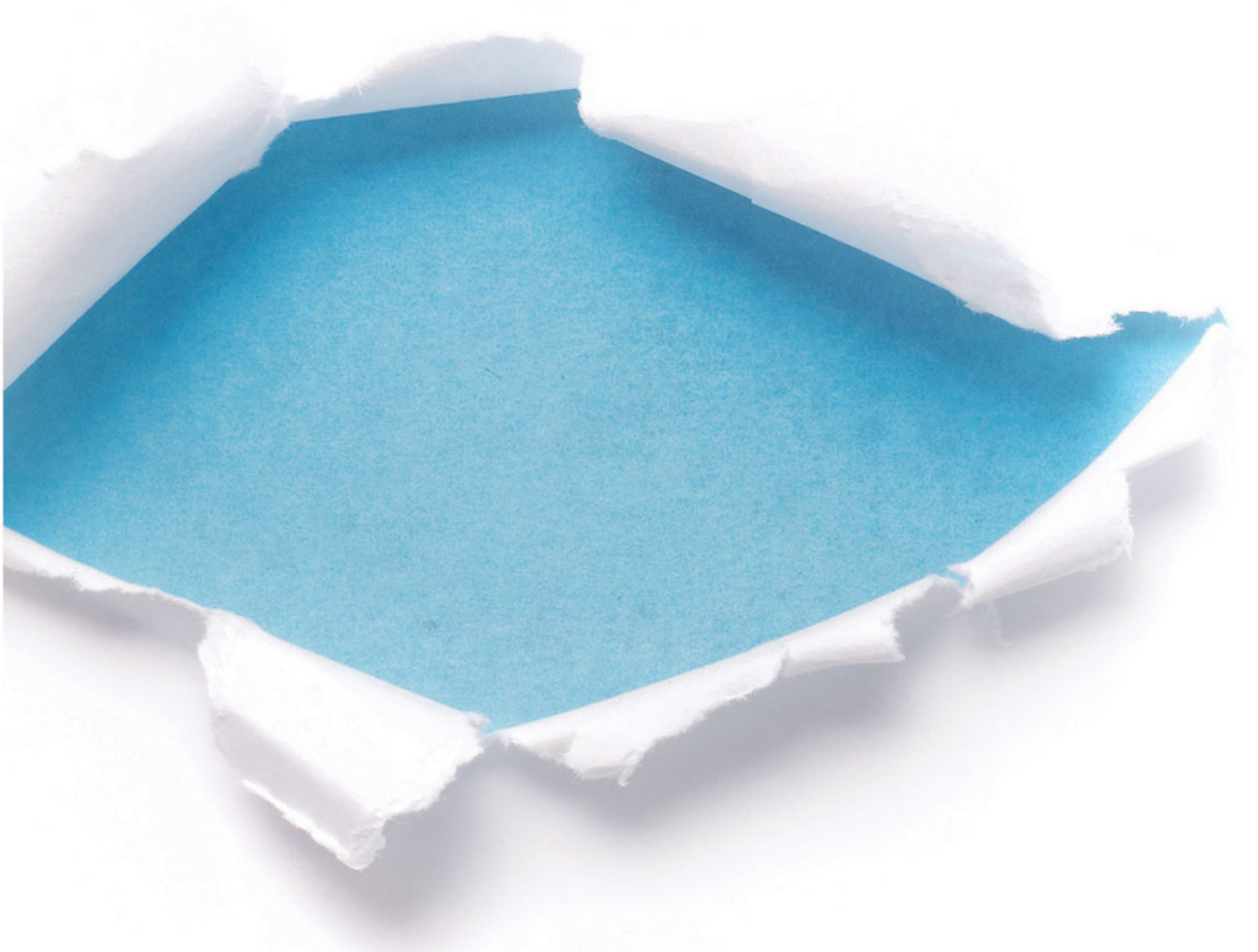

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Assess Risk with Technology-driven Micro-investigations

Corporate, Securities, and Governance





CHEAT SHEET

- ***Small but powerful.*** Micro-investigations are small, targeted searches that use sampling and advanced technologies to quickly and affordably identify critical documents
- ***One thing leads to another.*** Micro-investigations encourage in-house legal teams to begin their searches based on their existing knowledge, focusing on the most likely documents and then expanding out based on findings.
- ***Money saver.*** Micro-investigations can lower the cost of outside counsel given their limited scope.
- ***Risk averse and on trend.*** Micro-investigations can help in-house counsel identify potential risks and keep up with new trends in regulations and government investigations.

