

Dear Art:

Thanks for the opportunity to provide a written submission to the Task Force on the Model Definition of the Practice of Law. Please forward my comments to the chair.

As you know I have served as the Reporter of the Elawyering Task Force (described below) of the ABA Law Practice Management Section since its inception. Especially from the point of view of small firm practitioners and solos, I predict that the work of the Task Force has the potential of transforming the legal profession. A significant fact we uncovered that will force this change on the profession is that lawyers now have the choice of “renting” their technology and software from web service companies (known as ASPs or application service providers) rather than buying computers and software themselves. Outsourcing the technology function levels the playing field for solo and small firms who do not have IT professionals on their staff or a computer literate lawyer with large firms. The literature on technology outsourcing for the legal profession is filled with “chilling” stories of potential ethical problems – nevertheless, when properly deployed, outsourcing allows solos and small firms to compete globally and do so at a world class level with the large firms. I believe it is the bar associations’ duty to work with technologists and lawyers to address the ethical issues presented by technology in a positive way so that solos and small firms can outsource their technology function and know that we are acting in an ethically compliant manner.

Below, I am setting forth portions of my executive summary to the Elawyering Task Force of the ABA Law Practice Management Council so that the members of the Task Force on the Model Definition of the Practice of Law can benefit from our findings. I understand that our co-chair, Richard Granat, has also submitted a report, so there may be some redundancy for which I apologize.

“Executive Summary

“In the fall of 1998, American Bar Association President-elect, Mr. William Paul, asked the Law Practice Management Section of the ABA (LPMS) to create a Task Force to develop a program to assist the legal profession in serving the needs of moderate income individuals and families through the use of technology. The Task Force sought out the help and guidance of other groups, in particular, the ABA Standing Committee on the Delivery of Legal Services.

“The Task Force agreed to do several things during Mr. Paul's term of office:

- (1) create a web site to promote the use of technology in legal services,
<http://www.elawyering.org>.
- (2) hold a national invitational conference to unite key players in technology and Law,
- (3) recommend a long-range plan of action for the Association to assist lawyers to provide electronic services to clients of moderate means based upon the discussions at the National Conference

“The following is a summary of the key points discussed by members of the Task Force and participants of the National Invitational Conference held in March, 2000.

- The legal profession must determine how to connect underutilized lawyers with people who have unmet legal needs. Technology appears to provide the most promising solution.
- Other providers of professional services, such as the medical and accounting professions, are far ahead in using Internet technology to deliver their services.
- There is a possibility that a large segment of the legal profession, mostly solos and small firms, could be displaced by competitors providing legal solutions under the categories of “legal information services” rather than “legal services.” Under present regulatory schemes, only the latter category is subject to regulation, including the requirement that providers be licensed attorneys.
- The Internet makes it practical to treat some instances of what used to be considered service delivery as information transactions. As a result, some types of legal services will be commoditized. Numerous legal digital products have already been developed and are being offered on the Internet. Non-lawyers are providing legal and quasi-legal services over the Internet. This trend has grown dramatically, and will continue to grow.
- Artificial intelligence and expert systems, document assembly, hypertext, visualization and collaboration technologies are more sophisticated than they were previously. They have the potential to make revolutionary changes when deployed in combination with the Internet.
- The legal profession must reengineer the delivery of legal services in order to find new ways to deliver legal services in the Digital Age. Examples of these new Internet-based services include: client development (lawyer referral services), intake and screening, online advice and forms preparation, communications with clients, and on-line dispute resolution.
- Pricing choices will move from hourly rates to auction and reverse auction models, increased use of legal insurance models, flat fees for unbundled legal services and products, and free legal information with charges for complex work.
- Infomediaries, trusted third parties who will be venture funded and will develop legal technology, will begin to match lawyers with consumers who are searching the Internet for lawyers, and will provide "smart" technology systems to lawyers who utilize their services.
- The ethical framework for delivering legal services online is not in place, and many of the people who control this decision making process are not familiar with the impact that the Internet is having and will continue to have on professional boundaries.
- Ethical issues, which will have to be addressed to permit the innovations of the digital practice of law, include when the lawyer-client relationship begins, fee splitting, and the unauthorized practice of law.
- New technologies offer opportunities to enhance the values which the ethical rules are meant to protect including client autonomy (increased information gathering and

diagnosis), zealousness and loyalty (increased accountability), confidentiality (control), continuity (feedback and ongoing contact) and competence (training, resources and feedback).

