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A podcast for tax, legal and compliance professionals around the globe.

Episode title: Combatting the legal industry's most common AI misconceptions

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Zach Warren: And hello, everybody. My name is Zach Warren, I'm the newly minted Manager of Enterprise Content for Technology and Innovation with the Thomson Reuters Institute. And today on the Thomson Reuters Institute Insights podcast we're going to talk AI, or more specifically I should say where artificial intelligence fits within the legal community. Now, I'm sure there's probably a few people out there who may hear that and think the answer is, well, AI fits nowhere in law, but as we at the Institute have found, you're probably already using AI in your practice, and you may not even know it. There are a number of misconceptions about AI and law that still need to be cleared up. And with me today. If somebody who is great at doing just that, Bobby Malhostra is of counsel and Co-leader of the information governance and e-discovery practice at law firm Munger, Tolles & Olson. Based out of Southern California, Bobby is also a frequent speaker on technology and law and as a matter of fact, he spoke on this very topic just a few weeks ago at the International Legal Technology Associations yearly conference in DC. So, Bobby, I have to start out with the question just to kind of level set here, when we're talking about AI and law, what exactly does AI mean in this context?

Bobby Malhostra: That is such a good question because I get people asking me that all the time and using terminology that doesn't make sense or kind of quite fit, so that I think that's a great kind of intro question. AI in legal is really the process of teaching computers or algorithms or machines, whatever, whatever word you want to describe it to mimic human or lawyer behavior and thought processes in order to help, and this is the key, solve or deal with a legal problem or challenge at hand, right? So, you're trying to teach the computer how to make decisions and you're trying to solve a problem. So, whether that be teaching a machine to identify what documents are relevant to your matter in an e-discovery world or e-discovery space, or identifying words and phrases that may trigger compliance issues such as price collusion in the antitrust context or identification of potential workplace harassment or abusive content in the employment law context or even building algorithms to identify or flag unacceptable missing or deficient contractual clauses, right? These are all examples and I think the bottom line is that there is some form of people, process, technology in play and we're not just talking about robots' kind of running the world this is not a sci-fi movie. As a lot of people think it might be when we're talking about AI in the legal practice, and then to answer your other question, just kind of level setting in terms of terminology, artificial intelligence is this broader concept of creating smart intelligent machines to be able to carry out tasks in a way that we would consider as humans "smart" quote unquote or in our field decisions that are quote unquote lawyer like, right? So, machine learning is a subset of AI and it focuses on using the data and human inputs that gives computers the capability to learn from those that data and that human input, right? And it powers, quite frankly, a lot of the things that we're doing when we're integrating AI into the practice of law, right? And it's not just law, it's the real world as well, right? So, to give you some examples and hybrid examples, right, machine learning is behind those chat box and those predictive text. So, when you're logging on, you're signing up for insurance and you're getting chat box responding to you that's machine learning. When you're in the e-discovery context and you have documents in non-english language that you want to translate, that's machine learning helping you translate that to the English equivalents, right? Then we do that in the e-

discovery world quite a bit. On everyday use where the algorithms are showing which songs or shows to play or view in Netflix or Pandora, those suggestions are brought to you by AI. Your social media feeds, right? So, when we're on those social media apps, how they're presented to you, how they're curated for you, that's all AI based on kind of algorithms, understanding of what you like, taking into account characteristics about you personally, about your likes, your preferences, and it's curating those feeds for you. And lastly, as an example, it also powers autonomous vehicles and machines that can diagnose medical conditions. So, it's doing some pretty complex stuff out there, Zach, not new. And now we're just using it more and more, I think, in the legal context.

Zach Warren: Definitely, and in speaking of misconceptions, something that really stands out to me as you're talking is how you're very outcome-based with this. I know it's something, especially when people first try to adopt AI in the legal context, they're thinking we want to be forward-looking, so let's go get some AI, but that's not really helpful if you don't know what you're actually applying AI to, correct?

