

# VOICEMAIL: THE NEXT E-DISCOVERY CHALLENGE?

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## I. INTRODUCTION

For business managers, IT professionals, and their lawyers, the past few years of explosion in awareness and use of electronic documents in litigation have presented great challenges. The extensive use of e-mail in business, for example, has required, in many instances, the revamping of document retention policies and the dedication of substantial new resources and personnel to ensure that the enormous volume of business e-mail is properly treated, from a regulatory and litigation preparedness perspective.<sup>1</sup>

The problem may be getting substantially worse soon. Added to the gigantic growth in use of e-mail as a business tool, the use of voicemail has similarly exploded in recent years. The most recent development, digitized voicemail and the development of technology that threatens to make voicemail as permanent and accessible as e-mail has become, may open a new, and perhaps even more difficult, battlefield in the e-discovery wars.

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1. C. Bennett, *Dealing With Office E-Mail*, N.Y.L.J., May 16, 2002, at 5, col. 1; see generally, Steven C. Bennett, *Building An E-Document Retention Policy*, 3:3 InfoPro 42 (2001).

## II. IS VOICEMAIL DISCOVERABLE?

The framers of the Federal Rules of Civil Procedure recognized, more than 30 years ago, that "data compilations," including data in electronic form, are discoverable.<sup>2</sup> Since the amendment of the Federal Rules in 1970, courts have routinely allowed discovery of electronic communications and computer-stored documents.<sup>3</sup> On that broad definition, voicemail is potentially discoverable.<sup>4</sup>

## III. MUST VOICEMAIL BE PRESERVED?

Once it is accepted that a form of data (such as voicemail) is potentially discoverable in litigation, the question immediately arises whether the data must be preserved. In general, courts enforce a concept of "spoliation" of evidence.<sup>5</sup> The essence of the spoliation concept is that parties in litigation have a duty to preserve evidence that may be relevant to the litigation. Deliberate (and perhaps even negligent) destruction or modification of evidence may constitute "spoliation," which may subject a litigant to a range of sanctions (from the imposition of costs to the application of adverse inferences to the striking of pleadings and default judgments). The ultimate sanctions, penalties for contempt or obstruction of justice, although relatively rare, are quite possible.

The duty to preserve evidence, moreover, may arise even before formal litigation proceedings are commenced. Where a party knows that a dispute or investigation is underway (or very likely) an obligation may exist to preserve all relevant evidence.<sup>6</sup>

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2. FED. R. CIV. P. 34 (defining "documents" subject to discovery); see *id.*, Advisory Committee Notes (1970).

3. See, e.g., *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120, 1995 WL 649934, at 2 (S.D.N.Y. Nov. 3, 1995) ("today, it is black letter law that computerized data is discoverable if relevant."); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 461 (C.D. Utah 1985) ("it is now axiomatic that electronically stored information is discoverable.").

4. See, e.g., Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 565 (2001) (defining electronic discovery to include voicemail); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 333 (2000) (defining electronic discovery to include voicemail). There is a more than competent argument to be made, however, that electronic records (such as voicemail) should be subject to rules that differ from the rules for conventional, paper records. See Jonathan M. Redgrave & Ted S. Hiser, *The Information Age, Part I: Fishing in the Ocean, A Critical Examination of Discovery in the Electronic Age*, 11 SEDONA CONF. J. 195 (2001).

5. Randolph A. Kahn & Kristi L. Vaiden, *If the Slate Is Wiped Clean, Spoliation: What It Can Mean For Your Case*, BUS. LAW TODAY, May/June 1999, at 13.

6. The precise point at which a duty to preserve evidence arises and the precise scope of what is relevant evidence, of course, must be developed on a case-by-case basis.

#### IV. WHY IS ELECTRONIC DISCOVERY HARD TO HANDLE?

In the long gone world of purely paper business records, the ability to comply with the duty to preserve relevant evidence was a relatively simple matter. Absent affirmative efforts to shred or discard such records, in most instances paper records would remain available, and unaltered, in company files in virtual perpetuity. Once the duty to preserve evidence arose, the principal challenge was simply to identify and gather the relevant records.

