

# Emerging Risk Podcast Series

## Episode 3

### AI in the boardroom

#### Deepak Adappa

Welcome to the navigating emerging liability risks, with Marsh FINPRO [Financial and professional liability] podcast miniseries. I'm your host, Deepak Adappa, Marsh's US FINPRO advisory leader. Organizations today are navigating a rapidly changing risk landscape. It poses various challenges for senior leaders and executives. Emerging technologies, regulatory shifts and evolving trends are all introducing new risks and intensifying existing ones, requiring proactive governance and risk management strategies. Through this podcast series we examined directors' and officers' liability, employment practices and wage and hour contemplations, fiduciary liability and kidnap ransom and extortion risk that organizations might expect to face.

To do so, I'm joined by four of Marsh's FINPRO product leaders – Ruth Kochenderfer, D&O product leader. La'Vonda McLean, employment practices liability and wage and hour product leader, Kate Maybe, the fiduciary product leader, and Alyssa Wade kidnap ransom and extortion product leader. They and their guests are eager to share their insights with you. So, without much further ado, I'm pleased to introduce you to your host for this episode. Ruth Kochenderfer.

#### Ruth Kochenderfer

I am Ruth Kochenderfer, and this is the latest episode of the Navigating Emerging Liability Risk Podcast series. And today, we're going to talk about artificial intelligence in the boardroom. And now I'm going to turn it over to my speaker. Who is a real expert in this area, so I think you're going to love what she has to share today. So, Kara Peterman, a quick introduction please.

#### Kara Peterman

Thanks so much, Ruth, and thanks. Thanks for having me. So, as Ruth mentioned, my name is Kara Peterman. I'm a partner in the Securities Litigation Group at Alston and Bird. And I represent primarily public companies and their directors and officers and really all manners of shareholder litigation, M&A litigation, SEC investigations and internal usually board level investigations. Though we have to say one of the aspects of my job that I really enjoy the most is actually

counseling with clients on emerging corporate governance risks, disclosure risks, issues to be aware of, of pre litigation. So again, thanks so much Ruth and Marsh for having me today. I'm excited for this conversation. Absolutely.

#### Ruth Kochenderfer

Alright. So, we're going to dive right in. I don't like. Anytime you're talking about artificial intelligence, it's always, I think, important to set the stage because artificial intelligence is something that actually isn't new. The term itself has been around since the 1950s, so it's really important to try to figure out what it is we're talking about, especially when you're dealing with lawyers and contracts and insurance, right terms matter, what we're talking about matters. So, I actually asked AI to define what AI is and it says, "AI refers to the simulation of human intelligence in machines programmed to think and learn like humans." That's a really big definition. I think what we're really talking about - what's got the most interest recently - is truly kind of the newest iteration of AI. When we talk about generative AI, I think about Chat GPT, Copilot, Dolly; really, the newest technology that's been out for the last few years. So that's, we're going to be talking about AI both generally and focusing on generative AI, which has a lot of the interest of folks recently. So now with that background, let's talk a little bit about some of the new risks that are presented by AI. As a broker, that's my, our, bread and butter. We're always identifying that and so far we've seen actual, a few actual, D&O claims against publicly traded companies, and in other lines of coverage we have seen on various types of claims, be it bias in the data set, resulting in alleged harassment, not harassment, alleged discrimination in the employment practices space. So, but what is it that they're actually kind of complaining about? Well, some of the other things we've seen are using AI to create a deep fake. Deep fake pretending to be a CEO or a vendor or some kind of other important customer of someone and then taking that information and then trying to commit criminal conduct. We talked a little bit about bias and when we mean that bias and AI, we're talking about bias in the data that is used to train the AI, right. If you, if you, it's kind of the basic simple garbage in, garbage out, right? So, if you have, if you have that bias in here and in your data set, then anything that the AI produces is likely to also to have the bias in its output. I am, and then one place where we've seen a lot is infringement and trademark issues. They, when you train the AI there's been what they call data scraping which is going out for every website in the internet - any place where you can get written content right - Twitter, you know, New York Times, YouTube - any type of content using that to train the AI model and some of that content may be copyrighted or may be trademarked. And, because of that there are some pending copyright and trademark suits. And one thing that I also find very interesting with

AI, which I feel like gets the least attention in our discussion, especially in the most recent time, is AI takes a whole lot of energy. They're pretty, actually, a pretty non green technology. All that gathering of information, that large language model training, the artificial intelligence that takes a lot of computing, computing power, and that takes a lot of energy to run that computing power. So, with all that background, let's get into the more interesting part and put this into well, let's start talking about what are we seeing with respect to our regulators and in particular the Securities and Enforcement Commission, the SEC.

