

LITIGATION & T.A.R.

BY STEVE EMBRY

What's New?

As it has been for several years, the use of technology in the courtroom and e-discovery are some of the most popular topics in legal technology. While there continue to be a myriad of software choices in these areas, much of the hardware and software actually used have remained mainstream.

Laptops, which have incorporated tablet functionality and ease of use, continue to gain ground as the technology of choice by many lawyers in the courtroom, while the use of smaller mobile devices like tablets and smartphones has stabilized.

And, for the first time in a while, the availability and use of trial presentation hardware and software in courtrooms has increased. Courts seem to devote their energies and resources to evidence hardware as opposed to other hardware options.

Bottom line: more lawyers are using technology in the courtroom, though the purchase of and training on courtroom presentation technology shows only modest increases.

Mandatory and voluntary electronic court filings in state and local courts continue to increase and have become the norm. E-discovery requests continue to rise and are mainstream. But predictive coding and technology assisted review (T.A.R.) have not yet caught on or become mainstream. Simple solutions and keyword searching remain the tools of choice.

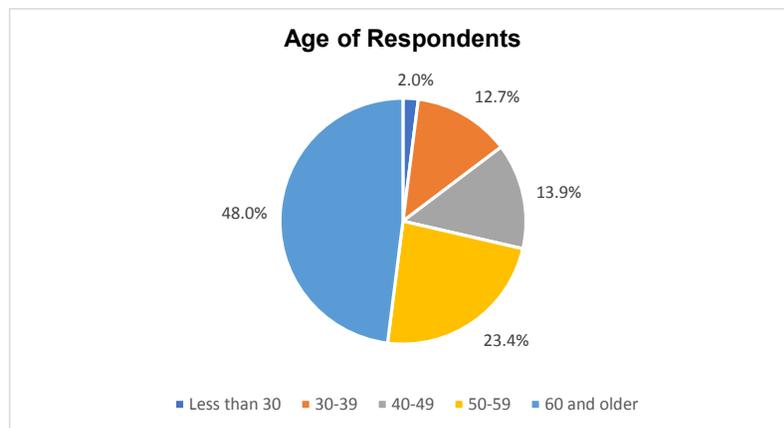
The troubling technology gap between large firms and small firms in hardware and software, IT staff and assistance, training, and overall resources continues to exist. In the courtroom, this means more reliance on “do it yourself” by small firms and the use of specialized staff or consultants by large firms. In the hardware and software world, this means less investment by small firms and greater access to technology tools by their larger brethren. In the e-discovery world, this means an increased use of software and consultants by large firms while small firms

struggle along the best they can. This gap continues to have repercussions for the quality of service to underserved legal needs and the continued health of smaller firms that play such a key role in society. But there are some signs of improvement at the mid-size firm level which could be a harbinger of things to come.

Who Responded?

A few words about demographics. 75% of the respondents were from firms of less than 50 lawyers. This skews the results slightly: firms with 50+ lawyers typically have more IT and technology resources. In addition, the survey size of some of the larger firms (500+) was only 8%, thus the responses from this limited number may not necessarily reflect what is happening in these larger firms.

In addition, the average age of the respondents was 56; on average, the respondents had been admitted to the bar for 29 years. 48% percent of the responders fall between the ages of 60 or older.



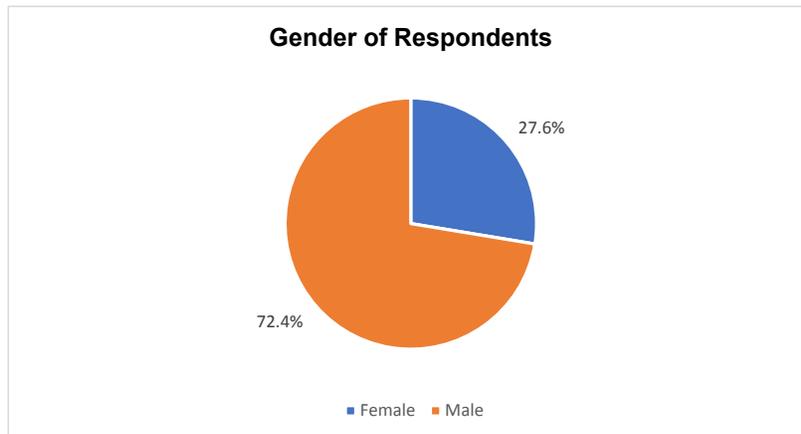
This, too, may skew the results: while many in this age group may be early adopters and fully conversant and comfortable with technology, they also came of age as lawyers when technology was not as ubiquitous as it is today.

