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# Adapting E-Discovery Protocols to Virtual Meetings, Video Conferencing, and Video Chats in Commercial Litigation

Retention Policies and Production of Data From Microsoft Teams, Cisco WebEx, Skype, Zoom, Slack, and Other Platforms

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Today's faculty features:

Amanda Cook, RCA, CEDS, Senior Project Advisor, **Acorn Legal Solutions**, Chicago

Jonathan G. Hardin, Partner, **Perkins Coie LLP**, Washington, D.C.

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# On the discoverability of virtual meetings

By Jonathan G. Hardin, Esq., and Ryan Parietti, Esq., *Perkins Coie LLP\**

JULY 16, 2020

In 1964, futurist Arthur C. Clarke predicted that in 50 years, people “will no longer commute — they will communicate.” For a significant portion of the American workforce, the future is now.

COVID-19 has fundamentally changed how we communicate: The virtual meeting is suddenly our primary means of interaction with coworkers. Video conferencing platforms like Zoom, Microsoft Teams, and Cisco’s WebEx have seen unprecedented spikes in active users.<sup>1</sup>

As companies transition from triage to planning for the new normal, the prevalence of video conferencing has serious implications for commercial litigation.

Face-to-face discussions that were only memorialized by meeting notes or related correspondence can be fully preserved as video files, subject to discovery.

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“It is uniformly agreed that a corporation under a duty to preserve is not required to keep ‘every shred of paper, every e-mail or electronic document, and every backup tape.’”

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It is therefore essential to understand the technical functionality of virtual meeting recordings and the likely legal obligations that accompany them.

The ability to record meetings is nothing new; standard conference call providers offer the ability to create an audio recording for future use. What is relatively new — in addition to the COVID-19-related explosion in meetings conducted virtually — is that recording is as simple as pressing a button.

By default, the meeting host is usually the only one with the option to hit “record,” but many of the leading video conferencing providers offer settings that allow any participant to start a recording — or even those that record meetings automatically.

Either approach seems likely to result in a proliferation of discoverable content.

Regardless of recording permissions, the file size of video recordings creates additional risk.

Virtual meeting software typically provides two basic options for storing recordings: (1) in the software provider’s cloud, or (2) on the user’s local device, network, or cloud.

As companies run up against cloud storage limits, their employees might be tempted to move saved recordings to less-then-secure locations when attempting to share them with coworkers (attaching a large recording file to an email is usually not a viable option).

An April Washington Post investigation revealed users who did not safeguard their recordings unwittingly allowed 15,000 Zoom recordings to be publicly available in open cloud storage space.<sup>2</sup>

## NO GENERAL DUTY TO RECORD VIRTUAL MEETINGS

A threshold question is whether there is a legal obligation to record virtual meetings at all. If the courts react to the proliferation of virtual meetings as they did to the email explosion of 20 years ago, the answer is no.

“It is uniformly agreed that a corporation under a duty to preserve is not required to keep ‘every shred of paper, every e-mail or electronic document, and every backup tape[,]’ ... such a requirement ‘would cripple large corporation’”<sup>3</sup>

There is good reason to believe courts will take a similar approach to virtual meetings.

In a 2002 decision, then-Magistrate Judge Nan Nolan explained the basic rationale for treating e-discovery differently than traditional discovery: “Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail.”<sup>4</sup>

The parallel is clear: Recordings of virtual meetings document communications that previously occurred in a different — and undiscoverable — form.

It will be difficult to argue for a right to obtain discovery of data that:

- (1) was not previously available,
- (2) is so voluminous that it would overload existing technological infrastructure, and
- (3) would require great expense to review for relevance and privilege.



Under the Federal Rules' post-2015 proportionality framework, to overcome these structural roadblocks, the party seeking discovery would likely need to show that the recording in question is essential to resolving the issues at hand.

### NO GENERAL DUTY TO PRESERVE EXISTING VIRTUAL MEETING RECORDINGS

As for recordings that already exist, the standard preservation obligation outlined in The Sedona Conference's e-discovery principles "requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation."<sup>5</sup>

Similarly, Federal Rule of Civil Procedure 37(e) calls for sanctions only "if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it."<sup>6</sup>

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Because of the high cost of storing large recordings and the relative difficulty of accessing the information they contain, the mere existence of a dispute does not necessitate preservation of all recordings.

