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PERSPECTIVES

THE RISKS OF AI NOTETAKERS IN THE BOARDROOM

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Board minutes are important corporate records. They are the official account of corporate action, often assumed to be the most accurate and complete record of a board's deliberative process.

As a result, they are intensely scrutinised by shareholders exercising their rights to inspect a corporation's books and records, regulators conducting inquiries and investigations, and courts adjudicating corporate disputes.

When questions arise, perfunctory or incomplete minutes can compound concerns about the corporation's and directors' decision making. Yet thoughtful, substantive minutes can help protect corporations and boards by showing that directors acted with care and loyalty and exercised well-informed, well-reasoned business judgment.

Given how consequential they can be, boards have perfected the art of complete but curated meeting minutes. These minutes thoughtfully document substantive meeting content, such as presentations, adviser guidance and deliberations, while intentionally excluding content that is immaterial or that a corporation may have good reason not to memorialise, such as subjective opinions and reactions, privileged discussions or highly confidential information. This approach balances the benefits of thorough, reliable records

against the need to protect sensitive information, encourage candid participation and limit unhelpful second-guessing.

Today, virtual board meetings and the increasing presence of artificial intelligence (AI) notetakers are challenging the status quo, replacing or supplementing thorough but curated minutes with exhaustive records. Businesses and executives increasingly use AI meeting assistants and similar tools to create detailed or verbatim records, and boards are no exception.

In some cases, boards purposefully enable AI notetaking on sanctioned platforms to generate transcripts that help prepare official minutes. In other cases, third-party bots and attendees' personal notetakers may record and transcribe meetings without key stakeholders' approval – or even awareness. Because these tools often sync to calendars and join meetings automatically, some records may be created because of a default setting rather than a conscious decision.

One implication is diminished corporate control over the dissemination of board meeting records.

Many AI vendors store these tools' output on their own or third-party servers rather than company-controlled infrastructure, and some vendors' standard terms authorise their use of customer content to train AI models.

When AI assistants automatically send output to attendees, or directors use personal AI tools, meeting records can land on personal devices and storage systems as well as vendor servers. This dispersion could put board meeting summaries – and sensitive information they contain – at greater risk of exposure through vendor staff, cyber attack or a subpoena or a document request directed at any third party possessing the data.

In addition to the dissemination of their records, AI meeting assistants can also diminish boards' control over the substance of their records. Notetakers can create records that include, in painstaking detail, content typically excluded from official minutes. They can also mistranscribe or omit important content, and summarisation tools may miss important topics or critical discussion points.

Even technically accurate transcriptions can be misinterpreted when jokes and sarcasm are divorced from a speaker's tone and other nonverbal cues. Careful editing can address some problems, but if the original output is saved on third-party servers or distributed to participants, correcting every version of the record may be impossible.

Together, diminished control over the dissemination and substance of board records could have wide-ranging consequences when disputes arise. Indeed, the proliferation of AI-generated records may itself lead to more disputes. Shareholders may seek these files under applicable books and records provisions and, if successful, mine unfiltered documents for content that might appear to support derivative suits or other litigation.

Because these records can include inaccuracies, offhand remarks and AI-generated characterisations stripped of context, plaintiffs may succeed in constructing allegations from material that, properly understood, reflects no misconduct. This risk exists even when corporations are permitted to redact irrelevant information from documents produced in response to books and records requests, as under amended Delaware General Corporation Law section 220. Even if only relevant portions of a transcript are produced, their granular detail may furnish far more fodder for second-guessing and criticism than traditional board minutes ever would.

AI-generated material is also considered electronically stored information (ESI), likely discoverable under federal and state law, so AI notetakers carry significant discovery implications. When corporations clearly anticipate litigation, they must preserve relevant AI-generated board records and ensure their vendors preserve any copies on their systems.

