

**ADVICE**<sup>TM</sup>  
**FROM COUNSEL**

**Measuring Your  
E-Discovery Program  
Against Industry, 2015**

*Advice from Counsel is sponsored by:*

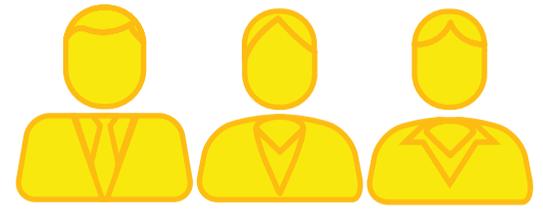


# Introduction

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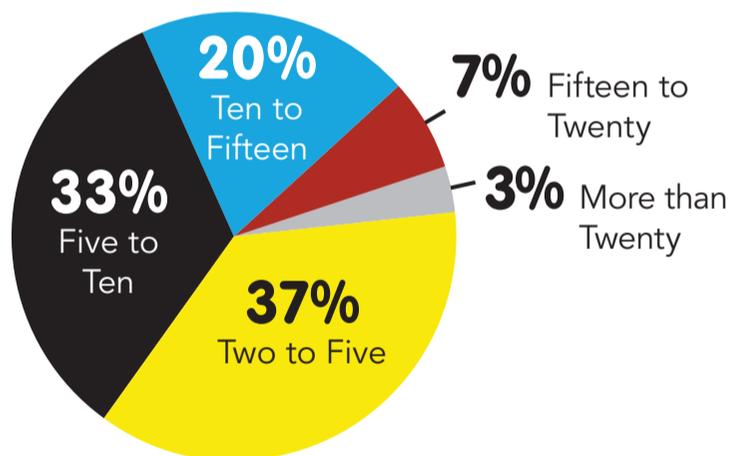
Over seven years and nine reports, the *Advice from Counsel* study has shared the opinions and advice of inside counsel from some of the world's largest corporations about the e-discovery process. The 2015 study builds on this strong tradition, with 31 in-house counsel from Fortune 1000 organizations sharing their advice and perspectives across a range of e-discovery trends. This year's study covers a number of growing corporate challenges, from budget transparency and retention policies to data security and potential amendments to the Federal Rules of Civil Procedure. From these results, legal teams can measure their own program's effectiveness against the best practices of in-house peers.

# In-House Staffing



E-discovery is a team effort that spans legal, IT and security in addition to outside counsel and service providers. It's interesting to note that 80% of respondent organizations have fewer than 10 people working on e-discovery, even when considering cross-functional teams (and large corporation sizes). Respondents discussed establishing repeatable workflow, regular reporting, process audits and cross-team collaboration as key elements for driving better efficiencies, even with smaller teams.

## How many employees (legal, IT , etc.) support your company's e-discovery process?



## Quotes:

"I wish this number were bigger."

"We have 11 in total. We have five full-time employees on the e-discovery team in legal, four on an IT collections team, and two administrators. We are small but mighty."

"We have 15 in legal and it is part of the job of anyone in the litigation department."

# Increasing Budget Transparency



The disparate e-discovery process, spanning across a variety of internal and external stakeholders, is a frequently cited reason for a lack of budget transparency. As the e-discovery market matures, more corporations are developing Master Service Agreements (MSAs) to negotiate for alternative billing models and greater budget predictability. MSAs with certain service providers can include more of the process - collection services, software fees and even managed review – so that the overall strategy is consistent.

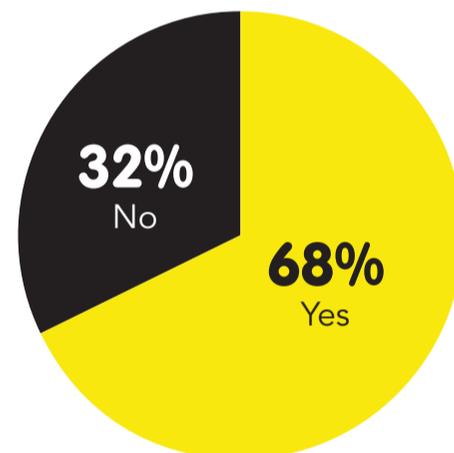
## Quotes:

“There are a lot of pieces to that and we haven’t assembled them.”