- Lawyers will face increasing competition from other professionals, including accountants and MDPs, who may not be subject to the ethical rules. The unauthorized practice of law statutes will be hard to apply in an Internet context to combat these competitors.

“At the conclusion of the presentations, the Participants developed a set of strategic recommendations which were broadly divided into three areas: ethics and rules, technology and standards, and lawyer competency.

“The Task Force is continuing its efforts to help implement its recommendations. The web site (<http://www.elawyering.org>) will be a catalyst for building a “virtual community” of lawyers and anyone interested in law to showcase how Internet technology can be used revolutionize the delivery of legal services to consumers.”

Finally, I am attaching the introduction to a recent article I published with Peter Lepsch in the New England School of Law Journal which addresses the need for the profession to develop a set of global rules for the use of technology in a harmonized manner. As anyone can see from the conflicting legal rules which have all ready developed in the different jurisdictions addressing the global effects of the use of internet technology, every business, including law firms, act at their peril when they do business through web sites. What is lawful in one jurisdiction may be unlawful in another, and disclaimers on the web may not be legally effective. This chilling result is the unintended effect of the slow pace of jurisprudence in the face of rapid developments in technology. We live in a global world, and I believe it is up to the legal profession to develop ways to achieve global consensus on the legal rules which will govern our conduct, or some group other than lawyers will. We want to preserve the role of lawyers and the value we bring to society. To do so, we need to reinvent our profession for the times we live in.

Sincerely,

Jeffrey M. Aresty

ATTACHMENT

Professional Responsibility in a Global World: A Lawyer's Role Redefined in the Age of the Virtual Practice¹

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*The law is the last result of human wisdom acting upon human experience for the benefit of the public.*⁴

– Samuel Johnson

I. INTRODUCTION

Samuel Johnson's instructive words remind today's lawyers that experience must guide the transformation of the practice of law in the twenty-first century. Lawyers must draw upon our historic roots as the guardians of the rule of law and face the challenges of a changing world by finding new ways to practice law in the next millennium as a global online society emerges. As lawyers we must remind ourselves, our profession is nimble,

¹ Adapted from remarks by Mr. Aresty, NEW ENGLAND JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW SYMPOSIUM, "International Business Law: E-Commerce and the Impact of Globalization on the Practice of Law," NEW ENGLAND JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, New England School of Law, April 10, 2001.

² L.L.M., Taxation, Boston University School of Law (1979); L.L.M., International Banking, Boston University School of Law (1993); J.D., Boston University School of Law (1976). Mr. Aresty is Senior Partner, Aresty International Law Offices, P.C., Boston, MA (www.cyberspaceattorney.com), is former Chair of the Law Practice Management Section of the Massachusetts Bar Association and has served in several leadership roles in the American Bar Association in the fields of technology and international law. He is a co-founder of the ABA's premier technology forum and trade show, the ABA Techshow (now in its 16th year), a former member of the ABA Standing Committee on Technology and Information Systems and he is the co-editor of THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS (2D ED. 2000).

³ J.D. Candidate, New England School of Law (May 2002); M.S., The American University, Justice, Law and Society; B.A., Ithaca College. Mr. Lepsch is the Editor-in-Chief of the New England Journal of International and Comparative Law at New England School of Law (2001-2002).

providing society a steady-beacon in its foggiest hours. We must draw upon our collective experience to assure that rapid changes in society coincide with rapid changes in the law and social order. In the first decade of the 21st century, cyberspace will become the place where most of the world's business is conducted; and, a networked world will demand that a global legal architecture be put into place. As the mechanisms for making global law struggle to keep pace with changes wrought by the Information Age, the legal profession can and should be at the forefront of bringing about just rules of law to the electronic frontier. Law's historic opportunity is to transform itself and become global by meeting the needs of a new online society. The online community will look to private parties as well as to governments to develop rules of law for transactions occurring in cyberspace. Indeed, international law is no longer solely the rubric of the nation-state foreign ministries and state departments. The changing role and global nature of the legal profession also presents many new challenges and opportunities for the day to day practice of every lawyer.

