ADVICE FROM COUNSEL: TRENDS THAT WILL CHANGE E-DISCOVERY (AND WHAT TO DO ABOUT THEM NOW)

Ari L. Kaplan[†]

EXECUTIVE SUMMARY

In the Fall of 2012, I interviewed thirty inside counsel to identify the most important trends that will transform e-discovery in the next decade, and to solicit their guidance on how to navigate this altered landscape. All of the respondents worked for Fortune 1000 companies and all had e-discovery responsibilities. Key themes in these interviews ranged from the promise of technology-assisted review to the impact of Big Data. Participants' insights focused on four key areas.

1. *Visions for E-Discovery 2015*

Almost all of the respondents expect e-discovery to be different in 2015. Participants characterized their views with the hope of growing judicial guidance tempered by the fear of an unprecedented pool of unmanageable data.[1] More than half cited predictive coding as the key technological shift that could alter the balance of reasonableness and proportionality in the coming years.[2] With the promise of broader information governance, lower-

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[†] Principal, Ari Kaplan Advisors. Kaplan, an attorney, is the author of REINVENTING PROFESSIONAL SERVICES: BUILDING YOUR BUSINESS IN THE DIGITAL MARKETPLACE (2011) and the lead researcher for the *Advice from Counsel* benchmarking survey series, for which FTI Technology is the underwriter. He is a popular keynote speaker and provides law-related copywriting for a number of companies, firms, and individuals in the legal industry. The author would like to thank Emily Rickard for her research assistance.

1. *See also* Jason Krause, *Rockin' Out the E-Law: A Few Federal Judges Are Becoming Stars as They Create New E-Discovery Rules*, A.B.A. J., July 2008, at 48, 49–50 (discussing the vital role that judges have been playing in the development of e-discovery law).

2. This is due to the cost-effectiveness of predictive coding:

> [Predictive coding] is cheaper for clients, less time consuming for attorneys, and typically more accurate than traditional manual review and keyword searches. In a recent survey of 11 predictive coding vendors, four reported an average cost reduction of 45 percent, while seven of the vendors reported savings as high as 70 percent.

Adam M. Acosta, *Predictive Coding: The Beginning of a New E-Discovery Era*, RES GESTAE, Oct. 2012, at 8 (footnote omitted).

cost solutions, and expedited litigation, many foresee greater efficiencies in e-discovery.

2. *Facing the Data Deluge*

Social media, cloud-based data storage, and a growing "bring your own device" (BYOD) work environment are creating a "big data" perfect storm.[3] This threat is beginning to overwhelm legal departments of all sizes. In-house counsel concerns range from identification and collection of disparate information to the cost and security of the entire e-discovery process.[4]

3. *Growing Partnership with Service Providers*

As e-discovery technology and processes evolve and grow more complex, counsel increasingly recognizes the value of experienced service provider partners.[5] While counsel maintains control of the process and the budget, service providers are proving their value—from predictive coding as a defensible service offering to project management and secure cloud-based software.[6]

4. *The Tipping Point for Spend Management*

This study reflects a dramatic rise in the number of in-house lawyers who can quantify their spending on e-discovery.[7] Though they often shared the numbers in ranges, most were generally more familiar with their

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3. One author described the magnitude of electronically stored data:

> Just looking at internet and email use, the statistics are staggering. Worldwide email traffic consisted of 247 billion messages per day in 2009, and that figure is projected to double to 507 billion messages daily by 2013. According to one survey, "business [email] users spend an average of 19 [percent] of the[] work day [] sending and receiving email," which amounted to an estimated "108 business email messages per day in 2009." The volume of this traffic does not even include "non-communication" data such as word processing, computerized accounting, and similar business and personal functions. Commentators have recognized that at least 90 percent of business information is stored electronically today.

Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 26 (2011) (alterations in original) (footnotes omitted).

4. *See id.* at 31.

