



MARSHALL

# *Anticipated AI Discovery Issues in Litigation*

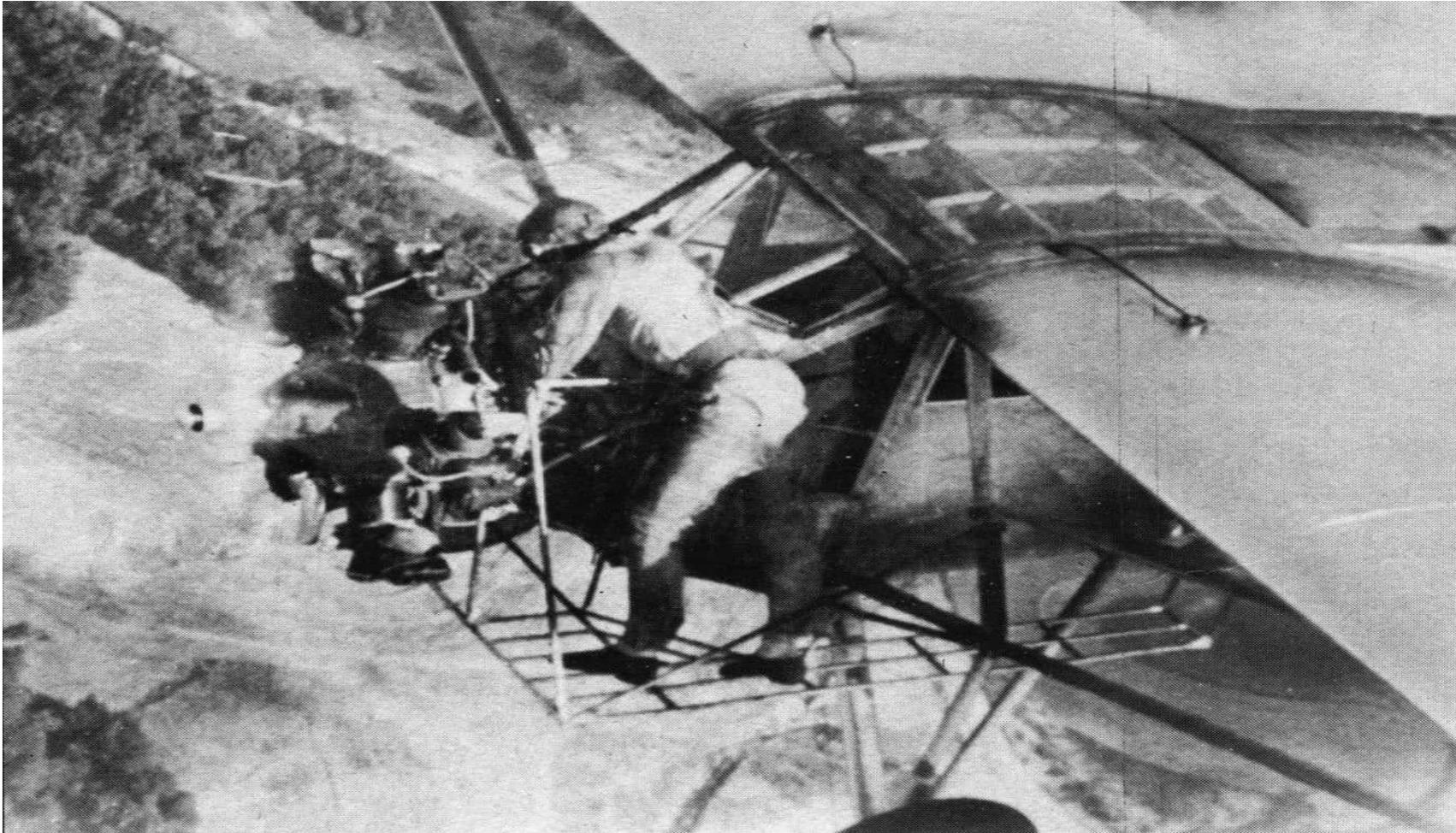
Matt Keris

*Association for Corporate Counsel Virtual Education*

*February 12, 2026*

# “AI Continues to Show Great Promise”

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**WHO ARE WE?**



**CEOs**



**WHAT DO WE WANT?**



**AI!**



**AI TO DO WHAT?**



**WE DON'T KNOW!**



**WHEN DO WE WANT IT?**



**RIGHT NOW!**



# The Medical Record 1996 to 2025

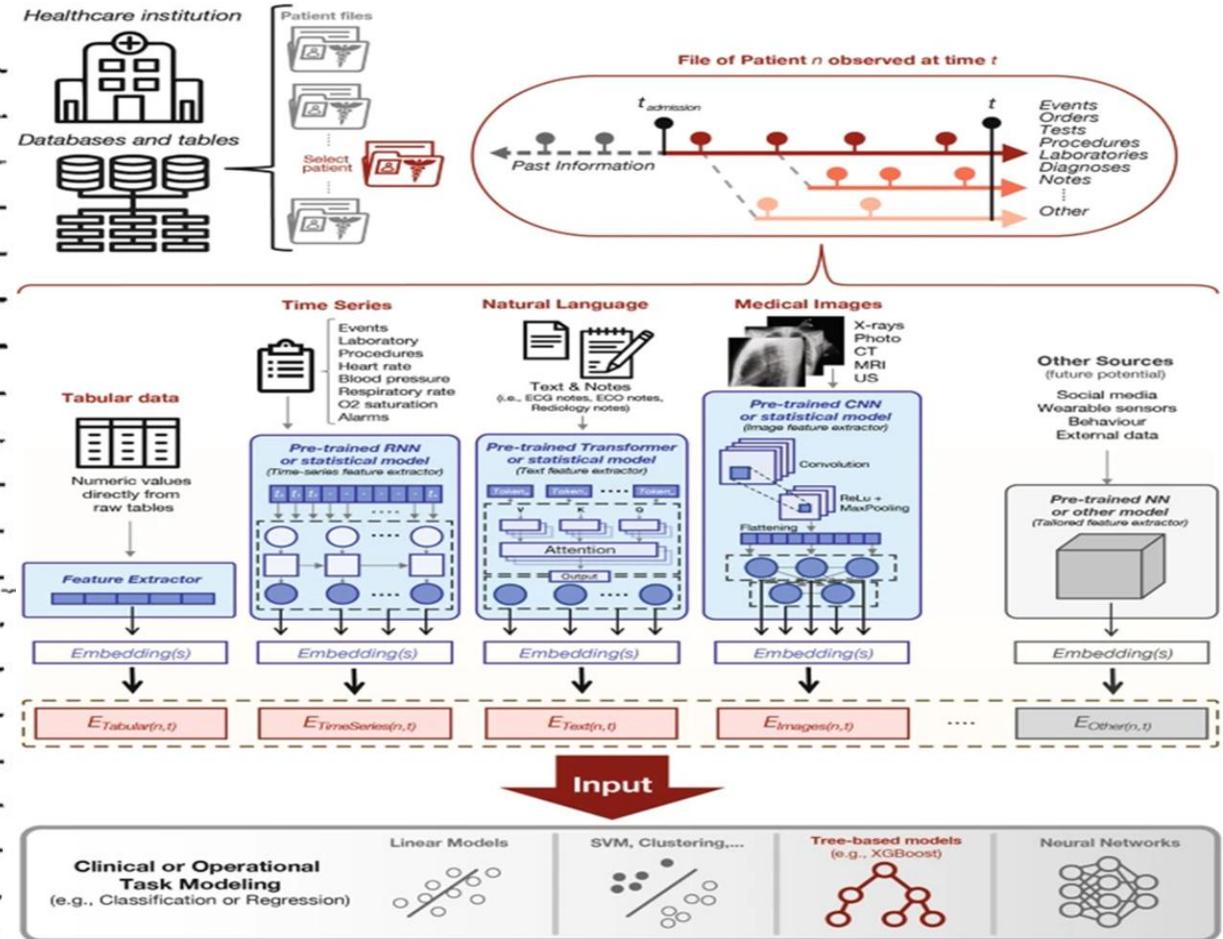
10/10/86 ENT:

Pt. is Apneustic by path  
Tolerating Amblyocoria well  
Adapted for pressure in para para intubation  
C. 1. f

Pt. is rather head-down in visual  
blurring in para para  
Pt. - Exam 2 per HA  
HENT: Thin & clean & white  
N. m. (c) leucine  
(c) bleed

HP/NP: (c) slight frontal sin  
lx - clear TUC white  
well tolerated scan, resolution  
