The fallible memory problem

Why the phone call is still the gap in the record



Most litigators are familiar with the point made in *Gestmin v Credit Suisse*: human memory is fallible, and contemporaneous documents deserve more weight than recollections formed later. It's a principle that shapes how disputes are argued. It also raises a practical question that we, as people who build communications technology, think about a great deal: how much of a matter's record is actually contemporaneous?

We're not lawyers, and this isn't a legal analysis. But from where we sit, there's a consistent gap between how much of a matter happens in conversation and how much of that conversation is ever captured.

Where the record breaks down

Email has quietly become the backbone of the matter file. It is timestamped, searchable and preserved more or less automatically. The phone call is different. Instructions are clarified, advice is given, risks are discussed and expectations are set, and the record of all of that usually depends on an attendance note written afterwards.

Some notes are excellent. Others are written hours later, from memory, under time pressure, or not at all. None of this reflects badly on the people involved. It reflects the fact that note-taking competes with everything else a fee earner has to do. The result is a record that is strongest where the communication was written and weakest where it was spoken, which is often the reverse of where the most important exchanges took place.

What recording and transcription actually produce

Call recording and AI transcription are now widely available, but the terms are often used loosely. Practitioners considering them should understand that they produce three different things.

- **The recording** is the primary source: the conversation as it actually happened, in the participants' own words and tone.
- **The transcript** turns that audio into text. Its main value is that it makes a conversation searchable in the same way as an email. You can find a phrase, a figure or a date without listening back to an hour of audio.
- **The summary** is an AI-generated overview of the conversation. It helps someone review a long call quickly, or pick up a matter a colleague has been handling, but it is a condensed interpretation, not a full account.

Each output has a different role. The recording is the reference point. The transcript is how you find things. The summary is how you orient yourself. Treating them as interchangeable is where problems start.

What the technology doesn't do

As technology providers, we think it's important to be clear about the limits.

Transcription is not infallible. Accents, crosstalk, poor lines and specialist terminology can all affect accuracy. A good transcript is a highly useful working document, but where the precise words matter, the recording should be the source you rely on.

Technology also only captures the channels it is connected to. A system integrated with a firm's office phone system won't necessarily capture a call made on a personal mobile or a video meeting on another platform. Firms need an honest map of where client conversations actually happen before assuming their record is complete.

Finally, a summary supports professional judgement but does not replace it. Deciding what a conversation means for a client's position remains the lawyer's job.

The questions worth asking first

Recording client calls means creating a new and sensitive category of client data, so the choice of tool matters as much as the decision to record. Confidentiality concerns about client material being entered into public AI tools have already reached the courts. In one Upper Tribunal decision, uploading confidential client documents to open-source AI platforms was held to breach client confidentiality. Transcription tools raise similar questions. Before adopting one, we'd encourage firms to ask:

- Where are recordings and transcripts processed and stored?
- Who can access them, and can access be restricted at a group or individual level?
- How are retention and deletion handled?
- Is call data used to train the provider's AI models?

A reputable provider should be able to answer all of these clearly and help you understand what the answers mean for your firm.

A solvable problem

For a long time, the gap between what was said on a call and what made it onto the file was simply accepted as part of practice. Memory and good note-taking were the only tools available, and both have limits that courts recognise.

That is no longer the case. The conversation is often the most important part of a matter's record and the least well captured. Technology now makes it possible to change that, provided firms understand what the tools produce, are realistic about their limits, and choose them with the same care they apply to any other client data.

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