



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 35: A Double-Edged Sword? The DOJ Confronts AI

*Featuring Matt Adams and Mark McCreary of Fox Rothschild*

**Adams:** Hi, everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense & Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams. Today I'm joined with our guest Mark McCreary, who is one of my partners and the Chief Artificial Intelligence & Information Security Officer at our firm.

Mark, welcome. How are you today?

**McCreary:** I'm doing great, Matt. Thank you for having me.

**Adams:** Yeah, great, and thank you so much for joining us.

I mean, the role of artificial intelligence officer at the firm, probably, what's it, a couple of months that you've had that title? I've never seen a technology in my lifetime progress at the warp speed that artificial intelligence has.

Am I off base or is that something that you sense as well?

**McCreary:** No, I don't think there's been anything close to it. The internet took years, and it was actually pretty quick when you stop back and think about it. But using ChatGPT as the benchmark, which many of us do, it took five days for them to reach a million users. Nothing like that had ever happened before

**Adams:** Five days. That's just mind boggling. What I really want to focus you in on today is, you know, our audience is used to us talking about Department of Justice priorities on this podcast, used to us talking about trends and enforcement. And Deputy Attorney General Lisa Monaco in a public statement said that there would be harsher penalties forthcoming for federal crimes that are aided by AI. And she went on to say that there are significant gaps in the enhancements that are attendant to the federal sentencing guidelines for things like AI, the misuse of AI in criminality. And she basically set the priority for the DOJ by saying, quote, "This approach will deepen accountability and exert deterrence. And it reflects the principle that our laws can and must remain responsive to the moment."

And I think that moment is really just captured in what we were chatting about, how quickly this phenomenon has emerged, and emerged in a real way.

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Why don't we step back and go to the basics? What is generative AI?

**McCreary:** Yeah, so I think it's a good place to start, because generative AI, as many of your listeners know, is a subset of artificial intelligence. So, generative AI is artificial intelligence that creates content, whether it be text, photo, audio, video. I'm sure there's other mediums out there that we could pick on.

But really, it's just the idea that it's an intelligence -- a system, a computer, if you will -- out there doing it on its own. You tell it what to do. It's trained already by the time we get a hold of it. And it creates the content that normally a human would create with, frankly, very little input.

**Adams:** If I'm hearing you correctly, this notion of generative AI -- and we've had AI online for a lot of years and it's helped us with search functionality and things like that.

But this notion that something's actually going to be created out of whole cloth by computers really creates a whole host of evidentiary concerns. As it relates to evidentiary concerns in the criminal context in particular, how do we put guardrails on that?

**McCreary:** I think it's difficult. Let me use an analogy to kind of set the table, to use a hacking expression. But we have a lot of school administrators and a lot of educators out there that are concerned about generative AI. They want to know that the paper that gets turned in by the student is actually created by the student. They want to know that the drawing or even graph that is made as part of a science experiment is actually made by the student.

And I can tell you, if any of your listeners wants to make a \$1 billion, come up with a technology that detects that, because right now it's extremely difficult to do that.

**Adams:** Let's you and I do it.

**McCreary:** It's difficult to know what is made by AI versus humans. And so, when it comes to the criminal context and evidentiary issues, I think it's -- I don't want to use the word insurmountable, but there is going to be some real difficulties finding answers to whether something that's being introduced is real. And that introduces a very large conversation about deep fakes. But just in general, whether it's creating any sort of content, whether it's creating a signature, whatever it is, using artificial intelligence to generate that output is going to be very difficult to detect in many circumstances. And that problem is only going to increase.

**Adams:** And one of the examples that DAG Monaco in her release and public statement about the priorities of the Department of Justice as it relates to the misuse of generative AI, one of those examples that the department clung to as a rationale for this policy shift and this deterrence pronouncement was actually the New Hampshire primary, presidential primary. There was alleged to have been a deepfake recording robo call that went out to registered Republicans, back in January when the New Hampshire primary voters were going to the polls.



