

**Wednesday, October 23, 2019
3:30 PM - 4:15 PM**

Workshop 7

Using Artificial Intelligence in Your Real Estate Practice: Practical Tips and Ethical Issues

Presented to

**2019 U.S. Shopping Center Law Conference
Marriott Marquis San Diego Marina
San Diego, CA
October 23-25, 2019**

by:

Rachael Philbin
Counsel
Perkins Coie
131 Dearborn
Chicago, IL
rphilbin@perkinscoie.com

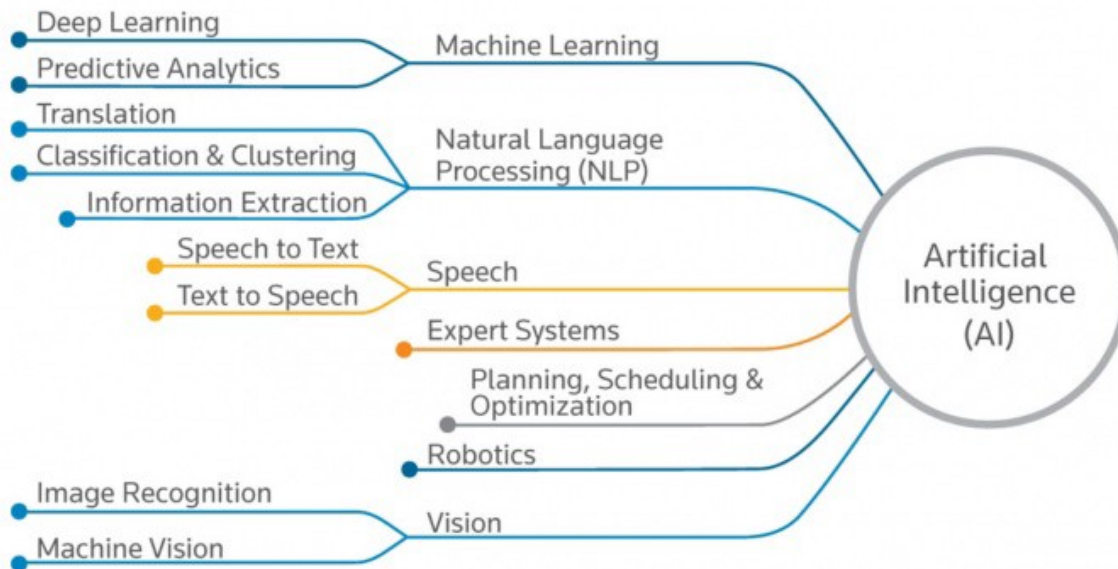
Lindsay Smith
Legal Knowledge Engineering
Manager
Kira Systems
370 King St. W, Box 67, Suite 500
Toronto, ON M5V 1J9
Lindsay.smith@kirasystems.com

Artificial Intelligence in Context

"It's only AI when you don't know how it works; once it works, it's just software."

-Unknown

Artificial Intelligence ("AI") is simply defined as the ability of computers to perform tasks that mimic human intelligence. There are many branches of computer science that make up "artificial intelligence" which can be combined in a variety of ways to assist with various tasks. This is why when there are discussions of AI, it can really encompass a number of different technologies from robotics through machine learning.



Within the context of legal practice, the areas of AI that are primarily being harnessed include machine learning, natural language processing and expert systems.

While AI is defined as mimicking human intelligence, AI technology really supplements human work, but cannot replace many aspects of it. This is especially true for activities that require judgment, perception or negotiation. There is an art to applying AI to legal work that involves identifying the appropriate technological solutions, which requires breaking down work into tasks, some of which can be automated and some of which cannot.

Artificial Intelligence in Transactional Legal Practice

"Lawyers and machines are collaborators, not mortal enemies."

