THE INAUGURAL NJSBA AI INSTITUTE – DAY 6

2025 Seminar Material

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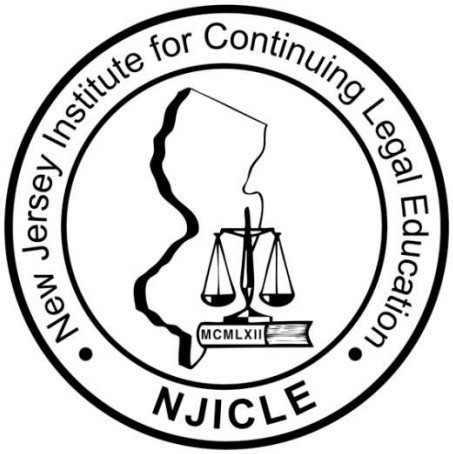

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THE INAUGURAL NJSBA AI INSTITUTE – DAY 6

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Table of Contents

Page

Admissibility of Evidence of AI/GAI
Under *Accutane* and *Olenowski*
The Inaugural NJSBA AI Institute
Session #6
PowerPoint Presentation
Honorable Ronald J. Hedges, USMJ (Ret.)
Marissa J. Moran 1

About the Panelists… 43

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ADMISSIBILITY OF EVIDENCE OF AI/GAI UNDER *ACCUTANE AND OLENOWSKI*

THE INAUGURAL NJSBA AI INSTITUTE

SESSION #6

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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)

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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 presenters.

This presentation is offered for informational and educational uses only.

TOPICS TO BE ADDRESSED

- Admissibility Standards
- The nature of hallucinations
- What might go wrong
- New Jersey case law

ADMISSIBILITY IN GENERAL

The "Hurdles" to Admissibility

Is it relevant?

Is it authenticated?

- Self-authentication
- Testimony of competent person?

Is it hearsay?

- If it is, is there an exception?

Is it an original?

Is there undue prejudice?

ADMISSIBILITY IN GENERAL

The rules do not address explicitly AI but are adaptable to it.

However, some rules may make admissibility problematical:

- **What is a declarant?**
- **What is a business record?**
- **Is "it" authenticated?**
- **What is an original writing?**

ADMISSIBILITY IN GENERAL

***Federal Rule of Evidence* 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

ADMISSIBILITY IN FEDERAL COURT

***Federal Rule of Evidence* 104. Preliminary Questions**

"(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."

ADMISSIBILITY IN FEDERAL COURT

***Federal Rule of Evidence* 902:**

"The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: *

(13) *Certified Records Generated by an Electronic Process or System*. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."

ADMISSIBILITY IN FEDERAL COURT

Committee Note to 902(13):

"The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. * It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly."**

ADMISSIBILITY IN FEDERAL COURT

"A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided."

12

ADMISSIBILITY IN FEDERAL COURT

"(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12).
The proponent also must meet the notice requirements of Rule 902(11)."

PROPOSAL TO AMEND FEDERAL ADMISSIBILITY RULES

As currently written, *Fed. R. Evid.* 901(b)(9), which applies to "evidence about a process or system" states that such evidence is "accurate" if the proponent show that the process or system "produces an accurate result."

The Advisory Committee for the Federal Rules of Evidence is considering a proposal to amend *Fed. R. Evid.* 901(b)(9):

- The proposal initially changes the "accurate" standard and replaces it with a requirement that the proponent provide evidence that shows that the process or system produces a "reliable" result.
- For evidence generated by AI, the proponent must also
  - (a) describe the software or program that was used, and
  - (b) show that it has produced reliable results in the proposed evidence.

PROPOSAL TO AMEND FEDERAL ADMISSIBILITY RULES

There is also a proposal to add a new Federal Rule of Evidence 707:

- **"[w]here the output of a process or system would be subject to Rule 702 if testified to by a human witness, the court must find that the output satisfies the requirements of Rule 702 (a)-(d). This rule does not apply to the output of basic scientific instruments or routinely relied upon commercial software."**

The proposed amendments are available at pages 269-71. See https://www.uscourts.gov/sites/default/files/2024-11_evidence_rules_committee_meeting_agenda_book_final_10-24.pdf

ADMISSIBILITY IN STATE COURT

N.J.R.E. 104. Preliminary Questions

(a) In General.

"(1) The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege and Rule 403.

(2) The court may hear and determine such matters out of the presence or hearing of the jury."

16

ADMISSIBILITY IN STATE COURT

N.J.R.E. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

N.J.R.E. 402. Relevant Evidence Generally Admissible

"All relevant evidence is admissible, except as otherwise provided in these rules or by law."

