JUDGES SURVEY 2019

A SURVEY OF INDUSTRY TRENDS, PRACTICES, AND CHALLENGES FACED

exterro® + E·D·R·M DUKE LAW

EXECUTIVE SUMMARY

FOR OUR **5TH** ANNUAL FEDERAL JUDGES SURVEY, WE SURVEYED OVER **260** FEDERAL JUDGES TO DISCOVER THEIR PERSPECTIVES, PRACTICES, AND THOUGHTS ABOUT E-DISCOVERY TODAY.

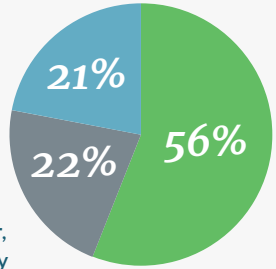
Examining the data, the message to e-discovery practitioners was clear: **Stay on top of e-discovery. Request judicial assistance when needed, as most judges will wait for a request before they get involved in discovery disputes.**

Several key takeaways supported this notion.

1 Be proactive. Only 22% of judges consider themselves active discovery managers.

What role should judges play in the e-discovery process?

- No role. Parties should resolve most discovery issues themselves, asking court intervention only as last resort
- Active case manager, monitoring discovery and intervening before problems arise
- Case manager, promptly addressing discovery issues as they arise



2 Understand your client's IT infrastructure and cooperate with opposing counsel to make sure you can manage e-discovery without judicial intervention.

What do you consider the important components of cooperation?

- Working together without the court to identify e-discovery parameters — 83%
- Proactive communication before the meet and confer — 74%
- Collaboration on search methodology — 69%
- Candid representation of e-discovery demands — 67%
- Transparency into client's IT infrastructure — 54%

3 Bad faith and poor communication are the leading causes of sanctions.

In the past 12 months, how often have you had to take affirmative action (e.g., require additional conferences, issue a warning, sanction) to address an e-discovery problem?

- One — 26%
- Two — 27%
- Three — 15%
- Four — 7%
- More than five — 25%

4 Attorney e-discovery competence is improving.

In the past 12 months, the lawyers appearing before you have shown an adequate level of knowledge and expertise in e-discovery matters.

- Strongly disagree — 3%
- Disagree — 15%
- Neutral — 26%
- Agree — 52%
- Strongly Agree — 4%

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KEY TAKEAWAY #1

BE PROACTIVE MANAGING E-DISCOVERY.

Only **22%** of judges consider themselves "active case managers" in terms of e-discovery activities. Monitor the discovery process and call problems to their attention when necessary.

- Judges will resolve disputes promptly when they arise. In addition to the active discovery managers, **56%** of judges see themselves as umpires in discovery matters.
- Involve judges if cooperation with opposing counsel breaks down. **58%** of judges are open to joint requests for e-discovery conferences.
- Know your judge. **90%** feel it is important to understand their expectations around e-discovery. The best way to do that is by asking questions (**54%**) and reviewing relevant orders (**48%**).
- Judges devote a modest amount of their time to e-discovery. The vast majority (**78%**) spend less than **10%** of their time in civil cases managing and resolving e-discovery issues.

"I think it is important to be proactive, to enforce the rules, and to get counsel to play nice during the discovery process. It is much easier to deal with a discovery problem at the outset than to let it fester and erupt on the eve of the discovery cut-off date.

- Federal Judges Survey Respondent

KEY TAKEAWAY #2

UNDERSTAND YOUR CLIENT'S IT INFRASTRUCTURE AND COOPERATE WITH OPPOSING COUNSEL TO MAKE SURE YOU CAN MANAGE E-DISCOVERY WITHOUT JUDICIAL INTERVENTION.

- Take "meet and confers" seriously. They set the tone for the entire e-discovery process—either collaborative and efficient or conflicted and painstaking.
- Understand your client's preservation strategy, e-discovery technology, and potential issues with collection and production.
- Know what the judge expects. **62%** feel it is very important for counsel to know their expectations.
- Cooperation with opposing counsel is key. Working together to identify reasonable and proportional e-discovery parameters (83%) proactive communication before the meet and confer (74%) are required components of cooperation.
- Involve clients' IT experts early and often. Judges recognize IT pros are the real experts and expect you to consult with them to identify potential technological pitfalls.
- Educate your judge when necessary. They're not necessarily e-discovery experts and they welcome training sessions and conferences with attorneys and IT professionals.

