



FORENSIC

Managing Electronic Data for Litigation and
Regulatory Readiness

Is the Legal Department Ready?

A Global Survey

ADVISORY

Foreword

Why is readiness important?

Before assessing the question of how ready companies consider themselves to be, it is worth considering the factors that make 'readiness' important.

It is also important to clarify the distinction between the reactive 'response' to litigation and regulatory matters and the proactive readiness for those matters. This survey is about the proactive readiness of legal departments (for those familiar with the Electronic Discovery Reference Model (EDRM) in the U.S., it is about 'going left' on that model).

However, the proactive and the reactive are clearly linked and for many respondents the concerns and challenges they identified were concerns relating directly to the reactive response to litigation (for example, e-discovery concerns) or to regulatory matters. Therefore, for many, 'readiness' is about the ability to respond as effectively as possible – in particular regarding the collection, review and disclosure of electronic material - when required to do so.

In that sense it is easy to see the value in being 'ready' as it allows businesses to handle litigation and regulatory matters as effectively as possible, putting them ahead of an opponent or a regulator, understanding their exposure or risk and leaving them less open to further challenge (for example, through an inability to find documents). Proactive readiness enables legal departments to assess their legal strategy early, deal with matters more efficiently and achieve the best outcome for the business.

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1 Executive summary

A KPMG Forensic and Harris Interactive survey reveals considerable uncertainty regarding the readiness of legal departments to manage electronic data.

The survey has revealed in-house lawyers' views on how ready their legal department is to cope with the electronic information management challenges involved in litigious and regulatory matters. Over 200 of the top global companies' in-house lawyers were interviewed revealing that:

There is a discord between high perceived levels of general readiness and

considerable practical concerns,

showing perhaps a lack of understanding of the concept of 'readiness', or a willingness to accept the concerns in the absence of obvious solutions.

Many respondents believe that records management policies and processes are

unclear and unworkable.

Only 19 percent mentioned the existence of policies or procedures for collecting and processing the data.

Perceived readiness levels appear stronger for some matters, such as employment/personnel matters (with

75% indicating a high level of readiness) but weaker for others, such as competition/anti-trust cases (with 62 percent indicating a high level of readiness).

There are very mixed views on how easy it is to retrieve data for regulatory or litigious matters.

38% indicate some level of difficulty in retrieving data. 10 percent think it is extremely easy to retrieve data while 10 percent think it is extremely difficult.



21% of legal departments had never been consulted by their IT departments about changes in storage capabilities within the organization. 25 percent were 'rarely or never' consulted about the adoption of new technologies for dealing with electronic evidence for e-discovery.

43% think outside counsel manage electronic information cost-effectively whilst 43 percent do not. 33 percent did not rely on external counsel at all for managing data, with 34 percent relying on them in most (80 percent plus) of their cases.

Litigation or regulatory response assessments by external providers are relatively common.

24% of respondents had been through such an exercise in the past 12 months, and 26 percent were likely (either quite, very or extremely likely) to undergo such an exercise in the next 12 months. There were mixed views on the benefits of such exercises.

Finally, the survey revealed that data readiness is a global challenge. These are not just U.S. or common law issues. Respondents indicated that the issues were much more widespread, including Europe, Asia Pacific, South and Central America, the Middle East and Africa.

2 Introduction and methodology

Increasing volumes of data have become a well-documented global challenge for businesses, including how to manage the storage, security and transfer of data, and how to gain insight and value from such electronic information across the business. Despite this often being regarded as an 'IT' issue, it falls to the legal department to ensure that data is managed effectively when responding to litigation and regulatory requests. The fundamental question asked by this survey is, "are legal departments ready?"

It is often in-house legal departments who act as the catalyst for wider records management exercises, with an agenda of litigation and regulatory readiness. Our survey aims to establish a high level view from some of the most senior lawyers in many of the world's largest corporate organizations of how ready their organizations are to manage data for legal purposes and what they are doing to improve readiness.



The survey consisted of 40 questions aimed at exploring the following key topics:

How ready do legal departments believe they are?

Is this challenge limited geographically (for example, US v rest of world) or jurisdictionally (for example, civil v common law)?

Have companies undergone formal litigation/regulatory readiness assessments?

How closely are legal departments working with IT departments?

How efficiently do companies believe their external legal advisors deal with their data?

What do companies see as the main challenges in managing data in litigation and regulatory matters?

What do companies see as the main ways of tackling these challenges?

Survey Methodology

The research was conducted by telephone between December 2008 and April 2009. The research programme was conducted by Harris Interactive, an independent global market research organization.

Interviews were conducted in English, German, French, Italian, Brazilian Portuguese, Mandarin, Japanese and Korean.

The survey data is based on 218 interviews with 215 companies. Of the 218 interviews, 170 were with representatives of Forbes 2000 companies, 10 were with divisions of Forbes 2000 companies and 38 were with large companies of at least 1,000 employees. Of the 170 Forbes 2000 companies, 76 (44 percent) are ranked in the Top 1000. All data is based on 218 respondents unless otherwise stated.

