Leveraging Technology in Mediation – Moneyball for Negotiation

By Don Philbin1

Technology in law has largely consisted of faster typewriters enabling more and longer documents and opinions, cheaper telephones and faster internet, and storage, search, and retrieval of electronic documents.

Computers are now fast enough that real insights can be sifted from huge amounts of information. The National Security Agency (NSA) phone tracking controversy is an example of this phenomenon. Neural networks and learning algorithms can comb data reflecting how people behaved in certain situations and use that historical data to make predictions about what they will do next.

For some perspective on the power of humans + thinking machines:

- Google can predict flu outbreaks faster than the Centers for Disease Control
- Mobile phone companies can predict your location with 93% accuracy
- Hurricane Katrina forecasts predicted landfall within 15 miles two days prior
- Picture It Settled® predicts final settlements within 5% with two rounds of offers

Case negotiation and settlement has met the NSA, and the results are significant. Imagine what it would be like to know where a case will most likely to settle (within 5%) within the first couple of rounds? It is now possible to predict with high accuracy what the other side will do and when they will do it in a negotiation. Unlike some databases, this technology is available to everyone.

Since all but a few lawsuits settle pretrial (0.4% tried in Texas), effective negotiation has become the inflection point in litigation. If the other side has adopted technology to improve its negotiation planning and results, we risk playing the childhood game of Battleship with an opponent who has sonar.

Technology Enables More Effective Negotiation Strategies

You’ve heard the conventional wisdom about negotiation. The settlement lies at the mid-point between the first two reasonable offers. First numbers impact negotiations so anchor the round well (take a tough position). And even, late concessions take twice as long and concede half as much.

Are they true? If true, are they helpful? Do general “rules” increase your odds of a better deal? No, no, and no, according to the data. Technology can help us mine data from thousands of similar

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Don was named the 2014 “Lawyer of the Year” for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, is one of seven Texas mediators listed in The International Who’s Who of Commercial Mediation, and is repeatedly listed in: The Best Lawyers in America, Texas Super Lawyers, The Best Lawyers in San Antonio, and the U.S. News and Best Lawyers “Best Law Firm” survey. He is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals.
case negotiations to drive better outcomes like Billy Beane and the Oakland A’s mined baseball stats to leverage low budgets into great results in *Moneyball*. It’s a new game in negotiation too.

Human Behavior Varies – Often Irrationally – But It Is Predictable Even When Irrational

It turns out that the negotiation of litigated cases is more nuanced than one-sized general rules. The negotiation of litigated cases usually involves a dance that divides into roughly three phases. Some are tangos while others are waltzes, but effective negotiators engage in a pattern of reciprocating behavior that tests the strike price for a deal over multiple rounds. Short circuiting the negotiation dance often leaves money on the table. The graphs show actual negotiations plotted with dollar moves coming together along the horizontal axis and time running from the start of the mediation down the vertical axis to a deal.

1. Opening

Whether begun in a joint session or out of the blocks in caucus, parties tend to share information early in the round in an attempt to persuade their counterparty, or at least justify their tough position. Informational asymmetries may be wider in early mediations than those occurring on the eve of trial. Damage calculations are often offered to support early demands and offers during the opening phase of the mediation.

2. The Middle Muddle

The middle muddle usually coincides with lunch in a full-day mediation. There isn’t much information left to share. The other side already knows about the smoking gun that should have brought them around to our case evaluation. They also know how we are calculating damages, or the lack of them. Yet, the parties are still divided, but the ball is still moving. Neither party wants to give-up until they see how sweet the deal will get. But it’s not fun. To plumb the other side for their best number, we keep moving the target closer to them without going to their demand. Colloquially in Texas, we hang the meat low enough the dog *thinks* he can get it. A pattern of reciprocating movement ensues, even if we’re not thrilled with it. Both sides move in rough proportion (not dollar equivalents) to the other begrudgingly.
3. Impatience Grows as Glucose Drops En Route to Deal

Later in the afternoon, impatience grows as if the alcoholic needs a drink. The top chart depicts the parole grant rate by Israeli judges throughout a single day. Regardless of their underlying crimes, all prisoners are eligible for parole. But the court has discretion in granting it. The decisions are the kind of clean binary choices that thrill empirical researchers – the judges can only grant or deny parole.

Researchers studied the outcome of hundreds of cases. They found little correlation among performance factors, but did find a startling correlation between parole grants and the time of day a case came on for consideration. It turns out that the judge’s eating habits and metabolism had more to do with parole outcomes than prisoner performance.

So imagine you are handcuffed in the blocks with dozens of other prisoners awaiting the call of your case. You’ve really shown reform and have been the model prisoner. The prisoner to your right has not been bad, but has not gone out of his way to comply with the system. You anticipate that your case should be more favorably reviewed than your neighbor’s – such overconfidence imbues the decisions of the most highly trained people, including lawyers.

But his case is called early in the morning. It looks close but he is paroled. Your hopes rise – if he made it, you surely will too. But the morning drags on as the judge listens to similar facts in dozens of cases. The judge appears to be getting weary of the same story as her attention wanders. You notice she seems to be granting fewer paroles as we get closer to the lunch break. As much as you want her to get to your case, you’d rather she eat a snack or at least drink some coffee before it does. Alas, it’s 11:30 and the bailiff calls your case. The state doesn’t contest your good behavior much, yet the judge seems to be fading. She is clearly ready for a break. Then it comes – denied! Oh no. Why couldn’t your case have come up after lunch when grant rates return to morning levels? Could it be that random?

