flipstream

BUILDING TRUST
LAWYERS' RELATIONSHIPS WITH CLIENTS AND COLLEAGUES ONLINE

Associate Professor Justine Rogers,
Tony Song, and Dr Felicity Bell
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UNSW
SYDNEY

THE LAW SOCIETY
OF NEW SOUTH WALES

WHAT IS FLIP STREAM?

A strategic alliance between the Law Society of NSW and UNSW Law aims to tackle the challenges of technological change and its impact on lawyers, law and the legal system.

In 2016 the Law Society of NSW established the Future Committee and, in turn, the Future of Law and Innovation in the Profession (FLIP) Commission of Inquiry. In March 2017, the inquiry culminated in the Law Society's ground-breaking FLIP Report, which discusses the future of the legal industry in the digital age.

The Report recognised the legal profession is undergoing change at a pace never before experienced and in unforeseen ways. This change has major ramifications for not just the legal profession, but for clients and society more generally, particularly in relation to access to justice.

In November 2017, the Law Society entered into a strategic alliance with University of New South Wales (UNSW) Law & Justice to generate a stream of research to consider and respond to the issues raised by the FLIP Report, such as legal technology, clients' needs and expectations, new ways of working, community needs and legal education, artificial intelligence and the practice of law and technological solutions to facilitate improved access to justice.

This dedicated research was also asked to tackle some of the increasingly complex challenges presented by digital and other technological transformations and its impact on lawyers, law and the legal system.

This strategic alliance, forged between a world-class university, UNSW, and the Law Society is a milestone of progress for both institutions and for the entire legal profession.

Our organisations are meeting the challenges and opportunities presented by technology and innovation in our operating environment head on, driven by a shared mission:

To help equip Australian lawyers with the tools they need to confront the future with confidence and ease.

Each year the FLIP Stream, as it has become known, has undertaken research into an annual topic that is then disseminated through the academy, the profession and society. In 2018 the annual topic was *Artificial Intelligence and the Legal Profession*, led by Professor Michael Legg and Dr Felicity Bell. The 2019 topic on *Change Management* was led by Associate Professor Justine Rogers. The 2020 topic on The Sustainability of Law and Lawyers was led by Professor Michael Legg and resulted in two primers: *The Future of Legal Costs and Legal Fees* by Professor Michael Legg, and *Legal Design Thinking* by Dr Felicity Bell. The 2021 topic on *The Future of Legal Service Delivery* was led by Associate Professor Marina Nehme and Dr Felicity Bell. The FLIP Stream has also engaged with and responded to other areas of research and law reform.

The Law Society is encouraged and excited by this alliance, knowing that our members and the people we serve are and will continue to be the ultimate benefactors.

BUILDING TRUST

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A PRIMER

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CONTENTS

EXECUTIVE SUMMARY

Trust has a special place for the lawyer as the archetypal 'trusted advisor'. It is fundamental to professional work, which is premised on the specialised knowledge of the professional and comes with substantial legal, fiduciary, and professional ethics obligations (to the client, the courts, the profession, and the justice system) – all designed to support that trust. Trust drives and enables 'not just the professions, but our economy and our society'.[1] When there is high trust, procedures and transactions are quicker and less costly.[2]

Within workplaces, there is voluminous research indicating that trust is a critical factor in organisational performance.[3] For example, the Harvard Business Review paper, 'The Neuroscience of Trust', identified that professional environments that foster secure connections, where people feel like real contributors, correlate with higher productivity, better-quality products, and increased profitability.[4] Likewise, the Global Workplace Survey, conducted by Six Seconds, found that trust, motivation and teamwork are associated with increased retention, greater productivity, and future success.[5] Research has repeatedly shown the benefits of trusting relationships for both individuals and groups.[6] Trust also promotes cooperative behaviour between organisations and other institutions – in the legal context, the courts and social services, for example, as well as law firms and the professional regulators. And, of course, the entire profession rests on public confidence in its expertise and processes. Chief Justice Allsop of the Federal Court has stated that 'Courts, and any dispute resolution model, depend and depends on public confidence and trust.'[7] In a recent report, George Beaton (of Beaton Research

+ Consulting) emphasised the high esteem in which the public holds professionals, or the hope we have in them.[8] Susskind and Susskind further explain:[9]

> *We want to trust professionals, to see them as upright people whose motives often seem noble, and for them to be the embodiments of honesty, probity and integrity. We expect that they will act in good faith and put the interests of those they help ahead of their own.*

Meanwhile, in their 20th Anniversary (2021) edition of The Trusted Advisor, professional advisors Maister et al highlighted the humanity of this trust, and the relationality of professional practice:[10]

> *Technology changes; markets and organizations change; demographics, business roles, and communications media change. What stays constant are human dynamics, including the dynamics of trust.*

However, trust is fragile. Lawyers today must earn trust by meeting their professional ethics obligations, displaying integrity and good judgment, and cultivating positive (empathetic and productive) relationships. Further, they must do so in the face of extreme pressures and new disruptions. From the development of innovative technologies – to the global shift to hybrid workplaces – lawyers are operating in vastly different business environments now than just a few years ago. While for some the shift to remote or hybrid work (both at home and in the office) was temporary, for many it is a

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[1]   George Beaton, *Why Professionalism Matters More Than Ever* (Australian Council of Professions, May 2022) 22.

[2]   Stephen MR Covey and Rebecca R Merrill, *The Speed of Trust: The One Thing That Changes Everything* (Free Press, 2006) 10-11.

[3]   For a synthesis of some of this research, see: Michael Pirson, Kirsten Martin and Bidhan Parmar, 'Public Trust in Business and Its Determinants' (2019) 58(1) *Business & Society* 132 ('Public Trust in Business and Its Determinants').

[4]   'Paul J Zak, 'The Neuroscience of Trust', *Harvard Business Review* (online, 1 January 2017) <https://hbr.org/2017/01/the-neuroscience-of-trust.>

[5]   The Global Workplace Survey, conducted by Six Seconds, a non-for-profit network seeking to increase emotional intelligence education within schools and businesses.

[6]   Kurt Dirks and Donald Ferrin, 'Trust in Leadership: Meta-Analytic Findings and Implications for Research and Practice' (2002) 87 *Journal of Applied Psychology* 611.

[7]   Chief Justice Allsop, 'The Courtroom Post COVID-19' (Presentation, Australian Bar Association National Conference, 28 April 2022) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20220428>.

[8]   Beaton (n 1) 22.

[9]   Richard E Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 1st ed, 2015) 11.

[10]   David H Maister, Charles H Green and Robert M Galford, *The Trusted Advisor: 20th Anniversary Edition* (Simon & Schuster, 2021) xix.

permanent change.[11] In this way, legal practice today, and the relationships it involves, are increasingly online or mediated by online technologies.

Yet, for many decades now, studies have emphasised co-location (or being in the same place) and physical contact as central to the dynamics of trust or positive and effective interactions and relationships.[12] Indeed, for interactions that require particularly high mutual cooperation and trust, it has even been suggested that trust cannot exist without meeting in-person.[13]

So, in a context where trust is said to matter more than ever before,[14] how might lawyers foster trust in their relationships with others, when these interactions are often and sometimes solely online?

How can trust and good working relationships with clients, colleagues and the court continue to be cultivated in an increasingly online profession?

This Primer addresses these questions with reference to academic research, primarily from the organisational management, social psychology, and philosophy literatures, as well as industry reports and examples.

We look at two main relationships for the lawyer working in the online or hybrid context: the relationship with the client, and those relationships with the firm itself with whom they work and/or they manage, with a special focus on new graduates ('grads') and team members.

In each section, we also relate our ideas to sole and small firm practice contexts without, for example, grads or formal teams. The Primer is structured as follows.

Part I, the Introduction to the primer, gives a detailed overview of the context, including theories of trust, and what we know about the impact of moving online.

Part II, Trust and the Client Relationship Online, looks at all aspects of the client relationship, from acquiring clients through to building and maintaining client relationships. Though its nature and workings vary depending on law firm size, specialty area and type of client, trust is essential in the lawyer-client relationship.

Also in Part II, we look at the fundamental duties that are salient to client relationships, and how they are affected by the shift online, including competence; confidentiality; honesty and courtesy; capacity and the giving of instructions.[15] In times of crisis, compliance with these responsibilities is all the more urgent.[16] Indeed, the Office of the Legal Services Commissioner (OLSC), the legal regulator in NSW, observed a spike in complaints received since the start of the pandemic.[17]

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[11] Meganne Tillay, 'Slater & Gordon to Close London Office, Staff to Work From Home Permanently', *Law.com International* (online, 27 May 2020) <https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permently/>; Simon Lock, 'Mishcon Hands Lawyers, Staff Unlimited Remote and Flexible Working', *Law.com International* (online, 25 February 2021) <https://www.law.com/international-edition/2021/02/25/mishcon-hands-lawyers-staff-unlimited-remote-and-flexible-working/>.

[12] Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55 (Macauley notes a manifestation of trust might be a brief conversation, followed by a physical handshake).

[13] Charles Handy, 'Trust and the Virtual Organization' *Harvard Business Review* (online, 1 May 1995) <https://hbr.org/1995/05/trust-and-the-virtual-organization>.

[14] Ross Dawon, *Living Networks 20th Anniversary Edition* (Advanced Human Technologies, 2022) 99.

[15] Other obligations include the duty to avoid conflicts; charge reasonable fees etc. The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility adopts a similar list in its formal opinions addressing the ethical considerations of remote legal practice, stating that 'virtual practice commonly implicates the key ethics rules' (1) competence, diligence and communication; (2) confidentiality; and (3) supervision: American Bar Association, Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 498 Virtual Practice* (at 10 March 2021) 1-4. See also American Bar Association, Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 495 Lawyers Working Remotely* (at 16 December 2020); Laurie Webb Daniel and Philip George, 'Twin ABA Ethics Opinions Cover What You Need to Know About Remotely Practicing Law', *American Bar Association* (online, 15 May 2021) <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/twin-aba-ethics-opinions-cover-what-you-need-to-know-about-remotely-practicing-law/>.

[16] Maureen A Weston, 'Lawyering and Representing Organizational Clients in a Public Health Crisis' (2021) 56(2) *Gonzaga Law Review* 259, 264.

[17] Office of the Legal Services Commissioner, 'Annual Report 2020-2021' (Report, 2021) 4 <https://www.olsc.nsw.gov.au:443/Pages/lsc_publications/lsc_annualreports.aspx>. While the OLSC did implement a new streamlined online Complaints Management System (which could have contributed to the upsurge in complaints) the new system itself had teething issues and is still seeking further funding for completion.

Finally, Part III, Managing (Hybrid) Workers from Home: Online Teams and New Grads, looks at all aspects of managing a workforce that is at least partially remote. As noted, meta-analyses across many domains indicate that regardless of one's role, the knowledge that trust is reposed in you is beneficial for individuals. This then flows through to the prioritisation of collaboration and group goals,[18] and as we illustrate, several benefits for the organisation. A thread underlying the Primer is that the rise of technology, perhaps counter-intuitively, means that lawyers' "soft skills" are more important than ever before. This Part includes a number of strategies for building effective teams and supporting new graduates and junior lawyers in hybrid workplaces.

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[18] Kurt T Dirks, 'The Effects of Interpersonal Trust on Work Group Performance' (1999) 84(3) *Journal of Applied Psychology* 445 cited in Kurt T Dirks and David De Cremer, 'The Repair of Trust: Insights from Organizational Behavior and Social Psychology' in David De Cremer, Rolf Van Dick, John Keith Murnighan (eds), *Social Psychology and Organizations* (Routledge, 2010) 212, 214.

I. INTRODUCTION

'Every day, as part of our law practice, we meet and communicate with a wide range of people aiming to find the best possible way to help them and trying to develop a relationship built on trust. The problem is, trust cannot be established quickly, but it can be instantly demolished by your actions'.[19]

The Law Society's (2017) Future of Law and Innovation in the Profession ('FLIP') Report illustrated the ways in which the profession has moved online, with law practices conducting more or all of their services online (as virtual firms); offering remote working; and/or starting to use a range of technologies to undertake legal work. The COVID-19 pandemic has accelerated many of these changes, notably working from home (WFH) and the use of mobile technology and video-conferencing software apps.

But all these developments, and the events and other pressures to which they respond, represent immense change and uncertainty for the profession. Indeed, we know from our 2021 FLIP research project, The Future of Legal Service Delivery, that a central concern for law practices is how to maintain effective relationships among staff and with clients in the current (pandemic/post-pandemic) context. The pandemic has physically distanced lawyers from each other, from their clients and prospective clients, and from the courts. This has diminished or at least challenged the normal workings of trust and rapport that underpin legal practice and the relationships involved in being a lawyer. New graduates may be learning how to become lawyers via remote or hybrid working arrangements, without having stepped into their firms, and without the same sorts of close-contact induction processes and supervision that their seniors experienced. Indeed, firms are faced with a large proportion of employees wishing to continue to work from home, with smaller numbers keen to return to an office or shared work context. It appears that, in the move towards forms of virtual legal practice, we need new means of creating and sustaining reliable and effective work relationships, despite being without or with fewer of the normal mechanisms and perks of face-to-face (FtF) communication, interaction, socialisation, and oversight. Good, trusting relationships are seen by some in the profession as more necessary than ever before.[20]

Indeed, it has been argued that society is suffering from a 'trust deficit', caused by not just the pandemic, but many events over a long period of time, such that 'trust in business, government and some public institutions is at historic lows'.[21] Writing on today's digital economies, Professor Philippa Ryan notes that 'perceptions of the global financial crises, data breaches, disinformation and the manipulation of political sentiment have combined to create a modern trust crisis'.[22] Beaton identifies a mounting wall of mistrust by the public of experts, including professionals and related institutions.[23] In the Governance Institute of Australia's 2021 Ethics Index Report, lawyers were scored in the bottom 10 occupations, being given a trust score of zero.[24] Adding uncertainty to this context, COVID-19 has brought immense change both externally and internally to the professions.[25] Especially salient for law is the resounding shift away from traditional office work and settling into the equilibrium of a hybrid or mixed-mode model. Law firms today find themselves entering a 'highly experimental' phase, navigating a post-pandemic hybrid

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[19]   'The Essential Importance of Trust Between Lawyers and Clients: 5 Simple Strategies to Build and Maintain Trust in the Digital Age', *Consumer Law Magzazine* (online, 5 November 2019) <http://consumerlawmagazine.com/importance-trust-lawyers-clients/>.

[20]   Lawyers on Demand, *Trust: An Antidote to Uncertainty – A LOD Report into the State of In-house Legal teams Around the World in 2021* (Report, 2021) <https://www.lodlaw.com/au/our-thinking/reports/global-survey-report-2021/>.

[21]   Reinhard Bachmann, Nicole Gillespie and Richard Priem, 'Repairing Trust in Organizations and Institutions: Toward a Conceptual Framework' (2015) 36(9) *Organization Studies* 1123 citing '2012 Edelman Trust Barometer', *Edelman* (Web Page, 2012) <https://www.edelman.com/trust/2012-trust-barometer>; 'Confidence in Institutions', *Gallup.com* (Web Page, 2014) <https://news.gallup.com/poll/1597/Confidence-Institutions.aspx>; 'Pubic Trust in Government', *Pew Research Center* (Web Page, 2014) <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>; and also Jared D Harris, Brian T Moriarty and Andrew C Wicks, *Public Trust in Business* (Cambridge University Press, 2014); Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000).

[22]   Philippa Ryan, Trust and *Distrust in Digital Economies* (Routledge, 2019).

[23]   Beaton (n 1) 17.

[24]   Conducted by independent global market research firm Ipsos, the index relies on an "ethical expectation deficit" (EED), measuring the gap between what society perceives to be the overall importance of ethics and what the actual level of ethical behaviour is. Compared to trusted occupations: Fire Services (85); Nurses (80); General Practitioners (71)—Lawyers (0) sit alongside untrusted occupations including: Federal Politicians (-22); Real Estate Agents (-14); and Directors of Foreign Companies Operating in Australia (-12).

[25]   Kevin M Kniffin et al, 'COVID-19 and the Workplace: Implications, Issues, and Insights for Future Research and Action' (2021) 76(1) *American Psychologist* 63.

landscape with little data on the best approach to adopt.[26] Against a background of shifting client demands, addressing these challenges will impact lawyers' career development, talent retention, and likely the client retention of their firms.

Notwithstanding, technology can in fact enhance perceived trustworthiness. For instance, law practices today are using technology to build awareness, engage clients through multiple communication channels, and then as a tool to manage client relationships. When used effectively, technology can streamline the legal experience into a smoother and more efficient process, enhancing trust in the relationship. Equally however, when technology is not used correctly or effectively, or where risks are not properly mitigated, the opposite effect is possible and trust may be frustrated.

This established and emerging research indicates the focus of attention for this year's FLIP topic and this Primer, which looks at trust and relationships in the online context, particularly issues related to clients and employees. The Primer comprises two main sections: first, securing clients, client care and client duties; and second, managing teams; new graduates and junior lawyers.

A. THE CONTEXT: TRUST AND RELATIONSHIP

Why are trust and good relationships important? Trust is indispensable – strongly associated with successful organisations, effective institutions, and stable societies. Trust allows people to live and work together, safely, and effectively. It allows us to be vulnerable with one another; to share purposes and projects. Trust is central to the definition of a profession. A profession is an occupation that professes to have special knowledge and skills to

use in the trusted service of important social needs and goals. Professionals act as social trustees, promising to act ethically and competently so that essential institutions can function and flourish. Professionals are workers who recognise and care about the vulnerability of the people and institutions who or that depend upon them. Clients of professionals must rely on the professionals and the systems in which those professionals operate, without fear of exploitation. In the legal context, 'clients often place their confidence in solicitors during times when they are at their most vulnerable; assuming they will protect their interests, money and assets and personal, often sensitive, information.'[27]

Trust is seen as the 'answer' to how this 'problem' of vulnerability can be addressed. Clients can rely on a professional having certain qualifications (as conditions of practice) and possibly further credentials – but most clients act on reputation and perceived trustworthiness. Trust accelerates and facilitates the exchanges between professionals and clients and adds to client satisfaction.[28]

In high trust work environments, leaders are committed to modelling trustworthiness, people and teams are better able to adapt to change as needed, and relationships are characterised by 'goodwill and reciprocity'.[27] A related literature on work relationships shows how our relationships with others, including in the workplace, 'function to provide such important psychological functions as guidance, alliance, attachment, and opportunities for nurturance to help individuals when they are faced with various life challenges.'[30] Our relationships with colleagues support our health, and help develop our identities and life meaning.[31] Work accounts for a massive portion of our adult life experiences and conscious attention – so it is important to consider the interpersonal relationships within them, including those that function online.

[26] Andrew Maloney, '"A Multiyear Reckoning": Hybrid Work Is a Challenge That Isn't Going Anywhere', The American Lawyer (online, 14 March 2022) <https://www.law.com/americanlawyer/2022/03/14/a-multi-year-reckoning-hybrid-work-is-a-challenge-that-isnt-going-anywhere/>. See Danny Gilbert, managing partner of Gilbert + Tobin's comments: 'The firm is still working on how it will create that environment [where people come into the office]': Christopher Niesche, '"It Has To Be Overwhelmingly a Carrot—Not a Stick": Gilbert + Tobin Chief on How to Get Staff Back to the Office', Law.com International (online, 19 January 2022) <https://www.law.com/international-edition/2022/01/19/it-has-to-be-overwhelmingly-a-carrot-not-a-stick-gilbert-tobin-chief-on-how-to-get-staff-back-to-the-office/>.

[27] 'Public Trust and Confidence', England and Wales Solicitors Regulatory Authority (Web Page, 25 November 2019) <https://www.sra.org.uk/solicitors/guidance/public-trust-confidence/>.

[28] Pirson, Martin and Parmar, 'Public Trust in Business and Its Determinants' (n 3) 133.

[29] Catherine Hungerford and Michell Cleary, '"High Trust" and "Low Trust" Workplace Settings: Implications for Our Mental Health and Well-being' (2021) 42(5) Issues in Mental Health Nursing 506 ('High Trust and Low Trust'), citing Morela Hernandez, Chris Long and Sim Sitkin, 'Cultivating Follower Trust: Are All Leader Behaviors Equally Influential?' (2014) 35 Organization Studies 1867 and Catherine Hungerford, Jan Sayers and Michelle Cleary, 'Facilitating Goodwill in Workplace Relationships: The Benefits and Challenges' (2016) 37(7) Issues in Mental Health Nursing 530.

[30] David L Blustein, 'The Interface of Work and Relationships: Critical Knowledge for 21st Century Psychology' (2001) 29(2) The Counseling Psychologist 179, 182, citing Carolyn E Cutrona et al, 'Perceived Parental Social Support and Academic Achievement: An Attachment Theory Perspective.' (1994) 66(2) Journal of Personality and Social Psychology 369.

[31] Ruthellen Josselson, The Space between Us: Exploring the Dimensions of Human Relationships (Sage Publications, 1996) 3.

In low trust relationships or environments, there is typically more uncertainty, cynicism, dread and fear,[32] exhaustion and illness, withdrawn or limited energy and commitment,[33] increased efforts to control (whether that be through greater regulation or performance review measures), poor communication (conflict, avoidance, lack of transparency, overly critical feedback etc), and limited, to no, responsibility.[34] In professional contexts, where the stakes are usually high for the client, lack of trust can have serious consequences. For example, a client might avoid a difficult conversation with, or even mislead, their lawyer; or a junior might not approach their senior about a costly mistake.

Recently, Rogers (one of the authors of the primer) identified five 'core skills' categories lawyers need to successfully lead and navigate their professional relationships in a trustworthy manner.[35] We discuss these, and the implications for online relationships, in Part II.

B. WHAT IS TRUST?

While we might all agree that trust is important (not to mention mandatorily imposed on lawyers in many areas), views on exactly what trust is, vary. As Nissenbaum explains: 'Trust is an extraordinarily rich concept covering a variety of relationships, conjoining a variety of objects. One can trust (or distrust) persons, institutions, governments, information, deities, physical things, systems, and more'.[36] Trust in institutions such as courts may be connected to other salient issues such as trust in government institutions, degree of cynicism towards the law, and sense of one's obligation to obey the law.[37] In this Primer, our focus is primarily on interpersonal trust, and we examine the research on 'trustor' (the person who

places trust) and 'trustee' (the person in whom trust is placed) attributes found in the literature, such as perceived benevolence, integrity, and ability.[38]

Views diverge when it comes to how to create, develop, and sustain trust over time. When we add the distance —spatial, temporal, and psychological—of online work, and the challenges of virtual communication, these complexities multiply. Nonetheless, we can conceive of trust as necessitating a relationship between a trustor and a trustee. A key definition in the literature was devised by professors of organisational management, Mayer, Davis and Schoorman, who synthesised diverse perspectives on trust across disciplines into a single model of organisational trust:[39]

> *Trust is the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control that party.*

These ideas correspond to the fiduciary relationship where the client must rely on the professional to promote the client's best interests without the expertise or oversight to fully assess whether this is taking place. Trust is supported or enforced through the law taking a strict view of the fiduciary obligations and providing a range of remedies.[40] Taken from the trustor's perspective, there are two main components of the Mayer, Davis and Schoorman definition (see Figure 1):

- positive expectations (i.e., cognitive driven); and

- willingness to be vulnerable (i.e., affective/attitude driven).[41]

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[32] Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge University Press, 1999); Slavica Kodish, 'Organizational Trust Online: A Discursive Perspective' (2017) 17(4) *Journal of Organizational Psychology* 36; Peter Hwang and Willem P Burgers, 'Properties of Trust: An Analytical View.' (1997) 69(1) *Organizational Behavior and Human Decision Processes* 67.

[33] Annette M Bourgault, 'Take Control of Your Work Environment and Personal Well-Being' (2019) 39(6) *Critical Care Nurse* 10; Ryan M Nicholson, Michael P Leiter and Heather KS Laschinger, 'Predicting Cynicism as a Function of Trust and Civility: A Longitudinal Analysis' (2014) 22(8) *Journal of Nursing Management* 974, cited in Hungerford and Cleary, 'High Trust and Low Trust' (n 29).

[34] Pirson, Martin and Parmar, 'Public Trust in Business and Its Determinants' (n 3).

[35] Justine Rogers, 'Teaching Soft Skills including Online: A Review and Framework' (2021) 30(1) *Legal Education Review* 1 ('Teaching Soft Skills'), drawing on the research of: Susan Swaim Daicoff, 'Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law' (2012) 52(3) *Santa Clara Law Review* 795 ('Expanding a Lawyer's Toolkit'); Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press, 2017).

[36] Helen Nissenbaum, 'Securing Trust Online: Wisdom or Oxymoron?' (2001) 81(3) *Boston University Law Review* 635.

[37] Joseph Hamm et al, 'Deconstructing Public Confidence in State Courts' [2013] *Publications of the University of Nebraska Public Policy Center*, 28.

[38] Roger C Mayer, James H Davis and F David Schoorman, 'An Integrative Model of Organizational Trust' (1995) 20(3) *The Academy of Management Review* 709, 709.

[39] Ibid 712. See also an update to their model in 2007: F David Schoorman, Roger C Mayer and James H Davis, 'An Integrative Model of Organizational Trust: Past, Present, and Future' (2007) 32(2) *Academy of Management Review* 344.

[40] JD Heydon, Justice M J Leeming, Dr PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 2002) [7.110].

[41] Jennifer Feitosa et al, 'Measuring Team Trust: A Critical and Meta-Analytical Review' (2020) 41(5) *Journal of Organizational Behavior* 479, 480.

Cognitive-based trust is based on the available knowledge about the trustee's competence, reliability, and dependability.[42] Affective-based trust is based on emotional investments, genuine care, and concern for the welfare of partners and the belief that these sentiments are reciprocated.[43] In our context, both may be relevant though in different ways and at different times.[44] Another set of trustee attributes found in the trust literature are perceived benevolence, integrity and ability or competence (Figure 2).[45]
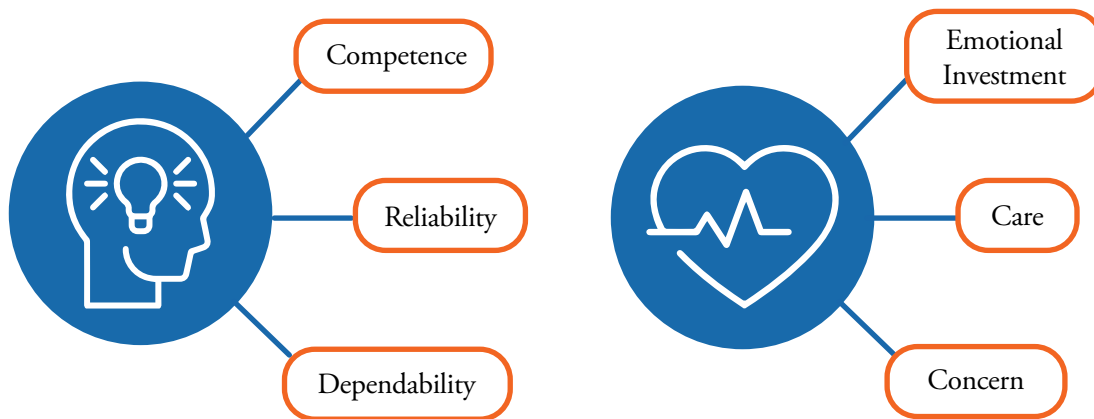

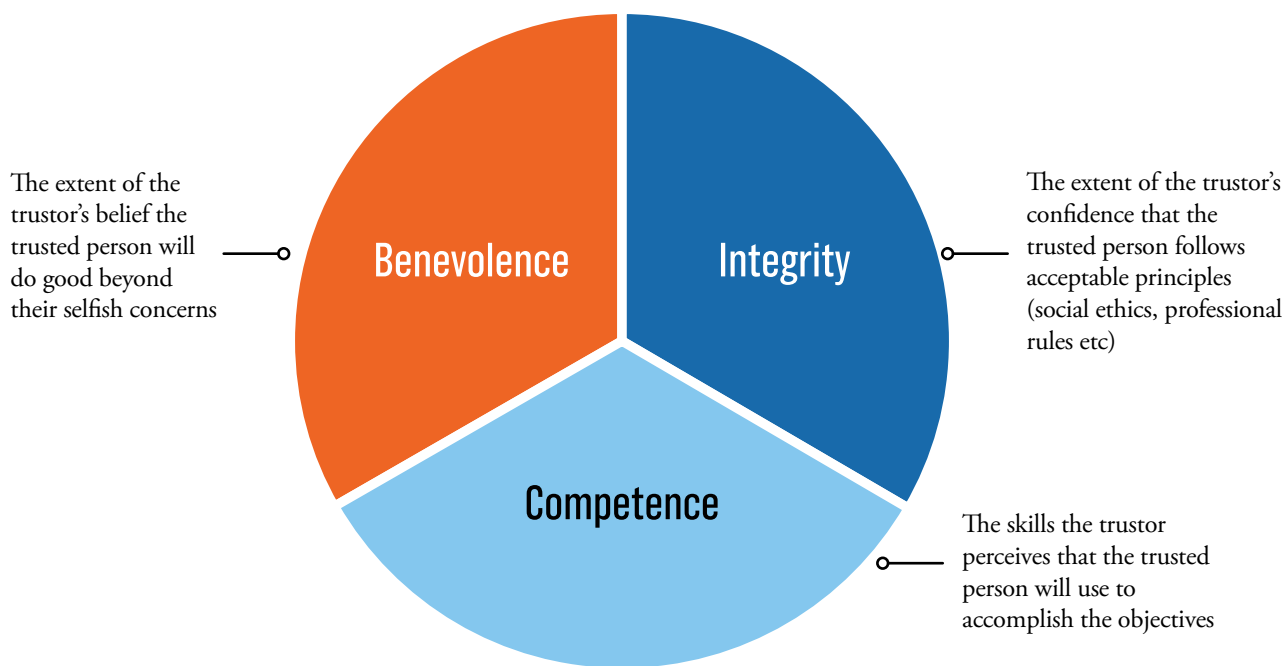
Figure 1: Cognitive-based and effective-based trust

The extent of the trustor's belief the trusted person will do good beyond their selfish concerns — Benevolence

Integrity — The extent of the trustor's confidence that the trusted person follows acceptable principles (social ethics, professional rules etc)

Competence

The skills the trustor perceives that the trusted person will use to accomplish the objectives

Figure 2: Key attributes of those we can trust from the psychological literature on trust

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[42] Niklas Luhmann, *Trust and Power* (Wiley, 1979).
[43] J David Lewis and Andrew Weigert, 'Trust as a Social Reality' (1985) 63(4) *Social Forces* 967, 971.
[44] For example, in relation to the lawyer-client relationship, in some contexts, only cognitive-based trust will be relevant; while in supervisor-graduate relationships, affective-based trust will be needed.
[45] Morton Deutsch, 'Trust and Suspicion' (1958) 2(4) *Journal of Conflict Resolution* 265; Roy J Lewicki and Barbara Benedict Bunker, 'Trust in Relationships: A Model of Development and Decline' in Barbara Benedict Bunker and Jeffrey Z Rubin (eds), *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch* (Jossey-Bass/Wiley, 1995) 133.

