

# E-Discovery Quarterly: Rulings on Hyperlinked Documents

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# E-Discovery Quarterly: Rulings On Hyperlinked Documents

By **Tom Paskowitz, Robert Keeling and Colleen Kenney** (August 8, 2024, 1:34 PM EDT)

*This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving hyperlinked documents.*

Discovery of electronically stored information, or ESI, in litigation often requires courts and litigants to adapt to new technologies and business solutions.

This maxim has certainly proven true with respect to hyperlinked documents, also referred to as modern attachments, as demonstrated by several recent decisions from federal courts.

Hyperlinked documents pose challenges from a discovery perspective because a copy of the document that is hyperlinked is not physically attached to or otherwise stored with the document that contains the hyperlink, such as an email or a chat message.[1] The hyperlinked document may be stored in an entirely different system, and edited or altered after the hyperlink was included in the email or chat message.

For these reasons, among others, some courts do not consider hyperlinked documents as attachments in the traditional sense.[2]

But, the U.S. District Court for the Northern District of California noted in its April ruling in *In re: Uber Technologies Inc. Passenger Sexual Assault Litigation* that the collection and production of contemporaneous versions of hyperlinked documents can provide "important evidence bearing on claims and defenses" and can "support an inference regarding who knew what, when." [3]

As the use of enterprise software that incorporates hyperlinked documents has become more prevalent, discovery disputes regarding parties' obligations to produce such documents has similarly become more common. These disputes often center around the parties' ESI protocol, and whether and to what extent it should obligate the parties to produce hyperlinked documents.

Recent case law demonstrates that, when it comes to these hyperlinked documents, the practical implications of the technology used to preserve and restore them plays an outsized role in how litigants and courts approach the subject.

For example, in a May order from the U.S. District Court for the District of New Jersey in *In re: Insulin Pricing Litigation*, the court addressed competing ESI protocol provisions from the parties regarding how to handle the collection and production of hyperlinked documents after the parties failed to come to an agreement.[4]

The plaintiffs proposed that hyperlinked documents should be produced with the associated family — i.e., the message in which the hyperlink appeared — but the defendants argued that this would be "technologically infeasible" and "would create undue burdens disproportionate to the needs of this



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matter."[5]

The defendants submitted several declarations supporting their argument and explaining that it would not be "feasible" or "practicable" to produce hyperlinked documents in family groups.[6]

The court agreed with the defendants because "hyperlinks are not the same as traditional attachments."[7] The court saw its role as determining "whether commercially available tools that may be used to maintain family relationships in the context of hyperlinks are feasible in the data environments or systems used by each producing party subject to the ESI Protocol and, if feasible, if the use of such tools are proportional to the needs of the case and not unduly burdensome."[8]

Ultimately, the court found that "such tools are either not feasible whatsoever or unduly burdensome to apply to their respective data environments."[9]

Courts in the Northern District of California have faced similar issues in three recent opinions. In *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* in February, the court also addressed a dispute in connection with the parties' negotiation of an ESI protocol.[10]

The plaintiffs had proposed that hyperlinked documents "do not need to be produced in the first instance as part of the same family group" unless the party could export the hyperlinked documents "automatically (e.g., not manual process) during collection using Google Vault."[11]

The defendants meanwhile had proposed that documents "hyperlinked inside a responsive document need not be produced in the first instance," but submitted that parties should "engage in reasonable efforts to locate" up to 500 hyperlinked documents if the requesting party identified the documents containing the requested hyperlinks.[12]

As in the *Insulin Pricing* case, the court mostly sided with the defendants, noting that one problem with the plaintiffs' proposal was that it assumed the existence of tools that could automatically associate hyperlinked documents with the document in which the hyperlink appeared.[13] The court was more inclined to adopt the defendants' proposal because it allowed for "manual retrieval of hyperlinked documents upon request," which the court noted was "more robust than an automated system" that would raise "questions of reliability and validation." [14]

Nevertheless, the court declined the part of the defendants' proposal capping the number of hyperlinked documents that could be requested at 500, ruling that such requests "shall not be excessive and shall be reasonable, proportional to the needs of the case, and not unduly burdensome." [15]

The Northern District of California revisited these issues once again in a pair of decisions in *In re: Uber Technologies Inc. Passenger Sexual Assault Litigation* and *In re: StubHub Refund Litigation*.

In *Uber*, the court was faced with a dispute regarding "evolving" hyperlinked documents.[16] The parties there could not agree whether the ESI protocol would require Uber to identify and produce historic versions of hyperlinked Google Drive documents contemporaneous with the message containing the hyperlinks.

Uber used Google Vault "as an information governance and e-discovery tool for its Google Workspace data," and to store ESI for production purposes.[17]

The court noted that the Google Vault storage system did not automatically capture the contemporaneous version of documents hyperlinked within a Gmail or Google Chat message, meaning that an historic version of a hyperlinked document could not be restored from the Google Vault along with the document containing the hyperlink.

