



Barclay Damon Live Presents Cyber Sip™
**Season 5, Episode 2: “Fake Cases, Real Consequences:
The NYS Appellate Division Weighs In”**
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[Kevin Szczepanski]: In today’s episode, we’re going to talk about, yes, sanctions for lawyers citing fake cases. Why are we going to talk about this? Well, a couple of reasons, really. There are over 450 documented cases of lawyers getting sanctioned for citing fake cases or real cases that don’t say what the lawyer says they say. And that list is getting longer and longer. It’s a big problem because lawyers are getting sanctioned and punished for citing fake cases. Some of the punishments include financial sanctions, which range from \$1,000 to up to \$31,000. We saw that in one case. Revocation of the lawyer’s right to practice in a particular case, a referral to the disciplinary committee, forcing the lawyer to reveal what he or she has done to his or her client. And every judge that the lawyer has ever appeared in front of, which you can imagine is highly embarrassing, could cost relationships with clients and credibility in the courts in which the lawyer practices. We’ve also seen some courts sanction the lawyer by requiring the lawyer to either take an educational course on AI and the perils of AI, or, interestingly, that require the lawyer to give a course on AI. I guess some judges believe that the best way to learn a subject is to teach it, but ... the sanctions run the gamut.

[Kevin]: They’re very significant. And as I implied in listing some of the sanctions, there is a significant reputational harm that attends citing fake cases. Lawyers, clients, judges are going to think that you are not up to par when it comes to practicing law, and you want to avoid that. So what I thought I would do today is not just talk about three or four or 50 of our favorite cases dealing with fake cites, but instead, I’m going to highlight a recent decision by the New York Appellate Division, Third Department. For those of you that don’t know, the highest court in New York is called the Court of Appeals. The secondary layer of appellate courts are called appellate divisions, and the Third Department happens to sit and serve around the state’s capital, in the Albany area. So the Third Department recently had the opportunity to address a case involving a lawyer citing fake cases. It’s the most recent case. And so I thought, let’s discuss it. Hit me up in the comments if you have any other suggestions. But I thought this is the perfect opportunity to address this issue in New York. We’ve seen federal decisions in New York address this issue, but this is the first state Appellate Division. So let’s dive right in.

[Kevin]: The case is called Deutsche Bank National Trust Company versus LeTennier. It might be LeTennier, but I’m going to pronounce it LeTennier. And, Ms. LeTennier, if I am mispronouncing your name and you happen to see this, my apologies. Please feel free to respond and correct me. So first, let’s talk about what the case is about. We’ll talk about how the lawyer gets in trouble, what the court does in response, and how you can avoid doing this yourself in the future. So it’s a mortgage foreclosure case. Ms. LeTennier signs a note to borrow money. She secures it by a mortgage on her property. She defaults on the note and finds herself defending a mortgage foreclosure action. Now, it’s not perfectly clear from the Deutsche Bank decision, but it sounds like, at least initially, Ms. LeTennier was representing herself. In fact, she filed several what are called pro se motions, which is representing herself. She loses the foreclosure action. She files a motion to renew or re-argue and to vacate the order, essentially asking the court over and over and over again to revisit the very same things that the court has already decided.



