

**Our New Reality:
Practicing Law During and After a Pandemic**

**2020 National Conference
on Special Needs Planning and
Special Needs Trusts**

Stetson University College of Law

October 14, 2020

Prepared and Presented By:

Craig C. Reaves, CELA
Elder and Special Needs Law Attorney
REAVES LAW FIRM, P.C.
4400 Madison Avenue, Kansas City, Missouri 64111
Telephone (816) 756-2100; Fax (816) 756-0333
email: info@ReavesLawFirm.com

Our New Reality: Practicing Law During and After a Pandemic

Table of Contents

I.	Three Time Frames	2
II.	Practicing Law Before COVID-19 (Pre-COVID Era) - The Good Old Days?	2
1.	The Commute	2
2.	The Office	3
3.	The Paper	3
4.	The Reception Room	3
5.	The People	3
6.	The Signing of Documents	4
7.	The Courts	4
8.	The Lunches and Social Events	4
9.	The Meetings and Conferences	5
III.	Practicing Law During COVID-19 - Our New Reality, For Now	5
1.	Working From Home	6
A.	Requirements to be Able to Work From Home	7
1)	Internet Connection	7
2)	Computer	7
3)	Camera and Microphone	8
4)	Headset for Telephone	8
5)	Workspace	9
6)	Printer and/or Scanner	9
B.	How to Access Information at the Office	10
C.	How to Handle the Telephone	11
1)	Handling Calls to the Office - With a VoIP Telephone System	11
2)	Handling Calls to the Office - With a Landline Telephone System	12
3)	Handling Calls from Home	13
D.	How to Communicate and Work With Co-Workers While in Different Locations	14
2.	Remotely Meeting With Others	15
A.	Ethical Concerns With Video Conferences	16
B.	Keeping Video Conferences Secure	17
3.	Remote Court Hearings	17
4.	Filing Court Pleadings Electronically	18
5.	Remotely Signing Documents	18
A.	Electronically Signing Documents Not Requiring Witnesses and Notary	19
B.	Remote Notarization	20
C.	Remote Witnessing	22
1)	Case Law	22

2)	Uniform Probate Code	28
D.	Solutions Used by Attorneys	29
1)	Signing in the Office	29
2)	Signing While Watching Through Windows	30
3)	Signing Outdoors	31
4)	Signing With Witnesses and Notary in the Client's Facility or Home	31
E.	Governor's Executive Orders	32
1)	New York	32
2)	Missouri	33
6.	Design of Current Documents	36
A.	Durable Power of Attorney	36
1)	Two Types of Durable Powers of Attorney	36
2)	Springing Durable Power of Attorney	36
3)	Non-Springing Durable Power of Attorney	38
B.	Advance Directives	39
C.	Special Needs Trusts	42
7.	Working with People Isolated in Institutions and Homes	42
8.	Mental Health Concerns for Clients and Caregivers	43
9.	Marketing the Law Practice	45
10.	Reopening the Office During the COVID Era	46
IV.	Practicing Law After COVID-19 (Post-COVID Era) - What Will the Future Look Like?	49
1.	Continuing to Work Remotely, at Least Some of the Time	49
2.	Changes to Documents	50
A.	Springing Durable Power of Attorney	50
B.	Advance Directive	51
C.	Special Needs Trust	51
D.	Electronic Signing	51
3.	Remote Video Meetings and Conferences	52
4.	Conferences and CLE Programs	54
5.	Communicating With Others	55
6.	Court Hearings and Appearances	55
7.	Remote Administrative Hearings	55
8.	Electronic Court Filings	57
9.	Electronic Recording of Deeds	57
10.	Electronic Signing of Legal Documents	57
11.	Continuation of Remote Witnessing and Notarization	57
12.	Electronic Wills	58
13.	Possibly Using a Cloud-Based Client Management System	60
14.	Possibly Using a VoIP Telephone System	61
V.	And in Conclusion	61

Our New Reality: Practicing Law During and After a Pandemic

Written and Presented By
Craig C. Reaves, CELA¹
Reaves Law Firm, P.C.
Kansas City, Missouri

Last March, life as we know it came to a screeching halt as a highly contagious novel coronavirus that was later publically named “COVID-19” (officially referred to as “SARS-CoV-2”) began rampaging throughout the United States forcing state and local governments to issue emergency orders to shut down businesses and require everyone to stay at home. Suddenly, attorneys and their staff members found themselves working remotely from separate locations outside their office, and it was no longer possible to physically meet with clients and colleagues. Many systems utilized in law offices and the design and clauses used in some legal documents were found to be no longer viable in this new reality.

It's not clear which picture is more accurate: did COVID-19 accelerate everything and push us into the future? Or did it grab the future and drag it back to us in this time? Either way, it caused a dramatic shift in how law firms practice law.

While challenging and tragic on many levels, there is a silver lining in this seismic event. Attorneys have quickly adapted and reimagined how to practice law and continue to help their clients during a time when many clients or their family members are isolated at home or in locked down facilities and it is not safe or possible to meet in person. And special needs trusts designed for completely different circumstances have been flexible enough to allow trustees to help beneficiaries who are facing challenges that were never envisioned when the trust was drafted.

¹ Certified Elder Law Attorney by the National Elder Law Foundation. Neither the Supreme Court of Missouri, nor the Missouri Bar reviews or approves certifying organizations or specialist designations.

These materials provide an overview of some of the creative solutions to shortfalls in systems and documents that have been implemented during this time, many of which will no doubt continue to be utilized in the future.

I. Three Time Frames

This paper will discuss the impact of COVID-19 on law practices by looking at it during three different time periods:

Practicing Law Before COVID-19 (Pre-COVID Era) - The Good Old Days?

Practicing Law During COVID-19 (COVID Era) - Our New Reality

Practicing Law After COVID-19 (Post-COVID Era) - What Does the Future Look Like?

II. Practicing Law Before COVID-19 (Pre-COVID Era) - The Good Old Days?

We all remember our own version of what life was like before it was impacted by COVID-19 (for ease of reference, this will be referred to simply as “COVID” throughout these materials), and each person had a different experience. But as a quick summary, consider the following observations about life revolving around your law practice “once upon a time, long, long ago...”.

1. The Commute: Whether by car, train, subway, and/or your legs, there was physical movement from one physical space called your “home” to your another physical space called your “office” or something similar. For many, this meant the stop and go challenges, and sometimes dangers, of rush hour traffic, crowds, noise, stress, and so on. It is assumed that not many people truly enjoyed and looked forward to commuting to and from home and work.

2. The Office: Having a physical space dedicated to work, containing all the equipment and supplies needed to help you be productive and get work done, was very helpful and productive. There is an energy that is palpable and positive. There are co-workers who are (usually) (somewhat) helpful and able to assist you accomplish the necessary tasks for that day. You can drop in their office to ask a question; and you would, of course, respond helpfully and cheerfully when they stopped by to ask you something. There was the coffee pot, water cooler, break room, or someplace similar where small talk was exchanged and you were able to feel closer and better connected with your co-workers. And, if possible, most of the stress of the workday could be left behind when you left for home at the end of the work day because it was associated with that physical space called your office.

3. The Paper: Unless your office was very progressive, there was paper, lots of it, everywhere. There were paper files; printed documents, pleadings, and letters - whether sent to you, being drafted and reviewed by you, or ready to be filed in those paper files; law related magazines waiting to be read, filed away, or thrown away, or marked with yellow sticky notes to be copied or scanned and then filed or thrown away; and books, many, many books. This paper was either filed where it belonged, such as file cabinets, shelves, or drawers, or filed on any available flat surface.

4. The Reception Room: Where people coming to visit you or others would sit and wait until their appointed time to meet. To make this a more pleasant experience, there were magazines, newspapers, or brochures for them to read. Coffee, tea, soda, and water was offered in ceramic cups, glasses, or bottles and cans.

5. The People: Whether clients, co-workers, vendors, potential clients, delivery people, or others, there were people all around you, and you could actually see their

entire face. You shook hands with others, and with a few, there were hugs upon greeting or leaving. You sat in conference rooms or offices across or next to other people and didn't think it was a bit unusual or dangerous (at least, usually didn't think that). You actually passed papers back and forth, and even occasionally shared pens, phones, or reading glasses.

6. The Signing of Documents: Clients would come to your office, meet with you and/or other staff to review and sign the documents you had prepared for them, whether they were wills, trusts, petitions, Medicaid applications, or the myriad of other documents you deal with. If there were last minute corrections or changes, they were almost always made while the client waited. Everyone (clients, attorney, witnesses, notary, possibly additional staff) crowded into a room around a table to sign documents, often passing them after being signed to the next person for their signature to be affixed. Then, depending on the type of documents that were signed, the clients often left with their original documents, or copies of what had just been executed. Handshakes all around as they left the office.

7. The Courts: You actually traveled to the courthouse, rode in the elevator, shook hands with your clients and other attorneys, talked to other people, sometimes close together to not be overheard by others, sat in the hallway or courtroom waiting for your case to be called, sat at the counsel table without first wiping it down with sanitizer (although, even in the good old pre-COVID days, this may have been something you wished you could do), perhaps met in chambers with judges and possibly other attorneys, and you talked with court employees such as bailiffs, clerks, and administrative assistants, so you could accomplish your business, and keep them in your good graces.

8. The Lunches and Social Events: You went to restaurants and met people for lunch, shook hands when you met, talked and ate close together next to other

diners. You met with colleagues and/or friends after work for a drink of something with alcohol, caffeine, or something else, and you talked, told stories, and laughed together.

9. The Meetings and Conferences: You attended small meetings with others, perhaps the meeting of a board you sat on, or a committee where you serve or volunteer. Sometimes these were bar association related, other times they were charitable, religious, political, social, or community focused. You attended CLE conferences, whether in your town or across the country, where you would gather with other attorneys in rooms large and small, to listen to speakers or share stories with each other. If you wanted to attend, there were social gatherings at the end of the day (and, occasionally, earlier), dinners with friends, perhaps entertainment afterwards, such as a play, sporting event, or live music.

And then came March 2020, when our world as we knew it dramatically changed. The COVID virus had landed a couple of months earlier on our shores, both east and west, and was rapidly passing among the unsuspecting citizens. Suddenly, it was causing massive, out of control damage to people, businesses, and the economy. Government leaders in states, counties, and cities were suddenly ordering public gatherings to be halted, businesses to shut their doors, and everyone to “shelter at home.”

