

THE PROMISE AND THE PERIL OF THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN LITIGATION

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Generative artificial intelligence ('GenAI') has been employed by lawyers and parties to litigation in courts and tribunals around the world. While GenAI holds out the promise of more accessible legal services, GenAI also creates risks, such as the production of non-existent or inaccurate case citations and statements of law. Both lawyers and self-represented litigants ('SRLs') have failed to verify this 'fake' law and have used the outputs in litigation. This article examines why lawyers and SRLs are prone to misuse GenAI in litigation, including by reference to aspects of human psychology, such as automation bias and verification drift. The article then explores potential solutions to address this misuse: education, certification, sanctions and/or prohibition. Attention to solutions is crucial if the justice system and its users are to reap the benefits of GenAI without the risk of a hallucinated body of precedent eroding public trust in legal processes and the courts.

I INTRODUCTION

The public release of OpenAI's ChatGPT,¹ and other consumer-grade generative artificial intelligence ('GenAI') tools,² has made advanced artificial intelligence

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1 ChatGPT is a popular multimodal GenAI chatbot developed by OpenAI and released in November 2022. It can read, 'understand' and generate human-like text, as well as other outputs including code, images, audio, and data. More technical information about GenAI models is covered in Part II. See Ivan Belcic and Cole Stryker, 'What is ChatGPT?', *IBM Think* (Web Page, 19 April 2025) <<https://www.ibm.com/think/topics/chatgpt>>; 'Introducing ChatGPT', *OpenAI* (Web Page, 30 November 2022) <<https://openai.com/index/chatgpt/>>.

2 Other GenAI tools identified in case examples in this article include solutions such as Microsoft Copilot, an AI-powered productivity assistant available as a standalone product and in conjunction with other Microsoft applications and services: see 'What is a Copilot?', *Microsoft* (Web Page) <<https://www.microsoft.com/en-us/microsoft-copilot/copilot-101/what-is-copilot/>>. Another example is Google Gemini (formerly Google Bard), which is a personal AI assistant and collection of large language models developed by Google: see Rina Diane Caballar and Cole Stryker, 'What is Google Gemini?', *IBM Think*

(‘AI’) widely accessible, sparking widespread experimentation.³ GenAI outputs are appearing in an ever-expanding range of scenarios, both personal and professional. Unsurprisingly, GenAI that creates text based on large language models has rapidly infiltrated the legal sector, including through its use by lawyers and parties in litigation in courts and tribunals around the world.⁴ This rapid adoption, combined with high-profile examples of misuse, is the motivation for this article, which examines why misuse occurs and possible solutions to address misuse.

Lawyers are drawn to GenAI because of its disruptive or revolutionary possibilities for the practice of law. GenAI can be more thorough in undertaking certain tasks and do so more quickly than a human lawyer, thereby demonstrating greater proficiency and efficiency. Adopting GenAI is seen as necessary to remain competitive in the legal marketplace by increasing productivity, innovating, and being able to provide cost-effective services to clients.⁵

(Web Page, 27 September 2024) <<https://www.ibm.com/think/topics/google-gemini>>; ‘Introducing Gemini, Your New Personal AI Assistant’, *Gemini* (Web Page) <<https://gemini.google/assistant/>>. Anthropic has also introduced Claude AI, a multimodal GenAI chatbot and large language model: Ivan Belcic and Cole Stryker, ‘What is Claude AI?’, *IBM Think* (Web Page, 24 September 2024) <<https://www.ibm.com/think/topics/claude-ai>>; ‘Meet Claude, Your Thinking Partner’ *Anthropic* (Web Page) <<https://www.anthropic.com/claude>>. Further, there are legal technology solutions with GenAI integration and features, such as LEAP, which is a legal practice management software incorporating AI: *LEAP* (Web Page) <<https://www.leap.com.au/>>. Westlaw, an online legal research service from Thomson Reuters, now has GenAI capabilities: ‘Westlaw Australia’, *Thomson Reuters* (Web Page) <<https://www.thomsonreuters.com.au/en-au/products/westlaw-australia.html>>; ‘Westlaw’, *Thomson Reuters* (Web Page) <<https://legal.thomsonreuters.com/en/westlaw>>. The products of LexisNexis, a provider of legal research and technology services to legal professionals, also have GenAI capabilities: ‘Lexis+AI’, *LexisNexis* (Web Page) <<https://www.lexisnexis.com/en-au/products/lexis-plus-ai>>.

- 3 ChatGPT was estimated to have reached 100 million monthly active users two months after launch: Krystal Hu, ‘ChatGPT Sets Record for Fastest-Growing User Base: Analyst Note’, *Reuters* (online, 3 February 2023) <<https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>>.
- 4 See discussion of cases in Part III drawn from a dataset of GenAI cases compiled by the Centre for the Legal Profession at UNSW Law & Justice, based on searches of case law that is accessible via public legal information websites and legal subscription databases from Australia, New Zealand, the United Kingdom, Ireland, the United States (‘US’), Canada, South Africa, and India. As of 30 September 2025, the dataset comprised 524 cases where GenAI was identified as being used in litigation. Examples involving legal practitioners comprised 27% of cases, examples involving self-represented parties comprised 68% of cases, with the balance comprised of witnesses and other individuals, including a small number of judicial officers. The dataset is on file with the Centre for the Legal Profession.
- 5 Anthony C Johnson, ‘How Law Firms Can Invest in Tech to Stay Competitive’, *Forbes* (online, 2 June 2023) <<https://www.forbes.com/councils/theyc/2023/06/02/how-law-firms-can-invest-in-tech-to-stay-competitive/>>; Ben Abbott, ‘Legal AI Is Taking Off in Australia and Could Shake Up the Private Practice Legal Market’, *TechRepublic* (Web Page, 8 March 2024) <<https://www.techrepublic.com/article/australian-legal-profession-adapting-ai/>>; Marjorie Richter, ‘How AI is Transforming the Legal Profession’, *Thomson Reuters Law Blog* (Blog Post, 16 January 2025) <<https://legal.thomsonreuters.com/blog/how-ai-is-transforming-the-legal-profession/>>. See also Jan Hatzius et al, ‘The Potentially Large Effects of Artificial Intelligence on Economic Growth’ (Economic Research Report, Goldman Sachs, 26 March 2023) 7 <<https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html>>, estimating that 44% of current legal work tasks could be automated by AI (the average for all industries is 25%). GenAI ‘will be able to carry out some of the core nonroutine tasks of highly paid professionals in the years ahead’: National Academies of Sciences, Engineering, and Medicine, *Artificial Intelligence and the Future of Work* (Consensus Study Report, 2025) 64, 111 <<https://doi.org/10.17226/27644>> (‘*Future of Work*’).

GenAI has also been promoted as a solution to barriers to access to justice.⁶ GenAI can assist self-represented litigants ('SRLs')⁷ by providing information about the law, including explaining legal rights or the elements of a cause of action in accessible language. GenAI may also be able to help individuals understand court procedures, including the steps that are available or need to be taken to pursue a claim, and can assist in drafting some court documents or forms. Earlier forms of AI had started this process.⁸ However, GenAI was promoted as a major step forward as it was not limited to a particular area of law or jurisdiction, could adjust answers to address client capability,⁹ and was free, at least for certain versions. GenAI held out the promise of access to justice with less cost, delay, and need for expertise.¹⁰

While the adoption of GenAI was portrayed as providing a competitive advantage or levelling the playing field for the SRL, GenAI comes with certain limitations or risks that need to be addressed for the benefits to be reaped. A key risk for law and litigation, as explained in Part II, is the propensity for GenAI to 'hallucinate', or to produce outputs that are convincing but incorrect or inaccurate due to the way GenAI functions. The occurrence of this risk is illustrated by the examples set out in Part III. In the case law, both lawyers and SRLs have unquestioningly relied on GenAI-generated content as authoritative. The failure to verify the accuracy and relevance of GenAI outputs has resulted in court documents with misleading citations and statements of the law.

In Part IV of this article, we discuss why lawyers and SRLs are prone to misuse GenAI in litigation with reference to five general categories: AI literacy, legal literacy, lawyers' practice of 'copy-paste', automation bias, and verification drift. Both lawyers and SRLs have demonstrated a lack of understanding as to how GenAI functions, and consequently its limitations. This has been compounded for SRLs who lack access to alternative sources of legal information, making GenAI

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- 6 Lyria Bennett Moses et al, 'AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators' (Research Report, December 2023) 55 <https://ajja.org.au/wp-content/uploads/2023/12/AIJA_AI-DecisionMakingReport_2023update.pdf>; Colleen V Chien and Miriam Kim, 'Generative AI and Legal Aid: Results from a Field Study and 100 Use Cases to Bridge the Access to Justice Gap' (2025) 57(4) *Loyola of Los Angeles Law Review* 903; Francine Ryan and Liz Hardie, 'ChatGPT, I Have a Legal Question? The Impact of Gen AI Tools on Law Clinics and Access to Justice' (2024) 31(1) *International Journal of Clinical Legal Education* 166 <<https://doi.org/10.19164/ijcle.v31i1.1401>>.
 - 7 'Self-represented litigant' is terminology commonly used in Australian courts to describe people representing themselves in legal proceedings. Other terminology used includes 'litigant in person', 'unrepresented litigant', and in the US courts, 'pro se litigant'.
 - 8 Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart Publishing, 2020) ch 6 <<https://doi.org/10.5040/9781509931842>>; Michael Legg, 'Online Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2nd ed, 2024) 377; Michael Williams, 'Lawyers, Technology and Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2nd ed, 2024) 317.
 - 9 See, eg, 'Educator FAQ', *OpenAI* (Web Page) <<https://platform.openai.com/docs/chatgpt-education>>, providing examples of how ChatGPT can be used in education, including customizing materials for different preferences (simplifying language, adjusting to different reading levels, etc).
 - 10 Maura R Grossman, Paul W Grimm and Daniel G Brown, 'Is Disclosure and Certification of the Use of Generative AI Really Necessary?' (2023) 107(2) *Judicature* 69, 72. See also *Future of Work* (n 5) 143, predicting one future with AI where insights from elite expert knowledge will become accessible to a broader range of workers, making the expertise less scarce.

attractive, but also difficult to check. For lawyers, an additional cause of misuse may be the past practice of recycling legal work through copying and pasting, which has carried across to their use of GenAI. However, the possible causes of misuse are also the result of human psychology that presents itself through automation bias, or the tendency to trust technology such as AI. Alternatively, even when humans are aware of GenAI limitations, they engage in verification drift, that is, they are lulled into a false sense of accurate outputs because of GenAI's 'tone', which, when combined with time or financial pressure, leads to a failure to verify.

Finally, in Part V, this article addresses possible solutions to GenAI misuse, such as education, certification, sanctions, and/or prohibition. Some of these solutions have been adopted, albeit without complete success, as GenAI misuse has continued. This article explains and critiques these solutions, including their advantages and drawbacks. Each of the solutions has a role to play and they are generally mutually reinforcing. Attention to solutions is crucial if the justice system and its users are to reap the benefits of GenAI in litigation but without the substantial cost of eroding public confidence in the operation of the justice system.

II TECHNICAL FOUNDATIONS AND CONSTRAINTS OF GENAI

Developing a GenAI model requires large volumes of data. GenAI companies typically train their models using publicly available internet data, along with additional datasets such as those acquired from industry partners.¹¹ These models learn to identify correlations between words and predict the likelihood of specific words appearing in a given context.¹² For example, if the words 'law' and 'justice' frequently appear together, a GenAI model presented with the prompt 'Law is about ...' would predict that 'justice' is highly likely to follow. To make this prediction, the model evaluates all the words in its vocabulary (eg, 50,000 words) and ranks them based on their probability of fitting in the given context. For the phrase 'Law is about ...', the top-ranked predictions might be as follows: 'justice' (40%), 'rules' (30%), 'regulation' (15%), 'society' (8%), 'order' (2%), and so on. However, GenAI models do not always select the word with the highest probability. Instead, they choose one of the more likely options randomly, eg, one of the top six words in the ranking.¹³ While this approach introduces variability and

11 'How ChatGPT and Our Foundation Models Are Developed', *OpenAI* (Web Page, 2023) <<https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-foundation-models-are-developed>> ('How Foundation Models Are Developed'); 'Privacy Policy', *Anthropic* (Web Page, 19 February 2025) <<https://www.anthropic.com/legal/archive/a2eef43-807a-4a53-89dd-04c44c351138>>.

12 Diksha Khurana et al, 'Natural Language Processing: State of the Art, Current Trends and Challenges' (2023) 82(3) *Multimedia Tools and Applications* 3713 <<https://doi.org/10.1007/s11042-022-13428-4>>.

13 Alec Radford et al, 'Improving Language Understanding by Generative Pre-training' (Research Paper, OpenAI, 11 June 2018); Armin Alimardani and Emma A Jane, 'We Pitted ChatGPT against Tools for Detecting AI-Written Text, and the Results Are Troubling', *The Conversation* (online, 20 February 2023) <<https://theconversation.com/we-pitted-chatgpt-against-tools-for-detecting-ai-written-text-and-the-results-are-troubling-199774>>; 'How Foundation Models Are Developed' (n 11).

creativity into the generated outputs, it can be a drawback in the legal domain. In such contexts, the model might select a synonym or a less precise term instead of the most accurate legal term.

This example highlights an important point: the predictive performance of GenAI models is fundamentally tied to the data they consume. If in the training data, ‘law’ and ‘justice’ never appeared in the same context, the probability of generating ‘justice’ in the example above would be zero. Similarly, if the training data includes legal documents specific to a single jurisdiction, the model may generate inaccurate responses when asked about laws in other jurisdictions.

At a basic level, GenAI models are not designed to generate truth; they are trained to produce the most probable sequence of words. When the generated content aligns with accepted facts and fits the context, it is often perceived as accurate and relevant. However, when the output deviates from reality, is fabricated, nonsensical, or entirely unrelated to the context, it may be described as a ‘hallucination’. Because these models are designed to produce fluent and natural-sounding text, hallucinated content can appear highly plausible. Although there have been efforts to reduce GenAI hallucinations,¹⁴ some argue that it is unlikely that this issue will ever be eradicated.¹⁵ More advanced language models may be less prone to hallucination, but they also produce more human-like text, making false information more likely to be mistaken for truth.¹⁶

Although GenAI models are trained on vast amounts of data, a common misconception is that they function as knowledge repositories.¹⁷ GenAI models generate each word through statistical analysis, randomly selecting from among the most probable next words. As such, these models do not function by searching their databases. Furthermore, not all publicly available internet content is included in their training data, and materials behind paywalls are often excluded. Therefore, GenAI models cannot serve as replacements for conventional search engines.

In light of these constraints, efforts have been made to augment GenAI models with complementary tools. One such approach is internet access. Models with internet access can provide outputs of higher quality and improved currency. Nonetheless, internet access presents certain limitations. For example, the model might fail to retrieve the most relevant information, or it might access outdated, unreliable, jurisdictionally irrelevant legal information,¹⁸ cite the wrong source,

14 OpenAI, *OpenAI O1 System Card* (Report, 5 December 2024) <<https://cdn.openai.com/o1-system-card-20241205.pdf>> (*‘O1 System Card’*).

15 Changlong Wu, Ananth Grama and Wojciech Szpankowski, ‘No Free Lunch: Fundamental Limits of Learning Non-Hallucinating Generative Models’ (Conference Paper, International Conference on Learning Representations, 23 January 2025); Samuel Greengard, ‘Shining a Light on AI Hallucinations’ (2025) 68(5) *Communications of the ACM* 9 <<https://doi.org/10.1145/3715691>>.

16 OpenAI, *GPT-4 Technical Report* (Report, 4 March 2024) <<https://doi.org/10.48550/arXiv.2303.08774>>.

17 Vicki McNamara, ‘Generative AI: Uses and Abuses in Litigation’, *Law Society Journal* (online, 7 February 2025) <<https://lsj.com.au/articles/generative-ai-uses-and-abuses-in-litigation/>>.

