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Session 3: Harnessing the Power of Information and Insight to Improve Strategic Decision Making and Choice

Moderator: Mary Beth Cantrell

Speakers: Randall Kiser, Dr. Alexander Insam, Donald R. Philbin, Jr.

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Pepperdine University in Malibu, California

I. BIOGRAPHIES

Mary Beth Cantrell is Senior Associate General Counsel at Amgen Inc., where she is responsible for and manages the company's securities litigation, antitrust matters, and other complex commercial cases. Cantrell has also had responsibility for governmental investigations of Amgen including qui tam actions, products liability litigation, third-party-payor litigation, consumer protection cases, class actions, and multi-district litigation (MDLs). Amgen, a Fortune 500 company, is a leading human therapeutics company in the biotechnology industry. The company pioneered the development of novel products based on advances in recombinant DNA and molecular biology and launched the biotechnology industry's first blockbuster medicines. Prior to joining Amgen in 2003, Cantrell was a partner in the office of Holland & Knight in Orlando, Florida.

Randall Kiser is a Principal Analyst at DecisionSet® in Palo Alto, California, and an international authority on legal decision-making. Kiser is the author of two books on legal judgment and conflict resolution, *Beyond Right and Wrong: The Power of Effective Decision Making For Attorneys and Clients* (Springer, 2010), and *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy* (Springer, 2011). He also is the lead author of the largest multivariate study of settlement decision making, "Let's Not Make A Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" (*Journal of Empirical Legal Studies*, Vol. 5, Issue 3, September 2008). The *New York Times* described that study as "the biggest of its kind to date" and noted that it "raised provocative questions about how lawyers and clients make decisions." Kiser teaches legal decision

making at the University of Washington School of Law, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the Saltman Center for Conflict Resolution at the University of Nevada, Las Vegas. He received his law degree in 1978 from the University of California at Berkeley and was awarded his undergraduate degree with highest honors in 1975 from the University of California, Davis.

Dr. Alexander Insam is a Partner of KPMG and KPMG Law Germany and a member of KPMG Germany's CHRO Services Leadership Team with over 320 human resources experts, consultants, tax specialists, labor lawyers, and mediators. He specializes in the strategic analysis and modification of employment conditions and remuneration systems, especially for the financial services industry. Additionally, Insam uses the tools of mediation to help executives and employees to use their working hours more efficiently and to increase their level of cooperation. As a mediator, he has conducted numerous high-profile mediations at the workplace during the last eight years. Currently, he is involved in continuing mediations concerning structural conflicts and labor disputes in the aviation industry. Insam headed two studies on conflict costs conducted by KPMG in 2009 and 2012. From 2009 to 2014 he acted as a director at the Center for Conflict Cost Research (Zentrum für Konfliktkostenforschung) at the Humboldt-Viadrina School of Governance in Berlin, Germany, and was appointed member of the editorial board of the German journal *Die Wirtschaftsmediation (The Business Mediation)* in 2013. In addition, Insam held positions as Assistant Professor for Business Mediation at the Universities of Heidelberg and Bayreuth for more than five years. He lives in Seeheim near Frankfurt, Germany.

Don Philbin was named Lawyer of the Year for Mediation in San Antonio by Best Lawyers in 2014 and 2016, was recognized as the 2011 Outstanding Lawyer in Mediation by the *San Antonio Business Journal*, is one of eight Texas lawyers listed in *The International Who's Who of Commercial Mediation*, and is listed in Texas Super Lawyers. 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. Philbin's software company, Picture It Settled®, is "Moneyball" for negotiation. Philbin's behavioural software has learned negotiating patterns from parties to thousands of litigated cases in a wide variety of jurisdictions and claim types. It uses that intelligence to make accurate predictions of where a negotiating round is headed in time for parties to act on that intelligence using the program's planning tools. The planning tools allow users to fine-tune their target settlement and project what impact a particular move might have on the round before making it. The result is more settlements on more advantageous terms.

II. SPEAKER PRESENTATIONS¹

Randall Kiser: Good afternoon and thank you for the invitation to discuss managing conflict with big emotions and big data. Today my remarks will start with a brief assessment of the quality of corporate legal decision-making. We will then move to our main theme, which is managing conflict with both big emotions and big data. We will conclude by attempting to understand how we can better evaluate improvements in conflict management.

Starting first with an assessment of corporate legal decision-making, I would like to share with you three snapshots of legal decision-making, starting with the courts, then moving to corporate executives, and concluding with corporate counsel. When we first look at the courts, my company measures decision errors. We define a decision error as proceeding to trial or arbitration and obtaining a worse result at trial or arbitration than you would have obtained simply by accepting the other side's pre-trial settlement offer. It is a measure of a financial loss usually caused by optimistic overconfidence. When we look at the frequency of these decision errors, we find that corporations actually show a higher frequency of decision errors when they are defendants than the other types of defendants. As you can see [referring to slide], the first column is "Corporations," evidencing a decision error rate of 33%. This compares unfavorably with the decision error rate of 23% for unincorporated businesses, public entities, and female individuals. As you can see, male individuals have a slightly lower decision error rate of 21%.

Shifting our attention to corporate executives, I'd like to share with you the results of the Fieldfisher survey. As many of you know, Fieldfisher is an international firm headquartered in London. When they surveyed their corporate executive clients, they found that nearly half reported that "a personal dislike of the other side has led them into expensive and time-consuming litigation." About two out of every three acknowledged that "emotion and personal pride adversely affected their chances of reaching a commercial resolution." Perhaps even more tellingly, three out of four said that "a lack of focus on the weakness of their own case has contributed to the escalation of a dispute." And perhaps the very reason why we are all here

1. These presentations have been modified to conform to the compositional criteria of this Volume. For the complete video of these presentations, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 – Session 3*, YOUTUBE (Dec. 3, 2015), <https://youtu.be/h9daG6K3mC8> [hereinafter Presentation Three Video].

today is that about 80% are reporting that “dispute resolution is not handled very well in our organizations.”

When we try to understand what is in the minds of corporate counsel, we find some more disturbing information. My company has conducted extensive surveys of the decision-making styles and practices of corporate counsel. What we find is that invariably they say that accurately assessing the likely outcome of a legal problem is essential to an attorney’s success in our firm. But when we ask them, “How many of you actually compare your assessment of the likely outcome with what actually happened?” we find across the board that barely a majority say they do that. When we ask the critical question, “Do you agree with the statement that ‘my legal department has methods for measuring and improving attorneys’ decision-making and problem-solving?’”, we find that virtually all of them say “disagree.” In fact, most corporate counsels disagree with that statement. The most alarming results we found were when we surveyed a large number of high-tech companies. Only 6% of corporate counsel said that they slightly agreed with the statement that “their legal department had methods for improving attorneys’ decision-making skills.” And 94% either strongly disagreed or slightly disagreed with that statement. I share this data with you to indicate there appears to be more than ample room for us to improve our decision-making in conflict situations. The LexisNexis survey of attorneys confirmed that, as you see it [referring to slide], 87% say their case assessments are performed “on an informal basis,” and we appear to have very few sound, formal practices in evaluating and resolving conflict.

My theme today is managing conflict with big data and big emotions. We so often hear the term, “big data,” and my firm does a tremendous amount of work with big data. But lost in that emphasis on big data is the importance of big emotions. Most of us are making our decisions in this middle area [referring to slide] called, “bounded rationality.” It’s not entirely emotional and, yet, it’s not entirely data-driven. The style or method that we use to resolve conflict depends on how we’re feeling that day, what we think about the people who are asking us to participate in resolving conflict, and the ease with which we can access information to resolve that conflict. Bounded rationality is also known as “Anecdotal”—a little bit of anecdote and a little bit of data. I am urging you this afternoon to start stretching your conflict resolution skills in both directions to become simultaneously more emotion-driven and more data-driven. One response to this is, “these are contradictory concepts. We can’t do both.” I would suggest to you with the utmost kindness that that was *Managing Conflict 1.0*. *Managing Conflict 4.0* is embracing both the need to become more emotionally sensitive to and aware of people and the need to expand our conflict resolution repertoire to embrace big data. Just as we have developed opposable thumbs that enable us to have much more dexterity in handling

tasks, we need to develop opposable minds so that we can toggle back and forth easily between the data-driven decisions and the emotion-driven decisions.

Turning first to the emotions. When I work with attorneys and counsel them on retrospective evaluations of adverse outcomes—which is a nice way of saying, “really bad decisions that hit the bottom line in a big way”—so often I hear this response from an attorney: “So, Randy, you’re saying I was too emotional.” Invariably, my response has to be something like this: “It’s much more complex than that. You are emotional when the situation calls for more detachment and you are detached when the situation calls for a greater degree of empathy and emotional understanding.”

What we know from the neuroscience field is that our effort to drive emotions out of case evaluation and decision-making over the last 2,500 years has been an abject failure. What we have learned is that people are and will continue to be fundamentally emotional decision-makers. The most recent neuroscience research tells us that people feel first, act second, and think later. The sequence of ready, aim, fire is actually reversed in our decision-making practices. We fire first, we aim, and then we spend a lot of time getting ready to explain why we did what we did. It turns out that we make decisions before we’re even aware that we make decisions. When we can record the neuro-processing of a decision, we find that people are making a decision anywhere from a fraction of a second to up to fifteen seconds before they are even aware that they have made a decision. This is why we have to conclude that we are not so much *rational* decision-makers or evaluators as we are *rationalizing* decision-makers and evaluators. The belief that has permeated our behavior for 2,500 years is if we could just drive the emotions out of decision-making, all of our decisions would improve. What we know now is, first, that’s never going to happen, so isn’t it about time to give up on it? And secondly, when we can study people whose emotional capacities have been eliminated, usually due to brain damage, they’re not very good decision-makers anyway. Among other things, they lack the ability to prioritize and to establish preferences and, perhaps most importantly, they lack the capacity to anticipate how other people will react to them and their ideas.

