

Advice from Counsel: Best Practices on Controlling E-Discovery Costs

By Ari Kaplan, Principal of Ari Kaplan Advisors

Introduction

While all companies deal with e-discovery in some form, few publicly share their best practices regarding e-discovery tools and processes. Many corporations view their e-discovery processes and tools as a competitive advantage in litigation matters, others are just naturally conservative when discussing such an obviously sensitive topic, and even more are still struggling to find their own e-discovery Utopia.

“The days of getting the single line item invoice from the law firm are over. The GCs are being asked to justify these costs and must explain their necessity.”

So, if case studies are few and far between in e-discovery, how can companies obtain inside intelligence on best practices from corporate counsel and IT? And, what specific steps are companies taking to reduce the overall cost of e-discovery?

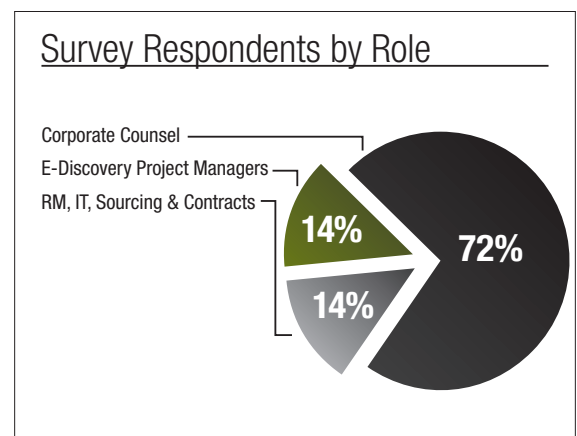
These questions are both urgent and timely. The legal community has changed more dramatically in the past twelve months than in the past decade. The economy has forced law firms to question the fundamental manner in which it provides, as well as charges for, legal services. Corporations are downsizing IT and legal budgets while still expecting their legal teams to produce the same results with fewer resources, including the use of outside counsel. The requirement to do more with less has led many to call for cost reduction, expense management and alternative billing in litigation, with a particular focus on electronic discovery. As one survey respondent said, “the days of getting the single line item invoice from the law firm are over. The GCs are being asked to justify these costs and must explain their necessity.”

In an effort to answer these questions, in-house counsel and IT were surveyed across a variety of industries. From basic questions to advanced e-discovery issues covering processes, e-discovery tools, vendor/service provider management, legal and IT integration, structured data collection and review, international litigation, and budgeting, among others, their responses and advice have been aggregated into this report.

Participants

127 professionals from Fortune 1000 corporations were contacted and asked for their participation in this study. Of that group, 29 agreed to participate in telephone interviews ranging from 15 to 45 minutes.¹

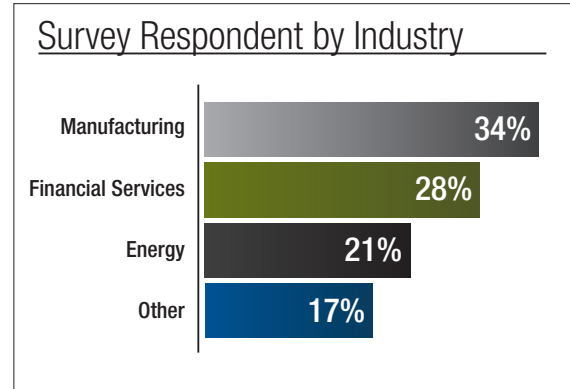
72% of respondents to the phone interviews were corporate counsel, 14% were electronic discovery project managers, and the remaining 14% included managers of records, IT security, strategic sourcing, and contracts.



¹ Interviews were conducted between June 11, 2009 and July 16, 2009.

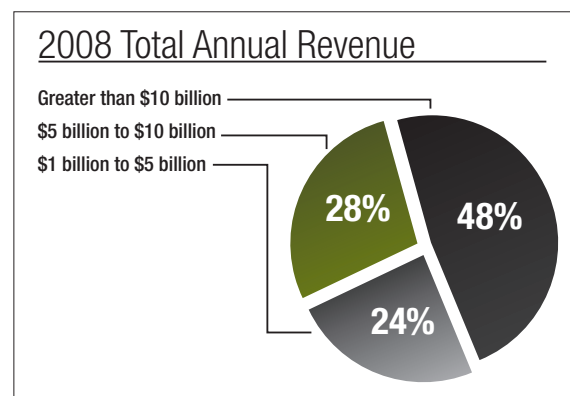
By industry:

- 34% were from manufacturing companies
- 28% were from the financial services industry including banking and credit institutions, as well as insurance companies
- 21% were from energy and utilities companies
- 17% were from other industries, including telecommunications, healthcare and technology