18 Ryan and Hardie (n 6) 184; Armin Alimardani, ‘Generative Artificial Intelligence vs. Law Students: An Empirical Study on Criminal Law Exam Performance’ (2024) 16(2) *Law, Innovation and Technology* 777 <<https://doi.org/10.1080/17579961.2024.2392932>> (*‘GenAI vs Law Students’*). Overstatements regarding the capabilities of GenAI have been criticised in other fields as well: see, eg, Armin Alimardani and

or hallucinate a source.¹⁹ Another method is Retrieval-Augmented Generation ('RAG'). In this approach, the credible sources of data are provided to the model (eg, in the form of PDF files). When a user submits a query, the system retrieves relevant sections (for example, several paragraphs) from these sources²⁰ and passes them to the GenAI model as context for generating responses.²¹ Since the GenAI model relies on the relevant and reliable pieces of information, this method reduces the likelihood of hallucinations and generation of irrelevant and erroneous outputs. Legal documents can be stored in dedicated databases, allowing RAG to generate responses tailored to specific jurisdictions and legal contexts.²² Nonetheless, RAG is also subject to limitations, such as potentially overlooking critical information during retrieval,²³ and users must keep the stored documents up to date – a challenging task when managing large datasets.

In addition to these methods, newer iterations of GenAI, known as 'reasoning models', have been introduced.²⁴ These models undertake an explicit reasoning phase, generating a 'chain of thought' before responding to user queries. This approach allows the model additional time and computational resources to test various strategies, evaluate conclusions and reasoning pathways, recognise mistakes, and ultimately generate a refined final answer for the user. Many platforms made this chain-of-thought process visible to their users, enabling them to identify errors in the model's reasoning. Reasoning models have the potential to produce more robust legal analyses. However, these models also face complex issues, sometimes beyond those of the traditional models.²⁵ For instance, the model might reason that it should satisfy the user's expectations and, therefore, excessively agree with the user's assumptions.²⁶ Similarly, instead of admitting

Emma A Jane, 'GenAI and the Mirage of Personalised Learning for All' (2025) 7(2) *Law, Technology and Humans* 63 <<https://doi.org/10.5204/lthj.3764>>.

19 Klaudia Jaźwińska and Aisvarya Chandrasekar, 'AI Search Has a Citation Problem', *Columbia Journalism Review* (online, 6 March 2025) <https://www.cjr.org/tow_center/we-compared-eight-ai-search-engines-theyre-all-bad-at-citing-news.php>.

20 This is known as 'embedding'.

21 Yunfan Gao et al, 'Retrieval-Augmented Generation for Large Language Models: A Survey' (Research Paper, 27 March 2024) 2 <<https://doi.org/10.48550/arXiv.2312.10997>>.

22 Some companies, such as LexisNexis, have introduced RAG as a service to leverage their extensive legal databases: Caroline Hill, 'LexisNexis Announces New Capabilities for Lexis+ AI Including RAG Enhancements', *Legal IT Insider* (online, 22 July 2024) <<https://legaltechnology.com/2024/07/22/lexisnexis-announces-new-capabilities-for-lexis-ai-including-rag-enhancements/>>.

23 Jiawei Chen et al, 'Benchmarking Large Language Models in Retrieval-Augmented Generation' (Conference Paper, Association for the Advancement of Artificial Intelligence Conference on Artificial Intelligence, 25 March 2024) <<https://doi.org/10.1609/aaai.v38i16.29728>>.

24 *O1 System Card* (n 14); OpenAI, *OpenAI O3-Mini System Card* (Report, 31 January 2025) <<https://cdn.openai.com/o3-mini-system-card-feb10.pdf>>.

25 Cade Metz and Karen Weise, 'A.I. Is Getting More Powerful, but Its Hallucinations Are Getting Worse', *The New York Times* (online, 6 May 2025) <<https://www.nytimes.com/2025/05/05/technology/ai-hallucinations-chatgpt-google.html>>.

26 See Thilo Hagendorff, 'Deception Abilities Emerged in Large Language Models' (2024) 121(24) *Proceedings of the National Academy of Sciences* e2317967121:1–8 <<https://doi.org/10.1073/pnas.2317967121>>.

uncertainty about a question, the model might fabricate plausible but incorrect answers – a phenomenon known as ‘intentional hallucination’.²⁷

GenAI models reason differently from humans on at least two levels. First, these models rely on a dictionary of words, with each word linked to a specific number. When given a prompt, the model converts each word into its corresponding number. It then uses complex algorithms to predict the most likely sequence of numbers to follow, before converting them back into words to generate a response. Second, we should be cautious about trusting the reasoning provided by language models, as it may not reflect the actual processes behind their responses. These models are not taught by humans; rather, they are trained on vast datasets and do not perceive the world in the way humans do. It is likely that they have their own universal ‘language of thought’, and develop their own internal strategies for solving problems, which can differ significantly from human reasoning.²⁸ Although their output may seem ‘human-like’ and rational, models are sometimes ‘unfaithful’ in how they represent their inner reasoning to users. The ‘faked’ reasoning can be inaccurate and highly convincing.²⁹

Across all use cases of GenAI, two significant bottlenecks persist: first, user queries may be misinterpreted by the GenAI model and result in outputs that might not be aligned with the user’s intent; second, even when the retrieved materials are accurate – whether from the internet or through RAG – the intrinsic randomness in GenAI’s word generation process can lead to incorrect or inaccurate outputs.

The practical implications of GenAI’s limitations have already become apparent in the legal context. The following section examines a series of legal cases where reliance on GenAI models had serious repercussions, underscoring the risks of treating AI-generated content as authoritative without verifying its accuracy and relevance.

III THE RISE OF GENAI IN LITIGATION

In this section, we discuss some key examples of GenAI misuse appearing in case law from around the world, demonstrating the scope of the problem. This by no means covers all the cases, as the authors have collected 524 case examples across the eight jurisdictions researched.³⁰ We conclude this section by identifying themes, or categories of misuse, from this case law.

27 *O1 System Card* (n 14) 8.

28 ‘Tracing the Thoughts of a Large Language Model’, *Anthropic* (Web Page, 27 March 2025) <<https://www.anthropic.com/news/tracing-thoughts-language-model>> (‘Tracing the Thoughts’); Emmanuel Ameisen et al, ‘Circuit Tracing: Revealing Computational Graphs in Language Models’, *Anthropic Transformer Circuits Thread* (Thread Article, 27 March 2025) <<https://transformer-circuits.pub/2025/attribution-graphs/methods.html>>.

29 ‘Tracing the Thoughts’ (n 28); Ameisen et al (n 28).

30 See above n 4.

A Early Warning Signs: Lawyers Using GenAI

An early reported case of GenAI misuse in litigation was *Mata v Avianca Inc* (*'Mata'*), with judgment imposing sanctions delivered on 22 June 2023.³¹ In this United States ('US') District Court matter, lawyers filed submissions containing 'non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT'.³² This error was exacerbated by their failure to verify submissions, and their continuing to defend the fake material even under judicial scrutiny.³³

During the court hearings, one of the lawyers, Mr Schwartz, admitted misunderstanding ChatGPT's capabilities, stating

he was 'operating under the false perception that this website [ie, ChatGPT] could not possibly be fabricating cases on its own' ... [and] 'I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view.' ... 'My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up.'³⁴

Other serious issues in this case included subjective bad faith on the part of the lawyers, 'acts of conscious avoidance and false and misleading statements to the Court',³⁵ and violations of procedural rules. These ethical and procedural breaches led to a joint sanction of USD5,000 against the lawyers and their firm.

Following this decision, extensive media coverage highlighted GenAI's potential to produce convincing but fictitious case law.³⁶

In the US, 'regulatory' responses were swift. In May 2023, a judge in the US District Court for the Northern District of Texas implemented a new requirement for attorneys appearing before him to certify either that no part of the document was generated by an AI tool like ChatGPT, or that a human had reviewed any AI-generated text. Filings lacking this sworn attestation would be rejected by

31 678 F Supp 3d 443 (SD NY, 2023) (*'Mata'*).

32 Ibid 448 (Castel J).

33 Ibid 449–51.

34 Ibid 451.

35 Ibid 449.

36 See, eg, Benjamin Weiser, 'Here's What Happens When Your Lawyer Uses ChatGPT', *The New York Times* (online, 27 May 2023) <<https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html>>; Kathryn Armstrong, 'ChatGPT: US Lawyer Admits Using AI for Case Research', *BBC News* (online, 28 May 2023) <<https://www.bbc.com/news/world-us-canada-65735769>>; Molly Bohannon, 'Lawyer Used ChatGPT in Court and Cited Fake Cases: It's Now Backfired Spectacularly', *Forbes Australia* (online, 8 June 2023) <<https://www.forbes.com.au/news/innovation/lawyer-used-chatgpt-in-court-and-cited-fake-cases-its-now-backfired-spectacularly/>>; Erin Mulvaney, 'Judge Sanctions Lawyers Who Filed Fake ChatGPT Legal Research', *The Wall Street Journal* (online, 22 June 2023) <<https://www.wsj.com/us-news/judge-sanctions-lawyers-who-filed-fake-chatgpt-legal-research-9ebad8f9>>; Damien Carrick and Sophie Kesteven, 'This US Lawyer Used ChatGPT to Research a Legal Brief with Embarrassing Results. We Could All Learn from His Error', *ABC News* (online, 24 June 2023) <<https://www.abc.net.au/news/2023-06-24/us-lawyer-uses-chatgpt-to-research-case-with-embarrassing-result/102490068>>; Michael Legg and Vicki McNamara, 'AI is Creating Fake Legal Cases and Making its Way into Real Courtrooms, with Disastrous Results', *The Conversation* (online, 13 March 2024) <<https://theconversation.com/ai-is-creating-fake-legal-cases-and-making-its-way-into-real-courtrooms-with-disastrous-results-225080>>.

the Court.³⁷ Other US judges followed suit.³⁸ Several US state bars also adopted specific GenAI guidance or opinions.³⁹

B A Global Phenomenon

Parker v Forsyth ('*Parker*')⁴⁰ is a comparable South African case decided around the same time as *Mata*. In this case, the Plaintiff's counsel provided opposing lawyers with a list of allegedly relevant cases.⁴¹ By the time of the hearing, counsel admitted the cases were inaccessible and had been generated using ChatGPT. The court observed:

The Plaintiff's attorneys used this artificial intelligence medium to conduct legal research and accepted the results that it generated without satisfying themselves as to its accuracy. As it turned out, the cases listed above do not exist. The names and citations are fictitious, the facts are fictitious, and the decisions are fictitious. The Plaintiff's counsel was constrained to concede as much.⁴²

Unlike in *Mata*, the fake cases were shared only with the opposing lawyers, and the judge accepted there was no intent to mislead the Court. No punitive costs order was imposed, nor was the conduct referred to the relevant regulator. However, the court criticised the lawyers' 'undue faith in the veracity of the legal research generated by artificial intelligence', describing their conduct as both 'overzealous and careless'.⁴³

Just six months after *Mata*, a similar incident occurred in *Zhang v Chen* ('*Zhang*'),⁴⁴ where a Canadian lawyer was held personally liable for costs after including several fake cases generated by ChatGPT in a court application. The lawyer had ignored multiple notices from her Law Society about responsible GenAI

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- 37 Judge Brantley Starr, United States District Court for the Northern District of Texas, 'Mandatory Certification Regarding Generative Artificial Intelligence' (Certification Requirement, 2 June 2023) <<https://web.archive.org/web/20240408090605/https://www.txnd.uscourts.gov/judge/judge-brantley-starr>>. The order is reproduced in New York State Bar Association, *Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence* (Report, 6 April 2024) 51 <<https://nysba.org/wp-content/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf>> ('*New York State Bar Association Report*').
- 38 Standing Orders and Local Rules on the use of AI in the US are collected and summarised by the law firm Ropes & Gray: 'Artificial Intelligence Court Order Tracker', *Ropes & Gray* (Web Page) <<https://www.ropesgray.com/en/sites/artificial-intelligence-court-order-tracker>>.
- 39 See, eg, State Bar of California, 'Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law' (Committee Paper, 16 November 2023) <<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>>; Florida Bar, 'Ethics Opinion 24-1' (Opinion, 19 January 2024) <<https://www.floridabar.org/etopinions/opinion-24-1/>>; *New York State Bar Association Report* (n 37); New Jersey Supreme Court Committee on Artificial Intelligence and the Courts, 'Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers' (Practice Notice, 24 January 2024); Pennsylvania Bar Association and Philadelphia Bar Association, 'Ethical Issues Regarding the Use of Artificial Intelligence' (Joint Formal Opinion, 2024–200, 22 May 2024) <<https://www.lawnext.com/wp-content/uploads/2024/06/Joint-Formal-Opinion-2024-200.pdf>>.
- 40 [2023] ZAGPRD 1 (Regional Division) ('*Parker*').
- 41 *Ibid* 34–7 [78]–[85] (Regional Magistrate Chaitram).
- 42 *Ibid* 37 [87].
- 43 *Ibid* 38 [89].
- 44 [2024] BCSC 285 ('*Zhang*').

use,⁴⁵ as well as ChatGPT's own disclaimer warning 'output could be inaccurate and that using ChatGPT is not a substitute for professional advice'.⁴⁶ Although the Court found her conduct negligent rather than intentional (she withdrew the cases, acknowledged her error, apologised, and expressed remorse), the incident caused her significant reputational harm.⁴⁷ Like *Mata*, it is another cautionary tale about the risks of careless GenAI use in legal work.

Other examples of lawyers' inappropriate reliance on GenAI over 2023 and 2024 in the US include:

- *People v Crabill*, where a lawyer was suspended after citing fake case law generated by ChatGPT.⁴⁸
- *Smith v Farwell*, where a lawyer was sanctioned after filing multiple motions prepared by an associate using AI, containing fake cases.⁴⁹ The supervising lawyer failed to review the associate's work.⁵⁰
- *United States v Michel*, where lawyers asked an AI tool to '[w]rite a powerful, emotionally compelling closing argument' for a criminal trial.⁵¹ The client found it less than compelling, alleging his lawyers were ineffective in representing the case, and requested a new trial.⁵²
- The Cuddy Law Firm, which attempted to justify its fees in multiple cases by relying on ChatGPT's suggestions about lawyers' rates.⁵³
- *Gauthier v Goodyear Tire & Rubber Co*, where a lawyer used Anthropic's Claude AI to produce a Response containing fake cases.⁵⁴ He tried but

45 Law Society of British Columbia, 'Guidance on Professional Responsibility and Generative AI' (Guidance, November 2023) ('British Columbia Guidance'); *ibid* 11–12 [33]–[36] (Masuhara J).

46 *Zhang* (n 44) 12 [36] (Masuhara J).

47 See, eg, Jason Proctor, 'B.C. Lawyer Reprimanded for Citing Fake Cases Invented by ChatGPT', *CBC News* (online, 26 February 2024) <<https://www.cbc.ca/news/canada/british-columbia/lawyer-chatgpt-fake-precedent-1.7126393>>; Leyland Cecco, 'Canada Lawyer under Fire for Submitting Fake Cases Created by AI Chatbot', *The Guardian* (online, 1 March 2024) <<https://www.theguardian.com/world/2024/feb/29/canada-lawyer-chatgpt-fake-cases-ai>>.

48 No 23PDJ067, 2023 WL 8111898 (Colo PDJ, 22 November 2023) ('*Crabill*').

49 Trial Order of Davis AsJ in *Smith v Farwell* (Massachusetts Superior Court, No 2282CV01197, 12 February 2024).

50 The lawyer was sanctioned after admitting

[he] is unfamiliar with AI systems and was unaware, before the Oppositions were filed, that AI systems can generate false or misleading information. He also was unaware that his associate had used an AI system in drafting court papers in this case until after the Fictitious Case Citations came to light. Plaintiff's Counsel said that he had reviewed the Oppositions, before they were filed, for style, grammar and flow, but not for accuracy of the case citations. He also did not know whether anyone else in his office had reviewed the case citations in the Oppositions for accuracy before the Oppositions were filed. Plaintiff's Counsel attributed his own failure to review the case citations to the trust that he placed in the work product of his associate, which (to his knowledge, at least) had not shown any problems in the past.

Ibid 6.

51 No 19-148-1, 2024 WL 4006545, *19 (Kollar-Kotelly J) (D DC, 30 August 2024).

52 Justin Wise, 'Rapper Pras Michel's Ex-Lawyer Defends AI Use in Criminal Trial', *Bloomberg Law* (online, 12 January 2024) <<https://news.bloomberglaw.com/business-and-practice/rapper-pras-michels-ex-lawyer-defends-ai-use-in-criminal-trial>>.

53 See *JG v New York City Department of Education*, 719 F Supp 3d 293 (SD NY, 2024); *TP v New York City Department of Education*, No 22 Civ 9413, 2024 WL 986587 (SD NY, 7 March 2024); *SC v New York City Department of Education*, No 23-CV-1266, 2024 WL 1447331 (SD NY, 2 April 2024).

