

The great eDiscovery reset

OpenText engaged Ari Kaplan Advisors to anonymously survey corporate legal leaders to understand how pre-existing trends and the pandemic have affected in-house legal professionals' approach to eDiscovery. This paper presents respondents' perspectives regarding immediate challenges, long-term opportunities and their impressions of the industry moving forward.



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Executive summary

Legal teams beginning to redefine normal and assess their needs in a post-pandemic environment are looking for ways to improve their prospects and transform their litigation support practices. To understand how pre-existing trends and the pandemic have affected how in-house legal professionals approach eDiscovery, OpenText engaged Ari Kaplan Advisors to anonymously survey corporate legal leaders online and through interviews about their immediate challenges, long-term opportunities and impressions of the industry moving forward.

The results revealed that, driven by several catalysts, corporate legal teams are re-evaluating their eDiscovery technology and services. This paper combines a range of quantitative data and qualitative perspectives from leaders focused on altering and redefining the legal team's impact on the corporation's mission.

Key takeaways: What is being reset?

The survey reveals that legal departments face immediate and long-term opportunities related to technology, vendor selection, use of ALSPs and the evolving relationship with outside counsel that affect who is managing work and how it is getting done. While some trends were already well underway pre-pandemic, others have accelerated:

- There is a general desire to do more eDiscovery internally, with 70% of survey respondents setting or contributing to the in-house eDiscovery team's strategy.
- Centralizing eDiscovery data and processes is cited as a priority.
- The use of ALSPs to support e-discovery and investigations continues to shift, with a number of online respondents emphasizing their use of this resource to supplement their needs. 45% indicated they have used ALSPs (alternative legal service providers) to support eDiscovery and investigations and will continue to do so at the same level in 2022, while 8% are planning to increase that usage.
- 41% strongly agree that their workloads will increase.
- Most respondents (53%) strongly agree that their teams will adopt new technology to reduce manual efforts and improve efficiency.
- Automation technology is increasingly viewed as a means of empowering legal department's internal eDiscovery activities.
- Artificial intelligence (such as machine learning and technology-assisted review approaches) is increasingly perceived as transformative but remains an untapped opportunity for some.
- 43% of online respondents noted that AI will have a strong impact or a transformative impact on the sector by 2023.
- Cloud-first strategies, renewals, deficiency in scalability and performance, missing or deficient features are all cited as triggers for eDiscovery technology changes.
- eDiscovery is expanding into new areas, including privacy (45%), information governance (41%) and data subject access requests (37%). Records management (27%), breach response (25%), cybersecurity (24%), and contract analytics (16%) are also projected areas of growth.
- The default for eDiscovery will remain remote.

“Our renewal prompted evaluation of cloud offerings in response to our cloud-first strategy.”

Survey participant explaining the reason behind a re-evaluation of eDiscovery technology

Leading eDiscovery challenges and best practices

In-house teams can optimize efficiency and streamline workflows by leveraging technology and advanced analytics, beyond simple early case assessment (ECA) and integrating disparate eDiscovery tools.

Many interview participants reported that they had achieved success in eDiscovery from following proven, adaptable protocols that allow them to scale and manage their workflows seamlessly. “We have a mature, established process for conducting eDiscovery in house [using] in-house controls that are centralized with our team to provide consistent guidance to our outside counsel and outside providers,” noted one participant. Another said, “The company has a dedicated IT team for legal, which follows a proven and defensible process.”