Negotiators aren’t much different. As the hours tick away, the negotiator often expresses frustration that the other side has taken too long to concede too little, but we still want to get this over with today (tonight). But we’ve been reasonable. They need to move. Buyer’s remorse has set in – both sides have moved more than they wanted to already. But since everyone can see a deal by now, no one wants to pull the plug. But both sides make smaller concessions in quicker succession to telegraph to each other that you must come to us. Closing is hard work that often requires a variety of mediator tools.
The questions that weigh on everyone's mind is: "Will this thing settle? How much will they pay (or how little with they accept)?"

Patterns Emerge From Large Data Sets

It turns out that humans are predictable, really predictable. NSA wants our cell phone data because the phone companies can predict where we'll be tomorrow with 93% accuracy. Make a credit card charge outside of your established pattern and you'll get a text or call from the bank within seconds.

Lawyers in legal negotiations are also very predictable. Not only do their early moves telegraph where they are headed when matched to historical patterns, the pace of play is also predictable. We have spent years building a neural network system that compares each move in a legal negotiation to a set of over 15,000 other cases.

The result is, after a few moves, the system can predict your opponent's next move within minutes and dollars. Armed with that information, you will know where the other side is headed before they get there. No more guess work. You can fine-tune your strategy to subtly affect the pace of concessions and the eventual outcome.

Of course, there is no cookie-cutter way to negotiate a case. But the larger the data set, the smaller the chances become that someone has an untried pattern that works. We have studied lawyer negotiating behavior in the historical data and have drawn some critical, and often counter-intuitive, insights.

Extreme Positions Often Don't Work

The data shows us that taking an extreme position early in a negotiation often does not improve the settlement outcome. Holding an extreme position too long and then conceding at the last minute can leave 15% or more on the table. That's $150,000 in a $1 million claim. This insight flies in the face of the conventional wisdom and mythology of legal negotiation. Having said that, the definition of an extreme position varies by venue, claim type, and other variables.

John Travolta played a lawyer in the movie *A Civil Action* whose opening offer was so outside of the social convention for such negotiations in Boston in the early 1980s (over 35 times the eventual settlement) that it failed to even draw a response. The plaintiffs' lawyers and the Bank of Boston, their financier, had valued the case at $25 million. Had Travolta's character had the benefit of modern analytics combing data in similar cases from the Boston area, he would have known that a 2.5 multiple was more in line with convention for the
venue and case type. Had he started around $62 million, there was a much better chance he could have landed a settlement in the $25 million range. Instead, his 35 multiple failed to draw a response and he and his partners lost their homes and went bankrupt pursuing the case for years to an $8 million settlement. The real lawyers have told me that a mediator would have averted that breakdown, but we all know the dampening effect of offers that far outside of local convention. Extreme anchors rarely blow a round in one move, but the party making the extreme offer tends to make larger concessions afterward to avert an early impasse. So it is usually more prudent to start with an offer that is high (or low), but perceived as reasonable locally and concede less in subsequent rounds.

Variations by Venue and Case Type

What's acceptable negotiating behavior also varies by case type. The employment bar might tolerate more extreme anchors than the construction bar in the same venue. Non-economic damages may move the line of scrimmage out across demographic markers.

1. Venue Matters

Our database has the tough negotiator and other seasoned professionals bargaining in different jurisdictions and venues. We learned that venue has a large influence on negotiation strategy and behavior (as it does on verdicts). Since it takes two to tango in negotiation, errant behavior often results in collapse of the round. What works in New Jersey may not play at all in Peoria. If aggressive first offers are the local custom and you don't make one, you may frustrate progress by trying to make up lost ground the rest of the day. Conversely, extreme offers that aren't customary can have the chilling effect of shutting down negotiations before you get a feel for how high or low the other side will move.

When we plot final settlement figures (dark center line) against opening demands and offers (high and low hashmarks), interesting patterns emerge. There are venues where the mid-point rule of thumb is closer to the mark. There are also places where one might compromise their position – and leave money on the table – by not dancing the local dance with more extreme anchors. If the expectation is that negotiators demand several times what they are actually willing to settle for – and you don’t – it may be hard to make up that discrepancy in subsequent rounds. Conversely, if you make an over-the-top demand in a jurisdiction that doesn't dance that way, you may find yourself looking at an empty room like Travolta’s character. Open too low and you’ll have a hard time making it up, but open too high and you’ll poison the well and risk an early impasse. Local mediators often moderate expectations to local custom.
2. So Does Claim Type

Negotiating conventions vary by claim type too. Within the shaded boxes lie the majority of the offers and demands, but notice there are some fairly extreme moves across claim types. General rules break down in specific cases so we match behavioral patterns rather than imposing categorical rules. We look for an instance where a negotiator has acted like your counterparty, rather than misapplying general rules to specific facts.

Predictive Analytics Offer Insight

Because our software can model negotiations 50 rounds into the future (you rarely need them all), you can forecast in real time what the effect of a planned move will be on the round. Not only will the system model your adjusted course, it will anticipate the other side’s reaction to it. Overdo it, and the odds of impasse increase. Fine-tune it, and you’ll improve your position without unnecessarily increasing the risk of impasse. That means more deals on better terms.

Probabilistic Projections of the Negotiation Path

Hurricane forecasters combine historical data with current weather readings to forecast storm movements. They are really making a series of individual projections that are aggregated into cone-looking graphs. The forecasts get better with additional data and the cone narrows. A hurricane that once might have been projected to come in somewhere between Florida and Texas later appears to be headed for western Louisiana. That’s news we can use. Forecasters predicted landfall for Hurricane Katrina within 15 miles two days ahead of time.

