

# Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

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## ADR Technology

### How 'Tomorrow's Lawyers' Are Using Technology Now to Improve Outcomes

BY DON PHILBIN

Remember the runaway bestseller *Megatrends* in 1983?

Author John Naisbitt captivated his audience by identifying 10 themes that would change the world. The relative accuracy of these predictions 30 years later is haunting. Here they are:

1. Shift from an industrial society to an information society.

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2. Shift from high-touch human responses to newly automated responses.
3. Shift from a national economy to a global economy.
4. Shift by management from short-term planning to long-term perspectives.
5. Rapid decentralization of business, politics, and culture.
6. Shift from institutional help to self-help.
7. Shift from a representational democracy to a participatory democracy.
8. Shift from hierarchies to networks.
9. Shift from Northeast to Southwest and Florida.
10. Shift from binary choices—that is, either/or—to multiple options.

Richard Susskind is the John Naisbitt of legal megatrends. He's shaken us up for years with *The End of Lawyers?* (2008),

*Transforming the Law* (2000), and *The Future of Law* (1996). Like Naisbitt, he won't be right on all of the particulars when we have the luxury of grading him 30 years down the road.

But some of his predictions are already upon us. Here are the three megatrends Susskind claims are combining to form a perfect storm in his latest book, *Tomorrow's Lawyers*, which was published in March by Oxford University Press USA:

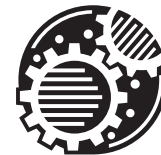
1. The "more-for-less" challenge from clients.
2. Liberalization of who can provide legal services and information.
3. Information technology.

The specific path of this perfect storm, and its aftermath, are the subject of considerable debate. But even its less controversial effects could bring profound change to dispute resolution methods. ADR will broaden, diversify, and develop as an essential lawyering skill. Like medicine, advanced decision aids will also help those well-trained practitioners guide their clients to better results.

#### 'MORE-FOR-LESS'

General counsel have been under enormous pressure to reduce their legal spending for

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The San Antonio-based author is an attorney-mediator, adjunct law professor, and president of Picture It Settled®, behavioral software that has learned negotiating patterns from parties to thousands of litigated cases in a wide variety of jurisdictions and claim types. He is a CPR Institute panelist, curates www.ADRToolbox.com, and is one of five Texas mediators listed in the International Who's Who of Commercial Mediation. He is a fellow in the International Academy of Mediators and the American Academy of Civil Trial Mediators, and listed in the Best Lawyers in America and Texas Super Lawyers.

If a mediation resolution is unable to be reached initially that respects a party's 'I remember' value, then the mediator and the parties will explore whether the litigation system will consider that value and address it.

manner. I want a personal connection so I can better understand them and also react within the bounds of my own humanity. If it is a story that may be part of the evidence of a case, I want everyone in the room to hear, understand and act consistently with the values and interests of the person telling the story.

If a resolution of the case is unable to be reached that respects this "I remember" value, then we explore whether the litigation system will consider and address it. If the answer is no, then we must consider the personal impact of ending the litigation while exploring other ways to recognize and address the principles or values.

If there are no other viable routes, then I ask the person to consider if they are keeping

the litigation alive with the false hope that it will ameliorate the harm associated with the memory. I also ask whether a negative outcome for them in the litigation will exacerbate the situation and make the memory even more haunting.

There are cases where a person wants a jury to confirm a personal narrative, and ratify that the person was in the right and the other parties were wrong. This is what participants often call "Justice." I ask them if the jury decides the opposite—that is, accepts a contrary version of events which places blame squarely on the participant—if they will change their own beliefs and accept the adjudicated fact as being "the Truth."

It is a win-win query for the mediator.

If the answer is "no," and the person will stick with his or her own story for the rest of his or her life, then the need for a jury verdict is irrelevant to the memory. If the answer is "yes," then the focus shifts to the risk and consequences of the negative outcome. If it is devastating on a personal level, then whatever economic difference separates the parties is unlikely to be worth the impact of failure.

\* \* \*

With some foresight and thought, advocates and mediators can communicate during mediation in a manner that respects the limitations of memory. Facts are there but not absolute because proof rarely happens in mediation. Findings and Truth and Justice can remain in the beholder's mind, as a resolution in mediation shapes each person's memories in a subjective manner. Always recall that mediation is an alternative process because it addresses needs that are often unable to be satisfied in adversary proceedings. ■

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## ADR Technology

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years. That trend accelerated during the financial downturn. Susskind reports that many general counsel have faced 30%–50% reductions in their legal budgets, while legal and compliance work has doubled in terms of legal spend. See Sue Reisinger, "LegalVIEW Data Shows Litigation Up, Legal Spend Down," *Corporate Counsel* (April 25, 2013)(available at <http://bit.ly/16tXabq>).

