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Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse

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Article: The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse

Lucille M. Ponte[1]

At 6:00 p.m., in Boston, plaintiff's counsel is undertaking the direct examination of his expert witness in London, where it is midnight. The expert is testifying about a key element of the misappropriation claim raised in the plaintiff's complaint that was filed electronically with the court. The expert witness is illustrating several of her points using animation being streamed in the upper right-hand corner of the videoconferencing screen. Opposing counsel, in her Colorado office, jots down a few notes for cross-examination while her paralegal is clicking through a CD-ROM containing that expert's earlier deposition testimony. An automated court reporter ("ACR") is monitoring the proceedings as a voice-recognition system creates a real-time transcript that is running at the bottom of the screen for hearing-impaired viewers. A digital audio and video recording system using microphones and cameras is also capturing the images and words, preserving the testimony for any subsequent court review. The judge in Michigan halts the proceedings momentarily as a glitch in the Internet broadcast of the proceedings is resolved and the trial is now back online for public viewing.[2]

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[2] For a review of the broad array of new and advanced courtroom technological tools *see generally* Stanley C. Sandstrom & Adam Bloomberg, *An ancient art jazzed by high tech*, 3 LEG. TECH. NEWS 1 (Spring 2002), *available at* http://www.provid.com/LegalTechNews–Spring.pdf (last visited June 26, 2002) (on file with the North Carolina Journal of Law & Technology); Samuel H.

Courtrooms have always been centers for the substantial exchange and processing of complex information.[3] High technology courts have just begun to test and use rapidly emerging technologies, like those described above, to help process, review, distribute and store mountains of court data.[4] Some of these high tech courtrooms serve as private laboratories for applying and

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Solomon & Martin E. Gruen, *The High Tech Courtroom*, Sixth National Court Technology Conference, National Center for State Courts (Sept. 1999), *available at* http://www.ncsc.dni.us/NCSC/TIS/TIS99/CTC6%20–%2030%20–%20session.htm (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology); Frederic I. Lederer, *Courtroom Practice in the 21st Century*, TRIAL (July 1999), *available at* http://www.ncsc.dni.us/NCSC/TIS/TIS99/CtromtecTrial2.htm (last visited June 10, 2002) [hereinafter Courtroom Practice Article] (on file with the North Carolina Journal of Law & Technology); Frederic I. Lederer, *The Courtroom as a Stop on the Information Super Highway*, REFORM, THE AUSTRALIAN JOURNAL OF LAW REFORM (1997), *available at* http://www.courtroom21.net/About.Us/Articles/AUSTLREF.HTML (last visited June 10, 2002) [hereinafter Information Super Highway Article] (on file with the North Carolina Journal of Law & Technology).

[3] Information Super Highway Article, *supra* note 2, *at* 1. Prof. Lederer, a pioneer in courtroom technology and director of Courtroom 21 at the College of William and Mary stated that,

> The courtroom is a place of adjudication, but it is also an information hub. Outside information is assembled, sorted, and brought into the courtroom for presentation. Once presented, various theories of interpretation are argued to the fact finder who then analyzes the data according to prescribed rules... and determines a verdict and result. That result, often with collateral consequences, is then transmitted throughout the legal system as necessary. The courtroom is thus the center of a complex system of information exchange and management. The increasing use of technology in courtrooms and the advent of high technology courtrooms might best be viewed in the age of the information superhighway. The administration of justice is clearly compatible with the "highway." But how will or should the two interact?

Id. *See infra* note 5 and accompanying text.

[4] It has been asserted that about 70% of all court and law firm business could be handled in an electronic or virtual context. Judge (Ret.) Arthur M. Monty Ahalt, *Remaking the Courts and Law Firms of the Nation: Industrial Age to the Information Age*, 31 TEX. TECH L. REV. 1151 (2000), *available at* http://www.montyahalt.com (last visited June 30, 2002).

assessing cutting edge courtroom technologies as part of legal education programs, such as Courtroom 21 at William and Mary College of Law[5] and the National Advocacy Center at the University of South Carolina, Columbia.[6] Other high tech courtrooms are born from public initiatives aimed at assessing the value of technology in improving the overall efficiency of courts and advancing the sophisticated presentation of evidence, such as

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[5] Established in 1993, the Courtroom 21 project is a collaborative effort between the College of William & Mary Law School and the National Center for State Courts (NCSC) and the NCSC's Court Technology Laboratory. Courtroom 21 at the McGlothin Courtroom is considered to be one of the most technologically advanced courtrooms in the world. Courtroom 21 provides training programs on courtroom technology and seeks to act as a resource for those studying and considering the use and impact of technology on court processes. http://www.courtroom21.net (Web page for Courtroom 21 project). *See* Information Super Highway Article, *supra* note 2, at 1; Courtroom Practice Article, *supra* note 2, at 1. The project considers itself to be the model for the proposed Michigan Cyber Court. Press Release, *Immersive Virtual Reality to Be Used in Groundbreaking Experimental Trial* (n.d.), *available at* http://www.courtroom21.net/Current_events/Current_events.htm (last visited June 27, 2002) (on file with the North Carolina Journal of Law & Technology).

Each year, Courtroom 21 undertakes a mock trial to help introduce and receive feedback on new courtroom technological innovations. Courtroom Practice Article, *supra,* at 1; Wendy R. Leibowitz, *Back to the Future: Virtual Immersive Technology in Courtroom 21*, WENDYTECH, May 7, 2002, at 1, *available at* http://www.wendytech.com/articlescourtroom21.htm (last visited June 25, 2002). In April 2002, Courtroom 21's mock jury trial, *United States v. NewLife MedTech,* involved a manslaughter case against the manufacturers of a medical device that had been implanted in a patient that died a month later. Press Release, *supra*; Leibowitz, *supra*, at 1. The trial simulation showcased the use of virtual immersive technology that allowed jurors wearing specially designed goggles to see exactly what the witness was seeing in the operating room while that witness was testifying. Press Release, *supra*; Leibowitz, *supra*, at 2.

[6] The National District Attorneys Association and the U.S. Department of Justice jointly provide centralized training programs for federal, state and local prosecutors at the National Advocacy Center. The center includes ten courtrooms that utilize state-of-the-art audio technology to aid in the training of prosecutors on trial advocacy and a wide range of specialized law enforcement topics. *NDAA Training at the National Advocacy Center*, http://www.ndaa-apri.org/education/nac_index.html (providing an overview of National Advocacy Center) (last visited Nov. 12, 2002) (on file with the North Carolina Journal of Law & Technology).

Courtroom 23 in Orange County, Florida.[7] These private and public high tech courtrooms, tethered to specially designed spaces at a particular physical location, are one type of partially virtual or cyber court.[8]

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[7] Inspired by a visit to Courtroom 21, the Ninth Circuit Judicial Court of Florida contracted with Applied Legal Technology for the creation of the Robert A. Barker Courtroom, or Courtroom 23, in 1998. The high tech courtroom includes various evidence presentation devices, such as a digital document camera to display materials, video and audio cassette players, a visual image printer for immediate photo quality prints of court presentations, an illustrator tablet with a touch screen monitor for attorneys and witnesses to mark projected documents and other images, and laptop connections for computerized demonstrations that can appear on some 20 flat screen monitors installed throughout the courtroom. Automated court reporting provides both digital and real-time court reporting with audio CDs offered at a small charge to the public. Six mounted cameras throughout the courtroom allow for selected live Web casts on the circuit court's website. *Courtroom 23*, http://www.ninja9.org/courtadmin/mis/courtroom_23.htm (providing an overview of Courtroom 23 on circuit court's website) (last visited Nov. 12, 2002) (on file with the North Carolina Journal of Law & Technology); Lin Walker, *Courtroom 23, Orange County Florida*, COURT TECH. BULL. (Spring 1999), *available at* http://www.ncsc.dni.us/NCSC/TIS/TIS99/CTB/1999/PIPCtrm23.htm (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology). The Ninth Judicial Circuit Court in Florida was also the first public court to purchase a NOMAD mobile system that includes VCR and DVD players, a document camera, laptop connection, a multi-media sound system and LCD projector computer, which can be moved throughout twelve different courtrooms to enhance evidence presentations at trials and hearings in traditional courtrooms. *Courtroom 23*, http://www.ninja9.org/courtadmin/mis/courtroom_23.htm (last visited Nov. 12, 2002) (on file with the North Carolina Journal of Law & Technology).

[8] There are different views as to what makes a court into a cyber court or virtual courtroom:

> Cybercourts, also known as virtual courts or cyber tribunals, assume a variety of appearances because they have no established definition. Some cyber courts are designed for educational purposes. Some courts may claim the status of cyber court because they maintain Web sites for informational purposes and/or accept electronic filings. Other courts are coined "cyber courts" because the courtrooms are set up with evidence presentation technology.

Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi in the Court of Next Resort*, 8 B.U. J. SCI. & TECH. L. 1, 5–6 (2002). This paper focuses on virtual

Recently, Michigan passed legislation that would establish the nation's first public and *fully* virtual court in 2003.[9] Under its

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or cyber court proceedings in which the filings, communications, and determinations can be handled completely online without the need for the physical presence of any of the participants, administrators or decision-makers in any one location. *See infra* notes 39–77 and accompanying text.

[9] The idea of a Cyber Court was first announced in Michigan Governor John Engler's state of the state address in January 2001. In that speech, Gov. Engler suggested that a Cyber Court, along with a proposed exemption from the state business tax, would play important roles in a new Michigan that would attract more information technology companies to the state. Gov. Engler stated that,

> For inventors, entrepreneurs, small tech and IT firms, the protection of intellectual property rights is a critical concern. In a world where we can go from idea to IPO at warp speed, we need a connected court that can keep up.
>
> Tonight, I propose that Michigan boldly go where no state has gone before by creating the Cyber Court. In the Next Michigan, the Cyber Court will:
>
> - feature e-filings, web-based conferencing and virtual courtrooms;
> - significantly reduce travel time and cost;
> - recognize that prompt dispute resolution means the difference between success and failure for a new venture; and,
> - use mediators and judges who have the skills and knowledge to render prompt, competent decisions.
>
> Done correctly, America's first Cyber Court will make the Next Michigan uniquely attractive to the next generation of technology-driven companies. The Next Michigan has the potential to be to technology companies what Delaware has been to public corporations.