The pre-COVID era came to a screeching halt and everyone was unmercifully and unwillingly tossed into the era of COVID.

III. Practicing Law During COVID-19 - Our New Reality, For Now

Suddenly, with little or no warning, practicing law as it had always been, was over. But that did not stop clients from having legal issues. In fact, for many, it created new and potentially lethal legal issues.

Clients in nursing homes and group homes were no longer able to get out and, worse yet, their family and friends could no longer visit them in person. That was bad enough for those who could at least somewhat understand what was happening across the country and that these actions were to protect them. But it was confusing, frightening, and potentially devastating for those who did not have the intellectual ability to do that. Depending on the type of clientele you had or the types of cases that were in process when this happened, you were suddenly confronted with crises that you had no idea how to solve, or you heard about them from others and knew it was just a matter of time before the same issues would be knocking at your door.

But rather than curl up in a fetal position and try to ignore what was happening (at least for very long), attorneys - ever the problem solvers - quickly pivoted and figured out ways to help their clients and keep their law practices alive.

What follows is an overview of some of the issues that were confronted, both legally and practically, and how they were resolved. But make no mistake, this is nowhere near a complete litany of all those issues and solutions. Every attorney and law firm solved their individual issues in unique ways that worked for them. In some instances, it was by mere chance; in others it was well researched and planned. Some creative solutions were made up by the attorney and staff members; others were the result of getting a great idea from someone else who had faced the same dilemma and shared how they resolved it. No matter how it happened, it has brought us to where we are today.

- 1. Working From Home:** For many law firms, the first problem to solve because of the stay-at-home orders was how the attorneys and staff could work from home. Some law firms had the foresight in pre-COVID era to start shifting away from primarily using paper files to electronic systems, and from relying on servers physically housed in the office to online, cloud based systems for case

management and data storage. But most weren't there yet. However, COVID forced everyone into the future.

The most basic issues were these:

- Do all attorneys and staff members even have the ability to work from home - both equipment and internet connection?
- How do we access client and firm information that is located at the office?
- How do we communicate with co-workers and others in order get things done?
- How do we handle the phone calls, mail, and deliveries coming to the office from clients, attorneys, government and court personnel, and others?

A. Requirements to be Able to Work From Home:

1) Internet Connection: At the least, to be able to work from home there needs to be a way to connect to the internet. Hopefully, this is a cable with high speed broadband. If necessary, it can be a cellular hotspot, but those don't work very well and can be expensive to operate. Fortunately, many people already had this set up in their homes. If so, it did not require anything else. If not, or if the service needed to be upgraded, that would need to happen first before any of the other solutions can be applied.

2) Computer: Again, many people already had a home computer, whether a desktop or laptop. If not, one needs to be purchased and set up, quickly. While a tablet or mobile phone may

allow access to internet and emails, it is very difficult to draft or review documents on those devices. If an person works on multiple monitors at the office, do they have the same set up at home? If not, is that needed, or helpful, or necessary, or affordable? What about USB ports? If a camera and microphone are added, are there enough USB ports to handle them? Or can one be expanded with a USB hub? And if so, does it require one that is powered?

3) Camera and Microphone: If the attorney or staff member is using a relatively new laptop, then most likely there is a camera and microphone built in and usable. If not, but they have a smartphone or tablet, then a camera and microphone are already part of the device. But if it is necessary to attend remote court hearings, or hold client consultations over video, or attend committee or other meetings via video, then a good camera² and microphone³ are a must. While there are many options to choose from, during “stay-at-home” order times, delivery of these items to the house is necessary. No doubt, many turned to Amazon.com or similar online stores to research and purchase these items.

4) Headset for Telephone: Unless a person wants a very sore neck, difficulty typing or taking written notes, or to use a speaker phone all the time, it is a good idea to investigate how a headset can be connected to the phone being used at home.

² See <https://www.pcmag.com/picks/how-to-buy-the-best-webcam> and <https://www.techradar.com/news/computing-components/peripherals/what-webcam-5-reviewed-and-rated-1027972> for two of many reviews of webcams.

³ See <https://www.pcmag.com/picks/the-best-usb-microphones> for a review of computer microphones and <https://www.bestreviews.guide/computer-headsets> for a review of computer headsets.

If the phone is a smartphone, there will be a way to attach a headset or ear buds that contain both speakers and a microphone. In fact, many people with smartphones are already using these. If the calls can be routed through the computer through a VoIP system, then the same headset or microphone and speaker used during remote video conferences can be utilized for telephone calls.

5) Workspace: This involves not only having a physical space in the home to work, but having the furniture to use while working. This becomes more important if video conferencing is part of the work requirements. Not only must sound be controlled (so the rest of the household does not hear confidential conversations or information, and cannot be heard by those on the telephone or video meeting), but what the camera shows in the background must also be appropriate. Staging the new “studio” became a problem no one had anticipated or knew much about, but needed to be quickly solved.⁴

6) Printer and/or Scanner: Depending on what the attorney or staff member is trying to accomplish while working at home, it may be helpful to have a printer and/or scanner in the home office. If so, there are many small and efficient printers to choose from that also have a scanning function. If this is of interest, a September 2020 PC Magazine article that reviews small office printers may be helpful.⁵

⁴ See Judy A. Grimaldi, The Challenge of Video Conferencing, NAELA News Journal - NAELA News Online (June, 2020) for a first-hand account of how one attorney solved this problem. Retrieved from https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineJune2020/Video.aspx?WebsiteKey=f881172b-19a7-45b3-a375-e61ff9416f86&_zs=mJ0XW1&_zl=UcVw6.

⁵ See <https://www.pcmag.com/picks/the-best-printers>.

If it is not necessary to have a printer, it is also possible to only purchase a scanner. If this is of interest, a December 2019 PC Magazine article that reviews scanners may be helpful.⁶

B. How to Access Information at the Office: Attorneys quickly discovered there are basically only two options to access electronically stored information that previously was easily available when working at the office. Either that information is stored online (in the “cloud”) or the attorney’s computer or server at work needs to be accessed remotely from home.

Those firms that had already transitioned to a cloud-based law practice management system had very little disruption. Other than switching the rights to access the system to different computers and, perhaps, granting access rights to other employees, everything seemed fairly normal. There are many cloud-based systems available to choose from, but unless a firm was already using one, the onset of the COVID era would not have been the best time to try to change the law firm’s practice management system.

For the rest of the law firms who were using a non-cloud based law practice management system and their electronic data was stored on a server located in the office, their only choice for a quick fix to be able to access this remotely was to start using a remote desktop software program. Some options were free (such as Chrome Remote Desktop⁷ or Windows Remote Desktop Connection⁸), but for many these were not robust enough. Many firms chose instead to purchase this type of software. Among all of the options that were

⁶ See <https://www.pcmag.com/picks/the-best-scanners>.

⁷ See <https://remotedesktop.google.com/?pli=1>.

⁸ See <https://support.microsoft.com/en-us/help/4028379/windows-10-how-to-use-remote-desktop>.

workable for a law firm, some of the more popular ones included RemotePC,⁹ GoToMyPC,¹⁰ Splashtop,¹¹ and TeamViewer.¹² Of course, each has its own pricing schedules and features, and there are many other companies to explore and chose from.¹³ Whatever choice was made, it needed to be made, and the software up and running, as quickly as possible.

C. How to Handle the Telephone: Solving the problems of (i) being able to answer the telephone when a client or someone else calls the office number, or (ii) being able to call a client, another attorney, or anyone from home without giving out the personal home or mobile number, were problems that needed to be quickly solved.

1) Handling Calls to the Office - With a VoIP Telephone System: Those firms what were already using Voice over Internet Protocol (VoIP) telephone systems found this an easily solved problem. In case you are not familiar with VoIP, it is a method of digitizing voice signals and sending them over the internet. In addition, it usually involves being able to also use traditional phones on the same system.

⁹ See <https://www.remotepc.com/>.

¹⁰ See <https://get.gotomypc.com/>.

¹¹ See <https://www.splashtop.com/>.

¹² See <https://www.teamviewer.com/en-us/info/remote-desktop/>.

¹³ See <https://www.lifewire.com/free-remote-access-software-tools-2625161> (15 Best Free Remote Access Software Tools) and <https://www.techradar.com/news/best-remote-desktop-software> (Best Remote Desktop Software of 2020) for two websites comparing various remote access software programs.

With a VoIP system it is not difficult to route calls ringing the primary office number to another phone on the VoIP system (say, for example, one in the law firm receptionist's home). This allows the phone to be answered just as if the receptionist was sitting at the office, and to route calls to the phone of the person being called (such as, for example, the attorney) just as it would have happened if both the receptionist and the attorney are sitting in the same office. Only in this situation, both the receptionist and the attorney are in their separate homes.

From the caller's perspective, nothing is different; it is exactly as it would have been handled if everyone was physically in the office. But from the law firm's perspective, everything is different. No one is in the office. The receptionist who answered the call is at home, and the attorney to whom the call was transferred is in the attorney's home across town.

2) Handling Calls to the Office - With a Landline Telephone System: But for the law firms that had a traditional landline telephone system, this was not possible. Instead, without an actual person at the office to answer the phone, it was only possible to have the caller leave a message, or to forward the call (and all calls) to another phone number (and many older office phone systems don't even have this capability). And with many traditional systems, when the calls are forwarded, it is difficult, if not impossible, to switch them back to the after-hours answering system without physically being in the office.

Of course, many traditional office telephone systems allow a caller to be directed to the desk of the person being called, either by entering a code number or having a direct dial number. Then, if the person being called is at their desk, he or she can pick up the phone and talk, or the call goes to voicemail. With this type of system, it is usually up to the person being called or a staff member to retrieve the messages.

Each law firm solved this problem in it's own way. But many routed all calls to a message ("Due to the COVID-19 crisis and mandatory stay-at-home orders, all of the staff at the law firm is working remotely at this time. However, we are checking messages, so please leave a message and someone will call you back.") and then assigned a staff member to remotely check messages on a regular basis. These messages were then forwarded or transcribed and sent to the person who was being called so the call could be returned. Or each staff member was responsible for remotely checking their assigned voicemail boxes.

3) Handling Calls from Home: As for making telephone calls from home without disclosing a personal phone number, again the law firms already using a VoIP telephone system were not as inconvenienced as the firms who did not have a VoIP system. With a VoIP telephone system, a call can be made from any phone that can connect to the system and, as far as the person being called is concerned, the call is coming in from the law office's phone number.

