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The Impact of the Internet on the Practice of Law: Death Spiral or Never-Ending Work?

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I.	Introduction	2
II.	The Internet – A Unique and Destabilizing Medium	3
A.	Its Uniqueness	3
B.	Its Destabilizing Effects	6
III.	The Business of the Legal Profession	9
IV.	Current Obstacles	12
V.	Impacts of the Internet	15
A.	Impacts on Lawyers	15
B.	Impacts on Canadian Firms	20
C.	Impacts on Lay People	22
D.	Impacts on Regulators	23
E.	Jurisdictional Considerations	23
F.	Canadian Developments	25
G.	American and European Developments	27
H.	Continuing Concerns	29
I.	Impacts on Dispute Resolution and the Justice System	29
VI.	The Shape of Things To Come	34
VII.	Strategies for the Profession	38

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A. Competitive Strategies.....	38
B. Cost Leadership.....	39
C. Differentiation.....	40
D. The “Vision Thing”.....	42
VIII. Conclusion.....	43

I. Introduction

“Can law jump the dividing line between its past and its future and channel its strength on knowledge (not just information) into the strength on the Internet that would ensure its freedom to grow?”¹

1. There has never been a more interesting time to practice law than the present. The professional lives of lawyers (not to mention their personal lives) have been fundamentally and forever altered by the introduction of a new medium - the Internet. And, because the Internet is still in its infancy, that alteration will not only continue but will expand exponentially. Like the Chinese proverb, practicing law in “interesting times” is both a curse and a promise for the future. This paper will explore both the curses and the promises of the Internet on the private practice of law.
2. To better understand the impacts, this paper will begin with a discussion of the significance of the Internet on society in general and on commerce in particular. It will discuss the inevitable growth of that influence and its destabilizing effects on societal institutions.
3. The paper will then proceed to discuss the business of law. It will analyze the structure of the “legal industry” by considering the competitive forces to which the business of law is subjected. As will be seen, those forces will determine the profitability of the legal industry because they influence the prices, costs and required investment of lawyers in their business.
4. Next, there will be discussion of the obstacles which, for the most part, are currently embedded in the practice. Those attitudinal and structural obstacles are preventing many firms from taking more fulsome advantage of the new medium.
5. The impact of the Internet on the business of law, however, is not confined to lawyers - its impact is felt on all of the “players” in the business. The paper, then, will study the impacts not only on lawyers, but on Canadian law firms, clients, regulators, and dispute resolution and the justice system.
6. Is there a future in the practice of law? If so, what forms will the delivery of legal

¹ Michael G. Rukstad, David B. Yoffie and Carl Johnston, *Microsoft – 2000*, 9-700-071 HARV. BUSINESS SCHOOL REV. (April 13, 2000).

services take? The paper will attempt to answer those questions by discussing the theories and predictions of some of the leading authorities on what may be in store for the members of the “royal priesthood” of law.

7. Finally, the paper will set out a number of competitive strategies which firms might consider implementing. Those strategies are designed to enhance the competitive advantage of firms within the legal industry. In other words, where might firms invest to get the best technological “bang for the buck”?²

II. The Internet – A Unique and Destabilizing Medium

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather...

Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.”³

A. Its Uniqueness

8. Much has been written about the dawn of the “Information Revolution” brought about by the Internet. Although that dawn predated 1998, it was not until that year that the Internet firmly established itself as a major institution within mainstream culture. In May, 1998, the US Justice Department sued Microsoft, Kenneth Starr made his report of presidential misdeeds available online, investors were betting up the shares of “dot coms” and the sales figures of Amazon.com skyrocketed. By the end of that year, it is estimated that there were 200 million users of the Internet worldwide.⁴

² This paper will assume that the reader has a general working knowledge of the Internet and how it operates. It will also assume that the reader is familiar with the terms “Internet,” “web,” “Intranet,” “hypertext,” “e-business” and “cyberspace.” For definitions of the terms “Internet,” “Intranet” and “hypertext,” see Jorge Amieva, *Legal Advice Given Over The Internet And Intranet: How Does This Practice Affect The Lawyer-Client Relationship?*, 27 RUTGERS COMPUTER & TECH. L.J. 205 (2001). For definitions of the terms “Net” and “e-business,” see Dr. J. Shaw, *Spinning Out Of Control – Understanding And Regulating The Web*, 6 INTELLECTUAL PROPERTY & INFORMATION TECHNOLOGY LAW (2001), available at <http://ql.quicklaw.com>. For definition of the term “cyberspace,” see Ethan Katsh, *Law In A Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 414 (1993), cited in Ethan Katsh, *Digital Lawyers: Orienting the Legal Profession to Cyberspace*, 55 U. PITT L. REV. 1141 at note 26 (1994).

³ John P. Barlow., *A Declaration of Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, (Feb. 8, 1996), available at <http://www.eff.org/~barlow/Declaration-Final.html> (last visited Aug. 27, 2002).

⁴ *Developments in the Law: The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1578 (1999), available at http://www.harvardlawreview.org/issues/112/7_1574.pdf (last modified: 2002) [hereinafter *Developments in the Law: The Law of Cyberspace*].

9. It is hard to believe that in such a short time, the Internet has already transformed markets and had a dramatic effect on the global economy. But what makes it different from other media, such as the telephone or the television? It is unique in that it represents the “combination of instantaneous access to digitalized data and the ability of anyone having access to that data to copy and print it almost endlessly without loss of quality.”⁵ Digitalized content is made available to users around the world almost instantaneously. And unlike other forms of communication, (e.g. the telephone, courier service or ordinary mail), the cost is relatively insignificant. It is as simple and as inexpensive to communicate with the Far East as it is with the law firm across the street.
10. The Internet is also unique in its ability to combine other forms of media. It is capable of freely mixing text, audio clips, photographs, motion pictures, computer programs, and personal interaction. That ability to mix and deliver many forms of media has, in turn, created a host of new legal issues - along with a host of new legal work.
11. The Net has, then, the ability to extend the potential to reach anyone throughout the world. That ability has been referred to as “cyber-reach” in that the Web provides educators, students, professionals, business people and the average lay person with a unique tool to acquire and disseminate information. On the one hand, it promises to become the public library of the 21st century.⁶ On the other, it threatens the traditional “bricks and mortar” method of retailing.
12. Finally, the Internet is unique in its accessibility. At present (i.e. the summer of 2002), it is largely accessed through computers. In the not-too-distant future, however, it will be accessible through televisions, handheld devices and game consoles. One noted futurist and the inventor of computer speech recognition technology, Ray Kurzweil, predicts that by 2010, computers as we know them will disappear and be replaced by technology embedded in our clothes and eventually in our bodies.⁷ In his book, *The Age of Spiritual Machines* (written in 1999), Kurzweil forecasts that a \$1,000 computer in 2019 will have the computational ability that matches the human brain.⁸ He also predicts that humans will be using embedded computers to augment their own intelligence. Since computers will be tied to our own biological systems, humans, he argues, will be able to share collective knowledge with others in the same way as computer files are swapped today.
13. That vision is very close to that of Canadian philosopher, Marshall McLuhan, once referred to as the “oracle of the Electronic Age.” McLuhan, who died in 1980, did not

⁵ Frank Diedrich, *A Law of the Internet? Attempts to Regulate Electronic Commerce*, 3 J.I.L.T., (2000) available at <http://elj.warwick.ac.uk/jilt/00-3/diedrich.html> (last viewed Aug. 27, 2002).

⁶ *Developments in the Law: The Law of Cyberspace*, *supra* note 4 at 1580.

⁷ Rachel Ross, *Machine Brains Poised To Surpass Us: Researcher Predicts Computers Will Outwit Humans By 2029* THE TORONTO STAR, E4 (Aug. 2, 2002).

⁸ David Atkin, *Gates Says Smart Computers Far Off*, THE GLOBE AND MAIL, B1 (Aug. 21, 2002).

live to see but perhaps foresaw the merging of text and electronic mass media in what we now call the Internet. According to McLuhan, the technology of electronic circuitry was an extension of the nervous system. McLuhan theorized that the dominant medium of any age dominates people; in other words, “the medium is the message.” More to the point, according to McLuhan, electronic media “re-tribalize” the human race. By that, he meant that the ability to instantaneously communicate will return us to a pre-alphabetic oral tradition where sound and touch are more important than sight.⁹

14. When information travels at electronic speeds, McLuhan believed, the linear clarity of the print age becomes replaced by a feeling of “all-at-onceness.” In other words, everything everywhere happens simultaneously without clear order or sequence. We all become members of the “global village” in the sense that we are all within reach of a single voice or the sound of tribal drums. Print culture had produced, in McLuhan’s view, the rational man in whom vision was the dominant sense. Perhaps presciently, the global village for McLuhan held a profound risk of terror and sudden panic.¹⁰
15. The Net, then, represents, metaphorically speaking, the connection of neurons in human brains around the world. At present, the impact of that connectivity is not fully recognized. That is due, in part, to difficulty in access and in part to difficulty with existing interface technology (i.e. the traditional keyboard). That will change when the “tribe” comes together on a global playing field. As Barlow noted, “with cyberspace, we are, in effect, hard-wiring the collective consciousness.”¹¹
16. Are the futurists right when they predict the exponential growth of the Internet and its influence? The answer is “probably yes.” That is largely because of the operation of three “laws.” The first is the so called “Moore’s Law,” named after Dr. Gordon E. Moore, a founder of Intel Corporation. In 1965, just four years after the first planar integrated circuit was discovered, Moore predicted that the number of transistors the industry would be able to place on a computer chip would double every 18 months. That is so because as chip production processes get smaller and smaller, more and more transistors can be crammed into a chip, resulting in an increase in performance since new performance features can be added. In addition, the speed of the chip increases since the distance between the transistors is reduced.
17. In 1995, Moore updated his prediction from a doubling every 18 months to a doubling every two years. In effect then, Moore’s law means that the processing power of computers doubles every two years. Moore’s observation has remained valid and “has

⁹ Marshall McLuhan, Caslon Analytics biographical profiles, *available at* <http://www.caslon.com.au/biographies/mcluhan.htm> (last modified: July 2002).

¹⁰ Gary Wolf, *The Wisdom of Saint Marshall, the Holy Fool*, 4.01 WIRED 1, 3, (Jan. 1996), *available at* <http://www.wired.com/wired/archive/4.01/saint.marshal.html> (last modified: 2002).

¹¹ Jennifer C. Kreisberg, *A Globe, Clothing Itself with a Brain*, 3.06 WIRED 1, 3, (Jun. 1995), *available at* <http://www.wired.com/wired/archive/3.06/teillard.html> (last modified: 2002).

become the guiding principle for the industry to deliver ever more powerful semiconductor chips at proportionate decreases in cost.”¹²

18. The second influential insight into the growth of the Internet is called “Metcalfe’s Law,” named after Dr. Robert M. Metcalfe, inventor of the Ethernet and founder of 3Com Corporation. Metcalfe observed that the value or usefulness of a network grows proportionately with the number of its users.¹³ Applying Metcalfe’s law to the Internet, it can be seen that the value of the Internet will grow proportionately with the number of online users.
19. The third principle affecting the growth of the Internet is known as “Gilder’s Law,” named after economist and author, George Gilder. In 1998, Gilder predicted that the world’s total supply of bandwidth will double roughly every four months - or more than four times faster than the rate of advances in computer horsepower. In mid-2000, Gilder recalculated his theorem, stating that bandwidth would double every six months. Whether it is four or six months, for our purposes, is not important. What is important is that Gilder was the first to see that infinite bandwidth would have a similar impact on the world as the microprocessor.¹⁴ The subtitle of Gilder’s book, *Telecosm*, says it all; “How Infinite Bandwidth Will Revolutionize Our World.”¹⁵
20. Considering the combined impact of the above laws, the futurists’ predictions (e.g. wearable computers and the global connection of neurons) do not seem as farfetched as they may have originally appeared.

B. Its Destabilizing Effects

21. The Internet weakens many of the institutions that we traditionally rely on for solutions to basic problems of collective actions. As we will see later, one of those institutions is the traditional practice of law. The Internet does so by creating a “new, decentralized process that does not closely resemble those which we have used in the past to pass laws

¹² Michael Kanellos, *Moore Says Moore’s Law To Hit Wall*, CNET NEWS.COM, (Sept. 30, 1997), available at <http://news.com.com/2100-1001-203750.html> (last viewed Aug. 27, 2002); *Intel Executive Bios: Gordon E. Moore*, Intel, available at <http://www.intel.com/pressroom/kits/bios/moore.htm> (last modified: 2002); Gordon E. Moore, *The Continuing Silicon Technology Evolution Inside the PC Platform*, 2 Platform Solutions 4, 4 (Oct. 15, 1997), available at <http://www.intel.com/update/issue/issue2.pdf> (last viewed Aug. 27, 2002).

