



An Information Superhighway “On Ramp” for Alternative Dispute Resolution

BY GEORGE H. FRIEDMAN AND ROBERT GELLMAN*

For years, commentators have predicted that the future would bring the benefits of online technology to our paper-laden method of resolving disputes. Although there has been some limited movement in that direction, with some courts establishing limited access to basic docket information, or permitting filing of papers online, attorneys have awaited the development of a truly online, self-contained dispute resolution system.

The wait appears to be over, with the start of the Virtual Magistrate Project, a joint venture of the Cyberspace Law Institute, the American Arbitration Association, the National Center for Automated Information Research, and the Villanova Center for Information Law and Policy. The project, launched this Spring, creates a completely online system for resolving disputes, using the Internet's World Wide Web as a gateway. Fashioned as a one-year demonstration project, the Virtual Magistrate project has been established to resolve certain disputes between online service providers, subscribers, and others, concerning posting of material online.

For attorneys, it brings about the development of the virtual arbitration, with all communications and information

related to the case available through their computer at any time from any place. With some estimates of Internet use now projected at 37 million as of the beginning of 1996, and use of online technology growing exponentially, this project gives us a glimpse of the way attorneys will likely be conducting arbitrations and litigation by the year 2000. ☺

Introduction

By all measures, 1995 was a watershed year for the so-called “Information Superhighway.” In increasing numbers, individuals, governments, and businesses — including attorneys, their clients, and the courts — made expanded use of the burgeoning information and services available on computer networks such as the Internet.

As courts and lawyers moved online, it was only natural that the Information Superhighway would ultimately build an “on-ramp” for the alternative dispute resolution (“ADR”) movement. This indeed occurred late in 1995 with the creation of the Virtual Magistrate Project, a joint venture aimed at developing an online dispute resolution system for addressing some of the disputes that may arise between online providers, subscribers, and others.

With the enactment of the Communications Decency Act, S. 652 (February 7, 1996), which requires online providers to play a greater role in policing content, the arrival of the Virtual Magistrate Project was timely if not prescient. This paper examines the development, operation, and future of the Virtual Magistrate Project.

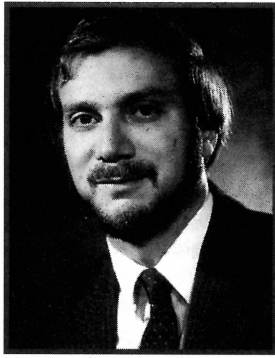
The Information Superhighway

American society is now undergoing a profound change. Armed with powerful and inexpensive computer technology, businesses, organizations, governments, and individuals are

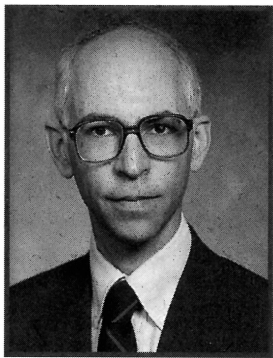
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increasingly using computer networks to conduct transactions, promote goods and services, and exchange information on virtually any subject. Over the past several years, there has been an undeniable explosion in the use of the "Information Superhighway." This term generally describes the use of computer networks for economic, social, governmental and other activities. Business uses include communication, marketing, research, and financial transactions.

In the past two years, the Internet has become a familiar term to everyone. Originally started as a Defense Department project to support communication between computers at research facilities, the Internet has grown into a world-wide network of countless computer systems. By some estimates, 37 million people use the Internet.¹ A huge amount of information on an almost infinite number of topics is now available online, and virtually any computer can connect to the Internet.

The fastest-growing component of the Internet is the World Wide Web,² which connects text, color photos, video clips, and sound, using hypertext technology. The Web gives anyone the ability to make information available to other Internet users. Web pages come alive with high resolution color graphics, sound effects, and even motion pictures. Once connected to a Web site, a user can click on links that connect to other sites anywhere around the world. Users can also easily download information for local use.

