The Value Series
"Defining Value in Delivery of Legal Services"

By Cash Butler

And contributions from International Thought Leaders, Experts and Legal Connoisseurs: Elizabeth Ortega, Nathan Hepple, Brett Ablong and Mitch Kowalski, Richard G. Stock, Eva Bruch, Cloudesley Hobbs, Jeffrey Fowler, Jeffrey Greene, Aaron Lewis, Lon Troyer, Claire E Bibby, Baltasar Cevc, Michael Reiss von Filski, Jacquie Champagne, Spencer X. Smith, Mo Zain Ajaz

Business of Law

For the Best eDiscovery Results,
Pair Human Expertise and Sophisticated Technology

A Roundtable Discussion with Jeffrey Fowler, O'Melveny & Myers LLP, Jeffrey Greene, Greenberg Traurig LLP, Aaron Lewis, Covington & Burling LLP, Lon Troyer, H5

*Jeffrey Fowler **JF**, Jeffrey Greene **JG**, Aaron Lewis **AL**, Lon Troyer **LT**.*

Roundtable set-up:

As data types and sources proliferate, the eDiscovery process in litigation and investigations becomes ever more challenging. It now requires a unique combination of human expertise and sophisticated technology to wrest the necessary facts from massive data piles to support the narrative or to find the key evidence that can make or break a case. In this roundtable, experts who face these challenges daily discuss the need to leverage both human and technological intelligence to get the best results.

1.   *In litigation or investigations, finding evidence=especially in large matters—is becoming ever more challenging as the*
   sources, volume and complexity of potentially relevant data has exploded. Use of technology to address this has pretty much become an imperative. How has this reality affected your role or the role of counsel in general?

JG: It has transformed the skills necessary to be a successful lawyer. In order to advise clients, lawyers must know how to efficiently locate the evidence they need across numerous, ever-changing data sources. This requires that lawyers be more proactive than ever to identify and preserve relevant data. It also means they must work in conjunction with vendor partners who are experts on the data sources at issue in their cases. Notably, however, we've not yet identified a technology solution that can replace the subjective judgment that makes for a successful lawyer.

JF: The standard of care has evolved. Lawyers are no longer able to defend their efforts by shrugging their shoulders and saying they did the best they could. Document discovery now requires specialists to help craft reasonably diligent and efficient information retrieval strategies that we can defend. The role for those of us who practice eDiscovery is not only to craft these strategies; we also must be able to stand up and persuade courts, regulators, and adversaries (often by citing to tangible evidence) that our efforts meet the evolving standard of care.

AL: The strategic eDiscovery-related decisions that counsel make at the outset of an investigation have become more important because of the effect these decisions have on an investigation's efficiency and accuracy. It is virtually impossible to scrutinize the data volumes we see today without leveraging technology. This technology is a benefit for counsel because it allows us to complete tasks that humans are less efficient at, such as searching for key terms in a large set of documents. As a result, the importance of the partnership and collaboration between lawyers and eDiscovery vendors has grown stronger over time.

LT: This is consistent with our experience. Attorneys are increasingly seeking external technological expertise as their challenges become more complex and the solutions increasingly sophisticated. Most third-party software available to them has been designed to conduct manual review in a linear workflow that simply buckles under the weight of today's data volumes. We've grown even more consultative working with counsel to provide a variety of analytics and techniques, in addition to

technology-assisted review that can help them. These solutions are drawn from linguistics, data science, statistics, and artificial intelligence (AI).

2. *Lawyers and their clients are faced with a number of ways to go about data exploration, from manual document review to machine learning algorithms. Do you think there is a wider acceptance now of technology-assisted review (TAR) and other advanced methods of data exploration? What has been your experience with such approaches?*

JG: It's definitely more widely accepted than it was even five years ago, in large part due to courts' express approval of such methods of data exploration. But lawyers must be strategic about which method of review is appropriate for their case - there is no one-size-fits-all document review methodology. This means, at the outset of a case, they must gain an understanding of the types and potential volume of data that may require review. My experience is that TAR significantly increases efficiency and reduces costs when employed across an appropriate data set, but lawyers sometimes fall back to linear review in a "belts and suspenders" approach, resulting in a costly and inefficient process.

AL: Yes, TAR and data exploration have become more widely accepted as both clients and regulators have become increasingly comfortable with their use in recent years. Both appreciate the ability to quickly identify key documents and gain a deeper understanding of the most relevant facts early in the life of a matter, in order to inform strategic decisions.

