

## IS AI THE FIGHT CLUB OF LEGAL TECHNOLOGY?

Artificial Intelligence has become the biggest buzz word in legal technology since, well the last biggest buzzword. ECA, TAR, Blockchain, Analytics, Big Data, Collaboration, Disruption, Innovation. Every 6 months we have a new “big thing” and right now it’s AI.

Articles are constantly harping on the rise of the machines that AI portends. Gartner includes AI on their list of the top 10 strategic technology trends of 2019 and even estimates that 80% of emerging technologies will be built on a foundation of artificial intelligence by 2021. In a Law Technology Today article, Andrew Ng, Co-Founder of Coursera and Adjunct Professor of Computer Science at Stanford University, says AI is the new electricity. “Just as electricity transformed almost everything 100 years ago,” he explains, “today I actually have a hard time thinking of an industry that I don’t think AI will transform in the next several years.”

And in that same article, Ajith Samuel technologist and co-founder of eDiscovery company Exterro, says that:

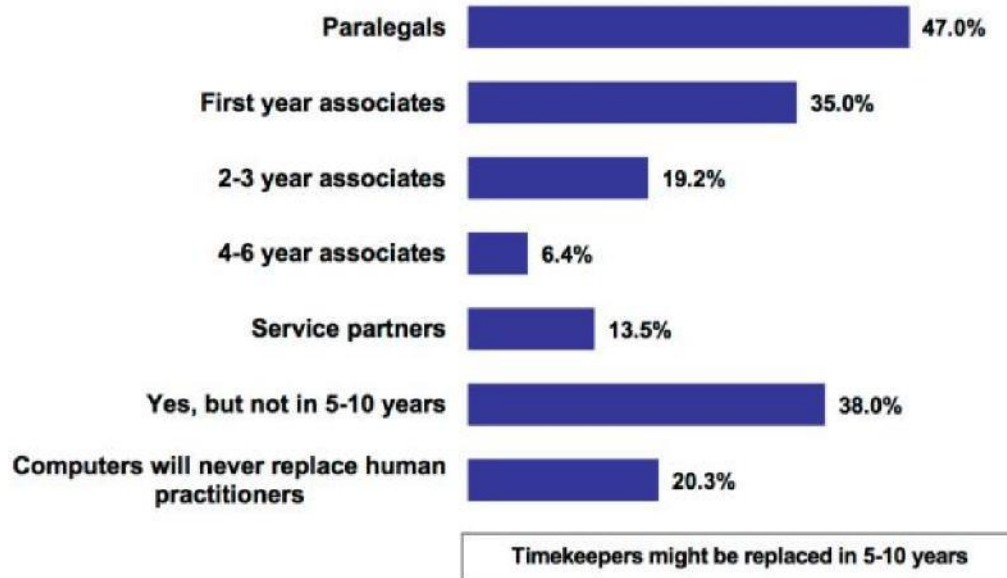
1. Using AI will become “frictionless,” meaning that it will be ever more seamlessly integrated into the e-discovery process.
2. AI will move out of the review phase, earlier in the EDRM, helping legal teams get to the facts of the matter faster, cheaper, and smarter than ever before.
3. AI will play an increasing role in orchestrating the e-discovery process, streamlining the process and improving efficiency.

<https://www.lawtechnologytoday.org/2019/04/artificial-intelligence-will-change-e-discovery-in-the-next-three-years/>

And let’s not forget the 2015 survey by Altman Weil of 320 firms with at least 50 lawyers on staff which found that 35 percent of the leaders at those firms (responding anonymously) believed some form of AI

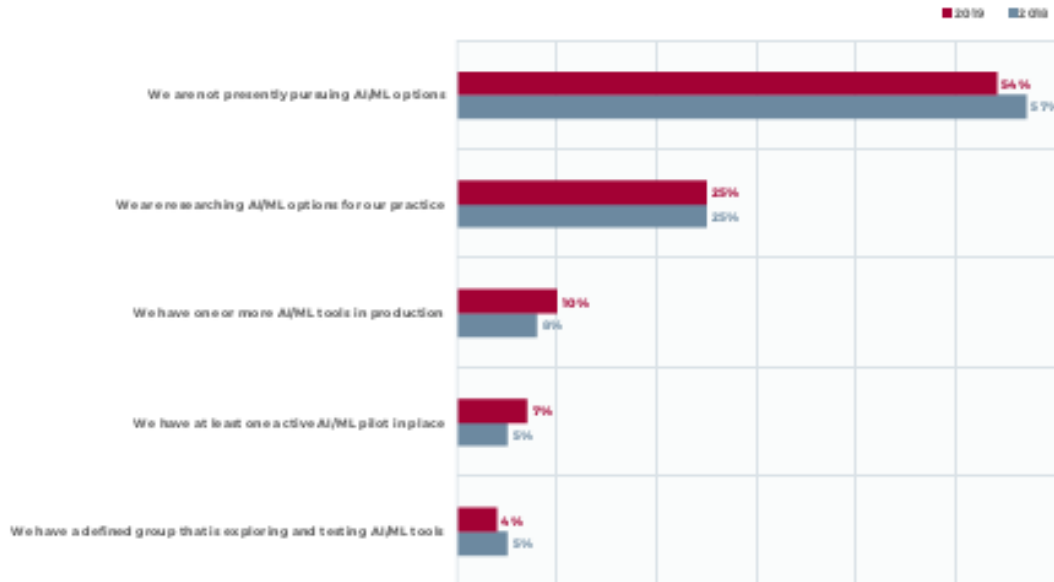
would replace first-year associates in the coming decade. 20 percent of those same respondents said second- and third-year attorneys could also be replaced by technology over the same period and half said that paralegals could be killed off by computers. (See graphic below)