5. *See* Lauren Katz, Note, *A Balancing Act: Ethical Dilemmas in Retaining E-Discovery Consultants*, 22 GEO. J. LEGAL ETHICS 929, 929–30, 935–36 (2009).

6. *See* Robin M. Hulshizer, *Legal Ethics in E-Discovery*, PRAC. LITIGATOR, Mar. 2011, at 7, 8.

7. *See* Michael Yager, *E-Discovery as Quantum Law: Clash of Cultures—What the Future Portends*, 19 RICH. J.L. & TECH., no. 3, 2013, at 25, 32, 37, 39.

organization's e-discovery spending than in the past few years.[8] There is also a movement to better calculate, track, and reduce spending, which may represent a tipping point in the cost-control challenge that continues to concern corporate law departments.[9]

The full *Advice from Counsel* study summarizes these findings in greater depth. It also discusses other predictions and advice from leading in-house lawyers.

INTRODUCTION

The *Advice from Counsel* series reflects a universal understanding and a shared sense of responsibility for influencing the trajectory of e-discovery. This study summarizes the key areas of agreement associated with the changing digital landscape of modern litigation, as well as certain issues of contention, with the goal of providing a roadmap for piloting process enhancements and cost-effective technological improvements for in-house counsel. It is intended to provide readers with qualitative and anecdotal advice beyond the quantitative statistics included in many industry reports. The interviews with thirty leading in-house practitioners yielded a number of insights that are shared directly in their own words and help characterize the trends driving the e-discovery market.

I personally interviewed thirty in-house legal professionals with responsibilities that included e-discovery. All participants were from Fortune 1000 corporations and spoke by telephone, under condition of anonymity, in October and November 2012. The results of this study reflect the second consecutive year of 100% corporate counsel participation, up from 72% in 2009 and 97% in 2010.[10]

Of this year's participants, 90% select e-discovery tools and vendors for their organization; 83% implement e-discovery technology; 93% manage e-discovery tools and vendors; and 97% develop and implement e-discovery processes.

The vast majority of participating organizations had total annual revenues greater than $10 billion and over 10,000 employees—70% and 86%, respectively. In terms of litigation events over the past twelve months, 37% reported managing more than 500 litigation events and 20% reported managing more than 2,000 litigation events.

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8. *See* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 MINN. J.L. SCI. & TECH. 151, 158–82 (2011) (providing a breakdown of the quantified costs of e-discovery).

9. *See id.*

10. ARI KAPLAN, ADVICE FROM COUNSEL: AN INSIDE LOOK AT STREAMLINING E-DISCOVERY PROGRAMS 9 (2011).

I. E-DISCOVERY SUCCESS IN 2015

In many ways, 2012 was a watershed year for e-discovery—from high-profile court rulings on predictive coding, to ongoing market consolidation of providers and software vendors.[11] In this year's *Advice from Counsel* study, I asked e-discovery practitioners for their thoughts and educated guesses on the future of e-discovery. Where appropriate, I included data from previous years to compare and contrast changes in perception.

According to 90% of respondents, e-discovery will be different in 2015. Seven key reasons emerged.

A. *"Predictive Coding Will Have a Dramatic Impact."*

Despite current adoption rates, predictive coding will be a key e-discovery tactic in 2015, according to 57% of respondents. This indicates that predictive coding is continuing to gain interest within the industry, considering that in the previous year's survey 55% of respondents said they were contemplating the use of predictive coding. Many respondents expressed optimism that predictive coding technology can better automate the review process and dramatically reduce costs.

Quotes included: "People will get more comfortable with technology-assisted review"; "[p]redictive coding or some type of algorithmic/automatic document review should be more mainstream"; "[e]-discovery will just be more prominent and more sophisticated with the implementation and increased use of predictive coding"; "[t]here will be a growing push to fully automate review"; "[y]ou will see a rise in predictive coding primarily based on practicality and expense"; "[w]e are moving to predictive coding to reduce cost and improve efficiency"; "[t]hings like predictive coding will take an increasingly important role in e-discovery"; "[t]echnology is evolving all of the time and predictive coding is the hot subject. That and other tools will become more mainstream."