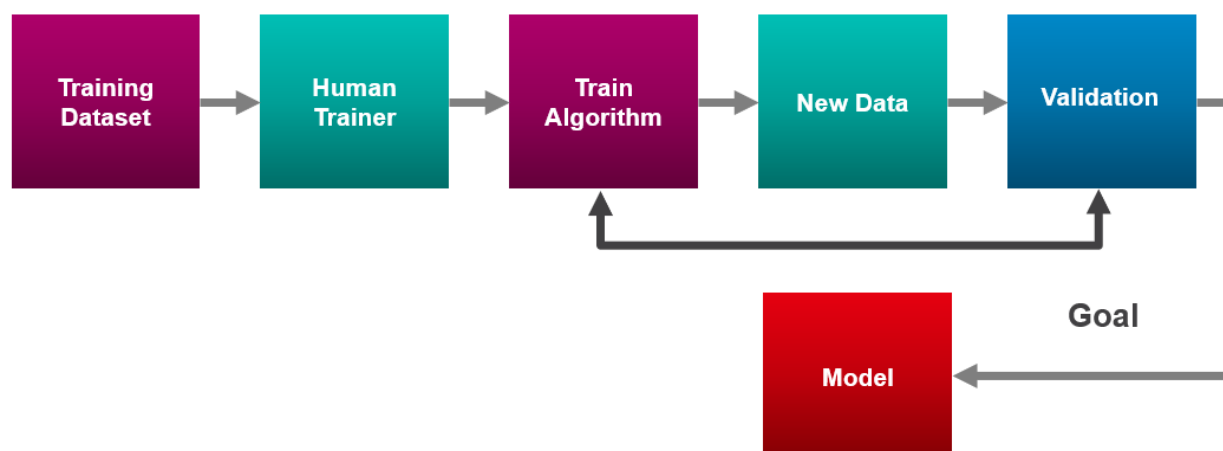
-Mark Cohen, Legal Mosaic

The development of AI technology for use in legal practice is a direct response to the data explosion of the 21st century. The proliferation of email, document management systems to store massive amounts of data has necessitated products to address access, identification, analysis and production of documents. The use of AI technology for legal practice has been ongoing for over a decade, however, the use in transactional matters is somewhat new. Factors that have influenced its gaining acceptance include a desire by clients to streamline processes, reduce costs, and increase accuracy and quality.

One of the most widely used types of AI in transactional practice is supervised machine learning. Supervised machine learning (SML) differs from unsupervised machine learning in that it involves human input to train a system. Unsupervised machine learning involves an algorithm that infers patterns within data but has no reference to a sample. Supervised Machine Learning involves training an algorithm to identify similar objects to create a model to use across a larger set of data. A SPAM filter in an email software is a commonly known supervised machine learning model.

In the context of transactional practice, the objects that are being identified, generally consist of similar contract terms and provisions. The process of SML involves using a sample set of data (or contracts) to train an

algorithm to identify similar contract terms in a larger set of contracts. The process is typically iterative in nature and it involves lawyers or other subject-matter experts validating the results of what the algorithm identifies as similar. As more rounds of sample sets are provided to the system with the lawyer validation feedback loop, the more accurate the algorithm gets at identifying the appropriate terms. Once the algorithm is correctly identifying the terms for which it has been trained, a model is created which can then be used on larger or different sets of contracts.



Many of the products that are available have out-of-the box models that can be used and some provide the option of training a unique model. These products can be leveraged in due diligence context or contract review for compliance or updating purposes.

In the former days of due diligence, lawyers would have to pour over contracts and review them page-by-page to identify the relevant terms and provisions and then copy or summarize those provisions into a table. Today, out-of-the-box AI products or pre-trained models have changed that process significantly. To start a project using AI for due diligence or a contract review, a template or set of contract terms that the party is interested in finding must be identified and created. For example, if a party is only interested in controlling law and assignment, a template to find those two terms is created. Once that is completed, the contracts are run through the software and a report is generated. The report will identify the contract by name and will have a column for each provision (e.g. controlling law and assignment). If the contract contains the provision, the provision language will appear in the row for that contract. If the contract does not have the provision, the cell will appear blank. For most AI software, this process will take minutes. These reports can be used as generated but to ensure accuracy, lawyers should review the report and validate the results against the actual contracts. It is also recommended that the lawyers sampled the contracts on the report that do not have the relevant provisions for false-negatives. While this still requires attorney review, the report points the lawyers to the contracts that contain the relevant provisions and where they are in the contract. In addition to be faster, the use of AI is more accurate.¹

