

The Legal Ethics of AI for Judges & Attorneys: Or I'm Sorry Pal, You just Shouldn't do That

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Disclaimer

- *Disclaimer: The views in this presentation are those of the author and do not necessarily reflect the official policy or position of the United States Department of Veterans Affairs or the United States Government (USG).*

North Carolina CLE Rules

- “Technology training” shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B1320(a)(11), or successor statutory provision, for a definition of “information technology”), including education on an information technology product, device, platform, application, or other tool, process, or methodology.

NC Definition:

Information Technology

- (11) **Information technology or IT.** – Set of tools, processes, and methodologies, including, but not limited to, coding and programming; data communications, data conversion, and data analysis; architecture; planning; storage and retrieval; systems analysis and design; systems control; mobile applications; and **equipment and services employed to collect, process, and present information to support the operation of an organization.** The term also includes office automation, multimedia, telecommunications, and any personnel and support personnel required for planning and operations

Florida Rules of Professional Conduct

- Maintaining competence:
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, **including an understanding of the benefits and risks associated with the use of technology**, and comply with all continuing legal education requirements to which the lawyer is subject.

Florida CLE Rules

- (g) **Technology**. Credit may be awarded for courses that include information on technology tools, programs, or applications to assist lawyers in their law practice....
- Technology topics must focus on or highlight their use in the practice of law.
- The content of a course on technology is generally eligible for credit if it:
- (2) is **tailored primarily for lawyers** (e.g., **adherence to the Rules of Professional Conduct when using the technology**, the risks and/or benefits or using the technology as a lawyer, and/or teaching about or discussion of situations encountered when a lawyer uses the technology in conjunction with the lawyer's practice); or,

Maine CLE

- RULE 5. Continuing Legal Education ("CLE") (a) Purpose.
- To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, attorneys must be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. The purpose of minimum continuing legal education (MCLE) requirements is to promote and sustain competence and professionalism and to ensure that attorneys remain current on the law, law practice management, and technology in our rapidly changing society. These rules establish minimum requirements for continuing legal education, accreditation criteria, and compliance procedures.

ABA 2021 Survey

- When asked if lawyers were required to stay up-to-date on benefits and risks of technology as part of jurisdiction's competency requirements:
 - 68% Yes
 - 14% No
 - 19% I don't know

Ask Chat GP

What are the legal ethics reqs for judges to use AI?

The legal ethics requirements for judges to use AI vary depending on the jurisdiction and the specific circumstances. However, some general considerations and principles apply:

1. **Impartiality and Fairness:** Judges must ensure that any AI tool they use does not introduce bias or prejudice into the decision-making process. They should verify that the AI system is trained on unbiased data and that its algorithms produce fair and equitable results.
 2. **Transparency:** Judges should understand how the AI system works and be able to explain its reasoning and outcomes. Transparency in AI systems is crucial for maintaining public trust in the judicial process and ensuring accountability.
 3. **Accountability:** Judges remain ultimately responsible for the decisions they make, even when assisted by AI. They must exercise oversight and ensure that the AI system is functioning correctly and in accordance with legal and ethical standards.
 4. **Confidentiality:** Judges must ensure that any data used by AI systems is kept confidential and is used only for lawful purposes. They should be mindful of privacy concerns and comply with relevant laws and regulations governing data protection.
 5. **Competence and Training:** Judges should have the necessary competence and training to effectively use AI tools in their decision-making processes. They should stay updated on developments in AI technology and undergo appropriate training to understand how to use AI responsibly and ethically.
 6. **Due Process:** Judges must uphold due process rights and ensure that parties appearing before them have a fair opportunity to present their case and challenge any evidence, including evidence generated or analyzed by AI systems.
 7. **Independence and Integrity:** Judges must maintain their independence and integrity when using AI tools. They should avoid any conflicts of interest or improper influences that could compromise the fairness and impartiality of their decisions.
 8. **Regulatory Compliance:** Judges should comply with any applicable laws, regulations, and ethical guidelines governing the use of AI in the legal profession. They should be aware of any specific rules or standards established by judicial authorities or professional organizations regarding the use of AI tools.
- It's essential for judges and legal professionals to engage in ongoing discussions and collaboration with experts in AI ethics, legal ethics, and technology to address emerging challenges and ensure that AI is used responsibly and ethically in the administration of justice