Fig 1: Profile of respondents by region

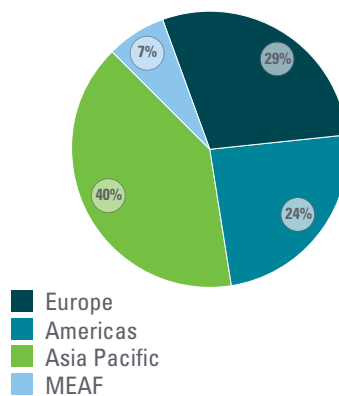
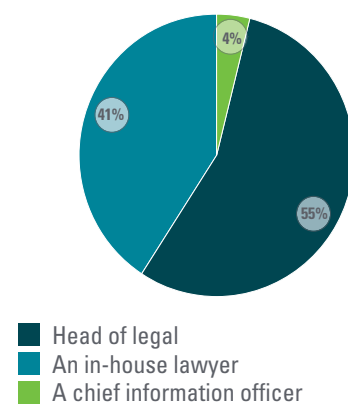


Fig 2: Profile of respondents by role



Regional breakdown by country

Europe (64 respondents): U.K., Germany, Spain, Switzerland, France, Holland, Italy.

Americas (52 respondents): U.S., Brazil, Canada, Bermuda.

Asia Pacific (87 respondents): China, Japan, South Korea, Australia, Hong Kong, India, Singapore, Taiwan.

Middle East and Africa (15 respondents): South Africa, Saudi Arabia, U.A.E.

3 Findings

In this section we present the main results of the survey. We start with the general levels of perceived readiness and move on to discuss the main concerns coming out of the survey. We then present the main findings relating to how companies are trying to improve readiness, some geographic and sector trends in the data and, finally, respondents' views on the future of this area.



A How ready are organizations across the globe for managing data in litigious and regulatory situations?

This question is at the heart of the survey. The results show a mixed picture, with a dissonance between the general perception of readiness (which is generally medium to high) and level of concern about certain practical aspects of readiness (which indicate that there are significant challenges).

1 High perceived levels of readiness

The results of the survey show that 81 percent of respondents across the globe consider themselves to have a good or very good level of readiness overall. Respondents believe their organizations are most ready for employment/personnel matters (with an average readiness of 7.4 out of 10) but less ready for internal fraud or competition matters.

Respondents in the Americas regard themselves as being slightly more ready than their counterparts in Asia Pacific and Europe, with just over one in four (27 percent) in the Americas having very high levels of awareness. In Europe, nearly one in four (23 percent) consider themselves to have low levels of readiness overall.

Fig 3: Readiness overall

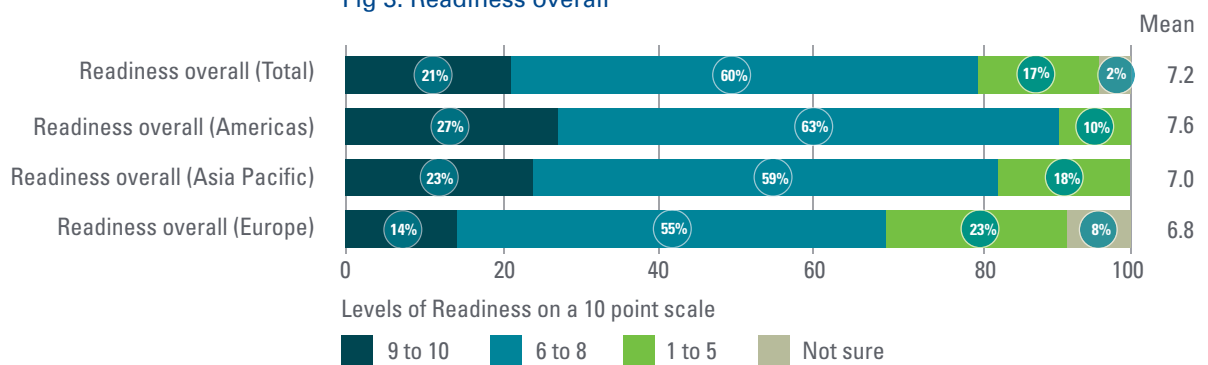
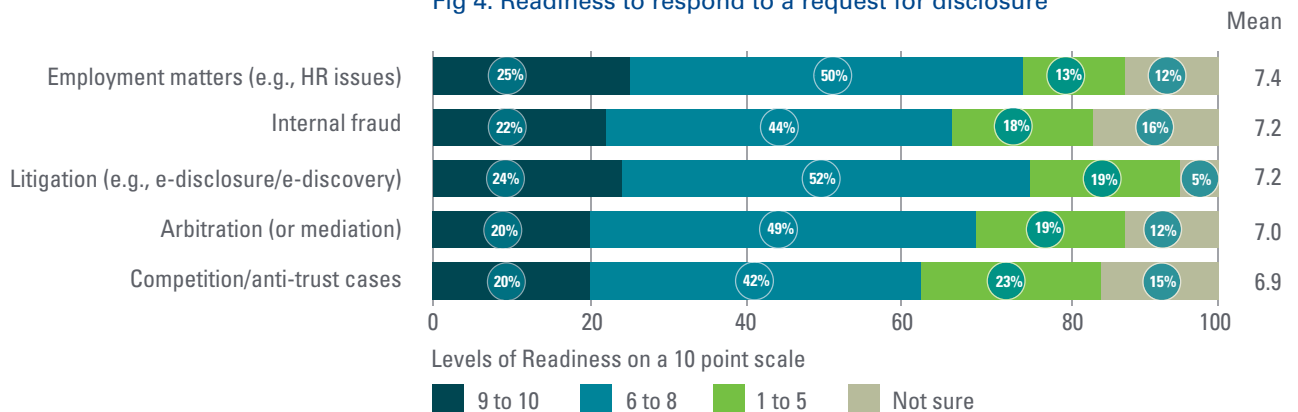


Fig 4: Readiness to respond to a request for disclosure



“Man hour costs are the most prohibitive concern around managing data.”

