



COVER STORY: LITIGATION STRATEGY



WELCOME TO YOUR NEW WAR ROOM

How technology is finding its way into litigation case strategy: what to expect, how to evaluate the impact, and how several legal departments—at Cisco, Humana, and United Airlines—are already putting it to use.

The digital revolution is disrupting business on a daily basis as companies leverage technology to become smarter, more connected, more efficient, and more responsive. To a large extent, however, their legal departments and their law firms have been on the periphery of the profound technology-driven shifts that have transformed the business world. But that is all changing. Today, technology is not only streamlining legal operations, it's also finding its way into litigation case strategy—a move that will reshape the traditional formulas for courtroom success in the coming years.

There are several converging trends driving this change. One is the evolution of the technology itself, with rapid innovation in everything from analytics and artificial intelligence (AI) to knowledge management and videoconferencing. Law departments have already achieved real benefits from technology, but now those tools and solutions are becoming more sophisticated

and easier to use, and they are reaching into every aspect of the litigation cycle.

Meanwhile, law departments have a growing need for technology tools as they deal with an expanding universe of information from a variety of sources. “Data keeps growing exponentially, and obviously, in litigation, you want to get to the key pieces of evidence and find what’s most relevant and responsive,” says Heather Kolasinsky, senior legal counsel at the Louisville, Kentucky-based **Humana** health care company (for more on Humana’s approach, see sidebar on page 11). “The haystacks keep getting bigger, and that costs money and time. So you need to use technology to help you find the right information.”

The nature of litigation is changing, as well. “The overall trend today is for companies to take fewer cases to trial, but to take the cases that are more complex and significant to the business all the way because the client needs to take a stand or a case can set precedent for a docket,” says [Kent Goss](#), a Crowell & Moring

partner and a member of the firm's [Litigation Group](#) Steering Committee in Los Angeles. "This drives costs up, and technologies such as analytics and AI-based automation will be needed to manage those costs." In addition, he says, "when you're litigating a high-impact case, you need to understand how to leverage technology to realize each and every incremental advantage. Litigation is an inexact science. The ability to gather and distill information quickly is critical to setting case strategy. The more solid data you have, the better your analysis is going to be and the more likely it will be that you have a good outcome."

By using technology to gain greater access to information, lawyers can find more accurate answers to critical litigation-related questions, from where and when to file to which arguments are likely to resonate with judges and juries. Trial lawyers on both sides of the courtroom are starting to harness technology to secure an edge—and the ability to use such tools will only be more important in the coming years.

In short, technology is evolving into a critical tool that can feed litigators the targeted information and insights they need to win—and contain budgets along the way. "For tomorrow's litigators, legal acumen and the ability to argue persuasively in court will still be critical. But now those litigators must understand how to leverage technology like never before. The days of a trial team without tech expertise are long over," says [Shari Lahlou](#), a partner at Crowell & Moring in Washington, D.C., and co-chair of the firm's [Antitrust Group](#). "For example, whether you're in a bench trial or a jury trial, it's important to focus on the most powerful points and avoid tangential arguments and documents. Leveraging technology in the right way can help funnel critical information to allow the litigator to more effectively put together the story with the evidence that supports it—and then deliver a crisp presentation of it in court."

TARGETING KEY LITIGATION PROCESSES

Digital tools are already an important consideration for legal departments. "We are constantly looking for areas where technology can automate work or help us be more efficient and ultimately enable our in-house team to focus on more strategic, higher-value work," says Leslie McKnew, vice president, litigation, at [Cisco](#) (for more on Cisco's approach, see sidebar on page 7).

"Technology has brought greater efficiency and effectiveness to legal operations and back-office processes, and it can do the same for litigation strategy," says [Brian Paul Gearing](#), an [Intellectual Property Group](#) partner at Crowell & Moring in

New York. "There is no single silver-bullet technology that can address all of the challenges involved in a trial, but there are a variety of technologies that are opening new doors in early case assessment, e-discovery, litigation strategy, and even jury selection. Every litigator needs to embrace the use of technology as a core component of trial readiness to up their game and to serve their clients well today and into the future."

