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Big Data in Litigation: Leveraging Analytics for Jury Selection, Trial Costs, Determining Case Strategy

TUESDAY, MARCH 12, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Stephen E. Embry, Publisher, **TechLaw Crossroads**, Louisville, Ky.

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**BIG DATA IN LITIGATION:
LEVERAGING ANALYTICS FOR JURY
SELECTION, TRIAL COSTS,
DETERMINING CASE STRATEGY**

WHAT LAWYERS NEED TO KNOW



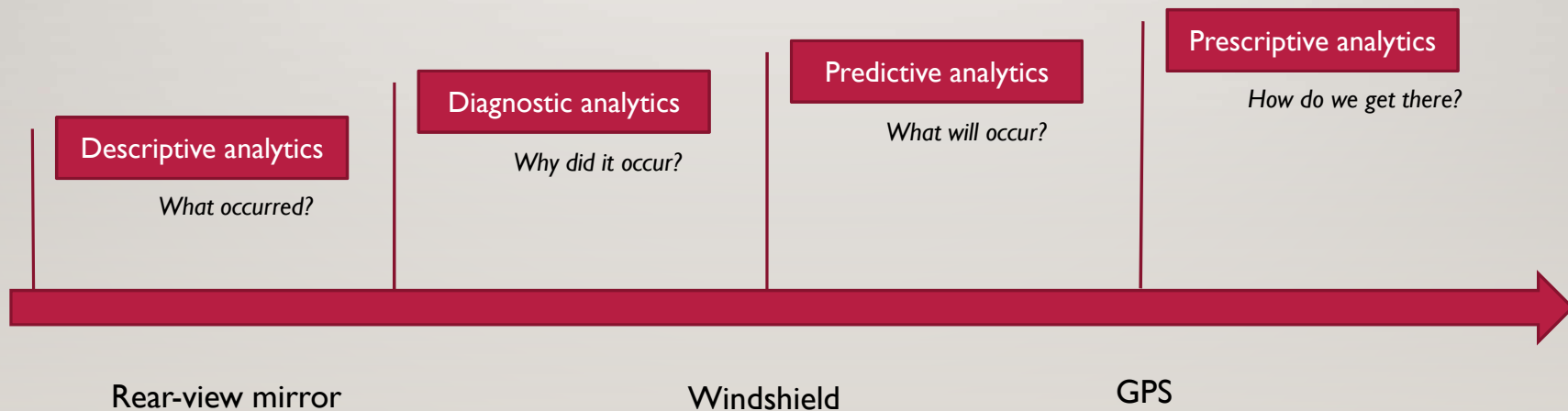
6 DATA ANALYTICS – WHY DOES IT MATTER?

- The Rise of Data Analytics at the Trial Level
 - [Lex Machina](#) – Insights about judges, lawyers, parties & patents from millions of page of litigation information.
 - [Ravel Law](#) – Judge and Case analytics
 - [Bloomberg Law](#) – Judge and Case analytics – fully integrated with Bloomberg’s giant corporate information resources
 - [Premonition](#) – Judge and Case analytics – enormous state court database
 - [Westlaw Edge](#)
 - [FastCase](#)
 - [Justly](#)
- Bringing precision to conventional wisdom

7 THE BOTTOM LINE

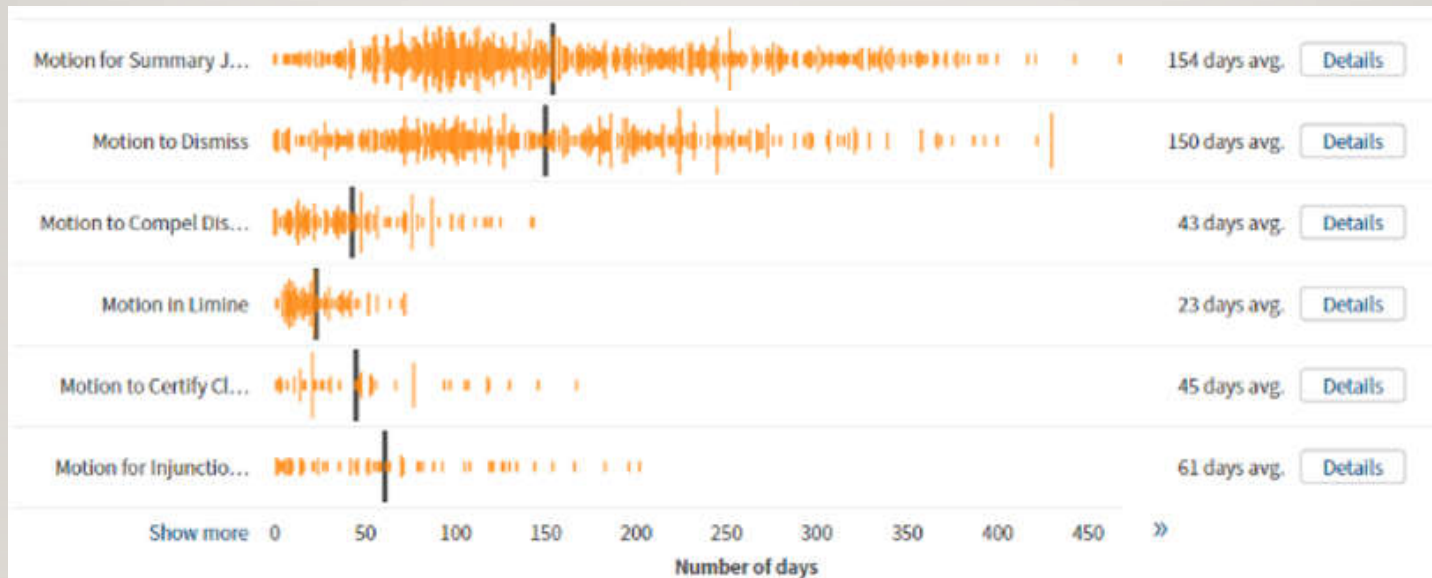
- “The better that judges are understood, the more effective lawyers will be both in litigating cases and, as important, in predicting the outcome of cases, thus enabling litigation to be avoided or cases settled at an early stage.”
 - Lee Epstein, William M. Landes & Judge Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, (Cambridge: Harvard Univ. Press, 2013).

