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Artificial Intelligence Update

BY JUDGE E. KENNETH WRIGHT, JR., JUDGE MICHAEL CHMIEL, & EDWARD CASMERE

Since it was announced that artificial intelligence ("AI") could not only take the multistate bar exam, but pass it with 90 percent accuracy, the legal profession has been on guard. Overnight AI went from an amorphous concept that may impact *other* professions to a potential threat right at our backdoor.

While AI is not prosecuting cases yet, AI systems have progressed. With these technological advancements comes additional concerns regarding accuracy of information, privacy, and means to regulate the field. This article introduces various AI advancements specifically made within the legal fields, as well as steps governments and private sector groups have taken to protect against the above referenced concerns. Finally, it explores

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Judicial Code … Judicial Elections … What You Need to Know for 2024

BY ANN JORGENSEN

The Illinois Judicial Ethics Committee (IJEC) is comprised of members nominated by the Chicago Bar Association, Illinois State Bar Association, and Illinois Judge's Association. IJEC is a confidential resource for judges seeking advice on ethics as it relates to the Code of Judicial Conduct, and it has issued ethics opinions based on the former code since 1992. All that changed when a new Illinois Code of Judicial Conduct (Code) was approved by the Illinois Supreme Court in July 2022. It became effective on January 1, 2023.

There are a number of significant changes in the Code. As we approach the 2024 election cycle, it is important to recognize that judicial campaigns are governed by the Election Code, as well as the Code. Specifically, for judicial candidates and non-candidate sitting judges, the Code distinguishes permitted political conduct from prohibited political conduct. These changes prompted a series

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Artificial Intelligence Update

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ways the legal system can help regulate AI—specifically generative AI.

AI Specific to the Legal Profession

While ChatGPT garners the most media attention, legal-centric AI applications and programs exist such as Harvey.AI, Relativity, Logikcull, LawGeex, and Disco.[1] Generally speaking, these vendors offer generative AI that tackle fundamental legal tasks such as legal research, e-discovery, and document review.[2]

LawGeex goes so far as to describe its services "as an extension of your legal team." That its AI goes beyond simply redlining mistakes; can actually understand "the contractual context as well as [your firm's] position. . . [and negotiate] with the counterpart – just like an experience attorney but with enhanced speed and accuracy."[3]

Harvey AI is an AI startup, the brainchild of a former securities and antitrust litigator and AI research scientist, Winston Weinberg and Gabriel Pereyra respectively.[4] Self-described as a "co-pilot for lawyers,;" this product is designed to automate legal research and some document drafting while simultaneously learning any given firm's own work products and templates, so it becomes 'smarter' as to that firm's particular practice, tone, and content.'"[5] The first law firm to subscribe to Harvey's services was London based Allen & Overy. David Wakeling, head of the firm's Markets Innovation Group commented, "'. . . I have never seen anything like Harvey. . . Harvey can work in multiple languages and across different practice areas, delivering unprecedented efficiency and intelligence.'"[6] Another interesting aspect of Harvey AI is its marketing and branding. Unlike other legal AI websites, Harvey's website has almost no information about its services, but simply invites interested parties to join a waitlist.[7]

These are just two examples of the AI technologies geared to service attorneys and legal professionals.

There have also been cases where attorneys have gotten in trouble with the use of AI. One instance is *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), an Order to Show Cause was issued when plaintiff's counsel's response to a Motion to Dismiss was filled with fictitious case cites. Plaintiff's counsel states that these nonexistent cases were supplied by ChatGPT.

Concerns: Accuracy and Regulations

Technological advancements are not without their own challenges and concerns. General areas of concern include: accuracy of information, privacy, and lack of regulations governing this field.

- Accuracy, Privacy, and Copyright: At this point, most have learned that everything on the internet is not real or even accurate. There are stories aplenty of attorneys utilizing AI only to find cited cases do not actual exist. Concerns have grown from accuracy of information and veracity of photos and videos. In fact, Congress recently expressed concern regarding AI-generated election ads and deepfake videos.[8] Which opens the door for privacy and copyright concerns. The prevalence of social media makes images, voices, and content very accessible. Moreover, how will current laws apply to work created by generative AI. At a minimum, the general public must be told when they are viewing generative AI content, and there must be a way to ensure compliance.
- Lack of Regulation: Recognizing a lack of AI regulation, governments as well as the private sector groups are trying to establish a legal framework to address AI. The United States, Canada, and the European Union have all taken such steps to varying degrees of success. In addition, several private companies have formed their own watch groups to help protect against

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harmful AI.

In the United States, various initiates, acts, and orders have been entered to address AI; however, as of today, no federal legislation exists. As early as February 11, 2019, former President Donald Trump signed an Executive Order creating the "American AI Initiative" to help ensure an AI-ready workforce and to supposedly keep America at the forefront of this technology.[9] Throughout 2021, federal agencies made various presentations regarding principles, ethical considerations, and ways to approach and use AI.[10] Effective January 1, 2021, the National Artificial Intelligence Initiative Act of 2020 promulgated a definition of AI, introduced a "National Artificial Intelligence Initiative" which again instructed the federal government to support AI initiatives.[11] In October 2022, the White House rolled out its "AI Bill of Rights," and in early 2023, Biden-Harris Administration promulgated three principles to help ensure the responsible creation of AI: safety, security, and trust.[12] Since its inception, 15 companies voluntarily committed to act with these principles in mind. In July 2023, the following seven companies voluntarily committed to take action ensuring their products adhere to the three principals – Amazon, Anthropic, Google, Inflection, Meta, Microsoft, and OpenAI.[13] In September 2023, a second wave of companies – Adobe, Cohere, IBM, Nvidia, Palantir, Salesforce, Scale AI, and Stability – agreed to do the same. [14] Notably, these are pledges with no enforcement measures, akin to a pinky promise.