“The matters that require e-discovery are divided between different divisions at the company and there is no centralized way to make this calculation.”

“It swings wildly depending on the docket. Some cases demand a lot and others do not.”

## Can you quantify how much you spend on e-discovery per year?





# Reducing E-Discovery Costs

As highlighted in the 2014 mid-year study, *Advice from Counsel: 13 Ways Your E-Discovery Manager Thinks You Can Reduce E-Discovery Spending*, a growing trend among leading e-discovery teams is the use of analytical tools earlier in the e-discovery process. While some companies still review documents in a linear fashion using older review platforms, analytics and predictive coding are enabling legal teams to conduct surgical examinations of the data to uncover the facts earlier. This is helping to shape case strategy faster, reduce the amount of data reviewed and produced, and ultimately lower the overall cost of e-discovery.

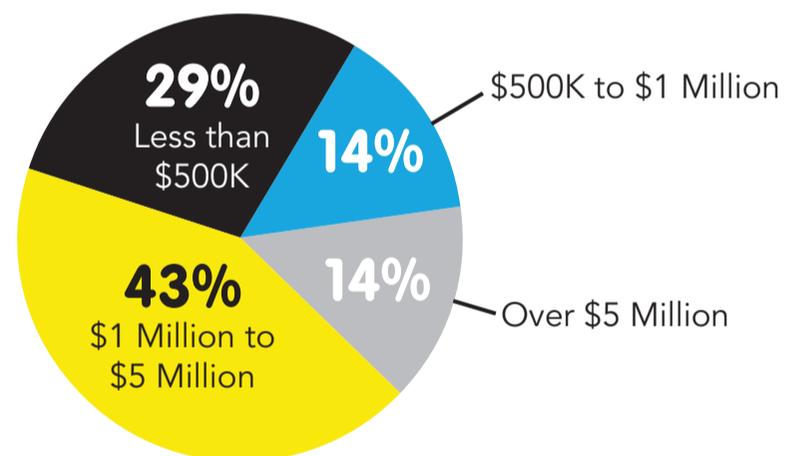
## Quotes:

"Cost is important, but our priority has always been that discovery not detract from the merits of litigation."

"Average is meaningless because one year spending was \$200,000 and another year it was \$11 million."

"I see the bills and hold my nose. I know they are pretty expensive for the value we are getting. It is more expensive than I thought it would be."

## What is the dollar amount you spend on e-discovery per year?



# Evaluating Your Email Retention Policy



For some industries, email retention policies are dictated by regulations. For others, as one respondent noted, "Our retention policy is for infinity since there is no policy." As information governance grows in importance and cybersecurity breaches rise, many companies are beginning to reevaluate their existing policy (or lack thereof) to reduce storage costs and potential risk. Partnering with counsel and service providers to develop, document and educate employees on new retention requirements can help ensure defensibility. Implementing meaningful information governance strategies, including remediating old data and legacy applications, can provide additional cost-saving benefits.

## Quotes:

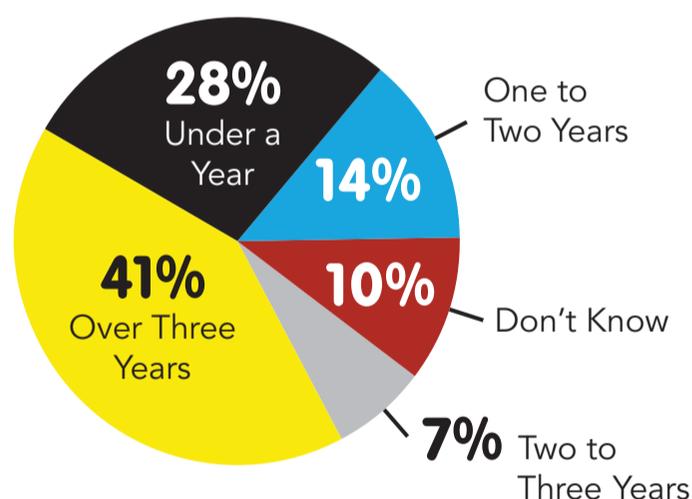
"There is no automatic delete function. The company is considering a change in 2015 or 2016 given the cybersecurity risks. We have too much data."