While expectations for predictive coding were high, many respondents noted that the technology is evolving quickly, requiring acceptance from the courts, new skills from e-discovery practitioners, and necessitating greater

11. *See, e.g.*, Moore v. Publicis Groupe, 287 F.R.D. 182, 192–93 (S.D.N.Y. 2012) ("[C]omputer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review."), *aff'd*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534, at *1, *3 (S.D.N.Y. Apr. 26, 2012) ("[M]agistrate judges generally have broad latitude with respect to discovery issues."); *see generally* Barry Murphy, *eDiscovery 2012: The Year in Review*, FORBES TECH, Dec. 26, 2012, http://www.forbes.com/sites/barrymurphy/2012/12/26/ediscovery-2012-the-year-in-review(reviewing market consolidation in the eDiscovery market).

partnership with predictive coding service providers.[12] Ideally, corporations could conduct predictive coding in a defensible manner, reduce the costs of e-discovery while keeping internal control of the process, and rely on a service provider partner to constantly innovate on the technology.[13]

B. *"The More [Skills] They Can Bring to Bear, the Better They Will Be."*

Reflecting expectations that predictive coding will play a greater role in e-discovery, respondents broadened the list of skills helpful for future e-discovery practitioners.[14] While legal and technology aptitude remained high at 83% and 77% respectively, respondents also listed new, and perhaps surprising skills including statistics, accounting, project management, and linguistics.[15]

While many acknowledged that there is no formal curriculum for this diverse skill set, one representative commented:

> You need to have a broad set of skills. Increasingly, people who manage these decisions from within companies need to have technological and legal training. We will also need to give basic training in statistics to understand the probabilities of predictive coding and how to use the data to determine what should be reviewed. There needs to be a math-based education for those individuals.

Other representative comments include: "An understanding of data privacy is essential because you may need to address international data," and "[i]t would be good for people to be familiar with statistics. Project management and process principles are also important. This work requires someone who has more of a scientific and mathematical mindset to understand the underlying issues. Math is also important in managing the process."

A large number of respondents maintained that a core legal and technological understanding would always remain in demand, but that for more specialized skills, including statistics, project management, and data privacy processes, service provider partners would augment the company's

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12. *See* Nicholas Barry, Note, *Man Versus Machine Review: The Showdown Between Hordes of Discovery Lawyers and a Computer-Utilizing Predictive-Coding Technology*, 15 VAND. J. ENT. & TECH. L. 343, 365–71 (2013).

13. *See, e.g.*, Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 534–38 (2009); *see also* Craig B. Shaffer, *"Defensible" by What Standard?*, 13 SEDONA CONF. J. 217, 220 (2012).

14. *See* Margaret Rowell Good, *Loyalty to the Process: Advocacy and Ethics in the Age of E-Discovery*, FLA. B.J., June 2012, at 96, 96–97.

15. *See* Hulshizer, *supra* note 6, at 8–9 (providing an overview of the manner in which e-discovery developments have made it necessary for attorneys to expand their skill sets).

skill sets.[16] It is interesting to note that just four years ago, in the first *Advice from Counsel* study (2009), respondents were primarily focused on enabling greater collaboration between legal and IT.

C. *"I Don't Think You Can Ever Do It Purely in-House."*

Connected with the last point, 73% of the respondents noted that future management of e-discovery would be more team-oriented and consist of a combination of influence from in-house counsel, outside counsel, and providers.[17] Two important themes emerged from discussions on who would conduct e-discovery: the increasing importance of collaboration across inside counsel, the law firm, and service providers, and the need to clearly define roles.[18] "There will be a lot more openness and cooperation between all of the participants," one attorney remarked. "I don't know anyone who is doing it alone," added another. Many agreed that "[v]endors will have a large role, with cooperation and assistance from both in-house counsel and outside counsel." One specifically encouraged peers to seek outside support: "Organizations would be wise to bring in third-party consultants to assist."