## Kara Peterman

Yeah, absolutely. So, you know. I'm going to talk fairly narrowly about SEC actions and where they may be going as best we can into it today. Of course, there's so many regulators here in the United States and abroad that are looking at AI from different perspectives to your point. Are there certain biases that are inherent based on the way that you've collected the data and, and, and used the data, etcetera, etcetera. But when we are focusing, in particular on, you know enforcement of the US securities laws, certainly we have seen some SEC interest to date. So, under the prior administration, there were a number of public statements from the then chair, from the then head of the Division of Enforcement, talking about how are, SEC regulated entities using AI, and just as importantly, how are they describing their use of AI? Is it accurate? Is it complete? We saw that a lot in the focus on broker dealers, investment advisors, et cetera, who we're talking about using new emerging AI technologies to make better, you know, investment decisions on behalf of their clients. And lo and behold, sometimes those disclosures, those descriptions, were not fully accurate for the use of AI technology in, that in, that area was overstated and, in some instances, that resulted in enforcement actions being brought against these broker dealers, these investment advisors. So, we've seen a significant focus within the broker dealer world, in particular to date from the SEC. But they also have made statements more generally to public companies about accurate, the need to accurately disclose use of AI, the risk of your use of AI and to be adapting your disclosures to accurately, accurately reflect your own companies considerations narrowly - not just the general kind of boilerplate disclosure that 'emerging technologies may have risks', really want you to focus on your particular risks, Where this may be going in the future, and I mean, I think it's still very much up in the air, I will say that the SEC still seems to be interested in this issue. They recently created a cyber and emerging technology unit and kind of placed AI related issues within that unit. And I think, there's, there's going to be some further developments coming out of that unit. There was also interestingly - just earlier this month, earlier in March, a an SEC roundtable with a collection of different experts, some professors, some individuals who work in this arena who were called together to discuss the use of AI, disclosure of AI et cetera, et cetera. And certainly, I think that there's a general consensus within that group and within the SEC at large that you know I disclosures are important.

People are reading them. Investors are paying attention to them. They need to be accurate and complete as with all disclosures. But there is, I think at this point a lack of consensus about whether that means that these disclosures should be standardized in some way, whether there should be, you know, some SEC guidance or, or, kind of voluntarily, or voluntary guidelines or whether the SEC should just leave this topic alone and let others - perhaps, perhaps, deal with it. So, I think there's still a lot up in the air as far as where regulatory with the SC in particular will be focused on AI moving forward. It's still very much, you know, of the moment and, and being discussed with some regularity now.

## Ruth Kochenderfer

And I think I think that's really insightful. And I know I thought it was interesting when the new cyber and emerging technology unit you were talking about was was first introduced. One of the statements from Acting Chairman Uyeda. Was part of the goal of it was to facilitate capital formation and market efficiency by clearing the way for innovation to grow. So, a very kind of business focused business friendly, 'hey? We understand you need some regulation, but we don't want to put so many constraints on you that you can't be innovative, you can't embrace this new. Technology and really push this forward with your business. So yeah, just seeing where that balance, where that balance actually happens.

## Kara Peterman

Yeah. And, and even I think the focus to date has really been on what I would call kind of classic alleged fraud, in other words, you're saying one thing, we use this technology for XYZ purposes. And in reality, there's no basis in fact according to the SEC for those statements, so very as far as these things go, clean out, clear, can't, can't make misrepresentations to your customers or to the investing public about what you're doing when in reality you're not actually doing it. Despite statements about wanting to ensure that businesses have the ability to, to, innovate and to use this in the innovative technology moving forward and find it hard to believe that these sort of classic types of enforcement actions based on just pure alleged misstatements, misrepresentations would not continue to be brought moving forward.