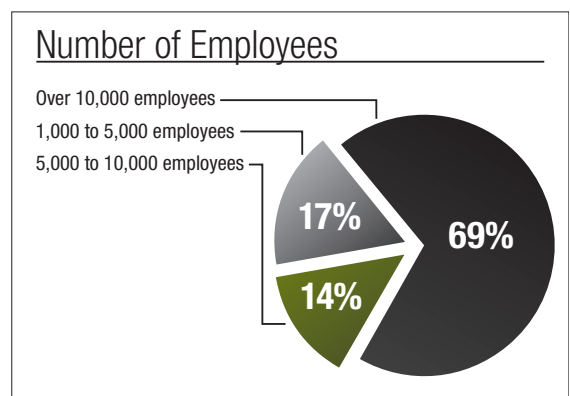
2008 revenues:

- 48% had total annual revenues greater than \$10 billion
- 28% had total annual revenues between \$5 billion and \$10 billion
- 24% had total annual revenues between \$1 billion and \$10 billion
- 0% had total annual revenues under \$1 billion



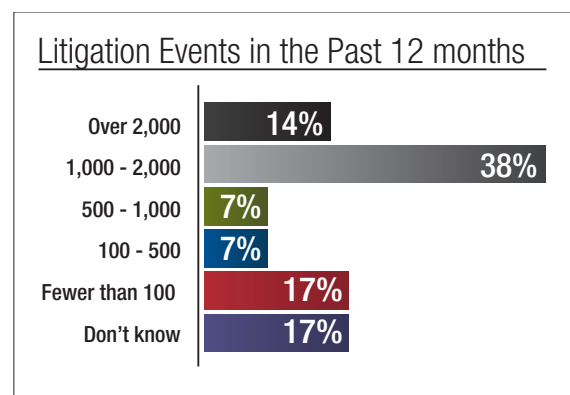
Number of employees:

- 69% worked for a company with over 10,000 employees
- 14% worked at companies with 5,000 to 10,000 employees
- 17% worked at companies with 1,000 to 5,000 employees
- 0% worked at companies with fewer than 1,000 employees



Number of litigation events in the past 12 months:

- 14% reported over 2,000 litigation events
- 7% reported between 1,000 and 2,000 litigation events
- 7% reported between 500 and 2,000 litigation events
- 38% reported between 100 and 500 litigation events
- 17% reported fewer than 100 litigation events
- 17% didn't know the number of litigation events



Ten Tips for Controlling Costs

E-discovery is big. It's complex. It has a lot of moving parts and people with different budgets, timelines, agendas and even jargon. There is no one-size-fits-all solution to e-discovery, and the best response for your company is dependent upon a number of variables, including your litigation profile, vertical industry, internal staffing, business processes and company culture. Based upon the needs of the company, some Fortune 100 companies choose to bring the entire process in-house and purchase technology and hire staff to support the end-to-end e-discovery process. Others prefer to completely outsource e-discovery, or bring only select processes and tools in-house.

The challenge for every company is finding the right mix of technology, people and processes to handle their e-discovery challenges in a cost-effective and defensible manner. The survey results below and interview responses highlight many of the common steps companies have successfully taken to reduce the cost of e-discovery. Ten key themes were often repeated and used by many, if not all, in helping to reduce their costs. These themes, highlighted by actual quotes from survey respondents, are:

One company was able to reduce the cost of document review by 67%, resulting in savings of nearly \$2 million in 2008.

1. “Since legal review is the biggest cost, focus on that area to find savings.”

72% of respondents cited legal review as the most expensive phase of e-discovery, referencing attorney fees and data volumes as key components for the cost. Implementing efficient tools and processes around legal review can produce real results. One company was able to reduce the cost of document review by 67%, resulting in savings of nearly \$2 million in 2008.

Respondents offered a range of measures to help reduce the cost of review, including:

- 86% process and reduce data sets in-house before sending them on for legal review. Using a mix of culling software and refined information management and collection processes, many companies reported being able to reduce the amount of data subject to legal review in-house, thereby reducing the cost of legal review.
- 59% outsource legal review to a third-party provider. Specialized review firms often have strong experience with advanced review technology and many provide pricing models that provide the client with increased predictability that can help control costs.
- Two out of every five respondents reported using clustering or visualization tools to speed the review process. Besides reducing the overall data set and the hourly rates for attorneys to review the data, many companies find success with visualization tools that can help attorneys review documents faster than using a linear review tool or process.

