

Katten



QUINLAN
SCHOOL of BUSINESS

J.P.Morgan

CSUF

Charting a Course for Family Business Legal Leadership

General Counsels & Principals in Dialogue

Tuesday, April 16, 2024

SESSION 1

Responsibly Using AI for Your Family and Business



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**“Ai is one of the most important things
that humanity is working on.”**

- Sundar Pinchai, CEO, Google



The technology's advancement could be comparable to “the Industrial Revolution, or electricity ... or maybe the wheel.”

- Geoffrey Hinton, Professor Emeritus, Department of Computer Science,
University of Toronto

THE FASTEST THINGS ON EARTH



CHEETAH



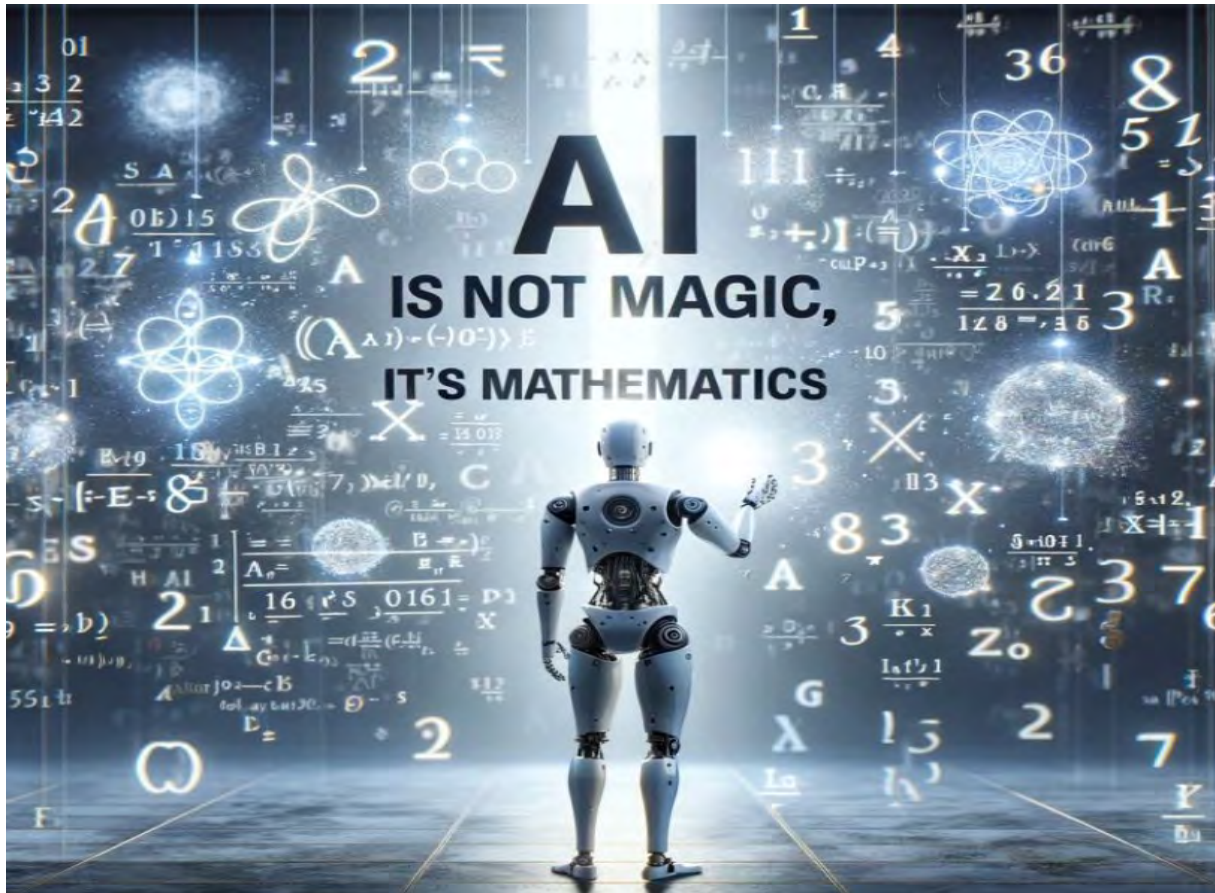
AIRPLANE



SPEED OF LIGHT



PEOPLE BECOMING EXPERTS IN AI



INTRODUCTION TO AI

- What is AI and Machine Learning
- GenAI
- Legal Apps
- Legal & Regulatory Considerations
- Q&A



AI Disclosure: this image was created using Bing Image Creator, powered by DALL-E 3, an AI system that can create realistic images and art from a description in natural language. Prompt: "create a cartoon of the best AI professor ever in a flying car with his students cheering."

AI

Application Examples:

- Self-driving cars.
- Autonomous robots.
- Chatbots (coming soon-Agentbots).
- Regression and classification predictions.
- Facial recognition.
- Radiology (medical diagnoses).

Artificial Intelligence

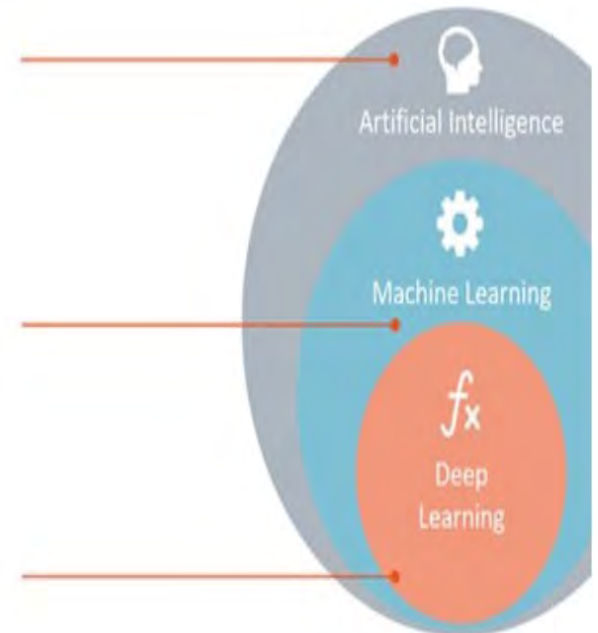
Any technique which enables computers to mimic human behavior.

Machine Learning

Subset of AI techniques which use statistical methods to enable machines to improve with experiences.

Deep Learning

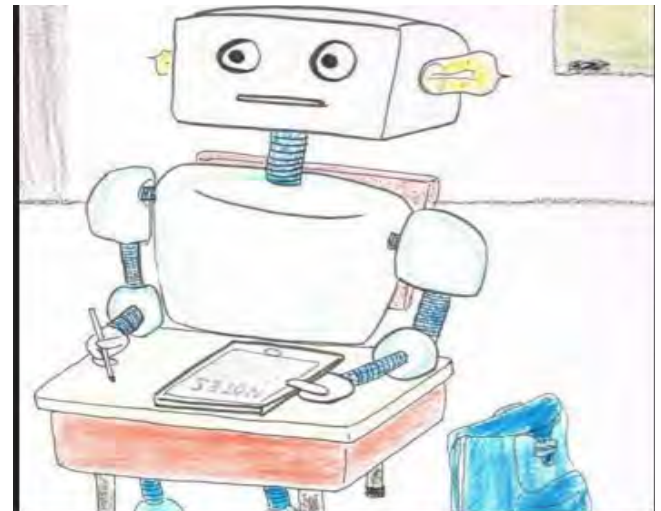
Subset of ML which make the computation of multi-layer neural networks feasible.



WHAT IS MACHINE LEARNING?

Algorithms that learn from data.

Why- many tasks are too complex to describe by a set of rules, so it is often easier to teach by example.



ML KEY CONCEPTS

Most common ML problems:

Regression

Classification

Prediction function:

A prediction function takes input x and produces an output y .

Machine learning is about finding the best prediction function.

$$Y = f(X) + \epsilon.$$

I.E., solve a prediction problem: given an input X , predict an “appropriate” output Y :

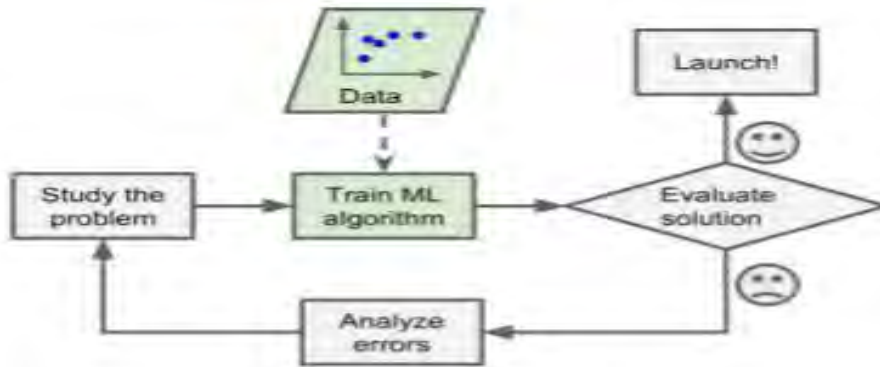
$Y = F(X)$.

Y – outcome.

F – function (algorithm) that relates X to Y as trained.

X – new instances.

MACHINE LEARNING APPROACH



Statistical learning—Where programmers create statistical models for specific problem domains and train them on data.

ML vs. Rules Based Programming:

- Don't reverse engineer an expert's decision process.
- Machine "learns" on its own.
- We provide "training data." i.e., many examples of labeled data (input x , output y) pairs.

WHAT IS LEARNING?

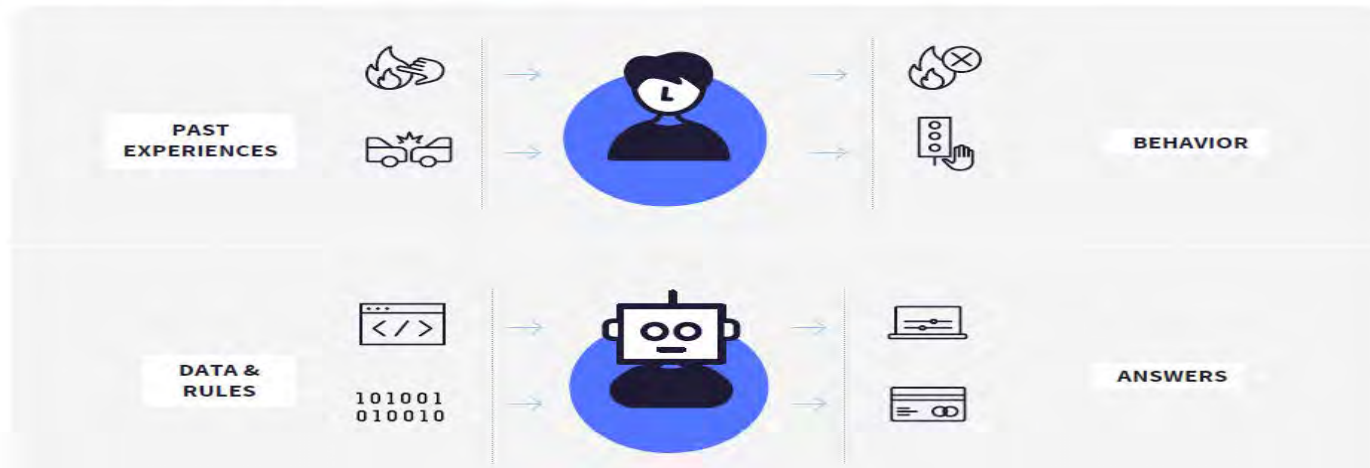


What is Machine learning?

The answer is, in one word, algorithms.

Machine learning is, more or less, a way for computers to learn things without being specifically programmed. But how does that actually happen?

As humans, we learn through past experiences. We use our senses to obtain these “experiences” and use them later to survive. Machines learn through commands provided by humans. These sets of rules are known as algorithms.



WHAT IS LEARNING?

Study and construction of algorithms that can learn from and make predictions from data - such algorithms overcome following strictly static program instructions by making data-driven predictions or decisions through building a model from sample inputs.

```
100% |██████████| 12651/12651 [2:26:46<00:00, 1.81it/s]
100% |██████████| 3163/3163 [36:36<00:00, 1.59it/s]
100% |██████████| 1/1 [00:00<00:00, 12.20it/s]
```

Training 1st Time

```
Epoch ██████████ 100% 1/1 [3:04:13<00:00, 11053.69s/it]
```

epoch	trn_loss	val_loss	accuracy
0	2.362414	1.164363	0.713653

```
Epoch ██████████ 100% 1/1 [3:05:03<00:00, 11103.65s/it]
```

epoch	trn_loss	val_loss	accuracy
0	1.372776	0.597693	0.831583

```
Epoch ██████████ 100% 1/1 [3:05:35<00:00, 11135.57s/it]
```

epoch	trn_loss	val_loss	accuracy
0	0.976203	0.398532	0.876378

Machine Learning- Regression

$$Y = f(X) + \epsilon.$$

Given training examples/instances of x and y

X = features of that instance (features are properties that describe each instance)

F = trained function/algorithm (model)

Y = output attribute

For each instance, the output is a function of the input vector which we are trying to learn.

Amsterdam Apartments		
$n.$	Area (m^2)	Price (€10,000)
A	30	31
B	46	30
C	60	80
D	65	49
E	77	70
F	95	118

Table 3.1: Hypothetical dataset of apartment prices in Amsterdam.

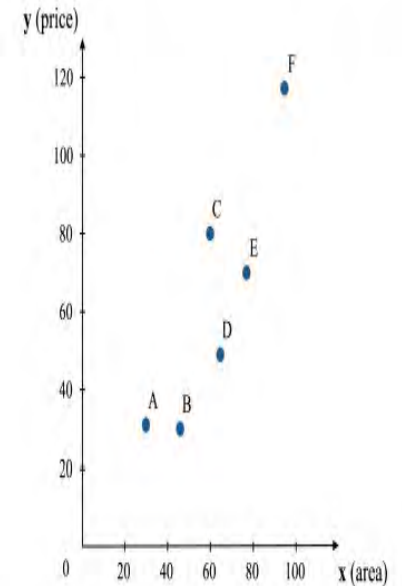


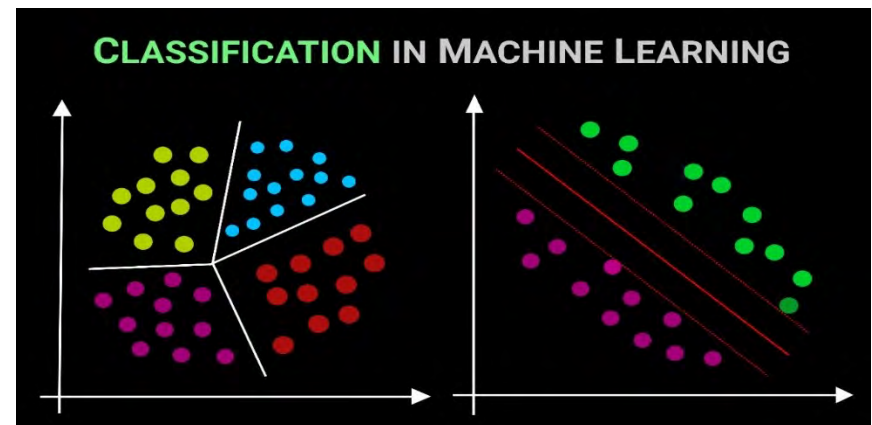
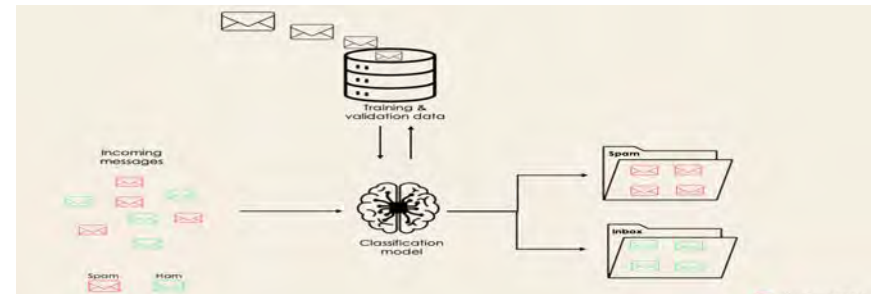
Figure 3.1: A Scatter Plot of the Amsterdam housing prices dataset.

MACHINE LEARNING- CLASSIFICATION

Classification - a supervised learning approach in which the computer learns from data to make new observations or classifications.

A process of categorizing data into classes.

Goal = *identify which category/class the new set of data belongs to on the basis of a set of data (trained) which is already classified.*



AI PROJECT

OBJECTIVE: CREATE A PRODUCT DEMAND FUNCTION THAT SUGGESTS THE OPTIMAL TIMING (WHEN) AND DEPTH (PERCENT) OF MARKDOWNS TO REALIZE THE HIGHEST PRODUCT MARGIN.



WHY?

”Defining discount levels, made possible by data science only recently available to retailers, can boost gross margins by 10% to 20% for in-season and end-of-season sales programs.” (source: Boston Consulting Group).

Using AI for procurement tasks, the average cost savings is 7.9%. (source: Capgemini).



