



Texas Association for
Home Care & Hospice
Leading ★ Advancing ★ Advocating

56th Annual Meeting
Tuesday, August 26, 2025
4:30pm-5:30pm

PC4a. AI Focus: The Consequences and Liabilities

Presented by:

Heidi Kocher, Esq, JD, MBA, CHC, Liles Parker PLLC

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Texas Association of Home Care & Hospice 2025 Annual Meeting

AI: The Perils and the Pitfalls and How to Address Them

Tuesday, August 26, 2025

Presented by:
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Agenda

1. AI Regulations / Law
2. AI and Data Privacy
3. Potential Liabilities
4. Considerations for AI contracts

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AI Regulations and Federal Law, etc.

1. **National Artificial Intelligence Initiative Act** – federal law to coordinate use of AI across federal agencies.
2. **TAKE IT DOWN Act** – prohibits deepfake porn
3. **Executive Order 14179 (2025)** –
 - A. Directs all federal agencies to develop an AI Action Plan within 180 days, focusing on promoting innovation, reducing regulatory burdens
 - B. Agencies are instructed to identify and repeal any policies that may hinder AI development or deployment.
 - C. Emphasizes risk-based regulation and encourages partnerships with the private sector

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AI Regulations and State Law

1. **Texas Responsible Artificial Intelligence Governance Act (TRAIGA 2.0)**
 - A. Takes effect on January 1, 2026
 - B. Creates a regulatory framework for the development, deployment, and use of AI systems
 - C. Applies mostly to state government agencies, but can affect private employers
 - i. Prohibits the development and deployment of AI systems that intentionally discriminate against protected classes in violation of state or federal law.
 - D. Will be enforced by Texas Office of Attorney General.
 - E. No private right of actions.

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AI and Data Privacy

1. Make sure you understand the laws that apply to your data

1. Privacy Act of 1974 – applies to federal government agencies
2. HIPAA 1996
3. HITECH 2009
4. 21st Century Cures Act 2016
5. Federal Trade Commission – breach notification of data not covered by HIPAA
6. Substance abuse protections – 42 CFR Part 2
7. Genetic Information Nondiscrimination Act (GINA) 2008
8. Texas Prohibition on data off-shoring via contract requirements
9. Texas Data Privacy and Security Act
 - A. Doesn't apply to entities covered by HIPAA
 - B. Doesn't apply to "small businesses". For home care services, small = less than \$19 million in revenues.

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AI and Potential Liability

1. Malpractice concerns

1. AI tools are usually a black box.
2. Is there informed consent of patient?
3. What IS the standard of care?
4. Bias in the system regarding certain patient populations
5. Is licensed professional responsible to scrutinize, or deny AI outputs?
 - A. Sampson v. HeartWise Health Systems Corporation, 2023 – physicians used software program for cardiac health screening that wrongly classified a young adult with a family history of congenital heart defects as "normal." The patient died weeks later.
6. Who enforces standards of care? How?
7. What if wrong output is used?
 - A. Can a human detect errors before a patient is harmed?
8. What is the potential for harm to a patient?
9. Is the software timely and properly updated?

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AI and Potential Liability

1. Privacy concerns

- A. Where is data being maintained? Where are the servers?
- B. Can the tool comply with HIPAA? Don't take their word for it.
- C. What happens in the event of a breach?
- D. Patients have rights in some states to know AI is being used. Will this become national standard?

2. Data Security concerns

- A. What cybersecurity protections are in place?
- B. Do YOU have sufficient cybersecurity protections in place?
 - i. Have you completed a Security Risk Analysis? What are your policies & procedures? Have your staff been trained?

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AI and Potential Liability

1. Other concerns

A. Coding errors –

- i. Can cause inaccurate predictions or misinterpret of medical data.
- ii. Do these cause medical mal practice issues?
- iii. Do these cause false claims??

B. Data integrity

- i. What is source of training data?
- ii. Is the training data biased?
- iii. What are the knowledge cut-off dates?

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Examples of Cases Involving Use of AI

- **2024** - US DoJ subpoenaed several pharmaceutical and digital health companies regarding their use of generative AI in electronic medical record (EMR) systems to determine whether the tool results in care that is either excessive or medically unnecessary.
- **2024** - Texas AG settlement with Pieces Technologies which sold a generative AI tool that created documentation of the patients' condition and a treatment plan in the patient's chart. Tool was marketed as being "highly accurate," leading to allegations of false, misleading, and deceptive claims about the accuracy of the AI tool.
- **2023** - Cigna and United Healthcare sued in class action lawsuits for allegedly using AI algorithms to override treating physicians' medical necessity determinations.

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Considerations for AI contracts

1. Define and Consider Scope of Work and Deliverables

- A. What is the tool supposed to do? Does the product description accurately describe what it's supposed to do? Does the description meet your needs?
- B. What kind of documentation is available?
- C. What inputs are required? What are the outputs/deliverables?
- D. What is the scope of the tool?
- E. Are there biases in the data and output?
- F. What are the risks to using the tool? What is the likelihood of error?
- G. Is your use case permitted? (vendor's acceptable use policy)

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Considerations for AI contracts

2. Consider Intellectual Property Rights

- A. Who owns the inputs? Who controls what happens to the inputs?
 - i. Do you give up ownership of the inputs by using the tool?
 - ii. What about trade secrets and confidential information? Is copy righting the input good enough?
- B. Who owns the output/deliverables? Can you use the output/deliverable as you wish, or are there restrictions on that?
- C. Who owns the algorithm/program? What if you want to make changes to the process or outputs?
- D. What happens to any training information or usage information?
- E. Does the tool use proprietary or open source software?
- F. Do you need any special licenses to use the AI tool?

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Considerations for AI contracts

3. Address Performance and Service Levels

- A. What is the tool's availability? Establish standards.
- B. What are any maintenance down-time expectations?
- C. How do you address quality concerns?
 - i. **This is ESPECIALLY important in light of AI "hallucinations".**
- D. Establish the quality metrics and the tracking metrics.
 - i. Include the process for reporting and resolving incidents and time to resolution expectations
- E. Ensure the tool allows you to comply with:
 - i. Professional/licensure obligations
 - ii. Other regulatory requirements
 - iii. Your internal policies

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Considerations for AI contracts

4. Draft a solid contract

- A. Include the appropriate representations and warranties
 - i. The vendor has the necessary rights, licenses, and permissions to use open-source or proprietary technology/programs.
 - ii. The vendor has the right to grant the user the rights covered by the contract.
 - iii. The vendor will not violate any laws or regulations, including privacy laws.
 - iv. The vendor will not violate or infringe upon the IP rights of others.
- B. Is the vendor putting in any limitations of liability?
- C. What are the payment terms?
 - i. Can you withhold or delay payment if there's a delay in implementation or if the quality doesn't meet your standards?

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Considerations for AI contracts

4. Risk Management

- A. Will the tool integrate with other tools? How?
- B. Identify who is responsible for what kind of failure.
- C. Clearly identify who is responsible for what kind of cybersecurity
 - i. Remember HIPAA. Vendor is likely a Business Associate.
 - ii. The vendor has the right to grant the user the rights covered by the contract.
 - iii. Consider periodic audits
- D. Maintenance of documentation regarding risk identification and management
 - i. Cyberliability insurance

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Conclusion

- **REMEMBER** – AI often works on probabilities. Are those applicable to your situation?
- **REMEMBER** – the tools are still developing. You can wait until tools are more developed. And compare alternatives.
- **REMEMBER** – make sure your malpractice and cyberliability insurance cover use of AI tools!
- **REMEMBER** – HIPAA still applies.

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Questions?



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