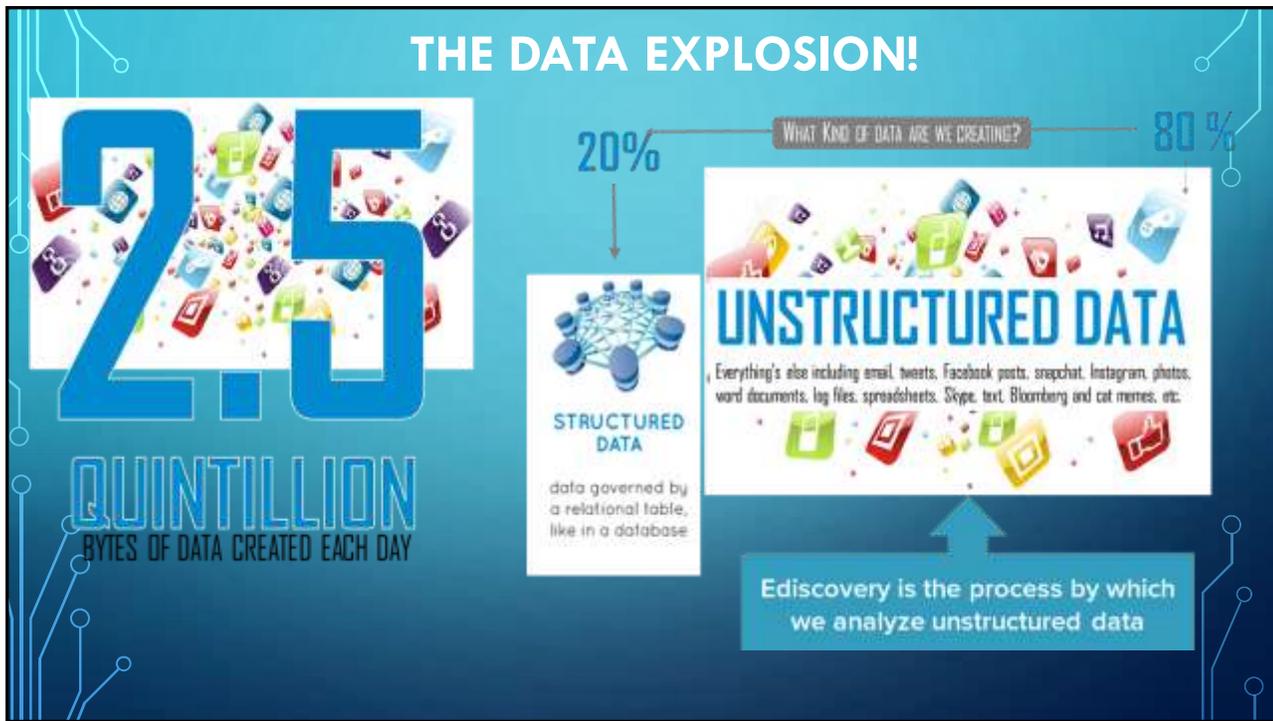
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WHAT YOU WILL LEARN

- **How GAI works:** Understanding the technology and how it performs
- **What GAI can do:** How is the technology being used and what it might be used for
- **When GAI might be used by attorneys** (legal research, document review, drafting, and more) and how to go about integrating it into the practice of law, whether a firm or in-house
- **Opportunities and risks of GAI and the future of the practice of law**
- **Judicial responses to ChatGPT, including imposing sanctions and conditions of use**





HOW GAI WORKS

What do we mean by AI?

- If a computer simply matches patterns to pre-determined categories, is that AI?
- If a computer uses algorithms that continuously learn such that outcomes are refined as data volumes increase and do so without human intervention, is that AI?

HOW GAI WORKS



Generative AI is a type of artificial intelligence (AI) that uses machine learning algorithms to create new and original content like images, videos, text, and audio.

1 Forming a Database

A neural network, consisting of various information or media files like images, text, data, sounds, etc., forms the basis of artificial intelligence.



