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THE SARATOGA COUNTY BAR ASSOCIATION

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LAW NOTES

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The views expressed in the enclosed articles are those of the authors and do not necessarily represent the views of, and should not be attributed to, the Saratoga County Bar Association.

THE PRACTICE PAGE

AVOID ChatGPT WHEN PREPARING LEGAL PAPERS

HON. MARK C. DILLON *

ChatGPT is a form of Artificial Intelligence (AI) which became available to the public on November 30, 2022. “Chat” refers to its chat box functionality. The “GPT” stands for Generative Pre-Trained Transformer. The program has many functions, one of which is to compose letters and essays on topics selected by the user. Essays produced by ChatGPT are not based on dedicated search engines such as Westlaw, but are instead based on generally-available information which leaves room for error in the sophisticated and detail-orientated field of law.

This is just my opinion, take it for whatever it is worth: Do not use ChatGPT for writing legal papers that will be served upon parties and filed with a court. Two attorneys learned that lesson the hard way in the case of *Roberto Mata v Avianca, Inc.* The plaintiff, Mata, commenced an action in the Supreme Court, New York County, seeking damages for personal injuries allegedly sustained as a result of having been struck by a metal serving cart during a 2019 airline flight bound for New York’s JFK Airport. The action was removed to the federal District Court for the Southern District of New York, under Docket No. 22 CV 1461 (Castel, J.). The defendant, Avianca, Inc., later moved to dismiss the action under F.R.C.P. 12(b)(6) (https://storage.courtlistener.com/recap/gov.uscourts.nysd.575368/gov.uscourts.nysd.575368.16.0.pdf), which was opposed by counsel representing the plaintiff. The opposition papers were composed by plaintiff’s counsel using ChatGPT. Because of shortcomings with the ChatGPT program, the papers submitted in opposition to

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THE PRACTICE PAGE

AVOID ChatGPT WHEN PREPARING LEGAL PAPERS

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dismissal cited to several judicial decisions which did not, in fact, exist (https://www.documentcloud.org/documents/23826751-mata-v-avianca-airlines-affidavit-in-opposition-to-motion). The non-existent cases were accompanied by non-existent quotes from them and contained internal citations which also did not exist. Quick on the uptake, District Judge P. Kevin Castel directed that the plaintiff's attorneys show cause on June 8, 2023 as to why they should not be sanctioned for the submission (Weiser, Benjamin, Here's What Happens When Your Lawyer Uses ChatGPT," New York Times, May 27, 2023, available at https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html).

On June 22, 2023, Judge Castel financially sanctioned the two attorneys and their law firm who had submitted the misleading opposition papers the sum of $5,000. The court noted that the attorneys failed in their gatekeeping function to assure the accuracy of their filings. Further, in a separate order, the District Court dismissed plaintiff Mata's personal injury action as untimely (https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/).

Lawyering is never one-size-fits all. No computer program such as ChatGPT can incorporate the years of experience that an attorney brings to a matter such as in the drafting of legal papers for filing.No computer program can provide human judgment, strategy, nuance, emphasis, and persuasiveness. No computer program can know, like a lawyer, what type of argument may best resonate with the particular judge assigned to the matter.And if composition programs such as ChatGPT do not incorporate proven research platforms like Westlaw, legal research and analysis is rightly suspect.

Some might argue that the problem which came to light in Mata was not one of burgeoning technology, but a failure by counsel to double-check ChatGPT's draft to assure that the final product submitted to the court was accurate and complete (Wilkins, Stephanie, "The Problem With the 'Bogus' ChatGPT Legal Brief? It's Not the Tech," NYLJ, June 2, 2023, available at https://www.law.com/legaltechnews/2023/06/02/the-problem-with-the-bogus-chatgpt-legal-brief-its-not-the-tech/). But that begs the question. If the technology produces flawed material, should any attorney use it in the first place rather than drafting the papers from scratch using our traditional schooled methods?Do not clients deserve the traditional effort?

