

A portrait of Sheila Mackay, a woman with short, curly brown hair, smiling. She is wearing a dark green V-neck sweater and a necklace with several small pendants. The background is dark and out of focus.

An interview with

# Sheila Mackay

## Managing Director of eDiscovery, H5

By Editorial Department

### **About H5**

**H5** helps corporations and law firms find and manage the documents that matter in litigation and investigations by providing expert-driven, technological solutions to address the complex challenges created by electronic data. With expertise in eDiscovery, compliance services and technology, technology-assisted review and search, H5 is committed to helping clients find and manage the information they need to win cases, meet

regulatory requirements and address risks by providing creative products and solutions that ensure fast, accurate, cost-effective results.

### **Why did H5 decide to conduct a survey about investigations?**

H5 works with companies in the context of litigation, investigations and compliance in several ways.

H5 is often called upon to support or advise clients in various investigatory processes, especially those that are data-related. While we continually listen to and learn from our clients about the challenges they face, we wanted to hear more from a wider selection of professionals who spend their time on the front lines of investigations.

So, we partnered with Above the Law to conduct an online survey, asking respondents to share their experiences about a number of investigations-related topics. We got a very healthy response—more than 315 professionals directly involved in investigations in their companies participated, representing a variety of industry verticals both within and outside of the U.S.

**Today’s evolving business and social climate seems to be seeding the soil for potential problems in a number of areas (e.g., discrimination, harassment, cybersecurity, privacy, regulation) that could lead to an investigation. This would suggest that companies need to take a proactive stance in order to stay ahead of any suspicious activity that may be brewing, or be ready to respond quickly to a possible request for information. Based on the survey, are corporations being proactive? If so, how?**

Getting ahead of any investigation is important in mitigating risk, and what we are seeing is that companies are becoming proactive in some ways while remaining reactive in others. An overwhelming number of survey respondents (63%) said they expect to see the number of investigations increase over the next

three years, with workplace investigations topping the list.

How they respond to this perception remains to be seen, but there are a number of encouraging signs that corporations are looking to be proactive. For one thing, intensifying cultural and ethical pressures (think #metoo and social media concerns, for example) are driving companies to sharpen their compliance focus with enhanced company policies and employee training—that is a positive. Cybersecurity concerns and privacy mandates like GDPR and CCPA are having the same effect. This flurry of compliance activity is necessarily engaging wider groups of stakeholders and getting them to collaborate in efforts to examine internal practices and processes in ways they might not have done before.

Attention to proactive management of electronic data is also a crucial element in reducing risk. Sixty-seven percent of survey respondents said their companies now proactively monitor data to identify potential wrongdoing (e.g., via email review or network monitoring), notably higher in regulated industries. I think we can also assume that the accelerating development of technological analytics and AI tools will become more widely adopted for proactively addressing investigations, as well as enhancing the workflow itself once an investigation is in progress.

**Investigations present significant risks for a company on a number of fronts – costs to pursue, damages and fines, business disruption, reputational damage. What are the survey takeaways related to these risks?**

Investigations come in various shapes and sizes and depending upon the type of investigation and the company that faces them, the perceived risks and potential consequences differ. Costs—either to pursue or resolve an issue (damages and fines)—are generally a concern. But the survey found that reputational damage is of greater concern in many cases, especially for workplace and white collar investigations, where the headline-grabbing potential is high and can do the company serious harm. Reputational damage is also a major concern in regulatory and cybersecurity investigations, but it was outweighed by potential cost of damages or fines in the first instance, and potential disruption to the business in the second.

These are not really surprising findings given the frequency with which we see questionable corporate behavior make the front page, or worse, the news feeds of social media. In some ways, concern over reputational damage is more a reflection of a culture of exposure, which can have both positive and negative consequences. The bottom line is that investigations can be costly, risky, and are often disruptive no matter what, and anything a company can do to preempt them is a good use of resources.

**A challenging problem for US and non-US corporations alike is addressing the ever-growing volume of electronic information that is within a company's purview. What insights does the survey provide about this digital challenge?**

Dealing with the constant proliferation of data remains an ongoing challenge and concern. In

litigation and investigations both, it can be one of the biggest (not to mention most expensive) concerns and can present the greatest risk, which is probably why topics related to protecting, preserving, collecting or finding the evidence within electronic data continue to appear on the agenda of legal and compliance conferences around the globe.