Similarly, we use probabilistic projections to project negotiation behavior. Our system models where a round is likely to end up by combining historical data with the demands and offers from the current case. These models are graphed with probabilistic cones too. The darker colors represent the most likely settlement outcomes. Like hurricane projections, more information increases confidence in the projections and the cones narrow. What might start as a fairly wide
spread, like the Florida to Texas hurricane cones above, narrows as additional bid data from the round is entered.

The intersection point of the two projections – plaintiffs coming from higher dollar figures at the right leftward and defendants moving toward the plaintiff from the left – projects the zone of possible agreement in both money and time.

Highly Accurate Projections

Picture It Settled® has published case studies on the accuracy of its projections in specific negotiations (examples attached). By the second of 17 rounds in an intellectual property case, our system projected the final settlement within 3.5% of the then $28.55 million spread. In another technology case, the projection was within 3% after round three. Those initial projections improved with additional information.

Insight Becomes Actionable

Accurate forecasts are insightful, but only helpful if you act on the information.

Once you know where the other side is headed, you can adjust the target settlement (dot at the bottom) to improve the round without increasing the risk of impasse. The system recalculates suggested offers that will get you to the adjusted target settlement incrementally, rather than with sudden moves. Since these moves are based on successful rounds, your odds improve.

If you get too aggressive, the model will show an increased risk of impasse. By continually adjusting expectations and strategy to the current forecast, you can test whether your trial alternatives are better than the projected deal. Even small percentage improvements usually yield much better settlements. Since the strategy is informed by successful and unsuccessful historical rounds, the improvement comes without out unnecessarily increasing the risk of impasse.

Conclusion

Our software gives you accurate insight into negotiations early enough to use that intelligence to improve your outcome without unnecessarily increasing the risk of impasse. That means more deals on better terms. A 5% improvement to a $10 million case is worth $500,000. That’s worth some planning.

Like the best weather forecasts, the best results combine expert intuition with models driven by the latest technology. The machine won’t do it for you, but it will help you chart a successful path with your inputs. You determine the target settlement based upon your hard-headed case evaluation. You decide what to demand or offer, but having a decision-aid that can quickly draw on thousands of similar cases and model the round out 50 moves in advance instantaneously only helps refine that well-honed intuition. That increases confidence and reduces stress while improving outcomes.
Predictive analytics will change law and negotiation. Most cases do not settle at the midpoint of the initial offers. Whether they settle at the midpoint of the first two reasonable offers is something we don’t know until it’s much too late to act on it. We know that initial offers have weight, but only in proportion to their reasonableness. As we’ve seen, the credibility of the offer varies by venue, claim type, and other factors. Always demanding three times what you are willing to take may risk early impasse in some locales and leave money on the table in others. And we know that concessions do not take twice as long to concede half as much.

General rules of negotiation offered maxims before technology delivered customized solutions. In an era where specific and customizable insights are available, general rules are no longer useful, and are probably harmful if they give false comfort. In the high-stakes world of legal negotiation, having a reliable forecast of the other side’s move before they make it gives you a powerful competitive advantage. Having planning tools to fine-tune your strategy based on that intelligence only increases the likelihood of a more favorable deal.
Legal Technology Post-Script

Lawyers have long mined and assimilated data to guide transactions and construct winning arguments. No other profession has the equivalent of the common law – a massive derivative work that constantly builds upon itself to guide others in its shadow. Transaction attorneys search for provisions that have been favorably construed by courts – often over decades. Litigators mine cases to draw parallels between “spotted horse” cases, or those with many similar factual markings, and their own position. With few exceptions, the idea is to find compelling support in existing data. Before computers, digests and Shepard’s citations wove the labyrinth together.

The first generation of technology sped up production of more and longer judicial opinions that could be accessed through expensive databases mechanizing the tools of the existing labyrinth and adding a Boolean search that combined search terms and defined connectors to scour every word of an opinion rather forcing reliance on the indexer. The data has become big – it took 65 years to fill 999 volumes of the Federal Supplement and 15 years to fill the second next 999 volumes. And “unpublished” data is growing at an even faster rate. According to Google Executive Chairman Eric Schmidt, we create more information every two days than we did from the dawn of civilization through 2003.

Faster and cheaper computer storage and retrieval also facilitated the collection of other datasets. Jury verdicts and arbitration awards became accessible. Insurance companies aggregated automobile collision and personal injury data. The introduction of PACER by the Federal Courts opened a window into what was going on at different phases of a trial court proceeding, rather than awaiting a published appellate opinion in the few cases that didn’t resolve first. Before statistics on all court filings, we might have formed a warped perception of the litigation landscape by the “hairy hand” and other unusual cases that get selected for rarified review.

Big Data Now Helps Make Better Decisions

We’re now at the point where doubling computing power (Moore’s Law) allows insights for decision making. It’s one thing for PACER to allow search and retrieval. It’s quite another for Stanford spin-out Lex Machina to have bots scour PACER every night so its thinking machines can draw insights out of the raw data to help decision makers evaluate intellectual property case prospects. The combination of a perfect economic storm and billing analytics derived from millions of dollars of real bills has also changed how legal services are bid and awarded.

Online Dispute Resolution

Dispute resolution may be one of the best examples of supplementary technology. PayPal, eBay, Amazon, TaoBao, and other E-commerce providers already handle over 150 million disputes per year across jurisdictional lines, according to Modria’s Colin Rule, who led PayPal’s program for years before offering similar services to a host of online merchants. Traditional ADR providers have also incorporated online dispute resolution services into their offerings.

