

WEBINAR



# How Artificial Intelligence is Changing D&O Exposure

Thursday, January 11, 2024

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**2024 VIRTUAL**  
**MANAGING D&O RISKS FROM EMERGING TRENDS**

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January 11, 2024



**How Artificial Intelligence is Changing D&O Exposure**

Presentation part of the Wilson Elser D&O Forum Series

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2024 | VIRTUAL  
Managing D&O Risks from Emerging Trends

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## Our Goals Today

- Basic Concepts & Terms
- Regulatory Environment
- Industry Uses
- Risk Considerations



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## Introduction / Background

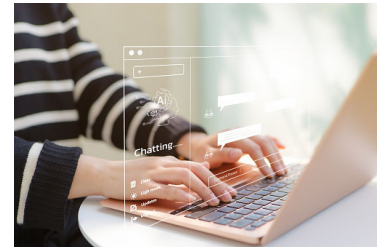
- What is Artificial Intelligence?
  - Definition
  - Importance
  - Ethical and Legal Consideration



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## Artificial Intelligence Today

- How is Artificial intelligence impacting our daily lives?
  - Democratization of AI
  - Current uses of Chat GPT and similar tools like Harvey.AI
  - AI has been in use for years, example of chatbots
  - Microsoft Inspire AI Software
  - Use in the Financial Service Organizations



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## Artificial Intelligence Today (Cont.)

- Board Standard Duties to the Organization
  - Duty of Loyalty, Care, Candor
  - Business Judgment Rules
  - Ethics
  - Board Oversight over the implementation of Technology

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# Government Regulation of Artificial Intelligence and Regulatory Actions



- Regulations in the US
  - 2019's Executive Order 13859, "Maintaining American Leadership in Artificial Intelligence,"
  - White House rules on AI – Oct 2022
  - FDA in April 2023 has rules on "Marketing Submission Recommendations for a Predetermined Change Control Plan for Artificial Intelligence/Machine Learning (AI/ML)-Enabled Device Software Functions"
  - Congress considering a Federal Algorithmic Accountability Act
  - October 30, 2023 – Executive Order on the safe, Secure, and Trustworth development and Use of Artificial Intelligence

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# Government Regulation of Artificial Intelligence and Regulatory Actions (Cont.)



- FTC Regulatory Actions
  - 2022 FTC Enforcement Actions involving Everalbum, Facebook, Clarifai on facial recognition technology practices
  - July 2023 FTC Investigation into OpenAI as to whether mishandled personal data
- Regulations in the EU, UK, and China
  - Italy in April 2023 ban further development of ChatGPT over privacy
  - Geneva Association Report on AI Regulation – Sept 2023.
  - Artificial Intelligence Act – EU Parliament's provisional agreement – Dec 2023.
- Importance of Regulation
- Impact of Regulations



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## State Task Forces on AI Usage

- **Alabama** Council on Advanced Technology and Artificial Intelligence, Ala. Code § 41-9-1100 (effective May 6, 2022).
- **California** Future of Work Commission, created by executive order Aug. 14, 2019.
- Artificial Intelligence: A Roadmap for California, Little Hoover Commission, Nov. 2018.
- **Hawaii** Artificial Intelligence Advisory Committee, created by 2019 Bill Text HI S.R. 142.
- **Illinois** Future of Work Task Force, 20 ILCS 4103/10 (enacted and effective Aug. 19, 2021; to be repealed on Jan. 1, 2024); Generative AI and Natural Language Processing Task Force, 20 ILCS 1370/1-80.
- **New Jersey** Governor's Future of Work Task Force, Nov. 2018.



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## State Task Forces on AI Usage

- **Texas** Artificial Intelligence Advisory Council, Tex. Gov't. Code §§ 2054.621 through 2054.624 (when codified); 2023 Bill Text TX H.B. 2060 (introduced Feb. 8, 2023, enacted June 13, 2023).
- **Texas** Use of Next Generation Technology, Tex. Gov't Code § 2054.601, (effective Sept. 1, 2019; expires Sept. 1, 2025).
- **Utah** Deep Technology Talent Advisory Council, created by 2020 UT S.B. 96.
- **Vermont** Artificial Intelligence Advisory Council, 3 V.S.A. § 5023 (effective July 1, 2022; repealed July 1, 2027).
- **Washington** Automated Decision-Making Systems Workgroup Report, 2021 Bill Text WA S.B. 5092 (enacted and effective May 18, 2021).