In June 2023, Senate Majority Leader Chuck Schumer ("Schumer") launched an effort to establish rules on AI to address national security and education via his SAFE Innovation Framework for AI policy ("SAFE Framework").[15] The SAFE Framework focuses on Schumer's policy objectives: Security, Accountability, protecting our Foundation, Explainability, and Innovation. A bipartisan effort, Schumer asked the leaders to work alongside his peers, in what he termed "AI Insight Forum," to explore issues, answer questions, and develop the Senate's policy response. Insight Forum topics include: guarding against doomsday scenarios, AI's role in our social world, copyright and intellectual property, workforce, use-cases and risk managements, as well as privacy and liability.[16] The first Insight Forum took place in September 2023. While senators and industry leaders met one participant – Inioluwa Deborah Raji, a researcher at the University of California, Berkeley, fellow at Mozilla, and named one of MIT Technology Review's 235 Innovators Under 35 in 2020 – described the gathering as "more of an informational rallying effort than it was a genuine opportunity for meaningful policy discourse and recommendations."[17]

At the state level, there has been a bit more success. Some states included AI regulations as part of broader consumer privacy laws, others have proposed or pending bills, and yet still more created task forces to investigate AI and areas of harm.[18] Specifically in Illinois, this part legislative session acts were proposed regulating AI including the collection of personal information through algorithms,[19] to prevent misuse of AI in automated hiring decisions and the healthcare realm,[20] and to establish a Generative AI and National Language Processing Task Force.[21]

In comparison, on June 16, 2022, Canadian legislator introduced the Digital Charter Implementation Act 2022, which included Canada's first proposed law dedicated solely to artificial intelligence, the Artificial Intelligence and Data Act ("AIDA").[22] While AIDA has not yet been adopted, AIDA attempts to regulate AI design, development and use in the private sector in connection to trade with a focus on harm and bias. AIDA imposes requirements and monetary as well as criminal penalties for non-compliance.[23] Additionally, in September 2023, the Minister of Innovation, Science and Industry announced the Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems.[24] This temporary code "provides Canadian Companies with common standards" and allows them to show their Generative AI developments as well as its responsible use "formal regulations is in effect.[25]

One the other hand, in Europe, a legal framework specific to AI was proposed in April 2021, adopted by the European Commission in 2022 and accepted by European Parliament in 2023.[26] The more recent adoption of the Artificial Intelligence Act ("AI Act") results negotiations between the European Parliament, the European Commission, and the Council of the European Union.[27] The negotiations have yet to take place; however, the AI Act places the European light years ahead of the United States with respect to actual legislation.

The AI Act proposes a regulatory framework that categorizes AI into four different risk levels: unacceptable risk, high risk, generative AI, and limited risk.[28] Unacceptable risk are systems considered to be a threat to people and as such will be banned, unless it falls under an exception. High risk AI systems refer to those that negatively affect safety or fundamental rights. Under this level, AI systems are divided into two categories, AI products used in toys, aviation, and cars, and then "everything else." The "everything else" category is then further subdivided into eight specific areas: 1) biometric identification and categorization of natural persons, 2) management and operation of critical infrastructure, 3) education and vocational training, 4) employment, worker management and access to self-employment, 5) access to and enjoyment of essential private services and public services and benefits, 6) law enforcement, 7) migration, asylum and border control management, and 8) assistance in legal interpretation and application of the law. Generative AI would have to comply with transparency requirements such as disclosing that content was created by AI, publishing summaries of copy righted data, and preventing the generation of illegal content. A limited risk system would have to comply with minimal transparency requirements that provide users with enough information to make informed decisions before using AI.

Finally, China and Singapore both have announced their approach to AI regulation.[29] Lawmakers in Singapore are building on their 2019 Model AI Governance Framework and introduced its National AI Strategy. In China, a draft of its Administrative Measures for Generative Artificial Intelligence Services was released in April 2023.

In addition to government approaches, the private sector has taken steps to address

regulatory concerns. For example, in July 2023, Google, OpenAI, Microsoft, and Anthropic announced the formation of the Frontier Model Forum.[30] Its mission is to "advanced AI safety research and technical evaluations for the next generation of AI systems" and industry leaders and governments to continually monitor AI risks.[31] While this is a useful measure, there still is no clear regulation.

Suggested Steps: The Public Justice System's Role in AI Regulating AI

Rather than passively wait for legislators to take substantive action, perhaps it falls on the laps of attorneys, judges, and the public system as a whole, to shape the role of generative AI, at least within the legal sphere. There is no shortage of stories of attorneys and even judges using AI to draft arguments and opinions.

Author S.I. Strong explores this possibility and analyzes the benefits of judicial action, legislative action, action by state licensing authorities, complementary actions such as national legal associations or professional organizations and finally international options like the Hague Conference on Private International Law.[32]

With regards to judicial action, Strong asserts that individual court rules or local rules of court can initially address the use of generative AI in litigation. While an issue of consistency within and across different judicial systems may arise, this approach "has the benefit of speed . . . and accountability."[33] In addition, court sanctions can ensure accountability.[34]

Recently, a few U.S court judges have issued standing orders to address AI-related issues. On May 30, Judge Brantley Starr of the US District Court for the Northern District of Texas issue the first standing order on AI. The order requires attorneys and pro se litigants to "file a certificate declaring whether any portion of their filings will be drafted using generative AI tools."[35] Additionally, "attorneys must certify that either none of the content in any of their filings will be drafted using generative AI, or that generative AI content will be verified for accuracy by a human being."[36] Judge Starr, in his standing order, notes the "danger of generative AI making stuff up" and its 'lack of a sense of duty, honor, or justice that binds practicing attorneys."[37]

Similarly, on June 8, Magistrate Judge Gabriel A. Fuentes of the US District Court for the Northern District of Illinois "issued a revised standing order for civil cases." It requires parties to disclose the use of generative AI to conduct legal research as well as draft documents for filing, as well as "the specific tool and the manner in which it was used."[38] Additionally, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the Court "continue[s] to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry."[39] "Mere reliance on an AI tool" does not constitute reasonable inquiry.[40] A Rule 11 certification means that an "living, breathing, thinking human beings" have "read and analyzed all cited authorities to ensure that [it] . . . actually exists" and complies with the Rule.[41]

Strong identifies consistency across courts and even states a key problem. Strong suggests amendments to the federal rules as a possible means to achieve some level of consistency.