JF: Agreed. I never understood what all the fuss was about. For decades before TAR made a splash, lawyers used various technologies to aid document reviews. Discovery compliance hinged on imperfect scans of paper documents, patchy deduplication, and buggy concept clustering. None of these advances were the subject of judicial debate. It was not until parties sought affirmative approval of TAR that any of this drew attention. In my view, these efforts to legitimize TAR—and the protracted negotiations that plagued acceptance—stunted its use. Fortunately, now that the TAR debate has settled down, parties are more apt to accept it.

LT: We've actually been surprised at how long it has taken the profession to embrace it. We're fortunate to have partnered with law firms that were looking to technology and related expertise to help them drive down costs while improving the quality of responsive reviews, so they could devote their time to developing the narrative and legal strategy. As more vendors have entered the space, it's been exciting to see new technologies and workflows emerge, and the competition encourages us to keep experimenting and innovating to develop new capabilities and technologies.

3. *Technology doesn't live in a vacuum – there has to be some human involvement. But there may not be a shared understanding in the best way to combine the two. How do you think about the intersection of legal and technological expertise when it comes to discovery or fact-finding?*

JG: The intersection of law and technology is a complicated one. There is a greater need for legal professionals with the expertise to properly identify the best technology solution for a particular task and to effectively manage its use, but until we have a technology-savvy cadre of lawyers at our disposal, our vendor partners will likely have to provide the necessary technological expertise and oversight. Law firm legal technology hiring is on the rise (a good thing), but lawyers are notoriously slow to adopt new technology (a bad thing). Ultimately, the ability to explain the abilities and the limitations of new technologies is a key point for success in any eDiscovery narrative.

JF: We will always need well-informed (human) lawyers to supply the strategic vision. The question is whether lawyers are the humans best equipped to perform the data mining exercise. At what point does the task require something other than legal expertise? As the world's data continues to expand and morph, data scientists are becoming more crucial to analyzing it. Someday soon, relying on lawyers using kitschy-named software to retrieve key evidence will be like hiring me to photograph your wedding using my smart phone. Sure, I can do it. But it will probably be safer (and even less expensive) to hire a photographer. In my view, the team best equipped to locate responsive documents is not limited to lawyers and litigation support personnel: it includes information retrieval experts who know how to leverage technology to obtain the most accurate, cost-effective results.

AL: Exactly right. The legal expertise allows for the effective deployment of the technological expertise. If you don't have a strong grasp

of the law, you don't have as strong an understanding about what facts would be critical for your case, and thus would not be able to consider how technology can help you find those facts quickly and efficiently.

LT: In my former life as an academic, I was always drawn to interdisciplinary work that crossed departmental boundaries in order to bring many perspectives to bear on a given subject. What's most exciting about the legal technology space today are the interdisciplinary conversations taking place.

When a lawyer, a linguist, a data scientist, and a statistical expert sit around a table talking about the best ways to interrogate an incoming production, they come up with a better strategy than any single party would on their own. Collaboration like that asks each expert to share insights from their specific domain and provides an opportunity for that expertise to be informed by others' perspectives. It doesn't ask lawyers to become technological experts or linguists to become lawyers, but in the end both develop a familiarity and facility with each other's perspectives that reap major rewards.

4. *One of the hardest things to do today is target specific evidence – think case narrative support and smoking guns – in large data populations. Lawyers know it when they see it, but what part can technology play? What do you think is the best way to leverage both human and technological intelligence for this kind of effort?*

LT: Not only do lawyers know it when they see it, they are great at postulating what it might look like, where it might live, and all of its possible flavors. The best way to leverage human and technological intelligence is to deploy *both* to quickly find documents that fit the profile. Instead of the old error-ridden and inconsistent issue-coding approach that used to prevail, advanced technology in the hands of experts allows them to target with great precision what lawyers are most eager to find. It flips the old model on its head: instead of applying a static set of criteria that will be applied imperfectly to all documents, the task is to prioritize the specific identification of key documents from the very start of the process.

JF: The goal of any evidence-targeting project should be to put only the most useful evidence in front of the lawyers. Technology can help, but equally important is a well-designed plan for how to use the technology to achieve the project's goals. Humans who understand the technology and its limitations are best equipped to deliver the documents that the legal team should see.

