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FROM COUNSEL

The Emerging E-Discovery Playbook

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Introduction

When we first began the *Advice from Counsel* survey and report, the goal was simple: Learn how leading e-discovery practitioners within corporations were managing e-discovery and share the advice they would give with peers just beginning to undertake the e-discovery process. One of the first questions was: “For companies just beginning to develop their e-discovery program, what advice would you give to reduce the overall cost of e-discovery?”

With an incredible amount of gratitude toward the community of respondents who have lent advice over the years, we now share the results of our fifth edition of the *Advice from Counsel* study. In a relatively new industry, the fifth of anything is a significant milestone — one that begs the question: What has changed? And perhaps more important: Where will we be five years from now?

To the first question, What has changed?, note that e-discovery is increasingly considered its own specialty area, requiring a dedicated manager or team. In the original survey, all the respondents held e-discovery responsibility, but only 14 percent had e-discovery or technology as part of their title, compared with 37 percent of respondents this year. This specialization is

positively impacting each company’s approach to and control of its e-discovery process. As an example, 27 percent of respondents in the 2010 survey did not know how many service providers their company uses for e-discovery.

For those who did, the average number of service providers used to support the e-discovery process was five. This year, all our respondents knew the number of service providers used, and 40 percent are using three or fewer providers. This is just one of the many examples of how the industry has changed that will be discussed in this report.

“Seven years after amendments to the Federal Rules of Civil Procedure (FRCP), corporations now have a clear game plan on how to operationalize e-discovery for greater efficiency, transparency and cost predictability.”

As to where the industry is going, the data are quite clear. Seven years after amendments to the Federal Rules of Civil Procedure, corporations now have a clear game plan for how to operationalize e-discovery for greater efficiency, transparency and cost predictability. This paper outlines the key components of an effective corporate e-discovery playbook, highlights areas where the industry has matured from five years ago and discusses additional findings from our panel of leading corporate e-discovery experts. From these results, corporate e-discovery practitioners can benchmark their own program and pinpoint areas where the emerging corporate playbook can be implemented.

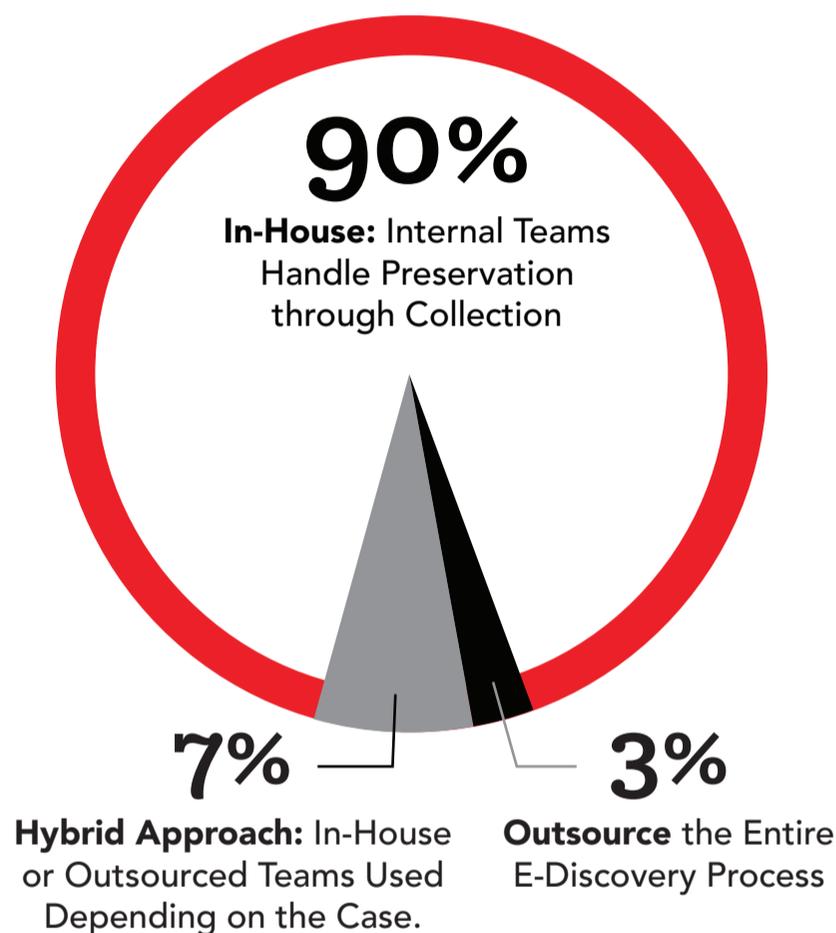
FTI Technology recruited Ari Kaplan Advisors to interview 30 in-house legal professionals with responsibilities that include e-discovery. All participants were from Fortune 1000 corporations and spoke by telephone, under condition of anonymity, in November and December 2013 (additional information on respondents is included in the Appendix). From these results, a clear operational e-discovery structure emerged, captured by the following points:

