Advances in Social Sciences Research Journal – Vol. 10, No. 7
Publication Date: July 25, 2023
DOI:10.14738/assrj.107.15075.
Hunter, R. J., & Shannon, J. H. (2023). How a Simple Tort Claim is Transformed into an Exposition of the Implications of Artificial Intelligence on the American Legal System. Advances in Social Sciences Research Journal, 10(7). 142-170.

How a Simple Tort Claim is Transformed into an Exposition of the Implications of Artificial Intelligence on the American Legal System

Richard J. Hunter
Stillman School of Business, Seton Hall University,
Collins College of Business, University of Tulsa

John H. Shannon
Stillman School of Business, Seton Hall University

ABSTRACT

This article discusses issues relating to artificial intelligence (AI) in the context of a lawsuit essentially alleging negligence. The case, however, quickly turned to a discussion relating to how the plaintiff's attorneys, with the aid of ChatGPT, fabricated as series of precedents that would have permitted their case to go forward on the basis of the application of a statute of limitations found in the Montreal Convention. The article discusses AI as it applies to the Rules of Professional Conduct and Rule 11 of the Federal Rule of Civil Procedure relating to the duties and responsibilities of attorneys. All of the quotations and factual representations are taken from the Case Documentations.

Keywords: Artificial intelligence (AI), Montreal Convention, sanctions, Chat GPT, 12(b)(6) motion, fabricated research, prompts

Artificial Intelligence: Field of computer science and engineering practices for intelligence demonstrated by machines and intelligent agents.

INTRODUCTION

In an opinion and order imposing sanctions on Attorneys Peter LoDuca and Steven A. Schwartz, and the firm of Levidow, Levidow & Oberman, dated June 22, 2023 (Case 1:22-cv-01461-PKC, Document 54), United State District Court Judge P. Kevin Castel wrote:

"In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. 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."

In imposing sanctions in a case captioned "*Roberto Mata v. Avianca, Inc.*," Judge Castel decided that the Respondents had "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" (see Felzmann, Villaronga, Lutz, & Tamo-Larrieux, 2019).

The context of this ruling involves one of the most interesting and important areas of law involving artificial intelligence (AI), and how reliance upon the use of AI had a major impact on the resolution of this now-infamous American court case.

2. Case Synopsis: How a Simple Tort Claim is Transformed into an Exposition of the Implications of Artificial Intelligence on the American Legal System (see Case 1:22-cv-01461-PKC, document 55)

In 2019, a New York law firm, employing associates Steven A. Schwartz and Peter LoDuca, brought suit against the Colombian airline Avianca on behalf of Roberto Mata, who claimed he was injured on a flight to John F. Kennedy International Airport in New York City due to Avianca's "carelessness, recklessness and negligence." The airline moved to dismiss the Complaint based on Federal Rule 12(b)(6) (see Marrero, 2018), stating that Mata's claim is "time-barred under the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (1999) (DeLeon & Eyskens, 2001), more commonly known as the Montreal Convention, which had been built upon the earlier "Warsaw Convention" (1929), which had been promulgated to "reform the Warsaw Convention so as to harmonize the hodgepodge of supplementary amendments and intercarrier agreements of which the Warsaw Convention system of liability consists" (see *Mata v. Avianca, Inc.*, 2023, quoting *Cohen v. American Airlines, Inc.*, 2921, p. 244).

Mata's attorneys filed a 10-page brief arguing why the suit should proceed. The document cited more than half a dozen court decisions, including *Varghese v. China Southern Airlines, Martinez v. Delta Airlines, Miller v. United Airlines, Shaboon v. Egyptair, Peterson v. Iran Air,* and *Estate of Durden v. KLM.* Unfortunately for the plaintiff's attorneys, the Clerk of the United States Court of Appeals for the Eleventh Circuit, in response to an inquiry by Judge Castel, "confirmed that there has been no such case before the Eleventh Circuit with a party named *Vargese* or *Varghese* at any time since 2010." It also appeared that the non-existent *Varghese/Vargese* decision contained numerous "internal citations and quotes, which in turn, are non-existent." In addition, the other five decisions submitted by plaintiff's counsel contained similar deficiencies and "appeared to be fake as well."

Interestingly, the research had not actually been prepared by attorney Peter LoDuca, but by his colleague at the same law firm, Steven A Schwartz, who had been a practicing attorney for more than 30 years. In his written statement, Schwartz clarified that LoDuca had not been part of the research and had no knowledge of how it had been carried out.

Nevertheless, LoDuca, who had replaced Schwartz as attorney-of-record, was ordered to *show cause* why he ought not to be sanctioned for "citing non-existent cases" to the Court in the *Affirmation of Opposition* to defendant's motion for dismissal and by "submitting to the Court copies of the non-existent judicial opinions." What was the cause of this controversy? *It appeared that ChatGPT had, in fact, fabricated all of them.*

URL: http://dx.doi.org/10.14738/assrj.107.15075

A SUMMARY OF THE UNDERLYING CASE (SEE CASE 1:22-CV-01461-PKC, DOCUMENT 55)

Plaintiff Roberto Mata claimed that on August 27 or 28, 2019, he was severely injured when a metal service tray struck his left knee during an overnight flight from El Salvador to John F. Kennedy Airport in New York. Defendant Avianca, Inc. moved to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (see Hamabe, 1993), asserting that Mata's claim was time-barred under the *Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Montreal, Canada* (1999), more commonly known as the Montreal Convention (Oliveto, 2022).

The *Montreal Convention* is a multilateral treaty that "applies to all international carriage of persons, baggage or cargo performed by an aircraft . . .." The Convention states in relevant part that a "carrier is liable for damage sustained in case of . . . bodily injury of a passenger upon condition only that the accident which caused the . . . injury took place on board the aircraft . . . ." Interestingly, while the term 'accident' was not defined in the Montreal Convention, the Supreme Court has interpreted the substantively identical provision of the Warsaw Convention as 'an unexpected or unusual event or happening that is external to the passenger.'" Both the United States and El Salvador are signatories to the Montreal Convention and are therefore bound by its terms. As such, Mata's allegations about his injuries fall within the Convention's use of the word "accident."

As such, the *timeliness* of Mata's Claim is governed by the Montreal Convention and *not* the Civil Practice Law and Rules (CPLR) Section 214(5), which provides, in effect, for a three-year statute of limitations. Under the Convention, "[t]he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped" (Montreal Convention, ch. III, art. 35, Section 1l; see also Stewart, 2015). An action brought more than two years *after the date of arrival* is properly dismissed on a Rule 12(b)(6) motion.

Avianca argued that Mata had commenced this action *after* expiration of the two-year period prescribed by the Montreal Convention and thus was "time-barred."

As the record indicated, on August 27, 2019, Mata was traveling on Avianca Flight 670 from El Salvador to JFK Airport. Mata claimed that sometime between 11 p.m. and 1 a.m., an employee of Avianca struck him in the left knee with a metal serving cart, resulting in injury. Mata attributed his injury to Avianca's "carelessness, recklessness and negligence." Mata described the injuries as "grievous and painful," including unspecified damage to his nervous system that required medical treatment and which prevented him from working.

On July 20, 2020, Mata had filed a previous complaint with similar allegations against Avianca, but subsequently learned that Avianca was in bankruptcy proceedings and subject to the automatic bankruptcy stay under 11 U.S.C. Section 362(a) (see generally Murphy, 1986). Upon learning in January 2022 that Avianca had emerged from bankruptcy proceedings, Mata voluntarily dismissed that prior complaint, then brought the current complaint on February 2, 2022, in the New York Supreme Court, New York County, a state court.

Avianca filed a *Notice of Removal* on February 22, 2022. The Notice of Removal asserted that the United States District Court for the Southern District of New York had federal question jurisdiction because Mata's claim arose under the Montreal Convention, an international agreement (see generally Schwartz, 2022).

Later, attorneys for Avianca would file a motion to dismiss the entire matter under Rule 12(b)(6), discussed below.

The 12(b)(6) Motion

Reiser (2016) writes that Rule 12(b)(6) provides that a motion to dismiss a complaint may be filed for "failure to state a claim upon which relief can be granted." The purpose of the Rule is to permit a court to dismiss actions that are "fatally flawed" in their legal premise and which are destined to fail, sparing the litigants (and the court) "the burdens of unnecessary pretrial and trial activity" (*Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, 1993), and presumably, expense, as well.

Hamabe (1993, p. 204) writes that Rule 12(b)(6) may … serve the functions of important issue identification and some screening of unmeritorious or insufficient claims or defenses.

