Generative AI, Fake Law and Professional Guidance

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I. Introduction

It is axiomatic that courts must decide cases based on the law. The law applicable to a particular dispute is usually put forward by lawyers as part of presenting their client's case. But courts and lawyers are facing a new challenge. Generative AI (GenAI) is increasingly being used in legal processes, including in litigation – and we are seeing an increase in fake and inaccurate case citations in proceedings.[1]

If this goes unchecked, how can we ensure that the careless use of GenAI does not erode public confidence in the administration of justice? How have legal regulators and courts in similar jurisdictions approached the use of GenAI? And what GenAI guidance does the Australian legal profession need to promote responsible and ethical adoption?

II. GenAI and the rise of "fake law"

To date, the United States has seen the most examples of court filings with fake cases and citations created by GenAI. In *Mata v Avianca*[2] a standard personal injury claim erupted into a legal scandal, resulting in sanctions and negative publicity for two lawyers and their firm after they filed documents citing judicial decisions supposedly published in authoritative sources, including the Federal Reporter and Westlaw. However, the legal research had been conducted using ChatGPT and the citations and quotes were fictitious and inaccurate. Unaware that ChatGPT can produce convincing but factually incorrect text (hallucinations[3]), the lawyers failed to verify the accuracy of its output. The consequences were disastrous - their client's case was dismissed, the lawyers were sanctioned for acting in bad faith, fined US$5,000 along with their firm,[4] and exposed to public scrutiny.[5]

In making the sanctions order, 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

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[1] Michael Legg and Vicki McNamara, "AI is creating fake legal cases and making its way into real courtrooms, with disastrous results", *The Conversation*, 13 March 2024 <https://theconversation.com/ai-is-creating-fake-legal-cases-and-making-its-way-into-real-courtrooms-with-disastrous-results-225080>.

[2] *Mata v Avianca Inc* (SD NY, No 22-CV-1461 (PKC), WL 4114965, 22 June 2023).

[3] Dave Shumaker, "Hallucinate, Confabulate, Obfuscate: The State of AI Today" (2024) 41(1) *Information Today* 12.

[4] *Mata v Avianca, Inc* (SD NY, No 22-CV-1461 (PKC), WL 4114965, 22 June 2023) [1], [16]-[17].

[5] Sara Merken, "New York lawyers sanctioned for using fake ChatGPT cases in legal brief", *Reuters*, 26 June 2023.

impose a gatekeeping role on attorneys to ensure the accuracy of their filings … [the Respondents] … abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.

Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[6]

Given the publicity surrounding *Mata v Avianca*, one might expect lawyers to be cautious about using public GenAI applications for legal research, particularly for submissions in litigation. However, *Mata v Avianca* is not an isolated example.

People v Zachariah C Crabill[7] involved the disciplinary hearing and suspension of a Colorado lawyer. The presiding judge noted:

Crabill … cited case law that he found through the artificial intelligence platform, ChatGPT. Crabill did not read the cases he found through ChatGPT or otherwise attempt to verify that the citations were accurate … Crabill filed the motion with the presiding court. Before a hearing on the motion, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious. But Crabill did not alert the court to the sham cases at the hearing. Nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases, Crabill falsely attributed the mistakes to a legal intern.[8]

In *Park v Kim*,[9] a lawyer cited a fake case after using ChatGPT to identify legal precedent. In imposing sanctions and referring the lawyer's conduct for further investigation, the court noted "At the very least, the duties imposed by Rule 11 require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely",[10] and "The brief presents a false statement of law to this Court, and it appears that … [the lawyer] … made no inquiry, much less the reasonable inquiry required by Rule 11 and long-standing precedent, into the validity of the arguments she presented".[11]

Smith v Farwell[12] also resulted in sanctions after a lawyer filed documents citing fake cases. These were prepared by interns and an associate of the lawyer using an unnamed AI system, and reviewed by the lawyer for "style, grammar and flow, but

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[6] *Mata v Avianca, Inc.* (SD NY, No 22-CV-1461 (PKC), WL 4114965, 22 June 2023) [1].

[7] *People v Zachariah C Crabill* WL 8111898 (Colo OPD.J, 22 November 2023).

[8] *People v Zachariah C Crabill* WL 8111898 (Colo OPD.J, 22 November 2023).

[9] *Park v Kim*, 91 F 4th 610 (2nd Cir, 2024).