1. “Handle preservation through collection internally.”

Overwhelmingly, 90 percent of respondents said internal teams handle preservation through collection in-house; 3 percent stated they outsource the entire e-discovery process, including identification, preservation and collection. The remaining 7 percent take a hybrid approach, where, depending on the particulars of the case, in-house or outsourced teams are used.

There are some exceptions. Respondents outlined four areas when third parties are called in to assist with preservation and collection:

- In large, high-stakes matters where a third-party expert may need to testify on the defensibility of the collection process
- In matters where compliance with data privacy regulations for global matters involving data from outside the United States needs to be ensured
- For matters involving social media platforms with unusual preservation or collection requirements
- In “bring your own device” (BYOD) environments where employees may have relevant data on personal devices such as laptops and cell phones



2. **“Outsource to a vendor whose sole job is e-discovery. It is faster and cheaper, and service providers track the trends better. This frees counsel to focus on the strategy of the case.”**

Just as collection and preservation are well-suited to be managed in-house, corporations are mostly outsourcing review and production. Eighty-three percent of respondents outsource review and production - 60 percent outsource directly to a service provider and 23 percent rely on law firms.

According to respondents, the outsourced model was found to be the most efficient and cost-effective approach to review and production. As one participant stated, “The do-it-yourself component is overrated. ... It is not only a large capital resource expenditure but requires a lot of time to perfect internal processes.”



“83% of respondents outsource review and production”

3. **“You don’t need to handle predictive coding in house, but you should be involved in the decisions.”**

“While the company does not manage predictive coding internally, it does drive the selection process and other elements.”

Only 17 percent of respondents recommended that companies bring predictive coding in-house. Most of the feedback suggested that while corporations should control the strategy, service providers are better equipped to execute predictive coding. “While the company does not manage predictive coding internally, it does drive the selection process and other elements.” Another said, “I would be astonished if a company had enough volume to do its own predictive coding.”

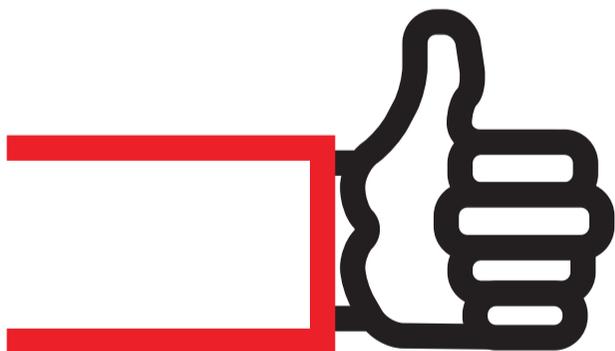
4. **“We would like to leverage prior work product. This is a goal for 2014.”**

Forty percent of respondents currently reuse coding decisions made on documents for previous matters such as privileged documents. Eighty percent of this year’s participants would consider deploying a multi-matter repository that enables the reuse of document coding decisions if it required standardizing on one legal review tool. “Data reuse is an area we’ve identified for improvement since we’ve found that we review the same documents multiple times,” reported one respondent. Another participant said, “That is something we always have wanted to do better because there seems to be a lot of potential.” A third respondent said, “Typical litigation tends to involve the same custodians and require the same general information.” As a result, these numbers may increase in the next year or two, particularly since “the company is testing this now” as another participant reported.



