FORENSIC

e-Disclosure

The 21st Century Legal Challenge

A Survey by KPMG Forensic

ADVISORY

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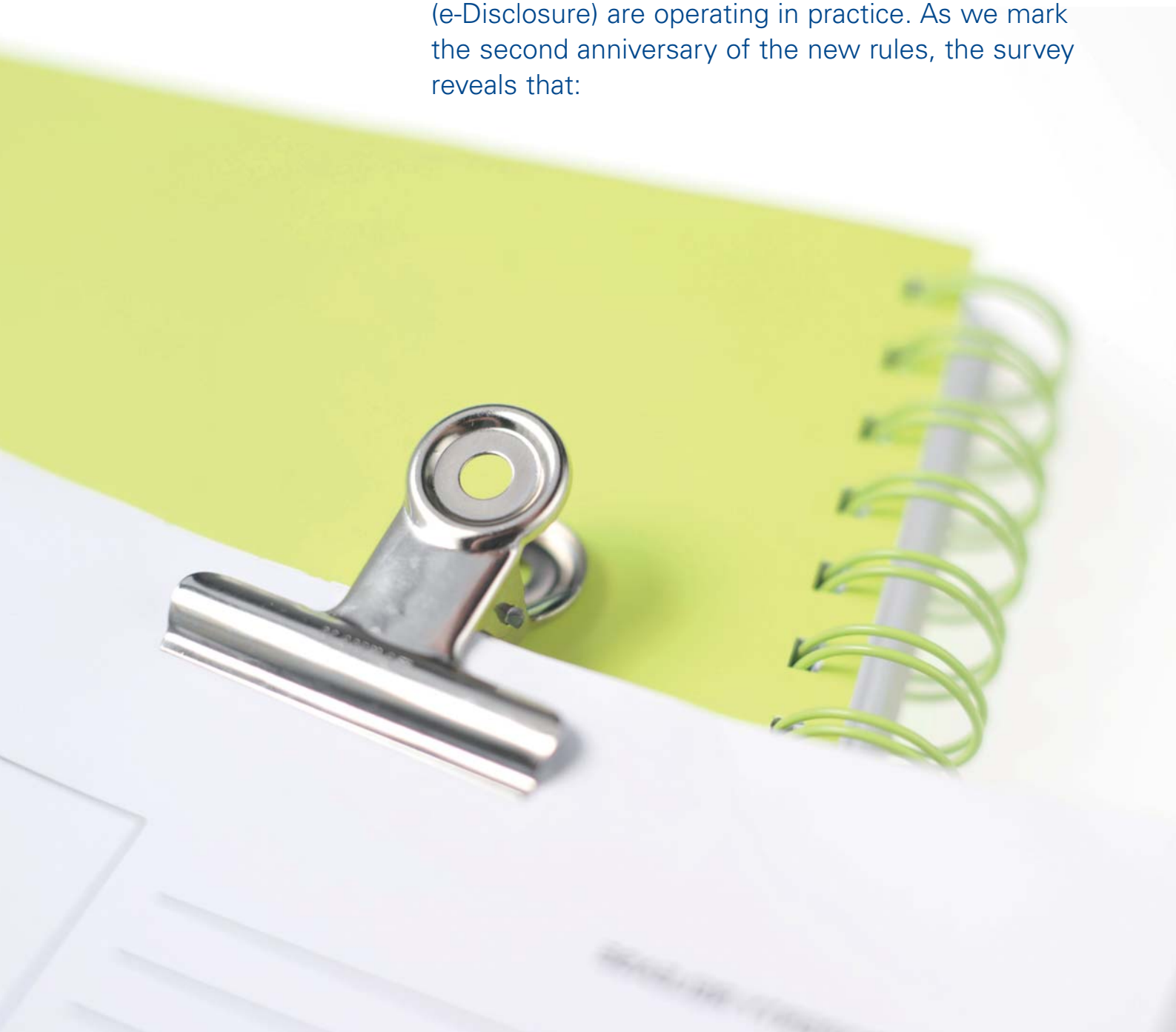
Contents

Executive Summary

A KPMG Forensic and Ipsos MORI survey reveals senior litigators' desire for greater clarity on e-Disclosure rules.

A recent independent Ipsos MORI survey, commissioned by KPMG Forensic, has revealed litigators' thoughts on how changes to the rules on the disclosure of electronic documents (e-Disclosure) are operating in practice. As we mark the second anniversary of the new rules, the survey reveals that:



- Only 17 percent of practitioners consider that the changes to Part 31 of the Civil Procedure Rules (CPR) have had a positive impact. Nearly a quarter believe that the rules have had no impact and 43 percent believe that the rules have not assisted the management of e-Disclosure exercises.

- CPR Part 31 is credited with raising awareness of e-Disclosure obligations, and there is moderate endorsement of the encouragement of co-operation between the parties. There is also some acknowledgment that CPR Part 31 has been useful in focusing the attention of clients on the importance of electronic evidence.

56%
of practitioners believe that the rules have increased the costs of conducting litigation.

- Approximately 56 percent of practitioners believe that the rules have increased the costs of conducting litigation. As we explain later in this report, in our experience, some of those cost increases may be caused by factors other than the new rules themselves. The increasing reliance of society on technology, the sheer proliferation of electronic evidence, and a gradual transition by practitioners to new methods to deal with these new challenges, probably also contribute (for example, practitioners seem to recognise that they now have to spend more time planning earlier for e-Disclosure in the dispute).

- There is concern amongst respondents about ambiguity in the rules, which they would like to see clarified by new rules or case law. However, there may be practical obstacles which could limit the opportunity for such rules to emerge.

- The most common suggestions for improving the process are (1) to obtain more clarity and guidance on the rules and (2) to restrict the types of documents or information disclosed or the cases in which such rules apply.

- That desire for clarity and guidance seems to be reflected in practitioners' views on the effectiveness of judicial case management:

  – Opinion appears divided on how well equipped Judges and Masters are to make effective case management decisions on electronic disclosure, though a majority of those more heavily involved in e-Disclosure consider Judges and Masters to be ill equipped.

  – 50 percent of those surveyed believe that Judges and Masters should be trained on the difficulties routinely faced in an e-Disclosure exercise.

  – 68 percent of practitioners surveyed supported the establishment of an independent body of industry practitioners to promote best practice and training in dealing with the disclosure of electronic documents. Given our concerns as to the practical limits on the development of new case law, such a body may prove an important practical support to practitioners. In that context, we are pleased that recent suggestions of the formation of an England and Wales Working Group of the Sedona Conference appear to be underway.