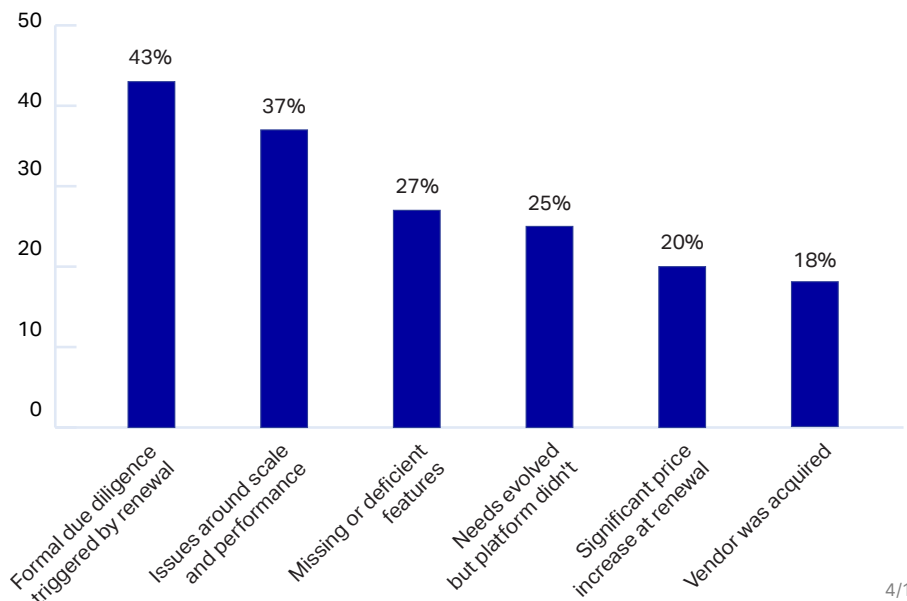
Several emphasized that their capabilities in managing data for eDiscovery contributed to their growth. “Preservation, collection and the left side of the EDRM elements of eDiscovery are well done at the company,” said one participant. Another reported that, “We are particularly happy with our work on the left side of the EDRM, such as identification and collection; we see opportunities in review and even processing and culling.”

The challenges seem to be associated with optimizing efficiency, integration and technology. “We may not be doing the work as efficiently as possible given our reliance on outside counsel,” said one participant while another noted, “the quick sampling of data and ECA piece is what we are missing, which causes some delay in our protocols.” A third suggested that “managing the eDiscovery of new data sources”, and a third confessed that it “feels like a game of Whack-a-Mole.”

Regarding efficiency, a few highlighted the opportunities available in leveraging advanced data and technology practices. “I would like our analytics to do more beyond ECA, concept searching and predictive coding” said a participant. Another noted that “IT is moving aggressively into the cloud and is not necessarily asking legal for their opinion and whether their systems are compatible, which is causing issues with collections, such as changing the metadata when migrating.” A third participant said, “Our systems are not well integrated, such as the disconnect between our legal hold tool and Office 365.”

Catalysts of change

Reasons for re-evaluating eDiscovery technology



“Our strategy is to combine technology and judgment. We want to know the silver bullet so that we can find it using technology. The best combination for a team is to have professionals who understand the technical aspects and others who are familiar with the legal principles. The most successful teams combine their legal and technical talent.”

Survey participant describing their team approach to eDiscovery strategy

Who is managing eDiscovery?

eDiscovery is increasingly viewed as a collaborative initiative that involves other business functions such as IT, HR and InfoSec.

As organizations navigate change, 80% of interview participants reported that they work on teams that have at least one dedicated eDiscovery manager. 60% of interview participants select eDiscovery software and services, and nine out of 10 indicated that the same person or team involved in selecting software providers also chooses where they procure services.

The selection processes are also typically the same. “In combination with procurement, the eDiscovery team issues an RFP,” said one participant, while another said, “Each eDiscovery software vendor has to pass the company’s security assessment; we also need a sign-off from HR and legal for collecting internal data.”

Some organizations apply a more rigid set of standards. “Those processes are complicated and have been expanded over the past few years to include procurement, privacy and IT to ensure that it is consistent with overarching corporate goals; it is a lot more complicated than it used to be with a lot more people involved than in previous years,” said one leader. While another participant described the practice as ad hoc with few formal processes other than a security review.