Project Goals

Gain an understanding of retailer's current markdown approach

Propose improved markdown methodology to increase retailer's profitability

Transform from markdowns as an art to a science



Data

Data cleaning, processing, and feature engineering

Analysis and classification of patterns in current markdown methodologies



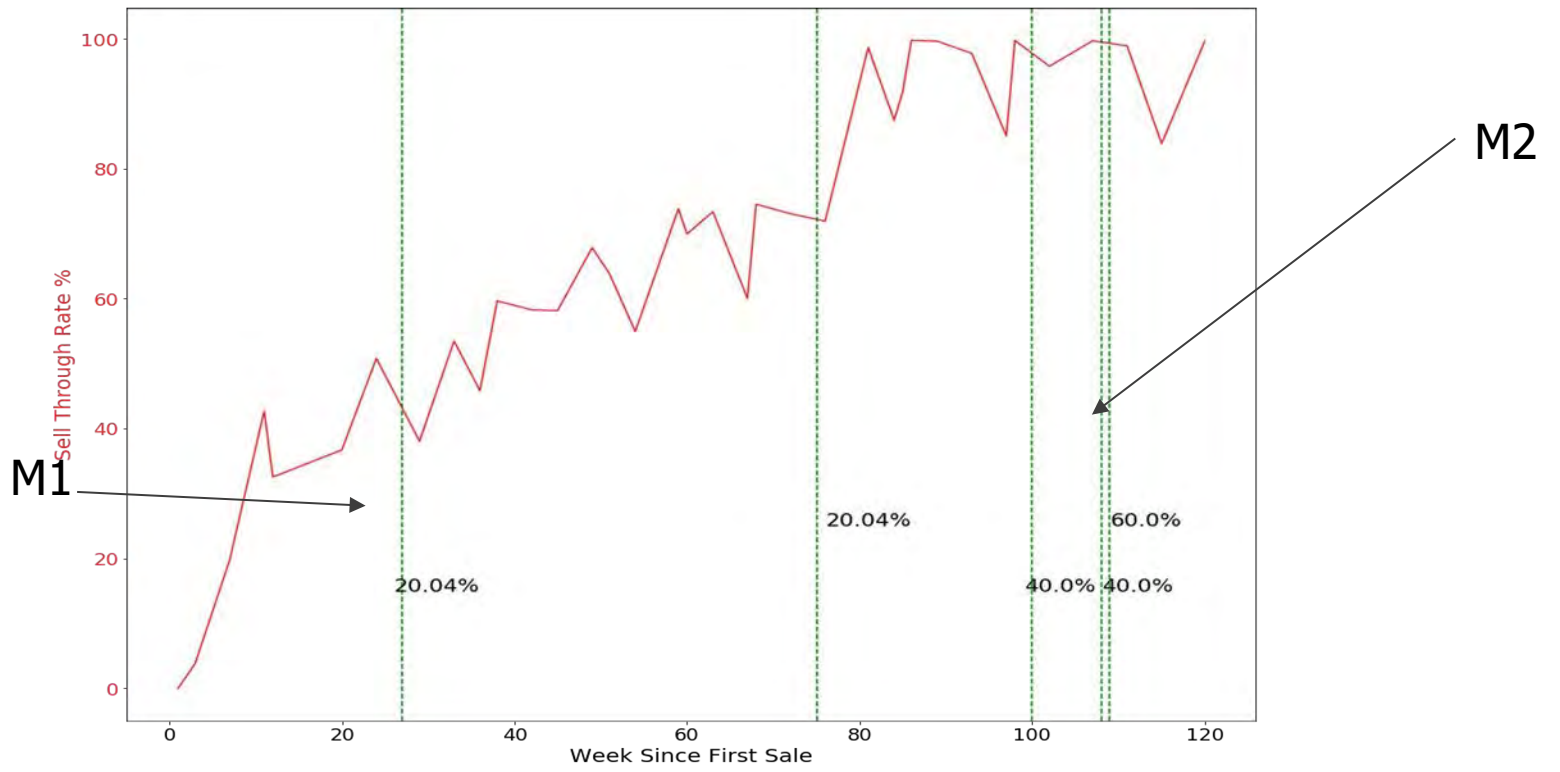
Models

Classify products by features

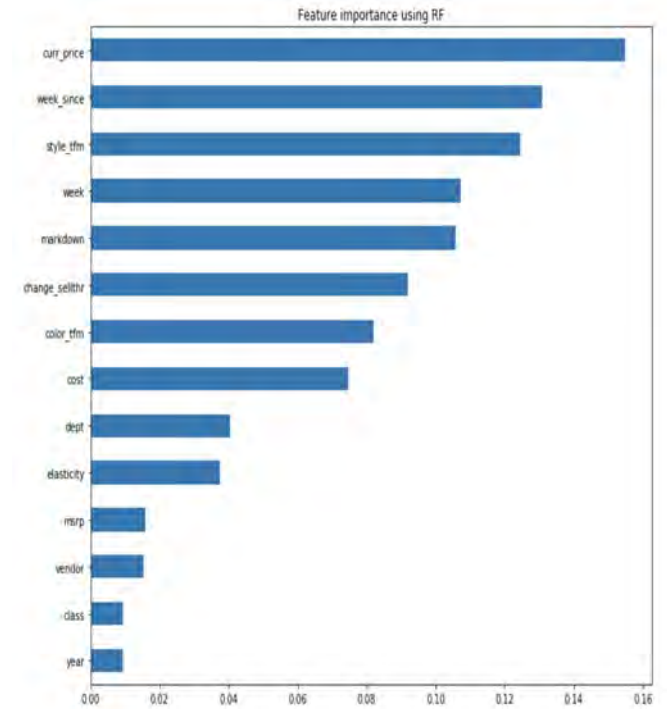
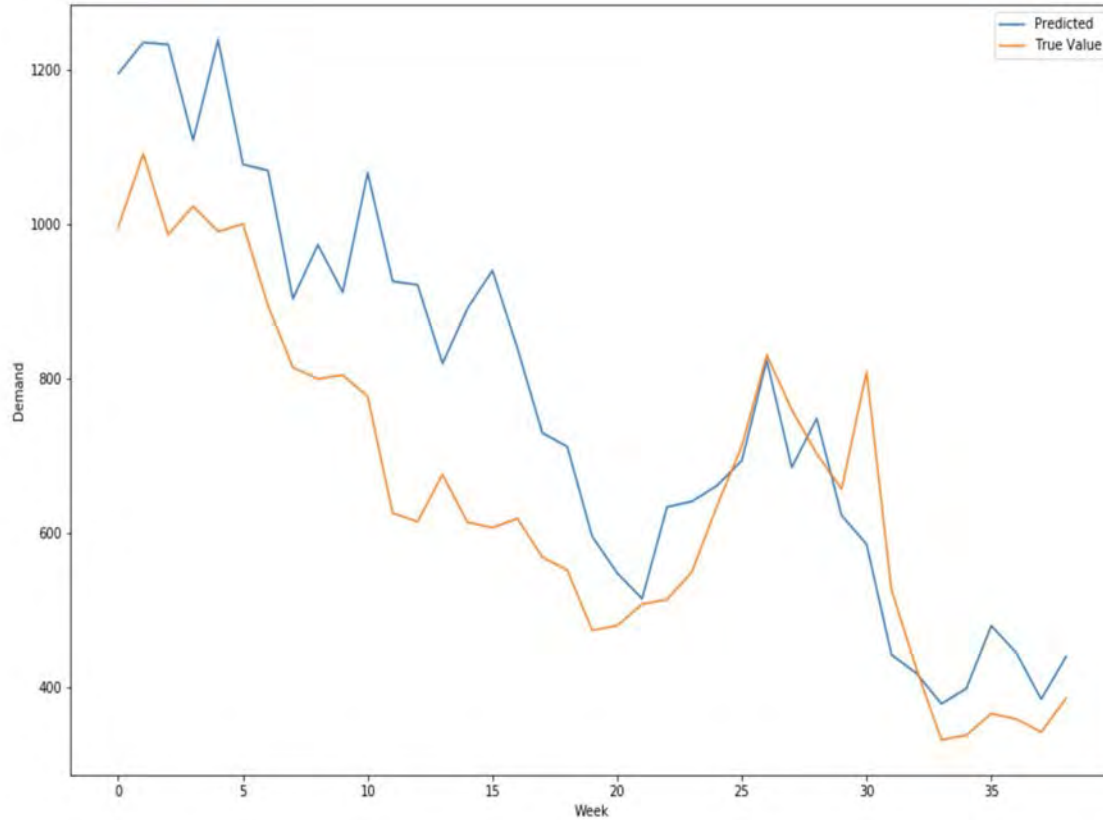
Demand prediction

Calculate Δ Price based on Δ Demand and Elasticity to suggest optimal markdown timing

Build interactive model



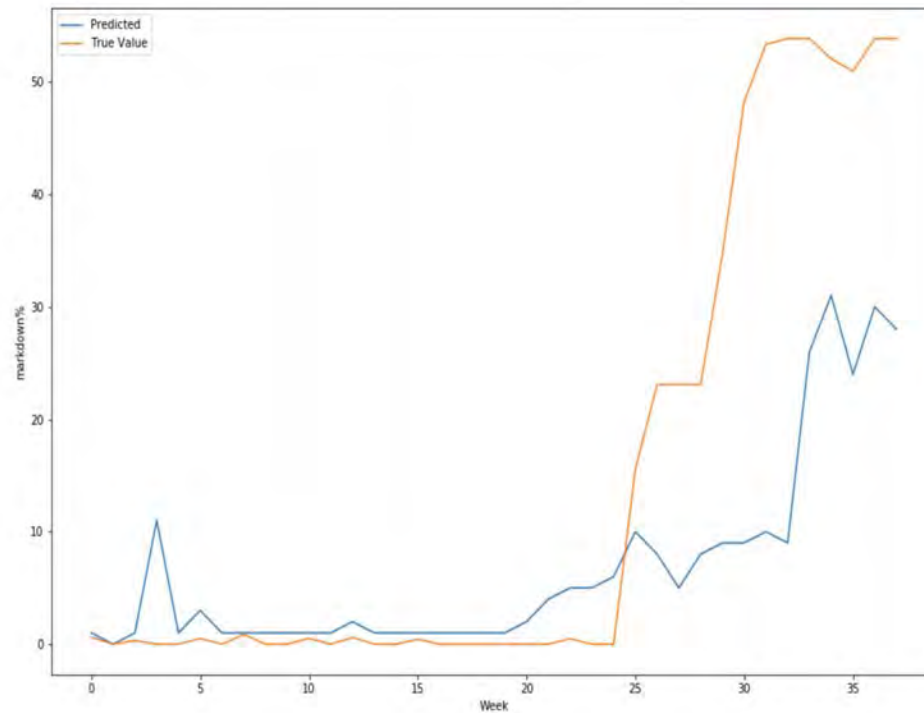
Markdown Optimization-Random Forest Demand Predictions



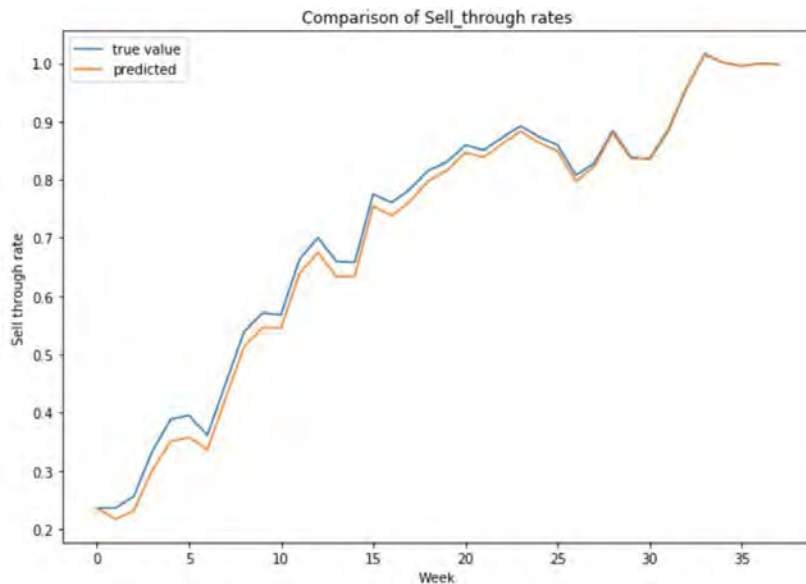
MARKDOWN SUGGESTION FOR PRODUCTS

3 main features:

- Style.
- Weeks since first sale.
- Sell through rate.



EVALUATION OF MARKDOWN MODEL



Average weekly margin actual:
41%.

Average weekly margin based on
suggested markdown: 50%.

RESULT: AI model that impacts
performance: +9%.

GEN AI

- **Machine Learning-** functions that improve their performance of a predication task with experience.
- **Generative AI-** a model that creates new data, rather than making a prediction about a specific dataset. A generative AI system is one that learns to generate objects that looks like the data it was trained on.
- **GenAI** is *simply* text prediction, but due to advances in compute and algorithms, this ability to generate has vastly improved.

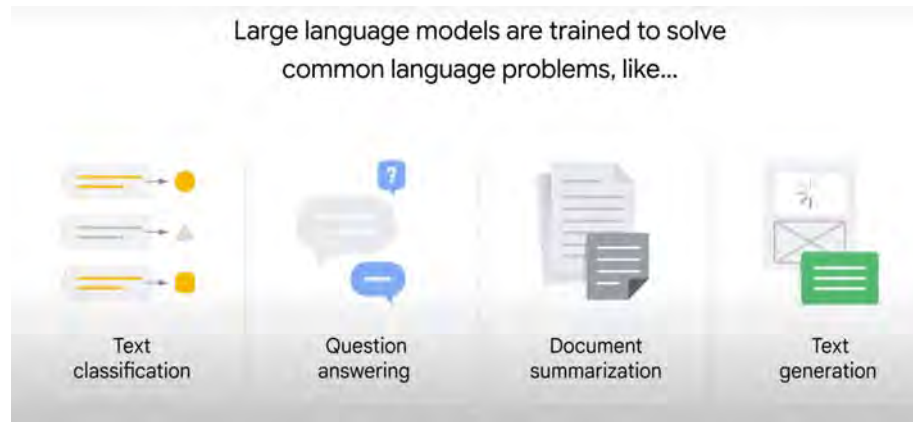


GEN AI

Generative AI-

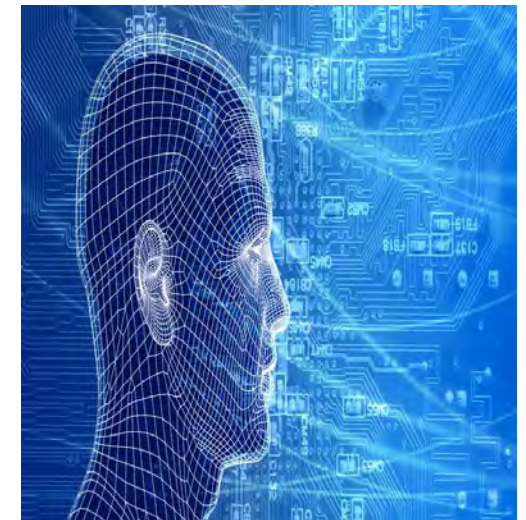
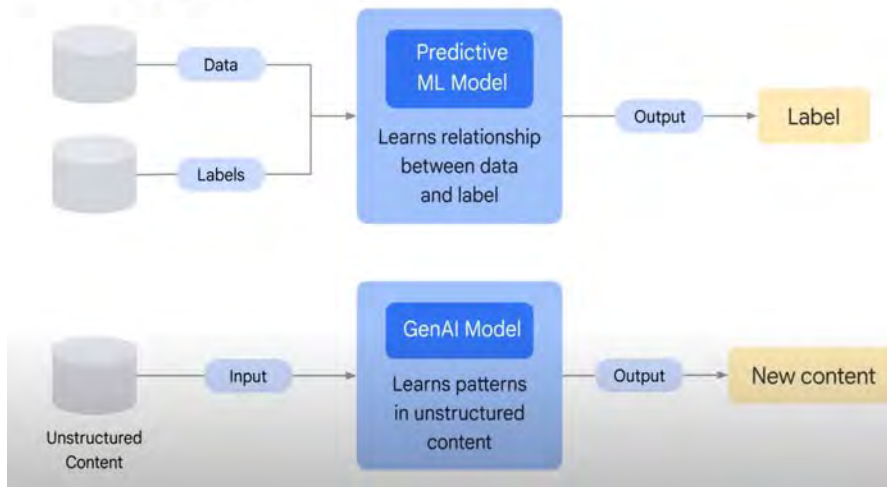
- *Focused on creating new content, whether that be text, images, music, video, or other types of media.
- *Learns from a vast amount of existing data and then using patterns found in this data to generate new, original creations.
- *Models like Generative Adversarial Networks (GANs) or transformer models like GPT (Generative Pre-trained Transformer).
- *AI systems are not just about replicating data but are capable of producing creative, novel output that can be used in various fields.

Generative AI (GenAI)- a class of apps built on LLMs that can create new content like images, text, audio, translation, summarization, and video.



source: Google

$$Y = f(X) + \epsilon.$$

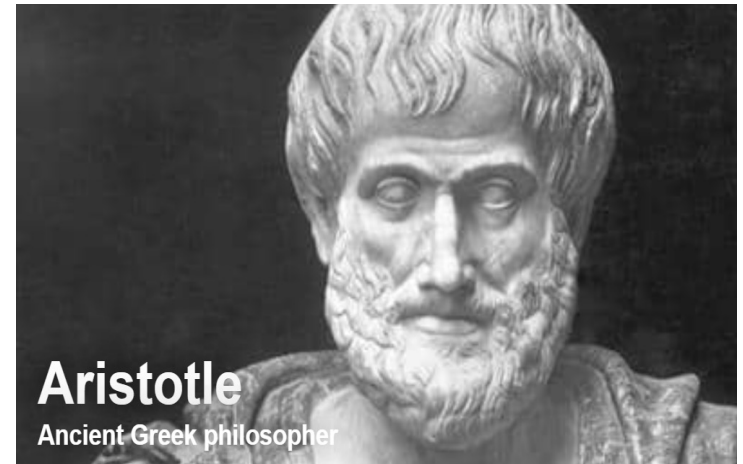


source: Google

FIRST PRINCIPALS OF LLMS

What is Language?

- Aristotle saw language as an object of rational inquiry, a means of expressing and communicating thoughts.
- In his view, human language is a kind of man-made arbitrary *symbol*.
- We can, for our purposes, define language as symbolic representations, invited by humans, like math and logic, to communicate.
- And what we observe is that there are detectable patterns of communication, as expressed in language.
- LLMs, at a very high level, convert human or natural language into computational language capable of imitating humans by applying math.
- In general, LLMs aim to model the likelihood of word sequences to predict the probabilities of future word segments.



FIRST PRINCIPALS OF LLMs



Human language has an inherent structure and detectable logic.

It has grammar, pattern regularity, and similarity.



LLMs are exposed to vast datasets to uncover the statistical relationships that underpin language.

As children learn grammar rules and vocabulary, these models recognize how words relate and depend on each other to convey meaning.



LLMs discover that sentences have syntactic and semantic regularities.

They learn, for example, that verbs typically follow nouns and that some words are more likely to appear together than others. With enough data, LLMs grasp these nuances, like an expert linguist who has studied the subject extensively.




In sum: LLMs computational power enables them to discern the logical, mathematical patterns woven throughout human communication.

It is this recognition of semantics that gives large LLMs their remarkable ability to generate and understand language.

Large Language Models (LLMs)- A class of deep learning models, particularly focusing on natural language processing (NLP) and trained on massive test databases to acquire strong language abilities.

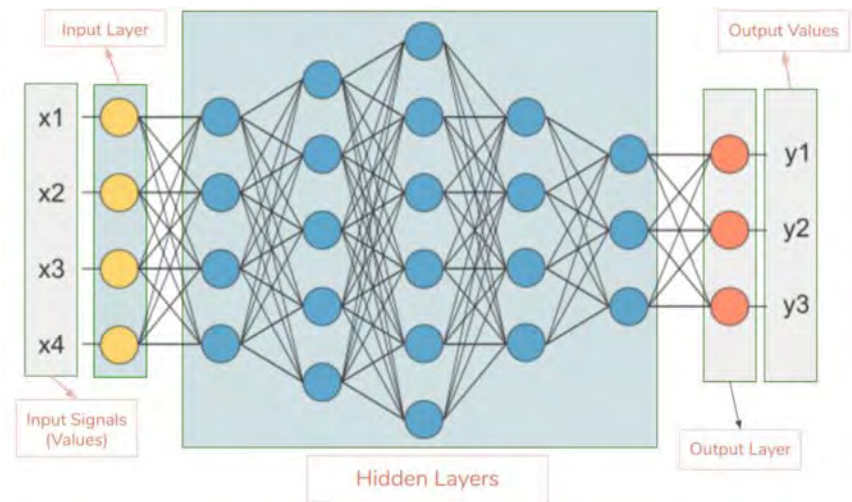
👉 LMs are "just" statistical models of text.



