

# Influencers

## **The Road Ahead:**

Current Trends in Litigation for 2022



LAW IN ORDER



with



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The trends we saw emerging in 2021 will continue into 2022. The effects of COVID-19 and remote working are still profoundly affecting how the profession is operating and is driving both innovation and a strong move to the cloud. It is also creating new complications and challenges for eDiscovery with the increasing emergence of new forms of data.



## The Effects of Remote Work

- During the current wave of high COVID-19 infection numbers, a full remote working model has been re-adopted by a number of companies. However, we are still seeing a hybrid model with employees splitting their time between office, home or other remote locations as the model that will be widely adopted going forward and it is here to stay.
- From a data management and security point of view, companies will need to look at implementing long term models to support a hybrid working environment, if not already done. The use of cloud-based platforms to manage and store company data has been on the rise for the last few years and will continue.
- Greater acceptance of virtual and technology solutions in the legal industry, due to lawyers embracing the greater benefit of remote and online operations throughout COVID-19. This acceptance will remain moving forward.

## Technology Assisted Review (TAR) Gently Accelerates

- Five years ago, it was predicted that TAR would take the coding decisions and relevance calls from human reviewers, applying them to larger document collections to make relevance or other coding predictions on those unreviewed documents. It was anticipated that this would largely replace human review. This has not been the case and uptake is still slower than eDiscovery industry experts expected. However, adoption of the technology is still growing and with an increasing understanding of TAR by lawyers and judges, will continue to accelerate.
- As data sizes continue to grow however, the use of TAR and low cost Document Review teams will also continue to grow in order to keep disclosure costs in check, driving the projected acceleration.

## The Age of Social Media and Chat

- As forecast, we have seen a significant increase in litigation matters requiring collection, analysis and review of social media and chat messages. Given that the relevant date period of litigation is often a few years behind, this will continue to rise. The beginning of the COVID-19 pandemic in March 2020 saw employees working from home and created a sudden increase in the use of chat messages and video conferencing as a critical part of the business. We will see an increasing number of disputes relating to the period since then.
- While email still remains the largest source of documents volume wise, social media and chat messages are increasingly containing the highly relevant, “smoking gun” information and cannot be ignored anymore.
- Chat messages and social media create multiple challenges from an eDiscovery, collection, analysis and review perspective. What is the best way to collect data from WhatsApp or Wechat? What constitutes a “document” that needs to be produced in court when applied to chat messages in Teams or Slack? Is it the entire exchange between 2 or more people which can span a period of multiple years? Is the exchange within the relevant data period / relating to a specific topic document? Is it each message sent? These are all questions that haven’t been clearly defined in the courts’ practice notes nor answered by rulings. eDiscovery technology is only slowly beginning to provide adequate tools to not only review chat messages efficiently but also ‘slice and dice’ them for the purpose of production to courts and parties.
- The use of emojis, gifs and other graphical content included in chat messages and increasingly in emails, creates further challenges from a review perspective:
  - For years the eDiscovery industry adopted keyword searching as a means to reduce the document volume to review. In more recent times, text-based analytics supplemented or replaced the keyword searches, in particular in the form of TAR. However, both keyword searches and TAR relies on text / words. The technology does not yet support emojis efficiently.
  - Complexity increases further due to the simultaneous use of multiple forms of communication. With video meetings, people started to have side communications using different communication platforms during the meeting. The context sometimes only becomes clear if put together with the meeting video.
  - There is also the question about the meaning of an emoji. For some emojis, the meaning has changed over the years. Different platforms use different emojis. Are people using emojis with their intended meaning?

### Example Scenario

*A legal team is investigating bullying or mobbing claims. Three of the employees are in a Zoom meeting together. While Employee 3 is talking, Employee 1 sends a message in MS Teams to Employee 2 saying, “That is:” and inserts an inappropriate gif animation. Employee 2 responds with a thumbs up and a grinning or laughing emoji. Traditional keyword searching will not identify the relevant evidence. In addition, the context becomes only relevant if a timeline is drawn up between data collected from different zones and overlaid to put context to the exchange.*



## The Emergence of Virtual and Hybrid Hearings

- Virtual and Hybrid Hearings still remain a priority during the uncertainty of the pandemic. We expect to see a transition to more Hybrid Hearings as restrictions are relaxed.
- Due to COVID-19 restrictions, Isolated Witness Support services grew in popularity. This service includes video conference set-up and on-site technical support for remote witnesses or legal professionals in any location for appearance in Virtual and Hybrid Hearings.

## Health Analytics – the Next Big Challenge

- The Internet of Things (IoT) refers to the billions of physical devices around the world that are now connected to the internet, all collecting and sharing data. With the rapid growth of Health Analytics, accelerated through COVID-19 as well as the IoT, the next significant eDiscovery challenge is already on the horizon.

As we all wrestle with coping with COVID into the foreseeable future and with its effect on industry and business globally, it's now more important than ever before to stay informed regarding litigation technology trends.





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