



Using AI in Litigation

By J.R. Davidson

You Are Already Using Artificial Intelligence

Today, few of us ever visit our firm or law school libraries to research a legal question in printed material. LexisNexis went online in 1996.¹ Westlaw.com was released in 1998 as the first web-based version of Westlaw.² Whether we acknowledge it or not, we have some basic level of trust that LexisNexis has properly “Shepardized” and Westlaw has properly “KeyCited” the precedent we research. Faith in collectively accepted precedent is the fiat currency of the practice of law. But how do these search engines really work?

According to the Berkeley Law Library, “Both Westlaw and Lexis use a default Natural Language

search, similar to Google’s: type a keyword, a group of terms, or a question, and press Enter. Results appear ranked for relevancy.”³ Natural language search is powered by natural language processing, which is a branch of artificial intelligence, or “AI.” Even if you’re searching with Boolean operators (the “terms and connectors” most of us forgot after our legal writing classes), whatever database you are querying likely has used some form of machine learning to organize and restructure the cases, statutes, and secondary sources it contains. If you are using Westlaw, LexisNexis, Trellis, Fastcase, Casetext, or any of the handful of other search engines or their sub-features, the odds are high that you are already using “AI” in some format.

Docket Alerts/Client Alerts

The easiest way to begin using AI in litigation is to sign up for a docket alert service (e.g., Docket Alarm, Docket Alerts, etc.).⁴ In fact, most commercial litigators tap into new business opportunities by registering for alerts with some form of docket alert service.

At this point you may be asking: Do I not already receive alerts from Alacourt or PACER for cases I am involved in? Does opposing counsel not have to serve me with a copy of every filing? Sure, but even assuming you automatically receive alerts for cases where you are counsel of record, what about cases against your clients' competitors, or cases based on facts or questions of law similar to those your client is facing? While setting up multiple alerts for cases you are interested in may be cumbersome, legal analytics platforms with alert-only type services, like Courthouse News Service and Trellis, can help find similarly situated cases, generate alerts, and use the information these cases provide for deep legal analysis.

Trellis, for example, uses AI to provide clients with daily filing reports for new cases and docket entries.⁵ A daily filing report is much more than a traditional docket alert. It is a spreadsheet that contains detailed coverage of newly filed state and federal litigation actions, filed in a specific jurisdiction, curated just for the user. Reports can be emailed to subscribers every morning and include all case metadata (i.e., judge, party, counsel, practice area) as well as direct links to the docket and the complaint. This saves the time and expense of having an associate or staff member constantly check a court's docket.⁶

Generative AI

But doesn't AI often get things wrong? We all know, for example, the horror story of the New York attorneys who were sanctioned for filing a brief citing fake cases generated by ChatGPT.⁷ At one level, time and use refine the output AI provides a user. Unlike the machine learning and natural language processing AI we have already been using (whether we knew it or not), *generative* AI ("GenAI") technologies like ChatGPT (developed by OpenAI), Gemini (Google), Claude (Anthropic), and Llama (Meta), just to name a few, can create new material. These GenAI platforms typically operate in the form of question and response

between the user and a "chatbot." GenAI programs are built around, or "trained" on, among other things, large language models ("LLM") consisting of billions of words of ordinary language.⁸ Most of us are familiar with chatbots, but now with GenAI powered chatbots, not only can you ask questions, you can tell the chatbot to do something based on certain instructions (a "prompt") and it will *generate* the output in the form of something new: new text, new images, new audio, etc.

OpenAI made ChatGPT available to the public in November 2022, and its growth and adoption in use has exploded exponentially. With the recent explosion of GenAI technology, the legal world is slowly reacting to what could be landmark changes in the way attorneys practice law. This is true across both transactional and litigation practices. Lawyers are finding ways to incorporate AI, including GenAI, into their practices while still protecting client data, maintaining privilege, and avoiding pitfalls like those mentioned in the New York case above.⁹

Be Not Afraid

Lawyers should embrace AI with the understanding that it is a supplement, not a replacement, for human legal reasoning. "[J]ust like artificial intelligence is not intelligence, machine learning is not learning."¹⁰ It is almost cliché at this point, and that is because it is true: AI is never going to fully replace lawyers, but lawyers using AI may replace lawyers who do not.

When LexisNexis and Westlaw were digitized, lawyers who became adept at using Boolean operators combined with natural language search immediately gained an advantage over those who kept digging through the old Michie's and West's reporters. But lawyers still have to take the materials Westlaw or LexisNexis provides to craft arguments for their clients. Similarly, while AI and GenAI can now take some of the legwork out of legal research and writing, they are never going to replace a human attorney's ability to make value judgments. AI is only as good as the information it is trained on and the lawyer using it.

