THE INAUGURAL NJSBA AI INSTITUTE – SESSION 1

2024 Seminar Material

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THE INAUGURAL NJSBA AI INSTITUTE – SESSION 1

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In cooperation with **LEAP**

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ATTORNEYS AND NEW TECHNOLOGIES: A FRAMEWORK FOR ATTORNEYS CONSIDERING ANY NEW TECHNOLOGY

SESSION #1

NJSBA SERIES ON ARTIFICIAL INTELLIGENCE

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FACULTY

- Ronald J. Hedges, former United States Magistrate Judge
- Robert T. Szyba, Seyfarth Shaw LLP

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.

AGENDA

- New Technologies: An Overview
- Regulation and Litigation Involving New Technologies
- Ethical Obligations of Attorneys to Understand New Technologies
- Suggested Best Practices When Dealing with New Technologies

NEW TECHNOLOGIES: AN OVERVIEW

Examples:

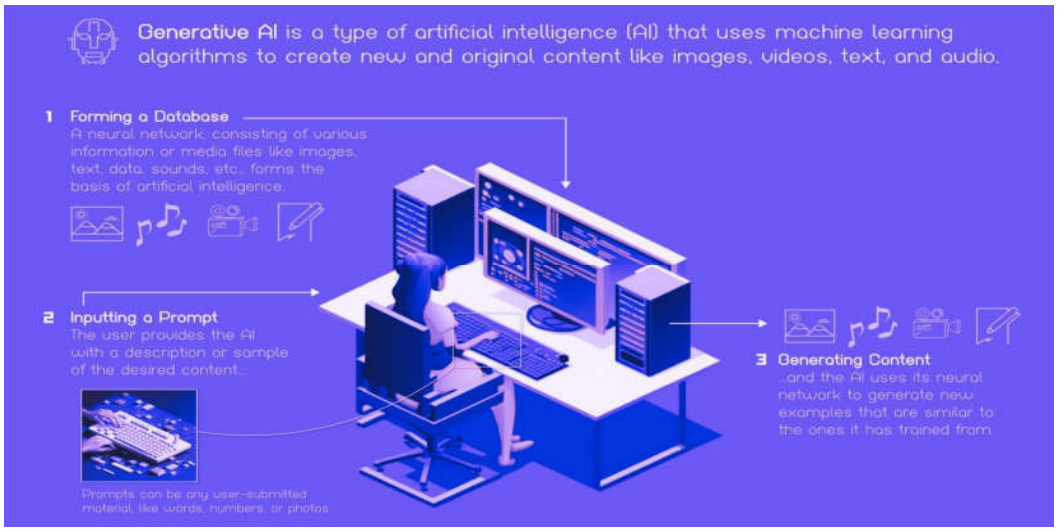
- Generative Artificial Intelligence (GAI)
- Collaboration Tools
- Ephemeral Messaging Tools

ARTIFICIAL INTELLIGENCE

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?

GENERATIVE ARTIFICIAL INTELLIGENCE



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COLLABORATION AND EPHEMERAL MESSAGING TOOLS

Examples:

- Slack
- Microsoft Teams
- Signal
- WhatsApp
- SnapChat

EPHEMERAL MESSAGING

Settlement between the FTC and Snapchat:

- "Touting the 'ephemeral' nature of 'snaps,' the term used to describe photo and video messages sent via the app, Snapchat marketed the app's central feature as the user's ability to send snaps that would 'disappear forever' after the sender-designated time period expired.
- Despite Snapchat's claims, the complaint describes several simple ways that recipients could save snaps indefinitely.
- Consumers can, for example, use third-party apps to log into the Snapchat service, according to the complaint. Because the service's deletion feature only functions in the official Snapchat app, recipients can use these widely available third-party apps to view and save snaps indefinitely. Indeed, such third-party apps have been downloaded millions of times.
- Despite a security researcher warning the company about this possibility, the complaint alleges, Snapchat continued to misrepresent that the sender controls how long a recipient can view a snap."

https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were

REGULATION AND LITIGATION INVOLVING NEW TECHNOLOGIES

- Anticipate regulatory burdens that might be imposed on a new technology before it is selected
- Appreciate what might happen if a technology "fails" or violates a law or regulation
- Realize emerging liabilities that might arise from:
  - Bias
  - Invasion of individual privacy
  - Failure to comply with obligations imposed by law or regulation on the use of protected personal information