Following in-house-first eDiscovery strategy

In-house teams increasingly would like to rely more on in-house tools and resources to do as much as possible before document review, while combining and optimizing legal and technical resources.

Seventy percent of interviewees set or contribute to the eDiscovery team’s strategy, which varied by organization, with several key themes.

There is clearly a focus on execution in-house, at least at the outset. “The objective is to use our internal suite of tools as effectively and heavily as we can; we want to try to do as much as we can in-house, but pivot as needed,” said one participant.

For some teams, however, the strategy is set on a case-specific basis and often in collaboration with their outside lawyers. “We leave the decision of how the eDiscovery team operates to the business unit we are supporting,” said one participant. Another noted, “It is simply to collect data and send it to outside counsel; we would like to do more processing and culling internally to reduce the amount of data that we send out, but we have not achieved that yet.”

Improving and empowering in-house eDiscovery

In-house legal teams are taking more eDiscovery processes in house, leveraging technology and best-practices processes and playbooks to improve efficiency, compliance and cost-savings. At the same time, noted gaps in human expertise, particularly around use of advanced tools such as AI or technology-assisted review, mean that organizations should look to how outside experts can augment resources and deliver specialized skills as needed.

Survey participants made a range of practical suggestions for how in-house teams can improve their eDiscovery practice. This included the need for more education from stakeholders on the company’s legal obligations in eDiscovery and where the team could leverage technology to save costs, increase efficiency and improve compliance. One respondent said their team’s goal is to double or triple the number of cases it manages internally, which will require more training on how to use its platforms.

“We could have better centralized program-level tracking and transparency in the later stages of eDiscovery based on increased internal engagement,” said one participant. “We need a process repository, where people can access our procedures, playbooks and guidelines, which we also need to revise.”

Survey participant explaining how centralization could improve in-house eDiscovery

Finding ways to supplement human expertise was another priority. “I would like to leverage continuous active learning and more AI,” said one participant while another suggested, “We would like to build in more automation. Many organizations are still doing work manually, at a higher cost, with greater risks of errors and delays.”

For many, the ideal strategy is a combination of expertise and automation, with an emphasis on internal performance wherever possible. “It would be mostly internal management of technology and process, with the ability to scale until we need to outsource; ideally, we would have the capacity to handle the vast majority of matters that are smaller, such as a third-party subpoena,” said one participant.

In fact, several discussed using automation to empower their internal activities. “We would like to have a single tool or platform. We also want to automate more of our workflow as automation is huge if it is defensible,” said one participant. Another said, “It should be less manual and more precise using automation; users should be able to seamlessly migrate data between systems, for example, from collection to review.”

The barriers for many range from a lack of leadership support to deficient infrastructure. “It is a function of internal bandwidth and external counsel influencing our internal stakeholders, who may not all be lawyers and can be less familiar with the company’s ultimate capabilities,” said one participant.

Technology is still a hurdle. “Some of the advanced tools that we want are only available in the cloud and we want them behind our firewall,” explained one leader, while another said, “The barrier is to strengthen and increase our internal resources, which are currently limited from a human capital perspective, not investment.”

The impact of the pandemic on eDiscovery

The pandemic brought on new eDiscovery challenges, including the need to focus on remote collection capabilities, as well as integration of increasingly common forms of data, such as chat, into eDiscovery review processes.

More than half of the interview participants (60%) advised that their approach to eDiscovery has not changed because of the pandemic. Those that adjusted typically did so because of challenges associated with collecting data and remote work.

“We require more time to find things since we are no longer working in a unified way in a single location; there has also been a degradation of information governance practices.” Several highlighted that returning to the office at least periodically will alleviate some of these concerns.

Remote or hybrid work failed to faze others. “Most of our team works remotely and only works in person for physical collections; we could probably work from home indefinitely and there is no longer any need for optics or face-time,” said one leader.