adequate  
T. P. stable  
Exam: stable  
Plan: - Continue Amblyocoria  
- plan for pt

Patient  
Care



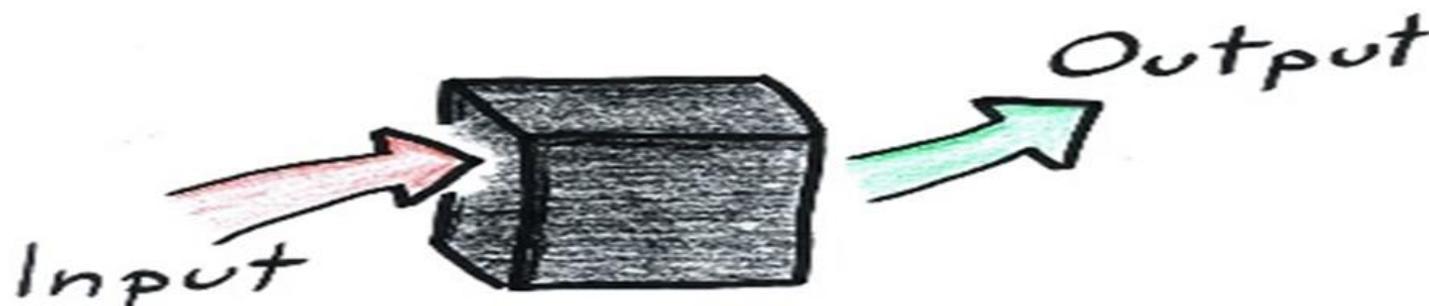
# AI Use In Healthcare

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- Smart wearables
- Ambient listening
- Computer Aided Diagnosis (CAD)—imaging and pathology
- Virtual hospital
- AI-enhanced surgical devices
- Clinical Decision Support (CDS)
- Charts will look completely different than they do now in five years

# AI Basics—Two Components

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1. **Data**—How reliable is it? Who owns/maintains?
2. **Algorithms**—Who created and what biases were introduced?
  - Equations applied to data
  - Sometimes referred to as the “**black box.**”
    - Makes complex decisions without explaining rationale.
    - Complicated as variables are added to the algorithm.