8 ANALYTICS – STRATEGIC VALUE

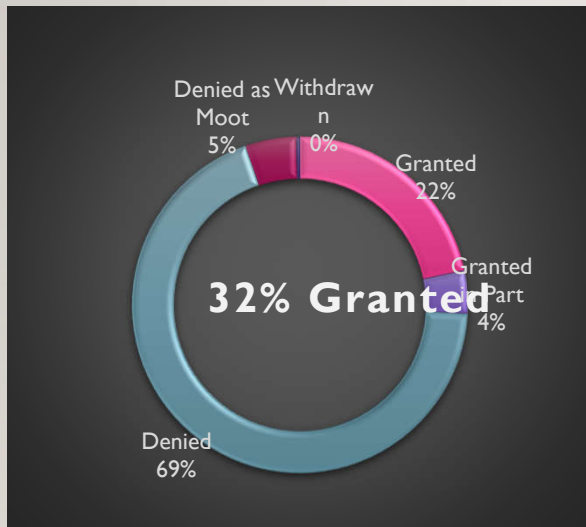


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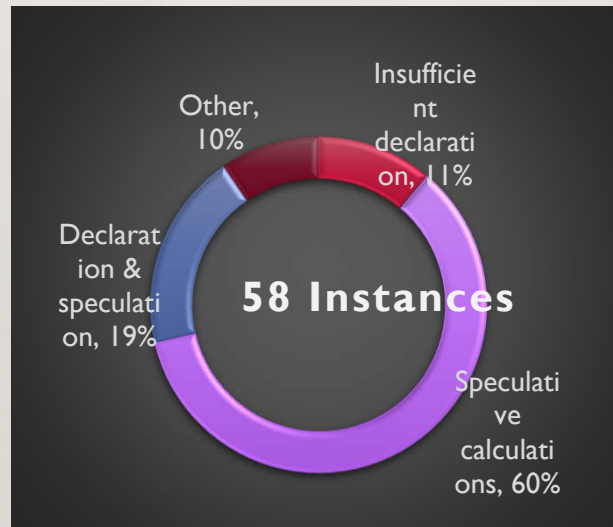
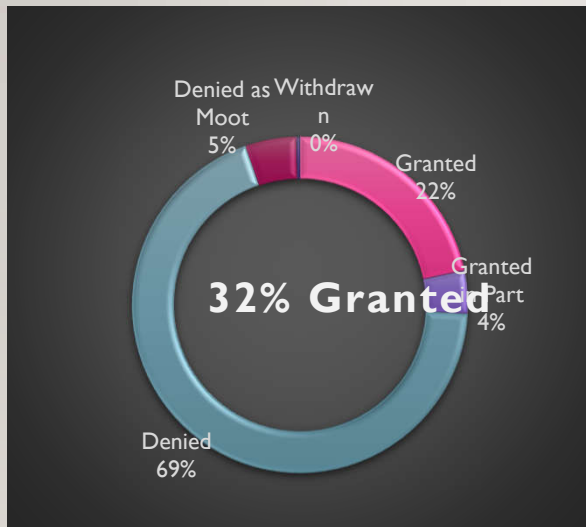
SELECTION OF COUNSEL / SETTING EXPECTATIONS



