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Lawyers as the movers and shakers of legal innovation

By Mauricio Duarte

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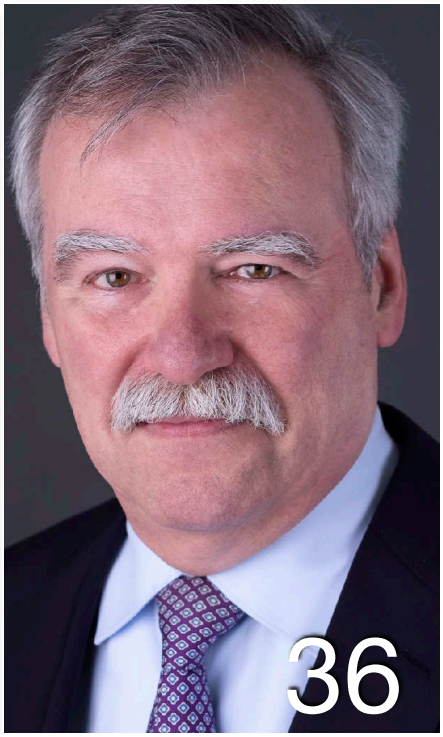

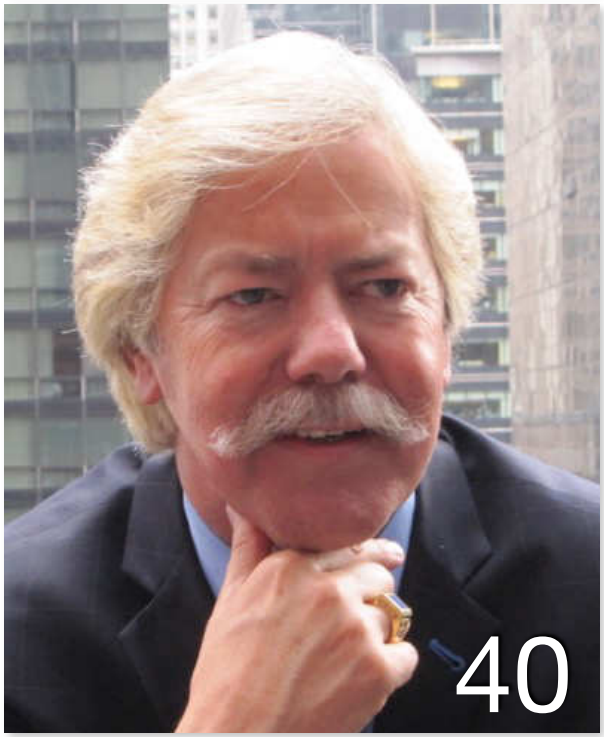

Lawyers As The MOVERS SHAKERS Of Legal Innovation

By Mauricio Duarte, Mauricio Duarte, Attorney (Guatemala) and Chief Operating Officer with A2J Tech (Colorado)

In a recent virtual event with the Asian International Arbitration Centre, I got asked: "Who should be the drivers and movers & shakers of the legal technology industry?" Without a doubt, I said: **attorneys.** Did I say it because I am an attorney? Partially, yes. However, my response was heavily influenced as a practitioner, observer, and legal tech industry student.

Technology alone will not replace lawyers or make them a relic of the past. Technology will undoubtedly accelerate change, but the most impactful innovations in law will result from a profound transformation in the attorney's role. As controversial as it might sound, technology is not always the solution.

The events of 2020, specifically the coronavirus pandemic outbreak created countless challenges for legal professionals. However, with those challenges, there are many avenues for innovation and disruption.
A new generation of entrepreneurial attorneys is on the rise. This new breed of attorneys is leveraging the power of technology and entrepreneurship to provide affordable legal solutions.

THE ROLE OF ATTORNEYS.
History will remember March 2020, when the World Health Organization (WHO) designated COVID-19 as a global pandemic. Shortly after, we saw the cancellation of events, legal offices closings, and a steep decline in attorneys' revenue. By the end of April, the pandemic's impact was in full force in the legal industry. For example, the 2020 Clio Legal Trends Report reported [1] the following: *"In terms of revenue, 2020 was initially trending to become a positive year for law firms, as January and February saw the average firm collecting over 10% more than the year prior. By March, year-over-year revenue began trending lower. In April, the average law firm collected 8% less revenue than the year prior. Even though new matters saw a slight uptick in May, firms saw revenues fall further to 13% below to the previous year."*

Furthermore, the COVID-19 pandemic had an impact on an already severe global gap in access to justice. However, there is light at the end of the tunnel. As the World Justice Project [2] reported: *"Promising strategies are emerging, and the pandemic has brought urgency to supporting and scaling them. (...)*

Over the longer term, the recovery effort must be designed with a particular focus on addressing the systemic injustices that the pandemic has revealed and reinforce."

The COVID-19 pandemic has magnified the existence of creative "outside-the-box" attorneys. These professionals are willing to invest their time and resources in expanding legal services, including pro bono efforts and more accessible legal services. Attorneys are developing open educational resources, training non-lawyer assistants to help people, and harnessing technological tools to find efficient legal solutions to everyday justice problems are a few examples.

For instance, during the pandemic, Stevie Ghiassi founded Legaler Aid [3]. I describe this platform as the "Go Fund Me" for the legal industry in colloquial terms. However, Legaler Aid is an open and free crowdfunding platform that enables users to donate to legal cases fighting social justice in more appropriate terms.

In addition, Camila Lopez made strides with People Clerk [4], a legal tech solution to enhance access to justice for consumers and their claims. At A2J Tech, we created COVID-19 Eviction Forms. This free platform allows tenants to generate a declaration letter that can help prevent eviction from their home until December 31, 2020, according to the Centers for Disease Control and Prevention Temporary Halt in Residential. In the last few months, I've witnessed these efforts and more. Attorneys in Ecuador, Spain, Colombia, El Salvador, and Germany have shown me the power and value of entrepreneurial attorneys.

This new wave of attorneys has to wear many hats, such as digital marketer, head of public relations, project manager, accountant, in-house counsel, and many other roles. However, their leadership, vision, innovation, job creation, and competitiveness will bring a new era to the legal industry.

I believe the attorney's role is transitioning from just an "advocate" or "advisor" to leaders in innovation, technology, and client service. Long gone are those days in which the attorney will sit back and advise their client. Instead of reactive attorneys, we are looking at the dawn of proactive attorneys.

If you believe that you are an attorney that "categorizes" himself as only an advocate or advisor, think again. I like the odds of showing you how attorneys are more than that. Sometimes we are just too shy to admit it.

PROACTIVE ATTORNEYS

When I use the term proactive attorney, it doesn't mean the attorney acts like a traditional attorney, but it has the will to be the first to call their client on a specific issue from time to time. Being proactive goes beyond that. Let's use a couple of examples.

Daniel Pelinka is a Partner at a "Big Law" firm. This firm has over 200 attorneys around the world in 34 offices. However, in the specific office which Daniel Pelinka leads, he has seen a considerable decline in timely payments. Over the last few months, Daniel has received push back from clients on their monthly billing. Clients are not sure or happy about the number of hours invested in a specific matter. Furthermore, clients don't know why, when,

or how the associates and paralegals spent too much time drafting a data-sharing agreement. Does this situation sound familiar to you? It does to me.

A proactive attorney would not only sit back and keep receiving angry emails or bad reviews on Yelp. Trust me; I've seen examples of clients ranting on Yelp [5] and Twitter. A proactive attorney would take clear, achievable, and sustainable steps to improve the client experience. How would this look like? For example, Daniel could propose a flexible billing arrangement for certain matters. Instead of everything being billed hourly, he could set certain documents at a fixed price. He could go a step beyond and change its entire pricing model. Another alternative could be using a document automation solution, such as Documate, Community Lawyer, or docassemble, to create model templates, which will reduce the time the associates and paralegals spend drafting and reviewing a contract. Finally, Daniel could set up a feedback form for clients, in which he could receive comments, suggestions, or ideas to improve the billing experience for their clients.

Let's put another example. For this scenario, I will use my experience with the project Process Improvement for Legal Aid. To learn more, you can go to legalaidprocess.org. Imagine a legal aid organization that has been struggling to improve its intake process.

Text Calls with intake staff take too long, and the transition from intake to the attorney takes too long. Legal aid organizations want to help as many people as they humanly can. For these noble organizations, it's frustrating not being able to help more people in their community.