It’s also important to note that the survey was directed to lawyers in private practice only—not in-house lawyers who, as clients, may ultimately drive more changes across the board.

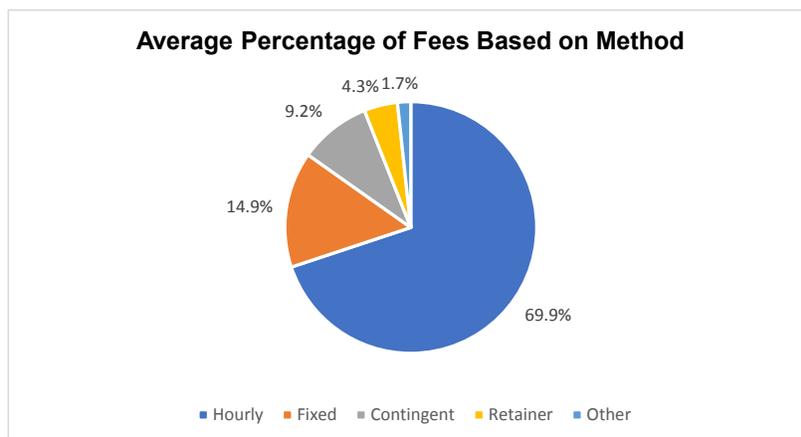
On the plus side, most the responses were from those whose primary practice area was litigation. Some 67% of the respondents said they actually practice in the courtroom. This constitutes little change from the past several years.

Seventy-two percent of the respondents were male; this gender gap decreases

with age.



One other demographic note: the billable hour is still king among our respondents; almost 70% said it was their primary billing mechanism.



This, in turn, may drive some of the technology foot-dragging lawyers are notorious for. Consciously or subconsciously, the incentive to adopt time-saving technologies for those on an hourly pay scale differs from those who are not.

Technology in the Courtroom

Significantly, the percentage of lawyers *not* using technology in the courtroom continues to drop: 43% in 2017 compared to 45% in 2016, 51% in 2015, and 54% in 2014.

Whether this reflects the adoption by more states of Comment 8 to Model Rule 1.1 (requiring that lawyers kept abreast of developments in technology), increased availability of resources and cost decreases, or some combination of all these and other factors is unknown.

Laptop Use in the Courtroom

Laptop use in the courtroom experienced an increase over last year with 57% reporting using a laptop for various tasks, compared to 55% in 2016, 49% in 2015, 46% in 2014, and 48% in 2013.

Why the upswing? In previous years, smaller mobile devices like the iPad were stealing a chunk of the laptop business. Laptops continue to morph into hybrids (like the Microsoft Surface Pro or Lenovo Yoga), and the old terminology and dichotomy between the traditional laptop and tablet is becoming less and less relevant.

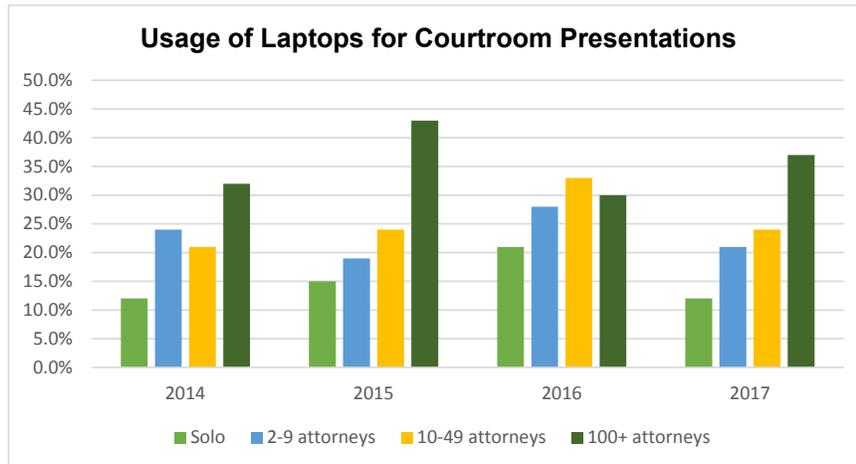
As predicted last year, as laptops continue to get lighter, thinner, and incorporate multi-touch screens, their use is increasing. We are seeing the benefit across the board of incorporating this tablet functionality in laptops.