54 No 1:23-CV-281, 2024 WL 4882651 (ED Tex, 25 November 2024) ('*Gauthier v Goodyear*').

failed to verify them through another legal AI tool and filed the Response anyway.⁵⁵

- *Re Neusom*, where a lawyer was suspended after admitting he ‘may have used artificial intelligence to draft the filing(s) but was not able to check the excerpts and citations’.⁵⁶
- *Re Samuel*, where a lawyer’s submissions included fake and inaccurate citations from a website containing GenAI-generated content.⁵⁷
- *Mortazavi v Booz Allen Hamilton Inc*, in which a lawyer relied on AI when drafting a motion but failed to comply with a standing order to disclose and verify AI-generated content.⁵⁸

Additionally, courts around the world have issued guidance addressing GenAI use.⁵⁹ Legal professional bodies have also acted, producing guides for responsible AI use in Europe,⁶⁰ the United Kingdom,⁶¹ New Zealand,⁶² and multiple Canadian provinces.⁶³

55 Monk submitted the Response without reading the cases cited, or even confirming the existence or validity of the cases included therein. In fact, it is unclear what legal research, if any, Monk completed before filing the Response. Furthermore, after Goodyear specifically identified the non-existent legal authorities contained in the Response, Monk took no action to verify his research.

Ibid *3 (Crone J).

56 Grievance Committee for the Middle District of Florida, Fort Myers Division, ‘Report and Recommendation of the Grievance Committee’ (MD Fla, No 2:23-cv-00503-JLB-NPM, 2024 WL 982508, 11 January 2024) *3 (*‘Re Neusom Committee Report’*).

57 82 Misc 3d 616, 619 (Graham J) (NY Sur Ct, 2024).

58 No 2:24-cv-07189-SB-RAO, 2024 WL 4308032, *1 (Blumenfeld J) (CD Cal, 26 September 2024).

59 See, eg, UK Courts and Tribunals Judiciary, ‘Artificial Intelligence (AI): Guidance for Judicial Office Holders’ (Judicial Guidance, 14 April 2025) <<https://www.judiciary.uk/wp-content/uploads/2025/04/Refreshed-AI-Guidance-published-version-website-version.pdf>>; Courts of New Zealand, ‘Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals’ (Judicial Guidelines, 7 December 2023) <<https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-guidelines/all-benches/20231207-GenAI-Guidelines-Judicial.pdf>>; Hong Kong Judiciary, ‘Guidelines on the Use of Generative Artificial Intelligence for Judges and Judicial Officers and Support Staff of the Hong Kong Judiciary’ (Judicial Guidelines, 12 September 2024) <https://www.judiciary.hk/doc/en/court_services_facilities/guidelines_on_the_use_of_generative_ai.pdf>; Singapore Courts, ‘Guide on the Use of Generative Artificial Intelligence Tools by Court Users’ (Guidelines, 1 October 2024) <https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/guide-on-the-use-of-generative-ai-tools-by-court-users.pdf?sfvrsn=3900c814_1>.

60 New Technologies Commission, European Bars Federation (Fédération des Barreaux d’Europe), ‘European Lawyers in the Era of ChatGPT: Guidelines on How Lawyers Should Take Advantage of the Opportunities Offered by Large Language Models and Generative AI’ (Guidelines, June 2023) <<https://www.fbe.org/wp-content/uploads/2023/06/European-lawyers-in-the-era-of-ChatGPT-FBE-Guidelines-on-how-lawyers-should-take-advantage-of-the-opportunities-offered-by-large-language-models-and-gene-kopia.pdf>>.

61 ‘Generative AI: The Essentials’, *Law Society* (Web Page, 1 October 2025) <<https://www.lawsociety.org.uk/topics/ai-and-lawtech/generative-ai-the-essentials>>; Bar Council, ‘Considerations When Using ChatGPT and Generative Artificial Intelligence Software Based on Large Language Models’ (Guidance, 30 January 2024) <<https://www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-Generative-AI-Software-based-on-large-language-models-January-2024.pdf>>.

62 New Zealand Law Society, ‘Lawyers and Generative AI’ (Guidance, 14 March 2024) <<https://www.lawsociety.org.nz/assets/Professional-practice-docs/Rules-and-Guidelines/Lawyers-and-AI-Guidance-Mar-2024.pdf>>.

63 ‘British Columbia Guidance’ (n 45); Law Society of Ontario, ‘Licensee Use of Generative Artificial Intelligence’ (White Paper, April 2024) (*‘Ontario White Paper’*).

In Australia, the supreme courts of Victoria and Queensland issued AI guidance in May 2024.⁶⁴ The Supreme Court of New South Wales followed with a Practice Note on 21 November 2024.⁶⁵ AI-related guidelines for lawyers were released by the New South Wales Bar Association and Queensland Law Society in mid-2023 and mid-2024 respectively.⁶⁶ On 6 December 2024, the Law Society of New South Wales, the Legal Practice Board of Western Australia, and the Victorian Legal Services Board and Commissioner issued a joint statement on the use of AI in Australian legal practice.⁶⁷

Australian courts have now directly confronted the misuse of GenAI by local lawyers or law firms in litigation on multiple occasions. The earliest cases are *Re Dayal* ('*Dayal*'),⁶⁸ decided on 27 August 2024; and *Valu v Minister for Immigration and Multicultural Affairs [No 2]* ('*Valu [No 2]*'),⁶⁹ decided on 31 January 2025.⁷⁰

In *Dayal*, a lawyer submitted a list of fake case citations and summaries in proceedings before the Federal Circuit and Family Court of Australia.⁷¹ When the

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- 64 Supreme Court of Victoria, 'Responsible Use of Artificial Intelligence in Litigation' (Guidelines, May 2024) <<https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines/guideline-responsible-use-of-ai-in-litigation>> ('VSC Guidelines'). Also adopted in Victoria: County Court of Victoria, 'Responsible Use of Artificial Intelligence in Litigation' (Guidelines, 3 July 2024) ('VCC Guidelines'); Queensland Courts, 'The Use of Generative Artificial Intelligence (AI) Guidelines for Responsible Use by Non-lawyers' (Guidelines, 13 May 2024) <https://www.courts.qld.gov.au/_data/assets/pdf_file/0012/798375/Artificial-Intelligence_Guidelines-for-Non-Lawyers.pdf> ('Queensland Courts Non-Lawyers Guidelines'). See also subsequently issued GenAI guidance for judicial officers and their staff, Queensland Courts, 'The Use of Generative AI: Guidelines for Judicial Officers' (Guidelines, 15 September 2025) <https://www.courts.qld.gov.au/_data/assets/pdf_file/0009/879714/the-use-of-generative-ai-guidelines-for-judicial-officers.pdf>; Supreme Court of Queensland, *Practice Direction Number 5 of 2025: Accuracy of References in Submissions*, 24 September 2025.
- 65 Supreme Court of New South Wales, *Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)*, 28 January 2025 <https://supremecourt.nsw.gov.au/documents/Practice-and-Procedure/Practice-Notes/general/current/PN_SC_Gen_23.pdf> ('NSWSC Practice Note'). See also the District Court of NSW, *Practice Note 2: Generative AI Practice Note*, 3 February 2025; Land and Environment Court of NSW, *Practice Note: Use of Generative Artificial Intelligence (Gen AI)*, 11 February 2025; Industrial Relations Commission of NSW, *Practice Note No 33: Use of Generative Artificial Intelligence (Gen AI)*, 19 February 2025; NSW Civil & Administrative Tribunal, *Procedural Direction 7: Use of Generative Artificial Intelligence (Gen AI)*, 7 April 2025.
- 66 New South Wales Bar Association, 'Issues Arising from the Use of AI Language Models (Including ChatGPT) in Legal Practice' (Guidance, 12 July 2023) <<https://inbrief.nswbar.asn.au/posts/9e292ee2f90581f795ff1df0105692d/attachment/NSW%20Bar%20Association%20GPT%20AI%20Language%20Models%20Guidelines.pdf>>; Queensland Law Society, 'No 37: Artificial Intelligence in Legal Practice' (Guidance Statement, 30 May 2024).
- 67 Law Society of New South Wales, Legal Practice Board of Western Australia and Victorian Legal Services Board + Commissioner, 'Statement on the Use of Artificial Intelligence in Legal Practice' (Statement, December 2024) <<https://www.lsbic.vic.gov.au/news-updates/news/statement-use-artificial-intelligence-australian-legal-practice>>.
- 68 (2024) 386 FLR 359 ('*Dayal*'). For the unreported version, see *Dayal* [2024] FedCFamC2F 1166.
- 69 (2025) 386 FLR 365 ('*Valu [No 2]*'). For the unreported version, see *Valu v Minister for Immigration and Multicultural Affairs [No 2]* [2025] FedCFamC2G 95. See also *Valu v Minister for Immigration and Multicultural Affairs* [2025] FedCFamC2G 94 ('*Valu*').
- 70 Subsequent Australian case examples include *Murray v Victoria* [2025] FCA 731 (Murphy J) ('*Murray*'); *JNE24 v Minister for Immigration and Citizenship* [2025] FedCFamC2G 1314 (Gerrard J) ('*JNE24*'); *DPP (Vic) v GR* [2025] VSC 490 (Elliott J).
- 71 *Handa v Mallick* [2024] FedCFamC2F 957.

court could not locate the cases and the lawyer failed to produce copies, Judge Humphreys questioned how the list had been prepared.⁷² The lawyer admitted the list was generated using LEAP, a legal practice management system enhanced with AI, and had not been verified before submission.⁷³

The lawyer claimed, ‘he did not intentionally mislead the court ... [and] acknowledged the need to verify AI assisted research ... for accuracy and integrity.’⁷⁴ He took remedial steps, apologised to the court, compensated the opposing party’s lawyers to cover costs, and self-reported to the Legal Practitioners Liability Committee.⁷⁵

In her judgment, Judge Humphreys referenced *Mata* and reiterated the risks associated with relying on non-existent legal authorities generated by AI.⁷⁶ She cited guidelines issued by the Supreme and County Courts of Victoria,⁷⁷ which emphasise that ‘[p]arties and practitioners who are using AI tools in the course of litigation should ensure they have an understanding of the manner in which those tools work, as well as their limitations’.⁷⁸ Although those guidelines do not directly apply to the Federal Circuit and Family Court of Australia, Judge Humphreys stressed that legal practitioners’ general duties still apply when using AI, ‘including the duty not to mislead the court or another participant in the litigation process and the duty of candour to the court’.⁷⁹ The matter was referred to the Victorian legal regulator for further investigation, which resulted in the lawyer’s practising certificate being varied.⁸⁰

In *Valu [No 2]*, a lawyer used GenAI to prepare submissions containing fake case citations and inaccurate quotations. Upon detection of these errors, the lawyer admitted to using AI to locate Australian cases, which led to the inclusion of the fake cases.⁸¹ The lawyer explained his error was partly due to personal circumstances, and:

due to time constraints and his health issues, he decided to use AI ... He accessed the site known as ChatGPT, inserted some words and the site prepared a summary of cases for him. He said the summary read well, so he incorporated the authorities and references into his submissions without checking the details.⁸²

As in *Dayal*, the tribunal acknowledged the lawyer’s contrition and mitigating actions but referred the conduct to the New South Wales (‘NSW’) legal regulator.

72 Ibid [6].

73 Ibid [7].

74 *Dayal* (n 68) 361 [8] (Judge Humphreys).

75 Ibid 361 [7], [9].

76 Ibid 362 [11].

77 ‘VSC Guidelines’ (n 64); ‘VCC Guidelines’ (n 64).

78 ‘VSC Guidelines’ (n 64) 1 (principle 1); ‘VCC Guidelines’ (n 64) 1 (principle 1).

79 *Dayal* (n 68) 362 [16].

80 Variations imposed included restrictions on the lawyer’s practising certificate, only practising as an employee solicitor, requiring two years of supervised legal practice, and no longer being entitled to operate his own law practice, or practise as a principal lawyer. For more details see Victorian Legal Services Board + Commissioner, ‘Statement on the “Mr Dayal” Matter’, (Statement, 2 September 2025) <<https://lsbc.vic.gov.au/news-updates/news/statement-mr-dayal-matter>>.

81 *Valu [No 2]* (n 69) 367 [10] (Judge Skaros).

82 Ibid 368–9 [22].

C Self-Represented Litigants and GenAI

Since GenAI tools became publicly available, SRLs have been using them for assistance in litigation. Some of the earliest recorded examples of GenAI use by SRLs occurred in Australian courts. In *Nash v Director of Public Prosecutions (WA)*, Quinlan CJ referenced the possible use of GenAI by an SRL seeking leave to appeal their conviction for breach of bail.⁸³ Judgment was delivered on 8 May 2023, pre-dating the *Mata* and *Parker* decisions discussed above, which were released in June 2023.⁸⁴

Another early example of SRL use of GenAI is the UK case of *Harber v The Commissioners for His Majesty's Revenue and Customs*,⁸⁵ where an SRL attempted to rely on nine fake cases apparently generated by AI. The Tribunal regarded this error as ‘a serious and important issue’,⁸⁶ but accepted her explanation that she was ‘unaware that the AI cases were not genuine and that she did not know how to check their validity’.⁸⁷

In the Florida case of *Gutierrez v Gutierrez*,⁸⁸ an SRL lodged multiple non-compliant appeals in a probate matter. The Court ultimately found the SRL had ‘filed ... a notice of phantom case law, listing the legal authorities relied on ... “that simply do not exist”’.⁸⁹ After failing to respond to a show cause order, the court barred the SRL from future filings and dismissed the remaining appeals as a sanction for abuse of process.

A similar approach was adopted by the US District Court in *UMB Bank National Association v Gauthier*,⁹⁰ involving an SRL engaged in extensive litigation over a foreclosure dispute. Submissions ‘contained numerous misquotations and miscitations and ... a citation to a case that does not appear to exist’.⁹¹ The Court regarded this as a ‘grave and substantial error’, issued a show cause order regarding potential sanctions and imposed filing restrictions.⁹²

Finch v Heat Group Pty Ltd is an Australian example.⁹³ Ms Finch, an SRL who was engaged in a protracted anti-discrimination dispute, applied to restrain

83 [2023] WASCA 75, [9].

84 Another early Australian example of GenAI use by a SRL is *DPP (ACT) v Khan* [2024] ACTSC 19, decided on 7 February 2024, where a SRL submitted multiple character references, including one allegedly from his brother. Mossop J was particularly critical of this reference, questioning whether it had been written using a large language model. Although the defendant claimed it was created using a computer translation tool rather than a large language model, Mossop J disagreed and found that ‘the use of language within the document is consistent with an artificial intelligence generated document’, noting that certain expressions were inconsistent with the referee’s relationship to the defendant, and declining to rely on the reference: at [39]–[44].

85 [2023] UKFTT 01007 (TC).

86 *Ibid* [5] (Tribunal Judge Anne Redston).

87 *Ibid* [3].

88 399 So 3d 1185 (Fla Dist Ct App, 2024) (*‘Gutierrez’*).

89 *Ibid* 1187 (Lobree J).

90 No 2:23-cv-00380-JAW, 2024 WL 4871738 (D Me, 22 November 2024).

91 *Ibid* n 2 (Woodcock J).

92 *Ibid*.

93 [2024] FedCFamC2G 161 (*‘Finch’*).

the law firm MinterEllison from acting for her former employer.⁹⁴ She emailed the judge's chambers a list of 24 purported authorities supporting her position.⁹⁵ Some cited cases did not exist, while others were irrelevant.⁹⁶ When questioned, Ms Finch denied knowing what ChatGPT was but apologised.⁹⁷ Nonetheless, Judge Riley was openly critical, regarding the act as 'an egregious instance of Ms Finch misleading the court. ... [which] remains a serious issue. If the court had delivered an *ex tempore* judgment ... and relied on the summaries of cases Ms Finch provided, the court could have been led into substantial error.'⁹⁸

Another Australian example involved Ms Luck, a prolific SRL who filed over 50 unsuccessful applications between 2000 and 2025. In *Luck v Principal Registrar and Chief Executive Officer of the Federal Court of Australia* ('*Luck v Principal Registrar*'),⁹⁹ she admitted to using AI, stating:

as an unrepresented litigant she had benefited from using artificial intelligence, or AI, technology in the preparation of her documents. She apologised in advance for the prospect that the Court might identify that some of the citations in her documents were not accurate. Indeed, there is at least one case cited by the applicant in her written material that does not exist.¹⁰⁰

Despite her apology, Ms Luck repeated this behaviour in *Luck v Secretary, Services Australia*,¹⁰¹ including a citation that the court concluded 'may be a product of hallucination by a large language model'.¹⁰² The Federal Court subsequently stayed all her current proceedings, prohibited future applications, and indicated it was considering making a vexatious proceedings order.¹⁰³

D A Persistent Issue

As we pass the second anniversary of *Mata*, judicial patience with GenAI misuse is clearly wearing thin. Courts are responding with increasing firmness towards both legal practitioners and SRLs.