"Other. The company does not have a time period. It is based on size and is therefore user defined. Users get 250 MB of space and have to either delete their messages or archive their material in a PST file."

"There is no policy. The duration of time a document is kept is driven by business need and record type."\*

\* Interestingly, this quote summarizes the perspective of quite a few respondents given nearly half keep emails over 3 years and many do not even know the length of time of the retention policy.

## What is the length of time your company keeps emails as part of its normal retention policy?





# Law Firm Security

As the respondents' quotes indicate, many have not had in-depth security discussions with their law firms (although they may do so soon). Also, while most respondents utilizing large Am Law 200 law firms felt secure about their own firm's security, some expressed concern about their firm producing sensitive materials to opposing counsel on matters involving smaller firms with little to no security staff or safeguards. For matters that do not have "law firm parity" one lawyer respondent has successfully argued for the use of a central repository controlled by a service provider whereby the various law firms can access produced documents without sacrificing security. Clearly, this is a top priority and as data breaches continue we can expect to see more creative approaches to ensuring data protection.

## Quotes:

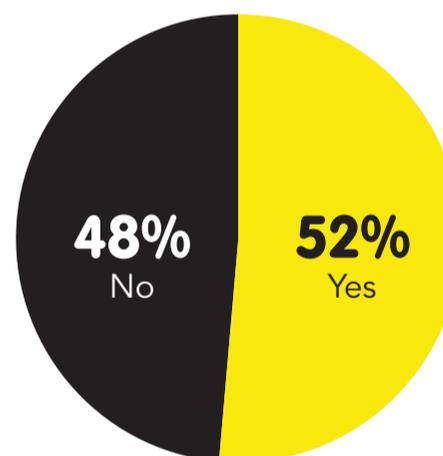
"In the past, law firms have only been required to certify that their networks are secure, but now the company is in the process of mandating much stricter requirements."

"We do not, but that would be a great idea. It seems like such an obvious thing, but I have never really thought about it before."

"The master services agreement contains provisions about data protection (from technical to practical)."

"Outside lawyers are required to maintain data within the company's firewall. The company does not turn data over to its outside counsel."

## Do you have any security requirements for law firms that work with you?



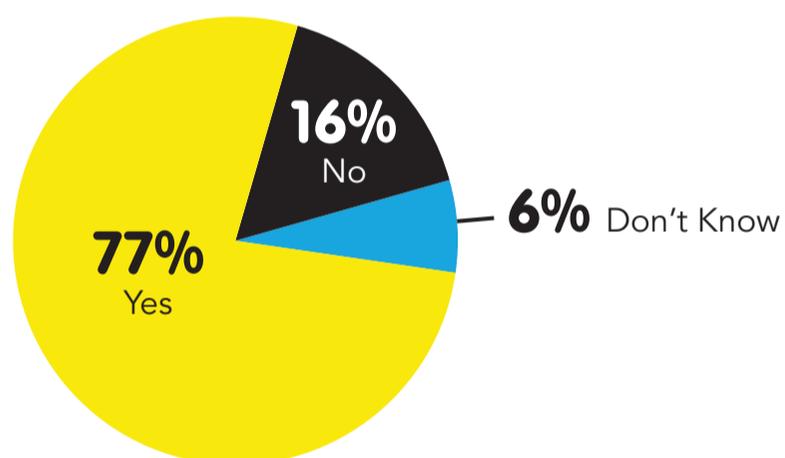
"We expect law firms to protect our data and information, including privacy and privilege, but we don't have specific requirements. Maybe that is something we should look at. Thank you!"