But the biggest advances may be in traditional mediation. From studies going back to the Kennedy-Nixon 1960 debate that the medium through which we communicate can be outcome determinative. College test subjects whose parents may not have been born when the debate took
place still have a different perception of who “won” the debate depending on whether they read the transcript, listened to the radio feed, or watched the video.

A faster internet and compression technology allows disputants to upgrade their message even if time or economics don’t allow face-to-face mediation. In this session, we’ll demonstrate technology that will bring the parties together, allow them to share documents, and break into various caucus formats almost as seamlessly as if they were in the same building. The message gets upgraded from sound only to visual – and since 72% of us are visual learners and most communication is non-verbal, that’s a real advance.

Analytics Available to Guide Human Decision Makers

But technology has not only brought the George Jetson picture phone to life, learning systems provide real insights to negotiators.

Not only can the parties better evaluate their cases by retrieving jury verdicts, trial and appellate statistics (12(b) and MSJ grant rates, reversal odds, and the impact of time on money), better cost data, and other insights, they can also plot successful negotiation strategies by drawing on the experience contained in thousands of similar cases.
In my current role as VP and Associate General Counsel for Rackspace, and previously as Deputy GC at Akin Gump and Associate GC at Clear Channel Communications, I have come to realize that our in-house clients, the business decision makers, want predictability in litigation. As in-house lawyers, we conduct thorough and early case evaluations, negotiate budgets, research comparable disputes, and look for other markers that add something to the valuation and predictability mix. Early resolution is often a good outcome for everyone involved in a dispute. Depending on the case, it can be a tremendous cost-saving strategy, not only in external counsel costs but also time and distraction within the business. A negotiated outcome also gives the business an opportunity to take some control over the dispute and drive the issues toward a strategic business objective. How can an in-house lawyer best position a case for a strategic win in the negotiations? Consider the case for taking for a more data-driven approach.

There is a built-in tension between risk assessment from outside counsel and what our internal clients need to run the business and make financial forecasts. Naturally, external litigators are unwilling to guarantee results. Litigation is inherently unpredictable. Sometimes, though, external lawyers are reluctant to handicap the likelihood of various potential outcomes. “What are our chances of success?” asks the business executive. “It depends,” says the lawyer. This challenge is compounded when it’s time to negotiate a case, either directly or with the help of a mediator. How do we plan a negotiation strategy that will help us arrive at an optimal settlement? The answer to that challenge has been a series of books and courses on negotiation that provide great theory but don’t always provide the structure and predictability that could help determine how to advance a mediation toward a desired end-game. We are increasingly looking for data-driven metrics — similar to what our clients use on the operations side of running the business.
As a technology company, we are early adopters of software and other technology tools. So when I learned that there was a predictive analytics program that uses the intelligence gathered from tens of thousands of negotiating rounds to predict the course of future negotiations, I was very intrigued.

Picture It Settled®, a productive analytics tool developed by San Antonio lawyer-mediator Don Philbin, is like Moneyball for negotiation. Like Moneyball, Picture It Settled helps in-house lawyers (and others) plan a negotiation strategy that is calculated to induce cooperative behavior, which results in more settlements at optimum numbers.

Let’s face it. Despite all the books and classes we may have consumed on the art of negotiating, too often we rely largely on educated guesses and gut instinct to dictate our strategy and negotiation tactics in the past. “Where will they go if we move to X?” “How can we send the message that they have to make the next big move?” Our experiences and intuition are tremendously valuable, but guesswork makes our business colleagues a bit nervous, and we also run the risk of sending the wrong signal to the other side. Since our cases are often large and complex, we want tools that will help us increase the predictability of a settlement on favorable terms.

The rise of big data and predictive analytics is now part of practicing law. And in-house counsel are early adopters because these technologies are already being used on the business side of our companies. There are now technologies that help us estimate costs in a given matter, plumb intellectual property data sets for valuation markers, and now predict the course of negotiations and formulate strategies around those forecasts.

When I first heard about Picture It Settled, I was excited because I believed it would be incredibly helpful to us in building predictability into an uncertain, often volatile process. Picture It Settled has gained its intelligence by ingesting outcomes from 10,000+ successfully settled cases from across the U.S. Don Philbin developed the tool because he believed there was “music in the noise” of negotiation – patterns of human behavior that could be predicted – and he was right. People can be irrational and seemingly erratic in litigation, but it turns out that they are predictably so. There are predictable patterns to negotiation. As you enter in
your negotiation details and moves into the game-like Picture It Settled interface, the technology searches for patterns and offers a prediction of what might happen next.

We recently had occasion to apply this technology to a high-value mediation, and the results were quite amazing.

The mediation in question was a longshot to settle at all, but like many courts’ scheduling orders, we were required to give it a shot. The parties had been to the mediation table once before and we had ended up more than $10 million apart. This commercial dispute had actually resulted in some emotional bad blood, and each side had dug its heels in. Still, we went forth to round two with an open mind. This time around, we had Picture It Settled on our side, and it definitely played a pivotal role in helping the case settle.

Once we entered the case’s demands and offers into the system, we began to see that there was a chance for settlement. Our outside counsel input the details of the case (jurisdiction, net worth of the parties, type of case, etc.) and Picture It Settled began to create a visual representation of the negotiation. As negotiation moves were made and the amounts and times of offers were typed in, the software created a graphical representation of where the negotiation was going, with one party’s trajectory marked in red and the other’s in blue.

