INSIDE E-DISCOVERY:
THE STATE OF E-DISCOVERY ACCORDING TO CORPORATE COUNSEL

SURVEY FROM BDO CONSULTING FINDS MIDDLE MARKET TRAILS IN ADOPTION OF E-DISCOVERY TECHNOLOGY

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The *Inside E-Discovery Survey by BDO Consulting* is a national survey conducted by ALM, a global leader in specialized business news and information serving the legal, real estate, consulting, insurance and investment advisory industries, and an independent and impartial research firm. ALM surveyed 140 senior in-house counsel at leading corporations throughout the United States to collect their insights for BDO Consulting's second annual study.

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"As the universe of Big Data continues to grow, and the already complex regulatory environment becomes more challenging, it's imperative that technology play a central role in determining what information is ultimately relevant to pending litigation or an investigation."

– Stephanie Giammarco, BDO Consulting Partner and
Forensic Technology Services Practice Leader

Introduction

E-discovery traces its origins to the dawn of the digital age. As far back as 1999, a University of California study found that 93 percent of all information generated during that year was digital in nature. Yet "e-discovery" didn't officially become part of legal parlance until 2006, fourteen years after the first-ever text message was sent.

Since then, the magnitude of electronically stored information (ESI) has increased exponentially. The IDC anticipates that the volume of data being generated globally will exceed 40 zettabytes by 2020. Compounding these data challenges is the growing complexity of the global regulatory environment. Anti-bribery and anti-corruption enforcement acts targeting multinationals have globalized e-discovery, adding foreign data privacy laws into the mix.

In this highly regulated and litigious digital age, a robust e-discovery program is essential. Falling behind on the advances in e-discovery yields inefficiencies, increased costs, as well as possible allegations of incompetence or non-compliance.

Taking the pulse of e-discovery to identify key challenges and opportunities impacting corporations in the year ahead, the second annual *Inside E-Discovery Survey by BDO Consulting* examined the opinions and insights of 140 senior in-house counsel at leading corporations throughout the United States.

The survey found that organizations have made relatively little improvement in their e-discovery technology capabilities over the last year, with the middle market falling the furthest behind. Thirty-eight percent of all organizations report they do not employ any recent e-discovery technological advances. This percentage rises to half (50 percent) when looking at organizations with revenues between $100 million and $1 billion ("middle market").

This suggests a seismic shift is needed in the way organizations and their counsel approach e-discovery. Though the legal industry has long been hesitant to adopt new technologies, it would be wise to consider such advances in e-discovery. Organizations who take advantage can better scope their projects, save time and money, and net greater results.
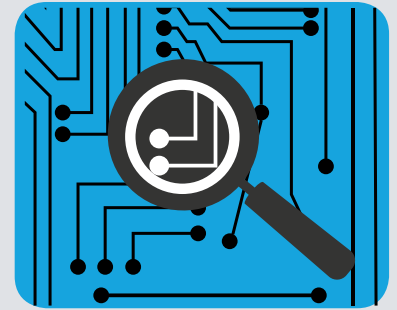
38%
of all organizations report they do not employ any recent e-discovery technological advances.
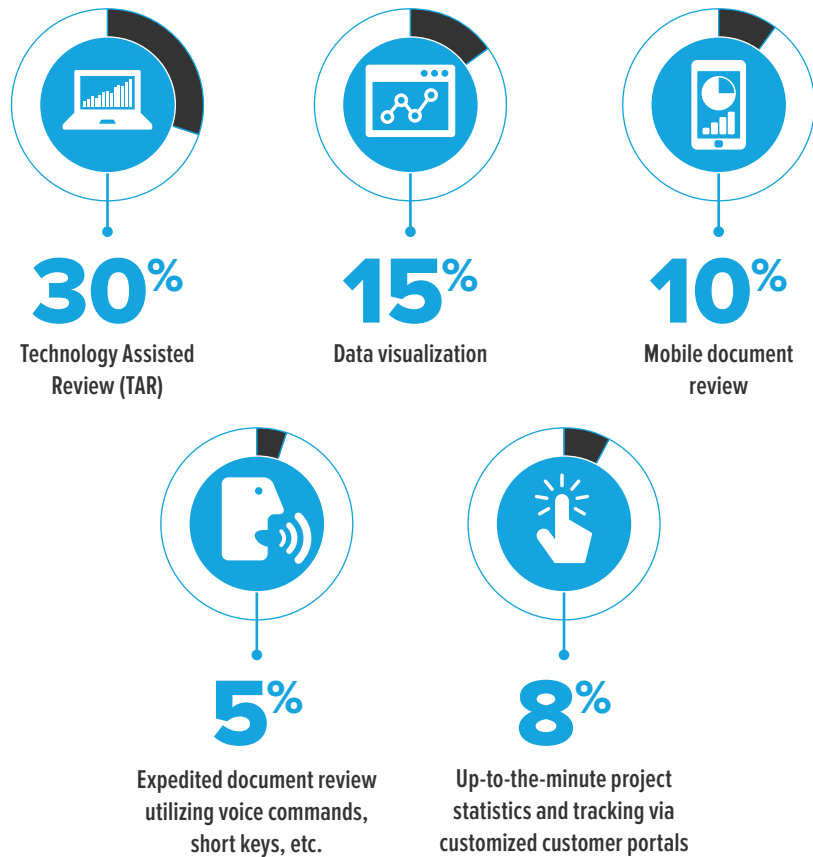
Corporate Counsel Remains Behind the Technology Curve

