PROGRAM MATERIALS
Program #2964
March 13, 2019

# Lessons from 'Michael Cohen v. United States'



---

Celesq® AttorneysEd Center
www.celesq.com

5301 North Federal Highway, Suite 180, Boca Raton, FL 33487
Phone 561-241-1919 Fax 561-241-1969

# Lessons from *Michael Cohen v. United States*:

## Criminal Defendants Should Not Be at the Mercy of Technology for Privilege Review

Ellen Murphy, Scott Morvillo, Wendy Curtis, Jeremiah Weasenforth, and Kelly Cullen

orrick

# Meet the Panel

**Wendy Curtis**
Chair, eDiscovery and Information Governance | Innovation

**Scott Morvillo**
Partner | White Collar, Investigations, Securities Litigation & Compliance

**Ellen Murphy**
Partner | White Collar, Investigations, Securities Litigation & Compliance

**Jeremiah Weasenforth**
Managing Project Attorney | Orrick Analytics

**Kelly Cullen**
Senior eDiscovery Career Associate | General Litigation

# United States v. Michael Cohen

**Donald J. Trump**
@realDonaldTrump
Follow

Kevin Corke, @FoxNews "Don't forget, Michael Cohen has already been convicted of perjury and fraud, and as recently as this week, the Wall Street Journal has suggested that he may have stolen tens of thousands of dollars...." Lying to reduce his jail time! Watch father-in-law!