2 Inputting a Prompt

The user provides the AI with a description or sample of the desired content.



Prompts can be any user-submitted content like words, numbers, or photos.



3 Generating Content

and the AI uses its neural network to generate new examples that are similar to the ones it has trained from.



WHAT GAI CAN DO

- Draft Documents
- Conduct Legal Research
- Contract Review
- Predictive Analytics
- Chatbots for Legal Advice
- Brainstorm
- Summarize Legal Narratives
- Convert Legalese Into Plain Language

**Generative
AI**

WHEN GAI MIGHT BE USED BY ATTORNEYS

“Human legal professionals are needed for strategy, but generative AI has the potential to revolutionize the field by allowing legal professionals to work more efficiently and elevate the human legal professionals’ practice of law.

... and as generative AI matures, its transformative potential will continue to push boundaries.”

~Brandi Pack, a Legal Tech Analyst and AI Consultant at UpLevel Ops and Sumi Trombley a Senior Advisor at UpLevel Ops.

Source: Trombley, B. P. and S. (2023, June 21). *Breaking boundaries in Legal Tech: The game-changing potential of Generative AI*. Corporate Counsel. <https://www.law.com/corpcounsel/2023/06/21/breaking-boundaries-in-legal-tech-the-game-changing-potential-of-generative-ai/>

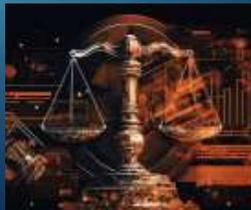


WHEN GAI MIGHT BE USED BY ATTORNEYS

“AI will not eliminate the need for lawyers, but it does portend the end of lawyering as we know it.”

~ Andrew Perlman, Dean Suffolk University Law School

Source: Perlman, A. (2023, March 24). *The implications of CHATGPT for Legal Services and society*. Harvard Law School Center on the Legal Profession. <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/>



WHEN GAI MIGHT BE USED BY ATTORNEYS

Some plaintiff's counsel who handle workers comp claims have stated that AI has been invaluable to their practice because they use AI to:

- Store information about employers
- Calculate settlement values
- Identify risk and intervention opportunities and find applicable cases
- Analyze data and make predictions about the outcome of a case based on relevant data and case files
- Chatbots can transcribe client statements

Source—"AI Is Super-Charging the Client Side In Workers' Comp Disputes." (June 12, 2023 Today's General Counsel)

WHEN GAI MIGHT BE USED BY ATTORNEYS

The American Immigration Lawyers Association is partnering with Visalaw.AI to launch a product, similar to OpenAI's ChatGPT, that will specialize in immigration-focused administrative and case law. The platform's objectives are:

- To aid attorneys with research
- Summarize and draft immigration related documents

Source: Andrew Kreighbaum : "AI Makes Its Way to Immigration With New Tool to Aid Attorneys," *BloombergLaw.com* (June 21, 2023)

EXAMPLE: CHATGPT & FACTUAL RESEARCH

Prompt: Develop a list of deposition questions for the plaintiff in a routine motor vehicle accident in Massachusetts.

1. Can you please state your name and address for the record?
2. How are you employed?
3. Can you describe the events leading up to the accident?
4. Where were you driving at the time of the accident?
5. Can you describe the other vehicle involved in the accident?
6. How fast were you driving at the time of the accident?
7. Did you see the other vehicle before the accident occurred?
8. Did you have time to react to avoid the accident?
9. Were you injured as a result of the accident?
10. Can you describe the injuries you sustained?
11. Have you received any medical treatment for your injuries?
12. Can you estimate the cost of the medical treatment you have received?
13. Have you missed any time from work as a result of the accident?
14. Can you estimate the amount of income you have lost due to missing work?
15. Have you incurred any other expenses as a result of the accident?
16. Are you seeking any damages as a result of the accident? Etc.

EXAMPLE: CHATGPT & DRAFTING A REAL ESTATE CONTRACT

Prompt: Create a document for the sale of property from Jane Smith to John Doe. The property is at 120 Tremont Street, Boston, MA and will be sold for \$500,000. The document should contain the usual terms and conditions of such a sale in Massachusetts.