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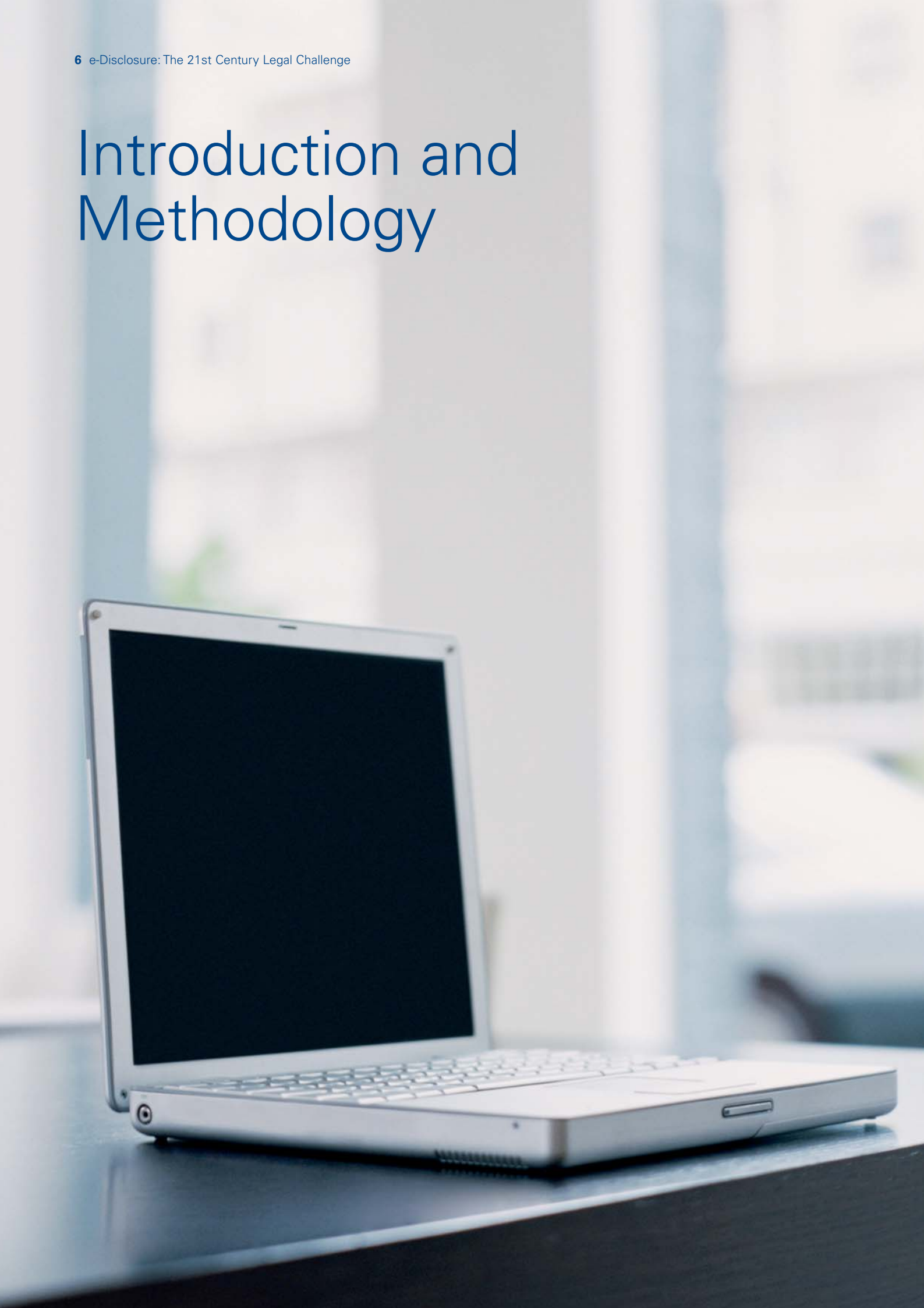
Introduction and Methodology



Background

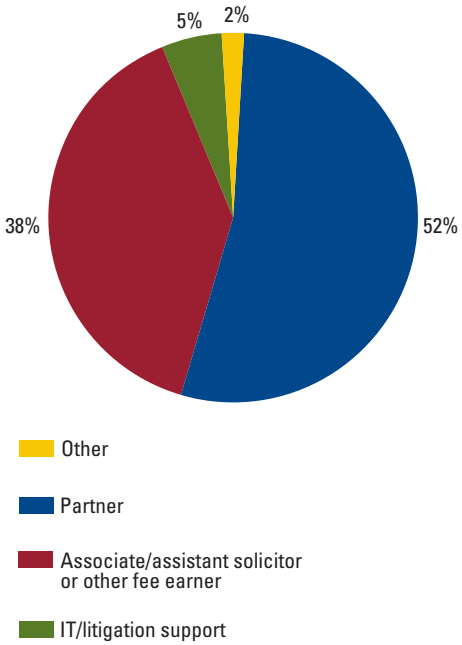
On 1 October 2005, amendments to CPR (Civil Procedure Rules) Part 31 and the Practice Direction came into force seeking to clarify the electronic disclosure (e-Disclosure) obligations of litigants in England and Wales.

KPMG's Forensic Technology team provides advisory and technology support services to lawyers and their clients to assist them in complying with their e-Disclosure obligations. After the rules had been in force for well over a year, we were keen to understand practitioners' views on how these amendments had affected them in practice and how they deal more generally with their clients' electronic documents.

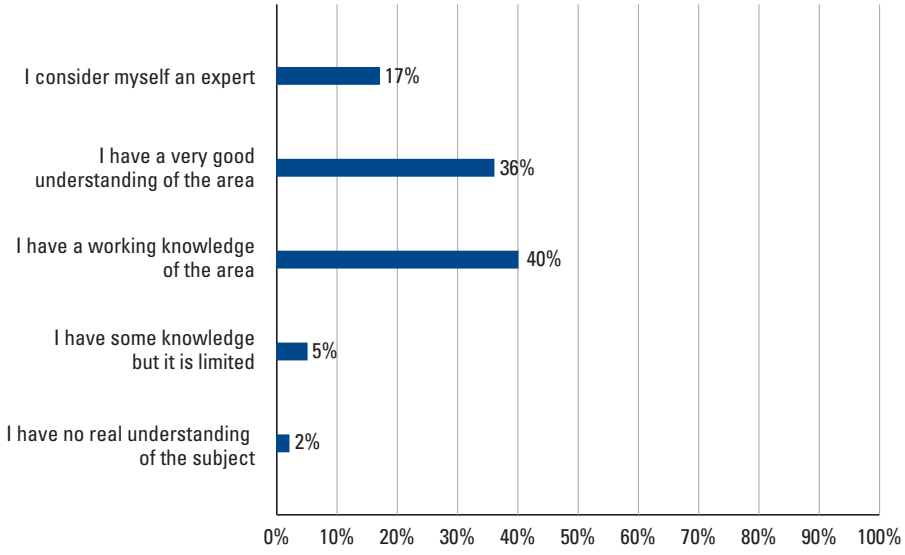
Therefore, we commissioned Ipsos MORI to conduct an independent survey, via telephone interviews of 100 senior litigators at 22 leading UK-based law firms, who had either a good or an excellent understanding of the area, and been involved in cases involving the electronic disclosure of documents in the previous 12 months. Those results have now been delivered to us, and the aim of this report is to highlight the key findings of the research, as well as provide a commentary on them in the light of our experience of working with the new rules and with lawyers themselves.

