Think before hitting 'transcribe'

Legal risks to consider in using AI recordings, transcriptions

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As artificial intelligence tools continue to revolutionize how we work, many Ontario businesses are using AI-powered transcription services to record and document virtual meetings. While AI tools promise convenience and accuracy, they should not be used without considering potential risks and mitigation strategies. Before you automate, pause to consider the privacy, consent, and legal implications. What may seem like a harmless convenience could turn into a costly misstep.

Here's why you should think before hitting "transcribe."

Under the Criminal Code of Canada, it is legal to record a conversation if at least one party consents to it. This means if the individual recording the virtual meeting is part of the meeting (and therefore, by definition, consents to the recording), there is no breach of the code. However, if the recording takes place automatically – such as with a preselected setting - without the consent of at least one of the participants, this may be a breach of the code.

Some workplaces have a clear policy prohibiting the recording of any workplace communication without the consent of each of the parties to the communication. If this is an appropriate policy for your workplace, ensure the policy clearly prohibits recording virtual communication by any means, including through a virtual meeting platform.

Privacy, data security, accuracy risks with AI transcription

An AI transcription tool may transmit data to a server outside of Canada. This raises concerns about compliance with Canadian privacy standards. Sensitive information - such as employee health, disciplinary, or performance records - could be exposed to unauthorized access, stored indefinitely, or shared with other parties, including a foreign government.

Before using an AI transcription tool, be sure to clearly understand where the gathered data is stored, what people or organizations will have access to the information, and what measures are in place to ensure its security.

While it may be sufficient to have an AI tool generate a basic summary of a virtual meeting, the technology is far from perfect; AI-generated transcripts and summaries are not always accurate. An AI tool can misidentify a speaker, omit critical context, or misconstrue the meaning of a statement - especially when dealing with a legal, technical, or nuanced discussion.

If an employer finds itself in litigation, it may be required to produce any transcript it has of arguably relevant internal communications, such as a discussion about the decision to terminate someone's employment. If a transcript contains information harmful to the employer's position, the opposite party will attempt to rely on the transcript. If an employer wishes to challenge the accuracy of the AI-generated transcript, the employer will bear the onus of establishing how the transcript is inaccurate.

Potential impact on protected legal communication

Solicitor-client privilege may be inadvertently waived by the use of AI technology. If a third-party AI-tool is used to summarize communication between a client and lawyer through which legal advice is sought and provided, this can jeopardize the legal protection that attaches to the communication, known as solicitor-client privilege.

If meeting content is processed or stored on an external server, or a transcript or a recording of a communication is sent to a third party, this increases the possibility the employer (in this context, the client) could lose the confidentiality protection typically afforded to privileged communication. It is not yet clear whether, in the event of litigation or a regulatory investigation, improperly stored transcripts could be subject to a production order.

Even if not prohibited by law or a workplace rule, before recording workplace communications consider the impact on workplace morale once employees know such a practice is in place.

AI recording safeguards

If your organization is considering using an AI recording or transcription tool, we recommend the following safeguards:

- Train your HR team and managers on appropriate protocols when creating meeting documentation, including any policy on recording communications and/or AI

transcription.
- Consider whether you have [appropriate consent](#).
- Educate yourself about software being used, including where data is stored and how it can be accessed.
- Approach any AI created record with caution; it may not be accurate.
- Limit transcription to administrative purposes, such as creating a list of follow-up items rather than a complete record of a discussion.
- Consider the impact if a transcript had to be produced in litigation.
- Consider the impact on solicitor client privilege.
- Consult legal counsel before adopting new technology that collects or processes employee data.

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