Conclusion

Laws and regulation at both the state and federal level has a long way to go to adequately regulate AI. While bills have been introduced, it is hard to tell when they will be enacted and importantly, if those bills will regulate AI as needed. As of now, no binding regulation have been passed by the federal government to bring uniformity and consistently to AI regulation. There are only guidances, frameworks, and pledges on using AI responsibly. Without the ability to enforce these guidances and frameworks and hold accountable those who pledge, it is difficult to believe AI will be used responsibly.

Since the advancement of AI, we have seen its prominent impact in the legal profession. Lawyers and judge alike are using AI to complete everyday tasks such as writing arguments or rendering decisions. With this comes the concern for accuracy, privacy, and copyright, as well as the lack of regulation of AI within the legal field itself. Judges have encountered briefs, motions and other filings to contain nonexistent authorities. This has led some judges to issue a standing order requiring disclosure of AI use in any filing. Absent binding regulation, members of the legal community may have to take the initiative to shape the role of generative AI within the legal sphere.■

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Judicial Code … Judicial Elections … What You Need to Know for 2024

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of questions to IJEC from both candidate and non-candidate judges about election and campaign activity. In light of these inquiries, a roster of recurring issues on political activity for candidates and non-candidates was updated in October 2023. In a simple format of straightforward questions and direct answers, it serves as guide for both candidates and non-candidates through the first election cycle under the Code. Keep in mind that IJEC's "Election/Campaign FAQ's" is the consensus of the IJEC but is not binding on the Judicial Inquiry Board or the Illinois Courts Commission. However, the "FAQ's" provides guidance for judicial candidates and judges under the Code. The "FAQs" is attached for your review.

The most notable change in the Code regarding elections and campaign activity is public endorsements (in Rule 4.1). Under the Code, a judicial candidate may *only* publicly endorse or oppose *another judicial candidate* in the *same election cycle* and is prohibited from publicly endorsing any non-judicial candidate. For example, judicial candidates may no longer publicly endorse or oppose a candidate for senate, county board, or state's attorney. Rather, a judicial candidate is limited to public endorsement or opposition only of another judicial candidate and only in his or her election cycle. Thus, a judicial candidate for retention in November 2024 may not endorse a judicial candidate in the spring 2024 primary. Non-candidate judges are prohibited from publicly endorsing or opposing any candidate for public office at any time.

For additional information regarding IJEC, please visit www.ija.org. ■

Illinois Judicial Ethics Committee

JUDICIAL ELECTION/CAMPAIGN FAQs

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The Illinois Judicial Ethics Committee (IJEC), a joint committee of the Illinois State Bar Association, the Chicago Bar Association, and the Illinois Judges Association, provides the following responses to Frequently Asked Questions (FAQs) as a service to candidates seeking election to judicial office in Illinois. These FAQs are intended to provide general guidance on common questions faced by judicial candidates. The FAQs are not intended to offer legal advice, provide a comprehensive analysis applicable to specific factual scenarios, or constitute a substitute for a candidate's own legal research and judgment.

Issues faced by candidates for judicial election in Illinois are generally governed by the Illinois Code of Judicial Conduct of 2023 ("Code") or the Illinois Election Code (10 ILCS 5/1-1 *et seq*.). Additional guidance regarding those issues is contained in the IJEC's published opinions. *See* https://www.ija.org/opinion-list. Note that IJEC's opinions published prior to January 1, 2023, do not consider or address whether the 2023 Code affects their analysis or conclusion. The views of the IJEC expressed in these FAQs and its published opinions are not binding on the Judicial Inquiry Board, the Illinois Courts Commission, the Attorney Registration & Disciplinary Commission, or the courts.

Last Updated: *October 2023*

1. What activities may I engage in prior to declaring as a candidate?

You may make inquiries to, and seek support from, elected officials and others to determine the viability of candidacy. You may ask people to join your committee or campaign team. You may not engage in any fundraising activities.

2. When do I become a candidate?

As defined in the Code of Judicial Conduct, a "judicial candidate" means "any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as they make a public announcement of candidacy; declare or file as a candidate with the election or appointment authority; authorize or, where permitted, engage in solicitation or acceptance of contributions or support; or are nominated for election or appointment to office. See Rules 4.1, 4.3, and 4.4.

3. May I personally circulate my nominating petitions?

Yes. Rule 4.1(D)(2)(b) allows judicial candidates to distribute campaign materials supporting their candidacy.

4. May I personally circulate or sign other candidates' nominating petitions?

Yes, you may sign any candidate's petitions for election. As to other candidates seeking a judicial office in the same election, you may also circulate their petitions. You cannot circulate petitions for candidates for non-judicial office. Rule 4.1(D)(2). *See* IJEC Opinion 1998-02 (A judge may circulate and sign the nominating petitions of a judicial candidate when that judge is also a candidate in the same election).

5. May I raise money for my campaign?

No, you may not personally solicit campaign funds. All fundraising must be conducted by your campaign committee. Rule 4.4(B)(2) limits soliciting contributions no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. *See also* IJEC Opinion 1995-08 (judge may send a personally signed "thank you" note to campaign contributors).

6. Is it necessary to form a campaign committee?

Yes, it is necessary to form a campaign committee if your campaign intends to solicit funds from others. Rule 4.4. The primary functions of the campaign committee are to (a) raise money and (b) track and report funds received and expenses paid. To remain compliant with the Code of Judicial Conduct, it is advisable to form a campaign committee. However, it is not necessary to form a campaign committee if your campaign is self-funded and expenditures do not exceed the statutory threshold established by the Election Code.

7. How do I form and organize a campaign committee?

Rule 4.4 states that a candidate may establish a campaign committee, but it is silent on the organization of a committee. The Illinois Election Code only requires that a Chairman and Treasurer be named. *See* 10 ILCS 5/9-2(f).

8. How does my campaign committee get registered?

Registration is governed by the Election Code.