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Thus, in the regular course of business, there does not appear to be an ongoing obligation to retain recordings of virtual meetings.

### CONSIDERATIONS WHEN LITIGATION IS ANTICIPATED

The calculus changes when litigation is anticipated, triggering a preservation obligation. Whether an existing video recording falls within the scope of that obligation will depend on "the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort."<sup>7</sup>

Recordings of virtual meetings are extremely large files. Cisco estimates a required 330 MB per hour of meeting time for high-definition Webex MP4 recordings; Zoom suggests that depending on "resolution, duration, and shared content in the recording," file size ranges from less than 1 GB to several GBs.<sup>8</sup>

Because of the high cost of storing large recordings and the relative difficulty of accessing the information they contain, the mere existence of a dispute does not necessitate preservation of all recordings.

If an existing recording does not reasonably relate to the claims involved in the dispute, it probably does not need to be preserved.

This is especially true if the party can show that the information it contains is largely duplicative of other more accessible data sources, such as meeting transcripts, notes, or agendas.<sup>9</sup>

### A NOTE ON ALL-PARTY CONSENT LAWS

There is an additional consideration when recording virtual meetings: While federal law requires only single-party consent to record an oral or electronic communication (i.e., consent of the party recording is enough),<sup>10</sup> a number of states have criminalized the recording of conversations unless all participants consent.

Because virtual meetings often cross state lines, there may not always be clarity as to which standard applies, and meeting hosts would be well advised to obtain affirmative consent from all parties to a conversation before initiating a recording.

### BEST PRACTICES FOR THE NEW NORMAL

Ideally, companies should avoid recording and storing virtual meetings in the first place. COVID-19 has abruptly changed how we communicate, and the nature of progress suggests we are unlikely to go back when the pandemic is behind us.

Businesses are advised to react with the same speed to:

- (1) Limit virtual meeting recording permissions
- (2) Implement policies where recording is the rare exception rather than the rule
- (3) Revise document retention policies and litigation hold notice templates to carve out virtual meeting recordings

It does not take a futurist to observe that technology will continue to capture and record more and more of our communications.

Companies should take care to ensure that when disputes inevitably arise, discovery of these ever-expanding data sources is limited to what is relevant, probative, and proportional.

### Notes

<sup>1</sup> See, e.g., Eric S. Yuan, *A Message to Our Users*, Apr. 1, 2020, <https://bit.ly/3fAGfdP>; Jared Spataro, *Remote work trend report: meetings*, Apr. 9, 2020, <https://bit.ly/3eAt63d>; Sri Srinivasan, *Cisco Webex: Supporting customers during this unprecedented time*, Mar. 2, 2020, <https://bit.ly/3fAUcZv>.

<sup>2</sup> Drew Harwell, "Thousands of Zoom video calls left exposed on open Web," *The Washington Post*, Apr. 3, 2020, <https://wapo.st/30ehhKY>

<sup>3</sup> *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 517 (S.D.W. Va. 2014) (quoting *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

<sup>4</sup> *Byers v. Illinois State Police*, 53 Fed. R. Serv. 3d 740, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. May 31, 2002).

<sup>5</sup> "The Sedona Principles, Third Edition," *19 Sedona Conf. J.* 1, Principle 5, 93 (2018).

<sup>6</sup> FED. R. CIV. P. 37(e).

<sup>7</sup> "The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger & The Process," *20 Sedona Conf. J.* 341, Guideline 7, 389 (2019).

<sup>8</sup> *What is the Average Size for a 1 Hour Network-Based Recording?*, Sept. 18, 2018, <https://bit.ly/3945vH8> (last visited July 1, 2020).

<sup>9</sup> "The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger & The Process," *20 Sedona Conf. J.* 341, 391-93

<sup>10</sup> See 18 U.S.C. § 2511(2)(d).

