

ETHICS AND ARTIFICIAL INTELLIGENCE (AI)

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PROCRASTINATING PARKER

Parker is a last-minute kind of lawyer. Parker has a brief due tonight on an important legal issue that could be dispositive in Parker's clients' case. Parker attended a seminar recently about generative artificial intelligence and how it can be a helpful time saver to lawyers. Parker doesn't have subscriptions to any law-specific generative AI applications. Parker decides to try ChatGPT and inputs the issue and some facts from the case. Parker is astounded – within a few minutes, ChatGPT has provided Parker with a fully written brief with some cases that are exactly on point, giving Parker exactly the brief that Parker was looking for. Parker files the brief exactly as written by ChatGPT.

A – Need not worry – AI is very reliable.



B – Should be worried about possible court sanctions.

C – Should be worried about possible disciplinary action.

D – Should be worried about possible court sanctions and disciplinary action.

PARKER:



ETHICS ISSUES

Competence – Rule 4-1.1, Comment: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, *including an understanding of the benefits and risks associated with the use of technology*, and comply with all continuing legal education requirements to which the lawyer is subject.

Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question. Competent representation also involves safeguarding confidential information relating to the representation, including, but not limited to, electronic transmissions and communications.

RULE 4-5.3, COMMENT

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning,, and using an Internet-based service to store client information. When using these services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.



Rule 4-3.3 - (a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

- ▶ (1) 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;
- ▶ (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

ETHICS ISSUES
CONT'D

FEDERAL RULE OF CIVIL PROCEDURE

11

(b) 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:

- ▶ (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- ▶ (2) 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;
- ▶ (3) 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
- ▶ (4) 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.

FEDERAL RULE OF CIVIL PROCEDURE 11

- ▶ (c) 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.

CASES

- ▶ *Mata v. Avianca*, 678 F. Supp. 3d 443, (S.D.N.Y. 2023). Two lawyers and law firm jointly and severally sanctioned for using ChatGPT to write a motion that cited authorities that did not exist or did not support the proposition for which they were cited. The law firm never withdrew the motion and the court sanctioned both lawyers and the law firm even though the state court lawyer was not admitted to the SDNY. The court's order cites to New York's Rule 3.3.
- ▶ *People v. Crabill*, No. 23PDJ067, 2023 WL 8111898 (Colo. O.P.D.J. Nov. 22, 2023). Lawyer suspended 90 days for using ChatGPT in a motion without checking the citations; some were fictitious. Lawyer did not disclose to court and when the court inquired, blamed a legal intern. Violations of competence, diligence, candor toward court and conduct involving dishonesty.
- ▶ *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024). The Second Circuit referred a lawyer to its Grievance Panel for investigation into whether the lawyer violated Fed.R.Civ.P. 11. In a reply brief the lawyer cited 2 court decisions, one of which the Second Circuit was unable to locate. On inquiry, the lawyer essentially admitted the case did not exist, saying she used ChatGPT, which suggested the "case."

In re Neusom, 2024 WL 1013974 (M.D.Fla., Mar. 3, 2024). The United States District Court for the Middle District of Florida suspended a lawyer for one year, required him to complete Florida Bar professionalism and law practice management training, and ordered him to receive counseling through the Florida Lawyers Assistance Program. The lawyer was counsel for the plaintiff in a breach of contract case and filed an Amended Supplementary Removal notice. The lawyer was referred to the federal court's Grievance Committee for investigation, which found inaccurate citations and fabricated authorities in the Amended Supplementary Removal. When interviewed by the Committee, the lawyer stated that he "may have used artificial intelligence to draft the filing(s) but was not able to check the excerpts and citations."

THINK IT COULDN'T
HAPPEN IN
FLORIDA?



THE COURTS RESPOND



Mandatory Certification Regarding

Generative Artificial Intelligence

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT or Harvey.AI) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.

THE COURTS RESPOND CONTINUED



CERTIFICATE REGARDING JUDGE-SPECIFIC REQUIREMENTS

I, the undersigned attorney, hereby certify that I have read and will comply with all judge-specific requirements for Judge X, United States District Judge for the Northern District of Texas. I further certify that no portion of any filing in this case will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court. I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.