Canadian respondent, oil and gas sector

“Very concerned regarding the system security. It’s not only an internal problem but mainly external with our customer’s data.”

Brazilian respondent, banking sector

2 Significant concerns

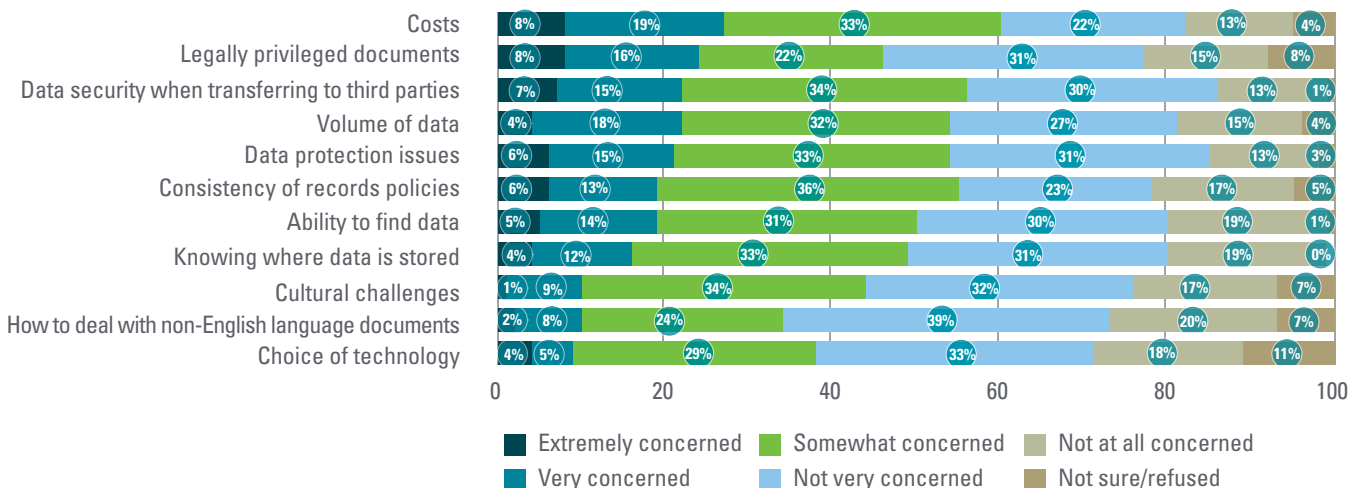
Though many respondents had a general view that they were ready, the results show that they also have significant concerns related to readiness. As regards the concerns identified by respondents, the results can be split into two broad categories – logistical and compliance concerns.

Unprompted, around 32 percent of respondents identified some sort of logistical concern regarding the collection, review and disclosure of electronic data/documents.

Unprompted, around 25 percent of respondents identified some sort of compliance concern regarding the collection, review and disclosure of electronic data/documents.

The chart below provides an overview of respondent concerns when asked how concerned they were about each of the issues below. 60 percent are concerned (somewhat, very or extremely) about costs, 56 percent are concerned about security issues, 55 percent are concerned about records management policies and 54 percent are concerned about data volumes. 50 percent admit to being concerned about the legal department’s ability to find data.

Fig 5: Level of concerns about collecting, reviewing and disclosing data



“The big problem is the exponential growth of data that is stored, collected and managed by the organization.”

Canadian respondent, financial services sector

“[We need a] greater understanding of weaknesses associated with document retention and production.”

Bermudian respondent, insurance sector

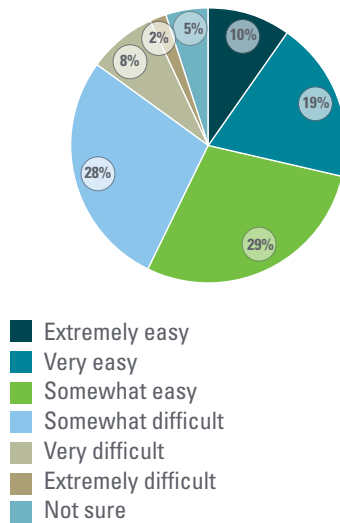
The survey explored some areas of potential concern in greater detail and some of the interesting findings are presented below covering the following issues:

- i. Retrieving electronic data
- ii. Policies and procedures
- iii. The legal and IT departments’ relationship
- iv. Cost concerns

i. Retrieving electronic data

38 percent of respondents considered that it would be difficult (either somewhat, very or extremely) to retrieve data in their organization. Nearly one in three (29 percent) claim it would be extremely or very easy to retrieve relevant data that is held electronically.

Fig 6: Ease of retrieving electronic data



ii. Policies and procedures

Many respondents were either unable or unwilling to give details on specific policies or procedures for collecting and preserving data. Only 19 percent indicated that they had internal policies. 16 percent mentioned a document retention policy or records management policy and seven percent mentioned a litigation or document hold policy.

Improving policies and procedures, the awareness of them and their implementation is a clear area for improvement.

For many respondents there was a recognition that more needs to be done regarding policies and processes and that initiatives were underway, but sometimes moving slowly.

“The process that we have for storing data only works if people have been trained to store it properly.”

U.S. respondent, retail sector

“Data is difficult to find, since we are a global company. Each location having different systems makes it difficult to locate the relevant data. There is not a central global management filing system.”