They assign a **probability** to every suffix of a prompt, token-by-token.

source: Google

Model Name	n_{params}	n_{layers}
GPT-3 Small	125M	12
GPT-3 Medium	350M	24
GPT-3 Large	760M	24
GPT-3 XL	1.3B	24
GPT-3 2.7B	2.7B	32
GPT-3 6.7B	6.7B	32
GPT-3 13B	13.0B	40
GPT-3 175B or "GPT-3"	175.0B	96

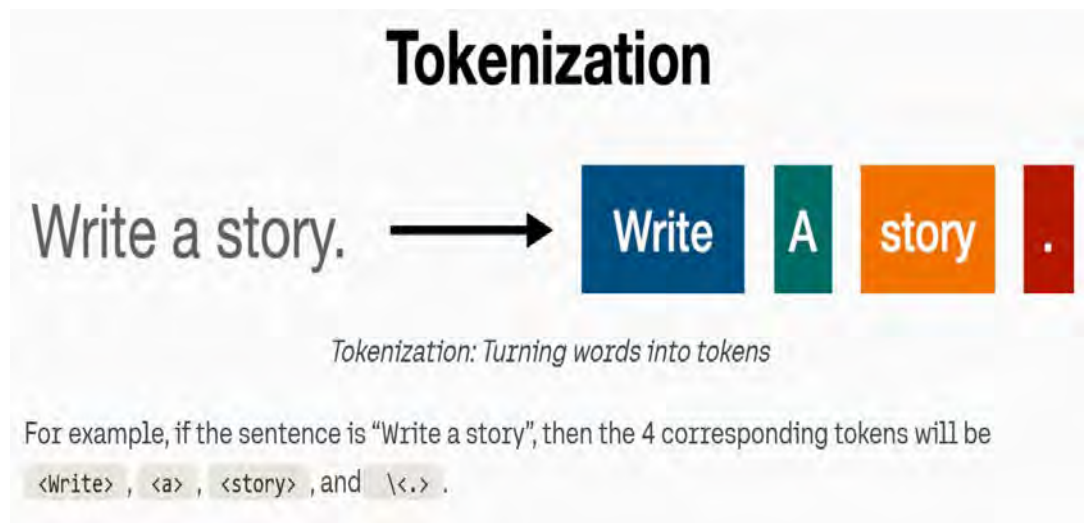




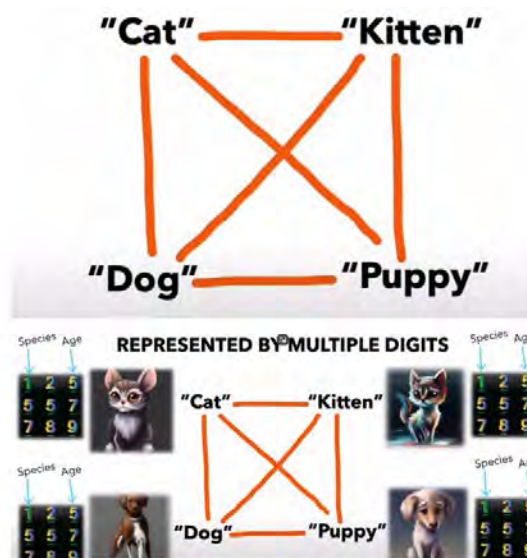
- In this huge corpus of text, words and sentences appear in sequences with certain dependencies.
- This recurrence helps the model cut text into statistical chunks that have some predictability.
- It learns the patterns of these blocks of text and uses this knowledge to propose what might come next.
- Uses self-supervised learning - leverages the *inherent structure of the data itself* to generate labels for training.
- In the context of natural language processing, self-supervised learning enables models to learn from unannotated text, rather than relying on manually labeled data.

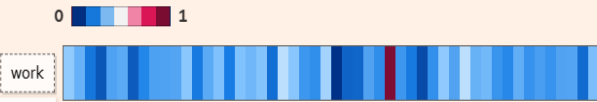
Tokenization

Text data is split into smaller chunks called tokens. This is done by splitting on spaces and punctuation. Each token becomes an input data point for the model. The tokenization step takes every word, prefix, suffix, punctuation signs, and sends them to a known token from the library.



Vector Embedding



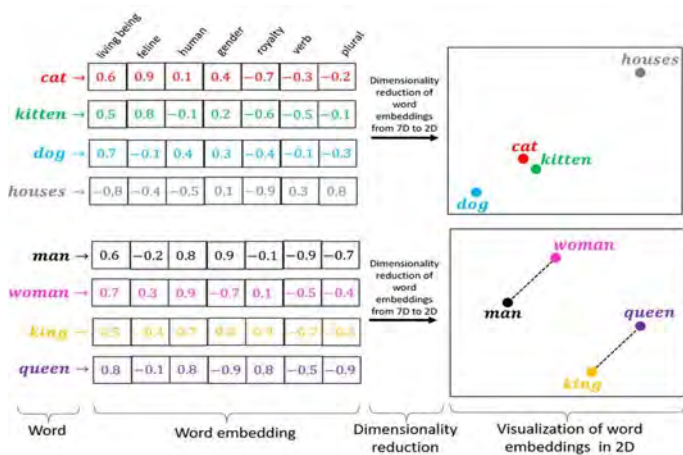


A word embedding can have hundreds of values, each representing a different aspect of a word's meaning. Just as you might describe a house by its characteristics — type, location, bedrooms, bathrooms, storeys — the values in an embedding quantify a word's linguistic features.

Vector Embedding

Each token is then mapped to a numeric vector.

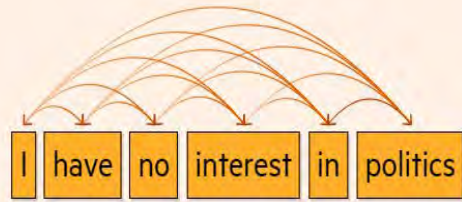
- For example, "cat" and "feline" vectors will be closer than "cat" and "truck."
- Word and sentence embeddings are the bread and butter of LLMs. They are the basic building block of most language models, since they translate human speak (words) into computer speak (numbers) in a way that captures many relations between words, semantics, and nuances of language into equations regarding the corresponding numbers.



source: Medium



With self-attention, the transformer computes all the words in a sentence at the same time. Capturing this context gives LLMs far more sophisticated capabilities to parse language.



Why are Transformers Special?

1. **Attention Mechanism:** At the heart of the transformer architecture is the attention mechanism. This allows the model to focus on different parts of the input data with varying degrees of attention, akin to how humans pay attention to specific parts of a sentence when understanding context or meaning. It enables the model to capture long-range dependencies and relationships in data.
2. **Scalability:** Transformers are highly parallelizable (ability of a computational task to be divided into smaller sub-tasks that can be processed simultaneously, rather than sequentially). Transformers can process data in parallel, making them more scalable and faster in training on hardware accelerators like GPUs.

MEANING IS DEFINED BY THE COMPANY IT KEEPS,
IT'S CONTEXTUAL!



River bank



Financial bank

NEED TO EMBED SEQUENCES OF W



River bank



Financial bank

Transformers in AI: Revolutionizing Natural Language Processing

Ability to learn the relevance and context of words.

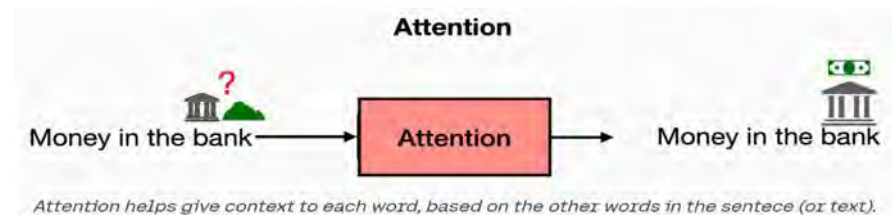
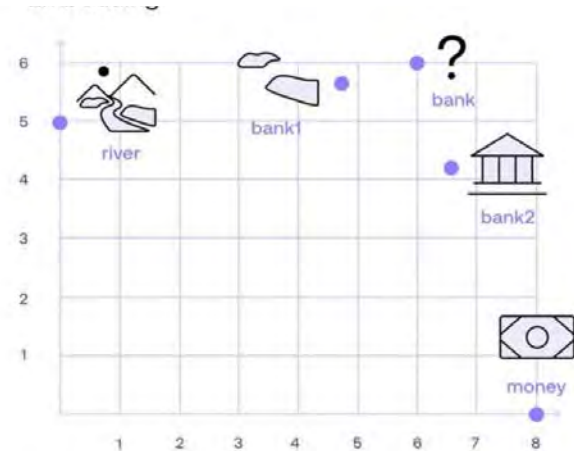
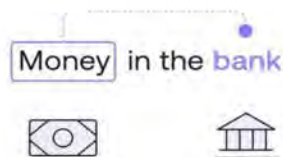
One Word, Multiple Meanings

In order to understand attention, let's look at two sentences:

- **Sentence 1:** The **bank** of the river.
- **Sentence 2:** Money in the **bank**.

Attention:

Telling context in words



IV. BUSINESS USE CASES

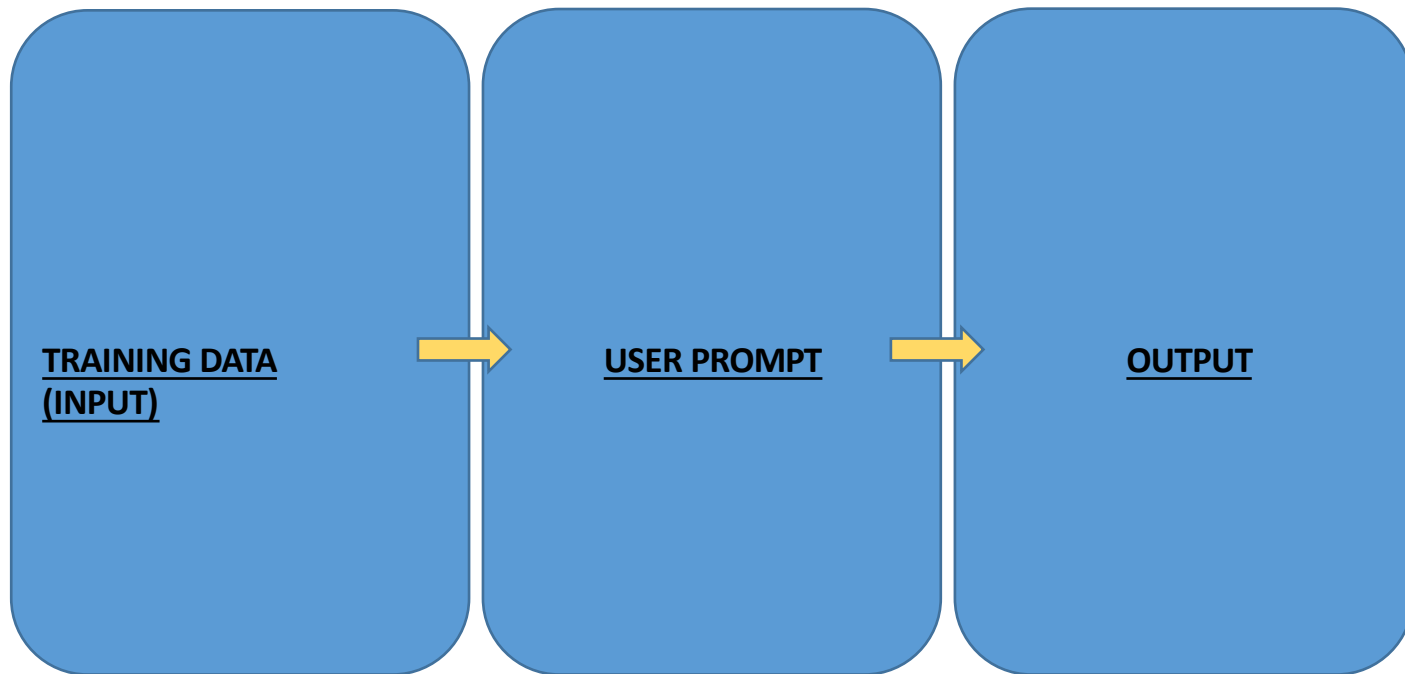
Examples:

- Deloitte- ESG Impact on Stock Performance and Volatility (Summer 2023).
- H&M- built AI models to predict product demand to better inform their buying decisions, with the desired outcomes of increasing sales, realizing higher gross margins, and decreasing investment in overstocks.
- Designer Brands Inc. (Discount Shoe Warehouse)- to determine optimal shoe size profiles to become more precise with merchandising decisions. The algorithms were developed to allow its merchandisers to input various styles and output size demand predictions.
- Petco- built AI models to: 1. map products purchased within customer baskets to ensure dependent SKUs were present in the store, i.e., what are the must-have products, including quantity relationships, and 2. detail the implications of out-of-stocks; that is, what products are substituted when the desired product is not available.
- Peapod Digital Labs- built AI models to: 1. Improve the accuracy of online order projections, and 2. Predict online order fulfillment source and method. The outcome is to assist PDL management in its planning fulfillment operations.
- Tractor Supply Company- investigated the impact of coupon redemptions on margins and consumer behavior. Models built classify consumers that should/should not receive promotions and that enable testing of various scenarios to predict response rates in relation to changing features.
- ULTA Beauty- In this experiment, we considered historical trends in traffic, labor, and sales as impacted by weather. Using a nonparametric tree ensemble model, we were able to accurately predict store traffic two weeks in advance so ULTA can adjust store staffing to positively influence conversion rates and average ticket size.

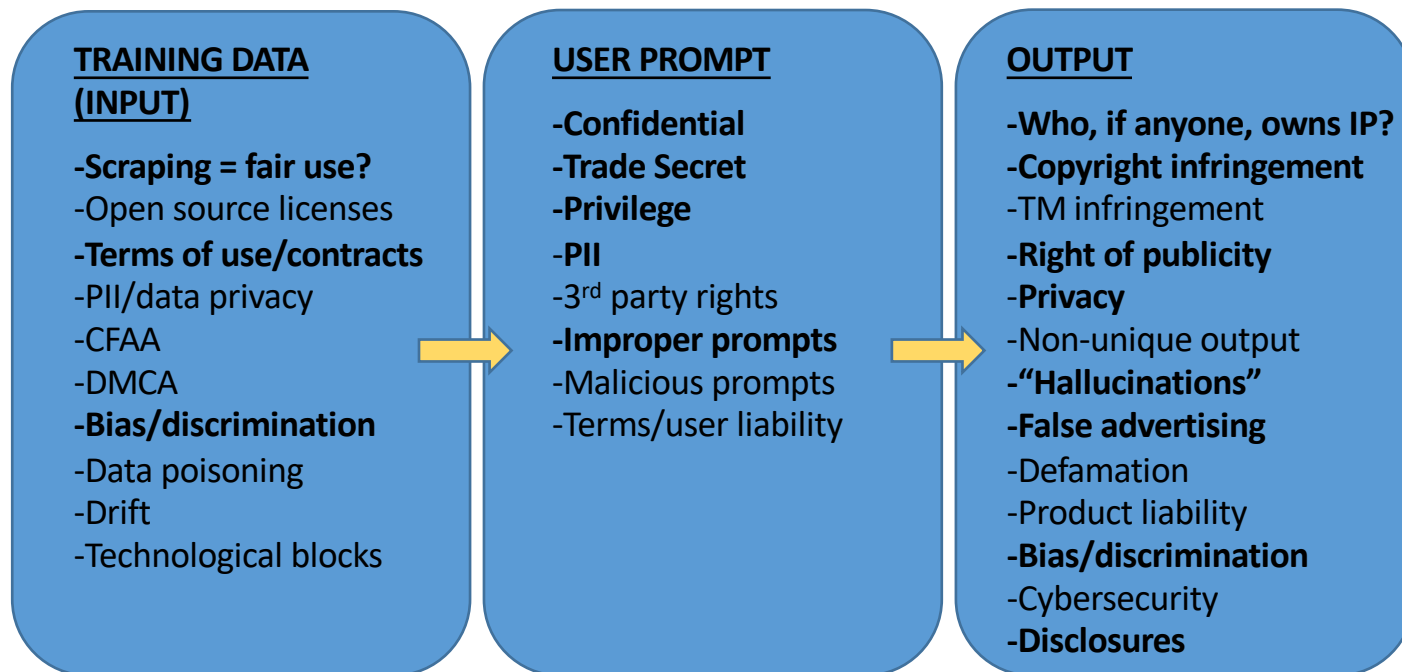
CURRENT PROJECTS (MOSTLY GENAI)

- Loan compliance.
- Tax law (IRC), regs, and IRS form uniformity.
- Block chain audits.
- GenAI Agents (i.e., credit card dispute resolution).

Legal and Regulatory Risk



Legal and Regulatory Risk

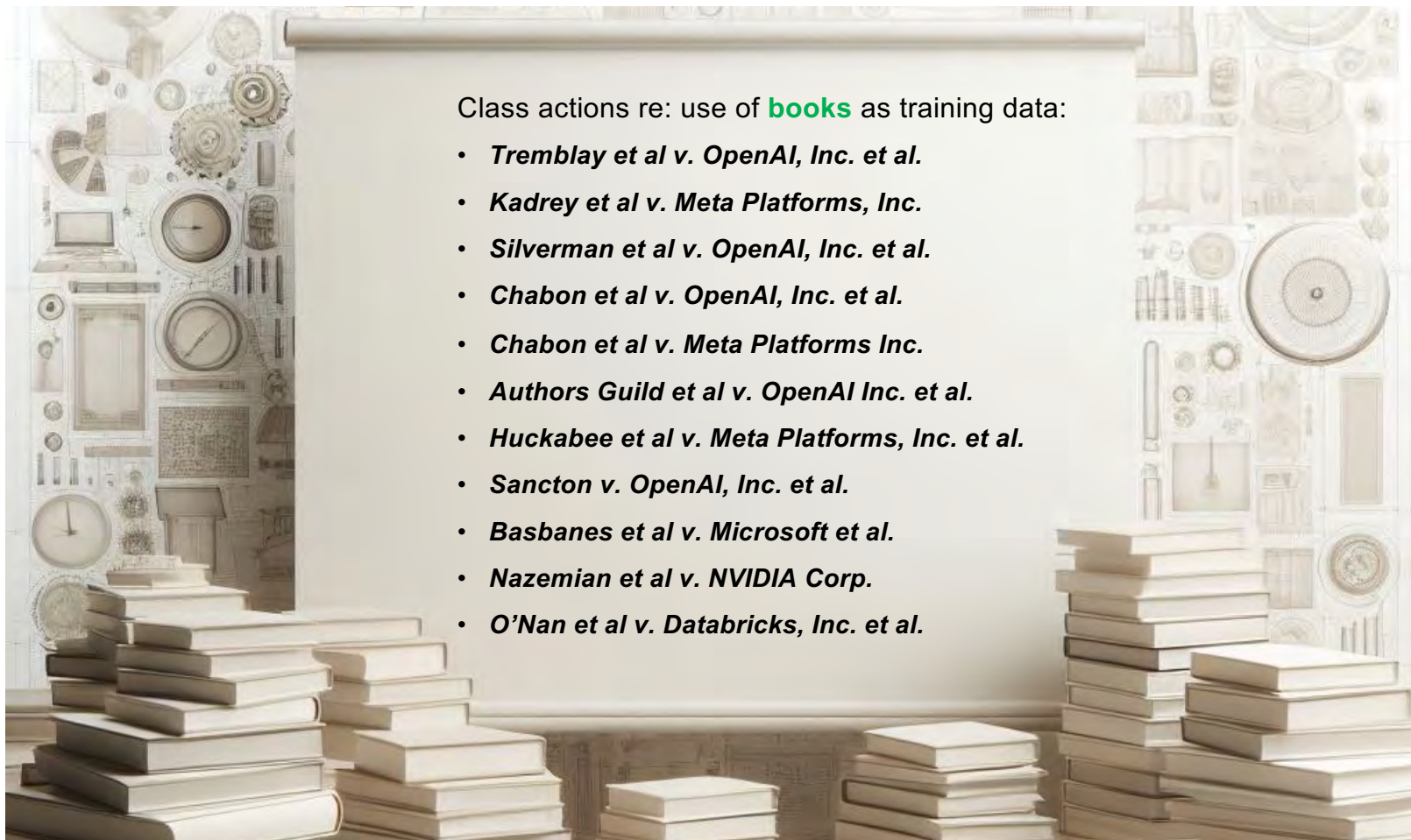


GenAI cases we are monitoring

- ***Getty Images (US), Inc. v. Stability AI, Inc.***
 - (scraping and use of **photos** and reproducing GETTY watermark)
- ***Andersen et al v. Stability AI Ltd. et al***
 - (class action re: scraping and use of **photos**)



