

The Impact of the Pandemic on the Practice of Law

Authored by:

Adam G. Linett

A.G. Linett & Associates, PA | adam@aglinett.com

Leslee Sharp

Sharp Law Offices, PC | leslee@sharplawoffices.com

The North Carolina Bar Association Professional Vitality Committee creates sourced articles centered on reducing inherent stress and enhancing vitality in the lives of legal professionals and offers those resources as a benefit for members of the NCBA.

As lawyers, we are often tasked with considering a set of facts and predicting how a legal case or a client's problem will turn out in the future. We do this by looking at precedent, such as former case law, and using our own experiences and judgment. However, when facing something as unprecedented as this COVID-19 pandemic, the legal community does not have the comfort of *stare decisis*, and none of us have firsthand experience, given that the last similar situation was the flu pandemic some 100 years ago.

With this article, we will target some changes to the practicing of law brought on by the pandemic and explore resources to help navigate those identified changes. Although your area of practice might not be touched on here, some of the resources and solutions can be adapted for your use. Of course, any predictions must be offered with a grain of salt, because even the best among us are often surprised with the result a particular judge or jury

reaches, even on a topic with which we are familiar.

Research and writing of this article began in February of this year with a hope that by publication time life would be back to normal. Instead, the continuing impact of the pandemic on our practices requires ever more vigilance in keeping up with change.

The Short-Term Impact

For many of us, the current pandemic turned our lives upside down. Jury trials have been suspended, courthouses have been designated as COVID-19 hotspots, and client interactions have been severely limited. When the pandemic initially struck, courthouses were closed for all but essential business. This had a tremendous impact on certain practice areas, especially those typically adjudicated in District Court, such as criminal, traffic, and

family law cases. Perhaps through a combination of fewer tickets being issued and certain counties in North Carolina dismissing a backlog of traffic and criminal cases, these practice areas slowed down. As we write, most serious criminal cases are being continued out months or years, making it less likely that a defendant will hire an attorney until the cases are close to being set for hearing.

As lawyers, we are attuned to changing laws and rules. But the necessity to keep abreast of the constantly changing rules governing our practice has, at least for some, given us angst. The Governor has issued numerous Executive Orders that affect day-to-day operations not only for the legal profession, but for all businesses and professions, as well as the public in general. In addition to these Executive Orders, the chief justice of the Supreme Court of North Carolina issued several orders containing Emergency Directives (“CJSCNC Orders”). Between March 13, 2020, and January 29, 2021, there were 32 such Orders containing some 22 Emergency Directives (“ED”), as well as directives regarding bail bond forfeitures and procedural deadlines. These CJSCNC Orders can all be found on the North Carolina Judicial Branch website nccourts.gov. As of February 13, 2021, several earlier EDs are no longer in force, but with the CJSCNC Order issued March 12, 2021, several remain in effect through at least April 11, 2021. See the website for specifics, and while this pandemic continues, check it frequently.

Much of the information gleaned informally from congregating at the courthouse, interacting with colleagues, calendar calls and talking with court staff, now must be sought out more formally. Much can be obtained from nccourts.gov. At that website, be sure to check for orders, policy memoranda and the like from the counties in which you practice. And of course, look at the N.C. Court of Appeals and Supreme Court pages. We should all be familiar with this website, but checking for updates was probably not a daily activity before this pandemic.

Adoption of New Communications Technology

While the practice of law has sometimes lagged in adopting new technology, the pandemic has had a positive impact on law practices of all sizes. Likely, the pandemic caused modifications in the way we communicate with our clients and the courts; it moved us forward, perhaps some five to ten years in the adoption of technology. For example, the proliferation of video communication platforms such as Zoom,¹ Microsoft Teams,² and WebEx,³ has allowed

attorneys to “meet” with clients (new and existing) and make court appearances with newfound convenience.

Today, attorneys and their staff are becoming adept at sending Zoom links to hold conferences with clients regularly. We can not only have “face-to-face” discussions with clients to go over facts, claims, defenses, and discovery needs, but we can also share documents on the screen to better inform them. This development may provide greater convenience for clients who live a great distance away, or others who may be otherwise limited by age or disability. Also, given the sensitive nature of a variety of issues we handle, some clients (both existing and potential) may feel more comfortable sharing the details of their case from the privacy of their own home, instead of sitting in an unfamiliar office or conference room.