EEOC

EEOC Artificial Intelligence and Algorithmic Fairness Initiative:

"As part of the initiative, the EEOC will:

- Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions;
- Identify promising practices;
- Hold listening sessions with key stakeholders about algorithmic tools and their employment ramifications; and
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies."

https://www.eeoc.gov/ai#:~:text=As%20part%20of%20the%20initiative,and%20their%20employment%20ramifications%3B%20and

EEOC

EEOC, “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees” (May 12, 2022)

https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence

EEOC AND USDOJ

USDOJ, "Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring" (May 12, 2022), https://www.ada.gov/resources/ai-guidance/

EEOC AND FTC

- EEOC, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (May 18, 2023), https://www.eeoc.gov/newsroom/eeoc-releases-new-resource-artificial-intelligence-and-title-vii
- FTC, "Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act" (May 18, 2023), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-biometric-information-section-5-federal-trade-commission

FTC

- Absent a comprehensive federal law, might the FTC be the national regulator of any "new" tech?
- Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45) prohibits "unfair or deceptive acts or practices in or affecting commerce."
- An example of what the FTC has done: *I/M/O Chegg, Inc.,* Docket No. 202-3151, https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-finalizes-order-ed-tech-provider-chegg-lax-security-exposed-student-data

FTC

"The FTC's order requires Chegg to implement a comprehensive information security program, limit the data the company can collect and retain, offer users multifactor authentication to secure their accounts, and allow users to request access to and deletion of their data."

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NEW YORK CITY LOCAL LAW INT. NO. 144

- Regulates use of "automated employment decision tools" in hiring and promotion
- Requires notice prior to being subject to the tool
- Allows opting-out and another process
- Requires annual, independent "bias audit"

COMPREHENSIVE STATE DATA PRIVACY LAWS

- California
- Colorado
- Connecticut
- Delaware
- Florida -- **with a caveat**
- Indiana
- Iowa
- Kentucky
- Maryland
- Minnesota
- Montana
- Nebraska
- New Hampshire
- New Jersey -- **effective Jan. 1, 2025**
- Oregon
- Tennessee
- Texas
- Utah
- Vermont
- Virginia

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ETHICAL OBLIGATIONS OF ATTORNEYS TO UNDERSTAND NEW TECHNOLOGIES

- Recognize how the duty of competence impacts use and advice about new technologies
- Understand how to maintain confidentiality when using new technologies
- Appreciate what attorneys should do when supervising subordinate attorneys and non-attorneys regarding new technologies
- Recognize the need for an attorney to be “somewhere” in the process

ETHICAL OBLIGATIONS OF ATTORNEYS TO UNDERSTAND NEW TECHNOLOGIES

ABA House of Delegates Resolution 112 (adopted as revised at the August 12-13, 2019 Annual Meeting), https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/112.pdf:

"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 OBLIGATIONS OF ATTORNEYS IN DEALING WITH NEW TECHNOLOGIES

Task Force on Responsible Use of Generative AI for Law (pub. Feb. 28, 2023):
1 Duty of Confidentiality to the client in all usage of AI applications;
2 Duty of Fiduciary Care to the client in all usage of AI applications;
3 Duty of Client Notice and Consent* to the client in all usage of AI applications;
4 Duty of Competence in the usage and understanding of AI applications;
5 Duty of Fiduciary Loyalty to the client in all usage of AI applications;
6 Duty of Regulatory Compliance and respect for the rights of third parties, applicable to the usage of AI applications in your jurisdiction(s);
7 Duty of Accountability and Supervision to maintain human oversight over all usage and outputs of AI applications;
Source: https://law.mit.edu/pub/generative-ai-responsible-use-for-law/release/9

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ETHICAL OBLIGATIONS OF ATTORNEYS IN DEALING WITH NEW TECHNOLOGIES

- For a comprehensive overview of how attorneys might "embrace technology" and avoid "ethical, legal and professional issues," see *Best Practices for Professional Electronic Communication* (Florida Bar: Updated May, 2020), https://www-media.floridabar.org/uploads/2020/06/ADA-E-communication-FINAL_May-2020.pdf

SUGGESTED BEST PRACTICES

- What is the existing technology framework?
- Who decides what new technology is needed?
- Who checks out the new technology?
- Who incorporates the new technology?
  - Internal?
  - Third party?
- Who has access to the new technology?
- Who monitors the new technology?
- What is the audit trail for the new technology?