Ask Chat GP

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The legal ethics requirements for judges to use AI vary depending on the jurisdiction and the specific circumstances. However, some general considerations and principles apply:

1. **Impartiality and Bias:** Judges must ensure that the AI system does not introduce bias or prejudice into the judicial process. This includes verifying that the AI system is trained on unbiased data and that its results are transparent and explainable to maintain public trust in the judiciary.
 2. **Transparency and Explainability:** Judges should ensure that the AI system's reasoning is transparent and explainable to the parties involved, as this is essential for maintaining public trust in the judicial process.
 3. **Accountability:** Judges must remain accountable for the decisions made by the AI system. This involves ensuring that the AI system is used as a tool to assist in decision-making, rather than as a replacement for the judge's own judgment.
 4. **Privacy and Data Security:** Judges must ensure that the AI system complies with applicable privacy and data security laws. This includes implementing robust security measures to protect sensitive case information and ensuring that data is stored securely and accessed only by authorized personnel.
 5. **Access to Justice:** Judges should consider the impact of AI on access to justice. While AI can potentially streamline the judicial process and reduce costs, it is important to ensure that the use of AI does not create barriers for parties who may not have the resources to engage with AI-powered systems.
 6. **Continuing Education:** Judges should engage in ongoing education and training to stay current on the latest developments in AI technology and legal ethics. This may include attending workshops, seminars, or courses specifically designed for judges on the use of AI in the courtroom.
 7. **Regulatory Compliance:** Judges must ensure that the use of AI complies with applicable regulatory requirements. This includes staying informed about any new regulations or guidelines issued by judicial ethics committees or other relevant bodies regarding the use of AI in the judiciary.
- It's essential for judges to engage in ongoing discussions and collaboration with experts in AI ethics, legal ethics, and technology to address emerging challenges and ensure that AI is used responsibly and ethically in the administration of justice.

Thank you
And
have a good day!

The birthday party in the woods

- Now that AI can do these slides we can take more time to relax...



Sources of Law

- Judicial Canons
- CLE Requirements
- Bar Rules
- Cases & Controversies

4 (or 5) Judicial Canons



Code of Conduct for US Judges

- Canon 1: A Judge Should Uphold the **Integrity and Independence** of the Judiciary
- Canon 2: A Judge Should **Avoid Impropriety** and the Appearance of Impropriety in All Activities
- Canon 3: A Judge Should Perform the Duties of the Office **Fairly, Impartially and Diligently**
- Canon 4: A Judge May Engage in Extrajudicial **Activities That Are Consistent** with the Obligations of Judicial Office
- Canon 5: A Judge Should **Refrain from Political Activity**

Army

- The “*Code of Judicial Conduct for Army Trial and Appellate Judges*,” dated 16 May 2008, (available on JAGCNet), is applicable to all trial and appellate military judges and military magistrates.
- Personnel involved in court-martial proceedings are encouraged to look as well to other recognized sources (for example, decisions issued by State and Federal courts or ethics opinions issued by the American Bar Association(ABA) and the States) for guidance in interpreting these standards and resolving issues of professional responsibility
- Army Reg 27-10, Military Justice, 20 Nov 2020, para 5-10.b & c

Army/ 4 Judicial Canons

- CANON 1 A JUDGE SHALL UPHOLD AND PROMOTE THE **INDEPENDENCE, INTEGRITY, AND IMPARTIALITY** OF THE JUDICIARY, AND SHALL **AVOID IMPROPRIETY** AND THE APPEARANCE OF IMPROPRIETY.
- CANON 2 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE **IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**.
- CANON 3 A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO **MINIMIZE THE RISK OF CONFLICT** WITH THE OBLIGATIONS OF JUDICIAL OFFICE.
- CANON 4 A JUDGE SHALL **NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY** THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

ABA Model Rule 1.1, Competence

- **Rule 1.1 COMPETENCE**
- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.
- Is this limited to “legal knowledge”?
- What about subject matter knowledge?