[10] *Park v Kim*, 91 F 4th 610 (2nd Cir, 2024), [9].

[11] *Park v Kim*, 91 F 4th 610, 615 (2nd Cir, 2024), [10].

[12] *Smith v Farwell* (Mass Suffolk Superior Ct, Civ 2282CV01197, 12 February 2024) (Copy of "Findings, Rulings and Order Imposing Sanction") <https://masslawyersweekly.com/wp-content/blogs.dir/1/files/2024/02/12-007-24.pdf>.

not for accuracy of the case citations".[13] The court accepted the lawyer's submission there was no intention to mislead, but imposed a US $2000 sanction as "responsive action to ensure that the problem encountered in this case does not occur again in the future".[14]

Finally, in *Re Thomas G Neusom*,[15] a professional misconduct investigation resulted in a range of sanctions (including suspension) for a Florida lawyer. The court found he "violated Florida's Rules of Professional Conduct in multiple ways",[16] including failing to act with reasonable diligence. The Grievance Committee investigating the lawyer noted that he had filed pleadings containing "inaccurate authorities to support what appear to be mostly frivolous legal arguments … [and that he] … admitted to the Committee …that 'he used Westlaw and FastCase and may have used artificial intelligence to draft the filing(s) but was not able to check the excerpts and citations'".[17]

These examples show a growing concern within the US courts about fake case citations generated by GenAI and a willingness to impose disciplinary measures on lawyers responsible for their inclusion in filings, including under Rule 11 of the *Federal Rules of Civil Procedure.*[18] This concern escalates when the lawyers' actions also demonstrate a lack of honesty, diligence, or other unprofessional behaviour.

Discipline for GenAI misuse in litigation is also occurring outside the US. In a recent Canadian case, *Zhang v Chen*,[19] a lawyer cited fake cases and was held personally responsible for the opposing party's legal costs due to delay. Despite taking a less punitive approach than in the US examples, the Canadian court observed:

> Citing fake cases in court filings and other materials handed up to the court is an abuse of process and is tantamount to making a false statement to the court. Unchecked, it can lead to a miscarriage of justice.[20]

However, mitigating circumstances included withdrawal of the cases before hearing, and that there was no 'intent to deceive' by the lawyer.[21] The court also declined to further penalise the lawyer, noting:

> [T]he circumstances do not justify the imposition of a special costs award against … [the lawyer] … which include the significant negative publicity to which she has been

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[13] *Smith v Farwell* (Mass Suffolk Superior Ct, Civ 2282CV01197, 12 February 2024) 6 (Copy of "Findings, Rulings and Order Imposing Sanction") <https://masslawyersweekly.com/wp-content/blogs.dir/1/files/2024/02/12-007-24.pdf>.

[14] *Smith v Farwell* (Mass Suffolk Superior Ct, Civ 2282CV01197, 12 February 2024) 7 (Copy of "Findings, Rulings and Order Imposing Sanction") https://masslawyersweekly.com/wp-content/blogs.dir/1/files/2024/02/12-007-24.pdf.

[15] *Re Thomas G Neusom* (MD Fla District Ct, No 2:24-mc-2-JES, 8 March 2024) <https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2024-00002-6-2-mc>.

[16] *Re Thomas G Neusom* (MD Fla District Ct, No 2:24-mc-2-JES, 8 March 2024) 2 <https://ecf.flmd.uscourts.gov/cgi-bin/show_public_doc?2024-00002-6-2-mc>.

[17] *Re Thomas G Neusom* (MD Fla District Ct, No 2:23-cv-00503-JLB-NPM, WL 982508, 11 January 2024) [4].

[18] *Federal Rules of Civil Procedure* (US) r 11. See also M Legg, *Case Management and Complex Civil Litigation* (The Federation Press, 2nd ed, 2022) 301-335.

[19] *Zhang v Chen* [2024] BCSC 285.

[20] *Zhang v Chen* [2024] BCSC 285, [29].

