



# 5 Trends That Will Influence E-Discovery In 2021

by Brian Schrader | January 5, 2021

The e-discovery field has undergone a period of rapid evolution over the past decade, with powerful new technological tools making it possible to manage, preserve, collect, analyze and produce responsive documents more quickly and accurately than ever before.



It is largely these tools that have enabled the industry to keep pace with the rapid expansion of electronically stored information, or ESI, as people live more and more of their lives online.

As we look forward to 2021 and beyond, changes in the way we work and communicate — including some brought on and accelerated by COVID-19 — will bring new challenges for e-discovery vendors. We also expect the industry to continue refining its tools and workflows to increase efficiency, accuracy and effectiveness wherever possible.

## **1. ESI will continue to expand, but mostly in a manageable way.**

Recent years have seen exponential growth in the amount of ESI. New ESI types and metadata come from all sorts of different data points, including business and manufacturing automation and monitoring systems, team collaboration tools, video resources, social media platforms, smart devices like Fitbit, Android and Apple watches, and much, much more.

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In 2021 and beyond, we expect to see that growth continue — both in ways we can anticipate and in ways we cannot yet fathom.

While we are collecting data from more places than ever before, we've not yet reached a leveling-off point for human and system data creation. From an e-discovery standpoint, while some content-diverse systems like team collaboration platforms will continue to present challenges, as discussed below, much of that data likely won't have a measurable effect on our workloads.

Data points from automation systems and internet-connected devices, for example, tend to be simple and structured, so they can be analyzed, reviewed and produced more easily, often through built-in reporting engines. It's the yet-unknown sources that will present the biggest challenges, as most new systems are not created with compliance, regulatory and e-discovery needs in mind — at least not from the outset.

## **2. Collaboration platforms will remain the Wild West.**

While organizations have used team collaboration platforms like Slack, Microsoft Teams and others for internal communications for years, 2020 saw a huge surge in their use, largely due to the higher number of employees working from home amid the pandemic. This has led to an increase in chat, video, meeting and other such data that may need to be collected in legal matters, along with new questions and challenges over how best to search and produce that data.

Chats are one of the largest challenges of those platforms. Unlike email threads, which usually contain subject lines and other identifiers, and which tend to cover only one or a few topics, chats are usually never-ending conversations that can cover hundreds of different topics. The stream-of-consciousness nature of chats makes them challenging to search through, since current e-discovery solutions tend to focus on organized topical indicators.

In chats, one line of conversation may be completely unrelated to the lines before and after. And while this is not a novel challenge — as chats have been around for years — the massive increase in the use of chat systems presents a clear challenge.

In addition, when chat data is produced in a legal matter, there's no clear legal standard yet on what constitutes the beginning and end of a chat topic. What's more, most chat threads go on seemingly infinitum. Obviously, it doesn't make sense to

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produce an entire chat thread that might extend over years, with the vast bulk being irrelevant.

To complicate matters, we all tend to speak more casually in chats than email, which can make them a likely place to find a smoking gun — and thus, their sudden expanded use makes them more important than ever before. Then there are the Word, Excel, PowerPoint and other files stored in those platforms, often referenced in those chats, but usually without clear links in the chats themselves.

In 2021 and beyond, we expect this area to become even more challenging as email continues to die out and workers rely on chats and collaboration platforms almost exclusively, especially for internal communications. As Generation Z workers — those born after 1996 — enter the workforce, their default mode of communication will be chats and other text messaging solutions.

Software developers are often slow to build features into their apps that facilitate compliance, retention, preservation and e-discovery. Until that happens, our increased use of these platforms will continue to complicate those areas.

### **3. There will be lasting changes in e-discovery workflows.**

The old-fashioned, linear approach to document review meant reviews — and discovery generally — would often drag on for months, if not years. Technology-assisted review vastly sped that process along, but the remainder of the e-discovery workflow lagged behind. That's changing as better methods, technologies and workflows have spread across the entire e-discovery process.

Traditionally, the e-discovery process would start with a single or a small group of custodians, then gradually expand to encompass others based on findings from that initial data set. The adverse result of that piecemeal approach was that the legal teams would not learn until long into the process that they'd been looking in the wrong places for the information they need, as they discovered things like product nicknames or other idiosyncrasies of internal communications.

The use of analytics tools early on and throughout the e-discovery workflow has fundamentally changed the way we approach data identification, analysis and document review. However, for these tools and methods to be most effective, data must be gathered as comprehensively as possible at the outset.

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The days of using huge teams to queue through millions of documents are coming to an end. Instead, we should be looking at cases as a whole and weeding out irrelevant data early in the process, which will greatly increase the speed of the entire process.

#### **4. The EDRM becomes more of a framework, not a workflow.**

In the past, when we had limited tools and limited resources, the Electronic Discovery Reference Model, or EDRM — which outlines the stages for the recovery of digital data — provided a guideline for handling e-discovery most effectively. With large cases, brute force was often the way that work got done — by simply bringing in enough extra people to do the job in a reasonable amount of time.

However, as analytics technology has become less expensive, e-discovery vendors are now applying it to nearly every step of the process, instead of at one specific phase. Looking forward, we expect the use of analytics to expand across the entire EDRM. And while the EDRM continues to provide the big picture of how e-discovery works, it doesn't mean that things must happen in that exact order anymore.

#### **5. We may see changes in privacy and employment law.**

Data privacy laws and rights are long overdue for an overhaul — especially in the U.S. While some states like California, Illinois and New York are rapidly developing and passing data privacy rules and regulations into law, the result of that piecemeal approach is an increasingly chaotic patchwork as difficult to navigate as a minefield.

Hope holds out that the federal government will step in to provide a clear, overarching and controlling national regulatory standard and framework for data privacy, but until that happens, people's privacy will depend more on their location than on their individual rights.

All of that complicates e-discovery, too, as everything from data collections to reviews and productions also must consider the ever-expanding hodgepodge that is data privacy in America today.

And then there are our Fourth Amendment rights when it comes to our digital devices. As individuals, the right not to have the “second brain” that is our mobile devices

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searched, especially without a warrant, is anything but clear. While courts have tended to require at least a warrant in many cases, that isn't always the case, and often depends largely on the circumstances.

For employers involved in litigation, one question looms largest: Can employees be forced to hand over their personal devices for litigation involving the employer, even if the employee isn't named in the lawsuit? Courts have come down on all sides regarding that subject, so more national clarification is sorely needed. Some clarification on this may happen in 2021, but certainly more will be needed for years to come.

In a related area of law, the increase in employees working from home has opened up another interesting question: Which state's employment rules should apply if the employer and employee are located in different states?

This could make a difference in the amount of overtime pay, vacation leave, unemployment or severance pay to which an employee is entitled. To establish where and when an employee is doing work, individual cases will require e-discovery, using data collected from apps like Office 365.

## **Conclusion**

Clearly, many unanswered questions and challenges lie ahead in 2021 and beyond, but for those we know about, I'm confident that we will meet those challenges successfully. How those areas develop will rely on how courts decide many of these sensitive questions, but also on how well the e-discovery industry adapts and stays current. The biggest challenges are the unknowns we have yet to envision, but as the last decade has shown, people, systems and solutions can and will adapt and improve as we all continue to grow.

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