And as we know, we're deeply in the throes of our electoral cycle now, for who will be the next president. And they used a alleged deepfake of President Biden's voice to urge New Hampshire Republican voters to stay home. And that spurred a whole host of action from the Federal Communications Commission.

What ways can we bake into legitimate communications, legitimate recordings and photos, that would allow them to be authenticated such that we don't encounter this problem. Is there a way? I mean, or is this insurmountable? Is this something that we are just going to have to work harder to ferret out and to expose when we are in court? Or is there a technology answer to the technology problem?

**McCreary:** Well, the answer to that is no. But let me just make a comment on your example. Doesn't that just show us how new we are at this? Just how emerging the technology is that we're having the conversation that some Republican pundits -- and again, politically, you know agnostic-- but some Republican pundit thought it would be a good idea to do that, and that there would be no problems come from that. And number two, that there's no, like you said, guardrails around it right now. There's no prohibition. It's a public figure. There was probably no law broken doing it, other than you can make an argument of election interference. But there is nothing there.

So, number one is, it's an interesting case of how far we have to go, and how quickly it snuck up on us. The second thing is to answer your question: No, that technology doesn't exist. I mean, we, the technology, everyone else, the publishers can build in watermarks. We can build in technologies that allow us to see what is real. We can legislate around it, saying, if you're going to create something through generative AI, it has to have a watermark that says, A, B, or C, or whatever the scenario is. And there will always be some way around breaking that DRM. There always will be.

And as we're on the cusp of quantum computing, it's going to become even worse, where that is not going to happen. So, the simple answer to your question is we can build the technology, but it's always going to be defeatable. Now, I don't want to suggest that we don't still legislate around it. But I do not think technologically, there's an answer that's going to be a guarantee every time that will tell us whether something was generated or was not.

**Adams:** Yeah, and we're truly on the cutting edge. And just the fact that you now have the title of Chief Artificial Intelligence & Information Security Officer at this firm indicates that it's a concern in our legal industry. But what industries, in your assessment, Mark, are most at risk for the misuse, the type of misuse that DAG Monaco has warned will result in enhanced requests for stronger penalties when the Department of Justice is involved?

**McCreary:** Yeah, I mean, I don't know if industries is what I can answer, but I can tell you that the ability to commit fraud as a result of this technology is extraordinarily heightened. Whether it's your traditional financial fraud, whether it's identity theft, whether it's impersonating somebody. I think that is extraordinarily heightened, number one, the technology just lends itself to that. And number two, I think that if you're going to really talk about an industry, I think who's probably most vulnerable is the entertainment industry.



Whether it's actors or singers or anybody that makes their living based upon original content that they create, there, there's a problem there. You probably sat through my artificial intelligence training for our firm a year ago and you may recall one of my examples was I asked ChatGPT to create a song about environment change in the voice of Lizzo. And it was amazing! It came out and it sounded like Lizzo. So I think that there really is some concern as far as impersonating, that ability to have that talent and who that person is.

I think we even saw it with a fake Drake song. There was a collaboration with the Weeknd, which was artificial intelligence. There's going to be a lot that's out there as far as taking away the artist's rights and the ability to make money from that through these fakes.

**Adams:** Yeah, it really is a brave new world, I think, when it comes to the ability of computers to almost appear as if they are the genuine article.

In addition to announcing the Department of Justice's position that it would be taking a very aggressive stance on penalties for AI crimes, there was, in DAG Monaco's public statements, the announcement of a new DOJ initiative called Justice AI, which, she said, will be a group of individuals quote, "from across civil society," and all kinds of backgrounds. She wanted a report to the White House on the use of AI in the criminal justice system within the year.

Do you see this as an opportunity for a public-private partnership on getting this right? Or is it going to take some real high-profile disasters, for lack of a better phrase, before we can start to get our hands around this thing?

**McCreary:** Well, I think if you talk to Taylor Swift, she would say those disasters are already happening. But really, I think that it does create an opportunity for there to be input from the public with what the concerns are that the government, frankly, may not see. The government has a very singular lens, depending on what function it has within the government, versus you, who has a much more defensive view and lens of that, versus someone like me that views it towards protecting client data and protecting our attorneys while they're using these tools.