AND LAW FIRMS RESPOND...






Lawyers may use generative artificial intelligence (“AI”) in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. . . . Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer’s ethical obligations. . . . Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

FLORIDA ETHICS OPINION 24-1

DID PARKER VIOLATE ANY
OTHER RULES?



A lawyer must not reveal information relating to a client's representation except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

RULE 4-1.6 CONFIDENTIALITY



WHAT ABOUT EXCEPTIONS?

(c)(1) A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary to . . . serve the client's interest unless it is information the client specifically requires not to be disclosed.

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6. . . a lawyer should:

- ▶ Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- ▶ Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- ▶ Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

FLORIDA ETHICS OPINION 24-1

PROCRASTINATING PARKER CONTINUED

Instead of filing without reading, Parker instead reviewed the brief carefully, edited all the factual and legal statements to comport with the facts and law relevant to the case, and checked and corrected all the citations before filing. What would be appropriate for Parker to bill for the brief?



VIRTUAL VINNIE

Consumer Connie visits Virtual Vinnie's website. Connie has a potential family law case. A chat box pops up with the text "Got a Question?" Connie types a question about whether Connie can obtain sole custody of a minor child into the chat box.

A – Absolutely - if you hire Virtual Vinnie.

B - Under your facts, yes. Disclaimer: this is not legal advice.

C – The answer depends on specific facts – please schedule an appointment to discuss with Vinnie

D – I am not a person, I am a chatbot. You need advice from a lawyer.

THE CHAT
BOX
RESPONSE
SHOULD BE:

Decorative white lines consisting of several parallel diagonal lines extending from the bottom right towards the top right of the slide.

FLORIDA ETHICS OPINION 24-1

Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm.

AND THE FUTURE. . .

GENERATIVE AI AND...

- ▶ Paralegals?
- ▶ Lawyers?
- ▶ Access to Justice
- ▶ Unlicensed Practice of Law
- ▶ Legal Malpractice
- ▶ Law Schools



You

can using chatgpt to obtain legal advice constitute the unlicensed practice of law



ChatGPT

Yes, using ChatGPT to obtain legal advice could potentially be considered the unlicensed practice of law depending on the jurisdiction and the specific circumstances. Providing legal advice typically requires a license to practice law, as it involves interpreting the law and applying it to individual situations. While ChatGPT can provide information and general guidance, it lacks the expertise and qualifications of a licensed attorney. Therefore, relying solely on ChatGPT for legal advice may not be advisable in situations where the law is complex or specific legal advice is needed. It's always best to consult with a qualified attorney for legal matters to ensure compliance with relevant laws and regulations.



WILL AI REPLACE
ETHICS LAWYERS?

will screening avoid the imputation of a conflict of interest with a former client of the same law firm in Florida



ChatGPT

Screening, also known as "Chinese Wall" or "Information Barrier," is a mechanism used in law firms to prevent conflicts of interest. It involves isolating certain individuals or teams within the firm from accessing information about particular clients or matters to which they are potentially conflicted. This method can be effective in certain situations, but its efficacy depends on various factors, including the specific circumstances of the case and the applicable laws and regulations in Florida.

In Florida, as in many jurisdictions, the rules regarding conflicts of interest and screening procedures are governed by legal ethics rules, such as the Rules of Professional Conduct. These rules provide guidance on how law firms should handle conflicts of interest to ensure that they fulfill their ethical obligations to clients.

While screening may help mitigate conflicts of interest, it is not a foolproof solution. Courts and legal authorities may scrutinize the effectiveness of screening measures to determine whether they adequately prevent the sharing of confidential information and the influence of conflicted attorneys on a matter. Additionally, the viability of screening may vary depending on the specific circumstances of the case and the nature of the conflict.

It's essential to consult with legal experts who are familiar with the rules and regulations governing conflicts of interest in Florida to determine the appropriateness and effectiveness of screening in a particular situation involving a former client of the same law firm. Additionally, transparency and disclosure are crucial in addressing conflicts of interest ethically and responsibly.





QUESTIONS?

