

Litigation Trends and Opportunities in 2019

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AI Brings Challenges and Efficiencies to Law Firms

By Carlyn Kolker

Artificial intelligence is taking hold across large law firms, introducing both challenges and benefits to the way they do business and manage their daily operations.

Using computer-based learning to sift through vast troves of data—the lifeblood of big litigations and transactions—AI can help make law firms more efficient, improve the accuracy of their work, and change their staffing models.

AI has the potential to disrupt all aspects of a law firm's business.

Despite much recent hype in the legal world, onlookers are unsure how deeply AI technology has penetrated law firms. Only 7.5 percent of large practices were using AI technology, with another 29 percent exploring their options, according to a 2017 survey by consultancy Altman Weil.

Unlike other advances in legal technology over the years, AI has the potential to disrupt all aspects of a law firm's business—including the value proposition it offers clients, profits, internal processes, and resources, said Thomas Clay, principal at Altman Weil.

A handful of law firms have invested in AI by creating their own innovation and experimentation centers, hiring teams of specialists such as data scientists and nonpracticing lawyers to test cutting-edge technology, and even writing their own algorithms, said Daniel Linna, a visiting professor at Northwestern University's Pritzker School of Law.

"I think we've seen a lot of change in the last few years," said Linna, who has developed an index to rate innovation at law firms. "I don't think it's evenly distributed across the marketplace." He added, "You can't tell me a practice area that isn't ripe for change."

Christopher Emerson of global law firm Bryan Cave Leighton Paisner said the firm has used AI-based tools to "substantively change the ways attorneys work." The firm's internal innovation group has created an algorithm to help determine billing rate increases, a process that used to take two weeks and require multiple in-person meetings. It's also helped clients create automated procurement contracts and analyze high-volume litigation.

In the past several years, a range of AI-based companies has entered the market, offering the ability to speed up document and contract review, automatically generate contracts, and analyze litigation trends, among other functionalities.

And IBM Watson's artificial intelligence unit has been in talks with a number of major law firms, signaling a large-scale entrance into the U.S. and U.K. legal markets in 2019, Sam Skolnik reported in Bloomberg Law.

To help navigate the marketplace, a dozen global law firms joined last year to create a consortium to support Reynen Court, which is studying and funding development of common AI applications.

The drive to use AI is coming in part from clients who want more efficiency, said Wendy Butler Curtis, chief innovation officer of global law firm Orrick.

"It's important to understand that the consumer of our business is using this, in their products and in their legal departments," Curtis said. And with the Big Four accounting firms increasingly grabbing more of the legal spend, and alternative legal providers making a bid, too, "it's not as much a choice anymore as a requirement."

Some firms have created specific AI-based tools to transform the work of certain practice specialties. At Drinker Biddle & Reath, a group of lawyers and data scientists has developed about 20 tools to analyze vast troves of data and automate analysis, said partner Bennett Borden.

One such software program has altered the work of its investment management practice, he said. It can crawl through Securities and Exchange Commission filings, using AI to compare risk factors across company prospectuses. The software effectively replaces work done by a team of lawyers who manually reviewed the prospectuses over several weeks.

The drive for AI comes in part from clients who want more efficiency.

"We save like 90 percent of the time that it takes to do those tasks," Borden said. At least 25 firm clients now use the tool, he said, and the new technology has given way to other changes, too.

"Efficiency is not the friend when you bill by the hour," he said. "We have to completely change the way we bill." The firm now charges clients a flat fee for the work, so they pay less than they used to, and the firm has higher margins.

AI is unlikely to replace lawyers in large law firms, but it could alter staffing on large matters. One natural consequence may be an even greater reliance on contract lawyers, said Clay of Altman Weil.

But Oz Benamram, chief knowledge officer of global law firm White & Case, said AI can also help elevate the work junior associates do. They don't have to be buried researching case law, doing document review, or handling due diligence.

"It's cheaper and faster for computers to go through mountains of data to find relevant or related documents," Benamram said. "Computers are way better because they are consistent, they never get tired, they never get hungry. And by shaving off hours of e-discovery and due diligence, it means our lawyers are focused on higher-level, more interesting thinking."

Carlyn Kolker is a reporter who has covered the legal industry for more than 15 years.