I think all of those inputs are necessary to have a full and valid conversation before making decisions. And I will make the comment, while I am not opposed to there being some sort of heightened guidelines or penalties when it comes to the use of AI to create crimes, I do think it's going to be difficult to figure out where to draw those lines without that conversation. It's one thing to say, if a crime is committed using artificial intelligence, there's going to be, you know, heightened sentencing. That's makes a lot of sense in some of the more extreme cases, but in maybe a check fraud case, I'm not sure that it really comes into that. I mean, there's a lot of technologies that existed before artificial intelligence that made that easier -- whether it's better printers, better ink, better paper -- where I didn't see any heightened guidelines there. And now we're doing a blanket artificial intelligence boogeyman approach. And I'm not suggesting that's where she would end up, but I think that conversation is going to require more than just law enforcement minds making those decisions.



**Adams:** Yeah, I can tell you this, that I was appointed to serve on the New Jersey Supreme Court Committee on Artificial Intelligence and the Court System. And among the topics that we've explored over the last year was how this interfaces with the ethical requirements on lawyers. And when pro se litigants now have tools that allow them to generate work product that rivals that of lawyers, and what the courts can do to understand -- just like that professor in the hypothetical you used at the outset -- to understand if citations are correct and that the cases that are being cited to the authorities that they purport to be cited for are actually standing for the propositions of law that are reflected in those documents. And I think that the discussion will continue for years before we really do have a better handle on this.

But in your capacity as a practicing attorney that's working every day in this space, I know that you're working with lots of businesses, including our business, this law firm, to develop, deploy and use new technologies in manners that are responsible and that have guardrails on them.

Talk to me a little bit about how that process works from a compliance perspective. Because I know I get your policy memorandum on what we are and are not allowed to use on firm computers and things of that variety. But the private business, the private enterprise that's out there, what compliance guardrails can they put on these new technologies, new emerging technologies, I should say, to be a more responsible and ethical corporate citizen?

**McCreary:** So what's interesting about the practice of law is we have it easier than most other industries, in some ways, in that we've always had ethical obligations about how we disclose client information.

It's baked into us from law school day one, and we know that we have to protect and safeguard that information, not share it except if necessary, et cetera. It's very important to the practice of law.

Now, you take this technology, AI, gen AI, and you apply it to a law firm. Often, I would tell an attorney, "Hey, you just got to make sure whatever work product comes out, you don't put in client information, you review and everything."

And I usually get a big "Duh, I know that, I'm a lawyer." But it's a good reminder. Other industries don't have that foundation. You take somebody that's in the shipping department or the accounting department at a widget company, and they're not really thinking about, maybe I shouldn't be putting company data company trade secrets, company financial information into this artificial intelligence tool. They need that training. They require that training. Because there's a lot of things that can go into a tool and come back out in very unexpected ways.

So, I think what's fun about this practice is it affects, not quite literally but almost literally, every industry and every business out there in one way or another. And it really all starts with training and creating policies and deciding how that company is going to approach the use of that gen AI.

**Adams:** Did anyone see this phenomenon coming, Mark?



**McCreary:** Yeah, kind of. So we've seen a couple of examples that came out where ... first of all, the deepfakes have been around for many years and only improving over the years. And you could kind of see where that was headed, where it became more and more available to people like you and me, often for free. So we could see that the technology was evolving. That being said, in November of 2022, when ChatGPT was really first released, pretty much in a beta or invite-only scenario, but became available, it was mind boggling to those of us lucky enough to see it. To see exactly how far it had come and to come out of, for pedestrians like you and me, out of thin air. It was quite amazing. So while we all appreciated that Google -- which, frankly is AI -- and Netflix recommendations -- which frankly are AI-based -- have only gotten better over the years, I don't think any of us predicted what was going to come with the generative content that comes out of ChatGPT and its ilk.