[Kevin]: So not only does she lose, but the court says, look, I am barring you from making any motions on this subject ever again. If you do happen to make one, you have to bring it on by order to show cause. And I'm awarding attorney's fees to your opponents. Now, this is a bank, right? So for a court to be so exercised as to require a pro se plaintiff to pay a bank's attorney's fees gives you some idea of how ridiculous this case had become. So good news/bad news. The good news is, Ms. LeTennier gets wise to the fact that she needs a lawyer, and she hires one to represent her in the case going forward. The bad news is, the lawyer eventually gets himself into trouble. One particular motion... the court decides the case and then separately says, now I'm going to address this problem of the lawyer citing fake cases. So far, the cases, in the court's words, "conventional." Nothing unusual. And here's what the court says: "Where this appeal becomes unconventional, however, is that defendant's opening brief..." This is the briefs that the lawyer prepared, not Ms. LeTennier when she was pro se. "The defendant's opening brief cites six cases which do not exist. Plaintiff," meaning the bank "identified these fabricated cases as possibly being the product of artificial intelligence and moved for an order seeking sanctions against the defendant, Ms. LeTennier, and her lawyer." What does the defendant do in response? Now, first, before you hear about the response, think of this situation. If you do find yourself in a situation where you have cited fake cases hopefully you catch it before your opponent does or before the court does. You bring it to everyone's attention. You fall on your sword, you apologize. You correct your papers, and you hope that the court takes that into consideration in deciding whether or how to sanction you. That's not what happens here. Here, the offending lawyer, the defense counsel, first learns that he has cited fake cases from the bank's counsel, who brings a motion saying, look, you've got to sanction this guy for citing fake cases. So that's what the bank's counsel does, brings a motion. In response, here's what the defense counsel says. According to the court, "defendant claims that the non-existent cases were citation or formatting errors that he would correct in his reply brief." Okay, that's a rough explanation, right? I mean, I suppose it's a citation error if you're citing something that doesn't exist. But typically when we think of citation errors, we think, well, the citation of the case is 82 New York 2nd 445. And instead of that citation I said 83 New York 2nd 445. That's a citation error. This is more than a citation error. This is a flat-out hallucination, where the defendant says, hey, this is just a citation error. I will correct it in my reply brief. So you have the defendant's opening brief. Plaintiff catches the mistakes, moves for sanctions. Defendant says oh, just mistakes little pro forma. I'll fix it in my reply. And the reply brief according to the court. "There are more..." Here it is. "Defendant's subsequent reply brief acknowledged that his citation of fictitious cases is a serious error but failed to offer any corrections or further explanation as previews previously stated." Here's where it gets worse. "Defense counsel then proceeds to include more fake cases and false legal propositions in two subsequent letters to this court that asked the court for some additional relief." Further examining the matter, the court says "more non-existent cases were discovered in a motion that had granted affirmative relief to the defendant." So what is the court saying? Saying, wait a second. We've investigated this further and we have found that you asked the court for relief. You asked the court for something, and the court gave it to you, but the court gave it to you on the basis of fake citations and non-existent authority. That's a big deal. That goes right to the integrity of the judicial system. Courts get very concerned, very upset, I dare say, when they find out that they were duped into doing something on the basis of fake legal authority, and that's what's going on here. So, final nail in the coffin. According to the court, "defense counsel reluctantly conceded during oral argument." ..So he's got fake cites in his opening brief. The plaintiff, Deutsche Bank, points this out in its opposition, makes a motion for sanctions. Defense counsel fails to fix it in reply. Follow-up letters to the court have fake cites. The court does some digging and finds that there were fake cites in a still another motion that the defense counsel had made. And now icing on the cake. Defense counsel is at oral argument of the appeal and he reluctantly conceded, which is code for "we, on the Appellate Division we pushed him hard. We really laid into him at oral argument, and it took him a few minutes to actually admit that what he did was wrong." "Defense counsel reluctantly conceded during oral argument that he used AI in the preparation of his papers, and although he told the court that he checked his papers, the filings themselves demonstrate otherwise."



[Kevin]: In other words, you told us at oral argument that you checked your cases before you cited them. But the very existence of fake cases in your papers to the court demonstrate that you didn't, because if you had, you would have found them. So the court pauses there and then moves to its reasoning and ruling. And the court is actually fairly levelheaded. First begins by saying there are other state and federal courts that have addressed the misuse of AI in legal papers. But we have not. And we here at Cyber Sip, have taken note of the federal cases in New York that have addressed this issue. But again, this appears to be the first appellate level decision in New York to do so. That's why ergo, we're talking about it. So court says this is the first time we're looking at this and then is very candid. Says, look, we understand there are benefits to the use of AI in legal work, as did the shift from digest books to online legal databases, the court says, generative artificial intelligence represents a new paradigm for the legal profession. "It has the potential to offer benefits, particularly in promoting access to justice, saving costs for clients, and assisting courts with efficient and accurate administration of justice." So what is the court saying? Court is saying is that it's bad enough that the citation of fake authority puts the offending lawyer's adversary to the task of identifying the fake cases and making a motion, or it puts the court to the task of sorting all of this out, which is a drain on judicial resources. The citation of fake cases affects the victim. The lawyer's client, who may end up losing the case or losing his... the client's request for relief as a result of his lawyer's or her lawyer's mistake. And in the big picture, if judges are not relying on accurate legal authority and an accurate set of facts to resolve cases, that affects the administration of justice overall. It affects every single one of us, you and me. Because ultimately, we begin to question whether we can rely on a judicial opinion.

[Kevin]: ...If it could be based on law that doesn't exist, or law that is not properly identified and discussed. Okay, so the court talks about all this and then turns to the question: what to do about it. In New York, courts have discretion to award costs or impose financial sanctions against an attorney or party for engaging in frivolous conduct. And this is the court's administrative code. Those of you that aren't lawyers, I apologize. Citation coming. But it is 22 NYCRR Section 130 1.1a. That is the New York Administrative Code section that deals with frivolous legal arguments. And the court cites to that correctly. And what the court says is "conduct is frivolous. And we can sanction under this code section if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." And what is the courts say next? Well, you guessed it. If you're citing law that doesn't exist. Your argument cannot be supported by the law. It is meritless, frivolous as a matter of law. All right. So the court says, here's the authority that I have to impose a sanction. What happened in this case? Well, the defendants submitted at least 23 fabricated legal authorities across five filings during the pendency of this appeal.