While the degree of involvement may vary, the consensus was that there would be a role for each group in the future.[19] "Outside counsel will always have their hands in it. In addition, some companies will bring more of the work in house for cost-saving purposes, but vendors will become more and more involved as time goes on," noted one lawyer. Technology is also impacting this shift and "[t]here will always be a place for vendors because they are continuously developing the technology."

Ultimately, many agreed that e-discovery is a specialized area and predicted a rise in the number of in-house lawyers with e-discovery in their title.[20] These lawyers will work directly with records management and IT to ensure that the company addresses the legal department's interests in data retention or reduction.[21] "The likelihood of having those titles and a career path there is greater than it has ever been and will continue to grow," said one participant.

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16. *See id.*

17. *See* Alexander, *supra* note 3, at 58–59.

18. *See id.* at 59.

19. *See* Rachel J. Littman, *Finding the Silver Lining: The Recession and the Legal Employment Market*, N.Y. ST. B.A. J., Sept. 2009, at 16, 20 (pointing out that the advent of "eDiscovery specialists" creates new job opportunities in a contracting legal market).

20. *See* Krishna Grandhi, *The Discovery Within: Employing E-Discovery Coordinators for Management of Electronic Discovery Processes in Federal and State Cases*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 1, 17, 20 (2011).

21. *See id.*

D. *"Legal Review in the Cloud Is Inevitable."*

A big reason why providers will continue to play a large role in e-discovery, according to respondents, is the advent of e-discovery in the cloud.[22] In 2011, 52% of respondents indicated a growing interest in using cloud applications for e-discovery, but had no specific plans. In the current study, 37% of respondents are evaluating the use of a legal review tool in the cloud and are doing so for a variety of reasons, including freedom, cost-control, and a continuing interest in being more efficient. "Cost is a driving factor," said one respondent. "We have looked at it and would definitely consider it because it offers us leverage and flexibility," said another.

Some are simply trying to keep pace with their peers.[23] "It is out there now and everyone is doing it," one lawyer said. "We want to explore all of the options and make sure we are picking the right one," the lawyer added. Still others are not ready.[24] "There is a hesitation to deal in the cloud until we understand it," noted one participant. "I'm not convinced of the safeguards; I probably will be, but not yet," said another. Indeed, security in the cloud remains a sticking point for many.[25] The ability to access, control, and protect discovery data will remain a baseline requirement for providers offering cloud-based legal review software.[26]

E. *"The Lack of Control that Corporations Are Going to Have on Their Information and Knowing Where to Find It Will Be the Biggest Issue."*

Sixty-four percent of the in-house lawyers participating in the survey noted that the impact of "Big Data" on e-discovery requests will be the overwhelming challenge for the foreseeable future, followed equally at 32% by "social media and data in the cloud" and "the emergence of the 'bring your own device' environment becoming a workplace norm." A notable 14% believe that the ongoing conflict between United States e-discovery requirements and data privacy rules overseas will continue to present obstacles to seamless discovery.[27] "The big data problem cannot be avoided

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22. *See* Jonathan P. Armstrong et al., *The Challenges of eDiscovery and Cloud Computing*, 25 INT'L L. PRACTICUM 139, 143 (2012).

23. *Id.* at 139.

24. *See id.* at 141 (providing an overview of the many nuances of cloud storage that often provoke hesitation from some lawyers).

25. *See* Shawn L. Holahan, *Silver Lining in that Cloud*, 60 LA. B.J. 320, 320–21 (2013).

26. *See id.* at 321.

27. *See* John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 WASH. L. REV. 595, 598–99 (2012).

and it is not going to subside in volume or variety," remarked one lawyer. Nevertheless, another participant cautioned: "As technology increases, the courts are less sensitive to the burdensome nature of e-discovery," cautioned another participant.