Being a proactive attorney would mean that you take steps to change this situation. Do you always need technology or a hefty allocation of resources? No. For this example, attorneys within a legal aid organization can implement a "business process improvement" approach to solve many client intake issues. In other words, legal aid organizations would not need infinite resources or the latest technology. Attorneys need only a willing staff open to defining, measuring, analyzing, improving, and controlling ("DMAIC") [6] their new processes. The technology could be a potential solution that could accelerate change. However, it's not the only tool you need to be proactive.

Do you need technology to be proactive? No. We are used to equating innovation with technology. For some, being proactive means add a complex artificial intelligence system to review contracts. Let this be a reminder that technology is not a panacea for problem-solving. Everyone would love it if technology could solve all of our problems. Imagine losing weight just by clicking an app? **Technology has limits; human ideas and creativity don't.**

Any proactive attorney will have a positive impact on the legal industry. Proactiveness is not exclusive to attorneys that start legal tech solutions. Innovation and proactiveness are available to everyone. Furthermore, proactiveness is not limited to, internal solutions. As Michele Distefano [7] has suggested, you can be an "intrapreneur" (within your organization) or "extrapreneur" (outside your organization). Either way, be sure that those efforts are essential to build upon and improve the legal industry.

INNOVATION EVERYWHERE

Legal innovation it's not only limited to technology. Design in law goes beyond simply using technology. The world after COVID-19 will be a better place because attorneys will make it happen. We have to. The legal industry, in particular, is in an excellent position to keep improving and changing.

I find it inspiring to hear about the creative solutions some law firms, legal aid organizations, and legal tech companies have found to keep innovating, even amid a global pandemic. Flexible pricing models, alternative legal services, free resources, and more are just a few examples.

As we enter the end of 2020, let's do everything to ensure that this crisis was not all in vain. The gains we are currently making in a collaborative, and innovative spirit must prevail when this crisis ends. It will be in the hands of attorneys to be the leaders of change in the legal industry. Let's not wait for another pandemic to change the legal industry.

Notes

[1] Clio. (2020, October). *2020 Legal Trends Report*. https://www.clio.com/resources/legal-trends/2020-report/read-online/

[2] World Justice Project. (2020). *The COVID-19 Pandemic and the Global Justice Gap*. https://worldjusticeproject.org/our-work/publications/policy-briefs/covid-19-pandemic-and-global-justice-gap

[3] For more information, visit: legaleraid.org

[4] For more information, visit: www.peopleclerk.com

[5] Weiss, D. (2018, May 17). *Lawyer's firm gets bad Yelp reviews after he is named as man in video ranting about Spanish-speakers*. Www.Abajournal.Com. https://www.abajournal.com/news/article/lawyers_firm_gets_bad_yelp_reviews_after_he_is_identified_as_man_ranting_ab

[6] MacDonagh, C. A. (2014). *Lean Six Sigma for Law Firms*. Ark Group.

[7] DeStefano, M. (2018). *Legal Upheaval: A Guide to Creativity, Collaboration, and Innovation in Law*. American Bar Association.

About the Author

Mauricio Duarte is a Lawyer from Universidad Francisco Marroquín (Guatemala) with an LL.M. from St. Thomas University (Minnesota). Mauricio worked for 4 years in international arbitration before devoting himself to technology and legal innovation issues. Mauricio is the COO of A2J Tech, a Denver based (Colorado) company that builds legal tech solutions to improve access to justice. Besides, Mauricio serves as an Of Counsel Partner of Legal Plus, a law firm focused on advising entrepreneurs and technology companies, and the Host of the Legal Hackers Podcast (Spanish). Also, Mauricio has served as a Kleros Fellow of Justice and Arbitrator Intelligence Ambassador, two prominent legal tech companies that look to enhance alternate dispute mechanisms.

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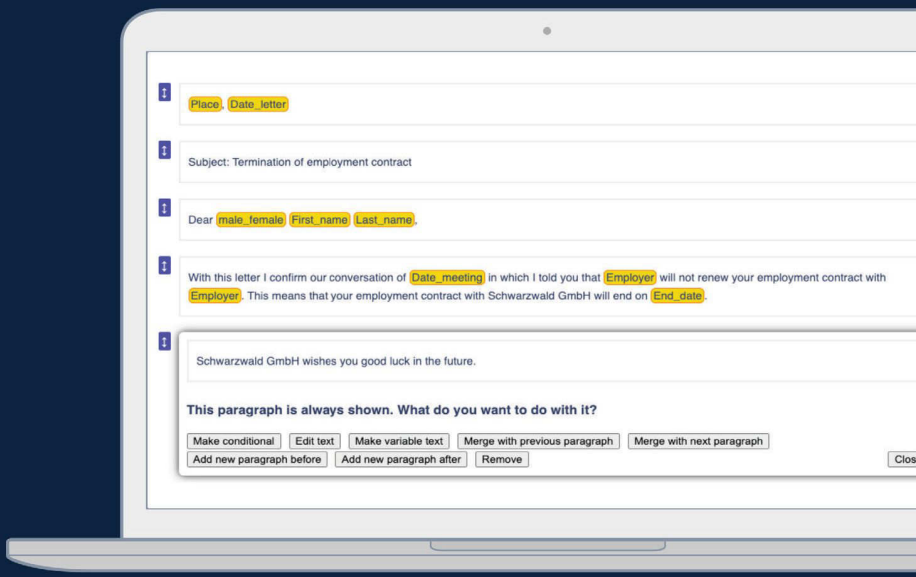

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Tone of Voice:

Why LAWYERS NEED TO THINK ABOUT THEIRS

BY ELECTRA JAPONAS, FOUNDER OF THE LAW BOUTIQUE

The trouble with lawyers
See, lawyers are special. The language they use is very special. And by special, we unfortunately mean painful. We have been (expensively) trained for years to speak in a "code", or "legalese" as it's often called.

"Legalese" is reserved for lawyers and the complicated, technical nature of it means that those outside of the profession are left confused by the jargon.

And considering that the stuff written in legal documents is mostly meant for other people, and rarely the lawyers themselves, this seems counter-productive.

But legal language doesn't need to be complicated. It can be serious and should be legally binding, but it must also be simple. A court won't look at a contract that has the word "notwithstanding" in it and interpret it more favourably than if it said ˜in spite of".

A real-life example
In 2010, US lawyer Sean Flammer asked 800 circuit court judges to choose which argument was best framed. One was a traditional "legalese" argument, the other was in what he called "plain English".

The judges overwhelmingly preferred the plain English version (66% to 34%), and that preference held no matter their age or background. The respondents also said that they thought the plain English author was more believable, better educated and worked for a prestigious law firm.

In conclusion, plain English makes you more popular, more believable and also makes you sound clever too.

Adopting a user-focused approach
There's no point in writing a contract or drafting legal advice which can't be understood by your clients. Put yourself in your reader's shoes when you're writing or advising.

Here's an example of how you might structure advice. Firstly, start by defining the questions your client really wants to know. The structure might be:

- Can I do what I want to do?
- Will I get in trouble because of it?
- How much will it cost?
- How did you reach this conclusion?
- If you were to read it out loud, does it sound like the kind of thing you'd actually say?

Case study
Say for example John from HR asks you whether he can dismiss Susan, who has been employed for four months and has been a less than model employee for that time.
(By the way, this is not legal advice, this is an attempt to illustrate how you might go about advising your internal stakeholders).

Here's what you need to know

- ***Can we dismiss Susan?*** Yes, we can.
- ***What's the risk of Susan suing us?*** Susan may well decide to bring a claim against us. But I think the chances of her winning any such claim are low.
- ***Do we need to pay them a settlement?*** We don't need to do this under the agreement or by law. However, there are some benefits if we choose to do this.

How we got there

- ***The contractual position.***
  Under our agreement with Susan, we can end her employment under Clause 3 which says that we can do that if the employee acts in a way that is not in line with the interests of our business. We think that Susan's conduct is a valid reason for dismissal.
- ***The legal position.***
  From a legal point of view, under s.98(2)(b) Employment Rights Act 1996, an employer may end an employee's employment for misconduct. This may be a single serious act or a series of less serious acts. I think we can rely on the latter here.

Under English law, an employee can't bring a claim for unfair dismissal against their employer unless they've been employed for over two years OR if the employer has acted in a way that qualifies the dismissal as automatically "unfair".