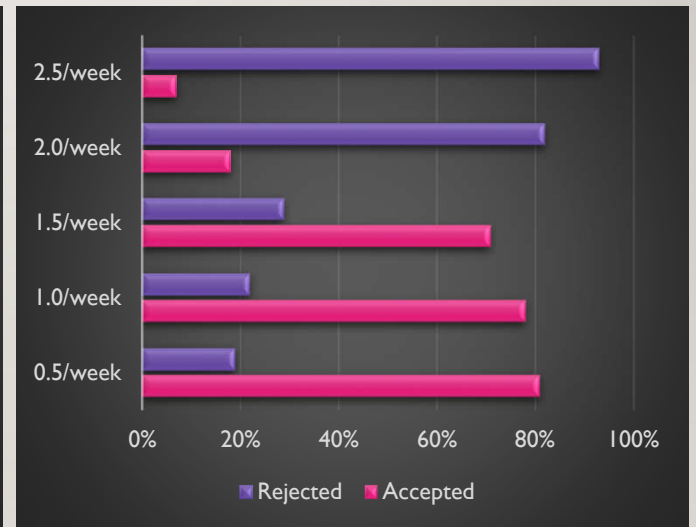
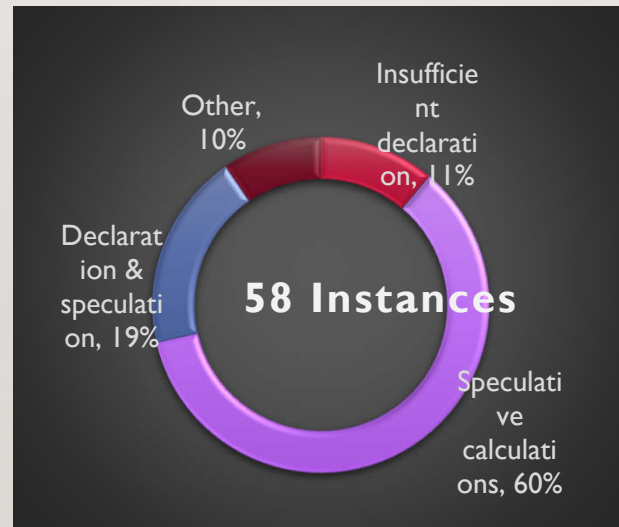
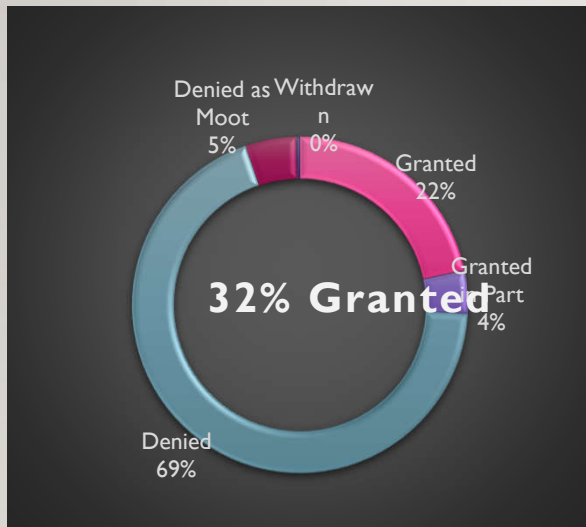
10 DESCRIPTIVE → DIAGNOSTIC