Contract for Sale of Real Estate

This contract (the "Agreement") is made and entered into on this date by and between Jane Smith (the "Seller") and John Doe (the "Buyer").

1. Property: The property being sold is located at 120 Tremont Street, Boston, MA.
2. Purchase Price: The purchase price for the property is \$500,000.
3. Closing: The closing of this sale shall take place on or before December 31, 2022.
4. Financing: The Buyer shall be responsible for obtaining any necessary financing for the purchase of the property.
5. Representations and Warranties: The Seller represents and warrants that the property is free and clear of any liens or encumbrances, and that the Seller has the right to sell the property. The Buyer represents and warrants that the Buyer has the financial ability to complete the purchase of the property.
6. Indemnification: The Seller agrees to indemnify and hold the Buyer harmless from any claims arising from the condition of the property.
7. Entire Agreement: This Agreement constitutes the entire agreement between the parties, and supersedes any prior agreements or understandings, whether written or oral.
8. Governing Law: This Agreement shall be governed by the laws of the Commonwealth of Massachusetts.

EXAMPLE: CHATGPT PROVIDES AN OVERVIEW OF A PARTICULAR AREA OF LAW

Prompt: Explain the concept of personal jurisdiction.

Personal jurisdiction refers to a court's power to hear a case involving a particular individual or entity. In order for a court to exercise personal jurisdiction over a defendant, the defendant must have certain minimum contacts with the state in which the court is located. These minimum contacts must be such that it would be fair and reasonable to require the defendant to defend the case in that state. The concept of personal jurisdiction is important because it ensures that individuals and entities are only subject to lawsuits in states where they have sufficient ties, and it protects defendants from being dragged into court in states where they have no connection.

EXAMPLE: CHATGPT & DRAFTING A WILL

Prompt: Draft Andrew Perlman's will in Massachusetts leaving all of his property to his wife, Lisa Aidlin.

Last Will and Testament of Andrew Perlman

I, Andrew Perlman, being of sound mind and body, do hereby make, publish, and declare this to be my Last Will and Testament, revoking any and all prior Wills and Codicils made by me.

1. I hereby appoint Lisa Aidlin as the executor of this Will.
 2. I give, devise, and bequeath all of my property, real and personal, wherever located, to my wife, Lisa Aidlin.
 3. In the event that Lisa Aidlin predeceases me or is unable or unwilling to serve as the executor of this Will, I hereby appoint my brother, John Doe, as the alternate executor.
 4. I hereby waive any bond that may be required of the executor of this Will.
- IN WITNESS WHEREOF, I have hereunto set my hand this day of December 5, 2022.

“A PRECAUTIONARY TALE” FOR ATTORNEYS WHEN USING CHATGPT

Mata v. Avianca, Case No.: 22-cv-1461 (PKC), U.S. District Court for the Southern District of New York.

On June 22, 2023, U.S. District Judge P. Kevin Caste imposed a \$5,000.00 fine on the attorneys who submitted fake case citations created by ChatGPT.



“A PRECAUTIONARY TALE” FOR ATTORNEYS

Mata v. Avianca, in the words of the court....

“The court credits the sincerity of Respondents when they described their embarrassment and remorse. The fake cases were not submitted for any respondent's financial gain and were not done out of personal animus...”

Further that ...

“There is a salutary purpose of placing the most directly affected persons on notice of Respondents' conduct. The Court will require Respondents to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed.”

“The Court will not require an apology from Respondents because a compelled apology is not a sincere apology. Any decision to apologize is left to Respondents.”

ETHICAL & PROFESSIONAL RESPONSIBILITIES OF AN ATTORNEY



“Adding generative AI to the mix of research tools — when deployed with the right protections — reduces the number of tries an attorney will need to get the right cases.

That’s going to make a significant improvement in the accuracy and efficiency of lawyering. But it’s not *replacing* the attorney.

