

Updates

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On the Discoverability of Virtual Meetings

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.[1] 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. 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.[2]

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 corporations.'"[3] 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."[4]

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." [5] 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." [6] 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." [7] 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. [8] 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. [9]

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), [10] 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.

Endnotes

[1] See, e.g., Eric S. Yuan, *A Message to Our Users*, Apr. 1, 2020, <https://blog.zoom.us/a-message-to-our-users/>; Jared Spataro, *Remote work trend report: meetings*, Apr. 9, 2020, <https://www.microsoft.com/en-us/microsoft-365/blog/2020/04/09/remote-work-trend-report-meetings/>; Sri Srinivasan, *Cisco Webex: Supporting customers during this unprecedented time*, Mar. 2, 2020, <https://blog.webex.com/video-conferencing/cisco-webex-supporting-customers-during-this-unprecedented-time/>.

[2] Drew Harwell, "Thousands of Zoom video calls left exposed on open Web," *The Washington Post*, Apr. 3, 2020, <https://www.washingtonpost.com/technology/2020/04/03/thousands-zoom-video-calls-left-exposed-open-web/>

[3] *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)).

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

[5] "The Sedona Principles, Third Edition," *19 Sedona Conf. J. 1*, Principle 5, 93 (2018).

[6] FED. R. CIV. P. 37(e).

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

[8] *What is the Average Size for a 1 Hour Network-Based Recording?*, Sept. 18, 2018, [https://help.webex.com/en-us/WBX59323/What-is-the-Average-Size-for-a-1-Hour-Network-Based-Recording;Frequently asked questions about local and cloud recording](https://help.webex.com/en-us/WBX59323/What-is-the-Average-Size-for-a-1-Hour-Network-Based-Recording;Frequently%20asked%20questions%20about%20local%20and%20cloud%20recording), https://support.zoom.us/hc/en-us/articles/360040771752#h_f953c54b-a2a9-4d57-83ff-46e6161bcaff (last visited July 1, 2020).

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

[10] See 18 U.S.C. § 2511(2)(d).

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