Meanwhile, frequent advancements and changes require teams to continuously adapt. “The changing dynamic and rapid introduction of new technology have created problems with the collection, processing and review of data; we are more often unaware of the tools that people are using, which has a downstream negative effect on eDiscovery,” said one participant.



Technology strategy is becoming a collaborative effort

Legal leaders need to consider internal processes and a broader set of influencers within the organization when it comes to technology strategy and procurement.

Most of the online respondents (92%) reported that they have a structured program for determining their eDiscovery technology strategy. Forty-one percent noted that it is a collaborative effort across multiple stakeholders, while 51% assign responsibility for decision-making to a senior eDiscovery leader. The titles of that individual include general counsel, a senior technical program manager for eDiscovery, in-house lawyer or director-level eDiscovery professional.

With respect to the approval process to adopt new technologies or change vendors, almost half (49%) of online respondents require review and oversight from procurement or the contracts management team, 45% make the decision in collaboration with legal operations and 33% need to secure approval from a senior lawyer.

Examining eDiscovery spending and budgeting for upgrades

After delaying certain decisions during the pandemic, eDiscovery teams are either examining their budgets or identifying areas that require adjustments.

In fact, 35% of online survey respondents reported that they have a formal budget process, which accounts for any new software purchases and renewals, and includes specific metrics for tracking the total cost of ownership for those applications. 24% percent have a similarly formal budget process, but do not track metrics on the total cost of ownership, while another 24% reported a more flexible budgeting process. Only 4% advised that their organization lacks a formal budget process.

For more than three-quarters of the respondents, general counsel (39%) or the director of eDiscovery (37%) sets the budget. Twenty percent reported that the director or manager of legal operations is responsible for that effort. About 15% also noted that another in-house lawyer, IT manager or CIO/CTO-level leader influences budgeting.

Recognizing the evolving role of outside counsel and external providers

Legal teams are focused on how best to structure in-house resources, external counsel and ALSP capabilities and roles to optimize efficiency. ALSPs are increasingly taking on more eDiscovery tasks to augment internal team resources and expertise, while outside counsel is being tasked to focus on case strategy.

Both the online survey respondents and interview participants emphasized that the role of outside counsel and external service providers is routinely evolving among corporate law departments. While 22% of online respondents described their outside lawyers as somewhat influential on their technology decisions, 71% indicated that their outside lawyers do not influence their internal technology decisions. Only 4% of respondents described their outside lawyers as very influential and said they relied on their guidance to make technology decisions.

The major role of outside counsel in the eDiscovery and investigations programs, for 76% of the online respondents, is determining their case strategy. Fifty-five percent reported that they have a major or complete role in performing document review and 53% noted the same level of influence on production.

In contrast, 55% said that outside counsel has no role in processing data for review and 65% indicated that their outside lawyers have no role or a minimal role in offering guidance on what data to collect. “For larger cases, inside counsel typically issues the first legal hold, outside counsel supplements as needed and manages through disposition; small matters and investigations are usually handled exclusively by internal counsel,” said one online respondent.

By way of comparison, the use of ALSPs to support eDiscovery and investigations continues to shift, with a number of online respondents emphasizing their use of this resource to supplement their needs. Forty-five percent indicated that they have used ALSPs and will continue to do so at the same level in 2022. Eight percent are planning to increase that usage, while 4% will reduce it.

