Georgia Privacy & Technology Forum

How to Leverage Technology on Key Legal Issues

March 29, 2022

AGENDA

01

TECHNOLOGY & PRIVILEGE

02

TECHNOLOGY & COLLABOATION TOOLS

03

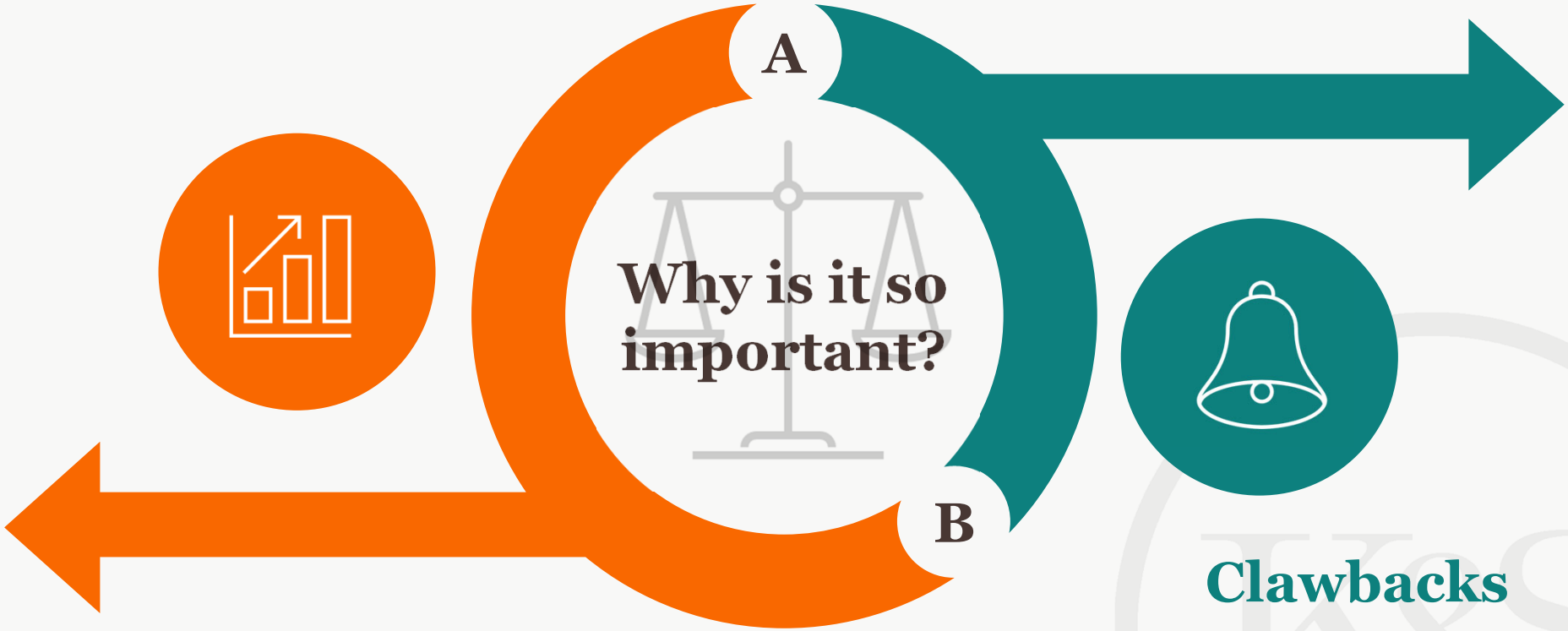
RECENT CASE LAW

04

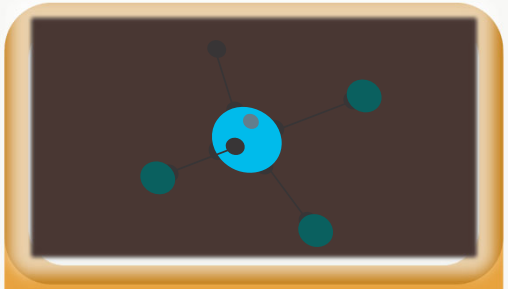
Q&A

Technology & Privilege

What is Privilege?



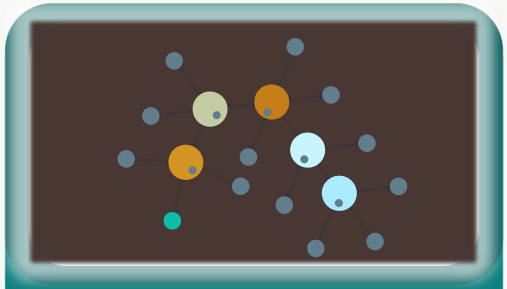
Why is Privilege Review Costly?