# Service Provider Security

As with on-boarding any new service provider or partner, organizations should conduct information security risk assessments that analyze the provider's backup protocols, security system, and also develop guidelines on individual access to the sensitive data.

**Do you have any security requirements for service providers that work with you?\***



## Quotes:

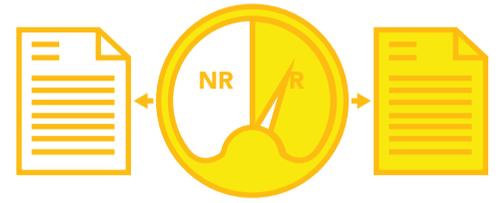
"There are extensive requirements, including a strict review by the IS team and potential outside visits."

"The company requires adherence to certain requirements and conduct period evaluations. The service provider's security protocols are factored into the RFP process."

"For service providers, the IT department performs a hack and penetration test to ensure that the files are secure. The distinction between treatment of law firms and service providers makes zero sense to me, but is a battle above my pay grade."

*\*Due to rounding, some totals may not equal 100 percent.*

# Predictive Coding



While predictive coding is not a silver bullet to eliminate the cost and burden of e-discovery, respondents clearly view it as a helpful tool to have in the arsenal. Testing the software on a recently completed matter or partnering with an established provider can enable teams grow more comfortable with the software and workflow. Respondents found predictive coding useful in prioritizing review materials or making sense of opposing productions, although many warned it is not appropriate for all cases, depending on the matter and data types involved.

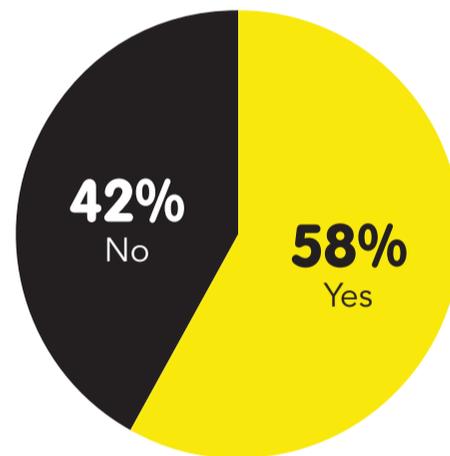
## Quotes:

"Yes. When the company uses predictive coding as part of its QC and privilege process, it does not disclose it. On all other occasions, it provides disclosure and discusses with opposing counsel."

"I did not find predictive coding was very good. The case was a highly technical construction power plant matter with many acronyms and twists/turns for the potential solution....At the end of the day the lawyers had to review the entire set anyway."

"Have only used it internally to prioritize custodians or documents, as well as quality control checks. In its template, the company gives itself and the other party the option to use predictive coding."

## Have you used predictive coding before?



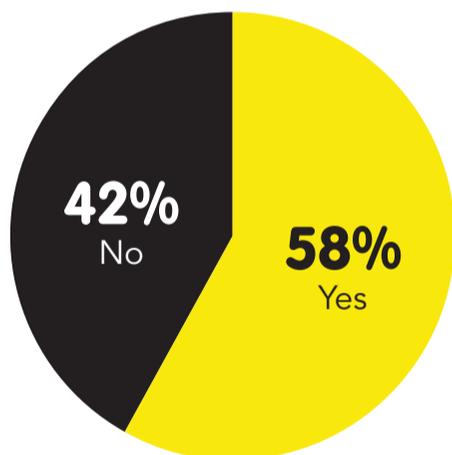
"Yes. It is best used as a tool to help with your review. I don't know we are at a place where we can reveal all of the use cases. Using predictive coding with really good reviewers who know what they are doing is ideal. We still do a hybrid."



# Re-Using Data

For organizations with similar matters that involve overlapping custodians and data, developing a multi-matter repository can produce substantial savings. They can collect, process and review materials once then use that same data on future matters, eliminating the need to repeat the whole e-discovery process, and saving money on costly privilege review. Even for those companies without a multi-matter repository, creating a centralized coding template for use across all matters can help create greater efficiencies in the legal review process.

