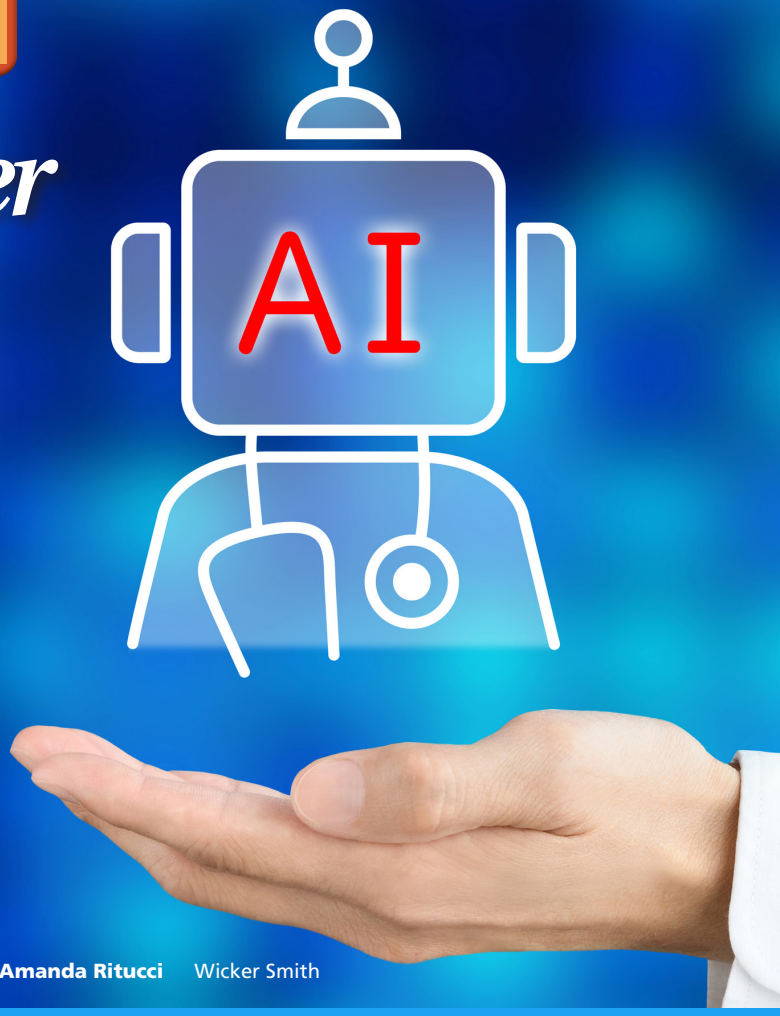
The New Frontier
AI AND HEALTH CARE LIABILITY



John Floyd, Jr., **Ryan A. Hestbeck** and **Amanda Ritucci** Wicker Smith

In July 2025, a physician characterized as an "expert diagnostician" entered a conference room at Harvard to present his findings in a clinicopathological conference to dozens of students, physicians, and researchers. The expert recounted the patient's relevant signs and symptoms and explained his reasoning with care. Ultimately, this diagnostician reached an accurate diagnosis.

The expert diagnostician had six weeks to prepare.

Up against the expert was a new AI model named CaBot, which was named in honor of Richard Cabot, the physician who invented these conferences. CaBot presented its findings through a humanized voice to the conference and reached the same accurate diagnosis as the expert diagnostician.

It took CaBot only six minutes.

The future of health care is inextricably linked to AI. In 2024, investors pumped an estimated $11 billion into AI's use in health care in the United States. Hospitals and providers have already implemented AI to assist with clinical decision-making and diagnosis to assist with patient care. For the most part, these models use millions of data sets to analyze a patient's data to provide insights to providers. AI's involvement in health care extends beyond diagnosis. The medical industry is testing AI programs in connection with electronic medical record systems, patient scheduling, billing, scribing, and task automation.

While the goal of AI in medicine is to provide better patient care and reduce the cost of medicine, there are significant areas of concern that should be considered. From the time an AI vendor is engaged to provide services up to the inevitable question of AI's role in patient care in malpractice, AI will be a critical factor. Understanding these risks should be at the forefront of the minds of everyone involved in health care law.

This article examines a few of the many applications and issues that are all but certain to arise in health care liability with the use of AI. These areas include data gathering, diagnostics, risk mitigation, and litigation. Additionally, certain jurisdictions are implementing new laws regulating the use of AI, creating additional areas of potential liability.

HIPAA AND DATA SECURITY

The effectiveness of AI largely depends on the collection and use of large amounts of data, including protected health information ("PHI") governed by HIPAA. Whether recording conversations between providers and patients or assimilating data from electronic medical records, PHI must be protected in accordance with federal and state laws.

An example is AI-driven dictation software that listens to patient-physician conversations and transcribes the conversations into a note for the physician to then review and finalize. While this automation tool can reduce the number of hours a provider spends documenting, it creates areas of significant liability. First, in many jurisdictions, a patient must consent to the use of recording. Second, providers must be trained to engage and disengage the recording when moving from patient to patient, or risk inadvertently including PHI in the wrong patient's record. Third, over-reliance on this technology without reviewing the final record could lead to incorrect or incoherent chart entries.

During these patient interactions, AI gathers PHI to expand its database. Of course, this PHI is the same data from which AI models gather information to provide services. Health care organizations already experience the highest reported cost and occurrence of data breaches. AI creates a new avenue for these breaches. It

is important for entities to investigate and understand their vendors' security practices and integrate those practices within their facility operations, and to ensure contractual obligations such as indemnification provisions are in place as appropriate..