Since 200 corporations buy 80% of legal services, it doesn't take pressure from very many clients to put pressure on the industry. And GCs are working together through the Association of Corporate Counsel's Value Challenge (see [www.acc.com/valuechallenge](http://www.acc.com/valuechallenge)) and other forums.

They are also aided by predictive analytics crunching big data sets to forecast expected expenditures on a matter with various staffing options. TyMetrix (see [tymetrix.com](http://tymetrix.com)), LexisNexis CounselLink Insight ([www.lexisnexis.com/counselink](http://www.lexisnexis.com/counselink)), and Mitratech ([www.mitratech.com](http://www.mitratech.com)) already have

commercialized that service and others will follow.

The more-for-less challenge not only applies to large companies with in-house legal teams, but also to small companies that have had difficulty hiring counsel and individuals who have seen public legal aid monies dry up.

Susskind laments that only the very rich and the very poor have access to the legal system at a time when a record number of law graduates go without jobs.

### LEGAL SERVICES' LIBERALIZATION

The liberalization of who can provide legal services and information to the underserved 90% of the population is a Susskind megatrend. His views are certainly colored by his jurisdiction, the United Kingdom.

In England, "reserved" legal business—work only lawyers can do—is narrower than what constitutes the "unauthorized practice of law" in the U.S. U.K. non-lawyers can own and run legal businesses and make investments in law firms.

There already is a publicly traded law firm in Australia, which used capital from a financing round to buy a British personal injury firm. Other firms are expected to list their stocks in the United Kingdom soon. Susskind also sees the reentry of Big Four accounting firms more than a decade after 1,500-lawyer Andersen Legal went down in the unrelated Enron scandal.

While it's easy to dismiss this as a European phenomenon, the ABA Commission on Ethics 20/20 has been studying the definition of the practice of law and unbundling of legal services for a decade, and has made some relatively minor adjustments. Susskind is convinced that within 10 years, "after intense agonizing and various changes of direction, most major jurisdictions in the West ... will have liberalized in the manner of England."

We'll see. What we know now is that LegalZoom.com Inc., RocketLawyer Inc., AOL Inc.'s TechCrunch, and a variety of websites provide online forms that pro se litigants are already using in large numbers. Court help centers and walk-in clinics everywhere are filled.

During a ReInvent Law conference in  
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Silicon Valley, attendees visited a “law office” that looks more like an Apple store. Its owner revolutionized the trademark process for small businesses with Trademarkia.com and has broadened its focus with a rebrand to LegalForce. Forty-eight states also have adopted court-approved family-law forms for pro se litigants, and other specialties are in development. See Chief Justice Wallace B. Jefferson, State of the Judiciary presented to the 83rd Legislative Session, Austin, Texas, 9 (March 6, 2013) (available at <http://bit.ly/ZdHswc>). And Wevorce.com aims to streamline divorce in a collaborative law-meets-Silicon Valley way.

## INFORMATION TECHNOLOGY

As with Naisbitt, Susskind sees a world in which IT transforms many industries. He claims that the legal profession will “increasingly find it impossible to avoid the technology tidal wave.”

Here again, Susskind may be in a bit of an echo chamber—his work over the past 30 years has been devoted to thinking and writing about technology and its impact on lawyers and courts.

But “Moore’s Law” is still holding: The pace of change evident at LegalTech New York and ReInvent Law Silicon Valley is hard to overstate. In 1965, Gordon Moore, the founder of Intel, predicted that computers’ processing power would double every two years. If it continues, the average desktop computer will have the processing power of the human brain by 2020 and of humanity combined by 2050.

Quantum computers that can run multiple calculations simultaneously, rather than one at a time in classical computers, are reaching commercialization. Gary Marcus, “A Quantum Leap in Computing?” *The New Yorker* (May 18, 2013)(available at <http://nyr.kr/16KfOvX>)).

Google bought one in mid-May. Dylan Love, “Google Bought a Computer That Is 1,000 Times Faster than Yours and Will Use It to Study AI,” *Business Insider* (May 16, 2013) (available at <http://read.bi/1475NW3>).

