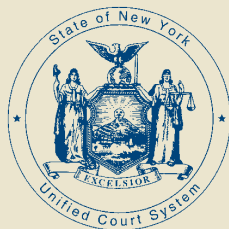


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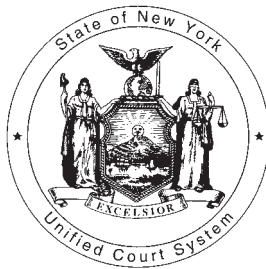
SUMMIT ON THE INTERNET AND THE  
PRACTICE OF LAW:  
CHARTING A COURSE FOR THE  
TWENTY-FIRST CENTURY

FORDHAM UNIVERSITY SCHOOL OF LAW  
NEW YORK, NEW YORK

JUNE 18 – 19, 2002

RECORD OF PROCEEDINGS

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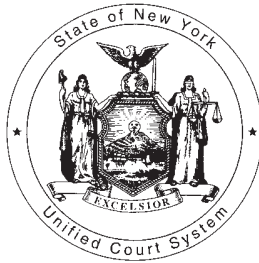
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JUDGES OF THE  
NEW YORK STATE COURT OF APPEALS

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HON. JUDITH S. KAYE, CHIEF JUDGE

HON. GEORGE BUNDY SMITH

HON. CARMEN BEAUCHAMP CIPARICK

HON. RICHARD C. WESLEY

HON. ALBERT M. ROSENBLATT

HON. VICTORIA A. GRAFFEO

HON. SUSAN P. READ

# NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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# JOURNAL OF THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

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## TABLE OF CONTENTS

FOREWORD .....	i
EXECUTIVE SUMMARY .....	v
CONVOCATION PROGRAM .....	vii
TRANSCRIPT OF FORMAL PROCEEDINGS:	
OPENING SESSION AND KEYNOTE ADDRESS .....	1
TECHNICAL DEMONSTRATIONS .....	19
ONLINE DOCUMENT PREPARATION AND THE UNAUTHORIZED PRACTICE OF LAW .....	49
ADVERTISING ON THE INTERNET .....	58
ONLINE ATTORNEY REFERRAL SERVICE .....	62
E-LAWYERING AND MULTI-JURISDICTIONAL PRACTICE .....	71
ONLINE COURT DOCUMENT ACCESS .....	80
ONLINE MEDIATION AND DISPUTE RESOLUTION SERVICES .....	86
REVIEW OF ISSUES .....	92
UNBUNDLING OF LEGAL SERVICES .....	94
PANEL DISCUSSION OF UNBUNDLING OF LEGAL SERVICES .....	107
SUMMIT ATTENDEES' ROUNDTABLE DISCUSSION OF ALL TOPICS .....	125
ROSTER OF PARTICIPANTS .....	158
APPENDIX A .....	164

## FOREWORD

On June 18 and 19, 2002 the New York State Judicial Institute on Professionalism in the Law conducted a two-day conference at the Fordham University School of Law titled “Summit on the Internet and the Practice of Law—Charting a Course for the Twenty-first Century”. Attended by professors, judges and practitioners from diverse backgrounds, the Internet Summit marked the official opening of the Institute’s effort to promote legal scholarship and practical attention to the Internet as it affects the practice of law.

The Institute was created in 1999 as a permanent and official body of the New York State Unified Court System, under the auspices of Chief Judge Judith S. Kaye. Its mandate is to continuously, and with continuity, encourage and support the organized bar, law schools and other institutions of the legal profession “in promoting the awareness of and adherence to professional values”. As notions of these professional values evolve at a rapid rate in today’s increasingly global world, certain verities remain intact. Among those is the fundamental principle that the qualitative relationship between a lawyer and client is different from the arm’s length relationship between other sellers and consumers of goods and services. And at the heart of this difference lies the public obligations and responsibilities shared by all lawyers.

The record of the Internet Summit proceedings assembled in this volume demonstrates the challenges the Internet poses for the profession. The range of legal information and services available on the World Wide Web raises questions as basic as: Who is a client? What is representation? What expectations of competence and confidentiality can the public have when accessing the web? What is legal advice? What obligation does the profession have to the millions of people who seek to have previously unmet legal needs satisfied via the Internet?

It is fitting that this comprehensive examination and debate on the Internet and the practice of law occur in New York. Fitting because our diverse bar, broad range of the legal services the profession provides, and near limitless variety of clients makes New York an influential venue within the American and global legal community.

It is the Institute’s intention to report its findings and recommendations, based upon the Summit, subsequent research and debate, to the Chief Judge for her consideration. In undertaking this effort, we do so with a commitment that reflects our view that the profession is a calling to be of service to both the public and to the rule of law.

The Institute is deeply grateful to Chief Judge Judith S. Kaye, the Judges of the Court of Appeals, Professor Catherine J. Lanctot of Villanova University Law School and the many other professors, judges and practitioners who gave so generously of their valuable time, attention and effort in making the Internet Summit a reality.

Christopher E. Chang  
*Chair, Subcommittee on the Internet*  
November 1, 2002

## EXECUTIVE SUMMARY

The Summit on the Internet and the Practice of Law, held in New York City June 18-19, 2002, brought together leaders of New York's law schools, bar and judiciary to engage in a discussion on how emerging technology, especially the Internet, has impacted the practice of law. The two-day event was organized by Christopher E. Chang, Esq. and through his hard work and dedication included a cross-section of the legal community and highlighted many of the issues affecting the legal profession from the increased use of the Internet. The goal of the Summit was to highlight problems, offer possible solutions and produce proposals for how the Internet should be addressed in New York State. The Summit was structured to have more than one day of presentations outlining the Internet and the issues affecting lawyers as a result of the growing popularity of the Internet. After the presentations, the participants were encouraged to share their views on potential problems and solutions for regulation of the Internet.

Louis A. Craco, Esq., in his role as chair of the Judicial Institute on Professionalism in the Law, began with opening remarks about the Institute and its creation by Chief Judge Kaye as "a permanent and official body of the court system." He discussed how the Institute has addressed many issues relating to professionalism yet the rise of the Internet introduces quintessentially the "emerging issues in the practice of law that may present issues of professionalism and ethics" for which the Institute was created. Mr. Craco also noted that the work of the Institute has been conducted thus far without a generally acceptable comprehensive definition of professionalism. He predicted the discussion about the Internet would involve the following fundamental questions with difficult answers: What is a client? What is advice? What is representation? When does a lawyer-client relationship arise? Who may decide and police this activity in the public interest? Mr. Craco left the participants with the notion that New York is "the most elaborate laboratory in the country in which to study these issues" because of its diversity, the demand for legal services and the range of specialties in law.

Catherine J. Lanctot, Esq., Professor at Villanova University School of Law, delivered the keynote address. She began by noting that this is a good time for this discussion because the Internet has become more common, yet has passed the peak when it seemed as though "the dot-coms were going to take over the world." Ms. Lanctot illustrated the profession's love/hate relationship with technology citing examples of lawyers' resistance to telephones, typewriters and elevators. She continued by noting that the profession has had similar technological challenges in the past, citing the example of a 1930's radio show called the Good Will Court that was designed to have lay people receive legal advice from lawyers and judges. The show was driven off the air by lawyers, illustrating two extremes: lawyers protecting lay people from bad advice or lawyers stamping out an innovative use of technology that provided legal education to the lay public



who might otherwise not be able to afford legal advice.

Moving to the Internet, Ms. Lanctot highlighted the following areas of concern: consumer access to lawyers through law firm web sites, search engines, and dedicated web sites that are designed to give names of lawyers; the potential to provide general legal information to consumers at low-cost to people who cannot afford them; the capacity of the Internet to give targeted service to clients, raising the question of "unbundling," or limited representation; and lay people practicing law on the Internet. Ms. Lanctot suggested that deciding our vision of professionalism in the twenty-first century would be the biggest challenge. Is it possible to find a balance between harmful unauthorized practice of law and providing low-cost legal services to people who might not otherwise obtain them?

Technical demonstrations were provided to help participants understand how the Internet works. Guy Alvarez, Esq., Founder, Bid Partners, started the technical discussions with a brief introduction of the Internet as "the largest network of computer systems on the planet." He explained Internet connections, the World Wide Web, browsers, e-mail, linking, caching, meta tags, search engines, spiders, HTML, URLs or web site addresses, firewalls, cookies, chat rooms, message boards, and mailing lists.

After providing the background, Guy Alvarez took the participants "web surfing" to find out how John Q. Public might access legal information on the World Wide Web, as a way for the participants to see what is out there, before discussing what should be done about it. A computer was hooked up to a screen in the room for the participants to view. Searches were conducted using various search engines and included topics that an ordinary family might be interested in such as bankruptcy, real estate, DWI, divorce, and personal injury. Issues raised included jurisdiction, unauthorized practice of law, attorney advertising, and online mediation and arbitration.

George Angelich, Esq., law clerk for Judge Cecelia Morris of the Poughkeepsie Bankruptcy Court, demonstrated the electronic case file (E.C.F.) system of the bankruptcy court which allows attorneys to file petitions online resulting in an electronic case file with no papers associated with it at the court. This demonstration raised issues of privacy as he was able to access both personal and corporate bankruptcy filings via this system.

Bob MacConnell, an engineer with LexisNexis, continued the technical demonstrations with a look towards the future of the Internet. He led the audience through an amazing discussion of where the technology is going noting that advanced search engines, memory cards and computer monitoring systems will soon be available and may change the profession more than we have previously imagined.

Catherine Lanctot summed up with a look at how new technologies have led to the problem of unauthorized practice of law, focusing on online document

preparation. When does online document preparation become unauthorized practice of law? How is this different from the purchase of books with sample drafts of legal forms? The answer seems to lie in the interaction, such as when the computer is able to prompt questions that gear a person from one form to another. While there are obvious benefits to having access to document preparation online what happens when the consumer gets misinformation? Who will be responsible when problems occur? If online document preparation is “wrong” then what is “right”? Finally, what is our vision for the future of routine legal services?

The presentations then focused on another potential problem stemming from lawyers’ presence on the Internet - advertising and the ensuing ethical considerations. Gary A. Munneke, Esq., Professor at Pace University School of Law, noted that advertising and marketing account for the most common uses of the Internet by attorneys. He distinguished different types of Internet marketing, ranging from the most basic informational website to direct solicitation whereby information may be sent out via e-mail. He fashioned a set of principles to be used as guidelines for discussion in regulating the Internet saying “whatever regulatory scheme we come up with should be simple, narrow and enforceable”. He concluded by bringing up the possibility of leaving the market unregulated, a free market where the most efficient providers win.

Michael S. Ross, Esq., principal of the Law Offices of Michael S. Ross, Esq., highlighted the fact that we live in a different world now, because the next generation will use search engines to find anything they want. He emphasized that we need to decide if lawyer partnering with non-attorneys and fee-splitting are appropriate ways to manage this new world. Mr. Ross suggested rules disclosing that lawyers pay search engines for the number of hits they receive, suggesting this would better inform the public and create a more level playing field. The First Amendment constrains what we can forbid people to say; however, it does not restrict us from providing consumers with information about how people are there and why. His goal would be not to restrict what goes on, but to make the public aware of what is already happening.

Peter D. Ehrenhaft, Esq., a member of Miller & Chevalier and a member of the American Bar Association Multi-jurisdictional Practice Commission, spoke about multi-jurisdictional practice highlighting what he called “FIFO” or fly in, fly out lawyering and suggesting that unauthorized practice laws, as they apply to multi-jurisdictional practice, may not be the best way to protect the consumer from incompetent legal services. The world we live in today, including the rise of the Internet, has made it possible to offer legal services without boundaries. He offered the example of being confined to a hospital in Washington with an intravenous in his arm and still being able to participate in a real-estate closing taking place in Geneva. The idea of multi-jurisdictional practice of law, therefore, is not simply confined to practice within the United

States but also includes practice outside this country. Additionally, to expand the current laws to allow for more multi-jurisdictional practice does not simply include letting in others lawyers, but also involves giving all lawyers more freedom to practice elsewhere.

Floyd Abrams, Esq., who a member of Cahill Gordon & Reindel and currently serves as Chair to the New York State Commission on Public Access to Court Records, discussed the issue of privacy vs. the First Amendment. He started by noting that court records are generally public documents, but have been subject to a notion of “practical obscurity”, meaning that the information has been available but no one knows where to look. With the rise of the Internet there have been new concerns about how people can access information. May a member of the public request all court documents of a particular nature, i.e., all bankruptcy filings? If certain information is to be excluded, who will cleanse the documents? The real challenge will be balancing the competing interests.

Lesley Friedman, Esq., an associate at Paul, Weiss, Rifkind, Wharton & Garrison, followed with a discussion of “ODR” otherwise known as online dispute resolution. She defined ODR as including mediation, arbitration, negotiation and other neutral services wholly or partly provided through the Internet. She highlighted the new problems that online ADR users faces such as language and cultural differences, fairness, establishing jurisdiction, determining applicable law, accessibility including costs, and enforcing judgments. However, ODR may be the only or best option for people who meet online. For example, consumers who are dissatisfied with their transaction on e-Bay are much more likely to use ODR services than traditional offline judicial resolution mechanisms.

Richard Zorza, Esq. then discussed a major issue in online provision of legal service, the concept of unbundling. Unbundling basically means that the lawyer will solve a particular problem, rather than handle all legal problems. For example, a lawyer will simply prepare a document for the consumer. Online there is an enormous potential to provide unbundled services. There are risks to both the lawyer and the consumer in providing legal services in this way. The lawyer risks liability in that perhaps a judge will see his name on a form and call him in to defend it. The consumer risks being left in a worse position without a professional to turn to. Perhaps, the use of unbundling and other technologies can increase access to justice. However, unbundling may shift power to those with power, by encouraging the use of more shrink-wrapped agreements, thereby de-legalizing the system.

A panel discussion on unbundling followed where the following issues were raised: How can a lawyer give legal advice about a part of a problem when she does not know the totality of the client’s circumstances? What are we trying to accomplish by permitting some form of limited representation? Is it better than nothing? How will disintermediation affect the provision of legal services? (Disintermediation is defined as the phenomenon that with information so eas-

ily accessible people do not need to go to professionals to interpret, in fact they want to interpret it themselves.) What is the difference between information and advice?

The program concluded with a discussion of the major issues identified and then some possible solutions to those issues, facilitated by Russell G. Pearce, Esq., a Professor at Fordham University. Solutions focused on education of consumer and professional; revision of codes and laws; the lack of empirical research in this area, and the need to look to other states and countries to come up with solutions.

In his closing remarks, Louis A. Craco noted how in all the work of the Institute the question of who we are as lawyers is continually raised. Additionally, there is the need for empirical research on many of these issues, before solutions can be implemented.

Many issues regarding the Internet's impact on the legal profession were discussed, through the gathering of professionals at the Internet Summit. More work needs to be done to develop the possible solutions into realistic changes.

## CONVOCATION PROGRAM

### OPENING SESSION AND KEYNOTE ADDRESS

#### **LOUIS A. CRACO, ESQ.**

Louis A. Craco, Esq. is the senior partner of Willkie Farr & Gallagher, where his practice has centered on litigation and arbitration. New York State Chief Judge Judith S. Kaye appointed him Chair of the New York State Judicial Institute on Professionalism in the Law when she created the Institute in 1999; he also served as Chair of the Chief Judge's Committee on the Profession and the Courts. From 1982-1984, Mr. Craco was President of the Association of the Bar of the City of New York.

#### **CHRISTOPHER E. CHANG, ESQ.**

Christopher E. Chang, Esq. is the founder of the Law Offices of Christopher E. Chang, Esq., specializing in commercial practice. He has been a member of the New York State Judicial Institute on Professionalism in the Law since its establishment and was a member of its predecessor, The Committee on the Profession and the Courts. New York State Chief Judge Judith S. Kaye recently named him to the Commission on Public Access to Court Records. He was the Program Chair for the Summit on the Internet and the Practice of Law.

#### **CATHERINE J. LANCTOT, ESQ.**

Catherine J. Lanctot, Esq. is a Professor at Villanova University School of Law, where she teaches constitutional law, legal ethics and employment discrimination. She has written numerous articles on legal ethics and employment discrimination, including articles on legal ethics in cyberspace. Professor Lanctot is a frequent participant in conferences pertaining to her specialities. She clerked for the Hon. Murray M. Schwarz, U.S. District Court Judge, was an associate at Akin, Gump, Strauss, Hauer & Feld and later served as an assistant branch director for government information at the United States Department of Justice, Civil Division.

### TECHNICAL DEMONSTRATIONS

#### **GUY ALVAREZ, ESQ.**

Guy Alvarez, Esq. is a founder of BDI Partners, a knowledge management and Internet technology consulting firm. The former Global Director for Internet Operations at KPMG International, he designed and launched the company's global website. A former associate publisher at American Law Media, he served as an advisor to LegalTech and was the Director of Business Development for Shark Net, Inc., a technology consulting firm.

**GEORGE ANGELICH, ESQ.**

George Angelich, Esq. is the Law Clerk to Hon. Cecelia G. Morris of the United States Bankruptcy Court, Southern District of New York.

**ROBERT MACCONNELL**

Bob MacConnell is an engineer with LexisNexis where is he responsible for high level systems integration for customers. Since joining LexisNexis in 1972, Bob has been instrumental in design, leading him to own the majority of patents within the Company. Bob studied electronic engineering while employed by the United States Air Force.

**ADVERTISING ON THE INTERNET:  
ETHICAL CONSIDERATIONS****GARY A. MUNNEKE, ESQ.**

Gary A. Munneke, Esq. is a Professor at Pace University School of Law, where he teaches torts, professional responsibility and law office management. He writes and speaks extensively on topics related to his areas of expertise, especially law office management, professional responsibility, legal careers, and lawyer training. Professor Munneke is the immediate past Chair of the ABA Law Practice Management Section, following service as Chair of the section's Publishing Board. He also serves on the ABA Standing Committee on Publishing Oversight and is an honorary fellow of the College of Law Practice Management.

**ONLINE ATTORNEY REFERRAL SERVICE:  
PARTNERING WITH NON-ATTORNEYS AND  
FEE-SPLITTING AMONG ATTORNEYS****MICHAEL S. ROSS, ESQ.**

Michael S. Ross, Esq. is the principal of the Law Offices of Michael S. Ross, Esq. where he concentrates his practice on attorney ethics and criminal law. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York. Mr. Ross serves as an Adjunct Professor at Benjamin N. Cardozo School of Law, as well as serving as Faculty Advisor to the School's Moot Court Program, teaching courses in professional responsibility, criminal and civil litigation, appellate advocacy, and judicial administration. Mr. Ross is a lecturer on ethics issues, trial practice and criminal law. He is an active member of several bar associations.

## **E-LAWYERING AND MULTI-JURISDICTIONAL PRACTICE**

### **PETER D. EHRENHAFT, ESQ.**

Peter D. Ehrenhaft, Esq., a member of Miller & Chevalier, is engaged in a transactional practice, representing U.S. firms that invest in licensing rights, purchase products and otherwise serve foreign markets. He was the Deputy Assistant Secretary and Special Counsel of the U.S. Department of the Treasury and served as a principal negotiator of the 1979 Antidumping Code. Mr. Ehrenhaft is part of the 12-member American Bar Association Commission on Multi-Jurisdictional Practice that recently issued a report recommending changes in the geographically based structure of lawyer regulation. He has taught and written extensively on international trade.

## **ONLINE COURT DOCUMENT ACCESS: PRIVACY vs. THE FIRST AMENDMENT**

### **FLOYD ABRAMS, ESQ.**

Floyd Abrams, Esq., a partner at Cahill Gordon & Reindel, is an nationally recognized expert on First Amendment issues. In this capacity he has taught as a visiting professor and lecturer at Yale Law School, Columbia Law School and the Columbia University Graduate School of Journalism. New York State Chief Judge Judith S. Kaye recently appointed him Chair of the Commission on Public Access to Court Records.

## **ONLINE MEDIATION AND DISPUTE RESOLUTION SERVICES**

### **LESLEY FRIEDMAN, ESQ.**

Lesley Friedman, Esq. is an associate at Paul, Weiss, Rifkind, Wharton & Garrison whose litigation practice focuses on Internet, media and communications, and technology issues. She is the founding Chair of the New York State Bar Association's Internet and Litigation Committee and has served as Chair of the Association's Professional Responsibility Committee. She also has been a member of the executive committee of the Association's Commercial and Federal Litigation Section since 1994 and a member of the Federal Bar Council since 2000.

## **UNBUNDLING OF LEGAL SERVICES**

### **RICHARD ZORZA, ESQ.**

Richard Zorza, Esq. is a consultant whose firm, Zorza Associates, provides strategic planning for effective use of technology in legal and nonprofit worlds. A former vice-president for technology at the Fund for the City of New York, he also served as counsel for technology at the Vera Institute of Justice. In these capacities, Mr. Zorza has participated in the development of innovative programs designed to provide greater legal access to the public.

## **UNBUNDLING OF LEGAL SERVICES: PANEL DISCUSSION BY PRESENTERS**

## **SUMMIT ATTENDEES' ROUNDTABLE DISCUSSION OF ALL TOPICS: ISSUES AND PROPOSALS**

### **RUSSELL G. PEARCE, ESQ.**

Russell G. Pearce, Esq. is a Professor at Fordham University School of Law where he teaches professional responsibility, advanced ethics and public interest law, remedies, and legal process. He was a law clerk to Hon. Jose A. Cabranes, and served as an associate at Fried, Frank, Harris, Shriver & Jacobson, a staff attorney at the Legal Aid Society and General Counsel to the New York City Commission on Human Rights before turning to academia in 1990.



# **SUMMIT ON THE INTERNET AND THE PRACTICE OF LAW**

## **OPENING SESSION AND KEYNOTE ADDRESS**

**LOUIS A. CRACO, ESQ.**

CHAIR, NEW YORK STATE JUDICIAL INSTITUTE  
ON PROFESSIONALISM IN THE LAW

Good morning, everybody. My name is Lou Craco for those of you whom I have not already met. I have the pleasure of being the Chair of the Institute on Professionalism in the Law.

This is one of those events that happens in my life that cause consternation to my family. There have been several of them over the course of my practice. The first one was when I, though not able to balance my own checkbook, became the lawyer for the accounting profession which, as it turns out, cannot balance its checkbook either. But I am here, to the consternation of my children, at a conference on the Internet. So I play to my weakness at every opportunity.

I want to welcome you and thank you for coming to participate in this event. I would like to spend a few minutes introducing the Institute and placing this endeavor into the context of what we are trying to accomplish.

The Institute was created, as some of you who are members well know, in 1999 to follow-up on about eight years of work that had preceded it, exploring the issues of professionalism in the law in the State of New York. That work, which in turn had built on many years of work by others, made many key findings, of which two are pertinent to the discussion we have today. The first one: That the professionalism of lawyers in New York State was extraordinarily high (bad jokes to the contrary notwithstanding). Their service to people day in and day out in the ordinary practice of law was remarkably good. But it needed continuous nourishing and reinforcement. And the second key finding: That the pressures on that notion of professionalism triggered by the changes in the profession and in the culture at large were on-going and were enormous and needed to be addressed on a continuing basis, rather than through episodic blue ribbon commissions that would attack crises and then disband.

So, the Institute is formed as a permanent and official body of the court system by the administrative order of the Administrative Board of Courts, and its members were appointed by the Chief Judge. Among the charges that were given to it in its foundational order was this: To “promote scholarship regarding and practical attention to the emerging issues in the practice of law that may present issues of professionalism or legal ethics.”

The notion of “professionalism”, of course, is one of those definitional things that you need to come to terms with when you start to talk about “professionalism”, left and right. And we have to confess that a generally acceptable comprehensive definition of “professionalism” has eluded us thus far. It means many different things to many different people.

One of the reasons that a consistent definition of what we mean when we talk about professionalism has not really emerged is because so much of the last generation has been spent with both the scholarship and the practical consideration of professionalism devoted to refuting the old ideas of professionalism which emerged out of notions of elitism and guild protectionism, both of which are clearly obsolete in the new and much more healthy, open and much more democratic legal profession that we live in today.

Nevertheless, as you think about these things, certain intrinsic hallmarks keep coming out that are essential to what it means to be an American lawyer at this time. We conceive ourselves to be engaged in a learned profession. We conceive ourselves to be engaged in a helping profession. And we are engaged in an occupation that is inescapably, in our view, public in character.

The key notion on which our Institute operates is that lawyers help clients one-by-one by putting at their service our special knowledge and craft. In the aggregate, we cause a system to function in which public goods are delivered in the private ordering of affairs in a responsible, reliable and efficient way, and disputes both public and private are resolved peaceably, in a way that accrues a body of law to guide affairs in the future.

Those values which crop up in any attempt to define comprehensively the notion of professionalism imply certain things about lawyers. First, they imply the possession by the lawyer, in the role either of an advisor or an advocate, of a special competence. They imply, second, a qualitative relationship between the advisor/advocate on the one hand and the client on the other that is fundamentally different from the nexus that exists between the buyer and seller of goods. And they imply, third, a sense, however imperfectly it may be realized by the individual lawyer at any given moment, a sense of public engagement that entails individual and collective obligations and constraints.

This coherent account of the contemporary professional idea is challenged on virtually every front by the changes that have already been wrought by the Internet and foreseeably will be. When we began this work, those challenges were only dimly perceived. But in the interval, the rise of the Internet and its implications present quintessentially the “emerging issues in the practice of law that may present issues of professionalism and ethics” for which this Institute was created.

Those questions are, as I say, fundamental. They include such absolutely basic issues as: What is a client? What is advice? What is representation? When does a lawyer-client relationship arise? On the Internet, what levels of assurance

can the public realistically expect? What level of assurance are users entitled to about such things as access, quality, confidence, privacy and loyalty? And not least, it raises the question: Who may decide all these questions and police this activity in the public interest?

With this conference we begin a serious and official effort to promote scholarship and practical attention to this crucial emerging issue. In New York, we have, we think, a special opportunity and a cognate special duty to do that. The opportunity arises, among many other reasons, because of the huge diversity of New York State, the diversity of its people, the demand for legal services, the practice settings in which lawyers find themselves, the specialties in which they engage. And that diversity presents, in the bar and the public of New York State, the most elaborate laboratory in the country in which to study these issues.

With that comes the duty, not only because of the diversity and the opportunity that should not be squandered, but also because of the centrality to the American legal profession and the influence in the American legal profession of the New York bar. That influence and that centrality creates an opportunity in New York, a duty in New York, to struggle to come to a right understanding of how to cope with the challenges of the Internet. We hope to do that, to explore these issues, in the context of adapting our professional understandings and ethical precepts to the new realities created by the Internet. We expect to do so, not as an exercise in guild protectionism, but consistent with the enduring values of the occupation that we love, which is called to be of service both to the public and to the rule of law. I want to thank all of you, and particularly those who are going to be participants in the panels, for helping with your expertise in beginning this endeavor.

We hope, as the year goes on, to take what we have learned at this forum, what we will learn in other study and scholarship and research that we do, and to publish towards the end of the year some proposals for how the Internet should be regulated, considered, approached in New York State. We will do it as an exposure draft. We hope at the end of the next year to have recommendations for the court system on this subject, again, along the lines and the standards that I have suggested.

I want to offer my special thanks to Fordham Law School for the hospitality of this place and the cordial welcome it has given us. To Catherine Wolfe, our indefatigable and amazing counsel, without whom no movement in this Institute is possible, and certainly not this one. To Sheila Murphy, who is I think still out there doing what makes this work: handling all the logistics. And finally to Chris Chang, who has, in the style of the Institute, headed the working group of members of the Institute who have brought this forum together.

So, Chris, I thank you.

**CHRISTOPHER E. CHANG, ESQ.**

*PROGRAM CHAIR, NEW YORK STATE JUDICIAL INSTITUTE OF  
PROFESSIONALISM IN THE LAW*

Welcome, everybody. I would like to go through the morning's proceedings: We have a keynote address and a technical demonstration is stimulating.

The technical demonstration will be broken up into three parts. There will be an initial brief presentation of how the Internet works. I know in looking at the audience that there are many people here who are sophisticated in the Internet. On the other hand, with all due respect to those other people, there are people who will benefit by hearing how the Internet works.

Following that, we will have an on-line demonstration based on a hypothetical we have created which reflects various instances where a family of moderate income means who needs a lawyer in this day and age, will be surfing the Net for web sites, chat rooms, and things of that nature. This demonstration also includes a solicitation of word searches from you.

Finally we have Bob Macconnell here from Lexis-Nexis. He is an engineer, who will speak to where Lexis-Nexis believes the Internet is going, where the technology is going. From that threefold approach you will have a primer on the Internet.

Before that, we have the keynote address by Professor Catherine Lanctot. Cathy, is a professor at Villanova University School of Law. Cathy has written extensively in a number of areas, including Legal Ethics In Cyberspace. She has written a number of very thought-provoking articles which you will find, based on her keynote address, will stimulate the discussion scheduled for the second day of the conference. So without any further delay, Professor Cathy Lanctot.

## THE INTERNET AND THE PRACTICE OF LAW: PROMISE AND CHALLENGE

CATHERINE J. LANCTOT, ESQ.

PROFESSOR, VILLANOVA UNIVERSITY LAW SCHOOL

Thanks very much, Chris, and thank you to Lou Craco and to the Institute for inviting me. It is a privilege to be here. This is a historic moment in the history of technology and the legal profession particularly with regard to our coping with the Internet. My job is to be stimulating this morning, so I hope you all had coffee and are ready to be stimulated by my talk. I find this area exciting.

The history of our profession's love/hate relationship with technology continues today. And we are going to see a lot of demonstrations later this morning. We are going to have a number of panelists come this afternoon and give you little pieces of the puzzle of the Internet.

What I am going to do this morning is try to put things in historical context to some extent. I want to talk to you a little bit about our profession and its technophobia. Some of you are technophobes. You can freely admit it. Some of us are technophiles, I guess.

Our profession has a long history of tension with business machines and with novelty in the area of technology. So what I am going to do is talk a little bit about that first, and give you some historical examples of where we have been with respect to technology. Then I am going to frame for you some of the issues that we are going to talk about later today.

In particular, I am going to identify initially the areas where we see substantial amount of growth in terms of law practice either by lawyers or maybe law practiced by non-lawyers that is ongoing in cyberspace. I am going to identify those for you so you will have a framework within which to consider the tech demonstration in this afternoon.

I am also going to briefly sketch for you what I perceive to be the challenges in store for our profession, because I think there are very significant challenges to our profession that are inherent in any kind of new technology. But they may be more pressing in the area of the Internet.

Let me start by explaining why I think now is the right time to do this. I have felt for quite some time that the legal profession has not yet come to grips with the Internet, that we have not as a group focused on what is really happening out there, what we ought to be doing about it, why we ought to be systematically reviewing these activities, and whether we ought to be regulating any Internet activities. The benefit of doing this kind of analysis today is that we are not too early. And I will explain in a minute why I think it is not too early. It is also not too late. We really have the opportunity during the next couple of

days, a luxury almost, to sit and take stock of where we are with technology: What lawyers are doing that we think is good. What lawyers are not doing that we think they should be doing. What lay people are doing out there that we either like or do not like. But we do have an opportunity to sit and focus on something which otherwise we would perhaps only know about casually, perhaps through articles we read or our own interactions with technology.

I really do hope by this time tomorrow, after the benefit of a full day of discussion, everyone in the room, the techies and the non-techies alike will be in a position to start to evaluate critically what we ought to be doing about shaping the future of law practice in cyberspace.

I have been looking at these issues since roughly the fall of 1995, which is not that long. It is seven years. In cyber-years (which are like dog years), I think that is an eternity. So I have been impatient for a long time about what I have seen as our profession's inability to recognize that the future is coming. I am delighted to see that we are finally attacking the issue.

On the other hand, I think it is also the case that had we tried to figure out ten years ago or seven years ago or two years ago where we ought to be heading with respect to cyberspace, that we might not have been able to come up with the right answers. When you think about the changes in the last ten years just recollect for a minute about what you have in your pocket or briefcase or your purse today that you did not carry around with you ten years ago — perhaps not even five years ago. I am not going to ask you to put each item on the table like you are going through airport security. You have got your cell phone, your Palm Pilots, your pagers. Some of you no doubt have notebook computers. Things that you might not have carried around ten years ago, even five years ago. When you think about your own use of the Internet think about how that has changed from ten years ago or five years ago. Ten years ago the term "cyberspace" or "Internet" was really not known within the real legal world.

I have been flipping through Lexis, one of our friendly presenters today, and looked in *The American Lawyer* to try to find one of the earliest references to lawyers in cyberspace. *The American Lawyer* in 1993 had a glossary of terms you could drop at cocktail parties to show that you were very astute, and it defined words like "e-mail" and "cyberspace." This is not that long ago — October 1993. But *The American Lawyer* felt there was a need to get people up to speed so they would appear to be current in the evolving world of cyberspace.

By the end of 1993, *Time* magazine reported that there were about 20 million people worldwide with access to the Internet. That might have seemed like a lot at the time. Of course, the numbers today are staggering by comparison. Certainly upwards of 110 million Americans by the fall of 2000 had access to the Internet. But ten years ago very few, if any, of us, other than the most highly technological people here, knew what cyberspace was, had ever heard of the Internet, had any clue that it would become such an important part not only of

their own practice, but of popular culture as well.

The real focus did not come until late 1994, early 1995. That is when I started in this area. Some colleagues of mine, who were quite technological, were doing a CLE program for lawyers. It was called "The Internet: Hip or Hype." I think I was arguing that it was "hype." So perhaps my predictions ought to be taken with a grain of salt.

What they wanted me to do was to give the ethics component to this new Internet thing. I remember at the time they showed me things that were going on online. I, who had been teaching legal ethics for a long time, clutched my chest and said, "I cannot believe all this -there is unauthorized practice of law, confidentiality breaches, advertising problems. There is advice being given by people who don't know how to give the advice."

So I began to develop my own expertise by looking closely at what was going on online and trying to bring the more traditional ideas of attorney-client relationships to bear on this new medium.

This was only seven years ago. Seven years ago it was possible to count the number of lawyer web pages there were. In November 1994 there were five lawyer web pages. By July 1995 there were five hundred. So when you think about the rapid change that occurred in a very brief period of time, we can see that seven years ago we might not have been ready to consider where we ought to be with respect to technology and law practice. At that time many law firms were still debating whether they ought to have a connection to the Internet in the office. What were their concerns? There might be security problems. You could have all those lawyers searching things online that they were not suppose to be searching. Maybe lawyers were going to become nothing but glorified typists. Those things were debated a short time as seven years ago.

I think these concerns were reflected in popular culture as well, not just in the legal profession. I occasionally hang onto old Newsweek and Times magazines. I do not keep the obvious, like the Presidential election issues. I hang onto the ones that I think are going to provide amusement in future years: the one that announced on the cover that Newt Gingrich would be president; the one that anointed Marisa Tomei as the next Marilyn Monroe. I tuck those away for safekeeping. I kept one from February 1995, which was eagerly awaiting the impending issuance of Windows 95. It was an entire issue devoted to cyberspace. It is really quite instructive to take a look at that issue. This is seven years ago. It was calculated at that time that something like thirteen percent of the American population had ever been on-line. The word "on-line" is put in quotations throughout the magazine because no one knew what that was. Only four percent of the population had ever surfed the World Wide Web. Less than two percent used it more than an hour a day.

Columnist Robert Samuelson, who still writes for Newsweek, speculating into the future, said that perhaps within a decade every American will have an

e-mail address. He seemed to say it with great hesitation as if it was a wild fantasy to imagine that the American public would some day flock to e-mail. Amazon.com was still a gleam in someone's eye seven years ago. It was founded in July 1995. It was not even mentioned in *Time* magazine until early 1997. This was just seven years ago, which, again, in dog years is a long time, in human years is not that long ago. Seven years ago, we as a culture, let alone as a profession, had not yet incorporated cyberspace into our lives. If we had tried to do this program seven years ago or even five years ago in 1997, we really would have found a very different world with many lawyers just beginning, gradually, to integrate computers into their practice.

If you look at the discussions within the legal profession five years ago, there was a lot of focus on the whole question of e-mail confidentiality: Is it appropriate to have communication with clients on-line? There were also concerns about advertising rules, the applicability of these rules to web sites and debates about whether the Internet was cost effective. I am not suggesting that these issues have gone away. They have not. But other issues have also arisen in the last five years.

I suggest that even if we did this program just a couple of years ago, the profession would not have anticipated the changes that have occurred most recently. Two years ago, at the height of dot-com hubris, the sense was that dot-coms were going to take over the world. The consensus was that it is simply a matter of time before all professions will dissipate; everyone will be on-line; legal education will be on-line; lawyers, doctors and everything else would be done in the brave new world of the Internet.

Some people spoke at that time about the coming tsunami that would wash away the legal profession, trying to find a way to package and market legal services, and to do to us what Amazon.com was hoping to do to book stores. There was a sense among those who are real innovators in the field that it really was just a matter of time before a truly radical transformation takes place: The sole practitioner will become obsolete and the entire legal world would be transformed.

That has not happened yet. I am not saying that it will not happen. I simply do not know. It is true that a couple of years ago we still had an imperfect vision about where cyberspace was headed. Perhaps today we are in a much more realistic position, an ideal situation in which to take stock of how the Internet continues to affect and change the way that we practice law.

Nothing is yet set in stone. Things are still in flux. Lawyers are still grappling with how to use the technology. So it is a good time for us as a profession, the Institute in particular, to get out in front to look at what has been going on, and to anticipate some of the changes, realizing that it is hard to do so in this area. We should try to steer the direction of the use of technology rather than simply be steered by it.



Despite my claim, that it is an ideal time to look at this issue, in some respects lawyers are not the ideal folks to look at technology. The relationship between lawyers and technology has always been a complex relationship. To some extent it is the technophobia that some of us have. I am as guilty as anyone else in that respect. That fear of technology has been a barrier not only to full acceptance of the technology, but also to people confronting it and thinking about it. Lawyers sometimes think that they need to know more about computers and how they work and they need to know about technology and how it works. Without that knowledge, lawyers believe they are not in a position to grapple with some of the issues that emerge from the Internet. I think that view is wrong. I know that there are exceptions to this rule. There are many people, "early adopters" who always have the latest toy. (Maybe some of you have it in your pocket right now, and you can show it to us at lunch.) But I think most lawyers are cautious and conservative by training, if not by personality. So we do not tend to wholeheartedly embrace every gadget that comes down the pike. We tend to think about all the possible risks that will arise from pushing that button, using that device, plugging in that equipment. Then later, when everyone else in the world has embraced it, we decide "Oh, okay, I think we can use that particular device."

I am not a techie, although I have been working this field for a long time. I do not have the Palm Pilot or the laptop or the pager, although I do have a little cell phone now. This is my own insecurity: I am always afraid that I am going to buy the Betamax, or the 8-track. I always am convinced that whatever new technology it is, I am going to get the one that is already obsolete.

I am always worried I am going to be the one that jumps on the wrong bandwagon. So I tend not to be an early adopter. I was not the first kid on the block with the Internet. I have not been the last. I only mention that because I think that it is important for everyone in this room, whatever your background, not to think that this is an area that is simply for those with technological backgrounds. This is an area for any lawyer who is a problem-solver, who is aware what law practice is, and will be in the future, and can bring that insight to bear on this particular problem. You do not need a degree in computer science to think about this area. You do not even need to be able to program your VCR. (That is what your kids are for anyway.)

I do want to talk for a few minutes about what I have seen as an antipathy to technology historically. It is important to put that notion in context before we dive into the Internet.

Because of my own research, I have spent many hours digging up stories about lawyers and their struggles with technology. There are deep historical roots for our professional technophobia.

One example that I have looked at and written about is lawyers' hostility to the telephone when it was first invented. Alexander Graham Bell, as we all

know, patented the telephone in 1876. He did it over the objection of his prospective father-in-law, who told him that it was a waste of time, a toy not worth any more of his attention. Needless to say his father-in-law was in fact an attorney who thought that the telephone was silly. He was reluctant to let his daughter marry Alexander Graham Bell for wasting time with that foolish machine in the basement.