Gov. John Engler, State of the State Address, *Building the Next Michigan*, Jan. 31, 2001, *available at* http://www.michigan.gov/gov/1,1431,7-103-705-1931—M_2001_1,00.html (last visited June 27, 2002) (on file with the North Carolina Journal of Law & Technology). Although originally planned to go online in October 2002, recent funding challenges have lead to the postponement of the opening of the Cyber Court until 2003. Amy Lane, *Lack of Funding Keeps Cyber-Court Offline* 1 (July 15, 2002), *available at* http://www.michigan.craintech.com (last visited July 23, 2002) (on file with the North Carolina Journal of Law & Technology).

The idea of a virtual court is not a new one and dispute resolution commentators have often suggested that the borderless online world would benefit from the creation of its own cyberspace dispute resolution system to handle online disputes. *See generally* Alejandro E. Almaguer & Roland W.

proposed program, Michigan's Cyber Court will not be limited to one specific physical location, but will operate primarily in cyberspace using e-mail, electronic filing systems, videoconferencing, and Web broadcasts.[10] Judges, lawyers, parties, witnesses, and the public will participate in a bold experiment that will test the limits of these technological innovations beyond the physical limitations of current high tech courtrooms. This pilot program offers the tantalizing opportunity to assess the real world value of new and emerging technologies in a fully virtual court experience.

Although the Michigan Cyber Court will be the first virtual public courthouse, there have been earlier projects that have provided private court services online.[11] The Virtual Magistrate

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Baggott III, Note & Comment, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711 (1998); Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems, and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175 (1998); Exon, *supra* note 8, at 4; E. Casey Lide, Note & Comment: *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193 (1996); Charles Lee Mudd, Jr., *Cyber Court: A Virtual Resolution of Differences or an Alternative Proposal for Law and Order in Cyberspace* (1995), *available at*, http://www.mudd.org/professional/articlesclm/cybercourt.htm (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology); Susan Patlyek, *Dispute Resolution in Cyberspace* (n.d.), *available at* http://chss.montclair.edu/leclair/LS/papers/cyberadr.html (last visited June 21, 2000) (on file with the North Carolina Journal of Law & Technology).

[10] *See infra* notes 38–58 and accompanying text.

[11] Another form of virtual court is iCourthouse that allows parties to invite Web surfers to act as jurors who review and deliver verdicts on posted disputes. *iCourthouse*, http://www.icourthouse.com (last visited Nov. 12, 2002). Other previous private court projects struggled for survival and eventually closed down. Similar to iCourthouse, Cyberjury sought to solicit input from members of the online community who reviewed the case documentation to help render determinations (formerly *at* http://www.cyberjury.com). Bordone, *supra* note 9, at 188 n.59. Cybertribunal sought to provide both online mediation and arbitration services starting in 1997. http://www.cybertribunal.org (former website of Cybertribunal) (last visited July 26, 2000); Patlyek, *supra* note 9, at 4–5. Housed at the University of Montreal, Cybertribunal closed down due to a lack of funding in December, 1999. http://www.cybertribunal.org (last visited July 26, 2000). *See infra* note 78 and accompanying text. *See generally*, Lucille

("VMAG") project[12] was the first pioneer to grapple with notions of a fully virtual private court, but it was unsuccessful in attracting interested disputants or in achieving its goal of serving as a conflict resolution portal for the online community. Will the Michigan Cyber Court end up as just another quirky footnote in the history of online dispute resolution ("ODR"), or can it play a substantive and valuable role in the development of fully virtual courts? The answer to this question depends largely upon whether or not the pilot program can attract enough litigants so that the pilot can collect sufficient data to provide useful insights into the advantages and disadvantages of a fully virtual court.

This article will examine the proposed objectives and procedures for Michigan's public virtual courtroom project, including a review of the enacting legislation and the new draft rules of Cyber Court practice.[13] By revisiting the failed VMAG project, this article will consider some of the issues that its demise poses for the nascent Michigan Cyber Court.[14] This article will summarize some of the main barriers facing the new Cyber Court that may stymie its efforts to serve as a public laboratory for virtual court technologies.[15] Finally, this article will conclude with recommendations on how Michigan's pilot program might

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M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. OF TECH. & INTELL. PROP. 55, 80–86 (Spring 2001) (providing a summary of online arbitration and jury service providers).

[12] *Virtual Magistrate, VMAG: Online Dispute Resolution, at* http://www.vmag.org (last visited Nov. 12, 2002) (website for newly-revitalized Virtual Magistrate project). *See The Virtual Magistrate Project* (Concept Paper, July 24, 1996), *at* http://www.vmag.org/docs/concept.html (last visited May 4, 2002) (initial document that outlines the goals and procedures of the then-proposed Virtual Magistrate pilot project) [hereinafter referred to as Concept Paper] (on file with the North Carolina Journal of Law & Technology).

[13] MICH. COURT RULES, SPECIAL RULES FOR ELECTRONIC PRACTICE IN CYBER COURT (Draft Sept. 15, 2001), *available at* http://www.michigancybercourt.net (last visited June 13, 2002) [hereinafter DRAFT CYBER COURT RULES] (on file with the North Carolina Journal of Law & Technology). *See infra* notes 39–58 and accompanying text.

[14] *See infra* notes 85, 88–89 and accompanying text.

[15] *See infra* notes 93–96 and accompanying text.

overcome initial reluctance to use its services and promote party participation in the Cyber Court.[16]

I. Overview of Michigan Cyber Court Legislation

Michigan Governor John Engler's call for a Cyber Court was formalized into legislation under House Bill 4140, which was passed in November 2001, and signed into law on January 9, 2002.[17] H.B. 4140 sets forth the basic outline of the new Cyber Court that will be funded through and under the direction of Michigan's Supreme Court.[18] The state Supreme Court is also charged with adopting rules to fully implement the operations of the Cyber Court.[19]

Under H.B. 4140, the Michigan Supreme Court will appoint elected judges who request to participate in the Cyber Court program, possess expertise in commercial litigation, and are

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[16] *See infra* notes 100–145 and accompanying text.

[17] H.B. 4140, 91 Leg. Sess. (Mi. 2001) (enacted), *available at* http://www.michigancybercourt.net (last visited Nov. 14, 2001) (on file with the North Carolina Journal of Law & Technology). The development of the Cyber Court is part of an overall Michigan state strategy on information technology. The state of Michigan has taken a progressive role in the use of online technologies to aid the delivery of government services. In a 2001 Brown University survey, the state's Web portal, *Michigan.gov*, was rated number 2 in the country. Press Release, Susan Shafer, *Michigan.gov Ranks Second in U.S.: Survey Vaults State Portal to National Leadership,* Sept. 10, 2001, *at* http://www.michigan.gov (last visited June 28, 2002) (on file with the North Carolina Journal of Law & Technology). In addition, the Center for Digital Government ranked Michigan eighth nationally for Social Services and ninth for Law Enforcement and Courts in the use of technology. Press Release, Susan Shafer, *Michigan Rated in Top 10 for Online Government Services Delivery* (June 7, 2001), *at* http://www.michigan.gov (last visited June 28, 2002) (on file with the North Carolina Journal of Law & Technology). Last August, Gov. Engler created a Michigan State Department of Information Technology, effective October 14, 2001. Executive Order No. 2001–3, DEPARTMENT OF INFORMATION TECHNOLOGY, DEPARTMENT OF MANAGEMENT AND BUDGET, Executive Reorganization, *at* http://www.michigan.gov (last visited June 28, 2002) (on file with the North Carolina Journal of Law & Technology).

[18] H.B. 4140, at § 8003. Approximately $1 million has been earmarked for the 2003 pilot program. Lane, *supra* note 9, at 1–2.

[19] H.B. 4140, *supra*, at § 8027.

familiar with the application of technology to court proceedings. These Cyber Court judges will be appointed for three-year terms and will attempt to reflect the racial and ethnic diversity of the state bench and state population. The judges will receive special technology training to assist them in their new online duties. The total number of Cyber Court judges will depend upon the overall caseload of the virtual court. In addition, the Michigan Supreme Court will also appoint a clerk who is specifically assigned to deal with cases coming before the Cyber Court.[20] All matters in the Cyber Court are heard solely before a judge, and not a jury.[21]

The proposed Cyber Court will be located in one or more Michigan counties in facilities that are capable of conducting electronic hearings and proceedings. Such facilities will be open to the public in the same manner as other state circuit courts.[22] All Cyber Court proceedings will be heard through electronic means, including, but not restricted to video, audio or Internet conferencing.[23] Since Cyber Court judges may schedule electronic proceedings at any times that best accommodate parties and witnesses from outside the state, Cyber Court proceedings can be held at any hour of the day and will be broadcast over the Internet, when feasible.[24]

Under H.B. 4140, the Cyber Court is an official court of record[25] and retains the authority to subpoena witnesses, to

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[20] *Id.* §§ 8003(1)–(5).
[21] *Id.* §§ 8001(4), 8019.
[22] *Id.* § 8001(3).
[23] *Id.* §§ 8001(1)(H)(4), 8015.
[24] *Id.* § 8001(4). *See infra* notes 42–50, 53–55 and accompanying text.
[25] The law states that:

> (1) The Cyber Court is created and is a court of record.
> (2) The purpose of the Cyber Court is to do all of the following:
> (a) Establish judicial structures that will help to strengthen and revitalize the economy of this state.
> (b) Allow disputes between business and commercial entities to be resolved with the expertise, technology, and efficiency required by the information age economy.
> (c) Assist the judiciary in responding to the rapid expansion of information technology in this state.

mandate the production of relevant documents, and to administer oaths.[26] The Cyber Court will have concurrent jurisdiction with other state circuit courts for business and commercial cases in excess of $25,000.[27] Although the official emphasis has been on dealing with information technology disputes, the Cyber Court will also be allowed to handle a broad range of business conflicts regarding commercial real estate, business and commercial insurance, commercial and banking transactions, contract disagreements, and internal business organization matters, including battles between partners, owners, officers, directors, and shareholders.[28] The law specifically excludes landlord-tenant, tort,

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(d) Establish a technology-rich system to serve the needs of a judicial system operating in a global economy.
(e) Maintain the integrity of the judicial system while applying new technologies to judicial proceedings.
(f) Supplement other state programs designed to make the state attractive to technology-driven companies.
(g) Permit alternative dispute resolution mechanisms to benefit from the technology changes.
(h) Establish virtual courtroom facilities, and allow the conducting of court proceedings electronically and the electronic filing of documents.