“Data re-use is an area we’ve identified for improvement since we’ve found that we review the same documents multiple times.”

5. **“You may be better off to have a good provider support your work.”**



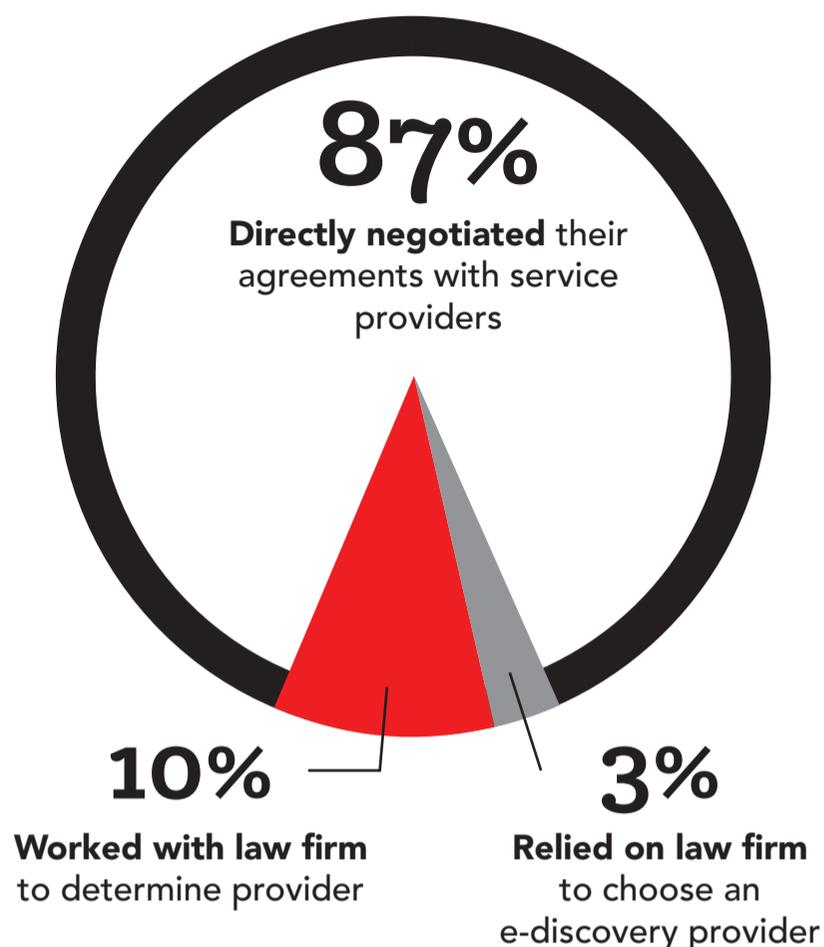
The corporate/service provider relationship played a prominent role in this year’s responses. Most acknowledged that bringing the entire e-discovery process in-house was not feasible

due to budget, staffing, and the volume and variety of matters. In fact, 86 percent of respondents said there were no plans to bring the entire e-discovery process in-house.