In the US, a lawyer in *Bunce v Visual Technology Innovations Inc* ('*Bunce*') cited non-existent case law, alongside real cases that were either overruled or irrelevant. He admitted to using ChatGPT, stating he had 'blindly trusted an algorithm he had never used before. He conducted no research into ChatGPT's efficacy as a legal tool, ... [and] no independent research into the legal cases that

94 Shannon Deery, 'Sacked Cosmetics Executive Suing Heat Group "Out of Her Depth"', *Herald Sun* (online, 14 March 2014) <<https://www.heraldsun.com.au/news/victoria/sacked-cosmetics-executive-suing-heat-group-out-of-her-depth/news-story/6118b49028436f74087fc43df6c6b58e>>.

95 *Finch* (n 93) [127] (Judge Riley).

96 *Ibid* [128]–[135].

97 *Ibid* [137].

98 *Ibid* [138].

99 [2024] FCA 1256 ('*Luck v Principal Registrar*').

100 *Ibid* 1 [3] (Wheelahan J).

101 [2025] FCAFC 26 ('*Luck v Secretary*').

102 *Ibid* [14] (Rofe J).

103 *Ibid* [42].

were cited',¹⁰⁴ and claimed 'he never in his "wildest dreams" predicted that AI would provide artificial cases'.¹⁰⁵ Nonetheless, the court imposed sanctions.¹⁰⁶

Similarly, in *Bevins v Colgate-Palmolive Co* ('*Bevins*'), a lawyer filed briefs containing fake cases.¹⁰⁷ When questioned, he offered no explanation beyond asserting it may have been the 'result and consequence of a tired, rather than fresh eyed, last proof reading of the filing'.¹⁰⁸ The court found this unpersuasive, struck out the motion, and imposed sanctions.¹⁰⁹

In *Mid Central Operating Engineers Health and Welfare Fund v HoosierVac LLC* ('*Mid Central Referral Proceedings*'), a lawyer admitted to drafting multiple briefs containing fake cases using AI, without verifying their accuracy.¹¹⁰ In the first instance, a magistrate judge recommended sanctions of USD15,000.¹¹¹ Although this was reduced to USD6,000 in subsequent proceedings, Hanlon J noted this still represented a substantial sanction, highlighting that the lawyer had experienced adverse 'collateral consequences', including damage to his professional reputation and referral to the state attorney disciplinary commission.¹¹²

In *Lacey v State Farm General Insurance Company*,¹¹³ two law firms representing the plaintiff were held jointly responsible for 'bogus AI-generated research' contained in a brief, which they failed to properly correct before re-submission despite explicit notice of issues.¹¹⁴ The court regarded their conduct as 'tantamount to bad faith',¹¹⁵ imposing litigation sanctions and financial payments totalling USD31,100 to compensate the defence.¹¹⁶

Courts in some jurisdictions have also threatened contempt proceedings against lawyers misusing GenAI. In Canada, in *Ko v Li*, an experienced lawyer narrowly avoided contempt proceedings after submitting a document that included fake cases.¹¹⁷ Similarly, in the UK, in *R (Ayinde) v Haringey LBC*, both a junior barrister and an experienced lawyer acting in separate matters faced severe criticism for suspected misuse of AI and submission of false material.¹¹⁸ The court considered initiating contempt proceedings against both individuals, but ultimately issued

104 No 23-1740, 2025 WL 662398, *3 (Scott J) (ED Pa, 27 February 2025) ('*Bunce*').

105 Ibid *1.

106 Ibid *4.

107 No 25-576, 2025 WL 1085695 (ED Pa, 10 April 2025) ('*Bevins*').

108 Ibid *6 (Baylson J).

109 Ibid *7-8.

110 No 2:24-cv-00326-JPH-MJD, 2025 WL 574234, *1 (Dinsmore J) (SD Ind, 21 February 2025) ('*Mid Central Referral Proceedings*').

111 Ibid *2-3.

112 *Mid Central Operating Engineers Health & Welfare Fund v HoosierVac LLC*, No 2:24-cv-00326-JPH-MJD, 2025 WL 1511211, *1-2 (SD Ind, 28 May 2025) ('*Mid Central Sanctions Proceedings*').

113 No CV 24-5205 FMO (MAAx), 2025 WL 1363069 (CD Cal, 5 May 2025) ('*Lacey*').

114 Ibid *1 (Wilner J).

115 Ibid *3.

116 Ibid *5.

117 2025 CarswellOnt 7499 (WL Can) ('*Ko*').

118 [2025] EWHC 1383 (Admin) ('*Ayinde Referral Proceedings*'). The judgment addresses two proceedings: the Ayinde case and the AI-Haroun case.

a strong warning, referring both cases to the professional regulators for further investigation and calling for urgent action.¹¹⁹

Courts are also taking a stricter stance with SRLs. In *Ferris v Amazon.com Services LLC*, an SRL used GenAI to prepare filings containing fake and misleading case citations, and also for an oral statement to the court at a show-cause hearing.¹²⁰ The court issued a strong rebuke:

Courts exist to decide controversies fairly, in accordance with the law. This function is undermined when litigants using AI persistently misrepresent the law to the courts. AI is a powerful tool, that when used prudently, provides immense benefits. When used carelessly, it produces frustratingly realistic legal fiction that takes inordinately longer to respond to than to create. While one party can create a fake legal brief at the click of a button, the opposing party and court must parse through the case names, citations, and points of law to determine which parts, if any, are true. As AI continues to proliferate, this creation-response imbalance places significant strain on the judicial system.¹²¹

The judge in *Ferris* further observed that ‘[t]rials are a search for the truth’ and fake law undermines that objective, and indeed lies may become laws.¹²²

Additionally, SRLs relying on fake cases may also harm their own case. In *Sanders v United States*, the court observed that the ‘Plaintiff’s unquestioning reliance on AI hindered her own ability to effectively represent herself. Misled by the fake cases, Plaintiff cost herself an opportunity to make the best possible arguments in support of her claim for relief.’¹²³ And in *Page v Long*,¹²⁴ an SRL who was a defendant in civil trespass proceedings relied on GenAI to produce supporting cases that did not exist, leading to the judge observing ‘a litigant runs the risk that their case will be damaged, rather than helped, if they choose to use AI without taking the time to understand what it produces, and to confirm that it is both legally and factually accurate’.¹²⁵

The perils of GenAI misuse, clearly demonstrated in these cases, include increased costs, wasted resources, inefficiencies, unfairness, self-inflicted loss of opportunities to be heard, and overall an undermining of the rule of law.

119 Ibid [82] (Sharp P). See also a subsequent UK case example, where a barrister’s conduct was referred to the Bar Standards Board (BSB) for investigation after he misused ChatGPT and attempted to mislead the Upper Tribunal (Immigration and Asylum Chamber) by submitting an AI-generated fake case citation. The option of referring such conduct to the police for further investigation or initiating contempt proceedings was discussed, but ultimately, these responses were not regarded as appropriate given the surrounding circumstances: *Bangladesh v Secretary of State for the Home Department* [2025] UKUT 305, [9], [11]–[18] (Judge Lindsley).

120 778 F Supp 3d 879, 880 (Mills J) (ND Miss, 2025) (‘*Ferris*’).

121 Ibid 880–1. See also *Weedbrook v Partlin* [2024] QDC 194, [40] (Porter DCJ) (‘*Weedbrook*’).

122 *Ferris* (n 120) 881, citing Franz Kafka, *The Trial*, tr David Wyllie (Dover Publications, 1925) 159. See also *JNE24* (n 70) [24] (Judge Gerrard).

123 176 Fed Cl 163, 169–70 (Roumel J) (Fed Cl, 2025) (‘*Sanders*’).

124 [2025] VCC 868.

125 Ibid [21] (Judge Tran). See also at [19]–[20]; *Yang v Nought to Five Early Childhood Centre Inc* [2025] FWC 1205, [39] (Commissioner McKinnon); *JNE24* (n 70) [24] (Judge Gerrard) (‘there is the potential for a good case to be undermined by rank incompetence’); *Stewart v Good Shepherd Australia New Zealand* [2025] VSCA 206 14–15 [63] (Richards JA) (‘The inclusion of fabricated authorities and citations in Ms Stewart’s written submissions did not help her cause.’).

E GenAI Misuse: Emerging Themes

The above discussion of case examples illustrates several recurring themes:

1. Fake and incorrect case citations and summaries – GenAI tools generating fake cases, citations, statutory references, or inaccurate legal summaries.
2. Flawed legal reasoning – submissions containing incorrect and unfocused arguments, apparently based on unverified GenAI outputs or deficient research.
3. Incorrect documentation – legal documents prepared using GenAI tools exhibiting procedural mistakes and other substantive errors.
4. Prolix documentation, ‘flooding’ courts and tribunals – GenAI is being used to create voluminous, often incoherent or irrelevant material, burdening courts and opposing parties.

Themes 1 and 2 account for the majority of documented incidents, although many cases exhibit multiple overlapping issues. Despite increasing guidance from courts and tribunals, efforts of legal regulators, extensive media coverage, explicit product disclaimers, and professional education efforts, GenAI misuse in litigation persists. The key question is why, and what can be done in response to address the problem.

IV SUGGESTED CAUSES OF GENAI PROBLEMS

Understanding why legal professionals and SRLs fail to verify AI-generated content is essential to preventing future misuse of GenAI and encouraging its responsible application in litigation. Our research suggests that this failure stems from several overlapping causes. For the purposes of this article, we will discuss them under five categories: AI literacy, legal literacy, copy-paste practice, automation bias, and verification drift.¹²⁶ While no single explanation can account for every instance of GenAI misuse, taken together, these categories provide a comprehensive framework for understanding the various ways individuals may misuse GenAI in court settings. It is important to note, however, that it is often difficult to identify which factors are involved in a particular case, as explanations are typically insufficient or absent. Moreover, multiple factors may contribute at the same time, further complicating precise attribution.

126 Other possible theories that may explain the misuse of GenAI in courts include confirmation bias and superiority illusion bias. For further information on these theories: see Yiran Du, ‘Confirmation Bias in Generative AI Chatbots: Mechanisms, Risks, Mitigation Strategies, and Future Research Directions’ (Research Paper, 12 April 2025) <<https://doi.org/10.48550/arXiv.2504.09343>>; Makiko Yamada et al, ‘Superiority Illusion Arises from Resting-State Brain Networks Modulated by Dopamine’ (2013) 110(11) *Proceedings of the National Academy of Sciences* 4363 <<https://doi.org/10.1073/pnas.1221681110>>; Matthew J Hornsey, ‘Linking Superiority Bias in the Interpersonal and Intergroup Domains’ (2003) 143(4) *Journal of Social Psychology* 479 <<https://doi.org/10.1080/00224540309598457>>.

A AI Literacy

A common explanation for overreliance on GenAI is a limited understanding of the technology's shortcomings, including its tendency to generate fabricated content. This explanation is particularly plausible during the initial adoption of GenAI in legal settings, when the legal community and SRLs were still becoming familiar with its capabilities. Unlike many other technologies, GenAI tools like ChatGPT were introduced to the public with minimal prior exposure or understanding. The sudden availability of powerful, free, and easily accessible GenAI tools meant that individuals without adequate training or awareness of the technology's limitations could inadvertently misuse them.

The media's enthusiasm for GenAI played a significant role in shaping the public's perception of this technology. Following the release of ChatGPT in November 2022, media coverage largely focused on the AI's potential to transform employment, especially within the legal profession, while giving little attention to its limitations, including its tendency to produce hallucinated content.¹²⁷ This influence is evident in a filing arising out of *Mata*, where show cause orders were issued as Stephen A Schwartz and Levidow Levidow & Oberman, PC, in their capacity as counsel for Mata, 'filed [an] affirmation in opposition that included non-existent judicial opinions with fake quotes and fake citations created by artificial intelligence'.¹²⁸ In their capacity as non-parties, Schwartz and the firm filed a memorandum in response to one of the orders, asserting that '[a]t the time Mr. Schwartz used ChatGPT to conduct legal research, the technology was the subject of almost daily discussion in the media and the legal industry'.¹²⁹

The legal sector has been a particular target for some AI companies.¹³⁰ For example, in 2023, OpenAI announced that GPT-4 achieved results in the top 10% of test takers in the US Uniform Bar Examination.¹³¹ However, empirical studies raised doubts about the validity of these claims, indicating that GPT-4's actual capabilities in legal reasoning and analysis are more limited than suggested.¹³² Despite that, this

127 See John Villasenor, 'How AI Will Revolutionize the Practice of Law', *Brookings* (online, 20 March 2023) <<https://www.brookings.edu/articles/how-ai-will-revolutionize-the-practice-of-law/>>; Raquel Gomes, 'AI And The Legal Industry: How To Amplify Efficiency', *Forbes* (online, 16 May 2023) <<https://www.forbes.com/councils/forbesbusinesscouncil/2023/05/16/ai-and-the-legal-industry-how-to-amplify-efficiency/>>; Shritama Saha, 'Meet Harvey, the Copilot for Lawyers', *Aim Media House* (online, 15 February 2023) <<https://analyticsindiamag.com/ai-news-updates/meet-harvey-the-copilot-for-lawyers/>>; Katherine Haan and Rob Watts, 'How Businesses Are Using Artificial Intelligence', *Forbes* (online, 24 April 2023) <<https://www.forbes.com/advisor/business/software/ai-in-business/>>.

128 *Mata* (n 31) 443.

129 Stephen A Schwartz and Levidow Levidow & Oberman, PC, 'Memorandum of Law by Non-Parties', Memorandum in *Mata v Avianca Inc* (SD NY, No 1:22-cv-01461-PKC, 6 June 2023) 16 ('*Mata* Memorandum').

130 Eric Martínez, 'Re-Evaluating GPT-4's Bar Exam Performance' (2024) 33 *Artificial Intelligence and Law* 581 <<https://doi.org/10.1007/s10506-024-09396-9>>.

131 *GPT-4 Technical Report* (n 16); 'GPT-4 Is OpenAI's Most Advanced System, Producing Safer and More Useful Responses', *OpenAI* (Web Page) <<https://openai.com/gpt-4>>.

132 Alimardani, 'GenAI vs Law Students' (n 18); Martínez (n 130).

perception has been echoed in a judicial commentary where a judge referred to GPT-4 as the model that ‘scored in the 90th percentile on the bar exam.’¹³³

The community’s misunderstanding of GenAI capabilities is clearly represented in some cases. In *Mata*, the lawyer acknowledged being unaware of GenAI’s limitations, admitting he had not considered the possibility that ChatGPT might fabricate cases.¹³⁴ Seeking reassurance, he even asked whether the cases provided were real, to which ‘ChatGPT responded that it had supplied “real” authorities that could be found through Westlaw, LexisNexis and the Federal Reporter’.¹³⁵ In *Bunce*,¹³⁶ similarly, the lawyer found GenAI hallucination so unexpected that he stated not even in his ‘wildest dreams’ would he have imagined AI could generate fabricated cases.¹³⁷ For SRLs, limited AI literacy may continue to play a role in the submission of fabricated, incorrect, or irrelevant content to courts. This issue is likely to persist until there is widespread public understanding of AI technology and its key limitations. Some courts, however, already appear to expect SRLs to be aware of GenAI’s tendency to generate false or misleading information. In one case involving fabricated citations, the court observed:

AI-Hamim [SRL] filed his opening brief ... more than one year after media outlets throughout the country reported on the attorneys’ submission of a brief filled with ChatGPT-generated hallucinations in *Mata*. ... By mid-2024, GAI tools’ propensity to produce hallucinations in response to queries regarding legal issues was not arcana known only to members of the bar and judges.¹³⁸

This expectation, however, assumes that AI literacy is the sole factor behind the submission of fabricated materials. Such reasoning may overlook other potential causes, including the broader challenges SRLs face in navigating the complexity of the legal system.