Id. §§ 8001(1), (2)(a)–(h).

[26] *Id.* § 8017.

[27] *Id.* § 8005(1).

[28] *Id.* § 8005(2)(a)–(f). The section reads:

(2) For purposes of this section, "business and commercial actions" means disputes arising between business owners, associates, or competitors or between a business entity and its customers. Business and commercial actions include, but are not limited to, the following types of disputes:
(a) Those involving information technology, software, or website development, maintenance, or hosting.
(b) Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers.
(c) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, noncompete, nonsolicitation, and confidentiality agreements.
(d) Those arising out of commercial transactions, including commercial bank transactions.
(e) Those arising out of business or commercial insurance policies.

employment, administrative agency, criminal, and enforcement of judgment matters from the Cyber Court's jurisdiction.[29] The law also indicates that alternative dispute resolution ("ADR") options should be made available electronically before the Cyber Court.[30]

A plaintiff may select the Cyber Court as its forum and file its complaint with the clerk of the Cyber Court. Since the Cyber Court pilot program is meant to be voluntary, a defendant may remove the case to the standard circuit court within fourteen days of the deadline for filing an answer to the complaint. If a party fails to remove the matter within the allotted time, the case cannot be removed from the Cyber Court and the parties will be viewed as waiving their right to a jury trial.[31] Appeals from the judgments or rulings of the Cyber Court will be to the standard court of appeals.[32]

The state court administrator will submit a written report to the state legislature in October 2004 on the two-year activities of the Cyber Court along with any recommendations for expanding the duties and jurisdiction of the Cyber Court.[33] In addition, a legislative oversight committee will monitor the Cyber Court from January 1, 2002 to December 31, 2004. The committee will review draft rules for the Cyber Court and, if needed, propose further legislation to aid in the full implementation of the Cyber Court. The oversight committee will also provide a written report on the Cyber Court to the chairpersons of the Senate and House state judiciary committees.[34]

(f) Those involving commercial real property other than landlord/tenant disputes.

[29] *Id.* § 8005(3)(a)–(f). Rep. Mark Shulman, the main sponsor of the Cyber Court, indicated that in the future the Cyber Court could help resolve family law matters. Mike Wedland, *Michigan looms as Cyber Court pioneer*, DETROIT FREE PRESS, Nov. 1, 2001, at 2, *available at* http://www.freep.com (last visited Nov. 14, 2001) (on file with the North Carolina Journal of Law & Technology).

[30] *Id.* §§ 8001(3), 8023. The use of electronic or online communications in alternative dispute resolution processes is commonly referred to as online dispute resolution ("ODR"). *See generally* Ponte, *supra* note 11, at 65–86 (providing a detailed review of wide range of ODR options).

[31] *Id.* §§ 8009, 8111, 8013.

[32] *Id.* § 8021.

[33] *Id.* § 8025.

[34] *Id.* § 8029.

II. Draft Rules and Procedures for Michigan Cyber Court

With the passage of H.B. 4140, the State Bar of Michigan, through its Cyber Court Rules Workgroup, moved quickly to draft Special Rules for Electronic Practice in Cyber Court.[35] The Workgroup also made some minor revisions to the existing Michigan Court Rules[36] and the Michigan Rules of Evidence[37] to reflect electronic transmissions and communications under the new draft rules. In creating the special practice rules, the Workgroup sought to balance the need for adequate specificity in the rules to guide Cyber Court parties, attorneys and the courts, with the desire to retain a certain degree of flexibility to respond to future technological developments.[38]

A party's ability to operate within the virtual court hinges primarily upon being classified as an "authorized electronic

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[35] DRAFT CYBER COURT RULES, *supra* note 13. The proposed practice rules define the term "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." *Id.* at R. 2.001C(4).

[36] MICH. COURT RULES (Draft Sept. 10, 2001), *at* http://www.michigancybercourt.net (last visited June 13, 2002) (on file with the North Carolina Journal of Law & Technology).

[37] MICH. RULES OF EVIDENCE (Draft Sept. 3, 2001), *at* http://www.michigancybercourt.net (last visited June 13, 2002) (on file with the North Carolina Journal of Law & Technology).

[38] In its comments on the proper construction of the new draft rules, the Workgroup noted that,

> The world of technology is evolving so rapidly that the court rules, which should be a detailed but relatively stable source of direction and guidance to attorneys, judges, and court staff, cannot be burdened with the job of keeping up with the latest technological vocabulary, nor interpreted rigidly in the context of old technology. To that end, the model rules employ flexible definitions and provisions, leaving technical specifications to be developed and updated in the Authorized Electronic Filer agreement and in a user guide, both of which the model rules require to be posted on the Cyber Court Website.

DRAFT CYBER COURT RULES, *supra* note 13, at R. 2.001B cmt. at 2.

filer."[39] As defined under the draft rules, an authorized electronic filer must sign an agreement with the Cyber Court in which that party agrees to comply with court mandated electronic security procedures. These procedures include the use of digital signatures, identification of a current e-mail address for receiving electronically transmitted materials, payment of the applicable service fee, and full compliance with the authorization agreement establishing one's electronic filing status.[40] This filing status clearly does not require the authorized electronic filer to be an attorney or a member of the Michigan bar, thus opening the doors of the virtual courts to litigants in other states and countries.[41]

While some state and federal courts allow for limited electronic filing of court documents,[42] the proposed Cyber Court rules vastly expand the materials that can be transmitted electronically. Once a party is registered, they may make service of process through e-mail or by facsimile without prior party consent, provided that the other party is also an authorized

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[39] Rule 2.102A, Filing In The Cyber Court, states that:

> *(A) Authorization as Electronic Filer.* Electronic transmission of documents to the Cyber Court may only be made by authorized electronic filers. The clerk of the Cyber Court or a cyber-qualified court must register a person as an authorized electronic filer who:
> (1) Signs an authorized filer agreement under which the person agrees to
> ....
> b. comply with all electronic security procedures of the court, including the use of a digital signature issued by a certification authority
> c. maintain with the court a current an e-mail address of record for the receipt of information from the court and other authorized electronic filers
> d. Pays any applicable service fee
> e. Has not had a previous authorization as an electronic filer revoked for any reason, including failure to comply with the authorized filer agreement.

[40] *Id.*

[41] This special status may result in some interesting opportunities to redefine and explore notions of unauthorized practice of law and the current geographic limitations of bar licensure in the borderless world of an online court.

[42] *See infra* notes 102–103 and accompanying text.

electronic filer.[43] If the parties agree to use the Cyber Court,[44] they may electronically transmit pleadings and other court papers to one another and the clerk of the Cyber Court.[45] The draft rules also allow for electronic motion practice with parties filing motions and responses thereto along with briefs and affidavits electronically.[46] In addition, registered filers may submit scanned copies of certified documents and notarized sworn statements.[47] Depositions that are recorded electronically may also be filed electronically with court approval.[48] A document is "filed" when the document accesses the information processing system of the Cyber Court and when applicable fees are paid. Such fees may be paid electronically.[49] The Cyber Court is open twenty-four hours a day for the purpose of electronically filing documents and to provide for flexible scheduling of court proceedings in different time zones.[50]

The clerk of the Cyber Court will send e-mail confirmations of electronic filings to the authorized electronic filer. The burden is on the filer to contact the Cyber Court if no e-mail confirmation is received and to retransmit the materials, if necessary.[51] The electronic filer is also responsible for any

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[43] DRAFT CYBER COURT RULES, *supra* note 13, at R. 2.001(I). Proof of service may be by electronic confirmation of receipt of the summons on registered e-mail or facsimile, by the recipient's acknowledgement, by affidavit or other sworn statement of the party making service or other satisfactory proof of service to the Cyber Court. *Id.* at R. 2.001(H).

[44] As indicated in H.B. 4140, a defendant may seek removal or transfer of an action from the Cyber Court to a circuit court of proper venue. *Id.* at R. 2.103A(1). *See supra* note 31 and accompanying text. In addition, the proposed rule also recognizes that an intervener has the right to make a motion to remove or transfer an action. *Id.* at R. 2.103A(2). Furthermore, the court on its own may transfer an action out of the Cyber Court if the court determines that an intervener's rights cannot be adequately protected in the virtual court. *Id.*

[45] *Id.* at R. 2.001I.

[46] *Id.* at R. 2.001F.

[47] *Id.* at R. 2.001D.

[48] *Id.* at R. 2.001G.

[49] *Id.* at R. 2.102A(B), (D). The payment of fees to the Cyber Court can be made by electronic funds transfer, authorized credit card, authorized debit card or other electronically approved means. *Id.* at R. 2.102A(E).

[50] *Id.* at R. 2.100A cmt., at 6, R. 2.102A(B).

[51] *Id.* at R. 2.102A(D).

transmission difficulties and for assuring that electronically filed materials are readable and properly submitted.[52]

Pre-trial conferences, hearings and other court proceedings can be carried out through audio, video or Internet conferencing.[53] The Cyber Court judge is not limited to one location, but may sit in any technologically appropriate space[54] with distant parties, attorneys, and witnesses allowed to appear electronically from satellite locations.[55] Hearings open to the public may be accessed through physical attendance or live closed circuit television broadcasts at the primary or satellite locations as well as through live Web casts.[56] Public notice of the hearings will normally be posted on the Cyber Court's website twenty-four hours in advance with information about how the hearing may be observed or accessed.[57]

Besides notifying the public about upcoming hearings, the Cyber Court website is intended to serve as an online public information resource. For instance, the Cyber Court website will identify the chief judge and other Cyber Court judges, along with the court clerk who may be contacted electronically. The website will also post the jurisdiction of the Cyber Court and applicable statutes and rules of the Cyber Court, as well as the current docket and clear notification of any docket matter in which a motion has been made to limit public access to Cyber Court proceedings. Further information about how to become an Authorized Electronic Filer and how to access Cyber Court documents online will also be posted on the website. Finally, the website will list a

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[52] *Id.* at R. 2.102A(C).

[53] *Id.* at R. 2.104A. To accommodate out-of-state participants, the draft rules define the concept of a court appearance as follows: "Upon approval of the court, a party or witness in a proceeding of the Cyber Court or a cyber-qualified court, including discovery and pretrial procedures, may satisfy the requirement of appearance by being present at a proceeding using two-way interactive video technology, video conference technology, or Internet broadcast technology." *Id.* at R. 2.000E. *See* MICH. COURT RULES, *supra* note 36, at R. 2.401(B)(1)(d).