Figure 1

Profile of Respondents



Which of the following best describes your level of understanding matters relating to part 31 of the Civil Procedure Rules, which focuses on the treatment of electronic documents in dispute? Would you say ...?



NB. All respondents involved in e-Disclosure case(s) in the last 12 months

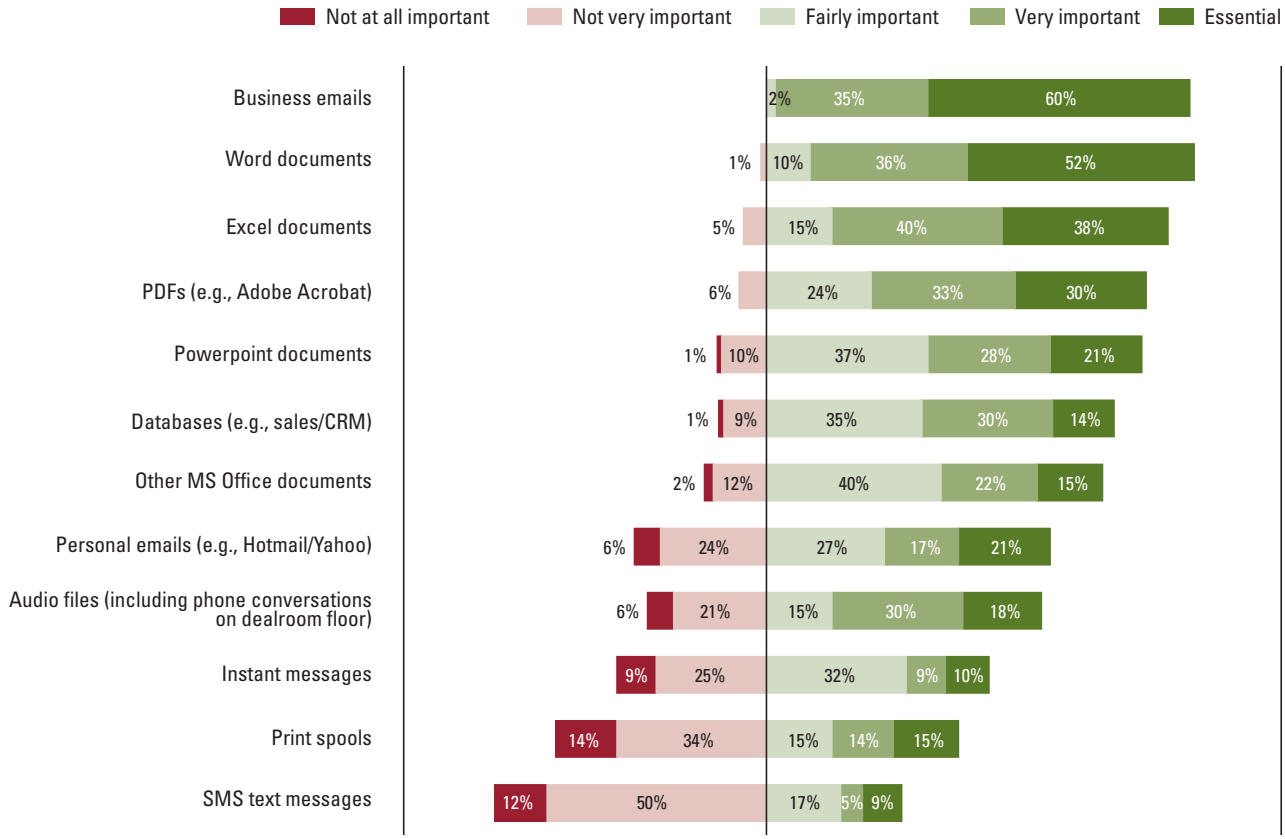
Findings

What are lawyers looking for?

Rules on e-Disclosure are required simply because there is such a proliferation of electronically stored information within organisations that may contain evidence that is potentially relevant to proceedings. So, it is the types of electronic evidence that will dictate the scope of disclosure, and that must be the starting point. What types of electronic evidence are the parties and their legal teams considering in typical e-Disclosure exercises?

Figure 2

The importance of various types of electronic document



51%

of respondents regarded instant messages as being important.

Figure 2 illustrates the importance assigned to various forms of electronically stored information by respondents to the survey. In general, this is consistent with our experience in supporting e-Disclosure exercises.

The most important forms of evidence are business emails followed by the kinds of *Microsoft Office* and other documents that are most similar to paper documents (for example, files created in Word, Excel, PowerPoint, PDF and so on).

63%
of practitioners surveyed considered audio files to be important.

Unsurprisingly, SMS text messages are regarded as relatively unimportant, though we expect that such forms of evidence may be of interest in specific types of case as the technology to support its extraction develops (for instance, in employment cases or where the honesty of individuals is in question).

Surprisingly, 51 percent of respondents regarded instant messages as being important. This has not been consistent with our experience – we are not seeing instant messages being considered in 50 percent of our cases. In fact, we see them considered in very few cases.

However, instant messages should certainly be a cause of interest for Chief Information Officers and document managers considering electronic archiving solutions. We are seeing businesses taking a greater interest in managing their electronic records and implementing archiving policies.

As part of those policies, a question that often arises is whether to enable individual user access to instant messaging. If it is enabled, there is then a question of whether those messages are 'recorded' and/or archived.

A decision that some businesses are taking is to enable instant messaging but to deactivate the 'record' function unless, and until, a suspicion is raised that such messages may contain material that may be relevant to a dispute or other review. At that stage, effectively, a 'litigation hold' approach is adopted and such messages are then recorded. It will be interesting to see the extent to which lawyers actually resort to this type of evidence in the future, given potential limits on its future availability and the concerns expressed regarding the current cost of typical e-Disclosure exercises.

63 percent of practitioners surveyed considered audio files to be important. We suspect that this reflects an acknowledgment that there is a growing amount of such evidence available as businesses routinely store such material (for instance, deal room floor conversations or voicemail messages may be recorded digitally and routinely stored on back-up tapes).

At the moment, the most common solution to the problem of assessing the relevance of such material appears to be the use of large teams of paralegals listening to the recordings. This can be costly and prone to human error. This is an area where we expect technology to continue to evolve to enable the use of voice recognition and concept-mapping software to provide a more cost-effective solution to this growing problem.

Our experience to date of voice recognition software is that the quality of the recordings needs to be so good as to render its effectiveness minimal for the sort of recordings that are likely to be relevant in litigious or regulatory environments.

However, even where lawyers have to resort to the use of human beings to transcribe the recordings, advanced software can still provide a means of linking the transcribed text to the audio files. This means that the reviewer can then run key word searches or use concept-mapping techniques across those transcripts and then click on the part of the transcript they are interested in to hear that part of the recording, in order to get a sense of context and meaning.

CPR Part 31: The good, the bad and the unclear

We asked the respondents to the survey how they believe changes to CPR Part 31 had affected the conduct of disputes. We also asked how, if at all, the changes to CPR Part 31 had assisted practioners in the management of their clients' e-Disclosure exercises.

