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The Digital Law Practice

How Technology Has Transformed the Legal Profession

There is a scene in the movie *First Monday in October* that depicts two justices of the Supreme Court arguing in chambers. The fictional Justice Dan Snow (played by Walter Matthau) opines that judges are obliged to descend from the rarefied atmosphere of the bench when they are making their case decisions: "All we ever get to see are lawyers, cold records, cold briefs. Where's the human being? Where's the pain? We have to reach out and touch flesh." While appellate judges are obligated to be dispassionate, and removed from the drama of the trial court, Snow's lament is understandable: the impersonality of trial records and voluminous attorney briefs can obscure the true nature of the litigants and their opposing positions.

First Monday dates from 1981, the era of typewriters, carbon paper, and landline telephones. It would be interesting to hear Snow's comments today, in the era of Internet research, e-mail, iPads, laptops, and "smart phones." While the conveniences of digital technology are as integral to the practice of law as to any modern business or institution, digital gizmos may interfere with as much as assist the officers of the court in their daily work. Even beyond the security and reliability problems all computer users occasionally suffer, the rise of electronic gadgets has not been entirely compatible with the particular conventions and practices of the legal profession. Consider the misguided magistrates who have been reprimanded for texting or surfing the Web rather than giving full attention to the case before them. Witness also the common decision of lawyers and judges to ban cell phones and especially smart phones from their offices, courtrooms, and chambers due to the distraction of their beeps, ring tones, and other demands for attention.

Under sworn testimony I would have to admit that I miss much about the typewriter and handshake days, when the common practice was not electronic transmission, but direct communications between attorney and client, attorney and attorney, and attorney and judge. When I began my legal work in 1984, all of our verbal

communications were either in person or via landline telephones. Moreover, we had no fax machines, and the fastest way to transmit a document was courier delivery (during regular business hours only) or overnight mail. The practice of law was slower then, in any number of ways, and not all of them beneficial. But the reduced speed of data transmission allowed us to contemplate the legal issues at greater length, and to *think* before we fired off an e-mail that could be shallow, faulty, or impersonal, as too many attorney e-mails are today.

In my present law practice (litigation, administrative/government, transactional) I am both irritated and mystified by the general lack of attention that some clients, enamored of their electronic gadgets, pay to their own cases. I therefore insist that my clients disable their smart phones so that we are not interrupted while in conference—and they usually comply. But I sometimes receive looks of insult or complete surprise in response to my request. I've lost some clients that way, and some legal fees, too. But cases demand the full attention of both attorney and client for the professional relationship to continue in the proper semblance of order.

The human element is paramount to me. I like to look my clients in the eye on a regular basis over the course of a case, because seeing them in the flesh gives me a better insight about the nature of the parties and other aspects of a case. Any good attorney will tell you that from the outset the client is being analyzed as a potential witness, to ascertain how his or her presence (or lack of it) might affect the outcome if the case ultimately goes before a judge or jury. This kind of evaluation cannot be done "virtually."

For a similar reason it is also important to meet opposing counsel face-to-face. During a conversation we all assess how our interlocutor acts and reacts as the give and take unfolds; and we pay close attention (whether we are aware of it or not) to tone, body language, facial expressions—in short, to all the aspects of communication beyond spoken words. These cues are especially important to a lawyer who uses them to analyze the other practitioner's dedication, experience, and knowledge of the facts and law at hand. That is why, after the first telephone call, I ask to meet the other attorney and discuss the status of the case in person, no matter how unremarkable or mundane the case may be.

It is equally important for attorneys to meet the presiding judge face-to-face—early and often. Many attorneys liken court hearings to skirmishes before entering into full battle at trial: a way to analyze the opponent and probe for strengths and weaknesses. But while I keep a watchful eye on opposing counsel during hearings, I also take the judge's measure and determine if my arguments, my client's position, and the facts and law of my case are making inroads with the court as we proceed.

In short, it is impossible to really know the client, gauge the other attor-

ney, or fathom the judge's case proclivities via electronic communication. As legal proceedings become increasingly electronic, the chasm between the real-life legal case and its facts, law, and participants seems likely to deepen and widen, and to the detriment of all parties concerned.

By way of example, earlier this year I found myself on a short (Friday through Monday) out-of-state vacation. On Thursday the parties in a pending case had agreed to an interim litigation settlement, the details to be completed when I returned to my office. While en route to my destination, however, I received a message by e-mail that the settlement had dissolved and my client was presented with a new proposal that, if unacceptable, meant the parties were again at war. Moreover, the new proposal expired at 5 p.m. on Monday, and the complications were several, including that no extensions of time would be granted, that I had no access to the case papers or my research materials until Tuesday morning, and that my client, also without documents, had traveled to a remote area.

But, unlike the old days, my client and I could speak by cell phone. Moreover, we could send our written response to the other side by e-mail before the deadline, and salvage the negotiations. So after a weekend of brainstorming and cell phone calls to overcome the handicaps of distance, by Monday morning my client and I had cobbled together a response that, we believed, put Humpty Dumpty back together again and preserved the case settlement.

I dutifully sat down at my laptop and spent ninety minutes composing a detailed, responsive e-mail message and counter-proposal, and reviewing it for form and content. With less than an hour left to shower, shave, pack, and vacate the hotel room, and only two hours to make my airport connection, I was about to become a testimonial case for the near-miraculous capabilities of the digital professional who prevailed over obstructions and adversity by the power of instant communication. I smiled, clicked the "Send" button—and the document disappeared. I sat there, stunned, staring at a blank screen, and then frantically attempted to recover a saved version of the document, but to no avail. It had vanished into the electronic ether.

With the time constraints I faced, there was simply no way I could reproduce the lengthy missive. *The hell with the e-mail*, I decided, and picked up the phone. Happily, the other attorney was in his office, and we quickly reached accord on a revised interim settlement. When I explained my predicament he also volunteered to have the new document typed and transmitted to my e-mail so that the agreement was properly memorialized and I could review it on my way back to the office.

While I was grateful for the electronic gear without which my client and I could not have responded in time to the new settlement deadline, it was due to a failure of our sophisticated communication technology that

the negotiations became so complicated, and might have collapsed but for a phone conversation. Although we did not exactly "touch flesh," by my dispensing with e-mail and talking directly to the other attorney, he and I resolved the pending dispute. Before the advent of today's electronic gadgets and instant communication, I doubt that the crisis would have arisen at all. That is, a telephone message left on my 1984 message machine, unheard by and unknown to me, would have been insufficient notice of the settlement breakdown and new deadline. And the entire matter could easily have been resolved upon my return to the office on Tuesday, and without so much frenzy if the possibility for such frenzied communication did not exist in the first place

Without question, the electronic age has brought increased efficiency and accessibility to the practice of law, arguably strengthening the dispensation of justice. Moreover, computers alone have made much of our professional work (especially clerical and administrative tasks) simpler, faster, and cheaper; and none of us, as legal practitioners, would choose to return to the typewriter and carbon-paper days. But while celebrating these benefits, we have cause to worry over the decline of the personal and interpersonal aspects that they bring to legal practice. Lady Justice may be blind; but we, as officers of the court, must never lose sight of the human beings whose representation we undertake, and whose infinite personal and case variations make the practice of law an art.

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