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A Summary of the Rand Report - Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery

In continuing the dialogue¹ regarding the persistent challenge of reducing eDiscovery costs, the RAND Institute for Civil Justice published a 131-page report entitled *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*.² The authors of the report set out to answer the following four questions:

- What are the costs associated with different phases of eDiscovery production?
- How are these costs distributed across internal and external sources of labor, resources, and services?
- How can these costs be reduced without compromising the quality of the discovery process?
- What do litigants perceive to be the key challenges of preserving electronic information?

To answer these questions, the authors conducted case studies of eight large corporations in various industries.³ The corporations provided eDiscovery cost data for 57 large-volume eDiscovery productions, including those in traditional lawsuits and regulatory investigations. The authors also collected information from extensive interviews with key legal personnel from the responding corporations.

The data shows that document review makes up the largest percentage of eDiscovery costs. Collection of electronically stored information (ESI) consumed approximately 8% of expenditures, while 19% was spent on processing of ESI. It is the review of ESI that consumed the remaining 73% of all costs.

¹ N.M. Pace & L. Zakaras, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," 2012 found at <http://www.rand.org/pubs/monographs/MG1208.html>. You can catch the highlights of the report's focus and findings in the summary, also available on RAND's website.

² This dialogue first hit a zenith with William H.J. Hubbard's *Preliminary Report on the Preservation Costs Survey of Major Companies* prepared for Civil Justice Reform Group, available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Civil%20Justice%20Reform%20Group.pdf and his written statement for the "The Costs and Burdens of Civil Discovery" hearing before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representative, available at <http://judiciary.house.gov/hearings/pdf/12132011Hubbard.pdf>.

³ The authors recognize that "Because the participating companies and cases do not constitute a representative sample of corporations and litigation, we cannot draw generalizations from our findings that apply to all corporate litigants or all discovery productions. However, the case-study approach provides a richly detailed account of the resources required by a diverse set of very large companies operating in different industries to comply with what they described as typical e-discovery requests."



The report also concludes that outside counsel makes up the largest percentage of eDiscovery expenditures, at 70% of the total costs. Data from the 57 cases revealed that internal expenditures were generally around 4% of the total eDiscovery costs, while vendor expenditures were approximately 26%. Vendors played a dominant role in collection and processing, while review was largely the domain of outside counsel.

The report concludes that the largest cost savings could derive from eliminating the familiar document-by-document review often employed by outside counsel and instead using computer-assisted review or coding. By doing so, the authors estimate companies could save up to 75% of their costs. The authors explored other often-suggested, cost-saving measures. They noted that contract review costs have likely bottomed out and the rate of document review would not likely decrease, as the current average of 100 documents requires 36 seconds for a reviewer to make a decision on relevance, privilege, and confidentiality. Any increase in the rate would likely decrease accuracy of the review. They also opine that techniques for grouping documents would probably not foster significant dramatic improvements in the review speed for most large-scale reviews.

The report concludes that computer-categorized document review may provide cost savings. The report notes one study that revealed that human reviewers are highly inconsistent, coding documents differently 23–54% of the time. Computer-categorized document review techniques such as predictive coding identify at least as many documents of interest as traditional eyes-on review with about the same level of inconsistency or even better. The benefit is in its potential to reduce the hours attorneys must spend by about three-quarters. One study suggests that predictive coding would have saved 80% in attorney review hours.

Despite the potential advantages of computerized categorization, litigants may be unsure whether they can identify all potentially responsive documents while avoiding any overproduction, reliably identify privileged information, flag smoking guns and other crucial documents, and categorize highly technical documents. Another barrier to widespread use may be a resistance by outside counsel who would stand to lose a historical revenue stream.

The authors note that the most important barrier is the lack of any signals from the bench that computer-categorized document review techniques are defensible.⁴ The authors suggest that if companies commit to using computerized categorization in litigation, it may force the courts to either support or reject it as a valid discovery technique.

⁴ Since the report was published, two cases are evaluating predictive coding as a discovery technique. See *Kleen Products, LLC, et. al. v. Packaging Corporation of America, et. al.* in the Federal District Court in the Northern District of Illinois where plaintiffs are challenging defendants' methods because they did not use predictive coding, and *Da Silva Moore v. Publicis Groupe* in the Federal District Court for the Southern District of New York where expert evidence regarding the validity of predictive coding is currently being presented to the court.



The report also discusses preservation of ESI in anticipation of litigation and the challenges that preservation presents for companies. In general, companies are not tracking the costs of preservation, but the expenses are reportedly significant. There is no consistent, trans-jurisdictional legal authority on the question of preservation scope, process, and sanctionable behavior. Without it, thoughtful preservation is thwarted, leading to costly over-preservation. Companies and their counsel need to have an understanding of whether their preservation measures are defensible and that they are not at risk for sanctions. The report calls for changes to the Federal Rules of Civil Procedure to provide needed guidance.

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