

# Slack, Teams, WhatsApp – Oh My – DISCOVERY OF NEWER DATA TYPES

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  - Antitrust and commercial litigator
  - Chair, Winston E-Discovery & Information Governance Group
  - National E-Discovery Counsel for several Fortune 500 companies
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  - Working Group 1 on Electronic Discovery (former steering committee member)
  - Working Group 6 on International Privacy
  - Working Group 11 on Data Security
- ADVISORY BOARD – GEORGETOWN LAW SCHOOL EDISCOVERY INSTITUTE
- DC BAR – E-DISCOVERY COMMITTEE
- CO-CHAIR FJC – JUDICIAL TRAINING PROGRAM (2017 – 2019)
- EDITOR-IN-CHIEF – EDISCOVERY ADVANTAGE
- AUTHOR OR CONTRIBUTOR TO SEMINAL WRITINGS IN THE FIELD, INCLUDING:
  - Editor, Federal Judge’s Guide to Discovery (3rd ed.)
  - Duke Conference’s Guidelines and Practices for Implementing the 2015 Discovery Amendments
  - Numerous Sedona Conference Commentaries (Principles)

“John Rosenthal is one of the best e-discovery lawyers in the US. One of his great strengths is how good he is in the courtroom and before judges about e-discovery matters.”

## LEGAL 500

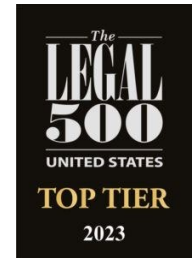
“A great trial lawyer who is also an expert on discovery matters; a bulldog for his clients who is always prepared on the law and the facts..”