C. THE MOVE ONLINE AND COMMUNICATION

The pivot to remote work during the pandemic saw lawyers and their practices rely on information and technology tools to continue doing business. Despite some initial friction, in a sink or swim situation, the legal profession swiftly adapted practice and procedure to the new, remote environment, whether BigLaw[46] or sole and small practices.[47]

For example, prior to the pandemic, online courts in Australia were confined to pilot studies or theoretical or experimental situations,[48] or to certain witnesses appearing 'remotely'. The onset of pandemic-related lockdown measures in 2020 changed this completely as all manner of hearings were heard remotely.[49] Studies of the courts post-2020 give an emerging picture of the experience of online courts for litigants, lawyers, court staff and judiciary, in various jurisdictions such as England and Wales, certain states of the US, and Australia.[50] Largely, this has focused on access (in some cases improved, in others hindered), communication, procedural fairness issues, and general satisfaction with the online forum. Many of these issues may well be impacted by, and themselves impact, trust. It seems, too, that many lawyers can see the benefits of online court proceedings.[51]

Despite strong statements from some courts, others have indicated they will substantially retain the virtual format.[52] Difficulties in communication in this medium – the lack of immediacy, frustration of technical glitches and loss of the courtroom space – jostle with convenience and safety.

However, the debate in the literature about the effects of being online is not confined to online courts, but is occurring across all aspects of online legal practice. One set of studies has been labelled the 'cues-filtered-out' perspective.[53] This perspective says that nonverbal cues shape social interaction by producing information that can help form personal impressions, improve comprehension, and assess the truthfulness of communications. Conversely, being online limits nonverbal cues, creating less personal and socially emotional interactions.[54] These nonverbal signals include eye contact, facial expressions, body movement and gestures, speech patterns (pace, pitch, tone, and volume of speech), and appearance. Without FtF nonverbal information, the task of identifying emotive content, establishing rapport, and communicating emotions (or the lack of them) becomes more complicated.[55]

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46 Surveying 55 law firms across Australia, the Australian legal market recorded a 12.1% growth in profit, more than double the 5.5% growth firms were predicting in 2020: 'CommBank Legal Market Pulse: November 2021', *Commonwealth Bank of Australia* (Report, November 2021) <https://www.commbank.com.au/business/business-insights/industries/professional-services.html> ('Commbank Legal Market Pulse: November 2021').

47 In the 2021 LexisNexis Bellwether Report Series, 'Small Law in the Pandemic: The Good, the Bad, and the New', 77% of sole and small practices in the United Kingdom reported seeing COVID-19 as a chance to drive innovation and change in workplace practices: LexisNexis, *Bellwether 2021: Small Law in the Pandemic: The Good, the Bad, and the New* (Report, 2021); Jerome Doraisamy, 'Lessons for Young Sole Practitioners from COVID-19', Lawyers Weekly, (online, 11 June 2020) <https://www.lawyersweekly.com.au/sme-law/28560-lessons-for-young-sole-practitioners-from-covid-19>.

48 Eg, in the Victorian Civil and Administrative Tribunal, see: Vivi Tan, 'Online Dispute Resolution for Small Civil Claims in Victoria: A New Paradigm in Civil Justice' (2019) 24 *Deakin Law Review* 101, and the studies of the Court of the Future Network, see: David Tait et al, 'Towards a Distributed Courtroom', Court of the Future Network (Research Report, 15 July 2017) 80.

49 Michael Legg and Anthony Song, 'The Courts, the Remote Hearing and the Pandemic: From Action to Reflection' (2021) 44(1) *University of New South Wales Law Journal* 126; Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49(2) *Federal Law Review* 16; Felicity Bell et al, 'The Use of Technology (and Other Measures) to Increase Court Capacity' (2021) 8(2) *International Journal of Online Dispute Resolution* 102.

50 Mary Ryan, Lisa Harker and Sarah Rothera, 'Remote Hearings in the Family Justice System: A Rapid Consultation' (Nuffield Family Justice Observatory, 2020); Elizabeth Thornburg, 'Observing Online Courts: Lessons from the Pandemic' (2021) 54(3) *Family Law Quarterly* 181

51 Jerome Doraisamy, 'NSW Lawyers Push A-G to Retain COVID-era Court Measures', *Lawyers Weekly* (online, 16 June 2022) <https://www.lawyersweekly.com.au/wig-chamber/34660-nsw-lawyers-push-a-g-to-retain-covid-era-court-measures>.

52 Chief Justice Andrew Bell, 'Ceremony Upon the Occasion of the Swearing in of the Hon. Justice Andrew Bell as Chief Justice of New South Wales' (Speech, Banco Court, Supreme Court of New South Wales, 7 March 2022) <https://nswca.judcom.nsw.gov.au/wp-content/uploads/2017/04/Chief-Justice-Bells-swearing-in-speech.pdf> cf eg, Carmella Ben-Simon and Annette Charak, 'Interview with the Honourable Chief Justice Alstergren' [2019] (166) *Victorian Bar News* 34.

53 Mary J Culnan and M Lynne Markus, 'Information Technologies' in Frederic M Jablin, Linda L Putnam and Karlene Hahn Roberts (eds), *Handbook of Organizational Communication: An Interdisciplinary Perspective* (Sage Publications, 1987), 421; JB Walther, 'A Longitudinal Experiment on Relational Tone in Computer-Mediated and Face to Face Interaction' in *Proceedings of the Twenty-Fifth Hawaii International Conference on System Sciences* (IEEE Computer Society Press, 1992) 220.

54 Joseph Walther and Judee Burgoon, 'Relational Communication in Computer-Mediated Interaction' (1992) 19 *Human Communication Research* 50, 53; Lee Sproull and Sara Kiesler, 'Reducing Social Context Cues: Electronic Mail in Organizational Communication' (1986) 32(11) *Management Science* 1492.

55 Walther and Burgoon (n 54) 53.

However, the original cues-filtered out research was focused on text-based computer communications, rather than video conferencing.[56]

Moreover, this research has been challenged by studies demonstrating that nonverbal cues and social or emotional information are still conveyed online, albeit at a slower rate than FtF. These theorists hypothesize that the key difference 'is not a matter of medium capability, but a matter of the rate at which the medium can transmit the needed information'.[57] Even with massive technological improvements since this research, things have not changed so much that being online is entirely straightforward. Recently, Chief Justice Allsop reflected on how technology issues can generate mistrust in online matters, and the potential impact for disadvantage to court participants, saying:[58]

> *A lack of internet connection or stable internet connection, the unfamiliarity of on-line videoconferencing platforms and/or a fear or mistrust of technology. In the Federal Court, the unrepresented migration litigant, for instance, was extremely difficult to cater for.*

The impact of technology glitches, for example, has been shown to be considerable. Poor-quality audio has been shown to have significant impacts on the listeners' ratings of witness credibility, reliability, and trustworthiness; and the weight given to witness evidence as a result.[59] Bild et al have explained:

> *A large body of research in social and cognitive psychology shows that processing the content of a message is accompanied by subjective experiences of ease or difficulty, which can shape how much people trust the communicator,*

> *agree with the message, remember its details, and rely on it when making a decision.[60]*

Likewise, in an examination of online court proceedings, Bandes and Feigenson identified numerous reasons why they would expect empathy to be impacted negatively by the online setting. They explain that

> *empathy is subject to the similarity bias: Evaluators are more likely to empathize with subjects whom they regard as similar to themselves. This may be because perceived similarity with the other person facilitates the perspective-taking which often precedes empathy – it's easier to adopt the other's perspective if the other's situation seems familiar – and/or because observers feel more confident about the congruence between their own affective state and what they presume a similar other person is feeling.[61]*

They conclude that the absence of shared physical space will likely lead to diminished feelings of empathy among participants, in part because of perceptions of less similarity and greater physical distance.

These themes relate also to the experiences of employees online, including grads and teams. Research on remote work has suggested that a lack of close contact between colleagues can inhibit the formation of trust and connection.[62] Delivering critical feedback can also be more difficult online.[63] Feedback is especially important for newcomers, and loss of feedback opportunities can lead to weaker acculturation, lower commitment to the organisation and higher turnover rates.[64] These challenges may be further exacerbated by the phenomena of 'zoom-fatigue' – where the use of videoconferencing software has appeared to exhaust people.[65] Psychologists have

[56] Sproull and Kiesler (n 54).

[57] Robert Bastress and Joseph Harbaugh, 'Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating' (2003) 10 *Clinical Law Review* 115, 129.

[58] Allsop (n 7).

[59] Elena Bild et al, 'Sound and Credibility in the Virtual Court: Low Audio Quality Leads to Less Favourable Evaluations of Witnesses and Lower Weighting of Evidence', *Law & Human Behavior* (forthcoming).

[60] Ibid 5; for reviews, see Adam L Alter and Daniel M Oppenheimer, 'Uniting the Tribes of Fluency to Form a Metacognitive Nation' (2009) 13(3) *Personality and Social Psychology Review* 219; Norbert Schwarz, 'Metacognition' in Mario Mikulincer et al (eds), *APA Handbook of Personality and Social Psychology, Volume 1: Attitudes and Social Cognition* (American Psychological Association, 2015), 203; Norbert Schwarz et al, 'Metacognitive Experiences as Information: Processing Fluency in Consumer Judgment and Decision Making' (2021) 4(1) *Consumer Psychology Review* 4.

[61] Susan A Bandes and Neal Feigenson, 'Empathy and Remote Legal Proceedings' (2021) 51(1) *Southwestern Law Review (Symposium on Courts in the COVID-19 Era)* (forthcoming).

[62] Joseph Grenny and David Maxfield, 'A Study of 1,100 Employees Found That Remote Workers Feel Shunned and Left Out', *Harvard Business Review* (online, 2 November 2017) <https://hbr.org/2017/11/a-study-of-1100-employees-found-that-remote-workers-feel-shunned-and-left-out>.

[63] Therese Huston, 'Giving Critical Feedback Is Even Harder Remotely', *Harvard Business Review* (online, 26 January 2021) <https://hbr.org/2021/01/giving-critical-feedback-is-even-harder-remotely>.

[64] Christian Vandenberghe et al, 'A Dynamic Model of the Effects of Feedback-Seeking Behavior and Organizational Commitment on Newcomer Turnover' (2021) 47(2) *Journal of Management* 519.

[65] Jeremy N Bailenson, 'Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue' (2021) 2(1) *Technology, Mind, and Behavior* 1.

pointed to the subconscious pressure of a video call, where participants are more self-aware of their own appearance.[66] Two researchers explain

> [H]ow people understand and adapt to facial expressions, gaze patterns, postures, and body movements often happen outside of awareness, including through nonconscious mimicry (also known as the "chameleon effect"), that is, the automatic tendency to imitate the behavior of others. Nonconscious mimicry also has many other prosocial consequences between interaction participants, including the increase in accuracy of emotion perception, in displays of helpful behaviors, and in feelings of liking, empathy, and trust.[67]

Indeed, being online can challenge our relationships, wellbeing, and career progression. For instance, a study of Microsoft employees during the pandemic found that the development of new networks was stunted, while existing networks were strengthened. In other words, people were engaging more with those with whom they already had a connection and fewer new connections were being made, leading to increased 'siloing'.[68] This is significant, including because client referrals and 'backers' for promotion often come from one's network. Learning is relational and so being cut off reduces opportunities to learn new perspectives

and skills. But 'siloing' is also significant given the research shows that the prevalence of loneliness – a 'psychologically painful emotion' – was already high in modern society, pre-pandemic.[69] Workplace loneliness has been shown to have strong negative relationships to staff commitment, affiliative behaviours and performance.[70] This is perhaps not surprising since connections with others are key to employees' motivation and satisfaction.[71] Where people are able to interact with others at work, online communication also then increases the risk of miscommunication and misunderstandings. As we explore later in this Primer, research also shows that virtual teamwork, for example, tends to lack the richness of communication available to FtF teams.[72] In such an environment, well-recognised problems such as coordination and conflict may be exacerbated.[73] This conflict and miscommunication, made more likely by being online, can in turn contribute to and compound existing loneliness.[74]

These are some of the many changes entailed by the move online, changes that need to be considered and addressed by lawyers, firms, and the legal profession. We now turn to our first main section, looking at the relationship with the client in an online or hybrid context.

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[66] Kristen M Shockley et al, 'The Fatiguing Effects of Camera Use in Virtual Meetings: A Within-Person Field Experiment' (2021) 106(8) *Journal of Applied Psychology* 1137.

[67] Vincent Denault and Miles L Patterson, 'Justice and Nonverbal Communication in a Post-pandemic World- An Evidence-Based Commentary and Cautionary Statement for Lawyers and Judges' (2021) 45 *Journal of Nonverbal Behavior* 1, 5 citing M L Patterson, 'A Systems Model Of Dyadic Nonverbal Interaction' 43 *Journal of Nonverbal Behavior* 111; T L Chartand and J A Bargh, 'The Chameleon Effect: The Perception-Behavior Link And Social Interaction' (1999) 76(6) *Journal of Personality and Social Psychology* 893; Ursula Hess and Agneta Fischer, 'Emotional Mimicry: Why and When We Mimic Emotions' (2014) 8(2) Social and Personality Psychology Compass 45, T L Chartrand, J L Larkin, 'The Antecedents And Consequences Of Human Behavioral Mimicry' (2013) 64 *Annual Review of Psychology* 285.

[68] Longqi Yang et al, 'The Effects of Remote Work on Collaboration Among Information Workers' (2022) 6(1) *Nature Human Behaviour* 43, 46-47.

[69] Vivek Murthy, 'Work and the Loneliness Epidemic', *Harvard Business Review* (2017) 3-7; John T Cacioppo and William Patrick, *Loneliness: Human Nature And The Need For Social Connection* (WW Norton & Company, 2008); Liesl M Heinrich and Eleonora Gullone, 'The Clinical Significance of Loneliness: A Literature Review' (2006) 26(6) *Clinical Psychology Review* 695.

[70] Hakan Ozcelik and Sigal Barsade, 'No Employee an Island: Workplace Loneliness and Job Performance' (2018) 61(6) *Academy of Management Journal.*

[71] Jane Dutton and Emily Heaphy, 'The Power of High Quality Connections' in Kim Cameron, Jane E Dutton and Robert Quinn (eds), *Positive Organizational Scholarship*, (Berrett-Koehler, 2003) 263.

[72] Luis L Martins, Lucy L Gilson and M Travis Maynard, 'Virtual Teams: What Do We Know and Where Do We Go from Here?' (2004) 30(6) *Journal of Management* 805.

[73] Mark Mortensen and Pamela J Hinds, 'Conflict and Shared Identity in Geographically Distributed Teams' (2001) 12(3) *International Journal of Conflict Management* 212.

[74] John T Cacioppo et al, 'Loneliness as a Specific Risk Factor for Depressive Symptoms: Cross-Sectional and Longitudinal Analyses' (2006) 21(1) *Psychology and Aging* 140.

II. TRUST AND THE CLIENT RELATIONSHIP ONLINE

Given the context outlined in the Introduction, how can lawyers develop trusting relationships with their clients online, from the client's initial point of contact to the conclusion of the matter? How can lawyers ensure that clients return to, recommend, and remunerate them? In legal services, trust is enforced by legal and ethical obligations as well as other factors, such as virtue, esteem, profit motives, and reputation. Trust requires the client be willing to be vulnerable to the actions of the lawyer, trusting that the lawyer will perform even if the client cannot monitor or control the lawyer.[75] As a reminder, the trustor (the client) is looking for, and requires, benevolence, integrity,[76] and competence from the trustee (the lawyer).[77]

Today, clients are likely to search for a lawyer or law practice online, even where they have been given a referral or word-of-mouth recommendation.[78] This means that the law practice's online presence is part of the initial phase of the client experience. Online presence needs to both convey qualities of trustworthiness (perceived trustworthiness) and, for legal and ethical reasons, be in fact trustworthy.

To some extent, what follows is informed by 'CX' (customer experience) approaches to legal practice, and the emergence of the 'client-centred law firm'.[79] The CX philosophy frames the client experience as part of the product on offer – such that 'you don't just provide a legal deliverable – you provide a legal experience.'[80] Sometimes called the client 'journey', CX is the process the client goes through when trying to achieve a particular goal with their lawyers.[81] Ultimately, all clients either want their problem solved, the fear of a missed opportunity alleviated, or the worry of a legal action dissolved.[82] For any legal practice, large or small; local or international; BigLaw or NewLaw—the CX message is the same: deliver an end-to-end positive and productive client experience, build trusted relationships, and acquire more work.

According to this approach, running a client-centred law firm is not just a business strategy—it is a mindset that puts the focus on our innate human desire to connect with others. It is important to extend this mindset to all 'touch points' (being the points of contact between lawyer and client) along the CX journey. When needs are ignored, the relationship is rendered less stable and the level of trust accorded to the lawyer by the client is diminished. However, and as distinguished from a 'client-first' approach, while a client-centred law firm does put the client at the heart of all decision making, this is not to the detriment of all other priorities of the practice. Yet the pressure to conduct work online is ongoing: as Joel Barolsky, Managing Director of Barolsky Advisors notes:

> *The biggest competition in the future is not necessarily going to come from start-ups, but the firm next door that works much more efficiently and effectively… Firms have to learn how to handle a matter through Zoom.*[84]

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[75]   Mayer, Davis and Schoorman, 'An Integrative Model of Organizational Trust' (n 38) 712. See also an update to their model in 2007: Schoorman, Mayer and Davis (n 39).

[76]   Mayer, Davis and Schoorman, 'An Integrative Model of Organizational Trust' (n 38).

[77]   Roy Lewicki and Barbara Bunker, 'Developing and Maintaining Trust in Working Relations' in Roderick Kramer and Tom Tyler (eds), *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications, 1996) 114.

[78]   Up to 57% of clients find a lawyer with an online search engine: Clio, *Legal Trends Report 2019* (Research Report, 2019). People who would use the internet to find and retain a lawyer grew from 7% in 2005 to 38% in 2014: Minn Eagan, 'Internet Is Now the Most Popular Way to Find and Research a Lawyer, Says FindLaw Survey', *Thomson Reuters* (Web Page, 17 April 2014) <https://www.thomsonreuters.com/en/press-releases/2014/internet-lawyer-search-survey.html>.

[79]   Jack Newton, *The Client-Centered Law Firm: How to Succeed in an Experience-Driven World* (Blue Check Publishing, 2020).

[80]   Ibid 77.

[81]   Newton (n 79); Shay Namdarin, 'Mapping The Client Journey At Your Law Firm To Design More Memorable Moments' *New Law Academy* (Blog Post, 2021) <https://www.newlawacademy.com/blog/mapping-the-client-journey-at-your-law-firm-to-design-more-memorable-moments>; Teresa Matich, 'How to Improve the Client Journey at Your Law Firm', *Clio* (Blog Post, 9 May 2018) <https://www.clio.com/blog/client-journey-law-firms/>; Hannele Korhonen, 'Customer Journey Map for Customer-Centric Lawyers', *Lawyers Design School* (Web Page, 14 May 2021) <https://lawyersdesignschool.com/customer-journey-map-for-customer-centric-lawyers/>.

[82]   Jordan Furlong, *Law Is a Buyer's Market: Building A Client-First Law Firm* (Law21 Press, 2017) 131-132.

[83]   Newton (n 79).

[84]   Macquarie, Law 2024: *The Future of Legal Businesses* (Report, 2021) 8.

We now look at three aspects of the client relationship – and experience – in an online context: securing the client; managing the relationship; and retaining the client, as represented in Figure 3.

Securing Clients Online: Acquisition

- Client Identification
- Branding (website, social media)
- Initial consultation (first meeting, expectation management)
- Professional ethics/liabilitiy

Client Relationships Online: Matter Management

- The interview, advice, costs disclosure, negotiation
- Client relationship management, communication, reporting/updating
- Professional ethics/liability

Client Relationships Online: Retention and Feedback

- Feedback and reflection
- Data analytics
- Sustaining relationship and goodwill (reminders, newsletters)
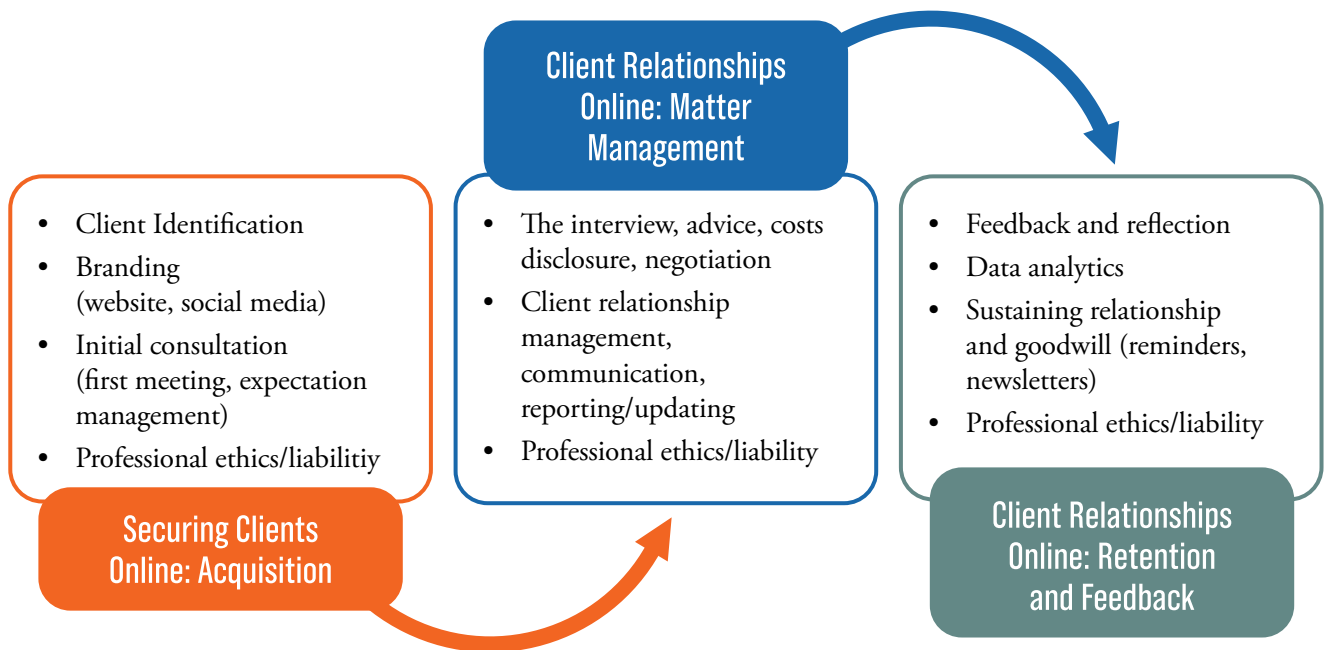- Professional ethics/liability

Figure 3: Trust and the Client Relationship Online

SECURING CLIENTS ONLINE: ACQUISITION

In today's competitive legal market, distinguishing the firm is ever more important as the legal market grows and becomes increasingly accessible to clients. Deemed a 'buyer's market',[85] clients now have access to a full range of domestic and international, low-cost providers, generalists, and specialists. This is even more so post-pandemic, as according to the Clio Legal Trends Report 2021, consumers open to the idea of working remotely with a lawyer rose from only 23% in 2018 to 79% in 2021.[86] Having a client-driven digital marketing strategy underpinned by a strong foundation of trust is now imperative.

At the same time, the baseline expectation for lawyers is that they can complete work competently. Differentiation in the actual legal deliverables as between lawyers may be insignificant.[87] In today's environment, characterised by the 'more-for-less' challenge of client demand, simply doing quality work may no longer be enough to differentiate oneself or one's firm from competitors.[88]

Meanwhile, in most firms, certain lawyers are more naturally adept at developing business ('rainmaking') than others.[89] While their skills are highly valued in law firms, some view this type of marketing as not fitting with traditional professional ideals.[90] Further, though rainmakers are great at attracting new work, their style may not be as desired or needed by clients mid-way through a matter; at this point, client priorities may shift to completing the work efficiently and to a high standard.[91] Some firms therefore emphasise their "bench strength" rather than any one individual.[92]

Though the pandemic brought attention to doing business online, acquiring clients online is not new for lawyers.[93] Activities such as business development, marketing, and 'client relationship management' (coordinating the firm's interactions with clients) have become a central focus for many types of law practice such that lawyers or staff possessing these skills are now in high demand.[94]

Business development involves pursuing opportunities by cultivating relationships; identifying new markets; and generating long-term value by conscientiously servicing clients.[95] **Marketing** covers the broader communication and 'interface' with clients, intending to enhance market reputation.[96] An example illustrates the difference. In the case of a legal newsletter, marketing involves a general communication to show upcoming legal developments; while business development involves a customised communication for selected clients fitting their unique situation.[97]

Broadly speaking, the steps in a legal marketing process involves:

A. Client Identification – understanding the marketplace and identifying the client or type of client;

B. Strategy – designing a client-driven marketing strategy to meet their needs; and

C. Consultation and Conversion – acquiring and converting clients.

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[85] Furlong (n 82).

[86] Clio, *Legal Trends Report 2018 (*Research Report, 2018) <https://www.clio.com/resources/legal-trends/2018-report/> ('*Legal Trends Report 2018*'); Clio, *Legal Trends Report 2021* (Research Report, 2021) <https://clio.drift.click/ltr-2021> ('*Legal Trends Report 2021*').

[87] Newton (n 79) 45.

[88] The 'more-for-less' challenge was one of three drivers of change (others being liberalisation and information technology) foreseen by Richard Susskind in his seminal book: Richard E Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017) 3.

[89] Tom Bird, 'How Do You Teach Lawyers to "Do" Business Development?' in Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020); Jane Fenton, Anna Grutzner and Brian Kogler, *The Rain Dance: A Marketing Book for Lawyers* (Fenton Communications, 1996) 2.

[90] Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35(1) *Sydney Law Review* 27, 36.

[91] Bird (n 89).

[92] See, eg, '4 Easy Ways to Develop Bench Strength', Revelagroup, (Blog Post, 30 January 2020) <https://www.revelagroup.com/blog/easy-develop-bench-strength>.

[93] See MR Ken Matejka, *The Lawyer's Ultimate Guide to Online Leads: Getting More Clients from the Web Into Your Law Practice, Step-By-Step* (Cartwright Publishing, Paperback, 2015); Troy Waugh, *101 Marketing Strategies for Accounting, Law, Consulting, and Professional Services Firms* (Wiley, 1st ed, 2004); Jim Hawkins and Renee Knake, 'The Behavioral Economics of Lawyer Advertising: An Empirical Assessment' (2019) 2019(3) *University of Illinois Law Review* 1005, 1018; Gregory Siskind & Deborah McMurray, *The Lawyer's Guide to Marketing on the Internet* (American Bar Association, 4th ed, 2017) xiii.

[94] 'Commbank Legal Market Pulse: November 2021' (n 46) 12.

[95] Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020). Revell derives this definition by reference to the Oxford Dictionary and Wikipedia.

[96] Thorsten Zulauf, 'Making the Sale, Clinching the Deal – the Case for a Business Development Team' in Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020).

[97] Ibid.

When they are based on the real values and capabilities of the firm, these processes all build trust, and lead to the fourth and most important outcome – satisfying, potentially ongoing client relationships.

A. CLIENT IDENTIFICATION

The internet has changed the marketing of law firms, and in the process legal practices have become publicly accessible and transparent instead of exclusive and mostly hidden.[98] Marketing processes have evolved too, from mass-marketing to building direct and deeper relationships with carefully selected groups.[99] In marketing terms, defining the target audience is similar to defining a 'persona' – or categorising a consumer based on factors such as demographics, age, location, psychographics (meaning attitudes and aspirations), values and beliefs. Where the target clients are organisations, a 'client map', a document charting the structure of the client's organisation, key decision makers and stakeholders, may also be helpful here in pinpointing where trust is situated and which relationships should be the focus of attention.[100]

To identify their target or desired clients, law practices should have a clear view of where they themselves fit in the market, the services they can offer, and to which type of clients. This activity will impact their ability to generate trust with their clients. For example, firms may serve a high-volume market with lower margins or a low-volume market with higher margins. The former is typically associated with a more generalist practice, while the latter requires technical qualities and social capital (an established client-base and referral network). This step will also be influenced by practice size. Sole practitioners are more limited by time constraints, having to juggle the tasks of building new client relationships,

increasing market reputation, and developing the practice's offering – all while servicing existing clients. However, being a smaller, local practice typically means that a closer relationship with higher degrees of trust is easier to build. By comparison, for larger firms, where multiple different lawyers or rotations may be servicing a client simultaneously, it is more important to focus on building perceived trustworthiness – based, of course, on actual trustworthiness – through the firm's brand, as well as defining the scope of which markets and practice areas on which to focus expertise. The higher the level of trust between client and lawyer/partner (meaning, the extent to which the features of benevolence, integrity and competence are present) and the more robust the relationship, the less price matters and the greater the barriers for competitors.[101] Loyalty can prevent clients from moving to competitors.