Conception of Virtual Magistrate Project

The Virtual Magistrate Project evolved during the last quarter of 1995. In October, a meeting was convened by David Johnson, Esq., Chairman of Lexis-Counsel Connect,³ and trustee of the National Center for Automated Information Research (NCAIR). NCAIR is a foundation "dedicated to enhancing the law and legal profession through the use of computers."⁴ The purpose of the meeting was to explore the possible creation of an online industry standard protocol for resolving disputes. Also attending were representatives of NCAIR, the Villanova Center for Information Law and Policy, the American Arbitration Association, the United States Federal Trade Commission, the Cyberspace Law Institute, and several major online providers.

While the initial focus of the meeting was on how to establish an industry-wide protocol for resolving online disputes, attention quickly shifted toward the development of an online ADR mechanism. A one-year demonstration project was proposed to test an online system for resolving a defined class of disputes. Required elements were rules for online dispute resolution, identification of parties, and a method of communication. Administration and operation of the project would be completely online.

Birth of Virtual Magistrate Project

In the ensuing weeks, the project, dubbed the Virtual Magistrate ("VM") Project, quickly took shape. It was determined that the Virtual Magistrate Project would be a joint

¹ "Internet Demographics Survey," Conducted by Dun & Bradstreet's Nielson Media Research and Commerce Net, *Dallas Morning News*, January 7, 1996, p. H-1.

² *Id.*

³ Lexis Counsel Connect is an online service for attorneys featuring a wide range of law and law-related information. Its Home Page on the World Wide Web may be found at: <<http://www.counsel.com>>.

⁴ The National Center for Automated Information Research is a non-profit, educational corporation engaged in the study and application of technology to the legal and accounting professions. Its purposes are: "to study modern methods of research and information retrieval, to educate the professions in these methods, and to further the development and availability of these methods..." NCAIR WWW site, <<http://www.law.vill.edu/ncair>>.



venture of the Cyberspace Law Institute,⁵ the American Arbitration Association,⁶ NCAIR,⁷ and the Villanova Center for Information Law and Policy.⁸ Roles and relationships of the four entities are as follows:

❖ The Cyberspace Law Institute is the convening body of the Virtual Magistrate Project, and directs its policy. Robert Gellman serves as the Executive Director of the project;

❖ The American Arbitration Association administers cases submitted to the Virtual Magistrate Project. It is charged with establishing systems to assure appropriate receipt and routing of complaints;

❖ The Villanova Center for Information Law and Information Policy provides online facilities that allow public access to the work of the Virtual Magistrate Project;

❖ The National Center for Automated Information Research (NCAIR) provides initial funding for the Virtual Magistrate Project, and will administer the disbursement of the funds.

In late 1995 and early 1996, funding was received from NCAIR, rules were drafted, panelists ("Virtual Magistrates") were identified, and a World Wide Web site, with links to the Web sites of the Virtual Magistrate partners, was established for the Project. In early 1996, the Virtual Magistrate home page was tested for technical performance, and the Project was formally announced in early March.

Goals of the Virtual Magistrate Project

The Virtual Magistrate Project offers arbitration for rapid, interim resolution of disputes involving (1) users of online systems, (2) those who claim to be harmed by wrongful messages, postings, or files and (3) system operators (to the extent that complaints or demands for remedies are directed at system operators).⁹

The project goals are to:

- 1) establish the feasibility of using online dispute resolution for disputes that originate online;
- 2) provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings;
- 3) To provide a rapid, low-cost, and readily accessible remedy for complaints about online postings;
- 4) To establish a self-sustaining, online dispute resolution system as a feature of contracts between System Operators, users, and content suppliers;
- 5) To help define the reasonable duty of System Operators in addressing complaints;
- 6) To determine the feasibility of using the Virtual Magistrate to resolve other types of online disputes; and
- 7) To develop a formal governing structure for the Virtual Magistrate.¹⁰

Operation of the Virtual Magistrate Project

The operation of the Virtual Magistrate Project is relatively simple from the perspective of the parties, although as described below, significant "behind-the-screens" coordination between the Virtual Magistrate parties takes place throughout the process.