On the flip side, this accelerated use of various communication tools may cause considerable frustration to disabled or elderly clients. Most clients (other than institutional clients such as corporations or insurance companies) are not as familiar with the legal process or these tools as we are. A client with disabilities or of advanced age may find the lack of person-to-person interaction adds frustration to an already unfamiliar process. Finding creative ways to interact meaningfully with these clients may help them to accept advances in technology. Helping these clients become comfortable trusting these new processes and procedures may now be part of our role as counselors-at-law.

Rule 1.4 of the N.C. Rules of Professional Conduct requires lawyers to keep their clients reasonably informed about the status of a matter.⁴ The ability to set up a link for a video meeting is another option for attorneys to keep their clients better informed on the status of their cases. This, of course, is important not only because it is a good business practice, but because the failure to communicate with or return phone calls is a common complaint leveled against attorneys with the State Bar.⁵

The Meteoric Rise of Electronic Signatures

Another change sweeping through the legal community is the adoption of digital signing of documents. There are a number of services such as DocuSign,⁶ Citrix RightSignature,⁷ and Adobe Document Cloud,⁸ that facilitate the signing of documents, contracts and retainer agreements remotely. On the concluding end of cases, clients are now able to sign mediated settlement

agreements, releases, or client disbursement statements without having to come to a lawyer's office. These services provide digital proof of the IP addresses, including date and time stamps, to verify signatures.

In the litigation context, there may still be some limitations on using anything but handwritten or "wet" signatures for documents filed in court. However, in many courts, an electronic signature is already permissible.

In Federal Court, a jurisdiction's local rules typically provide that a document provided under the attorney's login and password are considered signed by that attorney. As an example, Local Rule 5.3 of the Middle District of North Carolina provides that an attorney may use an image of a signature or an "/s/" before the typed name where the signature would otherwise appear.⁹ Similarly, Rule 3.4 of the North Carolina Business Court requires the use of electronic signatures.¹⁰ The use of electronic signatures in matters before the North Carolina Industrial Commission is common for all pleadings and motions.¹¹ And the North Carolina Rules of Appellate Procedure do not require the "manuscript signature" of the counsel of record, if the document is filed electronically at ncappellatecourts.org.¹²

Even immigration practitioners have seen an increase in the ability to use digital signatures. On March 20, 2020, U.S. Citizen and Immigration Services ("USCIS") announced that it would accept all benefit forms and documents "with reproduced original signatures."¹³ This means that the documents may be scanned, faxed, photocopied, or similarly reproduced for submission to USCIS.¹⁴

While a handwritten "wet" signature may still be required by Rule 11 of the North Carolina Rules of Civil Procedure for District and Superior Court, the proposed eFiling rules contemplate a time when handwritten signatures will be a relic of the past. The North Carolina Supreme Court has addressed this issue in the eFiling Pilot Project. The Proposed Rule 4.1 states:

An electronically filed document requiring a signature is deemed to be signed by the eFiler pursuant to Rule 11 of the Rules of Civil Procedure, regardless of the existence of a handwritten signature on the paper, and must contain the name, postal address, e-mail address, and State Bar number of the eFiler, and the name of the eFiler preceded by the symbol "/s/" in the location at which a handwritten signature normally would appear.¹⁵

Currently Rule 5 of the North Carolina Rules of Civil Procedure allows for service by email under specified conditions. Certainly, an expansion of those conditions to formally allow service by email would facilitate the use of electronic signatures.

Notarization Versus Signing Under Penalty of Perjury

Before the pandemic, signatures on many documents were required to be affixed in front of a Notary Public. Emergency Directive 5 ("ED5") provides an alternative in the form of an affirmation by the signer of a pleading, motion, petition, supporting affidavit, or other document that is to be filed in the General Court of Justice. This eliminates the need for the signer to appear in front of a notary. Many states have allowed this type of signing under penalty of perjury for years. The permanent adoption of signing most pleadings, motions, and affidavits under penalty of perjury, as opposed to signing in the presence of a notary public, will reduce the administrative stress on lawyers and their staff. Situations where the prospective signer does not have identification sufficient for a notary to verify his or her identity¹⁶ or when it is not feasible for the signer and a notary public to be physically present together, illustrate the value of this change.

