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Generative AI – Uses and Abuses in Litigation

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‘Generative AI – Uses and Abuses in Litigation’

Snapshot

- *The use of Generative Artificial Intelligence (GenAI) in litigation is rapidly increasing, offering potential benefits while also introducing new complications.*
- *GenAI can be used in various litigation tasks, include drafting and editing, eDiscovery, legal research, summarisation and analysis. Some uses are higher risk than others, particularly when GenAI is used to draft evidentiary materials.*
- *When using GenAI for litigation, it is essential to comply with court protocols or guidelines, rules of evidence, and relevant professional and ethical standards.*
- *New South Wales litigators should be familiar with the Supreme Court’s new GenAI practice note (Practice Note SC Gen 23), which commenced on 3 February 2025 and has also been adopted by the Land and Environment, District and Local Courts.*

The impact of GenAI on legal services is expanding rapidly. When used appropriately, GenAI can increase lawyers’ efficiency, benefit clients, improve access to legal services for underserved groups, and streamline the administration of justice. However, as an emerging technology, GenAI also creates new complications in some areas of legal practice, particularly in litigation.

Rapid growth and impact of GenAI use in litigation

The [Centre for the Future of the Legal Profession](#) at UNSW Law & Justice is monitoring the impact of GenAI use in litigation across multiple jurisdictions, as documented in official court and tribunal records. Since the public release of OpenAI’s ChatGPT in November 2022, numerous ‘GenAI cases’ have been identified involving the use of various GenAI products during litigation preparation, such as:

- submissions containing AI-generated fake or inaccurate citations, or inaccurate summaries of law
- cases based on fallacious or irrelevant arguments
- inadequate fact-checking by parties or witnesses

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- prolix and incorrect drafting, and
- ‘flooding’ of courts using AI-generated documents.

When used effectively, GenAI can enhance specific litigation tasks and increase access to justice for unrepresented parties by enabling more effective participation in formal dispute resolution processes. However, misuse or abuse of GenAI can also lead to increased risks and complications in litigation, including:

- unnecessary delays
- increased workloads
- higher litigation costs
- partial or complete failure of proceedings
- reputational damage, and
- other sanctions including costs orders.

The suitability of GenAI products for litigation tasks varies. Public, general-purpose products like ChatGPT and Google Gemini (formerly Bard) may be less reliable for certain tasks. In contrast, legal industry-specific GenAI products trained on legal data may offer a better overall experience, as they are designed for legal requirements and workflows. Nonetheless, issues such as inaccuracy, hallucinations and bias persist. All GenAI-generated material intended for use in litigation must be verified for accuracy and relevance using independent, reputable sources, along with the user’s own judgement and professional expertise.

If you choose to incorporate GenAI into your legal practice, it is crucial to adopt an appropriate governance and risk management framework. Prioritise data security, protection and privacy. Avoid, or exercise caution when inputting client, privileged, confidential or other sensitive information into public, general-purpose GenAI products. Verify how data is handled, stored or reused by the product’s provider. It is also good practice to keep a record of your GenAI use, including prompts and documents uploaded, to retrace how an outcome was achieved, if needed. However, even this step may not be enough to protect your professional reputation if you do not verify the accuracy of AI-generated material before relying upon it in litigation. A recent US case illustrates this point (see David Thomas, [‘Judge rebukes Minnesota over AI errors in ‘deepfakes’ lawsuit’](#) Reuters (Online, 14 January 2025)).

GenAI uses in litigation and avoiding abuses)

The following suggested uses of GenAI in litigation are not exhaustive. It is important to research options and experiment safely with different GenAI products to understand their benefits and limitations. Building your ‘GenAI literacy’ will help you identify appropriate uses tailored to your practice, clients and matters.

When evaluating whether a GenAI product is suitable for a litigation task, consider whether traditional AI technologies and other legal resources (such as well-maintained forms, precedents, and established legal databases) might be better alternatives. If consistency and reliability of output are crucial, the ‘transformation’ of content by GenAI may be problematic. In fact, it may increase costs and reduce efficiency by requiring more effort to ensure a reliable and trustworthy outcome.

Drafting and editing communications and simple documents

For proficient users who understand the relevant law and specifics of a matter, using GenAI for drafting and editing communications and simple documents is relatively low risk. With effective prompting, GenAI can quickly generate first drafts of emails, letters, and basic documents, which can then be tailored to the specific matter. You can also ask GenAI to adapt the tone or style of communications or documents, summarise and simplify technical language and concepts for clients, and help structure advice or oral or written arguments for greater clarity and persuasiveness.

When reviewing GenAI-generated material, ask:

- Does it make sense?
- Is the content legally and factually accurate?
- Does it use ‘Australian English’?
- Are the language and tone appropriate?
- Is the content contextually relevant?

Be aware that GenAI responses can sometimes include overly positive language, jargon and clichés. To avoid sounding like a bot, look for common patterns in AI-generated text. See this article for more help: [‘Six obvious AI words to avoid in your writing’ Microsoft 365 Life Hacks](#) (Blog, 13 September 2024).

Drafting evidentiary material

Using GenAI to prepare litigation materials such as affidavits, witness statements, character references, and other evidentiary documents carries higher risks. Numerous GenAI cases highlight issues that can arise in litigation, especially when misuse is combined with a lack of legal knowledge, carelessness, or a poor understanding of GenAI’s limitations. These issues include GenAI-generated material that sounds plausible but is invented or inaccurate (e.g. fake case citations), lacks nuance, is irrelevant, or misses context.