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## State Laws Already in Place Regulating AI

- **Right against automated decision making** — A prohibition against a business making decisions about a consumer based solely on an automated process without human input
  - California (California Privacy Rights Act (2020; fully operative Jan. 1, 2023)),
  - Colorado (Colorado Privacy Act (2021; effective July 1, 2023)),
  - Connecticut (Connecticut Data Privacy Act (2022; effective July 1, 2023)),
  - Delaware (Delaware Personal Data Privacy Act (2023; effective Jan. 1, 2025)),
  - Indiana (Indiana Consumer Data Protection Act (2023; effective Jan. 1, 2026)),
  - Iowa (Iowa Consumer Data Protection Act (2023; effective Jan. 1, 2025)),
  - Montana (Montana Consumer Data Privacy Act (2023, effective Oct. 1, 2024)),
  - Oregon (Oregon Consumer Privacy Act (2023; effective July 1, 2024)),
  - Tennessee (Tennessee Information Protection Act (2023; effective July 1, 2025)),
  - Texas (Texas Data Privacy and Security Act (2023; effective July 1, 2024)).
  - Virginia (Virginia Consumer Data Protection Act (2021; effective Jan. 1, 2023)).



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## Litigation over privacy concerns related to AI against Technology Companies

- Look at issues as to Service terms agreements and limitation of liability
- Address inadequate privacy provisions, intrusive data protection clauses
- **Example Cases:**
  - *In re Clearview AI, Inc., Consumer Priv. Litig.*, 585 F. Supp. 3d 1111, 1118 (N.D. Ill. 2022)
  - *Divino Grp. LLC v. Google LLC*, No. 19-cv-04749-VKD, 2022 U.S. Dist. LEXIS 180048, at \*18 (N.D. Cal. Sep. 30, 2022)
  - *P.M. et al v. OpenAI LP, et al*, No. 23-cv-3199 in the US District Court, Northern District of California.
  - *Mark Walters v. OpenAI LLC*, No. 1:23-cv-03122, in the U.S. District Court for the Northern District of Georgia.



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## Litigation over Product Liability

- *Cruz v. Raymond Talmadge d/b/a Calvary Coach*, 244 F. Supp. 3d 231 (D. Mass. 2017).
  - plaintiffs were injured (some killed) when the bus that they were on struck an overpass. The plaintiffs sued the manufacturers of the two GPS devices (a popular AI item) that were guiding the driver under the theories of breach of warranty, strict liability, and negligence.
  - Case settled.
- *Nilsson v. General Motors LLC*, Case No. 4:18-cv-00471 (N.D. Cal. June 26, 2018).
  - plaintiff, an injured motorcyclist, was hit by an autonomous vehicle (AI-controlled car) when it swerved into his lane on a highway. A backup driver was in the car at the time of impact but was not operating the vehicle. The plaintiff sued the manufacturer solely on the theory of negligence, arguing that the vehicle itself (and not the backup driver) drove negligently (i.e., that the car did not use reasonable care when driving).
  - Case settled.



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## Litigation Over Intellectual Property

