AI: Legal Facts and Fictions

Exploring the legality of the ever-advancing technology and how it fits into your firm's operations.

BY LAUREN R. PETTINE

Traditional computer programs are rules-based, deterministic. For example, when you enter 2 + 2 into a calculator, its programming will always generate 4 as the answer. A traditional program cannot make determinations beyond its initial programming. If you ask a calculator to divide a number by zero, it will produce an error.

Artificial intelligence programs differ from those with traditional programming because they can "learn" and make decisions beyond their initial programming. Artificial intelligence (AI) is a broad catchall term used to describe any programming that allows a computer to make decisions and generate content via

algorithms without human interference.

Artificial intelligence is not defined by the goal or output of the program – it's defined by its approach to a problem. Artificial intelligence encompasses:

- **Computer vision:** These systems can recognize and interpret images and videos. Examples are the programs in self-driving cars and those that analyze medical imaging.

- **Predictive modeling:** These systems can be used to predict what will occur based on data inputs. Examples are programs that predict which consumers are likeliest to purchase a product or programs that recommend products an individual might purchase based on similar consumer decisions.

- **Natural language processing:** These programs are built to mimic or interpret human language. Examples are programs that power chatbots, voice recognition or language translation.

- **Generative artificial intelligence:** These programs create an output from a large dataset and user prompt. Examples are image generators such as DALL-E or text generators such as ChatGPT.

All forms of artificial intelligence are created in essentially the same way. First, the program is given a vast quantity of data. Depending on the type of artificial intelligence, that data can include text, images, voice recordings and consumer profiles. AI companies are often opaque about just how much data they use to develop a program; however, the first dataset used for the development of an AI program can range from 550 gigabytes (GB) to 45 terabytes (TB) of data.

For context, 550 GB of data amounts to about 372 *million* pages of text or roughly 850,000 images. And 45 TB of data is approximately 30 *billion* pages of text or nearly 700 *million* images. In total, the Library of Congress has approximately 74 TB of information available on the internet.

Once an AI program has been trained on that first dataset, it is then fine-tuned with a second, smaller dataset. For instance, the first dataset might teach a large language model how to "speak" English, then the second dataset will fine-tune it

to speak like a customer service representative, specifically.

Because artificial intelligence is a process, not an output, AI programs can be trained to do a number of things relevant to the deathcare profession:

- Automatically create obituaries from input consumer data

- Prepare digital marketing materials, including images and text

- Replace a customer service agent with either a chatbot or virtual voice assistant for phone calls

- Analyze consumer data for marketing or lead-generation purposes

- Create music to play during funeral livestreams

In the context of funeral service, it has been suggested that artificial intelligence will save costs on customer service agents and licensing for marketing and streaming materials, but as the technology continues to improve, there will likely be more use cases.

> *Artificial intelligence programs differ from those with traditional programming because they can "learn" and make decisions beyond their initial programming.*

LEGAL ISSUES

Artificial intelligence is a new technology, so it has not yet been fully tested – technologically or legally. Prior to using artificial intelligence, you should be aware of potential liability issues and limitations.

Accuracy

Fiction: Computers cannot lie, and if the computer does lie, the company is not responsible for it.

Fact: Artificial intelligence can "hallucinate" or, effectively, lie. For artificial intelligence that generates text, this means that the program is capable of saying explicitly untrue things. Take the strawberry problem. For a while, when you

asked ChatGPT how many R's are in the word "strawberry," it would confidently tell you that there are only two. This is because AI programs function differently than the human brain. AI programs transform text into numbers, then predict what "number" should come next. So, ChatGPT was unable to register the word "strawberry" the way the human brain would, therefore the program couldn't count the letters accurately.

Fact: A company that uses or develops artificial intelligence is responsible for it, regardless of its accu-racy. Air Canada's AI chatbot gave incorrect information about fare pricing to a consumer, and the court required Air Canada honor the prices that the chatbot provided. A consumer persuaded an AI chatbot on Chevrolet's website to sell him a 2024 Chevrolet Tahoe for $1. A man is suing OpenAI in Norway because ChatGPT said that the man had killed his two sons and was in prison for 21 years.

The Federal Trade Commission (FTC) has issued guidance that companies are responsible for the actions of their chatbots and must take precautions to prevent hallucinations or errors.

If you implement a chatbot, voice assistant or artificial intelligence program with which consumers directly interact, your company may be responsible for the deals that it makes. Consider what would happen if an FTC enforcement agent asked your AI assistant for the price of embalming. Would your AI tool give the right price, or would it give a range of prices based on the data with which it was programmed? What if a consumer told your AI agent that the quoted price was too expensive and they wanted a lower one?

AI programmers are working diligently to create technological safeguards that will limit the number of hallucinations and errors artificial intelligence makes. However, the technology is simply not advanced enough to prevent all errors, and providing the wrong pricing information to a consumer over the phone is a violation of the FTC Funeral Rule, which carries a fine up to $53,000.

Any company that uses artificial intelligence should have a review process in place to ensure any potential for bias or discrimination is mitigated.

Data Privacy

Fiction: Consumer data fed into an AI program is not subject to data privacy laws.

Fact: Consumer data, even that data put into a dataset for an AI program, can be subject to data privacy laws and consumer deletion requests.

As of this year, more than 20 states have adopted some form of consumer data privacy law that requires the deletion of consumers' private data. For example, in 2024, New Jersey passed a consumer data privacy law that allows a consumer to obtain a copy of their personal data and request the deletion of their personal data. It also requires deletion of personal data at the end of the provision of services.

