

Generative AI and Courts: How Are They Getting Along?

Hon. Bernice Bouie Donald (ret.), Hon. James C. Francis IV (ret.), Ronald J. Hedges, Kenneth J. Withers

Reprinted with permission.





September 2023

Generative AI and Courts: How Are They Getting Along?

Hon. Bernice Bouie Donald (Retired)

Sixth Cir. Court of Appeals

Hon. James C. Francis IV (Retired)

JAMS

Ronald J. Hedges

Ronald J. Hedges LLC

Kenneth J. Withers

The Sedona Conference®

Introduction

Generative artificial intelligence (GAI) burst into public consciousness in November of 2022. It's fair to say that, as of today, GAI has gone mainstream and is a regular—and constant—feature of articles that, among other things, address the benefits and risks associated with its use. As was inevitable, GAI is now a feature of civil litigation as an element of a claim and (soon) an element of a defense. However it arises in litigation, GAI will be a subject of discovery. Moreover, GAI is also a research tool that attorneys have used and misused, and the latter has led to sanctions in one civil action and a number of prophylactic orders issued by federal judges.

This article will examine the nature of GAI and what it can offer attorneys, the concept of “hallucinations” and what those have led courts to do, and likely causes of action arising out of GAI.

And stay tuned. We expect GAI to evolve as a technology on a rapid basis, as we expect federal and state courts to address it!

GAI: What It Is and What Attorneys Might Do with It

Artificial Intelligence (AI) is a broad term that refers to the ability of machines to perform tasks that are typically associated with human intelligence, such as learning, reasoning, and problem-solving.

Technically speaking, the [National Institute for Standards and Technology defines artificial intelligence](#) as “an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments.” The [U.S. military defines it](#) as “the ability of machines to perform tasks that normally require human intelligence – for example, recognizing patterns, learning from experience, drawing conclusions, making predictions, or taking action – whether digitally or as the smart software behind autonomous physical systems.”

The concept of artificial intelligence has been with us for almost 200 years. In the early 19th century, Ada Lovelace (1815-1852) collaborated with Charles Babbage (1791-1871) to design the Analytical Engine, a primitive mechanical computer. Lovelace's notes on the machine included an algorithm for calculating Bernoulli numbers, which is considered by most historians to be the first computer program. In other writings, she proposed that machines could be programmed to simulate human thought. Later, the concept of artificial intelligence was popularized in science fiction but generally embodied in mechanical humanoid characters, like Robbie the Robot in the movie *Forbidden Planet*, R2D2 in *Star Wars*, or Marvin the Manic-Depressive Robot in *Hitchhikers Guide to the Galaxy*.

AI has been with us for a long time, built into things we use every day. Common examples are spam filters that learn which email messages you want to read and which you would rather trash. Recommendation systems suggest which song to listen to or movie to watch next based on your prior selections or those of other users. Smart household appliances can be programmed to cater to your preferences. Later, customer support systems can diagnose the problem with your smart household appliances when they go haywire. Medical diagnostic systems interpret x-rays and lab results, often more accurately than trained physicians. Self-driving vehicles are an advanced set of AI

applications that we are all learning to share the road, bike lane, or sidewalk with. And the list goes on.

Most AI applications we interact with on a daily basis are computational in nature. They produce results based on predefined sets of operations. While the speed and accuracy with which the machines present results may impress us as “intelligence” beyond that of mere mortals, AI at the most common level is really a sophisticated *imitation* of human intelligence. The machines are not “thinking,” they are matching patterns.

Machine Learning (ML) takes AI to a higher level by enabling machines to modify their operations based on data inputs. ML’s operational algorithms engage in data analysis to identify patterns and make predictions based on statistical probability. As more data is ingested into the system, it refines its algorithms without a human programmer making the modifications.

Examples of ML in common use include language translation programs, facial and voice recognition programs, and weather prediction models. In the legal profession, we have already become accustomed to ML, without necessarily knowing it. You may be using “natural language queries” to find statutes or court decisions online, or you may have noticed that your word processor or email application is getting much better at finishing the word you just started typing or suggesting the next word for you to type. ML is a convincing imitation of human intelligence, but it’s not inventive or creative—just better at statistical analysis leading to accurate predictions of what you want.