[54] *Id.* at R. 2.104A.

[55] *Id.*

[56] *Id.* at R. 2.104A(B). It is anticipated that all public proceedings before the Cyber Court will be Web cast live. *Id.* at R. 2.104A(B)(3).

[57] *Id.* at R. 2.104A(C).

menu of ADR options available to parties before the Cyber Court.[58]

III. Revisiting the Virtual Magistrate Project

A. Background of the VMAG Project

The VMAG project was initially developed in 1996 as a collaborative effort between the National Conference of Automated Information Research ("NCAIR"), the Cyberspace Law Institute ("CLI"), the American Arbitration Association and Villanova Law School.[59] In its original iteration, the VMAG project sought primarily to resolve online disputes between online users and their online service providers, or conflicts between online users and others in cyberspace alleged to have distributed

[58] *Id.* at R. 2.105A. In the Workgroup Comment to this section, improved accessibility to court information is highlighted as follows:

> In many ways, the most important courthouse door of the Cyber Court is the Internet. Through the Internet, the public will be able to visit the Cyber Court at all hours, review its docket, and "attend" any proceedings underway. Practicing attorneys will be able to check on the status of their cases, view documents, and make filings. The model rules lay out basic information that should always reside on the Court's website in order to achieve its potential as a fully accessible and convenient forum, and as a showcase for the application and development of technology in Michigan courts.

Id. at R. 2.105A cmt.

Many state and federal courts have developed websites to inform the public about court activities from basic court hours, locations and docket information to downloadable court forms and online court fine payments. *See generally*, Court Web Sites, *available at* http://www.ncsconline.ord/Information/info–courts_web_sites.html (last visited June 11, 2002) (providing a detailed listing of state, federal and international court websites) (on file with the North Carolina Journal of Law & Technology).

[59] Bordone, *supra* note 9, at 187–88; Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 987–88 (1997); Concept Paper, *supra* note 12, at 1; Patlyek, *supra* note 9, at 2.

harmful or illegal messages and postings.[60] In addition, the project also planned to establish some dispute resolution norms for online conflict resolution.[61]

The VMAG project provided the groundbreaking framework for virtual courts and other forms of online conflict resolution. First, and most importantly, the project allowed the

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[60] Almaguer & Baggott, *supra* note 9, at 720–22; Cona, *supra* note 59, at 987–88; Concept Paper, *supra* note 12, at 2–3. VMAG selects disputes it deems appropriate for its service, including:

> online disputes over communications, property, tort and contract disputes. Examples include 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 . . . [VMAG] will consider cases involving financial obligations or compensation, so long as the issues in dispute arise from, or are directly related to, online activity or commerce. Other complaints deemed to be unsuitable for the Virtual Magistrate process will not be accepted.

Id.

[61] The Virtual Magistrate Project developed an ambitious seven-point agenda at its inception as follows:

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. Provide users and others with rapid, low-cost, and readily accessible remedy for complaints about online postings.
4. Lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings).
5. Help to define the reasonable duties of a system operator confronted with a complaint.
6. Explore the possibility of using the Virtual Magistrate Project to resolve disputes related to computer networks.
7. Develop a formal governing structure for an ongoing Virtual Magistrate operation.

Almaguer & Baggott, *supra* note 9, at 720–21. *See also* Cona, *supra* note 59, at 987–88; Concept Paper, *supra* note 12, at 1–2.

participants to file complaints and responses, distribute information, communicate with each other, and render decisions completely online.[62] Although e-filing opportunities are rapidly emerging today,[63] the Virtual Magistrate was the first to implement the filing of complaints electronically.[64] The project also permitted the parties and the magistrate to communicate and exchange information completely online through e-mail and a password-protected listserv (referred to as the "grist").[65] Through the use of online technologies, the participants were not physically present nor did they undertake any direct face-to-face communication.[66]

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[62] THE VIRTUAL MAGISTRATE ARBITRATION PROGRAM, BASIC RULES at 1–3 (1999), *available at* http://www.vmag.org/docs/rules.html (last visited May 4, 2002) [hereinafter referred to as VMAG RULES] (on file with the North Carolina Journal of Law & Technology); Concept Paper, *supra* note 12, at 1–3.

[63] *See supra* note 4 and accompanying text.

[64] VMAG RULES, *supra* note 62, at 1; Almaguer & Baggott, *supra* note 9, at 723; Concept Paper, *supra* note 12, at 3; Patlyek, *supra* note 9, at 3.

[65] VMAG RULES, *supra* note 62, at 3; Almaguer & Baggott, *supra* note 9, at 725–26; Patlyek, *supra* note 9, at 3.

[66] Concerns have been raised that the lack of face-to-face contact in virtual courts may remove an important human factor that is necessary for fair and effective conflict resolution, particularly as to the issue of judging witness credibility. Anita Ramasastry, *Michigan Cyber Court: Worthy Experiment or Virtual Daydream* (Feb. 6, 2002), *available at* http://www.findlaw.com (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology); Doug Isenberg, *The Pros and Cons of "Cybercourts"* (April 2001), *available at* http://www.gigalaw.com (last visited June 23, 2002) (on file with the North Carolina Journal of Law & Technology); Frederic I. Lederer, *Courtroom Technology From the Judges' Perspective* (July 29, 1997), *available at* http://www.courtroom21.net/About_Us/Articles (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology); Information Super Highway Article, *supra* note 2, at 2, 8. As Professor Lederer indicated,

> In years to come it may be that we will use virtual courtrooms, ones without physical presence, and which exist only as Internet-type meeting places for disembodied individuals and electronic data exchange. This may even prove highly efficient and economical—but it will not be the same legal system we prize today. Whether such a system could incorporate the same humanity and values that exist today and whether virtual judges, and especially juries, would yield similar or superior verdicts to those that are currently delivered are fascinating questions to ponder.

Information Super Highway Article, *supra* note 2, at 2.

The Michigan Cyber Court has borrowed some of these essential online elements such as using the Internet to file documents, to disseminate case materials, to communicate with the other parties and the decision-maker, and to post final decisions.

The VMAG project further leveraged the efficiency benefits of technology with simplicity by limiting the types of eligible disputes, and by requiring brevity in case submissions as well as brisk time frames. A party could complete a short online complaint form by typing in contact information for both parties, scrolling down a date menu to identify the date of the dispute, and by then clicking on one of ten categories to identify the nature of the dispute. The disputed incident and the requested relief had to be basic enough for each to be described in 200 words or less, similar to a small claims court complaint but certainly far more brief than a typical civil lawsuit complaint.[67] The VMAG program screened complaints to determine if their services were appropriate for the matter.[68] If the program accepted the complaint and all parties had agreed to participate, then a virtual decision-maker with proper expertise was selected to handle the case.[69]

The virtual magistrate was responsible for conducting the online proceedings and could ask questions and request additional information from the parties. No specific discovery process was required. Each party submitted their own evidence and made their own arguments. The virtual magistrate was expected to hold fair proceedings, but the formal rules of evidence were not applied.[70] If allowed by the virtual magistrate, a private e-mail address was established for parties to communicate privately with the third party neutral.[71] Also, subject to the virtual magistrate's approval, parties could request that communications and other private information, such as names and addresses, disclosed during the process remain confidential.[72]

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[67] *Virtual Magistrate, Your Information,* http://www.vmag.org/complaint/ (last visited May 4, 2002) (Web page for online access to a copy of the VMAG complaint form).

[68] VMAG RULES, *supra* note 62, at 2; Concept Paper, *supra* note 12, at 2.

[69] VMAG RULES, *supra* note 61, at 2; Concept Paper, *supra* note 12, at 2.

[70] VMAG RULES, *supra* note 62, at 3.

[71] *Id.*

[72] *Id.* at 1.

Once both parties agreed to participate, the virtual magistrate and the parties were required to act quickly and concisely. The VMAG project set a goal of seventy-two hours or three business days to render a decision.[73] The virtual magistrate was not limited to the laws of any particular jurisdiction, but considered the reasonableness of the legal and factual arguments made by the parties in rendering the written decision.[74] Once a determination was made, the magistrate's final ruling was posted on the grist for public review, unless good cause was shown for sealing the award.[75] The VMAG's decisions were viewed as final and binding, but the service did not have the power to enforce its own decisions.[76] The program relied primarily on the good faith of the parties who had voluntarily agreed to use the process or the assistance of Internet service providers to remove postings or to restrict online access in appropriate cases.[77]

B. VMAG Project Assessment

It was anticipated that the online community would readily gravitate towards this free online service to deal with its online conflicts. Unfortunately, the Virtual Magistrate had tremendous difficulty generating any interest in its services. The VMAG project never caught on with the online community, attracting only a few disputes,[78] and ultimately rendering only one 1996

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[73] *Id.* at 2; Concept Paper, *supra* note 12, at 3.

[74] Concept Paper, *supra* note 12, at 3. With an eye on potential litigation outcomes, the virtual judge may also consider applicable netiquette, contract terms, substantive law and other relevant information. *Id.*

[75] VMAG RULES, *supra* note 62, at 3; Concept Paper, *supra* note 12, at 4–5.

[76] Concept Paper, *supra* note 12, at 4.

[77] *Id.* at 3–4.

[78] Almaguer & Baggott, *supra* note 9, at 733; Bordone, *supra* note 9, at 196. It was estimated that the initial pilot project considered less than 20 cases. Almaguer & Baggott, *supra*, at 734. A number of for-profit and nonprofit ODR service providers currently offer online private court or arbitration services. *See e.g.*, http://www.onlineresolution.com (for-profit entity that provides both binding and nonbonding arbitration services) (last visited July 15, 2002); http://arbiter.wipo.int/center/ (World Intellectual Property Organization (WIPO) Arbitration and Mediation Center offers online arbitration of intellectual property and provides both binding and nonbonding arbitration services) (last

spamming decision, *Tierney and EMail America*, brought by one of the project's advisors.[79] After a period of dormancy, NCAIR and CLI recently joined with the Chicago-Kent College of Law to revive the Virtual Magistrate in 2000.[80] Using the same basic technological tools of the original project, the new Virtual Magistrate has added the resolution of online contract, property and tort conflicts to its dispute categories[81] and has updated the program's rules of procedure.[82] Despite remaining a free service,[83]

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visited July 15, 2002); http://www.intellicourt.com (retired judge offers private judging services online) (last visited May 4, 2002); http://www.resolutionforum.org (Center for Legal Responsibility at South Texas College of Law offers online arbitration services along with mediation and neutral case evaluation using sophisticated CAN-WIN conferencing software) (last visited May 1, 2002). *See generally* Ponte, *supra* note 11, at 65–86 (providing an overview of wide range of ODR services). A recent ABA report noted that the private ODR industry has had difficulty coming up with a successful business model and is still struggling for survival today. ABA Task Force on E-commerce & Alternative Dispute Resolution, Addressing Disputes in Electronic Commerce, Final Recommendations and Report (2002), *available at* http://www.law.washington.edu/ABA–eADR (last visited July 18, 2002).