Directors holding these files must also preserve them, whether received from the company or created with personal AI tools. The alternative may be sanctions for spoliation, as courts are increasingly holding businesspeople accountable for removing text messages and similar ESI from personal devices. To mitigate this risk, corporations may become increasingly inclined to collect and image directors' personal devices and accounts at the outset of a dispute, making directors with relevant AI-generated records likelier targets for intrusive data collections that may ultimately prove unnecessary.

When litigation materialises, boards' use of AI tools could also force companies to disclose confidential or other sensitive information unrelated to the dispute. Unlike books and records requests and litigation to compel inspection, where corporations are often permitted to redact irrelevant material, civil litigation in other contexts generally requires parties to produce documents in full.

In this context, even if only a few lines of an AI meeting transcript are relevant, the producing party may be required to disclose the entire document, including verbatim discussion of sensitive topics like personnel matters or competitive research. The production of meeting transcripts could also result in the attribution of statements to specific directors and attendees, which official minutes usually avoid. The prospect of such disclosures could chill participation, making directors less willing to raise thorny issues, express unpopular views or voice concerns.

Although information protected by the attorney-client privilege or work-product doctrine is generally shielded from discovery, whether these protections extend to information captured by AI tools remains unsettled. For example, a federal court in the Southern District of New York ruled that information a criminal defendant fed into an AI chatbot, including information learned from counsel, was not confidential for attorney-client privilege purposes, in part because the vendor disclosed that it might use inputs to train its models.

The court also determined that documents the defendant generated using AI were not protected work product, even assuming they were prepared in anticipation of litigation, because they were not prepared by counsel or at counsel's direction. Addressing work product protection in a civil matter involving a pro se litigant, a court in the Eastern District of Michigan reached a different conclusion, ruling that materials the litigant prepared with the assistance of AI were protected work product, and the use of AI did not waive the protection because it was not disclosure to an adversary, nor was it likely to result in disclosure to an adversary.

Courts considering these issues are reaching different conclusions, and in practice the analysis will likely be highly fact-specific. But the risk of a court declining to extend privilege or work

product protection to materials shared with or generated with the assistance of AI notetakers, or concluding that the use of AI tools waives these protections under certain circumstances, is meaningful. The risk may be greater for directors using personal AI notetakers because courts have ruled that outside directors' use of external email accounts can waive attorney-client privilege.

AI-generated board meeting transcripts and summaries can also undercut the evidentiary value of well-prepared official minutes, even when corporations maintain both. Delaware courts have dismissed derivative complaints incorporating board minutes where the minutes do not support an inference that directors violated their duties of care and loyalty.

That dynamic is even more significant now that amended Delaware General Corporation Law section 220 allows corporations to condition production on a stockholder's agreement that the records will be incorporated by reference into any subsequent complaint. Beyond the pleading stage, well-prepared minutes can carry significant weight as evidence of what a board considered and how it reached its decision, making courts less likely to second-guess the board's business judgment.

Courts are less likely to rely on minutes, however, when they appear incomplete, contradict other evidence or when related records could support an inference of improper conduct. AI-generated notes and transcripts, with their potential for errors, omissions and misinterpretation, could unduly undermine the perceived reliability of official minutes.

"AI may change a board's process for preparing its records, but it does not change the principle that the board should remain purposeful about the substance of its records."

In short, AI notetakers carry significant risks, but their benefits may also be substantial, so boards that see value in these tools need not avoid them entirely. Before adoption, boards should work with counsel to establish clear guidelines for selecting and using the technology.

Among other things, boards and their counsel should consider: (i) establishing clear procedures for reviewing, approving, retaining and deleting AI-generated materials; (ii) determining whether

any meetings or portions of meetings should be transcribed; and (iii) using AI meeting assistants and notetakers in ways that protect privilege and work product where possible.

AI may change a board's process for preparing its records, but it does not change the principle that the board should remain purposeful about the substance of its records. Boards should be mindful to use AI thoughtfully, leveraging its efficiencies without giving it outsized influence over the records they create and retain. CD

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