

Legaltech® news

Ahead of the Curve: The E-Discovery Landscape in 2023

By Mallory Acheson and West Lee, Nelson Mullins

March 14, 2023

In the world of e-discovery, where requests are always urgent and the deadline is always yesterday, time moves differently. One day can feel like a month, but a year can pass in what seems like a week. So, it's not surprising that despite the already incredible evolution of e-discovery, it's still a fairly young industry with a lot of growing left to do.

Here's where the industry is headed and what that will mean for corporations, vendors and law firms trying to stay afloat in the e-discovery waves.

First, let us consider the changes already underway, the ripple effects of which are being felt now.

Pivoting to AI and Other Technology

In recent years, we have seen e-discovery evolve from document requests to an all-encompassing industry for data management. Much of this evolution can be attributed to the ease of pivoting to developed technology and skill sets to assist with new tasks. We expect to see a continued pivot to other areas of need, such as: 1) breach response, 2) contract management and 3) information governance.

Artificial Intelligence (AI) has been making great strides in the e-discovery industry over the last decade. Processes that were once time-consuming and manual (e.g., document review) have seen enormous efficiency gains and corresponding reductions in cost through AI-based tools such as machine learning and predictive coding. Thus, with the battle for acceptance entering the rearview mirror and with the evolution of tailored-use cases, we expect to see increasing use and acceptance of AI models in place of traditional linear review.



Credit: metamorworks/Shutterstock

The COVID-19 pandemic accelerated an already occurring shift to a more remote/hybrid work culture, which increased reliance on communication technologies such as Slack, Zoom and Microsoft Teams. While these tools were successful in keeping businesses going when circumstances might have otherwise ground things to a halt, they brought with them new challenges regarding collection, processing and production.

As the industry moves to implement standardization in e-discovery processes for these new technologies, it must also contend with their continued proliferation and the associated rise in unstructured data volumes. People will continue to find new ways to communicate, but the old adage that, "If you put it in writing, it could come up in court" will remain true.

Cloud computing offers businesses a cost-effective, scalable solution to storing and accessing data, so it should come as no surprise that we are witnessing

a continued industry-wide movement to cloud-based technologies. However, this shift creates challenges of its own, such as the need for sophisticated e-discovery tools capable of working with cloud-based data.

There are also data privacy concerns—namely, that the movement of sensitive data to online locations will invariably result in an increase in cybercrime. The e-discovery industry must continue to ensure that its processes are secure and compliant with relevant data privacy laws and regulations.

Now that we've taken stock of where the e-discovery industry is headed in the short term, let's look ahead to other potential disruptors.

Data Privacy and Blockchain

With the advent of comprehensive data privacy laws and regulations in several jurisdictions, we'll see an increase in activity related to implementation, enforcement and prosecution of those edicts. Similarly, with the looming replacement of the Privacy Shield and its promise to provide an adequate level of protection for personal data transferred from European Union entities to their U.S. counterparts, we'll likely also see an increase in cross-border actions and increased efficiencies within same.

The growing concern over data security makes the blockchain an intriguing option with respect to the secure storage of data. The blockchain is an immutable ledger, which, by its decentralized nature, is highly secure and hack resistant. Additionally, its ability to catalog the digital signatures of users leaves a permanent trail by which the movement of data can be easily traced.

Alas, as with all opportunities, potential use of the blockchain in e-discovery would present its own challenges. For example, its decentralized and cryptographic nature makes it challenging to access. Further, the data stored on the blockchain is often in a non-standard format, which causes processing problems. There are also issues related to the lack of uniformity across blockchain systems.

As use of the blockchain grows, understanding the e-discovery associated with it will be key to successful long-run adoption.

We've analyzed the issues we expect to be prevalent in the e-discovery industry in both the short and longer term. Lastly, let's consider at some of the challenges and opportunities ahead.

Challenges and Opportunities

As discussed above, the industry must adopt a standard approach to new technologies. While there is some level of familiarity and comfort with the more "standard" flavors of new data, such as communication tools, the road ahead is wholly unclear with respect to AI tools like ChatGPT. Could its use augment existing e-discovery practices, similar to existing AI tools? Could the words it generates ever be discoverable? If so, are there issues regarding its collection, processing, review and production that we need to understand?

With increasing data volumes and clients seeking partners who will leverage technology to keep costs from becoming similarly inflated, value-add services such as early case assessment, analytics and fact building, will become ever more important to differentiating brands.

While states have steadily adopted their own standards of technological competence since the American Bar Association modified its Rule 1.1 in 2012, aspects of the current standards remain vague and can therefore lack the necessary teeth. Additional guidance will allow for continued evolution through a common set of principles.

In summary, e-discovery makes its home between two fields (legal and tech) that are always evolving. As a result, so too does our industry grow and change at a rate that often outpaces most others. Hopefully then, it comes as some consolation on those late nights when you're trying to figure out the solution to a problem few have had before you, that we are part of something that is and will remain ahead of the curve.

Mallory Acheson is of counsel at Nelson Mullins, where she focuses on privacy and security compliance, technology transactions, and the intersection of data and electronic discovery issues.

West Lee is discovery counsel and advanced solutions consultant at Nelson Mullins, where he focuses on e-discovery.