B Legal Literacy and Access

When lawyers review GenAI-generated outputs, their expertise may enable them to identify at least some of the inaccurate statements and fabricated sources, and they may consult legal databases to verify the information. In contrast, SRLs often lack the necessary legal knowledge to critically evaluate GenAI outputs, making it challenging for them to spot errors or unreliable sources. Additionally, SRLs typically have limited access to comprehensive legal research tools.

For example, in *Kruglyak v Home Depot USA Inc*, the SRL admitted that while he was unaware of the concept of AI hallucinations, ‘he had limited access to legal research tools, such as LexisNexis and Westlaw, to verify the authenticity and accuracy of his case citations’.¹³⁹ Similarly, in *Dukuray v Experian Information Solutions*, the court acknowledged that ‘it may be more difficult for a *pro se* litigant

133 *Salisbury v United States*, No CV-23-00109-TUC-JAS, 2024 WL 1406344, n 4 (Soto J) (D Ariz, 29 March 2024).

134 *Mata* (n 30) 451 (Castel J).

135 *Ibid* 458.

136 See above Part III(D).

137 *Bunce* (n 104) *1, *3 (Scott J).

138 *Al-Hamim v Star Hearthstone LLC*, 564 P 3d 1117, 1124 (Lipinsky J) (Colo App, 2024) (‘*Al-Hamim*’).

139 *Kruglyak v Home Depot USA Inc*, 774 F Supp 3d 767, 770 (Sargent J) (WD Va, 2025).

without access to computerized legal databases such as Westlaw or LEXIS to check the veracity of case citations generated by AI programs'.¹⁴⁰ In *Luck v Principal Registrar*,¹⁴¹ the SRL informed the court that she used AI to assist her in preparing her legal document and apologised for the possibility that some of her sources were inaccurate.¹⁴² She repeated this conduct in another case.¹⁴³

These examples suggest that even when SRLs are aware of the risk of AI-generated inaccuracies, they may lack the resources and expertise to verify their documents, leading them to submit the material as generated by AI. In *Hamilton v Tigard Police Department*, recognising these challenges, the court, after identifying fabricated cases submitted by an SRL, listed several law libraries and resources that offer free access to legal research services, including Westlaw and LexisNexis.¹⁴⁴ However, such legal resources may not be available across all jurisdictions.

Legal professionals do not always have access to reliable legal databases. In *Mata*, the lawyer's firm had limited access to federal case law and did not subscribe to Westlaw and LexisNexis.¹⁴⁵ Nonetheless, lawyers are expected to submit verified documents and arguments, and limited access to legal databases can explain, but does not justify submission of fabricated material.

C Copy-Paste Practice

A further potential source of lawyers being prone to falling for AI hallucinations comes from an aspect of legal practice. A central feature of the common law system is the reliance on precedent; to advise on current legal requirements, lawyers often need to locate and reference past statements of the law.¹⁴⁶ Additionally, legal practitioners, to varying degrees, rely on established sources such as legal textbooks or legal encyclopaedias.¹⁴⁷ Beyond these sources, lawyers also generate new documents by reusing earlier materials, such as opinions, advice, and memoranda, retrieved through their firm's document management systems. This practice introduces the risk that statements of law are copied verbatim without sufficient scrutiny or adaptation to the client's particular circumstances.¹⁴⁸ Historically, the

140 *Dukuray v Experian Information Solutions*, No 23 Civ 9043 (AT) (GS), 2024 WL 3812259, *11 (Stein J) (SD NY, 26 July 2024) ('*Dukuray*').

141 See above Part III(C).

142 *Luck v Principal Registrar* (n 99) [3] (Wheelahan J).

143 *Luck v Secretary* (n 101).

144 No 3:24-cv-00895-AR, 2025 WL 907297, *8 (Armistead J) (D Or, 7 February 2025).

145 *Mata* (n 31) 456 [37] (Castel J).

146 Louis Waller, *Derham, Maher and Waller: An Introduction to Law* (LBC Information Services, 7th ed, 1995) 99 ('a system of precedent means that a question should be answered in a certain way today because a similar question was so answered yesterday'); David Hamer et al, *Laying Down the Law* (LexisNexis, 12th ed, 2023) 209.

147 Sue Milne and Kay Tucker, *A Practical Guide to Legal Research* (Lawbook, 2008) 19; Bruce Bott and Ruth Talbot-Stokes, *Nemes & Coss' Effective Legal Research* (LexisNexis, 8th ed, 2022) 69–70.

148 Discussing the practice of copying by lawyers, see Carol M Bast and Linda B Samuels, 'Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty' (2008) 57(3) *Catholic University Law Review* 777, 803–8. Summarising examples from US cases, see Dennis A Rendleman, "'Copy That!': What Is Plagiarism in the Practice of Law?', *American Bar Association* (Web Page, March 2020) <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-march-2020/_copy-that_-_what-is-plagiarism-in-the-practice-of-law-/>.

act of copying may have involved handwriting the material, or having handwritten or dictated material typed by an assistant. However, with the digitalisation of legal resources, the copy and paste functions of widely-used computer programs allow for rapid reproduction of legal text in a memorandum, advice or court submission.

There is often an underlying assumption that the cases cited, and the legal propositions stated, are accurate. This assumption is relatively safe when the material is being copied from a leading text or senior counsel's advice, provided the law is not out of date or in a state of flux. However, this should not be taken as an endorsement of the 'copy-paste' practice. Ideally, all cases should be cite-checked to ensure they are still 'good law'—that is, they have not been overturned, or not followed by other cases, nor their holdings altered by legislation. In addition, the case itself should be read to ensure that it genuinely supports the proposition that it is cited for. Despite these best practices, the 'copy-paste' practice is driven by a desire to be efficient, which can be very important when acting for a client with a limited budget. When this practice is combined with automation bias, in addition to a lack of understanding of how GenAI functions, it leaves lawyers, especially those who are under time or resource pressure, more susceptible to not catching hallucinations in AI-generated content.

D Automation Bias

Despite limited awareness of GenAI's shortcomings, many individuals have been relying on these systems. A prominent explanation for this phenomenon is 'automation bias', which refers to the 'tendency to use automation as a heuristic replacement for vigilant information seeking and processing' in an automated aid system.¹⁴⁹ Examples of automation bias include scenarios where a driver entering a one-way street from the wrong direction based on incorrect navigation instructions, or following the advice of an automated expert flight planner, even when its recommendations are incorrect or suboptimal for the situation.¹⁵⁰

Among the various factors contributing to automation bias, one is the 'perceived trust of humans in automated aids as powerful agents with superior analysis capability'.¹⁵¹ This perception is reinforced by research indicating that people often regard AI as trustworthy. For example, a study conducted in the UK found that most participants reported generally positive experiences with AI, which contributed to their trust in AI. Participants in the study expressed the belief that technology, unlike humans who may exhibit bias, is neutral, reliable, and operates

149 Kathleen L Mosier and Linda J Skitka, 'Automation Use and Automation Bias' (1999) 43(3) *Proceedings of the Human Factors and Ergonomics Society Annual Meeting* 344, 344 <<https://doi.org/10.1177/154193129904300346>>.

150 Raja Parasuraman and Dietrich H Manzey, 'Complacency and Bias in Human Use of Automation: An Attentional Integration' (2010) 52(3) *Human Factors* 381, 391 <<http://dx.doi.org/10.1177/0018720810376055>>.

151 Ibid 392.

without self-interest.¹⁵² As such, when it comes to various sources of advice, users tend to attach more weight to automated aid systems.¹⁵³

Another way automation bias can affect individuals is explained by the cognitive-miser hypothesis, which suggests that people tend to choose the path of least cognitive effort when making decisions.¹⁵⁴ In other words, recommendations and directives from automated aids can act as strong decision-making heuristics, leading users to rely on them instead of engaging in more effortful analysis and evaluation.¹⁵⁵ A related concept is cognitive offloading, where ‘individuals delegate cognitive tasks to external aids’ (eg, using a calculator for arithmetic tasks).¹⁵⁶ While reducing the cognitive load on working memory can be beneficial, as it may improve learning and performance,¹⁵⁷ research has shown a correlation between cognitive offloading and decreased critical thinking.¹⁵⁸ When individuals heavily rely on AI tools, they may engage in cognitive offloading to the extent that the tools replace rather than support their cognitive processes.¹⁵⁹ This over-reliance on automation can reduce opportunities for critical analysis and independent thought, potentially diminishing overall cognitive engagement.¹⁶⁰

A case that illustrates the bias to trust automated aid systems over other sources of advice is *Perez v E Mortgage Capital Inc*.¹⁶¹ In this case, the court referred to a previous instance where one counsel, Mr Rasmussen, had cited a non-existent case. When the court inquired about it, Mr Rasmussen responded that the case could be found on Google. The court did not pursue the matter further. Approximately six months later, in a separate opposition, another counsel, Ms Rodriguez – who worked at the same law firm as Mr Rasmussen – cited the same fictitious case, ‘despite having been given a warning by the Court that the case is bogus’.¹⁶² Upon further inquiry, Ms Rodriguez explained that her colleague, Mr Rasmussen, had assisted in drafting the document and may have used ChatGPT during the process.¹⁶³ As such, despite the court’s previous warning, the fact that Mr Rasmussen reused the same fictitious case suggests that he found ChatGPT – an automated aid system – a more

152 Michael Gerlich, ‘Exploring Motivators for Trust in the Dichotomy of Human: AI Trust Dynamics’ (2024) 13(5) *Social Sciences* 251 <<https://doi.org/10.3390/socsci13050251>>.

153 Parasuraman and Manzey (n 150).

154 *Ibid* 391.

155 *Ibid* 392.

156 Michael Gerlich, ‘AI Tools in Society: Impacts on Cognitive Offloading and the Future of Critical Thinking’ (2025) 15(1) *Societies* 6:1–28, 2 <<https://doi.org/10.3390/soc15010006>> (‘AI Tools in Society’).

157 John Sweller, ‘Cognitive Load During Problem Solving: Effects on Learning’ (1988) 12(2) *Cognitive Science* 257 <https://doi.org/10.1207/s15516709cog1202_4>; Gerlich, ‘AI Tools in Society’ (n 156).

158 Gerlich, ‘AI Tools in Society’ (n 156).

159 *Ibid*; David P Biros, Mark Daly and Gregg Gunsch, ‘The Influence of Task Load and Automation Trust on Deception Detection’ (2004) 13(2) *Group Decision and Negotiation* 173 <<https://doi.org/10.1023/B:GRUP.0000021840.85686.57>>.

160 Gerlich, ‘AI Tools in Society’ (n 156).

161 Minute Order of Judge Steiner in *Perez v E Mortgage Capital Inc* (Cal Super Ct, No 30-2023-01320486-CU-NP-NJC, 10 September 2024).

162 *Ibid* 2.

163 *Ibid* 1.

reliable source of advice than the court.¹⁶⁴ A similar pattern was observed in *Dayal*. As discussed in Part III(B), Mr Dayal used the LEAP platform to generate the fabricated cases. This platform offers subscribed users an optional service to have a legal professional verify the accuracy and integrity of the AI-generated content. Mr Dayal requested this verification service and received a report on the integrity of the generated cases within four hours, well ahead of his court appearance. However, despite obtaining this report, he placed undue reliance on LEAP's AI output and did not incorporate the verified material into his court preparation.¹⁶⁵

An example of cognitive offloading to GenAI and a tendency to take the path of least cognitive resistance can be seen in *Rubio v District of Columbia*.¹⁶⁶ The SRL in this case appeared to submit content generated by GenAI without reviewing it. The submission included statements such as: '[t]his case supports your argument that MedStar's failure to inform you about your coverage cancellation and your rights constitutes a violation of patient protection laws' and '[h]ere are some relevant legal precedents from the District of Columbia that can help establish the non-isolated nature of the conduct in your case'.¹⁶⁷

These excerpts resemble unedited responses to a prompt, highlighting the SRL's reliance on GenAI as a shortcut for legal research and drafting with little or no critical analysis.

E Verification Drift

In this section, we explore the misuse of GenAI through the concept of 'verification drift'.¹⁶⁸ This phenomenon occurs when users, despite having at least a basic understanding of GenAI's limitations and knowing they should verify its outputs, ultimately choose not to do so. This lapse can be attributed to factors such as GenAI's credible and authoritative-sounding output, the significant time and effort required for verification (the 'verification burden'),¹⁶⁹ and users' inflated perceptions of GenAI's capabilities. Unlike automation bias which broadly addresses the over-reliance on automated systems, verification drift specifically captures the unique dynamics that emerge when users interact with machines that employ natural language capabilities.

To clarify the basis for this concept, it is important to first establish that many users do, in fact, have at least a basic understanding of GenAI's limitations. We

164 For another automation bias case, see *Mojtabavi v Blinken*, No SA CV 24-1359 PA (ASx), 2024 WL 5316832 (CD Cal, 22 October 2024).

165 Josh Taylor, 'Melbourne Lawyer Referred to Complaints Body after AI Generated Made-Up Case Citations in Family Court', *The Guardian* (online, 10 October 2024) <<https://www.theguardian.com/law/2024/oct/10/melbourne-lawyer-referred-to-complaints-body-after-ai-generated-made-up-case-citations-in-family-court-ntwnfb>>.

166 No 23-719 (RDM), 2024 WL 4957373 (D DC, 3 December 2024).

167 *Ibid* *4 (Moss J).

168 Armin Alimardani, 'Borderline Disaster: An Empirical Study on Student Usage of GenAI in a Law Assignment' (2025) 6(2) *IEEE Transactions on Technology and Society* 210 <<https://doi.org/10.1109/TTS.2025.3540978>>.

169 Armin Alimardani, 'The Siren's Song of GenAI: Why Legal Practitioners Still Fall for Fabricated Content', *Law Society Journal* (online, 16 April 2025) <<https://lsj.com.au/articles/the-sirens-song-of-genai-why-legal-practitioners-still-fall-for-fabricated-content/>>.

present three reasons supporting this assumption before examining the factors that contribute to verification drift in more detail.

First, widespread media coverage since mid-2023 has highlighted instances of AI-generated fabrications in legal proceedings. Reputable outlets such as The New York Times, The Wall Street Journal, and the Australian Broadcasting Corporation have extensively reported on these issues,¹⁷⁰ making it reasonable to expect that legal professionals have become cognisant of the risks linked to AI-generated content.¹⁷¹ Some courts have expressed frustration over claims of ignorance regarding the limitations of GenAI. In *United States v Cohen* (decided in March 2024), the judge remarked, '[g]iven the amount of press and attention that Google Bard and other generative artificial intelligence tools have received, it is surprising that Cohen¹⁷² believed it to be a “super-charged search engine” rather than a “generative text service”'.¹⁷³ Nearly a year later, in *Wadsworth v Walmart Inc* (February 2025), the court made a similar observation: 'It is also well-known in the legal community that AI resources generate fake cases.'¹⁷⁴

Second, even for those who might not follow media reports, GenAI platforms themselves display warnings about the technology's limitations – although arguably insufficiently. These warnings are displayed either after logging into the account, at the bottom of the page, or both. For example, one of the messages that was displayed to ChatGPT users stated: '[T]he system may occasionally generate incorrect or misleading information and produce offensive or biased content. It is not intended to give advice'.¹⁷⁵ In the early months following the release of ChatGPT, such warnings only appeared a few times as a pop-up message upon logging in. This can explain why some users who initially engaged with the tool out of curiosity or for non-professional reasons, may have ignored these messages or failed to take them seriously.¹⁷⁶

However, as time progressed, companies such as OpenAI began displaying persistent warnings, such as 'ChatGPT may produce inaccurate information about people, places, or facts'.¹⁷⁷ Given the sensitive nature of legal work, it is reasonable

170 See above n 36.

171 For instance, *Bevins* (n 107) was decided in April 2025, and *Mid Central Referral Proceedings* (n 110) was decided in February 2025.

172 Cohen was a disbarred attorney.

173 724 F Supp 3d 251, 259 (Furman J) (SD NY, 2024).

174 348 FRD 489, 497 (Rankin J) (D Wyo, 24 February 2025) ('*Wadsworth*').

175 Lance Eliot, 'Generative AI ChatGPT Can Disturbingly Gobble Up Your Private and Confidential Data, Forewarns AI Ethics and AI Law', *Forbes* (online, 27 January 2023) <<https://www.forbes.com/sites/lanceeliot/2023/01/27/generative-ai-chatgpt-can-disturbingly-gobble-up-your-private-and-confidential-data-forewarns-ai-ethics-and-ai-law/>>.