Don’t blame AI for lawyering fails. Like a lot of things in tech, the source of the error here lies between the keyboard and the chair.”

~Joe Patrice, senior editor at *Above the Law* and co-host of *Thinking Like A Lawyer*

Source: Patrice, J. (2023, June 16). *Lawyer figures out CHATGPT made up fake cases in his brief on day of hearing.* Above the Law. <https://abovethelaw.com/2023/06/lawyer-figures-out-chatgpt-made-up-fake-cases-in-his-brief-on-day-of-hearing/>

USING GAI WISELY

Practical Tips:

- Figure out how to prompt it in a way that gives the best result.
- Use it for appropriate projects.
- Do not feed it confidential information – the user cannot control what it does with that information.
- Always verify what it gives you is accurate – trust, but verify.
- Do diligence to ensure that the response it gives you is not plagiarized.
- Include appropriate notices and disclaimers about the item being produced with ChatGPT.
- Develop a policy concerning scope of use and implement training on the policy

Source: *IP lawyer vs. chatgpt: Top 10 legal issues of using Generative AI at work.* Foley & Lardner LLP. (n.d.). <https://www.foley.com/en/insights/publications/2023/03/ip-lawyer-vs-chatgpt-top-10-legal-issues-ai-work>

OPPORTUNITIES AND RISKS OF GAI: CAUSES OF ACTION

- Breach of Privacy
- Discrimination
- Copyright Infringement
- Malicious Uses, Such as Disinformation,
- Automated Hate Speech, Scamming, Deep Fakes
- Lack of Transparency About How Model was Trained and Evaluated for Bias
- Lack of Uniform Principles on Responsible Use
- Cybersecurity
- Defamation
- Violations of NLRA
- Ethical Violations; Inadvertent Privilege Waivers; Inadvertent disclosures of confidential information
- Worker Displacements



OPPORTUNITIES AND RISKS OF GAI: CAUSES OF ACTION

- What is “bias?”
- What results might raise a question of bias?
- What might be a consequence of allegedly proprietary algorithms?
- What about “black box” algorithms?
- What might be sought in discovery?
- What might be the role of experts?
- What about competence of attorneys?



OPPORTUNITIES AND RISKS OF GAI: EMPLOYMENT FOCUS



- On May 5, 2023, the FTC, CFPB, DOJ and EEOC released a joint statement that outlines their commitment to enforce the laws within their respective jurisdictions to protect against bias and other harms in “automated systems.”
 - “Automated systems” are defined as software and algorithmic processes, including AI, that are used to automate workflows and help people complete tasks or make decisions, including about access to employment, housing, credit and other goods and services.
- All four regulatory agencies have published guidance and commenced regulatory and/or civil actions against entities alleged to be using AI improperly. Some states and municipalities, such as Illinois and NYC, have enacted legislation. US Senator Schumer outlined US plan for addressing/regulating AI. (June 21, 2023)
- As an example, the EEOC published guidance in 2022 concerning avoiding ADA claims and in 2023 concerning avoiding disparate impact claims when using automated systems and has commenced a lawsuit pending in SDNY alleging improper use of AI in applicant selection

OPPORTUNITIES AND RISKS OF GAI: EMPLOYMENT FOCUS

DOJ'S RESPONSE



- May 12, 2022--published “Algorithms, Artificial Intelligence, and Disability in Hiring”
- In employment matters, DOJ enforces disability discrimination laws with respect to state and local government employers.
- DOJ will look seriously at whether the AI screens out persons with disabilities.
- Employers must use accessible tests measuring the applicant’s job skills, not the disability, or make other adjustments to the hiring process so that a qualified person is not eliminated because of a disability.
- On June 21, 2022, DOJ announced settlement of a lawsuit pending in SDNY against Meta Platforms alleging algorithmic discrimination under the Fair Housing Act due to alleged discriminatory advertising



JUDICIAL RESPONSES TO LAWYERS' USE OF AI

Order to Show Cause, *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (May 4, 2023)

Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex.) (Judge Starr), <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>

Standing Order re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Pa. June 6, 2023),
<https://www.paed.uscourts.gov/documents/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf>

RESOURCES

- “Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring” (USDOJ Civil Rights Div.: May 12, 2022), <https://beta.ada.gov/ai-guidance/>
- “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees” (EEOC: May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>
- W. Goren, “DOJ and EEOC Guidances on AI in Hiring” (Understanding the ADA Blog of William D. Goren, J.D. LL.M: May 17, 2022), <https://www.understandingtheada.com/blog/2022/05/17/doj-eeoc-guidances-on-ai-in-hiring/>

RESOURCES

- The Federal Trade Commission's Business Blog posts "Keep your AI claims in check" (Feb. 27, 2023) and "Chatbots, deepfakes, and voice clones: AI deception for sale" (Mar. 20, 2023)
- The National Institute of Standards and Technology's "Artificial Intelligence Risk Management Framework (AI RMF) 1.0" (Jan. 2023)
- The U.S. Copyright Office's statement of policy on "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence" (Mar. 16, 2023).
- New York City's Local Law 144 requires among other things, that employers conduct bias audits of AI-enabled tools used for certain employment decisions. (enforcement commences July 5, 2023)

QUESTIONS? / COMMENTS?



THANK YOU FOR JOINING US!

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**Generative AI in Legal Practice:
What It Is and How Lawyers Use It**

June 28, 2023
Webcast

Artificial Intelligence: A Judge's View of Generative AI

By

Ronald J. Hedges
Ronald J. Hedges LLC
Hackensack, New Jersey

Artificial Intelligence: A Judge's View of Generative AI

by Ronald J. Hedges, Esq. (retired U.S. Magistrate Judge (D.N.J.)), Ronald J. Hedges LLC

This practice note provides a judge's insights into the use of generative artificial intelligence (GAI) in civil litigation and covers topics such as potential uses of GAI, ethical concerns, how specific rules apply to GAI, discovery issues, and key takeaways.

For more on AI in litigation, see *AI and Legal Ethics: What Lawyers Need to Know, Evaluating The Legal Ethics Of A ChatGPT-Authored Motion*, and *Litigators Should Approach AI Tools With Caution*. [available on LexisNexis]

AI Overview

Artificial intelligence is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects and making decisions based on data.

"Machine learning" is an application of artificial intelligence in which computers use algorithms (rules) to learn from data. Machine learning adapts with experience. In other words, the algorithm can change as more data is fed into it.

Attorneys and their clients already use AI and machine learning for various purposes. Here are some uses of AI available to attorneys:

- **Contract review.** AI can review proposed text, flag potential issues, and suggest changes in text.
- **Document drafting.** AI can "fit" data into a template and prepare a document.
- **Predictive analytics.** AI can analyze data and predict results prior to commencement of a civil action.
- **Legal research.** AI can search and review large volumes of data and provide insight for arguments.
- **Risk management.** AI can identify legal risks, such as those related to data privacy and intellectual property.

In other words, AI can assist attorneys in the practice of law.

GAI is a type of artificial intelligence that uses machine learning algorithms to create new and original content such as images, videos, text, and sound. GAI hit the news in late 2022, when ChatGPT became available from OpenAI, an AI research and deployment company with a stated mission to "ensure that artificial general intelligence benefits all of humanity." ChatGPT uses data to generate text. Other GAI, such as DALL.E2, another product of OpenAI, can create images and art from a description in natural language.

GAI might be used by attorneys in litigation to, among other things, draft pleadings and engage in discovery. Attorneys should understand that reliance on the output of GAI in a specific instance might be problematic.

Ethical Implications

Before we delve into the uses and potential abuses of GAI, it would be worthwhile to think about the ethical duties of attorneys that might come into play. In August 2019, the House of Delegates of the American Bar Association adopted the following resolution:

[T]he American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law including: (1) bias, explainability, and

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transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.

Resolution 112 (ABA August 2019).