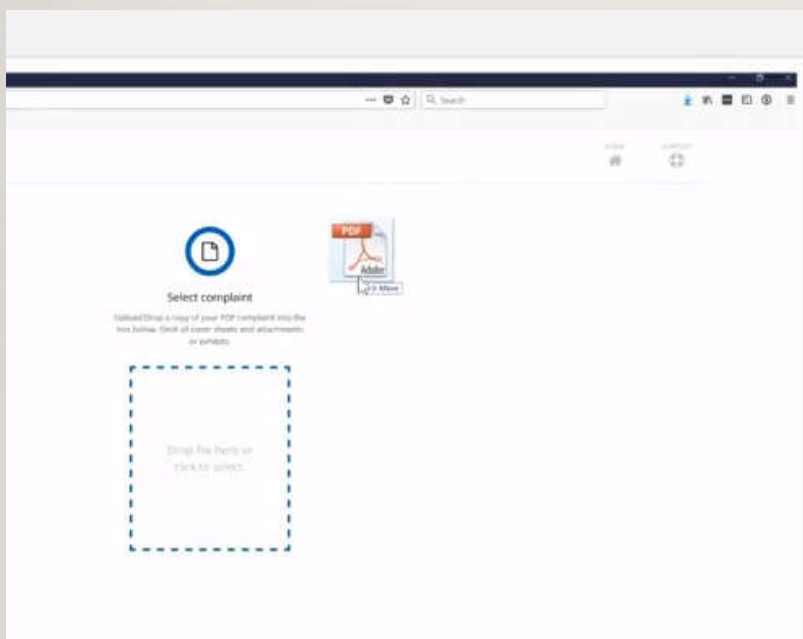
II DESCRIPTIVE → DIAGNOSTIC



12 DESCRIPTIVE → DIAGNOSTIC → PREDICTIVE



13 MACHINE LEARNING & A.I.



Step 1

Drag and Drop the Complaint

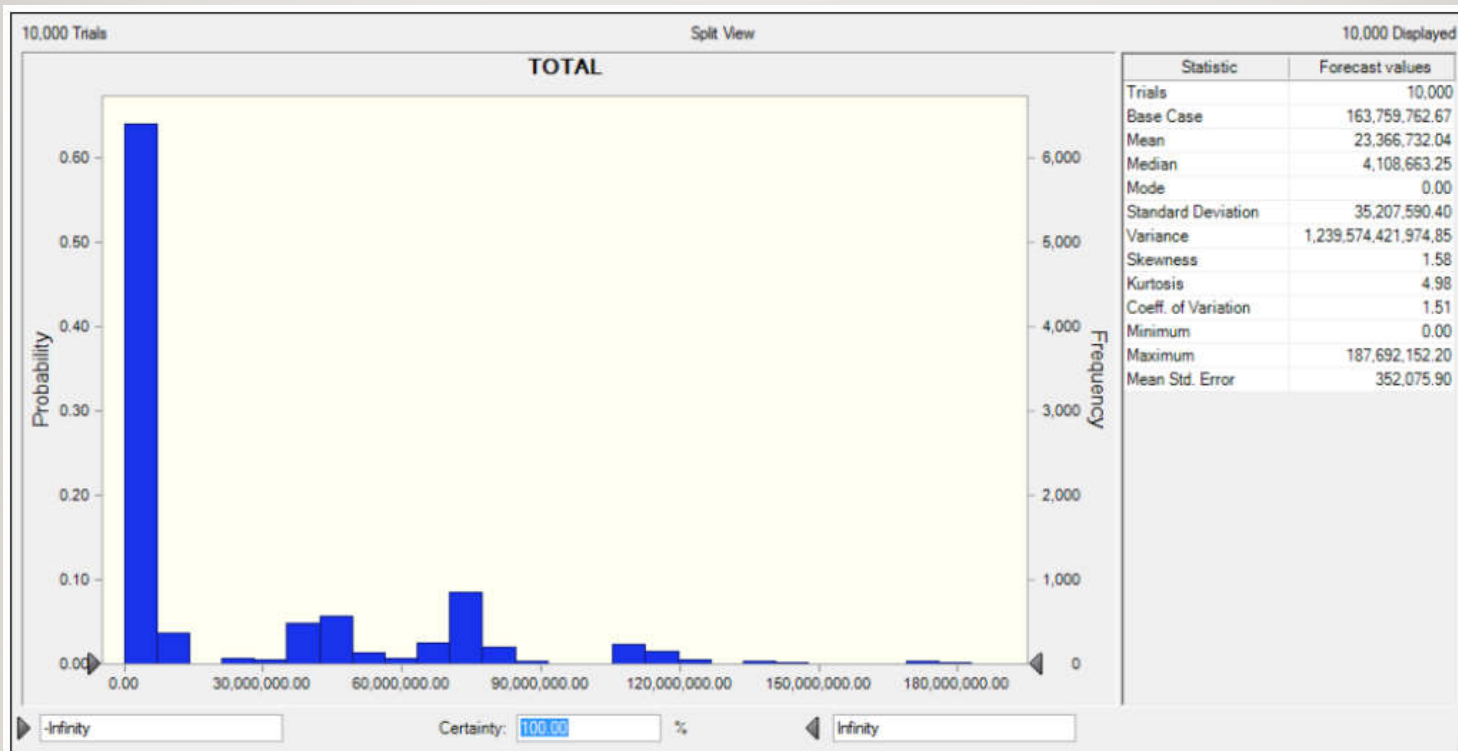
14 DIAGNOSTIC → PREDICTIVE →
PRESCRIPTIVE



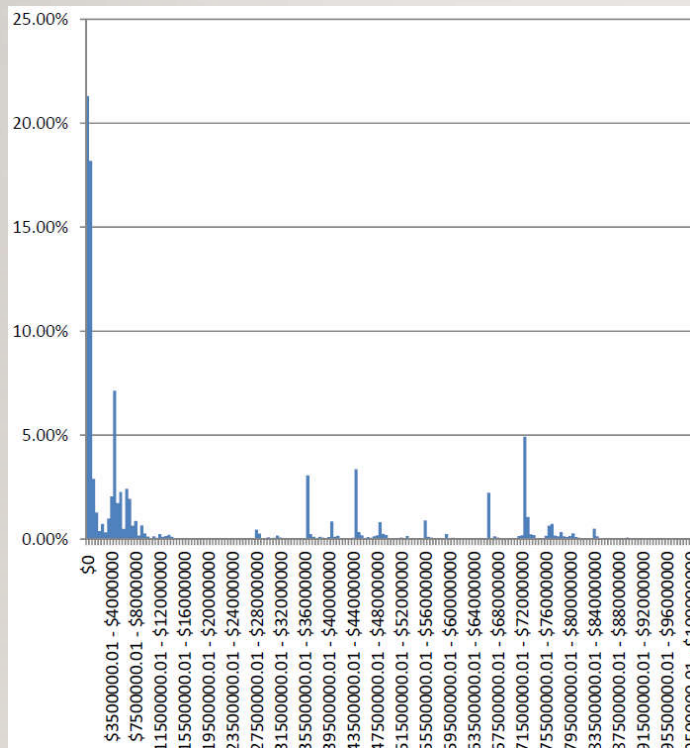
15 DIAGNOSTIC → PREDICTIVE → PRESCRIPTIVE

	Baseline Exposure (Low)	Baseline Exposure (High)	D Win on Mtn Dismiss (Low)	D Win on Mtn Dismiss (High)	D Win on Meal Waiver 6&Out (Low)	D Win on Meal Waiver 6&Out (High)	D Win on Cert (Low)	D Win on Cert (High)	D Win on MSJ (Low)	D Win on MSJ (High)	D Win Trial (Low)	D Win Trial (High)	PAGA Reduction (Low)	PAGA Reduction (High)
Meal	\$ 2,500,000.00	\$ 3,200,000.00	25%	45%	52%	55%	45%	65%	23%	35%	32%	55%	60%	83%
Rest	\$ 4,800,000.00	\$ 5,200,000.00	10%	25%	N/A	N/A	45%	70%	32%	70%	40%	70%	60%	83%
OTC - Min Wages	\$ 1,500,000.00	\$ 2,255,000.00	10%	25%	N/A	N/A	33%	55%	48%	50%	30%	60%	60%	83%
OTC - 1.5 Wages	\$ 400,000.00	\$ 625,000.00	10%	25%	N/A	N/A	33%	55%	48%	50%	30%	60%	60%	83%
OTC - 2.0 Wages	\$ 25,000.00	\$ 53,000.00	10%	25%	N/A	N/A	33%	55%	48%	50%	30%	60%	60%	83%
Unreimbursed Expenses	\$ 300,000.00	\$ 1,200,000.00	60%	75%	N/A	N/A	25%	65%	35%	70%	35%	75%	60%	83%
Split Shift	\$ 1,700,000.00	\$ 2,100,000.00	60%	80%	N/A	N/A	48%	70%	33%	55%	25%	45%	60%	83%
Reporting Time	\$ 1,550,000.00	\$ 1,870,000.00	60%	80%	N/A	N/A	65%	70%	N/A	15%	25%	45%	60%	83%
Wage Statements (226)	\$ 3,200,000.00	\$ 3,200,000.00	55%	75%	N/A	N/A	25%	50%	N/A	15%	25%	45%	60%	83%
Untimely Final Pay (203)	\$ 1,234,000.00	\$ 1,324,000.00	55%	75%	N/A	N/A	25%	50%	N/A	15%	55%	65%	60%	83%
Untimely Pay During Employment (204)	\$ 1,234,000.00	\$ 1,324,900.00	55%	75%	N/A	N/A	25%	50%	N/A	15%	55%	65%	60%	83%