## Ruth Kochenderfer

And that's actually a perfect segue. Because we're going to start talking about where we've seen the trends to date and actual securities class actions being brought against companies. And I would say the majority of them probably do involve what we would almost say kind of typical standard disclosure issues with respect to misrepresentation. Let's talk a little bit about what we're seeing with respect to some of the trends in the Securities class action space involving AI,

## Kara Peterman

Yeah, absolutely. Well, there's been a pretty significant uptick in shareholder class actions filed that touch upon AI in one manner or another. By our count, I think we're up to around 18 or so shareholder class actions that have been filed. This is really only in the last I'd say 18 months or less. Big uptick last year and already this year towards the end of Q1 we've seen a number of additional filings. So certainly, shareholders are are are paying attention to these disclosures, plaintiffs counsel's paying attention to these disclosures, and you know registrants, public companies absolutely need to be paying attention to these these disclosures. I think the uptick is based on a couple of things; 1. Companies are just disclosing, are just disclosing more and more about their use of AI. In some ways in a, in a manner that's very targeted to increase investor activity and interest, touting use of AI in other ways. We've also seen a significant increase in risk factor disclosures about the use of AI. So, there's just more fodder out there for the plaintiff's firm to latch on to and claim that there's been some alleged misstatement, if you will. The other thing is of course just the proliferation of AI related companies. Technology companies who may be becoming the target of increased shareholder focus and ultimately litigation. So that is kind of a perfect breeding ground I guess you could say for these types of claims just given how fast this industry is moving both in terms of new AI businesses and in terms of very traditional businesses using the technology more and talking about their use of the technology more often.

## Ruth Kochenderfer

And I think these are loosely called AI washing, right? Washing over the capabilities over stating the capabilities and -- I want your opinion on this -- I almost feel like you could put/ substitute climate washing or any other type of thing for AI washing. It's nothing about really the AI content felling, it's just overstating what your company is doing with it. Is that kind of accurate with respect to what's going on or?

## Kara Peterman

I think that's fair. I think that's absolutely fair. You know, we always see sort of fluctuating interest from investors on the issue de jour, so that may at some point be ESG or climate change. Right now, it it seems to be potentially AI related issues. So certainly, when there's some hot button issue or topic, you know, investors are more interested in it and and litigants are more interested in it. The difference I I think I see Ruth between alleged AI washing, (overstating your use of AI) and and and greenwashing (overstating your ESG or sustainability initiatives) is that when it comes to AI it's more built into your business itself or your products or your services or your goals etcetera. ESG for most companies is not what they do. They talk about it as a byproduct of their normal business and initiatives that they're taking to reduce their carbon footprint with respect to their existing business rather than in the case of AI actually something that's embedded in their business. So, the similar terms similar concept of

overstating whatever the underlying issue is, but a little bit different into, as to how they actually fit within your business model, if you will.

## Ruth Kochenderfer

And I think some of the the interesting cases which we've seen only a handful of to date, but are going, I think, to be kind of the future of what when we start to see more and more AI type cases is right now you're talking about companies are overstating or perhaps misrepresenting what the AI can do for them. It's when they actually start to use the AI, and it maybe doesn't perform in the way that they expected, right and what kind of consequences are we going to see from that? I think we've had a couple, maybe not generative today, I'm more you know, the older AI out there.

## Kara Peterman

Absolutely. I definitely think that is starting to occur and to your point it's likely to pick up. That was something happened with implementation of a given technology and it didn't perform as expected. Or it impacted, sort of cannibalize some other portion of their existing business which maybe had higher returns or something to that effect. We've even, we've even seen certain companies face shareholder litigation where they weren't really moving fast enough to implement technology and other companies kind of came into this space, took over that business and they were left a little flat footed and their revenues started to just to decline precipitously because of that. So there's all sorts of different forms that this could take, and that it is taking which I think makes it frankly very challenging for businesses to to determine how to manage and how to disclose when we're talking about their actual SEC disclosures and how they're talking about this technology the use of this technology, the risks of this technology, both internally at their own company and in the broader atmosphere.

## Ruth Kochenderfer

In the AI may become so pervasive that we don't even put it as a separate segment that we kind of track with respect to securities claims data we don't know right now. It's still enough that we can track the trend.