So how can attorneys, especially litigators, use AI to their advantage, while remaining ever mindful of its limitations? The following paragraphs will walk through just a few examples of how various AI technologies can give litigators a competitive edge.

Pleadings and Motion Practice

What do you do with these filings and their respective metadata? Let us use a real-world example. Everyday legal practice is filled with stories about attorneys asking their colleagues for anecdotes about a judge, a jurisdiction, a client, or opposing counsel – anything that may give them an advantage in litigation. What if you had this information at your fingertips via AI, and what if it were measurable?

Imagine you represent a manufacturer, as either in-house or local counsel, and your client is being sued for a workplace injury. You can now use a legal analytics platform to catalog every dispute filed against your client and its industry peers by browsing through an archive of daily filings reports and registering for new alerts for any cases involving workplace injuries. The outcome of this simple practice can reveal astounding, otherwise unidentifiable, insights about the current litigation landscape, all displayed in an interactive dashboard:

- How are the judges in different jurisdictions handling these types of cases?
- What types of arguments are holding sway?
- Does opposing counsel tend to settle early? Do they usually push through to trial?
- What are typical settlement values for cases with similar facts?
- Is there anything your client can put into practice now to help them mitigate their risk of exposure to litigation in the future?

This information can then help you “optimize” your motion practice. You can make a statistically informed decision on what motions are likely to succeed in a given forum. This in turn will likely save you time and your client money.¹¹

What about the actual work of motion practice, that is, drafting the documents? Most practicing attorneys would not dream of drafting a pleading or motion by

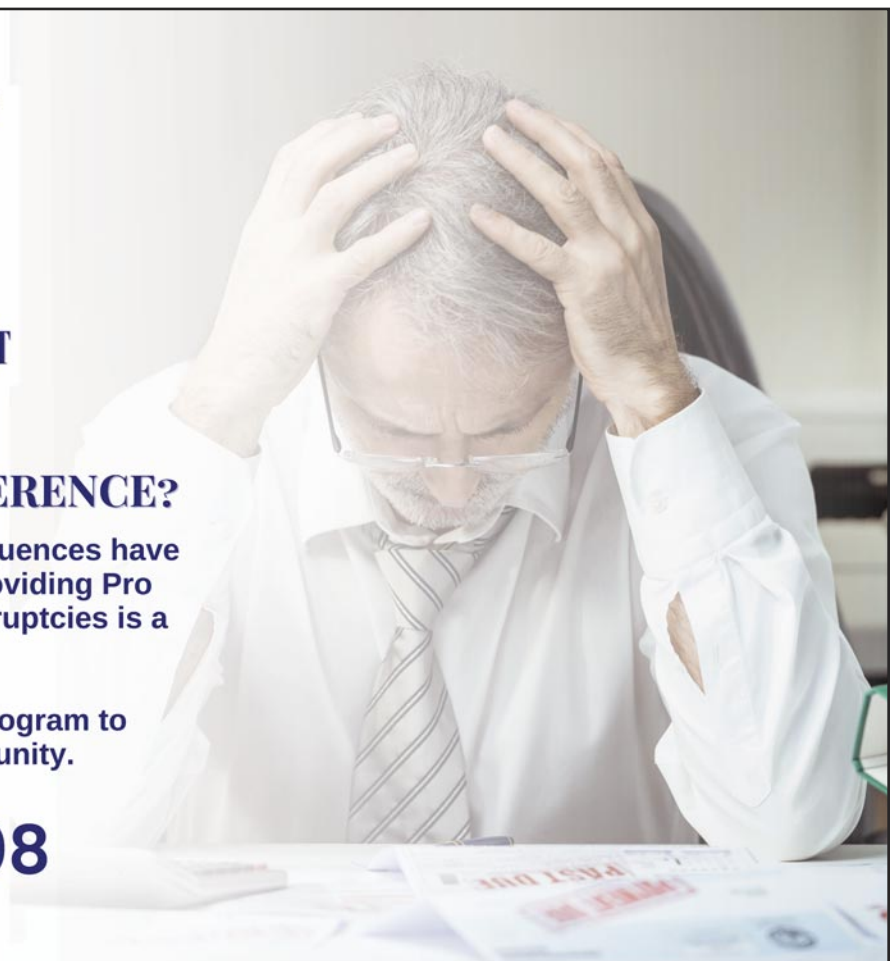
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hand, from scratch. We take bits and pieces of previous filings, cases, and other templates we have saved, and we mold them into a document that suits our client's needs. What if your docket alert or legal analytics service provided drafting capabilities within their respective platform, allowing you to copy and paste from filed documents which their system has already "read" (performed optical character recognition, or "OCR")?