In last year's *Inside E-Discovery Survey*, the majority of respondents (55.4 percent) self-identified as "late adopters" of new e-discovery tools and technologies. Only 5.4 percent identified their organization as an "early adopter."

In line with last year's findings, adoption of crucial e-discovery innovations remains relatively low, with the middle market dragging its feet the most. Thirty percent of middle market organizations have adopted technology-assisted review, compared to nearly half (47 percent) of organizations with revenues of $1 billion or above. Similarly, just 15 percent of middle market organizations have adopted data visualization techniques, compared to 27 percent of larger organizations.

WHICH OF THE FOLLOWING INNOVATIONS/TECHNOLOGICAL ADVANCES ARE YOU CURRENTLY EMPLOYING WITH RESPECT TO E-DISCOVERY?

Middle Market E-Discovery Technology Adoption

30%
Technology Assisted Review (TAR)

15%
Data visualization

10%
Mobile document review

5%
Expedited document review utilizing voice commands, short keys, etc.

8%
Up-to-the-minute project statistics and tracking via customized customer portals

(50% responded "None of these")

"While some larger organizations have started to adopt technology, the middle market is late to the game. Not only do such tools reduce e-discovery costs, they can result in better case outcomes. It is critical for organizations of all sizes to evaluate and implement these technology advances as they become increasingly mainstream."
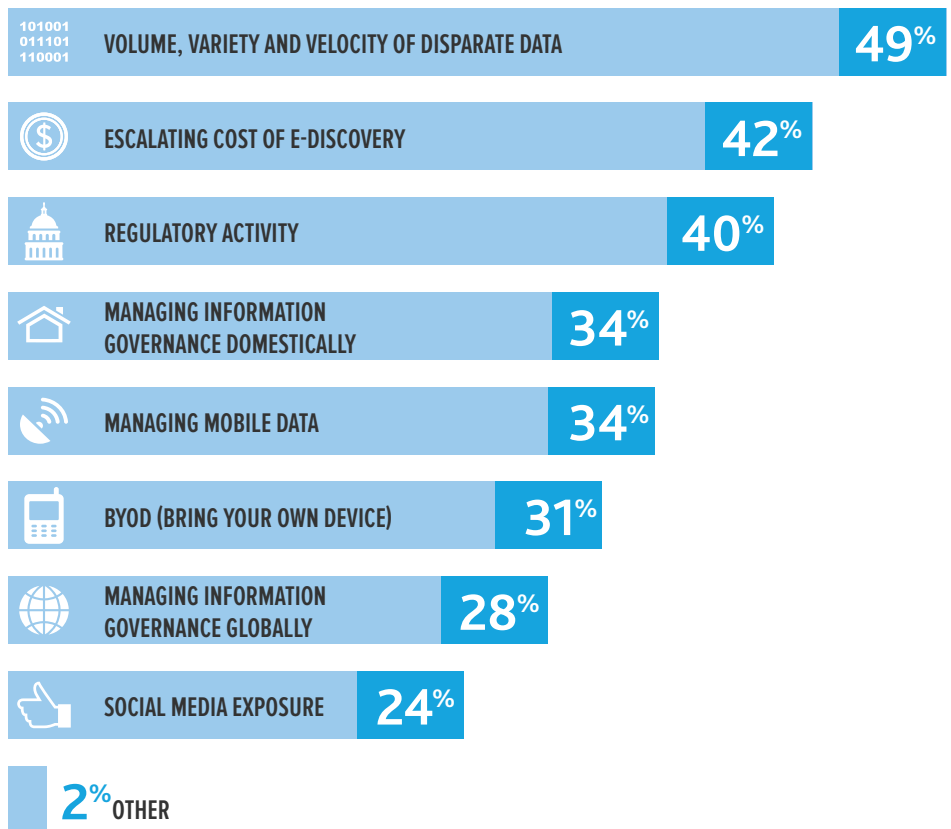
– Douglas Herman, Principal in BDO Consulting's Forensic Technology Services Practice

