



# The Future of ADR

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*by*

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*“Never Make Predictions, Especially About the Future”*

Casey Stengel, Baseball Hall of Fame Manager

*“There are two classes of people who tell what is going to happen in the future: those who don’t know and those who don’t know they don’t know.”*

John Kenneth Galbraith

*“The Future Belongs to Those Who Believe in The Beauty of Their Dreams,”*

Eleanor Roosevelt

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The future of Alternative Dispute Resolution (ADR), like its past, is promising but not static. Conflict is an inevitable part of the human experience. Tribal leaders have been mediating human conflict since Biblical times. George Washington included an arbitration provision in his will. Famed mediator Eric Green has been discussing dispute resolution in evolutionary terms for years—Stage 1: Blood Conflict; Stage 2: Jury Trial; Stage 3: Conflict Resolution. U.S. Chief Justice John Roberts developed a similar metaphor by recounting 1838 dueling rules in his 2015 Annual Report advancing procedural rule changes for civil trials.

We have always had conflict in human interactions, and we always will. But our understanding of behavior in conflict is advancing and opening opportunities for the next generation of conflict resolvers.

While ADR has deep roots, its application to civil trials has been more recent. The big bang that accelerated its growth was the 1976 Pound Conference. Justice Frank Evans essentially penned the Texas ADR Procedures Act on a bench in the Capitol in 1987. The 1925 Federal Arbitration Act (FAA) has been used to preempt various state substantive and procedural limits on arbitration over the last couple of decades.

Structural changes have driven exponential ADR growth for a generation. The question is whether this growth has formed a strong base for further expansion, or a ceiling. Are recent criticisms signs of growing pains or decay? What role will technology have in the use and delivery of ADR?

We do not pretend to have all the answers, but we have surveyed the literature<sup>4</sup> and polled our colleagues in drafting what we hope will be a conversation starter. We aim to prod practice development and brainstorming about the future by focusing on two questions:

- (1) What will we do from a practice perspective to address growing pains, and
- (2) How will the rapid advance of technology change both our understanding of how people make decisions, and the delivery of ADR? To discover the answers to these questions we must take one step back to take two steps forward.

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<sup>4</sup> This is such a broad essay that almost every sentence could lead to a bibliography of fine work. Mediate.com recently ran a Mediation Futures Project (<http://www.mediate.com/Futures/index.cfm>), Professor Tom Stipanowich has conducted a number of surveys of mediators, arbitrators, and users (<http://ssrn.com/author=846541>), Paul Lurie has spearheaded Guided Choice (<http://gcdisputeresolution.com/>), our own Justice Frank Evans has been urging Managed Dispute Resolution for years, and so many others have developed the area and continue to lead us forward.

# Dangers of Success:

## ● Strengths Become Weaknesses?

One of life's ironies is that great success often precedes or reveals weakness. Fortune 500 companies have always risen with innovation, and fallen when the rest of the world catches up. Technology has only accelerated that lifecycle.

In its 2016 Report on the State of the Legal Market,<sup>5</sup> Georgetown Law begins with the story of Kodak's rise to control of 90% of the film market and 85% of the camera market in 1976. This seemingly unassailable advantage led to bankruptcy 36 years later. It was not that Kodak did not anticipate digital photography—one of its engineers developed the technology in the 1970s and received a National Medal of Technology and Innovation at a White House ceremony just three years before Kodak's bankruptcy. Kodak just did not anticipate that consumers would want to view their photos on a screen. That decision was undoubtedly tainted by cognitive errors based in its success and control of 80% of the market for the chemicals and paper on which photography was based. Its strength became a barrier to anticipating the future.

### A. Rapid Adoption of ADR Attracts Critics

ADR's rapid adoption has also revealed growing pains that can be outgrown with innovation.

#### 1. Opt-Out Rule for Mediation Successful but Can Be Overdone

Court rules requiring mediation in civil cases successfully overcome known cognitive biases impeding negotiations. With a default rule requiring mediation, no one has to show weakness by asking for it. We know from the best-selling book, *Nudge*,<sup>6</sup> that whether a choice is presented as an opt-in or opt-out can double participation rates for 401(k) and organ donation programs. Similarly, mediation rates are higher in states like Texas that fall closer to an opt-out rule. However, commentators have noted that some courts repeatedly send the same case to mediation as a docket control measure, not allowing reasonable showings by all parties that a case is dead on arrival in mediation. While stories settling cases with that diagnosis are common, litigators and mediators have observed that making something routine can undermine its magic. There are opportunities here to fine-tune rules and their application to broaden mediation's appeal.

