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PERSPECTIVES

# POWERING LEGAL STRATEGY, PROCESS AND RESULTS: AI'S IMPACT ON LITIGATION

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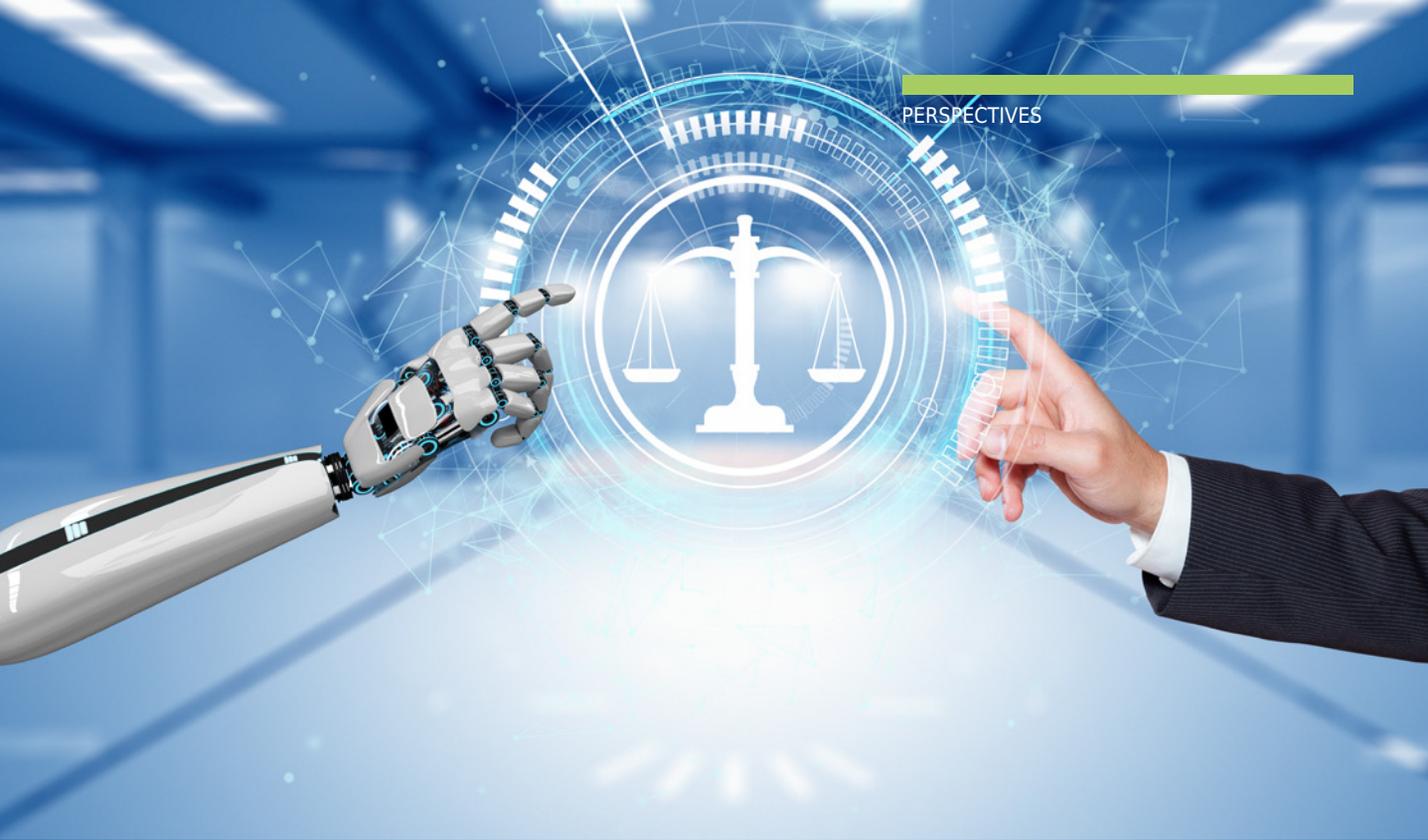
Few technologies have garnered more hype in the legal world than artificial intelligence (AI). A buzzword in every sense, AI has been promised to solve every challenge in legal practice, from contract creation and predicting the duration and outcome of a case, to patent analysis, alternative billing and document review. The lines between AI's broader potential and actual, practical capabilities, have been blurred time and again.

In reality, the hype cycle remains ahead of actual impact. We are nowhere near a world in which AI replaces the role, legal expertise and strategic value of lawyers. Rather, we are seeing progress toward its ability to augment legal work and create more time

and mental capacity for lawyers to focus on higher-value tasks.

## Defining AI

AI theory started in universities in the late 1950s and evolved slowly. Ask 100 people for a definition of AI, and you will receive 100 unique responses. They may all be correct. From our perspective, AI refers to computer automation of functions that traditionally required human intelligence. AI systems are programmed to use logical rules, or algorithms, to analyse data, establish patterns and identify insights. AI is exhibited in systems that can detect patterns and both learn and predict. In the context of legal practice and litigation, it is being used to assist



in e-discovery, investigations, due diligence, contract review and legal research. It can be used to assist with and automate certain day-to-day tasks, freeing up junior lawyer hours, reducing the time needed to complete high-volume, process-driven projects and boosting efficiency.

### **The junior lawyer of today**

The addition of AI to the corporate legal world has already changed the working lives of today's young lawyers. Gone are the days of large teams of junior lawyers manually reviewing boxes full of documents into the small hours of the morning. Instead, today's junior lawyers are expected to bring technical savvy to their roles, so they can use and benefit from the many tools at their disposal.