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During phone interviews, respondents provided additional tips and color on how to reduce the cost of review:

- **“Try to concentrate data at one or two hosting providers.”** Many, if not most companies use multiple law firms and legal service providers to assist with various matters, which includes handling the e-discovery process. Using multiple vendors can, however, result in a lack of repeatable and defensible processes. Just as streamlining internal processes can help reduce the cost and complexity of e-discovery, streamlining

external processes through standardizing on a few well-qualified partners can yield similar value. As one study participant observed, “When you have your data in one or two places, it’s a lot easier to rationally manage it. Most of us are used to having data all over the place and haven’t really managed it.”

- **“Make sure to manage collection and culling of the data in-house prior to hiring an e-discovery vendor.”** The majority of interviewees reported that their organizations reduced the amount of data that turned over to providers. One reported saving “several hundreds of thousands of dollars over the past three or four years” through a mix of in-house software, a refined information management policy, and processing data prior to legal review. Start with a very good document retention program, specifically maintaining a short retention period for e-mails. From there, investigate in-house culling tools that can reduce the amount of data sent to law firms and legal service providers for processing, review and production.
- **“Outsource document reviews. This is the area where companies can cut costs with the least amount of effort and most impact to enhance success.”** Since legal review is the most expensive portion of e-discovery, many companies initially consider bringing the complete process in-house to save legal fees. While this can help reduce outsourcing costs, it can be difficult to maintain an in-house review shop year-round and manage the “peaks and valleys” of litigation. Plus, in-house review for early case assessments and other targeted reviews have proven extremely effective, but it is not always necessary or cost-effective for that team to review the entire data set when they can instead help build case strategy. Just as respondents had reduced the cost of e-discovery by reducing the data set before legal review, finding outside review partners for initial review can often cost substantially less than relying on outside counsel for this stage of e-discovery. As an example, the use of contract attorneys saved a participating company about \$500,000 for a particular matter.

69% of respondents reported bringing software tools in-house to reduce the cost of e-discovery.

2. “You have to spend money to save money.”

Developing a long-term e-discovery strategy and deploying the tools and resources to support that strategy, can save corporations a significant amount of money in the long-run. This does require an investment up front to realize the long-term benefits. One respondent commented, “Due to pressure on budget, we try to minimize the costs of e-discovery and are willing to make investments if we know it advances that goal.”

69% of respondents reported bringing software tools in-house to reduce the cost of e-discovery, and 45% even hired internal staff to help manage the process. In comments, such as “don’t be penny wise and pound foolish,” a number of respondents suggested that corporate counsel implement proper systems so that the company has the ability to expand and adapt for the future. In addition, it’s important at the outset to “ensure that you have a comprehensive plan because coordinating e-discovery business unit by business unit is inefficient and costly,” highlighted one individual.

3. “Understand your own litigation profile and your specific needs.”

Despite the fact that 100% of those interviewed for this research study incorporated some cost-cutting measure(s) in their e-discovery operations, many noted that an organization cannot address its core concerns until it understands the universe in which it operates. For that reason, the interviews revealed a wide variety of suggestions based on certain fundamental principles:

- Understand your internal retention program and digital landscape first. Partnering with IT and records management to understand how and where your company manages its data is an important first step in developing appropriate e-discovery processes.
- Understand the types of litigation or regulatory matters you're involved with on a regular basis and the processes and tools to support those specific matters. For example, many tools were built for smaller matters and cannot scale up to handle multiple terabytes of data. Because of this, large companies in highly-regulated and litigious industries should consider scalability, as well as performance on large matters, an important feature when selecting tools. 90% of respondents said scalability was 'important' or 'very important' when selecting software tools, whereas 98% gave the same range of answers when selecting a legal service provider.
- Set realistic expectations on what can be handled in-house. When planning a resourcing strategy, consider macro conditions, such as the economy and how it will impact staffing.
- Do your homework on e-discovery best practices and the vendors and service provider offerings available. Seek out whitepapers, attend webinars and conferences, talk with industry experts, and verify provider claims, especially those companies that have been in the e-discovery market for less than a few years.
- Partner with a reputable e-discovery consultant that can assist in developing and executing on a repeatable, defensible and cost-effective e-discovery program for any type of matter.

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4. "Evaluate total solutions that can be used throughout the process, rather than in a single instance."

The issue of vendor and service provider management was a recurring theme throughout the respondents' answers, indicating that navigating the crowded and disparate market continues to be a major challenge for e-discovery teams. One respondent said "a seamless end-to-end solution is on everybody's wish list. That is why it is important to have a vendor who understands that the sale does not end with the installation."

A few respondents advised organizations, even those with experience, to retain an independent consultant once they understand their internal operations to optimally architect an e-discovery program and/or archive its records. "Bid out the work to fully understand what is available in the market and to identify partners that feature the most current capabilities," suggested one individual.

Once you have selected a partner, mandate that outside attorneys work with the partner's team. Select preferred providers for production, processing and first pass review then work to educate outside counsel on your preferred processes, providers and technology.