Struggling to Put the Lid on Big Data

When evaluating the e-discovery issues that will have the greatest impact on their organizations, corporate counsel expressed the most concern about their organizations' ability to handle the growth of data. Almost half (49 percent) cited the volume, variety and velocity of disparate data as the e-discovery-related issue that will have the greatest impact on their organization looking forward. The broader concern this year over managing the explosive increase in data generation is consistent with last year's survey results, when respondents listed managing mobile and social data as the top e-discovery issue looking forward.
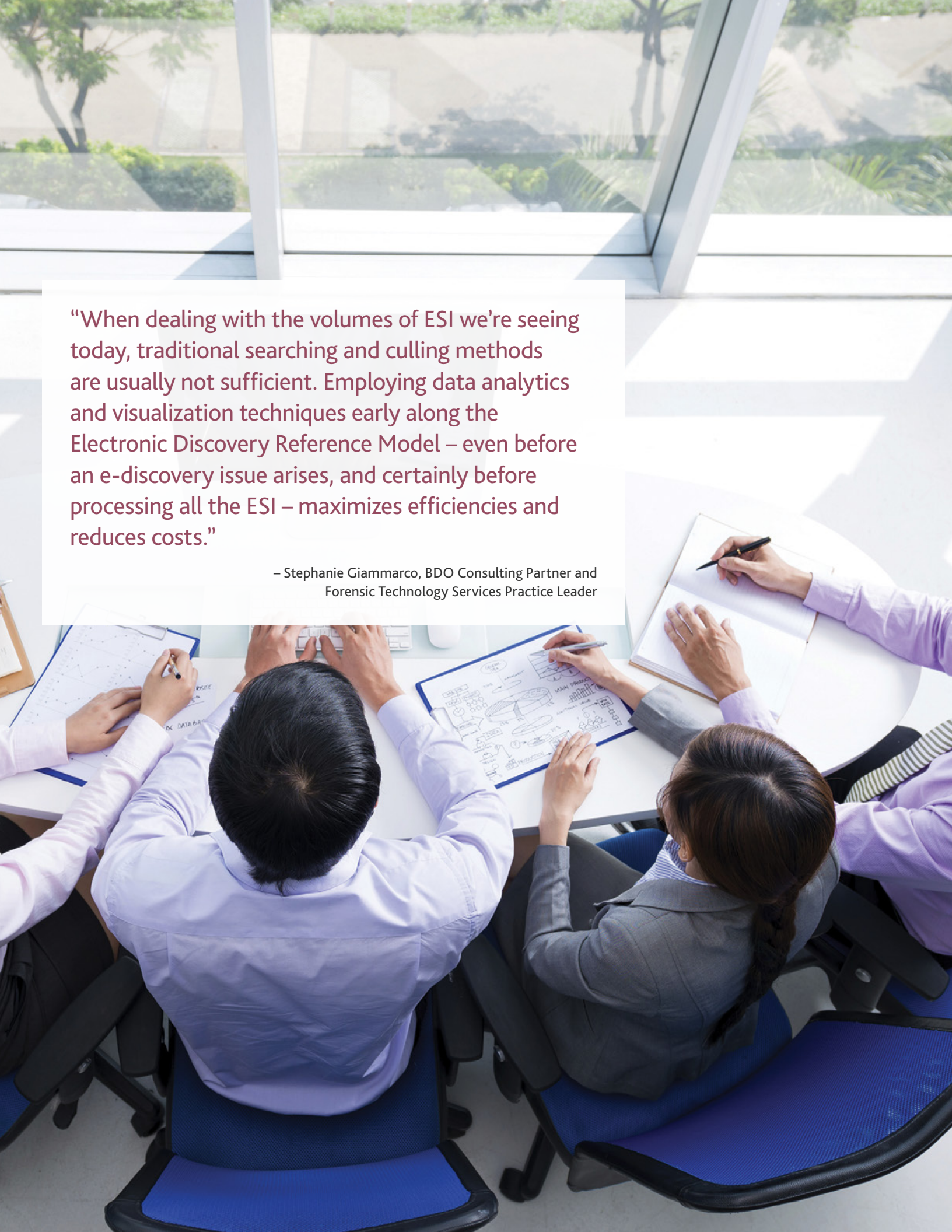
The escalating cost of e-discovery and regulatory activity (42 percent and 40 percent, respectively) held firm as the second and third most impactful issues. The top three issues are closely related, with data growth and regulatory requirements forcing an increase in spending.