Requires Nuanced Analysis

Look to context of communications

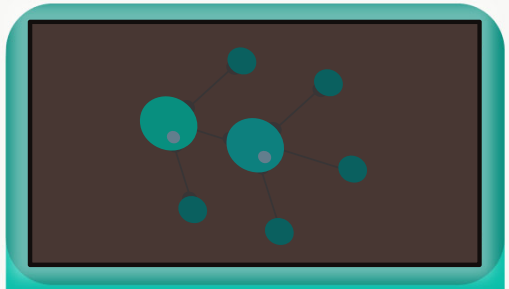
Consider role of attorney (legal v business)



Over-Designations

Unnecessary documents in privilege log queue results in additional billable hours

Overbroad privilege application invites privilege challenges



Data Volumes

Treatment of duplicates in data sets and impact to privilege review

Use of near duplicate analysis to manage volumes and consistency

Traditional Methods for Improving Privilege Review

TRADITIONAL WORKFLOW CHECKLIST
Manual keyword filter
Lawyer-custodian analysis
Propagation
Threading
Metadata analysis
Doc-by-doc review
Privilege folder suppression

Past Results of Using TAR / AI for Privilege

2010

Analysis of 1.3 million Enron documents for privilege found recall rates of 7-71%, precision rates of 30-49%..

Cormack, G.V., Grossman, M.R., Hedin, B., Oard, D.W., Overview of the TREC 2010 Legal Track, 34 (2011)

Analysis by KPMG found recall rates of 90% with 50% precision using developmental technology.

Gabriel, M. and Sharpe, D. Using Predictive Coding to Find Privileged Content, Today's General Counsel, Vol 11 (Jun/Jul 2014)

2014

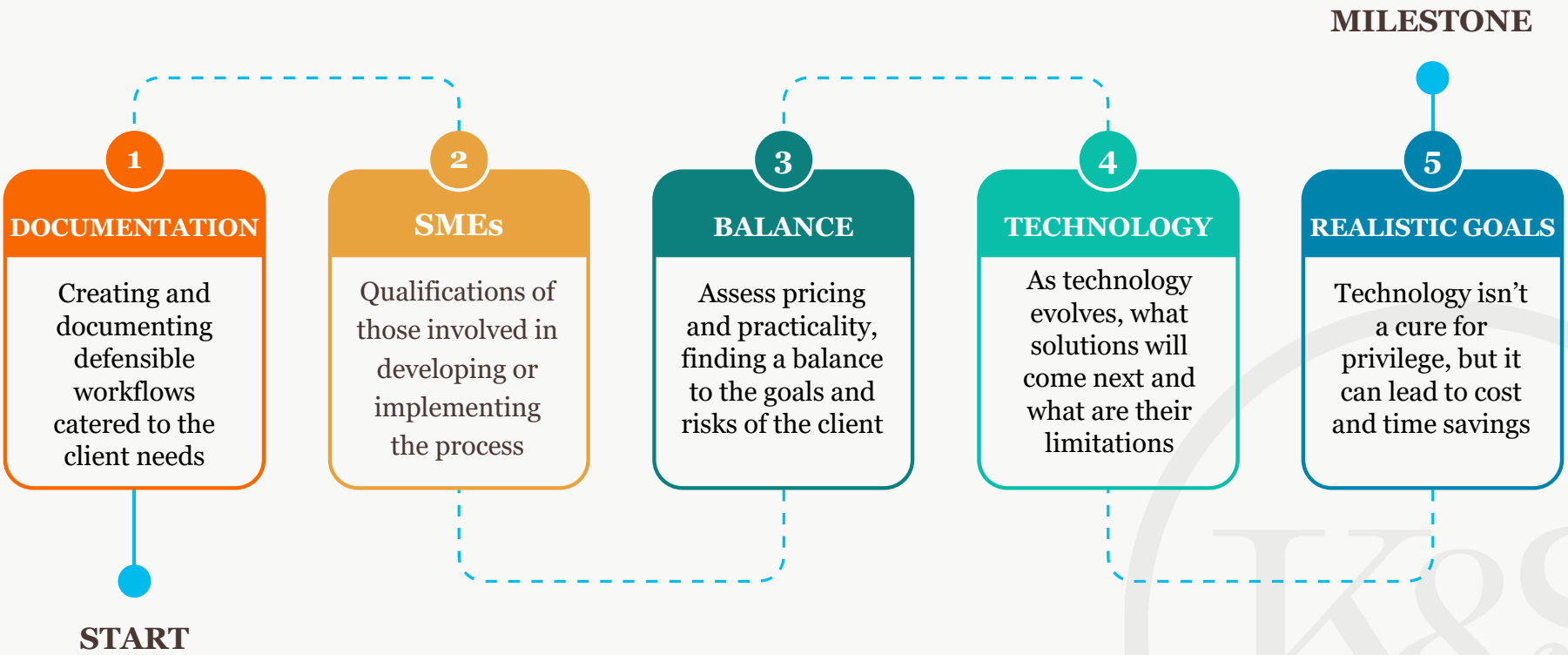
Privilege Detection Applications

1. Algorithms built to analyze connections and relationships between people
2. Cross-platform identification
3. Detection of non-name handles
4. Footer exclusions
5. Removal of "junk" emails
6. Domain breakdowns
7. Reach beyond top-level metadata
8. Aligned versus adverse counsel refinement
9. Language surrounding phrasing
10. Reviewer guidance of "why" it is a hit

Examples of Available Technology

Access required inputs	Run Text IQ pipeline	Collect feedback, refine precision and produce results
Text IQ works with hosting partner to get required inputs in the correct format Data required includes: • Extracted text and metadata • Attorney list & law firms • Priv Screen hits	Text IQ runs set of algorithms on dataset, including: • Disclaimer removal, spammer identification, domain prediction • Identify unknown attorneys • Identify client-client priv Text IQ sends institutional knowledge feedback (IKF) to designated client point of contact **Text IQ shares an initial batch of Not Privileged (NP) documents**	Text IQ incorporates institutional knowledge feedback and runs precision refining workflow **Text IQ additional set of Not Privileged documents ("NP Report")** **Text IQ shares set of scored Potentially Privileged documents ("PP Report") with priv reasons** Start optional precision enhancer workflow if desired
Week 0	***1-1.5 weeks***	***1-1.5 weeks***

Critical Points of Privilege Review



Courts on Privilege

As with TAR for relevancy, courts are unlikely mandate the usage of any tools.