N.J.R.E. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

"Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of:

(a) Undue prejudice, confusing the issues, or misleading the jury; or

(b) Undue delay, wasting time, or needlessly presenting cumulative evidence."

ADMISSIBILITY IN STATE COURT

N.J.R.E. 701. Opinion Testimony of Lay Witnesses

"If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:

(a) is rationally based on the witness' perception and

(b) will assist in understanding the witness' testimony or determining a fact in issue."

18

ADMISSIBILITY IN STATE COURT

N.J.R.E. 702. Testimony by Expert Witnesses

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise."

ADMISSIBILITY IN STATE COURT

N.J.R.E. 901. Requirement of Authentication or Identification

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims."

ADMISSIBILITY IN STATE COURT

N.J.R.E. 902. Self-Authentication

"The following items of evidence are self-authenticating and they require no extrinsic evidence of authenticity in order to be admitted:

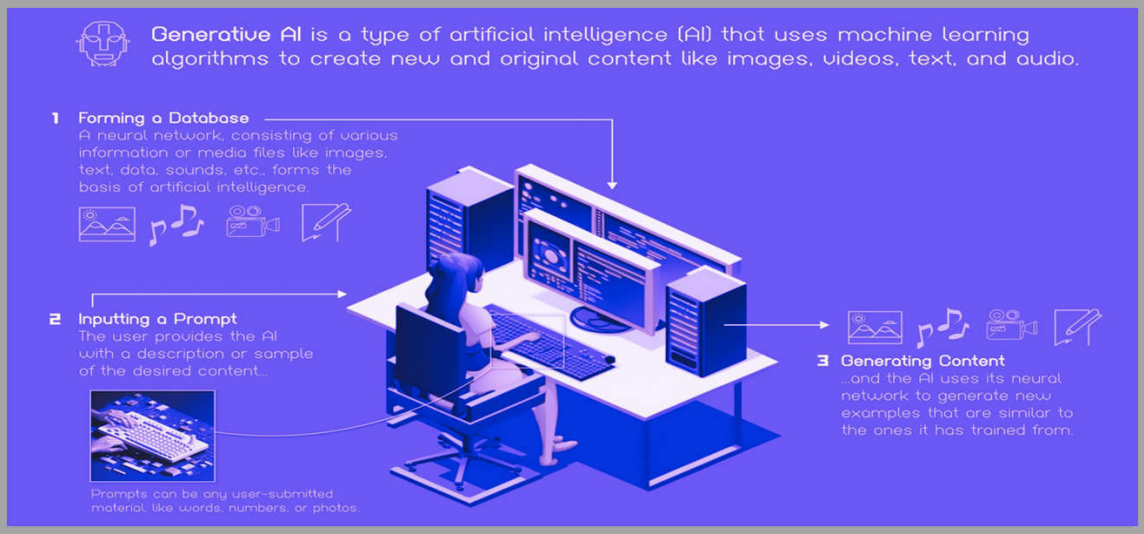
(a) New Jersey Public Documents. *.**

(b) Other Domestic Public Documents. *.**

(c) Foreign Public Documents. *."**

Etc.

THE NATURE OF HALLUCINATIONS



THE NATURE OF HALLUCINATIONS

From a Google search:

"A generative AI hallucination is when a large language model (LLM) produces inaccurate, false, or misleading output. LLMs are the foundation of AI chatbots, search tools, and conversational AI applications."

Google. (n.d.-b). Google search. https://www.google.com/search?q=what%2Bdescribes%2Ba%2Bgenerative%2Bai%2Bhallucination&rlz=1C1UEAD_enUS972US972&oq=what%2Bis%2Ba%2Bgenerative%2Bai%2Bhallucination&gs_lcrp=EgZjaHJvbWUqCAgBEAAYFhgeMgYIABBFGDkyCAgBEAAYFhgeMggIAhAAGBYYHjIICAMQABgWGB4yCAgEEAAYFhgeMggIBRAAGBYYHjIICAYQABgWGB4yCAgHEAAYFhgeMggICBAAGBYYHjIICAkQABgWGB7SAQkxODQ5MmowajeoAgiwAgE&sourceid=chrome&ie=UTF-8