The telephone does provide interesting parallels, something I have looked at in my articles. The White House got its first phone in 1878. New Haven got its telephone exchange that year. It took longer for law firms to get comfortable with this new technology. It took longer in those days even for the phone to permeate American society. It took about twenty-five years for phones to be somewhat common. I was interested to note that as of 1940, only forty percent of all households had a phone, which I found astonishing at that late date. When you read histories of large law firms, as I did a couple of summers ago, you see that the entry of the telephone into the office was an event mixed with fear and trepidation. Many partners thought the telephone was an undignified apparatus, that it might be risky to business, that it might interfere with confidentiality. In those days, confidentiality might have been a realistic concern because in those days an operator listened in and plugged in to connect a phone call. But lawyers preferred to use live messengers to carry documents from place to place rather than the telephone, which they perceived as impersonal. Some lawyers worried about the immediacy of the phone, that it put too much pressure, because a response was immediate. If someone asked a question directly, you did not have time to ponder and reflect. You had to respond. Think about the Internet as we think about the phone.

The same was true with respect to typewriters, which do not seem to be particularly scary today. When typewriters first came into the office, it required a shift from scribes to a different kind of office worker. When scribes would prepare a document, it was written out in very beautiful longhand, the sort that does not exist any more. Some lawyers felt that typewriters were impersonal and the documents produced by machine would eliminate the client's sense that he had received individualized attention from the lawyer. In effect lawyers worried that clients would reject these machines. Some worried that the courts would not like machine-made letters or documents that are prepared on machines.

One of the real hard-core resisters that I found in my research was a lawyer named Clarence Seward, who was the managing partner of what would later become the Cravath, Swaine firm. The official Cravath history indicates that Clarence Seward did everything in his power to keep machines out of the firm because he felt that all machines were destroying the simplicity of American life. He fought the telephone. The firm finally installed the telephone into the firm, but Seward refused to answer his for many years. I guess he covered his ears

when it rang. Seward also tried to keep out typewriters. There is a long, involved story of how the firm surreptitiously installed typewriters into its office, and it was too late for him to remove the machines. He would not use them for his own correspondence. The firm legend has it that Seward even objected to elevators, too, as a form of evil. The story, which is too good to be true, so perhaps it is, was that when he arrived at federal court he refused to take an elevator, ran up four flights of stairs, was so winded that he could not deliver his oral argument, which had to be cancelled.

Clarence Seward incarnates an extreme example of a certain strain in our profession. Who among us cannot sympathize with his concern about the encroachment of technology? The objection to the elevator seems to be extreme. But if you were a fan of L.A. Law, you remember that the elevator played a very significant part in the demise of Rosalind Shays, a lawyer who met her death in an elevator shaft. So perhaps Clarence Seward knew something.

At the same time, historians tell us that it was the advent of these machines that made the large law firm possible. Certainly typewriters and telephones made possible the proliferation of the kind of law firm that we see today.

What is the point of this story other than amusing me? I think the story reflects both strains that we experienced as lawyers with respect to technology. First we tend not to be early adopters. We tend to worry about what might happen if the technology goes wrong. We adopt the technology eventually when the pressure is too strong not to do so. Often that pressure comes externally from our clients who say, "Would you people get a phone? Would you people get on board? Would you people please get e-mail?" Some lawyers are visionary during these time periods in that they can see the potential of the new technology. Others fight the losing battle and run up the stairs.

The second part of this story of lawyers and technology is that we always manage (sometimes despite ourselves) to figure out how to harness that technology and to make it work for us. That is something we will see with respect to the Internet.

Let us move forward in history just a little bit before I talk about the Internet. This ambivalence about technology that we saw at the turn of the distant Twentieth Century really was not limited to the past.

Another example I like to share when I talk about this issue is the advent of radio and how radio also put pressure on the legal profession. In the early 1930's, radio began its dominance in popular culture, and it is hard to appreciate today what a radical shift radio precipitated in American life. That new technology also collided with traditional notions of the legal profession. The vehicle for that collision was the emergence of radio courts.

The story of radio courts captures another aspect of our relationship with technology. The radio courts were programs in which a panel of experts — here in New York they were judges — would participate. Lay people would appear

on the program and recount their legal problems to the panel. The panel would advise them about how to proceed.

The most famous program was the so-called "Good Will Court," which had a brief and spectacular rise in the mid 1930's, only to be shut down by the New York County Lawyers Association. The Good Will Court was the brain-child of a former police reporter who thought it would be good radio to have average people tell their stories to real judges. This was not quite the "Judge Judy" of the 1930's, because the judges did not adjudicate disputes. The show was designed to have lay people tell their stories, then receive legal advice from lawyers and judges. Some of the stories are detailed in articles that I have seen. "Your Honor, my wife wants to divorce me, but we have a child." "Your Honor, my wife had a lobster in the restaurant that made her sick, and we want to sue." Very mundane problems. The panel would advise people on the air. The show was a spectacular ratings success.

The lay people were anonymous. They did not divulge their identities over the radio. There was a disclaimer at the beginning and end of every program saying essentially that this is not the practice of law and the viewer should not be following this as advice. But nevertheless the format struck a chord with the American public. This was not "Jerry Springer", where people shriek insults at each other. It was 1930's radio.

NBC picked up the show for national distribution in July 1936 because of its popularity. It was the Who Wants To Be a Millionaire of its time. Alas, it did not last quite as long. NBC gave the show the 8-9 p.m. slot on Sunday. For my generation, that was the Ed Sullivan slot on Sunday night T.V. At that time it was the Major Bowes Amateur Hour, a very popular variety show, which was displaced to put on this program. The show got an extremely favorable review from the New York Times, and received very high ratings. Within three months it was driven off the air.

Why? The New York County Lawyers Association and many other lawyers began to be concerned about how the technology was being used to disseminate legal advice. These concerns arose not just in New York but around the country, because copycat courts arose in many other states, and because the Good Will Court received national distribution. In New York, a report was issued denouncing radio courts as lacking dignity, providing snap judgments without reflection, and exploiting what was termed "morbid curiosity" — which, of course, has been a hallmark of radio and television ever since. The report also expressed that uninformed people would unduly rely on this advice.

The New York report flatly denied any concern about the possible effect that a radio court might have on business, although it was the height of the Great Depression, and a report in 1933 had said that nearly half the lawyers in Manhattan were living below subsistence level. For that reason, I think the Bar Association took great pains to identify their objections as being professional,

not financial. The ultimate concern was that judges and lawyers were allegedly using their influence to sell Chase & Sandborn coffee. The ABA also issued an opinion that criticized these courts. In December 1936 the Appellate Division, First Department here in New York issued a new rule for lawyers in New York and Bronx Counties barring them from participating in radio courts. Two days later the program was cancelled. The

ABA later incorporated aspects of that opinion into its own canons, which have been displaced by the Model Rules today.

The following year a Massachusetts court stepped in and said that radio courts were engaged in the unauthorized practice of law. The show itself mutated into a general advice program called *The Goodwill House*, starring John J. Anthony and his advice to the lovelorn.

What is the significance of this story other than entertainment? There are several points to be made. Depending on your point of view, how you feel about technology, and perhaps what profession, you may hear two different stories in what I just recounted. One version is that the radio courts amounted to the exploitative, undignified manipulation of lay people just to sell coffee. Lawyers should not have participated in this enterprise, because there were legitimate professional concerns about giving lay people bad advice in public. A selfless group of lawyers who, with the sole motivation of protecting innocent lay people, put a quick end to a mockery of legal practice, and in so doing, restored dignity to an already-tarnished profession. That is one version of the story, and I do not mean to say that there is not an aspect of truth to that, because I have my own ambivalence about the value of the Good Will Court.

But the other interpretation, the one that most lay people hear when I tell that story, is that an innovative use of modern technology that educated the public, hurt no one, and assisted people with legal problems at a time when none of them could have afforded a lawyer, was stamped out. It was driven into oblivion by a profession selfishly pursuing its own economic benefit. The lawyers protected themselves.

No matter which version of the story you find more compelling, it is important to keep both of them in mind as we go through our next day-and-a-half. We need to recognize both strains of our relationship with technology — our effort to protect and uphold the tradition of our profession, and also our precipitous rejection of technology and unwillingness to experiment with technological developments.

You are probably waiting for me to get to the Internet. I will move forward from the 1930's into 2002, and talk a little bit about the modern versions of the Good Will Court, and our struggles against business machines. I will not go into great detail now because we are going to have a series of presentations on this issue. But what I do want to do is frame the issue about what is happening on the Internet today. What are the uses of the Internet? What are the chal-

lenges that confront us as a profession?

One thing I want to mention, and I mentioned this a little bit earlier, is when we talk about the Internet today, we must recognize an absolute explosion of use by the lay public to an extent that we would not have anticipated a few years ago. My parents are retired people. I never thought they would be online because they have trouble setting the time on the VCR. But they are. Across the spectrum, from the young (and we know with the young, the average three-year-old today can program a VCR, and does) to the older segments of society, and even across-the-board by income (although obviously far less penetration into the lower income levels), there has been tremendous growth in both access to the Internet and use of the Internet.

As of October 2000, more than half of all households in the country had computers. That number has undoubtedly increased since then. Over the last two or three years there has been a very rapid increase in the percentage of both computer owners and Internet users. This is even true with respect to households of moderate income. In mid-2000, according to federal statistics of households with income of \$25,000 and \$34,000, about 35 percent had access to the Internet. That is not a huge amount, but might be more than one would have anticipated.

There are couple of ways of looking at these numbers with respect to the growth of access. One is to see this remarkable increase, and be struck by the tremendous potential that this medium has to reach across-the-board, a large segment of the population. The other part to keep in mind that access to the Internet still is largely limited by class, income and education; the higher your income, the more likely you are to be on the Internet. And, even for those who use the Internet that use may still be very limited. Only in the last couple of years have many people overcome the fear of putting their credit cards numbers on the Internet, perhaps to buy something on Amazon.

So mere access does not tell the whole story. It does not mean that people are involved in very sophisticated searches, or even using the Internet on a daily basis. But what it does mean is that lawyers have been able to take advantage of this medium to reach clients or potential clients in a way that would not have been thought possible several years ago.

By way of offering a sneak preview of the next part of the program, I will identify a couple of those areas and then talk about a couple of the danger spots.

Lawyers today use the Internet, in many different ways.

One way has been to help consumers find a lawyer — by law firm web sites, search engines, dedicated web sites designed to give names of lawyers, referral sites and lawyers who link up with referral sites. These methods, of course, raise issues about relationships with non-lawyers. But one way that the Internet has provided an avenue for consumers has been to give them access to finding a lawyer.

We will talk about the problem later about whether the lawyer referral information is worthwhile, whether they are getting good information, whether that is any more or less random than taking a dart and throwing it at the phone book.

Another way lawyers used the Internet is to provide general legal information to consumers — an area of great potential. The proliferation of information online means that consumers can have access to a multitude of official sites from the government, the courts, law schools, and of course all kinds of unofficial sites. Whatever legal information a person might need can be found online. Whether it is accurate, whether it has been digested appropriately, whether it is easy for the average consumer to use are different issues. In terms of providing information, the potential is certainly there.

More specifically, the Internet has the capacity to provide personal legal advice on-line. This has been my area of focus over time. Setting aside clients and lawyers who have a preexisting relationship, lawyers today offer advice over the Internet for a fee, "Ask me a question in the e-mail, give me your credit card number, and I will answer you, a hundred words or two hundred words or less. I will give you a brief answer to your legal question."

There are web sites, (it is hard to get a handle on how many) where lay people just post questions and people claim to be lawyers post answers. Maybe some of them are lawyers. Maybe some of them are not. Most of these sites have disclaimers renouncing any formation of an attorney-client relationship, although when you are exchanging credit card information for advice I think it is tougher to disclaim the relationship. But you do have personal legal advice being given to questioners in cyberspace — some anonymously by lawyers who gravitate and give the advice for free, and some by lay people who are giving lay advice to other lay people.

There is also the capacity to get personalized legal documents like wills and divorce forms online. Again, there are several aspects of this. Law firms can, of course, produce documents for clients in cyberspace. What I have been focusing on lately is the proliferation of lay sites, sites by non-lawyers that state: "Type in your information on this questionnaire, give us your credit card number and we will send you a will, or send you divorce papers." This scenario raises unauthorized practice questions that will be addressed later today or tomorrow. In addition, there is also the Internet's capacity for e-filing, for filing documents with the court. And, we will have a presentation about online dispute resolution which involves a myriad of activities relative to law practice.

As you look at today's presentations, as you think about the great potential that the Internet has for providing low-cost legal services to people who can not afford them, or to moderate income people who perhaps cannot find a lawyer, or do not know how to afford a lawyer, keep in mind the pressures and the challenges that these developments pose. Just as the telephone and the typewriter

and the radio challenged our traditional idea of professionalism, so too, do these cyberspace developments.

I want to sketch these pressures in broad terms today, and ask you to think about them. There are two concerns — one is for the lawyers and the other is for the non-lawyers. For lawyers, the whole question is, “What is the attorney-client relationship and how are we defining the relationship in the twenty-first century? How is it created? Is it created when you have an exchange of credit card information? Is a fee even necessary for the relationship to commence? If a lay person posts a question, and a lawyer says, “I will give you the answer,” at what point does that question and answer become an attorney-client relationship?

The more specific the advice, the more closely detailed the story is to the facts, the more likely it is that it will be held to be an attorney-client relationship. I am not confident that a big fat disclaimer is going to salvage a bad situation if bad advice is given, if the information given looks like advice.

The broader question arises as to whether we ought to be rethinking the attorney-client relationship, whether we ought to think differently about them because of the capacity the Internet provides to give very targeted, limited service to clients.

There are other broad issues besides defining the attorney-client relationship in cyberspace. The question of “unbundling,” or limited representation is one that the profession has begun to focus on. Though we will address this issue quite a bit tomorrow, I think today about unbundling as we watch the Internet presentation and hear our expert speakers. Is our professional model of a full service attorney-client relationship, carrying with it full responsibilities of confidentiality, zealous representation and diligence, going to continue to be the model? Or is the combination of the pressures of the Internet and the vast unmet needs of low- and middle-income people going to combine to drive our profession to think about that relationship in a different way? Is our ultimate goal to empower consumers to represent themselves with a little help from us? Or will that really constitute abandonment? If we unbundle legal services will we simply abandon an entire strata of the population? I am not going to answer any of these questions. My role is to pose the questions.

The concern for the non-lawyers is, “What do we do about the many lay people who seem to be practicing law on the Internet? Are they practicing law on the Internet by participating on web sites that offer to prepare a will, or a divorce? Are the non-lawyers who purport to give legal advice in chat rooms or web sites in fact practicing law? Do we have to redefine what the practice of law means before we can define what the unauthorized practice of law is?”

We have never been very good at defining the practice of law. We tend to say that the practice of law is whatever lawyers do. But whether we can get away with that in the twenty-first century is a different question, particularly as



more and more lay sites proliferate. In addition, constitutional questions about free speech will enter in when we try to shut down speech about the law. Whether we can continue to keep non-lawyers off our turf simply by saying the practice of law is what we say it is, will be an open question in the future.

To me, the biggest challenge facing us is not just the working out of all the substantive issues that we are going to hear about the next day-and-a-half. To me, it is deciding at the outset what is our vision of professionalism in the twenty-first century? That decision will drive our conclusion about the substantive issues.

If our vision is that it is time for the legal profession to streamline, that lawyers cannot be all things to all people, that we perhaps need to let a certain segment of the population help itself by taking advantage of cyberspace, then that is a vision very different from a vision that holds to the model of professionalism we have maintained for so many years.

The overarching question is, "What do we mean by professionalism in the cyberspace age?" We truly are on the threshold of a transformation. There is no question that the transformation is far more significant than the challenges and opportunities brought to us by the telephone or the typewriter or the radio.

There is much to be lost and much to be gained. There are dangers in not carefully charting where we want to go with this new technology and simply, reflexively reacting to it. There is a danger if we decide that cyberspace is no good, it is disturbing to us and that the people who practice law this way, need to be stamped out.

The danger is that we could lose something very significant, which is the tremendous opportunity to serve the public better. We could fail to take advantage of the benefits of cyberspace because we are shackled to a nineteenth century vision of professionalism.

On the other hand, the danger of embracing every innovation in cyberspace without thinking seriously about each one is that at some point lawyers could become glorified content providers. We could become nothing but scriveners. If we simply wholeheartedly embrace every aspect of the technology without thinking seriously about where we want it to lead, we could well create a two-tier model of the profession where lower and middle-income folks, who cannot really afford legal services, can seek advice from Desktop Lawyer, or Ask Me.com. They can get their legal advice from lay people, or from a lawyer via a brief e-mail, but the profession abandons the notion of offering them full service representation. There is that danger that one part of the public gets the Cadillac or BMW version of legal services and the other gets the Hyundai.

The other part of the equation in reflexively embracing cyberspace is the loss of personal interaction, and personal identification with the client. The loss of that feeling of personal responsibility for a client is something that we have to keep in mind all the way through our discussions. I have thought about this

more in the context of law schools and distance learning. A couple of years ago it was perceived as a great thing if a person could attend law school, by sitting in front of a computer screen at home in pajamas. A law professor would appear on screen to deliver the lecture. I guess the Socratic method would be challenging by e-mail. The theory was that this innovation would wonderfully transform legal education.

No doubt you can tell from my tone that I was skeptical. Only part of my skepticism derived from my fear that this was the latest Betamax. More importantly, I was concerned that there continues to be a value to personal interaction even in the cyberspace era, that there is a value in personal relationships that cannot be substituted for by technology. Similarly, at some point, if we chip away too much of the traditional attorney-client relationship, we do risk losing that aspect of our profession. Our profession is, of course, a service profession. We are not just content providers. I do not see myself as a content provider. I doubt that many of you see yourselves as content providers.

What do we gain by taking advantage of this technology today? The demonstration that you will see this morning, only scratches the surface of what could be done with this technology. There is tremendous untapped potential: Meet the unmet legal needs of consumers, become more knowledgeable and competent lawyers, and provide better service to our clients.

In tapping the Internet's potential, we need to be guided by a vision. That vision is a vision of professionalism. What we provide is not just information but service, and not just service, but sympathy, understanding, our advice and our judgment. What the legal profession ultimately provides is access to justice. Justice is a term that we must keep in mind when we talk about cyberspace.

With all the bells and whistles and points and clicks, let us not lose sight of that aspect of the legal profession — our overriding mission is to deliver access to justice to everyone out there who needs it. I think that the technology has the potential to enhance our delivery of justice. I think that the technology will be the hallmark of twenty-first century practice. We can harness this resource, and we will harness this resource, because lawyers ultimately are problem solvers and lawyers ultimately will play that role in harnessing innovation and bringing it to the people who need it.

It has been tremendously exciting to me to be a part of this dialogue. Today is the first step in the profession's effort to systematically study the impact of cyberspace on the profession. Thank you very much for permitting me to be part of that first step, I look forward to many more steps to come. Thank you.

**CHRISTOPHER E. CHANG, ESQ.:**

We are set to get going for our technical demonstration, which I think you will find stimulating and enjoyable. Our next speaker will be Guy Alvarez. Guy is founder of BDI Partners, a consulting management firm that specializes in the Internet and computer technology.

## TECHNICAL DEMONSTRATIONS

**GUY ALVAREZ, ESQ.**  
**FOUNDER, BID PARTNERS**

Thank you, Chris. Good morning, everyone. Thank you for having me here today. I am a retired attorney.

I practiced international trade law for about two years at a small Wall Street firm. Then I started my own consulting company, helping lawyers like you take advantage of the Internet. I helped them build web sites and do some online marketing to gain clients. From there, I went to work for American Law Media, which was then known as you the New York Law Journal. I was the associate publisher of the Law Journal Extra, managing the Internet operation. From there I went to work for KPMG International — one of the world's major accounting firms. At KPMG, I was initially the director of international operations, managing about 150 different global web sites. Then I got into the area of knowledge management which is an area that is fast developing in the legal profession. The goal is to capture intellectual properties, within the organization and harness it for re-use.

Today I am going to describe how the Internet works. So very quickly, what is the Internet? We know it is the largest network of computer systems on the planet. The forerunner of the Internet was a system called the ARPAnet that was developed in 1969. It was developed by people within a university as a research tool to enable them to exchange information at large universities. Built during the cold war era to protect the vital information that was being developed at some of the most prestigious universities in the country, it was used primarily by scientists until around 1992 - 1993. When the World Wide Web came to be, the use of the Internet exploded.

How does the Internet work? Without getting extremely technical, it uses a protocol that is called TCP/IP, short for transmission control protocol/internet protocol, nothing you need to worry about. Just a different way that computers communicate with one another. The information actually travels in packets. The reason this is important is because the way the Internet was created, it is not just one computer connected to another in a direct way. It is more like a huge web of different connections going back and forth. So sometimes when you send out an e-mail, half of your e-mail might go through Virginia and get to your counterpart across the street and the other half might take a completely different route. So, when you hear about people getting to your e-mail, it is extremely difficult to actually do that because the information is separated and sent out in different packets.

Let me offer a little background on those information packets. The

packets bounce from node to node until they finally find the destination where they are suppose to go. Obviously, users need to be connected in order to access the information. What does a user need to connect to the Internet? Primarily, a modem is necessary if you have a stand-alone computer. At a large law office or an organization that has a dedicated connection, the computer needs to connect to a network cable, as is the case here today. There are various different kinds of connections. Today the slowest one is your traditional dial-up connection where you are usually dealing through a phone, albeit slowly, although it has gotten faster in recent years. A faster connection is DSL, which is a bigger phone cable. An even larger cable is the T-1.

A user needs an Internet service provider to provide the connectivity. America Online is one example of an Internet service provider. However, with America Online the user is actually connecting to their network first. Often when accessing AOL, the user is not actually on the Internet per se. The user is on the AOL network and can jump from there onto the Internet.

Other Internet providers, do not have that AOL University. The user must then just connect directly to the Internet through a browser, primarily either Internet Explorer, which is the Microsoft product, or Netscape Navigator, which is owned by America Online.

What is the World Wide Web? As I said, the Internet really took off in 1992-1993 when the World Wide Web came into existence. Before that, searching on the Internet involved, for the most part, a rudimentary series of commands. You only saw text, no image, no sound, no video, no chat. People were not very interested in it. It was mostly used by scientists.

Then came the World Wide Web, invented by a scientist, Tim Berners-Lee. It opened up a whole new world for people who were using the Internet because it introduced the graphics to the Internet. It utilizes something called hypertext transfer protocol or HTTP, a series of letters that appears at the beginning of a URL or web address. The hypertext allows the user to nest hyperlinks inside different words, images, and enables the user to jump from one place to another. It really allowed the Internet to become a commercial entity and all the great things that we see today — image, sound and motion — became possible.

A browser is the software that allows a person to view information on the World Wide Web.

The Internet has applications in addition to the World Wide Web. E-mail is an application that many people use today. FTP, file transfer protocol is a precursor to e-mail. It allows the user to access certain repositories and actually download programs from it. News groups, chat rooms or discussion groups are repositories where you can find hundreds of different topics. These work like supermarket bulletin boards where a person posts notes on topics of interest or things to sell or buy. Lists known as mailing lists are similar to the discussion

groups except this is all done via e-mail. There is one for international law, for example. Lawyers who are interested, subscribe to it and exchange information.

There are older applications we do not need to discuss at length, for example, Telnet is a way to remotely connect to different computers; Gopher is an old system to search.

How does information travel through the Internet from one PC to another? Again, it travels in packets that look for specific IP addresses. It is usually a series of numbers. The IP address is really the location of a computer. So it is similar to a telephone number. The web address which is comprised of those numbers is then, with something called a domain name server, converted into a name. A user may see [www.Jacob.com](http://www.Jacob.com), but there is actually a numeric IP address that is associated with the name that the user does not see. It is difficult to remember a series of numbers just as it is difficult to remember a whole phone book. Again, the DNS, domain name service, converts into URLs, uniform resource locators, from IP addresses. When a person downloads information from the Internet her computer, which is usually known as the client, asks another computer, sometimes known as a server, to send a file.

Now, the beauty of the Internet: one computer can both act as a client and as a server. It really depends on what a person is doing. At any point in time you could be switching. Again, servers send files in packets. Packets travel in different routes. Packets arrive at any destination.

What is linking and how does that work? Linking uses the hypertext transfer protocol. The click of a mouse usually makes a request from a particular server or web server. Links are composed of the destination URL and the name of the file requested. So the URL will probably say, "From this address I want this particular file."

What is caching, and how does that work? Caching is saving a particular file in a computer's memory. Many times a person downloads from the Internet, a graphically-heavy page, the computer will actually save temporarily some of those files so as the person surfs throughout the web site, the computer does not constantly have to ask for the graphics to come down. Sometimes it will save those graphics in the computer. It just refreshes the textural information. Unless the user clears the cache, the computer will save the graphics. A cache is not to be confused with a cookie. I will talk about that in a second. Usually files are cached in memory for a determined period of time, depending on how the computer is set up. Remember caching allows the user to pull up a file without having to send a request to the server for the file again and thereby speeds up the process especially if a person uses a dial-up connection. You will probably be discussing that later in the program.

What are meta tags? This is part of the HTML codes. They are used primarily to help search engines find different pages. During the demonstration this morning, we will go to a search engine. We will do a key-word search or

key-phrase search. Search engines actually find the information through the code. A user does not actually see it. The meta tags that are part of the code say: this is a page about international property law or commercial real estate transaction.

Sometimes these meta tags are manipulated. A couple of years back some of the sites were actually using company names that did not belong to them as a way to trick people into visiting their web sites. That has been regulated somewhat. Manipulations like that are now penalized by the search engines engineers. And usually, again, they include key words or descriptions of the particular page or the particular site. There has been some litigation involving meta tags over the past few years.

How do search engines and directories compile and organize information? Search engines use spidering, also known as agent technology. A program searches and hits different web sites all the time, and archives the information that it is looking for or that is out there, so that when a user does a search, the search will match up with the spidering technology and will distribute a list of results based upon different factors.

Spiders are like rollers that search the Internet and basically compile a database. Every search engine has a different algorithm, set of factors that it uses to rank the most useful sites on a descending basis. Again, the meta tags are used to display the description of the key words so that the search engines can actually do their cataloguing inside their databases.

Next we will talk about directories, such as Yahoo. Yahoo is a combination of search engines directories. A user can go to Yahoo and conduct searches by key words or key phrases. What they have done is similar to the Yellow Pages. They have indexed and categorized all the different web sites that people have submitted to Yahoo directly. At one time Yahoo did this for free. Very recently they started to charge for the service. If a website owner wants the site to be categorized in the Yahoo directory, a fee of approximately \$150.00 must be paid. Clearly, there is an evolution of how these things are handled.

What is HTML, hypertext markup language? That is primarily what most web pages are built with. It was invented by researchers in CERN Institute in Geneva. It is exclusively to build pages on the World Wide Web. One of the newer technologies is XML. This is an extension of HTML, and allows for some more additional functionality that I am not going to go address today. If anyone is interested, you can certainly speak with me later. Again, the HTML is for the hyperlinking between sites, between different areas of different sites, and allows you to jump back and forth between different places.

We talked a little bit about URLs or uniform resource locators or domain names. A URL is a web address that usually starts with <http://www.domain name.com>. Again, it points to a specific IP address. And the domain indicator is usually the last part of an Internet address. [Abcny.org](http://Abcny.org)

is an example. The top level indicates the kind of organization that is running the site. So the most common one is the “dot-com”, usually for commercial entities. There is “dot-gov” for government agencies, “dot-edu” for educational institutions, “dot-org” usually reserved for non-profit organizations, although it is not always the case. “Dot-net” is usually reserved for network providers or ISPs. “Dot-mil” is a military extension. Then there is “dot-country”. For the UK it is “dot-UK”. For Mexico it is “dot-MX”. There are a ton of dot-coms going south. People wanted certain domain names. It was not available to them. They just came out with “dot-TV” and “dot-LAW”. There are many new ones that are coming out right now.

**QUESTION FROM THE AUDIENCE:**

Is that protocol driven by the industry or is there some governing body?

**GUY ALVAREZ:**

There is a governing body that actually creates the different extensions. There were some government hearings two to three years ago. The governing body is called the Standard of Registrars. They determine the new extensions that are coming out. You will actually have the ability to sell those. Initially all of them were primarily sold by a company called Network Solutions that had a monopoly on the extensions. Over the past two to three years they have opened it up to other registrars which allowed prices to come down and increased competition in that particular space.

Firewalls. You may not have heard about fire walls. Basically they are secured measures. They examine all inbound and outbound traffic, and make sure that no viruses are getting in, and that no one who should not be getting into your network is getting in. Firewalls also do a lot of address translation. And, they check for viruses in files. They log activity to make sure that, again, someone is not coming up and trying to play around with your web site. Sometimes they are sold as hardware usually in the form of a router or switch. Sometimes it is just a plain old software product. It depends what level of security you are looking for.

What are spiders? We talked about that quickly. That is what search engines use. They are merely robots used by search engines to index the web.

What are cookies? Again, there has been a good deal of litigation surrounding cookies. Cookies are small pieces of information that are sent to your browser from a World Wide Web server. Many sites use cookies today to actually help the user get the information quicker. For example, say a user is interested in making a purchase at Macy's and goes to the Macy's site. In order to make a purchase the user has to register, by entering a user name, creating a password, and putting in personal information. Once the user does that, the Macy's site will put a cookie on the computer so the next time the user visits the Macy's

web site it will look at that cookie to know, "This person has been here before." This is who the user is. The user does not have to go through the whole process of registering. The site will automatically fill the form for them and allow them to come back.

Another reason cookies are used is for marketing purposes. Web site owners want to see who is stopping at their site and how many times they are coming. Obviously cookies raise some serious privacy concerns or privacy issues that have been litigated and will continue to be litigated in the future. We will scroll over that. People continue to have misconceptions about cookies. They cannot erase your computer or hard drive. They cannot access information. They are merely left on a computer so later on, the website can access them. Cookies really cannot access information about your local system. Do not be that concerned with cookies for those reasons.

What is the difference between a browser and a search engine? A very basic explanation is that the browser is the program that allows a user to view documents on the World Wide Web. Netscape and Internet Explorer are browsers. A search engine is a page on the World Wide Web that allows a person to search for other pages on the World Wide Web. A search engine can be viewed through a browser. Sometimes people confuse browsers with search engines because a search can be done inside a browser and a person could think that a search engine performed the search. But it is actually not. It is more looking within the document of the site that was loaded up. Some examples of search engines are: Yahoo, Alta Vista, Google, Lycos, and Infoseek. There are many more out there.

What are chat rooms? Again, there has been some litigation surrounding chat rooms, primarily around some chat rooms that were created by Yahoo where there was talk that stocks were manipulated when people spread rumors and lies through the chat room about a company. Chat rooms are real time communication. It is not like e-mail where a person sends a message and then waits for an answer. In a chat room a person can actually be typing and at the same time see what others are saying. Others can respond immediately. It is somewhat distracting because unless the chat room is moderated, there can be several different conversations at one time. It is sometimes difficult to keep track of who is conversing and who is answering a question. This typically takes place on a browser.

Chat rooms can be unmoderated or moderated. In a moderated setting a moderator allows each post to go on. Before the posting is made, the moderator reviews it to make sure the conversation stays on track and there is no obscenity. There is different software that can be used. Some people use IRC or proprietary software.

We talked earlier about message boards. Messages are threaded discussions. The posting, which is hosted, is bulletin-board style, not real time. Sometimes



they are called news groups. Again moderation versus un-moderation applies here.

Mailing lists, also known as list service, are very similar to discussion groups, except they are all done via e-mail. They support open and closed, moderated and unmoderated. "Open" means anyone can have access. "Closed" means a person must subscribe to it. They run on different types of software. A little bit of my background on mailing lists. When I was practicing international trade law, I actually created a mailing list called foreign international law. Lawyers get involved in mailing lists primarily for two reasons. Number one is for discussions with colleagues who have the same interests; the same practice; the latest issues that are going on; and they trade suggestions on how to handle specific things. Number two, mailing lists are good ways to softly market legal services. If a lawyer knows something specific about a practice of law, and thinks there is a decision that could affect some clients or others, lawyers will actually post this information on a mailing list hoping that a few clients are out there who will respond to the posting and say, "I am interested in this. Tell me more."

For example, I posted on my list a decision that declared some of the export controls unconstitutional. On the list I said, "This just happened. It could have an effect on you." Within a few days I received a few requests from clients looking for more information. My firm was able to sign on the second largest Connecticut exporter in the United States as a client all because of the work I was doing.

Marketing on the web does work for lawyers. Obviously a lawyer has to be very careful about what he or she is doing. But it is active. The web could be a good research tool to market legal services. A lawyer can also find word-of-mouth-type information, instead of going to a search engine or reference area like a library or something similar.

Having offered that basic primer on the Internet, let us talk about what is happening specifically with the Internet and the legal profession.

There was a survey created by Microsoft in a newsletter called The Internet Lawyer couple of years ago, which indicated about 1.2 million lawyers, or 89% of lawyers were using computers to access Internet for various things: E-mail, research and marketing. Forty-eight percent of lawyers are using the Net to retrieve federal court opinions, statutes and regulations. The number of attorneys' home pages or web sites has surged from slightly more than 2 dozen in 1995 to almost 10,000. That number continues to grow on a daily basis.

Major corporations and clients are demanding that law firms e-mail communications, they have a web site to point out information, and something you may have heard about, intranet, which is a private way to communicate with your clients through the Internet. So, corporations are actually demanding that law firms step up to the technology and deliver services through this technology. It is a lot of pressure.

The legal marketplace on the Internet is growing rapidly. The legal market is making use of Internet technology at an adoption rate faster than any other market segment in the United States. The reasons for this The practice of law is the most information intensive profession in the world. Communications are at the heart of what all lawyers do. E-mail is basically a means of communication. Clients are demanding that a lawyer use this technology. Clients are making decisions on which law firms to hire based upon the technology that the law firm has adopted.

What are lawyers using the Internet or online services for? About 97% of attorneys surveyed said they use it for legal research. Other uses are: communication with clients either via e-mail or through an intranet, communicating with others lawyers or colleagues, accessing court records, some nonlegal research, the SEC database, corporations' websites, Dun & Bradstreet.

Before I get into the hypothetical scenarios, are there any questions with the information I just covered?

**QUESTION FROM THE AUDIENCE:**

Did you give the source of those statistics?

**GUY ALVAREZ:**

The source is a study that was run by the Microsoft Corporation in conjunction with the newsletter called The Internet Lawyer. It is about two years old now. So those statistics are probably much higher today than they were two years ago.

**CHRISTOPHER E. CHANG:**

The hypotheticals developed are very elementary. They are based on a moderate-income family that has Internet access either at home, school, work, or at a public library. In that context we have developed situations where a moderate-income family will have a need for a lawyer. We will see some interesting things as we start surfing the Internet.

**GUY ALVAREZ:**

I will go through these examples. To reach these sites, I went up through the Google search engine. I ran different key words or key phrase searches. These are the results that I came up with. In the first hypothetical assume John Smith just got married, and is now looking to buy or lease a house. The first site that came up is the Colorado Real Estate Commission. This is a state-run web site that provides forms in Adobe Acrobat software, which is known as PDF.

Here we see application forms, contract forms, E.N.O. insurance. There is different information on each forms, depending on whether John Smith is

looking to purchase or lease a house. If we clicked on any of these, we would actually see the forms.

Let us take a look at exclusive right to sell listing contract. Here we see the form. John Smith, can hit "print" on his computer, and this beautiful-looking document can be downloaded. This is the form to use to purchase a house or lease a house in Colorado.

**QUESTION FROM THE AUDIENCE:**

Do we know anything about who the Colorado Real Estate Commission is? Is that a government site? It did not have a ".gov".

**GUY ALVAREZ:**

Let us go back to it. It actually has a "us" finish. But it does look to me like it certainly is a state-owned commission, or at least it appears to be.

**CATHERINE J. LANCTOT:**

I do see the state seal.

**GUY ALVAREZ:**

Yes. We go all the way down here, "Department of Regulatory Agency, Division of Real Estate." By the address, it looks like a government site.

**CATHERINE J. LANCTOT:**

The point is, you will never know.

**GUY ALVAREZ:**

That is a very good point. Let us look at another site. This is the Cornell Legal Information Institute. It is a wonderful site for lawyers. They have a ton of information for lawyers and also non-lawyers. Again, this site came up. There is some real estate transaction, overview, and a menu of sources, including federal material. There is a link to the United States Supreme Court recent fair housing decisions and to the U.S. Circuit Court of Appeals recent housing decisions. There are also some decisions from the New York State Court of Appeals concerning real estate transactions, as well as appellate decisions from other states. This is probably not as useful to non-lawyers as to lawyers. But again this is one of the sites that came up when I did a search for real estate contracts.

**QUESTION FROM THE AUDIENCE:**

I have another question. In the general hypothetical, does John want to buy or lease a house in Colorado?

**CHRISTOPHER E. CHANG:**

John was presumably in the southern tier. John just married Jane. They saved a few dollars and they are in a position to make a down-payment and get mortgage financing to buy a moderately-priced house.

Another hypothetical is more urban in nature. John and Jane have saved a few dollars and are looking to buy a condo or co-op. I think the results are generally the same.

I want to ask Guy what were the name searches he did because John Smith is in New York, but all of a sudden he is buying a house in Colorado.

**QUESTION FROM THE AUDIENCE:**

How do search engines rank their results?

**GUY ALVAREZ:**

We talked a little bit about that before. Basically every search engine has a mathematical formula or an algorithm. They take into consideration various different factors.

We talked a little bit about meta tags, which includes pinning words or phrases in their codes. That is the first place search engines look. The search I did was "real estate contracts." Sometimes these sites will have in their text, the words that comprised my search. Another factor that must be taken into consideration is how many other sites are linking to this site. If a large number of sites are linking to this site from that particular search phrase, that means that it is probably a good site for that information.

Google, for example, allows web site owners to purchase certain key phrases and key words so that in addition to this algorithm, if I look for real estate contracts on the left-hand side, I will actually see some sites that are highlighted. People have paid money to own those particular words that will appear highlighted on the screen.

Every search engine is different. The algorithms are different. They take into consideration different factors. Many lawyers and non-lawyers say, "I want to bring my site up in relevancy. I have great information on intellectual property law, but it is not showing up on the search engines. How do I do that?" I wish there was a simple answer, but there is not. Search engine ranking is not a science but more of an art. For each different search engine, you will have to play around with the factors that are going to your web site to bring it up in relevance.

Take a look at another site. This site had purchased the name "real estate contract", and contains sample real estate contracts. This is a company called U.S. Legal Forms. As you can see, they have many different areas. The compa-

ny services both lawyers and non-lawyers. As you can see, there are all kinds of different residential contracts, commercial addendums, other forms. For example, look at residential contracts. Here we see a bill of sale, a contract for a deed. Obviously the site asks for which state. Let us choose New York. Here are forms for divorce, bankruptcy, bill of sales, contract for deed. You have to pay \$7.95 for a hard copy of a contract for sale of a residential house.

**CATHERINE J. LANCTOT:**

My recollection of this site is that they will sell you the blank form. I do not see where you click on the other option. This is one of the sites I was going to talk about next where the lay person provides information, and the lay people, not lawyers, provide the document.

**GUY ALVAREZ:**

I used two different phrases for this search. One was sample real estate contracts. And the other one was real estate law in quotes. These are the sites I came up with. I do not know what happened with that one.

Here is another one called Nupplegal. It says "Professional downloading business documents." These are expert legal forms. If I click on real estate, look at residential. Here are the different residential lease agreements including a lease with option to purchase. The site tells a user what states the forms are legal in. Here are "tab and fill in" forms.

I think the site is saying "Here, you can download this." If you have Microsoft Word, it has tabs where a user can fill it in the fields with personal information for a fee. Here is the full residential rental lease agreement kit. It tells a user all the different things that are included. So as you can see, this is pretty readily available in the Internet.

**CHRISTOPHER E. CHANG:**

Is there a chat room on that particular site?

**GUY ALVAREZ:**

Not on that one. The next hypothetical is interesting. This is actually a law firm. An attorney, Rachel Maizes, has a down-home law practice - her own business, obviously in Colorado. She has wills, trusts, probate and residential real estate practices. Here are various contracts, forms and some tips that she has included.

Ms. Maizes, "Do I need a lawyer?" Looking at a the real estate section, she has a link to the Real Estate Commission of Colorado, to the section where she says, do I need a lawyer? The commission itself addresses that question. It talks about how much a lawyer will cost, what if a person does not have a lawyer, can

a person rely on others in the insurance company. There are tips on selling a home. It seems to me she really has not written anything here. She just links to other web sites. You tell me how much value that provides.