B. STRATEGY

An overall marketing strategy involves generating awareness, building a brand/profile, identifying opportunities, and then executing activities to achieve a goal, profit or other objective.[102] For lawyers, this is generally achieved by attracting clients, building trusted relationships with them, and then acquiring more work through referrals. This involves both understanding the basics (know what the firm does, and is doing on a day-to-day basis) and also the big picture (vision for what type of business is the goal).[103] Perceived trustworthiness and being recommended by others remain the most effective forms of advertising, both generally for business and for lawyers too.[104]

The relevance of the internet to trust is that it has substantially increased the ease with which consumers can verify such word-of-mouth recommendations. Marketing

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[98] Law Society of Western Australia, *Future of the Legal Profession* (Research Report, 2015) 10 <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017DEC12-Law-Society-Future-of-the-Legal-Profession.pdf>.

[99] Gary Armstrong et al, *Principles of Marketing* (Pearson Education Australia, 7th ed, 2018) 16.

[100] Katie Cramond and Julia Randell-Khan, 'Business Development - the Nuts and Bolts' in Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020) [2.4].

[101] Zulauf (n 96).

[102] William J Stanton, *Fundamentals of Marketing,* (McGraw-Hill College, 7th ed, 1984) 7.

[103] Stephen Revell, 'The 10 Fundamental Elements of Business Development' in Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020).

[104] Pre-COVID, trust in traditional offline ad formats was still strong – especially among Millennials. See Nielsen, 'Recommendations From Friends Remain Most Credible Form of Advertising Among Consumers; Branded Websites Are the Second-Highest-Rated Form' (Web Page, September 2015) <https://www.nielsen.com/us/en/press-releases/2015/recommendations-from-friends-remain-most-credible-form-of-advertising>. The 2012 Legal Australia-Wide Survey of 20,716 respondents (aged 15 years old or over, contacted using random digit dialling) found that, in three-quarters of cases, respondents used their own personal resources or network to source a 'main adviser' for a legal dispute (including both legal advisers i.e., lawyers, court services, Legal Aid; and non-legal advisers i.e., government advisers, police, health or welfare advisers and financial advisers). Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012) 120–121. Similarly, in the US, Clio's annual Legal Trends Report (surveying tens of thousands of legal professionals) found in 2017 that 62% of people get a referral from friends or family compared to 37% from using an online search engine: Clio, *Legal Trends Report 2017* (Research Report, 2017) 16 <https://www.clio.com/resources/legal-trends/2017-report/> ('*Legal Trends Report 2017*').

literature calls this 'electronic word of mouth' or 'e-WOM' – a term covering all online statements that consumers make about companies, products, and services.[105] These statements provide the 'social proof' of a company's or professional's trustworthiness. Social proof is a psychological phenomenon,[106] commonly accounted for and used in digital marketing, whereby people seek out the reviews and recommendations of others before making decisions, including purchasing.[107] Social proof for lawyers and law firms includes these testimonials and reviews made by clients and industry peers. It is also generated by an individual's and/or organisation's social media profile and website.[108] We now look at social media and websites – the two most salient sources of social proof that a law practice itself can shape, and describe how firms are using them to improve their perceived trustworthiness online

Websites

Websites are one of the first opportunities to establish trust with a prospective client. It provides the most accessible and visible means of communicating essential information such as firm values, expertise, credentials, and contact information.[109] Content Pilot, a digital branding strategy firm, analysed the websites of the top 50 global law firms (by revenue) using a framework of 10 'Foundational Best Practices' (Table 1).[110] Notably, the average across all firms rose from 68.7 or 'fair' in the 2016 study to 76.2 or

1	**Communicating Your Message**	The firm's 'Message' is conveyed in a way that will resonate with clients
2	**Design**	Having a consistent look and feel (logos, web design, colour choices) with mobile-compatibility
3	**Navigation**	Ensuring visitors can find all relevant information and site features
4	**Professional Biographies**	Detailed experience is listed, current photographs, social media links and professional personality comes through
5	**Content**	All elements of website, such as graphic images, texts, news, articles, careers pages are relevant and engaging[112]
6	**Interactivity, Engagement + Social Outreach**	Interactions, share functionality, and access to additional content including multimedia, blogs, social media, alumni portals, social responsibility
7	**Site Search**	Good search functionality, results are intuitive and resources easy to find
8	**Site Optimization + Online Awareness (SEO)**	Site is optimised for search engines – website is high on the organic (or natural) search engine results page for specific searches by users
9	**Mobility**	The website is optimized for smart phones, so brand integrity and user experience are maintained
10	**Site Hygiene + Usability**	Site is secure, accessible and functions on latest browsers, without error pages, and with correct spelling/grammar

Table 1: Top 10 Best Practices for Law Firm Websites

[105] Jens Dammann, 'Electronic Word of Mouth and Consumer Protection: A Legal and Economic Analysis' (2020) 94(3) *Southern California Law Review* 423; Ryan (n 22) 63–64.

[106] Robert B Cialdini, *Influence: The Psychology of Persuasion, Revised Edition* (Harper Business, 2006).

[107] 'Social Proof: How to Use Psychology in Digital Marketing', *Sprout Social* (Blog Post, 24 May 2021) <https://sproutsocial.com/insights/social-proof/>.

[108] See Jeff Lantz, 'Build an Integrated Marketing Platform Using Your Website, Social Media, and Online Reviews' (2021) 38(5) *GPSolo* 43.

[109] Gregory H Siskind, Deborah McMurray and Richard P Klau, *The Lawyer's Guide to Marketing on the Internet* (American Bar Association, 2007) 30.

[110] Content Pilot, *How Do They Measure Up? 2020 Global 50 Websites: Ten Foundational Best Practices* (Whitepaper, 2020) 12. Only two of the fifty firms ranked 'excellent' (McDermott Will & Emery and Winston & Strawn), while only one Australian law firm, Herbert Smith Freehills ranked in the top 50, ranked 9th. (Note that Content Pilot use their own scoring metric, assigning numerical scores instead of using percentages).

[111] McDermott Will & Emery (86.8) and Winston & Strawn (86.3) scored the highest, while the lowest scoring firm ranked fair (63.3).

[112] Siskind, McMurray and Klau (n 109) 29.

'good' in the 2020 study – signalling that firms are now actively curating and improving their websites to align with marketing industry best practice.[111]

Messaging and content

To foster trust it is important to include a web page that provides a firm's story, incorporating the firm's mission, values, and history. Clients want a lawyer and law practice they can relate to.[113] 'Proof points' are also needed – reasons and evidence for why a client should hire that lawyer or firm to handle a legal matter.[114] We have mentioned social proof from other consumers, but websites themselves can include testimonials and other forms of proof, such as their lawyers' credentials and industry awards or the firm's pro bono and social justice commitments – markers of the firm's competence, integrity, and dependability. These features are vital given potential clients might visit several law firm websites in the course of choosing their lawyer. These elements are also likely to maximise a visitor's 'dwell time' or the length of time they spend on the website. In this respect, the website content should be relevant and current, and should also align with the 'target audience' or the client base identified earlier. For small firms, where budget is concerned, design is less important than ensuring that the website provides friendly and efficient help. [115]

Chatbots

To provide quick assistance, integrating chatbots into the website may be an option. Chatbots are software that perform automated tasks, most commonly having a conversation with a human who has visited the site.[116] This can potentially build trust through interactivity and generating an immediate response (we pick up on the importance of a speedy response time shortly). However, technology is only an enabler, not a replacement for building that initial trust. Research also shows that ultimately, many clients just 'want to deal with a person, whether it's a phone call or Zoom call' so the option to transfer to a real person should always be available.[117]

Blogs

Like many other businesses, law firms use blogs or 'blawging'[118] on their websites to establish expertise, show diligence in a given field and to promote trust in the firm's practice over its competitors.[119] Another strategy is for lawyers to enter marketing agreements with sites like Mondaq, or similar websites that provide coverage of legal analysis.[120] Generally, in exchange for supplying content, lawyers and their firms receive exposure to global audiences and build their reputation – and social proof – as a trusted advisor in the area.

Podcasts and videos

Even before COVID-19, lawyers were increasingly becoming involved in a range of legal podcasts and videos. About three quarters of the Am Law 100 (firms ranked in the top 100 by gross revenue in the US) have active 'firm podcasts' across a range of topics.[121] Even more recent, during the pandemic lawyers have been using TikTok[122] to create educational, informational or lifestyle videos. Law firms too have either used the app as a marketing tool[123] or otherwise supported their lawyers in using it.[124]

Social Media

Social media is the collective term for online communication channels that facilitate the interaction

[113] Jeffery W Lantz, *The Essential Attorney Handbook for Internet Marketing, Search Engine Optimization, and Website Development Management* (Esquire Interactive, 2009) 84–85.

[114] Despina Kartson and Tom Mariam, 'The Future of Legal Marketing', *American Bar Association Law Practice* (The Marketing Issue) (Web Page, 1 March 2022) <https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/ma22/kartson-mariam/>.

[115] Tom Puthiyamadam and José Reyes, Experience Is Everything: Here's How to Get It Right, *PricewaterhouseCoopers* (Research Report, 2018) 6 <https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/future-of-customer-experience.html>.

[116] Francine Ryan, 'Delivering Legal Services without Lawyers' in Emma Jones et al (eds), *Digital Lawyering* (Routledge, 2021) 113.

[117] Marina Nehme and Felicity Bell, *The Future of Legal Service Delivery: Sources of Innovation in the Legal Profession* (UNSW Law FLIP Stream, 2021) 34.

[118] Sarah Mui and Lee Rawles, 'ABA Journal Annual Blawg 100 2014' (2014) 100(12) *ABA Journal* 35.

[119] Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (Wolters Kluwer Law and Business, 11th ed, 2017).

[120] Robert J Ambrogi, 'Array of New Sites Range from Substance to Gimmick Legal Online' (1999) 43(2) *Res Gestae* 30, 30.

[121] Guy Alvarez, Kevin Vermeulen, and Victoria Zimmon, 'The Social Law Firm Index', *Good2BSocial* (Study, 2021) <https://cdn2.hubspot.net/hubfs/3295561/2017%20Client%20End%20of%20Year%20Reports/Social-Law-Firm-Index-19.pdf>

[122] TikTok is a social media platform launched in 2016 that hosts short-form video 'content' from 15 seconds to 10 minutes.

[123] 'Socials for Solicitors: 5 Law Firms Using Tiktok That Are Going Viral', *Boss Digital* (Blog Post, 24 January 2022) <https://boss-digital.co.uk/blog/law-firms-tiktok/>.

[124] Tiana Headley, 'Big Law's TikTok Stars Embrace Industry's New Social Media Norms', *Bloomberg* (online, 12 July 2021) <https://news.bloomberglaw.com/business-and-practice/big-laws-tiktok-stars-embrace-industrys-new-social-media-norms>.

and sharing of information. It provides a powerful platform for awareness (including among new audiences, free of the paywalls and timelines of traditional print media), networking and client acquisition.[125] In a profession where work is based on connections and reputation, social media provides an attractive, immediate and efficient way to maintain relationships without the costs (or sometimes inconvenience) of in-person interactions.[126] According to the 2020 American Bar Association Technology Report, 81% of lawyers in the US maintain a presence on at least one social media platform. Law firms are increasingly using social media as part of their marketing too. Many firms now encourage their employees to use LinkedIn and consistent firm branding to present a recognisable, 'professional' image.[127] Finally, some lawyers use social media as platforms to educate the public and generate goodwill and trust.[128]

This contributes to an increased blurring between personal and professional lives, and there have been many instances of lawyers incorporating these apps as part of their wider marketing strategy to simultaneously engage the public, generate awareness of a personal/firm brand and to promote their expertise.[129] However, as Maister et al note, in relation to building trusting relationships with clients, social media is a neutral tool, meaning it is neither 'for' nor 'against' trust-building – it simply provides a 'wider range of tools with which to create, or foil, trust.'[130] Lawyers need to distinguish between using social media as, for example, a 'vehicle to blast out the digital equivalent of highway billboards to mailing lists at zero marginal cost', and a powerful means to build sincere and trusting relationships.[131]

C. INITIAL CONSULTATION AND CONVERSION

The end goal of any client engagement is to 'convert' the website viewer/visitor into a client – so this early connection with the firm is critical. Much of this will turn on establishing a first impression of trustworthiness, including whether the website is responsive and whether the firm responds quickly to contact requests or phone calls. Responding quickly to phone calls has been found to be the most important factor for potential clients choosing a lawyer.[132] Even post-pandemic, the Clio Legal Trends Report 2021 found that when first reaching out to a law office, traditional forms of communication, whether in-person or by phone, remained top preferences among clients. This is not surprising given that clients contact lawyers when they are most vulnerable and most in need of a strong sense of trust from someone. This leads to the importance of the first greeting.

Greeting

The first step in creating a positive relationship with the client is the client 'greeting'. In this opening stage, the lawyer needs to consider the client's perspective. Facing a legal issue is new or unfamiliar territory for most people.[133] As mentioned, lawyers deal with people most often in situations of uncertainty, conflict, hostility, and/or stress. The client probably does not wish to be there and is likely to be experiencing negative feelings.[134] Even if they have seen a lawyer before, they might not have been 'socialised' into the process of interacting with a professional (lawyer) online.[135] The strategy Hyams et al suggest – using the walk from the waiting room to the office to settle nerves and engage in appropriately friendly

[125] Melissa Castan and Oyiela Litaba, 'Lawyers' Conduct and Social Media: Tips and Traps' (2012) 110 *Precedent* 26, 110; Shelley Dunstone, 'Online Social Media — Minefield or Goldmine?' (2010) 32(8) *Bulletin* 18, 18–19; Stephen Stine and Joshua Poje, 'The Good, the Bad and the Ugly of Blogging, Microblogging and Social Networking for Public Lawyers' (2009) 17(2) *The Public Lawyer* 13, 16. The US Institute of Reform noted that social media represents a potent marketing tool to monitor and recruit plaintiffs: New Media Strategies, 'The Plaintiff's Bar Goes Digital', *Institute for Legal Reform* (Report, 29 February 2012) <http://www.instituteforlegalreform. com/doc/the-plaintiffs-bar-goes-digital-O>.

[126] See Karen Salaz, Thomas Hodson and Chris J Davey, 'New Media and the Courts: The Current Status and a Look at the Future' (SSRN Scholarly Paper No 1666332, 26 August 2010) <https://papers.ssrn.com/abstract=1666332>; Kathryn Millist-Spendlove, 'Websites, Social Media and a Barrister's Practice' (2013-14) (Summer) 89 *The Journal of the NSW Bar Association* 49, 51.

[127] Simon Chester and Daniel Del Gobbo, 'Social Media Networking for Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging' (2012) *Law Practice* 38 (1).

[128] Marilyn Krawitz, 'An Examination of Social Media's Impact on the Courts in Australia' (PhD Thesis, Murdoch University, 2014) 69.

[129] See Kirrily Schwarz, 'Riding the TikTok Boom', *Law Society Journal* (online, 8 February 2022) <https://lsj.com.au/articles/riding-the-tiktok-boom/>; Lauren Ferri, 'Sydney Lawyer Raymond Zhai Offers Legal Advice on Tik Tok', *Daily Telegraph* (online, 1 March 2021) <https://www.dailytelegraph.com.au/newslocal/macarthur/sydney-lawyer-raymond-zhai-offers-legal-advice-on-tik-tok/news-story/fc-cb751af2840b35de6983f1637a7742>.

[130] Maister, Green and Galford (n 10) 86.

[131] Ibid 86–87.

[132] Clio, 'Legal Trends Report 2017' (n 104) 17 ranked responding quickly to phone calls (67%); followed by offering free consultations (64%) and offering fixed fees (47%).

[133] Newton (n 79) 89.

[134] Ross Lindsay Hyams, Susan Lathrop Campbell and Adrian Hellier Evans, *Practical Legal Skills: Developing Your Clinical Technique* (Oxford University Press, 2014) 18–19.

[135] Stuart Ekberg et al, 'Managing Clients' Expectations at the Outset of Online Cognitive Behavioural Therapy (CBT) for Depression' (2016) 19(3) *Health Expectations : An International Journal of Public Participation in Health Care and Health Policy* 557, 566.

chat[136] – is not available online. Being online might diminish the lawyer's ability to pick up on the client's feelings, and the tone of the conversation may become more transactional than FtF. Bastress and Harbaugh note how online communication can been seen as 'businesslike, depersonalized and lacking in the emotional content' of FtF communication, and that informal chat is important online to promote good working relationships.[137] At the same time though, where both lawyers and clients are working from home, lawyers may feel they can be, in partial contrast, instantly informal – and as mentioned, there is some research to show that the relational quality of online communication is often still present.[138] In other words, being online does not automatically mean cold and official. But in some contexts, 'too much' informality can be insensitive or just not suitable given the wider purpose and content of the meeting.[139]

The Pitch

From a marketing perspective, this first conversation also includes elements of a 'pitch process.'[140] This is where the lawyer explains why they should be trusted and are best placed to serve the prospective client. As Cramond and Randell-Khan note, 'the art of writing a persuasive pitch is also about thinking differently – thinking about seeing the world through the client's eyes – so that the firm shows an understanding of the client, its business and legal needs.'[141] Effective pitches seek to anticipate the problems the client faces and offer some initial and practical guidance on how the firm would solve such a problem, highlighting the firm's expertise (or competence) and track record (or reliability).

Expectation Management

Each interaction with a client should involve different forms of 'expectation management':

- about the lawyer (their expertise/scope, costs, and approach to communicating with and updating the client);

- the law practice;

- about the purpose of the meeting and how it relates to subsequent meetings;

- the client's legal options and likelihood of success; and

- the legal profession, the law, and the legal system generally.

Regarding the first point, it is important for the lawyer to convey their approach to communication. This is especially so when WFH has blurred the boundaries between home and work.[142] Zadow et al surveyed over two thousand University employees in 2020, finding that

> *being in a constant state of hyper-vigilance awaiting work notifications at home can affect metabolism and immunity, creating susceptibility to serious health problems such as infection, high blood pressure and depression...* [143]

Zadow et al's study confirmed that answering calls or responding to emails outside work hours can have serious health implications, both mental and physical.[144] The OLSC reported that 'out of hours' communications with clients can create ongoing expectations that may be

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[136] Hyams, Campbell and Evans (n 134).

[137] Bastress and Harbaugh (n 57) 129.

[138] Ibid. See also below Civility, Courtesy and Honesty, relating to lawyers duties online and the need to remain civil, courteous and honest despite the more informal medium of being online.

[139] Hyams, Campbell and Evans (n 134) 56.

[140] Zulauf (n 96).

[141] Cramond and Randell-Khan (n 100).

[142] See below The Shift to Remote Work.

[143] Amy Zadow, 'Do You Answer Emails after Work Hours?', *Law Society Journal* (online, 9 May 2022) <https://lsj.com.au/articles/do-you-answer-emails-after-work-hours/>; Amy Jane Zadow et al, 'Predicting New Major Depression Symptoms from Long Working Hours, Psychosocial Safety Climate and Work Engagement: A Population-Based Cohort Study' (2021) 11(6) *BMJ Open* 1.

[144] Amy Jane Zadow et al, 'Predicting New Major Depression Symptoms from Long Working Hours, Psychosocial Safety Climate and Work Engagement: A Population-Based Cohort Study' (2021) 11(6) *BMJ Open* 1.

unrealistic and diminish a healthy work/life balance.[145] This applies to the client too. In other words, a lawyer should not expect a client to routinely reply to emails or calls out of hours. As for the last point listed, clients may have misconceptions about their legal entitlements and the nature of the legal system and will need to be educated by the lawyer. Ultimately, many of these will need to be covered not only in the initial consultation but, if engaged, on an ongoing basis.

Costs

Studies are mixed on the importance of cost: projected cost is a significant influence on a client's choice of lawyer; however, quality of service and reputation (part of trustworthiness) have also been found to be critical.[146] In any case, costs disclosure and reasonable billing are key components of trust and fairness for clients. Indeed, they are now mandatory parts of a lawyer's legal duties and professional obligations.[147]

In the section on client engagement and matter management, below, we continue this discussion of the initial consultation and then reflect on the entire 'journey' or matter management with the client. We show how to cultivate the cognitive and affective aspects of trust – or how to provide competence and show benevolence and concern towards the client, from the start and right through. Having just mentioned the duty of cost disclosure, first we turn to more of these duties to demonstrate their centrality for trust in the online client relationship.

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[145] Office of the Legal Services Commissioner, *Annual Report 2020-2021* (n 17) 12.

[146] H Ronald Moser, David Loudon and Robert E Stevens, 'An Empirical Analysis of the Public's Attitude Toward Legal Services Advertising' (2014) 35(2) *Services Marketing Quarterly* 105, 121.

[147] *Legal Profession Uniform Law 2014* (NSW) ('LPUL') s 174(1).

SECURING CLIENTS ONLINE: PROFESSIONAL AND LEGAL DUTIES

Professionals are, or ought to be, marked out by the exercise of independent judgment, their specialist expertise and care for their clients, and a public interest commitment. These standards are articulated and enforced by the conduct and practice rules and the disciplinary and other liability regimes. On one level, these standards and rules simply transfer to the new, online context. Nonetheless, the digital realm does bring novel challenges and risks. In this section, we discuss a number of possible risks, including to the duty of competence (and specifically technological competence); misleading and deceptive conduct; confidentiality and duty of care (including cybersecurity); implied retainers; privacy; and professionalism. These represent both risks to the client, including breaches of trust, but also to the esteem in which the profession as a whole is held.

A. DUTY OF COMPETENCE

A solicitor must deliver legal services competently, diligently and as promptly as reasonably possible.[148] The client's perceptions and experiences of the lawyer's competence are key to cognitive-based trust, which is (along with affective-based trust) one of the main types of trust.[149] There are additional considerations when practising online. During the dot-com boom in the late 1990s, the concept of 'digital literacy' emerged (or 'the ability to both understand and use digitised information'),[150] which evolved into 'technological competence'; though both terms are used. Belshaw, a technologist scholar, identifies eight 'C' elements constituting technological competence, to which Jones has applied to the legal profession (Table 2).[151]

1	Cultural	Adapting the use of technology to different cultural contexts e.g., within the workplace
2	Cognitive	Fluency in navigating technologies e.g., the menus and files involved in a case management system
3	Constructive	Using technology in different ways e.g., using cloud technology to collaborate in real-time with clients
4	Communicative	Communicating in a way that demonstrates acknowledgement and use of appropriate assumptions and norms e.g., including an appropriate digital signature when using email
5	Confident	Managing self-learning and solving problems in the digital environment e.g., lawyers adapting to new technology and training
6	Creative	Doing new things to discover new solutions e.g., creating e-discovery systems which can also facilitate communication online
7	Critical	Questioning assumptions e.g., lawyer questioning how accessible new technologies are for their client base
8	Civic	Using technology to support the development of society more generally e.g., online law clinics to provide free legal advice pro-bono, especially where travel or distance is otherwise prohibitive

Table 2: The 8 Cs of Technological Competence

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[148] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) ('ASCR') r 4.1.3.
[149] Mayer, Davis and Schoorman (n 38), Luhmann (n 42).
[150] Paul Gilster, *Digital Literacy* (Wiley, 1997) 2.
[151] Emma Jones, 'Digital Lawyering Skills' in Emma Jones et al (eds), *Digital Lawyering: Technology and Legal Practice in the 21st Century* (Routledge, 2021) 344–345 ('Digital Lawyering: Technology and Legal Practice').

These attributes mirror many of the skills of the O-shaped lawyer (see Figure 9 below), for example, being open to trying new digital solutions, or using opportunities to incorporate digital technology in innovative ways. Similarly, Hunter sees digital literacy as the ability to locate internal and external information quickly, looking beyond just black letter law (cases, legislation and precedents) to using all the freely available business resources and information available today online.[152]

Regarding 'cognitive' competence, when working online, the same access to documents, files and information should be available as in the normal course of business in the office.[153] Lawyers should be adept in being able to provide access that is reliable and available even on short notice, alongside generating regular, readily accessible backups in the event of a data loss. Lawyers today also need to be able to assess whether using online technology to interview, counsel or negotiate is appropriate for each circumstance (for example where clients have poor internet connections). Technological competence may additionally include obtaining more general, technical skills such as how to set up a videoconference effectively to ensure privacy and prevent Zoom-bombing (by using strong passwords, paying for enterprise tier security, and securing recordings/transcripts), or being able to judge whether an email needs to be encrypted.

In Australia, digital literacy is increasingly seen as an essential aspect of legal practice and, as with working offline, reasonable standards of care apply. However, unlike in the US[154] and Canada[155] (or certain states/provinces within them) there has not yet been an express inclusion of technological competence as part of the legislated duty of competence.

B. PROFESSIONALISM AND MISLEADING AND DECEPTIVE CONDUCT

On one level, securing clients, online or in person, is simply a matter of business development. In an increasingly competitive market, practitioners might be tempted to over-sell their expertise[156] or otherwise present 'perfect versions of themselves' online.[157] But pursuing opportunities can morph into being or appearing unprofessional.[158] Further, lawyers need to be able to substantiate their marketing claims.

The widely reported case of Sydney-based lawyer, Dominique Grubisa, is illustrative.[159] Grubisa was sanctioned for selling online training courses, misrepresenting she held all the appropriate financial services licences, and for encouraging her students to use data from the Family Court list for improper purposes (such as to identify people in financial distress so as to buy their undervalued properties). What constitutes acceptable means of seeking out clients sits within a wider debate about the erosion of professional identity and civility in the profession.[160]

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[152] For example, being able to use Google to find business information such as market commentary, databases, and statistics. Ian Hunter, 'Digital Literacy in the Workplace: A View from the Legal Sector' (2018) 35(2) *Business Information Review* 56, 57.

[153] Raymond H Brescia, 'Ethics in Pandemics: The Lawyer for the (Crisis) Situation' (2021) 34(2) *Georgetown Journal of Legal Ethic*s 295, 316–317.

[154] American Bar Association, 'Model Rules of Professional Conduct' r 1.1, cmnt 8 (Competence) <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/>. ('lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology'). At time of writing, 40 US states have adopted the duty of technology competence: Robert Ambrogi, 'Tech Competence', *LawSites* (Web Page) <https://www.lawnext.com/tech-competence>.

[155] 'Model Code of Professional Conduct', r 3.1-2[4A]-[4B], *Federation of Law Societies of Canada* (October 2019) <https://flsc.ca/national-initiatives/model-code-of-professional-conduct/>; Ronald Davis and Bree Pierce, 'Lawyers in a Digital Age: Emergent Duty of Technological Competence', *The Lawyer's Daily* (online, 7 December 2021) <https://www.thelawyersdaily.ca/articles/32014/lawyers-in-a-digital-age-emergent-duty-of-technological-competence>. While Ontario only had guidelines on the duty, in a recent case *Worsoff v. MTCC* 1168, 2021 ONSC 6493, Justice Frederick Myers declared: 'Counsel and the court alike have a duty of technological competency' [32(g)], leaving only Prince Edward Island, British Columbia and Nunavut to elide the duty.

[156] Justine Rogers and Peter Dombkins, 'Balancing Legal Project Management with lawyers' professional obligations', 1 September 2021, *LSJ online*, (online, 1 September 2021) <https://lsj.com.au/articles/balancing-legal-project-management-with-lawyers-professional-obligations/>.

[157] Evan Shirley, 'Lawyers, Social Networking, and How to Avoid Falling into Ethical Traps' (2011) 14 *Hawaii Bar Journal* 123, 127. See discussion below at Professionalism (fit and proper conduct) in relation to Sydney-based lawyer Dominique Grubisa's misrepresentations about holding all appropriate financial services licences.

[158] Revell (n 95).

[159] '22-079MR Dominique Grubisa Receives Four-Year Ban', *Australian Securities & Investments Commission* (Media Release, 5 April 2022) <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-079mr-dominique-grubisa-receives-four-year-ban/>.

[160] Bagust (n 90) 36. For discussion in US see Justice O'Connor's dissent in Edenfield v. Fane, 507 US 761, 778 (1993) (O'Connor J, dissenting); Shapero v. Ky. Bar Ass'n, 486 US 466, 485 (1988) (O'Connor, J, dissenting): whereby a decade after *Bates* has led to 'increasingly unprofessional forms of attorney advertising to be protected speech.'