SUGGESTED BEST PRACTICES:

Illinois State Bar Ass'n Professional Conduct Advisory Opinion No. 16-06 (Oct. 2016), https://www.isba.org/sites/default/files/ethicsopinions/16-06.pdf:

"At the outset *** lawyers must conduct a due diligence investigation when selecting a provider. Reasonable inquiries and practices could include:

"1. Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;

2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;

3. Investigating the provider's reputation and history;

SUGGESTED BEST PRACTICES

4. Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;

5. Requiring an agreement to reasonably ensure that the provider will abide by the lawyer's duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;

6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data;

7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business."

SUGGESTED BEST PRACTICES

1. Figure out how to prompt it in a way that gives the best result.
2. Use it for appropriate projects.
3. Do not feed it confidential information – the user cannot control what it does with that information.
4. Always verify what it gives you is accurate – "trust, but verify."
5. Do diligence to ensure that the response it gives you is not plagiarized.
6. Include appropriate notices and disclaimers about the item being produced with ChatGPT.
7. 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

RESOURCES*

- *Ethics Guidelines for Trustworthy AI* (High-Level Expert Group on Artificial Intelligence: Apr. 8, 2019), https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai
- "AI and Bias" Series, *Brookings Center for Technology Innovation,* https://www.brookings.edu/series/ai-and-bias/

*Note: Materials on artificial intelligence are published on what seems to be a daily basis. The materials listed in these Resources are examples.

RESOURCES

- EEOC, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (May 18, 2023), https://www.eeoc.gov/newsroom/eeoc-releases-new-resource-artificial-intelligence-and-title-vii
- FTC, "Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act" (May 18, 2023), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-biometric-information-section-5-federal-trade-commission
- E. Tabassi, "Minimizing Harms and Maximizing the Potential of Generative AI," *Taking Measure* (NIST: Nov. 20, 2023), https://www.nist.gov/blogs/taking-measure/minimizing-harms-and-maximizing-potential-generative-ai

RESOURCES

- *CISA Services Directory* (2d ed. fall 2021), https://www.cisa.gov/sites/default/files/publications/FINAL_PDFEPUB_CISA%20Services%20Catalog%202.0.pdf
- L. Fair, *Multiple Data Breaches Suggest Ed Tech Company Chegg Didn't Do Its Homework, Alleges FTC* (FTC Business Blog: Oct. 31, 2022), https://www.ftc.gov/business-guidance/blog/2022/10/multiple-data-breaches-suggest-ed-tech-company-chegg-didnt-do-its-homework-alleges-ftc?mkt_tok=MTM4LUVaTS0wNDIAAAGH0x3YDZPPHKQrBOHYoXF44XeIJEdRYnuCTB9I4OVMJZhlDGYqWgWt58g0TvpXBZAdOV4Oe92lag0_gcw5Eco4w_vQ9Q4uMszL7hJ2m5bfge5h
- *Commentary on Law Firm Data Security* (The Sedona Conference: July 2020), https://thesedonaconference.org/node/9662

RESOURCES

- G.L. Gottehrer, R.J. Hedges & C.S. Parikh, "Discovery Considerations When Choosing and Using Virtual Meeting Platforms and Ephemeral Apps," *PLI Chronicle* (Jan. 2021) (in materials)
- K.J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," 37 *U. of Baltimore L. Rev.* 349 (2008), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?httpsredir=1&article=1829&context=ublr

RESOURCES

- Illinois Artificial Intelligence Video Interview Act, 820 ILCS 42/, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68
- New York City Local Law Int. No. 144, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search

RESOURCES

- The Sedona Conference *Commentary on Ephemeral Messaging* (Public Comment Version Jan. 2021), Publications_Catalogue_May_2021.pdf (thesedonaconference.org)
- K.J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," 37 *U. of Baltimore L. Rev.* 349 (2008), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?httpsredir=1&article=1829&context=ublr

About the Panelists…

Honorable Ronald J. Hedges, USMJ (Ret.) is a Principal in Ronald J. Hedges LLC in Hackensack, New Jersey. Formerly Senior Counsel for Dentons in New York City and a member of the Litigation and Dispute Resolution Practice Group, he has extensive experience in e-discovery and the management of complex civil litigation matters, and has served as a special master, arbitrator and mediator. He also consults on the management and discovery of electronically stored information (ESI).