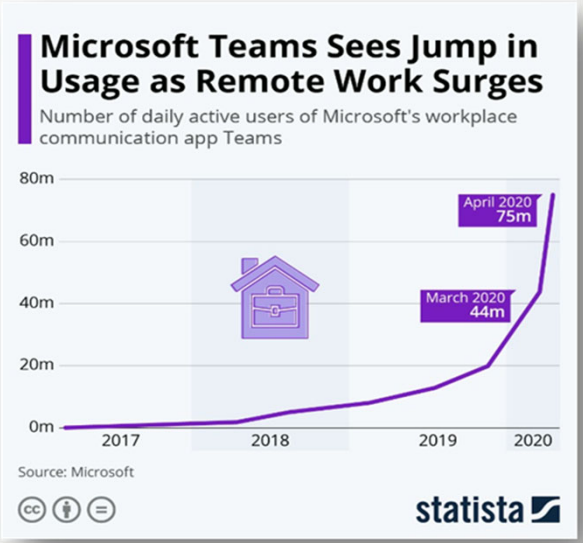
"Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." – Principle 6.

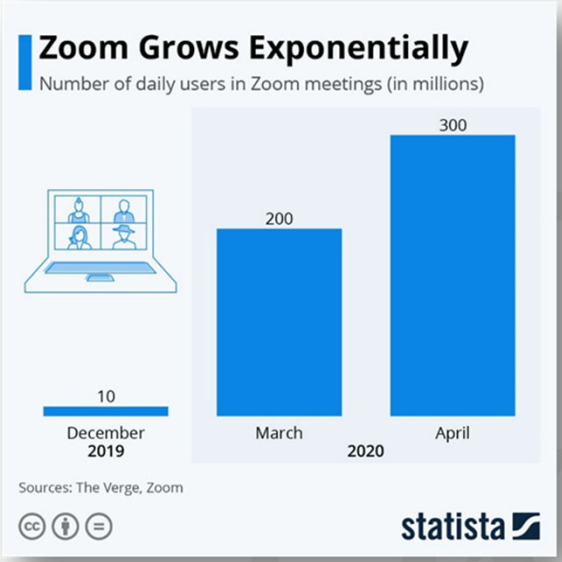
Agree to a 502(d) order to further protect your client's privileged communications, regardless of the technology being used.

Technology & Collaboration Tools

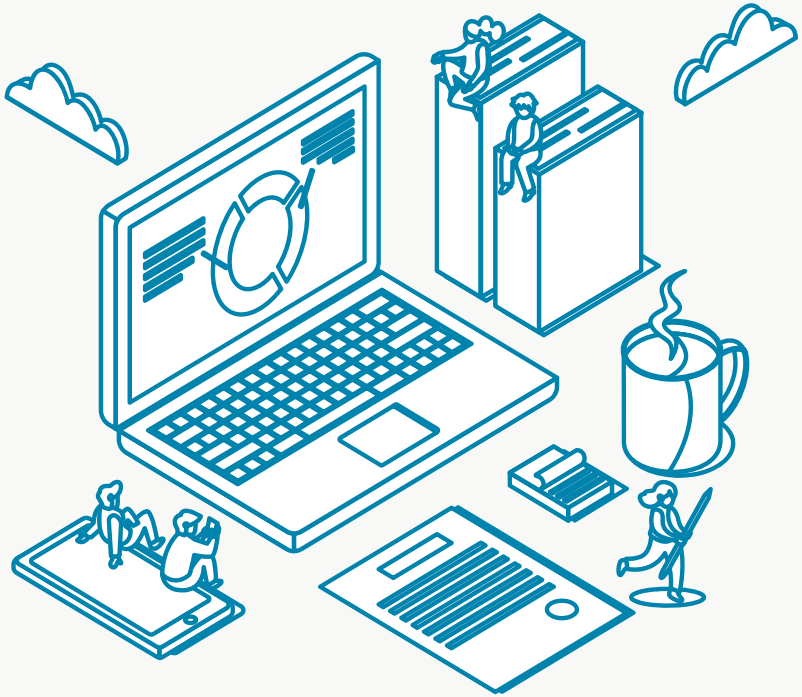
Growing Collaboration Tools Trends

The rise in company-approved use of collaboration tools amongst employees is directly related to the Covid-19 outbreak, with work-from-home becoming more normalized. That increased use of these tools in the workplace, in addition to text messages, is starting to make an impact on courts and discovery.





Challenges with Collaboration Tools & eDiscovery



Information Governance

Data Privacy

Hold Notices
Auto-Deletion and BYOD Policies

Collection

Multi-Channel Conversations

Review and Production

A "Traditional" eDiscovery Family

Relational Documents

During processing, documents that have attached or embedded files will have those files treated as separate documents when loaded into the review database.