The solicitors' conduct rules stipulate that lawyers must ensure that any advertising, marketing or promotion is not false; misleading or deceptive; offensive; or prohibited by law.[161] Moreover, they must not convey a misleading or deceptive impression of specialist expertise.[162] The Australian Consumer Law (ACL) also protects consumers against misleading and deceptive conduct, including by lawyers.[163] As tools like social media increase in usage, lawyers need to ensure all statements, including posts or comments by visitors to websites or third parties abide by consumer law and the conduct and practice rules.[164]

C. IMPLIED RETAINERS AND TERMS

Lawyers should also be aware that marketing techniques such as questionnaires, chat bots or the use of social media can inadvertently create lawyer-client relationships or an implied retainer, giving rise to professional duties of care and confidentiality.[165] For example, a family friend might ask you via Facebook for your views on a legal issue they're facing, and that casual medium could impel you to give an off-the-cuff response that is taken as legal advice. In *Carmody v Priestley & Morris Perth Pty Ltd*[166] the court found that in similar circumstances, it was reasonable for the client to expect the advice to be specific, prudent advice. The lawyer had not warned that their communication should not be relied upon as fully considered advice. It is good practice to maintain a written record of advice given with warnings on its limited nature. Moreover, though the standard of care can be raised if lawyers hold themselves out as having specialist knowledge, the principle does not work in reverse. Giving 'free' advice online does not lessen the standard of care – of the ordinary skilled professional – that is required.

D. PRIVACY

In conducting business online, infringing the privacy of clients through, for example, a data breach can not only destroy their trust, but it may also breach privacy laws. Privacy rights fall under the purview of the *Privacy Act*.[167] Bender at al summarise the Australian privacy principles as:[168]

1. Open and transparent management of personal information

2. Anonymity and pseudonymity

3. Collection of solicited personal information

4. Dealing with unsolicited personal information

5. Notification of the collection of personal information

6. Use or disclosure of personal information

7. Direct marketing

8. Cross-border disclosure of personal information

9. Adoption, use or disclosure of government related identifiers

10. Quality of personal information

11. Security of personal information

12. Access to personal information

13. Correction of personal information

Complaints under the *Privacy Act* are made to the Office of the Australian Information Commissioner (OAIC). The Commissioner may mediate directly with the organisation to solve the complaint or, on their own initiative, decide to investigate an act or practice that may be a breach of privacy.[169]

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[161] *ASCR* (n 148) r 36.1.

[162] Ibid r 36.2: lawyer must not use the words "accredited specialist" or a derivative of those words (including post-nominals), unless the solicitor is a specialist accredited by the relevant professional association.

[163] *Competition and Consumer Act 2010* (Cth) sch 2 s 18 ('Australian Consumer Law').

[164] Mark Bender et al, *Marketing and the Law* (LexisNexis Butterworths, 6th ed, 2020) 468; *ACCC v Allergy Pathway Pty Ltd* (No. 2) [2011] FCA 74; *Australian Consumer Law s* 29(1)(f) prohibits false or misleading representations in the form of a testimonial by any person. Where comments are inaccurate, untrue, out of date or incorrect, they will be misleading and the endorsement or publishing of them by a practitioner amounts to misleading and deceptive conduct: Law Society of South Australia, *Guidelines for Legal Services Advertising, Marketing and Promotion* (Guidelines, 20 November 2012) 7 <https://www.lawsocietysa.asn.au/PDF/Prof_AdvertisingGuidelines.pdf>.

[165] Tanya M Marcum and Elizabeth A Campbell, 'Legal Marketing through the Decades: Pitfalls of Current Marketing Trends' (2016) 6(2) *St Mary's Journal on Legal Malpractice and Ethics* 244, 253; John Gergacz, 'Using the Internet to Attract Clients and the Attorney-Client Privilege' (2006) 33(1) *Rutgers Computer & Technology Law Journal* 17; Carrie Pixler and Lori A Higuera, 'Social Media: Ethical Challenges Create Need for Law Firm Policies Lawyers and the Cloud' (2010) 47(8) *Arizona Attorney* 34, 35.

[166] (2005) 30 WAR 318.

[167] *Privacy Act 1988* (Cth).

[168] Bender et al (n 165) 805–808.

[169] *Privacy Act 1988* (Cth) ss 40(1A), 40(2) (even if there is no complaint).

An organisation that seriously or repeatedly interferes with the privacy of an individual or individuals may be subject to civil penalties.[170] It should also be noted recent proposed amendments to the *Privacy Act* contain significant reforms, some of which include greatly increasing penalties, giving the OAIC new powers, establishing a right to erasure of data, and enacting specific rules to protect vulnerable groups. [171]

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[170] Ibid s 13G: Up to 2,000 penalty units for individuals ($420,000 as of writing) and 10,000 penalty units for companies ($2.2 million as of writing).
[171] See Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) and more recently the: Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 (Cth).

CLIENT RELATIONSHIPS ONLINE: ENGAGEMENT AND MATTER MANAGEMENT

How can lawyers sustain healthy, trusting relationships with clients once they are 'through the door', including when the interactions will be completely or mostly online? The literature shows that clients feel satisfied with their lawyers and are more likely to want to work with them again if they sense that there is 'rapport' that is, 'a relationship of understanding, empathy and trust'[172] between them. This rapport can then develop into a deeper relationship of 'trust and understanding'.[173] Yet, typically, lawyers are not formally trained in how to manage the relationship with the client, whether or not it takes place primarily online. In this section, we examine some of the main components and attributes of client engagement or managing the relationship with the client (as part of matter management), with a focus on the online context and technological options to support.

Online or not, showing care for a client – exercising so-called 'soft skills' and adopting a relational approach – is a critical part of being a lawyer. Lawyers have always used, or needed, soft skills, but the relevance of soft skills (core emotional and social skills that support trusting relationships) 'may be increasing due to current challenges facing the legal profession'.[174]

A 2012 meta-review by Susan Daicoff, a US law and psychology scholar, sought to derive the 'traits' of successful lawyers.[175] She found that top lawyers are marked out by higher emotional intelligence and self-management (stress tolerance abilities). Top young lawyers and top women lawyers shared the same four strengths: independence, stress tolerance, assertiveness, and optimism.[176] A lack of these strengths can, it follows, contribute to 'bad' practice; as complaints data establishes, there is a relationship between lawyers' poor soft skills and client dissatisfaction.[177] Daicoff argues that without soft skills training or learning how to relate to others, lawyers may in practice 'fill in the blanks' with negative or

less-than optimal behaviour. This can then generate more problems by increasing tension and conflict.[178]

Rogers's recent study of lawyers' soft skills, drawing on the research of Daicoff and of Kiser (a researcher in law and social sciences),[179] singles out five core capabilities. The first four are fundamental skills with generalisable content: self-awareness; self-management and self-development; social proficiency; and leadership. The fifth category, professionalism and ethics, can be seen as both a standalone skill (requiring particular, situational ethical and behavioural considerations as determined by the professional context), and as a culmination or 'goal' of the attainment of the four fundamental skills. These categories are:

Figure 4: Skills needed for trusting relationships

Self-awareness, the 'ability to recognize and understand [one's own] moods, emotions, and drives as well as their effect on others', is a 'threshold requirement' for lawyers.[180] These skills include the ability to overcome biases in perception and the negative personal conditions (stress and anxiety, aggressiveness, imposter syndrome, and procrastination) that they can cause. Without self-awareness skills, lawyers may struggle to correctly

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172 Stephen B Goldberg, 'The Secrets of Successful Mediators' (2005) 21(3) *Negotiation Journal* 365, 366, cited by Joan Albert Riera Adrover, Maria Elena Cuartero Castaner and Juan Jose Montano Moreno, 'Perceptions of Trust-Building in Family Mediation (2020) 13(2) *Negotiation and Conflict Management Research* 354.

173 Ki Kim, Nicole Cundiff and Suk Choi, 'The Influence of Emotional Intelligence on Negotiation Outcomes and the Mediating Effect of Rapport: A Structural Equation Modeling Approach' (2014) 30 *Negotiation Journal* 49.

174 June Rogers, 'Teaching Soft Skills' (n 35) 10; Susan Swaim Daicoff, 'Expanding a Lawyer's Toolkit' (n 35) 873.

175 Daicoff (n 35).

176 Ibid 820.

177 Ibid 804.

178 Ibid 807, 829-30, 834.

179 Kiser (n 35).

180 Ibid 26.

interpret situations and relationships and hence behave inappropriately.[181] For example, assuming that homogenous teams will naturally work better together, which as well as being untrue, reflects biased and possibly discriminatory thinking.

Self-management skills put self-awareness into practice. They include the 'ability to control or redirect disruptive impulses and moods' and, crucially for lawyers in client-facing and adversarial roles, 'to suspend judgment – to think before acting'.[182] Covey points out that those who cannot trust themselves, often have a hard time trusting people - where 'personal incongruence is often the source of our suspicion of others'.[183] On a practical level self-awareness includes the ability to receive and implement feedback, learn from mistakes, and manage stress.[184] High-stress occupations, like law, are particularly reliant on self-management and self-development skills.[185]

Social proficiency skills include collaboration and teamwork, relevant for a lawyer's relationship with their juniors, colleagues, and clients. These skills also require understanding others' views and empathy; communication, persuasion and listening; cultural competence; and the ability to 'read' others and to see the world through their eyes. This accords with Jones's assertion that lawyers need a special set of client skills, 'a delicate blend of empathy and detachment, approachability and boundary setting'.[186] It also dovetails with a CX perspective which prioritises empathy. To best serve the client, lawyers also require particular social skills in questioning and interviewing; problem solving and strategic planning; negotiating and advocacy. We delve into these areas of practice, in the online context, below.

Leadership skills: Lawyers can take on a variety of leadership roles, and the leadership skills required will depend on the organisation and context. In general, self-awareness and social proficiency skills are considered necessary for effective leadership, as are other leadership-specific skills, like vision, passion and integrity, capacity to inspire others, and the resilience needed to receive and process feedback.[187]

Finally, **professionalism and ethics** requires the ability to recast knowledge and practice in terms of accountability and responsibility to other people, including the client, juniors, colleagues, and other institutions, principally, the court. This can be seen as a standalone skill but also as involving the fundamental skills above, and indeed the culmination of these other skills.

Sparrow argues that teaching has not kept pace with these findings, and that these relationship management skills should be explicitly taught and developed at law school.[188] There are relatively few articles and books on lawyer-client (and lawyer-lawyer) communication and care. Those in existence tend to assume that the interactions will be FtF and/or assume that being online makes client care more complicated.[189] To elaborate on the last point, research is premised on the view that FtF communication 'incorporates an abundance of social information (including verbal and non-verbal cues)' while online communication 'contains far less information of a social nature'.[190] This paucity of social information is said to apply especially to text communication (for instance, email) versus audio-visual (for instance online conferencing). Some twenty years ago, an American lawyer, Jorge Amieva, advised lawyers to use online communication as no more than a supplement to FtF interactions.[191] His concern was that lawyers would

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[181] Ronald E Wheeler, 'Soft Skills: The Importance of Cultivating Emotional Intelligence', (January/February 2016) 20(3) *American Association of Law Libraries Spectrum* 28, 29: 'Good self-management is not possible without self-awareness' and 'self-management informed by self-awareness provides the tools to deal with various situations': 30–1.

[182] Daniel Goleman, 'What Makes a Leader?' (1998) 76(6) *Harvard Business Review* 93, 95.

[183] Covey and Merrill (n 2) 13.

[184] Joshua D Rosenberg, 'Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law' (2004) 58 *University of Miami Law Review* 1225, 1226; Susan Swaim Daicoff, 'Lawyer, Form Thyself' (2015) 27 *Regent University Law Review* 205, 208.

[185] See, eg, Marjorie Silver, *The Affective Assistance of Counsel* (Carolina Academic Press, 2007) 5–52; Susan Swaim Daicoff 'Expanding a Lawyer's Toolkit' (n 35) 827.

[186] Emma Jones, 'Digital Lawyering and the Growing Importance of the Human Touch: Implications for Wellbeing' (October 2019) 7 *The Legal Technologist* 25.

[187] Deborah L Rhode, 'Leadership in Law' (2017) 69(6) *Stanford Law Review* 1603, 1611; Kiser (n 35) 259–60; Esther Cameron and Mike Green, *Making Sense of Change Management: A Complete Guide to the Models Tools and Techniques of Organizational Change* (KoganPage, 3rd ed, 2012), 157 citing W Bennis, On Becoming a Leader (AddisonWesley, 1994). Examples from other fields are Patricia L Harms and Deborah Britt Roebuck 'Teaching the Art and Craft of Giving and Receiving Feedback' (2010) 73(4) *Business Communication Quarterly* 413-431 and Ali H Algiraigri, 'Ten Tips For Receiving Feedback Effectively In Clinical Practice' (2014) 19(1) *Medical Education Online* 25141.

[188] Sophie Sparrow, 'Teaching and Assessing Soft Skills' (2018) 67(2) *Journal of Legal Education* 553.

[189] Bastress and Harbaugh (n 57).

[190] Ibid 130.

[191] Jorge Amieva, 'Legal Advice Given over the Internet and Intranet: How Does This Practice Affect the Lawyer-Client Relationship Notes and Comments' (2001) 27(2) *Rutgers Computer & Technology Law Journal* 205, 222.

over-rely on the new medium and use it as an excuse for never having to learn and exercise important interpersonal skills, such as being attentive, empathetic, co-operative, and responsive. In other words, Amieva feared that being online would worsen the worst of lawyer-client relationships, in which the lawyer is, as he put it, insensitive and arrogant, or at best impersonal. He saw it as critical for lawyers to use a combination of FtF and online, and at least conduct the initial meeting in person.

Since Amieva was writing, technology has been developed to alleviate some of the problems of engaging and relating with the client online. Indeed, the technology itself is known as client relationship management (CRM) systems. Examples include Salesforce, Hubspot, Microsoft Dynamics, iManage and Clio.[192] They aim to improve lawyer-client trust. We discuss the potential of such technologies further below.

A. RELATIONAL SKILLS

Research shows that lawyers need to be able to offer a wider set of skills and expertise to clients than traditional legal knowledge only. In his book addressing 'soft skills' in lawyering, Kiser, mentioned above, synthesized research assessing clients' and lawyers' perceptions of the 'most important attorney traits, qualities, characteristics and habits'.[193] These were conspicuously different to those which lawyers thought would be valued by clients.

Kiser's research on skills valued by clients	Lawyers' views on skills valued by clients
Communication with clients: keeping them informed and responding to their queries and questions	Legal expertise and competence
Attentive listening skills	Maintenance of client confidentiality
Responsiveness to – and anticipation of – clients' needs, interests, and goals	Punctuality
Explanations of practical issues – fees and costs	Skills in risk mitigation
Strategic problem solving, legal advice, and case/project management	Honouring commitments
Understanding clients' needs, expectations and priorities	Delegation and management skills
Empathy and compassion	Integrity and trustworthiness
Respectfulness	Objectivity in assessing solutions and outcomes
Legal expertise/knowledge of the law	Courtesy and respect for others
Trust	Trial-preparation skills

Table 3: Skills Valued by Clients

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[192] Clio Connect is a secure communication portal that provides access to documents, communications and other case information, minimising follow-up time on minor updates while also reducing costs.

[193] Kiser (n 35) 32-33. We note that 'trust' is at the bottom of the clients' list. It is unclear from Kiser's synthesis of the studies that he used to devise these lists how 'trust' was spoken about by clients and/or if it was a quality that was prompted by the interviewer(s) in the studies. Overall, it is unsurprising that trust might be last of those listed since the concept is elusive and not immediately meaningful without a context. Indeed, trust is evidenced by the more specific interpersonal and problem-solving skills that feature above it.

Kiser also noted how professional contexts can also give rise to challenges sometimes more 'personal' than 'professional' in nature. The lawyer-client relationship often involves clients sharing sensitive, intimate details with lawyers; interactions with clients can be 'profoundly personal', and 'not a mere cognitive exercise'.[194] After a weighting of the study results to reflect their sample sizes, Kiser concludes that while clients and lawyers may define 'attorney effectiveness' differently, 'both attorneys and clients indicate that soft skills – what we have framed as core relational skills – are more important than hard skills'.

In the US, Sparrow examined the findings of the 2016-7 Whole Lawyer surveys and reports, highlighting how '[client] confidentiality, timeliness, commitment, integrity, respect, listening, responsiveness, diligence, strong work ethic, and attention to detail' were deemed by employers to be 'the top ten foundation skills'.[195]

Howieson and Rogers' Australian study of law students participating in lawyer-client role play, detailed further below, found that if the elements of procedural justice (respect, neutrality participation, trustworthiness) were present, the "clients" were more likely to co-operate with the "lawyers", and generally felt satisfied with the meetings and viewed them as fair.[196]

In some practice contexts, these, and other components of 'client care', have been formalized via management disciplines and methodologies, for instance those depicted in the T-shaped lawyer (Figure 5). The vertical bar of the "T" represents traditional legal knowledge and skills, while the horizontal bar reflects other non-traditional knowledge, skills and expertise. Legal Project Management, for instance, is an example of how client care has been more explicitly formalised. It includes core relational skills, many of which were regarded favourably by clients in Kiser's research: communication, disclosure, planning, reporting, and reflecting.[197] These methodologies require different levels of familiarity with technology. We explored above what that technological knowledge might involve, in relation to the duty of competence.
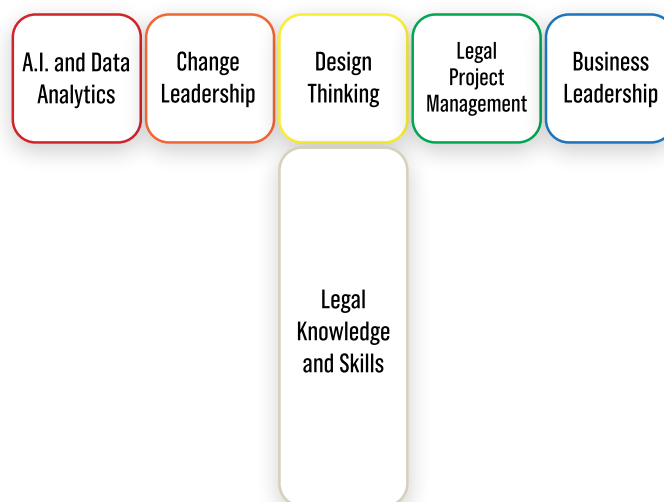

Figure 5: The T-Shaped Lawyer [198]

As a final point here though, another model showing the relational qualities that might be required of a lawyer is the 'O-Shaped' lawyer, designed by a UK in-house lawyer (Figure 6) and mentioned above. The 'O' represents the lawyer being 'rounded' and skilled in five components: optimism (positive outlook), ownership (accountable), open-minded (flexible, willing to learn and take sensible risks), opportunistic (curious, willing to try new things), and original (creative, problem-solver).[199]
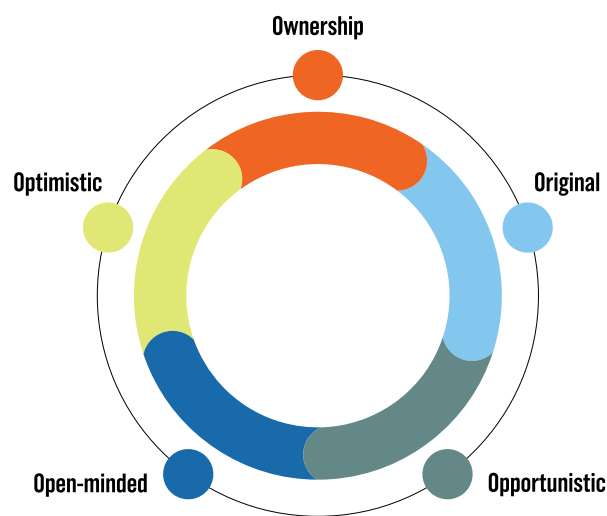

Figure 6: The O-Shaped Lawyer

[194] Kiser (n 35) 3.
[195] Sparrow (n 189) 556.
[196] Jill Howieson and Shane L Rogers, 'Rethinking the Lawyer-Client Interview: Taking a Relational Approach' (2019) 26(4) *Psychiatry, Psychology and Law* 659 ('Rethinking the Lawyer-Client Interview').
[197] Justine Rogers, Peter Dombkins and Felicity Bell, 'Legal Project Management: Projectifying the Legal Profession' (2021) 2 *Law, Technology and Humans* 133.
[198] Jones (n 151) 364.
[199] Dan Kayne, 'The Lawyer of the Future Is O Shaped', *Practical Law* (Web Page, 6 February 2020) <http://uk.practicallaw.thomsonreuters.com/w-023 9499?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

Certain lawyer models will be more or less applicable depending on the practice context– and by implication, the types of client care and relational skills required.

B. STRATEGIES

As noted, lawyers may not be trained in or adept at managing client relationships. CRM software can improve the client experience in terms of many of the things identified by Kiser.[200] This might include real-time project status updates, automated billing information, shared work platforms or sending industry tips or updates. The data on the client's matter, including documents, can be integrated into a joint database which is accessible to lawyer and client through a dashboard or home page. For sole practitioners or smaller practices, adopting such software can reduce time spent on administrative tasks or delegating to their word-processing staff or secretary.[201] Moreover, one survey found more than half of clients preferred to check the number of hours spent on a case electronically via email or an online portal or website.[202]

There are different online resources and methodologies that lawyers can use when engaging with their clients to reduce the challenges of being online. Lawyers might use (validated) psychological frameworks to better understand their clients, or to start a discussion with the client about their preferences.[203]

We now turn to some more routine skills involved in the client relationship online, picking up this section at the interview stage having finished the last on the initial consultation, and moving through to the online advice and negotiation stages.

1. Interviewing

When conducting a client interview, Hyams et al recommend a three-stage process: listening to your client's story in its entirety, asking questions to obtain a complete understanding of the facts and the chronology of the story; and assessing options and giving advice.[204] A very important part of the interview stage is active listening – showing interest in and empathy for what they are saying. Lawyers should seek to obtain a global view of the client's problems, which includes suppressing any tendency to anticipate.[205] In short, a lawyer needs to see the client as 'more than just a set of legal problems to be solved. A client-centred practice looks beyond a case to a client'.[206]

One of the themes in Howieson and Rogers' study of law students is the notion of perspective-taking – where we acknowledge the perspective of the other person, tapping into the 'fundamental human desire to be understood by others'.[207] In this study, law students role-played a lawyer-client interview and then each pair completed separate, post-interview surveys. The results show that the pseudo-client's perception of their pseudo-lawyer's perspective-taking (just defined) seemed to increase their trust in the lawyer, which increased the client's self-disclosure, which subsequently helped the lawyer gain a better understanding of their situation (see Figure 7). In other words, there were important 'feedback loop' dynamics during the interaction.[208]
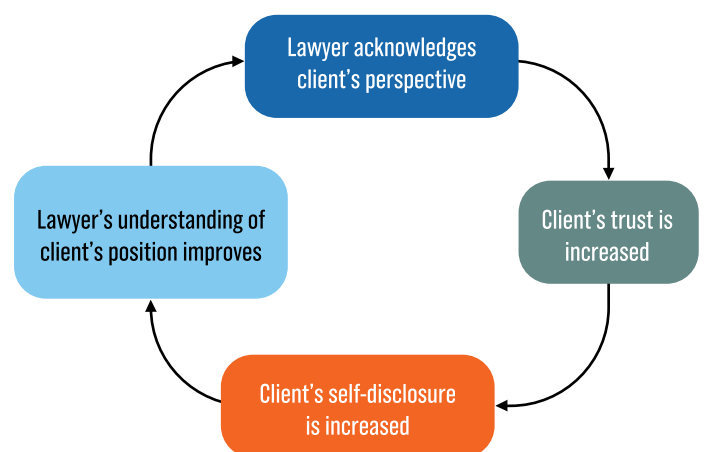

Figure 7: Perspective-Taking Feedback Loops

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[200] See discussion of Kiser's research above (n 193 and accompanying text).

[201] Lauren Joy Jones and Ashley Pearson, 'The Use of Technology by Gold Coast Legal Practitioners' (2020) 2(1) *Law, Technology and Humans* 57.

[202] Clio, 'Legal Trends Report 2018' (n 86) 41.

[203] An example is 'What Is the DiSC Assessment?', DiSC Profile <https://www.discprofile.com/what-is-disc>. Dr William Moulton Marston, a psychologist first proposed his theories which have progressed into the modern DiSC system today: William Moulton Marston, *Emotions of Normal People* (K Paul, Trench, Trubner & Co Ltd; Harcourt, Brace and Company, 1928). 'The DiSC Styles', *DiSC Profile* (Web Page) <https://www.discprofile.com/what-is-disc/disc-styles>.

[204] Hyams, Campbell and Evans (n 134) 18.

[205] Alan Crouch, 'Barriers to Understanding in the Legal Situation' 53(9) *Law Institute Journal* 505.

[206] Howieson and Rogers, 'Rethinking the Lawyer-Client Interview' (n 196) 21.

[207] Ibid.

[208] Ibid.

Other research shows that just as important as recognising the perspective of the other is the act of making it clear to the person what one's own perspective is. Ames and Wazlawek found that stating one's own perspective (if not done too forcefully) was a key element of assertiveness and something that helped to foster understanding of the situation while reducing anxiety associated with uncertainty for both parties.[209] In other words, there needs to be some self-disclosure from the lawyer, for the client to believe and know that the lawyer will work in their best interests.

When dealing with elderly or other vulnerable clients The Law Society of New South Wales guidelines, When A Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors (2016) ('When A Client's Mental Capacity is in Doubt') provide tips on how to better engender client trust and confidence, including taking time to 'break the ice', stressing the confidentiality of the relationship, using encouragement, taking more time to respond directly to the client's feelings, and conducting business over multiple sessions to increase familiarity and opportunities for trust building. Further effort is likewise required by the lawyer to ensure technology is functional and accommodating of sensory changes (including louder than average audio where required, or better lighting to address vision issues) while also making it clear to the client that they can terminate the call at any time if they feel they are not comfortable continuing.

Early on in matters, an option to discuss details in real-time is generally most important (in-person, phone or video conferencing), while at latter stages, asynchronous, digital options, which do not require interactions in real time, are preferred for status updates.[210]

However, being live online (for instance in a video conference) can involve difficulties at any stage. For example, certain research, of people generally, suggests that individuals are more likely to act in an uninhibited manner and may 'express themselves in strong and even inflammatory ways' when they are online.[211] The client's feelings of distress or anger, for instance, might also seem 'bigger' online because, in the video chat context, their face might appear larger and closer on your screen than it would in real life.[212]

Illustrating the core skill of self-management,[213] a lawyer needs to know how to manage their own responses to such (potentially distorted) expressions of negative feelings online and continue to steer proceedings. Bastress and Harbaugh explain that lawyers must make use of non-verbal cues, such as body language, to back up what they are saying to clients.[214] In other words, it is not just about the lawyer being able to see the client's body language - the client must be able to perceive the friendly but firm presence of the lawyer. They give the example of the lawyer who needs to ask a client to provide or verify important details. The 'inexperienced interviewer who lacks confidence, or who fails to see the importance of his [or her] task, will often only ask verbally for the information. He dutifully poses the question, while his whole non-verbal manner communicates his doubt that he has any right to expect an answer'. This lack of authority is problematic – including when it comes to accuracy of what the client is saying. Part of the role of the lawyer is to root out any untruths in the client's narrative so they have all the facts before giving the advice.[215] It is critical that this phase isn't rushed, but also possible that being online might make us more likely to rush.

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209 Daniel R Ames, 'Assertiveness Expectancies: How Hard People Push Depends on the Consequences They Predict' (2008) 95(6) *Journal of Personality and Social Psychology* 1541; Daniel R Ames and Abbie S Wazlawek, 'Pushing in the Dark: Causes and Consequences of Limited Self-Awareness for Interpersonal Assertiveness' (2014) 40(6) *Personality and Social Psychology Bulletin* 775.

210 Including by phone (73%); in-person (68%), email (66%), secure client portals (61%) and video conferences (60%): 'Legal Trends Report 2021' (n 86) 18.

211 Bastress and Harbaugh (n 57) 131.

212 Tania Sourdin, 'Mediating via Zoom' (2021) 31(4) *Australasian Dispute Resolution Journal* 280.

213 See Figure 4 above.

214 Bastress and Harbaugh (n 57), citing Gary Bellow and Bea Moulton, T*he Lawyering Process: Materials for Clinical Instruction in Advocacy* (Foundation Press, 1978).

215 Hyams, Campbell and Evans (n 134) 39–40.

2. Advising

Lawyers need to recognise and clarify the client's own priorities and goals before giving advice. Kruse has identified the tendency of lawyers to 'issue-spot' their clients' problems, overemphasising the clients' legal interests and either diminishing or ignoring the other cares, commitments, relationships, reputations, and values that constitute the objectives with which clients come to legal representation.[216] A client-centred approach includes understanding client problems from the client's own point of view (perspective-taking) and shaping legal advice around a broad construction of their interests. One way to do this, and to honour the lawyer's educative duties in outlining legal alternatives, is to discuss positive and negative consequences of different options (not just legal costs, but also hidden legal costs, non-legal costs, time, future relationships).[217] The lawyer also needs to check in to see whether the client has understood what they have been told. Cues may be less obvious online when body language is muted and less visible, and so more explicit approaches may be needed. In online interviewing and advising, 'the lawyer's ability to empathically reflect emotive content becomes paramount to ensure that the lawyer is, in fact, understanding the client.'[218]

The online context – specifically, asynchronous (not live) online communication (for instance email or text) – might be useful to a lawyer when they are having difficulty 'getting past the confusion generated by client feelings' to sort out the underlying issues, and they need 'to communicate precise language and the rationale behind the selection of those words'.[219] Text communication could assist to focus on facts and can also be useful when communicating certain emotions too, giving the lawyer more time to formulate an appropriate response, offering the opportunity for more accurate and sensitive reactions.[220]

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[216] Katherine R Kruse, 'Fortress in the Sand: The Plural Values of Client-Centered Representation Papers Presented at the UCLA/IALS Conference on Enriching Clinical Education' (2005) 12(2) *Clinical Law Review* 369; Katherine R Kruse, 'Beyond Cardboard Clients in Legal Ethics' (2010) 23(1) *Georgetown Journal of Legal Ethics* 103.