Bobby Malhostra: That's exactly right. I think you have to understand the nature of the problem, what you're trying to solve. You need to understand the requirements, right? Timing, expenses, what you know, what it is, you know, if you're dealing with the litigation, for example, you know what's the amount in controversy, what judge you're in front of. If you're dealing with this on the M&A side, there might be some timing requirements or some requirements in terms of counterparties that you know prohibit you from using AI and the way you would like so, I think it's all about understanding the challenge you're trying to solve and then building workflows around it to help with, you know, the process and you know to take that even a step further I think there is probably some use for AI in just about any large scale legal project, right? Whether it be an in-house project related to information governance, whether it be a project related to the M&A context and performing due diligence in the M&A context to compliance issues and litigation, I mean, there's so many use cases for it. So, it's good to kind of think out-of-the-box and definitely think about things that step back a little bit. It's not just about incorporating AI, it's kind of thinking about how they are going to help you, what's the problem I'm trying to solve and how do I get there.

Zach Warren: So, when people are really diving into this, what are some of the misconceptions that either you seen in your practice or you talked about with others or at ILTA that really plague people trying to get into this?

Bobby Malhostra: Yeah, another great question. I think there's really four misconceptions. There's more than that, but four that I see on a regular basis. One there's this misconception that I can't trust AI. The reality is, AI is often more reliable and consistent than the traditional manual human approach, right? AI, you know, it's like, hey, I doesn't get tired after 8 hours of reviewing documents or AI, you know, doesn't make erroneous calls because their kids are sick at home and they're dealing with them, right? So, AI doesn't have those issues, so you tend to get reliable results. And it does a better job, quite frankly, in treating like information in a similar manner. Whereas when you're dealing with humans, you know, you can have two lawyers look at the same type of document or the same type of information and come to opposite conclusions. AI is usually more consistent about it, so this whole notion of I can't trust AI, I think is a misconception. I think it's all about once again having the right people, process and technology in place but, if you have that in place, AI is oftentimes, and quite frankly in my opinion, usually more reliable and consistent than the human kind of manual approach, that's a, you know, misconception one. Misconception two, I get this all the time from lawyers at and at conferences. I'm

not technical or sophisticated enough to use AI, I didn't go and get a computer science degree well. My answer to that is I don't think you need to be; I don't think AI is limited to super technical folks anymore or those organizations that have data scientists on staff. This isn't just about Silicon Valley organizations. It's more about, like I said earlier, creating a reasonable process with validation checks, documentation, and having the right team who can explain the process to your stakeholders if you're in the litigation context to your adversaries, to the judge, to the judiciary. So, it's more about that. And the second point that I want to make for those people who say, hey, I really need to be technical. Several e-discovery providers and I know this is out so even outside of the e-discovery contacts, software providers in general have really put their money where their mouth is, right? They're making significant investments into AI capabilities, right? You're seeing it more when you apply for insurance or you're, you know, you're looking for movies it's being used kind of across the board. And there, you know, companies are putting significant kind of development dollars into this, right? And these providers are integrating cutting edge AI solutions directly into legal platforms, whether it be legal platforms to perform due diligence, whether it be document review tools in the e-discovery context. The bottom line is they're building functionality that's very Netflix or Amazon-like. And it's easier to use it more robust so you don't really need to have this super technical ability anymore to be able to use AI workflows. And I think the, you know, the third misconception is that, you know, at least in the legal context e-discovery context, that car is the only application for AI, right? And for me it's more about taking a holistic approach, Zach, I really hate this, these labels TAR, CAL, 2.0, 3.0. And if I had never heard them again, I would be happy. It's all about, like I said earlier, solving the legal challenge at hand. The legal challenges are becoming more complex. Data volumes are expanding, becoming more complex. So, it's really about using the right set of tools in your toolbox, right? And that could be anything from advanced analytics to sentiment detection, to sampling techniques, to custom classification models with deep learning, right? Not to get too technical, but there's a whole different set of tools in your toolbox that you can use depending on the problem that you're facing, you know, that that's kind of the key and catering solutions around that problem, right? So, there's no, you know, I think the key point is that there's no longer this cookbook type recipe into how you should run your AI workflows. The needs and requirements of every project are just totally different. And then, you know, as a practitioner, I can say, in reality I'm using AI on a daily basis, but not necessarily with TAR. TAR is becoming less and less frequent. I'm still using it obviously on active litigation matters, but on a daily basis I'm using it for compliance. I'm using it for cybersecurity threat detection. I'm using it to identify confidential documents that my clients might have. I'm using it to help financial organizations help with anti-money laundering, non-disclosure laws, the use cases are just so expansive, so this whole notion of it's all about TAR. I hope that gets abandoned. I hope we can drop the labels and as we head into 2023, I actually said this in 2022, early 2022, but as we head into 2023, I hope we can be less about labels and more about what it is I'm trying to accomplish. Number four, even if I want to use AI, it'll be hard to get my teams on board, right? So, I get this all like how do I get stakeholder by and no, they're not going to, they're not going to accept it. I think it's all about selling, right? We're all salesman or women in some respect, and it's about making the right pitch to the right people. And don't be shy because this is a time where it's critical, where it's really advantageous and you get this strategic advantage if you're using these tools to kind of help you in practice, right? So, what I would say is don't be shy about making the pitch, but also know your audience. I'll give you an example. You know, I kind of cater my pitch if I'm trying to bring a client rep on board into using AI, I might touch on defensibility and validation and workflow, but usually my pitch is more largely focused on how is AI going to save the client money? What am I going to do

