Data Analytics: Hollywood and the Practice of Law

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Moneyball: The Book and the Movie

We are not going to confess how many times we've watched *Moneyball*. It's embarrassing – and still, when it comes on, we are apt to look at one another, smile and nod in silent agreement – yes, again please.

The very first time we saw *Moneyball*, we knew it would crop up in an article. The movie's use of data analytics in baseball immediately prompted us to start talking about how some of the lessons of *Moneyball* applied to the legal sector.

We promise you that we came up with the title of this column ourselves, but as we began our research, we were shocked at how many others have had the same idea. In fact, a CLE at this year's Legal Tech had a very similar name – and several articles on data analytics in the law did too.

So, if you have thus far missed seeing *Moneyball*, let us set the stage. The book *Moneyball*: The Art of Winning an Unfair Game was written by Micahel Lewis and published in 2003. It is about baseball – specifically about the Oakland Athletics baseball team and its general manager, Billy Beane. The cash-strapped (and losing) Athletics did not look promising until Beane had an epiphany.

Perhaps the conventional wisdom of baseball was wrong. Perhaps data analytics could reveal the best players at the best price that could come together as a winning team. The epiphany came from Peter Brand, a genius at analytics whom Beane brought onboard. They begin to recruit bargain-basement players with game-winning skills.

A long way from the law? Not so much . . .

An Introduction to Data Analytics

One of the articles we found was by Owen Byrd, the CEO of Lex Machina - its site well worth cruising to get some sense of the state of data analytics today. As he said "We are not far from the day when player stats in the legal game will be as omnipresent as they are in baseball. In federal intellectual property litigation (and soon other federal subjects), everyone involved in any legal matter – lawyers,

opposing parties and judges – is already subject to rigorous statistical analysis, including assessments of strengths and weaknesses and performance rankings."

We are beginning to pick our lawyers with data analytics, predict the outcome in court before a particular judge and assess the probable result of using a particular strategy or argument. Clients will be looking to see the costs involved to get a good result and the costs expended on lawsuits that proved to wag their tails. Settle or litigate? Who is the best attorney (or firm) at the best price point to get the desired result?

How many attorneys advertise their losses? Or make themselves sound more familiar with a subject area than they really are? While data analytics is still in its relative infancy, more and more attorneys and law firms will be chosen by in-house counsel and others based on the verifiable realities of their record.

When we talk to lawyers about this, most wince. Some lawyers will come off splendidly – but others may find that their record dooms them as a litigator. Worse for those lawyers, this technology, currently fairly expensive, is bound to come down in price and be more accessible to consumers of legal services.

How Does Data Analytics Work?

It is beyond the scope of this column to explain precisely (and clearly) how analytics works, but basically millions of pages from litigation records are fed into the analytics platform, which arranges them using natural language processing and machine learning. This means you can simply ask who has won the most patent infringement cases in a specific geographic area involving a particular kind of patent or in front of a particular judge – and bam, you have a near-instantaneous answer.

This answers are invaluable maps to those who decide whether to move forward with litigation and with which firm or attorneys. For example, Byrd cites a case in which a large tech firm wanted alternatives to the large (read expensive) law firms his company had been using. That company now has a list of lower-priced boutique firms, all of which had not previously been in opposition to the company, who had experience in the technology involved from other cases and who had a good track record of success. It does sound a lot like *Moneyball*, doesn't it? Cheaper players, good skills, part of a winning team . . .

Moneyball Law

So how are lawyers selected today? Maybe they were referred to the client, or the client saw their TV ads, billboards, social media or website. Maybe they had great offices, or were in "Top Lawyer" lists. Studies have shown that client selection of lawyers by these means have only average results.

Law firms do no better: They tend to select their own lawyers based on interviews, considering other highly regarded law firms which had hired them, the pedigree of their law schools or how well they fare in an interview. A study by Premonition LLC, an artificial intelligence company which targets the legal industry, demonstrated that in the U.K., the law firms picked lawyers poorly, based on some of the factors cited above.

For the client, what predictor works? According to Toby Unwin, Premonition's CIO, it's the "win rate" preferably tied to a particular kind of case before a particular judge. It wasn't an easy road for the company. It discovered that the only things that get tracked in law firm is an attorney's wins and billed fees.

