

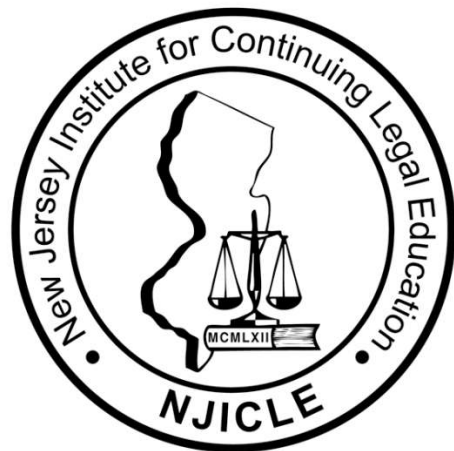
THE INAUGURAL NJSBA AI INSTITUTE – SESSION 2

2024 Seminar Material

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New Jersey Institute for
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THE INAUGURAL NJSBA AI INSTITUTE – SESSION 2

Speakers

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In cooperation with LEAP

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**BENEFITS AND RISKS OF AI/GAI:
CAUSES OF ACTION AND DEFENSES**

THE INAUGURAL NJSBA AI INSTITUTE
SESSION #2

PRESENTER
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) and *Supplement* (April 2022)
- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Chair of Court Technology Committee of ABA Judicial Division
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PRESENTER 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 and Generative AI
- Chair of the Labor and Employment Law Section of the New Jersey State Bar Association
- Co-Chair of the New Jersey State Bar Association's Labor and Employment Law Section's Technology Sub-Committee
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DISCLAIMER

- The information in these slides and presentations 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

- Overview of artificial intelligence (“AI) and generative artificial intelligence (“GAI”)
- Benefits and risks of AI and GAI known and foreseeable
- Causes of action arising out of AI and GAI use
- Defenses to liability

OVERVIEW

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?

OVERVIEW

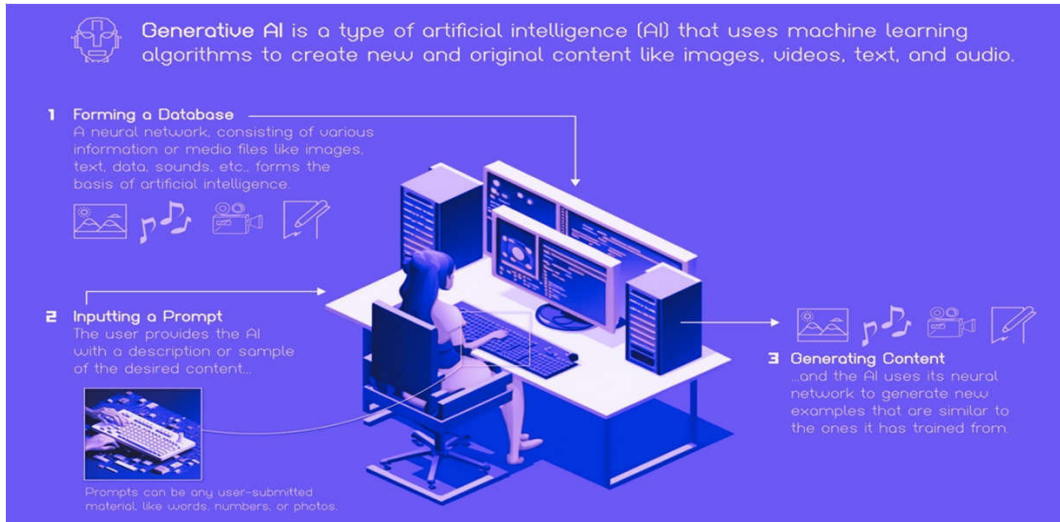
- “Artificial Intelligence (AI) refers to the computational techniques that simulate human cognitive capabilities. AI will transform most, if not every aspect of humanity, which presents a range of challenges and opportunities.”

[\(https://coe.gsa.gov/coe/ai-guide-for-government/introduction/\)](https://coe.gsa.gov/coe/ai-guide-for-government/introduction/)

- "*Generative* Artificial Intelligence (GAI) creates content, such as text, images, or music, autonomously, using machine learning models to produce original and creative output."