All right. Let us move onto the next hypothetical. John Smith now wants to make a will. He is married now. He has some kids, and thinks it is time to make a will. The first one we are going to look at is a British site, by the name of “desktoplaw.” Here it asks, “Why pay for legal documents when you can do it yourself?” Obviously this is in the U.K. I can guarantee there are sites in the U.S. that say the same thing.

Then the site shows the different services. In this case John Smith is looking for a will. Here is a little introduction on wills that include descriptions. Obviously if John wanted to purchase some of these documents, there is a cost associated with that. I do not know, Cathy, if you wanted to mention anything about the site.

**CATHERINE J. LANCTOT:**

I was going to talk about this in my next segment. I wanted you to click on one of the sales price. One of the aspects of “desktoplawyer” is that the person does not just buy the document. Here it is, “Married person with legal phone support.” John Smith can buy a document either way, stand alone or with consultation from a lawyer in 15-minute increments. It is not quite like a Circuit City extended warranty, but it is the same concept. John can buy a certain amount of lawyer time. We can talk about that later, but I did want to show you that part of the site.

**COMMENT FROM THE AUDIENCE:**

It strikes me as potentially confusing to John Q. Public that there is nothing on the site to immediately explain that this is pursuant to U.K. law. You also have links to “solicitors” and the price is in pounds. I can easily imagine somebody thinking that they have got themselves a will that is valid in the U.S. using this.

**QUESTION FROM THE AUDIENCE:**

Is a payment made by a credit card in pounds?

**COMMENT FROM THE AUDIENCE:**

It says nineteen pounds.

**CATHERINE J. LANCTOT:**

There is a parallel U.S. site, “mylawyer.com.” It is similar but not quite the same.

**GUY ALVAREZ:**

Here is another example. The search phrase for this one was “sample wills” or “estate planning sample” or “estate planning documents.” These are the sites they came up with.

This is something called “Wills for America”, made by Americans, one stop estate planning. A person selects a state. State of New York. It has a will, a power of attorney form, and a living will. The site lists different types of wills. They cost \$20.00 to buy.

**CHRISTOPHER E. CHANG:**

Guy, the way this is set up, a person has to pay first, and then can see the document.

**GUY ALVAREZ:**

That is correct.

**QUESTION FROM THE AUDIENCE:**

Does this site have any information that identifies the seller before the purchase? Who sells the product?

**GUY ALVAREZ:**

Wills for America.

**QUESTION FROM THE AUDIENCE:**

Is that a D.B.A. corporation?

**GUY ALVAREZ:**

I do not think the site has information on that. That is a good comment. You can go to “register.com”, for example, or Network Solutions. There are a couple of others that have a database called the “who is database.” So if we went to that and we entered “willsforAmerica.com” as a search phrase, it would then identify who actually purchased that domain name. The information would contain the name of the company, usually a contact phone number, a contact address and the like. Sometimes that is a way to find out. But it is not always the case.

People create fictitious names. The registrars do not really check. They do not do a Dun & Bradstreet search to make sure they are legitimate companies. It is not 100% reliable. Most people out there in the public have no idea about how to find out ownership.

**COMMENT FROM THE AUDIENCE:**

That could be true if you bought a book, a form.

**GUY ALVAREZ:**

Sure.

**COMMENT FROM THE AUDIENCE:**

The “Wills for America” site is in fact analogous to what is already at Barnes & Noble.

**GUY ALVAREZ:**

True. Except, obviously the cost of creating a web site and posting it is much cheaper than finding a publisher, publishing a book, binding it and distributing it in book stores. The ability to do this on the Internet is much easier than it would be to do it with a book.

**COMMENT FROM THE AUDIENCE:**

The services which allow the user to insinuate information transform it. If you look at Turbo Tax and H&R Block, you see a demand for those services. It has occurred to me that the IRS might be interested in competing with some of these services.

**GUY ALVAREZ:**

The IRS, in fact since 1995, has allowed a person to file online directly to them. They have a whole system. Additionally the IRS will pay the refund online.

**COMMENT FROM THE AUDIENCE:**

In fact, last year the IRS focused on the extent to which people who filed their own income tax credit paid \$150 of that credit to the electronic filing companies or to H&R Block. There are Legal Aid programs in California which have an on-line system for preparing court documents for low and middle income. They are going to apply for a grant to do an income tax credit. They are talking to the IRS about what the appropriate collaboration is, which is good. It is so easy to look at these things and see the problems because, as Catherine said, there are problems.

In terms of opening up access to the legal system to what our profession is about, these ideas all have huge potential.

**COMMENT FROM THE AUDIENCE:**

I do not understand why people feel this is qualitatively different than buy-



ing a book of forms or going to a drug store that sells forms and buying the form you want and paying ten or fifteen dollars for it, other than it is accessible to more people and may or may not be cheaper for somebody to put it up.

**CHRISTOPHER E. CHANG:**

I would like to suggest that we postpone further discussion until we examine more of the hypotheticals.

The next hypothetical involves our John Smith going into business as a business partnership or a small corporation. Basically he wants to start his own company.

**GUY ALVAREZ:**

The search phrases for this hypothetical were “sample partnership agreements”, “simple shareholder agreements”, “incorporation service”, and “corporation services.” We will take a look at a few of these web sites.

This one is called [urgentbusinessforms.com](http://urgentbusinessforms.com). Here we see partnership agreements. The site talks a little bit about the partnership forms that they offer and the different forms that they actually have.

**QUESTION FROM THE AUDIENCE:**

I wonder if your search was too sophisticated for most layman? How would they know to use the phrase "partnership agreement or shareholder agreement"?

**GUY ALVAREZ:**

That is right. That is why I did a search for corporation services. Here is a partnership package selling for \$25.95.

Let us take another look at some of the other ones. This is a web site that is actually very well-known because they do a lot of advertising, called [nolo.com](http://nolo.com), “law for all”. They have a ton of information here. They have an e-mail newsletter. As you can see, they have different types of law centers where you can find different types of information.

For the hypothetical instance, let us look at their small business law center. Here the user gets not only forms, but also articles and frequently asked questions — ask Auntie Nolo some of the issues. What does it say about creating a corporation? Here are the different questions: “How do I start a pension?” “I heard Delaware has the most business. Shall I incorporate my business in Delaware or my own state?” Answer: “Best approach is to stay where you are.” The user can e-mail this to a friend who might be interested as well.

**COMMENT FROM THE AUDIENCE:**

The Nolo folks have a long history of hostility to the organized bar, and long before the Internet was invented, were encouraging people to “do it yourself”. So I have found while some of these other sites have forms written by lawyers, or you can consult with a lawyer if you want, Nolo tells people, “Do not bother with the lawyer. The lawyers are trying to crook you, and here is how easy it is for you to go off on your own and do this.”

**GUY ALVAREZ:**

That is correct. They are pretty active in advertising their site. They send out e-mail to different segments of the population with messages just like you mentioned, “You do not need a lawyer. Do not get ripped off by lawyers. You can do it yourself.”

**QUESTION FROM THE AUDIENCE:**

Cathy mentioned in her remarks that many of these sites have disclaimers. Does this one have a disclaimer?

**GUY ALVAREZ:**

Let us take a quick look down here. It says, "legal information is not legal advice." That kind of disclaimer does not work.

**QUESTION FROM THE AUDIENCE:**

That is the whole? Do we know anything about who Auntie Nolo is?

**COMMENT FROM THE AUDIENCE:**

My own view, the use of the phrase “hostile to lawyers” might be a slight exaggeration with respect to Nolo. They are lawyers. They are coming out of the legal services community fifteen, twenty years ago. They certainly have a commitment to the idea that people can do things on their own.

**CHRISTOPHER E. CHANG:**

As you can see, that was a response on the disclaimer. The answer to the question about the sophistication of the search, brings us to our next hypothetical. John Smith’s family, has had the misfortune of dealing with the children who are beginning to drive. This is parent's nightmare. John gets a phone call, "Dad, I have been arrested for DWI." What is the name search John Smith would put in? He needs to find a lawyer. That is what we are looking for.

Ten years ago during the public hearings Lou Craco conducted around the state, on behalf on Chief Judge Judith S. Kaye’s Committee on the Profession and the Courts, there was one question I asked consistently, “How did you get a lawyer?” Generally the response was, “I had a friend.” Very few people at that

time said, "I took a name off of the billboard or I took it out of the Yellow Pages."

In this context, the hypothetical is an emergency situation. John Smith's son or daughter has been arrested for DWI and will soon be arraigned. John is at home. He does not generally come into contact with lawyers. He may have had a lawyer prepare a house contract, a simple will, or a partnership agreement. But John does not know if that lawyer has criminal expertise. John is in New York, in the southern tier. John does not want to call his friend at midnight to ask for help. He needs to find a lawyer. He has Internet access.

**GUY ALVAREZ:**

The search I used was "D.U.I." Here's a D.U.I. attorney who is in Florida. Right off the bat we see a picture of Richard. He tells you his whole history and he has some good articles on how to win your case. John Smith can actually take a quiz.

**CATHERINE J. LANCTOT:**

Try [topgundui.com](http://topgundui.com). Friends do not let friends plead guilty. This is a site I looked at for a very long time. Guy, if you can click under greetings, here is a partial list of successful D.U.I. drunk driving defense cases and here he lists his clients by blood alcohol content and disposition. So, not only were they legally drunk, they were practically legally dead.

Now, if you go back, I think he has got a client intake section. I do not mean to pick on this lawyer. I believe that in California this is all perfectly legal. Here is the "New Client" e-mail questionnaire. At the bottom, you see words to the effect that the information is subject to attorney-client privilege. He says that he will use this information to contact the new client. This is not quite as dignified, shall we say, as the one you saw. I guess there is a slammer. He does not put his blood alcohol content up there.

**GUY ALVAREZ:**

There are a couple of others that I found. This one called [drunkdrivingdefense.com](http://drunkdrivingdefense.com). This one is usually created by William Head. It looks like it is actually a collection of different attorneys who specialize in D.U.I. cases. John Smith can go in there and locate one in New York.

**CHRISTOPHER E. CHANG:**

Cathy has pointed out, if you go back, Guy, up to the top, apparently they have begun to trademark sites. Look at the trademark symbol at [Drunkdrivingdefense.com](http://Drunkdrivingdefense.com).

**GUY ALVAREZ:**

See if we can find a lawyer in New York. Here we go - Ed Kencaso (phon.). We have New York's drunk driving law. It is not there. Looks like another intake site as well.

**CHRISTOPHER E. CHANG:**

In one of today's panel presentations, Professor Gary Munneke from Pace Law School, will be talk about advertising on the Internet. This is a web site. This is clearly advertising. This is not the worst you can possibly see. Change the hypothetical so that John Smith's daughter has a marijuana arrest. Now we will search for a "pot lawyer".

**GUY ALVAREZ:**

I am going to Google, which is a search engine and will put in "pot lawyer". When we are using a key word phrase, we always want to put it in quotes so that it will look for those words together. If you do not put the quotes, it will look for pot and lawyer. There is actually someone called a pot lawyer. Looks like he is in Arizona. Here are some testimonials from satisfied clients.

**CHRISTOPHER E. CHANG:**

In the presentation having to do with advertising on the web, one of the theoretical issues that has to be addressed is whether sites like these can be considered print advertisement, broadcast advertisement or something in-between. Then when a lawyer starts answering questions or asking questions and getting answers, is that exchange an in-person solicitation? Is it a house call of sorts? Is it like being sent to a potential client?

Large firms have different types of websites. Here is Willkie, Farr & Gallagher. A first-rate web site, it has obviously different fields reflecting the firms various practice areas. Much of the information on the site would ordinarily be provided by the firm's brochure. It does not have the heavy-handed testimonials.

**GUY ALVAREZ:**

As I was doing my search last night, I could not believe I found this ad. I just want to show you. It is called "D.U.I. pictures". Someone actually collects pictures of people involved in accidents who were arrested for D.U.I. As I said earlier, if you want to find it, you can probably find it on the net. From the bizarre to the sublime, you can find it.

Let us do the next hypothetical. John Smith slips at the supermarket, has surgery, and the doctor leaves a pair of scissors inside John. Here is Ellis law. The phrases I entered here were "accident report" and "personal injury", which

I know is probably not a good search term for the public. They do not know what that is. I also entered “accident lawyers”, “accident law”, and other similar terms. Here we see his information. The disclaimer is right there for this one.

**CHRISTOPHER E. CHANG:**

In our next hypothetical, John Smith is getting a divorce. This will bring in online mediation and arbitration.

Leslie Friedman will speak about that issue. It has become very popular with insurance carriers, in particular in the context of personal injury. A person who has a claim is encouraged to participate in dispute resolution online without the need for a lawyer.

In our hypothetical, John Smith and his wife get a divorce and in this context we will also get on the bankruptcy site, because these two events are generally linked.

**GUY ALVAREZ:**

This is the New York State Office of Court Administration site. A person can get some forms here, including divorce forms. Then obviously you have many different lawyers that are offering their divorce services.

**CHRISTOPHER E. CHANG:**

Okay. If I can now introduce George Angelich, Esq. George is a law clerk for Judge Cecelia G. Morris in the United States Bankruptcy Court, Southern District, in Poughkeepsie.

**COMMENT FROM THE AUDIENCE:**

One question before we leave that. Cathy introduced the idea of changing our collective vision; she suggested that we should encourage more self-help. It would not be unreasonable to think the courts, the bar associations, and/or the profession in some way should offer more sites along the lines of what we saw, in some way to control the quality of the work. That can be a possibility.

**CATHERINE J. LANCTOT:**

The question is, are you recoiling in horror by watching this? Are you thinking, “Wow, this is great?” Or are you not sure yet. I think you are right. We need to take a look at it before we know which way you are headed.

**COMMENT FROM THE AUDIENCE:**

What we are clearly seeing is something that costs money to put up and, therefore, would not be put up if it were not filling some need. So the question is whether that is the way to fill the need or whether there are some alternative

ways of doing that.

**QUESTION FROM THE AUDIENCE:**

The question arises even if you are recoiling in horror, “Is there any real way of controlling it?” These little guys can be stamped out one at a time. One is stopped and two come up. What can be done about it?

**CHRISTOPHER E. CHANG:**

For those of you who are bankruptcy practitioners, you probably know that the United States Bankruptcy Court is very much ahead of the curve in terms of online filing. Their web site, and just the Internet in general, has had a significant impact in two ways. Number one, it has increased the manner in which people can proceed pro se or self-represent themselves. It has also changed the manner in which the bankruptcy bar practices certainly over the last five years. George is here to speak briefly on that subject. He will show us what is happening in this area. It is a glimpse of the future. After George, the final segment will be Bob Macconnell, an engineer Lexis-Nexis. He will talk about the technology.

**GEORGE ANGELICH, ESQ.**

*LAW CLERK FOR JUDGE CECELIA MORRIS, POUGHKEEPSIE BANKRUPTCY COURT*

Do we have any bankruptcy practitioners in the room? You will be familiar with what I am going to talk about later. Let me first just do a Google search and do a search on bankruptcy based on something John Q. Public might use. Here is one of the first filed items. Here also is the American Bankruptcy Institute.

**COMMENT FROM THE AUDIENCE:**

It was filed at 2:30 a.m. on Monday morning. That gives you an idea of the power behind this that these firms always work 24/7. We did not involve the courts necessarily 24/7 in the past. Now we are involving the courts 24/7.

**GEORGE ANGELICH:**

E.C.F. is open 24/7. If John Q. Public gets to official bankruptcy forms, he hits the jackpot. This is a U.S. web site; it has all the official bankruptcy forms that a debtor could possibly need. For example, if I click on voluntary petition, you will see a sample or a copy of the official form as provided by the U.S. Courts at no cost.

**QUESTION FROM THE AUDIENCE:**

How does John Q. Public, who thinks he is bankrupt, but is not, who only

knows he does not have any money to pay his credit card bills, how does he know he wants a voluntary petition?

**GEORGE ANGELICH:**

I do not know what would motivate John Q. Public to file bankruptcy. I do not know if that is included in the hypothetical. For example, if you go to this web site, the voluntary petition is the first document on the list. If John is already thinking about the type of document he needs in order to file, this will help. John could call the Clerk's Office at the Bankruptcy Court for the Southern District of New York. They might direct him to using the official forms. They have copies of the official forms at the Clerk's Office. The initial evaluation as to whether or not to file bankruptcy, is something John should speak to an attorney about.

The next few pages list law firms and other sources. But here we have the Southern District of New York's Bankruptcy Court home page. You will see right at the top there is a link to Enron if you want to learn what is happening in the Enron case. Here is the calendar. John Q. Public obviously does not have a need for that. Way on down in our web site, there is important information for all filers. The Court has our local rules, administrative orders, ADR options, information about the courthouses, and miscellaneous forms. We have motions, summonses, some official information at the bottom of the page, and information about "Prepack 11". Obviously, the usual John Q. Public is not going to worry about that.

A person can also access the Court's filings. An attorney who has a pacer/E.C.F. password, can access our electronic document system. And as you said, at 2:30 in the morning you can docket a petition or a motion or any other type of filing.

**CHRISTOPHER E. CHANG:**

Alternatively, can you do a name search to find out whether somebody has filed, within the time frame of when the system has been placed online?

**GEORGE ANGELICH:**

Sure. This is a U.S. pacer page. You need a pacer log in. Anybody who has a pacer log in here should use E.C.F. This is a fairly common sense. It costs seven cents a page to print the copy.

**CHRISTOPHER E. CHANG:**

Are there any restrictions on people who are authorized to get this?

**GEORGE ANGELICH:**

You have to be an attorney or get a U.C.F. password.

**COMMENT FROM THE AUDIENCE:**

A person does not need to be an attorney to access the information. Anyone can open a pacer account. Until two years ago anybody in America or anybody in the world could access documents from bankruptcy court for free. And the government, decided to make that a revenue raiser and began to charge seven cents a page. That decision has a consequence, whether it was unintended or not. What it did in effect was shut down access to the courts for the layman and the public. The notion being that although you can still run down to court and look at any paper that has been filed on their terminals in court, you can no longer do it from your desk top, unless you have a pacer account and are willing to spend seven cents a page. Most lawyers in New York have the pacer account. A person who hears that his neighbor filed for bankruptcy and wants to be nosey is initially stopped. If that person is really nosey, he can set up a pacer account. It is not a big thing. It is one way to restrict access to the courts. John Werner, Esq., Clerk of the New York State Supreme Court, New York County, who is with us today, has considered this issue: Just how much access should there be with electronic filing.

**CHRISTOPHER E. CHANG:**

Later this afternoon, Floyd Abrams, Esq. is coming to talk about the privacy question and the impact of the Internet on access to court documents. It is one thing, quite simply, to march down to the courthouse at 60 Centre Street, go to the basement, make a request, wait for the document, do it from 9 a.m. to 4 p.m. and it is another thing to be sitting in Wichita, Kansas entering name searches online and getting documents at 2 a.m.

**GEORGE ANGELICH:**

Let me give you a definition of E.C.F. E.C.F. allows attorneys to file petitions and other electronic documents with designated United States Courts through the Internet by using a standard web browser. This results in a completely electronic case file that does not have any papers associated with it at the court. Therefore, all the case information is available for examination electronically through the Internet. Again, through the use of a standard web browser. E.C.F. has been the primary method for filing documents with the court and for treating case information with the court.

This is our E.C.F. start page. First, we have a function bar at the top of the page. Basically, two functions assist filers with uploading documents up to our system. For example, I click on bankruptcy, and I go to open a bankruptcy case this will walk a person through step-by-step on how to file a petition.



It operates like Turbo Tax. It asks you a series of questions. You upload the documentation. It is fairly straightforward.

Now, going to what you mentioned, Chris, about query. This is a type of search engine on E.C.F. I go to query, and I type in, for example, XO. I go down to type, put in party. I run this query. And I come up with about half a dozen, four hits on XO. Click on XO Communications and XO Communications, Inc. It asks for case number. Obviously the case was filed yesterday. It is a voluntary petition. Approximately three dozen documents have been filed in the past 24 hours in the case.

**QUESTION FROM THE AUDIENCE:**

Can a member of the public see these documents without a pacer account?

**GEORGE ANGELICH:**

At the courthouse there are numerous terminals for public use. There is a public user password, and it is free. You can print. It is a pay service. The Clerk's Office charges ten cents for photocopying.

**QUESTION FROM THE AUDIENCE:**

I noticed that the first field on the open case was a case number. Is there a method by which you can purchase an index number and open the case through the bankruptcy court online, or do I have to register it with E.C.F. after having obtained a case number?

**GEORGE ANGELICH:**

E.C.F. assigns a case number to your petition. So ultimately you get a case number. This is petition filed by Laura Brackman, who is on the Sopranos. She filed a petition in 1999. You can see the personal information like her phone number. This is part of her telephone account number. You would see her address, her Social Security number, the names of her children, their ages, details about her divorces from Harvey Kietel and Edward J. Olmos. A lot of personal information about Ms. Brackman is on that web site.

This is a 2016 statement. This is a statement that has been filed by debtor's attorney detailing compensation. Applicant has agreed to provide a retainer of \$200,000. We request that parties sign the /S. In fact, if you go to her petition, you will see her handwritten signature as well. That is E.C.F. There is a handout that details some of the privacy issues.

**CHRISTOPHER E. CHANG:**

Thank you very much. We have for our next presentation at the conclusion of the technical demonstration, we have Bob Macconnell. He is an execu-

tive consultant with LexisNexis and he is an engineer. Bob has told me that he is a holder of great many of the patents in LexisNexis. He will be talking about where we will be for the next five to ten years.

**ROBERT MACCONNELL**

*EXECUTIVE CONSULTANT, LEXISNEXIS*

Thank you. My name is Bob Macconnell. I am from Dayton, Ohio. I work for LexisNexis as an engineer. I am only disappointed everyone else is going to be an attorney.

Feel free to ask questions and I will tell you the answers without a marketing person present. I was a happy engineer just until last week when marketing said, "Bob, you have to go to New York. Would you like to have an all-expense-paid vacation for one day?" "I said, Gee, thanks a lot." But, here I am.

Today's topic really interests me: What is the future of the Internet? Where is Lexis heading in the future? I spent a good bit of time on this to see where we have come from to where we are going.

So, I am going to take you back in history a little bit. Gutenberg invented the printing press. If you had a book done today, the average cost for the printing press manuscript would be a hundred thousand dollars. The librarians were not too friendly either. That book or manuscript would have been chained onto a desk. Unless you were a nobleman, you would not have been able that take it home. Then along came a fellow by the name of Fleming who invented the vacuum tube. The vacuum tube is what let the engineering process start for the mechanical computer to get into the electronic computer. At that point the transistor came on, and then high integrated circuitry.

Today on the size of your thumbnail you can fit over 42 million, probably another 10 million since a couple of weeks ago. This has been the enabler that has let all the technology run loose.

Cathy's presentation put me back into another time, back in 1973 when I came to the prestigious Legal Institute for a presentation and demonstration of Lexis. I had to bring in a lot of equipment. I set it up one day early in preparation for the next day's presentation. The librarian said, "Mr. Macconnell, You can come back with a white shirt instead of a yellow shirt. You have to bring a sign on the door saying this maybe hazardous to your health."

The legal profession since 1973 has really gone through a major change. To illustrate that from microfilm to microfiche, which was after the books, was very, very influential. Along came the UBIQ. How many of you remember the UBIQ? I designed it. It is now in the Smithsonian Institute, which tells you how old it is. It is on display here at the Cooper Hewitt in New York.

Today you can handle ten novels in a hand-held device. The publishing industry is going to issue their publications in hand-held electronic formats in the very near future. This is one of our preferred devices. It is compact and has

two forms: One is a wireless device that does not really operate at a high enough speed to be a real productive tool. This is changing. You can look on the Lexis. I have a wireless PDA. A person can log on in ways that will run him through the process. When the person gets back to the PC, it can be synchronized. These prices are going down astronomically in cost. People are a little bit afraid because the devices have keyboards. The user has to bring them up on the screen and tap on them. Or the device can have a very small keyboard like this one.

These developments have a major impact on us. We may not know it, but our children are far more dextrous than we are. Their fine motor skills are better than ours. Our thumbs are not developed. Their thumbs can type. They can actually type with their thumbs now. This is a change in our physiological makeup — how we work. About two months ago there was a patent filed on a new keyboard that is called a virtual keyboard. That device will have a little flip-up device on it, will have a red projector that will shoot down on the table next to us. When you put your device down on the table, a projector will show a keyboard. You will be able to type in the light and make your entries. Things are changing. The way you are going to perceive the future is very different.

We talked about ISP. These are companies that provide that Internet service to you today. The companies that are here now are probably going to survive because hundreds have perished within the last two or three years. The providers that we are dealing with are probably going to continue.

The area you are probably not familiar with is the SSPs. People that run MIS groups are familiar with these. Now everything is done through storage providers. So that information is backed up on a continuous basis to that storage provider, like NetDocuments in the State of Utah inside a salt mine.

Now, in the next group of the alphabet is the application service provider, an ASP probably. In three years the MIS department may have five people instead of twenty-seven people. The computer room will shrink down to probably something that can fit in the podium area. Communication speeds have become so rapid, the cost has gone down so dramatically. Computer power has gone down dramatically in cost as well. These providers will now offer a document management system, word processing system, spread sheets, all the things that are used from a remote location — I will pick on Utah again — that is where a lot of technology is coming out in this area. There are major changes coming and computer room enhancements mean lower costs for users.

However, on the other side, information is in total overload. Within the last few years there are eighteen times as many URLs to go to. These are the registered locations that you were talking about earlier. Not only that, even kindergarten teachers have to publish or perish. There is a phenomenal amount of information being put out on the net. You can see the dramatic increase in the amount of information that is going up. I noticed on some of the searches done this morning there were a million answers. How helpful is that?

Firms are buying their way ahead in the queue of search engines so a user can get the answer he wants the person to have, maybe not the answer that the person should be getting. So this has a profound effect on how Lexis is going to be providing information to you as well as other folks.

The people who have used Lexis know we have a search structure where you can start in a big file and work your way down. We call it a search advisor that is very word oriented. We are only word oriented because we were taught to be that way. We are all visually oriented. We come that way. God makes us that way. We are in the process of changing a lot of our library structures so a person can point a mouse, and pull the section apart to see how this data or that library is related to another library.

Where we have tested it, it has been very popular. A desktop today is really separate operations. These are word processing, billing, mail, database, customer relations information, and document management research. For many law firms it has already changed. There are maybe 300 vendors that sell portals. Probably 3 of these portals that are very good and legally specific. We have one. What happens is it takes the entire desk, moves it into one active area on your screen.

Typically out of 100% of software, if you have 100% of an application, you are only using 20%. What we do is take the primary elements of the things that a person uses, and put them into a very small screen or a segment, a gadget. Then we let the user work at it. I have one firm that has it. They do not talk about it because they consider it their secret weapon. What happens is the telephone rings — and I am changing names to protect the innocent here. The phone rings. A little green screen pops up and the user can see who is calling. The person picks up the phone. He acknowledges the fact that he picked up the phone. What happens next is the billing information that they have done for Intel is on the screen. The names of the 5 people that are assisting this attorney, are on the screen and their billing rate, etc. Meanwhile, Lexis has gone on. We have done a search on Intel for all the current stories. We call it an extractor. All the trackers are there so the person can click on a tracker and figure out what the five assisting lawyers are doing today. Also current e-mail links to their document management system. The last 5 documents they prepared are also on the screen. Everything is in one place for the practitioner to catch up very quickly just on the fly on the telephone call.

It also has the capabilities to be a web crawler and spider. The best way I can explain it is, that the portals also have spiders that allow it to go out on the Internet through the user's own databases, through the client's data bases, and retrieve information that the user should look at and can keep that in a private file. It also follows all the rules of security. That is going to change the way business is done.

Another thing that we have started working with is called DolphinSearch.

The technology is very impressive. It is based on some work that was done for six to ten years on how dolphins actually use their sonar. Amazingly enough when a dolphin shoots out that burst of energy and gets a return, it is looking at an entire picture of a landscape. To them that could be a New Hampshire database. When that return comes, that dolphin can tell whether the fish has died or is alive, what type of fish it is, whether he wants to eat it, or whether it is a 55-gallon water drum under water. If it had a database behind it, it could tell who made that drum. Dolphins are not quite that sophisticated. We are. You can take a look at a word profile that is returned from Dolphin and from that technology we have brought in products that run an office for document management systems, D.M.S., e-mail, litigation support.

It also supports something called a point of view. We have divided the legal field into forty different practice areas. I am going to pick one like labor law and real estate law. In point of view, take a word like "severance". A search of that word against Lexis, would bring up with everything having to do with severance packages, mainly to do with labor law. A real estate attorney, would not want to see those results because the reference has to do with clearing brush and clearing property. A search done from the point of view of a realtor, would yield totally different results.

Also when Dolphin is working, it reads the entire database. So if a person reads a database about George Bush, it would show that George W. Bush is the son of George Bush. It knows that he is the President of the United States, chief and commander. It would bring up other things that are related to George Bush. It is not done with taxonomy. It is done with this pattern recognition that I have been talking about. It will allow document management systems to operate very effectively.

Today the average search is probably five to ten minutes. In some cases, a search can go through seven million documents. This will return a response in approximately twenty-five seconds.

I am going to pass out some samples to you. This is printing technology. It actually makes physical parts. I am going to pass around a bust of a person, a pattern, that is art work. I am going to try to play something. Hold your ears if it comes out a little too loud.

*(Tape played on how the printer prints a physical object).*

Why is that important? Well, I have been in the business for thirty years. Every time something goes below the price point of \$10,000 law firms buy it. This is about ready to slip under that price point.

What is so important about that right now is this: Say you were mugged in the parking lot and you gave a visual description of the person who mugged you. The police officer can draw the mugger's features with this printer. With 3-D technology you can literally make a bust of that individual. So when there

is a police briefing, the police can hold up the bust up for everybody to see in 3-D.

I have given you a small image of one. Say you had a client, an IP client that had designed a duct fan like the one, I have passed around. He looked inside a Xerox machine and learned they were using his duct fan. You, his lawyer, can go to the mechanical prints of that Xerox machine, put it into here, make a copy of that duct fan, make a copy from your patent of that duct fan which you had scaled to size, and look at both physical and say, "My God, that guy stole our pattern." This has tremendous impact. If there is evidence in a locker out in Los Angeles, and you are a New York attorney, you can have that locker scanned and have that evidence effectively brought to you so you can examine it and work with it. There are so many possible applications of this product that this is one of the important things that is going to happen in the profession.

This is where I say the Internet is coming to its senses. You may find this amusing. Consider that the device up there in the top left is an odor generator. It can reproduce any odor. A person can go to a URL, for instance, Smokey the Bear and see him standing in a pine forest. All of a sudden your room smells like a pine forest. If you drop a match, it will smell like that terrible charcoal odor with water. I do not know how this fits in with what you are doing here but in some way it is going to affect you.

These items are for sale now, at approximately \$300 each. There is another one for the flavor industry. It has a cartridge so that instead of having the primary colors of red, green, blue, it has sweet, sour, salty, and bitter. This is a little wafer of bread that has a neutral taste. The screen may show Bill Cosby saying your super-duper chocolate-raspberry is the flavor of the month. The user hits a button and will receive sample to be tasted. These things are going to affect the way we perceive and see the Internet.

**CHRISTOPHER E. CHANG:**

May I ask a question? What is the time range for this kind of technology, mainly the last two things you talked about?

**BOB MACCONNELL:**

You can go on the Internet and buy them now. They cost \$300 apiece. They are not well-known because in order to use them additional equipment is necessary. It is a chicken or the egg question. As another example, there is even a church that will probably give communion with wine. This is going to have far-reaching effects.

The following example is one that you may have already worked with. That is: There are people in Los Angeles and New York doing a T.V. conference. The people in the background appear a little bit blurry. But to a person in the

room it is actually three dimensional. So the judge, the lawyer and the other side could be in three different locations and the viewer would literally feel right there. In fact, they even have devices that tackle feedback, so a viewer can actually go over and touch, feel, rotate, see. If it moves, the viewer moves. It forces hand movement. So things of that nature are coming rapidly. The costs again are coming down.

This is a university-type activity right now. This is military action. This is actually Star Trek become real. The holograph that you probably have seen on T.V. is going to be enacting crime scenes. And that crime scene might be something that takes place right here. The military is actually working with it and has force fields involving things that can actually move and not just have an image moving.

That is very important, because if a crime did take place, one person's viewpoint might be different from another viewpoint. A viewer can literally get up and back around and see what is actually happening. It is going to be an equation of whoever can afford the most.

This is a little cross ink pen in my hand=d. Do not worry, it does not have a real laser. Take, for example, the advertisements at a subway station. There might be an ad for a Broadway play. Down at the very lower, usually the bottom right-hand side there is a bar code. Also on the side of your Coca Cola can there is a bar code. This device (the pen) is a bar code reader. I can go like this and transmit to my PC, and I will go right to the Coca-Cola site. If I scan that pointer for the stage play, I can go to my PC and go right to their web site.

Publishers have to get together to set real standards, so that every book has a physical reference. If a person in the library, identified an article for use rather than having to copy down all the information to go to Lexis with, all the person would have to do is scan the bottom of that with the bar code reader (my pen), go to a PC, and Lexis will be right on that page right now. Not only that, then a person will be able to hit the key more like this. Now a person can get all the rest of the stories or cases that are just like the critical one. The industry is only a stone throw's away from this. There has to be some standards that are still pending.

Microsoft is out there with their new generation PC this Christmas - it is really a clipboard. It is total PC. It has a PDA built in like one I showed you. It has a small phone pager and handwriting recognition, all the bells and whistles in one easy-to-hold device that is very portable. It also supports Blue Tooth.

Does everybody know what Blue Tooth is? Blue Tooth is a short-range radio system. For instance, if a person was carrying a PC down the street, and was interested in a store that just passed, it would know the size of your shoes potentially. If the store has size 5 shoes on sale today, it would tell you to come in. Or a restaurant could send out a signal: "Your favorite food is here today, special."

This technology, the Blue Tooth, was named after a Danish king who was able to rule successfully over many different religious groups. And Blue Tooth works with almost every computer operating system. So they came up with the name of Blue Tooth in honor of him.

This is something that you will think I am really stretching. I am really not stretching. There is a movie that was done back in 1965 called The President's Analyst. I loaded with the permission of the people who run this product. It actually came from their web site as well.

Last week, Dan Rather on 48 Hours, had a long segment about the human brain and things that can happen. There are more points in your brain than there are stars in the universe. We are pretty wonderful! Through advances in technology, these points can be accessed. They do not understand what is going on yet. But there is an exchange of information. So someday you will be able to be programmed. You might find this tape amusing.

*(A video tape is played).*

A person's memory may be altered or enhanced.

**CHRISTOPHER E. CHANG:**

Thank you Bob, George and Guy for your presentations. We have one more presentation — Cathy Lanctot. She is back online so to speak. She will give a presentation on online documents and the unauthorized practice of law.



## ONLINE DOCUMENT PREPARATION AND THE UNAUTHORIZED PRACTICE OF LAW

CATHERINE J. LANCTOT, ESQ.

It is me again. While watching Bob's presentation, I felt like James Bond in the movies where he is shown all those wonderful gadgets. It was very interesting to see. And I also started to feel like Clarence Seward, not wanting to get on the elevator. The new technology always seems very alarming. I am still figuring out why I want my computer to receive smells. But I am sure that some smart marketer will tell me someday. Right now, it seems like one more reason to tell the children not to touch the computer.

I am going to talk about online document preparation. Guy has done a lot of my work for me in terms of showing the lay of the land. I am going to try to focus your attention just on the legal aspect of this, and not spend a lot of time on the ins and outs what is out there on the World Wide Web. You have a good picture of what is available. Some people had some questions about what is the difference between this and a book. Why do we care? What are they doing that is transformed by the technology? That is what I want to focus on now. Think about the legal part of this new world. We ought to talk some law this morning and not just technology. The question, ultimately, is whether this is unauthorized practice of law? And if it is not unauthorized practice of law, are there other concerns that we have about these sites?

There are a couple of different types of sites. I just wrote a law review article called, *Scriveners in Cyberspace* focused particularly on this phenomenon of document preparation on-line. I looked specifically at lay preparation. We will leave the lawyer side apart for a moment. The question is this: If a lay person sells another person a legal form, is that the practice of law? Probably not. Certainly not. But if a lay person assists another person to complete the form, or advises that person on which form to select, at what point does that assistance or advice become the practice of law?

Now, I have examined this question against our existing precedent. I do not know what we are going to say about this issue in the future. This is something I alluded to this morning about whether or not we must redefine what we mean by law practice. Several people have raised this question to me: How is this different from what happened in the past? When a lay person says, "Give me your information, I will select a form, and put that information on the form for you." Or alternatively, "Tell me what kind of form you want. I will sell you the form." How have the courts and the bar treated this question in the past? One possibility is to treat it like a book. If it is a book, is it unauthorized practice of law? You know from my presentation this morning that I am a schol-

ar of history. I like to be.

I looked historically at the book question. The best known example is a guy named Norman Dacey from the 1960's. Not that it rings a bell today, but Norman Dacey had the number one best seller in 1966. It was a book called, *How To Avoid Probate*. Norman Dacey initially self-published the book, and then got a publisher to publish his book on how to avoid probate. It became a runaway best seller in 1966. It was the number one New York Times best seller in the nonfiction category. What is really striking about that is the fact that the number two book that year, was a medical book by two doctors named Masters and Johnson entitled, *Human Sexual Response*. That was number two.

Imagine this. People went to the bookstore in 1966. And they had in their hand two books: *How To Avoid Probate* and *Human Sexual Response*. And they bought *How to Avoid Probate*, which just tells you how much the American public hates lawyers. The New York County Bar Association, our heroes for today, sued Norman Dacey and got an injunction against his book, banning it as unauthorized practice of law. But Norman Dacey was a feisty fellow. He charged on. He did ultimately succeed in having that holding reversed on the grounds that it was not unauthorized practice, because what he was selling was not legal advice. He was selling a book on how to avoid probate. He sold forms with the book. But that was not the same as giving advice individualized to actual people. The court also said that there were substantial First Amendment concerns, substantial free speech concerns, implicated by the banning of a book, which is, after all, what happened to *How To Avoid Probate*. There was an injunction against the sale of that book in New York State. The court said that there were substantial constitutional issues that arose if what is being punished is free expression rather than unauthorized practice.

What does that mean for our purposes today? I think this approach has traditionally been taken since the 1960's. Generally, if it is a book, it is not really legal advice because you are not personalizing or tailoring the information to an individual's particular situation. People just buy the book. They do what they want with it. You do not have the interaction that will transform it to unauthorized practice.

There is another line of cases to look at when considering this whole question of on-line document preparation. These are the "typing service" cases that arose in the 1970's and 1980's, and somewhat later when no fault divorce came into vogue, and people could do their own divorces. Lay people would sell packages or kits or they would sell packets of forms. There are several cases from different states about whether or not selling a divorce kit, is unauthorized practice. Generally the courts have concluded that merely selling the form itself is not unauthorized practice. What causes it to be unauthorized practice is if the person who is typing the information into the form gives advice. The courts generally have drawn this line: It is okay to go to someone who is a paralegal or lay

person and give them your documents and say "type them up for me." But if the scrivener offers advice such as, "You do not want that form, you want this form. You do not want that information in box A, you want it in box D", that can be sufficient to be unauthorized practice of law. The dividing lines have not been that clearly drawn. Other lines of cases suggest that this area is not without controversy. At what point does putting in information, giving information to a lay web site, having the website owner transform the information into a document, become unauthorized practice?

Now there is another very recent area which the courts have looked at, which is software similar to Turbo Tax. It is the Quicken Family Lawyer controversy from a couple of years ago. This occurred in the Northern District of Texas, before Judge Sanders. Quicken Family Lawyer has a CD-ROM that was marketed in Texas. It contained forms. It also had a little section that was called, "Ask Arthur Miller," the professor from Harvard. On the CD-ROM video Arthur Miller said, "So you want to have a will?" He would give a little lecture on wills. It was not quite the hologram in the movie Star Wars, where Princess Leia or Yoda actually appears on your desk and starts lecturing. It is just a little video was included in the CD-ROM.

