2023 NJSBA Fall Conference

Two Hot Issues in Labor and Employment

This program will address two hot topics for labor and employment attorneys. First, hear about the ramifications of *Pantano vs. New York Shipping Association* from Matthew Schiappa, who argued the case on behalf of the prevailing respondents.

Matthew will delve into The Borrowed Employee Test as discussed in the June 2023 decision**.** The New Jersey Supreme Court considered the test for determining whether someone who commits a tort in the course of employment is a "special employee" and thereby shields the company from liability. Matthew will provide an in-depth analysis of the test used to determine whether a company exercises control over an employee and what it means for your practice.

Then, the Hon. Ronald Hedges will "generate" some excitement when he discusses the second hot issue of the day, how generative A.I. (GAI) will affect your labor and employment practice. Judge Hedges will discuss the nature of GAI and how it is being used, the Model Rules of Professional Conduct, NJ RPC's and GAI, GAI and the Federal Rules of Civil Procedure and finally, what the future might hold.

Speakers:
Hon. Ronald J. Hedges (Ret)
Ronald J. Hedges, LLC, Hackensack
Matthew A. Schiappa, Esq.
Lomurro Law, Freehold

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

Philip Pantano v. New York Shipping Association (A-19-22) (087217)

Argued April 25, 2023 -- Decided June 5, 2023

SABATINO, P.J.A.D. (temporarily assigned), writing for a unanimous Court.

This personal injury case involves application of the multi-factor test announced in Galvao v. G.R. Robert Construction Co., 179 N.J. 462, 471-73 (2004), for evaluating whether a worker who negligently caused a plaintiff's jobsite injury was a so-called "borrowed employee" of the plaintiff's own employer. The Court considers whether an employer's vicarious liability under the borrowed-employee doctrine, as guided by the Galvao factors, is a question of law to be decided by the court or, conversely, a question of fact reserved for the jury.

In November 2013, plaintiff Philip Pantano, a mechanic employed by Container Services of New Jersey (CSNJ), was injured at work while attempting to move a heavy piece of industrial equipment. Lawrence Giamella, who was also working on the site that day, tried to help plaintiff move the equipment with a forklift; plaintiff's foot was crushed in the process. Plaintiff collected workers' compensation benefits from his employer, CSNJ. He and his wife also brought a personal injury action against numerous defendants, including Marine Transport, Inc. (MT). MT and CSNJ are related companies owned by the same person. The core of the parties' dispute concerns which entity or entities employed the negligent worker, Giamella, at the time of the accident: MT, CSNJ, or both companies.

The trial court granted summary judgment in favor of CSNJ because of the statutory bar established by N.J.S.A. 34:15-8. MT also moved for summary judgment, arguing that it was not Giamella's employer and was therefore not vicariously liable for his negligence. Although Giamella was on MT's payroll, MT raised the affirmative defense that he was a "borrowed servant" or "special employee" working for CSNJ at the time of the accident, applying the multi-factor test set forth in Galvao. The pretrial judge denied MT's motion.

At the close of plaintiff's case, MT moved for judgment pursuant to Rule 4:40-1, founded on the same borrowed-employee theory it had raised earlier in its summary judgment motion. The trial judge did not rule on the motion, reserving judgment for after the jury verdict.

The jury awarded plaintiff damages for pain and suffering, lost wages, and loss of consortium. Pursuant to an agreement reached by counsel, the jury was asked to presume that MT was vicariously liable and was not asked to resolve the borrowed-employee question. Instead, counsel assented to have the court resolve the borrowed-employee argument through the mechanism of MT's yet-to-be-decided Rule 4:40-1 motion. In essence, the agreement contemplated that if the court ruled in MT's favor on the motion and found that Giamella was, in fact, a borrowed employee working for CSNJ, then MT would not be liable for a jury award. Conversely, if the court denied MT's motion, then MT would be liable for the award under the parties' agreement.

The trial judge vacated the verdict and awarded judgment to MT, concluding that Giamella was a borrowed employee working for CSNJ when the accident occurred. The Appellate Division reversed, vacated the directed verdict, and reinstated the jury verdict in plaintiff's favor. The Court granted MT's petition for certification limited to whether the court or the jury should determine the borrowed-employee issue. 252 N.J. 244 (2022).

HELD: Application of the Galvao multi-factor test -- which can involve matters of disputed fact and witness credibility -- is presumptively for a jury to determine. The court itself should not resolve the borrowed-employee issue unless the evidence concerning the factors is so one-sided that it warrants judgment in a moving party's favor as a matter of law. Because the evidence in this case concerning the Galvao factors was not sufficiently one-sided, the trial court incorrectly granted defendant's Rule 4:40-1 motion and deemed the worker who caused the accident a borrowed employee of plaintiff's own employer.

1. An employer is generally responsible for harm suffered by third parties through any negligent work-related acts of its employees. In some situations, an employer, known as a "general employer," loans one of its workers to another employer, known as a "special employer," for defined tasks or purposes. When such arrangements are created and the loaned or "borrowed" worker negligently injures someone, questions arise regarding whether the general employer is vicariously liable for that negligence, whether the special employer is liable, or whether both employers are liable. Galvao fused two historical tests for resolving the liability issue in borrowed-employee cases -- the "control test" and the "business furtherance test." Under the hybrid Galvao test, "control" is the threshold inquiry. There are four methods by which a party can demonstrate control: through direct evidence of on-spot control, or by showing that an employer has "broad" control based on (1) the "method of payment"; (2) who "furnishes the equipment"; or (3) the "right of termination." 179 N.J. at 472. "The retention of either on-spot, or broad, control by a general employer would satisfy this first prong." Ibid. (emphasis added). If (and only if) the general employer is found to have control, the analysis moves onto the

"business-furtherance prong." Ibid. A worker is furthering the general employer's business if the work being done is within the general contemplation of the general employer and the general employer derives an economic benefit by loaning its employee. Id. at 472-73. Galvao also provided guidance for when a worker may be serving as a dual employee of both the general and special employers. (pp. 10-13)

2. The independent strands of case law before Galvao using either the control test or the business furtherance test plainly signified that a jury, not a judge, presumptively must evaluate whether a negligent worker who causes an accident was or wasn't a "borrowed employee" of the special employer. The Court reviews relevant case law and observes that the pre-Galvao tradition of presumptively deeming borrowed-employee disputes as questions of fact for a jury makes sense. Factual disputes about control and business advantage can readily turn on the assessment of the credibility of competing witnesses. Juries are well-suited to making those assessments, as they are for a host of other factual disputes entrusted to them at trial. The Court finds that nothing in Galvao did or should change that traditional allocation of the jury's role in borrowed-employee disputes, although it notes that the court may decide the issue without a jury upon a summary judgment motion or on a Rule 4:40-1 motion if the proofs at trial on the issue are sufficiently one-sided. The Court thus reaffirms that the traditional role of the jury as the finder of fact in resolving borrowed-employee questions was unaltered by Galvao. The jury, not the trial judge, presumptively applies Galvao's hybrid multi-part test, subject to possible motion practice before trial under Rule 4:46-2 and at trial under Rule 4:40-1. The Court recommends that the Model Civil Jury Charges Committee consider whether a specific model charge, with perhaps a recommended verdict form, should be developed to assist jurors in applying the Galvao factors. (pp. 13-17)

3. Applying those principles and viewing the trial record in the light most favorable to plaintiff as the non-moving party, the Court explains why the evidence pertinent to the Galvao factors, at the very least, pointed in both directions. It was improper for the trial court to decide a Rule 4:40-1 motion in MT's favor with such a mixed record, and the motion should have been denied. Ordinarily that would mean that the borrowed-employee issue should be presented to the jury to resolve. However, because both sides made clear in light of their agreement that they did not desire a remand to the trial court for a new jury trial on the agency issues, the consequence of the denial of the Rule 4:40-1 motion is to reinstate the jury's verdict and to hold MT vicariously liable for the molded damages award. (pp. 17-19)

AFFIRMED.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, and WAINER APTER join in JUDGE SABATINO's opinion. JUSTICE FASCIALE did not participate.

SUPREME COURT OF NEW JERSEY

A-19 September Term 2022

087217

Philip Pantano and Phyllis Pantano,

Plaintiffs-Respondents,

v.

New York Shipping Association, Container Services, Inc., Hyster-Yale Group, Inc., 303 Doremus Urban Renewal, NAP Realty Corporation, Eastern Lift Truck Co., Inc., Metropolitan Marine Maintenance Contractors' Association, Inc., and Port Technical Training Institute,

Defendants,

and

Marine Transport, Inc.,

Defendant-Appellant.

On certification to the Superior Court, Appellate Division.

Argued	Decided
April 25, 2023	June 5, 2023

Patrick B. Minter argued the cause for appellant (Donnelly Minter & Kelly, attorneys; Patrick B. Minter and Jared J. Limbach, of counsel and on the briefs, and David M. Blackwell, on the briefs).

Matthew A. Schiappa argued the cause for respondents (Lomurro, Munson, Comer, Brown & Schottland,

attorneys; Matthew A. Schiappa and Christina Vassiliou Harvey, of counsel and on the briefs).

JUDGE SABATINO (temporarily assigned) delivered the opinion of the Court.

This personal injury case involves the application of the multi-factor test we announced in Galvao v. G.R. Robert Construction Co., 179 N.J. 462, 471-73 (2004), for evaluating whether a worker who negligently caused a plaintiff's jobsite injury was a so-called "borrowed employee" of the plaintiff's own employer. Our grant of certification is confined to whether an employer's vicarious liability under the borrowed-employee doctrine, as guided by the Galvao factors, is a question of law to be decided by the court or, conversely, a question of fact reserved for the jury.

Defendant argues the Appellate Division erred by reversing the trial judge's determination that the negligent worker who caused plaintiff's injury in this case was a borrowed employee, and by construing the record as indicative of genuine issues of material fact for a jury under the Galvao factors. Defendant stresses that this Court's opinion in Galvao did not expressly require the factors to be evaluated by juries rather than by trial courts. Defendant also relies upon several illustrative cases in which borrowed-employee status was resolved by the trial court, either on summary

judgment before trial pursuant to Rule 4:46-2 or on a motion for judgment at trial pursuant to Rule 4:40-1.

We reject defendant's contentions. Amplifying Galvao, we hold that the application of the multi-factor test -- which can involve matters of disputed fact and witness credibility -- is presumptively for a jury to determine. The court itself should not resolve the borrowed-employee issue unless the evidence concerning the factors is so one-sided that it warrants judgment in a moving party's favor as a matter of law.

The fact that the records in some past borrowed-employee cases were sufficiently one-sided for the court to determine the worker's status does not signify that we should depart from pre-Galvao case law treating that status as a presumptive jury issue.

As the Appellate Division rightly concluded, because the evidence in this case concerning the Galvao factors was not sufficiently one-sided, the trial court incorrectly granted defendant's Rule 4:40-1 motion and deemed the worker who caused the accident a borrowed employee of plaintiff's own employer. Consequently, we affirm the Appellate Division's judgment to enforce the parties' mutual agreement to implement the jury verdict if defendant's motion failed.

I.

The facts and procedural history relevant for our purposes may be stated concisely. On November 19, 2013, plaintiff Philip Pantano, a mechanic employed by Container Services of New Jersey (CSNJ), was injured at work while attempting to move a heavy piece of industrial equipment (called a "genset") he had knocked on its side. Lawrence Giamella, who was also working on the site that day, tried to help plaintiff move the genset back into position with a forklift. As Giamella operated the forklift, a chain slipped, causing the genset to crush plaintiff's left foot. After several unsuccessful surgeries, plaintiff's foot was amputated.

Plaintiff collected workers' compensation benefits from his employer, CSNJ. He and his wife also brought a personal injury action against numerous defendants,[1] including petitioner Marine Transport, Inc. (MT).

The core of the parties' dispute concerns which entity or entities employed the negligent worker, Giamella, at the time of the accident: MT, CSNJ, or both companies. MT and CSNJ are related companies owned by Robert Castelo. The companies jointly lease and occupy a large shipping yard on the Newark waterfront.

[1] None of the other named defendants are pertinent to the issues before us.

CSNJ is in the business of repairing shipping equipment, such as containers and refrigeration systems. MT, meanwhile, is in the trucking business, transporting containers from Port Newark to their inland destinations, although MT's employees regularly perform mechanical work for CSNJ's customers. The revenues from that mechanical work go to CSNJ, and CSNJ does not reimburse MT.

CSNJ is a union shop employer bound by a collective bargaining agreement that requires CSNJ to pay its unionized workers time-and-a-half overtime wages on weekends and holidays. By contrast, MT is not a union shop. At times, CSNJ's unionized employees worked on MT's payroll on the weekends at their regular, weekday wages. All workers at the shared workplace were supervised by a manager paid exclusively by CSNJ.

Plaintiff claimed that MT helped operate the yard and should have known about CSNJ's negligence. The trial court dismissed the claims against all co-defendants except for CSNJ, MT, and the companies' landlord, and discovery ensued.

Following discovery, the remaining defendants moved for summary judgment. The court granted the landlord's motion because of a delegation-of-duties provision within its lease with CSNJ and MT. The court also granted CSNJ's motion because of the statutory bar that precludes, except in rare

instances involving an intentional tort or its equivalent, injured workers from bringing tort cases against their own New Jersey employers or arising out of the negligence of their fellow employees unless the employer has agreed to opt out of the workers' compensation system. See N.J.S.A. 34:15-8.