We don't think that Susan can claim that we're dismissing her for any reason that is unfair so if Susan decides to sue us, it's unlikely that she'll be successful. (That doesn't mean she won't, it just means that she probably won't win.)

Obiter dictum

Joking. We mean "Conclusion".

Final words of wisdom: if you always put your user first, tell them what they need to know and deliver your advice in the most digestible format possible, you really can't go wrong!

About the Author

Electra Japonas is the founder of The Law Boutique, the world's first Legal Optimisation Company. Electra founded the business after spending 10 years in large corporates and becoming frustrated with the way legal services were delivered. The Law Boutique is on a mission to transform in-house Legal into a commercial advantage, through the implementation of user-centric process design, smart tech and bespoke tools. Through its four pillared approach: Define, Design, Delegate and Automate, The Law Boutique helps Legal and Compliance teams align their trajectory with that of the business, make themselves scalable and fuel business growth.

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Strengthening Workplace Forensic Investigations

By Marais Dekker (L), Oliver Schoeman, Christo van der Walt and Todd Hutchison (R)

Investigations, just like all legal matters, are projects. The rigour in the process of collecting, preserving and presenting evidence warrants a greater formality in the planning and execution of investigations, independent if they relate to homicide cases, private investigations and through to organisational-based workplace investigations.

Regarding workplace investigations, the corporate goals of an organisation are continuously shaped and moulded by its unique operational requirements, characteristics and culture, often exerting undeniable influence on the formation of internal corporate policies and procedures.

The contextual aim of internal policy regulation is to unite employees in their understanding of their respective individual and complementary duties, with a clear view of the rules in participating in a corporate 'team-game'. When these rules are not followed, an investigative process is required to validate the circumstances and key factors that lead to misconduct to enable the taking of reasonable measures to remedy any non-conformance.

Internal investigations related to suspected employee misconduct require not only a consistent application of the investigative and disciplinary procedure, but also the effective remedial application of any findings in order to guide the process of constant improvement in implementation, management and enforcement of corporate policies.

The organisation's legislative framework, with its policies and related procedures and work practices, help guide the terms defined in the employment contract. They need to embody the collective rules and regulations applicable to the workplace that presents a mechanism to provide insights to acceptable conduct to guide employee behaviour.

Ingrained in any employment relationship ought to be the principles of fairness and equity. The employer therefore retains an ongoing duty to manage and communicate policies and procedures effectively, setting out the parameters to the employees of what is reasonably expected of them. This includes any sanctions applicable when they are being non-compliant. This basically constitutes the aim of the governance framework that sets out a 'disciplinary code'.

Internal investigations within the workplace for cases of suspected employee misconduct by allegedly contravening the employer's policies are best managed by a clear investigation plan when seeking to establish a *prima facie* case against the employee.

The aim of discipline is to enforce the employer's policies with the coupled objective of implementing a progressive disciplinary code in order to bring employee behaviour in line with the employer's rules. The disciplinary process must represent fair and consistent implementation of the employer's rules through the adherence to principles of standardised application of discipline and corrective disciplinary measures.

To ensure the aims of disciplinary processes are achieved, completed investigations and hearings should allow the organisation to accurately review and develop its governance framework based on reviewing actual employee misconduct events; in alignment with the intent of the rules. This enables ongoing policy effectiveness and identifies and addresses the risk of having a disciplinary code that does not act as a deterrent.

Enforcement of the rules to maintain and promote progressive discipline within an informed and participatory process aims to gain buy-in by employees and an aligned understanding of the expectations of what constitutes desired performance.

Not all employee misconduct is worthy of investigation when considering limited inhouse investigation time and resource constraints. A reported suspicion of employee misconduct

may reflect only a contravention of the employer's policies as a once-off event, or as a possible indication of an ineffective set of rules that fails to align employee conduct with organisational goals.

Proper control over investigation protocols can often identify the underlying origins of what seems to be merely surface ripples in policy mismanagement, while in fact being caused by much stronger internal currents of maladroitness practices. Internal investigation processes may however not always produce, as its default output, information or data relevant to policy review considerations, especially if the investigation was not designed and performed with the objective of providing constructive input to improving the governance framework.

Although a reported suspicion of misconduct would naturally require proper investigation planning and execution, when an employer is being inundated with hundreds of complaints and reports, due process becomes inhibited by the limited in-house investigation resources provided. This warrants the severity of the misconduct to be assessed.

Whilst some of these triggers may contain valuable information that could save the organisation, many may be menial, maligned, vexatious, misinformed, or simply 'fake-news'. The reality is that fact-finding exercises performed by investigators are often open-ended to start with, despite clear objectives and an effective investigation methodology. The smallest crumb of evidence has the potential to lead to the unraveling of large-scale policy transgressions within the organisation and may not be limited to the alleged offender.

Deploying a Legal Project Management (LPM) approach requires the establishment of repeatable processes for specific legal projects, organising actions of critical role-players, by following a blueprint that is resilient to contingencies. Legal projects in this context include general legal matters and investigation cases, both of which can lead to court actions.

The investigative lifecycle in LPM is explained in its four phase life cycle of 'define' that looks at the investigation requirements, 'plan' that ensures an adequate strategy of an effective investigation is confirmed, 'deliver' that enables the plan to be executed within the boundaries set, and 'close' where the objectives of the investigation are confirmed to have been met. This is supported by the investigation methodology that comprises the selected tools to maximise the investment in the investigation toward the desired outcomes.

The process begins with formulating the definitive identification of the scope and context of the investigation that is critical to purposeful work. This includes understanding what possible contraventions may be present (working theories / draft charges), what evidence is likely to be required to prove those charges against the employee, and a cause of action. These all must be determined (or at least determinable) in the early phases of the life cycle.

By focusing on pragmatic sequences, the investigator needs to seek validation of 'prime sources', alleging specific contraventions of the employer's rules, allowing for well-

organised outcomes to a duly structured investigation.

These outcomes have come to define what is known as the 'Prosecutor Led Investigation' approach. The defined phase of the LPM planning must determine the investigator's brief. The 'plan' phase then is well informed to set out the whole scope of the investigation before resources are deployed.

This allows the 'deliver' phase of the investigation to be purposeful and leads to capturing and preserving the evidence that will enable charges. Drawing up and presenting the charges in accordance with the disciplinary process of the employer and the labour relations legislation should always be reasonably sufficient to allow the employee to answer the case against them. The likely result of the successful prosecution of an offending employee is also considered early on to identify the appropriate sanction, based on the seriousness and extent of proven irregularity and culpability of the employee's conduct. Therefore, the LPM approach simply brings a robust approach to standardising the process of an investigation with the ability to respond, adapt and maneuver to the needs of the findings.

The International Institute of Legal Project Management recognises the uniqueness of certain legal and investigation projects that incorporate forensic science due to the need for stringent evidence collection practices. This covers the wide medical-based and physical crime scene forensic specialisations, on one end of the spectrum, but includes the increasing reliance of digital forensic disciplines that extend the traditional computer forensics, to analysis of on-board electronics on any digital device, like the mobile smart phone or drone, and video and audio files.

This is because forensic-based investigations are subject to outcomes-based evidence gathering for the purpose of internal investigations and internal disciplinary hearings. The standard of gathering and presenting facts must always adhere to the generally accepted principles of the law of evidence. Leading toward relevant admissible evidence must be able to withstand the scrutiny of court proceedings in the event that cases are to be referred to the courts or disciplinary tribunals. This rigour means a stronger focus on process guiding consistent behaviours of the investigation team members.

Assurance that the investigative procedures comply with evidentiary thresholds related to the rules of evidence, admissibility, chain of evidence protocols and source verification of evidence are therefore of critical importance. The onus of proof will be met more efficiently by strict adherence to a system that may effectively be implemented and managed by knowledgeable forensic investigators, especially when working with legal practitioners that are competent in legal project management.

Forensic evidence varies depending on the nature and context of each case that may heavily influence the appropriate approach to be followed given the sensitive nature of some investigations and the privacy and protection requirements of those involved. Consider the following examples:

1. an anonymous tip-off may require basic

verification before a committing to an investigation;

2. a whistle-blower may need personnel identity protection that avoids disclosure of witness identities;

3. fraudulent behaviours may need covert technology intervention, given that the offenders are often at the controls of the financial systems or may have visibility into internal communications;

4. sexual harassment and discrimination that may require extra sensitivity due to the discomfort felt by the victims;

5. allegations against senior employees may have to be investigated outside normal channels to prevent interference with the investigation; and

6. misconduct involving persons outside the organisation may not be subjected to internal policies, unless agreed to in terms of a contract of appointment in the case of contractors and consultants.

