



Managing Modern Attachments Throughout Legal Discovery: Challenges, Best Practices & Future Trends

a Purpose Legal article

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Over the past decade there has been an increasing usage of cloud-based storage systems, resulting in a speed bump in the legal discovery process: modern attachments.

What are Modern Attachments?

Modern attachments are links embedded within documents or emails which direct a user to external digital files stored elsewhere on platforms such as Google Drive, Microsoft SharePoint, or Microsoft OneDrive. Unlike traditional attachments, modern attachments are not actually contained within the host document but rather the files are dynamic references to external files. To further complicate matters, the target files are often editable and may be edited over time by multiple parties. The dynamic characteristic of the files poses significant challenges in litigation, particularly when it comes to preservation, collection, and production of evidence in litigation. While the common nomenclature for these documents is 'modern attachments', other terms may be used intending to mean the same thing including hyperlinks, cloud attachments, embedded files and pointers.

Understanding Modern Attachments

Modern attachments are unlike an attached physical PDF or spreadsheet to an email or document. To understand modern attachments, one must understand they are hyperlinks pointing to external files stored across various digital platforms, such as SharePoint or Google Drive for example. These links allow multiple users to access and edit the same document, meaning the linked file can (and often does) change over time. These dynamic characteristics make modern attachments particularly difficult to handle in litigation, where accuracy, preservation, and data integrity are paramount.

In legal discovery, modern attachments may exist in emails, chat messages, or cloud-based files. These links may not be immediately apparent in the initial collection of data but can contain critical information that is essential to a case. This makes it imperative to identify, collect, and preserve not just the hyperlink, but the actual content of the linked file as it existed at the time the link was shared.

Technical Challenges associated with Modern Attachments

Handling modern attachments involves several technical and logistical hurdles which are not present in traditional physical file collections. Below are several key challenges associated with modern attachments:

Identification of Linked Attachments

Identifying the modern attachments in a collection could be burdensome. The hyperlinked files are often hosted within extremely large and complex databases. They are not only located in emails, but may be embedded in chat messages, embedded in images or contained in documents located in a shared cloud environment. The use of advanced techniques, such as analysis of metadata and keyword searching, may be utilized to identify and then narrow the scope of relevant modern attachments requiring collection.

Collecting Data with a Dynamic and Decentralized Nature

As modern attachments are not always stored in a single central location, another challenge associated with collecting modern attachments is likely to be encountered. The hyperlinked files are often stored across multiple cloud platforms and typically will not reside on the custodian's local storage system. Furthermore, modern attachments are dynamic in nature. Because of this, the file pointed to may have been altered by other users after the link was initially created. Legal teams must ensure that, when possible, they preserve and collect the version of the file that was current when the link was shared. Collection of modern attachments may require the use of specialized tools (i.e. Forensic Email Collector), obtaining proper software licensing (i.e. obtaining an E5 Microsoft Purview license which offers the collection option of cloud attachments), developing custom scripting solutions or even a potential manual process to download hyperlinked data.

Associated Permissions and Access to Modern Attachments

Accessing modern attachments could prove difficult due to varying user permission levels enabled. The permissions and access a user will have to a file may change over time. Even if a user had access to a linked file when initially shared, there is no guarantee that the same access will be available at the time of collection. Moreover, some linked files may be secured with passwords, have set time limits or be located in proprietary systems, further complicating the process. The nature of access rights involving data stored within a cloud



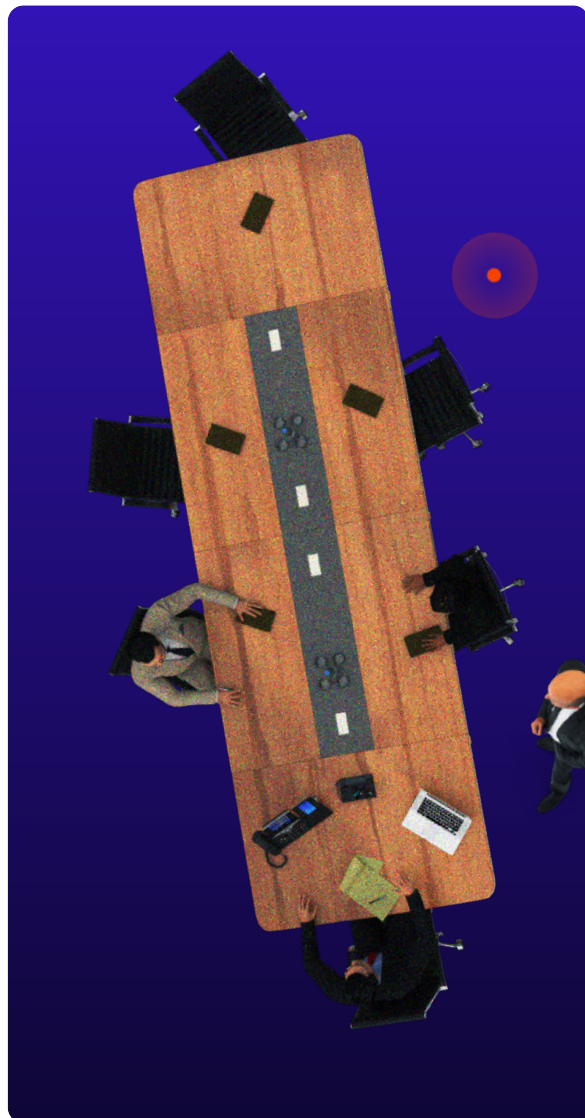
environment means legal teams will invariably face hurdles both in accessing the modern attachments and in ensuring the files accessed are in the same state as when they were first shared.

