

THE 1% SOLUTION: AMERICAN JUDGES MUST ENTER THE INTERNET AGE

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Practicing lawyers, judges, and law schools are in the early stages of a revolution driven by the forces of information technology. The quality of justice in the twenty-first century will be determined by the clarity of our vision in understanding these revolutionary forces and our entrepreneurial creativity in adapting to them.

Information technology in the form of the Internet and the World Wide Web (the “Web”) is a revolutionary force because it provides a new marketplace for the exchange of goods and services, a new political forum for mass democracy, and new pathways for the Rule of Law. In this new marketplace, economic barriers to entry are much lower than at any time in history. One can set up a web site for the price of a \$3,000 computer and a \$19-per-month Internet connection, compared to tens of thousands of dollars to set up a physical storefront, hundreds of thousands of dollars to operate a printing press, and millions of dollars to operate a television transmitter.¹ These low barriers to entry mean that small enterprises, including small law firms, have access to markets they never could reach in the past. The Internet’s low transaction costs make it possible for these small enterprises to engage in low-value transactions and still make a profit.

The Internet is the key technology enabling these remarkable changes. The Internet is so powerful as a foundation

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1. See *CDW Computer Centers, Inc.*, <<http://www.cdw.com/shop/search/results.asp?key=Servers>> (accessed Apr. 7, 2000).

for change because of its ubiquity. Before the Internet became popular, one could distribute or acquire information by an electronic network, but one had to invest in establishing the network itself, in software at both ends of the connection, and in other infrastructure features. Now that the Internet is ubiquitous, one can take the network for granted. One can take for granted the availability of web server and browser software at the ends of the connection. In other words, one can take the infrastructure and user interface for granted and concentrate on the particular value-added features that are within one's own particular competence.

I. THE 1% PROBLEM

Legislatures, courts, and statutory bodies all over the world are discovering how an Internet-connected computer can be a remarkably cheap printing press for legal publishing through which new statutes, court decisions, and administrative regulations can be communicated instantly to anyone in the world. A low-cost personal computer connected to the Internet becomes a virtual library through which a judge, legislator, or government official can consult new law, regardless of its source.

The Internet facilitates both the placement of primary information and the publication of bibliographic aids. All it takes to publish a document on the server is to save it in a particular format—"HTML" (HyperText Markup Language)—from either of the two most popular word processing programs and then to "publish" it to a particular directory on the server—a single step in either of the two most popular Internet web browser programs. For an institution such as a court that regularly generates textual judgments or opinions, the process of web publishing can be automated with a few simple scripts that take word processing files for opinions or judgments as soon as they are released, automatically format them, and publish them to an appropriate directory on the web server, automatically generating indexes and tables of contents as new opinions or judgments are added.

Unfortunately, not all governments make their information resources available for electronic access. The reluctance of some

foreign governments stems from the communist era in which public access to information about government activities either was unnecessary or was actively opposed. In other cases abroad—and in almost every case in this country—the motivation is not to discourage public participation in government, but to make money. Many government institutions recognize the economic value of government information in electronic form and also recognize that monopolists can extract more revenue by maintaining their monopolies and discouraging competition. Accordingly, they set up government-run or government-sponsored monopolies to sell access to their information resources while blocking access by others.²

State sponsored monopolies over government information are undesirable for a number of reasons. Monopolies make it easier for censorship to occur. Monopolies usually perpetuate older information technologies because monopolists have no economic incentive to introduce new technologies, thus depriving consumers of the benefits of new technology. Monopolies rarely serve the needs of particular consuming communities as well as a competitive market structure can serve them because no monopolist can understand and cater to the needs of specialized communities as well as a designer and producer who specializes more narrowly.

Accordingly, information policy should commit to and encourage a diversity of sources and channels for government information.³ This policy is best implemented by a legal

2. Henry H. Perritt, Jr. & Christopher J. Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 *Buff. L. Rev.* 899, 899 (1997) (citing Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 *Wm. & Mary Bill Rights J.* 179, 184 (1995); (explaining and criticizing agency temptations to set up state monopolies over government information); Henry H. Perritt, Jr., *Should Local Governments Sell Local Spatial Databases Through State Monopolies?* 35 *Jurimetrics J.* 449, 454-55 (1995) (same)).