Aside from the shortfalls of ChatGPT, ethics rules may be implicated as well. How is counsel to bill a client for the research and drafting of legal papers actually researched and drafted by Artificial Intelligence, which a non-lawyer could obtain by using the same computer program? How can counsel sign an attorney certification that filed papers are not frivolous, as required by 22 NYCRR 130-1.1a(b) and Federal Rule 11(b), if counsel relies upon ChatGPT research and fails to carefully review the papers to assure that there are not inaccuracies and non-existent citations? May there be disciplinary concerns under the Rules of Professional Conduct, 22 NYCRR 1200.1.1(a)? The answer to all of these questions may be problematic for any attorney caught in a ChatGPT snare.As General Colin Powell once said of the Pottery Barn rule in a different context, "You break it, you own it."

We do not have a crystal ball as to whether and to what extent AI might become more accurate and reliable in the future. A law office is not a drive-thru business. For now, nothing beats lawyering the old fashioned way --- knowing the facts, accumulating evidence, performing legal research, drafting papers discussing the facts and law, being persuasive in submissions, attaching relevant exhibits, and filing the papers in an appropriate manner that permits you to sleep well at night.

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**Mark C. Dillon is a Justice of the Appellate Division, 2nd Judicial Dept., is an Adjunct Professor of New York Practice at Fordham Law School, and is a contributing author of CPLR Practice Commentaries in McKinney's.*

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ., *LEMIRE & HIGGINS, LLC*

Demolition derby fan saved from summary judgment.

Waite v. County of Clinton (Pritzker, J., 4/6/23)

Plaintiff attended the Defendant's county fair and bought a ticket to the demolition derby that gave him access to the pit - inside the track used by the cars to crash into one another. During the final heat of the day, a vehicle pushed through a perimeter of concrete barriers and entered the spectator area of the pit, striking and injuring the plaintiff. Supreme Court (Lawliss, J., Clinton Co.) awarded the defendant summary judgment, finding plaintiff understood the risks of observing the demolition derby (including his signed waiver) or that such risks should have been obvious.The Appellate Division reversed and reinstated the Complaint, noting the plaintiff's expert witness (with credentials in engineering and racing licenses) opinion that the absence of interconnecting braces between the concrete barricades made for "a unique and weak configuration" that was "not generally accepted in the demolition derby community".

Defendant driver faced with emergency wins dismissal.

Ohl v. Smith (Lynch, J., 4/6/23)

Plaintiff was seriously injured when the car in which he was a front seat passenger made a left turn across the northbound travel lane and collided with the defendant Smith's oncoming vehicle. Relying on the "emergency doctrine" – that he acted reasonably when faced with an emergency not of his own making – Smith moved for summary judgment. Supreme Court (McBride, J, Chenango Co.) denied the motion, construing defendant's deposition testimony as an acknowledgment that he had up to 10 seconds to react to the vehicle turning left through his lane of travel, finding a triable issue of fact as to whether defendant applied his brakes in an attempt to avoid the collision. Noting that the driver of the plaintiff's vehicle conceded at deposition that she did not look for oncoming traffic before she turned left, and that she later plead guilty to a traffic ticket charging her with failing to yield the right of way, the Third Department reversed and dismissed the plaintiff's Complaint, agreeing that Smith proved the other driver was the sole proximate cause of the accident.

Labor Law § 240(1).

Barnhardt v. Richard G. Rosetti, LLC (McShan, J., 5/11/23)

Plaintiff, a self-employed contractor, was hired to install surveillance cameras in the ceiling of an office rented by a defendant (Harrell) in a building owned by the defendant Rosetti. Plaintiff testified that as he stepped from the office roof onto an extension ladder (which he owned and had set up), the bottom of the ladder "started to give away", causing the ladder (and him) to fall to the ground.Supreme Court (Powers, J., Schenectady Co.) denied plaintiff's motion for summary judgment under Labor Law § 240(1); which requires a plaintiff to show the statute was violated and that the violation proximately caused the injury. The Third Department reversed, ruling there was no dispute that the ladder did not perform adequately as "no one was holding the ladder…when it suddenly shifted or wobbled, and that no safety devices were provided to prevent the ladder from slipping or plaintiff from falling if it did".

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Insurer's coverage disclaimer letter fails "specificity" test.

