Checkmate:
Early Moves Define Negotiation Outcomes

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EARLY MOVES DEFINE NEGOTIATION OUTCOMES

By Don Philbin

Chess grandmasters report that, while a match may last hours, the board is set in the first few moves. Players send strategic signals early and then work for hours to implement their plan while taking account of, but not being controlled by, their opponent's moves. They relentlessly run *their* plan.

Effective negotiators also send strong strategic signals in their first few moves. Since litigators are used to weaving simple stories from complexity and constantly threading evidence through the ultimate questions for the fact finder, they are already experts at strategic planning. Those skills are the grist of a successful negotiation. The question is whether, through research, we can draw insights about negotiation strategies that can help lawyers add value for their clients in real time.

FROM ANECDOTAL MAXIMS TO BIG DATA AND ADVANCED ANALYTICS

Historically, most negotiation research has been anecdotal because real participants do not want to have a social scientist sitting in the corner coding variables for research. The result has been anecdotal maxims drawn from experience: The settlement lies at the midpoint between the first two *reasonable* offers. First numbers anchor negotiations. Take a tough position by anchoring high or low, and even late concessions take twice as long and concede half as much.

It turns out, though, that the negotiation of litigated cases is more nuanced than these one-sized general rules. With advancements in technology—including smart phones—and the application of advanced analytics, computer scientists, physicists, mathematicians, sociologists, psychologists, economists, and lawyers have been able to draw meaningful insights about human behavior using learning algorithms and neural networks. In the best-selling book *Burst*, Albert-Laszlo Barabasi claims, "Their conclusions are breathtaking; they provide convincing evidence that most of our actions are driven by laws, patterns, and mechanisms that in reproducibility and predictive power rival those encountered in the natural sciences." While human behavior varies—often irrationally—it is predictable, even when irrational.

NEGOTIATIONS FOLLOW PREDICTABLE SOCIAL CONVENTIONS

The negotiation of litigated cases usually involves a dance that divides into roughly three phases. Some are tangos while others are waltzes, but effective negotiators engage in a pattern of reciprocating behavior that tests the strike price for a deal over multiple rounds. Short circuiting the negotiation dance often leaves money on the table. Figure 1 and Figure 2 show actual negotiations plotted with dollar moves coming together along the horizontal axis and time running from the start of the mediation down the vertical axis to a deal.

FIGURE 1 AND FIGURE 2
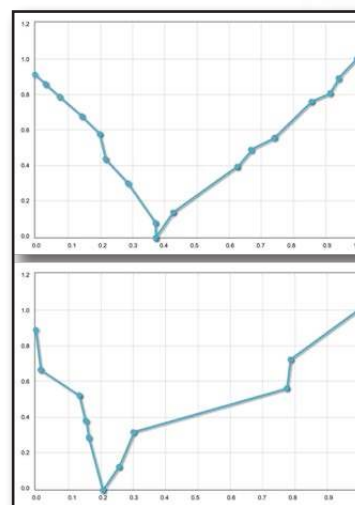
Opening: Whether begun in a joint session or out of the blocks in caucus, parties tend to share information early in the round in an attempt to persuade their counterparty, or at least justify their tough position. Informational asymmetries may be wider in early mediations than those occurring on the eve of trial after discovery. Damage calculations are often offered to support early demands and offers during the opening phase of the mediation.

Middle Muddle: The middle muddle usually coincides with lunch in a full-day mediation. There isn't as much information left to share. One side probably already knows about the smoking gun that should have brought them around to the other side's case evaluation. They also know how the other side is calculating damages, or the lack of them. Still, although the parties are still divided, the ball is still moving. Nei-

ther side wants to give up until they see how sweet the deal will get, but it's not fun. To plumb the other side for their best number, they keep moving the target closer to them without going to their demand. Colloquially, they hang the meat low enough that the dog *thinks* she can get it. A pattern of reciprocating movement ensues, even if the parties are not thrilled with it. Both sides move in rough proportion (not dollar equivalents) to the other, begrudgingly.