3. A good example of a commitment to a policy of diversity is expressed in the *Paperwork Reduction Act of 1995*, which amended 44 U.S.C. § 3506 to read as follows, in material part:

- (d) With respect to information dissemination, each agency shall—
 - (1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through—
 - (A) encouraging a diversity of public and private sources for information based on government public information;

framework that grants anyone a right of access to basic government information and also gives everyone a privilege to publish that information in electronic form or otherwise.⁴

As we begin the twenty-first century, it is useful to take the pulse of the progress of this information revolution in United States legal institutions. Oversimplifying somewhat, one can classify three functions of conventional legal institutions such as courts, legislative bodies, and administrative agencies: (1) dissemination of decisions and other legal texts; (2) rulemaking; and (3) adjudication. For purposes of comparison, one might say that the potential of the Internet to improve these functions of government in the United States has been realized as follows: 75% of the dissemination function, 25% of the rulemaking function and only 1% of the adjudication function.

A. Dissemination

The dissemination function makes effective use of the Internet at all levels. Texts of statutes are available on the Internet in comprehensive collections mounted by the Congress of the United States and by a rapidly growing number of state legislatures. Most federal agencies publish their major regulations and supporting advice and compliance manuals on

(B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and

(C) agency dissemination of public information in an efficient, effective, and economical manner.

Paperwork Reduction Act of 1995, Pub. L. 104-13, § 244, 109 Stat. 163, 174 (1995).

4. See Perritt & Lhulier, *supra* n. 2. In the United States, the *Paperwork Reduction Act of 1995*, which amended 44 U.S.C. § 3506(d), appropriately continues:

(4) [With respect to information dissemination, each agency shall] not, except where specifically authorized by statute—

(A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;

(B) restrict or regulate the use, resale, or redissemination of public information by the public;

(C) charge fees or royalties for resale or redissemination of public information; or

(D) establish user fees for public information that exceed the cost of dissemination.

Paperwork Reduction Act of 1995, Pub. L. 104-13, § 244, 109 Stat. 163, 174-75 (1995).

the Web, and state administrative agencies are joining them. Readily available court decisions are necessary components of any rule of law that depends on consistent decisionmaking. Appellate courts have taken the lead in using the Internet to improve citizen and lawyer access to legal materials. Most federal circuits have web sites publishing the full text of their opinions.⁵ A rapidly growing number of state appeals courts are doing the same;⁶ Arkansas is a good example.⁷ The remaining 25% of the work in the dissemination function will be complete when all legislatures, courts, and agencies have followed suit, and when we have learned more about the best practices in organizing links and other entry points for diverse populations of lawyers, users, and commentators. As legal institutions in the United States move their legislative materials and cases to the Web, they fulfill the goal of the principle of open trials and the freedom of information acts.

B. Rulemaking

By comparison, the job is about 25% complete with respect to the rulemaking function. Most committees of the Congress now publish notices of hearings, and some hearing records, on the Web, but few permit testimony and statements to be submitted electronically. Federal administrative agencies usually publish notices of proposed rulemaking on the Web. Many allow comments to be submitted by e-mail, but only a few provide user-friendly forms for comment submission. More federal agencies are maintaining their dockets of submitted comments on the Web, thus allowing participants in rulemaking proceedings to see what others have said in framing their own comments. State legislatures and agencies are clearly behind, but there is every reason to believe that they are embracing the federal examples.

5. See *Federal Judiciary Homepage—Court Links* <<http://www.uscourts.gov/links.html>> (accessed June 18, 2000).

6. Links for state and federal court sites can be obtained from the *Federal Web Locator* and the *State Web Locator*, maintained by Chicago-Kent College of Law at *CILP: The Center for Information Law and Policy* <<http://www.cilp.org/>> (last updated Nov. 4, 1999).

7. Opinions of the Arkansas Supreme Court and Arkansas Court of Appeals <<http://courts.state.ar.us/opinions/opmain.htm>> (last updated Mar. 9, 2000).

C. Adjudication

With respect to adjudication, the job is only about 1% complete. Individual trial judges have been innovators, sometimes requiring that trial counsel post all materials associated with a particular case on specialized web pages, as in the Phen-Fen case. But few courts so far are exploiting the potential of the Internet as a way of facilitating up-to-date access to dockets at the trial and appellate level, and fewer still—the Western District of Missouri being a notable exception—encourage or require filings to be done through the Internet. One of the reasons for slow adoption of Internet tools in adjudication is that the circle of people interested in access to litigation materials in particular cases is limited. Probably fewer than a half dozen people actually read a typical memorandum of law or brief. State and local courts are managed and funded by a wide variety of local structures and confusing and overlapping control. There are perverse incentives in place in some of these organizations. For example, some court clerk compensation is based on the number of employees managed rather than the amount of work completed. Therefore, the political impetus needed to open automation budgets and reengineer the court processes in thousands of clerks' offices across the country has been slow to emerge.