A key finding is that the connections from the parts of the brain associated with emotions to the deliberative functions are stronger than the connections from the deliberative parts or the executive parts of the brain to the emotions. The practical effect of this is that our emotional responses and functions can more easily override our deliberative functions than the deliberative functions can override the emotional functions. We also know that when we look at processing speed, the emotional parts of the brain are

processing new information at five times the speed of the executive portions of the brain. When we've actually been able to put strategic decision-makers in MRI machines and give them business simulations, we were surprised to find out that the most strategic performers had a remarkable capacity to toggle back and forth between their executive functions and their emotional functions. Contrary to the myth that good decision-makers just focus on facts and rationality, we have learned that the best decision-makers actually spent some time shutting down the executive functions of their brain so that they could spend more time understanding how other people would react to their proposed ideas and strategies. As the study indicated [referring to slide], they consciously downplayed executive function. This goes against most of what we have been teaching about rational thought and action during the last 2,500 years. Max Bazerman at Harvard Business School has been teaching negotiation for decades and his research tells us that these soft skills—the emotion-driven factors like trust, familiarity, and rapport—are actually as important, if not more important, than the actual merits of positions, especially when we're trying to negotiate win-win outcomes.

Let's shift our attention to big data. What is big data? The term, itself, is a misnomer. Big data alone does not give us much capability. Where we get the predictive power from is large data sets and the ability to identify predictor variables and write algorithms to predict outcomes. A more accurate description of big data would be, "big algorithms," but I'm sure as you hear that resonate in your ears, you understand "big data" is a much better sound bite than "big algorithms." That's why we don't call it "big algorithms." Now, I define big data as the systematic collection and analysis of large volumes of data primarily for the purpose of prediction. When many people see this word, "prediction," they think, "Randy, you need to understand we're in the conflict-resolution business; we're in the legal services business; I'm not a business executive, and we don't do any of this prediction or forecasting stuff." When I hear that, I'm reminded of former Prime Minister Tony Blair's remark when he was asked about why events didn't turn out in the Middle East the way he had told the reporters that he had expected them to. He was a little bit uptight when they started questioning him. He took umbrage and turned to them and said, "I don't make predictions; and I never will." I think that reaction shows us how deeply-embedded in all of our thought processes this need to predict and simulate is. We're making literally thousands of predictions every day. You ran a simulation and you made a prediction when you decided what time to walk away from your seat at lunch to be here on time. Our life is imbued with predictions and this is why there is such a focus on learning how to accurately predict. Fundamentally, for our business, the conflict resolution business, we need to recognize that what we term BATNAs, PATNAs, and

WATNAs are really all forms of predictions. Since we really are in the prediction business, we need to recognize as Oliver Wendell Holmes told us more than a hundred years ago, that the practice of law is really nothing more than the business of prediction—what he called “systematized prediction.” What he told us is that, although we think of ourselves as lawyers providing legal information, clients don’t care “two straws” about what the law is. They don’t care *anything* about the rule against perpetuities. What they want to know is, “What happens to my Blackacre when I die?” That’s why ultimately law is the practice of prediction.

When we look at this core question of, “Who’s better at prediction?”—the human hand on the left or the computer, the model on the right [referring to slide]—the disturbing news is that the model on the right, the mechanical method of prediction, is invariably superior. One reason for that is that we cannot escape the biases that we bring to every form of human evaluation and prediction.

The first attack on unaided human judgment came from Paul Meehl. He conducted a meta-analysis in 1989 of 150 studies of prediction. They could be anything from correctly diagnosing a patient to predicting how well someone would perform after they were hired. Every one of those 150 studies indicated that actuarial methods—what we think of as statistical models—were always superior to the human model. As he pointed out, we receive very little feedback for our decisions and that is one reason why we are not particularly good at forecasting. In my earlier remarks, I talked about this gap between corporate counsel saying that accurately assessing outcomes is absolutely essential to an attorney’s success and then the reality that nobody does that. That’s an example of the lack of feedback that prevents us from becoming the accomplished forecasters that we actually could be.

Paul Meehl’s study was updated in the year 2000 by Professor Grove. He looked at 130 new studies and could find only eight studies where human judgment was superior to quantitative models. Upon closer analysis, it turned out that in those eight studies there were exceptions. The humans actually were given more information than the computer was given. We really can’t even find eight where we’re showing better predictive capacity. Now what’s kind of comforting, at least for me, is that we’re not that far off; the average human had 66% accuracy rating compared with 73% for the quantitative models. It’s a significant difference but it doesn’t indicate that we would never have the capacity to improve our decision-making. In our study of attorneys and decision errors, we find that if you aggregate plaintiffs’ and defense attorneys, their accuracy rate is about anywhere from 52% to 56%. Not much better than chance.

Applying this to law, Theodore Ruger thought, “What a great opportunity to compare statistical models with human forecasting by looking at all the decisions that were to be made by the U.S. Supreme Court for the next term, then seeing what the experts predicted, and then comparing that with the statistical model.” Of course, the statistical model is a really lousy lawyer; it doesn’t know anything about the law. All it knows is what happened with these justices over the years in which they’ve been voting based on type of case and prior voting before they were even on the U.S. Supreme Court. He assembled a dream team of Supreme Court experts: thirty-eight former law clerks, thirty-three chaired professors, and five current or former deans. Well, when the term was over, they compared what were the predictions of the dream team versus this dumb computer software program that had never passed the bar, is never going to take the bar, and doesn’t know anything about the law. This is what happened: the model predicted accurately 75% of the Court’s results and the dream team got about 59%. This has since been done on a massive scale retrospectively for six decades of decisions. Again, the actuarial model was remarkably accurate.

Because the statistical models worked so well in predicting outcomes, you can see [referring to slide] that they’re being employed in almost every area of law—from attorney hiring decisions, through Lawyer Metrics, which is run by Bill Henderson at the University of Indiana, to Lex Machina doing a great job on IP case predictions. We actually tried to build a model and found we could model almost anything except IP cases because they were much more game theoretic than our other case types. Don Philbin is going to talk with you about his software programs that predict outcomes in negotiations: *Picture It Settled*. Most of the turbulence in law schools and for entry-level attorneys is ultimately due to the changes brought about by big data. That’s why you won’t find first and second-year associates on document management and document production cases; all of that is done by software. During the last two or three decades, whether we were looking at due diligence or manual discovery, many attorneys spent their first two to three years in practice, often in some warehouse that you leave for on Sunday night and come back on Friday night if you are lucky. And although nobody knew what due diligence was, we knew that it had to be done and the only way to do it was to send ten associates to some warehouse in Des Moines. For years, this was what we called “training.” All of that work is gone. It’s gone forever.

Lastly, turning to how we might be able to measure improvements in conflict resolution. The key ratio for many of you is total legal spending as a percentage of revenue. All depending on the type of industry you are in—that will range from 0.2% to 1.2%. Not surprisingly, the corporations that are spending about 1% of their total revenue on legal services are in the

financial services industry and other industries are showing dramatically lower rates, sometimes as low as 0.18%. Another thing we want to keep track of is number and types of claims and trends. The reason for this is that even if our percentage is going down, if we find that there's no change in the number of claims, then there's something fundamentally wrong with what we're doing. Reducing costs is only one measurement, but ultimately, if we're doing things right as conflict resolvers, we're actually not only reducing the costs, but we're also reducing the occurrence. The emphasis on reducing types of claims dovetails with Alexander's [Insam, KPMG Germany] presentation where he will talk in part about systemic problems. When we find that there's no reduction in the number of types of claims, we find that that may be a systemic conflict that needs to be dealt with differently. Increasingly, corporations and those of us in the conflict resolution business are focusing on cycle time. The reason we know that is so critical is that there's an immensely strong correlation between duration of conflict and cost of conflict. Very simply, the longer conflict goes on, the more expensive it is. Of course, this is part of the beauty and the attraction of arbitration and mediation if properly handled. Think of the informal methods that Scott [Partridge, Monsanto] has pointed out. Anytime we can reduce cycle time, we have a very good chance of reducing total cost.

I think we've covered a lot of data, a lot of territory, in a brief period. We've assessed the quality of corporate legal decision-making and recognized that it's not as we would like it to be. We then looked at the importance and the advantages of focusing on both emotions and big data. We then touched very briefly on methods to measure improvements in conflict management. Thank you very much and I hope this has been helpful.

* * *

Dr. Alexander Insam: I have been looking forward to this moment for one and a half years and preparing my speech ever since. I have to admit I'm a little depressed right now, because when I listened to all those great speeches today I realized, "Okay, I have a serious problem right now." It's about half past three and it's in the middle of the night in Germany, so I'm experiencing fatigue and stress and I'm not ready at all to talk to you. I'm very sorry I can't do it. This is probably not the answer you expect from someone who is professionally into conflict management. But it is another example of how often the unplanned strikes us. I am prepared after all. [Holding up a football and a hockey puck.]

When I think about conflict management, I basically think about American football and ice hockey. Today, I am going to tell you five

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secrets. Five secrets you probably already know have something to do with conflict management. The first one is this: when you think about conflict management, which resembles conflict management more? Is it like football with all those big guys on the field tackling each other? That sounds like conflict management, but do you know what? Football is actually, as I understand it as just a foreigner, a game of chess. You have a great playbook. You have all those great coaches, like Bill Belichick, and you have Tom Brady, the quarterback, who then throws the ball to the receiver that runs his route. If everything works as planned, you get that great touchdown. But you know what? That never happens in conflict management. You never get that time to even think about all the plays in the playbook.

Conflict management is actually a lot more like ice hockey where you have to make decisions in a split second. For one thing, you don't see the puck as well as the football. But, on the other hand, you only have a split second to make decisions. It's way faster. And as the first secret is about to be revealed we need to understand that conflict management is a lot more like ice hockey because we get more and more conflicts faster and faster. And there is a simple explanation to that: we are living in an age of dynexity.

What's dynexity? It's actually a scientific term made up of dynamics and complexity. That's what we are experiencing. We are in the age of globalization, digitization, and Internet speed. Everything moves faster and faster. When you think about how many emails you receive day in and day out, how many telephone calls you make, how many colleagues you contact, how many interactions there are, or how much multitasking you did while you are attending the conference today, you can feel that everything is getting faster and faster. And it is getting more complex, too, because when you work in a large organization, it makes a huge difference when you have ten colleagues, hundreds of colleagues, or thousands of colleagues. The number of possible communications and interactions multiplies exponentially. So we are having ever more conflicts and we can't do a thing about it. I really like what you said, Randy. We really have to simply accept it. So we can take that for granted.

What is the second secret? At KPMG, we are proud that we are quite good with numbers, so let's talk about big data. In 2009 and 2012, we did two studies about measuring the costs of conflict, and we came up with a model. Basically, this is what we did: in a workshop, I imprisoned a controller and a mediator and I said you can only leave this room when you come up with a combined model about how we can measure the costs of conflict. It took a couple days, weeks, and months until they finally reemerged, but then we had found a way that is actually quite simple. The simplest way to think about costs of conflict is the measure of the working

time that is lost by all the people dealing with the conflict instead of doing what they are normally paid to do for the employer.