Preservation of Metadata and Versions

Metadata—such as file names, authorship, modification dates, and other details—plays a critical role in legal discovery. Modern attachments create an additional layer of complexity, as the metadata related to the linked document might not be preserved if the collection is not handled correctly. Moreover, because the linked document may change over time, capturing the version of the document as it appeared at the time of the email or document's creation is crucial but challenging.

Data Volume and Complexity

Cloud-based storage solutions such as SharePoint, OneDrive, and Google Drive often house vast amounts of data. The sheer volume of information makes identifying relevant modern attachments a challenge. Moreover, cloud data often exists in multiple locations and can be replicated across different systems, further complicating collection efforts. Even if a linked document is located, legal teams need to ensure that all associated metadata and permissions are captured correctly to preserve the document's context. Without the usage of advanced software and expert involvement, maintaining the family relationship between modern attachments and their original documents could become extremely problematic.



Best Practices to Overcome Modern Attachment Challenges

Given the many complexities involved in managing modern attachments throughout discovery, it's essential for legal professionals to adopt best practices to mitigate risks. Below are several key practices to implement when modern attachments may be involved:

Early Identification and Preservation Strategies

One cannot overstate the importance of early identification of modern attachments. Legal teams should prioritize identifying modern attachments as soon as possible in the discovery process. The identification process requires examining available metadata and reviewing documents for hyperlinks to external files contained within. Early identification of the embedded files will enable proper preservation strategies to be in place, ensuring that both the link and the actual content it points to are preserved in their original forms.

Legal counsel should ensure legal holds are in place and data is preserved on cloud repositories and shared workspaces where modern attachments could reside. The risk of unintentional modifications or deletions of

modern attachments during the course of litigation is greatly reduced when proper legal holds are issued. If not already in place, versioning should be enabled for the shared data and the modern attachment version available at the time litigation commenced should be maintained and preserved.

Engagement with Experts and Use of Advanced Tools and Software

It is crucial to involve forensic experts who have access to advanced software tools and are familiar with the best practices when collecting data which includes modern attachments. These professionals will ensure that the correct buttons are pressed to preserve the relationships between modern attachments and their source documents. Legal teams should engage with experts as early in the discovery process as possible ensuring a comprehensive approach to preservation and collection of modern attachments is in place.

Deployment of specialized forensic tools and software platforms designed for modern discovery challenges is essential. Utilizing tools such as Forensic Email Collector and advanced eDiscovery platforms such as Relativity, Everlaw or Reveal can help a party effectively identify, preserve, collect, process, review and produce modern attachments. These specialized software programs are built to handle the complexity of modern attachments, and their proper usage will ensure both the links and the documents they point to are treated as a cohesive whole during discovery. Without such software one may find they have collected modern attachments but lack a viable path to properly link families back together again.

Additionally, obtaining proper software licensing (for example an E5 Microsoft Purview license which allows collecting cloud attachments) or even custom scripting may be required to ensure that data is collected accurately. This will be especially true when dealing with data linked to proprietary systems where additional user credentials are a factor. Legal teams should work closely with forensic experts and IT professionals to ensure that all relevant data is captured and preserved according to required legal standards.





Drafting Comprehensive and Robust ESI Protocols

A cornerstone of effective discovery practices is a well-drafted ESI (Electronically Stored Information) protocol. The inclusion of a section which addresses the treatment of modern attachments will typically be crucial in litigation, especially as cloud storage continues to escalate amongst custodians. The language included within the ESI Protocol should outline clear procedures for handling modern attachments, including identification, preservation, collection methodologies and production requirements. The protocol should also address how family relationships between the host document (for example an email) and the linked file will be maintained.