5. “We want one vendor and the ability to build a relationship.”

While several respondents commented that they were willing to use different vendors as long as they did their tasks well, the majority indicated that if possible, they would prefer to do more of the process with fewer vendors. In fact, 97% of respondents said “using fewer service providers to do more of the e-discovery process” was one of the more important considerations in the selection process, and 79% said the same when selecting a software provider. One individual reported that by changing the company’s e-discovery vendor and centralizing efficiencies, it has realized \$2 million in cost savings per year.

Managing multiple vendors for any project can be time-consuming, expensive and generally burdensome. For e-discovery, it can also increase risk. Manual work is error prone, especially when companies must move data through the nine-step Electronic Discovery Reference Model process using multiple applications.

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6. “Establish a budget and surround yourself with people that will stick to it.”

The difficulty in anticipating litigation, regulatory requests and investigations has prevented companies from planning for e-discovery events and assigning an appropriate budget. As e-discovery events and awareness have increased, however, so has a company’s ability to anticipate needed resources and appropriately budget. By understanding your company’s litigation profile and knowing how much you can spend, you can decide whether to “build from within, purchase external products or partner with someone.”

Upon establishing a budget, you may find that it is “hard to spend money on an e-discovery solution that you do not use all of the time.” For these companies, it may be “best to partner with someone who will help an organization avoid spending a lot of money on internal systems.”

As discussed earlier in the paper, there is no “one size fits all” solution for all companies, but having a good sense of your company’s litigation profile and corresponding budget can be a good starting point for ensuring that your company’s needs are met. Many companies have benefitted from bringing tools in-house, and others have found partnering with an outside provider more appropriate. “The benefit of partnering with a vendor is that you do not have to provide financial capital in order to purchase the system because if you are not working on a daily basis, it is not cost effective.”

7. “You have to have the right people on board or you will just be running in circles.”

One of the respondents opened the conversation about the relationship between the legal and IT departments with the comment, “We need the attorneys and IT folks to take a team approach. Lawyers and IT have to talk and don’t understand each other’s worlds. That is the reason that processing costs are one of the biggest issues right now.”

Based upon survey results, it's clear that legal and IT integration is a major focus for corporate teams. 83% report having an integrated e-discovery team with legal and IT representation, and 34% now rate the integration between the legal and the IT department regarding discovery matters as "excellent" while another 31% rate it as "good."

Developing effective communication between all departments impacted by e-discovery is crucial. Internal education on the ins and outs of e-discovery and team-building efforts can pay quick dividends and is one area that the corporation can completely control. Some participants start by asking IT how to reduce the costs that the organization does not necessarily need to outsource. They also encourage developing a relationship with IT and educating the technologists about attorney obligations.

83% report having an integrated e-discovery team with legal and IT representation.

8. "Hire an in-house e-discovery manager. That is the absolute best advice I can give to anybody."

In addition to strengthening the collaboration between legal and IT, creating a role of in-house e-discovery manager has also provided significant benefits to corporations. In fact, a number of the survey respondents hold this title and were able to speak more comprehensively about the process than those in legal and IT roles.

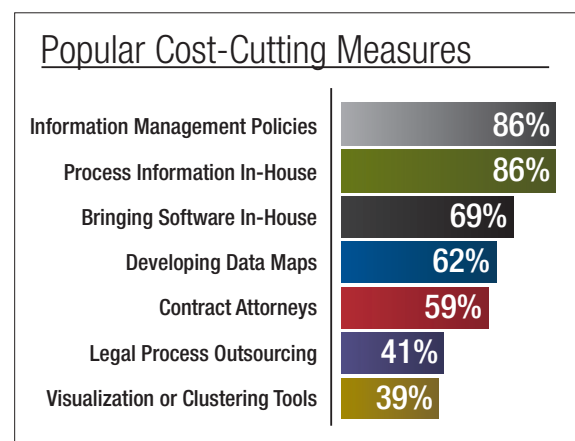
Creating an in-house position to oversee the process can help provide greater transparency to the process, improved budget control, and an ability to identify and respond to any threat of risk. The position can also provide a single point of control for the process and underlying technology whether in-sourced, outsourced or a hybrid mix.

9. "Internalize the costs by developing internal practices and investing in certain tools."

Even during a downturn, companies are choosing to streamline internal protocols before making certain external changes, with 86% developing and implementing more effective and reasonable information management, retention and destruction policies, and process more information in-house, with 86% doing so to reduce the overall data set for review.

The other most popular cost-cutting measures:

- 69% said bringing software in-house
- 62% said developing data maps
- 59% said utilizing contract attorneys
- 41% are using legal process outsourcing providers
- 39% are using visualization or clustering tools to speed the review process



10. "Viability is important, but e-discovery is such a young field that it can be unclear who is truly viable."

