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FEDERAL E-DISCOVERY

Hyperlinks Are Not Attachments, Court Finds


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Imagine, if you will, it is 1996 and you are a newly minted lawyer. It's Friday night and you have tickets to go see *The English Patient*, which you don't really want to see, but your friend says it's amazing and insists you go. But you may have to miss it because you've taken on the Herculean task of reviewing the then-massive document production of 10 boxes of paper that you've just received from your adversary. Knowing how important it is that you understand the content of the production as soon as possible, you turn up the volume on your CD player and dig into the production.

It's a typical document production—reports, presentations, memos and letters—some with attachments as indicated on the documents themselves, as was the style. One memo references some figures on "the chart circulated at our last meeting." The memo, though, does not indicate that the chart was attached, and it was not included with the memo in the production. You hit pause on your CD and stop to think. Perhaps the chart was also produced, but is sitting in another box? But if relevant to the memo, should it have been produced with it, as an attachment, even if it was not originally physically attached to the original memo?

Now, fast forward to today, 25 years later, and consider a 2021 version of this hypothetical: A responsive email is produced that contains hyperlinks to other documents, but those documents were not produced as attachments to the email. Should the hyperlinks, especially the ones to documents in an internal file system, be considered attachments? Must the documents the hyperlinks lead to be produced as email attachments—even if they may already also be somewhere else in the production? In a recent decision, a judge who is becoming well-known for her thought-provoking e-discovery decisions answered these questions clearly: no.

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SHUTTERSTOCK

'Nichols v. Noom'

In the class action *Nichols v. Noom*, 2021 WL 948646 (S.D.N.Y. March 11, 2021), relating to an alleged unlaw-

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ful auto-enrollment scheme for weight loss services by the defendant, Noom, a noteworthy discovery dispute arose: whether hyperlinks are considered attachments.

In negotiating an ESI protocol, the parties disagreed on a key aspect of how Noom would collect documents from its Google Workspace systems such as Gmail and Google Drive. While the plaintiffs agreed to Noom using the Google Vault archiving and e-discovery service to collect documents from their Google Drive file storage service, the plaintiffs wanted Noom to use a different tool to collect from Gmail. "One main concern of Plaintiffs was that a Google Vault collection would not pull documents referenced in emails by a hyperlink." Id. at *2.

The court, after hearing from experts on both sides and considering the costs and delays associated with using the plaintiffs' preferred tool, had found that Noom could use Google Vault to collect email, "finding that method reasonable and deferring to the principle that a producing party is best situated to determine its own search and collection methods so long as they are reasonable." Id. Additionally, "to address Plaintiffs' concern about not being able to identify which Google Drive documents in the production related to a particular hyperlink, the Court directed that if there were particular key documents containing hyperlinks where the hyperlinked documents could not be located in the production, Plaintiffs could raise that issue with the Court. In a later conference the Court held that if there were certain documents discovered in the production containing hyperlinks for which the corresponding hyperlinked document could not be located or identified, Plaintiffs could raise the issue with Noom and Noom would be required to provide the document or Bates number." Id. at *3.

In deciding that a hyperlink is not an attachment, Judge Parker applied common sense thinking to a tricky topic, ultimately concluding that if a document is not attached, it is not an attachment.

Here, arguing that "neither the Court nor the parties appreciated that there would be thousands of Noom documents containing hyperlinks to other internal Noom documents at the time of the Court's initial ruling on this issue," the plaintiffs moved for clarification or reconsideration of these orders. Id.

The Court's Analysis: A Hyperlink Is Not an Attachment

The court began its discussion by noting that "[t]he issues raised by Plaintiffs raise complex questions about what constitutes reasonable search and collection methods in 2021—when older forms of communicating via emails and documents with attachments and footnotes or endnotes are replaced by emails and documents containing hyperlinks to other documents, video, audio, or picture files. It also highlights the changing nature of how documents are stored and should be collected." Id. at *2.

Finding itself guided by "proportionality concerns set forth in Rule 26(b)(1) and Rule 1's mandate to ensure the just, speedy, and inexpensive determination of this action," the court also noted that while "Rule 34 requires a party to produce documents in a 'reasonably usable form,' … it is appropriate to limit collection and review to non-duplicative, relevant information." Id. at *3.