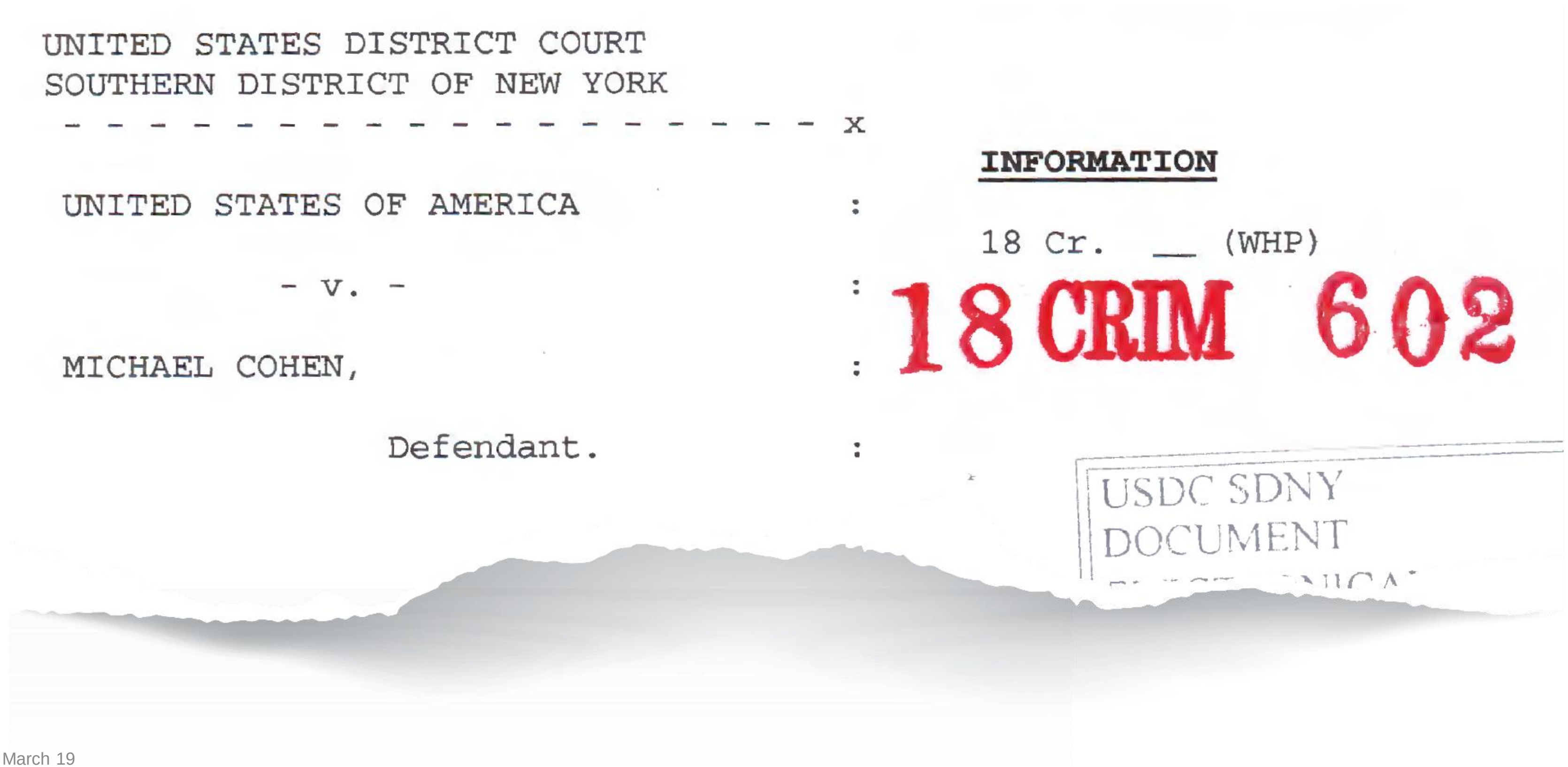
**BOMBSHELL REPORT!**

## Trump's Top 'Fixer' — Payoffs & Threats Exposed

'I'm going to come at you, grab you by the neck, and I'm not going to let you go!'

## *F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful'*

# United States v. Michael Cohen


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

- v. - :

MICHAEL COHEN, :

Defendant. :

**INFORMATION**

18 Cr. __ (WHP)

18 CRIM 602

USDC SDNY
DOCUMENT

# DOJ Protocol to Obtain Search Warrant for a Subject Attorney’s Office

- U.S. Attorney’s Manual §9-13.420 contains the DOJ’s mandated protocol to obtain approval to seek a search warrant on an attorney’s office:
  - Consider seeking to obtain the information through less intrusive means, such as a subpoena, “unless such efforts could compromise the criminal investigation” USAM §9-13.420(A)
  - Obtain approval from the U.S. Attorney or relevant Assistant Attorney General prior to seeking the search warrant from the court. USAM §9-13.420(B)
  - Consult with DOJ’s Office of Enforcement Operations before seeking the search warrant. USAM §9-13.420(C)

# DOJ Protocol to Obtain Search Warrant for an Attorney's Office Who Is Not Subject of an Investigation

**USAM §9-19.221 provides:**

"Where the materials sought are in the possession of a disinterested third party . . . lawyer . . .application for a warrant must be approved by the appropriate Deputy Assistant Attorney General . . . The request for authorization from the Deputy Assistant Attorney General should be made in writing and include a copy of the warrant application as well as a brief description of the facts and circumstances that form the basis for the recommendation of the authorization. In addition, the request must include a statement that it is authorized by the United States Attorney or the supervising Department of Justice attorney. If the request for authorization is made orally, or if, in an emergency situation, the application is authorized by the United States Attorney or the supervising Department of Just attorney, a written record, as described above, must be sent to the Deputy Assistant Attorney General within seven days. 28 C.F.R. §59.4(b)(3)."

# Identifying Attorney-Client Privilege

- There are basically four elements to establish the attorney-client privilege:
  - A confidential communication
  - Between an attorney and his or her client
  - Made in the course of legal representation
  - For the purpose of providing or obtaining legal advice

# Protecting Attorney-Client Privilege is Critical

The purpose of the Attorney-Client Privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

A lawyer's ability to provide sound legal advice to her client and advocate on her client's behalf "depends upon the lawyer's being fully informed by the client."