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Litigation Finance Growth Spawns Oversight Concerns

By Shaheen Pasha

Litigation finance has experienced a market boom in recent years as Big Law, corporations, and deep-pocketed hedge funds have seen increased opportunity in third-party funding.

But with great growth comes greater pressure for more oversight into deal structures and the murky relationships with third-party funders—issues the industry will have to contend with going forward.

Litigation finance firm Vannin Capital estimated \$800 million to \$900 million of global dispute resolution spending came from third-party funders in 2016. The firm projected dispute funding by litigation finance companies would grow 20 to 30 percent each year, reaching \$2.1 billion to \$2.7 billion by 2021. Given that the industry still represents only 4 percent of the dispute resolution market, that leaves lots of room for growth.

“Litigation finance is a good thing for the industry, as it gives the case a better shot of being heard on the basis of merit,” said Cassandra Burke Robertson, law professor and director of the Center for Professional Ethics at Case Western Reserve University School of Law.

In a David and Goliath case, the bankrupt gold-mining firm Crystallex International won a \$1.4 billion award from a World Bank arbitration court in its claim against Venezuela for expropriating a gold mine. A cash infusion from Tenor Capital Management allowed Crystallex to push forward with a lawsuit threatening to seize Venezuela’s prized asset, Houston-based Citgo Petroleum, to force it to pay the settlement. Under the agreement, Tenor will receive around 70 percent of any payments Crystallex collects, once it pays off the initial loan from Tenor and other creditors.

While litigation finance firms can make significant profit, law firms and in-house lawyers also stand to benefit from such arrangements, Liz Bigham, chief marketing officer at leading litigation finance firm Burford Capital, told Bloomberg Law. She said in-house lawyers could use third-party funding as a risk management and corporate finance tool, and law firms could use it to become more competitive in developing business.

But Robertson said practitioners must make sure that lawyers remain loyal to their clients over the funder. Such transparency concerns over funder-client relationships are driving calls for more regulation and oversight. And courts stepping in on a state-by-state basis could have far-reaching implications for the industry going forward.

Law firms and in-house lawyers can benefit from third-party funding, according to Bloomberg Law.

In January, the U.S. Court of Appeals heard arguments from lawyers representing third-party funders Atlas Legal Funding, RD Legal Funding, and Thrivest Specialty Funding, which had lent money to cognitively impaired football players in their lawsuits against the National Football League for damage resulting from concussions they suffered.

The funders, who were set to receive payment of the loans, which often have sky-high interest rates, were blocked in a 2017 ruling by federal judge Anita Brody. She voided the contracts, saying the cognitive disabilities impaired the players’ ability to understand the terms laid out by the lenders.

Ethical questions relating to funder-lawyer relationships abound, said Page Faulk, senior vice president of legal reform initiatives at the U.S. Chamber Institute for Legal Reform, which advocates for more scrutiny of litigation finance.

In August, the New York City Bar ethics committee said funding agreements that are tied to future legal fees are unethical and violate lawyer conduct rules that generally forbid lawyers to share legal fees with non-lawyers. Faulk said bar associations in Maine, Nevada, Utah, and Virginia issued similar statements, reflecting growing concern about the practice even as it becomes more popular in the industry.

Judges may play more of a role in shaping the future of litigation finance.

While ethical rulings are not the same as legal prohibitions, Faulk said they pave the way for more judicial and legislative oversight, particularly when it comes to deal transparency. There's certainly precedent. Last year, Wisconsin became the first state to require plaintiffs in all civil actions to disclose third-party funding contracts. Faulk said she expects more to follow, and there could be increasing pressure for the federal Advisory Committee on Rules of Civil Procedure to amend Rule 26, requiring explicit disclosure of litigation finance arrangements.

Such disclosure has long been a point of contention with funders, and some lawyers who warn that mandatory disclosure could cripple litigation by providing a road map to legal strategy. Case Western's Robertson said legislative actions may be slow, but judges could play more of a role in shaping the future of litigation finance.

The resulting push toward greater transparency is something funders will need to consider as they prep for growth.

Shaheen Pasha is a writer and journalism professor, focusing on legal and financial issues.



