



# Call Recording and Electronic Discovery



# Introduction

In today's complex business environment, the threat of litigation is one every organization must consider and prepare for. It can cause uncertainty for business owners, corporate shareholders and officers, and dramatically disrupt operations, or even jeopardize the stability of the company. Nearly 90 percent of US companies with revenue exceeding \$1 billion are facing an average of 147 lawsuits at any given time, and the average cost to defend a corporate lawsuit exceeds \$1.5 million per case<sup>1</sup>.

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Most businesses are aware that if someone sues them, they are required to produce documents requested by the plaintiff. What many businesses may be unaware of is the fact that this requirement also applies to electronic documents. In 2006, US federal courts ruled that electronic records are no different than paper documents when it comes to the discovery process. Electronic discovery, or e-discovery, is the preservation and production of electronically stored information typically requested during the discovery phase of litigation.

Many cases have been won or lost due to how thoroughly defendants complied with the requirements of discovery when it applies to finding all the relevant electronic records, such as email, and the contents of those records.

In this white paper, we will examine how Mitel call recording and voice documentation solutions can help protect businesses when they are faced with the prospect of litigation.

## Call Recording, Lawsuits and Electronic Discovery

For any business that regularly communicates with customers, clients, partners, and vendors over the telephone, call recording can be a vital risk management tool that offers protection in the event of a lawsuit. Consider the following example of how call recording can play a critical role in properly preparing an organization for the threat of litigation or criminal prosecution.

JLK Shipping is a freight company in St. Louis, MO. They have contracted with AlphaBeta Promotions to ship AlphaBeta's trade show booth and equipment to a major industry show. The contract stipulates the freight is to arrive on Wednesday, November 18th. Four weeks before the show date, an AlphaBeta employee calls JLK and states that the materials should actually arrive on Wednesday, November 25th instead.

As it turns out, the employee at AlphaBeta misinterpreted the show documentation and the event actually starts on the 25th. Due to JLK delivering the materials late in the afternoon on the 25th, AlphaBeta is unable to set up and exhibit since the two-day show is already half over.

Phone calls between AlphaBeta and JLK fail to create a resolution AlphaBeta is willing to accept, and they file a \$1.2 million dollar lawsuit to recoup their expenses and loss of potential new business they expected as a result of their trade show appearance. JLK files a counter suit since AlphaBeta refuses to pay their shipping bill.

## The Consequences of Miscommunication

As part of the discovery process, AlphaBeta's lawyers demand all documentation associated with the disputed delivery. The only records JLK has in its possession are the original contract; the terms of service, which includes a notation that changes made by telephone will be held as valid and binding; a handwritten note by the JLK representative servicing AlphaBeta's account recounting that JLK had requested a change in the arrival date; and an email from the representative to the shipping manager to make the change.

The contract clearly lists the 18th as the required arrival date. Since it is a valid document, it is given far greater credence by the court than the other items. Unfortunately, in the court's view, the handwritten note could have been created after the fact by JLK as an attempt to prove they had not made the mistake.

The court rules in AlphaBeta's favor. JLK's insurance rates go up. As a result of increased operation costs, attorney's fees, court costs, and the \$1.2 million judgment, the company is forced to close.

## How Mitel Solutions Solve the Problem

Call recording could have effectively resolved this situation in one of two ways:

In the first, and most likely scenario, when AlphaBeta calls with their initial complaint, their representative at JLK can easily search for the call made by the AlphaBeta employee requesting the date change. The search can be conducted based on a variety of criteria, such as date, time, phone number, etc. Upon retrieving the call in question, she plays it back and emails a secure link to the actual conversation to her contact at AlphaBeta. Upon listening to the voice document, AlphaBeta recognizes that fault for the miscommunication lies with their company, and they take appropriate action with the employee who made the mistake. As a result, the companies are able to avoid costly legal action and resume their prior working relationship.

But, what if AlphaBeta still wants to pursue the complaint? Since they face more than a million dollars in potentially lost revenue, they may want to take their chances in court. In this situation, JLK produces all of the records detailed previously. In addition, they are able to produce an authentic recording of the call the AlphaBeta employee made requesting the change in arrival dates.

Mitel solution's verification functionality inserts a unique digital watermark on all recordings. Using this capability, it can verify that the electronic record in question has not been edited or altered, enhancing its value as evidence.

Since the terms of service state changes made by telephone will be considered valid and binding, after hearing the recording, AlphaBeta's lawyer recommends to his client that they drop the case and pay for the shipment as JLK did not actually make any error. AlphaBeta agrees to reimburse JLK for their legal costs, including discovery, and JLK keeps operating profitably.

## Protecting Valuable Business Relationships

In the previous example, JLK was able to prove they were not at fault for the delivery mistake that occurred. But what if the tables were turned, and upon reviewing their voice document it was discovered that JLK were somehow responsible for the error?

Even in that event, having an electronic record of the conversation would greatly benefit JLK. Resolving the dispute before it goes to court will save JLK costly attorney fees, court costs, and all the other significant expenses associated with defending against a lawsuit. Most importantly, it is good business practice to resolve customer complaints as quickly as possible once they have been uncovered. Just as in the provided example, call recording can decrease the likelihood that a dispute or complaint will escalate to the litigation stage.

Let's assume the AlphaBeta employee had simply called to confirm the booth should arrive on the 18th since the show started on the 25th. JLK's representative misunderstood the conversation and mistakenly changed the shipping date to arrive on the 25th.

When AlphaBeta calls to complain, their representative retrieves the call, plays it back and immediately realizes her mistake. She consults with her managers and they call AlphaBeta back to apologize. Through back and forth negotiation, the two companies are able to arrive at an agreement that is satisfactory to them both, all without ever taking the dispute to court.

## Powerful Features Addressing the Risk of Litigation

Mitel call recording and voice documentation solutions offer many features that can prove greatly beneficial to organizations when faced with litigation.

### ADVANCED SEARCH

Companies must provide all relevant electronic records. Advanced search capabilities allow users to search by date, the number called, the number from which the call originated, or many other standard and customizable data fields to ensure pertinent calls are quickly found.

### AUTHENTICATION

Call recordings are embedded with a distinct digital watermark that indicates whether they have been tampered with or altered, negating a potential challenge to the call's authenticity.

### PROCESS ADHERENCE

Review recorded telephone conversations to verify compliance with communications processes and various adherence mechanisms. This can be especially vital in environments dealing with sensitive data that requires strict identification verification such as in health care, financial services, and municipal services.

### PERSONNEL DEVELOPMENT

The risk of litigation is minimized through systematic review and evaluation of telephone calls in sales, customer service, product support, collections, scheduling, dispatch, and other critical business communications functions. Using real calls to train employees, rather than relying on role playing with hypothetical situations is an extremely effective way to teach employees what, and what not to do in any given situation.

### SCALABILITY

Mitel recording solutions can easily address the needs of any size organization from four employees to several

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## Conclusion

One lawsuit can be enough to put many companies out of business overnight. The discovery process is complex and expensive, averaging in excess of \$1.75 million for a single case<sup>2</sup>. Add to that the costs associated with legal representation combined with what a company could pay out should they lose the case, and the results could prove catastrophic.

With the threat of potential litigation always looming, Mitel call recording and voice documentation solutions provide a secure, reliable means of handling e-discovery measures and helping to protect businesses from unwarranted claims of wrongdoing and costly legal action.

#### Sources

1. *Meeting Compliance and E-Discovery Demands: What IT Managers Need to Know*, Gartner, 2006
2. "E-Mail Archives and Litigation: Here's How to Get It Right," Andrew Conry-Murray. *InformationWeek*, June 23, 2008