As the moves progressed over time, we began to see that the graphs began to overlap, indicating to us that settlement was increasingly likely. Picture It Settled illustrated the projections probabilistically like “hurricane graphs”. With every new offer, those projections became more precise. We could also run “what-if” analyses and move the target settlement to optimum, but still likely outcomes. This data-driven tool was incredibly valuable.

Picture It Settled predicted the settlement’s final outcome within 6.6% accuracy after just two moves per side. This improved to 3% accuracy after round three. Even the estimates of the next moves by both sides in dollars and time were very precise. In fact, the individual dollar move projections for plaintiff and Rackspace both were on average within 3.5% of the actual moves, except for one opening offer by our side and the wind-up offers.
The results produced by Picture It Settled were extraordinary, providing clear evidence that metrics and analytics can be extremely accurate and predictive as a complement to experience, instinct and intuition which are usually a litigator’s primary tools. Frankly, the fact that Picture It Settled showed a reasonable chance of settlement kept us at the negotiation table longer. The analytics and graphs it produced gave us a reason to believe it was worth staying the course; it kept us in the game. We ended up closing a case that we thought had a very low chance of being resolved by agreement.

Picture It Settled provided predictability and also gave us confidence that we were steering the negotiation process in the right direction toward an acceptable range of outcomes. Even before the mediation began, we knew more about how we could get to our preferred outcome – or something close to it. Picture It Settled offered us more control and insight into the path the negotiation could take based on results from thousands of successful settlements.

My plan is to use Picture It Settled for many of my upcoming cases. The degree of predictability and accuracy the analytics provide is impressive and gives me real metrics to bring to my internal clients on the business side to talk about desired outcomes and strategies to achieve them. I predict that any GC’s office that discovers this technology will recognize its unique value and will find it to be a great tool to assist us in evaluating cases, and planning and executing negotiation strategies. It doesn’t replace well-honed intuition, experience and gut reactions. But it does allow us a data-driven way to test our intuitions against thousands of historical cases. This tool is worth a test-drive on your next case.
Discovering Picture It Settled®, Breakthrough Predictive Analytics Software for Negotiation

By Will Pryor, Mediator, Arbitrator and Adjunct Professor of SMU Law School, Dallas

As a lawyer, a district judge and now as a mediator for many years now, I have always sought out useful technology tools to make the process work better. I have seen parties use static Excel spreadsheets and midpoint analysis to try to project settlement numbers, but the negotiation process is much more sophisticated than that.

At SMU Law School in Dallas, I teach a survey course on alternative dispute resolution (“ADR”). The course includes segments on negotiation, mediation and arbitration. Our textbook for the negotiation segment referred to software and the internet as negotiation tools, but the tools referenced were merely common sense driven or only superficially useful.

Enter Don Philbin, a lawyer-mediator based in San Antonio who is a highly skilled negotiator. Don had seen a need for technology that could accurately predict negotiation moves and settlements, and he set about building that solution. Enlisting the help of lawyers, statisticians and probability experts, Don created a web-based application called Picture It Settled® which was officially launched at LegalTech New York in late January 2013.

Picture It Settled® is predictive analytics for negotiation, and it derives its power to predict moves and outcomes because Don collected deep data from over 10,000 cases and had them entered into the system. And the more cases that Picture It Settled® learns from, the smarter and more powerful it will become.

Having known Don for years and being intrigued by Picture It Settled®, I invited Don into my classroom to show us how the technology worked. Coincidentally, I had recently mediated an IP case in the Eastern District of Texas in which the Plaintiff’s original demand had been $29 million and the Defendant’s original offer was $450,000. The case settled at 7pm for $8 million after 17 painstaking rounds of negotiation.
Don entered the negotiation moves from this case into the Picture It Settled® online interface live for my class and the software began to show a graphical representation of the potential settlement territory. By only the 2nd round, Picture It Settled® predicted a settlement in the $9 million range, which was only off 3.5% of the $28.55M spread at the time, and the software nailed it in 2 rounds instead of 17! Of course, Picture It Settled® tightened its projection even more as we entered additional offer information. It was truly magical, fascinating – I realized that this tool could be helpful for a broad spectrum of cases.

Picture It Settled® is an incredibly useful tool that will become increasingly powerful as more case data is entered to make it even more intelligent. Any negotiator who wants to be prepared needs to have a tool like this. You can rely on your instincts and experience, but that will only take you so far. This software gives you a better ability to predict which way a case is headed. Whoever uses Picture It Settled® will have a clear advantage over the other party. As a mediator, it will help me keep energy in the process and keep parties at the table longer.

Lawyers have a tendency to be concerned that technology is going to replace them, but that is an unfounded and unwarranted concern with Picture It Settled®. This is a tool to help lawyers and mediators do their jobs better and faster. The psychology of negotiation and mediation will remain the same but the software will help guide the outcome to be more streamlined and advantageous to those who use it.

I am sure that lawyers and mediators will discover the advantages of Picture It Settled®. I challenge anyone to refute that it provides more control over the negotiation process and settlement outcomes. Picture It Settled® is fascinating and very exciting technology. There will come a time when everyone will be using it!
How ‘Tomorrow’s Lawyers’ Are Using Technology Now to Improve Outcomes

BY DON PHILBIN

Remember the runaway bestseller Megatrends in 1983? Author John Naisbitt captivated his audience by identifying 10 themes that would change the world. The relative accuracy of these predictions 30 years later is haunting. Here they are:

1. Shift from an industrial society to an information society.
2. Shift from high-touch human responses to newly automated responses.
3. Shift from a national economy to a global economy.
4. Shift by management from short-term planning to long-term perspectives.
5. Rapid decentralization of business, politics, and culture.
7. Shift from a representational democracy to a participatory democracy.
8. Shift from hierarchies to networks.
9. Shift from Northeast to Southwest and Florida.
10. Shift from binary choices—that is, either/or—to multiple options.

