# epiq clarity

## What to Know About Artificial Intelligence in the Legal Community

# Artificial Intelligence in law is here. AI is embedded in many legal processes and will only become more prevalent. Lawyers who fail to understand and apply AI to their practice risk becoming irrelevant.

This technology is changing the legal practice by automating tasks like legal research and eDiscovery review that previously required substantial labor. The cognitive task of identifying relevant information within large populations of documents can be achieved both more efficiently and more accurately with the new class of AI applications referred to by some as "cognitive computing." These applications collect and analyze data, process natural language, recognize key concepts, disregard data inapplicable to an inquiry, and identify trends.

A panel of legal experts at the 2018 Bloomberg Law Leadership Forum offered some working definitions of AI, starting with "any task, that if performed by a human, would require intelligence." One panelist added: "It's a tool. Basically mathematical algorithms that tease out correlations. So it's not really intelligence as we would think in a human sense… it's meant to supplement humans." Another panelist characterized AI as "a collection of algorithms that are categorizers… the algorithms observe patterns in flows of data to provide decision support, or even sometime to take actions independently."[1] The range of legal tasks that fall into those definitions is extremely broad. As we consider the emerging practical applications of AI in law, it is clear we are still in the early days of an era of legal practice that will be profoundly impacted by AI.

While more lawyers are accepting AI's role in the legal community each day, many still are hesitant to integrate it into their practice.[2] Reasons for this include cost, resistance to change, and fear that AI will take away jobs. However, AI can actually enhance and improve a lawyer's skills in ways that were never thought possible before. While this technology can do a lot, it cannot substitute the judgment and skill that lawyers bring to the table. As AI in law continues to evolve, lawyers must develop knowledge of AI for three reasons.

First, it is an ethical obligation. Rule 1.1 of the ABA Model Rules of Professional Responsibility includes the requirement to "provide competent representation," and in comment 6 to Rule 1.1 confirms that this rule is intended to include understanding "the benefits and risks associated with relevant technology." Second, as the application of AI becomes more prevalent, it will be necessary to understand the legal implications of AI as applied by opposing counsel. And third, embracing the economic efficiencies afforded by AI will provide competitive advantage to lawyers who understand it.

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[1] JD Supra "Perspectives on AI and the Law" (June 8, 2018) https://www.jdsupra.com/legalnews/perspectives-on-ai-and-the-law-39454/

[2] A survey of 207 lawyers employed in corporate legal departments (ranging from small to large department size) concluded that 67% were confident in trying new technology. However, only 1% of the total participants already used technology based on AI. Another 4% were seriously looking into using AI and 44% were not sure if their departments already used AI or planned to use it in the future. Thomson Reuters "Ready or Not: Artificial Intelligence and Corporate Legal Departments" pp. 5-6 (2017) https://static.legalsolutions.thomsonreuters.com/static/pdf/S045344_final.pdf

# epiqconfidence

## Understanding current and potential applications of AI in law

**Current AI Applications in The Legal Industry**

AI offers lawyers plenty of options, from general to customized solutions, which can be used in several areas of practice. Before integrating AI into daily practice lawyers should perform a thorough review and analysis of their workflow to determine which solutions best suit their needs. Key factors for making this decision include primary goals, time allocation, budget, and client demands. For example, litigation firms should explore technology-assisted review (TAR) and legal analytics solutions, while a firm with high-volume contract business would benefit more from contract analytics solutions. Another major decision is whether to perform the work in-house or to outsource it to an organization with AI offerings. In-sourcing business models, which legal departments commonly use, will require a team of individual to teach and train the software. Below are some key AI solutions that are currently available to the legal community.

**Predictive Coding**

The type of AI lawyers use most is predictive coding software. While many lawyers may not realize this, they have been using predictive coding tools to perform legal research for years.

