From the President's Desk

Facts Drive the Law



By Christian Stegmaier

Facts drive the law. Professor Jim Flanagan taught me that at the University of South Carolina School of Law. I have not found a better four-word summary of what we do.

A gifted advocate can tell a story. But more times than not, the story does not move the matter. The facts do. Verdict, appeal, settlement, a deal that closes – or one that falls apart – each one turns on what the record shows. And the record is about to get much bigger.

I dictate into a small recorder (Pocket AI) most days. Billing entries, case updates, the occasional idea worth chasing (this article began as one). It transcribes, summarizes, and files. It is cheap, it is good, and it gets better every month.

Now scale that up. CNBC put it in four words on October 18: "Always on, always listening." Pendants, glasses, and watches that never stop recording are already for sale. Law Practice magazine settled the timing question this spring in three words: "because it will."

What happens to our work when nearly every conversation is a record? Here is what changes.

Consent changes first. Recording law differs from state to state and country to country. Some American states require the consent of one party to a conversation; others require the consent of all parties present. Europe layers data protection on top of both. Wearables do not check the border before they start recording. In August, a federal court in California refused to throw out the main privacy claims against Otter.ai, a popular notetaking app, including a claim under the federal law against secret recording.

Preservation changes. When a dispute is coming, a company must keep its records. That used to mean a few inboxes and a file cabinet. Soon it will mean every device a witness wore to work. Expect more fights over spoliation (the lawyer's word for losing what you were bound to keep).

Discovery changes. In an American lawsuit, each side must hand over its relevant documents to the other. AI notetakers now capture what formal minutes never did: the side comments, the correction, the joke. Lawyers told The New York Times in May that nearly everyone is now using them. One noted that the other side can usually ask for every document on a topic – including those electronic, AI-generated notes. Every one of those transcripts is now a document open to discovery.

Privilege changes. Privilege is the rule that keeps a client's conversations with a lawyer confidential. In February, two federal courts reached different conclusions on whether AI chats are protected. In United States v. Heppner, Judge Jed Rakoff held that documents a defendant created with a public AI tool were not protected, even though he later gave them to his lawyers. A Michigan court in Warner v. Gilbarco went the other way. The courts will sort out the split. Until they do, plain English: if you typed it into a public chatbot, assume the other side can and will read it.

The notetaker in the meeting is no safer. "The amount of times I have seen clients lose privilege because an AI notetaker disseminates notes from a confidential meeting," Arielle Patrick of Upland Workshop told Fortune's Workplace Innovation Summit in May. The recap goes out to a list. No lawyer is on it. One e-discovery lawyer wrote last month that the frameworks governing these tools "must be updated now, before the first case arrives." He is right.

Admissibility changes, slowly. A proposed U.S. rule of evidence would test machine-generated evidence the way courts test expert witnesses. In June, the committee that oversees the federal rules sent it back for more study. Courts everywhere will face the same question. The technology has moved first. The rulemakers are still in the hallway.

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Integrity changes. In January, a witness in London's High Court gave evidence wearing smart glasses. In a March judgment, the judge found he had been "assisted or coached in his replies to questions" and rejected his evidence "in its entirety." In February, a Los Angeles judge warned members of Mark Zuckerberg's team who had worn camera-equipped Meta glasses into court. The device that preserves the truth can also be used to manufacture it.

Dealmaking changes too. The negotiation that once lived in two memories now lives on a server. Board minutes are no longer the only minutes. Diligence will soon ask for the transcripts, not just the contracts.

Judgment changes least of all. More data does not make a better lawyer. More data, sorted well, does. The lawyer who can find the three facts that matter in ten thousand hours of noise wins. The one who drowns in it does not.

To our clients: Know three things about every recording tool your people use. What does it keep? Where does it go? Who can read it? Ask the same of your conference room and your next negotiation, and have your lawyer check the settings. The answer should never surprise you in a dispute or in a data room.

The tools change. The work does not. The stakes on doing it right just went up. The careful operator, the honest witness, and the disciplined lawyer have always had the record on their side. Soon the record will be bigger and harder to argue with. Run the business at standard, and the "tape" takes care of itself.

Professor Flanagan was right. Facts drive the law. We are about to have a great many more of them. The lawyers who know them, use them, and can disseminate them first will win.

