

The use of generative AI in litigation: future implications and potential impact

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In this article, Rebecca Byczok and Reeve Boyd of CMS Cameron McKenna Nabarro Olswang LLP provide a high-level overview on the emerging applications of generative artificial intelligence (AI) in litigation and its impact on the legal landscape.

Understanding Generative AI

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Understanding Generative AI

Generative AI is a term used to describe AI models designed to “understand” complex requests and generate a human-like output. Generative AI uses machine learning algorithms trained on massive data sets to simulate human ability to create text, music, video or images that humans can interpret and understand. Large language models (LLMs) are one type of generative AI tool that take user inputs to perform various tasks, including understanding, summarising, analysing, translating and creating new text. Within the legal sector, the use of generative AI is gaining momentum and holds significant potential.

ChatGPT is perhaps garnering the most attention, but it is only one of many generative AI tools out in the market, with other examples including DALL-E (an image generator); MuseNet (a generative model that can create new music); Google’s Bard; Meta’s LLaMA and Claude. There are also specialised legal tools including, for example, Harvey, CoCounsel and Spellbook.

These engines are amazing, but they do not think or reason nor have any concept of right and wrong – they simply provide statistically relevant words given the input prompt, based on the training set of data that they have been provided with.

Impact in litigation

Generative AI could transform the field of litigation, enabling legal professionals to work more efficiently and enhance the overall quality of legal services. In his recent *speech*, the Master of the Rolls and the Head of Civil Justice, Sir Geoffrey Vos, spoke about the implications of generative AI in the legal field, commenting that the legal profession may turn generative AI “to the advantage of access to justice and effective and economical legal advice and dispute resolution”. (See *Legal update, MR does not think lawyers and judges will soon be redundant but identifies necessary mechanisms to deal with generative AI.*)

Some examples of how generative AI may be used to assist litigators include:

- E-discovery. AI tools will further accelerate disclosure reviews by identifying relevant emails and documents by understanding the issues as set out in the pleadings. AI tools will also be able to analyse the sentiment of communications being reviewed.
- Drafting. These tools may accelerate the drafting and review process, including by analysing existing legal texts and precedents to produce coherent and relevant drafts of pleadings, letters, or other documents. They could therefore save time, reduce errors, enhance consistency, and tailor their documents to specific contexts, audiences, and objectives.
- Client facing chatbots. AI powered chatbots may be able to assist in client communications by answering routine legal questions.
- Enhancing legal research. Generative AI has the power to revolutionise legal research by rapidly scanning, analysing and summarising vast volumes of legal texts, precedents, and relevant case law. By recognising patterns and extracting relevant information, AI can assist lawyers in finding pertinent authorities, citing relevant cases, and identifying potential inconsistencies.
- Improving predictive analysis and decision-making. Generative AI’s ability to process large datasets and identify patterns could substantially enhance predictive analysis in litigation. By analysing historical judgments and case law, it can provide insights into potential outcomes, aiding lawyers and litigants in making more informed decisions.
- Assisting settlement negotiations. Generative AI could assist with generating and evaluating settlement proposals based on the goals and constraints of the parties, as well as the expected outcomes and risks of the case. This may enable lawyers to reach faster and fairer

resolutions, to avoid costly and protracted litigation, and to preserve the relationships of the parties.

Due to these increased efficiencies, it's likely that the volume of disputes in certain areas will be reduced. For example, improved document drafting may minimise legal disputes arising from unclear or ambiguous terms, whilst early settlement negotiations may be facilitated.