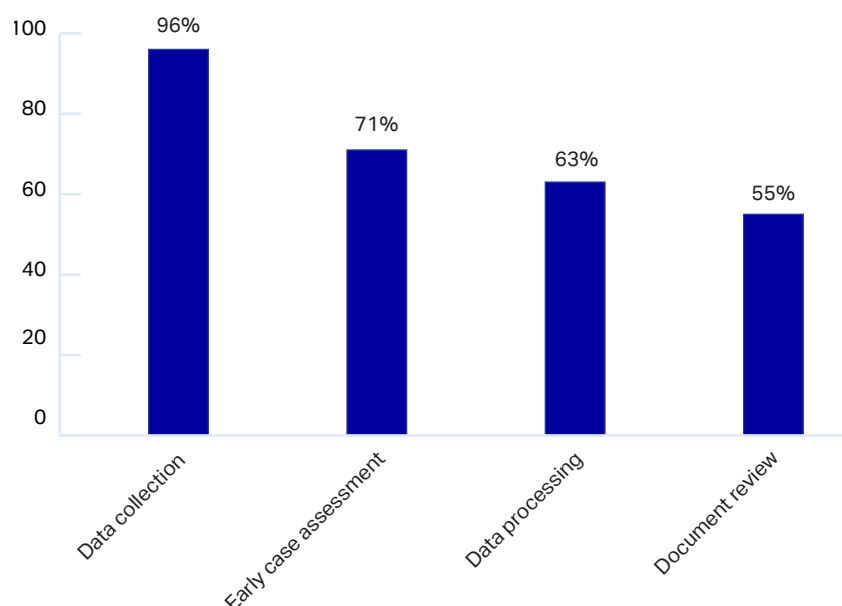
The relationship between the legal department and outside counsel remains strong

Despite its evolution, the strength of the relationship between outside counsel and the corporate legal team remains critical. “It is a partnership in that we provide guidance and give our outside lawyers flexibility. We collaboratively set a general case strategy, but our eDiscovery team dictates how it performs eDiscovery and how the outside lawyers should do so,” said one interview participant.

Some legal teams rely more heavily than others on their outside counsel, while others manage the majority of matters themselves. A consistent theme was that projects usually start with the in-house team and then provide data to outside counsel for review. Many noted that the internal team bears responsibility for the tactical elements of eDiscovery, while their outside law firms conduct some level of review and set advanced case strategy.

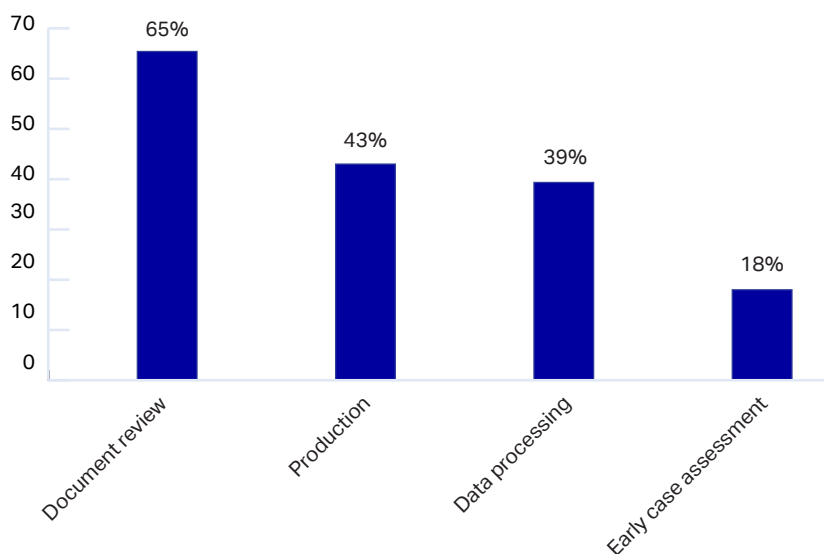
Many in-house teams balance guidance from outside counsel with support from external providers

