KRIEG DEVAULT

Insights

Virtual Discovery: New Considerations in the New Normal

October 8, 2020

By: Matthew C. Branic and Elizabeth M. Roberson

The “new normal” brought on by the Covid-19 pandemic has ushered in the era of virtual meeting technology and other connective platforms as substitutes for in-person communication. Platforms such as Zoom, Microsoft Teams, Skype, Webex, Google Hangouts, and GoToMeeting have become mainstays in the business world, to the point where the average professional can hardly spend a workday without using at least one.

As with any new workplace technology, the benefits come hand-in-hand with important considerations for organizations in terms of data retention and document preservation in the event of litigation. Organizations utilizing these virtual meeting platforms need to be aware of their specific features, including what electronic information is being generated and to what extent that information is being recorded. And organizations should implement appropriate policies for the use of these platforms and the protection of this data if a dispute – or the prospect of a dispute – arises.

How can you ensure your company is preserving the appropriate information for potential litigation?

The rapid expansion of virtual meeting technology means that these platforms are now fair game for electronic discovery by an opposing party in a lawsuit, formal document requests from regulatory agencies, subpoenas, and public records requests, among others. Organizations should explore a variety of platforms and determine which platform works best for their organization not only from a practical perspective, but also from a data retention perspective.

For example, platforms like Zoom and Microsoft Teams have recording capability at the option of the meeting organizer. If a meeting is recorded, it becomes a piece of electronically stored information, or “ESI”, and is every bit as discoverable as traditional ESI like email or saved files on a computer hard drive. But even if not recorded, most platforms automatically retain other important information pertaining to each meeting, including the date, time, and duration of each meeting; the identities of the participants; and when each participant joined and left the meeting. This information can have significant evidentiary value depending on the particular lawsuit or legal matter and will be (in fact, already is being) highly sought after in discovery.

An often overlooked component of virtual meeting software – one that can have critical importance in litigation – is a chat or messaging feature. Because these conversations are typically informal and give the impression of being conducted “off-line”, employees tend to view such messages as private or temporary. But in reality, these chat or messaging conversations between meeting participants are also discoverable ESI to the extent they are electronically retained. Thus, it is important to understand the available features of virtual meeting platforms and how they are being used within your organization.

What policies should your company have in place to manage the amount of discoverable material created from virtual meeting platforms?

With these key considerations in mind, the question becomes what policies should employers implement to govern the use of virtual meeting platforms and the retention and preservation of information generated by these platforms. Employers should already have in place technology policies that cover the use of company provided technology. Such policies likely dictate how and when employees can use company technology, including whether use for personal or non-business reasons is permitted. Existing technology policies should apply equally to the use of virtual meeting tools provided by the company.

Employers should also consider what virtual meeting platforms they will allow and/or require their employees to access while on company issued computers or while connected to the company network. Virtual meeting policies should address how these platforms are to be used, when meetings should be recorded, and where the recordings, if any, should be stored. Employers should consult with their IT administrator regarding the storage of data generated from virtual meeting platforms, particularly as it relates to recorded meetings. Creating an audit log that documents who was in attendance at a meeting, when the meeting was held, and the topic of discussion, can serve as a back-up if a recording from a virtual meeting platform is lost or unrecoverable. Some of this information may be found in other places such as emails and calendar invitations.

Finally, employers may wish to include in their virtual meeting policies certain standards for use of the chat or messaging function during virtual meetings, what type of behavior is proper within that software feature, the expected dress code and background when participating in virtual meetings, and the level of privacy required for the remote locations from which employees may be participating. If all of these aspects of a virtual meeting are addressed in a comprehensive policy, it will ensure your company presents itself in a uniform and professional manner while taking all the appropriate steps to preserve the data it chooses to maintain or is required to preserve once litigation, or the threat of litigation, arises. The manner in which the company is portrayed could be especially important if a recording of the virtual meeting becomes substantive evidence in a dispute or other legal matter.

Technology and data retention are difficult to manage, especially in the midst of potential or ongoing litigation. As the tools companies use to conduct business in a virtual world expand, so too do the potential sources of discoverable information. Please contact **Matthew C. Branic**, **Elizabeth M. Roberson**, or a member of our Litigation Practice Group for further assistance or questions regarding the retention and preservation of electronically stored information, including information generated by virtual meeting platforms.