*Many attorneys treat the rule **16** conference as a "drive-by" rather than a serious hearing where they need to come prepared to discuss all aspects of the case.*

- Federal Judges Survey Respondent

Lawyers need to get involved and not leave it to their clients. The IT personnel who understand systems need to be involved early in the process. Don't delay. It is not a game.

- Federal Judges Survey Respondent

KEY TAKEAWAY #3

BAD FAITH AND POOR COMMUNICATION ARE THE LEADING CAUSES OF SANCTIONS.

Judges most often sanction spoliation when there is intentional misconduct, failure to preserve when the duty is triggered, and lack of communication with custodians that causes spoliation.

- Judges will act when necessary. While only 13% of judges have issued an e-discovery sanction, 74% have taken affirmative action (e.g., required additional conferences, issued warnings) to solve e-discovery problems multiple times in the past year.
- Be careful with basic data sources. Email, text messages, mobile data, and difficult to access data are those most often spoliated.
- Be aware of the implications of FRCP 26(g)(3) and 37(c). Judges see these rules neglected more than others.
- Follow the spirit as well as the letter of the rules. 67% of judges will use inherent authority to issue sanctions if necessary.

"Despite the rule amendments, some counsel still make overbroad requests, some counsel still make boilerplate or improper objections or responses, and some just don't confer in good faith in an effort to streamline the discovery process. Things are improving, but slowly.

- Federal Judges Survey Respondent

KEY TAKEAWAY #4

ATTORNEY E-DISCOVERY COMPETENCE IS IMPROVING.

56% of judges agree that "lawyers appearing before them have shown an adequate level of knowledge and expertise in e-discovery matters."

In 2018, only **23%** agreed that "the typical attorney possesses the legal and technical subject matter knowledge required to effectively counsel clients on e-discovery matters."

I divide lawyers into 3 tiers. The best lawyers I rarely see because they know what they are doing and work out their discovery issues. In the second tier are good lawyers who need help from time to time. The third tier are the lawyers who don't know what they're doing (or don't care), and I see them routinely.

- Federal Judges Survey Respondent

COMPLETE SURVEY RESULTS

Survey Demographics

Note: In some cases, rounding may result in percentages that do not total **100%**

264 SITTING AND RETIRED FEDERAL JUDGES RESPONDED TO THIS SURVEY.

THERE ARE CURRENTLY APPROXIMATELY **1400** ACTIVE FEDERAL JUDGES, INCLUDING **663** DISTRICT JUDGES AND OVER **500** MAGISTRATE JUDGES.

Which best describes your role?

A. District Judge	54%
B. Magistrate Judge	43%
C. No response	3%

How many years' experience on the bench do you have?

A. 0 – 5 years	16%
B. 6 – 10 years	20%
C. 11 – 15 years	15%
D. 16 – 20 years	15%
E. 21+ years	33%

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E-DISCOVERY MISSTEPS AND REMEDIES

> *Many of my discovery conferences are a result of lack of telephone or in person communication. Instead parties play games with emails and letter writing campaigns.*
>
> - Federal Judges Survey Respondent

1 *In your opinion, which e-discovery rules do attorneys neglect to comply with most often? (select top two)*

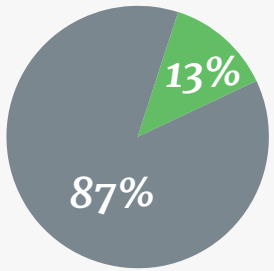
A.	FRCP 26(g)(3) - Ensure that Discovery Request/Response is "Complete and Correct"	48%
B.	FRCP 37(c) - Duty to Disclose, to Supplement an Earlier Response, or to Admit	38%
C.	FRCP 16(f) - Obey Scheduling Order and/or be prepared for Pre-Trial Conferences	23%
D.	FRCP 37(f) - Participate in Framing a Discovery Plan	18%
E.	28 U.S.C. 1927 - Do not submit unreasonable filings	16%
F.	FRCP 37(e) – Preserve Electronically Stored Information	10%
G.	FRCP 37(b)(2) - Follow a Court Order	5%

2 *In the past 12 months, how often have you had to take affirmative action (e.g., require additional conferences either in camera or unsupervised or issue a warning or sanction) in a case to address an e-discovery problem?*

A.	One	26%
B.	Two	27%
C.	Three	15%
D.	Four	7%
E.	More than Five	25%

3 *In the past 12 months, have you sanctioned a lawyer for e-discovery misconduct?*

A.	Yes	13%
B.	No	87%



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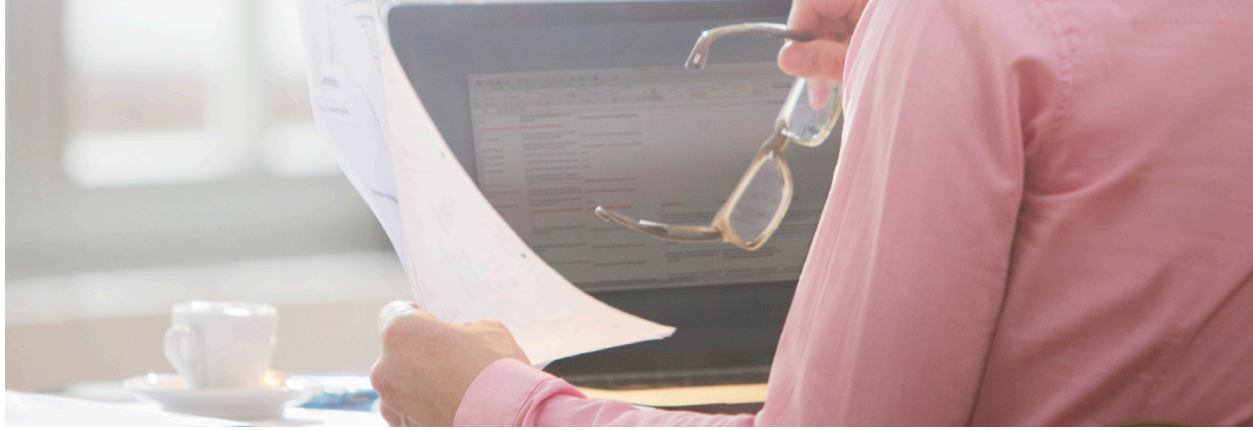


4

Under which circumstances are you most likely to impose a sanction to address an e-discovery problem? (check all that apply)

A.	Intentional misconduct that caused spoliation	86%
B.	Party did not preserve data when the duty to preserve was triggered	52%
C.	Failure of lawyer to communicate with custodians/data stewards causing spoliation	49%
D.	Boilerplate language is used when objecting to discovery requests	25%
E.	Party has no defined process for preserving data, which caused spoliation	16%

4A

What advice would you give legal teams looking to minimize their risk of sanctions?

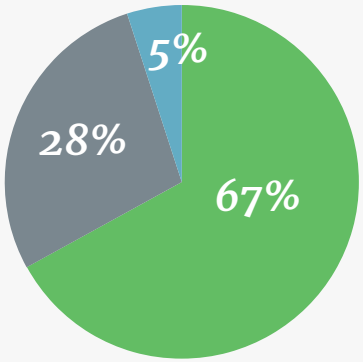
"Meet with your client's IT people as soon as possible to find out what they can do and what you will need.

"Work collaboratively with opposing counsel. Save your fighting for trial or summary judgment. The key in discovery is to quickly and efficiently produce what is reasonable and proportional. This requires the cooperation of counsel and oversight by the court.

5

Would you consider using your inherent authority if Rule 37(e) did not apply for e-discovery sanctions?

A.	Disagree	5%
B.	Neutral	28%
C.	Agree	67%



"*Spoliation of evidence can often be the biggest impediment to ascertaining the truth about what happened.*

- Federal Judges Survey Respondent

"*I do not care to sanction parties or lawyers unless absolutely necessary. Most of the time, the problems are ignorance. Education is better.*

- Federal Judges Survey Respondent

6

In the past 12 months, what data types have you seen most often spoliated? (pick your top 3)

A.	Email	38%
B.	Text Messages/Mobile	33%
C.	Data Not Reasonably Accessible (deleted data, backup tapes)	24%
D.	Social Media	17%
E.	Unstructured Data (word documents, excel worksheets, etc	10%
F.	Data Archives	8%
G.	Audio	6%
H.	Structured Data (database information)	5%
I.	Paper	5%

6A

How can legal teams minimize their risk of spoliating these data types?

"Work directly and continuously with the client's IT personnel and potential custodians of relevant data to make sure they know what must be preserved and why.

"Early involvement with the client, usually as soon as law firm knows of event. Give instructions to client to preserve whenever an event occurs that might result in litigation.

7

In the past 12 months, how often have you entered a preservation order specifying how much ESI to preserve?

A.	1 time	34%
B.	2 times	23%
C.	3 times	13%
D.	4 times	4%
E.	More than 4 times	26%

8

Which of the following steps do you expect legal teams to comply with to meet their e-discovery obligations? (choose all that apply.)

A.	Meet and meaningfully confer with counsel	84%
B.	Send out a legal hold	78%
C.	Collect data from key custodians	70%
D.	Suspend compliance with those parts of document retention policies that would otherwise delete relevant information	66%
E.	Enter into an e-discovery protocol/agreement	65%
F.	Track and record all activities within the preservation process	48%

"*It is much easier to preserve than to defend against a spoliation motion. Such motions are time consuming, expensive, and risky.*

- Federal Judges Survey Respondent

"*All of these steps are necessary for an effective and efficient e-discovery process.*

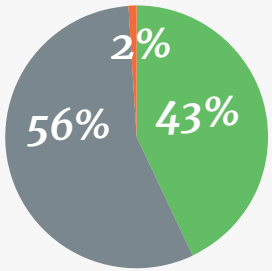
- Federal Judges Survey Respondent

9

To what extent do you expect outside counsel to understand their client's e-discovery practices and technology concerning the following criteria?

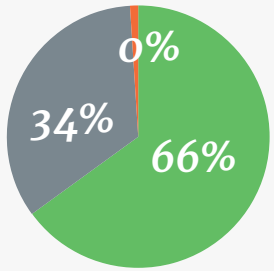
Client's IT infrastructure

Thorough Understanding of Details	43%
Moderate Understanding	56%
Not Important	2%



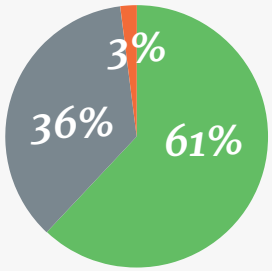
Troublesome collection and/or production issues

Thorough Understanding of Details	66%
Moderate Understanding	34%
Not Important	0%



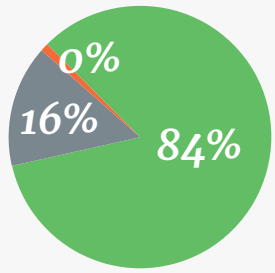
E-Discovery technology used for preservation, collection, review or production

Thorough Understanding of Details	61%
Moderate Understanding	36%
Not Important	3%



Client's preservation strategy

Thorough Understanding of Details	84%
Moderate Understanding	16%
Not Important	0%



10

Do you agree with the following statement? In the past 12 months, the lawyers appearing before you have shown an adequate level of knowledge and expertise in e-discovery matters.

A. Strongly disagree	3%
B. Disagree	15%
C. Neutra	26%
D. Agree	52%
E. Strongly Agree	4%

"

What part of this is NOT a lawyer's job?

- Federal Judges Survey Respondent

"

Counsel is the face of the client in court. Therefore, to be effective, counsel must know their client.

- Federal Judges Survey Respondent

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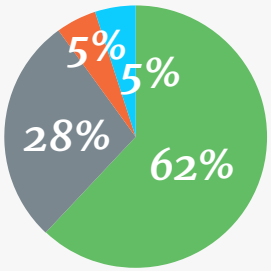
WORKING EFFECTIVELY WITH JUDGES

> *The important part is the parties' expectations. If the parties are satisfied with ESI discovery, the court will not be alerted to any issue and there is no court intervention.*
>
> - Federal Judges Survey Respondent

11

How important is it for legal teams to know your expectations when it comes to managing e-discovery activities?

A. Very Important	62%
B. Somewhat Important	28%
C. Somewhat Not Important	5%
D. Not Important	5%



13

Reported case law says cooperation between parties in e-discovery negotiations is the best way to facilitate efficient and cost-saving e-discovery practices. What do you consider the important components of cooperation? (check all that apply)

A. Working together (without the court) to identify reasonable and proportionate e-discovery parameters	83%
B. Proactive communication between parties before the meet and confer	74%
C. Requiring producing party to meet and confer with opposing party to develop the search methodology (e.g., agreeing on keywords, classifying relevant documents for TAR training-review process)	69%
D. Candid representations of their e-discovery demands	67%
E. Transparency into their client's IT infrastructure (including constraints or hindrances)	54%

12

What are the best ways for a lawyer to learn your e-discovery expectations? (check all that apply)

A. Request informal conference with you and opposing counsel to discuss expectations	54%
B. Review all orders in the case	48%
C. Review your past decisions	23%
D. Ask colleagues or lawyers who tried cases before you	21%

13A

What are some ways you help facilitate cooperation throughout e-discovery activities in your courtroom?

> "I have required the parties to have the IT experts from each side to be involved with the meet and confer... They tend to be much better than the lawyers at solving the problems that arise in identifying and retrieving relevant ESI.

> "I give them choices... either cooperate or I will put a Special Master in place to oversee the process.

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14

What role should judges play in the e-discovery process?

A.	Case manager, promptly addressing discovery issues as they arise	56%
B.	Active case manager, monitoring discovery and intervening before problems arise	22%
C.	No role. Parties should resolve most discovery issues themselves, asking court intervention only as last resort	21%

"

My view is that all discovery should be supervised and directed in order to reduce time and cost that necessarily accompanies an adversarial approach.

- Federal Judges Survey Respondent

"

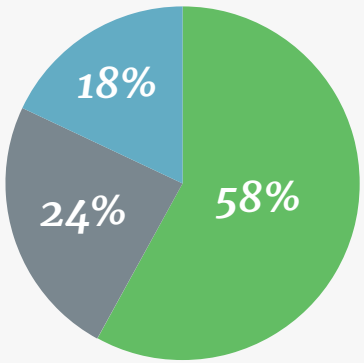
Ideally parties should be required to make a real effort to resolve issues on their own. Judicial resources should not be expended on resolving discovery disputes until the parties have first made a substantial effort on their own.

- Federal Judges Survey Respondent

15

If you would like more information about a certain aspect of e-discovery technology or practice, what is the best way for a legal team to approach you?

A.	Request conference with court along with opposing counsel	58%
B.	Request permission to provide a tutorial session along with opposing counsel	24%
C.	Request permission to submit a written explanation of the technology or practicel	18%



"

I want to hear from the experts, not the lawyers.

- Federal Judges Survey Respondent

"

Lawyers are too reluctant to offer tutorials. I personally love them.

- Federal Judges Survey Respondent

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E-DISCOVERY PRACTICES

16 *In the past 12 months, what percentage of the time in civil cases would you estimate you devoted to managing and resolving e-discovery issues?*

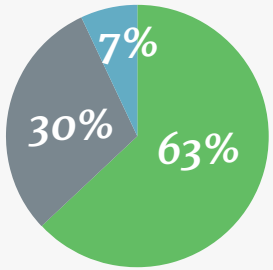
A.	None	20%
B.	5%	42%
C.	10%	16%
D.	15%	8%
E.	20%	9%
F.	25%	2%
G.	More than 25%	2%

> *Judges who were on the bench before e-discovery was a thing would probably benefit from a hands-on training exercise.*
>
> - Federal Judges Survey Respondent

> *Judges who have practiced as lawyers in the last 10 years are often more conversant with these issues.*
>
> - Federal Judges Survey Respondent

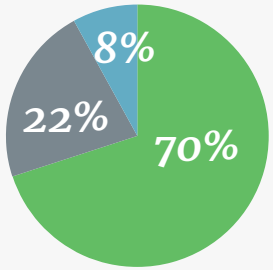
17 *Are you satisfied with your level of knowledge of e-discovery technology and practices?*

A.	Yes - I require no additional training or education	30%
B.	No - I require additional training or education in certain limited areas of e-discovery technology and practices	63%
C.	No - I require extensive training or education on e-discovery technology and practices	7%



18 *Should federal judges in general be receiving more training and education on e-discovery technology or practices?*

A.	No. Existing training and education programs are adequate	22%
B.	Yes. Modest increases in e-discovery training or education programs are needed	70%
C.	Yes. Extensive increases in e-discovery training or education programs are needed	8%



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ABOUT exterro®

Exterro is the preferred provider of software specifically designed for in house legal and IT teams at G2000 and AMLaw 200 organizations. Exterro's software unifies the entire e-discovery process through flexible workflows, intuitive dashboards and the industry's broadest integration capabilities.

ABOUT E·D·R·M DUKE LAW

EDRM is a community of e-discovery and legal professionals who create practical resources to improve e-discovery and information governance. As technology radically transforms litigation and the legal profession, EDRM members collaboratively develop vital frameworks, standards, educational tools, and other resources to guide the adoption and use of e-discovery technologies.

EDRM was acquired by *Duke Law School* in 2016. Now housed in the *Duke Law Center for Judicial Studies*, EDRM is part of a broad community of lawyers, technology providers, judges, scholars, students, business leaders, and others who are dedicated to improving the administration of justice. As e-discovery shapes the future of the legal profession, EDRM is working to shape the evolution of e-discovery.

YOU DON'T HAVE TO TAKE OUR WORD FOR THE CONCLUSIONS WE DREW FROM THE 2019 FEDERAL JUDGES SURVEY BY EXTERRO AND EDRM.

Download the complete data in spreadsheet format here