While they thought their analytics would find a fertile market in large law firms, they were wrong. "It was a stupid idea" according to Premonition CEO and co-founder Guy Kurlandski. "It was like interviewing cows, asking them what they thought of McDonalds. You don't ask the candlemakers what they think about light bulbs."

The company worked hard to perfect how it mined and analyzed court records. Now the system downloads cases in real time as they are filed, analyzing them, creating complicated tables, calculating win rates and assessing differences from judge to judge looking for attorneys specializing in various case types. Primarily, it looks for "outliers," litigators with long strings of unbroken wins before particular judges. Kurlandski notes wryly that "every judge has their favorites."

He also says "In law you don't always get what you pay for." The firm found no correlation between win rate and billing rate. In fact, it found that the most successful counsel in each court is found at solo or small firms. This defies the traditional wisdom about selecting lawyers. We love this quote from Kurlandski: "Law has long been seen as a Geffen Good, an economics terms whereby the more a consumer pays for something, the better it is perceived to be."

Analysis of cases in one court showed that statewide firms had a pretty healthy success rate, but three national firms did not. Why do general counsels hire "White Shoe" firms that lose three out of the four times they go to court? The answer seems to be that they simply don't know because no one keeps score. And perhaps that they are covering their backsides by hiring big law firms with big reputations.

That is now changing. And more quickly than most lawyers realize. Even insurance companies are turning to data analytics, calling it a game changer and saying that better litigators means fewer losses which means lower premiums.

Ben Wolkov, CEO of Litigas, has said "The profession has been able to escape accountability, but big data is bringing transparency. Picking attorneys by anything other than their win rate no longer makes sense."

What else can data analytics do?

It's not only about selecting lawyers. Before a demand letter is drafted, attorneys can analyze who caused the harm, who has the deepest pockets and how prospective defendants will react to a claim, which is evidenced by the prior litigation behavior of those defendants.

Even if they've never been sued before, you can analyze the behavior of similar defendants faced with similar claims. The defendants themselves will use similar analytics to inform their strategic decision making.

Data may show that establishing jurisdiction by a court with a measurable track record favoring plaintiffs with similar claims can have more impact on the outcome than any subsequent tactics.

If data informs you that a particular judge in a patent case typically ruled on claim construction solely on the briefs, without holding a hearing, the attorneys will know to include all their arguments in the brief. Why hold anything back for a hearing that will probably never take place?

If you know the average length of time of a particular kind of case in a court, that may impact the litigation budget. If you know the average length of trial time, that can impact how you strategically decide to present your case.

We were a little nonplussed by the idea that zealous representation in litigation can include using statistical information about opposing counsel. If you know what cases opposing counsel is handling and you have the filing deadlines in those cases, you could serve your discovery requests when that counsel is busiest with other matters. That is not only *Moneyball*, but hardball. No doubt data analytics will be used in exactly that manner, to the dubious credit of the lawyers employing those tactics.

Resistance to data analytics is no doubt futile. Think about the permanency of data analytics in the legal profession as you read the next section of this column.

Quotes:

A quote from the book by Michael Lewis:

"There was but one question he left unasked, and it vibrated between his lines: If gross miscalculations of a person's value could occur on a baseball field, before a live audience of thirty thousand, and a television audience of millions more, what did that say about the measurement of performance in others lines of work? If professional baseball players could be over or undervalued, who couldn't?"

Peter Brand (the data analytics genius played by Jonah Hill) in the movie *Moneyball*:

"People who run ball clubs, they think in terms of buying players. Your goal shouldn't be to buy players, your goal should be to buy wins."

John Henry (co-owner of the Boston Red Sox) in the movie *Moneyball*:

"Anybody who's not building a team right and rebuilding it using your model (Billy Beane's), they're dinosaurs."

A quote from Billy Beane (played by Brad Pitt) in the movie *Moneyball*:

"Adapt or die."

Final words:

Author Nelson did not wish to watch *Moneyball* believing the movie to be all about baseball – which puts her to sleep. She was wrong. The movie was all about data – baseball was simply the stage on which data analytics proved its worth. And it presaged one of the most significant developments in the legal sector. We're still struggling to understand all the implications of data analytics, but we

know that they are profound – and that law firms which understand and employ them may secure an immediate and long-lasting advantage in a marketplace that is increasingly competitive. Billy Beane was right. Adapt or die. Not much of a choice.

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