Electronic business records — e-mail in particular — fundamentally changed the landscape. In an electronic environment, the creation, modification and destruction of data is a highly active, and often chaotic, process. In most businesses, for example, e-mail is not meant to be preserved permanently. An e-mail, in concept, is often the equivalent of an informal note, meant to be read once, acted upon, and then discarded. Users often delete e-mail immediately upon its receipt. Most e-mail systems, moreover, are designed to delete all e-mail messages after some set period that is often quite brief.

In such an electronic data environment, complying with the duty to preserve evidence becomes much more difficult. A large part of the scramble, over the past few years, has been an effort by businesses to establish policies that will permit a business to suspend record destruction, and to create an archive of potentially relevant records, which will be preserved in original form, without danger of destruction or modification. In many instances, the simplest solution is to identify potentially relevant e-mail accounts by particular departments or employees, make copies of the accounts, and then when requests for specific information are made, review the records for responsive materials.

The crushing volume of electronic records, however, can make this preservation and review process very difficult. Simply identifying potentially responsive materials may be a major undertaking, especially in a large business. Technology may solve some of the problem, as it may now be possible for a business to search through records electronically, rather than reviewing all records by hand to identify responsive materials. When records are produced, however, they typically must be reviewed for privilege, as well as relevance, proprietary contents, and any other concerns requiring special attention. Thus, almost inevitably, some review of records by hand — at least for privilege — will be required. The cost of such review (chiefly, legal fees) can be quite substantial. Alternative, cost-saving approaches such as the production of

records without any privilege review, subject to a "claw back" right for the producing party, are to say the least, problematic.<sup>7</sup>

#### V. WHY IS VOICEMAIL EVEN HARDER TO HANDLE?

The preservation, review and production of voicemail records may be even harder to handle than other electronic records. As noted above, one common solution, in attempting to preserve e-mail records, is to identify likely accounts where relevant e-mail might reside, make a copy of those accounts, and then review the preserved records for relevance and privilege. Voicemail makes the process harder, in several ways.

First, unlike e-mail, the principal focus of voicemail records is on the recipient of the message. It is typically the recipient's voicemail account that will contain a record of a message.<sup>8</sup> To preserve voicemail records effectively, likely recipients must be identified. Recipients of relevant messages, however, may be a much larger group than the senders of such messages. Thus, to preserve potentially relevant messages, a business may be required to cast a much wider net.

Second, unlike e-mail, voicemail does not generally have immediately useful search capabilities built in. One cannot simply review the "to" and "from" lines of an e-mail, or the "re" indication, to determine the general nature of the communication. Unless voicemails are transcribed or otherwise converted into searchable text, it is not currently possible to review voicemail easily for relevance and privilege. In essence, review of voicemail may require hours, days or even weeks of real-time listening to messages, in an effort to determine what should be done with the messages from a discovery standpoint.

Finally, production of voicemail messages in discovery may be complicated by the fact that the sounds of the actual messages may be critical to understanding what was being conveyed. A mere transcript of a message cannot capture tone, emphasis and all the other subtle cues provided by actual speech. Thus, requesting parties may insist on actual copies of messages rather than, or perhaps in addition to, transcripts. The added cost and burden may be substantial. Editing oral materials for relevance and privilege, for example, will present unique challenges to most lawyers.

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7. Jonathan M. Redgrave & Kristin M. Nimsgger, *Electronic Discovery and Inadvertent Production of Privileged Documents*, 49 FED. LAW. 37 (2002).

8. The accounts, moreover, may be maintained in several locations: in-house, through an application service provider, or through a telephone carrier, which may make retrieval even harder. See Michael S. Kridel, *Bytes That Bite: The Discovery of Electronic Evidence*, INFO TECH UPDATE, May 1, 2001, available at 2001 WL 16996545.

## VI. IS VOICEMAIL THE NEXT "NEW THING"?

Voicemail evidence is powerful. Even beyond e-mail, where informal, often ill-considered messages can produce damning admissions, the actual sound of an oral message — producing a “you are there” sense not generally available from written words — can literally make or break a case. In one recent insider trading action, for example, a voicemail provided to prosecutors revealed that the defendant had announced his stock trading intentions and awareness of insider information.<sup>9</sup> In another recent corporate control contest, a voicemail that leaked to the news media was a key piece of evidence in a publicity and courtroom battle.<sup>10</sup> There have been several other recent cases in which voicemail evidence figured prominently.<sup>11</sup> The capacity of such evidence to have a major impact on the outcome of a litigation — either affecting the substantive result, or putting pressure on a party to settle — means that voicemail is a natural target for discovery by parties in hard-fought litigation. Regulators may not be far behind in demanding such records.

