PREPARE TO HEAR More Discovery Requests for Audio

By Albert J. Kassis*

BY NOW, MOST LITIGATORS HAVE SEEN THEIR SHARE of electronic discovery issues. While the industry continues to develop the best practices and strategies related to all aspects of e-discovery, one relatively new area of discovery which is likely to gain even more attention as an area of concern is audio. This article will focus on issues that litigators may encounter when making or receiving requests for audio data.

First of all, what do we mean by audio files? The applications that produce audio include:

1. Voicemail
2. Teleconferences
3. Web Conferences
4. Recordings from Call Centers
5. General recordings of events including meetings
6. Dictation

Federal Rule of Civil Procedure, Rule 34(a) allows for the discovery of these audio files. In addition to general audio files, even video would fall within the discoverable category.

Preservation hold letters should incorporate all of the above audio components. More importantly, as organizations assess their data environment, the locations of audio files should be included in any architecture assessment that will be used to ascertain and communicate locations for discovery.

Historically voicemail has not been the focus of discovery requests because of various systems limitations. One issue was a lack of file backup. Additionally, limitations on "inbox size" would impose system deletion requirements. Older voicemails housed on legacy voicemail systems were more likely to have data deleted

because of the system's size restrictions. Moreover, some audio systems used proprietary software; without the system software or a conversion to a usable file, the audio could not be utilized in discovery.

Organizations that continue to maintain older voicemail systems that delete voicemails as part of their programming will likely encounter issues pursuant to these preservation letters. Some entities are likely to face a scenario where legal requirements will need to be buttressed against technological limitations.

For most companies the use of audio related technology has evolved. Most of these files, ".wav" files in particular, can be played on any computer. With this standardization comes the potential for a plethora of requests for voicemail.

Modern voicemail systems create a digital file when a voicemail is created. This file is stored, archived and dealt with much like other data files. These digital files may also be delivered to the recipients e-mail in box. A more formal term for this is "Unified Messaging." While e-mail discovery involves issues associated with the senders and recipients, voicemail focuses on those who have received the information. Under the amended Federal Rules of Civil Procedure, the "accessibility" of electronically stored information (ESI) has an impact on whether discovery of that data will occur. This may in some circumstances allow for mandates of sampling, or cost shifting. Use of these unified messaging systems make discovery arguments related to undue burden and cost less likely less persuasive.

The recipient of a voicemail message may do a number of things with a message: listen to the voicemail, delete it, save it or forward it. In the event the message is stored and kept, companies will face a challenge in applying document retention policies related to these voicemails. Those receiving voice messages routed through email will need to be identified during the collection process.

The request for audio files may cause different types of problems than the traditional document requests. Let's start with call center recordings. Why would someone want call center recordings? As always, it depends on the case. If you are trying to prove that a company knew of an issue with their product and you are able to determine that a preponderance of calls into their call center incorporate the issue, then you have good information. A cross section of industries and litigation matters may likely involve audio. From web-based matters to mandated company recordings in various industries, audio could provide the smoking gun.

Litigators must proactively consider voice data that their clients store and should consider the other side's storage locations as well. The meet and confer should shed light on counsel's awareness of audio locations. Regardless, litigation holds should include audio. It is vital at first to include audio from any sources as part of the "litigation hold" to avoid automatic deletion.

If audio data has to be reviewed for production, many applications will help facilitate this. Software is available to assist organizations in culling, identifying and searching these records to determine relevant, non-privileged files. Thereafter a producing party may convert the document to text, which would then have the advantages of an electronic document.

A vital, though potentially costly consideration for the producing party is whether to convert audio to text from the beginning of the review process. If there is a disagreement of sorts, and one party feels that not all relevant audio files are produced, then an entity may have to listen to the audio files again. A practical suggestion is that both adversaries work to agree on this particular issue if it arises.

As previously noted, typically the recipients, not creators of audio files need to be identified. While this does require some work, those requesting this data may find audio and voice recordings more useful and demand them as opposed to a transcribed version of the voicemail. The difficulty of these audio files is that they are naturally handled much differently than other electronic files. The natural course for determining what files are relevant, which are privileged, and what files are not, is inherently difficult with audio and audio related files. Additional issues occur when accent, lingo and vernacular considerations must be addressed. The payoff may be worth it, since indeed there is evidentiary power in the spoken word.

For counsel advising clients on records retention, storage efforts must also be managed. Archiving may be different for various audio files. It is difficult to apply retention policies to these digital files in the same fashion that would apply to e-mail for example. Arguably, once voicemail is turned into a written document, then preservation and discovery principals would mimic that of any electronic document. Accordingly, counsel should consider the ramifications of a process which would convert audio to written text absent a specific need, including litigation.

A company's overall network setup is also of importance in audio or video data retrieval. Discovery of these files may be easier in thin client networks, where the network servers house a majority of the data and the individual user workstations house little data. On the other hand, voicemail may be maintained at a telephone carrier or service provider locations.

As we move forward under the amended federal rules, you should expect to see audio and video as the subject of requests in discovery discussions. If you prepare your clients for such a development, both from a records retention standpoint and ultimately from a review and production standpoint, the number of issues you encounter throughout the process will be manageable.

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