[217] Hyams, Campbell and Evans (n 134) 51.

[218] Bastress and Harbaugh (n 57) 141.

[219] Ibid 139.

[220] Bastress and Harbaugh (n 57) 140, citing John Suler, Psychological Dynamics of Online Synchronous Conversations in Text-Driven Chat Environments, Psychology of Cyberspace 6-7 (Web Page, October 1997) <http://www.rider.edu/-suler/psycyber/texttalk.html>.

CLIENT RELATIONSHIPS ONLINE: PROFESSIONAL AND LEGAL DUTIES

As mentioned above, moving online does not change the professional duties that apply to lawyers. These institutional protections are for the benefit of the client and, above all, the court. They also benefit lawyers by enabling them to differentiate themselves from mere service providers. In the context of trust, these duties support the lawyer to form a trusting relationship with the client. However, satisfying these duties may be more complex in the less familiar digital realm. To ensure the continued trust of clients, lawyers need to understand these nuances.

A. CLIENT'S BEST INTERESTS AND REQUIREMENT OF CLIENT CAPACITY

A lawyer has a duty to act in the best interests of a client in any matter in which they represent the client, to provide clear and timely advice so clients can make informed choices, and to follow a client's lawful, proper and competent instructions.[221]

To support these duties, lawyers must be reasonably satisfied their client has the capacity to give instructions. At common law, a person who enters into a contract, including a legal retainer, is presumed to have full capacity to do so.[222] Lawyers must assess whether a client has the requisite mental capacity before either taking instructions or assisting them to make a legal decision that will affect their interests.[223] They may have serious consequences, such as in the case of wills, if testamentary capacity is incorrectly assessed: COVID-19 significantly impacted the important requirements for making a will.[224] Failing to be attentive to capacity issues can also lead to disciplinary action or

liability in negligence.[225] The Law Society's guidelines, When A Client's Mental Capacity Is in Doubt provides a Capacity Worksheet which include observational signs of:[226]

- **cognitive functioning** (short-term memory problems, language communication or comprehension problems, financial management issues, lack of mental flexibility, disorientation)

- **emotional functioning** (emotional distress, emotional lability)

- **behavioural functioning** (delusions, hallucinations, poor grooming)

This can assist lawyers in making determinations about client capacity. However, the assessment strategies largely assume a FtF meeting. Conducting meetings virtually makes it harder for lawyers to assess client autonomy due to not being able to see off-screen. To mitigate this, a lawyer must resort to additional methods, such as directly asking whether anyone else is present, more closely assessing body language, and perhaps spending additional time on the process overall. It may for example be harder to determine whether an elderly client is confused due to dementia, hearing loss, or because she is videoconferencing for the first time. Certain information may be lost altogether by not seeing a client FtF, for instance, whether a client has any strange bruises, or flinches when reaching out to shake hands.[227]

Another example of the challenges acting in the client's best interests online arose with the lockdown of nursing homes when there was great difficulty in taking instructions and witnessing signatures.[228] As noted above, remote witnessing can present difficulties,[229] many of which apply to assessing online capacity generally. To ensure that the person signing in real-time is the person it is supposed to be, the adjustment of camera angles may be

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[221] *ASCR* (n 148) r 4.1.1; 7.1; 8.1 respectively.

[222] Full or partial exemptions apply for those with certain disabilities or for minors. A contract entered into by a person with a mental disability is voidable, and can be ratified: *Gibbons v Wright* (1954) 91 CLR 423. This is subject to the caveat that the person has lucidity of mind at the time of ratification.

[223] The Law Society of New South Wales, *When A Client's Mental Capacity Is in Doubt: A Practical Guide for Solicitors* (Guide, 2016) <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf> ('When a Client's Mental Capacity is in Doubt'). See also *Anastasia Pates v Diane Craig and the Public Trustee: Estate of the Late Joyce Jean Cole No. 106306/94 Wills-Solicitors* [1995] NSWSC 87, *Winefield v Clarke* [2008] NSWSC 882 and *Edith White v Judith Liane Wills* [2014] NSWSC 1160.

[224] Kelly Purser, Tina Cockburn and Bridget Crawford, 'Wills Formalities beyond COVID-19: An Australian-United States Perspective' [2020] (5) *University of New South Wales Law Journal Forum* 1, 5.

[225] *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 at [418], per Bell J (holding that it is a breach of a lawyer's duty of care to take and act on instructions from a client who the lawyer knew or should have known lacked the mental capacity to give instructions, reasoning that it is 'always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of the client's mental capacity to instruct').

[226] 'When a Client's Mental Capacity is in Doubt' (n 223) 16–18.

[227] Michael Ablan et al, 'Law Practice During and After COVID-19' (2020) 37(4) *GPSolo* 52 <https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/july-august/law-practice-during-after-covid19/>.

[228] Linden Barnes, 'Has the Pandemic Changed Our Ethical Rules?' [2020] (68) *Law Society of NSW Journal* 19.

[229] See general Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A' (2017) 91 *Australian Law Journal* 133; and 'Part B' (2017) 91 *Australian Law Journal* 205.

necessary to allow a view of the face of the signatory, the signing hand and the document as the signing occurs.[230] To be reasonably satisfied that the document being signed is correct, lawyers can have the document read aloud by the signatory so the witness can check counterparts are identical, hold the document to the camera so that a 'page-turn' comparison can be conducted.[231] Lawyers should keep records of all attendees in the online meeting, including screenshots of proof of identification throughout the process. While another person present is likely to be a support person rather than someone attempting to exercise inappropriate pressure on the client, it is nonetheless important to maintain a record.

B. CIVILITY, COURTESY AND CARE

Recently, there has been growing concern about incivility in law,[232] as indicated above, and in the workplace generally.[233] A solicitor has a duty to be honest and courteous in all dealings in the course of legal practice.[234] The duty of courtesy includes not using insulting, provocative or annoying language, or acrimonious or offensive correspondence.[235] Former Chief Justice Spigelman said this duty, or the obligation of civility, goes beyond mere etiquette and manners and is central to the functioning of the legal system:[236]

> *The core element of civility is the manifestation of respect for other persons… Civility remains on daily display in our courts and throughout the legal system. All legal practitioners must, and generally do, treat judges, clients, witnesses and each other with respect. We must all ensure that*

proper conduct remains a principal characteristic of our legal discourse. Ours is a profession of words. We must continue to express ourselves in a way that demonstrates respect for others.

Commentators have noted that civility and courtesy are especially important in our technology-rich milieu and have offered at least four reasons,[237] in addition to the institutional rationale just outlined. First, echoing the 'O'-shaped lawyer, clients are looking for problem-solvers and/or conflict-resolvers. Resolution is promoted by dialogue and understanding, and civility and honesty are necessary to promote discourses more conducive to effective resolution.[238] Second, reputations are vulnerable: one uncivil outburst can haunt a lawyer for years to come due to the permanent nature of the internet. Justice McMurdo singles out technology as a contributing factor because of the speed at which messages or views can be broadcast:[239] trust takes years to build up, but seconds to destroy. Third, what separates lawyers from legal-related products is professionalism and service. Finally, civility is important because it affects motivation, productivity and creativity in the workplace[240] and specifically in our thinking about the client's situation.

Lawyers must be sensitive to the risks that may arise from messages being sent online. Statements may be misconstrued or read literally when humour or irony was intended; ambiguities may be read the wrong way; and the like. The risk of misunderstandings is compounded by hasty drafting and perfunctory proofreading when communicating online. Hyams et al suggest people should approach email as a letter – and 'draft' it (i.e., do not send right away).[241] This would apply to text

230 *Electronic Transactions Act* 1999 (Cth) s 14G(2).

231 Michael Ablan et al (n 227).

232 Kathleen P Browe, 'A Critique of the Civility Movement: Why Rambo Will Not Go Away' (1994) 77(4) *Marquette Law Review* 35; Jeremy Bloom, Rachael Bosch and Jennifer Mandery, 'An Exploration of Civility within the Legal Industry' [2019] (August) *PD Quarterly* 42; Paula Baron and Lillian Corbin, 'The Unprofessional Professional: Do Lawyers Need Rules?' (2017) 20(2) *Legal Ethics* 155; Paula Baron and Lillian Corbin, 'Robust Communications or Incivility - Where Do We Draw the Line' (2015) 18(1) *Legal Ethics* 1.

233 Lynne Andersson and Christine Pearson, 'Tit for Tat? The Spiraling Effect of Incivility in the Workplace' (1999) 24 *The Academy of Management Review* 452; Christine Porath and Christine Pearson, 'The Price of Incivility', *Harvard Business Review* (online, 1 January 2013) <https://hbr.org/2013/01/the-price-of-incivility> ('Price of Incivility').

234 *ASCR* (n 148) r 4.1.2.

235 *Legal Services Commissioner v Lynch* [2015] VCAT 772 at [14].

236 Chief Justice J Spigelman, (Address delivered at the Annual Opening of Law Term Dinner of the Law Society of New South Wales, Sydney, 30 January 2006) <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spig elman_speeches_2006.pdf>.

237 Jayne Reardon, 'A Whole New Mindset for Lawyers', *2Civility* (Web Page, 17 March 2016) <https://www.2civility.org/technology-law-requires-new-mindset/>.

238 Justice Philip McMurdo, 'Civility and Professional Courtesy' (Speech, Queensland Law Society Symposium, 21 March 2014) 4.

239 Ibid 8.

240 Porath and Pearson, 'Price of Incivility' (n 233).

241 Hyams, Campbell and Evans (n 134) 90.

messages. They advise lawyers to have a clear sense of the purposes of any email (or text) before beginning it and to read any written (or typed) words through the eyes of the client – or any recipient. Lawyers should avoid any communication that could be seen as unprofessional, abusive, defamatory, threatening etc. The OLSC has also expressed concern that email and text messaging can result in communications that are unprofessional and inappropriate, stating 'some late-night texts and emails, whether to clients or opposing representatives, that have come before this Office would [be] better to have not been sent'.[242] Note also the risks of using messenger services to communicate with clients during online court hearings.[243]

An uptick in informal and problematic communications may become more apparent with the shift to remote and hybrid work.[244] Where trust is broken with a client due to incivility, clients have the right to terminate retainers at will, whereas lawyers require just cause to terminate.[245]

C. DUTY OF CONFIDENTIALITY

Central to a client's trust in the lawyer, and indeed the public's trust in the professional generally, is the lawyer's duty to maintain the confidentiality of all client information.[246] Clients place their trust in lawyers and this vulnerability imposes an obligation on the lawyer to maintain their confidences.[247] For the client, an

unauthorised disclosure may lead to financial loss/exposure, reputational damage, an emotional toll, a loss of public trust in their organisation, legal liability, and/or a waiver of legal professional privilege in respect of the information.[248] For the lawyer, a breach of confidentiality is not only ethically wrong but can lead to embarrassment, loss of clients, damage to lawyer/firm reputation, and, of course, disciplinary sanctions and/or legal liability.[249]

While generally in the initial consultation, only preliminary information, documents and data is provided, lawyers can still sometimes receive economically valuable data such as corporate secrets, details of large transactions, and sensitive personal data such as addresses, tax file numbers, bank account details and other financial records.[250] Australian law firms are now frequent targets of cybercrime.[251] In 2021 the Australian Cyber Security Centre received 67,500 cybercrime reports, equivalent to one report every eight minutes.[252] Hacking of high-profile law firm databases emphasises the need for appropriate measures to protect client information.

Confidentiality risks compound during the engagement stage of the matter as lawyers collect more data, manage more documents and conduct more communications with their clients, all of which need to be stored securely. Traditionally, this was achieved by storing client files in the office and destroying (usually by shredding) unneeded documents.[253] Today, the business reality of practice is that lawyers routinely surrender control of confidential

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[242] Office of the Legal Services Commissioner, *Annual Report 2020-2021* (n 17) 12.

[243] E.g., *Fowles & Fowles* [2021] FamCA 368, [91]-[92].

[244] For a discussion of this see Initial Consultation and Conversion: Expectation Management.

[245] Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 6th ed, 2016) 101–102.

[246] Law Society of New South Wales, Submission No 168 to Department of Home Affairs, *Australia's 2020 Cyber Security Strategy* (1 November 2019) 2. The creation of a lawyer-client relationship is based in contract or in the retainer: *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1; *Ibrahim v Pham* [2005] NSWSC 246. If the rule is not an express term, it is implied into the retainer. It is based also in equity: under a lawyer's fiduciary relationship with their client. The confidence and trust placed into the lawyer forms the basis of a fiduciary relationship with their client. And see also ASCR (n 148) r 9; *Legal Profession Uniform Conduct (Barristers) Rules 2015* (at 4 March 2022) r 114.

[247] *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 [214] (Stanton J); *Baker v Campbell* (1983) 153 CLR 52 [65] (Gibbs CJ).

[248] Gino Dal Pont (n 245) 360.

[249] Ibid; International Bar Association, *Cyber Security Guidelines* (Guide, October 2018) 4 <https://www.ibanet.org/MediaHandler?id=2F-9FA5D6-6E9D-413C-AF80-681BAFD300B0>; Christine Parker and Adrian Hellier Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 98–99. Parker and Evans observe 'confidentiality is important to the reality of individuals' humanity and freedom. We all deserve to keep some secrets…if we are to remain psychologically healthy and effective.' See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Pantheon Books, 1983).

[250] Simone Herbert-Lowe, 'Cyber Security: Protecting Client Confidentiality in the Digital Era' [2019] (56) LSJ: *Law Society of NSW Journal* 88.

[251] Naomi Neilson, 'One in Five Law Firms under Attack from Cyber Criminals', *Lawyers Weekly* (online, 20 October 2019) <https://www.lawyersweekly.com.au/sme-law/26742-one-in-five-law-firms-under-attack-from-cyber-criminals>; Christopher Nische, 'Australian Law Firms Remain Vulnerable to Cyberattacks, Experts Say', Law.com International (online, 19 February 2021) <https://www.law.com/international-edition/2021/02/19/australian-law-firms-remain-vulnerable-to-cyber-attacks-experts-say/>. Jane LeClair & Gregory Keeley, *Cybersecurity in Our Digital Lives* (Excelsior College Press, 2015).

[252] 'ACSC Annual Cyber Threat Report 2020-21', *Australian Cyber Security Centre* (Report, 2021) <https://www.cyber.gov.au/sites/default/files/2021-09/ACSC%20Annual%20Cyber%20Threat%20Report%20-%202020-2021.pdf>.

[253] Gino Dal Pont (n 245) 361.

information in their everyday communications (e.g., emails, text messages, websites). As law firms 'increasingly [move] to cloud delivery' as an alternative to traditional on-premises legacy systems, an understanding of the risks involved is essential.[254]

The term 'cloud computing' is commonly used to refer to the delivery of 'hosted services' (or 'web services') over the internet.[255] Cloud applications are processed and stored in remote data centres around the world (collectively referred to as the 'cloud'). Many LegalTech solutions operate as cloud-based software-as-a-service (SaaS) that seek to offer law firms and clients better usability, scalability and security.[256] The cloud provides affordable data storage and reduces the risk of data loss by providing an efficient backup system.[257] Jones and Pearson conducted a study in 2018 of nine Gold Coast smaller size practices. They found that technologies, such as practice management software or cloud-based storage software, had made storing files more secure, economical, and accessible.[258] Moreover, the ability to work remotely added more flexibility, and could create a more satisfying work-life balance. In a small firm, where there are only two or three solicitors, cloud technology allowed files to be managed and accessed when a lawyer was sick or on leave. Where previously cloud software was too expensive for smaller practices, in the last few years access to technology has democratised, and small or solo practices can now access the same workflow and collaboration tools as larger firms.[259]

Yet working from home has amplified the risks of protecting confidentiality online, and indeed of certain types of cyber-attacks. Cybersecurity risks include data breaches, data loss, account/service hijacking, denial of service (DoS) attacks (where a machine or network is shut down and made inaccessible) and exploiting insecure Application Programming Interfaces (APIs).[260]

Lawyers ought to remain mindful of their surroundings and must avoid inadvertently broadcasting their conversations,[261] which may be more difficult at home where there can be more distractions. Those they live with are not workplace colleagues or associates for the purposes of the duty of confidentiality.[262] Lawyers should limit printing of confidential information in shared households, they should lock computers, and shut doors. Moreover, without proper preparation, lawyers working remotely may be unable to secure confidential documents and information.[263] This may stem from not having appropriate hardware devices (such as an enterprise-grade security router/modem) or software systems (antivirus, encryption or virtual private networks) at home.[264] Perhaps less obviously, lawyers should also consider risks that home smart speakers could be listening.[265] Online meetings might be at risk of being 'Zoom-bombed' – where uninvited persons join a meeting remotely and surreptitiously listen in or disrupt the meeting.[266] These problems may be more common in the initial consultation, where the procedure for joining the first meeting may be less clear to clients or the process in general is more prone to teething problems.

As WFH continues, cloud computing is likely to grow in importance. However, while virtual servers are hosted or owned by third parties including Amazon Web Services, Microsoft Azure or Google Cloud, the duty still lies with the lawyer to ensure information remains safe and confidential. As client information stored on cloud services is out of the direct physical control of the legal

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[254] 'Lawtech Adoption Research', *Law Society of England and Wales* (Report, 2019) 20 <https://www.lawsociety.org.uk/en/topics/research/law-tech-adoption-report>.

[255] Office of the Legal Services Commissioner, 'Cloud Computing Practice Note' (January 2013) <https://www.olsc.nsw.gov.au:443/Pages/olsc_education/olsc_education_notes.aspx> ('Cloud Computing Practice Note').

[256] Software-as-a-service (or web-based or hosted software) is a way of delivering applications over the internet as a service, omitting the need to install software or manage hardware: 'SaaS: Software as a Service', *Salesforce* (Web Page) <https://www.salesforce.com/au/saas/>.

[257] 'Technology and Legal Services', *Solicitors Regulation Authority* (Paper, November 2018).

[258] Jones and Pearson (n 201) 63–66.

[259] Macquarie (n 84) 10. For more on how sole and small practices can experiment with technology, see Anthony Song and Seena Serram, 'Five LegalTech Tools for Sole and Small Practices' *Law Society Journal* (online, 2 September 2022) <https://lsj.com.au/articles/five-innovative-technology-tools-for-small-practices/>.

[260] Justin Edwards, 'Cloud Computing Services: Professional Obligations and Ethics' (2016) 43(3) *Brief* 32.

[261] Gino Dal Pont (n 245) 715 [21.180].

[262] See NY County Lawyers Association, *Commission on Professional Ethics, Formal Opinion 754-2020* (2020) <https://www.nycla.org/pdf/NYCLA%20Op.%20754-2020%20-%20Ethical%20Obligations%20when%20Lawyers%20Work%20Remotely.pdf>.

[263] Brescia (n 153) 316–317.

[264] For example, American Bar Association, Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 498 Virtual Practice* (at 10 March 2021).

[265] Ibid 6. See also Weston (n 16) 269.

[266] See Michael Legg, "OK Zoomer: The Impacts and Future of Working from Home" (2020) 73 *Law Society of NSW Journal* 77 ('OK Zoomer'); Legg et al. 'Open Justice During a Pandemic – The Role and Risks of Remote Hearings' (2022) 33(2) *Public Law Review* 143.

practitioner, it may be vulnerable to unauthorised access. Threats are external (e.g., hackers) and internal (e.g., employees).[267] Lawyers should conduct due diligence on services by assessing the terms and conditions of use, where data is stored, the governing choice of law, jurisdiction and extent of encryption;[268] alongside setting up a data breach policy and an incident response plan to communicate any breaches to impacted clients.[269]

The rise of legal outsourcing or 'taking a specific task previously performed within a firm and having it performed by an outside service provider',[270] also poses new risks as during the matter it is now not uncommon for work to be routinely delegated to outsourcing agencies. However, often outsourcing agreements lack specific information on maintaining standards of confidentiality, so additional vigilance in remote supervision and obtaining client consent to use third parties may be necessary.[271]

Otherwise, general protective measures to preserve confidentiality include having two-factor authentication (2FA) on devices – for example by combining a password with a mobile phone text verification.[272] Lawyers should also use email platforms with encryption protocols (such as Gmail, Microsoft Outlook 365, or iOS devices) or third-party encryption tools.[273]

[267] Coralie Kenny and Tahlia Gordon, 'Cloud Computing Issues for Legal Practices.' (2012) 50(5) *Law Society Journal* 78.

[268] 'Cloud Computing Practice Note' (n 255).

[269] Callie Hinman, 'Cybersecurity for Law Firms: What Legal Professionals Should Know', *American Bar Association* (online, 24 December 2021) <https://www.americanbar.org/groups/law_practice/publications/techreport/2021/sponsored-lawpay-cybersecurity/>.

[270] Coralie Kenny and Tahlia Gordon, 'Outsourcing Issues for Legal Practice' 50(4) *Law Society Journal* 72; Unison Outsourcing, 'Outsourcing during COVID-19', *Lawyers Weekly* (online, 21 July 2020) <https://www.lawyersweekly.com.au/partner-features/28972-outsourcing-during-covid-19>; Victoria Hudgins, 'Firms' Post-Pandemic Reality: Fewer Secretaries, More Automation and Outsourcing', *Law.com* (online, 8 July 2021) <https://www.law.com/legaltechnews/2021/07/08/firms-post-pandemic-reality-fewer-secretaries-more-automation-and-outsourcing-397-48348/>.

[271] Paul Monaghan, 'What Are Our Obligations When Outsourcing Elements of Our Practice?' [2020] (67) *Law Society Journal*.

[272] Helen Brown, '7 Tips to Better Password Security', *The Law Society of New South Wales* (Web Page) <https://www.lawsociety.com.au/resources/resources/career-hub/7-tips-better-password-security>; 'Multifactor Authentication: A Security Must-Have', *Legal Practitioners' Liability Committee* (Web Page, May 2019) <https://lplc.com.au/uploads/main/Resources/LPLC-Articles/Multi-factor-authentication.pdf>.

[273] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 477 *Securing Communication of Protected Client Information* (at 11 May 2017). Some examples of encryption options available in Microsoft 365 include Microsoft Purview Message Encryption, S/MIME (Secure/Multipurpose Internet Mail Extensions) and Information Rights Management (IRM): 'Email Encryption in Microsoft 365', *Microsoft* (20 April 2022) 3 <https://docs.microsoft.com/en-us/microsoft-365/compliance/email-encryption>.

CLIENT RELATIONSHIPS ONLINE: RETENTION AND FEEDBACK

Retention is crucial, as it is easier to generate more work from existing clients than acquire work from new clients. Maintaining trust is key to retention. According to the results of PwC's 2018 Future of Customer Experience survey, 32% of Australian customers would stop doing business with a brand they loved after just one bad experience, while over half would stop after a few bad experiences (due to, for e.g., bad attitudes, inconsistency and/or a lack of expertise).[274]

Upon completion of the solicitor's engagement, certain steps need to be taken to close the matter. Completing these appropriately is important for ensuring the return of the client or for a future recommendation. First, clients are to be given any client documents (including electronic copies) 'as soon as reasonably possible when requested'.[275] This requires the ability to retrieve electronic copies of documents and to find all duplicates. If the client has left the file with the lawyer, it must be stored safely for seven years (although typically lawyers keep files for longer for the purposes of taxation or statutory limitation periods).[276] A solicitor cannot charge for the storage costs of any documents unless the client has consented.[277] A common challenge in the (often transitory) start-up world of LegalTech is ensuring the files will remain accessible across the seven-year period.[278]

Another part of client retention is, at the conclusion of the matter, following-up to receive feedback on the client's experiences and satisfaction. There is a general shortfall in collecting feedback from clients, with one 2018 US survey finding that 37% of law firms do not collect feedback at all, while 42% collect feedback only casually or informally in-person.[279] However, casual feedback, in addition to being difficult to track, may have self-desirability biases (where people aim to please rather than offer honest criticism) which can taint the validity of the feedback.[280] Giving feedback in person may also similarly be biased. For this reason, it is best for feedback to come through third parties such as Qualtrics (experience management software), Delighted (online surveys) or Podium (text message surveys).

Such surveys can then be used to monitor how likely clients are to recommend their services to others. In marketing, this is generally gauged through a tool known as Net Promoter Score (NPS).[281] NPS categorises clients into 'promoters' (highly likely to recommend); 'passives'; and 'detractors' (unlikely to recommend).[282] Marketing research found that 'promoters' are five times as likely to repurchase from companies and more than seven times as likely to forgive companies if they make a mistakes than if they are 'passives' or 'detractors'.[283] As an industry, law firms rank low on NPS, with a score of 25 out of a maximum of 100, matching that of airlines, banks, wireless carriers, and credit card companies.[284] By comparison, high net promoter score companies include Starbucks (77), Netflix (68) and Amazon (62).[285] In the legal context, the most significant factors in likelihood to recommend were overall cost, ease of service (such as ease of understanding case expectations, getting information

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[274] PricewaterhouseCoopers, 'Experience is Everything: Here's How to Get It Right' (n 115).

[275] *ASCR* (n 148) r 14.1. An exception is if there is an effective lien in place.

[276] *ASCR* (n 148) r 14.2; Office of the Legal Services Commissioner, 'File Ownership and Handling' (Fact Sheet, July 2015) <https://www.olsc.nsw.gov.au:443/Pages/olsc_education/olsc_education_notes.aspx>.

[277] *ASCR* (n 148) r 16.

[278] Paul Monaghan and Linden Barnes, 'Mind Your Ethics Tips and Tricks for Playing by the Rules...' [2018] 49 *Law Society Journal* 17.

[279] Clio, 'Legal Trends Report 2018' (n 86) 33. The Legal Trends Report is prepared from the data of nearly 70,000 legal professionals who are paid subscribers to Clio.

[280] Ibid; Justine Rogers and Felicity Bell, Change Leadership for Lawyers (UNSW Law FLIP Stream, 2019) ('*Change Leadership for Lawyers*').

[281] Newton (n 79) 228. Other indicators include Customer Satisfaction Score (CSAT) measuring how satisfied the customer is or customer effort score (CES) measuring how well a company performs when a customer calls in with a problem. To calculate NPS, survey clients on a scale of 1-10 how likely they are to recommend the services to a friend or colleague. responses are grouped as promoters (9-10); passives (7-8); and detractors (1-6). The NPS is equal to subtracting the percentage of detractors from the percentage of promoters i.e. NPS = Promoters (%) – Detractors (%).

[282] To calculate NPS, survey clients on a scale of 1-10 how likely they are to recommend the services to a friend or colleague. responses are grouped as promoters (9-10); passives (7-8); and detractors (1-6). The NPS is equal to subtracting the percentage of detractors from the percentage of promoters i.e. NPS = Promoters (%) – Detractors (%).

[283] Temkin Group, 'New Temkin Group Research Shows Connection Between Net Promoter Score Metric and Loyalty', *PR Newswire* (Web Page, 21 June 2016); Promoters recommend a company to an average of 3.5 people: Newton (n 79) 228; Clio, 'Legal Trends Report 2018' (n 86) 32.

[284] Teresa Matich, 'NPS For Law Firms', *Clio* (Web Page, 13 November 2018) <https://www.clio.com/blog/nps-law-firms/>.

[285] Alex Bitca, 'What Do Companies with High Net Promoter Score Have in Common?', *Retently* (Blog Post, 24 February 2022) <https://www.retently.com/blog/companies-high-nps/>.

on case status, getting questions answered, accessing case documents), and responsiveness.[286] These reflect the same elements necessary to build up trusted relationships with clients. It has been suggested that to improve NPS scores and hence trust, analysing client feedback (however gleaned) for insights and reaching out to detractors quickly (again through tools such as Delighted, Podium or the like) can salvage clients and rebuild lost trust.[287]

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[286] Clio, 'Legal Trends Report 2018' (n 86) 34; Newton (n 79) 230–234.
[287] Newton (n 79) 230–234.

III. MANAGING (HYBRID) WORKERS FROM HOME: ONLINE TEAMS AND NEW GRADS

In this Part, we first examine the impact of WFH or being online, on teams. The human need for supportive relationships is crucial in all areas of law firm management but is particularly important for teamwork and collaboration. A strong bond of trust can improve engagement and productivity, enhance business development, or make the implementation of a strategy a success (including a virtual or remote one).[288] It has been found that 'there's ample research showing that virtual teams can be completely equal to co-located in terms of trust and collaboration. It just requires discipline.'[289]

Next, we turn to graduates' professional development or introduction to the profession's values, expertise, and community. These processes have traditionally occurred through learning on the job, with additional formal training now offered by some firms.[290] But law firms' onboarding processes, their systems to introduce and integrate their new recruits, were not designed for crisis conditions, nor were they likely a top priority as the pandemic took hold.[291] While most firms transitioned to the 'new experience' of remotely-conducted graduate programs,[292] some firms deferred their graduate programs altogether on the basis that an online experience would not adequately set up graduates for career success.[293] With remote working in some form here to stay, the form of graduate supervision and mentoring must be refashioned to be sustainable.

A. THE SHIFT TO REMOTE WORK

As signalled in the Introduction, one of the dramatic responses to the pandemic was flexible or remote work. In Australia, the Productivity Commission reported that work-from-home rates grew from 8% in 2019 to 40% in 2020 and 38% in 2021.[294] Currently, 96% of Australian knowledge-based workers are either working fully remote or in a hybrid arrangement.[295]

While the viability of WFH has now been largely been tested,[296] its desirability is not yet clear. Today, for many firms transitioning into a post-pandemic environment, a significant challenge is how best to approach hybrid

[288] Bob Murray and Alicia Fortinberry, *Leading the Future: The Human Science of Law Firm Strategy and Leadership* (European American Publishing, 2021) 43–44.