[79] Almaguer & Baggott, *supra* note 9, at 732–33; Cona, *supra* note 59, at 995–96.

[80] THE VIRTUAL MAGISTRATE PROJECT, FREQUENTLY ASKED QUESTIONS 3 (1999), *available at* http://www.vmag.org/docs/FAQ.html (last visited May 4, 2002) (on file with the North Carolina Journal of Law & Technology).

[81] VMAG selects disputes it deems appropriate for its service, including:

> online disputes over communications, property, tort and contract disputes. Examples include 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 ... [VMAG] will consider cases involving financial obligations or compensation, so long as the issues in dispute arise from, or are directly related to, online activity or commerce. Other complaints deemed to be unsuitable for the Virtual Magistrate process will not be accepted.

VMAG RULES, *supra* note 62, at 2.

[82] *See supra* note 62 and accompanying text.

[83] The use of free or nominally priced conflict resolution services is particularly attractive to online consumers who normally have low dollar transaction amounts. *Boosting Consumer Confidence In E-Business: Recommendations*

no new Virtual Magistrate decisions have been posted to the site as of July 2002.[84]

The VMAG project offered free, streamlined conflict resolution services, but was still unable to attract serious interest from the online community. A number of reasons may explain its inability to attract disputants. First, unlike the courts, VMAG had no power to require parties to participate, to respond truthfully or to disclose relevant information fully to the other side.[85] The Michigan Cyber Court is also voluntary, but if parties agree to participate, they and other witnesses can be subpoenaed into court and the Cyber Court can order relevant discovery.[86] Furthermore, Cyber Court parties that have agreed to participate are sworn under oath to provide truthful testimony with the use of cross-examination promoting the reliability of such testimony.[87]

Second, the VMAG project did not have the authority to enforce its own decisions.[88] It remains unclear whether courts would enforce these decisions in the same manner as offline

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For Establishing Fair and Effective Dispute Resolution Programs For B2C Online Transactions, 12 ALBANY L. J. OF SCI. & TECH. 441, 469–470 (2002). Although not originally intended for consumer disputes, Consumers International rated the newly revived VMAG quite positively in its most recent report. CONSUMERS INTERNATIONAL, OFFICE FOR DEVELOPED AND TRANSITION ECONOMIES, DISPUTES IN CYBERSPACE 2001 app. c (2001), *available at* http://www.consumersinternational.org (last visited May 22, 2002) (on file with the North Carolina Journal of Law & Technology). The report indicated that "[t]he Virtual Magistrate scores high in terms of all key criteria: independence, transparency, affordability, convenience, speed, due process and liberty. The service is especially appealing because it is free to consumers, and because case results are published." *Id.* at app. C, 39.

[84] The only reported decision is the *Tierney* case that has yet to be posted on the revived website. *Virtual Magistrate,* http://www.vmag.org/sample.html (indicating that full text of *Tierney* opinion will be posted soon) (last visited Nov. 12, 2002).

[85] Ponte, *supra* note 11, at 64. In the Tierney case, one of the other parties, Email America did not participate in the proceedings. Almaguer & Baggott, *supra* note 9, at 733; Cona, *supra* note 59, at 987–88.

[86] *See supra* note 26 and accompanying text.

[87] *See supra* notes 26 & 31 and accompanying text.

[88] Ponte, *supra* note 11, at 64, 88–89.

arbitration awards.[89] Parties had to rely on the good faith compliance of the losing disputant or obtain the willing assistance of the online service provider.[90] It is easy to understand why few parties would choose to place time and effort into a dispute resolution system that was not able to enforce its own judgments. In contrast, the Michigan Cyber Court does have the authority to enforce its own decisions and thus may be more attractive to disputants.[91]

Lastly, there was an overall lack of public awareness and understanding of the VMAG project outside of the small dispute resolution field. ODR is still a relatively new field, and it may have been unrealistic to expect parties to put their disputes in the hands of unknowns in an unfamiliar arena.[92] The original VMAG project may have been too far ahead of its time. The same problem could prove to be true of the Michigan Cyber Court. Through the creation of a fully virtual court, the Michigan Cyber Court is also

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[89] ABA Task Force on E-commerce & Alternative Dispute Resolution, Draft Preliminary Report & Concept Paper 4–5 (May 2001), *available at* http://www.law.washington.edu/ABA-eADR (last visited July 18, 2002) [hereinafter Task Force Report] (on file with the North Carolina Journal of Law & Technology). In considering the ODR field, the ABA draft report indicated that,

> One of the largest concerns with respect to ODR is the existence of means for enforcing outcomes. In many cases, the link between ODR and effective enforcement mechanisms remains unclear. When parties are located in different jurisdictions and are interacting solely via the Internet, it becomes hard for one party to make the other comply with a resolution. Without effective enforcement, the vitality of ODR may be severely hindered.

Id. *See* Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745 (E.D. Va. 2001) (determining that UDRP's domain name ODR program was not arbitration under the FAA).

[90] Ponte, *supra* note 11, at 64; Almaguer & Baggott, *supra* note 9, at 720–21; Cona, *supra* note 59, at 987–88.

[91] *See supra* notes 25, 27, & 32 and accompanying text.

[92] Ponte, *supra* note 11, at 90–91. The ODR industry is still struggling for survival and has had difficulty adopting a clear business model for sustained success. Ramasastry, *supra* note 66, at 3; Task Force Report, *supra* note 89, at 7, 23.

breaking new ground, and the field still may not have advanced to a point of general public acceptance.

The coupling of voluntary participation with a lack of familiarity with the Cyber Court's procedures and online technologies could endanger the pilot from the start. Although the VMAG project's failure does not automatically spell doom for the Michigan Cyber Court, the pilot program must be able to identify and overcome obstacles to its initial use. Identifying potential barriers will permit the pilot program to proceed with the experimentation and data collection that will help assess the real benefits and limitations of a virtual court.

IV. Potential Barriers to Initial Use of Michigan Cyber Court

Concerns have already been raised in Michigan that the Cyber Court will drain off limited judicial resources for a glitzy project that will do little to reduce current court backlogs.[93] Even ardent supporters of the proposed virtual court have indicated that it will likely only handle a small number of cases.[94] Yet even attracting a few cases may help illuminate both the efficiencies and deficiencies of a virtual court. It is clear from the VMAG experience that merely offering an interesting online conflict resolution option will not insure that parties will elect to use the virtual forum. As with the VMAG project, getting parties to

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[93] Amy Franklin, Associated Press, *State Legislature approves cyber court for business* (Dec. 15, 2001), *at* http://www.detnews.com (last visited Jan. 15, 2002) (on file with the North Carolina Journal of Law & Technology). The $250,000–500,000 funding of the Cyber Court raised the hackles of some local politicians who were angered by the loss of six judicial slots that occurred at the same time as the introduction of the pilot program. *Id.*

[94] *Id.*; Dibya Sarkar, *Michigan creates cyber court* (Jan. 11, 2002), *at* http://www.fcw.com/geb/articles/2002/0107/web-mich-01-11-02.asp (last visited Nov. 11, 2002) (on file with the North Carolina Journal of Law & Technology). Attorney Richard McLellan, chair of the Information Technology Association of Michigan and author of the cyber court bill, admitted that the Cyber Court would only attract a small number of business cases and would not help alleviate local court dockets. However, he expressed the hope that overtime the Cyber Court would help lead the way to improved court efficiency. *Id.*

voluntarily participate in the Michigan Cyber Court may be one of its biggest initial challenges.[95]

Parties and their lawyers may be reluctant to gamble on an untested system, particularly in major cases involving important legal precedents or substantial financial amounts.[96] Other potential participants may shy away from the virtual court because of uncertainty about the costs of new technological tools and unfamiliarity with how to use new technologies in their case preparation and presentation.[97] Additionally, technological glitches are inevitable in even the most sophisticated systems. Distrust of technology may raise party concerns about whether

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[95] Although a supporter of the Cyber Court pilot program, Michigan Judge Donald Shelton indicated that "[o]nce the plaintiff files in the cyber court, the defendant can opt out to go to a traditional court.... I suspect that's what will happen here. The number of cases in cyber court will be less than what the legislation envisions." Sarkar, *supra* note 94. *See* Ramasastry, *supra* note 66; Doug Isenberg, *supra* note 66; Ponte, *supra* note 11, at 90–91.

[96] "'The integration of technology into courtrooms is a bit like the chicken and the egg,' said Andrew Sellers, president of the Indianapolis technology firm Video Images. 'The technology is available, but users need to embrace it to drive its integration into the courts.'" Kelly Lucas, *A Picture Worth a Thousand Words*, THE IND. LAW. 6 (May 8, 2002) (LEXIS-NEXIS Academic Universe). Judge Ahalt contends that the "participants in the legal process are the largest block to the virtualization of the law." Ahalt, *supra* note 4, at 2.

[97] New courtroom technologies require both judges and lawyers to handle case preparation and presentation in new ways and encouraging change amongst them may be difficult after years of accepted practices. Information Super Highway Article, *supra* note 2, at 7; Lederer, *supra* note 66, at 3; Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1295–96 (2001).

> As Prof. Marder stated,
>
> Most trial judges have grown comfortable with their own courtroom procedures and have little incentive to change them. Attorneys have also become accustomed to certain ways of proceeding at trial. If attorneys enjoy success for their clients with traditional methods, then they, too, have little reason to seek change. Change is uncomfortable and unpredictable.... New tools introduce new uncertainties; attorneys worry about how new tools might affect their clients' chances of success and their own sense of control, while trial judges worry about how they might affect appellate judges' rulings.