But is OCR not just a fancy way of converting a PDF to Word to cut snippets from old documents? Could a good associate with Adobe not do the same? That is true. But what if you could train AI to *write like you write*.

Picture yourself as a senior partner who wants to work fewer hours while still guiding the younger attorneys at the firm. You can now mold certain tech to mimic your hard-won legal acumen. As legal tech experts Noah Waisberg and Dr. Alexander Hudek have noted, "[o]ne of the most interesting implications of artificial intelligence is that if you teach it to be like you, to answer questions as you would, or to make the legal decisions that you would make in a specific situation, you could – effectively – be doing work when you're not actually doing work. Consequently, the retiring senior partner mentioned above could be vacationing in the Cayman Islands while his insights are benefiting attorneys in his former firm. If this sounds closely like a 'robotic' attorney, it is, minus the tailored suits and cliché stock photos."¹² These developments are real, and they are happening in real time.

Discovery

Most litigators are familiar with electronic discovery ("eDiscovery") platforms that help manage document review of electronically created information. These services help attorneys filter through mountains of emails, letters, contracts, invoices, receipts, and other electronic documentary evidence (or print material that has been digitized), both to provide relevant discovery responses and to scour opposing counsel's production. Still, reviewing hundreds or thousands of emails to find the handful that are responsive to a discovery request is time-consuming, expensive, and not always successful.

AI is having a tremendous impact on this search-and-review phase of discovery. While eDiscovery platforms have long been able to perform OCR to sort and filter otherwise unsearchable documents, this has only

marginally reduced the time spent manually reviewing eDiscovery material. With AI, attorneys can now go through a relatively small sample of documents to train the eDiscovery platform on what they are looking for. The system can then perform a search of the remaining records to retrieve relevant material, while simultaneously documenting the math and statistical reasoning it used to later justify its methods to both the requesting attorney and the court.¹³

Solo practitioners and small firms can use this technology to triage their document review, allowing them to take on larger and more complex cases with confidence. In-house counsel can similarly use these features to reduce spending. “You can do data discovery and review with AI, and then use outside counsel to do a more thorough analysis of the most relevant data.”¹⁴

Conclusion

Legal analytics platforms are unpacking the silos that have previously rendered data inaccessible to all but the largest of firms that had the staffing capabilities to chase it down. The practice of law is moving away from gut instinct and towards actionable data. However, “Data, like technology, has no intrinsic value,” writes Mark Cohen, CEO of Legal Mosaic.¹⁵ “It acquires enormous significance, however, when it is mined, parsed, and turned into information that is analyzed and crystallized by data analytics.”¹⁶

According to Waisberg and Hudek, “Today, AI enhances lawyers, rather than replacing them. AI is helping lawyers do work that they never would have been able to do before. Instead of framing the decision as whether to trust AI or a human lawyer, consider whether you should trust a lawyer doing work the same old way over a technology-enhanced one. We wouldn’t.”¹⁷

Attorneys are constantly required to make judgment calls, at any given moment, based on information about dozens of cases. Whether we know it or not, we each do this by mentally developing our own probability distributions. Each has its own shape and range of possibilities. We know that some outcomes are more likely than others and that some predictions command more confidence than others. Some attorneys make these decisions on gut feeling and instinct. Some rely on legal analytics. *Why not use both?*¹⁸ ▲

Endnotes

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8. Timothy B. Lee & Sean Trott, *A jargon-free explanation of how AI large language models work*, ARS TECHNICA (July 31, 2023), <https://ars.technica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/>.
9. Any reference to AI in the remainder of this article will include GenAI, unless specified otherwise.
10. Andriy Burkov, *THE HUNDRED-PAGE MACHINE LEARNING BOOK*, xvii (2019).
11. See Noah Waisberg & Dr. Alexander Hudek, *AI FOR LAWYERS* 127 (2021).
12. *Id.* at 73.
13. *Id.* at 100-106.
14. *Id.* at 56 (quoting Mary O’Carroll). See also Stephanie Wilkins, *Legal Tech’s Predictions for KM, Data Governance & AI Usage in 2024* (January 16, 2024), <https://www.law.com/legaltechnews/2024/01/16/legal-techs-predictions-for-km-data-governance-ai-usage-in-2024/>
15. Clark *supra* note vi.
16. *Id.*
17. Waisberg & Hudek, *supra* note xi.
18. Clark, *supra* note vi.

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