Recordkeeping Violations	\$ 1,234,000.00	\$ 1,324,900.00	25%	55%	N/A	N/A	25%	50%	N/A	15%	55%	65%	60%	83%

16 DIAGNOSTIC → PREDICTIVE → PRESCRIPTIVE



17 DIAGNOSTIC → PREDICTIVE → PRESCRIPTIVE



**COUNT OF EVENTS
BY EXPOSURE AMOUNT
POST TRIAL DISCOUNT NOT INCLUDED**

	Exposure Amount	Count Of Events	Pct. Of Counts
Total		10,000	
1.	\$0	2,129	21.29%
2.	\$.01-\$500000	1,818	18.18%
3.	\$500000.01-\$1000000	289	2.89%
4.	\$1000000.01-\$1500000	127	1.27%
5.	\$1500000.01-\$2000000	38	0.38%
6.	\$2000000.01-\$2500000	72	0.72%
7.	\$2500000.01-\$3000000	32	0.32%
8.	\$3000000.01-\$3500000	99	0.99%
9.	\$3500000.01-\$4000000	204	2.04%
10.	\$4000000.01-\$4500000	714	7.14%
11.	\$4500000.01-\$5000000	172	1.72%
12.	\$5000000.01-\$5500000	226	2.26%
13.	\$5500000.01-\$6000000	48	0.48%
14.	\$6000000.01-\$6500000	241	2.41%
15.	\$6500000.01-\$7000000	193	1.93%
16.	\$7000000.01-\$7500000	64	0.64%
17.	\$7500000.01-\$8000000	87	0.87%
18.	\$8000000.01-\$8500000	16	0.16%
19.	\$8500000.01-\$9000000	65	0.65%
20.	\$9000000.01-\$9500000	27	0.27%
21.	\$9500000.01-\$10000000	12	0.12%
22.	\$10000000.01-\$10500000	4	0.04%
23.	\$10500000.01-\$11000000	13	0.13%
24.	\$11000000.01-\$11500000	6	0.06%
25.	\$11500000.01-\$12000000	23	0.23%
26.	\$12000000.01-\$12500000	11	0.11%
27.	\$12500000.01-\$13000000	14	0.14%
28.	\$13000000.01-\$13500000	20	0.20%
29.	\$13500000.01-\$14000000	10	0.10%
30.	\$14000000.01-\$14500000	1	0.01%
31.	\$14500000.01-\$15000000	-	0.00%
32.	\$15000000.01-\$15500000	1	0.01%
33.	\$15500000.01-\$16000000	1	0.01%
34.	\$16000000.01-\$16500000	1	0.01%
35.	\$16500000.01-\$17000000	1	0.01%
36.	\$17000000.01-\$17500000	1	0.01%
37.	\$17500000.01-\$18000000	-	0.00%
38.	\$18000000.01-\$18500000	1	0.01%
39.	\$18500000.01-\$19000000	-	0.00%
40.	\$19000000.01-\$19500000	-	0.00%

