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AI and Access to Justice

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Agenda

▶ Transformative Moment in Access to Justice

▶ Brief Explanation of AI and Tools for Civil Litigators

▶ Generative AI: Game Changer

▶ Algorithmic Bias
  ▪ Remains Important Issue
  ▪ Case law evolving

▶ Regulatory Horizon

Transformative Moment In Access to Justice

Transformative Moment…

▶ In civil law access to justice, generative AI is transformative

▶ Next gen will allow civil litigants to have ability to:
  ▪ Perform research
  ▪ Draft papers
  ▪ Be "heard"

▶ Total game changer for the unrepresented

Transformative Moment, (cont'd)…

▶ Generative AI will change the way law is practiced
  ▪ And justice dispensed

▶ Today, accuracy concerns remain

▶ Confidentiality issues (privacy)

▶ Generally unsettled state of the law

▶ Prediction: 1-2 year horizon for accuracy and legal dust to start to come down

Briefly: AI and Tools for Civil Litigators

Overview of AI

▶ **AI is just that: "artificial" intelligence**

▶ **AI must "learn", it needs a "brain" (the algorithm and computing power), and information (data sets)**

▶ **AI uses data to find patterns**
  - Example: find best bread recipe
  - Data set = entire Internet
    - Reads recipes
    - Discerns ingredients (inputs)
      - Flour, water, yeast, salt (maybe sugar)
    - Weights according to representation in the recipes it has read
  - Output = "best" bread recipe based on what it has read

▶ **AI Bread Recipe Tool only knows the world of recipes provided ("data set")**

Data Sets Are Critical

▶ **Choosing the data set is critical**

▶ **Data set issues:**

- Selection process

- Derivation

- Timeframe

- Representation

  – Historical context

  – Social context

  – Regional variation

  – Embedded biases

AI Tools Leading to Civil Claims

- **Algorithmic tools used today to make decisions in**
  - Credit and lending
  - Housing
  - Employment
  - Medical treatment
  - Education
  - Insurance
  - Access to certain benefits
- **Data sets can discern patterns:**
  - Who are "good" credit risks
  - Who will pay the rent
  - Who will be the best employee
  - Which teachers are performing well
  - Who will die at what age, of what

Do Civil Litigators Need Discovery of the Data Set or Algorithm?

▶**Algorithm and data set establish output**

▶**Result may be challenged**

▶**Discovery of the AI tool**

- Issues
  - Can you get it?
  - Will you understand it?
  - Do you have the resources for an expert?
  - Has the tool user maintained the data set the tool was trained on?
  - Does the tool user even have access to the data set?
  - Can you tell if weightings within the pattern were altered?

Current Dialogue Re AI Tools in These Areas

► **Accuracy versus fairness**

► **Design of algorithm**
- Explainable logic?
- Explainable output/decisions?
- Blackbox?

► **Selection of data sets**
- Who is responsible for choosing
  - Just corporate data
  - Aggregated / federated data
- Vetting process

► **Overall traceability of algorithm design and data sets**
- Retention of data sets and impact assessments required by certain regs

Current Dialogue Re Algorithms, (cont'd)

- **Potential** for bias and discrimination in output
  - Intentional
  - Disparate Impact
- Through embedded biases
  - Selection of data set
  - History behind data
  - Human adjustments
- "Past is prologue"
  - Inaccuracies or historical inequities embedded in data
    - Get pulled forward
- Blackbox tools: hard to tell where bias came from
- Impact assessments KEY
- Contractual allocation of responsibility

Exs. of Algorithmic Bias in Civil Law Areas

Algorithmic Bias: Credit and Lending

► **Biased data sets**
- Geography
  - Neighborhood
  - Time period

► **Job category**

► **Family characteristics (married, unmarried)**

► **"Thinness" of file**

► **Even if exclusions, other inputs remain**
- Proxy issues
  - Zip codes
  - Schools attended
  - Names of athletic teams

Algorithmic Bias: Credit and Lending (Cont'd)

► **Cases**

- *Cnty Cook v. HSBC N. Am. Holdings*, 136 F. Supp. 3d 952, 957 (N.D. IL. 2015) (Cook Country alleged that HSBC used algorithmic modeling to intentionally target borrowers in predominantly minority areas to grow its subprime mortgage lending business.).