Because of this, maintaining a strong, collaborative relationship with service providers was seen as a key imperative for any e-discovery program. Since more than half the respondents (53 percent) already have standardized on two or three e-discovery service providers and

17 percent are planning to do so in 2014, this trend seems likely to continue. Some interesting data points that stress the growth in developing more strategic service provider relationships include:

- Eighty-seven percent of corporations directly negotiated their agreement with service providers, 10 percent worked with a law firm to determine the providers and only 3 percent relied on a law firm to choose the e-discovery providers.
- Eighty-six percent have a Master Service Agreement (MSA) with their legal service providers, whether the company uses one provider or several. While not all corporate MSAs are the same, service providers typically undergo a rigorous selection process as part of an MSA, including security checks, client references and workflow training.



In summary, the majority of corporations are using a model in which they own the identification, preservation and collection steps for regular matters. Companies are turning to service provider partners to assist with any challenging collection projects such as those involving multinational data, social media or cloud data, or information stored on employees' personal devices. Service provider partners, working under an MSA, assist with the processing, review and production steps. This includes the use of predictive coding and, increasingly, will utilize legal review software that enables the reuse of lawyer work product such as privilege calls.

Not all respondents currently are employing every aspect of this model, as there is no one-size-fits-all solution for e-discovery. As one respondent noted, "Ultimately, your litigation profile will dictate the processes you handle internally." That said, respondents indicated this model provides the greatest flexibility to handle a wide variety of matters, types and sizes and also ensures that resources are appropriately allocated for maximum efficiency.

New Challenges Emerge

While respondents were confident in how they had operationalized their e-discovery program, they were also quick to identify new challenges.



BYOD

Although it is a relatively recent phenomenon, 67 percent of respondents work with organizations that have implemented a “bring-your-own-device” (BYOD) policy within the last four years. Another 10 percent will implement a BYOD policy this year. In fact, by 2015, up to 90 percent of respondents expect to have such a policy at their company.



Big Data

Costs often are directly linked to data volume, but predicting these amounts remains a mystery to 43 percent of survey participants and their legal teams. Conversely, 57 percent of respondents reported being able to quantify how much data they collect, review and produce in a typical matter. Those amounts range from 20 gigabytes (GB) per custodian to 100 GBs of data from 50 custodians.

Sixty-two percent of participants expect a continued upward trend in e-discovery data volume over the next few years. Thirteen percent expect a decrease, and 24 percent believe that data volume will remain the same. “The company continues to grow, which increases the amount of data,” noted one respondent. Others were more specific: “The company is moving toward BYOD so we are expanding the number of devices that contain discoverable data.” These figures are consistent with last year’s study, which found 64 percent of respondents worried about the rising impact of Big Data on e-discovery.

“The company continues to grow, which increases the amount of data.”



Information Governance

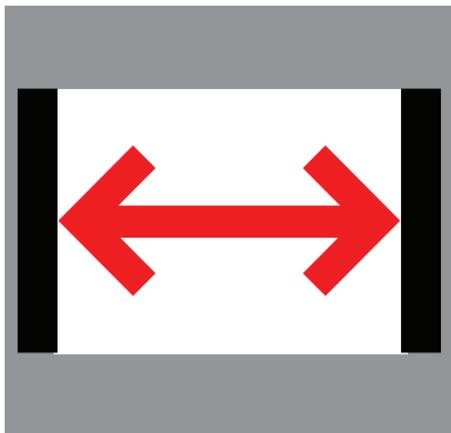
When asked to highlight the top three information challenges, 37 percent of respondents identified growing data volume as the highest priority, followed by 23 percent who struggle with data mapping and identification of sources of information. The remaining issues ranged from data security and the disposition of legacy data to BYOD concerns and navigation of the diversity of media.

The majority of participants (52 percent) identified the cross-practice (information technology, compliance, legal) collaboration required to develop and implement a plan as the most significant inhibitor to establishing an effective information governance strategy. Insufficient budget or resources to define and put in place an effective plan followed with 22 percent, and 17 percent of participants described an unclear business driver as the most significant inhibitor. One participant noted that the key challenge to information governance is a lack of leadership or an uncertainty as to where to start the process.