At the least, the resolution implicates several Model Rules of Professional Conduct (Model Rules). First, there is the attorney's duty of competence under Model Rule 1.1. More than 30 states have adopted a comment to the rule providing that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Am. Bar Ass'n 2023, Model Rule 1.1 cmt. [8]; see also [Litigation Technology Competence State Law Survey](#).

Second is the duty to maintain client confidentiality under Model Rule 1.6.

These duties go together. An attorney must:

- Understand the technology that they or the client uses –and–
- Take reasonable steps to protect information "given" to the technology

Moreover, assuming you are working with a vendor or vendors, you might have supervisory duties under Model Rule 5.3 which, in turn, relates back to understanding the relevant technology.

Substitute "GAI" for the word "technology" to drive your ethical duties home.

How the Federal Rules Apply to AI

Rule 11(b) addresses representations by attorneys, specifically stating:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b).

In addition, Rule 11(c)(1) addresses sanctions for a violation of Rule 11(b), providing:

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed. R. Civ. P. 11(c).

Second, consider Rule 26(g), which focuses on discovery-related signatures by attorneys:

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Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, email address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Fed. R. Civ. P. 26(g).

Note the reference in these rules to the need to undertake a "reasonable inquiry." How does an attorney do that if they are relying on the output of GAI to draft a pleading or conduct a search of large volumes of data? That is a question that a judge must confront should there be a dispute about, among other things, a pleading or a document production that incorporated GAI output and has been challenged.

The rules require an attorney to "stop and think" before affixing their signature to a court document. As the Comment to the 1983 amendments of Rule 26 states:

[a]lthough the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

Fed. R. Civ. P. 26, cmt.

The duty to make a reasonable inquiry "is satisfied if the [attorney's investigation] and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard In making the inquiry, the attorney may rely on assertions by the client . . . as long as the reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances." *Fed. R. Civ. P. 26(g)* Advisory Committee Notes to the 1983 Amendment.

I will leave to the reader what reasonable inquiry they might make, for example, before presenting the court with information that originated from a client's or vendor's GAI output. Suffice it to say that whatever the attorney does, they should document their inquiry.

Possible Causes of Action

The use of GAI might spawn various lawsuits, including claims for:

- Breach of contract ("the GAI output was not what was contracted and paid for")
- Misrepresentation ("the GAI output was not what the provider said it would be")
- Libel or slander ("the GAI output included words or images that injured a person in some way")

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- Trademark or copyright or other intellectual property infringement ("the GAI output incorporated words or images that were protected by law")
- Breach of privacy ("the GAI reviewed and gave output based on personal data in violation of a data privacy law")
- Employment discrimination ("the GAI output resulted in unlawful age, gender, or racial discrimination")

All the above raise some threshold issues that judges (and attorneys) should expect to have to deal with. These include:

- Whether to execute a protective order under Rule 26(c)(1) assuming there is a showing of "good cause" to limit disclosure of certain information
- How to resolve disputes about requests for, or responses to discovery requests, "prepared" or "responded" to with the assistance of GAI
- Whether discovery will be allowed of GAI used for discovery and, if so, how that discovery might be conducted
- Whether opinion testimony relating to GAI will be necessary under *Federal Rule of Evidence 702*, and, if so, whether that opinion satisfies the standard for admissibility under *Daubert*
- Whether evidence of GAI output is admissible at trial

GAI-Created Court Documents

Let's take all the above and craft the following hypothetical. An attorney submits a brief in opposition to a summary judgment motion. On its face, the judge has no reason to believe that the brief was created by GAI and simply signed by the attorney. On these facts, absent some knowledge on the part of the judge and adversary counsel, what should the judge do?

On the facts of the hypothetical, I believe the answer is nothing unless there is a local rule or chambers' practice that requires the attorney to certify that the brief is the product of the attorney (and their human partners or associates), and that GAI did not contribute to the brief.