9. What authority does my campaign committee have?

Comment [2] to Rule 4.4 states a campaign committee "may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns." Comment [3] provides that the campaign committee may also "solicit and accept campaign contributions from lawyers and others who might appear before the candidate," but that the "candidate should instruct the campaign committee to be cautious in connection with such contributions so it does not create grounds for disqualification. See Rule 2.11."

10. May I serve as chair or treasurer of my campaign committee?

No. Rule 4.1(E) states a judicial candidate shall not personally solicit contributions. These activities are reserved for the candidate's campaign committee. The chair or treasurer of a campaign committee is inherently associated with any solicitation of funds by the committee. Because a candidate is prohibited from soliciting funds personally it follows that the candidate cannot do so on behalf of the candidate's committee.

11. May a spouse or other family member serve as treasurer of my campaign committee?

The Illinois Code of Judicial Conduct does not prohibit a spouse or family member from serving on the committee. Rule 4.1(C)(3) states that a "judicial candidate… except to the extent permitted by Paragraph (E) [concerning personal solicitation of funds], shall not authorize, encourage, or knowingly permit members of the judicial candidate's family[] or other persons to do for the candidate what the candidate is prohibited from doing under the provisions of this Rule." The exception stated at the beginning of the rule is important; the exception references Rule 4(E), which contains the prohibition against a judge "personally" soliciting or receiving funds. Because Rule 4.(C)(3) excepts Rule 4(E) from the prohibitions extending to "family or other persons," it suggests that family and other persons can actively participate in campaign committees, including solicitation or receipt of contributions. *See also* IJEC Opinion 1996-01 (a candidate for judge or a member of the candidate's family is not prohibited from signing campaign fund checks to pay campaign expenses).

12. May I personally seek endorsements of my campaign?

Yes. There is no prohibition against a candidate personally seeking endorsements.

13. May my campaign committee seek endorsements of my campaign?

Yes. Rule 4.4(A) allows a campaign committee "to manage and conduct a campaign for the candidate," and there is no specific prohibition against seeking endorsements.

14. May I endorse other candidates?

Yes, as to other candidates for judicial office in a public election in which the judicial candidate is running. Rule 4.1(D)(2)(d). The permission granted by the Rule does not extend to candidates for non-judicial office. Note that a judge who is not a candidate is prohibited from publicly endorsing or opposing candidates for any office. Rule 4.1(A)(2).

As to what actions constitute a public endorsement, wearing the emblem or logo of a candidate has been found to constitute a public endorsement of that candidate. *In Re Klein*, No. 05-CC-2 (June 16, 2005). Beyond this example, it may be challenging to determine when campaign activities with a non-judicial candidate cross the line into a prohibited public endorsement of that candidate. Keep in mind that the "Rules of the Code are rules of reason" and should be applied "with due regard for all relevant circumstances." Code, Preamble and Scope, paragraph [9]. For context, the same Code that prohibits public endorsements of non-judicial candidates permits all judges—not just candidates—to attend fundraisers, identify as a member of a political party, or make political contributions. Rule 4.1(D)(1). All these permitted actions could be viewed as an implicit public endorsement; the fact that they are permitted leads to the likely inference that the type of public

endorsement prohibited by the Code would tend to be fairly explicit.

15. May I campaign with other judicial candidates?

Yes. There is no specific prohibition against a judicial candidate (whether the candidate is a judge or lawyer) campaigning with other judicial candidates. Furthermore, the Code specifically allows judicial candidates to speak to gatherings on their own behalf, and publicly endorse or publicly oppose other candidates for judicial office in the same election. Rule 4.1(D)(2)(a), (d). These types of allowed activities may be undertaken with other judicial candidates.

16. May I campaign with non-judicial candidates?

Yes. Campaigns do not occur in a vacuum, as there is generally a large number of candidates running in the same election. Some may be of the same party as the judge. It is not unusual that candidates might campaign together. It is important to remember, however, that a judge's campaign activities with non-judicial candidates should not rise to the level of an endorsement of a candidate for a non-judicial office. Rule 4.1(D)(2)(d); see also question 14, above.

17. May I jointly advertise with other judicial candidates?

Yes. There is no specific prohibition against a judicial candidate (whether the candidate is a judge or lawyer) jointly advertising with other judicial candidates. Nevertheless, a candidate should be mindful that a judicial candidate is individually responsible to maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary. Rule 4.1(C)(1).

18. May I jointly advertise with non-judicial candidates?

Yes. There is no specific prohibition against a judicial candidate (whether the candidate is a judge or lawyer) jointly advertising with other non-judicial candidates. The joint advertising should not rise to the level of an endorsement of a candidate for non-judicial office. Rule 4.1(D)(2)(d). For example, an advertisement featuring only the judge and one other non-judicial candidate might reasonably be construed as an endorsement, whereas a joint advertisement with multiple candidates would be less likely to do so. Furthermore, be mindful that a judicial candidate is individually responsible to maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary. Rule 4.1(C)(1).

19. May I wear a robe in any of my advertisements?

Yes. An incumbent judge may wear a robe in political advertisements as long as doing so is consistent with the dignity, integrity, and independence of the judicial office. *Cf.* IJEC Opinion 1994-03 (judge may wear his or her robe in civic parade).

20. What if I have a question about a specific advertisement?

The IJEC does not ordinarily comment on specific campaign advertisements. A candidate is responsible for any ads published by his or her campaign committee.

21. May I be on a slate card that lists all candidates of my party?

Yes. Rule 4.1(F) allows candidates for judicial office to permit their "name or image to be included in campaign materials along with other candidates for elective public office."

22. May I personally solicit campaign contributions?

No. Neither a judge nor a judicial candidate shall personally solicit or accept campaign contributions. Rule 4.1(E)(1). *See also Williams-Yulee v. Florida Bar,* 575 U.S. 1656 (2015) (upholding constitutionality of prohibition against solicitation of campaign contributions by judicial candidates).

