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Electronic Discovery Implications & Considerations When Employees Are Working Remotely

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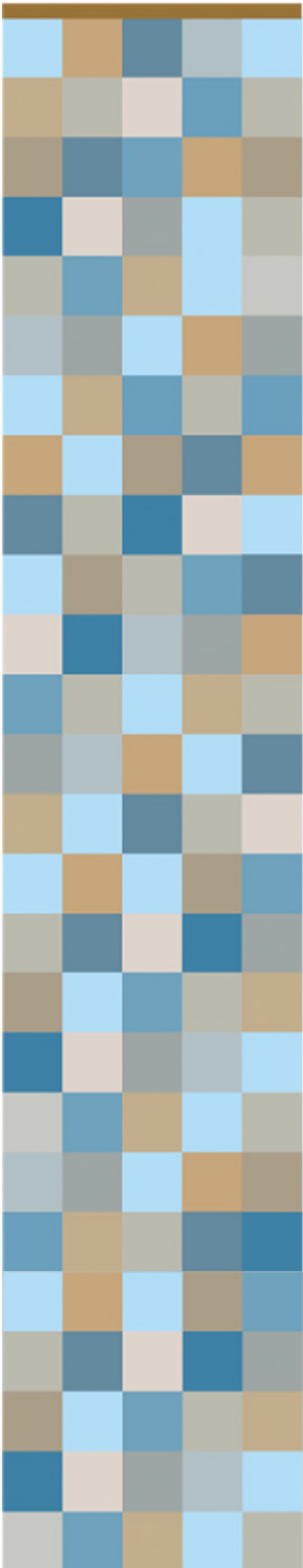
Pursuant to Executive Order 202.6, effective March 19, 2020, Governor Cuomo put New York State on "Pause" directing that all non-essential workers work from home. Similar orders have been, and continue to be, implemented throughout the country. In the wake of these directives, many businesses that previously operated 'in-person' have been forced to quickly adapt and find ways to carry out their business remotely. While available technology has made this shift possible, the implications for current and future litigations, and in particular, on the discovery process are unknown.

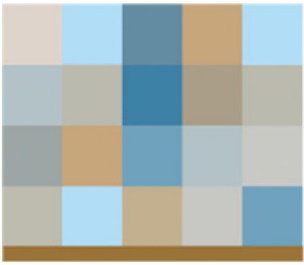
One of the most burdensome and expensive processes during any litigation is the discovery phase. This is especially the case when there are large amounts of Electronically Stored Information ("ESI") that are potentially relevant to litigation.

ESI, in sum, is any form of data that is stored electronically. Common examples are pdfs, word documents, excel spreadsheets, text messages, email communications, and social media posts. Finding ways to conduct discovery of ESI in effective, permissible, and cost-efficient manner has always presented several challenges to both the attorney and the client.

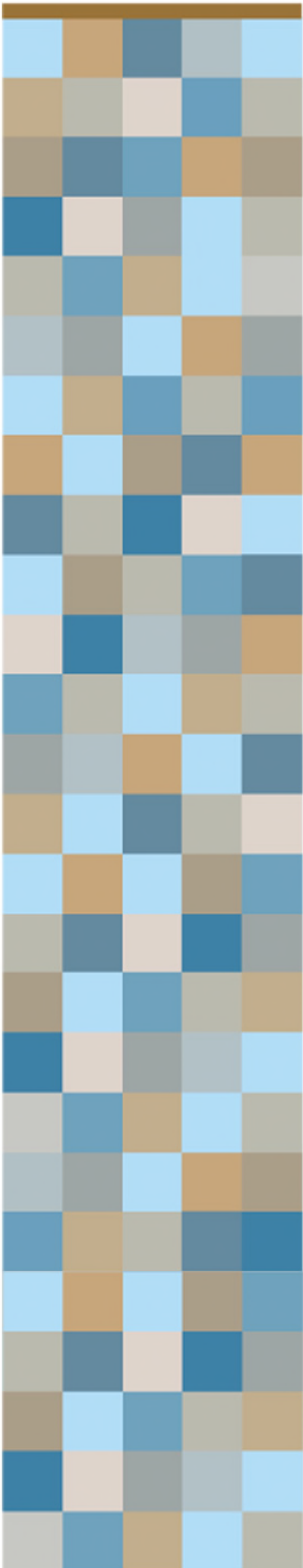
Now that many businesses are operating solely by remote means, the amount of ESI in the context of discovery is expected to skyrocket. For example, many companies that previously held meetings face-to-face are now generating more emails, texts, and other messaging forms of communications in order to interact with their employees and clients. Video conferencing is regularly being used. Employees are using personal devices, and possibly their personal email accounts, to communicate with co-workers and clients. Individuals may also be saving work-related documents to personal computers and other personal devices or company issued devices that were not regularly used in the past. As a result, if a business finds itself a party to a litigation, and the relevant timeframe of the dispute includes this period during which the majority of the workforce is working remotely, that business will need to work with its attorneys (and IT Department) to identify the vast amount of ESI that has been generated during this period in order to preserve, collect, and produce relevant documents as required under the law.

