# The End of "It Depends"?

*Data-Driven Law: Data Analytics and the New Legal Services*
Ed Walters et al. (Ed Walters ed., CRC Press, Taylor & Francis
Group 2019), 215 pages

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> [W]hen clients ask lawyers their most important questions, lawyers
> often answer with educated guesses based on limited experience. In law,
> this is often called professional judgment, but in other industries, these
> judgments would be called hunches . . . .
>
> —Ed Walters[1]

Black-letter law aside, law is one of the grayest of disciplines. The highest-level work that attorneys do—predicting outcomes, persuading judges, negotiating deals, and advising clients—is, at its most fundamental level, guesswork.[2] To be sure, the guesswork is informed, educated, and strategic, but in the end, lawyers can never know with certainty where a given case is going to go.[3] When viewed from this lens, teaching students how to "think like a lawyer" is, in essence, teaching them how to guess better than others.

In his introduction to *Data-Driven Law: Data Analytics and the New Legal Services*, Editor Ed Walters makes a compelling argument for using data, both big and small,[4] to improve the accuracy of these guesses, and

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[1] Ed Walters et al., Data-Driven Law: Data Analytics and the New Legal Services 1 (Ed Walters ed., 2019).

[2] This is not a new observation. Indeed, over a hundred years ago, Justice Oliver Wendell Holmes, Jr. wrote, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).

[3] *See* Mark K. Osbeck, *Lawyer as Soothsayer: Exploring the Important Role of Outcome Prediction in the Practice of Law*, 123 Penn St. L. Rev. 41, 64 (2018) ("As a result, outcome prediction—notwithstanding its major importance to the practice of law—has always been a rough science, its accuracy leaving much to be desired.").

[4] While the terms "big data" and "small data" present definitional issues, for purposes of this review, they can be thought of as two sides to a coin. Big data describes very large quantities of data that typically require computer intervention to analyze

thus the satisfaction of both attorneys and clients.[5] Walters argues that data is the answer to the three questions that plague attorneys the most: how to find clients, how to keep clients, and how to do both as efficiently as possible.[6]

Walters is primarily concerned with the business side of how data collection and management, or the lack thereof, affects the provision of legal services. Several chapters follow up on this theme, addressing how firms and other legal services providers can collect both internal and external data, what types of data to collect, and how new technologies, especially artificial intelligence, can be used to process it more efficiently—i.e., to make it usable. Other chapters delve more deeply into how data can be used to improve specific legal tasks, such as contract analysis and electronic discovery.

As a whole, the book makes a convincing case that data is, as one author put it, "21st Century Gold."[7] Want to know which arguments a given judge is likely to find most convincing? Data. How about whether a potential employee is likely to perform well? Data. Whether a contract you've drafted is employing the appropriate clauses? Data. In short, "There's data for that," is the new, "There's an app for that."

Consider, for example, the costs associated with recruiting, interviewing, selecting, and retaining employees. Traditionally, employers have relied on a small amount of relatively subjective information to determine who they should hire and who is likely to stick around once they are hired: resumes, cover letters, interviews, references, etc. While this information is helpful, it is also incomplete. Data can assist in drawing a more detailed picture of both candidates and current employees:

> Employers can access more information about their applicant pool than ever before and have an ability to correlate data gleaned from the application itself, perhaps supplemented by publicly available social media sources, to determine how long a candidate is likely to stay on a particular job. Similarly, by combing through computerized calendar entries and e-mail headers, Big Data can tell us which employees are likely to leave their employment within the next 12 months.[8]

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and manipulate; in the legal realm, this is data that is external to a law firm, such as information about legal outcomes in particular types of cases. Small data is data internal to the law firm, such as information on the number of hours particular attorneys bill on particular matters. *See generally* Jared D. Correia & Heidi Alexander, *Big Data, Big Problem: Are Small Law Firms Given a Sporting Chance to Access Big Data?*, 37 W. New Eng. L. Rev. 141, 142–44 (2015) (describing the difficulty of defining "big data" and discussing the difference in size between external and internal data).

**5** *See generally* Walters, *supra* note 1, at 1–10.

**6** *See id.* at 2.

**7** Kenneth A. Grady, *Mining Legal Data: Collecting and Analyzing 21st Century Gold*, *in* Data-Driven Law: Data Analytics and the New Legal Services, *supra* note 1, at 11.

Because several of the authors have computer science or other IT-related backgrounds, some chapters are technical and dense. I originally opted to review this book because I was considering adopting it for a new "Introduction to Legal Technology" course that I am teaching, but I found many of the chapters too advanced for those with a non-technical background. For that reason, the book may be more appropriate for an advanced course or for attorneys with some technological training. However, for those with some technical background or those at firms or institutions with an IT specialist who can help translate some of the more high-level concepts, the book provides a wealth of unique insights into how to harness data to drive organizational and professional change.

From a legal writing perspective, the most valuable takeaway is that traditional modes of predicting and persuading are being upended by the data revolution. More and more, clients are expecting answers that rely on more than an attorney's personal judgment and analysis—the very skills that have, for so long, been the bread to the butter of communication skills. Clients no longer want to know simply what the attorney thinks will happen; they want to know what the data says will happen.[9]

What the implications for this shift in client expectations mean for the future of advocacy remains to be seen, but it is clear that, as the profession changes, legal education will need to follow. One hint of what is to come is in Professor Kevin Bennardo's article in a recent issue of this journal, in which he argues that legal writing professors should stop calling legal analysis "predictive analysis," because how a given law applies to a given case is only one piece of the larger puzzle of how decisions are made.[10] The future of legal education lies in teaching students how to complete the rest of that puzzle, and this collection provides convincing evidence that data analytics will play a crucial role in that task.

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**8** Aaron Crews, *The Big Move Toward Big Data in Employment*, *in* Data-Driven Law: Data Analytics and the New Legal Services, *supra* note 1, at 59, 60; *see also* Correia & Alexander, *supra* note 4, at 146 ("One of the most well-known and pervasive applications of big data in large law firms is its use within tools developed to predict case outcomes, including verdicts. As one company boldly assays, '[w]e help lawyers predict the future.' More specific predictions are developed via the analysis of massive aggregations of historical case information. Armed with anticipated outcomes with which to compare incoming fact patterns, large law firms can make informed and reasoned decisions when screening cases and developing case strategies. There is no shortage of service providers in this area. Some products provide case predictions for specific practice areas, including medical malpractice and patent law. Other tools analyze the litigation histories of judges and opposing counsel, and provide comparative case outcomes for every stage of litigation." (footnotes omitted)).

**9** While it is beyond the scope of this book review, it should be noted that the idea that data-based predictions will be more accurate and, thus, more valuable than human-based predictions raises difficult questions about the unintended consequences of overreliance on data. *See, e.g.,* Caryn Devins et al., *The Law and Big Data*, 27 Cornell J. L. & Pub. Pol'y 357, 359 (2017) (arguing that "Big Data's asserted objectivity is a myth" and that "[d]ata require theory in order to be interpreted and applied, and any single interpretation of data is rarely conclusive" (footnote omitted)).

**10** *See generally* Kevin Bennardo, *Abandoning Predictions*, 16 Legal Comm. & Rhetoric 39 (2019).