23. May I purchase tickets to political events?

Yes. A judge or judicial candidate may purchase tickets for and attend political gatherings. Rule 4.1(D)(1)(a).

24. May I hold a fundraiser for my candidacy at my house?

Yes. There is no specific prohibition against a judicial candidate (whether the candidate is a judge or lawyer) holding a campaign fundraiser for their own candidacy at his or her residence. Be mindful that you may not personally solicit or accept campaign funds, nor may you solicit individuals to attend the function. However, your campaign committee may engage in these activities. Rule 4.1(E)(1).

25. May I accept donations from attorneys?

No, you may not personally, but your campaign committee may. *See* Rule 4.4, Comment [3]. In accepting campaign contributions all candidates should keep in mind that if the total amount of the contributions from any one source is disproportionately large, that may provide the basis for a disqualification or recusal motion pursuant to the United States Supreme Court's analysis in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S. Ct. 2252 (2009).

If a party, a party's lawyer, or the law firm of a party's lawyer has made a direct or indirect contribution to the judge's campaign in an amount that would raise a reasonable concern about the fairness or impartiality of the judge's consideration of a case involving the party, the party's lawyer, or the law firm of the party's lawyer, the judge should consider whether recusal would be appropriate. Rules 2.11(A), Rule 4.4, Comment [3].

Additionally, the IJEC has opined that a judge is disqualified from hearing any matters during an election campaign in which one of the parties is personally represented by the judge's campaign chairman. However, this is limited to the chair and does not apply to other lawyers associated with the chair. *See* IJEC Opinion 1996-20. Moreover, a judge is usually not disqualified simply because a lawyer or a party was a contributor to the judge's campaign. *See* IJEC Opinion 1993-11.

26. What can individuals and family members do to help my campaign?

Individuals may do anything within the election laws to help your campaign—such as raise money, solicit support, hand out literature, etc., unless they are judges, court employees or Hatch Act employees, subject to the same or similar restrictions as you.

Rule 4.1(C)(3) provides: "except to the extent permitted by Paragraph (E), [judicial candidates] shall not authorize, encourage, or knowingly permit members of the judicial candidate's family or other persons to do for the candidate what the candidate is prohibited from doing under the provisions of this Rule." As discussed in question 11, family members and other persons are not prohibited from participating in campaign committees or from personally soliciting or receiving funds.

27. What can my family members do to help another person's campaign?

IJEC Opinion 2006-02 notes that a judge's family members may engage in independent campaign activities in support of a candidate for public office including: (1) soliciting funds for the candidate; (2) publicly endorsing the candidate; (3) displaying a bumper sticker on a vehicle jointly owned by the spouse and judge and driven by the spouse; and (4) displaying a campaign sign in the yard of the home jointly owned by the spouse and judge.

28. May I contribute to the party organization or candidate?

Yes. Any judge or judicial candidate may contribute to a political party or organization or candidate for public office; a judge is, however, prohibited from paying an "assessment" to a political organization or candidate. *See* Rule 4.1(D)(1), 4.1(A)(4), and IJEC Opinions 1994-06 and 1996-12.

29. May I loan money to my campaign?

Yes. You may loan money to your campaign. You must disclose this on your campaign finance report filings.

30. What am I allowed to say, or prohibited from saying, during my campaign?

Pursuant to *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), a candidate for judicial office may state personal views on legal, political or other issues but may not make pledges or promises other than the faithful and impartial performance of the duties of office. Rule 4.1(C)(4)(a). A candidate also shall not knowingly or with reckless disregard for the truth, make, or permit or encourage others, including, his or her campaign committee, to make any false or misleading statement (Rule 4.1(C)(4)(b)) or any public statement about a matter pending or impending in any court (Rule 2.10(A)). See also Rule 4.1, comments [7] through [10].

31. May I make any promises or pledges regarding how I will conduct myself if elected?

Rule 4.1(C)(4)(a) prohibits a judge from making "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office with respect to cases, controversies, or issues that are likely to come before the court." General statements, such as a pledge to follow the law, are usually permissible.

32. May I respond to questionnaires?

Yes. Candidates for judicial election or retention may respond to questionnaires from media sources, public interest groups or advocacy groups that ask for candidates' views on controversial moral, legal or political issues so long as they refrain from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues within cases that are likely to

come before the court. See IJEC Opinion No. 2021-3.

33. Is there a time limit on ending my campaign activities once the election is over?

Yes. Pursuant to Rule 4.4(B)(2), a judge's candidate committee may not solicit contributions "more than 90 days after the last election in which the candidate participated."

34. When are written thank you letters to contributors permitted?

Your committee may thank your contributors at any time. A judicial officer may sign thank you notes to contributors before and after the election. The IJEC has opined that a judge may send a personally signed "thank-you" note to campaign contributors. *See* IJEC Opinion 95-8.

35. What may I do if my campaign committee has a debt (or a surplus) after the election?

This is governed by the provision of the Illinois Election Code, 10 ILCS 5/9-5, regarding disposition of surplus funds of an inactive committee.

36. May I keep working as an attorney after the election?

A judge-elect is permitted to continue practicing law until sworn in as a judge. Thereafter, like all judges, the new judge is prohibited from practicing law. *See* Rule 3.10.

37. Must a judge's name be removed from the firm name, and listing of lawyers, of the judge's former firm once the judge takes office?

Yes. Several jurisdictions and authorities have concluded that a newly elected judge is required to remove promptly the judge's name from a law firm. *See* Gray, "Ethical Issues for New Judges," American Judicature Society (1996) https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/EthicalIssuesforNewJudges.ashx.

Some limited relief from this requirement was referenced in IJEC Opinion 1998-08 ("A judge need not require his former firm to remove his or her surname from the name of the firm if the judge's foreseeable tenure on the bench does not constitute a substantial period of time"). *See also* Illinois Rule of Professional Conduct 7.5(c) ("The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").

