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When The Walls Have Ears: 3 Ways To Leverage Recorded Audio Evidence

From the Expert

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Financial institutions and companies in other regulated industries are under the microscope like never before. With increasing global commerce, growing data volumes, data privacy issues, aggressive regulators and cybersecurity crises, corporations are facing immense pressures and challenges in maintaining compliance and managing their legal and IT budgets. Employee surveillance is one approach that can help address these pressures. Theoretically, it can detect and prevent illegal or harmful activity within an organization. Despite the fact that these processes are historically manual and error-prone, various forms of surveillance are considered standard practice in the financial services world and among highly regulated institutions.

The U.S. Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA) both require banks to monitor employees' personal trades and other activity that may signal illicit trading. This includes recording and storing phone calls. And while banks have long recorded and saved calls, there hasn't been an efficient way to use or access that data. Traditionally, when responding to a regulatory probe, an organization would end up paying millions of dollars to have a group of lawyers listen to thousands of tapes, with hundreds of thousands of hours of audio, only to find that maybe 10 percent or less of the audio reviewed was actually relevant to the inquiry.



New advances in surveillance and electronic discovery technology are changing the legal and tech landscape around audio evidence. Using emerging forms of phonetic indexing, audio analytics and automated transcription, legal and compliance teams can now reasonably access and review audio data that may need to be produced to regulators or for litigation. These advances are of particular importance to the financial services industry, which already has specific requirements for recording employee phone calls. But corporations in healthcare, energy, construction and other regulated sectors, or any organization that routinely records customer service calls, should also take note.

A recent example of this in the courtroom is *Compass Bank v. Morris Cerullo World Evangelism*, which was ruled on in the U.S. district court, S.D. California, earlier this year. In this matter, the defendant filed a motion for evidentiary sanctions against Compass Bank. The defendant claimed that by failing to preserve a recorded telephone call that was known to be relevant to the case, Compass Bank engaged in willful spoliation of evidence. The court found in favor of the defendant, granting an adverse inference jury instruction and imposing monetary sanctions against Compass Bank.

This case illustrates the importance of carefully handling audio evidence and the impact it can have on a case's outcome. The first step is to understand the ways this type

of data can be utilized for legal, regulatory and information governance purposes, and then attorneys can begin to apply the emerging wave of audio technology to them. Below is an outline of the top three ways audio evidence can be leveraged using new technology, and some best practices for how to execute:

1 Reactive E-Discovery: This approach is the most common and familiar to regulated corporations, and addresses the process for responding to an active regulatory inquiry, investigation or lawsuit. As mentioned, the traditional approach is to tap into the thousands of hours of audio sitting on backup tapes, and review the recordings for potential relevance. Now, harnessing advances in phonetic indexing, counsel can turn to software that can process the taped audio and log the sounds into an index. The software also automatically creates searchable transcripts that attorneys can quickly and efficiently analyze and review for relevance, as they would any other form of evidence within their e-discovery repository.

2 Proactive Compliance: Moving toward a more strategic approach, corporations can go beyond simply reacting and can monitor employee activity proactively. In looking at the financial services industry as an example, consider the somewhat over-simplified example of a broker sending an email or text message saying, "I can get you five times your money back," or "I've got something hot," which would be a direct violation of SEC/FINRA regulations. Anyone engaging in this kind of behavior will most likely do so via phone, as voice communications have traditionally been less of a focus for compliance monitoring than email and other written forms.

Using audio technology and phonetic indexing to monitor phone calls in real-time for suspicious phrases, compliance officers and counsel can review what's happening, and catch and stop nefarious activity before it snowballs into a full-blown investigation. This approach is already being put into place by some banks, which hope to save millions by quickly identifying and putting a stop to rogue trading.

3 A 360-Degree Picture: What most banks are concerned with is the fact that the Commodity Futures Trading Commission and the SEC will begin to require institutions to provide a full reconstruction of transactions, and provide documentation of all communications that took place around any given deal. While many banks report that they can do this, being able to do so quickly and across many inquiries is a formidable task.

This is truly the future of information governance from a compliance perspective, and corporations need to be prepared to adhere to these emerging expectations. Most organizations are prepared to produce this kind of documentation from other forms of unstructured data, such as chat formats, email and text messages. But understanding how audio evidence fits into this picture, and having the ability to incorporate recordings into the overall data universe, will be extremely important as this landscape evolves. A hub and spoke model may be implemented, with a central hub of compliance liaisons monitoring and managing the data, and disseminating it to the appropriate business units as needed.

Potential Pitfalls and Considerations

It is important to keep in mind that in addition to the steps above, corporations need to be thinking about audio as part of their over-arching information governance policies. Because audio evidence has traditionally been stored on backup tapes, it is often hoarded and lost to company data retention and deletion programs. Generally speaking, audio recordings only need to be saved for six months. But when kept for 10 years, and something or someone within that data store goes on legal hold, then none of it can be deleted, and the company may be on the hook to review all of it. Hoarding data in this way – especially audio recordings – is opening the company up to a great deal of cost and risk. In most cases, 90 percent of the content on recorded tapes are irrelevant to a matter, but the company is still required to pay for its review.

Secondarily, counsel should be aware of challenges with audio recordings in foreign languages and different cultures. Phonetic indexing is still in its nascent stages for languages other than English and among cultures with spoken communication and delivery that are uniquely nuanced. Because of the global nature of most large and regulated organizations, this is expected to continue to be an obstacle and an area that is likely to change significantly as the practice of proactive audio monitoring becomes more widespread.

Like everything else in e-discovery, recorded audio evidence should be approached holistically, and in carefully planned stages. By first focusing on addressing reactive issues and ensuring that the expectations of regulators are met, and then moving toward attainable, proactive information governance initiatives, corporations will be more successful in driving meaningful change. And while the financial services industry is certainly most affected by these issues, corporations across the board can apply the practices discussed to their overall information governance and e-discovery programs to further safeguard against corruption, IP theft and regulatory violations.

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