¹³ Paul Stranahan, *Robert M. ‘Bob’ Metcalfe, Ph.D.*, Jones Telecommunications & Multimedia Encyclopedia, (1999), available at <http://www.digitalcentury.com/encyclo/update/metcalfe.html> (last viewed Aug. 27, 2002); Robert Metcalfe, *The Internet After the Fad: Remarks of Dr. Robert Metcalfe at the University of Virginia May 30, 1996, at Metcalfe’s Law*, The Computerworld Smithsonian Program, available at <http://americanhistory.si.edu/csr/comphist/montic/metcalfe.htm> (last modified: 1997).

¹⁴ Gary Rivlin, *The Madness of King George*, 10.07 WIRED, (July 2002), available at <http://www.wired.com/wired/archive/10.07/gilder.html> (last viewed Aug. 28, 2002).

¹⁵ David Futrelle, *Was George Gilder Blinded by the Light?*, BUSINESS 2.0 (April 2, 2002), available at <http://www.business2.com/articles/web/0,1653,39333,FF.html> (last viewed Aug. 28, 2002).

and enforce behavioral norms.”¹⁶ Information on the Web is costless to copy, is capable of being spread widely, and is virtually incapable of being confined. In effect, then, the Internet has created a new decentralized process that will lead to a fundamental re-examination of institutional structures.

22. Secondly, unlike real space, cyberspace is less regulable because in cyberspace, the default state is anonymity. In other words, users of the network find it easier to hide. Cyberspace, therefore, changes how people identify themselves, which, in turn, makes it much more difficult for the application of laws and commercial norms.
23. Thirdly, the Internet has had a destabilizing effect on commerce. Because the Internet operates in “real time” over open networks, e-commerce is eroding economic and geographic boundaries and is causing a surge in productivity and economic growth. Unlike offline commerce, e-commerce impacts regulatory issues by extending the reach of commerce beyond government borders. Again, unlike offline commerce, e-commerce creates new issues regarding confidence, trust and verification.¹⁷ The “Net effect” is not only the weakening of traditional institutions but, in the longterm, a reduction in the power of nation states.
24. The fourth destabilizing effect of the Internet is how it impacts the power parameters of buyers and sellers. In offline sales, consumers often rely on information provided by sellers. Sellers rarely disclose more information than is required and, as a result, consumers often make purchasing decisions without complete information. The seller, then, in offline sales, usually enjoys a position of power vis-à-vis the customer.
25. The Internet has the potential to reverse that power paradigm. The online consumer has unprecedented access to information prior to making an online sale. That information is available on websites, discussion groups and chat rooms, among other places. As a result, the online customer is much more empowered than their offline counterpart.¹⁸
26. What is relevant to the regulated service provider (e.g. lawyers), however, is the fact that the reverse of the power paradigm may not be the same for the delivery of services. For example, in the delivery of online professional services, the client will continue to rely on the regulatory framework maintained by the appropriate regulatory body. By way of illustration of the difference, in an online sales scenario, the vendor is usually entitled to contract out of default provisions and replace them with contractual provisions that are

¹⁶ David R. Johnson and David G. Post, *And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law*, CYBERSPACE LAW INSTITUTE, (May 9, 1996), available at <http://www.cli.org/emdraft.html> (last viewed Aug. 28, 2002).

¹⁷ C. Kolb & E. Schwartz, *Responses to Briefing The President, Regulating the Internet: How Far Should Government Reach?*, available at http://www.internetpolicy.org/briefing/response_kolbschwartz.html.

¹⁸ American Bar Association, *Global Jurisdiction Project – Excerpt: Sale of Services – Case Study: Telemedicine*, available at www.aba.net.org/buslaw/cyber/initiatives/proj-documentation/html. See also <http://www.kentlaw.edu/cyberlaw/docs/rfc/g2.doc> (last viewed May 25, 2003).

more favorable to the vendor. In the delivery of online professional services, however, regulatory bodies would usually prohibit such contracting out. Using law as an example, local regulators will continue to ensure that practicing lawyers comply with minimum standards of conduct and competency. Presumably, those authorities would prohibit lawyers from contracting out of those regulations since they are viewed as essential to ensuring public safety and confidence.¹⁹

27. The fifth way the Internet destabilizes commerce is by the creation of the sense of “Internet time.” Since information on the Internet travels at the speed of light, those who are online have come to expect faster time scales. That expectation will only increase as more people become “wired.” Lawyers, as service providers, should anticipate that the expectation for faster delivery of legal services will only increase.²⁰
28. How is all of this talk about destabilization relevant to the practice of law? Richard Susskind, a U.K. law professor and a leading authority on the future of law, discusses disruptive technologies in his book, *Transforming the Law*.²¹ Susskind, in turn, relies upon the work by Clayton Christensen, a professor at Harvard Business School, whose book is entitled *The Innovator’s Dilemma*.²² According to Christensen, companies fail because they recognize too late in recognizing the impact of “disruptive technologies,” i.e. those technologies that periodically emerge and fundamentally transform companies, industries and markets. Because disruptive technologies initially under-perform established products in mainstream markets, many leading companies and their customers reject these new technologies.
29. According to Christensen, “(d)isruptive technologies, though they initially can only be used in small markets remote from the mainstream, are disruptive because they subsequently can become fully performance-competitive within the mainstream market against established products.”²³ At the same time that leading firms reject the new technologies, smaller, entrepreneurial firms embrace and exploit them. Once the impact of the disruptive technologies is fully recognized by the leaders, it is too late. Susskind firmly believes that online legal services are such a disruptive technology and, as a result, the strategic health of many of the world’s outstanding law firms is in doubt.²⁴
30. To summarize, then, the Internet is a unique and destabilizing technology because it is both distributive and virtual. In its application, it is international. Its users are largely anonymous because of the absence of “real space” markers and authenticating

¹⁹ *Id.*

²⁰ C. M. Armstrong, *The Internet and E-Commerce*, INTERNET POLICY INSTITUTE, (March 2000), available at http://www.internetpolicy.org/briefing/3_00.html (last viewed April 17, 2001).

²¹ RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* (Oxford U. Press, 2000) at 56-60 [hereinafter *Transforming the Law*].

²² CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA*, (Harvard Business School Press, 1997).

²³ *Id.* at xxii.

²⁴ *TRANSFORMING THE LAW*, *supra* note 21, at 60.

information (e.g. residence or personal identity). It makes a large amount of information available immediately. Its applications are very often ahead of the regulatory curve. Finally, it is often most effectively used by entrepreneurs who have a “frontier” mentality. In the end, it threatens any business that ignores or rejects the opportunities made available online.

III. The Business of the Legal Profession

“A thorough analysis of potential opportunities for electronic commerce requires that managers start with the basics - a deep understanding of their current business. They must clearly define the current competitive environment, market dynamics, and the company’s longterm goals, strategies, and core competencies. This deep understanding of today’s business must then be married with a deep understanding of the features and functionality of the technology that can be used to add value to the current business and/or enable the firm to go to market in new ways. The lessons from the history of electronic commerce help frame the questions to be asked and the solutions to be sought.”²⁵

31. As the above quotation suggests, to better understand the impacts of the Internet and to better identify the potential opportunities of e-law, one must begin with a better understanding of the current business of the practice of law. Any discussion of the current business model of law must begin with a consideration of the method by which it is regulated. Certain professions provide service to the public for which regulatory bodies are mandated only to create and set standards for acceptance into the practice of the profession. Engineering is an example of such a profession.
32. Other professions, such as law and medicine, provide service for which regulatory bodies impose educational and practical experience to enter the profession and possess a continuing role over the conduct and practices of their respective professionals. This continuing role is indicated by the “authority of the regulatory body to conduct disciplinary proceedings, require ongoing education, initiate investigations into an individual’s professional practices and the power to initiate mandatory practice guidelines.”²⁶
33. According to H.W. Arthurs, University Professor and President Emeritus, Osgoode Hall Law School, York University, the “concept of a profession is based on the premise that

²⁵ Lynda M. Applegate and Janis Gogan, *Electronic Commerce: Trends and Opportunities*, HARV. BUSINESS SCHOOL REV. at 15 (Oct. 6, 1995).

²⁶ Michael Geist, *Jurisdiction: Building Confidence in a Borderless Medium*, (July 26-27, 1999), available at http://www.ilpf.org/events/jurisdiction/presentations/geist_julrep.htm (last viewed 27 Aug. 2002) [hereinafter *Sale of Services Working Group*].

its members possess expertise, skills and knowledge, which others do not.”²⁷ On this premise, according to Arthurs, rests the claim to a monopoly of professional practice.²⁸ In the case of law, on that premise rests the requirement of bar associations to regulate the monopoly, a code of professional ethics to ensure that legal knowledge is used for the benefit of clients, and a professional culture with shared values, symbols and practices which bind together those who have a common base of knowledge.²⁹

34. According to Arthurs, there are external and internal forces being brought to bear on the profession which further dilute whatever common knowledge base legal practitioners may have once shared.³⁰ In order to better understand the current business model of law, one has to ask; what is going on? In other words, one must have a better understanding of the current competitive environment and market dynamics of the legal industry itself.
35. Few business school professors have been as influential or as well known as Harvard Business School’s Michael E. Porter. In his landmark book, “*Competitive Strategy: Techniques for Analyzing Industries and Competitors*”³¹, Porter presented an analytical framework for understanding industries and competitors and formulating an overall competitive strategy. His book describes the five competitive forces that determine the attractiveness of an industry and their underlying causes, as well as how these forces change over time and can be influenced through strategy.
36. According to Porter, “in any industry, whether it is domestic or international or produces a product or a service, the rules of competition are embodied in five competitive forces - the entry of new competitors, the threat of substitutes, the bargaining power of buyers, the bargaining power of suppliers, and the rivalry among the existing competitors.”³²
37. Porter’s five forces framework summarizes the impacts of market power and business systems:³³

²⁷ H. W. Arthurs, *Lawyering in Canada in the 21st Century*, 15 WINDSOR Y.B. ACCESS TO JUST. 202 at 211-12 (1996). Arthurs argues that there is no such thing as a single legal profession or a typical lawyer. Instead, what is regarded as the legal profession, according to Arthurs, is actually fragmented according to specialty, location, size of firm, clientele and affluence. [15 WINDSOR Y.B. ACCESS TO JUST. 202 at 211-12].

²⁸ 15 WINDSOR Y.B. ACCESS TO JUST. 202 at 219.

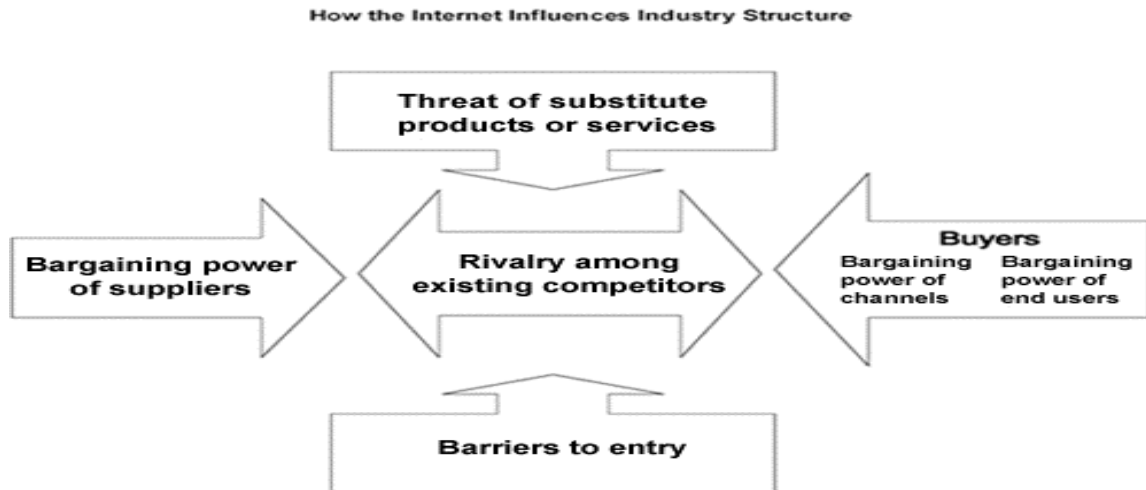
²⁹ *Id.*

³⁰ *Id.*

³¹ Michael E. Porter, *Competitive Advantage: Creating and Sustaining Superior Performance* (1998), available at <http://www.simonsays.com/excerpt.cfm?isbn=0684841460&areaid=33> (last viewed Aug. 27, 2002) [hereinafter *Competitive Advantage*].

³² *Id.*

³³ M. E. Porter, *Strategy and the Internet*, HARV. BUSINESS REV. 60, 67 (March 2001) [hereinafter “Strategy”].



