

The Legal Intelligencer

Speed and Finding Key Facts Make or Break an Investigation: How E-Data Can Help

In this article, the first installment in our 2021 series, we discuss opportunities for the e-data attorney to apply her unique skillset toward mastery of the art of internal and government investigations.

By Charles Imohiosen and William Childress | March 11, 2021 at 12:48 PM



William Childress, left, and Charles Imohiosen, right, of Morgan Lewis & Bockius. Courtesy Photos

Editor's Note: This is the first in a four-part series.

In last year's article series, we examined the e-discovery attorney's two-decades long transformation into today's e-data attorney. We noted that the e-data attorney brings to her role a formable array of tools, including process design, tested workflows, business planning and technological mastery, assembled over time through hard work and experience. We considered the creative ways in which she deploys these tools to help her clients navigate the complex and ever-shifting demands of e-discovery, contracts and regulatory compliance. In this article, the first installment in our 2021 series, we discuss opportunities for the e-data attorney to apply her unique skillset toward mastery of the art of internal and government investigations.

Investigations cut a different path than e-discovery. Discovery is a means to achieving a predictable end—a trial where admissible evidence is presented, attorneys argue their client's positions, and either a factfinder reaches a decision on the issues in dispute or the parties reach a settlement. Because rules of civil procedure have traditionally permitted broad discovery, parties conduct a thorough search for any potentially relevant evidence to support their claims and defenses. Although some "rocket dockets" push cases to trial in less than a year, the "file to trial" date in most courts is more deliberate. In fact, discovery can go on for years in complex cases. Absent court-imposed deadlines, the parties typically control the pace of discovery, so attorneys can take their time gathering the facts and developing a full understanding of the strengths and weaknesses of their client's case. During traditional discovery, the e-data

attorney uses her knowledge of technology to collect, process, and review large volumes of data for the purpose of identifying all relevant and privileged documents.

By contrast, investigations are substantially narrower in scope with far different objectives and timelines. Both speed and key fact finding are the hallmarks of investigatory success. A typical investigation focuses on uncovering alleged misconduct or noncompliance as well as determining the degree of legal exposure that a client may face. The investigation's goal is not to find every single relevant document in the client's possession, but only those materials sufficient to verify the existence and scope of, as well as actors involved in, any alleged misconduct.

The client's legal and business need to remediate and mitigate legal exposure as quickly as possible in an investigation compresses greatly the time available for discovering the facts underlying alleged misconduct. For example, in a government investigation, a client may feel obligated to self-report alleged misconduct to a regulatory agency to garner credit, which may not be available if the agency learns about the alleged misconduct independently. Understanding whether an employee stole trade secrets, behaved inappropriately or violated the law or a code of conduct will impact a client's risk exposure and its options for mitigating any harm.

The investigation's answers to who, what, when, where, and why often are buried in a vast repository of unstructured data. Yet, most companies are ill-equipped to locate vital information within that data pool quickly and cost-effectively. Consequently, investigations can encourage attorneys to collect and process a large volume of data unnecessarily, when in practical terms only a handful of the documents collected will ever prove material to the investigation.

Under this challenging framework, the e-data attorney's toolbox is critical to striking a reasonable balance between the speed an investigation compels and the thoroughness that the fact-finding process in an investigation may require. From the start of the investigation, e-data attorneys apply a mix of technological prowess and legal expertise to identify and cull relevant key data sources. They can, for instance, remove identical and near identical documents from the data universe, as well as track email threading—techniques which also make the data review more manageable and cost effective. Those same tools keep the investigation on track and avoid the time-consuming and costly processing of unnecessary data.

The e-data attorney can also use data analytics to provide insight into the data itself and to pinpoint key information. When properly designed and trained, algorithms can capture and analyze large amounts of data simultaneously and in multiple dimensions. Algorithms can identify patterns, and, more importantly, anomalies within and across data sets that attorney reviewers may find difficult to discern amid an investigation's highly accelerated time frame for completion. When coupled with the e-data attorney's experience, this technology provides comprehensive and effective evaluation of large volumes of data.

In one real-world situation, our practice group ran a blind test for a client parallel to an investigation that employed a traditional document review approach. In the traditional review, attorneys spent 30 days and approximately 600 hours reviewing 35,000 documents from nearly a dozen custodians. In the end, the attorney review identified approximately 140 documents as

key to the investigation. In our practice group's simulated review, we employed advanced data analytics in combination with our prior investigative experience to locate over 94% of the key documents in only four days. In sum, the e-data attorney's holistic use of technology in combination with subject matter expertise would have delivered the key facts to the client three weeks sooner at a substantial cost savings.

Although similar results cannot be guaranteed in every investigation, this example illustrates the power of an experienced e-data attorney's toolbox to deliver critical information quickly and effectively.

Building on the test case results, our practice group has recently developed a flat fee analytics package for clients at the preliminary stages of an investigation. This diagnostic package involves collecting, processing, and analyzing data from up to five custodians to identify critical facts and circumstances. We deliver the analysis in a privileged report supported by our key findings and observations. Although not designed to reach definitive conclusions about any issues, we believe that this approach will allow clients to gain important early insights into the investigated claims and guide their decision-making over the course of the investigation.

Government and internal investigations highlight an important practice area in which an e-data attorney's toolbox can be deployed in an efficient and cost-effective manner to deliver exceptional client outcomes.

*Morgan, Lewis & Bockius of counsel **Charles Imohiosen** brings a diverse set of professional experiences and skills to assist clients in leveraging people, processes, and technology to evaluate and manage their electronic data, and to deliver greater efficiencies to their legal processes, including electronic discovery. Associate **William Childress** counsels clients on electronic discovery.*

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