The original email file with an attachment will be loaded into the database as two documents: the email is referred to as the "parent" and any attachments are referred to as "children."

Standalone documents with embedded files (such as a Word document with an embedded Excel) will be similarly loaded as the "parent" (document with embedded files) and "children" (embedded files in the document).

This relational designation is important because documents are searched, reviewed, and produced keeping "families" together, as they would be treated in their native format.

PARENT
Original document with attachments or embedded files

CHILD
Original document attached to an email or embedded within another document

EMBEDDED FILE
Original file saved within a separate, distinct document

A "Collaboration Tool" eDiscovery Family

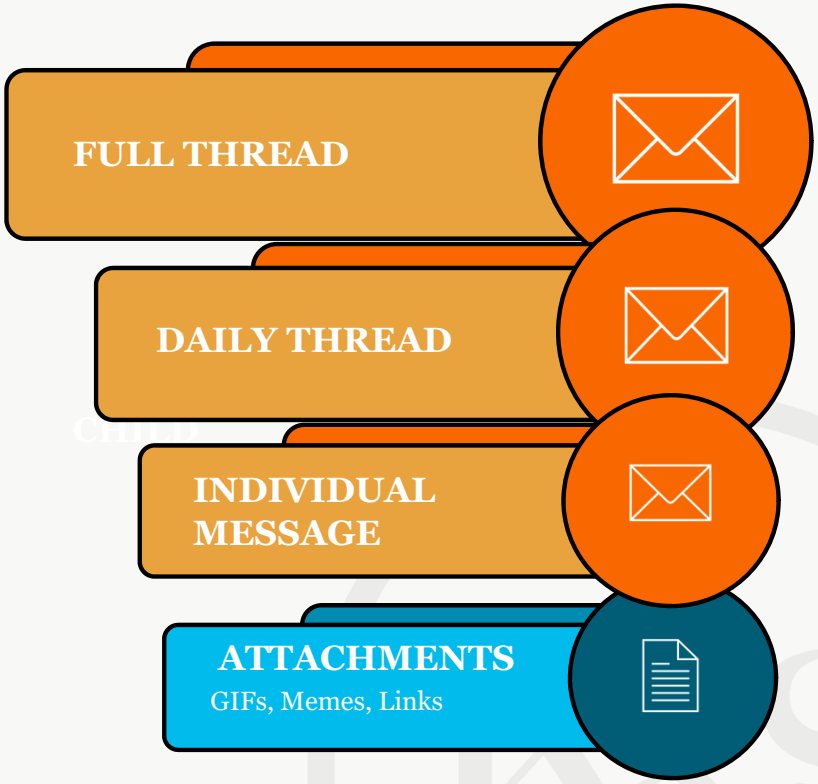
Relational Documents

Instead of a traditional two-tiered family relationship with a "parent" and "children" collaboration tool families are based on the relationship of where the messages exist in a given thread:

- The full message thread
- Daily messages within that thread
- Individual messages within that thread
- Attachments of individual messages within that thread

This multi-tiered relationship creates challenges to:

- Review workflows
- Approaches to QC
- Production spec decisions



Unique Challenges to Collaboration Tool Messages

Workflow Questions to Consider for Chat Message Reviews

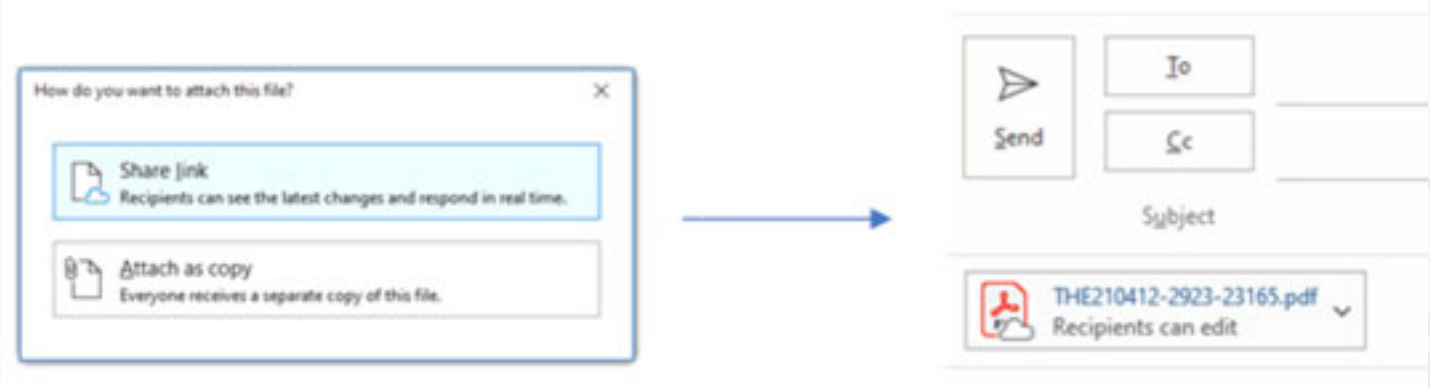
1. Search terms must take into account casual language (including privilege terms)
2. How do you decide what to review once you have search hits - all messages in that thread or day?
3. How will you handle relevancy for memes and emojis?
4. What analytics tools can be used for documents with such a small amount of text and be effective?
5. What's the best way to produce these messages?