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<sup>5</sup> Center for the Study of the Legal Profession at Georgetown Law, 2016 Report on the State of the Legal Market, available at <https://www.law.georgetown.edu/news/2016-report-on-state-legal-market.cfm>.

<sup>6</sup> *Nudge: Improving Decisions About Health, Wealth and Happiness*, Richard Thaler & Cass Sunstein (Penguin Books, 2009).

## **2. Arbitration Critiques Increased with Consumer Usage**

Arbitration has been successful in commercial and international disputes, and recently has spread to a wide range of statutory and collective matters. In two decades we have gone from President Clinton issuing an executive order promoting ADR in administrative disputes to President Obama's Consumer Financial Protection Bureau (CFPB) proposing rules rolling back arbitration in consumer-financial contracts. As the U.S. Supreme Court has strengthened the FAA's policy favoring arbitration, opponents have proposed arbitration fairness acts to do broadly what CFPB is advancing by rule in its domain. Fortunately, arbitration providers and associations have proposed and implemented due process protocols aimed at these critiques.

### **B. Fit the Forum to the Fuss but Don't Get Hijacked**

#### **1. Lack of Mediation Structure Conducive to Creativity, and Abuse**

Mediation's free form spawns creativity. The parties are not bound by the remedies a court could impose, and can explore creative options with a neutral under the protection of confidentiality. Advanced preparation with counsel often results in a customized process that fits the forum to the fuss.

But that lack of form is also subject to manipulation. Commentators have recently fretted that advocates have either poisoned joint sessions with stilted rhetoric or refused to participate in them at all. The antidote may be using what we know about the way people make decisions, to educate participants on the best uses of what may be the only opportunity for direct communication between them.

Of course, advanced work with the attorneys and parties often results in better use of that opportunity. If the mediator knows the case and the parties feel heard before a joint session, the second telling often becomes more of a problem-solving discussion rather than a stirring closing argument that has the predictable effect of triggering defensive posturing and aggressive bargaining. Continued education in brain science will help neutrals address this drift.

#### **2. Customizable Arbitration Can Become Arbitigation**

Similarly, the ability of parties to customize an arbitration process by contract and rule adoption that fits their specific deal is credited with its popularity. There are no one-

sized clauses, though drafters often use a plug-and-play form clause at the last minute that they later regret. When a dispute arises, the advocates resort to what they know, often explicitly or implicitly agreeing to adopt state or federal procedural and evidentiary rules that critics have said make arbitration into “arbigation” (as expensive and time-consuming as traditional litigation). Broad efforts are underway to educate clause drafters on their role in streamlining the process, as well as rule and best practice protocols that will allow case development while addressing valid criticisms. Arbitrators as case managers are increasingly attuned to opportunities for settlement and early involvement of mediators.

## **C. Timing—The Right Number at the Wrong Time Is the Wrong Number**

### **1. Fifty Pounds of Potatoes in a Ten-Pound Bag**

As repeat players, neutrals and advocates naturally want to get through a movie they have seen many times before. They push to magically turn the clock hands to 3:30 p.m. by insisting on “reasonable” offers or trying to shove a complicated or emotional matter into a half-day mediation. Their counterpart usually shares the need for speed while making the same “reasonableness” complaint about offers coming from the other party.

Non-repeat playing parties are having a different experience, though. They may be faced with their toughest life decision, and be unable to cognitively cut to the chase. They have to get used to the rapidly changing altitude and adjust their expectations incrementally. With work and time, however, they can reevaluate prior positions with new information. It is a difficult adjustment that is made piecemeal as they evaluate the repetitive pricing signals coming with each offer from the other side.

Artificially truncating that process is like suggesting that since NBA games usually come down to the last two minutes, let us put two minutes on the clock and 100 points on each side and play it out. The result may ultimately be the same, but there is a very different satisfaction level. We can use what we now know about brain science to test some of these assertions.