**Adams:** Do you think that the future of AI is bright? Or do you think that this may be a technology, as DAG Monaco suggests, that sort of gets co-opted for illicit purposes and ultimately is sort of regulated out of our society?

**McCreary:** I don't know, how dark do you want to get?

**Adams:** I want to get dark.

**McCreary:** I would say, if I were a betting man, there's a one in 10 chance that sometime in our lifetime, AI will end our civilization. I, I truly think there's a real risk of that. And I'm not talking about the Skynet kind of stuff, I'm talking about not putting the genie back in the bottle. Where AI, I don't want to say sentient, I don't know if that's the right word, but, the technology gets a hold or deep into our systems where we lose control of a lot of our infrastructure and things like that.

It's not because the AI is evil. It's because bad people do bad things. And I do have a real concern that as other countries have this technology, and we become less able to defend against it as it becomes more advanced, I think there's a real chance of that happening. I really do.

And I'm not a doomsdayer, I'm really not. But you can see the technology, you can see how fast it comes. Most of us have seen the new "Mission Impossible" movie, I mean, you can see how this is going to go.

But most likely, it's just going to be something that becomes part of our lives. It's going to be more ... Maybe the Apple Vision Pro is a good example of it. It's going to be more of us having conversations with our devices instead of reading our devices. It's going to be more of ... As much as the internet gave us content in our fingertips, it's going to be that on steroids. It's going to be that information available.

And I think that the impact on careers is unknowable at this point. People used to ask me, is this going to replace lawyers? And I would always say no. I'm a very much a believer that it will not replace the actual practice of law, but a lot of lawyers are going to be unnecessary in the future. And I don't know how soon that future is. But we're certainly going to need less lawyers in the future. And that's just because what I know. You can apply that to almost any industry. You're going to less need



less writers, less news reporters, less photographers, less creative, advertise people, there's a lot that's going to be replaced.

**Adams:** And in an age where information has, in some ways, become weaponized.

**McCreary:** Yeah, absolutely. I mean, you started with the example of the election interference. That is a very good example, because it's going to become less and less detectable as we move along. And I know, all of your listeners know, just based upon current events and what we've seen in our lifetimes, there's a lot of countries out there that want to do bad things to Western countries, or even just their enemies. And this is going to be another tool that's available.

**Adams:** At this point in the evolution of generative AI, are you telling me that there is not a litmus test to determine what is and is not generated by AI? And if such a litmus test were to be created, and you said you'd become a billionaire if you did, is that even reliable?

**McCreary:** I don't think to the extent there's any indications right now of what is AI generated and what is not, that they are infallible. I think there is probably good technology. I think there are good indications. You can often see, like, generative AI does not create human fingers very well. Those clues exist right now, but they're temporary. They're going to go away.

So no, in answer to your question, I don't think there's an infallible litmus test out there right now. And I don't think there's necessarily going to be one. I think that the technology will always stay ahead. The generative technology will always stay ahead of the detection technology. And until somebody figures out a way to absolutely watermark anything that comes out of a gen AI tool, which isn't going to happen, I don't think there's going to be any definite way to determine what is real.

**Adams:** Do you believe that initiatives like Justice AI, which DAG Monaco mentioned in her release that we've been chatting about today, those types of initiatives are going to be able to combat the potential issues that arise out of this generative AI concept? Or do you think that's just window dressing?

**McCreary:** So, I'm a big believer in don't let perfection be the enemy of good enough. And I think anything that we're doing to try to combat those technologies from harming people is a positive thing. Do I think it's going to be 100% successful? No. Do I think they could have picked a better name? Yes. But I do applaud their efforts to go do that and to find ways to do it.

And I hope she finds support to enhance guidelines around sentencing to make that more, you know, it's like using a firearm committing a crime, you're going to have a bigger sentence. I do support that. I just hope that it's done in a restrained manner. I hope they do not overreach with it when they go to do what they're going to do.