"The function of Rule 12(b)(6) can be the disposition of certain cases as follows: i) those which state no legal theory whatsoever, including frivolous cases… ; ii) those which state no legal ground to establish a claim…; iii) those which contain no factual allegation of an essential element of established legal theory…; iv) those which state only conclusory, general allegations without any description of the basic nature of the dispute…; or v) those containing highly improbable allegations of an essential element of established legal theory… ."

Under most circumstances, a Rule 12(b)(6) motion will be filed at the beginning of the case and replaces filing an answer to the complaint. The motion will be decided based on the standards that the United States District Court for the district in which a complaint was filed and will be based on the pleadings in the case.

Stone (2023) explains: "A pleading is the name of the formal court documents that the court requires parties to file at the beginning of a case. Typical pleadings include a ***statement of claim*** and a ***defense***," which set out the details of the claim or defense that the plaintiff is making and the facts that underlay that claim or defense. "The purpose of the pleadings is to identify to the court, and to the other parties, the key issues for determination in the case." Even if a court decides that the factual allegations are entitled to an assumption of truth, the facts must also "plausibly suggest an entitlement to relief" by a plaintiff (Stone, 2023).

To survive a motion to dismiss a complaint under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face'" (citing *Ashcroft v. Iqbal* (2009, p. 678; see also Sirica, 2010; Moore, 2012). The court is required to examine only the "well-pleaded factual allegations," if any, "and then determine whether they plausibly give rise to an entitlement to relief" (*Ashcroft v. Iqbal*, 2009, p. 679). "Dismissal is appropriate when 'it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law'" (citing *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 2014).

URL: http://dx.doi.org/10.14738/assrj.107.15075

The court will accept the truth of all allegations found in the complaint and will "draw all reasonable inferences in favor of the plaintiff" (*Gross v. German Found Indus. Initiative*, 2004). The pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct."

A Rule 12(b)(6) motion may be based on *res judicata* (also known as the doctrine of claim preclusion that bars re-litigating claims previously decided in an earlier action) (Clement, 2016), or, as in the case of *Mata v. Avianca, Inc.* (2023), when the motion is premised on a statute of limitations defense (*Rycoline Products, Inc. v. CW Unlimited* (1997).

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may only consider the complaint, exhibits attached to the complaint, matters of public record, and "undisputably authentic documents" if the claims are based upon those documents (see *PBGC v. White Consolidated Industries, Inc.*, 1993). In *In re Burlington Coat Factory* 1997), the Third Circuit Court of Appeals noted that a document forms the basis of a claim when it is "integral to or explicitly relied upon in the complaint" and such a document "may be considered without converting the motion to dismiss into one for summary judgment."

Since the facts of the case as evidenced in the Complaint described an "accident" that occurred between 11 p.m. and 1 a.m. on August 27 or 28, 2019, assuming that Mata's flight arrived at JFK Airport in the morning hours of August 28, 2019, Avianca argued that Mata's claim for damages became "time barred" on August 28, 2021.

The Core Issue

In opposition to the motion to dismiss, on March 1, 2023, attorney LoDuca filed an "Affirmation in Opposition" (hereinafter Affirmation) to the motion to dismiss. The Affirmation cited and quoted from purported judicial decisions that were said to be published in the Federal Reporter, the Federal Supplement, and Westlaw. Above LoDuca's signature line, the Affirmation in Opposition states, "I declare under penalty of perjury that the foregoing is true and correct."

Although LoDuca signed the Affirmation to Avianca's 12(b)(6) motion and filed it as required, he was not its author. It was researched and written by Schwartz. LoDuca reviewed the affirmation for style, stating, "I was basically looking for a flow, make sure there was nothing untoward or no large grammatical errors." Before executing the Affirmation, LoDuca did not independently review any judicial authorities cited in his Affirmation. There is also no claim or actual evidence that he made any inquiry of Schwartz as to the nature and extent of Schwartz's research or whether Schwartz had found any contrary precedents as required. LoDuca simply relied on his belief that work produced by Schwartz, a colleague of more than twenty-five years, would be reliable. There was no claim made by any Respondent in response to the Court's Orders to Show Cause, described below, that Schwartz had prior experience with the Montreal Convention or with bankruptcy stays. Technically, plaintiff's opposition had been submitted as an "affirmation" and not a memorandum of law—seen as a distinction without a difference" in terms of its legal effect. The Local Civil Rules of this District require that "the cases and other authorities relied upon" in opposition to a motion be set forth in a memorandum of law.

"An affirmation is a creature of New York state practice that is akin to a declaration under penalty of perjury." Schwartz has stated that "my practice has always been exclusively in state

court . . .” and that he had attempted “to research a federal bankruptcy issue with which he was completely unfamiliar.”

The Affirmation filed by LoDuca argued that Mata’s claim should be governed by Civil Practice Law and Rules (CPLR) 214(5), which establishes a *three-year limitations period* for filing negligence claims. However, *Cohen v. American Airlines, Inc.* (2021), had rejected the argument that state tort law can supplant or supersede the provisions of the Montreal Convention relating to the time period for filing a claim. The *Cohen* court observed that “courts have consistently held that the Warsaw and Montreal Conventions preempt state law and provide the sole avenue for damages claims that fall within the scope of the Conventions’ provisions.”

The Affirmation filed by LoDuca, however, cited certain authorities that purportedly held that state courts have concurrent jurisdiction with federal courts over Montreal Convention claims. LoDuca argued that the Convention’s two-year time bar was *tolled* while Avianca was operating under the automatic bankruptcy stay. In support of the plaintiff’s position that there was a tolling of the statute of limitation under the Montreal Convention by reason of a bankruptcy stay, the plaintiff’s submission cited a decision of the United States Court of Appeals for the Eleventh Circuit, *Varghese v China South Airlines Ltd* (2019), bolstering its position that dismissal was not appropriate.

Recall that Mata had filed an earlier complaint against Avianca on or about July 28, 2020. On November 20, 2020, Mata’s counsel learned for the first time that Avianca had filed for bankruptcy in May 2020 and was subject to the Bankruptcy Code’s automatic stay. Thus, in January 2022, when Mata’s counsel learned that Avianca had emerged from bankruptcy, on January 31, 2022, the parties filed a stipulation of discontinuance of the prior action. Mata then filed the complaint in this action on February 2, 2022. Mata asserted that the February 2 action was timely brought because the automatic bankruptcy stay tolled the Montreal Convention’s limitations period.

Avianca filed a five-page Reply Memorandum on March 15, 2023. It included the following statement: “Although Plaintiff ostensibly cites to a variety of cases in opposition to this motion, the undersigned has been unable to locate most of the case law cited in Plaintiff’s Affirmation in Opposition, and the few cases which the undersigned has been able to locate do not stand for the propositions for which they are cited.” The reply memorandum asserted that certain cases cited in the Affirmation in Opposition were in fact non-existent: “Plaintiff does not dispute that this action is governed by the Montreal Convention, and Plaintiff has not cited any existing authority holding that the Bankruptcy Code tolls the two-year limitations period or that New York law supplies the relevant statute of limitations.”

The Reply Memorandum then detailed by name and citation seven purported “decisions” that Avianca’s counsel could not locate and set them apart with quotation marks to distinguish a nonexistent case from a real one, even if cited for a proposition for which it did not stand. Despite the serious nature of Avianca’s allegations. Respondent never sought to withdraw the March 1, 2023, Affirmation or provide any explanation to the Court of how it could possibly be that a case purportedly in the Federal Reporter or Federal Supplement could not be found. The Court conducted its own search for the cited cases but was unable to locate multiple authorities cited in the Affirmation in Opposition.

URL: http://dx.doi.org/10.14738/assrj.107.15075

LoDuca testified at the June 8, 2023, sanctions hearing that he received Avianca's reply submission and did not read it before he forwarded it to Schwartz. Schwartz also did not alert LoDuca to the contents of the reply.

As it was later revealed, Schwartz had used ChatGPT, which had literally *fabricated* the cited cases. Schwartz testified at the sanctions hearing that when he reviewed the reply memo, he was "operating under the false perception that this website [i.e., ChatGPT] *could not possibly be fabricating cases on its own."* He stated, "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." Schwartz also testified at the hearing that he knew that there were free sites available on the internet where a known case citation to a reported decision could be entered and the decision displayed. He admitted that he entered the citation to "Varghese" but could not find it. The following dialogue is quite instructive:

> THE COURT: Did you say, well they gave me part of Varghese, let me look at the full Varghese decision?
> MR. SCHWARTZ: I did.
> THE COURT: And what did you find when you went to look up the full Varghese decision?
> MR. SCHWARTZ: I couldn't find it.
> THE COURT: And yet you cited it in the brief to me.
> MR. SCHWARTZ: I did, again, operating under the false assumption and disbelief that this website could produce completely fabricated cases. And if I knew that, I obviously never would have submitted these cases.