The Texas Bar Association Committee on Unauthorized Practice sued Quicken Family Lawyer, and succeeded in getting an injunction from the federal court banning the sale of that CD-ROM in Texas on the grounds that it was unauthorized practice of law, that it was the sale of legal advice. Judge Sanders addressed the constitutional questions, but said that on balance this was not protected speech. He reasoned that if it is the practice of law, it is really not speech, it is conduct, and is therefore subject to regulation.

Now, the Texas situation is interesting because what happened there was a very active lobbying effort by Quicken and Nolo, which had also been chased by Texas for a long time, and others. Some segments of the public also pressed to amend the Texas statute on unauthorized practice to permit the sale of this kind of CD-ROM, which the legislature ultimately did.

I am not going to go into the specifics of the statute. They did amend it to permit the sale of software as long as the software did not include personalized advice. So we never really got a definitive opinion on the constitutional question other than from the district court. The Fifth Circuit vacated that opinion because of the statute change. So we do not know how this balance is going to be struck between the state's regulatory concern on the one hand and the constitutional concerns on the other.

So we have this one odd opinion, and really the Texas one is the only one I know that suggests the sale of a CD-ROM could be authorized practice where there is clearly no live interaction with the lay person who ultimately generates the forms. Remember that a CD-ROM is a disk. It does not know who is putting it into a computer. It is not answering questions. But Judge Sanders felt

because the disk had prompts — it would ask, “What state are you in,” and the user would click the state, and then it would give the user the document for that state — that was sufficient to be like a paralegal saying, “No, you want this form or that form.” That is acting as a human being.

There is one other area where I have seen some concern about using software and typing forms, and that is in the bankruptcy area. There are cases about the lay bankruptcy petition preparers, and whether or not lay people who are preparing petitions for other lay people are engaged in unauthorized practice. There are enough cases, not loads of cases, but enough out there where some bankruptcy courts have said that using software to plug in information and generate forms is not just a scrivener service. That in fact it is the practice of law.

The courts that have looked at these situations have been prompted to do so because of the inadequacy of the forms that were filed. There have been lay preparers, some with good intentions, some with not so good intentions, who have taken people's money, prepared their forms, and the forms have been worthless.

That is a very quick sketch of the lay of the land in terms of the law that we would bring to bear on this problem. Consider the online document services. What are they most like? Are they like a book? Are they like a typist? Are they like a software? How significant is it if the human being is cut out?

**QUESTION FROM THE AUDIENCE:**

Are there any cases where the preparers, have been held to be practicing law, negligence, contracts, what have you, preparing useless forms?

**CATHERINE J. LANCTOT:**

The cases that I have looked at have at times required the preparers to disgorge fees received from lay people. I am not a bankruptcy person. The statute does permit a certain amount of lay participation. But there have been cases where they had to disgorge their fees or be barred.

If you have U.S. Law Forms or Desk Top Lawyer or someone else, if your retired parents decide that is how they want to do their will because their children went to law school and they do not even know how to prepare a will, they get a will from those folks. And if those folks turn out not to protect the assets, are we going to be able to sue uslaw.com? These sites are exploding with disclaimers saying, “We ain't no stinking lawyers.”

**QUESTION FROM THE AUDIENCE:**

Have there been any cases directly related to the Internet sites?

**CATHERINE J. LANCTOT:**

Not yet.

**QUESTION FROM THE AUDIENCE:**

Maybe this is buying into the jailhouse lawyer myth. Did you look at any cases? Are there any cases that come out of the practice of law among inmates?

**CATHERINE J. LANCTOT:**

I have taken a real quick look. I have not looked that closely at that because I have looked primarily at commercial sites. Inmates are not doing it online yet.

You reminded me, though, of the example I wanted to raise which is not an inmate. It is analogous. This is a guy named Marcus Arnold who was featured in the New York Times Sunday Magazine a year ago. Marcus Arnold went online about two years ago to give legal advice to lay people. There was a site called askme.com where experts could offer answers to the questions.

Marcus answered about a thousand questions online. He gave himself a name: Justin Wilder, Esq. He started to get phone calls at home. People began to come to him to seek more help. He decided that he had to explain to them that he was a fifteen-year-old boy, and that he was typing these answers in his parents' basement. He disclosed his identity, admitting that he was fifteen and that he was making these answers up. To the interviewer who asked him, "How do you know all this law?" Marcus said, "I was born knowing." Basically makes it up, like lawyers sometimes do, like our own kids would do while playing around. He would make up stuff that sounded like Judge Judy, answers were based upon what he had seen on Law & Order.

The interesting aspect of his story is once he was outed, as it were, once it was disclosed he was not a lawyer, he had more lay people flock to him. I do not know how much of a cult dynamic was at work, that here is this mysterious 15-year-old with mystical powers. I do not know how much is an indication how much the public hates lawyers. Marcus Arnold became a minor celebrity in the cyberspace world by doling out absolutely worthless, made-up advice.

What struck me about the New York Times Magazine article at the time, which was an excerpt from the book *Next* by Michael Lewis, was that the journalist thought this was all pretty good, that this just showed how legal information was really overvalued anyway. He had a line in his article asking "Who was really hurt except perhaps the people who went to Marcus Arnold?" What do you mean perhaps?

Marcus Arnold looms large in my own consciousness in thinking about advice that is doled out by lay people. This is not to say that every lay person giving out legal information is a fifteen-year-old kid hanging out in the basement. It is to say a person does not know who is at the other end of these services, who is at the other end of these forms. There is very little recourse if that

person turns out to be a young kid.

**QUESTION FROM THE AUDIENCE:**

Where do you put in your picture the traditional sort of business and government advice, the brokerage house, the bank, the mutual fund designating beneficiaries, transferring assets, the government agency that tells a person when one thing or another can be done not using lawyers at any point selecting and guiding people and signing papers?

**CATHERINE J. LANCTOT:**

Or the court clerk.

**COMMENT FROM THE AUDIENCE:**

The court clerk is often dealing with a broker, is dealing with lawyers.

**CATHERINE J. LANCTOT:**

I am not sure that fits in. I will say I know that it has come up time and again in the last 75 years. Unauthorized practice as a concept was largely a creature of the 1930's. Cynics say it was a creature of astronomic disproportion in the 1930's because of the Depression's effect on lawyers.

A look at the history of unauthorized practice, demonstrates that sporadically the legal profession gets upset at a particular type of advice we are describing – bankruptcy preparers, newspaper advice columns. During these periods different states have issued various opinions telling realtors not to fill out forms, or bankers not to give out certain information, because it would be the unauthorized practice of law.

As we know from the whole current debate over multi-disciplinary practice, that issue is still with us now. There are a couple of problems. One is that the concept of unauthorized practice has a bad name with the public because the public sees our insistence that lay people can not do certain things as nothing more than economic protectionism. We are trying to drive the Marcus Arnolds out of business in order to drive prices up.

It has for some academics also had a bad name as being symptomatic of something that is generally wrong with the organized bar. I personally do not think that is the case. I think there has to be a place where we do draw a line and say, "This is what professionals do, and this is not permitted to those who are not licensed to practice law."

The tension, of course, is between the desire to ensure that the practice of law is conducted only by lawyers and the vast unmet legal needs out there where people think the only person that they can get to help them with their problems is a fifteen-year-old kid. At least he will hear them and he will let them come to

his house to give him their documents - as long as they come before his bedtime. You have those considerations.

The overlying consideration here, for regulatory purposes, is the constitutional question about the First Amendment, which, as a professor of constitutional law, I focused particularly on, but which I think is worth keeping in the back of your minds. The Norman Dacey book, *The Quicken Family Lawyer*, even the typing service cases, all question where the line is drawn between free speech and unauthorized practice. So even if we decide to stop all these lay websites, it would be hard to do. We would actually have to define "the practice of law" before we could tell lay people, "You can do this and you can not do that." We have not, throughout our history, defined what is the practice of law. We have taken Justice Stewart's, "I know it when I see it" approach. If we get a constitutional challenge, that is not going to be enough. Part of what the government has to do when it is restricting something that looks like speech is to have a statute that is narrowly tailored, only to suppress what is suppressible and not suppress speech that is protectable. It is hard to do that if you have no definition of whether a document service is the practice of law or not.

What do I think the problems are with these lay services? Let me say at the outset, "There are benefits to them." I am ambivalent about where we go with these sites. What I worry about is the obvious fact that there may be wrong information or misleading information on the sites, that the consumers are left to their own devices in selecting the wrong form, or that the entity that selects the form is not doing the right job. In addition, if there is a flaw in the documents, no one is responsible later. The consumer is the one who is stuck. I worry about some of the advertising that I think is deceptive on some of these sites. I worry that if we shunt consumers along this route and say, "Lawyers do not find it cost effective to write wills any more, so you can write your own," what will that say about our public responsibility, as we discussed at the beginning today? Also what will relegating people to a very low tier of service say about that public responsibility?

I also wonder 10 years from now when all these folks who got their wills from Desktop and USLaw Forms, start to have this will probated and they all start to have problems, and whether or not that will cause a great war, if that happens. I am not sure what will happen. If that happens, whether that will cause a rethinking 5-10 years down the road about whether it was a good idea for the law profession not to step in earlier to set-up some kind of oversight of these areas.

I am just going to make two more quick points. Analytically I think the question is, "Where is the human element in this, or is it the human element that transforms it from providing legal information to providing legal advice?" I can comprehend the concept, as I think we all can, of someone who is typing and says, "No, take Form A and not Form B," and that live person brings judg-

ment to bear on a specific question that has been raised. We may agree or disagree about whether or not that is law practice. It is easier to understand when a live human being is making that choice. But when the provider is a Quicken CD-ROM or a web site, and it cuts out the human being, when it is all automated there may be a difference. You punch information in and it spits it out. With a CD-ROM, there is no live person giving any kind of advice. With the Internet site there may or may not be a live person overseeing that. It depends on the site. If it is Desktop, a person can buy a twenty-minute phone call just to see if the document is okay. I think that is going to have to be the question, if we are defining legal advice. Legal advice is the hallmark of practice of law. If a person gives legal advice, that person has to be a lawyer. If that is where we are going, we have to see what act triggers the legal advice.

There is certainly an argument to be made, which I think Judge Sanders thought, and others might think, that even though the human being is not giving specific advice to that specific person, some human being did structure the software in such a way that X input comes in and Y comes out. Whether or not the creation of the software is going to be sufficient to constitute legal advice is going to be the question upon which these issues turn.

The last point I did want to make is to reiterate something I addressed earlier this morning: What is our vision? Is this our vision of the future for providing routine legal services? Is this how we think services ought to be provided? This is where we are going to differ. If we steer people this way, we are encouraging sites, or at least not suppressing these sites, presumably because that is a preferable way to empower consumers and give them the ability to do things that the profession largely has not been eager to do. And if that is not the case, then I think we do need to grapple with how far we want to go with respect to regulating these sites.

The idea of consumer empowerment is a powerful one, but I am skeptical of the ability of the average person to sort out even very routine legal issues. I spend my time with lay people who are pretty smart. They are called law students. And they can not do it. And they are supposed to have done the reading. And so, I think about law students and their problems with grappling with complex statutes or even routine statutes. Then I think of my family members, relatives, senior citizens, folks who are not particularly educated, and even educated upper-middle-class professionals who are not lawyers. I think of them going to one of these sites. How do they know whether they want Form A or Form B? So, if we are going to go that route to empower consumers, there has to be a lot more than just relegating them to their own devices. The bar's role is going to have to be both oversight of these providers and also informing consumers about how to care for themselves. And if it is not the case, and we are going to continue to serve them, then we need to learn how to harness that technology ourselves, that we can provide the best service to folks who are not being



served today.

I think you have heard enough. Thank you again for your attention.

**CHRISTOPHER E. CHANG:**

Our next presenter, is Gary Munneke, Professor of Law at Pace University School of Law. He will speak on advertising on the Internet and the ethical considerations raised by advertising. Like Cathy, he has written extensively in this area, which is the reason we chose him. Gary Munneke.

## ADVERTISING ON THE INTERNET: ETHICAL CONSIDERATIONS

GARY MUNNEKE, ESQ.,  
PROFESSOR OF LAW, PACE UNIVERSITY SCHOOL OF LAW

Thank you, Chris. In preparing for today's presentation, I decided that you will not hear this afternoon a long exegesis of Supreme Court cases on advertising or bar ethic opinions. I thought that would be too much for the first post-lunch presentation. I am going to try to talk about some of the bigger picture questions and tie some loose ends together.

I was speaking on the same topic on Friday to the Maryland State Bar Association in Ocean City, Maryland. This topic I think is an integral part of the larger question of lawyers in cyberspace. But to keep advertising in its place, I think a lot of the discussions have focused on some of the things that Cathy talked about earlier and lawyers have wondered about: When does the lawyer-client relationship emerge? What is authorized and unauthorized practice on the web? What about confidentiality and conflicts? Those are all important issues. But in a sense advertising, as I use the term, marketing on the web, is really where lawyers are most focused.

Most of you are in law firms that have some kind of web site or web presence. You probably are not delivering legal services on the web. Those firms are out there, but most lawyers are in the marketing mode when they use the web. To put this in perspective, I should tell you that I grew up in Texas. I went to high school, college and law school there. There is a particular analogy about the Internet, I have a certain sympathy for: the electronic frontier. The frontier of the Old West was a sparsely populated and little regulated place. The spirit of those early settlers of the Old West was often uninhibited and independent, suspicious of authority. In the Old West, there were battles over free range between the cattle herders and the sheep ranchers. And over a period of time law and order emerged, although some studying Texas law would still question whether that has actually occurred.

Lawyers on the electronic frontier have entered this new world, and now have to deal with the practice of law as it is evolving there. How do lawyers use the Internet for marketing? I am going to try to spend a little bit of time focusing on exactly how we are on the Internet. What risks and problems are posed by Internet marketing? And maybe, to use the old analogy, discuss when cow pokes become wrestlers.

Behind all of this, there are a couple of questions that lurk in the background. Can we regulate marketing in cyberspace? And if so, should we? If we should, how do we do it? Does our current regulatory scheme work for online

marketing, or do we need to devise new rules to deal with this new medium? A related question is, "What are the implications of non-regulation - of just letting the Internet evolve?"

Before going forward to answer some of these questions, I want to define the terms a little bit. What do I mean by marketing? I refer to any communication to a potential consumer designed to produce a positive reaction about a potential service provider. That is true on or off the net. By this definition, marketing may or may not directly lead to hiring or retention of the service provider. Said another way, marketing is communication to the consumer about what it is the provider does, so that the consumer can make decisions about whether or not to employ the provider. The other thing we have to keep in mind in the background of our notions of marketing is that when providers selling their services in a competitive marketplace are in essence facing each other as competitors. We grow in a world of economic Darwinism, where only the fittest survive, and not all will survive. That is sort of is the background for lawyers marketing on the Internet.

I thought about calling this talk "From Bates<sup>1</sup> to Bytes in Twenty-Five Years", because I think that is truly part of the problem. For most of the Twentieth Century lawyer advertising was prohibited completely. It was not until the Bates case in 1977 that the Supreme Court said lawyers have the right to advertise their services at all. And so, in the past 25 years, not only have we been forced to learn how to market, but we have been faced with the problems of marketing in this new medium.

As I look at the lawyers who have been out there, I can see a certain progression. In the early days of the web there were a few explorers, like Lewis and Clark, who went through the Old West and mapped it. Then there were the first settlers who homesteaded the West. They put up houses and little fences and tried to make a go of it in this new land. Then the town folk came. And they populated the web. The town folk were some of the rank and file lawyers who began to find ways to use the web to help them deliver their services and to advertise those services. Finally, in the most recent years, we have seen the dot-coms commercializing the web. That is not only law first, but commercial legal service providers and coming to the web and delivering the services and marketing the services online. Translating that all, the progression has been sparsely populated and competitive, great deregulation, considerable experimentation with new methods- a shake-out. One thing about the shake-out that inevitably occurs in a new industry is that not always the best provider succeeds. Look at Microsoft. I mean, how many Apple people are out there still swearing that their products are better. Finally in a mature market, there comes some stability.

What sorts of activities are we talking about when we talk about market-

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1. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

ing on the web? I am going to go through a laundry list. There are probably other things that I did not think of. But I think this covers a lot of the things that lawyers are doing on the web that involve marketing. As I talk about these things, I want you to separate the general concept of just being on the web and delivering services on the web from marketing in the sense that I talked about it - communicating to potential clients. The first and most obvious place is a web site. Just look at the kinds of web sites that are out there. Interestingly in the presentation before lunch, you saw some of the variation of law firm web sites. We were talking at lunch about whether a web site is advertising or solicitation. I said, "It is very difficult to make generalizations about something that has as much variety as the law firm web sites do."

But the first kind of web site is the one that provides directory and general practice information. "Here is our firm. This is what we do. Our offices are located at X. These are the lawyers in the firm and this is what they do." It is sort of a Martindale-Hubbell with pictures.

The second site is one that contains usually the directory information, but also some kind of legal information, typically very general information like looking at the areas of practice with some summary about what people do when they come to lawyers with problems in those areas.

The third type of site is one where the information is much more specific. The site itself becomes an information site with legal information. It can have cases that the lawyers in the firm have been involved in. It can have stories. It can have articles written by the lawyer. It is a very a information-intensive site. It may be structured in such a way as to guide the visitor to the site through different choices to find information that the lawyer wants the consumer to find.

A friend of mine from Tennessee has one of the earliest successful law sites that is called [visalaw.com](http://visalaw.com). It is not about credit cards. It is about his practice with people who are coming into this country seeking visas and all of the attendant problems. When he put up his site about ten years ago, he simply posted online copies of forms that were available to people free at courthouses and government offices. People would come to his site, download the material, and then call him if they had questions. He just gave away things that people could already get.

Interestingly, people at the time told him that immigration law is not an area that would work with the web, because immigrants do not have any money and they do not have a computer, so they will not go on the web. He gets a couple of hundred thousand hits a month to this day, and has developed a practice that started with just himself. He has about fifteen lawyers in his firm now. The only advertising he does is on the web. It is basically by giving people information.

The fourth type of site is one that I describe as interactive. In some way it draws the browser into a conversation. It has a question and answer component.

It has opportunities for the individual to input information or to provide specific questions that then get answered. But it is certainly a step beyond just having the information itself posted. Finally, as in sites like mylaw.com, the consumer actually can go online to get a particular document, answer a series of questions, and have the site generate the document, which is then delivered to the consumer. The consumer pays up-front by credit card solving the Beer browser problem which is that a lawyer out-of-state can hold up the fees and the other state may say, "Why, that is unauthorized practice, so you do not have any right to the fees." But these sites you pay with the credit card before you get your form.

The second type of marketing on the Internet is the delivery of specific information pieces to readers or consumers or potential clients. This would include law firm newsletters, announcements, case law updates, commentary. And again, much of this information can be posted on a web site passively so that a consumer who wants to know that Munneke wrote an article on advertising on the Internet, can go to the Pace web site, find that article, and read that article. But not wanting to wait for people to find me on the Pace Law web site, I e-mail a copy of my article to all the people who came to this conference because I know that you would like to get it. Lawyers and law firms are doing the same thing. I receive a fair number of law firm newsletters in the mail. Increasingly I am now getting e-newsletters online. Lawyers are sending out the same kinds of things that they mailed to people before. You can break down these mailings - mailings to existing clients, mailings to former clients, mailings to potential clients, mailings to business contacts who may refer potential clients to the law firm, and finally to members of the general public.

The third form of marketing — and people do not think much about this — is the electronic card that accompanies many e-mail messages. Lawyers can have a card prepared that is attached automatically to every e-mail that they send out. The card can be downloaded with a click to the recipient's Outlook or other personal information manager so that the information about the lawyer can then be kept by the person who receives the message. So it is a little bit more than just sending the message.

Fourth, banner ads on commercial web sites, ISP home pages, listings in search engines, and online publications. Any of you who have been on the net know if you go to Netscape or AOL, before you get to the home page that you need to look at the information, you get all of these annoying little dialogue boxes with advertising material. Those are banner ads. Law firms can and do use banner ads with some

## **ONLINE ATTORNEY REFERRAL SERVICE: PARTNERING WITH NON-ATTORNEYS AND FEE- SPLITTING AMONG ATTORNEYS**

**MICHAEL S. ROSS, ESQ.**

PRINCIPAL OF THE LAW OFFICES OF MICHAEL S. ROSS, ESQ.

I have written and spoken about the Internet and ethics for so long that some people in the state are somewhat bored hearing from me. On the New York State Bar Association Committee on Professional Discipline, I have been told that we floated a number of proposed reforms to the rules in New York. There are people, quite powerful ethics people here in the State of New York who absolutely maintain that the current ethical rules can be embraced by the Internet, and that there is no need whatsoever to change the rules. Their view is, that the Supreme Court tells us we only limit lawyers on the Internet so they cannot be deceptive and all the other rules are a perfect fit.

I am here to tell you that if you really understand how the Internet works on the issue of referral fees, you can take what Professor Munneke, who has spoken a lot about these kinds of issues, said and I hate to say it but you can discount them. I would like to tell you why the issue is not advertising and the issue is really not solicitation.

The issue happens to be the way the Internet, it is an infrastructure that trolls millions of communications to bring people in as potential clients. Most people know that Google and the other search engines make a difference. As an example, I will use pet law one of my favorite sites. There is in fact a very popular site called "petlaw". If you got a pet in New York City, this is the place to go. If the landlord harasses a tenant about a dog in the home, go to "petlaw.com". Many people do not know about it. Is the issue then how "petlaw.com" advertises? The answer is no.

Understanding the Internet is understanding the following: The Post, The New York Times, Newsday, have some advertisements for lawyers. That is lawyer advertising and it is completely passe. I have a six-year-old, a nine-year-old and a twelve-year-old. By the time they were in kindergarten, they were already working on the Internet.

The next generation will not look for lawyers in The Times or "Martindale-Hubbelllaw.com". Basically people will use search engines to locate anything they want. A person who wants to buy a chair, will not go to Staples. That person will go to Google, enter in "chair." A purchaser can even bid on a chair. The next generation is going to be putting in "pet". And they are then going to get hits. Ladies and gentlemen, the issue is not going to be, as so many people who are ancient as the dinosaur, is the advertisement accurate or decep-

tive. It is very hard to be found to be deceptive.

The question is, "Are we going to take a view, a paradigm shift, a shift in how we think about things to limit the way the lawyer referral service is going to operate in the 21st and 22nd Century?" Because that is the way it is going to work. Can you have a lawyer who partners and truly is a partnership, partners up with an Internet site that trolls the sea, whether it is Google or some other situation, and trolls the sea to anybody who puts "pet", "dog" or "cat."

Now, a lawyer can contract with certain search engines so that every time "dog" or "cat" is entered for a search, the lawyer's web site will come up. A person might be looking for dog food, do you know what she is going to get? The lawyer. The same way if a child is involved in the Girl Scouts. Enter "Girl Scouts" and it is likely to produce hundreds of pornographic sites. Why? It is the way the Internet works. It looks for a word. You do not look for it.

The old way lawyers used to advertise in Newsday in New York for bankruptcy clients was to say, "One hundred dollars, for every bankruptcy." I suppose that is deceptive. That is not the way it works on the Internet. Essentially, we are making a decision about how lawyers get connected with potential clients. What is the fair way to deal with that? Issues of deception are going to be easy for the professional. It is either truthful or it is not truthful, right? A lawyer either tells the client in a personal injury cases that the client is responsible for disbursements or he does not. That is the easy stuff.

I submit to you the question you have to ask yourself is, "Are we going to create a structure in which the public meets the lawyer on a level playing field?" Here is an example. A person is looking for someone to help determine whether or not a dog can live in an unstabilized apartment on 62nd Street. The person puts the word "pet" and "law" in. There are a number of different entrepreneurs who are on the Internet grabbing, looking for those words.

Here are a couple of things that can happen. Should the person, the entrepreneur that the lawyer is partnered with be fair about it? Should he capture everybody even though that person really was not looking for a lawyer. For example, if I put the word "pet" in, is it fair to have the lawyer's partner grab me and send me to the lawyer's site? I did not put "law" in. I put "pet." But do you get the person connected, do you allow the lawyer to partner with someone who is going to overgrab and bring me into that site?

Second, I have not addressed the advertisement yet. Once the search engine gets a person to that selected site, how soon should the lawyer's partner tell the person that it is a law site or it is not a law site?

What about the sites that are difficult to get out of. Some of you who have accidentally hit a pornographic site know how hard it is to get out. A person basically has to shut down the computer to get out. How many of you will admit that you ever gone to a pornographic site, you tried to click the back click, you are stuck in there forever. It is a called a loop. Of course, if you are look-

ing to keep a client base at “petlaw.com”, it is not a good idea to have as a partner a provider who does not make it easy for the person to get out of the site.

What then am I suggesting to you? I firmly believe that you cannot adopt a wait and see attitude. Why? Because those of you who think that this is an advertising issue, it is not. This is really about how entrepreneurs of the 21st and 22nd Century are going to direct a new generation to lawyers. We all know that the real public is likely to hire the first lawyer or second lawyer they see. And so, to the extent that we permit lawyers to troll the seas, this is like a person fishing for whale and tuna. Is there going to be a limit short of the deception rules by which we limit the way lawyers get potential clients? A lawyer’s site gets hundreds of hits. Only one or two people who are searching are really interested in that site. How is it that the lawyer brought them to the site?

First, the question becomes, “Do you make laws?” “Do we change these rules which many people say are just fine?” “Do we change these rules to make the lawyer responsible for the person they contract with?” That is an interesting thought. I represent lawyers for a living. It is 85% of the work I do. Can you tell me a rule that says that I am responsible for the way I partner up, for the way someone gets my clients, in order to preserve the administration of justice. That is not very helpful. Is it being deceitful? The lawyer hired a firm, and has reason to expect them to act properly in the marketplace. Should there be a rule that requires lawyers to act responsibly in determining who they partner with? Are lawyers going to be responsible essentially for the people that they engage in business with? That is number one. How you get to the site is really the major challenge of the 21st and 22nd Century.

If we had an all-day forum, we could sit down and think about that. But I tell you from the enforcement end of the business or defeating enforcement as the case may be, that is really where the battle is. Once the lawyer partners with the entrepreneur, how is a level playing field maintained with all other lawyers?

Second, this business about fee splitting, I appreciated the comments. We have been talking about fee splitting for 25 years. How lawyers get work from other lawyers is one of our profession’s dirty secrets. Do we really believe that giving somebody a third of our fee is going to cause us to get the better cases? Put it another way. I am more likely to give work to people that I am going to get money from. The whole issue of fee splitting is something that is part of our profession, and probably will not change in our lifetime. That is a fact. But the truth is that most of the public, who are clients, do not really understand that. Go to the personal injury profession and say to them, “How many of the people who are with lawyers know they are really the second lawyer, the referred lawyer. How many clients really know of fee splitting, and how many know of the ground rules of fee splitting?” Very, very few.

If you watch the cable channels at 2 o’clock in the morning, you are familiar with the following kinds of ads, “Do you think it is time to get a writ for



yourself? Tired being in Nassau County jail? Call 1-800-LAWYER". If the viewer's eyes are great, he can see about 40 lines of print. Forty law firms that are not a part of the cable advertising group. That is how law firms sort of comply with the rules today.

The real question as you look at the Internet is, "How much information will we require?" I hope a new set of rules will give the Internet consumer information about whether a site is a firm or a referral site. If a person wants pet law and enters "pet," the entrepreneur brings that person to a site. If this site is not a law firm's site, but a referral site that has 20 different firms, the person doing the search should know that. Also, the entrepreneur who is managing the site, should tell the Internet citizen, "I am here, and the lawyers who pay me are paying me for the number of hits the site receives?" Is that the issue? Remember DR 2-101(d)? DR 2-101(d) says that ads and publicity should be designed to educate and provide information that facilitates the selection of the most appropriate counsel. That is a New York rule. Does anyone really believe that if a person puts the word "pet" in and somebody brings the person to an Internet site of twenty different lawyers in New York State, that DR-2101(d) was really complied with? The answer is, "We have a First Amendment." And people are entitled to have these companies.

But the real issue is something that can be changed. The people or lawyers who operate these sites can be required to educate the public to the fact that the lawyer is paying for the number of hits. The notice could say, "Those law firms whose names you see listed above pay remuneration or a fee for the number of Internet visitors who visit this site. Being listed on this site is not a designation of skill, ability or recognition in the profession." I am sure there are many people who say, "Well that is not consistent with the First Amendment. This is over regulation of the profession." The fact of the matter is, the Internet will become the new medium. The medium is the message.

In the next 20-30 years the bulk of the people looking for lawyers who are not corporate clients are going to be looking for them on the Internet. How we connect the Internet to the public is going to be the key. It is not going to be about deception. It is going to be about truthfulness.

So, I ask, when you consider what this forum is, to consider the core question of what are the rules of the road at this point in time, when as they say, the rubber hits the road? What will an Internet consumer be told when she hits the site and sees the law firm's names cited? Are we going to say nothing because of the First Amendment? Or can we fairly regulate, consistent with the First Amendment, the information that the consumer is told about how people are there and why?

Finally, I want you to consider the following two related concepts. We in New York, like most jurisdictions, permit fee splitting when three conditions are met. Many of you might giggle if you know how lawyers really work. You can-

not derive a fee in New York unless the client consents. Most of you may realize that most clients do not know about fee splitting. Two, the fee may not be unreasonable. Three, the lawyer who is accepting the case on the referral must accept joint responsibility or be paid on a quantum merit basis. In other words, the client must know the referring attorney accepts joint responsibility. So, in other words, if I am a lawyer and am involved in some kind of Internet business, I cannot refer a client to somebody else and expect a fee unless the client knows I am getting a fee, accept joint responsibility, and unless the fee is not excessive. If you are going to create a set of rules, now is the time to begin enforcing the DR 2-107 that has been on the books. It is one of the oldest rules around involving fee splitting.

Whatever else clients are told when they hit an Internet site, they should be told up front, clearly, that there may be a lawyer, that the lawyer is taking the case, and that lawyer may refer the case to someone else. The clients have to understand that if a lawyer is going to be paid a percentage of this referred case, that lawyer has to accept joint responsibility. That is something that most of the judges on the Appellate Divisions today recognize is not the case. It is a rule that is being honored in the breach more than anything else. Lastly, this is a summit on the Internet, and you are talking about what lawyers are going to do, so the question becomes, again not so much of advertising, but of marketing. I think it is really about marketing.

You should not talk about advertising, create the term “marketing”, and then say, “What are the acceptable marketing techniques?” As you deliberate recognize there is a mind shift from what it looks like in the newspaper. Is it lying to the public as opposed to what are the fair rules that need to be adopted? The question becomes, “How, in the words of the last speaker, do we apply the disciplinary rules to what lawyers can do?” Many of you may have been aware of the early opinions giving what lawyers can do on the Internet. The conclusions were drawn based upon old brick and mortar, to use the words of another speaker, brick and mortar ethics rulings. You interpret the rules for the Internet by arguing inferentially about how the way the system use to work.

I frankly think that is silly. You just cannot compare deception in advertising to deception in the way the lawyer and the client meet. You cannot describe referral fees when they are an anachronism. It is really the Internet provider that is really referring the lawyer. If a fundamental value judgment is going to be made, it needs to be made about whether lawyers can do the same thing that other lawyers have done with respect to the Yellow Pages. I invite you at the end of the day to go to a phone booth, if you can find one that has the Yellow Pages. They are very rare. You may realize if you got to a phone booth, for many years there have been law firms who have paid the phone company to do what? To have their ads first.

I represented a lawyer who was suspended for five years and was a horrific

lawyer. Words do not exist to describe how bad this lawyer was. The question became, when I finally convinced the disciplinary committee not to disbar and to only suspend him for five years, where is he getting the work? Where is this man getting the work. How can the work be victimized again and again and again, because there is not one person in the universe who will say I recommend him or her to my friend? Here is the answer. He had the first page in the Yellow Pages. When a person is not sophisticated, if a person is poor and needs a divorce or order of protection, the Yellow Pages becomes a source. The first glitzy ad, which does not have to be deceptive. It does not have to be fancy. If it is big and first, that is my lawyer.

#### **COMMENT FROM THE AUDIENCE:**

Advertising is the second source of revenue for the Yellow Pages.

#### **MICHAEL S. ROSS:**

There is a whole underbelly of trading for names of law firms that have the proprietary right, the informal right to those first pages. If I told you what a small ad or large ad cost in the Yellow Pages, you would probably be shocked. Here is the point I am making: If we believe that the First Amendment is tying our hands, and if that is the conclusion of this Internet summit, make that conclusion. Draw that conclusion.

Others would say that where there is a new medium, perhaps there ought to be new rules. Is the public entitled to an Internet that treats them fairly in directing them to lawyer sites? Is the Internet something where clients, potential clients and the public should have a fair path to get to the client sites? We limit the way whales and dolphins are trapped. That is a curious thing. If we limit the way whales and dolphins are trapped, do we limit, consistent with the First Amendment, the way we trap clients and bring them to lawyer sites? I do not have the answer to that.

I do know, and I am very unhappy, and I think there are others who share that unhappiness with me, that the First Amendment means lawyers are free to pay Internet providers based on the number of hits they get. That is basically the rule now. Most people say, "Sure, lawyers are not permitted to share fees. But we can pay these Internet trollers, we can pay them anything they want so long as it is based on the number of hits."

If you do that, you will end up having Internet trollers, not today, but five or ten years from now that will be outrageous, that will be clever. They will do everything they can to bring the public to them. At the end of the day, as the public begins to be based in the Internet, you will be taking the public and trapping them someplace they do not want to be.

That is not fair to the profession. It is not fair to the lawyers who provide honest services. At the end of the day, whatever the criticisms we have today of

the way clients get to lawyers, in the future we are destining the lawyer public, the client public to very, very bad services. Thank you.

**QUESTION FROM THE AUDIENCE:**

Mike, do you feel that there will be new rules for the Internet? Do you have to be able to envision what is needed before you say, "Do this?"

**MICHAEL S. ROSS:**

You are right about that. Let me just tell you what I do not think there is. Obviously I have some very strong feelings. I represent people who are not necessarily the nicest people. One of the things is very troubling.

I just want to say this, not as a paid political announcement, that there are people who are very much stuck to old ways of thinking. I just want to share with you that there are people in positions who have been around a long time. Not here in this group, they are not here today. Otherwise they would know whom I was referring to. There are people who believe there are actually no changes needed at all. You are right, you need a vision first. That is exactly the point.

For example, the modality of thinking about advertising is not the right way to think about it, because, of course there cannot be deceptive advertising. That is too simple. That is why I am saying, you need to envision a lawyer, a consuming public that is going to use Google and other search engines. I am not saying you are going to do everything at once. The important priorities are the way clients are trolled in and the information given to them when they hit the site. I want to give you one example.

I am very much involved now in studying shrink-wrap agreements. A person goes to a site. It says, "Hello, do you have a problem? If you have a problem, click here." You all know it. You have done that when you signed up for AOL or installed Word Perfect or Word. As you go, essentially you are agreeing to a lot of shrink-wrap agreements. Basically this is the informed consent. That is an interesting kind of thing. But is it a bigger issue, a much more profound issue?

Visionary thinking asks the question, "What ought the potential clients know when the rubber hits the road, when they get to the site where either they hit a single law firm or multiple law firms?" So the vision is: This is an Internet site. A person is brought to it by paid advertisement. My point of entry to the vision is where the biggest abuse occurs today among the poor and unsophisticated members of the public who need to get to the law firm. There has to be some concern about the truth, not truth in advertising. I call it truth in trolling. How does a person get to a particular website? Was it because someone is a great lawyer or because there was a partner? That to me is the most important point. A lot of the other things I think will work themselves out as the years go by.

**COMMENT FROM THE AUDIENCE:**

We may be coming to the same place from a different perspective. You are concerned about deceptions, falsities that are in the paradigm. Analogize to the way the SEC regulates investment advisors. They take a view with respect to certain kinds of compensation formulas, that there is no type of disclaimer that can be an adequate disclaimer. Therefore, simply having a certain kind of advisory fee arrangement is per se deceptive.

Now, if you take that perspective with respect to lawyer advertising or marketing, whatever term you want to use, and come to the conclusion that as a matter of law the failure to disclose how you got here, the failure to disclose the relationships you have with the non-lawyer web providers who are effectively steering you, the customer, and you, the client towards me, the lawyer, is per se deceptive if you fail to disclose all the elements of it, do you not get to the same place without having to say, "I have a new paradigm. I have to scrap the preexisting rule?"

**MICHAEL S. ROSS:**

We do not know each other. I have been serving on committees since 1998. You know, these are folds in the same cloth. What we are talking about is the same, and that is: There are many people who are fundamentally against this whole program. They say the Internet, is like advertising in the paper. And I think it is not. Because how a person gets to that is different from picking up a newspaper and looking at it. Here a person actually does something to get into the search engine.

We are saying the same thing. But I do not think that you can rely on a disciplinary concept like "prejudicial to the administration of justice." You always revamp the rules to get where you want to be. So I am not comfortable with the concept that intrinsically it is deceptive unless people are told something. But what I am saying is, we are probably there because there is such competition now among the search engines, and the sophistication of the search engines has reached the point where they are overcoming what the public is using when they put the word "pet" in. Things are happening where they are being brought in where they do not want to be. I think we are very close to saying the same thing. As long as when the rubber hits the road, when you get to that site, let this person be told something that is informative, and take it away from this whole concept of deceptive. But that is leading a lot of people astray. Our last speaker focused on the Supreme Court's rulings that we cannot be deceptive. That is the old thinking. And I think that thinking is appropriate for print, maybe for advertising on T.V. But it really is not going to help us when we are on the Internet.

**QUESTION FROM THE AUDIENCE:**

Are you trying to create a level playing field among lawyers or are you trying to do something that deals with the client?

**MICHAEL S. ROSS:**

It is the potential clients. There is never going to be a level playing field for lawyers. If I can afford the first page in the Yellow Pages; if I can afford, when I am going to the Midtown Tunnel that big sign at the entrance, in the United States, in civilized society, the law is there is no level playing field.

All things being equal, that person in his home on 62nd Street clicks Google, puts "pet" in. There has to be some lawyer ethics driven regulatory manner to let the client as a consumer be treated fairly. Because it is an issue of consumerism which traps the client — I should not say trap — directs the client to particular lawyers.

**COMMENT FROM THE AUDIENCE:**

The guy who pays for the most expensive advertising always gets the most expensive play. This is a different way to be the most expensive way to get there. If you are not trying to get a level playing field among lawyers, what difference does it really make to the client?

**MICHAEL S. ROSS:**

In a hundred years you will be right. Today, when someone picks up the newspaper and they see Smith and Jones, they know it is an ad. I am not sure, in fact I am confident that there are many people trolling the Internet who see a banner for blank dot-com, and they think it sounds official. There is a sense to the public that these lawyers have somehow earned their way there. I think there is potential to mislead as to how and why they got to that point. Our rules are giving this generation, the computer unsophisticated generation, a little bit of protection that may not be needed 30 or 40 years from now. Much of the ethical rules now are really passe. They were really devised for lawyers to protect the client when there really was the wild, wild west.

**CHRISTOPHER E. CHANG:**

Thank you very much. The phrase brick and mortar has been used several times during the morning session and this afternoon. The Internet, by definition, brings to question or brings to the fore the question of the law and multi-jurisdictional practice. Peter Ehrenhaft was a member of the ABA's Commission on Multi-jurisdictional Practice. He has been kind enough to come up from Washington. Thank you very much.

## E-LAWYERING AND MULTI-JURISDICTIONAL PRACTICE

**PETER D. EHRENHAFT, ESQ.**

MEMBER, MILLER & CHEVALIER

One of the hot issues in multi-jurisdictional practice is “FIFO”. That is not the “first-in/ first-out” notion you might be familiar with; but “fly-in, fly-out”, which is one of the hot issues in multi-jurisdictional practice. Unfortunately I had to fly in, fly out to make this presentation this afternoon, so I am not too aware about what has already been said today. Perhaps what say will be repeat things that you have already heard. That said, I thought the conclusion of the last presentation might be a perfect segue into the thoughts that I will share with you from my experience on the ABA's Multi-jurisdictional Practice Commission.