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## ABOUT THE AUTHORS



**Jonathan G. Hardin** (L) is an insurance coverage partner in **Perkins Coie LLP**'s Washington office. He is an experienced trial and appellate lawyer who has litigated in state and federal courts throughout the United States. His practice focuses on insurance recovery, environmental, and other commercial disputes. He can be reached at [JHardin@perkinscoie.com](mailto:JHardin@perkinscoie.com). **Ryan Parietti** (R) is a senior discovery attorney in Perkins Coie's Seattle office. He counsels clients on the preservation, collection, review and production of electronically stored information, and oversees and manages document reviews as well as other discovery-related tasks. He can be reached at [RParietti@perkinscoie.com](mailto:RParietti@perkinscoie.com). This article was first published July 7, 2020, on the Perkins Coie website and reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic. Republished with permission.

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# eDiscovery Considerations with Business Use of Zoom

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## Amanda Cook, CEDS, Esq.

*Amanda Cook is a detail-oriented eDiscovery practitioner who has worked in all stages of the EDRM life cycle. Amanda is a passionate advocate for the use of electronic discovery to reduce costs and increase efficiency. Amanda's consultative and customized approach to client service has helped her clients achieve successful and cost-effective outcomes. Amanda is also fluent in translating technical jargon to legalese to plain English and back again.*

As companies nationwide shifted from in person to remote working overnight, there has been a concurrent increase in the use of video conferencing tools to collaborate internally and interact with clients. There are many different video conferencing tools currently experiencing a huge uptick in usage including Microsoft Teams, Cisco WebEx, Skype, and the focus of this article, Zoom.

The number of daily meeting participants in Zoom jumped from 10 million in January to 300 million in April, a nearly 3000% increase in three months. It is evident from these numbers that Zoom usage has increased exponentially as companies have had to shift to a new way of working. As with any electronic data, any new source of data a company is using must be carefully considered in terms of

retention policies and potential legal obligations.

The use of Zoom as a business communication tool was likely implemented quickly and without enough time to consider all the potential eDiscovery implications. Consider Zoom as a new source of electronic data, like mobile phones, or Slack, or social media. It is important to understand what kind of data is being created and how that data should be handled. Additionally, because Zoom allows individual users to record meetings, the location of the data can also become very important. The bottom line is that Zoom is creating discoverable data. The goal of this article is to advise on the potential eDiscovery issues that could arise if a comprehensive and clear policy around the use of Zoom is not created and implemented now.

## Zoom Meetings that Are Not Recorded

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Most companies can clearly see data containment issues if video is being preserved. But what if a Zoom meeting is not recorded? It is important to understand what types of records are being created when the meetings are not recorded to understand how it could impact discovery obligations in the future. Any time that a zoom meeting occurs, Zoom retains a record of that meeting. As a basic user, you can view under the Meetings tab, a record of every Zoom meeting that you have scheduled or attended. The information contained on that tab includes the date, time, meeting ID, and title of the meeting. This area also allows the individual user to delete a meeting from their history. From a discovery and collection perspective, this information would be both hard to collect and not substantively very useful.

Administrators and owners of the account, however, have much deeper visibility into their organization's usage of the platform. An administrator can view monthly reports on every Zoom meeting that has occurred, regardless of whether the meeting was recorded. Under the Reports tab, and then under Usage Reports, the Administrator can view and export daily usage reports that identify the number of new users, meetings, participants, and total of meeting minutes for each day. They can also drill down further for reports on their Active hosts and export a meeting report for any 30-day period of all the meetings that an organization has conducted over Zoom.

On this report is some particularly valuable information including the topic of the meeting, meeting ID, the user who set up the meeting, the email of that user, department, group, creation of the meeting time, start and end time of the meeting, duration of the meeting, the name and email addresses of the attendees, join time

and leave time for each participant, along with duration. Administrators are also able to export reports about inactive users, upcoming events, meeting registration or poll reports, and an overview of the cloud recording storage capacity. These reports can be retrieved for the previous twelve months limited by a 30-day search range. The reports are exported as CSVs. The only way for an administrator or owner to delete the usage activity is to delete the user. Deleting a user will permanently remove the user, including their meetings and recordings from Zoom.

Although the information that is retained for non-recorded meetings is not as expansive as a recorded meeting would be, there are many situations in which the failure to retain this data could run counter to preservation obligations. Federal and most local rules of civil procedure allow discovery regarding any non-privileged information relevant and proportional to the needs of the case. Depending on the litigation, a spreadsheet outlining that certain people were attending certain meetings on certain dates could be relevant. Companies need to be cognizant of the way this information is being maintained, saved, and collected to ensure they can comply with discovery obligations later.