Each of these factors are important contextual elements to be established in the 'define' and 'plan' phases. This is where the boundaries and level of rigour to the investigation project is set, however enabled by variation through the LPM change management process where warranted given that the investigation is still subject to findings as it progresses.

Taking a formalised LPM approach also means the holistic consideration upfront of the key factors of resource allocation, schedule and budget provisions, with due consideration to the level of stakeholder engagement, information flow and quality assurances, as well as managing process-based risks, issues and changes.

The combined forensic and legal project management approach promises easier cooperation and smoother transitions between legal, investigative and forensic science practitioners as they align their work through a formalised project-based approach.

This enables the different expertise required to be allocated to the right tasks in a managed approach to best utilise investigative resources for the purpose of taking appropriate actions against employee misconduct and to ultimately increase organisational performance in accordance with the organisation's governance framework.

About the Authors

Marais Dekker leads Bind.Africa's Transaction Risk Management Services Research & Development Team as Executive Director, focusing on industry specific process modelling and system design to improve control over contractual performance.

Oliver Schoeman is Corporate Legal Counsel at Jenny Internet in South Africa. Previously an Advocate of the Pretoria Bar and

and director at Argumentum Legal Project Management, specialising in Consumer Law, Construction Law, Commercial and Criminal Litigation.

Christo Van Der Walt is a practicing attorney and Director of Len Dekker Attorneys Inc in South Africa specializing in Employment and Commercial law and a member of the International Ombudsman Association.

Todd Hutchison, Adjunct Associate Professor, is an executive of Australian law firm Balfour Meagher, a police-licensed investigator and digital forensic specialist with Forensics Australia, and the Chairman of the International Institute of Legal Project Management.

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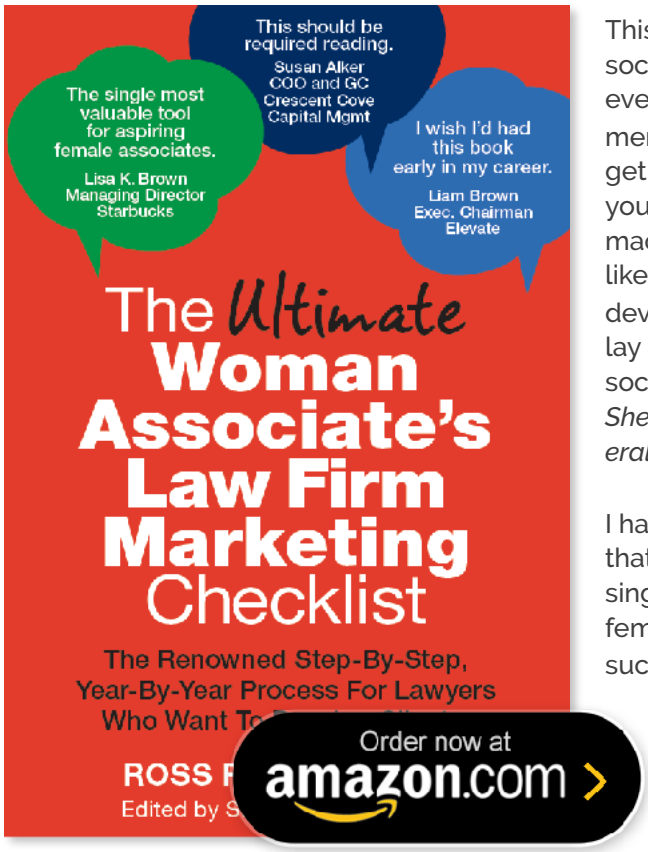
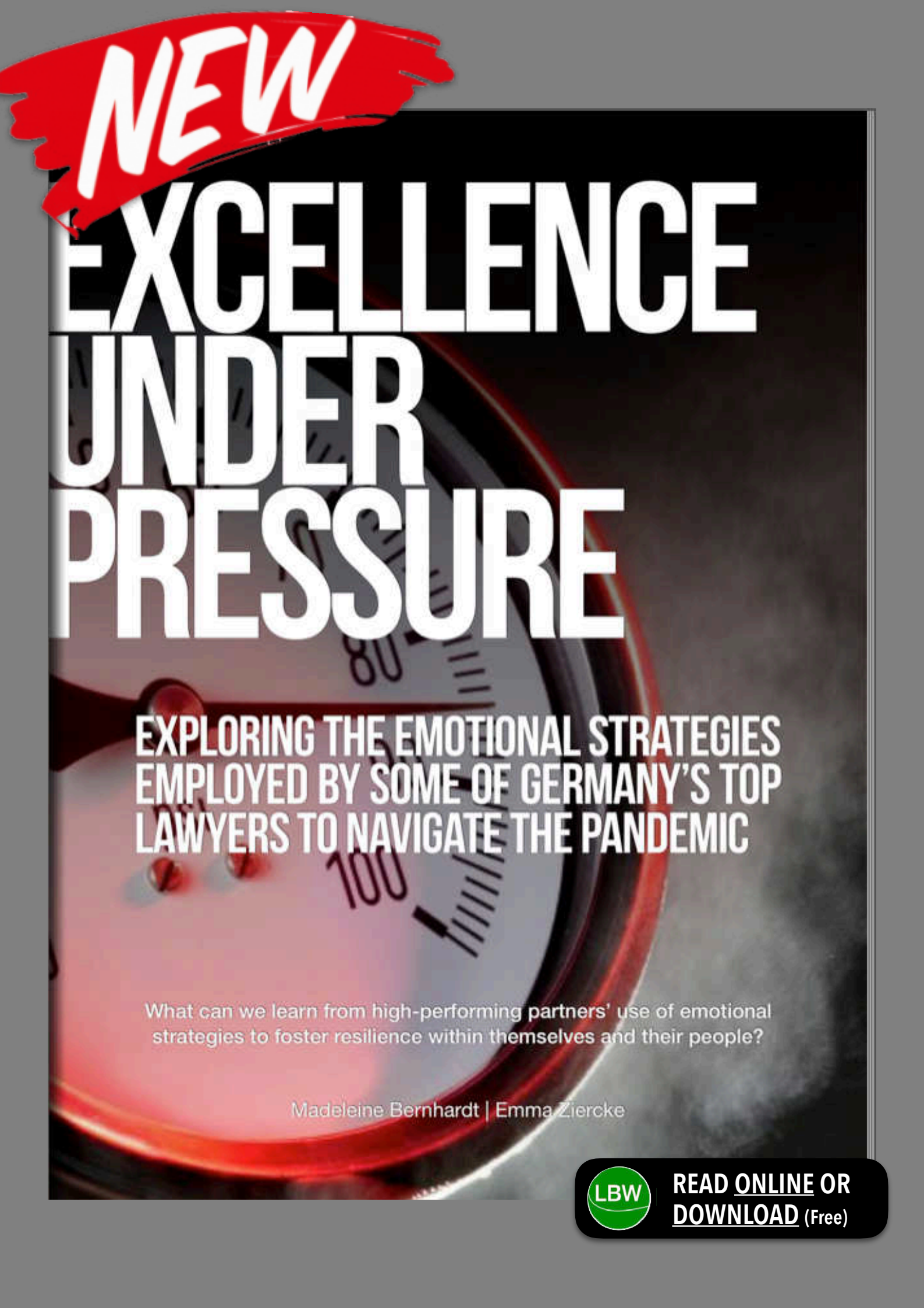


This book addresses a critical need for women associates. In the Legal sector, it is more important than ever to market yourself and create business development opportunities. If you own your own business - you get to dictate your professional careers and the earlier you can start on this path the better. For a variety of macro and micro reasons, women associates are less likely to have the information to be a successful business developer. No more, Susan Freeman and Ross Fishman lay out in plain English steps that can lead to women associates becoming more visible and better marketers. *Sheila Murphy, CEO, WOMN, LLC, Former Fortune 50 General Counsel*

I have long subscribed to the simple but powerful notion that "all good things begin with a list!" I can't think of a single tool that would be more valuable to an aspiring female associate, striving to navigate her environs and successfully sow the seeds of personal investment in brand, career, and community, than the thoughtful and competent compass she'll find in the principles set forth by Susan and Ross. *Lisa Kremer Brown, Managing Director, Starbucks Law and Corporate*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The Value Series

A ClariLegal interview with Vincent Cordo, Chief Client Development and Relationship Officer at Holland & Knight LLP

By Cash Butler, founder of ClariLegal and Jeff Kruse, President of Kruse Consulting and Dispute Resolution LLC

The terms "trailblazer, pioneer, and innovator" are overused buzzwords. But the terms truly apply to Vince Cordo Jr. Before becoming a true innovator in the delivery of legal services, Vince was a member of internationally touring rock bands. He knows what it takes to be a star and to be successful.