Rapidly-changing business, legal, and regulatory landscapes require chief legal officers and their teams to assess and manage risks quickly and effectively. That can be a tall order when risks — whether from bad actors within a company or intruders from outside — seem to be ever on the rise.

Despite the potential overhead that comes with risk monitoring inside the company, corporate legal teams have a duty to continuously track and mitigate known risks and detect and remediate potential ones before they become liabilities.

Micro-investigations leverage sampling and advanced search technologies to identify critical documents more quickly and cost-effectively than is possible during a formal investigation.

Most corporate investigations require the scrutiny of relevant information found in massive electronic data stores. Within their depths, after all, lie communications that may provide evidence of past, current, or future wrongdoing. One need only to skim today's headlines to understand the role that a company's emails play in revealing incriminating or exculpatory facts about its practices, culture, and policies. But formal investigations can be time-intensive and costly, often involving the review of tens of millions of documents at a cost of sometimes as many dollars. The duplicative nature of how the same documents and email threads are stored within an organization can exponentially increase the volume of documents to be reviewed. Their exhaustive nature can drain the resources of an in-house legal team or require expensive assistance from outside counsel, sometimes necessitating difficult choices about which investigations to prioritize or even pursue at all.

Since time and budgets are finite, it is not possible to investigate every possible issue. However, thanks to modern technologies, there is a way to dip a few toes in the water before diving into to a full-scale investigative document review. It is a method not used as often as it could be, but one that is of invaluable assistance to companies and their boards: the micro-investigation.

Why micro-investigations are prudent

As the name implies, micro-investigations are small, targeted investigations. But it's not so much their size as the methodology used to execute them that makes them so compelling. Micro-investigations leverage sampling and advanced search technologies to identify critical documents more quickly and cost-effectively than is possible during a formal investigation. They provide CLOs with a means of managing risk more proactively than they have been able to do in the past and provide an investigative option in cases where resource constraints might otherwise preclude an investigation altogether. The key to their success is effective planning and execution and, most importantly, the expertise applied to the effort.

Since most investigations today are data-focused, the ability to effectively leverage search is an essential part of the process. The keyword list, that old standby, is the most common tactic used by in-house (and outside) legal teams to find information. But for investigations — micro-investigations especially — compiling a keyword list, no matter how expansive it may be, is not enough. For one thing, the inherent nature of an investigation implies that information may be hidden or disguised. For another, the search process must be precise and methodical to provide the most reliable result. It must be iterative and accurately constructed, with sensitivity to both the indexing and search capabilities of the particular search platform and tools. Thus, the ability to accurately target information on a specific topic requires both search expertise and advanced search technologies, which are not paired often enough in today's investigations.

Micro-investigations are useful whether or not a formal investigation turns out to be necessary. If a formal investigation becomes inevitable, micro-investigations can be used to understand what the broader investigation should include, making it more targeted and cost-effective. If the investigation

can in fact be contained, the micro-investigation provides insight into the potential scope and severity of the associated risk and can help identify supporting evidence.

Importantly, micro-investigations can reduce the potential scope and impact of risks on an ongoing basis. Unlike formal investigations, this approach can be adjusted to suit the circumstances, including time and budget constraints, to identify emerging risk patterns and to manage risks over time. For example, electronic data can be routinely monitored using expert-constructed linguistic searches that flag worrisome language or sentiment for a proactive investigation. Having such a capability permits in-house counsel to add value to their organization before the liability arises.

Micro-investigations can also lower the cost of outside counsel by limiting the scope of an investigation to something that is reasonable under the circumstances. In-house counsel can thus manage the spend budgeted for such investigations under the theory that they are preventative in nature for what could be larger costs if not quickly remediated. If the scope of the investigation is narrow because it is focused, outside counsel will spend less time verifying and validating information, further reducing the overall cost.

An alternative approach to determining relevance

The crux of any investigation is to find information relevant to an issue or concern or, even more difficult, determine its absence. So, it should be no surprise that when electronic data stores are in play, finding relevant information requires search tools and a sound search methodology. The better the search tools and methodology, the better and faster the result.