176 In the '*Mata Memorandum*' (n 129), counsel for Mr Schwartz and Levidow Levidow & Oberman, PC observed that 'given that Mr. Schwartz had once or twice before used ChatGPT for leisure (when his children were showing him the program), it is likely those same warnings did not appear. Mr. Schwartz has no recollection of seeing those warnings before using ChatGPT for research': at 7 n 4.

177 Sally Young, 'How Do We Make AI More Human: and Get It to Tell the Truth?', *Australian Academy of the Humanities* (Blog Post, September 2023) <<https://humanities.org.au/power-of-the-humanities/how-do-we-make-ai-more-human-and-get-it-to-tell-the-truth/>>.

to expect legal professionals to take such warnings seriously, making claims of ignorance less plausible. This concern was highlighted in *Zhang*.¹⁷⁸

Third, a few cases directly demonstrate that legal professionals, despite being aware of GenAI's limitations, have submitted fabricated or irrelevant material to the courts. The most notable example is *Park v Kim*.¹⁷⁹ In December 2023, a hearing was held after attorney Jae S Lee cited a fabricated case and admitted to using GenAI. The following statements from Lee suggest that she understood GenAI's limitations: "it is important to recognize that ChatGPT represents a significant technological advancement," and ... that "[i]t would be prudent for the court to advise legal professionals to exercise caution when utilizing this new technology."¹⁸⁰ Despite this admission, in a separate case in March 2024, the court raised concerns that notwithstanding the lawyer's recent history in *Park v Kim*, at least one of the cases cited by Lee was fabricated.¹⁸¹

Taken together, these points suggest that, particularly by 2024 and 2025, some individuals who misuse GenAI have at least a basic understanding of the technology's limitations. Verification drift offers several explanations for this behaviour.

The key factor contributing to verification drift is GenAI's authoritative tone and its generation of a blend of detailed, accurate, and inaccurate information in a way that appears credible.¹⁸² Even when the model hedges its responses, some users may interpret it as 'epistemic humility', which can increase their perception of the system's trustworthiness.¹⁸³ In practice, users may initially intend to verify GenAI outputs carefully. However, as they read the authoritative and detailed content, their confidence in its accuracy grows and they ultimately decide that further verification is unnecessary.

This dynamic is illustrated in judicial commentary describing how fabricated and genuine elements are combined to create plausible but fictitious citations:

ChatGPT apparently provided the case number, 'No. 16-cv-246-SWS.' ... On first glance, this looks legitimate, as 'SWS' is the abbreviation to signify one of District Judge Scott W. Skavdahl's cases. However, when the case is searched through the Electronic Court Filing System, the case is actually [a different case name and presiding judge].¹⁸⁴

Lawyers have repeatedly stated that they found hallucinated content to appear credible, as in *Mid Central Referral Proceedings*: 'These "hallucination cites," Mr. Ramirez asserted, included text excerpts which appeared to be credible. As such,

178 See above Part III(B).

179 91 F 4th 610 (2nd Cir, 2024) ('*Park*').

180 Ibid 615 (Parker, Nathan and Merriam JJ).

181 *Lee v Delta Air Lines Inc*, No 20-CV-01705 (WFK) (LGD), 2024 WL 1230263, *3 (Kuntz J) (ED NY, 22 March 2024).

182 *GPT-4 Technical Report* (n 16); Samir Passi and Mihaela Vorvoreanu, 'Overreliance on AI' (Literature Review, June 2022) <<https://www.microsoft.com/en-us/research/uploads/prod/2022/06/Aether-Overreliance-on-AI-Review-Final-6.21.22.pdf>>.

183 *GPT-4 Technical Report* (n 16) 60.

184 *Wadsworth v Walmart Inc*, No 2:23-CV-118-KHR, 2025 WL 515094, n 2 (Rankin J) (D Wyo, 6 February 2025). See also *Al-Hamim* (n 138) 1123-4 (Lipinsky J).

Mr. Ramirez did not conduct any further research, nor did he make any attempt to verify the existence of the generated citations.¹⁸⁵

Time pressure and workload are additional factors that, in combination with others, may persuade users to skip the verification process. Studies have indicated that a high proportion of legal professionals work more than 40 hours per week¹⁸⁶ with reports of burnout,¹⁸⁷ substance abuse, and depression.¹⁸⁸ When GenAI produces an output that appears genuine, some users may judge that, in light of their workload, verification is not a rational use of their time. This concern is particularly relevant given that verifying AI-generated content can be time-consuming. In *Valu [No 2]*,¹⁸⁹ the practitioner explained that time constraints and poor health led him to use ChatGPT.¹⁹⁰ He added that this technology had been promoted by well-known legal services as a tool that can assist in legal tasks.¹⁹¹ After accessing ChatGPT and entering his query, the system generated a summary of the cases he was researching. He explained that ‘the summary read well’ (ie, authoritative tone); as such, he decided to use the AI-generated content without verification.¹⁹²

In summary, verification drift is driven by a combination of GenAI’s persuasive presentation, the influence of media and industry enthusiasm, practical constraints such as workload and time pressure, and cognitive biases. These factors help explain why individuals who are aware of GenAI’s limitations may nonetheless choose not to verify its outputs, contributing to ongoing misuse in legal contexts.

V POSSIBLE SOLUTIONS

A court has an inherent or incidental power to control proceedings before it, including to prevent misuse of its procedures that may result in unfairness or otherwise bring the administration of justice into disrepute, and a supervisory jurisdiction over legal practitioners as officers of the court.¹⁹³ Lawyers have a duty

185 *Mid Central Referral Proceedings* (n 110) *1 (Dinsmore J).

186 Natalie Mei-Chuen Drew, Doita Datta and Jill Howieson, ‘The Holy Grail: Work-Life Balance in the Legal Profession’ (2015) 38(1) *University of New South Wales Law Journal* 288, 309.

187 Marion Nickum and Pascale Desrumaux, ‘Burnout among Lawyers: Effects of Workload, Latitude and Mediation via Engagement and Over-engagement’ (2023) 30(3) *Psychiatry, Psychology and Law* 349 <<https://doi.org/10.1080/13218719.2022.2035840>>.

188 Adele J Bergin and Nerina L Jimmieson, ‘Australian Lawyer Well-Being: Workplace Demands, Resources and the Impact of Time-Billing Targets’ (2014) 21(3) *Psychiatry, Psychology and Law* 427 <<http://dx.doi.org/10.1080/13218719.2013.822783>>; Christopher Kendall, ‘Psychological Distress and Depression in the Legal Profession: Summary of Report’ (2011) 38(5) *Brief* 8.

189 See also Part III(B).

190 *Valu [No 2]* (n 69) 368–9 [21]–[22] (Judge Skaros).

191 See above Part IV(A).

192 *Ibid* 368–9 [22]. See also *Nguyen v Savage Enterprises*, No 4:24-CV-00815-BSM, 2025 WL 679024, *1 (Miller J) (ED Ark, 3 March 2025): ‘[Counsel] responded that artificial intelligence, as well as counsels’ heavy workload and personal issues, may have contributed to the errors in her response’.

193 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 265–8 (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); *Atanaskovic v Birketu Pty Ltd* [2020] NSWSC 573, [29]–[30] (Hammerschlag J); *Hartnett v Bell* (2023) 112 NSWLR 463, 492–4 [123] (Bell CJ).

to the administration of justice, including an obligation not to mislead the court.¹⁹⁴ Courts are adequately equipped to respond to GenAI misuse on a case-by-case basis. However, the prevalence of GenAI misuse and its ability to undermine confidence in the judicial system require a more comprehensive and prophylactic approach from the courts, the legal profession, and legal regulators. The potential solutions to GenAI misuse are education, certification, sanctions, and in some circumstances prohibition. Education is central to prevention. Courts, the legal profession, and regulators have placed an emphasis on education (albeit typically only in the form of providing information) but more is needed. Sanctions consist of a range of responses of varying degrees of seriousness that can be calibrated by the courts to meet the particular misconduct. In the US, monetary sanctions have become common. A number of courts have made costs orders and raised contempt as a response. Where prevention has failed, the courts have looked to sanctions to achieve deterrence. In NSW, certification and prohibition have been combined to adopt a more systematic response. This part discusses each of the potential solutions, including their advantages and drawbacks.

A Education

A common response in the court and professional guides described in Part III was education about the operation of GenAI and its shortcomings or risks, which, when addressed to lawyers, was coupled with reference to lawyers' professional and ethical obligations. For example, the Queensland Courts' guidelines for non-lawyers state in the second sentence, '[b]efore using Generative AI chatbots, or any other AI tool, make sure you have a basic understanding of their capabilities and their limitations'.¹⁹⁵ The guidelines go on to explain how GenAI functions, its capabilities, and its limitations, including that they are not search engines.¹⁹⁶ The Victorian guidelines, aimed at lawyers and SRLs, explain how GenAI functions and then state that AI-generated text should be checked to avoid a range of problems, including that the text may be out-of-date, incomplete, inaccurate, or incorrect, or inapplicable to the jurisdiction.¹⁹⁷ The Victorian guidelines make clear that '[t]he use of AI programs to assist in the completion of legal tasks must be subject to the obligations of legal practitioners in the conduct of litigation, including the obligation of candour to the Court'.¹⁹⁸ The Supreme Court of New South Wales issued a Practice Note, which coming later in time was able to be more specific about the risks of GenAI including:

Legal practitioners and unrepresented parties should be aware of limits, risks and shortcomings of any particular Gen AI program which they use. These may include:

- (a) the scope for 'hallucinations', that is, the generation of apparently plausible, authoritative and coherent responses but which are in fact inaccurate or

194 Michael Legg, "'Fake It 'til You Make It': Not with AI and the Courts' (2024) 98(9) *Australian Law Journal* 685 ('Fake It 'til You Make It').

195 'Queensland Courts Non-Lawyers Guidelines' (n 64) 1.

196 *Ibid.*

197 'VSC Guidelines' (n 64) 2 [8].

198 *Ibid* [4].

fictitious. Examples include false citations and fabricated legislative, case or other secondary references.¹⁹⁹

The advent of GenAI has also prompted law schools to undertake steps to educate students on how the technology functions and the tasks for which it can and cannot be used.²⁰⁰

In addition to these more formal attempts at guidance and education, GenAI tools such as ChatGPT or Google Gemini also come with disclaimers and warnings.²⁰¹ When Gemini was asked by one of the authors ‘[c]an a person use outputs from generative AI on legal questions in court?’, the answer was ‘[w]hile generative AI offers potential benefits for legal professionals, its outputs regarding legal questions should be treated with extreme caution and cannot be directly used in court without significant human oversight and verification in Australia’. The answer then listed significant risks and limitations, including the possibility of hallucinations, and referred to court guides and practice notes dealing with GenAI.²⁰²

However, the continued misuse of GenAI suggests that education is not effective, or more, and better, education is needed. Users, both lawyers and non-lawyers, are attracted to the (perceived) ease of use and low cost of ChatGPT or Google Gemini, despite the risks. As explained in Part IV above, the risks are not understood because of a lack of AI literacy and automation bias. Alternatively, as explained by verification drift, the risks are known but the persuasiveness of GenAI outputs when combined with time and resource pressures leads to risk management steps being foregone.

The failure of education may also flow from a belief among lawyers that AI is not an immediate concern, but rather something to be dealt with in the longer term, so that education can be delayed.²⁰³ Alternatively, the speed of change and the constant release of new AI tools, both public and legal specific, create a reluctance to invest due to a fear that any learning will be lost when a new or enhanced product becomes available.²⁰⁴ Moreover, lawyer training may be unevenly distributed with larger law firms and in-house teams being better placed to adopt policies and training, but also invest in and pilot law-specific GenAI tools.²⁰⁵ Sole practitioners, small law firms and non-lawyers who bring litigation without legal assistance may lack the resources or awareness that training is necessary. As science fiction writer

199 *NSWSC Practice Note* (n 65) 2 [7].

200 See University of Queensland et al, *Legal Research Skills: An Australian Law Guide* (2025) pt 5 ch 40 <<https://doi.org/10.25120/afz3-dvvr>>.

201 Eliot (n 175).

202 Output from Gemini, Google to Michael Legg, 9 May 2025.

203 Future of Legal Services Commission, International Bar Association, *Future of Legal Services* (White Paper, 2024) 6 <<https://www.ibanet.org/document?id=future-of-legal-services-report-2024>>.

204 Lucy Endel Bassli, *The Simple Guide to Legal Innovation* (American Bar Association, 2020) 56, 64; Václav Janaček, Rebecca Williams and Ewart Keep, ‘Education for the Provision of Technologically Enhanced Legal Services’ (2021) 40 *Computer Law & Security Review* 105519:1–13, 9 <<https://doi.org/10.1016/j.clsr.2020.105519>>; Joshua AT Fairfield, *Runaway Technology: Can Law Keep Up?* (Cambridge University Press, 2021) 41 <<https://doi.org/10.1017/9781108545839>>.

205 International Bar Association and the Centre for AI and Digital Policy, *The Future Is Now: Artificial Intelligence and the Legal Profession* (Report, September 2024) 12, 15 (‘*The Future Is Now*’).

William Gibson is often claimed to have said, ‘the future is already here – it’s just not evenly distributed’.²⁰⁶

If training and education are not being sought voluntarily then further action is required. Two potential approaches for lawyers are creating a clear ethical obligation through revising professional conduct rules and/or altering continuing professional development (‘CPD’) requirements.

In the US, the American Bar Association in 2012 added a comment to the rule addressing competence that provided that ‘a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology’.²⁰⁷ In jurisdictions outside the US, such as Australia, where there is no specific rule or commentary addressing technology, the general requirement of competence may nonetheless be viewed as including competence with technology.²⁰⁸ The decisions in *Dayal* and *Valu [No 2]* discussed in Part III support this. However, a clear, written rule is not just about imposing an ethical requirement; it is also about communicating the requirement to lawyers. It is then necessary to explain what competence with technology means. Competence with email (which was once an issue) is different from competence with GenAI.²⁰⁹ But an explanation needs to be at a certain level of abstraction to allow for future developments in technology. Consequently, competence entails understanding how a particular technology functions and its suitability for the planned task, including risks and limitations, and how they can or cannot be ameliorated.²¹⁰ Ideally competence would be supported by firms’ policies, due diligence on AI tools before lawyers are permitted to access them and AI tool-specific training before use is permitted.²¹¹

Understanding the technology also means comprehending its output.²¹² For GenAI that means being able to assess the accuracy and relevance of the text supplied. In *Mata*, Castel J noted:

Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.²¹³

206 See, eg, ‘The Science in Science Fiction’, *Talk of the Nation* (NPR, 22 October 2018) 00:11:22 <<https://www.npr.org/2018/10/22/1067220/the-science-in-science-fiction>>, where Gibson stated ‘as I’ve said many times, the future is already here, it’s just not very evenly distributed’. Gibson further explains that his writing uses science fiction to draw attention to existing issues.

207 ‘Model Rules of Professional Conduct’, *American Bar Association* (Web Page) r 1.1 (comment 8) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/>.

208 Legg and Bell (n 8) 292.

209 *The Future Is Now* (n 205) 22–3.

210 Legg and Bell (n 8) 339–40; ‘Ontario White Paper’ (n 63) 8–9.

211 See, eg, Law Society of Ontario, ‘Generative AI: Your Quick-Start Checklist’ (Supplementary Resource, April 2024), setting out a ‘quick-start checklist’.

212 Legg and Bell (n 8) 340.

213 *Mata* (n 31) 448. See also *Wadsworth* (n 174) 493 (Rankin J): ‘As attorneys transition to the world of AI, the duty to check their sources and make a reasonable inquiry into existing law remains unchanged.’

This observation has been adopted by various court guidelines.²¹⁴ The idea of a human user assessing the output of AI to determine if it is accurate or reliable, and can be used or needs to be amended or rejected is typically referred to as the ‘human-in-the-loop’.²¹⁵ In litigation where a lawyer is present the requirement becomes the ‘lawyer-in-the-loop’. This returns lawyers to their traditional skill of attention to detail in both law and fact, and demonstrates that competency in technology use is closely aligned to professional competency.

Lawyers are typically required to undertake CPD as a condition of practising.²¹⁶ For example, the *Legal Profession Uniform Law* rules require that a lawyer complete 10 CPD units each year. This includes at least one CPD unit in each of the following compulsory fields: (1) Ethics and professional responsibility; (2) Practice management and business skills; (3) Professional skills; and (4) Substantive law.²¹⁷ The rules could be amended to add technology as a fifth compulsory field so that every 12 months, every lawyer would need to devote at least one hour to training on technology.²¹⁸ A single hour is not sufficient, but it may be enough to alert lawyers to developments in technology such as GenAI and to identify what they do not know and need to learn.