**Adams:** Well, we're running short on time, but let's finish up here. What's our firm doing? What are we doing here at our law firm? Sitting here in the first half of 2024 as civil society as we know it is debating this issue, discussing this issue and having a full-throated conversation about the types of



guardrails and the types of deterrence that we've been talking about as it relates to the Department of Justice.

What are we doing? What are we employing to ensure that we remain a good corporate citizen with high ethical compass, and that we're on the up and up when it comes to generative AI?

**McCreary:** Well, there's two responses I'll give, and you really touched on the first one. I've been involved with law firm technology, privacy decisions, client data, my entire career. I've been lucky enough to do that. This is by far the time that I've had the most honest and open conversations with other lawyers and other law firms about how they're tackling these issues. I have not seen an atmosphere where people are holding their cards close to the vest for a competitive advantage. And instead we are having those conversations.

That's never happened before. Not in my career. We didn't talk about email when it became part of the practice of law. We didn't talk about using Google to do quasi-internet legal research when it started to happen, but we are sure talking about AI.

And the second is as far as our firm goes, you know, as well as I do, we have been what I would call smart and restrained about rolling out tools. We see all the sexy ones that are out there. We see all the opportunities. And every time we've kicked the tires on them, we've come back saying, maybe not ready for prime time.

And we do that not only protect ourselves -- as we are responsible for our work product -- but to protect our clients, to make sure that what comes out of it is actually worthy, it's usable, it's not going to waste more time than it saves. But we do see some very promising tools that have evolved over the past 12, 13 months that we've been looking at them that we continue to look at.

But the one thing I am proud about the firm is as much as we keep saying, we have to get into this, otherwise we're going to be behind, we haven't made irrational decisions to make sure we leap before we look.

**Adams:** I've been surprised. You know, I thought on this committee that I sit on for the New Jersey Supreme Court that there would be this resistance. That there would be sort of a pushback against AI. But instead, whether it's because it's an exciting technology or it's just the cat is out of the bag, the court is hook, line and sinker buying into the utility of it as part of the court system. And I think as businesses are concerned, you kind of have to take that same approach. Would you agree?

**McCreary:** I would. And it's funny, we're talking about the Department of Justice and sentencing guidelines and the exciting things they're talking about. It becomes kind of a "Minority Report" conversation at some point of when the Justice Departments start using in connection with doing their job, and exactly where the lines are drawn there. So I do think that's a double-edged sword or a double-edge conversation, to turn a phrase, to make sure that the tools they're going to use are actually done in a fair and ethical and nonbiased way when it comes to defendants.



So, I do think that, as excited as we all are, I'm just excited myself to see that the conversations are happening at the appropriate pace, I believe.

**Adams:** Well, I tend to think this is not the last time that we are going to discuss generative AI on this podcast.

I want to leave you all with another quote from the Deputy Attorney General's public statements on this topic that we've been discussing throughout. She said, "We need to use the tools that we have and apply really fundamental principles, principles about privacy, principles about transparency, principles about equal treatment under law. And make sure we're doing that with regard to the use and abuse of AI."

And I think that's a pretty good statement. Now, I don't agree with every one of the pronounced policies that come out of the Department of Justice. Heck, I'm a defense lawyer and I challenge them routinely for a living. But at the end of the day, it really seems like this dramatic sea change of a new technology is actually forcing us to get back to pretty antiquated, but tried-and-true brick-and-mortar principles that should be governing business, the practice of law, the enforcement of law, and just about every other aspect of our society to begin with.

And with that, I want to thank Mark McCreary, who's been our guest here today on "The Presumption of Innocence." Mark is again, the Chief Artificial Intelligence & Information Security Officer for Fox Rothschild. He also co-chairs our Privacy & Data Security Practice and chairs our Artificial Intelligence Practice.

This is a brave new world, Mark. And I think we're just getting our feet wet, as they say, and there'll be lots more to talk about. But these issues are being addressed at the highest levels of our government and driving Department of Justice policy that we will see in enforcement action in the days and months and years to come.

So, thanks so much for joining us on "The Presumption of Innocence." Until next time, I'm Matt Adams. We'll see you then. Take care.