The employer thinks like a football coach. He says, "I got a playbook and, in my playbook, I have a clear and written budget. I'm going to spend that budget on some employees, those employees will have a workload, they will carry out the workload, and I will gain revenue." And that's how everything goes. Do you find anywhere in that playbook the word "conflict management"? Not so often. Do you find a budget for conflict management? Not so often. It's like a planned playbook. So all of the working hours from people are allocated in how they do their work. I always ask a question about this when talking to employers, and they say, "Well Alexander, that sounds terrific but you know my people they are just working overtime and they do this conflict management overtime!" That sounds great at first, but there is a limit to that reasoning. It's called twenty-four hours a day. I've been working a long time at KPMG but I have never experienced someone working twenty-five hours a day. There are some people who claim to do it but it's just not possible because there is a limit. For some, the limit is not eight, but ten and twelve. Nevertheless, for everyone there is the limit of twenty-four hours a day. So even if we are spending money and even if we take into account all the time worked, if more and more conflicts arise, we need to find better ways. When we did the conflict cost studies, we came up with brilliant ways to measure the costs of conflict. If you are interested, you can Google it and download the cost of conflicts studies for free at the KPMG Germany homepage.

When we came up with this measure in 2012, we thought that we found the Holy Grail and that it would be ever so simple. When I studied mediation, the question that came back haunting me always was, "What is mediation doing? What is the cost benefit analysis?" If you can measure costs of conflict, you find the Holy Grail, everybody embraces mediation, and everybody says, "Come on, it's so cost efficient. Let's do it." So we found this Holy Grail and I talked to all these people about it. But nothing else happened. And it took me three years to understand why.

It's because you just don't get rewarded for finding conflict. You're an outsider and you will not get rewarded for it. Do you have a remuneration system that rewards you for raising your hand and saying, "Hey, I found new conflict"? No, certainly not. That's when we started realizing that controlling the costs of conflict is not the answer, but it's another obstacle to overcome because people shy away from it. Even when I begin a new mediation and I come into the room with eight people smiling on the one side, and another eight people smiling on the other side. I then ask, "Okay, what are we doing here? What's the topic what's the problem?" All of them

will start to say that they have no problems and that they have no conflicts. If that were true, everything would be fine and I could go back home. Unfortunately it is not that easy. But there might be a little something here worth recognizing. We are really, really hesitant to talk about our conflicts because we are playing the blame game. So that's the second secret: conflict management used to be playing the blame game. When you are talking about conflicts, you are more often the victim than the problem solver. You are perceived as being part of the problem, not part of the solution.

That's when we realized that not every conflict is the same. There are different kinds of conflicts and one of them is particular important to start dealing successfully with conflict management. I'm leading to secret number three. Unfortunately, conflicts don't run around with a big sign around their necks. So how do I distinguish between them? Now, the answer is tied to the third secret: knowing about structural conflicts. What's that all about? Well, a structural conflict will remain in the organization even if you exchange the acting parties. So let's say you are having a conflict between Jim and Joe, and you substitute them for Mark and Allan. If the conflict still exists, then apparently the conflict has nothing to do with Jim and Joe. Apparently, it's a structural conflict. "Why do we have structural conflicts?" Do any of you work in a matrix organization? A matrix organization is an organization in which you get orders from at least two people. It can be three, four, or even more. If you are talking about large matrix organizations like KPMG, I can get as many as five or six people telling me what to do. The thing about matrix organizations is that when you experience structural conflict, it's because you try to comply with every order. You can't do it. It's just impossible. So you get conflicting goals. And we are setting conflicting goals in organizations all the time. Why is that? When you think about, for instance, target agreements and goals, and we go back to football, to ice hockey, to basketball, and to baseball, you will find that performance is measured by individual numbers as well as team numbers. Individual KPIs and team KPIs. What is more important to the company? The guys who scored goals or the guys who delivered the assists? Is it just scoring goals or putting up assists or is there more? How can we set good team metrics? When I'm starting a mediation session, structural conflicts are revealed when I ask people why they do what they do, because that is typically related to how their goals are set. It is that simple. People behave in a job according to their goals, because they want to make money. They want to get a good performance review. They try to reach their goals. But when these goals begin to conflict with goals of other people, you are experiencing structural conflicts.

But the good news about structural conflicts is that they enable common goal setting because structural conflicts are devoid of the blame game. You can actually start solving structural conflicts. You can sit side by side and

look at a screen and say, “Okay, what is our task? We actually have a structural conflict and we are going to solve it.” From this, we can see it has nothing to do with our personality. However, what makes it more complicated in reality is that an untreated structural conflict will turn into an interpersonal conflict. Interpersonal conflicts are marked by my attitude of “I don’t like you. You are doing me wrong. You are the evil; I am the good.” So the fourth secret is really about how you can distinguish structural and interpersonal conflicts.

We have three different layers where we can identify structural conflicts in organizations. The first one is the complexity of the organization reflected in roles and structures. I talked about the matrix organization. When you set up a matrix, yes, you have conflicting goals and that’s also done on purpose because you want to balance things. Unfortunately, because we have this concept of dynexity, there is no way to set non-conflicting goals. Forget that solution. You will always have conflicting goals. And you can’t sue dynexity. So you just have to accept it. But instead of blaming dynexity, you can try to identify why we set the conflicting goals, how we are going to deal with this, and how this affects our organizational roles and structures. How does this affect the second big pillar of organization: our processes? Normally, a process is like a playbook. It is carved out for special situations. You know the good old days when we were talking about Six Sigma and things of that nature; it was like an assembly line in a car factory. We just had a clear, 100% plan of what we can do one step at a time and, if we got better over time, we would maximize our profit and minimize our costs. What is happening right now is that we are not playing with the assembly line, but we are playing with ever-changing situations. Imagine the turf on the football field just turns into ice and suddenly everything is changing. That’s happening at your companies all the time. You arrive at the office Monday morning and you have a list of ten things you want to do, and then suddenly it’s Monday afternoon. How many of those things did you get done on average? Normally I’ll accept four out of eight because that’s becoming the new normal. But more than 50% of all working time is now consumed by unplanned activities. Activities I did not foresee. And, of course, I can always say there are 20% of those that are not necessary. I’ll just try to be polite to other people. But there is still a significant amount of time and the good news is that amount is increasing because of dynexity. The unplanned amount of working time is increasing and the structural conflicts are increasing. We are not so much playing a game of planning and acting as playing a game of reacting and dealing with the unplanned.

You have to educate and train your people to deal with the unplanned. So who's responsible for dealing with structural conflicts and conflict management 4.0? Is this the responsibility of the CEO? Is it the responsibility of the HR department? Is this the responsibility of some outsourced conflict manager that sometimes may be just a whistleblower hotline?

The fifth secret is that it is actually the responsibility of *all* the employees in the company. Managing Conflict 4.0 is about developing a system of conflict management that includes everyone because conflict management and the skills necessary to deal with conflicts are to be used by every employee. First, the executives have to know that when we have a deviation from the plan, it is not so easy to just to say, "We have a structural conflict. Let's deal with this." The practical complexity is that you need to prioritize. You have to make a conscious decision. You will have your emotional operating system, your social operating system, and you will have all those things that say, "Let's make a fast decision. Let's not slow it down." But actually, slowing it down is the big secret when dealing with the unplanned. The first thing you do in a mediation session is you slow down. You say, "Okay, just tell me, from the beginning, what it's about." You take one step at a time. In the end, you'll be faster that way.

When I learned mediation, there was a great saying, shared by two of the most famous American mediators: "Trust the process." Trust the process when you work with people and they devote all their attention to face-to-face meetings that are coming up with good results. You still have to do some training, but other than that, the one thing that works best in my mediations is when people get together and they are starting to talk one-to-one. So you have to start thinking about investing in a working schedule on purpose for dealing with the unplanned. I'm now doing conflict management with a couple of doctors and they were telling me, "We have this situation. We are all together and the patient doesn't see this because he is on medication. But we have these five people who are all working around him and sometimes they have conflicts too. We don't know how to deal with that." And I said, "Okay, let me take a look at your schedule." When I was looking at their schedule, I saw that from 7:00 a.m. until basically 5:00 p.m. there was not even a spare minute. And those people wonder why they have no time to talk through their conflicts and why their interpersonal conflicts keep heating up throughout the day. The solution I wanted to suggest would've been rejected immediately because the first solution is to create some time between the parties to allow for thirty minutes of talking it out. "Oh, no. We can't do that. It's not efficient." Since it was not the solution for them, I didn't tell them. You need the time and the workshop for them to come up with that simple idea. You want them to say, "Oh, it might be a good idea to have thirty minutes in between two operations to

talk about the things that went wrong in the last one so the next one will go better and we won't kill the patient." "That's a spectacular idea. Let's do that." So being a mediator also means holding back your final solutions because it's not the same as when people realize their own ideas. At the end, you often end up with the questions: "What are you doing here? We came up with the solution on our own but we are paying you anyway—thank you for that."

I want to come back to the football and the hockey puck. When you think about Managing Conflict 4.0, you need to find ways for companies to acknowledge that they are in a world of dynexity—moving faster and faster. The hockey puck is moving fast and it will not stop. You will have new unplanned situations everyday and you need to ask yourself what the source is. "What can we do about it?" When we were naming the conference we thought, "Yes, it is like a wave!" The wave is obviously a beautiful picture here at Pepperdine. But a wave can also be a destructive force. Nevertheless, if you're a wave rider, it's the best thing on earth. You can use the power and just ride along it, but you will need some time to become a better wave rider. A wave rider with no time to ride a wave is not a good wave rider. So I can only ask you to take conflicts as waves, learn to be a wave rider, and use the opportunities, especially in structural conflicts. Once you solve structural conflicts, you will be in the right flow to even deal with interpersonal conflicts because a group of people will suddenly care about themselves being a team. Thank you.

* * *

Don Philbin:² We are at the end of the day when people don't make hard decisions. But what is this? In a full day of mediation, this is the exact time of day when we ask them to make the hardest decisions they'll probably ever make in their life. To come up with a hero story they can tell their boss, spouse, friend at the bar, whoever it is, about why they took a conflict off of the conveyer belt headed to court—where they could blame it on a "dumb jury" or a "dumb judge"—and take responsibility for their own decision. Jeremy mentioned the metabolic curve and what happens physiologically, but you know what happens intuitively. We are following that curve late this afternoon.

