

Voicemail Archiving: Challenges & Risk Issues

The e-Discovery and retention issues surrounding the management of today's most often overlooked electronic record



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Introduction

Gone are the days when the use of voicemail came without an audit trail, and the expectation of having to produce voicemail records in legal proceedings was virtually unprecedented.

Today, to streamline communications, many organizations use IP-based phone systems running unified messaging platforms, such as Cisco's Unity Connection. These platforms allow voicemails, faxes, instant messages and e-mails to be delivered to users in a central location – usually an e-mail inbox. These various communication systems automatically synchronize to reduce communications complexity and speed response. This type of integration solves business communication issues, reduces costs and enhances collaboration; but is the impact of this technological advancement being fully understood as it pertains to electronic record retention?

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Most forms of electronic communication, including voicemail, are now generally discoverable under the Federal Rules of Civil Procedure. Most organizations have fully adapted to the need to implement retention policies for email communications and other documents, however, most do not understand the need for similar policies pertaining to voicemail and other electronic communications.

Organizations which (a) are required to retain communications; or (b) are proactively seeking to manage risk and improve customer service, have two choices. These organizations can implement an effective and efficient process for preserving and accessing archived voicemail and other electronic communications, or face the risk and attendant consequences associated with a lack of record retention compliance.

In years past, it was easier for organizations to refute discovery requests for voicemail and other electronic communications as being too cumbersome and expensive. However, now that most organizations have made the move into voice over IP (VOIP), such an argument may no longer be a valid legal defense. In many contexts, voicemail has become an electronic record, and as such, those records become subject to retention and archival requirements. In fact, voicemail production requests may become more prevalent as savvy attorneys are learning that voicemail archival technology is available and poses little if any financial burden to acquire and implement.

The Expectations

Prior to the arrival of digital technology for voice messaging, most courts regarded voicemail as an exception to the general rule that communication records are required to be produced for litigation purposes due to the unreasonable burden associated with retaining and accessing relevant messages. However, with the widespread adoption of VOIP and unified messaging platforms, along with the increased awareness of the technology, courts are becoming less inclined to limit discovery of voicemail messages. What used to be considered an exception is rapidly becoming an expectation.

Thompson Hine, one of the nation's leading law firms for business litigation, has begun advising its clients that "because digitized voicemail is discoverable, failing to maintain this data may constitute 'spoliation' of evidence; meaning that if you fail to preserve key voicemail messages that your adversary claims are relevant, you may be barred from contradicting the evidence that your adversary claims was contained in the voicemail."

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Steven C. Bennett, a partner in the New York City offices of Jones, Day, Reavis & Pogue and chair of the firm's E-Discovery Committee, expands on this thought. **"In the middle of litigation is no time to formulate, much less implement, a new data preservation and production policy. Precisely the opposite is true. A business benefits greatly from having a well-considered policy in place, in advance of litigation.** Often, what is possible to preserve and produce under that policy will be the base-line against which actual obligations in litigation will be measured."

There are few formal rules which govern e-discovery standards. Therefore, there is no easy way to predict the nature and breadth of the obligation a court will impose on a party to preserve and produce electronic materials. Courts will most likely require producing parties to take reasonable steps to ensure that they protect and disclose electronic information such as voicemails. This "reasonableness" standard would be consistent with what courts have traditionally prescribed for assessing document retention policies.

The Challenge

The most formidable obstacle to voicemail discovery is that organizations typically delete voicemail after a short period of time, according to Atlanta products liability defense attorney Laura Lewis Owens.

"Usually it's a matter of days, not months, and once voicemail is deleted it's more difficult, if not impossible, to recover, as compared to e-mail and other forms of data," she said. "Voicemail is not indexed and is not readily searched." But according to Los Angeles technology attorney, Michael R. Overly, the "here-today-gone-tomorrow" nature of voicemail is becoming a thing of the past.

Steven C. Bennett adds that "voicemail archiving technology can now add date and time stamps, recipient and sender telephone numbers, and identification of actions taken such as retain, forward or delete. These additions turn a mass of voicemail records into accessible, useable evidence."

