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EXPERT FORUM

BUILDING A GLOBAL INFORMATION GOVERNANCE & DISCOVERY PROGRAMME - PREDICTIVE ANALYTICS



PANEL EXPERTS

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Glenn Barden is a senior director at FTI Consulting, with a focus on the use of the Relativity disclosure platform. He has project experience across a range of market segments, including the management of some of the largest e-discovery cases across Europe. He has worked on several high-profile government and public services cases, including coordinating large-scale device collections across the country before working through methodologies to streamline a review of over 50 million documents. Mr Barden specialises in the development of review workflows in combination with the reduction of document sets through the application of technology assisted review.

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Sonia Cheng is a managing director at FTI Consulting and a member of the technology consulting practice. Based in London, she currently leads the EMEA information governance privacy and security (IGPS) practice. Possessing unique insights on the intersection across the diverse disciplines of records management, privacy, e-discovery, compliance, risk, security, operations and IT, she is a trusted adviser to some of the world's largest financial services, insurance, pharmaceutical and energy firms.

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Patrick Oot is a globally recognised practice leader in pre-trial litigation and government investigations. He is a go-to lawyer for the world's largest companies, with regular court appearances litigating complex issues involving technology and electronically stored information in state, federal district court and multidistrict litigation. Mr Oot has both successfully defended against spoliation claims and has efficaciously obtained adverse inferences by deploying counterstrategy against legal adversaries using forensics and investigative techniques. He has led investigative responses to demands by the Securities and Exchange Commission (SEC), the Department of Justice (DOJ) and state attorneys general offices.

CD: Could you provide an overview of the benefits that predictive analytics can bring to a global information governance (IG) and discovery programme? To what extent is predictive analytics becoming a modern business staple?

Barden: Whereas tasks in the past would have all been completed manually, with the quality control also forming part of this manual workflow, we are now in a position where technology is able to amplify manual decisions and then statistically validate the work product. Data growth continues to increase exponentially, and although that means decisions can be made using richer data than before, we are reaching the tipping point of where full manual review of that data is becoming impossible. The use of statistical modelling maximises the value of the data that is already available – meaning that the experts are able to spend more time deriving insights, rather than locating the patterns.

Oot: Many parties have integrated predictive analytics into their global information governance (IG) programmes and pre-trial litigation practices. Analytics can help spearhead off-label marketing compliance research through the application of similarity analysis to reduce the volume of data to what is most important. A user can identify a set of email messages and use the built-in tools

to locate similar documents in a large data set. Also, parties can use predictive analytics to target litigation themes that develop during depositions through a feedback loop to help illustrate their position or contradict opponents. Analytical tools can also provide insights into overall information management and governance programmes. The tools help identify high-risk data and aid in the development of paths for information security and data minimisation strategies to comply with privacy regulations, while also meeting regulatory retention requirements. Like any tool, predictive analytics can be beneficial in litigation and investigations; it is not a binary decision. A party should understand how to use the right technology for the right task, as opposed to applying predictive analytics to every case.

Cheng: Predictive analytics covers a broad set of statistical techniques that mine current and historical trends to predict future trends and patterns. Predictive modelling supports and optimises decisions which need to be made about information. For the past decade, enterprises have been using these capabilities to battle financial crime, fraud and anti-money laundering (AML) use cases. In the past five years, we have seen more off the shelf and in-house developed Big Data tools have some element of machine learning (ML) to support typical use cases of content identification or classification to help spot compliance risks. Expertise

is still required to train these systems, but over time, accuracy improves.

CD: What are the core components of a successful IG and discovery programme? How can technologies, such as predictive analytics and machine learning (ML), enhance these programmes?

Oot: In our experience, a ‘team first’ approach can be very effective. Organisational leadership matters most in this area. Many parties have developed a ‘centre of excellence’ in discovery and IG. However, to achieve success, organisations require the right internal people who have cross-functional technical and legal training. A core team might include representatives from litigation, compliance, data security, records and information management and data privacy. Beyond that, clients should develop strategic business plans or legal objectives to identify what the team seeks to accomplish with predictive analytics. Research indicates that analytical tools are very good at locating information quickly when driven by subject-matter experts, but clients managing complex litigation should realise it is not a simple ‘tick box’ approach. After the use of analytics, legal teams will then engage with the materials, identify the need for follow-up and feedback, and develop the strategic narrative that builds into persuasive memos and briefing. In-house and external teams should work in tandem to first

use technological tools to identify the information sought to help explain the findings to a non-technical or non-legal audience. This approach often acts as an effective courtroom strategy when conveying points to a judge.

Cheng: First, you need holistic, aligned policies. It is important to align compliance obligations for data with strategic business drivers and outcome. Second, you need sponsorship and accountability. Board-level focus and prioritisation is critical to sustaining change. Well-defined roles and responsibilities and clear accountability for data is necessary. Finally, you need technology-enabled operations. Technology is required to connect people and process like glue. ML can proactively identify where there may be governance gaps from a resourcing perspective as well as at a data level to expedite legacy data remediation. Emerging use cases of ML in privacy include the ability to convert legal terms, such as privacy policies or terms of use, to machine-understandable concepts, to spot potential data usage compliance violations.