Collaboration Tool Challenge: Hyperlink Files

Modern Attachments Example

Microsoft integrates OneDrive for business and Outlook. Rather than sending documents the traditional way, attaching a copy to an email message. With modern attachments a link to the document is sent which point back to the senders OneDrive location. This saves space in the mailbox and allows for better collaboration, without the need to send document versions back and forth.

Modern attachments work only if the document is stored in OneDrive but the user experience is that same as attaching any document to an email. However, when the file is stored in OneDrive the user is presented with the following option.



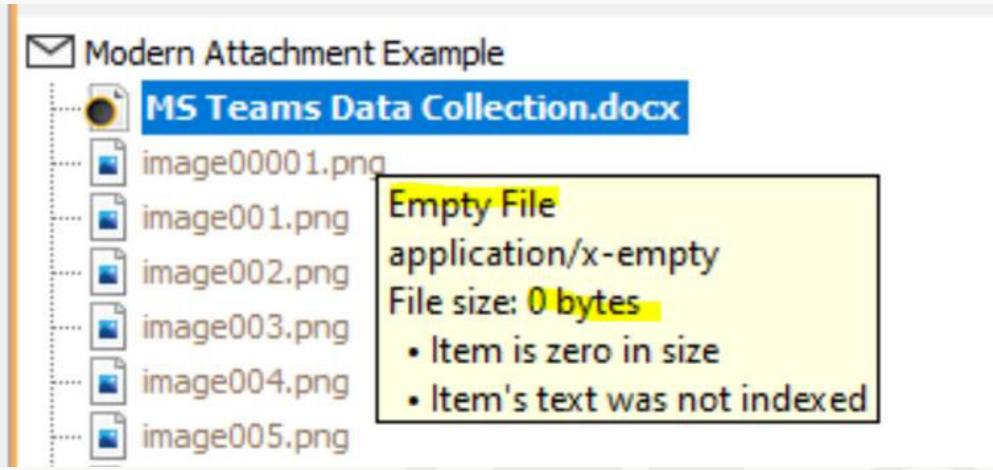
Collaboration Tool Challenge: Hyperlink Files

Modern Attachments Example

The cloud symbol on the attachments indicates the attachment is coming from OneDrive and not attached as a local copy.

The issue with modern attachments from an eDiscovery and preservation prospective is that because the documents are not actually attached to the email and not stored in the email. This means Legal professionals need to be aware that both the Mailbox & OneDrive location should be placed on legal hold in order to preserve all data.

When processing Modern attachments, they look like this in Nuix:



Collaboration Tool Challenge: Hyperlink Files

Modern Attachments Example

Everything looks normal about the attachment, though when you did a little deeper, the file is empty and is 0 bytes. Further Metadata below shows it's a modern attachment.

Name	Value
Properties	
File Created	Wednesday, 21 July 2021 at 13:02:36 British Summer Time
File Modified	Wednesday, 21 July 2021 at 13:02:37 British Summer Time
Mapi-371e	
Mapi-Access	2
Mapi-Access-Level	0
Mapi-Attach-Extension	...docx
Mapi-Attach-Filename	MS Teams Data Collection.docx
Mapi-Attach-Flags	0
Mapi-Attach-Long-Filename	MS Teams Data Collection.docx
Mapi-Attach-Long-Pathname	https://linealservices-my.sharepoint.com/personal/nattoe_linealservices_com/Documents/Forensics/MS%20Teams%20D...

Solution: Preserve and collect both Email & OneDrive sources for all relevant custodians utilizing Graph API to automate collection of modern attachments where possible.

