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# When a Judge Has Been Misled (Unintentionally)

In this article, Joel Cohen analyzes a case in the public eye that is still pending. It will hopefully provide a teachable moment in the context of an artificial intelligence mistake that many litigators may conceivably encounter.

February 12, 2024 at 10:00 AM

By Joel Cohen | February 12, 2024 at 10:00 AM

Michael Cohen is in the mix again. This time, though, it's not about his relationship with Donald Trump. Now it's because, as we assume innocently, Cohen employed Google Bard, a ChatGPT competitor (*U.S. v. Michael Cohen*, 18 Cr. 602 (JMF)). No longer practicing law, he was apparently unfamiliar with the flaws in this advanced technology that literally came up with non-existent case cites. The cases ostensibly supported a draft motion that he forwarded to his friend/lawyer (Lawyer 1). Cohen collected them, hopefully to be used by Lawyer 1 in a filing to support Cohen's proposed motion to terminate his supervised release arising from his earlier criminal conviction in federal court.

Lawyer 1, apparently without carefully enough checking the cites and apparently believing that they had been successfully vetted, included them in his motion. And notably, the government's opposition papers didn't find the cites wanting. It simply opposed the motion on the merits.

Enter Lawyer 2, who already had an attorney-client relationship with Cohen from earlier. She is asked by Cohen to file a response to the government's opposing papers. While apparently not yet formally in the case, she checked the case cites contained in the submission that had previously been filed by Lawyer 1, and found some of them to be non-existent. Presumably, she promptly told Cohen, and also filed a notice of appearance asking for leave of the court to file a reply to the government's opposition.

A sophisticated criminal defense lawyer, Lawyer 2 was undoubtedly aware that only a few months earlier, in a totally unrelated case and amid considerable fanfare in the legal community, U.S. District Judge Kevin Castel of the Southern District of New York sanctioned lawyers who, too, had mistakenly submitted non-existent case cites in a pleading. Castel determined that those cites were bogus and, after receiving submissions and argument, sanctioned the lawyers (*Mata v. Avianca,* 25- cv-1461(PKC)) in what was seemingly a case of first impression.

Lawyer 2 wasted little time. Having been granted leave of U.S. District Judge Jesse Furman of the Southern District of New York, she filed a reply letter supporting the relief Cohen's Lawyer 1 had sought for him. However, she added in a footnote that, *"While several cases were cited in the initial Motion filed by different counsel, undersigned counsel was not engaged at the time and must inform the Court that it has been unable to verify those citations*."

To the press, she later added that "[c]onsistent with my ethical obligation of candor to the court" she felt obligated to advise the court that those cites (that had been provided by Bard and were erroneously included in the defense motion) were indeed fictitious ("Michael Cohen Used Artificial Intelligence in Feeding Lawyer Bogus Cases," Weiser, B. and Bromwich, J., N.Y. Times, Dec. 29, 2023).

Lawyer 2 undoubtedly suspected that, potentially, Furman might not simply accept the "apology" from a second lawyer who had no responsibility for the wrongdoing. Instead, he would likely ask how it occurred, especially given the emerging scandal in the legal profession over the use of AI and how Cohen fit into all this. Lawyer 2, one must suspect, told Cohen of that potentiality, and the possibility of a potential sanction by the court—maybe against Cohen too. Not to mention the viability of the motion.

Lawyer 2 was faced with a difficult quandary that we don't wish on anyone. She didn't *directly* tell Lawyer 1 what she had found that would have allowed him to alert the court or withdraw his submission, or both. Instead, as she affirms, she left it to Cohen who apparently wanted to notify Lawyer 1 himself. Possibly, and one can easily understand it, she wanted to directly make the disclosure to the court lest Furman conclude that she was somehow responsible for having filed the (partly) false submission—even though she clearly was not.

Had Lawyer 1 himself known the problem and written the letter to the court as soon as possible, and withdrew those cites upon learning of his flawed motion, rather than Lawyer 2 doing so, the court might have been less likely to issue an order directed at Lawyer 1's conduct. *United States v. Michael Cohen*, *supra*, Order to Show Cause, dated Nov. 29, 2023 (that is, parenthetically, an order that specifically also asked for a full explanation of Cohen's own role in this mess, which he later gave). But, of course, this is armchair quarterbacking—always risky.