THE NATURE OF HALLUCINATIONS

***Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 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."**

24

THE NATURE OF HALLUCINATIONS

***Mata* conclusions of law:**

- Attorneys acted with subjective bad faith and violated Rule 11
- Firm jointly and severally liable for the attorneys' violation
- Sanctions under Section 1927: "Reliance on fake cases has caused several harms but dilatory tactics and delay were not among them."
- "Alternatively" to Rule 11, sanctions imposed under inherent power
- $5,000.00 penalty imposed jointly and severally

WHAT MIGHT GO WRONG: *MATTER OF WEBER*

***Matter of Weber,* 2024 NY Slip Op 24258 (Surrogate's Court, Saratoga County Oct. 10, 2024), https://law.justia.com/cases/new-york/other-courts/2024/2024-ny-slip-op-24258.html**

- **Court ruled on petition for judicial settlement of the interim account of the trustee of an estate**
- **Court found that damage calculations of an objector's expert could not be credited as these were unreliable.**
- **Among other things, expert relied on Microsoft Copilot.**

26

WHAT MIGHT GO WRONG: *MATTER OF WEBER*

- "Mr. Ranson [the expert] was adamant in his testimony that the use of Copilot or other artificial intelligence tools, for drafting expert reports is generally accepted in the field of fiduciary services and represents the future of analysis of fiduciary decisions; however, he could not name any publications regarding its use or any other sources to confirm that it is a generally accepted methodology."
- "In the instant case, the record is devoid of any evidence as to the reliability of Microsoft Copilot in general, let alone as it relates to how it was applied here. Without more, the Court cannot blindly accept as accurate, calculations which are performed by artificial intelligence."

WHAT MIGHT GO WRONG: *MATTER OF WEBER*

- "In what may be an issue of first impression, at least in Surrogate's Court practice, this Court holds that due to the nature of the rapid evolution of artificial intelligence and its inherent reliability issues that prior to evidence being introduced which has been generated by an artificial intelligence product or system, counsel has an affirmative duty to disclose the use of artificial intelligence and the evidence sought to be admitted should properly be subject to a *Frye* hearing prior to its admission, the scope of which should be determined by the Court, either in a pre-trial hearing or at the time the evidence is offered." [footnote omitted].

28

WHAT MIGHT GO WRONG: *KOHLS v. ELLISON*

***Kohls v. Ellison,* Court File No. 24-cv-03754 (D. Minn.)**

- **"Order Granting in Part and Denying in Part Plaintiffs' Motion to Exclude Expert Testimony and Denying Defendants' Motion for Leave to File an Amended Expert Declaration" (filed Jan. 10, 2025), https://scholar.google.com/scholar_case?case=4092043911734681987&hl=en&as_sdt=6&as_vis=1&oi=scholarr**
- **"Order Denying Plaintiffs' Motion for a Preliminary Injunction" (filed Jan. 10, 2025), https://scholar.google.com/scholar_case?case=11899700091759745932&hl=en&as_sdt=6&as_vis=1&oi=scholarr**

WHAT MIGHT GO WRONG: *KOHLS v. ELLISON*

"Expert Declaration of Prof. Jeff Hancock" (filed Nov. 1, 2024), https://storage.courtlistener.com/recap/gov.uscourts.mnd.220348/gov.uscourts.mnd.220348.23.0.pdf

- **"I conduct studies on the impact of social media and artificial intelligence (AI) technology on misinformation and trust ***."**

WHAT MIGHT GO WRONG: *KOHLS v. ELLISON*

"Declaration of Prof. Jeffrey Hancock in Support of Motion for Leave to File an Amended Declaration" (filed Nov. 27, 2024), https://storage.courtlistener.com/recap/gov.uscourts.mnd.220348/gov.uscourts.mnd.220348.39.0.pdf

- **November 1st Declaration cites to things that do not exist (as plaintiffs' pointed out in their memorandum in support of the motion to exclude).**
- **"I am writing to acknowledge three citation errors in my expert declaration ***."**
- **"*** I stand firmly behind all of the substantive points in the declaration."**

WHAT MIGHT GO WRONG: *KOHLS v. ELLISON*

From the Order on Exclusion of Expert Testimony:

- **"Attorney General Ellison concedes that Professor Hancock included citations to two non-existent academic articles and incorrectly cited the authors of a third article.**
- **Professor Hancock admits that he used GPT-4o to assist him in drafting his declaration but, in reviewing the declaration, failed to discern that GPT-4o generated fake citations to academic articles."**
- **"The irony."**

32

WHAT MIGHT GO WRONG: *KOHLS v. ELLISON*

- "Professor Hancock's citation to fake, AI-generated sources in his declaration—even with his helpful, thorough, and plausible explanation—shatters his credibility with this Court. At a minimum, expert testimony is supposed to be reliable. More fundamentally, signing a declaration under penalty of perjury is not a mere formality; rather, it 'alert[s] declarants to the gravity of their undertaking and thereby have a meaningful effect on truth-telling and reliability.' The Court should be able to trust the 'indicia of truthfulness" that declarations made under penalty of perjury carry, but that trust was broken here.'"