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Alan E. Brill, a consultant with Kroll Ontrack, notes that electronic communications records can be an important tool in building a timeline in a case, and according to computer forensics expert Michelle C.S. Lange, [staff attorney for e-discovery forensics specialist also of Kroll Ontrack], goes a step further, saying **it's prudent to consider voicemail as a "footprint in cement."**

Voicemail on older systems may only be set up for storing messages for a maximum of one month. In contrast, voicemail records can be made accessible for months, or even years, on newer, digitized voicemail systems. Voicemail may soon be as easy to archive and retrieve as e-mail.

The Costs

Current technological limitations have the potential to make voicemail discovery prohibitively expensive and time consuming. To be effective under such limitations, a voicemail discovery plan must be very specific. "The alternative is a very time-consuming search that is unwieldy and impractical", according to Steven Brower, a trial attorney in Costa Mesa, California.

"Even if voicemail is automatically sent out as e-mail [unified messaging], you're still talking a year or more of time to retrieve and listen to all the voicemail of all employees from ABC company from the past year," said Brower. "The voicemail still won't be categorized by subject. Converting to e-mail does not necessarily make it easier to retrieve." This kind of random search can become extremely expensive, concurs Brill.

"If your discovery request is a pure fishing expedition, you have to decide if you have enough people with enough time to listen to it or read it, hoping for a hit," he said. "That's obviously a tactical litigation decision." But, Brill added, "if something is there and is relevant and you know about it, it's probably worth it to request voicemail in discovery."

Preservation

In light of emerging technology, a voicemail message stored on voicemail servers is likely to be treated similarly to e-mail for preservation purposes. In fact, in one product liability case the court considered the defendant's failure to produce voicemail 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."

Preserving the information is a critical first step, but retrieving such information remains difficult. Computerized voicemail systems may not provide practical searching options due to a variety of technical and strategic concerns.

"With the wide range of proprietary systems out there, attorneys may not know what they're dealing with," Overly said. "A lot of attorneys are purchasing the software to conduct a review of e-mail themselves; but it's very different for voicemail, and a competent forensics expert should handle it."

Bennett adds that the integration of voicemail with e-mail and other electronic devices "may multiply the incentives to create, distribute and retain voicemail. Just as e-mail has improved the efficiency of business, so too enhanced voicemail may offer benefits. The ability to retain, search and easily

transcribe voicemail might make it possible to use voicemail as a significant adjunct to e-mail, or even in lieu of e-mail."

Bennett continues, "a business must start with the worst-case presumption that it may be subjected to very broad preservation and production obligations." Bennett said that businesses should create retention policies for voicemail now, instead of waiting until a litigation crisis to formulate one. "With voicemail, a business that has no data management protocol, or no allocation of responsibility for data management, may struggle greatly when new data preservation and retrieval obligations are imposed [by a judge]."

Businesses should be planning now for document-retention policies for voicemail, instead of waiting until a litigation crisis to formulate one.

Conclusion

Voicemail records, long neglected by organizations and attorneys, is the next frontier in electronic discovery and retention compliance, and potentially, one of the most powerful pieces of evidence in a legal proceeding.

With the advent of VOIP and its strong adoption in the market over the past 15 years, voicemail is now being stored like other electronic files, which makes it an easier target for discovery. The potential result: more audio information stored for longer periods of time on a greater number of devices, such as smart phones and personal digital technology.

Even though voicemail is much more accessible today than it was only a few years ago, working with these electronic files remains much more cumbersome than working with other digital information like e-mail messages and electronic documents. As a result, producing parties may have strong, valid reasons to resist producing this material. Conversely, receiving parties may find that they must spend substantial amounts of money to transcribe a large number of voice mail messages in order to find-or eliminate the potential for-one or two messages of interest.

Solution

Donoma Software's Message Vault is the first, and currently the only, voicemail archiving solution for the Cisco Unity Connection phone platform. It delivers a flexible, secure, accountable policy-driven voicemail record retention solution. With Message Vault one can not only apply policy-driven record retention but now have the ability to quickly search, filter, restore and report on any voicemail message.

