E-Discovery in a Post-COVID World

> *When it comes to e-discovery, savvy litigants and litigators who take the time to proactively tweak their practices now will be well-positioned for effective advocacy (and intact litigation budgets) in a post-COVID world.*

By now, we are all aware of the explosion of digital connectivity necessitated by the COVID-19 pandemic. While the pandemic will eventually end, changes like increased remote work and reliance on digital communication are likely here to stay.

These societal changes spell certain increase to our digital footprints and for litigants, changes to the discovery landscape for electronically stored information (ESI). As experienced litigants know, discovery of ESI (e-discovery) can be a budget-buster involving costly disputes, production, and even sanctions if a party neglects its obligations.

Oftentimes, these issues can be avoided with simple planning and effective communication with opposing parties. Post-COVID e-discovery is no different: revisiting standard e-discovery practices now can make all the difference in litigation expenses and outcomes in the years to come.

Prior to the pandemic, discoverable communications generally included text messages, emails, and social media messages and posts. As time goes on, lawsuits will increasingly involve events during which parties relied more heavily than normal on these traditional digital communications and perhaps

integrated new technologies like Zoom, Slack, Microsoft Teams or other collaborative platforms. For litigants, this means: (1) an increase in the volume of potentially relevant ESI; and (2) additional non-traditional sources of ESI.

As with any emerging issue, it will take time for courts to issue meaningful guidance on how to preserve, produce and request ESI in a post-COVID world, particularly from these non-traditional data sources. In Texas, courts have historically taken a measured "common sense" approach to e-discovery. Proportionality is the name of the game; baseless, oppressive requests for ESI and boilerplate objections will not win the day. Parties are encouraged to work out e-discovery issues on their own and, if court intervention is necessary, must come prepared with real facts on which forms of ESI are available, and the benefit and expense of the ESI they seek to compel or resist.

With this background in mind, it is reasonable to conclude that post-COVID litigants should continue to prioritize knowledge of each party's systems and available ESI from the outset of litigation. For example, before sending out discovery requests for ESI, a party should consider whether to first request specific information regarding an opposing party's systems and practices to better tailor their substantive requests.

Given recent rapid changes in many workplaces, these types of requests might be appropriate even when the party or attorney used to be familiar with the producing party's systems. Litigators should adopt the same attitude toward their own clients and ensure from the outset of litigation that they have up-to-date information on their systems and retention policies. Counsel may also consider whether to update form discovery requests, instructions and definitions to include, for example, Zoom recordings or chats, prior versions of collaborative documents, or communications on other platforms.

As with much in life, an ounce of e-discovery prevention is worth a pound of cure. Savvy litigants and litigators who take the time to proactively tweak their practices now will be well-positioned for effective advocacy (and intact litigation budgets) in a post-COVID world.

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