We can vary the hypothetical. Assume that, somehow, the judge becomes aware the brief was the product of GAI or that GAI "contributed" to the brief. So what? Attorneys have been known to submit papers drafted by associates and signed by the attorney. Should it matter to the judge what the GAI wrote if the attorney signed the brief and complied with Rule 11(b) or 26(g)?

Now, for a variation on the theme, imagine GAI is being used to draft complaints that might be filed. Assume that the complaints are filed in large numbers, perhaps in response to a mass casualty. Again, there is the effect of the attorney's signature under Rule 11(b) to consider. We also must remember here that particular attorneys might already have templates they use for a particular cause of action, and that the templates have blanks to be filled for, among other things, a plaintiff's name, address, and injuries.

I have no definitive answers to these hypotheticals. However, they raise questions that I would not be surprised to play out in the real world, sooner rather than later.

Key Takeaways

This practice note suggests several takeaways or best practices related to GAI:

- 1 GAI is here to stay and you and your firm and your clients should expect to see it and, perhaps, use it.

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- 2 Recall your duty of competence under Model Rule 1.1. Understand the benefits and risks in GAI and discuss those with your client.
- 3 Recall your duty of confidentiality under Model Rule 1.6. Appreciate the need to take reasonable steps to protect confidential communications. This need reinforces your duty under Model Rule 1.1. You can't take those reasonable steps unless you understand the technology and what it can and cannot do.
- 4 If you or your firm or your client decide to use GAI, understand the nature of the data that GAI will input, where the data comes from, and whether there are restrictions on access or use of the data.
- 5 Consider the legal consequences that might arise from GAI output and engage in a reasonable inquiry about that output before sharing or relying on that output.
- 6 Be prepared to address discovery and admissibility of GAI output with a judge.

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**Generative AI in Legal Practice:
What It Is and How Lawyers Use It**

June 28, 2023
Webcast

**Deepfakes Are Coming to Courts.
Are Judges, Juries and Lawyers Ready?**

By

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ANALYSIS

Deepfakes Are Coming to Courts. Are Judges, Juries and Lawyers Ready?

Courts and e-discovery teams have some tools to deal with the flourishing deepfake technology—but much is also up in the air, like the emotional impact on juries, and the potential for long, costly discovery fights.

May 26, 2023 at 01:53 PM



Isha Marathe
Legal Tech Reporter

The 86-year-old head of the Catholic Church, Pope Francis, was not, in fact spotted, wrapped in a [white Balenciaga puffer jacket](#), a sliver crucifix hanging down his neck.

Yet, when the Midjourney-generated image circulated across the internet in March, it was met with instant glee, showing up on thousands of Instagram stories and Twitter timelines within minutes.

But the image was a “deepfake,” a type of manufactured media created by deep learning artificial intelligence technology.

Outside of popular culture, deepfakes, which have become more sophisticated and easier to create given the democratization of generative AI tools like Midjourney and DALL-E, are inevitably poised to permeate the legal process.

Within the last year, at least two separate trials have included claims from opposing parties about the evidence presented being a deepfake—in a [Tesla](#) lawsuit involving Elon Musk, and in a case related to the [Jan. 6 riots](#) involving former President Barack Obama. While both judges determined that the evidence was not manufactured, attorneys and AI experts believe the instances are likely the prologue to a much longer problem.

To be sure, its likely more AI-generated images will come into court as evidence. While some deepfakes will be caught by the first line of defense against inauthenticity—[e-discovery professionals](#) well-versed in the Federal Rules of Evidence (FRE)—others may be gatekept by a [tech-savvy trial judge](#). Some deepfakes, however, will end up causing protracted “battles of experts,” or leaving unwanted impressions on a jury.

With their growing [prominence](#), deepfakes have potential to throw a wrench in the traditional understanding of evidence in courts. But whether the judicial system is prepared for them is an open question.

The Education Defense

Lee Tiedrich, a professor of ethical technology at Duke Law and a former partner at Covington & Burling, told Legaltech News that the quality of audio and visual deepfakes is only improving, and the judicial authentication process isn't necessarily equipped to cope just yet.