This Commission of twelve lawyers was appointed by the President of the ABA when shock waves overcame the profession as a result of the *Birbrower*<sup>2</sup> case in California. The notion that New York lawyers, invited by long-standing clients in California, could spend time in California and in their New York office advising that client in the client's office and from the lawyer's own office by e-mail, telephone and letter, and at the end of the day be denied the right to be paid for their services by the client because their delivery of services in California was “the unauthorized practice of law” was, of course, a terrible decision as far as most lawyers are concerned.

As far as Peter Ehrenhaft is concerned, I am admitted here in New York and in the District of Columbia. But I do not think that I have got a single client in either jurisdiction. All of my days and nights are spent serving people in other jurisdictions, probably in breach of their unauthorized practice of law rules.

The President of the ABA initially appointed a commission to look at the problem of unauthorized practice within the United States. But we, in the International Law Section of the ABA, suggested that this was hardly an issue limited to our interstate situation, and that therefore it was necessary to include a few international renegades on this Commission as well. I was the only such person appointed. I have been sort of the lone wolf on the Commission urging that it raise its horizons to embrace the issues of international multi-jurisdictional practice no less than the interstate practice.

People here have been referring to a sense among bar officials and others, that our rules have created the most superb justice system in the world, provid-

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2. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 17 Cal. 4th 119, (1998).

ing wonderful employment for all of us and equal justice for our population. There is not, I can tell you, a lot of sentiment out there to change our rules just because the Internet or other phenomena have changed the world. The Chief Justice of one of our states testified at our Commission that just because there are numerous speeders on the highway does not mean that we should increase the speed limit on the highway.

Similarly, he suggested, just because everyone in the room regularly advises clients in another jurisdiction does not mean that we should allow that nefarious practice; our present rules should be not only obeyed, but strengthened, and more resources placed in the hands of bar officials to prevent this unauthorized practice of law. All of this was said with a straight face, justified on the grounds that our disciplinary rules, geographically-based, are one of the historic heritages of the United States. We have a federal system of which we should be proud, and which needs to be strengthened and reinforced, a sentiment that I think has a certain resonance at the Supreme Court these days. Secondly, it was said this system is a fundamental requirement for consumer protection.

But when people who offered that view were asked how it could possibly be a model of consumer protection, when each of us knows the dirty little secret that the bar exam, that serves as the surrogate for testing competence, was administered years ago and the law on which we were tested has probably changed significantly, they had no answer. In fact, there is no effort by almost any jurisdiction seriously to determine the current competence of most lawyers in a preventative kind of way, the way that the bar exam is administered. While we have continuing legal education requirements in many states, we also know the dirty little secret of how CLE in fact is administered. Most states do not require that CLE be actually performed in the state in which the lawyer is admitted. It can be obtained anywhere on any subject totally unrelated to his or her actual practice.

So it is a sham, in my judgment, that we either regard the bar exam or CLE as the appropriate basis for determining the competence of lawyers. That the idea that these kinds of rules must be administered on a state-by-state basis to protect the integrity of the legal system within the state, as a way of consumer protection I think is incorrect and borders on fraud.

Well, I have to tell you that my views are not necessarily those of the entire Commission. Indeed, I am very troubled by the way that this Commission operated, as I think many commissions operate with similar volunteers from the bar. Well-meaning, experienced people get together and are told, "This is what we are going to study." They look at their bellybuttons and say, "These are my prejudices on this issue."

You hear testimony for two years. I have a shelf a foot long of submissions that we received from foreign countries, from radicals like Gary, from all kinds of other people that told us what we really needed to know. But it is hard to



find a reference to a single such outside input in our work. At the end of the day, people looked at their bellybutton again and said, "Well, it looked pretty good at the beginning. It still looks pretty good today."

I probably am guilty of the same kind of an approach. I believed, when we started, that the unauthorized practice rules as we have them in the United States are probably an anachronism, are no longer appropriate guides for regulating the profession for the benefit of the consumer if we believe that the purpose of these rules really is the protection of the consumer. If we believe that, and I think that the draftsmen of the rules of professional responsibility or the ABA did believe that, by putting it as rule number one, the rule that a lawyer must be "competent" in what he does. That is the one — and only — touchstone that I believe is appropriate for determining the appropriateness of services that a lawyer provides: That he shall be competent. That competence can be determined before or after the event.

It is not possible in as complicated a society as we have today to look at this ahead of time. There are adequate guides to competence. The thought that admission to the bar many years ago is an appropriate guide to competence is just a joke. So the only effective way that competence can be really addressed is after the fact. Was the advice given correct or competently provided? Was sufficient effort devoted to answering the question that was posed to the lawyer? Did he appropriately address the audience that he had to address, whether it be a client itself, whether it be a court, an administrative agency, another lawyer? If he is incompetent in any of those ways, is it appropriate that he be punished in various ways, including denying his fee, requiring the payment of damages, what have you?

This motion, however, is not what the Multi-jurisdictional Commission came up with, as you will see. What it did is recognize the difficulty of change, which it is probably is important to recognize. I did not dissent from the Commission's Report. It is a unanimous report, including my subscription to it. It says, "We have to go one step at a time, and shape our rules to reflect the modern world. That includes cyberspace. That includes personal presence wherever one is."

The fact that it is possible to deliver services without any regard to boundaries is something that most of us now take for granted. I can illustrate it very well to any colleagues by telling them I was supposed to go to Geneva for the closing of a transaction between my Italian client and an American company to build some power plants in Italy. But on the eve of my departure I had what is called a "temporary ischemic attack", a small stroke. The doctor said, "You cannot go to Geneva. You have to go to the hospital overnight. You need heparin in your blood, and you have to stay in the hospital." I was really shocked by this news. I said, "Well, okay. Put heparin in my blood." They put a pole there, and I was dancing around the hospital room with it like Fred Astaire did with a

floor lamp, if you saw that old movie. The heparin drip was in one arm and I had my office bring in computer to the hospital. I then participated in a closing in Geneva from my hospital room in Washington. It was perfectly feasible. It worked very well. That kind of opportunity to use the Internet or modern communication systems to cross cyberspace and cross boundaries is an everyday event.

The more usual paradigm discussed in the Multi-jurisdictional Commission was of the guy sitting on the beach in Barbados rather than in a hospital room in Washington, and, with his laptop, conducting a closing wherever it might be held. That is accurate. Today's lawyer delivers services everywhere. The real question is, "Who has the ability to regulate that practice for the benefit of consumers, wherever they are?" This is not such a tough problem. Wherever the service is delivered is a place where regulatory authorities can test the competence of that service. Wherever the client has been harmed by the lawyer's chutzpah in delivering the service he is liable. So if I am giving advice on the law of Italy to an Italian client, and I am wrong, there ought to be a way that the Italian client can complain either to his own regulatory commissions or regulatory agencies that might conduct a hearing into my competence to provide that kind of advice to the client.

I would suggest to you that if I have purposefully availed myself of the opportunity to deliver legal services in Italy, then I am no different than the producer of cars or toys that are the basis of all of the product liability cases about which you are familiar. When a company purposefully avails itself of the stream of commerce to have its toy cars or real cars, or its valve stems or entire tires, sold in another jurisdiction, it ought appropriately to respond to damages that it has caused in that jurisdiction. The judgment of that local place ought then to be enforceable where the lawyer is licensed, just as the tort judgment against a person even if he declines to defend or inadequately defends can be enforced in another jurisdiction. I think that is the right way to deal with this problem.

But you have not come here to hear what my thoughts are. You are more interested in what in fact the ABA's Multi-jurisdictional Practice Commission is proposing, and what the likely outcome of its report may be, including its reach to e-mail and cyberspace. You will be hard-pressed to find very many references to e-mail in or to cyberspace in that report. It is a very important phenomenon. Anybody who goes into the office now faces a daily load of e-mails to deal with. He knows that e-mails are part and parcel of the private lawyer's workday today. But the rules that the Multi-jurisdictional Commission really wrestled with are much more old-fashioned and parochial. We dealt a lot with the questions: "Can New Jersey lawyers come to New York?" "Can New York lawyers go to New Jersey?"

The Chair of our Commission came from New Jersey and felt that he was a member of a particularly threatened species of lawyers, with the colossus of

New York on one side and the colossus of Philadelphia on the other, squeezing poor New Jersey lawyers. He thinks it is important that New Jersey be able to avoid the numerous excessive lawyers from New York and Philadelphia who want to encroach on New Jersey practice. When it was suggested that it was likely that New York and Philadelphia lawyers charged higher hourly rates, and, therefore, were unlikely to reduce the opportunity for at least price competition by New Jersey lawyers, it was argued to us that nevertheless, they are going to take away from the opportunities of New Jersey lawyers to practice law in their home jurisdiction. It is important that they be allowed to do this in order to support a vibrant bar in New Jersey that had important public functions.

Now I think there is no doubt that a vibrant bar is a useful institution in every state. We want to support it. But there is also no evidence that a vibrant bar cannot be supported by those who are members of that bar whether they are performing their actual day-to-day work in New Jersey, New York or in Italy. Membership in the bar ought to be the source of the obligation to do the kind of work that is needed, that bar members do and from whom the bar draws its support. That is an answer to that particular concern. But again, I was not overwhelmingly persuasive.

Nevertheless, the Commission is recommending to the ABA — this is all the Commission can do: It can recommend to the ABA that it turn around and recommend to the states that they adopt these rules. Whether and when they will do so is of course still an open question. But there are two basic difficult issues that we spent most of our time on discussing. The first question is: “When can a lawyer from one state move to another state and practice law in that other state without once again taking the bar exam?”

On that issue we were stymied by the particular rules of the State of California, where there are a very large number of American lawyers. The State of California has declined to adopt the rule that in order to take its bar exam, one must be a graduate of an ABA-accredited law school. This is of course not something that ABA Commissions like to hear. Indeed, the ABA was created to accredit law schools. That was its first purpose in being. Therefore, it takes very, very seriously its obligation to determine that law schools are providing appropriate education to their graduates, teaching legal ethics, having a variety of subjects that they offer, maintaining a ratio of students to professors that is adequate.

It is going to be a real challenge to the ABA to decide what to do with the law schools that are offering their curriculum by cyberspace. Can one argue that the relationship between student and professor is one to one if the professor answers e-mails directly? Is the quality of legal information available on cyberspace any less than in a law library of hard books, particularly when people have ripped relevant pages out of the book that is on the shelf on reserve (and other tricks that many of you will recall fondly from your days of law school)?

In California they have a rule you can go to a non-accredited law school and still take the bar exam. The result of that rule has been that many states in the United States have declined to allow California lawyers to be admitted on motion when they move to that other state. They require the California lawyer to take a local bar exam because that lawyer does not have that basic surrogate of competence; namely, he passed a bar exam to which he was admitted only after finishing his education at an ABA-accredited law school. It could be that the person in question has been in practice for thirty years and is the nation's most esteemed expert on federal antitrust law. If he did not graduate from an ABA-accredited law school, New York will not admit him on motion in New York. In fact, I do not know whether New York has such a rule. I am just using it as a hypothetical. But we heard there are states that do have that rule. The result has been that California has said, "If you will not take our lawyers, we will not take yours either. We do not care if the reason you do not take ours maybe inapplicable, because your lawyer did graduate from an ABA accredited law school. The fact you are not taking ours on that basis is sufficient basis for not taking yours".

Thus, it is almost impossible to be admitted on motion in California. This is a serious problem in our country, with the great fluidity of lawyers moving from one place to another. But the even greater problem, by far the greater problem is the FIFO problem, mentioned at the outset. That is, to what extent can lawyers fly in, provide their service, fly out? To what extent can they send letters to another jurisdiction? To what extent can they send e-mails to another jurisdiction?

This is actually not only a problem in the United States. This morning I was serving as on an International Advisory Committee on Trade in Service, a statutory committee that the U.S. Trade Representative and Secretary of Commerce, have to consult with before they enter into trade agreements. I am on the particular committee that deals with services. As a kind of interesting footnote, I might add that when the Trade Act of 1974 was passed, there were eighteen such committees created: One for ferrous metals, one for forest products, one for chemicals, and one for services. But services are now eighty percent of the GDP of the United States. There are thirty-two members of our committee, of which I am the only person from "legal services." So I am the guy trying to sell legal services of the United States to the rest of the world.

We believe we have a comparative advantage in the legal services that we offer. We ought to have access abroad for the delivery of our services. We want to do it in two ways. We want to open offices in foreign countries, but not on a "national treatment" basis, because our lawyers are not able to speak, say, Slovak, Russian or Arabic and so on, as it would be necessary if one wanted to be a local lawyer in the place to which the lawyers went. We want to be "foreign legal consultants," that is, lawyers able to practice what we do, whatever we can

do, other than local law. If you wanted to practice local law, you ought to pass a local bar exam. But the foreign offices of American law firms practice international or transnational law and home country law. That is what we want to be sure that we can achieve. It turns out that only about one hundred American law firms have actual permanent establishments of law in about twenty countries. But there is a market in many, many other countries. Most of that other demand for our services is served not from permanent offices, but by FIFO legal service: Fly-in, fly-out. We go to the client's office the foreign country, draft documents and negotiate. We may go to country A to talk about projects in country B. The client may be in country C. This is not at all an unusual kind of fact pattern.

What I am describing to you are the four modes of delivery of services that are recognized in the General Agreement on Trade in Services. This month the United States is being required to submit what it is requesting from the rest of the world in the W.T.O. The G.A.T.S. contemplates four methods of delivering services.

Mode One consists of sending something from the home jurisdiction to the service consumer in the other jurisdiction. A letter written from my office to a foreign consumer, provides Mode One services. When I send an e-mail to foreign consumers, I am providing mode one services. On the other hand, if that foreigner comes to my office in Washington, and we talk about his problem, that he is going to use in a foreign country, that is Mode Two. The consumer of the service is coming to my country for the export of the service. That is a very important thing for those involved in export control. A foreigner comes to the United States, looks for a plant in the United States. Suppose you are one of the plants. You have extolled the know-how of that plant to that foreigner while walking around the plant in Schenectady. You have "exported" information by Mode Two.

Mode Three is establishing a foreign office. And mode four is the temporary provision of services in another country. This mode four is the conscientious problem for the United States, because we do not have adequate laws in the United States now for visas that contemplate that a professional from a foreign country can come to the United States, deliver his professional services here, and leave. If you are a fashion model, okay. If you are Pavorati, and you come to sing, that is okay. If you are a great athlete, you can do this too. But lawyers, no. Lawyers are not in that league. There is a great reluctance on the part of the U.S. Trade Representative to ask a foreign country to do what he cannot deliver domestically.

This very morning we were discussing that New York was the pioneer in recognizing the need to have appropriate rules for foreign lawyers in this jurisdiction. You were the first state, in the 1970's, to have a foreign legal consultant rule allowing foreign lawyers to open offices in New York for rendering serv-

ices on other than New York law. These foreign lawyers can become partners of New York lawyers, can hire New York lawyers, be employed by New York lawyers, if they are foreign legal consultants. We are hoping that New York will also be the first jurisdiction to recognize the importance of a “FIFO” rule for foreign lawyers. Foreign lawyers would then come to New York, temporarily provide their service and leave again, just the way that there are thousands of New York lawyers who do this everyday by going to foreign countries and providing their services.

The Multi-jurisdictional Practice Commission unfortunately did not get to these issues until pretty late in the day. Our Recommendations Eight and Nine (out of ten) deal with them. But there is already a widespread unease, to put it charitably, in the House of Delegates about a “FIFO” rule. We have been asked, “You mean you would allow a Taliban lawyer to come to New York and leave again?” We suggest there are few of those who are likely to make themselves known as such and express interest in coming here.

Above all, think of it the other way. We need such a rule so that our lawyers can enter countries abroad. Just to suggest to you what some of the obstacles are, let me mention Colorado. Colorado has no foreign legal consultant rule. The President of the Colorado Bar asked the Supreme Court, “Please adopt a foreign legal consultant rule allowing foreign lawyers to open offices in Colorado.” The Colorado Bar Association supported it. The International Law Section of the Colorado Bar Association supported it. The ABA supported it. The U.S. Trade Representative even sent in a letter urging this be done. The local bar examiners, however, said to the Supreme Court, “No foreign lawyer has ever asked us to be admitted in Colorado. These guys are asking us to do some work on a hypothetical matter that has no real relevance. We are already overworked. Please do not do this to us.” So, we said, “But the real reason why we want this in Colorado is not for lawyers from France or Mexico who are going to flock to Colorado to open offices. This is so that Colorado lawyers can go and practice in France or Mexico and elsewhere. We need that as a reciprocal basis.” They said, “We have not heard from any Colorado lawyers that said that. Moreover, what Colorado lawyers do outside the state is of little interest to us.” So the Colorado Supreme Court declined to adopt a foreign legal consultant rule.

The fact is that American law firms, the largest ones, the ones who have a stake in these international kinds of relations, have been reticent about promoting their own interests either before our commission or before the regulatory agencies in the states. I am very grateful to the organizers of this conference that supposedly is interested in this issue.

I did hear this morning from the U.S.T.R. that if at least a few of the principal states that would be affected most directly, were to adopt a FIFO rule, the U.S.T.R. would not be constrained to avoid raising this issue in the G.A.T.S. negotiations. So, I hope that all of you who are engaged in this kind of practice

will urge the New York authorities, whoever they are, to adapt your rules to contemplate “fly-in-fly-out” services for foreign lawyers. We all then have a hope that others will do that in the future. That same principle should then equally be applicable to the other modes of delivery of the service, which includes the e-mails and cyberspace communications, that are the real focus of today's meeting. Thanks very much.

**CHRISTOPHER E. CHANG:**

Thank you very much. Our next speaker does not need an introduction. He has most recently, amongst his many honors been appointed by Chief Judge Judith Kaye to chair the Commission on Public Access to Court Records.

As we saw during this morning's technical demonstration, which was horrifying to me, if you voluntarily file a bankruptcy petition all sorts of information can be made known just by clicking a button, financial information and otherwise. Those are issues that our next speaker's commission will be examining. He has graciously agreed to come in to outline those issues for us in connection with this presentation, which is entitled “Online Document Court Access: Privacy versus the First Amendment.” Ladies and gentlemen, Floyd Abrams.

## ONLINE COURT DOCUMENT ACCESS: PRIVACY vs. THE FIRST AMENDMENT

**FLOYD ABRAMS, ESQ.**

PARTNER, CAHILL, GORDON & REINDEL

Thank you very much. I was saying a moment ago, I have been wondering really for some time whether one of the effects of the easy, cheap worldwide dissemination of information on the Internet would be that less information would be made public, that is to say, that the courts, the Congress, the F.T.C., a variety of institutions, would make a decision that if the price tag of information being “public” is truly public dissemination, instantaneous, worldwide, seven days a week, twenty-four hours a day, that perhaps the decision-makers would determine that less should be made public in the first instance.

That is not directly what the commission I have been asked to head is addressing. Our role is to deal in the realm of information that is already public, and to offer some views as to whether that information contained in court files or otherwise available in that fashion through the judiciary, should be made available on the Internet in precisely the same way and to the same degree as it would be if one simply walked into a courthouse and said, “Can I see such and such a file?”

In New York, like a lot of other states, all court proceedings are presumptively open to the public. There is, of course, a lot of give in the word “presumptively”. There is significant judicial discretion to close some otherwise open proceedings to protect rights of parties and witnesses, and to further the administration of justice. But it is not easy to close court. It is not easy to get an order barring the dissemination of information introduced in court.

There are certain types of proceedings as to which judges have discretion to exclude all persons not having a direct interest in proceedings involving divorce, abortion and rape, and certain other crimes. But even those involve as well a significant balancing test, a rather heavy burden for those who want proceedings closed, except in those circumstances where as a matter of law it is conclusively presumed necessary to close it in the first instance.

Court records are, for many of the same reasons - the desirability of public scrutiny of the judicial system, the ability of the public and press to pass judgment on the functioning of the judicial system - presumed open to the public. Although some records are sealed as a matter of law in juvenile delinquency cases, mental health records, grand jury minutes, of course, records of adoption proceedings — a number of specific areas as to which the decision has been socially made such that as a matter of practice, the public is more disserved than served by making the information public. But the general rule, and it is a rule



with particular bite in New York State, is that what occurs in a courtroom is public property. What occurs in a courthouse belongs to the public.

Trials are not playthings of lawyers, but belong to our society as a whole in the sense that they may be seen, observed and judged. Access to court materials has historically required a visit to the courthouse. If you know what to ask for, and you ask for it, you generally get it. But things are changing. More and more around the country, and again especially in a state like New York, which has a tradition of openness of judicial proceedings, litigants are being encouraged to use modern technology in the filing of court papers electronically, something that is being tested in certain courts now, and certainly the direction I think a lot of judges and court administrators would like to go. Electronic filing and storage of documents, many believe, will offer new efficiencies and cost savings to the courts and the public. It also promises a totally new concept of public access to court records.

Probably the state of the country that is rightly thought of as the most open, the most committed to opening up everything to public scrutiny, is Florida. Any of you who watch Court T.V. will notice that a significant part of the diet there are Florida cases, because just about every proceeding in Florida that occurs in court is televised. It is a heavy burden on a party that wants a trial that he or she is involved in not to be televised to prevail. A specific showing has to be made, the reasons that television should not be allowed must be specified with precision and it must be shown that a strong presumption of openness can be overcome. How "open" is Florida? Remember the Florida chads being examined. That was another uniquely Florida approach, the fact that the cameras were routinely, without any need for anyone going to court, allowed to televise district by district, courthouse by courthouse, election district by election district, what was going on. About a year and a half ago a court clerk in Florida made the decision that consistent with that, he would put all the court files online. Well, the world came down on him. People who thought that Florida's openness was a good thing started to get very nervous at the idea of the added openness and the impact of the added dissemination of all the court files.

In Florida Family Court, for example, with the exception of material about children, everything is open to the public, which is to say, all the financial data that people submit is routinely contained in open and public court files. People started to object. Institutions started to object that simply putting all records online went too far. Maybe, some people argued, "public" should not mean "public" in the Internet sense. Maybe, they argued, the notion of material being available should be understood to have some sort of different meaning in court files than it does in terms of making it available on the Internet.

A number of situations developed around the country, have developed in the last year, as the explosion of use of the Internet has developed. You may recall what happened in Washington. A federal statute requires federal judges to

file a statement of the companies in which they own stock, certain loans and obligations that they are involved with, so that counsel can decide whether to make a motion to recuse the judges. The files have historically been kept in a room in a building in Washington. If one dares go to the room, one signs in, fills out a form that gives a reason — totally unauthorized by the statute, by the way — but a reason why you are asking for the court files. Then they give it to you.

Well, what happened was that one of the Internet news entities came to that entity and asked for all the judges' forms, just basically said, "Could you give us all the forms? We are going to put them all online." The answer from the judges was no, in the face, I repeat, of a federal statute requiring that this information be made public. The judges said, that is not what we understood "public" to mean. Our "public", they said, meant in this room, in this building, where you sign in, and life is not so easy. Not until Chief Justice Rehnquist gave a speech responding to what the judges had done was there a complete reversal and a cutback, not coincidentally, on precisely all the information that was then made available.

There is a concept I find very interesting, that I did not believe existed, but that has existed in law longer than the Internet has. It is a concept of "practical obscurity". The Supreme Court used the phrase in a Freedom of Information Act case in the 1970's in which the Committee for Freedom of the Press, arguing for the release of certain information from the government, said, "Well, look, it has been made public already because so and so had it. Therefore, you should not deem it still to be classified because it was effectively declassified, and therefore it should be made public. The court said in response, that the information was "practically obscure." It may have been available, but no one knew where to look.

I suspect that it is that concept that the commission, that have been asked to head will be looking at: Should there be a difference with respect to certain types of information that are "public" and others? Should the courts themselves play a role in getting out public files by making them all online? Or should it, to use a pejorative word, play a more censorial role, to assure that there is nothing in there which ought not to come out.

Take something as simple as a Social Security number. There is a federal law which bars federal government and states from releasing Social Security information, including Social Security numbers. Yet as we know, Social Security numbers have come to play a role not completely unlike a national identity card. Those of us that defend depositions and take depositions sometimes are faced with the question of whether to allow our clients to answer a question about what their Social Security number is. (I usually insist that the answer not be given on the ground that it cannot lead to any admissible evidence, and that it is illegal indeed to require its revelation.) But court files often have that infor-

mation in it. Sometimes people just ask in court what a witness' Social Security number is. People fill out forms to get credit with their Social Security number in it. What shall we do?

There are some jurisdictions in the country outside New York which have already gone to an all disclosure approach on the Internet regime. In Hamilton County, Ohio, for example, which includes Cincinnati, if you get a ticket, traffic ticket, the ticket itself is immediately made available to anyone that wants to read it. On the traffic ticket they put down your Social Security number. Do not ask me why. But that is one of the questions that the policeman asks when the apprehension is made. So, there it is.

One of the hard questions we will be looking at is: Even if a file is public, is there any requirement, or as a matter of public policy, should a court do anything to purge it of information that by its nature should not so easily be made public? In New York, and on the Commission, we had people from victims' rights groups who have expressed great concern that stalkers would be able to get information from public court files, indeed their own public court file, including the home address of someone whom they have followed about. There has been concern expressed about detailed financial information which sometimes routinely is disclosed in ongoing judicial proceedings put on the Internet. There has been concern expressed that it is an entirely different sort of disclosure when information is available 24 hours a day, 7 days a week, and easily sorted and identified by name so that a vast amount of information about individuals can much more easily be accumulated as a result of the files.

On the other side, of course, there is the presumption that I referred to earlier that our courts have enforced for many years, that has played such a significant role in our jurisprudence, as a matter of New York State law, New York State constitutional law. It has been understood to mean that if something was "public", it was "public" in every sense. No explanation needed as to why you want something. No explanation needed as to what you are going to do with the information when you get it.

Certainly if we were to advocate some different treatment for information that is going to be used on the Internet, it would raise some difficult and significant legal issues. So we are going to have to look at questions such as whether there should be different levels of access based on the nature of the records involved — whether parties and their attorneys, for example, should have a greater level of access even after a case is completed than the media or members of the public.

We are going to be looking at whether there are justifications on imposing restrictions based on the person or the type of person requesting the records, or based on the intended use. For example, in the Model Rules drafted by the Conference of State Chief Justices and the Conference of State Court Administrators, a group that is studying this very subject for state courts around

the country, they recommend restricting certain types of documents such as databases and compiled information to persons demonstrating a scholarly or journalistic need for them as opposed to a commercial motivation.

Another question is whether there are justifications for restricting access to public information in bulk form. May a member of the public request all court documents of a particular type or nature? If personal information is going to be excluded from certain types of records, who will bear the burden? Who will bear the expense of cleansing the documents? What effect will that have on the otherwise public nature of the documents?

I mentioned earlier the model policy that is still in the drafting stage by the Conference of State Chief Justices. I thought I would give you a sense of how they articulate the premises under which they operate in trying to come out with guidelines, and the purposes of a policy such as they are trying to draft. They say that the model policy that they are proposing, and the model policy that they urge be adopted, is one which would keep in mind the following premises: First, to retain the traditional policy that court records are presumptively open to public access.

Second, that the general rule should apply that access should not change depending on whether the court record is in paper or electronic form. Whether there should be access, they conclude, should be the same regardless of the form of the record, although the manner of access may vary. Any model policy, they argue, should therefore apply to all court records.

However, they conclude, the nature of certain information in some court records is such that remote public access to the information in electronic form may be inappropriate even though public access at the courthouse is maintained. That, as I have said, will be a central issue that my commission will be looking at in terms of recommendations about New York.

They urge also that the nature of the information in some records is such that all public access to the information should be precluded unless authorized by a judge. Finally, that access policies should be clear, consistently applied, and not subject to interpretation by individual court or clerk personnel. I find that notion both attractive and amusing. They are marvelously over-optimistic that anything they draft will not be subject to interpretation. Finally, they offer as their purpose for the whole policy the drafting of a comprehensive policy which provides for access that does each of the following things: "Maximizes accessibility of court records, supports the role of the judiciary, promotes governmental accountability, contributes to public safety, minimizes the risk of injury to individuals, makes most effective use of court and clerk and court staff, provides excellent customer service, provides independent privacy rights and interests, protects proprietary business information, minimizes the reluctance to use the courts to resolve disputes, and does not unduly burden the on-going business of the judiciary." Obviously the chief justices think all that can be done with one

policy. They are right.

Chief Judge Kaye appointed to the commission people from different disciplines, including the former executive editor of The New York Times, the County Clerk of New York County, lawyers who represent publishers and journalists, criminal lawyers and lawyers who represent the victims of domestic abuse. A number of our members have been involved in developing New York's electronic filing pilot program and a similar program in the U.S. District Court for the Eastern District of New York. We will go about our task of interviewing people with special knowledge of these subjects such as court personnel, judges, the media representatives, victims rights advocates and others, to address the difficult issues that I referred to.

It is an interesting subject. I have urged everyone on the commission, and even myself, to keep an open mind about where we are going, because the competing interests at stake here are indeed very real. The decision about what to do will have impact, I believe, in a manner which transcends the specific conclusion of the degree to which "public" files should all be made available on the Internet. As I said earlier, I at least start with a view that the more information that is made easily available on the Internet, the more pressures will grow to make less information public at all. That is one of the considerations we have to bear in mind as we do our best to weigh the different public policy interests that pull in one direction or another.

That said, it is nice to be here. And I wish you all well. I am sorry I was not here for the demonstration this morning, which I have been assured my commission will be able to see for itself someday soon.

One of the problems for someone that does not come easily to new technology, and only bought a cell phone after 9/11, I really have to start from scratch. It is good to talk to you all.

**CHRISTOPHER E. CHANG:**

As I think you have seen from what has happened so far today, the power of the medium is not only relegated to the providing or obtaining of information, but also provides alternate means of communication, substantive communication.

That brings us to our last presentation. We are fortunate to have with us today Leslie Friedman. Leslie is a founding chair of the New York State Bar Association's Internet and Litigation Committee. She is an attorney at a little boutique firm. Paul, Weiss is it? Yes. Lesley Friedman.

## ONLINE MEDIATION AND DISPUTE RESOLUTION SERVICES

**LESLEY FRIEDMAN, ESQ.**

ASSOCIATE, PAUL, WEISS, RIFKIND, WHARTON & GARRISON

ODR, or online dispute resolution, is an emerging industry that encompasses a broad range of dispute resolution services. ODR includes mediation, arbitration, negotiation, and other neutral services wholly or partly provided through the Internet. It is for both consumer and non-consumer parties.

ODR includes online ADR for both consumer and other transactions, whether transactions occur online or in the old economy. Conversely, ADR for online consumer transactions may be accomplished by ODR or could use more traditional tools.

In both brick and mortar worlds and in the electronics worlds, conflict inevitably arises. Tens of millions of new cases are filed every year driving the yearly cost of litigation in the U.S. to more than two hundred billion dollars.

In many other parts of the world the problem is even worse than just the expense. It is long delays, confusing legal requirements, and sometimes rampant judicial corruption.

ADR is a known alternative to the litigation scenario. What is new is the use of the web to implement ADR online. ADR is useful for both new and old economy disputes. There are aspects of the new economy disputes that lend themselves particularly to ODR. The web has opened the door to international business-to-consumer transactions on an unprecedented scale. New problems arise in this context.

For consumers, there are issues such as language and cultural differences, inconvenience and the expense that may result from distance between the parties in the event of conflict. Litigating these conflicts can present difficulties such as establishing jurisdiction, determining applicable law, and enforcing judgments.

Consumers need to feel confident that they will have access to redress or they will shy away from using the web. For businesses there are other sets of complications. Businesses need to be able to determine, with a degree of confidence and predictability, where they can be subject to jurisdiction and which laws might apply to them. The absence of such predictability could significantly increase the cost and risk of doing business online.

The court system may have its shortcomings, but the rapid growth in online only disputes has cast these shortcomings in even starker relief. Legal systems are tied to geography almost by definition. In the U.S., lawyers are only admitted to the bar on a state-by-state basis, facing penalties if they offer legal

advice to clients in other states. Enforcement of court decisions involves jails or police officers or asset seizures, and jurisdiction is restricted to a limited geographical area.

Transaction partners who meet on the web can take little comfort from the redress options provided in the fact-to-face world. You cannot merely re-create offline judicial mechanisms in an online world and expect them to work. The model does not work, on a fundamental level, when participants in the system may engage in small, one-time only transactions with a partner on the other side of the planet, who can change its identity as easily as it changes its e-mail address. ODR cannot be expected to operate effectively as a safety net for those types of cases that involve criminal wrongdoing, or where the parties are unwilling to use a non-public forum, or when they put the highest priority on due process and precedent. But for a huge number of cases that crop up online, where the value under dispute is less than likely legal bills, or where both parties truly participated in the transaction in good faith, online dispute resolution can really no longer be considered an alternative but really the default solution in a number of cases.

There are three types of ODR I am going to talk about in turn. I will start with mediation. Mediation is a one-to-one process. It facilitates a dialogue between the disputants to reach an agreement. The neutral can offer evaluation of certain elements of the case or can simply facilitate resolution dialogue. Mediation is non-binding: Neither party is required to accept any recommendation that the mediator might make. Any settlement and its terms are entirely subject to the parties' agreement. The entire process is generally confidential. In the model followed by the Center for Information Technology and Dispute Resolution at the University of Massachusetts — a project carried out on the eBay web site — mediators follow a shuttle diplomacy model, managing the communications process by e-mail.

Earlier in the day, Professor Lanctot mentioned the interpersonal element in legal practice and in law teaching, and expressed concern that the loss of that interpersonal element might become more and more rampant as we become more and more reliant on the web. This concern arises, not surprisingly, in the online mediation context as well. Some of the core skills we associate with mediators are communications management skills such as active listening, demonstrating impartiality, summarizing, reframing, and agreement writing. How does this translate into an electronic model?

The University of Massachusetts project used the following steps in online mediation. First, upon receiving a complaint, the mediator e-mailed the other disputant to see if he was willing to participate in the process and to solicit basic information from that side. Second, each party then had an opportunity to present his narrative, make his claims, demands or desires known. Third, the mediator attempted to distill the basic issues and problems of the dispute. This some-

times required repeated communications because it was carried out by e-mail rather than in real life. The mediator's skill of reframing the dispute, and in toning down or rephrasing in less accusatory terms the statements of the parties, can be a challenge in a medium where the communications are not instantaneous and the mediator cannot jump in as the narrative process unfolds.

The University of Massachusetts study did not use instant messaging technologies or video conference technologies. It seems to me that as those technologies become more and more widely used, they could ameliorate some of the problems raised here.

In the end, a decision point arises. Either one party gives in, or the other party does, or both parties make a compromise. The mediator then facilitates the resolution. If there is no determinative resolution, the dispute is considered at impasse and is either left dormant or the parties are left to their own devices.

I am going to move now from online mediation to online negotiation. This is one of the most innovative, and possibly contentious, aspects of ODR. Negotiation is the well-understood process of direct communication between two parties to a dispute with the goal of achieving resolution. In ODR, there is automated negotiation and assisted negotiation. In automated negotiation, a claimant contacts an institution and presents its request. The automated negotiation provider then contacts the other party, which can accept or refuse to submit to the jurisdiction of the institution (unless they are already bound by previous agreements, such as membership, trademark or certification).

The parties then enter into a blind bidding procedure, in which each of them in turn offers or demands a certain amount of money (although some institutions, notably one called SettleSmart, offers the possibility of additional, non-monetary settlement criteria). The proposed figures are confidential; they are neither communicated to the other party nor made public.

When the amount of the offer and the demand are sufficiently close, the case is then settled for the arithmetic mean of the two figures. The proposed amount is usually considered close enough for a settlement if the difference between them is thirty percent. Some mechanisms require ten percent. In the case of one provider called MARS, it is five percent.

The number of bids allowed for each party varies: Cybersettle and SettleSmart each allow for three. There are other services that provide for an unlimited process until the parties ultimately either reach agreement or end the process. There is also a time limit for parties to reach an agreement, which ranges from 15 days in the case of MARS, to ninety days for Settleonline, to even 12 months for the (inaptly named) ResolveItNow.com. The scope of automated negotiation is limited to what is owed rather than whether something is owed.

Some examples of automated negotiation providers, in addition to the ones that I just mentioned, are 1-2-3 settle.com, AllSettle.com,



Clicknsettle.com, InterSettle, NewCourt City, Settlementonline, Settlesmart, The Claim Room, U.S. settle, Webmediate, WeCanSettle, and VirtualMagistrate. An up-to-date view and list appears at [www.ombuds.org/centeronlineADR/HTML](http://www.ombuds.org/centeronlineADR/HTML).

The automated negotiation model is particularly useful in insurance company and claimant disputes in which the disagreement is over money. Settlement out of court has always been expected. They are available 24 hours a day, 7 days a week. They are priced according to the settlement range between, typically between \$100,000 - \$200,000 upon settlement of a case.

While I am on the subject of automated negotiation, I would like to raise the question of how these services interact with the formal legal system. Here is how one automated negotiation service provider, Cybersettle, handles it. Cybersettle's participation agreement provides, "Any settlement shall be final and binding upon the parties, subject only to the review of a court or other entity where required." Another section of the Participation Agreement provides that any settlement, "shall be an absolute bar to any further claim or cause of action relating to or arising from the facts alleged in the claim as against those parties participating in a system. Any settlement herein shall also include any and all derivative claims arising from the same claims (i.e., loss of consortium or loss of service). The amount of the settlement includes any and all legal fees and expenses. Neither side may make a claim against the other for any additional fees or expenses."

There are significant rights being waived, and other significant legal ramifications to participating in this process. Is that waiver informed? Is it knowing? Is it voluntary? Is it desirable? Can or should this language be improved? If so, should it be in a mandatory or in a voluntary fashion?

In addition to automated negotiation, there are also assisted negotiations, as offered by SquareTrade (used by the eBay web site), and OnlineResolution. Assisted mediation services provide a security site and storage means, but no actual negotiation service. Essentially they are software for setting up a communication, assisting in developing agendas, engaging in productive discussions, identifying and assessing potential solutions, and ultimately writing agreements. Assisted negotiations are more useful than automated negotiations in cases where it has not yet been determined whether something is owed.

What is the difference between online and offline negotiation? With online negotiation, there is no need for traveling or agreeing on a neutral place, no need for a meeting, neither in space nor in time. It suffices to leave messages on a communication software platform. It brings cost savings and convenience — parties need not be connected at the same time. However, it is likely to be inadequate for complex negotiations. And going back to Professor Lanctot's point, it lacks the personal touch. It lacks the face-to-face meetings, observation of body language, hints and non-verbal perception.

A third form of ODR is arbitration. Arbitration is the well-known binding, non-confidential process in which the parties agree to have a neutral third party acting in much the same way as a judge would in court, reviewing the facts and evidence about the dispute, and making a reward based on any applicable rules and principles of law.

Arbitrations are binding, final, but less formal than court trials. They are in some cases desirable for the very reason that they will not be made public in this very wide range. Online arbitration, like its offline counterpart, involves the transmission and storage of information, and reviewing and processing of information by an arbitrator. A prime example of online arbitration is the Uniform Dispute Resolution Policy, or U.D.R.P. U.D.R.P. establishes a procedure for the online resolution of disputes involving domain names. This global domain name dispute resolution process was created by the Internet Corporation for Assigned Names and Numbers, also known as ICANN. Over the past three years, the U.D.R.P. process has resolved thousands of disputes all over the world. On the other hand, there are significant questions about the fairness of ICANN-sponsored domain name arbitration, with a lopsided number of cases decided in favor of the claimants. To date approximately eighty percent of all dispositions ended in a name transfer.

There is growing movement to foster ODR. International organizations, including O.E.C.D., The Hague Conference on Private International Law, the United Nations, certain consumer groups, governmental bodies, professional associations, the ABA, the AAA, and business organizations such as the ICC, have all issued recommendations calling for high quality online dispute resolution.

Interestingly, ODR systems are in the works on a wide variety of areas, such as privacy, intellectual property, government, workplace and other types of disputes. The question is how to make such systems work well for all the stakeholders. Of particular concern is how to protect consumers online. ODR providers must ensure that their services are adequately explained and that the procedures and costs are fully disclosed. Participation agreements, such as the one that I quoted from earlier, should fully outline the process for both consumers and attorneys who may represent them. For example, they should ensure that an attorney has the client's consent prior to using the system to settle the claim. Where consumers access an ODR system pro se, there is a significant drawback if the party is uneducated as to the approximate value of his or her own claims.