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Data Protection Laws Complicate Cross-Border Discovery

By Lisa Singh

For global businesses navigating litigation concerns, varying data protection laws are triggering potential complications in cross-border discovery. State and federal laws maintain differing levels of compliance, and new data protection laws overseas, led by the European Union's General Data Protection Regulation, are calling for more uniform approaches to data collection.

"The GDPR has made a huge impact internationally," said Karyn Harty, partner and e-discovery specialist with McCann FitzGerald. "So many international organizations do business in the European Union, or involving EU citizens' data, that GDPR compliance has become a significant issue for businesses in the U.S. and in other regions, such as [Asia-Pacific] and the Middle East."

The lack of exceptions in the discovery process accorded by GDPR raises the stakes. With the notable exception of the Stored Communications Act, state and federal data protection laws' allowance for the retention and disclosure of data, where the law requires it, minimizes impact on U.S. civil discovery, said David Kessler, partner and co-head of Norton Rose Fulbright's e-discovery and information governance practice. The lack of a similar loophole under GDPR complicates cross-border discovery efforts.

An Illinois Supreme Court ruling weakens a common defense strategy, reports Bloomberg Law.

"The GDPR does not have an express exception for civil discovery happening in a third country like the United States," Kessler said. In the case of co-equal sovereigns, conflict of law is now becoming more common in the discovery process.

"Compliance with a non-EU law obligation is not recognized as a valid legal basis for processing personal data from a GDPR perspective," Harty of McCann said, "whereas compliance with an EU law obligation is."

GDPR isn't the only regulation posing potential challenges to discovery. "Beyond GDPR, there are country-specific regulations that require navigation, such as blocking statutes and works council notification," said Bryant Isbell, managing director of the global e-discovery and data advisory group at Baker McKenzie.

Meanwhile, even as experts see limited impact on discovery from federal and state data protection laws, this may soon change as well.

"Increased requirements around data security in some newer privacy regulations are raising concerns among organizations and their counsel regarding security infrastructure and retention policies," said Rich Vestuto, managing director in discovery for Deloitte Transactions and Business Analytics. He cites the California Consumer Privacy Act and the New York Department of Financial Services' cybersecurity regulation, which shares tenets with the GDPR.

Additional measures nationwide are further cementing public expectations of data protection safeguards. The recent Illinois Supreme Court ruling that plaintiffs need not demonstrate adverse effect in order to sue companies under the state's biometric privacy law weakens a common defense strategy, reports Bloomberg Law. It's only a matter of time before discovery, even where data is housed stateside, may face additional complications, experts predict.

"To the extent that the California Consumer Privacy Act enhances people's awareness of privacy and cybersecurity, they're going to want [to extend it to] any process that handles personal data—that [could] include discovery," Kessler said.

Internationally, while EU lawmakers now allow companies to store nonpersonal information anywhere in the bloc, as reported by Bloomberg Law, the scope of the GDPR remains far-reaching, and is increasingly hard to ignore.

In the past, “many companies would practically make a choice—not produce the data and potentially get fined or take the risk that the data protection authority in the EU would fine [them],” Kessler said. “That decision is a lot harder now, because the fines under GDPR are so enormous.” Organizations, in turn, are exercising extra precaution.

The scope of the GDPR is increasingly hard to ignore.

“We are seeing increasing use of documented legitimate interest assessments prior to searching,” Harty said. “Real thought is given to the nature of the data within the producing organization and the extent to which it falls within the scope of the discovery order.”

In this environment, there’s a growing trend to revisit information governance. “If you have data organized and classified correctly, you’re improving your efficiency 20 percent,” said Bennett Borden, chief data scientist at Drinker Biddle. “Not only that, your e-discovery costs plummet.”

Establishing teams on the ground is critical in navigating the escalating intricacies of cross-border discovery—particularly, experts say, as individual data privacy concerns grow.

“We may see more complaints specifically in the context of discovery, especially where the production in another country may have direct personal repercussions for an individual,” said Natascha Gerlach, an e-discovery and European data protection law expert.

“It is important to have a network of local experts to fall back on to help identify specific issues early on, to brief the client, opposing counsel, and the court [in a] timely [manner], and avoid unnecessary conflict,” she said.

Also important is employing the right mix of technology, people, and protocols—and ensuring the other side does as well, experts say.