Below are considerations when addressing modern attachments in an ESI protocol:

- The scope of modern attachments to be collected should be clearly defined.
 - A process to identify hyperlinked files should be established which may include use of search terms or date filters.
 - The protocol may call for the review of a random sample of the embedded files.
 - Allowing a current file version to be produced when the original version no longer exists.
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- Including provisions for dealing with emerging data types, such as instant messaging apps (for example Slack and Teams) or social media.
 - Ensuring compliance with data privacy regulations, including cross-border data collection and transfer issues.
 - Providing the flexibility needed to adapt when good cause is shown by either party, ensuring a path to resolve disputes is in place. When good cause and technical challenges are present the parties should meet and confer to discuss alternative solutions and amendment of the ESI protocol.

Collaboration Across Teams

Open channels of communication between legal professionals, IT teams, forensic experts, and external litigation support vendors is paramount in ensuring the successful management of modern attachments. Clear communications across relevant teams, both internal and external, will go a long way in preventing

costly mistakes or oversights. The mistakes which may be avoided include failing to identify important modern attachment files or neglecting to capture relevant versions of hyperlinked documents at the time of collection. A collaborative approach for managing modern attachments will ensure the legal team acquires the necessary technical skills, has the correct software available, and gains the requisite knowledge to navigate the complexities modern attachments present into the discovery process.

Continuing Education and Ongoing Training

Challenges associated with the legal discovery process continue to escalate as technology evolves. Legal professionals must engage in ongoing education and regular training to keep pace with these rapid changes. This includes staying informed of the latest software releases available on the market, attending relevant continuing education courses, and learning about new legal precedents as they emerge. As modern attachments become more common in data sets, it is critical for legal teams to remain current on the latest tools and techniques available for handling them.

Future Developments Expected Regarding Modern Attachments

Advances in AI and Machine Learning will Help with Identification of Hyperlinks

Artificial intelligence (AI) and machine learning will both play pivotal roles in the treatment of modern attachments during the discovery process. Computer assisted technologies will help with identifying and managing modern attachments through automating processes which were previously manual and time-consuming. The implementation of AI technologies will reduce the vast volumes of irrelevant modern attachments which require collection, review or production. AI will quickly identify relevant modern attachments based on contextual clues and discard non relevant hyperlinks, resulting in both saving time for attorneys and costs for their clients. Using a computer assisted culling process will allow legal teams to focus more of their time on reviewing the most relevant and vital documents in a matter. Machine learning algorithms will be deployed to predict patterns within large data sets, making it possible to identify versions of modern attachments which have been altered over time.



New Software Solutions Will Become Available in the Market

Expect there to be continuing advancements in software programs designed to handle modern attachments and the many complexities they pose for discovery. New tools will emerge which will streamline the process of identifying, preserving, collecting, processing, reviewing and producing modern attachments throughout litigation. Cloud storage solutions will also continue to evolve and become more sophisticated. Specialized tools for handling modern attachments will be developed and one should expect more integrated eDiscovery platforms in the future.

Evolution of a New Method of Communication Using Modern Attachments

Communication amongst custodians using modern attachments as the medium is likely to develop and will evolve over time. Looking forward, courts will need to address a new form of communication which uses embedded links to dynamic content to foster a back-and-forth dialogue. Under this scenario hyperlinks and document versioning will play an even more integrated role in digital communications, further complicating the discovery process. Legal teams need to anticipate changes to communication patterns and be prepared to adjust their discovery processes accordingly.

A Broader Interpretation of Modern Attachments by the Judiciary

Judicial interpretations of modern attachments are likely to continue evolving. Courts will increasingly recognize the importance of modern attachments and mandate their production. Counsel should expect courts to mandate the collection of modern attachments when technology exists to allow it. While current courts may not require a party to acquire new technologies allowing collection of modern attachments, in the future courts will likely expect parties to have the capability to acquire modern attachments in place if they use them in the course of their regular business practices.





Data Privacy and Globalization of Data Storage Issues

Data privacy concerns will remain a critical issue. This is particularly poignant with modern attachments which are housed in a cloud environment and may be stored across multiple jurisdictions. Legal teams must be prepared to navigate laws and privacy regulations governing the transfer and collection of data across borders, including the General Data Protection Regulation (GDPR) in Europe. Legal professionals must be aware of these regulations when managing modern attachments, especially when they involve sensitive or personal identifying information.

Conclusion

Modern attachments have introduced new challenges into the legal discovery process. As businesses increasingly rely on cloud-based platforms the usage of modern attachments continues to rise. Going forward the presence of modern attachments should be expected at the outset of litigation. Their dynamic, decentralized nature poses significant technical and logistical challenges for legal teams. To effectively navigate over these hurdles posed by hyperlinked files legal professionals must adopt best practices including early identification, engagement of experts, negotiating well drafted ESI protocols, using advanced forensic and discovery tools, teamwide collaboration and obtaining continual education. As we look ahead, advancements in AI, machine learning, and specialized software will further enhance the ability of legal teams to manage modern attachments throughout litigation and courts will continue to be more inclined to treat modern attachments in the same vein as traditional attachments.



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