In seeking summary judgment, MT argued that it was not Giamella's employer and was therefore not vicariously liable for his negligence. Although Giamella was on MT's payroll, MT raised the affirmative defense that he was a "borrowed servant" or "special employee" working for CSNJ at the time of the accident, applying the multi-factor test set forth in Galvao. The pretrial judge then handling the case found there were unsettled issues of material fact on the Galvao factors and denied MT's motion.

After an initial mistrial, plaintiff and MT had an eight-day jury trial in December 2019. At the close of plaintiff's case, MT moved for judgment pursuant to Rule 4:40-1, founded on the same borrowed-employee theory it had raised earlier in its summary judgment motion. The trial judge did not rule on the motion, reserving judgment for after the jury verdict.

The jury found Giamella seventy percent negligent and plaintiff thirty percent negligent. It awarded plaintiff damages for pain and suffering, lost wages, and loss of consortium, which the trial judge molded to $861,000 pursuant to the Comparative Negligence Act, N.J.S.A. 2A:15-5.2(d). Pursuant

to an agreement reached by counsel, the jury was asked to presume that MT was vicariously liable and was not asked to resolve the borrowed-employee question. Instead, counsel assented to have the court resolve the borrowed-employee argument through the mechanism of MT's yet-to-be-decided Rule 4:40-1 motion. In essence, the agreement contemplated that if the court ruled in MT's favor on the motion and found that Giamella was, in fact, a borrowed employee working for CSNJ, then MT would not be liable for a jury award. Conversely, if the court denied MT's motion, then MT would be liable for the award under the parties' agreement. Although the trial judge initially expressed reluctance to proceed in this manner, he acquiesced to counsel's plan.

After considering additional proofs on the borrowed-employee issue outside of the jury's presence, the trial judge vacated the verdict and awarded judgment to MT as a matter of law in a written opinion. The judge concluded that Giamella was a borrowed employee working for CSNJ when the accident occurred. Applying the Galvao factors, which we will discuss below, the trial judge found that: (1) "in every practical sense Giamella was a functional employee of CSNJ" due to CSNJ's control over his work, and (2) "there [was] no evidence that MT derived an economic benefit by providing the services of Giamella to CSNJ." Plaintiff appealed that ruling.

In a detailed opinion, the Appellate Division reversed the trial court and reinstated the jury verdict. Like the trial judge, the appeals court expressed a reticence to resolve Giamella's status as a matter of law, observing that "[f]acts central to the question, if not the very question itself, could have been determined by the jury." But, despite that reticence, the court abided by the agreed-upon process that removed the status issue from the jury.

Turning to that issue, the Appellate Division found the trial judge erred by performing a complete analysis of the Galvao factors and reaching a conclusion on the merits of the borrowed-employee question after weighing the evidence. According to the appeals court, the trial judge should have performed a directed verdict analysis in accordance with Rule 4:40-1's requirement that the court evaluate such a motion by viewing the trial proofs in the light most favorable to the non-moving party, here the plaintiff.

Applying that standard, the Appellate Division discerned that there was substantial evidence to support both main prongs of the Galvao test (control and business furtherance) in plaintiff's favor, which more than satisfied plaintiff's burden under Rule 4:40-1 of presenting a scintilla of proof to successfully oppose a directed verdict motion. Specifically, the appeals court ruled there was "enough evidence for a jury to have found MT retained sufficient control of Giamella," especially because MT paid for Giamella's

forklift training after the accident. The court also disagreed with the trial judge that MT received no financial benefit, stating that such a conclusion "defies common sense." The appeals court inferred from the record that "MT obviously received financial benefit from the arrangement, or it would not have participated in it." The court found the idea that MT would simply donate Giamella's labor to CSNJ "not only inconceivable . . . but incongruent with the indulgent standard afforded the plaintiff[] when considering the evidence of record on a motion under Rule 4:40-1." Consequently, the court vacated the directed verdict and reinstated the jury verdict in plaintiff's favor.

MT then filed a petition for certification, raising several points. As its primary argument in its petition, MT contended that the borrowed-employee question "is purely a legal issue" that should not be decided by a jury. Nor should the issue be evaluated by a court with any concern about how a jury might consider or weigh the Galvao factors. Instead, the court should decide the issue itself on a plenary basis, as the trial judge did here. According to MT, the Appellate Division mistakenly overturned the trial court's plenary finding that Giamella was CSNJ's borrowed employee. MT thus urges that the judgment in its favor be reinstated.

As we noted at the outset, we granted the petition solely on a limited but core issue: whether an employer's vicarious liability under the borrowed-

employee doctrine, as guided by the Galvao factors, is a question of law to be decided by the court or, conversely, a question of fact reserved for the jury. 252 N.J. 244 (2022).

II.

The borrowed-employee doctrine, also known as the "special employee" (or, in a former era, "borrowed servant") doctrine of vicarious liability, was established long ago in our jurisprudence. The doctrine's origins and rationale were described at length in this Court's opinion in Galvao, see 179 N.J. at 467-71, and we need not repeat that discussion in full.

With respect to the basic concept of vicarious liability, it will suffice to say here that a party "who expects to derive a benefit or advantage from an act performed on [that party's] behalf by another must answer for any injury that a third person may sustain from it." Id. at 468 (quoting Carter v. Reynolds, 175 N.J. 402, 408 (2003)). Thus, an employer is generally responsible for harm suffered by third parties through any negligent work-related acts of its employees. In some situations, an employer, known as a "general employer," loans one of its workers to another employer, known as a "special employer," for defined tasks or purposes. When such arrangements are created and the loaned or "borrowed" worker negligently injures someone, questions arise regarding whether the general employer is vicariously liable for that

negligence, whether the special employer is liable, or whether both employers are liable.

Before this Court's opinion nineteen years ago in Galvao, the "borrowed employee" doctrine developed through two distinct tests to determine whether a general employer would be liable for an employee's negligence. In one line of cases, the law examined whether the borrowed employee was under the control of the general employer, as measured by several factors. Id. at 468. In another line of cases, the law considered whether the borrowed employee's work furthered the business interests of the general employer. Ibid.

Galvao fused the historical "control test" with the historical "business furtherance test." The Court's opinion created, going forward, a hybrid test to be applied in resolving borrowed-employee liability disputes. The two-part test was explained in Galvao as follows.

"Control" is the threshold inquiry. Id. at 472. There are four methods by which a party can demonstrate control. Id. at 472-73. The first is showing "on-spot" control, which is "the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done." Id. at 472 (quoting Wright v. State, 169 N.J. 422, 436-37 (2001)). As an alternative to direct evidence of on-spot control, parties can show that an employer has

"broad" control in any of three ways: based on (1) the "method of payment"; (2) who "furnishes the equipment"; and (3) the "right of termination." Ibid. (quoting Wright, 169 N.J. at 437). "The retention of either on-spot, or broad, control by a general employer would satisfy this first prong." Ibid. (emphasis added). A "lack of control ends the inquiry." Id. at 474.

If (and only if) the general employer is found to have control, the analysis moves onto the "business-furtherance prong." Id. at 472. A worker is furthering the general employer's business if both "'the work being done [by the loaned employee] is within the general contemplation of the [general employer,]' and the general employer derives an economic benefit by loaning its employee." Id. at 472-73 (second alteration in original) (emphases added) (quoting Viggiano v. William C. Reppenhagen, Inc., 55 N.J. Super. 114, 119 (App. Div. 1959)). If the general employer either did not expect or intend for the employee to perform the relevant project for the special employer or did not receive a benefit from the employee's work, then the employee is a borrowed employee in the employ of the borrowing employer, regardless of who controlled the employee. Id. at 474.

Galvao further refined the law by noting that, in some instances, a worker may be serving as a dual employee of both the general employer and the special employer. Id. at 474-75. The opinion "recognize[d] that a situation

can arise where general and special employers both retain some control over a project and both stand to reap an economic benefit from it." Id. at 474. "In those circumstances, allocating liability between the responsible parties might be appropriate as it would in any matter in which two or more parties are responsible for a plaintiff's injuries." Id. at 474-75.

III.

We now focus on the sole doctrinal question before us: whether the multi-factor Galvao test should be applied by a jury or by the trial judge.

The independent strands of case law before Galvao using either the control test or the business furtherance test plainly signified that a jury, not a judge, presumptively must evaluate whether a negligent worker who causes an accident was or wasn't a "borrowed employee" of the special employer.

Almost a century ago in Pedersen v. Edward Shoe Corp., the Court of Errors and Appeals ruled that a jury, rather than a judge, properly decided the question of whether a coal delivery boy who caused an accident to a passerby when delivering coal to a shoe cobbler's shop "lost his identity" as the coal company's worker and became a borrowed employee and agent of the cobbler. 104 N.J.L. 566, 567-68 (E. & A. 1928). Fifteen years later, that same court in Younkers v. Ocean County stated that when there are "conflicting inferences" that could be drawn from the evidence about whether a worker had the status

of a borrowed employee, "submitting the case to the jury was correct." 130 N.J.L. 607, 610 (E. & A. 1943). Later, in Larocca v. American Chain & Cable Co., this Court reiterated that when "the posture of the evidence" made the employment relationship "not determinable as a matter of law," the trial court "should have submitted [the] question to the jury." 13 N.J. 1, 7 (1953). Likewise, in Gibilterra v. Rosemawr Homes, Inc., this Court stated that the borrowed-employee question "is a question for jury determination on the proofs." 19 N.J. 166, 172 (1955). More recently before Galvao, we noted in Volb v. G.E. Capital Corp., that the Court of Errors and Appeals in Younkers correctly treated the borrowed-employee issue as a "jury question." 139 N.J. 110, 129 (1995).

This pre-Galvao tradition of presumptively deeming borrowed-employee disputes as questions of fact for a jury makes sense. In many instances, the general employer's witnesses and proofs will clash with those presented and relied upon by the opposing side. Factual disputes about control and business advantage can readily turn on the assessment of the credibility of competing witnesses. Juries are well-suited to making those assessments, as they are for a host of other factual disputes entrusted to them at trial.

To be sure, certain pertinent facts affecting borrowed or special employment may be readily and objectively established, such as which

employer paid the worker for the services rendered. But other aspects of the multi-part test may require a trier of fact to sort out. In fact, a comparable New Jersey model jury charge has been used for decades to guide jurors in evaluating a tortfeasor's employment status in garden-variety vicarious liability cases, such as when a truck driver collides with a plaintiff and the truck's owner contends the driver was not acting as an agent within the scope of employment. See Model Jury Charges (Civil), 5.10H, "Agency" (rev. Aug. 2011) (formerly 5.10I); see also Estate of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 596 (2015) (stating that the model charge is based on Restatement (Second) of Agency § 220 (1958), which provides factors for differentiating a "servant" -- now termed "employee" -- from an "independent contractor" in respondeat superior cases).

Nothing in Galvao did or should change that traditional allocation of the jury's role in borrowed-employee disputes. Although we did not explicitly say in Galvao that the tradition should continue under the hybrid multi-factor test, there was no need to do so. MT fails to provide us with any reasoned argument as to why the jury's role should be diminished or altered by Galvao.[2]

[2] That said, we do recommend that the Model Civil Jury Charges Committee consider whether a specific model charge, with perhaps a recommended verdict form, should be developed to assist jurors in applying the Galvao factors.

This is not to say that all disputes over borrowed-employee status must be sent to the jury in every case. Before trial, either the plaintiff or defendant can move for full or partial summary judgment under Rule 4:46-2 and ask the trial court to resolve the status question. If, under the well-established summary judgment standard, the court finds the evidence, even viewed in the light most favorable to the non-moving party with all reasonable inferences, is so one-sided that there are no genuine issues of disputed material facts, the court may decide the issue without a jury. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Likewise, if the proofs at trial on the issue are that one-sided, the trial court may render a judgment on it as a matter of law upon a motion filed under Rule 4:40-1. Id. at 536; Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). "The role of the judge in that procedure is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if [the judge] finds it to exist." Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 73 (1954).

MT points to one reported federal case, Kelley v. Edison Township, 377 F. Supp. 2d 478 (D.N.J. 2005), and multiple unreported cases in which the borrowed-employee dispute was decided by the court as a matter of law, either on summary judgment or on a mid- or post-trial motion under Rule 4:40-1. But MT misreads the significance of those cases. They are simply instances in

which the facts were so one-sided as to warrant the court's departure from the default rule that the jury normally decides the borrowed-employee question. They do not mean that the default approach is to have the court decide the issue.

In sum, we reaffirm here that the traditional role of the jury as the finder of fact in resolving borrowed-employee questions was unaltered by Galvao. The jury, not the trial judge, presumptively applies Galvao's hybrid multi-part test, subject to possible motion practice before trial under Rule 4:46-2 and at trial under Rule 4:40-1.

IV.

We conclude by briefly applying those principles to this case. In the posture of MT's motion it chose to file under Rule 4:40-1, we must view the trial record in the light most favorable to plaintiff as the non-moving party. Having done so, we agree with the Appellate Division that on the first Galvao prong of control, the evidence was not sufficiently lopsided to conclude as matter of law that MT relinquished its control over Giamella once he started performing tasks for CSNJ at the jobsite. As noted by the Appellate Division, several facts weighed in plaintiff's favor on the control prong. Among other things, they include the fact that MT paid Giamella and, critical to plaintiff's theory that negligent forklift operation caused his injury, the fact that MT

failed to provide Giamella with legally required forklift training. At least some indicia of control by MT are present, thereby posing fact questions for the jury to weigh and resolve. We agree with the appeals court that the trial court committed error in finding conclusively that MT lacked control over Giamella.