Company viability was listed as the second most important consideration for inside counsel when selecting both software and service providers. This finding is a subtle reflection of the uncertainty in the rapidly evolving e-discovery market.

The most recent Socha-Gelbmann survey shows that over 600 software vendors and service providers have an e-discovery offering. While it is a market that is growing in size and importance, industry analysts are predicting a coming wave of vendor consolidation, and some vendors have already left the e-discovery space. A recent Gartner research report, in fact, predicted that “by the end of 2009, there will be 25% less e-discovery vendors in the space” than in the previous year.

As with any major purchase, due diligence into a company’s financial strength and client experience is key. Check public earning statements, talk with industry analysts and other industry experts, and ask for client references when selecting a vendor. Since these companies often assist legal teams with a company’s most sensitive data, and often cases can continue for many years, understanding a software or service provider’s financial health is key to mitigating unnecessary risks.

Surprises

The survey produced a number of overall results that run contrary to some of the conventional wisdom within the industry. Here are some of those key takeaways.

Cost is *NOT ALWAYS* King

Even during one of the worst recessionary periods in the legal industry’s history, cost was not reported to be the most important factor when considering technology or a support team. In fact, defensibility was listed as a most important factor twice as frequently as cost.

Interviewees were asked to rate several factors from not important at all to most important. When selecting e-discovery software, the following factors were most commonly cited as “most important” for respondents:

- 62% rated defensibility as most important
- 41% rated the software provider’s viability as most important
- 38% rated minimal disruption to the company’s business processes as most important
- 31% rated cost as the most important

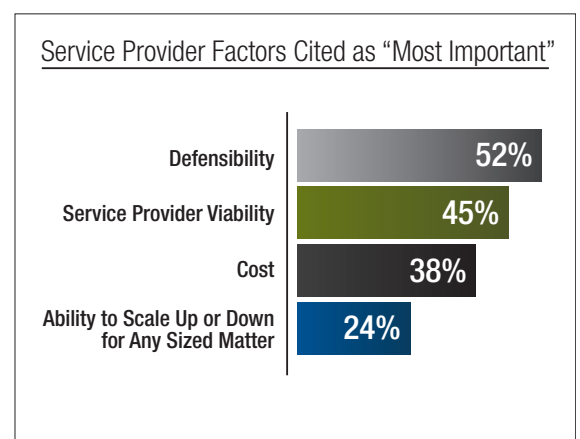
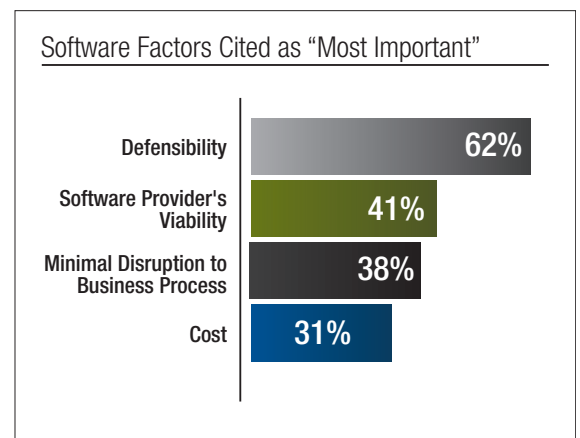
Likewise, when selecting an e-discovery service provider, the following factors were most commonly cited as “most important”:

- 52% cited defensibility as most important
- 45% cited company viability as most important
- 38% cited cost as most important
- 24% rated the ability to scale up or down for any-sized matter as most important

The balancing between utility and price has gained prominence in the faltering economy. “Cost is extremely important, but ultimately it is a cost benefit analysis. We buy expensive products when we know the ultimate expense is more costly,” revealed one individual. Another echoed that sentiment. “We will buy so long as we know that the investment is less than what we would pay the vendor. Due to the pressure on budgets, we try to minimize the costs of e-discovery and are willing to make investments if we know it advances that goal.”

Cost Calculations Remain a Mystery

When asked for specific details on cost calculations, and of the effectiveness of certain cost-cutting measures, the answers varied. Although 100% of the respondents engaged in certain efforts to reduce expenses, only 34% could describe their material cost savings, with only 21% providing figures.



- The highest amount was “projected savings of \$6 million in 2009,” but most estimates were much lower:
- Another reported saving “close to \$1 million in legal fees in 2008 over 2007” by bringing review staff in-house on a temporary basis, as well as changing legal service providers and law firms to handle certain matters.

Specific numbers, however, were coupled with overviews. “This is hard to determine,” revealed one participant. 66% of the respondents could not provide any figures at all. While this may seem low, the fact that a third of respondents were able to assign specific cost savings could be seen as progress in a relatively new and often reactive process.