The survey reflects those concerns. Regulatory/governmental and workplace investigations were said to generate the most data for collection and review, and the volumes can be quite large; respondents reported that nearly 60% of their most frequent investigation type generates more than 100GB of data; 14% said more than 1TB. And, as I mentioned earlier, a healthy majority said their companies are proactively monitoring data. We are seeing the growing adoption of technological tools across the board, and not just in the U.S. In the UK, for example, the Serious Fraud Office (SFO), indicated that they have already used AI robots to check for privileged material in past cases and that machine learning and AI-based technology-assisted review features would soon be used in investigations to create greater efficiencies and shorten decision-making timelines.

**Investigations can be costly and resource-draining. What were the respondents' views on the nature of the spend? What are the most costly aspects of an investigation?**

There is no question that investigations can be expensive and time consuming. Nearly thirty percent of respondents put their companies' overall investigations spend last year at more

than \$1M, with 17% saying over \$6M. Interestingly, non-U.S. companies reported a higher spend: 21% reported spending \$10M+ (vs 2% of U.S. companies)

The top three areas of spend for a typical investigation are costs for outside counsel (86%), analytics technology (59%) and, running neck and neck, costs for eDiscovery services and contract reviewers (52%+). Of course, costs can vary by investigation type as well, particularly where large data volumes are involved. As collected data grows, other costs—for processing, hosting, and review (particularly by outside counsel)—also grow.

An interesting indicator for the future is that for a typical investigation, analytics technology was named as the second largest area of spend after outside counsel, an indication of a move towards using more advanced tools to handle investigations.

**The management of corporate investigations is important, of course, and the survey queried respondents about who manages investigations at their companies. Although the legal department racked up the largest response (44%), compliance departments (27%), the C-suite (21%) and the board (8%) also play significant roles. What can we infer about how investigations are handled from their responses to this question?**

I think the responses here demonstrate the growing realization that a wider circle of corporate stakeholders must play a more proactive role in investigations. While legal will necessarily be on the front lines, it is the collabo-

ration among in-house teams in developing and following through with appropriate compliance initiatives, technology and automated workflows that will ultimately move the needle.

**What did you learn from the survey regarding how satisfied respondents are with their ability to identify key documents during investigations?**

Finding key documents to understand the facts is a critical part of an investigation and it is a very different exercise than reviewing documents for production in a litigation. In an investigation, you are looking for facts that may not be known or well-developed, not documents that support a particular legal narrative. Too often, unfortunately, the same approach is used. Keyword search by in-house resources (31%) or a manual document review effort (28%) were cited most often in the survey, which, given the expenditure on analytics technology mentioned earlier, is a bit surprising. Only 17% noted use of analytics technology for finding key documents, with TAR/CAL and AI technology at 12% each.

Satisfaction levels with finding key documents were fairly mediocre, so we can infer that there is room for improvement here. About one-third of those surveyed report being somewhat or very dissatisfied with the efficiency and cost-effectiveness of their company's current approach, increasing to nearly half when it comes to the speed of finding key documents. Presumably, the ongoing evolution of advanced technologies will ultimately gain traction, leading to a wider

adoption of more sophisticated and targeted methods for finding the documents that tell the story.

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**About Sheila Mackay,**  
[Sheila Mackay](#) has more than 25 years of experience in the legal services industry including

product development, professional services, operations, management and business development. An advocate of the use of technology to drive efficiency, Sheila works hand in hand with H5's client services, infrastructure and technical services teams to develop and deploy custom solutions for global and domestic companies and law firms.

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## Lexpo 2020 Speakers... and more to come!

### Anna Lozynski

Anna Lozynski is an executive general counsel and author. She believes that legal innovation is invigorating, change is energising and efficiency will never go out of fashion.

Anna has studied law in Melbourne, Beijing, Utrecht and Boston. Starting out at a major Australian law firm, she has spent the majority of her legal career in-house working in the banking, automotive and cosmetics industries.



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### Chris Ryan

Chris serves as a Managing Director and leads the Legal Transformation + Innovation practice within the Advisory business at HBR Consulting (HBR). Chris focuses on helping clients transform service delivery and business operations, identify and implement innovative technology solutions, and improve financial performance. Prior to joining HBR, Chris was founder and managing principal of Overwing, a boutique operational consulting firm, and a director at Huron Consulting Group.



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