On the positive side, 23 percent of respondents considered that the changes to CPR Part 31 had given them a better understanding of the rules on electronic disclosure. Asked which were the most helpful parts of the new rules, there was moderate endorsement of the rules raising awareness of e-Disclosure obligations (16 percent); the encouragement of co-operation between the parties (11 percent); and some found the new rules helpful on their obligations to search for documents (9 percent).

A number of respondents identified that the rules gave them a framework and guidelines to work around. As one partner remarked, "we are now more focused on electronic data. It is higher in everybody's minds than it was before and the issue is raised at an earlier stage with clients."

When asked to identify the most helpful aspects of the rules, a number of respondents considered that they enable them to focus their clients' attention better on technology. There is now an explicit set of rules dealing specifically with electronic material which provides clearer authority to seek more information about the client's IT systems than existed before.

However, only 17 percent of respondents felt that, in general, the changes to the rules had made a positive impact. In fact, a worrying 43 percent considered that the rules had not assisted the management of e-Disclosure exercises at all and 16 percent complained of ambiguity in the rules.

One solicitor commented that "The [N265] form that has been produced for the parties to sign is very ambiguous and difficult to understand". Members of the LiST (Litigation Support Technology) Group and ALPS (Association of Litigation Professional Support Lawyers) have been considering revised draft versions of the N265 form and we understand that a working draft may be produced for wider distribution in due course.

As highlighted by some of the respondents, a central foundation of CPR Part 31 is the encouragement of the parties to co-operate with their opponents in managing the scope of e-Disclosure exercises. Figures 3 and 4 illustrate the respondents' views on the effect of these aspects of the rules.

Figure 3

In the last 12 months, in how many cases have you met with your opponent to discuss e-Disclosure?

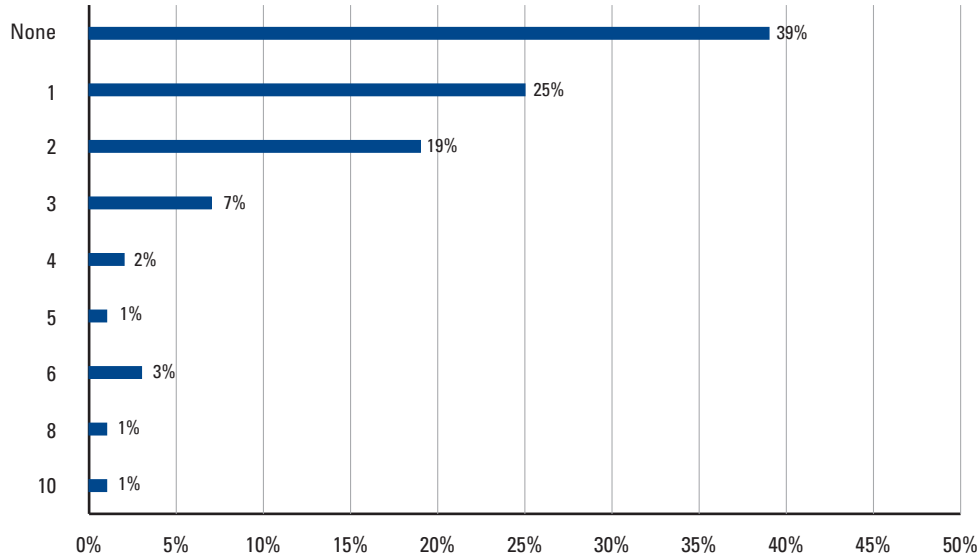
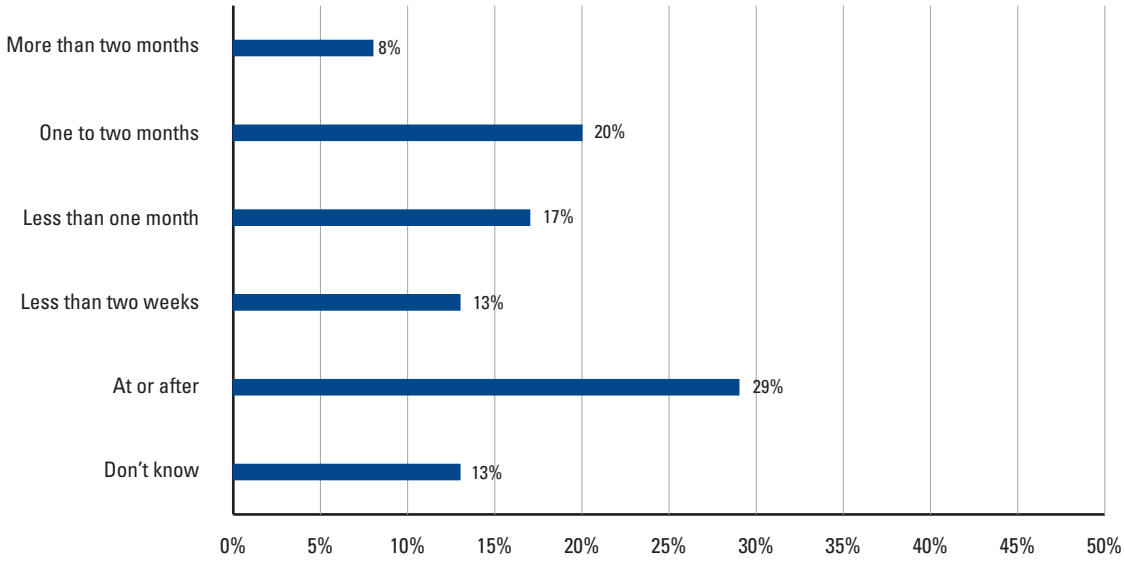


Figure 4

Typically, at what stage do such meetings or discussions first occur in relation to the case management conference?



39%

of respondents said that they have never met with their opponent to discuss e-Disclosure.

Interestingly, 39 percent of respondents said that they have never met with their opponent to discuss e-Disclosure, which is slightly surprising given the encouragement in the rules to co-operate. Further, of those spending more than £500,000 per year on e-Disclosure, 57 percent say that they have never met their opponent to discuss e-Disclosure. In nearly a third of all cases, such meetings or discussions with opponents first occur on or after the case management conference.

In our experience, this may explain some of the cost-related consequences discussed later in this paper. 59 percent of respondents were satisfied that orders for e-Disclosure provided them with sufficient time to comply with disclosure obligations but 30 percent were dissatisfied with the time allowed.

We also asked how well equipped Judges and Masters are in terms of the knowledge and tools available to them to make effective case management decisions on the scope of e-Disclosure. Opinion was divided. Overall, 45 percent of respondents considered that Judges and Masters were well equipped but 48 percent considered that they were not very well equipped.

This diversity of opinion seems at first view to be difficult to reconcile. Scratching beneath the surface, 55 percent of partners and 67 percent of those spending more than £500,000 per year on e-Disclosure considered Judges to be not very well equipped. Clearly, more senior lawyers and those more heavily involved in e-Disclosure feel that the courts are ill equipped to assist them.