Message Vault benefits:

- Archives all voice messages in real time.
- Messages are archived regardless of end user deletions.
- Messages are easily searchable as needed for download, restoration or reporting.
- Messages can be tagged with ad-hoc tags and searched via tagging.
- Multi-level administration roles provides for different levels of access.
- Leverages Cisco's familiar "Class of Service" settings to simplify set up & administration.
- Ensures that records are archived and destroyed on a consistent policy schedule.

- Filters & Tags make message search & refinement very fast.
- Message preview enables quick inline message review prior to downloading or releasing voicemail records.
- New users are automatically flagged for archiving setup.
- Provides a complete audit trail & activity reporting.

Message vault delivers a flexible, secure, accountable policy-driven voicemail record retention solution.

Learn More

To learn more about Message Vault or request information or a demonstration, visit <http://donomasoftware.com/donoma-message-vault/> or contact us at (866) 265-2770.

Appendix A: Use Cases

Electronic Record Retention for Compliance

Issue/Objective: The need to ensure that voicemail records are being archived according to the same electronic record retention policies being applied to other electronic records in the organization.

Organizations: Any regulated industry with electronic record retention compliance requirements. Typically this might include: Financial, Healthcare, Energy, Utilities, Government, and certain Academic and Commercial organizations.

Key Personnel: Risk Managers, Legal, Operations.

Application: Message Vault is installed in the client's data center and connects to their Cisco Unity Connection voice system. Employees are sorted into retention policy groups that are administered via the Class of Service. Each policy group is activated and voicemails are captured and archived upon arrival. End users may delete voicemails from their account, but a copy of such voicemails, along with critical information, such as date stamp, disposition and caller ID, are also recorded. The system continues to archive messages for the length of the established retention policy set for each group of user.

In the event that a voicemail message needs to be located, the system administrator can search for messages via a streamlined web interface to their Message Vault system. Records may be searched via a number of criteria including date, time, extension, caller ID and any tags applied to a message. The system returns a list of the messages meeting the search criteria. From there, those messages may be restored back to the system (if the user accidentally deleted them and would like them restored), or they may be securely emailed or downloaded to media. A record of all such activities is preserved in the system's audit trail and levels of administrative security ensure the ability for different personnel to interact with the messages with appropriate rights.

Outcome: Voicemail records are securely archived according to established policies contained within a single system. Because it does not rely on unified messaging for its archival method, there is no opportunity for the voice record to be considered "at risk" for manipulation.

Customer Service

Issue/Objective: The need to check allegations of customer service issues/complaints with mismanaged communications.

Organizations: Any organization.

Key Personnel: Line of Business Managers, Call Center Managers, Sales Managers, Operations.

Application: Message Vault is installed in the client's data center and connects to their Cisco Unity Connection voice system. Employees are sorted into retention policy groups that are administered via the Class of Service. Each policy group is activated and voicemails are captured and archived upon their arrival. End users may delete voicemails from their account, but a copy of such voicemails, along with critical information, such as date stamp, disposition and caller ID, are also recorded. The system continues to archive messages for the length of the established retention policy set for each group of user.

In the event that an organization needs to track down an alleged message (for example, a customer who complains they left specific instructions, a citizen filing a complaint with the Police Department, an architect confirming instructions to a Project Manager) Message Vault may be used to locate messages and ascertain if whether a message exists, the contents of the message, when it was reviewed, and by whom.

The system administrator searches for messages via a streamlined web interface to their Message Vault system. Records may be searched via a number of criteria including date, time, extension, caller ID and any tags applied to a message. The system returns a list of the messages meeting the search criteria. A record of all such activities is preserved in the system's audit trail and levels of administrative security ensure the ability for different personnel to interact with the messages with appropriate rights.

Outcome: Voicemail messages may be quickly found to address customer service complaints and allegations for faster resolution of issues based on fact.

Litigation Hold Requirements

Issue/Objective: The need to ensure that voicemail records are being archived and accessible to comply with a litigation hold.

Organizations: Any organization.

Key Personnel: Legal.