LOOKING FORWARD, WHAT NEW E-DISCOVERY-RELATED ISSUES WILL HAVE THE GREATEST IMPACT ON YOUR ORGANIZATION?

Issue	%
VOLUME, VARIETY AND VELOCITY OF DISPARATE DATA	49%
ESCALATING COST OF E-DISCOVERY	42%
REGULATORY ACTIVITY	40%
MANAGING INFORMATION GOVERNANCE DOMESTICALLY	34%
MANAGING MOBILE DATA	34%
BYOD (BRING YOUR OWN DEVICE)	31%
MANAGING INFORMATION GOVERNANCE GLOBALLY	28%
SOCIAL MEDIA EXPOSURE	24%
OTHER	2%

"Managing the retention and storage of data through corporate-wide information governance initiatives is integral to an efficient e-discovery strategy. Data management oversight through the right policies and protocols not only reduces the risk of legal liability, but expedites the e-discovery process and ultimately cuts costs."

– Karen Schuler, Managing Director in BDO Consulting's Forensic Technology Services Practice

"When dealing with the volumes of ESI we're seeing today, traditional searching and culling methods are usually not sufficient. Employing data analytics and visualization techniques early along the Electronic Discovery Reference Model – even before an e-discovery issue arises, and certainly before processing all the ESI – maximizes efficiencies and reduces costs."

– Stephanie Giammarco, BDO Consulting Partner and
Forensic Technology Services Practice Leader

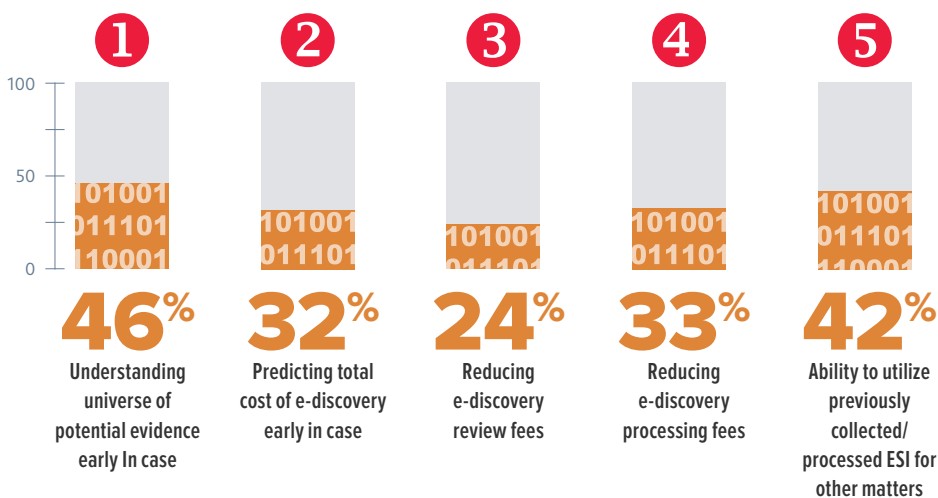# Early Understanding is Key to Successfully Managing E-Discovery

Should litigation or an investigation arise, a solid information governance foundation will help legal teams gain an understanding of the universe of potential evidence early in the case, which survey respondents ranked as the most important factor in managing e-discovery in litigation. Early understanding enables legal teams to follow a more efficient discovery process, more effectively assess case facts, set case strategy, and better predict costs — the second most important factor in e-discovery management.