## Chambers USA

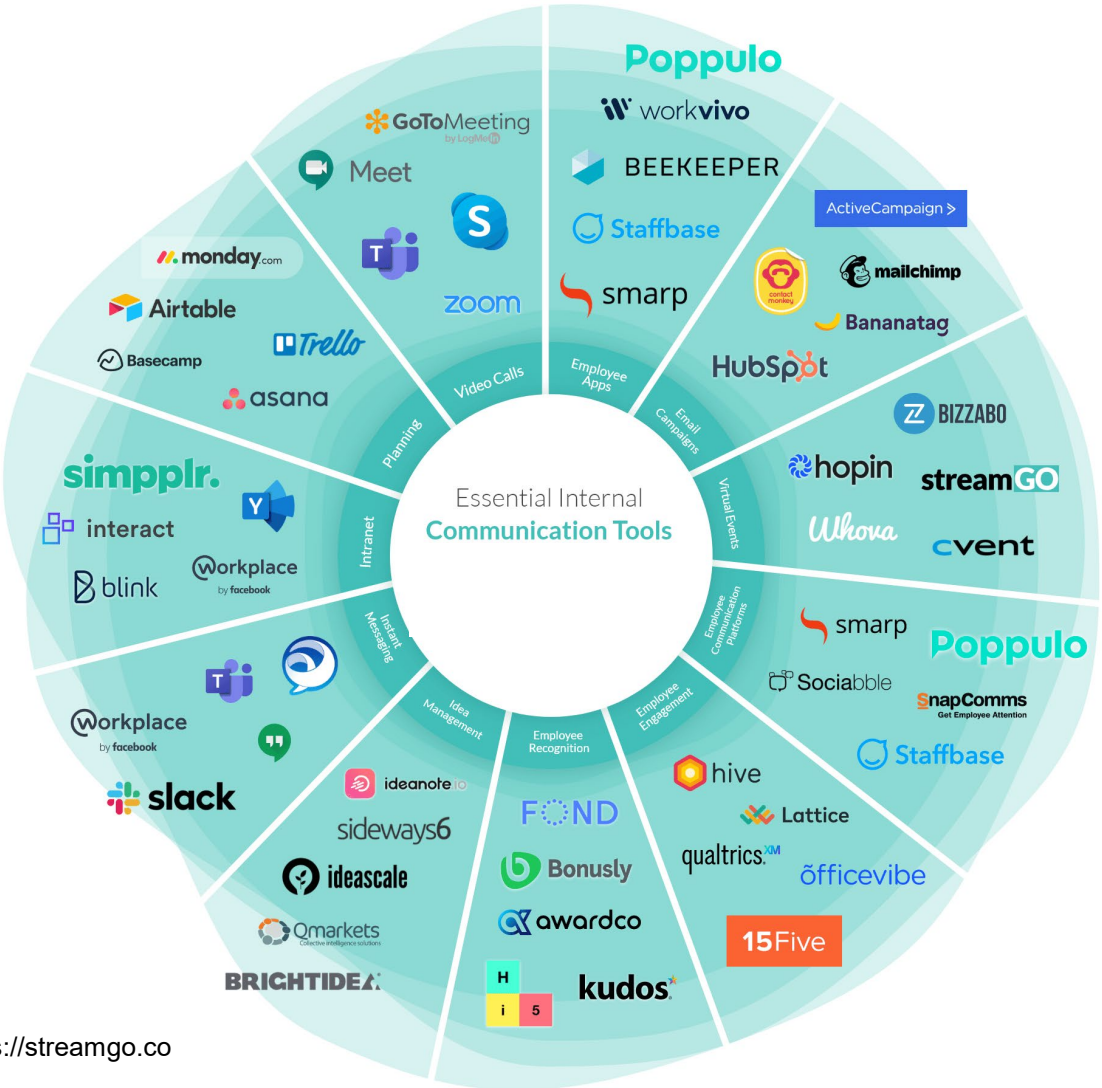


# Jason Moore

- **Winston & Strawn LLP - Washington, D.C.**
  - **Senior E-Discovery Attorney**
  - **Experienced litigator in commercial, intellectual property, product liability, healthcare, antitrust, and government investigation matters**
- **Practice:**
  - Counseling clients on defensible information governance, preservation, collection, review, production, and privacy
  - Representing clients in litigation in connection with discovery and spoliation matters
- **Member:**
  - The Sedona Conference Working Group 1 on Electronic Discovery
  - International Association of Privacy Professionals
  - DC Bar E-Discovery Committee
- **Lead Editor – Winston & Strawn eDiscovery Advantage**



# Newer Data Types



Source : <https://streamgo.co>

# COVID Changed The Game

The number of **Microsoft** Teams users increased by more than 10x since January 2020

Zoom went from 10 million daily active meeting attendees in Q4 2019 to over **200 million** at the beginning of **Q2** 2020.

**Slack** saw a **25%** surge in the span of just six days at the outset of lockdown.

**53%** of employees are using their personal laptops and computers for business operations while WFH.

WhatsApp has **2 billion** monthly active users globally and WeChat has over 1.5 Billion!

# Newer Data Types in the Headlines

**B** Bloomberg.com

The SEC Wants To See More Phones

**B** Bloomberg.com

WhatsApp Probe Hits Big Hedge Funds as SEC Asks for Phone Review

**AH** AdvisorHub

Finra Increases Scrutiny of Brokers' WhatsApp Use

**WM** Wealth Management

[SEC Fines Firms \\$1.1B for WhatsApp, Texting Record-Keeping Failures](#)

The SEC charged 15 b/ds and one affiliated investment advisor with electronic

**B** Bloomberg Law News

DOJ Crackdown Prompts Compliance Scramble on WhatsApp, Signal

**LEX** Lexology

DOJ Issues Further Guidance, Warnings on Ephemeral Messaging Apps

**R** Reuters

US court sanctions Google for deleting evidence in antitrust cases

Alphabet Inc's Google LLC intentionally destroyed employee "chat" evidence in antitrust litigation in California and must pay sanctions and...



**R** Reuters

US Justice Dept warns of steeper penalties for firms that fall foul of messaging policies

**NLR** National Law Review

Default Judgement After Failure to Provide Slack Messages

Red Wolf Energy Trading v. BIA Capital Management, the court entered a default judgment against the defendants due to failure to produce...



**LAW** Law.com

Court Sanctions Defendants for Using Signal to Thwart FTC Investigation | Legaltech News

Federal Trade Commission v. Noland spotlights the perils of using ephemeral messaging once litigation is reasonably anticipated and...



**B** Bloomberg.com

SEC's WhatsApp Probe Reaches Into Private Equity

**B** Bloomberg Law News

WhatsApp, Signal Chats Targeted in DOJ Corporate Crackdown (2)

# Updated DOJ Guidance

- On September 15, 2022, the DOJ issued a memorandum on Corporate Criminal Enforcement Policies, stating that, moving forward, “prosecutors should consider whether the **corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved.**” Furthermore, the enforcement of existing policies and training will be taken into account when considering whether to grant cooperation credits to a corporation being investigated by the DOJ.
- March 3, 2023, Assistant Attorney General Kenneth A. Polite announced<sup>[1]</sup> significant revisions to the Department of Justice (“DOJ”) Criminal Division’s Evaluation of Corporate Compliance Programs (“ECCP”)
  - How policies relating to personal devices and messaging applications are “tailored to a company’s risk profile,”
  - **How policies ensure that business-related data can be “preserved and accessed,”**
  - How the policies are communicated to employees, and
  - How companies monitor and enforce compliance by employees.