Indeed, in circumstances where discovery obligations are unbalanced (a solo plaintiff representative in a class action against a major corporation, for example), the demand for every conceivable form of record (including voicemails) is almost inevitable. In that context, one side has essentially no risk or burden in discovery. It will have a few records at most, easily retrieved and produced.

The other side, by contrast, will have vast and varied records. A demand for all such records, from the small party perspective, is all upside. The worst that can happen is that the party gets nothing, which is an unlikely result. More likely is that something will be produced, which may be highly relevant to the lawsuit. And, it is quite possible that the large party will be forced to produce a large volume of records. The burden, and the risk that the records

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9. *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998). The defendant's conviction, however, was nearly reversed on appeal because the prosecutors obtained the voicemail from an employee who hacked into the defendant's voicemail account. Thus, the court held that the voicemail was the product of illegal interception of a wire communication. Because there was additional evidence of the insider trading unrelated to the voicemail, however, the conviction was affirmed.

10. Ross Snel & Pui-Wing Tam, *H-P CEO Urged Pressure to Win Votes for Merger*, WALL ST. J., Apr. 11, 2002, at B4 (voicemail “message was left anonymously on a reporter's voice mail”).

11. See, e.g., Lucy Morgan, *Gov.'s Daughter Charged With Fraud*, ST. PETERSBURG TIMES, Jan. 30, 2002, available at 2002 WL 3232038 (Governor Bush's daughter charged with falsifying a prescription after voicemail from “doctor” was identified as being from her); Noah Adams, *All Things Considered*, National Public Radio, Mar. 13, 2001, available at 2001 WL 9433961 (discussing trial of Sean “Puffy” Combs, and voicemail message in which Combs allegedly offered to make a potential witness and his family “comfortable”); *Alta-Teacher-Sex*, BROADCAST NEWS, May 24, 2001, available at 2001 WL 21879796 (discussing voicemail evidence in trial of teacher accused of seducing student).

will be mishandled (perhaps with spoliation implications) may produce powerful settlement leverage.

Demands for voicemail records may thus become common in a variety of litigation contexts. Employment discrimination and securities law claims, for example, may increasingly turn on what was said to whom, at what time, and in what specific tone.<sup>12</sup> As these records increasingly play a role in major litigation matters, more and more practitioners will begin to think of demanding such records in their cases.

### VII. WILL TECHNOLOGY SAVE THE DAY?

Technology, of course, is what got us into this problem in the first place. Increased computer processing and storage capacity, and decreased cost for computer service, are what made e-mail possible (and now ubiquitous).<sup>13</sup> The same trends are affecting voicemail. While 20 years ago voicemail was something of a novelty, today voicemail is a standard element of business communications.

Voicemail records, moreover, have long since moved from simple tape recordings to digitized, manipulable records.<sup>14</sup> Such records can easily be distributed to multiple recipients. Indeed, an increasingly popular technology may soon involve the creation of digitized voicemail packets, which can be attached to e-mail, and widely distributed.<sup>15</sup> The integration of electronic devices — cellular phones, personal digital assistants, and various web and e-mail devices — moreover, may further multiply the incentives to create, distribute and retain voicemail.<sup>16</sup>

The last straw here may be the development of effective voicemail archiving technology. One vendor, for example, advertises that its technology provides the capability to add date/time stamps, recipient and sender telephone numbers and identification of actions taken (retain, forward, delete, etc.) to voicemail records.<sup>17</sup> These additions may turn a mass of voicemail records into accessible, useable evidence.

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12. Baker & Daniels, L.L.C., *Beware: Technology in the Workplace is a Source of Liability*, 11 IND. EMBL. L. LETTER 3 (2001) (surveying potential liability based on evidence from electronic records).

13. Steven C. Bennett & Thomas M. Niccum, *Two Views From The Data Mountain*, — CREIGHTON L. REV.—(forthcoming 2003)(manuscript on file with authors).

14. John H. Jessen, *Special Issues Involving Electronic Discovery*, 9 KAN. J.L. & PUB. POL'Y 425, 436 (2000) (describing development of voicemail systems).