We also concur with the Appellate Division that the trial court erred in concluding as a matter of law that Giamella's activities at the jobsite were not in furtherance of MT's business interests, being outside MT's general contemplation, and not providing MT with any economic benefit. As counterproof to that finding, we underscore the Appellate Division's reference to MT's website, which touted that its customers could obtain repair services arranged by MT but performed by CSNJ mechanics. That MT advertised repair services could support a finding that such activities were within its general contemplation. And the fact that CSNJ received the direct payments for those repair services did not eliminate the potential business advantage gained by MT in attracting clientele. As the Appellate Division noted, a "decision to operate through interlocking corporations reflects the pragmatic determination that the specific advantages derived from the multi-corporate enterprise outweigh the risk of tort liability that that form of enterprise entails." (quoting Volb, 139 N.J. at 126).

On the whole, the evidence pertinent to the Galvao factors, at the very least, pointed in both directions. It was improper for the trial court to decide a Rule 4:40-1 motion in MT's favor with such a mixed record. We agree with the Appellate Division that the motion should have been denied.

Ordinarily that would mean that the borrowed-employee issue should be presented to the jury to resolve. However, because both sides made clear to us in light of their agreement that they did not desire a remand to the trial court for a new jury trial on the agency issues, the consequence of the denial of the Rule 4:40-1 motion is to reinstate the jury's verdict and to hold MT vicariously liable for the molded damages award.

V.

The judgment of the Appellate Division is affirmed, and a final judgment is awarded in favor of plaintiff, remanding this case to the trial court for the entry of a final judgment that reinstates the jury verdict.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, and WAINER APTER join in JUDGE SABATINO's opinion. JUSTICE FASCIALE did not participate.

GENERATIVE ARTIFICIAL INTELLIGENCE: AN OVERVIEW

PRESENTER
RON HEDGES

- United States Magistrate Judge, District of New Jersey, 1986-2007
- Chair of Court Technology Committee of ABA Judicial Division
- 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*
- Editor of *Electronic Evidence in Criminal Investigations and Actions: Representative Court Decisions and Supplementary Materials* (hosting by the Massachusetts Attorney General's Office)
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DISCLAIMER

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

TOPICS FOR TODAY

- The nature of GAI and how it is being used
- The Model Rules of Professional Conduct and GAI
- The New Jersey Rules of Professional Conduct and GAI
- The Federal Rules of Civil Procedure and GAI
- What the future might hold

THE NATURE OF GAI AND HOW IT IS BEING USED

- 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 NATURE OF GAI AND HOW IT IS BEING USED

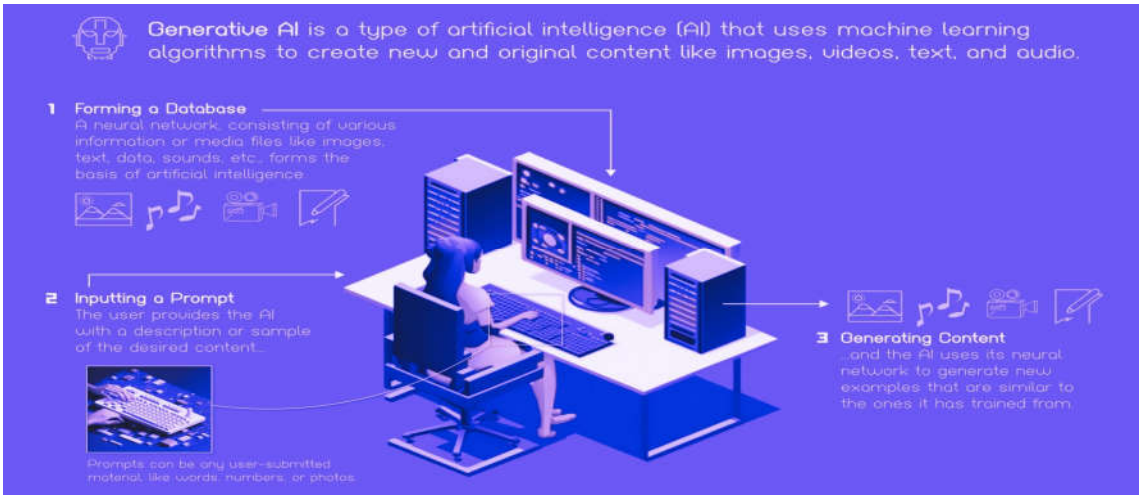
From Wilson:

"Artificial Intelligence (AI) is a branch of computer science that focuses on creating intelligent machines that can think and act like humans. AI has been used to develop computer programs that can solve complex problems and make decisions and predictions with minimal human input."

THE NATURE OF GAI AND HOW IT IS BEING USED

Generative AI (GAI) is a subset of artificial intelligence that uses algorithms to generate new data from existing massive data sources. The data sources primarily come from the Internet. GAI can be used to create text, images, music, and other forms of media. Examples include ChatGPT, Bard, and DALL-E-2.

THE NATURE OF GAI AND HOW IT IS BEING USED



THE NATURE OF GAI AND HOW IT IS BEING USED

- Draft documents
- Conduct legal research
- Contract review
- Predictive analytics ("risk assessment")
  - Civil – whether to file action
  - Criminal – whether to allow pretrial or post-conviction release
- Chatbots for legal advice
  - UPL?
- Brainstorming
- Summarize legal narratives
- Convert "legalese" Into plain language

THE NATURE OF GAI AND HOW IT IS BEING USED

Use of AI and GAI might give rise to causes of action:

- Breach of Privacy
- Discrimination
- Copyright Infringement
- Malicious Uses, Such as Disinformation, Automated Hate Speech, Scamming, Deep Fakes
- Lack of Transparency About How Model was Trained and Evaluated for Bias
- Lack of Uniform Principles on Responsible Use
- Cybersecurity

THE NATURE OF GAI AND HOW IT IS BEING USED

- In employment matters, DOJ enforces disability discrimination laws with respect to state and local government employers.
  - Still a good idea to exhaust administrative remedies with EEOC first.
- DOJ will look seriously at whether the AI screens out persons with disabilities.
- Employers must use accessible tests measuring the applicant's job skills, not the disability, or make other adjustments to the hiring process so that a qualified person is not eliminated because of a disability.
- Know what a reasonable accommodation is.
  - Starting line analogy.
  - DOJ Guidance is at https://beta.ada.gov/ai-guidance/

THE NATURE OF GAI AND HOW IT IS BEING USED

R. 4:10-2(a) (Scope of Discovery):

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought."

THE NATURE OF GAI AND HOW IT IS BEING USED

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?

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THE NATURE OF GAI AND HOW IT IS BEING USED

Some relevant (?) case law:

- *Loomis v. Wisconsin*, 881 N.W. 2d 749 (Wisc. 2016), *cert.* denied, 137 S.Ct. 2290 (2017)
- *People v. Wakefield,* 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), aff'd, 2022 NY Slip Op. 02271 (Ct. App. Apr. 26, 2022)
- *State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)

ABA HOUSE OF DELEGATES
RESOLUTION ADOPTED AUGUST 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."

THE MODEL RULES AND GAI

Andrew Perlman, Dean Suffolk University Law School:

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

THE MODEL RULES AND GAI

"Adding generative AI to the mix of research tools — when deployed with the right protections — reduces the number of tries an attorney will need to get the right cases.

That's going to make a significant improvement in the accuracy and efficiency of lawyering. But it's not *replacing* the attorney.

Don't blame AI for lawyering fails. Like a lot of things in tech, the source of the error here lies between the keyboard and the chair."

Source: Patrice, J. (2023, June 16). *Lawyer figures out CHATGPT made up fake cases in his brief on day of hearing*. Above the Law. https://abovethelaw.com/2023/06/lawyer-figures-out-chatgpt-made-up-fake-cases-in-his-brief-on-day-of-hearing/

THE MODEL RULES AND GAI

- Duty of Competence (MRPC 1.1)
  - What does it mean when dealing with GAI?
- Duty of Confidentiality (MRPC 1.6)
  - Can disclosure to GAI waive attorney-client privilege?
  - What about protection of client confidences?
- Duty to Supervise (MRPC 5.1 and 5.3)
  - How might an attorney GAI?

THE NEW JERSEY RULES AND GAI

RPC 1.1 (Competence):

“A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.”

THE NEW JERSEY RULES AND GAI

I/M/O Adoption of a Child by C.J., 463 N.J. Super. 254 (App. Div. 2020):

"If counsel is unable to obtain sufficient knowledge or retain counsel with expertise, counsel has the ethical obligation to inform the appointing court of his or her inability to handle the case assigned."

"By determining counsel was ineffective we render no opinion as to whether the representation provided constitutes gross negligence. See RPC 1.1(a)."

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THE NEW JERSEY RULES AND GAI

RPC 1.6 (Confidentiality of Information):

"(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

***

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

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THE NEW JERSEY RULES AND GAI

RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance):

"With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

THE NEW JERSEY RULES AND GAI

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or ratifies the conduct involved;

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct."

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THE FEDERAL RULES OF CIVIL PROCEDURE AND GAI

What rules might be implicated by GAI use:

Rule 11(b):

(b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

THE FEDERAL RULES OF CIVIL PROCEDURE AND GAI

Rule 26(g):
(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. ***. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

WHAT THE FUTURE MIGHT HOLD

Federal action:

- United States Congress
  - "Safe Innovation Framework for AI Policy," https://fedscoop.com/sen-schumer-introduces-ai-policy-framework-calls-for-comprehensive-legislation/
- White House
  - "Blueprint for an AI Bill of Rights," https://fedscoop.com/white-house-publishes-ai-bill-of-rights-blueprint/
- Regulatory agencies
  - EEOC
  - FTC
  - USDOJ

WHAT THE FUTURE MIGHT HOLD

- 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=

WHAT THE FUTURE MIGHT HOLD

Foreign action:

- "Measures for Generative Artificial Intelligence Services" (draft issued by Cyberspace Admin. of China), see https://www.china-briefing.com/news/understanding-chinas-new-regulations-on-generative-ai-draft-measures/
- European Union AI Act, https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence

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WHAT THE FUTURE MIGHT HOLD

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)

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WHAT THE FUTURE MIGHT HOLD

Judicial responses:

- *Mata v. Avianca, Inc.* 22-cv-1461 (PKC) (SDNY June 22, 2023)
- Mandatory Certification Regarding Generative Artificial Intelligence, Judge Specific Requirement of Judge Brantley Starr, Northern District of Texas, https://www.txnd.uscourts.gov/judge/judge-brantley-starr
- Etc.

RESOURCES

- News, “EU AI Act: first regulation on artificial intelligence (European Parliament: updated June 14, 2023), https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence
- B. Fung, “Schumer outlines plan for how Senate will regulate AI,” *CNN Business* (June 21. 2023), https://www.cnn.com/2023/06/21/tech/schumer-ai-plan?fbclid=IwAR2HfK_r_5czjtn_blWs7E0oqOElnRG55W9rjsFldBOupcdaq3r0AU1VQgc

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- 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

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- R.J. Hedges, "Artificial Intelligence Admissibility Caselaw" (last updated June 12, 2022) (in materials)
- R.J. Hedges, "Artificial Intelligence: A Judge's View of Generative AI," *Lexis Nexus Practical Guidance Practice Note* (in materials)

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- T. O'Connor, "Has Legal Artificial Intelligence (AI) Become a Fight Club?" *DigitalWarRoom* (Dec. 2, 2019), https://www.digitalwarroom.com/blog/is-ai-the-fight-club-of-legal-technology-and-ediscovery
- T. O'Connor, "AI … Is It Safe?" *NOBA Blog* (New Orleans Bar Ass'n: Apr. 18, 2023), https://www.neworleansbar.org/?pg=news&blAction=showEntry&blogEntry=90403

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- A. Perlman (2023, March 24), "The implications of CHATGPT for Legal Services and Society," *Harvard Law School Center on the Legal Profession* (Mar. 24, 2023), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/
- 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

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- QUESTIONS?
- COMMENTS?
- THANK YOU!

ARTIFICIAL INTELLIGENCE DISCOVERY & ADMISSIBILITY CASE LAW

By

Ronald J. Hedges

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INTRODUCTION

I began this collection to assemble information on artificial intelligence ("AI"). Unsurprisingly, content grew and continues to grow as AI becomes mainstream and the subject of interest to many actors, including elected officials and regulators. I hope to update the collection on a regular basis, but the reader should appreciate that new AI-related material appears daily.

The reader might also wish to look at compendiums of case law, etc., I have compiled on electronically stored information ("ESI") in criminal investigations and proceedings which are hosted by the Massachusetts Attorney General's Office and are available at https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions.

With the above in mind, let's start with some basic definitions (from Donahue):

"Artificial Intelligence" is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages. AI mimics certain operations of the human mind.

"Machine learning" is an application of AI in which computers use algorithms (rules) embodied in software to learn from data and adapt with experience.