**Result:** *Netflix/Amazon/Facebook/iTunes experience.*

# Accuracy erosion, Hallucinations and the Black Box

How an A.I. that draws digits “collapses” after being trained on its own output

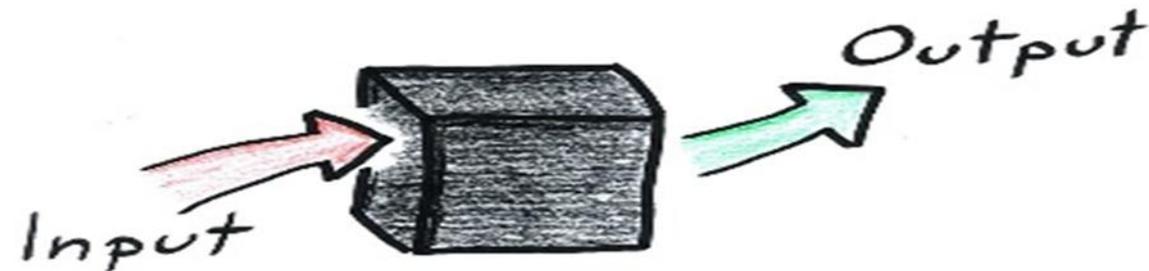
	“3”	“4”	“6”	“8”	“9”
Handwritten digits					
Initial A.I. output					
After 10 generations					
After 20 generations					
After 30 generations					

The Verge / Tech / Reviews / Science / Entertainment / AI /

HEALTH AI FEATURES

## Google's healthcare AI made up a body part – what happens when doctors don't notice?

Google dubbed an error from its Med-Gemini model a typo. Experts say it demonstrates the risks of AI in medicine.



# Solving or Creating New HC Problems?

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- ***Health care AI, intended to save money, turns out to require a lot of expensive humans, by Darius Tahir, December 23, 2024 KFF Health News***
  - “In essence: You need people, and more machines, to make sure the new tools don't mess up.”
    - Many institutions are not routinely monitoring the performance
    - Increased monitoring may raise health care costs by 20%
    - FDA Commissioner Robert Califf --*“I do not believe there's a single health system, in the United States, that's capable of validating an AI algorithm that's put into place in a clinical care system.”*
    - The best ambient listening devices have error rates as high as 35%

# Knowledge of AI Results Can Create Biased Decisions

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- *When radiologists know AI in chest x-rays, they undervalued AI versus their own judgment*
- **Accuracy: AI 92%; Human 74%; AI/Human: 76%**
  - *Combining Human Expertise with Artificial Intelligence: Experimental Evidence from Radiology, N. Agarwal, A. Moehring, P. Rajpurkar, T. Salz; NBER Working Paper No. 31422, July 2023, Revised March 2024*
  - May need multiple reviews to be certain of diagnosis and/or recommendations
  - Some advocate that AI is best without human involvement depending on situation

# Early Preservation Letters Create Important Logistics Challenge

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- When does anticipated litigation begin?
- Need to pattern like medical device manufacturers because this could be an Achilles Heel to a defense (spoliation, adverse inference, etc.)
- Non-privileged emails and texts may be fair game in subsequent litigation



# AI Information Will Be Similar to Products Liability Discovery

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- This is novel!
- Will require even greater collaboration with attorneys, risk management, medical records, IT and software engineers
  - More expensive to produce/explain
- Lack of legal precedent in this setting because it is so new
- Need to educate your judge on these issues
- AI vendors will be reluctant to assist defense
  - Disclosure of negative proprietary information
  - Costs/time associated with participating in defense

# Relevance is a Touchstone: Hybrid Case

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- Waiting for this case—will be big and expensive
  - TPLF discovery
- Defense Considerations if AI Vendor Not Sued:
  - Joinder of AI Vendor to Reduce Comparative Negligence
    - What does contract say?
    - Retention of firm with products liability experience if joining AI vendor
    - Affidavit of Merit/Certificate of Merit required?
      - Who will be your expert?
    - Jury optics of joinder
    - Can of worms?
      - Discovery from both Plaintiff and Additional Defendant

# Identification of AI and Description of Use

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- Identification of the Specific AI product
  - Intended use, indications, and patient population
  - Identify all components using the AI
  - History of AI use and integration
  - Describe any versions or modifications of the AI and the dates they were introduced
    - Can you do?
    - Do you know how to do?
    - Who keeps track of updated EMR/AI?