Here's a graph of the parole grant rate by Israeli judges. Researchers tried to find all the other reasons why people were getting paroled, but it

2. This presentation contains various statistical references to interactive materials displayed with the symposium. For a visual accompaniment to this transcript, please see Presentation Three Video, *supra* note 1, at 1:06:31.

came down to what time of day their case came up for consideration. Notice that, at 9:30 a.m., hopefully the judge didn't stay up too late watching a ball game and ate a light breakfast, prisoners have a 75% chance of getting paroled. Same prisoner, later in the morning, about 11:30 a.m., and the grant rate drops down to somewhere below 10%. Your best hope then is that the judge has a good lunch. Then there is a pop in the grant rate again. It approaches where you started in the morning, up in the 65% to 70% range. Then it trickles back down, and you just hope for a strong cup of coffee and a sweet cookie that will bounce it back up if your case is late afternoon. Guess what? Those cookies and coffee don't last long, and then you get down to my speaking time slot—where my job becomes keeping you guys semi-awake until they're ready to open the bar—and it drops very low. This is the time of day that we're asking people to make these difficult decisions that they will have to defend to everybody else. It stands to reason that we back up and look at what is going on.

I went to a great mediation presentation that tracks the metabolic curve that researchers quantified empirically in the Israeli judge test. A group of very fine mediators in the International Academy of Mediators focused on the three different basic sections of a mediation that looked just like this curve: the beginning, the "middle muddle" they called it, and closing. We spent all of our time coming up with great closing tools and ways to fill the gap at the end that are wonderful. You'll see from the graphs of real dollar concessions that are made during a daylong mediation that the big concessions are made in the morning. That's where I'm going to show you graphs of how real deals come together. You'll see big movements in the morning spaced out in time.

We track for two variables: one, the dollar or money concession; and two, the time it takes to make them, because we all know that the right number at the wrong time is the wrong number. People will constantly say, "Well, negotiation will expand to fit the space available. Since we know we're going until 5:30 p.m., let's magically turn the clock hands down to 3:30 p.m., and we'll start there." I said, "Well, that's great. It's like saying all professional basketball games come down to the last two minutes, so why don't we put 100 points on the board for each team and let them play out the last two minutes?" Not too satisfying for the folks that didn't get to drink beer for four quarters of back and forth play, and it's not satisfying for those who think they want to speed into the negotiation process.

What's going on? Can we learn from what Randy and Jeremy and so many others tell us about human predictability? We seem like we're irrational, especially in periods of great uncertainty in litigation. I always assume that I'm catching people on next to the worst day in their life when they're going to act out as badly as they ever do. The display mechanisms are different. In divorces, it's acceptable to throw things. In business

mediations, you have to dress like this and take extremely hard, tough positions as a proxy for throwing something at somebody. But it's the same. What you'll see, if we look at this in reverse, is that deals are set up to come together in the first third. Impasse is avoided by keeping them in the building during the middle muddle, the 11:30 a.m. to 3:30 p.m. timeframe, where nothing great happens. We just have to survive it. The pace has already been set by the first few moves, but if we get through the middle muddle to 3:30 p.m., some of the alcoholics will get the shakes, others will get impatient, and we'll get a deal. If it hadn't blown up by 3:30 p.m., we're going to get a deal. It's a question of how the parties craft the hero story they can sell back home or at work.

The great chess grandmasters will tell us that chess matches can go all day, sometimes more, just like a full-day mediation, but the board's set in the first two or three moves. It comes down to human predictability. Just as Israeli judges are very predictable, and the work that Jeremy has told you about and that Randy has drilled down into with lawyers specifically, we think we're all very unique, especially lawyers. Nobody has ever negotiated or tried a case like the kid. Turns out, though, that we're unique just like everybody else. We are susceptible to the same brain shortcuts, pattern recognition, System 1 thinking that has been part of our nature for a long time. The pattern recognition System 1 thinking that Jeremy told you about has been vital to our survival. Those people on the African Sahara who weren't able to distinguish between dinner and danger have long since been weeded out of the gene pool. So we recognize patterns quickly. It's often very helpful, but it can also throw us astray in making unchecked, emotional decisions. Even these short, emotionally driven decisions are very predictable.

You'll see some stats. The telephone companies can predict where we're going to be tomorrow with 93% accuracy. The credit card companies have it down better than that or they'd have sent us five fraud detection alerts while we've been here. You almost never get fraud detection alerts on your spending patterns anymore. That's because they are able to determine our likely spending patterns with such accuracy that they know whether it's me out of the country or at a gas station down the street. We are very predictable for the reasons that Jeremy and Randy taught. It turns out that we're even predictable in negotiation. Recall that Jeremy said that we tend to mirror each other's behavior and act like each other—in-group more than out-group. Litigation is inherently in-group because it's venue and case type driven. It turns out that negotiating litigated cases is done by social convention. Negotiation is a social convention that varies by what the in-group is.

We all know that lawsuit value is determined, number one, by venue. Plaintiffs who keep their chosen venue have much higher returns on their cases than those who are either transferred to another court, or that are removed to federal court and then transferred out of state. Venue is the number one determiner of value, and it permeates negotiations. We also know that the bar tends to divide by case demographics and claim types. The same people don't often, except in smaller markets, handle personal injury and construction cases, and so there's in-group segmentation by claim type too. What this graph [referring to PowerPoint slide] shows you is where people anchor relative to the end result in a case varies dramatically by venue and by case type. What these box graphs represent are final settlement positions relative to opening demands and opening offers. In this column, we've got gross recoveries by jurisdiction, so people have segmented by where they are located. I'm not going to tell you who does the most puffing, but you can see that, in certain parts of the country, you have to put more horseradish on your opening demand than in other parts of the country. It's interesting in-group behavior.

You've got to know what the in-group behavior is, because if you're from out of town and go in and try to negotiate with the in-group, you may think, "Gee, I may be from a more reasonable jurisdiction, and we start at two and a half to three times," which is what we really want, and think, "I'll be seen as more reasonable if I'm in a jurisdiction that might suggest that we want five times, or we're going to shoot the moon a little more and demand five or six times what we ultimately take." The problem is that the dollar concessions that you make in each round are tantamount to gifts. Even people who don't like each other feel an obligation to return gifts. If somebody gives you a gift and you don't like them, what do you feel? You'll feel like, "I wish they hadn't done that, but now that they have, I'm going to have to give them the white elephant gift I got last year." People will reciprocate gifts even if they don't want to, and it ends up being mirroring behavior that shows up not only in the way we sit or lean back, and everything else in conversations, but also in negotiation.

The result of it is that, if you're used to playing at two and a half or three times what you really want, and you're in a jurisdiction that expects an opening demand of about five or six times, they will see you as more reasonable (or foolish) in the first demand if you start at two or three times. But what happens then? You've constrained yourself on the graph by moving over to here and have to, by definition, make smaller concessions for the rest of the mediation to get to your end point. The other side actually gets more irritated by the smaller concessions than they would have if you had shot the moon with the first round anchor. It's all a function of in-group behavior and how people respond predictably, depending on in-group behavior by jurisdiction and case type.

This aligns with game theory research. Remember the Prisoners' Dilemma? When researchers run it once, people will defect. This is a game where you have the choice—if both of you continue to lie or keep quiet, you get out of jail. If somebody defects, that person gets a short-term sentence, and the other one goes to the slammer for a long time. It's a nice little game to quantify empirical results. What they find is that first-time players will defect, but as you play more and more in repeat play, people will tend to cooperate. Same kind of thing depending on the in-group behavior in litigation. I suspect, but can't prove, that people in larger bar associations are more likely to be competitive because they're not likely to run across the same litigants again. It doesn't have to be a large geographic area though; it can be within bar association segments. The Los Angeles tort bar, in general, might be quite competitive because you won't see each other again. If you drilled down into the IP bar or some very narrow segment of the bar, it might exhibit completely different behavior because they will see each other again.

We know that negotiation is a dance. Some are tangos and some are waltzes, but they all have a rhythm. We currently have a database of about 20,000 case histories. The average number of moves in those cases is seven rounds, but they range from three to fifty-four. Somebody went through fifty-four, not moves, but rounds to get to a settlement. The average is a little over seven in civil litigation. Car dealers know that nobody wants a deal in the first round. So they play this game according to choreographed social convention. They would love for us to buy on fleet plans, go to Costco, and get one number. They know what their costs are. Instead, they've conditioned us, and we have now conditioned them, to want to play this rug bazaar thing every five or ten years. They put a sticker on a car. We come up with the price we got off the Internet. They play this game where somebody goes and hides behind a Coke machine and says they're working real hard for us against the manager, and comes back with a fairly large concession. It takes a while in that round, relatively speaking.

Then you give them another number, still trying to lowball it. You might be walking for the door, and they're running you down, whatever the dynamics are. Then what happens? Then there's a smaller concession at the end, and you might get things that don't cost them much but might have more value to you. Free oil change, undercoat, floor mats, or whatever the final concession is in the third round. They do this not because they're getting better deals, but because they want all of us to go and tell our friends that you took old Fred on this Chevy and that Fred's an easy mark. They want that to spread so that all my friends go down and buy their cars from Fred, thinking that they can take advantage of him. The whole thing is

designed to make us feel good about the deal that we made, knowing that it might be bad. They're doing alright at this game by the looks of the showroom.

How is mediation any different? The last two hours are mainly about constructing the hero story so that that person can feel good, even while their metabolism is crashing, that they made the right decision. So they're testing the story they'll tell to spouses, bosses and friends at the bar. What do we do in that period? You'll see in a minute. We go from big moves in the morning that define the day—often justified (often unconvincingly) with an expert report or some mathematical contortions—to grinding through the middle muddle before skidding into closing. Early moves are often tethered to something that might seem analytical.

You'll also see in a minute that when we get into the middle muddle, things are just a grind. It's not elegant or theoretical, you're just grinding it out. But it's a critical time of day since impasse risk rises dramatically as people marinate in new pricing information. I was in a mediation session, and the plaintiff was getting bored with the process and decided to go to the gym after lunch, and not tell anyone. So I go back in the room and there's nothing but a post-it note on the table. It says, "Don, give them \$50,000 every twenty minutes until I get back from the gym." I said, "This is crazy." He did leave me a cellphone number in case things went off the rail, and there were a couple of ethical issues popping around in my head. But since I had twenty minutes, I thought, "This is the first person who's ever listened to us when we say, 'Do a concession strategy and plan what your moves are going to be regardless of what happens on the other side.'"