A **"neural network"** is a computer that classifies information -- putting things into "buckets" based on their characteristics.

Please remember that this collection is not intended to be comprehensive. Rather, it is an overview of a complex – and fast-evolving -- technology and how law and society attempts to deal with that technology.

Comments, criticisms, and proposed additions are welcome. Please send to me at r_hedges@live.com.

DECISIONS

There is limited case law on AI. However, as the representative decisions below indicate, expect to see courts address, among other things, discovery and admissibility issues.

Congoo, LLC v. Revcontent LLC, Civil Action No. 16-401 (MAS), 2017 WL 3584205 (D.N.J. Aug. 10, 2017)

In this action for, among other things, unfair competition, plaintiff sought discovery of defendants' source code used to create the content of allegedly false and misleading advertising. The court denied plaintiff's motion to compel:

> In order for the production of source code to be compelled, Plaintiff must prove that it is relevant and necessary to the action. The relevancy and necessity requirements must be met, regardless of whether a Discovery Confidentiality Order exists. Courts have held that when source code is requested not only must it be relevant and necessary to the prosecution or defense of the case but when alternatives are available, a court will not be justified in ordering disclosure.
>
> The majority of cases cited by Plaintiff are distinguishable in that they are patent cases in which production of the source code was necessary to prove infringement claims. The Court finds that unlike in a patent case alleging infringement, Plaintiff does not need to review the actual code because its interest is in the specific functionalities of the software, not the underlying code. ***
>
> In this case, Plaintiff alleges that the Defendants have employed 'false and misleading representations in advertising to generate greater income from their Ads and those of Defendants' Advertisers in order to offer its services at more attractive rates than Plaintiff can offer, and to take Plaintiff's business, erode Plaintiff's market share and damage Plaintiff's goodwill in association with Plaintiff's native advertising business.' The focus here is *what* Defendants are doing, that is, whether they are creating ads or influencing the creation or content of the ads. The Court is not convinced that an understanding of the Defendants' influence on or creation of the ads

requires production of the technology, i.e., the source code, utilized by the Defendants. Rather, the Court is persuaded that through witness testimony an understanding of the functionality of the software algorithm as it relates to issues in this case, e.g., selection of higher paying Content Recommendations, can be adequately addressed.

Assuming, however, that the source code is relevant, the Court finds that its highly confidential nature is such that it cannot be adequately safeguarded by a Discovery Confidentiality Order and therefore outweighs the need for production. The proprietary nature of Defendants' source code is outlined in the declaration of Revcontent's Chief Product Officer ***.

A weighing of the competing interests: an ability to elicit facts for a full assessment of the claims and defenses, on the one hand, and protecting trade secrets, on the other, must be made with full consideration of factors, including availability of other means of proof and dangers of disclosure. Given the proprietary nature of Defendants' source code, which is not in dispute, and the irreparable harm that could occur if it is produced, the Court finds that production of the source code is not warranted, especially in light of Defendants' representation that 'the present discovery dispute concerns only several discrete functions of [Defendants'] technology.' Moreover, weighing the competing interests, the existing Discovery Confidentiality Order is insufficient to justify production of Defendant Revcontent's highly protected trade secret.

The Court finds that Plaintiff has not met its burden of demonstrating that production of the source code is relevant and necessary. The Court further finds that the information provided by Defendants regarding the source code and the additional information that Defendants are willing to provide regarding the functionality of the source code is sufficient and that production of the actual source code is not necessary for an adequate assessment of the claims and defenses in this case. Specifically, Defendants have provided a Declaration from Defendants' Chief Product Officer in which he explains the functionality of Defendants' technology. Defendants have also provided a proposed stipulation as to the source code which describes how the technology determines which native ads will be displayed in the Revcontent widget from the pool of available native ads. The Court notes that Plaintiff can also depose the employees involved in the creation of the

ads in order to prove its false and misleading advertising claims. ***. [citations and footnote omitted].

In re Google RTB Consumer Privacy Litig., Case No. 21-cv-02155-YGR (VKD) (N.D. Ca. Nov. 2, 2022)

The plaintiffs in this class action sought to compel the defendant to produce documents related to its "automated data selection process" used to select data for distribution to third-party participants in auctions. The court addressed certain disputes as follows:

During the hearing, Google suggested that it does not necessarily have documents that show all of the details of the automated data selection process that plaintiffs say they require. In that case, plaintiffs may of course use other means to obtain the discovery they need, including deposing any witnesses whose testimony may be necessary to provide a more complete understanding of the process or to identify relevant sources of information about the process. If this deposition testimony is important for class certification briefing, the Court expects the parties to cooperate in promptly scheduling such depositions. ***.

RFP [Request for Production] 96 asks for documents sufficient to show "the architecture of the software program(s)" that comprise the automated data selection process. Google says that this is highly sensitive information and that production of such detailed technical information is unnecessary for plaintiffs to understand how data is distributed through the RTB auction. ***. Plaintiffs argue that Google has not shown that the architecture of the software underlying the data selection process is sensitive or trade secret, but even if it is, the protective order affords adequate protection. ***.

The Court is skeptical that discovery of the architecture-level details of Google's software is relevant and proportional to the needs of the case, particularly in view of Google's representation at the hearing that it has no

objection to producing (and did not withhold from its prior production) internal design documents that reveal how the automated data selection process operates. ***. Absent a more specific showing of need for information about the architecture of Google's software, the Court agrees that production of design documents, including schematics, showing how the automated data selection process operates should be sufficient.

Modern Font Applications v. Alaska Airlines, Case No. 2:19-cv-00561-DBB-CMR (D. Utah Feb. 3, 2021), interlocutory appeal dismissed, No. 2021-1838 (Fed. Cir. Dec. 29, 2022)

The district court issued a protective order pursuant to which the defendant designated source code. The plaintiff sought modification to allow its in-house counsel access. The court upheld the designation, finding that the source code contained trade secrets and that inadvertent disclosure would be harmful. The court also denied the plaintiff's request for modification:

Here, Plaintiff argues that even if its in-house counsel is a competitive decisionmaker, his specialized knowledge, the risk of financial hardship to Plaintiff, and the ability to mitigate the risk of disclosure through an amended protective order establish good cause to allow access ***. Defendant responds that Plaintiff has access to competent outside counsel and has otherwise failed to show good cause to amend the protective order ***. The court acknowledges that Plaintiff's in-house counsel has specialized knowledge as a software engineer and institutional knowledge regarding the Patent-in-Suit. However, the fact that Plaintiff has competent outside counsel and could hire outside experts reduces the risk of prejudice to Plaintiff. Even if reliance on outside counsel and experts causes some financial hardship, the normal burdens of patent litigation are insufficient to outweigh the significant risk of inadvertent disclosure of confidential information in this case. Further, amending the protective order would be insufficient to mitigate this risk because, as explained above, this heightened risk remains even with the existence of a protective order. ***. The

court has carefully balanced the conflicting interests in this case and concludes that the risk of inadvertent disclosure outweighs the risk of prejudice to Plaintiff. The court therefore declines to modify the standard protective order or the confidentiality designations therein. [citations omitted].

People v. Wakefield, 175 A.D.3d 158, 107 N.Y.S.3d 487 (3d Dept. 2019), affirmed, No. 2022-02771 (N.Y. Ct. App. Apr. 26, 2022)

From the Third Department decision:

Defendant was subsequently charged in a multicount indictment in connection with the victim's death. Law enforcement collected a buccal swab from defendant to compare his DNA to that found at the crime scene. The data was eventually sent to Cybergenetics, a private company that used a software program called TrueAllele Casework System, for further testing. The DNA analysis by TrueAllele revealed, to a high degree of probability, that defendant's DNA was found on the amplifier cord, on parts of the victim's T-shirt and on the victim's forearm. ***. At the *Frye* hearing, Supreme Court heard the testimony of Mark Perlin, the founder, chief scientist and chief executive officer of Cybergenetics, among others. Following the *Frye* hearing, the court rendered a decision concluding that TrueAllele was generally accepted within the relevant scientific community. *** Perlin also testified that TrueAllele is designed to have a certain degree of artificial intelligence to make additional inferences as more information becomes available. Perlin explained that, after objectively generating all genotype possibilities, TrueAllele answers the question of "how much more the suspect matches the evidence [than] a random person would," and the answer takes the form of a likelihood ratio. ***

Supreme Court found that "there [was] a plethora of evidence in favor of [TrueAllele], *and there [was] no significant evidence to the contrary*." In view of the evidence adduced at the *Frye* hearing, we find that the court's ruling was proper.

As described in the affirmance by the Court of Appeals:

Prior to trial, defendant moved for disclosure of the source code in order "to meaningfully exercise his constitutional right to confront his accusers." He

argued that the report generated by TrueAllele was testimonial, that the computer program was the functional equivalent of a laboratory analyst and that the source code was the witness that must be produced to satisfy his right to confrontation. He claimed that Perlin's "surrogate" trial testimony without disclosure of the source code was inadequate—"the TrueAllele Casework System source code itself, and not Dr. Perlin, is the declarant with whom [defendant] has a right to be confronted." The court denied the motion, finding that the source code was not a witness or testimonial in nature, and that defendant would have the opportunity to confront and cross-examine Dr. Perlin-the analyst and the developer of the software.

Defendant again raised his confrontation argument prior to Dr. Perlin's trial testimony, asserting that the TrueAllele Casework System was the witness and that he needed the source code to effectively cross-examine that witness. When the court questioned how one cross-examines a computer program, defendant represented that, once his experts had the opportunity to review the source code, he would then pose questions to Dr. Perlin based on the experts' review. The court denied the request, stating that the issue defense counsel raised was a discovery issue and that defendant's ability to cross-examine Dr. Perlin, the developer of the source code, satisfied his right to confrontation.

***

We must address whether the trial court abused its discretion in determining that TrueAllele "is not novel but instead is 'generally accepted' under the Frye standard".

***

Here, the evidence presented at the Frye hearing established that the relevant scientific community generally accepted TrueAllele's DNA interpretation process and that the continuous probabilistic genotyping approach is more efficacious than human review of the same data using the stochastic threshold. It was undisputed that the foundational mathematical principles (MCMC and Bayes' theorem) are widely accepted in the scientific community. It was also undisputed that the relevant scientific community was fully represented by those persons and agencies who weighed in on the approach. Although the continuous probabilistic approach was not used in

the majority of forensic crime laboratories at the time of the hearing, the methodology has been generally accepted in the relevant scientific community based on the empirical evidence of its validity, as demonstrated by multiple validation studies, including collaborative studies, peer-reviewed publications in scientific journals and its use in other jurisdictions. The empirical studies demonstrated TrueAllele's reliability, by deriving reproducible and accurate results from the interpretation of known DNA samples.

Defendant and the concurrence raise the legitimate concern that the technology at issue is proprietary and the developer of the software is involved in many of the validation studies. This skepticism, however, must be tempered by the import of the empirical evidence of reliability demonstrated here and the acceptance of the methodology by the relevant scientific community. (citations and footnote omitted)

Rodgers v. Christie, 795 Fed. Appx. 878 (3d Cir. 2020)

This was an appeal from the dismissal of a products liability action brought under the New Jersey Products Liability Act (NJPLA) against the entity responsible for the development of the "Public Safety Assessment (PSA), a multifactor risk estimation model that forms part of the state's pretrial release system." The plaintiff's son had been murdered by a man who had been granted pretrial release. The Court of Appeals held that the PSA was not a "product" and affirmed:

The NJPLA imposes strict liability on manufacturers or sellers of certain defective "product[s]." But the Act does not define that term. To fill the gap, the District Court looked to the Third Restatement of Torts, which defines "product" as "tangible personal property distributed commercially for use or consumption" or any "[o]ther item[]" whose "context of *** distribution and use is sufficiently analogous to [that] of tangible personal property." It had good reason to do so, as New Jersey courts often look to the Third Restatement in deciding issues related to the state's products liability regime. And on appeal, both parties agree the Third Restatement's definition is the appropriate one. We therefore assume that to give rise to an NJPLA

action, the 'product' at issue must fall within section 19 of the Third Restatement.

***

The PSA does not fit within that definition for two reasons. First, as the District Court concluded, it is not distributed commercially. Rather, it was designed as an "objective, standardized, and *** empirical" "risk assessment instrument" to be used by pretrial services programs like New Jersey's. Rodgers makes no effort to challenge this conclusion in her briefing and has thus forfeited the issue. Second, the PSA is neither "tangible personal property" nor remotely "analogous to" it. As Rodgers' complaint recognizes, it is an "algorithm" or "formula" using various factors to estimate a defendant's risk of absconding or endangering the community. As the District Court recognized, "information, guidance, ideas, and recommendations" are not "product[s]" under the Third Restatement, both as a definitional matter and because extending strict liability to the distribution of ideas would raise serious First Amendment concerns. Rodgers's only response is that the PSA's defects "undermine[]" New Jersey's pretrial release system, making it "not reasonably fit, suitable or safe" for its intended use. But the NJPLA applies only to defective *products*, not to anything that causes harm or fails to achieve its purpose. (citations and footnote omitted).