### **How cost drives a need for AI**

Any lawyer with litigation experience is familiar with the onerous obligations in e-discovery to disclose all relevant documents in their power, possession or procurement. In an age when the volume of electronically stored information (ESI) continues to grow, adding complexity, time and costs to the discovery process, complying with these obligations can quickly become disproportionate to the value of a matter.

Recently in Ireland, authorities pledged support for an initiative to promote the region as an international legal services hub. The initiative propelled a movement to reform court procedures and discovery expectations to make commercial disputes in Ireland faster, more predictable and more cost-effective.

AI tools – including technology assisted review (TAR), which uses machine learning to identify and tag potentially discoverable documents – present one path toward achieving this. Anecdotal evidence suggests significant cost savings for cases involving large volumes of discovery documents, and research shows that TAR and predictive coding may substantially reduce the risk of parties being wrongly accused of deliberately concealing relevant documents.

### **Changing court processes and procedures**

Within the EU, examples of AI in judicial decisions are emerging, but remain limited. In Ireland, the ruling in *IBRC and Ors v. Quinn and Ors* served as a milestone for the adoption of AI in litigation in Europe. Like the widely-known *Da Silva Moore v. Publicis Groupe* case in the US, it was the first judicial approval for the use of TAR in the region.

In *IBRC and Ors v. Quinn and Ors*, counsel for IBRC requested permission to apply TAR to support relevance review across 1.7 million documents. Three defendants objected, on the basis that the method did not comply with the rules of the superior courts. The plaintiffs' keyword searches had resulted in a dataset of approximately 1.8 million documents, which were reduced to 900,000 following deduplication. IBRC proposed a protocol for the use of TAR to further narrow the set, which included an allowance for the defendants to view a schedule of

the relevance calls made throughout the process. Justice Fullam ultimately approved the proposal.

Later, in a unanimous judgment to the court, justice Finlay Geoghegan confirmed that the High Court does indeed hold jurisdiction to model its own rules and was correct in its decision. Her ruling included statements that the courts have acknowledged the value of technology in dealing with large document volumes in discovery. The court agreed that what was approved by the High Court in *IBRC and Ors v. Quinn and Ors*, was fair, proportionate and accounted for the increasing need for discovery to be handled cost-effectively. The court went on to endorse the Sedona principles and explained that parties should aim for the earliest engagement possible in relation to an intention to use TAR.

For all its benefits, however, AI is not without its flaws. One of the primary concerns is that because it has been used in a limited number of cases, it has not been fully tried and tested, and the industry has not reached an agreement about when and how it should be used.

When technology is being used in a matter, parties involved may want to consider seeking to reach an agreement to its use at the outset. There are currently four case decisions that cast light on how failure to agree can affect the conduct of a case. These include the *Pyrrho Investments Ltd v. MWB Property Ltd*. case in the UK, the first matter in which the court approved the use of a form of

TAR, continuous active learning (CAL). Both parties agreed to use CAL. The case set out 10 factors to consider in the use of CAL that have been used to evaluate TAR in other cases. Another is *Brown v. BCA Trading*, wherein the use of CAL was requested by the respondents. In *Triumph Controls v. Primus*, one party used CAL without the other party's explicit agreement, which led to the court ordering a re-review of a large volume of documents.

### Case assessment

In the UK, discovery rules are more prescriptive than in Ireland and outline several factors that define the 'reasonableness' of a particular search. These include the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval of any particular documents, and significance of those documents to the proceedings at hand. When ESI is involved, the law states that in some cases it may be reasonable to search only part of a party's electronic storage system, whereas in other cases the entire system may need to be searched. The UK rules also emphasise cooperation between parties when determining discovery parameters.

In all regions, parties are expected to engage appropriately and constructively at the voluntary discovery stage to reach agreement. Additional

recent Irish case law has stated that a trial judge has oversight and decision-making authority over discovery obligations and proportionality, particularly when parties cannot reach agreement. In an extreme

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case, a judge may decline to order discovery in the full terms sought, simply based on a failure to properly engage in the voluntary discovery process.

### Future developments

AI is not something for the far future, but something for our time. In litigation, it will significantly improve the cost, time and risk involved in discovery. It has the potential to improve litigators' ability to do their jobs effectively and improve case outcomes.

We are also seeing developments in the use of AI to detect, stop and prosecute against financial and other crimes. In the financial services industry, experts are using AI to recognise behaviour patterns

in misconduct and use that data to prioritise fraud detection for any activity that follows similar patterns. This helps investigators work smarter and forge a faster and clearer path toward the evidence they need to pursue action.

In another use case, the European Commission for the Efficiency of Justice (CEPEJ) recently formally adopted principles on the use of AI in judicial systems and their environment. This involves utilising AI systems in judicial ruling processes to remove biases and emotion, thus improving decision-making objectivity.

The use of AI is here to stay. While we have come a long way, there is also a long way to go. In the legal field, a key factor in driving innovation and adoption will be building trust across the judiciary, lawyers, legal experts and other participants. More, the legal field will need to recognise and address potential drawbacks to AI's impact on key legal issues. AI is not yet advanced enough to deeply comprehend the nuances of facts, differing jurisdictional laws,

historic case precedents and other factors that play into legal decision making. Human understanding and legal expertise remain essential to litigation. Factors such as empathy, strategy, critical thinking, problem solving and intelligence remain key to the client-lawyer relationship. Striking a healthy balance between these human elements and the power of technology will take time, trial and error and collaboration. **CD**



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