- 38.
39. According to Porter, the above five forces determine industry profitability because they influence the prices, costs, and required investment in an industry - the elements of return on investment. In other words, the competitive intensity which any industry faces is the sum of the five competitive forces.
40. Starting at the top of the diagram new entrants place a limit on prices. The bargaining power of suppliers determines the cost of raw materials and other inputs. Buyer power influences the prices that firms can charge and can also influence cost and investment because powerful buyers demand costly service. Substitutes influence the price and quality of a product or service because they seek to gain market share through responding to customer demands for lower costs, better quality or both.³⁴ In summary, every industry is in competition with its own suppliers and buyers, new entrants and substitutes, and finally internal rivals.
41. Applying Porter's model to the legal industry provides an interesting analysis of its current competitive environment and market dynamics:
- 1) with regard to new entrants, lawyers enter the profession and new law firms are created virtually every day. That threat of entry places a limit on the prices charged by lawyers and shapes the investment required to deter the entrants;
 - 2) with respect to suppliers, the "inventory" of law is information. Today, that information is being supplied from a number of sources such as legal publishers and research facilities. The bargaining power of those suppliers determines the costs of "raw materials" (i.e. legal

³⁴ See *Id.*

information) and other inputs;

3) with respect to the buyers (a.k.a. clients), they compete with the practice through ongoing demands for lower cost and better quality. As noted earlier, the power of clients can also influence cost and investment because powerful clients demand costly service;

4) with respect to substitutes, accounting firms (e.g. Ernst & Young) and consulting firms provide competition in the form of tax advice, advice on employee benefits and human resources, among other things. As well, substitutes now exist in the form of legal websites and online legal services. Those substitutes seek to gain market share largely through responding to demands for lower costs;

5) finally, with respect to rivalry within the legal profession, there already exists rigorous competition - competition for clients and competition for legal talent. Through branching out and increased marketing efforts, law firms are becoming national and international in scope. The internal rivalry within the industry will only intensify as law firms become increasingly multi-disciplinary.³⁵ That increase in intensity within the practice will influence prices as well as the costs of competing in such areas as product development, advertising and recruitment.

42. The picture one gets from applying Porter's five forces to the current practice of law is one of rigorous competition, both internally and externally. With the growth in the power and influence of the Internet, that competition will only intensify. What can be done to change that threat into an opportunity?

IV. Current Obstacles

“As Niccolò Machiavelli described long before the Internet, ‘Innovation makes enemies of all those who prospered under the old regime, and only lukewarm support is forthcoming from those who would prosper under the new.’ And so it is today with us. Those who prospered under the old regime are threatened by the Internet. Those who would prosper under the new regime have not risen to defend it against the old; whether they will is still a question. So far, it appears they will not.”³⁶

43. Probably the biggest obstacle in transforming the threat of the Internet into a business

³⁵ Luis Millan, *Barreau du Québec Proposes Rules for Multidisciplinary Partnerships*, LAW. WKLY 22, 13 (Aug. 9, 2002).

³⁶ Lawrence Lessig, *The Internet Under Siege*, (Nov. – Dec. 2001) available at http://www.foreignpolicy.com/issue_novdec_2001/lessig.html (last viewed Nov. 15, 2001).

opportunity is a lack of imagination. There is, of course, a natural tendency on the part of everyone to attempt to resist changes to the status quo. That tendency to resist change is probably no more deeply imbedded than within the legal profession. One Canadian author, however, sees defensive-minded retrenching as all-to-common among leaders of the legal profession.³⁷ Those leaders are resistant to multi-disciplinary law practices, the takeover of Canadian firms by US legal conglomerates, multi-point-of-service legal co-operatives, the pluralization of legal self-regulation, the introduction of no-fault insurance schemes, the introduction of real estate title insurance, the introduction of prepaid legal insurance and the practice of paralegals, among other things.³⁸ Regardless of whether or not one agrees with that observation, it would be hard to argue that there are many within the profession who do not seek to maintain a certain elitism and thus prop up the self-image of the profession.

44. All too often, there is also a lack of imagination within a law firm's decision making authority. In most major law firms, that decision making authority rests with senior partners of the firm. Those partners have often made a good living practicing law in the traditional way. That way of delivering legal services had the following characteristics: It was advisory; the services were delivered one to one; they were reactive in the sense that a client sought an answer to a legal problem; the billing for the services was based on time; and the services themselves were restrictive and defensive in the sense that they were focused on legal issues and were not multi-dimensional.³⁹
45. As Susskind points out, senior partners are reluctant to move away from a highly profitable business model. The challenge to convince them to move to a new business model is compounded by the fact that many of the senior partners are close to retirement. As a result, the decision making authority in firms is often focused on short-term financial targets in an attempt to maximize as much profit as possible from the traditional way of delivering legal services. As a result, a firm's "pyramid" of authority often attempts to cling to the "old economy," i.e. the traditional ways of delivering legal services.⁴⁰
46. The resistance to change in many parts of the profession can be illustrated in the following technology adoption cycle:

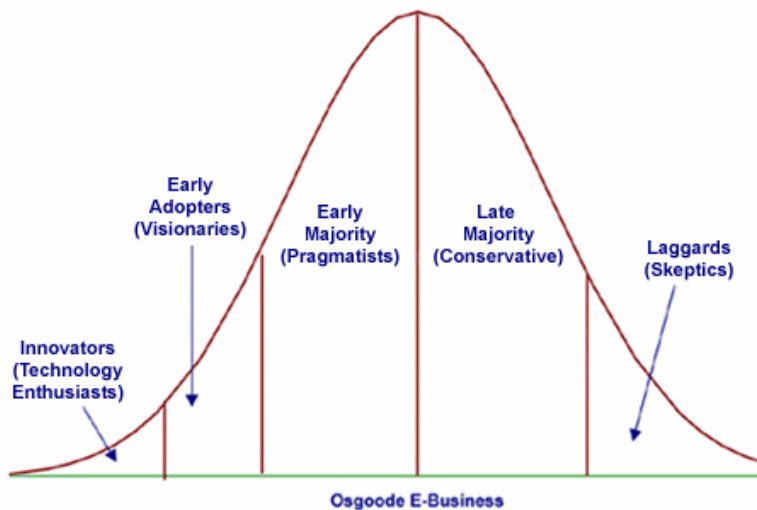
³⁷ Roderick A. Macdonald, *Let Our Future Not Be Behind Us: The Legal Profession in Changing Times*, 64 SASK. L. REV. 1, 4 (2001).

³⁸ *Id.*

³⁹ *Transforming the Law*, *supra* note 21 at 82-3.

⁴⁰ *Id.* at 55.

The Technology Adoption cycle



- 47.
48. As will be discussed later, several major firms, such as Clifford Chance in the UK, would fit into the “early majority” category. Most major law firms, however, would fit into the “late majority” category with a few (i.e. the skeptics) well behind.
49. There is a significant risk to those firms which do not aggressively move to incorporate an Internet strategy. That is because of the natural reluctance to abandon what works becomes a formidable obstacle to firms which fall into the “late majority” or “laggard” categories. Occupants of those categories risk being stuck with the difficult task of getting clients to abandon investments they have already made in competitors, i.e. those firms in the “early adopter” or “early majority” categories. That barrier (i.e. the reluctance to abandon what works) increases over time as the relationship between the client and the quick-off-the-mark competitor deepens.⁴¹
50. A formidable obstacle to a firm’s exploitation of the Internet is the method of billing for legal service, i.e. charging by the hour. Many big firms, presumably in response to the increase in the intensity of competitive forces (as described above), have set higher billable hour targets for their lawyers.⁴² The whole system of billable hours rewards inefficiency and ignores the value added aspect of legal advice. Increasing billable hour targets only exacerbates those inadequacies. More important for the purposes of this

⁴¹ Shikhar Ghosh, *Making Business Sense of the Internet*, HARV. BUSINESS REV. 126, 129 (Mar. – Apr. 1998).

⁴² Harry W. Arthurs & Robert Kreklewich, *Law, Legal Institutions, and the Legal Profession in the New Economy*, 34 OSGOODE HALL L.J. 1 at note 163 (1996).

analysis, however, is the fact that time-based billing is antithetical to the delivery of online legal services.

51. Another major obstacle in embracing the opportunities of the Internet is a tendency among lawyers to resist sharing information with their colleagues. Susskind calls this an “information non-sharing culture.”⁴³ That resistance may be as a result of a perceived competitive threat, a tendency among lawyers to be conservative, or professional insecurity (i.e. attempting to avoid professional criticism). For whatever reason, that resistance acts as an obstacle in pursuing online strategies.
52. Finally, although lawyers are in the “knowledge game,” most law firms do not have knowledge management systems. In other words, there is an inability to identify the firm’s “inventory” of collective knowledge. That inability to “capture” and package collective knowledge is a major obstacle in pursuing a successful Internet strategy. Far too often, firms spend significant amounts of money on information technology and have little idea how to make their big IT ideas work.⁴⁴ Until firms learn how to capture and package their collective knowledge and make it available online, much of the money being spent may be wasted.

V. Impacts of the Internet

“Toto, I’ve a feeling we’re not in Kansas anymore”

Dorothy in the movie *The Wizard of Oz*

A. Impacts on Lawyers

53. This section of the paper will discuss how the Internet has impacted the “major players” in the business of law. Not surprisingly, that discussion will begin with the impacts which are now being experienced by lawyers.
54. Seven years ago few lawyers chose to work online. Those that did used the Web for online legal research. Lawyers’ first exposure to online work was finding and downloading court decisions. In the space of seven years, however, that has rapidly changed. Now, being online is fully integrated with lawyers’ daily routines. They communicate with other lawyers and clients, do research, network, market their practice and stay current with developments in their practice area, all online.⁴⁵
55. For all practical purposes, “legal research, a central aspect of virtually any legal practice,

⁴³ *Transforming the Law*, *supra* note 21 at 23.

⁴⁴ Richard Susskind, *Firms Have Little Idea How To Make Their Big IT Ideas Work*, TIMES OF LONDON, (Nov. 14, 2000), available at <http://www.timesonline.co.uk/> (last viewed Nov. 2000).

⁴⁵ Josh Blackman, *Lawyers Online: An Interview with Mark Obbie* (April 1998) IV, 4 THE INTERNET LAWYER, available at LexisNexis (last viewed Aug. 4, 2002).

has migrated to the Internet. Former “dial up” services such as LEXIS (www.lexis.com) and Westlaw (www.westlaw.com), previously based on a proprietary software model, are now Internet-based. These subscription services, along with Canadian counterparts such as e-Carswell (www.ecarswell.com) and QuickLaw (www.quicklaw.com)” allow lawyers to search vast online data bases of legal material. Using a simple click of a mouse, lawyers now have instant access to cases, statutes, and scholarly articles.⁴⁶

56. Arguably, the publicly accessible nature of Internet-based information requires lawyers to possess a high level of Internet research skills. If a law firm advertises on the Internet, it implicitly represents that it possesses the skill and ability to use that medium. Lawyers within such a firm would be expected to be more competent with Internet technologies than members of the general public. Ironically, the minimum standards of professional competence, as a result, will rise with the increased availability of this information.⁴⁷
57. As incubators of the legal profession, law schools are becoming more direct and proactive in integrating the learning of research skills, tools and methodologies throughout legal education. No longer would a first year course in legal research and writing be considered adequate professional preparation for the changes occurring in the sources and access to legal information.⁴⁸ In the UK, the Law Society and Council of the Bar issued a joint statement in 1999 requiring law schools to introduce to their undergraduates a basic range of IT skills. The University of Cambridge took the lead and now requires all first year students at the Faculty of Law to successfully complete a compulsory IT course.⁴⁹
58. In terms of their “tool kit,” lawyers have an ever increasing array of technologies available to them. For example, chat rooms and Web logs are now being used by litigation lawyers to discuss strategies, share pleadings and precedents and exchange exhibits. That development has been of tremendous benefit to the plaintiffs’ bar. Up until recently, lawyers acting for plaintiffs were largely isolated and unaware of events occurring contemporaneously across other jurisdictions. Much to the chagrin of institutional defendants (e.g. insurance companies), chat rooms and Web logs used by plaintiffs’ counsel are proving very effective in developing common strategies.
59. By reason of advanced compression technology for video and file sharing, and enhanced security, Web conferencing is becoming more popular. Web conferencing applications

⁴⁶ Michael Geist, *E-Commerce and Legal Services in Canada: Meeting the Challenge* (Sept. 20, 2000) available at <http://strategis.ic.gc.ca/SSG/ss00026e.html> (last viewed June 27, 2001) [hereinafter *E-Commerce and Legal Services*].

⁴⁷ Lawrence D. MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608-9, 647 (Summer 2000).

⁴⁸ *Id.* at 647.