AL: I agree. The best way is for very smart lawyers to help design the plan for deploying technological resources to find the critical evidence. The time and effort spent upfront to do so yields incredible dividends later in the life of a matter.

JG: Today, finding the "key" documents is no longer an exercise in finding a needle in a haystack, but rather finding a needle in a stack of needles. But perspective is important. We recently had a client say he had seen a "terrible" document that prominently included the word "pandemonium." Even with a variety of tools and very targeted approach, the lawyers

couldn't find the document. It was eventually found using a more traditional TAR approach, and to the client's dismay, it didn't even include the offending word. The simple lesson: when using technology, avoid seeing the tree for the forest and remember to be flexible in your approach. Technology is not a magic bullet and no technology exists (yet) that can magically uncover all of the smoking guns at the push of the button. In the end, technology needs a legally-trained brain to make it work.

5. *Do you think the increased interest in AI by corporations is having an impact on the expectations your clients have about your use of technology, or the way you interact with technological experts, when it comes to matters of discovery and evidence gathering?*

LT: Absolutely. Many corporations have seen how AI technologies are transforming core business processes, and that has made them increasingly interested in how AI can be used to transform litigation. But they have seen firsthand that the successful adoption of such technologies hinges on the services and expertise that are delivered with them. They've seen that information governance or knowledge management tool that cost millions and lies dormant because the software vendor made no provision to provide the expertise necessary to maximize the ROI. Corporations tend to have a well-rounded view not only of the possibilities of technology, but also its limitations.

AL: I'm not sure that interest in AI is the driving force, but it is certainly the case that clients expect us to conduct fact development projects as efficiently as possible. Clients rec-

ognize that the volume of potentially relevant information has exploded, but they rightly expect their lawyers to deploy every tool available to manage the cost of learning the facts in order to defend the client's interests.

JG: The hype around AI has, to a certain extent, resulted in increased expectations from some clients relating to capabilities of eDiscovery technology solutions. For sure, the technology is great, but understanding what it can and can't do is critical. No matter the technology, significant levels of human interaction (subjective attorney analysis, for example) are still necessary and required, so it is important to set expectations regarding cost and time.

JF: There is definitely more of an appetite for leveraging technology to retrieve documents, and I think the emergence of AI—which someday soon will generate a whole new sphere of electronic evidence to be produced in discovery—supports the thesis that document production is no longer a general practitioner's game. It requires a specialized understanding of how technology and information retrieval science interact with our legal obligations.

6. *Do you see differences between American and European firms in their daily operation and how they develop, plan and implement (innovative) tech strategies?*

JF: I see innovation everywhere, including in American and European firms. American discovery requirements are traditionally more arduous, and so Americans have had a bit of a head start on e-discovery. But the rest of the world has caught up quickly, offering many

opportunities to apply our expertise to legal problems all around the globe.

LT: The scope of discovery or disclosure tends to be more limited in Europe generally, and in some countries discovery as understood in the US, with large-scale disclosure of documents, doesn't take place at all. As a result, there's a common perception that European firms are behind US firms when it comes to innovative tech strategies because the need for and adoption of technology-assisted review came later. What we've seen, however, is that European firms seem to be as, if not more, committed to identifying and adopting new technologies, with some going as far as investing in new start-ups, creating internal tech incubators, and formulating business strategies that place new technologies at the center, which you don't hear much about in the US.

7. The legal profession is changing and professionals need to be more business and tech savvy. What do you see as the biggest challenge for the legal professional in the next five years?

JG: There is no doubt that technology has become a game-changer for litigation, and attorneys and clients have experienced significant cost and efficiency savings as a result. Attorneys must be knowledgeable about new technologies that can reduce cost and increase efficiency. Their challenge will be how to learn and effectively utilize them.

AL: I think the challenge will always be about how we can serve our clients most efficiently to achieve good outcomes for them and add value to their business.

LT: The biggest challenge is also the biggest opportunity: how to chart a rewarding legal career when budgets keep shrinking, data volumes keep growing, and client demands keep increasing. Developing command of the case law, fluency in the lingo, technological acumen, and a rich network of trusted partners and advisors is a good way to start becoming future-proof.

JF: I believe our biggest challenge is accepting the non-lawyer experts' role in our profession. Particularly in big-ticket litigation, we will be most effective if we yield non-lawyer tasks to experts, including project managers, budget analysts, experts in information retrieval, data analysis, communications, and theme building. Lawyers are often slow to adapt to new modes of practice. Those who embrace the ever-changing technological landscape—and leverage it to improve their law practice—will emerge victorious. ⟶

Note:

The views and opinions in this article are those of the authors and not of their respective firms.