EARLY CASE ASSESSMENT

"Technology is going to be key to determining what to do with a case as soon as it comes in the door," says Humana's Kolasinsky. "What is your risk in this case? What's the time frame? How long should this case sit on your pile before you settle it or try it? What are all the various outcomes that can happen? You have got to figure those things out fairly quickly and accurately, and technology is going to be the way to do it."

That approach can be seen in the legal analytics platform from Menlo Park, California-based [Lex Machina](#), which captures daily litigation data from a wide variety of sources, including federal and state courts and the U.S. Patent and Trademark Office (for more on Lex Machina's approach, see sidebar on page 10). This data is then cleaned up using natural language processing and machine learning technologies, as well as attorney experts, and analyzed to provide insights into a range of factors, from specific judges, courts, law firms, and individual attorneys to the findings, outcomes, and damages in cases.

For lawyers assessing a case, analytics capabilities can provide insights into similar cases—their outcomes, how long they took, how specific judges have handled them—to help them quickly assess the risks and rewards involved. For example, says Owen Byrd, chief evangelist and general counsel at Lex Machina, "if a company wants to sue a vendor over a contract dispute, it can use the data to understand their prospects of success and whether it really makes sense to pursue it, apart from the analysis on the merits. And you can look to see what sort of damage awards, down to the penny, have been generated by similar cases. You can get a sense of what's the most you can expect to receive and does it justify the litigation spend that it will require."

LITIGATION STRATEGY

Once a case is underway, today's analytics can be used to shape the company's approach to litigation. "It can give you critical



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Leslie McKnew, Vice President, Litigation, Cisco

How are newer technologies helping your legal department?



For one thing, by bringing the e-discovery function in-house we are continuing to see savings in time, resources, and money. With their in-depth knowledge of our systems, data, and their substantive expertise, our e-discovery experts are incredibly effective at staying on top of new technologies and assessing whether they will drive increased efficiencies and cost reduction in our practice while meeting our standards. We have used types of predictive coding for document review in certain use cases. And our legal operations team is pursuing machine learning to spot non-standard or outlier provisions in contracts. We also use our collaboration tools as our standard way of working with each other and our law firms. All of our team meetings and nearly all of our internal team interactions are done over Webex video if we are not in the same office. And almost all of our case pitches, check points meetings, mock exercises, and expert interviews have somebody participating over our TelePresence technology. For our mock arguments, our counsel often is not local and neither are our mock judge panels, so we will have multiple locations participating in an exercise at the same time. We've also been doing more depositions over TelePresence. In addition to getting the personal connection and feeling like you are in the same room, these collaboration tools allow us to include a broader network of people, save on travel, and simplify and expedite scheduling.

How do you make sure new technologies are adopted and successful?

We have a legal operations team, and they do a great job of collecting feedback on what problems we are trying to solve, assessing new technologies, and ensuring that the technologies actually are a solution to the problem. They have taught us that when you bring new tools in, it's not just about the technology, it's equally critical to think about the people and processes. New technologies need to integrate into people's workflow. If they're not, you're just creating more work for them, which is the antithesis of why you're getting the technology in the first place. In addition, from the litigation perspective, you also need to make sure that when new applications are brought into the organization, they can extract data from your systems efficiently and support data preservation.

How else do you see technology impacting how you work with your firms or the services they offer?

We have integrated our collaboration tools into our workflows internally and with outside counsel. We use our Webex Teams platform to collaborate on and share documents in an efficient way. It takes us out of our email and provides a platform where we can work on documents internally and with our outside counsel in an efficient way. Looking ahead, I think law firms can increase their use of technology to capture all the lessons and knowledge that are in people's heads and anonymize the data they have about judges, venues, case types, strategies, and costs, and house it in a way that they and their clients can easily tap into it to make data-driven decisions.

statistics to guide your strategy in a particular venue before a particular judge. There are several points along the process where analytics and other technologies can help," says Gearing.