In their new book, “The New Digital Age: Reshaping the Future of People, Nations and Business,” (at 34 (Knopf: April 23, 2013)), Google executives Eric Schmidt and Jared Cohen note, “The data revolution will bring untold benefits to the citizens of the future. They will have unprecedented insight into how other people think, behave and adhere to norms or deviate from them.”

## Shifts and Megatrends

**The problem:** Dealing with clients’ ‘more-for-less’ challenge.

**What does it mean?** Think of it on these terms: How long are you going to rely on the price insensitivity of big cases to sustain your business?

**Technology’s help:** The author works in predictive analytics, and discusses the litigation uptake.

While lawyers have used computers and Boolean searches for years—think Google, LexisNexis, and Westlaw—Susskind sees artificial intelligence making way for learning systems like IBM’s Watson, which beat the two best human contestants in a special *Jeopardy!*

## LIMITS TO PRICE COMPETITION

The more-for-less challenge has been addressed with price reductions and alternative fee arrangements.

Susskind’s premise is that law firms and their clients cannot address “more-for-less” over the long-term with price cuts and alternative fee arrangements that repackage the estimated hourly expenditure. Those will work in the short-term, and if the legal market returns to 2006 levels, the Band-Aid worked.

But Susskind believes that 2006 was the high-water mark for law that won’t come again after clients realize they can get “more-for-less” and alternatives become available. Others

agree or back up the concepts: A recent *Bloomberg BusinessWeek* cover story by Paul Barrett, “Howrey’s Bankruptcy and BigLaw Firms’ Small Future” (May 2, 2013)(available at <http://buswk.co/105f8sD>); Indiana University Maurer School of Law Prof. William Henderson’s paper, “From Big Law to Lean Law” (available at <http://bit.ly/11qHkO6>), and Steven Harper’s book, “The Lawyer Bubble: A Profession in Crisis,” paint a similar picture.

But it is not uniform. For example, New York University law professor Richard A. Epstein critiques Harper’s view in a recent review. “The Rule of Lawyers,” *Wall Street Journal* (May 5, 2013)(available at <http://on.wsj.com/18JM8vm>).

Susskind’s bet is that at least one mega firm will break ranks and offer long-term solutions to more-for-less and that when they do, others will scramble to follow.

Seyfarth Shaw massively invested in data and knowledge management to form SeyfarthLean (see <http://bit.ly/15c6EZg>).

Prof. Dan Katz at Michigan State University College of Law in East Lansing, Mich., and co-founder of the ReInvent Law Laboratory (see [www.reinventlaw.com](http://www.reinventlaw.com)), sees firms becoming two-tier organizations—a law firm owned by lawyers, and allied services organizations that provide software and other services that are funded from a larger capital pool.

Collaboration software company Xerdict Group is a wholly-owned subsidiary of Sedgwick, a San Francisco-based international law firm. It could presumably raise outside capital from nonlawyers.

This author believes that “bet-the-company” litigation and megadeals will remain relatively conventional and price insensitive. But that population of cases is shrinking in the eyes of general counsel. When I started practicing, the percentage of cases that seemed price insensitive—“Get me out of this at any cost”—was reportedly around 25%.

Now general counsel say the number is in the low single digits. So while litigation as a whole is up, the percentage of cases that are price insensitive has decreased significantly. The remaining cases and many transactions continue to face the more-for-less challenge.

## UNBUNDLING LEGAL SERVICES

One way Susskind believes that law firms can

‘I’m not naïve enough to think there will not be dislocation for people and firms that do not adopt emerging technology. There will be. ... But no one will replace David Boies, Ted Olsen, or Ken Feinberg with a bot.’

meet the persistent more-for-less challenge is by unbundling the overall engagement to protect the legal expert’s value-proposition, while sourcing other pieces to lower-cost providers.

This is already occurring. Document review already has been sent offshore or onshore to lower U.S. cost regions, and predictive coding aims to automate costly E-discovery. The U.S. Department of Justice just approved the use of predictive coding to review millions of electronic documents in the proposed Anheuser-Busch In Bev NV/ Grupo Modelo SAB merger. A handful of judges have approved such review in litigated cases, but Justice’s approval may spur more wide-spread use. Joe Palazzolo, “Software: The Attorney Who Is Always on the Job,” *B1 Wall Street Journal* (May 6, 2013)(available at <http://on.wsj.com/126T4Si>).