Another area of AI that is used often in transactional practice is expert system automations. Expert systems automation is a rules-based logic system that applies human-made rules to sort and utilize data. Examples of mainstream expert systems would be out-of-the-box products for preparing tax forms or applying for mortgages. Expert system automation can be combined with other types of AI systems to increase efficiencies across many parts of a deal or project. For example, once an SML AI software tool extracts relevant contract provisions from unstructured contract to a structured data format (a report), the structured data can then be used with an expert system to auto-populate disclosure schedules, change of control notifications or consents.

Case Studies

Case Study 1

A law firm (“Law Firm A”) represented a large hospital in a transaction which involved restructuring of the involved entities without transfer of the underlying assets. A key concern in the transaction was whether there

¹ Studies have shown that this type of software is as or more accurate than human review.
<https://www.prnewswire.com/news-releases/artificial-intelligence-more-accurate-than-lawyers-for-reviewing-contracts-new-study-reveals-300603781.html>

were any restrictions on change of control in the entities' third-party vendor contracts and leases. The Law Firm was provided with the entirety of the client's contract management system, over 8,000 documents. The client needed all of the vendor contracts reviewed for change of control restrictions. Many of the documents were not contracts although discerning which documents were contracts and which documents were not could not be done easily.

Law Firm A employed AI to facilitate the review. First, the contracts were run through a pre-trained model that has already been trained to identify change of control provisions. The AI tool took about 10 minutes to generate a report for 8000 documents. Second, the contracts and AI output were loaded into a cloud-based document review platform used for eDiscovery. The eDiscovery platform was employed in this project because it allowed for rapid review of documents without the time associated with opening and closing documents in image or native format. It also allowed for easy organization by linking the contracts to their amendments and exhibits. Furthermore, the eDiscovery platform had a robust keyword search engine which was used to perform quality control. Commonly found language in change of control provisions were searched within the database to pick up any contracts the AI software did not identify. A small number of documents were found and added to the attorney review portion of the project.

Once the eDiscovery platform database was set up, a team of lawyers validated the AI output against the actual contracts and coded each contract in the database by identifying whether a change of control restriction was present, what type of restriction it contained, and the exact language from the contract. The results of the review were provided to the client in a table exported from the document review platform. Using AI technology enabled Law Firm A to identify a true contract universe of 800 documents, only 10% of the original volume. In the end, the lawyers were able to focus on the smaller contract universe, quickly review and validate the results and perform quality control all within the client's tight deadline.

Case Study 2

A law firm ("Law Firm B") represented a client in the acquisition of a multi-tenanted space that included review of forty-seven fee components, eight ground leases, and 245 related leases. By using AI, Law Firm B was able to review the underlying real estate documents nearly five weeks ahead of the schedule agreed to by the client.

Case Study 3

A law firm ("Law Firm C") represented buyers in the acquisition of student housing portfolios. Law Firm C used both pre-trained AI search models and custom-built models specific to the student housing practice to extract the relevant information out of the underlying real estate documents. By using AI, Law Firm C reduced their clients' transaction risk by reviewing all 500-1000 leases in connection with the acquisition. Without the AI tools, Law Firm C would have only been able to review a small sample of the related leases due to cost and timing factors.

Lessons Learned from Using Artificial in Transactional Legal Practice

Artificial intelligence is not appropriate for every due diligence or contract review. There are some factors that must be considered before implementing the use of AI technology into a project. These factors will determine if the use of the technology will be successful and will aid in streamlining processes.

First, to train a data set, it must be substantial in size. Small numbers of contracts are not ripe for AI technology, because the process requires enough examples to train the algorithm to the point where the system can accurately identify like objects. If the total number of contracts to review is small, there may not be enough examples in the set to properly train the model. Likewise, if the total contract set is small, the whole set may have to be used to train the model. In these circumstances, manual review may be more cost-effective. To successfully use SML AI, the project requires a large enough data set and enough pristine examples (with enough variation) to allow the system to train properly.