Regarding the use of personal devices for work-related matters, one in-house respondent noted: "Many of us are dealing with the BYOD issue right now." The respondent advised that "[t]here is a lot of competition between IT, which wants to serve the employees, and the legal/compliance teams, who want it done properly." One lawyer described it as a "self-inflicted wound," and another remarked, "The lack of control that corporations are going to have on their information and knowing where to find it will be the biggest issue."

Since many of the issues are related in that BYOD and social media are causing the exponential increase in data, the participants suggested that legal teams should develop stronger processes that they can implement and audit.[28] That capability is particularly important, since many remain concerned with the treatment of these issues by the judiciary.[29] "How the courts deal with the amount of personal sources of information that may need to be accessed in the future is key," noted one lawyer.

F. *"If You Don't Have a Process and You Are Not Constantly Streamlining, Costs Will Increase."*

As with any discussion on e-discovery, cost was a recurring theme in all of the interviews.[30] Despite the advances expected with predictive coding, emerging challenges—such as increasing data volumes, complex data types from social media and the cloud, as well as increasing international discovery demands—provided such a counterweight that 47% of counsel expect e-discovery costs to increase over the next few years. Roughly the same number of participants thought costs would decrease (27%) or stay the same (27%).

Counsel offered three key areas to focus on to help ease the cost burden. The first key area is to document the processes used across internal and external resources, and implement training and/or incentives to ensure these

28. *See* Ronald J. Hedges & Maura R. Grossman, Ethical Issues in E-Discovery, Social Media, and the Cloud, Address at RTCLJ's CLE Symposium (Nov. 7, 2012), *in* 39 RUTGERS COMPUTER & TECH. L.J. 125, 130–31 (2013).

29. *See id.* at 129–30 (discussing the lack of clarity from the courts regarding the duty to preserve in light of proportionality principle in FED. R. CIV. P. 26(b)(2)(C)(iii)).

30. *See* Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a "Loser Pays" Rule for E-Discovery Costs*, 60 CLEV. ST. L. REV. 1103, 1110–14 (2013).

processes are repeated in a disciplined manner. One respondent indicated: "Ultimately, the volume of data is increasing, so in order to keep the costs down, you need to have a defensible process in place and good partners." Another stated that "[a]s processes improve, costs should go down." Further, another noted: "We will get to a point at which we have managed processes in place, and while costs associated with the data will increase, review costs will fall."

The second key area is technology. Advanced technology like analytics and predictive coding, used in combination with repeatable processes, can help provide cost savings. Still, one respondent remarked: "While I expect savings to come from technology and better execution, that will be offset by expansion of data types and broader requirements."

The third key area is review management. First-pass review is perhaps the most expensive step in the entire e-discovery process, and respondents have found cost-savings in using managed review providers for this phase of review. One respondent noted: "Consistent use of vendor first-pass review will gain popularity and push the price down, and as more companies become more comfortable with the processes they built over the past few years, it will start to bear fruit."

The emphasis placed on process underscores its importance and complexity.[31] As more sophisticated technology is used, and more techniques are employed to save review time (such as segregating documents that are most likely responsive or potentially privileged), more sophisticated processes will be needed. Inside counsel, outside counsel, and service providers all play a role in utilizing repeatable processes to help streamline e-discovery, reduce costs, and bring greater budget predictability.[32] E-discovery process and litigation readiness audits can provide best practices for improvements specific to a company's litigation profile.[33]

G. *"I Expect E-Discovery Will Be Easier as We Get More Technologically Savvy and the Courts Provide Additional Guidance."*

The courts were mentioned by 43% of respondents as a catalyst for future change. Judges are growing increasingly savvy about e-discovery,

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31. *See* Daniel B. Garrie & Yoav M. Griver, *Unchaining E-Discovery in the Patent Courts*, 8 WASH. J.L. TECH. & ARTS 487 (2013) (exploring the merits and pitfalls of streamlined e-discovery process in a patent context).

32. *See generally id.*

33. *See, e.g.*, Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 SEDONA CONF. J. 229, 230–31 (2010).

according to respondents, and they are hopeful that this will enable the courts to provide additional guidance and improvements on a wide variety of issues, from predictive coding to reasonable collections.