Too often, the task of finding relevant evidence (or the lack of it) is reduced to the combination of two blunt tools: keyword search and manual review. An initial keyword list is drafted by attorneys to reduce millions of documents to a more manageable volume, which then undergoes a linear review. The quality of the blunt force approach often leads to volumes of duplicative and non-responsive data while potentially missing relevant evidence. Out of the gate, potentially key documents are consigned to the cutting room floor because they were not captured by keywords and so are left unreviewed.

Next, document reviewers do their best to apply issue coding to identify the key information, but their assessments are rarely consistent independently, let alone from reviewer to reviewer. Coding can be a highly subjective determination at the point of document identification — which can lead to different production results by different reviewers. The volume of key documents returned can easily run as high as 25 percent of what was reviewed, which then leaves outside counsel with a mountain of documents to wade through in order to find the handful they truly need. Given the time, energy, and cost involved, it's no wonder that CLOs may be hesitant to undertake investigations until their boards or regulators force them to.

Micro-investigations turn this process on its head by encouraging in-house legal teams to use the knowledge they have upfront to undertake a targeted, reasonable process to uncover key information without boiling the ocean. They do not assume that all custodians and all documents are equally relevant, paring down the collection to find critical evidence. Rather, a micro-investigation focuses from the outset on roles and communications that are most likely to provide insight into the activities of concern. It starts small and grows, branching out in various directions as the results warrant. In-house counsel first test hypotheses narrowly, and then they expand the scope of the investigation as necessary or as defined by budget and time allocation. This “one thing leads to another” approach can be very cost-effective — especially when using smart, strategic, sample-based micro-investigative techniques — since legal teams can expand the investigation based upon accurate information and

will be less likely to follow errant leads.

The effective micro-investigation presupposes not just search, but highly-sophisticated search capabilities and expertise, to which every corporation should have access in this day and age.

Early stage micro-investigations benefit CLOs

Micro-investigations can be very successful in identifying early signs of a potential risk or a growing threat so that overall risk can be managed more effectively going forward. For example, if government investigations, whistleblowing, or a certain type of malfeasance is becoming more common in the sector in which the organization operates, micro-investigations can identify relevant activity that would enable CLOs to manage the risk proactively. Moreover, a micro-investigation likely requires less resource and general awareness within an organization, which is especially important for sensitive and confidential investigations. Electronic data could be routinely monitored using expert-driven search terms that would identify information suggestive of risk in that area. Similarly, if a product team has been involved in IP-related litigation, micro-investigations can be used to ensure on-going compliance.

Micro-investigations also can be used to keep pace with changing trends in regulations and government investigations. For example, if a government entity has announced its intent to apply increased scrutiny on an industry, micro-investigations can be implemented to reveal the organization's current state so the CLO can manage the risk more effectively. In the case of a pharmaceutical company, that could mean taking note of the FDA's increased enforcement under the False Claims Act and conducting a micro-investigation into the emails of key sales and marketing personnel to identify any off-label promotions for the most likely products.

Further, micro-investigations can be useful in situations where other risk signals are at an early stage or before the need for a legal hold arises. Perhaps there is an industry-level discussion about an emerging topic, such as the use of Personally Identifiable Information (PII) before the EU's General Data Protection Regulation (GDPR) or the California Consumer Privacy Act. Maybe class actions have been filed, such as the recent NCAA-related actions in the United States that address the dangers of university-level football. Or, perhaps no lawsuits have been filed and there has been no formal demand for documents, but some type of early-stage investigation seems warranted to determine if there is cause for concern.

Most CLOs have learned through years of experience what risk patterns tend to look like in their industries and what early signals precede litigation, class actions, and regulation. Micro-investigations give them an opportunity to stay ahead of troublesome situations by assessing risks early. Obviously, it is not practical to evaluate every potential risk, but for CLOs, having a reliable way to prioritize risk assessment and management is important so they can take appropriate action earlier to limit risk exposure and related costs.

Often unrecognized: Search is an expertise

The effective micro-investigation presupposes not just search, but highly-sophisticated search capabilities and expertise, to which every corporation should have access in this day and age. Those not exploiting these capabilities are doing themselves a great disservice. Electronic data plays too

important a role for companies to not avail themselves of the latest tools, technologies, and expertise that are required to maintain, collect, and effectively search it.

