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Artificial Intelligence for court discovery:
are we being left behind?

Relativity, the world's largest and most ubiquitous eDiscovery software platform, have announced that Technology Assisted Review (**TAR**) 1.0 is no longer to be supported by the platform. By September 2022 this AI technology will no longer be available to Relativity users.

For organisations who expect to be involved in large scale document review, this change may mean that their standard approach to such reviews needs to be updated. However, it's also an exciting opportunity to understand and become more familiar with the most up-to-date and effective AI tools on the market. Whilst this particular TAR 1.0 approach is becoming obsolete, document review technology is moving on to more powerful and sophisticated options for sifting large document sets using 'continuous active learning' artificial intelligence. Despite these exciting opportunities, the legal profession has not adopted the technology to the extent required, and needs to hasten its adoption of these technologies so as not to be left behind.

5 MIN READ

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TAR in Irish law

In 2015, the Irish Commercial Court became only the second Court in the world to approve the use of TAR in the Irish Bank Resolution Corporation Ltd v. Quinn (2015) IEHC 175. This was a landmark decision in which the Irish Courts accepted and approved the use of TAR 1.0 (detailed explainer below) to identify relevant documents for the purposes of complying with a parties' discovery obligations.

It is important to note, that approval was not unqualified and the judgment stressed that on the proviso that the TAR 1.0 process is sufficiently transparent, and that appropriate checks and balances are put into place and/or agreed between the parties the use of TAR 1.0 was judged sufficient to fulfill discovery obligations.

What is TAR 1.0?

TAR 1.0 is a particular application of artificial intelligence to large scale document review, which is often necessary during the discovery phase of litigation. Electronic data is filtered and manually reviewed to identify the documents of interest to the case. This can result in hefty fees for litigants if each individual file is read and assessed by a human.

TAR 1.0 harnesses machine learning so a computer model – trained by experts in the case – can identify files most likely to be relevant, and eliminate from the review the files which are unlikely to be relevant. The computer modeling is carried out with a level of statistical certainty which can be shared with the court, demonstrating scientifically the accuracy and reliability of the computer's decisions.

TAR 1.0 is often referred to as *sample based learning*, as the computer learns about the case through a series of document samples selected and reviewed by senior lawyers on the case. However there can be significant challenges with using TAR 1.0. Not only does the technology require a complex workflow, TAR 1.0 also requires

a sufficiently large set of documents to run optimally, which can mean many cases are too small to benefit from the process. Additionally, the requirement to use experts to initially train the machine learning model can mean that senior lawyers are tied up reviewing documents rather than tackling the legal issues in the case.

Use of TAR 1.0 in practice

Since the Quinn decision, the option of using TAR 1.0 in any litigation involving discovery of large electronic data sets has been available, with the result that technology can significantly speed up the identification of documents relevant to the case. This results in a more efficient, and importantly a more defensible approach, to the discovery of electronic data.

In practice, however we have seen very few cases in the past seven years following this landmark decision make full use of the possibilities of TAR 1.0. The complexities of building a discovery around TAR 1.0 and litigators' lack of access to expert technical advice has meant that the full capabilities of TAR 1.0 have been rarely fully exploited.

Future of technology in court discovery?

Given the usefulness of TAR 1.0 in large discovery exercises, why is Relativity removing it as an option from its document review software?

The answer is that, whilst uptake of TAR 1.0 has been slow amongst the legal profession, the pace of change in the technology sphere has been quicker than ever before. Despite the huge advantages afforded by TAR 1.0 during the discovery process, TAR 1.0's use has been rendered obsolete by the emergence of alternate artificial intelligence systems that are even easier to use and to defend in court.

TAR 2.0, also known as *continuous active learning (**CAL**)*, has become the default approach for the use of the technology, so much so that Relativity, the largest discovery technology company in the world no longer supports TAR 1.0 at all. CAL improves on the TAR 1.0 experience by providing a more intuitive way for promoting the documents most likely to be relevant for a human review. It provides easier tracking and visualization of the state of the artificial intelligence model. For instance, CAL allows

machine learning to be used over a smaller document set than TAR 1.0, opening up the use of technology for more cases. Additionally, the different approach that CAL takes means that the input of expert reviewers is less crucial, and a larger team of reviewers can train the machine learning model effectively.

In short, the speed of technology advancement is far outpacing the legal professions' rate of technology adoption. Since the Irish courts endorsed TAR 1.0 seven years ago, its adoption has been far from universal. The use of manual filtering methods (such as search terms) is still commonplace and often preferred, being seen as a "simpler" option despite the lack of built-in statistical checks and measures which are incorporated by default in TAR approaches.

We can compare this rate of technology adoption to the UK (which approved the use of *TAR 1.0 in Pyrrho Investments Ltd* v *MWB Property Ltd* 2016), and the US (approval of TAR 1.0 came with *Moore* v *Publicis Groupe* 2012). These two jurisdictions generally see a higher uptake of the use of technology in document reviews for court discoveries, encouraged by schemes such as the

Disclosure Pilot Scheme in the UK which asks parties to justify what (if any) reasons they have for not using TAR for discovery.

This is just one example of a much bigger challenge to the legal profession at large where industry norms and common practices are and will continue to struggle to keep pace with technological advancements. Shifting the onus from allowing practitioners to choose their approach (using technology or otherwise) to forcing them to justify why they are not using the most effective and proven approach has the potential to deliver transformative results – not just for the legal profession, but their clients as well.