I don't think those were the real numbers, but we played this out, and guess what happened by the time he got back from the gym? We were in the zipper. You know the zipper, where both sides are moving in patterned increments. It wasn't \$50,000 for \$50,000, but it might have been \$50,000 for \$12,500 or \$15,000. Every time we come back with another \$50,000, here comes another \$12,500, so we're just going right down the zipper. He knew where the thing was going to be when he returned. He knew how long he was going to be at the gym, how many \$50,000 moves I'd give away in the process, so he knew where his side of the equation was going to be in advance. He still had room to play and could blow it up later if necessary. It turns out that it triggered mirroring behavior from the other side. You know what happens in mediation? Most of the time they'll say, "I know where I want to be, but what I'm really going to do is respond in-round to every move that the other side makes. If they give me a bad offer, I'm going to give them a bad offer, and then we're off to a death spiral by the third round.

Let's look at a few real cases. You'll see money coming together along the horizontal axis. Time is vertical. I know it's the only time you'll ever see time plotted down, but it seems to make sense to have money coming

together horizontally. Most of the time, as we all know, it'll be plaintiff starting first. Why? Sometimes I'll ask the defendants, "If you know more about the case than the other side, and you know anchors have some impact with less information, don't you want to set the sticker price rather than give that opportunity to the other side?" Most of the time they don't do it. Everybody wants to wait because they think that somehow the clouds will part and the plaintiff will give them a number that they think will be "reasonable." I haven't seen it yet, but I'm waiting.

What you'll see is the plaintiff starting somewhere up in here to the right with an aggressive anchor and moving somewhere down here over time to get to a deal. The defendant is coming in from the left and moving something like this. The settlements are rarely in the mathematical middle. You've heard all these rules. Settlement will lie at the midpoint between the first two "reasonable" offers. That's a great one. If somebody would only tell me when they start being reasonable, assuming they knew, that might provide some kind of a signpost to me that would predict where the round was going to end up. It's like saying that most of the money in health care is spent in the last year of life. Until we get a turkey baster that pops up and says, "You're in the last year," it's only something that helps measure after you die. Then we know when the last year started and how much was spent. The midpoint between the first two reasonable offers is something I know with amazing clarity the next day after. I then know where the endpoint was. Then I can say, "Oh, at 2:45 p.m., Joe started being 'reasonable.'"

Watch the graphs. Obviously there's a progression. They rarely end up at the fifty-yard line. There's more real estate off to the right. In the absence of a great counterclaim, the defendant is more or less bound by zero. So the game is on. We get into this large number, small number analysis. If you're the plaintiff, you like to remind the mediator that you made a large dollar concession. Defendants like to measure in percentage moves—we doubled our last move. Remember this one: The plaintiffs are always saying, "Well, gee, I moved a million two, and the other side moved \$50,000." The \$50,000 folks are going, "Yeah, but it was up from \$10,000, so it's a 500% increase, and those guys started in fantasy land and came down 12%."

Keep watching the graphs [referring to PowerPoint slides]. You'll see the parties moving along. Notice they're almost exactly mirroring each other in-round to get to the end. You've got the opening part up here, the first three moves where people are sounding each other out, making moves that are tethered to expert reports and things like that to rationalize aggressive anchoring. This one hit the skids in the middle muddle, a lot of talking. What happens here? Plaintiff moves; defendant comes out of the

box pretty strong. Plaintiff reciprocates, moves out a little bit; defendant pulls back. Plaintiff and mediator, probably, it's not my case, had a long conversation in here over a bad lunch talking about whether they should keep this up. This is when they break out all those lines mediators love to hear. "I hope you haven't ordered lunch yet." "Last week, when we had a good mediator, they did X."

After a long chat, plaintiff says, "Okay, I'm going to play it again. I'm going to move out to here, but we're going to see what the defendant does." The defendant comes out again and then we're back on, but notice the symmetry. This all sounds in the moment like it's just complete noise and posturing. Everybody's barking at us, and it sounds like lots and lots of noise and static. But if you look at these graphs, and the moves of the parties after the fact, it's really fairly elegant. There's usually mirroring of behavior that results in predictable lines to a deal. Plaintiff moves in; defendant says, "Hey, we might be able to get a deal." Then we get the typical V shape late in the day. There will almost always be a symmetrical V at the bottom, which is when the reasonable offers started. Then it does become the midpoint at the end of the day when the deal comes together.

The only theory that seems to hold water in litigated cases is the "tit for tat" game theoretic. Remember that one? It's mirroring behavior where one move is reciprocated with similar concession. Negotiators will usually respond to your tit with a tat. Another concession strategy is tit-tat-tat, if they don't respond in the same round, they will respond within two. It comes out of Prisoner's Dilemma research. All of these graphs, most of the ones I see, are exactly tit for tat. People are responding not to end game, not to points that they want to get to, but in-round to the other side's move. They calibrate their moves in or back depending on the behavior of the other side in that round.

That's why I always ask people who want to pull back all of a sudden, "What do you think is going to happen if you do that?" We all know what's going to happen and they know what's going to happen. The other side will reciprocate; they're going to hit the brakes too. If you all keep this up for two rounds, we're going to get into a death spiral that ends up in impasse. And it's always easier to avoid a death spiral by having that conversation in advance than it is to get out of a spiral once it starts. It then takes a leap of faith by one side to get out of it.

Here's an injury case with almost perfect symmetry. You can imagine all the noise that's going on with the offers, and we'll get a demo of that in a minute. It's lots of noise in the moment but completely elegant in retrospect. When graphed, it's almost a linear progression with a little bit of pullback. Even then, the defendant keeps running an almost linear game. This is the equivalent of the \$50,000 concession every thirty minutes. Plaintiff reverts to the line and just keeps chugging. This is about the closest you'll get to

where everybody's being reasonable. It ends up pretty close, 37% of the original demand, but fairly close to the midpoint of the original offer and demand. Again, it's completely symmetrical, even down to these pullbacks. Notice that when defendant pulls back here, it's reciprocated with a pullback there. Then defendant comes back out of it and almost reverts to the line, and then comes out.

I could poll all the good mediators here and you would tell me that, most of the time, they will have a good idea by noon what the ultimate outcome is going to be. Anybody want to go out on a limb and say that *most* of the time you'll have a very good sense of what's going to happen?

Then we've got to go through this kabuki theater through at least the middle muddle so everybody can test out his or her assumptions and, with continual price information from the other side, narrow the gap. We don't change our minds. We will reevaluate prior positions based on new information. And we do it in small increments. That's why we can't just put 100 points on the board and two minutes on the clock and rush this thing from 3:30 p.m. to 5:30 p.m.

People are mentally adjusting to the altitude in small increments. They anchor and adjust, anchor and adjust, anchor and adjust, all the way down to where they get to at the bottom of the round. That's the reason we have to develop all these closing techniques. Everybody already has buyer's remorse by the time you get down to 3:30 p.m. If you make it through the middle muddle—the highest risk part of the day—we're more likely to get to use those closing techniques as they finalize their hero story.

You're chugging along and get into that zone. Here's a construction case. Usually you would think because of the contract measure of damages it would be a little more symmetrical, but plaintiff takes an aggressive position. Notice what happens. You can bet the conversation went something like, "You'll get away with that once." Guess what happens? There's all this research on anchoring, but how many of you think that the second round is more important than the initial anchor? It turns out that it's more important how parties move off of the anchor. Almost everybody will put up with at least one aggressive anchor—now that we have mediators, at least.

In the era of *A Civil Action* (book and movie) in Boston, the plaintiffs blew the round with an aggressive anchor. Remember, lawyer Jerry Facher walks out with the pen and a croissant from the hotel because the opening demand was too high? I teach that one here. All of those lawyers will tell you that, had there been a mediator there at the Four Seasons that day, the deal would have come together. You can get away with that once. Very few cases will blow over the initial anchors, even though we have lots of

research and spend lots of time on anchors. The important part is what happens in the next round—the slope of the line between the first and second moves.

Plaintiff saved this one by getting off of its aggressive anchor in round two. We don't know what these concessions are in real dollars, but notice the almost linear path down to at least here [referring to PowerPoint slide], which is probably a halving effect. As crazy as it looks, and it's a demand for more than five times what they ultimately took, aside from all the noise, it was completely elegant. It's a linear path down to closing time. Both sides tit for tat all the way down until defendant pulls back. By then, plaintiff had saved enough face to get the deal done.

Then the question is, if things look like this, what can we do with it? Can we project where the offers are headed in time to inspire people that have huge gaps that the deal will probably get done? "Keep playing, this is a game you can win," during the middle muddle when we've got a huge gap? Can we do something about concession plans that are a little more elegant than \$50,000 every twenty minutes until I get back from the gym? As it turns out, there were two things: one was the byproduct.

The first one was, can we probabilistically project this like they do hurricane graphs to see where something's likely to land, long before it gets there, to have a number of byproducts, one of which is they stay in the game? Two is that they moderate their behavior as they get more pricing information from the other side because they're not waiting for the late-round 3:30 p.m. numbers because they know where it's headed more accurately earlier in the day.

Then the next question was, "Gee, if we're going to try to be intelligent about this and play battleship with sonar, can we reverse engineer the trajectory knowing what we know about in-group behavior by jurisdiction and by claim type? How do we get to the number that we want in a way that takes advantage of what we know about neuroscience and mirror neurons to take some of the noise that's likely to increase impasse out of the concession strategy?" The answer to both questions ended up being yes. The first is a probabilistic projection that looks like a couple of hurricane graphs overlapping to indicate the sweet spot of the negotiation round. You can see at the top, and we'll do one live in a minute, that there's a huge gap between the parties. This is the initial take, but the projections make it look like there is momentum to a deal. It takes advantage of other cognitive errors to get people thinking that this is a deal that can be done, rather than paying attention to the short-term, in-round noise. The focus becomes strategic.

The other is, how do we back up? If I want to get to X, how do I get there? It's no surprise that plaintiffs are going to start more aggressively. This graph will change based on jurisdiction and claim type because of the in-group behavior, but it's not symmetrical. Obviously, everybody's going

to move more at the beginning to get off of their aggressive anchors and set the hook. But how do we get off of those anchors and set the round up for the conventional V at the bottom? How do we strategically plan to get there? The defendant's line is a little straighter. There is a little bit of a curve at the top to make the concessions. Plaintiffs usually curve more. I don't remember the case specifically, but this looks like a PI case in Boston. It's a little more linear, very strong anchoring, asking for \$94 million on what ended up to be \$28 million settlement. So then, using actionable intelligence in-round—modeling concession strategies in the down time rather than playing Candy Crush and Angry Birds—to see where you're going, and move the dots around to fine tune your strategy before you get there. The goal is to improve outcomes with precise planning.

