BRG–Relativity–ACEDS

Artificial Intelligence and Machine Learning Report

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INTELLIGENCE THAT WORKS

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INTRODUCTION

Berkeley Research Group (BRG), Relativity, and the Association of Certified E-Discovery Specialists (ACEDS) launched the inaugural Artificial Intelligence and Machine Learning (AIML) Survey at Relativity Fest in fall 2022.

The survey was designed to gather information about the state of AIML in eDiscovery and document review. The survey included twenty-two questions, and the topics covered general AIML experience, experience negotiating and implementing electronically stored information (ESI) agreements, uses of AIML in document review (including privilege document review), and respondent demographics.

The survey resulted in 242 respondents, including 35 attorneys, 25 consultants, 119 litigation/practice support professionals, and 61 paralegals. Over 80% of respondents said they had used AIML technology over the past twelve months, and 86% said they anticipated their organization would use AIML technology in the next twelve months. Of those who responded "yes" to the latter, 35% indicated that their job would involve using AIML technology a lot, 43% answered some, and 14% said a little. Only 7% of respondents did not expect their job to include using AIML technology in the next year.

The survey responses provided key insights into the use and issues surrounding adoption of AIML technologies. One of the most common themes was the need for more education. Respondents who said they had used AIML technologies in the last twelve months identified educating potential users as the biggest issue they had encountered using these technologies. We also asked about impediments to negotiating ESI agreements that discuss the use of technology-assisted review (TAR), and 150 respondents (62%) listed attorney education as the number one impediment. Additionally, when we asked about the hardest challenges to adopting AIML technology, we found that attorney education was the third biggest challenge, followed closely by judiciary education.

With respect to document review, 85% of respondents used AIML technology, and 78% of respondents reported that the use of the technology saved them money. In terms of use of AIML technology, 38% of respondents have done responsive review only, 17% have done privilege review only, and 30% report doing both.

Combining the 17% and 30% responses means that 47% of respondents used AIML technology for some type of privilege review. We also asked about clawbacks: whether respondents had to clawback privilege documents after production, and if so what percentage of documents were clawed back. Nearly 80% of respondents reported having to clawback privilege documents, with the majority reporting clawbacks less than 2% (58 respondents: 24%) and less than 5% (56 respondents: 23%). Only 7 respondents (3%) reported having to clawback more than 10% of privilege documents.

When asked whether the technology worked as expected, 46% of respondents said it did but that there were issues predicting responsive documents; 10% of respondents said it worked but took too long; and 27% of respondents said it worked with no issues. Only 1% of respondents reported the technology did not work.

When asked about the best method for purchasing AIML for document review, the majority of respondents (31%) said per gigabyte (GB) size. This was followed by blended into other services (21%), then per document (19%), and lastly per hour (14%).

Finally, we wanted to identify the biggest challenges to overall adoption of AIML technology. Not surprisingly, respondents indicated that cost is the biggest challenge, with 45% ranking it number one.

In addition to the survey, we held two focus groups that we split into law firm and corporate professionals. We split the groups to get different perspectives and make it easier for members of each group to share their experiences and opinions freely. We presented the survey results to the focus groups and had open discussions about their interpretations of the results and their recommendations for others. Additionally, we conducted polling questions during the focus groups, which led to productive feedback.
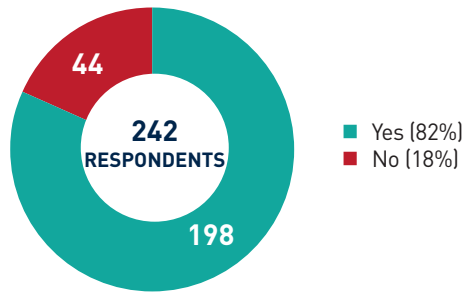
When we started this process last fall, we thought it would be good to benchmark where the industry is when it comes to the uses of AIML in eDiscovery and document review. We asked the focus groups about the utility of this information and whether this survey should be done on a regular basis. An overwhelming majority of people responded yes to both questions, and we plan on doing another survey this fall.
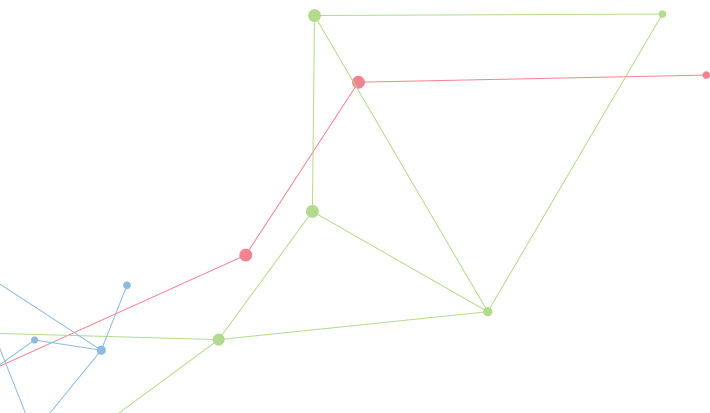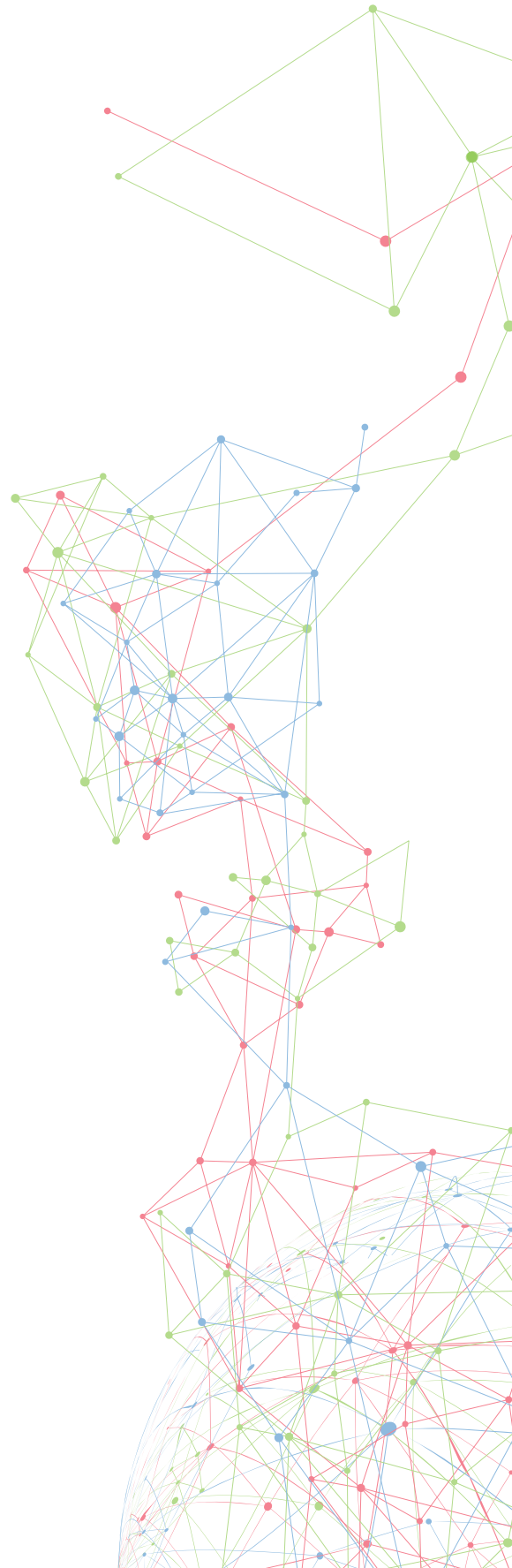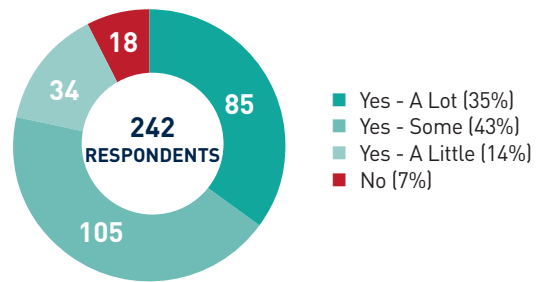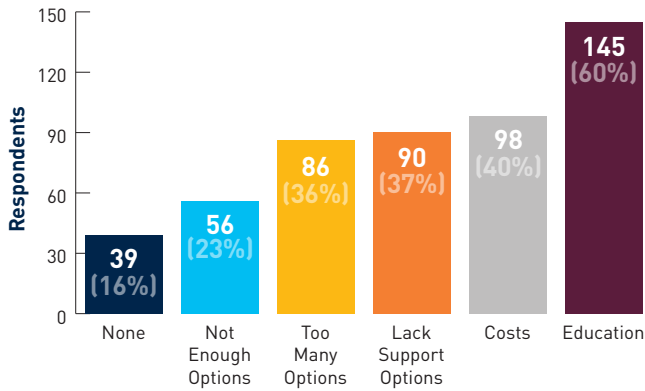
Survey Questions and Results

AIML EXPERIENCE

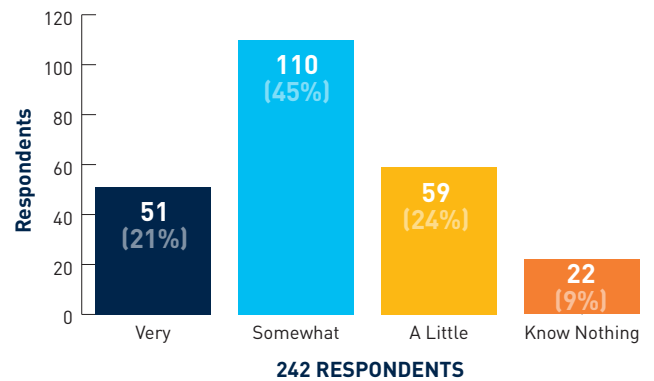**i. Have you used any AIML technologies in your organization in the last 12 months?**

242 RESPONDENTS

- 44
- 198

Yes (82%)
No (18%)

iv. In the next 12 months do you expect your job to include using AIML technologies?

242 RESPONDENTS

- 18
- 34
- 85
- 105

Yes - A Lot (35%)
Yes - Some (43%)
Yes - A Little (14%)
No (7%)

ii. Have you encountered any of the following barriers to integrating more AIML technology within your organization? (check all that apply)

Respondents

- None: 39 (16%)
- Not Enough Options: 56 (23%)
- Too Many Options: 86 (36%)
- Lack Support Options: 90 (37%)
- Costs: 98 (40%)
- Education: 145 (60%)

242 RESPONDENTS

v. How knowledgeable do you rate yourself on understanding AIML?

Respondents

- Very: 51 (21%)
- Somewhat: 110 (45%)
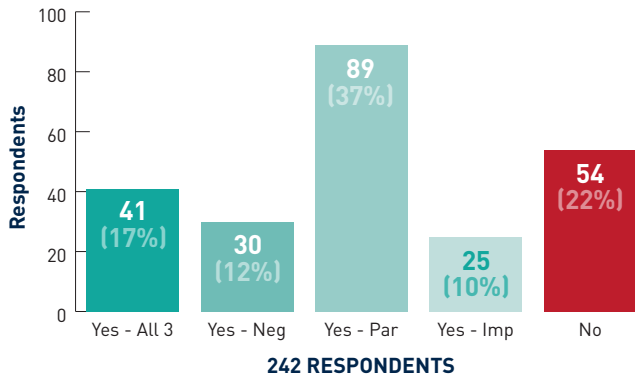- A Little: 59 (24%)
- Know Nothing: 22 (9%)

242 RESPONDENTS

iii. Do you anticipate that your organization will leverage any AIML technology in the next 12 months?
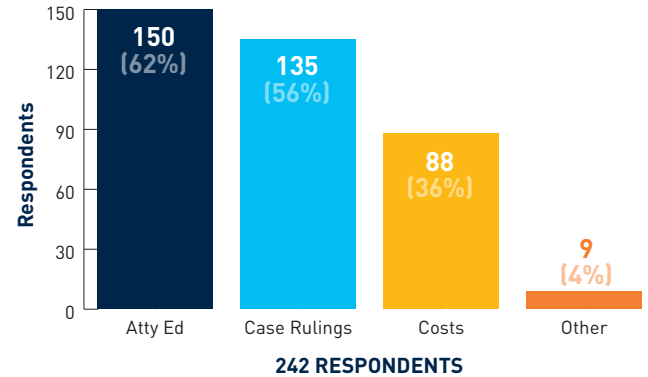
242 RESPONDENTS

- 35
- 207

Yes (86%)
No (14%)
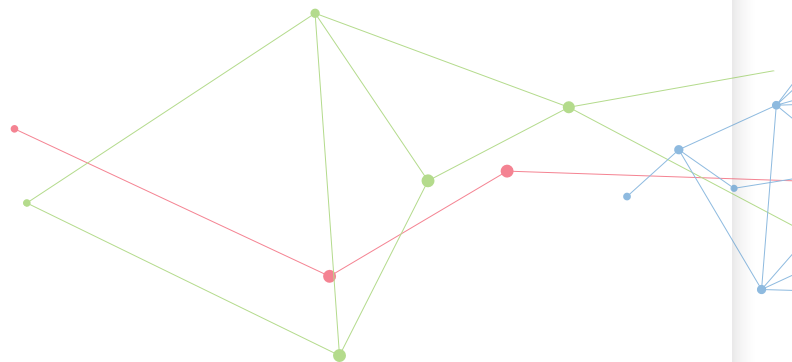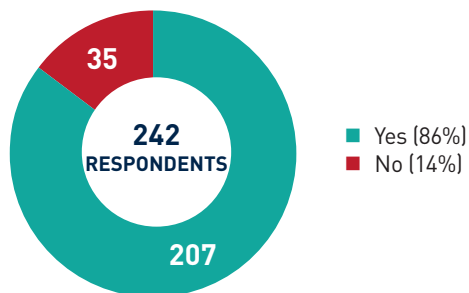
ESI AGREEMENTS

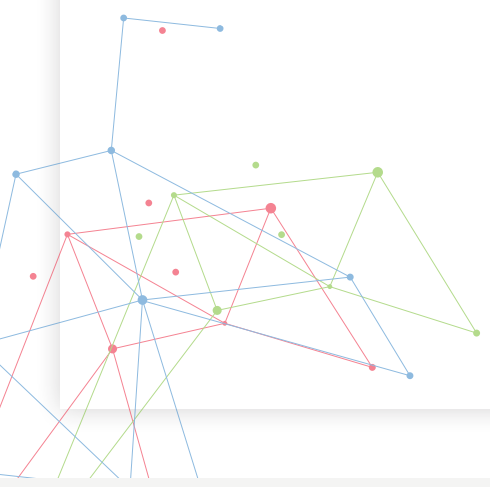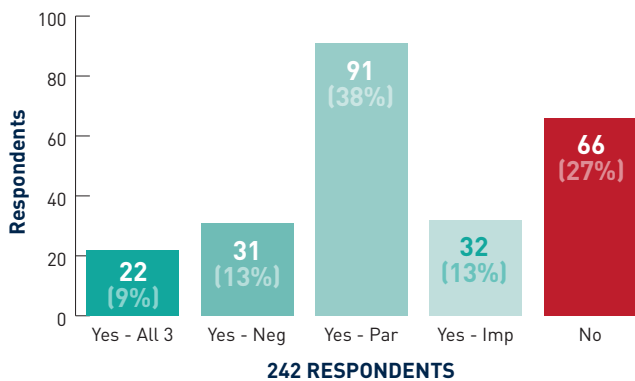**i.** In the past 12 months have you negotiated, participated [in], or implemented ESI agreements with TAR specifications?

Respondents

- Yes - All 3: 41 (17%)
- Yes - Neg: 30 (12%)
- Yes - Par: 89 (37%)
- Yes - Imp: 25 (10%)
- No: 54 (22%)

242 RESPONDENTS

iii. What do you believe are the biggest impediments to negotiating ESI agreements that discuss the use of TAR? (select all that apply)

Respondents

- Atty Ed: 150 (62%)
- Case Rulings: 135 (56%)
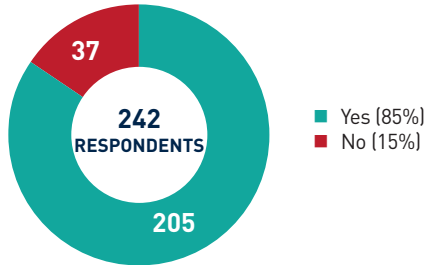- Costs: 88 (36%)
- Other: 9 (4%)

242 RESPONDENTS

ii. In the past 12 months have you negotiated, participated [in], or implemented ESI agreements that made specific references to the acceptable uses of TAR for privilege review?
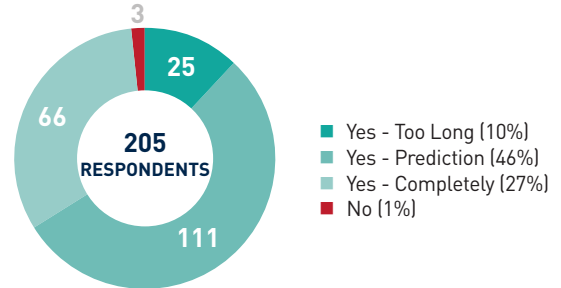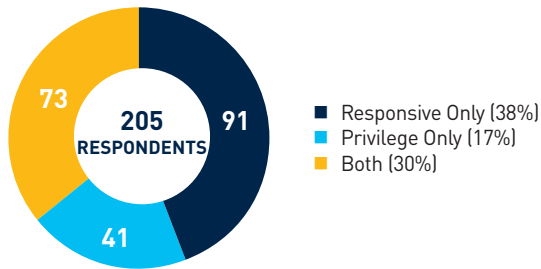
Respondents

- Yes - All 3: 22 (9%)
- Yes - Neg: 31 (13%)
- Yes - Par: 91 (38%)
- Yes - Imp: 32 (13%)
- No: 66 (27%)

242 RESPONDENTS

AIML USE IN DOCUMENT REVIEW

i. In the past 12 months have you used an AIML technology to assist you with document review?

242 RESPONDENTS

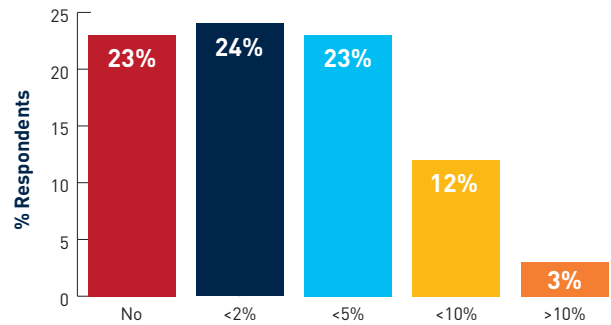37
205

- Yes (85%)
- No (15%)

ii. Did you use AIML technology for responsive reviews, privilege reviews, or both?

205 RESPONDENTS

91
73
41

- Responsive Only (38%)
- Privilege Only (17%)
- Both (30%)

iii. Did the technology improve your review process?

205 RESPONDENTS

55
64
86

- Yes - Accuracy (23%)
- Yes - Speed (26%)
- Yes - Both (36%)

iv. Did the AIML technology work as expected?

205 RESPONDENTS

3
25
66
111

- Yes - Too Long (10%)
- Yes - Prediction (46%)
- Yes - Completely (27%)
- No (1%)

v. Did you have to clawback privilege documents after production?

% Respondents

No	<2%	<5%	<10%	>10%
23%	24%	23%	12%	3%
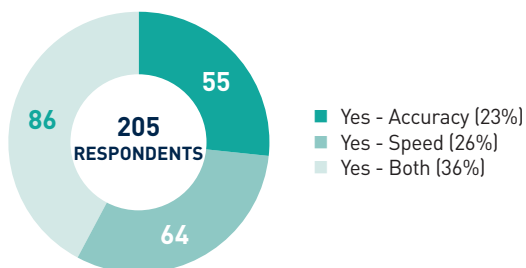
vi. Did using the technology save money?

205 RESPONDENTS

16
189

- Yes (78%)
- No (7%)
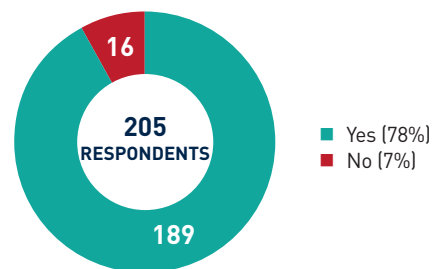
AIML USE IN DOCUMENT REVIEW (CONT.)

vii. In your opinion what is the best method for purchasing AIML technology for document review?

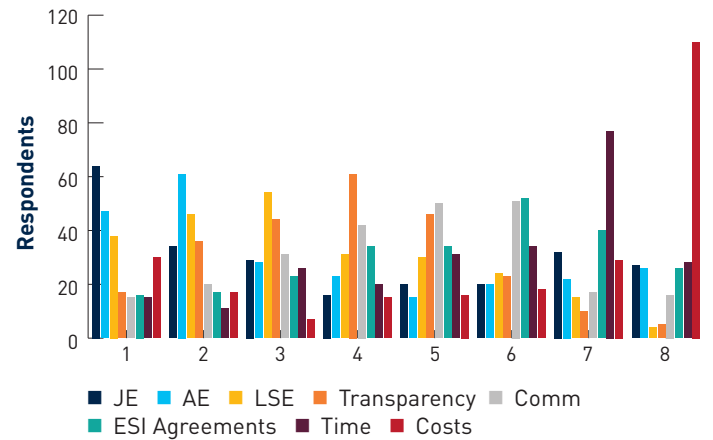| Method	Value
Blend	51 (21%)
Hourly	35 (14%)
Doc	45 (19%)
GB	74 (31%)
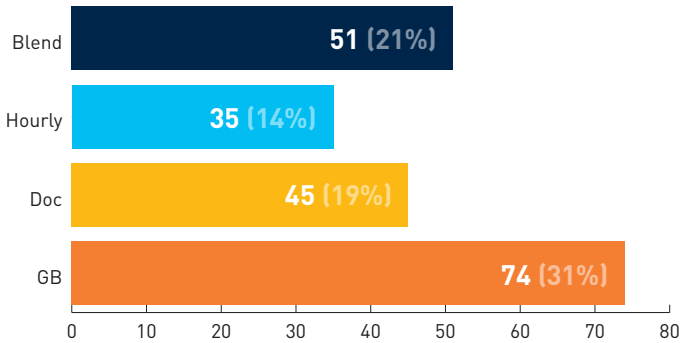
ix. Please rank the following challenges from 1-8 with 1 being the easiest challenge and 8 being the hardest.

Legend: ■ JE ■ AE ■ LSE ■ Transparency ■ Comm ■ ESI Agreements ■ Time ■ Costs

JE = Judiciary Education

AE = Attorney Education

LSE = Litigation Support Education

Comm = Communications

viii. Please identify the AIML technologies used in the past 12 months (check all that apply)

Technology	Value
RelativityOne / Active Learning	150 (62%)
Reveal / Brainspace	126 (52%)
Disco	51 (21%)
Exterro	56 (23%)
Supplier	45 (19%)
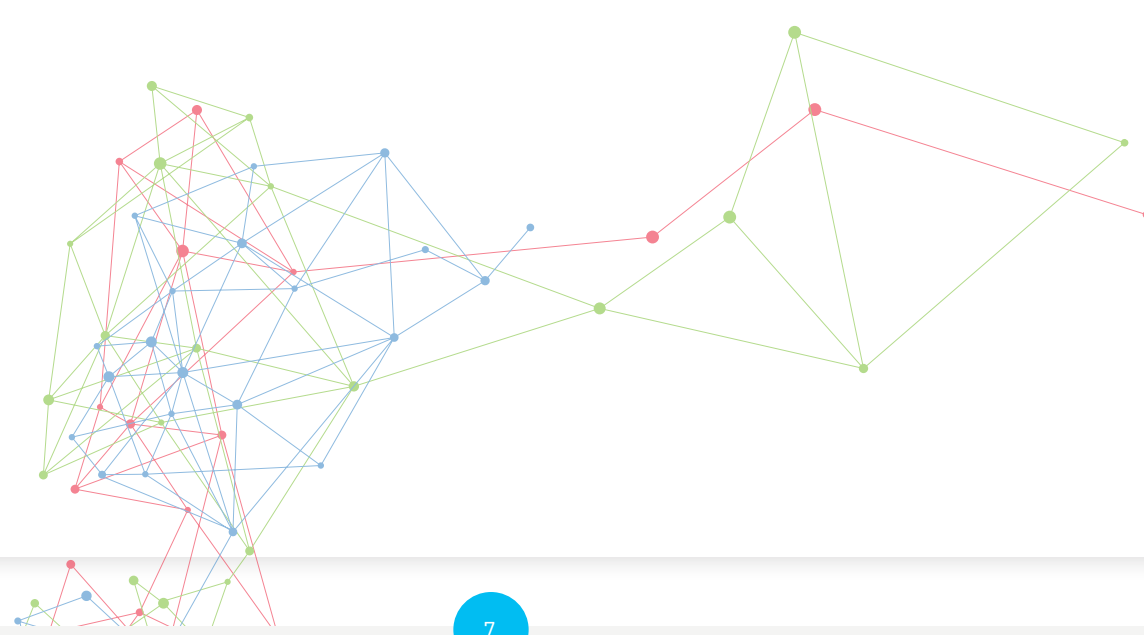
DEMOGRAPHICS

i. What is your current role?

Role	Value
Atty	35 (14%)
Cons	25 (10%)
eDisc	119 (49%)
Para	61 (25%)
Other	10 (4%)
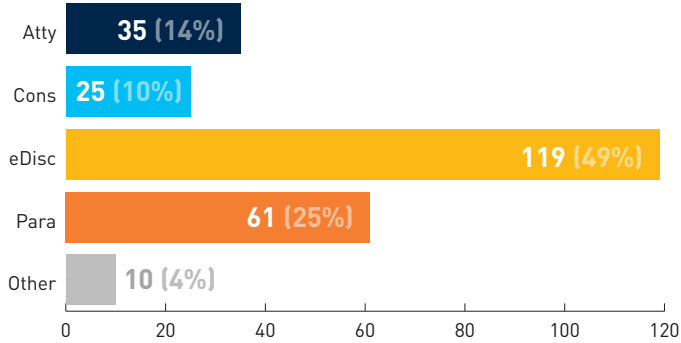
iii. What is the size of your organization?

Size	Value
>10	27 (11%)
11-50	76 (31%)
51-250	75 (31%)
<250	64 (26%)
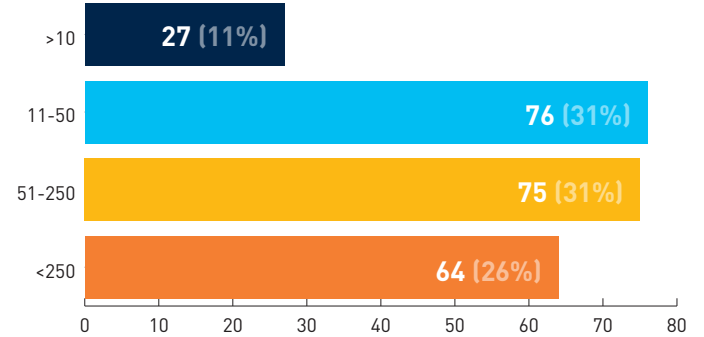
ii. What best describes the industry that you work within?

Industry	Value
Corp	60 (25%)
Gov	15 (6%)
Ind	9 (4%)
LF	95 (39%)
SP	63 (26%)
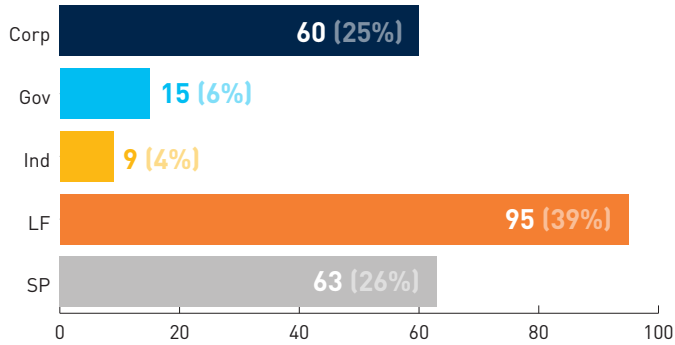
Atty = Attorney
Cons = Counsel
eDisc = eDiscovery
Para = Paralegal
Corp = Corporation
Gov = Government
Ind = Independent
LF = Law Firm
SP = Service Provider

BIGGEST CHALLENGES FACING ADOPTION

At the end of the survey, we asked people to rank eight of the most challenging issues to adoption of AIML. The eight choices were then correlated with the overall survey answers and the focus group feedback we received.

When it comes to the judiciary, both focus groups agree that education on AIML is a big issue. Educating the judiciary (JE) was the third-highest impediment to adoption of these technologies, right behind educating attorneys (AE). Both groups also agreed that judicial rulings do not yet exist that can provide the industry guidance, clarity, and guardrails on AIML that would spur further adoption.

Not surprisingly, cost was the highest-ranked issue, but this too can be traced back to the need for better education. The majority of people who have used the technology said that it worked and saved them money. We suspect that the pressure to still have "eyes on" documents during document review is a factor, as is the need for greater explanation and transparency into how the AIML technologies work.

Last, people should consider the timeliness of the process when planning to use AIML technology. The industry often works on the "hurry up and wait" principle during discovery. This impedes the use of AIML technology due to the time needed first to prepare for and run AIML technology and then for data scientists to work with the results.

Traditional document review is a linear process where data is filtered, reviewed, produced, and finished with privilege work. AIML can be deployed across multiple activities at the same time (e.g., predicting responsive and privilege documents).

Ultimately, as the adoption of this technology matures, it will be easier for parties to understand and negotiate the timeliness of activities and how they impact discovery deadlines.
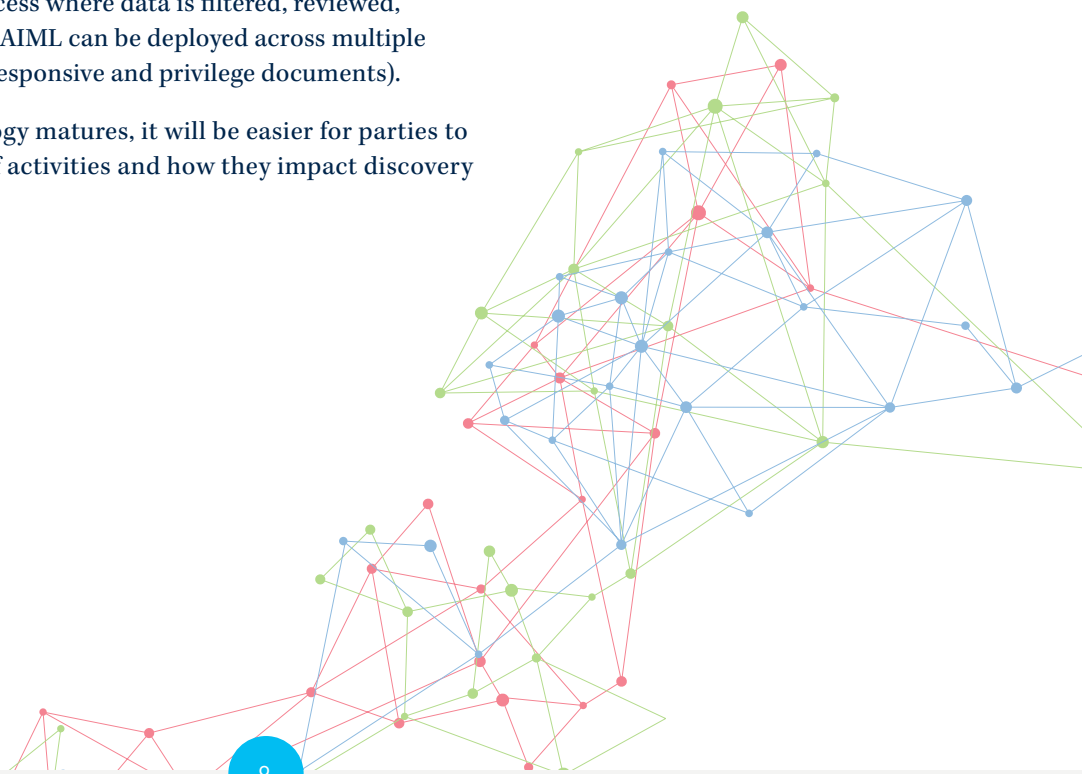
FOCUS GROUP FEEDBACK

We conducted two focus groups in January and February 2023. The first group was attended by law firms and the second by corporate professionals. At each group session, we shared the survey results, asked for feedback, and conducted polling questions. Participants in the groups included a mix of people who had taken the survey and who had not.

Much of the feedback we received was consistent with the survey results. The need for education was the number one issue that came out of both sessions. There was general consensus that attorney and judiciary education were two primary obstacles to broader adoption of AIML technologies. We conducted polling questions during each focus group, and both law firms and corporate legal were consistent on the need to provide more training. Interestingly, both groups felt that in-house training was the best method for teaching attorneys about AIML: 57% of law firms and 33% of corporates prefer direct training from their own organizations. CLE programs were the next most popular choice. Corporations also indicated that they like training provided by outside counsel. This offers a good opportunity for law firms to strengthen their relationships with their clients by providing AIML training and CLEs.

57% of law firms and 33% of corporates prefer direct training from their own organizations

ESI AGREEMENTS

We polled both groups about whether ESI agreements are more trouble than they are worth and how to make ESI agreements better. Interestingly, law firms overwhelmingly said that ESI agreements were not more trouble, while corporations were evenly split on the question. Law firms were more supportive of ESI agreements based on prior experience and more hands-on usage implementing ESI protocols.

Both focus groups chose "More education on the value of well-crafted ESI agreements" as the top option to make ESI agreements better, although law firms again were much more supportive (68% of law firms versus 36% of corporations). Part of the education issue is that the eDiscovery support professionals often are left out of negotiation on protocols. Our survey found that most respondents had only implemented ESI agreements, and our law firm focus group confirmed that.

Law firms had more to say about ESI agreements, and we heard some interesting points of view. One respondent expressed a desire to caution attorneys not to get too detailed about the use of TAR in an ESI agreement. ESI agreements are negotiated so early in the discovery process that the parties are often unaware of all the different data types that will be collected. Putting a placeholder in an ESI agreement, rather than including a lot of detail, was one idea that was widely agreed upon. Another supported suggestion was to handle the issue by agreeing that parties could use TAR but had to notify each other when they were going to use it and agree to answer questions.

We discussed whether it was a good idea to enter ESI agreements as court stipulations. The majority of people thought you would make your life harder by pinning yourself down to things you could end up fighting over later. We suspect many judges would have smiled listening to the group encouraging more meet-and-confers and more cooperation versus fighting over ESI issues in court.

Are ESI agreements more trouble than they are worth?

In other words, are you better off not negotiating TAR specifics?

Law Firm Focus Group:
82% No
18% Yes

Corporate Focus Group:
56% No
44% Yes

DOCUMENT REVIEW – RESPONSIVE AND PRIVILEGE

One of the most important survey topics involved the use of AIML in document review. After we shared the survey results with the focus groups, we had some dynamic conversations about technology experiences, challenges faced, and document clawbacks.

As mentioned above, over 80% of survey respondents said they had used AIML in document review in the last twelve months. The focus groups confirmed their own experiences were similar. Most people had used some form of continuous active learning for responsive document review, and there was consensus that the technology worked and saved money over traditional document review. We had positive discussions about the software currently being used for responsive document review. While people would like to see features added, the more pressing issue involved educating younger attorneys who are the primary users of these systems.

The discussion around AIML and privilege review revealed different sets of experiences. Those who had used AIML for privilege review had mixed experiences with the technology. There was consensus that out-of-the-box software does not do enough to predict potentially privileged documents. There are several reasons for this:

a. *Lack of customizable software*. Determining privilege in a matter does not simply involve a machine learning model that can learn the difference between dogs and cats from images. Customization per matter is difficult with pre-built software. Building machine learning models per matter requires data scientists, but few organizations have full-time data scientists. Some vendors have them, but they are focused on product development and not on building models per matter.

b. *Poor document review*. Even when people have customized machine learning models, they perform poorly when document review is inconsistent or labeling of privilege documents is wrong. It is the dogs and cats problem when the machine is taught that some cats are dogs. Better quality control (QC) was mentioned as part of mitigating these issues, but QC is an extra step and slows the process.

c. *Transparency*. Explaining how the machine learning model works is one thing. Explaining why it ranked a document higher or lower than a similar document is not as easy. Lack of explainability is a confidence killer and must be addressed for attorneys to grow more comfortable with the process.

There also was discussion about the nuances of particular privilege issues; for example, documents that can be privileged in one setting but not in another, documents that may be privileged depending on who is reviewing them, and documents that get miscoded as privileged or not privileged. These exceptions skew the machine learning process and can make privilege reviews more challenging. Several participants reported using the technology for QC of already reviewed privilege documents, and in those instances satisfaction rates with the technology were higher.

No discussion about AIML use in privilege document review would be complete without a discussion of clawbacks. Our survey found 77% of respondents who used AIML had to clawback documents. The majority of people reported clawback rates of less than 2% and less than 5%, while a small number of people had clawback rates of more than 10%. There was a consensus that clawbacks were to be expected. Multiple participants remarked that clawback provisions had been in ESI agreements long before AIML technology appeared.
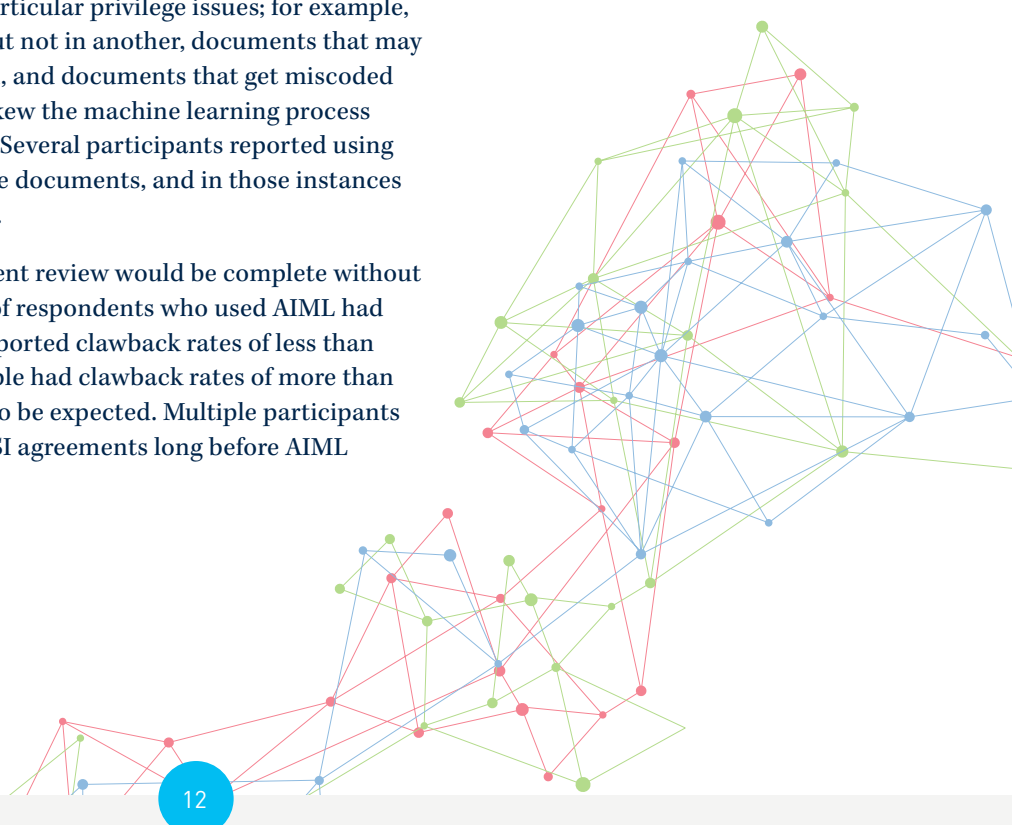
COSTS OF AIML

We talked about the costs of AIML and the preferred way to pay for the technology. There was consensus that costs were a big issue. Some participants reported not being able to recommend using certain technologies because of the costs, while others reported that they had successful experiences using the technologies but that they cost too much.

In the survey, we asked people to identify their preferred way of purchasing AIML services. The clear preference was per GB. The law firm focus group confirmed this preference, although there was discussion about whether that was the best way to purchase services. In that discussion, blended into other services and per document pricing were preferred over hourly charges.

At the end of both focus group sessions, we asked about the value of the survey and whether it should be done on a regular basis. We heard enthusiastic responses for an annual survey and interest in some regular interactions between surveys. The technology is changing so rapidly that some type of regular activity is warranted.

CONCLUSION

Three main themes stand out in our survey and focus group feedback. The first theme may be the most surprising: law firms are driving the adoption of and pushing for AIML technology in matters where it will have clear benefits. This may seem counterintuitive; there is a bias that law firms don't support technology that changes their revenue model, but this is clearly not the case with AIML technology.

Maybe this historical bias needs a rethink. Law firms are making the decision to use AIML technologies 70% of the time, negotiating ESI agreements with little input from clients, and negotiating pricing with vendors and service providers.

The second theme is the need for better ESI agreements. ESI agreements should be drafted with more flexibility; being too specific at the beginning of discovery can be problematic later. We also note that the majority of the respondents had limited exposure to the ESI process.

When we looked at the responses of just litigation/practice support people and paralegals, the results indicate the need for their increased involvement: 90% had no involvement in *negotiating* ESI agreements, 89% had no involvement in *implementing* ESI agreements, 56% had no involvement in *participating in* ESI agreements, and 22% had no involvement at all. This must change for the industry to overcome some of the adoption issues to using AIML technology.

The last theme showed up the most: education. Education is the number one issue for many pieces of this pie. Overall adoption, negotiating better ESI agreements, and the hardest challenges facing the industry all point to the need for more education. The mantra for 2023 should be: More CLEs, more webinars, more in-house trainings, and more industry knowledge sharing.

We look forward to doing this again at the end of the year and sharing our results in early 2024.

We asked the corporate focus group to identify the primary decision maker in purchasing AIML technologies or services.

They responded that outside counsel makes the decision **40%** of the time, with input from the corporate legal department; the legal department is the ultimate decision maker **30%** of the time; and the legal department provides no input about the decision **30%** of the time.

About ACEDS

The Association of Certified E-Discovery Specialists (ACEDS), part of leading legal education provider BARBRI Global, is the world's leading organization for training and certification in e-discovery, information governance, and related disciplines. ACEDS provides training to corporate legal departments, law firms, the government, service providers and institutions of higher learning. Our flagship CEDS certification is recognized around the world and used to verify skills and competence in electronic discovery for organizations and individuals through training, certification, and continuing education. The CEDS credential is held by practitioners at the largest Fortune 500 companies, Am Law 200 firms and government agencies. ACEDS has 30 chapters in most major US cities, Canada, the UK, Ireland, the Netherlands, South Africa, and Australia. Our goal is to help professionals and organizations reduce the costs and risks associated with e-discovery while helping to improve and verify their skills and advance their careers and overall technology competence in e-discovery and related fields.

About Relativity

Relativity makes software to help users organize data, discover the truth and act on it. Its SaaS product, RelativityOne, manages large volumes of data and quickly identifies key issues during litigation and internal investigations. Relativity has more than 300,000 users in approximately 40 countries serving thousands of organizations globally primarily in legal, financial services and government sectors, including the U.S. Department of Justice and 198 of the Am Law 200. Please contact Relativity at sales@relativity.com or visit www.relativity.com for more information.

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