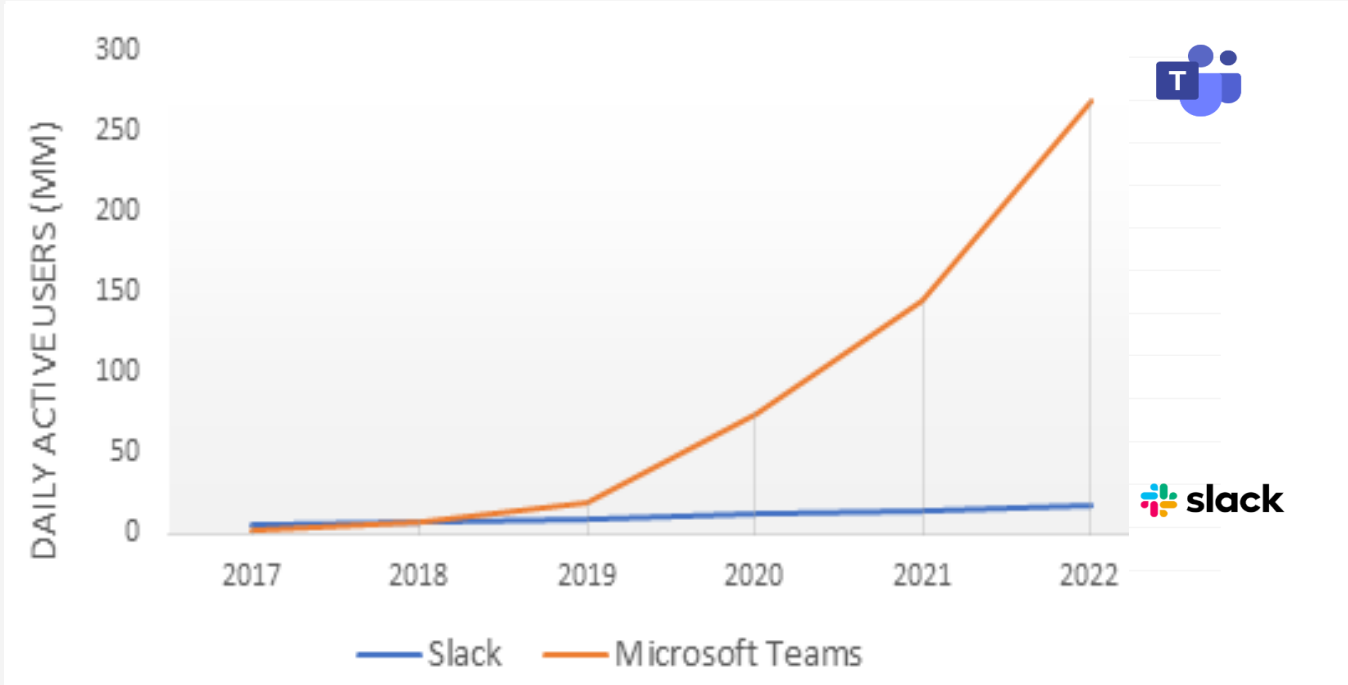


# Newer Data Types



# The Rise of Collaboration Platforms

Microsoft Teams vs Slack: [Daily active users](#)



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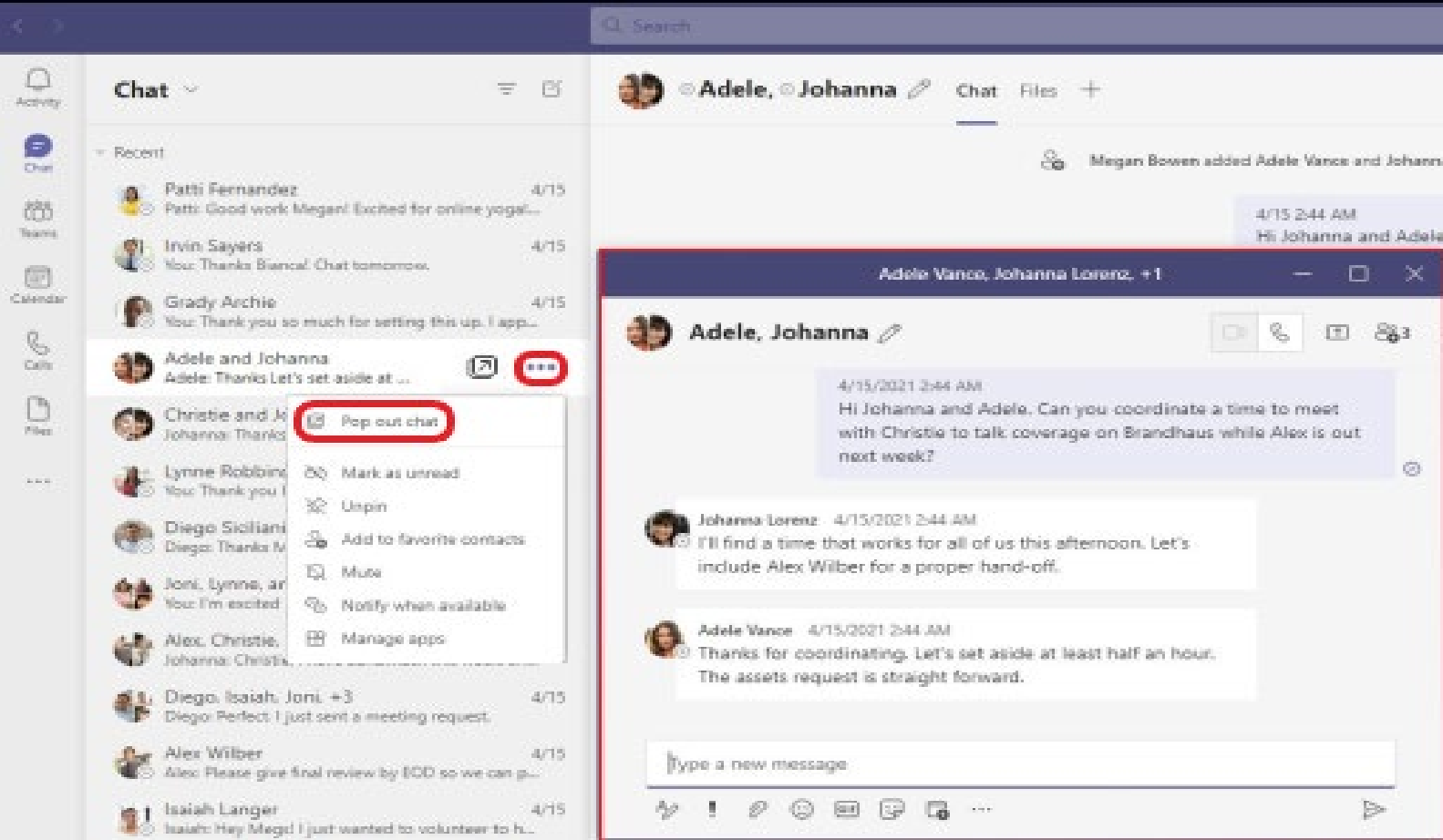
# Collaboration Platforms

