

OBJECTION! USE OF AI!

Evaluating the Role of Generative Artificial Intelligence in Litigation: Risks and Regulations

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Abstract Generative artificial intelligence (AI), most prominently ChatGPT, has generated massive amounts of hype around the world, including in litigation. The use of this technology, while possibly beneficial in certain regards, also poses significant risks: misinformation and made-up information, breaches of legal professional privilege, data collection and retention, damage to judicial integrity and concerns about ethics. This paper set out to (1) review the risks that the use of generative AI poses in litigation, and (2) suggest regulations to address said risks. The findings show that generative AI, in its current form, should be prohibited altogether in litigation. Whether generative AI should be involved in litigation at all remains an open societal question which urgently demands consideration.

Keywords: generative artificial intelligence, litigation, regulation, ChatGPT, literature review

I. Introduction

Varghese v. China Southern Airlines Co., Ltd., 925 F3d 1339 (11th Cir. 2019). To the untrained eye, this appears to be a completely normal case decided before the US 11th Circuit Court of Appeals. However, the opposite is true; the plaintiff “Varghese” does not exist and the 11th Circuit Court of Appeals never heard the case, nor was it heard by any other court. In other words, the case is fake. The case was made up by generative artificial intelligence (AI) chatbot ChatGPT. Attorney Steven Schwartz and Peter LoDuca used the case in a filing for a client in the Southern District of New York (*Mata v. Avianca, Inc.*, 2022). The judge presiding over the case found out that the case was fake, as well as five other cases LoDuca had used in his filing. Schwartz, LoDuca and the law firm they worked for were all sanctioned by the Court for their conduct (*Mata v. Avianca, Inc.*, 2022).

The example above lays bare one of many risks that arise when generative AI is used in litigation: the provision and use of inaccurate, made-up information. Other risks concern breaches of legal professional privilege, data collection, judicial integrity and the ethical question of whether generative AI should be involved in litigation at all. It is of great importance that these risks be examined. People in high-responsibility jobs, such as lawyers, prosecutors and judges, should all be held to the highest professional and ethical standards. These are the people who should ensure that the rule of law is respected. They pass the judgment of “guilty” or “not guilty” and determine the liability of whoever finds himself in the courtroom. It is these individuals who wield the power of punishment and possess the authority to strip people of their money and freedoms.

Consequently, this paper tries to answer the following research question: “What are the risks of using generative AI in litigation, and how should said risks be addressed with regulations?” To begin, this paper explains its methodology. Next, a brief history of generative AI is given and risks of its use in litigation are discussed. Then, regulations are suggested to address said risks. Lastly, it is concluded that, in its current form, generative AI—specifically ChatGPT—should be prohibited in litigation. Whether generative AI should be involved in litigation at all remains an open societal question which urgently demands consideration.

2. Methodology

The main methodology used in this paper is a literature review. This literature review comprises section three, which introduces the concept of (generative) AI, and section four, which discusses the risks that generative AI poses in litigation.

For section three, two systematic literature searches were conducted on two academic databases, these being JSTOR and Web of Science. Search parameters for AI in general were “((artificial intelligence) OR (AI))” with a temporal parameter of articles published in 2021 or later and a subject parameter for technology studies. Search parameters for generative AI were “((generative artificial intelligence) OR (generative AI))” with a temporal parameter of articles published in 2022 or later and an “article” document type parameter. The journal articles found on these databases give a general background on (generative) artificial intelligence and are of a more theoretical nature. Additionally, some additional articles found ad-hoc on the web were selected to supplement the main literature gathered during the systematic literature search.

For section four, the methodology was a more ad-hoc literature review. The search strategy for this section was focused on identifying problem areas, i.e., the risks that the use of generative AI poses in litigation. A variety of sources, such as bar association reports, expert opinion articles, web blogs and court cases, were selected. This reflects the multifaceted character of generative AI and the current discourse surrounding it. Moreover, modern generative AI, due to its new and ever-changing character, does not yet prominently feature in academic literature. This is especially true of its use in litigation. These sources thus reflect contemporary developments, and they tell us more about how society is currently responding to the use of generative AI in litigation. Given that most of the alternative types of sources mentioned above are not peer-reviewed, these sources are treated with great scrutiny. The credentials of all authors and possible conflicts of interest have been checked, and transparency regarding all of these sources is guaranteed.