The emphasis on early understanding is certainly connected to the expectations of rising costs. Thirty-nine percent of respondents anticipate they will need to spend more on e-discovery this year. Just five percent anticipate their e-discovery costs will decrease.

However, despite the clear connection between early understanding of scope and cost with minimizing overall spending, most organizations aren't taking full advantage of tools available to them. As previously noted, only 22 percent of respondents reported using data visualization techniques, which help organizations more accurately identify potentially relevant ESI – even before the ESI goes through the traditional e-discovery processing tools – and can play a significant role in reducing e-discovery costs.
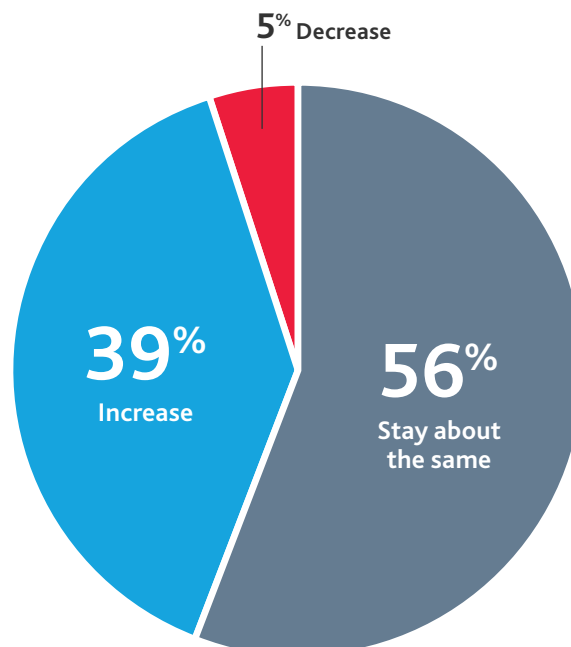
PLEASE RANK ORDER HOW IMPORTANT EACH OF THE FOLLOWING FACTORS IS IN HOW YOU MANAGE E-DISCOVERY IN LITIGATION?
(1 = Most important, 5 = Least important)

❶ **46%**
Understanding universe of potential evidence early In case

❷ **32%**
Predicting total cost of e-discovery early in case

❸ **24%**
Reducing e-discovery review fees

❹ **33%**
Reducing e-discovery processing fees

❺ **42%**
Ability to utilize previously collected/processed ESI for other matters

(13% responded "Other")

HOW WILL YOUR TOTAL SPENDING ON E-DISCOVERY CHANGE IN THE NEXT YEAR?

5% Decrease

39% Increase

56% Stay about the same

Staying Local Has Its Costs Too

Organizations are engaging in e-discovery activities on an international basis but aren't maximizing the global opportunity. On average, organizations report having operations in four different regions around the world; however, respondents prioritize global coverage last among the factors they consider when evaluating an e-discovery provider. Quality was rated as the most significant factor when selecting an e-discovery provider, and following the theme of early understanding to minimize cost, total cost and predictive or flat-fee pricing were rated second and third, respectively.