Despite these barriers, judges and litigants must take advantage of new Internet tools to improve the ability of judges to resolve disputes and the ability of lawyers to practice law. Internet-enabled systems can make service on counsel and filing with the court much more efficient. The Internet has enormous potential to facilitate access to the justice system by claimants who are not represented by lawyers.⁸ Tens of thousands of

8. A good example is the Illinois Pro Bono Center, "a not-for-profit corporation chartered in 1992 by the Illinois State Bar Association to assist Illinois volunteer attorneys and provide support for organized local pro bono projects. The Center's mission is to increase the number of indigent citizens of Illinois who receive quality, uncompensated, civil legal services from volunteer lawyer programs, to establish volunteer lawyer programs in new areas, and to expand the number of lawyers participating in existing volunteer lawyer programs." *Illinois Pro Bono Center* <<http://www.illinoisprobonocenter.org/>> (accessed June 18, 2000). See also Global Legal Information Network, *The Guide to Law Online* <<http://lcweb2.loc.gov/glin/worldlaw.html>> (accessed June 18, 2000) ("an annotated hypertext guide to sources of information worldwide on government and law

disputes in any legal system involve such small amounts in controversy that they do not justify much lawyering—if they warrant legal representation at all. These claimants often are denied access to the legal system altogether because they do not know how to navigate traditional filing systems, and it is not worth the money or the inconvenience to retain a lawyer.

Two new initiatives have recently been launched to encourage and speed the use of Internet tools in the 99% of adjudication matters where the new information technology has yet to make an impact: the Justice Web Collaboratory and the ABA Technology 2000 Taskforce.

II. THE 1% SOLUTION

A. *The Justice Web Collaboratory*⁹

The Justice Web Collaboratory (“JWC”) is a partnership between Chicago-Kent College of Law and the National Center for State Courts (“NCSC”).¹⁰ The JWC was formed to use the tools of the World Wide Web to create a laboratory for collaboration aimed exclusively at American judges. The JWC is organized as a communications, publications, and education web site whose primary goals are:

1. Creation of an online community for judges that encourages them to learn about the Internet and to use its capabilities in appropriate ways to enhance the performance of judges on the bench and in chambers;

available online without charge”); *Nolo.com: Law for All* <<http://www.nolo.com/>> (accessed Mar. 27, 2000) (containing legal encyclopedia helpful to those researching many topics such as small business, wills and estates, estate planning, and personal injury law).

9. See Justice Web Collaboratory, *Justice Web Collaboratory* <<http://www.judgelink.org/>> (accessed Apr. 9, 2000).

10. The Dixon Conference on *Using the Internet to Improve the System of Justice*, held on April 23-24, 1998, triggered the development of the Justice Web Collaboratory and provided initial funding through the National Center for Automated Information Research. The responsibility for the management of the Justice Web Collaboratory is coordinated by Ronald Staudt, Associate Vice President for Law, Business and Technology and Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law, and Roger Warren, the President of the National Center for State Courts. Operational leadership is handled by Chicago-Kent College of Law’s Manager of the Justice Web Collaboratory, Todd Pedwell, and Marcia Koslov, Director, Knowledge Services, National Center for State Courts.

2. Delivery of educational content and research material to judges with special initial focus on topics relating to technology, science and computing, including case management, electronic filing, data integration and knowledge management; and

3. Establishing a living and vibrant laboratory for improving the justice system in the United States with special focus on public access to the courts.

The centerpiece of the Collaboratory is *JudgeLink*,¹¹ a web site designed exclusively for American judges. The site is built to include an information clearinghouse for judges, continuing judicial and legal education programs, and an on-line think tank. *JudgeLink* is designed to provide a secure forum for the sharing of knowledge and exchanging of ideas between judges of varying backgrounds and geography. This forum can serve as a “just in time” learning network for judges who are unable to consult with knowledgeable colleagues on issues of judicial administration, technical information and other matters. This password-protected, members-only forum supports discussions of developments across different jurisdictions as they occur, without concern that conversations will be taken out of context or publicized prematurely. Secure discussions of hot topics are facilitated in a chat room, in a listserv, and in threaded discussion forums. Since its debut, the Judicial Conference Center has experimented with a variety of topics such as courts in the age of the Internet, evidentiary issues related to technology, politicizing the judiciary, and pro se representation.¹² In addition, *JudgeLink* provides useful information for judges in the form of annotations of a wide range of web sites that might be helpful in day-to-day judicial functions. Chicago-Kent students search the Web and write brief descriptions of the content of useful sites.