However, the potential of generative AI will not only be utilised by those acting in good faith and, as it increases in prevalence, it may also lead to increased litigation in certain areas, including:

- **Fraud.** Fraudsters could utilise generative AI to substantially increase the volume, complexity, and believability of fraudulent attempts, leading to an uptick in disputes with financial institutions.
- **Privacy and data protection.** Generative AI often relies on large datasets to learn and generate content. This raises concerns regarding privacy and data protection as AI models may inadvertently generate sensitive information or personally identifiable data.
- **Intellectual property.** Generative AI does have the potential to create original works, but the training data used to train these tools is regularly taken from the internet via web scraping. Disputes may arise over who owns the rights to the work generated, or whether they infringe upon existing copyrights.
- **Defamation and reputation issues.** The use of generative AI to generate realistic deepfake videos or synthetic text raises concerns about defamation and reputation damage to individuals and organisations.
- **Ethical and discrimination disputes.** Generative AI models rely on the data they are trained on, which may reflect biases present in society. If AI generated content or decisions result in discriminatory practices, individuals or groups may bring claims as a result.

Future Implications

There are many benefits to the utilisation of generative AI in litigation, which is likely to result in significant time and cost savings for legal professionals and their clients, therefore allowing lawyers to devote more time to complex legal analysis and strategic planning. Soon, it may no longer be the case that a sizeable number of junior associates will be needed to work through the voluminous documents and large number of minor tasks that come with large and complex litigation. Instead, it could be attended to by a much smaller team of lawyers.

Our view is that technology will not replace lawyers, but lawyers who use technology

effectively will replace lawyers who do not. We are then likely to see changes in how legal work is priced and charged for. For example, hourly rates may become unattractive to both lawyers and clients in certain instances, and instead alternative fee structures may be used to give more cost predictability and accommodate the cost of the generative AI tools being used.

However, whilst generative AI models are impressive, they do have drawbacks. Reliant on statistical patterns learnt from the training data, they may not fully comprehend the context of a user's input and do not understand the content they generate, leading to incorrect responses.

These models are also engineered to address missing information by leveraging statistically significant responses. When encountering a gap in knowledge, the model will generate the necessary information, potentially leading to 'hallucinations' where fictional output is produced. It's also important to appreciate that the responses generated will be conditioned by the quality of the user's input, so not all lawyers will get the same benefit. In the future, connecting generative AI tools to other systems or knowledge repositories (as we can already see with ChatGPT's Connectors) should enable the inclusion of a broader range of knowledge.

There are also issues with the training data that these models use being either outdated, biased or both. For example, OpenAI's GPT-4 model (which ChatGPT uses) was largely trained on publicly available text up to September 2021 and therefore its knowledge is limited to the information available up to that point. Safeguarding against biases present in training data is also crucial, as AI algorithms may inadvertently perpetuate systemic inequalities or result in unfair outcomes. Regular monitoring, assessment, and validation of AI systems are essential to ensure their compliance with legal requirements and ethical standards.

Whilst these tools hold immense promise, there are also a plethora of questions surrounding generative AI that litigators will look to explore. These include, but are not limited to:

- How generative AI can be used to investigate evidence pre-action?
- How will generative AI impact the quality, reliability, and admissibility of expert witness testimony? Could it even be utilised to produce expert evidence itself?
- Will generative AI replace judges or arbitrators in certain disputes, particularly with those involving low-stakes, high-frequency and standardised issues?
- Will a code of conduct, rules or a practice direction be introduced for lawyers on the use of generative AI?
- What are the ethical, legal, and technical challenges and risks of using generative AI to create or modify documents, data, or evidence, and how can they be prevented, detected, and addressed?
- The use of generative AI for increasing access to justice.

Legal professionals will therefore need to adapt and understand the implications of AI on their work, leveraging its capabilities while maintaining their critical role in legal decision-making and professional judgment, a sentiment echoed by Sir Geoffrey Vos.

Conclusion

Generative AI holds immense promise in transforming various aspects of litigation. While it may contribute to an increase in certain areas of legal disputes, the overall impact on the volume of litigation is yet to be determined. The collaborative partnership between human legal professionals and generative AI systems is crucial to harness the potential of this technology responsibly. By embracing generative AI ethically, the legal profession could enhance access to justice, improve legal outcomes, and drive efficiency in the legal system.

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