Moreover, given the responses provided to questions on how to improve the process (see further below), it appears that practitioners may feel that the rules provide sufficient flexibility to empower Judges to make effective case management orders; however, they may not have sufficient training or knowledge of the practicalities of conducting an e-Disclosure exercise to make effective orders.

How much is this costing?

In practice, who is involved in the performance of an e-Disclosure exercise and how much is a typical exercise costing?

Any e-Disclosure exercise is going to involve an element of IT support. We asked how often, in general terms, respondents would meet with an IT specialist whether within the respondent's law firm, from the client or from an external vendor.

Over two-thirds of respondents sought guidance from such an IT specialist in all or most cases, and some with more than one IT specialist. However, 10 percent confessed to never consulting with an IT specialist in any case. 75 percent said they would consult a specialist within their own firm; 33 percent said they would consult a specialist at the client; and 40 percent said they would consult an IT specialist at an external vendor.

Figure 5

For which of the following tasks, if any, have you used / would you use a third party technology or litigation support provider?

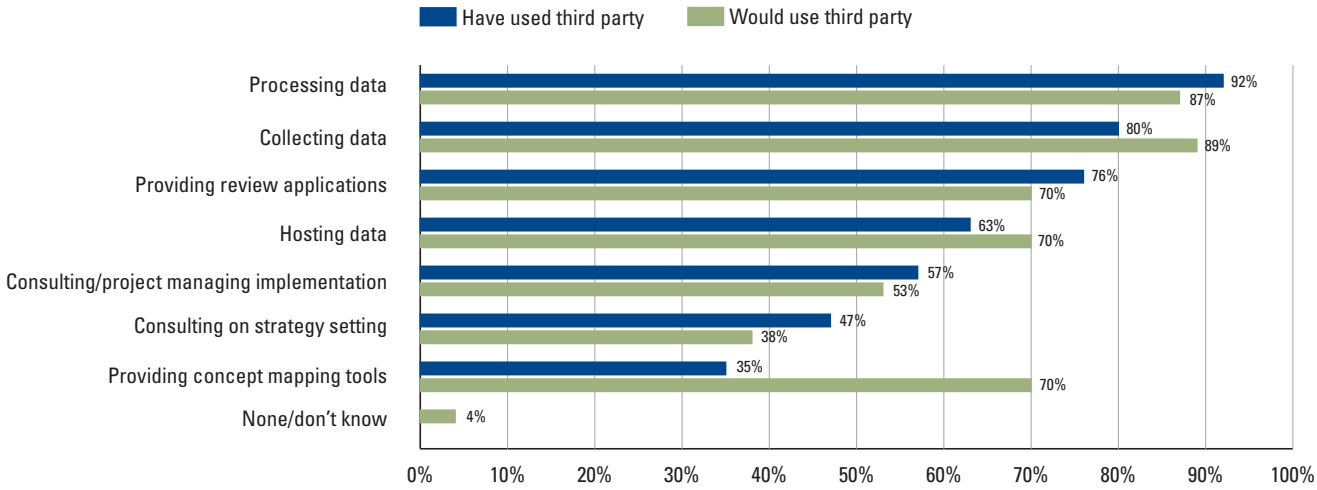
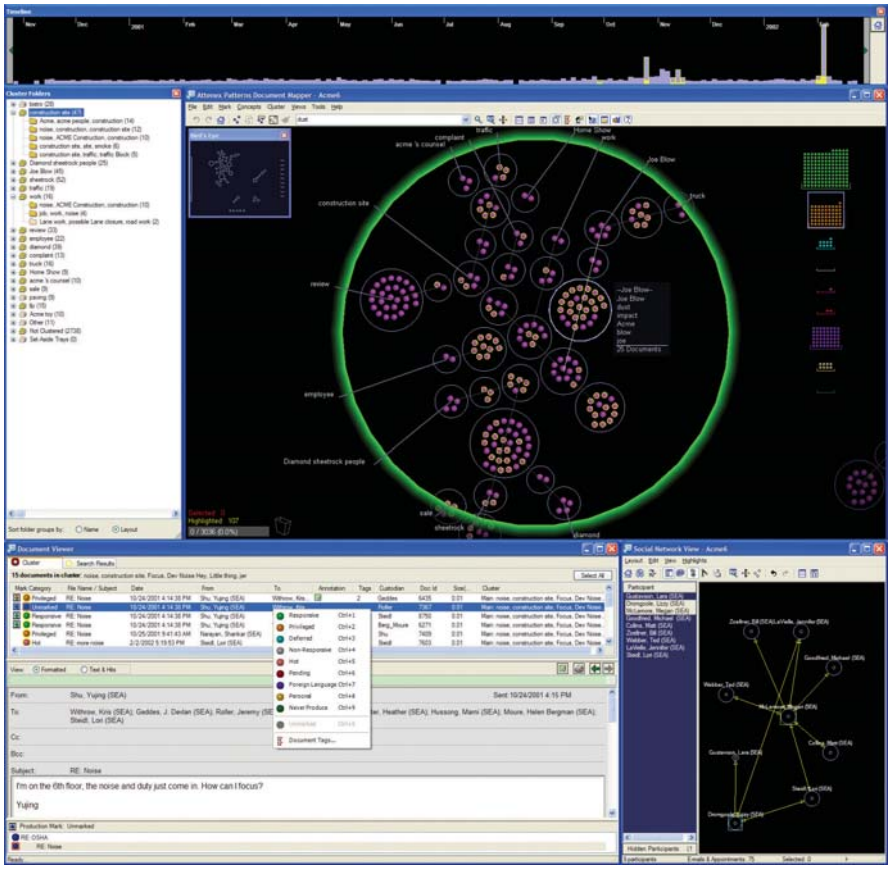


Figure 5 is an illustration of the types of tasks on which external IT specialists have either been used by practitioners or would be used by practitioners. Third party service providers are used and seen as adding the greatest value in more process driven tasks such as collecting data, processing data and providing review and hosting applications. Such endorsement is even more pronounced amongst those spending more than £500,000 per year on e-Disclosure.

Interestingly, though only 35 percent of respondents said that they had used third party vendors to provide concept mapping tools, 70 percent said that they would look to third party vendors to provide such tools. This is consistent with our experience of the conduct of e-Disclosure exercises. As data volumes are becoming larger, and as litigants become increasingly focused on business email as a source of useful evidence, we are seeing a greater demand for concept mapping engines such as *Attenex Patterns* (see Figure 6). The data visualisaton functions of such engines help to facilitate the swift review of material in context.

Figure 6

Attenex Patterns provides dynamic combinations of views to aid the swift review of electronic evidence in context.



70%

said that they would look to third party vendors to provide concept mapping tools.

"Electronic disclosure has become more complicated. The changes have added to the cost, the time involved and the confusion of what we are supposed to be looking for."

This seems to be a view that is shared widely. We asked whether the changes to CPR Part 31 had increased or decreased the costs of litigation. 82 percent said that costs had either stayed the same or increased (56 percent responding that costs had increased).