- *Zamudio v. HSBC North Am. Holdings*, No. 07-C-4315, 2008 WL 517138, *2 (N.D. IL. Feb. 20, 2008) (Plaintiff asserted that racially discriminatory assumptions are embedded in the statistical formulas used to analyze credit information and automated underwriting and credit scoring, and ultimately form underwriting decisions.).

- *Miller v. N.Y. State Dep't Fin. Serv.*, No. 101118/2014, 2015 WL 1504301, *2 (N.Y. Sup. Mar. 27, 2015) (Petitioner requested DFS provide documents related to (1) the creation and maintenance of the database that DFS had compiled to identify payday lenders who allegedly violated NYS usury laws and (2) the "algorithm" used to create the underlying database.).

Algorithmic Bias: Credit and Lending / Regulations

▶ **Regulations - New York**

- Concerns re bias in credit determinations
  - Issue is weighting of data
    - Person or group
- In response to the Consumer Financial Protection Bureau's "No Action Letter" policy to facilitate the use of AI for pricing and underwriting loans
  - NY AG opposed, in part, due to concern over "what data is relevant to a creditworthiness evaluation and how each piece of data should be weighted."

▶ Letter from DC Attorney General to Chairman of the DC Council in support of the "Stop Discrimination by Algorithms Act of 2021" (Dec. 9, 2021)

- "Lending algorithms have calculated higher interest rates for borrowers who attended Historically Black Colleges and Universities."

Algorithmic Bias: Human Resources

▶ **Predictive recruitment tools**

- "Scoring" for job candidates

- First and last names, a women's college, font

- Data sets taken from orgs with few in demographic categories

    – E.g., Amazon's experiment with a recruitment software that relied on 10 years of résumés from applicants and hires: algorithmic bias consistently favored male candidates over women.

▶ **Amount of human judgment**

- How to "judge" atypical candidate, work ethic

▶ **Inaccurate decision-making**

- Use of keyword scanning

- Manipulation of key words

▶ **Case**

- *Mobley v. Workday*, Inc., 3:23-cv-00770 (N.D. Cal. Feb. 21, 2023) (Plaintiffs alleged that Defendant screened applications with AI tools that disproportionately disadvantage those who are Black, over the age of 40, or have disabilities).

Algorithmic Bias: Human Resources / Regulations

► **EEOC's Artificial Intelligence and Algorithmic Fairness** [Initiatives](#)

- Technical assistance to provide guidance on algorithmic fairness and 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 Hearing](#) on potential benefits and harms of AI and other automated systems in employment decisions (Jan. 31, 2023)

- To prevent and eliminate unlawful bias in employers' use of automated technologies.

► [Letter from DC Attorney General](#) to Chairman of the DC Council in support of the "[Stop Discrimination by Algorithms Act of 2021](#)" (Dec. 9, 2021)

- "Employment algorithms can filter job applicants by how closely they match a business's current workers and screen out applicants with disabilities."

Algorithmic Bias: Insurance

► **Underwriting factors could affect protected traits and proxies**

  ▪ The Casualty Actuarial Society (CAS) this year <u>acknowledged</u> "the potential impact of systemic racism on insurance underwriting, rating and claims practices."

► **Impacts algorithm and data set choices**

  ▪ An algorithm <u>could be legal in one state but illegal in another</u>

Life Insurance Underwriting Factor	State/Territory Restrictions
Race	24% prohibit
National Origin	24% prohibit
Religion	20% prohibit
Age	24% generally restrict; 76% expressly permit
Sexual Orientation	25% completely prohibit; 4% strongly limit; 73% generally restrict
Gender	2% prohibit; 98% expressly permit
Genetic Information	Approximately 30% expressly permit; 50% generally restrict; less than 20% specifically limit or prohibit
Credit Score	Approximately 25% expressly permit; 75% generally restrict; less than 10% specifically limit or prohibit
Zip Code	78% generally restrict; 16% have some limitations; 2% prohibit

Algorithmic Bias: Insurance (Cont'd)

► Case

- *Amos v. Geico Corp.*, No. 06-CV-1281, 2008 WL 4425370, *1, 9 (D. Minn. 2008).

