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eDiscovery in a Post-COVID World

Ellen Blanchard

Managing Corporate Counsel, Discovery: T-Mobile

Briordy Meyers

Director, Senior Counsel, eDiscovery (U.S.): Boehringer Ingelheim

Maureen O'Neill

Senior Vice President, Strategic Engagement: Consilio

The COVID-19 pandemic transformed how businesses and their employees work almost overnight. For those of us handling litigation and regulatory matters, the pandemic demanded substantial changes to how we conduct eDiscovery. As the world struggles to contain COVID-19 for the foreseeable future, we expect many of these changes to remain in place, and we anticipate new adjustments in reaction to evolving circumstances. In this article we consider what the litigation and regulatory landscape may look like as COVID-19 ravages the world's systems and economies, and we explore how organizations can effectively carry out eDiscovery in this environment.

More—and New—Lawsuits and Regulatory Activity

There's no question that the COVID-19 pandemic will generate a surge of litigation and regulatory activity. In some areas—bankruptcy and restructuring, for example—the surge has already begun. Some of the increased activity will be an uptick in familiar types of disputes; some of the activity will be new types of claims and causes of action uniquely related to the pandemic. Here's a rundown of what organizations can expect:

- **Employment law:** As companies continue to downsize their workforce and adjust their compensation, employees will likely pursue legal remedies, both administrative and judicial. Employees who have returned to work—or those who hold “essential” jobs and never stopped working—may file lawsuits alleging their employers did not act reasonably to prevent exposure to the virus. Employees with serious health conditions may file suits demanding pandemic-related accommodations under the Americans With Disabilities Act.
- **Data privacy:** International and domestic data privacy laws—including the new California Consumer Protection Act (CCPA)—are likely to provide fodder for individual and class action lawsuits regarding the mishandling of individuals' personal data, especially as pandemic-containment tools like temperature checks, health screening questions, and contact tracing become common. Security concerns around remote workforces may also lead to privacy lawsuits.

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Intellectual property: Pharma-related businesses engaged in virus research and vaccine and medicine development may face disputes over patent and trademark issues. Lawsuits may also arise over counterfeit or defective personal protective equipment.

- **Corporate restructuring:** As retailers, restaurants, and other hospitality businesses experience downturns in business because of weakened economies and restrictions on operations, and as they struggle to reopen their physical facilities, many of them will need to restructure or file for bankruptcy.
- **Commercial litigation:** Companies may seek to avoid contractual promises made before or during the COVID-19 pandemic that they no longer can (or want) to fulfill. On the flip side, companies will file breach of contract claims when other companies fail to perform their obligations. Businesses will sue insurers for failing to provide business interruption coverage for disruptions caused by the COVID-19 pandemic. Students will sue colleges and universities for failing to provide the in-person education promised. Consumers will sue businesses for failing to offer refunds for goods or services they were unable to provide.
- **Securities fraud:** Consumers and regulators will take action against publicly traded companies that made false statements about the impact of the coronavirus on their financials.
- **Regulatory investigations:** Organizations will face increased scrutiny from government agencies on a number of fronts, including whether they've complied with the terms for administering or using emergency loans and funding (such as the Paycheck Protection Program and CARES Act) and if they've met safety standards for their workplaces.

eDiscovery Programs and Processes

The pandemic has increased the existing pressure on corporate law departments to contain eDiscovery costs. Organizations that were already focused on finding more efficient ways to work—particularly those forced to do the same or even more work with fewer staff—have redoubled their efforts. They are taking

a variety of approaches to reducing costs and streamlining workflows, whether by insourcing more work, outsourcing certain processes, or adopting new technology. Some are looking “upstream” at their information governance programs to find ways to make “downstream” eDiscovery more efficient. Virtually all are figuring out how to adjust eDiscovery workflows to accommodate remote work.

Identification and Preservation of Information

To effectively and comprehensively identify information potentially relevant to legal matters—and to preserve that information when necessary—organizations need to consider how their employees are creating, using, and storing information in the new work-from-home paradigm. With the shift to working from home, companies need to consider:

- Whether employees are storing electronic information locally on their personal devices;
- Whether they are printing and keeping hard copies of documents in their home files;
- Whether teams are relying more on online collaboration tools and communication channels that are creating new sources of discoverable data;
- Whether employees are using applications while they're out of the office that aren't supported by the enterprise IT function; and
- How to gather information in the possession of former employees who were no longer reporting to an office.