Richard Susskind is the John Naisbitt of legal megatrends. He’s shaken us up for years with The End of Lawyers? (2008), Transforming the Law (2000), and The Future of Law (1996). Like Naisbitt, he won’t be right on all of the particulars when we have the luxury of grading him 30 years down the road.

But some of his predictions are already upon us. Here are the three megatrends Susskind claims are combining to form a perfect storm in his latest book, Tomorrow’s Lawyers, which was published in March by Oxford University Press USA:

1. The “more-for-less” challenge from clients.
2. Liberalization of who can provide legal services and information.
3. Information technology.

The specific path of this perfect storm, and its aftermath, are the subject of considerable debate. But even its less controversial effects could bring profound change to dispute resolution methods. ADR will broaden, diversify, and develop as an essential lawyering skill. Like medicine, advanced decision aids will also help those well-trained practitioners guide their clients to better results.

‘MORE-FOR-LESS’

General counsel have been under enormous pressure to reduce their legal spending for (continued on page 91)
If a mediation resolution is unable to be reached initially that respects a party’s ‘I remember’ value, then the mediator and the parties will explore whether the litigation system will consider that value and address it.

manner. I want a personal connection so I can better understand them and also react within the bounds of my own humanity. If it is a story that may be part of the evidence of a case, I want everyone in the room to hear, understand and act consistently with the values and interests of the person telling the story.

If a resolution of the case is unable to be reached that respects this “I remember” value, then we explore whether the litigation system will consider and address it. If the answer is no, then we must consider the personal impact of ending the litigation while exploring other ways to recognize and address the principles or values.

If there are no other viable routes, then I ask the person to consider if they are keeping the litigation alive with the false hope that it will ameliorate the harm associated with the memory. I also ask whether a negative outcome for them in the litigation will exacerbate the situation and make the memory even more haunting.

There are cases where a person wants a jury to confirm a personal narrative, and ratify that the person was in the right and the other parties were wrong. This is what participants often call “Justice.” I ask them if the jury decides the opposite—that is, accepts a contrary version of events which places blame squarely on the participant—if they will change their own beliefs and accept the adjudicated fact as being “the Truth.”

It is a win-win query for the mediator.

If the answer is “no,” and the person will stick with his or her own story for the rest of his or her life, then the need for a jury verdict is irrelevant to the memory. If the answer is “yes,” then the focus shifts to the risk and consequences of the negative outcome. If it is devastating on a personal level, then whatever economic difference separates the parties is unlikely to be worth the impact of failure.

* * *

With some foresight and thought, advocates and mediators can communicate during mediation in a manner that respects the limitations of memory. Facts are there but not absolute because proof rarely happens in mediation. Findings and Truth and Justice can remain in the beholder’s mind, as a resolution in mediation shapes each person’s memories in a subjective manner. Always recall that mediation is an alternative process because it addresses needs that are often unable to be satisfied in adversary proceedings.

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ADR Technology

(continued from front page)

years. That trend accelerated during the financial downturn. Susskind reports that many general counsel have faced 30%–50% reductions in their legal budgets, while legal and compliance work has doubled in terms of legal spend. See Sue Reisinger, “LegalVIEW Data Shows Litigation Up, Legal Spend Down,” Corporate Counsel (April 25, 2013)(available at http://bit.ly/16tXabq).

Since 200 corporations buy 80% of legal services, it doesn’t take pressure from very many clients to put pressure on the industry. And GCs are working together through the Association of Corporate Counsel’s Value Challenge (see www.acc.com/valuechallenge) and other forums.

They are also aided by predictive analytics crunching big data sets to forecast expected expenditures on a matter with various staffing options. TyMetrix (see tyme-metrix.com), LexisNexis Counsellink Insight (www.lexisnexis.com/counsellink), and Mitratech (www.mitratech.com) already have commercialized that service and others will follow.

The more-for-less challenge not only applies to large companies with in-house legal teams, but also to small companies that have had difficulty hiring counsel and individuals who have seen public legal aid monies dry up.

Susskind laments that only the very rich and the very poor have access to the legal system at a time when a record number of law graduates go without jobs.

LEGAL SERVICES’ LIBERALIZATION

The liberalization of who can provide legal services and information to the underserved 90% of the population is a Susskind megatrend. His views are certainly colored by his jurisdiction, the United Kingdom.

In England, “reserved” legal business—work only lawyers can do—is narrower than what constitutes the “unauthorized practice of law” in the U.S. U.K. non-lawyers can own and run legal businesses and make investments in law firms.

There already is a publicly traded law firm in Australia, which used capital from a financing round to buy a British personal injury firm. Other firms are expected to list their stocks in the United Kingdom soon. Susskind also sees the reentry of Big Four accounting firms more than a decade after Andersen Legal went down in the unrelated Enron scandal.

While it’s easy to dismiss this as a European phenomenon, the ABA Commission on Ethics 20/20 has been studying the definition of the practice of law and unbundling of legal services for a decade, and has made some relatively minor adjustments. Susskind is convinced that within 10 years, “after intense agonizing and various changes of direction, most major jurisdictions in the West … will have liberalized in the manner of England.”

We’ll see. What we know now is that LegalZoom.com Inc., RocketLawyer Inc., AOL Inc’s TechCrunch, and a variety of websites provide online forms that pro se litigants are already using in large numbers. Court help centers and walk-in clinics everywhere are filled.