Susskind breaks transactions and litigation down into their component parts (see boxes below). Of the Litigation Tasks, U.S. litigators responded that strategy, tactics, and advocacy were the tasks that singularly require their expertise. Since the United Kingdom has long separated solicitors and barristers, U.K. litigators predictably responded with strategy and tactics. Susskind also took a hand at decomposing the tasks involved in most transactions, as indicated in the Transactional Tasks box.

## NEGOTIATION CRITICAL

Negotiation is a critical task in both transac-

### LITIGATION TASKS

Document review  
Legal research  
Project management  
Litigation support  
(Electronic) disclosure  
Strategy  
Tactics  
*Negotiation*  
Advocacy

tions and litigation, but not something the litigators Susskind surveyed identified as requiring their expertise.

That aligns with settlement counsel literature suggesting it is prudent to do in litigation what we do as countries—separate the war and peacemaking functions. See, e.g., “Settlement Counsel: 10 Free Internet Resources,” *SettlementPerspectives.com* (April 4, 2013)(direct link: <http://bit.ly/ZeNsYz>); Kathy A. Bryan, “Why Should Businesses Hire Settlement Counsel?” 2008 *J. Disp. Resol.* 195 (available at <http://bit.ly/15QGY4v>). [Editor’s note: Bryan is a publisher of *Alternatives*.]

Keeping the generals singularly focused on beating the other side has key strategic benefits. But there is almost always another line open between the diplomats that does not oscillate with ebbs and flows of the war effort. Diplomats do not get involved in the war effort, but keep those channels open so the generals do not have to show weakness by stopping the battle to talk peace. Generals win or accept surrender.

Diplomats don’t interfere with prosecution of the war, but are looking for alternatives that might satisfy the parties’ interests. They are complementary, not competitive, and allow tight focus without compromising their position by momentarily changing rolls.

Of course, every effort is well coordinated and overseen by the head-of-state or client. Dallas-based author and consultant John De-

### TRANSACTIONAL TASKS

Due diligence  
Legal research  
Transaction management  
Template selection  
*Negotiation*  
Bespoke drafting  
Document management  
Legal advice  
Risk assessment

Groote and others advocate that settlement counsel can be used to bring settlements about earlier and more efficiently. See De-Groote’s *Settlement Perspectives* website at the link above.

James McGuire notes that the types of questions are different when focusing on a future settlement than on preparing an autopsy of the past. See, e.g., James McGuire, “Why Litigators Should Use Settlement Counsel,” 18 *Alternatives* 1 (June 2000).

## HUMAN + MACHINE

Susskind is a legal technologist and when you’re a hammer, everything is a nail. He makes sweeping projections about the disruptive effects of technology.

I am also a fan of the benefits of technology, but see the two as much more complementary. I’m not naïve enough to think there will not be dislocation for people and firms that do not adopt emerging technology. There will be. The printing press dislocated some scribes. The industrial revolution reduced the prominence of horses. And undersea fiber optics and the Internet have been tough on call centers, bank tellers, and facilitated foreign document review.

But no one will replace David Boies, Ted Olsen, or Ken Feinberg with a bot.

That’s not to say they will not be greatly aided by learning systems that function as decision aids. Louis M. Solomon, chairman of the commercial and international litigation groups and Litigation Department co-chair at Cadwalader, Wickersham & Taft in New York, tries headline-grabbing cases and has the well-honed judgment that comes with that experience. Still, he is an early adopter of predictive analytics for negotiation and other advanced decision aides.

## ONLINE DISPUTE RESOLUTION

Susskind lists several technologies he believes will have disruptive effects. (See the box below.)

Online dispute resolution, or ODR, is a perfect example of supplementary technology. PayPal, eBay, Amazon, TaoBao, and other E-commerce providers already handle more than 150 million disputes per year across ju-

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jurisdictional lines, according to Modria's Colin Rule, who led PayPal's program for years and now offers similar services to a wide-range of online merchants.

Imagine what would happen if those disputes were dumped onto an already over-worked and underfunded court system, even if the courts had jurisdiction over the E-merchant. California is darkening courts in response to its budget crisis. A well-respected federal judge with detailed knowledge of federal court finances explained the calamities that will befall that branch if the sequester and its effects aren't undone. And even without sequester, appropriators have not adequately funded our courts for some time and have signaled more of the same in future budgets.