State v. Ghigliotty, **463 N.J. Super. 355 (App. Div. 2020)**

At issue in this interlocutory appeal was whether the trial court had erred in directing that a *Frye* hearing be conducted to determine the scientific reliability of proposed expert testimony on the positive identification of a bullet fragment recovered from a murder victim. The Appellate Division affirmed:

An application of the Frye test at an evidentiary hearing was necessary in this case because BULLETTRAX is a new, untested device, operated by Matchpoint, a novel software product. As the trial court found, 'BULLETTRAX is a highly automated technology that does not merely photograph the bullet's surface, as suggested by the State, but instead digitally recreates the

entire surface area.' The parties did not provide the court with any judicial opinions or authoritative scientific and legal writings demonstrating the reliability of this machine.

In addition, neither Sandford [the State's expert witness] nor Boyle [a salesman with the business that offered the technology] were experts in the science behind the BULLETTRAX system and, therefore, were unable to address whether it provided reliable images. In that regard, both witnesses conceded that BULLETTRAX created some degree of distortion when it "stitched together" the images of the bullet fragment and the test bullets that Sandford used to reach his conclusions. The trial court also correctly found that, for many of these same reasons, "the reliability of Matchpoint" was "[e]qually unproven at this time."

Under these circumstances, we affirm the trial court's determination that a Frye hearing was necessary to protect defendant's due process rights and ensure that the images produced by BULLETTRAX were sufficiently reliable to be admissible under N.J.R.E. 702.

The appellate court also addressed the trial court's order that, among other things, the State provide to defendant algorithms used by the technology in advance of the *Frye* hearing:

The trial court ordered the State to produce the BULLETTRAX and Matchpoint algorithms based solely upon defense counsel's request. While it is certainly possible that this information might be needed by defendant's experts to evaluate the reliability of the new technology, the defense did not present a certification from an expert in support of this claim for disclosure. Thus, there is currently nothing concrete in the record to support the court's conclusion that granting defendant "the opportunity to review the algorithms and elicit testimony concerning" BULLETTRAX is necessary "in order to completely explore and test the integrity of the images it produces."

Under these circumstances, defendant is required to make a more definitive showing of his need for this material to provide the court with a rational basis to order the State to attempt to produce it. *In that regard, the trial court was aware that the algorithms are proprietary information within UEFT's, rather than the State's, sole possession. While the court was open to issuing a*

protective order to attempt to overcome UEFT's reluctance to disclose this information to the State, the parties did not submit suggested language to the court to assist it in attempting to craft and issue such an order.

Therefore, we vacate the court's order directing the turnover of the algorithms, and remand the discovery issues to the court for further consideration. The court must promptly conduct a case management conference with the parties to determine the most efficient way to proceed to identify the types of information that must be shared by them in advance of the Frye hearing. Resolution of discovery issues must be made after a N.J.R.E. 104 hearing to ensure the development of a proper, reviewable record that supports the court's ultimate decision. (emphasis added).

State v. Loomis, 371 Wis.2d 235, 881 N.W.2d 749 (2016), *cert.* denied, 137 S. Ct. 2290 (2017)

The defendant was convicted of various offenses arising out of a drive-by shooting. His presentence report included an evidence-based risk assessment that indicated a high risk of recidivism. On appeal, the defendant argued that consideration of the risk assessment by the sentencing judge violated his right to due process. The Supreme Court rejected the argument. However, it imposed conditions on the use of risk assessments.

State v. Morrill, No. A-1-CA-36490, 2019 WL 3765586 (N.M. App. July 24, 2019)

Defendant asks this Court to "find that the attestations made by a computer program constitute 'statements,' whether attributable to an artificial intelligence software or the software developer who implicitly offers the program's conclusions as their own." (Emphasis omitted.) Based on that contention, Defendant further argues that the automated conclusions from Roundup and Forensic Toolkit constitute inadmissible hearsay statements that are not admissible under the business record exception. In so arguing, Defendant acknowledges that such a holding would diverge from the plain

language of our hearsay rule's relevant definitions that reference statements of a "person." *** Based on the following, we conclude the district court correctly determined that the computer generated evidence produced by Roundup and Forensic Toolkit was not hearsay. Agent Peña testified that his computer runs Roundup twenty-four hours a day, seven days a week and automatically attempts to make connections with and downloads from IP addresses that are suspected to be sharing child pornography. As it does so, Roundup logs every action it takes. Detective Hartsock testified that Forensic Toolkit organizes information stored on seized electronic devices into various categories including graphics, videos, word documents, and internet history. Because the software programs make the relevant assertions, without any intervention or modification by a person using the software, we conclude that the assertions are not statements by a person governed by our hearsay rules.

***State v. Pickett*, 466 N.J. Super. 270 (App. Div. 2021), motions to expand record, for leave to appeal, and for stay denied, *State v. Pickett*, 246 N.J. 48 (2021)**

In this case of first impression addressing the proliferation of forensic evidentiary technology in criminal prosecutions, we must determine whether defendant is entitled to trade secrets of a private company for the sole purpose of challenging at a Frye hearing the reliability of the science underlying novel DNA analysis software and expert testimony. At the hearing, the State produced an expert who relied on his company's complex probabilistic genotyping software program to testify that defendant's DNA was present, thereby connecting defendant to a murder and other crimes. Before cross-examination of the expert, the judge denied defendant access to the trade secrets, which include the software's source code and related documentation.

This is the first appeal in New Jersey addressing the science underlying the proffered testimony by the State's expert, who designed, utilized, and relied upon TrueAllele, the program at issue. TrueAllele is technology not yet used or tested in New Jersey; it is designed to address intricate interpretational challenges of testing low levels or complex mixtures of DNA. TrueAllele's computer software utilizes and implements an elaborate mathematical

model to estimate the statistical probability that a particular individual's DNA is consistent with data from a given sample, as compared with genetic material from another, unrelated individual from the broader relevant population. For this reason, TrueAllele, and other probabilistic genotyping software, marks a profound shift in DNA forensics.

TrueAllele's software integrates multiple scientific disciplines. At issue here—in determining the reliability of TrueAllele—is whether defendant is entitled to the trade secrets to cross-examine the State's expert at the Frye hearing to challenge whether his testimony has gained general acceptance within the computer science community, which is one of the disciplines. The defense expert's access to the proprietary information is directly relevant to that question and would allow that expert to independently test whether the evidentiary software operates as intended. Without that opportunity, defendant is relegated to blindly accepting the company's assertions as to its reliability. And importantly, the judge would be unable to reach an informed reliability determination at the Frye hearing as part of his gatekeeping function.

Hiding the source code is not the answer. The solution is producing it under a protective order. Doing so safeguards the company's intellectual property rights and defendant's constitutional liberty interest alike. Intellectual property law aims to prevent business competitors from stealing confidential commercial information in the marketplace; it was never meant to justify concealing relevant information from parties to a criminal prosecution in the context of a Frye hearing. (footnote omitted).

State v. Saylor, 2019 Ohio 1025 (Ct. App. 2019) (concurring opinion of Froelich, J.)

{¶ 49} Saylor is a 27-year-old heroin addict, who the court commented has "no adult record [* * * and] has led a law-abiding life for a significant number of years"; his juvenile record, according to the prosecutor, was "virtually nothing." The prosecutor requested an aggregate sentence of five to seven years, and defense counsel requested a three-year sentence. The trial court sentenced Saylor to 12 1/2 years in prison. Although it found Saylor to be indigent and did not impose the mandatory fine, the court imposed a $500

fine and assessed attorney fees and costs; the court also specifically disapproved a Risk Reduction sentence or placement in the Intensive Program Prison (IPP).

{¶ 50} I have previously voiced my concerns about the almost unfettered discretion available to a sentencing court when the current case law apparently does not permit a review for abuse of discretion. *State v. Roberts*, 2d Dist. Clark No. 2017-CA-98, 2018-Ohio-4885, ¶ 42-45, (Froelich, J., dissenting). However, in this case, the trial court considered the statutory factors in R.C. 2929.11 and R.C. 2929.12, the individual sentences were within the statutory ranges, and the court's consecutive sentencing findings, including the course-of-conduct finding under R.C. 2929.14(C)(4)(b), were supported by the record.

{¶ 51} As for the trial court's consideration of ORAS, the "algorithmization" of sentencing is perhaps a good-faith attempt to remove unbridled discretion – and its inherent biases – from sentencing. Compare *State v. Lawson*, 2018-Ohio-1532, 111 N.E.3d 98, ¶ 20-21 (2d Dist.) (Froelich, J., concurring). However, "recidivism risk modeling still involves human choices about what characteristics and factors should be assessed, what hierarchy governs their application, and what relative weight should be ascribed to each." Hillman, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, 58 The Judges Journal 40 (2019).

{¶ 52} The court's statement that the "moderate" score was "awfully high," given the lack of criminal history, could imply that the court believed there must be other factors reflected in the score that increased Saylor's probable recidivism. There is nothing on this record to refute or confirm the relevance of Saylor's ORAS score or any ORAS score. Certainly, the law of averages is not the law. The trial court's comment further suggested that its own assessment of Saylor's risk of recidivism differed from the ORAS score. The decision of the trial court is not clearly and convincingly unsupported by the record, regardless of any weight potentially given to the ORAS score by the trial court. Therefore, on this record, I find no basis for reversal.

State v. Stuebe, No. 249 Ariz. 127, 1 CA-CR 19-0032 (AZ Ct. App. Div. 1. June 30, 2020)

The defendant was convicted of burglary and possession of burglary tools. On appeal, he challenged the admissibility of an email and attached videos generated by an automated surveillance system. The Arizona Court of Appeals affirmed. First, the court addressed whether the system was a "person" for hearsay purposes:

¶9 In general, hearsay evidence is inadmissible unless an exception applies. Ariz. R. Evid. 801, 802. Hearsay is "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). A "statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Ariz. R. Evid. 801(a). A "declarant" is "the person who made the statement." Ariz. R. Evid. 801(b).

¶10 Because the rule against hearsay applies to "a person's" statements and "the person who made the statement," Ariz. R. Evid. 801(a) and (b), we must determine whether a machine that generates information may qualify as a "person" under the Rules. The Rules do not define "person." See Ariz. R. Evid. 101. Therefore, we may interpret the word according to its common definition. A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of the language."); *State v. Wise*, 137 Ariz. 468, 470 n.3 (1983) (stating that unless the legislature expressly defines a statutory term, courts give the word its plain and ordinary meaning, which may be taken from the dictionary). ***

¶11 *** Neither statute supports the proposition that a machine can legally be considered a "person." Additionally, because "Arizona's evidentiary rules were modeled on the federal rules[,]" we may consider federal precedent to interpret them. *State v. Winegardner*, 243 Ariz. 482, 485, ¶ 8 (2018). The federal circuit courts have repeatedly held that a "person" referenced in the rules of evidence does not include a "machine" or "machine-produced" content. *See United States v. Lizarraga-Tirado,* 789 F.3d 1107, 1110 (9th Cir. 2015) ("[W]e join other circuits that have held that machine statements aren't hearsay.") (collecting federal circuit court cases); *United States v.*

Washington, 498 F.3d 225, 231 (4th Cir. 2007) (holding that for hearsay purposes "raw data generated by the machines were not the statements of technicians" who operated the machines); *United States v. Khorozian,* 333 F.3d 498, 506 (3d Cir. 2003) (holding that neither header nor date and time information automatically generated by a facsimile machine was hearsay because they were not statements made by a person).

¶12 Applied to the facts here, the motion-activated security camera automatically recorded the video after a sensor was triggered. The automated security system then produced an email and immediately sent it to the property manager. No "person" was involved in the creation or dissemination of either. The email only contained the date, time, client ID, serial number, camera location code, and language that read "Automated message – please do not reply to this address." Because the email and video were "machine produced," they were not made by a "person" and are not hearsay.

¶13 Machine-produced statements may present other evidentiary concerns. *See Washington*, 498 F.3d at 231 (noting that concerns about machine-generated statements should be "addressed through the process of authentication not by hearsay or Confrontation Clause analysis"). At trial, the court denied Stuebe's authentication objection to the video, *see* Ariz. R. Evid. 901, but Stuebe has not raised this issue on appeal.

The Court of Appeals also rejected the defendant's argument that admission of the email and video violated the Confrontation Clause:

¶14 The Sixth Amendment's Confrontation Clause states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In general, testimonial evidence from a declarant who does not appear at trial may be admitted only when the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 68-69 (2004); *State v. Forde*, 233 Ariz. 543, 564, ¶ 80 (2014) (citing *Crawford*, 541 U.S. at 68). "[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial." *Ohio v. Clark*, 576 U.S. 237, 245 (2015). "Testimony" means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Crawford, 541 U.S. at 51. Statements are testimonial when the primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009) (holding forensic reports on substances alleged to be drugs, prepared in anticipation of prosecution, are testimonial statements). But statements are not testimonial if made to law enforcement during an ongoing emergency, *see Davis,* 547 U.S. at 827, and are "much less likely to be testimonial" if made to someone other than law enforcement, *Clark*, 576 U.S. at 246.