[289] Harvard Business Review, *Coronavirus and Business: The Insights You Need from Harvard Business Review* (Harvard Business Review Press, 2020) 46 ('*Coronavirus and Business*').

[290] Jacqueline So, 'Highlight: Many Young Lawyers Learn through Osmosis, Rising Star Says', *Australasian Lawyer* (online, 10 March 2022) <https://www.thelawyermag.com/au/news/general/highlight-many-young-lawyers-learn-through-osmosis-rising-star-says/398098>.

[291] Art Markman, 'Starting a New Job — Remotely', *Harvard Business Review* (online, 4 May 2020) <https://hbr.org/2020/05/starting-a-new-job-remotely>.

[292] 'Great Expectations, Deflated Outcomes: The Reality for Law Graduates during COVID-19', *Law Society Journal* (online, 13 March 2022) <https://lsj.com.au/articles/great-expectations-deflated-outcomes-the-reality-for-law-graduates-during-covid-19/>.

[293] Hannah Wootton, 'Graduate Programs Stall as Virus Hits Lawyers', *Australian Financial Review* (online, 30 April 2020) <https://www.afr.com/companies/professional-services/law-firms-grapple-with-graduate-hiring-amid-covid-19-downturn-20200424-p54n3q>; Varsha Patel, 'Large UK Firms Maintain 2020 Trainee Intake as Mid-Tier Wavers', *Law.com International* (online, 4 June 2020) <https://www.law.com/international-edition/2020/06/04/large-firms-maintain-2020-trainee-intake-as-mid-tier-wavers/>.

[294] Productivity Commission, 'Working from Home', *Australian Government* (Research Paper, September 2021) 2, 11-12 ('Working from Home'). It is likely this rate is even higher for lawyers as office-based and knowledge professionals.

[295] 'Balancing Act: The New Equation in Hybrid Working', *PricewaterhouseCoopers* (Report, 2022) <https://www.pwc.com.au/future-of-work-design-for-the-future/balancing-act-the-new-equation-in-hybrid-working.html> ('Balancing Act: The New Equation in Hybrid Working').

[296] The year 2021 has been one of the strongest years on record for the law firm industry see: '2022 Client Advisory', *Citi Private Bank & Hildebrandt Consulting* (Report, 12 September 2021) <https://www.privatebank.citibank.com/insights/citi-hildebrandt-client-advisory>; see also Paul Hodkinson, 'The New Normal Could Be the Beginning of the End for Law Firm Culture', *Law.com International* (online, 13 January 2021) <https://www.law.com/international-edition/2021/01/13/the-new-normal-could-be-the-beginning-of-the-end-for-law-firm-culture/> ('Profitability might not be affected by remote working; the periods of lockdown demonstrated that work and communication continued efficiently').

work.[297] Broadly speaking, different combinations of approaches have been adopted by law firms being: fully in the office, fully remote, hybrid (percentage split) or leaving it up to the discretion of the manager or individual.[298] In considering which approach is most suitable, it is important to recognise that to some degree or another, all trust is mutual.[299] Reciprocity of trust is such that it is 'difficult to trust anyone who shows, by their actions, expressions, or gestures, that they do not trust us'.[300] A PwC survey of over a thousand knowledge-based workers reported that close to two in five workers (39%) felt that they were not trusted by their manager to work remotely.[301] Thus, organisation-wide mutual trust is needed.

This is especially so as, according to PwC, 74% of Australian workers and their international counterparts want a mix of remote and in-person working in the future.[302] The general sentiment is one of support for flexibility, with the caveat that the office will still play an essential role. Most firms in Australia and internationally have adopted a hybrid form of remote working arrangements known as a 60-40 model (3 days in the office, 2 days remote).[303]

This more balanced approach has received judicial support from Victorian Chief Justice Anne Ferguson advocating it would be a mistake 'to snap back to March 2020'.[304] Conversely, Chief Justice Andrew Bell of the New South Wales Supreme Court has called for a return to the office saying:

> *the absence of practitioners from chambers and solicitors' offices will sap them of vitality and will stunt the personal growth and professional development of young lawyers in particular. An essential part of being a good lawyer is understanding people and human nature, how others react to different situations, perform under pressure and interact with each other.*[305]

Similar sentiments have been raised across the profession; for example in our 2021 FLIP Stream Primer on the Future of Legal Services Delivery, an interviewee summed up the challenges of WFH as (1) the ability to develop the skills and the careers of junior lawyers – is 'much, much harder to do when you don't have a lot of face-to-face time'; and (2) collaborating together on matters – is 'a lot harder when you're not in the same location... particularly on large transactions and time-pressure transactions'.[306]

In this section we focus on how WFH has transformed the two core aspects of legal practice identified by Chief Justice Bell: managing online teams and managing graduates. First, however, we look at some of the research on teamwork.

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297 Rose Walker and Hannah Roberts, 'The Home vs Office Dilemma: Which Is the Best Model for Law Firms and Their People?', *Law.com International* (online, 5 May 2021) <https://www.law.com/international-edition/2021/05/05/the-home-vs-office-dilemma-which-is-the-best-model-for-law-firms-and-their-people/>; Citi Private Bank (n 296) 16; Andrew Maloney, '"A Multiyear Reckoning": Hybrid Work Is a Challenge That Isn't Going Anywhere', *The American Lawyer* (online, 14 March 2022) <https://www.law.com/americanlawyer/2022/03/14/a-multi-year-reckoning-hybrid-work-is-a-challenge-that-isnt-going-anywhere/>.

298 Ibid.

299 Paul J Zak, 'The Neurobiology of Trust' (2008) 298(6) *Scientific American* 88.

300 Murray and Fortinberry (n 288) 166.

301 PricewaterhouseCoopers, 'The Balancing Act: The New Equation in Hybrid Working' (n 295) 16.

302 'The Future of Work: Changing Places: How Hybrid Working Is Rewriting the Rule Book', *PricewaterhouseCoopers* (Report, 2021) <https://www.pwc.com.au/important-problems/future-of-work-design-for-the-future/changing-places-hybrid-working.html> ('The Future of Work'); In the US, more than half of government and corporate workers report they would like to work from home at least 3 days a week after the pandemic ends: Andrea Alexander et al, 'What Employees Are Saying about the Future of Remote Work', *McKinsey & Company* (Web Page, 1 April 2021) <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/what-employees-are-saying-about-the-future-of-remote-work#>. A further 29% of workers say they would consider quitting if they were forced to abandon remote work completely: Max Woolf, 'Is Remote Work Here to Stay?', *Livecareer* (Study, 2021) <https://www.livecareer.com/resources/careers/planning/is-remote-work-here-to-stay>. In the UK, 85% of people would like hybrid work to continue: Tony Dobbins, 'Flexible Working: Remote and Hybrid Work', *House of Commons Library* (Research Briefing, 30 November 2021) 22 <https://researchbriefings.files.parliament.uk/documents/CBP-9391/CBP-9391.pdf>.

303 'Commbank Legal Market Pulse: November 2021' (n 46) 20; Michael Pelly, 'No Pressure: Law Firms Only "Encourage" Return to Office', *Australian Financial Review* (online, 24 February 2022) <https://www.afr.com/companies/professional-services/no-pressure-law-firms-only-encourage-return-to-office-20220224-p59z7m>. For a list of how firms have approached flexible working policies see: Meganne Tillay and Simon Lock, 'Flexible Working Policies: The Latest Firm-By-Firm Guide', *Law.com International* (online, 8 June 2021) <https://www.law.com/international-edition/2021/04/08/flexible-working-policies-a-firm-by-firm-guide/>.

304 Michael Pelly, 'Don't Snap Back to 2020's Ways of Working, Says Victoria's Top Judge', *Australian Financial Review* (online, 29 April 2022) <https://www.afr.com/companies/professional-services/don-t-snap-back-to-2020-s-ways-of-working-says-victoria-s-top-judge-20220429-p5ah5f>.

305 Bell CJ (n 52); see also Michael Legg, 'OK Zoomer' (n 266).

306 Marina Nehme and Felicity Bell, *The Future of Legal Service Delivery: Sources of Innovation in the Legal Profession* (UNSW Law FLIP Stream, 2021) 47. The interviewee raised a third challenge of marketing 'It's crucial to an organisation such as mine that my colleagues are out in the city meeting clients, networking, making connections, winning work, particularly the more senior colleagues who are required to originate work.'

MANAGING ONLINE TEAMS

Increasingly, as with other sectors, lawyers work in teams online. Some of these teams are globally distributed, some are temporary – including where their members may never have worked together before. In the lawyer's context, teams may be referable to practice area or to matter, for example. As noted, above, a critical component of the success of teams or any collaborative relationship is trust building.[307] When groups are characterised by strong social relationships or interpersonal ties (things that we might associate with 'companion trust', as explained below), there is higher trust, and knowledge sharing can exceed what might be required formally.[308]

Before continuing to outline the research on trust, we note that this discussion on teams still applies to sole and small firm practitioners. These lawyers may not work as formally in the team setting, but they form teams, with other professionals to conduct their work. They also form teams among themselves, as committees and groups, in order to share ideas and experiences, and pursue joint goals. During the pandemic, for instance, South Australian small firm lawyers participated in their Law Society's Small Practice Committee and some joined a Facebook group to continue to engage with other practitioners and support one another.[309] Some sole practitioners covered their colleagues' matters when sick with COVID-19.[310] This could be a mutual arrangement and extend beyond the pandemic context, and indeed regularly meeting as a network is a key way for small and sole practitioners to stay on top of their professional ethics and training. In all these collaborative contexts, trust is vital.

In the Introduction, we defined two aspects of trust: cognitive (knowledge about person's competence and reliability) and affective (mutual feelings of care and concern). In work teams, both affective-based and cognitive-based trust have been found to increase the ability of team members to work together.[311] If we apply these ideas to the team level: the cognitive element is representative of an individual expecting that their teammates are able to perform a task appropriately whereas the affective element is associated with an emotional investment and caring for the teammates.[312] Research also indicates that cognitive-based trust precedes affective-based trust [313] and that cognitive-based trust may be more relevant to team performance than affective-based trust.[314] Of the few studies on team dynamics, a study by Jarvenpaa, Knoll, and Leidner found that the main characteristics we look for in those we trust in any situation transferred to the team context: ability, integrity, and benevolence were associated with team trust in (global) virtual teams as well.[315]

[307] Ana Cristina Costa, C Ashley Fulmer and Neil R Anderson, 'Trust in Work Teams: An Integrative Review, Multilevel Model, and Future Directions' (2018) 39(2) *Journal of Organizational Behavior* 169, 169; Joel Olson and Linda Olson, 'Virtual Team Trust: Task, Communication and Sequence' (2012) 18(5/6) Team Performance Management: An International Journal 256, 256, citing Benoit A Aubert and Barbara L Kelsey, 'Further Understanding of Trust and Performance in Virtual Teams' (2003) 34(5) *Small Group Research* 575; Dirks and Ferrin (n 6); Charles Handy, 'Trust and the Virtual Organization', *Harvard Business Review* (online, 1 May 1995) <https://hbr.org/1995/05/trust-and-the-virtual-organization>; Rousseau et al, 'Introduction to Special Topic Forum: Not So Different after all: A Cross Discipline View of Trust' (1998) 23(3) *Academy of Management* 393; Sue Newell, Gary David and Donald Chand, 'An Analysis of Trust among Globally Distributed Work Teams in an Organizational Setting' (2007) 14(3) *Knowledge and Process Management* 158, 159.

[308] Sue Newell, Gary David and Donald Chand, 'An Analysis of Trust among Globally Distributed Work Teams in an Organizational Setting' (2007) 14(3) *Knowledge and Process Management* 158.

[309] Chris Johnston, 'Pivot of Perish: Managing a Small Practice in the Grip of a Pandemic' (2020) 42(6) *Bulletin (Law Society of South Australia)* 22, 25.

[310] Julie Gilfoyle, 'Sole Practitioner in Quarantine: Unwell and Interstate, Corona Control Steps In' (2020) 40(3) *The Proctor* 32, 33. This support system is endorsed by Richard Maltz, counsel at Frankfurt Kurnit Klein & Selz: Richard M Maltz, 'Solo Practitioners' Battle Against COVID-19', *Frankfurt Kurnit* (Professional Responsibility Law Blog, 12 May 2020) <https://professionalresponsibility.fkks.com/post/102g6vi/solo-practi-tioners-battle-against-covid-19>.

[311] Gloria Barczak, Felicia Lassk and Jay Mulki, 'Antecedents of Team Creativity: An Examination of Team Emotional Intelligence, Team Trust and Collaborative Culture' (2010) 19(4) *Creativity and Innovation Management* 332.

[312] Feitosa et al (n 41), citing Ferda Erdem and Janset Ozen, 'Cognitive and Affective Dimensions of Trust in Developing Team Performance' (2003) 9(5/6) *Team Performance Management: An International Journal* 131.

[313] Daniel J McAllister, 'Affect and Cognition-Based Trust as Foundations for Interpersonal Cooperation in Organizations' (1995) 38(1) *Academy of Management Journal* 24.

[314] Roy Young Joo Chua, Paul Ingram and Michael W Morris, 'From the Head and the Heart: Locating Cognition and Affect-Based Trust in Managers' Professional Networks' (2008) 51(3) *Academy of Management Journal* 436; Paul S Hempel, Zhi-Xue Zhang and Dean Tjosvold, 'Conflict Management Between and Within Teams for Trusting Relationships and Performance in China' (2009) 30(1) *Journal of Organizational Behavior* 41.

[315] Sirkka Jarvenpaa, Kathleen Knoll and Dorothy Leidner, 'Is Anybody Out There? Antecedents of Trust in Global Teams' (1998) 14 *Journal of Management Systems* 29.

Meanwhile, the nature of trust in teams will depend on numbers and other dynamics. In any team, there will be both dyadic trust, between individuals, as well as collective trust (team-level). Dyadic trust between team members refers to trust with the referent of another member in the team at the individual level and is thus based on the interpersonal relationships between pairs of members in the team.[316]
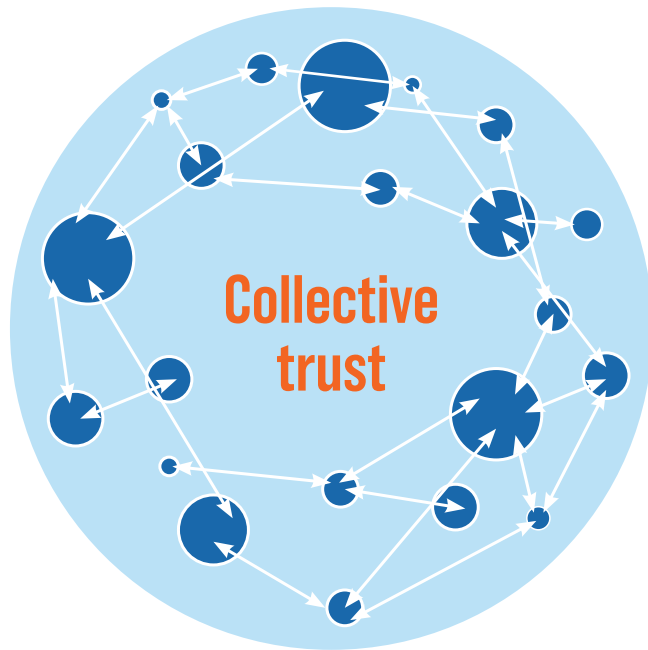
Team-level or collective trust, meanwhile, has been defined as a common belief among a group of individuals that another individual or group:

- makes good-faith efforts to behave in accordance with any commitments (explicit or implicit);

- is honest in whatever negotiations proceeded such commitments; and

- does not take excessive advantage of another even when the opportunity is available.[317]

Costa, Fulmer and Anderson explain that collective team trust refers to the aggregated perceptions of trust about the team as a distinct unit or team members as a whole and team trust emerges when team members share consensus in their trust in the team.[318] They explain that trust emerges from both interpersonal (individual to individual) interactions and group dynamics. These two levels interact with each other and will act as feedback loops; outcomes of trusting behaviours will lead to more perceived trustworthiness (Figure 9).
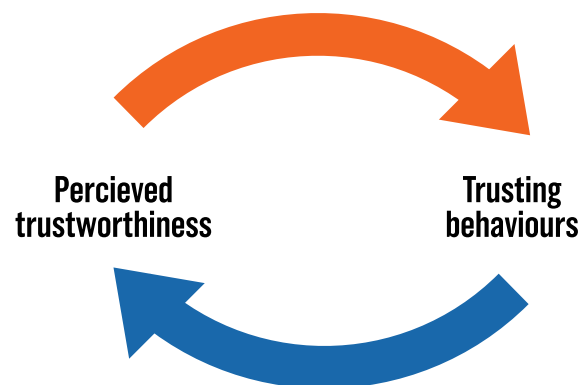

Figure 8: Dyadic and Collective Trust

Figure 9: Relationship between perceived trustworthiness and trusting behaviours

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[316] Costa, Fulmer and Anderson (n 307) 174-175.

[317] LL Cummings and Philip Bromiley, 'The Organizational Trust Inventory (OTI): Development and Validation' in Roderick Kramer and Tom Tyler (eds) *Trust in Organizations: Frontiers of Theory and Research* (Sage Publications, 1996) 302, 303.

[318] Costa, Fulmer and Anderson (n 307) 169-72. See also C Ashley Fulmer and Michele J Gelfand, 'At What Level (and in Whom) We Trust: Trust Across Multiple Organizational Levels' (2012) 38(4) *Journal of Management* 1167 and Roderick M Kramer, 'Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions' (1999) 50 *Annual Review of Psychology* 569.

In addition to individual and team factors, there are also contextual factors that influence trust in teams. Indeed, 'context' plays a role in Newell and Swan's threefold typology of trust (commitment, competence and companion trust), applied to a team setting. Their typology also fleshes out the cognitive and affective elements of teams:

Commitment trust arises between parties who have an expectation of mutual benefit from their cooperation. That cooperation could be part of a formal agreement or an expectation arising from their relationship,[319] such as the lawyer-client relationship. It reduces risk, allowing people to work together believing that their joint work will be completed and appropriately rewarded. This type of trust can be described as the trust that team members feel in the project(s) or matters they are working on and in the firm's willingness to provide future projects that will satisfy their career ambitions. It is based on contextual factors rather than on the emerging interpersonal relationships among the team members.

Competence trust is based on perceptions of another's competence to carry out the tasks that need to be performed and is based on an attitude of respect for the abilities of the trustee to complete their share of the job at hand. It does relate to contextual cues but while these might initially inspire competence trust, if the other fails to deliver as expected, competence trust can quickly deteriorate. In project teams, this type of trust relates to trust that members feel in the technical and organisational abilities of other project members.

Companion trust is based on judgments of goodwill or personal friendships, resting on a moral foundation that others will behave in a way that does not harm but rather promotes the good, of other members of the network. There is a joint expectation of honesty and openness. This trust develops over time as people get to know each other personally and develop friendship ties through continuing reciprocal exchange. It has a strong emotional component and is important for the maintenance of social networks. However, if eventually broken, this trust is also likely to cause the greatest rift between the parties involved. In project teams, this type of trust relates to the friendship ties that develop as an outcome of collaborative work and is related to the frequency of informal interactions.[320]

These elements affect each other. For example, competence is especially important to establishing companion trust.[321] Trust plays an even more essential role in virtual teams.[322] But the possibility of losing trust is much higher than with FtF teams.[323] Being online has been shown to increase 'low individual commitment, role overload, role ambiguity, absenteeism, and social loafing [putting in less effort than one would working alone]'.[324] It can reduce or even eliminate 'the type of communication cues that individuals use to convey trust, warmth, attentiveness, and other interpersonal affections.'[325] Certainly, it can slow these down.[326] Indeed, in general, virtual teams have been shown to take longer to develop trust than face-to-face teams at the start of projects because they require more time for members to exchange social information, meaning, primarily, information about our intentions but also other parts of our identities and behaviour relevant to cooperation.[327] Once trust is in place, in-depth discussion can be greater in online groups than in FtF ones.[328]

In a virtual team, the informal interactions that help foster social relationships will typically be limited. Indeed, colocation, or physical proximity more generally, is said to reinforce social similarity, shared values, and expectations,[329] the importance of which is detailed shortly. FtF encounters have traditionally been considered irreplaceable for both building trust and repairing shattered

[319] Violet T Ho, Denise M Rousseau and Laurie L Levesque, 'Social Networks and the Psychological Contract: Structural Holes, Cohesive Ties, and Beliefs Regarding Employer Obligations' (2006) 59(4) *Human Relations* 459, 461.

[320] McAllister (n 313).

[321] Newell, David and Chand (n 308); Susan Newell and Jacky Swan, 'Trust and Inter-Organizational Networking' (2000) 53 *Human Relations* 1287.

[322] Lilly Platt, 'Virtual Teaming: Where Is Everyone?' (1999) 22(5) *The Journal for Quality and Participation* 41, citing Mary O'Hara-Devereaux and Robert Johansen, *Globalwork: Bridging Distance, Culture and Time* (Jossey-Bass, 1994).

[323] Ibid.

[324] Sirkka Jarvenpaa and Dorothy Leidner, 'Communication and Trust in Global Virtual Teams' (1998) 3(4) *Journal of Computer-Mediated Communication* 791–2, citing Mary O'Hara-Devereaux and Robert Johansen, *Globalwork: Bridging Distance, Culture and Time* (Jossey-Bass, 1994).

[325] Ibid 793.

[326] Walther and Burgoon (n 54) 23; Joseph B Walther, 'Group and Interpersonal Effects in International Computer-Mediated Collaboration' (1997) 23(3) *Human Communication Research* 342 ('Group and Interpersonal Effects in International Computer-Mediated Collaboration').

[327] Jeanne M Wilson, Susan G Straus and Bill McEvily, 'All in Due Time: The Development of Trust in Computer-Mediated and Face-to-Face Teams.' (2006) 99(1) *Organizational Behavior and Human Decision Processes* 16, 17.

[328] Longqi Yang et al, 'The Effects of Remote Work on Collaboration among Information Workers' (2022) 6(1) *Nature Human Behaviour* 43.

[329] Jarvenpaa and Leidner (n 324) 791–792, citing Bibb Latané et al, 'Distance Matters: Physical Space and Social Impact' (1995) 21 *Personality and Social Psychology Bulletin* 795.

trust.[330] Some have argued that virtual teams cannot be effective without at least some in-person interaction.[331]

Several research studies and industry reports have shown how diverse teams (and indeed diverse workforces) are good for business, in terms of both innovation and profit,[332] in addition to being intrinsically worthwhile. Looking more closely, diverse teams enhance the team's critical thinking, troubleshooting, creativity and problem-solving skills,[333] even beyond a group of homogeneous high-achievers.[334] In the legal context, Rice makes the case for interdisciplinary teams, specifically in including or consulting those from other disciplines, to canvass a wider range of perspectives, interests, and solutions.[335]

However, without in-person interaction or with less of it, the composition of the team seems to matter more. Research shows, at least in global team contexts (where the differences between people may be larger), the heterogeneity of team members may make it more difficult to establish trust based on interactions.[336] When people are interacting with those who are seen to be like them (or interacting in homogenous social environments), the collaborative nature of interactions can be taken-for-granted.[337] Similarity with others positively reinforces members' own identities and contributes to their willingness to cooperate.[338] Similarities can relate to nationality, age, and functional background.[339] However, in interactions among heterogeneous teams, the ability to meet these expectations can be more challenging.[340] It is posited that trust and cohesion develop more naturally and quickly in teams where members have more commonalities and are more comfortable interacting with each other than in teams where members are more diverse.[341] There is, to be clear, some research to indicate that certain teams make strong bonds and trust despite heterogeneity and short time spans [342] but generally the greater the team member diversity, the more time is required for team members to form strong bonds.[343] Similarities can serve as a rule for defining the ingroup boundary, and individuals tend to attribute positive characteristics such as cooperativeness and trustworthiness to ingroup members.[344] Similarly, in cross-functional teams (incorporating people from different 'functional' areas of an organisation), an 'us versus them' attitude often prevails, which is detrimental to team trust.[345]

These tendencies raise critical issues of inclusivity and diversity, and therefore for the skills and functioning of the team. Indeed, 'spillover effects'[346] must be recognised

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[330] Ibid, citing Nitin Nohria and Robert G Eccles, 'Face-to-Face: Making Network Organizations Work' in Nitin Nohria and Robert G Eccles (eds) *Networks and Organization: Structure, Form and Action* (Harvard Business School Press, 1992); Mary O'Hara-Devereaux and Robert Johansen, *Globalwork: Bridging Distance, Culture and Time* (Jossey-Bass, 1994).

[331] Handy (n 13).

[332] For a summary, see David Rock and Heidi Grant, 'Why Diverse Teams are Smarter', *Harvard Business Review*, (online, 4 November 2016) < https://hbr.org/2016/11/why-diverse-teams-are-smarter>; Handy (n 13) and David Rock, 'Why Diverse Teams Outperform Homogenous Teams', *Psychology Today (*Web Page, 4 June 2021) <https://www.psychologytoday.com/au/blog/your-brain-work/202106/why-diverse-teams-outperform-homogeneous-teams>.

[333] Margaret Lohman and Michael Finkelstein, 'Designing Groups in Problem Based Learning to Promote Problem-Solving Skill and Self Directedness' (2000) 28 *Instructional Science* 291, 303.

[334] Scott Page, Diversity and Complexity (Princeton University Press, 2011); Lu Hong and Scott Page, 'Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers' (2004) 101(46) *Proceedings of National Academy of Sciences of the United States of America* 16385.

[335] Simon Rice, 'What Does a Social Justice Lawyer Need to Know?' (2022) 47(2) *Alternative Law Journal* 90.

[336] Newell, David and Chand (n 308) 161.

[337] Ibid.

[338] Ibid.

[339] Costa, Fulmer and Anderson (n 307) 175. The term 'functional background' means the job-related education, training, and work expertise the person is bringing to the job or team.

[340] Newell, David and Chand (n 308) 161.

[341] Costa, Fulmer and Anderson (n 307), citing Henri Tajfel and John C Turner, *The Social Identity Theory of Intergroup Behavior*, in Stephen Worchel and William G Austin (eds), *Psychology of Intergroup Relation* (Nelson-Hall Publishers, 2nd ed, 1986); Donn Erwin Byrne, The Attraction Paradigm (Academic Press, 1971); Anne S Tsui, Terri D Egan and Charles A O'Reilly, 'Being Different: Relational Demography and Organizational Attachment' (1992) 37(4) *Administrative Science Quarterly* 549.

[342] Gerardine DeSanctis and Marshall Scott Poole, 'Capturing the Complexity in Advanced Technology Use: Adaptive Structuration Theory' (1994) 5(2) *Organization Science* 121; Marshall S Poole and Gerardine DeSanctis, 'Microlevel Structuration in Computer-Supported Group Decision Making' (1992) 19(1) *Human Communication Research* 5.

[343] Ibid.

[344] Costa, Fulmer and Anderson (n 307), citing Marilynn B Brewer, 'Depersonalized Trust and Ingroup Cooperation' in Joachim I Krueger (ed), *Rationality and Social Responsibility: Essays in Honor of Robyn Mason Dawes* (Psychology Press, 2008) 215; Roderick M Kramer, Pri Pradhan Shah, Stephanie L Woerner, 'Why Ultimatums Fail: Social Identity and Moralistic Aggression in Coercive Bargaining' in Roderick M Kramer and David M Messick (eds), *The Social Context of Negotiation* (Sage Publications, 1995) 285, Roderick M Kramer and Jane Wei, 'Social Uncertainty and the Problem of Trust in Social Groups: The Social Self in Doubt.' in *The Psychology of the Social Self* (Lawrence Erlbaum Associates Publishers, 1999) 145.

[345] Newell, David and Chand (n 308).

[346] Fiona Murray, 'Innovation as Co-Evolution of Scientific and Technological Networks: Exploring Tissue Engineering' (2002) 31(8–9) *Research Policy* 1389.

and accounted for in any team based on strong social relationships. These dynamics can have a negative impact on aspects of knowledge sharing, for example by excluding those who are not part of the friendship or 'ingroup' group. In other words, the development of strong social networks and community bonds can create boundaries and an environment marked by cliques[347] and stereotyping, and unlawful discrimination can ensue.[348] Studies have shown how we make poor judgments or overattribute qualities of trust, such as benevolence and competence,[349] because of these immediate, unthinking, judgments about similarities and differences.[350] Studies have also shown that an implicit sense of shared identity, for instance, based on race or gender, can lead team members to put 'too much faith in each other's judgments, fueling a circle of blind conformity' in which people copy each other's assumptions and mistakes.[351]

In addition to providing time for socialising and trust-building between diverse team members at the start of a project,[352] other strategies can be implemented to mitigate some of the barriers to trust development. Brock notes that the benefits of diversity are not guaranteed simply by putting together a diverse team; the environment must be one in which inclusivity is valued and where each member has a voice.[353] This means that any strategy used should be aligned with and support a wider inclusivity commitment and culture. We now provide additional strategies for managing online teams.