On April 11, 2023, the Court issued an Order directing LoDuca to file an affidavit by April 18, 2023, that annexed copies of the decisions cited in the Affirmation in Opposition. The Order stated: "Failure to comply will result in dismissal of the action pursuant to Rule 41(b), Fed. R. Civ. P." On April 12, 2023, the Court issued an Order that directed LoDuca to annex an additional decision, which was also cited in the Affirmation in Opposition.

Apparently, Schwartz understood the import of the Orders of April 11 and 12 requiring the production of the actual cases: "I thought the Court searched for the cases [and] could not find them . . .." LoDuca requested an extension of time to respond to April 25, 2023. The letter stated: "This extension is being requested as the undersigned is currently out of the office on vacation and will be returning April 18, 2023." LoDuca signed the letter and filed it.

The Order to Show Cause (Case 1:22-cv-01461-PKC, Document 31)

On May 4, 2023, LoDuca was ordered to *show cause* why he ought not be sanctioned pursuant to (1) Rule 11(b)(2) and (c) of the Federal Rules of Civil Procedure, Section 1927, and the inherent power of the Court, for (A) citing non-existent cases to the Court in his Affirmation in Opposition, and (B) submitting to the Court annexed to his Affidavit filed April 25, 2023 copies of non-existent judicial opinions. LoDuca was also ordered to file a written response to this Order by May 26, 2023.

The Clerk of the United States Court of Appeals for the Eleventh Circuit, in response to the Court's inquiry, confirmed that there has been no such case before the Eleventh Circuit with a party named *Vargese* or *Varghese* at any time since 2010. The Clerk further stated that "the

docket number appearing on the "opinion" furnished by plaintiff's counsel, Docket No. 18-13694, is for a case captioned *George Cornea v. U.S. Attorney General, et al.* (2019 Neither Westlaw nor Lexis has the case, and the case found at 925 F.3d 1291, 1339 is *A.D. v Azar* (2019). The "Varghese" decision contains internal citations and quotes, which, in turn, were non-existent:

- "The furnished copy of the "Varghese" decision cites Zicherman v Korean Airlines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008), which does not appear to exist. The case appearing at that citation is, indeed, an Eleventh Circuit case decided in 2008, but is titled *Miccosukee Tribe v. United States,* 516 F.3d 1235 (11th Cir. 2008).
- The furnished copy of the "Varghese" decision cites Holliday v. Atl. Capital Corp., 738 F.2d 1153 (11th Cir. 1984), which does not appear to exist. The case appearing at that citation is, indeed, an Eleventh Circuit case decided in 1984 but is titled *Gibbs v. Maxwell House*, 738 F.2d 1153 (11th Cir. 1984).
- The furnished copy of the "Varghese" decision cites Hyatt v. N. Cent. Airlines, 92 F.3d 1074 (11th Cir. 1996), which does not appear to exist. There are two brief orders appearing at 92 F.3d 1074 issued by the Eleventh Circuit in other cases.
- The furnished copy of the "Varghese" decision cites Zaunbrecher v. Transocean Offshore Deepwater Drilling, 772 F. 3d 1278 (11th Cir. 2014), which does not appear to exist. The case appearing at that citation is, indeed, an Eleventh Circuit case decided in 2014, but is titled *Witt v. Metropolitan Life Ins. Co.*, 772 F. 3d 1269 (11th Cir. 2014)."

Judge Castel also noted that the five decisions submitted by plaintiff's counsel, described in the case summary, contain similar deficiencies and "appear to be fake as well."

The Schwartz Response (Case 1:22-cv-01461-PKC, Document 32-1)

Schwartz filed an Affidavit in response to the Order to Show Cause on May 24, 2023. Schwartz confirmed that as he was not admitted to practice in the Southern District of New York, Peter LoDuca, an associate in the law firm of Levidow, Levidow & Oberman, PC, became the attorney-of-record in the case. However, Schwartz admitted that he had "continued to perform all of the legal work that the case required"-including "all of the legal research which was included in plaintiff's affirmation in opposition." Schwartz confirmed that LoDuca had "no role in performing the research in question, nor did he have any knowledge of how said research was conducted."

With reference to the use of artificial intelligence, Schwartz stated that he had consulted "the artificial intelligence website ChatGPT in order to supplement the legal research performed"-and "did locate and cite" cases in the affirmation listed in the case synopsis, "which this Court has found to be nonexistent." Schwartz also maintained that the citations and opinions provided by ChatGPT also "assured the reliability of its content and that he had relied on the legal opinions provided to him 'by a source that has revealed itself to be unreliable.'" Further, Schwartz admitted that he had never utilized ChatGPT "as a source for conducting legal research prior to this occurrence and therefore was unaware of the possibility that its content could be false." However, Schwartz admitted that while it was his "fault" in not confirming the sources provided by ChatGPT, he had "no intent to deceive" the Court nor the defendant.

URL: http://dx.doi.org/10.14738/assrj.107.15075

In an attempt to mitigate any sanctions that might be imposed against him, Schwartz stated that neither he nor LoDuca had "ever be cited for any legal misconduct of any source nor ever been sanctioned by this Court or any Court in over thirty years of experience." Schwartz expressed remorse "having utilized generative artificial intelligence to supplement the legal research performed herein and will never do so in the future without absolute verification of its authority."

Would that be enough to save Schwartz, LoDuca and their law firm, Levidow, Levidow & Oberman, from the imposition of sanctions?

Opinion and Order on Sanctions (Case 1:22-cv-01461-PKC, Document 55)

Beginning his decision in the matter of issuing sanctions on the various parties, Judge Castel wrote:

"In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. 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. Peter LoDuca, Steven A. Schwartz and the law firm of Levidow, Levidow & Oberman P.C. (the "Levidow Firm") (collectively, "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."

Judge Castel commented about the "harm to the legal system" that could result from such actions:

"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."

The decision to impose sanctions against Respondents Schwartz and LoDuca includes comments on the filing of the March 1, 2023, submission that first cited the "fake" cases:

"But if the matter had ended with Respondents coming clean about their actions shortly after they received the defendant's March 15 brief questioning the existence of the cases, or after they reviewed the Court's Orders of April 11 and 12 requiring production of the cases, the record now would look quite different. Instead, the individual Respondents doubled down and did not begin to dribble out the truth until May 25, after the Court issued an Order to Show Cause why one of the individual Respondents ought not be sanctioned."

As a result, Judge Castel found "bad faith" on the part of the individual Respondents based upon acts of "conscious avoidance and false and misleading statements to the Court." Sanctions would

therefore be imposed on the individual Respondents. Rule 11(c)(1) of the Federal Rules of Civil Procedure also provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its . . . associate, or employee." Because the court found no exceptional circumstances, sanctions would be jointly imposed on the Levidow Firm. The sanctions are "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated" (Rule 11(c)(4)).

It is important to point out that the Court focused on statements made by LoDuca who had requested an extension of time to respond to April 25, 2023. The letter filed by LoDuca stated: "This extension is being requested as the undersigned is currently out of the office on vacation." The Court stated that LoDuca's statement was false, and he knew it to be false at the time he made the statement. Under questioning by the Court at the sanctions hearing, LoDuca admitted that he was *not* out of the office on vacation. Mr. LoDuca testified that "[m]y intent of the letter was because Mr. Schwartz was away, but I was aware of what was in the letter when I signed it. . .. I just attempted to get Mr. Schwartz the additional time he needed because he was out of the office at the time." As a result, the Court found that LoDuca had made the knowingly false statement to the Court that he was "out of the office on vacation" in a successful effort to induce the Court to grant him an extension of time. Further, that false statement had the intended effect of concealing Schwartz's role in preparing the March 1, 2023, Affirmation and the April 25, 2023, Affidavit and concealing LoDuca's lack of meaningful role in confirming the truth of the statements in his affidavit, evidencing the subjective bad faith of LoDuca.

THE USE OF CHATGPT (SEE CYPHERT, 2021)

Schwartz attempted to explain why he turned to ChatGPT for legal research. The Levidow Firm primarily practices in New York state courts, using a legal research service called *Fastcase*, and surprisingly did not maintain Westlaw or LexisNexis accounts. When Schwartz began to research the Montreal Convention, the firm's *Fastcase* account thus had limited access to federal cases. Schwartz had not previously used ChatGPT and became aware of it through press reports and conversations with family members.