Barden: I believe there to be three pillars to this, none of which are mutually exclusive and all of which are supplementary: people, technology and process. First, without the right people initially sponsoring and then the right team of people to sustain a programme, it can very quickly fall out of consciousness or its usefulness will be limited.

Second, the evolution of technology in this area over the past 10 years has been immense. The technology is continuing to grow, and more automation is possible than ever before. Even once a technology is adopted it is prudent to continue to evaluate all possibilities proactively. Finally, a robust, defensible, repeatable process can only be achieved by stitching together the right people with the right technology. A 'business as usual' and an 'emergency' strategy should be included, with defined workflows and assigned stakeholders in advance.

CD: What advice would you give organisations in terms of building an IG and discovery programme which utilises predictive analytics and ML? What are the key considerations and techniques that need to be considered?

Barden: As cliché as it sounds, there is very rarely a one-size-fits-all solution – and nor should we strive to fit everyone inside the same box. Each company will have its own unique challenges and the key is in preparation. Take the time to evaluate requirements, evaluate the quality of your data and do not blindly trust the first set of results you get. This will be a continually evolving process and you may not always be able to rely on historical data to be an accurate

representation of the future. So long as you have sight of your end destination on this journey, then there is no harm in patiently arriving there step-by-step.

“ML can proactively identify where there may be governance gaps from a resourcing perspective as well as at a data level to expedite legacy data remediation.”

*Sonia Cheng,
FTI Consulting LLP*

Cheng: ML is not a silver bullet. There is a tendency to focus on technology as a panacea. I equate it to building a house. You might have world-class machinery, but without the expertise or knowledge of how to use it, it is not going to help build the house. The second key point is that the model is only as good as the experts training the system. If you do not have well understood objectives, thresholds and protocols, you could end up with a poorly trained and poorly performing system. The final key piece of advice is to not fall into the snowflake trap. There will always be exceptions

to the rule, but do not let the exceptions be the reason to not adopt predictive analytics.

Oot: When building a programme, companies must lay out a plan by first focusing on the people. Companies must identify stakeholders to develop an action team. There are many factors to consider. What budgets are in play? Which groups stand to realise the most cost savings or proposed efficiencies? Which internal organisation can properly assess the strengths, weaknesses, risks and rewards? Companies must also integrate subject matter experts (SME) and users into the stakeholder team and consider the operational impact, the skill sets needed and workforce educational opportunities. Companies must also identify deliverables, such as standard operating procedures, policies, message maps to inside and outside teams, legal guidance, defined milestones and completion and assessment processes that define success prior to launch. Participants in these programmes should understand the important service role that they play to support the team's mutual client.

CD: When implementing an IG and discovery programme, particularly one utilising predictive analytics,

how important is it to have senior management and boardroom level buy-in?

“Data-driven analytics can be very powerful and can limit the human overhead required to derive value from your data. But it is a misconception that this will remove all human interaction.”

*Glenn Barden,
FTI Consulting*

Cheng: Senior sponsorship is critical to the success of any company-wide transformation programme. IG is no exception, whether it incorporates predictive techniques or not. Predictive analytics is a capability which needs a strongly defined purpose and should be considered a capability that is part of a programme, rather than the end itself. There is a lot of hype and misunderstanding about predictive analytics. While it is important to get senior stakeholders inspired, education and awareness – both about the positives and potential downsides – are critical to long-term success and adoption.

Oot: While IG and discovery may be important to litigation and compliance teams, it rarely will bubble up as a top priority to the C-suite and board. That said, litigation risk, cyber risk, data security and data privacy are well-known areas of focus when managing the broad issues of corporate governance, enterprise risk management (ERM) and corporate compliance. While a corporate board likely expects that IG and discovery are covered and managed, ownership and buy-in rests in the legal department and compliance group in most circumstances.

Barden: There is certainly an interesting psychological question around any programme involving change or innovation. It is natural that different people in different companies will have very different appetites towards both risk and change. Having senior sponsorship on any innovation programme is therefore vital to signal the importance of it to the rest of the organisation and to educate on the benefits and reasons why something is being adopted. A laissez-faire attitude towards change will quickly permeate throughout the team and lead to the areas deemed as particularly high risk, not fully understood, or not as important to be those items dropped for more pressing engagements. This is particularly important on change involving technology. The greater the complexity, the greater the potential resistance to change.

CD: What are the potential considerations or downsides of utilising predictive analytics or ML in the context of IG and discovery?

Oot: Practitioners should properly set expectations with their internal and external clients, adversaries and the court. Litigants are often evaluated by disparate and ephemeral standards such as 'reasonableness' and 'good faith', yet those standards are often difficult to balance against a requesting party's overreaching demands that regularly use words like 'each', 'every' and 'all'. These tools may not be appropriate for every case, and translating reasonableness to the statistics of predictive analytics and ML can be a real challenge. Motion practice may result, and a litigator must help underscore that reasonableness, not perfection as the standard, regardless of whether it is a manual or technological process. Any information management process will have margins of error and different levels of precision. Predictive analytics can be one way to help illustrate this theme, so long as the parties do not expect perfection.