Second, training a model takes time and a subject matter expert that is familiar with the relevant provisions. As described above, model training is an iterative process and may require several rounds of training before the model stabilizes. This investment of time can be very valuable when the goal is to use the model against a substantially large number of contracts or if it is going to be used over a long period of time. However, if the goal is to review a small number of contracts in a short amount of time, model training may not be worth the

time. The out-of-the-box algorithms are helpful in this respect because most are pre-trained on most commonly found contract terms, including those found in leases. However, if the contracts are unique in nature or the terms that are of the most interest are specific to a particular company or industry, these products may not be able to accomplish the goal.

Third, with every SML product, bias is a factor that must be considered. Model bias is the result of the model regularly learning the wrong thing because of the failure to take into account all the information. This can occur because the model is trained on a specific set of documents. For example, common models are often trained on publicly available data. Using a pre-trained model for standard contract or lease terms can be a great way to make the process more efficient, however, they may not be accurate when analyzing contracts for a private company or a specific industry, with unique terms and language.

Finally, AI software is not great at judgment. AI software is a tool that can be used when there are very defined parameters. For example, one can use an AI tool to find all assignment provisions. It cannot however, find all provisions restricting business because it is not analyzing the provisions for its impact. In that regard, if a contract review requires a great deal of judgment or involves a “I’ll know it when I see it” approach, a traditional review will be a better.

Legal Ethics and the use of AI

As with all changes in the law and in legal practice, ethical duties arise. This is true for the use of technology and AI software as well. The use of advanced technology and AI implicates a number of rules of ethics, including among others, ethical issues surrounding competence, supervision and fees.

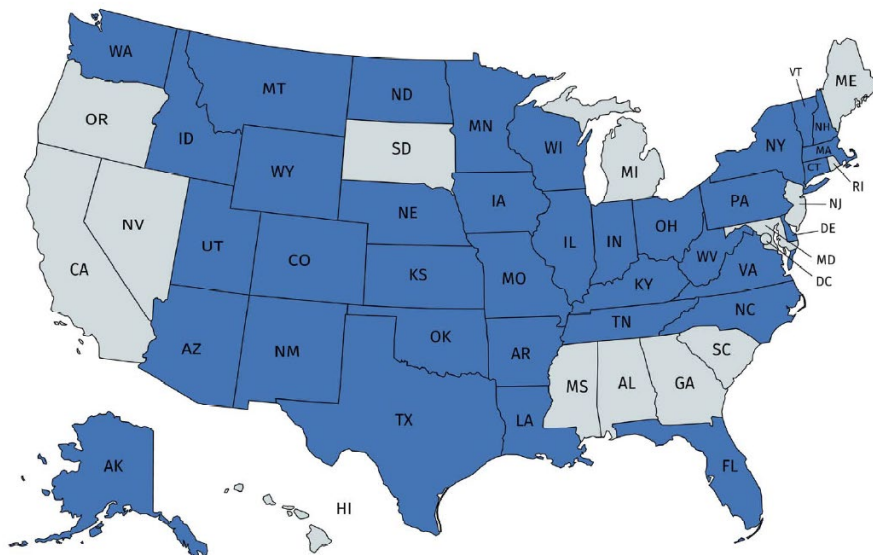
In reaction to the ever-increasing use of technology in legal practice, there was a major change to the ABA Model Rule 1.1² regarding a lawyer’s duty of competence. In 2012, the ABA adopted Comment 8 to the rule that not only required lawyers to possess competence in the practice of law but also with respect to technology. ABA Rule 1.1, Comment 8 states.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with *relevant technology*

Since the adoption of Comment 8, 36 states have adopted similar duties of technological competence that follow the model rule.