About the Participants

Jeffrey Fowler, O'Melveny & Myers LLP

Jeffrey Fowler, Esq. – O'Melveny & Myers, is Chair of O'Melveny's Electronic Discovery and Document Retention Practice Group. A seasoned general litigator, Jeff's clients engage him to serve as coordinating discovery counsel in complex, multi-front litigations and government investigations. He also is one of the country's few practitioners with deep, hands-on experience litigating evidence spoliation and other e-discovery issues of first impression.
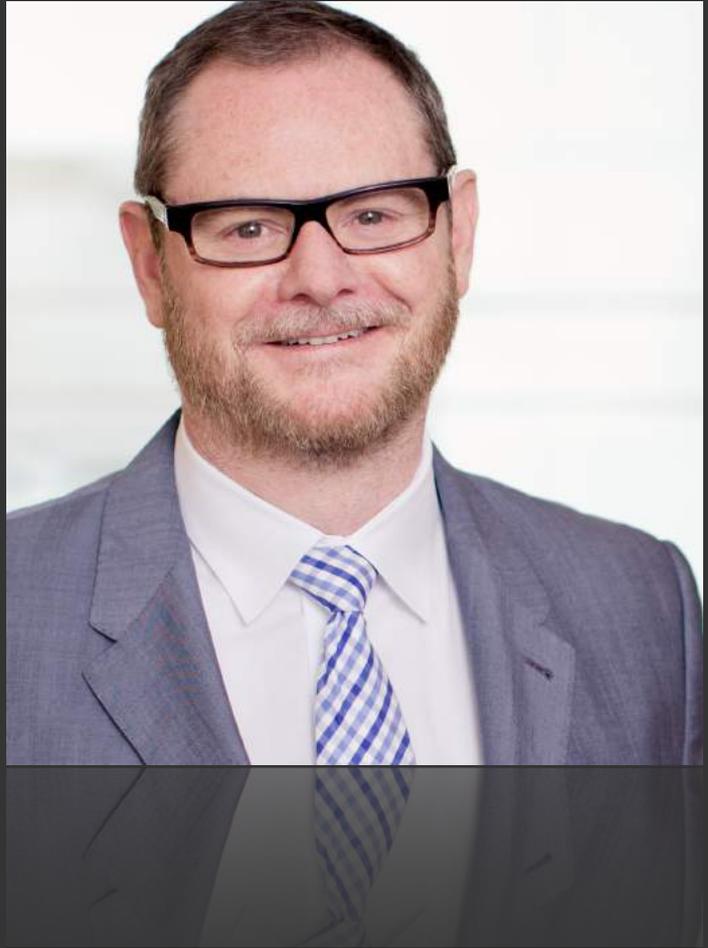
Aaron Lewis, Covington & Burling LLP

Aaron Lewis, Esq. – Covington, is a member of Covington's White Collar Defense and Investigations Practice Group. He represents clients in sensitive, high-stakes internal investigations and government enforcement matters. Mr. Lewis returned to Covington in 2015 after six years of service in the Department of Justice, first as a Counsel to Attorney General Holder, and later as a federal prosecutor in Los Angeles.

Jeffrey Greene, Greenberg Traurig LLP

Jeffrey W. Greene, Esq. - Greenberg Traurig, is a shareholder in Greenberg Traurig's Litigation Practice in the firm's Boston office and is Co-Chair of the firm's global eDiscovery & eRetention practice. Jeff is an experienced trial lawyer who focuses his practice on litigation and investigations that involve complex legal, factual and data management issues. Jeff has served as eDiscovery/information governance counsel for more than a dozen Fortune 500 companies, responsible for coordinating the overall strategy for records retention as well as for preservation, collection, review and production of ESI in thousands of state and federal lawsuits as well as government investigations.

Lon Troyer, H5

Lon Troyer, Ph.D., H5 is Managing Director of H5's Professional Services Group, which harnesses H5's scientific and information retrieval expertise to help clients with complex litigation and compliance challenges. He leads H5 teams in the identification of key documents and fact patterns that help H5's clients advance their case strategies in high-stakes matters, including antitrust, IP, white collar, FCPA, consumer products, and internal and government investigations.