Some of the comments include: "The courts will have refined the amount of information that is required to be searched"; "as judges and lawyers become more comfortable with predictive coding it will be cheaper and it will lead to greater use"; "[e]-discovery will become more mainstream as judges and lawyers become aware of the risks in the process—I think it will continue to improve as a result"; "[c]ourts and practitioners realize that it is unsustainable to cull and collect as much data as we are"; and "[a]s judges and lawyers become more comfortable with predictive coding, it will lead to greater use."

II. ADDITIONAL FINDINGS

While the primary focus of the interviews was to gather predictions from counsel on the future of e-discovery, the discussions provided insight into the present-day realities for these legal professionals.

A. *Unprecedented Understanding of Spending*

Sixty percent of respondents revealed that they are able to quantify how much they spend on e-discovery annually. This is a significant jump from the 42% who were able to do so in 2011, the 40% in 2010, and the 34% in 2009.[34] Although more in-house lawyers are familiar with their spending, that knowledge is almost universally based on a substantial range, rather than an exact figure. For example, one respondent said his company spent three to five million dollars per year on e-discovery, and another reported over ten million dollars as the annual spend.

One lawyer, who advised that the legal department spends 28% of its legal budget on electronic discovery, stated that "[i]t is easy to capture the vendor and internal spending, but it is more difficult to capture the outside counsel spending because the uniform billing codes did not address e-discovery in the past or did not address them clearly."

One of the challenges is the diversity of personnel involved.[35] After all, knowing what you are spending is closely linked to tracking it, which is

34. *See* KAPLAN, *supra* note 10, at 9; ARI KAPLAN, ADVICE FROM COUNSEL: EVOLVING STRATEGIES FOR INCREASING THE EFFICIENCY AND EFFICACY OF E-DISCOVERY PROGRAMS 9 (2010); ARI KAPLAN, ADVICE FROM COUNSEL: BEST PRACTICES ON CONTROLLING E-DISCOVERY COSTS 9 (2009).

35. *See, e.g.*, Grandhi, *supra* note 20, at 20 (recommending the appointment of an e-discovery coordinator to alleviate the problem of diverse personnel and costs involved in e-discovery).

confusing for many in-house lawyers.[36] One lawyer noted that the legal department spends over one million dollars on e-discovery, but was not sure of the exact amount because the costs are spread across various business units. "The problem is that the bills are not centralized through the legal team," reported another participant.

Despite the increased awareness of spending metrics, 40% of participants are still wholly unfamiliar with the amounts at issue. "That is one of our biggest struggles," reported an in-house lawyer. "We have a tremendous amount of inefficiency and do not have a means by which we can quantify it," the lawyer added, noting: "It is probably worse than I fear and more than I imagine."

Others are partially familiar. For example, one lawyer advised that although the legal team spent $200,000 to $300,000 for searching, processing, hosting, and filtering data, it could not quantify what it spent on outside counsel fees for review. Another noted: "When we get a large piece of litigation, we spend $500,000 per year, but what is harder to quantify is the internal resources specifically devoted to this work."

B. *Greater Reuse of Coding Decisions*

Since legal review is the most expensive phase of e-discovery and privilege coding is the most expensive phase of legal review,[37] it is not a surprise that 57% of participants are reusing coding decisions made on documents for previous matters. Given the focus on efficiency, this number is likely to increase.[38] "The company has created a master set of data since several cases have similar themes, including the same custodians and issues," remarked one lawyer. Many noted that when they manage repeat or related litigation (e.g., patent matters), they preserve the basic coding.

Others, however, recognized their disorganization.[39] "We do not do this nearly enough. We are inefficient and collect some of the same stuff over and over," admitted one lawyer. Another cautioned: "You cannot be so rigid that you apply that designation for the entire lifecycle of the record," since the issues may change the meaning or impact of a particular document.