The Justice Web Collaboratory has the potential to change the way that knowledge is exchanged between members of the judiciary. Over 30,000 state court judges and 800 federal judges practice in the United States alone. Under the guidance of the

11. Justice Web Collaboratory, *supra* n. 9.

12. *Id.* See also *Nolo.com: Law for All*, *supra* n. 8; The Equal Justice Network, *Client Self Help Strategies: Technology Educated and Assisted Pro Se With and Without Advocate Backup* <<http://www.equaljustice.org/visions/TechConf/09-strategies.htm>> (accessed Mar. 27, 2000).

new JWC Advisory Board, formed under the leadership of Associate Justice George Nicholson of Sacramento, California, networking among the various organizations representing judges from the federal, state, and tribal jurisdictions will be encouraged. The JWC web facilities will also be positioned to support deeper collaboration in the development of public access projects and data integration initiatives across the country.

All of these Internet tools made available to judges through the Justice Web Collaboratory are designed to help judges gain the knowledge they need to push the 1% of Internet-enabled adjudications upward in their own courts. The solution to the 1% problem must be driven by judges themselves, aided and supported by parallel professionals like court administrators, clerks, and technologists. Only when judges insist that their courts be Internet-enabled, and only when judges themselves use the tools of the Internet on the bench and in chambers, will rapid progress be possible.

B. ABA Technology 2000 Taskforce

Practitioners must remain ready to represent clients with these new forms of advocacy, while remaining faithful to the core principles of the Rules of Professional Conduct. Important barriers to public access to legal services arise from the costs of searching for a lawyer and the transaction costs of face-to-face meetings. Members of the bar, spurred by the judiciary, must be aggressive in helping clients find potential counsel, request lawyer services, enter into fee agreements, and engage in some forms of lawyer-client conversation over the Web.

At the direction of ABA President Bill Paul, the Technology 2000 Taskforce on Lawyers Serving Society Through Technology investigated the new forms of law practice made possible by the Internet. The Taskforce aimed to use these new tools to increase access of moderate-income clients to legal services. Its goal was to use technology to match underused lawyers with unmet legal needs. On March 28, 2000, after two days of discussions, demonstrations of "new economy" lawyering web sites, and debate, the Taskforce reported eight recommendations to Bill Paul. The recommendations urged the ABA to interpret existing rules of practice to encourage the use

of the Internet for delivering legal services to moderate-income clients. The Taskforce recommended that the ABA revise its Model Rules to encourage lawyers to take advantage of the Web to deliver more accessible and cost-efficient services to moderate-income clients. In addition, the group urged that the ABA President establish exchanges of technology from commercial to non-profit groups, reassess education standards to encompass relevant technical skills, and invest in building web tools for practicing lawyers.¹³ The seamless range of legal services available through lawyer web sites such as *VisaNow.com*,¹⁴ *VisaLaw.com*,¹⁵ *Americounsel.com*,¹⁶ and dozens of other new law practice sites should become the conceptual starting point for the way we practice law, not curiosities confined to specialized practice areas.

III. CONCLUSION

There is a special significance in the fact that both the Justice Web Collaboratory and the ABA Technology 2000 Task force are tightly connected to a law school. Law schools and law professors are well suited by virtue of their independence and professional distance to serve as midwives for judicial change and to help explore the major changes needed in our practice institutions, such as the ABA. Judges must be vigilant to avoid appearances of impropriety and entangling connections between themselves and litigants or the lawyers that appear before them. Bar associations are torn today between factions that are driven by self-interest and factions that are eager to leverage the brand and access to markets represented by bar associations.

13. *ABA Tech 2000: Lawyers Serving Society Through Technology* <<http://www.kentlaw.edu/clc/tech2000/>> (last modified Apr. 7, 2000). The plenary presentations delivered at the ABA Tech 2000 Workshop at Chicago-Kent College of Law in Chicago, Illinois, are available at this site in streaming video. *Id.* <<http://www.kentlaw.edu/clc/tech2000/videos.htm>>. The recommendations prepared during the Workshop are also posted on this site. *Id.* <<http://www.kentlaw.edu/clc/tech2000/Recomm.htm>>.

14. *VisaNow.com*: The Only Place to Get Your Immigration Visa Online <<http://www.visanow.com/>> (accessed June 18, 2000).

15. Siskind, Susser, Haas & Devine, *VisaLaw.com* <<http://www.visalaw.com/>> (last updated June 15, 2000).

16. *Americounsel.com*: *Quality Legal Services. Flat Fees.* <<http://www.americounsel.com/>> (accessed June 18, 2000).

Independent from both of these forces of influence, law schools and educators can offer perspective, insulate judges and bar leaders, and offer opportunities for interaction in neutral territory as the commercial and professional forces spar for advantage. The schools and educators are well served when their students can take part in the deliberative processes, observe the discussions, and support the meetings of judges, lawyers, and technologists. In this way, a true collaboration can develop to deliver the 1% solution for both judges and lawyers.