Marder, *supra*, at 1295–96.

court deadlines can be met or whether a successful case presentation may be ultimately damaged by a glitch.[98] Parties and witnesses may be worried about invasions of privacy from the inclusion of their personal information in court files and testimony that is broadcast or made accessible over the Internet.[99]

To avoid seeing the flourish of publicity and the buzz of activity surrounding the pilot program fizzle into failure, the Michigan Cyber Court should take some initial steps to promote first time use of its virtual forum. To assist in its initial start-up, the pilot program should consider phasing in online technologies over a period of time, streamlining its procedures to better leverage the current benefits of new technologies, addressing concerns about party privacy in advance and offering positive incentives for use of the virtual court.

A. Phased-In Introduction of Online Technologies into the Cyber Court Program

The Michigan Cyber Court has set an ambitious agenda in promoting a fully virtual court that integrates a wide range of new technologies that collect, distribute, broadcast, process and store case information. Due to the limited but growing number of high tech courtrooms,[100] few judges and lawyers have had an

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[98] Technology challenges can take away from effective case presentation. In some instances, there may be an overuse of technology that becomes distracting and detracts from the clear presentation of case materials and arguments. Leibowitz, *supra* note 6, at 5; Marder, *supra* note 97, at 1293. Even in the sophisticated Courtroom 21, technology may not perform at an optimum level, such as a blurry hologram or a remote witness who cannot be heard, damaging the trial experience in one of its recent mock trials. Leibowitz, *supra*, at 4.

[99] Wendy R. Leibowitz, *Electronic Filing: Is There Gold in Them Thar Courts?* (Feb. 12, 2002), *available at* http://www.wendytech.com/articles.htm (last visited June 25, 2002); Rebecca Fairley Raney, *Jury Is Out on Online Court Records* (Jan. 25, 2002) (on file with the North Carolina Journal of Law & Technology), *available at* http://www.ojr.org/ojr/law/p1015015443.php (last visited May 22, 2002); Brian Krebs, *Group Calls for Privacy Review of Court Records Database* (Jan. 26, 2001), *at* http://www.newsbytes.com (last visited May 22, 2002) (on file with the North Carolina Journal of Law & Technology).

[100] In 2001, it was estimated that there were about 300–500 high technology courtrooms in operation in the United States and Australia. Distance Education

opportunity to employ the integrated use of courtroom technologies on a regular basis.[101] Most parties, judges, lawyers and court administrators are still trying to grasp these technologies on an individual basis, and are likely to be completely overwhelmed by the planned Cyber Court.

Recognizing the need for a learning curve and taking into account the costs of emerging technologies, some courts have adopted a more phased-in approach. These courts use only certain information technology tools, such as electronic filing or "e-filing" of certain documents[102] or briefs submitted with supportive

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System-Wide Interactive Electronic Newsletter, *Experiment in Future Courtrooms Given Encouraging Verdict*, vol. 6.4, April 2001, *available at* http://www.uwex.edu/disted/desien/2001/0104/bizgoved.htm (last visited June 26, 2002) (on file with the North Carolina Journal of Law & Technology). Some of these high tech courtrooms are housed at law schools and other training centers. *See supra* notes 5–7 and accompanying text.

[101] Information Super Highway Article, *supra* note 2, at 1; Courtroom Practice Article, *supra* note 2, at 4; Frederic I. Lederer, *The Road to the Virtual Courtroom? Consideration of Today's—and Tomorrow's—High Technology Courtrooms*, at 2, Sixth National Court Technology Conference, National Center for State Courts (Sept. 1999) *available at* http://www.ncsc.dni.us/NCSC/TIS/TIS99/CTC6/CTC6%20–%2030%20–%20session.htm (last visited June 10, 2002) (on file with the North Carolina Journal of Law & Technology).

[102] A limited number of state, federal district and bankruptcy courts allow parties to file court pleadings and documents online. Information on federal courts that currently accept some electronic filings is *available at* http://www.uscourts.gov/CMECF/CMECF_court.html (last visited June 23, 2002). A 2001 amendment to the Federal Rules of Civil Procedure allows parties to electronically serve another party in federal and bankruptcy court matters provided that there is prior written consent to such service. FED. R. CIV. P. 5(b). *See New Federal Civil Procedure Rules Will Permit Electronic Service Upon Parties,* 6 ELECTRONIC. COMM. & L. 1189, *available at* http://ippubs.bna.com (last visited Dec. 5, 2001) (on file with the North Carolina Journal of Law & Technology). Under the revised Federal Rules of Appellate Procedure, courts of appeal may adopt local rules on electronic filing and service if the party being served consents to it. FED. R. OF APP. P. R. 25(a)(1)(D) (2002). A state-by-state review of court use of technology, including e-filing options, can be reviewed online on the website of the Information Resource Center of the National Center for State Courts. Courts Doing Business on the Web, *available at* http://www.nscs.dni.us/NCSC/TIS/Tis99/courtbus.htm (last visited June 23, 2002) (on file with the North Carolina Journal of Law & Technology).

appendices and cases on CD-ROM.[103] Even the VMAG project, which was aimed at technically savvy Web surfers, limited itself to the use of simple online forms, e-mail and a listserv in carrying out its functions.[104] To make the Cyber Court more attractive to

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[103] The use of CD-ROM technology can provide detailed information with extensive hyperlinks to supportive materials (either within the disk or outside the disk on the Web) in a readily accessible format that requires little storage space. Bradley Hillis, *Electronic Briefs in Trial and Appellate Courts*, JURIST (2000), *available at* http://www.jurist.law.edu/courttech3.htm (last visited June 11, 2002). The value of CD-ROM technology to the courts was extolled in the complex environmental case of *Alcoa v. Aetna Casualty & Sur.*, 2000 Wash. LEXIS 831 (2000) (LEXIS-NEXIS Academic Universe). In dicta, in the Supreme Court of Washington case, the court stated that:

> The record in this case was vast, covering some 57,000 pages of Clerk's Papers and a Report of Proceedings of over 12,000 pages. The parties agreed to bear the cost of scanning the record into an electronic format. The parties also submitted their briefs in CD-ROM form with hyperlinks to the record and the cases cited. We express sincere appreciation to the parties for doing this, as it greatly enhanced our ability to handle this case. The savings to the Court in time-motion efforts alone enabled us to retrieve and examine relevant parts of the record with ease, and made the record far more accessible than it would have otherwise been. The materials in this case occupy about 50 banker's boxes. We note that there is no reason why parties in more routine appeals to this Court should not seriously consider submitting the record and briefs to us in a similar format.

Id. at 4 n.1.

In the past, courts have been uncertain about adopting the technology, particularly if the CD-ROM links to materials outside of the court record on the Web or if the other party, which may lack the tools to review the CD-ROM, has not given prior consent to its use. Hillis, *supra*. *See* Yukiyo, Ltd. v. Watanabe, 111 F.3d 883 (Fed. Cir. 1997) (granting motion to strike CD-ROM brief out of concern for party who lacked ability to review CD-ROM materials, but encouraged use of CD-ROM technology with prior party consent). Taking their lead from the *Yukiyo* case, the U.S. Court of Appeals for the First Circuit and for the Federal Circuit were the first federal appellate courts to permit the use of CD-ROM technology to accompany paper briefs provided that there was prior court approval and party agreement on its use and that all hypertext links jumped to materials contained within the CD-ROM, and not to the Web. U.S. CT. APP. 1ST CIR., LOC. R. 32.1 (2002); U.S. CT. APP. FED. CIR. R. 32 (2002). *See* Hillis, *supra*.

[104] *See supra* notes 62–84 and accompanying text.

potential litigants, it may be better to introduce these technologies into the pilot program over a period of time, rather than all at once. Instead of expecting judges, lawyers, parties, and witnesses to take on the full panoply of technologies, the Cyber Court may first wish to hear cases using a mix of traditional and online technologies. For example, in some cases, the parties may agree to file documents electronically, but to have live testimony in one location augmented by advanced evidence presentation systems in a high tech courtroom. The live testimony could be broadcast over the Web with the court documents and final decision posted online for public access. Phasing in the use of online technologies provides an opportunity to improve familiarity with online technologies and to learn from preliminary virtual court experiences before advancing to a fully virtual court.

The current pilot program also envisions specialized training for judges and clerks who participate in the Cyber Court.[105] Before the pilot program begins and during its early stages, the Cyber Court should also take an active role in offering training programs for lawyers and informational sessions for the public to help demystify the operations of a fully virtual court.[106] Opportunities for hands-on experimentation with virtual court technologies and mock virtual trials will raise interest in the new court and increase comfort levels.[107] In the longer-term, the Cyber Court should actively promote greater integration of courtroom

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[105] *See supra* note 20 and accompanying text.

[106] *See* Ponte, *supra* note 11, at 90–91 (recommending providing greater public education on ODR methods to bolster public confidence in and use of ODR); Solomon & Gruen, *supra* note 2, at 6 (calling training in courtroom technologies key to the success of high tech courtrooms); Philip A. Talmadge, *Briefing and Oral Argument: New Technologies and Appellate Practice,* 2 J. APP. PRAC. & PROCESS 363 (2000) (suggesting continuing legal education and judicial seminars on electronic technologies to encourage their use in appellate courts); Task Force Report, *supra* note 87, at 24 (calling for greater public and e-business education on ODR methods and benefits).

[107] Solomon & Gruen, *supra* note 2, at 6. "Education is critical to the successful implementation and use of a High Tech Courtroom. Training needs to accommodate the different constituencies' requirements and levels of sophistication. Interactive multimedia training, videotapes and hands-on "mock trial" simulations seem to work best." *Id. See supra* notes 5 & 106 and accompanying text.

technologies into law school education. Increasing an awareness and understanding of the workings of the Michigan Cyber Court will improve confidence in its use in both the legal professional and public communities.

B. Streamline the Cyber Court Process to Leverage the Benefits of Current Online Technologies

Proponents of virtual courts assert that there will be substantial cost and time savings in allowing documents to be filed and stored electronically and in the associated reduction of paper use and processing times.[108] It is claimed that electronic court records are more accurate.[109] Electronic materials can be more easily searched using key words compared to a time-consuming traditional search through mounds of paper by hand for relevant materials.[110] In addition, the use of video or audio conferencing may help save on the lost productivity and travel costs for distant parties and witnesses.[111] The new court will need to show that its forum will actually save parties' time and money in bringing their actions. Lawyers are unlikely to advise clients to use a virtual system without clear evidence that, at a minimum, the process will provide these basic benefits.[112]

Courtroom technologies currently provide a mixed picture on potential time and cost savings. Recent experiences with e-filing illustrate that this process does not automatically save time

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[108] Frederic I. Lederer, *supra* note 101, at 23; Richard L. Marcus, *Complex Litigation at the Millennium: Confronting the Future: Coping with Discovery of Electronic Material*, 64 L. & Contemp. Prob. 253, 266, 272–273 (2001) (LEXIS-NEXIS Academic Universe); Ramasastry, *supra* note 66, at 1; Talmadge, *supra* note 106, at 373.