“And while that’s a great idea for encouraging collaboration, building teamwork, and creating a reservoir of institutional knowledge, it has terrifying potential ramifications for ediscovery, risk management, and information governance. Keeping all that data and chatter—the relevant and the irrelevant, the timeless and the passing fancy, the project-oriented and the social—opens up a whole world of potential risks related to privacy, confidentiality, and ediscovery.”

*J. Murphy, Managing Ediscovery and Compliance Needs Within the Hottest Collaboration Platform (2019)*

# MS Teams

- Chats
- File Storage
- Attachments
- Applications





# Teams Content

- **Teams 1:1 chats.** Chat messages, posts, and attachments shared in a Teams conversation between two people. Teams 1:1 chats are also called conversations.
- **Teams group chats.** Chat messages, posts, and attachments shared in a Teams conversation between three or more people. Also called 1:N chats or group conversations.
- **Teams channels.** Chat messages, posts, replies, and attachments shared in a Teams channel.
- **Private Teams channels.** Message posts, replies, and attachments shared in a private Teams channel.

# Slack Communications

## Channel

A Slack channel is a persistent chat room organized by project, team, topic or location. Users who join a channel have access to all of the information that the other members have access to. All information in a channel becomes searchable immediately upon creation and remains accessible to all channel members until the channel is archived or deleted.

## Groups

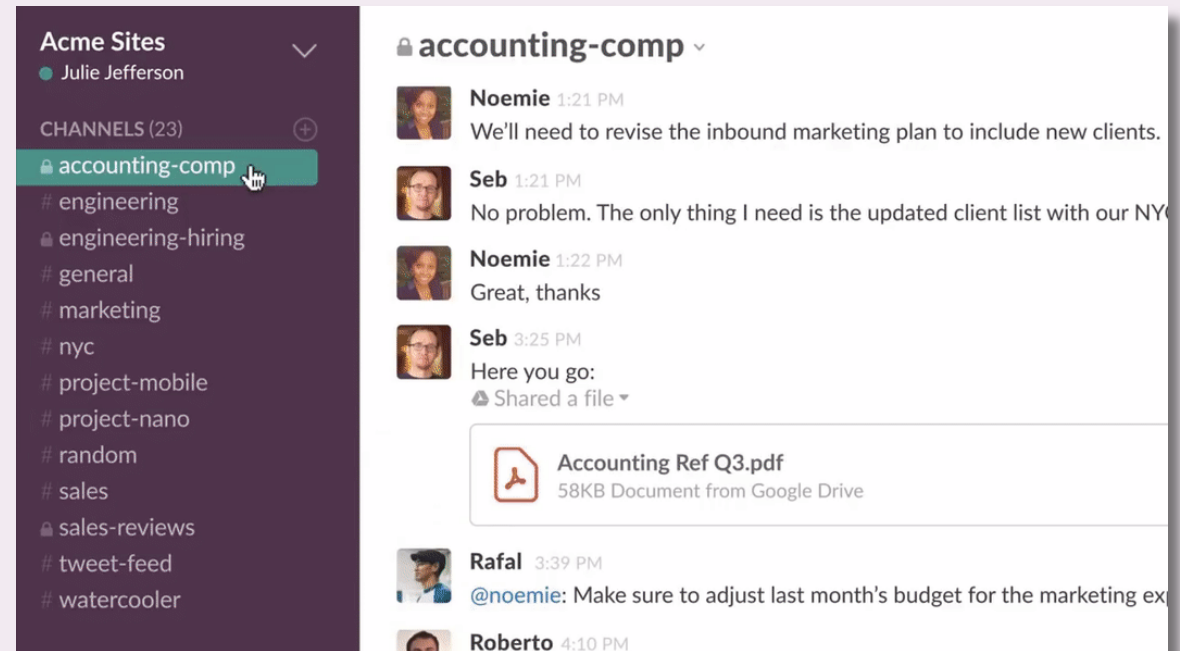
A Slack group is a small group of workspace users who need to communicate and collaborate with regard to a particular topic. Groups are similar to another type of communication, the Multi-Party Instant Message (MPIM). However, unlike MPIM's, groups are given names which can be used within channels to notify all members of the group, like a distribution list. For example, if a channel member wishes to notify all members of a group called "security" of a hazardous condition, she can simply mention @security in a channel message.