The law firms that were using a traditional landline system at the office were not so lucky. Some directed each staff member to get a Google

Voice¹⁴ number and use that when making law firm related calls. Others used Google's G Suite¹⁵ to manage this for all of the staff members working remotely. Still others found different solutions.

D. How to Communicate and Work With Co-Workers While in Different Locations: In the pre-COVID era, communicating with co-workers and collaborating on projects was easy; you just walked over to where the person was or attended a meeting of multiple co-workers. But that is not possible when everyone is working from their own homes.

As with everything else, law firms solved this differently. Some were already set up to accomplish this, whether intentionally or because the firm was already using a system that allowed this to easily happen.

For example, law firms that were already using Ring Central¹⁶ for their VoIP phone system, could just start using the integrated video conferencing, screen sharing, and messaging aspects (if they were not already doing so).

For the other law firms, however, it was necessary to set up a new system to accomplish this. While there were many options available, the most popular ones seemed to be Microsoft Teams,¹⁷ Google's G Suite,¹⁸ and

¹⁴ See <https://voice.google.com/about>.

¹⁵ See <https://gsuite.google.com/>.

¹⁶ See <https://www.ringcentral.com/>.

¹⁷ See <https://www.microsoft.com/en-us/microsoft-365/microsoft-teams/group-chat-software>.

¹⁸ See <https://gsuite.google.com/>.

Slack.¹⁹ Each of these programs allow all law firm employees to easily communicate with each other, whether via an instant message or video format, break up into small groups to work on specific cases without involving everyone else in the firm, share files and documents, collaborate on shared documents, and share what is on each other's computer screens. There is talk of Amazon buying Slack in the future.²⁰ If this happens, then it will be Microsoft, Google, and Amazon facing off for this type of business.

If all the law firm wanted was the ability to have group video meetings, then instead of signing up for a fully integrated system like those described above, they could consider using any of the video conferencing programs mentioned below.

2. Remotely Meeting With Others: Since it was no longer possible to have in-person meeting with clients, staff members, attorneys, and others, law firms were left with two options. Either rely totally on telephone conversations or augment the telephone with video conferencing. Most, if not all, chose the latter.

Once the appropriate hardware is in place (computer and camera, along with speakers and microphone, or a headset that combines these), the next requirement to hold video conferences is the appropriate software. As with all of the other software issues and solutions law firms dealt with, there are multiple options for video conferencing solutions.²¹

¹⁹ See <https://slack.com/>.

²⁰ See <https://medium.com/gigaom/will-amazon-buy-slack-397b082f05ca>.

²¹ See https://www.g2.com/categories/video-conferencing?utf8=%E2%9C%93&order=g2_score for an article entitled Best Video Conferencing Software.

However, unless the law firm had other programs that could be utilized for this (such as RingCentral or Microsoft Teams), there are typically three options most law firms seem to have chosen - Zoom,²² Cisco WebEx,²³ or BlueJeans.²⁴ In addition to using these programs for law firm business, many courts are using one of these programs to hold remote hearings.

While each of these programs has different pricing structure and platforms, they are actually quite similar in how they appear to the users and how they operate. Which one to choose often came down to which one the law firm attorneys or staff may have already heard about or been using back in the pre-COVID days, or which options were being used by the local courts for remote hearings.

A. Ethical Concerns With Video Conferences: When meeting with clients via a video conferencing program or otherwise discussing confidential topics, attorneys and staff members must be careful to take every reasonable means to protect client confidentiality, as is required by Model Rule of Professional Conduct 1.6(c),²⁵ or the equivalent rule in the state where the attorney practices. This means the video conference must be as secure as possible.²⁶

²² See <https://zoom.us/>.

²³ See <https://www.webex.com/>.

²⁴ See <https://www.bluejeans.com/>.

²⁵ Model Rule of Professional Conduct 1.6(c) (“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”).

²⁶ See McCreary, Jane R., Remote Client Meetings: Are You Zooming Past Privacy Concerns in the Age of COVID-19? (2020, September 9), NAELA News Journal - NAELA News Online, for a deeper analysis of this. Retrieved from www.naela.org at <https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineSept2020/Remote.aspx>.

B. Keeping Video Conferences Secure: At a minimum, this means utilizing a waiting room (so no one can enter the conference until the host lets them in) and possibly a password (so no one can enter the waiting room without having the correct password). In addition, setting the program to automatically turn off participants video and audio when they enter the conference (they can always turn them on after entering the conference), limit screen sharing to the host only, not allowing participants to join before the host, and having a sound played when anyone enters or leaves the conference (this can be set so only the host hears it) are often utilized to try to keep the remote conferences confidential.

Once the conference starts, the host should lock the meeting so no one else can enter without the host letting them in. Lastly, clients and other invited participants should be told to not share the link to enter the meeting. Instead, if they want someone else to attend, they should send that person's information to the host and let the host invite them. By doing this, the host will then have a list of everyone who is supposed to be attending the conference and will know who to let in.

3. Remote Court Hearings: After a brief suspension of all hearings and court matters, along with court deadlines and tolling of statutes of limitations, most courts were fairly quick to start holding remote video hearings. In the author's experience, the courts were using either Zoom,²⁷ Cisco WebEx,²⁸ or BlueJeans²⁹ for these remote hearings. For most estate planning, elder law, and special needs law attorneys, this did not dramatically alter how probate, guardianship, and

²⁷ See <https://zoom.us/>.

²⁸ See <https://www.webex.com/>.

²⁹ See <https://www.bluejeans.com/>.

conservatorship hearings were conducted; except they were being held remotely instead of in-person.

Once everyone became familiar with the technology, and the court was clear in its processes and requirements, remote hearings quickly became routine, at least for uncontested matters being heard by a judge. Jury trials were continued to future dates, and while some courts have attempted to conduct them remotely, many courts the author is aware of have still not started holding jury trials as of the date these materials were prepared.

Courts have established phases that describe how open to the public a court will be based on the level of COVID infections in various areas of the state. For example, Missouri has a constantly updated website that keeps everyone apprised of how each court is currently operating.³⁰

4. Filing Court Pleadings Electronically: Fortunately, in many jurisdictions around the country, the requirement to file pleadings and pay filing fees and court costs by mailing or delivering paper documents and checks to the court was already a thing of the past. Many courts had already transitioned to electronic filing of pleadings and paying of fees. For attorneys practicing in those jurisdictions, nothing changed in the COVID era. However, for attorneys practicing in jurisdictions requiring paper to be filed, accomplishing this is now limited to mail only.

5. Remotely Signing Documents: Once the law office staff was able to run the office remotely, the next concern was how to adequately represent clients while

³⁰ See <https://www.courts.mo.gov/pandemic/#:~:text=The%20Supreme%20Court%20of%20Missouri,restrictions%20on%20in%2Dperson%20proceedings.&text=On%20June%205%2C%20the%20Court,jury%20proceedings%20during%20the%20pandemic> for the Missouri Judiciary Responses to Coronavirus (COVID-19).

the office is operating remotely. This partially depended on the type of legal services being provided.

Anything involving documents that clients need to sign required creative thinking. Particularly, if the document needed to be notarized or witnessed.

A. Electronically Signing Documents Not Requiring Witnesses and

Notary: In many industries, such as real estate and business, electronically signing contracts and other documents had already become an accepted practice. Utilizing such programs as DocuSign³¹ and AdobeSign,³² parties to legal documents are able to affix legally binding signatures without actually signing a piece of paper.

In the United States, there are two primary types of electronic signatures that are authorized (often referred to as “e-signatures”):

1) Electronic Signature - is basically any electronic process used to validate the identity of the signer of a document. This can be in the form of an email, password, or PIN sent to another device known to belong only to the signer, such as a mobile phone. The signature is often proven by including an audit trail embedded into the e-signed document.

2) Digital Signature - is a more secure type of electronic signature that utilizes a certificate-based digital signature. A digital signer is issued a unique digital ID in the form of a certificate and PIN

³¹ See <https://www.docuSign.com/>.

³² See <https://acrobat.adobe.com/us/en/sign.html>.

from an accredited trust service provider (TSP). When using this procedure to sign, the signer's identity is re-validated and cryptographically bound to the PDF document being signed utilizing public key infrastructure (PKI) technology. This can be revalidated to authenticate and validate the identity of a person signing a document.

Electronic signatures were formally authorized in the United States with the enactment on June 20, 2000, of the Electronic Signatures in Global and National Commerce Act (ESIGN or E-Sign Act).³³ In addition, most states have adopted a version of the Uniform Electronic Transactions Act (UETA).³⁴

As law firms adapted to the COVID era restrictions, utilizing electronic signatures for engagement letters / legal services agreements, and other contracts not requiring a witness or notary turned out to be an efficient and quick way to obtain needed signatures.

B. Remote Notarization: Although the Uniform Law Commission³⁵ had proposed in the 2018 revision of the Revised Uniform Law on Notarial Acts

³³ Pub. L. 106-229, June 30, 2000, Available at <https://www.govinfo.gov/content/pkg/PLAW-106publ229/pdf/PLAW-106publ229.pdf> for a copy of this law.

³⁴ See <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> (a listing of which states have enacted this act, along with a link to the uniform act and citations to the bills enacted in the various states).

³⁵ Often referred to as "ULC" and also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

(RULNA)³⁶ that remote notarization could take place, it imposed certain restrictions, and only nine states had adopted it prior to 2020.³⁷

In addition to the traditional requirements that the notary verify the identity of the individual signing a document and that the document being notarized is the same document that is being signed by the individual, RULNA goes on to require:

- the notary public, or a person acting on behalf of the notary public, must create an audio-visual recording of the performance of the notarial act;³⁸
- the notary clause must indicate the notarial act was performed using communication technology, such as “This notarial act involved the use of communication technology;”³⁹ and
- the recording of the notarial act must be retained for at least ten years.⁴⁰

³⁶ See Revised Uniform Law on Notarial Acts (2018), available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aec212eb-a1e8-183a-13dd-587c7604666e&forceDialog=0>.

³⁷ These states were Minnesota, Iowa, Maryland, Washington, Kentucky, Idaho, Montana, South Dakota, and North Dakota. So far in 2020, this was enacted in Wisconsin, and has been introduced but not yet enacted when these materials were written in Arizona, Hawaii, Connecticut, Kansas, and New Jersey. See <https://www.uniformlaws.org/committees/community-home?communitykey=8acec8a5-123b-4724-b131-e5ca8cc6323e&tab=groupdetails>.