Manual book research is essentially obsolete in the legal practice. Instead, lawyers utilize legal research applications like Westlaw and Lexis to aid with legal analysis and case arguments. Westlaw and Lexis use forms of predictive coding in order to pull relevant cases from just a few key terms.

However, when legal professionals think of predictive coding today, more complex and innovative tools come to mind. Many lawyers use TAR software to assist with key litigation tasks, such as discovery review and early case assessment. Users train TAR to recognize what data is relevant to a certain inquiry. This goes beyond the regular keyword search and can actually recognize key concepts and trends among documents. After sufficient training, the software can review a large document set and recognize relevant data in a matter of seconds. TAR technology is also constantly improving. Currently, the most advanced version is referred to as continuous active learning (CAL). These solutions are distinguished from earlier TAR versions by the ability to review data on a rolling basis. This is ideal for litigators since new documents frequently appear throughout the span of a case.

## Contract Analytics

Lawyers who have high-volume contract business can benefit from using contract analytics software. Before this technology, there was only contract management software available that had simple storage and document assembly functions. Contract analytics takes things to a whole new level. These solutions rely on AI algorithms to analyze and extract data from contracts. Just like TAR, knowledgeable users will need to train the software on what is relevant. Benefits include fast results, multiple language review capabilities, risk assessment, and improved contract management. For example, lawyers may use contract analytics to ensure that select clauses in a particular type of contract are identical. If the program identifies an inconsistency, it will generate suggested changes. The lawyer can then explore renegotiation and amendment.

## Legal Analytics

Legal analytics software has also emerged in the industry, especially among litigation firms. This technology uses AI to identify and predict legal trends – such as how a certain judge will rule on an issue, opposing counsel's arguments or case strategies, and expert testimony. Training is a crucial component for these solutions because many data sources, such as court dockets and briefs, are unstructured or contain complex legal terms and concepts. Using legal analytics helps lawyers evaluate strategy, risk, and success rate. Additionally, data can help lawyers reflect on their own strengths and weaknesses. All of this enhances their practice and increases the odds of a favorable outcome.

## Other AI Solutions

Additional AI-powered solutions legal professionals are exploring include:

- **Distributed ledger technology (DLT):** Blockchain is a DLT used for things such as cryptocurrency. This provides a platform for permanent, irreversible, and secure transactions. Lawyers are starting to encounter blockchain in many areas, such as payment for legal services, tele-attorney services, medical records and health databases, eDiscovery, and smart contracts.

- **Legal bots:** Some organizations now use bots on their websites to automate responses to legal issues. Since this can potentially raise some ethical questions, lawyers need to be careful when determining the capacity and function of the legal bot.

- **Auto-classification software, email threading, and near duplicate analysis:** All of these solutions can help legal professionals with information governance and discovery functions by promoting document organization.

## Potential AI Applications

The AI tools discussed above will only become more refined and useful as the technology advances. As such, the legal community will certainly begin to utilize these tools more often and eventually view AI as a staple in practice. Another potential application of AI in the future will be in the court systems. This could include judges using AI to help reach decisions or courts using AI to automate certain functions.

As AI usage increases in the future, it will also undoubtedly affect law firm billing practices – particularly with firms that bill at an hourly rate.[3]

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[3] Marchant, Gary E., The SciTech Lawyer "Artificial Intelligence and the Future of Legal Practice" p. 23 (2017).

Since AI programs can automate tasks that take lawyers hours to complete manually, firms will have to explore new ways to bill. This could include switching billing practices or billing some of the AI costs back to clients. Law students may also see AI incorporated into their curriculum in the future to help prepare them for practice.[4]

## AI and the Law

Since more lawyers are using AI, especially in litigation, some courts have started to address issues surrounding the technology. However, the case law on this subject is still limited and will surely develop in the coming years. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012) was the first case to outright approve TAR as an eDiscovery tool. In that case, the parties presented the court with a negotiated TAR protocol outlining how the software would be trained and used. Judge Andrew Peck gave the protocol his stamp of approval and noted that lawyers dealing with data-rich cases should seriously consider using TAR because it cuts down on time and money while yielding more accurate results.[5]