GAI is a subset of ML that entered popular culture at the end of last year when ChatGPT, developed by OpenAI, was made available to the public. We asked ChatGPT to define itself, and it replied, “Generative artificial intelligence creates content, such as text, images, or music, autonomously, using machine learning models to produce original and creative output.”

That’s the key distinction. AI can crunch massive volumes of words and numbers to find answers and ML can learn as it goes with various feedback mechanisms. GAI goes one step further and presents its findings as newly generated text, images, charts, graphs, audio and video, even legal articles. As GAI continuously improves with more data and feedback from users, its presentations become difficult, if not impossible, to distinguish from human-generated presentations.

It should be pointed out that GAI is not a search engine like Google, Lexis, or Westlaw. It operates on a completely different model and presents completely different results. Using a search engine, you might want to find documents that use the phrase “due process” or “due within three words of process.” The search engine will return

citations or links to the documents that meet those criteria. Forty years ago, we thought that was miraculous, but today it can hardly be called intelligent.

GAI, on the other hand, can be prompted to create a new document summarizing the concept of “due process” by assembling all the words relevant to “due process,” drawn from a large dataset of text, based on statistical probability, arranged in sentences and paragraphs that follow appropriate grammatical and stylistic rules. In other words, GAI can write a memo on “due process.” It does not present a list of court decisions or law review articles to read (unless specifically prompted to do so) but creates what appears to be a polished essay on the topic. It might create references or footnotes with what appear to be citations to sources, but these are *imitation* citations, based on the statistical probability that the elements of the citation (name, date, court, reporter page number, etc.) are responsive to the inquiry.

With that understanding of GAI, and a healthy skepticism regarding the accuracy of its results, there is still plenty of room for productively using GAI in the everyday practice of law:

- GAI has been harnessed for contract review, processing thousands of contracts to identify commonalities or gaps to assess risk and recommend updated contract clauses. It can also be used to summarize complex legal language in “plain English” so that parties better understand their contracts or other legal documents.
- GAI has been used to present complex statistical analysis in simpler terms, with charts or graphs when appropriate, to better understand how courts have decided categories of cases, or what the likely settlement range might be for a particular cause of action.
- GAI has been incorporated into language translation programs to significantly improve the readability of translated legal or technical documents; a great advance over the literal translations that computers performed until recently.
- GAI has been used to create initial drafts of complaints, answers, and deposition questions. In this role, GAI is similar to the “form files” kept by many firms for generations to assist novice associates and paralegals, always with the warning that they are just examples and shouldn’t be slavishly copied.
- GAI has a legitimate role in legal research, despite its reputation for inaccuracy. As a tool for brainstorming or creating initial outlines of a research project, it can stimulate thinking and even suggest novel ideas. Just take everything GAI presents with a large grain of salt, and always do your own fact and citation checking.

Hallucinations and How One Court Has Dealt with These

The poster child for the dysfunctional relationship between generative AI and the judiciary is *Mata v. Avianca, Inc.*, 2023 WL 4114965 (S.D.N.Y. June 22, 2023). This was a personal injury case brought against an air carrier, for which the governing substantive law was the Montreal Convention. The air carrier moved to dismiss on statute of limitations grounds, and the plaintiff answered the motion, arguing that the limitations period was tolled during the period that the carrier had been in bankruptcy. Defense counsel alerted the court that many decisions cited in the plaintiff's answer to the motion could not be found, that the decisions appeared to be fake, and that those decisions that could be located did not stand for the propositions for which they were cited. The court then ordered plaintiff's counsel to provide certain of the cited cases. But the copies or excerpts submitted did not relate to actual decisions.

As it turns out, counsel had drafted the original affirmation in opposition by giving ChatGPT prompts such as "provide case law in support that statute of limitations is tolled by bankruptcy of [the airlines] under montreal convention." Then, when the decisions were called into question, counsel sought to verify their authenticity by querying ChatGPT itself, which reassured them that the decisions were real and could be found on legal research databases such as Westlaw and LexisNexis.