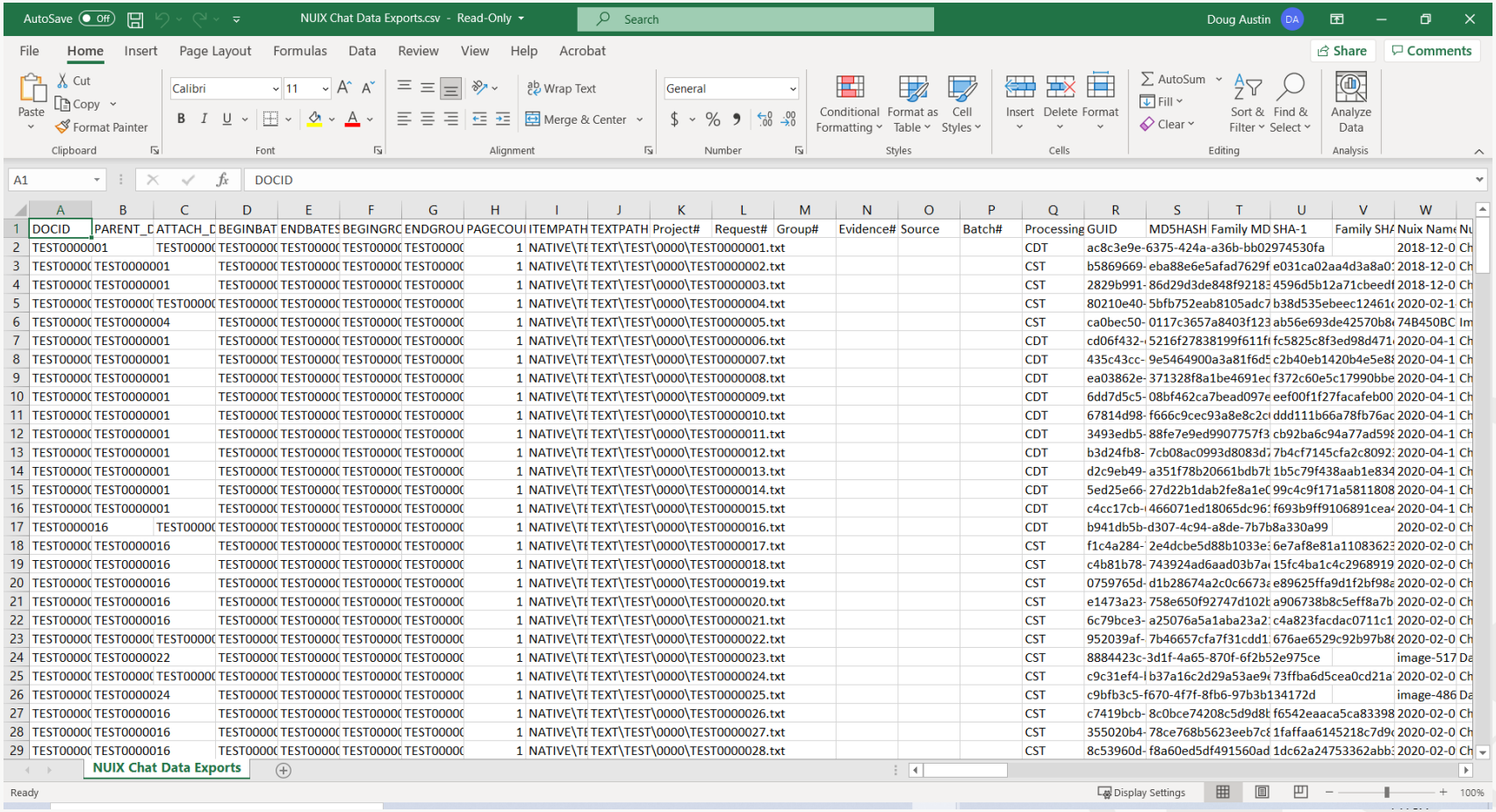
Getting Technical: Slack Messaging Encoding


```
{
    "type": "message",
    "channel": "C2147483705",
    "user": "U2147483697",
    "text": "Hello world",
    "ts": "1355517523.000005",
    "is_starred": true,
    "pinned_to": ["C024BE7LT", ...],
    "reactions": [
        {
            "name": "astonished",
            "count": 3,
            "users": [ "U1", "U2", "U3" ]
        },
        {
            "name": "facepalm",
            "count": 1034,
            "users": [ "U1", "U2", "U3", "U4", "U5" ]
        }
```

Getting Technical: Chat Data Conversion Exports

```
message.Subject = lines.ElementAt(0).Trim().Replace("Subject: ", "");
if (message.Subject.Contains(WHATSAPP_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.WhatsApp;
else if (message.Subject.Contains(WECHAT_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.WeChat;
else if (message.Subject.Contains(VIBER_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Viber;
else if (message.Subject.Contains(IMESSAGE_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.iMessage;
else if (message.Subject.Contains(IMESSAGE_CUE2, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.iMessage;
else if (message.Subject.Contains(INSTAGRAM_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Instagram;
else if (message.Subject.Contains(KIK_MESSENGER_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.KikMessenger;
else if (message.Subject.Contains(SKYPE_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Skype;
else if (message.Subject.Contains(SNAPCHAT_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.SnapChat;
else if (message.Subject.Contains(LINE_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Line;
else if (message.Subject.Contains(TIKTOK_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.TikTok;
else if (message.Subject.Contains(TEXTNOW_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.TextNow;
else if (message.Subject.Contains(TELEGRAM_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Telegram;
else if (message.Subject.Contains(FACEBOOKMESSENGER_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.FacebookMessenger;
else if (message.Subject.Contains(WICKR_CUE, StringComparison.OrdinalIgnoreCase))
    message.ConversationPlatform = DataSource.Wickr;
```

