

RELYING ON AI IN THE PRACTICE OF LAW

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Overview:

This script is based on the real events depicted in the public opinion and order of sanction in *Mata v. Aviance, Inc.*, in the U.S. District Court, Southern District of New York. The court details the events leading up to two attorneys being sanctioned, stemming from, but not limited to, the improper use of ChatGPT in researching a matter. While this case has become an infamous cautionary tale regarding artificial intelligence, that initial wrongdoing is merely the tip of the iceberg in considering professionalism and ethics issues.

Discussion:

The heart of the problem evidenced in this scenario is an old one—misuse of a resource in performing legal work. In short, most people would pinpoint that the catalyst of the attorneys' problem was that the attorney negligently researched a matter without professional competence.

However, while a serious one, that is merely the surface problem. There are far more layers of misconduct and professionalism issues than that one. The more complicated issues here—the one with more lessons to be learned—are one of professionalism and professional identity.

The problematic behaviors that the attorneys exhibited actually started with the inception of the case. As poor decision followed poor decision, the proverbial hole was dug. These layers are rich for discussion as they unfold through the video.

Executive Summary of Actual Case Timeline:

- February 2, 2022: Mata filed NY state suit injured by a serving cart—against Avianca.
Attorney of Record: Steven A. Schwartz of Levidow Firm
- February 22, 2022: Avianca removes to federal court—federal jurisdiction question
- March 31, 2022: Peter LoDuca (same firm) files a notice of appearance because Mr. Schwartz was not admitted to practice in the federal district. LoDuca claims that Schwartz continued to perform all substantive legal work
- January 13, 2023: Avianca files motion to dismiss on the injury, claiming that Mata's claims are time-barred under the Montreal Convention. *Note:* The Montreal Convention establishes airline liability in the case of death or injury to passengers, as

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well as in cases of delay, damage or loss of baggage and cargo. It unifies all of the different international treaty regimes covering airline liability that had developed haphazardly since 1929. As such, it is a single, universal treaty to govern airline liability around the world.

January 18, 2023: Letter from Schwartz (signed) and filed (LoDuca) requested one month extension to respond from the 2/3 due date until 3/3 claiming the undersigned will be out of the office for a previously planned vacation. The motion is granted.

March 1, 2023: **LoDuca (attorney of record) files an Affirmation in Opposition** to the motion to dismiss, which cited and quoted purported judicial decisions published in Federal Reporter, The Federal Supplement, and Westlaw. This affirmation states explicitly, *“I declare under penalty of perjury that the foregoing is true and correct.”*

LoDuca signed it and filed it, but he was not the author—Schwartz was the author. LoDuca reviewed the affirmation—for style, “I was basically looking for a flow, make sure there was nothing untoward or no large grammatical errors.”

The attorney of record did not review any judicial authorities. No evidence made any inquiry of Schwartz as to the nature and extent of research or whether he had found contrary precedent. Just relied on belief that his word (colleagues for more than 25 years) was reliable.

No evidence Schwartz had prior experience with Montreal Convention or bankruptcy—on the contrary, his practice was exclusively state court.

March 15, 2023: Avianca submitted a five-page reply. It included the following statements: “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.”

“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.”

This document detailed by name and citation seven decisions that they could not locate, and also that the cases which were found did not actually stand for the propositions for which they were submitted.



Interim: *Schwartz and LoDuca did not withdraw affidavit.
 *Court conducts its own search—unable to locate multiple cases cited.
 *LoDuca received the notice from the court regarding this problem, and does not read it. Instead, he just forwarded it to Schwartz, who did not alert LoDuca to the contents of that reply

Schwartz had used ChatGPT which fabricated the cited cases.

Schwartz ultimately testified at his sanctions hearing that when he reviewed that reply memo, he was operating under the false perception that ChatGPT could not possibly be fabricating cases on its own.

April 11 and 12, 2023: Court issued an order directing LoDuca to file an affidavit by April 18 that attached copies of the decisions cited in the Affirmation in Opposition.

That week: *LoDuca requested an extension of time to respond until April 25 and stated that he was out of the office. This statement was false and known to be false.

 *There was a sanctions hearing. The replies of the lawyers are generally taken as quotes from the actual information quoted in the Judge’s order of sanction.