The court held that counsel had acted in bad faith and sanctioned the individual attorneys and their firm under Rule 11 of the Federal Rules of Civil Procedure and the court's inherent power. It found that, in addition to submitting fabricated decisions and failing to withdraw the submission after becoming aware of its deficiencies, counsel falsely attested to having made a reasonable inquiry as to the law, misrepresented to the court the basis for seeking an extension, and stated that ChatGPT was used to "supplement" other research when it was, in fact, the only source of the case law cited.

Mata illustrates the need for counsel to be cognizant of the limitations of any generative AI tool. Counsel were unaware that the ChatGPT was not performing actual legal research but was merely fabricating "cases" in the style of actual decisions in response to the instructions of counsel to achieve a predetermined result. One of the fake decisions, which is attached to the *Mata* opinion, is a striking example of a GAI hallucination: It has an apparent docket number, uses legal jargon, cites "precedent," and is attributed to a real judge. But, as the court in *Mata* observed, the hallucination goes off on irrelevant tangents, its legal analysis is "gibberish," and it ends without any conclusion. It is effectively a caricature of legal reasoning.

Mata also exemplifies the need for attorneys who choose to use GAI to be aware of its benefits and risks. In other words, those attorneys must be competent to use GAI (and AI) consistent with their ethical duties under Model Rule of Professional

Conduct 1.1. (We leave for another day the applicability of other model rules, including MRPC 5.3, the duty to supervise non-lawyers.)

Proactive Approaches to GAI Use

Some judges have been quick to react to the advent of GAI in general and to *Mata* in particular. One Texas appellate court identified nonexistent “published” cases and errant jump-cites in a brief filed in connection with a criminal appeal. Previously, the court might have assumed incompetence or willful fabrication by counsel. In the present environment, however, the court opined that “at least the ‘Argument’ portion of the brief may have been prepared by artificial intelligence.” *Ex parte Lee*, No. 10-22-00281-CR (Tex. 10th Ct. App. July 19, 2023).

While the court in *Lee* did not ultimately need to decide whether the offending brief had been authored by GAI, the case illustrates the fact that GAI does “hallucinate” and does that so well that we may not tell the difference between a real and illusory citation just by looking at it. As they say, “To err is human, to really screw things up requires a computer.” Which is why, in our opinion, human review is imperative—and required by Federal Rules of Civil Procedure 11(b) and 26(g)(1).

Some judges have sought to preempt misuse of GAI in the courtroom by issuing chambers’ rules or practices. For example, one judge requires that counsel attest that no portion of any filing will be drafted by GAI or, if it is, it will be checked against traditional legal databases by a human. See [“Mandatory Certification Regarding Generative Artificial Intelligence,”](#) Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas.

Another judge mandates that counsel identify any specific portions of text created by GAI as well as the program used and certify that use of the GAI has not resulted in disclosure of confidential or proprietary information. See [“Order on Artificial Intelligence,”](#) Judge Stephen Alexander Vaden, U.S. Ct. of International Trade (June 8, 2023).

A third judge, perhaps unwittingly, requires disclosure of the use of *any* artificial intelligence—not specifically limited to generative AI. By its terms, this requirement directs counsel to reveal the use of seemingly innocuous programs like Grammarly. [“Standing Order Re: Artificial Intelligence \(‘AI’\) in Cases Assigned to Judge Baylson,”](#) Eastern District of Pennsylvania (June 6, 2023).

The danger of rules or practices such as these is that, by suggesting skepticism of GAI and associating its use with added burden and risk, courts will impede GAI’s use in court filings even when it has attained reliability equivalent to that of human drafters.

A more thoughtful approach has been adopted by Judge Subramanian in the Southern District of New York, whose rule states that “use of ChatGPT and or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any such research conducted by these means.” [“Individual Practices in Civil Cases,”](#) Southern District of New York (July 28, 2023).