The case does raise several interesting questions involving Cohen and Lawyer 1. We focus here, however, on a lawyer in Lawyer 2's predicament and that lawyer's ethical responsibilities. One, and which I'm afraid we don't really answer here, raises an interesting question about whether even though she hadn't yet formally filed an appearance when she determined that the court had been given false information, would she have been ethically obligated to make a disclosure to the court if she decided to not file an appearance in the case and simply declined the representation. Not too clear.

Two, was Lawyer 2 ethically obligated to *directly* advise Lawyer 1 that she intended to promptly communicate her findings directly to the court without letting him do so first? Three, did Lawyer 2 have an ethical duty of any kind to "report" Lawyer 1?

It seems agreed among the individuals in question in their filings that Lawyer 2 left it to Cohen who, for no seemingly untoward reason, neglected to tell Lawyer 1 either that the case cites were false or that Lawyer 2 had decided to immediately inform the court.

Taking the last question first, Lawyer 2, once in the case, seemingly had no specific "ethical" obligation to await Lawyer 1 correcting the record. Notably, she didn't deliberately point her finger at Lawyer 2 (or her client Cohen, for that matter). It might have been nicer for her to have done so, especially given that she probably should have been confident that the court wouldn't conclude that she was responsible for what had occurred. But that, too, is a second guess from a bystander.

In total fairness to her, perhaps she *wasn't* fully confident in what Cohen had told her about *his* own role in what had occurred. Self-protection and protecting the client from himself is extremely important in criminal lawyering. As the late Gerald Shargel would say, "it's a hardball league" indeed. Although the record isn't clear on this, presumably she explained to Cohen how she intended to address the issue with the court, and that's where her ethical obligation would seemingly have lied.

These questions are complicated. Accordingly, I asked Professor Roy Simon, author of what I call the "Ethics Bible"—*Simon's New York Rules of Professional Conduct Annotated* (Thompson Reuters, 2023)—to weigh in. Among the issues to address—knowing that her client, Cohen, might be adversely impacted by her disclosure, was Lawyer 2 still ethically obligated to disclose—even if Cohen's wrongdoing, as it appears, was *un*intentional and not fraudulent?

Here is what Professor Simon says:

> *The issue boils down to which Rule of Professional Conduct triggered Lawyer 2's letter to the court asserting that she was unable to "verify" certain cases cited in Lawyer 1's submission. On one hand, if she was reporting Lawyer 1's misconduct pursuant to Rule 8.3, which requires a lawyer to report another lawyer's serious ethical violation, then her Rule 1.6 duty of confidentiality to her client (Cohen) offered an exception – so she had no affirmative duty to report Lawyer 1 if revealing the fake cites was "likely to be embarrassing or detrimental" to Cohen.*
>
> *On the other hand, if she was reporting Lawyer 1's citation of phony cases pursuant to Rule 3.3, which requires a lawyer representing a client before a tribunal to take "reasonable remedial measures" to correct false evidence or a fraud on the court, then the duty of confidentiality was not an exception, because the duty to maintain the integrity of the court system trumps the duty of confidentiality – but disclosure to the court is a last resort, to be used only if no other remedial measure will work.*
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> *Either way, Lawyer 2 may have jumped the gun. Under Rule 8.3, she needed Cohen's informed consent to reveal that the citations were fake, because that was confidential information. (Sure, the citations were in a publicly filed submission – but the fact that the citations were fake was confidential because their phoniness was not "generally known" until Lawyer 2 blew the whistle.) Under Rule 3.3, even if the fake citations amounted to "false evidence" or "fraudulent conduct," Lawyer 2 could and maybe should have tried other measures, such as asking Lawyer 1 to withdraw the initial submission, or at least to ask the court to disregard the fake citations, before spilling the beans herself. It is laudable that Lawyer 2 tried to be so ethical, but I think she may have acted too hastily."*

As mentioned earlier, Lawyer 2 was presented with an extremely difficult dilemma given the facts presented to her. It may have been largely remedied if Lawyer 1 had affirmatively learned that his cites were false and he himself immediately withdrew and corrected his submission. Either way, my sense of it is that Lawyer 1's unfortunate conduct wouldn't have gone to his "fitness" to practice.

We, of course, must always aspire to be candid with the court recognizing, too, that we are also all prone to innocent errors. AI has made that proneness more problematic, however it is employed. Hopefully, we will all learn from the potential dangers that AI may cause and make certain that what occurred here, especially given this oddball confluence of events and notwithstanding apparent good faith all around, won't happen to any of the rest of us.

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