There is also a potential for abuse if businesses impose on consumers mandatory arbitration. This is not new; it is also a problem to the offline world and offline mandatory arbitration clauses have attracted the attention of consumer advocacy groups. These concerns are only exacerbated online. There are legal notices at the bottom of most commercial web sites of any significant size.

The click-through rates on legal notices are infinitesimally small. The vast majority of consumers are waiving important rights without even knowing it.

Mandatory arbitration clauses are showing up in credit card agreements, in automobile and computer purchase contracts, in HMO and health insurance contracts, home sales contracts, and others. These issues are not new or unique to ODR, but to the extent that such terms are imposed or communicated online, the "fine print" committing the consumer to such arbitration may not be visible, or may be even likelier to be overlooked than in printed documents.

There are some additional public policy consequences of ODR to bear in mind. If complaints are not resolved by legal authorities or enforcers of codes of conduct, recurring problems may never be brought to their attention. Also, differences in language, culture, and expertise in specific subjects may make it difficult for the parties to understand each other, and may lead to unfair results.

In the interest of time, I would like to just leave you with some final thoughts about issues to be addressed in developing and conducting ODR, particularly in the consumer context: fairness, visibility, accessibility (including reasonable costs), timeliness, finality and enforceability. Thank you.

**CHRISTOPHER E. CHANG:**

Thanks very much. We are concluding for today. Just some closing remarks for today's proceedings. When Catherine Wolfe and Catherine and I were talking about how to set up the program, the thought was to give everybody in the audience, irrespective of sophistication or lack thereof with the Internet, a basic primer, then a demonstration of how it works, and then to bring somebody in to talk about where the products were going in the future. The programs that followed were intended to frame some, but not all of the issues that arise with respect to the Internet and its impact on the practice of law.

Tomorrow Richard Zorza will address the question of unbundling. That presentation will provide a context for offering an analytical framework for answering some of the many questions that are raised about the Internet and its impact on the profession. Everybody can then weigh in with their opinions.

We look forward to seeing you tomorrow. Thank you.

*(WHEREUPON, THE PROCEEDINGS WERE ADJOURNED UNTIL WEDNESDAY, JUNE 19, 2002.)*

## REVIEW OF ISSUES

### CHRISTOPHER E. CHANG:

Before I introduce our next speaker, who will speak on the topic of unbundling, let me take a couple of minutes very briefly, not only to recap, but also try to point out and reflect upon what we as an Institute tried to do yesterday.

In our opinion, the Internet itself as a medium is only one aspect of what is driving this particular conference. The practice of law has changed enormously over the last ten years. There are many people here practicing a long time. I have only been practicing 24 years as of this month. A number of people have been practicing a lot longer than that, and seen enormous changes in the profession.

The Institute thinks that the Internet is just one influence that has led to changes in our profession. It is probably just one factor in the more encompassing change in how the public has viewed us lawyers and the legal profession at large. In making these presentations yesterday, there were really two things that we tried to get across to you, the audience.

One was to raise the question of who we think as attorneys we want to be in the 21st Century. In light of how the public perception of lawyers and the profession has changed over the last ten years, who do we want to be? What is it that we do as attorneys? Do we just provide information? Do we meet with a client, just fill out documents for them, such as a house contract or a will? Or do we bring something more to the relationship? In terms of value, what do we do counsel, advise, guide? Does the public feel that they need a lawyer to do that? What value do we bring in the context of that retention? These questions were at the heart of the two presentations having to do with online document preparation and getting a house contract or a will or partnership agreement or shareholders agreement online.

If we conclude - and I am not suggesting what we should conclude - but if we conclude that is an area that perhaps the public, as the consumer, feels rightfully they no longer need an attorney, then it brings us to the second, presentation, the online dispute resolution and arbitration presentation. Because if we make a value judgment that we as attorneys no longer have to service the public in the preparation of a will or house contract, then what do we do when the public starts representing itself in connection with its claims, when they waive potentially, substantive rights, in the course of going online for mediation or even arbitration which maybe be binding.

Once that question is resolved, in the context of this conference, then the other presentations are intended to focus our participants' attention as people who influence policy. That is the reason you were invited here - to focus on how as attorneys, we will comport ourselves in the multi-jurisdictional practice in the

21st Century. Do the geographical lines, state lines, really matter now in light of the Internet?

Advertising, as Michael Ross pointed out, is it really advertising, or do we have to address that issue in a different way? Privacy, is not only about getting documents online, it is also about the substantial personal information available on the web. And closely related is the question of confidentiality operates, which is at the essence of the attorney-client privilege because documents are open to the public and for everybody to examine.

So having made some brief comments in the form of a recap, we are quite pleased to have with us today Richard Zorza, to speak on the question which has been called “unbundling.” He is the former vice president for technology at The Fund for the City of New York. He is presently at his firm, Zorza Associates. Thank you.

## UNBUNDLING OF LEGAL SERVICES

**RICHARD ZORZA, ESQ.**

CONSULTANT, ZORZA ASSOCIATES

Thank you very much. It is very appropriate that New York is moving forward to look at these issues in such a systematic way. You have a real leader in charge of New York's judiciary. The Chief Judge is both an intellectual leader and personal leader.

What is unbundling and why is it important? The core idea is of unbundling is an attempt to escape a narrow and unproductive view of the relationship between attorney and client. In this traditional model, the attorney says, "You have a problem. I will solve it for you – I will do everything." But the reality is that for a variety of reasons, partly economic, partly an increase in client empowerment, and partly changed expectations, that model does not work any more in many parts of the legal system. Unbundling replaces that with a system in which the attorney performs certain limited tasks while the client performs other tasks for themselves.

At the low-income end, the way our legal system is now, it is simply unrealistic for poor people or any one else for that matter to pay lawyers to handle all the legal problems that occur in all their manifestations. Unbundling helps solve the problem.

The practical economic barrier is just as great for middle-income people. Indeed, for upper-income level, and particularly in the corporate system, in fact we have always had a form of unbundling, in which the lawyer . Corporate lawyers are hired by a corporate officer who says, "Give me a memo on this. Prepare this document." Corporate lawyers are not hired to handle all the corporation's problems.

So the arguments in support of unbundling are cost, client autonomy, client flexibility, appeal to the bar who now get more work, and the way that unbundling supports broader changes in the role of the courts.

There are those in the bar who regard this kind of innovation as a threat. They regard it as essentially taking clients who had previously been "full representation" and turning them into part time clients. Now the client is going to say, "Fill in this form for me and I will take it from there."

However, in California, where unbundling has moved forward fastest, this issue has been turned around the other way. Advocates of unbundling have been able to say to the bar, "This is a sizable latent market, a huge number of people who have legal problems who cannot deal effectively with the legal system on their own, cannot afford the whole package. But these people are able to identify some part of a legal service that requires hiring of a lawyer." It might be that the form is too complicated for them to fill out alone. It might be that a person

has a divorce case and is just worried about keeping one fact out of the public eye, and needs advice on how to do that. It may be that the person can fill out the form but cannot manage the hearing itself.

Forrest S. Mosten is a proponent of this conception of unbundling. In his speech on the subject he pulls out a pile of lollipop sticks and suggests that unbundled clients should choose the sticks they need. One says, "Prepare a pleading." Another stick says, "Argue a motion."

In California, lawyers now go around training lawyers on how to manage the unbundling relationship with these clients. As I am sure is obvious to you, it requires greater skill to manage such an unbundled relationship. The traditional retainer says, "Well, then, you cannot manage it do not worry. I will take care of everything." In the unbundled situation, the client is better informed and is then potentially more ornery. Managing expectations becomes even more important.

Experts in unbundling say that the key is managing the information that a person has so that he can be part of the process of deciding what is appropriate for himself to do or not do.

The Change in the Way Courts Define Their Role. I think that many in the bar do not yet we realize the speed with which the courts are changing their self-perception. For several hundred years we have understood courts as institutions in which a man in a black robe, who sits at least four feet higher than everyone else in the courtroom, decides issues between two people in jackets and ties. The court is judged only on the smoothness of the way it makes the choice between the two jackets. Within the last ten years that assessment has been based upon the number of jackets that are waiting in the corridor. No evaluation of the outcome. No evaluation of the extent to which that system is open and accessible to the people with real legal needs, with disputes or conflicts or issues in need of resolution.

What I am seeing around the country is that the standards of the legal system are changing with astonishing speed. More and more courts and judges and legal aid programs are asking the question, "Are we accessible? Are we reaching people?" The unbundling movement and those questions go very much together. The issue is broader than the hours a court may be open. The reality is that when a person walks in the front door of most courts, she cannot even figure out where to go without a lawyer. She cannot figure out which form to submit. She cannot understand the words the system uses. How may pro ses know they are pro ses? Courts are now finally putting in programs that help people. California now has in every county a family law facilitator to help people without lawyers. They do a brilliant job of using federal child support enforcement money to fund the core of this service. California spends \$10 million a year on pro se programs.

The Risks of Unbundling Any innovation raises challenges.

There is a very good argument that there is potential harm to the client. Mary Helen McNeil has an excellent article in which she points out that if the client is an older person who may suffer from diminished capacity, it is just not enough to fill in a form and send them on their way. Filling in one form for them, and then doing nothing more is going to violate our first rule to “do no harm”. That client is going to be in a worse situation. So we need to figure out how to avoid that situation.

There are also, of course, risks to the attorney. The attorney may be exposed to all kinds of liabilities such as financial liability and problems with insurance coverage. Very practically, what happens when the attorney signs the pleading on an unbundled basis, and the judge says to the clerk, “Call that attorney's office and tell him to get in here.” Before you know it, the attorney has spent a week on the case, and has gotten paid only the \$50 that was the original fee for the form.

Those issues are appropriate for the ethics and regulatory system to approach and deal with. What is remarkable is that the ethics and regulatory systems have started to do so.

Towards an Ethical and Regulatory Approach to Service Delivery Innovation. Moreover, the way they have done so suggests a way of thinking about innovations in the delivery system, including technology innovations and how they should be mediated through the ethics system.

Traditionally, we have tended to ask, with some nervousness “Can we implement this innovation ethically?” For example, the ethics of giving advice by e-mail was a big question three or four years ago.

I suggest that the right question to ask is, “Does the innovation provide an opportunity to increase access and ability to do our job right? Can we find a way of using it to make sure that we maximize this opportunity to meet the goals of the profession?”

We should take the new technology, the new delivery system idea, and then ask, “Can we use this technology to advance our core values? Can we use it to increase client autonomy, to increase zealotry and loyalty, to create some of the continuity of relationship with clients that is of value, and to increase attorney competence?”

I suggest to you we have to take the time to work it all the way through. Every single one of the technologies we talked about yesterday actually offers this potential. If you have e-mail contact with a client, think about the potential that represents to increase your competence, to increase the continuity and zealotry of your relationship with that client.

Remember, that these values, which are the values of our profession to be protected by the ethical rules are not values that stand for themselves. We do not believe in zealotry because we like tough guys, right. (Well, maybe we do, but that is not the way we justify zealous advocacy to the public.) It is



because we believe, as Mr. Craco laid it out wonderfully in the introduction yesterday that zealotness on the part of all provides access to justice for all. It is that simple. It is a fascinating example of a process view of the world, sort of like our belief in the market.

So that is how we should think about these innovations. First of all, there is often a question when you are in a new service modality whether it is governed by the ethical rules at all. Whether it is unbundling or talking to somebody on the Internet, there is often a temptation to get out of the difficult issues by just saying, "There is no attorney-client relationship."

You see that statement on many web pages. You see that in e-mail footers. I am actually very queasy about that approach. While it certainly appears to solve the short-term ethical problem, in the sense that it limits, or appears to limit the attorney's liability, in fact a number of speakers suggested yesterday it may be a false disclaimer. But more importantly, it actually lets the profession avoid the real question, which is, "What is the lawyer's duty in the context of this particular relationship using this technology in this way?"

Surely just by putting on his a web page the statement, "There is no relationship when you read this web page", a lawyer or non-lawyer has not given him or her self the right to be incompetent and legally wrong.

I think the right thing for a lawyer to do is assume there is a relationship with duties; but not to assume that the relationship and duties are necessarily all identical all the time in every context.

What we should do is identify the values that we care about. We should then identify the ways to protect those values. Finally, we should then find ways to look at our rules, restate and modify our rules so that they create the right duties and the right protection of values in that particular context. As I will discuss in a minute, that, I think, is some of what has happened in the unbundling context.

Online form preparation, electronic advice, more and more interactions happen other than in the traditional context. As more and more tools that we cannot yet imagine are developed, there are going to be more and more of those kind of things happening.

Here is one of those ideas I wish I got around to patenting; nobody has done it yet. In all of our lives more and more of us do more and more of our work on web sites. Why not build a browser that automatically pops up a frame next to it telling you your legal rights in the underlying transaction? It is an easy thing to build at least conceptually. Every web site has an address. If a person goes to [www.hotdate.com](http://www.hotdate.com), or [www.tonight.com](http://www.tonight.com), the little browser can pop up a prenuptial agreement. A person can go to [www.Joesglorioususedcars.com](http://www.Joesglorioususedcars.com), and lemon laws pop up. So the question becomes, what is the relationship, what is the operator of the site's relationship to somebody using that web site? It probably depends. Is it a free service, a fee service, an open web page, protected? The

internet creates many new kinds of relationships.

Technology can be used to protect our core values. Technology provides an ability to control the process. A document assembly program can be built that lets somebody generate a pleading. The ability exists to build competence into that and knowledge into that and zealously into that. That could never be done with one attorney sitting at their word processor or dictating to a secretary, because the technology now controls the information and the way information moves.

Similarly, it gives an ability to monitor. The AARP runs wonderful telephone hot lines, which offer research and advice. It is an unbundled service. Part-time attorneys are hired who can actually sit on a beach and do their job from there on their cell phones. They like to work part-time. They log in when they want to work. The center routes the call to them when they plug in. But they have to type in the content of the phone call into a computer system. That is reviewed by a supervisor at the end of the day. So they are building a whole monitoring and quality system.

We have not talked yet about the line between information and advice. It links to the changes that are going on in the court system. In the court system you have a traditional view that prohibits clerks and court staff from helping people in any way. It is a misstatement of the law. The correct statement is the clerks and court staff cannot give legal advice. But they can, and maybe should, give information.

There are now court rules and wonderful writing on what is the distinction between advice and information. It basically comes down to asking, "What is the question?" If the question is "what" or "where", it is probably information. If the question is "how", it is probably advice. "What paper do I file to get a divorce?" The clerk can answer that. "How much do I describe what happened in my marriage?" The clerk cannot tell you that.

My own thought of a humorous definition of the distinction between advice and information is that if you ask a question and two lawyers can give different answers, and neither answer constitutes malpractice, that is advice. But if there is only one correct answer, that is information. What lawyers do day-to-day, a huge amount of it, falls within the definition of providing information.

What I suggest is that in this instance technology has moved the line. Because a web page that is built on an algorithm — a set of rules on how to fill in a document which can have a lot of legal learning in it — has turned something that was advice into information. My own view is that the distinction between advice and information has been generally helpful politically in moving the debate forward, but it less stable than some think.

Applying this Approach in the Unbundling Context. What I suggest to you is that what is needed and what the rules should move towards is ensuring the attorney's obligation is to make sure that the specific unbundled service is

what the client needs in the circumstances.

ABA Ethics 2000, is the package of [then, at the time of the speech and now in relevant part adopted] proposed rule changes. In New York we are not specifically under the ABA model rules. We are under the old code. However it has been so amended that it sort of resembles the most recent ABA model rules.

The new ABA Model Rule 1.2 ©), as adopted by the ABA prior to the time of publication of this speech, reads as follows: A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent

But there is nothing here that talks about how you decide whether something is reasonable under the circumstances and whether or not the consent is informed. My view is that unbundled representation, whether it is provided online or in the office or on the courthouse steps, requires some form of diagnostic interview.

Now, in 1999, we had right in this building, in fact right in this room, a conference on changes in the delivery system and attendant ethical implications. We ended up hammering out this concept of a diagnostic interview. We discovered it existed in the literature before we had our meeting, although none of us realized it; The idea is that a lawyer has an obligation to have in place a system to decide what scope of service is appropriate in the circumstances. It could be a series of questions on the web page to basically figure out whether this is going to be a do-no-harm or a do-harm situation. It could be in the e-mail interchange. It could be in the conversation. It could be in some technology we have not figured out yet. Of course, the questions that are asked are specific to the circumstances.

The Issue of Conflicts in Unbundled Services in Ethics 2000. Conflicts. This is important because it shows the way the ethics system is moving. Here is the problem. There are new delivery systems which include pro bono lawyers and unbundled representation, often in courthouses. The reality is that there are all kinds of buried conflicts that would place attorneys in violation of the [then] current rule structure, if it was being rigorously applied, which it is not.

The classic example given is an attorney in a big firm who volunteers for a pro se help program in California, and goes one afternoon a week to talk to clients about their legal problems. The law firm actually represents Opel in Germany. Technically that means that anybody who comes in with an issue with a G.M. car, that is a formal conflict. But it is not a real conflict.

The new rule 6.5 basically does — what it really does is it does two things. It removes imputed conflict in nonprofit brief service and advice programs, nonprofit or court based programs. It also removes in those programs the conflict checking requirement. If there is a real conflict that emerges or becomes known, the lawyer still has the obligation to get out of the conflict? I do not read the

rule to allow people to be in an individual professional conflict situation.<sup>3</sup>

This came out of the pro bono movement. The rule was drafted by the Superior Court Judge Laurie Zelon from California, who was part of Ethics 2000, and should be lauded for her role.

Ghostwriting, ties very much to technology. Ghostwriting is an unfortunate phrase for the process in which an attorney deals with a client and drafts their form for them, and then gets out of the case. A federal judge in Colorado blew his stack and took a position that it was fraud on the court, not to disclose the participation of the attorney in the drafting of the form. I think that is a hard position to justify.

The Colorado rule that ultimately came out of this is a compromise. A lawyer must disclose his or her name on the pleading, but the judge cannot use that name on the pleading to haul the lawyer into court. There are other [then proposed] rules, like the one in California, which actually allows a lawyer not to disclose their name<sup>4</sup>.

I want to offer a very concrete suggestion about how we think about the relationship between this ethics rules here and innovation. I am suggesting that we should pass a good faith innovation access safe harbor. In other words if somebody is experimenting with a delivery system and ends up doing something that is found to be in violation of a technical rule, if, in fact, they make a successful argument that their conduct was good faith effort to increase access to the system without an attempt to get around the rules, they should be found to have acted within the rule. There is already ABA Model Rule 8.4.2, which is really about the right to test the law in terms of good faith beliefs.

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3. The text of the new ABA Model Rule 6.5 is as follows:

- (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

4. The new relevant California rule, governing family law matters, which goes into effect on July 1, 2003, reads as follows:

- Rule 5.170. Nondisclosure of attorney assistance in preparation of court documents  
 [Nondisclosure] In a family law proceeding, an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.
- [Attorney fees] If a litigant seeks a court order for attorney fees incurred as a result of document preparation, the litigant must disclose to the court information required for a proper determination of attorney fees—including the name of the attorney who assisted in the preparation of the documents, the time involved or other basis for billing, the tasks performed, and the amount billed.
- [Applicability] This rule does not apply to an attorney who has made a general appearance or has contracted with his or her client to make an appearance on any issue that is the subject of the pleadings.

So I repeat the long-term question, “What are the ethical obligations of judges and courts when there is a way of using technology or innovation to increase access?” Think about the whole system, think about all the players in the system, think about the roles people need to play.

Any questions? Sir?

**QUESTION FROM THE AUDIENCE:**

I take it in unbundling, I cannot appear with somebody in court on Monday and say, but I am not going to come in on Tuesday?

**RICHARD ZORZA:**

If Monday was the hearing on child support and Tuesday was the hearing on the divorce, and there were no issues in the divorce, you certainly could agree with the client that that would be the arrangement.

**COMMENT FROM THE AUDIENCE:**

It is the same case. Maybe you need permission from the court not to withdraw from the case.

**RICHARD ZORZA:**

Many of the rules propose concepts of limited appearance, which allow people to file an appearance for a limited purpose. The [then] proposed Washington State and California rules permit that.

**HON. CECELIA MORRIS:**

In the bankruptcy arena we have petition preparers as part of the court rules are allowed to do it. My problem as a judge is how can it determine that the person in front of me in the petition has not been prepared correctly? How do I go behind the petition and say, “You did this wrong, you are out of here.” That individual will be damaged, and yet I have no regulatory authority or direct impact on the lawyer who actually prepared the incorrect petition.

Through all of this, I have been very much in agreement with you. It is been very interesting, because I would like to see lawyers go to that direction. But then as the judge sitting on the bench, when someone comes in, with a petition, filed without any kind of pre-bankruptcy information, the judiciary is put in a very difficult position.

**RICHARD ZORZA:**

I think your point is dead on. The one place I agree that there is an exception to the ghostwriting notion, is when there is a reason to believe that competence is an issue. I do not want to do anything that authorizes, permits or encourages incompetence, because I do not think incompetence facilitates

access. So the fraud on the court would not be that the lawyer did not disclose it. The fraud on the court would be if the lawyer is incompetent. I completely agree with you.

Let me talk about the Access to Justice Technology Bill of Rights. In the State of Washington the state bar is engaging in a process to figure out a new set of principles by which the justice system should use technology. This bar process, of which I am a part, has been told by the State Supreme Court that the Supreme Court will consider for adoption as a state rule whatever recommendations made by the State bar.

The Washington State process is grounded in the creation in Washington State of an access to justice community that has been in existence for almost ten years under an Access to Justice Board established by the State Supreme Court. A number of turf wars among the legal aid programs have been solved because everybody works together. It is a different environment. We need some of this in New York.

In Washington State we have tried to step back and ask, "What are the general principles that everyone can agree about?" In a sense it is like writing a constitution and a bill of rights. But then we are going to be face interesting implementation issues.

I would like to share the current draft of this access to justice technology bill of rights and talk about it a little. I hope to give you a sense of what we are doing and why we are doing it. A preamble basically says that the principle design is to make sure the technologies advance access to justice. Very simple, easy, general, uncontroversial statement. Although when you ultimately start to work it through, it has a lot of implications. Now, the first Principle is in some sense a restatement. Technology must be used by the courts, their partners, other conflict resolution systems, the parties to litigation, those seeking intervention from the justice system, and the legal profession so that it promotes full and meaningful and equitable access to the justice system for all.

We did something very interesting - a mock hearing. In the mock hearing, a court was proposing to promulgate an electronic filing system. In the hypothetical, there were problems with the electronic filing system, that is, a particular kind of software needed to be used, you had to a fee had to be paid and so on. We then did a mock hearing in which an access to justice group used this drafted bill of rights to challenge the electronic filing proposal. What was absolutely fascinating was how much the hearing highlighted how much can be achieved when there is a principle on which people agree. The issues that came up - the fee structure for the electronic filing system, the software acted as a barrier to access and so on had to be resolved in terms of agreed principles.

The second proposed principle is as follows: The Justice System should advance the use of technology to maximize balance in access between the parties and to advance fundamental constitutional values of equality throughout socie-

ty. It should develop procedures to make sure that changes in technology do not undercut these and other constitutional values.

The classic problem is when one party has a technology to build a huge reenactment of an accident and the other party has no money. It is clearly a problem, right? You can say, "Well, one has better lawyers than the other side. There is nothing to be done about that." Or you can put in place structures like the one Massachusetts has, the indigent court costs statute, Massachusetts General Laws Chapter 261, Section 27A, et seq., that basically says, "If you need an expert and you do not have the money to pay for it and you are indigent, the state will pay for it." Information and justice are the result.

The third proposed principle is as follows: The Justice System should advance the use of technology and its ability to access, integrate, analyses and distribute information to bring about the most just result.

To me this one, which advocates the use of technology to get the just result, it is a no-brainer. Where this point comes from, by the way is the New York City Midtown Community Court. I am sure many of you are familiar with it on 54th Street, ten blocks from here. One of the things that we did there was pull together a much broader range of information about each case for the judicial decision-maker - much broader information about the defendant, much broader information about the negative. That is what we should be doing. It is about just results. Technology can be used to bring information in.

One of the things technology does by bringing in a lot of information is it moves people away from mandatory systems in favor of discretionary systems, because now there is in place a system in which a person can actually use discretion wisely. It moves a judge towards the ability to be more flexible in sentencing structures because technology can be used to track whether people are in compliance, and intervene quickly if they are not in compliance.

The proposed openness and privacy principle. Courts should advance the use of technology to create an appropriate balance between openness and visibility on the one hand, and privacy on the other, and to protect against the inappropriate use of integration of information.

Of course technology has a lot of impact in this area. Here we are sort of punting. They are making a general statement about the need for balance between the two, because I think this has to be worked out on a common law basis because it is so complicated.

Transparency and appropriateness. The proposed principle: Technology itself should be deployed appropriately and transparently— it should be the engine for advancement of other values, not an end in itself, and should be evaluated in terms of those other values. Transparency is required to guarantee appropriateness.

As the legal system uses technology, we have to make sure it is transparent. There were many comments yesterday on technology, in particular. We do not

know what is happening there. We do not know what is going on behind the scenes. We cannot tell if it is fair. We do not know whose idea it was. We do not know who to hold liable. I think the transparency and the appropriateness are really important.

Finally the proposed principle that: Courts should advance the use of technology to maintain the effectiveness of the role of courts as the fundamental neutral protectors of those with less power in governmental to individual, individual to corporate, and individual to individual transactions. This is potentially a massive role.

All of this leads me to conclude that these technologies do not represent fundamental, unsolvable challenges to our profession or to our ethics rulemaking structure. On the contrary, if we think about them rightly and systemically, and ground ourselves in the values of the profession, we will find that we can find ways of using the technology, regulating the technology, engaging the technology with a much broader vision, to have access to justice, which works for all of us professionals in the legal system and of course, works for the public. Thank you.

**LOUIS A. CRACO:**

The emphasize of your discussion, and for good reason, has been on access to justice which moves the discussion radically into the court environment. Could you comment briefly on what you think these various principles might imply for a transactional practice.

**RICHARD ZORZA:**

I would tend to give a collective answer to all areas of practice actually, which is, that the technology can mean that we can do our jobs more cost effectively and better. In terms of access to the transactional practice service system, for want of a term, if a person can get a lawyer who can help with the transaction, while keeping costs down, these are the first things that can make a huge difference.

In a sense, you know, what technologies do is they mean that the capital investment allows the marginal cost of delivering a service to drop radically. It means it is very hard to be a solo practitioner unless a market structure is built that supports solo practitioners.

It raises for me a deeper question: "If it is right that an attorney in fifty years is going to depend heavily on online referrals, online tools, and perhaps most importantly, aggregated data about how everybody is using the system, we run a risk, in my judgment, that as lawyers, solo or mid-sized, we will be dependent on monopoly providers of those services."

Google was offered as a vision of where the legal system is going. I think it is more likely to be legal intermediaries who will invest so many millions in document assembly that they will have good data on what is happening in the



courts. Data are needed by a lawyer to make a legal decision. That is what court data are. It is not marketing data in the sense of how your clients are sold marketing data, or how a lawyer sells a case. We have not thought about court data in decision making terms yet. We see statistical decision making as just for the bank and commercial people.

There is a risk that a young lawyer coming out, will have no choice but to take help from Lexis or Westlaw, on West conglomerate's terms, which would not be paid very much. So I think the challenge may be that while access will be good because the pricing structure will be low, access will not be good in terms of our power as a profession to stand up for rights.

We are at a moment where the United States government goes to court, asserting its rights to decide that a U.S. citizen does not have the right to counsel because he has been labeled by that government a combatant, and asserting that that determination is not subject to judicial review. That is a bad moment in history for our profession. We need a profession that can stand up against that. If we become essentially subservient to a legal intermediary conglomerate that makes large corporate contributions to the government, there will be no one left to stand up to that. We need to make sure without destroying that access value, that nonetheless we have someone in the profession that is independent.

My own view, we need to find a way that the professional organizations will be the ones that develop these tools, and make them available to their members. We will only be able to do that if it is done in the service of public service.

I want to tell you another story. One of the great things about the Midtown Community Court — I suggest people take a look at the high-tech court on 54th Street. We project on T.V. monitors the calendar and dispositions, including the charge, of cases that are being disposed of. We project this information in the holding areas, in the back as well. The Legal Aid people said, "Absolutely not." You cannot project into the pens because some people are being charged with sex-related crimes and people accused of sex-related cases are victims of assaults in the penal system." We said, "You are right." Now, if you look at the monitor, if it is a sex-assault-related case, it still gives a statutory reference, but no other explanation of what the charge is. The point of this story is that technology can be tweaked to give a kind of specificity and balance. I think that to the extent you engage in a transactional practice, and you use technology, it is important that it is transparent for the client that they see what they are getting and how the technology is being used.

**CHRISTOPHER E. CHANG:**

We are ready for a round table discussion about unbundling. Professors Munneke and Lanctot are here. Leslie Friedman is here, too.

Let me introduce to you the Honorable Cecelia Morris, Bankruptcy Judge

of the United States. Remember, that wonderful presentation where we were all horrified by the information available from bankruptcy filings. Judge Morris has really taken the forefront in terms of e-filing and all the technological advances that you see in the United States Bankruptcy Court here in the Southern District. That is really her work and her doing. Welcome her, please.

## PANEL DISCUSSION OF UNBUNDLING OF LEGAL SERVICES

### **RICHARD ZORZA:**

What we thought we would do is give each of the panelists an opportunity to comment on the issues that we have been talking about this morning. I will try to refrain from reacting. Then relatively quickly I hope we can get to a discussion. Gary.

### **GARY A. MUNNEKE:**

Preliminarily I have to say that I am a great supporter of unbundling of legal services. I think they are not only necessary, but inevitable in the future of practice today.

But having said that, I have a couple of reactions to Richard's comments. What he said is similar to what I have heard from many proponents of unbundled legal services. That is, in their zeal for the concept, they sometimes do not deal with some of the underlying issues.

As he was talking, I was flipping through the New York Code of Professional Responsibility and trying to come to grips with its admonitions about unbundling. It seems to be very unhelpful in giving us guidance. DR 7-101 and the ECs that accompany that section, really do not say too much about unbundling, certainly not with the clarity that the ABA Model Rule 1.2©) does.

More than that, there is a fundamental question that is in the back of the minds of all those who question or oppose unbundled legal services. That is, how can you give legal advice about a part of a problem if you do not understand the totality of the client's circumstances and issues? Can a lawyer come in and just deal with a simple transaction or tell somebody that they need to file these papers to represent themselves pro se? The question whether or not representation is competent involves coming to grips with the entire set of circumstances surrounding the client and the client matter.

Clearly the concept of informed consent comes into play. Can you tell the client, "I will answer this one question," without presenting an array of alternatives from which the client can choose?

These issues are not adequately addressed and I think they can be. A part of unbundling does involve limiting the lawyer's representation. As a profession we have implicitly recognized unbundling from time immemorial. If you go back to the old English system, it was unbundled. One lawyer, the solicitor, prepared the documents. And another lawyer, the barrister, argued the case in court.

It is not uncommon today for one lawyer to try the case and another lawyer to appeal the case. So even in the context of what is traditionally recog-

nized, we implicitly accept unbundling. Certainly with specialization today, even though we do not recognize it officially, many lawyers limit their practice by handling only tax cases or bankruptcy cases. In that sense, it is with us.

For some reason, the unbundling with respect to assisting pro se litigants and doing simple transactions online has engendered more opposition than some of these more traditional forms of unbundling. That may be a political proposition and truly intellectual proposition.

I would really like to see those who support unbundling to come more directly at the critics and explain how unbundling can be effective, without looking at all of the circumstances of a client.

I want to offer those of you who are interested in the subject to look at what I think is an excellent book by Professor Forrest Mosten from California. It is called *Unbundled Legal Services*. It is published by the American Bar Association.

**RICHARD ZORZA:**

I guess actually I would say I that you can not represent someone, even in a limited way without engaging the entire circumstances of a person and case. Engaging is not the same as providing full services. I completely agree with you. I actually think it is unfortunate that the Ethics 2000 did not go further in terms of talking about a kind of diagnostic process. The scope of the representation must be reasonable. I think that, so long as we are a profession, we must take our responsibility seriously.

**CATHERINE J. LANCTOT:**

I guess it is my turn. I am a teacher of constitutional law. So let me start with a basic premise as to where I am. The premise is a quote I like to use in my constitution law class, which, of course, is by a great framer of the Constitution, "If men were Angels, no law would be necessary, no government would be necessary." As a teacher of legal ethics, I paraphrase that to say, if lawyers were angels, no ethical rules would be necessary. I start from the premise that lawyers are not angels, and that ethical rules are necessary.

To some extent, the fundamental question at the outset is to consider how to regulate the practice of unbundling.

As someone who has taught legal ethics for a very long time, I suppose I have developed a professional affection for the concept of ethical rules. Proponents of unbundling tend to have less affection for ethical rules. A safe harbor rule to the effect that, if a lawyer has a good faith reason to not abide by an ethical rule the rule should not be applied, causes my ethics hackles to rise.

So, here is my issue with unbundling: is that I do not share the assumption that the rules are simply political or simply barriers to representation. I do accept the premise that the rules provide some degree of consumer protection.

We do need to figure out what it is that we are trying to accomplish by permitting limited representation.

If we decide as a profession that we want to permit limited representation, we need to figure out why that is so. Why are we permitting that kind of representation? Is it because we charge people too much money for the full service? Since we are going to charge them \$100 for Tylenol if they have a headache, if they cannot afford to pay the \$100, they cannot have the Tylenol. The best they can get is a cold, wet towel, for which we will only charge \$20. If that is the problem, then maybe the problem is something different regarding the economics of law practice.

If the reason we are providing limited representation is because we feel that many services that are called legal services are not really legal services, and that it is a waste of our time sometimes to provide them when people can do it for themselves effectively, we need to think through what those services are. How do we decide which services qualify? Can these tasks be competently performed by uneducated, lower-income people living in the inner city, farmers in rural areas with very little contact with the courts, elderly clients or elderly people — I guess these are not clients any more — elderly people perhaps with disabilities or health issues? If we are going to decide that all those folks are capable of representing themselves with little help from us, I think we need to decide just how we are going to characterize which tasks are theirs and which tasks or services are ours.

I tend to be uncomfortable with the lack of definition as to what we are talking about with unbundling. Unbundling is not the same as specialization. A tax specialist specializing in a particular area provides full service in that area. Unbundling to some extent is a particular legal transaction or problem in which certain portions are performed by the client and some by the lawyer. I think we need to figure out if what it is that we are saying is within the capacity of the consumers. And as I said yesterday, I am somewhat skeptical of the ability of the average lay person to provide a whole lot of representation.

Couple of other very quick points. A lot of the discussion I have had on this issue before, and yesterday, and perhaps today, has been some variation of the following statement: "It is better than nothing. It is better than nothing." These people are not getting representation anyway, so it is better that they get some little representation than none at all. We need to, at least, address that question. Is it better than nothing?

There are a couple of assumptions there. One is that it is qualitatively better to get a little bit of not as good representation than none at all. Maybe that is true. Maybe that is not. Another assumption is that those are the choices: Limited representation or no representation. I wonder whether we have fully considered whether technology could not be used to make it cost effective to provide full representation to these folks rather than stripping it down and say-

ing, “Well, we cannot afford to give you everything you will need. You can have a little piece of it.” Why cannot we use technology to provide full cost-effective representation to people who otherwise cannot afford it under the current model? The “its-better-than-nothing” concept is one we at least need to explore and not take at face value.

The Professor Mary McNeil (phon.) I think is her name, has written about whether a boat with one oar is better than a boat with no oars. I have seen the analysis, which I think I mentioned yesterday, where some people will get the BMW and some people will get the Honda, but the car will still get them there. I wonder — I have said this in many writings before — whether at some point an unbundled relationship is not really a Honda. It moves like a car that was on Saturday Night Live many years ago called The Adobe, which was a car made of clay. Saturday Night Live did a parody commercial about a little car that was totally made of clay and did not go very fast. If the car hit something, it could be patched back together because it was totally made of clay. That is what I wonder. Is it really the case that self-representation is an unqualified good?

So it may be that I am departing right at the outset from the unbundling concept because I am not convinced that the case has been made that we only have two choices, and that is, to lead people to their own devices or to give them a very stripped-down model of the plan. I look forward to our exploring this issue. I do think it is an important one. But I think we need to keep the other side of the coin in mind.

#### **RICHARD ZORZA:**

It is a very interesting question. Maybe let me put it in a slightly broader perspective. The process of rethinking that is going on now in the courts and Legal Aid is moving in the direction of a very radical rethinking. One of the topics on the table is a civil Gideon. There should be a right to counsel in every civil case. We know that it will go nowhere so long as its cost would be totally astronomical.

What I am starting to pick up happening almost independently in different parts of the country, is an exploration of a set of interrelated ideas which goes a little like this: Unbundling produces data on what people really need lawyers for. Then we can start to think about building a system in which there is a right to counsel — but only to the extent that counsel is really needed to protect a person’s legal rights. In Maryland, for example, as they talk about the campaign to build a civil Gideon, they are thinking in terms of a system in which there will be a triage and diagnostic system in which a person gets a lawyer, but only if the case goes to trial. There are all kinds of lesser ways of asserting a person’s rights.

It gets very controversial, because it is necessary to protect against the risk that people will insist on taking every case to trial because that way they get a lawyer and they will settle the claims with the lawyer. That contrasts the way

legal services runs now. There would be a sliding scale co-payment. Put all those together, that is a radical change in the whole system.

What I personally find one of the most interesting things about unbundling is that we can do it in an experimental way. By the way, we have a way to get good data on this. There is a group called TCRIC, Trial Court Research and Innovation Consortium, a consortium of a group of trial courts including California, New Mexico and Florida as well as other groups, like the National Center for State Courts. The leaders are collaborating in developing a research agenda around issues of pro se representation and other issues.

One thing I would love to do as an experiment would be to have a court with a mandatory unbundled consultation program. The service would not be free; maybe a fee surcharge would be required. But the biggest advantage of the program would be, we could finally systematically gather some data on what people need from lawyers. Sometimes it is somebody to holler for a client in the courtroom. Sometimes it is because the client wants to keep the affair out of the divorce. The client needs to talk to somebody about that. As lawyer, we do not know what it is. If we knew that, then we could start to answer that question about whether or not unbundling is appropriate and in what situations..

Unbundling advocates do not regard this as a solution to everything. It as a way of moving forward. We have been in a terrible place for 25 years. Legal Aid is meeting 10% of the need, and they have to go to Congress and say, "Give us a 10% increase and we will meet 11% of the need." It does not fly.

Interestingly, one of the things they have done, they have an innovative technology program to explore those very issues in — which is add-on funding from the United States Congress. The Republican-dominated Congress gave the Legal Services Corporation an average of \$4 million a year to do technology experiments in support of access.

#### **CHRISTOPHER E. CHANG:**

Before we go to Lesley, I have just try to make an observation. Put this discussion in a different context, because I do not think it is necessarily specific to the legal profession.

What is occurring in the medical profession in pharmaceuticals is that if a person goes onto the web sites of very large pharmaceuticals like Merck, big players, there are sites where a person can type in physical conditions or ailments that he is feeling. From that information comes a number of responses which suggest what the physical problem might be. For those problems there are recommendations of Merck drugs, whether it be a certain type of antibiotic or certain type of drug or regiment to treat the problem.

Now, put that in the context of a company like LexisNexis, which has a similar web site. Take a situation, with the following parameter: No prior arrest. The person blew .11. In this court or this county. What is the traffic bearing

in terms of the penalty a defendant will get generally from a judge given these parameters?

This discussion here of unbundling is exactly what the medical profession is seeing now in terms of self-treatment facilitated by the use of the pharmaceuticals. Because what has happened is that the patient gets the recommendation of the drug, a particular type of antibiotic - biacin. Or a chronic condition for which they recommend a steroid. What is happening is pressure from the public builds.

**HON. CECILIA MORRIS:**

The problem is you then go to the doctor. In the law, you do not have to go to lawyers.

**CHRISTOPHER E. CHANG:**

That is right. The person has to go to a doctor because a doctor has to prescribe the medicine. The pressure in that profession is that the pharmaceuticals are beginning to suggest the treatment before the patient gets to the doctor. What is happening is also the emergence of a black market of doctors who are just writing prescriptions because you have a friend. So the observation is that this exists not only in this profession. It is happening in the medical profession. It has been going on for about five years.