“Parties should not only require appropriate protective orders before exchanging data,” Kessler said, but ensure that their opponents “are implementing appropriate administrative, organizational, and technical security protocols to protect the data they are producing.”

Automation, Kessler added, will be key.

“Law firms that leverage technology and analytics to reduce the amount of data in discovery, so that less is manually reviewed and produced, will be [in a] better position to protect privacy in discovery.”

Lisa Singh is a writer specializing in business and technology matters.

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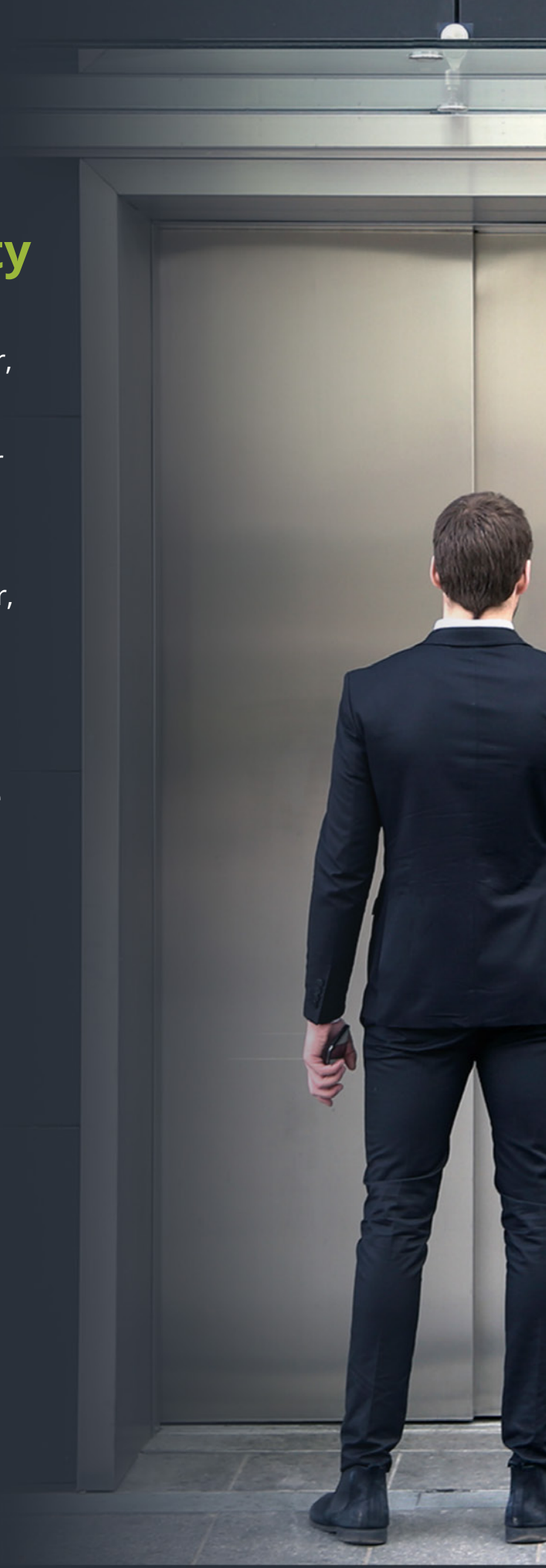
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Tech Alters Big Law-Big Four Dynamic

By Tam Harbert

Big Law and the Big Four accounting firms are increasingly bumping into each other in the legal services market, prompting a frenemy relationship: Sometimes they compete as enemies; sometimes they cooperate as friends.

Even though the Big Four are prohibited from practicing law in the U.S., there is nothing keeping them from using technology to provide legal-related services.

"We already compete with [the Big Four] in the U.S.," said John Fernandez, global chief innovation officer at Dentons. In alternative legal services, what the Big Four do is similar to what Big Law does, particularly in transactions such as large M&A deals.

Even if the Big Four don't practice law, "You'd be foolish to think that is some kind of shield that will protect you from the power of change that's happening in the industry," he said.

Each side brings particular advantages to the table. The Big Four have scale—in revenue, number of employees, big-project experience, and deep pockets to fund and leverage technology. But their biggest advantage may be their experience in systems, business processes, and project management.