Getting Technical: NUIX Chat Data Exports



	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W
1	DOCID	PARENT_D	ATTACH_D	BEGINBAT	ENDBATES	BEGINGRC	ENDGROU	PAGECOUI	ITEMPATH	TEXTPATH	Project#	Request#	Group#	Evidence#	Source	Batch#	Processing	GUID	MD5HASH	Family MD	SHA-1	Family SH	Nuix Name
2	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000001.txt							CDT	ac8c3e9e-6375-424a-a36b-bb02974530fa					2018-12-0
3	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000002.txt							CST	b5869669-eba88e6e5afad7629f			e031ca02aa4d3a8a0		2018-12-0
4	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000003.txt							CST	2829b991-86d29d3de848f92183			4596d5b12a71cbeedf		2018-12-0
5	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000004.txt							CST	80210e40-5bfb752eab8105adc7			b38d535ebeec12461		2020-02-1
6	TEST0000	TEST0000004		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000005.txt							CST	ca0bec50-0117c3657a8403f123			ab56e693de42570b8	74B450BC	Im
7	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000006.txt							CDT	cd06f432-5216f27838199f611f			fc5825c8f3ed98d471		2020-04-1
8	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000007.txt							CDT	435c43cc-9e5464900a3a81f6d5			c2b40eb1420b4e5e8		2020-04-1
9	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000008.txt							CDT	ea03862e-371328f8a1be4691ec			f372c60e5c17990bbe		2020-04-1
10	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000009.txt							CDT	6dd7d5c5-08bf462ca7bead097e			eef00f1f27facafeb00		2020-04-1
11	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000010.txt							CDT	67814d98-f666c9cec93a8e8c2c			ddd111b66a78fb76ac		2020-04-1
12	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000011.txt							CDT	3493edb5-88fe7e9ed9907757f3			cb92ba6c94a77ad59		2020-04-1
13	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000012.txt							CDT	b3d24fb8-7cb08ac0993d8083d			7b4cf7145cfa2c8092		2020-04-1
14	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000013.txt							CDT	d2c9eb49-a351f78b20661bdb7b			1b5c79f438aab1e834		2020-04-1
15	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000014.txt							CDT	5ed25e66-27d22b1dab2fe8a1e			99c4c9f171a5811808		2020-04-1
16	TEST0000	TEST0000001		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000015.txt							CDT	c4cc17cb-466071ed18065dc96			f693b9ff9106891cea		2020-04-1
17	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000016.txt							CDT	b941db5b-d307-4c94-a8de-7b7b8a330a99					2020-02-0
18	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000017.txt							CST	f1c4a284-2e4dcbe5d88b1033e			6e7af8e81a1108362		2020-02-0
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20	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000019.txt							CST	0759765d-d1b28674a2c0c6673			e89625ffa9d1f2bf98		2020-02-0
21	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000020.txt							CST	e1473a23-758e650f92747d102			a906738b8c5eff8a7b		2020-02-0
22	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000021.txt							CST	6c79bce3-a25076a5a1aba23a2			c4a823facdac0711c1		2020-02-0
23	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000022.txt							CST	952039af-7b46657cfa7f31cdd1			676ae6529c92b97b8		2020-02-0
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25	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000024.txt							CST	c9c31ef4-b37a16c2d29a53ae9			73ffba6d5cea0cd21a		2020-02-0
26	TEST0000	TEST0000024		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000025.txt							CST	c9bfb3c5-f670-4f7f-8fb6-97b3b134172d					image-486
27	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000026.txt							CST	c7419bcb-8c0bce74208c5d9d8			f6542eaaca5ca83398		2020-02-0
28	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000027.txt							CST	355020b4-78ce768b5623eeb7c			1faffaa6145218c7d9		2020-02-0
29	TEST0000	TEST0000016		TEST0000	TEST0000	TEST0000	TEST0000	1	NATIVE\TE	TEXT\TEST\0000\TEST0000028.txt							CST	8c53960d-f8a60ed5df491560ad			1dc62a24753362abb		2020-02-0

Getting Technical: Relativity Short Message Format


```
[
   {
      "id":"m2",
      "type":"message",
      "parent":"m1",
      "body":"Looks good!",
      "participant":"P1",
      "conversation":"C1",
      "deleted":false,
      "importance":"normal",
      "timestamp":"2018-09-11T09:55:00",
      "reactions":[
         {
            "value":"thumbs up",
            "count":2,
            "participants":[
               "P1",
               "P2"
            ]
         }
      ],
      "attachments":[
         {
            "id":"partyon.png",
            "display":"partyon.png",
            "size":4254
         }
      ],
      "edits":[
         {
            "participant":"P1",
            "timestamp":"2018-09-12T12:53:00"
         }
      ],
      "custom":[
         {
            "name":"GPS",
            "value":"41 24.2028, 2 10.4418"
         }
      ]
   }
]
```