Bahnuk v. Countryway Insurance Co. (Ceresia, J., 3/23/23)

The defendant sent its insured (Williams) a 6-page letter explaining why it was disclaiming coverage for the slip-and-fall lawsuit filed against her by the plaintiff, an EMT who was hurt while responding to a call at a residence in Binghamton. Countryway corresponded separately with the plaintiff and his attorney in two brief letters; the first of which stated in one sentence that there was no liability coverage available for the claim because the property did not constitute an "insured location" under the Williams' policy. Williams then hired her own attorney, and during the litigation, the parties agreed that the property owner would sign a confession of judgment for $100,000 (the limit of the Countrywide insurance policy), and plaintiff would try to execute the judgment (pursuant to Insurance Law § 3420(a)(2)) against the insurer. In that action, Supreme Court (Faughnan, J., Broome Co.) denied both parties' motions for summary judgment, and the Appellate Division affirmed, finding Countrywide's disclaimer to the injured party lacked the required "high degree of specificity (of) the ground or grounds on which the disclaimer is predicated", and that there remained a question of fact whether the confessed judgment agreement between plaintiff and Williams "was the product of collusion".

Adverse inference jury charge follows spoliation of evidence.

Payne v. Sole Di Mare, Inc. (McShan, J., 5/18/23)

Two days after the plaintiff claimed he slipped and fell while attending a wedding reception in Troy, plaintiff's counsel sent a letter to the defendants advising them of potential litigation and requested preservation of relevant video surveillance in its "present form". The wedding venue's general manager saved a 20-second excerpt of the video that included some four seconds of images preceding the plaintiff's fall (the cause of which was alleged to have been oil on the floor, apparently from a piece of tomato that may have fallen from bruschetta that was being offered to reception guests). The remainder of the video from the date of accident was later recorded over in accordance with the facility's general business practice. Plaintiff, having received the 20-second video clip in discovery, moved pursuant to CPLR 3126 to strike the defendants' Answer as a sanction for failure to provide more complete video including the circumstances leading up to the plaintiff's fall. Supreme Court (Buchanan, J., Schenectady Co.) granted plaintiff lesser relief – an adverse inference charge at trial for defendants' failure to preserve video evidence – and the Third Department affirmed, agreeing that deletion of the video "depicting the preparation of the room by defendants' employees in anticipation of guests arriving…clearly has a detrimental effect" on the plaintiff's attempt to establish whether the hazard was created by the defendants.

Bonus: Court of Appeals on primary assumption of risk; "reckless disregard" under V&T Law § 1104.

Grady v. Chenango Valley Central School Dist. (Garcia, J., 4/27/23)

Again acknowledging that the assumption of risk doctrine "may not sit comfortably" within New York's comparative fault landscape, the Court of Appeals (Garcia, J.) here considers two cases in which plaintiffs seek to recover for injuries sustained during organized sports practices for high school athletic teams. In *Grady*, the Court reversed the Appellate Division's summary judgment award to the defendant school district, finding the plaintiff had raised triable questions of fact whether a baseball practice drill in which infielders made throws to two first basemen (separated by a protective screen) "was unique and created a dangerous condition over and above the usual dangers that are inherent" in baseball. In *Secky*, the Court affirmed summary judgment for the defendant, concluding the inherent risks of playing basketball were not enhanced by the rebounding drill in which the boundary lines of the court did not apply and only major fouls would be called.

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Anderson v. Commack Fire District (Cannataro, J., 4/20/23)

New York Vehicle and Traffic Law § 1104 permits operators of fire trucks and emergency vehicles to pass through intersections against a red light, so long as they do not act recklessly. But General Municipal Law § 205-b makes a fire district vicariously liable for the negligence (a lesser standard than recklessness) of a volunteer firefighter when they operate vehicles in the discharge of their duties. Analyzing the intersection of the two statutes, the Court of Appeals (with two dissenters) concludes that holding a fire district liable for simple negligence in vehicle injury claims “would be contrary to legislative intent, this Court’s precedent, and the general principles of negligence law and vicarious liability”.

IMMIGRATION AND MENTAL HEALTH

DAVID W. MEYERS, ESQ., *MEYERS & MEYERS, LLP*

With Mental Health Awareness Month just recently in our rearview mirror, I thought a short missive on the connection between immigration and mental health would be appropriate. And when I refer to mental health, I’m speaking to both attorneys and their clients.