Since the *Da Silva Moore* decision in 2012, many cases have tackled various issues associated with predictive coding software and the results are all over the map. There is really no debate anymore that it is appropriate to use AI solutions during litigation and that a court will allow counsel to use this technology. Several courts have even encouraged counsel to use TAR to enhance the discovery process.[6]

Where the conflict lies is ruling on the steps and details associated with using these solutions. Some common issues courts are still grappling with include:

· Whether the court will require a party to use TAR

· If a party can start using TAR during the middle of discovery, after only performing manual review up to that point

· Whether parties must disclose their seed, training, or validation sets to the court and opposing counsel

· If a party may use TAR without receiving advance approval from the court[7]

For example, in *Kleen Products LLC v. Packaging Corporation of America*, Case No. 10-cv-5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012), plaintiff asked the court to require the defendant to use TAR after defendant had already performed discovery review using keyword searching. The judge denied this request, noting that the court will not force a party to use one specific type of technology, especially after that party already completed their document review. Instead, the court ordered the parties to meet and confer so they could formulate an alternate plan for review moving forward.[8] This is

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[4] *Id.*

[5] 18 Sedona Conf. J. 11-12 (2017).

[6] 18 Sedona Conf. J. 15-17 (2017). See also *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 109 (S.D.N.Y. 2012); *Malone v. Kantner Ingredients, Inc.,* Case No. 4:12-CV-3190, 2015 WL 1470334, at *3 n.7 (D. Neb. Mar. 31, 2015); *Deutsche Bank National Trust Co. v. Decision One Mortgage Co., LLC*, No. 13 L 5823, 2014 WL 764707, at *1 (Ill. Cir. Ct. Jan. 28, 2014); *Johnson v. Ford Motor Co.*, No. 3:13-cv-06529, 2015 WL 4137707 (S.D. W. Va. July 8, 2015).

[7] 18 Sedona Conf. J. 20-37 (2017).

[8] Id. at 20-21.

just one of many cases focusing on the nuances associated with using predictive coding software for eDiscovery review. In other cases dealing with this same issue, courts actually proposed or ordered that parties use TAR in order to streamline the document review process.[9]

The case law from the past seven years illustrates that the stance on AI as a practice aid has definitely evolved in U.S. federal courts. While there are still a myriad of issues that courts do not agree on, lawyers no longer have to fear that a court will deem their review methods as being unacceptable. The trend seems to be that courts favor AI technology and that agreements, cooperation, and transparency between counsel are key to avoiding conflict. Additionally, counsel should discuss using TAR or any other AI software early on in discovery.

At the state level, courts are also accepting AI solutions as appropriate litigation aids. In 2018, the New York Commercial Division court system added a rule encouraging lawyers to use programs like TAR to efficiently review discovery documents and to confer throughout discovery about what technology they intend to use.[10] Additionally, the Wisconsin Supreme Court approved algorithm use for criminal sentencing.[11]

Lawyers in other countries also use AI solutions to assist with their practice. Just as in the U.S., several international courts (including Ireland, Australia, and England) have explored the benefits of programs like TAR and have given their stamp of approval.[12] International approval is favorable for lawyers who have global cases where they need to cooperate with lawyers in other countries and become familiar with international court processes.

Besides document review, many lawyers will undoubtedly encounter AI several other ways related to their practice. For instance, some cases may be centered on AI technology and lawyers will need to educate themselves on certain topics in order to provide competent representation to clients. This could be a medical malpractice or product liability case where a smart device failed and caused someone injuries, thus resulting in a lawsuit. Additionally, the U.K. has plans to implement a dispute resolution system solely powered by the Internet to handle small value civil disputes without court intervention.[13] These are just a few of the many ways legal professionals around the world might encounter AI in the years to come.