GenAI cases we are monitoring



GenAI cases we are monitoring

Lawsuits re: use of **news articles / editorial content** as training data

- *The New York Times Company v. Microsoft Corp. et al.*
- *The Intercept Media, Inc. v. OpenAI Inc. et al.*
- *Raw Story Media, Inc. et al. v. OpenAI Inc. et al.*

GenAI cases we are monitoring

- **Concord Music Group, Inc. et al v. Anthropic PBC**
 - (class action re: use of **music lyrics** as training data)
- **Main Sequence, Ltd. et al v. Dudesy, LLC et al**
 - (misappropriation of **name, image, voice, likeness, copyrighted comedy routines** as training data)
- **Young v. NeoCortex, Inc.**
 - (class action re: **right of publicity** on face-swap app, brought by *Big Brother* actor)



GenAI cases we are monitoring

- ***DOE 1 et al v. GitHub, Inc. et al***
 - (class action re: scraping and use of **software code**)
- ***Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.***
 - (scraping and use of Westlaw **case summaries**)



GenAI cases we are monitoring

- ***P.M. et al v. OpenAI LP et al***
 - (class action re: scraping and use of **personal data** – Fed/CA/IL/NY/cl)
- ***A.T. et al v. OpenAI LP et al***
 - (class action re: scraping and use of **personal data** – Fed/CA/NY/cl)
- ***J.L. et al v. Alphabet Inc. et al***
 - (class action re: scraping and use of **personal data** – Fed/CA/cl)
- ***A.S. et al v. Openai LP et al***
 - (class action re: scraping and use of **personal data** – Fed/CA/cl)



GenAI cases we are monitoring

- ***Walters v. OpenAI, LLC***
 - (defamation based on ChatGPT hallucination of embezzlement complaint)
- ***Battle et al v. Microsoft Corp.***
 - (defamation based on Bing Chat hallucination wrongly associating plaintiff with convicted terrorist of similar name)



GenAI cases we are monitoring

- ***Thaler v. Perlmutter et al.***
 - (APA challenge to Copyright Office's refusal to **register copyright** in AI-generated work)
- ***In re Théâtre D'opéra Spatial***
 - (request for reconsideration before Copyright Office Review Board challenging refusal to **register copyright** in AI-generated work)
- ***In re Suryast***
 - (request for reconsideration before Copyright Office Review Board challenging refusal to **register copyright** in AI-generated work)



In re Théâtre D'opéra Spatial

- Request for reconsideration of Copyright Office's **refusal to register AI-generated artwork for lack of "human authorship"** (Copyright Office Review Board)
- Claimant used Midjourney to create the image with **600+ iterative prompts**, and Photoshop to alter the image afterwards
- Claimant did not disclaim GenAI image in application
- On September 5, 2023, Review Board upheld the refusal, finding that prompts are not sufficient authorship of the output
- But, post-output alterations, and text prompts themselves, could potentially qualify for protection



The New York Times Company v. Microsoft Corp. et al.

- Lawsuit regarding use of **NYT news articles and other content** as training data for GPT models (SDNY)
- Defendants are Microsoft and various OpenAI entities
- **Copyright infringement** (direct, vicarious, and contributory), **DMCA, unfair competition, trademark dilution** (re: hallucination)
- NYT provides various examples of **outputs** from GPT models that are allegedly verbatim or near-verbatim copies of NYT content
 - GPT chat outputs and “synthetic search” results, e.g., Bing Chat search engine
- NYT also alleges lost revenues from affiliate referrals from Wirecutter recommendations, and that hallucinated/lower quality content dilutes NYT marks
- Filed December 27, 2023; **partial MTDs filed Feb. 26, 2024 and March 4, 2024**
- Related to *Authors Guild* case in SDNY

Concord Music Group, Inc. et al v. Anthropic PBC

- Putative class action on behalf of **music publishers** regarding use of **lyrics** as training data for “Claude” GenAI models (M.D. Tenn.)
- **Copyright infringement** (direct, contributory, and vicarious) and **DMCA**
- Music publishers allege that models are trained on data sets that include copyrighted lyrics and thus models and outputs infringe
 - Allege that even when not directly prompted to recite lyrics, famous lyrics are still included in outputs (specific song examples like *American Pie*)
 - Allege existing market for licensing of song lyrics
- Filed October 18, 2023
- Publishers **moved for PI** on November 16, 2023
- Anthropic filed MTD November 22, 2023
- PI/MTD briefing concurrent through February 2024
- Parties requested oral argument and/or evidentiary hearing

Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.

- Owner of Westlaw legal research service (Thomson Reuters) sued ROSS in 2020 (D. Del.) for copying large amount of **legal case summaries** and other copyrighted content to build an AI-powered competitor to Westlaw
- ROSS allegedly **induced** a third-party Westlaw licensee to copy the content and provide it to ROSS, after Westlaw refused to grant ROSS a license
- Alleged **copyright infringement** and **tortious interference with contracts**
- Both parties moved for **summary judgment in 2023** – fair use is a primary issue
- **In September 2023, court mostly denied motions for SJ** regarding copyright infringement and fair use, but flagged key factual/legal issues for jury
- Jury trial on copyright issues set for **August 2024**

Copyright infringement v. fair use

Fair use balances four factors:

- (1)the purpose and character of the use [commercial/transformativ],**
- (2)the nature of the copyrighted work,
- (3)the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- (4)the effect of the use upon the potential market for the copyrighted work.**

17 U.S.C. § 107.

Fair use is a mixed question of law and fact

- Application of the test is primarily legal, but it requires determination of subsidiary factual questions about the copying and/or the marketplace
 - **Highly fact-intensive and case-specific**

Copyright infringement v. fair use



INPUT ↔ OUTPUT

**1ST FACTOR ↔ 4TH
FACTOR**

- The FTC has been very active in putting out blog posts and guidance about consumer protection issues involving AI
 - **Do not overstate, understate or discriminate**
 - Do not suggest that users *own* outputs if they do not (or fail to warn that users may not own outputs)
 - Do not misrepresent (or fail to warn) regarding IP infringement issues
 - Do not make “surreptitious, retroactive amendment” to terms of use or privacy policy to allow for AI training
- The FTC is coordinating with other agencies regarding AI risks, including discrimination and bias in algorithms
- Focusing on finances, health, education, housing and employment



The Washington Post
Democracy Dies in Darkness

EXCLUSIVE

FTC investigates OpenAI over data leak and ChatGPT's inaccuracy

The agency's demand for OpenAI's documents marks the company's greatest U.S. regulatory threat to date

FTC Authorizes Compulsory Process for AI-related Products and Services

FTC Launches Inquiry into Generative AI Investments and Partnerships

Agency Issues 6(b) Orders to Alphabet, Inc., Amazon.com, Inc., Anthropic PBC, Microsoft Corp., and OpenAI, Inc.

FTC lawsuits...

FTC v. Automators LLC et al. (S.D. Cal.) – PENDING

- TRO entered August 2023; stipulated PI entered **September 2023**
- Alleges that defendants operated deceptive scheme promising profits from “passive investments” in AI-powered e-commerce stores on Amazon and other platforms, which resulted in over \$22 million in harm
 - “We’ve recently discovered how to use AI tools for our 1 on 1 Amazon coaching program, helping students achieve over \$10,000/month in sales!”
 - Defendants’ settlements with unhappy customers included onerous non-disparagement clause
 - Section 5 FTC Act, Business Opportunity Rule, Consumer Review Fairness Act
- On Feb. 27, 2024, parties filed **Stipulated Order for Permanent Injunction and Monetary Judgment**
- Total monetary judgment of over **\$21 million**

For business opportunity sellers, FTC says “AI” stands for “allegedly inaccurate”

Right of publicity / impersonation

FTC fraudulent “impersonation” rulemaking

- **Impersonating businesses and governments**
 - Materially and falsely pose as government entity or officer thereof
 - Materially misrepresent affiliation/endorsement/sponsorship of government entity or officer thereof
 - Materially and falsely pose as business or officer thereof
 - Materially misrepresent affiliation/endorsement/sponsorship of business or officer thereof
- **Impersonating individuals**
 - Materially and falsely pose as business or officer thereof
 - Materially misrepresent affiliation/endorsement/sponsorship of business or officer thereof



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Right of publicity / impersonation

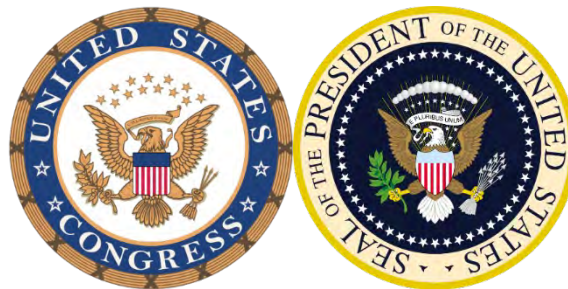
- Federal Legislation:

- *Movement towards a potential “federal right of publicity” or federal anti-impersonation right, e.g., NO FAKES Act, No AI FRAUD Act*

- *President Biden says to “ban AI voice impersonations” in March 2024 State of the Union*

- State Legislation:

- *Tennessee ELVIS Act*



AI Legislation / Regulation - State

- **State Legislation:**

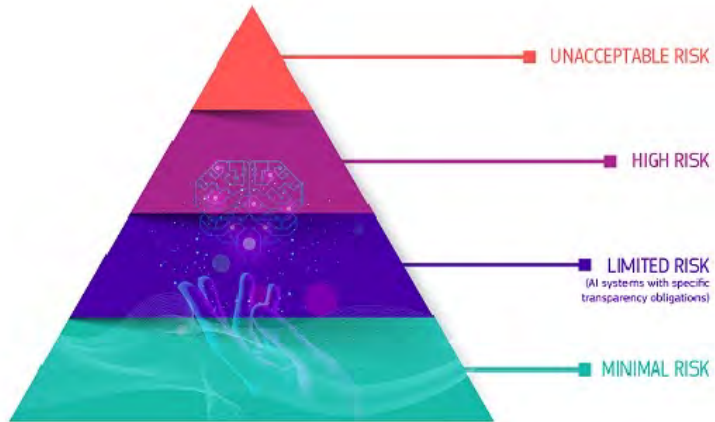
- A number of states have enacted new laws or are considering proposed laws that address AI issues, including with respect to:

- Data privacy
- Biometric data
- Automated decision-making / profiling
- Discrimination
- Disclosure of AI use (e.g., in chat bots and other tech)
- AI safety

- **Local Legislation:**

- NYC has a new law regarding discrimination in AI automated decision-making for employment – enforcement began July 2023

EU AI Act



STEP 1



A high-risk AI system is developed.

STEP 2



It needs to undergo the conformity assessment and comply with AI requirements.*

*For some systems a notified body is involved too.

STEP 3



Registration of stand-alone AI systems in an EU database.

STEP 4



A declaration of conformity needs to be signed and the AI system should bear the CE marking.

The system can be placed on the market.

If substantial changes happen in the AI system's lifecycle

GO BACK TO STEP 2

The new reality



Phase 1: “Don’t feed our IP and trade secrets to the robot!”



Phase 2: Calibrating risk tolerance and business strategy; vetting enterprise software from trusted vendors; vetting use cases
Robust agreements (IP, data security, reps/warranties, indemnification)



Phase 3???: Every company has its own custom GenAI model leveraging its proprietary data, and every employee relies heavily on custom copilot/agent, etc.

The new reality



- **First steps include:**
 - **Stop-gaps**
 - **Assemble cross-functional team to consider risks and use cases**
 - **Implement employee usage policy and employee training**
 - **Educate vendors**
 - **Update vendor and other agreements**
 - **Monitor and revisit**

THANK YOU

Responsibly Using AI for Your Family and Business



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SESSION 2

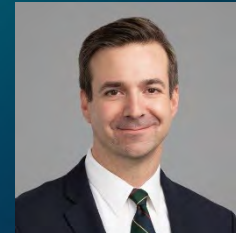
Addressing Unexpected Lawsuits & Settlements: BIPA Madness



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What Is Biometric Data?

Data concerning the intrinsic physical or behavioral characteristics of an individual, e.g., DNA or fingerprints.

There are generally three different components of systems that use biometric data:

- A sensor that recognizes and records biometric data;
- A computer that stores biometric data for comparison; and
- Software that connects the sensor and the computer.

Common examples include smartphones and computers that use a fingerprint or Face ID to unlock (iPhone/Android or laptop).

Emerging trend:

Companies are increasingly using biometric data to verify identities, and to track employee time and attendance.

Illinois Biometric Information Privacy Act (BIPA)

Key provisions:

- Retention schedule and destruction policy.
- Prior written notice and a written release.
- Prohibition on sale, lease, trade or profit.
- Restricts disclosure or dissemination on certain conditions.

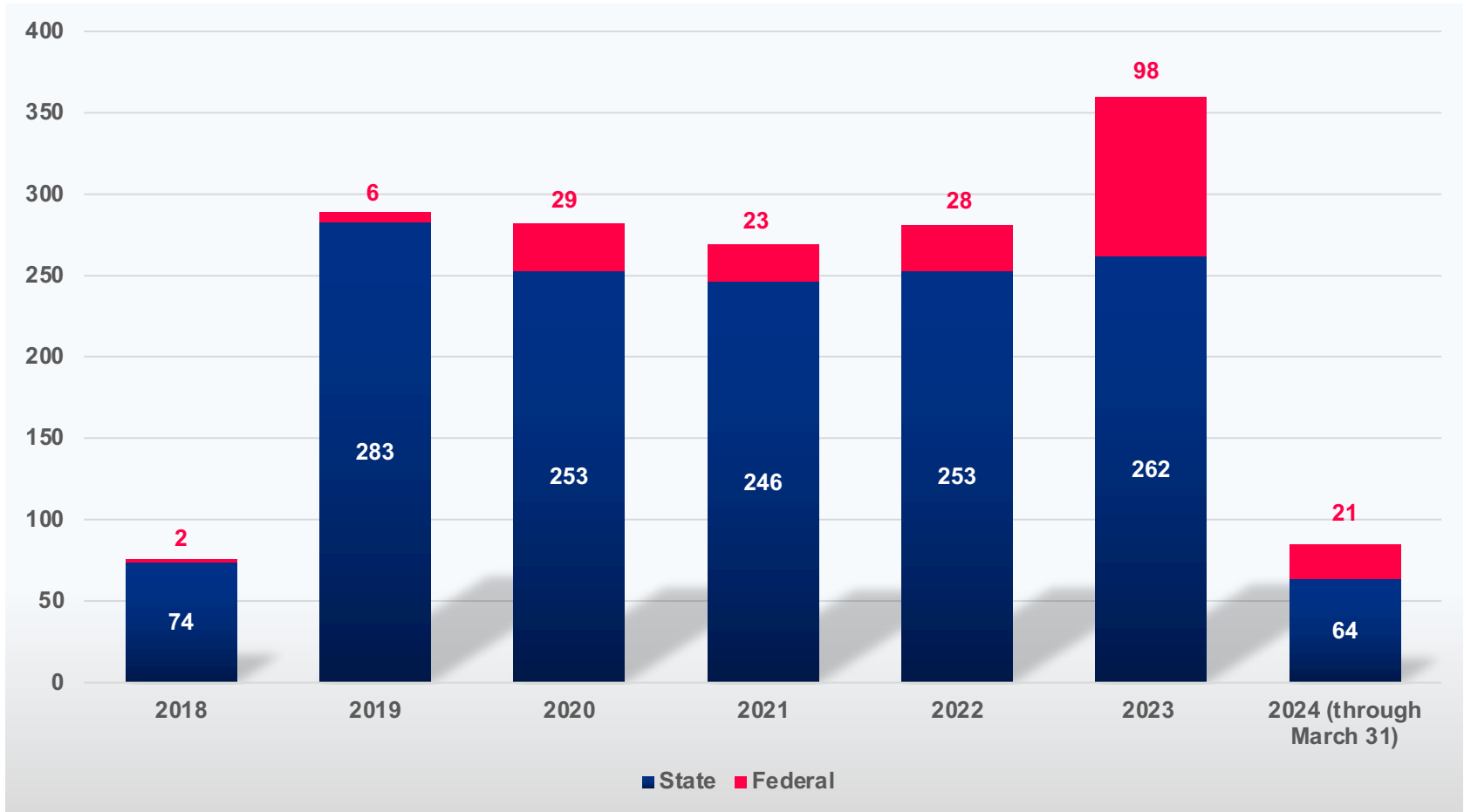


Statutory remedies:

- Negligent violations: \$1,000 or actual damages.
- Reckless/Intentional violations: \$5,000 or actual damages.
- Reasonable attorneys' fees.



Illinois Federal and State Complaints Asserting BIPA Claims



Sources: Westlaw Docket Search by keywords for all Illinois federal courts; Courthouse News Service Docket Search by keywords for all Illinois state courts. **Note:** Cases removed to federal court are counted once.

Illinois Courts Have Expanded BIPA's Reach



Illinois' Highest Court Holds That BIPA Claims are Subject to a Five-Year Statute of Limitations, Not One Year

February 3, 2023



Janet Widmaier



Geoffrey Young



Charles DeVore

Ever-Expanding BIPA Damages: Illinois Supreme Court Holds Each Collection or Dissemination of Biometric Data Constitutes a Separate Violation of BIPA

February 23, 2023



Janet Widmaier



Geoffrey Young



Charles DeVore

In an eagerly-awaited decision in *Cothron v. White Castle System, Inc.*, the Illinois Supreme Court recently held, by a 4-3 margin, that a separate claim for damages accrues under the Illinois Biometric Information Privacy Act ("BIPA") every time a private entity scans or transmits an individual's biometric identifier or information in violation of BIPA. In so holding, the Court rejected the commonly asserted position that a BIPA violation occurs only upon the first scan and first transmission. This is bad news for businesses operating in Illinois that utilize biometric data, as this holding significantly expands the potential BIPA damages.

Pending IL Legislation to Limit BIPA

- SB2979 would do away with Cothron's accrual ruling.
 - Passed by a bipartisan majority in early April 2024; pending committee in IL House.
- HB3811 would increase the per-violation penalty for a negligent violation to \$1,500, but would do away with the *Cothron's* ruling that damages continue to accrue for repeated violations for the same individual.
 - Passed the IL House and stuck in committee in the IL Senate.
- HB3199 would create a 15-day safe harbor for a company to cure allegedly violative conduct, and would also eliminate *Cothron's* accrual ruling.
 - Proposed in the IL House and stuck in committee.

Targets Of Biometric-Related Class Actions

Clients in all industries are impacted

- Manufacturing
- Technology
- Media/Entertainment/Sports
- Healthcare
- Financial Institutions
 - GLB Act exemption has limits

Trending Issues

- Authentication
- Consumer Products (vehicles, gym equipment, “try-on” products)
- Targeted Advertising
- Public Security/Law Enforcement



Other Key Jurisdictions

General Data Protection Regulation (GDPR)

- Biometric data is an example of a special category of data pursuant to Art. 9 GDPR when processed to uniquely identify a natural person. Binding in all EU countries.

California Consumer Privacy Act (CCPA) and Privacy Rights Act (CPRA)

- Definition of “biometric information” is broader than BIPA: Includes any physiological, biological, or behavioral characteristic (*e.g.*, walking gait), that is used or intended to be used to establish an individual’s identity.
- Limited private right of action (data breaches).