When selecting third party vendors to assist an e-Disclosure exercise, cost was identified as overwhelmingly the most important factor (61 percent saying that it is or would be the most important factor). As figure 7 illustrates, technical expertise (46 percent) and track record (33 percent) are also seen as significant factors. Of those that have used third party suppliers, half of assistant solicitors regarded technical expertise as a key factor which is interesting given that they tend to have the most significant role in the day-to-day management of e-Disclosure exercises.

As experience of managing e-Disclosure exercises in the UK develops, we expect quality assurance to be an increasingly important factor in the selection of third party providers.

We also asked respondents how much had been spent on e-Disclosure on their cases in the previous 12 months. The results can be seen in Figure 8. Over a quarter of respondents said that e-Disclosure costs, on cases in which they had been involved personally in the previous 12 months, exceeded £1million.

Figure 7

What are / would be the most important factors you consider / would consider when deciding which third party technology or litigation support provider to use? (Top Mentions)

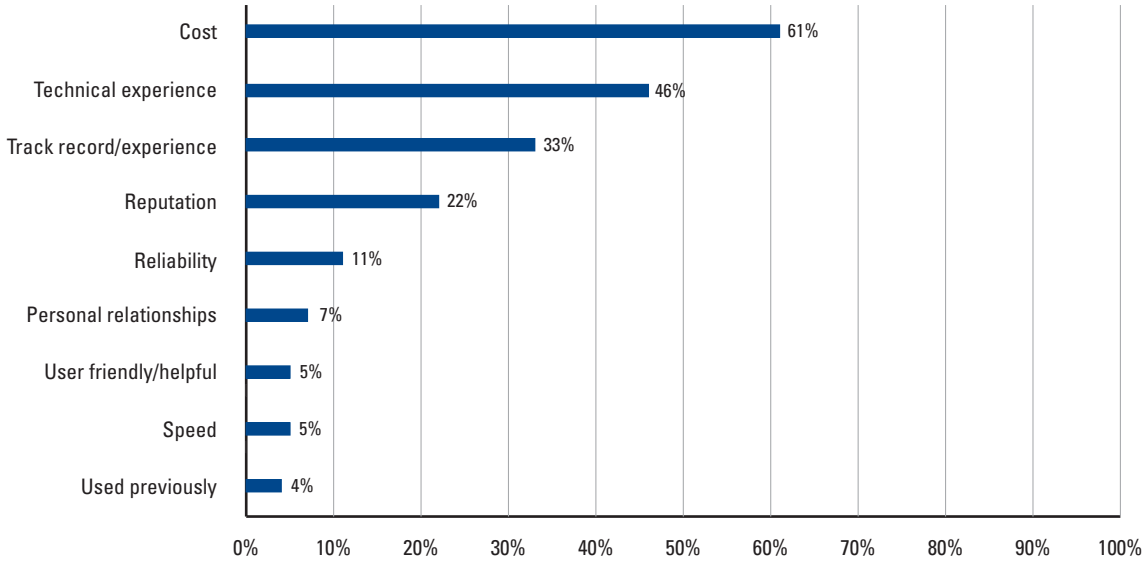
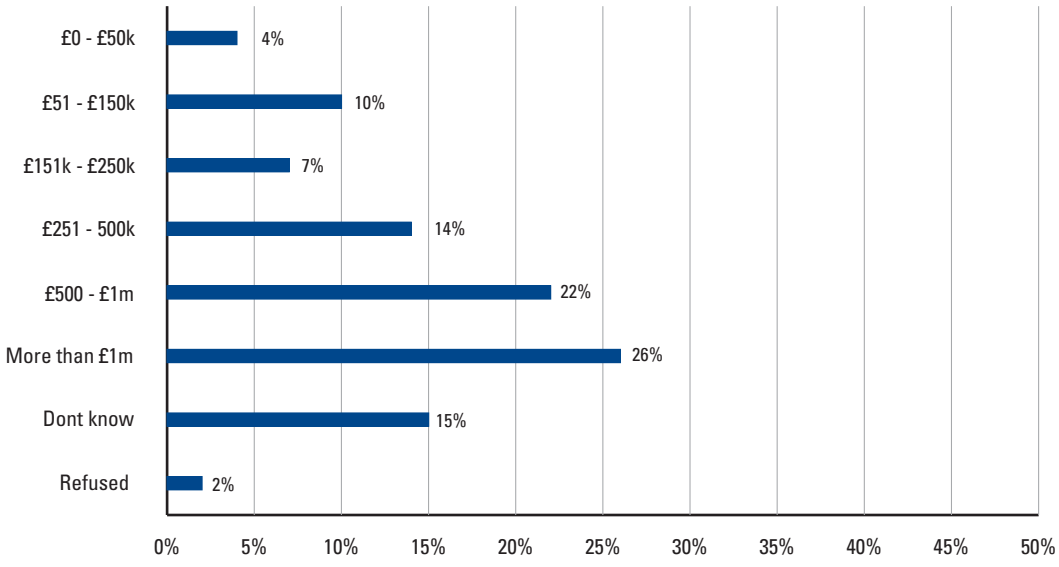


Figure 8

In absolute terms, approximately how much would you say has been spent on e-Disclosure across all the cases you personally have been involved with in the previous 12 months?



Mean: £684k

Our impression from conducting e-Disclosure exercises in many different jurisdictions (particularly in the United States which is a very advanced market in this field) is that UK practitioners are developing their understanding of the issues that typically arise in e-Disclosure exercises, and the ways in which costs may be controlled whilst still providing disclosure that is proportionate to the proceedings in question.

Although the responses in Figure 5 indicate lower usage of third party vendors for consulting on project management / implementation and on e-Disclosure strategy, our experience is that effective planning at an early stage is the most effective way to control costs. In other words, the earlier the stage at which a party considers the e-Disclosure that is required, the better the opportunity to produce a considered plan which will save costs in the long run.

The difficulty is a cultural one and it involves a conceptual shift for lawyers. Historically, motivated by an understandable desire to save costs, disclosure may have been left by many practitioners until dealing with it became unavoidable.

Typically, this may have meant that the full extent of paper disclosure was not considered until just before the case management conference (CMC) or maybe after a timetable had already been set at the CMC depending on the circumstances of the case. This is consistent with the results of the survey as to when e-Disclosure is typically considered (see Figure 4).

Addressing disclosure relatively late in the day becomes significantly more problematic with electronic material than with paper, because of the sheer scale of the documentation involved as well as the need to carefully plan and prioritise the processing of that data (not to mention the data privacy implications which may affect the collection of that data in the first place).

Therefore, as practitioners develop their experience of the practical challenges of managing e-Disclosure exercises, and cases become increasingly dependent on electronic rather than paper evidence, we hope and expect that a much greater proportion of time and energy will be spent at the planning stage, much earlier in the proceedings and well in advance of the CMC.

10%
confessed to never consulting with an IT specialist in any case.

75%
said they would consult a specialist within their own firm.

33%
said they would consult a specialist at the client.

How do we improve the process?

So, what can be done to improve the process and to reduce costs?