from a budgeting cost perspective? I have two models in place, one that shows a workflow with AI, one that shows up workflow without AI and then if you can show the that there's significant cost savings that tends to resonate a lot with client context, right? If I'm trying to make the pitch to a senior partner at my firm I'm going to highlight, I mean the other stuff is great, but my pitch is going to really be focused on defensibility, safeguards, QC, validation, what arguments are we going to make in court if we're challenged about our process, thinking about those issues up front and getting the partner senior partner comfortable with AI, from the defensibility standpoint, that's my kind of that's my entree, or that's the way I lead. If I'm dealing with technologists, I'd like to focus on how we're selecting the right tools for the right job, and how we're going to make your life easier as a technologist, you're already overworked, working 12 hours and 14 hours, how am I going to reduce that stress and, well, how am I making the right choice in terms of the right tools for the job, right? So, that's my pitch to technologists. So, what I can say in that is just, cater your approach when you're making the pitch, don't be shy. It's not a time to be shy. I think it's an operative time to kind of use AI, and those are kind of the four areas that I think are key misconceptions.

Zach Warren: Yeah, a few different things that I want to pull out of that, and I'll start with the 4th one first, because that's something that I've heard from a few people and been talking about for probably two or three years now is the technology is there. It's not really a question anymore or of is the AI actually something that is going to work within my practice because this has been tested at this point this is happening. It's more a question these days of adoption and making sure that the technology is being used to its fullest potential and how exactly do I get buy-in to your point from all of these different stakeholders within the organization. So, I guess my question out of that is when you're trying to get a new tool installed, or even a tool that you already have, how much attention do you have to pay to the change management portion of it all?

Bobby Malhostra: I think that's a, that's a critical component. I mean understanding the tool that you're bringing in, what the capabilities are, what the inefficiencies are, you know, it's something that's very important that needs to be looked at in detail, but at the same time, like I said, I think it's more about processes and developing the right processes to solve the challenge that you're dealing with and making the right pitch to the stakeholders, because if you can make a pitch that resonates with them more often than not, they will be willing to at least try in some form kind of using AI. They get in and at that point you get more they get more comfortable in the process as they start using it more.

Zach Warren: Absolutely. And to your second misconception as well I mean, you're an e-discovery guy. I know e-discovery. You threw out a few terms like TAR and CAL that we both know, but somebody just getting into the AI space might be saying I'm not sure what that is. I want to know. It sounds interesting. So, where exactly do you suggest that people start on the AI journey and figuring out what some of these terms and some of these use applications actually are?

Bobby Malhostra: I think there's some really great resource materials out there Zach, Sedona Conference, which is a kind of a think tank of lawyers, judges, and kind of key folks in the discovery world publish primers and in various areas including Technology Assisted Review, which is what TAR stands for. EDRM the electronic data reference model is a great site to learn the basics and understand the acronyms and the basics out there as well. The Association of Certified e-Discovery Specialists has a great knowledge, kind of think tank. There's also our close friend and colleague Doug Austin who kind of published his e-discovery today. He has some really great material on his website, so there is an

abundance of material out there. Those are probably the places that I would start with, but there's no lack of resources out there on the Internet.