Additionally, there is an obligation to preserve documents, including ESI, once litigation is *anticipated*. A common misconception is that this obligation starts only when litigation





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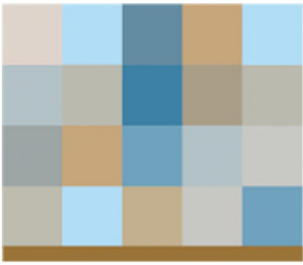
is commenced. However, if an individual or business could reasonably anticipate litigation prior to the commencement of such action, the obligation to preserve relevant documents attaches at that point. The sanctions for failing to do so may be severe and can disadvantage a party in litigation.

Thus, when this obligation arises, businesses are advised to suspend document deletion policies and preserve relevant hard-copy documents and ESI. In the past, a business that has had no one or few of its workforce working remotely, would have a less difficult time identifying sources of relevant ESI, preserve such ESI, and comply with its obligations. However, now during this unprecedented time, it may be more difficult for a business to identify all of the potential sources of ESI that need to be preserved given the drastic increase in the number of electronic devices and amount of resources being used to carry out day-to-day operations.

In many courts, the concept of proportionality has been applied to discovery to weigh the burden or cost of producing ESI against the value of the case. However, it is unclear at this early stage how courts will apply the proportionality concept during this unprecedented time period when almost every operating business is generating significant amounts of ESI outside of its normal channels and processes.

It is unknown at this time how long businesses will be working remotely. However, as businesses adapt to this new manner of conducting business, there are a few best practice points that can be employed now to ensure that businesses meet their obligations under the law to identify relevant ESI during this time period:

- *Businesses should try to keep a record of what devices their employees use to communicate and perform work-related tasks during this time period. This will allow an employer to quickly identify sources of ESI in the future if the need arises.*
- *To the extent employees create documents for business purposes and save them to their personal devices or company issued devices not normally utilized, businesses should advise their employees to not delete such documents and to retain such ESI in an easily identifiable location and/or folder. This will not only make it easier for the business and its counsel to identify relevant ESI at a later date, but in the event the obligation to preserve documents arose during this time period, taking such measures will ensure that such relevant data is not deleted.*
- *Businesses should also advise their employees to notify them if they plan to replace or upgrade any device being used during this time period. This will ensure that the business has an opportunity to evaluate whether*



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or not any steps need to be taken to preserve relevant ESI prior to the destruction of any devices.

- *Businesses should direct their employees to use their business email addresses (as opposed to their personal email addresses). This will reduce the number of email accounts that will need to be searched if necessary. In the event employees have no choice but to use their personal email addresses to communicate, the employer can: (1) direct the employee not to delete work-related emails; and (2) keep a record of personal email addresses being used by employees to communicate regarding work related business.*
- *Businesses should keep track of meetings taking place via video conference, and what topics are discussed, in order to determine whether such video conferences may be relevant to litigation. Some video conferencing services permit conferences to be recorded and/or for participants to chat with one another during the video conference. Therefore, a business should also have an understanding of what ESI may be created as a result of a video conference.*

Each of the above-referenced suggestions may not be appropriate for every business. Additionally, the above-points are not an exhaustive list, as each business may need to take additional or different measures depending on how it has transitioned to having its workforce work remotely. It should also be noted that the above-points are not only good strategies to employ now during the current COVID-19 crisis, but should also be considered any time a business has employees working remotely.

If you have questions regarding the steps your business can take now to better situate itself in the event of a litigation, please feel free to reach out to Jacquelyn Moran at (516) 880-7227 or jmoran@moritthock.com



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