To demonstrate live, I've got two outstanding litigators/neutrals to help negotiate a simulated case.³ Deborah Rothman, you know from Los Angeles, a fantastic neutral, mediator, arbitrator, and recent president of the College of Commercial Arbitrators. John DeGroot from Dallas was general counsel and later ran a very large company. After running BearingPoint, he is now a great business-minded neutral. They're both feisty too, so they'll simulate real negotiations. I needed live wires to keep us awake at this time of day. They're going to play plaintiffs and defendants in this simple contract dispute in Los Angeles state court. Your in-group is Los Angeles, California and it's a contract case.

This is a real case with real offers, but not one of my cases. They'll ham up the style, but the numbers come from a case. They'll tell me the real number in dollars and the time of day so that we can get real projections on where this thing might have ended up. Obviously, the expectations on both sides are different. If Deborah and John are playing this, they're not going to pick the same target number or they wouldn't be in mediation. They would have done this four years ago by themselves. But for our purposes, I'm going to pick the end point since I know where it actually ended up. I'm going to pick \$1.8 million. But know that both sides would obviously be playing to different numbers.

How does the system suggest that we get to \$1.8 million searching a database containing thousands of case histories? You can imagine that people in industry, parties, lawyers, people in the risk business, are all very interested in asking, "How do I get to the target number that we have set in a way that keeps from blowing the round?" Insurance execs will tell you that

3. As part of his presentation, the speaker simulated a negotiation to demonstrate the Picture It Settled® Predictive Analytics Software. For the visual demonstration, see Presentation Three Video, *supra* note 1, at 1:39:22.

all these frantic calls to Chicago, Hartford, New York, and London, late in the day result in gap-filling moves not because they suddenly got smarter about the case; it's because they held back authority from their local representative in the mediation. They didn't want them to spend it all too early in the day. So now they're saying, "Well, how can I space out my offers in a way that I know they're not going to spend it too early when we know that the real deal is going to get cut late in the round?"

Every negotiation expands to fit the space available, or people think they gave up too much too soon. That's the reason negotiations go down to the end. Anybody who makes a deal too early thinks they got rooked.

Deborah, you want to ham it up for a minute and then make a demand of John?

Deborah Rothman, Plaintiff: Because this is Los Angeles and we're very sophisticated litigators, we're not asking for pie in the sky. We're making a \$4 million demand. It's 10:35 a.m. We don't think this should take the full day. This is a close-to-the-bone demand.

Don Philbin, Speaker: At 10:35 in the morning, you're making close-to-the-bone demands? How many of you mediators get those? Everybody will tell you, "Let's cut to the chase," but they've got a different definition of the chase. John?

John DeGroot, Defendant: I mean, Don, Deborah told us she was going to negotiate in good faith. I cannot imagine. We made the two-hour drive from Downtown Los Angeles to Malibu this morning and, I've got to tell you, \$4 million is absolutely ridiculous. I don't even know if that would do anything for me. I've talked to my client and they said, "Look, let's just put my budget up there and get it going." It's 11:00 a.m., we'll say half a million dollars, and I'm already at my ceiling.

Don Philbin, Speaker: There we go. Any of you mediators hear this kind of stuff in mediation? I've actually got a list somewhere of the things mediators hear everyday. You can take the survey of your responses to the "28 Things Mediators Always Hear."

So, \$500,000 at 11:00 a.m. Notice that, as we get into this, it will adjust the concession strategy based on the times. After a couple of rounds, it'll get really accurate. It'll start to make projections. The darker colors are the first standard deviation. The lighter colors indicate the second standard deviation. It presents a probabilistic projection of where the round might end up. I'll save the punch line for a minute. Deborah, your serve.

Deborah Rothman, Plaintiff: It's not going to take us much time to respond. \$500,000 is a non-starter. We're inclined to just leave. They're obviously not here in good faith. We've shown them our damages. As I said, \$4 million, really, is no fat left on the bone demand, and we think that's a realistic assessment. Convince me to stay.

Don Philbin, Speaker: I would love to, but we're trying to cut me out of this in the interest of limited time.

Deborah Rothman, Plaintiff: We'll come down to \$3.8 million just to give them one more chance to be realistic. It is 11:06 a.m.

Don Philbin, Speaker: \$3.8 million at 11:06 a.m. Notice that the time projections continue to become more accurate. Now what do you pros think when somebody does that? You've got \$200,000 off a \$4 million demand. What are you mediators thinking now? We've got some work to do. Either Deborah's breathing her own exhaust, or we're going to have a breakthrough later in the day. But that's the nice thing about this. Consistently, the criticisms of mediators are patience and perseverance. Both are imbued with, "We just sit through this too long, and we know where it's going, but we're getting impatient." You just want to throw the stapler at somebody at two o'clock in the afternoon, but we don't. If you understand the neuroscience behind it, you understand how people are processing information and making decisions. It appears flawed but turns out to be predictable. When you see the patterns, it goes from frustrating to amusing. You're like, what are they going to do next?

I'll walk into the room knowing that they're going to think worse of the other side than what they're really doing because of reactive devaluation, and say, "Okay, Deborah. What do you think they offered?" I should do that to John now. Guess what it does? Play closest to the pin with everybody in the room and make them all guess what the number from the other side will be. I had one the other day, six people in one room. Every single number was at least 10% higher than the actual offer. What does that do? It makes Jeremy's slide on gains and losses real. We know that people will take twice as much risk to avoid a loss as they will to get the equivalent gain.

That was experimental psychology out of Kahneman & Tversky for years. Neurologists have now mapped it with MRI machines. MRI machines show twice as much oxygen consumption when people are processing losses as equivalent gains. People faced with a loss have fireworks going off in their brain. Because people are reactively devaluing anything from the other side, they assume worse of the other side. That has the effect of converting a loss into a gain when the actual offer is better than we thought. John's going to tell me that Deborah's off her meds this week and will demand \$6 million. But when she comes in at \$3.8 million, he's like, "Wow, this is not a \$3.8 million loss that I'm going to have a lot of cognitive resistance to. I just picked up a \$1.2 million gain." The reframe will cut cognitive dissonance in half. By changing the frame, the same

information is processed as a gain with half the cognitive dissonance. That's why merchandise is marked up to be marked down.

John, I've talked too much about something besides your case. What do you want to do? You heard Deborah.

John DeGroot, Defendant: Don, it took her six minutes to come up with that number because she didn't think about it.

Don Philbin, Speaker: She might have thought about it quite a bit before we got here, John.

John DeGroot, Defendant: Quite frankly, I don't bet against myself but I think it's time. I'll throw you another number and we'll see if she comes back with another one. I'll put \$600,000 on the table, but it's time for her move.

Don Philbin, Speaker: \$600,000.

John DeGroot, Defendant: At 11:15 a.m.

Don Philbin, Speaker: 11:15 a.m. Now watch what happens on this round, not only on how it changes the projection on one side, but it's changing the other side's projection based on what the system anticipates Deborah's reaction will be. I sometimes say, "Turn off your Angry Birds for just a minute, and instead of asking me how I think they're going to respond, model it out." Notice that since they're running about six-minutes between bids, that the computer models are saying, "Wait a minute, this is not going to be a seven move round. At this rate, we've got a long time to go until we get this thing done. Don, you're going to be reduced to a clothespin going back and forth at high rates of speed by the time we get through with this."

Quick station break: We're now two rounds in. Looks like the overlap is somewhere around \$1.658 million. The parties are \$3.2 million apart. The projection is only \$150,000 or so off. So \$150,000 is 4.6% of the remaining gap. Two rounds in and the system is projecting the outcome within 4.6%. Just like chess, remember? Chess grandmasters will say the first two or three moves define the game. After two moves, these smart systems will project the outcome within 6.5% on average. Watch what happens with three. The game is going to be done by third move, even though we'll have to play it out to satisfy the parties. Deborah?

Deborah Rothman, Plaintiff: Well, he's not moving at all. I mean, tell him that if you hang with the big dogs in Los Angeles, you've got to hang the meat where the dog can smell it. I can't smell \$600,000 when I've got a \$4 million claim. I came down to \$3.8 million. I'll stay in the game at \$3.7 million. I'll match, but I'm not moving.

Don Philbin, Speaker: \$3.7 million, at 11:30 a.m. Notice that the time projections on the concession plan are off by less than five minutes at this point. The computer figured out what the pace of play is going to be for these litigants. All this is to show how predictable people are in negotiations. They think they are a long way apart, and they are if you measure the \$3.2

million gap. But they are already on track to settle within \$150,000 later today.

John, give me another round. Let's see if we can tighten the projection to 3.5% or so in the third round.

John DeGroot, Defendant: They always tell me don't spend all your money in one place, but we're either going to get there or we're not. But I'll put a little bit more money on. It's 11:35 and I'm offering \$750,000. I've got to tell you now I'm already running out of room.

Don Philbin, Speaker: \$750,000 at 11:35 a.m. The time projection was only off by five minutes. Let's do one more, and then we'll go to Q&A for the whole team. Deborah?

Deborah Rothman, Plaintiff: He came back fairly quickly and he broke out of his \$100,000 at a time, so I'm going to reward him by coming down \$200,000. I'm at \$3.5 million at 11:45 a.m.

Don Philbin, Speaker: Notice that the time projection is now within three minutes. Now notice what happened to the pattern. You just got exactly what we've been talking about—reciprocating concession behavior. That's why I picked these champs. They've been in every chair in the room. They'll know exactly what's going on. That's what we hear audibly. Notice the mirroring behavior. This is the neurology of negotiations and everything Jeremy talked about animated in a live, noisy round of negotiation. Thank you two for being good sports. I'll turn it back over to Mary Beth.

III. PANEL DISCUSSION⁴

Mary Beth Cantrell: Let me start with Randy. Are corporate counsels more receptive to metrics and data-driven approaches than outside counsel? Why or why not?