### **2. Tension Between Efficiency and Due Process in Arbitration**

As in court, there is a constant tension between controlling costs and due process, especially in consumer and employment arbitration. Easy answers are elusive, but in-

creased emphasis on tailoring arbitration clauses on the front-end, together with procedural due process protocols during the dispute, have raised the profile of the issue while giving arbitrators guidance. Fortunately, there are great minds addressing these practice issues.

## **D. Preparation Is Key, But in What Areas?**

### **1. Law and Facts, Of Course, But Is That Enough?**

It seems axiomatic that neutrals should be prepared on the law and facts, yet preparation remains a leading criticism of mediation. Credibility is key, and few can pull it off without knowing what is important in a case. The market seems to take care of neutrals who phone it in, and don't prepare in advance. While there is confidential information that mediators need, there is also information that should be shared with the other side. Exchanging pocket (short) briefs in advance sets the table and reduces the need to take strident positions during any joint session.

A separate note to the mediator, outlining factors impeding negotiation and valuation information (comparable verdicts or decisions and quantitative assessments) will pay dividends, especially if later discussed in a pre-mediation call.

### **2. Brain Science—How People Decide Under Stress and Uncertainty**

The Pound Conference's experimental psychologists and neurologists have made great strides in understanding, and even mapping, how people predictably make decisions under the stress and uncertainty of conflict. They have catalogued dozens of cognitive errors that impede rational, disinterested analysis. More importantly, they have done groundbreaking work in countering those predictable reactions to help parties frame big decisions more objectively.

The ABA Journal recently dubbed these cognitive shortcuts the elephant in the room for lawyers. But such topics are still a novelty in ADR provider education. That should change not only to increase empathy and effectiveness, but also to address another top complaint: perseverance. Once mediators and advocates understand how parties are processing information in mediation, they naturally become more patient and persist toward resolution. Insight enlightens understanding, and understanding ameliorates the frustration that often increases the chance of impasse.

# Practice Evolves as User Preferences Change in Digital Age

If the only constant is change, we have to keep upping the game or risk becoming a commodity. There is still a market for print photography, but it is not large enough to sustain a company that was part of the Dow Jones Industrial Average for 74 years. If our mediations and arbitrations are pro forma and become routine, advocates take them less seriously.

Routine mediations are less effective, and the perception of mediation as a commodity has cascading implications for both the effectiveness of the process generally, as well as its role in the market. Why dig into what will improve negotiated outcomes if the mediator will follow a cookie-cutter model anyway? Why stop to ask what the parties really want and need if the mediator will “bash and trash” all sides until a grudging deal comes together?

The good news is that we have digital photography inventors in our midst. Will we listen and innovate, or soldier on with existing tools until the market changes around us? Since neutrals are an inherently creative bunch, our guess is that we will adapt quickly.

## A. Managing Conflict 4.0

Pepperdine’s Straus Institute for Dispute Resolution and KPMG Law recently hosted a forward-looking program with an audacious title: Managing Conflict 4.0. With a title like that, the content and delivery better be good. It was a bottom-up look at conflict. It used what we now know about neuroscience to cross cultural divides, strengthen relationships, harness the power of information to improve strategic decision making and choice, and promote conflict-competent leadership and conflict management. While posing tough questions, the presenters aimed at KPMG’s tag line of “cutting through complexity.” We are fortunate to have innovative “think tanks” in the academy and industry systematically thinking about addressing intractable conflict. There are some really creative thought leaders in ADR.

## B. Negotiation Coaching and Decision Architecture Help Process Disputes

Because mediators see so many deals come together, they develop a well-honed intuition about what does and does not work in negotiations. Many also study human behavior and the way we make decisions through a variety of disciplines. They often come away with an appreciation of how the framing of issues impacts the way the question is processed, and how sub-

tle word choices affect cognitive dissonance. They see how the same parties who resist “bashing and trashing” will self-diagnose when nudged with targeted questions.

Parties and advocates will often ask mediators they trust for advice on various negotiating positions. Without making their problem the mediator’s own, this opens channels to test various options without being heavy-handed. Those skills also migrate to evolving uses of ADR.