Texas and Washington State

- **TX (2009):** Capture or Use of Biometric Identifier Act (CUBI) is similar to BIPA (notice, consent and data security), but enforcement is only through TX Attorney General. Penalty is \$25,000 per violation.
- **WA (2017):** H.B. 1493 is not as broad as BIPA (does not apply to facial scans) and has broad exemption for “security purposes.” Only WA Attorney General can enforce.

THANK YOU

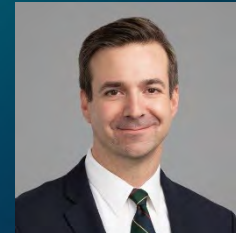
Addressing Unexpected Lawsuits & Settlements: BIPA Madness



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SESSION 3

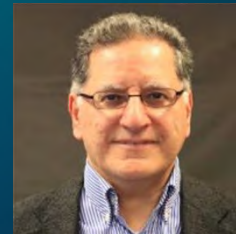
Stress in the Workplace: The Impact It Has On Our Thinking



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Your Best Thinking in the Worst Situations: Improving Decision Making Under Stress

Tony Pacione, LCSW, CSADC

Deputy Director, Illinois Lawyers' Assistance Program

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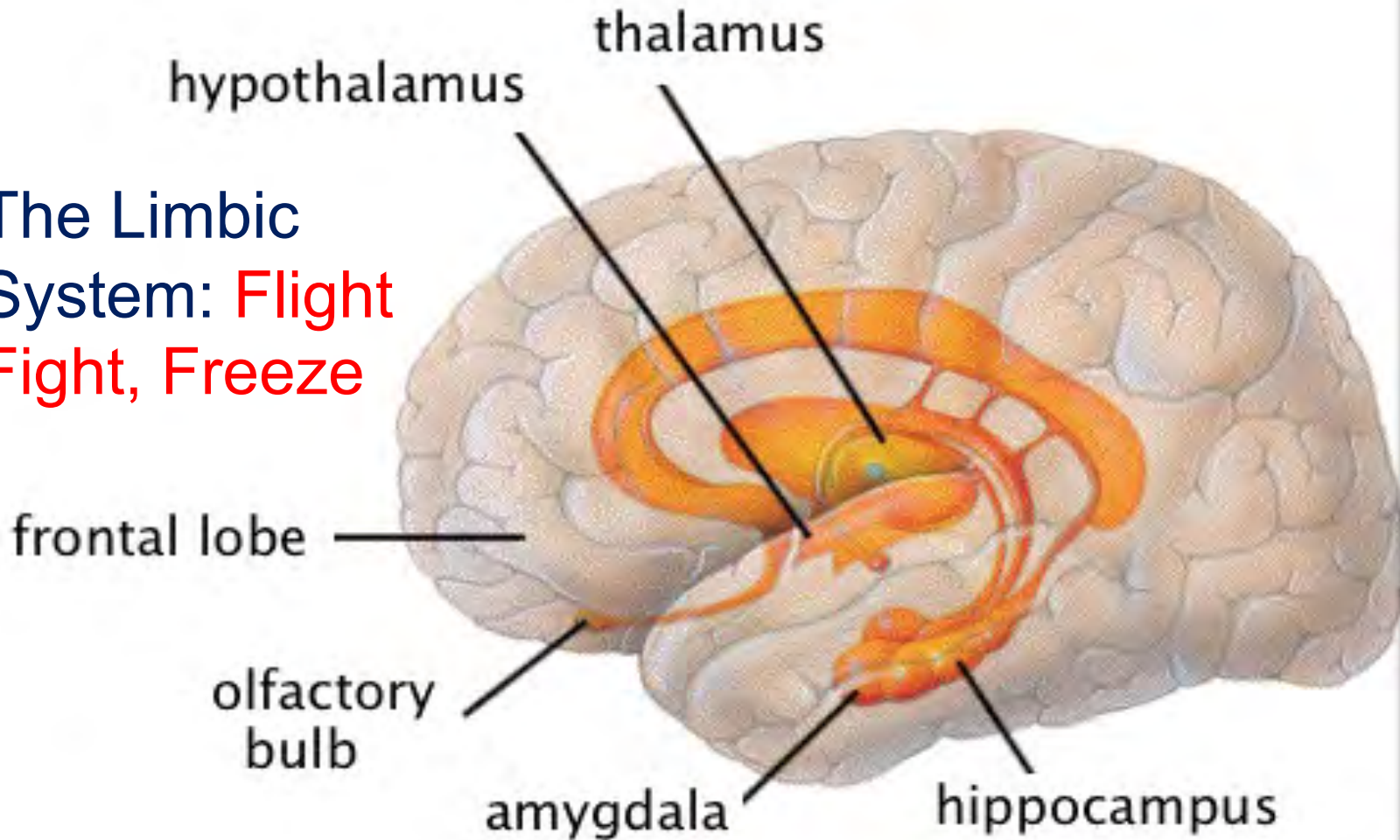
Our GPS Guide

- Describe how stressful situations affect our thinking, judgments, and decisions
- Identify stress reactions: how Flight or Fight response affect mind & body
- Demonstrate three evidenced-based strategies to improve our decision making under stress



“Anatomy is Destiny?” (S Freud)

The Limbic System: **Flight**
Fight, Freeze



Attorneys Under Stress

Event – Response = Stress

loss aversion effect:

Flight



righting reflex:

Fight



uncertainty:

Freeze



Attorneys Under Stress

Cognitive depletion

Perceptual narrowing

Zero sum encounters



Evidenced Based Strategies

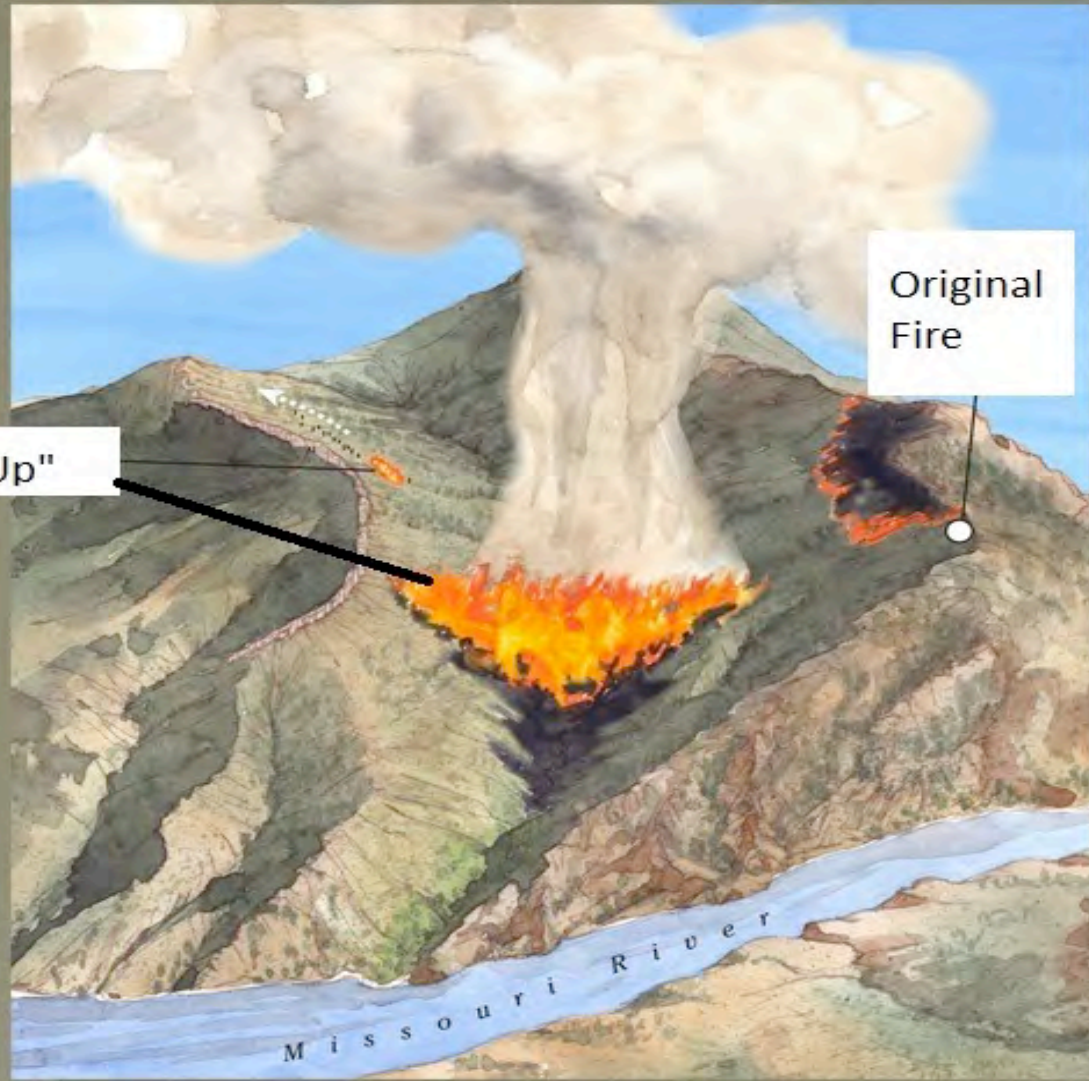
1. *Mindfulness Stress Reduction (Persistent Patience)*
 - Wide and varied applications
 - 20 plus years of research
2. *Thought Challenging*
 - Based on cognitive restructuring therapies
 - Demonstrated effectiveness for many problems
3. *Managing Uncertainty/Ambivalence*
 - Based on enhancing intuition practices
 - Change resistive thinking into resilient thinking



The Mann Gulch Fire, Montana August 1949: Tragedy & Triumph (image: US Forest Service)



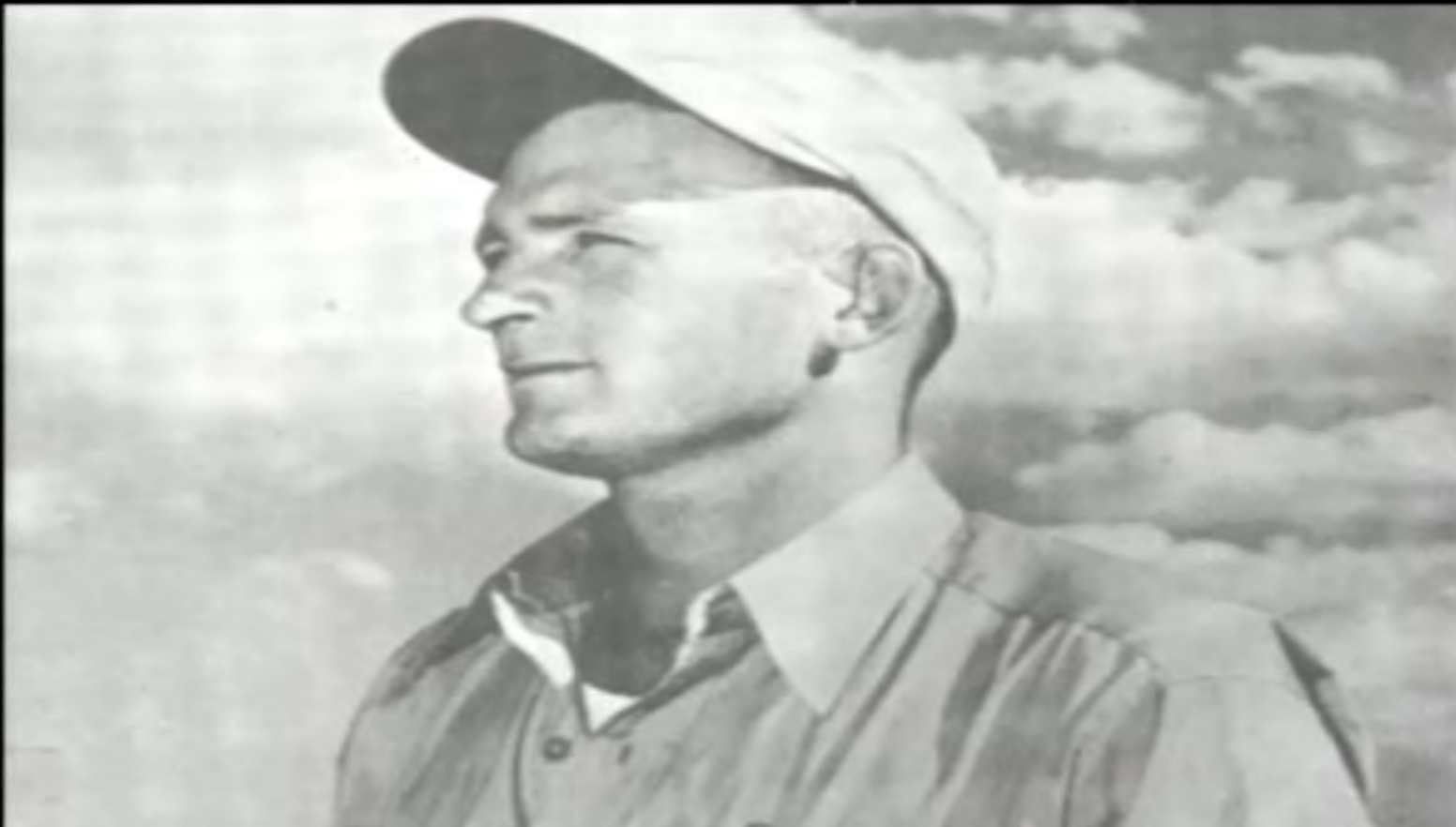
Mann Gulch Fire - Tragedy



(image: US Forest Service)

Robert Wagner (Wag) Dodge – Triumph “The Escape Fire”

(image: Dodge Family Website)



E-B Strategy 1: *Persistent Patience*

Mindfulness Based Stress Reduction

J Kabat-Zinn, 1990

Skills and Principles:

1. Non-judging
2. Patience
3. Beginners Mind
4. Non-striving
5. Acceptance
6. Letting Go
7. Trust



Non-judging/Non-striving

- Non-judging attentiveness
 - Observing while being aware of judgments
 - Perceiving vs Reacting (objectivity?)
 - “Judge less, observe more”
- Limit multi-tasking (“really doing what you are doing”)
- Skill sets employed
 - Letting go
 - Fresh Mind
 - Non striving



Patience & Non-judging: Meditation Practice

- Awareness of
 - Mind wandering
 - Where the mind went
 - How you returned it to the here and now
- Skill sets employed
 - Non-judging
 - Patience
 - Letting go

Meditation Practice: Insight & Problem Solving

Immune Function
Kabit-Zinn et al, 2003

Problem Solving

Newberg & D'Aquili,
2001

Insight

Davidson, 2004
Kounios, et al 2006

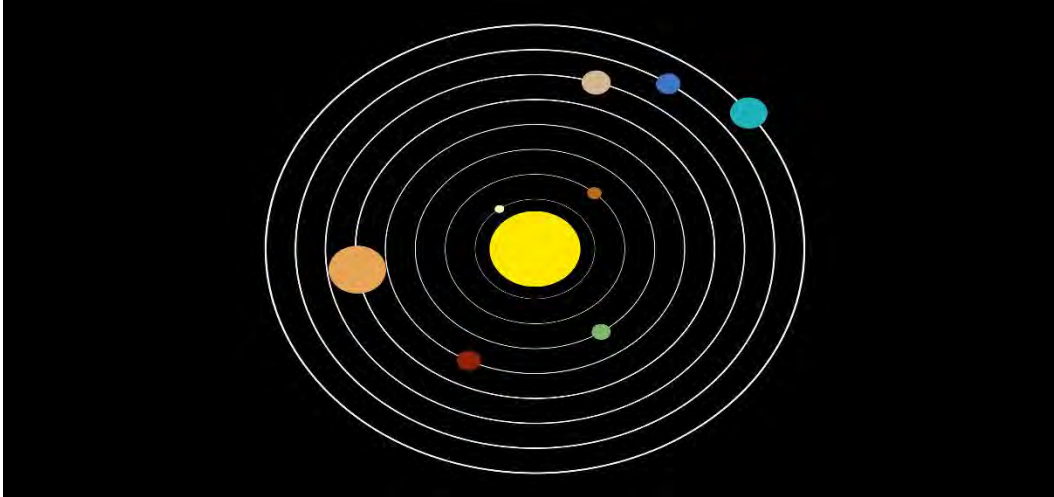
Reduce Reactivity

Keng, et al 2011



E-B Strategy 2: Thought Challenging

based on CBT, J Beck, 1995



Automatic Thoughts/Feelings (Auto Pilot):

- “Mental” reactions to situations
 - Real; imaginary/perceived; anticipatory
- Not fully conscious or deliberate
- Instantaneous and immediate
- Intense emotional associations

Common Thinking Errors

(Feeling Good by David Burns, MD 1999)

- 1. All or nothing thinking
 - 2. Overgeneralization
 - 3. Mental filters
 - 4. Jumping to conclusions
 - 5. Catastrophizing
 - 6. Emotional reasoning
 - 7. Personalization
-
- Three Laws of Thinking- (Pacione, 2021)
 - 1. Thoughts are NOT Facts
 - 2. You can survive many bad outcomes
 - 3. You don't have to be perfect to be successful or 'good enough.'

Thought Record

27 y/o female attorney (Steps 1-2)

Situation/Event	Automatic Thought	Feeling/MFN	Emotion (1-10)
Started new job; increasing work load, little support	"If I'm competent and want to be successful, I can't ask for help."	Fear Depression Patience/Non-judging	Righting reflex 8
Recommended to take time off work for treatment	"I will probably lose my job if I'm off of work for more than a few days."	Fear/Panic Non-striving/letting go	Loss aversion 8
Overwhelming work load and expectations	"I can't keep up; I'll be judged a 'loser'."	Depression/Anxiety Trust/Fresh Mind	Perceptual narrowing 10
Father's illness, work more hours	"Must do it without support; can't burden my family/friends"	Guilt/Anxiety Non-striving/Trust	Panic vs urgency 10

Challenging Automatic Thoughts

Using I.C.E. to cool off 'Hot' thoughts (Steps 4-5)

Thoughts are NOT Facts

- **I** – Identify the Thought
- **C** – Challenge the Thought
- **E** – Evaluate the Thought

I. C. E. (Step 4-5)

Identify and rate the thought:

- “I’ll lose my job if I take time off to recoup now.”
- Certainty rating = 80%

I. C. E. (Steps 4-5)

Challenge the thought:

Evidence For (Loss Aversion)

- I've seen my boss get rid of someone else before
- There's been threats of lay offs
- If I lose my job, I'll burden others
- The partners have been watching me lately

Evidence Against

- The HR staff encouraged me to get help if I need it
- The managing partner told me "we support you"
- They told me "I'm a valuable employee"
- Boss won't talk to me about returning to work now

I. C. E. (Step 5)

Evaluate the thought:

- a) Post challenge certainty rating = 45%
- b) Revise thought to make it more truthful:

“There is a higher probability I can lose my job if I don’t get help and continue to slide, than if I take time off now to get help”

E-B Strategy 3: Managing Uncertainty & Ambivalence

Improving Intuition

in·tu·i·tion
int(y)oo'ISH(ə)n

Managing Uncertainty & Ambivalence

*“... she just kept saying,
‘We’ve got to find the child.’”*

The story of a two-year old girl who miraculously survived a horrible crash that killed her parents captivated the nation in March 2003. But if it were not for the determination of Wisconsin State Patrol troopers and others at the crash scene, the story might not have had at least one fortunate ending.

Before dawn on March 7, Troopers Sean Berkowitch and Rhonda Waldera, of District 5—Tomah, were at the scene of a fatal crash on a rural stretch of Interstate 94 in Jackson County. A westbound semi-truck had jack-knifed on the icy road and crossed the median into the eastbound lanes. A Honda with Minnesota license plates hit the semi's trailer and then passed underneath—shearing off the top of the car. It traveled another 700 feet before ending up in the median. Both adults inside the car were dead. That much was known.