The methodology of the research undertaken by Schwartz is itself quite revealing. Schwartz testified that he began by querying ChatGPT for broad legal guidance and then narrowed his questions to cases that *supported the argument that the federal bankruptcy stay tolled the limitations period for a claim under the Montreal Convention.* In response, ChatGPT generated case summaries or excerpts, but not full court opinions.

His first prompt stated, "*argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to Montreal convention*." ChatGPT responded with broad descriptions of the Montreal Convention, statutes of limitations and the federal bankruptcy stay, advised that "[t]he answer to this question depends on the laws of the country in which the lawsuit is filed" and then stated that the statute of limitations under the Montreal Convention is tolled by a bankruptcy filing. ChatGPT did not cite case law to support these statements.

Schwartz then entered various prompts that caused ChatGPT to generate descriptions of fake cases, including "*provide case law in support that statute of limitations is tolled by bankruptcy of defendant under Montreal convention,*" "*show me specific holdings in federal cases where the statute of limitations was tolled due to bankruptcy of the airline,*" "*show me more cases*" and "*give*

URL: http://dx.doi.org/10.14738/assrj.107.15075

me some cases where te [sic] Montreal convention allowed tolling of the statute of limitations due to bankruptcy."

When directed to "*provide case law*," "*show me specific holdings*," "*show me more cases*" and "*give me some cases*," the chatbot complied by *making them up.* At the time that he prepared the Affirmation in Opposition, Schwartz did not have the full text of any "decision" generated by ChatGPT. *He cited and quoted only from excerpts generated by the chatbot.*

Yet, in his affidavit filed on May 25, Schwartz stated that he relied on ChatGPT "to supplement the legal research performed." He also stated that he "greatly regrets having utilized generative artificial intelligence to supplement the legal research performed herein . . .." But at the hearing, Schwartz acknowledged that ChatGPT was *not* used to "supplement" his research:

> "THE COURT: Let me ask you, did you do any other research in opposition to the motion to dismiss other than through ChatGPT?
> MR. SCHWARTZ: Other than initially going to Fastcase and failing there, no.
> THE COURT: You found nothing on Fastcase.
> MR. SCHWARTZ: Fastcase was insufficient as to being able to access, so, no, I did not.
> THE COURT: You did not find anything on Fastcase?
> MR. SCHWARTZ: No.
> THE COURT: In your declaration in response to the order to show cause, didn't you tell me that you used ChatGPT to supplement your research?
> MR. SCHWARTZ: Yes.
> THE COURT: Well, what research was it supplementing?
> MR. SCHWARTZ: Well, I had gone to Fastcase, and I was able to authenticate two of the cases through Fastcase that ChatGPT had given me. That was it.
> THE COURT: But ChatGPT was not supplementing your research. It was your research, correct?
> MR. SCHWARTZ: Correct. It became my last resort. So I guess that's correct."

Judge Castel thus concluded that Schwartz's statement in his May 25, 2023, affidavit that ChatGPT "supplemented" his research was "a misleading attempt to mitigate his actions by creating the false impression that he had done other, meaningful research on the issue and did not rely exclusive on an AI chatbot," when, in truth and in fact, *it was the only source of his substantive arguments,* supporting the Court's finding of subjective bad faith.

It is also important to note that following receipt of the April 25 Affirmation, the Court issued an Order directing LoDuca to show cause why he ought not be sanctioned and directed LoDuca to file a written response. LoDuca submitted an affidavit in response, which also annexed an affidavit from Schwartz. Judge Castel noted that "In this affidavit, Schwartz made the highly dubious claim that, before he saw the first Order to Show Cause of May 4, he 'still could not fathom that ChatGPT could produce multiple fictitious cases . . .." Schwartz stated that only when he read the Order of May 4, "I realized that I must have made a serious error and that there must be a major flaw with the search aspects of the ChatGPT program."

The Court rejected Schwartz's claim because (a) he acknowledged reading Avianca's brief claiming that the cases did not exist and could not be found; (b) he concluded that the court could not locate the cases when he read the April 11 and 12 Orders; (c) he had looked for

"Varghese" and could not find it; and (d) he had been "unable to locate" "Zicherman" after the Court ordered its submission.

In fact, the Schwartz Affidavit of May 25 contained the first acknowledgement from any Respondent that the Affirmation in Opposition cited to and quoted from "bogus" cases generated by ChatGPT. The Schwartz Affidavit of May 25 included screenshots taken from a smartphone in which Mr. Schwartz questioned ChatGPT about the reliability of its work (e.g., "*Is Varghese a real case*" and "*Are the other cases you provided fake*"). ChatGPT responded that it had supplied "real" authorities that could be found through Westlaw, LexisNexis, and the Federal Reporter.

When those screenshots were submitted as exhibits to Schwartz's affidavit of May 25, he stated: "[T]he citations and opinions in question were provided by Chat GPT which also provided its legal source and assured the reliability of its content. Excerpts from the queries presented and responses provided are attached hereto." This is an assertion by Schwartz that he was misled by ChatGPT into believing that it had provided him with actual judicial decisions. While no date is given for the queries, the declaration strongly suggested that he questioned whether "Varghese" was "real" prior to either the March 1 Affirmation in Opposition or the April 25 Affidavit.

However, Schwartz's declaration offered a different explanation and interpretation. It asserted that "those same ChatGPT answers confirmed his by-then-growing suspicions that the chatbot had been responding 'without regard for the truth of the answers it was providing.'"

"Before the First OSC, however, I still could not fathom that ChatGPT could produce multiple fictitious cases, all of which had various indicia of reliability such as case captions, the names of the judges from the correct locations, and detailed fact patterns and legal analysis that sounded authentic. The First OSC caused me to have doubts. As a result, I asked ChatGPT directly whether one of the cases it cited, "*Varghese v. China Southern Airlines Co. Ltd.*, 925 F.3d 1339 (11th Cir. 2009)," was a real case. Based on what I was beginning to realize about ChatGPT, I highly suspected that it was not. However, ChatGPT again responded that Varghese "does indeed exist" and even told me that it was available on Westlaw and LexisNexis, contrary to what the Court and defendant's counsel were saying. This confirmed my suspicion that ChatGPT was not providing accurate information and was instead simply responding to language prompts without regard for the truth of the answers it was providing. However, by this time the cases had already been cited in our opposition papers and provided to the Court."

Judge Castel characterized this statement as containing "shifting and contradictory explanations, submitted even after the Court raised the possibility of Rule 11 sanctions," which undermined the credibility of Schwartz and support a finding of subjective bad faith.

On May 26, 2023, the Court issued a supplemental Order directing Schwartz to show cause at the June 8 hearing why he ought not be sanctioned pursuant to Rule 11(b)(2) and (c), 28 U.S.C. Section 1927 and the Court's inherent powers for aiding and causing the citation of non-existent cases in the Affirmation, the submission of non-existent judicial opinions annexed to the April 25 Affidavit, and the use of a false and fraudulent notarization in the April 25 Affidavit. The same Order directed the Levidow Firm also to show cause why it ought not be sanctioned and also

URL: http://dx.doi.org/10.14738/assrj.107.15075

directed LoDuca to show cause why he ought not be sanctioned for the use of a false or fraudulent notarization in the April 25 Affidavit. Thomas R. Corvino, who describes himself as the sole equity partner of the Levidow Firm, also filed a declaration in the matter.

On June 8, 2023, Judge Castel held a sanction's hearing on the Order to Show Cause and the supplemental Order to Show Cause. After being placed under oath, LoDuca and Schwartz responded to questioning from the Court and delivered prepared statements in which they expressed their remorse. Mr. Corvino also delivered a statement. However, it is interesting to note that Judge Castel found that *at no time had any Respondent written to this Court seeking to withdraw the March 1 Affirmation in Opposition or advise the Court that it may no longer rely upon it.*

The Impact of Rule 11(b)(2)

In issuing its findings of fact and conclusions of law, Judge Castel provided an interesting exposition on the nature of legal argument. Judge Castel began by citing Federal Rule of Civil Procedure 11(b)(2), which states:

"By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . ."

"Under Rule 11, a court may sanction an attorney for, among other things, misrepresenting facts or making frivolous legal arguments" (*Muhammad v. Walmart Stores East, L.P.*, 2013). A legal argument may be sanctioned as frivolous when it amounts to an "'abuse of the adversary system . . .'" (*Salovaara v. Eckert,* 2000*).* "Merely incorrect legal statements are not sanctionable under Rule 11(b)(2)" (*Storey v. Cello Holdings, L.L.C.*, 2003). "The fact that a legal theory is a long-shot does not necessarily mean it is sanctionable." Judge Castel noted that "A legal contention is frivolous because it has 'no chance of success' and there 'is no reasonable argument to extend, modify or reverse the law as it stands.'" However, it is also clear that an attorney violates Rule 11(b)(2) *if existing case law unambiguously forecloses a legal argument*.