**Do you currently re-use coding decisions made on documents for previous matters, such as privileged documents?**



## Quotes:

"In theory, we strive to, but I'm not sure how often it happens."

"We always reinvent the wheel."

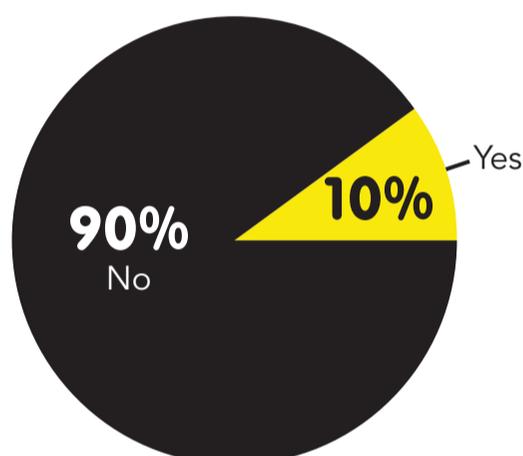
"Yes, but not often because the types of cases the company has do not lend themselves to sharing coding decisions."



# State E-Discovery Rules

Nearly 90 percent of the respondents revealed that they are not seeing any impact at all from state-specific protocols. In fact, the only jurisdictions where participants are experiencing any pressure are in California, Maryland and Minnesota.

## Are you seeing any real impact of state e-discovery rules?



## Quotes:

"I experienced a case where another state's e-discovery rules were imposed on an out-of-state company."

"Yes. There is a special master in a case in Maryland applying state rules and some issues in Minnesota. Most of the larger cases are driven by the federal rules."

"No. Most work is driven by federal rules although the state courts are making rulings related to the state's FOIA requests, which seem to be impacting e-discovery."

"Yes. In California, for example, e-discovery rules are written to mirror the federal rules, the federal case law becomes highly persuasive. It makes the playing field clear in terms of analyzing and deciding case law. Those jurisdictions that don't have e-discovery rules or which differ radically from the federal rules are more problematic."

# Potential Changes to the Federal Rules of Civil Procedure (FRCP)



Most respondents were cautiously optimistic that FRCP changes could more clearly define preservation requirements and help reduce the number of organizations that “over preserve” due to spoliation concerns. Whether the language is clear and counsel feel empowered to act upon any changes remains an open question among several more skeptical respondents.

## Quotes:

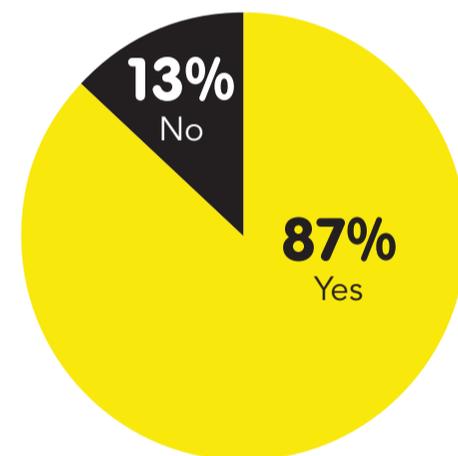
“Yes. I am optimistic about changes in proportionality, but it depends on what judges do.”

“Yes I think the changes to rule 37 removing sanctions for timely destruction of information will eliminate unfair leverage in negotiations.”

“Yes. Moving the proportionality analysis into the definition of the scope of discovery is sea changing because it gets to issue of proportionality in preservation. If the rules are adopted and the scope of discovery moves to a proportionality analysis, it will change the process because there are currently no parameters around the scope of preservation.”

“No. They may be helpful providing a more consistent standard regarding spoliation standards. I don’t think the new emphasis on proportionality will make a substantial difference although it is nice language.”

## Are you following the news about potential changes to the Federal Rules of Civil Procedure?



“I hope so. Rules related to reasonableness should have an impact. There has been language in the rules for years that can temper the amount and expense of e-discovery, but outside counsel has not used it effectively. This is a step in the right direction.”