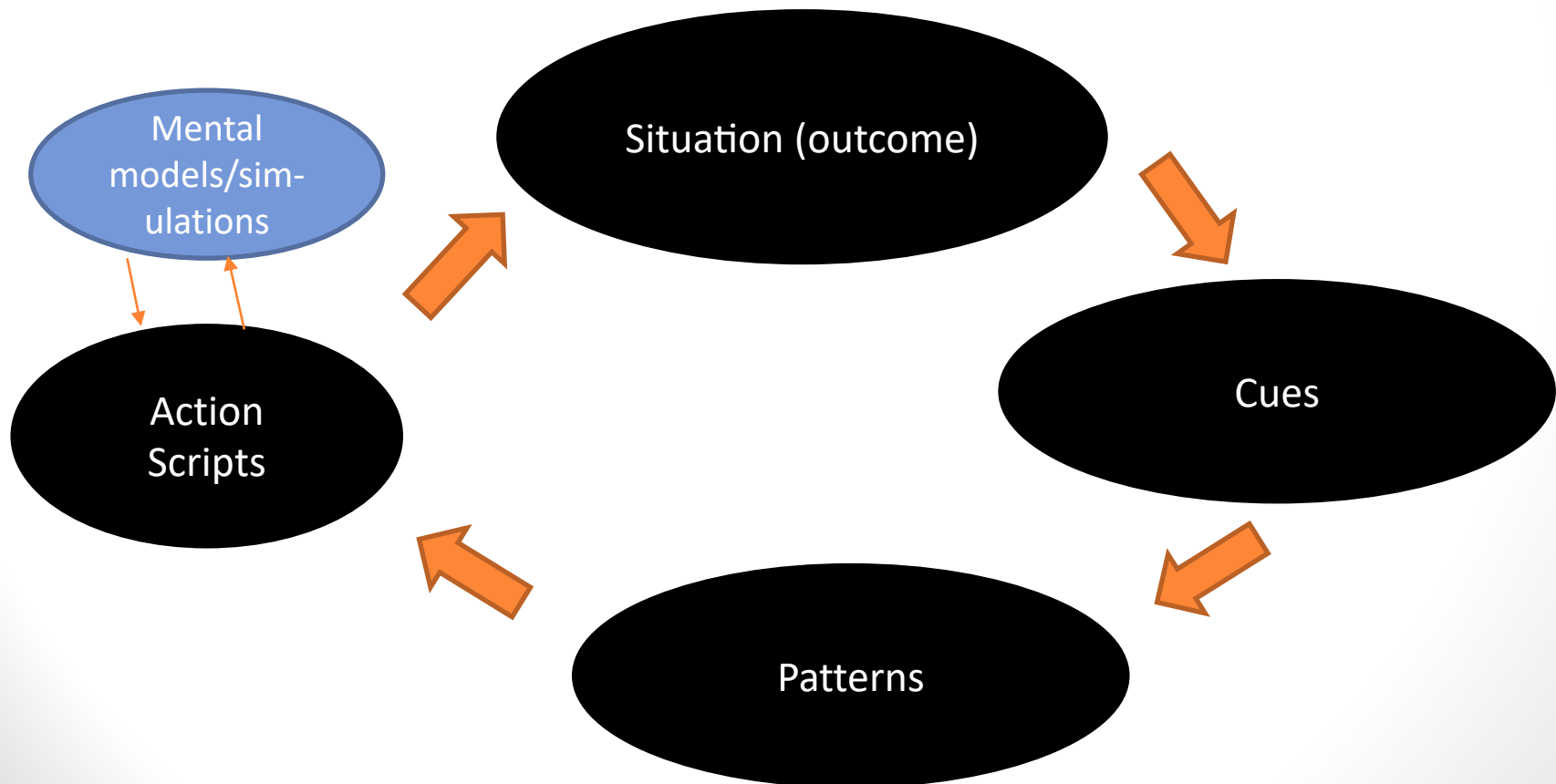
But Trooper Waldera also was concerned about the unknown. While investigating the scene, she found a coat, blanket, a “sippy” cup and some pull-up diapers in the car. These items indicated that a small child



Managing Uncertainty & Ambivalence

Intuition: Deliberate Practice Model

G Klein, 2004



Building Intuition

“The book of nature is written in the language of mathematics” Galileo



Decision Matrix

27 y/o attorney – settle or litigate

1. Does the client have the time to pursue court case?

1 2 3 4 5

2. Does the client have the money to pursue court case?

1 2 3 4 5

3. Does the evidence favor our position?

1 2 3 4 5

4. How strongly does the client want to pursue court case?

1 2 3 4 5

Getting started...

- Choose 1 or 2 EBS or techniques
- Become more aware more often
- Create more comfortableness
- Use I. C. E.
- Measure progress (persistent patience)
- Meditation Practice: 3 X's weekly/15 min



The Limbic Lyric

Always on, and ready for a fight,
my limbic system is rarely set for flight;

It suppresses doubt and jumps ahead,
Always searching for threats and things I dread;

Once it's on the trap is set,
I may act in ways I'll soon regret;

Slow my breath and become more sane,
Then I'll remember thoughts and facts are not the same!

T Pacione, 2018

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Career Transitions
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& Much More

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LAWYERS' HELPING LAWYERS'

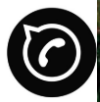
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Treatment Assistance Program

THANK YOU

Stress in the Workplace: The Impact It Has On Our Thinking



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SESSION 4

Forming a Family Office – Legal and Practical Considerations



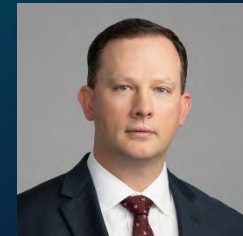
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Agenda

- **Introductions**
- **Part One: Family Offices Generally**
 - Typical Set Up
 - Services Provided
 - Pros and Cons
 - When does a family office generally make sense?
 - Transitioning to *Lender* Structure
- **Part Two: Typical Family Office Structure**

Agenda

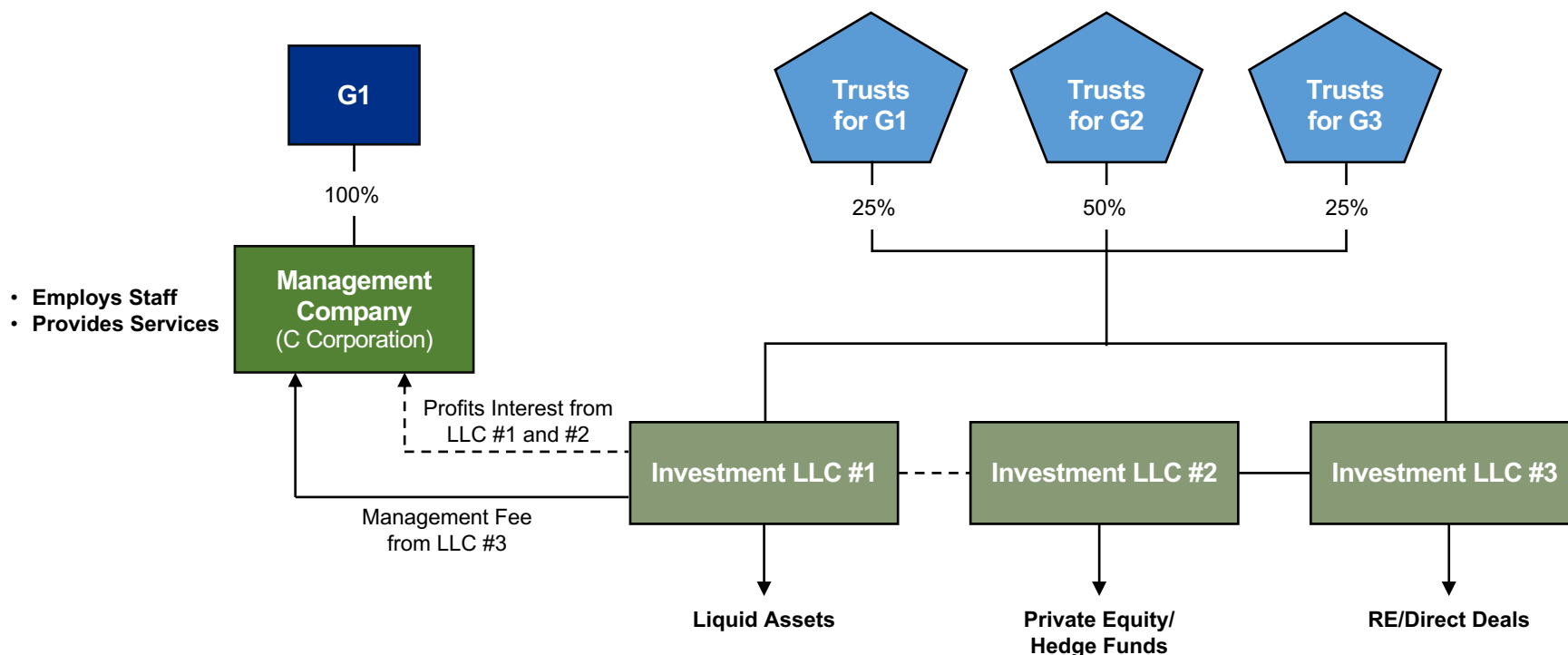
- **Part Three: What is Required – Legal and Tax**
- **Part Four: Practical Considerations**
- **Part Five: Q&A**

Part One: Family Offices Generally

- **Typical timeline of a family office**
 - Initially, often imbedded in an operating family business
 - Then, a new generation come into the business; additional employees of business find themselves spending time on non-business / family matters
 - G2 / G3, with some active; some in active
 - At some point no longer appropriate to have business employees doing work on behalf of a few family members – this is typically when we see a stand alone family office built out
 - New employees added; additional family members added as clients; increased sophistication

Part One: Family Offices Generally

Typical Set Up – Stand Alone Family Office



Part One: Family Offices Generally

Services a Family Office Can Provide

- Strategic management of family's global wealth
- Legal and tax
- Family governance, talent development and philanthropy
- Administrative / lifestyle services
- Family back-office support – provide family with information, education family members, manage relationships with service providers, managing access to information

Part One: Family Offices Generally

Pros

- Drive Family Financial Goals
- Oversight / Time Saved
- Informed Family Members
- Execution of Family's Long Term Vision
- Potential Tax Benefits

Cons

- Sacrifice Autonomy
- Complexity and Expense
- Family Dynamics

Part One: Family Offices Generally

- ***Drive Family's Financial Goals***

- Opens communication around family goals, values, time horizons, risk appetite, and overall mission and vision for what they are building together.
- Employing a governance system to oversee performance enables families to make targeted investment decisions with their important goals in mind.
- Families are more likely to meet their wealth goals with a family office structure and process.
- Family members can aggregate and leverage their global wealth.
- Structure can be used to incentivize key family office employees via profits interests, deferred compensation and similar arrangements.

Part One: Family Offices Generally

- ***Oversight / Time Saved***

- Simplifies the delegation of management and execution of activities.
- Platform for efficient oversight structure and process.
- Enables family members to gain altitude and assume a strategic oversight role.

- ***Informed Family Members***

- Family members are more informed about the family's businesses, investments, philanthropy, etc.
- The family office serves as a hub for information.

Part One: Family Offices Generally

- ***Execution of Family's Long-Term Vision***

- Families can have a broader mission beyond growing financial assets like building strong businesses with great culture or to do good via philanthropy.
- A family office can organize family retreats that build unity, teamwork and collaboration.
- A family office can help the family remain adaptive, tactically implement investments and projects related to social impact and philanthropy.

- ***Potential Tax Benefits***

Part One: Family Offices Generally

Cons:

- ***Sacrifice Autonomy***: Different family members (or branches of the family) sacrifice autonomy and independence in order to invest collectively.
- ***Complex and Expensive***: Structuring and operating a family office can be a complicated, time consuming and expensive process.
- ***Family Dynamics***: As the family grows, likelihood for disputes and imbalances of wealth between family members and different branches of the family increases.

Part One: Family Offices Generally

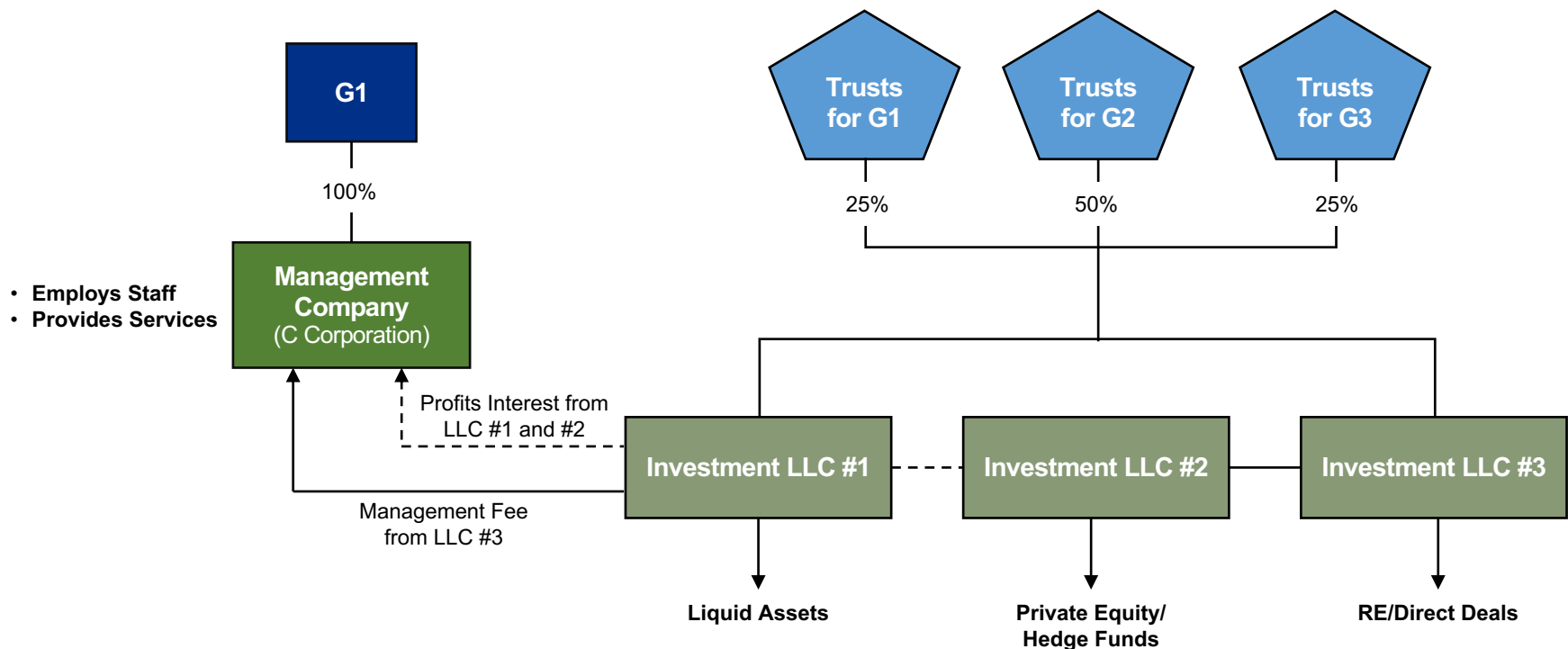
- Common Questions:

- When does a family office generally make sense?

- At what point does it become economical to transition to a *Lender* structure?

Part Two: Typical Family Office Structure

Typical Lender Structure



Part Three: What is Required – Legal and Tax

- **Separate legal entity to serve as family office entity**
 - Determine appropriate legal entity form – C corp v. LLC
 - Determine proper ownership of entity
 - Form legal entity
 - Taxpayer ID number
 - Operating Agreement / Other Books and Records

- **Employees**
 - Payroll
 - Employment Agreements

Part Three: What is Required – Legal and Tax

- **Family Office Clients**

- Investment LLCs
- Trusts

- **Fee Agreements**

- Profits Interest (layered into LLC / fund LLC agreements)
- Management Fee Agreements

- **Miscellaneous**

- SEC issues
- Section 2701 valuation / deemed gift concerns
- 721(b) – gift on funding investment LLCs

Part Four: Practical Considerations

- **What inspired family office creation?**
- **How did the family office work start?**
- **What employees do you have? What functions do they serve?**

Part Four: Practical Considerations

- **What recommendations would you provide to those families just getting started?**
- **What road blocks did you run into?**
- **Next milestones?**

Part Four: Practical Considerations

- **How long until fully functional / built out?**
- **What resources did you use to aid in setting up your family office (legal, consulting, etc.)?**
- **What resources did you use to aid in setting up your family office (legal, consulting, etc.)?**

Part Four: Practical Considerations

- **What resources did you use to aid in setting up your family office (legal, consulting, etc.)?**
- **One piece of advice you'd give to a family starting the journey of forming a family office?**
- **Final words / observations?**

THANK YOU

Forming a Family Office – Legal and Practical Considerations



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SESSION 5

Corporate Transparency Act: Overview and Update



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Background

- The Corporate Transparency Act (“CTA”) (31 USC § 5336) requires “reporting companies” to report certain information with respect to themselves, their “beneficial owners” and their “company applicants” to the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”).
- Purpose*: “Requiring entities to submit beneficial ownership information (“BOI”) to FinCEN and providing timely access to this information to law enforcement, financial institutions, and other authorized users is intended to help combat corruption, money laundering, terrorist financing, tax fraud, and other illicit activity.”
- “The ultimate goal of this regulatory proposal is to combat, to the broadest extent possible, the proliferation of anonymous shell companies or other opaque corporate structures.”

* Per FinCEN’s Fact Sheet on its Notice of Proposed Rulemaking (December 2021)

What is the Corporate Transparency Act?

- U.S. Treasury's attempt to identify the “true” owners (i.e., natural persons) – the “beneficial owners” – of businesses.
- Get behind the array of shell companies used to hide who really owns or controls.
- Companies created in or registered to do business in the U.S.
- Part of the Anti-Money Laundering Act of 2020 which seeks to deter money laundering and promote national security.

Key Elements

- The Corporate Transparency Act requires a “**Reporting Company**” (unless exempt) to disclose **specific information** regarding (1) the company itself (31 CFR 1010.380)(b)(1)), (2) its “**Beneficial Owners**” (31 USC § 5336(b)(1) & (2)) and (3) its “**Company Applicants**” (for Reporting Companies formed on or after January 1, 2024) to (31 USC § 5336(b)(1) & (2)).

Reporting Companies: Generally

- Domestic: Corporations, Limited Liability Companies, or other similar entities created by the filing of a document with a secretary of state or a similar office under the law of a State or Indian Tribe. 31 USC § 5336(a)(11)(A).
 - Includes Limited Partnerships and Business Statutory Trusts
 - Common Law Trusts are not Reporting Companies; but individuals associated with such trusts may be Beneficial Owners, where applicable.
 - Includes entities formed in US territories (e.g., USVI)
- Foreign: Entity formed under the law of a foreign country and registered to do business in the US.

Reporting Companies: Exemptions

- 23 Current Exemptions (See 31 USC §5336(a)(11)(B)(i)–(xxiii)), including:
 - Large Operating Businesses:** Entities that have greater than 20 full-time employees in the US, have a physical operating presence in the US, and filed a federal income tax return reflecting more than \$5m in gross receipts or sales (aggregate) for the prior year. 31 CFR 1010.380(c)(2)(xxi).
 - Family Offices are not specifically exempted, but certain **Banks*** and **Pooled Investment Vehicles** are exempt. 31 CFR 1080(c)(2)(iii); 31 CFR 1010.380(f)(7); 31 CFR 1080.380(c)(2)(xviii).