¶15 Considering all the circumstances we cannot conclude that the "primary purpose" of the email and video was to "creat[e] an out-of-court substitute for trial testimony." *Id.* at 245 (alteration in original) (quoting *Bryant*, 562 U.S. at 358). And Stuebe does not argue otherwise. The email was sent to the property manager, not law enforcement, and was not made in anticipation of criminal prosecution. Thus, it was not testimonial. *See Davis*, 547 U.S. at 827-28 (finding recording of a 911 call seeking police assistance was not testimonial); *State v. Damper*, 223 Ariz. 572, 575, ¶ 12 (App. 2010) (finding text message from murder victim seeking help not testimonial); *Bohsancurt v. Eisenberg,* 212 Ariz. 182, 191, ¶ 35 (App. 2006) (holding breathalyzer calibration reports not testimonial). The property manager testified and was cross-examined about the email and the video, and the admission of the email and video did not implicate the Confrontation Clause. *State v. Fischer*, 219 Ariz. 408, 418, ¶ 37 (App. 2008) ("Non-testimonial statements are not subject to a confrontation challenge."); *cf. United States v. Waguespack,* 935 F.3d 322, 334 (5th Cir. 2019) (holding that machine-generated images were not "statements" in the context of the Confrontation Clause).

United States v. Shipp, 392 F. Supp. 3d 300 (E.D.N.Y. July 15, 2019)

The court has serious concerns regarding the breadth of Facebook warrants like the one at issue here. The Second Circuit has observed that "[a] general search of electronic data is an especially potent threat to privacy because hard drives and e-mail accounts may be 'akin to a residence in terms of the scope and quantity of private information [they] may contain.'" Ulbricht, 858 F.3d at 99 (quoting Galpin, 720 F.3d at 445); see also Galpin, 720 F.3d at 447 (explaining that "[t]his threat demands a heightened sensitivity to the

particularity requirement in the context of digital searches"). This threat is further elevated in a search of Facebook data because, perhaps more than any other location—including a residence, a computer hard drive, or a car—Facebook provides a single window through which almost every detail of a person's life is visible. Indeed, Facebook is designed to replicate, record, and facilitate personal, familial, social, professional, and financial activity and networks. Users not only voluntarily entrust information concerning just about every aspect of their lives to the service, but Facebook also proactively collects and aggregates information about its users and non-users in ways that we are only just beginning to understand. Particularly troubling, information stored in non-Facebook applications may come to constitute part of a user's "Facebook account"—and thus be subject to broad searches—by virtue of corporate decisions, such as mergers and integrations, without the act or awareness of any particular user.

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Compared to other digital searches, therefore, Facebook searches both (1) present a greater "risk that every warrant for electronic information will become, in effect, a general warrant," Ulbricht, 858 F.3d at 99, and (2) are more easily limited to avoid such constitutional concerns. In light of these considerations, courts can and should take particular care to ensure that the scope of searches involving Facebook are "defined by the object of the search and the places in which there is probable cause to believe that it may be found." (citations omitted in part).

Wi-LAN Inc. v. Sharp Electronics Corp., 992 F.3d 1366 (Fed. Cir. 2021)

This was an appeal from an award of summary judgment of noninfringement. The district court held that the plaintiff lacked sufficient admissible evidence to prove direct infringement after it found a printout of source code inadmissible. The plaintiff sought to admit the source code to establish that systems used by the defendants "actually practiced" a methodology patented by the plaintiff. The Federal Circuit affirmed.

The plaintiff argued on appeal, among other things, that the source code printout was a business record that was admissible under the business records exception to the hearsay rule:

To establish that the source code printout was an admissible business record under Rule 803(6), Wi-LAN was required to establish by testimony from a "custodian or other another qualified witness" that the documents satisfied the requirements of the Rule. Wi-LAN argues that it properly authenticated the source code printout through the declarations of the chip manufacturers' employees. We agree with the district court that the declarations could not be used to authenticate the source code printout on the theory that the declarations were a proxy for trial testimony or themselves admissible as business records.

As Wi-LAN notes, declarations are typically used at summary judgment as a proxy for trial testimony. But declarations cannot be used for this purpose unless the witness will be available to testify at trial. Under Federal Rule of Civil Procedure 56(c)(2), Wi-LAN was required to "explain the admissible form that is anticipated." Fed. R. Civ. P. 56(c)(2) advisory committee's notes on 2010 amendments. Wi-LAN argued that it met this burden by explaining that the declarants were available to testify at trial. The district court, however, found the opposite. Indeed, when asked by the court at the summary judgment hearing whether the declarants would appear at trial, Wi-LAN's counsel responded that Wi-LAN did not "think that [it would be] able to force them to come to trial."

Wi-LAN thus did not establish that the declarants would be available to testify at trial and, as a result, the declarations could not be used as a substitute for trial testimony. *E.g., Fraternal Order of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (testimony admissible if declarants were available to testify at trial); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.,* 909 F.2d 1524, 1542 (3d Cir. 1990) ("[H]earsay evidence produced in an affidavit opposing summary judgment may be considered if the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that 'would be admissible at trial.'" (quoting *Williams v. Borough of West Chester*, 891 F.2d 458, 465 n.12 (3d Cir. 1989)).

Wi-LAN also seems to argue that it properly authenticated the source code printout because the declarations were custodial declarations that were themselves admissible as business records under Rule 803(6). Wi-LAN, however, admits that it obtained the source code printout and declarations by filing lawsuits against the manufacturers and then dismissing the lawsuits without prejudice after the manufacturers provided Wi-LAN with the source code printout and declarations it sought. Wi-LAN even explains that "[t]he lawsuits were necessary to secure production of the source code and declarations because [the system-on-chip manufacturers] had refused to cooperate in discovery." *The declarations thus do not constitute a "record [that] was kept in the course of a regularly conducted activity of a business."* Fed. R. Evid. 803(6)(B). *Instead, the declarations were created and prepared for the purposes of litigation, placing them outside the scope of the exception. As a result, the declarations were not admissible as business records for use to authenticate the source code printout.* (emphasis added).

The Federal Circuit also rejected the plaintiff's reliance on Rule 901(b)(4):

Wi-LAN also appears to argue that the district court should have found the source code printout admissible under Federal Rule of Evidence 901(b)(4). Rule 901(b)(4) permits a record to be admitted into evidence if "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" "support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), (b)(4).

In support of its Rule 901(b)(4) argument, Wi-LAN states only that "there was no legitimate reason to question the trustworthiness of the source code." The district court concluded that the source code printout's "appearance, contents, substance, internal patterns, [and] other distinctive characteristics," Fed. R. Evid. 901(b)(4), did not satisfy Rule 901(b)(4)'s strictures "given the highly dubious circumstances surrounding the production and the lack of indicia of trustworthiness in the source code," as described in the previous Section. On this record, the district court did not abuse its discretion in refusing to treat the source code printout as evidence under Rule 901(b)(4).

Moreover, the Federal Circuit rejected the plaintiff's reliance on Rule 703:

Wi-LAN alternatively argues that the source code printout should have been admitted into evidence under Federal Rule of Evidence 703. Wi-LAN's expert submitted a report stating that Sharp's and Vizio's television sets infringe the claimed methods of the '654 patent by the use of the source code. Wi-LAN's expert did not attempt to authenticate the source code printout. But Wi-LAN argues that its expert should be able to opine on the meaning of the inadmissible source code printout and to provide the inadmissible source code printout to the jury despite Wi-LAN's failure to authenticate the source code printout.

Wi-LAN's argument presents two separate and distinct questions: (1) whether the source code printout was admissible because it was relied on by the expert and (2) whether the expert's testimony relying on the source code was admissible to establish infringement. The answer to the first question is "no" because expert reliance does not translate to admissibility. The answer to the second question is also "no" because Wi-LAN did not establish that experts in the field "reasonably rely on" unauthenticated source code.

Concluding its discussion of admissibility, the Federal Circuit rejected the plaintiff's argument that the court below should have extended discovery:

In light of these admissibility issues, Wi-LAN's fallback position is that the district court should have granted it additional time to obtain an admissible version of the source code. We disagree. Wi-LAN had ample time to obtain the source code and to find custodial witnesses to authenticate the source code over the course of discovery but failed to do so.

Wi-LAN had been on notice since early 2016 that it was going to need the system-on-chip source code from third parties to prove its direct infringement case. Throughout the litigation, Wi-LAN repeatedly requested extensions of time to obtain the source code from the third-party manufacturers. Ultimately, however, Wi-LAN only procured a single printout version of the source code with declarations after suing the third-party manufacturers.

Wi-LAN, as the district court found, "had ample time and opportunities over years of litigation to obtain evidence of infringement from the [system-on-chip] manufacturers" but failed to do so. Given this record, the district court did not abuse its discretion in denying Wi-LAN an additional opportunity to obtain an admissible form of the source code. (citations omitted in part).

ARTIFICIAL INTELLIGENCE IN LITIGATION

C. Cwik, *et al.,* "Intelligence and the Courts: Materials for Judges" (AAAS: Sept. 2022), https://doi.org/10.1126/aaas.adf0786.

P.W. Grimm, "New Evidence Rules and Artificial Intelligence," 45 *Litigation* 6 (2018), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Rules_of_Evidence/Grimm.pdf

P.W. Grimm, M.R. Grossman & G.V. Cormack, "*Artificial Intelligence as Evidence,"* 19 *Nw. J. Tech. & Intell. Prop*. 9 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1349&context=njtip

R. Hedges, G. Gottehrer & J.C. Francis IV, "Artificial Intelligence and Legal Issues," *Litigation* (ABA: Fall 2020), Artificial Intelligence and Legal Issues (americanbar.org)

THE NIST FRAMEWORK

On January 26, 2023, the National Institute of Standards and Technology ("NIST") released the Artificial Intelligence Risk Management Framework, together with related materials. The Framework is described as follows:

In collaboration with the private and public sectors, NIST has developed a framework to better manage risks to individuals, organizations, and society associated with artificial intelligence (AI). The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.

The Framework and related materials can be found at https://www.nist.gov/itl/ai-risk-management-framework

W.J. Denvil, *et al.,* "NIST Publishes Artificial Intelligence Risk Management Framework and Resources," *Engage* (Hogan Lovells: Jan. 31, 2023), https://www.engage.hoganlovells.com/knowledgeservices/news/nist-publishes-artificial-intelligence-risk-management-framework-and-resources/

J. Johnson, *et al.,* "NIST Releases New Artificial Intelligence Risk Management Framework" *Inside Privacy* (Covington: Feb. 1, 2023), https://www.insideprivacy.com/artificial-intelligence/nist-releases-new-artificial-intelligence-risk-management-framework/

C.F. Kerry, "NIST's AI Risk Management Framework Plants a Flag in the AI Debate," *Brookings TechTank* (Feb. 15, 2023), https://www.brookings.edu/blog/techtank/2023/02/15/nists-ai-risk-management-framework-plants-a-flag-in-the-ai-debate/?utm_campaign=Center%20for%20Technology%20Innovation&utm_medium=email&utm_content=247081757&utm_source=hs_email

D. Pozza, "Federal Guidance Offers Framework to Minimize Risks in AI Use," *Bloomberg Law* (Feb. 9, 2023), https://news.bloomberglaw.com/us-law-week/federal-guidance-offers-framework-to-minimize-risks-in-ai-use

S. Witley, "AI Risks Guide Sets Starting Point for Compliance, Regulation," *Bloomberg Law* (Feb. 1, 2023), *https://news.bloomberglaw.com/privacy-and-data-security/ai-risks-guide-sets-starting-point-for-compliance-regulation*

FEDERAL, STATE, AND LOCAL GOVERNMENT "RESPONSES" TO ARTIFICIAL INTELLIGENCE

AI is being used by business entities to, among other things, sift through job candidates. This use has led to concerns about, among other things, lack of transparency and possible bias in the selection process. Expect statutory and regulatory responses. Here are some.

FEDERAL

"Statement of Interest of the United States" submitted in *Louis v. Saferent Solutions, LLC,* Case No. 22cv10800-AK (D. Mass. Jan. 9, 2023), https://www.justice.gov/d9/2023-01/u.s._statement_of_interest_-_louis_et_al_v._saferent_et_al.pdf

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 5171 to assist the Court in evaluating the application of the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., in challenges to an algorithm-based tenant screening system. The United States has a strong interest in ensuring the correct interpretation and application of the FHA's pleading standard for disparate impact

claims, including where the use of algorithms may perpetuate housing discrimination.

"Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People" (White House Office of Science and Technology: Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf. Summary of the Blueprint at https://www.whitehouse.gov/ostp/ai-bill-of-rights/

"Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," (Feb. 16, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/

Algorithmic Accountability Act of 2022, introduced Feb. 3, 2022, see https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems?peek=BH793HGzEX7gimi20t7HiHEg8n9b3vET476N7MsTy%2BcOuyHe

EEOC Draft Strategic Enforcement Plan for 2023 – 2027, 88 FR 1379 (Jan. 10, 2023), https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan

Among other things, the draft plan "[r]ecognizes employers' increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions;"

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

"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."

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

"FTC Launches New Office of Technology to Bolster Agency's Work," (Feb. 17, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work?utm_source=govdelivery

P. Phillips, *et al.,* "Four Principles of Explainable Artificial Intelligence" (NIST: Sept. 2021), https://nvlpubs.nist.gov/nistpubs/ir/2021/NIST.IR.8312.pdf

We introduce four principles for explainable artificial intelligence (AI) that comprise fundamental properties for explainable AI systems. We propose that explainable AI systems deliver accompanying evidence or reasons for outcomes and processes; provide explanations that are understandable to individual users; provide explanations that correctly reflect the system's process for generating the output; and that a system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output. We have termed these four principles as explanation, meaningful, explanation accuracy, and knowledge limits, respectively. Through significant stakeholder engagement, these four principles were developed to encompass the multidisciplinary nature of explainable AI, including the fields of computer science, engineering, and psychology. Because one-size fits-all explanations do not exist, different users will require different types of explanations. We present five categories of explanation and summarize theories of explainable AI. We give an overview of the algorithms in the field that cover the major classes of explainable algorithms. As a baseline comparison, we assess how well explanations provided by people follow our four principles. This assessment provides insights to the challenges of designing explainable AI systems.