Section five builds on the literature discussed in section four. It suggests how the risks discussed in section four can be regulated. Nonetheless, section five is not a literature review and the suggested regulations are not solidly established in academic literature. This is mainly because generative AI has not yet been subjected to much regulation. Thus, the success or failure of the suggested regulations will have to be evaluated in the future.

3. A Brief Introduction to (Generative) AI: What Is It and What Is Its Purpose?

AI is designed to mimic and oftentimes even surpass the intelligence of humans to perform certain tasks (McKinsey & Company, 2024). Many forms of AI have been part of our lives for a substantial period of time, in sectors such as agriculture, healthcare, the energy sector, and finance (Kshetri, 2023), and as content

algorithms on Google, Facebook and more recently TikTok (Grandinetti, 2021). Modern types of AI learn from data sets without human supervision, so-called *self-supervised learning* (McKinsey & Company, 2024). Though many forms of AI are already present in our daily lives, they are mostly out of sight, in the background. That is where generative AI differs.

The most popular example of generative AI is ChatGPT, a chatbot which responds to almost any question one feeds into it. It is fed massive amounts of text, from which it identifies patterns and can consequently generate predictions of what word naturally comes next in a sentence. For example, when presented with the prompt “Tell me a story in five sentences about a princess”, ChatGPT is able to predict a response which fits that prompt. The story includes fairytale-like storytelling, a kingdom, a castle, a young knight courting the princess and a grand adventure.

Generative AI differs from “traditional” AI in that it generates, synthesising existing knowledge to create something new (McKinsey & Company, 2024). Older AI performs simpler tasks such as classifying images, identifying colours and finding out what book a paragraph of text comes from. Modern generative AI, on the other hand, makes images, generates colours and comes up with new stories. It produces new knowledge.

That is not to say that generative AI does not have its downsides. On the contrary, the information provided by generative AI can be incorrect, harmful and irrelevant (Harrer, 2023). Generative AI remains *predictive*—it *guesses* what the correct answer to a given prompt would be (American Bar Association, 2023). That makes it harder to verify its answers: when it does provide sources, they are often made-up or incorrect, and when it does not, its answers must be verified by finding some other source.

4. Playing with Fire: Risks of Using Generative AI in Litigation

4.1 Misinformation and Made-Up Information

In litigation, the facts of the case applied to the law determine whether someone is guilty in a criminal case or liable in a civil case. Two parties argue back and forth, in writing and orally, until either a judge (in civil law systems) or a jury (in common law systems) determines such guilt or liability.

Black’s Law Dictionary (Garner & Black, 2009, p. 121) defines an argument as “[a] statement that attempts to persuade; esp., the remarks of counsel in analysing and pointing out or repudiating a desired inference, for the assistance of a decision-maker”. To ensure that the decision-maker, that is, the judge or the jury, can come to a decision grounded in law, it is paramount that the arguments made

are also grounded in law, and not in opinions, lies or made-up information. This essential component of an ethical and just judiciary could potentially be undermined by generative AI.

OpenAI, the company which developed and launched ChatGPT, admits that the information ChatGPT provides may be incorrect, may produce harmful instructions or biased content and has limited knowledge of events occurring after 2021 (OpenAI, n.d.a). The same is mentioned on ChatGPT's starting screen. However, those disclaimers have not been seen or heeded by all its users.