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[9] See EORHB, Inc. v. HOA Holdings LLC, Civil Action No. 7409-VCL (Del. Ch. Oct. 15, 2012) (Hr'g Tr. at 66–67); Independent Living Center v. City of Los Angeles, No. 2:12-cv-00551, slip op. (C.D. Cal. June 26, 2014).

[10] Rules of the Commercial Division of the Supreme Court, Section 202.70, Rule 11-e(f).

[11] Marchant, Gary E., The SciTech Lawyer "Artificial Intelligence and the Future of Legal Practice" p. 22 (2017).

[12] 18 Sedona Conf. J. 45-46 (2017).

[13] Marchant, Gary E., The SciTech Lawyer "Artificial Intelligence and the Future of Legal Practice" p. 22 (2017).

## Maintaining ethical responsibilities

Whenever a lawyer incorporates a new tool into their practice, they must consider their ethical obligations. For example, the American Bar Association ("ABA") Model Rule 1.1 states that lawyers must provide clients with competent representation. What qualifies as competence will depend on the field of law and scope of representation. Say a lawyer gets a new case about an AI device, such as a medical malpractice case involving a smart device. In order to provide competent representation, the lawyer will need to educate themselves on the specific functions of the device and any legal issues associated with AI technology. Additionally, in 2012 the ABA modified Rule 1.1, requiring lawyers to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.[14] This includes understanding the basic features of technology commonly used in legal practice.[15] Since the legal practice is already moving toward AI usage being a norm, lawyers need to learn about this technology to remain competent. Performing extensive research about different AI solutions before deciding to use one can also help lawyers understand the benefits and risks.

Under ABA Model Rule 1.6, lawyers have an obligation to keep client data confidential unless a client provides them informed consent for disclosure. This is where privacy considerations and challenges with AI technology come into play.[16] It is important to use secure AI solutions and continuously monitor data security on a firm's network to ensure that sensitive client data is protected from hackers or inadvertent disclosure. Failing to safeguard data could result in sanctions or even license suspension, depending on the situation.

These are just a few major ethical duties that lawyers should be aware of when exploring the AI universe. It is important for lawyers to know all applicable ethics rules in the states they are licensed to avoid any future issues.

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[14] ABA Model Rule 1.1 - Comment 8, Competence

[15] ABA Formal Opinion 477R* (May 11, 2017; Revised May 22, 2017)

[16] The Sedona Conference discussed "Data security and privacy challenges in AI systems" at a meeting earlier this year. Legal professionals should keep tabs to see if they issue any publications on this topic in the coming months or years.

## Maintaining economic relevance

Firms that choose not to use AI may eventually lose clients and revenue. This is because the firms that use AI are likely more appealing to clients since they can save them time and money, while producing superior results and case outcomes. In order to keep up with the times and maintain economic relevance, lawyers will need to start exploring how they can incorporate AI into their practice and remain competitive in the legal market. For example, a 2019 survey of 700 lawyers in the U.S. and Europe concluded that firms using new technologies are more profitable. Firms that were "leading" in technology saw a 68% profit increase over the year, while those considered "transitioning" saw only 52% increase those considered "trailing" came in at a 38% profit increase.[17] This is illustrative of the major financial impact that new technologies like AI can have on the legal industry.

## Conclusion

AI is here to stay. It will change the way firms and their clients operate. Lawyers who understand more about AI will deliver better value and achieve more effective outcomes for their clients. It is difficult to imagine more compelling reasons to overcome whatever resistance individual lawyers may have to pursuing more complete understanding of this exciting technology.

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[17] Artificial Lawyer "Tech 'Leading' Firms Are Most Profitable – Wolters Kluwer Survey" (April 3, 2019) https://www.artificiallawyer.com/2019/04/03/tech-leading-firms-are-most-profitable-wolters-kluwer-survey/

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