The filing of papers "without taking the necessary care in their preparation" is an "abuse of the judicial system" that is subject to Rule 11 sanction (*Cooter & Gell v. Hartmax Corp.*, 1990). Judge Castel pointed out that Rule 11 creates an "incentive to stop, think and investigate more carefully before serving and filing papers. Rule 11 'explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed.'"

Rule 3.3(a)(1) of the New York Rules of Professional Conduct states: "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .." A lawyer may make a false statement of law where he "liberally us[ed] ellipses" in order to "change" or "misrepresent" a court's holding (*United States v. Fernandez*, 2013). In this light, the Court has described Respondents' submission of fake cases as an unprecedented circumstance.

A *fake opinion* is not "existing law" and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system. "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. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee."

Any Rule 11 sanction, however, should be "made with restraint" because in exercising its sanctions powers, a trial court may be acting "as accuser, fact finder and sentencing judge." Even though Schwartz was not admitted to practice in the Southern District of New York and did not file a notice of appearance, Rule 11(c)(1) permits a court to "impose an appropriate sanction on *any* attorney . . . that violated the rule or is responsible for the violation."

A Showing of Bad Faith

When, as here, a court is considering whether to impose sanctions on its own motion or *sua sponte*, it "is akin to the court's inherent power of contempt," and, "like contempt, sua sponte sanctions in those circumstances should issue only upon a finding of subjective bad faith." "[B]ad faith may be inferred where the action is completely without merit" (*In re 60 E. 80th St. Equities, Inc.*, 2000). Subjective bad faith includes the *knowing and intentional submission of a false statement of fact*. A false statement of knowledge can constitute subjective bad faith where the speaker "'knew that he had no such knowledge . . ..'" In *Weddington v. Sentry Indus., Inc.* (2020), the Court stated: "In considering Rule 11 sanctions, the actual *knowledge and conduct of each respondent lawyer* must be separately assessed and *principles of imputation of knowledge do not apply.*" Based on the application of these principles, Judge Castel concluded that LoDuca had acted with subjective bad faith in violating Rule 11 in the following respects:

a. "Mr. LoDuca violated Rule 11 in *not reading a single case* cited in his March 1 Affirmation in Opposition and taking no other steps on his own to check whether any aspect of the assertions of law were warranted by existing law. An inadequate or inattentive "inquiry" may be unreasonable under the circumstances. But signing and filing that affirmation after making no "inquiry" was an act of subjective bad faith. This is especially so because he knew of Mr. Schwartz's lack of familiarity with federal law, the Montreal Convention and bankruptcy stays, and the limitations of research tools made available by the law firm with which he and Mr. Schwartz were associated."
b. "Mr. LoDuca violated Rule 11 in *swearing to the truth* of the April 25 Affidavit with no basis for doing so. While an inadequate inquiry may not suggest bad faith, the absence of any inquiry supports a finding of bad faith. Mr. Schwartz walked into his office, presented him with an affidavit that he had never seen in draft form, and Mr. LoDuca read it and signed it under oath. A cursory review of his own affidavit would have revealed that (1) "*Zicherman v. Korean Air Lines Co. Ltd.* (2008) could not be found, (2) many of the cases were excerpts and not full cases and (3) reading only the opening passages of, for example, "Varghese", would have revealed that it was internally inconsistent and nonsensical."
c. "Further, the Court directed Mr. LoDuca to submit the April 25 Affidavit and Mr. LoDuca *lied to the Court* when seeking an extension, claiming that he, Mr. LoDuca, was going on vacation when, in truth and in fact, Mr. Schwartz, the true author of the April 25 Affidavit,

URL: http://dx.doi.org/10.14738/assrj.107.15075

was the one going on vacation. This is evidence of Mr. LoDuca's bad faith" (emphasis added by italics).

The Court also concluded that Schwartz had acted with "subjective bad faith" in violating Rule 11 in the following respects:

a. "Mr. Schwartz violated Rule 11 in connection with the April 25 Affidavit because, as he testified at the hearing, when he looked for "Varghese" he "couldn't find it," yet did not reveal this in the April 25 Affidavit. He also offered no explanation for his inability to find "Zicherman." Poor and sloppy research would merely have been objectively unreasonable. But Mr. Schwartz was aware of facts that alerted him to the high probability that "Varghese" and "Zicherman" did not exist and consciously avoided confirming that fact."
b. "Mr. Schwartz's subjective bad faith is further supported by the untruthful assertion that ChatGPT was merely a "supplement" to his research, his conflicting accounts about his queries to ChatGPT as to whether "Varghese" is a "real" case, and the failure to disclose reliance on ChatGPT in the April 25 Affidavit."

Concerning the potential liability of the Levidow Firm, Judge Castel found that the firm was *jointly and severally liable* with Schwartz and LoDuca for the Rule 11(b)(2) violations of LoDuca and Schwartz. Rule 11(c)(1) provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Judge Castel noted that the Levidow Firm has not pointed to exceptional circumstances that warrant a departure from Rule 11(c)(1).

In a summary discussion, Judge Castel stated that "[T]he Court has 'wide discretion' to craft an appropriate sanction, and may consider the effects on the parties and the full knowledge of the relevant facts gained during the sanctions hearing." Further,

"A Rule 11 sanction should advance both specific and general deterrence. A sanction imposed under [Rule 11] must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

Judge Castel noted that Mr. Corvino has subsequently acknowledged responsibility, identified remedial measures taken by the Levidow Firm, including an expanded Fastcase subscription and CLE programming, and expressed his regret for Respondents' submissions. Judge Castel added: "The Levidow Firm has arranged for outside counsel to conduct a mandatory Continuing Legal Education program on technological competence and artificial intelligence programs. The Levidow Firm also intends to hold mandatory training for all lawyers and staff on notarization practices." Imposing a sanction of additional mandatory education would be redundant. Judge Castel noted that counsel for Avianca did not seek reimbursement of attorneys' fees or expenses. Thus, ordering the payment of opposing counsel's fees and expenses was not warranted.

Judge Castel also considered the significant publicity generated by Respondents' actions. The Court credited the sincerity of Respondents when they described their "embarrassment and remorse." The fake cases were not submitted for any respondent's financial gain and were not

done out of personal animus. Judge Castel noted that LoDuca and Schwartz did not have a history of disciplinary violations and there was a low likelihood that they would repeat the actions which gave rise to the imposition of the sanctions.

Finally, the Court required Respondents to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed. Interestingly, the Court did not require an apology from Respondents because a "compelled apology is not a sincere apology." Any decision to apologize was left to Respondents. The Court concluded that a penalty of $5,000, to be paid into the Registry of the Court is sufficient, but "not more than necessary" to advance the goals of specific and general deterrence (Shin, 2023; Merken, 2023).

THE RESOLUTION OF THE CASE

The resolution of the case is almost a footnote to the controversy. In the end, the Second Circuit interpreted the Montreal Convention as analogous to the Warsaw Convention's two-year period as a strict condition precedent to the bringing of a claim, as opposed to a limitations period potentially subject to equitable tolling principles (see *Fishman by Fishman v. Delta Air Lines, Inc.*, 1998). "Under the language of the treaty, as interpreted by *Fishman*, the two-year limitation is a hard stop after which a plaintiff's right to sue is extinguished, and this court sees no reason to depart from this rule in the case of a bankruptcy stay." Because the Complaint followed by Mata described an injury on an aircraft that arrived on or about August 28, 2019, and Mata commenced this action on February 2, 2022, the Court concluded that his claim was "untimely under the Montreal Convention's strict two-year time bar." Avianca's motion to dismiss was therefore granted (Case 1:22-cv-01461-PKC, Document 55).

IS CHATGPT THE "ELEPHANT IN THE ROOM"?

Davis (2020) points out that the use of AI in the provision of legal services raises "legal, ethical, regulatory and risk management issues," as well as providing challenges for legal education.
Carrel (2019, p. 1153) wrote that:
"The nature of legal services is drastically changing given the rise in the use of artificial intelligence and machine learning. Legal education and training models are beginning to recognize the need to incorporate skill building in data and technology platforms, but they have lost sight of a core competency for lawyers: problem-solving and decision-making skills to counsel clients on how best to meet their desired goals and needs."