This trend plus the fact that laptops are versatile, easy to use, and can perform so many other non-courtroom tasks have made them, at least for now, the choice of litigators.

The top uses for laptops in the courtroom according to the *ABA 2017 Legal Technology Survey Report* include:

- 34% to access email
- 33% to access key evidence and documents (28% in 2014)
- 29% to do legal research
- 27% to access court dockets and documents
- 23% to deliver presentations (a percentage that interestingly has remained fairly constant despite improvements in technology)

The gap between the percentage of large firm respondents who use laptops to deliver presentations in the courtroom (37%) and solo and small firm respondents (12-21% respectively) continues to exist. For whatever reason, there was a small decline in the use of technology to deliver courtroom presentations across the board; this may just be an anomaly, though, since the percentage has remained constant over the last several years.



Given the increased development of mobile apps, tablets, and cloud computing, however, it is no surprise to see an overall increase in accessing key evidence and documents in the courtroom. Evidence is being stored in the cloud using low budget tools like Dropbox, or higher-end e-discovery tools like Relativity (and everything in between), and then accessed from mobile devices like laptops, tablets, hybrids, and even smartphones.

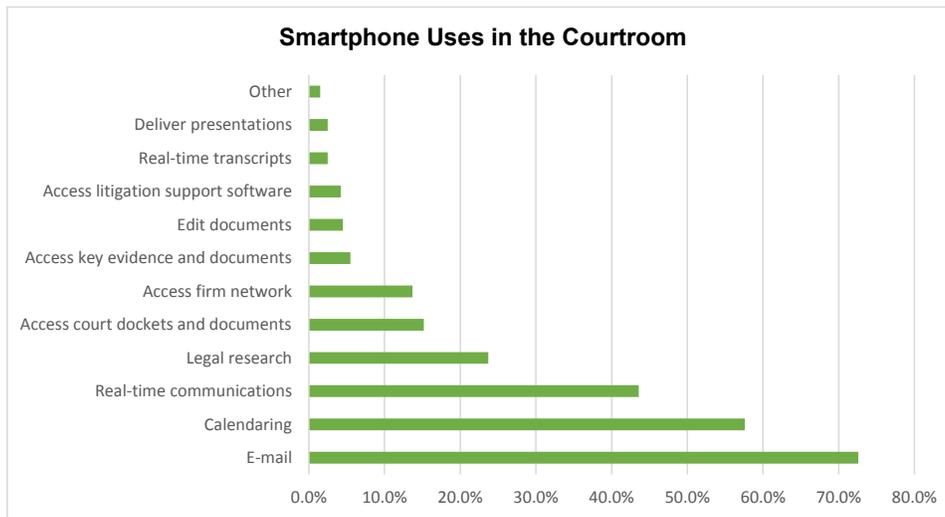
What About Tablets and Smartphones?

Use of tablets in the courtroom continues to remain level (or perhaps maxed out), with 38% of respondents reporting using a tablet device in the courtroom, compared with 37% in 2016, 35% in 2015, and 37% in 2014.

The top uses of tablets in the courtroom are the same as last year: email (29%), calendaring (21%), and online research (25%). 17% report using their tablet to access key evidence and documents, compared to 12% in 2016—another indication that laptop hybrids remain the device of choice.

Interestingly, the number of large firm respondents using tablets in the courtroom significantly dropped from 44% last year to 28% this year, which may reflect a greater reliance on laptops or hybrids. The remaining categories of firms using tablets remained steady.

Smartphone use in the courtroom was roughly the same as last year (80%), compared to 76% in 2015 and 77% in 2014. As expected, the greatest uses of smartphones in the courtroom are email and calendaring. The least common uses were for conducting online research and accessing court documents. This reflects the clear preference to use laptops over smartphones and tablets to conduct these activities. Perhaps courtroom smartphone use is maxing out, as well.



What Hardware is Supported and Provided by Courtrooms?