As mentioned earlier, analytics and AI technologies can provide insights into how opposing parties have behaved in similar cases. But some law departments are now applying that capability to assess their own patterns, as well. "Just as political campaigns will do opposition research on themselves, you can get insights into your own litigation strategies and behaviors so that you can anticipate how the other side is going to respond to you," says Lex Machina's Byrd.

Byrd recalls a situation in which an analysis was performed for a company involved in Abbreviated New Drug Application patent litigation. "We found that the judge in question ruled on claim construction just on the pleadings, without holding a hearing, over 80 percent of the time," he says. "The general counsel told us, 'That totally changes our strategy. We usually save our best argument for last to present it in the claim construction hearing rather than burying it up front in the plead-

ings, where it might not lodge in the judge's mind. Now we're going to put everything we've got into our pleadings.'"

Overall, having solid information on a range of litigation-related factors helps litigators and legal departments move past the traditional reliance on "anecdotal." That is, instead of drawing on the subjective experience and insights of colleagues and consultants, they can have a more objective, data-driven view of how litigation is likely to unfold—and use that to augment their professional acumen.

That's especially important in higher-stakes litigation, says Gearing. "There is often a lot on the line, and key litigation decisions can also be very significant business decisions for a company," he says. That means that analytics can be especially valuable as the legal department coordinates litigation strategies with the business.

"GCs work in companies that have applied analytics to every other element of corporate activity—marketing, finance, sales, operations," says Byrd. CEOs, he says, have come to expect data-driven strategies in those areas, and they have a

growing expectation to see them in the legal department. With analytics, attorneys can talk to business leaders using supportable, objective information about the risks and rewards involved in a case.

E-DISCOVERY

For the past few years, advanced legal technology has been focused primarily on discovery, largely because that area has felt the brunt of growing data volumes. In technology assisted review (TAR), for example, human experts process a small “seed-set” sample of a large collection of documents; the system then learns from their actions to automatically go through the complete collection and identify responsive documents. This “predictive coding” approach has not been adopted as quickly as some might have expected. But legal departments that are using it are seeing real benefits.

United Airlines, for example, draws on TAR for its largest and most complex cases (for more on United’s approach, see sidebar on page 9). “When you have a case with terabytes and terabytes of data, TAR is really your best option, especially when you have the usual budgetary constraints. We’ve been able to use it quite effectively when we need to get through a large swath of documents,” says Javaria Neagle, assistant general counsel, Litigation and IP, at United Airlines in Chicago. “The use of TAR is a time-saving measure, which translates into cost savings. And if it’s carefully trained and applied, it can return more accurate and complete results than a human review team would.”

E-discovery continues to advance and now encompasses not only predictive coding but also AI tools such as machine learning and natural language processing. That makes it possible to review more types of data—and especially unstructured data. With this ongoing evolution, says Neagle, “TAR is the wave of the future. I think that the need for human involvement with the seed set and in coding documents will continue to decrease as the technology becomes more efficient and more sophisticated.”

In time, Neagle speculates, these systems could become “smart” enough to work without human input and even provide guidance to e-discovery teams. “Today, we’re training the software to understand what’s responsive and what’s not,” she says. “But one day, the software is likely going to be able to train us.”

THE FUTURE OF JURY SELECTION

Technology is also transforming *voir dire*. “Attorneys often end up going with gut feelings and input from a few other lawyers and perhaps a consultant in the courtroom,” says Goss. Today, however, there is a great deal of online information about jurors, which is increasingly important in understanding juries. For example, Goss says, “millennials tend to not say much during the *voir dire* process, but they have a lot to say online. And they tend to be highly engaged during deliberations and to have strong opinions around issues like corporate responsibility to consumers and society.”

This growing range of online data has the potential to provide valuable insights into jurors. The problem, however, is that it is spread across numerous sources, which makes it cost-prohibitive to analyze using traditional methods. But new technology is enabling litigators to tap into that rich vein of data to complement the art of jury selection with a measure of science.