B. STRATEGIES

1. Team Leadership

Leaders play a primary role in establishing and developing trust in teams.[354] Indeed, they play a primary role in enabling high-trust workplaces in general, given they set up or otherwise influence the structures of the workplace and communicate their objectives.[355] Leadership behaviours that are relationally driven, such as helping, being willing to convey openness, and being emotionally accessible build a foundation for successful relationships among team members.[356] Leaders who engage in high-quality leader-member interactions are perceived to be more trustworthy, approachable, and providing greater role clarity to others.[357] Leaders who share information with the team and rely on the team, build the team's expertise.[358] This promotes similar behaviours between other team members, which in turn increases team knowledge sharing overall.[359] Hernandez et al identify three factors that affect a team member's trust in their leader: the leader's capabilities (personal, ethical, and leadership); the relationship between the leader and the team (does the leader understand team member's aspirations, needs and challenges?); and the context of the workplace (and how that is shaped by the leader).[360] Leaders who convey a collective message have been found to increase team trust among members.[361] By contrast, favouritism of any form undermines trust and is associated with a lack of transparency, a lack of innovation, and corruption.[362]

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[347] Ibid; Justine Rogers, 'Since Lawyers Work in Teams, We Must Focus on Team Ethics' in Ron Levy et al (eds), *New Directions for Law in Australia Essays in Contemporary Law Reform* (ANU Press, 2017) 483.

[348] Discriminatory practices, apart from being illegal, are also often grounds for disciplinary sanction. The Law Society of NSW has also recently published a report on 'the business case' for diversity in the profession: Law Society of New South Wales, *Diversity and Inclusion in the Legal Profession: The Business Case* (Report, 2016)

[349] Daniel Z Levin and Rob Cross, 'The Strength of Weak Ties You Can Trust: The Mediating Role of Trust in Effective Knowledge Transfer' (2004) 50(11) *Management Science* 1477.

[350] Joseph B Walther, 'Group and Interpersonal Effects in International Computer-Mediated Collaboration' (n 326) 342.

[351] Rock (n 332).

[352] Newell, David and Chand (n 308).

[353] Rock (n 332).

[354] Dirks & Ferrin (n 6).

[355] Hungerford and Cleary, 'High Trust and Low Trust' (n 29) 507.

[356] Abraham Carmeli, Asher Tishler and Amy C Edmondson, 'CEO Relational Leadership and Strategic Decision Quality in Top Management Teams: The Role of Team Trust and Learning from Failure' (2012) 10(1) *Strategic Organization* 31.

[357] George B Graen and Mary Uhl-Bien, 'Relationship-Based Approach to Leadership: Development of Leader-Member Exchange (LMX) Theory of Leadership Over 25 Years: Applying a Multi-Level Multi-Domain Perspective' (1995) 6(2) *Leadership Quarterly* 219.

[358] John K Butler, Stephen R Cantrell, Randall Flick, 'Transformation Leadership Behaviors, Upward Trust, and Satisfaction in Self-managed Work' (1999) 17(1) *Organizational Development Journal* 13.

[359] Pauline Lee et al, 'Leadership and Trust: Their Effect on Knowledge Sharing and Team Performance' (2010) 41(4) *Management Learning* 473.

[360] Hungerford and Cleary, 'High Trust and Low Trust' (n 29) 508, citing Morela Hernandez, Chris Long and Sim Sitkin, 'Cultivating Follower Trust: Are All Leader Behaviors Equally Influential?' (2014) 35 *Organization Studies* 1867.

[361] Aparna Joshi, Mila B Lazarova and Hui Liao, 'Getting Everyone on Board: The Role of Inspirational Leadership in Geographically Dispersed Teams' (2009) 20(1) *Organization Science* 240.

[362] Hungerford and Cleary, 'High Trust and Low Trust' (n 29) 511.

2. Newcomers to the team and monitoring

As indicated, teams often function because of social relationships and the exchange of implicit (or non-formalised) knowledge. New members of a team, for instance a new graduate or a lateral hire, can find themselves in a vulnerable position.[363] In many instances, formal documents or a brief will not be available or will not be sufficient to allow them to understand what they are supposed to be working on or where the recorded knowledge is that could help them complete a task for team's benefit. The leader needs to guide the new member. The role of trust is critical. The leader must trust that the novice is capable of following those instructions, as per cognitive trust. Likewise, the novice must sense there is some affective trust in the relationship with the leader. They need to be able to trust, more specifically, that by admitting help is needed the leader/manager/supervisor will not leverage this admission of a lack of expertise against them. Without trust as a foundational component of the relationship, this exchange cannot take place.

Supervising or close monitoring in a team is a tricky area, regardless of the status of the members (whether or not they are novices) because on some level monitoring suggests an absence of trust.[364] Alternatively, some scholars argue that trust and monitoring can be positively reinforcing,[365] especially where the members of the team do not know each other.[366] One interesting finding is that too much monitoring at the start can be negative for team trust, but its effects are positive at later stages.[367] A critical factor is the form of monitoring. When monitoring involves 'backing up' behaviour – helping team members succeed – it can be beneficial.[368] It also depends on whether monitoring is perceived as being inherent to the task and thus expected or whether it is unexpected or a surprise in that context, and therefore erodes trust.[369]

3. Setting and executing the team's task: interdependence

Task interdependence describes how much one individual group member's performance is dependent upon the skills and actions of group members.[370] When there is high task interdependence, trust becomes more critical to achieving team goals;[371] where it is low, this is not so necessary.[372] High task interdependency results in increased needs for adjustment, communication, and coordination.[373] But at the same time, interdependency facilitates trust development[374] so low task interdependence means lower trust.[375] Wilson et al pointed out that this often leads to a downward spiral: low levels of interdependence result in restricted interaction which then inhibits trust development.[376] In addition to the increased flow and exchange of information, a positive aspect of 'task interdependence' is that it decreases the social isolation associated with working online.[377] For lawyers managing a team, this means that distributing tasks in ways which require staff to work with one another will increase communication, trust and social connection.

[363] See below Managing New Graduates.

[364] Mayer, Davis and Schoorman, 'An Integrative Model of Organizational Trust' (n 38) 729.

[365] TK Das and Bing-Sheng Teng, 'Between Trust and Control: Developing Confidence in Partner Cooperation in Alliances' (1998) 23(3) *The Academy of Management Review* 491 ('Between Trust and Control'); Bart de Jong and Tom Elfring, 'How Does Trust Affect the Performance of Ongoing Teams? The Mediating Role of Reflexivity, Monitoring, and Effort' (2010) 53(3) *Academy of Management Journal* 535 ('How Does Trust Affect the Performance of Ongoing Teams?'); McAllister (n 313).

[366] Ana Cristina Costa, Katinka Bijlsma-Frankema and Bart de Jong, 'The Role of Social Capital on Trust Development and Dynamics: Implications for Cooperation, Monitoring and Team Performance' (2009) 48(2) *Social Science Information* 199.

[367] Das and Teng, (n 365); de Jong and Elfring (n 365); McAllister (n 313).

[368] Christopher OLH Porter et al, 'Backing up Behaviors in Teams: The Role of Personality and Legitimacy of Need' (2003) 88(3) *Journal of Applied Psychology* 391.

[369] McAllister (n 313).

[370] Michael A Campion, Gina J Medsker and A Chaterine Higgs, 'Relations Between Work Group Characteristics and Effectiveness: Implications for Designing Effective Work Groups' (1993) 46(4) *Personnel Psychology* 823; Ruth Wageman and George Baker, 'Incentives and Cooperation: The Joint Effects of Task and Reward Interdependence on Group Performance' (1997) 18(2) *Journal of Organizational Behavior* 139.

[371] Bart A De Jong, Kurt T Dirks, Nicole Gillespie, 'Trust and Team Performance: A Meta-analysis of Main Effects, Moderators, and Covariates' (2016) 101(8) *Journal of Applied Psychology* 1134.

[372] Sirkka Jarvenpaa, Thomas Shaw and D Staples, 'Toward Contextualized Theories of Trust: The Role of Trust in Global Virtual Teams' (2004) 15(3) *Information Systems Research* 250.

[373] Richard A Guzzo and Gregory P Shea, 'Group Performance and Intergroup Relations in Organizations' in Marvin Dunnette and Leaetta M Hough (eds), *Handbook of Industrial and Organizational Psychology,* Vol 2, 2nd Ed. (Consulting Psychologists Press, 1992) 269.

[374] Wilson, Strauss and McEvily (n 327).

[375] Claus W Langfred, 'The Downside of Self-Management: A Longitudinal Study of the Effects of Conflict on Trust, Autonomy, and Task Interdependence in Self-Managing Teams' (2007) 50(4) *Academy of Management Journal* 885.

[376] Wilson, Strauss and McEvily (n 327).

[377] Olson and Olson (n 307) 256.

	High trust teams	Low trust teams
Discussing Goals	Discussed goals Contacted manager with questions in case of ambiguity Discussed time-management	Did not discuss goals Contacted manager with questions only where lost No discussion of time-management
Communication	Praised one another and the team Demonstrated optimism and enthusiasm Task-oriented (low social communication) but empathetic Frequent and timely communication	Low social communication and low empathy
Reliability	Exhibited individual initiative, volunteered for roles, met their commitments Notified team ahead of time of absences Dealt decisively with "free-riders"	Exhibited inaction, characterized by the asking of questions but little delivery of work, and by asking for volunteers but rarely volunteering Did not notify of absences Ignored the "free-riders"
Feedback	Gave substantial feedback oriented to improving fellow member's work Part of a pattern of frequent communication and frequent bursts of interaction	Gave minor feedback: "ok"; "looks good to me" Part of a pattern of infrequent communication and sense of not being heard due to long and unexplained breaks in communication
Interdependence	Divided work so that one person did first iteration and others gave feedback and reworked	Divided work so as to eliminate interdependence

Table 4: High Trust versus Low Trust Teams

4. Team member behaviour

One research study summarised a number of observable differences in online teams between those which developed high trust and those which did not.[378]

The researchers noted that those teams which developed high trust appeared to demonstrate this from the outset. The low-trust teams also began by demonstrating trustful actions but in these teams, trust decreased almost immediately due to low communication and inaction.

Meanwhile, the action and active communication of the high trust teams seemed to reinforce their trust.

Other research has shown that the downsides of being online can be compensated for if members employ additional communication strategies including taking initiative, expressing enthusiasm, responding in a timely and meaningful manner, increasing feedback, increasing perceptions of virtual co-presence, providing transparent information, focusing on tasks rather than on procedures, and exchanging information about team processes.[379]

5. Collective trust: team climate and organisational culture

Some wide-scale research surveys argue that team trust is really an aspect of overall team climate.[380] Research on leading (management) teams demonstrates that team climates with interpersonal trust and mutual respect allow members to believe that they will not be penalized or disadvantaged for speaking up or challenging prevailing opinion. [381] This then enables reflexivity and learning from failure,[382] which improves outcomes. In virtual teams, a high trust climate like this can compensate for the lack of in-person informational cues.[383]

As indicated, the context of a team is a critical factor. Context comprises the environment or larger social system in which the team operates and influences the relationship between team inputs, process/emergent states, and outcomes.[384] For work teams, the workplace context in which teams operate is especially relevant when understanding how trust emerges and develops in team contexts.[385] This includes how centralized or decentralized decision making is within the organisation.[386] Highly formal structures are less conducive to trust than participative structures.[387]

Indeed, management practices impact all levels of an organisation. As suggested by the notion of 'commitment trust' outlined above, a fair rewards system is important for trust.[388] Team-based rewards might be good for development of trust but can also be, at times, de-motivating for high-performing team members.[389] Ideally, rewards would be both individual and teams-based – one

[378] Jarvenpaa, Knoll and Leidner, 'Is Anybody Out There?' (n 314); See also Jarvenpaa and Leidner (n 324).

[379] Bradley J Alge, Carolyn Wiethoff and Howard J Klein, 'When Does the Medium Matter? Knowledge-Building Experiences and Opportunities in Decision-Making Teams' (2003) 91(1) *Organizational Behavior and Human Decision Processes* 26; Shoshana Altschuller and Raquel Benbun-an-Fich, 'Trust, Performance, and the Communication Process in Ad Hoc Decision-Making Virtual Teams' (2010) 16(1) *Journal of Computer-Mediated Communication* 27; Darleen M DeRosa et al, 'Trust and Leadership in Virtual Teamwork: A Media Naturalness Perspective' (2004) 43(2–3) *Human Resource Management* 219; Susanne Geister, Udo Konradt and Guido Hertel, 'Effects of Process Feedback on Motivation, Satisfaction, and Performance in Virtual Teams' (2006) 37(5) *Small Group Research* 459; Jarvenpaa and Leidner (n 326); Michael E Palanski, Surinder S Kahai and Francis J Yammarino, 'Team Virtues and Performance: An Examination of Transparency, Behavioral Integrity, and Trust' (2011) 99(2) *Journal of Business Ethics* 201; Ana Zornoza, Virginia Orengo and Vicente Peñarroja, 'Relational Capital in Virtual Teams: The Role Played by Trust' (2009) 48(2) *Social Science Information* 257.

[380] Amy Edmondson, 'Psychological Safety and Learning Behavior in Work Teams' (1999) 44(2) *Administrative Science Quarterly* 350; Ute R Hülsheger, Neil Anderson and Jesus F Salgado, 'Team-Level Predictors of Innovation at Work: A Comprehensive Meta-Analysis Spanning Three Decades of Research' (2009) 94(5) *Journal of Applied Psychology* 1128.

[381] Ibid.

[382] Amy Edmondson and Bertrand Moingeon, 'From Organizational Learning to the Learning Organization' (1998) 29(1) *Management Learning* 5.

[383] Ana Zornoza, Virginia Orengo and Vicente Peñarroja, 'Relational Capital in Virtual Teams: The Role Played by Trust' (2009) 48(2) *Social Science Information* 257.

[384] Daniel R Ilgen et al, 'Teams in Organizations: From Input-Process-Output Models to IMOI Models.' (2005) 56 *Annual Review of Psychology* 517; Steve WJ Kozlowski and Bradford S Bell, 'Work Groups and Teams in Organizations' in Walter V Borman, Daniel R Ilgen and Richard J Klimoski (eds), *Handbook of Psychology: Industrial and Organizational Psychology, Vol 12* (John Wiley & Sons, 2003) 333.

[385] Newell and Swan (n 321) 1287-1288.

[386] Russell Hardin, 'Trustworthiness' (1996) 107(1) *Ethics* 26.

[387] Christine Moorman, Rohit Deshpande and Gerald Zaltman, 'Factors Affecting Trust in Market Research Relationships' (1993) 57 *Journal of Marketing* 81 in the context of project marketing.

[388] Guido Hertel, Susanne Geister and Udo Konradt, 'Managing Virtual Teams: A Review of Current Empirical Research' (2005) 15 *Human Resource Management Review* 69.

[389] Jacquelyn S DeMatteo, Lillian T Eby and Eric Sundstrom, 'Team-Based Rewards: Current Empirical Evidence and Directions for Future Research' in Barry M Staw and Larry L Cummings (eds), *Research in Organizational Behavior, Vol 20: An Annual Series of Analytical Essays and Critical Reviews* (Elsevier Science/JAI Press, 1998) 141.

study of virtual teams found this to be the most effective in making members feel motivated and responsible for team success.[390]

Organisational culture is important too – a perception that a person's beliefs and values are congruent with those of the organisation, and a collaborative culture, specifically, are positively associated with trust.[391] Where there is a collaborative culture in a workplace, individuals are more willing to cooperate, share information, offer differing viewpoints, and openly discuss problems.[392] As mentioned in the discussion on diversity, a collaborative culture is also an inclusive culture. Members in high trust teams perceive each other to have strong functional as well as interpersonal capabilities, which can create a feeling that the team can jointly make decisions and share ideas without fear of criticism.[393] In an organisational climate based on trust, coordination and control can be accomplished through empowerment, participation, and interpersonal relations that are supportive, cooperative, and trusting in nature.[394]

Managing online teams largely hinges on internal relationships of trust within the firm. In the following section, we look to the management of new graduates.

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[390] Guido Hertel, Udo Konradt and Borris Orlikowski, 'Managing Distance by Interdependence: Goal Setting, Task Interdependence, and Team-Based Rewards in Virtual Teams.' (2004) 13(1) *European Journal of Work and Organizational Psychology* 1.

[391] Peter Li, Yuntao Bai and Youmin Xi, 'The Contextual Antecedents of Organizational Trust: A Multidimensional Cross-Level Analysis' (2012) 8 *Management and Organization Review*; CB Bhattacharya, Daniel Korschun and Sankar Sen, 'Strengthening Stakeholder–Company Relationships Through Mutually Beneficial Corporate Social Responsibility Initiatives' (2008) 85 *Journal of Business Ethics* 257.

[392] Barczak et al (n 311).

[393] Edmondson, (n 380).

[394] Malcolm G Patterson et al, 'Validating the Organizational Climate Measure: Links to Managerial Practices, Productivity and Innovation' (2005) 26(4) *Journal of Organizational Behavior* 379.

MANAGING NEW GRADUATES

New lawyers generally lack the practical skills or experience to engage in autonomous, independent practice, and supervision is required for the first two years post-admission.[395] Graduate programs ought to bridge this gap as an essential step in the socialisation of graduates into legal professionals,[396] and professionals who can better trust themselves.[397] Traditionally, supervision, mentoring, induction, and training have been conducted in person. Moving these processes online transforms the dynamics within these relationships, removing or diminishing the trust and rapport built up (usually) by simply being in the same physical space as each other for concentrated periods.[398]

New graduates enter a profession already facing challenges including growing commercialisation and more aggressive profit-seeking;[399] wellbeing concerns;[400] workplace bullying;[401] long hours;[402] unidimensional performance review;[403] issues with inclusion and diversity;[404] and, in some instances, cultural clashes between generations.[405] Many junior lawyers identify the culture of their workplace as a negative one.[406] In this way, young lawyers are being acculturated into a professional environment that was, even before WFH and at least somewhat, struggling to provide the conditions conducive to a healthy, ethical, and competent professional identity.

Meanwhile, FLIP Stream's 2021 research found that 'trust and communication were key when the workforce was working remotely' but also that '[t]his could be harder with new starters or with junior staff'. Online and hybrid work is generally perceived to be more exhausting for staff,[407] and can lead to reduced opportunities, constrained relationship-building and less ad-hoc or day-to-day support. Several juniors have publicly reported on the difficulties of remote working[408] – in contrast to many senior lawyers who have appeared to thrive WFH.[409] In

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[395] *LPUL* (n 147) s 49.

[396] Vivien Holmes et al, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15(1) *Legal Ethics* 29, 29.

[397] Covey (n 2) 47.

[398] Richard Moorhead and Fiona Boyle, 'Quality of Life and Trainee Solicitors: A Survey' (1995) 2(2–3) *International Journal of the Legal Profession* 217, 244.

[399] See Margaret Thornton, 'Legal Professionalism in a Context of Uberisation' (2021) 28(3) *International Journal of the Legal Profession* 243, 246-259 ('Legal Professionalism in a Context of Uberisation'). Thornton attributes it to 1) incorporation of legal practice; 2) the establishment of multidisci-plinary practices; 3) stock exchange listings; and 4) globalisation.

[400] Michelle Brady, 'Lawyer Wellbeing Report', *Victorian Legal Services Board & Commission* (Report, 6 September 2021) <https://www.lsbc.vic.gov.au/lawyers/practising-law/lawyer-wellbeing/lawyer-wellbeing-report>; Junior Lawyers Division, 'Resilience and Wellbeing Survey 2019', *The Law Society* (Survey, April 2019) <https://communities.lawsociety.org.uk/Uploads/b/y/k/resilience-wellbeing-survey-report-2019.pdf>.

[401] Joanne Bagust, 'The Culture of Bullying in Australian Corporate Law Firms' (2014) 17(2) *Legal Ethics* 177; Victorian Legal Services Board and Commissioner, *Understanding How Workplace Culture Affects Lawyer Wellbeing* (Report, 1 April 2022) 12 <https://lsbc.vic.gov.au/lawyers/practising-law/lawyer-wellbeing/understanding-how-workplace-culture-affects-lawyer>.

[402] Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23(1) *International Journal of the Legal Profession* 13.

[403] Eg, focused on solely on billing: Justine Rogers and Michael Legg, 'Lawyers' Fee Arrangements and their Wellbeing', in Michael Legg, Prue Vines and Janet Chan (eds), *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 267; Iain Campbell and Sara Charlesworth, 'Salaried Lawyers And Billable Hours: A New Perspective From The Sociology Of Work' (2012) 19(1) *International Journal of the Legal Profession* 89-122; Michael Legg, *The Sustainability of Law and Lawyers: The Future of Legal Costs and Fees - Time Based Billing and Alternative Fee Arrangements* (UNSW Law FLIP Stream, 2020).

[404] Lisa Webley et al, 'Access to a Career in the Legal Profession in England and Wales: Race, Class, and the Role of Educational Background' in David B Wilkins et al (eds), *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers* (Cambridge University Press, 2016) 198.

[405] Jan L Jacobowitz, Katie M Lachter and Gabriella Morello, 'Cultural Evolution or Revolution: The Millenial's Growing Impact on Professionalism and the Practice of Law' (2015) 23(4) *Professional Lawyer* 20.

[406] One UK survey on junior lawyers found that 93% of respondents felt stressed in their role the month before completing the survey, with a quarter being severely stressed. Stress has a profound impact on decision making, which can either lead to riskier choices in pursuit of immediate stress relief or risk-aversion to make any decision at all. 'Life in the Law 2020/21', *LawCare* (Research Report, 28 September 2021) <https://www.lawcare.org.uk/media/14vhquzz/lawcare-lifeinthelaw-v6-final.pdf>.

[407] Alex Christian, 'Why Hybrid Work Is Emotionally Exhausting', *BBC* (online, 21 January 2022) <https://www.bbc.com/worklife/article/20220120-why-hybrid-work-is-emotionally-exhausting>.

[408] Stefanie Costi, 'Covid Working: A Junior Lawyer's Version of Hell', *Australian Financial Review* (online, 22 September 2021) <https://www.afr.com/companies/professional-services/pandemic-is-a-junior-lawyer-s-version-of-hell-20210922-p58tqx>; Hannah Wootton, '"Nightmare Dressed up as a Holiday": Young Lawyers Rue Virus Workload', *Australian Financial Review* (online, 20 May 2021) <https://www.afr.com/companies/professional-services/nightmare-dressed-up-as-a-holiday-young-lawyers-rue-virus-workload-20210513-p57rpx>.

[409] Hannah Wootton and Michael Pelly, 'COVID-19 a "catalyst for Change" for How Law Firms Work', *Australian Financial Review* (online, 21 May 2020) <https://www.afr.com/companies/professional-services/covid-19-a-catalyst-for-change-for-how-law-firms-work-20200514-p54svc>. For one middle manager lawyer's positive experience of remote work, see: Sateesh Nori, 'How I Learned to Find Work-Life Balance during the COVID-19 Pandemic', *American Bar Association Journal* (online, 11 January 2022) <https://www.americanbar.org/groups/journal/articles/2022/how-i-learned-to-find-work-life-balance-during-the-covid-19-pand/>.

the Law Society of NSW's 2022 Post-COVID survey of member solicitors, the ability to develop junior staff was regarded as the third most negatively impacted area by the pandemic, behind professional networking and staff mental health and wellbeing. Similarly, the International Bar Association (IBA), in their global snapshot of young lawyers, found that while graduates appreciated more flexible working arrangements, their gratitude was clouded by overwhelming workloads, potential salary cuts, and isolation. The IBA concluded that in the next five years, half of young lawyers are somewhat or highly likely to move to a comparable workplace/firm, a third to a new role within the legal profession, and a fifth to leave the legal profession entirely.

With this context, we begin by outlining how each of these traditional processes of graduate socialisation – supervision, mentoring, induction, and training – have been transformed by WFH and hybrid work arrangements. We then provide five strategies to mitigate these changes and to re-build trust and rapport in graduate relationships within the firm.

A. SUPERVISION, MENTORING INDUCTION AND TRAINING

Supervision has always played an integral role to the functioning of the legal profession,[410] and has been said to lie at its heart and represent its future.[411] Described as 'experiential, practical',[412] supervision is essential for junior lawyers to develop task competence and autonomy,[413] key features of a trusted professional. In Australia, legal professional legislation mandates a two-year period of supervised practice after admission.[414] Supervised practice acts as the third stage of legal education, intended to

Figure 10: The Development of a Professional Identity

transition novice lawyers to becoming practitioners who are worthy of being trusted.[415]

Principals with designated responsibility ('carriage') of matters are required to exercise reasonable supervision over employees, with penalties for failing to do so.[416] The OLSC has flagged in its Annual Report that it is incumbent to have robust systems in place for remote supervision of junior lawyers. The rule implies a positive obligation, so the proverbial office 'open door' policy is unlikely to meet the required standard for a proper management system.[417] In the online realm, without any office doors at all, supervision is even more difficult and 'more complex than simply walking into an adjacent office.'[418] Thomson Reuters found that 59% of private practice professionals increased technology investment during the pandemic. Accordingly, supervisory lawyers also need to understand their use in order to ensure they can properly fulfil their supervisory duties.[419]

To lead effectively, law firm leaders need to be credible and their followers need to feel that they can trust them.[420] However, previous research has for some time now identified the complexities of fostering trust remotely in relationships of differing seniority.[421] Supervisors may be more concerned with reviewing work and monitoring

410 EW Timberlake, 'Origin and Development of Advocacy as a Profession' (1922) 9(1) *Virginia Law Review* 25, 32. For a history, in the English and Australian contexts, see: Michael John McNamara, *Supervision in the Legal Profession* (Springer Singapore, 1st ed 2020).

411 Caitlin Hamilton and Jim Milne, 'Supervising Graduate Lawyers in Legal Practice' (Conference Paper, Conference of Regulatory Officers, Hobart, 5–6 November 2015).

412 Jonathan Rose, 'The Legal Profession in Medieval England: A History of Regulation' (1998) 48 *Syracuse Law Review* 1, 31.

413 Holmes et al (n 396).

414 *Legal Profession Uniform Law 2014* (NSW) s 49.

415 Michael John McNamara, *Supervision in the Legal Profession* (Springer Singapore, 1st ed, 2020) 31.

416 *ASCR* (n 148) r 37 and *LPUL* (n 147) s 35.

417 Glenda Carry, 'Practice and Procedure: Are You Supervising as You Should?: Your Staff and Your Practice Depend on It' (22) *Law Society of NSW Journal* 70.

418 Thornton (n 399) 'Legal Professionalism in a Context of Uberisation' 253.

419 Christopher A Suarez, 'Disruptive Legal Technology, COVID-19, and Resilience in the Profession' 72 *South Carolina Law Review* 393, 420–421.

420 Donald Polden, 'Lawyers, Leadership, and Innovation' (2019) 58(3) *Santa Clara Law Review* 427, 430; James M Kouzes and Barry Z Posner, *Credibility: How Leaders Gain and Lose It, Why People Demand It* (Jossey-Bass, 2nd ed, 2011) 16–20. Kouzes and Posner have stated this relationship as follows: 'Leadership is a relationship between those who aspire to lead and those who choose to follow.' James M Kouzes and Barry Z Posner, *A Leader's Legacy* (Jossey-Bass, 1st ed, 2006).

421 Karen L Murphy et al, 'A Constructivist Model of Mentoring, Coaching, and Facilitating Online Discussions' (2005) 26(3) *Distance Education* 341, 341–342. See also Rogers and Bell, 'Change Leadership for Lawyers' (n 282).

productivity, while supervisees may struggle with reduced access to managerial support, or otherwise feel out of touch with their remote managers.[422] Indeed, research shows that what supervisees desire the most is more contact time with their supervisor, formal training and development targeted at wider personal and professional growth, and empathy and support.[423] This requires commitment of time and resources by the supervisor and their organisation. As explained in the Introduction, being online can hamper the process of building rapport,[424] which means those other relational elements, like empathy and support are less likely to develop. Moreover, arranging structured time together is more cumbersome, even accessing information or getting answers to simple questions can feel like a hurdle, especially for new employees. It may be harder for junior lawyers to seek impromptu guidance through an unrelated and/or group Zoom call for example, than quickly ask a lawyer who is sitting in close physical proximity. From the supervisor's end, it is harder to assess a supervisee's capacity online (e.g., are they happily working away or alone and stressed from overwork?). Also, remote workers may find it easier to shirk or cut corners, necessitating additional monitoring.

Mentoring is a collaborative experience involving the sharing of both professional and personal experiences to develop self-discovery and confidence in one's standing within an organisation and profession.[425] Some of the by-products of any mentoring (whether online or in-person) are greater trust and common expectations.[426] Mentees may have multiple concurrent 'constellations' of mentor relationships.[427] How people make the most of their relationships with mentors can materially affect their work experiences, including perception of fairness at work and job satisfaction, and even future earnings.[428] This is especially relevant for junior lawyers, as past research has found having a mentor early in one's career improves ability to develop social capital.[429] Fukuyama links social capital with trust, that when cultivated creates greater opportunities and wealth.[430] Crucially, trust enhances knowledge-sharing, which is critical because, as a reminder, most of the ways knowledge is learnt in workplaces occur between people, rather than through documents and standardised procedures. Mentoring can help individuals learn the content and rules of organisational culture.[431] This has been termed a community of practice,[432] where tacit knowledge is crystallised and shared among a group.[433] For example, mentors teach the 'secrets' of being an advocate, such as passing on conventions on etiquette or even style of dress.[434] It has been said that support from peers is the most important factor affecting newcomer attitudes toward work.[435] For formal mentorships, remote work can actually provide benefits through better accessibility;

[422] Harvard Business Review, *Coronavirus and Business* (n 289) 51.

[423] McNamara (n 415) 172.