[21] *Zhang v Chen* [2024] BCSC 285, [31].

subjected. I accept her evidence that she was naïve about the risks of using ChatGPT and that she took steps to have the error corrected … I do not find that she had the intention to deceive or misdirect.[22]

III. Ethical obligations and GenAI guidelines

Lawyers have long been subject to formal ethical obligations in the jurisdictions in which they practice. In the current context, the obligations with particular resonance are: (1) the paramount duty to the court and the administration of justice, including not misleading the court;[23] (2) acting in the best interests of a client;[24] (3) competent and diligent delivery of legal services;[25] (4) avoiding compromise to integrity and professional independence;[26] (5) honesty in communications with opponents;[27] and (6) appropriate supervision of other lawyers and employees acting on a matter.[28]

As the US and Canadian cases illustrate, lawyers who use GenAI in legal processes must exercise their own judgment and diligence and independently verify the accuracy of outputs or run the risk of sanctions or other penalties.

Legal regulators and courts in various jurisdictions are alive to potential challenges posed by the growing use of GenAI in legal processes. Several US state bars and courts now have specific GenAI guidance, opinions or orders, mostly recognising its innovative potential but also emphasising limitations and existing obligations.[29]

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[22] *Zhang v Chen* [2024] BCSC 285, [32].

[23] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rr 3.1, 19.1.

[24] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.1.

[25] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 r 4.1.3.

[26] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.4.

[27] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 22.1.

[28] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 37.1.

[29] These include California: The State Bar of California, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (16 November 2023) <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>; New Jersey: Law.com, *Notice to the bar legal practice: Preliminary guidelines on the use of artificial intelligence by New Jersey Lawyers* (24 January 2024) <Notice-Legal-Practice-Preliminary-Guidelines-on-the-Use-of-Artificial-Intelligence-by-NJ-Lawyers-01-24-24.pdf>; Florida: The Florida Bar, *Ethics Opinion 24-1* (Ethics Opinion, 19 January 2024) <https://www.floridabar.org/etopinions/opinion-24-1/>; for examples of standing orders in various US courts, see Jessiah Hulle, *AI Standing Orders Proliferate as Federal Courts Forge Own Paths* (8 November 2023) Bloomberg Law <https://news.bloomberglaw.com/us-law-week/ai-standing-orders-proliferate-as-federal-courts-forge-own-paths>.

Guides have also been issued for GenAI use in Europe,[30] the United Kingdom,[31] New Zealand and in British Columbia, Canada.[32]

Judicial GenAI guides from the United Kingdom[33] and New Zealand[34] are useful for benchmarking similar initiatives in Australia. Both cover the use of public GenAI chatbots and similar tools by the courts and tribunals in those jurisdictions, including by judges, judicial officers, tribunal members, clerks, and other support staff. They note that GenAI use must be consistent with existing obligations protecting the integrity of the administration of justice and court and tribunal processes.[35]

Key limitations and risks of public GenAI chatbots covered include:

- the generation of text (or other outputs) is based on probability, they are not search engines or authoritative databases;
- they can generate fake legal cases, citations, or quotes;
- their outputs are based on and reflect their training data, and may be inaccurate, incomplete, misleading, or outdated;
- they cannot differentiate between facts, inferences, and opinions in their training data;
- their outputs may be biased or otherwise inappropriate for use for jurisdiction-specific legal matters, in part due to a lack relevant localised content in their training data; and
- any information provided by a GenAI tool must be independently checked for accuracy before it is used or relied upon, particularly for court or tribunal submissions.

Both guides recognise that there are some suitable uses for GenAI by courts and tribunals as a secondary tool, including summarising text, presentations and speech writing, and administrative tasks such as email and memoranda drafting. In short, non-core legal tasks. However, this is subject to maintaining security, confidentiality,

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[30] The European Bars Federation (Fédération des Barreaux d'Europe) New Technologies Commission, *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* (June 2023) <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>.

[31] For UK lawyers, see The Law Society, *Generative AI – the essentials* (17 November 2023) <https://www.lawsociety.org.uk/topics/ai-and-lawtech/generative-ai-the-essentials>; for UK barristers, see The Bar Council, *Considerations when using ChatGPT and generative artificial intelligence software based on large language models* (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>.

[32] Law Society of British Columbia, *Practice Resource: Guidance on Professional Responsibility and Generative AI* (October 2023) <https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Professional-responsibility-and-AI.pdf>.

[33] UK Courts and Tribunals Judiciary, *Artificial Intelligence (AI) - Guidance for Judicial Office Holders* (12 December 2023) <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance/>.

[34] Courts of New Zealand, *Guidelines for use of generative artificial intelligence in courts and tribunals* (7 December 2023) <https://www.courtsofnz.govt.nz/assets/6-Going-to-Court/practice-directions/practice-guidelines/all-benches/20231207-GenAI-Guidelines-Judicial.pdf>.