Gregg, Koch, and Smith (2019, p. 50) argued that "The legal field has widespread areas of application for AI, including TAR [technology assisted review], document coding, aspects of legal research, contract analytics, predictive analytics, computer generation of documents, and work automation and process improvement." Davis (2020, p. 1) writes" "… what will these changes mean for the size, shape, composition and economic model of law firms, as well as the implications of these changes for legal education and lawyer training" (see also Shope, 2021) Clearly, the "elephant in the AI room" is ChatGPT.

ChatGPT is an artificial intelligence chatbot developed by OpenAI and which was launched on November 30, 2022. Fennema (22) writes that a "chatbox is the user interface of a given chat application. A common use for chatboxes is a popup window on a business website through which the user interacts with a live agent or AI bot." OpenAI is an American artificial intelligence research laboratory consisting of the non-profit OpenAI Incorporated and its for-

URL: http://dx.doi.org/10.14738/assrj.107.15075

profit subsidiary corporation OpenAI Limited Partnership. OpenAI conducts AI research with the declared intention of promoting and developing friendly AI (Fox, 2015; Open AI, 2015; Times of India, 2023).

OpenAI was founded in 2015 by Ilya Sutskever, Greg Brockman, Trevor Blackwell, Vicki Cheung, Andrej Karpathy, Durk Kingman, Jessica Livingston, John Schulman, Pamela Vagata, and Wojciech Zaremba, with Sam Altman and Elon Musk serving as the initial board members. Microsoft provided OpenAI LP with a $1 billion investment in 2019 and a $10 billion investment in 2023 (Browne, 2023). By January of 2023, ChatGPT was the fastest-growing consumer software application in history, gaining over 100 million users and contributing to OpenAI's valuation, growing to US$29 billion (Hu, 2023; Veranasi, 2023).

Armstrong (2023) writes: "ChatGPT can answer questions using natural, human-like language and mimic other writing styles." Stefanowicz (2023) adds: "AI chatbot is a piece of software that simulates conversations with users using natural language processing (NLP). It operates through messaging applications and uses machine learning to provide a human-like experience. … AI bots understand user intent and learn with time about different ways to phrase questions to find the best answers for [your] clients."

The technology enables users to "refine and steer" a conversation towards a desired *length, format, style, level of detail, and language* used. "Successive prompts and replies are taken into account at each stage of the conversation as a context." Edwards (2023) states: "ChatGPT generates responses based on which word is statistically most likely to follow the last series of words, starting with the prompt input by the user. It continues the conversation… by including all of your conversation history in successive prompts."

While the core function of a chatbot is to "mimic a human conversationalist," it can write and debug computer programs (Tung, 2034), compose music, teleplays, fairy tales and student essays, answer test questions) (Heilwell, 2022), generate business ideas (Eapen, Finkenstein, Folk, & Venkataswamy, 2023), write poetry and song lyrics (Reich, 2022), translate and summarize text (Rider, 2023), simulate entire chat rooms, play games, or simulate an ATM (Edwards, 2022).

However, at the same time, James (2022) noted "ChatGPT has displayed a tendency to confidently provide inaccurate information." It is interesting to note that the technology comes with a warning that it can "produce inaccurate information."

Interestingly, Armstrong (2023) writes:
"ChatGPT itself had responded to the question whether the case was indeed real. It responded that yes, it is - prompting a further question: "What is your source." After supposedly "double checking," ChatGPT responded that the case was real and can be found on legal reference databases such as LexisNexis and Westlaw. It says that the other cases it has provided to Mr. Schwartz are also real."

IMPLICATIONS OF THE CASE FOR THE LEGAL PROFESSION

Nelson and Simek (2020) point out the already ubiquitous nature of AI in the practice of law in such areas as:

- Electronic discovery/predictive coding
- Litigation analysis/predictive analysis
- Contract management and analysis
- Due diligence review
- Detecting dangerous or bad faith behavior within an entity, and
- Legal research

However, Professor Daniel Martin Katz, of the Chicago-Kent School of Law, who teaches professional responsibility and studies artificial intelligence, framed the issue as follows: "You are ultimately responsible for the representations you make. It's your bar card" (quoted in Jones & Scarcella, 2023).

While the American Bar Association's *Model Rules of Professional Conduct* (1983) do not explicitly address artificial intelligence, Endicott (2023) observes:

"This type of machine-assisted lawyering is not a futuristic scenario, but increasingly part of the everyday practice of law. Even since the ABA issued its AI Resolution, the technology has evolved. For example, the ABA's report accompanying the AI Resolution (the AI Report) describes AI used for document review as "an attorney training the computer how to categorize documents in a case" and then using "a method of predictive coding" to classify documents "after extrapolating data gathered from a sample of documents classified by the attorney…. This is an example of what is called 'supervised' machine learning."

In a provocative article, titled "*Could it be unethical not to use AI?*" Endicott challenges the conventional wisdom that raised "red flags" on the use of AI and writes:

"First, a competent lawyer must be able to understand and explain the potential role of AI in her representation. In fact, Comment 8 to Rule 1.1 elaborates that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology … ." Undoubtedly, AI now qualifies as one such "relevant technology." Similarly, Comment 5 to this Model Rule 1.1 explains that "[c]ompetent handling of a particular matter includes … use of methods and procedures meeting the standards of competent practitioners." It is therefore arguably incumbent on lawyers to understand the extent of the AI technology available, and—if that technology becomes standard—to make use of it.

A lawyer's decision whether to adopt an AI solution triggers other ethical obligations as well. For example, as the ABA notes in its AI Report, a "lawyer's failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer's fees to be reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client." Similarly, ABA Model Rule 1.3 requires a lawyer to act "with reasonable diligence and promptness in representing a client." If an AI solution could have avoided the need to seek an extension which irks the court or delays a deal, a lawyer may have

URL: http://dx.doi.org/10.14738/assrj.107.15075

to consider whether abstaining from AI runs afoul of the promptness requirement under Rule 1.3. As the ABA AI Report explains: "The bottom line is that it is essential for lawyers to be aware of how AI can be used in their practices to the extent they have not done so yet."

But satisfying the new requirements of competent representation will require more than simply adopting new technologies as they become increasingly mainstream. The Model Rules require attorneys not only to "keep abreast" of technological advances, but also to obtain their clients' informed consent to use of new technologies and to supervise the use of machine assistance. Therefore, in selecting AI technologies, an attorney must consider whether she can adequately explain the process employed by that AI and its results and continue to adequately supervise the work streams she automates."

"Second, the duty of competence arguably requires more than being informed about AI solutions for day-to-day tasks as counsel. AI solutions already used by commercial firms and government organizations include programs for generating sales leads on social networking platforms, running sophisticated insurance optimization algorithms, or even locating available shelter beds. The legal profession is a relatively late adopter of AI technology. To provide competent counsel, we need to be able to assess the legal risks and potential benefits these technologies present for our clients. Comment 2 to Rule 1.1 emphasizes that "perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve …" The novel solutions AI provides also raise a series of novel legal issues. To provide competent representation, lawyers must have the requisite technological fluency to spot those issues."

"Third, the duty to keep abreast of technology may similarly require understanding of how it is being used by our courts. The use of AI in sentencing has already come under scrutiny, as highlighted by the decision of the Wisconsin Supreme Court in *State v. Loomis*, 881 N.W.2d 749, 767 (Wis. 2016) (evaluating the due process implications of algorithmic risk assessment in sentencing). But this is only one possible use of the technology. AI is likely to play an increasing role in resolving discovery disputes and shows promise as an early case assessment tool, which could assist in mediation programs. To competently represent a client, a lawyer likely will need to understand the evolving role AI is playing in our courts. The extent to which the judiciary and other government adjudicative bodies will adopt this technology remains to be seen, though the ABA has included the judiciary in its call to action."

In fact, at its 2019 annual meeting, the ABA adopted *Resolution No. 112* (2019), urging courts and lawyers to address the ethical and legal issues relating to the use of AI in the practice of law in such areas as "bias, explainability, and transparency of automated decisions made by AI, ethical and beneficial usage of AI; and controls and oversight of AI and vendors that provide AI" (see Deeks, 2019; Nelson & Simek, 2020; Cyphert, 2021).

Legal and Ethical Issues Explored

The following represent some of the possible legal and ethical issues (see generally Delfino, 2023) raised by the actions of Schwartz and LoDuca, as well as the Levidow law firm, based on the Model Rules (1983), the Official Comments to the rules (see Jefferson et al, 2020), and Rule 11 of the Federal Rules of Civil Procedure. Could Schwartz and LoDuca, as well as the Levidow law firm face further discipline based upon their now admitted violations of the Model Rules?