## Direct Message

Direct Message (DM) communications are private conversations between two members of a Slack workspace

## Multi-Party Instant Message

A Multi-party Instant Message (MPIM) is private direct message conversation between three or more members of the Slack workspace. MPIM's can be converted to groups at any time.



# Ephemeral Communications

## What is it?

- **Data that only last for a short time. In the context of electronic communications, messages disappear once accessed/read (or soon thereafter).**

## How Does It work?

- **Employs encryption or the process of converting data into an unreadable form:**
  - Messages are generated, sent and received using the app.
  - Once opened, messages often go away, although what's there (and for how long) is determined by the software company's retention policies.

# Ephemeral Communications

								
	Status	Telegram	Signal	Whatsapp	WeChat	Line	KakaoTalk	Messenger
Leverages P2P Protocols	✓	✗	✗	✗	✗	✗	✗	✗
E2E encryption by default	✓	✗	✓	✓	✗	✓	✗	✗
App & Server Completely Open source	✓	✗	✓	✗	✗	✗	✗	✗
No phone number or email required	✓	✗	✗	✗	✗	✗	✗	✗
Perfect forward secrecy	✓	✓	✓	✓	✗	✗	✗	✓

**Privacy Features of Status In Comparison – 24. 04. 2020**

\* This is a comparison of features implemented in Status. We understand there are privacy features not available in Status – Check the full story on <https://our.status.im/elements-of-private-secure-messaging-apps>

# Virtual Meeting Platforms

**“Virtual meeting software is applications and other digital platforms that let you bring people together over the internet. Usually, these apps include a form of video conferencing, as well as tools like chat, reactions and screen sharing. Examples include Zoom, Webex, Google Meet, Lifesize and Jami.”**

<https://teambuilding.com/blog/virtual-meeting-software#:~:text=Virtual%20meeting%20software%20comprises%20applications%20and%20digital%20platforms,building%20activities%2C%20games%2C%20or%20events%20for%20remote%20teams.>



- Recording
- Chats
- Sharing documents
- Sharing links



# Impact of AI Engines – MS Teams

Focus on what matters with AI-powered meetings, including GPT from OpenAI

**Suggested notes**

- ▶ **Serena** wants to look at the sales report before she and **Beth** spend more budget on the campaign. 5:00
- ▶ **Beth** explains that they are on track for new product release in December. But they will need to keep an eye on advertisement budget. She will follow up on that. 5:05
- ▶ **Beth** explains that they are managing the capacity well. They could be a problem if they get more popular. **Babak** is going to double check on that. 5:34

**Suggested tasks**

- ▶ Beth will follow up on advertisement budget.
- ▶ **Jon Shammass** will double check with **Amanda** regarding the ETA for the release of the new product.

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# Legal Framework

# Relevance - Proposed Rule 26(b)(1)



## (b) DISCOVERY SCOPE AND LIMITS.

(1) **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is **relevant to any party's claim or defense and proportional to the needs of the case**, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

~~For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.~~

# Relevance – Newer Data Types

Slack

- ***Laub v. Horbaczewski*, 2020 WL 7978227 (C.D. Cal. Nov. 17, 2020)** (finding that the plaintiffs credibly argued that certain private Slack messages may be relevant because the messages would show evidence of the underlying contract violation claims, but concluding that the defendant did not have “possession, custody, or control” over the private Slack channels under the free and standard versions of Slack);
- ***Mobile Equity Corp. v. Walmart, Inc.*, 2022 WL 36170 (E.D. Tex. Jan. 4, 2022)** (finding that certain Slack channels listed in plaintiff’s motion to compel were relevant to the issues presented and must be produced, and ordering the parties to meet and confer on the remaining Slack channels in the list);
- ***Benebone LLC v. Pet Qwerks, Inc.*, 2021 WL 831025 (C.D. Cal. Feb. 18, 2021)** (finding that Slack messages were relevant because the plaintiff used Slack for part of its internal business communications).
- ***Franklin v. Howard Brown Health Ctr.*, No. 1:17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018)**; report and recommendation adopted, 2018 WL 5831995 (N.D. Ill. Nov. 7, 2018) (imposing sanctions on defendant for failing to preserve relevant messages from its instant messaging system (MS Lync) where defendant configured the system to keep messages for up to two years)
- ***Charter Communications Operating v. Optymyze*, 2021 WL 1811627 (Del. Chanc. Ct. Jan. 4, 2021)** (referencing Court’s prior order compelling production of native copies of Microsoft Teams messages)

Teams

Ephemeral

- ***Waymo LLC v. Uber Tech., Inc.*, No. C 17-00939 WHA, 2018 WL 646701 (Jan. 30, 2018)** (holding that plaintiff could present evidence and argument to the jury regarding defendant’s use of “ephemeral messaging” to eliminate relevant evidence).
- ***Herzig v. Arkansas Foundation for Medical Care, Inc.*, No. 2:18-CV-02101, 2019 WL 2870106 (W.D. Ark. July 3, 2019)** (plaintiffs acted in bad faith because they intentionally hid their communications from the defendant)
- ***WeRide Corp. v. Kun Huang*, No. 5:18-cv-07233, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020)** (criticizing defendants and imposing terminating sanctions for, among other things, implementing an enterprise grade ephemeral messaging application to conceal relevant communications from discovery)