"I think there are two sets of issues that need to be addressed," Tiedrich said. "One is, the judge needs to decide, 'Am I going to admit this evidence or not?'" and now that we have a lot more deepfakes in society, it puts a lot of pressure on the judges on how [to] authenticate the evidence."

Of course, the obvious move on all judges' parts should be to have a skilled and trusted technical expert on hand, someone who may be able to authenticate the evidence and keep abreast of the latest technology creating these AI generated visuals and recordings.

Tiedrich pointed out that deepfake evidence could come into the court in two ways: the first would be at the center of a defamation case—similar to a [case](#) in Philadelphia about a woman allegedly harassing students using deepfake content. Second, would be as fake digital evidence in any civil or criminal proceeding.

In either case, judges need to be educated on the language and basic concepts behind generative AI, the tools available for authentication. For Tiedrich, who holds workshops educating trial judges on ethics and technology, the judge is a key player who might not only set the tone for the education of counsel in the room, but also for the education of juries who are likely to have to make determinations on deepfakes.

"Sensitizing the judges to the fact that deepfakes are really prevalent, and preparing them to at least be able to ask the right questions around authentication could address some issues," she noted. "But the other thing is educating the bar. I think most lawyers want to do a responsible job and do not want to fool the court with false evidence. But sometimes they may not know the best techniques to spot a deepfake."

'A Widget Is a Widget'

Though deepfakes pose new problems for the court, that doesn't mean judges and lawyers don't have tools to tackle the nascent technology—such as the federal rules of evidence and technical experts.

Ron Hedges, a former magistrate judge for the District of New Jersey and the principal at Ronald J. Hedges, told Legaltech News that he believes the main issue around deepfakes in court is going to end up being about authentication, and then about admissibility.

The "gatekeeper" so to speak when it comes to authentication would be the e-discovery teams, he said. Whereas when it comes to admissibility, it would have to be the judge.

"Number one: we've got existing rules that courts are going to have to use, because I don't see any new rules coming down," Hedges said, referring specifically to Federal Rules of Evidence Rule 901. "That's a whole series of rules about authentication.

For now, Hedges believes the current FRE 901 series, which includes admissibility of computer generated information in Rule 13 and 14, may be enough to guide judges dealing with potential deepfake evidence.

The problem is likely going to be about long, drawn-out [e-discovery battles](#), especially among technical experts, he said.

“I can easily see arguments being made about [not sharing] proprietary source code, trade secrets, protective orders and the like,” he noted.

For Heidi Saas, a data privacy and technology attorney at H. T. Saas, while deepfakes and evolving generative AI technology do pose new challenges, for courts who have adapted to a whirlwind of tech evolution, “a widget is a widget,” she said.

Like Hedges, she noted that FRE 902 and similar rules are in place in state courts for a reason, and she finds it unlikely that judges would be fazed by deepfakes.

Jury Impressions

While deepfake evidence could likely strain on e-discovery teams and judges, its impact on juries is an open question.

Some believe it won't be much of a problem. Saas said that juries deserves credit for being able to understand the complications of the new technology, and even if they are presented with deepfake evidence that is later thrown out, they are more discerning than many believe.

Hedges agreed, noting that the jury is a part of the process and it has to be trusted to be appropriately educated by the court and counsel. Indeed, [FRE 403](#), the rule on excluding evidence that the bench deems prejudicial exists just for this scenario—a judge wouldn't admit a deepfake knowingly, should they believe the impact would be detrimental.

Tiedrich, however, believes the issue is more complicated. “At the end of the day, jurors are humans,” she said. And “first impressions” are hard to shake, similar to the impact of the Pope in the puffer jacket, or fake pictures of former President Trump being arrested, she said.

“Not only do I worry that a jury won't be able to unwind” the emotions they may feel seeing a fake image of someone attacking someone else, or a recording saying something threatening, but “if this gets to the point where we don't have ways to quickly authenticate [evidence], I worry about access to justice issues, prolonged trials and ultimately, you end up with an expensive ‘Battle of Experts.’”

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