Competence – Comment 8

- Comment 8: Maintaining Competence
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including **the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Continue
to learn...

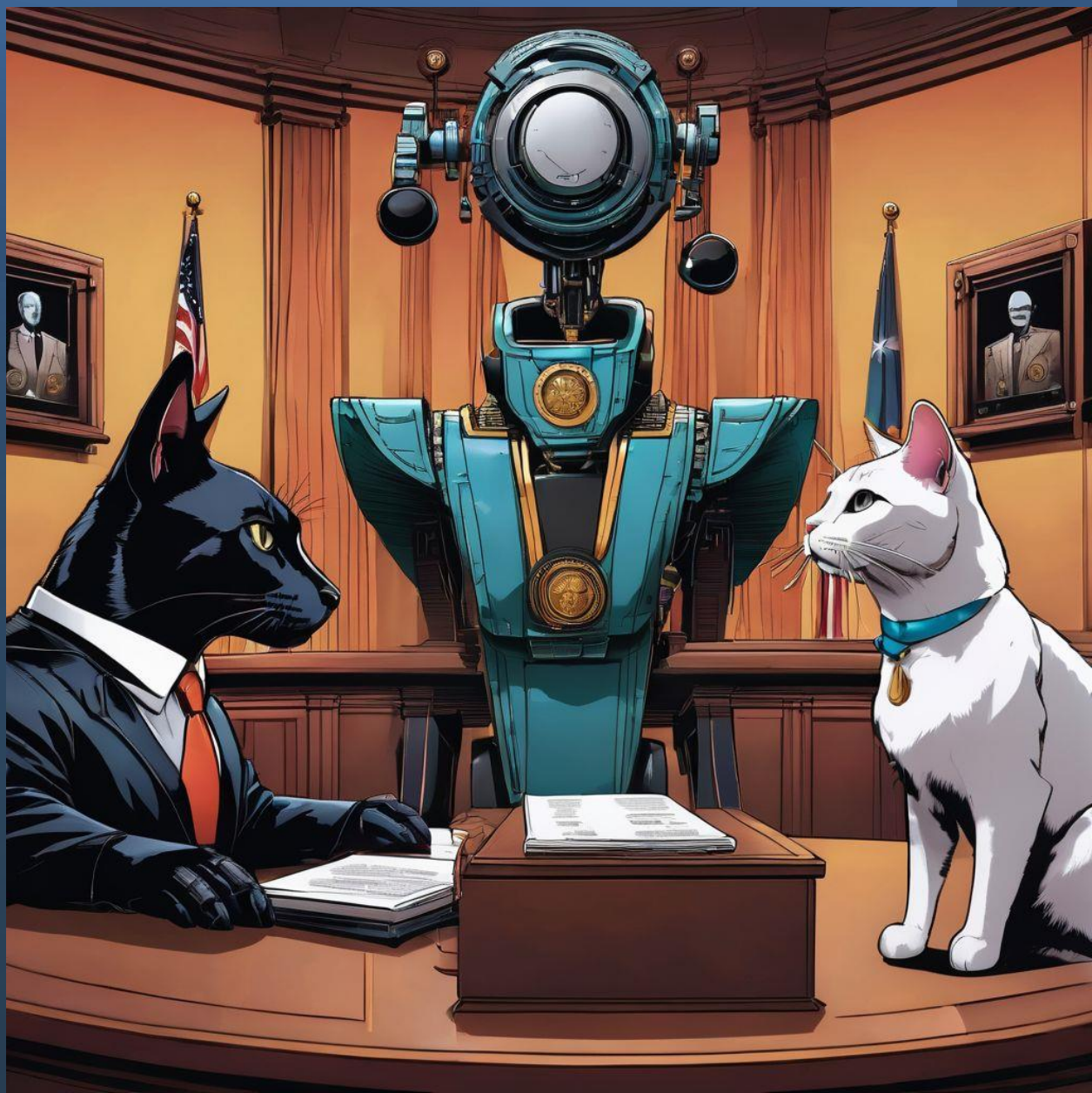


What is AI?