ED5, however, does not apply to wills to be probated, real estate conveyances, or any other document that is not to be filed in the General Court of Justice. The North Carolina Secretary of State helped fill that gap by granting temporary authorization to all notaries public to perform video notarization. That temporary authorization lapsed before Governor Cooper extended the authorization through December 31, 2021. Note this is a notarization facilitated by direct, real-time interaction between the signer and the notary via video. The authorization memorandum can be found at the Secretary of State website, SOSNC.gov. A notary must adhere to the requirements laid out in the authorization for the notarization to be valid.

Video notarization should not be confused with eNotaries. An eNotary is a North Carolina notary who has received additional training and is certified to affix an electronic notary signature on a document to maintain a completely paperless transaction.¹⁷ The signer and the notary are still required to be in the same place at the same time, but the forms signed and notarized are electronic. As our profession moves further toward an electronic and paperless means of practice, e-notarization seems to be

more prevalent also. Take, for instance, e-closings. A white paper on e-closings can be found on [SOSNC.gov](https://www.sosnc.gov).¹⁸ The e-closing laws were on the books before the pandemic arrived, but seem to have found more acceptance and utilization in these times.

The Coming eFiling Revolution

As of the date of this article, the eFiling system for North Carolina is limited to four counties.¹⁹ However, once the eFiling system is rolled out and further adopted by the North Carolina legal community, we should be able to submit pleadings, motions, and exhibits as PDFs, without requiring an original handwritten signature.²⁰

It is the authors' hopes that the legislature and legal profession can adopt changes to continue to allow for the ease of electronic filing, whether through an amendment to Rule 11 allowing electronic signatures, or the statewide adoption of eFiling. In a world where we can transfer millions of dollars with a few keystrokes, we should be able to file a certificate of service with a typed signature.²¹ As the eFiling Pilot Project begins in some counties, an important goal is to make it as user friendly as the electronic filing which now exists in the North Carolina Supreme Court and Court of Appeals.

The recently launched e-Courts Guide and File allows self-represented litigants, paralegals and attorneys the ability to obtain and prepare court documents in certain matters.²² This service does not yet allow for filing of those documents electronically; the documents are printed and ready for filing by mail or in-person. Perhaps this is a good step in the direction of eFiling. The timetable for launch may not have been a result of the pandemic, but the timing makes for a new useful tool in these times.

Electronic Communications and Data Sharing with Non-Court Entities and Institutions

Likewise, the Uniform Real Property Electronic Recording Act (N.C.G.S. 47-16.5) allows for the recording of documents with a Register of Deeds through electronic means. Not all counties are equipped to handle this. As of August 20, 2018, as reported on the NCSOS website, 76 counties had full capabilities, an additional 5 were doing satisfactions only, and an expected 5 more counties would have capabilities within 12 months of August 20, 2018. With several counties not allowing in person tasks in their

Register of Deeds office, the use of electronic recording is likely to become more prevalent.

New innovative terms are finding their way into real estate contracts, and certainly other contracts as well. With a limited physical access to public records, attorneys and parties may find that timely completion of tasks required under a contract is nearly impossible. Practitioners are now crafting language and terms to deal with a potential default where the failure is a result of circumstances related to the pandemic.

Those practitioners who interface frequently with banks and other financial institutions through their practice areas are experiencing an education. Many of us have been cautious (to say the least, some of us down-right leery) of on-line banking. Banks have been moving right along with everything from cell phone deposits to banking from anywhere anytime with only a computer, notebook, laptop or cell phone. While the convenience of this is tempting, when we are dealing with the money of our clients, wards, or other principals, it is important to remember concepts and rules about confidentiality and protection of property. 2011 FEO 7 allows use of online banking for our trust accounts provided the managing attorney is regularly educated on the ever-changing security risks and actively maintains end-user security.²³ It is also important to understand whether the software of the bank or financial institution provides the tools required to meet trust account rules.

Impact on the Physical Office Environment

Another change concerns the structure of the physical office itself. Many attorneys and staff are working from home, which does not require the traditional office space and overhead. This may be preferable for some; however, working from home has challenges, whether it is setting up a comfortable and productive work environment, or having the tools needed to accomplish legal work.