In the United States alone, two cases have already been reported where lawyers had ChatGPT erroneously generate case law to support their position in a written legal brief. The first case was in the Southern District of New York. In this civil case, Peter LoDuca was representing the plaintiff Roberto Mata, who sustained an injury on a flight from El Salvador to New York (*Mata v. Avianca, Inc.*, 2022). Attorney Steven Schwartz conducted the legal research for LoDuca, which included the use of ChatGPT. Schwartz was allegedly unaware that the cases ChatGPT gave him were fake. In response to an order of the Court to file documents of these made-up cases, Schwartz turned to ChatGPT again, which generated fake text for these made-up cases. After receiving excerpts from the made-up cases, the judge determined that the cases were fake, and the sanctioning process against Schwartz and LoDuca commenced. Following Schwartz' disciplinary hearing, the judge appeared poised to impose some kind of sanction (Weiser & Schweber, 2023). And indeed, on 22 June, Schwartz, LoDuca and the firm they both worked for were sanctioned for their conduct. They were ordered to pay a fine of \$5,000 and apologise to the individual judges cited in the fake cases (*Mata v. Avianca, Inc.*, 2022).

A second case came to light on 13 June 2023, when Colorado Springs attorney Zachariah Crabill also had ChatGPT generate a case in support of his client. This time, the name of the case was correct but its contents and the year in which the decision was issued were not (Ritzdorf, 2023). Crabill argued that the case *Gonzalez v. Allstate Ins. Co.*, which, according to him, was decided in 2014, dealt with an excusable absence in Court. In reality, however, the decision was issued in 2002 and dealt with a dispute over an insurance policy. Crabill argued in Court that he used ChatGPT because he felt inexperienced in legal research and writing. Consequently, he argued, using ChatGPT expedited the drafting process, saving him effort and his client legal fees. Here, too, the presiding judge has threatened to file a complaint.

4.2 Breaches of Legal Professional Privilege, and Data Collection and Retention

Legal professional privilege entails that confidential documents and confidential communications between a lawyer and his client are protected, and in case of

breach of privilege, disciplinary or even criminal sanctions can follow—though differences exist between common law and civil law jurisdictions (Good et al., 2004).

In most common law jurisdictions, confidential documents and communications between lawyer and client are protected. Furthermore, only the client may waive the privilege. The privilege is also waived when communications are not kept in confidence (Sayers, 2023). Thus, when a lawyer communicates confidential information to anyone besides client, he (unlawfully) waives the privilege.

On the other hand, in civil law systems, the parties have a duty to disclose any documents which support their case, and those they wish to rely on at trial. However, the lawyer has a duty not to disclose any confidential communications between him and his client. In some jurisdictions, the obligation is absolute and not even the client can waive the privilege (Good et al., 2004).

Both in common law and civil law jurisdictions, generative AI poses a risk to legal professional privilege and connected to that, opens the possibility of unwanted data collection and retention (Iu & Wong, 2023; Lidstone, 2023). OpenAI's (n.d.a., n.d.b.) website and official help page provide specific information regarding the cause of these risks. According to the forum's FAQ, humans manually review users' conversations with ChatGPT. The privacy policy notes that prompts entered into ChatGPT are retained; it also states that conversations with ChatGPT are used for training purposes, and they may be provided to third parties.

Such policies can create friction with legal professional privilege. If confidential lawyer-client communications are entered into ChatGPT, this information can be accessed and reviewed by humans, will be stored on OpenAI's systems, will be used for training purposes, and can also be transferred to third parties. There is no question of *whether* this would breach legal professional privilege but rather a guarantee, since many parties who are not the client or lawyer will have access to confidential information covered under legal professional privilege.

4.3 Judicial Integrity and Ethics

There is a broader societal question as to whether generative AI should be involved in litigation. Two cases of ChatGPT being used in litigation have already been discussed above. In *Mata v. Avianca, Inc.*, the lawyers have already been sanctioned, and it is not unlikely that the lawyer in the other case will be sanctioned as well.

In Colombia, a judge used ChatGPT in a ruling dealing with whether an autistic child should cover their own healthcare costs (Gutiérrez, 2023; Zoppo, 2023). The judge in question, Juan Manuel Padilla García, did not hide the fact that he had used ChatGPT. On the contrary, he justified his use of the software based

on Law 2213, passed in 2022, permitting the use of technology in the judiciary (JLDCC, 2023). Though the decision García came to appears to be correct based on the facts and law, his deliberate use of ChatGPT sparked controversy among his peers (Parikh et al., 2023).