The Big Four are good at "breaking down the actual work, its components, and how it is delivered, how to do process mapping, and identifying opportunities to eliminate waste and find ways to leverage technology," Fernandez said.

They are now applying that skill set to legal services, prompting some large law firms to try to develop those capabilities. "Law firms are investing more and more in process engineers and legal project managers and the systems engineering disciplines that 10 years ago you wouldn't have contemplated in the legal industry," Fernandez said.

Law firms' advantages include the depth and breadth of their legal and regulatory experience. Tim House, U.S. senior partner at Allen & Overy, cites advantages in two areas. On the transactional side, "we have got a tremendous data base and tremendous familiarity with documenting very complex transactions," he said. "We understand the workflow that's involved in relation to that." On the litigation side, he cites the firm's experience in e-discovery and efficient search.

It's on some level a hedge against the Big Four, Steve Immelt told Bloomberg Law.

Meanwhile, Big Law is developing its tech muscle. Several firms have launched consulting and technology development divisions. Hogan Lovells has several consulting groups offering services including cybersecurity risk and transfer pricing. The move was not just in response to client needs, Hogan chief executive Steve Immelt told Bloomberg Law, admitting that "it's on some level a hedge" against the Big Four.

Allen & Overy has developed an advanced delivery approach, which House said combines the firm's legal expertise, new technology, and new ways of delivering services. It includes a legal technology group that comprises 45 software developers and programmers, a markets innovation department that develops specific solutions for specific clients, and Fuse, a collaborative tech innovation space in London.

Fuse houses a different set of tech startups each year, and enables Allen & Overy lawyers, clients, regulators, and others to learn about the technologies, he said. The legal tech group sits right next to Fuse, and lawyers at the London location can easily mingle and talk with the tech experts about potential solutions to client problems.

Dentons launched Nextlaw Labs as a subsidiary that would drive innovation in the firm, said Fernandez, who also serves as Nextlaw's global chair. It also created a separate unit called Nextlaw Enterprises, a suite of businesses that interacts with clients, technology companies, and other organizations in new ways. The businesses include a venture capital investment arm, a referral network, and an in-house consulting team.

Still, the Big Four and Big Law often work together in service of a common client. Law firms hire Big Four companies to digest data on large transactions, for example. "The reality is that it can be a very complementary relationship," Meghann Kelley, a legal management consulting leader at Deloitte, told Bloomberg Law.

Complementary relationships may often exist between large law firms and the Big Four.

Although Deloitte competes with Allen & Overy in areas such as e-discovery, the two collaborated to develop a digital system that simplifies the regulatory burden associated with derivatives trading.

Large projects also can bring a big consulting firm and a big law firm together, according to Chris May, head of discovery at Deloitte. A multinational corporation may reach out first to its law firm, which turns to Deloitte, with its store of global resources, to help. Or vice versa.

May describes a recent example in which a multinational bank hired Deloitte to assess how it was handling data from a litigation and regulatory perspective around the world. The bank hired law firm Reed Smith to work with Deloitte to make sure its collection process was legally defensible.

"Deloitte would figure out where the gaps were and help implement an operational model that works, and Reed Smith would oversee that and make sure from a legal perspective that it would stand up in a court of law," May said.

A law firm might also be brought into cases where a firm like Deloitte wants to maintain a veil of privilege for a client, May said. In some cases, privilege may not exist for a U.S. client or even a multinational with operations in the U.S., because Deloitte cannot practice law in the U.S.

It all depends on what the client needs. "Sometimes your biggest competitor can be your biggest ally," May said. It may be a new concept in the legal market, but it's common in the tech sector.

Tam Harbert is a journalist specializing in technology, business, and public policy.

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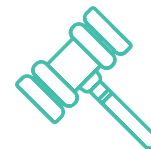
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Automation Revamps Litigation, Raises Ethics Issues

By Casey Lindahl

Artificial intelligence can process more data in less time and more accurately than humans can, so businesses are increasingly using it to improve analytics, manage and reduce risk, and make workflows more efficient. The legal field is following suit.

AI—machines learning to mimic human thought processes to make decisions based on data and patterns—is changing some of what lawyers do.