## **C. Guided Choice Integrates Neutrals Earlier in Disputes**

Mediation started as a late-in-process docket control device for overcrowded courts. It was a single event. That often works in less complicated money disputes where someone is needed to keep the tune going during a distributive dance to find a number.

Guided Choice recognizes that success rates in complex disputes increase with early neutral involvement—before large transaction costs make it more difficult to resolve. Guided Choice mediators do not impede trial preparation. They facilitate the exchange of information to enable informed negotiation, help identify factors that lead to stalemate, and recommend customized processes that reduce the odds of impasse. Arbitrators also increasingly work mediators into the process to streamline case presentment while searching for a deal.

## **D. Settlement Counsel**

Settlement counsel is a party-specific variation on the theme. Rather than the parties collectively choosing a Guided Choice mediator, parties select their own settlement counsel. The lawyers aid in the development of settlement strategies that are designed to maximize outcomes, and to keep lines of communication open while the trial preparation continues. Just as countries have separate diplomatic channels open while prosecuting a war, parties with settlement counsel keep those lines open as the warriors improve tactical positions that make trial a viable option and inform settlement options.

## **E. Early Neutral Assessment Brings Non-Binding Objectivity**

It is natural and predictable to favor our own position. Bringing neutrals in to offer an early case assessment is another way to work through cognitive biases that inevitably tilt case assessments toward the party making it.

Studies of baseball arbitration proposals show that even when the incentive is high to propose a number closest to the neutral assessment, we just cannot completely dislodge from our positional biases. The result is that both sides are off by at least 15% in their favor. Since we instinctively devalue whatever the other side’s assessment shows (reactive devaluation: nothing

my enemy suggests can be good for me, even if it actually is), tasking a neutral with de-biasing case assessments early reduces cognitive dissonance, while averting the costs associated with fully working up the case.

## F. Deal Mediation

In conflicts, neutrals both reduce cognitive dissonance to competing proposals by reducing reactive devaluation, and by serving as the lightning rod for contentious deal points, thereby promoting better relationships between the parties. So why then are those functions not helpful in negotiating complex deals?

Put simply, the frame is different. Making deals happens in the romance phase of the relationship, where the parties are building a future together. Beginnings reduce reactive devaluation and resistance to the other's proposed deal terms.

But there are usually sticky terms, the equivalent of the pre-marital agreement, that could use a scapegoat, so the parties' relationship is nurtured by the upside discussion while someone takes the heat on the less endearing points. If nothing else, arbitration clauses might become more tailored to "what happens if" scenarios without detracting from the euphoria of the deal.

## G. Users Are Innovating, So We Must Too

When mediation exploded after the Big Bang, most lawyers had not taken a negotiation course in law school, much less a mediation course. Those armed with a 40-hour basic mediation course were cutting edge and received some deference—helped by the fact that many were former judges. Like Kodak, we find ourselves in a different environment today. Many advocates have either taken a 40-hour course, or a more specifically designed course along the lines of the "How to Spin the Mediator" variety. So they are not wowed by "swing a dead cat, hit a mediator" neutrals who stepped over a very low barrier to entry.

Our deliverable cannot just be organizing the settlement process with a cookie-cutter. To add value, we have to:

- understand the law and facts through specific case preparation;
- understand negotiation concepts broadly; and
- appreciate how real people in those negotiations process information as they encounter predictable cognitive errors.

Finessing deals with a variety of tools, including sober risk analysis drawn from the participants through open-ended questions, gets to the same place as those bashing and trashing positional arguments, but with less cognitive resistance.

## H. Life-Long Multidisciplinary Learners

One of the best things about ADR is its multidisciplinary nature. It is a study of the human condition under the stress and uncertainty that attends conflict. Each mediation brings a slightly different combination of facts, law, and personalities. The disputes are human problems that have taken on legal trappings. Understanding the underlying problem breeds empathy, and there are some wonderful resources to aid mediators in developing that understanding.

Experimental psychologists have discovered the predictability of cognitive shortcuts or errors. Neurologists are now mapping the operation of those biases in the brain. Game theorists have studied how people interact in repetitive play. Communication theorists provide insight into the broad fidelity of human communication. We can have fun learning from the symmetry of music, the rhetorical flourishes of great speeches, the power of a well-timed and turned phrase from stand-up comedians and improvisational actors. According to Eric Green, we would also do well to study evolutionary biology. He contends that organisms are naturally cooperative at a cellular level and that we will trend that direction over time.