⁴⁹ Richard Susskind, *Cambridge Law Takes The Lead In IT*, TIMES OF LONDON (Feb. 19, 2002), available at <http://www.timesonline.co.uk/> (last viewed Feb. 2002).

allow multiple lawyers to meet online and share documents in real time. Unlike traditional video conferencing which required massive amounts of bandwidth and was based on dedicated two-way lines, the new Web-based software requires significantly less bandwidth and is intelligent enough to permit only one speaker at a given time.⁵⁰ In addition, before the video-conference begins, documents can be downloaded to each participant's personal computer. The materials can then be presented in synch when a moderator calls something up.⁵¹

60. One of the latest tools available to lawyers is the Wireless Local Area Network ("WLAN"). The advantage of WLAN is it enables the user to roam the office (and eventually, larger wireless "campuses") without losing connectivity to their in-house applications, files, e-mail and the Net. For lawyers, real time access to e-mails, files and all of the other "tools of the trade" from anywhere in the office translates into faster service for client and in-house enquiries. When one considers the day when a major city becomes a gigantic wireless "campus," the implications for WLAN are huge.⁵²
61. Historically, from a technology perspective, civil litigation lawyers were ahead of criminal law lawyers. The criminal justice system, however, is now driven to new technologies, largely because of the use of new technologies by police to organize their investigations. As a result, criminal lawyers are beginning to use software and to learn to rely upon data indexing for organizing a case.⁵³
62. The Internet has also had a significant impact on the practice of corporate commercial law. For instance, the UK based law firm, Clifford Chance, has developed the Cross-Border Acquisition Guide (www.cliffordchance.com/online) which helps to identify and analyze the main legal and commercial issues that arise during mergers and acquisitions involving more than one regime. The Guide covers twelve European jurisdictions and is aimed at investment banks, private equity houses, and corporations which are interested in making acquisitions.⁵⁴
63. To assist in corporate commercial work, online "work rooms" and "deal rooms" have been developed. One such system, developed by Anderson Legal, enables clients to monitor and check the progress of work being undertaken on their behalf.⁵⁵ The Internet-based tool also provides access to useful legal and multi-disciplinary news, knowledge

⁵⁰ Zack Medicoff, *Web Conferencing Gaining Ground*, GLOBE AND MAIL, Aug. 21, 2002 at B12.

⁵¹ *Id.*

⁵² George J. Atis, & Chris Duncan, *Are Wireless Local Area Networks (Wlans) Viable For Law Firms?*, LAW. WKLY (Aug. 9, 2002).

⁵³ Gary Procknow, *Digital Technology Comes To Aid Of Criminal Lawyers*, LAW. WKLY (Aug. 9, 2002).

⁵⁴ Richard Susskind, *Legal Site That Does Without The Lawyers*, TIMES OF LONDON (May 7, 2002), <http://www.timesonline.co.uk/> (last viewed May 2002) [hereinafter *Legal Site*].

⁵⁵ Richard Susskind, *Disaster Planning Tops Agenda*, TIMES OF LONDON (Oct. 30, 2001), <http://www.timesonline.co.uk/> (last viewed Oct. 2001).

and information.⁵⁶ That degree of transparency will no doubt effect changes in the ways lawyers communicate to clients and each other.

64. One intriguing new commercial tool is Deal Proof 3.0. That utility “can read a document and quickly provide summaries of certain arguments. It is designed to make it much easier to absorb long, complex documents such as lease agreements and certificates of incorporation.”⁵⁷
65. In Australia, lawyers have collaborated in developing a secure document exchange for the management of legal transactions. The site (www.securedocx.com) is an independent virtual deal room facility which enables all documents and communications on a transaction to be stored electronically in one single location.⁵⁸
66. In the United States, a number of Internet portals such as Find Law (www.findlaw.com) have been developed. Those portals catalogue the available online freely accessible legal information.⁵⁹
67. Rather intriguingly, American lawyers have recently begun buying evidence online. A growing number of lawyers bid, often against one another, for various items ranging from smoking gun documents to dangerous products. A US lawyer involved in litigation on behalf of lung cancer victims, for example, recently bought old cigarette advertisements that he believes can be used to recreate for jurors the atmosphere in which his clients got hooked on cigarettes.⁶⁰
68. In terms of job hunting, for law students who are interested in obtaining help in finding a job, there is a free online placement service available in the UK to help them obtain full-time work.⁶¹ There is also in the UK an online legal recruitment service that specializes in filling senior in-house positions. The system creates profiles of candidates, including their experience and education, and then matches the profiles against the recruitment needs of clients.⁶²
69. For lawyers who are interested in legal technology, there are a number of services that are available free of charge. One such service is the Journal of Information Law and

⁵⁶ *Id.*

⁵⁷ *Deliberations of the ABA Committee on Research About the Future of the Legal Profession on the Current Status of the Legal Profession*, 17 ME. BAR J. 48, 57 (Winter 2002).

⁵⁸ Richard Susskind, *Web-Based Injury Claims Are A Hit*, TIMES OF LONDON (May 28, 2002), <http://www.timesonline.co.uk/> (last viewed May 2002) [hereinafter *Web-Based Injury Claims*].

⁵⁹ *E-Commerce and Legal Services*, *supra* note 46.

⁶⁰ Lisa Girion, *The Nation Lawyers Bid for Exhibit A as Evidence Surfaces on EBay*, LA TIMES, July 21, 2002, at A1, available at 2002 WL 2491478.

⁶¹ Richard Susskind, *How Students Can Find a Job by Going Online*” TIMES OF LONDON (June 20, 2000), available at <http://www.timesonline.co.uk/> (last viewed June 2000).

⁶² Richard Susskind, *Korn/Ferry Keeping in Step with the Net*, TIMES OF LONDON (July 11, 2000), available at <http://www.timesonline.co.uk/> (last viewed July 2000).

Technology. It contains contributions on legal technology and on IT law and includes, among other things, book and technology reviews and conference reports.⁶³ As well, assistance in dealing with the interface of law and IT is available from the UK's leading technology organization, the Society for Computers and Law (www.scl.org).⁶⁴

70. Of particular interest to small and medium-sized UK firms is a service which provides clients with standard legal news and information which can be supplemented and branded by the firm.⁶⁵ Also in the UK, there is a twice weekly summary of legal IT news made available by Legal Technology News (www.legaltechnologynews.com). Finally, there is a service in the UK called Law on the Web which allows users to ask questions via e-mail. The questions are screened and routed to solicitors who have agreed to answer questions for no charge and within one working day.⁶⁶
71. For lawyers who feel particularly daunted by the introduction of the above technologies, there is help - online of course. LawCommerce.com is an American-based e-market place for the legal profession. It has two aspects of its operation. The first, on behalf of its members, is the procurement of products and services, from insurance and IT products to expert witnesses. The second aspect of the facility offers a range of IT and Web-based solutions to support the actual practice of law, including online training and deal collaboration. It even has an advisory board composed of senior American lawyers and clients.⁶⁷
72. In addition, the legal publishers, PLC, make available the experience of twenty specialist support lawyers (www.practicallaw.com). Its first service, PLC Property Law, was launched in April for commercial property practices. The second service, PLC Corporate Law, provides services covering commercial and competition law. Each service provides a collection of continuously updated practice notes, precedents and check lists as well as e-mail alerts.⁶⁸
73. In many ways the Internet represents for lawyers a double-edged sword. On the one hand, it has improved the capacity of lawyers to serve their clients. Traditional tasks, such as legal research, have been made easier. The new tools of Internet information services and

⁶³ Richard Susskind, *E-Journal Gets the Vote of Law Librarians*, TIMES OF LONDON (July 9, 2002), available at <http://www.timesonline.co.uk/> (last viewed July 2002).

⁶⁴ Richard Susskind, *Australian Firm Sets Up One-Stop Site*, TIMES OF LONDON (Jan. 8, 2002), available at <http://www.timesonline.co.uk/> (last viewed Jan. 2002).

⁶⁵ Richard Susskind, *Dot-Coming Soon, Another Legal Website*, TIMES OF LONDON (May 30, 2000), available at <http://www.timesonline.co.uk/> (last viewed May 2000).

⁶⁶ Richard Susskind, *Blue Flag Unfurled/Free Services/Online Debt Recovery*, TIMES OF LONDON (May 9, 2000), available at <http://www.timesonline.co.uk/> (last viewed May 2000).

⁶⁷ Richard Susskind, *Hits on Legal Websites Still Increasing*, TIMES OF LONDON (Sept. 12, 2000), <http://www.timesonline.co.uk/> (last viewed Sept. 2000).

⁶⁸ Richard Susskind, *Register and Protect Domain Names*, TIMES OF LONDON (Nov. 20, 2001), available at <http://www.timesonline.co.uk/> (last viewed Nov. 2001).

data banks, electronic filing, and electronic litigation will make the practice easier in the future.

74. That ease of access to information, however, will also make the practice more vulnerable. Lawyers have just begun to feel the impacts of online tax filing, do-it-yourself wills, marriage contracts, and divorce software, computerized real estate and mortgage search programs and plead your own traffic tickets and summary conviction offence kits.
75. The combined effect of the new technology has the potential to result in the downsizing of larger firms and the possible elimination of local, smaller practices.⁶⁹ As the impact of the Internet is more keenly felt on the legal industry, a firm's competitive strategy within the industry becomes more essential. That competitive strategy is the subject matter of Section 7 of this paper.

B. Impacts on Canadian Firms

76. The Internet may have a particular impact on Canadian law firms.⁷⁰ As H.W. Arthurs of Osgoode Hall has observed, Canadian law is not a major factor in shaping world consensus. Instead, it is reshaped to fit a consensus which often resembles the legal arrangements which prevail in the dominant economies (i.e. the US). As a result, Canadian arrangements have a tendency to favor companies based in those dominant economies. As legal systems converge (which convergence is accelerated by the Internet), they create a global market for legal services in which Canadian lawyers are required to compete not only with foreign lawyers, but for Canadian clients.⁷¹
77. The most recent example of that dynamic is the *Sarbanes-Oxley Act* signed into law by US President George W. Bush in August, 2002. According to the new US law, all companies, including those which are Canadian-based, that list on US stock exchanges are required to comply with stringent new corporate accountability rules, including a provision that mandates senior executives to personally certify financial reports. The US Act does not exempt foreign issuers from its strict provisions and, as a result, Canadian companies will be required to follow most of the new rules.
78. At the time of the writing of this paper (the summer of 2002), Canadian corporations are scrambling to obtain legal advice as to how best to comply with the provisions of the

⁶⁹ Macdonald, *supra* note 38, at 18.

⁷⁰ Professor Alan C. Hutchison of Osgoode Hall Law School at York University believes that there is no longer a Canadian legal profession. Rather, according to Hutchison, there are many different ones, ranging from the solo practice to the large corporate bureaucracy to small partnerships and government lawyers. See Alan C. Hutchinson, *Legal Ethics and Professional Responsibility*, Chapter 3.A (1999), available at <http://ql.quicklaw.com.servlet/qlwbic.qlwbi?filename=hutc-00000313.htm&source=host&sid...> (last viewed July 23, 2002).

⁷¹ Arthurs, *supra* note 27, at 210.

Act.⁷² One enterprising Toronto-based law firm has nationally advertised that it has 80 US lawyers to assist cross-border issuers in Canada in providing advice regarding the *Sarbanes-Oxley Act*.⁷³ Time will tell as to whether Canadian companies employ the services of Canadian-based intermediaries or go directly to US-based firms to obtain legal advice.

79. In addition, the borderless nature of the Internet has created and will continue to create a challenge to Canadian firms as many US and European firms directly access the Canadian legal market. From the perspective of Canadian firms, the Internet will play a critical strategic role in enhancing the ability of foreign firms to access Canadian clients and law students.⁷⁴
80. Another important impact on the practice of Canadian firms is the Internet's emphasis on American law as opposed to the laws of other countries. Larry Lessig is a law professor at Stanford University and a well known author on Internet law. Lessig notes that Americans were leaders on the technology side in the sense that they were there first. As a result, the Internet flourished there because there was a neutral platform upon which it could grow. Because Americans were involved in designing the system, they became involved in regulating the system in the context of US law.
81. Lessig finds it depressing how quickly and willingly other countries have followed the American lead in seeking to impose controls on the Internet. The reason why the US is at the core of Internet regulation is because intellectual property is one of its most important industries. That industry has a huge amount of power and is exercising it as strongly as it can. As a result, the focus of the Internet has been on American law because it is having the most significant impact in setting the agenda for the Internet. Lessig hopes that the laws of other jurisdictions (e.g. Europe) will provide a greater diversity and eventually help to balance the influence of US law on the Internet.⁷⁵
82. According to Arthurs, the challenge to Canadian firms will be to offset the above effects by going global. However, the comparative advantage of Canadian firms is based, in large part, on their affinity to Canadian-based clients. There are, unfortunately, relatively few Canadian-based clients carrying on global activities. That will pose a considerable hurdle for Canadian firms. That difficulty is exacerbated because of the incremental costs of going global. If Canadian firms decide to compete with US and British firms, they will find that the costs of running a foreign practice and the associated risks are large.⁷⁶

⁷² Richard Blackwell, *Canadian Firms Bound by U.S. Law*, GLOBE AND MAIL (Toronto), Aug. 8, 2002, at B3.

⁷³ Torys LLP Advertisement, GLOBE AND MAIL, Aug. 8, 2002, at B6.

