

Rochester's corporate law experts advise getting ahead of AI learning curve

■ CAURIE PUTNAM

The European Union recently passed rules covering implementation of artificial intelligence (AI). Called the EU Artificial Intelligence Act, it sets forth guidelines for using this emerging tech. In light of this, corporate attorneys in the United States are encouraging businesses to get ahead of best practices now, even though there is no clear legislation.



F. Paul Greene

"There have been some initial efforts to regulate the field, but it's still a huge patchwork of overlapping, sometimes conflicting obligations in the United States,"

said F. Paul Greene, a partner with Harter Secrest & Emery LLP and chair of the firm's privacy and data security practice group.

Greene says there are several bipartisan bills currently in the House concerning AI, like the CREATE AI Act, but most of these bills are focused on funding, research and education, as opposed to regulating usage. He expects most regulations on usage down

the road will be at the state level.

"Regulations are coming, but even beyond that, organizations need to ask, 'How do we do the right thing in relation to this technology?' because, on a societal level, we've done a lot of wrong things with technology in the past," Greene said. "How can we avoid some of those risks? How can we develop trustworthy and ethical ways to adopt AI?"

Greene encourages clients to embrace an enterprise-level risk management approach when it comes to AI.

"Our main focus with clients right now is to encourage them to build an AI governance approach that's the right size for their organization and build an assessment of AI implementation into their overarching risk management and risk assessment processes," he said.

The biggest challenge when it comes to self-regulating AI, Greene says, is to start. He recommends beginning with the National Institute of Standards and Technologies' AI Risk Management Framework. Published in 2023, it features four essential,

core functions: govern, map, measure and manage.

"If I had a wish for any organization looking at AI adoption, it would be to consider these four functions in the first instance," he said. "I want my organizations to start with the map function. Sit down, assess what you're using currently, where you want to be, and then figure out how your organization can build governance around that once you gain that knowledge."

Richard J. Marinaccio is a partner with Phillips Lytle, who serves as co-chair of the technology industry team.



Richard Marinaccio

"With AI a lot of what you're seeing on the regulation side is geared toward more on the development side versus the user," said Marinaccio, who explains that

for most companies today, they're probably not developing their own AI solutions. "But in general, the key step is understanding what AI is when you're talking about it and then going from there."

At Phillips Lytle, LLP the firm has proactively been educating, counseling and presenting on AI for almost two years. In May they hosted a well-attended forum for the business community to discuss business use, legal and regulatory issues and policy considerations shaping the deployment of artificial intelligence technologies.

“We’re trying to do our best to get out there and educate people about artificial intelligence,” Marinaccio said. “What I’ve found through these different engagements is that the masses are still a bit behind in utilization and even full understanding of what it means to use artificial intelligence.”

For example, educating clients about the differences between general AI and generative AI. Whereas general AI mostly recognizes patterns and can provide canned answers to set questions and keywords, generative AI creates brand-new content, including text, images, audio and more that appear human-like in origin.

“There isn’t necessarily a lot of regulation right now concerned with generative AI, but we’re trying to educate people that it is another product,” Marinaccio said. “It’s another service that exists that brings to light other areas of the law that have already existed or may maybe require you to look at an area of the law that’s already existed in a different way.”

Katarina (Kate) Polozie, CIPP/US, AIGP, a partner at Woods Oviatt Gilman LLP in the business and tax department explains

there is no comprehensive federal AI law (although there are certain sectors for which there is some AI regulation).



Kate Polozie

“That said, it’s important to understand that although AI is a new technology, first and foremost our current laws that protect civil rights, fair competition, equal opportunity and consumer protection (among others) do apply and one cannot take any action by AI that would otherwise be illegal if conducted without AI,” she said.

Several federal agencies, including the Department of Justice, issued a joint statement in 2023 about enforcement efforts “to protect the public from bias in automated systems and artificial intelligence” and made it clear that neither the fact that AI is novel, nor a lack of understanding of how it works is a defense, she pointed out.

Other federal agencies have followed suit and issued guidance, principals, requests for information or announced settled charges indicating their positions.

“It’s important to understand that AI can be prone to bias or discrimination based on the underlying data used to create the model,” Polozie said. “It can be very complex, so complex, in fact, that even the developers don’t know exactly how it works, and it can be wrong.”

Polozie points to hallucinations — false or misleading results that

AI models generate — as an example. She encourages clients who are buying, developing, or using an AI product to engage in a risk assessment of what the AI solution does in the greater context of individual, group or societal harms.

“The analysis doesn’t stop there,” she said. “Since, generally, businesses want to deploy their AI solutions across the country and around the world, and data has no boundaries; we need to advise them not just on the current US federal and state laws but also on the various new state, local and international legislation that impacts their AI solutions.”

For example, in the 2024 legislative session, according to the National Conference of State Legislators, at least forty-five states introduced AI bills and thirty-one states, Puerto Rico and the Virgin Islands adopted resolutions or enacted legislation.

“With the change in administration, I expect that patchwork state approach to continue — resulting in a myriad of new state laws that warrant consideration depending on the type of AI solution the client is looking to build, buy, or deploy,” she said.

Among the many ways Polozie and her team support clients with AI usage are: creating internal AI policies, reviewing and negotiating contracts with AI vendors, and assisting clients seeking to buy companies that have developed an AI product with due diligence to determine some of the risks around the business they are interested in buying.