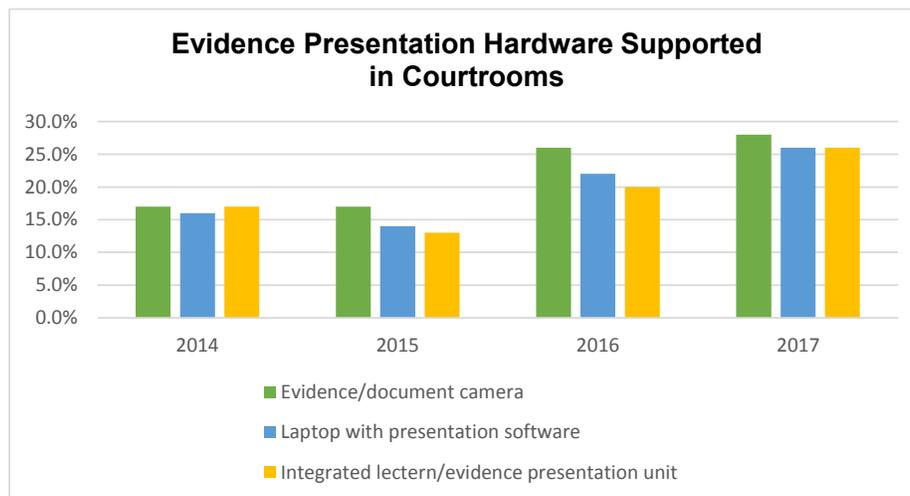
The number of courts that reportedly provide and support audio and video display hardware showed some signs of improvement for the first time in several years.

For example, on the annotation hardware front, in 2017, some 22% of the courtrooms provided touch screens, compared to 16% last year. The audio hardware provided or supported also reportedly also showed some improvement.

Other improvements include:

- 66% reported in 2017 that projection screens were provided (57% in 2016)
- 54% reported that digital projectors were provided (46% in 2016)
- 42% reported having individual monitors for trial participants (34% in 2016 and 29% in 2015, which is an encouraging increase)
- 54% reported having digital projectors (46% in 2016)

These numbers represent a welcome change, which is encouraging.



The availability of real-time reporting equipment to court monitors actually decreased slightly but real-time reporting to individual lawyer monitors increased from 18% last year to 21% this year, reflecting a trend toward more availability and greater functionality, since allowing lawyers to access this software is key to usage.

The largest 2017 increases, however, were in the increased supporting and providing of evidence hardware:

- Evidence and document cameras continued to increase (28% in 2017).
- Laptops with presentation software increased from 22% last year to 26% this year.
- Integrated lectern evidence presentation units increased from 20% last year to 26% in 2017.

These are significant and encouraging gains, and may reflect both the decreased costs of these goods and greater availability of the integration of these tools with existing hardware.

But Are Lawyers Using It?

Many respondents, however, simply remain aware of what hardware is provided or supported in courtrooms or how to use it. Despite over half of the respondents reporting using courtroom technology, a large number still do not use any of the courtroom hardware that is available.

The good news is this number is declining. Legislatures and courthouses finally seem to be “getting it,” and the “build it and they will come” approach may be

finally paying off. It will be slow going, though.

The hardware most used by the respondents were projector screens (an increase from 28% last year to 44% today) and laptops with presentation software (from 28% last year to 43% this year). The later number again reflects perhaps the growing use of the powerful laptop hybrids and suggests that future courtrooms will use technology that can do other things for the users than what's associated with the traditional courtrooms.

The Have and Have Nots: What Lawyers are Buying and Leasing

Lawyers and law firms seem to be buying and leasing hardware a bit more than last year.

Sixty-eight percent of the respondents said they or their firms did not own or lease annotation hardware versus 73% last year. This year, 41% said they had no display output hardware (down from 52% last year), and 42% had no courtroom presentation hardware (down from 51% last year). 68% said they did not own or lease audio courtroom hardware (down from 84% last year).

For the first time in a while, these numbers generally show an increase in investment from previous years. Whether this reflects a trend remains to be seen.

As suspected, large firms had much more owned and leased hardware at their fingertips than smaller firms, giving these firms a potential advantage.

The most purchased and leased hardware continues to be laptops with presentation software, likely indicating that these devices have multiple uses beyond the courtroom, making the expenditures easier to justify. This was particularly the case with large firm respondents; some 74% of them reported owning or leasing laptops with this software. This is consistent with the decreased use of tablets in the courtroom by big firm lawyers reported above.