[109] Information Superhighway Article, *supra* note 2, at 7; Lederer, *supra* note 66, at 1, 4.

[110] Although electronic filings and communications may lead to more intrusive and more abundant document discovery, key word searches can make the review of documents much less onerous than standard page-by-page reviews of materials. Talmadge, *supra* note 106, at 367–68; Marcus, *supra* note 108, at 261. *See supra* note 99 and accompanying text.

[111] Information Superhighway Article, *supra* note 2, at 5; Lederer, *supra* note 101, at 23; Marcus, *supra* note 108, at 272; Ramasastry, *supra* note 66, at 1.

[112] *See supra* notes 96–97 and accompanying text.

and money for either lawyers or the court system. Those lawyers who have experienced e-filing found that it can be time-consuming and may only be slightly less expensive than traditional methods.[113] The benefits of electronic storage and retrieval for the courts are not being felt in the short-term as courts grapple with indexing and storage issues.[114] The proliferation of different e-filing systems may lead to different and incompatible platforms that will further limit projected efficiencies for courts and lawyers.[115] In addition, judges, lawyers and court administrators often print out the electronically filed documents to read them,[116] or as required for later use in appellate court review,[117] which obviates the savings in paper use, processing and storage.

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[113] Leibowitz, *supra* note 99, at 1. As Ms. Leibowitz observed,

> E-filing requires the attorney to be actively involved in the administrative act of filing the documents, instead of handing the documents off to a secretary or messenger, and some attorneys grumble at that. Solo and small firm practitioners turned out to be a higher percentage of e-filers than was initially thought, and they count every penny, and frequently file by regular postal mail, not by messenger. The smallest difference in price between low-tech filing and electronic filing provoked complaints.

Id.

[114] Leibowitz, *supra* note 99, at 1.

[115] *Id.* To help stem this problem, uniform international standards for legal data exchange are being explored through the LegalXML section of the Organization for the Advancement of Structured Information Standards (OASIS). Press Release, OASIS Expands to Include LegalXML, Legal Community Moves Standards Development to International Consortium, OASIS News (March 28, 2002), *available at* http://www.oasis–open.org (last visited July 18, 2002). OASIS is a nonprofit international consortium that strives to help in the development of global e-business standards with corporate and business members in more than 100 countries. http://www.oasis–open.org (last visited July 18, 2002) (home page of OASIS).

[116] Talmadge, *supra* note 106, at 373. *See supra* note 99 and accompanying text.

[117] Leibowitz, *supra* note 99, at 1–3. The e-filing industry has struggled to remain profitable. *Id.* at 1. CourtLink, one of the largest e-filing firms, was recently acquired by LEXIS-NEXIS, and will likely be an important information resource for the firm, but not a major profit center. *Id.* at 1, 3. Many e-filing firms are looking to stay profitable by providing data to credit card and financial services firms, insurance companies, private investigators and other customers from searches of their stored e-files, and not from the actual processing and

Furthermore, videoconferencing and other advanced electronic evidence presentation systems may be too great an investment for lawyers who may only use them in a few cases outside of the physical space of the Cyber Court.[118] Mock virtual trials have shown that these new court technologies are subject to technological glitches that can weaken case presentation.[119] When operating at their best, these systems are useful primarily in jury trials,[120] and, therefore, they will not yield the same overall benefits for virtual bench trials as in the Michigan Cyber Court. Clearly, additional technological experimentation and data

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storage of court materials. *Id.* at 2–3. Clearly, profiting off of the personal information of litigants and witnesses raises troubling ethical and privacy concerns. *See infra* note 134 and accompanying text.

[118] It is estimated that the basic costs for installing display and video conferencing equipment is $50,000–$100,000, depending on the equipment and number of monitors selected. Lucas, *supra* note 96, at 2. Others claim that costs can be kept down through careful planning and mixing and matching cost-effective technologies. Sandstrom & Bloomberg, *supra* note 2, at 3–4. However, even Prof. Lederer recognizes that

> One of the most fundamental questions raised by technology augmented technology and high technology courtrooms in particular, is whether they potentially disadvantage key participants in the process. The threshold question is whether the cost of equipment, and the case-specific preparation that requires office access to technology, effectively prohibits small firms, solo practitioners, and pro se litigants from technology use. Courtroom technology potentially includes not only inexpensive straightforward methods of evidence presentation such as document cameras, but possibly costly document scanning, and almost certainly expensive methods such as computer animation production. Choosing to proceed via the expensive route is a gamble; even if the case is won the results may not justify expense.

Lederer, *supra* note 102, at 17. *See supra* note 103 and accompanying text.

[119] *See* Leibowitz, *supra* note 5.

[120] Lucas, *supra* note 96, at 1; Leibowitz, *supra* note 5, at 4–5; Marder, *supra* note 97, at 1274–75. The visual benefits of advanced electronic evidence presentation systems help speed up juror review and comprehension of case materials. Lederer, *supra* note 66, at 3; Lucas, *supra* note 96, at 1; Marder, *supra* note 97, at 1274–75. In addition, time and money is saved when multiple copies of documents need not be made and materials need not be passed slowly from one juror to another for inspection. Lederer, *supra* note 66, at 4; Lucas, *supra* note 96, at 2.

collection is needed to provide adequate support for the claimed time and cost benefits of electronic filing and remote witness communication for individual parties, lawyers, and the courts.

With this mixed technological picture, the pilot program should learn a lesson from the VMAG project and focus initially on simplifying case filings, reducing the quantity of case submissions, and incorporating shorter time frames into the Cyber Court process to truly leverage the current benefits of virtual court technologies. As with the VMAG project, party complaints and responses could be simplified using easy to complete online submission forms with useful boxed segments and roll-down menus.[121] Party complaints and responses could be reduced to a more brief recitation of claims and defenses like those found in offline demands and responses in arbitration cases[122] or in small claims forms. Shortened time frames for discovery, party motions and pleadings, and court decision-making coupled with online technologies would also help to improve the time and cost savings to the participants.

At the outset, the Michigan Cyber Court may need to consider making changes that are more radical to its proposed special practice rules by offering a newer, more streamlined process specifically tailored to the proposed Cyber Court. These revisions would make the Cyber Court process more like an online arbitration program[123] rather than a forum for full-blown online litigation. Court-based arbitration programs are not new and are well-established in courts across the country.[124] Since parties must voluntarily agree to use the Cyber Court, these procedural

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[121] *See supra* note 67 and accompanying text.

[122] *See American Arbitration Association,* http://www.adr.org (last visited Nov. 12, 2002) (website for American Arbitration Association, which includes online and downloadable forms for demand for arbitration); LUCILLE M. PONTE & THOMAS D. CAVENAGH, ADR IN BUSINESS 165–166 (West Educational Publishing 1999) (providing samples of demand and submission forms for arbitration before the American Arbitration Association).

[123] *See supra* note 78 and accompanying text. *See also* Ramasastry, *supra* note 66, at 3 (calling for Cyber Court to utilize nonbinding conflict resolution in its pilot program).

[124] *See* PONTE & CAVENAGH, *supra* note 122, at 188, 192 (providing an overview of court-based arbitration programs).

differences must be weighed in making a decision to use the Cyber Court.

As an alternative to rewriting procedural rules, the Cyber Court pilot could streamline its processes initially by using its online technologies to implement Cyber Court-based ADR/ODR programs.[125] The existing rules and legislation already indicate that the Cyber Court should direct its resources to providing parties with ADR/ODR options.[126] In its preliminary phases, the Cyber Court could decide to take only online arbitration or mediation matters. As with the VMAG project, the Cyber Court could create its own set of procedural rules in administering their online ADR/ODR programs. Discovery can be limited in ADR/ODR, yielding even greater benefits from e-filing. Proceedings would not be bound by traditional evidentiary rules and could allow for more abbreviated opportunities to work and increase familiarity with audio and video conferencing programs and other electronic evidence presentation tools. Since ADR/ODR processes are held in confidence,[127] issues of privacy and security surrounding Web-based access could be delayed until more experience is gained with virtual court tools.

C. Balancing Party Privacy with Public Access in the Cyber Court

As a new judicial experiment, it is clear that the public would likely have a great interest in the Michigan Cyber Court. For instance, the electronic submissions and electronic broadcasts will make it easier for members of the public to learn more about the workings of the Cyber Court, in particular, and the operations of courts and lawyers, in general.[128] Rather than travel to the local

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[125] *See supra* notes 30 & 58 and accompanying text.

[126] *See supra* notes 30 & 58 and accompanying text.

[127] *See* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, *cert. denied*, 489 U.S. 1033 (1989) (holding that no First Amendment right of public access to court-ordered ADR proceedings); PONTE & CAVENAGH, *supra* note 122, at 28, 33 (discussing confidential nature of ADR proceedings).

[128] *See* Krebs, *supra* note 99, at 1; Raney, *supra* note 99, at 1. "Without question, more Web sites that examine court proceedings could materialize as courts post more records online. The availability of thousands of court records

courthouse, a member of the general public might watch a live Web cast of Cyber Court proceedings or access documents in the case to learn more about the dispute from their home or office computer. Such quick and convenient access will also help the media. It will be easier to scan key court documents for information, and this access will enable reporters to quickly write or report on the court and its cases.[129] This same unprecedented opportunity to improve public access to the courts also raises important privacy issues.[130]

Concerns about the protection of personal information raise another potential barrier to the use of the Cyber Court. Unlike a

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online could supply the public with insight into the workings of the court system that they never had before." Raney, *supra,* at 1. Currently, the courts aid public understanding of their obligations to serve on jury trials through online juror orientation videos that prospective jurors can view at home or in their office. Marder, *supra* note 97, at 1271.

[129] Lederer, *supra* note 101, at 21; Raney, *supra* note 99, at 2–3.