(ChatGPT's response to a prompt)

OVERVIEW



BENEFITS AND RISKS

Some Benefits:

- Working with Large Volumes and Varieties of Data
- Making Predictions
- Eliminating Human Error

Some Risks:

- Bias in Decision Making
- Scraping Data That Is “Protected”
- “Hallucinations”

CAUSES OF ACTION*

- Breach of Privacy
 - For example: ELVIS Act (Tennessee) – Right of Publicity
- Data Breach
- Employment or other Discrimination
- Copyright or other Intellectual Property Infringement
 - For example, *Andersen v. Stability AI LTD.*, Case No. 21-cv-00201 (N.D. Ca.)
- Malicious use, such as deepfakes, hate speech and scamming
- What else?

For example: *Doe v. Tenet Healthcare Corp.*, Civil Action No. 23-12978-PBS (D. Mass. Apr. 23, 2024)

*Civil actions only

DEFENSES (OTHER THAN ON THE MERITS)

- No Standing
 - *Elansari v. Meta, Inc.*, No. 22-3060, 2024 U.S. App. LEXIS 972 (3d Cir. Jan. 16, 2024) (*per curiam*)
- No Subject Matter Jurisdiction
- No Personal Jurisdiction
 - *Hasson v. FullStory, Inc.*, No. 23-2535, ___ F.4th ___ (3d Cir. Sept. 5, 2024)
- Choice of Law
 - *Draftkings Inc. v. Hermalyn*, No. 24-1443 (1st Cir. Sept. 26, 2024), ___ F.4th ___ (1st Cir. Sept. 26, 2024)
- No Private Cause of Action
 - Sec. 16, New Jersey Privacy Act, [P.L.2023, c.266](#)
- State Causes of Action Preempted
 - *Best Carpet Values, Inc. v. Google, LLC*, 90 F.4th 962 (9th Cir. 2024)

DEFENSES (OTHER THAN ON THE MERITS)

- State Cause of Action Preempted
 - *See Best Carpet Values, Inc. v. Google, LLC*, 90 F.4th 962 (9th Cir. 2024)
- Right to Cure
 - Sec. 14(b), New Jersey Privacy Act, [P.L.2023, c.266](#)
- Availability of Insurance
 - *Merck & Co., Inc. v. ACE American Ins. Co.*, 475 N.J. Super. 420 (App. Div. 2023)
- Indemnification
- Terms of Service
 - Duty to Arbitrate (*See Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023))
 - Choice of Venue

FOLLOWING SESSIONS

- Session 3 – How AI/GAI Might Assist Attorneys in Litigation – Nov. 20
- Session 4 – Discovery of AI/GAI: Possible Requests and Objections – Dec. 18
- Session 5 – AI/GAI in Criminal Investigations and Proceedings – Jan. 22
- Session 6 – Admissibility of AI/GAI Under *Accutane* and *Olenowski* – Feb. 26
- Session 7 – The Ethics of AI/GAI Use by Attorneys – Mar. 12

RESOURCES*

- R.J. Hedges, “Artificial Intelligence Admissibility Caselaw” (Jan. 2024) (in materials)
- S. Wilson, *et al.*, “Deepfakes and the Admissibility of Evidence,” *PLI Chronicle* (Feb. 2024) (in materials)
- S. Wilson, *et al.*, “Artificial Intelligence and Discrimination: Combating the Risk of Bias in AI Decision-making,” *NJ Labor and Employment Law Quarterly*, Vol. 42, No. 4. (May 2021), <https://www.reedsmith.com/en/perspectives/2021/05/artificial-intelligence-and-discrimination-combating-the-risk-of-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

- J.E. Baker, *et al.*, “An Introduction to Artificial Intelligence for Federal Judges” (Federal Judicial Center: 2023), https://www.fjc.gov/sites/default/files/materials/47/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf
- “AI and Bias” Series, *Brookings Center for Technology Innovation*, <https://www.brookings.edu/series/ai-and-bias/>
- 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>

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

- QUESTIONS?
- COMMENTS?
- THANK YOU!

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.

Stephanie Wilson is a Senior Counsel in Reed Smith LLP's Financial Industries Group in the firm's Princeton, New Jersey, office. She defends financial services companies in connection with lawsuits, third-party administrative subpoenas and administrative investigations. She frequently advises companies on properly using AI-related tools and litigating discrimination claims associated with the use of such tools.

Admitted to practice in New Jersey and New York, Ms. Wilson is Chair of the New Jersey State Bar Association Labor and Employment Law Section and chairs the Section's Technology

Subcommittee. She is also a member of the NJSBA AI Taskforce, where she is Co-Chair of the AI Products and Services Subcommittee.

Ms. Wilson received her B.A. from Yale University and her J.D. from Columbia University School of Law.