⁷⁴ *E-Commerce and Legal Services*, *supra* note 47 at "The Challenge."

⁷⁵ Interview with participants in Summer Internet Law Program at Harvard Law School, in Cambridge, Mass. (Jul. 2, 2001), available at <http://www.techtv.com/cybercrime/digitaldisputes/story/0,23008,3336289,00.html> (last viewed 2002).

⁷⁶ Arthurs, *supra* note 27, at 211.

83. What are the strategic options available to Canadian firms? The first is to move aggressively into the international sphere seeking to exploit special trading or investment relationships (e.g. Hong Kong). The second is to form alliances with or become absorbed in global firms.⁷⁷ Those strategies will be more fully discussed later in Section 7.

C. Impacts on Lay People

84. From the perspective of the non-lawyer, law has never been regarded as “user friendly.” Ask a client who has gone through the time, effort and expense of a civil trial whether they feel they had been well served by the justice system. The answer is probably predictable - “There’s got to be a better way.” Increasingly for lay people, that better way is the Internet. As earlier noted, the Internet provides everyone with a powerful tool to acquire and disseminate information quickly and inexpensively. To that extent, it creates a democratizing process and for the first time shifts the balance of purchasing power from the supplier to the buyer.⁷⁸
85. There are a number of examples where that democratizing process has begun in the area of law. In the United States, lay people can obtain practical legal guidance from the My Lawyer Website (www.mylawyer.com). That guidance is in the form of simple explanations of legal issues as well as a series of frequently asked questions. Various aspects of US law are covered, including immigration, debt, neighbors and personal injury. There are even inexpensive legal documents available, such as a power of attorney or a prenuptial agreement, at a modest cost. Using the latest software, documents can be generated automatically once users complete secure online questionnaires.⁷⁹
86. In the UK, a service called First Law (www.firstlaw.co.uk) uses the Internet to help clients to choose and instruct lawyers, to manage competitive tenders and to assist clients with the negotiation of legal fees. Law firms submit tenders in a pre-specified electronic form and traditional glossy brochures from law firms are not permitted.⁸⁰
87. Also in the UK, as a result of a government sponsored initiative, home buyers will be able to access a system to help streamline real estate conveyancing. The Internet service transforms the tedious task of conducting land registry searches into a one-step online process.⁸¹ As well, a Welsh law firm has developed a site which focuses on providing legal services for managers in small and medium-sized businesses. The site offers a

⁷⁷ *Id.*

⁷⁸ Johnson and Post, *supra* note 16.

⁷⁹ “Legal Site,” *supra* note 55.

⁸⁰ Richard Susskind, *Scots Sign up to Documents by E-mail*, TIMES OF LONDON (Mar. 12, 2002), available at <http://www.timesonline.co.uk/> (last viewed Mar. 2002).

⁸¹ Richard Susskind, *Home Searches on the Net*, TIMES OF LONDON (January 29, 2002), available at <http://www.timesonline.co.uk/> (last viewed Jan. 2002).

library of legal documents, free guidance and a range of fixed fee packages covering the legal aspects of running a business, employment law, commercial law, e-business regulation, commercial disputes and debt recovery. For clients who require traditional help, they can seek it via structured questionnaires available online.⁸²

88. Available in the UK for landlords and tenants is an online subscription service which provides practical information, articles, links, answers to frequently asked questions and standard documents, all for a modest fee. Also available online in the UK is an employment law service, which service can also be licensed and implanted directly into Websites of law firms.⁸³
89. In Canada, the Canadian Corporations Directorate has established an online incorporation and filing program that allows anyone with a browser to incorporate a federal company without legal assistance.⁸⁴ Many federal and provincial courts, including the Supreme Court of Canada, the Federal Court of Canada, and the Alberta, British Columbia, and Ontario Court systems are now online providing users with court information and copies of recent decisions.
90. The Parliament of Canada and various provincial legislatures maintain sites that provide access to recently tabled legislation, committee work, and other parliamentary business. All of that information is available to lay people without cost.⁸⁵
91. In Ontario, real estate transactions are in the process of migrating to a fully automated online real estate system. Lawyers (and perhaps eventually lay people) have the ability to perform title searches online and close real estate transactions without leaving their office.⁸⁶
92. The above are but a few examples of how legal information is being democratized, i.e. made more readily accessible to the lay person. Does that mean that the practice of law is threatened? As set out later in this paper, the answer to that question (in typical lawyer fashion) is both “yes” and “no.”

D. Impacts on Regulators

E. Jurisdictional Considerations

93. Using the Internet to practice law does not alter the jurisdiction of states or provinces to

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *E-Commerce and Legal Services*, *supra* note 47, at note 4.

⁸⁵ *Id.* at “The Potential.”

⁸⁶ *Id.*

regulate the legal profession. They retain the right to assert that jurisdiction over individuals who practice law within their borders.

94. Typically, bar associations are granted the right to regulate the practice of law on behalf of the state. The policy underlying the regulation of legal services is public protection. We can expect that states and provinces will continue to assert their jurisdiction over such activities in the future without regard for the service provider's physical location in order to ensure that the public is adequately protected. The practice of law, like the practice of medicine, will not be defined by the location of the service provider but rather by the effects of the provision of those services within a given jurisdiction.⁸⁷ In other words, the key to that authority will not be the medium (i.e. the Internet), but the actions of the individual and the effects of those actions within a specific jurisdiction.⁸⁸
95. Historically, there have been two main approaches to dealing with the practice of law by "foreign" lawyers. The first approach is for the courts to assert jurisdiction using existing conflict of law principles and case law. The second is a state or provincial regulatory approach conducted through local bar associations and their respective codes. Both approaches have been used in regulating the provision of legal services over the Internet.
96. Recently, the California Superior Court established (albeit in dicta) that a "foreign" attorney need not be physically present within California to violate Section 6125 of the State's Business and Professions Code which prohibits one's ability to practice law in California unless the individual is an active member of the State Bar.⁸⁹
97. In Texas, the State's Bar Association sought an injunction against the sale of a computer program which provided legal services within that state. The Unauthorized Practice of Law Committee has authority to sue out-of-state individuals and entities and to enjoin them from practicing law within Texas. The Committee won a summary judgment in the Federal Court on a complaint seeking an injunction against the sale of the computer program on the grounds that the program constituted unauthorized practice in that state.⁹⁰
98. States and provinces, however, are much more actively involved in the practice of law than just regulating it through bar associations. A large number of lawyers work in state institutions as legislators, legal practitioners, judges, administrators, adjudicators and in other capacities. Large areas of the legal practice are directly subsidized by the state through legal aid systems. Ironically, the state's greatest impact on the legal profession is more indirect than direct. That is because much of the profession's work on behalf of non-government clients is concerned with resisting, avoiding or complying with state

⁸⁷ American Bar Association, *supra* note 18.

⁸⁸ Geist, *supra* note 27, at "a) Telemedicine & Jurisdiction over the Out-of-State Physician."

⁸⁹ *Id.* at note 4.

⁹⁰ *Id.*

legislation, regulation, and administrative actions.⁹¹

99. The Internet can only lead to a growth in legislative and regulatory actions. In response to the increasing complexity of the law, lawyers' work on behalf of non-government clients will necessarily expand. Arguably then, the authority of states and provinces to influence the practice, both directly and indirectly, will inevitably increase.

F. Canadian Developments

100. The responses of Canadian regulators to challenges currently faced by the legal profession have been, on the whole, very positive. In an address to the Federation of Law Societies of Canada in August, 2001, Malcolm Heins, Chief Executive Office of the Law Society of Upper Canada, stated:
101. "This shift to information access and communication through technology is really a reflection of the times. When we start looking at various government initiatives, such as electronic registration, the integrated justice project, or e-Laws, we realize that many government initiatives that deal with information are starting to move to an electronic environment. And, in essence, lawyers are in the information business. If we don't move into the electronic or digital world, we risk being left behind. As the regulator of the legal profession, the Law Society has an obligation to assist and to promote the use of technology by lawyers, as well as, to use technology ourselves in the delivery of services."⁹²
102. In keeping with those sentiments, the Law Society of Upper Canada has adopted *Practice Management Guidelines* regarding the use of information technologies. *The Guidelines* note that lawyers must determine when the use of information technologies is necessary for the maintenance and enhancements of their practices. *The Guidelines* outline the circumstances in which the use of information technology is mandatory (e.g. electronic registration of real property) and those circumstances when information technologies are recommended (e.g. electronic document management systems or services). *The Guidelines* also invite lawyers to consider the use of technologies to support client service expectations and practice management. They also remind lawyers to address concerns regarding security, disaster management and technological obsolescence.⁹³
103. At the national level, the Federation of Canadian Law Societies has established Guidelines for the Practice of Law on the Internet. One such guideline is that lawyers

⁹¹ Arthurs, *supra* note 27, at 204.

⁹² Malcolm Heins, *Message From The Chief Executive Officer*, The Law Society of Upper Canada Annual Activity Report To the Federation of Law Societies of Canada (Aug. 16-19, 2001), available at <http://www.flsc.ca/en/calender/Reports/ReportOntario.doc>.

⁹³ The Law Society of Upper Canada, *Practice Management Guidelines – Technology*, available at http://www.lsuc.on.ca/services/pmg_tech.jsp (last viewed Aug. 27, 2002).

must maintain competence, including technological competence. Specifically, a lawyer using technology must either have a reasonable understanding of the technology used in the lawyer's practice, or access to someone who has such an understanding. Lawyers are also required to know the implications of the use of technology by clients.

104. Specifically, the Federation of Canadian Law Societies' Guidelines provide that a lawyer who practices law in another jurisdiction by providing legal services through the Internet must respect and uphold the law of the other jurisdiction and must not engage in unauthorized practice in that jurisdiction. In addition, the Guidelines provide that a lawyer who comes into possession of a privileged written communication (including e-mail) of an opposing party must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing Counsel, or if received electronically, purge the communication from the system. As well, with respect to potential conflicts of interest, the Guidelines provide that to ensure there is no breach of the obligation to avoid a conflict of interest when delivering legal services using the Internet or e-mail, a lawyer must determine the actual identity of the parties with whom the lawyer is dealing.⁹⁴
105. The Internet can be a very unsecured and unreliable medium for the practice of law. That is because anyone online can assume any e-mail identity. In addition, it is difficult to develop an auditable trail to confirm that an actual document was sent from a particular person and delivered untampered to the right person. To respond to those risks, The Law Society of British Columbia formed Juricert Services Inc. to provide trusted digital credentials to lawyers and others for use with secure third party applications. That initiative was endorsed by other law societies in May, 2000. Canadian lawyers now have access to safe, Public Key Infrastructure secured third party applications that use trusted digital credentials.⁹⁵
106. Consistent with the above developments, the Canadian Federation of Law Societies recently initiated a proposal for a unified and streamlined approach to ease the flow of legal services across provincial borders to better meet the needs of clients. The proposal is "client driven" according to Vern Krishna, Q.C., Treasurer of the Law Society of Upper Canada and Chair of the Federation's Inter-Jurisdictional Mobility Task Force. According to Krishna,

"As the world has become smaller and transactions in both goods and services and technology have traversed boundaries, both provincial and international, there has been a greater and greater need for legal services to follow the client.

It's not at all unusual for clients to be engaged in business and

⁹⁴ Federation of Law Societies of Canada, *Guidelines on Ethics and the New Technology* (pt. 2.3), available at <http://www.flsc.ca/english/committees/technology/reports/ethicsguidelines.htm> (last viewed June 27, 2001).

⁹⁵ Juricert, *Board Member Briefing Note* (Aug. 8, 2000) at 1-2.

commercial transactions that cross-over several different provincial boundaries. And when that's the case, the client wants his or her legal advisors to be a part of those transactions in as many jurisdictions as possible."⁹⁶

107. That principle was reflected in an interim report of the Mobility Task Force which was approved in principle at the 2002 mid-winter meeting of the Federation. It was then distributed to provincial and territorial law associations for consideration. (In Ontario, Convocation approved the interim report in principle in February, 2002. It is available online on the Law Society's Website, www.lsuc.on.ca/news/pdf/convfeb02_interjuris.pdf. At its annual meeting in August, 2002, the Federation accepted the Mobility Task Force's report and proposed agreement to remove barriers to inter-jurisdictional mobility. Each jurisdiction that wishes to participate in the enhanced mobility regime must approve and implement the terms of the agreement. According to Krishna, "Canada's lawyers will soon begin to see provincial barriers to the practice of law virtually dissolve under this nationwide multi-jurisdictional practice agreement."⁹⁷

G. American and European Developments

108. In the United States, regulators are still considering how to overcome some of the challenges associated with the more decentralized legal system in the US. There are two key obstacles to legal mobility in the US. The first is accreditation. Unlike Canada, where all law schools are accredited and where fairly uniform standards apply across the country, a number of law schools in the US are not accredited by the American Bar Association ("ABA"). The second obstacle is admission standards. In each state, the "highest court" governs admission to the state's bar. Those admission requirements vary from one state to the next. Any national mobility plan, then, would require the co-operation of the highest courts of the fifty states.⁹⁸
109. Laurel Terry, a professor at Penn State Dickinson School of Law is vice-chair of the ABA section of the International Law Transnational Legal Practice Committee and a member of the International Bar Association Committee on cross-border practice issues. She notes that in the past couple of years, US state regulatory bodies have started to take serious notice of legal work being carried on across state lines. According to Terry (and as discussed earlier in this paper), state regulatory bodies have increasingly begun invoking unauthorized practice of law provisions against lawyers doing work in parts of the country where they are not licensed.⁹⁹

⁹⁶ *Breaking Down Borders and Barriers: The Need for Enhanced Mobility*, ONTARIO LAWYERS GAZETTE 6 at 6 (Spring 2002).