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36. *See id.*

37. *See* Tom Turner & John Tredennick, *Smart Sampling in E-Discovery: Reduce Document Review Costs Without Compromising Results*, TENN. B.J., Oct. 2011, at 16, 19 (explaining the "clustering" technique).

38. *See id.*

39. *See* Grandhi, *supra* note 20, at 14–15.

C. *Potent Information Governance Structures*

Given the concern over "Big Data," it was not surprising that 77% of respondents reported that their organizations maintain some type of information governance strategy.[40] In the next few years, these are likely to become more robust and integrated into the overall e-discovery structure since most respondents seemed to believe that their policies offer room for improvement.[41] "It is more in concept than in reality," said one lawyer. "The company has information governance standards and its employees aspire to a high level of sophistication, but the company is in the early stages of this process," remarked another.

D. *The Quality of Service Providers Is Key*

From discussions on predictive coding workflow, to collaboration and streamlined processes, respondents explicitly asserted the need for high-quality third party professionals.[42] In fact, 60% of counsel listed this as the most important factor in selecting an e-discovery service provider. As one commented:

> You can have a great technology and a great process, but it is only as good as the people that manage it. It is not only about being technologically savvy, but professionals need to have business savvy and be able to translate something that is highly technical in a way that makes sense to a business person. The people who work with the service provider have to be top-notch.

There was also acknowledgement from the group that top-quality professionals do not come cheaply.[43] As one stated: "We do not mind paying a premium for a firm that we trust, but then we are also very demanding and expect a high level of service."

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40. *See id.* at 9–12.

41. *See id.*

42. Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH. 1, 3 n.3 (2012) (advocating a need for third-party discovery vendors when dealing with a large database of electronic information).

43. Jennifer M. Smith, *Electronic Discovery and the Constitution: Inaccessible Justice*, 6 J. LEGAL TECH. RISK MGMT. 122, 142 (2012) (stating that vendor costs often substantially increase the cost of e-discovery).

E. *Significant Year-Over-Year Changes*

For the most part, criteria scores remained consistent or showed moderate increases; yet, a few areas showed considerable year-over-year jumps in the "most important" rankings of software and services. For software, the ability to scale up or down increased 31% from the previous year, perhaps reflecting increasing concerns about growing data volumes. Integration with existing applications increased 25% from 2011, an indication that counsel may be looking for point solutions to work alongside their existing in-house e-discovery investments. Additionally, 53% of respondents said that minimizing the disruption of normal business processes was most important, an increase of 18% from 2011.

Mirroring the software criteria increases, 53% of respondents said that minimizing the disruption of normal business processes was most important when selecting a service provider, an increase from 29% in 2011. The service provider's long-term viability grew in importance as a consideration, increasing from 29% in 2011 to 50% in 2012.

III. FORECASTS

Based upon the survey responses, it is possible to forecast coming trends that e-discovery teams should be aware of. First, in-house counsel will begin conducting more predictive coding pilots with experienced service providers. While predictive coding is growing in acceptance, corporations indicate a preference to use trusted and proven service providers to handle the complexity and defensibility of predictive coding.

Second, an increasing number of professionals, with backgrounds in statistics and economics, will enter into the e-discovery industry. As predictive coding and analytics play a bigger role in e-discovery, those with legal, IT, and mathematical skills will be in great demand.

Third, data security in the cloud will be a key component of any Request for Proposal ("RFP") process for cloud-based tools. Cost-conscious companies are evaluating cloud-based tools because they can reduce IT spending and often provide flexible subscription billing models, yet adoption has been slow to date because of data security concerns. Providers will need to ensure both cost-savings and data security in order to help adoption grow.

Finally, more corporations will develop their own "privilege coding repositories" to more efficiently store and reuse privilege coding decisions made in previous matters. As legal teams grow more knowledgeable about their e-discovery costs, privilege coding will likely be a key target for efficiencies because of its expense. The ability to store and reuse coding

decisions made in previous matters will enable legal teams to quickly reduce costs and focus on important information faster.