## Kara Peterman

Yeah, absolutely.

## Ruth Kochenderfer

Alright, so Kara, we've talked about kind of, I think it's fascinating where we've seen securities class actions today. I think the more interesting thing which we've started to talk about is what we can see in the future, right? And you have to kind of go back and tie it to the risk that we've you know we're starting to identify with respect to AI today and we talked briefly at the beginning of the podcast about deep fakes, right? It's impersonating executives. The one that that I think that got the most attention was an employee who was

allegedly on a video conference call with executives of his company and the video, as well as the audio of the folks that he thought he was talking to, was all AI generated, a true deep fake. And as a result of that he transferred I believe \$25 million, to a criminal. So, you know that made the news. If it makes the news, that means there are probably others going on that haven't made the news? But I think that's kind of the next generation of "Oh my". So, what are we, you know? As for people leading companies, what do we tell them?

## Kara Peterman

Yeah. Well, it's really, really challenging, Ruth, because my recollection of the facts of that instance is that the employee had received what appeared to be kind of your standard usual phishing e-mail that we've all been trained time and again not to click on. And he did not click on it and then the criminal kind of escalated to the next level. And as you said, got on the video call with him appeared to be the CFO of the company and other executives of the company instructed him to wire the funds if he did. And so, it's really challenging because I don't think our old playbooks that we've all been trained on are really going to be sufficient for this next generation of criminal actors. It really demonstrates some of the challenges and the scary bad parts of AI and the overlap, frankly, between, AI, cybersecurity and just general crimes, corporate crimes and so as far as what we tell them I think we just have to make everyone aware of these risks. Start to work on counter technologies that can you know hopefully try to try to battle this and come up with other creative solutions for ensuring that you know, we executives, directors, officers, corporations can't be taken advantage of it this way. And of course, just normal everyday people similarly. So, I wouldn't say that I have the solution sitting here today. But I think as a first step it has to be education that this is happening, that this is a real risk and that people need to be mindful of it. And if something sounds fishy, you know, dig into it. Dig into it further. Call. Call your executive up. Call them on their cell phone. Have special you know terms that they have to say predetermined when they are going to be asking you to make a transaction of this sort. Code words, whatever the case might be, we can't, you can't just sit and do nothing. We have to, really, I think, be more proactive about trying to mitigate these sorts of risks.

## Ruth Kochenderfer

I think it's almost like a cultural change too, which is to really encourage people. At all levels of an organization to question and double and ask twice. Right. And for that to become the culture versus the feel like oh you have a task that's been assigned to me, I must get it done. Right. It's more of a it there's nothing wrong with taking a moment. Stepping back and asking a question to make sure that this is actually a legitimate request. Especially when it comes to anything involving money.

## Kara Peterman

I think that's a great point, and reciprocally, there needs to be a culture at the top that you want in your and you're encouraging your employees to do so, not that they should be scared to ask the CEO twice. Or to bother them with a call to their cell phone. You know, it's got to come from the top and be a welcoming, encouraging the inquiry and not discouraging, unfortunately necessary doubt of what you're being instructed to.

## Ruth Kochenderfer

Alright, so I thought while we were in the realm of deep fakes we have to go to some of the issues that I have seen with respect to AI and some of the kind of questions that make me question "Are we into the area of science fiction or is this actual reality?" Artificial intelligence as a director of a corporation. Did it happen? Has it happened?

## Kara Peterman

Yeah. I really struggle with this. I'll tell you why. I absolutely think that there's a role for AI in the boardroom in educating directors in prepping for meetings in identifying corporate risks, et cetera et cetera. The concepts of AI in some way replacing a human being as a director or an officer, gives me significant pause, I mean, for a lot of reasons. But most especially when we think about the law, we talk about the business judgment rule a lot and the deference that is given to business judgment and that is innately a human decision, right? It's a considering all of the factors. All of the different risks. Which may be informed by AI. Again, maybe you know, supplemented what's being presented to the directors may be informed by AI or use AI technology. But at the end of the day, it's a matter of judgement. There is no "right" and "wrong" answer when it comes to business judgment and there are sort of softer considerations or nonfactual considerations about how people may or may not react to something almost at an emotional level that could very well be taken into account and and fairly taken into account by directors and officers in making decisions on behalf of their companies. And so I really struggle with the idea that a machine, at a minimum, where we are right now with the technology, could in some way replace the judgment of humans with lived experience, who, who, will take into account all of these different factors and come to what they believe to be the best outcome.