**LESLEY FRIEDMAN:**

I wanted to pick up on a comment that Professor Munneke made. We have been looking at it up until now from an equal access to justice point of view. I would like to slightly shift to look at it from the legal profession point of view.

I see a parallel or mirror image phenomenon, which is to say, contract attorneys, part-time attorneys, attorneys working remotely from a location that is not an office, may be the very ideal people to provide this type of unbundled service. Unbundled practice may enable some lawyers to fulfill, for example, other obligations to family and children or a parent. They may have an illness in the family, or whatever it is that prevents them from the practice law in the traditional sense of going in the office every morning and staying there all day.

**HON. CECILIA MORRIS:**

First let me introduce myself a bit, not from the prospective that I am a judge in the Southern District of New York, but how I came of age. I came of age as a lawyer with a Minivac machine. I do know what it is like to stand there and crank things out, particularly forms, when you are in the bankruptcy court. From there to the Internet. I consider myself a liberated traditionalist. The advantage of technology is that it is the only way we can absorb the case load



that is coming towards us. At the same time, my ethic standards go back to the E.F. Hutton - "the old fashion way."

When I represented clients, I tried to represent them all the way. I represented some very poor clients at times, because I felt the obligation to do that. Everybody has legal issues on multiple levels, particularly in bankruptcy or matrimonial law. It is like an onion. Once the bankruptcy is peeled off there is a mortgage issue, a credit card issue. It is an amazing complex of issues and problems.

Mr. Zorza talked about form-driven information. If it is bankruptcy, it is simply form-driven, okay, fine. Unbundling is not a problem. But what if it is the marriage intersecting with the bankruptcy? Should the bankruptcy be filed before or after the divorce? How does that onion get peeled? That is where the law and the lawyers that are competent to answer those questions need to be in it.

Again, I agree with Catherine Lanctot. The problem is not all competent information and who is going to regulate it. It is the incompetent information and who is going to regulate it. From a judge's point of view, when I look out and see incompetent counsel, I cannot necessarily tell the lawyer to sit down and be quiet. I have to try to lead it along. That puts a huge burden on the court.

A lot of law clerk-judge time is spent simply trying to figure out the pleadings and not harm the client. I may be totally angry at the lawyer. But I must not harm that client as a judge — that is my constitutional duty. So that is the first part of it.

Then just as an aside on that, the Second Circuit and New York County Supreme Court are seeing larger numbers of pro se litigants.

**KAREN MILTON:**

I am Karen Milton. I am the Circuit Executive for the Second Circuit. Approximately 44% of our docket consists of pro se litigation. Of that 44%, about 27% consists of prisoner petitions, habeas corpus, 1983 or civil rights actions. That is a tremendous difference from twenty years ago, when it was the inverse. The federal courts in general have a tremendous pro se docket these days.

**HON. CECILIA MORRIS:**

So, that brings me to the final point that I was thinking about through Mr. Zorza's presentation. I very much love the profession of the law. I really respect attorneys. I respect the judiciary. When people quote William Shakespeare's "kill all the lawyers," they are quoting it out of the context in which it was raised in that play. But the mandate was that the lawyers had to be killed before the rebels overthrew the government.

So, when there is any question that someone does not have a right to an attorney - that is our role. Part of what I hope we will always keep in mind when

we are thinking about unbundling is to make sure that whatever happens, we continue to put out in some way that there must be respect for the judiciary and respect for our profession, and that whatever we are doing, we are doing it with a higher goal in mind than simply cost-effectiveness. We need to help this client. We need to look at what is being said out on the Internet, and say, "That is completely wrong." We have a responsibility to make sure it is correct.

**RICHARD ZORZA:**

I do not disagree. It is very refreshing to hear a judge speak with candor of the problem of incompetent lawyers. You very frequently just hear judges talk about the problem of the uninformed pro ses.

I do think it is important as a profession to talk about the need for regulation, to recognize the substantial failures in the existing regulatory system. I do not think it is a mistake to expect that the regulations do their job. There is a strong argument that in fact consumer protection, access to justice, actually require reasonable rules to be really enforced. It is like what we find in other areas of the justice system. If a rule exists, it had better be enforced or the whole system erodes.

**ALLEN CHARNE:**

It seems that a lot of the problems that have to do with these filings, whether they are prison filings or filings in the Supreme Court, are not likely to be helped by unbundled representation. I say that because, first, in Munneke's book he really says that anyone without at least some level of college education is not suitable for unbundled services. Here what we are talking about is not only those many who do not even have a high-school education or who have a problem with the English language. The cases in federal and state court are, plaintiffs' claims for damages that, whether because of the prison system or some other perceived wrong, are no longer allowed to be handled by legal services groups. I do not know how private lawyers are going to be able to handle those claims, because unlike the medical field, here there is someone on the other side. There is an opposing party who is bringing motions or from whom you have to get discovery. And discovery is being resisted. So I think it is much more difficult than in the medical field.

What seems most helpful is what Richard just mentioned. That initial unbundled-type evaluation, that initial evaluation whether this client is someone who can carry the matter forward and whether this type of issue can be handled on this kind of a basis.

The analogy to the person with one oar is apparent. That person has to know when to switch the oar to the other side so the boat does not keep going around in a circle. Just wonder about the comments that anyone would have about serving those who do not have a college education.

**HON. CECILIA MORRIS:**

Or even those pro se litigants who do have a college education and have the oar on one side of the boat. I think that is a struggle. Again, from the point of view of the judge, that is a struggle. They are in front of you. There is someone on the other side who is taking advantage of it.

Under the Supreme Court decisions, you can help the pro se litigant a bit by asking questions and saying, "Hey, have you thought about putting the oar on the other side?" It is a struggle.

**GARY MUNNEKE:**

This is somewhat provocative. A lot of our comments come from the perspective of the legal profession and being kind of guardians of the system of justice. But there are couple of factors outside the profession that are really critical, that particularly affect the practice of law online. One is the concept of disintermediation. The other is autonomy. Disintermediation means with information easily accessible so that people do not need the learned professional to interpret it for them. They can go directly to the information and make decisions about what to do with it.

Along with that is the growing trend in society for people to seek control of their own minds and bodies and personal affairs. Which means that people want to make choices about medical treatment. They want to make choices about how their legal problems get resolved. They do not want to just turn these problems over to doctors and lawyers and accountants.

We may say that when you bring the problem to us, we can give you more helpful than you can provide yourself. But the trend in society is that people want this. When two things are put together, people are predictably going to say, "I want to go to a web site and get a will. Sure a lawyer could give me a diagnostic, estate planning analysis. But, I want the simple will."

So when we face this problem, we have to recognize that this is a part of the mix in which we live, that people will get the simple will. They will go pro se. Not because they cannot get a lawyer but because they do not want a lawyer. They feel that they can do just as good a job by doing it themselves. They may be dead wrong. But this is the real trend in our society.

**RICHARD ZORZA:**

There are some numbers on that. It is actually very interesting there is some real variation. California numbers on it are that a really pretty low percent, like 10% saying they are really doing it for reasons other than inability to pay. The Arizona numbers, where, of course, some of the earlier work was done, are closer to 33% doing it for reasons of principle.

Interestingly, of course, Arizona has not had an unauthorized practice of

law statute. It may well be that the experience of people in Arizona has been sufficiently negative. This would tend to confirm the argument for regulation.

The bottom line is both these forces are at work. There also is a political component, to the extent that it is driven by dissatisfaction with the bar. Ironically, the bar is more resistant to liberalizing the rules because lawyers actually see it as a source of loss of business. They want to keep the profession locked up.

**GARY MUNNEKE:**

It is been analogized to the Reformation when the printing press made religious material available to the masses, and people no longer needed to have religion interpreted by the priests in the Catholic Church. Some have said that people believe they no longer need the lawyers to interpret the law.

**CATHERINE J. LANCTOT:**

Four-hundred years since the Reformation and there is still a church or two.

**HON. CECILIA MORRIS:**

Mr. Zorza brought the point out when he asked, "Are we accessible? Are we doing a good job?" I mean "we" as a profession.

**CATHERINE J. LANCTOT:**

To pick up on that point just briefly, I think Gary has made an excellent point. What do people want? They want to represent themselves. Why? Medicine is a good comparison. People do not want to take out their own appendix. But also, people do not want to go to the doctor, only get ten minutes, then have an insurance company tell them they cannot have certain treatment. So people go to the Internet because they think treatment is too costly and because they think they are not getting full service. We need to ask, "Why is it people feel they have no choice?" I think a much smaller percentage of people seek to help themselves because they are taking a philosophical stand against professionals. Rather, people feel that they are not be adequately served.

One last thing, to pick up on my appendix. We do not let lay people take out their own appendix. We also do not let lay people take out other people's appendix.

I understand that the medical analogy does break down where we talk about the law. There are aspects of professional competence where lawyers have expertise that other people do not have. And it is not elitist to suggest in those situations people do not know what they need. I do think we have to think about that. Gary has brought up an excellent point: We do think of it from the legal profession's perspective. I suggest we are not always wrong.

**JOSEPH ROSENBAUM:**

I am in private practice. Professor Lanctot and Mr. Zorza bring up a point. Technology is enabling. Technology did not create the demand for information. And technology certainly, in my view, is not going to change the ethical standards the profession has to adhere to. There will be conflicts. There are going to be obligations that we have to represent clients properly.

What technology does is give access both to the court systems and information that people never had before. And the questions are: What value do the lawyers have to the public? What professional obligations do we have to the public? That is changing.

Just like the printing press revolutionized people's access to religion and ultimately created libraries with card catalogues, today we have an Internet which gives people the ability to get drug information or medical information or legal information. That does not mean that lawyers are not valued. It simply means that we have to find ways to translate what we do into that value. That is different from unbundling and saying, "We are only going to limit our representation to matrimonial versus landlord/tenant. That is more of subspecialty issue.

I look at the issue of professionalism on the Internet. How do we, in an era where a lay person can assemble a will — and it may not be the correct will under the estate planning laws of one jurisdiction versus another — how do we as lawyers here in New York make sure that the public knows that there is a value to be imposed on the process? And what is that value? To me, Professor Lanctot's question about our real role as professionals, that is the ultimate question that technology is going to throw in our face.

**HON. CECILIA MORRIS:**

Let me give a little history right now, a little digression from that comment. The reason electronic case filing was, not invented, but put together in the Southern District of New York Bankruptcy Court was the overwhelming number of bankruptcy filings we had in 1992. Eastern Airlines had been there 3 years. We had Macy's. We had Wranglers. I cannot remember all that we had. It was just overwhelming.

We had a computer system that was simply a docketing system that took 26 minutes between screens. It was physically impossible to deal with the paper. We knew in 1992 that we could not deal with another influx of filings without some kind of automated system. Now, we did take into consideration some of the things that had to be taken into consideration. For instance, in bankruptcy court there is a statute that says a credit card number must be on the petition. So we had to put the credit card number on the petition.

We were very lucky. We had a ten-year lull before the Enron filing. A nor-

mal case in the Southern District of New York, and this is an exception to the nation, has 750 docket entries. In the first six weeks Enron had 4500. Without an electronic case filing system, it would have been a physical impossibility to manage that paper.

Other things come into it too. The privacy. The Social Security number of individual debtors went out on the Internet. Well, that was a problem. We are looking at ways to address that. But one way that protected privacy almost instantly was the fact that the Administrative Office of the U.S. Courts, with a mandate from Congress, started charging for that information. That gives another level of password. And if somebody is just simply searching the Internet for somebody's Social Security number, they are going to have pay for it. That does not necessarily prevent it. It at least puts in place another layer of getting to it. That was some historical background.

**ELAINE LAFLAME:**

This is a continuation of the conversation I had. One of the problems I have focusing on this discussion of unbundling legal services is the fact that we still do not have a very good definition of what legal services are and what is informational, what is advice. I think until we begin to pry apart the various tasks, trying to figure out how to unbundle, how far to unbundle, whether to unbundle becomes very difficult.

You mentioned taking out an appendix. That is a fairly clear example. But there are lots of steps that lead up to that decision that people are very capable of making on their own, in the medical setting. This started with 1960. The Women's Health Operation in Boston went to a group of bodies, ourselves. Women wanted to claim for themselves physical knowledge about their own physical bodies - what is good for them, what is bad for them. I see the same kinds of things happening here in the legal industry. We need to define what it is we do that is legal advice and distinguish between that and information. What is it that people should have access to in terms of dealing with courts and dealing with different administrative bodies. That is where the technology comes into play.

We will have to let go of the information. Technology is taking it out of our hands and making information accessible to all, forcing us to redefine what it is we really do.

**LESLEY FRIEDMAN:**

I would like to pick up on that comment. If a person needs an appendix taken out, obviously that person needs to go to a doctor. If a person is going to join Weight Watchers, they probably will recommend seeing a doctor. Most people probably do not visit the doctor with they start a diet or even an exercise regime.

There are a lot of things that people can do for themselves that might qualify in a medical realm. If I bought something on eBay and it turned out not exactly what I was hoping for, there is no way I am ever going to hire a lawyer for that. There is not a lawyer in the country who would want to handle that.

Does it help us to have access to online information? That is a philosophical position. It is simply the scale of the thing.

**RICHARD ZORZA:**

Technology changes. Those of us who are Star Trek fans, know this: The doctor takes a box and puts it on people, and it cures them. He is basically there as counselor. In our lifetime, appendix removal maybe sufficiently automated that in fact you can press a button.

**LESLEY FRIEDMAN:**

Just to finish the thought. I think there may be some value for us as a profession to consider ourselves as educators as well as practitioners. For example, to go into the high schools where many people's education may end and give a course called, "The Law and You." Make sure that there is an automated component to the course so people understand if they need to download a certain type of document, this is a good place to go. Make sure the downloaded document is valid in the right jurisdiction, et cetera.

**ANTHONY BENTLEY:**

I am Anthony Bentley from the American Judges Committee. My question is for Judge Morris. My question relates to the completeness of access electronically-based on electronic filing system, which apparently you were instrumental in instituting. Are there provisions in the future for access to, for instance, archival material in the archives in Kansas City of closed cases prior to whatever the date currently is? No plans. So I guess my point is that total access, particularly in a judicial system that it is based on, should at least address the degree to which there is complete access electronically to that which is accessed, albeit through bars manually.

In the event that there is material on the basis of which, in the closed-case file, that one might wish to demonstrate that their case is on all fours with a published opinion, the more access to the underlying material that led to the decision, the more complete an individual's research might be.

**HON. CECILIA MORRIS:**

I understand. I do not necessarily disagree with you. I think at some point, though, that becomes dollars and cents.

**LOUIS A. CRACO:**

This question goes back to the second to last question and some of the discussion. I frankly approached the question about the task before the Institute to try to make a stew out of all these ingredients. I have no hope it will be a better stew. I would like to ask you this: Professor Zorza indicated in one of his slides that the line between information and advice is an unstable one. And the question we are going to have to grapple with at some point in trying to come up with coherent recommendations here is how that phenomenon, an unstable line, an environment which is continuing to change, ought to be defined. I am frankly skeptical myself of being able at this late date, after so many others before us have failed, to make a comprehensive and enduring for all time definition of what the practice of law is. Nobody else has been able to do it.

For example, there is an assumption in the online arbitration and mediation discussion that that is somehow a professional function, and we have to defend against the notion that it is appropriately done by lay people. But, of course, arbitration has been done by lay people long before it was done by lawyers, and was thought to be a non-lawyer function.

How do you suggest we proceed? This is for Cathy, as well as others, do we do what Oliver Wendell Holmes said, not draw a line, but just put down dots and hope the line emerges over time? When we come to our ruling making function, how do we approach the phenomenon?

**CATHERINE J. LANCTOT:**

Having spent a couple of years of my life trying to figure out the difference between information and advice when I wrote my article about attorney-client relationship in cyberspace, I would say this: There is research, mine and others, that indicates what we have said in the past is the line. Then you have to decide whether you like what has been done in the past. But I think you have to start by understanding what the precedent, what courts, bar opinions and others have said. It seems so obvious that I hardly believe I am saying it. Except in these Internet contexts we tend quickly to go into the new medium -no rules, no past, just present. And I do not think we can do that.

So, the first thing to do is look and we see. I can tell you in a nutshell that historically when lawyers have been told, "You may give general information but not specific advice. If you give specific advice, there is an attorney-client relationship." That has come up in my research with respect to advice or information given on radio, television, seminars, 900 numbers, newspapers, and so on. The line has always been, the more specifically tailored to someone's individualized situation, the more we will treat it as legal advice. If it is legal advice, then there is an attorney-client relationship.

Part one, to me, is that lawyers agree on what the parameters have been in the past. Then there are couple of paths to take. One is to say, "This is what



we said in the past. We now reject that view because we have a new paradigm, a new understanding what the attorney-client relationship is.” Or, we look at what has been done in the past and say, “We accept this because this is our professional understanding of what professionals do. They bring professional judgment to bear on specific problems. We will draft our regulation to make that historic treatment of the line consistent with what goes on online.” Again, this may seem to be very basic. I do think this ultimately a policy decision about whether we adhere to traditional understandings or whether this is a brave new world.

**RICHARD ZORZA:**

The key word that Catherine used is “judgment” with respect to the line between advice and information. When the response to a question involves independent professional judgment, then I view that as advice. Which is sort of related to the other: Is there a list of answers or is there really only one answer? Which does not mean lawyers may not be substantially in the business of giving information. They may be the best information provider. It is different from saying to a person what should be done if you file the bankruptcy before the divorce.

With respect to the second question about the practice of law. In Washington State, [at the time of this event] they basically have a common law, judicially defined definition of the practice of law. Under that common law the determination of whether something is unauthorized practice of law includes an analysis not only what lawyers traditionally do, but also the extent to which there is a public interest in restricting that to a group of people. And the state Supreme Court has said have said that if a task such as title preparation is of the kind that it is in the public interest that it not be restricted to lawyers, then it should not be limited. Essentially the public interest in access is balanced against the interest in quality that comes from restricting who can perform a task.

It is a very interesting approach. What that has led to is rule making, which has actually set up a board which [at the time of the event] is in the process of defining sections as to what the right practice is.

**TOM GLEASON:**

I am a practicing attorney. I work with OCA in connection with the electronic filing issue.

One of the things I found interesting about this discussion regarding the identification of professional judgment is that it has some history in computer science in terms of trying to figure out when you have artificial intelligence and when you do not. The classic task that has been identified is the turning test. It might actually be somewhat applicable here as a radical solution. I say that somewhat in jest.

The turning test is basically this: Take a person and put him in a room with a computer terminal in front of him, and the person can ask questions and pose those questions either to person A, and person B who are in separate rooms. One of them is a real person and one of them is a computer. If the person posing the questions cannot tell the difference between who is answering the questions, then artificial intelligence has really been identified. That has been pursued in the field of computer science for many years now. Identified artificial intelligence has so far, except in very narrow areas, been a real failure. It is an interesting analogy to what we have here.

I think what we are talking about is two separate kinds of problems. There is the problem, on the one hand that we like to see unbundled, which is the area where applications on a machine or by an untrained person can provide an answer to a question which is in the nature of information. Then, on the other hand, we have a group of problems that require that intrinsic kind of professional judgment that we do not want to see released out and be given by people who do not have the competence to do it. It is very difficult to identify any kind of bright line between those two. That is really what we are talking about. It is somewhat difficult.

I would submit to you that there are many, many kinds of problems that we deal with as lawyers that are different. We have a very difficult time telling people why they are different. Perhaps we have not really articulated it as well as we could. But I do think that there are areas where, they are different, and we advise people based upon our appreciation of it and the training we have received.

Now what we unbundle, I think we have to confront that problem as well. To give people advice not just with respect to the specific things we talk to them about and give them advice on, but also those things that they can do themselves. Yet they may not be able to see or appreciate that distinction or why we say, "It is okay to do this but not okay to do that." Therein we have an inherent conflict, because I think we will see that people will try to perhaps pour too much in.

Perhaps a solution will be if in the future, we could have a value set of turning tests. We can have people specify their problems. They can write them in or send them in to the computer. Whatever our system is, computer on the one hand and lawyer on the other hand, when we really no longer tell the difference in the response, we will say, "Okay."

**RICHARD ZORZA:**

The exception, where the turning test passes psychology.

**GARY MUNNEKE:**

I think you are absolutely right. We have to tell people about what we do.

I talked yesterday about marketing, and mentioned earlier about informed consent and the duty to inform. Really part of this whole battle is not regulation, but letting people know what value lawyers bring to transactions and why someone should hire a lawyer for this particular service as opposed to getting a little piece of a service. I think as individual lawyers, as law firms and institutionally as a professionals, we failed miserably in marketing ourselves to the public, educating the public about how lawyers should be used. I would hope that every bar association in the United States would devote resources to that kind of education, that every law firm would really think about communicating to its targeted clientele exactly why they should hire that firm or that lawyer.

**JUDY LEVIN:**

My name is Judy Levin. I am the secretary of the ADR Committee of New York County Lawyers. I will report back on what we hear today.

At the risk of being redundant, I think the core issue really is: What do we do? Can we tell people what we do? Do we even ourselves know what we do as lawyers?

The challenge is somewhat daunting for Mr. Craco, that maybe the time has come that we really do have to figure out what we do and not say it has never been done before so we cannot do it. One of the things as a lawyer that I hate is when another lawyer says to me, "No, we cannot do it that way. Why do you want to do it the way you want to do it? I have always done it this way. This is how it is done." That drives me crazy. Why do we have to do it that way? It might be better to do it a new way. It might be innovative. It might be right. It might be that what our real job is to a client is to be a problem-solver.

This may be the real problem that we have to solve - to understand the distinction in gathering information and telling people information, but knowing that it is not just that we tell it. But every time we say a word, there is a slant to it. So much is subject to interpretation. Words mean things different to different people just because they hear them a different way it. Some of what lawyers do is explain words. So that the conveyance of information is not even information because you interpret it differently. Part of it is how we interpret it.

**RUSSELL G. PEARCE:**

Russ Pearce from Fordham. A number of these comments, the turning test observation, which I jumped off immediately thinking about Marcus Arnold and Cathy Lanctot's observation yesterday. But it also suggests perhaps another way to think about unbundling, and that is: Unbundling on the side of legal service providers and whether that is appropriate. It exists in other professions. Talk about medicine, nurse practitioners, paramedics. It actually exists in legal professions across the world. The kind of one-size-fits-all training that we have, is relatively unusual.

I was discussing with Cathy before, I think we are the only profession in the world that I know of where a person has to have to have a college degree before taking a law degree. So perhaps another way to think about unbundling is unbundling the ways to becoming a legal service provider, and to different levels of providing legal services.

**RICHARD ZORZA:**

Thank you everybody for great comments and great discussions.

**CHRISTOPHER E. CHANG:**

We are at the final portion of our two-day program. This is a chance for everybody to weigh in on all the topics which have been discussed over the last day and a half. We have with us Russell Pearce. Professor Pearce is a professor here at the Fordham Law School where he teaches, among other things, professional responsibility and advanced ethics. We are happy to have him here. You heard from Russell already. Professor Pearce.

**SUMMIT ATTENDEES'  
ROUNDTABLE DISCUSSIONS OF ALL TOPICS:  
ISSUES AND PROPOSALS**

**RUSSELL G. PEARCE, ESQ.**

PROFESSOR, FORDHAM UNIVERSITY SCHOOL OF LAW

Thank you. I want to apologize to the presenters. My sense of how to do this so that the whole group can participate is to use these easels. (Professor Pearce's charts can be found in Appendix One.)

Since I am the official voice of this part of the program, I want to welcome you and welcome the Judicial Institute on Professionalism here to Fordham. I also want to note that we do have a vehicle that is open to you in the future. That is the Louis Stein Center on Law and Ethics. We periodically hold a conference that my colleague Bruce Green, pioneered and where we partner with organizations. We have done this with ABA sections and the Legal Services Corporation among others. Now at least one of the ABA sections is taking the Green model on the road with another school, the University of Georgia.

What we do, at this conference Richard mentioned, which produced the wonderful piece by Professor McNeil is with our partners, solicit articles that are written in advance of the conference. Then at the conference we divide into working groups. Each working group has one, two or three pieces written for the group. Each group then spends two days meeting. The conferences are invitation only groups made up of people we select who represent a cross section of people interested in a particular topic. After the two days, each group comes up with a set of recommendations. We all meet together for a half day where we receive the recommendations, and accept or reject them.

If you look at development of the ethics rules, there have been a number of important contributions from these conferences. I think the first one was the change in the rule on representing people lacking capacity. Then recently some of these unbundling changes with regard to Ethics 2000, can be traced back to one of these conferences. Sorry for the advertising; it is an invitation from Fordham to work together in the future.

Certainly this is the kind of topic that really lends itself to a project like that, which then ends up in publication in a volume of the Fordham Law Review with the articles, recommendations, and the responses as well.

Let me tell you what I would like to suggest we do as a way of going through the materials and getting the benefit of the insights of the presenters and the invited guests, who presumably will not be with the Institute for its deliberations on these various issues. What I would like to do is take the time before the lunch break and go through in a relatively disciplined way, which means

there is not going to be enough time to talk about any particular issue, what I see as the major issues that you have identified. Then with each issue, take some time to identify proposals. We will use this easel for issues and this easel for proposals. I do not see us today resolving any of these matters. We might.

This is my proposed order: Vision, which Cathy Lanctot challenged in the beginning. Lou Craco's point is a terrific point on responsibility. One question for vision is: Do you need to come to any resolution on vision before moving forward? Other topics are multi-jurisdictional practice, unbundling, non-lawyer document preparation and advice, non-lawyer fee sharing, advertising, ADR. If there are other issues, we will list them and then give people a chance to respond. I apologize in advance for my handwriting. Why not start with vision. What are the issues that are important with regard to our vision of the legal profession, where is it going?

**JOSEPH ROSENBAUM:**

Increasing access to justice.

**RUSSELL G. PEARCE:**

Increasing access to justice. Okay. Others?

**JOSEPH ROSENBAUM:**

Attorney-client relationship.

**RUSSELL G. PEARCE:**

Attorney-client relationship. Be more specific. What do you mean, the formation of it?

**JOSEPH ROSENBAUM:**

How it arises in the context of the unbundling discussion we had. There are a number of people who raised the issue as: Can a lawyer adequately represent the client if she only focuses on one particular issue? I guess the question is: Are there times that a lawyer may be able to do that? In many cases she may not. I am not sure we have defined what that means.

**RUSSELL G. PEARCE:**

How the attorney-client relationship arises. What is its scope? Other vision questions? I can throw in one here from Catherine Lanctot. Are we moving towards a two-tier system, the Honda and BMW. I was comparing my 1987 Bonneville and BMW. Are we moving to a two-tier system of justice?

**QUESTION FROM THE AUDIENCE:**

Are we already there?

**COMMENT FROM THE AUDIENCE:**

Simplify court forms and processes.

**RUSSELL G. PEARCE:**

All right. I want to get the overall vision, not just the answers. Where are we going with the legal profession?

**RICHARD ZORZA:**

It is about the relationship between the way the bar structures its delivery services and the way the system is structured in terms of what services are needed to function in it.

**RUSSELL G. PEARCE:**

So, to put the two together, what is the relationship between lawyers' work and the courts' work?

**RICHARD ZORZA:**

No. The structure of the delivery of legal services and the structure of the justice system or structure of the court system. I do not mean structure in the sense of expectations. The implications of the way the judicial decision-making structure functions for what is needed in order to access it, including by lawyers.

**HON. CECILIA MORRIS:**

In the bankruptcy arena once upon a time five years ago when you filed a petition, you could be creative. Now you deliver it online. Your petition, whether it be Enron or — Cecilia Morris — is very similar and very structured.

**RUSSELL G. PEARCE:**

The court system influences the delivery of legal services.

**HON. CECILIA MORRIS:**

Not only the court system, but the court electronic system.

**RUSSELL G. PEARCE:**

Court-system-created-text. Yes?

**DAVID LERNER:**

What roles should lawyers play?

**RUSSELL G. PEARCE:**

Related to that, let me suggest an issue that came up before, especially in the last conversation. To what extent should consumers have freedom of choice?

**HON. CECILIA MORRIS:**

Freedom of choice and access.

**RUSSELL G. PEARCE:**

Choice and access for consumers. Okay. Another?

**BEVERLY RUSSELL:**

Beverly Russell, from the Office of Court Administration. My issue would be: Are the issues of unbundled legal services the same in a fee environment and a pro bono environment?

**RUSSELL G. PEARCE:**

Save that for unbundled. That is a specific question.

Let me add one more, and then look for one more hand, and then move on. Another concern that I have is: How do we preserve the core values of legal the profession?

**RICHARD ZORZA:**

Preserve and advance.

**RUSSELL G. PEARCE:**

Preserve and advance the core values. Then, as well, how do we protect the quality of legal services that are provided?

**HON. CECILIA MORRIS:**

Define the core values.

**RUSSELL G. PEARCE:**

Quality of legal services. Define core values. Also define the question coming up: Practice of law. Whether defining the practice of law can be done?

Before we get off the vision and go to unbundling, let me see whether people have any proposals that they would like to put up here to address any of these issues that have been raised. Yes?

**QUESTION FROM THE AUDIENCE:**

Actually I do not have a proposal. I am still stuck on your other easel, which is, I think, the geographical issue that was brought up yesterday. It was



not touched on in any of these proposals. Do we encourage the lack of boundaries or do we encourage boundaries to remain on geographical lines?

**RUSSELL G. PEARCE:**

Multi-jurisdictional practice goes to what is the meaning of the practice of law today. Do state boundaries have meaning any more? If so, what? So I will just write down state boundaries and licensing. Okay.

**COMMENT FROM THE AUDIENCE:**

Could I add one other thing to your vision statement, the roles of the players in the modern information economy. I think we have to add the role of non-legal information and service providers in the modern legal services economy.

**RUSSELL G. PEARCE:**

Okay. Definitely an important issue.

**DAVID GOLDFARB:**

David Goldfarb. When you say access to justice, does that mean access to legal information, documents, and other things? Access to justice meaning getting into the courts, but we also talked about access to wills on the Internet and other documents.

**RUSSELL G. PEARCE:**

I think that is a good question. As far as I know, there is no easy answer to that. Personally I put them together. But others might not. Call it increasing access to justice and legal information. That, of course, triggers the question that will come up again on unbundling and may come up in a number of other areas; that is, the difference between legal information and legal advice, if any.

Proposals for vision. It could be anything. We have resources in the room. We are brainstorming based on what we have talked about in the last day and a half. This is then for the Institute to take and do whatever it wants with it.

Are there any proposals for vision?

Richard, the last point we did not really discuss in your presentation was a brand new theory. Do people have any proposals related to any of this?

**COMMENT FROM THE AUDIENCE:**

This proposal actually relates to two things: the education of legal professions and the education of consumers. We talk about education of professionals in the legal system to make sure that the competence issue is addressed. Then education of consumers enables them to make better informed decisions about

the nature of legal service they need, or to what extent they need the legal profession.

**RUSSELL G. PEARCE:**

Education of consumer. Richard?

**RICHARD ZORZA:**

I think that the system needs to make crystal clear that the goal, of any proposed changes and innovations should be judged against their service of access to justice goals. That has to be the prime directive. Clarifying that should not be viewed as radical and strange. I think it represents a refocus against reality. That actually has lots of implications. Who regulates? How do we analyze? What kind of evaluation?

**RUSSELL G. PEARCE:**

Okay. So a proposal to evaluate regulation by the test of access to justice. That includes who regulates, how and what regulations. Other proposals? Yes.

**CATHERINE J. LANCTOT:**

Empirical research in New York State about the issues particularly about non-lawyer experience in the courts. Empirical research because generally in a number of the issues that we are discussing we are talking about vague senses, our own practice, anecdotal, perhaps our own theories. I do think it would be important for the Institute to try to accumulate data. Some of the court personnel in the room also may get some studies done to see what is really going on out there before the Code needs regulating.

**COMMENT FROM THE AUDIENCE:**

I think simplify our laws, not just the ethical laws. We have people doing wills on the Internet, which are not going to get probated as long as we have the Estate Power and Trust Law, the Surrogate Court's Procedure Act and rules set up under Tom Carvel and Howard Hughes cases. We have to have a simple structure, maybe a law that sets out a statutory form or something else, where people will not need intensive legal intervention.

**RUSSELL G. PEARCE:**

Okay. Simplifying the laws.

**COMMENT FROM THE AUDIENCE:**

Early case and client evaluation for those who cannot afford to hire lawyers, the way Richard suggested it, so that however it is funded there can be

an evaluation as to whether there is a viable case. There needs to be an evaluation to determine the needs of a particular client.

**RUSSELL G. PEARCE:**

Evaluation, meaning everybody should have access to a lawyer to evaluate their case?

**COMMENT FROM THE AUDIENCE:**

A lawyer who is not necessarily taking the case, but evaluating whether this is something that can be resolved through legal means.

**RUSSELL G. PEARCE:**

One hundred percent access to lawyers for early evaluation. Gary.

**GARY A. MUNNEKE:**

Revise the Code of Professional Responsibility to take into consideration the Internet and access to justice issues that we have discussed here today.

**RUSSELL G. PEARCE:**

Revise the Code. Before we leave this, I am not hearing some of the bigger picture suggestions. I guess in terms of who regulates. Anything broader in terms of rethinking the legal profession, or is this "stay where we are at?"

**COMMENT FROM THE AUDIENCE:**

We can look at what other countries do. Not every other country has the same system or the same restrictions.

**RUSSELL G. PEARCE:**

All right. Add look at other countries and other professions.

**HON. CECILIA MORRIS:**

The U.K. Accounting.

**RUSSELL G. PEARCE:**

The accounting model for us all. We will move on now from vision, which is broader. As I turn the page, I am suggesting MJP and unbundling. In some ways for lawyers, these topics mirror the two non-lawyer topics we will get to. One reason I say that is MJP constitutes unauthorized practice here. The lawyer who is practicing in the state where she is not admitted is just as much, under the law, engaged in unauthorized practice as any other non-lawyer for this purpose. Let us talk about the issues for MJP. Then the proposals for MJP.

**COMMENT FROM THE AUDIENCE:**

I have a proposal for vision. It is to make sure that in the legal education system, that law students are educated on the legal system delivery system, who gets what, what models are out there, how it actually works or does not work.

**RUSSELL G. PEARCE:**

What I heard and I may have heard this wrong, but from the presenter yesterday Mr. Ehrenhaft, the question that came up, one of the issues for MJP is the extent to which state regulation is relevant for legal practice. I have to say that was yesterday. There are some law review articles arguing for federal regulation of the legal profession. That was the closest I have ever heard of a bar leader making that kind of pitch. At least that is one of the issues. As someone who has a firm with a national or international scope, he was raising questions about the relevance of state regulation. Are there other kinds of issues for multi-jurisdictional practice that focus on how the Internet raises these kinds of issues.

**LESLEY FRIEDMAN:**

Competency to practice law outside your jurisdiction of license.

**HON. CECILIA MORRIS:**

Defining the jurisdiction of license.

**RUSSELL G. PEARCE:**

What do you mean by defining?

**LESLEY FRIEDMAN:**

Bankruptcy is national.

**RUSSELL G. PEARCE:**

Is that right? Meaning a lawyer that is admitted to the bankruptcy court

**HON. CECILIA MORRIS:**

A lawyer is not admitted to the bankruptcy court. There is no such thing. A lawyer is admitted to the district court of that district in which he normally practices.

**RUSSELL G. PEARCE:**

If I am admitted in the Southern District, can I then go to Delaware?

**HON. CECILIA MORRIS:**

To Delaware, no. If you are admitted in the Southern District of New

York, you can not practice in Delaware. If you are admitted in Delaware, the Southern District of New York will let you in for specific cases. Delaware will not let you in

pro hac vice. With the computer system, it is exactly the same thing. The Southern District of New York will allow you to file cases or file motions or file adversary proceedings if you are in another venue. But Delaware will not.

**RUSSELL G. PEARCE:**

Competency and right to practice outside your licensed jurisdiction.

**HON. CECILIA MORRIS:**

Licensed venue would be more proper, I think.

**RUSSELL G. PEARCE:**

I have to say one of the questions for the Internet, and this has come up for me with some ethics consulting questions, for me personally, but also for the client, is, once a lawyer is on the Internet and provides some service, even when simply advertising on the Internet, isn't that lawyer advertising in every state of the United States? So one of the questions is: "Do New York ethics rules apply to non-New York lawyers" Under the current system there really is not any application. They are either committing a crime or they are unregulated. In effect, I guess, it means generally that they tend to be unregulated.

**COMMENT FROM THE AUDIENCE:**

This goes both to multi-jurisdictional practice and to unbundling. It is a mind-set that is created by these artificial distinctions.

For example, we talk about jurisdictional practice. But when you have an international client, when you have a company that has a bankruptcy that starts out in Brussels and ends up in Southern District, to say that the problem is jurisdictional is an artificial distinction. It is one company whose problems span the globe.

I find that with the Internet, with a lot of our law, we have this artificial mind-set that says it is jurisdictional. The reality of the problem is not bounded by any state or country boundary. The issue is to lift the veil off of our eyes and approach it from a different perspective. There are really clients. There are really problems. There are things that happen in jurisdictional boundaries. How do we open up that discussion?

**RUSSELL G. PEARCE:**

Is law practice national and international? To what extent? Yes?

**QUESTION FROM THE AUDIENCE:**

I know we are going to have to deal with it, so I have to put it on the list. It is a subset of what you had with the application of New York ethics.

What is the nexus, if you want to call it that, between New York and anybody else whose product arrives on the Internet in New York such that we have, A, authority, and B, the means to protect the public, if that is what we think we ought to do, or to encourage access to justice by innovative means, if that is what we think we ought to do? Aaron perhaps suggested the situs of injury as the basis for that. But how, if an injury occurs in New York due to incompetent advice from a Colorado web site, do we do anything about it?

**RUSSELL G. PEARCE:**

Okay. That is a great question.

**COMMENT FROM THE AUDIENCE:**

This is a takeoff on what Mr. Craco is saying, which is that one major issue that technology and the Internet is presenting is that clients, problems and the delivery of legal services are not geographic, but access to the courts are.

**RUSSELL G. PEARCE:**

Okay. Related to this as well - clients are not geographically bounded, but courts are.

**COMMENT FROM THE AUDIENCE:**

Courts and ethics.

**RUSSELL G. PEARCE:**

Courts and ethics rules are. Okay.

**COMMENT FROM THE AUDIENCE:**

One of the big issues in the multi-jurisdictional practice of law is transactional practice. There seems to be a sense that litigation practice is dealt fairly well with arrangements, but in reality people are always crossing state lines. You mentioned there are applications of New York state ethics rules to lawyers from other states. But I think you ought to think that through. What it really means is that we are abandoning the notion that a person is only a lawyer in New York and everybody else is a non-lawyer in New York. You are changing the paradigm to say that the lawyer from out-of-state is a lawyer, and that is not unauthorized practice, but it is a new thing called authorized multi-jurisdictional practice that can be regulated. By adding this application of the rules, we are changing the paradigm considerably. We are also recognizing that a lawyer is a lawyer is a lawyer.

**RUSSELL G. PEARCE:**

That is the question: What is the status of the non-New York lawyer? Are they non-lawyers or are they non-New York lawyers, something different, though, than a New York lawyer?

**HON. JOHN WERNER:**

John Werner, New York County Supreme Court. I think some of this may be action-type driven. Mass tort comes to mind. So we have not really considered any of these issues specifically discussing in terms of action types. Yet that is very important. The general discussion loses relevancy if it is so general as not to focus on action types or where the money is or where the money is not. That is part of the issue.

On the prior issue, we have focused on ADR, which seems so fundamental that it should be included in the vision issues.

**RUSSELL G. PEARCE:**

It gets to go up-front. The role of ADR. Okay. Does anyone have some proposals on multi-jurisdictional practice in light of the Internet.

**COMMENT FROM THE AUDIENCE:**

A key is that the regulation of both of those items as well as the delivery system, that is to say, the Internet or something like the Internet, have to be bound together. That in some arbitration form or fashion, the marketing for services that you agree to submit to a formal arbitration, the regulation, the competency and the re-evaluation of the system as a result of which you can potentially, I would not say avoid, but make an end run around, the parochial regulation of delivery of these typically state-regulated forms of services.