² Rule 1.1, Competence, American Bar Association Model Rules of Professional Conduct, 9th Edition (2019)



What is required of a lawyer with respect to the technological duty of competence will depend on the context. ABA Comment 8 and corollary state rules require that lawyers understand the technology they are using for their legal practice. At the very least, a lawyer should understand what they do not know and find the appropriate resources to fill the knowledge gap. This could include hiring another lawyer or outside party to assist with using the technology and act as a subject matter expert. Advanced technology and AI software has been in use in litigation for over a decade and cases coming out of the eDiscovery context are illustrative on this issue. For example, a Delaware Chancery court ordered sanctions against a lawyer who admitted to the court that the discovery violations were, in part, due to his lack of knowledge with respect to eDiscovery technology. Specifically, when questioned by the court, the lawyer stated “I have to confess to this Court, I am not computer literate. I have not found presence in the cybernetic revolution. I need a secretary to help me turn on the computer. This was out of my bailiwick.” *James v. Nat’l Financial LLC*, C.A. No. 891-VCL, 2014 WL 6845560, *12 (Del. Chan. Dec. 5, 2014). In response to that the Court stated.

Professed technological incompetence is not an excuse for discovery misconduct. ...’[D]eliberate ignorance of technology is inexcusable.... [I]f a lawyer cannot master the technology suitable for that lawyer’s practice, the lawyer should either hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant who understands the practice of law and associated ethical constraints.’ Judith L. Maute, *Facing 21st Century Realities*, 32 Miss. C.L.Rev. 345, 369 (2013).

Id. While Rule 1.1 does not require lawyers to become data scientist, it does require at least knowledge about the technology they are using, the risk it imposes for their clients and necessitates finding knowledgeable resources when employing technology.

For lawyers who do not have not a sound understanding of technology, employing a tech-savvy lawyer or outside consultant can be an easy solution. With that said, however, duties of supervision are still required. ABA Model Rules 5.1³ and 5.3⁴ impose an obligation on lawyers who have a “direct supervisory authority” over other lawyers and nonlawyers. Specifically Rule 5.1 requires that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Likewise, Rule 5.3(b) requires lawyers who employ non-lawyers must also “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” The interplay of Rule 1.1 and Rules 5.1 and 5.3 requires a supervisory lawyer that employs lawyers and nonlawyers to assist with technology to ensure that they are competent to perform the technological tasks at

³ Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, American Bar Association Model Rules of Professional Conduct, 9th Edition (2019)

⁴ Rule 5.3, Responsibilities Regarding Nonlawyer Assistance, American Bar Association Model Rules of Professional Conduct, 9th Edition (2019)

hand. See ABA Formal Op. 08-451, *Lawyer's Obligations when Outsourcing Legal and Nonlegal Support Services* (Aug. 5, 2008)

Finally, when considering the use of AI technology or other advanced technology for use in legal practice, ethical duties related to fees must be considered. ABA Rule 1.5 states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” Whether a fee is reasonable depends on many factors. Specifically as it relates to the use of AI technology, the following factors are particularly relevant: (1) the time and labor required, (2) the fee customarily charged in the locality for similar legal services, and (3) the time limitations imposed by the client or by the circumstances.⁵ Lawyers have been sanctioned when they have overbilled for simple tasks or did more work than was necessary. See e.g. *In re Vanderbeek*, 101 P.3d 88 (Wash. 2004) (lawyer disbarred for overbilling for simple form pleadings, withdrawal notices and short letters); *Coffey's Case*, 800 A.2d 403 (N.H. 2005); *In re Dorothy*, 605 N.W.2d 493 (S.D. 2000). The use of AI can significantly decrease the amount of time certain tasks used to take. This impacts what the customary charge will be it gains wider acceptance and use. What once took many lawyer hours to complete can now be done in a matter of minutes. Likewise, the efficiencies that AI brings makes deadlines easier meet without the need of additional lawyer support. These factors are extremely important as the use of AI gains because it is simplifying tasks that once required much more time and expense. Not employing AI, or at least not considering its use, could, in the near future, subject lawyers to ethics violations for overbilling or performing more work than is necessary.

⁵ For a full list of factors see, Rule 1.5, Fees, American Bar Association Model Rules of Professional Conduct, 9th Edition (2019)