

Client Alert

June 2020

Immediate Steps Needed to Prevent Your Pandemic WFH Savior – Videoconferencing – from Turning Into a Future Litigation Nightmare

Faced with a global pandemic, many businesses were forced to transform the way they conducted everyday tasks. For example, seemingly overnight, the business world witnessed the widespread adoption of videoconferencing technology, such as Zoom, Skype, Webex, Microsoft Teams, and Google Meetings, to keep us all connected.

This relatively seamless transition has been transformative; however, like other transformative tools for electronic communication – such as e-mail and text messaging – the widespread use of videoconferencing is generating tremendous amounts of potentially discoverable electronically stored information (ESI).ⁱ As we have learned over the years, large amounts of ESI lead to burdensome and expensive discovery for the producing party and a potential gold mine for the requesting party as more informal communications like e-mail and text messages often provide unfiltered thoughts and comments, often without appropriate context, that a litigant would prefer to avoid sharing. Proper management of this new wave of ESI data now, *before you are faced with litigation*, will pay dividends down the road.ⁱⁱ This includes developing and implementing sound data retention policies addressing the vast amounts of data generated by your videoconferencing platform and providing employee training to mitigate the risks inherent in this growing body of potentially discoverable information.

The specific features of each videoconferencing system vary. However, in general, these platforms allow users to configure robust storage options, ranging from usage reports, in-meeting data such as a record of all participants, automatic transcript generation, and audio and full video recording. Indeed, one advertised feature of Zoom's enterprise package is "unlimited cloud storage."ⁱⁱⁱ Unlimited storage certainly sounds attractive, at least until the time comes to collect, review, and produce this massive trove of data during a lawsuit! In addition to cloud-based storage, some platforms, including Zoom, also have the capability of allowing local storage, where a copy of the data from a videoconference can be stored on individual machines apart from the central cloud-based repository, creating additional challenges for data collection during discovery. Left unmanaged, terabytes of potentially discoverable ESI may be stored and distributed across your enterprise, leaving a potential discovery nightmare from a cost and review management perspective, even if the ESI does not contain anything harmful to your litigation from a substantive perspective.

Managing the potential e-discovery challenges arising from the ubiquitous use of videoconferencing involves two main components: (i) updating (and enforcing) document retention policies to account for this data properly, and (ii) updating employee policies and training to not only implement sound document retention policies but also to remind employees that what happens in a videoconference may ultimately be played to a jury. Simply put, employees may not even be aware (despite being told at one time or another) that videoconferences are creating certain types of records that their employer is retaining.

If your business does not already have formal document retention policies in place, now is a great time to start. If you have existing document retention policies, now is the time to refresh them to address the realities of your use of videoconferencing. There is not necessarily a one-size-fits-all approach to

document retention – in fact, care and particularity should be taken to create each business’s approach.^{iv} What is important is having a policy that fits your business needs without perpetually storing every bit of generated ESI and properly educating your employees, so they understand what is being retained and why. This requires understanding the needs of your business and the features of the tool your business is using. For example, each business should consider:

- For the specific platform(s) being used by your enterprise, what data is automatically stored, what data can be optionally stored?
- Who has the ability to control storage settings and options? Are they set by the system administrator or each user?
- Where is the data stored?
- What administrative tools are available through the system to automatically manage data retention? Who can control these settings?
- For each type of record generated, what is the business value of maintaining each type of record? How long do these records need to be maintained to meet your business needs?

With this information at hand, you can update your policies for the use of videoconferencing and your document retention policy to implement a well thought out plan to properly limit the ESI to that which is business essential.

In addition to document retention, employee training, and policies on the proper business use of videoconferencing will certainly help mitigate litigation risk. In our experience over the last decade, it has become commonplace for e-mails and text messages obtained through discovery to provide startling statements that dramatically help the other side. Even if the substance of the messages is not necessarily damning, the tone of the message can be.

The ease of use of these tools has fostered a level of informality in communications that often results in this litigation gold for the other side. Videoconferencing, which now shares this ease of use, will only expand on this inherent problem. Not only will cavalier statements inevitably be available for discovery, but facial expressions, hand gestures, and overall body language may be recorded and available to play for a jury. Imagine the impact of your worst e-mail being read to a jury – now imagine that in the form of a video clip! Not only is this data expensive to maintain, burdensome to gather, review and produce in litigation, a moment of poor judgment by a single employee captured during a videoconference – where that employee’s thoughts may not be shared by others in the room or the company’s decision-makers – may prove to be devastating.

Thus, in addition to establishing sound document retention policies regarding the ESI associated with videoconferencing, companies will be well served by updating employee manuals and providing training to employees to highlight that videoconferencing is a business tool and its convenience and ease of use should not be an invitation to forego good judgment. In fact, it is important that employees understand that an even greater level of discretion needs to be exercised when using videoconferencing. In short, employees should assume a videoconference is being recorded and if they would not be comfortable having their statements, facial expressions, or gestures played back to a jury, they should not be engaging in such conduct during a videoconference.

Videoconferencing platforms have emerged as important business tools that have been a tremendous asset during the pandemic and will likely continue to be an important tool even after the current crisis is under control. Given the great success reported across many business sectors of remote work, when coupled with potential business cost savings on rent and in-person travel, many people are unlikely to return to a traditional in-office work life. However, like with other important business communication tools, proper management today can help your business reduce litigation risks and costs in the future.

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ⁱ ESI is generally discoverable in federal court subject to the limitations of Rule 26(B) of the Federal Rules of Civil Procedure related to “sources that the party identifies as not reasonably accessible because of undue burden or cost.”

ⁱⁱ One a party is involved in litigation or is on notice that a dispute may result in litigation; there is generally an obligation to retain potentially relevant information. Prior to that point, the routine destruction of documents pursuant to an established document retention plan is generally acceptable.

ⁱⁱⁱ See <https://zoom.us/pricing> (last viewed June 16, 2020).

^{iv} Certain classes of documents have recommended retention periods generally applicable to all businesses, such as tax records, which should be retained during any potential, audit period, and wage/timekeeping records, which also need to be retained to ensure compliance with federal and applicable state law.