Australian respondent, energy and natural resources sector

"I don't know about technology. For everything that regards IT there are colleagues predisposed to that and their job is completely different from mine."

Italian respondent, financial services sector

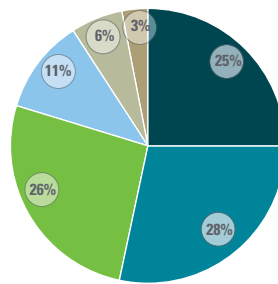
iii. The legal and IT departments' relationship

One in two organizations has an identified litigation response team in place to deal with e-discovery/e-disclosure or related requests. However, this overall percentage masks significant differences between regions with 81 percent of North American organizations having a response team but only 34 percent of European and 38 percent of Asia Pacific organizations having one.

Reassuringly, on the whole, in-house lawyers work closely with their IT department when preparing for and responding to requests for e-discovery/e-disclosure.

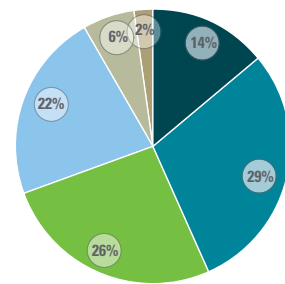
A slightly different picture emerges in terms of records management. Although 43 percent work extremely or very closely with IT, a substantial proportion (28 percent) work not very closely or not at all closely.

Fig 7: Cooperation between legal and IT departments: e-discovery/e-disclosure



- Extremely closely
- Very closely
- Somewhat closely
- Not very closely
- Not at all closely
- Not sure

Fig 8: Cooperation between legal and IT departments: records management



- Extremely closely
- Very closely
- Somewhat closely
- Not very closely
- Not at all closely
- Not sure

38%

expressed some level of concern about how to retrieve electronic data.

50%

of respondents have some concern over their ability to find data and 49 percent have some concern over knowing where the data is stored.

“There is no clear policy or a centralized global system.”

Australian respondent, energy and natural resources sector

iv. Cost concerns

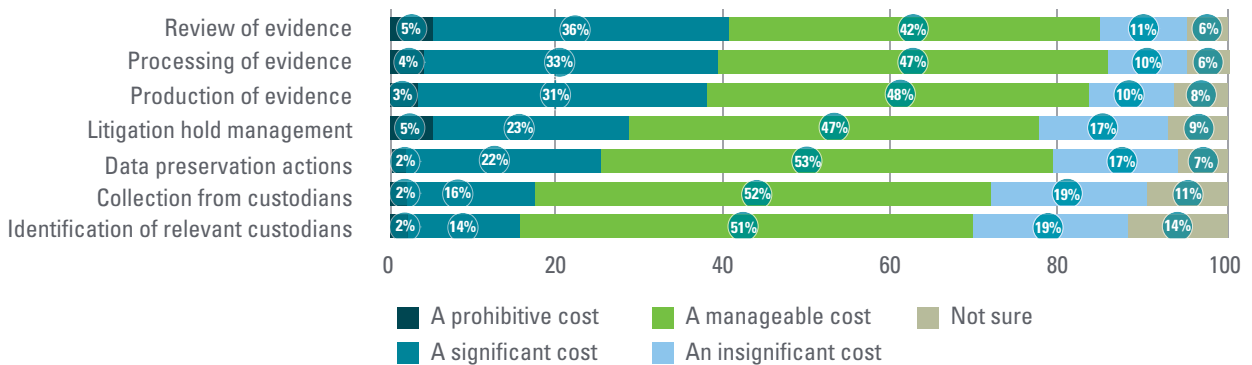
Respondents were also asked some further questions regarding costs. Figure 9 shows the cost perceptions regarding specific elements of the management of data in litigious and regulatory matters.

Respondents were also asked about how cost-effective they consider outside counsel to be when it comes to managing data.

A substantial proportion (33 percent) of respondents do not rely at all on outside counsel to manage electronic information in litigious and investigative disclosure situations. A similar proportion rely on outside counsel for the vast majority, if not all, cases (34 percent relying on outside counsel 80 percent or more of the time).

In terms of the cost-effectiveness of outside counsel when managing data in these situations, one percent of respondents regard the outside counsel as extremely cost effective with just over one in ten (11 percent) stating not at all cost effective. Two thirds regard outside counsel in these situations as only quite or not very cost effective at managing data.

Fig 9: Cost perceptions of...



“The cost is the main concern, considering the current economic situation.”

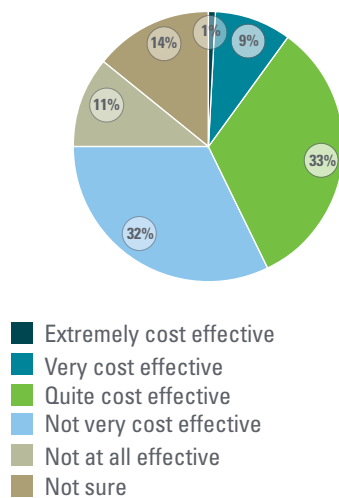
U.S. respondent, hotels and leisure sector

“We have a system allowing us to centralise data on a server with a menu and folders to be able to find the required data. This means that I feel confident but not as much as I could be. We are now going to try to set up back-up systems and retention procedures.”

French respondent, retail sector

Only **19%** indicated that they had internal policies for collecting and preserving data.