Case in point: Voltaire, a Telluride, Colorado, company, has developed a jury selection platform that gathers and analyzes a wide range of juror data. This includes not only information about addresses, employment, criminal checks, liens, licensing, and so forth, but also a wealth of web and social media data. “We look at publicly available information on social media platforms, directory listings, and at articles and posts by or about the individual,” says a company spokesperson. The platform then uses a proprietary algorithm and the IBM Watson AI platform to analyze psycholinguistics and behavioral characteristics, ultimately developing a profile of each prospective juror’s likely opinions, biases, and interests—factors that could affect their performance as jurors.

This concise report is delivered via the web to attorneys’ computers, tablets, or phones. Voltaire points out that the platform does not make decisions or recommendations per se. “We’re not scoring jurors or giving you a ‘go-no go’ decision,” the spokesperson says. “We’re analyzing this data and getting it to you in close to real time so that the experienced litigator can get an idea about what makes the jurors tick and use that insight to help make decisions in the courtroom. It’s not a persuasive tool—it’s a tool to help that attorney be more persuasive.”

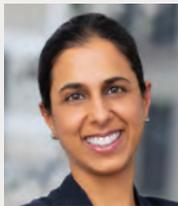
“Some courts have been reluctant to allow in-depth examinations of jurors’ online data due to privacy concerns, while others have been open to the idea,” Goss says. “It will be interesting to see how courts weigh these issues. There will be a



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Javaria Neagle, Assistant General Counsel, Litigation and IP, United Airlines

You've had some experience working with an outside vendor for technology assisted review (TAR). What lessons have you learned?



It is important to get your vendor and in-house teams on the same page. Your outside counsel, too. Educate every business partner, including your vendor, about the case objectives and the long-term litigation strategy. I spend time on case education

from senior leadership to individual team members. We discuss what the case is and what everyone's piece of the puzzle is. Getting all the parties on the same page leads to high-functioning teams who, in turn, understand their roles and communicate well with each other.

Does TAR have an impact on your internal processes?

One thing TAR sheds a light on is the need for corporations to have really robust record-retention policies. As these tools evolve and as they can process larger and

larger swaths of data, it's really important for companies to not only formulate their record-retention policies, but to abide by them. You need to have enforcement mechanisms in place to ensure that documents are destroyed pursuant to the record-retention policy—because ultimately TAR is designed to be a cost-savings tool, but it's only going to be a cost-savings tool if you're not accumulating mass amounts of unnecessary data in your company.

How is TAR affecting the way you work?

TAR means that there has to be a greater collaboration between myself and my outside counsel, in that we have to work very closely together and strategize at an early point about handling a complex case's discovery. TAR has the good effect of enabling closer relationships between outside counsel and in-house counsel. On a personal level, it forces me as the in-house lawyer to understand my case better, because you have to think about both the strategy and the details of the case early on in order to take full advantage of TAR.

tension between juror privacy and the belief that parties have a right to some transparency in the juror selection process.”

For its part, in the few years that Voltaire has been offering its platform, just one judge questioned the use of the software, says the company. Voltaire provided “a page or two worth of explanation that cleared that up right away, and the judge instantly permitted it.” The key, the spokesperson adds, is that “this is all based on publicly available information.”

ON THE HORIZON

Going forward, litigation technologies used at any juncture in the case life cycle can be expected to become more sophisticated, more real-time, and easier to use. Indeed, new applications are showing up with increasing frequency. For example, a company called Jury Lab is using facial-recognition software that reads facial “micro-expressions” to gauge mock jurors’ emotional responses. And a college student has created an AI chatbot that provides legal advice to people interested in fighting traffic tickets or filing lawsuits over data breaches, bank fees, or other commonly disputed transactions.

A basic tenet of the digital revolution is that while each of these technologies is powerful, they are most effective when used in combination. Take, for example, mock juries. This practice has already benefited from technologies such as videoconferencing that have reduced the costs of running mock exercises and make it feasible to use them more fre-

quently. Looking ahead, it's possible to see how that concept could be expanded with the combined use of AI, analytics, virtual reality, teleconferencing, and other technologies.