Randall Kiser: Because of the business orientation of corporate counsel, I think they are much more receptive to statistical modeling and predictive analytics than attorneys in law firms. If we were to look at the spectrum of reception to data-driven programs, I would say that the most receptive are judges and mediators because they see the frequency and the magnitude of these decision-making errors almost daily. Then, next to them would be the insurers because for them it is a business. They literally cannot afford to have the same biases and case evaluations that clients and their

4. This panel transcript has been modified to conform to the compositional criteria of this Volume. For the complete video of this session, see Pepperdine University, *Pepperdine Law: Managing Conflict 4.0 – Session 3 Q&A*, YOUTUBE (Nov. 25, 2015), https://youtu.be/F_02oJJscHs.

attorneys can have. Then, as we move over, we find clients a little more receptive, and then attorneys and law firms the least receptive.

This somewhat mirrors the whole reaction in society to data-driven programs. It sometimes brings out a tremendous fear that human judgment is going to be replaced by statistical judgment, but, of course, that's not the point at all. These are decision-making tools, just as you don't rely blindly on Google Maps. In fact, in our neighborhood, we had someone who did that and turned right, and that put their car right on the railroad tracks. You do have to exercise human judgment, so it's important to look at these as tools. In any event, that would be the spectrum of reception to these types of tools.

Mary Beth Cantrell: Alexander, how can top management executives be persuaded or incentivized to deal with conflict management?

Dr. Alexander Insam: They need to recognize that most of the conflicts that impact the business the most are structural conflicts and not interpersonal conflicts, or they start out as structural conflicts and only later turn into interpersonal conflicts. The real value for the C-level is that they realize it is a normal part of the business and we can be as good at it as we used to be if we plan ahead on the strategic planning games. Dealing with the unplanned is really about the competitive advantage of companies. When we want to outsmart our competition, we better start thinking about the unplanned and how can we react to that to regain that competitive advantage. It's the same with cultural conflicts because cultural conflicts are structural conflicts too. It doesn't matter who you take from that country; it's just how they behave. It is about how to build a competitive advantage through the right conflict competent leadership, and that's a C-level topic.

Mary Beth Cantrell: Don, have you found that whichever side, plaintiff or defendant, first states an anchor position, that influences a final settlement more favorable to that opening party's demand or offer?

Don Philbin: That's the conventional wisdom. I'm not sure it actually moves the ball. I think that it's more in-round behavior—people reciprocating moves in-round rather than thinking strategically about the long term. The research certainly suggests that initial anchors matter. I would say that the power of anchors is inversely related to their weight – and information symmetry. The less information somebody the other side has, and the less reasonable the anchor is, the less effect they have. If they're bound in rationality, which is a different conversation, they're likely to have more weight.

Mary Beth Cantrell: Any other thoughts on that?

Dr. Alexander Insam: When I listen to both of you, I think we have to distinguish between two different times or periods in that negotiation game. We have that one phase where we're really open to creative thought and probably identifying common interests or how we tackle a problem when we

stand next to each other instead of facing each other. At the end of almost any negotiation or problem solving, there will be that kind of, “How do we divide up the rest?” That’s what it always comes down to, the endgame. I always like to believe in being able to make a difference. The better you play in the first phase, like when you earn trust, when you build trust, when you’re able to build a relationship, the better you can play the endgame. You will get fair, creative results and better results than the software. You will achieve the so-called win-win situations, because you enlarge the cake before you divide it. When you only play the dividing game in the first phase actually you can leave it to the software to deliver the results, to cut the cake into pieces, because it’ll be like playing poker with each other.

Mary Beth Cantrell: I think this is a question from some of the young attorneys in the audience. If research is mechanized and decision-making is mechanized, what practice area do you recommend for young lawyers to specialize in dispute resolution, and how long until they’re obsolete?

Don Philbin: I don’t think it’s mechanized at all. This is a tool. It’s nothing more than a tool to help people that have well-trained, expert intuition. It models things to improve results. It will test assumptions, but all those are human assumptions. I don’t think it ever gets automated to the point where people are just playing this like video poker. There’s good research that, in the context of email negotiations, people that negotiate strictly online have horrible completion rates. It’s upped a little bit in academic contexts if the students talk to each other by phone before they engage in email negotiations. It’s still coming down to rapport. People have to build rapport and trust.

All this tool does is give you large data sets to check and model that well-honed intuition to improve outcomes. It’s a scope for the gun, not the marksman. Modeling the future to get better results takes some of the noise out of it so that you don’t have that high risk of impasse during predictable parts of the day for predictable reasons.

Mary Beth Cantrell: Alexander, this one is very similar. What is your opinion of online mediation? Although the parties are not present, multi-tasking could be avoided through video control. It’s been a great success in the Netherlands in divorce mediation.

Dr. Alexander Insam: I think it’s a question of what is available to you. If you have the possibility to meet in person in a room, I would always prefer that, but sometimes it’s not possible. Then I would say online mediation is better than doing nothing or writing emails. I think with the experiences we have had, it’s a different experience than just watching this online, because we can’t deny the fact that we are human beings. Also, we have different things going on with all the brain and the mind. It is different

how we perceive things, and I would say try to get in a room together to do it. If that is not possible at all, online mediation would be my second choice.

Don Philbin: There's great empirical work on that. You guys are old enough to remember the Kennedy-Nixon debates and that we actually had a President Kennedy and a President Nixon. There's wonderful research coming out of that that informs this debate. Students still are given three different mediums for the Kennedy-Nixon debates, and they actually did this in real time. Southern democratic governors were in Little Rock, Arkansas, and they didn't have live television feeds to the meeting location. The television feed from the debate was an hour delayed. So the governors listened to the radio feed for an hour before the television feed came on. The Atlanta Journal Constitution wrote that the southern democratic governors were whining about a fine, upstanding man like Senator Kennedy having to face off with a crusty old debater that had been inside the administration for eight years as vice president. Then the magic lantern of television came on and changed the results.

It's still outcome-determinative in test subjects among school-aged subjects. People who read the transcripts think Nixon got the better of Kennedy. People who listen to the audio feed think it's close but slight advantage Nixon. We all know the results when it is televised. It's a blowout for Kennedy, and that's the closest proxy we have to online mediation. Will it do in a pinch? Would I rather have a Skype conversation with an adjuster than a telephone conversation? Sure. Seventy-two percent of learning is visual, which is the way we build relationships. There's no substitute for it if we can get it, but, depending on the size of case, if we have to do it, it's better to be able to at least see in 2-D what's going on rather than just having an audio feed.

Mary Beth Cantrell: Randy, if we had to choose between emphasizing big data or big emotions, which would have the most impact on conflict resolution?

Randall Kiser: I think that, ultimately, since we are primarily emotion-driven, we would want to concentrate our skills in the soft skills area, and I think this also supplements the answer to the student's question about what fields can I go into. I think the short answer to that is conflict resolution, because it is one of those rare fields that require this unique combination of technical competence and soft skills. When we look at why have we lost so many jobs in the United States over the last twenty years, the one characteristic that distinguishes almost all those jobs is that they require only a technical competence. Those skills that require a technical competence and a soft-skill competence still have many job openings.

Mary Beth Cantrell: There's hope.

Dr. Alexander Insam: I would also say, because we're playing the game, dynexity, problems, and internal things are getting more complex

every day. So we need people with good judgment. The question to us is, “What kind of training do you need to solve the problems of tomorrow?” You don’t need any textbook training where you learn about 150 cases and are able to recite them by heart. To be able to use conflict as a resource, you need to have an understanding about how you approach conflict and the challenges within conflict. You need to develop conflict competency as a leadership skill. But that demands quite a set of techniques and some new soft skills. I think it requires even more training, not less, and all the computer stuff is just helping us. It drives home some points. I really like the tools and the models. Obviously, since I’m from KPMG, I do like some sort of control and numbers, but that’s just a tool to help. It will never be the same as being able to sit down with someone, figuring it out, building trust, discussing it and then making a decision. A good decision is not the fast decision that immediately springs to my mind, but it is having a thoughtful process around it. What I always like about mediation is the question at the end: when you wake up tomorrow and this is your solution, do you like it better than what you have when you now walk away or when you go back to court? One of the most famous questions I always get asked is, “Do I need to be able to force someone to execute a mediation result?” That question does not comprehend what a mediation result really is, namely an agreement of both parties that survives the BATNA test (Best Alternative To Negotiated Agreement). If it’s a good result and both people believe in it, then they will voluntarily execute it and not second-guess. If people believe they have a good decision at hand, then they will act accordingly and honor their agreements.

Mary Beth Cantrell: In your presentation, you talked about structural conflicts, where if you took the individuals out and put new individuals in, the conflict still remains. Do you think, in the next five to ten years, that there will be more or less of those types of conflicts?

Dr. Alexander Insam: There will be more structural conflicts because the three main drivers that I pointed out—structures of companies, processes in companies, and the amount of communication we see—all of them change and grow in the future. Especially the communication interactions continue to grow because we are connected and talk to more and more people during our workday. In a more international context where more cultures work together, all those factors also add up to having more structural conflicts. Just replace the word conflict with new challenges or unplanned challenges ahead and I think it might be easier. Apart from conflict resolution practitioners, the word conflict has a negative bias, and people fear the conflict. They don’t see as much of potential. When you put in the term “unplanned challenges,” it becomes much clearer that those are

growing opportunities and possibly new ideas and innovations that surround us.

Don Philbin: Or innovation. Innovation is conflict. Replace the status quo with something else, and it will only accelerate.

Dr. Alexander Insam: If you don't do something new, you will never change.

Don Philbin: It will only accelerate. The question is how we manage it; that's why we're here.

Mary Beth Cantrell: For any of you, do corporations clearly communicate their objectives to their attorneys, and why do we often see a disconnect between what the attorney thinks, what the client says they want, and what the client actually wants?

Randall Kiser: There are major communication problems because attorneys define success in a way that's very different from the actual client. Attorneys are not particularly good at that. I think one term we were using is "surfacing objectives." Early on, the attorneys define the objective, which may be quite different from how the client would define success. At the beginning, there is a fundamental communication gap quite frequently because that important dialogue, the art of humble inquiry, is never exercised, and people proceed on autopilot and a series of assumptions, often until the case proceeds to mediation.

Dr. Alexander Insam: I think it's still different for workplace conflict or business-to-business conflict, but when you take a look at business-to-business conflicts, companies are sometimes trying to outsource the conflicts and say, "You're a lawyer, just go and handle it. Win the case." They don't even define what they mean by winning the case. Is this just getting the arbitrator of the court to rule in their favor, or is it about getting the best economic outcome of it? We just need to define what the goals are.