*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)

# Attorney-Client Privilege in Criminal Cases

"Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."
— *Patterson v. Illinois, 487 U.S. 285, 290 n.3 (1988)*

"It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel and his Fifth Amendment right to due process of law."
— *United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980)*

"[S]ubstantial questions of fundamental fairness are raised where, in connection with a criminal prosecution, the government invades the privilege . . . because the right to a fair trial could be crippled by government interference with the attorney-client privilege long before the formal commencement of a criminal proceeding."
— *United States v. Neill, 952 F. Supp. 834, 839 (D.D.C. 1997)*

# The Debate:
# How to Review Cohen's Documents for Privilege?

# SDNY's Initial Suggestion: Taint or Filter Teams

The Privilege Review Team, also known as the "taint team" or "filter team," is typically a group of prosecutors from the same office pursuing the case but who are not part of the investigative or prosecution team. These prosecutors are "walled off" from the investigation and prosecution and will conduct the initial review of seized materials to determine whether the documents:

- Fall within the scope of the search warrant;
- Are privileged as attorney-client communications or attorney work product and therefore should not be turned over to the investigating prosecution team; and
- Are otherwise privileged but have lost privilege protections because of an exemption to the privilege rule, such as the crime-fraud exception, which provides that privileged material made in furtherance of a crime is not protected.

# SDNY's Initial Suggestion: Taint or Filter Teams

Prosecutors must document the process that will be used to protect privilege when executing a search warrant on an attorney's office, which is typically through the use of "taint teams" or "filter teams":

- USAM §9-13.420(E) requires the proposed "taint team" review procedures to document:
  - Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: (a) disruption of the law firm's operation is minimized; and (b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation;
  - Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (*i.e.,* procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

# SDNY's Next Suggestion: Technology Assisted Review

**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

*The Silvio J. Mollo Building*
*One Saint Andrew's Plaza*
*New York, New York 10007*

April 26, 2018

**BY ECF AND HAND**
The Honorable Kimba M. Wood
United States District Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

**Re: *Cohen v. United States*, 18 Mag. 3161 (KMW)**

# SDNY Proposes Use of TAR

...poken to some of the candidates we proposed. In that regard, we att... Exhibit A a letter from retired Magistrate Judge Frank Maas describing his proposed process. The Government supports the process recommended in Judge Maas's attached letter, namely, use of a technology-assisted review ("TAR") process to identify potentially privileged material for review in an efficient manner, with an opportunity for Cohen and the intervenors to be heard and to supplement the documents they claim as privileged. Judge Maas recommends this method based on his experience as providing a "timely and cost-effective" way to accomplish the review. He also notes that TAR is "at least as effective as exhaustive manual review, and far more efficient."

# Judge Maas's Letter

The process would continue as long as privileged data is identified by the TAR system. Barring complications, the entire technology-assisted review of the electronic data could likely be accomplished in one to two weeks, and would not require the use of contract reviewers or associates. I believe this would be the most effective, efficient, and secure method to accomplish the privilege review in a timely and cost-effective manner. I note that the Government has indicated in a letter to Judge Wood, dated April 18, 2018 (ECF No. 16), that the electronic material will be produced on a rolling basis. If so, the review of that material using Professor Grossman's TAR tool could begin as soon as a reasonable amount of material is available.

# Judge Maas's Letter (continued)

said, while I recognize the importance of this undertaking, whether the Government or a master performs the initial review of the seized materials, the process of identifying those that are privileged and determining whether any privilege exceptions apply should not be inordinately expensive or time consuming. In that regard, even if no master is appointed, I would urge you to consider using Professor Grossman, or someone with similar skills, to assist you with the review.

I hope … ny questions

# Technology Assisted Review: or “TAR”

# TAR: What is it?

- An approach to document review that leverages a computer algorithm to make predictions on a larger document population by training the algorithm through an iterative review process
- Results in smaller subsets of relevant documents, enhancing the efficiency of the overall review process
- Often removes the need for large scale manual review

# TAR: How Can You Use It?

- TAR can be used in a wide variety of litigations and investigations.
  Can be used to:
  - Cull populations of documents to a manageable number
  - Prioritize documents to see likely relevant documents up front
  - Quality control measure for manual reviewers
  - Identify relevant, potentially privileged, potentially confidential and key documents
- **Producing party is in the best position to decide whether TAR is appropriate**
  ***See*** **Sedona Principle 6 ("Responding parties are best situated to evaluate the procedures, methodologies, and technique appropriate for preserving and producing their own Electronically Stored Information.")**