“You can imagine a virtual mock trial,” says Gearing. “You could bring in a mock jury, present your case, see how the opposing side might react and what the judge might say, and gauge jury reactions both in terms of what they say and how they act as they hear testimony. You would then get a virtual outcome of the trial and be able to tweak different parameters in your litigation approach—different arguments, different motions, and so forth. You could test lots of variables quickly and cheaply to really fine-tune your approach.” The full virtual mock trial is not likely to be a reality anytime soon, he adds, “but that kind of extrapolation of today's trends lets you see what may be possible down the road.”

“We regularly use our immersive TelePresence technology for mock exercises with counsel and even for depositions,” adds Cisco's McKnew. “We will have our lead attorneys, judge panels, and our in-house litigation team in multiple locations across the country. It feels like you are in the same room, and it's much easier to schedule and more cost-effective than flying people in from all over the country or the world.”

KNOWLEDGE MANAGEMENT

While such technology developments are happening on the front lines of litigation, similar changes are taking place in the

operational areas of legal departments and law firms. For example, knowledge management systems have been around for years, but recently, they have taken significant leaps forward. Today, they can not only find documents, emails, and other work product, they can also connect attorneys with the appropriate experts in the organization who can provide a deeper understanding and context for those items—a capability that can be a big help to litigators. And some systems are now incorporating AI to automate actions such as the extraction of relevant contract provisions. With an effective knowledge management system, says Lahlou, “you can leverage what’s already been done so that you are not only increasing efficiency, you are also being more effective. By not having to reinvent the wheel every time, you are able to focus more deliberately on the key strategic issues that will dictate your case plan.”

The growing set of technology tools at the litigator’s disposal adds to the importance of the legal operations function. With numerous systems to consider, it can provide the oversight needed to keep it all in order—and help navigate a way forward as the technology changes—and thus play a vital role in helping litigators win and keep costs down. “Good knowledge management should be foundational to client service in 2019. Legal operations functions are actively examining ways firms can be more efficient, and demanding that they leverage technology to do so,” says Lahlou.

MAKING THE MOST OF THE TECHNOLOGY

Over time, companies and IT departments have learned that success with a new technology depends not just on the technology itself, but on addressing factors surrounding the technology, such as rethinking workflows and processes and preparing people to adopt new ways of working. For legal departments, doing so will be critical to using technology in litigation.

At times, advances in technology may drive organizational changes. For example, Cisco brought the e-discovery function in-house and created a Litigation Lab within the legal department to handle that work. “They are our e-discovery experts and they partner closely with outside counsel,” says Cisco’s McKnew. “They’ve developed our e-discovery processes based on their in-depth knowledge of our systems and data, and they ensure we have an integrated and standardized process end to end. Equally important, they have a seat at the table and are a stakeholder with our IT and other internal teams when the company is evaluating and rolling

Q&A

Owen Byrd, Chief Evangelist and General Counsel, Lex Machina

How do you see technology affecting attorneys’ jobs?



Robots are not coming to replace the lawyers. In fact, these technologies can liberate lawyers to spend more of their time on the really high-value work that involves reason and wisdom and judgment and true counsel. We lawyers like to be fact-based, evidence-based. But litigation strategy has often involved gut feeling and conferring with colleagues in the firm or the department. This will help us bring more data-driven insight to the process.

How can legal analytics help during litigation?

We have a number of ready-made apps that make it easy to use the analytics on the spot. For example, if I am the defendant in a patent case and I want to move for summary judgment, I can push two buttons and come up with the last 10 examples where the presiding judge granted such summary judgment, as well as the last 10 examples where he denied it, and go right into the briefs that the lawyers filed in those instances. I can start with what worked last time.

Growing ease of use is a trend in technology.

How does that apply in law?