Collaboration Tools: Helpful Software and Providers

1. AXIOM
Allows you to properly collect chat data preserving the ability to later deliver to RSMF

2. ONNA
Great tool for Slack data processing

3. HANZO
Hold, collection and discovery of Slack and other collaboration app data

4. ESI ANALYST
ECA analysis of mobile and collaboration app data

5. NUIX
Powerful data extraction tool

6. CELEBRITE
Mobile device collection and processing tool

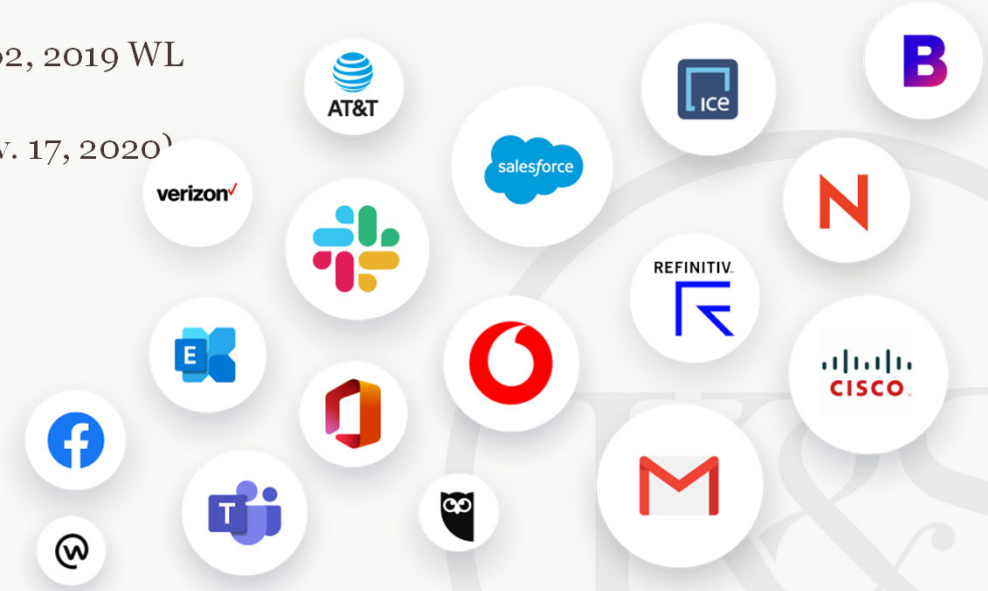
Recent Case Law

Case Law: Collaboration Tools Go To Court

Inconsistent treatment of efforts to compel production of data from NECs

- *West Pub. Corp. v. LegalEase Sols. LLC*, 2019 WL 8014512, at *8 (D. Minn. No. 22, 2019).
- *Milbeck v. TrueCar Inc.*, 2019 WL 4570017, at *1-3 (C.D. Cal. May 2, 2019).
- *Calendar Research LLC v. StubHub, Inc.*, No. 17-cv-4062, 2019 WL 1581406 (C.D. Cal. Mar. 14, 2019).
- *Laub v. Horbaczewski*, 2020 WL 7978227 (C.D. Cal Nov. 17, 2020)

Redaction of non-responsive content within responsive channels



Case Law: Auto-Deleting and Ephemeral Applications

DR Distributors – Issue Preclusion, Adverse Inferences, Costs (Paid by Company *and* Counsel), Admonishments to Counsel, & More

- **Case Summary:** Defendant failed to disclose various sources of relevant data to counsel. Counsel failed to ask client about possible locations of relevant data and failed to instruct client on proper hold notice procedure or for the client to disable any auto-delete settings to relevant data.
- **Outcome**: The judge held that certain issues related to the prejudicial spoliated data could only be remedied by **issue preclusion** and **adverse inferences**, **costs** related to the sanctions were ordered to be paid by Defendant and counsel, **admonishments** to counsel along with orders for counsel to complete 8 hours of **ESI-related CLEs** and certifying they read the full order (256 pages).

Fast v GoDaddy – Costs, Adverse Inferences, Additional 3rd Party Subpoenas for Opposing Party

- **Case Summary** : Plaintiff filed suit against Defendant, alleging wrongful termination. In spite of filing her claim, Plaintiff deleted numerous relevant Facebook Messenger and Telegram messages.
- **Outcome** : **Costs** to Defendant for sanctions motion, **adverse inference** instruction to the jury, **additional 3rd party subpoenas** for the opposing party to minimize prejudice caused by deletions.

Fast v GoDaddy.com, LLC, No. CV-20-01448-PHX-DGC (D. Ariz. Feb. 3, 2022).

WeRide Corp v Kun Huang - Terminating Sanctions

- **Case Summary :** Defendants moved communications related to the litigation to a self-deleting ephemeral app after they anticipated litigation and after an evidence preservation order issued by the court.
- **Outcome** : Judge issued **terminating sanctions** for Defendants, entering a default judgment in favor of the Plaintiffs.

WeRide Corp v. Kun Huang, 379 F.Supp. 3d 834 (N.D. Cal. 2019).

Case Law: Auto-Deleting and Ephemeral Applications

Sandoz, Inc. v. United Therapeutics Corp – Use of Search Terms to Identify Review Universe

- **Case Summary:** The producing party only produced the text messages that hit on search terms and did not provide the surrounding messages for context.
- **Outcome**: The producing party was required to produce the surrounding contextual messages.

Sandoz, Inc. v. United Therapeutics Corp., 2021 WL 2453142 (D.N.J. 2021).

Nichols v. Noom – Hyperlinked Files: Attachments or Not Attachments

- **Case Summary** : Plaintiff determined that defendant's employees would send hyperlinks of internal files in lieu of attaching the files to the email. plaintiffs argued that this practice resulted in "broken" families and requested that the court require defendant to work with a vendor to collect the Google Drive files. Defendants argued that hyperlinks are not attachments and stated all files were already produced.
- **Outcome**: The court denied the plaintiff's request, finding that a hyperlink is not the same things as an attachment, and further, the defendant/producing party had already searched, reviewed, and produced from their Google Drive.

Nichols v Noom, Inc., 2021 WL 948646 (S.D.N.Y. 2021).

Benebone v Pet Qwerks – Slack Data and Proportionality

- **Case Summary:** Producing party argued that collecting, reviewing, and producing Slack data would be cost prohibitive and outside the bounds of proportionality. The producing party did not provide any witness or expert testimony supporting their motion. The receiving party provide an export-provided affidavit regarding available software to assist with Slack data that was not cost prohibitive.
- **Outcome**: Producing party was ordered to produce the Slack data.

Benebone v Pet Qwerks, 2021 WL 831025 (C.D. Cal. 2021).

Q&A

Thank you!