Many years ago, I was asked to serve on a local board of directors for all the wrong reasons. They wanted a lawyer on their board. I, being much younger than I am now, thought that was a compliment, so I agreed. That was almost 25 years ago. While the reason I joined that board no longer resonates with me, the reasons I have stayed on it do. The organization provides services in many important areas, including mental health services. And I think everyone would agree that mental health is front and center in our national ethos right now, unfortunately for all the wrong reasons.

The practice of law can be very stressful for both attorneys and their clients.In the immigration realm, and perhaps most specifically (although certainly not exclusively) in the area that I refer to as “humanitarian immigration” (e.g., asylum, removal proceedings, crime victims, VAWA, etc.), issues surrounding mental health for both attorneys and their clients are numerous.

Not everyone who enters (or tries to enter) the United States does so for employment, to go to school, to start a new business, or to reunite with family. Some come because they need to escape

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IMMIGRATION AND MENTAL HEALTH

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an environmental catastrophe, persecution, or sometimes even war. Those seeking asylum, those applying for crime victim visas, and so many others, often struggle with significant trauma.Indeed, matters that many immigration practitioners think of as routine in their practice (e.g., filing a simple extension for a client's permission to work, etc.) are often very stressful for our clients.

I'm not a medical professional, but I read a fair amount. There are various forms of trauma. Some of our clients experience trauma in their home countries (e.g., family members being killed by gangs, watching a sibling being sexually abused by a rogue police officer, children being neglected and even abandoned by their families, and the list goes on). We, as lawyers, often experience secondary traumatic stress (sometimes called "vicarious trauma" or "compassion fatigue") when working with our clients who have experienced such trauma. It's caused by being indirectly exposed to someone else's trauma, like our clients when they tell us their stories so that they can, for example, include them in a declaration for an application for asylum. Dealing with one case is bad. Dealing with several or many can take it to a different level.

Our clients need to take care of themselves. We do our very best to help them. But we also need to take care of ourselves. The secondary trauma that we experience as a result of our clients' experiences, more so than the day-to-day stress that happens in the ordinary course of our law practices (and our lives), can make it hard to manage the myriad details involved in an immigration practice. Stress impacts our clients' memories when they try to tell us their stories. Stress impacts our own memories, among other cognitive functions.

My wife always says, "You should try some breathing exercises." She's right. The practice of law, especially as a solo or small firm practitioner (and one that works in the area of humanitarian immigration) can be incredibly stressful. The key is to eliminate some of the stressors in our lives and our practices and, as my wife would also say, build resiliency for the stresses that cannot be changed.

Likewise, immigrants need to understand that they likely will require mental health support throughout their immigration journey. Although research does show that immigrants tend to be very resilient concerning mental health issues, they still will often require both legal and emotional support if they want to properly manage those challenges while maintaining their legal right to remain in the United States. In most instances relying on a well-focused and experienced immigration attorney to assist with their immigration journey can free up an immigrant to focus more fully on his or her health and well-being. But that's not always the case, and consequently, our clients' mental and emotional health cannot be ignored.

Immigration attorneys are keenly aware of the reality that seeking a desired immigration status is a very stressful process for their clients, even when everything seems to be going smoothly (as far as we're concerned). Immigrants may end up waiting for months for responses to applications and petitions for benefits, like asylum or even permission to work. Or they simply don't understand what is often a convoluted process. They may feel as though their entire family is depending on them to not make a single mistake so that they can get through the process without any lasting repercussions. Again, our clients' mental and emotional health cannot be ignored.

But we too must take care of ourselves. We often find ourselves in the middle of our clients' stories, many who have and continue to experience heart-wrenching trauma, and then have to deal with an overly stressed and bureaucratic government system and its workers.This leaves us exposed to burnout.Immigration lawyers (and other types of victim advocates) need to take care of themselves as they deal with "compassion fatigue" and the secondary trauma that results from it.

There are tons of resources for lawyers in general who are experiencing various health problems, including mental health. Do yourself a favor. Don't ignore the symptoms. Take care of yourself as well as you take care of your clients.

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