[35] The same point has been made in relation to court use of other forms of technology, see M Legg, "The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality" (2021) 49(2) *Federal Law Review* 161.

and privacy, which can be a challenge when using public GenAI tools. The guides also do not recommend (and advise taking extra care when) using GenAI for legal research and legal analysis.

The New Zealand courts have also provided specific guidance for GenAI use by lawyers in courts and tribunals which mirrors the guidance above.[36] In addition, the guide for lawyers reiterates that GenAI use must align with existing professional obligations, and that as officers of the court they "must not mislead the court … [and] … must take all reasonable steps to ensure the accuracy of information (including legal citations) provided to the court … In addition, lawyers have obligations to their clients, opposing parties and opposing counsel, including obligations to preserve and protect private and confidential information".[37]

As we navigate the early stages of this promising new technology, ongoing education of the Australian courts and the broader legal profession is critically important. In particular, such education can support responsible use of GenAI in its current forms and encourage a proper consideration of potential benefits and risks when deciding how to adopt GenAI in the future.

Existing local initiatives include the NSW Bar Association GenAI guide for NSW barristers,[38] and the Australian judiciary, tribunal members and court administrators guide to AI decision making, recently updated for GenAI.[39] The Law Society of NSW and the Law Institute of Victoria released articles in 2023 for members, outlining the potential of GenAI, examples of efficient and safe use cases, and risks.[40] Some Australian courts are also considering adopting a similar approach to that of the United Kingdom and New Zealand Courts. However, guidance will need to be updated as GenAI progresses and may need to take account of differences between types of GenAI tools, such as those trained on general information and those fine-tuned on legal material, such as case law and legislation.[41]

IV. CONCLUSION

Many Australian lawyers, like the public, have some understanding of GenAI and recognise both its benefits and limitations. But others are not as aware. There are few documented Australian examples of fake GenAI cases at the time of writing,[42]

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[36] Courts of New Zealand, n 34.

[37] Courts of New Zealand, n 34.

[38] NSW Bar Association, *Issues Arising from the Use of AI Language Models (including ChatGPT) in Legal Practice* (12 July 2023) <https://inbrief.nswbar.asn.au/posts/9e292ee2fc90581f795ff1df0105692d/attachment/NSW%20Bar%20Association%20GPT%20AI%20Language%20Models%20Guidelines.pdf>.

[39] L Bennett Moses et al, *AI Decision Making and the Courts* (The Australasian Institute of Judicial Administration Incorporated, 2nd ed, June 2022) <https://aija.org.au/wp-content/uploads/2023/12/AIJA_AI-DecisionMakingReport_2023update.pdf>.

[40] The Professional Support Unit, *A solicitor's guide to responsible use of artificial intelligence* (14 November 2023) LSJ Online <https://lsj.com.au/articles/a-solicitors-guide-to-responsible-use-of-artificial-intelligence/>; Karin Derkley, "How lawyers are using generative AI" (2023) 97(9) *Law Institute Journal* 11.

[41] Uwais Iqbal, "Blog: The Emerging Legal AI Landscape", *Simplexico* (3 November 2023) <https://www.simplexico.ai/blog/legal-ai-landscape>.

[42] In *Nash v Director of Public Prosecutions (WA)* [2023] WASCA 75, [9]-[10], in dismissing the appeal of a self-represented plaintiff, Quinlan CJ noted that the plaintiff "may have had some assistance with … submissions (including, perhaps, from an artificial intelligence program such as Chat GPT)" and that he had cited non-

but it is only a matter of time before we face similar issues to those seen in other jurisdictions.

We have an opportunity to learn from overseas jurisdictions and to adopt the best of regulatory and court responses. Through education, awareness and the implementation of clear and consistent guidelines for GenAI use by the legal profession throughout Australia, we will facilitate the responsible and ethical adoption of GenAI and promote public confidence in the integrity of the administration of justice in Australia.

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existent authorities. And in *Director of Public Prosecutions (ACT) v Khan* [2024] ACTSC 19, [39]–[44], Mossop J declined to rely upon a personal character reference which appeared to have been generated using computer-generated translation or a large language model (LLM), deciding that it was inappropriate to use a LLM or computer-based translation to generate or assist with such references.