Automated Legal Guidance at Federal Agencies

Committee on Administration and Management

Proposed Recommendation for Committee | April 5, 2022

1   Federal agencies increasingly automate the provision of legal guidance to the public

2   through online tools and other technologies (which, together, constitute "automated legal

3   guidance"). The Internal Revenue Service, for example, encourages taxpayers to seek answers to

4   questions regarding various tax credits and deductions through its online "Interactive Tax

5   Assistant," and the United States Citizenship and Immigration Services suggests that potential

6   green card holders and citizens with questions about their immigration rights speak with its

7   interactive chatbot, "Emma." Almost a dozen federal agencies have either implemented or

8   piloted automated legal guidance tools in just the past three years.[1] This Recommendation

9   defines "guidance" broadly to include interpretive rules, general statements of policy, and other

10   materials that provide information about an administrative program.

11   Automated legal guidance tools can take several forms. The most common are chatbots

12   and virtual assistants.[2] The simplest chatbots provide standardized responses based on keywords

13   included in a user's question. Although the terms can overlap, virtual assistants tend to be more

14   versatile than chatbots and can often perform additional tasks such as making an appointment or

15   filling out a form in response to a conversation.[3] More robust tools rely on natural language

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[1] They include the Internal Revenue Service, United States Customs and Immigration Services, the Department of Education, the Social Security Administration, the Patent and Trademark Office, the Army, the General Services Administration, the Veterans Benefits Administration, the Food and Drug Administration, the National Institutes of Health, and the Environmental Protection Agency.

[2] Joshua D. Blank & Leigh Osofsky, Automated Legal Guidance at Federal Agencies (Mar. 25, 2022) (draft report to the Admin. Conf. of the U.S.).

[3] *Id.*

16 processing, a form of technology that can interpret natural human speech, or artificial

17 intelligence to interpret natural language and generate an individualized response.[4]

18   Agencies use automated legal guidance tools for a number of reasons. These reasons

19 include efficiently allocating limited staff resources, improving customer experience and service

20 delivery, and enhancing the quality, consistency, speed, and predictability of guidance provided

21 to the public. Because they are always available from any location and can efficiently and

22 effectively provide answers to common questions, automated legal guidance tools have the

23 potential to revolutionize the provision of agency guidance to the public.

24   Critics argue, however, that automated legal guidance tools can oversimplify the law,

25 leading members of the public to sometimes rely to their detriment on guidance that is imprecise

26 or misleading. Although the same can be said for other explanatory materials, such as brochures

27 and fact sheets, automated legal guidance tools pose unique concerns because they can appear to

28 be human. Users may perceive the kind of instantaneous and seemingly personalized responses

29 provided by an automated legal guidance tool to be more powerful or persuasive than a guidance

30 document.

31   The Administrative Conference has previously adopted several recommendations on the

32 development, use, and public availability of agency guidance documents.[5] This Recommendation

33 builds on those recommendations by identifying best practices for agencies to consider when

34 they develop, use, and manage automated legal guidance tools. The Conference recognizes that

35 the use of automated legal guidance tools may not be suitable for all agencies and administrative

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[4] *See* Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); Blank & Osofsky, *supra* note 2.

[5] *See* Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 Fed. Reg. 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38,931 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38,927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process,* 79 Fed. Reg. 35,992 (June 25, 2014).

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36 programs. The Conference also recognizes that, even when automated legal guidance tools are

37 used, agencies may wish to supplement those tools by, for example, hiring and training customer

38 service representatives. ~~This Recommendation aims to ensure that, when agencies choose to~~

39 ~~offer automated legal guidance tools, they design and manage them in ways that promote~~

40 ~~fairness, accuracy, efficiency, accessibility, and transparency.~~

Commented [COAM1]: Comment from Tobias Dorsey: This sentence should not be the end of the preamble; it should be turned into the first recommendation, something like: "Agencies should explore the possible benefits of offering automated legal guidance tools. When agencies choose to offer such tools, they should design and manage them in ways that promote fairness, etc."

RECOMMENDATION

Accessibility

41 1. Agencies should explore the possible benefits of offering automated legal guidance tools.

42   When agencies choose to offer such tools, they should design and manage them in ways

43   that promote fairness, etc. Agencies should utilize human-centered design methodologies,

44   empirical customer research, and user testing.