Some great books, many with one word titles, have come out recently dishing up hard science in easy-to-read formats that make these topics fun. Most everyone is familiar with Malcolm Gladwell's celebration of System 1 gut instincts in *Blink*. The flip side of relying exclusively on System 1 is the greatest hits of experimental psychologists Daniel Kahneman and Amos Tversky captured in *Thinking, Fast and Slow*. The predictability of these cognitive ticks is given fun treatment in Dan Ariely's *Predictably Irrational*, and the later corollary *The Upside of Irrationality*. David Brooks pulls much of the science together in his easy read *The Social Animal*, and notwithstanding a tall tale that got it pulled, Jonah Lehrer does the same with *How We Decide*. Behavioral economists Richard Thaler and Cass Sunstein capture the power of word selection and issue framing in the systematic processing of choices in *Nudge*. Together, these recent works give us an appreciation of how difficult it really is to make a big decision, particularly when it is not in your domain of expertise and appears under the stress and uncertainty of conflict. That understanding changes our perspective, patience, and perseverance to inform how we help them frame choices in what Thaler and Sunstein dub "decision architecture."

# Technology Moves from Speeding Old Processes to Providing Insight

## A. Advancements Have Sped Up Existing Practice

Most technological advancements in law offices since the Pound Conference have revolved around speeding up existing processes.

Document production went from typewriters to word processors to voice recognition;

Document delivery went from snail mail to facsimile to overnight delivery to email and secure sharing services; and

Document retrieval went from paper libraries to expensive proprietary services to search engines.

All essentially rely on the creativity of the user to design the Goldilocks search that retrieves the desired information without a massive amount of irrelevant hits. The flip side is that authors have changed writing habits to include those keywords for retrieval. Discussions have moved from landline to Internet telephony to video calling to more interactive systems. All of this was made possible by Moore's Law (two-year doubling time for computing power), and speculators massively overbuilding the telecommunications infrastructure (except the last mile) to facilitate the Internet and cloud services. Most of these advancements have changed form more than substance. The Federal Reporter filled much faster with word processors, even as jury trials declined. But legal futurist Richard Susskind predicts: "the legal world will change more radically over the next two decades than over the last two centuries" in his books *Tomorrow's Lawyers* and *The Future of the Professions*.

## B. Still Early in the Cycle

The funny thing is, we are still at the beginning. As Mark Andreessen has said, software is going to eat the world. Consider:

In 2000 there were a half-billion people on the Internet. By 2014 that number grew to 3 billion, and by 2020 it will grow to 5 billion.

In 2014 there were 3 billion smartphones being used, and by 2020 that number will grow to 5 billion.

By 2020 75% of the global population will have regular access to the Internet.

Even the oldest iPhone has at least 625 times more transistors than a Pentium processor from 1995. On the first weekend of the iPhone launch, Apple sold 25 times more transistors than were on earth in 1995.

Everyone now has a supercomputer in their pockets with them all day, and they upgrade it every year or two without fail. Soon every person in the world, no matter how far out in the jungle or desert they may be, will be able to access the whole of human knowledge with a few swipes of their fingers. We are getting closer to the singularity, when the intelligence of machines will exceed that of humans. Experts predict it will happen sometime around 2040, which is barely 20 years away.

## **C. Move from the Noise of Collection and Retrieval to Actionable Insight**

Now that we have created the means to drown ourselves in data, what will we do with it? Google's Eric Schmidt is credited with saying we created five exabytes of data between the dawn of civilization and 2003 and we now do that in less than two days. Who can read or even effectively search that much data? Smart systems will have to aid human professionals. After IBM beat reigning chess grandmaster Garry Kasparov with brute force computing in 1997, it moved to more cognitive-type systems. IBM's Watson stunned the world when it picked up the nuance of human communication and sentence structure to beat the best human Jeopardy players in 2011. Now it is using a photographic (machine) memory containing 290 medical journals, 200 textbooks, and 12 million pages of text to help customize cancer treatments based on individual medical histories. Watson is not making medical decisions, but it is a potent tool that aids the well-honed and educated human instincts of fine doctors who use its insights to fine-tune their decisions. Google's Deep Mind computer can apparently win a 2,500-year-old game much more complicated than chess.