³⁸ Revised Uniform Law on Notarial Acts (2018), § 14A(c)(3).

³⁹ *Id.* at § 14A(d) and § 14A(e).

⁴⁰ *Id.* at § 14A(f).

As a result of the COVID pandemic, many states authorized remote notarization by adopting a version of RULNA, whether through statute or executive order.⁴¹ Most of these states kept the RULNA provisions of (i) allowing the use of audio-video communication, (ii) requiring the notary to authenticate the person signing and what is being signed, and (iii) requiring the audio-video communication to be recorded.⁴² Unfortunately, in many of these states, the authorization of remote notarization is only of limited duration and, unless continued by the legislatures, will terminate when the COVID pandemic subsides.

C. Remote Witnessing: It has been more complicated for documents that require witnessing, such as a will. Normally, the laws of the states require that a will be signed in the “presence” of the witnesses and notary. Exactly what “presence” means has evolved over the years, but was fairly well settled as of the onset of the COVID era.

1) Case Law: In 2012, the Ohio Appellate Court addressed this in the case of *Whitacre v. Crowe*.⁴³ In this case, the execution of Kay Whitacre’s will was viewed by the witnesses through a one-way video monitor. The will was challenged, and the court upheld the lower court’s summary judgement finding that the will was invalid because

⁴¹ These states are Alaska, Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. See <https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/> for a list that is supposed to be kept up to date.

⁴² See Erica Asbell, COVID-19 and Remote Notarization: State-by-State Variances, NAELA News Journal - NAELA News Online (July 2020). Retrieved from [www.naela.org](https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineBlueJuly2020/COVIDRemote.aspx) at <https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineBlueJuly2020/COVIDRemote.aspx> provides more detail on this topic.

⁴³ *Whitacre v. Crowe*, 2012-Ohio-2981, 972 N.E.2d 659 (2012).

it was not signed in the presence of the witnesses. While the witnesses could see the testatrix sign, she could not see the witnesses sign. The court said:

The issue of what satisfies the requirement of “conscious presence” is one of first impression in Ohio. Historically, however, other jurisdictions which required witnesses to attest and subscribe the will in the presence of the testator interpreted “presence” to mean “conscious presence.” See, e.g., *In re Estate of Holden*, 261 Minn. 527, 113 N.W.2d 87 (1962); *In re Demaris’ Estate*, 166 Or. 36, 110 P.2d 571, 581 (1941); *Calkins v. Calkins*, 216 Ill. 458, 75 N.E. 182, 183–184 (1905); *Watson v. Pipes*, 32 Miss. 451 (1856); *Nock v. Nock’s Exrs.*, 51 Va. 106 (1853); *Nichols v. Rowan*, 422 S.W.2d 21, 24 (Tex.Civ.App.1967). The test has been referred to as a “mental apprehension test” and is stated as follows:

“When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him, it is the general, if not universal, rule that his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say. * * * In other words, if he has knowledge of their presence, and can, if he

is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it, and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses, for them to be in his presence. They are in his presence whenever they are so near him that he is conscious of where they are and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them do it.” *Demaris* at 582, quoting *Healey v. Bartlett*, 73 N.H. 110, 59 A. 617, 618 (1904).⁴⁴

The *Whitacre* court went on to review the conscious presence elements as described by other courts.

In re Tracy’s Estate, 182 P.2d 336, 337 (Cal.App.1947).

The *Tracy* court, citing a long history of cases from various states, set out the following elements to establish conscious presence, where the testator cannot

⁴⁴ *Id.* at ¶ 15, 662–63.

actually view the witnesses' signing: "(1) the witnesses must sign within the testator's hearing, (2) the testator must know what is being done, and (3) the signing by the witnesses and the testator must constitute one continuous transaction." *Id.* In Tracy, the witnesses signed the will in another room 25 feet away and, although the testator could not see them, she could hear the witnesses' conversation evidencing their contemporaneous signing. Given the timing of the witnesses' signatures immediately after the testator's and the testator's ability to hear the witnesses and understand by their conversation that they were attesting her will, the court concluded that the will was properly executed. *Id.*⁴⁵

The Supreme Court of Mississippi explained the rationale behind the conscious presence test. *In re Estate of Jefferson*, 349 So.2d 1032 (Miss.1977). The *Jefferson* court wrote that "the purpose of signing by the attesting witnesses in the presence of the testator is that the testator will know that the witnesses are attesting the testator's will and not another document; that the witnesses will know the same; these reasons being to avoid imposition or fraud on either the testator or the witnesses by substitution of another will in place of that signed by the testator; and that the witnesses will be reasonably satisfied that the testator is of sound and

⁴⁵ *Id.* at ¶ 17, 663.

disposing mind and capable of making a will.” *Id.* at 1036. In that case, the high court concluded that a witness who telephoned the testator and informed him that he was then signing and attesting the testator's will was not in the conscious presence of the testator.⁴⁶

In the 1963 case of *In re Weber's Estate*,⁴⁷ the Supreme Court of Kansas was called upon to interpret the following statute. As described by the court:

Every will, except an oral will as provided in section 44 [59-608], shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe or heard him acknowledge the same.⁴⁸

The court interpreted this statute by saying:

The mentioned statute, insofar as is pertinent to the issues involved, contains the following elements: (1) The will must be attested and subscribed by two competent witnesses in the presence of the testator; (2)

⁴⁶ *Id.* at ¶ 18, 663.

⁴⁷ *In re Weber's Estate*, 192 Kan. 258, 387 P.2d 165, (1963).

⁴⁸ *Id.* at 261/168.

the witnesses must have either seen the testator subscribe or have heard him acknowledge the will. It is apparent that the statute clearly requires two essential factors: (1) presence, and (2) sight or hearing. **There must be presence and sight or presence and hearing. Presence only, sight only, hearing only, or sight and hearing only are not sufficient.** It is quite possible that one could see a testator subscribe to his will, *i.e.*, by television, or one could hear the testator acknowledge his will, *i.e.*, by telephone, but in either instance the witnesses would not be in the presence of the testator as contemplated by our statute. Conversely, one could be in the testator's presence and yet not see him sign or hear him acknowledge his will. The witnessing of a will is a matter of great importance and solemnity, and this is especially so because dispute about it does not arise until the testator's lips are sealed. (*Rice v. Monroe*, 108 Kan. 526, 527, 196 P. 756.).⁴⁹

All parties agreed to the facts in the *Weber's Estate* case. At around noon on a workday Henry Weber was in his car which was parked at an angle against the curb of the street. His car was parked beneath a window of a bank which was approximately eight to ten feet away from the automobile. Three bank employees watched Mr. Weber from inside the bank through the closed window. While in his car, Mr. Weber met with two other men and reviewed what was said to be his will. He waived to the witnesses watching from the bank window, and

⁴⁹ *Id.* at 261–62, 168–69 (emphasis added).

placed the clipboard holding the will on his steering wheel and signed it while the witnesses watched. The signed will was then taken into the bank where the witness each signed the will. From his car, Mr. Weber could see the witnesses were signing something, but he could not see the actual paper being signed because the witnesses were using a table that was lower than the bottom window frame. At no time did Mr. Weber and the witnesses talk to each other.

The court ruled that Mr. Weber's will was not signed in the presence of the witnesses because the testator could neither see exactly what the witnesses were signing nor hear them.

2) Uniform Probate Code: Comment Subsection (a) of § 2-502 of the Uniform Probate Court, addresses the conscious presence test as follows:

Under subsection (a)(2), the testator must sign the will or some other individual must sign the testator's name in the testator's presence and by the testator's direction. If the latter procedure is followed, and someone else signs the testator's name, the so-called "conscious presence" test is codified, under which a signing is sufficient if it was done in the testator's conscious presence, *i.e.*, within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight. For application of the "conscious-presence" test, see Restatement (Third) of Property: Wills and Other Donative Transfers § 3.1 cmt. n (1999); *Cunningham v. Cunningham*, 80 Minn. 180, 83

N.W. 58 (1900) (conscious-presence requirement held satisfied where “the signing was within the sound of the testator’s voice; he knew what was being done....”); *Healy v. Bartless*, 73 N.H. 110, 59 A. 617 (1904) (individuals are in the decedent’s conscious presence “whenever they are so near at hand that he is conscious of where they are and of what they are doing, through any of his senses, and where he can readily see them if he is so disposed.”); *Demaris’ Estate*, 166 Or. 36, 110 P.2d 571 (1941) (“[W]e do not believe that sight is the only test of presence. We are convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether [an individual is] in his [conscious] presence....”).⁵⁰

D. Solutions Used by Attorneys: Given the status of the law requiring the witnesses of a will to be in the “conscious presence” of the Testator, during the COVID era attorneys were initially struggling with how to properly execute a will or any other document requiring witnesses. Some of the creative solutions implemented are the following.

1) Signing in the Office: Some law firms chose to make their office space as safe as possible and sign documents in the office. This requires spacing chairs far apart, everyone wearing masks, and sanitizing the conference room table and other surfaces that might be

⁵⁰ Uniform Probate Code § 2-502, Comment Subsection (a). Available at <https://www.uniformlaws.org/viewdocument/final-act-with-comments-114?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8&tab=librarydocuments>.

touched before and after the meeting. Some firms also purchased plexiglass dividers and installed them on the conference room table. Typically, these have small spaces at the bottom so papers can be passed among the participants. Since clients are coming into the office, all precautions are taken to make the office space as safe as possible for everyone, both clients and staff.⁵¹ With this solution, the signing process resembles what happened during the pre-COVID era, except everyone is wearing masks and trying to socially distance.

2) Signing While Watching Through Windows: This solution involves delivering the will and other related documents (but not the pages to be signed by witnesses and the notary) to the client who is in the nursing facility or at home. This can be accomplished by the U.S. mail or other delivery service. For the signing process, the client sits in front of a window and the witnesses and notary are outside the window. Unlike what happened in *In re Weber's Estate*,⁵² the client, witnesses, and notary communicate with each other by using telephones, often utilizing the speaker function. As a result, everyone can hear each other and see what each other is signing. The will is explained to the client, the client acknowledges this is her will, and she executes the document while the witnesses and notary watch and listen. The witnesses execute their signature pages while the client and notary watch and listen, and then the notary signs the notary clause while everyone watches and listens. All pages are retrieved by the attorney or a staff member and compiled into an executed and

⁵¹ See, *infra*, the 20 COVID-19-Related Best Practices suggested by Eric J. Einhart.