Again, the lawyer will then behave according to the goals. If you tell the lawyer, "Please find me a solution for how I can keep a continuing relationship with X as a company because I might need them in the future. We want to cooperate on some R&D projects," it's a totally different setting when you just tell them, "Win that case by all means and get a ruling in your favor." I'm a big fan of the C-level being involved in the clear goal setting and strategy because then they can work together with their lawyers as a team. If you just outsource the conflict and say, "Come on, get it out of my mind," then I don't think the results will ever be very good.

Mary Beth Cantrell: Along those same lines though, how are you sure that that decision-maker, that CEO, is getting accurate information and not just being told what they want to hear?

Dr. Alexander Insam: When they get outside counsel, that's just one opportunity. When, within the company, they have established a culture that's more control-based, they might have difficulties in getting people to

give them open feedback, but I would expect that a good outside counsel will be able to tell the CEO, “Well, when I hear that those are your goals, I think you should take into consideration A, B, and C.” A, B, and C might not be what a CEO expects, but that is how I would evaluate good outside counsel. It’s like talking about conflict management systems or people within companies that are trained in conflict management and experience many difficulties in selling their expertise in their own company because it is so different to change it when you’re within the company or within the system. When you go to another company, you suddenly become an outside expert. This conference is now full of experts, and many companies say, “Oh, wow, because we heard that from somebody else at another company. Oh, now this could work at our company too.” I think this is also very interesting to see that dynamic, that the outside expert is often able to tell a truth that is not accepted in the same manner when it’s the inside expert that’s telling the same truth.

Mary Beth Cantrell: On the other hand, in my experience, outside expert is colored by their perception of how well they’re going to do with the trial. If you hire trial lawyers, then those people want to go to trial, and so they’re going to be colored in what they’re telling the CEO about the expectations of how successful they’re going to be when you get there.

Dr. Alexander Insam: Of course, that’s tackling it from two sides. You can have the positive assumption that the outside expert has the interest to give good counsel to the CEO, or you have the assumption that the outside counsel just will do anything to please the CEO to pay him his hourly fees.

Mary Beth Cantrell: It’s probably somewhere in the middle.

Dr. Alexander Insam: Of course, I would expect, at least from the community here, that we have faith in the well-educated and trained lawyers, and to the students here today, that they will be able to make a living while telling people the truth and not just what they want to hear.

[Audience]: I have a question for Don. Your software is just fascinating. Have you been able to look at the impact of two things: caucus versus non-caucus in predictions, and also what happens if you’re looking at the length of time?

Don Philbin: I’ll take the second one first, the length of time. The algorithms will automatically adjust for the length of time and how long they think it will take. My personal anecdote is I don’t want somebody booking two days for a mediation. I want them booking one and reserving a second one only for backup. Because if everybody knows there are two days, nothing substantial happens the first day. Negotiation will expand to fit the space available.

As for the caucus versus non-caucus question, I can't tell because all the data is blind to me. But because it's didactic and it's two parties or more and it is about money, I'm assuming that, at some point, mediators are putting them into caucus to reframe some of the offers and probe weakness. My guess is that if the participants have enough rapport to be in the same room, that's just like the prisoner's dilemma problem. In repeat play, they're going to moderate their behavior. So the dynamic will be different if they're speaking to the other side directly. It's one thing to scream at us in caucus and say, "Deborah's not understanding me. That's completely outrageous." We've all seen the dynamic where people will perform for us differently than they would if they were in the round. You say, "You know what? That's a great idea. Why don't we walk down the hall and you tell them how it is?"

The behavior is often moderated in joint sessions, which is sometimes why I will do a little longer meet and greet individually with the parties before I throw them into a joint session. Not because I don't want them to do a joint session, which I generally do, but because the second telling of the story is often a lot milder than the first. They're spun up. They haven't relaxed, and so the first version is a lot more vitriolic. They'll likely tone it down in joint session if they've felt heard in the meet-and-greet, both because they've said it before and somebody's heard them and they're not going to act that way to the other party.

[Audience]: Do the law or the facts make any difference?

Don Philbin: Absolutely. The law and the facts are the backdrop for the negotiation and influence the parties' behavior. I'm able to capture the coordinates of their resulting moves in terms of monetary concessions and the time it takes to make them. Those data points necessarily capture the law and factual background against which the negotiations are taking place. We started with published verdicts, which is a relatively small and skewed sample. That's the reason you see differences by what is in-group. The assumption and the reason it works behaviorally is that all those factors are embedded in the offers made by pros in that jurisdiction and claim type. So those data points are baked into the offers that they're making. People are using guideposts to come up their offers and demands, and it is based on where we are, what kind of case, who's on the other side, and who the judge is. What we're projecting behaviorally through the use of neural nets trying to find somebody who's acted similarly so the algorithms can adjust that pattern to the current case. So, absolutely, and it's all baked into what drops out as the demands and offers.

[Audience]: I can't tell you how fascinated I am by your data program. I did want to ask, do you measure the zone of possible agreements at any given point in time? Do you also measure the risk of impasse at any given

point in time? You give a percentage on likelihood that this will continue or ultimately blow up.

Don Philbin: Absolutely. The reason it's represented probabilistically is that the cones themselves are telling you what the zone of possible agreement is. The graph is not still up there, but you may have noticed that it wasn't giving you one answer. It was giving a range within the first standard deviation and the second standard deviation. That's tantamount to the zone of possible agreement. I usually try not to do this so it doesn't anchor me until late in the day, but it's really handy when it comes time for brackets and mediator's proposals because I've gotten to check my intuition against big data to see where the projected brackets are in a probabilistic zone of potential agreement.

As far as the impasse, the width of the cone demonstrates the chance of impasse. If you get into a death spiral, and we looked at some of the cases that crashed, you start to see dots that go down or sometimes even jag back a little bit. Then the graphs not only point down, which anybody with a ruler could do, but also expand widely to show that our confidence in this projection is not very high at all and the risks of impasse are increasing. The way we've dealt with both of those is to back into them. Basically, the hurricane graphs will not only show the zone of possible agreement, but also represent the P value, the chance that it blows the round, by how wide the cone becomes. I didn't go far enough into this one, but what happens as the cone progressively gets narrower and narrower is it increases confidence in the projection.

[Audience]: I was wondering when you were looking at the behaviors of how people negotiate, were you basing it on a western model, or did you consider other cultural dimensions? If so, were there any differences?

Don Philbin: Part of it is that you just have to start somewhere, so the data set started with mediators, lawyers, insurance companies, and others that I knew that had reliable data, and then we went to a broader "clinical trial," if you will, with apps that would gather random data to see if we were breathing our own exhaust. I know for a fact that we've got cases that are outside the U.S. But just for treeing out geography and things like that, we have to start somewhere, so it started with the 3,200 some-odd counties in the U.S., which really boils down to the top 100—97% of U.S. litigation data is from the top 100 counties. While it doesn't answer your full question, there are certainly Western European inputs in the dataset and one of the development projects is a dollar converter for different currencies around the world.

But even within those silos, even with case types in certain counties, you can see that people emulate in-group behavior, which necessarily

incorporates the relevant cultural dimensions. One of my theories, back to the game theory and prisoner's dilemma, has to do with how likely you are to see each other again. If it's a smaller bar association, even within a large demographic, a smaller bar where they're going to deal with each other again, you get the prisoner's dilemma repeat play effect and behavior is moderated. The anchors come in with a probably a higher incidence of deals, but I can't tell you.

Mary Beth Cantrell: Is there another question out here somewhere?

[Audience]: It seems to me that the students in the room who are asking what field of law to get into can be informed by all the subjects the panelists have brought to the table today. It also seems that the answer could be to identify the industry or field of law that aligns with their values because nothing is more important than the training they get coming out. Would you agree?

Don Philbin: I would. I'd make it interdisciplinary. Pepperdine's leading the way in the decision theory course that Randy, I, and others have taught. One of the things in Randy's research was that good decision-making does not correlate with native IQ or with educational attainment. It is a taught and learned skill, and Jeremy and others said that you're able to toggle back and forth. We have to be calibrated.

Some of Randy's research, I'll blow his horn for a minute, is about mediation training. He controlled for lots of variables in looking at advocates that were making decisions on whether or not to go to trial based on last offer and demand. He controlled for the top twenty-five law schools, big firms, and small firms. None of those correlated with prediction accuracy, but what did correlate was that people who had mediation training were better calibrated in the decisions that they made as advocates. It may be a chicken or the egg dilemma: people who are drawn to neutral work might be more inclined to see the other side. But the result was statistically relevant that people who had mediation training, even when acting as advocates or clients, are better calibrated in decision-making and more open-minded. If you want to see the easy anecdotal research that good decision making is not correlated with native IQ and education, there's a great book, *Blunder*, that's an easy beach read showing a bunch of really smart people making really dumb decisions. In lieu of that, you might just buy tomorrow's paper. I'm sure there will be something.

[Audience]: First, I want to thank you all for a great presentation. Randy, you had some statistics I found interesting. There's only one I had an issue with. Males are better than females at picking outcomes? How could that possibly be the case?

Randall Kiser: It's a peculiar finding. What you were looking at is the frequency of settlement decision error by type of defendant. There was a small difference, 23% to 21%, female individuals and male individuals.

This is an anomaly in the decision-making research, but let's keep in mind, we're not talking about that great of a difference. The data is different when we look at males in the plaintiff role, and one of the most remarkable findings is that the decision-error rate for litigation teams on the defense side, headed by two males, is about 29% compared to the decision-error rate for litigation teams headed by a male and a female, which is around 21%. Although you may be focusing on the 8%, keep in mind, you're talking about a, roughly, 30% reduction in decision error comparing male-male teams with female-male teams.

I wanted to amplify, as Don was pointing out, when we tried to understand what are the predictor variables for these risk-taking settlement decision errors, we did find, and I think this relates to the issue of why there is a lower reception among law firms, that our research challenged the fundamental business model of the contemporary law firm. What we found is that the years of experience of the attorney, the size of law firm, and whether the attorney had graduated from a U.S. News & World Report top twenty law school or otherwise, those were not strong predictors of reduced error. The premises upon which many large firms are built, and specifically the hourly rate structure, we could actually find no empirical justification for when we attempted to quantify the predictors of settlement decision errors.

Mary Beth Cantrell: I think we're getting kicked off here, but I want to thank Randy, Alexander, and Don for doing all the heavy lifting. Thank you.