Filing of Cases

Any system operator may (1) require users (by means of the standard user contract) to refer complaints to the Virtual Magistrate Project; (2) require users to agree that any complaints about their postings or files will be referred to the Virtual Magistrate Project and may be handled in accordance with its decisions; (3) promise as part of its contractual undertakings to take actions consistent with the decision of a Magistrate in particular cases; or (4) agree with a particular user to refer a particular matter to the Virtual Magistrate Project. The Virtual Magistrate Project will redirect requests for mediation services to other appropriate sources of such assistance.

Case intake is via the Virtual Magistrate home page on the World Wide Web, utilizing an electronic docketing form.¹¹ In rare cases where one of the parties no longer has e-mail capability, alternate arrangements will be made. The filing of the case results in a download to the AAA's system administrator, who then notifies the parties of receipt and begins the formal case administration process described below. Although NCAIR has provided funding for the operation of the Virtual Magistrate Project during its pilot phase, to deter frivolous or repetitive complaints, there is a filing fee of \$10. Eventually, operations of the Virtual Magistrate Project may be funded through assessments against system operators or from other external funding sources. The project features a constantly-updated docket, which is available to the parties through a password-protected access system. The docket includes a record of all communications on each case.

⁵ A full description of the Cyberspace Law Institute may be found at its home page on the World Wide Web, <<http://www.ll.georgetown.edu/lc/cli.html>>.

⁶ The American Arbitration Association is a public-service, not-for-profit organization (IRS section 501(c)(3)) offering a broad range of dispute resolution services to corporations, attorneys, insurers, individuals, trade associations, unions, consumers, and all levels of government. Services are available through AAA headquarters in New York City and through offices located in major cities throughout the United States. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement. A full description of the AAA may be found at its home page on the World Wide Web, <<http://www.adr.org>>.

⁷ See n. 4, *supra*.

⁸ The Villanova Center for Information Law and Policy is affiliated with the Villanova University School of Law, and is supported by grants from NCAIR. It cooperates with other interested law schools and all levels of government "to implement a cooperative distributed system of legal information through the Internet." It also conducts research related to the field. VCILP WWW Page, <<http://www.law.vill.edu>>.

⁹ For the basic descriptive documents of the Virtual Magistrate Project, see the Virtual Magistrate Home Page, located at <<http://vmag.law.vill.edu:8080>>, [hereinafter referred to as VMAG Home Page]. Electronic Addresses for the Virtual Magistrate Project are: Virtual Magistrate Home Page Web Page: <<http://vmag.law.vill.edu:8080>>
AAA Web Page: <<http://www.adr.com>>
Complaints: <vmag@mail.law.vill.edu>
Help: <vmag-question@mail.law.vill.edu> and <vmag-help@mail.law.vill.edu>
VMAG Home Page Operations: <vmag-admin@mail.law.vill.edu> and <vmag-owner@mail.law.vill.edu>
AAA Administrator: <vmag-aaa@mail.law.vill.edu>
VMAG Home Page Executive Director: <rgellman@cais.com>

¹⁰ *Id.*

¹¹ *Id.*



Appointment of Virtual Magistrates

A single magistrate will be selected randomly by the AAA from a pool of qualified and trained arbitrators. Some cases may be referred to a panel of three magistrates. For the start-up phase of the project the pool of magistrates consists of eight neutrals selected jointly by the American Arbitration Association and a subcommittee of CLI Fellows.¹² Prerequisites are familiarity with the law and online systems. The pool is not limited to lawyers, although some cases may be assigned to lawyers or to others with specialized knowledge or experience.¹³

AAA has provided training and orientation regarding the applicable procedures and protocol for arbitration on the Net. The Handbook for Magistrates is available online through the Virtual Magistrate Web site.