No longer can American lawyers expect that their practices will be purely domestic. A growing proportion of business transactions involves foreign customers, suppliers, or joint ventures. As labor markets extend across national boundaries, employment agreements must cover foreign workers. International human rights norms are gradually intruding into criminal law litigation. Even in domestic relations practices, marital partners often take children across international borders. As securities markets go virtual, they also become inherently global. International business negotiations implicate public policy and therefore effective negotiators must be able to deal with public policy as well as business issues.⁵

⁴ SAMUEL JOHNSON, PIOZZI: ANECDOTES c.1750. (English, Author).

⁵ See HENRY H. PERITT JR. THE ABA GUIDE TO INTERNATIONAL BUSINESS NEGOTIATIONS, ix (2000).

What the legal profession can count on is that the technological developments of the past decade have connected the globe at mind-dizzying rates.⁶ Like no other time in recorded history do people possess the ability to communicate and share information and commerce on such a vast scale. Not only has technology enabled business opportunity and advancement, but also technology's allure forges civil society's demand that an interconnected world become the natural course of human interaction. The number of Internet users around the world topped 276 million in 1999, and as of August 2001 the world total number of Internet users rounded to 513.41 million. "The United States has the largest number of people surfing the Web - estimated to be 135 million by the end of this year - but the percentage of US users among those on the Internet is declining...Much of the growth in Internet users is taking place outside the US. Asia will see especially strong growth. China will become second to the US in number of Internet users by 2005. At the end of 2000, the US accounted for 36 per cent of total Internet users, down from 46 per cent in 1998 and 55 per cent in 1996."⁷

People with access to a computer, a browser and the Internet all over the world, make up the shape of this new society . A certain level of technical skill is required. One of the early views of the virtual world, which new society occupies, occurred in 1996. His Holiness the Dalai Lama gave an apt description of the online World's Fair, its visitors and the new and tremendous potential of this virtual world for the good of humanity. Vint Cerf, one of the Internet's founders, and Carl Malamud, a visiting professor at the MIT

⁶ See Richard Zorza, *The Emerging Tech Challenge to the Legal Profession*, 84 JUDICATURE 302 (2001). (Pointing out that "in a few short years the relationship among lawyers and the public will be formed as radically as book-selling, travel services, and banking already have been" by the societal impact of the Internet).

Media Lab, who is responsible for the first radio station on the Internet, the first on-line congressional hearings—a digital Santa Claus that has answered thousands of letters every Christmas, and who created free access to the U.S. Patent and SEC databases, set up the first virtual “World’s Fair for the Information Age”!

The Internet 1996 World Exposition was intended to acquaint the international community with the wonders of the information age. With five million visitors and a huge infrastructure, this fair was an assembly of many things. Principally it showed that cyberspace has become part of the real world. However, building a global village through these new communications networks is not a reason for neglecting our local communities. The technology that lets us span the world, to communicate instantly across oceans, is a tool that we can use to preserve diversity, to enrich our understanding of each other, and enhance our sense of community...

The combination of computer, telephone, and television has recently created a communications revolution. In this context, the Internet’s contribution to the diffusion and dissemination of knowledge and information is truly remarkable. Moreover, the Internet has the potential to be truly democratic because no one owns it, no single organization controls it. It crosses international boundaries and answers to no sovereign. Thus, it gives disenfranchised and marginalised groups a powerful voice to express their grievances and aspirations...Certainly, the Internet provides a nonviolent means for people who have no other voice to give expression to their aspirations for freedom.⁸

Historically, lawyers have met society’s shifting and evolving demands—albeit grudgingly.⁹ The challenge the legal profession faces today is how to bring the rule of law to cyberspace. However, unlike in the past, the nature of the global online society presents demands and challenges to the legal profession in a profoundly global way. A current example of how an online world brings real world rules into conflict with each other shows what happens when the legal profession does not anticipate that these

⁷ *Global Internet Users to Number 375 Million This Year*, May 2000 at [www.
http://it.mycareer.com.au/breaking/20000503/A38628](http://it.mycareer.com.au/breaking/20000503/A38628) (last modified May 3, 2000).