A Natural Transition to Legal Services

Vince did not start his career in the legal field. Rather, with his MBA from the University of Liverpool, a background in economics, and a Masters Degree in Technology Management from Columbia Business School, Vince is not an ordinary legal services provider.

Early in his career, Vince was a data scientist working heavily on data mining. During that period, he worked at two startup companies that provided key services in the legal space. One company focused on time management software, and the other on records management.

Both opportunities allowed Vince to work very closely with in-house legal teams supporting core innovation in the early days of what is now legal operations. In those roles, Vince played "a hybrid role" as a technologist who interfaced with clients. In that hybrid role, Vince worked hand in hand with the lawyers, human resources professionals, and information technology specialists employed by his clients.

By necessity and innate skill, Vince developed the vital ability to communicate highly technical information about software solutions to his customers, the in-house legal teams. In essence, he became a "universal translator" so that legal and business teams could understand technology, and he could help with the installation of the technology and provide key client support.

Early Role with Law Firms

Because of his unique ability to translate and implement technology, one of the law firms with which he had worked offered Vince his first stint working directly in legal services. The firm knew it had a "service delivery need" and Vince filled that need as the Chief Information Officer. At first, Vince's role at the firm focused primarily on technology, but the role transitioned into client support, pricing support, and innovation. The role evolved in part because of Vince's capability to understand the needs of the law firm's clients and to develop solutions to fill those needs.

For example, Vince recalls that one client had a need to better understand knowledge management. Through his exceptional ability to read the room, Vince recognized that the client needed a better grasp of operations within the legal department, and he and his team were able to help the client meet its needs.

Over the course of his first two decades in the legal services arena, Vince worked at several multinational law firms. During those years, Vince had the good fortune to collaborate with numerous like-minded individuals and their teams from various corporations like Jeff Carr at Univar, Leanne Geale , EVP and General Counsel Nestlé S.A, Maurus Schreyvogel at Novartis, Connie Brenton at NetApp, Justin Ergler at GlaxoSmithKline, Ritva Sotamaa, General Counsel at Unilever, Sam Bernstein at Amazon, Greg Kaple at Kaiser Permanente, Jason Barnwell at Microsoft, and Lisa Hart Shephard CEO Acritas just to name a few of the people who influenced Vince's journey for creating a vision for the role of strategic legal operations in delivering value in legal services.

In-House Experience

After several years working at those three major law firms, Vince found an opportunity to grow his legal operations skills in-house at Shell New Energies. While at Shell, he served as the Global Sourcing Officer, Central Legal Operations Officer, and ultimately as the Head of Global Integration and Compliance. In these roles, Vince managed a team of over 30 operations professionals responsible for pricing strategy and negotiations, legal project management, legal budgeting, business intelligence, compliance, metrics, and much more.

During his time at Shell, Vince's team won an Association of Corporate Counsel Value Champion Award for a implementing a large-scale counsel convergence program. That project resulted in significant annual outside

counsel rate reductions and an impressive overall external spend cut of 25 percent.

Diversity and Inclusion

Diversity and inclusion are important concepts to Vince. While at Shell, Vince helped drive the charge under Legal Director Donny Ching to establish diversity and inclusion metrics for the General Counsel (GC) for Diversity & Inclusion (D&I) initiative, and he regularly spoke on the topic in various events throughout Europe.

Return to a Law Firm

Earlier this year, Vince left Shell and joined Holland & Knight LLP as the Chief Client Development and Relationship Officer. Vince is uniquely qualified for this role. He has been a vendor in the legal services space. He has been an operations leader for multiple law firms. And most recently, he has been an in-house legal operations innovator. In short, he has seen legal services delivery from all sides and is now using that vast perspective to deliver value for Holland & Knight clients.

From Vince's viewpoint, "more than ever, global companies are looking at ways to expand in the states and all over the planet. These companies need help to adopt technology and processes and especially need help making these changes part of the fabric of their organizations."

In his new role, he is helping "allied professionals support the harmony of the dance of the delivery of value." For instance, instead of just helping a client implement a new technology solution, he is also focused on helping the client capture important data from that solution that might help the client's bottom line.

Another aspect of his new role involves cross-pollination in the delivery of services for clients. Rather than the siloed delivery of legal services, Vince is identifying opportunities for clients to use additional technology or harmonizing supplementary offerings to add value in the delivery of their legal services. Another aspect of the value harmony includes bringing in younger talent on matters for knowledge continuity and talent development.

Value

To Vince, value is about "impact and results." Delivering value means providing positive impacts on the bottom line of the business. Vince believes that value results from "the delivery of services executed in a way that is the most efficient and effective manner for the better outcome of the client." Essential to the delivery of value is the need for alignment. Service providers need to be aligned with the interests of their clients.

For Vince, value has three pillars. The first component of "value is understanding the right balance of savings and economic enhancement for both sides."

The second aspect of "value" is an understanding of client relationships and team loyalty. Team nurturing and loyalty is necessary to prevent "team erosion and make sure the team continues to deliver excellent service at the same high level." The third facet of value is an awareness of branding and marketing to highlight how everyone in the organization contributes to value delivery.

Importance of Data
Understanding data is important for understanding value in the delivery of legal services. Data is such a vital aspect in the value equation that Vince and Jaap Bosman wrote the book, "Data & Dialogue: a relationship redefined." In that book, they explain the need for both the clients and the service providers to communicate clearly about data analytics to drive efficiency and value. In the book, they discuss the "Value Matrix" which can provide a workable model to establish value price points.

Showcasing Value
Vince believes it is important to be "bold and brave in showcasing how you impact the business." For instance, early in his experience in legal services, Vince recognized the importance of using key performance indicators to demonstrate value and impact on the bottom line. Vince appreciated that his clients identified key performance indicators (KPIs) in their financial statements. So, he transferred those KPI concepts from his clients' financial statements into his legal services space. Specifically, he mapped his clients' KPIs so he "could show how he and the legal team were positively influencing those KPIs."

A key to showcase value is to move the discussion away from hourly rates and cost. As he notes, "People will pay for efficiency and would pay $10,000 an hour for a project if it could be done in an hour instead of a hundred hours." Thus, the discussion about value should focus on how the legal services positively impact the client's business and how the services are delivered in the most efficient manner for the client.

Key to Success in Legal Operations
To be successful in legal operations, Vince believes that you have to make the emphasis on delivering value "organic to the culture of the organization." In his experience, one of the biggest challenges is making the emphasis on value "more than just a fad." The focus on value has to be "embraced throughout the organization so that it becomes part of the culture and the fabric that organization." He credits the in-house Shell team for adopting that mentality and making the three pillars of value a part of the culture throughout the team.

Broad Perspective on Requests for Proposal
Vince has been on all sides of requests for proposals (RFPs). At the startups, he was on the vendor side responding to requests. When he was in-house, his teams prepared RFPs, and he evaluated vendor and law firm responses. When he has been at law firms, he has helped respond to RFPs. In short, Vince knows the RFP process.

To respond to RFPs successfully, Vince emphasizes the need for good writing. According to Vince, "you need to tell a well-written complete story from the first question to the one hundredth question and to weave key concepts like innovation throughout the responses." The entire response needs to be cohesive and the responding firm needs to "pay the right focus on the value throughout the entire response."

Vince notes that when law firms respond to RFPs, typically teams or individuals divide up responses to different sections of the RFPs. But for Vince, the total response needs to be

"coordinated and cohesive and not siloed."

As an example, Vince points to the TV show "Ink Master." On Ink Master, sometimes multiple tattoo artists are given the specific sections of a single tattoo to complete. But to win the competition, the finished product must look like it was done by one artist. To Vince, the same is true for RFP responses. As he notes, "a client does not want to see 50 different perspectives. The client wants to see one perspective."