Causes of Action Arising Out of GAI Use or Misuse

Here are causes of action implicating GAI that have already been pled in complaints—or that we expect will be:

- Antitrust
- Data Breach
- Privacy Breach
- Discrimination
- Copyright or Other Intellectual Property Infringement
- Defamation
- Malicious use-related, such as Deepfakes, Hate Speech, and Scamming

We will not address these in detail, and, of course, we have only listed civil actions. We leave for another day regulatory investigations and proceedings involving GAI. And, needless to say, expect to see criminal investigations and proceedings!

Conclusion

As GAI approaches one year on the public scene, it has stimulated prolific conversation, research, application, excitement, and concern. There is a mix of apprehension and anticipation about GAI's impact on society generally, and its impact on the legal profession specifically. Undoubtedly, it presents exciting opportunities for the advancement of the legal profession, but nobody quite yet knows the boundaries of GAI or what it means for the future of work; and courts are now only scratching the surface as to the limitations on which attorneys can use GAI.

New technologies offer benefits and risks as they enter the “market.” The full spectrum of those perils and opportunities may not be fully appreciated by designers and developers.

So it is with GAI. There is one certainty: inevitably, within years if not sooner, GAI will become a fixture of modern society; and it will continue to play a role in the relationship between attorneys and the courts and attorneys and clients.

Nevertheless, the foundational rules of the legal profession will remain, and new issues will be addressed within existing ethical, procedural, and substantive frameworks. Judges will continue to discharge their obligation to protect the integrity of the judicial process and apply ethical precepts, all while adjudicating complicated issues. Attorneys must assist the courts by being faithful to their ethical duties.

As attorneys respond to what many see as a technologically driven need to generate higher quality work with increased efficiency, some attorneys may see GAI as a means to “ease” or minimize the burdens of, among other things, writing and researching. But while GAI is one among many tools available to attorneys, it cannot supplant the lawyer’s duties of competence and diligence.

The Honorable Bernice Bouie Donald was nominated to the United States Court of Appeals for the Sixth Circuit by President Barack Obama and became the first African woman to serve as a judge on that court. Judge Donald has handled complex bankruptcy, commercial, insurance, ERISA, labor and employment, and malpractice cases, as well as other cases under federal statutes and laws while serving in the federal judiciary at three levels.





The Honorable James C. Francis IV is an arbitrator, mediator, and special master with JAMS. From 2017 through 2019, he was a Distinguished Lecturer at the CUNY School of Law, where he taught Electronic Discovery, Civil Procedure, Evidence, Federal Courts, and Constitutional Torts. From 1985 until 2017, he served as a United States Magistrate Judge in the Southern District of New York.

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 for over 20 years. Ron speaks and writes on a variety of topics, many of which are related to electronic information, including procedural and substantive criminal law, information governance, litigation management, and integration of new technologies such as artificial intelligence into existing information governance policies and procedures.

Kenneth J. Withers is the Deputy Executive Director of The Sedona Conference® and its Corporate Secretary. He has authored widely distributed papers on electronic discovery, hosted a popular website on electronic discovery and electronic records management issues, and presented at more than 300 conferences and workshops for legal, records management, and industry audiences. From 1999 through 2005, he was

Generative AI and Courts: How Are They Getting Along?

a Senior Education Attorney at the Federal Judicial Center in Washington D.C., where he developed Internet-based distance learning programs for the federal judiciary concentrating on issues of technology and the administration of justice.

			
You may also be interested in this PLI Program: Generative AI and Judges: How Are They Getting Along?	PLI Press Publications you may be interested in	To submit an article for consideration, please contact the editor at editor.plichronicle@pli.edu or visit pli.edu/PLIChronicle/contribute for more information	Sign up for a free trial of PLI PLUS at pli.edu/pliplustrial

Disclaimer: The article is based on comments made by the authors during a recent webinar. The viewpoints expressed by the authors are their own and do not necessarily reflect the opinions, viewpoints and official policies of Practising Law Institute, or the authors' organizations or clients.

This article is published on PLI PLUS, the online research database of PLI. The entirety of the PLI Press print collection is available on PLI PLUS—including PLI's authoritative treatises, answer books, course handbooks and transcripts from our original and highly acclaimed CLE programs.