Even when operating globally, for those organizations that have had an e-discovery experience in North America and other countries, two-thirds of respondents say North America presents the most challenging e-discovery landscape, with China lagging far behind in second place (13 percent).
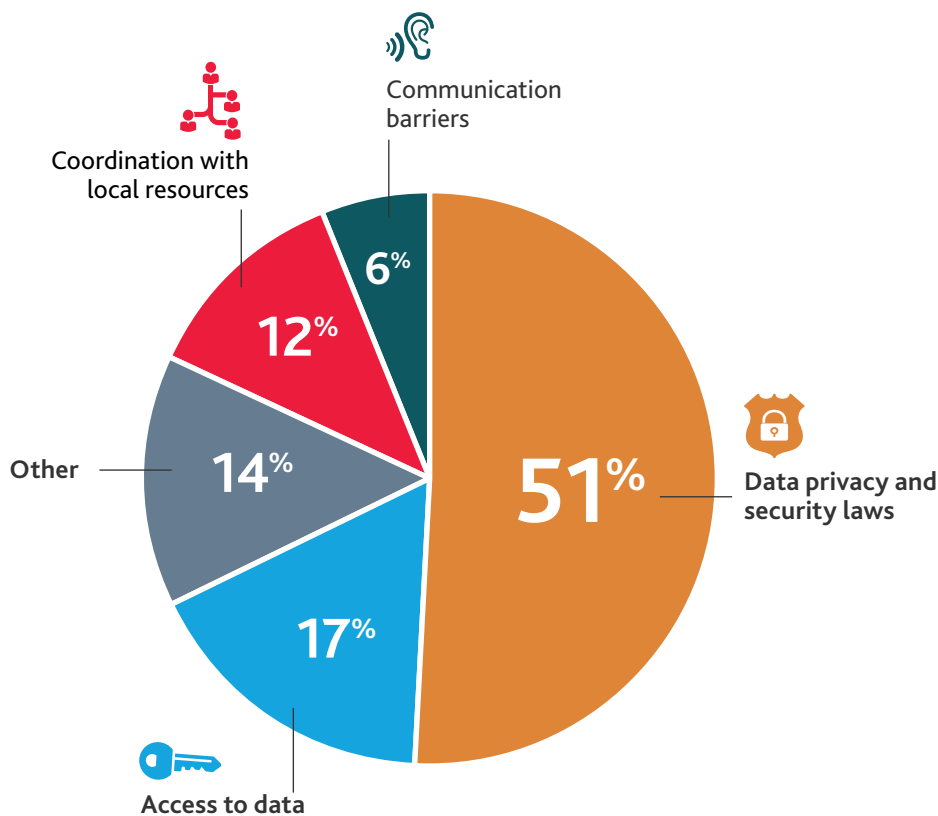
IN WHICH OF THE FOLLOWING COUNTRIES OR REGIONS HAS YOUR COMPANY DEALT WITH E-DISCOVERY ISSUES? OF THOSE SELECTED IN THE FIRST COLUMN, WHICH ONE PRESENTS THE GREATEST CHALLENGES FOR MANAGING E-DISCOVERY?

Region	Had eDiscovery Experience	Greatest Challenge for Managing eDiscovery
North America (United States, Canada, Mexico, Caribbean)	**100%**	**61%**
Central and South America	23%	3%
Middle East, North Africa	19%	0%
Sub-Saharan Africa	6%	3%
Western Europe	61%	10%
Eastern Europe	29%	6%
Russia	13%	0%
China	**35%**	**13%**
India	23%	3%
Other Asian countries (excluding China & India)	23%	0%
Australia, New Zealand	35%	0%

"In today's digital age, the volumes of data generated from disparate sources around the world, combined with the nuances of navigating complex legal and regulatory issues both in the U.S. and overseas, require robust e-discovery management capabilities. Pending changes to EU data privacy laws will certainly add to the complexity, potentially further impacting cross-border litigation or investigations."

– Jenna Aira-Ventrella, Managing Director in BDO Consulting's Forensic Technology Services Practice

WHAT IS THE ONE GREATEST CHALLENGE YOU FACE MANAGING CROSS-BORDER E-DISCOVERY?

Communication barriers

Coordination with local resources

6%

12%

Other

14%

51% — Data privacy and security laws

17%

Access to data

"Providers with boots on the ground typically have a solid understanding of local privacy laws and how to apply them. They are also best positioned to facilitate access, coordination and communication with local parties and resources."

– Glenn Pomerantz, BDO Consulting Partner and Global Forensics Leader

While domestic e-discovery requests remain top of mind, managing cross-border e-discovery creates its own unique set of challenges for organizations and their counsel. Respondents cite the myriad of international data privacy and security laws as their biggest challenge (51 percent), but a combined 35 percent rate local access issues – access to data, coordination with local resources, and communication barriers – as their greatest cross-border hurdle. While organizations may have put global capabilities on the backburner, vendors who have local operations around the globe can mitigate these challenges.

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