BRIEFLY

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Using data to assess past and plan future

By Andy Crowder and Eric Magnuson
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Although "justice" is blind, and sports a blindfold to prove it, we have long recognized that Supreme Court justices (and lower court judges) are not. And so for decades the Senate Committee on the Judiciary — and interested citizens — have analyzed judges' historical rulings and predicted how those judges would decide cases if elected to the Supreme Court. The implications are clear; if we can figure out how and why judges made certain decisions in the past, we can discern how they will act in the future. Because, ladies and gentlemen, knowing how a judge is likely to decide cases is a highly coveted advantage not only for Democrats and Republicans but for practicing lawyers and their clients as well.

As technology continues to advance at speeds never imagined only a few years ago, those changes continue to impact the practice of law. One such change, which promises to endure, is the extension of judicial predictions beyond the nominations process. Lawyers are now using data about judges' past decisions, and why those decisions were rendered, to chart a preferred course and advance the most promising positions for their clients. Clients are even using data about lawyers' results to select the best representation. As one former litigator recently put it, "Fast-forward a couple years, and it will be absolutely unthinkable to not study your judge or to not study the lawyer you're going to hire in a statistical fashion." Roy Strom, "New Data Analytics Tool Knows Every Federal Judge's Favorite Cases," New York Law Journal, Vol. 260 no. 105 (Nov. 30, 2018) (quoting Rick Merrill, creator of Gavelytics).

The referenced statistics—that raw data concerning a judge's or lawyer's past results—are now readily accessible and available for use. Indeed, LexisNexis has launched its "Context" program, which collects data for every federal judge, including how many motions each judge has ruled on, how many of those were granted, and what cases those judges are most likely to reference in opinions (among other relevant categories of information). The Context platform also provides data on over 100 different types of motions, including how often they are filed and how often they are successful. That is information lawyers, and their clients, should be (and will be) using to bring home the bacon from here on out, so you should get used to it. And, importantly, using this type of data analysis will make you more successful.

Some background on the data and the technology used to capture it is helpful here. For years, the busi-

ness world has been investing billions of dollars into data analytics tools in order to better understand and manage risk. It is data, and not empty promises, upon which deals are built. For example, offer to sell an investment bank billions of dollars' worth of mortgages, and the bank will balk. But back that offer with data concerning potential return—such that the majority of included mortgages will pay off early and fewer than 10 percent will default—and suddenly you've got a deal. This is what's indicated in an October 2017 article, "In God we trust. All others must bring data." Kirk C. Jenkins, "Making Sense of the Litigation Analytics Revolution," The Practical Lawyer (Oct. 2017).

It makes sense that the same would be true for the legal profession, but by and large technology has not been up to the task. So instead of indicating how a judge will likely rule and why, based on data and analysis, most pontificate based on gut: "this judge is pro-defendant" or "that lawyer is aggressive." Similar intuitive statements would not cut it in the business world, and as technology bridges the gap from business to law, soon they will not cut it in the legal profession either. Indeed, as Jenkins noted recently, "technology has caught up to textual-based documents" so that meaningful data analytics are now possible in the context of legal writing and opinions. Id.

This forward leap—from analyzing simple numbers to the persuasiveness of prose—can be found close to home. We recently wrote about the work of Empirical Scotus (a blog run by lawyer and statistician Adam Feldman and found at https://empiricalscotus.com/) who analyzed the Supreme Court's 2017 term. See "Getting Rid of those Amicus Blues," https://empiricalscotus.com/2018/07/16/amicus-blues/; see also Geoffrey Kozen, "How amicus briefs can be court's best friend," Minnesota Lawyer (Nov. 19, 2018). The Empirical Scotus blog is "designed to look at contemporary and historical Supreme Court issues at an empirical level," including "analyzing decisions and oral arguments," and the July 2018 analysis used cutting-edge software to study what made amicus briefs effective, including review of sentence length, word choice, and structure. Dr. Feldman ran more than eight hundred amicus briefs through his program of statistical analysis to declare the top-rated filers of amicus briefs in 2017 (including top repeat filer, and Minneapolis' own, Mahesha Subbaraman of Subbaraman PLLC).

Similar software suites are now available to lawyers. Lex Machina, Ravel Law, Bloomberg Litigation Analytics, and Premonition Analytics have all developed software in the past few years to assess lawyers, clients, companies, and judges (Lex Machina and Ravel Law have since been acquired by Lexis).

Bloomberg and Lex Machina, for example, offer tools to evaluate how often a certain plaintiff files litigation, and in what areas of law. Searching those results may provide useful admissions or contradictory positions if you face similar battle lines.

Likewise, Ravel Law "has analytics for every federal judge and magistrate in the country, as well as all state appellate judges." Jenkins, "Making Sense of the Litigation Analytics Revolution" (Oct. 2017). So instead of telling your client a judge is "pro-defendant," you can tell that client the judge granted 65 percent of defendants' motions to dismiss or for summary judgment in the past five years. As Jenkins writes in "Making Sense of the Litigation Analytics Revolution," "given the sheer amount of data" legal professionals have to wrangle these days, "having tools that can directionally help you is super helpful." And, maybe even better (or worse, depending), clients can now chose counsel based on real results as opposed to fancy online profiles and "gut feels."

Appellate practitioners are also getting in on the fun. Jenkins, an avid writer and practicing attorney, built his own firm databases of appellate cases in California and Illinois (thousands of cases decided since 1990 in Illinois and 1994 in California). He assessed a number of criteria for each case, including the parties, whether lower court decisions were unanimous, and eventual outcome. The results are both interesting and useful. While it is conventional wisdom in most jurisdictions that seeking Supreme Court review is only worthwhile in cases where there was a published dissent below, Jenkins found that "a significant fraction of both the California and Illinois Supreme Court's civil dockets arises from unpublished unanimous decisions." Jenkins, "Making Sense of the Litigation Analytics Revolution" (Oct. 2017). So while conventional wisdom and "gut feels" hold that seeking a petition for review is often not a valuable exercise, the raw data says otherwise, data and analyses we should all be incorporating into our practices. Armed with that information, appellate lawyers may find themselves with more work to do, which is (almost) always a good thing.

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