⁹⁷ Federation of Law Societies of Canada, *Mobility of Lawyers in Canada*, (Aug. 23, 2002), available at <http://www.flsc.ca/en/committees/mobility.asp> (last viewed Aug. 26, 2002).

⁹⁸ *The International Stage: A Comparative View*, ONTARIO LAWYERS GAZETTE 10 at 10 (Spring 2002).

⁹⁹ *Id.*

110. In response to the growing concerns involving mobility issues, the ABA, in July 2000, appointed a 12-member Commission on multi-jurisdictional practice to examine the ethical and regulatory implications associated with representing clients across state lines. After over a year of testimony and debate on how well present regulatory structures serve the public, the ABA Commission released its interim report setting out the kinds of circumstances or “safe harbors” where lawyers would be allowed to serve clients on a temporary basis in out-of-state jurisdictions. Those circumstances would include where the lawyer works in concert with local counsel, performs services that could legally be performed by non-lawyers, or represents clients as part of an arbitration or a mediation process. The interim report stops short of endorsing the concept of a “national practice” and upholds the requirement of admission to the bar when a lawyer wishes to establish a permanent presence in a state.¹⁰⁰
111. The ABA’s interim report’s safe harbor approach has been criticized as ambiguous and overly conservative. The ABA Commission met again in April 2002, to re-examine the safe harbor approach. It will present its final report prior to its annual meeting in Washington, D.C. in August, 2002.
112. By contrast, in Europe the introduction of a multi-jurisdictional model for delivering legal services became a constitutional requirement with the signing of treaties that created the European Community (“EC”) and mandated the mobility of all goods and services. While provisions allowing for temporary status for lawyers have been in effect for more than twenty years, the law governing permanent status was only introduced in 1998 and has not yet been implemented in all jurisdictions.
113. The European model for permanent status permits lawyers to practice in a host jurisdiction with full recognition of qualifications acquired in the original jurisdiction. However, it requires lawyers to register with the host state and, if involved in litigation, to work alongside a member of the home bar. It also allows the host jurisdiction to stipulate that certain areas of the practice (e.g. inheritance issues or land transfers) are out of bounds.
114. Ironically, the challenges faced by the EC regulators in achieving a more relaxed system for the delivery of legal services were much greater than those facing Canadian and American regulators. The EC, with its 15 member countries, had to cope not only with many different regulators but with significant language barriers. In addition, the EC includes both civil law and common law jurisdictions.
115. Although permanent mobility has only been in effect since 1998, so far the EC model appears to be working, primarily because “the European Union is much more liberal than the United States and most other jurisdictions and the move toward a more relaxed flow

¹⁰⁰ *Id.* at 11.

of legal services amongst member states has proved largely successful.”¹⁰¹ According to Terry:

“From what I’ve heard, it’s been uneventful. I have not seen any reports of problems. I’ve talked to European lawyers as well as people involved with regulatory bodies and haven’t heard of any problems from them.”¹⁰²

H. Continuing Concerns

116. Despite the responsive attitudes of Canadian and European law associations, the Internet poses a fundamental challenge to top down regulators. That is because it creates difficulties when attempting to identify the location at a particular point in time. With Internet access conduits world wide, the possibility exists for individuals to receive inter-jurisdictional legal services outside their jurisdiction of habitual residence. For example, an individual who lives in one state may access an inter-jurisdictional website located in a second state from a computer in a third state. The regulator or regulators then must determine which law applies; that of the first, second or third state or that of the lawyer. The use of the habitual residence of the client may be the most appropriate approach when attempting to determine if the lawyer responsible for the website is practicing law within a given jurisdiction.¹⁰³
117. In the end, bar associations responding to the challenge of the Internet may have to either attempt to reproduce offline regulation by changing Internet structures and devising new enforcement mechanisms for those structures or change regulatory goals to accomplish what is possible in light of the existing Internet structure.

I. Impacts on Dispute Resolution and the Justice System

118. Probably the biggest impediment to online B2C (i.e. business to consumer) purchases is the lack of effective dispute resolution mechanisms. From the perspective of consumers, rules are required to ensure they enjoy the same protections online as they do offline. On the other hand, businesses require rules to ensure that they are not hauled into a foreign court where their liability may be unlimited and unforeseeable.¹⁰⁴
119. Somewhat ironically, the solution to this problem may, in fact, exist online. In an opening address to a forum on alternative dispute resolution (ADR), Andy Pincus, General Counsel, Federal Trade Commission, summed up the problem and the possible resolution

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ American Bar Association, *supra* note 18.

¹⁰⁴ Michael Geist, *Moves Afoot to Give Consumer E-Commerce Legal Certainty*, GLOBE AND MAIL, Aug. 22, 2002, at B12.

as follows:

“A consumer is not going to purchase a product (online) if he or she believes that there’s no way to get redress if that product is defective or, indeed, if the product never arrives. The problem is obviously compounded because of the cross-border nature of transactions and the fact that buyer and seller ... (are) very far away.

And ... everyone agrees on the goal, which is consumers have to feel safe. The question is how to do it.

Traditionally, of course, the recourse has been to judicial remedies, administrative and judicial agencies ... But as with all things, the Internet forces us to confront the challenge of whether this traditional way of resolving these issues works in this new environment, and I think one of the things that we have to do is recognize that the technology that enables these transactions may also provide for a new means for resolving them in a quick, efficient and effective manner that makes the traditional ways of resolving them maybe second-best alternatives in this new environment. ...”

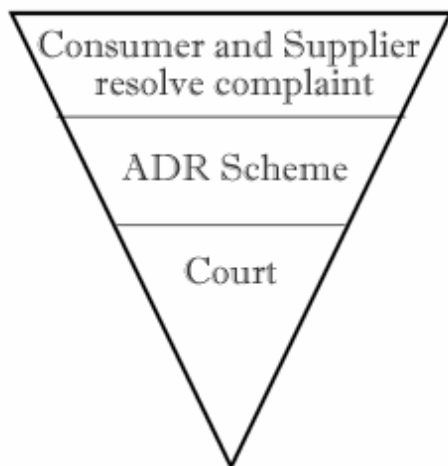
Address to forum on Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Washington DC, June 2000.¹⁰⁵

120. Because e-commerce takes place across jurisdictions, the costs involved in pursuing a complaint make it difficult for consumers to obtain redress. Factors such as language and legal systems further complicate the issue. Finally, many Internet transactions are relatively low-value. As a result, if free or inexpensive dispute resolution is not available, consumers will simply write off the cost of the Internet purchase with which they are dissatisfied.
121. The Government of Australia recognized that effective dispute resolution mechanisms for consumers are important for furthering that government’s goal of making Australia a center of excellence for consumer protection in e-commerce. To that end, it released a paper in October, 2001¹⁰⁶ which serves as a basis for discussion of dispute resolution mechanisms as well as encouraging creative thinking about ways of handling B2C e-commerce disputes. The paper encapsulates current dispute resolution mechanisms in the following graph:

¹⁰⁵ Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Public Workshop Transcript, Jun. 6, 2000, *available at* <http://www.ftc.gov/bep/altdisresolution/index.htm>.

¹⁰⁶ Australia, Consumer Affairs Division, The Treasury, *Dispute Resolution In Electronic Commerce-Discussion Paper*, Oct. 2001, *available at* www.ecommerce.treasury.gov.au/publications/DisputeResolutioninElectronicCommerceDiscussionPaper/dispute.pdf.

The Dispute Resolution Pyramid



122.

123. As the graph illustrates, it is expected that most consumers will seek redress by making a complaint first to their supplier. Suppliers will then apply their in-house dispute resolution processes. If disputes are not resolved at this point, consumers can seek redress by appealing to an industry-sponsored, independent and external dispute resolution scheme. If the consumers are still not satisfied, they can move to the bottom tier of the dispute resolution pyramid by seeking legal redress through courts. Interestingly, in Australia, decisions made under the auspices of an ADR scheme are not binding on consumers. If consumers receive an unfavorable outcome from an industry ADR process, they are not prejudiced in any way if they wish to have the dispute heard in court.¹⁰⁷

124. Historically, ADR mechanisms have played an important role in providing consumer redress and, because such mechanisms provide relatively inexpensive and quick results, they are often favored by consumers and businesses alike. In an online environment, the advantages of ADR over court action become even more evident. For example, the use of ADR does not usually bring into play jurisdictional issues that are likely to arise under jurisdiction-based court systems. In addition, new services and trading mechanisms can develop on the Internet in a short period of time. As well, ADR has more flexibility to adapt to changes in the trade environment and advances in technology.¹⁰⁸

125. The Australian paper details the various characteristics of internal dispute resolution, industry schemes handling e-commerce disputes, and international industry associations. It also deals with the role of credit card providers which typically offer their customers a

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.* at 23.

charge-back facility. The paper notes that the global reach of credit card companies involved in charge-backs and the importance of credit card payments in e-commerce make this a very effective discipline on Internet traders.¹⁰⁹

126. Creative online ADR mechanisms are, of course, not limited to Australia. In the United States, a service known as SquareTrade assists case participants to explore their positions and to generate their own options for settlement (www.squaretrade.com).¹¹⁰ Another US-based service is Cybersettle (www.cybersettle.com) which is a third-party dispute resolution facility designed to offer an online, computer assisted, method for settling monetary disputes, such as insurance claims. It gives the parties a chance to mediate quickly and confidentially over the Internet. Cybersettle is a "24/7" service. As a result, parties can settle claims well outside of the traditional business day which is particularly useful for parties negotiating from different time zones or jurisdictions.¹¹¹
127. In the United Kingdom, there are both government-sponsored and private online ADR mechanisms. In terms of government-sponsored activity, the Department of Trade and Industry has developed a Website (www.coalclaims.com) which streamlines the process of claiming compensation by those who have suffered respiratory and vibration related injuries. The site is an example of a start to finish e-claims process. With in excess of 300,000 claimants, it is the biggest personal injury scheme in British legal history.¹¹²
128. Also in the UK, the government has instituted a new court service website called Money Claim Online (www.courtservice.gov.uk/mcol). The site enables online users to recover money owed to them without handling complex forms or setting foot in court. The service covers claims, such as unpaid debts and rent arrears, up to a value of £100,000.¹¹³
129. On the private side, the ADR Group (www.adrgroup.co.uk) is intending to launch a first comprehensive, European-based online dispute resolution (ODR) service called The Mediation Room (<http://adr.themediationroom.com>). It runs on software provided by TheClaimRoom.com (www.theclaimroom.com) and intends to provide multilingual ODR services.¹¹⁴
130. For those who are not interested in using ADR mechanisms, there are online quasi-judicial services available. One such service is iCourthouse (www.icourthouse.com). It provides users with access to online adjudication and dispute evaluation and resolution. Parties can present disputes for trial before a jury of peers, any time, and for any reason,

¹⁰⁹ *Id.* at 20.

¹¹⁰ *Id.* at 30.

¹¹¹ *Id.* at 29.

¹¹² *Web-Based Injury Claims*, *supra* note 5958.

¹¹³ Richard Susskind, *Cambridge Law Takes the Lead in IT*, TIMES OF LONDON (Feb. 19, 2002), available at <http://www.timesonline.co.uk/> (last viewed Feb. 2002).

