

Rethinking E-Discovery Readiness Amid Rise Of Collab Tools

By **Jay Carle and Ryan Tilot** (April 21, 2022)

Business collaboration platforms are changing the way companies conduct business, and they are also changing the way discovery is conducted in litigation.

Over the past few years, companies have steadily adopted the use of online collaboration platforms and instant messaging communications to conduct business. For some, use of these tools has already surpassed email as the primary internal business communication and collaboration platform.

Millions of users each day use collaboration platforms to communicate in real time, share and edit documents, record video calls, and conduct web-based presentations. The COVID-19 pandemic and the necessity to keep remote workforces connected has rapidly increased the adoption of these tools and gave this transition a shot of adrenaline.

For example, Microsoft Corp. estimates that daily active users of Microsoft Teams — one of many collaboration platforms in the market — has skyrocketed from 20 million active daily users in November 2019 to 145 million active daily users in April 2021.

Collaboration platforms are now the second most common form of communication in business, behind email. Accordingly, we expect to see a steady increase in disputes surrounding the discoverability of certain data residing in collaboration platforms.

For example, last year, the U.S. District Court for the Central District of California ordered the plaintiff in *Benebone LLC v. Pet Qwerks Inc.*^[1] to review and produce messages from its collaboration platform, making the request comparable to the search and production of email.

On the other hand, in 2020, the same court denied the plaintiffs' request for such messages in *Laub v. Horbaczewski*,^[2] concluding that the plaintiffs' request was largely speculative that a search of chat messages within the collaboration platform would identify additional responsive messages. The court reasoned that the request was not proportional to the needs of the case.

In summary, courts are more frequently weighing in on the discovery of data created and stored in collaboration platforms and their focus is on whether data from collaboration platforms is relevant and proportional to the needs of the case.

The problems law departments are facing, and will continue to face with increasing regularity, from a legal compliance and litigation discovery perspective are twofold.

The first issue involves how collaboration platforms are architected and the way in which data is stored. Many collaboration platforms are developed with business functionality and the end user in mind, with far less emphasis on the importance of identification, preservation, search and collection of electronically stored information for litigation.



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For example, some collaboration platforms store chats in one location and documents shared during the chat in a completely different location with no built-in way to preserve or collect them in a cohesive, linked fashion. The documents shared during a one-to-one chat may only be stored and associated with the user that sent the chat, but not the other users who received the shared document.

Similarly, large discussions within collaboration platforms that involve many users, generally known as channels, often store data in locations that are not associated with any user involved in the channel. As a result, placing a legal hold on a particular individual may not preserve all relevant parts of a chat thread nor the documents that were exchanged during the chat communication.

Accordingly, it is plain to see that how and where data is stored in collaboration platforms and who it is associated with creates issues when businesses need to preserve and collect information from particular users.

Similarly, so-called modern attachments — documents shared by users via hyperlinks in chat messages and certain email systems — will continue to be a hot-button issue as use of collaboration platforms has become pervasive. Because the hyperlinked document is stored separate and apart from the chat communication, it can be difficult to collect and produce the chat and the hyperlinked document as a complete communication family.

For example, in *Nichols v. Noom Inc.*,^[3] the U.S. District Court for the Southern District of New York last year rejected the plaintiffs' argument that Google Drive documents hyperlinked to Gmail communications were attachments and were required to be produced as part of a document family. From a technical standpoint, the court reasoned that not all hyperlinks were linked to documents, citing that some hyperlinks are links to shortcuts such as a section of a document or a SharePoint folder.

Most importantly, however, the court determined that the plaintiffs had failed to show that many of the hyperlinked documents were material to the litigation. Therefore, the court denied the plaintiffs' request that the defendant collect all hyperlinked documents because the hyperlinked documents were not technically part of a document family, and the cost and burden was not proportional to the needs of the case.

It is important to note, however, that the defendant in *Nichols* was not immune from producing certain documents that were hyperlinked in Gmail communications. On the contrary, the court stated that the defendant was required to search and produce relevant Google Drive documents as part of a separate collection.

The important takeaway here is that while the court did not consider hyperlinked documents as part of a family that needed to be linked to the underlying communication, the court still expected the defendant to search and produce documents that were material to the litigation, regardless of their location. As such, responding parties need to be able to identify, preserve and collect documents that are hyperlinked in chat messages to the extent those documents are relevant and proportional to the needs of the case.

In addition, the format in which communications are stored may also be problematic.

Some collaboration platforms store chats as individual messages and do not link chat messages together as a cohesive thread when they are exported from the system. This makes it difficult to export, review and produce chats in a usable way as individual chats —

which are often just a few words of text — are exported as separate documents without a straightforward way of linking the individual chats into a cohesive thread putting them into context.

These issues are exacerbated by the fact that some businesses had to rapidly onboard and expand their use of collaboration platforms at the outset of the pandemic with little planning to accommodate a remote workforce. In the rush, some law departments may not have been consulted, or did not have the time and resources to monitor data retention and legal hold policies and procedures during these quick implementations.

Even law departments that are consulted on retention and preservation practices involving collaboration platforms struggle to implement effective policies and procedures because of the inherent architecture issues previously discussed.

On the bright side, some collaboration platforms are working to address the issues discussed above, and some offer enhanced e-discovery functionally, but typically at a cost.

In addition, various third-party tools have appeared on the market to better handle the preservation and collection of information in collaboration platforms, but those, too, have developmental progress to make in order to simply catch up, not to mention staying current with the rapid development of new features and functionality within collaboration platforms.

We expect these challenges will continue as the discovery from collaboration platforms becomes commonplace. Both in-house and outside counsel need to be aware of these inherent issues, and processes and procedures should be developed upfront to ensure compliance with discovery obligations.

Now that businesses have had a chance to recover from the initial impact of the pandemic, law firms and e-discovery vendors are working with law departments and information technology organizations to address these issues, architecting solutions and resolving information governance, records and information management, and e-discovery readiness issues as they relate to collaboration platforms.

As such, law departments and IT teams may consider the following steps to address the unique challenges that collaboration platforms raise from a discovery perspective:

- Review your company's information governance program, including records and information management policies and procedures, to account for information created or stored on collaboration platforms.
- Prepare an e-discovery readiness strategy that addresses how information created or stored on collaboration platforms is identified and preserved when subject to legal hold, and will be collected, reviewed and produced in litigation.
- Work with your collaboration platform provider and its channel partners to determine whether your organization has advanced e-discovery capabilities to address linking chat messages together or connecting messages with modern attachments. Note

that many collaboration platforms currently require advanced user licenses or a higher-level enterprise license to use advanced e-discovery features.

- In the event that your IT team does not have internal capabilities to address some or all of the e-discovery issues raised by client collaboration platforms, you may consider working with an e-discovery vendor that has developed tools that can be used to augment advanced e-discovery features.
- Consider working with your company's IT team or an e-discovery vendor to document the cost and burden of conducting discovery of information created or stored on collaboration platforms as part of an e-discovery readiness strategy.

The workplace is evolving and the way in which companies are conducting day-to-day business post-pandemic will almost certainly require organizations to continue to use collaboration platforms to conduct business, making it more likely that information exchanged on such platforms is relevant to litigation or a legal investigation.

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[1] *Benebone LLC v. Pet Qwerks, Inc., et al .*, WL 831025, at 3 (C.D. Cal. 2021).

[2] *Laub v. Horbaczewski* , WL 7978227 at 5-6 (C.D. Cal. 2020).

[3] *Nichols v. Noom Inc.* , 2021 WL 948646 at 1-5 (S.D.N.Y. 2021).