International Cost Calculations Are Even More Mysterious

For international matters, only 17% could provide detail related to the cost differential between a U.S.-only matter and a multinational case. One respondent commented “it is more costly because you are educating counsel and service provider fees tend to double.” Another replied, “it is much more expensive to manage an international matter.”

Two respondents were able to provide specific references. One noted, “An international matter will cost at least three times as much as a local matter because the company needs to rely on external resources in translation.” Another echoed that point. “It is three to four times higher for an international matter,” the individual said. Despite the minor consensus that international litigation is higher, one respondent remarked that there is “not that much difference,” which further spotlighted the confusion regarding cost calculations.

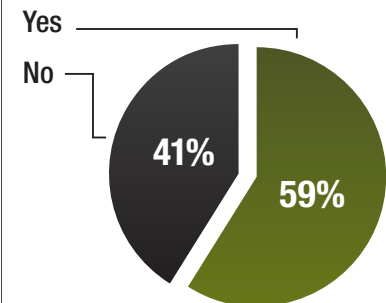
What is clear is that an understanding of your company’s international obligations is key as this can depend again on your industry and litigation profile. For companies with international requirements, consider developing strategic partnerships with firms that have offices around the world and can support international needs as part of your global e-discovery program.

Additional Findings

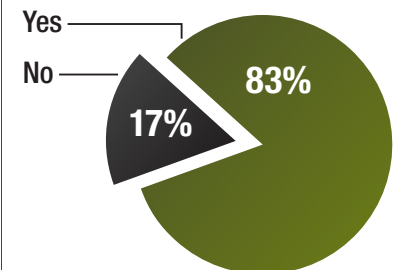
Each member of the corporate community is addressing the cost conundrum; however, every industry, and organization within that industry, is considering different aspects of its particular program in light of its culture and position on the litigation spectrum. As such, there is no single framework that applies to all litigants. Instead, there are broad guidelines that can help legal teams determine the strategy they should weigh against the costs and benefits of such an approach. These are a few of the findings that offer universal insight:

- **Multinational Litigation is Important, but Not a Primary Focus:** Given the globalization of business, 59% of companies have been involved in multinational litigation. Only 34%, however, could identify specific countries from which they needed to collect data.
- **Structured Data is Important, But Many Companies Still Do Not Have a Strategy:** 83% of companies have been required to produce structured data, but only 62% have a strategy to manage, collect, review and produce structured data for e-discovery.
- **Corporations are Facing an Increasing Number of Matters:** 38% had between 100 and 499 litigation events (including legal holds, government audit/regulatory requests, second requests, and current legal matters) in the past 12 months. And, 28% had over 500. 17% did not know the total number of litigation events in which their company was involved despite the fact that they were all responsible for legal operations in some way.
- **Scalability is Key:** Even the most sophisticated information management and culling programs are challenged to keep data volumes low. The ability to handle these large volumes was a key factor for respondents when selecting software and service providers.

Has your company been involved in multinational litigation?

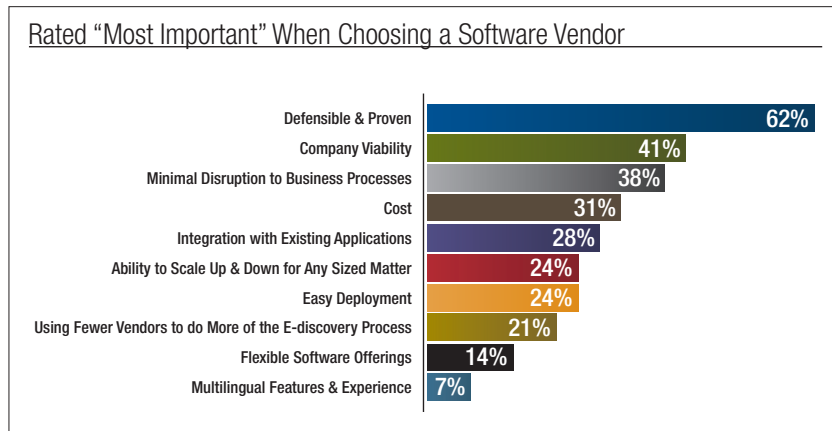


Has your company been required to produce structured data for a legal or regulatory matter?