Because he has seen every side of the RFP process, Vince understands the need for efficient and effective technology-enabled RFP, procurement, and business development processes to drive value. Corporations and law firms must understand what they need to provide accurate targets for service providers. Likewise, law firms need to identify client prospects and get access to corporate customers via open and actionable RFPs. With his background in data, Vince is currently looking at ways to use data analytics driven by Artificial/Augmented Intelligence (AI) to identify opportunities so he and his Holland & Knight can be ready to help potential clients immediately.

Advice for the Delivery of Value in Legal Services

Diversity of thought it crucial for success in the modern delivery of legal services. Organizations must "respect ideas and individuals regardless of their level or title." To be successful, legal services providers need to "be open to all the ideas regarding how they can move the needle of value no who has the idea." Vince believes it is just as important to recognize the ideas of the data and technology team members as it is to appreciate the ideas from the lawyers. Because the team is "here to provide value for the client, it is important to listen to all of the input on how we can help the client."

About the Authors

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Cash Butler is the founder of ClariLegal. A seasoned legal technology innovator, Cash has over 18 years of experience in the legal vertical

over 18 years of experience in the legal vertical market, primarily working in eDiscovery, litigation & compliance. Cash is an expert in legal vendor, pricing and project management.

ClariLegal is a preferred vendor management platform for legal services that improves business outcomes. Made for legal by legal experts. We match corporations and law firms with preferred vendors to manage the work through a fast and complete RFP and bidding process. ClariLegal's platform allows all internal client segments to improve business outcomes across the board – predictability, time and money. Learn more

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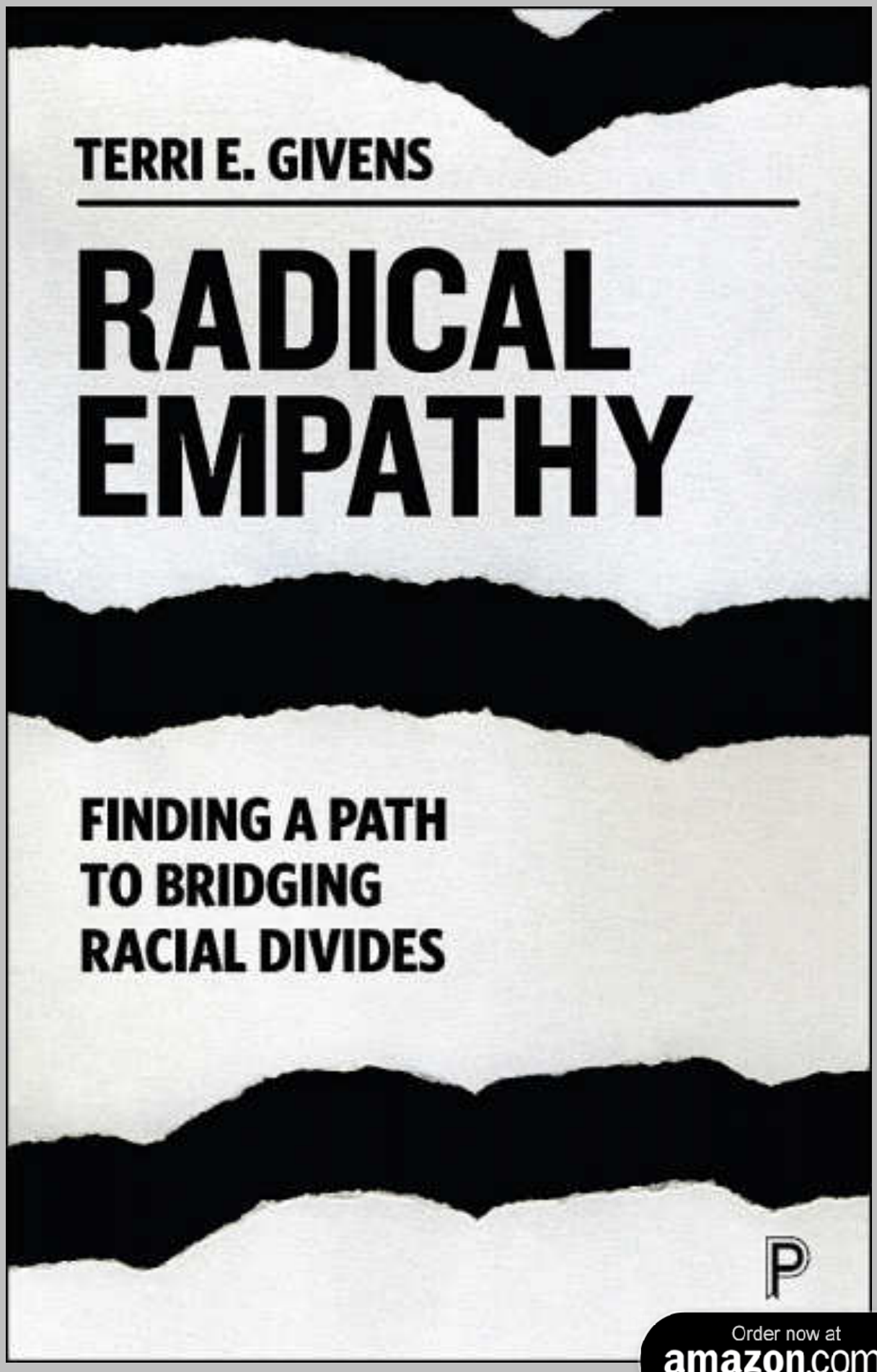


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Allocate Time Strategically in 2021

By Richard G. Stock, M.A., FCIS, CMC, Partner with Catalyst Consulting

This is the twenty fourth in a series of articles about how corporate and government law departments can improve their performance and add measurable value to their organizations.

Six years ago, the December 20th issue of The Economist featured a piece that asked the question "Why is Everyone So Busy?", sub-titled in search of lost time. The article was thoughtful yet frustrating because it did not offer any real solution. There is no path to balance, it seemed. This is doubly so now that so many in-house counsel are working from home.

As the article explains, "Once hours are financially quantified, people worry more about wasting, saving or using them profitably." Indeed, University of Toronto researchers found those who are paid by the hour tend to feel more "antsy" when they are not working. Of course, lawyers are not paid by the hour, but they do bill by the hour, and that culture influences how in-house counsel value their own time (since most have spent a few years at a firm).

And then there is the matter of overall compensation. Research has found that when people are paid more to work, they tend to work longer hours. Well, aside from the most recent recession, hourly rates and compensation for lawyers in private practice have continued to rise. So that should tell you something about a lawyer's work/life balance.

Time-management practices in the legal industry do vary from place to place, however. Over the past 18 months, I have spent 80 per cent of my time working for US and European clients, and I have observed significant differences. Even within the United States – from Seattle to Nashville to mid-town Manhattan – I detected important variations in work volumes and habits.

The overall number of hours worked, for instance, is higher in the US than in Canada. A Harvard Business School survey of 1,000 professionals found that 94 per cent worked at least 50 hours per week, and that almost half worked more than 65 hours. The Economist noted that "60% of those who use smartphones are connected to work for 13.5 or more hours per day." The Altman Weil 2020 Chief Legal Officer Flash Survey (contact info@altmanweil.com for reprint) reported that the pandemic has increased the length of the workday by an average of 10%.

To some extent, this can be explained by vacation entitlement and statutory holidays, which are more generous in Canada. The Glass Door Consultancy reported that the average US professional or manager "takes only half of what is allocated, and 15% don't take any holidays at all."

We have conducted at least ten studies on workloads and workflows for clients over the past decade. The data show that the length of the workweek had indeed increased by 10 per cent during this pre-covid period. But the real story emerges in the interviews with in-house counsel and their clients.

Work-related stress is driven by work flows and not workloads. Most departments have no protocol for who can call on the law department, and when they should do so. Access is unrestricted and available 24/7. Responses are expected within one business day or less, regardless of the significance of the matter.

An analysis of the type of work and the source of the requests shows that many departments

will dedicate 80 per cent of their resources to 20 per cent of their clients. The remaining 80 per cent of clients can become much more self-sufficient with increased training, standard form documentation and more explicit protocols for access to the law department. Productivity gains approaching 10 per cent can be achieved for most law departments using this multi-faceted approach.

