

2021 E-Discovery Trends and Predictions

Article By:

Lianna E. Donovan

It's no secret that, over the past year, the COVID-19 pandemic forced us to stay home and conduct more of our lives online: business dinners were replaced by Zoom meetings, groceries were ordered and arranged for contactless delivery through apps, doctor visits took a backseat to telehealth appointments, and remote learning resulted in school kids staring at their teachers through screens instead of in classrooms. Like everyone else, e-discovery professionals had to rapidly adapt to the changes brought on by the pandemic, including transitioning to remote work arrangements and keeping up with shifting litigation priorities and demands. The question we're faced with now is: how much of 2020 is here to stay and what's next in 2021?

One 2020 shift most experts agree will become the norm in 2021 and beyond is virtual managed review. While the appeal of virtual managed review projects started gaining traction over the last few years, it wasn't until the pandemic—and the lockdowns that resulted from it—that it became necessary for the e-discovery industry to find a way to conduct large-scale document reviews that did not involve reviewers sitting in close proximity under one roof. Virtual managed review proved to be a viable solution, allowing e-discovery attorneys in different locations to be trained remotely and review documents from the comfort and safety of their own homes. It wasn't long before the benefits of virtual managed review became obvious: the elimination of commuting time and the freedom to work beyond the operating hours of a review facility allowed reviewers to work longer hours (and, in turn, projects to be completed faster) and managers saw value in the ability to assemble review teams from a larger, more diverse pool of attorneys across various cities.

However, like anything else, virtual managed review has its downsides. In the past year, professionals in virtually every industry shared in the common struggles of working from home; frequent distractions caused by family members and new household responsibilities and less collaboration and engagement with colleagues and managers are two of the big ones. While these struggles impact and should be considered in the context of virtual managed review, perhaps the biggest issue e-discovery professionals must grapple with when it comes to remote work environments is new and increased security risks. Such risks include unsecured workstations which allow third parties to access confidential information, failure to protect and properly discard paper documents, and increased targeting from hackers. Still, e-discovery firms who are able to effectively manage and mitigate these risks will likely see that the pros of virtual managed review outweigh the cons.

In addition to virtual managed review, we'll also see companies of all sizes continuing to adopt

videoconferencing technology and collaboration tools like Slack, Zoom, and Microsoft Teams in 2021. While applications like these have been around for years, the use of these platforms exploded in 2020 as companies were forced to shutter their offices and quickly facilitate their employees' ability to do their jobs from home. Courts have begun to address preservation and collection of things like Slack posts, Zoom meeting recordings, and Microsoft Teams chats, but the proliferation of remote work environments stemming from the pandemic will likely accelerate disputes surrounding the discoverability of such data sources. See, e.g., *King v. Catholic Health Initiatives*, No. 8:18-cv-0326, 2019 WL 6699705 (D. Neb. Dec. 9, 2019) (holding that defendant had "no further duty to supplement" its prior production of user-saved Microsoft Lync and Slack messages); *Calendar Research, LLC v. Stubhub, Inc., et al.*, No. CV 17-4062 SVW (SSx) (C.D. Cal. Mar. 14, 2019) (granting plaintiff's motion to compel defendants' Slack messages despite defendants encountering significant technical challenges in collecting, reviewing, and producing the communications). How courts decide these disputes will impact how attorneys approach e-discovery and how companies use and manage these tools.

Lastly, expect more focused attention on information governance in 2021. Although the development and implementation of document retention policies and schedules, defensible data disposal strategies, data breach responses, and legal hold policies and practices may not be the most exciting e-discovery work for some, corporate legal departments and outside counsel are placing growing emphasis on controlling costs in e-discovery and proactively mitigating data-related risk. E-discovery providers that can offer fully integrated solutions addressing privacy, compliance, forensics, breach management, and, yes, e-discovery in a full package will be well-positioned for a successful 2021.

Copyright ©2024 Nelson Mullins Riley & Scarborough LLP

National Law Review, Volumess XI, Number 129

Source URL: <https://natlawreview.com/article/2021-e-discovery-trends-and-predictions>