## **D. Analytics Already Appearing in Legal—Expect More Soon**

Since law is a derivative works profession, how things have been done in the past (precedent) is prime. How a court found facts and applied the law in a "spotted-horse" case is much more helpful than a creative solution, unless it is a mediation where that creativity may expand the pie and settle the case. Law has adopted new technologies at an even slower pace than medicine. But as Center for the Study of the Legal Profession<sup>7</sup> observed with the Kodak metaphor, change is coming rapidly. Heat maps now illustrate relevance in legal research and document

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<sup>7</sup> Center for the Study of the Legal Profession at Georgetown Law, 2016 Report on the State of the Legal Market, available at <https://www.law.georgetown.edu/news/2016-report-on-state-legal-market.cfm>.

review. Neota Logic is delivering systems that model complex rules and reasoning processes. Stanford Law spinout Lex Machina is providing real and graphical insight through analytics into patent litigation with aspirations to expand the offering to other legal silos. Its acquisition by LexisNexis late last year may be the best signal that analytics are coming to mainstream law.

## **E. Technology is Helping Resolve Disputes Quickly**

### **1. Reputation-Based Systems Drive Conflict Resolution**

In 2015,<sup>8</sup> Black Friday saw more holiday shoppers online than in brick-and-mortar stores for the first time. Shoppers were buying from people they did not know based on mass reputation scores. Telling your neighbors you had a bad experience with a local merchant gave way to product and seller reviews online. eBay developed systems that have helped users resolve more than 60 million disputes per year, which is more than three times the total number of lawsuits filed in the U.S. annually, according to Susskind. Online Dispute Resolution providers are now expanding similar systems into a wide variety of other domains.

### **2. Communications Have Changed**

The promise of online mediation has been slow to come to fruition. Certainly, disputes are being resolved online. There are a variety of systems that help people frame offers, exchange bids, communicate in writing, and even get triaged out to a mediator in smaller, money denominated disputes.

But even Skype-type services have not provided an effective substitute for in-person negotiations. We know that most communication is non-verbal. People rarely say what they mean, but body language is much harder to mask. Studies of the Kennedy-Nixon debate measured differences based on the medium. People reading the transcript and listening to the audio feed reached different conclusions than those who watched the first video broadcast. So far, two-dimensional video has not come close to the communicative impact of in-person negotiations. However, three-dimensional virtual reality and easier interfaces may fill in some of those shortcomings. Academics have already found that students negotiating online with colleagues at different schools close more deals if they first develop some relationship through phone calls. Soon, technology may

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<sup>8</sup> Max Willens, Thanksgiving, Black Friday Desktop Sales Rise, While Brick And Mortar Sales Slide, available at <https://www.google.com/search?q=Thanksgiving%2C+Black+Friday+Desktop+Sales+Rise%2C+While+Brick+And+Mortar+Sales+Slide&oq=Thanksgiving%2C+Black+Friday+Desktop+Sales+Rise%2C+While+Brick+And+Mortar+Sales+Slide&aqs=chrome..69i57&sourceid=chrome&ie=UTF-8>.

bridge some of this gap and make remote appearances by company and insurance representatives more participatory.

### **3. Cultural Barriers Coming Down**

Neutrals need to be culturally competent to have credibility. Parties will not feel heard if they do not think they are understood. Assistive technologies already speed translations. Google, Facebook, and other sites translate messages instantly. They may even look up short articles on cultural differences. But understanding context is tough. The remarkable difference between IBM's brute force chess playing computer and its Jeopardy-winning Watson was the ability to understand language subtleties. While there is some amazing neurolinguistics research ongoing (predicting whether co-eds will form a relationship more accurately than they can by analyzing only their text messages), contextualizing communication is among the hardest of chores. For the foreseeable future, only training and experience shed light on whether a literal "yes" actually means "I understand" or "I agree." People in more collectivist cultures tend to say "yes" to be hospitable and indicate understanding. Many Westerners have thought they "got to yes" only to find out that their hosts were simply indicating that they understood. ADR practitioners should study different cultures to become more culturally competent. Of course, the continued diversification of neutrals and panels will help reduce barriers

### **4. Predictive Analytics Assist Negotiators**

We have long urged parties to prepare for negotiation differently than for trial. We urge parties to do the hardheaded case evaluations that attempt to quantify risks. We push them to encumber those projected outcomes with the transaction costs of experts and attorneys' fees. Be sure to measure negotiating outcomes against your best and worst alternatives in court. But how?