Fig 10: Cost effectiveness of outside counsel at managing data



Those respondents who considered external counsel to be not very cost-effective were asked to provide a reason (they were not given suggested reasons). The main reason cited for lack of cost effectiveness of outside counsel related to the actual price rather than issues with poor performance (48 percent of respondents simply commenting on the expensive nature of outside counsel). A substantial proportion (24 percent) think internal resources are better or cheaper for managing data. Around seven percent felt that the reasons external counsel were not cost-effective at managing data was to do with lawyers not having the appropriate skills – they ‘lack the knowledge or familiarity with electronic data and IT’, according to a number of respondents.

“At the moment we are in the process of determining a procedure for handling electronic data involving close co-operation between the different departments.”

German respondent, consumer durables sector

“We need to get up to speed on policies and procedures. We need time to convey to upper management so that they see the need to establish the programme.”

Hong Kong respondent, financial services sector

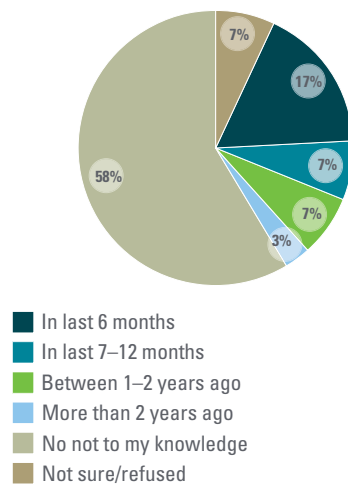
B How are respondents improving readiness?

Overall, many respondents were unable to identify specific initiatives underway to improve readiness. Comments from respondents indicate that many are currently looking to improve policies and procedures in this area. But for many this is more a recognition of a problem rather than a structured attempt to solve it. In this section we look at those respondents who are actively using outside support to try to improve their readiness.

External readiness assessments

Respondents were asked whether they had ever undergone a formal litigation or regulatory readiness assessment by an external body (and if so when) and the overall global results are shown in Figure 11.

Fig 11: Time since formal litigation or regulatory response assessment by an external body



“There is need for this. It is easier to have an assessment done by a third party. Internally, it’s difficult because of the bias.”

French respondent, food and drink sector

“I think the partnership with our external provider helped us change some internal procedures. That was the purpose – to change our procedures and that changed our lives.”

Brazilian respondent, financial services sector

"It is always good to have a view from the outside it is obvious."

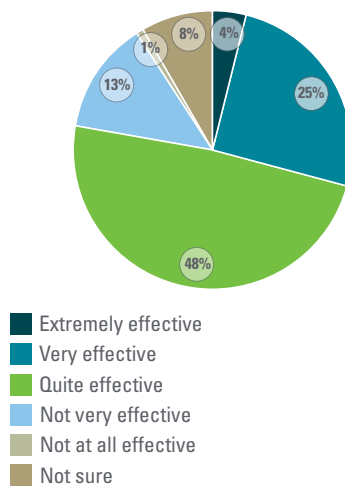
Spanish respondent, energy and natural resources sector

Rise in number of assessments

34 percent of respondents have undertaken an external readiness assessment, with half of that number having carried it out in the past six months. This indicates not only that a significant number of organizations have been through such an exercise but also that the number doing so is increasing.

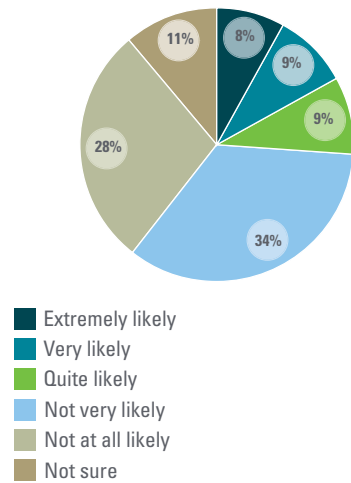
Respondents whose organization had ever undergone a formal litigation or regulatory readiness assessment by an external body have mixed views on the overall effectiveness of this exercise. Whilst 29 percent think the assessment had been extremely or very effective, just over 60 percent see some room for improvements (48 percent thinking quite effective and 14 percent thinking not very/not at all effective).

Fig 12: Overall effectiveness of the formal litigation or regulatory response assessment



Just over a quarter of respondents (26 percent) express at least some likelihood that their organization will undergo a formal litigation or regulatory readiness assessment by an external body within 12 months of responding to the survey. However, 62 percent think it either not at all likely or not very likely.

Fig 13: Likelihood to undergo a formal litigation or regulatory response assessment in the next 12 months



The reasons expressed for not being likely to undergo a formal litigation or regulatory readiness assessment included a lack of need or already meeting regulations. The other key reasons related to costs and the use of internal resources.

It is particularly notable that such exercises are very rare in the European region, with only eight percent of Europe-based respondents saying that their organization had ever gone through a formal litigation or regulatory readiness assessment by an external body. However, from our firms' experience this does not necessarily mean that European companies are not undergoing such assessments as they may be conducting them in-house.

“You always get a fresh insight [from third party providers] – new ideas.”