# AI Adoption Process

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- Identify individuals, departments, and committees involved in
  - the adoption of the AI
  - evaluating and addressing AI safety concerns
- Any alternative AI programs considered and reasons for adoption or rejection
- Describe how safety information, complaint data, and risk assessments are communicated to health system leadership
- Explain what steps, if any, were taken to mitigate the risks identified with the AI
- Describe the health care system's process for documenting and acting upon safety-related findings.

# Post-Use Surveillance and Adverse Events

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- Identify all adverse events and complaints received regarding the AI
  - Describe procedures for investigating adverse events or AI failures
  - State whether post-use studies or literature reviews identified safety concerns
  - Identify any internal investigations or audits conducted in response to complaints or recalls
  - Root cause analyses, corrective action plans, and recall effectiveness checks (if not protected)
    - Are communications/correspondence with AI vendor protected?
    - Don't create a paper trail of non-privileged emails/texts!

# Knowledge and Prior Litigation

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- Identify all lawsuits, claims, or settlements involving the AI
  - Describe when the AI developer first became aware of the type of injuries alleged
  - Identify internal memoranda or meetings concerning the risk of the alleged injuries
    - **WARNING**: *These documents with manufacturer may not carry privilege*
  - Identify employees or departments responsible for monitoring safety and complaint trends

# Marketing and Representations

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- Identify all materials or training documents distributed to hospital staff and patients
  - Describe how the AI was represented as superior or safer than alternatives
  - Identify all key opinion leaders, consultants, or speakers used to promote the AI
  - Describe any financial relationships or payments received by healthcare providers related to promotion

# Insurance, Corporate Structure, and Custodians

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- Identify all entities involved in the AI adoption, development, or integration
  - Describe the relationships among parent, subsidiary, or affiliate companies
  - Identify the custodian of design, regulatory, and complaint records
  - Identify all insurance policies that may cover claims involving the AI
  - Requests for all contracts, amendments and invoicing for AI

# *If Your AI:* **Design, Development, and Testing**

- Identify the individuals and departments involved in the adoption and use of AI
  - Describe the design control process and identify key design specifications and validation studies
  - Summarize all testing performed on the AI and the results
  - Describe any errors or performance issues discovered during testing
  - Identify all design changes made as a result of testing or post-use findings

# Responding to Inevitable Discovery Motions

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- Be Proactive!
  - Compel identification of Plaintiff's AI expert and challenge qualifications and methodology toward opinions
  - Request for cost shifting
  - File countermotions for protective order arguing proportionality and plaintiff's failure to provide basic information
  - Propose experts talk directly reconcile issues before motions practice
- Avoid Conclusory Responses to Plaintiff's Motions to Compel
  - Cite facts supporting burdensome nature of requests, not conclusions
  - Use of affidavits, budgets and projected time associated with preparing answers
  - Blame the AI vendor and/or get them involved

# Defense AI Use in Litigation

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## THE PLAINTIFF BAR IS WINNING IN AI

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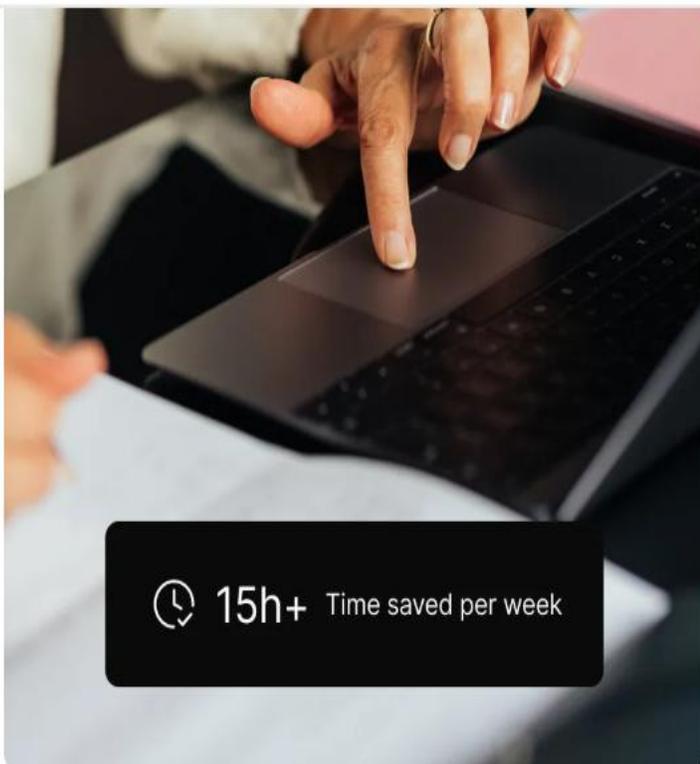
If you believe social inflation, nuclear verdicts and legal system abuse present existential risk, just wait until AI takes hold.