⁵² *In re Weber's Estate*, 192 Kan. 258, 387 P.2d 165 (1963), discussed *supra*.

attested will. This also applies to any other related documents being signed.

3) Signing Outdoors: This solution involves signing the will and other related documents while everyone is outside, either on a picnic or other table, or in the client's driveway, or while the client is in her motor vehicle and the witnesses and notary are standing outside the vehicle. Everyone wears masks and sometimes even gloves, and social distancing requirements are followed as much as possible. Everyone can see and hear each other, and watch each other sign the documents. Hopefully, the weather cooperates. Obviously, this is a more challenging option during rain storms or winter.

4) Signing With Witnesses and Notary in the Client's Facility or Home: As with solution 2, above, this solution involves delivering the documents to the client through mail or other delivery methods. The client meets with the witnesses and notary in the same physical space where the client is located. If this is a nursing facility, the witnesses and notary could be staff of the facility. If this is in the client's home, they may be neighbors or friends; however it is often difficult to get disinterested witnesses into the home without violating any stay-at-home orders. The attorney can supervise the execution over the telephone, or better yet, over a video meeting platform, such as Zoom or Skype.⁵³

⁵³ See <https://www.skype.com/en/>.

E. Governor's Executive Orders: Some Governors have signed Executive Orders trying to address this problem. Two examples are described below.

1) New York: The Governor of New York issued Executive Order No. 202.14,⁵⁴ which says, in part:

For the purposes of Estates Powers and Trusts Law (EPTL) 3-2.1(a)(2), EPTL 3-2.1(a)(4), Public Health Law 2981(2)(a), Public Health Law 4201(3), Article 9 of the Real Property Law, General Obligations Law 5-1514(9)(b), and EPTL 7-1.17, the act of witnessing that is required under the aforementioned New York State laws is authorized to be performed utilizing audio-video technology provided that the following conditions are met:

- The person requesting that their signature be witnessed, if not personally known to the witness(es), must present valid photo ID to the witness(es) during the video conference, not merely transmit it prior to or after;
- The video conference must allow for direct interaction between the person and the

⁵⁴ See State of New York Executive Order No. 202.14 at <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. This has been extended through October 9, 2020, by Executive Order 202.61 https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.61.pdf.

witness(es), and the supervising attorney, if applicable (e.g., no pre-recorded videos of the person signing);

- The witnesses must receive a legible copy of the signature page(s), which may be transmitted via fax or electronic means, on the same date that the pages are signed by the person;
- The witness(es) may sign the transmitted copy of the signature page(s) and transmit the same back to the person; and
- The witness(es) may repeat the witnessing of the original signature page(s) as of the date of execution provided the witness(es) receive such original signature pages together with the electronically witnessed copies within thirty days after the date of execution.⁵⁵

2) Missouri: An more lenient order was issued by the Governor of Missouri on September 12, 2020. In Executive Order 20-14,⁵⁶ the Governor ordered:

. . . to the extent that any Missouri statute requires the physical presence of any testator, settlor, principal,

⁵⁵ *Id.*

⁵⁶ See Missouri Executive Order 20-14 at <https://www.sos.mo.gov/library/reference/orders/2020/eo14>.

witness, notary or other person for the effective execution of any estate planning document such as a will, trust or power of attorney, or a self-proving affidavit of the execution of such document, such provisions are suspended or waived, and satisfied if the following conditions are met:

1. The signor must affirmatively represent that he or she is physically situated in the State of Missouri.
2. The notary must be physically located in the State of Missouri and state which county they are physically in for the jurisdiction on the acknowledgement.
3. The notary must identify the signors to their satisfaction and current law.
4. Any person whose signature is required may appear via using video conference software where live, interactive audio-visual communication between the principal, notary, and other necessary person which allows for observation, direct interaction, and communication at the time of signing.
5. The notary shall record in their journal the exact time and means used to perform the notarial act along with all other required information, absent the wet signatures.

...

FURTHERMORE, any notarial act in compliance with this order shall have the same force, effect, and validity as any other notarial act performed in compliance with Missouri law, and

may be relied upon to the same extent as any other notarial act under Missouri law;

. . .

FURTHERMORE, that if the document needs to be presented in a paper medium, it shall satisfy the requirements of being an original document, and prima facie evidence, if the notary prints the document and affixes an attestation stating that it is a true and correct copy of the electronic document, shall state it was performed pursuant to Executive Order 20-14 and the Notary signs and affixes their rubber stamp notary seal.⁵⁷

For a summary as of the end of June, 2020, of what each state has enacted regarding remote notarization and remote witnessing in response to the COVID-19 pandemic, see the ACTEC publication entitled Emergency Remote Notarization and Remote Witnessing Orders.⁵⁸

⁵⁷ *Id.*

⁵⁸ Lauren Wolven and Erin Mayer, Emergency Remote Notarization and Remote Witnessing Orders, American College of Trust and Estate Counsel (June 29, 2020). Retrieved from [www.actec.org](https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/) at <https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/>.

6. Design of Current Documents: Sometimes the traditional way documents have been designed proved adaptable and workable in the COVID era; other times, not so much.

A. Durable Power of Attorney: Attorneys practicing in the areas of estate planning, elder law, and special needs law are very familiar with durable power of attorney (DPA) documents. These are documents that appoint other people (an “agent” or “attorney-in-fact”) and empower them to make health care or legal and financial decisions on behalf of the person who signed the DPA (the “principal”).

1) Two Types of Durable Powers of Attorney: DPAs are referred to as being “effective” when the agent can begin acting on behalf of the principal. DPAs can be designed to be effective immediately upon proper execution of the DPA by the principal, or not effective until some future event happens. This second type of DPA is often referred to as a “springing” durable power of attorney.

2) Springing Durable Power of Attorney: Typically, the triggering event for a springing DPA is a certification by the principal’s physician, or any physician, that the principal is now so intellectually incapacitated that he or she can no longer make or communicate the decisions described in the DPA. Upon this written certification, the powers granted in the DPA “spring” into existence and the agent can then make decisions on behalf of the principal.

In the COVID era it became painfully obvious that springing DPAs have a serious flaw - they require that a physician be able to evaluate the principal to determine if the principal is incapacitated, and then

produce a written report or letter certifying that finding. Unfortunately, this is not possible if the principal is confined in a locked-down facility or at home and the physician can not meet with the principal.

Technologically, it is possible to accomplish this by the physician viewing and interacting with the principal through a remote video program such as Zoom or Skype, assuming the physician is familiar enough with the principal and is willing to do this. However, it is also necessary for telehealth consultations to be authorized in the state where the principal resides and the physician is licensed to practice medicine. In addition, the principal's insurance company needs to be willing to pay for such services, assuming the physician is going to charge for this evaluation and opinion letter.

Telehealth consultations have been authorized for Medicare beneficiaries for many years.⁵⁹ However, this was only available if the patient was "located in either a rural health professional shortage area as defined under section 332(a)(1)(A) of the Public Health Service Act (42 U.S.C. 254e(a)(1)(A)) or in a county that is not included in a Metropolitan Statistical Area as defined in section 1886(d)(2)(D) of the Act."⁶⁰

Fortunately, the restrictions on which Medicare beneficiaries can receive telehealth services was waived during the COVID era by the passage of the Telehealth Services During Certain Emergency Periods Act of 2020, which is found in Division B of the Coronavirus Preparedness and Response Supplemental Appropriations Act,

⁵⁹ See Sec. 1834(m) of the Social Security Act (42 U.S.C. § 1395m) and 42 C.F.R. § 410.78.

⁶⁰ See Sec. 1834(m)(4)(C)(i) of the Social Security Act (42 U.S.C. § 1395m(m)(4)(C)(i)) and 42 C.F.R. § 410.78(b)(4).

2020,⁶¹ and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).⁶²

In addition, early in the COVID era the federal government waived many existing requirements imposed on the Medicare, Medicaid, and CHIP programs, including expanding the use of telehealth services.⁶³

Unfortunately, unless extended by Congress, all of these expanded provisions are going to terminate when the public health emergency declared because of the COVID-19 pandemic ends.

3) Non-Springing Durable Power of Attorney: However, DPAs that were not springing were not affected by this issue. This is because they were effective when signed by the principal and did not

⁶¹ Pub. L. No. 116-123, March 6, 2020. Available at <https://www.congress.gov/bill/116th-congress/house-bill/6074/text>.

⁶² Pub. L. No. 116-136, March 27, 2020. Available at <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

⁶³ This was accomplished by

(i) the Secretary of Health and Human Services declaring the existence of a Public Health Emergency on January 31, 2020 (See <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>),

(ii) the President issuing an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (the “Stafford Act”) and declaring a national health emergency on March 13, 2020 (See <https://www.whitehouse.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf>), and

(iii) on the same date, CMS issuing notice authorized by Sec. 1135(b) of the Social Security Act (42 U.S.C. § 1320b-5) of the waiver or modification of many requirements imposed by Titles XVIII (Medicare), XIX (Medicaid), and XXI (Children’s Health Insurance Program (CHIP)) of the Social Security Act (See <https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>).

require the finding of incapacity by a physician in order for the agent to begin making decisions on behalf of the principal.

B. Advance Directives: If a person has sufficient intellectual capacity, then the person has the ability to sign an “advance directive” that states what the person’s preferences and decisions are about end-of-life care. These are used to direct this care if the person is unable to make or communicate these decisions at a time they are needed. Advance directives either (i) appoint an agent authorized in a durable power of attorney to make end-of-life decisions, or (ii) not appoint an agent and, instead, instruct that certain actions be taken, or not taken, if a physician determines the person is facing an end-of-life situation.

As the pandemic began to force many people into hospitals, doctors soon discovered that many COVID-19 patients needed to be on a ventilator.⁶⁴ This sparked many news stories that educated the public about what it is like to be on a ventilator and what damage prolonged use of one can cause.⁶⁵ In

⁶⁴ If a person infected with COVID-19 does not have an immune system that is able to fight off the infection, it can move into the lungs and cause acute respiratory distress syndrome (ARDS). This causes some or all of the lungs to be unusable and incapable of bringing oxygen into the person's body. If oxygen levels remain low for too long of a time, it can cause permanent damage to vital organs throughout the person's body, and even lead to death. Ventilators are used to artificially force a person to continue to breathe so oxygen is brought into the body and the person is kept alive long enough for the infection to be brought under control.