Panel members must avoid direct conflicts of interest. Since they are officially members of the Association's roster of neutrals, they agree to be bound by the AAA/ABA *Code of Ethics for Arbitrators in Commercial Disputes*.¹⁴ Magistrates will receive \$250 per case, through funds available to the project.

The roster of magistrates, and the identity of the magistrate responsible for each proceeding, is publicly available through the Virtual Magistrate Web site, and is set forth below:¹⁵

Professor Charles McClure

School of Information Studies, Syracuse University

Professor Ethan Katsh

Department of Legal Studies, University of Massachusetts

N. M. Norton, Jr., Esq.

Wright, Lindsey & Jennings, Little Rock, Arkansas

Paul Hoffman, Esq.

Croton-on-Hudson, NY

Larry E. Meyer, Esq.

Pohl, Bennett & Mathews, Houston, TX

Alton W. Payne

Sroufe, Payne & Lundeen, Houston, TX

Andrea W. Selvaggio, Esq.

Washington, DC

G. Gervaise Davis III, Esq.

Davis & Schroeder P.C., Monterey, CA

What Will the Virtual Magistrate Decide?

The Virtual Magistrate Project will accept complaints about messages, postings, and files allegedly involving copyright or trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate (obscene, lewd, or otherwise violative of system rules) materials, invasion of privacy, and other wrongful content.¹⁶

The Virtual Magistrate will decide whether it would be reasonable for a system operator to delete, mask, or otherwise restrict access to a challenged file or posting. Other cases may call for decisions about the disclosure of the identity of an individual to a person other than the government. In extreme cases, the Virtual Magistrate may rule on whether it is appropriate for a system operator to deny a person access to an online system.¹⁷

The Virtual Magistrate Project may broaden the scope of its rulings if all relevant parties identify themselves and agree to be bound by an arbitration decision. The Virtual Magistrate Project will not decide questions about billing or financial obligations as between users and system operators.

How Will Decisions be Reached?

Cases are governed by special rules developed for the Project and, to the extent they do not conflict, the AAA's Commercial Arbitration Rules.¹⁸ The filing of complaints and communications between the parties and the Virtual Magistrate Project will normally take place by e-mail. The Virtual Magistrate Project will make reasonable efforts to provide notice to all parties and persons in interest. Each Magistrate will attempt to reach a decision within 72 hours (three business days) after acceptance of a complaint and, when appropriate, a Magistrate may issue interim decisions more quickly.¹⁹ At the request of the parties or for good cause, the decision schedule may be extended.²⁰ The Magistrate will normally issue written opinions.²¹

Standard for Decisions

Decisions by the Virtual Magistrate Project will determine whether, in light of available information, network etiquette, applicable contracts, and appropriate substantive laws, a system operator would be acting reasonably if it withheld postings from public access pending resolution of claims between the parties in interest in any applicable legal jurisdiction.

In making a decision, the Virtual Magistrate Project will not automatically apply the law of any specific legal jurisdiction. It will consider the circumstances of each complaint, the views of the parties about applicable legal principles and remedies, and the likely outcome in any ultimate litigation or dispute resolution.²²

Effect of Decisions

The Virtual Magistrate Project expects system operators to support and enforce decisions as with other private arbitration decisions. When the Virtual Magistrate Project decides that a file or posting should be deleted, masked, or otherwise restricted pending further determination of the rights of all concerned, a system operator will normally be directed to comply.²³

The Virtual Magistrate Project will seek to persuade third parties (such as copyright owners whose works may have been infringed by network postings) to agree, in consideration of access to the dispute resolution process, to be bound

¹² *Id.*

¹³ *Id.*

¹⁴ AAA Policy Information provided by AAA National Vice President for Neutral Rosters, Rocco Scanza. The Code may be found at either the AAA or Virtual Magistrate home pages.