**Taylor Smith, John Burge**

MARCH 10, 2024



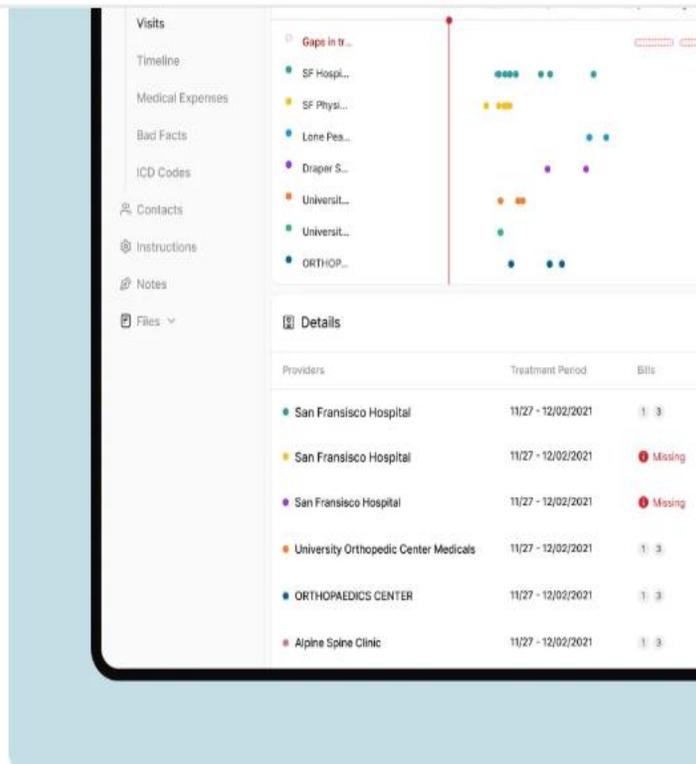
When it comes to litigated claims, the P&C Industry has focused nearly all technology on managing legal expenses, which only make up about 20% of total loss cost. It is time for P&C to get just as serious about indemnity as the personal injury attorneys who make their living from it, which means it is time to get serious about AI tech and data.



15h+ Time saved per week

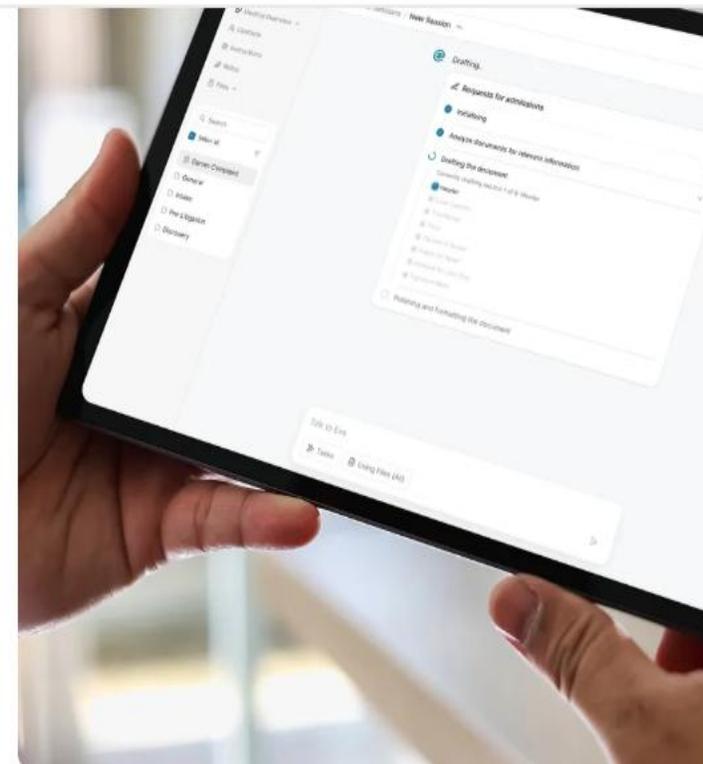
## Intake and Evaluation

Identify cases with the highest potential and create comprehensive case overviews based on key documents and relevant case facts.



## Pre-Litigation

Whether its demand letters, medical chronologies or complaints, Eve will seamlessly draft in your tone and style and cite your key case facts.