Application: Message Vault is installed in the client's data center and connects to their Cisco Unity Connection voice system. The employees identified for litigation hold are sorted into retention policy groups that are administered via the Class of Service. Each policy group is activated and voicemails are captured and archived upon their arrival. End users may delete voicemails from their account, but a copy of such voicemails, along with critical information, such as date stamp, disposition and caller ID, are also recorded. The system continues to archive messages for the length of the established retention policy set for each group of user.

Records may be searched via a number of criteria including date, time, extension, caller ID and any tags applied to a message. The system returns a list of the messages meeting the search criteria. When requested, the records may be securely emailed or downloaded to media. A record of all such activities is preserved in the system's audit trail and levels of administrative security ensure the ability for different personnel to interact with the messages with appropriate rights.

Outcome: Voicemail records are accurately retained and available to comply with legal holds within a single system. Because it does not rely on unified messaging for its archival method, there is no opportunity for the voice record to be considered "at risk" for manipulation.

Voice System Administration

Issue/Objective: The need for streamlined administration tools for IT to administer voice record search, retrieval & restoration.

Organizations: Any organization.

Key Personnel: IT Voice System Administrators.

Application: Message Vault is installed in the client's data center and connects to their Cisco Unity Connection voice system. Employees are sorted into retention policy groups that are administered via the Class of Service. Each policy group is activated and voicemails are captured and archived upon their arrival. End users may delete voicemails from their account, but a copy of such voicemails, along with critical information, such as date stamp, disposition and caller ID, are also recorded. The system continues to archive messages for the length of the established retention policy set for each group of user.

Currently if an administrator is asked to find and restore a voice message, there are few tools for them to use. They could try re-loading the backup of their voice system, but this only works if the message existed at the time of the backup. Because a backup is a snapshot in time and typically happens after work hours, this can often be a problem as the message may not have yet been captured. If the message appears likely to have been captured, the administrator must re-load the entire message database from the backup – they cannot pick through and restore messages like they can in Message Vault. This is time consuming and often futile.

With Message Vault in place, in the event that a message needs to be located, the system administrator can search for messages via a streamlined web interface to their Message Vault system. Records may be searched via a number of criteria including date, time, extension, caller ID and any tags applied to a message. The system returns a list of the messages meeting the search criteria. From there, those messages may be restored back to the system (if the user accidentally deleted them and would like them restored), or they may be securely emailed or downloaded to media. A record of all such activities is preserved in the system's audit trail and levels of administrative security ensure the ability for different personnel to interact with the messages with appropriate rights.

Outcome: Voicemail records are captured at time of arrival and administrators can quickly find and restore (or download) the requested messages providing a very helpful voice system administration tool.

Personnel Issues

Issue/Objective: The need to identify and retrieve voicemail records pertaining to internal employee issues such as harassment, performance, etc.

Organizations: Any organization.

Key Personnel: Human Resource Managers, Legal, Line of Business Managers, Operations, Executive.

Application: In the event of an internal personnel claim or issue that can be substantiated by voicemail messages, Message Vault can provide not only the ability to search for messages related to the issue, but can find additional messages that are in response if the issue is between two or more people.

Message Vault is installed in the client's data center and connects to their Cisco Unity Connection voice system. Employees are sorted into retention policy groups that are administered via the Class of Service. Each policy group is activated and voicemails are captured and archived upon their arrival. End users may delete the voicemail from their account, but a copy of the voicemail along with critical information, such as date stamp, disposition and caller ID, are also recorded. The system continues to archive messages for the length of the established retention policy set for each group of user.

In the event that a message needs to be located, the system administrator can search for messages via a streamlined web interface to their Message Vault system. Records may be searched via a number of criteria including date, time, extension, caller ID and any tags applied to a message. The system returns a list of the messages meeting the search criteria. From there, those messages may be restored back to the system (if the user accidentally deleted them and would like them restored), or they may be securely emailed or downloaded to media. A record of all such activities is preserved in the system's audit trail and levels of administrative security ensure the ability for different personnel to interact with the messages with appropriate rights.

Outcome: Voicemail records are quickly available to help clarify the issue or claim, and they may be tagged for future use related to the particular claim, case or issue.