15. Mike Tonsing, *Electronic Mail is Ubiquitous and its Consequences are Enormous*, 46 FED. LAW. 56, 58 (1999).

16. This convergence of telephone, voicemail, e-mail and internet functions, however, has not yet produced penetration of the mass market. Doug Allen, *Convergence in the Enterprise: Does Anyone Care?*, NETWORK MAG., June 1, 2002, available at 2002 WL 5730291.

17. VoiceSafe, at <http://www.kleave.com> ("VoiceSafe" product will make voicemail records available for "searching, producing and reviewing").

The development of voice recognition and auto-transcription technology, moreover, may add greatly to the value of such records.<sup>18</sup> With such technology, it may soon be quite possible to search for specific words in voicemail messages, and to print out transcripts of such messages for convenient review.<sup>19</sup>

Finally, the increasing storage capacity of voicemail systems may soon make it possible to retain all voicemail records, just as it is now theoretically possible for most businesses to retain all e-mail records. The only real constraint is the willingness of the business to dedicate storage capacity and the resources of computer professionals to the problem.<sup>20</sup>

And there may be powerful incentives for businesses to make use of this new technology. Just as e-mail has improved the efficiency of business, enhanced voicemail also may offer benefits. The ability to retain, search and easily transcribe voicemails, in theory, might make it possible to use voicemail as a significant adjunct to — or in some regard, in lieu of — e-mail. Only the future can tell how popular these new voicemail technologies may become. From the perspective of recent history (explosion in use of the internet and e-mail), however, the great likelihood is that this new, enhanced voicemail technology may soon become common-place in business.<sup>21</sup>

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18. See, e.g., Anne Brady, *Inter-Tel Sees a Growing Demand for New Phone Technology*, DOW JONES NEWS, July 3, 2002 (Inter-Tel's *Unified Communicator* "uses speech recognition and text-to-speech technology to allow users to access e-mail and voice mail messages from a remote phone" and "will allow users to use speech commands to forward messages to others and dictate 'header' comments to accompany them."); *Preferred Voice Launches New Peripheral for the Telco Market*, PR NEWswire, June 3, 2002 ("service access module" from Preferred Voice incorporates speech recognition, which permits voice-activated dialing and voicemail navigation).

19. *Fast-Talk and Esquire Deposition Services Sign Licensing Agreement*, BUS. WIRE, Aug. 14, 2002 (Fast-Talk's *Voicenetics* software permits searches of audio material based on "phonetic sequencing [ ] rather than converting speech to text," which will allow users "to extract specific information from logged phone conversations, voice mail messages, and audio based data.").

20. At present, of course, most businesses are much more focused on e-mail than voicemail. David L. Wilson, *Here's Looking at You—Employer's Reasons for Snooping may not have any Legal Basis*, THE STAR-LEDGER, Oct. 11, 1999, available at 1999 WL 29116735 (noting American Management Association survey, which revealed that only 5.8% of companies routinely store and review voicemails, versus 27% of companies that store and review e-mail).

21. There may be separate constraints on the use of these technologies, from a human relations perspective. As a general matter, so long as an employer's policies of monitoring and reviewing electronic records is disclosed to workers, there is no law protecting the privacy of records created on business equipment, at a business location. See Steven C. Bennett & Scott D. Locke, *Privacy in The Workplace: A Practical Primer*, 49 LAB. L.J. 781 (1998). Nevertheless, there are those who argue that some privacy should be afforded to communications that were not intended to be scrutinized by an employer, or by prying eyes in a lawsuit. James M. Rosenbaum, *In Defense of the Hard Drive*, 4 THE GREEN BAG 169 (2001). Voicemail may be peculiarly a type of communication subject to employee privacy claims.

#### VIII. WHAT SHOULD BE DONE TO MEET THE CHALLENGE OF VOICEMAIL?

Fortunately for business planners and their lawyers, the experience with e-mail should offer valuable insight into potential means to handle the voicemail challenge. Among the lessons to be applied here:

First, look before you leap. Once voicemail technology is in place for business purposes, courts are very likely to require that the same technology be applied to ensure that potentially relevant evidence is preserved, and produced. The trade-off between business efficiency and litigation risk and burden should, thus, be carefully considered, in advance of adopting such technology.