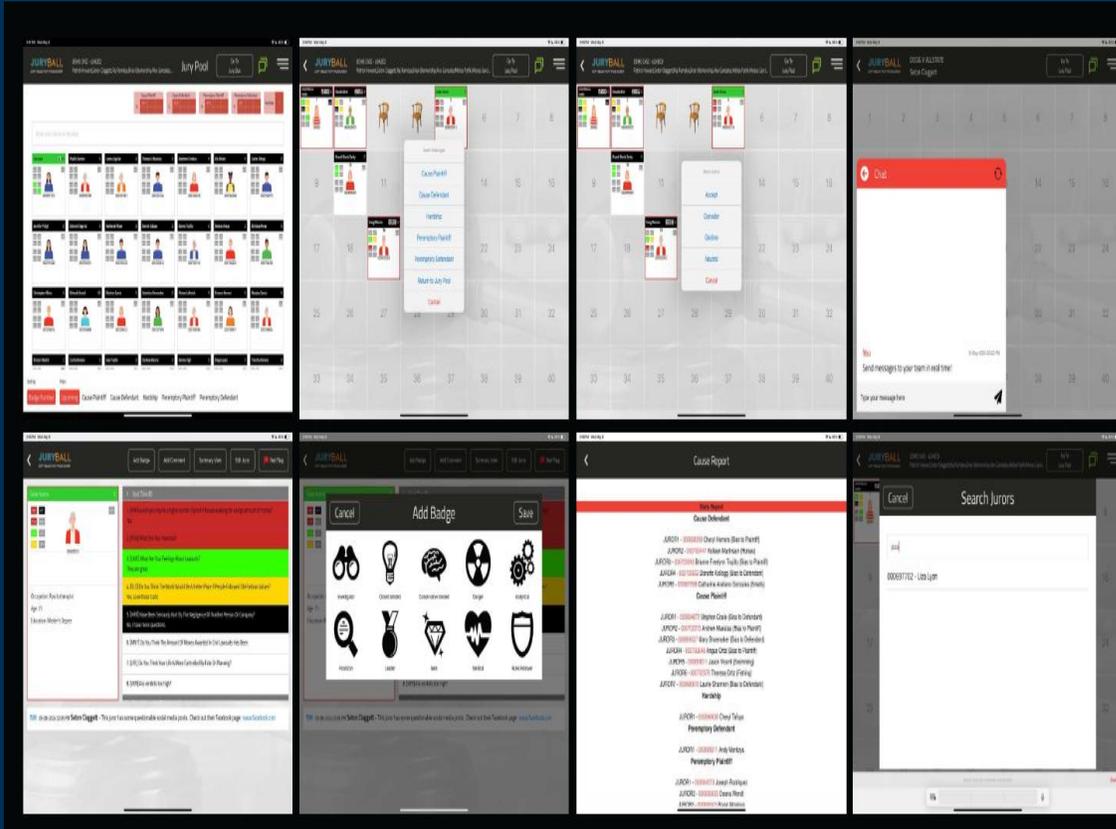
## Litigation

Generate detailed and relevant discovery requests, respond to propounded discovery, analyze depositions, and respond to motions in minutes instead of hours.

# JURYBALL APP

Jury Selection Made Easy

Contact Us



2. **Create your own jury questions** with pre-entered answers, making data entry faster
3. **Quickly enter notes** for one juror or switch to jury view and enter data for multiple jurors at once
4. **Allocate points to answers** and see jurors ranked by their responses
5. **Store comments about each juror in real-time** and have conversations about jurors with peers, all within the app
6. **Flag jurors for follow-up**, track peremptory and for cause strikes, and note those excused by the court
7. **Collaborate with co-workers in real-time** so that nothing a juror says or does goes unnoticed or unrecorded
8. **Engage with case and juror analytics**, then sync the predictive data about jurors straight into the app



# Analyze Multiple Transcripts

Uncover connections and contradictions across multiple depositions. Transcript Genius allows you to interrogate multiple depositions at once, for a comprehensive view of your case.

Compare witness testimonies, track evolving narratives, and identify discrepancies that might otherwise go unnoticed. Whether you're preparing for cross-examination or building a case strategy, with Transcript Genius, you'll gain a holistic understanding of your case's landscape.



## Transcript Genius

Search within your transcripts  
Q Motor

SEARCH

Includes references similar to "Motor"

Bob's Motorcycle Repair Company VS Thomas Van Buren  
• Ordered on behalf of: Kelly Martinson

Deposition of Megan Wright ✓ ADD

"the jury finally reached a verdict in the litigation case. They found the defendant liable for the accident and awarded the plaintiff a substantial sum in damages. This verdict sent a clear message that reckless behavior on a motorcycle, combined with mechanical issues, would not be tolerated in the eyes of the law."



34 results related to "Motor"

SMITH v ARMSTRONG MECHANICAL SERVICES OF ORANGE COUNTY • Ordered on behalf of: Tim Van Buren

Deposition of Megan Wright ✓ ADD

"clearly depicted the defendant recklessly speeding down the narrow residential street on his motorcycle. The plaintiff team argued that this reckless behavior on the motorcycle was a direct cause of the collision that left their client with injuries."  
show more

Case name goes here • Ordered on behalf of: Firm Person

Deposition of Jack Nguyen + ADD TO INTERROGATE

"the jury finally reached a verdict in the motorcycle litigation case. They found the defendant liable for the accident and awarded the plaintiff a substantial sum in damages. This verdict sent a clear message that reckless behavior on a motorcycle, combined with potential mechanical issues, would not be tolerated in the eyes of the law."

"The plaintiff's expert testified that the bike had a history of faulty brakes, raising questions about the defendant's ability to control the motorbike. Meanwhile, the defense countered with their own bike expert, who argued that both the brakes and the engine were functioning properly"

"clearly depicted the defendant recklessly speeding down the narrow residential street on his motorcycle. The plaintiff team argued that this reckless behavior on the motorcycle was a direct cause of the collision that left their client with injuries."