For SRLs education is unable to be delivered through the professional mechanisms set out above. However, courts and GenAI tools can provide information to their users, as illustrated in Parts III and IV above. In addition to information educating users about GenAI, it is also necessary to provide education about courts and litigation processes to address legal literacy. For example, it is not permissible to mislead the court or to fabricate evidence, even if it occurs through the use of GenAI.²¹⁹ It may also require reference to the ramifications of misconduct. However, the difficulty may be that information is not conveyed in a manner that is easily understood. The SRL is being required to comprehend two areas of expert knowledge – AI and law, substantive and procedural. Understanding the legal system was a significant challenge before GenAI and left SRLs at a

214 ‘VSC Guidelines’ (n 64) 2 [8]; *NSWSC Practice Note* (n 65) 4–5 [16]–[18].

215 Rebecca Crootof, Margot E Kaminski and W Nicholson Price II, ‘Humans in the Loop’ (2023) 76(2) *Vanderbilt Law Review* 429, 440 <<https://doi.org/10.2139/ssrn.4066781>>, defining a ‘human in the loop’ as ‘an individual who is involved in a single, particular decision made in conjunction with an algorithm’.

216 John Littrich and Karina Murray, *Lawyers in Australia* (Federation Press, 5th ed, 2025) 275–6. See, eg, *Legal Profession Uniform Law 2014* (NSW) s 52: ‘It is a statutory condition of an Australian practising certificate granted in this jurisdiction that the holder must comply with the applicable requirements of the Continuing Professional Development Rules.’

217 The Legal Profession Uniform Law applicable in New South Wales, Victoria and Western Australia includes the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*, enacted in the three jurisdictions. See also *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*, which includes the following four categories: (1) Ethics and Professional Responsibility; (2) Practice Management and Business Skills; (3) Substantive Law, Practice and Procedure, and Evidence; (4) Barristers’ Skills: at r 9.

218 Committee on Professional Responsibility and Conduct, State Bar of California, ‘Recommendations from Committee on Professional Responsibility and Conduct on Regulation of Use of Generative AI by Licensees’ (Memorandum, 16 November 2023) 4 <<https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000031754.pdf>> (‘California Memorandum’).

219 See, eg, *NSWSC Practice Note* (n 65) 3–4 [11]–[12], 5 [18].

disadvantage.²²⁰ As the Full Court of the Federal Court observed in a non-GenAI case, ‘litigants-in-person commonly fail to lodge documents in the correct form, observe court formalities and procedures, understand the significance of court processes, put the relevant evidence or law before the Court; and understand the role of the Court in adjudicating the matter’.²²¹ GenAI may be a potential solution to the disadvantage through providing access to legal requirements in plain language. But it may not, as it may necessitate even greater knowledge on the part of the SRL.²²² Additional knowledge about the risk and limitations of GenAI is needed, including that the plain language GenAI output may be incorrect.²²³ As a result, education about GenAI and litigation may allow the SRL to identify that there is a risk of hallucinated law, but there will still be a need for legal assistance to determine if in the instant case the risk has materialised. Access to legal assistance remains an underlying concern.

B Certification

As part of the litigation process courts will often require that a form or document filed with the court include a certification or endorsement that the content of the filing is well-founded or accurate. For example, a pleading which sets out a claim or defence must include a certificate or affidavit by the lawyer or party who prepared the pleading stating that the factual and legal material available to the lawyer/party provides a proper basis for each allegation, denial or non-admission in the pleading.²²⁴ In NSW, in a claim, or defence of a claim, for damages the lawyer must certify that the claim or the defence (as appropriate) has reasonable prospects of success.²²⁵ When discovery is provided in civil litigation, a list of documents is prepared and verified by affidavit.²²⁶ In NSW, the affidavit of documents must be accompanied

220 Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, 28 May 2008) 563–6 <<https://www.lawreform.vic.gov.au/publication/civil-justice-review-report-pdf/>>. Various solutions have been put forward, including greater funding to allow for access to legal advice and representation: at 567–82.

221 *Flightdeck Geelong Pty Ltd v All Options Pty Ltd* (2020) 280 FCR 479, 491 [52] (Markovic, Derrington and Anastassiou JJ) (*‘Flightdeck’*).

222 ‘California Memorandum’ (n 218) 4: ‘While generative AI may be of great benefit in minimizing the justice gap, it could also create harm if self-represented individuals are relying on generative AI outputs that provide false information.’ See also Legg, ‘Online Dispute Resolution’ (n 8) 293 [21.50].

223 See *Sanders* (n 123) 170 (Roumel J).

224 See, eg, *Federal Court Rules 2011* (Cth) r 16.01 (*‘FCR’*); *Uniform Civil Procedure Rules 2005* (NSW) r 14.23(2) (*‘UCPR’*); *Civil Procedure Act 2010* (Vic) s 42 (*‘CPA (Vic)’*). See also *Federal Rules of Civil Procedure* (US) r 11(b) (*‘FRCP’*), last amended on 1 December 2024, which requires an attorney to certify that ‘to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law’; Sir William Blair et al (eds), *Bullen & Leake & Jacob’s Precedents of Pleadings* (Sweet & Maxwell, 19th ed, 2020) [1]–[23], discussing the English requirement of ‘statements of truth’ which verify the factual content of a ‘statement of case’ (a pleading) to eliminate speculation or obfuscation in setting out a claim or defence.

225 *Legal Profession Uniform Law Application Act 2014* (NSW) sch 2 cl 4(2).

226 See, eg, *FCR* (n 224) rr 20.17, 20.22 (list of documents with an affidavit verifying it); *UCPR* (n 224) r 21.4(2); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 29.04 (filing and serving an affidavit of documents); *Rules of the Supreme Court 1971* (WA) ord 26 rr 1(3), 4(1), sch 2 item 17 (list of documents with an affidavit verifying it).

by a certificate of advice from the party's solicitor.²²⁷ In Victoria, parties must file an 'Overarching Obligations Certificate' which confirms that the party understands and will comply with their obligations to the court and other parties, such as acting honestly, not making baseless claims, minimising delay, and cooperating.²²⁸

These certifications typically reinforce a lawyer's or party's obligations.²²⁹ Placing the requirement in an affidavit meant the certification was under oath and punishable as perjury if incorrect.²³⁰ In some cases, such as the NSW reasonable prospects requirement or the Victorian overarching obligations, the certification was introduced as part of the creation of the obligation. The aim was to reinforce responsibilities and aid in creating a new litigation culture.²³¹ Certification should also have an educative function as a person turns their mind to the conduct or obligations they are agreeing to, assuming it is not approached in a perfunctory or 'tick-a-box' manner.

The misuse of GenAI in litigation has also been responded to through certification requirements. In the US a number of judges have required certifications about the use or non-use of GenAI, including an assurance that any AI-generated text has been checked by a human.²³² In Australia, the most comprehensive approach has been adopted in the State of NSW. The Supreme Court of New South Wales requires that an affidavit, witness statement, character reference or expert report must contain a statement that GenAI was not used in generating its content.²³³ Where the Supreme Court grants leave for GenAI to be used in an expert's report, the report must include a statement that GenAI was used to generate the content of the report and provide particulars of its use.²³⁴ The Supreme Court further requires that where GenAI is used in the preparation of written submissions or summaries or skeletons of argument, the document state that all citations, legal authorities and case law referred to exist and are accurate and relevant to the proceedings.²³⁵ In contrast, the Victorian Supreme Court guidelines encourage, but do not mandate, SRLs who use GenAI in the preparation of a document to include a statement in the document stating that GenAI has been used.²³⁶

227 *UCPR* (n 224) r 21.4(3).

228 *CPA (Vic)* (n 224) s 41.

229 See Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2nd ed, 2023) [7.98]–[7.105] (verification of pleadings).

230 *Ibid.*

231 *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300, 328 [124]–[126] (McColl JA); Explanatory Memorandum, Civil Procedure Bill 2010 (Vic) 6, 17.

232 Grossman, Grimm and Brown (n 10); Raymond H Brescia, 'New Governance and New Technologies: Creating a Regulatory Regime for the Use of Generative Artificial Intelligence in the Courts' (2024) 26(1) *North Carolina Journal of Law and Technology* 1, 31–5 <<https://doi.org/10.2139/ssrn.4939775>>.

233 *NSWSC Practice Note* (n 65) 4 [13], 5 [20]; *Uniform Civil Procedure (Amendment No 104) Rule 2025* (NSW) sch 1 items 1–3, 10 ('*UCPR Amendment*'), inserting *UCPR* (n 224) rr 31.4(3B), 31.27(6), 35.3B(2), sch 7 cl 3(3).

234 *NSWSC Practice Note* (n 65) 5–6 [22]; *UCPR Amendment* (n 233) sch 1 items 2, 10, inserting *UCPR* (n 224) r 31.27(7), sch 7 cl 3(4).

235 *NSWSC Practice Note* (n 65) 4–5 [16]; *UCPR Amendment* (n 233) sch 1 items 4–9, inserting *UCPR* (n 224) rr 51.12(4A), 51.13(2A), 51.13(6A), 51.36(1A), 51.45(5A), 59.8(4A).

236 'VSC Guidelines' (n 64) 2 [5].

The resort to certifications in relation to the use of GenAI is consistent with other procedures that aim to protect the court's procedures and to promote the efficient resolution of disputes. The concern is whether lawyers and parties are aware that they are using GenAI, and consequently, the certification requirements apply.²³⁷ Equally, there is a concern that there may be over-compliance. Court users may disclose the use of technology tools that are not subject to regulation. The NSW rules response to this concern is to define GenAI as

an artificial intelligence tool capable of creating text, images, sound or other content based on patterns and data obtained from a body of material and includes large language models, but does not include technology that does not generate substantive content and merely corrects spelling or grammar, provides transcription or translation or assists with formatting.²³⁸

By adopting a definition, the application of the rules is clearer. However, is it accurate in the sense of capturing only problematic GenAI? Further, is it able to be understood by lawyers and SRLs so that they may comprehend that the rules apply and whether certification is triggered? These two concerns may pull in opposite directions. A more precise, and probably technical definition, may be less comprehensible by non-technically trained lawyers and SRLs. As a result, a compromise will be needed, but it is a compromise that needs to be reviewed as both GenAI and user knowledge develop.

As a technique to discourage misconduct, certifications are not novel and courts are familiar with their use. However, their effectiveness relies on educated court users and proportionate enforcement or sanctions when there is non-compliance.

C Sanctions

The aim of a sanction is to provide an incentive for compliance, or put in the negative, to deter non-compliance.²³⁹ In litigation a range of sanctions are available and may be classified as follows:²⁴⁰

- Warnings and reprimands.
- Costs sanctions – awarding or denying costs due to some form of misconduct.²⁴¹
- Procedural steps sanctions – amending or not allowing the amendment of documents, including pleadings.
- Evidence sanctions – prohibiting the introduction of evidence, or disallowing evidence.

237 Grossman, Grimm and Brown (n 10).

238 *UCPR Amendment* (n 233) sch 1 item 13, inserting 'generative artificial intelligence' to *UCPR* (n 224) Dictionary.

239 Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2nd ed, 2022) 305.

240 Stanley Marcus et al (eds), *Manual for Complex Litigation* (Federal Judicial Center, 4th ed, 2004) 18–20 [10.154]; *ibid* 309–12.

241 In Australia, the award of costs is usually compensatory rather than punitive, but the courts have discretion to award costs for a relevant delinquency: *Oshlack v Richmond River Council* (1998) 193 CLR 72, 89 [44] (Gaudron and Gummow JJ), 97–8 [67]–[69] (McHugh J), 120–3 [134] (Kirby J). Costs sanctions also include wasted cost orders: *Ridehalgh v Horsefield* [1994] Ch 205; *Kalloghlian v Mitry* [2023] NSWCA 198, [59] (Mitchelmore JA, Gleeson JA agreeing at [1], Adamson JA agreeing at [67]).

- Terminating sanctions – striking out a proceeding, claim, defence or appeal, ordering a permanent stay. This may also include declaring a litigant vexatious (someone who continually takes legal action without reasonable grounds or for improper purposes) with the result that proceedings are stayed and cannot be commenced without leave/permission.
- Monetary/Compensatory sanctions – a payment to the court to impose a cost on the person engaging in misconduct or a payment to a person who suffers loss due to a party’s non-compliance with rules or orders to compensate that person.
- Professional discipline for lawyers – the court may act itself relying on its jurisdiction over legal practitioners or refer a lawyer to a professional disciplinary body.
- Contempt sanctions.
- Referral for criminal prosecution.

Clearly the courts have a range of mechanisms for addressing misuse of GenAI in the litigation process.

In the US, monetary sanctions have been common, with the federal courts relying on Rule 11 of the *Federal Rules of Civil Procedure*.²⁴² The imposition of sanctions of USD1,000 to USD31,100 was found to be warranted, due to misrepresentations being made to the court. Higher amounts have been imposed where lawyers insisted cases were real even after having concerns raised by the court. These heavier sanctions also serve to educate and deter the broader profession.²⁴³ In *Bunce*, the court found that the lawyer failed in his role as the ‘final auditor for all legal and factual claims contained in [his] motions’.²⁴⁴ The lawyer sought to withdraw from the case and argued that there would be no deterrent value in sanctioning him because he would play no further role in the case. The trial judge rejected this argument as it failed to recognise the need to specifically deter the lawyer from engaging in similar conduct in future legal proceedings, but also the need for ‘generally deterring other attorneys from credulously assuming AI can stand in place of an attorney’s obligations’.²⁴⁵

Cost orders have been utilised by a number of courts where the lawyer misused GenAI, including requiring payment of the legal fees incurred by the other side in relation to the court filings containing hallucinated case law,²⁴⁶ and prohibiting the charging of a lawyer’s own client for the activities associated with court filings.²⁴⁷ Similarly, in the Australian case of *Valu v Minister for Immigration and*

242 *FRCP* (n 224) r 11(c): ‘If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.’

243 *United States v Hayes*, 763 F Supp 3d 1054, 1073 (Kim J) (ED Cal, 2025); *Mid Central Sanctions Proceedings* (n 112); *Wadsworth* (n 174) 497–8 (Rankin J); *Lacey* (n 113).

244 *Bunce* (n 104) 4 (Scott J).

245 *Ibid.* See also *Ko* (n 117) [67] (Myers J).

246 See, eg, *Puerto Rico Soccer League NFP Corp v Federación Puertorriqueña De Fútbol*, Civil No 23-1203 (RAM), 2025 WL 1080732, *3 (Arias-Marxuach J) (D PR, 10 April 2025); *Murray* (n 70) [16] (Murphy J); *JNE24* (n 70) [36] (Judge Gerrard).

247 *Ko* (n 117) [65] (Myers J).

Multicultural Affairs, and in England, a ‘wasted costs order’ was made against lawyers for citing ‘non-existent’ or ‘fake’ cases.²⁴⁸

US lawyers have been placed on probation,²⁴⁹ or suspended from practice,²⁵⁰ or had their conduct referred to the courts’ disciplinary authorities.²⁵¹ In an English case, the judge sent the transcript of the hearing to the Bar Standards Board and to the Solicitors Regulation Authority.²⁵² Lawyers have also been ordered to complete a seminar or educational program related to the use of AI.²⁵³

In the US case of *Bevins* the court adopted a further sanction and removed the lawyer’s appearance in the case with the result they were unable to represent their client. As the client’s pleading had been struck out as a result of the defendant’s motion to dismiss,²⁵⁴ the plaintiff was required to retain a different lawyer if they wished to refile their case.²⁵⁵

In Australia, courts have referred the conduct to the relevant legal regulator. In *Dayal* and *Valu [No 2]*, the referral was made because both judges found there was a strong public interest in the regulator being aware of the professional conduct issues arising from the increased use of AI tools by legal practitioners.²⁵⁶ The real public interest is not so much regulator awareness, but that the regulators will conduct an investigation and take some action that educates and deters the larger profession.