Responses to this question varied considerably. One radical suggestion was that the Rules Committee should "get rid of e-Disclosure altogether. Paper always works better". Whilst this is an understandable expression of frustration which is likely to be shared by many practitioners involved in e-Disclosure exercises, it is probably fair to assume that, as society increases its dependence on technology, a movement to 'paper only' disclosure is an unlikely outcome.

Another suggestion was that there needs to be "greater project management of litigation". We have seen this work in practice and believe that there is much to commend a project management approach, with practices from commercial project management of IT projects assisting this part of the litigation process.

For instance, in a recent case in which KPMG Forensic was involved, at the CMC we produced very detailed projections of the time and cost to complete an exercise, taking into account variables such as the likely attrition of data from the use of keyword searches (which were tested on a sample data set), the average number of document decisions per day by a reviewer using different tools, and the time costs that would be involved in such a review. We intend to share those experiences with practitioners more widely once we have reported back to the Judge on that case.

Another suggestion was that businesses need to have better archiving systems in place. Dealing with a substantial part of the costs issue at source, by implementing effective electronic archiving solutions, is an approach which we are seeing our corporate clients increasingly embrace as they seek to reduce e-Disclosure and other subsequent data retrieval costs.

The most popular suggestions to improve the process and in turn control the costs are set out in Figure 9.

Two issues that emerge strongly are to restrict the types of documents / information to be disclosed and to improve the case management skills of Judges. As one partner observed, "It is a huge challenge to deal with electronic disclosure. It is still very difficult going through the amount of documents that is needed. An answer still needs to be found for that".

Another partner suggested that parties ought to be required "to identify issues more clearly at the first case management conference, so that it is clear what issues and discussions are required. Requiring parties to exchange wish lists of documents which they expect to see on e-Disclosure". Indeed, a couple of other partners suggested that costs penalties ought to be imposed for providing too much disclosure.

Although this is consistent with the spirit of the Woolf reforms and the modern approach to litigation in England and Wales, there is an argument that this merely transfers the costs burden from the inspecting to the disclosing party, as the real underlying cause is the sheer volume of documentation.

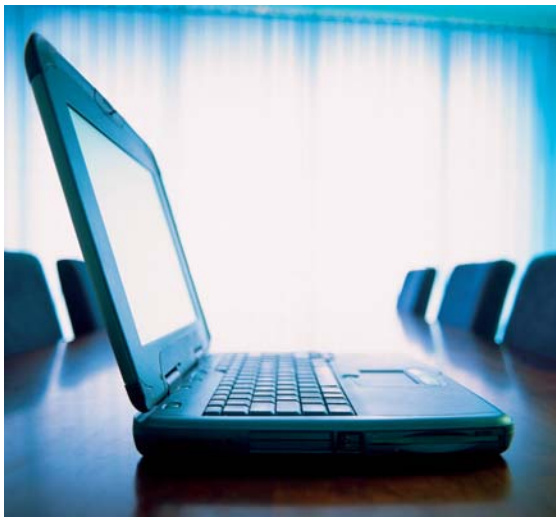
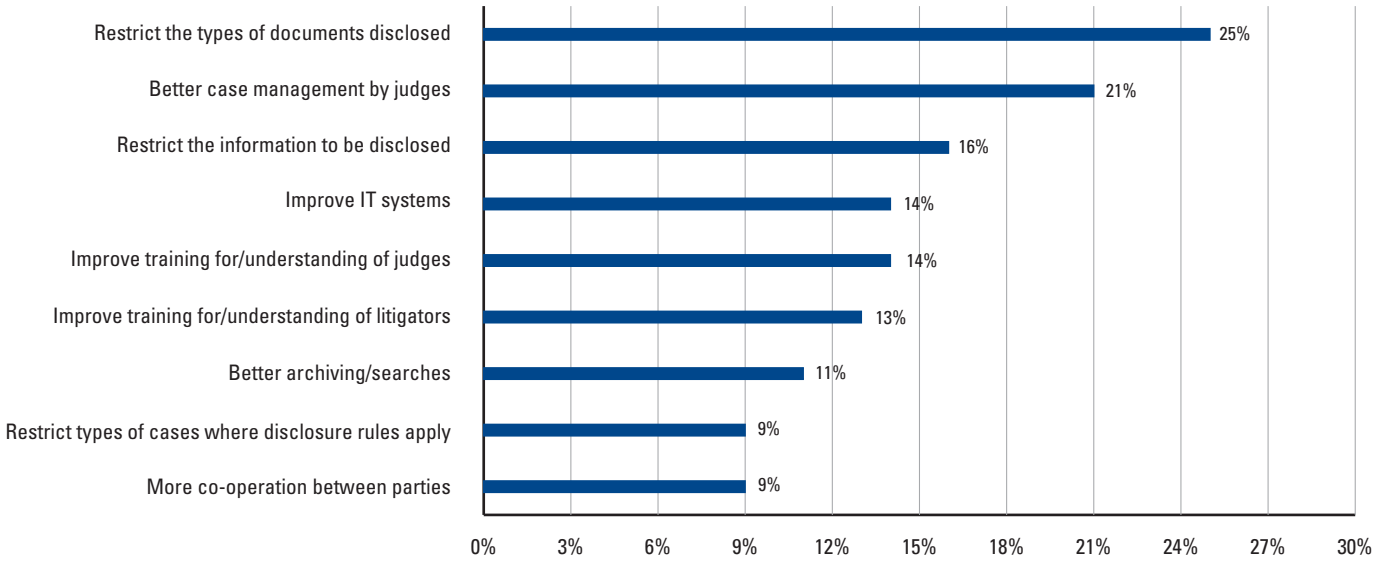


Figure 9

What steps do you think should be taken to better control costs? (Top Mentions)



Similar suggestions were made on the question of how CPR Part 31 might be changed, in response to which 20 percent of respondents called for greater clarity. One partner specifically requested "clearer guidelines on what constitutes a reasonable search" and another wanted "more guidance on keyword and concept searching". An assistant requested "more rules to follow as there are no set rules at the moment" whilst another complained that "there is a lack of case law". But how likely is it that such rules or case law principles are going to emerge?

Our view, based on our discussions with lawyers and practical experience, is that the difficulty for the draftsmen lies in the fact that any rules have to be sufficiently broad and flexible to respond to evolving technological developments, lest they quickly be rendered redundant. Thus, it is left to the courts to interpret broadly drafted rules in such a way as to address contemporary technological challenges. Of course, one of the difficulties for practitioners today is that there are few decided cases interpreting the rules on e-Disclosure.

As already mentioned, 48 percent of respondents indicated that they considered Judges and Masters ill equipped to make effective case management decisions (which may be considered a barrier to the emergence of such case law principles). How can that be improved? A radical suggestion made by one respondent was to promote younger (and therefore, presumably, more IT literate) Judges.