Barden: Data-driven analytics can be very powerful and can limit the human overhead required to derive value from your data. But it is a misconception that this will remove all human interaction. These techniques are very much

supplementary to work that has already been and will continue to be performed. Sometimes this can mean vast quantities of human reviewed input is required to train the system. There also must be a continual review of what data the underlying machine is using, as the world may have changed since that training was performed.

Cheng: One of the primary ethical concerns around algorithms in IG is the unprecedented access to information, and the implications of inferences made from personal data by machine algorithms that may negatively impact our everyday life. For instance, if a warehouse

worker wears wearable devices, information about what they are doing – including personal usage – might be shared, and inferences about their health and performance could then be made. This could then be shared with employers and insurers, which can negatively impact their employment or healthcare coverage. When utilising predictive analytics or ML, transparency is key. Predictive algorithms are based on complex statistical methods and may require a blend of expertise – including business, data scientists, legal and communications – to clearly explain what, how and why data is being used. There are technologies that can help to



orchestrate and align data usage, privacy and ethics. Additionally, when planning, it is important to look at the long game. In the short term, it can be more resource intensive with limited skills and availability, which may increase cost and time to value.

CD: What essential advice would you give to organisations in terms of establishing an IG and discovery programme that allows them to achieve their business objectives, address risks and uncertainty, be regulatory compliant and operate with integrity?

Cheng: Do not let perfect be the enemy of good. There is no perfect compliance programme or technology platform that will solve all risks and uncertainty. Change and transformation is hard to do organisationally and also on a fundamental human level. Recognise that, and build programmes with elasticity that enable room for learning and iteration. This applies to how compliance programmes are run, and key performance indicators (KPIs) that incentivise collaboration instead of competition. Integrity is something which cannot be manufactured or automated. It is simply a part of the culture and needs to be expressed horizontally and vertically to be effective.

Barden: The buy-in of senior management is integral, as is having an ultimate vision of the goals of the programme. In order to fully elaborate the end destination, it is important to be aware that there will need to be a time investment, sometimes substantial, upfront to fully plan and document the iterative steps that should be taken to achieve this. Each step should have a built-in evaluation phase to ensure targets are being met and that the next step can now be started. It is often the case that each iterative step will have an immediate positive impact to the current process, even if some legacy steps are still to be updated.

Oot: Organisations should develop a charter or mission statement for the programme, with the goal of meeting the objectives of the mission statement for all of the group's activities. For example, companies should tell their practitioners to avoid mistakes, but when a mistake happens, tell the right people quickly so resources are allocated to fix it. In litigation and investigations, time is the most valuable commodity. If you need more time, ask early.

CD: How do you envisage IG and discovery programmes evolving in the years ahead? As technologies advance, how can organisations best balance

innovation and privacy and ethics concerns?

Barden: The growth of data volumes is an issue which has been spoken about in depth for several years but is something which continues

“Data volumes will continue to grow and practitioners will need more tools to manage the data deluge.”

*Patrick Oot,
Shook, Hardy & Bacon LLP*

to cause problems. There is also the ‘breadth’ consideration – whereas five years ago we may have considered email and server data to hold all of the information we need, business practices have now evolved to include cloud-hosted applications, mobile phone data and platforms such as Skype, Slack and Microsoft Teams, all of which are already bringing new challenges. Combining these with maturing technologies we have begun to move away from the reactive nature of dealing with a single event towards a situation where more

proactive, continuous monitoring can take place – hopefully reducing event frequency but also increasing the efficiency of dealing with an event. The greater monitoring frequency will in turn require greater transparency about data use to reduce the impression of eroded privacy.

Oot: Data volumes will continue to grow and practitioners will need more tools to manage the data deluge. As with any technology, tools will get better, categorisations will become more accurate and less effort will be required to properly target search. That said, in US federal court, practitioners are required to certify that they have conducted a reasonable inquiry to formulate their responses to discovery under Federal Rule of Civil Procedure 26(g). The certification requirement, along with the mandates of Model Rules of Professional Conduct Rule 1.1, should set the stage for linking reasonableness and the use of technology like predictive analytics. Rule 1.1 requires a lawyer to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. Perhaps lawyers should now

certify their reasonable inquiries, while ensuring that this process considered, and possibly rejected, the use of some forms of technology, like predictive analytics or ML. We are a long way from fulfilling this federal rules obligation by simply stating ‘the computer did it’.

Cheng: Currently, privacy and cyber laws and regulations governing data are increasingly complex for global multinationals to implement. As these laws mature, regulator understanding about technology will improve, and companies’ ability to standardise governance processes and technologies will harmonise and codify privacy, retention and legal requirements. IG will also move away from a nice-to-have to a must-have. With data exploding in volume and diversity, IG needs to keep up to support the speed of innovation. With transparency, organisations can cultivate trust through open dialogue that balances commercial interest with ethical considerations as technologies evolve. Safe and ethical usage of data in the digital economy are built on trust and transparency. **CD**