

ALGORITHM LAW

WHAT IS IT?

Simply put, **algorithms** are instructions used by a computer for solving a problem or completing a task. The internet runs on algorithms - which are used for everything from online searching, online dating and book recommendations, attorney ratings and GPS mapping. See Pew Report - The Algorithm Age (February 2017). Legal tech companies are developing algorithm-based tools to assist lawyers in predicting the strength of a potential client's case, and indeed, may someday be used in helping lawyers to decide whether to retain a client at all.

WHY NOW?

According to the Pew Report - Algorithm Age, technology and policy experts concur that “[Use of algorithms] will continue to proliferate – mostly invisibly – and expects that there will be an exponential rise in their influence.” Because algorithmic decisions may embody bias and have serious consequences for consumers, use of algorithms has also attracted interest of policymakers. See White House [Report on the rise of algorithms and AI](#) (2016) and

Congressional subcommittee [hearings](#) on risks that widespread reliance on algorithms may pose to consumers (November 2017).

KEY LEGAL ISSUES:

Due Process Concerns - Use of algorithms in criminal cases raises due process concerns when defendants are denied access to the methodology applied, or when the algorithms are biased. See *Wisconsin v. Loomis*, 881 N.W.2d 749 (2016) (rejecting defendant's claims that lack of access to COMPAS algorithmic risk assessment tool for potential recidivism violated due process, finding that sentence was based on numerous factors in addition to the COMPAS results and that the defendant failed to show that COMPAS was gender biased), *Wired Magazine* (11/29/2017)(describing due process challenge to conviction based on identification of DNA through “probabilistic genotyping” formula to which defendant was denied access), But see but see [Judge Releases DNA Software Source](#), *ABA Journal* (11/29/2017).

Discrimination Concerns - For the past four years, Chicago has relied on an algorithm to evaluate every person arrested for for risk

of future crime - which shapes policing strategy and use of force. At the same time, a Department of Justice investigation of the Chicago Police Department found that racial discrimination remains a problem, thus raising questions about whether the algorithm may reflect those biases. See *Police Use Algorithms to Tell if You're A*

Threat, [Time](#), 10/3/2017. The EEOC is also investigating complaints that job tests, which rely on certain algorithms may discriminate against the mentally ill. See *Do Job Personality Tests Discriminate*, [ABA Journal](#) (9/30/2014).

Future Trends & Opportunities:

Algorithms are a sleeper issue, as well as a significant problem waiting to happen. As algorithms become more pervasive and gain influence in public policy, the courts and consumer matters, there is a growing need for “algorithmic literacy, transparency, and oversight.” says the Pew Report. At the same time, as algorithms become more sophisticated, courts and prosecutors will turn to them as a way to save resources - which in turn will put court-appointed and other resource-constrained criminal defense lawyers at a disadvantage - because even if they can successfully compel disclosure of algorithmic models, they may lack the expertise to challenge them. Lawyers must educate themselves on algorithms to ensure that their use does not harm their clients’ interests, and must also participate in public policy discourse on the potential consequences of reliance on algorithms without evaluating the formulas or underlying data sets for possible bias.