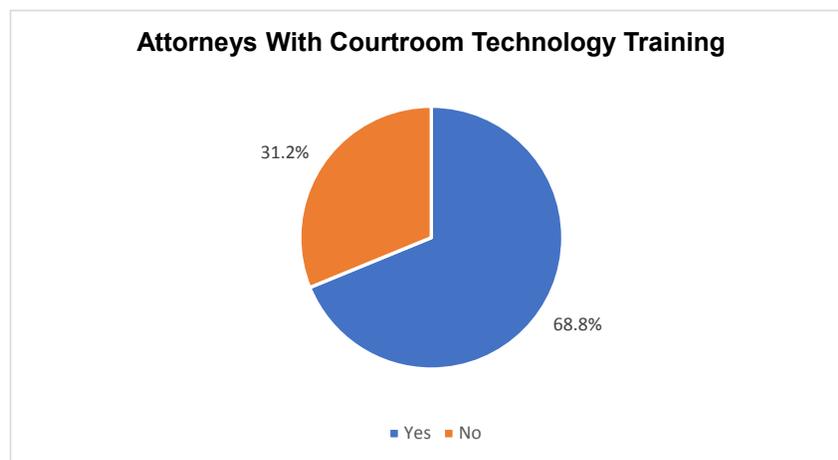
Who Is Operating the Technology?

Who makes the courtroom technology work depends almost entirely on the size of the firm. While overall, 35% of the respondents operate their own technology in the courtroom, 44% of the solos do so and only 6% of the large firm lawyers so. Again, this could suggest an advantage of the big firms. On the other hand, since they are forced to operate the technology themselves, solos may be more nimble and flexible with technology in the courtroom.

Importantly, 41% of the respondents report having no technology support staff. As expected, there is a huge gap between small and solo shops (77-46% respectively) and large firms (almost all have support).

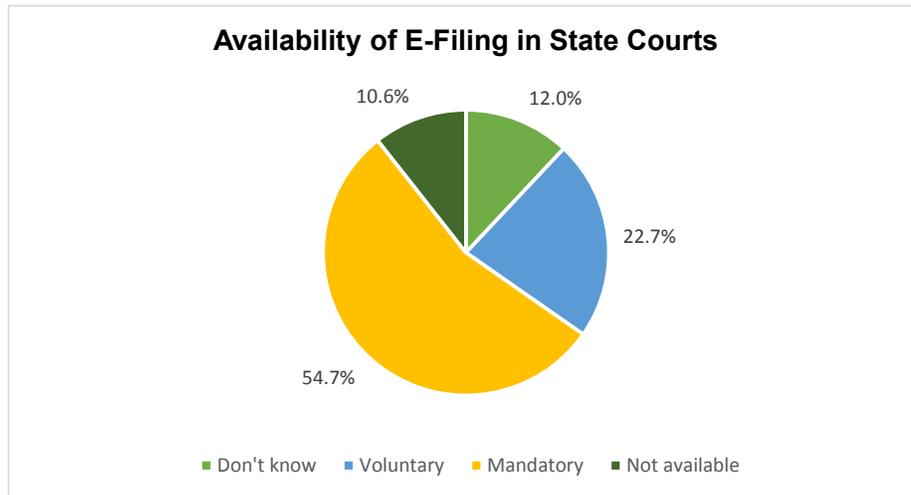
What About Training?

Again, the number of respondents with training in courtroom technologies, while low, appears to be improving (31% this year versus 28% last year). As suspected, the large firms (100+) lead the way in training, although mid-size firms (10-49 lawyers) have by and large caught up.



Importantly, the training that exists seems mainly on the job. 81% report that they learned about the technology by practicing with it in the courtroom before using it; only 56% reported actually attending a court sponsored course. This reflects the notion that lawyers typically learn what they need to learn when they need to, not beforehand. It also reflects that many of us perhaps still perceive technology to be only an insignificant aid in our courtroom storytelling as opposed to indispensable to telling our stories in the most persuasive way.

Why no training? The answers are interesting. The top reason given is that training is not available (42%). 28% said the courtrooms don't have the technology, so why bother training? 24% said they don't practice in the courtroom frequently enough to justify getting trained, perhaps reflecting the declining number of trials. 14% said training was too time-consuming (with most of this response coming from firms of 100+ lawyers, a short-sighted view in my humble opinion) and 26% said it wasn't necessary (again, primarily fueled by responses from lawyers in large firms). Remember though, that many of these firms have IT departments that frequently run the courtroom technology, making individual lawyer training less important. These numbers are consistent with last year's.



What About Software?

The most popular software is related to litigation support (available in 39% of the responding firms), followed by deposition transcription/management software (31%), and trial presentation software (28%).

