Automated Legal Guidance at Federal Agencies

Committee on Administration and Management

Proposed Recommendation | June 16, 2022

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 Federal agencies increasingly automate the provision of legal guidance to the public through online tools and other technologies.¹ The Internal Revenue Service, for example, encourages taxpayers to seek answers to questions regarding various tax credits and deductions through its online “Interactive Tax Assistant,” and the United States Citizenship and Immigration Services suggests that potential green card holders and citizens with questions about their immigration rights communicate with its interactive chatbot, “Emma.” Almost a dozen federal agencies have either implemented or piloted such automated legal guidance tools in just the past three years.²

Automated legal guidance tools can take several forms. The most common are chatbots and virtual assistants. The simplest chatbots provide standardized responses based on keywords

¹ This Recommendation defines “guidance” broadly to include interpretive rules, general statements of policy, and other materials that agencies consider to be guidance documents under other, separate definitions adopted by government agencies. See Admin. Conf. of the U.S., Recommendation 2019-3, Public Availability of Agency Guidance Documents, 84 Fed. Reg. 38,931 (Aug. 8, 2019).

² They include the Department of the Army, Internal Revenue Service, United States Citizenship and Immigration Services, the Department of Education, the Environmental Protection Agency, the General Services Administration, the Food and Drug Administration, the Internal Revenue Service, the Social Security Administration, the National Institutes of Health, the Patent and Trademark Office, the Army, the General Services Administration, the Social Security Administration, and the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.
included in a user’s question. Although the terms can overlap, virtual assistants tend to be more versatile than chatbots and can often perform additional tasks such as making an appointment or filling out a form in response to a conversation. More robust tools rely on natural language processing or artificial intelligence to interpret natural language and generate an individualized response.

Agencies use automated legal guidance tools for a number of reasons. These reasons include efficiently allocating limited staff resources, improving user experience and service delivery, and enhancing the quality, consistency, speed, and predictability of guidance, as well as the speed with which it is provided to the public. Because they are always available from any location and can efficiently and effectively provide answers to common questions, automated legal guidance tools have the potential to revolutionize the provision of agency guidance to the public.

Agencies generally take the position that users cannot rely on automated legal guidance. As this Recommendation recognizes, agencies must be clear in disclosing this position to users. That is true, of course, of all forms of guidance documents. Automated legal guidance may, however, create an especially heightened risk of a user’s relying on the guidance issued in a way that the issuing agency does not intend. Since users often enter specific facts relating to their circumstances, users may assume that the automated guidance tool is giving a customized response that has accounted for all of the facts that have been entered, which may or may not be the case. As with other forms of guidance, there also is an issue regarding the extent to which users are able to rely upon automated legal guidance. Agencies generally take the position that

Commented [CA2]: Proposed Amendment from Council #1.
The Council finds the original language unclear concerning why automated legal guidance poses an especially large risk of a user’s relying on guidance issued in the way an agency does not intend, among other things. It has suggested the following revision for the Committee’s consideration.

Commented [CA3]: Inquiry from Council:
Here and elsewhere, does “users” refer only to direct users of automated legal guidance tools or to third-parties as well? If the latter, then should an amendment be made?

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users cannot rely upon automated legal guidance, and that automated legal guidance does not bind the agency. Critics argue, however, that automated legal guidance tools can oversimplify or misstate the law or offer users guidance that does not apply well to their factual circumstances. Although the same can be said for other explanatory materials, such as brochures and fact sheets, automated legal guidance tools pose unique concerns because they can appear to be human. Users may perceive the kind of instantaneous and seemingly personalized responses provided by an automated legal guidance tool to be more authoritative or persuasive than a guidance document.

The Administrative Conference has adopted several recommendations on the development, use, and public availability of agency guidance documents. This Recommendation builds on those recommendations by identifying best practices for agencies to consider when they develop, use, and manage automated legal guidance tools. In identifying these best practices, the Conference recognizes that automated legal guidance tools may not be suitable for all agencies and administrative programs and that. Moreover, even when agencies use them, automated legal guidance tools are used, agencies should expect that they will need to provide additional guidance through other channels, including live person-to-person support. This Recommendation provides best practices to guide agencies when considering using automated legal guidance tools.

RECOMMENDATION

Design and Management

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1. Agencies should explore the possible benefits of offering automated legal guidance tools, including enhancing administrative efficiency and helping the public understand complex laws using plain language. This is especially true for those agencies that have a high volume of individual interactions with members of the public who may not be familiar with legal requirements.