"The defendant saw the other car coming in the opposite direction and felt they had no choice but to swerve to avoid a collision. With so little time, they could not properly assess their surroundings and the side-swipe collision damaged the motorbike."  
show less

Transcripts Added (2)

Deposition of Megan Wright  
SMITH v ARMSTRONG MECHANICAL SERVICES OF ORANGE COUNTY  
June 30, 2023

Deposition of Thomas Van Buren  
SMITH v PREMIER CARGO  
May 10, 2023

INTERROGATE TRANSCRIPTS



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For Court Reporters

Technology & Integrations

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# Upload Your Own Transcripts

Expand your analysis beyond Steno-provided depositions.

Easily upload .txt and .pdf transcripts from any source directly into Transcript Genius.

Analyze depositions taken by opposing counsel or review old case files with the same powerful AI tools. Simply drag and drop your files to add them to your workspace. Centralize your transcript analysis in one place, regardless of origin, for a more comprehensive and efficient review process.

The screenshot shows the STENO web application interface for uploading transcripts. At the top, there is a dark green navigation bar with the STENO logo on the left and a search icon followed by links for Home, Book A Job, Transcript Genius, Billing, and Admin. On the right side of the navigation bar, the user's name 'Lola Smith' and 'Location 1' are displayed. Below the navigation bar, the main content area has a title 'Transcript Upload' and a breadcrumb trail 'Transcript Genius / Upload Transcripts'. The central part of the page features a large dashed-line box containing a cloud upload icon with an upward arrow. Below the icon, the text reads 'Drag & drop your transcripts here (Supported file types: .txt)'. Underneath this text is a button labeled 'SELECT FILES FROM COMPUTER'. At the bottom right of the dashed box, there are two buttons: 'CANCEL' and 'SUBMIT'. The footer of the page is dark green and contains the STENO logo on the left, followed by the text 'Have questions? Need changes? Reach out to concierge@steno.com or call 888.707.8366.' and the address '315 W 9th St., Suite 807, Los Angeles, CA 90015' along with links for 'Privacy' and 'Terms'.



## AI-Powered Truth Detection

Upload a video interview, and our our next generation algorithm provides you with an accurate, line-by-line analysis of the subject's truthfulness.

The system shows whether it's determined whether or not it's flagged as a lie or truth, a confidence meter is provided.

[Try It Now](#)

The screenshot displays the Truth or Lie Meter interface. On the right, a video frame shows a smiling woman in a striped shirt. On the left, three text boxes illustrate the analysis process:

- Truth:** "My team increased revenue and..." (indicated by a green progress bar).
- Lie:** "I did not know about that account..." (indicated by a red progress bar).
- Truth:** "Yes, we were both there that night..." (indicated by a green progress bar).

At the bottom, the "Truth or Lie Meter" is shown as a horizontal scale from "Lie" to "Truth".

Lie	Truth
High confidence this statement is a lie.	High confidence this is a truthful statement.
Neutral/Unsure	Neutral/Unsure



## Tell Us What Happened

Go to our calculator & fill out the details of your personal injury claim



## AI + Human Lawyers

Our algorithm will research thousands of legal cases similar to yours



## Fast Timelines. Smart Results.

In seconds, our app will create a report on the value of your specific claim



## The Lowest Legal Fees

Use our in-app tools to get a fast and fair settlement offer, on your terms!



# See the AI Arbitrator in Action

Fast, cost-effective, and trusted dispute resolution within an intuitive, easy-to-use platform.



I'm filing on behalf of a company

My Cases	
Case ID	Status
<a href="#">012345678901</a>	Active

## Parties' Information

Name, address, telephone number, and email their known representatives (if any)

## Dispute Information

Brief statement setting forth the nature of the including the amount of damages, if any.

## Arbitration Agreement

Applicable agreement which provides for arb court order, or other party agreement

## Arbitration Cost

# Capping to the 20% Costs

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- Same as it ever was, but faster
  - Early triage, severity prediction and claim assignments
  - Document review to drive down billable hours
  - Claims evaluations
  - Grading of firms, individual counsel, experts and litigation support vendors
- Many platforms being utilized
- Using their data which is not public

# Don't Use ChatGPT For Court Submissions



## What would you like to do today?



### Check your work

- Examine an early draft of a brief or opinion to finish research much faster
- Double-check your work before filing to see if you missed anything important
- Update an older brief that may cite outdated law or require newer authority

Check your work



### Analyze an opponent's work

- Identify potential issues with the opponent's cited authority and quotations
- See relevant authority contrary to the positions in the opponent's filing
- Get analysis of your own work to anticipate attacks or spot weaknesses

Analyze an opponent's work



### Quick Check Judicial

- See the same analysis of briefs from both parties that judges can see
- Review the most relevant authority for the legal issues that neither party cited
- Discover issues with the citations and quotations relied upon by the parties

Quick Check Judicial

# My ChatGPT Experience

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- Medical research
- Background information on witnesses (papers and videos)
- Created illustrations/graphs and other visual aides
- Assist with themes and examples for opening/closing arguments
- Creation of records authorization
- Basic legal research
- Places/ideas for client entertainment
- Cross-examination ideas/outlines
- Comparison of experts by credentials
- Creation of specifically tailored written discovery requests based on case information
- Rejected offers for ML preparation

# Q: Is ChatGPT HIPAA Compliant?

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## Short Answer

No — ChatGPT (the standard consumer version) is *not* HIPAA compliant.