Second, do not expect courts, or rule-makers, to solve the problem. Thus far, in response to e-mail, the reaction of the courts has been, to put it charitably — erratic. It is not possible to predict whether a court will impose broad or narrow obligations to preserve and produce electronic materials. Nor have rule-makers stepped in to impose specific limits on electronic discovery. Indeed, it is the rare jurisdiction that does much more than state that, in general terms, electronic records are discoverable. Most formal rules of procedure say nothing about how to handle the unique burdens and processes of electronic discovery. In particular, voicemail is rarely addressed, and this gap in rules is likely to continue for the foreseeable future. For planning purposes, therefore, a business must start with the worst case presumption that it may be subjected to very broad preservation and production obligations.

Third, create your own standard of reasonableness. In litigation over the reasonableness of the efforts of a business to preserve and produce voicemails, those efforts will be scrutinized closely. A central element of that scrutiny will be the question whether the business has adopted neutral procedures to ensure that relevant records are retained and produced. Anything that smacks of a deliberate program to hide or destroy relevant records will be criticized by adversaries and, most likely, by the courts themselves. By contrast, facially-neutral programs and policies will generally receive better responses. If voicemail record-keeping practices are justified from a business perspective, and also reasonably designed to ensure that relevant records are preserved and produced in the event of litigation, they are more likely to be accepted than if they are solely a matter of business convenience. Thus, it is important for a business to plan, in advance, how it will show that its practices are reasonable.

Fourth, prepare to make a deal. The only real way to be certain that an adversary or regulator will not complain about the electronic

records practices of a business is to engage in deal-making on the subject. For that purpose, of course, a business must be prepared to offer reasonable treatment of relevant records. A business must also be prepared to address this issue early, before a court steps in to impose broad-brush solutions.<sup>22</sup>

Fifth, focus on cost. The real weapon in litigation concerning electronic records is the ability of a producing party to shift costs to the requesting party. In appropriate cases, courts will consider such cost-shifting, based on analysis of a variety of factors.<sup>23</sup> One key to that analysis is whether the materials requested are reasonably likely to advance understanding of the dispute at issue in the litigation. If a business has, with reasonable efforts, preserved and produced a substantial volume of highly relevant materials, and if the additional information requested is of marginal value (or merely a "fishing expedition"), and production of such information involves great cost, then the business may succeed in shifting the cost of "heroic" data preservation and production efforts to an adversary. Making a case for cost-shifting, however, requires a business to be in a position to show what it has done, why that is reasonable, and why more should not be required.

Sixth, plan for the crisis. The middle of a litigation crisis 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.

A business must be prepared, moreover, to respond effectively to the imposition of additional obligations in the event of litigation. The most basic of these additional obligations is the potential requirement to suspend data destruction policies in the event of a dispute.<sup>24</sup> For voicemail, where relevant data may reside in a number of locations, the challenge of suspending data destruction may be particularly great. A business that has no data management protocol, no allocation of responsibility for data

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22. *Kleiner v. Burns*, No. 00-2160-JWL, 2000 WL 1909470 (D. Kan. Dec. 15, 2000), where the court rejected, as "implausible," a claim by Yahoo that it had no relevant electronic records. *Id.* at \*4. The court imposed a broad obligation to "disclose all data compilations, computerized data and other electronically-recorded information," within 10 days of the court's order. *Id.*

23. Jonathan M. Redgrave & Erica J. Bachmann, *Electronic Discovery, Recent Views on Cost Shifting*, 49 FED. LAW 36 (2002).

24. The obligation, moreover, may be extended beyond simple preservation of what already exists. *Bayer Corp. v. Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1121-22 (N.D. Cal. 1999) (ordering former employee in trade secrets action to produce all existing data, including telephone messages, and to inform the court, within 72 hours, of any communication concerning trade secrets).

management, and no dedication of resources to that effort may struggle greatly when new data preservation and retrieval obligations are imposed. In practical terms, the business will likely fail to preserve and produce relevant records, and will thereafter suffer the disadvantages of trying to explain — to adversary and court — why the data was likely not important, or the destruction of data not culpable.

#### IX. CONCLUSION

Some form of enhanced voicemail technology is inevitable. Lawyers cannot (and should not) try to stop it. The enhanced technology, however, clearly presents new challenges and new risks for business managers, and their lawyers. Failure to prepare to meet the challenges and risks of this new technology may put a business at serious disadvantage when this new technology is used as a discovery tool in litigation.