Keeton Civil Trial

Evolutionary Advocacy

What we hoped and thought would be a short-term problem has now become the birth of what I call evolutionary advocacy. The global COVID pandemic ushered in technological changes that had been slow to take root in the legal profession. Now a year later, it is clear that many short-term changes will produce long-term shifts in practice. The litigation world will be forever changed, it will not return to the old "normal." Like all evolutionary shifts, we can either be the dinosaurs on our way to extinction or the new species of survivors. The dictionary definition of evolutionary is" relating to or denoting the process by which different kinds of living organisms are believed to have developed from earlier forms." That definition aptly describes the current landscape for litigators. While we have developed from a universe of mostly in-person proceedings, we are moving towards the new world of remote and hybrid proceedings. What was temporary is now the new permanent reality. To be successful we want to do more than just survive, we want to thrive. Thriving means that we actually embrace what the technology offers and use it to our client's advantage. We take the best of all possible worlds and expand our skill set to be premiere advocates no matter the setting. It is normal to mourn the passing of the world in which we were comfortable and proficient. It is natural to be resistant to new changes. We are professional rationalizers, so it is normal to be fearful of mastering a new skill set and express a thousand reasons why it is not necessary and could not possibly be better. So, congratulate yourself for being brave enough to explore necessary change and who knows, you might even come to enjoy and prefer it!

The following are excerpts from the book *Remote Advocacy in a Nutshell*: Tracy Walters McCormack

A NEW REALITY

"Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff . . . and the public from the risks of disease. We are learning new technology and practices together."
Texas Chief Justice Nathan Hecht President of the Conference of Chief Justices
Chair of NCSC Board of Directors Co-Chair of the National Pandemic Rapid
Response Team

A. THE CALL TO ACTION

As lawyers, our job is to give our clients honest and realistic advice about where their particular case will fall on the justice triage system that courts will use to clear the backlog of cases that could not be resolved during this period of dislocation. We must give our clients realistic assessments about what a jury trial might look like if it happens in the next year or so— and advise them of the risks and benefits of waiting or moving forward. We should actively seek assessments from those who have actually done a remote proceeding likes ours.

Fact: we know that nothing encourages case resolutions like a solid trial setting. We are creatures of the time clock and the time required to accomplish some objective will almost always match the time allotted. To the fullest extent possible, we need to keep our clients' cases moving forward. And it helps to acknowledge to ourselves that most of us practice in jurisdictions whose ethical rules require us to keep

up with changes in technology and adapt to changing environments, whether we like the changes or not. The pace of technological innovation has not and will not wait on any of us.

Learning how best to utilize videoconferencing platforms to appear in remote proceedings is just another technology-based skill set—one that requires a different set of advocacy skills and considerations. This book is designed to help you acquire and master those new skills.

A book like this is both temporary and permanent in scope. While we hope that much of the dislocation that we are feeling as lawyers and judges is temporary—and much of it probably will be only temporary (although temporary is a relative term here)—there will, inevitably, be changes brought by current conditions that are most definitely permanent. Even so, our temporary dislocation may not end as quickly as many of us may think: In a recent webinar, one judge projected that it may be 2– 4 years before her court returns to a normal jury trial docket with no restrictions[1]. That projection was not based on a lack of desire. It was simply a prediction about how six months, or even a year, of delay creates backlogs that are incapable of swift resolution once the courtroom lights come back on.

Whatever the timing, we can all be better advocates. This book will explore how to conduct some proceedings that will eventually return to normal. It will also help you embrace some skills that will make all of us better advocates no matter the setting. The most successful advocates will take this opportunity to expand and sharpen their skillset. They will become better remote and in-person advocates. We will need both skillsets to maintain a practice going forward.

By the time you read this book, remote hearings will no longer be a novelty. Some courts have already logged over one million hours of remote hearings since March 2020[2]. Neither will remote depositions be novel experiences. Remote mediations and arbitrations are well underway. Courts are already conducting remote bench and jury trials as well as oral arguments. There will be few spaces in which we advocate for our clients that will not have adapted to some remote advocacy element. Many courts have already expressed a preference for certain remote proceedings over traditional ones. Even after society can safely re-enter courthouses, remote advocacy will continue at levels that exceed anything we have seen thus far.

It is not a stretch to predict that many courts will maintain aspects of remote hearings indefinitely. In particular, the benefits of having more efficient motion practice and hearings will outweigh live argument and the assemblage of lawyers, witnesses, and court staff in some circumstances. Eventually, you may discover that you prefer remote hearings in many instances.