# Proportional Under Rule 26

- ***Laub v. Horbaczewski*, 2020 WL 7978227, at \*11–13 (C.D. Cal. Nov. 17, 2020)** (finding that the production of the **Slack Data** at issue was not proportional to the needs of the case because it was not in the producing party’s possession, custody, or control, and that the evidence was cumulative)
- ***Benebone LLC v. Pet Qwerks, Inc.*, 2021 WL 831025, at \*8–10 (C.D. Cal. Feb. 18, 2021)** (finding that the production of **Slack** was not unduly burdensome nor disproportional to the needs of the case considering third-party electronic discovery tools that could extract, process, and review the Slack messages at a reduced price and because the searches could be limited to certain channels, users, or custodians to reduce the volume of messages reviewed)
- ***Edwards v. McDermott International, Inc.*, 2022 WL 1568279 (S.D. Tex. May 18, 2022)** (finding that the application of the plaintiffs’ proposed search terms, which would require the defendant to review close to 1.3 million documents, was proportional to the needs of the case, especially in light of the \$1.3 billion that the plaintiffs were claiming in damages)

# Slack Example – Single Case (20 Custodians)

## Challenges presented:

- Volume!
- What is the definition of a document (single messages, all messages within a time period, all messages within a “chain”)?
- Traditional metadata associated with messages may not exist or be easily extracted because of Json format
- Often difficult to determine privilege in short message format, requiring additional due diligence from participants in conversation

Type of Artifact	Count
<b>Total Messages</b>	<b>40 Million</b>
<b>Conversations:</b>	300,000
- <b>Public Channels:</b>	500+
- <b>Groups:</b>	1000+
- <b>Multi-Party IM's:</b>	80,000+
- <b>Direct Messages:</b>	300,000+
<b>Attachments:</b>	1.5M

# Rule 37(e): Failure to Preserve ESI



If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a **party failed to take reasonable steps to preserve it**, and it cannot be restored or replaced through additional discovery, the court may:

- (1) upon finding prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

# Rule 37(e) Sanctions

- ***In re Google Play Store Antitrust Litig.*, --- F. Supp. 3d ---, 2023 WL 2673109 (N.D. Cal. Mar. 28, 2023)** (finding that that monetary sanctions were warranted under Rule 37(e) because defendant failed to take reasonable steps to preserve relevant **Google Chat** messages by (1) not actively shutting off the ephemerality feature, which generally allows messages to be permanently eliminated after 24 hours, and instead allowing its employees on legal hold to make their own determinations of relevance and self-preserve; and (2) failing to take follow-up steps to ensure the messages were actually preserved)
- ***Drips Holdings, LLC v. Teledrip LLC*, 2022 WL 3282676 (N.D. Ohio Apr. 5, 2022)** (finding that an adverse inference sanction against defendants was warranted under Rule 37(e) because defendants failed to take reasonable steps to preserve **Slack** messages, having changed its default retention of messages from “indefinite” to only 7 days after having notice of a duty to preserve and thereafter failed to preserve any messages in Slack until 10 months after the complaint had been served)
- ***Federal Trade Commission v. Noland*, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021)** (finding that an adverse inference instruction against the defendants was warranted after defendants took intentional steps to shield communications from discovery through the use of the ephemeral messaging app **Signal** and the encrypted email service **ProtonMail** after learning of the FTC’s investigation of the defendant’s business)



# “Reasonable Steps” ≠ Perfection

**Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. . . This rule recognizes that “reasonable steps” to preserve suffice; it does not call for perfection.**

## **But:**

**The court should be sensitive to the party’s sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation. For example, the information may not be in the party’s control. Or information the party has preserved may be destroyed by events outside the party’s control — the computer room may be flooded, a “cloud” service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.**

**Rule 37(e) Comments.**

# Reasonable Steps – Best Practices

- Understanding the client’s infrastructure (retention plan meeting)
- Development and documentation of a “retention plan”
- Issue legal hold memorandum
- **Determine whether additional steps are required to preserve “dynamic” ESI**
- Follow-up with “key players”
- Engage opposition in active preservation dialogue at Rule 26(f) conference with goal of reaching an agreement on the scope of preservation
- Monitor compliance
- Periodically update legal hold order
- Documentation and transparency
















# Practical Aspects of the Preservation, Collection, Review & Production of Newer Data Types

# Preservation – Where is the Data Stored?



Microsoft Teams

*Where are your Microsoft Teams data?*

Internal 1:1 chat	External 1:1 chat	Chat inside a channel	Recorded meetings	Voicemail
 Hidden file inside mailbox	 Hidden file inside mailbox	 Stored in SharePoint	 In the Stream application	 In the user's mailbox
 Accessible via eDiscovery	 Accessible via eDiscovery	 Accessible via file tab in a Teams channel	 Accessible to all attendees within Teams	 Accessible via Exchange
Internal 1:1 files	External 1:1 files	Files inside a channel	Meeting chat and files	Voicemail transcription
 Accessible via OneDrive for Business	 Accessible via OneDrive for Business	 Accessible via SharePoint's document library	 Files via Teams, chat via Stream	 Stored in user's mailbox