**RUSSELL G. PEARCE:**

The regulation and the use of the Internet need to be tied. If a lawyer uses the Internet, he has to submit to certain types of regulations.

**DAVID WARNER:**

A radical profession should abandon the profession that needs to be regulated.

**RUSSELL G. PEARCE:**

Regulate like a business.

**COMMENT FROM THE AUDIENCE:**

We are just afraid. We have different capabilities in delivering legal serv-

ices. It is not a profession which should be bound by ethical consideration. We should unbundle licensing considerations. It is just a trade, deliver a particular kind of service.

**RUSSELL G. PEARCE:**

There are non-professions. We regulate ourselves. There is the guild idea. Plumbers, for example — I do not want to denigrate the legal profession — plumbers are regulated. So are you saying is it the Milton Friedman approach, no regulation? Or are you saying regulate like other providers of goods and services.

**COMMENT FROM THE AUDIENCE:**

Other providers of goods and services have regulation, that is sort of medium step. It was simply a radical suggestion to put on a board of proposals. No one is necessarily advocating it.

**RUSSELL G. PEARCE:**

Since I think that is crosscutting, we will put that up here. I am guessing part of what you mean by that is, it is regulation by the legislature, for example, the executive of the judiciary. Providers of goods and services.

Let me at least add what I heard yesterday's suggestion as being. I am looking for inconsistent proposals for findings. We are not resolving anything here. We are just developing ideas. So one proposal is national regulation of lawyers.

**RICHARD ZORZA:**

Let me modify that. I would certainly be very comfortable with a rule that basically states that permission to practice in court is regulated at the state level. Admission to practice in any state constitutes authorization to engage in transactional practice in any state of the union.

**RUSSELL G. PEARCE:**

Court admission, state regulated, transactional, any state respected by others.

**RICHARD ZORZA:**

That leaves open the question of does that model have some political strength to it because it actually preserves the concept of state regulation, state structuring, state advantages to local lawyers, you know. But also deals with the reality.



**HON. BOB HEINEMANN:**

Bob Heinemann, New York Eastern District Court. I think bar associations - national, state, and local - have to play a very strong pro-active role in all of this, particularly when we talk about potential legislative changes. Really what we are talking about is almost lawyers without borders. How we link having access to information that is without really being able to deal with a legal problem without competent legal advice? What does that mean? How do we link these in a way that does not take advantage of a person. Otherwise a person can, by analogy, go to a pharmacy and write their own prescription and fill it? I think I am stating kind of the obvious. I am not sure which side of the flip-chart it is on. Where the bar association really needs to get very heavily involved in this, not in terms of referring out business to bars and specialties, but to change the way lawyering is approached and the state and federal regulations that may impact on that.

**RUSSELL G. PEARCE:**

I am looking for concrete proposals. You have identified an issue that is worth repeating. We heard yesterday and today about the lawyer sitting in the Bahamas and giving advice in New York or wherever. The notion that it is not just clients who are without borders, it is lawyers without borders. Not just a big firm, but through the Internet, anybody can be a lawyer without borders.

**COMMENT FROM THE AUDIENCE:**

The ABA Multi-jurisdictional Practice Commission has essentially drawn the line on temporary practice. The "FIFO" exception would be authorized under their proposal. They would prohibit two things: A lawyer engaging in a permanent, continuing presence in a state who is not licensed in that state, and a lawyer holding herself out as being licensed in a state when she is not.

**RUSSELL G. PEARCE:**

The ABA Multi-jurisdictional Practice recommendations, should be on the list as one of the ways to think about how to deal with this.

**COMMENT FROM THE AUDIENCE:**

I want to expand upon what Professor Zorza said: It is not only access to courts in the state in which a lawyer is licensed. If a lawyer is licensed in any state, she can do transactions anywhere. But the lawyer also worries about licensing restrictions where state law would govern a particular transaction; for example, opinion writing. There are certain transactions that raise court access issues. I do not appear in court, for example, on a closing. But I may have to write an opinion on enforceability under New York law.

**RUSSELL G. PEARCE:**

Can you make that into a proposal?

**COMMENT FROM THE AUDIENCE:**

The regulation should allow national or non-state specific transactions to permit licensing in any jurisdiction to practice law nationally, other than when you need to appear in court or when you need a state specific knowledge of particular laws.

**RUSSELL G. PEARCE:**

Then let me ask you, why would you always? Why if I am a New York lawyer and I am representing a corporation that is doing business in Iowa and a transaction is occurring, Iowa law is going to be relevant there, right? Once you say state-specific law, we are back to where we are today or pretty close. The whole question is, can New York lawyers interpret and apply New Jersey law, or should they be required to be physically in New Jersey?

**COMMENT FROM THE AUDIENCE:**

Malpractice insurance is a ticket to practice in another state.

**RUSSELL G. PEARCE:**

Okay. Malpractice insurance as a ticket. The next topic is unbundling. We are looking for unbundling issues and unbundling proposals. We talked about a number of them earlier today that we would like to put up here on the board. Unbundling issues? Yes?

**COMMENT FROM THE AUDIENCE:**

Educating the providers. None of us are going to work unless the legal profession understands.

**RUSSELL G. PEARCE:**

Okay. Educating the providers. Go ahead.

**COMMENT FROM THE AUDIENCE:**

Educating and evaluating the client or potential client.

**RUSSELL G. PEARCE:**

Educating, evaluating client.

**COMMENT FROM THE AUDIENCE:**

Client's ability to be a general contractor for that case.

**RUSSELL G. PEARCE:**

Okay. I will throw in one. One of the threads I heard goes to in part to Cathy's second tier concern here: Are unbundled services inherently less than competent?

**RICHARD ZORZA:**

Another issue is training the judiciary to make good use of unbundling. And another issue is working with the insurance providers to make sure that they are providing coverage.

**RUSSELL G. PEARCE:**

Yes?

**LESLEY FRIEDMAN:**

Proper management and supervision.

**RUSSELL G. PEARCE:**

Management and supervision of the providers?

**LESLEY FRIEDMAN:**

Of the overall matter considering that individual providers may be providing unbundled services.

**RUSSELL G. PEARCE:**

Management supervision of the providers. Okay. Other unbundling questions?

**COMMENT FROM THE AUDIENCE:**

Related question to the one you asked, "Is unbundled legal service less than zealous?"

**RUSSELL G. PEARCE:**

Less than zealous or competent. All right. Do we need to change the rules or the code to permit unbundled services? I was glad to hear Gary's comments earlier about how the New York code does not really address unbundled services. Having done the search myself over the last few days for a CLE that I taught yesterday it was not called unbundled. It was called brief services. Are there changes that are necessary?

**COMMENT FROM THE AUDIENCE:**

Liability of the provider of an unbundled service.

**RUSSELL G. PEARCE:**

Liability of provider. Right. This very much connected with moving toward, as we heard Richard earlier, different kinds of models. Our notions of malpractice tend to assume one way of providing services which requires investigation of the client's matter and which may not be consistent with unbundled services.

Okay. What are some proposals for unbundled service?

**COMMENT FROM THE AUDIENCE:**

I would define the relationships that would allow them.

**RUSSELL G. PEARCE:**

Define where allowed.

**COMMENT FROM THE AUDIENCE:**

In what circumstances can they make sense? It may not be a bright line in the beginning. There are some that are clearly okay and some that are clearly not. It is that middle ground that is going to take awhile to sort out.

**COMMENT FROM THE AUDIENCE:**

Define the goals of unbundled services across settings. In court we have access to governmental programs and governmental rights, administrative hearings, whatever.

**COMMENT FROM THE AUDIENCE:**

Clarify whether or not services are ethical. Clarify whether or not there needs to be a rule change? And also insurance carriers clarifying exposure issues.

**RUSSELL G. PEARCE:**

Clarify ethics and insurance issues, clarify and resolve.

**RICHARD ZORZA:**

I do think actually the Ethics 2000 language should be looked at as a start. The main issue is that the comments are inadequate to the kind of diagnostic process needed to determine reasonableness and informed consent.

**RUSSELL G. PEARCE:**

Consider Ethics 2000 proposals with a view that the comments are not

adequate with regard to diagnosis and informed consent.

**RICHARD ZORZA:**

Diagnosis in order to add to informed consent and reasonableness. And then I would specifically point, I do think the 6.5 conflict enigma is a very good one. The question should be considered as to whether it should be considered beyond the non-conflict context.

**RUSSELL G. PEARCE:**

Profits. Actually I have to say this was a question that came up in CLE, for lawyers doing pro bono work. One of the lawyers asked why he had certain kinds of protections if he did work for the court, for example, if he did work for a legal service provider, but not for work his firm is doing pro bono.

**COMMENT FROM THE AUDIENCE:**

When I was in graduate school, there was a concept that they floated to explain why certain questions were looked at a certain way and why other questions were unasked. The idea was that we all come in to situations with mind-sets. The mind-sets are formed by our beliefs. They are formed by our experiences. There are probably many factors. But what it provides or what it produces is a certain way of looking at things.

We do not go outside of that frame of reference. In order to truly have good research, good academic standards, we needed to identify those mind-sets at the outset so that we could take heed of them and provide for a more balanced approach. You do not want everybody in the same mind-set.

Especially with unbundled programs, we need to be very aware of and we need to ask the people who are leading the policy decisions, what the frame of references are that they bring to the solutions so we can be assured that there is a very broad base of experience and views looking at the problem, defining what the problem is, and looking at the potential proposals.

**RUSSELL G. PEARCE:**

Is this general or unbundling? You want to make this general?

**COMMENT FROM THE AUDIENCE:**

It can probably go either way.

**RUSSELL G. PEARCE:**

The question that came up earlier: Are we all talking about this as if we are lawyers? We are not thinking of non-lawyers. We are not thinking of consumers. We are thinking of ourselves. That is our frame of reference.

**COMMENT FROM THE AUDIENCE:**

For example, many of the studies never had women as subjects up until the 1960's because nobody thought of asking women or looked at women's issues.

**COMMENT FROM THE AUDIENCE:**

One proposal that tacks on Anthony's ideas of empirical research on the unbundling, preserve the client-consumer's point of view, with electronic tools we can do that now. Whether they like it, whether they do not like it. Why do they prefer us to lawyers? Why do they not regret not having lawyers? We need more examination of that.

(WHEREUPON, A LUNCH RECESS WAS TAKEN).

**RUSSELL G. PEARCE:**

What I did is to post what we already have on the wall so you can look at it. Non-lawyer preparation of documents and giving advice. It has some similarity to some of the issues that come up in unbundling. I guess the first question, of course, is quality. Then there is protection of consumers and the issue of consumer choice. Other issues? Yes?

**CATHERINE J. LANCTOT:**

I would add constitutional issues. There will be two, one I mentioned yesterday and one I did not. One is freedom of speech. The other is state actions that interfere with interstate commerce. I think that could be an issue with respect to any kind of regulation's activity.

**RUSSELL G. PEARCE:**

Other issues? Yes?

**COMMENT FROM THE AUDIENCE:**

I think there is an issue of risk-benefit, which relates to quality. It actually relates to the other subjects that we discussed, inasmuch as we want a high standard of quality. But at the same time, to what extent is the larger public being served by the online material? Is it an acceptable risk to have somewhat less than perfectly-framed forms and documents that serve a wider public and, as a practical matter, will not be the subject of contest?

**RUSSELL G. PEARCE:**

Is the risk acceptable given the increased access to legal information and services? Okay. Last issue.

**COMMENT FROM THE AUDIENCE:**

Confidentiality.

**RUSSELL G. PEARCE:**

Confidentiality. I take it that means, duties of confidentiality and, practically speaking, what happens. There was one more.

**COMMENT FROM THE AUDIENCE:**

This is actually tied to what the gentleman said about the public interest. Is there a public interest in either having or not having non-lawyers?

**RUSSELL G. PEARCE:**

Let me spend a moment on confidentiality. The more general question is the application of ethics. It is similar to the question regarding non-New-York lawyers. Application of ethics rules or values and regulation. So it is confidentiality, loyalty and conflict.

**COMMENT FROM THE AUDIENCE:**

Privilege.

**RUSSELL G. PEARCE:**

Evidentiary privilege. How do all these issues work where non-lawyers are providing documents, preparing them and offering advice? This is another one of those areas where it is either a crime or effectively there is no regulation today. All right.

What are some proposals with dealing with these issues? We are not resolving it today. I just want to get some proposals out.

**COMMENT FROM THE AUDIENCE:**

Differentiate providers, physician-physician assistant model, supervision over non-attorneys.

**RUSSELL G. PEARCE:**

Okay. Differentiate providers, e.g., physician assistant. Back in 1986 the ABA Commission on Professionalism made a proposal similar to this which was soundly rejected by the ABA House of Delegates.

**COMMENT FROM THE AUDIENCE:**

Proposed tort liability for improper advice.

**RUSSELL G. PEARCE:**

Tort liability. Yes?

**LESLEY FRIEDMAN:**

Common theme, education of the consumer.

**COMMENT FROM THE AUDIENCE:**

Permitted lawyers to affect the quality of non-legal services by allowing client-consumers to partner with them in the delivery mechanism.

**RUSSELL G. PEARCE:**

Improve the quality. I think that is the sense of what you are saying.

**RICHARD ZORZA:**

Many of the problems dealt with the courts providing these services. To the extent that the technology becomes a matter of making service available at zero margin cost, that becomes an option. The impetus is for the court providing these services. These drive out the poor quality providers who are perceived as a threat.

**RUSSELL G. PEARCE:**

Court should provide these services through technology. Yes?

**COMMENT FROM THE AUDIENCE:**

Again this is an area I think you need far more research in a far more disciplined approach to see what are the consequences of the services that are being provided as we speak.

**RUSSELL G. PEARCE:**

Empirical research on consequences. Richard or Cathy mentioned some of this. One statistic left out. I thought there was a study in California of client satisfaction. It shows that clients of non-lawyers for legal service have a much higher level of satisfaction.

**RICHARD ZORZA:**

That was actually with the courts.

**RUSSELL G. PEARCE:**

The notion that empirical research can be very helpful here.

Let us move on to the next topic. Maybe we addressed it already. The fee sharing issues. Non-lawyer fee sharing issues. We had a presentation. That is why I put it up here. We already discussed some of the issues above. There was



a suggestion that lawyer partnering be allowed. Anybody else have something to add to the notion of lawyers sharing fees with non-lawyers through Internet?

**RICHARD ZORZA:**

This is where the issue I talked about this morning about the risk of monopoly control of a profession by intermediaries who are providing the tools is really going to be focused. Indeed this is the place where the online legal providers, many of whom have burned through all their money, now have a problem with this. We went through huge efforts to create ingenious structures to get around fee sharing requirements. What that says to me is, it is a regulatory opportunity if we actually figure it out.

What we want to do is permit fee sharing in order to build the system we want. Because the control we have over the system is through fee sharing. Instead of looking at fee sharing as a danger, we should see it as our opportunity to make sure that the partnership between lawyers and non-lawyers goes in the right direction. Given the level of investment that is needed to set up the kind of system that will provide the technological system, we have got to have some kind of fee sharing. This is a barrier to access to justice right now.

**RUSSELL G. PEARCE**

Let me break that into two issues. One is risk of monopoly control of intermediaries. The other is whether the level of investment requires fee sharing. The two are related. Level of investment leads to monopoly. And investment provides access to justice and access to services.

**RICHARD ZORZA:**

We have got to come up with a structure in which the attorney revenue can get into the investment pool.

**RUSSELL G. PEARCE:**

Okay. Yes?

**COMMENT FROM THE AUDIENCE:**

Maybe just looking at the fee sharing and fee splitting to see if there is a difference and how it applies. We heard yesterday about lawyer fee splitting. This might be an interesting analysis.

**RUSSELL G. PEARCE:**

Yesterday's presenter also suggested revisiting lawyer fee sharing rules because he was suggesting that they are basically ignored right now. Yes?

**COMMENT FROM THE AUDIENCE:**

I just want to raise a point. I am not sure I am objecting to the specifics as much as the principle.

The only other model where intermediaries play a part because of investment, that I am aware of at least in the recent past, is the medical world. Nobody is happy with the medical system and the level of costs and fees. When you start to raise an intermediary that splits fees or that purports to make the investment to make the system more accessible, it may in fact be more of a danger to the system. The cure maybe worse than the disease.

**RUSSELL G. PEARCE:**

Look at models in other professions, e.g., medicine. And in other countries. Yes, Chris?

**CHRISTOPHER E. CHANG:**

Augmenting bar association attorney referral services. I think what has occurred is that the non-lawyer companies are filling the individual need for online referral services because bar associations have not for a variety of reasons, including finances. We do not have the system in place where a consumer will, in the first instance, look to a bar association for the referral of an attorney. So, to that extent bar associations, whether they be county bar associations, state bar associations, minority bar associations, gender group associations, whatever the case may be, should augment their referral services. As a consequence, the word would start to get out to the public that the first place to look for a lawyer, as oppose to calling a friend, is to consult the bar association. It leads within the profession to lawyers operating that referral service.

**RUSSELL G. PEARCE:**

Augment and improve bar referral services. Part of Milton Friedman's critique of professions goes to this notion of referral services and his view in the market that a referral service is a valuable commodity. Private referral services would actually come up.

What you are suggesting is to keep the approach we have now: Improve what we are doing through the bar.

**LESLEY FRIEDMAN:**

Alternatively, if we were to shift to more of a free-market-type model, we would want to make sure that there was full disclosure, and that the ethical rules provided for full disclosure of any type of fee sharing arrangements.

**RUSSELL G. PEARCE:**

Requiring full disclosure.

**ALLEN CHARNE:**

Al Charne. I am the director of the referral service for the Association of the Bar of the City of New York, which is the largest one in the country. The disciplinary rules need substantial overhaul in that area since bar associations are not defined, and there was a referral service that we started that was not approved by any bar in New York State that was a private group. The way the rules read now, even for bar associations, there is no regulation that a bar association meet any quality standards; for the city bar, there are ABA standards. But there is no requirement in New York that any such standards be met by a particular bar association.

**RUSSELL G. PEARCE:**

Let's say to revise the rules to apply quality standards. Just to get the issue out there as well, revise the referral rules to permit private referral. Yes? David.

**COMMENT FROM THE AUDIENCE:**

Liability issue. Adding liability for referrals.

**RUSSELL G. PEARCE:**

Liability for referrals. That is the tort part. Add ethics implications as well. Liability, tort liability and ethical duties.

The next issue is advertising, one of our last two issues. So, issues for advertising? One is related to the MJP issues. Right. It is the question of lawyers from New Jersey whose web sites are making their way to New York computers. Then there are also non-lawyer issues. So, again, this void. The non-lawyers who advertise like the New Jersey lawyers who are not covered by existing regulation other than criminal prosecution, which really is not happening.

Yes, Gary?

**GARY A. MUNNEKE:**

When should truthful communications be prohibited?

**RUSSELL G. PEARCE:**

Good issue for the Supreme Court. I have to say with regard to the way you described this issue in your opening talk, the Supreme Court is one justice away from giving Justice O'Connor a majority overturning Bates. If I was going to bet, I would bet that President Bush will appoint someone who does, if somebody from the pro Bates camp retires. To get beyond the short answer, Bates is

a decision that says states cannot constitutionally prohibit lawyer advertising. Actually I think it is a total of four justices who now believe that was a wrong decision.

**RICHARD ZORZA:**

Progress would reverse.

**RUSSELL G. PEARCE:**

That is possible. Frankly at this point, lawyers may not want to reverse it. The bar association and the disciplinary authorities may not want that. This question of when to prohibit truthful communications is an important one today, and may be even more important a few years from now.

Other issues for advertising? Yes.

**CATHERINE J. LANCTOT:**

Record-keeping. Regulation of existing ads on the web sites where the traditional requirements of keeping copies does not apply. Record-keeping for regulatory purposes, I guess.

**RUSSELL G. PEARCE:**

Record-keeping and regulation of web sites. This whole issue that Gary was discussing in his presentation about "neither fish nor fowl." To look at what exactly is a web site in terms of record keeping and other aspects of regulation.

Yes, Gary?

**GARY A. MUNNEKE:**

Institutional advertising, the profession. During the Superbowl, the AICPA had spots telling people how great it was to use a certified public accountant. In the wake of Enron, I think maybe that was a good use of their funds.

**RUSSELL G. PEARCE:**

All right. Bar advertising. All right. Proposals? Yes?

**LESLEY FRIEDMAN:**

We got a major privacy issue here. It was brought to light by the drunk driving lawyer who asked for permission in advance to have the client's name and blood alcohol level posted on his web site if he was successful in winning their case.

Also there are issues about cookies and placement of "gif" files and other tracking mechanisms.

**RUSSELL G. PEARCE:**

Until the recent Florida Bar situation this really was not on the Supreme Court's agenda in terms of the kind of argument for regulation that would promote regulation of lawyer advertising. Now it clearly is. Yes?

**COMMENT FROM THE AUDIENCE:**

In terms of institutional advertising, the courts themselves all now have their own web sites, including local courts. They are competing in certain respect with the private providers in terms of information and in terms of case tracking and services. I think that is something to be looked at.

**RUSSELL G. PEARCE:**

That is a great issue. We are going back to the other page, when Richard was talking about the courts making all the services available. One issue that does arise is the person who might hire a lawyer, but then figures, he can go down to New York State Supreme Court and the court personnel will just lead him through it. He does not need a lawyer. That is the implication. Is that a good thing or bad thing? Yes, Chris?

**CHRISTOPHER E. CHANG:**

The medium of the Internet, what type of medium is it? That is an issue. It is broadcast? If it is not, then what is it?

In the context of existing disciplinary rules in the various states with respect to advertising, from what I have read, that they are presently structured on the basis of making a determination on what kind of medium it is.

**RUSSELL G. PEARCE:**

It is similar to the web site, but you have broadened it. Define the Internet as a medium. Do existing rules apply? Are new rules necessary? Those are great questions.

Okay. Proposals? We have a blank page here. Yes?

**COMMENT FROM THE AUDIENCE:**

Require lawyers to state where they are admitted.

**RUSSELL G. PEARCE:**

Require lawyers to state where admitted. Any other proposals?

**CHRISTOPHER E. CHANG:**

Mike Ross, said that advertising is advertising. Disclosure, full disclosure of everything, whatever you can think of.

**RUSSELL G. PEARCE:**

Full disclosure.

**COMMENT FROM THE AUDIENCE:**

Wait and see. Let the Internet develop. Then regulate what needs to be regulated.

**CATHERINE J. LANCTOT:**

Take a look at what states, Florida and Texas, the states that have regulated the Internet, take a look at what they have done. See if the same policies would benefit New York.

**RUSSELL G. PEARCE:**

I guess we should retroactively amend the other proposals when we say look at other countries, look at other professions, also look at other states. This is one of those areas where I think the ABA has a great clearing house on professional responsibility. Any other proposals on advertising? Okay.

Then that takes us to ODR. All right. ODR issues? Some of them are going to be the same as the sort of the MJP and non-lawyer issues, right? Anybody want to raise specific ODR issues that need to be dealt with? Yes?

**COMMENT FROM THE AUDIENCE:**

This is really a practical issue. The problem with submitting physical evidence online.

**RUSSELL G. PEARCE:**

This may be cured by that machine where you can put in an exhibit and it gets copied. Virtual submission of exhibits.

**COMMENT FROM THE AUDIENCE:**

Physical evidence.

**RUSSELL G. PEARCE:**

Got it. Physical evidence.

**RICHARD ZORZA:**

Coerced consent issues.

**RUSSELL G. PEARCE:**

Coerced consent. All right. Yes?

**LESLEY FRIEDMAN:**

On that same topic, competency of consumers to administer their own claims.

**RUSSELL G. PEARCE:**

Competency of consumers. But also consumer choice. Yes?

**COMMENT FROM THE AUDIENCE:**

This goes more to the arbitration online than mediation. Who is the arbitrator? Conflict issues with the transparency, you do not know anything about the person.

**RUSSELL G. PEARCE:**

Actually I think it could go to mediators as well. Who is the mediator? You want to make a proposal with that regard?

**COMMENT FROM THE AUDIENCE:**

It would be disclosure.

**RUSSELL G. PEARCE:**

Full disclosure of who the neutral party is. Okay. Yes?

**COMMENT FROM THE AUDIENCE:**

Role of the courts, the judicial system. Everybody is assuming that these dispute mechanisms are outside the traditional judicial system, when with technology there may be a role for the court to play.

**RUSSELL G. PEARCE:**

Should the judicial system employ them? The other is, how should the judicial system respond?

**COMMENT FROM THE AUDIENCE:**

The question is arbitration, mediation typically have been outside the traditional judicial system. The question is whether or not technology either should or can change that mix of what goes in or outside the court system.

**RUSSELL G. PEARCE:**

Okay.

**RICHARD ZORZA:**

There is a position, for example, which is that the only people who can go into truly private, non-court systems are those who freely consent, right after the

event. But that if the consent is coerced or there is implied consent, actually it has to be something within the court system. It still an ADR-type system. There is a big distinction between what we should allow between true consent and implied consent.

**RUSSELL G. PEARCE:**

Do you want to make that a proposal, only permit with full and informed consent?

**RICHARD ZORZA:**

I would say, yes. Only permit non-court privatized service, with informed consent, right after the event. Because informed consent is meaningless, right. It is truly voluntary.

**LESLEY FRIEDMAN:**

I think, Richard, just to put the finer point on it, perhaps regulate what constitutes full, knowing and voluntary participation.

**RICHARD ZORZA:**

To me it is after the dispute, consent before the dispute is a risk. When both parties agree that this is the way they want to resolve it, they will do that. But the problem right now is that consent is obtained before the dispute has arisen, which reflects the balance of power at the time of the entry on the line transaction.

**COMMENT FROM THE AUDIENCE:**

Any difference between online dispute resolution and conventional arbitration that makes post accrual consent necessary, whereas in the world of regular arbitration it is not? It has to be voluntary. It has to be genuine.

I have sat probably in forty arbitrations as an arbitrator in the last year. All of them involved arbitrations that took place in the context of contracts that formed the deal, not after the deal had come apart.

**LESLEY FRIEDMAN:**

That is a fair point. I tried to raise it a bit yesterday in saying there is fine print to the contract. Then there are those little privacy notices and legal notices where you actually have to click through to get to the point where you understand. "You have been told that you agreed to submit your dispute to arbitration." I think there may in fact be a distinction when you have to click a few times on buttons that are statistically highly unlikely to actually be clicked, scroll down and read what it is you agreed to.



**RUSSELL G. PEARCE:**

I think this is a good issue to keep for consumers, and perhaps you have a different kind of issue on the Internet. I certainly sign a lot of forms, like car rental forms that are lengthy. And I do not always read them. They could include an agreement to ADR, and I would not know. Same way when I install software, I agree to everything.

**COMMENT FROM THE AUDIENCE:**

I have a concrete suggestion in that regard. Most federal and state courts have some ADR programs now. They usually have local rules and guidelines. Those need to be revisited from time to time. Which means the local rules committee needs to address some of these issues that the Internet and online legal information raises to see where those rules need to be tweaked. In some cases, the rules may have to be fully amended to add additional provisions in media and other alternatives.

**RUSSELL G. PEARCE:**

Revisit local court rules. Yes?

**COMMENT FROM THE AUDIENCE:**

Privacy and confidentiality issues, particularly in arbitration, which in live situations, are much more confidential and private, or should be, than those which are now online.

**RUSSELL G. PEARCE:**

The whole set of ethical issues governing ADR providers. My understanding, is that it is a real patchwork right now. Then the question is: Do we want to make sure that ethics rules for ADR providers apply to ODR?

**COMMENT FROM THE AUDIENCE:**

Are consumers really realizing that if they do online ADR, that there may be confidentiality issues that are completely different than if they engage in face-to-face ADR?

**RUSSELL G. PEARCE:**

So disclosure to consumers regarding privacy and confidentiality. Yes?

**COMMENT FROM THE AUDIENCE:**

This is unique to ODR. The issue of authentication of who exactly a person is dealing with as the mediator/arbitrator. A person should know if she is simply exchanging information via an impersonal, third-party medium. The proposal would be to insure authentication.

**RUSSELL G. PEARCE:**

We talked a little bit about authentication of the neutral. But I guess this would even extend authentication to the opposing party as well. By authentication I guess means more than just disclosure. Legitimate the neutral.

**COMMENT FROM THE AUDIENCE:**

Security issues.

**RUSSELL G. PEARCE:**

Authentication of the neutral and the other party. Add here security issues too. Yes?

**LESLEY FRIEDMAN:**

Accessibility should be listed as an issue. I think that accessibility is actually potentially quite enhanced under an ODR model than even under an ADR model. If you agree to buy something on eBay from somebody halfway across the country, and it turns out not to be what you bargained for, I think people are much more likely to engage in a square trade transaction to square it up with the person than to go down to small claims court and try to file their papers pro se. In some ways from a cost point of view and from a physical access point of view they are better off engaging in ODR with somebody in Kansas than trying to take somebody, their next door neighbor, to small claims court.

**RUSSELL G. PEARCE:**

I will add a proposal to encourage ODR where appropriate. I think that that does it. Great. Good job, everybody. Thanks.

**LOUIS A. CRACO:**

Speaking of good jobs. I live out on Long Island. You will remember the event. A couple of weeks ago, we had a horrific thunder, lightning and wind storm. I have some woods in the back of my property. Sometime around eleven o'clock at night, the lights went out. Some trees went down out in the woods. So I ventured out in the woods to see if I could find out what was going on. I found out that there was a tree down. As I wandered through the woods I thought I knew, I found myself in several thickets of wild rose bushes tied up. There was a live wire out there someplace, and I was not quite sure where.

The day after I extricated myself from all of this I discovered that there had also been a large patch of poison ivy out there. I resolved to myself I would never get myself in such a situation again.

Why that story comes to mind in this context, I am not quite sure. But it does seem to me, as I review what has gone on over the last few days, I not only

got myself in a thicket of thorns with live wires and all sorts of natural and unnatural traps, but I have led some of my good friends into it as well.

I want to thank you all very much for having come to participate in it. As a penalty for your generosity, I want to, assure you that your contributions are not over. Having gotten into the thicket, we are going to need your help as we try to find our way out.

First let me tell you what I think we are going to try to do here as a matter of process. The Institute's style is to operate working through working parties comprised of its members. We do not have a huge staff. We borrow our staff from the court system. While they perform heroic work for us, we are not a staff model organization. We are much more like the ABCNY committees.

Chris Chang has chaired the committee that has been working on this issue, and will continue to work on this issue. Chris, I want to thank you in front of everybody for the work that you have done in putting this initial event together.

We are going to reinforce that committee of members with some other people who reflect our style, which is to try to bring together the academy, the practicing bar, the judiciary and relevant lay constituency to advise us on what we do. What we are going to try to do is study the issues that have been identified by this conference with a view towards, as I said at the outset, producing some recommendations for possible action in the State of New York because of their importance and resonance within the legal community. We will look at Texas and we will look at the other states. We will look at the State of Washington, because all of those exemplars have things to say to us.

I want to suggest two things that I think are important as we proceed with this work and as we invite various of you to collaborate with us. You might know that they form some sort of a frame of reference for you.

It is really intriguing to me how consistently in all of our work, and this is perhaps the fourth project that we have launched, the question comes up of who are we as lawyers. The profession is collectively at a point of identity crisis, which is precipitated not only by commercialization and the Internet, but by a whole host of other things. All the efforts we launch, whether we are talking about the Internet or whether we are talking about orientation of young people into the legal profession, a project John Gross is heading for us, whether we are talking about the morale of young lawyers in the first seven years of practice, which will be the subject of a convocation we will convene in November of this year, all of those issues find at their heart the question of who do we think we are, after all - a question that was radically put earlier.

I suggested at the outset that I thought that the hallmarks of our profession, whatever else might properly be included in the definition of it, included the notion that we were learned, that is, that we had special skill and craft; that we were helping, that is, that we gave assistance and service to people; and that

we were publicly regarding, that we were inherently involved in all the work we do, in all the private practice we do in a public enterprise. It struck me as the conversation went on in all of this, that Internet providers, lay and otherwise, provide help. There are various kinds of skills and craft that we profess to have a monopoly on, and arguably we may not be entitled to that monopoly in any kind of efficient as distinguished from self-protective sort of way. But the thing that probably does distinguish us in certain ways, and that we have to keep in mind as we progress, is our role as a public profession. I do not mean the question of whether transactional lawyers blow the whistle on their clients who do bad things. I am talking about the fact that not only in gaining access to justice in the courtroom where the public character of the legal profession is conspicuously on display, but also in doing the leases, in doing the car rentals, in doing all those other things, provide in a variety of ways the application of a particular kind of judgment that in the aggregate builds up the rule of law.

If you do not think that the rule of law as a value is important to American society, I invite you to just think about two things: the insistence with which our State Department argues to China or Russia or other places around the world that the establishment of a regular form of rule of law that allows reliable planning of private transactions is indispensable to an effective economic network. Secondly, the fact that we and, I think, Cathy, if you do the homework I gave you, you will see I said this before — the fact is that we have a unique role I believe in the American social contract, we lawyers. We manage all sorts of tensions that are inherently built into the American democratic experiment in a way that is unique from what happens in France or Greece or Germany or any place else. We are the only deliberately-formed polyglot democracy ever attempted on the face of the Earth.

As we get more diverse, as our population becomes more diverse, as the competing claims of our people become more diverse, the single thing that binds us as a civic community is an adherence to the notion of a rule of law, a communal consensus that we believe there is a value to adherence to law.

We lawyers in our private practice have, I am afraid, come to the crisis of identity because in part we have not had the imagination to seize upon that value that we contribute, not to individual clients one by one, but in the aggregate, as the basis for why we do what we do. We are working on that in orientation and other things to try to convey to people and to ourselves what it is that makes us different. What it is that makes us different may have some implications for how we examine all of this.

It is very hard to regulate against harm to perceived values unless, first of all, you know what the values are that you are seeking to protect. We have to be both publicly responsible and unselfish in our definition of what those are. We are going to ask your help in doing that.

The second thing I want to pick up on is one that has been mentioned on

many of these summary sheets, and that is the necessity for empirical evidence of some sort on a whole bunch of things.

As I mentioned at the beginning, I have spent a good part of my career representing the accounting profession. I filed amicus briefs in the Florida case *Edenfeld v. Faine* in which the court instructed us that you had to not only identify the ideals which the regulation of commercial speech was trying to protect, but you also had to show that the harms you conceived were threatened were real.

I do not know how to find out whether the harms we have been talking about here are real. I suppose one can intuitively say that Marcus Arnold is a threat to people. But what about someone who is not a 15-year-old semiliterate person in California "faking it", as the title of that story had it, but somebody who is in fact a reasonably well-informed lay person: what harm do they do? What, concretely, are the things we are trying to protect against? And how do we know that they are, in fact, harm?

There is very little scholarship on that issue at the moment. There have been some references to things in the last couple of days that have been done on that subject. We would like anybody who knows work that has been done on that subject to help us with it. We cannot proceed by intuition and reflex here. We have to have evidence that will support a definition of the harm, such that the regulation that we propose is reasonably closely tailored to the actual threat. That is what we are going to be about.

I think we are indeed in a thicket but we hope to have something productive at the end of it. For your participation in getting us started, we are truly grateful.

I have to tell you that my gratitude is greatest to a woman who had the poor judgment to have lunch with me in the Four Seasons Hotel in Philadelphia several months ago, and has been singing for her lunch ever since, Cathy Lanctot, who not only has written on this subject, thought about this subject and spoken with us, but also has been the glue, the spirit and the advice behind this conference, and will continue to be. Cathy, thank you very much.

(Whereupon, the proceedings were concluded)

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## APPENDIX A

### VISION

<b>Issues</b>	<b>Proposals</b>
Increasing access to justice and legal information	Education to address quality
How attorney-client relationship arise?	Education of consumer
Are we moving to a two-tier system of justice? Are we there?	Evaluate regulation by test of access to justice
How the court system (including technology) influences the delivery of legal services?	Regulate like other providers of goods and service
Role of lawyers and non-legal providers in a modern information economy	Who regulates? How? What?
Freedom of choice and access for consumers	Empirical research, especially about non-lawyer experience in court.
How do we preserve and advance core values?	Simplify laws
Quality of legal services	100% access to lawyer for early evaluation
Define core values	Revise Code of Professional Responsibility
Define practice of law	Look at others countries/ professions
State boundaries and licensing Legal information vs. legal advice	Legal education - educate students on delivery and justice

## MULTI-JURISDICTIONAL PRACTICE

<b>Issues</b>	<b>Proposals</b>
<p>Relevance of state regulation, and the right to practice</p> <p>Is law practice national and international? To what extent? (Clients are not geographic, but courts and ethics rule are.)</p> <p>Competence outside licensed jurisdiction.</p> <p>Application of venue ethics rules to non-New York lawyers?</p> <p>Status of non-New York lawyers?</p> <p>Nexus between New York and non-New York providers authority, means to protect public, encourage access to justice.</p> <p>Importance of different action/practice area?</p>	<p>Regulation and use of Internet need to be tied</p> <p>National regulation</p> <p>Court admission–state regulation</p> <p>Transactional practice–any state</p> <p>ABA MJP recommendations</p> <p>Malpractice insurance as a condition to practice in the state</p>

## “UNBUNDLING” OF LEGAL SERVICES

Issues	Proposals
Educating providers Educating and evaluating client Are unbundled services inherently less than zealous or competent? Training judiciary Insurance providers Management and supervision of matter Need to change Code of Professional Responsibility Liability of provider	Define where allowed Define goals Clarify court access, etc. Resolve ethics and insurance issues Consider ethics 2000 proposals (comments not adequate, 6.5 good but extend beyond non-profits) Empirical research from client (consumer) view

## NON-LAWYER DOCUMENT PREPARATION/ADVICE

Issues	Proposals
Quality? Protection of consumers Consumer choice Constitutional issues: freedom of speech, commerce clause Is the risk acceptable given increased access to legal information/services? Privilege issues: confidentiality, conflicts Application of ethics rules/values Regulation Public interest	Differentiate providers, e.g., “physician assistant” Tort liability Educate consumer Allow lawyers to partner to improve quality Court should provide services through technology Empirical search on consequences

## NON-LAWYER FEE SHARING

<b>Issues</b>	<b>Proposals</b>
<p>Risk of monopoly control through intermediaries</p> <p>Given level of investment: fee-sharing, necessary to provide access to services</p> <p>Difference between sharing v. splitting fees</p> <p>Revisit attorney fee-splitting rules</p>	<p>Liability for referrals and ethical duties of e-partnering</p> <p>Permit fee sharing to build system we want; e.g., prevent monopolies</p> <p>Look at models in other professions (e.g., medicine and other countries)</p> <p>Augment/improve bar referral services</p> <p>Rules should require full disclosure</p> <p>Revise referral rules to apply quality standards</p> <p>Revised referral rules to permit private referrals</p>

## ADVERTISING

<b>Issues</b>	<b>Proposals</b>
<p>MJP issues</p> <p>Non-lawyer issues</p> <p>When to prohibit truthful communications?</p> <p>Define Internet as a medium? Do existing rules apply? Are new rules necessary?</p> <p>Record-keeping and regulation of web sites</p> <p>Bar advertising - court web sites</p> <p>Incentives to attorneys to build a website</p> <p>Privacy issue: posting client information</p>	<p>Require lawyer's state where admitted</p> <p>Full disclosure</p> <p>"Wait and see"</p> <p>Look at other states, countries, professions</p>

## ONLINE DISPUTE RESOLUTION

<b>Issues</b>	<b>Proposals</b>
<p>MJP/ Non-Lawyer</p> <p>Practical: submitting physical evidence (but see new technology)</p> <p>Authentication?</p> <p>Coerced consent</p> <p>Competency of consumers</p> <p>Consumer choice</p> <p>Who is arbitrator, mediator?</p> <p>Role of judicial system</p> <p>Privacy and confidentiality</p> <p>Ethical issues governing ADR providers</p> <p>Security</p> <p>Accessibility</p>	<p>Full disclosure of who the neutral party is</p> <p>Authentication of neutral</p> <p>Permit ODR only when voluntary consent is obtained. Define voluntary consent.</p> <p>Revisit local rules of courts</p> <p>Ethics rules for ADR to apply to ODR</p> <p>Disclosure to consumers re: privacy and confidentiality</p> <p>Encourage ODR when appropriate</p>