Emeritus Council of the Illinois Judges Association

BY JUSTICE LLOYD A. KARMEIER (RET)

There may be times when judges are entitled to be justly criticized by the media. There are also times when they are not. What is a remedy for a judge who believes criticism by the media is unfair, unjust, or unwarranted and the judge is precluded from responding because the litigation or the proceeding before the judge is ongoing? How can a judge, who is deeply invested in the proceedings rationally determine whether the media criticism directed at him or her is unfair or is legitimate commentary?

While the Illinois Judges Association has long had a Criticism Response Committee, Judge Eileen O'Neill Burke, the immediate past president of the Illinois Judges Association, took this concept a step further. She and her fellow officers created a new council and launched a new program designed to help judges who believe they have been subjected to unfair criticism or media coverage. It is called the Emeritus Council.

In a recent article then President O'Neill Burke said of the Council:

(It) "is comprised of retired Appellate Justices, retired Chief Judges and retired Presiding Judges. These legal luminaries have agreed to serve the people of Illinois once again.

Illinois Judges who have been the subject of press comment may confer with these Emeritus Council judges and seek advice about how to respond or whether to respond at all. And there may be times when the discussion with the concerned judge will result in a determination that the criticism, if not justified, was at least fair commentary thus leading to a discussion of how to do better as a judge. In some cases, the Emeritus Counsel will issue a statement to the press. Every one of the Emeritus Counsel were extremely successful at this job. They are people who are trusted by judges and the entire legal community."

The goal of the Emeritus program is at least twofold: 1) to aid a judge who has been subjected to unfair comment or criticism to have someone respond on his or her behalf; 2) to help a judge deal with and correct any concerns that have resulted in legitimate critical commentary.

Seven recently retired Justice of the Illinois Supreme Court have been named as co-chairs of the Council. They are Justices Lloyd Karmeier, Thomas Kilbride, Robert Thomas, Rita Garman, Anne Burke, Michael Burke, and Robert Carter.

The real work of the Council is done by the retired judges from each appellate court district who have agreed to implement the program by being available to talk to, counsel, and take recommended action on behalf of a judge who seeks help in responding to criticism, whether fair or unfair and unjust. Following is a list of those volunteers by appellate court district:

1st District

Justices Mary Anne Mason, Gino Divito, James Epstein, Stuart Palmer, Warren Wolfson, Shelvin Louise Marie Hall, Robert Gordon and Judges Mose Jacobius, Stuart Nudelman, Grace Dickler, Sharon Sullivan, and Maureen Connors.

2d District

Judge Ray McKoski and Justice Robert Spence

3rd District

Judge Kathryn Creswell and Justice Thomas Callum

4th District

Justice Carol Pope

5th District

Justice Richard Goldenhersh and Judges Ron Spears, George Timberlake, and William Mudge

Current IJA President Justice David Overstreet supported the concept when it was introduced and has indicated his continuing support going forward.

The Emeritus Council can only be effective and useful if judges are made aware of this program and its goals. Accordingly, I would urge every chief judge to make this article available to every judge in his or her circuit so all judges will be informed about this program and have readily available the names of the volunteer Emeritus Council judges they may call upon for help.

I would further urge all active judges in Illinois to make themselves aware of who the Council judges are in his or her district. Contact information for the Council judges may be obtained from the Illinois Judges Association website at ija.org; 321 S. Plymouth Ct, Chicago, IL 60604; Phone: (312) 431-1283.

Judges should be ready to immediately refer any issue of perceived unfair or unjust criticism or commentary to that Council judge in his or her circuit or district who can then investigate and confer with the judge to determine the appropriate course of action- or inaction- on behalf of the judge.

The Illinois Judges Association encourages all judges to take advantage of this opportunity to have a reasoned response to unjust criticism and to benefit from Emeritus Council's suggested corrective action appropriate to avoid just criticism in the future.■

Justice Lloyd A. Karmeier (ret)
Co-Chair, Emeritus Council of Illinois Judges Association

The Value of a Narrative Response in Family Law Cases

BY JUDGE JAMES A. SHAPIRO & ADAM R. HEUSINKVELD

Family law, which is a civil practice area, falls under the Civil Practice Act. *See* 750 ILCS 5/105(a) ("The provisions of the Civil Practice Law shall apply to all proceedings under this Act, except as otherwise provided by the Act"). Yet in domestic relations matters, many practitioners follow practice conventions that both (1) defy statutory rules governing pleading in civil matters; and (2) forgo the opportunity to educate the court by providing written argument and citation to case law in support of legal positions. This occurs most often in the context of responding to motions.

In most other areas of civil practice, (for example in cases before the Law Division, the Chancery Division, or in federal court), the respondent to a motion files what practitioners and judges commonly refer to as a "narrative response." That means the respondent to a motion responds in complete sentences and paragraphs, reframing the issues the movant presents in a cogent and persuasive manner favorable to the respondent. By contrast, family law practitioners frequently respond to motions the way other civil practitioners file an answer to a complaint: by admitting or denying each paragraph, including in response to legal arguments as opposed to factual allegations. This practice is singularly unhelpful to the judge deciding the motion.

Moreover, it violates one of the cardinal rules of good advocacy: It defers to the movant's organization of the motion, effectively letting the opponent write the response for them. This article hopes to explain some of the technical aspects of motion practice under relevant rules and case law. In addition, it seeks to drive home the importance of taking advantage of the opportunity to present arguments through a narrative response to motions.

Understanding the Difference Between Pleadings and Motions

It is important for all practitioners to understand the definitions of pleadings and motions in order to correctly prepare the appropriate responses. A pleading consists of a party's formal allegations of their claims or defenses. *William J. Templeman Co. v. Liberty Mut. Ins. Co.*, 316 Ill. App. 3d 379, 388 (1st Dist. 2000). A pleading is a document that sets forth in paragraph-by-paragraph format the facts and arguments petitioners consider relevant to build the framework of their cause of action. *See* 735 ILCS 5/2-603.

In the family law context, the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") expressly states that pleadings include "any petition or motion filed in the dissolution of marriage case which, if independently filed, would constitute a separate cause of action." 750 ILCS 5/105(d). For answers to pleadings, admitting or denying the allegations in the pleading is an obligatory and logical response to narrow the issues for trial. According to the Illinois Code of Civil Procedure, "every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates." 735 ILCS 5/2-610. Importantly, this only applies to pleadings; it does not apply to motions.