Most AI programs require vast amounts of consumer data to make predictions about which consumers will purchase which products or about which consumers are likely to make purchases at all. Usually, consumer data is added to artificial intelligence as part of the fine-tuning process, but consumer data can make its way into initial datasets, as well. This presents a problem because that data cannot be removed from the dataset without retraining the entire program.

There are currently no active cases regarding the inclusion of data in an AI program as a violation of consumer privacy laws. However, LinkedIn was sued by consumers for disclosing their private messages to a third party without permission, and Amazon was sued by the FTC for the indefinite retention of consumers' and children's voice recordings.

In the next few years, we anticipate that we will see litigation over whether consumer data is transformed and therefore allowed to be retained as part of an AI program or whether consumer data needs to be removed from an AI program upon consumer request for deletion.

Intellectual Property

Fiction: If data is on the internet, it's free for any use.

Fact: Data on the internet may still be protected by intellectual property law, and

we are seeing this dispute hit the courts.

In June, Disney and Universal sued AI firm Midjourney for copyright infringement. The 110-page lawsuit, which was filed in Los Angeles, California, alleges that Midjourney stole copyrighted works to train its AI engine to generate images. To date, many companies have sued AI firms for copyright infringement. *The New York Times* has sued OpenAI and Microsoft; Sony Music Entertainment has sued AI song generator companies Suno and Udio; and Getty Images has sued Stability AI.

Under the fair use doctrine, the use of copyrighted materials is permissible in certain contexts. The fair use doctrine allows limited use of intellectual property without the owner's permission for things like criticism, reporting, teaching or research, and this is determined on a case-by-case basis by courts.

Currently, no court has ruled whether AI datasets are protected under the fair use doctrine. Because many AI programs are monetized, it is possible courts will rule that using copyrighted materials to train artificial intelligence is impermissible and that all AI companies need permission from intellectual property owners to use their materials in datasets. This ruling would hamper the AI industry.

Courts also could rule that the outputs – derived from the original intellectual property – are owned by the intellectual property holder, not the AI company.

Until courts start issuing rulings, we do not know how the law will be applied to this novel technology, and this can produce liability for companies that use AI-generated content.

Bias/Discrimination

Fiction: Artificial intelligence is incapable of bias or discrimination.

Fact: Any biases present in the dataset on which an artificial intelligence was trained can be repeated by the program. This is a concern especially with customer-facing AI programs, such as chatbots, voice assistants and hiring assistants. AI bias occurs when the program produces prejudiced results due to historical inequalities that were embedded in the data.

This means that an AI chatbot could potentially violate the Civil Rights Act of 1964,

Equal Credit Opportunity Act or Fair Housing Act when interacting with consumers. This is also a concern within the hiring context.

The FTC has explicitly stated that companies must take all reasonable precautions before an AI program hits the market. Disclosures about potential biases are not enough to protect a company from discriminatory AI. Therefore, any company that uses artificial intelligence should have a review process in place to ensure any potential for bias or discrimination is mitigated.

> *Funeral service remains a profession that requires a licensed human being participate in the arrangement process.*

Licensure to Sell

Fiction: AI assistants can perform tasks that require licensure, such as those related to law or funeral service.

Fact: Licensed professionals must take responsibility for AI assistants helping with tasks that require licensure.

There has been much discussion about using chatbots or AI assistants to help firms sell funerals without the involvement of a funeral director. However, funeral service remains a profession that requires a licensed human being participate in the arrangement process. Therefore, all AI use should be limited to tasks that an unlicensed administrative staff member could legally perform. State regulators likely will issue guidance on the use of AI working with consumers in the future.

BEST PRACTICES

Artificial intelligence is a tool that can be used to make the funeral profession better. It is helpful for, say, performing administrative tasks or assisting with note-taking during arrangement conferences. However, because this is such a new technology, artificial intelligence should be used judiciously. The best practices for now are:

- **Be human.** Give consumers the power to talk to a person when a chatbot is involved. Establish a process that involves a human being

confirming your AI program or chatbot is providing correct, nondiscriminatory and noninfringing content. AI assistants should not be able to make contracts unless a human being is involved.

- **Disclose.** Companies that use AI programs should disclose to consumers what information is shared and what companies will have access to that information. If you use an AI program, you should tell consumers in the terms of service on your website and via disclaimers and disclosures.

- **Inform.** Consumers must be informed that they are talking to an AI chatbot. California law and FTC guidance explicitly require notification that consumers are interacting with an AI chatbot.

- **Audit.** Companies should have a process to periodically audit AI for accuracy and bias. Although there is not yet guidance on what this audit procedure should look like, we recommend you have a written operating procedure that outlines a timeline and process for review, as well as measures to correct any AI errors. In addition, you should ensure your AI pricing information is accurate.

- **Confirm.** Companies that use artificial intelligence should confirm with their AI provider that its AI dataset is in compliance with intellectual property laws and consumer data privacy laws.

- **Verify.** We recommend companies verify that finetuned datasets do not include consumer data that should have been deleted pursuant to state law or consumer deletion requests.

Ultimately, artificial intelligence is a tool. It can be used as an assistant to bolster productivity, and there are safe ways to use it. Until the law is more settled, use artificial intelligence cautiously.

Lauren R. Pettine is a Florida-licensed attorney and senior associate at WRW Legal PLLC. WRW Legal PLLC, led by Wendy Russell Wiener, who has 33 years of deathcare regulatory experience, focuses solely on guiding funeral homes, cemeteries, crematories, and their owners, operators and professionals. Pettine's practice centers on niche components of the firm's deathcare regulatory work, including intellectual property, data privacy and disposition of fetal remains.