⁶⁵ See Carrie MacMillan, Ventilators and COVID-19: What You Need to Know (June 2, 2020). Retrieved from [www.YaleMedicine.org](https://www.yalemedicine.org/stories/ventilators-covid-19/) at <https://www.yalemedicine.org/stories/ventilators-covid-19/>, and Sarah Richards, Surviving COVID-19 and a ventilator: One patient's story (June 18, 2020). Retrieved from [https://www.uchicagomedicine.org/](https://www.uchicagomedicine.org/forefront/coronavirus-disease-covid-19/surviving-covid-19-and-a-ventilator) at <https://www.uchicagomedicine.org/forefront/coronavirus-disease-covid-19/surviving-covid-19-and-a-ventilator> for examples of two articles.

addition, as time has gone on, “[a]n increasing number of U.S. covid-19 patients are surviving after they are placed on mechanical ventilators[.]”⁶⁶

If a person infected with COVID-19 is placed on a ventilator, it is possible they may remain on it for a very long time before they are able to be weaned off of the ventilator, or they do not survive.⁶⁷

If a person survives after being on a ventilator for an extended period of time, the damages caused by the ventilator can be serious and life altering. The person may “experience a range of symptoms that impact their everyday function including:

- Pulmonary issues, such as shortness of breath while walking or difficulty taking a deep breath
- Cognitive symptoms, such as inattention, or difficulties with memory or multi-tasking
- Musculoskeletal impairments, such as back pain, or limb weakness due to prolonged prone positioning during ventilation while hospitalized.”⁶⁸

⁶⁶ Lenny Bernstein, More covid-19 patients are surviving ventilators in the ICU, The Washington Post (July 3, 2020). Retrieved from www.washingtonpost.com at https://www.washingtonpost.com/health/more-covid-19-patients-are-surviving-ventilators-in-the-icu/2020/07/03/2e3c3534-bbca-11ea-8cf5-9c1b8d7f84c6_story.html.

⁶⁷ Hannah Wunsch, Mechanical Ventilation in COVID-19: Interpreting the Current Epidemiology. 202 Am. J. Respir. Crit. Care Med. 1(July 1, 2020). Retrieved from www.atsjournals.org at <https://www.atsjournals.org/doi/10.1164/rccm.202004-1385ED>.

⁶⁸ Beyond the Ventilator: Recovery and Rehabilitation After COVID-19 (July 1,2020). Retrieved from www.massgeneral.org at <https://www.massgeneral.org/news/coronavirus/beyond-the-ventilator>.

It has also been discovered that many COVID-19 patients who are successfully weaned off of a ventilator remain in a coma for a longer period of time than ventilator patients who were not infected with COVID-19.⁶⁹ Initially, some hospitals were following the protocol established for traumatic brain injury patients, which is providing full supportive care to a patient for 72 hours after being removed from a ventilator.⁷⁰ If the patient has not regained consciousness within this time, conversations about stopping other forms of life support often begin. But for patients infected with the COVID-19 virus, this may be too short of a time period.

Since a person placed on a ventilator is often sedated, they cannot indicate how long they want to stay on a ventilator, or even if one should be utilized at all. This caused people to look closely at an advance directive the ventilator patient may have signed. Unfortunately, most advance directives did not contemplate the intricacies caused by the use of ventilators for COVID-19 patients.

Typical advance directive forms contain language similar to this:

If I have a terminal illness or condition and there is no reasonable hope I will recover, or if I am persistently unconscious, I direct all of the life-prolonging procedures I have initialed below to be withheld or withdrawn. I direct the following treatments to be withheld or withdrawn: (initial all that apply)

_____ Mechanical ventilator (respirator)

⁶⁹ Martha Bebinger, Another COVID-19 Medical Mystery: Patients Come Off Ventilator But Linger In A Coma National Public Radio (August 24, 2020). Retrieved from www.npr.org at <https://www.npr.org/sections/health-shots/2020/08/24/904347130/another-covid-19-medical-mystery-patients-come-off-ventilator-but-linger-in-a-co>.

⁷⁰ Alexandra K. Pratt, *et al.*, A Fate Worse Than Death: Prognostication of Devastating Brain Injury (April 2019). Retrieved from www.pubmed.ncbi.nlm.nih.gov/ at <https://pubmed.ncbi.nlm.nih.gov/30855326/>.

While every case is different, typical advance directives often do not provide sufficient guidance for when to stop life support if a person is being treated aggressively for COVID-19 infection. This sparked discussions among attorneys on the NAELA Member listserv, and probably also others, as to how to best guide clients wrestling with this issue.

C. Special Needs Trusts: Trustees of special needs trusts generally did not have issues arise caused by the language used in the trust document. Traditionally, special needs trusts are drafted to grant trustees vast discretion in how and when to distribute money from the trust to or for the benefit of the beneficiary. In addition, a well drafted special needs trust authorizes the trustee or someone else (such as a trust protector or trust advisor) to amend the trust document to allow the trustee to adapt to unforeseen circumstances or changes in the law. As a result, if trustees found the language of the special needs trust being administered to be too restrictive or not helpful during the COVID era, they were able to amend the document to resolve that problem without going to court for modification.

7. Working with People Isolated in Institutions and Homes: Attorneys working with clients living in nursing or assisted living facilities, mental health facilities, group homes, or independent supported living facilities were quickly confronted with problems when the COVID era began and those facilities were locked down to prevent exposure to the COVID-19 virus. These problems often involved helping guardians, family members, social workers, and caregivers gain access to the person in the facility. When physical contact is prevented by laws prohibiting access to the facility and blocking the resident from leaving the facility, often the only option was trying to arrange some sort of remote access. These

ranged from telephone calls to remote video meetings, utilizing platforms such as Zoom or Skype.

For some residents, this was adequate even though not preferred. Given the alternative (no contact at all), these methods were better. However, this was not acceptable for many residents who have mental health conditions or intellectual disabilities and may not be able to understand or participate in remote visits. People resorted to standing outside ground floor windows and trying to communicate with the resident on the other side of the window. For some residents, this just increased the confusion and frustration because they could not understand why the people they wanted to see would not come in and visit them.

Often, the isolation and lack of physical contact with family and friends can have a negative impact on a person confined in a facility that is on lock down because of COVID. But this is not limited to people in facilities. People living in their own homes or apartments are also suffering from the effects of isolation.

8. Mental Health Concerns for Clients and Caregivers: Whether confined to a facility or living outside a locked down facility, people in general are having difficulty coping during the COVID era. Mental health issues, such as anxiety disorder, depression, and suicidal thoughts are plaguing many people living in the United States.

Consider the following statistics, which are only a few of those that came out of a survey of 5,412 adults conducted between June 24-30, 2020, and were published⁷¹

⁷¹ Mark E. Czeisler, Rashon I. Lane, MA, Emiko Petrosky, MD, *et al.*, Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States (June 24–30, 2020), *MMWR Morb. Mortal Wkly Rep* 2020, Vol. 69, No. 32, pages 1049 - 1057.

on August 14, 2020, by the U.S. Centers for Disease Control and Prevention (CDC).

- A. Almost 41% of adults reported an adverse mental or behavioral health symptom.
- B. When compared to 2019, those with anxiety disorder tripled and those with depression quadrupled.
- C. A quarter of the people who responded reported symptoms COVID-19 related trauma-and stressor-related disorder.
- D. When compared to 2018, twice as many people reported seriously considering suicide. Over 30% of caregivers, and more than 31% of essential workers, reported having suicidal thoughts.
- E. Unpaid caregivers reported over three times the amount of substance abuse and/or suicidal thoughts between May and the end of June.⁷²

Often, clients of special needs and elder law attorneys have mental health conditions and/or disabilities, whether intellectual, physical, or both. During the COVID era, these individuals are at heightened risk of exposure to the virus and of developing or exasperating mental health issues because of the precautions being taken to protect them from being exposed to the virus.

The World Health Organization, among many other suggestions, recommends that family, friends, and neighbors (and your author adds attorneys, trustees, and trust advisors) provide extra support for a person with a disability by doing the following:

⁷² *Id.*

- Check in regularly with a person with disability to provide emotional and practical support, respecting social isolation restrictions that may be in place.
- Be cognizant of how you talk about COVID-19, and do not exacerbate any existing stress.⁷³

Attorneys working with Veterans are also finding their clients are experiencing the same things. As a result, the COVID pandemic has caused an increased demand for mental health support organizations working with veterans.⁷⁴

9. Marketing the Law Practice: While writing blogs and newsletters emailed or mailed to clients and referral sources was not affected very much in the COVID era, almost every other form of law firm marketing was greatly impacted. The ability to hold in-person seminars, lunch and learns, in-service educational meetings, client dinners, or speaking to parent support, church, or civic groups came to a screeching halt when COVID hit.

But as the COVID era has continued on, attorneys have become creative with their marketing and networking. Some are holding video presentations to groups (using Zoom or a similar platform), while others are hosting webinars to the public. A few have begun podcasting.⁷⁵ For referral sources, checking in with a telephone call

⁷³ Disability Considerations During The COVID-19 Outbreak, World Health Organization, WHO/2019-nCov/disability/2020.1. Retrieved from https://www.who.int/docs/default-source/inaugural-who-partners-forum/english-covid-19-disability-briefing.pdf?sfvrsn=8a1aa727_1&download=true.

⁷⁴ Alyk Russell Kenlan, As Veterans Battle Pandemic Isolation, Organizations Adapt to Meet Their Needs (September 2, 2020). Retrieved from <https://www.military.com/daily-news/2020/09/02/veterans-battle-pandemic-isolation-organizations-adapt-meet-their-needs.html>.

⁷⁵ See <https://www.thepodcasthost.com/planning/how-to-start-a-podcast/> if you are interested in starting a podcast.

or email will go a long way towards maintaining that relationship. Also, keeping referral sources up to date by sending email updates or hosting live remote video presentations is helpful.

However, without the ability to physically meet, establishing new referral sources is challenging. While video and telephone meetings may allow existing relationships to continue, it is not very effective in establishing new ones.

10. Reopening the Office During the COVID Era: As COVID restrictions are gradually lifted by various communities, many law firms are beginning to meet with clients in the office. However, the law firm needs to be careful that all local COVID protocols are followed. In June, 2020, New York attorney Eric J. Einhart published a 20-point list in the NAELA News Journal - NAELA News Online that will be helpful for all law firms when they decide to reopen.⁷⁶ These are reproduced below:

COVID-19-Related Best Practices

1. Prominently display all relevant COVID-19 office policies outside your door for anyone coming in to see.
2. Communicate all COVID-19 office policies with staff and confirm their understanding of the policies.
3. Consider asking anyone who comes into your office if they have tested positive for COVID-19 and have a policy in place in the event they answer affirmatively.