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## What That Means

- OpenAI is not a covered entity or business associate under HIPAA.
- OpenAI does not sign Business Associate Agreements (BAAs) with ChatGPT users.
- Therefore, you cannot enter or share any Protected Health Information (PHI) — that includes names, dates of birth, medical record numbers, or any information that could identify a patient.

Even if you anonymize or de-identify data, you should ensure it meets the **HIPAA Safe Harbor or Expert Determination** standard before entering it here.

# Can I Upload Medical Records to ChatGPT for Analysis?

ChatGPT ▾

✦ Upgrade for free ✕

📤 Share

I'm able to review and analyze medical records that you provide, but there are important **privacy and legal considerations** you need to be aware of before doing so:

## 1. HIPAA and PHI

- You **should not include identifiable patient information** (names, dates of birth, medical record numbers, addresses, Social Security numbers, etc.) unless you are using a HIPAA-compliant environment.
- Our current chat environment is **not HIPAA-compliant**, so any PHI you submit could be exposed in ways that do not meet HIPAA standards.

### Safe alternative:

- **De-identify your records** before uploading:
  - Replace names with "Patient A," "Patient B," etc.
  - Remove dates or convert them to relative timeframes ("Day 1," "Week 3").

# Don't Be Tempted

ChatGPT ▾

✦ Upgrade for free ✕

Remove addresses, phone numbers, and other identifiers.

## 2. Types of Analysis I Can Provide

Once de-identified, I can:

- Summarize medical records chronologically.
- Extract key diagnoses, procedures, medications, and lab results.
- Highlight inconsistencies or missing information.
- Generate timelines or charts of patient care.
- Compare records to clinical guidelines or standards of care (non-legal opinion).

## 3. How to Upload

- You can upload PDFs, Word documents, or text files.
- I can process them and provide structured summaries or visualizations.

# Q: Is Co-Pilot HIPAA compliant?

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## Bottom line

Yes — Microsoft 365 Copilot *can be* HIPAA-compliant if it is used in the right enterprise environment, under the correct licensing, with a signed BAA, and with all appropriate controls in place.

No — it is *not* automatically HIPAA-compliant in every deployment, and using it in a consumer or uncontrolled environment could expose PHI to risk.

# Q: Can I share confidential client information with ChatGPT and maintain a privilege?

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No — you should not share confidential client information or any privileged material with ChatGPT if you want to maintain attorney-client privilege or work-product protection. Here's why and what the risks are:

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## 1. Privilege Basics

- **Attorney-client privilege** protects confidential communications between a client and their attorney made for the purpose of seeking or providing legal advice.
- **Work-product doctrine** protects materials prepared in anticipation of litigation.
- Both require **controlled disclosure** — sharing with third parties can **waive the protections**.



# Q: Can I share confidential client information with ChatGPT and maintain a privilege?

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## 2. Why ChatGPT Is Risky

- ChatGPT (including this platform) is **not a covered entity** under attorney-client privilege.
- Your inputs are **processed on OpenAI's servers**.
- While OpenAI has policies for data handling, they **cannot guarantee that sharing information here preserves privilege or confidentiality**.
- Any third party (or potential breach, subpoena, or audit) could theoretically access the data.

# Q: Can I share confidential client information with Co-Pilot and maintain a privilege?

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Yes — with **Microsoft 365 Copilot**, the situation is different than ChatGPT, but you still need to be careful. Here's a detailed breakdown:

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## 1. Enterprise vs. Consumer Copilot

- **Enterprise Copilot** (within Microsoft 365, under a corporate or law firm tenant) is designed to be used with sensitive business or legal data.
- **Consumer versions** of Copilot (e.g., standalone AI assistants) are **not covered** by enterprise security or privilege protections.

# Q: Can I share confidential client information with Co-Pilot and maintain a privilege?

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## 2. Privilege Considerations

- Microsoft does not automatically hold attorney-client privilege, but enterprise Copilot processes data within your tenant environment:
  - Data stays within your organization's Microsoft 365 tenant.
  - Copilot respects existing permissions, DLP (Data Loss Prevention) policies, and encryption.
- If your law firm has properly configured access controls and internal policies, using Copilot can preserve confidentiality internally.
- Privilege is maintained only if access is strictly limited to those who would normally have access to privileged information (attorneys, paralegals, etc.).

# Practical AI Advice

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- AI is not infallible and makes mistakes
- No matter how good AI gets, it still falls on humans to use it, so don't let it make independent decisions
- Treat Gen AI like a colleague/friendly competitor at happy hour after a drink
  - Part good, part BS
- Don't upload personal identifiers to AI unless support says OK
- Do not specifically reference clients, their communications or their specific information in AI

# THANK YOU

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Marshall Dennehey

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**Let's Connect!**