> Further, easy accessibility to court records could lead to better news coverage from all quarters. "It would be a great asset for a reporter to sit at a computer at his or her desk and access a file rather than go down to a courthouse and be at the mercy of a clerk," said Terry Francke, general counsel for the California First Amendment Coalition. Without question, because of the cumbersome process of examining case files at the courthouse, court coverage is often restricted to cases that have been pushed by police, prosecutors and publicity-seeking litigators. "The press attention is not really steady or even a responsible one," Francke said. "Part of the reason needs to be laid at the court's door."

Id.

[130] Some courts currently allow the public to access case summaries and civil and criminal court calendars. Raney, *supra* note 99, at 2. Alarm bells recently went off when the federal court floated the notion of linking all federal court files under one central search system, Public Access to Court Electronic Records (PACER). Currently, interested persons must log on to individual federal court sites to find the case materials filed with that court. Under the federal court proposal, about seven cents a page would be paid to search all online federal court records from a central portal. Privacy experts have called upon federal policy-makers to redact personal information from all online files to protect privacy rights and prevent identity theft. *National Commission Needed to Review Privacy of Court Records*, Privacy Watch (Jan. 26, 2001), *available at* http://www.privacyfoundation.org (last visited July 17, 2002); Krebs, *supra* note 99, at 1 (on file with the North Carolina Journal of Law & Technology).

traditional court, parties and witnesses appearing before the Cyber Court may have their testimony beamed live over the Internet, as well as their personal information such as names, addresses, telephone and Social Security numbers, and professional affiliations. The documents filed in the case that may contain personal information about one's medical, tax, financial, or employment history could be available to anyone in the world with Internet access.[131] Although the public currently has access to civil courtrooms and to documents in civil cases,[132] such access typically requires a greater expenditure of time and effort. The public must consider the cost of traveling to the courthouse, possibly in another state, to watch the live proceedings, or must undertake the onerous task of dredging through mounds of documents in the clerk's office to review pertinent case information. The potential for Web casts of testimony and document retrieval by anyone with Internet capabilities provides an unprecedented level of access that may unfairly sacrifice party and witness privacy rights.[133]

Some privacy experts have raised concerns that an Internet-wide release of personal information could lead to increased identity theft. E-filing firms that collect and store case files or provide retrieval services for case file information may potentially sell personal information to credit card or insurance companies without the individual's permission.[134] In addition, employers

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[131] *See* Krebs, *supra* note 99, at 1; Raney, *supra* note 99, at 1.

[132] *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986) (recognizing qualified privilege of public access to court proceedings under First Amendment) [hereinafter Press Enterprise II]. *See supra* notes 124–125 and accompanying text.

[133] *See* Krebs, *supra* note 99, at 1; Raney, *supra* note 99, at 1–2. Privacy rights in cyberspace are derived from a broad array of sources, including the penumbral rights of the U.S. Constitution, state constitutions, case law, and statutory mandates. G. FERRERA, ET AL., CYBERLAW, TEXT AND CASES 189–193, 202–210 (South-Western College Publishing 2001).

[134] Leibowitz, *supra* note 97, at 2–3. Ms. Leibowitz, a legal technology reporter and commentator, indicated that as regards the shaky fortunes of e-filing services that

> ... there IS gold in them thar courts, and the gold being mined (or data mined) is people's personal information.

could more easily search court documents for information that they cannot legally obtain by asking an applicant or current employee, such as one's age or medical conditions. Lastly, if there were inaccuracies about a person in the online record, such as unfair or exploitive claims that may be made in a complaint, then the incorrect information would be distributed to a huge audience and may be difficult to capture and correct.[135]

Although it is not a public court with an obligation to provide public access, the VMAG project recognized privacy concerns in structuring its online service. Under its rules, parties may request that private information be kept confidential and that even the final decision be kept confidential, if appropriate.[136] Clearly, the Cyber Court should be required to disclose its decisions, but accommodations should be made to protect personal information.

In balancing privacy with the public's right to know, one option for the Cyber Court is to follow the VMAG approach in which parties and witnesses may request that personal information be edited out of online files and excluded from broadcast over the Internet. This option will allow the Cyber Court to make case-by-case determinations in dealing with issues of public access and personal privacy. This piecemeal approach may be viewed as

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> The data-mining services are sold, quite legally of course, to private investigators, insurance companies, real estate, and credit agencies, and financial services companies using the information housed in the court. It's doubtful that anyone envisioned this role for electronic filing when it debuted, but that appears to be the direction in which the industry is currently heading.
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> Courts become publishers, providing information from their files to companies that splice and sell the data. Lawyers and their clients—who are compelled to use the courts to settle many disputes, such as divorces and bankruptcies—pay for the privilege of supplying the data. The clients' personal information is the gold and the clients—the general public—are being mined for all they are worth.

Id.

[135] Raney, *supra* note 99, at 1.

[136] *See supra* notes 71–72 and accompanying text.

troubling to parties and witnesses who do not know if the judge will grant their request for protection, but more satisfying to those concerned about protecting the public's right to know.[137]

Generally, the public's right to know is grounded in the desire to supervise the conduct and activities of the judicial branch rather than a desire to learn about the personal information of parties and witnesses.[138] To encourage party use of the virtual forum, the Cyber Court will need to provide greater assurances regarding the protection of personal information. To further encourage party participation, the Cyber Court should indicate in its special rules that sensitive personal information will not be made accessible online or through Web casts.[139] In addition, consent from parties and witnesses should be required before an e-filing firm can release personal information to others from Cyber Court case files.[140] The Cyber Court would certainly need to undertake adequate security measures to protect personal information that has been redacted from public files but is still stored in its databases.[141] Each of these conditions preserves the public's ability to supervise the conduct of the Cyber Court and also allows for greater protection of the personal information of parties and witnesses.

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[137] Raney, *supra* note 99, at 2. Advocates for greater public and press access to court documents prefer that courts undertake a case-by-case analysis of privacy concerns, rather than institute sweeping bans on particular categories of information. *Id.*

[138] Krebs, *supra* note 99, at 1; Raney, *supra* note 99, at 1–2. *See* Press-Enter. II, 478 U.S. at 9.

[139] *See* Letter from Privacy Foundation, to Subcommittee on Privacy and Electronic Access to Case Files of the Court Administration and Case Management Committee of the Judicial Conference of the United States (Jan. 26, 2001), *at* http://www.privacyfoundation.org (last visited July 17, 2002) (recommending that sensitive, personal information be automatically redacted from online court records).

[140] Currently, the European Union requires that online firms must seek party consent each time a firm seeks to release any personal consumer information to third parties. FERRERA, *supra* 133, at 216–17. In the U.S., there is little government regulation of the trade in personal information, with most online protection of personal information being grounded in the stated privacy policies of a particular website. FERRERA, *supra*, at 211.

[141] *See* Lederer, *supra* note 101, at 21 (discussing security concerns for virtual courts and indicates that effective system design is essential).

D. Offering Positive Incentives for Initial Use of Cyber Court Services

Courts generally have not provided incentives for parties to adopt and use new technologies in case preparation and presentation.[142] To help promote the Cyber Court's pilot program, it may be necessary to institute positive inducements to attract parties and their advocates. These enticements could be financial or non-financial in nature. These incentives need only be retained in the preliminary phases of the Cyber Court as it tries to encourage first time use of its pilot program.

One inducement is to reduce or waive filing fees for parties who use the Cyber Court's e-filing system. This incentive could also be extended to the filing fees for traditional appeals from the Cyber Court.[143] This approach may offer at least some cost savings to parties and provide the Cyber Court with an opportunity to test its e-filing system.

Parties could achieve even greater cost savings if the Cyber Court helped share the costs of using new technologies for case preparation and presentation in the virtual forum. For example, the Cyber Court could help subsidize party costs for scanning documents, preparing video depositions, or developing computer animated or video clips for trial. A ceiling could be placed on these Cyber Court subsidies to help control costs and to avoid any abuse of the subsidy system.

In addition to this direct financial assistance, the Cyber Court could provide technology seminars and training to parties and lawyers who utilize its services. A certain amount of hands-on training with new court technologies could be provided for free to parties and attorneys who file with the Cyber Court. This training incentive might be particularly attractive to business litigants who

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[142] *See* Science Applications Int'l Corp. v. Super. Ct. of San Diego City, 46 Cal. Rptr. 2d 332, 337 (Cal. Ct. App. 1995) (rejecting more than $300,000 of trial court awarded costs for advanced technological presentation as not reimbursable litigation expenses). *See supra* note 118 and accompanying text.

[143] Talmadge, *supra* note 106, at 366, 374 (calling for adjusted filing fees to promote e-filing in appellate court matters).

are more likely to be repeat players in the Cyber Court and would benefit from a clearer understanding of rapidly-emerging courtroom technologies. Further, this training would be in line with the Cyber Court's educational role of improving greater public and professional awareness and understanding of its virtual forum.[144]

Some may balk at the notion of expending public funds or subsidizing training for private litigants. However, these benefits will extend beyond the private parties to the court system as a whole. By attracting parties to help experiment with court technologies, the Cyber Court can collect hard data on the actual long-term benefits and deficiencies of a virtual court. From these experiences, those technological tools that offer promising cost and time savings can be utilized to promote efficiency for the entire court system in the future.[145]

V. Conclusion

The Michigan Cyber Court offers the opportunity to study the use of new and emerging technologies in a fully virtual public court. Unlike its predecessors, such as the VMAG project, the pilot program must engage in serious efforts to attract real world parties to test its virtual services. To help overcome barriers to its initial use, the Michigan Cyber Court should consider introducing online technologies over a phased-in period of time, streamlining its procedures to better leverage the current technological benefits, addressing concerns about party privacy in advance and offering positive incentives for use of the virtual court. By reducing

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[144] *See supra* notes 106–07 and accompanying text.

[145] *See supra* note 93, at 1; Sarkar, *supra* note 94, at 1. As Michigan Judge Donald Shelton stated,

> I think the real significance is not what [the Cyber Court] specifically ends up doing in the commercial litigation area; it will be, in effect, a prototype for electronic filing in an electronic jurisdiction that can be applied to all areas.... The short-term motivation is to make courts more responsive to the immediate commercial needs, but the long-term benefit would be further digitization of our entire court system.

Sarkar, *supra*, at 1.

obstacles to its first time use, the Michigan Cyber Court may be able to collect sufficient data and experiences that can help determine the actual advantages and disadvantages of a virtual forum and guide the future use of online technologies in both traditional and virtual courts.