**Can you envision a law-focused 'Watson' replacing any of the following timekeepers in your firm in the next 5 to 10 years? (Select all that apply.)**



But if we are to believe the latest ILTA survey, that simply isn't happening. The annual survey of the International Legal Technology Association was released on Nov 5 2020 and reported answers from 537 firms, representing more than 116,000 attorneys and 240,000 total users. With regards to IA, it finds that just over 50% of respondents are not "...presently pursuing any IA option" and only 25% are actively researching an AI option. Respondents with active pilot projects or study groups were 7% and 4% respectively with only 10% reporting an active AI tool deployment. See graphic below

## What is your firm's current strategy on Artificial Intelligence/Machine Learning (AI/ML)?



ILTA'S 2019 TECHNOLOGY SURVEY RESULTS

<https://www.iltanet.org/resources/publications/surveys/2019ts?ssopc=1>

So what is going on here? We hear lots of talk about AI but not much actual usage. Part of the problem is, I believe, definitional and actual definitions of AI are in short supply.

One recent article broke out AI into 6 categories

- Due diligence – Litigators perform due diligence with the help of AI tools to uncover background information. We've decided to include contract review, legal research and electronic discovery in this section.
- Prediction technology – An AI software generates results that forecast litigation outcome.

- Legal analytics – Lawyers can use data points from past case law, win/loss rates and a judge’s history to be used for trends and patterns.
- Document automation – Law firms use software templates to create filled out documents based on data input.
- Intellectual property – AI tools guide lawyers in analyzing large IP portfolios and drawing insights from the content.
- Electronic billing – Lawyers’ billable hours are computed automatically.

<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>

And an actual standard (or standards) for AI has been slow to develop with the first just recently published by the Organization for Economic Co-operation and Development (OECD) which [adopted and published its “Principles on AI”](#) on the Law and AI blog.

<http://www.lawandai.com/>

But in all that discussion, where are the AI use propositions for eDiscovery? Well the problem there is that eDiscovery vendors are traditionally close mouther about their systems. And since a primary feature of AI as mentioned by Ajith Samuel above is its “frictionless” adoption, then AI implementation is hidden by both design and practice. Legal technology has become more Fight Club than computer lab and AI has become the worst example of that proposition.

I’ve written before that all this emphasis on new technology reminds me of my old friend, the late Browning Marean. He was a great fan of the writings of Ray Kurzweil, the technologist and futurist who wrote *The Age of The Intelligent Machine*. Browning’s favorite Kurzweil was *The Singularity Is Near: When Humans Transcend Biology*, which posited that technological advances would irreversibly transform

people as they augment their minds and bodies with genetic alterations, nanotechnology, and artificial intelligence.

I however am more mindful of another tenet of the Singularity, that exponential increase in technologies will lead to a point where progress is so rapid it outstrips humans' ability to comprehend it. To me we are losing sight of the proposition that people are slow and computers fast but people are smart and computers are dumb.

And in fact, some of today's greatest minds in technology fell the same way Stephen Hawking has stated, in an [op-ed](#) which appeared in *The Independent* in 2014, "Success in creating AI would be the biggest event in human history. Unfortunately, it might also be the last, unless we learn how to avoid the risks.." His fear? As posted in a separate [interview with BBC](#), it was simply stated: "humans, limited by slow biological evolution, couldn't compete and would be superseded by A.I."

Hawking recently joined Elon Musk, Steve Wozniak, and hundreds of others in issuing a letter unveiled at the International Joint Conference Buenos Aires, Argentina warning that artificial intelligence can potentially be more dangerous than nuclear weapons. Even Bill Gates has expressed concerns and [during a Q&A session on Reddit](#) in January 2015, said "I am in the camp that is concerned about super intelligence. First, the machines will do a lot of jobs for us and not be super intelligent. That should be positive if we manage it well. A few decades after that though the intelligence is strong enough to be a concern. I agree with Elon Musk and some others on this and don't understand why some people are not more concerned."

Sound far-fetched? Well then, consider it from our perspective as attorneys. What is the ethical dilemma of bestowing legal responsibilities on robots? Does not all this talk of AI undermine our ethical duties to manage our client's matters if we don't really understand how these programs work?

As far back as 2013, Peter Geraghty (Director of the ETHICSearch, ABA Center for Professional Responsibility) and Susan J. Michmerhuizen (ETHICSearch Research Counsel) wrote an article for *Your ABA Enews* called *Duty to Supervise Nonlawyers: Ignorance is Not Bliss*. Although the article focused on issues with paralegals and support staff, I would suggest that computers also qualify as non-lawyers and the concerns mentioned in the article should apply to them and the technical experts who use them as well

This issue arises constantly when vendors run computer searches of documents and then produce directly to opposing counsel. The non-supervised release of privileged material can be an enormous problem for a firm, so much so that Geraghty and Michmerhuizen noted an excerpt from Comment [3] to Rule 5.3 which states:

***... Nonlawyers Outside the Firm***

*[3]A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.*

Keep this in mind when retaining a technical expert or using software to search and produce. Do you really understand what is going on? How much work being done by computers are you actively supervising in a knowledgeable manner? In these days of a duty of technical competence, attorneys cannot simply delegate to others, even their clients, the responsibility of understanding technology. I would suggest that blindly relying on AI or other computer

intelligence to make decisions does not rise to that necessary level of understanding.

Always remember that technology is a tool and humans use tools not vice versa. The ultimate decision-making about what tool to use and how to use it resides with you, the attorney. As I have said before, we need to keep the attorney in AI.

It's not enough to be aware of AI, we have to understand AI. Or, as the great technologist Elvis Aaron Presley once said, "A little less conversation, a little more action please."



*About the Author*



**Tom O'Connor**

Gulf Coast Legal Tech Center  
E-Discovery Committee Chair