The English and Welsh High Court of Justice, in dealing with false GenAI-generated case law, explained that placing false material before the court with the intention that the court treats it as genuine may, depending on the person’s state of knowledge, amount to a contempt. The court found that a barrister who had either deliberately included fake citations in her written work or used GenAI to produce her list of cases and/or to draft parts of the grounds of claim but had been untruthful about it, was a clear contempt. But the court determined not to initiate contempt proceedings, due to a number of mitigating factors, such as the inexperience of the barrister and questions about her supervision.²⁵⁷

248 *Valu* (n 69) [81] (Judge Skaros); *R (Ayinde) v Haringey London Borough Council* [2025] 4 WLR 71, [30] (Ritchie J) (‘*Ayinde Costs Proceedings*’); *Ayinde Referral Proceedings* (n 118).

249 *Crabill* (n 48) *1: 90 days to be served and the remainder to be stayed upon Crabill’s successful completion of a two-year period of probation, with conditions.

250 *Re Neusom* (n 56) (report and findings of grievance committee); *Re Neusom*, No 2:24-mc-2-JES, 2024 WL 1013974 (MD Fla, 8 March 2024) (report and recommendation adopted); *Re Neusom*, No 2:24-mc-2-JES, 2024 WL 2288969 (MD Fla, 21 May 2024) (reconsideration denied).

251 *Park* (n 179); *Mid Central Referral Proceedings* (n 110) *5 (Dinsmore J).

252 *Ayinde Costs Proceedings* (n 248) [78] (Ritchie J). See also *Ayinde Referral Proceedings* (n 118) [29] (Sharp P).

253 *Gauthier v Goodyear* (n 54) *3 (Crone J); *Bunce* (n 104) *4 (Scott J); *Dehghani v Castro*, No 2:25-cv-0052 MIS-DLM, 2025 WL 988009, *5 (Martinez J) (D NM, 2 April 2025); *Ko* (n 117) 12 [65] (Myers J).

254 See above Part III.

255 *Bevins* (n 107) *7 (Baylson J).

256 *Dayal* (n 68) 363 [21] (Judge Humphreys); *Valu [No 2]* (n 69) 371 [37] (Judge Skaros). In *Dayal* (n 68), the lawyer also proactively sought to address the misconduct voluntarily by making a payment to the solicitors for the other party in settlement of costs thrown away for the hearing: at 361 [9] (Judge Humphreys).

257 *Ayinde Referral Proceedings* (n 118). See also *Ko* (n 117).

Lawyers relying on fictitious GenAI output due to their lack of knowledge of how GenAI works and its propensity to hallucinate, or failure to verify outputs, demonstrate a lack of competence or negligence.²⁵⁸ While not a traditional form of sanction, the prospect of professional negligence and accompanying damages may also have a deterrent effect.

The courts have generally been more forgiving of SRLs misusing GenAI than legal practitioners, particularly when there is no evidence of deliberate misconduct or any intention to mislead the court.²⁵⁹ Warnings and excising or disregarding problematic materials were a common approach to SRLs misusing GenAI.²⁶⁰ This may reflect judges seeking to ensure a fair trial by addressing the litigants' limited access to reliable legal information, difficulties in navigating complex legal procedures without assistance, and a lack of both legal and digital literacy.²⁶¹

However, a judge is entitled to reprimand an unrepresented litigant if the judge believes that the litigant is 'trifling with the court'.²⁶² As a result, judicial patience with SRLs has its limits, particularly where SRLs use GenAI to bring or persist with legal proceedings for vexatious, misinformed, frivolous, or fallacious reasons.²⁶³

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- 258 Jessica R Gunder, 'Rule 11 Is No Match for Generative AI' (2024) 27(2) *Stanford Technology Law Review* 308, 344 <<https://doi.org/10.2139/ssrn.4769448>>; Earl Pott, 'Incorporating Generative Artificial Intelligence into the Practice of Law: Utilizing Generative AI within the Framework of the California Rules of Professional Conduct' (2024) 61(1) *California Western Law Review* 71, 79.
- 259 *Bottrill v Graham* [No 2] [2025] NSWDC 221, [75] (Gibson DCJ).
- 260 In Australia, see *Body by Michael Pty Ltd v Industry Innovation and Science Australia* [2025] ARTA 44, [31]–[32] (Member Dunne); *Goodchild v Queensland (Queensland Health)* [2025] QIRC 046, [39] (O'Niell IC); *Metcalf v Hector (Civil Claims)* [2025] VCAT 367, [40] (Member Hoel); *Wang v Moutidis* [2025] VCC 1156, [14]–[15] (Kirton J); *May v Costaras* [2025] NSWCA 178, [10] (Bell CJ) ('May'); *Gribble v ESSENTIAL ENERGY* [2025] NSWDC 344, [42]–[44], order 1 (Gibson DCJ); *Helmold & Mariya* [No 2] [2025] FedCFamC1A 163, [4]–[9] (Aldridge, Campton and Christie JJ). In Canada, see *Duarte v City of Richmond* (2024) BCHRT 347, [52]–[53] (Member Etmanski); *AQ v BW* [2025] BCCRT 907, [15]–[16] (Member Regehr); *Agyeman (dba Learn and Drive Academy) v Hosseinadmoghadas* [2025] BCCRT 1278, [10]–[11] (Member Rivers). In the UK, see *Zzaman v The Commissioners for his Majesty's Revenue and Customs* [2025] UKFTT 00539 (TC), [28]–[29] (Harkness J and Member Deighton); *The Commissioners for His Majesty's Revenue and Customs v Gunnarsson* [2025] UKUT 247 (TCC), [106]–[115] (Jones and Tilakapala JJ). In the US, see *Sanders* (n 123) 170 (Roumel J) (issuing a warning as the Plaintiff may not have been aware of the risk that AI programs can generate fake case citations and other legal misstatements); *Dukuray* (n 140) *11–*12 (Stein J).
- 261 *Hamod v New South Wales* [2011] NSWCA 375, [309]–[316] (Beazley JA, Giles JA agreeing at [829], Whealy JA agreeing at [830]) ('Hamod'); *Flightdeck* (n 221) [51]–[57] (Markovic, Derrington and Anastassiou JJ).
- 262 *Hamod* (n 261) [314] (Beazley JA, Giles JA agreeing at [829], Whealy JA agreeing at [830]); *Galea v Galea* (1990) 19 NSWLR 263, 283 (Meagher JA). See also *Weedbrook* (n 121) [41] (Porter DCJ), observing that 'uncritically placing [GenAI] output before a Court in circumstances where a litigant is reckless as to its accuracy could amount to contempt of court'; *Wallis v Knoester* [2025] VSCA 188, [59] (Richards JA), observing that 'Mr Wallis did not aid his own cause by referring to several non-existent authorities in support of his applications. Whether these "authorities" were AI-generated or just made up, their inclusion in court documents was misleading, a waste of the Court's time, and confirmed my conclusion that the proposed appeal had no merit.'
- 263 For Australian examples, see *Toyota Finance Australia Limited v Islam* [2024] NSWSC 1222, [25] (Parker J); *Luck v Principal Registrar* (n 99); *Luck v Commonwealth* [2025] FCA 68; *Luck v Secretary* (n 101); *Rowe v National Australia Bank* [2025] SASC 50, [37] (Doyle J); *May* (n 260) [49] (Payne JA) (referring to the need for 'more intrusive case management techniques' to address SRLs increasing the costs and complexity of litigation). For US examples, see *Kruse v Karlen*, 692 SW 3d 43 (Mo Ct App,

A range of sanctions are a necessary part of the court's arsenal in addressing the misuse of GenAI in a tailored manner to facilitate the goals of education and deterrence. US courts have tended to adopt harsher sanctions than other jurisdictions. This has occurred when the misconduct was more egregious (lying about the use of GenAI). It has also been supported by an argument that earlier cases and sanctions have failed to achieve general deterrence.²⁶⁴ However, at the root of the misconduct is a lack of basic lawyering skills – the ability to conduct legal research, including checking that the law (case or legislation) is still authoritative ('good law').²⁶⁵ If the cause of the misconduct is verification drift – a failure to check a known risk of hallucination – then stronger sanctions may be warranted. More tailored sanctions, such as mandatory education on legal research skills and tools and on the functioning and risks of GenAI, may be a better way to lift the profession's competence if the cause is a lack of AI literacy. This type of sanction would also be beneficial for SRLs. Until the mandatory education is successfully completed, practising certificates may be suspended or cases stayed.

D Prohibition

An approach that prohibited GenAI use in litigation would be based on a view that avoiding the perils of GenAI, such as the propensity to hallucinate, far outweighed the benefits of GenAI. Such an approach seems unlikely where GenAI offers efficiencies, and indeed proficiencies when used correctly, that can reduce costs and contribute to a better result for a client and for the court.²⁶⁶ GenAI use may be seen as consistent with the lawyer's duties of competence and acting in the best interests of clients where it facilitates the provision of more effective and efficient representation.²⁶⁷ Similarly most courts now have an overarching purpose or goal of reducing cost and delay as part of achieving justice.²⁶⁸ Indeed some courts are using, or looking to use, GenAI to support administrative functions in aid of efficiency.²⁶⁹

2024); *Morgan v Community Against Violence*, No 23-cv-353-WPJ/JMR, 2024 WL 639860, *5 (Johnson CJ) (D NM, 15 February 2024); *Gutierrez* (n 88); *Strong v Rushmore Loan Management Services*, No 8:24-CV-352, 2025 WL 100904 (D Neb, 15 January 2025); *Saxena v Martinez-Hernandez*, No 2:22-cv-02126-CDS-BNW, 2025 WL 522234 (D Nev, 18 February 2025); *Gordon v Wells Fargo Bank NA Inc*, No 5:24-CV-388 (CAR), 2025 WL 1057211 (MD Ga, 8 April 2025). For a Canadian example, see *Robertson v Kawartha Pine Ridge District School Board* (2024) CarswellOnt 17328.

264 See *Mid Central Referral Proceedings* (n 110) *3 (Dinsmore J); *Mid Central Sanctions Proceedings* (n 112) *1 (Hanlon J); *Wadsworth* (n 174) 457–8 (Rankin J).

265 *Mid Central Referral Proceedings* (n 110) 3 (Dinsmore J).

266 *Ayinde Referral Proceedings* (n 118) [4] (Sharp P).

267 Legg and Bell (n 8) 294, 298–9.

268 See *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, 213 [97]–[98], 214–5 [102]–[103] (Gummow, Hayne, Crennan, Kiefel and Bell JJ); *UBS AG v Tyne* (2018) 265 CLR 77, 93–4 [38] (Kiefel CJ, Bell and Keane JJ).

269 AI Rapid Response Team, National Center for State Courts, *Artificial Intelligence: Guidance for Use of AI and Generative AI in Courts* (Report, 7 August 2024); Jacqueline Thomsen, 'US Courts Cautiously Experiment with AI to Speed up their Work', *Bloomberg Law* (online, 7 April 2025) <<https://news.bloomberglaw.com/us-law-week/us-courts-cautiously-experiment-with-ai-to-speed-up-their-work>>.

However, certain uses of AI in litigation have been nominally banned by some courts. The Supreme Court of New South Wales's Practice Note addressing GenAI states that GenAI must not be used: (1) where it requires the entering of confidential information (such as material produced for discovery or in response to a subpoena) into the GenAI program unless that information will remain confidential, including not being used as training material for the GenAI program;²⁷⁰ (2) 'in generating the content of affidavits, witness statements, character references or other material that is intended to reflect the deponent or witness' evidence and/or opinion, or other material tendered in evidence or used in cross examination';²⁷¹ (3) as the sole method to verify citations to case law, legislation, academic publications or evidence;²⁷² or (4) to 'draft or prepare the content of an expert report (or any part of an expert report) without prior leave of the Court'.²⁷³

The qualified ban in relation to confidential information is to aid in avoiding the inadvertent loss of confidentiality. The obligation of confidentiality exists whether or not GenAI is used.²⁷⁴ The ban on using GenAI to verify citations reflects the concerns about hallucinations discussed above. Again, the need to ensure accurate citations are used and the court not misled exists whether or not GenAI is used.²⁷⁵ The concern with affidavits, expert reports and other material is that using a technology that generates testimony that is not the recollection or opinion (in the case of experts) of the witness involves the fabrication or alteration of evidence. This is prohibited by law, including as perjury.²⁷⁶ Each of the above bans may be seen as more about education or drawing attention to requirements by explaining how GenAI may result in a lawyer or party engaging in prohibited conduct. However, some of the bans are accompanied by requirements for certification, as addressed above, such as that GenAI was not used in generating the content of an affidavit (including by way of altering, embellishing, strengthening, diluting or rephrasing a witness' evidence),²⁷⁷ which aids the court by making misconduct easier to prove and punish. The mere use of GenAI while certifying non-use is a contravention. There is no need to establish that the testimony is false.²⁷⁸ As a result, the combination of certifications and bans can aid in the deployment of sanctions.

270 *NSWSC Practice Note* (n 65) 3 [9A].

271 *Ibid* 3 [10]. See also *UCPR Amendment* (n 233) sch 1 items 1, 3, inserting *UCPR* (n 224) rr 31.4(3A), 35.3B(1).

272 *NSWSC Practice Note* (n 65) 4–5 [16]–[17].

273 *Ibid* 5 [20]. See also *UCPR Amendment* (n 233) sch 1 item 2, inserting *UCPR* (n 224) r 31.27(5).

274 See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW); *Hearne v Street* (2008) 235 CLR 125 (the implied or *Harman* undertaking, referring to *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, which requires that disclosures received through litigation, such as discovery, answers to interrogatories, documents produced on subpoena, cannot, without the leave of the court, be used for any purpose other than that for which it was given unless it is received into evidence); Supreme Court of NSW, *Practice Note SC GEN 02: Access to Court Files*, 4 October 2019.

275 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) rr 3, 19.1, 19.2. See also Legg, 'Fake it 'til you Make it' (n 194).

276 *Crimes Act 1900* (NSW) s 327; *Oaths Act 1900* (NSW) ss 29, 33. See also Michael Legg, 'Generative AI and Affidavits' (2025) 99 *Australian Law Journal* 360 ('GenAI and Affidavits').

277 *NSWSC Practice Note* (n 65) 4 [13].

278 Legg, 'GenAI and Affidavits' (n 276) 363.

The NSW practice note concludes by stating: ‘Due to the rapidly developing nature of GenAI, this Practice Note will be periodically reviewed.’²⁷⁹ Changes in GenAI and user competence may see bans removed or altered. However, GenAI, or any technology, needs to operate and be used consistently with judicial process and requirements to ensure integrity of law and evidence. Where GenAI imperils those higher order goals then restrictions or prohibitions can be expected.

VI CONCLUSION

GenAI has been portrayed as a paradigm-shifting technology that will augment humans, lawyers and SRLs, with the promise of better access to justice, and efficient and effective litigation. However, this article has illustrated the perils of GenAI where its misuse adds to the pre-existing administrative burdens faced by courts and tribunals, creates unnecessary delays, adds to the cost of legal proceedings, and may deprive a party of legitimate arguments thus undermining the above promises. Further, if left unchecked, GenAI and its hallucinated body of precedent will erode public trust in legal processes and the courts.

The peril of GenAI results from a lack of AI and legal literacy, lawyers’ propensity to copy-paste previous legal outputs, automation bias and verification drift. These limitations indicate that GenAI models should be treated as ‘human-in-the-loop’ technologies, where users are responsible for identifying hallucinations and verifying output accuracy. Once these causes are understood they can be combined with a number of potential solutions to avert misuse and reap the benefits of GenAI.

Possible solutions are education, certification, sanctions, and/or prohibition. Each of the solutions has a role to play and they are generally mutually reinforcing. Education as to GenAI and the law, substantive and procedural, is clearly needed. Attention needs to shift to how literacy, or competency for lawyers, is achieved. Additional professional conduct rules or mandatory development requirements are possibilities for lawyers. However, for SRLs the long standing and continuing need for legal assistance remains. Certification aids in achieving education, and where non-compliance persists, it aids in the imposition of the next alternative – sanctions. Courts are empowered to impose a range of sanctions in response to misconduct, including GenAI misuse. Sanctions provide an opportunity to tailor the court’s response: warnings and education for the bewildered and stronger medicine, such as costs, penalties, or professional discipline, for the recalcitrant. Lastly, prohibition can be the backstop for when GenAI imperils the integrity, efficiency or fairness of the court system to a degree that cannot be tolerated.

GenAI and its promise of access to justice, and efficient and effective litigation, mean that its use in courts and tribunals will persist. However, the perils outlined in this article, such as inefficiency and unfairness, point to the need for a focus on solutions.

279 NSWSC Practice Note (n 65) 6 [26].