October 13, 2023

Re: JIC Advisory Opinion 2023-22

Dear   :

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows:

You have received several inquiries from judges about the use of emerging artificial intelligence (AI) technology and the potential use thereof in the performance of their duties. You believe the appropriate use of AI could be a "workflow gamechanger" that leads to "greater efficiency in the courts." You acknowledge that much of the available technology is "new, still under development and largely untested." You are concerned about the ethical implications concerning a judge's use and application of AI. Specifically, you want to know if a judge can use AI to conduct legal research and to draft documents such as orders and opinions. You also want to know if a judge can use AI to reach decisions in cases? Lastly, you want to know whether there are other ethical issues a judge should consider before utilizing AI?

To address your question, the Commission has reviewed Rules 1.2, 2.1, 2.2, 2.4(B), 2.5(A) and 2.7 of the Code of Judicial Conduct which state:

Rule 1.2 – Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 2.1 – Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

Rule 2.2 – Impartiality and Fairness

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartiality.

Rule 2.4 – External Influences on Judicial Conduct

(B)   A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

Rule 2.5 – Competence, Diligence, and Cooperation

(A)   A judge shall perform judicial and administrative duties, competently and diligently.

Rule 2.7 – Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

The Comments to the various Rules provide some instruction to the issues at hand. The Comments to Rule 1.2 state:

[1]   Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2]   A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

[3]   Conduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary. . . .

[4]   Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5]   Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Comment [1] to Rule 2.2 states that "[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded. Comment [2] provides that "a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Comment [3] notes that "a judge sometimes may make good faith errors of fact or law. Errors of this kind do not violate this Rule." Comment [1] to Rule 2.4 states:

An independent judiciary requires that judges decide cases according to the law and facts without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Comment [1] to Rule 2.5 provides that "[c]ompetence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office." Comment [2] states that "[a] judge should seek the necessary docket time, court staff, expertise and resources to discharge all adjudicative and administrative responsibilities." Comment [3] states that "[p]rompt disposition of the court's business requires a judge to devote adequate time to judicial duties . . . and expeditious in determining matters under submission."

Black's Online Law Dictionary 2nd Edition defines "AI" as "a software used to make computers and robots work better than humans. The systems are rule based or neutral networks. It is used to help make new products, robotics, [and] human language understanding." Webster's Online Dictionary gives two definitions for the term "AI" The first is "a branch of computer science dealing with the simulation of intelligent behaviors in computers." The second definition, which is the most instructive, states that AI is the "capability of a machine to imitate intelligent human behavior."

Whether you realize it or not, you already use some form of artificial intelligence in your everyday life: facial recognition on your cell phone; smart email categorization; suggestions from Facebook of new friends; recommendations for what to watch on streaming apps; and navigation sites such as Google Maps. The list is endless. AI has even taken hold within the legal community. In April 2023, it was announced that GPT-4, an AI component, took and passed all parts of the Uniform Bar Exam. The pass rate was in the 90th percentile. Legal search engines like Westlaw, LexisNexis or casetext use AI to let lawyers find more relevant case law for their briefs or correct case sites. The use of E-discovery is just another example of AI encroachment in the law.

So, what does the use of AI mean for judges? Judges have a duty to remain competent in technology, including AI. The duty is ongoing. A judge may use AI for research purposes. Judges must realize though that no AI program is perfect. Older models that rely on keywords to conduct a search only produce results that include the keyword itself. It does not consider concepts or context. Such searches may also fail to produce some relevant results. Keyword searches, while proper and useful, can result in false positives (irrelevant documents flagged because they can contain a search term) or false negatives "relevant documents not flagged since they do not contain a search term. Newer models which rely on concepts instead of words fall into two categories, general use AI and specific use AI. General use AI may produce inaccurate or offensive information. Specific use AI is much better. It reads and understands domain-specific content and usually has verifiable responses. It also tends to be private and secure while general use AI is not. However, specific use AI may have downsides if used for other than its intended purpose.

A judge should **NEVER** use AI to reach a conclusion on the outcome of a case. This is because of perceived biases that may be built into the program. Judges should think of AI as a law clerk, who is often responsible for doing a judge's research. Importantly, the law clerk never decides the case. The judge alone is responsible for determining the outcome of all proceedings. At the end of the day if the judge somehow violates the Code of Judicial Conduct in reaching a conclusion on the case, he/she cannot say, "the law clerk made me do it" nor can he/she say, "AI made me do it." The responsibility for the finished product rests solely with the judge. Therefore, just as a judge would do with a law clerk's work, he/she must check the final draft of any written decision to make sure it contains the most current case law and is error free.

The gray area revolves around the use of drafting AI to prepare an opinion or order. It is one thing to use a product like Microsoft Word that corrects spelling, punctuation, grammar, maintains a built-in thesaurus and provides an editor's score for the finished document. Those products are perfectly acceptable. However, the use of an AI product to actually draft the findings, conclusions and ultimate decision should be met with extreme caution. The drafting product may have built in biases or over time may

develop perceived biases based on the judge's thought process. AI should never decide the conclusion. As he/she would with a law clerk, the judge must decide which way he/she wants to rule and let the program know in advance to ensure that the product conforms with the decision rendered by the judge. Like the final draft of the law clerk, the judge must review it to ensure that it is what the judge wishes to convey to the parties in any given case and make changes where needed.

Ongoing ethical concerns involve confidentiality pertaining to certain cases like juvenile or abuse and neglect matters. Judges are responsible for ensuring confidentiality and should research the AI product with that in mind and refrain from inputting information that may retain and/or disclose private information. The potential for plagiarism is another possible concern when using AI, so again, it is important to use AI cautiously when drafting documents and to double check the finished product. The time saved by using AI may be non-existent if the judge must spend hours ensuring appropriate attribution has been given.

Based upon the foregoing, the Commission is of the opinion that a judge may use AI for research purposes but may not use it to decide the outcome of a case. The use of AI in drafting opinions or orders should be done with extreme caution. The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,

Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat