ON LEGAL GROUNDS

Ambient listening and the expanding legal footprint of AI

"On Legal Grounds" provides a general informative overview of the topics addressed. It is provided with the understanding that the author is not engaged in rendering legal advice. The guidelines suggested here are not rules, do not constitute legal advice and do not ensure a successful outcome. The ultimate decision regarding the appropriateness of any treatment must be made by each healthcare provider considering the circumstances of the individual situation and in accordance with the laws of the jurisdiction in which the care is rendered.

By Julie Ritzman, MBA, CPHRM, and Richard F. Cahill, JD

The healthcare community has vigorously endorsed the adoption of rapidly evolving technologies associated with artificial intelligence (AI). Early uses have included ambient listening of interactions between patients and clinicians through which conversations are automatically recorded to create entries into office charts.

After years of practical implementation and changing industry needs, ambient listening technologies are rapidly moving from experimental tools to embedded components of clinical documentation and a variety of operational facets. As healthcare organizations adopt AI systems that passively capture clinician-patient conversations and generate medical notes, they're confronting a familiar legal pattern: innovation outpacing governance.

Although these tools promise efficiency and reduced administrative burden, they also introduce a growing set of legal exposures tied to documentation integrity, patient consent, data retention and destruction – and liability allocation. The legal system is unlikely to treat these systems as novel exceptions to established duties of care and accepted norms of practice.

Documentation accuracy

At the core of the legal risk is the integrity of the medical record. Generative AI systems remain susceptible to error, omission and fabricated or inadvertently compromised outputs. In a clinical context, these inaccuracies are not merely operational defects – they can become evidence of negligence when they enter the record unchecked or when independent audits are not periodically conducted to demonstrate reliability and strict adherence to detail.

Critically, the legal responsibility for documentation does not shift with automation. Physicians and licensed clinicians retain full and nondelegable responsibility for the accuracy and completeness of the medical record, regardless of whether AI tools were used in its generation. Failure to appropriately and timely review and validate AI-generated content could expose practitioners to direct liability through malpractice claims, regulatory scrutiny and third-party administrative investigations.

This dynamic is further complicated by automation bias, whereby clinicians may place undue reliance on system-generated outputs. From a liability perspective, this does not mitigate responsibility; it might instead reinforce questions about whether reasonable clinical oversight was exercised.

Consent, privacy, legality

Ambient listening also raises threshold legal questions around consent and recording legality. Because these systems capture real-time patient-practitioner conversations, they implicate wiretapping and two-party consent statutes in certain jurisdictions. Noncompliance can create statutory exposure independent of any clinical outcome.

Even where recording is legally permissible, informed consent remains a central risk-control issue. Patients must understand that conversations are being recorded, how recordings will be used, whether data may be retained or used for model training – and whether refusal by a patient materially affects care, thereby requiring the need to determine alternative project management.

Certain clinical contexts, including those connected to behavioral health, substance use and domestic violence, may further elevate privacy concerns, requiring either modified workflows or exclusion from recording to mitigate foreseeable harm.

Retention practices

Perhaps the most underappreciated legal risk lies in data retention. Ambient systems often generate layered records – including audio files, transcripts, structured notes and metadata. Each layer may be discoverable in litigation.

Without disciplined retention and deletion policies, organizations risk creating expansive "shadow records" that extend beyond the traditional medical chart. In discovery, these materials can complicate defense strategy, expand evidentiary exposure and introduce inconsistencies between contemporaneous clinical documentation and underlying AI-generated content.

Vendor oversight

The introduction of third-party AI systems into clinical workflows does not transfer legal responsibility to vendors. Instead, it heightens the importance of structured oversight and continuous monitoring. Healthcare organizations must ensure that vendors meet applicable HIPAA and cybersecurity standards and that systems are auditable, transparent and operationally controlled within existing clinical governance frameworks.

From a regulatory standpoint, these systems are increasingly being treated as extensions of the office record infrastructure rather than standalone productivity tools. This raises regulatory concerns, as well as questions about the potential for inadvertent violations of state privacy laws and third-party payer requirements, which could create collateral consequences that the practice might not have adequately considered before implementing the technology.

Operational considerations

Practices are urged at the earliest practical opportunity to engage in a meaningful conversation internally about how best to utilize AI to promote the goals of the organization and how to investigate the availability of resources in the marketplace. The dialogue should include senior members of the executive team in consultation with IT experts regarding software options, as well as corporate counsel to identify local regulations and compliance rules governing the often-applicable privacy laws that may be unique to the practitioners' organizational model.

It's also recommended that administrators routinely audit each stage of the ambient listening process to confirm that it's functioning as intended, that recordings are retained for the required period and then deleted, that the informed consent is documented and that clinicians have reviewed and edited the resulting documentation. In addition, if the patient doesn't consent, administrators should verify that standard documentation procedures were followed without the use of AI.

Established duties

Ambient listening and related technologies are increasingly likely to become permanent features of healthcare documentation and routine operations. Their legal significance lies in how established principles such as the standard of care, informed consent, documentation integrity, compliance and discoverability apply in healthcare settings where AI plays a role in generating and maintaining the clinical record.

Efficiency gains don't change existing legal obligations. If anything, they increase the need for disciplined oversight, as the medical record is now shaped not only by clinicians – but also by systems that aren't fully transparent or fully controlled, which may thereby create inadvertent and unforeseen aberrations detrimental to the practice. **PSN**

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AN ETHICAL MATTER

Marketing around 'exclusivity' can impede real progress

By Anu Bajaj, MD

Editor's Note: "An Ethical Matter" is written by Anu Bajaj, MD, who served as the Ethics Committee chair in 2018. Readers are encouraged to submit queries to her at anukbajaj.mac@mac.com. *The views expressed in this column are those of the author and should not be considered legal advice. The ASPS ethics and compliance resource page can be accessed at* plasticsurgery.org/ethics. *for further information.*

With the rise of social media marketing, it has become increasingly common for surgeons and practices to distinguish themselves by promoting "special" techniques or "exclusive" procedures. It seems like every conveyor-belt cosmetic chain is offering its own patented liposuction or laser technology, while other surgeons may have developed unique methods to treat capsular contracture or other ailments that affect patients. Regardless, each of the physicians then will try to have a claim of exclusivity. To patients – who are not trained to evaluate surgical nuance – these claims can be difficult, if not impossible, to assess.

Our Code of Ethics offers some guidance for physicians. Under Section 1: General Principles, it states: *"Members should strive continually to improve medical knowledge and skill, and make available to their patients and colleagues the benefits of their professional achievements. Members have an affirmative duty to disclose new medical advances to patients and colleagues."*

In other words, innovation in medicine carries an obligation: not only to develop new techniques, but to share them with both your colleagues and your patients. So if you're sharing them, you can't be the only person with access to these advances.

Section 2 expands on this responsibility, cautioning against restricting access to medical knowledge. It states that a member should not seek or obtain a patent for a surgical method, or use trade secrets, confidentiality agreements or similar mechanisms to limit the availability of procedures or the dissemination of knowledge. In fact, the code specifically states that a member may be subject to disciplinary action or expulsion if *"...The Member seeks or obtains a patent for any invention or discovery of a method or process for performing a surgical procedure or employs trade secrets, confidentiality agreements or other methods to limit the availability of medical procedures and the dissemination of medical knowledge."*

Taken together, these principles suggest that it's unethical to develop a surgical technique and then restrict its use for the sake of exclusivity.

Nevertheless, in today's social media landscape, we frequently encounter messaging that implies exactly that – techniques are described as "proprietary," accessible only to a select few or uniquely mastered by a single practitioner. The sense of exclusivity can be implied – old procedures are renamed – or real when new techniques are developed. Whether explicitly stated or subtly implied, such claims can blur the line between legitimate innovation and marketing-driven exclusivity. Patients become the unsuspecting victims of this type of marketing campaign – they believe that certain procedures are only available by a select few.

To be fair, the issue is not always straightforward. Some techniques are trademarked rather than patented – and the legal distinctions between these designations are complex. The ethical principle, however, remains clear: Medicine advances through shared knowledge, not guarded trade secrets. To be frank, some of these new procedures are the natural evolution of previously tried and true surgical techniques.

If we're serious about improving patient outcomes, we must resist the temptation to frame innovation as exclusivity. Progress depends on openness – on the willingness to teach, to refine, and to allow others to build upon our work. **PSN**