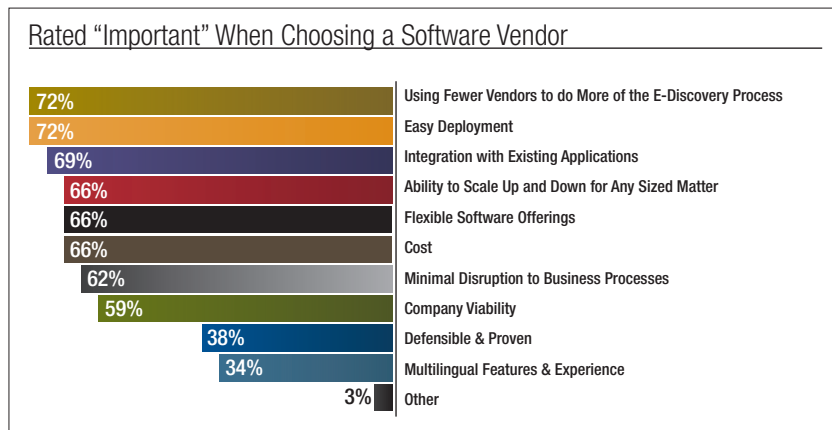


Study Results

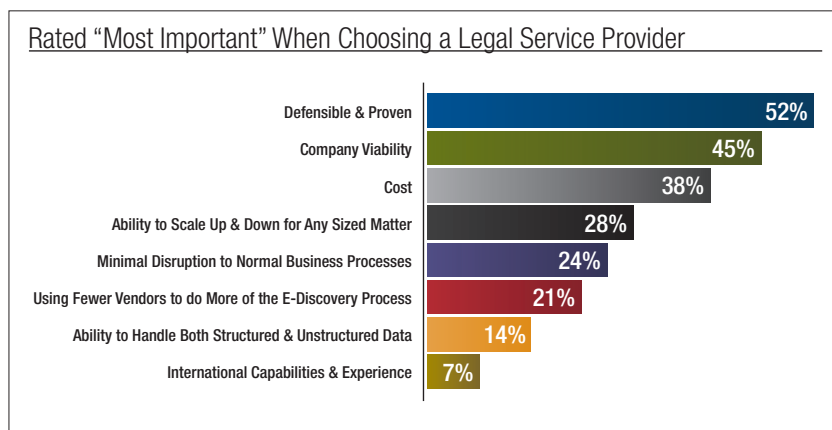
As part of the survey, respondents were often asked to rate certain criteria on a scale of one to ten, with one as “least important” and ten as “most important.” They could select ten or “most important” as many times as necessary. When it came to selecting software vendors, respondents stated that the following were “most important”:



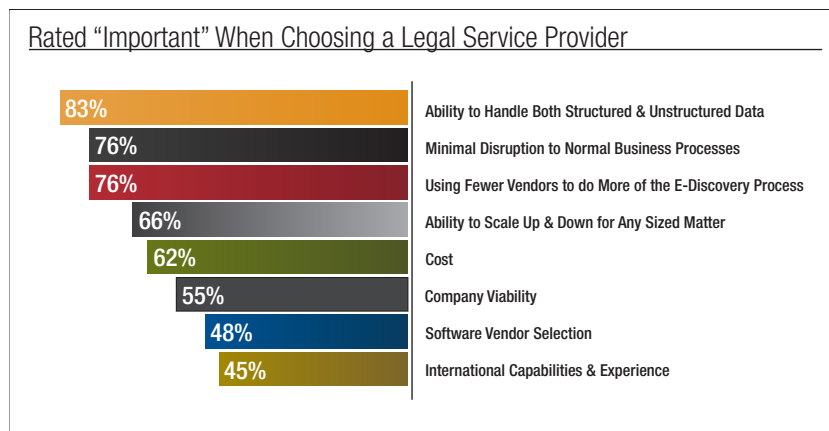
“Important” considerations for selecting software vendors were rated between a six and nine on the ten point scale:



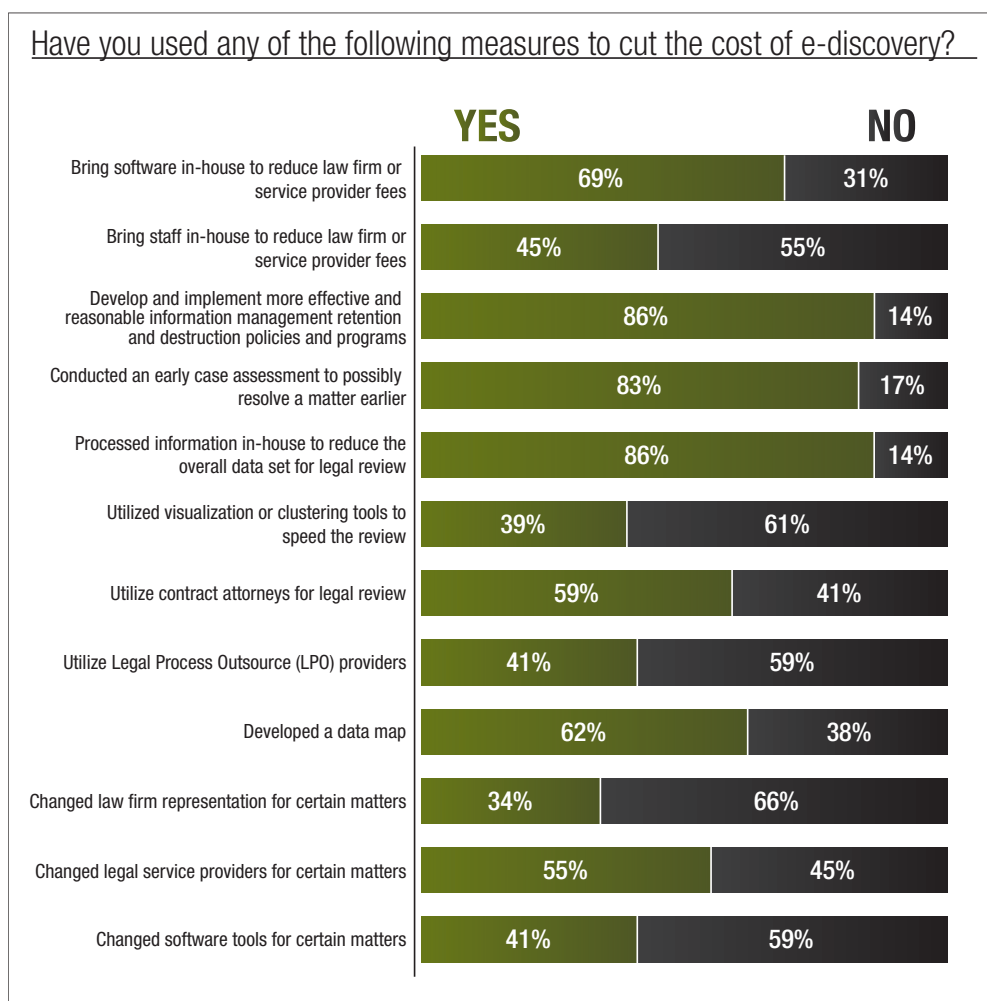
For selecting legal service providers, respondents stated that the following were “most important”:



“Important” considerations for selecting legal service providers were rated between a six and nine on the ten point scale:



When asked whether they had ever tried the following measures to reduce e-discovery costs, respondents answered as follows:



Forecasts

Based upon the survey responses, it is possible to forecast coming trends that e-discovery teams should be aware of:

- The importance of vendor viability and a growing desire to do more of the e-discovery process with fewer vendors will cause corporations to select larger and more established providers, further accelerating vendor consolidation within the e-discovery market.
- Corporations want in-house control of costs and risks, but are not likely to bring the entire process in-house, even in good economic times. This puts the onus on vendors to provide tools and offerings that are flexible in deployment options and can work well with other complementary tools.
- Since 17% of companies still do not have an integrated e-discovery team with legal and IT representation, the collaboration between the two disciplines will continue until there is almost universal acceptance. In addition, the inter-departmental relationships will grow more positive as the teams help their organizations achieve successful results.
- Given that 38% of companies do not have a strategy to manage, collect, review and produce structured data for e-discovery, more organizations will be developing protocols for these practices. This will be particularly true for the 17% of companies that have not yet had to produce structured data in litigation.
- Corporations will continue to develop a deeper understanding of their actual costs and the benefits of incorporating strategies to manage expenses.

About Ari Kaplan

Ari Kaplan is the author of the Amazon.com bestseller *The Opportunity Maker: Strategies for Inspiring Your Legal Career Through Creative Networking and Business Development* (Thomson-West, 2008), which the New York Law Journal called “a must-have treasure box of marketing ideas.” He practiced law with large firms in New York City for nearly 9 years and has been recognized in the Miami Herald, the New York Post, the ABA Journal, Above the Law, the National Jurist, the Chicago Lawyer, the California Recorder, and other publications.

As the principal of Ari Kaplan Advisors, he addresses professionals internationally about self-marketing, business development, getting published and dynamic networking. He has published over 200 articles, served as a legal commentator for CNET Radio and has been interviewed on CNN. Kaplan received Apex Awards in 2007 and 2008 for feature writing and was named a “Law Star” by LawCrossing.

He has spoken at law firms, law schools and bar associations nationwide, including as a keynote speaker at the National Association of Law Placement’s Professional Development Institute, the Louisiana State Bar Association’s Solo & Small Firm Conference, and the International Litigation Support Leaders Conference, among others.

Kaplan serves as a law-related ghostwriter for a number of companies, firms and individuals in the legal industry preparing their white papers, client alerts, and customer research. He holds the number one Google ranking for ‘legal technology ghostwriter’.

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