“It [information governance] is a couple of factors moving in different directions ... so it all becomes a giant mess very quickly,” said another respondent. And yet another remarked, “Ultimately, culture change is the most challenging aspect of information governance.”

“Culture change is the most challenging aspect of information governance.”

Other Findings

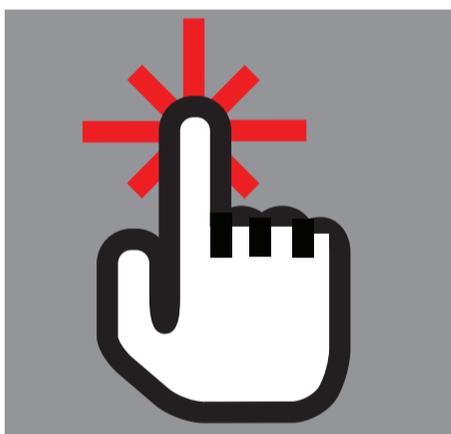


End-to-end Software

While many respondents noted the appeal of an end-to-end e-discovery software platform, spanning information management and identification to review and production, a number of participants were skeptical that one application could do it all effectively. “It’s like buying a stereo system: You can get all the components built into one box. But if you do so, it usually is an illusion, and you cannot improve any single aspect.

Also, it does lock you into one item. I am skeptical about whether that is preferable — I don’t get the utility of it.” A second respondent said, “It is difficult for a single tool to control the entire process.” And a third participant advised, “I’m not sure how successful one platform can be, given the diversity of necessary functionality.”

“I’m not sure how successful one platform can be given the diversity of necessary functionality.”



Ease of Use

The number one complaint about legal review software is ease of use. Nearly a quarter of respondents wanted usability improvements for existing software, including for analytics and predictive coding.



Analytics and Predictive Coding May Be Hitting a Tipping Point

The data reflect an almost perfect bell curve for participants claiming to work in an organization that uses advanced software and features such as analytics or predictive coding. While only 7 percent implemented this technology more than three years ago, 17 percent did so within the last three years, and 27 percent did so in 2013. In the near future, the numbers likely will remain constant with another 27 percent planning to utilize these tools in 2014 and an additional 10 percent likely to participate in 2015.



Budget Transparency Remains Flat

One of the critical cultural shifts over the past five years applies to spending. Fifty-seven percent of participants in this year's study were able to quantify how much their organization spends on e-discovery per year. For most, it was between \$5 million and \$10 million annually, but it ran as high as \$30 million per year for several respondents. The 57 percent of participants with budget transparency is fairly consistent with the 60 percent of those who responded in 2012 and is materially higher than the 42 percent who reported in 2011, the 40 percent in 2010 and the 34 percent in 2009. Almost half, however, still are unsure of their company's spending, and of those who could provide figures, few could offer an exact amount.

A number of participants were unable to provide a complete answer because they lacked knowledge of how much the company disburses on external legal advice. "Outside counsel spending remains a challenge because time entries are not coded for e-discovery," said one respondent. Another noted, "There is a heightened appreciation that monitoring spending is necessary, and some of the e-billing systems cannot code e-discovery vendors the same way they code task-based work from outside counsel."

In addition, information technology, in some cases, may be responsible for software licensing costs. The legal team may be unfamiliar with the associated expenditures so determining how much time employees are devoting to such activities becomes a guessing game.

Regardless of their spending, 53 percent of respondents expect costs to increase over the next few years, while the remainder split evenly between costs decreasing and remaining the same.

Generally, "The proliferation of different systems and tools and the expansion of data are forcing higher costs," said one individual, who essentially summarized many of the responses. "In addition, as companies need to search text messages, mobile devices and remote storage systems, expenses will rise." Finally, "The lawyers are becoming more sophisticated in fashioning discovery requests, and the courts are not exercising much restraint," noted one lawyer.