The litigation support software available at the respondents’ law firms remained constant. The highest number (42%) report that their firms have litigation support software (up from 36% last year). Deposition management software (31%) and trial presentation software (26%) remained close to what was reported last year.

Larger firms have much greater access to software (77% as compared to 14% at solos). When asked whether their firm had purchased software in the last six months, 67% said “No,” and some 29% said, “Don’t know.” This suggests a lack of interest in these technologies.

Why the low reported availability? It could be a general belt-tightening or the lack of need for these tools given the decline in trials. Or it could be just a lack of demand by the lawyers in the firms. Perhaps some of the software previously purchased is now available in cloud applications. It’s disturbing, since litigation software has many uses besides purely trial practice.

Relatedly, when asked what features of litigation software they liked the most, 61% said they simply didn’t use any! This was up from 55% last year, which is surprising.

Of those that did, some 33% said the feature they liked most was full-text

searching, a tool generally available on many software platforms that have no unique litigation features. This was consistent with last year.

Twenty-eight percent reported that trial presentation software was available at their firms. This was consistent with last year, and again, big firms led the way by a large margin.

Of those lawyers who used trial presentation software, PowerPoint remained the software most frequently mentioned, although other software is gaining ground. 79% of respondents reported using PowerPoint, Summation garnered 21%, and only 12% reported using TrialPad.

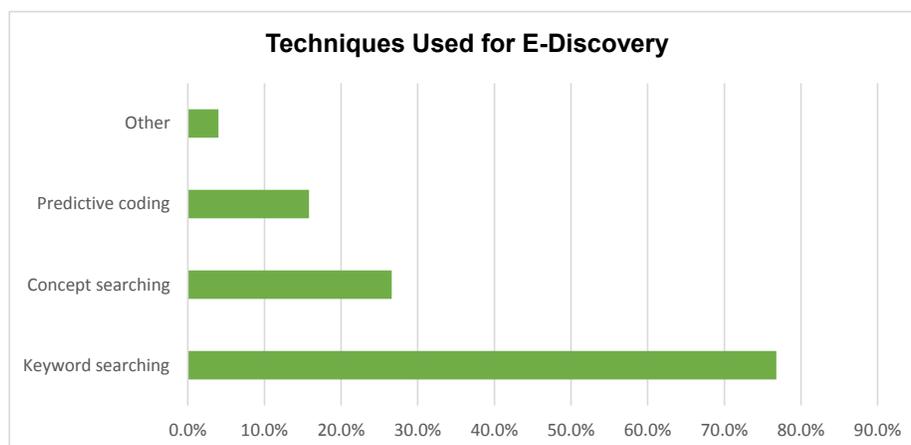
Thirty-one percent of firms reported having deposition management software available, with 56% of those at large firms having this tool but only 13% of solos. Etrans was the most popular (38%) followed closely by Summation (37%).

The respondents' clear choice for the hosting of the software they used was internal (17%); only 7% would prefer it to be in the cloud. But a very large percentage either had no preference, didn't use it, or just didn't know.

Electronic Filing and Documents

The frequency of electronic filings with court systems continues to increase and has clearly become the norm. Overall, almost 79% of the respondents say they now file documents electronically with courts.

Respondents report that the number of courts that allow electronic filings and the number of courts that require it have slightly increased over last year.



The unavailability of electronic filing is highest in the south (15%) and lowest in the midwest (2%).

Overall, some 87% of the respondent's report receiving electronic documents. This continues the trend toward increased electronic filing.

e-Discovery

The percentage of those who never receive requests for e-discovery fell slightly from 38% in 2015 to 36% in 2017; this is consistent with last year. The number of attorneys who never make e-discovery requests increased from 37% in 2016 to 42% in 2017, which is a bit surprising.

The number of firms involved in cases where processing of e-discovery is necessary remains constant at 51% and increases with firm size.

How Do Lawyers Review and Process e-Discovery?