Activities performed in house

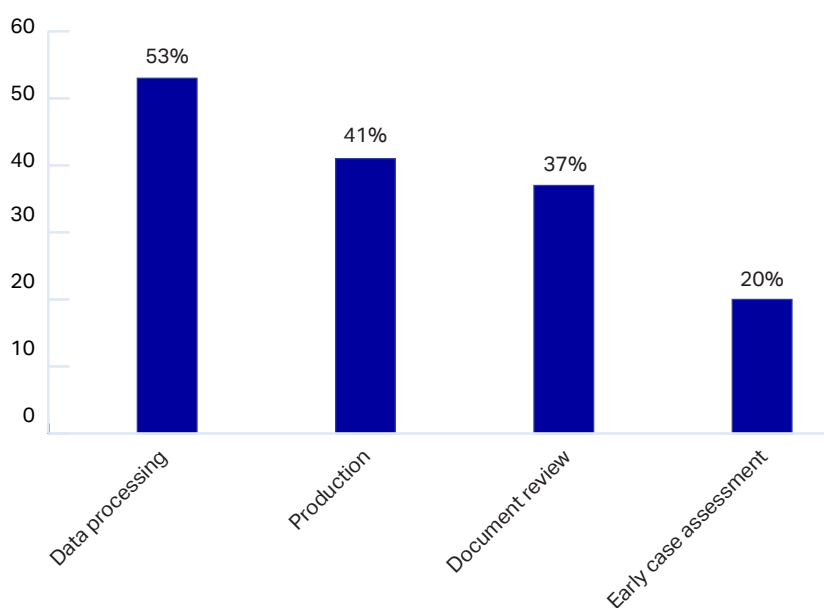




ALSP support activities



Software vendor support activities



Legal departments are beginning to harmonize decision-making related to the cloud

For 45% of online respondents, the process or people involved vary between cloud-based and on-premises products and solutions, and there can be additional review required for cloud-based solutions to ensure that they align with the organization's overarching cloud strategy program. Sixteen percent reported that the CIO/CTO or other IT leaders have a greater role for on-premises deployments.



There was an even split among the interview participants between those who apply different strategies and decision-making to cloud-based tools and those who do not. Several still focus on more traditional applications. “We still favor on-premises tools because we know that we will need to customize applications and require back-end access. We don’t typically have that capability with cloud-based tools,” said one participant

That said, participants recognized the cost savings and efficiencies associated with using the cloud. “It is one decision, which is based on cost; most of our applications are now cloud-based as a result of the cost-effective nature of those tools,” one participant said.

Seizing new opportunities in eDiscovery

When asked about opportunities in eDiscovery, 88% of the online respondents shared ideas for where to dedicate resources in the next 12-18 months. While one respondent reported “the intersection of eDiscovery and privacy will be the most important opportunity,” another shared that “eDiscovery will be more closely aligned with information governance and the data privacy department; these will not be operating in silos any longer.”

Interview participants also identified these opportunities for improving eDiscovery processes:

- Improving process consistency in all matters.
- Using new software for preservation and collection in Office 365®.
- Collection of non-central communication repositories.
- Bringing contract review under the eDiscovery umbrella.
- Collaboration and ephemeral ESI collection.

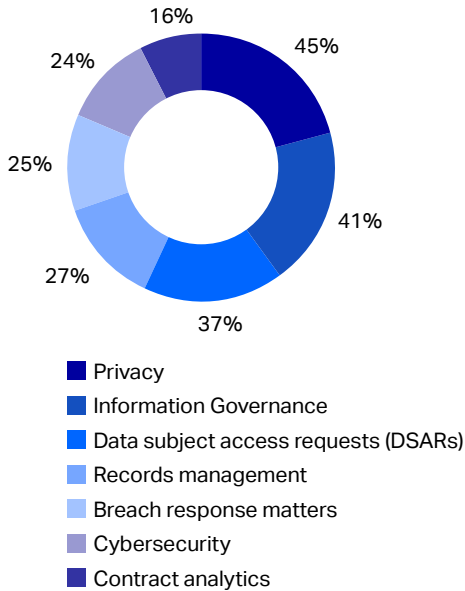
Trends in artificial intelligence adoption

The most common opportunity for improving eDiscovery processes that online respondents mentioned was artificial intelligence (AI), with almost a quarter emphasizing the promise of new initiatives involving AI. “The greatest opportunity is going to be in consolidation of technologies, with an immediate focus on AI and data deduplication across all data sources,” said one respondent. Another said, “More AI to take subjective user decisions out of the mix.”