⁸ Quoted from the Foreword to *A World’s Fair for the Global Village*, by Carl Malamud, MIT Press, 1997.

conflicts are likely to occur. Specifically, young people's interaction with technology has redefined modern perceptions of law's role as a social order mechanism. For instance, Napster's¹⁰ direct confrontation with traditional notions of property rights—like no other modern problem—pits competing legal and social interests against one another. The nature of services like Napster that link global communities, in ways never before imagined, provide outlets for legitimately challenging legal entitlements and frameworks.¹¹ Napster's technological innovation and the strong consumer embracing of its revolutionary technology, fundamentally challenge long-held legal frameworks concerning intellectual property which in turn reverberate throughout the legal profession.

Moreover, the demand for an ever-interconnected world increases as the next generation enters the work force. The definition of a lawyer is shifting. No longer do American lawyers practice the law of Lincoln or Webster nor do they practice the law of Brandeis or Thurgood Marshall, and long-gone are the days of Jarndyce and Jarndyce.¹² Today's youth knows no typewriters or mimeograph machines. Nor do they contemplate

⁹ See *supra* Section II.

¹⁰ In Napster's first nine months of operation nearly nine million users, reportedly mostly college and high school aged—downloaded and swapped music file. In May 2000, nearly seventy percent of college students told a polling firm that they accessed Napster services at least once a month while near sixty percent said they were weekly users. See Mary Deibel, *Napster Music-trade Software rock Colleges, Courts and the 'Net*, NY TIMES, May 21, 2000, at E5.

¹¹ It might be noted that the phenomenon perhaps occurring is the evolution of customary norms in the virtual world to those of law. This is a presumption of this article. As Professor Lawrence Friedman has explained, "law moved along, following society, responding to these social facts ... Custom is what we call the norms that regulate face-to-face relationships; law is the word for norms that regulate relations among strangers. When customary norms break down, society turns to law." LAWRENCE M. FRIEDMAN, *AMERICAN LAW: AN INTRODUCTION* 289 (1984).

¹² Jarndyce and Jarndyce is the fictitious law suit made famous by Charles Dickens whose length was immeasurable due to the incredibly mind-numbing procedure and pleadings of nineteenth century English Chancery courts. "Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in the course of time, become so complicated that no man alive knows what it means. The parties to it understand it least,

a society without computer access to instantaneous information, or the ability to virtually-traverse vast distances to communicate with people in lands across the globe. Our young people are at the heart of this technological revolution. It is with a younger generation that the future relies, and it is the consumers of tomorrow to whom lawyers should seek greatest counsel. The law practice in a virtual legal world requires an ever-increasing technological competence since the new legal consumer will demand modern technologically competent legal services.

Gone are the days of monolithic state-based jurisdictional regulation. More and more law firms and attorneys communicate with clients from their virtual offices, dispensing legal information and services *via* e-mail and Websites worldwide. The global community places information, ideas and service online. International law is the law that every lawyer will have to know how to practice.

The rapid advances in technology and its affect upon the profession must be a clarion call for the legal profession to confront these issues head-on. Lawyers must see emerging-technology as an opportunity to redefine their practice, and improve the administration and access to justice.

This article is a call for the legal profession to defy the enormous challenges of virtual practice in a global world. It seeks to explore the nature of the legal practice as its role is redefined as a result of an interconnected world and lawyers' virtual practice of law in that world. Lawyers need to propose and establish rules of professional responsibility as they affect lawyers who use the Internet. The legal profession's role as the protector of the rule of law is unmistakable and should not waiver in this time of great

but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to total disagreement as to all premises." CHARLES DICKENS, BLEAK HOUSE 20 (1964).

social change. Thus, the new century requires a steadfast adherence to the rule of law, the resolve to deliver legal services within its boundaries, and a commitment to encourage technological innovation, which will increase the public's access to justice. At a minimum, the profession must establish the best practices for clients, including shaping and implementing harmonized guidelines for rules of professional responsibility that meet these lofty and global societal expectations. In this context, the rule of law will at times yield to societal pressures, all the while the guiding hand of those protecting the rule of law will negotiate the fundamental legal mechanisms.

American attorneys hold a unique position, being the great generalists holding the potential to serve society through the impending changes brought on by technological growth. Thus, law practitioners are called upon to redefine their role in the contemporary context. The call is to reevaluate or be reevaluated by others. Others do not have the duties to the profession, nor to the rule of law, that have evolved and provided civilized society with its guiding light during the darkest of times. The global legal profession must foresee the effects of technology upon the profession and if it fails to do so, it will have to face the consequences of others drafting the new structure of law in cyberspace.