U.S. respondent, pharmaceutical sector

Use of electronic evidence services providers

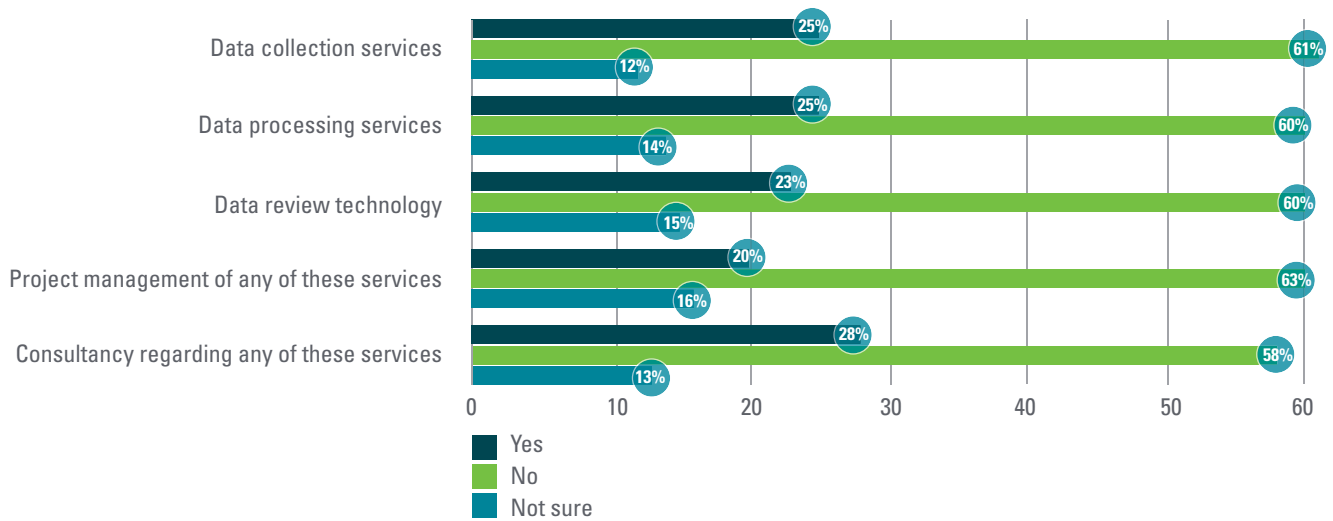
In terms of using third party support reactively, to help manage data challenges faced by the legal department, organizations are more commonly not using an electronic evidence services provider than using one. It is notable that some in-

house lawyers are unsure whether an electronic service provider is being used. Figure 14 shows respondents’ usage of services providers for key elements of the reactive response to litigation and regulatory matters.

Respondents were also asked “what types of technologies, if any, has your organization invested in specifically to address e-discovery/e-disclosure

management and evidence storage issues in the past 12 months?” 37 percent stated nothing/nothing new with a further 30 percent being unsure and 11 percent making no comment.

Fig 14: Use of an electronic services provider



C Geographic and sector trends

A global challenge

Recent changes to the Federal Rules of Civil Procedure and high-profile U.S. case law has meant that 'readiness' has become a hot topic in the U.S. But, is it a major concern beyond U.S. borders?

There are certainly some individual country and regional trends picked up by the survey, which do indicate that the U.S. is ahead of other jurisdictions in terms of readiness.

However, there are many findings in the survey which indicate that the challenge is very much a global one. Indeed, 23 percent of respondents maintained that readiness was a global concern rather than related to any particular country.

Furthermore, of the respondents who said that they had carried out a formal litigation or regulatory readiness assessment by an external body in the last six months, 65 percent of those were in the Asia Pacific region. This compares to 30 percent in the Americas where it is almost exclusively respondents from Brazil rather than the USA or Canada within this number, and only three percent in Europe and the Middle East and Africa respectively.

Overall, some of the survey results do indicate a greater level of awareness and readiness in the US. However, the trend is not marked and respondents from all countries have concerns about readiness. Managing information for litigation and regulatory readiness is a global challenge.

Geographic trends include:

Legal departments in the US (and a few other countries closely connected to that jurisdiction) are more likely to engage heavily with their IT departments.

Organizations from the Americas are more likely to rely on outside counsel to manage electronic information in litigious and regulatory disclosure situations than those in Asia Pacific or Europe.

30 percent of respondents considered that North America affects their organization the most in terms of litigation and regulatory demands, compared with 19 percent for Europe and 19 percent for Asia Pacific.

81 percent of North American organizations have a litigation response team in place specifically to deal with e-discovery requests, with only 34 percent of European and 38 percent of Asia Pacific organizations having one.



Sector challenges

The main findings in this survey (such as concerns about data retrieval and costs) apply across all sectors. However, it is possible to identify a number of sector-specific trends within the data.

Sector trends include:

The ease (or otherwise) of data retrieval appears to be of **particular concern in the Pharmaceutical Sector**. 88 percent of Pharmaceutical respondents felt that data retrieval was either somewhat, very or extremely difficult (compared with 44 percent for Telecommunications and 36 percent for Financial Services, for example).

Whilst **levels of concern are fairly evenly distributed across sectors**, there is an indication that the Pharmaceutical sector is more concerned overall. Pharmaceutical respondents 'score' most highly regarding concerns about costs, the ability to find data, the ability to identify legally privileged documents, data protection issues and how to deal with foreign languages.