Impatience Up, Blood Sugar Down: Later in the afternoon, impatience grows as if an alcoholic needs a drink. As blood sugar drops, non-inert or *status quo* decisions become more difficult. What trial lawyers know as the breakfast theory—what the judge had for breakfast may affect decisions—has been proven by empirical researchers. After looking for simple binary choices to quantify decisions, researchers settled on criminal parole outcomes because of their up or down nature. The prisoner's sentence could not be altered. The judge had two choices—parole or not. Figure 3 depicts the parole grant rate by Israeli judges studied throughout a single day. All prisoners were *eligible* for parole, but the court had wide discretion in granting it.
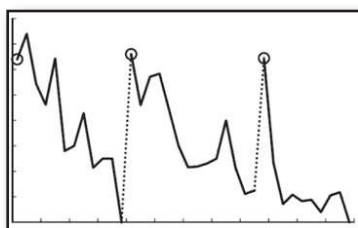
FIGURE 3

Researchers studied the outcome of hundreds of cases. They found little correlation among behavioral factors, but they did find a startling correlation between parole grants and the time of day a case came on for consideration. It turns out that the judge's eating habits and metabolism apparently had more to do with parole outcomes than prisoner performance.

So, imagine you are handcuffed in the docks with dozens of other prisoners awaiting the call of your case. You've really shown reform and have been the model prisoner. The prisoner to your right has not been bad, but he has not gone out of his way to comply with the in-house rules. You anticipate that your case should be more favorably reviewed than your neighbor's—such overconfidence imbues the decisions of the most highly trained people, including lawyers.

Your neighbor's case is called early in the morning. It looks close, but he is paroled. Your hopes rise—if he made it, you surely will, too. But the morning drags on as the judge listens to similar facts in dozens of cases. The judge appears to be getting weary of the same story, as her attention wanders. You notice she seems to be granting fewer paroles as we get closer to the lunch break. As much as you want her to get to your case, you'd rather she eat a snack or at least drink some coffee before she does. Alas, it's 11:30, and the bailiff calls your case. The state doesn't contest your good behavior much, yet the judge seems to be fading. She is clearly ready for a break. Then it comes—denied! Oh no. Why couldn't your case have come up after lunch, when grant rates return to morning levels? Could it be that random? In fact, it's predictable—not random at all.

Negotiators aren't much different. As the hours tick away, the negotiator often expresses frustration that the other side has taken too long to concede too little, but we still want to get this over with today (tonight). But we've been *reasonable*. They need to move. Buyer's remorse has set in—both sides have moved more than they wanted to already. Since everyone can see a deal by now, no one wants to pull the plug—yet. But both sides make smaller concessions in quicker succession to telegraph to each other, "*You* must come to us." Closing is hard work that often requires a variety of mediator tools. But the board is set much earlier.

THE FIRST FEW MOVES SET THE BOARD—LIKE CHESS

While much emphasis is placed on closing techniques—especially for mediators since our grades depend on a deal—the cake is baked much earlier in the round. No amount of frosting will help a cake that didn't properly bake earlier in the day. And the best closing technique is unlikely to settle a case that didn't start on the road to success—or get there in a couple of rounds.

Anchoring is Important: You've heard the research on anchors. Opening numbers are important. Studies show amateurs and experts being manipulated by changes in listing prices on real estate. Anchors work best when there are informational disparities. After discovery and expert reports, they hold less sway. Since anchoring is part of the social convention of negotiation, it varies by venue. We're expected to put more spin on the numbers in certain venues, and even within a particular geographic bar there are substantial variations by case type. The questions that weigh on everyone's mind are "Will this thing settle? How much will they pay (or how little with they accept)?"

Patterns Emerge From Large Data Sets: It turns out that humans are predictable, really predictable. The National Security Agency wants our cell phone data because the phone companies can predict where we'll be tomorrow with 93% accuracy. Make a credit card charge outside of your established pattern, and you'll get a text or call from the bank within seconds.

Lawyers in legal negotiations are also very predictable. Not only do their early moves telegraph where they are headed when matched to historical patterns, but their pace of play is also predictable. PictureItSettled.com has spent years building a system of neural networks and learning algorithms that compare each move in a legal negotiation to more than 15,000 other cases (a much larger data set than a clinical trial).

Also available as part of the eCourse
[Hot Topics for Corporate Counsel: Settlement Strategies and Government Relations](#)

First appeared as part of the conference materials for the
39th Annual Corporate Counsel Institute session
"Investigation and Settlement Strategies: The Right Number at the Wrong Time is the Wrong Number"