Lawyers can now appear in different locations around the state in a single day—without flights or long drives or other logistical hassles. The increased ability to share information and work collaboratively can positively impact representation of indigent clients who find getting to a courthouse to be a major ordeal in itself. Expert and fact witnesses can be available to courts in small towns and hard-to-reach locations. Suddenly, witnesses do not need to take off an entire day of work or find childcare to offer a few minutes of crucial testimony. Mediators may find cases settle more quickly now that all the decisionmakers can log into the mediation—and crucial stakeholders can easily participate. Without the added delay and expense of coordinating calendars for travel and time away, some justice will move more quickly, at less cost, and with no appreciable decrease in quality. Used appropriately, remote advocacy in many cases can free up courts to spend more time and resources on the matters that absolutely require in-person proceedings and justify the expenditures of time and resources that going to the courthouse involve.

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1. ABOTA Jury webinar July 2020, https://drive.google.com/file/d/14pdGVrbMWOxH7SuQHT2eKbPVMJMObUeL/view.
2. https://milawyersweekly.com/news/2020/09/29/statesvirtual-courtrooms-surpass-million-hour-mark/.

B. THE SHORT-TERM AND LONG-TERM NEED TO MASTER REMOTE ADVOCACY

Many of our clients will notice that, in their own remote worlds, brought on by the current pandemic, they are perfectly capable of functioning more efficiently and at significantly less costs. A fair question from those same clients that we will most certainly face will be: Why can't you lawyers do what the rest of the economy is doing? Why do I have to pay you to drive to a courthouse and hang around waiting on a hearing? Why do I need to drive to a courthouse to watch you hang around for a hearing? And why, oh why, don't lawyers and courts get with the program of living in a digital age and use current technology instead of the "old technology" of going somewhere to do something that can be easily handled over the internet?

Having recognized the economic value of remote proceedings, it will not just be technology company or other business clients asking these questions. Ordinary, non-techy clients will also have the same reaction about our requests to go down to the courthouse: ***why go there to do that?*** Clients may require lawyers to justify the costs of your in-person presence. While unthinkable a year ago, you may need to file a motion to request an in-person hearing or bench trial. You may have to defend your motion to quash a remote deposition, presenting evidence why the deposition needs to be conducted in-person and why you cannot conduct the deposition via Zoom, vTestify, or another platform yet unknown.

We are learning that Justice does not live at the courthouse. It is not confined to a physical space. It is *what* we do not *where* we do it that is most important. Judges and courthouse staff—those most tied to the physical space—recognized early the need to continue services regardless of location.

Consider how quickly Judges learned how to evaluate content and the credibility of witnesses— and the effectiveness of advocates—over a computer monitor. And from their homes. They learned how to log onto a computer, gather lawyers together, listen to arguments, receive exhibits, find court documents, and issue rulings. They became much more accustomed to seeing lawyers deliver arguments over a phone or tablet. Many learned how to use dual monitors to watch lawyers on one and track pleadings, exhibits or read case law on the other. Their brains switched from seeing live humans standing in a courtroom with all its trappings, to being by themselves, in their homes gathering information from pixels on a screen. They will have done this dozens—or hundreds—or thousands of times by the time courthouses re-open.

Once flipped, that switch will never go off again. This is a permanent disruption and not just a short-term wobble. Technology changes our habits of mind, what we think of as semi-sacred practices, and, ultimately, our brains. Swiping a screen and expecting anything to happen was not the norm just a few years ago, now, even babies and toddlers routinely swipe and touch screens. Lawyers and courts (largely passively) stalled the use of computerized legal research as incapable of doing what "noses deep in the law books" could produce. And yet, no one, except a legal romantic, would maintain the amount of commercial space needed for a traditional law library full of legal digests and reporters series—nor want to pay the subscription and shipping costs. Lawyers initially disdained digital exhibits and technology in the courtroom in favor of foam-board exhibits and no-tech scribbles on a court's chalkboard.

But once judges uniformly expect you to "share your screen" and show them the relevant portion of a document or information, will they be as tolerant of you making them leaf through a 20-page paper contract or case to get to the relevant section? And once our clients see the cost-savings of remote advocacy, won't they expect it and us to adapt and thrive? As lawyers become adept at communicating their message through a purely digital medium, their audiences will come to expect it—and then demand it.

Ready or not, willingly, or begrudgingly, we will work through the ins-and-outs of remote advocacy. We will become better advocates for our troubles. The clients who depend on us to represent them in all forums will thank us. Our judicial system will be better when we can administer justice competently, fairly, and efficiently using technology when beneficial and appropriate.

Also available as part of the eCourse
2021 Page Keeton Civil Litigation eConference

First appeared as part of the conference materials for the
44th Annual Page Keeton Civil Litigation Conference session
"Preparations for Trial: Suggested Changes for the Post-COVID Trial"