In fact, when asked to rate, on a scale of one to five, the projected impact they see AI having on eDiscovery in the next 12-18 months, 43% of online respondents rated it a four or five, noting that AI will have a strong or transformative impact on the sector by 2023.

Note that AI means different things within this feedback. The reference to data deduplication highlights that some consider process automation to be AI, while machine learning to reduce the subjectivity of user decisions is likely to be considered more squarely as AI. The key point is that AI has multiple interpretations and is really a continuum. However you define it, AI is already delivering significant time and cost savings.

eDiscovery expansion areas



Recognizing the expansion of eDiscovery

eDiscovery (and eDiscovery technology) is expanding into new territory and programs will evolve to address data privacy, breach response, cybersecurity and more.

Almost two thirds (61%) of online respondents expect their work in eDiscovery to expand into other areas in the next 12 to 18 months. “eDiscovery for subpoenas, litigation, internal investigations and employment matters continue to grow in volume; our program will need to grow to meet the additional demands,” said one participant.

As eDiscovery evolves in a post-pandemic environment, most respondents expect it to expand into privacy (45%), information governance (41%) and data subject access requests (37%). Respondents also expect an expansion of Records management (27%), breach response (25%), cybersecurity (24%) and contract analytics (16%) as projected areas of growth.

From outside counsel spending and technology adoption to budget trajectory and self-service opportunities, the needs of corporate legal teams are shifting. When asked whether they agree or disagree, most respondents (53%) strongly agree that their teams will adopt new technology to reduce their manual efforts and improve efficiency. Forty-one percent strongly agree that their workloads will increase.

In contrast, 39% somewhat or strongly agree that they will send more work to service providers or ALSPs, including outsourcing their technology needs, 31% disagree that compliance will have greater influence over their eDiscovery programs moving forward and 24% disagree that budgets will shrink.

Navigating the trajectory of discovery

Looking ahead, the default for eDiscovery seems to be remote. “When I started in eDiscovery many years ago, there was a sense that you needed to be in the office, but you can provide customer service remotely now,” explained one participant.

Respondents also expect eDiscovery to be integrated and intuitive, particularly for law firms that are supporting corporate legal teams. “Law firms need to be more skilled at supporting eDiscovery; we handle eDiscovery internally, but need guidance from our law firms, which some cannot provide beyond the basics,” advised a participant. Another said, “We want to take control from outside counsel to coordinate as much as we can in house and dictate which technology to use.”