  – Plaintiffs alleged that Geico used education and occupation not because they were valid measures of underwriting risk, but as proxies for race.

  – The court held that Plaintiffs failed to show that GEICO's decision in categorizing occupations was racially motivated. Specifically, the issue involved (1) the extent to which GEICO's decision to categorize occupations was actuarially sound and (2) the extent to which the categorization disproportionately disadvantaged African Americans.

  – The court pointed out GEICO had continually reevaluated its categorizations, sometimes with outside input.

Algorithmic Bias in Insurance / Regulations

► Colorado Bill 21-169 (signed into law July 2021)

  ▪ Prohibits use of "external" data and information, as well as algorithms using external data, which has the result of "unfairly discriminating"

  ▪ As required by the bill, the Colorado Division of Insurance is now requesting comments on a draft Algorithm and Predictive Model Governance Regulation, which seeks to set requirements for a life insurance company's internal governance and risk management framework.

► **Similar to CO law**

  ▪ NY A.B. 843 (only applicable to motor vehicle users)

  ▪ NY S.B. 553 (only applicable to an insurer's use of telematics systems)

  ▪ CA A.B. 1502 (only applicable to health insurers)

  ▪ IL A.B. 2203 (only applicable to motor vehicle insurers)

  ▪ OK H.B. 3186 "Insurance Consumer Rights Act"

  ▪ D.C. Bill 24-0558 "Stop Discrimination by Algorithms Act"

  ▪ RI H.B. 7230

Algorithmic Bias in Education

► **Replicating historical, structural biases**

- E.g., a college admissions office' algorithmic model to identify applicants likely to succeed at the college based on its previous admissions data.

- E.g., In 2020, University of Texas at Austin ceased using its software to evaluate Ph.D applicants because using the program's past admission decisions in the software's algorithms reduced opportunities for students from diverse backgrounds. (2020)

  – "Humans code these systems. Humans are encoding their own biases into these algorithms," said Yasmeen Musthafa, a Ph.D. student in plasma physics at the University of California, Irvine, who rang alarm bells about the university's machine learning system on Twitter.

► **Potential lawsuits**

- Risk of coding algorithms with arbitrary factors selected by humans.

  – Research has shown that colleges tend to market directly to "desirable candidates" and pay more visits to students at richer, whiter high schools to raise their tuition revenue.

  – Lawsuits have been filed against Harvard and the University of North Carolina because of the allegedly race-conscious admission decisions.

Algorithmic Bias: Education / Regulations

▶ D.C. Bill 24-0558 "Stop Discrimination by Algorithms Act"

- Stop the discriminatory use of traits like race, sex, and disability in automated decisions about employment, housing, education, and public accommodations.

▶ D.C. AG says, "[A]lgorithmic decision-making computer programs have been convincingly proven to replicate and, worse, exacerbate racial and other illegal bias in critical services . . . [t]hat includes obtaining **a mortgage, automobile financing, student loans, any application for credit, health care, assessments for admission to educational institutions from elementary school to the highest level of professional education**, and other core points of access to opportunities to a better life. This so-called **artificial intelligence is the engine of algorithms** that are, in fact, far less smart than they are portrayed, and more **discriminatory and unfair** than big data wants you to know. Our legislation would end the myth of the intrinsic egalitarian nature of AI."

Regulatory Horizon: Algorithmic Bias

Regulatory Environment (Algorithmic Bias)

► **Activity at federal, state and international levels**

► **Guidelines and Legislation requiring use of AI tools impacting consumers to be explainable, unbiased**

► **Examples**

■ Federal

– President Biden has issued a Blueprint for an AI Bill of Rights

– The FTC has issued guidance stipulating that the sale or use of racially biased algorithms is a deceptive practice banned by the FTC Act

– The EEOC warned employers against the use of algorithms that do not account for disabilities

Regulatory Environment (Algorithmic Bias) (cont'd)

► **Examples (cont'd)**

- State

  - New York requires employers to notify applicants about the use of automated employment decision tools and to conduct bias audit before using such tools. (effective April 2023)

  - Illinois requires employers using AI video interview tools to notify applicants about the use of such tools; the applicant also has the right to request that their video be deleted.