Model Rules Applications

The following paragraphs are taken from the Model Rules of Professional Conduct (1989) and the Official Comments to the rules. In some cases, the Model Rules are supplemented by additional explanation.

- **Preamble: A Lawyer's Responsibilities:** A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
- **Rule 1.1: Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Thoroughness and Preparation: Comment

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners (see Ruan, 2021). It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.

Maintaining Competence: Comment

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (see Preston, 2018; Linna, 2021).

- **Rule 1.6: *Confidentiality of Information*:** A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.

Authorized Disclosure: Comment

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.

Gregg, Koch, and Smith (2019) point out that a lawyer should also review the Official Comments with respect to the reasonableness of the safeguards the *lawyer and the vendor must institute to guard against the unwanted sharing or theft of client confidential information.* Thus, a lawyer/litigator who delegates a portion of the work to lawyers or nonlawyers working with AI should review his or her responsibilities under Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and Model Rule 5.3 (Responsibilities Regarding Nonlawyer

URL: http://dx.doi.org/10.14738/assrj.107.15075

Assistance). Those rules require lawyers to make "reasonable efforts" to ensure that the actions of those personnel will not violate the professional conduct rules.

Interestingly, Gregg, Koch and Smith (2019) also note that a lawyer's use of AI may "implicate Model Rule 1.5 (Fees), which requires lawyers' fees to be reasonable." Depending on the circumstances of each case, the use of AI could weigh in favor of a *reduced fee* if AI "makes the lawyer more efficient" or a *premium* if AI "improves the quality of the representation at a significant cost to the lawyer."

- **Rule 3.1: Meritorious Claims & Contentions:** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

- **Rule 3.3: *Candor Toward the Tribunal* (see Floyd, 1995):** A lawyer shall not knowingly:
  (a) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  (b) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly averse to the position of the client and not disclosed by opposing counsel; or
  (c) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Comment:
This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by

the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer: Comment

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation.

Legal Argument: Comment

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

- **Rule 3.4: Fairness to Opposing Party & Counsel:** A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law….

Grenardo (2019, p. 135) argues that "fairness" should certainly encompass the principle of civility and how "civility applies to advocacy and the practice of law, the efficiency of our justice system, lawyer well-being, obtaining a job and professional identity formation, and public confidence in the legal system."

- **Rule 5.1: *Responsibilities of a Partner or Supervisory Lawyer* (see Bernstein, 2018; Wendel, 2020)**: A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

URL: http://dx.doi.org/10.14738/assrj.107.15075

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Law Firms and Associations: Comments

Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

Comment:

Model Rule 5.1 defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct

occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct.

Rule 11 of the Federal Rules of Civil Procedure

In addition to the Model Rules cited above, Rule 11 of the Federal Rules of Civil Procedure provides specific information on the duties and responsibilities of attorneys (Vairo, 1998) relating to:

Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions Signature:

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name-or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

Representations to the Court:

By presenting to the court a pleading, written motion, or other paper-whether by signing, filing, submitting, or later advocating it-an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(c) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
(d) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
(e) the factual contentions have evidentiary support or, if specifically, so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(f) the denials of factual contentions are warranted on the evidence or, if specifically, so identified, are reasonably based on belief or a lack of information.

Sanctions:

(1) ***In General:*** 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. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

URL: http://dx.doi.org/10.14738/assrj.107.15075

(2) ***Motion for Sanctions****:* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative****:* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction:*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions:*** The court must not impose a monetary sanction:

a. against a represented party for violating Rule 11(b)(2); or
b. on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order:*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

CONCLUDING COMMENTS

Endicott (2023) writes:

"What is clear is that our understanding of "competence" must evolve as AI technology does. As the ABA AI Report explains, 'AI allows lawyers to provide better, faster, and more efficient legal services to companies and organizations. The end result is that lawyers using AI are better counselors for their clients.' To realize that result, we must actively engage with the ethical questions posed by our adoption of AI, including the question of whether it is ethical not to make use of these new technologies."

AI offers the legal profession both unique opportunities and challenges in managing core legal research. However, considering certain "red flags" as demonstrated in *Mata v. Avianca* will require diligence, attention to detail, and proper training in order to assure that the use of AI achieves its proper objectives.

References

American Bar Association (2019), Resolution 112, https://www.americanbar.org/news/reporter_resources/annual-meeting-2019/house-of-delegates-resolutions/112/

Armstrong, K. (2023). ChatGPT: US lawyer admits using AI for case research. BBC News (May 27, 2023), https://www.bbc.com/news/world-us-canada-65735769.amp

Bernstein, A. (2019). Mending the gaps in lawyers' rules of professional conduct. Oklahoma Law Review, 72(1): 125-148.

Bonifacic, I. (2023). A lawyer faces sanctions after he used ChatGPT to write a brief riddled with fake citations. engadget.com (May 28, 2023), https://www.engadget.com/a-lawyer-faces-sanctions-after-he-used-chatgpt-to-write-a-brief-riddled-with-fake-citations-175720636.html

Carrel, A. (2019). Legal intelligence through artificial intelligence requires emotional intelligence: A new competency model for the 21st century legal professional. Georgia State University Law Review, 35: 1153-1183.

Clermont, K.M. (2016). Res judicata as requisite for justice. Rutgers Law Review, 68: 1067-1141.

Convention for the Unification of Certain Rules for International Carriage by Air (1999) (Montreal Convention). T.I.A.S. 13038, 2242 U.N.T.S. 350, https://2009-2017.state.gov/e/eb/ris/othr/ata/115157.htm (accessed July 2, 2023).

Cyphert, AB. (2021). A human being wrote this law review article: GPT-3 and the practice of law. University of California Davis Law Review, 55: 401-443.

Davis, A. (2020). The future of law firms (and lawyers) in the age of artificial intelligence. Revista Direito GV, 16(1): 1-12.

Deeks, A. (2019). The judicial demand for explainable artificial intelligence. Columbia Law Review, 119(7): 1829-1850.

DeLeon, P.M. & Eyskens, W. (2001). The Montreal Convention: Analysis of some aspects of the attempted modernization and consolidation of the Warsaw system. Journal of Air Law and Commerce, 66: 1155-1185.

Delfino, R. (2023). The deepfake defense—Exploring the limits of the law and ethical norms in protecting legal proceedings from lying lawyers. Loyola Law School, Los Angeles, Legal Studies Research Paper 2023-02, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355140

Eapen, T.T., Finkenstadt, D.J., Folk, J., & Venkataswamy, L. (2023). How generative AI can augment human creativity. Harvard Business Review (July-August 2023), https://www.store.hbr.org/product/the-innovator-s-dna-mastering-the-five-skills-of-disruptive-innovators/14946?sku=14946-HBK-ENG

Edwards, B. (2022). No Linux? No problem. Just go get AI to hallucinate for you. Ars Technica (December 5, 2022), https://arstechnica.com/information-technology/2022/12/openais-new-chatbox-can-hallucinate-a-linux-shell-or-calling-a=bbs

Endicott, A. (2023). Could it be unethical not to use AI? Arnold & Porter (Relativity Blog) (January 5, 2023), https//www.relativity.com/blog/could-it-be-unethical-not-to-use-ai/#.

Felzmann, H., Villaronga, E.F., Lutz, C., & Tamo-Larrieux, A. (2019). Transparency you can trust: Transparency requirements for artificial intelligence between legal norms and contextual concerns. Big Data & Society: 1-14.

Fennema, G. (2022). A beginner's guide to chatboxes. Capacity (October 18, 2022), https://capacity.com/learn/chatbox/

Floyd, D.H. (1995). Candor versus advocacy. Court's use of sanctions to enforce the duty of candor toward the tribunal. Georgia Law Review, 29(4): 1035-1074.

Fox, E.J. (2015). Sam Altman on his plan to keep A.I. out of the hands of the "bad guys." Vanity Fair (December 15, 2015), https://www.vanityfair.com/2015/12/sam-altman-elon-musk-openai

Gregg, E.M., Koch, B., & Smith, D.W. (2019), How artificial intelligence is impacting litigators. ALAS Los Prevention Journal, Summer 2019: 48-59.

Grenardo, D.A. (2019). A lesson in civility. Georgetown Journal of Legal Ethics, 32: 135-175.

Hamabe, Y. (1993). Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A categorization approach. Campbell Law Review, 15(2): 119-205.

Heilwell, R. (2022). AI is finally good at stuff, and that's a problem. Vox (December 7, 2022), https://www.vox.com/recode/2022/12/7/23498694/ai-artificial-intelligence-chat-gpt-openai

Jefferson, R.K. et al. (2020). Professional responsibility: A contemporary approach. West Academic Publishing: St. Paul, Minn.

