

# **AN ETHICAL TALK ABOUT PUBLIC DEFENDERS AND AI**

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## Outline of Sources

### PART I: Understanding ChatGPT

- Website for ChatGPT: <https://openai.com/blog/chatgpt>
- Here are some articles/videos to explain how ChatGPT works:
  - <https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/>
  - <https://www.forbes.com/sites/bernardmarr/2022/12/21/chatgpt-everything-you-really-need-to-know-in-simple-terms/?sh=3843d3a7cbca>
  - <https://www.youtube.com/watch?v=xnrE93dnpLs>
  - <https://youtu.be/o5MutYFWsM8>

### Part II: Case study: How Not to Use ChatGPT

The case of *Mata v. Avianca, Inc.* (2023) out of New York District Court has caught the attention of lawyers and scholars around the country. It is the first reported case where a lawyer was sanctioned for use of ChatGPT. Attached to this handout is the Opinion from Judge Castel sanctioning the lawyer (and law firm) for failing to acknowledge that the cases cited were generated by ChatGPT. The entire opinion is worth reading, but pay particular attention to the Appendices to the opinion. Judge Castel includes a case that was generated by ChatGPT.

### Part III: Applicable Ethical Rules

#### *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.

#### **Commentary**

The ethical obligation of competence cuts both ways. On the one hand, a lawyer must ethically understand the limitations on the use of Artificial Intelligence (AI) products like ChatGPT. On the other hand, as AI becomes more prominent (and presumably more reliable), it may become an element of competence to use AI products. The key (as the lawyer discovered in the *Mata* case) is that you must check the accuracy of what ChatGPT is producing.

#### *5.1 Responsibilities of a Partner or Supervisory Lawyer*

(a) 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.

### ***Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants***

With respect to a non-lawyer employed or retained by or associated with a lawyer: (a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

#### **Commentary**

Under Rules 5.2 and 5.3 a lawyer has an obligation to supervise both lawyers and non-lawyers and make sure that they are aware of the ethical obligations and limitations of the firm. I highly recommend having policies in place with regard to the use of artificial intelligence such as ChatGPT. Young lawyers will use (and potentially trust) AI products while older lawyers may be unfamiliar with the platforms and not understand how they work.

### ***Rule 1.6 Confidentiality Of Information***

(a) 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).

#### **Commentary**

This applies not just to the ethical obligation of confidentiality but also the attorney client privilege. ChatGPT is currently free because it is in “training” mode. Everything that is entered into ChatGPT goes into its knowledge base to be considered for future questions. The Terms of Service of ChatGPT explicitly states that it can use content provided to help improve services and when you first sign in a dialog box says “Please don’t share any sensitive information in your conversations.” Lawyers should not place information into ChatGPT that could be used to identify the lawyer’s clients.