Courts have repeatedly addressed apparent confusion among family law practitioners as to the distinction between pleadings and motions. In *In Re Wolff*, the court distinguished between pleadings and motions in order to decide a motion to dismiss. 355 Ill. App. 3d 403 (2d Dist. 2005). Unlike a pleading (a party's formal allegation of their claims or defenses), "a motion is an application to the court for a ruling or order in a pending case." *Id.* at 407. In *Wolff,* the court denied the wife's motion to dismiss the husband's motion to reconsider. *Id.* The court based its denial on the fact that the wife's petition was a Section 2-619 motion, which applies only to the dismissal of pleadings. *Id.* The husband had filed a Section 2-1203 motion to reconsider, which is obviously a motion. Therefore, the wife's motion was a procedural nullity. *Id*. One cannot file a motion to dismiss a motion.

In cases governed by the IMDMA, a request for temporary or prejudgment relief in a pending case is a motion rather than a pleading. *See In re Marriage of Engst,* 2014 Ill. App. (4th) 121078. The IMDMA provides that either party may "move" for temporary maintenance or support, a temporary order of protection, preliminary injunction, or other temporary relief. 750 ILCS 5/501. Accordingly, such motions are applications to the court for a ruling or an order in a pending case. *Templeman*, 316 Ill. App. 3d at 388.

A recent unpublished Illinois case from the First District Appellate Court helps clarify the distinction between a pleading and motion. *In re Marriage of Nguyen*, 2023 Ill. App. (1st) 221045-U. Though no bright line test exists, there are clear, functional differences between pleadings and motions that carry implications in their separate roles. In *Nguyen,* the wife filed a motion to compel enforcement of her Marital Settlement Agreement (MSA). *Id.* ¶ 6. The husband filed a motion to dismiss the wife's motion to compel. The husband also filed "affirmative defenses" to which the wife did not respond. The husband later argued those defenses were affirmed.

The *Nguyen* court rejected the idea that a motion to compel is a pleading. The court followed the logic that in dissolution actions, either to start or modify the dissolution, the petition is considered a pleading, because it starts the new suit. *Id.* ¶ 23. As the wife's motion was simply to enforce a previously entered MSA, the court rejected the idea that a motion to compel enforcement is starting

anything new. Rather, as it sought relief granted in a previously existing case, it was not a pleading and thus could not be subject to a motion to dismiss. *Id.* ¶ 22.

Additionally, the court rejected the argument that by not responding to his "affirmative defenses" the petitioner had affirmed his defenses. Rather, the court pointed out that in the context of a motion, failing to respond to the respondent's defenses is not an automatic affirmation as it is in a pleading. *Id.* ¶ 23. "[T]he failure to file a written response to a motion within the time allowed therefor does not waive the right to contest the merits of the motion." *In re Marriage of Fahy*, 208 Ill. App. 3d 677, 685 (1st Dist. 1991). In sum, pleadings and motions are statutorily different and need to be treated as such.

How Lawyers Should Respond to Motions

Motions require a narrative response. When a party files a motion with the court, the party is telling the court a story about a specific issue within the pleadings already filed. In the motion, attorneys are the narrators telling the court about a problem or conflict the client needs the court to address before the ultimate resolution of that pleading. In so doing, the attorneys have opportunity to cite to statutory and case authorities in support of their argument.

A response to a motion grants the responding party or attorney the opportunity to tell that party's version of the narrative. It should ask for the responding party's own kind of remedy: to deny the opponent's motion. A response is supposed to make an argument for the respondent's side of the issue, not simply admit or deny the individual paragraphs of the original motion. An admit/deny response to a motion tells the court virtually nothing about the respondent's position regarding the facts or legal opinion of the original motion. In short, the admit/deny response lacks the care and advocacy that is required of a meaningful argument.

When an attorney prepares a response, it should tell the client's side of the story. It should be persuasive, it should advocate competently for the client, and it should have its own point of view. Of critical importance, a judge who has read the response to a motion should understand the responsive/rebuttal argument. Based on strong support from cited legal authorities, the judge should also understand why the facts of the situation support the responding client's position. By contrast, an admit/deny response lets the other party effectively write the response. Attorneys who do this are failing as an advocate. They are choosing to forgo their opportunity to tell their client's story in a way that makes the judge feel they should win.

Conclusion

The failure of many family law practitioners to appreciate the distinction between pleadings and motions results in the common practice of using the "admit/deny" format in responding to motions. Hopefully, greater education as to the rules of civil procedure can reduce or even eliminate the practice.

But there are also very practical reasons to favor a narrative response. Unsupported denials and underdeveloped thoughts are generally unpersuasive. The legal argument of "I disagree" or "That is not true" is not as effective as actually setting forth your client's narrative story and logical legal argument in support of the client's position. Practitioners need to let the court know the client's position, as well as the facts and legal authorities that support the client in a way that presents the client as the hero of their own story. Anything less than this is lazy and underperforming. Accordingly, family law practitioners should embrace the narrative response for the sake of their clients and themselves.■

Special thanks to Judge Mitchell Benjamin Goldberg and Domestic Relations Division Attorney McKenna Deutsch for their editorial input for this article.

Longing for Authenticity: The Human Connection in a Digital Workplace

BY CHRISTOPHER A. GARCIA

Audiophiles can purchase "scratch machines" now. Digital recordings of vinyl scratches, *scratch phrases* and singular scratch sounds to add to digital music. The marketing is not for an *authentic sound*, but the simulacrum of authenticity, an instant reproduction of a process that occurs over time and pressure of a needle on vinyl.

There are also digital machines that *mask* the authentic scratchiness of LPs. No doubt some have purchased both machines, hooked up to the same sound system, to capture an authentic sound and, when desired, mask it, or copy it and pretend its repeatability is both natural and authentic. There are "scratch menus" so listeners can create scratch patterns to their liking—a stab at programmed serendipity which is at best a contradiction in terms.