It was not so long ago that working from home meant the physical transport of actual files home and then the physical transport of the finished work product, be it paper, on a disc or a thumb drive back to the office. Some of us remember the time before cordless phones, facsimile machines, and mobile/cell phones, let alone desktops, laptops and notebooks. Some cannot imagine a time when the ability to perform much of our legal business from a cell phone did not exist. Each of these technological advances changed the way we practice. Now, implementing electronic and

cloud computing solutions is moving at a quick clip, enhanced by the impacts of the pandemic.

While attorneys and staff may be able to work from home, many clients and prospective clients simply do not have Internet access or do not feel comfortable with the technology required to connect virtually with a law office. Therefore, in the short term, some practitioners are locking their doors, conducting temperature checks on prospective clients before allowing them into their offices, and requiring masks consistent with state law. Other lawyers are using walk-up windows or arranging for staff to meet clients in the parking lots.

One attorney who works out of a converted bank building is using his drive-through window to take payments, meet with clients, and notarize documents. Clients execute wills while remaining in their vehicles, and documents are notarized on the other side of the drive-through glass window. Other law practices have used their parking lot as an open conference room for property or business closings, by having participants remain in their vehicles while the attorney or staff members move between vehicles with documents to be signed.

Perhaps drive-through offices are a wave of the future. Clients seem to like the convenience of not having to get out of their vehicles to interact with an office, especially if it is for something quick such as making a payment, dropping off a document, or picking up a check. Depending on the geographical location of a practice, a drive-through option may provide a more secure alternative. For some practice areas, this might be a benefit when accepting payments or dealing with upset family law clients or their exes.

One of the most difficult challenges in running a business is finding the right people to hire, and then holding onto them. The virtual aspect of the office will allow law firms to retain highly skilled staff that otherwise might be lost due to a move to another city, state or country. If an office has moved its files online using Share file, Dropbox²⁴ or a similar program, and can interact with clients and staff via Zoom, there is no reason that an employee must remain in the same locality as the office.

Closing the office might also mean outsourcing certain tasks to non-employees. Although outsourcing administrative needs is not new, this may be a good time to reevaluate the benefits of outsourcing tasks that do not need to be completed in a physical office environment. However, be mindful that outsourcing should only be used if client

confidentially can be maintained and client consent is obtained if required.

The Virtual Practice of the Future

At some point, hopefully soon, this pandemic will pass. This change to virtual meetings and working from home, however, is likely to have a lasting impact on our practices and the court system. There are many types of cases where a judge, hearing officer, commissioner, or magistrate needs to hold a status conference or pre-trial conference with multiple counsel in attendance. With the abundance of virtual meeting platforms, it is hard to believe that we will be back to physical meetings at the courthouse for minor, preliminary, or pre-trial matters.

For example, WebEx calendar calls for civil cases is a vast improvement over the prior method of calendaring cases and may continue well into the future. Traditionally, calendar call meant all counsel and unrepresented parties crammed together in a courtroom for the calendar call that might last hours. Using WebEx for the calendar call, counsel can submit proposed dates in the chat feature when the case is called. If there is no agreement, or counsel does not answer up in the chat box, the case gets put at the end of the calendar.

Further, simple motions and status conferences can be easier to handle online. The court can have counsel log in on a secure platform in at a given date and time and have an audio and video record available as soon as the conference is over. This may become the default method to speak with a judicial official in situations that do not require testimony or evidence. And in the cases where parties can stipulate to exhibits ahead of time, a court may still prefer to hear the matter virtually.

That is not to say that video conferences are a substitute, however, for in-person testimony. When it comes to issues of credibility, it is harder for most people to gauge facial expressions and a person's countenance over a screen. Perhaps, then, the remote hearings of the future will be limited to cases where no witness or other testimony is needed.

Ethical Considerations Regarding New Technologies and Working from Home

While we embrace these technological avenues, they often outpace corresponding changes in law and rules

governing them. Accordingly, it might be helpful to review a few existing ethics opinions that govern our use of these evolving technological advances. As attorneys, we have a duty to keep up with technology, which is reflected in the new one hour per year CLE technology requirement.²⁵

In 1995, RPC 215 *Modern Communications Technology and the Duty of Confidentiality* opined that a lawyer must take steps to minimize the risk of disclosure of confidential information when using a cellular or cordless telephone. Today, do many of us even consider that use of your cell phone is not “secure”?