Further analysis reveals that 40 per cent of the work done for core clients is still routine, and typically takes less than five hours per matter to complete. The average is 1.5 hours per matter. Indeed, one is hard-pressed to find a law department with more than 30 per cent of its resources allocated to complex work. That makes it hard for a corporate law department to make a significant and strategic contribution.

GCs cannot hold back the tides of demand for services from the law department. However, there are three things they must do to improve the productivity and value of their limited resources.

First, they should have an accurate and current picture of the demand for services. The type, complexity, frequency and source of work should be detailed for each lawyer and paralegal.

Second, they should introduce client training and work intake protocols designed to reduce the amount of routine work by 50 per cent and the number of occasional users by 75 per cent, with a view to generating 10 per cent more capacity in the law department.

And third, the practice-management habits of each department member should be examined, with particular attention to an over-reliance on paper and to poor email management habits. Three GCs recently told me that the pandemic has greatly accelerated the move away from paper-based systems in their law departments. Only then can a law department ensure that it is both efficient and effective. The challenge is to increase its strategic impact not its stamina in 2021 so that "business gets done".

About the Author

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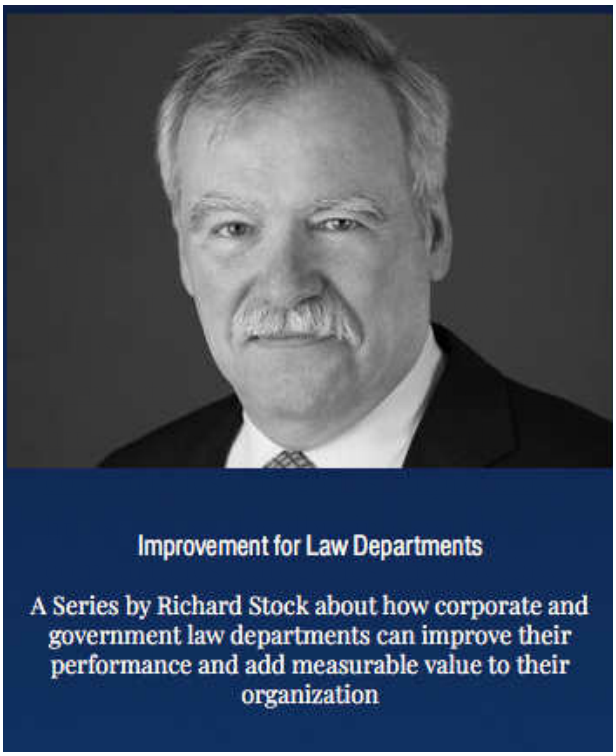

When A Leader

Needs To Confront Underperformance

By Patrick J. McKenna, Thought Leader, bestselling Author and renowned Speaker

One of the more difficult decisions that any firm leader or practice leader will be faced with, is when you have to confront and possibly remove someone on your team who is no longer "pulling their weight."

When you are faced with this challenge (and you definitely will be at some time in your leadership tenure) you need to understand that the consequences of taking decisive action are rarely as dire as they might seem to you at first glance. Nevertheless, there are numerous reasons why intelligent and capable leaders will go to great lengths to avoid taking any action. In reality, not taking action is the same as announcing that you will continue accepting unacceptable performance.

Therefore, you need to recognize each of these actions, or lack thereof, as significant traps:

- **Propensity to give the situation a bit more time.**

Situations in which sufficient data demonstrates that a particular professional is no longer doing the job is not always easy to accept. Some leaders are inclined to hold back, waiting for even more information that a colleague is not performing in the role. Yet other leaders have a high need to be loved, admired and respected by everyone within their group. This is an important part of their personal makeup and what attracted them to take on the position of being a leader in the first place. This need makes it particularly hard for them to deal with conflict of any kind and the thought of having to confront a colleague and peer is an especially painful situation.

I worked with the managing partner of one firm who had put off dealing with a underperforming senior partner for over a year, continually rationalizing (mostly to himself) how this guy was slowly coming around. You have to ask yourself: What are you seeing that makes you think that things are really going to get better without some intervention? What are the specific signs that this individual is making progress?

- **Fear of how the professional involved will be impacted.**

If you are like some leaders you will find it natural to be concerned about how the impact of being told that you are underperforming is going to be accepted. You are well aware that you are dealing with a professional where this may be seen as the first major failure they have experienced in their career. The shock of that failure, combined with any possible peer embarrassment, may be a crushing blow. There is an internal tension and huge reluctance to confront these people.

Yet at some point you do have to ask yourself how long you, and the team afflicted, can reasonably be expected to continue to tolerate underperformance or disruptive behavior. And in many cases, we are talking about situations where decisions taken or avoided can have measurable economic consequences.

- **Concern for how confronting the underperformer will be viewed by others.**

There is also a profound fear that having to confront the underperformance is not only likely to provoke embarrassment on the part of the professional involved, but it will also potentially stimulating other partners to be concerned about their own personal worth.

You need to realize that even if the situation ultimately results in the departure of a firm partner, or even a couple of departures within a relatively short period of time, it is not going to destabilize the entire partnership. As you put in place a carefully developed remedial plan for addressing the underperformance, your fellow partners soon realize that are transmitting a powerful signal about how the firm is enforcing standards and about the level of performance that is required of all lawyers.

- **Your sense of personal failure.**

It is not unusual for an experienced leader to entertain some feeling of having personally failed at preventing the underperformance. It may be very natural for you to harbor remorse

at not knowing how to turn this individual around or fix the situation. You believe that if you had only given this lawyer more guidance, clearer direction, or spent more time in providing personal coaching that none of this would have happened.

Your self-imposed guilt ignores a couple of considerations. In most every case I've observed this partner knows full well that they are not performing in accordance with the standards or with the level that they had performed in the past. The truth is that you can only do so much. For you to personally think that you can help make every professional a 'Star', is simply not realistic.

- **You cannot delegate the responsibility to take action.**

One of the benefits of being a leader is that you can delegate some of the more mundane or distasteful tasks to others. But, unfortunately this is not one of them. The unavoidable fact is that some responsibilities cannot be delegated, and dealing with performance issues is one of the key tasks of any effective leader.

That all said, before one takes corrective action it is essential to identify where the problem lies and whether there is any rational way to fix things. Very often we just rush into assumptions about why people are underperforming.

Assuming that your strong preference is to provide the underperformer with coaching and remediation to help them succeed, then diagnosis is the starting point. The diagnosis may point to areas where your coaching might be highly productive – having this individual develop a meaningful plan to get back on track, and then thinking through together how that plan might best be implemented.

CONSIDER WHY HE OR SHE IS UNDERPERFORMING

A common mistake in dealing with underperformance is rushing to talk to the underperformer without pausing to consider why he or she is underperforming. At a recent workshop session with a group of practice leaders, department heads and managing partners, they were asked to list the common reasons why their colleagues may underperform.

Here was their list:

1. Trouble at home or other personal problems (divorce, alcoholism, depression, etc.)
2. "Burnout" — no longer finding the work interesting or challenging
3. Fear of failure in trying something new and reaching for career progress
4. Quality-of-life choices — lack of desire to contribute more energy or time to the practice
5. Externally driven reasons such as the loss of a recent client or downturn in their chosen sector
6. Failure to keep up in their field; being less in demand
7. Struggling because of poor time management or other inefficiencies
8. Lack of knowledge about what they should be doing to succeed
9. Being poorly managed
10. Insecurity due to things like firm merger discussions, and withdrawing into their shell, pending resolution of unresolved firm issues

As you review this list, you can add any other possible causes that you think are missing, and then ask yourself: *"which of these reasons are the most common in your real world?"*

This particular collection of leaders selected: burnout, loss of enthusiasm, quality-of-life choices, personal / family issues, and externally driven market changes – as the major reasons for underperformance in their groups.

One of the participants added:
It all ties together. The work is so demanding, and it is so hard on you, that the result is that you ultimately say, "I just don't like to do this anymore." That can also spill over into personal and family issues, and it can also make you say you really want a different quality of life.

The reason people are not performing is rarely because they don't know what to do. Nor is it that they don't want to do it. The incentives to do it are probably there. If they aren't doing what they should, it is probably due to something deeply personal in their lives. The only way to find out what it is, and to deal with it, is to talk about it.

