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SYLLABUS

Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence.

References: MCJC 2(B), (C), MCJC 3(A)(1), (B)(1), RI-381, *Mata v Avianca, Inc.*, 1:22-cv-01461 (S.D.N.Y.), July 7, 2023.

TEXT

Judicial officers, like lawyers, have an ethical obligation to maintain competence with and further educate themselves on advancing technology, including but not limited to artificial intelligence (AI). Rule 1.1 of the Michigan Rules of Professional Conduct (MRPC) provides that “[a] lawyer shall provide competent representation to a client.” The comment to MRPC 1.1 expressly references technological competence.^[1] This need for competence applies to judicial officers as well. Specifically, Canon 3(A)(1) of the Michigan Code of Judicial Conduct provides that “[a] judge should be faithful to the law and maintain professional competence in it.” As the use of technology increases, so does the requirement to maintain competence in what is available, how it is used, and whether the use of the technology in question would affect a judicial decision.

Relevant Code Provisions

Canon 2. A judge should avoid impropriety and the appearance of impropriety in all activities.

- B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person’s race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.
- C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.

Canon 3. A judge should perform the duties of office impartially and diligently.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- i. A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism. ...

B. Administrative Responsibilities.

- i. A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

DISCUSSION

Artificial intelligence (AI) is not a single piece of hardware or software but a multitude of technologies that provide a computer system with the ability to perform tasks, solve problems, or draft documents that would otherwise require human intelligence. The increasing use of AI and other technological programs and devices requires judicial officers to understand how these tools will affect their conduct and docket in accordance with Canon 3(A)(1). Canon 2(B) provides that, in relevant part (emphasis added):

... At all times, the conduct and manner of a judge should promote public confidence in the integrity and **impartiality** of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person **fairly**, with courtesy and respect.

Further, Canon 2(C) provides that, in relevant part (emphasis added):

A judge should not allow family, social, or other relationships to **influence** judicial conduct or judgment. ...

Canon 2(B) and (C) could be triggered, for example, if a judicial officer uses an AI solution that is considered partial or unfair and may influence the judicial officer's judgment.^[2] This could occur if the tool's algorithm or training data creates bias. Specifically, if an AI tool's algorithm's output deviates from accepted norms, would the output influence judicial decisions in violation of Canon 2(C)? An algorithm may weigh factors that the law or society deem inappropriate or do so with a weight that is inappropriate in the context presented. This is but one example of why knowledge of technology and AI is essential. AI does not understand the world as humans do, and unless instructed otherwise, its results may reflect an ignorance of norms or case law precedent. Competency with advancing technology is further required by Canon 3(B), which requires judicial officers to "maintain professional competence in judicial administration." Legal knowledge, skills, thoroughness, and preparation are required for judicial officers to perform their duties. This includes knowing the benefits and risks associated with the technology that judicial officers and their staff use daily, as well as the technology used by lawyers who come before the bench.

As the legal community has seen, there are times when AI may be used improperly, i.e., when a lawyer submits AI-generated filings that are found to be incorrect.^[3] Judicial officers have expressed the need to parse cases and rules to ensure that filed pleadings are accurate for them to rely on and to ensure their judgments and orders are issued based on truthful pleadings and arguments. To ensure this, some courts^[4] have issued rulings or orders regarding the use of AI, such as requiring attorney review, placing the responsibility on lawyers to notify the court when using AI, and provide confirmation of the accuracy of the work done by the AI tool. Other judges have gone further and required that attorneys certify that confidential information was not disseminated to an AI tool and that lawyers outline each section that uses generative AI.^[5] However, there are times when, properly used, AI is an asset for the legal community, such as creating accurate content for pleadings and legal summaries, providing efficiency in docket management and legal research, and supplying answers to questions based on algorithms used by technological programs. Judges must determine the best course of action for their courts with the ever-expanding use of AI. As stated in *The Judge's Journal*, "[w]hat all experts agree is that artificial intelligence is not equivalent to human intelligence – and especially the intelligence that we expect from judges."^[6]

Judges need to understand artificial intelligence and the deep learning it eventually acquires for the following reasons:

- Advancing AI will eventually lead to inquiry and adjudication of AI-related technologies and their use in other matters before the court.
- Most artificial intelligence programs continue to learn, which requires adjustments in algorithms and formulas as they receive new and additional data. Due to this learning capacity, AI applications may need to be re-litigated or re-evaluated on an ongoing basis, even when there is precedent addressing the same AI tool.
- Due process will be a challenge when dealing with AI tools, as a litigant cannot question the algorithms and the deep learning the AI tool acquires over time.

Judges must not only understand the legal, regulatory, ethical, and access challenges associated with AI, but they will need to continually evaluate how they or parties before them are using AI technology tools in their own docket.^[7] This could include the use of basic docket management and courtroom tools (AI transcribing tools) and risk assessment tools (in making decisions on sentencing, pretrial release/bond conditions, probation, and parole). Judges must also understand the science and law relating to electronically stored information and e-discovery. Judicial use of AI must distinguish between using an AI application to decide and using AI to inform a decision.

AI is becoming more advanced every day and is rapidly integrating within the judicial system, which requires continual thought and ethical assessment of the use, risks, and benefits of each tool. The most important thing courts can do today is to ask the right questions and place their analysis and application of how they reached their conclusion on the record.

CONCLUSION

Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and understand AI's ethical implications to ensure efficiency and quality of justice.

[1] See Ethics Opinion RI-381 for the analysis regarding lawyers having an ethical obligation to understand technology.

[2] See *Artificial Intelligence: Examples of Ethical Dilemmas*, United Nations Educational, Scientific and Cultural Organization (UNESCO), (April 21, 2023)

[3] *Mata v Avianca, Inc.*, 1:22-cv-01461 (S.D.N.Y.), July 7, 2023.

[4] See examples in Texas and Illinois.

[5] See Judge Stephen Vaden of the U.S. Court of International Trade's Order.

[6] Greenstein, *AI and a Judge's Ethical Obligations*, The Judge's Journal (February 3, 2020).

[7] See American Bar Association, House of Delegates, Resolution 112 (Aug. 12-13, 2019) (urging courts "to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI").