mind-budget CONNECTION™

Changing the eDiscovery Burnout Blueprint

Practical Solutions to Address Failing Mental Wellness in the eDiscovery Industry

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The eDiscovery community is experiencing a mental health crisis that can and should be solved by senior stakeholders who control the economic foundations of our industry. Poor mental health has a number of potential taproots; indeed, mental health in the legal industry as a whole is problematic.

There is, however, something unique about eDiscovery that we, as a group, can address: the manner in which our contracts dictate the burden placed upon each of our workers, regardless of status or role. While many employers and organizations focus on mental-health and self-care steps that individual employees can take, the goal of the Mind Budget Connection and this paper is to focus on industry-wide structural issues that front-line workers cannot themselves control.

This paper explains the different roles within the eDiscovery market, the contract structures between those parties, and how those contract structures affect mental health. It additionally explores what is known about the state of mental health in the legal industry, generally, and in eDiscovery, specifically. Finally, it makes concrete recommendations about what we should be doing today to address this problem.

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01

What makes eDiscovery different?

There are several key differences between the eDiscovery industry and the legal profession at large that have meaningful impact on the way in which individuals experience mental-health challenges.

First, eDiscovery is highly technical and requires a level of sustained cooperation between lawyers and technologists not present in any other practice area. For this reason, the major economic players are not only lawyers and client, but rather a triad of clients, law firms, and legal-service providers. This added layer of complexity can increase the chances of miscommunication and mistakes, especially in a profession that already tends toward blame culture.

Second, consumers of eDiscovery services expect computer-like artificial intelligence level output when—in reality—the work of eDiscovery professionals is very human. This is compounded by eDiscovery marketing as well as pricing models, which often obscure human hours and attempt to commodify services.

Third, it is very easy to make mistakes in eDiscovery, which can have profound and serious consequences for clients. There are often very tight turnaround times for high volumes of work driven by unreasonable expectations and sometimes arbitrary deadlines.

Fourth, eDiscovery is viewed by many as a second-tier practice. This last point can lead to derision and hopelessness and is worth additional exposition.

All of this is explored in more detail below, as is the dangerously high level of burnout reported by eDiscovery practitioners in response to a 2022 Mind-Budget Connection™ survey (see § 11). The bottom line, however, is that there are changes we can and should make to the way we do business that would improve the working conditions of eDiscovery practitioners.

02

Introduction to the Mind-Budget Connection

When the mental health of eDiscovery professionals suffers, our community—as well as our service to clients—suffers. Many companies offer mental health salves targeted to individual employees, but these do not address the structural causes of overwork. All too often, the contractual relationships under which individuals labor are set up from the start to incentivize overwork.

More thoughtful discussion during the contract-negotiation process, coupled with provisions designed to provide protection against overwork, could create the stability necessary for independent mental-health initiatives to find footing and make measurable improvements.

Thus, the Mind-Budget Connection proposes a two-prong approach:

Develop principles for parties in the eDiscovery contract-formation process to consider in negotiating and drafting contracts.

Conduct evidence-based studies, research, thought leadership, and peer-to-peer discussions to educate practitioners at all levels about the seriousness of poor mental health in eDiscovery and its impact on clients.

This paper proposes ten starting principles for contracting parties, which are detailed in § 16 below. But first, we explore why eDiscovery needs this type of approach, what makes eDiscovery unique, and how its players relate to one another and the legal landscape more broadly.

03

eDiscovery as a boiler room

eDiscovery is a high-pressure, low-glory practice that requires long hours of precise focus. While there is significant money to be made in eDiscovery, the human beings doing the work are not those likely to profit most, nor are they rewarded with accolades or acclaim.

Califonia attorney Jeff Renzi captured the zeitgeist perfectly in his 2021 article, *Utopia is Usually Where ESI is Not: An In-House Counsel's View of eDiscovery*. "No matter your idea of bliss, it likely does not involve any aspect of e-discovery," he writes.[1] "As in-house counsel, I assure you that your client feels the same way." As Renzi describes, distaste so often leads to disdain: "Other than perhaps tracking time for the billable hour, no task for a lawyer is subject to more derision." Thus, an entire community is regarded as a necessary evil, subject to the negative impacts of both workload and condescension.[2]

Anecdotally, salaries for eDiscovery positions are lower than those for general litigation positions requiring the same levels of seniority and experience. Certain law firms mandate that eDiscovery attorneys are not eligible for partnership track and/or equity participation. Summer associates taking eDiscovery "clerkship" roles are often paid by the hour instead of the salary offered to "regular" summer associates. One eDiscovery associate (who asked to remain anonymous) reported a $40/hour wage for summer eDiscovery work, as compared to approximately $4,000/week for a "regular" summer associate at a large firm.

Importantly, those in decision-making and check-writing roles do not understand what goes into successful eDiscovery strategy, management, and implementation, or why it is so human-labor intensive. The fact that eDiscovery spend is often a client's number-one line item in major litigation has not raised the status of

[1] Jeff Renzi, "Utopia is Usually Where ESI is Not: An In-House Counsel's View of eDiscovery," A.B.A. Litigation Journal, Fall, 2021, https://www.americanbar.org/groups/litigation/resources/litigation-journal/2021-fall/in-house-counsel-ediscovery/ (last visited 9/25/24).

[2] It is worth noting that eDiscovery people are a proud people; members of this community choose this career despite the challenges, and this paper does not examine the unique characteristics of eDiscovery that can result in job satisfaction. Also, burnout and job satisfaction are not mutually exclusive, and, as detailed in § 7, below, some MBC survey respondents who scored high on the burnout index simultaneously expressed engagement in and commitment to their work.

eDiscovery professionals, and high-profile trial attorneys (who are courtroom specialists) are often left to consider the afterthought: who will manage eDiscovery?

And sometimes, eDiscovery marketing doesn't do the community any favors when it implies that top-tier results should be easy[3] or that better technology will make human stress within eDiscovery a thing of the past:[4]

> For savvy lawyers, those who embrace this new approach to discovery, there's a better way to get things done, one that doesn't require round-the-clock review, nights on the office couch, damaged relationships and near nervous breakdowns.

Such claims are not unique. If one were to believe eDiscovery marketing, hardly any time is necessary to review and produce documents, much less human exertion:[5]

Streamlined Productions:
"Quickly set up, pick metadata, and run a production in time to make your dinner plans. A million page production can run in as few as 25 minutes rather than hours."[6]

"Eliminate manual tasks, jumpstart your path to AI-powered insights, and gain valuable time back in your day. Automated and templatized workflows make it easy."[7]

"Stay ahead of deadlines with easy-to-use features that automate manual work, simplify complex legals tasks, and illuminate key evidence quickly."[8]

[3] See, e.g., Lepia, Ariana, "Fast and simple eDiscovery with backup and recovery," KeepIt Blog (Jun. 1, 2022) (offering the comfort: "eDiscovery really can be a breeze").
[4] Sullivan, Casey, "eDiscovery Shouldn't Cause a Mental Breakdown," https://www.logikcull.com/blog/ediscovery-shouldnt-cause-a-mental-breakdown last visited 9/23/24. The link goes to a "Request your demo" interest form.
[5] Available at: https://www.csdisco.com/why-disco/disco-ediscovery (last visited September 8, 2024).
[6] Available at: https://csdisco.com/why-disco/bing-ediscovery (last visited October 4, 2024).
[7] Available at: https://www.relativity.com/data-solutions/ediscovery/ (last visited October 4, 2024).
[8] Available at: https://www.everlaw.com/law-firms/ (last visited October 4, 2024).

This type of rhetoric in marketing, coupled with declining prices for certain types of eDiscovery work establish an expectation from clients that eDiscovery should be both easy and cheap. When it inevitably turns out otherwise, blame travels fast.

Even before eDiscovery became the dominant aspect of the dispute lifecycle, discovery had already been singled out for creating blame culture. As noted in this Fordham Law Review article from 1998, aptly named "The Discovery Process as a Circle of Blame:"

> The image of litigation that emerges from conversations with lawyers and judges outside the large firms is a circle of blame. Each group of participants righteously defends its role in the system, while blaming others for problems in the system as a whole, including occasional excesses in their own adversarial behavior. Despite their criticisms, few are willing to call for basic changes in the system. Absent some external shock, we can expect the structured antagonism that encourages parties to engage in unreasonable, inefficient, and amoral behavior to continue.[9]

In a fast-moving industry susceptible to blame culture, contracts rarely specify a method for examining the root cause of or managing mistakes. In the words of one legal-service provider who asked to remain anonymous, "It's as if everyone in the room is dedicated to learning as little as possible from the mistake or figuring out how to prevent it from happening again. The answer is always 'fire that guy' [from the vendor] to fix everything." The members of the litigation team are often unwilling to take the time to diagnose the cause of a problem mid-litigation, nor are they commonly required to do so.

[9] Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998).

04

Economic pressures in the eDiscovery contractual triad.

The major players in the eDiscovery market form a triad: (1) clients, (2) law firms, and (3) legal-service providers. Major clients in eDiscovery are typically corporations with significant eDiscovery burdens while engaged in litigation. That is not to say that individuals cannot be clients; rather, the market is largely driven by large companies that are repeat players in litigation. For purposes of this paper, the single heading of "legal-service provider" will encompass those companies that provide technology and/or data-management services (often called vendors), as well as those that provide contract-attorney services.[10]

While there are impressive profits available within the eDiscovery industry, which has been a lucrative target of private equity, that largess does not typically trickle down to front-line practitioners. The chief concern of this paper is the contractual interplay between clients, firms and legal-service providers as a whole, and the impact this has on individual well-being.

[10]There are additional participants in eDiscovery as well (judges being a notable example). At this time, however, only the three major players have significant visibility into or effect on the economic relationships at play.

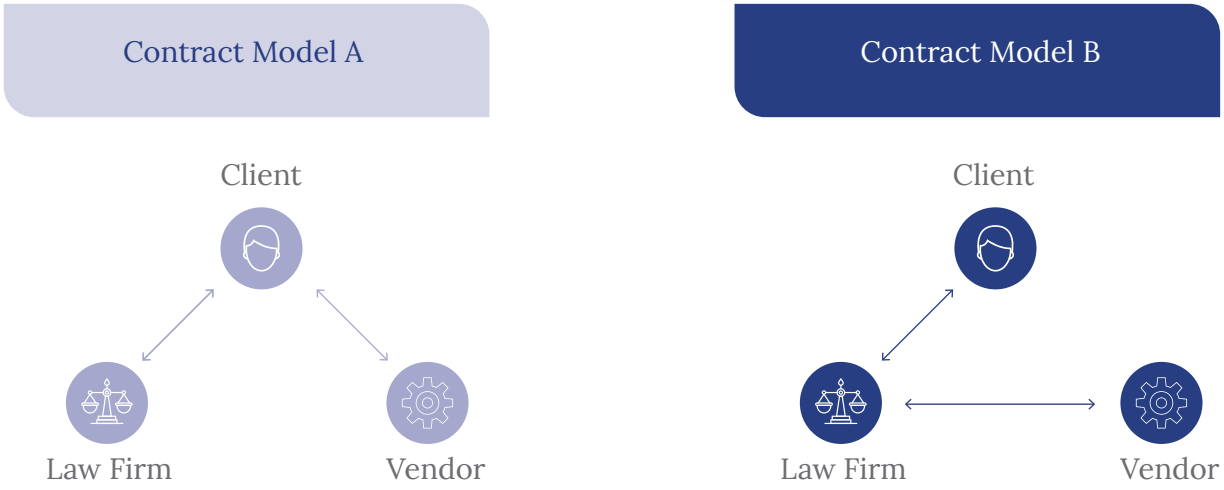
05

Who contracts with whom?

eDiscovery projects typically have two contracts. The first is between a client and a law firm for legal representation. Contracts with law firms are likely to be case-specific because lawyers usually aim for a defined scope of representation given state-specific ethical rules.

The second is between a client and a legal-service provider for services. Contracts with legal-service providers are more likely to cover multiple cases, guaranteeing continued work for the provider and possibly lowering prices for the client.[11]

For purposes of this paper, we will refer to two most basic (and most common) contract models. In Contract Model A, the client has retained both the law firm and the legal-service provider. In Contract Model B, the client has retained the law firm, which in turn has retained the legal-service provider.



[11] Additionally, there are instances where a firm retains the legal-service provider directly, or even acts as the legal-service provider itself. There are also clients that have attempted to take most legal-service provider services in-house. As you'll see, the thrust of what we hope to address—as pertains to workload, individual burdens, project management and assessing scope—applies across all scenarios.

06

Contracts between law firms and clients.

Contracts between clients and law firms are likely to follow three formats: the traditional hourly model, a flat-fee contract, or a contingency arrangement. Within those buckets, there are myriad potential textures: collars, incentive-based fees, volume discounts, and so on. The easiest option from the law firm's perspective is the traditional hourly model.

While a client might request an estimate of projected fees or other budgeting guidance, law firms that charge hourly have (theoretically) no risk of their efforts going unpaid. Given the drumbeat rise of hourly rates and client dissatisfaction with what they see as unpredictable overbilling,[12] however, the special fee agreement (whether flat-fee, contingency, or a hybrid), is growing in popularity on defense-side work.

Any sort of special fee agreement requires a law firm to risk realizing a lower rate on its time. (While plaintiff-side firms are experts at evaluating this kind of risk, defense-practitioners typically are not.) If a law firm is handling a case on a special fee agreement and the case unexpectedly takes a turn, law firms are limited in what valves can be opened to provide relief. Assuming that a law firm is already working in a relatively efficient manner, reducing the number of people staffed on the matter is too often the first and last option to preserve the firm's profit margin. Often the staff remaining after a cut have no visibility into the decision-making process and no say in how client needs will be met.

Similarly, clients often issue RFPs to law firms requesting flat-fee pricing in advance for vaguely defined workstreams such as "handling eDiscovery" or "responding to requests for production"—the price quotes handed back are often plucked out of

[12] *See, e.g.*, Bradley, Ryan, "Why the Billable Hour is Dead (or Should Be)," Forbes (May 26, 2017), https://www.forbes.com/sites/theyec/2017/05/26/why-the-billable-hour-is-dead-or-should-be/?sh=61f9a3305289

thin air and based on what the firm thinks the client wants to hear, rather than a good-faith estimate of work required (which is extremely difficult to predict on a bespoke basis).

What makes the uncertainty so high and the risk allocation so difficult? For the most part, the "American Rule" requires all parties to bear their own litigation costs, unlike the standard in many other countries where the loser pays. American discovery procedure is also unique—parties gather information with no judicial review of discovery requests (except for mental- or physical- health exams) and little oversight of the discovery process itself.

Economic theory tells us that people are more likely to use resources wisely when they must pay the cost themselves. "A party that does not bear the full cost of discovery is therefore more likely to ask for too much information."[13] This is especially true when one party holds all of the information at issue in litigation, and the other side can impose discovery costs without consequence.[14] With no judicial or definitional limits defined at the outset of a case, certainty in litigation discovery budgeting is impossible, and it is difficult to allocate risk fairly.

13. Jay Tidmarsh, *Shifting Costs in American Discovery*, Erasmus Law Review, 4, (2021).
14. Id.

07

Contracts between legal-service providers and clients.

Competition in the legal-service provider space is fierce. Winning bids tend to be those that are low, simple, and predictable. Thus, per-gigabyte pricing has been wildly popular for years, despite the fact that it is opaque as to what a particular legal-service provider might try to recoup by the metric of an intangible "gigabyte."[15]

Similarly, flat-fee, per-year legal-service provider contracts for "all-in" technology plus services are en vogue. Both models are difficult, however, at the low end of price points because there is little-to-no room for error in the profit margin.

Sometimes legal-service providers even price certain cases at loss-leader pricing to get the business from a new client. The only cost that can be toggled in that model is labor—and, despite what their marketing materials might lead one to believe, human hours are a huge portion of what goes into the work done by legal-service providers. Thus, to bid at an ultra-low-price, legal-service providers must plan from the start for an ultra-lean staff, perhaps two people where the job should (if scoped correctly) require five, or ten. This is especially true for legal-service providers that exclusively leverage utilization as a metric to guide staffing and/or do not have graduated hourly rates for personnel. As with law firms, those staffed on the matter have no voice in the staffing arrangement and are challenged to carry the load or leave.

[15] A deceptively simple proxy, nobody truly knows how a gigabyte relates to the number of human hours required for a project. And, indeed, what is represented in per-GB pricing—once you dig into it—or even how a "gigabyte" is measured (and when) differs significantly from legal-service provider to legal-service provider.

On the *Elevate.Together.Podcast.*, legal-service provider executives Jeff Fehrman (Reveal Brainspace) and John Reikes (High Impact) encouraged a different model based on partnership:

> We just need buyers and sellers in this market to all really commit to a partnership, to really work with whoever you're negotiating with, to figure out what are they really bringing to the table, what do they need out of that deal, and that applies regardless of whether you are buying services or selling services. It's figuring out what the other side needs for this to make sense for them.

This seemingly simple concept is elusive in practice.

[16] Elevate.Together.Podcast., Episode 43 (Nov. 2, 2021), Why Pricing Discovery is Not Much Different than the Billable Hour, featuring Jeff Fehrman, Vice President, Reveal Brainspace; and John Reikes, CEO, High Impact, https://elevateservices.com/podcasts/jeff-fehrman-why-pricing-discovery-is-not-much-different-than-the-billable-hour/

08

Relationships within the triad.

While the billing structure of the contract is important in predicting whether the human beings handling the case will be overworked, so is the arrangement of the parties involved.

In a perfect world, our three key players would array themselves in an equilateral triangle: the legal-service provider and law firm are each transparent with the client about their respective staffing needs, while the firm and legal-service provider work out the logistics of delivery, which the client understands and approves, paying an appropriate and fair amount for the services necessary.

In real life, seldom are the parties arrayed that way. Often, the client is positioned like the center of a clockface, with the law firm and legal-service provider acting as the hour and minute hand (Contract Model A). In this situation, the client must serve as a contractual intermediary between the other two parties when the client might be ill-suited for the role, because of both their lack of understanding of the details of the work required and the logistical and economic needs of the legal-service provider and law firm. Clients often say that they trust the law firm and legal-service provider to staff appropriately and don't want the burden of evaluating or managing staffing. This can put the firm and the legal-service provider at odds.

It can also be the case that the firm assumes this central position (Contract Model B). While this might make more sense from the standpoint of day-to-day management, it still creates problems for individuals employed by the legal-service provider. Specifically, law firms are not always incentivized to select the legal-service provider that will offer the best service, and often select the legal-service provider that offers the lowest price per gigabyte or the lowest price per hour for document review.

Law firms typically do not have any long-term relationship with employees of the legal-service provider, who must absorb the brunt of this ultra-low pricing, but are not in the position of driving the work and pace. In this set up, client has little-to-no visibility as to what is happening at the legal-service provider level—those humans are nearly invisible.

The Model Rules of Professional Conduct anticipate some of these challenges and provide guidance for the interaction of supervising attorneys with members of the triad, including legal-service providers, as discussed in § 12.

09

Declining eDiscovery prices come at the expense of the least protected within the industry.

While rates for legal services have been going up in double digit percentages, eDiscovery rates have been stagnant or, in some cases, have declined. This phenomenon has many components; one is client expectations. Consumers of traditional legal services expect bespoke work-product from highly specialized individuals and routinely accept annual rate increases from law firms for already high hourly rates. Consumers of eDiscovery services, however, expect fast, high-volume, computer-like output, even though the work of eDiscovery professionals is just as human-driven. This misconception of eDiscovery as a wholly automated practice is compounded by eDiscovery marketing and pricing models, which often obscure human hours and commodify services.

While many in eDiscovery have been talking about the race to the bottom on pricing for years,[17] few acknowledge that it is law firms and legal-service providers that are facilitating the price reductions, or the human cost that it entails. More than a decade ago, Above the Law covered an attempt by New York-area contract attorneys to unionize via Craigslist. The plea was simple:

> Stop allowing these employers to lower our rate! ... When we are hundreds of thousands in debt with three-year degrees in the professional practice of law, there is no excuse for working attorneys to be paid under $30 per hour on grueling document review projects that don't even provide basic benefits.[18]

[17] See, e.g., Kerschberg, Ben, "The Demise of Electronic Discovery's Per-Gigabyte Price Model," Forbes (Sep. 13, 2011) ("In a crowded, commoditized market characterized by price elasticity, prices will fall, accompanied by a rush for market share. In this scenario, absent hoped-for and new significant differentiators between legal-service providers, market share may be gained by a race to the bottom when it comes to per-gigabyte pricing—at least while the model lasts. However, legal-service providers must understand that this model will exhaust itself.") Note that the model has, apparently, not run out of gas nearly 13 years later.

[18] Mystal, Elie, A Contract Attorney Union?, Above the Law (Sep. 24, 2013), https://abovethelaw.com/2013/09/a-contract-attorney-union

Echoing what Big Law firms said in their bid to establish that document-review contract attorneys as exempt employees for purposes of overtime,[19] the union proponent pointed out the brain power required for the job:

> I don't care what anyone says about document review; it's a skill. Discovery work is critical to the outcome of a case; it requires thought and care. It requires more than just clicks of a mouse. Though the work can be mind-numbing, it deserves a respectful wage.[20]

Attorneys take on eDiscovery contract work for a variety of reasons, including:

- a lack of available full-time work or work that does not offer adequate compensation;
- attorneys in solo practice seeking to fill uncommitted billable time;
- family obligations that make permanent work impractical;
- military spouses who must move frequently;
- attorneys who prefer flexibility to pursue other interests;
- attorneys with barriers to entry to higher paid positions by virtue of country of origin, time away from practice, law school ranking, etc.

[19] *Henig v. Quinn Emanuel Urquhart & Sullivan, LLP*, 151 F. Supp. 3d 460 (S.D.N.Y. 2015).
[20] Mystal, Elie, A Contract Attorney Union?, Above the Law (Sep. 24, 2013), https://abovethelaw.com/2013/09/a-contract-attorney-union.

Although contract review typically requires a J.D. and an active law license, for several years some legal-service providers have paid an hourly rate for document-review attorneys as low as $23 per hour. [21] This low is jarring; the living wage for an individual with no children in the New York City area is $28.04 per hour and in California is $27.32,[22] figures that fail to take other financial obligations, such as law-school debt, into account. "An underclass [has] been created to perform the mundane tasks without the incentive of being mentored and trained for more sophisticated legal work," one contract attorney in Texas said. "And the members of this class could be discarded as soon as a litigation was over – sometimes literally on a moment's notice."[23]

For perspective, at the time of the publication of this paper, a Lowe's Garden Center Manager position advertises at $26.19/hour and has no education requirements other than the ability to read, write, and perform basic arithmetic.[24] The adult child of one of the authors of this paper made substantially more money waiting tables four nights a week than most contract reviewers make working more hours in the same time period.

The impact of a living wage on mental health cannot be understated. A study funded by the National Institute on Minority Health and Health Disparities found that every $1 increase in the minimum wage of U.S. states could reduce the suicide rate among people with a high school education or less by nearly six percent.[25] While this statistic does not speak to the effect of a living wage for professionally credentialed individuals such as contract attorneys, the practical result of bargain-basement pricing for document review is that individuals working on those projects often require the ability to work overtime (even if it's not paid at enhanced rates) and will sometimes work more than one review project at a time to earn enough per week to meet their minimum needs.

[21] Sep. 24, 2024, available at: https://www.linkedin.com/jobs/view/document-review-professional-i-at-consilio-llc-4008116699/?utm_campaign=google_jobs_apply&utm_source=google_jobs_apply&utm_medium=organic, requiring active Bar license to apply.

[22] https://livingwage.mit.edu/ (last visited July 26, 2024). The living wage is the hourly rate an individual must earn to support themselves working full time.

[23] https://www.washingtonpost.com/technology/2021/11/11/lawyer-facial-recognition-monitoring/ (last visited 7/26/24).

[24] https://www.lowes.com/careers (last visited 7/31/2024).

[25] Kaufman, J. A., Salas-Hernández, L. K., Komro, K. A., & Livingston, M. D. (2020). *Effects of increased minimum wages by unemployment rate on suicide in the USA. Journal of Epidemiology and Community Health.* https://doi.org/10.1136/jech-2019-212981.

In 2011, a blogger going by Tom the Temp maintained a blog called *Temporary Attorney: The Sweatshop Edition*, that claimed to have over 5,000 daily readers with a goal to "help expose the nasty sweatshops, swindling law schools and opportunistic staffing agencies." The blog reported on one overnight review that was offering $30 an hour and saw a stampede of willing applicants. Tom despaired:

> This is what it's come to, kids. "Down the road," as they say in the big house. Four years of college, the LSAT, 3 years of law school, the late nights studying until your eyes bleed, 100 K plus in loans, the bar'zam, the dues, the CLE shakedowns: all to beg for a graveyard shift gig at a whopping $30 an hour, sans OT. Trying to pay down loans at this rate is akin to using a Folgers can to bail out the Titanic: you'll drown long before the bilge is emptied.

One eDiscovery practitioner, Dominic Hithon, posted on LinkedIn about the changes in eDiscovery and their effect on mental health:

> While technology would seem like the savior, it put an emphasis on human error. Those mistakes/errors would lead to sanctions, spoliation, privilege information not being redacted, and loss of business. At that point the stress only became more heightened.

There is no indication that technology will be any sort of burnout cure. In fact, early indications show that enhanced technology may make burnout worse because of increasing expectations. In other words, technology itself may "simply create more space to fill up with new tasks," much the way email simply sped-up the pace of correspondence, rather than reducing its burden. [26]

[26] Epstein, Sophia, Why AI won't be the burnout cure we've been waiting for, BBC, July 13, 2023, https://www.bbc.com/worklife/article/20230605-why-ai-wont-be-the-burnout-cure-weve-been-waiting-for.

Some forms of technology bring additional mental stress to eDiscovery professionals. Remote surveillance of contract attorneys reviewing documents—meant to provide enhanced security—created frustrating and demeaning working conditions. During the COVID-19 pandemic, document contract reviewers, like all attorneys, worked remotely. But contract reviewers reported that their law firm supervisors had little trust in them. Unlike other legal professionals, these attorneys were monitored. The Washington Post reported on surveillance of contract reviewers:

> Contract attorneys … have become some of America's first test subjects for this enhanced monitoring, and many are reporting frustrating results, saying the glitchy systems make them feel like a disposable cog with little workday privacy. … [The systems are] a dehumanizing reminder that every second of their workday is rigorously probed and analyzed: After verifying their identity, the software judges their level of attention or distraction and kicks them out of their work networks if the system thinks they're not focused enough.[27]

These monitoring systems were not only demeaning, but buggy. Some attorneys were frequently kicked off the system even when they were carefully following protocol, leading to poor review rates and high frustration. Law firms did not impose these monitoring requirements on their own associates, even though pay for law firm associates is frequently between five and twenty times the hourly rate paid to contract reviewers. If tracking value is the concern, the level of surveillance should logically have a direct relation to the cost of the resource, not the inverse.

[27] Drew Harwell, Contract lawyers face a growing invasion of surveillance programs that monitor their work, Washington Post, (Nov. 11, 2021), https://www.washingtonpost.com/technology/2021/11/11/lawyer-facial-recognition-monitoring/.

10

What is the state of mental health in the law, generally?

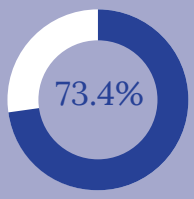
"The legal profession is in the throes of a mental health crisis…The human cost of the crisis for lawyers and their loved ones cannot be overstated; without question, the premature loss of members of the bar to death and chronic disease is tragic for the affected lawyers and those who care for them." [28]

Studies dating back decades establish that heavy workload and poor management are the most likely factors to lead to a high level of job-related stress.[29] Researchers point out that those professionals who face pressure to bill high hours literally lose themselves to the work and suffer, in part due to the loss of autonomy.[30] In one study of 60,556 full-time workers, the number of hours an employee perceived they were expected to work was the number one predictor of symptom severity in those already suffering from depression, anxiety, and other mental health problems. [31]

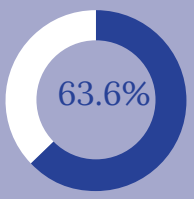
Stress is both body and mind: "When people are under stress, their bodies undergo changes that include making higher than normal levels of stress hormones such as cortisol, adrenaline, epinephrine and norepinephrine. These changes are helpful in the short term – they give us the energy to power through difficult situations – but over time, they start harming the body."[32]

Every year ALM conducts a Mental Health and Substance Abuse Survey sent to thousands of lawyers and legal professionals in law firms around the globe. In 2021, ALM published discouraging results from over 3200 responses to their survey:[33]

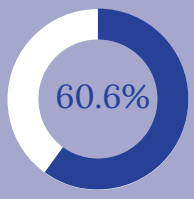
[28] Cheryl Ann Krause & Jane Chong, Lawyer Wellbeing as a Crisis of the Profession, 71 S.C. L. REV. 203, 244–45 (2019).
[29] Donald F. Parker & Thomas A. DeCotiis, Organizational Determinants of Job Stress, 32 ORG'L BEHAV. & HUM. PERFORMANCE 160, 175 (1983).
[30] Krause & Chong, supra.
[31] Hilton M.F., Whiteford H.A., Sheridan J.S., Cleary C.M., Chant D.C., Wang P.S., Kessler R.C. The Prevalence of Psychological Distress in Employees and Associated Occupational Risk Factors. J. Occup. Environ. Med. 2008; 50:746–757.
[32] Stress is both body and mind: "When people are under stress, their bodies undergo changes that include making higher than normal levels of stress hormones such as cortisol, adrenaline, epinephrine and norepinephrine. These changes are helpful in the short term – they give us the energy to power through difficult situations – but over time, they start harming the body."
[33] Every year ALM conducts a Mental Health and Substance Abuse Survey sent to thousands of lawyers and legal professionals in law firms around the globe. In 2021, ALM published discouraging results from over 3200 responses to their survey:



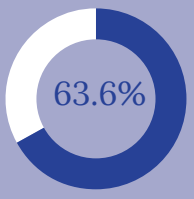
reported work conditions were contributing to their anxiety, depression, substance abuse, or other mental health problems.



of respondents struggle to use all their vacation time; and when on vacation, 72.5% feel unable to disconnect.



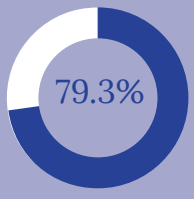
of respondents believe their firm has a sincere concern for their mental health, yet only 36.8% believe that concern translates into changes to the firm's practices and business model.



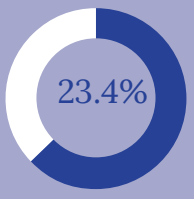
reported work caused personal relationships to suffer.

The majority of respondents cite four workplace issues negatively impacting their mental well-being: always on call/can't disconnect (72.0%); billable hour pressure (63.6%), lack of sleep (58.6%), and client demands (58.8%).

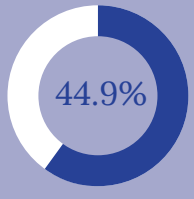
The 2024 results of the same ALM survey do not show much improvement, despite the end of world-wide pandemic conditions.[34] The survey questions have evolved to capture more information.[35]



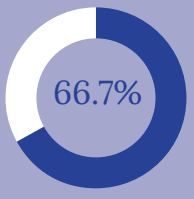
of respondents reported work conditions contribute to their anxiety, depression, substance abuse, or other mental health problems.



of respondents believe that office morale has improved since the pandemic. The remainder feel that it is the same or worse.



of respondents believe their firm has a sincere concern for their mental health. Only 35.59% of respondents believe their firm would allow extended leave to deal with mental health issues, and only 40.50% of respondents believe it is safe to raise mental health concerns in the workplace.



reported work caused personal relationships to suffer.

The majority of respondents cite four workplace issues negatively impacting their mental well-being: always on call/can't disconnect (64.12%); billable hour pressure (61.84%), lack of sleep (54.3%), and client demands (52.28%).

[34] 2024 Mental Health and Substance Abuse Survey and Report, ALM Global, available at: https://www.law.com/compass/#/surveydetail/301/overview. [35] The 2024 survey had approximately 2600 respondents.

According to the International Bar Association, mental health disorders resulting from job stress affect one out of three attorneys, yet almost half of attorneys avoid talking to an employer about mental health for fear of negative job consequences.[36] This is striking given that one of the biggest challenge law firms face is the retention of talented lawyers.[37] Some commenters have made the point to law firms that the inevitably resulting poor mental health is bad for the bottom line because it leads to turnover, decreased productivity due to symptoms of depression and substance abuse, and lawyer disciplinary actions.[38]

Leading business think-tank McKinsey & Company says that depression and anxiety have huge negative effects in the workplace in the form of lost productivity and higher health costs (and, in fact, high levels of stress are linked with high instance of diseases and cancers).[39] And although the vast majority of companies believe they take mental health seriously, only 16 percent provide mental health training for management. [40]

The corporate approach to mental health often focuses exclusively on treating individual workers' mental health symptoms in the form of Employee Assistance Programs (a set number of counseling hours), subscriptions to meditation apps, gym membership subsidies, etc. This approach does not address the fundamental causes of poor mental health in the workplace and is inadequate to create workplaces that prioritize worker safety and security. According to Dr. Maslach:

> We need to reframe the basic question from who is burning out to why they are burning out. It is not enough to simply focus on the worker who is having a problem—there must be a recognition of the surrounding job conditions that are the sources of the problems.[41]

[36] INT'L BAR ASS'N, MENTAL WELLBEING IN THE LEGAL PROFESSION: A GLOBAL STUDY, at 32, 45 (2021), https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study; see also MIND SHARE PARTNERS, 2021 MENTAL HEALTH AT WORK REPORT (2021), available at: https://www.mindsharepartners.org/mentalhealthatworkreport-2021

[37] THOMPSON REUTERS, 2021 LAW FIRM BUSINESS LEADERS REPORT (2021), available at: https://legal.thomsonreuters.com/en/insights/reports/2021-law-firm-business-leaders/form.

[38] Jarod F. Reich, Capitalizing on Healthy Lawyers, 65 VILL. L. REV. 361, 396 (2020).
39 INT'L BAR ASS'N, MENTAL WELLBEING IN THE LEGAL PROFESSION: A GLOBAL STUDY, at 41–42 (2021), https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study.

[40] Christine Maslach, Finding solutions to the problem of burnout. Consulting Psychology Journal: Practice and Research, 69(2), 143–152 (2017).

11

What is the state of mental health in eDiscovery?

The unique elements of eDiscovery—as viewed through the lens of mental health—are jagged edges. Mental health studies like the ALM Mental Health and Substance Abuse Survey (see § 6 above), are focused on the legal profession, broadly. That survey is distributed only through law firms and not to the alternative legal-service providers that are major participants in the eDiscovery industry, nor to non-attorney eDiscovery professionals working in-house or at law firms. To gather more information on the state of mental health in eDiscovery, the founders of the MBC conducted an industry-wide survey on the current state of mental health in eDiscovery, especially in juxtaposition to the rest of the legal industry.

The MBC Survey

The MBC team developed the survey in collaboration with survey research professionals during Spring 2022. The development process utilized several key resources, including the Oldenburg Burnout Inventory (OBI) and a guide to writing research questions from the George Mason University Writing Center.

The OBI is a freely available, scientifically validated tool to measure work disengagement and exhaustion. It is based on the MBI and represents a subset of the MBI measurements. The survey was designed to accurately measure levels of emotional exhaustion, depersonalization, and reduced personal accomplishment among eDiscovery professionals. MBC chose to use the OBI because it is well-tested and validated, eliminating the need to pilot survey questions. Additional information on the survey methodology can be found in Appendix A.

In addition to the OBI questions, the MBC team designed supplemental qualitative questions that asked about the respondents' attitude towards various aspects of their work.

Survey Results

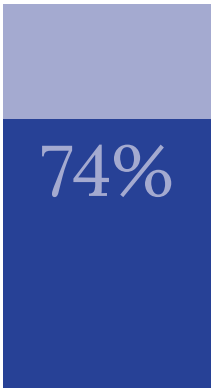
The World Health Organization ("WHO") defined burnout in its Eleventh Revision of the International Classification of Diseases (ICD-11) as a "syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed."[42] According to the WHO, burnout is characterized by three dimensions:

- Feelings of energy depletion or exhaustion
- Increased mental distance from one's job, or feelings of negativism or cynicism related to one's job;
- Reduced professional efficacy.[43]

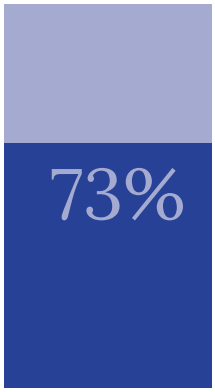
Of the survey respondents who answered the inventory questions, an astonishing 78.5% were in late burnout stages, and over 10% scored so poorly on the burnout scale as to require immediate intervention under the guidelines. Another 10% of respondents were not technically across the "burnout line" on the index, but very close. Only a small number of people responding to the survey had low burnout symptoms.

[42] 5/28/19, World Health Organization, Burn-out an "occupational phenomenon": International Classification of Diseases
[43] Id.

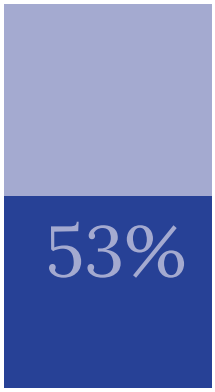
The OBI exhaustion and disengagement scores were equally discouraging, though exhaustion was more prevalent than disengagement:



of respondents felt that work was a significant contributor to stress.



of respondents reported that they were expected to work off-hours and 65% reported that their team had more work than they could handle.



In regard to the scope of projects, 53% of respondents noted that scope increases after inception.

Inability to adequately hire and train new people were the most cited reasons that teams were understaffed, but over 35% of respondents noted that their employer would not be able to make money if projects were adequately staffed.

There is not any systemic methodology yet in place to address these staggering numbers. The most common mental-health and self-care solutions eDiscovery employers offer do not address the structural foundations of eDiscovery burnout. Rather, these efforts give employees options for treating the individual-level symptoms caused by structural failures. This ancillary support for individual workers is inadequate to create workplaces that prioritize mental wellness, safety, and security.

12

How are eDiscovery contracts related to legal ethics?

Under the ABA Model Rules of Professional Conduct (the "Rules"), lawyers have an ethical obligation to provide competent representation to their client (Rule 1.1), maintain client confidences (Rule 1.6), supervise other attorneys and non-attorneys working under their direction (Rules 5.1 and 5.3), and communicate with clients (Rule 1.4). It may come as a surprise that all these ethical obligations equally apply to lawyers working with eDiscovery legal-service providers, document review attorneys, or non-attorneys, even if those professionals are hired by the client (as described in in Model B in § 9 above). "Enlisting the services of an outside legal-service provider to assist in review or coding does not discharge an attorney's obligation to provide competent representation. [44]

In other words, the relationship between law firm and service provider must be supervisory, even if it is not contractual. Specifically, Rule 5.1(b) provides that any lawyer who has direct supervisory authority over another lawyer, "… shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Rule 5.3(b) dictates that a supervisory lawyer must make reasonable efforts to ensure that the conduct of any non-attorney under their supervision is compatible with the professional obligations of the lawyer.

In the context of eDiscovery, document review attorneys and non-attorneys, the "reasonable efforts" mandate often gets lost in the shuffle, primarily due to virtual work by eDiscovery legal-service providers. Even in a virtual law practice, however, a lawyer's mandate to provide oversight still contains a duty of regular interaction and communication with associates and paralegals. These obligations apply equally to the eDiscovery legal-service

[44] Greenhall, Byler, and Morley, "Attorney Ethical duties in E-Discovery: It's Important to Stay Current," The Legal Intelligencer, Feb. 26, 2018.
[45] *See*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 21-498 (Mar. 10, 2021) (recognizing that lawyers who rely on technology legal-service providers must ensure the legal-service provider's personnel are aligned and comply with the lawyer's ethical obligations).

provider's document-review lawyers and any nonlawyers, such as technologists. [45]

Additionally, under Rule 1.1, a lawyer must stay informed of the benefits and risks associated with relevant technologies, which includes the technologies being used by individuals working under the direction of the lawyer.[46] This includes an ongoing evaluation of the experience (physical and mental) of document review lawyers and nonlawyers within the work environment. This is not a "one and done" exercise, as noted in ABA Formal Opinion 08-451:[47]

> The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and nonlawyers working for her in an effective manner … In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.

Thus, special care must be taken in forming the relationships within the eDiscovery triad to set up competent and adequately supervised legal services. "Failing to provide adequate training, oversight, and quality control of e-discovery legal-service providers or document reviewers can result in preservation and production errors and undermine counsel's duty to provide competent representation." [48]

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[46] *Id.*

[47] See, ABA Comm. on Ethics & Pro. Resp., Formal Opinion 08-451 (August 5, 2008) (discussing lawyer's obligations when outsourcing legal and nonlegal support services).

[48] Greenhall, Byler, and Morely, 2018.

13

Why do eDiscovery contracts matter when it comes to mental health?

At the simplest level, contracts of any kind matter because they establish the rules or framework by which parties engage with each other. Additionally, contracts establish the working conditions of a job, whether that be through the terms included or those omitted. As discussed above, the working conditions of a job may support or degrade the mental health of individual workers.

These basic principles run into very practical problems with the way eDiscovery contracts are currently formed. One perspective might be that an hourly billing arrangement creates a better incentive for a law firm or a legal-services provider to adequately staff and compensate for work required, but it also leaves the client worrying about whether this is "over-staffing" or allows inefficiency.[49] By the same token, a fixed-fee agreement gives less incentive for the firm or service provider to take on the larger, better-paid staff, because it's now effectively the one slicing up the pie. Fixed fees are extremely popular, either because they avoid the complexity of opaque, per-piece eDiscovery pricing (see § 11 above), or because they reflect clients' desire for budget certainty, or both.

Flat-fee eDiscovery contracts in either Model A or Model B are often underbid at the start. First, the cadence of eDiscovery work is difficult to predict and can expand and contract over the course of a matter, meaning budgeting is always based on an educated guess. Second, both law firms and legal-service providers are often incentivized to just "get the deal done," and then expand, as necessary, from there. Third, especially with the influx of private-equity investment into eDiscovery, the pricing structures of some of the industry's most basic services and technology are tied to

[49] *See, e.g.*, Chesler, Evan R., Kill the Billable Hour, Forbes, December 25, 2008 (updated July 16, 2012).

volume, which can sometimes create a perverse incentive to get as much volume (of work, of data) as possible, even if it reflects a lower per-project profit. Fourth, eDiscovery buyers are often not sufficiently fluent in contract structures or armed with data to resist their budget department's mandate to select the lowest bid, regardless of anything else.

Thus, ultra-low initial pricing is common. The consequences of that ultra-low pricing are felt early in a project. At high prices, small changes in price correspond to small changes in quality. At low prices (where there is little-to-no margin), small changes in price correspond to large changes in quality. Additionally, when pricing is "all in" or otherwise unlimited, strategic choices are made without regard to future volume; these contracts rarely provide protections or incentives to maintain appropriate staffing levels. In fact, certain contracts that do not adequately predict the volume of work required (such as "all inclusive" or "turnkey" structures) leave staffing as the only remaining profit lever. Staffing scarcity means workers are less able to get adequate rest, have less flexibility over their schedules, and less autonomy over how the work is done.

Further, contracts within the triad focus on what will be paid for, but rarely on how the work will be done. An exception to this are the service-level agreements (SLA's) that some eDiscovery service providers include to define turnaround time for certain tasks. For instance, a legal-service provider may require that a law firm allow four days after a production set is finalized before the production set will be delivered. Anecdotally, legal-service providers report that these SLA's are rarely respected, and that law firm representatives often claim ignorance of these terms or invoke changed circumstances. Given the competition in the marketplace, legal-service providers rarely enforce these SLA's, but the impact of the failure to enforce can have severe repercussions for legal-service provider staff who must work long hours under substantial time pressure to meet unreasonable demands with perfection as the expected outcome.

Unlike SLA's for technical work, contracts for eDiscovery services rarely include requirements about communication and decision making. Clients and law firms rarely engage legal-service providers in important decisions regarding litigation strategy. Trial counsel with a fixed mindset are less likely to understand that they may not

have all the information necessary to determine the feasibility of the strategy they propose, or consider an eDiscovery strategy at all.

At a more fundamental level, these contracts also do not address communication expectations and requirements. The people working for a given legal-service provider are often an afterthought to clients and firm attorneys, meaning that the workplace does not foster inclusion and belonging. We use these terms not in the "DEI" sense, but as a measure of whether people feel that their work contributes to a larger purpose. Requiring that law firms create an effective channel of communication with technical legal-service providers, project managers, and review teams fosters connection and community, a hallmark of healthy workplaces.

For example, legal-service providers often fail to receive timely communication regarding procedural changes in cases, even though these may affect data processing, promotion, and review. In one situation, a law firm failed to inform a legal-service provider and a document-review team that a claim and cross claim had been dropped from the suit, which would have simplified the review process, potentially improved work product, and saved the client money. In an extreme example, a law firm failed to inform a document-review team that the matter had settled. The reviewers had worked two full days in the interim.

Communication of timing and data management can be an additional challenge. Legal-service providers assemble review teams based on the volume and timeline of review. Reviewers are trained by the law firm, often by means of a "review memo" and then execute on document review and coding. If one phase of review ends before the other parties to the triad are prepared to start the next phase, reviewers may find themselves without work and without pay, but often with the ask that they remain available—without pay—until the new set of review documents are ready. The lowest-paid participants take the highest risk to their livelihood; they have little power in the contract they work under.

14

How does this harm clients?

There are certain industries with monitoring requirements that specify safety requirements for workers employed by companies in its supply chain. In fact, there are certain industries that mandate mental-health safety for workers employed by companies in its supply chain.[50] While eDiscovery is not currently one of those industries, it could be. Indeed, to protect clients the way in which lawyers' ethical rules are intended, perhaps eDiscovery should be.

Client's rights and legal responsibilities can be significantly affected by eDiscovery mistakes. For example, in *J-M Manufacturing v. McDermott*, a client sued its legal-services provider for failing to pass 180,000 documents through a privilege filter. Outside counsel signed off on productions containing privileged documents, apparently repeatedly. In other words, systems were in place to complete necessary tasks, but the human beings operating them made mistakes, such that the systems did not operate as intended.

While there is no evidence that the mistakes in *J-M Manufacturing* were caused by overwork or stress, there is ample evidence that overwork causes poor mental health and increases the likelihood of error.[51] Courts are not likely to document the reasons that mistakes are made, but it is reasonable to assume that the high levels of burnout in the eDiscovery industry can and will lead to mistakes.

Similarly, in *Bridgestone v. IBM*, a legal-services provider conceded that it accidentally produced a set of privileged documents instead of producing an intended set of non-privileged documents. This error was compounded by other mistakes by counsel, leading to a lengthy battle over privilege. The court ultimately ordered that Bridgestone could claim privilege over only 50 documents then on its log and had

[50] Achilles, Putting wellbeing at the heart of workplaces (and supply chains), available at: https://www.achilles.com/industry-insights/putting-wellbeing-at-the-heart-of-workplaces-and-supply-chains/ (last visited September 8, 2024.)

[51] Wong K, Chan AHS, Ngan SC. The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018. Int J Environ Res Public Health. 2019 Jun 13. (Collecting research on the correlation between working hours and health.)

to release the rest.[52] Surely at the beginning of that case, neither Bridgestone, its counsel, nor its legal-service provider envisioned that eDiscovery mistakes would lead to privilege limitations.

Even beyond published opinions, seemingly every eDiscovery practitioner has a story of something they saw go very badly—usually things that happened in the middle of the night, under a tight deadline, by a person new to the case, or under extreme pressure. High staff turnover caused by low wages, low job security, and the stress of under-staffed projects (which put pressure on those involved to carry more weight) means a deficit of institutional knowledge and impacts quality. Instead of reviewers and technologists with consistent experience with a client or a set of documents, litigation teams must contend with a stream of replacement workers with little context relating to the case or training on the client data. This is also true of law firm associates, for whom turnover in 2023 was at 18%.[53]

At the most fundamental level, the lack of adequate pay or job security for contract document reviewers has a direct impact on quality. Numerous studies show that raising wages raises productivity and reduces turnover.[54] In addition, economic research shows that, at low prices (such as those paid to contract document reviewers) even small increases in price result in increases in quality. Workers are more engaged and more productive after receiving raises. Conversely, at high prices (like those paid in law firms), small increases in price are less likely to impact quality.[55]

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[52] *Bridgestone Americas, Inc. v. Int'l Bus. Machines, Corp.*, 2015 WL 10990186, at *2 (M.D. Tenn. Oct. 1, 2015).

[53] https://www.nalpfoundation.org/news/the-nalp-foundation-releases-latest-update-on-associate-attrition-and-hiring-(cy-23)# (last visited 8/2/2024)

[54] See, e.g., Emma Harrington and Natalia Emanuel. Working Paper. The Payoffs of Higher Pay: Elasticities of Productivity and Labor Supply with Respect to Wages, available at https://scholar.harvard.edu/files/nataliaemanuel/files/emanuel_jmp.pdf collecting sources; see also, Seema Jayachandran, How a Raise for Workers Can Be a Win for Everybody, June 18, 2020, available at: https://www.nytimes.com/2020/06/18/business/coronavirus-minimum-wage-increase.html

[55] Steiner, W.J., Siems, F.U., Weber, A. et al. How customer satisfaction with respect to price and quality affects customer retention: an integrated approach considering nonlinear effects. J Bus Econ 84, 879–912 (2014). https://doi.org/10.1007/s11573-013-0700-6

15

The Proposal of the Mind-Budget Connection.

When the mental health of eDiscovery professionals suffers, our community—as well as service to clients—suffers. Mental health improvement initiatives aimed at individual eDiscovery professionals are unlikely to be successful if they do not address the structural causes of overwork. All too often, contractual relationships are set up from the start to incentivize overwork. More thoughtful discussion during the contract-negotiation process, coupled with provisions designed to provide protection against overwork, could create the stability necessary for independent mental-health initiatives to find footing and make measurable improvements.

Thus, the Mind-Budget Connection proposes a two-prong approach:

Develop principles for parties in the eDiscovery contract-formation process to consider in negotiating and drafting contracts.

Conduct evidence-based studies, research, thought leadership, and peer-to-peer discussions to educate practitioners at all levels about the seriousness of poor mental health in eDiscovery and its impact on clients.

With respect to the first prong, any set of principles guiding practical action must be iterative and refined over time as the community learns more through application. That said, what follows are suggested starting points for 2024 and 2025.

16

Ten Principles for Contracting Parties:

1

Clients should encourage matter-specific contracts or statements-of-work negotiated by the entire triad—client, law firm, legal-service provider—that clearly define the specific expectations for interaction.

2

The triad of contracting parties should clearly define the scope of work anticipated for a matter and avoid unlimited, all-in, or other pricing structures likely to force a law firm or legal-service provider into profit-loss should the scope of work unexpectedly expand.

3

The assumptions upon which the contracting parties rely should be included in the contract and be descriptive and thorough.

4

The triad of contracting parties should discuss and memorialize the number and title (or job description) of professionals reasonably anticipated for the defined scope of work with a goal of manageable individual workloads.

5

The triad of contracting parties should be transparent about the way in which they are each pricing goods, technology, and human services (and what the take-home pay is for human services), even if it means a more complex price sheet.

6

Clients should discuss with both law firms and legal-service providers the way in which they track the number of hours worked by individual legal professionals, for the specific matter that is subject of the contract as well as overall, and whether they can provide that information on request.

7

Contracting parties should define the circumstances under which flat- or capped-fee pricing should be renegotiated during the lifecycle of the contract.

8

Clients should engage their billing-management departments in discussions about the human cost of underbid eDiscovery contracts to understand that the lowest price offered will likely have negative impacts on both service performance and individuals' mental health.

9

Contracting parties should require periodic check-ins on staffing and performance through the life of the project and define when and how those will occur.

10

Large corporate clients can incorporate these principles in "contracts" other than a particular engagement for services, when the need to move quickly may be paramount. "Outside Counsel Guidelines" and "Outside Vendor Guidelines" are common in large corporations, and legal departments generally insist that their providers are bound by these. Such documents are an excellent place to codify expectations for behaviors, communication, and project management across multiple matters.

17

Let's make a difference.

What you can do today depends on your role in the eDiscovery space:

Everyone … please share contract structures or provisions that you believe help protect quality and mental health. (Suggestions may be emailed to mindbudgetconnection@gmail.com but please do not include health or company proprietary information.)[56]

Those who are in the position of affecting how contracts are negotiated and formed … please consider using the principles above. Subsequently, please send feedback on your experience to mindbudgetconnection@gmail.com so that we can gather our community's experience in testing the model.

In-House attorneys who must budget for litigation … you may not have control over pricing entirely, but you can ask about the treatment of and take-home wages for those at the bottom of the hierarchy. Remember that what you are paying is NOT what people are making. Simply put, make sure everyone in the chain has a living wage and design contracts that build in communication and respect at all levels.

Those who have a say in the staffing of eDiscovery projects … take the time to evaluate what the project you're managing truly requires in terms of human hours, and then divide by a normal full-time schedule to determine the number of people required. Be vocal in any situation you see understaffing occurring or on the horizon.

Those who are lower on the ladder … If you are a junior project manager, a junior associate, a temporary or contract attorney, an entry-level technologist, the very first thing you should do is evaluate whether the social constructs that keep you isolated—seemingly protected—are real and whether they are to your individual benefit or the collective benefit of the community. What are the ways in which you (inadvertently or otherwise) may be participating in or reinforcing structures tied to poor mental-health outcomes? In other words, question everything.

[56] We are excited to receive your ideas. Please do not include any privileged, confidential, proprietary, trade secret, or personal health information, your mother's maiden name, the make and model of your first car, or any other data that is not appropriate for public consumption. If you share mental well being stories or suggestions, please anonymvize data as much as possible.

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About the Authors

The Mind-Budget Connection ("MBC") is a group of volunteer eDiscovery professionals comprised of in-house counsel, law-firm lawyers, and legal-service providers. The MBC's mission is to address and analyze industry-wide practices that contribute to the problem and negatively affect the quality-of-service clients receive, in particular contractual arrangements that encourage a commercial "race to the bottom" that often results in a heavy human toll.

The MBC firmly believes that good mental health is not only necessary to improve personal well-being but is also good business. Healthier minds result in greater peak performance, which leads to more efficient work product and better client outcomes.

The views expressed in the paper are those of the authors in their personal capacity and do not necessarily represent the views of their employers or clients.

a. Proclamation

Our approach to changing the contractual foundations that drive poor mental health outcomes in eDiscovery is guided by two core tenets—awareness and commitment.

b. Awareness

The first step to changing a problem is awareness. We aim to shine a light on the issue of burnout in our industry and bring attention to its root causes. We believe this is not a problem that can be solved by any individual; the personal drive for self-care and mindfulness are not enough. Rather, we must examine the way we contractually agree to interact with one another and how those agreements affect the mental health of those actively working on client engagements.

c. Commitment

Beyond awareness, we believe the necessary structural change to the eDiscovery industry requires the following commitments:

- Conduct evidence-based studies, research, thought leadership, and peer-to-peer discussions to educate practitioners at all levels about these issues
- Provide the eDiscovery industry with a practical framework practitioners can use to effectuate change
- Continually advocate and build support in the eDiscovery industry for these initiatives
- Ensure these initiatives have a measurable, positive economic impact on the businesses that adopt them

d. Learn More

Visit us at https://mind-budget.com/ or find additional mental wellbeing resources at our sponsoring partner's website, http://edrm.net.

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Empowering the global leaders of eDiscovery, the Electronic Discovery Reference Model (EDRM) creates practical resources to improve e-discovery, privacy, security, and information governance. Since 2005, EDRM has delivered leadership, standards, tools, guides, specifications, and frameworks to improve best practices throughout the world. EDRM has an international presence in 145 countries, spanning six continents and growing, and is an innovative support infrastructure for individuals, law firms, corporations, and government organizations seeking to improve the practice and provision of data and legal discovery. Learn more about the EDRM at EDRM.net.

Appendix A:

MBC eDiscovery Mental Health Survey Methodology

Survey Administration

The survey was administered between June 6 and June 30, 2022, using the Qualtrics platform. This platform was chosen for its robust capabilities in survey design, distribution, and data analysis. The MBC team chose a broad array of distribution channels with a narrow focus on the eDiscovery market.

Distribution methods included:

- LinkedIn posts
- Email blasts to professional contacts
- Social media platforms
- The Association of Certified E-Discovery Specialists (ACEDS) website
- eDiscovery Today
- The Cowen Group
- Various eDiscovery legal-service providers

To further promote the survey, Christine Payne, the founder of the Mind-Budget Connection (MBC), appeared on the podcast eDiscovery After Hours.

Survey Respondents

A total of 316 responses were received. The survey captured important demographic information to ensure a comprehensive analysis of the data. The demographic breakdown of the participants included:

- Location: Respondents from six countries and 33 U.S. states
- Age: Over 75% of respondents were between 35 and 55 years of age
- Gender: 52% of respondents identified as female; 42% as male; 12% declined to identify
- Race/Ethnicity: Over 80% of respondents were white; black and Asian respondents were about 4% each
- Time in Role: Over 45% of Respondents had been in role for more than 5 years; 18% had been in role less than a year; 21% had been in role for 1-2 years

A qualitative review was conducted for open-ended responses to capture insights and experiences related to mental health and burnout. Additionally, the MBC team conducted follow-up interviews with some participants to better understand their responses to the qualitative answers provided.

Data Analysis

Quantitative data were analyzed using the Qualtrics platform to identify trends and correlations. Descriptive statistics were used to summarize demographic information, and inferential statistics were applied to explore relationships between variables. Qualitative data from open-ended responses and follow-up interviews were coded and analyzed thematically to extract key themes and insights.

Limitations

The sample size is a small fraction of the eDiscovery professional population. However, the results align with larger studies conducted by other entities on the mental health of the legal profession more generally.

The survey respondents are primarily middle-aged and white. No research is available to determine whether this is representative of the eDiscovery professional population in general.

State-by-state responses are skewed according to the level of survey distribution in different markets. The state with the highest number of respondents is Illinois, with 18% of respondents. California, one of the largest legal markets in the country, had only 8% of respondents.

Respondents hold a wide range of roles in eDiscovery and work in several arenas: law firms, legal-service providers, corporations, and government agencies. Reported roles include attorneys, paralegals, project managers, legal operations professionals, eDiscovery sales and marketing professionals, and forensic and other technology professionals. Results have not been analyzed according to job type.

Respondents were not asked how they heard about the survey, so data on the source of the participants is unavailable.

Limitations that have not yet been fully explored include potential response biases, the representativeness of the sample, and limitations inherent to self-reported data.

57. See, 2024 Attorney Well Being Report, Bloomberg Law, available at: https://aboutblaw.com/bfC3 (last visited 9/24/24); see, also, 2024 Mental Health and Substance Abuse Survey and Report, ALM Global, available at: https://www.law.com/compass/#/surveydetail/301/overview.