With an analysis that recalls the traditional distinction between "attachments" and "enclosures" to paper memos and letters, the court found that it did not agree with the plaintiffs that a hyperlinked document is an email attachment, writing:

> While the Court appreciates that hyperlinked internal documents could be akin to attachments, this is not necessarily so. When a person creates a document or email with attachments, the person is providing the attachment as a necessary part of the communication. When a person creates a document or email with a hyperlink, the hyperlinked document/information may or may not be necessary to the communication. For example, a legal memorandum might have hyperlinks to cases cited therein. The Court does not consider the hyperlinked cases to be attachments. A document also may contain a hyperlink to another portion of the same document. That also is not an attachment. A document might have a hyperlink shortcut

> to a SharePoint folder. The whole folder would not be an attachment. These are just examples. An email might have hyperlinks to a phone number, a tracking site for tracking a mailing/shipment, a [F]acebook page, a terms of use document, a legal disclaimer, etc. The list goes on and on. Many of these underlying hyperlinked documents may be unimportant to the communication.
>
> Id. at *4.

The court found other concerns relating to proportionality and Rule 1, specifically the cost and delay involved in a new collection of documents, especially when many of the hyperlinked documents would be in the Google Drive document collection already being reviewed by the plaintiffs. As noted by the court, the plaintiffs were merely speculating as to how many hyperlinked documents might be relevant; they did not "explain why a recollection of hyperlinked documents, many of which may be of no real value in the case and are redundant of the documents already collected, is proportional to the needs of this case." Id. Notably, the court also rejected the plaintiffs' argument that Noom was using its information governance practices as a shield against discovery, stating that the defendant was cooperating by searching and producing from Google Drive, that "[w]hat it objects to is collection of them through both a direct collection and a collection through hyperlinks that would dramatically increase redundancies in the collection, increase costs, and delay discovery." Id. at *5.

Ruling that hyperlinks are not attachments and that the process it had previously set forth regarding hyperlinks was appropriate, the court denied the plaintiffs' motion. Id. at *4.

The ESI Protocol

In its analysis, the court spent time detailing relevant passages from the ESI protocol agreed to by the parties. It wrote that while the ESI protocol contained some details on "attachments," "family groups," and even "document stubs"—the archive location of email attachments—it neither defined "attachments" nor stated that hyperlinks were part of family groups. Indeed, "there was no meeting of the minds on whether hyperlinks were attachments and this Court, when entering the order, did not view hyperlinks to be attachments." Id. at *3.

The plaintiffs, here, though, may have approached the ESI protocol differently had they known the extent to which Noom used hyperlinks. Acknowledging "the inherent tension between the value and efficiency in creating an ESI protocol up front that addresses all potentially foreseeable issues on the one hand, and getting discovery underway in a case on the other hand," the court found that the existing protocol along with the hyperlink request procedure "strikes an appropriate balance based on the needs of this case." Id. at *5.

Conclusion

Even prior to this decision, Magistrate Judge Katharine Parker had already made an impact on e-discovery jurisprudence with her rulings in *Winfield v. City of New York*, 2017 WL 5664852 (S.D.N.Y. 2017), on the use of technology-assisted review, and in *Pearlstein v. BlackBerry*, 2019 WL 1259382 (S.D.N.Y. 2019), on privilege and waiver. Here, in another well-reasoned, thoughtful decision, Judge Parker addresses one more modern discovery challenge.

In our 1996 hypothetical, it seems unlikely that the producing party would be compelled to go back to the original document set and reproduce the document mentioned in the memo along with the memo itself. In the substantially analogous e-discovery situation 25 years later in *Nichols v. Noom*, Judge Parker deferred both to Noom's reasonable information management practices and, citing the well-established notion that a producing party is best situated to determine its own search and review procedures as long as those procedures are reasonable, to their ESI collection procedures in determining that no en masse re-collection and re-production of hyperlinked documents was indicated. And in deciding that a hyperlink is not an attachment, Judge Parker applied common sense thinking to a tricky topic, ultimately concluding that if a document is not attached, it is not an attachment.