Its uses in litigation include applications for e-discovery and document review, legal research, drafting of pleadings and motions, jury selection, analysis of case merits and staffing needs, and the gathering and analysis of information regarding possible outcomes, judges, and opposing counsel. According to Bloomberg Law, big data can now assist lawyers in answering common client questions about cost, length of time to resolution, and likelihood of success.

“AI advances mean that the role of the attorney will be reduced to the ‘last mile’—it will be the role of the attorney to use judgment, empathy, adaptability, and creativity to persuade and argue for particular outcomes,” said Anthony Davis, partner at Hinshaw & Culbertson.

While AI offers litigators efficiencies and insights, those benefits aren’t available straight out of the box. Which technology to use and how to use it are important questions litigators must answer.

“There is a lot of churning in the legal field with respect to the use and deployment of AI. Attorneys need to remember that machine-learning AI is not instantly ready to go—you must train it, supervise it, and adjust it to get it to perform optimally,” said Gary E. Marchant, professor of law and director of the Center for Law, Science & Innovation at Arizona State University.

While attorneys probably won’t be expected to code, simply using the latest hot product won’t be enough. “To use AI well, attorneys will have to stop being afraid of math,” said Jeannette Eicks, research professor of law and director of the Center for Legal Innovation at Vermont Law School. “Attorneys don’t necessarily need to know how to program the AI, but they need to understand the basics of how it works.”

E-discovery, legal research, and predictive capabilities are among the most common applications in litigation, with e-discovery probably being the area most associated with AI in the legal space. “E-discovery was the first big use of AI in litigation,” Marchant said. “So far, no court has required its use—courts have allowed its use, though at some point it may be required because of its cost efficiencies and accuracy when compared to humans doing the same work.”

Using AI for e-discovery is a matter of endurance, Eicks said. “E-discovery AI is able to sustain its level of performance indefinitely, whereas humans start to decline after about three hours.”

Big data can now help answer common client questions, according to Bloomberg Law.

With respect to legal research, AI can find pertinent cases in a fraction of the time it takes seasoned litigators to find the same cases. According to Bloomberg Law, AI in legal research empowers lawyers to upload briefs or other documents for analysis and provides more specific search results regarding cases that may not have been cited.

Because of the way the AI is programmed, it may unintentionally prevent development of the law unless lawyers are attuned to this possibility.

“Legal research platforms tend to rank search results using the bell curve—more frequently cited results are ranked higher in terms of what the platform returns as a search result,” Eicks said. “For the law to develop, lawyers will have to understand enough about the technology and algorithms to structure queries so results beyond the first standard deviation of the bell curve are returned.”

"The evolution of societal values will not be reflected in the first standard deviation of cases returned by the platforms. For instance, imagine the outcome of cases involving issues such as gay marriage or slavery if only the most-cited past precedent had been relied on," Eicks said.

In addition, attorneys need to understand that different platforms return different results for the same query. They should also consider that judges may be using a different platform than the attorney. "What happens when a judge runs a query and different cases are returned for the judge to use in drafting an order or opinion? Will the attorney be found to have committed malpractice by not citing the cases the judge may rely on?" said Davis of Hinshaw & Culbertson.

Attorneys will need to understand the basics of how AI works.

Along with its many benefits, AI holds the potential to raise certain ethical issues.

"The requirements of technical competence no longer mean that lawyers can limit their understanding to concerns regarding confidentiality to things like hitting reply all to an e-mail or whether they will store client information in the cloud," Davis said.

Lawyers will need to have a sufficient understanding of the various AI tools to determine what is most appropriate to a client's needs. This adds an entirely new element to traditional competence requirements, according to Bloomberg Law. The use of AI also can open a variety of potential judicial bias issues because of the way it can bring to light information on patterns related to precedents and court decisions.

The matter of AI's potential impact on legal ethics also extends to questions of access. The California Bar last October established a task force on the innovation of legal services to look not only at how AI and other innovations might make legal services more available, but also how to possibly avoid the ethical roadblocks against fee sharing with non-lawyers and other arrangements.

The use of AI unquestionably offers the legal industry the prospect for greater efficiency and lower cost. Getting to those improvements, however, is not going to be a straightforward path. AI puts a new dimension of responsibility on lawyers and will clearly involve some disruption to current business models.

Casey Lindahl researches business of law and legal technology issues.



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