Admitted to practice in New Jersey, New York, Texas and the District of Columbia, and before several federal courts, Judge Hedges is a former United States Magistrate Judge in the United States District Court for the District of New Jersey (1986-2007), where he was the Compliance Judge for the Court Mediation Program, a member of the Lawyers Advisory Committee, and a member of and reporter for the *Civil Justice Reform Act* Advisory Committee. Chair of the Court Technology Committee of the Judicial Division of the American Bar Association, he has been a member of the American Law Institute, the American and Federal Bar Associations, and the Historical Society and the Lawyers Advisory Committee of the United States District Court for the District of New Jersey. He is a member of task forces established by the New Jersey and New York State Bar Associations to address artificial intelligence. Judge Hedges has served on the Sedona Conference Judicial Advisory Board; the Sedona Conference Working Group on Protective Orders, Confidentiality, and Public Access; and the Sedona Conference Working Group on Best Practices for Electronic Document Retention & Protection. He has also been a member of the Advisory Board of the Advanced E-Discovery Institute of Georgetown University Law Center. He is a former Fellow at the Center for Information Technology of Princeton University and has been a member of the College of the State Bar of Texas.

Judge Hedges has been an adjunct professor at Rutgers School of Law-Newark and is a former adjunct professor at Georgetown University Law Center and Seton Hall University School of Law, where he has taught courses on electronic discovery and evidence and mediation skills. He is the author of “Rule 26(f): The Most Important E-Discovery Rule” (*New Jersey Law Journal*, 5/18/2009) and has authored, edited and co-edited a number of other publications on ESI topics including *Discovery of Electronically Stored Information: Surveying the Legal Landscape* (BNA, 2007). He is the co-senior editor of *The Sedona Conference Cooperation Proclamation, Resources for the Judiciary, Third Edition* (June 2020) and its 2022 supplement; and the principal author of the third edition of the Federal Judicial Center’s *Pocket Guide for Judges on Discovery of Electronic Information*.

Judge Hedges received his B.A. from the University of Maryland and his J.D. from Georgetown University Law Center.

Robert T. Szyba is a Partner in the Labor & Employment Department of Seyfarth Shaw LLP in New York City, where he defends and counsels employers in a wide range of employment-related issues, including background check and *Fair Credit Reporting Act* violations, “ban the box” issues, prevailing wage requirements, wage and hour compliance, whistleblower retaliation, family and medical leave compliance and interference/retaliation claims, paid sick leave, and discrimination/harassment. He also advises clients on preventive employment counseling, pre-litigation strategy and litigation avoidance, alternate dispute resolution and mandatory arbitration programs, and employment policies and procedures.

Admitted to practice in the state and federal courts of New Jersey and New York, Mr. Szyba serves on the Executive Committee of the Labor & Employment Law Section of the New Jersey State Bar Association. He has been Co-Chair of the Ethics & Professional Responsibility Subcommittee of the American Bar Association Labor & Employment Law Section's Employment Rights & Responsibilities Committee.

Mr. Szyba has served on the Alumni Advisory Board of the *Hofstra Labor & Employment Law Journal* and as a member of the Sidney Reitman Employment Law American Inn of Court. He is a former Editor-in-Chief of the New Jersey State Bar Association's *New Jersey Labor & Employment Law Quarterly* and has lectured for ICLE, NELA-NJ, the American and New York State Bar Associations, and other organizations.

Mr. Szyba received his undergraduate degree, *cum laude*, from Berklee College of Music and his J.D., *cum laude*, from Hofstra University School of Law, where he was Editor-in-Chief of the *Hofstra Labor & Employment Law Journal* and a member of Hofstra's Moot Court Association.