Welcome to the Age of Keyboard Warriors

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Lachlan Robison considers the emergence of the "Online Court", expressing scepticism about its claims to greater efficiency in the disposal of litigation matters while praising the virtues of in-person courtroom appearances for the development of lawyers' skills.

Introduction

I was in the NSW District Court one day last December. The Judicial Registrar's list was posted outside the courtroom. It had 16 matters on it. All bar one was struck out with the handwritten word "Removed" scrawled beside it. Why had 15 out of 16 matters been removed from the most important civil list in Sydney? Had there been a miraculous wave of settlements? It was December after all – perhaps litigators were filled with the spirit of generosity that comes with the upcoming holiday season and the end of law term? No, this was not the reason. The reason was the "Online Court".

As with most reforms to civil practice, no doubt proponents of the Online Court would argue that it is efficient, as if efficiency is self-evidently the most important thing. Here, the efficiency (if there is any) must be limited to avoiding the need to physically attend court. It is not more efficient, however, in the sense of alleviating delay in the delivery of justice because precisely the same case management orders will be required whether made in a chatroom or courtroom.

Also, from the workplace perspective, the Online Court is no substitute for the invaluable on-the-job training that in-person appearances in a courtroom give the developing lawyer.

Greater Efficiency?

Let us first examine the efficiency point.

Most practitioners in the city of Sydney are located within walking distance of the CBD courts; hence the term "legal precinct". Others, I accept, are not, and, before coming to the Bar, I was a solicitor in Wagga Wagga (500-odd kilometres away from Sydney's District Court's John Maddison Tower). This did not cause any particular problems because the local registrar (who was a registrar of the Local, District and Supreme Courts and probably the Court of Appeal, but I am not quite sure) would conduct directions hearings in chambers and everyone was on a first name basis – much less formal than how these things are done in the city. In any event, practitioners who need appearance work done for mentions in the city can engage the services of a town agent or a reader for a couple of hundred dollars a pop.

With these considerations in mind, I really do not think that the Online Court is going to save litigants money. Solicitors' hourly rates vary considerably, but according to *Choice*: "Lawyers' hourly rates commonly range from $350 to $650."[1] Let us take the mid-point – $500 plus GST. Most solicitors charge in six-minute units. How is this going to play out? The solicitor opens the file to review recent correspondence. One unit. The first keyboard-mortar shot rings out across the battle field. One more unit. The enemy returns fire. We are onto our third unit. Things are looking serious, the solicitor calls counsel to chat about the orders. Now its four units. The proposed orders are varied. Five units. Finally, agreement is reached. Six units. I went to the Bar because I cannot do maths but I think that works out to be $(6 \times 50) + 10\% = \$330$. This is not cheaper than an in-court mention. It is pretty well exactly the same.

Many mentions end up being "by consent". This, I think, has caused some people to wonder what the point of turning up to court was when there was nothing to argue about. This misses the point. Most matters are by consent *because* of the need to turn up to court. Practitioners know that if they

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[1] Rebecca Douglas, "Legal Fees: How Much Should They Cost?", *Choice*, 1 August 2018 < https://www.choice.com.au/shopping/shopping-for-services/services/articles/legal-fees>.

have a nonsense position, their opponents will make them look stupid in the very public forum of the courtroom. Public humiliation is a strong motivator to not be unreasonable. It is also a strong motivator towards competence.

THE TRAINING GROUND OF THE COURTROOM

There is value in bringing up junior lawyers to be good lawyers, and the courtroom is where their skills are honed.

One of the biggest skills in litigation is negotiation. After all, we should all be trying to keep our clients away from the witness box (you never quite know what they are going to say until they get there). Online bullying is real. So much so that we are seeing the increasingly criminogenic aspects to keyboard warfare.[2]

When a practitioner knows s/he will have to face his/her opponent face-to-face, it is much less likely that things will get nasty. The online world feels like a consequence-free environment. It is very hard to negotiate a resolution of a case, either to finality or on an interlocutory level, if everything you say (I mean type) is going to end up either being copied into the court or attached to some affidavit. Frank, verbal, face-to-face discussion is to be preferred. When you know your opponent, talk to them in person, you can cut to the chase and do a deal – a proper compromise in your respective clients' interests – and your negotiation skills are enhanced in the process. On the other hand, you do not get to really *know* your opponent if all they are to you is black text on a computer screen.

The next skill, one I fear is being lost, is that of advocacy. Most people think the biggest part of advocacy is cross-examination. Destroying the other side. It is not. The biggest part of advocacy is justifying yourself (in the sense of your argument; not yourself personally) to a judge. In public. In a directions hearing, the argument may be as mundane as should the plaintiff have three weeks or four weeks to serve a document. That is not so much the point. The point is, if you do not get an opportunity to practice your craft with relatively trivial arguments, you are going to do a bad job when, finally, after years of fierce e-mails, you have to go to court and, say, keep your client out of prison, or get your severely injured client damages. Sitting behind a keyboard, you will never learn the basics which are so important. The content of submissions is one thing, but you will never be taken seriously in court unless you know which side of the bar table to sit at, how to bow to the Royal Arms, that your Gucci handbag or bottle of Coke does not belong on the bar table, and so on.

There is no doubt nerves are a factor. This is why we have to build up young lawyers skills sets gradually, with what psychologists call exposure therapy (like most lawyers, I am an amateur psychologist). I can still remember being an 18-year-old law clerk and being told on Friday that I would have to do a mention on the coming Monday. There was little sleep over the weekend. I am extremely grateful for that experience. At that time, in 2002, the Compensation Court had not been closed down and the *Civil Liability Act 2002* (NSW) was still but a glint in Bob Carr's eye. Lawyers were so busy running trials that list-court work was full of law clerks whereas you almost never see this today.

It is pretty hard to fatally stuff up a mention. The same cannot be said of motions, and obviously cannot be said of trial work. Unless new practitioners get mentions right, unless they get that vital on-the-job training in *their workplace* – the courtroom – their growth as lawyers will be stunted, and the court system itself will, in the long term, be doomed.

[2] In this regard, see *Criminal Code* (Cth) s 474.17 (found in *Criminal Code Act 1995* (Cth)): "Using a carriage service to menace, harass or cause offence."