40% chance below \$500k

Below 0.4% chance between \$10M-11M

Below 4.5% chance above \$11M

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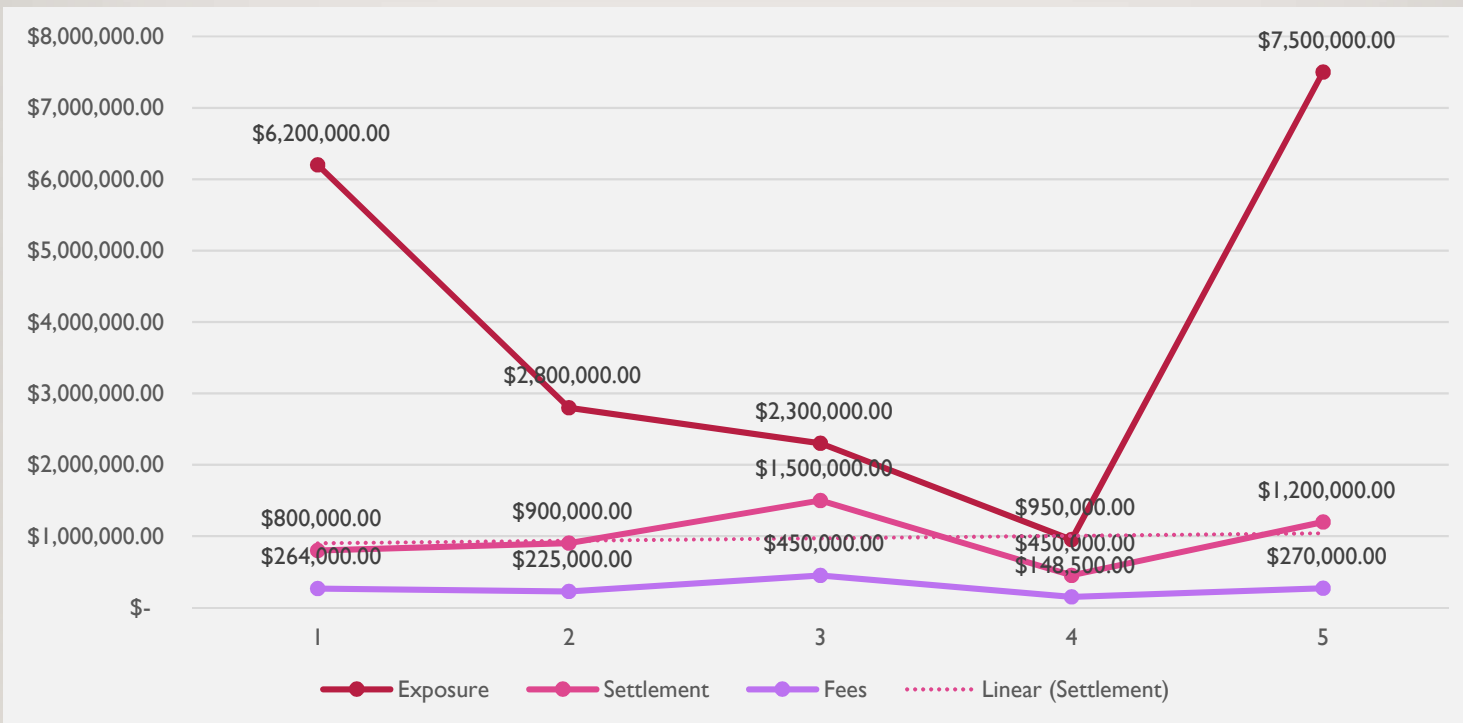
IMPROVING THE DISCOVERY PROCESS WITH PREDICTIVE ANALYTICS AND BIG DATA

- Drafting discovery
- Responding to discovery
- Document review and production
- Legal holds
- Impact on sampling

19 IMPROVING MOTION PRACTICE WITH PREDICTIVE ANALYTICS & BIG DATA

Total number class certification cases Judge [REDACTED] resolved re meal period claims	48	N/A
Class certification denied on meal period claim	17	35%
Reconsideration granted on class certification	1	2%
Top cases cited:		
* Brinker Restaurant Corp. v. Super. Ct., 53 Cal. 4 th 1004	47	98%
* Ashcroft v. Iqbal, 566 U.S. 662 [???	23	48%
* Belaire-West Landscape v. Sup. Ct., 149 Cal.App. 4 th 554	44	92%
* Kephart v. Genuity, Inc., 136 Cal.App. 4 th 280 [???	28	58%
* Wal-Mart v. Dukes, 564 U.S. 338 [???	11	23%

20 INSIGHTS REGARDING CASE VALUATION



21 ANALYTICS AT THE COUNSEL SELECTION LEVEL

- Researching your target before a counsel “beauty contest” (Lex Machina, Bloomberg, Ravel)
 - Nature of the target’s litigation
 - Does the company have more or less litigation than its competition
 - Is their win rate higher or lower than their competition
 - What trends over time?
 - Is the company’s current counsel winning or losing more than competition

22 PREPARING FOR COUNSEL SELECTION

- Researching other candidates for the target's business (all vendors)
 - Compare their win rate for the target with others
 - How experienced in this kind of litigation, this jurisdiction and/or this judge
- Researching yourself
 - What do the analytics vendors have on you and/or your law firm?
 - Self defense – you may think you don't need it, but what if the general counsel already has it?