Jones, D.N. (2023). What are the ethics for using AI to write briefs? The Daily Docket (Newsletter by Reuters and Westlaw) (May 31, 2023), The Daily Docket, https://newslink.reuters.com/public/31644939

Linna, D.W. (2021). Evaluating artificial intelligence for legal services: Can "soft law" lead to enforceable standards for effectiveness? Technology and Society Magazine, 40(4): 37-51.

Marrero, V. (2018). Mission to dismiss: A dismissal of Rule 12(b)(6) and the retirement of Twombly/Iqbal. Cardozo Law Review, 40(1): 1-33, https://cardozolawreview/category/volume-40/) Issue1

Merken, S. (2023). New York lawyers sanctioned for using fake Chat GPT cases in legal brief. Reuters (June 26, 2023), https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/

Model Rules of Professional Conduct (1988). American Bar Association, https://www.law.cornell.edu/wex/model_rules_of_professional_conduct (accessed July 2, 2022).

Moore, P.H. (2012), An updated quantitative study of Iqbal's impact on 12(b)(6) motions. University of Richmond Law Review, 46: 603-657.

Murphy, J.F. (1986). The automatic stay in bankruptcy. Cleveland State Law Review, 34: 567-635.

Nelson, S.D. & Simek, J.W. (2020). The ABA tackles artificial intelligence and ethics. Sensei Enterprises, 48 Law Practitioners, senseint.com (accessed June 28, 2023).

Oliveto, A.M. (2022). Revisiting the liability system of the Montreal Convention of 1999. Issues in Aviation Law and Policy, 21: 177-204.

Open AI (2023). Introducing open AI. OpenAI.com, https://openai.com/blog/introducing-openai (accessed June 28, 2023).

Preston, C.B. (2018). Lawyers' abuse of technology. Cornell Law Review, 103(4): 879-976.

Reich, A. (2022). ChatGPT: What is the new free AI chatbox? - Explainer. Business Innovation (December 27, 2022), https://www.jpost.com/business-and-innovation/tech-and-start-ups/article-725910

Reiser, G. (2016). Revisiting the standards to dismiss a complaint in federal court for failure to state a claim. Njlawconnect.com (April 29, 2016), https://njlawconnect.com/motion-to-dismiss-complaint-rule-12b6-new-jersey-federal-court/

Rider, E. (2023). How ChatGPT will dramatically change the influencer space. Entrepreneur (April 6, 2023), https://www.entrepreneur.com/science-technology/how-chatgpt-will-dramatically-change-the-influencer-space/448386

Ruan, M. (2021). Attorney competence in the algorithm age. American Bar Association Journal of Labor and Employment Law, 35: 317-338.

Russell, J. (2023). Sanctions ordered for lawyer who relied on ChatGPT artificial intelligence to prepare court brief. Courthouse News Service (June25, 2023), https://www.courthousenews.com/sanctions-ordered-for-lawyers-who-relied-on-chatgpt-artificial-intelligence-to-prepare-court-brief/

Schwartz, M. (2022). Establishing an unqualified standard for removal under 28 U.S.C. Section 1441: The propriety of removing maritime cases to Federal court. Loyola of Los Angeles Law Review, 55: 29-62.

Shin, R. (2023). Humiliated lawyers fined $5,000 for submitting ChatGPT hallucinations in court: 'I heard about this new site, which I falsely assumed was, like, a super search engine.' Fortune (June 23, 2023), https://finance.yahoo.com/news/humiliated-lawyers-fined-5-000-164109050.html?fr=sycsrp_catchall

Shope, M.L. (2021). Lawyer and judicial competency in the era of artificial intelligence: Ethical requirements for documenting datasets and machine learning models. Georgetown Journal of Legal Ethics, 34(1): 191-222.

Sirica, A. (2010). The new federal pleading standard: Ashcroft v. Iqbal. Florida Law Review, 62(2): 547-557.

Stefanowicz, B. (2023). 12 best AI chatbots for business & personal use. Tidio.com (May 10, 2023), https://www.tidio.com/blog/ai-chatbox/

Stone, A.B/ (2023). What is a pleading? Legalvision.com (May 10, 2023), https://lehalvision.com.au/what-is-a-pleading/

Stewart, A. (2015). The Montreal Convention's statute of limitations- A failed attempt at consistency. Journal of Air Law and Commerce, 80(1): 267-275.

Times of India (2023). Open AI, the company behind ChatGPT: What all it does, how it started and more. Times of India (January 25, 2023), https://timesofindia.indiatimes.com/gadgets-news/openai-the-company-behind-chatgpt-what-all-it-does-how-it-started-and-more/articlesshow/9729702

Tung, L. (2023). ChatGPT can write code. Now researchers say it's good at fixing bugs, too. ZDNET (January 26, 2023), https://www.zdnet.com/article/chatgpt-can-write-code-now-researchers-say-its-good-at-fixing-bugs-too/

Vairo, G. (1998). Rule 11 and the profession. Fordham Law Review, 67(2): 589-648.

Warsaw Convention (1929). Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11.

Wendel, W. (2020/2021). The regulatory perspective and systems thinking in legal ethics. Gonzaga Law Review, 56(2): 243-258.

Case Documentation

Case 1:22-cv-01461-PKC, Document 31. Order to Show Cause 2023)

Case 1:22-cv-01461-PKC, Document 32-1. Affidavit (2023)

Case 1:22-cv-01461-PKC, Document 54. Opinion and Order on Sanctions (2023)

Case 1:22-cv-01461-PKC, Document 55. Opinion and Order (2023)

Case Citations

A.D. v Azar (2019). 925 F.3d 1291 (United States Court of Appeals for the D.C. Circuit)

Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys. (1993). 988 F.2d 1157 (United States Court of Appeals for the Federal Circuit)

Ashcroft v. Iqbal (2009). 556 U.S. 662 (United States Supreme Court)

Cohen v. American Airlines, Inc. (2021). 13 F.4th 240 (United States Court of Appeals for the 2d Circuit)

Cooter & Gell v. Hartmarx (1990). 496 U.S. 384 (United States Supreme Court)

Fishman by Fishman v. Delta Air Lines, Inc. (1998). 132 F.3d 138 (United States Court of Appeals for the 2d Circuit)

George Cornea v. U.S. Attorney General, et al. (2019). No. 18-14326 (United States Court of Appeals for the 11th Circuit)

Gibbs v. Maxwell House (1984). 738 F.2d 1153 (United States Court of Appeals for the 11th Circuit)

Gross v. German Found Indus. Initiative (2008). 320 F. Supp. 2d 235 (United States District Court of N.J.)

In re Burlington Coat Factory (1997). 114 F.3d 1410 (United States Court of Appeals for the 3d Circuit)

In re 60 E. 80th St. Equities, Inc. (2000). 218 F.3d 109 (United States Court of Appeals for the 2d Circuit)

Mata v. Avianca. Inc. (2023), 22-cv-1461 (PKC) (United States District Court for the Southern District of New York)

Miccosukee Tribe v. United States (2008). 516 F.3d 1235 (United States Court of Appeals for the 11th Circuit)

Muhammad v. Walmart Stores East, L.P. (2013). 732 F.3d 104 (United States Court of Appeals for the 2d Circuit)

Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE (2014). 763 F.3d 198 (Court of Appeals for the 2d Circuit)

PBGC v. White Consolidated Industries, Inc. (1993). 998 F.2d 1192 (United States Court of Appeals for the 3d Circuit)

Rycoline Products, Inc. v. CW Unlimited (1997). 109 F.3d 883 (United States Court of Appeals for the 3d Circuit)

Salovaara v. Eckert. (2000). 22 F.3d 19 (United States Court of Appeals for the 2d Circuit)

Storey v. Cello Holdings, L.L.C. (2003). 347 F.3d 370 (United States Court of Appeals for the 2d Circuit)

United States v. Fernandez (2013). 722 F.3d 1 (United States Court of Appeals for the First Circuit)

Weddington v. Sentry Indus., Inc. (2020). 18-cv-10055 (PKC) (United States District Court for the Southern District of New York)

Witt v. Metropolitan Life Ins. Co. (2014). 772 F. 3d 1269 (United States Court of Appeals for the 11th Circuit)

Fabricated Cases Cited

Varghese v. China Southern Airlines
Martinez v. Delta Airlines
Miller v. United Airlines
Shaboon v. Egyptair
Peterson v. Iran Air
Estate of Durden v. KLM.