Even before the pandemic hit, decentralized workforces and flexible work-from-home schedules had become more common, so businesses should have been thinking about these issues and preparing processes and infrastructure to handle them. But those that didn't are now scrambling to react. The critical starting point is figuring out what technologies are being used to communicate and create business-related content, and how to capture and preserve this information. Custodian questionnaires should include questions about storage locations and new technologies, so legal teams can understand the data they have and implement defensible litigation holds to prevent spoliation.

Experienced eDiscovery and information governance professionals know that what's happening in practice often diverges from what official policy dictates. As we move forward during the pandemic, organizations—particularly those in highly regulated industries—should give critical thought to official work-from-home policies and how those policies address the following issues:

- How remote employees should communicate with team members;
- What applications and tools they are allowed to use; and
- How they should store hard-copy materials.

If the policies don't address those issues sufficiently, companies will need to evaluate what adjustments are needed to better reflect what employees should be doing to work most effectively and securely, and in compliance with applicable regulations.

Collection and Transmission of Information

Organizations that are mature in information governance and eDiscovery have gradually been moving toward more centralized systems, and they have also become more comfortable with cloud storage. These organizations will not see as much impact from the pandemic on their ability to collect data, because fewer sources will be located in remote, decentralized locations. Nonetheless, some data sources are by definition distributed and local, such as phones and other mobile devices. With face-to-face interactions restricted during the pandemic, organizations have been forced to rethink how they manage data collection from these sources. Development and implementation of technology to enable remote collection of these devices has accelerated, and in most instances no in-person contact is necessary to carry out a collection.

Legal teams should also consider working with opposing counsel to simplify data-related processes to avoid or limit the need for collection of information that can't be handled remotely. During your meet-and-confer sessions, look for ways to tier your productions. Consider whether you might winnow your list of data sources. If you are temporarily prohibited from retrieving original documents, ask whether you can share duplicates or near duplicates of documents in the interim.

Transmission of information has also been impacted by pandemic-related office closures—loading data to physical media and shipping it to the office of opposing counsel or a service provider is often not feasible. But alternatives exist, and litigants have become more flexible and creative in finding ways to effect digital transfers. Some government agencies are already bending their processes, moving away from requiring respondents to send hard drives with information, and permitting FTP transfers instead.

Document Review

Corporate legal departments historically have resisted document review conducted by reviewers working from home or in other remote locations, largely because of concerns around data privacy and security, and reviewer productivity. But the closure of offices during the pandemic, and the requirements for social distancing in indoor settings, made in-person review in traditional review centers impracticable if not impossible. So new processes and protocols sprung up to allow the work to continue. For the most part, these adjustments have worked well—so well, in fact, that it is highly likely that remote review will continue to some extent even after our physical workplaces return to “normal.”

Organizations have seen that there is no drop-off in review productivity when working remotely. In fact, in some instances productivity improved, likely due to the increased flexibility afforded reviewers to work when it best suits their personal schedules, and to take breaks throughout the workday to refresh their concentration. Review providers also developed new protocols and implemented new tools to facilitate remote collaboration and monitor the quality of reviewers’ work product. They’ve also engineered creative ways to mitigate the risk of reviewers mishandling company secrets or other sensitive information: some vendors add a watermark on the screen that will be imprinted on any image or screen shot taken of the document; others are sending locked-down laptops that restrict reviewers’ activities other than document review.

Allowing remote work also makes it easier to find specialized talent for complex cases. When review teams are limited to a particular geography, lawyers with necessary expertise, such as intellectual property, may be excluded because they are not local. But remote work opens the possibility of a broader talent pool across a wide geography, giving unprecedented access to global specialists.

Moving Forward to Address eDiscovery Challenges

The pandemic has presented novel problems for lawyers and their clients—and as we prepare for the onslaught of new litigation and regulatory matters to come, there’s no end in sight to eDiscovery challenges. But the organizations that are working steadily through these challenges by adopting new technology and workflows are positioning themselves to thrive in the post-COVID world. Indeed, the pandemic has opened new opportunities for collaboration to overcome these problems—we have seen eDiscovery providers working with their competitors to share their technology and tools, coming together to better serve their mutual clients.

The authors discussed many of the issues addressed in this article in a webinar that’s available to view [at Consilio’s website](#). We encourage you to reach out to any of us if you’d like to ask questions or explore these topics in more detail.

Ellen Blanchard: ellen.blanchard2@t-mobile.com
Briordy Meyers: briordy.meyers@boehringer-ingelheim.com
Maureen O’Neill: maureen.oneill@consilio.com

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