As figure 10 illustrates, there is a strong suggestion from practitioners that Judges and Masters should be trained on the difficulties routinely faced in e-Disclosure exercises. Overall, 50 percent of respondents were in favour of such training. Moreover, 60 percent of those spending more than £500,000 per year on e-Disclosure, 71 percent of those who believe that Judges are ill equipped to make effective case management orders, and 62 percent of those respondents who regard themselves as experts or as having a good understanding of e-Disclosure issues, called for such training.

A number of practitioners suggested that experiences ought to be shared in some kind of open forum. Indeed, 68 percent of all respondents agreed with the establishment of an independent body of industry practitioners to promote good practice and training in dealing with e-Disclosure (see Figure 11).

In the circumstances, it is to be hoped that the recent suggestions of the formation of a sub-group of the Sedona Conference dedicated to practitioners in England and Wales is pursued. Such non-partisan, independent training has been one of the successes of the US Sedona Working Groups and it seems that such a body could fulfil a similar function in England and Wales.

Figure 10

What additional training or tools should Judges or Masters be given to help them make more effective decisions on the scope of electronic disclosure?

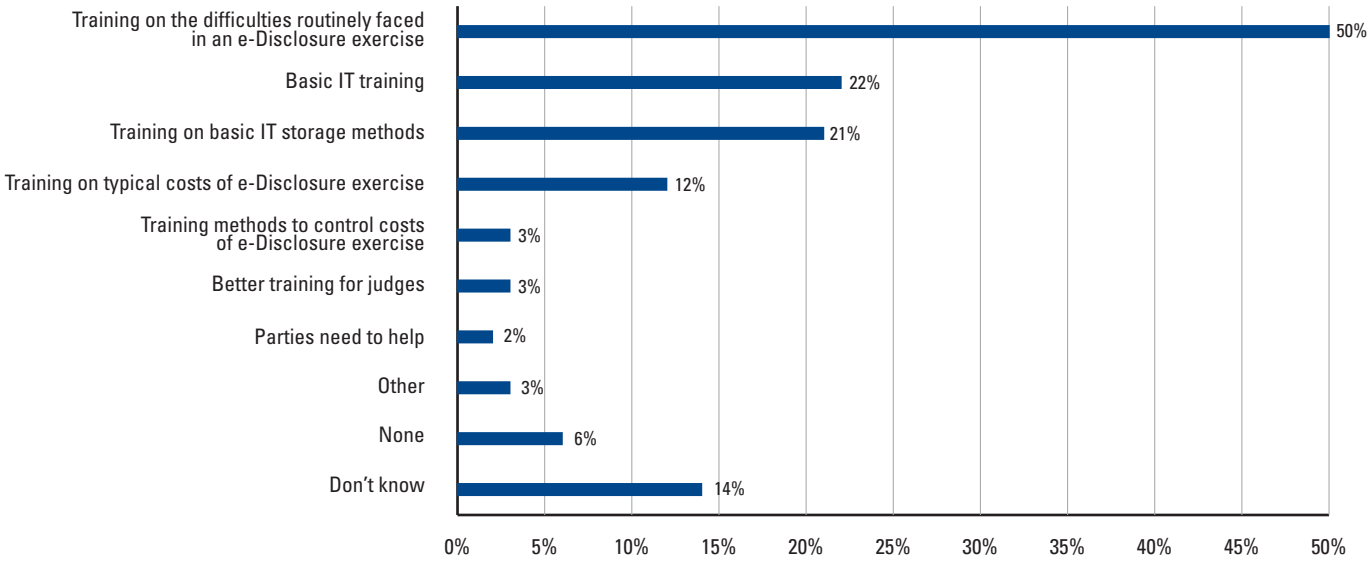
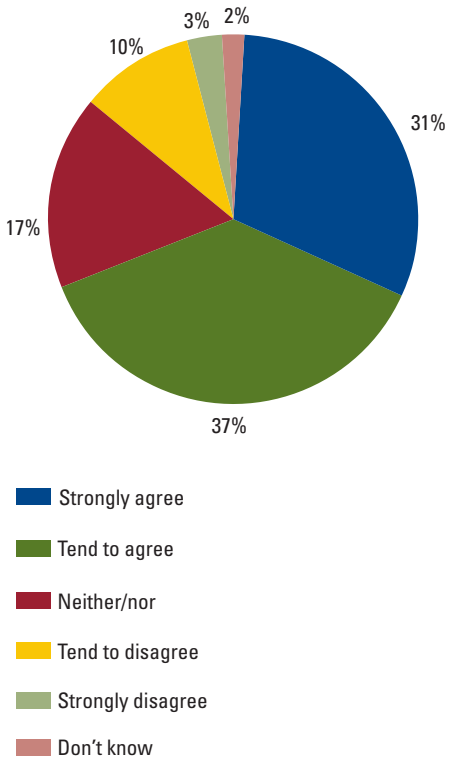


Figure 11

To what extent do you agree or disagree: "I would support the establishment of an independent body of industry practioners to promote best practice and training in dealing with disclosure of electronic documents."?



68%

of all respondents agreed with the establishment of an independent body of industry practitioners to promote best practice and training in dealing with e-Disclosure.

Our experience suggests that there is another more practical barrier to the development of case law which provides interpretation of CPR Part 31.

We have seen that, where there is a dispute on the scope of e-Disclosure, quite reasonably, Judges and Masters will often encourage the parties' IT specialists to meet and confer. The backdrop to that meeting may well be a direction from the bench in a tone that (quite rightly) reminds the parties that disclosure should not become a costly and distracting satellite dispute.

Against that backdrop, it would be unsurprising if, in most cases, the meeting of IT specialists results in an agreement on the scope of e-Disclosure. Inevitably, a case will arise where a significant dispute emerges which cannot be resolved by a meeting of the IT specialists and which, therefore, requires a definitive judicial ruling.

However, in practice, this may be a relative minority of cases and thus there will be a very limited opportunity for Judges or Masters to provide the guidance and clarity that practitioners seem to desire. In the circumstances, it seems that the suggestion of some kind of regular open forum to share experiences from a variety of practitioners may be the most effective way to develop professional good practice on e-Disclosure, provided that such forum is endorsed by, and involves representatives of, the judiciary and the Rules Committee.

71%

of those believe that Judges are ill equipped to make effective case management orders.

Conclusions

The experience of practitioners tends to suggest that the existing rules on e-Disclosure are by no means perfect.

Practitioners are coping with a comparatively new framework to deal with ever expanding volumes of electronic material. Difficulties will inevitably be encountered on that journey. Costs are clearly a legitimate concern and practitioners are calling for greater clarity in the interpretation of rules in the hope of achieving greater consistency and predictability.

For the reasons already outlined in this report, it appears that there may be limited opportunities for Judges and Masters to provide definitive case law guidance. Many practitioners also doubt that Judges and Masters are sufficiently equipped to make effective e-Disclosure orders.

A majority of practitioners also seem to favour the formation of an independent body of industry practitioners. Such a body may have a role to play in terms of training the judiciary to assist them to make more effective e-Disclosure Orders, and to promote good practice in dealing with electronic documents. It is to be hoped that such a body emerges, perhaps through the recently suggested formation of an English counterpart to the Sedona Conference Working Group.

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