Executive Summary of Issues:

Watching the video should be a “Where’s Waldo”-like exercise for attorneys in spotting all of the places where the lawyers made poor professionalism and ethics decisions.

1. Schwartz filed a case that he should have known had the possibility of being removed to a court/ in an area he had no experience, with no plan of how to handle if that happened.
2. Schwartz asked another lawyer to be a “hidden” attorney of record.
3. LoDuca agreed, knowing he will be signing papers in which he has not contributed, nor did he supervise or check that work in any way.
4. Schwartz researched with no experience in the area and sought no guidance.
5. Schwartz used new technology without understanding what it is, what it does, and the ramifications of it.
6. LoDuca files asked for more time (Jan. 18) stating he was on vacation when he was not (even though Schwartz was).



7. Schwartz entered the citations to cases but couldn't find them published anywhere, and cited them anyway in an affirmation, along with a statement that everything in this reply affirmation was true.
8. LoDuca signed and filed the affirmation, stating it was true with no knowledge.
9. When hit with an order to produce an affidavit attaching decisions, the lawyers lied again—saying the attorney of record was out of the office on vacation (Schwartz was out of the office)—to conceal Schwartz's role in preparing the affirmation and April 25 affidavit and conceal LoDuca's failure to confirm the truth of the work and the statements affirming them.
10. LoDuca signed Schwartz's affidavit attaching cases, even though only pieces of decisions were attached, stating they were what was available by an unnamed online database. It even indicated that he cited a case which was not found. LoDuca did not author the affidavit, and had no knowledge of whether it was true Schwartz did nothing further than indicate what was found through the continued misuse of ChatGPT.
11. The affidavit knowingly did not comply with the court's orders because it did not attach the full case texts. It also offered no explanation why LoDuca could not find the case cited in the affirmation.
12. The screenshots taken from a smartphone demonstrate that before filing, Schwartz questioned ChatGPT about the reliability of its work—is [case] a real case—and are the other cases fake? ChatGPT responded it had supplied real authorities. Schwartz questioned this, started to have doubts. "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." These cases showed issues—citing themselves as authority and listing wrong judges for the jurisdiction. Even though a simple follow up to those facial qualities would have demonstrated the falsity of the cases, Schwartz did not follow up
13. The declaration filed by Schwartz states he used ChatGPT to supplement the legal research performed, when it was the sole source of his research. He found nothing on Fastcase and relied exclusively on the AI chatbot.
14. Even when Schwartz had his suspicions, he never withdrew any authority or motions.
15. Schwartz never shared any of his concerns with the attorney of record.

Can you spot more?



Executive Summary: Three Categories of Professionalism Issues

1. **Misuse of new technology.**
2. **No professional identity for framework of handling a challenge—the doubling down of the lie—attorneys defending in bad faith what they did as being okay.**
3. **Basic everyday challenges - case management and working with colleagues and issues.**

Executive Summary: Questions for Discussion:

- How do we educate lawyers on the necessary heightened scrutiny of new technologies? In Texas, courts have ordered that no portion of work will be unchecked if used AI generative without other sources.
- The NYC Bar asked in a podcase: Do these courts have a secret Rule 11 requirement for technology and is this troublesome? No one asks lawyers to disclose if you asked anyone for help on another aspect of the case. Isn't it just as much trouble to be in if you asked a person for advice and you got bad advice without checking it? Why the burden for technology only and does that make sense?
- How do we educate lawyers on the professional identity framework of dealing with ethical trip-ups? This isn't a situation where these lawyers set out at first to be handling this in bad faith. They made a poor decision in researching it. But they made deliberate ethical violations to cover it up. They dug themselves a hole and kept digging. Can we teach lawyers not to do this? Should the process work differently so that they aren't afraid to own up to mistakes?
- Professional identity *provides the framework that lawyers use to make all their decisions.* The Holloran Center: professional identity is “a representation of self, achieved in stages over time, during which the characteristics, values, and norms of the ... profession are internalized, resulting in an individual thinking, acting, and feeling like a ... [member of the profession].” Compare this to the rules of professional conduct, and behaving in professional manner (on time, polite). This is now required to be taught in law schools. How can we make sure the entire attorney population has built a responsible professional identity?