- IP Risks of AI generated content and compliance with copyright laws
  - Feb 2023 - Copyright Office said it was canceling part of artist Kristina Kashtanova's copyright registration granted in September for their comic book "Zarya of the Dawn" due to "inaccurate and incomplete information." (images created with AI).
  - *Andersen v. Stability AI Ltd*, U.S. Dist Court for the Northern District of California, No. 3:23-cv-00201. (copyright infringement claim). 10/30/23 MTD denied in part, granted in part.
  - *Kadrey, et al v. Meta Platforms, Inc.*, US Dist Court for the Northern District of California (23-cv-3417) (copyright infringement claim. 11/20/23 MTD granted for most claims.
  - *Sarah Silverman, et al. v. Open AI, Inc.*, US Dist Court, Northern District of California, No. 23-cv-3416. (filed 7/8/23); 8/28/23 defendants MTD most claims based upon "failing to take into account the limitations and exceptions (including fair use) that properly leave room for innovations like the large language models now at the forefront of artificial intelligence." Motion Hearing on 12/7/23, no decision.
  - *Authors Guild et al v. OpenAI, Inc, et al*, US Dist Court, Southern District of New York, No. 23-cv-8292 (filed 9/19/23); amended complaint filed 12/5/23.
  - *NY Times v. Microsoft Corp, Open AI*, US Dist Court, Southern District of New York, No. 23-cv-11195 (filed 12/27/23)



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## Response by AI Companies to IP Litigation

- Google, OpenAI, Microsoft, and Amazon offering services to paid customers to pay for costs to defend customers over legal claims around copyright infringement
  - Google: “if you are challenged on copyright grounds, we will assume responsibility for the potential legal risks involved.” Caveat: “this indemnity only applies if you didn’t try to intentionally create or use generated output to infringe the rights of others.”
  - “OpenAI’s indemnification obligations to API customers under the Agreement include any third party claim that Customer’s use or distribution of Output infringes a third party’s intellectual property right. This indemnity does not apply where: (i) Customer or Customer’s End Users knew or should have known the Output was infringing or likely to infringe.”



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## Laws impacting Employment Screening Use of AI

- AI is being used on a regular basis to sort, rank, and disqualify potential candidates without significant human supervision. This process, however, remains subject to all applicable employment and anti-discrimination laws and AI bring inherent risks to this process.
- Legal Compliance
  - NYC 144 – enforcement as of July 5, 2023.
  - Illinois Artificial Intelligence Video Interview Act (820 ILCS 42) (eff. 1-1-20).
  - California, Maryland, and Washington are considering legislation
  - *Mobley v. Workday*, NDCA (No. 23-cv-770)
- EEOC Involvement
  - January 2023 EEOC held public hearing
  - *EEOC v. iTutorGroup, Inc., et al.*, EDNY (No. 22-cv-02565)



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## Regulations for Lawyers Use of AI

- **California Bar** - guidelines for the practical use of generative AI in legal work proposed in 2023.
- **Florida Bar** – November 2023 proposed guidelines for how attorneys can ethically use generative artificial intelligence in their legal work.
- **Illinois** – ND IL Standing Order on the use of Gen AI.
- **Michigan** - November 2023 - judges have an ethical obligation to understand advancing technology, including artificial intelligence.
- **New York** – example of cases of attorneys sanctioned for use of ChatGPT because of fake citations in June 2023.
- **Pennsylvania** – some judges in EDPA have order requiring disclosure of the use of AI in drafting filings
- **Texas** – some judges in NDTX Standing Order on the use of Gen AI.

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## Cyber Security Concerns over AI

- AI can create sophisticated phishing scams
- Impersonating IT staff or high-level executives in video or audio formats
- FTC estimated in 2022 that Americans lost nearly \$9 billion to fraud, an increase of over 150% in just two years.
- Concerns on deepfakes.
  - States in the US that have laws against deepfakes target deepfake pornography
  - Focus is on existing privacy, copyright infringement, and fraud legal framework
- Strengthen protocols and educate employees

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## Where will AI take us in the years to come

- Building Custom Large Language Models.
- Collaboration with experts, ongoing monitoring, and adaptation ensure legal compliance, minimize risks, and maintain the model's effectiveness.

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## Final Thoughts / Predictions for 2024

- AI on a global scale improving efficiency and accuracy
  - Building an internal system to keep privileged information protected
  - Be cautious when entering data into AI Tools
- Ethical and legal concerns must be addressed through regulation
- Increased Warnings on use of AI
  - Focus on Maintaining Privacy
  - Review generated content
- Clients must be advised of risks in using AI
- AI Large Language models can be customized for accuracy and relevance

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# Thank you!



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