Not that the scratchiness adds to the music; its purpose is to create an analog *experience.* How does one control, capture, and replay random sonic movement that itself changes with time, wear, and tear? The experience produced by these machines necessarily involves a willing suspension of disbelief that pretends to capture the effects of time and pressure into an instant digital menu, as if it could reproduce an authentic moment—again and again, which renders the experience *unoriginal* by definition.

Soon our avatars will communicate with programmed hesitations, small stutters,

halting speech and accents that imitate real human interaction in a desperate grasp for authenticity: "More human than human is our motto" says Eldon Tyrell in a rather inhuman gloss on the replicant slaves he creates in Blade Runner. Digital "dialogue," for lack of a better descriptor, is void of nuance, tone, and the sheer serendipity of human contact--the analog of life with its unpredictable scratchiness. Even in the middle of AI invention, we struggle to capture the creative messiness, the epistemological surprise of random epiphany at the heart of human interaction.

Much like an in-person conversation, which can be deliberate, thoughtful, yet surprising in its direction and flow, developing over time in different ways and through different narrations, starts and stops, and various tones, expressive accents, and re-articulations. To paraphrase T.S. Eliot, words in an actual face to face conversation will not "stay in place." There is always movement, emotion, misunderstandings, and unexpected connections.

> Words strain,
> Crack and sometimes break, under the burden,
> Under the tension, slip, slide, perish,
> Decay with imprecision, will not stay in place…

The Dialog of Oral Argument

For more than two years we were isolated from one another and (therefore) from ourselves. In the legal arena, for over two years young associates have missed out on the rhythms, the dialect, the *grammar* of oral argument. The legal profession is one of the last pure rhetorical arts, and oral argument forces the mind to actually *listen, comprehend and respond to another argument*—skills that are not learned on social media, which rewards a raging solipsism—in cyberspace, everyone can hear you scream.

Also missing from our practices is the coffee klatch or lunch with colleagues. In that common moment someone inevitably would suggest a thorny problem and suddenly three or four experienced attorneys begin working the issue, challenging one another with that blend of creativity and experience that is so valuable to our profession. One can never bill for having four partners work on a single client issue over coffee, but that is one of the most valuable moments for a client that occurs in the office.

Associates have lost (or worse, have not yet had) the experience of sitting in court and observing its dialect, pace, vocabulary—its *rhythm*. What is familiar and required in state court has different shadings in federal court, different still at the EEOC, the Illinois Department of Human Rights and the Illinois Human Rights Commission. Each has its own vocabulary, its own legal and performative *grammar*. Each venue must be *experienced* to understand and master.

Since virtual reality is a sacred cow let me be clear, the *new normal* will never move into reverse. In a Title VII and ADA context it would also be unavailing to argue in court that a workplace paradigm featuring hybrid work schedules in place over the last two years has suddenly become an "undue hardship." We do need to understand what has been lost as well as gained. What is lost in the fire is not always found in the ashes.

The key problematic for corporate leadership is when a face-to-face meeting is warranted and the need to provide more authentic dialogue is needed. Rather than communications mediated by a screen (with the incentive to roam about one's social media universe, and every other tug on an attention span from the refrigerator to TikTok videos). When do we need each other, in person, to learn and grow in our profession and in ourselves. When do we need to experience our un-digitally mediated existence?

Down the Rabbit Hole: Clickbait Distractions

You can momentarily take your eyes away from this article to rest them, or to reflect on the thoughts presented, but online programs, including Westlaw and LEXIS, are suffused with cognitive disruptions in the pull of hyperlinks, like so many digital wormholes revealed and evaded in the mind. They simultaneously focus and distract. Paralegals and young associates researching cases surf from jurisdiction to jurisdiction, through various fact patterns until they end up not remembering in which jurisdiction they washed up. Again, quoting Eliot: We are "distracted from distraction by distraction."

In a virtual workplace where the dominant *ethos* is "I'll do me and you do you in our own avatars," corporations are finding it difficult to inculcate a distinctive identity. Firms are finding it more than challenging to effectively communicate *policy* in a single coherent voice. The beginning of a solution is a versatile communications structure that considers multiple communication modalities: hybrid, one on one, in person and small group virtual meetings. But not everyone speaks the same language.

Native TikTokers, Tweeters, and Meta posters are working in the same virtual workplace with Boomers and Gen Z. How one motivates each generation, all speaking different coded languages, will determine how effectively the team performs. For now, we need to understand not just the knee-jerk desire for something called *efficiency,* (which sometimes means taking short-cuts, moving too quickly, and performing badly), but the real human need for personal contact—for mentorship and dialogue. "As iron sharpens iron, so one person sharpens another."■

The late Geoffrey Hartman's brilliant meditation on the rise of cultural studies and his own search for an authentic witnessing voice for Yale's Holocaust Testimonies was a constant inspiration for these thoughts: Geoffrey Hartman, *Scars of the Spirit: The Struggle Against Inauthenticity*. New York: Palgrave Macmillan, 2002.

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Jeffrey S. McKinley, 14th Circuit, October 16, 2023

2 The circuit judges have appointed the following to be associate judges:

- Jeffrey J. Altman, 22nd Circuit, October 2, 2023
- Lawrence W. Lobb, 16th Circuit, October 10, 2023
- Michael B. Baggett, 6th Circuit, October 27, 2023
- Lindsey D. Waldrop, 2nd Circuit, October 31, 2023
- Kishori R. Tank, 18th Circuit. November 13, 2023
- Daniel K. Wright, 7th Circuit, November 17, 2023.

3. The following judges have retired:

- Hon. Anna Helen Demacopoulos, Cook County Circuit, 15th Subcircuit, October 23 2023

4. The following Judge has deceased:

- Hon. James P. Flannery, Cook County Circuit, October 13, 2023
- Hon. Hon. Michael Coppedge, Associate Judge, 22nd Circuit, November 13, 2023
- Hon. Bruce P. Fehrenbacher, 10th Circuit, November 22, 2023■