# Automated Preservation



Microsoft Teams

- **Native Legal Hold Functionality with Security & Compliance Center**

Feature	E3	E5
	Core	Advanced
Content Search	x	x
Core eDiscovery (incl. Hold and Export)	x	x
Advanced eDiscovery		x
Custodian management (mapping content to custodian)		x
Custodian communications		x
Deep crawling/indexing		x
Review data (query data, tags, smart tags, dashboard) and annotate (redact)		x
Analyze data (near duplicate identification, email threading, themes)		x
Non-Office 365 ingestion and processing (e.g. OCR)	Partial	x
Advanced eDiscovery Export (download, export, add to another review set)	Partial	x
Basic Audit	x	x
Advanced Audit		x

# Automated Preservation – Slack



- **Key features:**
  - Legal holds can now be placed on specific users to preserve their messages and files in Slack
  - Legal holds can be applied to all conversations or just the direct message conversations a user is a participant in
  - Legal holds will save content regardless of retention settings or if users edit or delete content
  - Data subject to legal hold is accessed via export or through the Discovery API
- **However:**
  - Legal holds are only available at the **Enterprise Grid** license level (but there are ways to accomplish the same goals with other plans)
  - Legal holds won't include messages and file data from Slack Connect channels or DMs
  - Legal holds are user/custodian-based, not channel-based
  - If a channel included in a hold is deleted, content is not retained

# Preservation Considerations with Newer Data Types

- **It is an official communications platform for the company?**
- **Is it relevant to the claims and defenses?**
- **Is it proportional to the claim and defenses?**
  - Cost of preservation?
  - Burden of preservation?
- **Who is the opposing or requesting party? Judge? Government?**
- **Should you consider a bright line practice**
  - Always preserve?
  - Never preserve?
  - Preserve when relevant and proportional?

# Collection, Processing & Review

- **MS Advanced E-Discovery – Collection, Processing & Review**
- **Slack – requires export in json format then processing and unitization**
- **Traditional E-Discovery Tools for Processing, Search & Review not necessarily equipped for MS Teams & Slack:**
  - Use chat / message threading
  - Batch by message or conversation ID
  - Use family unitization for review of associated attachments
  - Key factor for both search and review: determination of group by:
    - Stand alone
    - Entire conversation
    - Portion of conversation (e.g., no. of messages, no. of hours). See Relativity's RSMF.



# Teams Metadata

Metadata property	Description
ContainsEditedMessage	Indicates whether a transcript file contains an edited message. Edited messages are identified when viewing the transcript file.
ConversationId	A GUID that identifies the conversation that the item is associated with. Transcript files and attachments from the same conversation have the same value for this property.
Conversation name	The name of the conversation the transcript file or attachment is associated with. For Teams 1:1 and group chats, the value of this property is the UPN of all participants of the conversation are concatenated. For example, User3 <User3@contoso.onmicrosoft.com>,User4 <User4@contoso.onmicrosoft.com>,User2 <User2@contoso.onmicrosoft.com>. Teams channel and private channel chats use the following format for conversation name: <Team name>,<Channel name>. For example, eDiscovery vNext, General.
ConversationType	Indicates the type of Team chat. For Teams 1:1 and group chats, the value for this property is Group. For Teams channel and private channel chats, the value is Channel.
Date	The time stamp of the first message in the transcript file.
FamilyId	A GUID that identifies the transcript file for a chat conversation. Attachments will have the same value for this property as the transcript file that contains the message the file was attached to.
FileClass	Indicates that type of content. Items from Teams chats have the value Conversation. In contrast, Exchange email messages have the value Email.
MessageKind	The message kind property. Teams content has the value microsoftteams, im.
Recipients	A list of all users who received a message within the transcript conversation.
TeamsChannelName	The Teams channel name or private channel name of the transcript.

# eDiscovery Issues with Short Message Formats

- **Short message formats such as MS Teams Chats or Slack Chats presents several problems from a traditional e-discovery perspective:**
  - What is a document (i.e., single message?, thread?)
  - Difficult to identify the actors
  - Short message format often difficult to understand/interpret/search
    - Slang
    - Emojis
    - Abbreviations
  - Advanced analytics may not perform in the same manner

# Lineal: ChatCraft

The screenshot displays the Lineal ChatCraft interface for a chat conversation. At the top, the document ID is GCHA00001. The interface includes a toolbar with options for Viewer, Image, and Extracted Text, along with a search bar and a 'Toggle Tags' button. The chat participants are listed as nattoe@linealplaypen.co.uk [26] and sri@linealplaypen.co.uk [19]. The chat history shows 45 messages between Oct 18, 2020 and Oct 26, 2020.