CAL, the successor to TAR 1.0, will also inevitably have a limited life span. TAR 3.0 is already on the horizon and is being tested and implemented by computer scientists in order to confirm its place as the next-in-line artificial intelligence model to drive document discovery. But even CAL has far from universal adoption in Irish court discovery at present, and as the technology for document review improves the legal profession risks getting left further and further behind.
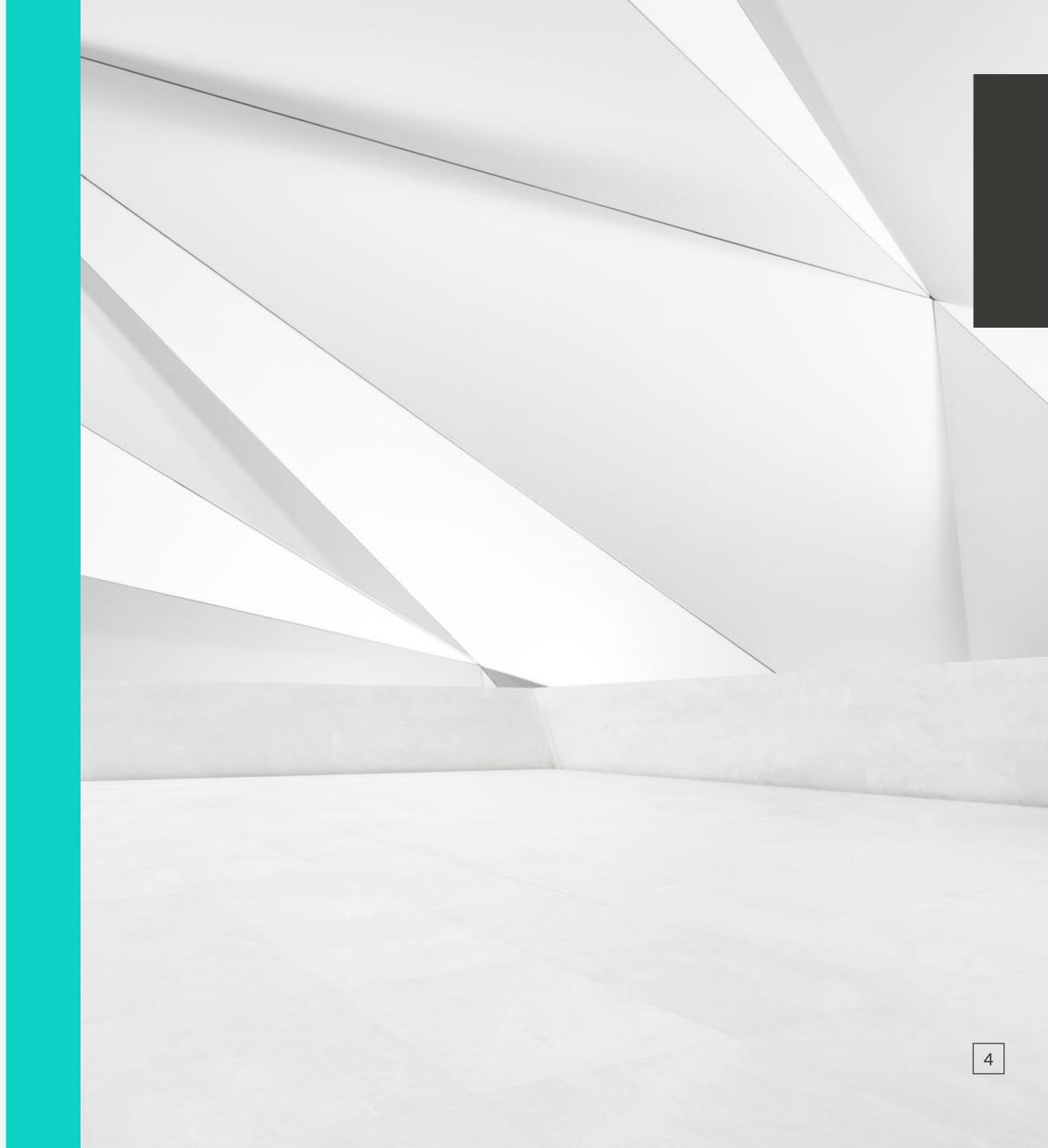
Conclusion

For organisations to make the most of current and future technology during discovery, it's crucial to tap into both the legal expertise and technological expertise needed to deploy the most up-to-date techniques correctly, and ensure that it is being used in a legally defensible way. The legal profession must become more agile in the adoption of new technologies that benefits our clients and we must be more nimble with how we deploy those technologies as they evolve. Our profession must embrace multi-disciplinary expertise on matters in order to ensure we provide our clients with the best service possible.

We expect to see legal technology in this area evolve even more quickly over the next few years, and ALG Solutions (**ALGS**) is at the cutting edge. ALGS is a multi-disciplinary team of technology specialists, project managers and lawyers, who work collaboratively together on client mandates to ensure we are also providing our clients with the best service possible. ALGS has already implemented TAR 2.0 as our standard operating model on all litigation cases requiring a document review – providing our clients with the most efficient and cost-saving solutions for data-driven projects.

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