# Appendix

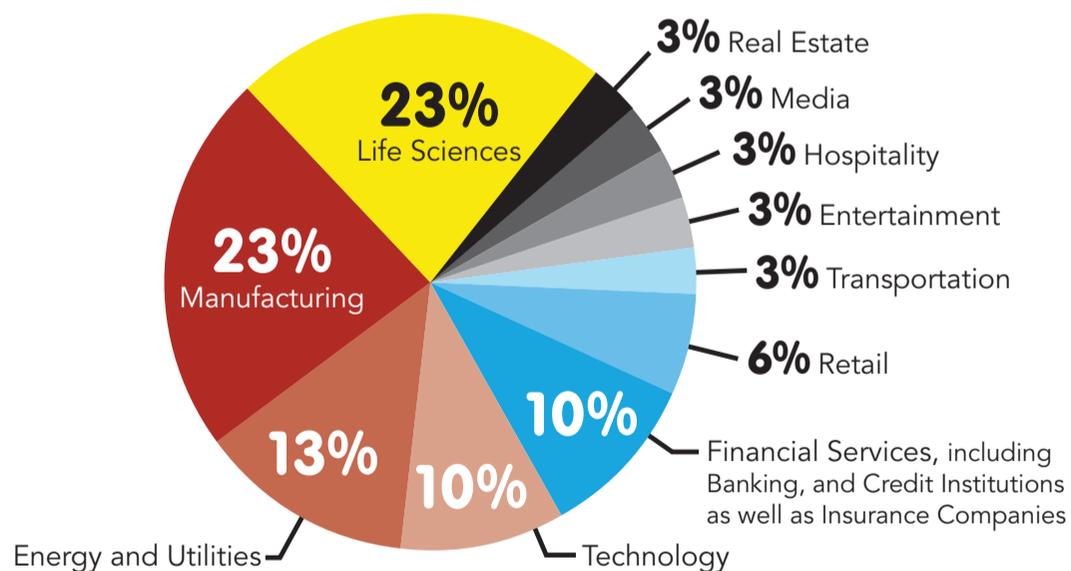
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Ari Kaplan Advisors personally interviewed 31 in-house lawyers with responsibilities that included e-discovery. All participants were from Fortune 1000 corporations and spoke by telephone, under condition of anonymity, during November and December of 2014.

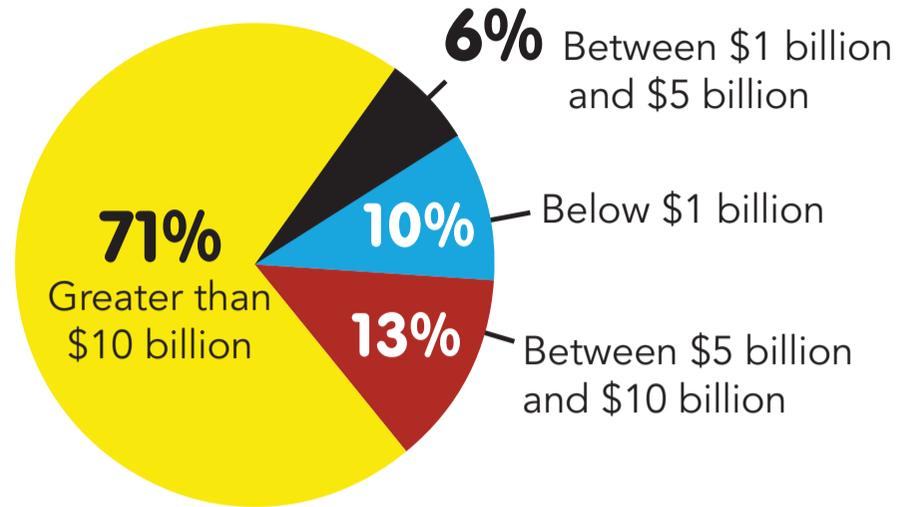
Of this year's participants, 100% develop and implement e-discovery processes; 94% select e-discovery tools and vendors for their organization; 81% implement e-discovery technology; and, 81% manage the e-discovery budget.