An attorney who expects the costs to decline offered three reasons: "First, new vendors are increasing competition, which is lowering prices; second, there is more willingness to embrace predictive coding; and third, the interest in studying spending trends tends to drive efficiencies and, thus, will lower costs."

APPENDIX

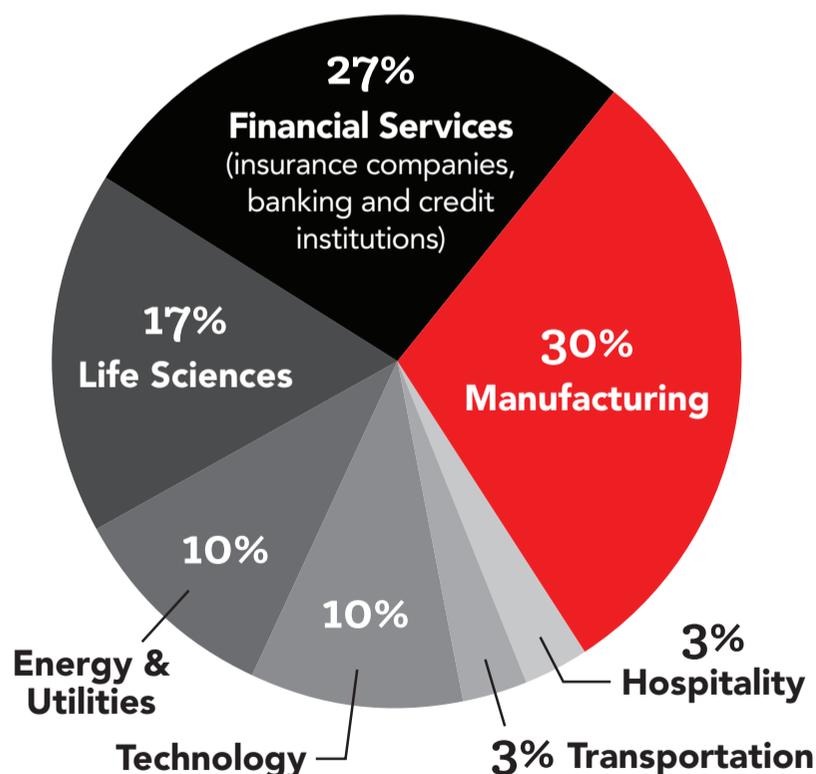
Participants

Ari Kaplan Advisors personally interviewed 30 in-house legal professionals with responsibilities that include e-discovery. All participants were from Fortune 1000 corporations and spoke by telephone, under condition of anonymity, in November and December 2013. The results of this study reflect the third consecutive year of 100 percent corporate counsel participation, up from 97 percent in 2010 and 72 percent in 2009.

Of this year's participants, 100 percent develop and implement e-discovery processes, 93 percent select e-discovery tools and vendors for their organization; 87 percent implement e-discovery technology; and 87 percent manage e-discovery tools and vendors.