- The term “artificial intelligence” or “AI” has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.
- Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.

Traditional AI and Generative AI

- Traditional AI
 - Analyze data and make predictions
 - Pattern recognition
- Generative AI
 - Creates new data based on training data
 - Creation of something new – text, code, pictures



DC Bar Rule 3.3: Candor to Tribunal

- (a) A lawyer shall not knowingly:
 - (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6;
 - (4) Offer evidence that the lawyer knows to be false, except as provided in paragraph (b). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (c) The duties stated in paragraph (a) continue to the conclusion of the proceeding.
- (d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

DC Bar Rule 8.4 MISCONDUCT

- It is professional misconduct for a lawyer to:
- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) Engage in conduct that seriously interferes with the administration of justice;
- (e) State or imply an ability to influence improperly a government agency or official;
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Mata v. Avianca, Inc

- In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis.
- Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.
- **But** existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. ...Peter LoDuca, Steven A. Schwartz and the law firm of Levidow, Levidow & Oberman P.C. (the “Levidow Firm”) (collectively, “Respondents”) abandoned their responsibilities when **they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.**

Mata v Avianca, Inc.

- “I declare under penalty of perjury that the foregoing is true and correct.” (*Id.*)
- Before executing the Affirmation, Mr. LoDuca did not review any judicial authorities cited in his affirmation.
- Defendant has been unable to locate most of the case law cited in Plaintiff's Affirmation in Opposition, and the few cases which the undersigned has been able to locate do not stand for the propositions for which they are cited.

Ignorance is not a defense

- As it was later revealed, Mr. Schwartz had used ChatGPT, which fabricated the cited cases.
- Mr. Schwartz testified at the sanctions hearing that when he reviewed the reply memo, he was “operating under the false perception that this website [*i.e.*, ChatGPT] could not possibly be fabricating cases on its own.”
- He stated, “I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view.”
-
- “My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up.”

Are you telling me the truth?

- The First OSC caused me to have doubts. As a result, I asked ChatGPT directly whether one of the cases it cited, “Varghese v. China Southern Airlines Co. Ltd., 925 F.3d 1339 (11th Cir. 2009),” was a real case. Based on what I was beginning to realize about ChatGPT, I highly suspected that it was not. However, ChatGPT again responded that Varghese “does indeed exist” and even told me that it was available on Westlaw and LexisNexis...

Not just these attorneys

Not just this AI platform

- Michael Cohen, former attorney for former President Trump, used Google Bard and provided fake case cites in motion
- Attorney J.L used ChatGPT to identify precedent but did not read or otherwise confirm the validity of the (non-existent) decision she cited

Don't Lie about your bad decision

- After filling in the template with case-specific details, Crabill wanted to bolster his legal citations. He used the AI program ChatGPT to search for cases that appeared to support his client's position. In the belief that he was using his client's money efficiently and reducing his own stress close to the deadline, he added the AI case citations to his brief without verifying their accuracy.

10:02 Respondent: I think all of my case cites from ChatGPT are garbage...I can't even find the cases in Lexis.

10:03 Paralegal: Did you not check them after it gave them to you?

10:03 Respondent: no. like an idiot.

10:12 Paralegal: Are you going to withdraw it?

10:12 Respondent: I have no idea what to do. I am trying to find actual case law in our favor now to present to the judge. I don't have time for this...

Now you have the time

- At the hearing the attorney blamed the mistake on an legal intern
 - Who may or may not have existed
- Blamed his untruthful response on being panicked
- No idea that AI technology could be deceptive
- 2 year suspension
 - (90 days served w/probation)

Standing Court Rules on AI

- Attorneys require to certify not drafted by generative AI or checked on traditional legal databases by a human
- These platforms are incredibly powerful and have many uses in the law, but...
- These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations.

Sign on the Line and select all the images showing traffic lights

- I further certify that no portion of any filing in this case will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a human being before it is submitted to the Court.
- I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.