¹¹⁴ Richard Susskind, *When E-mail Can Keep You Out of Court*, TIMES OF LONDON (Jun. 18, 2002), available at <http://www.timesonline.co.uk/> (last viewed June 2002).

with results enforceable through agreement between the parties. Interestingly, anyone who registers with iCourthouse can act as a juror in a peer jury case. Jurors can browse through pending cases and pick which ones they would like to help decide. Although participating in iCourthouse hearings does not restrict the parties from seeking legal redress in the offline world, it does offer many people a fast, low cost alternative to traditional litigation.¹¹⁵

131. Moving closer to the bottom of the dispute resolution inverted pyramid, the State of Michigan recently created an online state court. The cybercourt will have jurisdiction over business and commercial complaints in which the dispute is more than \$25,000. It is expected to go “live” in October, 2002. A judge will preside over the online court system which requires e-document filing and teleconferencing for arguments. Cases can be transferred to Michigan’s circuit court system and decisions can be contested at the Appeals Court level. According to Michigan’s Governor, John Engler, the online court “will make Michigan uniquely attractive for the New Economy Businesses the same way the State of Delaware has had an advantage for incorporation of major public companies.”¹¹⁶
132. In the Netherlands, fifteen tribunals and two prisons have begun limited experiments with online court hearings. The experiment has detainees participating in court hearings through video, audio and Internet links to the court house, rather than transporting them to a court house. Not surprisingly, there are concerns about the effect these online procedures will have on judge and jury.¹¹⁷
133. Finally, even for those who opt for the traditional form of dispute resolution, i.e. the court house, they will be surprised with the innovations that are now taking place. There are online litigation support systems available to enable lawyers and their clients to share access to data bases that are accessible via the Internet (www.ringtail.com.au; www.icconnect.net). One service provides access to the full text of briefs, pleadings, affidavits, judgments and expert witness testimonies in several US civil courts. Another such service is e-Law.com (www.elaw.com).¹¹⁸ In the near future, civil courts will be implementing video conferencing and video hearings as well.¹¹⁹
134. With the help of a Canadian company, Juricert Services Inc., Singapore is developing what are touted as “virtual courts”; an almost paperless system equipped with features

¹¹⁵ Australia, Consumer Affairs Division, The Treasury, *supra* note 107, at 31.

¹¹⁶ Robert MacMillan, *Michigan Creates Online ‘Cybercourt’*, NEWSBYTES (Jan. 9, 2002), available at <http://www.washingtonpost.com/wp-dyn/technology/> (last viewed Jan. 2002).

¹¹⁷ Andrew Rosenbaum, *Courts Online? Dutch Justice Ministry Gives It a Try*, NEWSBYTES (Nov. 9, 2001), available at <http://www.washingtonpost.com/wp-dyn/technology/> (last viewed Nov. 12, 2001).

¹¹⁸ Richard Susskind, *Britain Leads US in Client Technology*, TIMES OF LONDON (Feb. 27, 2001), available at <http://www.timesonline.co.uk/> (last viewed Feb. 2001).

¹¹⁹ Richard Susskind, *Pilots May Bring Video Justice*, TIMES OF LONDON (Aug. 22, 2000), available at <http://www.timesonline.co.uk/> (last viewed Aug. 2000).

such as e-filing, e-hearings, and Internet video phones designed for lawyers, judges and judicial commissioners. The country's civil courts are completely electronic while filings and procedural applications in all other courts are also conducted electronically.

According to Singapore's Chief Justice, Yong Pung How:

“Initially, we faced strong resistance from the legal profession. It was understandable that there would be resistance from the ground, especially since most members of the bench and the bar were brought up and worked in a setting in which paper was part of our everyday lives... It is generally acknowledged that the system has transformed the litigation landscape from one likened to a paper mountain into an electronic super-highway.”¹²⁰

135. Perhaps the most exciting use of technology is found in the renowned Courtroom 21 in Williamsburg, Virginia, a joint project of the College of William and Mary and the National Center for State Courts (www.courtroom21.net). Technological developments include the use of holographic modeling (e.g. of a heart) for medical malpractice negligence actions. Additionally, jurors have been provided with special goggles and immersed in virtual reality to simulate the feeling of being in an operating theater.¹²¹
136. A similar virtual courtroom was recently launched in the UK (www.courtcom.co.uk). Known as Court 21, it is a joint venture between Leeds University, a U.K. company called Courtcom and Courtroom 21 from Williamsburg. The UK court room is a not-for-profit research facility designed to demonstrate and experiment with a wide range of technologies to improve the English legal system.¹²²
137. There is an old saying that goes, “If you're not part of the solution, you're part of the problem.” There is no doubt that as we become increasingly wired, e-commerce will continue to cause problems, especially of a jurisdictional variety. It is intriguing though that the Internet is in the process of providing e-solutions to many of those problems. But what role will lawyers have in effecting those solutions?

VI. The Shape of Things To Come

“I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I-
I took the one less traveled by,

¹²⁰ Daryl-Lynn Carlson, *Canada's Courts Blaze Trails with Technology*, LAW TIMES, July 29, 2002, at 16.

¹²¹ *Legal Site*, *supra* note 55.

¹²² Richard Susskind, *You Too Can Resolve Legal Conflict Online*, TIMES OF LONDON (June 26, 2001), available at <http://www.timesonline.co.uk/> (last viewed June 2001).

And that has made all the difference.”

Robert Frost, from “The Road Not Taken”

138. In his works, Richard Susskind makes three predictions about the future of law. The first is that there will always be a requirement for traditional legal services for high-value, complex, sophisticated legal work. Although that work will include a greater use of IT (for example, online legal manuals similar to project managers), it will remain essentially unchanged from what it is today.
139. Susskind’s second prediction is that routine, repetitive legal work will be first systematized and then commoditized. Entire legal tasks will be pre-packaged, productized and made available on the Internet without direct involvement of any lawyer or law firm.
140. His third prediction is the growth of what he calls the “latent legal market.” That is the market which, in the past, has found legal services too expensive, cumbersome and complex. Susskind sees entrepreneurial lawyers who will seek to serve the latent legal market by developing legal guidance systems over the Internet. That market is not being serviced at the present time and Susskind believes that reaching out to it online will be a positive social development.¹²³
141. In the long term, Susskind sees a profession split between legal promulgators and analysts, on the one hand, and legal engineers and facilitators on the other. That split will lead to a redefining or dismantling of “lawyers” law. According to Susskind, innovation will involve more non-legal actors and the “royal priesthood of legal interpreters” will become confined to ever decreasing remit. For example, intelligent agents (i.e. sophisticated online programs) will be instructed to roam around specific bodies of new information in search of relevant materials of likely interest to those who instruct them according to a particular profile of interest. Susskind believes that the intelligent agents may eventually replace the conventional personal lawyer-client consultation.¹²⁴
142. Susskind’s theories have been characterized by Ed Greenebaum, an American law professor, as “do it yourself law.” According to Greenebaum, no program, regardless of how sophisticated or intelligent, could ever identify only “relevant material.” In other words, there will never be such a thing as “true information management.” Even if a program were able to identify only relevant information, he believes that the consumer (i.e. online client) would not be interested in all relevant information, only quality and

¹²³ *Transforming the Law*, *supra* note 22, at 111-113.

¹²⁴ Dr. J. Shaw, *Spinning Out of Control – Understanding and Regulating the Web* (2001) 6 INTELL. PROP. & INFO. TECH. LAW, available at <http://ql.quicklaw.com>.

cogent information. The risk is that bad relevant information could drive out the good.¹²⁵

143. According to Greenebaum, Susskind's perception of the law is that it is static, more akin to the civil code than to the common law. The provision of legal advice is much more fluid. It is closer to organized common sense than to something which can be systematized and commoditized. Greenebaum rhetorically and perceptively asks, if a lawyer who acts for themselves has a fool for a client, what does that make a lay person who relies on do-it-yourself law obtained online?¹²⁶
144. Others see a very different picture. According to one legal scholar, the new technology only exacerbates stratification within the profession. That stratification will result in the death of the small practice with a loss of service to marginalized clients. Big law firms, however, will continue to exploit IT and grow in power, size and prestige.¹²⁷
145. Contrary to that view, others see the Internet as providing an opportunity for smaller firms to obtain a "level playing field" with larger firms. Smaller firms, especially those with specific legal specialties, will be able to establish national and international reputations and prosper online.¹²⁸ The growth of e-commerce will result in disputes which will lead to an increase in juridification, that is the tendency to use formal legal procedures and legal institutions to resolve conflict and decide controversies.¹²⁹
146. On one issue, however, there appears to be a consensus among legal observers - that is the growing incursion of accounting and consulting firms into the traditional practice of law. Accounting firms were quick to embrace the new technology and to use it to exploit their relationships with clients. The Internet will facilitate that incursion as accounting firms use it to access prospective clients who have little regard for whether the services come from a "traditional law firm."¹³⁰
147. Can the legal profession use the Internet to respond to that incursion? Information is the essential commodity of the e-economy. Because lawyers are the brokers of a highly specialized knowledge, they are well positioned to capitalize on the greatest asset of the e-economy - information.¹³¹
148. In many ways, the Internet is ideally suited to the delivery of legal services by lawyers. To practice online, lawyers do not need a physical location. Unlike many businesses, they are unencumbered by distribution channels. Distance, again a major factor in many

¹²⁵ Edwin H. Greenebaum, *'The Future of Law' Debate: Greenebaum on Susskind and Susskind's Reply: Is the medium the message? A discussion of Susskind's 'The Future of Law'*, 6.2 INT'L J. L. PROF. 197, 201 (1999).

¹²⁶ *Id.* at 207.

¹²⁷ Arthurs & Kreklewich, *supra* note 43, at 44-50.

¹²⁸ *E-Commerce and Legal Services*, *supra* note 47, at "Introduction."

¹²⁹ Arthurs, *supra* note 28, at 206.

¹³⁰ *E-Commerce and Legal Services*, *supra* note 47, at "The Challenge."

¹³¹ *Id.* at "Introduction."

businesses, is largely irrelevant to the practice. Law firms can grow rapidly, relatively unhampered by costs and delays common in the physical world of most businesses. Firms can customize their services and tailor those services to meet specific client differences. In theory, a small number of lawyers could meet the diverse needs of a large segment of the global market.

149. Since English is the *lingua franca* of the Internet (and will likely remain so for years to come), there is virtually no language barrier to the delivery of service by North American law firms. In addition, the marginal cost of production online is low (e.g. the second visit to a legal website). The information base provided by IT is also flexible.
150. Since many corporations carry on business in North America, North American lawyers have a “home court” advantage. Finally, as described earlier in this paper, there are government and regulatory barriers to the entry of “foreign” lawyers into North American jurisdictions. Given all of the advantages to the online delivery of legal services by lawyers, one can ask rhetorically - what other business is better suited to take advantage of the Information Age?
151. As the world becomes increasingly “wired,” standing still is no longer an option for any business, including the business of law. Businesses must move forward at “net speed.” Like any other business, law will not survive without an active Internet strategy. The key question which lawyers should be asking themselves is - how do we use the Internet to better serve our clients?
152. Perhaps as a corollary of his views regarding disintermediation (i.e. elimination of the middle man), Susskind sees the potential for re-intermediation; that is, creating new values between producers and consumers using the Internet. Susskind sees two forms of re-intermediation; the first is transforming legal services through the unbundling of those services (e.g. outsourcing legal research); the second is the provision of online legal services with no access to legal guidance at all. According to Susskind, legal “info-mediaries” will transform the selection of legal services by identifying the suitable blend of human and technology based legal services.¹³²
153. In a similar vein, Susskind envisages the development of client-relationship systems. Those systems would include status tracking, financial reporting, virtual deal and virtual case rooms, online archives, online instruction, case/matter/management systems and dedicated client relationship sites.¹³³
154. Contrary to Susskind’s views, certainly in the foreseeable future, it is hard to envisage the delivery of legal services without the involvement of a human factor. The continued success of the profession will likely require a blend of more online activity and the more

¹³² *Transforming the Law*, *supra* note 22 at 47-9.

¹³³ *Id.* at 20.

traditional presence. That combination of online and traditional service has been characterized as “clicks and mortals.”¹³⁴ That human factor, however, might not necessarily take place fact to face but rather over the Internet, for example, by way of video conference - perhaps the best of both worlds.

VII. Strategies for the Profession

“Even if you are on the right track, you’ll get run over if you just sit there.”

Will Rogers

155. The Internet is in its infancy and no one fully understands its future impact on society at large. There is no doubt, however, that once over a billion brains are “wired together” through innovative and interactive technology (e.g. video conferencing or wearable computers), the results will be revolutionary.

A. Competitive Strategies

156. No business has the luxury of waiting on the sidelines for the outcome of the Technology Revolution. Instead, every successful business will need to develop strategies to compete and prosper within their respective industries. The same holds true for the practice of law. Not only must the “legal industry” remain attractive and profitable, but firms within it must, if they are to remain successful, adopt competitive strategies vis-à-vis their competitors. Competition is at the core of the success or failure of firms. Competitive strategy, then, is the search for a favorable competitive position in an industry, the fundamental arena in which competition occurs.¹³⁵
157. According to Porter, two central questions underlie the choice of competitive strategy. The first is the attractiveness of industries for longterm profitability and the factors that determine it. In section 3 (i.e. The Business of the Legal Profession), this paper attempted to answer Porter’s first question by exploring the rules of competition that determine the attractiveness of the legal industry. There, the paper used Porter’s five-forces framework to better understand those rules. As earlier noted, the collective strength of these five competitive forces (i.e. new entries, substitutes, buyers, suppliers, and rivals) determines the ability of firms in the legal industry to remain, on average, profitable.
158. Porter’s second central question in competitive strategy is the determinance of relative competitive position within an industry.¹³⁶ In other words, how is your firm going to

¹³⁴ Richard Susskind, *Challenge of Clicks and Mortals*, TIMES OF LONDON (April 24, 2001), available at <http://www.timesonline.co.uk/> (last viewed Apr. 2001).