Making it easy to use these tools is critical. Otherwise lawyers just won’t do it. But ease of use can also change the way you use technology. For example, traditional legal research platforms are used mostly by researchers, librarians, and associates, rather than partners and corporate counsel. But legal analytics is best when used by those senior attorneys. It’s an iterative, interactive experience, and you won’t know what questions you can answer unless you are using it yourself.



“Every litigator needs to embrace the use of technology as a core component of trial readiness to up their game and to serve their clients well today and into the future.”

—Brian Paul Gearing

Heather Kolasinsky, Senior Legal Counsel, Humana

What have you learned from your experience with technology assisted review (TAR)?



TAR is here, and it's going to stay. We've found that it's a great tool. For those who are looking at TAR, I would tell them to make sure they really do their research into what the tool can do and how you can use it. Like any other tool, it can be really great when people know how to use it correctly—and if they don't, it can be really bad.

How are other technologies helping Humana formulate litigation strategy?

We do data analytics on our corpus of cases. Every year, we look at what came in the door, what the time frame was on cases, what they cost—those kinds of things. You have to know what your trends are. For example, maybe a few years ago you were taking four years to wrap up an average case, and now you are doing them in two and a half years—it's good to track that and understand why,

out new systems or technology. They have built excellent relationships with other stakeholders, and they ensure that our litigation and discovery requirements for all of our cases are satisfied. They also are a key partner in e-discovery negotiations to ensure we meet our obligations, and they drive immense savings in both time and money," she says.

Legal departments also need to consider how teams can work together more closely, across the department, with the business, and with outside firms. With analytics providing objective data and collaboration technologies making it easier to share documents and communicate, "everybody can come to the table with the same information, and everybody knows where they need to be involved in the process," says Humana's Kolasinsky. "It really needs to be a collaborative environment nowadays. And everybody's opinion needs to be heard so that you come up with the solution that best fits your case."

"Advancing technology should not be seen as a replacement for lawyers but rather as a way to complement and enhance their capabilities. That means that tomorrow's attorneys will need to understand what the technology can and cannot do for them and most effectively leverage it for their matters," says Lahlou.

"It's not just a question of technology, it's also a matter of change in people—how they think and do things with the technology," says Kolasinsky. "You can have the greatest knowledge management system in the world, but if your employees don't use it, you've spent a lot of money for nothing."

and to keep finding ways to be more consistent and take similar stances across matters.

Much of the industry is looking at contract and knowledge management, and that's where we are now. In the future, I can see using technology for root cause analysis, pre-litigation—looking at litigation data and trends to figure out the pitfalls for counsel on the front end of litigation, rather than being reactive.

How is technology changing the legal department and the legal profession?

Gone are the days of people not knowing what technology assisted review or predictive coding are. Nowadays, you really have to understand how those things work—at least enough to be able to explain it in a court.

AI and automation are really going to push the practice of law in new ways. We may be the last generation of "traditional" lawyers, rather than lawyers-as-technologists. And AI and automation will make interesting inroads into how privilege is decided and the ethical implications around who is practicing law.

"Lawyers need really good project management skills to run parallel work streams and drive solutions and decisions across functions," says McKnew. For litigation in particular, "many different things are happening in parallel and there are different facets to consider in real time." Project management skills, she says, are key to "maximizing efficiencies, particularly the time and resources of in-house legal teams, and we really feel it when our law firms lack these skills. We think this is a real differentiator for firms. The need for effective project management is critical for discovery but as you approach pre-trial and trial activities, its importance is only heightened."

In a world where technology is becoming a critical factor in winning, tomorrow's litigators and legal departments will need to keep up with fast-changing technology and be open to new tools as they emerge. But as important, they will need to maintain a degree of healthy skepticism and look beyond the hype and excitement that so often comes with new technology.

"New technology can be very appealing, and often very effective," says Goss. "But you have to be smart about how you use it. There is a lot of marketing buzz out there, and there is a big difference between using AI wisely and just adopting it as a kind of flavor of the month. So you need to keep an eye on the basic questions: What will this technology do for us and how well will it do it? Is it proven? Will it stand up in a trial? And above all, will this technology help us win in the courtroom?"