71 percent of participating organizations had total annual revenues greater than \$10 billion and 74 percent had over 10,000 employees. In terms of litigation events over the past 12 months, 42% reported managing 100 to 500 litigation events, and 45% reported managing more than 500 litigation events.

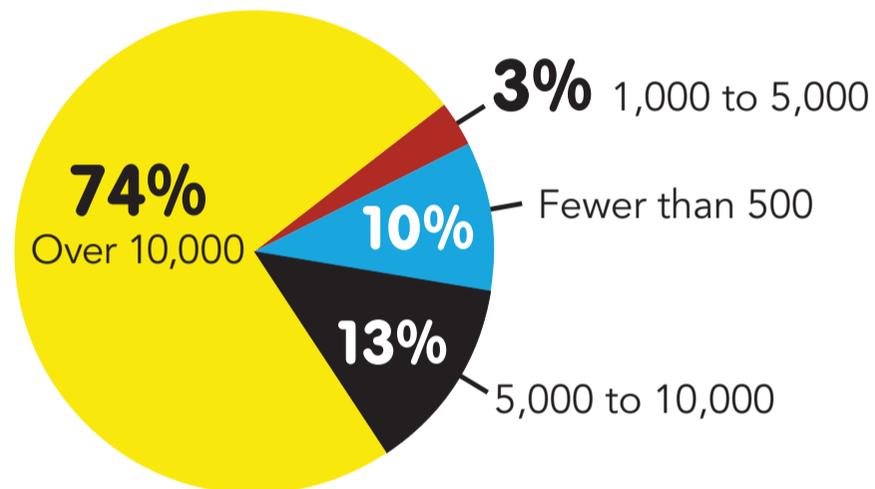
**Participants by industry:**



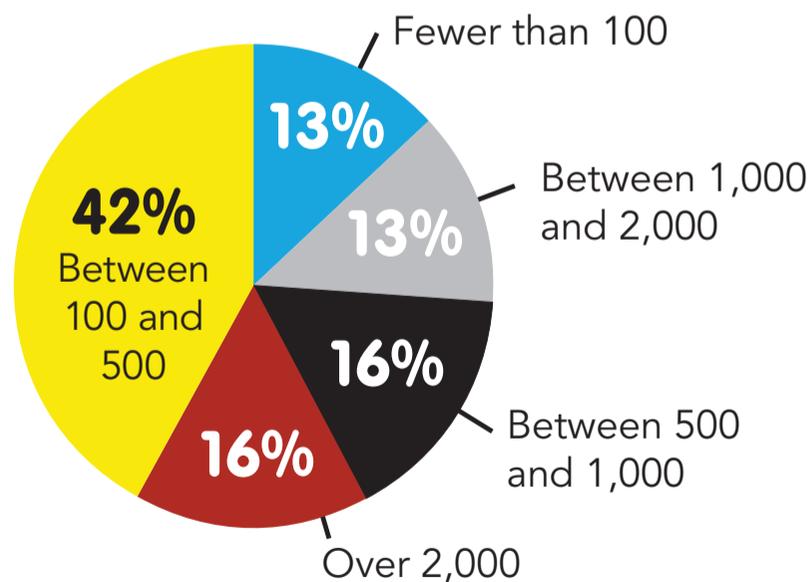
### Participants' 2013 revenues:



### Participants' number of employees:



### Participants' number of litigation events in the past 12 months:



# About Advice from Counsel

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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. For more on *Advice from Counsel*, please visit [www.ftitechnology.com](http://www.ftitechnology.com).



# About the Authors

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## 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 New York City, Kaplan, named to the inaugural Fastcase 50, has become a leading legal industry analyst and has served as the keynote speaker for events in Australia, Canada, the United Kingdom, and throughout the U.S. He produces a variety of annual benchmarking reports and has been the principal researcher for the Advice From Counsel series since its inception.

He is also the founder of two charitable endeavors, serves as a little league baseball coach, and is an Ironman triathlon finisher.

## 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 communications 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.