The main chat area shows a message from sri@linealplaypen.co.uk at 4:51 AM: "Chelsea drew 3-3 with Southampton". Below the message are radio buttons for "Responsive", "Not Responsive", "Privileged", "Not Privileged", and checkboxes for "Issue 1", "Issue 2", and "Issue 3". "Issue 2" is selected. Below the message is a screenshot of Premier League results for Saturdays, titled "Saturdays EPL Results.PNG" (11.1 KB). The screenshot shows the following results:

Match	Score
Everton vs Liverpool	2-2
Chelsea vs Southampton	3-3
Manchester City vs Arsenal	1-1
Newcastle United vs Manchester United	1-1

Below the screenshot are radio buttons for "Responsive", "Not Responsive", "Privileged", "Not Privileged", and checkboxes for "Issue 1", "Issue 2", and "Issue 3". "Issue 1" is selected. Below the screenshot is a message from nattoe@linealplaypen.co.uk at 4:51 AM: "Wow!". Below this message are radio buttons for "Responsive", "Not Responsive", "Privileged", "Not Privileged", and checkboxes for "Issue 1", "Issue 2", and "Issue 3". "Issue 3" is selected.

The bottom of the interface shows a timeline view of the chat history, with a blue bar indicating the duration of the chat session from Oct 18 to Oct 26.

Built within Lineal's Relativity and Reveal environments, Lineal ChatCraft allows case teams to drill down short-form messaging by individual or groups of days, and then review, tag, and prepare for production without leaving their review environment.

# Unitizing SMF

## Problem

- Channels, group chats, and direct messages in collaboration applications like Microsoft Teams may span months or even years.
- Does it make sense to treat a chat spanning months as a single “document.”
- Unitized chats that have a responsive message will also have numerous **non-responsive messages**.

## Strategy

- Unitize chats by thread and to apply common-sense boundaries—e.g., midnight to midnight.
- Sometimes called “24-hour thread unitization.”
- Depending on the context, you may need to negotiate unitization of chats with the requesting party.

# Formatting SMF

## Problem

- Exports of channels, group chats, and direct messages in collaboration applications like Microsoft Teams — much like text messages—are not conducive to review and production in most commercial e-discovery platforms.

## Strategy

- Some vendors have the ability to recreate some of the “look and feel” of the UI.
- This makes it much easier for reviewers and also facilitates production.
- Receiving parties typically prefer this approach as well.

# Developing Case Law re SMF Discovery

- Each Message is Separate:
  - *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice* (D.D.C. May 26, 2020)
- Day / Hour Approach
- X Many Messages Before / After Responsive Content:
  - *Sandoz, Inc. v. United Therapeutics Corp.* (D.N.J. Mar. 29, 2021 & June 16, 2021)
  - *Management Registry, Inc. v. A.W. Companies, Inc.*, 2020 WL 468846 (D. Minn. Jan. 29, 2020)
  - *Lubrizol Corp. v IBM Corp.*, (N.D. Ohio May 15, 2023)\*
- Hybrid Approach:
  - *Barker v. Insight Global, LLC*, 2019 WL (N.D. Cal. May 3, 2019)
  - *Laub v. Horbaczewski* (C.D. Cal. Nov. 17, 2020)

# Additional Ephemeral Challenges

- **Is the information stored and for how long?**
- **Where is the information stored?**
- **Can you get to the information?**
  - Corporate Policy
  - BOYD Policy
  - Privacy Laws
  - Stored Communications Act
- **How do you preserve the information?**
- **How do you collect the information?**

# Where is the Data Stored?

	Data Source	Forensic Image	Online Account	Screen shot	iCloud	Carrier	MDM
1	SMS	Yes	No	Yes	Yes	CDR	TBD
2	MMS	Yes	No	Yes	Yes	CDR	TBD
3	iMessage	Yes	No	Yes	Yes	No	TBD
4	Photos	Yes	No	Yes	Yes	No	TBD
5	Twitter	Yes	Yes	Yes	Yes	No	TBD
6	WhatsApp	Varies	Yes	Yes	Varies	No	TBD
7	Instagram	Varies	Yes	Yes	No	No	TBD
8	Telegram	No	Yes	Yes	No	No	TBD
9	E-Mail	No	Yes	Yes	No	No	TBD
10	Signal	No	Maybe	Yes	No	No	TBD
11	Call History	Limited	No	Limited	No	CDR	TBD
12	GPS History	Limited	Maybe	Limited	Maybe	CDR	TBD

Source – iDiscovery Solutions



# Possession, Custody & Control - Three General Standards

## Legal Right Standard

- When a party has the legal right to obtain the Documents and ESI

## Legal Right Plus Notification

- When a party has the legal right to obtain the Documents and ESI. Plus, if the party does not have the legal right to obtain the Documents and ESI that have been specifically requested by its adversary but is aware that such evidence is in the hands of a third party, it must so notify its adversary

## Practical Ability Standard

- When a party does not have the legal right to obtain the Documents and ESI but has the “practical ability” to do so

CATEGORY	CIRCUIT											
	1	2	3	4	5	6	7	8	9	10	11	D C
Legal Right			X		X	X	X	X	X	X	X	
Legal Right Plus Notification	X			X		X				X		
Practical Ability		X		X				X		X	X	X

# Closing Thoughts

- **Cannot stop the technological evolution**
- **Can take proactive steps to prepare for such technology to limit risk and costs:**
  - New technology committee
  - Policies
    - Use (e.g., whether and which platforms)
    - Retention (limit retention to extent practical)
    - Features (e.g., turn off recordings)
  - Legal Hold
  - Discovery
  - Education & training (e.g., corporate hygiene in document creating)