[Kevin]: Defense counsel has, the court notes, also misrepresented the holdings of several real cases as being dispositive, determinative. We win because of this when those cases did not support him. It is "axiomatic" legal term. How do we translate that into English? It is super-obvious and well settled—beyond debate—that the submission of fabricated cases is completely without merit in law and therefore constitutes frivolous conduct. Okay, so what does the court do? Let's just jump right to the, the punchline. The court reviews several cases across the country that have imposed sanctions, saying such a broad range of sanctions, you know, for anywhere from one 500 to \$31,000 reflects a "constellation of factors." I like that turn of phrase. And so the court weighs all of these factors and says, we recognize that this is the first appellate level case in New York addressing this issue. And in doing so, we find that the imposition of a monetary sanction on defense counsel in the amount of \$5,000 to be appropriate under the circumstances—not just to punish defense counsel, but, as the court notes, "with the further goal of deterring future frivolous conduct." So that's significant, because what the Appellate Division here in the Third Department is saying is that in imposing a sanction, we're not just going to take account of the factors that may help us determine the appropriate sanction in this case. We're also going to consider what deterrent effect we want the imposition of sanctions here to have on every other lawyer in New York practicing in New York reading this decision. And we want to make sure that not only this defense counsel, but everyone who's paying attention knows that if you do this, you are going to be sanctioned and this is what it might look like. A court closes, and I think this is very helpful advice. And so I'm going to share it with you. "To be clear, attorneys and litigants are not prohibited from using generative AI to assist with the preparation of court submissions." And we're going to talk about in different



episodes what the New York state court system has done to both encourage and caution lawyers about the use of AI. But here the court gets it I think, fairly saliently. Like, we're not telling you cannot use generative AI. The issue arises when attorneys and staff are not sufficiently trained on the dangers of such technology, and instead erroneously rely on it without human oversight. The use of generative AI, the court says, in no way abrogates an attorney's or litigants' obligation to fact-check and cite-check every document filed with a court. To do otherwise may be sanctionable, depending on the facts and circumstances of the case. So what's the takeaway here? I think overall, this is a fairly generous position taken by the court here. And you're talking about 23 fabricated cases, more cases that existed but were mis-cited. And defense counsel is really not paying attention to what he's doing, so that when he's questioned about these things, he doesn't come clean. He mischaracterizes these hallucinations as minor errors and leaves it to his opponents and to the court to investigate and figure out the depth of the problem. You don't want to leave yourself in that situation. And at the same time, the \$5,000 sanction. I don't know if that strikes you as high or not. Based on the cases I've seen that's, I would say that's in the middle range. The sanctions are trending upwards. But either way, to be publicly called out by the Third Department and his name is here, we're not going to share the name. It doesn't really matter. You can look it up. I'll give you the case cite offline if you need it. You can easily look it up. But the reputational harm that a lawyer may suffer for falling into the situation is extraordinary. I don't trust my imagination to think of what could happen to a lawyer who is caught citing fake cases, even if he or she doesn't mean it.

[Kevin]: So what's the moral of the story? Read the case. But number one, check your work. Every case you cite should be read to make sure that, number one, it exists. Number two, if it exists, it stands for the proposition you cited for and that it is cited accurately. And third, you want to make sure that it's not just you. You extend these principles in the form of training to every lawyer in your firm. And you include with this training, an AI policy. The policy is important because it sets the guardrails for your organization. These... this is what you can do. This is what you can't do. This is the procedure you should follow. And here's the sanction that will happen if you don't follow the policy. If we're careful, we do the things that we all know that we're supposed to do as lawyers.

[Kevin]: And we consistently train ourselves and update ourselves on the functioning of this technology, what its strengths and weaknesses are. We won't fall into this sort of mess. My guess is, before this is all said and done, I think, one of the reputable online sources I've seen has calculated over 450 cases in which lawyers have been sanctioned. That number is going to get much higher before we learn our lesson. But don't be the one that's mentioned in the First Department or the Second Department or the Fourth Department case. Be careful. Do the things that you know from law school you should do. And, hopefully we'll all be safe out there in the gen-AI universe. I hope this episode was helpful. If you have any questions or thoughts for me, hit me up in the comments. As always, like, comment, and share. I really appreciate it. I've enjoyed doing this episode with you. Hope you enjoyed it and we'll be back soon with another episode of *Cyber Sip*.

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