

THE EMERGING RISE OF ARTIFICIAL INTELLIGENCE IN THE LAW

2024 EDUCATION PROGRAM

JANUARY 10, 2024

10:15 – 11:15

PRESENTER

RONALD J. HEDGES

- United States Magistrate Judge, District of New Jersey, 1986-2007
- Chair of Court Technology Committee of ABA Judicial Division
- Member, NJSBA and NYSBA Artificial Intelligence task forces
- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Co-Senior Editor of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary, Third Edition* and April 2022 Supplement
- Author of *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (hosting by the Massachusetts Attorney General's Office)
- Contact: r_hedges@live.com

DISCLAIMER

- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
- This presentation represents the personal views of the presenter.
- This presentation is offered for informational and educational uses only.

TOPICS FOR TODAY

- How generative artificial intelligence (“GAI”) might be used by and its potential impact on litigation
- What ethical duties and obligations might be implicated by use of GAI
- Which ethical and litigation risks might arise in use of GAI and why these risks will continue to evolve as technology changes
- What measures are judges taking in response to GAI

THE BASICS OF GAI

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?

THE BASICS OF GAI



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

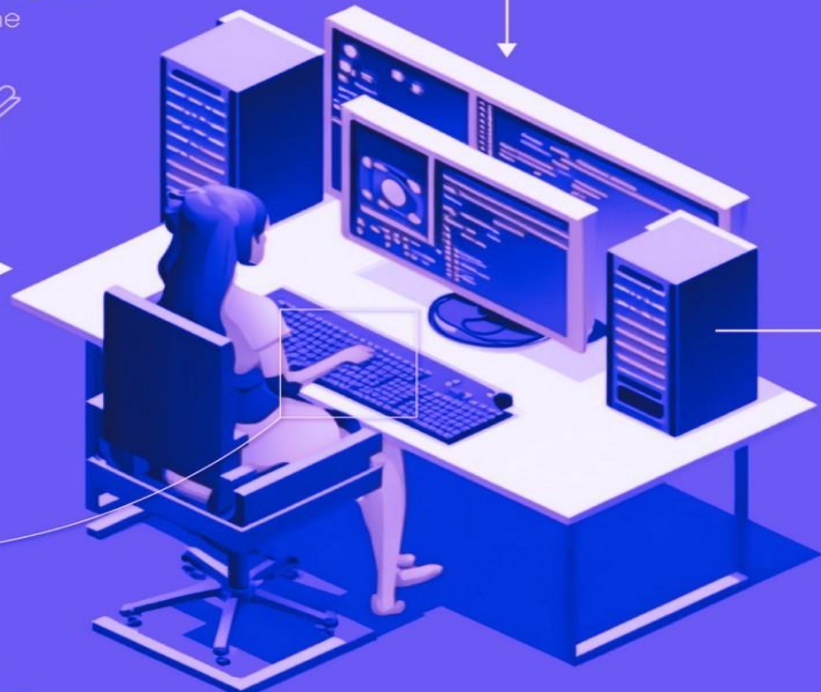
The user provides the AI with a description or sample of the desired content...



Prompts can be any user-submitted material, 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.



IMPACT ON LITIGATION

Use of GAI might give rise to causes of action for, among other things:

- Breach of privacy
- Discrimination
- Copyright infringement
- Data breach
- Malicious uses, such as disinformation, automated hate speech, scamming, “deepfakes”

IMPACT ON LITIGATION

Examples of litigation:

- *Tremblay v. OpenAI, Inc.*, Docket No. 3:23-cv-03223 (N.D. Cal. June 28, 2023) (copyright infringement action alleging that ChatGPT’s machine learning training dataset comes from books and other texts that are “copied by OpenAI without consent, without credit, and without compensation.”)
- *P.M. v. OpenAI LP*, Docket No. 3:23-cv-03199 (N.D. Cal. June 28, 2023) (putative class action alleging that the defendants’ use of “scraped” data of non-consenting consumers to train ChatGPT and other artificial intelligence models constituted misappropriation)

IMPACT ON LITIGATION

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

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/>

IMPACT ON LITIGATION

“Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” (White House: Oct. 30, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>

For a summary, see the accompanying Fact Sheet at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>

IMPACT ON LITIGATION

State and local action:

- Illinois, Artificial Intelligence Video Interview Act,
<https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68>
- Maryland HB 1202, Chapter 446 (prohibiting employer use of facial recognition services during job interview absent consent),
<https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1202?ys=2020RS>
- New York City Local Law Int. No. 1894-A (addressing bias in artificial intelligence hiring tools),
<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=ID%7CText%7C&Search=>

IMPACT ON LITIGATION

Topics for discovery:

- 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?