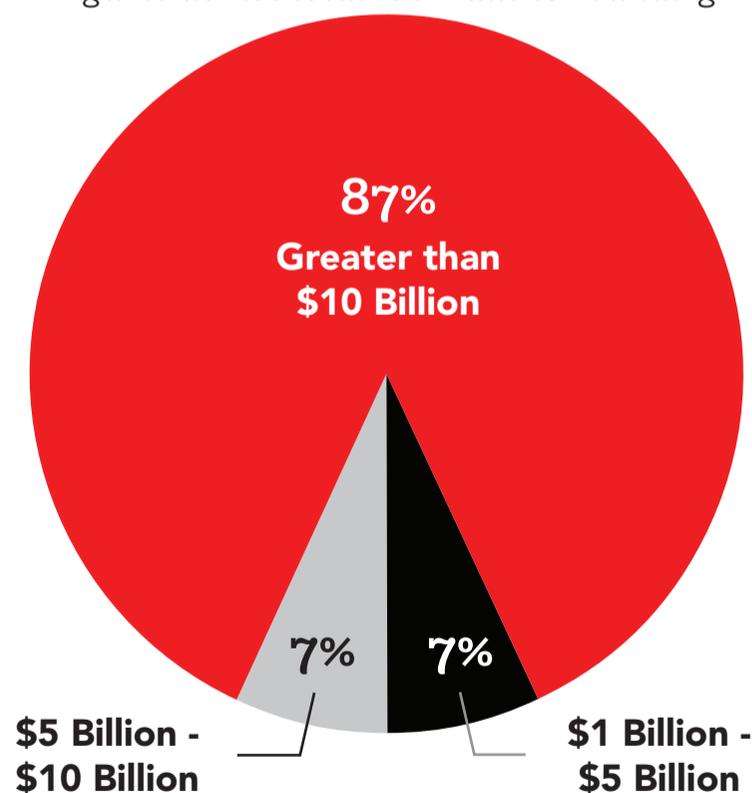
Eighty-seven percent of participating organizations had total annual revenues greater than \$10 billion and more than 10,000 employees, respectively. In terms of litigation events over the past 12 months, 40 percent reported managing more than 500 litigation events (up from 37 percent a year ago), and 23 percent reported managing more than 2,000 litigation events (up from 20 percent a year ago).

