

Looking Beyond E-mail: Alternate Forms Of Communication And Their Impact On Electronic Discovery

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When producing electronic discovery to turn over to the opposing party, it is imperative to be knowledgeable of the dangers of potentially missing relevant data during the standard forensic collection process. It is commonly believed that when a preservation order specifies "electronic communications," the order is referring to e-mail. However, there are a number of other forms of electronic communication that may exist on a custodian's computer that could possibly be overlooked.

One form of electronic communication that continues to gain in popularity is "instant message" communications, also known as "chat" communications. Such communication software includes Yahoo! Messenger, MSN Messenger, Google Talk, AOL Instant Messenger and Skype. Counsel must be aware of the fact that instant messaging, a real-time communication between two or more parties, travels across a company's network including the Internet, to another computer. Although companies have policies that prohibit the use of such software, it is not uncommon for employees to install it on their corporate computers and use it on a regular basis.

Unlike e-mails that are stored on a company's server and backed up to an archive, chat communication is not captured by a company's network infrastructure. Typically, chat communications can only be found on the user's computer. Unless the company's IT department has specialized network software designed to intercept these types of communications, this data will not be archived.

It is becoming more common for instant messaging programs to allow a user to activate the logging of chat communications. The length of time chat communications are retained on the hard drive varies based upon the software and user's configuration. Chat logs themselves may be stored in either plain text or an encrypted form. If the data is stored in an encrypted form, then any searches performed on that data set will have negative results due to the encryption. These logs must be decrypted before being searched. Yahoo! Messenger is among those soft-

ware programs with encrypted logs.

Additionally, individuals that use chat software can transfer files to other computers similar to an e-mail attachment. This activity is not archived by the company's network, unless specialized software is in place to intercept it. In matters involving the theft of intellectual property, recovery of chat communications (including file transfers) can prove to be invaluable evidence.

Issues involving the infringement of intellectual property, facilitated by the use of chat software, are becoming more common. One common scenario involves a key employee leaving a company to work for a major competitor. After the employee's departure, the company becomes concerned that the former key employee misappropriated their intellectual property. A forensic specialist is retained to search the former employee's computer for evidence of possible wrongdoing. If counsel requests a specific keyword search of the hard drive, it may provide negative results as the data might have been stored in an encrypted chat log. It is in the company's best interest for the forensic expert to look for chat logs and decrypt them if necessary. The forensic examiner must also review the logs for relevant information.

Short Message Service, also known as "SMS" or "text messaging," is yet another form of electronic communication that is frequently overlooked in electronic discovery. Individuals can use chat software installed on their company's computer to send an SMS message to a mobile phone user. If the user is logging the chat communication, it may include the entire SMS message. Depending on the type of chat software being used, SMS messages may also be encrypted.

When a trained computer forensic expert is trying to uncover online communications, the first step is to determine if any chat communication software has been installed. Once the installed software is identified, the forensic specialist examines the configuration of that software to determine user names, address books (e.g., friends or buddies lists) and chat log settings. Chat log settings reveal whether the logging is enabled, as well as the duration of the logs. The forensic examiner next identifies all of the logs and attempts to recover deleted logs using sophisticated forensic software.

Another communication of significant importance is Voice over Internet Protocol (VoIP) technology. This technology enables a computer to function as a telephone with the use of a headset and microphone. Any telephone calls made or received using this method are not recorded unless the user has configured software to record the communications. If a company does not have the appropriate software in place to capture these voice communications, the calls will not be archived on the organization's network. Prior to installing any

network monitoring software, there are legal implications that must be considered to avoid potentially violating any laws or regulations.

When using VoIP technology, an individual may also store voicemail messages on the company's computer. The voicemail is digitally recorded and stored as a file. Skype is among the most popular VoIP programs currently being used.

Fax communications can be directly sent from and received on a company's computer. These faxes can be sent and received via a computer and can be stored in a non-searchable proprietary format, similar to a TIFF image. Although viewed as a convenience, more and more frequently this software is not in compliance with a company's

policies, and use of such unauthorized software is often times strictly prohibited. During the forensic collection phase of electronic discovery, these faxes may be overlooked because no one was aware that the user installed and configured the fax software on to their computer.

Through thorough interviews of key custodians, counsel and their computer forensic expert can gain crucial insight into what third-party software has been installed and used on company computers and determine if relevant data exists that needs to be captured, processed and produced. By knowing what to expect during the forensic collection, counsel cannot only expedite the process, but also greatly reduce the potential for spoliation issues.

Advice On Meeting Legal Staffing Challenges

The Editor interviews **Charles A. Volkert**, Executive Director of Robert Half Legal, and **Dennis J. Foster**, President of Major Legal Services.

Editor: What developments in the law have had the greatest impact on legal staffing in 2007?

Volkert: Changes in federal e-Discovery rules and an increase in litigation matters have added to the volume of electronic review that corporate legal departments must manage. Also contributing to increased workloads are ongoing regulatory compliance issues. These factors are prompting additional hiring and companies are competing not only among themselves for lawyers with these skills but, in many cases, with law firms.

Foster: Companies are becoming more global in their operational growth and strategic planning. To compete and succeed, this involves both consistency and flexibility on management and operational levels so that the growth can be controlled in terms of market demand/interest and production capability. The companies must have management and personnel that understand the unique dynamics necessary for success on the local level in each market. Likewise, lawyers in firms who compete for corporate business, and companies developing their in-house law departments, must hire personnel who have localized insight and expertise, and who can strategize with current knowledge, and foresight, in developing markets. Further, candidate diversity is becoming critical to global success.

Editor: What factors should corporate counsel consider when developing a legal staffing strategy?

Volkert: There are some developments that should be taken into account when creating a staffing plan. A declining supply of law school graduates and pro-

fessionals with specialized expertise is creating a competitive hiring environment in law firms and corporate legal departments. Experience in specialty areas including litigation, intellectual property, commercial real estate and corporate law is desirable, and many employers are willing to pay higher salaries for in-demand skill sets.

In response, many organizations are streamlining their hiring processes to more quickly extend job offers to the most promising candidates. Even so, legal departments are watching budgets closely and many are augmenting their in-house teams with project legal professionals as a way to reduce the cost of outside counsel. In addition, many feel that keeping more work in-house provides the flexibility to meet goals more efficiently.

Interim legal professionals, such as project attorneys, paralegals and legal support staff, can supplement the skills and expertise of full-time employees, while also protecting core workers. By using project professionals as a staffing "buffer," managers can tap into talent with the necessary skills and experience, and seamlessly staff up or down as needed. This strategic staffing approach allows in-house counsel to reduce outside counsel spending, in many cases by 30 percent to 50 percent.

Some of the biggest expenses a firm or department faces are related to the loss of valued staff. Retention remains important as competition for the best legal professionals intensifies.

Foster: In developing a legal staffing strategy, factors mentioned above should be addressed if the firm or company is conducting business globally. Other factors include costs in terms of the recruiting process, the training cycle, the value of hiring the best candidates and the resources necessary to reach and acquire them. Counsel may also wish to consider incorporating psychological testing as a measure of a candidate's suitability/compatibility for a particular position.

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