¹³⁵ *Competitive Advantage*, *supra* note 32, at para. 1.

¹³⁶ *Id.* at para. 2.

compete and how will your firm position itself to be a superior performer? The answer to those questions will determine whether a firm's profitability is above or below the industry average. The fundamental basis of above average performance, according to Porter, in the long run is sustainable competitive advantage.

159. As the Internet puts pressure on profitability in many industries, it becomes even more important for firms to distinguish themselves, i.e. to set themselves apart from the pack. The only way to do so is to develop a sustainable competitive advantage - by operating at a lower cost, by differentiation (i.e. a premium price) or by doing both. Cost advantage and differentiation, in turn, are a result of an industry's structure. In other words, cost advantage and differentiation result from a firm's ability to cope with the five forces better than its rivals.¹³⁷
160. Applying Porter's competitive strategies to the practice of law leads to one conclusion - a law firm cannot be all things to all clients. Such a strategy effectively means that the law firm has no competitive advantage at all. That in turn leads to strategic mediocracy and below average performance. Instead, firms must choose whether they will seek competitive advantage by way of low cost or by way of differentiation, or a combination of both.

B. Cost Leadership

161. Using a cost leadership strategy, a firm sets out to become the low cost producer in its industry. A low cost producer must find and exploit all sources of cost advantage. In a law firm, that might require extremely low overhead or providing a standard, no-frills service with an emphasis on reaping scale from all sources. If a firm can achieve and sustain overall cost leadership, then it will be an above average performer in the legal industry provided it can command prices at or near the industry average. In the legal profession, however, there is a "wrinkle" - i.e. law firms cannot ignore professional standards. A firm cannot deliver a "product" (i.e. legal advice) that is perceived by clients, insurers, or regulators as substandard. Such perception would eventually lead to the firm's demise.
162. In addition, developing a competitive advantage based on cost leadership is very risky for lawyers. That is because the Internet weakens industries' profitability as rivals compete on price alone. In addition, since virtually all firms now use the Internet, it no longer provides proprietary advantages.¹³⁸

¹³⁷ Porter subdivides cost advantage and differentiation into three generic strategies to achieve above-average performance in an industry: cost leadership, differentiation, and focus. He then sub-subdivides focus into two variants; cost focus and differentiation focus. For purposes of this analysis, it is not necessary to deal with the subdivisions and sub-subdivisions. This analysis will instead focus on the two basic types of competitive advantage, i.e. low cost and differentiation. *Id.* at "Generic Competitive Strategies."

¹³⁸ See *Strategy*, *supra* note 34 at 67.

163. One example of obtaining a competitive advantage through cost leadership is Susskind's suggestion that law firm's set up a geographically distinct new economic unit, an off-site resource, whose purpose would be to engage in R & D and in entrepreneurial thinking on behalf of its parent law firm. The off-site unit would not only undertake research and development and promote entrepreneurial business models, but would also identify, develop and market online legal services using Christensen's "disruptive technologies."¹³⁹ Using those technologies, with their resultant lower cost structures, would enable the new economic unit to provide lower cost services to the low end of the market. Susskind predicts that, gradually, access to legal service package as information service will sell in high volumes for mass consumption at low prices.¹⁴⁰

C. Differentiation

164. In Porter's second generic strategy, i.e. differentiation, a firm seeks to be unique in its industry along some dimensions that are widely valued by buyers. It selects one or more attributes that many buyers in an industry perceive as important, and uniquely positions itself to meet those needs. The reward for that uniqueness is a premium price.¹⁴¹
165. In order to attract a premium price, a firm must be truly unique at something or be perceived as unique. In other words, the differentiation strategy requires firms to choose attributes in which to differentiate themselves that are truly different from those of its rivals. There are, however, a number of different means for differentiation peculiar to each industry. That differentiation can be based on the product itself, the delivery system, the marketing approach or a broad range of other factors.¹⁴²
166. Is there a role which the Internet can play to help achieve that strategic positioning? Yes, according to Porter, by integrating Internet initiatives into the firm's overall strategy and operations so that they 1) complement (rather than cannibalize) the firm's established competitive approaches and 2) create systematic advantages that the firm's competitors cannot copy.
167. Integrating Internet initiatives enhances a firm's ability to develop unique products, proprietary content, distinctive processes, and strong personal service - the sorts of things that create true value and that have always defined competitive advantage.¹⁴³ In other words, Porter sees the Internet as a strategic tool to make a firm's differentiation strategy stronger. In his words, "it's really the tailoring of the Internet to the firm's unique

¹³⁹ *Transforming the Law*, *supra* note 22 at 65.

¹⁴⁰ *Id.* at 103.

¹⁴¹ *Competitive Advantage*, *supra* note 32, at "Differentiation."

¹⁴² *Id.*

¹⁴³ *See Strategy*, *supra* note 34 at 67.

strategy that will be the real opportunity for advantage.”¹⁴⁴

168. Applying those principles to the practice of law, a firm using the differentiation strategy would select one or more attributes that many clients perceive as important and then would uniquely position itself to meet those needs. That differentiation could be based on the choice of product, the choice of markets, and/or the choice of courses of action.
169. There is then a multitude of ways by which law firms could choose to differentiate themselves.¹⁴⁵ However, several examples of such strategies (suggested by H.W. Arthurs) may be of assistance. The first is for large Canadian law firms to move aggressively into the international sphere, with particular focus on countries where they may be able to exploit special trading or investment relationships (such as Hong Kong or Cuba) or to take advantage of Canada’s lower cost strategies to compete with firms which presently dominate the global market for legal services.
170. A second strategy is the formation of alliances with or becoming absorbed into existing global law firms based in the United States and Europe. This is probably a logical strategy given the experience of comparable Canadian accounting firms. In effect, the firms would become competitors, partners or integral components of major multi-disciplinary international consulting firms which already dominate the market.
171. The third example is a restructuring of firms by reducing their size, overheads, profits and fees to enable them to compete more effectively for a different clientele, i.e. mid-sized Canadian companies. Ironically, the price of success for Canadian firms may come at the expense of their being solely Canadian and solely law firms.¹⁴⁶
172. Another example of differentiation strategy is the formation of a multi-disciplinary practice. Despite recent scandals in the accounting profession, the Barreau du Québec has recently published a series of preliminary regulations intending to provide a framework to govern the practice of multi-disciplinary partnerships in that province. The proposed regulations will allow lawyers to conduct professional activities within a limited liability partnership or joint-stock company and allow those new units to forge multi-disciplinary partnerships with professionals as defined by the Code des Professions Du Québec. The Barreau is consulting the profession over the proposed regulations which are expected to be finalized in the fall of 2002 and be in force in the spring of 2003.¹⁴⁷

¹⁴⁴ John A. Byrne, *Q&A: Caught in the Net*, BUSINESSWEEK ONLINE (Aug. 27, 2001), available at <http://www.businessweek.com/>.

¹⁴⁵ It is beyond the scope of this paper to identify those many ways.

¹⁴⁶ Arthurs, *supra* note 28, at 211-16.

¹⁴⁷ Millan, *supra* note 36, at 1-2

D. The “Vision Thing”

173. Once the firm has chosen its type of competitive advantage (i.e. cost leadership, differentiation or a combination of both), it must develop a digital vision firmly rooted in that competitive strategy. That vision must be diffused and accepted throughout the organization. The views of the key players in the firm need not be identical but should be consonant. In other words, there should be a general consensus that the firm is moving in the same direction.
174. To accomplish that, according to Porter, an organization needs a strong leader, i.e. someone who is willing to make choices and define the trade-offs. The strong leader does not have to invent the firm’s competitive strategy. The more critical job is for the leader to provide the discipline and the glue that keeps the organization’s unique position sustained over time. Part of that leadership involves ensuring that everyone in the organization understands the strategy. In other words, one of the leader’s jobs is to ensure that the many things that are done in an organization every day are all aligned in the same basic direction. Porter asks:
- “If people in the organization don’t understand how a company is supposed to be different, how it creates value compared to its rivals, then how can they possibly make all of the myriad choices they have to make?”¹⁴⁸
175. Once a firm has identified its distinctive strategy and chosen its leader to effect that strategy, it should proceed to use the Internet to re-enforce its distinctiveness. In establishing their online presence, however, lawyers must be mindful about inadvertently establishing online relationships that are arguably lawyer-client relationships. If they do, certain duties are owed to the Internet “client.” Those duties include confidentiality, competence (i.e. is the lawyer competent to advise individuals in a jurisdiction where he or she is not licensed), and conflict-free representation.¹⁴⁹
176. In considering how to use the Internet to strengthen its distinctiveness, a firm might consider any of the following Susskind suggestions:
1. Establish an off-site new economy unit;
 2. Achieve a blend of “clicks and mortals”;
 3. Work under the same virtual roof as clients;

¹⁴⁸ Keith H. Hammonds, *Michael Porter’s Big Ideas*, 44 FAST COMPANY 150, (Mar. 2001), available at <http://www.fastcompany.com/online/44/porter.html> (last viewed Aug. 27, 2002).

¹⁴⁹ Jim Calloway, *Attorney Advertising in Cyberspace*, 69.29 OKLA. BAR J. 2597, (Jul. 18, 1998) available at <http://www.okbar.org/map/articles/advertising.htm>.

4. Set up online resources for every matter;
 5. Identify clients' main business episodes; and
 6. Provide a wider range of services to clients.¹⁵⁰
177. John Kelly, a law teacher at Seneca College in Toronto, provides a number of suggestions for Internet applications by law firms:
1. Use an extranet for real time communications;
 2. Create secure pathways for exchanging privileged information;
 3. Eliminate time and distance barriers for widespread companies;
 4. Establish a common platform for exchanging documents;
 5. Create a common data bank as the first step in establishing performance indicators;
 6. Effect a proactive billings management program; and
 7. Facilitate outsourcing.¹⁵¹
178. Another example of a distinctive, client-centric strategy might be the development of a "third generation" website to increase the level of inter-activity between lawyers and clients. Such a site would embrace the opportunities of the Internet by providing online legal services through a dialogue with visitors or by using the Internet as an integral part of a client-service delivery strategy.¹⁵²
179. In the end, a firm's distinctive strategy is reinforced by combining the best "clicks" (i.e. the best technology) with the best "mortals" (i.e. the best legal minds). Whether the firm's competitive strategy is cost advantage, differentiation or a combination of both, its competitive advantage within the industry can only be strengthened by that combination.

VIII. Conclusion

"New technology generates its own remedy. To the extent that it destroys jobs, it endows jobs, by generating new wealth. And that is invested in endowing new jobs with capital. And that's why these predictions [of mass unemployment] always fail. And some of these jobs are services. There is an increased demand for services of all descriptions. And I think those kinds of jobs multiply as the old jobs

¹⁵⁰ *Transforming the Law*, *supra* note 22, at 63.

¹⁵¹ J. Melnitzer, *Confusing E-Commerce with E-Business: 'Legal E-Business Has Yet to Permeate the Legal Professional's Mindset'*, LAW TIMES, Aug. 12, 2002, at 14, available at <http://www.lawtimesnews.com> (last viewed Aug. 2002).

¹⁵² *E-Commerce and Legal Services in Canada*, *supra* note 45 at "Seizing the Opportunity."

get eclipsed. Essentially jobs that are replaced by machines are jobs that are subhuman. Human beings' chief distinguishing endowment are their brains. Essentially jobs that don't use creativity, don't use human capabilities tend to get routinized, and the jobs that do use human capabilities persist and that's sort of the way the evolution proceeds."¹⁵³

George Gilder

180. The Internet has resulted in an explosion of information and a challenge to the familiar ways of doing things. That impact is perhaps nowhere more intense than to the traditional practice of law. That is because lawyers have always been in the "knowledge game." But if legal information is freely and widely available from any network appliance and from a number of interfaces, why is there any longer a need for the "royal priesthood of law"?
181. As Gilder observed in the above quote, new technology both destroys jobs and endows jobs. The need for lawyers will not only remain but will inevitably grow because the Internet intensifies existing legal issues and creates new ones. By way of example, current "hot" e-issues include: online contractual obligations; technology contract disputes; ownership of content, specifically intellectual property; privacy law compliance; domain name disputes; consumer protection; and jurisdictional issues including choice of forum and choice of law.
182. The trip down the Information Highway will not be easy - but then again, standing still is not an option. Only one thing is for certain. The trip, for lawyers, will never be more interesting. But if lawyers, with all of the advantages which they currently enjoy, cannot use the Internet to grow and prosper, who can?

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¹⁵³ "George Gilder, Economist and Author" *Star Tribune* (1996), available at <http://www.startribune.com/stonline/html/digage/gilder.htm> (last viewed Aug. 27, 2002).