¹⁵ VMAG Home Page.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The Virtual Magistrate Rules and the AAA's Commercial Arbitration Rules may be found at either the AAA or Virtual Magistrate home pages.

¹⁹ VMAG Home Page.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

by the decisions. This means that they will be asked to agree that submission of a complaint to the Virtual Magistrate Project, and handling of the matter in compliance with the resulting decision, fulfills any duty the system operator may otherwise have had to respond to the complaint in the interim before more conclusive determination of the respective rights of the sender of a message and the complaining parties. The goal is to have all parties to a proceeding agree to comply with the decision pending additional legal actions.²⁴ Decisions by the Virtual Magistrate Project may be reconsidered but will not be subject to an internal appeal mechanism.

As a last resort, however, in the event of noncompliance with a Virtual Magistrate decision, a party is free to seek judicial enforcement of the decision as an arbitration award. Given the nature of online communications, enforcement will generally be sought pursuant to the United States Arbitration Act,²⁵ which provides for a summary process to enforce arbitration awards, subject to very limited judicial review.²⁶

All system operators, users of online systems, and others participating in the Virtual Magistrate's proceedings agree by virtue of their participation to waive any claim against the Virtual Magistrate Project and/or its participants for any liability as a result of the proceedings.²⁷ The AAA, in conformity with its normal policy and

practice, will usually provide representation for the Magistrates in the event of litigation over their activities as neutrals in the Virtual Magistrate Project.

Publication and Significance of Decisions

Decisions of the Virtual Magistrate Project will be made public, provided however that the panel may rule that specified matters be kept under seal or that publication of specific matters be delayed for good cause shown. The Virtual Magistrate Project will keep filings confidential until the decision is rendered. Complaints and other submissions relating to a proceeding will then be made public, unless the Magistrate in the case rules that the filings may be sealed for good cause.²⁸ Virtual Magistrate Project panels may conduct private deliberations.


Published decisions and proceedings are made available through a World Wide Web site maintained by the Center for Law and Information Policy at Villanova Law School.²⁹ Decisions by one Magistrate will necessarily not be treated binding precedent for other cases. Eventually, a body of cyberspace law may develop from the decisions and form the basis for resolving additional disputes. The parties to a proceeding will be bound by the decision and will not be permitted to relitigate identical matters through the Virtual Magistrate Project.

The Future

The Virtual Magistrate Project will report publicly on its experiences and will attempt to establish a protocol for online dispute resolution that can be emulated by others. The Virtual Magistrate Project may also seek to educate the public about network policies, practices, and conduct.

Evaluation is an essential element of the Virtual Magistrate Project. NCAIR and the Cyberspace Law Institute plan a conference in Washington, D.C., in May 1996 to evaluate the Project to that date and to accelerate the process of delivering the pilot project to its permanently funded administrative home.

If the project succeeds as its founders anticipate, it will dramatically change the way online disputes are resolved, and ultimately affect the way arbitrations are administered for a wide range of disputes beyond the online realm. For attorneys, it will bring about the development of virtual arbitration, with all communications and information related to the case available through their computer at any time from any place.

For years, commentators have predicted that the future would bring the benefits of online technology to our paper-laden method of resolving disputes. Through the Virtual Magistrate Project, the future quite clearly has arrived. 

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²⁴ *Id.*

²⁵ 9 U.S.C. secs. 1 *et. seq.*

²⁶ 9 U.S.C. sec. 10(a) provides that an arbitration award can only be vacated where: (1) the award was obtained through fraud, corruption, or undue means; (2) there was evident partiality or corruption of the arbitrators; (3) there was arbitrator misconduct (e.g., failure to accept relevant evidence or to postpone a hearing on good cause shown); and (4) the arbitrators exceeded their authority.

²⁷ VMAG Home Page.

²⁸ *Id.*

²⁹ *Id.*