## Ruth Kochenderfer

And this was not just a question to push the boundaries. There are a few companies outside the US, where they have actually, you know put AI as either a director or officer, and since we're talking about you know issues I mean, just a practical legal one. If you have AI as an officer or director, could you imagine what the discovery request would be when it's not a person, but yet it's a computer that's making a decision, right? What are they



entitled to see? I mean, you could see all kind of very quickly, complex legal issues stemming through that.

## Kara Peterman

Absolutely

## Ruth Kochenderfer

Alright so. We are, you know, it is a, you're talking to an insurance broker. So, we can't not leave off talking about risk mitigation tips. I think you've hit some of these, but I think it's always kind of good to highlight. Do a quick summary of the end about what are we recommending to boards, and as well as officers of companies. What should they be doing with respect to AI?

## Kara Peterman

Yeah, I think both officers and directors need to really dig in. Understand how was the technology being used at your company to date? Do, do you even understand the breadth of its use, of its current use? Keeping generally up to date on potential additional uses within your company and the the larger market. And really trying to become educated and informed about the possible use moving forward. I think there's similarly, especially within the legal department and the GC's office, to understand again how the company is currently using AI technology, its plans for future use and other risks that are kind of more general in the market. And, taking all of that knowledge and figuring out how to best disclose those issues to the investing public. How to distill how to distill all of these risks and opportunities? And how to talk about them? So there really has to be, I think, a lot of internal communication at all levels of the company to ensure that the C-suite knows what's going on, the Board of directors knows what's going on, and the legal department similarly understands what's happening.

## Ruth Kochenderfer

All important things. And last but not least, cannot leave off what is near and dear to my heart and having a quick discussion about D&O insurance with respect to AI. You know, right now I say we're at the early stages of what D&O insurance and D&O underwriters and carriers are thinking about with respect to AI, right? It is a top-of-mind issue right here is discussed some of the cases that we've already seen to date that have been filed and that the carriers are responding to. But with all of that, we are not yet seeing, and we're hopefully never will see exclusions related specifically to AI and D&O insurance policies, right? We would hope to never see that given that D&O insurance covers decisions with respect to a broad range of things that we would not want to see. Decisions with respect to AI which is permeating so much of what companies do these days in kind of enter into D&O policies. But we'll we'll where we're seeing the most action at this point in time is with the underwriters' asking questions at renewal time with respect to companies and they're asking a lot of those questions, Kara, that are similar to the advice you're

giving. Which is what are your disclosures? How is the board doing this? Do you have a committee designated to this? Have you actually done some kind of tally to figure out where your AI, how you're using it? What are your policies and procedures? So, I would say if you were asking me where would I put it. These insurers are definitely in the information gathering stage and I've seen their questions with respect to AI become more and more refined as they start to worry about it, understand the technology and understand the risk with respect to where the suits are coming in. So that's kind of it from the D&O front. I think Kara, if you and I are recording this, the same podcast in a year, I bet we would be talking about a lot of different issues. I think AI is going to really change the world that quickly.

## Kara Peterman

Absolutely agree, Ruth. I mean, it's already happening so fast and as I said just in our small little sliver of a world of D&O claims, with respect to AI, we're already seeing, you know, rapid uptick and increase shareholder interest, so absolutely agree that if we meet up again in March of 2026, we'll have a lot more to discuss along these lines.

## Ruth Kochenderfer

Yep. So, in conclusion, as AI continues to evolve, so do all the risks associated with it and we think it's you know, directors and officers need to be proactive, stay informed and keep listening to our great podcasts. So, with that, thank you so much, Kara. We've really appreciated you joining us today.

## Kara Peterman

It was my pleasure, Ruth. Thank you.

## Deepak Adappa

That's all for this episode of the Navigating emerging liability risk with Marsh FINPRO podcast miniseries. We hope you enjoyed our discussion and thank you for listening. You can rate, review and subscribe to the navigating merging risk liabilities with Marsh FINPRO on Apple Podcasts

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