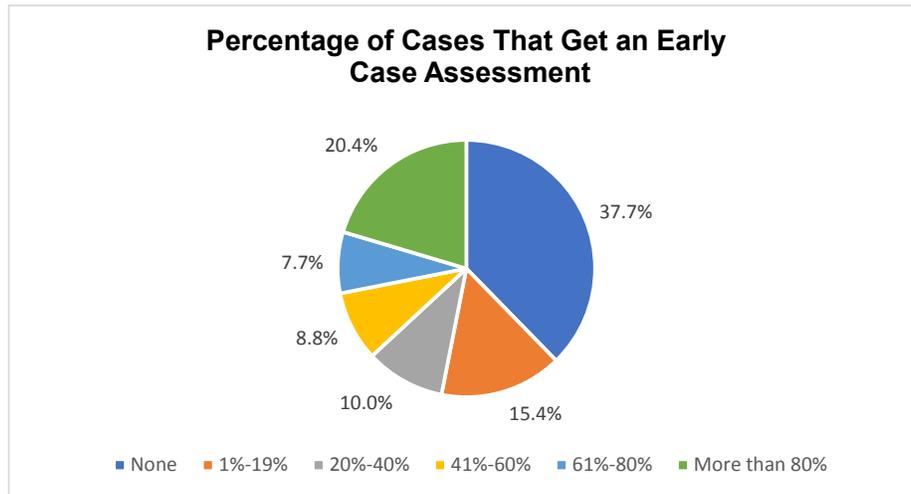
Forty-four percent of the respondents still use no sort of e-discovery review solution; 44% use no sort of case analysis solution.

The primary tool used to review e-discovery materials remains keyword searching (51%); only a few used context analysis and predictive coding. These numbers have changed little from last year.

Only 13% report using predictive coding to process or review e-discovery materials. The lowest percentage of use was at solo shops (7%), with the highest being at firms of 100-499 lawyers (39%).

Of those that review and process e-discovery, 25% prefer a "simple review" solution (a tool focused on the basics of review) with only 7% (down from 11% last year) opting for a "sophisticated review" solution (a tool that includes advanced review functionality and analytics). Ease of use and price were the key determining factors in choosing and using a case analysis solution.

Keyword searching remains the most favored technique for processing and reviewing e-discovery materials (51%), followed by data filtering (29%). Predictive coding remained at a low 13%.



Use of Predictive Coding

Of those using predictive coding:

- The key determining factor whether to use this tool is the number of documents and the deadlines imposed upon the lawyers (61%).
- 52% believed that the size of their cases simply did not warrant using this tool.
- 21% said they couldn't justify the cost (down from 29% last year).
- Almost 26% of the respondents were prompted to use the technology by inside counsel, who are likely more concerned about the efficiencies that predictive coding brings to the table.
- 12% still had concerns about the technology.

Interestingly, 40% of respondents at firms of 500+ lawyers had concerns about this technology. Firms between 50-499 lawyers also had concerns, while only 5% of the solos did (down from 17% last year).

This may reflect that solos are finding the need to use this technology to better compete with larger firms. Such a striking anomaly may also be explained by the small number of respondents from the very large firms who by coincidence may be lawyers who don't trust this technology. Or maybe large firm lawyers do not have enough hands-on experience with the technology to clearly understand it (larger litigation support staff and outsourcing resources may handle much of this for large firm lawyers).

Only 11% claimed that they were unfamiliar with the tool (down from 16% last

year).

When used, predictive coding was primarily used by respondents for document prioritization.

Another interesting finding: 38% of the respondents never bother to perform any sort of early case assessment, down from 44% last year, which is good.

Finally, the number of attorneys using outside litigation support bureaus (31%) and forensic specialists (31%) remains relatively constant in the *2017 Survey*. There is a clear preference among larger firms to use support bureaus and e-discovery consultants (45%); smaller firms are more prone to use computer forensic specialists (13%). Almost none of the respondents reported outsourcing e-discovery work to lawyers outside of the U.S. (3%) and only 15% reported outsourcing to lawyers within the U.S. 15% didn't know if their firm out sourced work to lawyers either inside or outside the U.S.

In summary, more lawyers are using technology in courtrooms but there has not been a significant increase in training or purchasing of hardware and software by law firms. Laptops remain the hardware of choice as opposed to tablets. The gap between large firms and small continues to be broad and vast and shows no signs of lessening. Finally, while electronic filing and e-discovery are more and more mainstream and a regular part of litigation, predictive coding and technology assisted review have not yet caught on.

About the Author



Stephen Embry is a member of Frost Brown Todd LLC and is a member of the Firm's class action and privacy groups. He frequently defends participants in consumer class action litigation and mass tort litigation. Stephen is a national litigator and advisor who is experienced in developing solutions to complex litigation and corporate problems. His mission is to find simple, successful, and elegant solutions to the problems posed by complex and substantial civil litigation, primarily in the mass tort and consumer class actions, and privacy and data breach arenas. Find him on [LinkedIn](#).