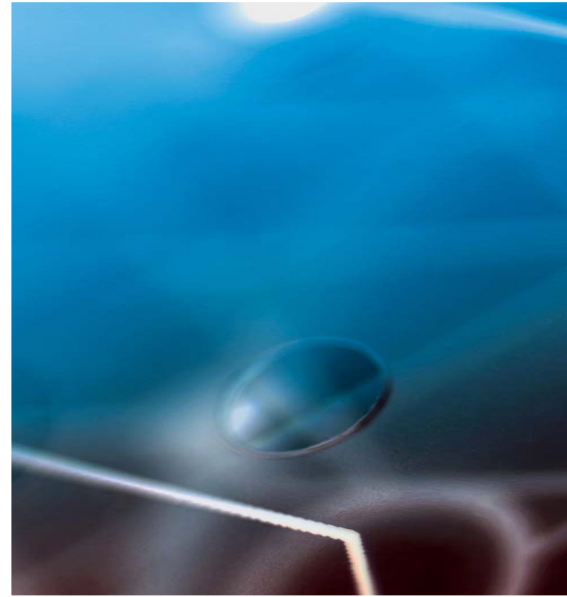
The level of involvement of the Head of Legal in e-discovery matters was similar across all sectors, with around 60-70 percent involved in these matters in each sector. However, the IT and Legal departments seem to work more closely overall in the Pharmaceutical Sector when it comes to e-discovery, with 88 percent of respondents considering that they worked closely with legal on these matters compared with 37 percent in the Energy and Natural Resources Sector (the lowest level).

There is some indication that **Financial Services companies are the least concerned** about a number of the issues in the survey, with respondents from that sector being the least concerned (on average, using a five point scale) in six out of the 11 main concern categories we identified. This may, of course, indicate that, as heavily regulated Financial Services entities, they are 'ahead of the curve' because they have had to be. Where they did have concerns was on security issues, which may be understandable given the high profile cases of data loss in that sector.

Notwithstanding specific concerns being lower in the Financial Services sector, respondents from that sector were more likely to be undergoing a **formal litigation or regulatory readiness assessment** by an external body in the next 12 months, with 34 percent either quite, very or extremely likely to undergo such an assessment, the highest figure in any sector. The Pharmaceutical sector had the highest proportion of respondents considering it unlikely that they will go through such an external readiness assessment.

D The Future

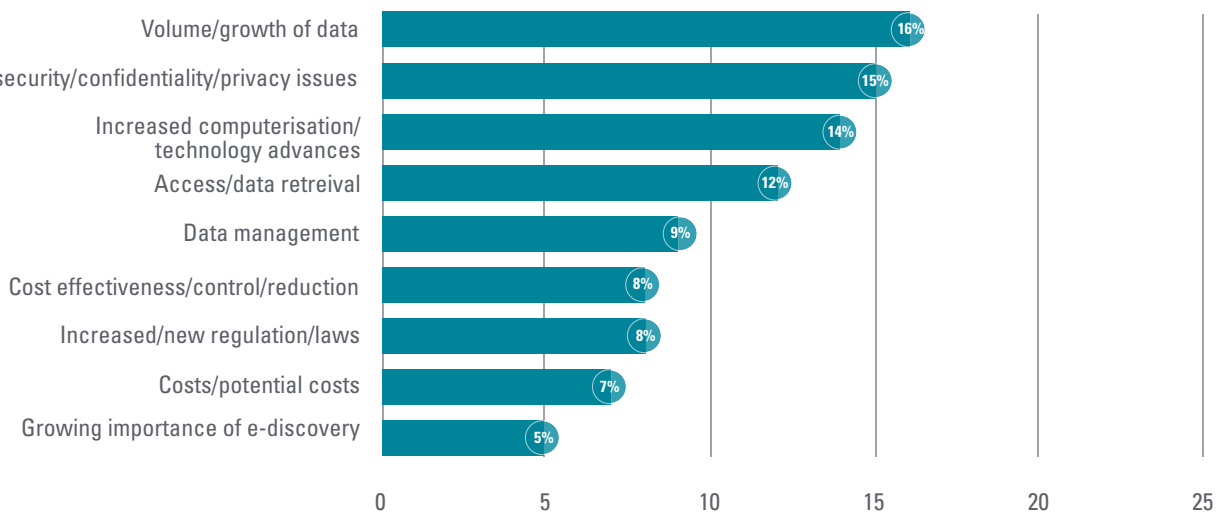
Respondents were asked for their views on the main challenges and opportunities data management and e-discovery/e-disclosure may present in the future. The results show very clearly that lawyers are cognisant of the extensive challenges for the future, which reflect the concerns previously identified, but have yet to embrace solutions that might exist in relation to this area which might improve the situation.



Future challenges

There are many challenges predicted by respondents for the future of electronic information management with the volume of data, data security, increased computerisation and data access being seen as the most typical. Only seven percent of respondents regard costs as a future challenge.

Fig 15: Future challenges



Note: Question not prompted; only top mentions shown.



“You have to try to restrict the volume of data which means deleting the information that you don’t need. Destruction of irrelevant information is the future.”