Covered entities utilizing AI should also be proactive in preventing unethical AI behavior. Colorado recently passed a law, which takes effect in 2026, implementing a duty on AI models to avoid discriminatory practices against certain races or people with disabilities. As AI continues to gain more and more traction, other states are likely to follow suit to ensure consistency and dependability in AI platforms, including those applied within health care.

DIAGNOSTICS AND CLINICAL DECISION MAKING

One particular area of medicine ripe for AI integration is radiology. One such usage is the Nvidia SuperPOD being utilized by the Mayo Clinic to diagnose pancreatic cancer at earlier stages. Through a compilation of thousands of pancreatic cancer patients' CT scans throughout the progression of the disease, the Mayo Clinic was able to train the AI model to detect early subtle markers for pancreatic cancer, greatly increasing efficacy in early detection and diagnosis. In fact, with the use of AI, providers at Mayo were able to diagnose pancreatic cancers on average 438 days earlier than without AI use. This is significant as pancreatic cancer is the eleventh most common form of cancer and is the third deadliest. Without the use of AI, 50% of patients were diagnosed at stage 4, providing an only 13% chance of 5-year survival, yet earlier detection increases this survival rate to 44%. For comparison, experienced radiologists such as Dr. Matthew Callstrom, director of AI strategy at Mayo Clinic, are about 50% accurate in detecting early pancreatic cancer on CT scans, whereas through the use of its AI technology, Mayo was able to increase the success rate in identifying pancreatic cancer to 97%.

Of course, such technology does not come without its pitfalls. The AI model can give false positives or negatives, and it cannot be relied upon without appropriate checks by trained clinicians and specialists. Its use requires education and training to be utilized properly. Success of such models requires integration into the clinical workflow with minimal disruption. Postproduction monitoring with radiological systems such as PACS is critical to ensure the continued use of the AI model remains accurate and impartial over time. As with all AI usage, maintaining data security and HIPAA compliance is essential.

LITIGATION CONSIDERATIONS

Health care, and malpractice lawsuits in particular, cannot escape the AI movement. All providers' actions or inactions will be measured against the effectiveness and expediency of the examples outlined above. It is not hard to imagine plaintiff lawyers deposing providers about clinical decision-making in a case and utilizing an AI chatbot to demonstrate how precisely the provider was either wrong in reaching a diagnosis or negligent in failing to utilize AI technology.

For example, an emergency physician in a malpractice suit reaches an incorrect diagnosis and discharges a patient, resulting in that patient's death. The hospital utilizes AI technology to create a differential diagnosis, but the physician rejected the AI diagnosis in favor of reliance on her training and experience. At her deposition, she is questioned extensively on why she disregarded AI's diagnosis. How could you, especially when there are tens of millions of data points that AI utilizes to reach the (correct) diagnosis? The converse of this example could be beneficial if the physician relied on AI, along with her own independent analysis, but turned out to be incorrect in the diagnosis.

But how does any of this make its way into evidence at trial? Most courts would likely view AI as simply evidence that should be presented through expert testimony. Federal Rules of Evidence 702 and its state equivalents govern the admissibility of expert evidence. AI technology would clearly satisfy the rule's requirements of utilizing sufficient data and methods of applying that data to a particular patient. But who would testify in a manner that would present the evidence to a jury? It is unlikely that a physician knows the subject matter well enough. Perhaps a software engineer? An information technology expert? Or someone designated by the AI vendor? In some instances, might the AI vendor be a co-defendant in the litigation itself, due to an alleged faulty algorithm or other operational deficiency? To what extent will the AI vendor be able or willing to disclose the intricacies of the AI algorithm, which they may insist is proprietary and a trade secret?

Risk mitigation starts with the hospital or clinic's contract with the AI vendor. Indemnity provisions should be specific and fashioned by someone with industry knowledge. The contract should also require the vendor to participate in good faith with discovery efforts and be transparent with data that is utilized. Vendors should also be required to stay up to date on legal and regulatory requirements of the use of AI in health care just as product manufacturers are often required to do in similar contracts. This is important as at least six states have passed laws on the use of AI in health care.

CONCLUSION

This article only scratches the surface on AI's involvement in health care liability. In the very near future, AI will be omnipotent in health care litigation. Hospitals, clinics, and providers will need to adapt to the rapidly evolving capabilities of AI and respond to the developing statutory and regulatory landscape that is attempting to keep up with AI. Health care lawyers will need to develop the subject-matter knowledge to present AI in a manner that is legally sound and persuasive to factfinders, while also counseling effectively on risk mitigation. This is the new frontier.

[1] Khullar, Dhruv. "If A.I. Can Diagnose Patients, What Are Doctors For?" The New Yorker, September 22, 2025. https://www.newyorker.com/magazine/2025/09/29/if-ai-can-diagnose-patients-what-are-doctors-for.

John Floyd, Jr. is a partner at Wicker Smith. His practice focuses on the defense of health care providers and hospitals as well as products liability defense, commercial, and domestic litigation in state and federal court throughout the Mid-South.

Ryan A. Hestbeck is a partner in Wicker Smith's Orlando office, focusing primarily on medical malpractice, health care, and general liability matters. Ryan handles cases for some of the firm's biggest clients, including major regional hospital systems and retail chains.

Amanda Ritucci is a partner in Wicker's Smith West Palm Beach office, where her practice focuses on matters involving medical malpractice, legal malpractice, and general negligence. She has been with Wicker Smith since 2010, handling medical malpractice issues for some of the largest hospital systems in Florida.