# TAR: An Evolving Tool

TAR 1.0 vs. TAR 2.0

Stored and reusable models

Analytics vs. Predictive Coding

Knowledge & Application

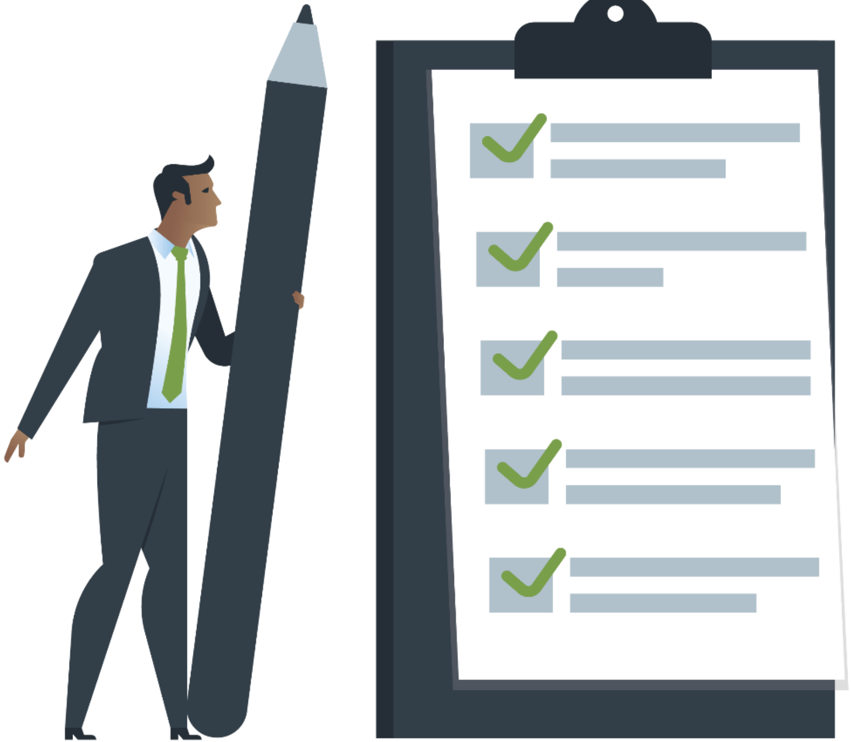
Levels of Disclosure

Adoption & Acceptance

Changes in Barriers to Utilizing Technology

# TAR: Practical Considerations

- Types of data
- Case type
- Case goals
- Jurisdiction
- Cost modeling/case size
- Civil vs. Criminal case



# Potential Pitfalls When Using TAR for Privilege Review in Criminal Cases

- **Potential violations of a defendant's constitutional rights by using TAR as the sole arbiter of privilege determinations**
  - Defense counsel is not able to review documents before they are sent to the prosecutor
  - Risk that privileged information ends up in the prosecutors' hands
  - Even with taint teams, courts have cautioned against liberal use because they present inevitable and reasonably foreseeable risks that privileged information may be leaked to the prosecution team.
    See *United states v. Renzi*, 722 F. Supp.2d 1100, 1112 (D. Ariz. 2012)
    (citing *In re Grand Jury Subpoena*, 454 F.3d 511, 523 (6th Cir. 2006)

# Conclusion

1. TAR is a useful tool
2. Producing party is in the best position to decide whether TAR is appropriate (Sedona Principle 6)
3. In criminal cases, fundamental fairness dictates that defendant should have an opportunity to decide whether to review documents before turning them over to the prosecution
4. Prosecutors should be concerned about situations where privileged communications end up in their hands

# TAR: Glossary of Terms

- **Training** – Process of training the TAR algorithm to make predictions on the overall data set and subsequently calibrate those predictions
- **Recall** – Percentage of retrieved relevant documents from the larger data population
- **Precision** – Percentage of retrieved documents that are in fact relevant
- **Validation** – process of verifying that the result aligns with the overall expectation. This is usually achieved through targeted or statistical sampling

# TAR: Glossary of Terms

- **Seed Set** – A sample of the overall data set used to measure the performance of the predictive coding process and algorithm (used mostly in TAR 1.0)
- **Confidence Level** – Probability that the measured value falls within the overall range of values
- **Margin of Error** – Maximum expected difference of the confidence level that allows for some level of change
- **Stratified Sample** – Selects documents based on their level of conceptual similarity to other documents, ensuring samples from the largest concept clusters are included

orrick