The American Arbitration Association, the CPR Institute, and other institutional providers of ADR services are building ODR options. [Editor's note: The CPR Institute, which co-publishes this newsletter, is working on a joint ODR venture for commercial mediation cases with the aforementioned modria.com.]

CyberSettle has been running a double-blind bidding system for small disputes since 1998, and recently morphed into settling claims between health-care providers and their uninsured patients. Fair Outcomes Inc. of Boston offers fair-division options primarily through buy-sell facilitated trades. This industry will continue to develop rapidly, but not as

### DISRUPTIVE LEGAL TECHNOLOGIES

Automated document assembly  
Relentless connectivity  
Electronic legal marketplace  
E-learning  
Online legal guidance  
Legal open-sourcing  
Closed legal communities  
Workflow and project management  
Embedded legal knowledge  
*Online dispute resolution*  
Intelligent legal search  
*Big data*  
*AI-based problem-solving*

a substitute for courts or litigators. It will serve unmet needs.

### BIG DATA, PREDICTIVE ANALYTICS

Susskind is fascinated with big data and predictive analytics. According to Google Executive Chairman Eric Schmidt, we create more information every two days than we did from the dawn of civilization through 2003.

Cheap storage has made retention of that data possible. With it, Google can predict flu trends faster than the CDC based on user's searches for flu-related topics. President Obama last month issued an Executive Order noting that government weather data in the hands of entrepreneurs had created GPS technology, and requiring that the "default state of ...Government information resources shall be open and machine readable." Executive Order, "Making Open and Machine Readable the New Default for Government Information" (May 9, 2013)(available at <http://1.usa.gov/1931KN6>).

"Apollo 11 ran on approximately 74 kilobytes of memory and did 50 calculations per second," noted Ian Koenig of LexisNexis in a recent *ABA Journal* piece. Joe Dysart, "How lawyers are mining the information mother lode for pricing, practice tips and predictions," *ABA Journal* (May 2013)(available at <http://bit.ly/ZMwHmy>). LexisNexis' system, Koenig adds in the article, now crunches between 5,000 and 10,000 calculations per second.

And these technologies are increasingly available to lawyers. Stanford Law's Mark Lemley believes "analytics is the wave of the future." Id. LexMachina's computers already crawl the entire federal court PACER docketing system daily looking for patent documents so practitioners can determine whether to try or settle their IP case. Lexis Advance MedMal Navigator offers similar predictions in medical-malpractice cases. Id. A recent article in the *Journal of Empirical Legal Studies* described a predictive system that uses company share prices to help value securities class actions. The aforementioned TyMetrix draws on the billions of dollars in legal bills it has collected with permission through its sister bill review product to help project how much a matter will cost.

SkyAnalytics, of Andover, Mass., offers a macro view into the costs of legal services; Serengeti Law, a Thomson Reuters legal-

matters management unit based in Bellevue, Wash., offers a similar product. Not only are general counsel using the predictive power of such analytics to form budgets and choose outside counsel, law firms are using the data and analytics to gauge case strength and to get a read on what other firms are charging. Id. "The ability to learn in real time and gain insights from meaningful, predictive data is increasingly important to delivering new levels of value to clients," said Bill Turner, chief knowledge officer of Womble Carlyle Sandridge & Rice in Winston-Salem, N.C., in the *ABA Journal* article.

And this author's Picture It Settled® is Moneyball for negotiation. The behavioral software has learned negotiating patterns from parties to thousands of litigated cases in a wide variety of jurisdictions and claim types.

Picture It Settled® recently predicted the outcome of an IP dispute within 3.5% after just two rounds—and those predictions improved with additional offer data (17 total rounds). These projections look like "hurricane tracks" coming from each side to form a zone of potential agreement in the overlapping areas.

The predictions become actionable intelligence when parties calibrate their concession plans by dragging the target settlement dot to an advantageous, but probable, outcome. Using splines informed by settlement data, parties can then work toward settlement by making offers intended to induce cooperative reciprocation.

By constantly inputting offer data and updating realistic targets in the game-like interface, users are able to increase their settlement rates by using a data-informed negotiation strategy. Picture It Settled® doesn't replace honed intuition; it puts a scope on the human controlled gun.

\* \* \*

These are exciting times for legal technology.

Increased computing power, cheap data storage, and rapid and ubiquitous communications have opened up new frontiers. Firms are mining their historical data and new data sets are being collected to aid decision-makers. Human judgment aided by advanced analytics is a powerful combination. ■

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