* As defined under Section 3 of the Federal Deposit Insurance Act, Section 2(a) of the Investment Company Act of 1940, or Section 202(a) of the Investment Advisors Act of 1940

Reporting Companies: Subsidiary Exemption

- **Entities that are controlled or wholly owned, directly or indirectly, by certain exempt entities** (including Banks or Large Operating Businesses but excluding Pooled Investment Vehicles). 31 CFR 1010.380(c)(2)(xxii).
- There is a limited interpretation of how far this goes.

Beneficial Owners

- “Beneficial Owner” is an **individual** who, **directly or indirectly**, (1) exercises “**substantial control**” over the reporting company and/or (2) “**owns or controls**” **at least 25% of the “ownership interests”** of the reporting company. 31 USC § 5336(a)(3); 31 CFR 1010.380(d).
 - A. Substantial Control Test: Individual who exercises “substantial control” over a Reporting Company.
 - B. Ownership Test:
 - Individual, if any, who owns 25% or more of a Reporting Company, or
 - Individual, if any, who controls 25% or more of the ownership interests of a Reporting Company.

Beneficial Owners: “Substantial Control”

- The Substantial Control test is a fact-based analysis.
- In order to determine whether an individual exercises substantial control over a reporting company, look for any of the following factors:
 - Senior Officer: Individual holding the position of (or exercising authority of) President, CEO, CFO, COO, GC, or similar officer of a Reporting Company;
 - Individual who has the authority to appoint or remove Senior Officers or a majority of the Board of a Reporting Company; or
 - Individual who has the power to **direct, determine or has substantial influence** over important decisions of a Reporting Company (e.g., amendments to governing documents; selection or termination of business lines).
 - See 31 CFR 1010.380(d)(1)(A) –(C).
- Catch-All: Individual who has any other form of substantial control over a Reporting Company.
 - See 31 CFR 1010.380(d)(1)(D).

Beneficial Owners: “Substantial Control”, Cont’d

- “Substantial control” can be exercised directly or indirectly, including through an entity that separately exercises substantial control over the reporting company.
- “An individual may directly or indirectly, **including as a trustee of a trust**, exercise substantial control over a Reporting Company through a variety of means, including through board representation.”
 - See 31 CFR 1010.380(d)(1)(D)(ii).
- The inclusion of the above Final Regulation alludes to the idea that some managers / directors on a board of a trustee could have “substantial control”.

Beneficial Owners: “Ownership Test”

- “Total Ownership Interests”, including:
 - Capital equity interests
 - Profits Interests
 - Convertible Instruments
 - Catch-All
 - 31 CFR 1010.380(d)(2)(i).
- An individual’s “total ownership interests” is calculated by comparing said interests to the total outstanding ownership interests of the reporting company. 31 CFR 1010.380(d)(3)(iii).
- For purposes of the Ownership Test, no difference between Voting Ownership and Non-Voting Ownership.
- Joint ownership (31 CFR 1010.380(d)(3)(ii)(A))
- Power of Attorney (31 CFR 1010.380(d)(3)(ii)(B))

Beneficial Owners: “Ownership Test”, Cont’d

- Under the Ownership Test, if a common law trust is an owner of an applicable Reporting Company under the Ownership Test, the analysis looks through to these specific individuals (31 CFR 1010.380(d)(3)(ii)(C)):
 - A beneficiary, if such beneficiary (i) is the sole permissible recipient of income and principal; or (ii) has the right to demand distributions or withdraw substantially all trust assets.
 - Grantors/Settlors, if he/she has the right to revoke the Trust or otherwise withdraw the assets of the Trust.
 - Trustees or other individual(s) with the authority to dispose of trust assets.

Beneficial Owners: “Ownership Test”, Cont’d

- “Other individual(s) with the authority to dispose of trust assets”
 - Despite numerous comments requesting clarification, the Final Regulations do not provide specific guidance with respect to what specific individuals fall into the category of “other individuals who can dispose of trust assets,” (e.g., Trust Protectors, Business Advisors, Distribution Committees, Investment Advisors)
 - “In addition to trustees, the final rule specifies that other individuals with authority to control or dispose of trust assets are considered to own or control the ownership interests in a reporting company that are held in trust.”

Beneficial Owners: Exceptions

- Minor Children (but parent/guardian information is instead reported).
- Individuals *acting* as nominees, intermediaries, custodians, or agents (but the actual individual being represented is still reportable).
- Employees acting solely in such capacity and not as Senior Officers.
- Individuals with a future interest (e.g., inheritance) in ownership of a Reporting Company.
- Creditors of a Reporting Company (unless they otherwise meet the Substantial Control Test or Ownership Test).
 - See 31 USC § 5336(a)(3)(B); 31 CFR 1010.380(d)(3).

Company Applicants

- Applicable to Reporting Companies formed on or after January 1, 2024.
- Direct Filer: Individual who directly files the incorporation, formation, or other creation documentation with a US State (or, if a foreign Reporting Company, files US registration documentation) 31 USC § 5336(a)(2).
- Directs or Controls the Filing Action: Individual who is primarily responsible for directing or controlling such filing. if more than one individual is involved in the filing of the document. 31 CFR 1010.380(e).
- **Includes Attorneys and Paralegals.**
- This can include only up to two (2) individuals.

Beneficial Ownership Information

- Specific Information to Be Reported on:
 - Reporting Company;
 - Beneficial Owners; and
 - Company Applicants (for Reporting Companies formed on or after January 1, 2024).
- See 31 USC § 5336(b)(2); 31 CFR 1010.380(b).

Beneficial Ownership Information: Reporting Company

- 31 CFR 1010.380(b)(1)(ii) requires Reporting Companies to provide:
 - Entity name (including DBAs)
 - Address of Principal Place of Business
 - Jurisdiction of formation (or, if a Foreign Reporting Company, jurisdiction of US registrations)
 - TIN or EIN
 - Beneficial Owners
 - Company Applicants (for Reporting Companies formed on or after January 1, 2024)
- Note:** The BOI Reports to be filed do not include any financial information regarding the Reporting Company, its Beneficial Owners, or its Company Applicants.

Beneficial Ownership Information: Beneficial Owners and Company Applicants

- 31 CFR 1010.380(b)(1)(ii) requires the following information for each Beneficial Owner and Company Applicant (for Reporting Companies formed on or after January 1, 2024) be reported:
 - Full legal name
 - Date of birth
 - Current address – Beneficial Owners vs Company Applicants
 - Unique identification number from an acceptable identification document (e.g., Passport) and image of such document
 - Upon request, FinCEN will issue a unique FinCEN identifier that can be included on subsequent filings instead of providing the foregoing information each time
 - **Burden shifts from Reporting Company to the holder of the FinCEN identifier to keep his/her information up to date.**

Reporting

- Entities formed before January 1, 2024: Initial BOI Report required to be submitted to FinCEN not later than January 1, 2025.
 - But: no requirement to submit information re: Company Applicants.
- Entities formed on or after January 1, 2024, but before January 1, 2025: Initial BOI Report required to be submitted to FinCEN within 90 calendar days of formation.
- Entities formed on or after January 1, 2025: Initial BOI Report required to be submitted to FinCEN within 30 calendar days of formation.
- Thereafter, updates to reportable information due within 30 calendar days (e.g., 30 days to report change of a Manager of an LLC or gift of 25% of the ownership of a Reporting Company).

State-Specific Transparency Laws

- The New York LLC Transparency Act was originally enacted on December 22, 2023 and subsequently amended by Chapter Amendment on March 1, 2024.
 - The NYLTA was enacted to achieve the same goals as the CTA but on the state level.
 - Effective January 1, 2026, the NYLTA will require certain limited liability companies (LLCs) to report BOI to the New York State Department of State.
- Maryland CTA (SB 954)
- California CTA (SB 1201)

Effects of the *National Small Business v. Yellen*

- On March 1, 2024, Judge of the U.S. Federal Northern District of Alabama ruled that the Corporate Transparency Act is unconstitutional.
- In *National Small Business Association v. Yellen*, the plaintiffs argued that the Corporate Transparency Act violated the First, Fourth, Fifth, Ninth and Tenth Amendments.
- The Northern District of Alabama found that the Corporate Transparency Act exceeded the constitutional limits on Congress's powers but did not address other arguments put forth by plaintiffs.
- The Treasury has filed their notice of appeal with the Eleventh Circuit.
- **NOTE: THIS RULING IS APPLICABLE ONLY TO THE PLAINTIFFS OF THE CASE.**

Practical Effects of the CTA to You

- The Corporate Transparency Act is an attempt by the U.S. government to identify true owners (i.e., natural persons) – beneficial owners - of Reporting Companies.
- If your entity is within the scope of the Corporate Transparency Act and no exemption is available, you will need to file a BOI Report with FinCEN.
- The stay issued in the *National Small Business v. Yellen* case, probably does not apply to your situation.
- ***If you are in doubt, consult your attorney!***

THANK YOU

Corporate Transparency Act: Overview and Update



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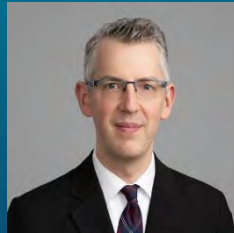
SESSION 6

Family Business Succession Planning



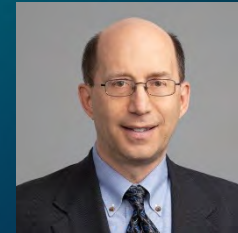
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Governance Considerations for the Family Business

Introduction

- In a family-owned business, there is a strong identity of interests between the legal entity and the family.
- But, the legal entity exists for a variety of important reasons - *e.g.*, limiting the liability of the family members and providing a vehicle through which consensus can be reached.
- How should the legal entity ensure that it achieves these objectives of limiting liability and achieving consensus, while preserving the identity with the family?
- What responsibilities do the participants in a closely-held family business have?
- To whom are these responsibilities owed?

Types of Business Entities

- Sole Proprietorship
- Limited Liability Company
- Corporation
- Partnership
 - General Partnership
 - Limited Partnership

Controlling Documents

- For all forms of legal entities, it is appropriate to consider addressing the following topics:
 - Manager/Director elections
 - Which might include addressing succession
 - Voting provisions – simple majority or supermajority
 - Protective provisions
 - Distributions
 - Income tax (partnerships and S corporations most commonly)
 - Operational distributions
 - Liquidation
 - Transfer restrictions and buy-sell provisions
 - Information rights

Types of Equity Interests

- Common
 - Voting
 - Non-Voting
- Preferred
- Equity Compensation Tools
 - Profits interests
 - Options/restricted stock
 - SARS and other forms of “phantom” equity

Rights as an Equity Holder

Whether as members of an LLC, partners in a partnership or shareholders of a corporation, equity holders have few rights other than those reserved for them by contract. Equity holders often have some, or all, of the following rights:

- Review books and records of the company
- Receive pro-rata distributions from the company (upon approval of the board/managers)
- Attend meetings of equity holders
- Vote on matters put before equity holders
- Other information about the company

But, **even these limited rights often may be modified or eliminated by contract**

Rights as an Equity Holder

Generally,

- Shareholders of a corporation do not have the authority, as shareholders, to direct the management of the company.
- The board of directors is responsible for the management and oversight of the company.
- Shareholder responsibilities are limited to voting upon the following matters, when presented by the board of directors:
 - Election of directors (shareholders might have the right to nominate candidates as well)
 - Amendments to the articles of incorporation
 - A proposed sale of all or substantially all of the company's assets
 - A proposed merger of the company
 - A liquidation or dissolution of the company

Role of the Board of Directors/Managers

- A corporation is required to have a board of directors.
 - In “close corporations,” the shareholder may reserve for themselves responsibilities of the board, but in doing so, might assume the liabilities of a board.
- The board has exclusive authority to manage the corporation’s business and affairs.
- In exercising this authority, board members are expected to act as “fiduciaries” of the corporation’s shareholders.
 - For IL corporations, the board, as fiduciaries, also may consider the impact on employees, suppliers, customers, the local community and other “pertinent factors”.

LLCs can be more flexible – which might include being “member managed” and/or contractually limiting or eliminating fiduciary duties.

Role of the Board of Directors

- A board may delegate responsibilities to committees and/or officers.
- In IL corporations, the board may not delegate to a committee the power to:
 - Authorize distributions (except for dividends on preferred or special classes or series),
 - Approve or recommend to shareholders any act reserved for shareholder action (e.g., amending Articles, approving a sale of the corporation),
 - Fill vacancies on the board or any committee,
 - Elect or remove officers or set committee member compensation,
 - Adopt, amend or repeal the by-laws,
 - Approve a plan of merger not requiring shareholder approval,
 - Authorize or approve repurchasing shares, other than according to a formula/method approved by the board, or
 - Authorize or approve the issuance or sale of shares (subject to limited exceptions).

Fiduciary Duties: Basic Rules

- Under Delaware law, directors have two principal fiduciary duties in managing the business and affairs of a company.
 - Duty of Care
 - Duty of Loyalty
- There are additional duties subsumed within these two duties
 - Duty of Candor
 - Duty of Good Faith
 - Duty of Confidentiality
- Given the Company's financial situation, the directors might owe these duties to the Company's creditors, in addition to owing these duties to the Company's stockholders

Duty of Care

- Directors should act in an informed and considered manner and take the care that a prudent business person would take when considering a business decision, and in a manner that they reasonably believe to be in the best interests of the Company and its stockholders (and, if applicable, in the best interests of the Company's creditors).
- Directors should assure themselves that they have all information necessary to take, or refrain from taking, action, and devote sufficient time to the consideration of the potential transaction.
- Directors are entitled to rely on the information provided by management and outside advisors in making their decisions.

Duty of Care (continued)

- Satisfying the Duty of Care:
 - Seek sufficient presentations from management and outside advisors (*e.g.*, financial and legal).
 - Understand the materials presented and ask questions. Ask management and outside advisors about their assumptions or analyses.
 - Frequency and duration of Board meetings are important factors in demonstrating that the Board made an informed decision.
 - Directors should consider how much authority to delegate to the Company's management and receive frequent updates from management regarding a potential transaction, including with respect to material open issues and negotiating strategy, and the Board should provide direction to management.

Duty of Loyalty

- Directors are required to put the interests of shareholders above any other personal interests that they may have relating to the action.
- Directors are required to disclose to other directors the existence and nature of any conflict of interest and any other material facts known to such director that would reasonably be anticipated to be material in a board decision.
- If an action is fair to the corporation at the time authorized by the board, the fact that a director is a party to the matter is not, by itself, a basis for invalidating the board action or the conflicted director's vote on it.
- However, if a stockholder contests the action on the basis of a conflict, the conflicted director likely will have the burden of proving fairness, unless the action was approved by a majority of disinterested directors (even if less than a quorum), or a majority of the shareholders, other than the interested director.
- A “disinterested” director is one who will not receive a personal financial benefit from a transaction, other than a benefit shared equally among shareholders.

Standards of Review

- Business Judgment Rule - the general rule
- Enhanced Scrutiny
 - Sale of corporate control – “*Revlon* duties”
 - Adoption of defensive measures in reaction to a perceived threat (*Unocal* Standard)
- Entire Fairness – arises where a Board might be deemed to be interested in a transaction or lacks independence

Business Judgment Rule

- If the directors satisfy the duty of care and duty of loyalty in reaching a decision, that decision will generally be protected by the Business Judgment Rule.
- The burden is on the plaintiff challenging a board's action to rebut the presumption by establishing that the directors breached their duties of care or loyalty.
- If the Business Judgment Rule applies, a court is required to presume that the Board's decision has been made on an informed basis, in good faith and in the honest belief that such action was in the best interests of the Company and its shareholders.
- When the Business Judgment Rule applies, courts give great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness and will not substitute its views for those of the Board if the Board's decision can be attributed to "any rational business purpose."

A case for Independent Directors

- Advocates of good corporate governance often highlight the benefits that independent directors can offer a board.
- The public discussion on this topic often focuses on public companies, largely because of the access to information, the prevalence of activists shareholders and shareholder suits and the regulatory and exchange requirements for board independence.
- Nonetheless the principles at the root of the discussion – lending credibility to conflict situations, diversity of perspectives and experience – often apply to circumstances faced by a family-owned business.
- These principles also can be relevant where other constituencies, not just shareholders, might have a stake in the integrity of the corporation's business decisions – *e.g.*, regulators, lenders, unions, vendors and customers.
- In some cases, the benefits of having independent perspectives available to the board can be achieved through an advisory board.

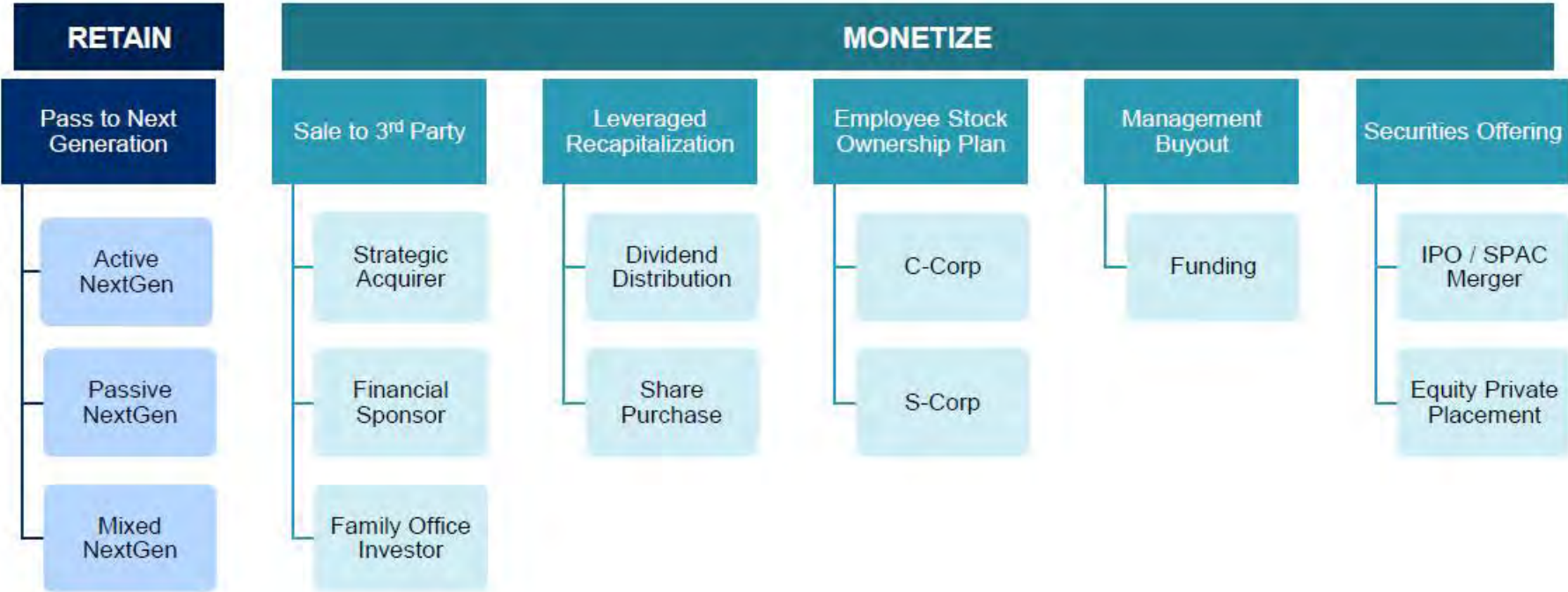
Protecting Directors from Liability

- An Illinois corporation is permitted to include in its Articles provisions that exculpate directors for monetary damages for breach of fiduciary duty, except for violations of duty of loyalty, acts or omissions that are not in good faith or involved intentional misconduct or knowing violations of law, and unlawful dividends, repurchases and redemptions, and transactions from which directors derive an improper personal benefit.
- An Illinois corporation also is permitted to indemnify its directors and officers for certain losses and expenses arising out of their service to the corporation (or its subsidiaries), which may include advancing expenses incurred in defending claims.
- An Illinois corporation also may obtain directors and officers liability insurance.