In response to the growing body of GenAI cases, courts and legal regulators in New South Wales and other jurisdictions have issued targeted GenAI guidance to pre-empt misuse and to maintain the quality and authenticity of evidence. Litigators must ensure that they, along with any colleagues working on a matter, clients, and witnesses

(including experts), comply with specific GenAI guidance, existing court or tribunal protocols, rules of evidence, and relevant professional and ethical obligations.

New South Wales litigators should be familiar with the Supreme Court's new GenAI practice note ([Practice Note SC Gen 23](#)), which commenced on 3 February 2025 and has also been adopted by the Land and Environment and District Courts. This note bans the use of GenAI for certain tasks, including generating the content of affidavits, witness statements, character references, and other types of material tendered in evidence or used for cross examination, other than '... work that is merely preparatory to the drafting ...' ([Practice Note SC Gen 23](#), paragraph 10). It also introduces new GenAI disclosure requirements, and leave must be granted before GenAI can be used to prepare annexures or exhibits to these documents or to draft or prepare expert reports. For details of this note and similar guidance from other courts and jurisdictions, see [Court Protocols](#) on the NSW Law Society's [AI for Legal Professionals Hub](#), and the [Generative AI resource page](#) on the Supreme Court of New South Wales website.

As courts and tribunals become more familiar with GenAI and as appropriate uses in litigation becomes more established, these requirements may relax. GenAI use may even become expected as part of some litigation processes for efficiency reasons. For example, after an initial wave of US court orders and rules restricting GenAI use and mandating disclosure, some courts are now adopting a more encouraging stance, recognising that AI technology is developing rapidly and may enhance the administration of justice when used safely (see Sara Merken, '[Illinois top court say judges and lawyers can use AI, with limits](#)' *Reuters* (Online 20 December 2024)).

eDiscovery

The use of GenAI in eDiscovery shows significant promise. Many eDiscovery providers are integrating GenAI for text processing with existing software, to enhance technology-assisted review (TAR) and predictive coding. GenAI-enabled features empower users to go beyond keyword searches, allowing natural language search across large evidence sets. GenAI can also generate summaries, extract patterns, and identify key data points.

GenAI use within eDiscovery is being hailed as a 'game changer' and lawyers handling large litigation matters should actively monitor these developments, for more information see: Bob Ambrogi, '[LawNext: How Gen AI Can Be A Game-Changer for Discovery and Litigation, with Everlaw CEO AJ Shankar](#)' *LawSites* (Blog, 20 November 2024).

If GenAI-enabled features significantly improve productivity and efficiency in eDiscovery products, this may also prompt courts and regulators to encourage and promote responsible GenAI use in this context in the future. Recent amendments to [Practice Note SC Gen 23](#) highlight the ongoing challenge of balancing restrictions on GenAI use

in litigation with potential productivity gains for appropriate purposes (see [Practice Note SC Gen 23](#), paragraphs 9A and 9B).

Legal research, summarisation and analysis

Legal research, summarisation, and analysis are increasingly popular uses of GenAI. Potential applications include summarising legal principles or resources in databases and web sources, extracting key provisions from statutes, listing key terms in documents, summarising transcripts, analysing court decisions (including the evidence presented, parties' arguments, and outcomes), and generating timelines, chronologies, indexes and lists.

However, using GenAI for these tasks presents similar challenges to drafting. GenAI products are not search engines or legal databases, although they may be integrated with these tools to enhance their use. Additionally, GenAI products do not 'understand' what they are summarising and currently have limited ability to perform formal logical reasoning (see Iman Mirzadeh et al, '[GSM-Symbolic: Understanding the Limitations of Mathematical Reasoning in Large Language Models](#)' *arXiv* (Online, 7 October 2024)).

Cases involving GenAI contain many examples of issues with AI-generated research, summarisation and analysis. These issues usually stem from using general-purpose GenAI products like ChatGPT, but there are also examples of misuse of legal industry-specific GenAI tools, such as the recent Australian case [Re Dayal](#) [2024] FedCFamC2F 1166.

In summary, use GenAI for legal research, summarisation and analysis with care. It may be a good starting point but always use your judgement and professional expertise to review and improve GenAI-generated material and verify its content using independent reputable sources rather than relying solely on GenAI. Again, be vigilant about data handling, confidentiality, and other restrictions before inputting information into GenAI products, and check court protocols for any prohibitions or permissions specifically addressing these types of uses of GenAI (such as [Practice Note SC Gen 23](#), paragraphs 9A, 9B, 16 -18).

Takeaways for litigators

The rapid rise of GenAI use in litigation presents both potential benefits and new complications. To effectively navigate this landscape, consider the following steps:

1. **Develop GenAI literacy:** Invest time in understanding how GenAI products work, their benefits, and limitations, and how they could enhance your practice. Attend GenAI training sessions and experiment with various products to build proficiency. Complement this with other essential technology skills.
2. **Promote responsible use:** Implement a governance and risk management framework for GenAI that prioritises data security, protection and privacy.

Advocate for the responsible adoption of GenAI in litigation, share best practices, and encourage discussions on its ethical implications and impacts.

3. **Monitor and track GenAI use:** Be vigilant about the possible use of GenAI by colleagues and those you supervise, other legal professionals, experts and other witnesses, and unrepresented litigants. Track your own GenAI use in litigation preparation and require the same from anyone working with you on the matter.
4. **Adopt ethical standards:** Stay updated on GenAI protocols from relevant courts and tribunals. Ensure that GenAI use in litigation complies with the rules of evidence and existing professional and ethical standards.
5. **Prepare for the future:** Engage in continuous learning about emerging technologies like GenAI and cultivate curiosity to incorporate future changes in your legal practice, remaining relevant and competitive.

By taking these steps, you can harness the potential benefits of GenAI in litigation and minimise complications, while supporting our courts and tribunals in adapting and maintaining the integrity of legal processes.