## Zoom Meetings that Are Recorded

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Zoom also allows for the recording of meetings, either locally to the computer or to the cloud. When a meeting is recorded, the following files are created: MP4 video file; M4A audio file; and a txt file of any chats that occurred during the meeting. Zoom also offers the ability to transcribe the meetings so you have a text record of what was said during the meeting. If you enable the audio transcript option under Cloud Recording, Zoom will automatically transcribe the audio of the meeting and include a separate .vtt text file. In addition to the data preserved for any meeting

outlined above, these are additional data sources created by the Zoom meetings that are recorded. Zoom will retain the cloud recordings, including the files listed above, until the storage capacity of the account is exceeded. Administrators can access and preserve any cloud stored meetings. These meetings are located under the Account Management, Recording Management area of the Administrator profile. However, the administrator can only access the recordings that have been stored to the cloud.

Depending on the account settings, as determined by the administrator or owner of the account, individual users or participants are also able to locally store recorded copies of their meetings. This means that anyone who attends a meeting can keep a permanent copy of the meeting's audio, video, and chat. From a discovery perspective, this is a data mapping nightmare. If you have a company with 50 people who are using Zoom on a daily basis to conduct business, and each one of those people is recording all their meetings locally, there are now 50 locations that could contain discoverable data. Picture the costs associated with collecting 50 different people's local zoom recordings folder from their work or personal computer?

Companies should be proactively thinking about what types of meetings need to be recorded and providing constructive guidance to their employees. There are industries where there is a legal obligation to record transactions such as banking and publicly traded companies. There are industries where recording communications with clients can turn into an ethical morass, such as law firms or in-house counsel at a corporation. Obviously, there is no one size fits all approach to the duty to record or not. Another area to consider is whether you have employees that despite retention and compliance policies are still creating unauthorized recordings. If your company gets sued, and

those recordings fall under the relevance and proportionality rules, how are you going to locate and preserve that information?

The major question that should be considered and outlined clearly in policies is the types of meetings that should be recorded. The second is when or if you should delete these recordings. If you hold a Zoom meeting where senior leadership is discussing the termination of an employee that could potentially turn litigious, are you under an obligation to record that because there is a reasonable anticipation of litigation and the duty to preserve applies? There is no clear-cut answer to that question as these cases have not yet been litigated. However, companies should be carefully considering how, when, and why they deploy the recording function.

From an eDiscovery perspective, the Zoom recordings create an expensive proposition. Consider the example outlined above, if you have 50 relevant recordings and they are all located on each person's individual computer, the company must then go and collect and process all of these files into a platform so they can review. Video and audio files typically are very large file sizes which makes the hosting of this data expensive. Complicating matters further, if a user does not opt for a transcript of the meeting, the video and audio files require significant customization to be searchable. How will a company know if a specific meeting is subject to a legal hold if you can't text search the content of that meeting?

## Best Practices and Considerations

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Next, we want to outline some best practices and considerations surrounding the use of Zoom in a business context. Companies should, if they have not already, be drafting and implementing policies regarding the usage of Zoom.

These policies should encompass when and how Zoom should be used, when the meetings should be recorded, and where the recordings should be stored.

Companies should also be authorizing the Zoom administrators to create system wide permission settings to ensure that the data they retain is contained in one central repository. Employees should not be able to save locally, rather a universal save to the cloud requirement should be enforced. An administrator can enforce company-wide objectives for all users that require how and when they record and where that recording is stored. As administrators can also delete recordings on the cloud, they should be provided with clear instruction of what should be saved and what can be deleted. This way companies can easily identify and collect potentially discoverable information.

Administrators should be cognizant of the timelines for deletion previously outlined, and ensure they download any available reports or recordings monthly. They should also be aware of the storage capacity in Zoom so potentially relevant data is not accidentally lost. It would also be beneficial for companies to create an audit log for meetings that occur and ensure that employees update continuously. The audit log would contain the date, time, attendees, and what was discussed. Adding transcription to recorded meetings will also make the information far more searchable and functionally useable in the future.

As we have outlined, there are many business decisions that must be developed around the use of Zoom to collaborate. Companies should be proactively providing guidance to their workforce around the use of these types of applications. We can provide further guidance on best practices.

## About Acorn

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