During a ReInvent Law conference in
In their new book, “The New Digital Age: Reshaping the Future of People, Nations and Business,” (at 34 (Knopf: April 23, 2013)), Google executives Eric Schmidt and Jared Cohen note, “The data revolution will bring untold benefits to the citizens of the future. They will have unprecedented insight into how other people think, behave and adhere to norms or deviate from them.”

**Shifts and Megatrends**

**The problem:** Dealing with clients’ ‘more-for-less’ challenge.

**What does it mean?** Think of it on these terms: How long are you going to rely on the price insensitivity of big cases to sustain your business?

**Technology’s help:** The author works in predictive analytics, and discusses the litigation uptake.

While lawyers have used computers and Boolean searches for years—think Google, LexisNexis, and Westlaw—Susskind sees artificial intelligence making way for learning systems like IBM’s Watson, which beat the two best human contestants in a special *Jeopardy!*

**LIMITS TO PRICE COMPETITION**

The more-for-less challenge has been addressed with price reductions and alternative fee arrangements.

Susskind’s premise is that law firms and their clients cannot address “more-for-less” over the long-term with price cuts and alternative fee arrangements that repackage the estimated hourly expenditure. Those will work in the short-term, and if the legal market returns to 2006 levels, the Band-Aid worked.

But Susskind believes that 2006 was the high-water mark for law that won’t come again after clients realize they can get “more-for-less” and alternatives become available. Others agree or back up the concepts. A recent *Bloomberg BusinessWeek* cover story by Paul Barrett, “Howrey’s Bankruptcy and BigLaw Firms’ Small Future” (May 2, 2013)(available at http://buswk.co/105fsD); Indiana University Maurer School of Law Prof. William Henderson’s paper, “From Big Law to Lean Law” (available at http://bit.ly/11qHkJ0), and Steven Harper’s book, “The Lawyer Bubble: A Profession in Crisis,” paint a similar picture.


Susskind’s bet is that at least one mega firm will break ranks and offer long-term solutions to more-for-less and that when they do, others will scramble to follow.

Seyfarth Shaw massively invested in data and knowledge management to form SeyfarthLean (see http://bit.ly/15c6EZg).

Prof. Dan Katz at Michigan State University College of Law in East Lansing, Mich., and co-founder of the ReInvent Law Laboratory (see www.reinventlaw.com), sees firms becoming two-tier organizations—a law firm owned by lawyers, and allied services organizations that provide software and other services that are funded from a larger capital pool.

Collaboration software company Xerdict Group is a wholly-owned subsidiary of Sedgwick, a San Francisco-based international law firm. It could presumably raise outside capital from nonlawyers.

This author believes that “bet-the-company” litigation and megadeals will remain relatively conventional and price insensitive. But that population of cases is shrinking in the eyes of general counsel. When I started practicing, the percentage of cases that seemed price insensitive—“Get me out of this at any cost”—was reportedly around 25%.

Now general counsel say the number is in the low single digits. So while litigation as a whole is up, the percentage of cases that are price insensitive has decreased significantly. The remaining cases and many transactions continue to face the more-for-less challenge.

**UNBUNDLING LEGAL SERVICES**

One way Susskind believes that law firms can
‘I’m not naïve enough to think there will not be dislocation for people and firms that do not adopt emerging technology. There will be. … But no one will replace David Boies, Ted Olsen, or Ken Feinberg with a bot.’

meet the persistent more-for-less challenge is by unbundling the overall engagement to protect the legal expert’s value-proposition, while sourcing other pieces to lower-cost providers.

This is already occurring. Document review already has been sent offshore or onshore to lower U.S. cost regions, and predictive coding aims to automate costly E-discovery. The U.S. Department of Justice just approved the use of predictive coding to review millions of electronic documents in the proposed Anheuser-Busch In Bev NV/Grupo Modelo SAB merger. A handful of judges have approved such review in litigated cases, but Justice’s approval may spur more wide-spread use. Joe Palazzolo, "Software: The Attorney Who Is Always on the Job," B1 Wall Street Journal (May 6, 2013)(available at http://on.wsj.com/126T4Si).

Susskind breaks transactions and litigation down into their component parts (see boxes below). Of the Litigation Tasks, U.S. litigators responded that strategy, tactics, and advocacy were the tasks that singularly require their expertise. Since the United Kingdom has long separated solicitors and barristers, U.K. litigators predictably responded with strategy, tactics, and advocacy. Susskind also took a hand at decomposing the tasks involved in most transactions, as indicated in the Transactional Tasks box.

NEGOTIATION CRITICAL

Negotiation is a critical task in both transactions and litigation, but not something the litigators Susskind surveyed identified as requiring their expertise.


Keeping the generals singularly focused on beating the other side has key strategic benefits. But there is almost always another line open between the diplomats that does not oscillate with ebbs and flows of the war effort. Diplomats do not get involved in the war effort, but keep those channels open so the generals do not have to show weakness by stopping the battle to talk peace. Generals win or accept surrender.

Diplomats don’t interfere with prosecution of the war, but are looking for alternatives that might satisfy the parties’ interests. They are complementary, not competitive, and allow tight focus without compromising their position by momentarily changing rolls.

Of course, every effort is well coordinated and overseen by the head-of-state or client. Dallas-based author and consultant John De-Groote and others advocate that settlement counsel can be used to bring settlements about earlier and more efficiently. See De-Groote’s Settlement Perspectives website at the link above.