23 ANALYTICS IN TRIAL PREPARATION

- Evaluating the opposing party
 - Plaintiff's side - Bloomberg – integrated with their library of 70,000 publicly held and 3.5 million private companies. Restrict by jurisdiction or date; whether to include or exclude subsidiaries. What's their record in court? Similar suits in other jurisdictions? Outcomes?
 - Lex Machina – the comparator app
 - Defense side – research a corporate or individual defendant. Premonition Analytics – larger state court database than Lexis, Westlaw and Bloomberg combined? Determine a plaintiff's litigation history, what worked and didn't in their prior suits, search pleadings for possible admissions.

24

EVALUATING YOUR ASSIGNED JUDGE

- Ravel Law – every federal judge and magistrate in the country, all state appellate judges
- Premonition Analytics – much bigger state database than competitors
- Results can drive possible peremptory challenge of judge, or removal from state court
- How experienced is your judge in the subject area? How often summary judgment/dismissal pre trial? Range of jury verdicts? Winning percentage for plaintiffs/defendants?
- Ravel and Bloomberg – how often is your judge cited by other courts (one indication of respect of peers)? How often appealed, and how often reversed? Are reversals concentrated in one area of law? Check Premonition Analytics for updates throughout!
- Lex Machina Comparator – Is the judge slow to decide cases? Compare outcomes and legal findings

25

ANALYTICS IN DISCOVERY AND MOTION PRACTICE

- Ravel Law – comprehensive data for every Federal judge – results on 90+ types of motion – summary judgment, dismissal, stay proceedings, remand to state court, certify for interlocutory appeal, motions to compel, motions in limine
- Lex Machina’s Motion Kickstarter – Links motion data directly to parties’ briefs and court’s order – discover which arguments prevailed with the judge
- Ravel Law – visualizations to see, doing legal research, which passages of case were cited by which judges. Or – directly identify which cases and passages trial judge cites

26 ANALYTICS AT TRIAL

- Premonition, Lex Machina, Ravel, Bloomberg – check judge databases and motion platforms
 - Do the judge's cases tend to go longer than other judge's in the jurisdiction? Might enable counsel to infer judge isn't strict with parties in trial
 - Check the motion database to determine the judge's handling of jury instructions
 - Judge's history with motions for new trial/JNOV – is judge more likely to grant one or the other – be sure to check the briefs/order on useful priors
 - Judge's history with constitutional challenges to punitive damages awards
 - Judge's history with remittiturs of compensatory damages

27 ANALYTICS ON APPEAL

- All vendors have comprehensive information on all Federal and most state appellate judges
- The building blocks for predicting likelihood of favorable result for client
 - How often does your COA reverse? Particular areas of law?
 - Individual judges' voting records – conservative or liberal (advance beyond the anecdotal impression)? Any leanings towards a particular kind of plaintiff/defendant?
 - How often is your COA reversed?
 - COA's favorite authorities for certain propositions
- How fast do cases in your COA go – crucial for budgeting and timing of receiving/paying judgment

28

WHAT IF THERE'S NO DATA? HOW TO THINK ABOUT AN APPELLATE PANEL (THE ACADEMICS)

- Charles Grove Haines, “General Observations on the Effects of Personal, Political, and Economic Influences on the Decisions of Judges,” 17 Ill. L. Rev. 96 (1922)
- C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*
- The Supreme Court Database – Originated by Professor Harold Spaeth. 247 variables for every SCOTUS decision since 1791
- Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice* (2013)

29

PANEL EFFECTS – THE EMPIRICAL LITERATURE

- “Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,” by Cass R. Sunstein, David Schkade, Lis Michelle Ellman (2003)
 - 4,488 published decisions and 13,464 separate judge votes
 - Democratic judge – 60% liberal; Republican judge – 46% liberal
 - DDD panel – 66% liberal; RDD panel – R is 54%
 - DRR panel – D is 53% liberal; RDD – R is 34% liberal

30 IDEOLOGICAL AMPLIFICATION & DAMPENING

- Affirmative action – RRR upholds program 37%; DDD upholds 82%
- Sexual Harassment – DDD for plaintiffs 76%; RRR for plaintiffs 32%
- Corporate veil-piercing – DDD for plaintiffs – 67%; RRR for plaintiffs – 23%; RDD – R for plaintiffs 37%; DRR – D for plaintiffs 29%
- Environmental regulation – voting against the industry challenger
 - RRR – 27%; RRD – 50%; RDD – 63%

3 | IDEOLOGICAL AMPLIFICATION & DAMPENING II

- Campaign finance – percentage voting to uphold regulation

RDD	RRD	RRR	DRR	DDR	DDD
35%	30%	23%	40%	38%	73%

32 PANEL EFFECTS IN VOTING RIGHTS ACT CASES

- Democratic Judge voting to find liability – 3 Democrats 40.7%; 2 Democrats 32.8%; 1 Democrat 27.8%
- Republican Judge voting to find liability – 3 Republicans 11.1%; 2 Republicans 21.3%; 1 Republican 23.9%