NEW JERSEY CASE LAW

State v. Jacobs, **Docket No. A-1033-22 (N.J. App. Div. Dec. 23, 2024) (*per curiam*) (addressing reliability of State's expert witness under *Frye*)**

In re Accutane Litig., **234 N.J. 340 (2018) (adopting *Daubert* for assessing reliability of expert methodology in civil cases)**

State v. Olenowksi, **253 N.J. 133 (2023) (adopting *Daubert* for assessing reliability of expert methodology in criminal cases)**

NEW JERSEY CASE LAW

In re Accutane Litig.:

- "At issue in this appeal involving a civil mass tort action is the admissibility of scientific evidence under the New Jersey Rules of Evidence."
- "We are persuaded that the factors identified originally in ***Daubert*** should be incorporated for use by our courts. The factors dovetail with the overall goals of our evidential standard and would provide a helpful—but not necessary or definitive—guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony."

NEW JERSEY CASE LAW

- "Our view of proper gatekeeping in a methodology-based approach to reliability for expert scientific testimony requires the proponent to demonstrate that the expert applies his or her scientifically recognized methodology in the way that others in the field practice the methodology. When a proponent does not demonstrate the soundness of a methodology, both in terms of its approach to reasoning and to its use of data, from the perspective of others within the relevant scientific community, the gatekeeper should exclude the proposed expert testimony on the basis that it is unreliable."

36

NEW JERSEY CASE LAW

***State v. Knight,* A-37/38-23, 2024 N.J. LEXIS 1174 (N.J. Dec. 18, 2024):**

- **"A key issue raised by both defendants is whether the trial court erred by allowing the jury to observe multiple times, in slow motion and with pauses, an approximately six-second segment of a surveillance video. *** The trial judge permitted those jury playbacks under her supervision in the courtroom, over defendants' objection." (from the decision below, 477 N.J. Super. 400 (App. Div. 2023)).**

NEW JERSEY CASE LAW

- "But some tools or functions may be so specialized that their usage constitutes an alteration of evidence, or the creation of new evidence. If a party intends to play a video with something beyond the 'basic techniques', noted in [State v.] Watson, [254 N.J. 558 (2023)], that party must come forward and alert the trial court and opposing counsel to any modifications or alterations made to the evidence. In those situations, a qualified expert may need to testify about the modifications consistent with N.J.R.E. 702. Watson, 254 N.J. at 606 (explaining that an expert would be required to testify about how they 'enhance[d] the quality of an electronic or video recording," or used "more elaborate forensic techniques . . . like 'pixel tracking'')."

RESOURCES

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J.E. Baker, et al., *An Introduction to Artificial Intelligence for Federal Judges* (FJC: 2023), https://permanent.fdlp.gov/gpo195237/An_Introduction_to_Artificial_Intelligence_for_Federal_Judges.pdf

R.J. Hedges, "Artificial Intelligence Admissibility Caselaw" (last updated Jan. 2024) (in materials)

L. Liu, "Stanford Misinformation Expert Accused of Using AI to Fabricate Court Statement," *The Stanford Daily* (Dec. 1, 2024), https://stanforddaily.com/2024/12/02/jeff-hancock-court-declaration/

S. McConnell, "New Law Review Article Explains the History and Application of Amended Fed. R. Evid. 702," *Drug & Device Law* Blog (Jan. 8, 2025), https://www.druganddevicelawblog.com/2025/01/new-law-review-article-explains-the-history-and-application-of-amended-fed-r-evid-702.html

FINAL SESSION

Session 7 ~
The Ethics of AI/GAI Use by Attorneys
March 12, 2025

QUESTIONS?/COMMENTS?

THANK YOU!

42

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.

Marissa J. Moran is Professor of Law and Paralegal Studies at New York City College of Technology, CUNY, in Brooklyn, New York, where she teaches Legal Technology, Forensic Science and the Legal Process, Legal Ethics and Professional Responsibilities, and Theatre of Law.

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Professor Moran received her B.A., *cum laude*, from Fordham University and her law degree from Brooklyn Law School. She clerked for the Honorable Burton R. Lifland, Chief Judge, United States Bankruptcy Court, Southern District of New York.