García posed the questions that lay at the core of the case to ChatGPT—a fact that is troubling given that even OpenAI’s CEO has stated that people should not rely on ChatGPT for anything important in its current state. García also failed to corroborate ChatGPT’s answers with more trustworthy evidence, such as jurisprudence or academic sources (Gutiérrez, 2023). In another Colombian case, a different judge relied on ChatGPT to answer technical questions about how to carry out an online hearing without checking the answers it provided (Gutiérrez, 2023). This puts the fundamental right of a fair trial at risk. If the trier of fact and law—here, a judge—relies on potentially erroneous results from generative AI, the outcome of the case might very well be wrong.

Even if these judges had verified the information given to them by ChatGPT, the question arises as to whether generative AI should be allowed to answer questions that arise in the complex high-stakes field of litigation. Indeed, the courtroom is where people are sanctioned for their conduct, victims are given redress and multi-million-dollar business disputes are settled. To let a model trained on large but limited—and potentially biased (Margetts, 2022)—text-based data sets influence judicial decision-making is dangerous, unreliable and societally undesirable (Baum & Villasenor, 2023).

Having discussed the most pertinent risks that the use of generative AI poses in litigation, this paper will now discuss how regulations could address these risks. These regulations discussed are not firmly established in academic literature, so their efficacy remains uncertain. Rather, they are suggestions intended serve as a basis for discussion on how generative AI in litigation could be regulated, which should be explored further in future research.

5. Taming the Beast: Regulating Generative AI in Litigation

This section suggests regulations for each of the risks discussed in section four, in the same order. For misinformation and made-up information, (a) mandatory disclaimers and (b) mandatory disclosures to the Court are suggested; for breaches of legal professional privilege and data collection and retention, (a) non-data saving modes and (b) a strict prohibition on entering confidential information; and for judicial integrity and ethics, (a) establishing a generative AI in litigation ethics committee. A last option—which this paper ultimately recommends—is a

blanket prohibition on generative AI in litigation *for now*. Given that leaving generative AI unregulated is problematic and the suggested regulations still need to be evaluated, this is argued to be the best current course of action.

5.1 Misinformation and Made-Up Information

5.1.1 Mandatory Disclaimers

At present, there are no guarantees that anything generated by generative AI produces accurate and reliable information. Regulations should not focus on guaranteeing that generative AI produces accurate and reliable knowledge—that is the job of the companies and developers who work on it—but rather on mandating disclaimers stating that generative AI is not qualified to give legal advice. If it is asked a question of a legal nature, generative AI may give an answer, but must insert a disclaimer at the end that the answer should not be regarded as legal advice and might contain made-up information or errors. Though there are already disclaimers in place, these often do not feature prominently on screen. Regulations could be implemented to mandate showing a non-skippable disclaimer (e.g., an infographic) on screen before allowing the technology may be used.

5.1.2 Mandatory Disclosures to the Court

5.1.2.1 “I Have Used Generative AI”

Some courts already have rules in place which mandate that lawyers disclose whether they have used AI in their legal briefs (Merken, 2023; Thomsen, 2023). This rule could be implemented uniformly across all courts. Lawyers and judges might still try to hide their use of generative AI in their writings and oral pleadings, but they would risk being sanctioned by the court for doing so. This obligatory disclosure might act as a deterrence mechanism against the use of generative AI, failing which it might make lawyers and judges take extra care when using the technology, incentivising them to check the accuracy of the information provided.

5.1.2.2 “I Have Not Used Generative AI”

A farther-reaching measure than the above, would be a mandatory disclosure to the Court that no use of AI was made. Mandating that this disclosure be included in any court filing or oral pleading from a lawyer or a judge would effectively function as a prohibition on the use of generative AI. In case of non-compliance, the lawyer or judge in question could be sanctioned for lying to the court.