By Industry

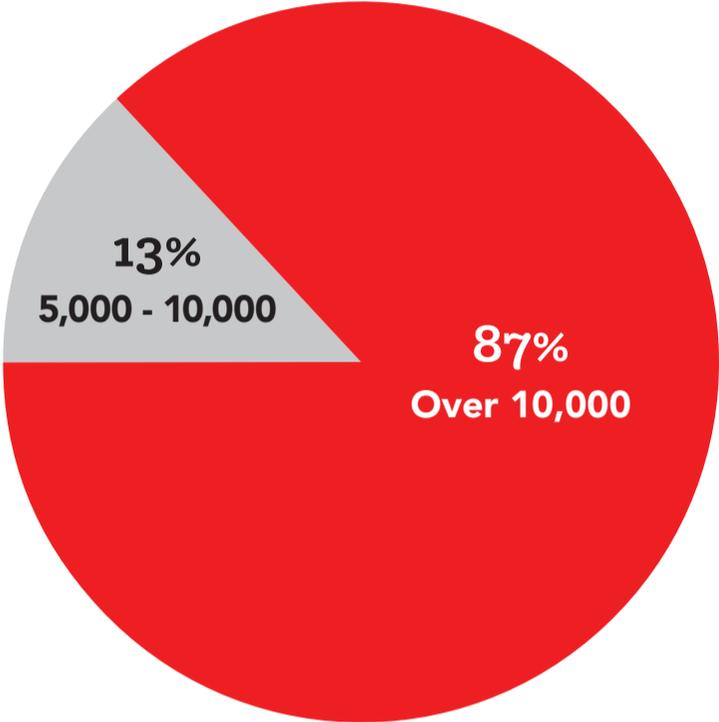


2012 Total Annual Revenues*

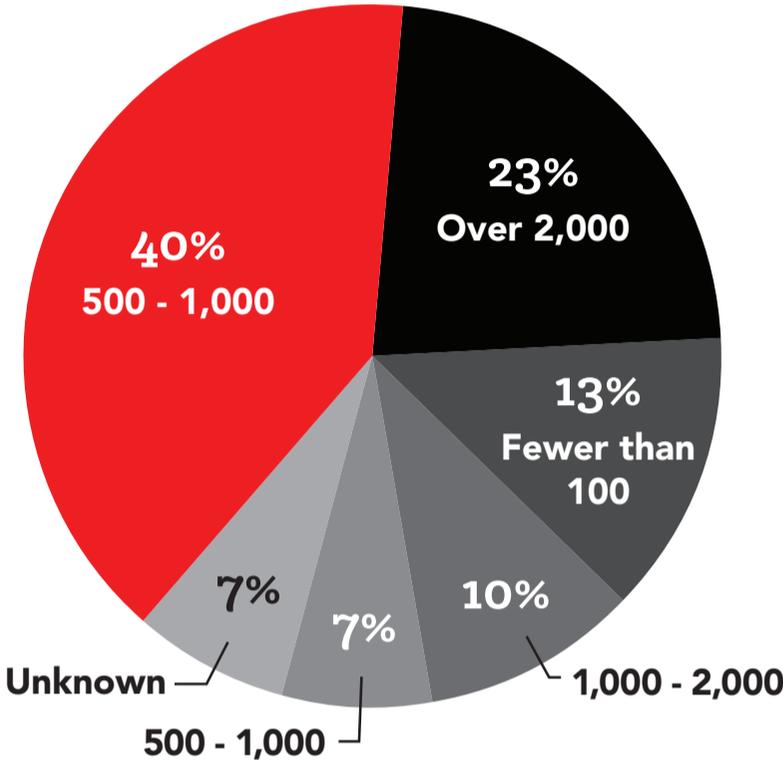
Figures do not total 100% due to rounding



Number of Employees



Number of Litigation Events in the Past 12 Months



About the Authors

Kate Holmes

Kate Holmes is a managing director in the FTI Technology practice and is based in Seattle. She collaborates with internal and external leaders to develop thought leadership content on e-discovery trends and best practices. She is a member of the ARMA Content Editorial Board, 2014 ARMA International Conference Proposal Review Group (CPRG), and has chaired the EDRM marketing committee. Prior to joining the company in 2006, Kate handled public relations and analyst relations for a number of technology companies including Microsoft, ADIC (now Quantum), and Dimension Data. She holds a B.A. from Indiana University in political science and history.

Ari Kaplan

The New York Law Journal called Ari Kaplan's first book, *The Opportunity Maker: Strategies for Inspiring Your Legal Career Through Creative Networking and Business Development* (Thomson-West, 2008), a "must-have treasure box of marketing ideas," and CEOs have described his second book, *Reinventing Professional Services: Building Your Business in the Digital Marketplace* (Wiley, 2011), which was also released in Japanese, as "an essential guide" that "expertly showcases the multitude of opportunities the digital age has brought to the professional services market."

After nearly nine years practicing with large law firms in Manhattan, Kaplan, named to the inaugural Fastcase 50, has become a leading writer and industry analyst in the legal community. In addition to serving as the principal researcher for the *Advice From Counsel* series since its inception, he has been the keynote speaker for events in Australia, Canada, the United Kingdom, and throughout the U.S, including the 2010 ABA Techshow.

Mike Kinnaman

Mike Kinnaman is a senior managing director in the FTI Technology practice. Mike leads the marketing strategy for FTI Technology's e-discovery software, services and consulting business. He has contributed to industry thought leadership through participation in organizations such as the Sedona Conference RFP+ eDiscovery Vendor Panel, was a founding member of the Electronic Discovery Reference Model (EDRM), and has been quoted on e-discovery in the New York Times and Fortune. Mike was the vice president of marketing and business development at Attenex when the company was acquired by FTI in 2008. Prior to Attenex, he held marketing leadership positions at Noetix Corporation, Appian Graphics, and Spectra Logic. Mike has a B.S. of Journalism and Mass Communications from the University of Kansas.

About Advice from Counsel

Through in-person events, virtual meetings, webcasts, surveys and reports, Advice from Counsel helps e-discovery leaders share ideas and advice with peers in an open and collaborative forum. Begun in 2008 as an annual survey and report on top e-discovery trends, Advice from Counsel has evolved into an interactive community of e-discovery professionals working to strengthen the people, process and technology at the core of e-discovery. Advice from Counsel is sponsored by FTI Technology.