Zach Warren: Definitely, that's true all of those different places and they kind of range from the technical which you might get in something like EDRM to I know Doug Austin is has a lot of case law updates and where these e-discovery issues might be arising in current litigation, which is always interesting. Kind of, I guess, my final question coming out of this, and it relates to your third misconception. I feel like a lot of people thought AI in law was just kind of a discovery problem. Like even you'd go to a conference like an ILTA or a legal week or something, and a lot of the technology vendors would either be very research focused or they would be very discovery focused, and there was not really much variation there, but kind of to your point, AI's use cases in legal have expanded dramatically even within the past two or three years, especially as so many people have gone remote. You've seen, I mean so many contract technologies using information governance and data analysis and so many different ways. So, just kind of putting your prognosticator's hat on. Where do you think AI and law kind of goes from here with all of these different use cases that are starting to pop up?

Bobby Malhostra: I think the sky is the limit with AI. I mean, at this point I don't even consider myself an e-discovery lawyer. I consider myself a data lawyer. You know, I think AI will be used in just about any facet in industry where there is a data problem. So, there's information governance, there's privacy, there's cybersecurity, there is compliance, you know, a use case. There's definitely the M&A use case so it goes well beyond e-discovery. And as I mentioned earlier I would say that as, you know, the roles are evolving and e-discovery the line is becoming blurred we can think of ourselves more as data lawyers and you're going to have data, data problems as organizations across industries, across departments. So, it's really a cross-functional type issue and I think in my opinion, I think the sky is the limit. What you'll see slowly is, you know, case teams, clients, judiciary all getting comfortable with AI and you'll see more of an adoption and really, you know, it's interesting because we first started talking about this years ago. I mean, I've been in the industry for 15 to 16 years, and we talked about it was more, I think, lip service. But what we've seen in the last two or three years, we probably had more, uh, more adoption and increase in the last two or three years than we did in the previous 15. And that's because data volumes are exploding, things are becoming tougher to deal with, and it's no longer just a nice to have, it is a necessity. If you are going to learn or you're going to survive out there with your, you know, dealing with data requests on the privacy side and dealing with data requests on the e-discovery side and cybersecurity you're really going to need to know as an organization how to implement AI strategically in order to be able to survive.

Zach Warren: Well, that was something I noticed even at ILTA as well, which has long been known as a very technologist IT-centric conference that wasn't necessarily the case this time, You saw a lot of partners, even managing partners, C-Suite level, people at firms showing up to this thing because if you are going to strategically lead your firm into the future this is a piece of that now. This is something that you need to know so I think that's very astute.

Bobby Malhostra: That's exactly right. That's exactly right.

Zach Warren: Well, any final thoughts before I let you go?

Bobby Malhostra: You know, what I would say is we as lawyers, you know, we're creatures of habit. We don't like change. We take the "if it ain't broken, don't fix it" attitude, but I think what we often what we

fail to understand is that the current traditional workflow, they're broken. They were doing things inefficiently, you know, there's 'cause we need a way to kind of remedy that. And AI can really help, right? So, a lot of times we get this question, you know, where do I start? And I would say that you can take things in baby steps. You don't need full automation on day one, you can choose the right workflow and level of automation, depending on the needs of your project and your risk appetite and what you're seeking to solve. So, point one, you know, kind of in the conclusion is there is flexibility, right? Oftentimes I start off by carving out discrete tasks within the overall project, and I have AI supplement what I'm already doing, right? So, in the e-discovery world, we often use AI to quality control human reviewer calls. That's a good way to get your feet wet, get comfortable with the work product, and understand how the work products being churned out and the efficacy of the work product. So, my mantra here is baby steps. Rome wasn't built in a day, so it does take time and it's a slow process, but it will be worthwhile from a cost savings and risk standpoint, I promise you that.

Zach Warren: Slow process, but ultimately rewarding. Definitely something to know well. Thank you very much for your time. This has been Bobby Malhostra, who's the Of Counsel and Co-Leader of the information governance and e-discovery practice at Munger, Tolles & Olson. My name is Zach Warren, the Manager of Enterprise Content for Innovation and technology with the Thomson Reuters Institute, and this has been the Thomson Reuters Institute Insights Podcast. Thank you for your time.

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