Dutch respondent, transportation sector

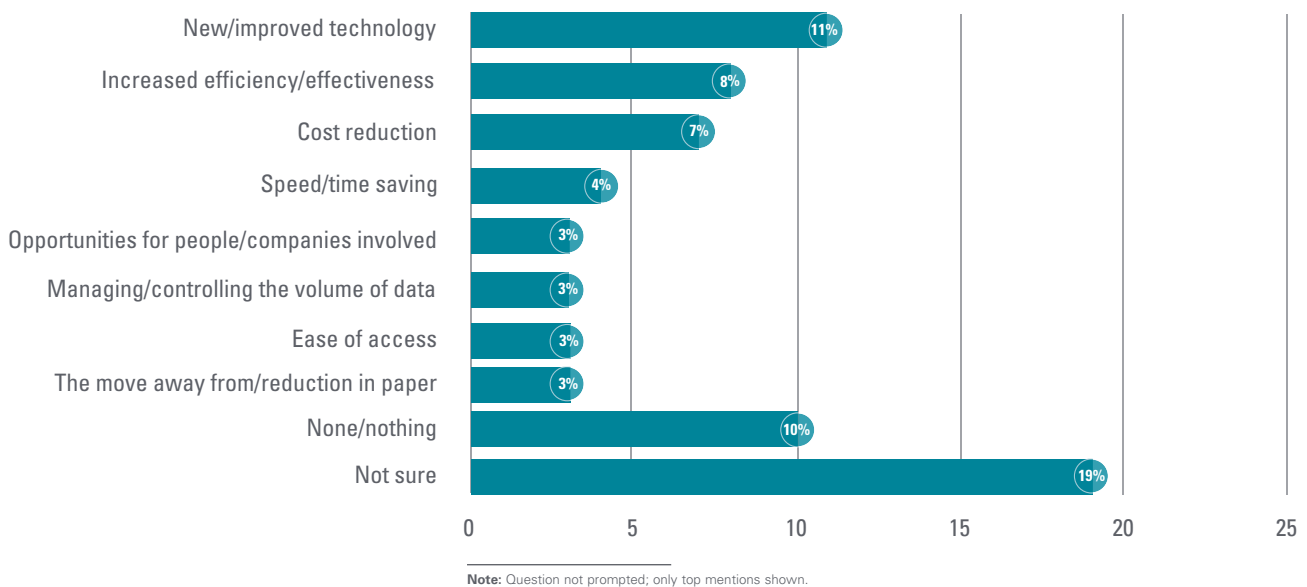
“I think the future is the creation of a single computerised system to allow interaction amongst courts, lawyers and companies.”

Brazilian respondent, utilities sector

Future solutions

In contrast, respondents regard solutions relating to data management and e-discovery harder to find. Nearly one in five (19 percent) was unsure and a further 10 percent did not see any improvements or opportunities for the future (respondents were unprompted). The most frequently mentioned opportunity was for new/improved technology (11 percent of respondents mentioned this).

Fig 16: Future solutions



4 Conclusions and a way forward

This survey seeks to provide a high level, global view of litigation and regulatory readiness. The title to this report asks 'Is the legal department ready?' The answer is mixed. Whilst many respondents feel reasonably ready, the significant practical challenges identified by respondents suggest they are not as ready as they could be.

This survey shows that a typical in-house lawyer at a major global organisation might:

- have mixed views as to how ready their company is to handle data in litigious and regulatory matters, but feel generally positive and comfortable regarding readiness;
- be likely to be able to identify a number of concerns about readiness and data challenges in responding to such matters; but
- be unlikely to have many clear ideas about how to improve the position.

One common reason for this mixed response by in-house lawyers is a lack of clarity internally over who should take responsibility for these matters. It is arguable that much of the subject matter of this survey falls under the responsibility of the CIO and the IT department. Certainly, that is the case for the management of data more generally. However, when it comes to legal matters (i.e., litigation and regulatory response) it will typically be the legal department taking ultimate responsibility. The concerns coming out of the survey demonstrate that the management of electronic data in these environments is a considerable challenge – and it will continue to be a challenge for the legal department. It is KPMG's view that only by being proactive about tackling those challenges can the legal department ensure it is truly 'ready' to respond.

The survey points to a number of initiatives that might be undertaken by the legal department to help improve readiness. These include better communication between IT and Legal, greater awareness of policies and clearer responsibilities.

Getting senior buy-in to spend money in these turbulent economic times is also a challenge especially when coupled with senior executives' lack of ability or desire to engage with technology.

There is no easy place to begin improving readiness – it has to become an ongoing process. However, short of spending significant sums of money on major enterprise content solutions, there are a number of 'quick wins' that our member firms' experience has shown can be successful in an organization and advance the position of the legal department.

**Some suggestions include:**

Develop an understanding of where data resides and how best to capture it in advance of any regulatory requests (to save time and cost when the data is required).

Create or update policies and procedures for handling these matters. These cannot be created in isolation and need to take into account technical infrastructure. A policy is meaningless if it is impossible to implement in practice. These may need to differ in language (technical v legal) but need to be aimed at aligning the two departments.

Clarify high level responsibilities. Use cost concerns to move readiness up the executive agenda.

Run a pilot by testing the ability to get hold of a specific e-mail within the business for a 'mock' regulatory matter and make recommendations as to how that process might be improved.

Develop industry best practice guidance for the legal department so that every in-house lawyer is aware of the appropriate approach to data management.

Educate in-house lawyers regarding the internal IT infrastructure and in the use of technology (for example, collection and review tools) in advance of litigation or regulatory matters in order to save time and costs.

Initiatives of this kind can not only help the legal department achieve specific efficiencies but also educate them about their organization's IT infrastructure. These initiatives then become small steps toward an understanding which can help in-house lawyers embrace and control technological advances in the long-term. This in turn can help to benefit the organization's bottom line and protect its reputation.

Contact us

If you would like further information about the survey, a discussion about the issues or any other information about KPMG's Forensic Technology, Litigation Readiness or Records Management services please contact:

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Designed and produced by KPMG LLP (UK)'s Design Services

Publication name: Is the Legal Department Ready?

Publication number: RRD-172484

Publication date: November 2009