Commented [COAM2]: For Committee: This language is taken from Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government.*

45 ~~1.~~2. Agencies should, consistent with applicable laws and policies, design and periodically

46   review automated legal guidance tools to ensure they meet the needs of the members of

47   the public they are meant to serve. ~~Agencies should utilize human-centered design~~

48   ~~methodologies, empirical customer research, and user testing.~~

Commented [COAM3]: Comment from Tobias Dorsey: I think this recommendation is conflating two different ideas. One idea is that we should design and manage to meet the needs of the public, and we should do that in certain specific ways (though to be honest I don't see concepts like 'human-centered design' discussed in the report, so I'm not sure what we are basing this on). A second idea is that we should have periodic review; here I'm thinking the periodic review should be not only about meeting the needs of the public, but also promoting fairness, etc., as listed above; and it might include language from the report about including outside experts. I would break this into two different recommendations.

49 ~~2.~~3. Agencies should ensure that information provided by automated legal guidance tools is,

50   consistent with the Plain Writing Act of 2010; Recommendation 2017-3, *Plain Language*

51   *in Regulatory Drafting*; and other applicable laws and policies, stated in plain language

52   understandable by members of the public most likely to use the tools.

53 ~~3.~~4. Agencies should design automated legal guidance tools to provide contact information

54   for a human customer service representative to whom users can address additional

55   questions if they are having difficulty using an automated legal guidance tool or

56   understanding the information provided by an automated legal guidance tool.

Transparency

57 ~~4.~~5. Agencies should clearly indicate in automated legal guidance tools that the information

58   provided may not be applicable in all cases, especially in those involving uncertainty in

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59   the underlying law. To the extent practicable, agencies should also provide access

60   through automated legal guidance tools to the legal materials underlying the automated

61   legal guidance tool, including relevant statutes, rules, and judicial or adjudicative

62   decisions.

63   5.6. Agencies should ensure that updates to automated legal guidance tools are made in a

64   timely manner. Agencies should also maintain a publicly accessible archive that identifies

65   and explains such updates to automated legal guidance tools, including those made to

66   reflect legal developments or correct errors.

67   6.7. When automated legal guidance tools provide standardized answers to users' inquiries,

68   agencies should publish all possible questions and responses to provide an immediate and

69   comprehensive source of guidance to users. Agencies should post this information in an

70   appropriate location on their websites and make it accessible through the automated legal

71   guidance tool to which it pertains.

72   7.8. When automated legal guidance tools learn to provide different answers to users'

73   questions over time, agencies should publish information related to how the machine

74   learning process was developed and how it is maintained and updated. Agencies should

75   post this information in an appropriate location on their websites and make it accessible

76   through the automated legal guidance tool to which it pertains.

77   8.9. Agencies that use automated legal guidance tools should provide users an option to

78   provide feedback or report errors.

79   9.10.   When automated legal guidance uses natural language processing or other

80   technology that makes users believe they may be engaging with a human, agencies

81   should provide disclaimers that the speaker is not human.

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    Reliance

83   10.11.   Agencies should allow users to retain a written record of their communication

84   with automated legal guidance tools and should include date and time stamps for the

85   information provided.

86 ~~11.~~12. Agencies should consider whether and under what circumstances a person's good
87   faith reliance on guidance provided by an automated legal guidance tool should serve as a
88   defense against a penalty for noncompliance with an applicable legal requirement.
89 ~~12.~~13. If an agency takes the position that it can depart from an interpretation or
90   explanation provided by a chatbot or other automated tool in a subsequent investigative
91   or adjudicative proceeding, it should prominently announce that fact to users.
92 ~~13.~~14. If an agency takes the position that a user cannot point to advice received by a
93   chatbot or other automated tool in defending against consequences for noncompliance, it
94   should prominently announce that fact to users.
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Design and Management

96 ~~14.~~15. Agencies should adopt clear procedures for designing, maintaining, and reviewing
97   automated legal guidance tools and should publish them on their websites.
98 ~~15.~~16. The General Services Administration should regularly evaluate the relative costs
99   and benefits of using outside vendors for the introduction of automated legal guidance
100   tools and share such information with agencies.

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