⁷⁶ Eric J. Einhart, Make Plans for In-Person Interactions in the Age of COVID-19 and Social Distancing, NAELA News Journal - NAELA News Online (June 2020). Retrieved from [www.naela.org](https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineJune2020/Plans.aspx?WebsiteKey=f881172b-19a7-45b3-a375-e61ff9416f86&zs=mJ0XW1&zl=UcVw6) at <https://www.naela.org/NewsJournalOnline/OnlineNewsArticles/OnlineJune2020/Plans.aspx?WebsiteKey=f881172b-19a7-45b3-a375-e61ff9416f86&zs=mJ0XW1&zl=UcVw6>.

4. Consider asking anyone who comes into your office if they have come in physical contact with anyone who has tested positive for COVID-19 and have a policy in place in the event they answer affirmatively.
5. Provide staff and clients with ample access to hand sanitize and offer disposable masks when necessary.
6. All attorneys and staff should wear masks and avoid all physical contact when interacting with clients and each other (e.g., no handshakes or hugs).
7. Consider the layout of your office location and establish a policy regarding movement of staff and visitors to minimize the opportunity of contact while walking throughout the office (e.g., one-way hallway, clockwise is COVID-wise).
8. Make sure all conference rooms and common areas are disinfected regularly.
9. Ensure that all clients are seated in a conference room or office immediately so that no one is congregating in the waiting room.
10. Remove reading materials from waiting room and/or conference rooms.

11. Consider having a call-ahead system in place where clients can call from outside the office to ensure that they can be seated immediately.

12. Confirm the number of people attending the meeting and encourage only a limited number of attendees.

13. Clearly mark assigned seating in conference rooms and mark the appropriate distance between clients and attorneys/staff.

14. Refrain from offering any food or drink that is not bottled or packaged.

15. Request that clients provide relevant documents prior to the meeting and not bring documents with them to be reviewed.

16. Consider increasing ventilation in your office by opening windows or adjusting air conditioning.

17. Do not share pens.

18. Do not schedule back-to-back appointments without some time in between. This will prevent clients from coming into contact with one another, and allow some time to disinfect your office.

19. Be conscious of the communication challenges face masks and social distancing may cause for clients with hearing loss. Be prepared to make accommodations to overcome these challenges, such as the

use of technology like smart phone apps that can help facilitate communication, or using clear face masks to allow lip reading.

20. Be prepared with a response to clients and colleagues who are resistant to your safety procedures.⁷⁷

IV. Practicing Law After COVID-19 (Post-COVID Era) - What Will the Future Look Like?

When the threat of COVID-19 is over and everything goes back to normal, it is very likely that “normal” will be quite different from what it was before COVID-19 ravished the United States. Some of the creative solutions adopted by attorneys in order to serve clients and keep the law firm in business during the COVID era are actually quite helpful, and it is presumed many of them will continue to be utilized in the post-COVID era. Some of these are summarized below.

1. Continuing to Work Remotely, at Least Some of the Time: Many companies have had a generally positive experience with employees working from home and, as a result, are considering reducing office space and continuing this model, at least for some employees.⁷⁸ According to a survey of over 2,000 global organizations conducted in April and May of 2020 by Robert Walters, a global professional recruitment company, 88% of workers would appreciate a more flexible approach to working from home, and only 14% of the companies surveyed said they

⁷⁷ *Id.*

⁷⁸ David Randall, Reuters Business News, Who still needs the office? U.S. companies start cutting space (July 22, 2020). Retrieved from <https://www.reuters.com/article/us-usa-results-realestate/who-still-needs-the-office-u-s-companies-start-cutting-space-idUSKCN24N2NL>.

would not adopt a more flexible approach to work after COVID-19, while 86% said they would be at least partly flexible in the future.⁷⁹

Some law firm jobs can be performed remotely, such as research, billing, accounting, and drafting many of the legal documents produced by the law firm. In addition, remote video or telephonic meetings, whether with clients or others, can be conducted from home as well as the office.

Of course, nothing will replace the comradery that happens when people work together in the same physical space. But working remotely at least part of the time will save on travel time and costs, allow more time to be working, and often provide better control over interruptions.

2. Changes to Documents: Every attorney will most likely have some clauses in their documents they want to change because of lessons learned during the COVID era. Four to consider are mentioned here.

A. Springing Durable Power of Attorney: For all of the reasons mentioned earlier in these materials, there will most likely be fewer springing durable power of attorneys used in the post-COVID era. This may be blunted somewhat if the ability to use telehealth for consultations is expanded after the COVID era to allow physicians to consult remotely via video with patients who are unable to come to the physician's office even though they are not located in a rural area.

⁷⁹ Returning to the New World of Work - A Practical Guide for Business Leaders (research conducted in April and May, 2020). Retrieved from <https://www.robertwalters.co.uk/content/dam/robert-walters/country/united-kingdom/files/whitepapers/robert-walters-a-new-world-of-work-e-guide.pdf>.

B. Advance Directive: While the actual language used in advance directives and health care durable power of attorney documents regarding ventilator usage may not dramatically change, attorneys counseling clients about them should dwell a bit longer on what the client's wishes are regarding the use of a ventilator. Consider helping the client define what a "meaningful recovery" means to them and, if possible, encapsulate that in language specifically drafted for the client's document. Doing so will go a long way towards helping attorneys-in-fact and others understand the client's wishes and, ultimately, help guide the care the client receives if the need to utilize a ventilator for the client's medical care arises in the future.

C. Special Needs Trust: For special needs trusts, assuring that the trust document contains a broad power to amend the document to adapt to changing circumstances will remain important. Also, some special needs trusts include provisions requiring a trust advisor or other person to actually talk with or visit a trust beneficiary periodically. In the past, this may have allowed telephone conversations to be used for the requirement to talk with the beneficiary. In the post-COVID era, it is expected that video conferencing will also be encouraged as a method of keeping in contact with the trust beneficiary. As a result, consideration should be given to expressly authorize this in the trust document, along with the purchase of computer equipment and software that will allow these meetings to take place, even if the beneficiary cannot personally use the computer.

D. Electronic Signing: When electronic signing of documents is used, consider adding a clause that acknowledges that it is being signed electronically. As an example, consider the following:

This Agreement may be signed electronically as a PDF or with a pen. If signed electronically, all signers acknowledge that the signer's electronic signature is the signer's valid and legally binding signature, and the date inserted is the date this Agreement was executed by the signer.

3. Remote Video Meetings and Conferences: It is very likely that video meetings and conferences will continue to be utilized in the post-COVID era. Not exclusively, as is happening during the COVID era, but to supplement in-person meetings.

Attending remotely via video has many advantages. It can be easily used to hold meetings with clients, advisors, distant friends and family, or others; attend board and committee meetings, staff meetings, CLE programs and conferences; appear at out of town depositions or court appearances; or for a multitude of other reasons. Some of the advantages of remote video meetings are:

- A. Saving time and expense that would otherwise be spent traveling to and from the meeting (particularly if the meeting is out of town),
- B. Quicker, more efficient meetings (if run properly),
- C. Easily bringing people together who are geographically separated, or do not have the time or ability to travel to a place where the meeting is held,
- D. Recording the meeting so those who were unable to attend can view it later and know what was discussed and decided. This can also be

kept as a permanent record of what transpired during the meeting, and

- E. Providing more information and connection to other attendees than a meeting conducted over the telephone. Attendees are able to see each other and pick up body language and other visual cues that should enhance communication.

However, remote video meetings will never replace in-person meetings and the ability to spontaneously ask a question of a person or get to know someone better by just chatting about non-specific or social matters. Networking with others will never be the same or as productive when conducted on a video platform as it is in person.

In addition, while visiting with others over a remote video platform may allow existing relationships to continue longer, they do not allow for new friendships and working relationships to begin easily. That requires being in-person. This is reinforced by an infographic published by Great Business Schools,⁸⁰ where it is reported that,

- A. 84% of people prefer in-person meetings, partially because they lead to stronger and more meaningful business relationships, and
- B. 95% of people say that face-to-face meetings are essential for long-term business relationships.⁸¹

⁸⁰ See <https://www.greatbusinessschools.org/networking/>.

⁸¹ *Id.* the sources for these conclusions are listed in this infographic.

If a law firm has not yet settled on the video conferencing platform it wants to use, or if it wants to see what else is available in addition to the citations provided earlier in these materials,⁸² a review of various video conferencing software platforms that was published by PC Magazine on May 28, 2020 may be of interest.⁸³

For suggestions about how to run a successful video meeting, Slack.com⁸⁴ has at least two blog posts that are worth reading. These are The Ultimate Guide to Remote Meetings⁸⁵ and How to Run Effective Meetings.⁸⁶ One of these even quotes John Medina, the author of *Brain Rules*, who very wisely says,

You've got 10 minutes with an audience before you will absolutely bore them. And you've got 30 seconds before they start asking the question, 'Am I going to pay attention to you or not?' The instant you open your mouth, you are on the verge of having your audience check out.⁸⁷

4. Conferences and CLE Programs: Conferences and CLE programs in the future will return to in-person for many reasons. While a few have simultaneously webcast some or all of their sessions in the pre-COVID era, it is expected more will do so in the post-COVID era. Since attorneys have become more accustomed to

⁸² See, *supra*, Sections III.1.D and III.2.

⁸³ See <https://www.pcmag.com/picks/the-best-video-conferencing-software>.

⁸⁴ See <https://slack.com/>.

⁸⁵ Deanna deBara, The ultimate guide to remote meetings in 2020 (January 2, 2020), <https://slack.com/blog/collaboration/ultimate-guide-remote-meetings>.

⁸⁶ Jennifer Phillips, How to run effective meetings (November 6, 2018), <https://slack.com/blog/productivity/run-effective-meetings>.

⁸⁷ John Medina, Brain Rules for Meetings (January 30, 2012), <http://brainrules.blogspot.com/2012/01/brain-rules-for-meetings.html>.

viewing CLE programs online in the comfort and convenience of their own home or office during the COVID era, there is good reason to believe there will be continuing demand for this in the future.

5. Communicating With Others: Options for communicating with others in the post-COVID era will include those that existed in the pre-COVID era: in-person meetings, sending a written letter, sending an email, and talking over the telephone. An added option in the post-COVID era will be video conferencing, for all the reasons stated earlier in these materials.