What of web-based management of client files? 2008 FEO 5 addresses the precautions that a lawyer must take when storing client files on a website accessible by clients via the internet. In general, this formal ethics opinion reiterates the duty of the lawyer to take reasonable and appropriate measures to minimize the risk of breach of confidentiality. This is true whether the website is maintained by the lawyer or a third-party vendor. See also 2011 FEO 6, which addresses the use of software as a service and the need for both confidentiality and preservation of client property.

We should also consider that e-mail and/or texting has become the primary mode of communication for many of us. This is true not only for client communication but also with opposing counsel, and to some extent with court personnel and other tribunals. Again, be conscious of and take appropriate measures to protect confidentiality.

Each of us and our clients may be using social media more as a result of that time away from our pre-pandemic workspace. 2014 FEO 5 requires a lawyer to advise their civil litigant clients about the use of social media. It seems these precautions are good advice to each of us as well.

Conclusion

It is hard to predict the future. If we could, we likely would not be practicing law. As is evident by changes since this article was in the drafting stages, many of the processes and procedures referenced here may be clarified or re-examined for efficiency as time moves forward. The one takeaway is that lawyers need to be ready to adapt and be willing to do so. If there is one thing we can predict, it is that the problems brought about by human nature seem to repeat over time and that the technology we use to interact with each other will continue to change. Yet even with change, some older means of communication may find a resurgence. Using a mix of new and old technologies to provide the highest level of legal services to our clients should be our goal.

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¹ <https://zoom.us>

² <https://www.microsoft.com/en/microsoft-teams/log-in>

³ <https://web.webex.com>

⁴ N.C. R. Prof. Cond. 1.4

⁵ <https://www.ncbar.gov/news-publications/news-notices/2020/04/professional-responsibility-in-a-pandemic/>

⁶ <https://www.docusign.com>

⁷ <https://www.rightsignature.com>

⁸ <https://acrobat.adobe.com/us/en/sign.html>

⁹ Middle District of North Carolina, LR. 5.3(e)(2)

¹⁰ N.C. Business Court Rule, 3.4(a) (“**Form.** A document to be filed that is signed by counsel must be signed using an electronic signature.”)

¹¹ 11 NCAC 23A.0108, ELECTRONIC FILINGS WITH THE COMMISSION; HOW TO FILE

¹² N.C. Rules of Appellate Procedure, Rule 26(g)(3) (2021)

¹³ <https://www.uscis.gov/news/alerts/uscis-announces-flexibility-in-submitting-required-signatures-during-covid-19-national-emergency>

¹⁴ However, practitioners are required to retain copies of the original documents with the “wet” signature in the event these are requested at a later interview or hearing.

¹⁵ [Second Supplemental Rules of Practice and Procedure, For the North Carolina eFiling Pilot Project](#) (June 24, 2013)

¹⁶ NORTH CAROLINA NOTARY PUBLIC MANUAL 30-32 (North Carolina Secretary of State 2016)

¹⁷ https://www.sosnc.gov/divisions/notary/e_notary

¹⁸ https://www.sosnc.gov/online_services/search/site_search_results

¹⁹ <https://www.efiling.nccourts.org/reg> (The four participating counties are currently only Alamance, Chowan, Davidson and Wake County)

²⁰ At the time of this publication, the North Carolina Supreme Court announced “Odyssey,” a new statewide electronic filing and case-management system that will be rolled out beginning the summer of 2021. <https://ncbarblog.com/pd-supreme-court-adopts-electronic-filing-rules-for-the-implementation-of-ecourts/>

²¹ A digital signature may raise questions about a lawyer or parties’ consent to a particular document. Therefore, keeping the verification pages provided by the services may be a best practice. Additionally, a practitioner can be prepared to confirm an electronic signature using an affidavit or other document should a question be raised.

²² <https://www.nccourts.gov/documents/publications/ecourts-guide-file-fact-sheet>

²³ If you chose to use online banking for trust accounts, please verify that your bank’s online systems are set up in a way to comply with the trust accounting rules.

²⁴ <https://www.dropbox.com/business>

²⁵ <https://www.nccle.org/for-lawyers/requirements/renewing-lawyers/>