5.2 Breaches of Legal Professional Privilege and Data Collection and Retention

5.2.1 Non-Data Saving Modes

The most clear-cut way to prevent legal professional privilege being breached, would be to mandate the inclusion of a generative AI non-data saving mode, preventing text entered into the software being saved on servers, stored anywhere else, or used for any other purpose. However, this would be a difficult measure to implement since many, if not all, companies are required to comply with legal obligations regarding data retention, such as filtering out illegal or harmful content and handing over information to the authorities in case someone is suspected of having committed a crime. Since most, if not all, data is subject to review by either an automated system or human reviewers, it would be almost impossible to preserve legal professional privilege when confidential information is entered into the system, even where it is not used for training the models of that particular generative AI.

5.2.2 Strict Prohibition on Entering Confidential Information

Given that non-data saving modes are difficult to implement and not airtight, a strict prohibition on entering confidential information into generative AI could be implemented. This way, lawyers and judges could still make use of generative AI, but they would have to ask it questions in such a way that no confidential information is disclosed, and legal professional privilege is thus preserved. A guideline for keeping confidential information out of generative AI is to ensure that no identifying information is entered into it, including names, addresses, neighbourhoods or body features. Nonetheless, the line between non-confidential and confidential information might not always be clear, making enforcement and compliance with this measure difficult.

5.3 Judicial Integrity and Ethics

Regulations regarding judicial integrity and ethics are of a more societal nature. The main questions in this regard are whether it is ethical to use generative AI in litigation and whether its use is detrimental to judicial integrity. There is no single answer to these questions; countries will differ in their responses depending on context. However, regulations could be implemented to facilitate the process of answering these questions. One such regulation is briefly discussed below.

5.3.1 Establishing a Generative AI in Litigation Ethics Committee

An ethics committee, made up of jurists, philosophers, data science experts, citizens, underrepresented minorities and other specially-affected groups, could

work together on a report to determine whether the use of generative AI in litigation would be ethical or societally desirable. Since litigation can involve almost anyone, a wide selection of experts and specially-affected people would have to contribute to the report so that all voices are heard.

5.4 Blanket Prohibition

The most far-reaching measure would be a blanket prohibition. Most measures discussed above, though potentially effective, would still fail to stem many risks: even mandatory disclosures to the court, which are predicted to be the most effective of all the suggested regulations, would not guarantee the responsible use of generative AI. A blanket prohibition would acknowledge that generative AI is too risky to use it in its current state. In a discipline with strict rules and high stakes, it might therefore be better to preliminarily exclude this novel and potentially dangerous technology. That is not to say the blanket prohibition could not be lifted in the future when more research on generative AI has been conducted, more transparent and secure AI models have been developed, and regulations have been carefully evaluated. Such a blanket prohibition could be implemented alongside some of the other previously-suggested measures, so that in the event lawyers or judges decide to use the technology unlawfully, there are barriers and deterrence mechanisms in place to caution them against doing so.

6. Conclusion

Generative AI is here to stay. This technology is transforming many areas of our lives and it appears that it will only continue to improve over time. Its arrival should both excite us and caution us—especially in litigation, where the stakes are high. The integrity of the judiciary and the functioning of the rule of law are a fundamental cornerstone of a modern, well-functioning democracy. The risks that generative AI poses to that integrity should not be understated.

The regulations suggested above should not be viewed in isolation. Rather, they are supposed to be implemented concurrently, according to societal needs and desires: some will choose less regulation, others more. It is the author's hope that even societies which are more reluctant to regulate generative AI in litigation, will still choose to regulate it to some extent. However, the overall recommendation of this paper is that generative AI should be prohibited in litigation altogether *for now*. Societies should be given ample time to consider whether they want to see generative AI used in litigation. In considering this question, they can discuss to what extent its use should be allowed in litigation and to what regulations

it should be subjected. The list of regulations suggested above is by no means exhaustive—an exploration of other means through which generative AI may be regulated is encouraged.

We should make sure that we control AI, and that it does not control us. Daedalus and Icarus showed us many years ago that the power of man knows no bounds, but if used excessively, it spells our downfall. Similarly, man has used his power to create generative AI, which if used recklessly, might diminish our trust in the judiciary. May it not be so.

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