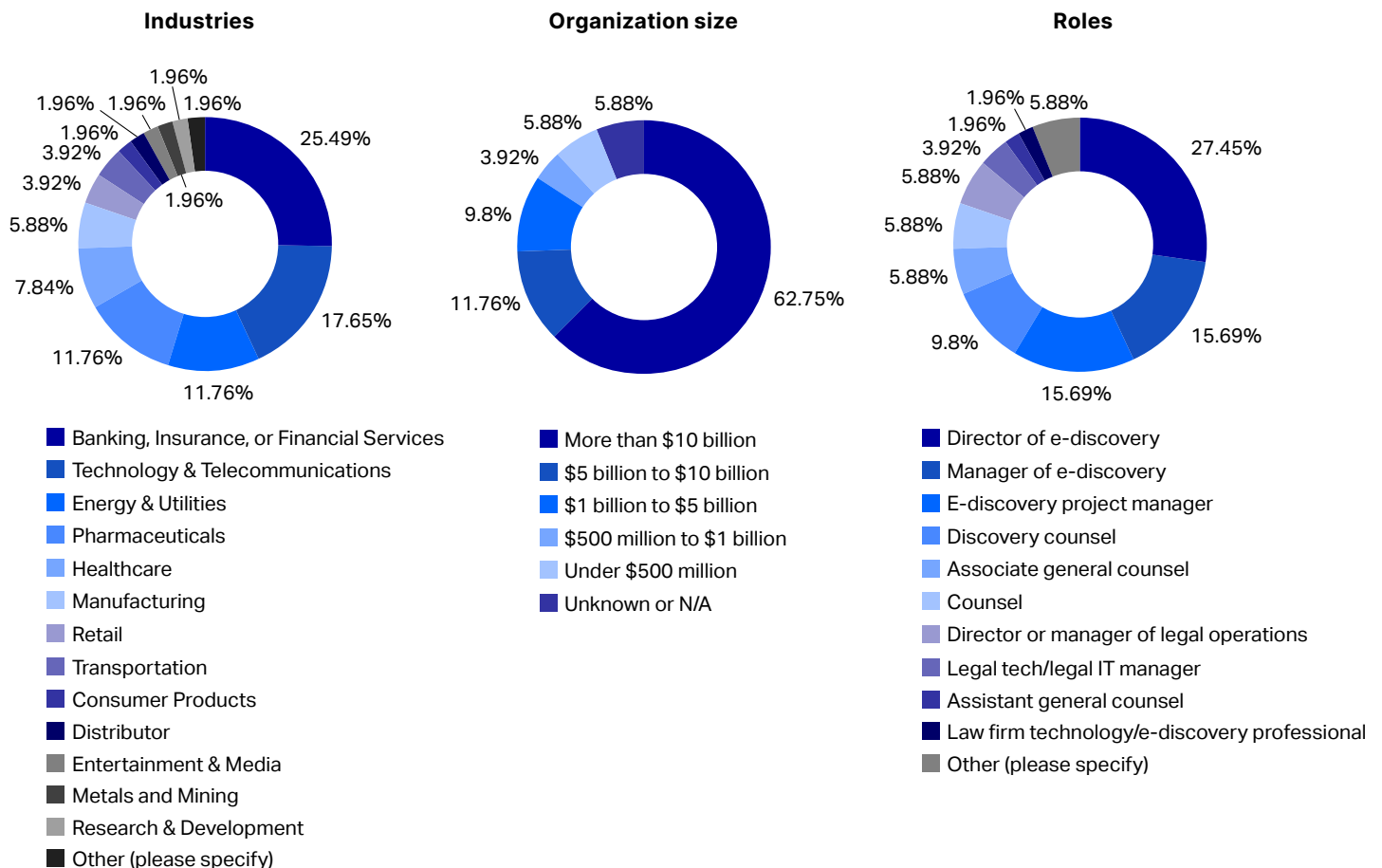
That familiarity would extend beyond core eDiscovery issues as well. “There should be a greater appreciation for privacy issues and a stronger collaboration with the company's privacy professionals,” said one leader. Another said, “We would like to go through eDiscovery without a human being looking at a document through better analytics and ECA at the outset, as well as better document coding when creating a record.”

Conclusion

Corporate legal teams find themselves in an eDiscovery power position in 2022. They have adapted to a remote operating environment, honed their skills in an array of new technology platforms and understand how to optimize their internal and external resources. While they continue to balance their budgets, manage shifting workloads and address an array of data management challenges, they are more resilient and empowered than ever, with an appreciation for the tech-enabled road ahead.

Research background

From March 28, 2022 through April 28, 2022, Ari Kaplan Advisors received 51 responses to an online survey. All of the respondents work in corporations and 96% are based in the United States (with one in Germany and another in India). To supplement these insights, Ari Kaplan also interviewed 10 in-house eDiscovery practitioners between April 4, 2022 and April 18, 2022.



Resource links

[OpenText eDiscovery solutions](#)

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Of those participating in the interviews, four are in banking, insurance or financial services and the remaining individuals are each in energy and utilities, entertainment and media, healthcare, manufacturing, research and development and retail. Seven work with companies that generate more than \$10 billion in annual revenue and have more than 10,000 employees.

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