Shareholders' Agreements

- A shareholders' agreement can serve as an effective tool to align shareholder interests, and limit the remedies available to an aggrieved shareholder, by addressing topics such as:
 - How are directors nominated and elected?
 - Are there significant decisions reserved for approval by shareholders?
 - What path, if any, should be afforded for shareholders to achieve liquidity?
 - When and how should the corporation address the prospect of a sale of the company?
- It is important to note that, while the fiduciary duties of the board are not permitted to be waived, Illinois law does recognize the enforceability of a covenant to support the board's decision in certain circumstances (e.g., a so-called "drag-along" obligation upon a proposed sale of the company) that might operate like a waiver of such duties.

Typical business transitions



Certain triggers can lead to tough decisions on the future of the business

TRIGGERS

-
- | | | | |
|----------------------|-------------------------|----------------------|-----------------------|
| • Retirement / death | • Law change (e.g. tax) | • Family discord | • Favorable valuation |
| • Liquidity needs | • Industry pressures | • Management failure | • Unsolicited offers |
-



KEEPING THE BUSINESS

- How will I generate liquidity for my spending needs?
- Will my heirs have enough liquidity to pay estate taxes?
- How will I buy out non-participating family members?
- What kind of management succession plans should be in place?
- To whom should I pass my ownership?
- How will my family stay in control?
- What mechanisms are in place for intra-family transfers?
- How will professional management be incented?
- What policies are in place for dividend distributions?
- How do I ensure equitable treatment between family members in business and out?
- How will family members in management be compensated fairly?



SELLING THE BUSINESS

- When is the best time for a sale?
- Should I sell the whole business or a part?
- Should I take stock or cash?
- Who are potential buyers?
 - Business partner?
 - Employees?
 - IPO?
 - Strategic buyer?
 - Financial buyer?
- How should employees be retained/compensated?
- How do I evaluate the economics of the transaction vs. retaining the business?
- What should I do with the proceeds?
- Will this facilitate charitable goals?
- Should I do any pre-transaction planning?

2024 Outlook

- Interest rates stabilizing and eventually falling drives an uptick in transaction activity
- The valuation gap between buyers and sellers tends to narrow over time
- Private equity and venture capital have record amounts of cash to deploy and own a record number of portfolio companies
- Strategic buyers will continue to use M&A as a way to expand geographic reach, increase its product offering and gain new technologies
- Upcoming Presidential election should accelerate the timing of some transactions for the first 9 months of the year

PRIVATE EQUITY OVERHANG



VENTURE CAPITAL OVERHANG



Transaction planning timeline

PRE-CLOSE AND DAY ONE		SHORT TERM			LONG TERM
PRE-CLOSE	DAY OF CLOSING/DAY 1	MONTHS 1-2	MONTHS 3-6	STATE & U.S. TAX BILL(S)	2024 - ONGOING
<ul style="list-style-type: none"> <input type="checkbox"/> Review current ownership by entity and create a holistic balance sheet <input type="checkbox"/> Begin discussion on wealth transfer and long-term investment plan, particularly if any pre-transaction planning will be considered <input type="checkbox"/> Ensure proper accounts are open for recipients of transaction proceeds <input type="checkbox"/> Establish Day 1 cash investment plan for long term funds and cash reserves <input type="checkbox"/> Establish contact at sending institution <input type="checkbox"/> Confirm wire instructions for all accounts receiving proceeds 	<ul style="list-style-type: none"> <input type="checkbox"/> Obtain Fed referral number from sending institution <input type="checkbox"/> Confirm cash receipts <input type="checkbox"/> Reconcile and verify closing activity <input type="checkbox"/> Implement Day 1 cash investment plan, including segregating any amounts needed for tax reserves 	<ul style="list-style-type: none"> <input type="checkbox"/> Consider investment of tax reserves <input type="checkbox"/> Finalize long term investment plan, including phase in schedule and near-term liquidity needs <input type="checkbox"/> Determine strategies for future liquidity needs <input type="checkbox"/> Confirm tax liability with accountant <input type="checkbox"/> Consider line of credit 	<ul style="list-style-type: none"> <input type="checkbox"/> Continue phasing in longer term investment portfolio(s) <input type="checkbox"/> Establish cadence to review investment and overall wealth plan progress <input type="checkbox"/> Consider charitable gifts before year-end (pending advice of tax counsel) to offset gains from the transaction <input type="checkbox"/> Work with JPM, tax advisor and estate planning attorney to formulate estate and tax plan and review any life insurance policies 	<ul style="list-style-type: none"> <input type="checkbox"/> Consider use of leverage to pay taxes if positive carry is offered <input type="checkbox"/> Liquidate investments earmarked for state and federal tax bill. Generally, U.S. taxes will be owed in April the following year of the transaction 	<ul style="list-style-type: none"> <input type="checkbox"/> Monitor portfolios on an ongoing basis <input type="checkbox"/> Provide market and economic outlook, review performance and adjust portfolio as needed <input type="checkbox"/> Review cash flow and liquidity needs <input type="checkbox"/> Reaffirm long term investment plan goals <input type="checkbox"/> Coordinate with your key advisors (tax, legal) <input type="checkbox"/> Consider education for next generation

A GRAT enables a trust grantor to potentially transfer some future appreciation of assets free of gift tax, while retaining the assets

- A GRAT is an irrevocable trust.
 - Grantor transfers assets to the GRAT at today's fair market value.
 - Grantor retains a right to an annuity stream over the GRAT term (which is chosen by the grantor).
 - Any assets left at the end of its term are distributed to remainder beneficiaries free of gift tax.
- A GRAT is typically structured so that the gift tax value¹ of the assets being transferred is zero (or close to zero).
- The annuity payments made by the GRAT may be a flat amount or may escalate up to 20% annually²
- A GRAT works best with assets that are expected to appreciate significantly during the GRAT term, usually five years or fewer.
- The transfer tax efficacy of a GRAT depends on the grantor surviving the trust term. If the grantor dies during the term of the GRAT, all assets held by the GRAT are includable in the grantor's estate for estate tax purposes³.
- The appropriate length of the GRAT term depends on the grantor's expected lifetime, as well as his or her views on interest rates and the return on GRAT assets.

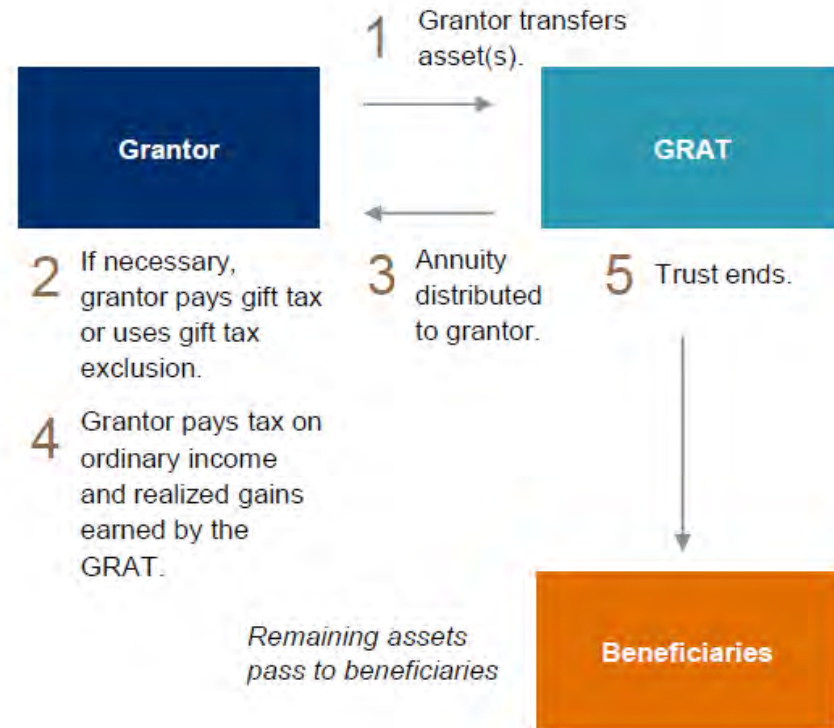
1. Gift tax value is determined by subtracting the present value of the grantor's annuity interest from the fair market value of the transferred assets.

2. Treas. Reg. §25.2702-3(b)(1)(ii)

3. Treas. Reg. §20.2036-1(c)(2)(i)-(ii)

How a GRAT works

- 1 Grantor transfers asset(s) to the GRAT.
- 2 Grantor pays little or no gift tax, or uses little or no gift tax exclusion¹, on the gift of the present value of GRAT's remainder².
- 3 Grantor receives an annuity stream for a set term (chosen by the grantor) in cash or, more typically, in kind.
- 4 Grantor pays tax on ordinary income and realized gain earned by the GRAT (but not on annuity amount transferred from GRAT to grantor).
- 5 When GRAT term ends, assets remaining in the GRAT pass to beneficiaries free of gift tax.
 - If the grantor does not survive the term, GRAT assets would be included in the grantor's estate and subject to estate tax³.



1. The lifetime gift and estate tax exclusion amount is \$10 million, adjusted for inflation after 2010. In 2024, the applicable exclusion amount is \$13.61 million per individual (\$27.22 million per married couple). In 2026, the exclusion amount is scheduled to revert to \$5 million (adjusted for inflation after 2010), which was applicable law prior to 2018.
2. Calculation based on Treasury discount rate in effect at time of funding GRAT. A Tax Court decision (*Walton v. Commissioner*, 115 T.C. No. 41 (Dec. 22, 2000)) allows a GRAT to be "zeroed out," eliminating the need to incur any gift tax.
3. Treas.Reg. 20.2036-1(c)(2)(i)-(ii).

Spousal Lifetime Access Trust (SLAT)

Problem

Married clients would like to take advantage of current lifetime gift tax exemptions (\$13.61MM each) but concerned they may need the money in the future



Possible Planning Strategy



Grantor creates:

Irrevocable Family Trust

\$13.61 million

Permissible beneficiaries typically include:
Spouse, children, grandchildren, charity



- Beneficiary spouse considers creating a separate irrevocable trust with independent terms
- This trust might include as permissible beneficiaries: Spouse, descendants, other relatives, charity

Planning to use gift tax exclusions involving trusts can be complex - please consult your tax advisors

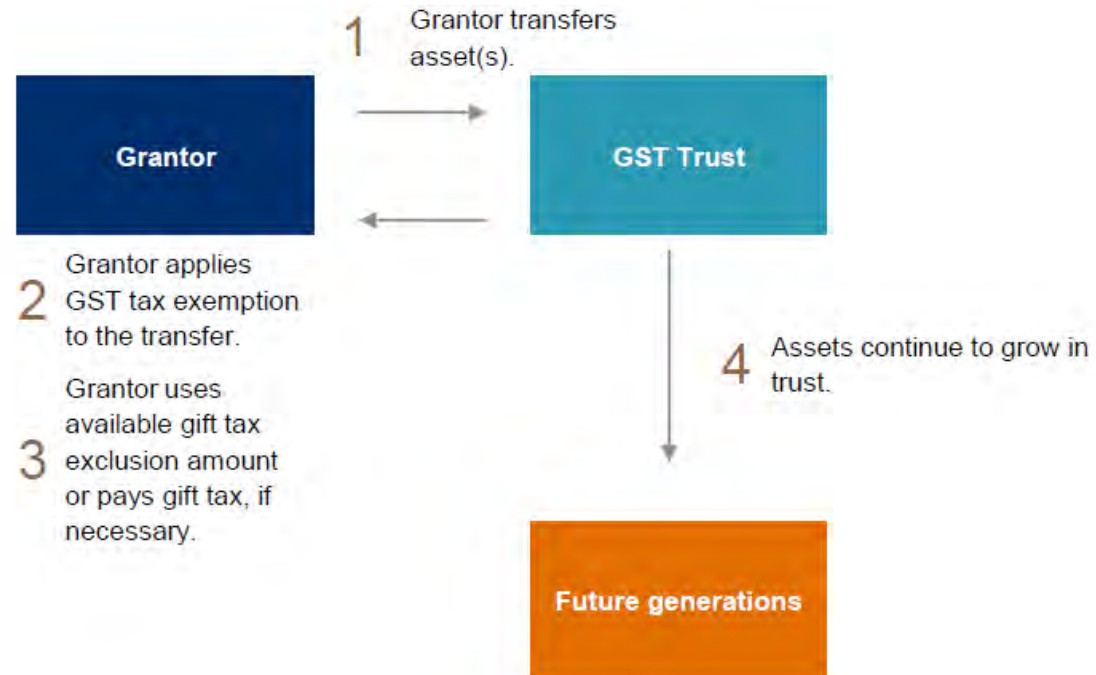
NOTE: Care must be taken to avoid the reciprocal trust doctrine. Several disparate provisions may create a good fact pattern, including: trusts created at different times (preferably in different tax years), different independent trustees, different funding assets, different rights and powers (see page 4)

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The gift tax and estate tax exclusion amounts are both \$10 million, adjusted for inflation after 2010, making, in 2024, the applicable exclusion amounts \$13.61 million per individual (\$27.22 million per couple). In 2026, the exclusion amounts are scheduled to revert to \$5 million (adjusted for inflation after 2010), the law prior to 2018.

How a GST trust works

- 1 Grantor transfers asset(s) to an irrevocable trust.
- 2 Generation-skipping transfer tax exemption is applied to the value of the gift on a properly and timely filed U.S. gift tax return.
- 3 Grantor uses gift tax exclusion amount or pays U.S. gift tax, if value of gift exceeds the available gift tax exclusion amount.
- 4 Trust continues over several generations, protecting assets, trust income and capital appreciation, and realized gains, from further estate, gift and GST tax.



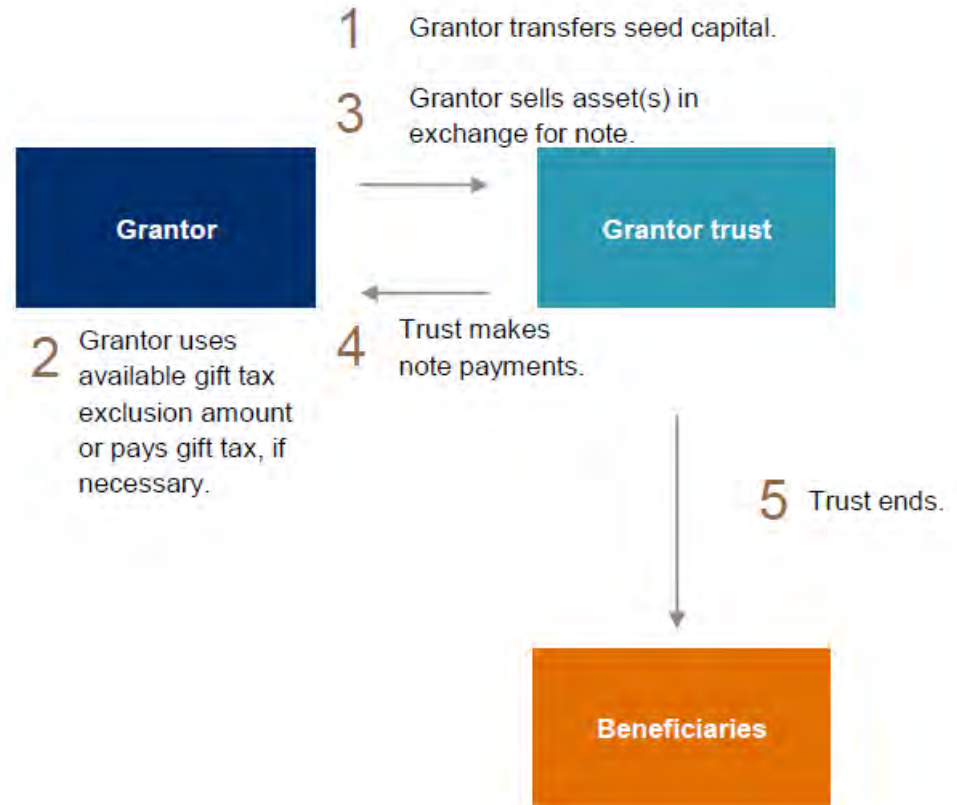
Selling assets to an irrevocable grantor trust effectively transfers appreciation on those assets tax-free

- Grantor makes an arm's-length sale of assets to a grantor-type irrevocable trust in exchange for a note bearing interest at the Applicable Federal Rate (AFR)¹.
 - The grantor may be able to claim valuation discounts on the assets sold that would reduce the face value of the note received from the trust.
- Trust makes annual interest payments to the grantor and a final balloon principal payment at the note's maturity.
- Grantor pays tax on income and capital gain realized by the trust.
- After the note is paid, any assets remaining in the trust are available to benefit members of the grantor's family.
 - Any appreciation of the assets sold to the trust during the term of the note in excess of the AFR constitutes, effectively, a tax-free gift to the trust.
- Additional considerations:
 - For an arm's-length sale to occur, the trust must have some means of repaying the note. Accordingly, the grantor should "pre-fund" the trust to provide sufficient coverage (seed capital) for the note (and pay gift tax).
 - Allocating the grantor's Generation-Skipping Transfer (GST) tax exemption to the seeding transfer to the trust can enhance the benefit to trust beneficiaries over several generations.
 - While there is no law, regulation, or rule, many practitioners are comfortable that an arm's-length exchange can take place if the trust has at least \$1 of equity for every \$9 of debt.
 - Alternative: If the trust is not pre-funded with sufficient assets, trust beneficiaries could guarantee the note at a market guarantee rate.

1. Applicable Federal Rates, published monthly by the Internal Revenue Service, are based on the average yield to maturity on U.S. Treasury obligations of comparable maturity during a thirty-day period prior to the determination. Taxpayers who make loans at a rate below the AFR for the term of the loan are deemed to have made a taxable gift of an amount equal to the spread between the interest rate charged and the AFR.

How a sale to an irrevocable grantor trust works

- 1 Grantor gives asset(s) to a grantor-type irrevocable trust.
- 2 Grantor uses gift tax exclusion amount or pays U.S. gift tax if value of gift exceeds the available gift tax exclusion amount¹.
- 3 Grantor sells asset(s) to the trust in exchange for a note bearing interest at the Applicable Federal Rate (AFR).
- 4 Trust makes annual interest payments and a final principal payment to the grantor in cash or in kind.
- 5 Any appreciation of the asset(s) sold to the trust during the note term in excess of the AFR remains in the trust free of gift tax.



1. The lifetime gift and estate tax exclusion amount is \$10 million, adjusted for inflation after 2010. In 2024, the applicable exclusion amount is \$13.61 million per individual (\$27.22 million per married couple). In 2026, the exclusion amount is scheduled to revert to \$5 million (adjusted for inflation after 2010), which was applicable law prior to 2018.

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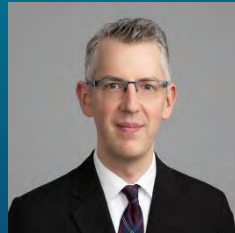
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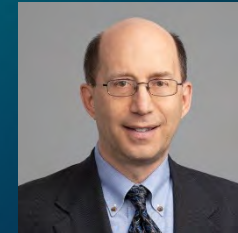
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