Many of the data management tools that some in-house legal teams use lack sophisticated search syntax functionality, AI capabilities, and other cutting-edge advances and thus provide limited value, offering a blunt instrument approach to a complex challenge. More up-to-date search technologies are precision tools by comparison. That being said, without the appropriate linguistic and search expertise, even the very latest tools will not yield the satisfactory results they could. (Think here of what a surgeon can do with a scalpel versus what the rest of us can do with it.)

Micro-investigations are most successful when search experts are paired with legal experts, with lawyers shaping the content and contours of the inquiry and with linguists, data scientists, and other information retrieval experts devising and executing search methodologies that surface key information quickly. There are a host of technologies available today — everything from machine learning to neural networks to linguistic models — that search experts can use to reduce data's complexity, augment its features, and prioritize it for search in order to find what matters most in ways that an army of document reviewers cannot match. Just as CLOs have increasingly recognized the need for e-discovery counsel that is distinct and separate from merits counsel, many are seeing the value to be gained by having search expertise on hand in addition or instead of document review capacity.

Data analytics enhance micro-investigations

The exponential growth of data has necessitated the development of modern tools that can navigate the ever-more-complex universe of documents quickly and cost-effectively. Of the benefits advanced search capabilities provide, data analytics capabilities improve the work outcomes of in-house legal departments. Advanced analytics are critical for micro-investigations because they help surface relevant information quickly and cost-effectively, well beyond what keyword search alone can accomplish.

The crux of any investigation is to find information relevant to an issue or concern or, even more difficult, determine its absence.

For example, using algorithms, advanced analytics capabilities can identify document relationships in email threads as well as identify and compare near-duplicate documents. The algorithms, which are not available in older systems, achieve faster and more accurate reductions in the data volumes to be targeted in micro-investigations than humans can, especially non-search-professionals. If the issue at hand, for example, is to determine the final version of a contract, algorithms can be used to collect all near-duplicates of a document and then organize it by its “last created” or “last accessed” metadata to quickly determine the last-in-time version.

Advanced analytics also take advantage of metadata so that CLOs can turn insights into appropriate action. Metadata comprises a wide variety of “data about data” that lives within an electronic document (e.g., time of creation, sender, recipient, author, size, etc.) Notably in legal scenarios, metadata can be used to rapidly identify a body of email communications or a subset of emails that have a particular characteristic, such as 1:1 emails, in which the participants may feel free to be more candid when sharing their opinions or concerns.

Advanced analytics also allow for the rapid identification of many types of PII in documents and

forms. The documents can then be prioritized based on the likelihood that they contain PII content, organized by PII type. This is useful in the event of a cyber-breach, when regulations require rapid reporting of compromised identities. Under the recently-enacted GDPR rules, in certain situations, EU citizens have a right to “be forgotten” by an organization that houses their personal data. Advanced analytics can help an organization with a cross-functional collection of data that might be responsive to such requests.

Plan your first micro-investigation

The best way to determine the actual benefits of a micro-investigation is to experiment with one, whether it focuses on a known issue or a potential issue that the CLO expects to grow in importance over time.

As with any investigation, a micro-investigation begins with assessing the facts at hand, whether based on a whiff of something untoward or a new or prevailing condition that sparks concern. What seems suspicious, and what is at risk? What data must be explored to uncover relevant facts, and what custodians are most likely to be associated with that data? Remember that with a micro-investigation, the most obvious targets are considered first and the investigation grows from the initial insights; the investigation can thus begin by using existing knowledge, however limited, to begin a query.

The people typically involved in pursuing such an effort are the same in a micro-investigation as a larger one, although the makeup of such teams is beginning to evolve with the times to include advanced search and AI experts who can accelerate the speed and accuracy of the data interrogation aspect. The ability to pare down the actual data to be investigated by using available analytics tools, including those for deduplication and email threading, is also critical, as the removal of such data greatly reduces the time and cost of the review effort.

Bottom line, micro-investigations are a tool to enable CLOs to understand the existence, scope, and potential of certain risks quickly and cost-effectively. When added to the legal toolbox, they provide legal departments with considerable investigative flexibility that has become necessary in light of today’s dynamic business and legal environments.

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