During the COVID era many people were introduced to, and have become comfortable with, video conferencing. There is no reason to think they will not want to continue this in the post-COVID era. It is likely that video conferencing will be used for communicating with clients and non-clients, staff, colleagues, adverse attorneys, courts, and friends.

6. Court Hearings and Appearances: In the post-COVID era, in-person appearances will most likely be primarily used for court hearings, and definitely for jury trials. However, video appearances may become more common for witnesses who cannot personally attend a hearing, or for a conference between the judge and attorneys.

7. Remote Administrative Hearings: Video may become the predominate method for holding administrative hearings. In the pre-COVID era, many administrative hearings were held by telephone. Video will be a great improvement over telephonic hearings.

The Social Security Administration has already taken this step. On September 3, 2020, the Social Security Administration announced that starting in the fall of 2020

it was offering to conduct video hearings using the Microsoft Teams platform, in addition to telephonic hearings.⁸⁸ This press release said, in part:

The Social Security Administration announced a new service for people awaiting a hearing decision. In addition to telephone hearings, Social Security will offer the opportunity for an online video hearing using the Microsoft Teams platform beginning this fall. This new free service will allow applicants and their representatives to participate in the hearing from anywhere they have access to a camera-enabled smart phone, tablet, or computer. This stable and secure online platform allows the Social Security judge to see and interact with applicants and their representatives just like an in-person hearing, while maintaining privacy of the claimant's information. Other hearing experts, such as medical or vocational experts, may participate as well.

The COVID-19 pandemic has highlighted the importance of finding new ways to serve the public," said Commissioner of Social Security Andrew Saul. "For over a decade, the agency has used video hearings to get applicants their hearing decisions sooner. This advancement builds on that effort, making it easier and more convenient to attend a hearing remotely, particularly during the COVID- 19 pandemic. To continue to ensure all participants' safety, we expect online video hearings and telephone hearings will be the only two hearing options for the foreseeable future.⁸⁹

⁸⁸ See <https://www.ssa.gov/news/press/releases/2020/#9-2020-1>.

⁸⁹ *Id.*

8. Electronic Court Filings: While not something that began during the COVID era, it is presumed that the movement towards more courts adopting electronic filings will continue. Not only is it more efficient and quicker than filing papers with the court, electronic filings certainly made life easier during the COVID era for those attorneys who were able to it.

9. Electronic Recording of Deeds: Closely related to electronic court filings is electronic recording of deeds and similar documents. As with electronic court filings, being able to record deeds, mortgages, lien releases, and similar documents electronically is more efficient and quicker. Many counties have already instituted this process, and it is assumed this trend will continue in the post-COVID era.⁹⁰

10. Electronic Signing of Legal Documents: When circumstances are appropriate, electronic signing of documents may be used more often in the post-COVID era. Many people discovered during the COVID era that this is a quick and efficient way to sign documents that do not require witnesses or a notary. Programs such as AdobeSign⁹¹ or DocuSign⁹² are easy to use and work on many devices, such as computers, tablets, and smartphones.

11. Continuation of Remote Witnessing and Notarization: Earlier in these materials it was pointed out that the COVID era exposed serious flaws with the current state of the law in many jurisdictions regarding the requirements imposed on signing, witnessing, and notarizing wills and other documents. Through executive orders and occasional statutes, many states and the federal government addressed this in creative and helpful ways.

⁹⁰ See <https://www.erecording.com/> for more information about e-recording.

⁹¹ See <https://acrobat.adobe.com/us/en/sign.html>.

⁹² See <https://www.docusign.com/>.

However, most, if not all, of these solutions authorizing remote witnessing and notarization of wills and other legal documents will terminate when the state of emergency caused by the COVID-19 virus ends. One of the lessons learned from the COVID era is that these temporary solutions have been critical and will continue to be very helpful after the COVID era ends. It is hoped that legislators and other decision makers will enact the necessary laws to allow this to continue to be used when necessary.

12. Electronic Wills: While not mentioned earlier in these materials, the COVID era also heightened everyone’s awareness of the probable inevitability that electronic wills be accepted in all jurisdictions as a valid testamentary document. This topic is not new. Among many others, articles and podcasts discussing electronic wills have been published by Forbes,⁹³ the American Bar Association,⁹⁴ the Harvard Law Review,⁹⁵ and ACTEC.⁹⁶

Actually, there are three types of electronic wills: offline, online, and qualified custodian. These are described in the Harvard Law Review⁹⁷ as:

⁹³ Christine Fletcher, The Pros and Cons of Electronic Wills (October 25, 2019). Retrieved from <https://www.forbes.com/sites/christinefletcher/2019/10/25/the-pros-and-cons-of-electronic-wills/#7cb411305457>.

⁹⁴ Technology-Probate: Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You (September/October, 2019). Prob. & Prop., Vol. 33, No. 5. Retrieved from https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2019/september-october/ready-or-not-here-they-come-electronic-wills-are-coming-a-probate-court-near-you/.

⁹⁵ Developments in the Law - More Data, More Problems, What Is an “Electronic Will”?, 131 Harv. L. Rev. 1715, 1790 (2018). Retrieved from <https://harvardlawreview.org/2018/04/what-is-an-electronic-will/>.

⁹⁶ ACTEC Trust & Estate Talk, An Update on Electronic Wills Statutes, Episode 108 (June 2, 2020). Retrieved from <https://actecfoundation.org/podcasts/electronic-wills-statutes/>.

⁹⁷ Developments in the Law - More Data, More Problems, What Is an “Electronic Will”?, 131 Harv. L. Rev. 1715, 1790 (2018). Retrieved from <https://harvardlawreview.org/2018/04/what-is-an-electronic-will/>.

Offline electronic wills are those that are simply typed (or “handwritten” via a stylus) onto an electronic device by the testator herself, signed by way of the testator typing her name or putting another signatory mark into the electronic document, and stored on the electronic device’s local hard drive — they are typically never printed, traditionally attested, or uploaded onto a website.

By contrast, online electronic wills are those that incidentally bring another private actor (a technology company, a cellphone service provider, etc.) into the mix — for example, where a testator logs into an existing social media account and creates a post that is intended to serve as the testator’s will. Such wills are those typically stored on the private actor’s servers or in “the cloud,” subjecting them to statutes regulating the management and retention of personal data as well as the private actor’s own policies — but also ensuring that a neutral third party is able to provide objective evidence on critical questions such as when a document was created.

Electronic wills of the third type are created where a company becomes a “qualified custodian” that would create, execute, and store the testator’s will, subject to rules and regulations put forth by a state.⁹⁸

⁹⁸ *Id.* Emphasis added, and the quote was broken into separate paragraphs to make it easier to read.

In 2001, Nevada became the first state to enact an electronic wills law.⁹⁹ Indiana was next with its law becoming effective July 1, 2018.¹⁰⁰ Arizona's electronic wills law became effective on July 1, 2019.¹⁰¹ Most recently, as of July 1, 2020, Florida's electronic wills law became effective.¹⁰² Both Nevada and Florida also allow remote witnessing; Arizona and Indiana do not.

In 2019, the Uniform Law Commission published the Uniform Electronic Wills Act (E-Wills Act).¹⁰³ On August 31, 2020, the State of Utah enacted its version of the E-Wills Act into law.¹⁰⁴

It is just a matter of time before electronic wills become a viable alternative to the paper versions. As the title of the September/October 2019 article in the ABA's Property & Probate magazine said, "Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You."¹⁰⁵

13. Possibly Using a Cloud-Based Client Management System: If a law firm is thinking about changing its client management system, then giving serious

⁹⁹ Nev. Rev. Stat. § 133.085, *et seq.*

¹⁰⁰ Ind. Code § 29-1-21-1, *et seq.* (2018).

¹⁰¹ AZ Rev. Stat. § 14-2518, *et seq.* (2019).

¹⁰² Fla. Stat. § 732.521, *et seq.* (2019).

¹⁰³ See <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8529b916-8ede-67e4-68eb-e0f7b1cb6528&forceDialog=0> for a copy of the Uniform Electronic Wills Act, with comments.

¹⁰⁴ H.B. 6001 Uniform Electronic Wills Act. See <https://le.utah.gov/~2020S6/bills/static/HB6001.html>.

¹⁰⁵ Technology-Probate: Ready or Not, Here They Come: Electronic Wills Are Coming to a Probate Court Near You (2019, September/October). Prob. & Prop., Vol. 33, No. 5. Retrieved from https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2019/september-october/ready-or-not-here-they-come-electronic-wills-are-coming-a-probate-court-near-you/.

consideration to a cloud-based system is a must after what was experienced during the COVID era. Some of the better known ones at the moment are Clio,¹⁰⁶ Zola Suite,¹⁰⁷ and MyCase.¹⁰⁸ However, currently there are many options to chose from.

To begin the research of what the current options are, a review of law practice management software published by Lawyerist.com may be helpful.¹⁰⁹

14. Possibly Using a VoIP Telephone System: If a law firm is thinking about changing it's telephone system, then strong consideration should be given to a VoIP system. While there are advantages and disadvantages of VoIP verses landline telephone systems,¹¹⁰ one of the lessons learned from the COVID era was that VoIP telephone systems provide more flexibility while working remotely from the office.

For a current review of various VoIP telephone systems, an article published by PC Magazine in July 2020 may be helpful.¹¹¹

V. And in Conclusion

While it is quite possible that many of the aforementioned items may not continue into the post-COVID era, it is hoped that some of them do. We are all aware that no one knows what the future holds and it is often a fool's errand to try to predict what will happen. Or,

¹⁰⁶ See <https://www.clio.com/>.

¹⁰⁷ See <https://zolasuite.com/>.

¹⁰⁸ See <https://www.mycase.com/>.

¹⁰⁹ See <https://lawyerist.com/reviews/law-practice-management-software/>.

¹¹⁰ See <https://www.businessnewsdaily.com/15323-voip-vs-landline.html>.

¹¹¹ See <https://www.pcmag.com/picks/the-best-business-voip-providers>.

as Winston Churchill said, “It is always wise to look ahead, but difficult to look further than you can see.”

Which leads to ending this paper with two more memorable quotes about the future that seem applicable in this COVID era.

“Never let the future disturb you. You will meet it, if you have to, with the same weapons of reason which today arm you against the present.”

Marcus Aurelius

And my favorite, “The future ain't what it used to be.” Yogi Berra