Telephones



Technological Innovation

- Cordless/Cellphones
 - In early 1990s this was a new fangled invention
 - Several states limited attorney/client discussion on cordless and cellphones
 - Permitted if Attorney used a Scrambler (NH 1991)
 - Permitted if Attorney obtains informed consent from client to include briefing interception risk (MA 1994)
 - Modern rules:
 - Allowed absent extraordinary circumstances suggesting risk of interception (DE 2001)

Smartphones and Security

- These are the days where a lawyer can hold their entire practice in the palm of their hand.
- The advent of sophisticated case management software has allowed lawyers to conduct their practice, from client intake to even presenting trial exhibits in the courtroom.
- Despite this, 2% of respondents indicated that they do not own a smartphone. There was no follow-up question as to why practitioners did not own a smartphone, but it is a question certainly worth examining.

Traditional AI Technology-Assisted Review (TAR)

- Document review
 - Learning pattern recognition for human reviewers
 - Searching for key words, phrases, interactions
- Identify key documents
- Flag documents for privilege review
- Review legal bills

My robot passed the bar

- Chat GPT-4 took the entire 2023 Uniform Bar Exam
- Passed with approximately 297 points
- Multi-choice Multistate Bar Exam (MBE), open-ended multistate essay exam (MEE) and Multistate Performance Test (MPT)

Generative AI Attorney:

- Please write a legal opinion on whether sentence appropriateness review for segmented sentencing must consider each segmented sentence to confinement, or instead only the overall sentence

****Legal Opinion: Consideration of Segmented Sentencing in Appropriateness Review****

- ****Issue:****
- The issue at hand is whether the appropriateness review for segmented sentencing should assess each segmented sentence to confinement individually or consider only the overall sentence.
- ****Background:****
- Segmented sentencing refers to the practice of imposing separate sentences for distinct offenses or counts, which may result in consecutive or concurrent periods of confinement. The appropriateness review involves evaluating the reasonableness and proportionality of the sentence imposed in relation to the severity of the offense(s) and the defendant's culpability.
- ****Analysis:****
- In determining the appropriate scope of the appropriateness review for segmented sentencing, it is imperative to consider both the individual segments of confinement and the aggregate effect of the sentences imposed. This approach aligns with principles of fairness, proportionality, and the individualized assessment of the defendant's circumstances.
- 1. ****Individual Segment Consideration:****
- Each segmented sentence to confinement represents a discrete punishment for a specific offense or count. Therefore, the appropriateness review should assess the severity and proportionality of each segment in isolation, taking into account factors such as the nature and gravity of the offense, the defendant's role and culpability, mitigating or aggravating circumstances, and any relevant statutory sentencing guidelines or principles.
- 2. ****Aggregate Effect Evaluation:****
- At the same time, the appropriateness review should also consider the cumulative impact of all segmented sentences on the defendant's overall period of confinement. This involves examining whether the combined duration of confinement is excessive or disproportionate in relation to the totality of the defendant's conduct and criminal history.
- 3. ****Judicial Discretion and Case-Specific Analysis:****
- The appropriateness review requires a nuanced and case-specific analysis that allows for judicial discretion in weighing the relevant factors and arriving at a fair and just outcome. Judges should consider the unique circumstances of each case, including the defendant's personal background, the nature and circumstances of the offenses, and any applicable sentencing principles or guidelines.
- ****Conclusion:****
- In conclusion, the appropriateness review for segmented sentencing should encompass both the individual segments of confinement and the overall sentence. By evaluating each segmented sentence in conjunction with the aggregate effect of all sentences imposed, courts can ensure that the sentencing outcome is fair, proportionate, and reflective of the defendant's culpability and the severity of the offenses committed.
- This approach promotes consistency, transparency, and adherence to the principles of justice in the sentencing process, thereby upholding the integrity of the criminal justice system.
- This legal opinion is provided for informational purposes only and does not constitute legal advice. Individuals seeking legal guidance on specific cases or issues should consult with qualified legal professionals.

Michigan Judicial Ethics Opinion

- 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.
- AI could affect impartiality and fair treatment
- AI can be biased

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

Questions?