ETHICAL DUTIES

ABA House of Delegates resolution adopted Aug. 12-13, 2019:

“RESOLVED, That the 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 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.”

ETHICAL DUTIES

Rule 4-1.1 Competence:

“A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Comment (Legal knowledge and skill):

“Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.”

ETHICAL DUTIES

(Thoroughness and preparation):

“*** The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.”

(Maintaining competence):

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, including an understanding of the benefits and risks associated with the use of technology, and comply with all continuing legal education requirements to which the lawyer is subject.”

ETHICAL DUTIES

Rule 4-1.6(a) Confidentiality of Information:

“Consent Required to Reveal Information. A lawyer must not reveal information relating to a client’s representation except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.”

ETHICAL DUTIES

Rule 4-3.3(a) Candor toward the Tribunal:

“False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer ***.”

ETHICAL DUTIES

Comment (Misleading legal argument)

“Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. ***. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”

ETHICAL DUTIES

Rule 4-5.3(b)(1) Responsibilities Regarding Nonlawyer Assistants:

“a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer ***.”

Rule 4-5.3(b)(2):

“a lawyer having direct supervisory authority over the nonlawyer must make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer ***”

ETHICAL DUTIES

Comment (Nonlawyers Outside the Firm):

“***. When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.”

ETHICAL DUTIES

- Duty of Competence:
 - What does it mean when dealing with GAI?
- Duty of Confidentiality:
 - Can disclosure to GAI waive attorney-client privilege?
 - What about protection of client confidences?
- Duty to Supervise:
 - How might an attorney supervise GAI?

ETHICAL DUTIES

“Proposed Advisory Opinion 24-1 Regarding Lawyers’ Use of Generative Artificial Intelligence – Official Notice” (Nov. 13, 2023),

<https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-24-1-regarding-lawyers-use-of-generative-artificial-intelligence-official-notice/#:~:text=In%20sum%2C%20a%20lawyer%20may,with%20the%20lawyer's%20ethical%20obligations:>

“lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.”

JUDICIAL MEASURES

Mata v. Avianca, Inc. 22-cv-1461 (PKC) (S.D.N.Y. June 22, 2023):

Plaintiff's attorneys "submitted non-existent judicial opinions with fake quotes and citations created by *** ChatGpt, then continued to stand by the fake opinions after judicial orders called their existence into question."

JUDICIAL MEASURES

Mata findings:

- Attorneys acted with subjective bad faith and violated Rule 11
- Firm jointly and severally liable for the attorneys' violation
- No sanctions under Section 1927
- In the alternative to Rule 11, sanctions imposed under inherent power
- \$5,000.00 penalty imposed jointly and severally

JUDICIAL MEASURES

Mata comments from the Bench:

- “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.”

JUDICIAL MEASURES

United States v. Michel, Case No. 1:19-148-1(CKK) (D.D.C. Oct. 16, 2023) (defendant alleged that his attorney's reliance on AI for his closing argument constituted ineffective assistance of counsel. Defendant's supporting brief states: "Kenner's [defense counsel's] closing argument made frivolous arguments, misapprehended the required elements, conflated the schemes and ignored critical weaknesses in the government's case.")

Ex Parte Lee, No. 10-22-00281-CR (Tex. App. Jul. 19, 2023) (in denying the petitioner's motion for a new bail hearing, the court notes that his brief contained citations that did not exist and arguments that appeared to be generated by GAI)

JUDICIAL MEASURES

Judge Brantley Starr, Northern District of Texas:

“All attorneys and pro se litigants *** must, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal data bases, by a human being.

***”
.

JUDICIAL MEASURES

Standing Order Re: Artificial Intelligence (“AI”) in Cases Assigned to Judge Baylson, Eastern District of Pennsylvania:

“If any attorney for a party, or a *pro se* party, has used Artificial Intelligence (‘AI’) in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and **CERTIFY**, that each and every citation to the law or the record in the paper, has been verified as accurate.” [emphasis in original].

JUDICIAL MEASURES

General Order Amending Local Rules 23-11, United States District Court for the Eastern District of Texas (Oct. 30, 2023):

“LOCAL RULE CV-11 Signing of Pleadings, Motions, and Other Documents

(g) Use of Technology by Pro Se Litigants. Litigants remain responsible for the accuracy and quality of legal documents produced with the assistance of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services). Litigants are cautioned that certain technologies may produce factually or legally inaccurate content. If a litigant chooses to employ technology, the litigant continues to be bound by the requirements of Fed. R. Civ. P. 11 and must review and verify any computer-generated content to ensure that it complies with all such standards. See also Local Rule AT-3(m).”

JUDICIAL MEASURES

“COMMENT: Recent advancements in technology have provided pro se litigants access to tools that may be employed in preparing legal documents or pleadings. However, often the product of those tools may be factually or legally inaccurate. Local Rule CV-11 is amended to add new subsection (g) to alert pro se litigants to this risk. The rule also alerts litigants that they remain bound by the certification requirements of Fed. R. Civ. P. 11 when employing such tools to verify all content meets those standards. A similar rule, Local Rule AT-3(m), is added to the standards of practice to be observed by attorneys.”

JUDICIAL MEASURES

“LOCAL RULE AT-3 Standards of Practice to be Observed by Attorneys

Attorneys who appear in civil and criminal cases in this court shall comply with the following standards of practice in this district:

(m) If the lawyer, in the exercise of his or her professional legal judgment, believes that the client is best served by the use of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services), then the lawyer is cautioned that certain technologies may produce factually or legally inaccurate content and should never replace the lawyer’s most important asset – the exercise of independent legal judgment. If a lawyer chooses to employ technology in representing a client, the lawyer continues to be bound by the requirements of Federal Rule of Civil Procedure 11, Local Rule AT-3, and all other applicable standards of practice and must review and verify any computer-generated content to ensure that it complies with all such standards.”

JUDICIAL MEASURES

“COMMENT: Recent advancements in technology have provided the legal profession with many useful tools for daily practice. Ultimately, however, the most valuable benefit a lawyer provides to a client is the lawyer’s independent judgment as informed by education, professional experiences, and participation in the legal and professional community in which the lawyer practices. Although technology can be helpful, it is never a replacement for abstract thought and problem solving. Local Rule AT-3 is amended to add new subsection (m) to remind lawyers of their continuing duties under applicable rules of practice despite any choice to employ technological tools in the course of providing legal services.”

JUDICIAL MEASURES

Judge Arun Subramanian, Southern District of New York, Individual Practices in Civil Cases 8F (rev. July 29, 2023):

“Use of ChatGPT and Other Tools. Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.”

JUDICIAL MEASURES

- May State judges regulate GAI use by chambers' practices?
- Absent authority to adopt such practices should the rules be amended to address?
- What statutes or rules might "regulate" GAI use by attorneys?
- What sanctions might be available?
- What proofs might a judge want?
- Will there be hearings?
- Etc.

RESOURCES

- P.W. Grimm, “New Evidence Rules and Artificial Intelligence,” *Litigation* (ABA: Sept. 1, 2018), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2018-19/fall/new-evidence-rules-and-artificial-intelligence/
- P. W. Grimm, M.R. Grossman, and G.V. Cormack, “Artificial Intelligence as Evidence,” 19 *Nw. J. Tech. & Intell. Prop.* 9 (2021), <https://scholarlycommons.law.northwestern.edu/njtip/vol19/iss1/2/>
- C. Cwik, P. Grimm, M. Grossman and T. Walsh, “Artificial Intelligence, Trustworthiness, and Litigation.” *Artificial Intelligence and the Courts: Materials for Judges*” (AAAS 2022), [https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness NIST FINAL.pdf](https://www.aaas.org/sites/default/files/2022-09/Paper%20AI%20and%20Trustworthiness%20NIST%20FINAL.pdf)

RESOURCES

- R.J. Hedges, “Artificial Intelligence Admissibility Caselaw” (last updated Sept. 7, 2023) (in materials)
- R. Hedges, G. Gottehrer & J.C. Francis IV, “Artificial Intelligence and Legal Issues,” *Litigation* (ABA: Fall 2020), [Artificial Intelligence and Legal Issues \(americanbar.org\)](#)

- **QUESTIONS?**
- **COMMENTS?**
- **THANK YOU!**