James McGuire notes that the types of questions are different when focusing on a future settlement than on preparing an autopsy of the past. See, e.g., James McGuire, “Why Litigators Should Use Settlement Counsel,” 18 Alternatives 1 (June 2000).

HUMAN + MACHINE

Susskind is a legal technologist and when you’re a hammer, everything is a nail. He makes sweeping projections about the disruptive effects of technology.

I am also a fan of the benefits of technology, but see the two as much more complementary. I’m not naïve enough to think there will not be dislocation for people and firms that do not adopt emerging technology. There will be. The printing press dislocated some scriveners. The industrial revolution reduced the prominence of horses. And undersea fiber optics and the Internet have been tough on call centers, bank tellers, and facilitated foreign document review.

But no one will replace David Boies, Ted Olsen, or Ken Feinberg with a bot.

That’s not to say they will not be greatly aided by learning systems that function as decision aids. Louis M. Solomon, chairman of the commercial and international litigation groups and Litigation Department co-chair at Cadwalader, Wickersham & Taft in New York, tries headline-grabbing cases and has the well-honed judgment that comes with that experience. Still, he is an early adopter of predictive analytics for negotiation and other advanced decision aids.

ONLINE DISPUTE RESOLUTION

Susskind lists several technologies he believes will have disruptive effects. (See the box below.)

Online dispute resolution, or ODR, is a perfect example of supplementary technology. PayPal, eBay, Amazon, TaoBao, and other E-commerce providers already handle more than 150 million disputes per year across ja-
risidional lines, according to Modria’s Colin Rule, who led PayPal’s program for years and now offers similar services to a wide-range of online merchants.

Imagine what would happen if those disputes were dumped onto an already over-worked and underfunded court system, even if the courts had jurisdiction over the e-merchant. California is darkening courts in response to its budget crisis. A well-respected federal judge with detailed knowledge of federal court finances explained the calamities that will befall that branch if the sequester and its effects aren’t undone. And even without sequester, appropriators have not adequately funded our courts for some time and have signaled more of the same in future budgets.

The American Arbitration Association, the CPR Institute, and other institutional providers of ADR services are building ODR options. [Editor’s note: The CPR Institute, which publishes this newsletter, is working on a joint ODR venture for commercial mediation cases with the aforementioned modria.com.]

CyberSettle has been running a double-blind bidding system for small disputes since 1998, and recently morphed into settling claims between health-care providers and their uninsured patients. Fair Outcomes Inc. of Boston offers fair-division options primarily through buy-sell facilitated trades. This industry will continue to develop rapidly, but not as a substitute for courts or litigators. It will serve unmet needs.

BIG DATA, PREDICTIVE ANALYTICS

Susskind is fascinated with big data and predictive analytics. According to Google Executive Chairman Eric Schmidt, we create more information every two days than we did from the dawn of civilization through 2003.

Cheap storage has made retention of that data possible. With it, Google can predict flu trends faster than the CDC based on users’ searches for flu-related topics. President Obama last month issued an Executive Order noting that government weather data in the hands of entrepreneurs had created GPS technology, and requiring that the “default state of …Government information resources shall be open and machine readable.” Executive Order, “Making Open and Machine Readable the New Default for Government Information” (May 9, 2013)(available at http://1.usa.gov/193lKN6).


These technologies are increasingly available to lawyers. Stanford Law’s Mark Lemley believes “analytics is the wave of the future.” Id. Lex Machina’s computers already crawl the entire federal court PACER docketing system daily looking for patent documents so practitioners can determine whether to try or settle their IP case. Lexis Advance MedMal Navigator offers similar predictions in medical-malpractice cases. Id. A recent article in the Journal of Empirical Legal Studies described a predictive system that uses company share prices to help value securities class actions. The aforementioned TyMetrix draws on the billions of dollars in legal bills it has collected with permission through its sister bill review product to help project how much a matter will cost.

SkyAnalytics, of Andover, Mass., offers a macro view into the costs of legal services; Serengeti Law, a Thomson Reuters matters management unit based in Bellevue, Wash., offers a similar product. Not only are general counsel using the predictive power of such analytics to form budgets and choose outside counsel, law firms are using the data and analytics to gauge case strength and to get a read on what other firms are charging. Id. “The ability to learn in real time and gain insights from meaningful, predictive data is increasingly important to delivering new levels of value to clients,” said Bill Turner, chief knowledge officer of Womble Carlyle Sandridge & Rice in Winston-Salem, N.C., in the ABA Journal article.

And this author’s Picture It Settled is Moneyball for negotiation. The behavioral software has learned negotiating patterns from parties to thousands of litigated cases in a wide variety of jurisdictions and claim types.

Picture It Settled recently predicted the outcome of an IP dispute within 3.5% after just two rounds—and those predictions improved with additional offer data (17 total rounds). These projections look like “hurricane tracks” coming from each side to form a zone of potential agreement in the overlapping areas.

The predictions become actionable intelligence when parties calibrate their concession plans by dragging the target settlement dot to an advantageous, but probable, outcome. Using spines informed by settlement data, parties can then work toward settlement by making offers intended to induce cooperative reciprocation.

By constantly inputting offer data and updating realistic targets in the game-like interface, users are able to increase their settlement rates by using a data-informed negotiation strategy. Picture It Settled doesn’t replace honed intuition; it puts a scope on the human controlled gun.

These are exciting times for legal technology. Increased computing power, cheap data storage, and rapid and ubiquitous communications have opened up new frontiers. Firms are mining their historical data and new data sets are being collected to aid decision-makers. Human judgment aided by advanced analytics is a powerful combination.

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