2. Agencies should also weigh the potential downsides of automated legal guidance tools, including potentially oversimplifying the law creating confusion as to whether and when the agency intends users to rely on the guidance issued. To avoid such confusion, agencies should follow the recommendations set forth in Paragraphs 18-20, letting guidance appear more personalized than it actually is, and not adequately disclosing that users cannot rely on the guidance to bind the agency.

3. Agencies using automated legal guidance tools should design and manage them in ways that promote fairness, accuracy, clarity, efficiency, accessibility, and transparency.

4. Agencies should ensure that automated legal guidance tools do not displace other agency mechanisms for increasing access to the underlying law.

5. Agencies should adopt clear procedures for designing, maintaining, and reviewing the substance embedded in automated legal guidance tools and should publish these procedures on their websites. These procedures should incorporate periodic user testing and other forms of evaluation by internal and external researchers to ensure accessibility and effectiveness.

6. The General Services Administration should regularly evaluate the relative costs and benefits of using outside vendors for the introduction-production of automated legal guidance tools and share such information with agencies.

Accessibility

7. Agencies should utilize human-centered design methodologies, empirical customer research, and user testing, as described and defined in Executive Order 14,058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in

Commented [CAS]: Proposed Amendment from Council #3:
The Council finds the original language unclear as to the potential downsides unique to automated legal guidance tools and what the agency might do to mitigate them. It has suggested this revision for the Committee’s consideration.
Agencies should, consistent with applicable laws and policies, design and periodically review and (when necessary) reconfigure automated legal guidance tools to ensure that they meet the needs of the particular populations that are intended to utilize the automated legal guidance tools.

Agencies should ensure that information provided by automated legal guidance tools is stated in plain language understandable by the particular populations that are intended to use the automated legal guidance tools, consistent with the Plain Writing Act of 2010; Recommendation 2017-3, Plain Language in Regulatory Drafting (82 Fed. Reg. 61,728, Dec. 14, 2017); and other applicable laws and policies.

Agencies should design automated legal guidance tools to put users in contact with a human customer service representative to whom they can address questions in the event that a question is not answered by the automated legal guidance tools, or if the users are having difficulty using the automated legal guidance tools.

Transparency

When the underlying law is unclear or unsettled, or when the application of the law is especially fact-dependent, agencies should be transparent about the limitations of the advice the user is receiving. To the extent practicable, agencies should also provide access through
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automated legal guidance tools to the legal materials underlying the tools, including relevant statutes, rules, and judicial or adjudicative decisions.

13. Agencies should disclose how they store and use the data obtained through automated legal guidance tools.

14. Agencies should update the content of automated legal guidance tools to reflect legal developments or correct errors in a timely manner. Agencies should also maintain an electronic, publicly accessible, searchable archive that identifies and explains such the updates. Agencies should **ensure that providers** the date on which the tool was last updated.

15. When automated legal guidance tools provide programmed responses to users’ questions, agencies should publish the questions and responses to provide an immediate and comprehensive source of information regarding the automated legal guidance tools. Agencies should post this information in an appropriate location on their websites and make it accessible through the automated legal guidance tool to which it pertains.

16. When automated legal guidance tools learn to provide different answers to users’ questions over time, agencies should publish information related to how the machine learning process was developed and how it is maintained and updated. Agencies should post this information in an appropriate location on their websites and make it accessible through the automated legal guidance tool to which it pertains.

17. Agencies that use automated legal guidance tools should provide users the ability to provide feedback or report errors.

18. When applicable, agencies should provide disclaimers that the automated legal guidance tool is not human.

Reliance

19. **When feasible**, Agencies should allow users to obtain a written record of their communication with automated legal guidance tools and should include date and time stamps for the information provided.

20. Agencies should consider whether, or under what circumstances, a person’s good faith reliance on guidance provided by an automated legal guidance tool should serve as a

Commented [CMA6]: Comment from Public Member Jack Beermann:

“This recommendation "seems way in the weeds and may involve disclosing proprietary information of contractors. Is it really necessary?"”

Commented [CMA7]: Proposed Amendment from Special Counsel Jeffrey Lubbers #2:

“My reason for suggesting this (I realize that feasibility is an implied condition for many of them) is that this requirement might discourage agencies from using these tools, and the report doesn't even give one example of an agency that does this now.”
defense against a penalty or other consequences for noncompliance with an applicable legal requirement, and it should prominently announce that decision to users.

21. If an agency takes the position that it can depart from an interpretation or explanation provided by an automated legal guidance tool in a subsequent investigative or adjudicative proceeding, including in the application of penalties for noncompliance, it should prominently announce its position to users.

Commented [CMA8]: Proposed Amendment from Public Member Jack Beermann:

"Not sure about the phrase ‘in a subsequent investigative or adjudicative proceeding’ because this principle may apply in other contexts. I recommend deleting it."