NLRB Office of the General Counsel, "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights," Memorandum GC 23-02 (Oct. 31, 2022), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos

Recent technological advances have dramatically expanded employers' ability to monitor and manage employees within the workplace and beyond. As more and more employers take advantage of those new capabilities, their practices raise a number of issues under the Act. An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer, if they so choose. Thus, I plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights. I will do so both by vigorously enforcing extant law and by urging the Board to apply settled labor-law principles in new ways, as described below.[footnote omitted].

USDOJ Press Release (Jan. 9, 2023): Settlement Agreement & Final Judgment, *United States v. Meta Platforms, Inc. f/k/a Facebook, Inc.,* 22 Civ. 5187-JGK (S.D.N.Y.), https://www.justice.gov/crt/case/united-states-v-meta-platforms-inc-fka-facebook-inc-sdny:

On June 27, 2022, the court approved the parties' settlement agreement and entered a final judgment in *United States v. Meta Platforms, Inc., f/k/a Facebook, Inc.* (S.D.N.Y.). The complaint, which was filed on June 21, 2022, alleged that Meta's housing advertising system discriminated against Facebook users based on their race, color, religion, sex, disability, familial status, and national origin, in violation of the Fair Housing Act (FHA). Specifically, the complaint alleged, among other things, that Meta uses algorithms in determining which Facebook users receive housing ads and that those algorithms rely, in part, on characteristics protected under the FHA. Under the settlement, Meta stopped using an advertising tool (known as the "Special Ad Audience" tool) for housing ads and developed a new system to address racial and other disparities caused by its use of personalization algorithms in its ad delivery system for housing ads. On January 9, 2023, the Justice Department announced that it reached agreement with Meta, as required by the settlement, on compliance targets for that new system. Under the terms of the June 2022 settlement, Meta also will not provide any ad targeting options for housing advertisers that directly describe or relate to FHA-protected characteristics. The settlement also requires Meta to pay a civil penalty of $115,054, the maximum penalty available under the FHA. The case involves a Secretary-initiated HUD complaint and was referred to the Justice Department after the U.S. Department of Housing and Urban Development (HUD) conducted an investigation and issued a charge of discrimination.

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

"Principal Deputy Assistant Attorney General Dona Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023," *USDOJ News* (Feb. 2, 2023), https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-doha-mekki-antitrust-division-delivers-0

M. Bisanz & T.K. Shinohara, "Supervisory Expectations for Artificial Intelligence Outlined by US OCC" (Mayer Brown: May 20, 2022), https://www.mayerbrown.com/en/perspectives-events/publications/2022/05/supervisory-expectations-for-artificial-intelligence-outlined-by-us-occ

A Burt & E. Runde, "Anti-Discrimination Laws are Faltering in the Face of Artificial Intelligence; Here's What to Do About It," *ABA J.* (Jan. 24, 2023), https://www.abajournal.com/columns/article/antidiscrimination-laws-are-faltering-in-the-face-of-artificial-intelligence-heres-what-to-do-about-it

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K.C. Halm, *et al.,* "FTC Proposed 'Commercial Surveillance and Data Security' Rulemaking Raises Significant Questions About Risks Arising from AI/Machine Learning," *Artificial Intelligence Law Advisor* (Davis Wright Tremaine: Aug. 18, 2022),

https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2022/08/ai-machine-learning-ftc-regulation-anpr

K.C. Halm, *et al*., "NIST Releases Two Guidance Documents for Developing Trustworthy AI," *Artificial Intelligence Law Advisor* (Davis Wright Tremaine: Mar. 24, 2022), https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2022/03/nist-trustworthy-ai-guidance#:~:text=NIST%20Releases%20Two%20Guidance%20Docun%20for%20Developing%20Trustworthy%20AI&text=On%20March%2016%20and%2017,intelligence%20(%22AI%22)

E. Jillson, "Aiming for Truth, Fairness, and Equity in Your Company's Use of AI" (FTC: Apr. 21, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai

J.J. Lazzarotti & K.C. Weber, "EEOC, DOJ Release Expectations on Employers' Use of Technology, AI for Employment Decisions" (Jackson Lewis: May 19, 2022), https://www.jacksonlewis.com/publication/eeoc-doj-release-expectations-employers-use-technology-ai-employment-decisions

J.E. Moreno, "Employers Seek Clarity on AI Bias Ahead of EEOC Enforcement Push," *Bloomberg Law* (Feb. 13, 2023),

https://news.bloomberglaw.com/daily-labor-report/employers-seek-clarity-on-ai-bias-ahead-of-eeoc-enforcement-push

D. Pasternak, "Impressing a Robot: EEOC Takes a Byte Out of AI Based Hiring" (Squire Patton Boggs: Feb. 6, 2023), https://www.employmentlawworldview.com/impressing-a-robot-eeoc-takes-a-byte-out-of-ai-based-hiring-us/

T. Samp & D. Tobey, "White House AI Bill of Rights May Prompt Agency Rulemaking and Legislation," *DLA Piper* (Nov. 29, 2022), https://www.dlapiper.com/en-us/insights/publications/2022/11/white-house-ai-bill-of-rights-may-prompt-agency-rulemaking-and-legislation

R. Schwartz, *et al.,* "Toward a Standard for Identifying and Managing Bias in Artificial Intelligence," NIST Special Pub. 1270 (Mar. 2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf

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E. Weinberger, "Banks' Reliance on Automated Compliance Systems Draws CFPB's Eyes," *Bloomberg Law* (Jan. 20, 2023),

https://news.bloomberglaw.com/banking-law/banks-reliance-on-automated-compliance-systems-draws-cfpbs-eyes

STATE

California SB-313 to create an Office of Artificial Intelligence, introduced Feb. 6, 2023, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB313

This bill would establish, within the Department of Technology, the Office of Artificial Intelligence, and would grant the office the powers and authorities necessary to guide the design, use, and deployment of automated systems by a state agency to ensure that all AI systems are designed and deployed in a manner that is consistent with state and federal laws and regulations regarding privacy and civil liberties and that minimizes bias and promotes equitable outcomes for all Californians. ***.

California Privacy Rights Act ("CPRA"), Cal. Civ. Code Sec. 1798.185 (a)(16)

Directs that regulations be adopted "governing access and opt-out rights with respect to businesses' use of automated decision-making technology, including profiling and requiring businesses' response to access requests to include meaningful information about the logic involved ... [and] a description of the likely outcome of the process with respect to the consumer." See https://cpra.gtlaw.com/regulations-2/

California Civil Rights Council, "Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems" (Version: Feb. 10, 2023), https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Attachment-C-Proposed-

Modifications-to-Employment-Regulations-Regarding-Automated-Decision-Systems.pdf

California Privacy Protection Agency – New Rules Subcommittee, Presentation (Dec. 16, 2022), https://cppa.ca.gov/meetings/materials/20221216_item8_presentation.pdf

Among other things, addressing current assignment and topics for preliminary rulemaking.

California Privacy Protection Agency, Draft "Sample Questions for Preliminary Rulemaking" (New Rules Subcommittee: undated), https://cppa.ca.gov/meetings/materials/20221216_item8.pdf

Setting forth questions on risk assessments, cybersecurity audits, and automated decisionmaking

Colorado S.B. 169, "Restrict Insurers' Use of External Consumer Data"

"The act prohibits an insurer from *** using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression." see https://leg.colorado.gov/bills/sb21-169. Draft regulations were released February 1, 2023 and are available at https://doi.colorado.gov/announcements/for-review-and-comment-draft-proposed-algorithm-and-predictive-model-governance

Illinois Artificial Intelligence Video Interview Act, 820 ICLS 42/
Regulates video recording of job interviews and use of AI to analyze the videos, requires notice and consent, limits sharing of video, requires report on demographic data and provides for destruction of videos. See https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68

E. Dinallo, *et al*., "Colorado Draft AI Insurance Rules Are a Watershed for AI Governance Regulation," *Debevoise in Depth* (Debevoise & Plimpton: Feb. 14, 2023), https://www.debevoise.com/insights/publications/2023/02/colorado-draft-ai-insurance-rules-are-a-watershed

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T. Wu, "As Attention on AI Increases, California Ramps Up Oversight," *Bloomberg Law* (Feb. 23, 2023), https://news.bloomberglaw.com/tech-and-telecom-law/as-attention-on-ai-increases-california-ramps-up-oversight?usertype=External&bwid=00000186-5670-d06a-a5df-f7f692330001&qid=7425217&cti=COR&uc=47893&et=NEWSLETTER&emc=blnw_nl%3A2&source=newsletter&item=body-link&region=text-section&access-

ticket=eyJjdHh0IjoiVEVOVyIsImlkIjoiMDAwMDAxODYtNTY3MC1kMDZhLWE1ZGYtZjdmNjkyMzMwMDAxIiwic2lnIjoiVlJ0S0kzanVDVWQ4aGdZNnE4NXZEWWZYTzY0PSIsInRpbWUiOiIxNjc3MTc5MjQzIiwidXVpZCI6ImZrdXJhbXZNOVpuTUpZR2xzVStBTlE9PTBQbFlIc09tS25JdFhPcHNIVzNucFE9PSIsInYiOiIxIn0%3D

LOCAL

New York City Local Law No. 1894-A

Effective April 15, 2023, regulates use of "automated employment decision tools" in hiring and promotion, requires notice prior to being subject to a tool, allows opting-out and another process, and requires annual, independent "bias audit." See Legislation Text - Int 1894-2020 (srz.com). Proposed rules pending as of February 15, 2023. See https://rules.cityofnewyork.us/wp-content/uploads/2022/12/DCWP-NOH-AEDTs-1.pdf

M. Capezza, *et al.*, "Deploying a Holistic Approach to Automated Employment Decision-Making in Light of NYC's AEDT Law" (Mintz: Feb. 3, 2023), https://www.mintz.com/insights-center/viewpoints/2226/2023-02-03-deploying-holistic-approach-automated-employment

INTELLECTUAL PROPERTY

Request for Comments Regarding Artificial Intelligence and Inventorship, 88 FR 9492 (Feb. 14, 2023)

The United States Patent and Trademark Office (USPTO) plays an important role in incentivizing and protecting innovation, including innovation enabled by artificial intelligence (AI), to ensure continued U.S. leadership in AI and other emerging technologies (ET). In June 2022, the USPTO announced the formation of the AI/ET Partnership, which provides an opportunity to bring stakeholders together through a series of engagements to share ideas, feedback, experiences, and insights on the intersection of intellectual property and AI/ET. To build on the AI/ET Partnership efforts, the USPTO is seeking stakeholder input on the current state of AI technologies and inventorship issues that may arise in view of the advancement of such technologies, especially as AI plays a greater role in the innovation process. As outlined in sections II to IV below, the USPTO is pursuing three main avenues of engagement with stakeholders to inform its future efforts on inventorship and promoting AI-enabled innovation: a series of stakeholder engagement sessions; collaboration with academia through scholarly research; and a request for written comments to the questions identified in section IV. The USPTO encourages stakeholder engagement through one or more of these avenues.

Re: Zarya of the Dawn (Registration # V Au001480196), United States Copyright Office (Feb. 21, 2023), Letter: In re Zarya of the Dawn

The Office has completed its review of the Work's original registration application and deposit copy, as well as the relevant correspondence in the administrative record. We conclude that Ms. Kashtanova is the author of the Work's text as well as the selection, coordination, and arrangement of the Work's written and visual elements. That authorship is protected by copyright. However, as discussed below, the images in the Work that were generated by the Midjourney technology are not the product of human authorship. Because the current registration for the Work does not disclaim its Midjourney-generated content, we intend to cancel the original certificate issued to Ms. Kashtanova and issue a new one covering only the expressive material that she created. [footnote admitted].

Thaler v. Hirshfeld, No. 1:20-cv-903-(LMB/TCB), 2021 WL 3934803 (E.D. Va. Sept. 2, 2021), affirmed, *Thaler v. Vidal*, 2021-2347 (Fed.

Cir. Aug. 5, 2022), petition for panel and rehearing en banc denied (Fed. Cir. Oct. 20, 2022)

This was an appeal from the refusal of the USPTO to process two patent applications. The plaintiff alleged that he was the owner of DABUS, "an artificial intelligence machine" listed as the inventor on the applications. The applications included a document through which DABUS had "ostensibly assigned all intellectual property rights" to the plaintiff. The court held:

> Before the Court are the parties' cross-motions for summary judgment, which address the core issue—can an artificial intelligence machine be an "inventor" under the Patent Act? Based on the plain statutory language of the Patent Act and Federal Circuit authority, the clear answer is no.
>
> [P]laintiff's policy arguments do not override the overwhelming evidence that Congress intended to limit the definition of "inventor" to natural persons. As technology evolves, there may come a time when artificial intelligence reaches a level of sophistication such that it might satisfy accepted meanings of inventorship. But that time has not yet arrived, and, if it does, it will be up to Congress to decide how, if at all, it wants to expand the scope of patent law.

Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071 (Copyright Review Board: Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf

This was the denial of a request by Steven Thaler (see above) to reconsider his attempt to register a "two-dimensional artwork claim" that had been rejected by the Registration Program of the United States Copyright Office. Thaler identified the author of the artwork as the "Creativity Machine," and stated that it was "autonomously created by a computer algorithm running on a machine." The Office refused to

register the claim as it lacked "human authorship necessary to support a copyright claim." The Review Board affirmed the refusal to register the claim:

> Thaler does not assert that the Work was created with contribution from a human author, so the only issue before the Board is whether, as he argues, the Office's human authorship requirement is unconstitutional and unsupported by case law. Currently, "the Office will refuse to register a claim if it determines that a human being did not create the work." Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered. (citation and footnote omitted).

The Review Board also rejected Thaler's argument that the human authorship requirement was unconstitutional:

> [T]he Board rejects Thaler's argument that the human authorship requirement is "unconstitutional" because registration of machine-generated works would "further the underlying goals of copyright law, including the constitutional rationale for copyright protection." Congress is not obligated to protect all works that may constitutionally be protected. "[I]t is generally for Congress," not the Board, "to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; not second-guess whether a different statutory scheme would better promote the progress of science and useful arts. (citation omitted).

Class Action Complaint, Andersen v. Stability AI Ltd., Case 3:23-cv-00201 (N.D. Ca. filed Jan. 13, 2023), see https://dockets.justia.com/docket/california/candce/3:2023cv00201/407208. Complaint alleges that "AI Image Generators are 21st-Century Collage Tools that Violate the Rights of Millions of Artists." (see Weiss below).

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GENERATIVE AI, INCLUDING CHATGPT

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The IAPP is tracking the latest developments around artificial intelligence in its Resource Center. The page contains articles, resources and white papers that cover the ethical considerations when AI is used, regulation to tackle the technology and where it intersects with privacy. It also highlights the IAPP Privacy and AI Governance Report. (IAPP membership login required.)

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LAW ENFORCEMENT AND MILITARY APPLICATION OF ARTIFICIAL INTELLIGENCE

Technology is neutral. That does not mean, however, that a given technology cannot have a military use. AI is no exception, as the examples below demonstrate.

USDOD, *Autonomy in Weapon Systems,* DoD Directive 3000.09 (Jan. 25, 2023), https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodd/300009p.pdf

The purpose of the Directive is to:

- Establishes policy and assigns responsibilities for developing and using autonomous and semiautonomous functions in weapon systems, including armed platforms that are remotely operated or operated by onboard personnel.

- Establishes guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.
- Establishes the Autonomous Weapon Systems Working Group.

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An increasing number of States are developing military AI capabilities, which may include using AI to enable autonomous systems. Military use of AI can and should be ethical, responsible, and enhance international security. Use of AI in armed conflict must be in accord with applicable international humanitarian law, including its fundamental principles. Military use of AI capabilities needs to be accountable, including through such use during military operations within a responsible human chain of command and control. A principled approach to the military use of AI should include careful consideration of risks and benefits, and it should also minimize unintended bias and accidents. States should take appropriate measures to ensure the responsible development, deployment, and use of their military AI capabilities, including those enabling autonomous systems. These measures should be applied across the life cycle of military AI capabilities. [footnote omitted].

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Although the U.S. government has no official definition of artificial intelligence, policymakers generally use the term AI to refer to a computer system capable of human-level cognition. AI is further divided into three categories: narrow AI, general AI, and artificial superintelligence. Narrow AI systems can perform only the specific task that they were trained to perform, while general AI systems

would be capable of performing a broad range of tasks, including those for which they were not specifically trained. Artificial superintelligence refers to a system "that greatly exceeds the cognitive performance of humans in virtually all domains of interest." General AI systems and artificial superintelligence do not yet—and may never—exist.

Narrow AI is currently being incorporated into a number of military applications by both the United States and its competitors. Such applications include but are not limited to intelligence, surveillance, and reconnaissance; logistics; cyber operations; command and control; and semiautonomous and autonomous vehicles. These technologies are intended in part to augment or replace human operators, freeing them to perform more complex and cognitively demanding work. In addition, AI-enabled systems could (1) react significantly faster than systems that rely on operator input; (2) cope with an exponential increase in the amount of data available for analysis; and (3) enable new concepts of operations, such as swarming (i.e., cooperative behavior in which unmanned vehicles autonomously coordinate to achieve a task) that could confer a warfighting advantage by overwhelming adversary defensive systems.

Narrow AI, however, could introduce a number of challenges. For example, such systems may be subject to algorithmic bias as a result of their training data or models. Researchers have repeatedly discovered instances of racial bias in AI facial recognition programs due to the lack of diversity in the images on which the systems were trained, while some natural language processing programs have developed gender bias. Such biases could hold significant implications for AI applications in a military context. For example, incorporating undetected biases into systems with lethal effects could lead to cases of mistaken identity and the unintended killing of civilians or noncombatants.

Similarly, narrow AI algorithms can produce unpredictable and unconventional results that could lead to unexpected failures if incorporated into military systems. In a commonly cited demonstration of this phenomenon ***, researchers combined a picture that an AI system correctly identified as a panda with random distortion that the computer labeled "nematode." The difference in the combined image is imperceptible to the human eye, but it resulted in the AI system labeling the image as a gibbon with 99.3% confidence. Such vulnerabilities could be exploited intentionally by adversaries to disrupt AI-reliant or -assisted target identification, selection, and engagement. This could, in turn, raise ethical concerns—or, potentially, lead to violations of the law of armed conflict—if it results in the system selecting and engaging a target or class of targets that was not approved by a human operator.

Finally, recent news reports and analyses have highlighted the role of AI in enabling increasingly realistic photo, audio, and video digital forgeries, popularly

known as “deep fakes.” Adversaries could deploy this AI capability as part of their information operations in a “gray zone” conflict. Deep fake technology could be used against the United States and its allies to generate false news reports, influence public discourse, erode public trust, and attempt blackmail of government officials. For this reason, some analysts argue that social media platforms—in addition to deploying deep fake detection tools—may need to expand the means of labeling and authenticating content. Doing so might require that users identify the time and location at which the content originated or properly label content that has been edited. Other analysts have expressed concern that regulating deep fake technology could impose an undue burden on social media platforms or lead to unconstitutional restrictions on free speech and artistic expression. These analysts have suggested that existing law is sufficient for managing the malicious use of deep fakes and that the focus should be instead on the need to educate the public about deep fakes and minimize incentives for creators of malicious deep fakes.

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RJH 2/25/23

PRACTICE NOTE

A Judicial View of Generative Artificial Intelligence

By Ronald J. Hedges, Esq.

This practice note is an introduction to generative artificial intelligence ("GAI") from a different perspective, that of a former judge who, rather than use GAI for professional, business, or personal reasons, questions how the output of GAI might become a claim or defense in a civil action or the subject of discovery and admissibility.

What is GAI?

Let's begin with artificial intelligence. That is the term used to describe how computers can perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects and making decisions based on data. "Machine learning" is an application of artificial intelligence in which computers use algorithms (rules) to learn from data. Machine learning adapts with experience. In other words, the algorithm can change as more data is fed into it. ''GAI'' goes a step further: It is a type of artificial intelligence that uses machine learning algorithms to create new and original content such as images, videos, text, and sound. What all this means, from my viewpoint, is that GAI can create ''things'' that might lead to government investigations and litigation. (FYI, this Practice Note is about civil litigation only. How GAI might lead to criminal investigations and prosecutions is for a different day).

GAI hit the news in late 2022, when ChatGPT became available from OpenAI, ''an AI research and deployment company,'' the published mission of which is to ''ensure that artificial general intelligence benefits all of humanity.'' *https://openai.com/about*. ChatGPT uses data to generate text. As noted above, other GAI, such as DALL.E2, another product of OpenAI, can ''create realistic images and art from a description in natural language.'' https://openai.com/product/dall-e-2.

Ethical implications

Before we delve into the uses and abuses of GAI that might lead to litigation, it would be worthwhile to think about the ethical duties of attorneys that might come into play.

In August of 2019, the House of Delegates of the American Bar Association adopted this resolution:

> 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. [https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/112.pdf].

At the least, the resolution implicates several Model Rules of Professional Conduct ("Model Rules"). First, there is the attorney's duty of competence under Model Rule 1.1 as that rule has been adopted across the Nation: The attorney should understand the technology he or she uses as well as the benefits and risks in doing so. Second is the duty to maintain client confidentiality under Model Rule 1.6. These duties go together: An attorney must understand the technology that he or she or *the client* uses and must also take reasonable steps to protect information "given" to the technology. Moreover, assuming the attorney is working with a vendor or vendors, he or she might have supervisory duties under Model Rule 5.3 which, in turn, relates back to understanding the relevant technology. Substitute "GAI" for the word "technology" to drive your ethical duties home.

How attorneys might use GAI

Attorneys and their clients already use AI and machine learning for various purposes. Here are some uses of GAI available to attorneys:

- Contract review: GAI can review proposed text, flag potential issues, and suggest changes in text.
- Document drafting: GAI can "fit" data into a template and prepare a document.

- Predictive analytics: GAI can analyze data and predict results prior to commencement of a civil action.
- Legal research: GAI can search and review large volumes of data and provide insight for arguments.
- Risk management: GAI can identify legal risks in each instance, such as those related to data privacy and intellectual property.

In other words, GAI can assist attorneys in the practice of law. Specifically for the purposes of this Practice Note, GAI might be used by attorneys in litigation to, among other things, draft pleadings and engage in discovery. Attorneys should understand that reliance on the output of GAI in a specific instance might be problematic. I will give two examples below. Before I do so, however, bear in mind that a GAI output might be wrong.

Let's look at *Federal Rule of Civil Procedure* 11 first. Rule 11(b) addresses representations by attorneys:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Rule 11(c)(1) addresses sanctions for a violation of Rule 11(b):

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Second, consider Rule 26(g), which focuses on discovery-related signatures by attorneys:

Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Note the reference in these rules to the need to undertake a "reasonable inquiry." How does a *competent* attorney do that if he or she is relying on the output of GAI to draft a pleading or conduct a search of large volumes of data? That is a question that a judge must confront should there be a dispute about, among other things, a pleading or a document production that incorporated GAI output and has been challenged.

The rules require an attorney to "stop and think" before affixing his or her signature. As the Comment to the 1983 amendments of Rule 26 states,

> [a]lthough the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.
>
> The duty to make a 'reasonable inquiry' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. ***. In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

I will leave to the reader what reasonable inquiry he or she might make of a client or vendor who presents the attorney with GAI output. Suffice it to say that whatever the attorney does, it might be worthwhile to document whatever

inquiry is made. And that course of action might be helpful if the attorney is making his or her own use of GAI.

Possible causes of action

Let's turn to litigation that might arise from the output of GAI. What causes of action might a judge see? Among others:

- Breach of contract ("the GAI output was not what was contracted and paid for")
- Misrepresentation ("the GAI output was not what the provider said it would be")
- Libel or slander ("the GAI output included words or images that injured a person in some way")
- Trademark or copyright or other intellectual property infringement ("the GAI output incorporated words or images that were protected by law")
- Breach of privacy ("the GAI reviewed and gave output based on personal data in violation of a data privacy law")
- Employment discrimination ("the GAI output resulted in unlawful age, gender, or racial discrimination")

What GAI-related issues should a judge expect?

All the above raises some threshold issues that judges (and attorneys) should expect to have to deal with. These include:

- Whether to execute a protective order under Rule 26(c)(1) assuming there is a showing of "good cause" to limit disclosure of certain information.
- How to resolve dispute about requests for, or responses to discovery requests, "prepared" or "responded" to with the assistance of GAI.
- Whether discovery will be allowed of GAI used for discovery and, if so, how discovery might be conducted.

- Whether opinion testimony will be necessary under *Federal Rule of Evidence* 702 and, if so, whether that opinion satisfies the standard for admissibility under *Daubert.*
- Assuming that evidence is offered before the finder of fact, whether for a nonjury or jury trial and the evidence if GAI output, whether the proffered evidence is admissible.

Key Takeaways

This Practice Note suggests several takeaways or best practices related to GAI:

1. GAI is here to stay and you and your firm and your clients should expect to see it and, perhaps, use it.
2. Recall your duty of competence under Model Rule 1.1: Understand the benefits and risks in GAI and discuss those with your client.
3. Also recall your duty of confidentiality under Model Rule 1.6. Appreciate the need to take reasonable steps to protect confidential communications. This need reinforces your duty under Model Rule 1.1: You can't take those reasonable steps unless you understand the technology and what it can and cannot do.
4. If you or your firm or your client decide to use GAI, understand the nature of the data that GAI will input, where the data comes from, and whether there are restrictions on access or use of the data.
5. Consider the legal consequences that might arise from GAI output and engage in a reasonable inquiry about that output before publishing or relying on that output.
6. Be prepared to address discovery and admissibility of GAI output with a judge.

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About the Panelists…

Honorable Ronald J. Hedges, USMJ (Ret.) is 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. A member of the Advisory Group of Magistrate Judges from 2001-2005, he has also 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. 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 principal author of the third edition of the *Federal Judicial Center's Pocket Guide for Judges on Discovery of Electronic Information*.

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