Without tools, we do what we have always done. So it is no surprise that negotiation planning looks like litigation—statements of law and fact often taken straight out of previously filed motions. While very helpful to be conversant about the case and develop credibility, it is half a loaf.

Risk analysis attempts to incorporate uncertainty and test sensitivity to various outcomes, but even the most elaborate decision tree is still imbued with the biased assumptions of the party doing the inputs. Software graphs such decisions and does the math for those of us who went to law school to avoid that exercise. These assessments are not perfect, but they are more useful than the adjective-driven System 1 gut analy-

sis: “we have a good case.” After such tools guide toward the best alternative to a negotiated deal—ideally a target number for the negotiations—how do we get there?

We know from brain science that it will be a process of concessions. Car dealers usually take three rounds to get to a deal. The exercise is less about finding a price than convincing the buyer that he or she got a good deal so that they tell all of their friends to shop that dealer. Negotiating litigated cases is not entirely different.

Research from thousands of litigated settlements coming together in Picture It Settled’s database indicates that it often takes about seven rounds to settle a case. Negotiators need time to evaluate the bids they are receiving. Where they start or anchor is important, but it turns out that the second and third moves define the round. Initial anchors vary by venue and case type due to varying social conventions, such as the “in-group” behavior of people in the same fish tank (i.e., geography, practice area).

Almost everyone is forgiven an aggressive anchor. What matters is what they do after staking out that tough position. It turns out that the second and third moves define the round. Now advocates can strategically plan their negotiating moves with their clients and adjust them in real time as they obtain more data. Predictive analytics can help guide the negotiations and predict where the round will end at the current pace. This builds the confidence of the negotiator and helps avert impasse as the projections map a course to a successful outcome, even though the current gap seems frustrating.

These models do not replace the well-honed instinct of the advocate. They simply model scenarios that help the advocate optimize outcomes for their client while reducing frustration that often leads to impasse. It is like playing the childhood game “Battleship,” with sonar. The result is more settlements with better results.

For those who do want to negotiate online, web-based services have reportedly handled more than 200,000 personal injury and insurance claims; Susskind reports that a UK web service helps consumers resolve grievances with 2,000 organizations. Interestingly, patients will be more candid with an avatar collecting medically relevant, but potentially embarrassing, information than they will be with a human asking the same personal questions. It is conceivable that disputants will be more honest with intelligent systems probing needs and interests than they are with humans they fear may be judgmental. Of course, these results might change if patients had lawyers present when the avatar conducts the interview.

# IV. Conclusion—Bright Future for Those Who Lead Change

ADR has certainly had its Kodak moment during the post-Pound Conference Big Bang. The necessity of clogged dockets and court funding untethered from growth created an environment for quick success.

Now, nearly every law school offers courses in negotiation and dispute resolution, and there is a nationwide community of professional dispute resolvers, many of whom have a degree in ADR. The overall market continues to look good. Conflict abounds, and that will continue or worsen. But first generation techniques may be an increasingly uneasy fit with evolving conflicts. If we wait for the market to come to us to apply proven tools, we risk the market switching to the equivalent of digital photography while we keep selling paper. Technology has disrupted every industry in the United States, from medicine to finance to entertainment, and law is not immune.

We will have to keep up with new developments in the brain sciences, how technology changes delivery of services, and how analytics leverage big data to provide insight to human decision-makers in conflict. We cannot presume to know where that will lead, even over the short-term. But we do know that the market for our “print photography” will change, perhaps dramatically. We can lead that change, or hope to survive it. The good news is that ADR is filled with creative practitioners who “believe in the beauty of their dreams.” Let us prove Eleanor Roosevelt correct by taking ADR to new heights in the years ahead.