In addition, while existing tools were capable of collecting contemporaneous versions of hyperlinked Google Drive documents in active environments, the tools were not able to do the same for hyperlinked documents archived with Google Vault.[18]

Uber claimed that it had conducted an exhaustive investigation and found that "no technical, scalable solution is available to automate the process of collecting contemporaneous versions of hyperlinked

documents."[19] The plaintiffs countered by submitting a proposed methodology — a proof of concept — to produce contemporaneous versions of documents with Google Drive hyperlinks, which would have required Uber to create a new computer program.[20]

The court did not view the plaintiffs' proposed proof of concept as "a reasonably available option" and concluded that it would "not order Uber to expend potentially significant time and resources to develop such a program in order to produce discovery in this MDL, as the program's effectiveness is not assured."[21]

In particular, the court was "satisfied by Uber's showing" that it "thoroughly investigated the issue" and determined that "no technological solution is currently readily available to automate the process."[22]

As a result, the court ordered that Uber would not be "required to produce the contemporaneous document version at the time the email or message was sent, as this is not possible through an automated process with existing technology."[23] But Uber would have to locate and produce through manual review up to 200 hyperlinks identified by the plaintiffs.[24]

A month later, in May, the court in StubHub faced similar circumstances and **decided** that StubHub would be relieved of an obligation to locate and produce hyperlinked documents.[25] There, the parties had entered into an ESI protocol that required the parties to maintain family relationships between documents when producing ESI, including for "documents referenced by document stubs or via links to internal document sources."[26]

But during discovery, StubHub concluded that it could not systematically produce hyperlinked documents, "despite having spent hundreds of hours trying to find linked documents and despite having retained an outside e-discovery vendor to assist with this effort."[27] As a result, StubHub filed a motion to modify the ESI protocol to remove the requirements to produce hyperlinked documents.

The plaintiffs submitted declarations stating that a "proper, technically sound approach to collecting and processing of documents with linked attachments is possible" and arguing that StubHub's e-discovery vendor, Epiq, could have located more hyperlinked documents if it had searched for hyperlinked documents in StubHub's native email files.[28]

But the court found these arguments to be conclusory and held that plaintiffs failed to establish that the hyperlink requirement in the ESI protocol was "broadly possible to comply with." The court was particularly persuaded by the fact that the parties agreed that there was "no commercially available or custom program in existence that could collect all of StubHub's hyperlinked documents," which "tip[ped] strongly in StubHub's favor."[29]

As a result, the court ordered that the parties' ESI protocol be amended to remove "hyperlinks to internal or nonpublic documents" from the categories of documents that had to be produced with a family group.[30]

## **Takeaways**

These decisions demonstrate that counsel should engage in early discussions with clients regarding the potential of hyperlinked documents in the clients' ESI, which will allow for more deliberate negotiation of any agreements regarding the scope of discovery.

In particular, early consideration of the client's technological capabilities with respect to hyperlinked documents will inform how to negotiate the manner in which hyperlinked documents will be treated in discovery.

These early discussions may include consideration of whether the ESI relevant to the dispute is likely to contain hyperlinks, and, if so, in what types of environments the hyperlinked documents and the documents containing the hyperlinks are stored — including in any live and archived systems.

Parties also can consider whether their systems, or their vendors, have the technological ability to associate hyperlinked documents with the original message in which the hyperlink appeared, and

whether there are issues — such as in the Uber case — with identifying the particular version of a hyperlinked document that existed at the time the message was sent.

Regardless of the answer to these questions, considering these issues in advance of discovery and including appropriate provisions in any agreement between the parties that address the technological realities of the parties' capabilities will save time and limit disputes regarding hyperlinked documents later in the case.


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[1] See, e.g., [In re: Uber Technologies, Inc., Passenger Sexual Assault Litigation](#) , No. 23-md-3084, 2024 WL 1772832, at \*2 (N.D. Cal. Apr. 23, 2024) ("cloud computing and document retention through Google Drive and Google Vault introduce a host of challenges to producing hyperlinked documents from Google Drive and other sources.").

[2] See, e.g., [Nichols v. Noom Inc.](#) , No. 20-CV-3677 (LGS) (KHP), 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021) ("the Court does not agree that a hyperlinked document is an attachment.").

[3] [In re: Uber Technologies, Inc., Passenger Sexual Assault Litigation](#) , No. 23-md-3084, 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024) ("[a]n email message with a hyperlinked document may reflect a logical single communication of information at a specific point in time, even if the hyperlinked document is later edited.").

[4] [In re: Insulin Pricing Litigation](#) , MDL No. 3080, 2024 WL 2808083 (D.N.J. May 28, 2024).


[5] *Id.* at \*7.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at \*8.


[10] [In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation](#) , No. 22-md-03047-YGR (PHK), 2024 WL 1786293, at \*7 (N.D. Cal. Feb. 20, 2024).

[11] *Id.*

[12] *Id.*

[13] *Id.* at \*8.

[14] *Id.*

[15] *Id.* See also [Meyer v. County of San Diego](#) , No.: 21-cv-341-RSH-BLM, 2024 WL 505193 (S.D. Cal. Jan. 22, 2024) (denying motion to compel production of training modules hyperlinked in ESI document produced as static PDF files and finding that requiring production would be unduly burdensome based on the defendants' assertion that it would take "40 hours to screen record" the training modules for production).

[16] **In re: Uber Technologies, Inc., Passenger Sexual Assault Litigation** , No. 23-md-3084, 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024).

[17] Id. at \*1.

[18] Id. at \*2.

[19] Id. at \*3.


[20] Id.

[21] Id. at \*4.

[22] Id.

[23] Id.

[24] Id.

[25] **In re StubHub Refund Litigation** , No. 20-md-02951-HSG (TSH), 2024 WL 2305604 (N.D. Cal. May 20, 2024)

[26] Id. at \*1.

[27] Id.

[28] Id. at \*1-2.

[29] Id.

[30] Id. at \*3.