[424] Katherine Isbister and Clifford Nass, 'Consistency of Personality in Interactive Characters: Verbal Cues, Non-Verbal Cues, and User Characteristics' (2000) 53(2) *International Journal of Human-Computer Studies* 251, 253; Richard L Daft and Robert H Lengel, 'Organizational Information Requirements, Media Richness and Structural Design' (1986) 32(5) *Management Science* 554; John Short, Ederyn Williams and Bruce Christie, *The Social Psychology of Telecommunications (*Wiley, 1976); Alan R Dennis, Robert M Fuller and Joseph S Valacich, 'Media, Tasks, and Communication Processes: A Theory of Media Synchronicity' (2008) 32(3) *MIS Quarterly* 575.

[425] Peter Gauhghwin, 'Collaborative Mentoring: Antidote to Bullying, Substitute for Supervision? Part 1' (August 2011) *The Bulletin* 20.

[426] Maud Lindley, 'Squeezing the Most out of a Mentoring Relationship', *Law Society Journal* (online, 19 April 2022) <https://lsj.com.au/articles/squeezing-the-most-out-of-a-mentoring-relationship/>.

[427] Monica C Higgins, 'The More, the Merrier? Multiple Developmental Relationships and Work Satisfaction' (2000) 19(4) *Journal of Management Development* 277.

[428] Yung-Yi Diana Pan, 'Typecast Socialization: Race, Gender, and Competing Expectations in Law School' in David B Wilkins et al (eds), *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers* (Cambridge University Press, 2016) 141, 145–146; G Melton Mobley et al, 'Mentoring, Job Satisfaction, Gender, and the Legal Profession' (1994) 31(1) *Sex Roles* 79; David N Laband and Bernard F Lentz, 'Workplace Mentoring in the Legal Profession' (1995) 61(3) *Southern Economic Journal* 783; George Dreher and Ronald Ash, 'A Comparative Study of Mentoring Among Men and Women in Managerial, Professional, and Technical Positions' (1990) 75 *Journal of Applied Psychology* 539; Ellen A Fagenson, 'The Mentor Advantage: Perceived Career/Job Experiences of Proteges Versus Non-Proteges' (1989) 10(4) *Journal of Organizational Behavior* 309.

[429] Monica Higgins and Nitin Nohria, 'The Sidekick Effect: Mentoring Relationships and the Development of Social Capital' in Roger Th A J Leenders and Shaul M Gabbay (eds), *Corporate Social Capital and Liability* (Springer US, 1999) 161.

[430] Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (Free Press, 1995).

[431] Belle Ragins, 'Barriers to Mentoring: The Female Manager's Dilemma' (1989) 42 *Human Relations* 1, 5.

[432] Mary Noonan and Ruth Ballinger, 'Peer and Faculty Mentoring in Doctoral Education: Definitions, Experiences, and Expectations' (2007) 19 *International Journal of Teaching and Learning in Higher Education* 251.

[433] Ikujiro Nonaka, Ryoko Toyama and Noboru Konno, 'SECI, Ba and Leadership: A Unified Model of Dynamic Knowledge Creation' (2000) 33(1) *Long Range Planning* 5.

[434] Fiona Wilson, 'Learning with the Devil: Mentoring and Advocates' (2021) 51(2) *Personnel Review* 464, 471.

[435] Meryl R Louis, Barry Z Posner and Gary N Powell, 'The Availability and Helpfulness of Socialization Practices' (1983) 36(4) *Personnel Psychology* 857.

allowing mentors to be brought in from outside the team, across the world or from more senior rungs of the firm.

However, a serious drawback of remote work is the loss of informal mentorships, without the opportunities of casual discussions in hallways, coffee catch-ups, or the spontaneous offer to join someone in court, for example. It is harder to begin a relationship asking for advice or assistance having never interacted or even seen someone before.[436] While research suggests that people generally underestimate the willingness of others to help,[437] without establishing the rapport that comes with everyday FtF interactions, graduates may feel reticent to ask for this sort of support.

Induction and Training are necessary for a lawyer to understand the workings and culture of the organisation, develop their knowledge and skills, including regarding their ethical obligations, and introduce trainees (or grads) to each other 'as a mutual resource for practical and emotional support'.[438] Skimping on the induction process because of the online or hybrid context means new lawyers are less oriented in their firms and have less chance of collegiality and loyalty developing, crucial for all lawyers working virtually.[439] Inadequate training can lead to ethics risks, difficult or unreasonable workloads, and greater friction within teams, in turn degrading trust, relationships, and wellbeing.[440] The Victorian

Legal Services Board and Commissioner surveyed lawyers renewing their practice certificates in 2021, and found that lawyers aged 21-30 cited lack of training and professional development as the most commonly reported negative factor on their wellbeing.[441] The quality of training may also be lower or less engaging online, especially in the case of more 'passive' training (such as presentations or lectures).[442] In addition, the use of video in online training sessions may be particularly alienating for young graduate lawyers, who may already be self-conscious as new members of the organisation.[443]

On the other hand, remote training also has some benefits, including expanding the physical capacities of training, improving convenience, allowing for trainers/speakers outside of geographical boundaries, and opening up training across practice groups.[444] Where previously, 'participatory methods, such as role playing' were used as simulations,[445] working remotely also allows juniors to join real meetings in the background and observe actual interactions of senior lawyers with clients.[446] This is possible because joining digitally is less intrusive than in-person attendance and can lead to better outcomes for junior lawyers.[447] A move to a more casual WFH environment can also give juniors a less intimidating environment to learn.

[436] Varsha Patel, 'Forgotten Generation: Junior Lawyers Share Their Struggles with Lockdown', *Law.com International* (online, 17 November 2020) <https://www.law.com/international-edition/2020/11/17/forgotten-generation-junior-lawyers-share-their-struggles-with-lockdown/> ('Forgotten Generation: Junior Lawyers Share Their Struggles with Lockdown').

[437] Vanessa K Bohns and Francis J Flynn, '"Why Didn't You Just Ask?" Underestimating the Discomfort of Help-Seeking' (2010) 46(2) *Journal of Experimental Social Psychology* 402.

[438] Edwin H Greenebaum, 'Development of Law Firm Training Programs: Coping with a Turbulent Environment Management' (1996) 3(3) *International Journal of the Legal Profession* 315, 327.

[439] Margaret Thornton, 'Towards the Uberisation of Legal Practice Symposium: Automation, Innovation and Disruption in Legal Practice' (2019) 1(1) *Law, Technology and Humans* 46, 53.

[440] Victorian Legal Services Board and Commissioner, 'Understanding How Workplace Culture Affects Lawyer Wellbeing' (n 403).

[441] Ibid. This rate was higher for women than men by 12%, which is especially important, as the majority of new entrants to the profession are female. Since 2011, more women (+67%) have entered the profession compared to men (26%): Urbis, '2020 National Profile of Solicitors', *Law Society of NSW* (Report, 1 July 2021) < https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics>.

[442] Lucas Kohnke and Andrew Jarvis, 'How to Keep Online Learners' Attention - Keeping the Ball Rolling' (2020) 29 *Modern English Teacher* 25.

[443] Shockley et al (n 66) 1144.

[444] Patel, 'Forgotten Generation: Junior Lawyers Share Their Struggles with Lockdown' (n 436).

[445] Greenebaum (n 438) 329.

[446] Christopher Niesche, 'How Law Firms in Australia Are Helping Staff Cope With COVID Lockdowns', *Law.com International* (online, 26 August 2021) <https://www.law.com/international-edition/2021/08/26/how-law-firms-in-australia-are-helping-staff-cope-with-covid-lockdowns/>. For example, one partner Corrs Chambers Westgarth said: "I've been doing a lot more just inviting junior lawyers onto Zoom calls where I don't really think they're going to add much value but it's a way to engage them".

[447] Rachel Setti, 'Mindset: Starting a Job Remotely' [2021] (82) *LSJ: Law Society of NSW Journal* 48, 49.

B. STRATEGIES

We now provide five strategies for managing grads online.

1. Increase and humanise interactions

When working online, interactions should be equal in number to those that would occur in the office, if not greater.[448] Surveys have found that regular one-on-one meetings with supervisors or managers helped personal and professional development,[449] especially where managers listen, spend time answering questions, keep everyone 'in the loop', and distribute workloads evenly.[450] The Law Society of NSW has guidelines for remote supervision, including the need to develop risk management strategies, conduct regular meetings, share contact details, manage workflow, set up document sharing logistics, and clarify how the supervisor will approve or provide feedback for legal work.[451] Similarly, the Law Society of the England and Wales suggests that, to replicate the benefits of physical proximity, supervisors should 'think out loud' when working, use coaching questions (such as 'What is the other side trying to achieve in this letter/agreement?'), and foster a culture of open discussion rather than waiting for formal catch-ups.[452] This last is confirmed by research into supervision that emphasises the need for regular, pre-scheduled meetings.[453] When giving feedback, short phone or video calls may be more beneficial than written feedback, as it is more difficult to check how the communication has been received when given via email.

In building trust, supervisors need to communicate clearly so that they are not misunderstood by their supervisees. Covey recommends stating one's intentions and expectations outright so there can be no doubt about what you are thinking and envisioning. Supervisees are vulnerable and oversensitive to the moods and cues of their supervisors, so it is important to 'talk straight' and be aware of how your tone and body language may be interpreted or misinterpreted.[454] When communicating remotely, it is beneficial to infuse messages with information about the communicator's character, emotion, and attitude.[455] Communicating encouragement and praise also help as general or background appreciation may be harder to discern online. In the educational literature, it has been suggested that encouragement involves strong verbal articulations that demonstrate acceptance, reinforce effort, and/or or appreciate performance and contributions.[456] Other ways to humanise digital interactions are by sharing photos and videos, and making the most of rare in-person interactions.[457] In all of this, it is important to factor in time to listen to the junior lawyer.

2. Leadership training

PwC's survey of knowledge workers found that during the pandemic, middle managers' lack of confidence as leaders trickled down to employees who felt they were not trusted.[458] Beyond being responsible for the difficult task of implementation, managers are now required to oversee performance, wellbeing, and relationships of their juniors in an uncertain environment. Yet, PwC also found that fewer than one-third of team leaders had received any formal training on leading in a hybrid environment.[459] What graduates (as trustees or the person in whom trust is to be placed) interpret as distrust by their managers (as trustors) may well be the result of inadequate management training for the new complexity of their roles. On the other end of the spectrum are cases of managers over-relying on trainees, without proper regard for the latter's

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[448] Harvard Business Review, 'Coronavirus and Business' (n 289) 45–46. See also Benjamin T Kaveladze et al, 'Social Interactivity in Live Video Experiences Reduces Loneliness' (2022) 4 *Frontiers in Digital Health*.

[449] 'Life in the Law 2020/21' (n 408) 54. LawCare report surveyed 1,700 legal professionals in the UK during COVID-19.

[450] Junior Lawyers Division (n 400); Nickolaos D Pitsounis and Paul N Dixon, 'Encouragement versus Praise: Improving Productivity of the Mentally Retarded' (1988) 44(4) *Individual Psychology: Journal of Adlerian Theory, Research & Practice* 507.

[451] 'Remote Supervision', *The Law Society of New South Wales* (Media Release) <https://www.lawsociety.com.au/news-and-publications/news-media-releases/impact-covid-19-legal-profession/remote-supervision>.

[452] 'Supervision', *The Law Society* (Practice Note, 29 July 2021) <https://www.lawsociety.org.uk/topics/hr-and-people-management/supervision> and 'Supervision: Good Practice for Remote Supervision of Junior Staff and Trainee Solicitors', *The Law Society* (Guide, 7 July 2021) <https://www.lawsociety.org.uk/topics/hr-and-people-management/supervision-good-practice-for-remote-supervision-of-junior-staff-and-trainee-solicitors>.

[453] McNamara (n 415).

[454] Covey (n 2) 136-143.

[455] Joseph B Walther, Tracy Loh and Laura Granka, 'Let Me Count the Ways: The Interchange of Verbal and Nonverbal Cues in Computer-Mediated and Face-to-Face Affinity' (2005) 24(1) *Journal of Language and Social Psychology* 36.

[456] Nickolaos D Pitsounis and Paul N Dixon, 'Encouragement versus Praise: Improving Productivity of the Mentally Retarded' (1988) 44(4) *Individual Psychology: Journal of Adlerian Theory, Research & Practice* 507.

[457] Maister, Green and Galford (n 10) 63.

[458] PricewaterhouseCoopers, 'Balancing Act: The New Equation in Hybrid Working' (n 295) 16.

[459] Ibid.

realistic capabilities. For example, a supervisor might be too busy to check on a junior, leading to a mistake being made, and the junior then being blamed.[460] At more senior levels, leaders need to set the tone and standards as role models. This may be by actively encouraging and normalising "speaking up" by subordinates to get work reassigned, and/or better managing client expectations regarding response times.[461] It might involve righting wrongs and being accountable, such as by apologising and rectifying or otherwise 'making good' on situations.[462] Leadership is not part of legal education and training, and lawyers need to be supported in the continuous process of becoming a trusted leader.

3. Psychologically healthy spaces

In a 2021 survey of 1,700 UK legal professionals by LawCare, qualitative responses indicated lawyers did not trust colleagues to keep confidential the concerns they shared; while others had no one to disclose to. However, fostering a psychologically safe environment where ideas can be freely and regularly shared without fear of making mistakes is essential for workplace trust and wellbeing.[463] Psychological safety enhances the quality of interpersonal relationships and fosters peer discussion and interactions. In turn, this helps team members to generate more creative ideas, without taking critical feedback personally.[464] Juniors also need to be able to express their concerns about the organisation through multiple channels, both confidential and direct.

Physical spaces are also important for psychologically safe environments. Graduate lawyers are less likely to have the resources for the most fitting home-office setup, which can decrease job effectiveness.[465] Consequently, graduates could be provided WFH expense reimbursements or otherwise assisted to create spaces that offer a reasonable equivalent to an office environment.

4. Firmwide policies

Online or hybrid firm systems and policies need to account for junior lawyer development, and incentivise and reward staff who show leadership in this area, whether through supervising, mentoring, training or informal initiatives. The firm structures need to align with the formal responsibility to new members who are learning how to become independent lawyers and loyal employees. For example, there can be an imbalance of senior to junior lawyers at the office in cases where senior lawyers prefer and are permitted to WFH, but junior lawyers are either encouraged or mandated to work in the office even if there are no or very few seniors on site to supervise and mentor them.[466] This can also lead to siloed, delegation-heavy types of work, whereby individuals are allocated tasks to be completed individually and debriefs occur much later if at all. Another risk is 'proximity bias', or the tendency for people to show favouritism or preferential treatment to employees who are closest to them physically.[467] This could mean that certain grads who happen to be in the office on the same days as more seniors are, could receive better training. To encourage real-time coordination, organisations should ensure that graduates, principals, and supervisors have at least two (but ideally more) days of overlap in the office.[468] It is also likely beneficial if there is at least one day per week when the whole team is physically present.

[460] Varsha Patel, 'We're "Too Busy": Are Law Firm Mental Health Efforts Failing Junior Lawyers?', *Law.com International* (online, 14 May 2021) <https://www.law.com/international-edition/2021/05/14/were-too-busy-are-law-firm-mental-health-efforts-failing-junior-lawyers/>.

[461] Junior Lawyers Division (n 400) 19; Patel, 'Forgotten Generation: Junior Lawyers Share Their Struggles with Lockdown' (n 436).

[462] Covey (n 2) 162-163.

[463] Soo Jeoung Han et al, 'How Virtual Team Leaders Cope with Creativity Challenges' (2017) 41(3) *European Journal of Training and Development* 261, 269; Adrian Choo, Kevin Linderman and Roger Schroeder, 'Social and Method Effects on Learning Behaviors and Knowledge Creation in Six Sigma Projects' (2004) 2004 *Academy of Management Proceedings*; Konstantinos C Kostopoulos and Nikos Bozionelos, 'Team Exploratory and Exploitative Learning: Psychological Safety Task Conflict, and Team Performance' (2011) 36(3) *Group & Organization Management* 385.

[464] Bret Bradley et al, 'Reaping the Benefits of Task Conflict in Teams: The Critical Role of Team Psychological Safety Climate' (2011) 97 *Journal of Applied Psychology* 151; Dana Yagil and Gil Luria, 'Friends in Need: The Protective Effect of Social Relationships under Low-Safety Climate.' (2010) 35(6) *Group & Organization Management* 727.

[465] Rachel Setti, 'Starting a New Job Remotely', *Law Society Journal* (online, 4 October 2021) <https://lsj.com.au/articles/starting-a-new-job-remotely/>; Productivity Commission, 'Working from Home' (n 294) 23.

[466] Hannah Wootton, 'Lawyers Choose Mondays and Fridays for Remote Work', *Australian Financial Review* (online, 24 June 2021) <https://www.afr.com/companies/professional-services/lawyers-choose-mondays-and-fridays-for-remote-work-20210623-p583p3>.

[467] Arlene S Hirsch, 'Preventing Proximity Bias in a Hybrid Workplace', *SHRM* (Web Page, 22 March 2022) <https://www.shrm.org/resourcesand-tools/hr-topics/employee-relations/pages/preventing-proximity-bias-in-a-hybrid-workplace.aspx>; Matthew Boyle, 'Bosses Admit to "Proximity Bias," But Want Workers Back in Offices Anyway', *Bloomberg* (online, 25 January 2022) <https://www.bloomberg.com/news/articles/2022-01-25/bosses-admit-to-proximity-bias-but-want-workers-back-in-offices-anyway>.

[468] Nicholas Bloom, 'Don't Let Employees Pick Their WFH Days', *Harvard Business Review* (online, 25 May 2021) <https://hbr.org/2021/05/dont-let-employees-pick-their-wfh-days>.

Assignment of work across the firm also needs to be organised more effectively under remote or hybrid policies. Traditionally, allocation of work is an informal process, largely premised on developing relationships between associates and the partners allocating the work.[469] However, without spontaneous interactions in the office and when partners or principals only see them occasionally in-person or during sporadic Zoom meetings, junior lawyers may find it harder to get involved in new matters and thus show and develop their capabilities. This may relegate certain juniors to routine 'execution tasks' (e.g., replicating a precedent or executing semi-detailed instructions) rather than more advanced 'stretch assignments' (i.e., strategic or complex in nature). Research shows lawyers to be achievement oriented. The delegation of 'stretch' assignments can improve motivation and generate loyalty.[470] Formalising the allocation of such tasks supports the fair and positive development of graduates. Regarding fairness, some firms have engaged intermediaries known as 'resource managers' or 'work allocation managers' to act as neutral managers of workflows.[471] While the initial impetus for these roles was to improve diversity and more equitable distribution of work, they could be directed to address the online barriers faced by junior lawyers in their professional trajectories.

5. Innovate

While leaders are responsible for bringing out their employees' talents and resources, they need to do so while building trust and positive work relationships.[472] Firms that introduce innovative workplace policies based on these principles (trust and positive relationships) are likely to enjoy retention of their graduates. The Commonwealth Bank Legal Market Pulse (2021) survey of 55 (mid and large size) Australian firms found that at least 75% are using flexible working arrangements, mentoring, mental well-being support, in-house learning and development,

and/or pro bono programs to engage, retain, and develop talent.[472] Rogers and Bell reported that some firms in their study adopted structural ways of supporting innovation such as allowing lawyers to count "innovation hours" as billable hours for the purpose of performance review.[474] Some firms have used external expertise to improve remote training. Herbert Smith Freehills, for example, sought guidance from the NeuroLeadership Institute for their leadership and on-the-job training, while Allens hired a consulting psychologist.[475] Meanwhile, King and Wood Mallesons started 'digital boot camps' in 2020 for its graduates to learn new technologies and then gave them the opportunity to advise senior staff on adopting them.[476] Perhaps more progressively however, they have removed billable hour targets for graduates and implemented multipliers on billable hours for time spent training on technology.[477]

While larger firms can allow graduate lawyers to choose between working in areas like legal operations or LegalTech instead of traditional practice areas, in smaller firms, lawyers can likely only contribute to innovation in their spare time.[478] Yet, in Jones and Pearson's study, two small firm lawyers were reported as creating their own disruptive technologies: one designing a product for accessible and affordable legal advice regarding divorce; the other, an estate-planning service targeting other professionals such as accountants and financial advisors.[479] Others were able to learn how to create a website for their own firm, build their own desktop computer for their office, or create their own system using various technologies, eliminating their need for a bricks-and-mortar office.

Creating a graduate program specifically tailored for remote work may also be an option. For example, pre-COVID, but in direct response to complaints from clients who had been assigned inexperienced juniors, the UK law

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[469] Tom Sharbaugh, 'Will Remote Work Adversely Affect the Training, Productivity, and Retention of Lawyers? (317)', *Legal Evolution* (Web Page, 17 July 2022) <https://www.legalevolution.org/2022/07/will-remote-work-adversely-affect-the-training-productivity-and-retention-of-lawyers-317/>.

[470] Anusia Gillespie and Scott Westfahl, 'Delegating Effectively to Develop and Motivate Others' (2017) 43(6) *Law Practice* 52.

[471] Harvard Law School Center on the Legal Profession, 'The Allocation of Work' 3(2) *The Practice* <https://thepractice.law.harvard.edu/article/the-al-location-of-work/>.

[472] Polden (n 420) 438.

[473] 'Commbank Legal Market Pulse: November 2021' (n 46) 8.

[474] Justine Rogers and Felicity Bell, 'Transforming the Legal Profession: An Interview Study Of Change Managers In Law' (2022) *Legal Studies* 1, 22.

[475] Niesche (n 446).

[476] Hannah Wootton, 'KWM empowers graduates to lead tech transformation' *Australian Financial Review* (online, 9 July 2020) <https://www.afr.com/companies/professional-services/kwm-turns-to-its-graduates-to-lead-tech-transformation-20200706-p559j6>.

[477] Michael Pelly, 'Top Law Firm Lets Staff Draw up Post-COVID-19 Roster', *Australian Financial Review* (online, 12 November 2020) <https://www.afr.com/companies/professional-services/top-law-firm-lets-staff-draw-up-post-covid-roster-20201110-p56d97>.

[478] Macquarie (n 84) 13.

[479] Jones and Pearson (n 201) 69–70.

firm gunnercooke introduced the gunnerbloom salary role for lawyers with 1-5 years of experience.[480] These lawyers are do not fill in time sheets, work substantially with mentors and senior lawyers, are sent on secondments and receive training in pricing and business development.

This and much of the above learnings and ideas can be applied to sole and smaller practices including with respect to their interactions with their admin personnel; how they engage with other practitioners in their networks; and how they engage with barristers and other experts in their matters. For example, with respect to innovation, for smaller practices with 'professional dependents' – i.e. people whose livelihoods will be affected by the law business such as secretaries, law clerks or receptionists – bringing their opinions into decision making can improve retention rates and sustain trust in the relationship.[481] Indeed, change managers recommend a very simple approach to starting a change program; asking the non-lawyer professional staff what changes they would make to how the firm operates if these changes could be made instantaneously.[482]

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[480] Mitchell Kowalski, *The Great Legal Reformation: Notes from the Field* (iUniverse, 2017) 132.
[481] Jordan Furlong, 'Law Firm Essentials for Surviving the COVID-19 Pandemic' (Aug 2020) *Australasian Law Management Journal* 1, 3.
[482] For an introduction to change leadership, see Rogers and Bell, 'Change Leadership for Lawyers' (n 282).

CONCLUSION

As this primer illustrates, trust is essential for professional practice. Trust is a critical condition for and driver of motivation and productivity, creativity and innovation, good relationships and loyalty, ethicality and accountability, wellbeing, and a positive reputation.[483] Trust involves the trustor being vulnerable to the actions of another, and the trustee, in turn, being benevolent, ethical, and competent.[484] But these dynamics can be more fragile and complicated online with fewer of the normal social cues, fewer opportunities to interact, and an increased chance for misunderstanding, conflict and/or isolation.

Part II demonstrated the blend of new business, technological, and relational skills lawyers need in order to attract, service, and retain clients online. Critically, they must do so in a lawful and ethical manner where the risks can be higher or different.

Reflecting on Part II, we suggest that the workings of good, trusting relationships is especially important for the growing demographic of junior lawyers.[485] As the future of the profession, inattention to the needs of this group, especially regarding supervision and mentoring, will lead to greater attrition rates.[486] A better understanding of the impacts of young lawyers entering the profession in an online world is vitally needed.[487] Meanwhile, trust makes teams, and therefore workplaces, more effective.[488] It leads to members supporting each other, resolving conflicts earlier, and being less likely to have conflict in the first place. It also enhances knowledge-sharing, which is critical because most of the ways knowledge is learnt in workplaces occurs between people, rather than through codified documents and standardised procedures. One of the key trust issues for teams is how to establish trust within a team, quickly. The more quickly you can trust someone, the more quickly the task can be completed.[489]

In sum, trust is achievable despite the challenges of the medium. Indeed, technology provides the means to collaborate, and enterprise social media tools can allow us to store and capture data, to have one-to-many conversations, to share best practices, and to learn in new ways never before conceived.[490] In many cases – when it comes to mentoring, supervising, building positive workplace cultures, and working in teams – the profession and legal practices, have been critiqued for relying heavily on unspoken and implicit methods, assuming that juniors will pick things up 'by osmosis', that staff will bring problems to the attention of management, and that leadership skills amongst supervisors and team leaders will develop naturally.[491] In terms of client relationships, poor lawyer communication and care has been one of the top complaints about lawyers to the regulator for decades. In other words, even before the pandemic forcing us online, best practice in these areas was not necessarily prevalent. With online or hybrid work needing a greater level of intentionality and structure, this is the optimal time to revisit and re-envisage lawyers' work relationships and workplace practices.

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[483] Pirson, Martin and Parmar, 'Public Trust in Business and Its Determinants' (n 3).

[484] See above What is Trust?

[485] Urbis (n 441) 2. (While the mean age of all Australian solicitors in 2020 was 42 years old, the proportion of solicitors aged 25 years and younger has grown by 19%.)

[486] 'Most Young Lawyers to Leave Firm or Industry in Next Five Years', *Australian Financial Review* (online, 3 February 2022) <https://www.afr.com/companies/professional-services/majority-of-young-lawyers-to-leave-firm-or-industry-in-next-five-years-20220203-p59tgh>; 'Staff Shortages Force Law Firms to Raise Salaries and Even Reject Work', *Australian Financial Review* (online, 2 December 2021) <https://www.afr.com/companies/professional-services/staff-shortages-force-law-firms-to-raise-salaries-and-even-reject-work-20211130-p59ddf>.

[487] International Bar Association, Legal Policy & Research Unit, *IBA Young Lawyers' Report* (January 2022) 40 <https://www.ibanet.org/LPRU/Young-lawyers-survey>.

[488] Newell, David and Chand (n 308) 159. A number of studies point to a 'notable link between team trust and team performance': Feitosa, 'Measuring Team Trust' (n 41) 479.

[489] Olson and Olson, (n 307) 258, citing Kenneth J Arrow, *Limits of Organization* (WW Norton & Company, 1974)

[490] Harvard Business Review, *Coronavirus and Business* (n 289) 47.

[491] McNamara (n 415).

FLIP STREAM

PROFESSOR MICHAEL LEGG

Director, Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream

Michael's research interests are in civil litigation, online dispute resolution / courts and the impact of innovation on the legal profession. In 2020 he co-authored the monograph "Artificial Intelligence and the Legal Profession" published by Hart Publishing and co edited "The Impact of Technology and Innovation on the WellBeing of the Legal Professional" published by Intersentia.

In 2020 he won the Article/Chapter (General) Award at the Australian Legal Research Awards. In 2017 he was awarded Academic of the Year at the Lawyers Weekly Australian Law Awards for his innovative teaching of technology and legal practice, especially in relation to litigation and alternative dispute resolution, and engagement with the legal profession.

Michael is admitted to practice in the Supreme Court of NSW, Federal Court of Australia, High Court of Australia and in the State and Federal courts of New York. He holds law degrees from UNSW (LLB), the University of California, Berkeley (LLM) and the University of Melbourne (PhD).

Michael is a member of the Law Society of New South Wales' Future Committee and the Law Council of Australia's Class Actions Committee.

ASSOCIATE PROFESOR JUSTINE ROGERS

Deputy Director, Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream

Associate Professor Justine Rogers is the Deputy Director of the Future of Law and Innovation in the Profession (FLIP) research stream. Justine also teaches and convenes the core legal ethics course as well as one of the legal theory strands at UNSW Law & Justice. Justine's research relates to lawyers - their identities, ethics, wellbeing, work, and regulation. She is also interested in the nature and processes of dispute resolution.

Before FLIP, Justine was a chief investigator in an Australian Research Council Linkage project with the Professional Standards Councils on professionalism and professional regulation in the 21st Century. Justine is a member of the Board of Directors of the Australian Pro Bono Centre.

DR FELICITY BELL

Research Fellow, Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream

Dr Felicity Bell is a Research Fellow for the NSW Law Society's Future of Law and Innovation (FLIP) research stream at UNSW Law & Justice. Felicity's primary research interests relate to the impact of new technologies, particularly artificial intelligence, on legal practice; legal professional ethics and lawyers' work, and empirical research in these areas. She is interested in identity construction, ideas of best practice and ethical obligations among lawyers. She has also researched extensively in family law and children's law, and her work has been cited in judgments of the Family Court of Australia. She is the co-author, with Professor Michael Legg, of Artificial Intelligence and the Legal Profession (Hart, 2020).

TONY SONG

Research Fellow, Law Society of NSW Future of Law and Innovation in the Profession (FLIP) research stream

Anthony (Tony) Song is a Research Fellow for the NSW Law Society's Future of Law and Innovation (FLIP) research stream at UNSW Law & Justice. Tony's research interests covers the impact of technology on the legal profession and across society, with a focus on AI, remote courts, drones, online trust, crypto and web3.0.

Tony is also a part-time trader of financial markets with certificates in the Wyckoff methodology of technical analysis.

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