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E-Discovery Challenges Presented By Voice Mail

Law360, New York (April 22, 2010) -- Gone are the days when the use of voice mail came without a paper trail. Today, many organizations are turning to unified messaging platforms to integrate all communications — meaning that voice mail, faxes, instant messages and e-mail may all be delivered to users in their e-mail inboxes. This integration may solve business communication issues, save costs and enhance collaboration, but it may come at a price.

Most forms of electronic communication, including voice mail, are generally discoverable under the Federal Rule of Civil Procedure. See, e.g., *In re: Flash Memory Antitrust Litig.*, No. C-07-00086-SBA, 2008 WL 1831668 (N.D. Cal. Apr. 22, 2008) (ordering parties to preserve “documents, data, or tangible things,” which expressly included voice mail).

Nevertheless, traditional voice mail messages — stored digitally only on a voice mail server with no written notification — are easily controlled by organizations’ retention policies. They may also prove time-consuming and costly to preserve, collect, review, and produce in litigation, supporting the argument that the information is not “reasonably accessible” under Federal Rule of Civil Procedure 26(b)(2)(B).

However, with a unified messaging platform, a voice mail is delivered to a user in an e-mail containing an attached audio file (e.g., .wav) of the voice mail message. The message is likely stored on the company’s e-mail server along with all other e-mail, is subject to the e-mail retention and backup policies, and can be saved and forwarded by users with ease. There are implications of this new form of voice mail at each stage of the e-discovery process.

Preservation

Challenges

A voice mail message delivered to an e-mail inbox and stored on e-mail servers is likely to be

treated similar to e-mail for preservation purposes. In fact, in one product liability MDL, the court considered the defendant's failure to produce voice mail from a unified messaging system in awarding discovery sanctions, stating, "Although AstraZeneca has a system to deliver voice mail, faxes and video into Outlook inboxes, none has been produced." In re: Seroquel Prod. Liab. Litig., 244 F.R.D. 650, 661 (M.D. Fla. 2007).

With the increased scope of preservation obligations comes increased costs. Organizations may lose capabilities to centrally manage the dissemination and retention of voice mail, which could drastically increase the volume of discoverable data on e-mail servers, for which companies may be required to build IT infrastructure to archive and retain. Moreover, the preservation of voice mail carries substantive risks due to the nature of voice mail dialogue.

Best Practices

To avoid the increased obligations and costs associated with voice mail, counsel for parties may attempt to limit the scope of preservation to exclude voice mail messages. For example, in two recent cases, the parties stipulated as to the non-preservation of specific electronically stored information, including voice mail. *United States v. La. Generating LLC*, No. 09-100-RET-CN (M.D. La. Mar. 5, 2010); *Network Appliance, Inc. v. Sun Microsystems, Inc.*, No. 3:07-CV-06053 EDL (N.D. Cal. Jan. 31, 2008).

Nevertheless, organizations and counsel should consider implementing or revising acceptable use policies regarding voice mail and should consider training employees regarding the appropriate use. Counsel should also review retention policies in light of implementing unified messaging platforms and should consider whether to specifically include voice mail in litigation hold notices, with instructions to users for preserving the audio files and their transmittal e-mails.

Collection and Review

Challenges

With unified messaging, because there is an increased volume of data preserved for litigation, there is also an increased volume of data to be searched. Moreover, because the voice mail messages are simply files attached to e-mails, the argument that such messages are not "reasonably accessible" may be challenging depending on the nature of the system.

The transmittal e-mails for the .wav audio files, which contain identifying information, such

as sender, recipient, originating telephone number, internal extensions, and date/time stamps, may be easily searched. In addition, companies may also choose to employ tools to aid searching, such as phonetic search capabilities or transcription services, both of which may create search and retrieval efficiencies, but carry high costs and the risk of inaccuracy.

Whatever search methods are employed, the results will yield higher volumes of data that must be processed and reviewed. Reviewers will either be required to listen to the messages for responsiveness and privilege or read the additional transcriptions, which will undoubtedly increase litigation costs.

Best Practices

Organizations and their counsel should carefully consider the efficiencies and risks associated with the collection approaches they will employ. For custodian-implemented collection based only on listening to the audio files, counsel should consider sending detailed instructions to the employees on what to collect, how to save, and where to send the messages.

On the other end of the spectrum, companies considering transcription services should thoroughly evaluate vendor offerings and perform testing of the functionality. Moreover, for attorney review of the messages, companies must consider whether to do a pure audio-based review, pure-transcript review, or a combination of both. No matter the collection and review approach taken, organizations should develop reliable business processes and documentation to enhance the defensibility of the chosen systems.

Production

Challenges

With the onset of unified messaging, parties will face the challenge of determining what constitutes the “usual course of business” or a “reasonably usable” form of production under Federal Rule of Civil Procedure 34(b)(2)(E). If text transcription is used, will it be sufficient for a party to simply produce the voice mail transcript without the audio file? If the transcript, audio file, and transmittal e-mail must be produced, does the technology allow the party to produce linked files?

Best Practices

Counsel should attempt to address and agree upon a strategy for the issues above in the early stages of the litigation. It will also be important for counsel to be aware of the metadata

fields that should be produced to ensure the usability of the messages.

Conclusion

As more and more companies implement unified messaging platforms, users must be aware of the impact their voice mails leave. Moreover, counsel must be fully prepared to assess the challenges and employ sound practices for the handling of unified communications in discovery.

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