Securities Regulation Daily Wrap Up, ARTIFICIAL INTELLIGENCE NEWS—S.D.N.Y.: Michael Cohen's lawyer explains why he cited AI-generated 'cases', (Jan 2, 2024)

By Anne Sherry, J.D.

Counsel to the former Trump fixer faces sanctions for citing cases that do not exist.

Two new filings in the criminal case against Michael Cohen attempt to explain how the Southern District of New York came to be presented with three "case" citations that were fabrications of artificial intelligence. According to the declarations, Cohen himself found the "cases" by "searching" Google Bard, not realizing that the tool was an AI chatbot rather than a search engine. His attorney, who now faces contempt charges, says he believed the cases had been reviewed by Cohen's other counsel and that he included the cases without independently verifying them (*U.S. v. Cohen*, December 28, 2023).

Cohen, himself a former attorney and fixer to Donald Trump, pleaded guilty to campaign finance violations in 2018. In November 2023 his attorney, David Schwartz, filed a motion for early termination of supervised release, citing three examples of Second Circuit cases granting early termination in similar circumstances. The court, and Cohen's new counsel, were unable to find the cases, and the court ordered Schwartz to either provide copies of the decisions or show cause why he should not be sanctioned.

Schwartz's story. In response to the Order to Show Cause, Schwartz explains that he sent Cohen a draft submission seeking early termination of supervised release that did not cite any cases. Cohen sent back a redline "ostensibly prepared by" Danya Perry, who represented Cohen in prior proceedings (and still represents him with respect to the Order to Show Cause). This redline suggested citing some cases. Drafts were passed back and forth between Schwartz and Cohen, and Cohen emailed Schwartz citations and summaries of the three ostensible cases. As Schwartz tells it, he assumed Perry had found the cases given her involvement in drafting the submission. Deferring to her expertise, he did not independently verify the cases.

Cohen's role. Perry also spoke up to mostly support Schwartz's recounting while attempting to insulate Cohen and herself from legal and reputational fallout, respectively. Cohen misunderstood Google Bard to be a "super-charged search engine" rather than an AI chatbot, Perry writes. She observes that Cohen does not have access to paid legal research tools, is not a practicing attorney, and "has no concept of the risks of using AI services for legal research—nor does he have an ethical obligation to verify the accuracy of his research."

Perry's letter to the court attempts a delicate balance of defending herself against Schwartz's belief that she was involved in the mix-up, while also emphasizing that Schwartz did not engage in misconduct. Schwartz's failure in his obligation to verify the cases is not the first example of his sloppiness, she writes, noting that in May 2023 Schwartz cited a "published opinion of the 7th circuit" that was actually just a blog post. Furthermore, Schwartz did not need to look for the AI-generated cases to notice something was wrong; the provided summary of one of the cases described the defendant's having served a 120-month sentence before being placed on supervised release, which was impossible to reconcile with the 2021 docket number.

Perry also emphasizes, though, that Schwartz was quick to admit the mistake and had no malicious intent. While the cases may not exist, "the underlying point indeed is not controversial," Perry writes, pointing to real cases and a study that support the motion for early termination of supervised release.

Of the descriptions of Schwartz's failings, Perry writes, "All of this is not to imply bad faith on Mr. Schwartz's part—of which there is no indication—but simply to note that Mr. Schwartz appears to have a history in this matter of

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inattentiveness to detail that cannot be attributed to reliance upon another attorney, and should not be imputed in any way to his client."

The case is No. 18-cr-0602.

Attorneys: Andrea Michelle Griswold, U.S. Attorney's Office, for the U.S. Guy Petrillo (Petrillo Klein Boxer) and Michael Monico (Monico & Spevack) for Michael Cohen.

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