33 THE RETURN OF COLLEGIALLY?

- In the great majority of Circuits, individual Judge's vote predicted as well or better by the party of the President who appointed the other two Judges as it is by the party of the President who appointed him/her
- Reasons for ideological amplification
- Reasons for ideological dampening

34

THE PHENOMENON OF DISSENT AVERSION

- Richard Posner, Lee Epstein & William Landes, “The Economics of Dissent Aversion: A Theoretical and Empirical Analysis”
 - Dissent rate is strongly correlated with ideologically diverse panels
 - Is dissent more likely in a reversal?
 - Raising the importance of the majority opinion?
 - What are the costs of the dissent to the dissenter?
 - Does a dissent impose costs on the rest of the Court?



35 DISSENT AVERSION II

- Jeffrey Segal, Lee Epstein, Chad Westerland, Charles Cameron & Scott Comparato, “Strategic Defiance and Compliance in the U.S. Courts of Appeals,” *American Journal of Political Science* 54: 891-905 (2010)
 - Random sample of 500 Supreme Court cases, yielding 10, 198 subsequent treatments in the Circuits
 - Does it matter if a lower Court believes that the current Supreme Court has shifted from the enacting Supreme Court?
 - Does it matter what earlier decisions of the lower Court did with a Supreme Court precedent?

36

DO MEN AND WOMEN APPROACH APPELLATE JUDGING DIFFERENTLY?

- Justice Sotomayor: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t live that life.”
- Robert S. Erickson, “Treating Appellate Court Assignments as a Natural Experiment: Gender Induced Panel Effects in Sex Discrimination Cases”
 - 435 Federal gender discrimination cases, 1995-2002
 - Female judges about 15% more likely to vote for liability in gender discrimination cases than male counterparts – significant at .01 level. Male judges nearly as likely to find liability with at least one woman on the panel

37 GENDER AND APPELLATE JUDGING II

- Renee Nicole Souris, “The Impact of Panel Composition on Sex Discrimination Case Outcomes at the U.S. Circuit Courts”
 - Examined 415 Federal cases – Sunstein database, as modified by Prof. Epstein
 - Logistic regressions for a wide range of gender-based causes of action
 - With at least one female judge and all female plaintiffs, odds of plaintiff prevailed increases 285%

38 GENDER AND APPELLATE JUDGING III

- Jennifer L. Peresie, “Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts,” 114 Yale L.J. 1759 (2005)
 - 556 Federal appellate decisions, 1999-2001 – Title VII gender discrimination & harassment
 - Controlling for other factors, gender increased probability of plaintiff vote from 22% to 41% in harassment, 17% to 28% in gender discrimination
 - For harassment, gender a more significant predictor than Democratic appointment, and equally significant for discrimination
 - Sitting with a female judge (controlling for ideology) increased likelihood of male judge voting for plaintiff from 16% to 35% harassment, 11% to 30% discrimination. Far more significant predictor than appointment by a Democratic president

39 EMPATHY AND PANEL EFFECTS?

- Adam N. Glynn & Maya Sen, “Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women’s Issues,” *American Journal of Political Science*, Vol. 59, No. 1, January 2015
 - Matching data on judges’ families to nearly 1,000 gender-related cases
 - Controlling for ideology, having daughters causes a male judge to vote for plaintiff 9% more often
 - Largely driven by Republican judges – 7% increase in plaintiff votes, statistically significant
 - Effect for Democratic judges is 4% and not statistically significant

WHAT DOES ORAL ARGUMENT TELL US ABOUT CASE OUTCOMES?

- Sarah Levien Shullman, “The Illusion of Devil’s Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument,” *The Journal of Appellate Practice and Process*, Vol. 6, No. 2 (Fall 2004), pp. 271-293
 - Ten oral arguments at SCOTUS – 1-5 score (helpful/hostile) – Party asked the most questions generally lost
- John G. Roberts, Jr., “Oral Advocacy and Re-Emergence of a Supreme Court Bar,” *30 Journal of Supreme Court History* 68 (2005)
 - Number of questions in first & last cases of each session 1980 term, and each session, 2003 term
 - Side asked more questions far more likely to lose
 - So apparently “the secret to successful advocacy is simply to get the Court to ask your opponent more questions.”

41 ORAL ARGUMENTS II

- Richard Posner, Lee Epstein and William Landes, “Inferring the Winning Party in the Supreme Court From the Pattern of Questioning at Oral Argument”
 - Reviewed all SCOTUS transcripts from 1979 to 2007
 - Counting words, not just questions
 - Petitioners won 62% of all cases; where respondent’s questions involved more words, 72% for petitioners; where petitioner’s questions involved more words, petitioner wins 50%
 - Where respondent asked average number of questions (56), if petitioner gets 125 or more, likelihood of winning falls to 33%
 - Roberts, Stevens, Scalia, Souter and Ginsburg all more heavily question side they’re voting against – Alito & Breyer more equivocal

42 QUESTIONS?

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