- International

  - China requires companies using algorithms for online recommendation systems to notify users when an AI algorithm is playing a role in determine which information to display to them and give users the option to opt out of being targeted.

  - The EU AI Act allows providers of AI systems to use data concerning race, gender, and ethnicity to ensure bias monitoring, detection, and correction.

EU AI Act

▶ **EU ahead of U.S.**

- Wants <u>EU AI Act</u> to be like <u>GDPR</u>

  – Set stage for overall floor of legislation

- Unclear when will be fully implemented

  – Or what technology will look like then

▶ **EU AI Act designates certain tools as high risk**

- Banking, credit, lending, consumer-related = high risk

▶ **Introduced an amendment**

- "General Purpose AI System" (<u>GPAIS</u>): for generative AI tools

▶ **GPAIS is considered "high-risk"**

GENERATIVE AI AND ACCESS TO JUSTICE

Generative AI: What is it Really?

► **Generative AI**

- Also called Foundation Models

► **Task oriented**

- Blows away the definition of narrow AI

► **Explosion of capability**

- Velocity of change unprecedented

► **Expect more changes in the very near future**

► **Literally now dozens of generative AI tools**

- Most well-known and well-funded is OpenAI's tool: ChatGPT
  - Various legal tools in the works

Generative AI (Cont'd)

- **Neural network**
  - More connections than the human brain
- **Built on huge amounts of data**
- **"Scraped" from the Internet**
  - Can include PII
  - Photographs
  - Copyrighted material
  - Information in social media
  - Anything accessible
- **Uses the content to:**
  - Generate predictions
  - Gather data / facts
  - Learns in ways we don't understand

Tools for Civil Law

▶ **Assuming following issues are resolved/solved in the near term, capabilities will exist**

▶ **Narrative form research questions with citations**

- Seconds

▶ **Research memos**

- Seconds

▶ **Preparing legal memoranda**

- Seconds

▶ **Uploading documents**

- Seconds

▶ **Prep of deposition outlines**

▶ **Prep of cross-examination outlines**

Implications of Generative AI for Access to Justice

►**Pros**

- More accessible pro se depositions
  - Now, questions are accessible (court reporting costs still an issue, but perhaps recording can be a court-ordered option)
- Better pro se filings
- Assistance to civil law groups that have heavy caseloads
- Evens the playing field with Big Law that has access to resources for research

►**Cons**

- License fees undetermined
- Legal issues need to be resolved
- Courts may be inundated with additional filings
  - Slowing access to justice itself

Generative AI: Deepfakes

► **Deepfakes**
  - AI-generated audio or visual content
    - Content is literally "fake"

► **Implications for evidentiary significance of audio and video**

► **Civil actions against deepfakes**
  - Privacy
    - Right of publicity
    - Name and likeness claims
  - Intentional infliction of emotional distress (IIED)

State Regulations / Deepfakes

► Massachusetts H.B. 72 (Introduced Jan. 18, 2023)

- Protects against deep fake and digital content forgery using technologies including AI and Machine Learning to fabricate or manipulate audio, visual, or text content with intent to mislead and thus facilitate criminal or torturous conduct.

► New Jersey S.B. 3707 (Introduced Mar. 9, 2023, currently in committee)

- Protects deceptive audio or visual media ("deepfakes")

► California S.B. 721 (Introduced Feb. 16, 2023)

- Requires the California Interagency AI Working Group to deliver a report to the Legislature regarding AI on issues including "among other things, proliferation of deepfakes

► PL 116–258 [S 2904] (Dec. 23, 2020) ("Identifying Outputs of Generative Adversarial Networks Act" or "IOGAN Act")

- Support research on outputs by Generative Adversarial Networks (outputs can be "deepfakes"),
- Affected 15 U.S.C.A. §9201–9204 (Identifying Outputs of Generative Adversarial Networks)

Questions?