You are now faced with two critical questions. Does you diagnosis indicate that this professional's performance shortcoming lie in a coachable area? Second, what results can be expected from you (or someone) coaching this individual and over what period of time – is the result worth the expenditure of professional time and effort to get there?

Those are very tough questions. Over the years I have counseled a number of firm and practice leaders on how they might deal with the challenge of either coaching or removing some underproductive professional. I don't ever want to underestimate the complexity or the intense emotional investment involved in making a decision to take action.

BE CAREFUL HOW YOU APPROACH THE DISCUSSION

Meanwhile, I have witnessed this same scenario play itself out, time after time, and we never seem to learn.

Imagine this: The practice leader has their attention drawn to the fact that one of our beloved partners is underperforming. This leader knew that the particular partner was underperforming. It didn't come as a shock. But they were content to let the situation drift without resolution, rather than have to confront the ugly reality of the circumstances. But today we have the situation, the statistics, the facts thrust before us and now something must be done.

Our devoted leader, unaccustomed to having to deal with an interpersonal situation of this nature, makes a case for simply leaving the underperforming partner alone and instead sending this individual a message via the annual compensation review. The rationale is that by cutting this person's compensation they will quickly come to the realization that they had "better pick-up-their-game and get with the program."

Given that we are dealing with rational people the leader's argument reaches sympathetic ears and after some months, the compensation adjustment is finally executed. No effort is

ever made to fully explain the compensation adjustment or to inquire as to why this partner's performance has declined. Has work dried up in their area of practice? Are they experiencing some personal problems, perhaps afflicted with burnout? Are problems at home creating a distraction? All potentially temporary in nature and capable of being remedied. But no one bothers to ask, "What's going on here?"

***LESSON #1** – in an earlier era of lock-step compensation, if a partner was underperforming, it was quickly detected and resulted in someone discretely visiting with the individual to offer assistance to get him or her back on track. Today, when that happens, management simply abdicates their job under the guise of adjusting the individual's compensation and sending them a message.*

Now our underperformer has had their annual compensation adjusted downward. But after some months, there is still no change in performance. Did this underperforming partner really know that their performance had declined and was below expectations? Absolutely! I have never seen an instance where the individual was ignorant to the realities of their situation. Did this underperforming partner know what they should do to get their performance back on track? Who knows. Not likely. And, certainly, nobody has bothered to ask thus far.

Well, this situation continues to fester for some protracted period of time, sometimes for years (unfortunately) until someone in a leadership position finally (hopefully), decides that maybe they should talk to this partner.

So a one-on-one meeting is scheduled. Now because this situation has been allowed to drag on for a prolonged period of time, it can be far more difficult for our underperforming partner to take the kind of remedial action that might have delivered results, had the discussion happened when the underperformance was first detected.

***LESSON #2** – difficult personnel or performance issues never get better with age. Nevertheless, our persistent leader sits down with the underperformer and points out the issue and asks the partner "what's going on here?" The partner now recognizing that they are facing a time of reckoning. And at some point will inquire of the leader (guaranteed!) the most natural question, "what do you think I should do to get my performance back on track?"*

Our naive leader, in an attempt to be of help and offer some genuine guidance, now outlines a number of alternatives that this underperformer might want to think about doing. The partner picks one of the alternatives, the leader is delighted to see that action is being taken, and everyone goes back to their office to let the situation percolate . . . for another six months; or year.

A year goes by, the performance has not improved and another sit-down is scheduled. Our frustrated leader asks the underperforming partner what happened. The partner responds, "I did exactly what you suggested, but it didn't seem to work for me."

(Interpretation: It was your idea Mr. Practice Leader and now it is your problem, not mine.

I tried what you wanted me to do . . . but it didn't work.)

LESSON #3 *– who really owns this problem, or – who's got the monkey?*
It reminds me of an article written in the Harvard Business Review many years ago wherein the author asked his readers to imagine, that every time one of their people has a problem, issue or challenge to deal with, to imagine that problem as a monkey sitting on their shoulder. His message was that the next words out of your mouth will quickly determine who owns that monkey!

In other words while you may, as a practice leader, want to be of help to your partner and indeed that is your highest value activity, by taking ownership of your partner's problem you have actually hindered their development.

WHAT TO DO
STEP ONE: Practice how you are going to handle this discussion.

At some point you need to try doing a dry run on how you will actually explain to your colleague why it is necessary for them to step up their performance. It often helps to sit down and write out the specific reasons you would give. The resulting insight can be powerful. "When I looked at this list, "one leader confided to me, "I could not believe I had closed my eyes to this situation for this period of time."

Take some time and have a trusted colleague work with you in allowing you to practice (role play) how your discussion with this individual might unfold. Very often practicing how you are going to handle the interaction helps you think through all of the optional ways in which this individual may react to your message and how you then need to respond. Whenever I have done this with a firm leader, invariably there is a sense of surprise at how "right" the discussion feels. In other words, this is a discussion that needs to happen.

STEP TWO: Confront the underperformance problem.

Have a one-on-one discussion with the individual to identify the underperformance. Ask first. Start responding later. Do not let the situation fester. Your leadership task is to figure out for each professional, as an individual, which reasons for underperformance exist. You must accomplish that before you can both work together to formulate any appropriate corrective action plan. For example, there is no point in talking about the meaningfulness of your group's work if the problem is family trouble.

You've got to have a discussion and try to find out what's going on. Say something like:
"I don't want to get things wrong here, but I get the sense that you're not fully engaged with your work like you used to be. You don't seem to be showing the normal levels of enthusiasm you have shown in the past. Something is going on. I would love to help you if I can."

It is important to remember that the goal is to convey a genuine concern: "How can I help you?" while leaving the responsibility for improvement with the individuals themselves.
Is there anything I can do?

Deal with this situation now. It will be far

harder to deal with a few months down the road and far more difficult to resolve in a satisfactory manner.

STEP THREE: Listen persuasively and express confidence.

Listening persuasively is the ability to ask questions to help your colleague come to his or her own conclusions. Ask lots of questions, seek to understand what's going on, and help your partner think through their various options. The key question you need to pose is: "So what do you think YOU need to do to resolve this issue?"

Reassure your colleague of your confidence in them. This is important to the individual's dignity and self-esteem. We all want to feel like we have someone on the sidelines pulling for us.

Jennifer, I know there are times when work dries up a little for all of us. You're a competent professional, so I know you can turn this around.

The proper role of an effective leader, when dealing with thorny performance issues, is to serve as coach, catalyst, and cheerleader. The coach cannot win if the team loses. You have a vested interest in the individual performance of each and every member of your group.

STEP FOUR: Invite your colleague to identify a sequential plan of action

Do not volunteer your ideas of what you think your partner needs to do. Rather inquire of this professional, what specifically they are going to do, and by what dates, to turn around their situation.

"I need you to understand that this performance is not acceptable to the partnership. You need to take responsibility for coming up with a remedial plan of action to get your performance back on track. I'll here to help you in any way I can, but this needs to be your plan. You need to own this situation."
And if they don't know what they should do?
"In that case, I think you might want to give this situation some considered thought, perhaps confer with some trusted colleagues. I'll let you take some time to do that and let's get back together at this same time next week. And when we get back together, I want your detailed outline of what specific action you are planning to take, together with some review dates whereby we can meet to see how things are progressing."

Invite them to think about whom within the firm (or outside of the firm) they might want to confer with to get some ideas. But leave the ownership for developing a remedial course of action with the professional affected.

As mentioned earlier, in most instances you may have a number of constructive ideas that you believe, if acted upon, would help resolve the situation. However, you need to allow your colleague to come up with their remedial ideas first. It is important to remember that the underperformance issue and whatever action must be taken are the responsibility of that individual. If you shape their remedial action plan for them, you allow them the convenient excuse that this wasn't really their plan, it was yours.

STEP FIVE: Offer your assistance by scheduling frequent follow-up meetings

Help your colleague by determining with them what they are expecting to do and accomplish, by what dates. It might be useful at this stage to take notes, put your mutual understanding in writing and ensure that your colleague gets a copy following the meeting. Set frequent follow-up sessions, at least every second month, to check in on their progress.

STEP SIX: Encourage them to maintain their focus and help celebrate small successes. Acknowledge any achievement, no matter how small, during your follow-up meetings, as soon as possible following any achievements. Your role is to "praise achievements back to acceptable levels of performance."

DEALING WITH THE UNCOACHABLE

There are times when your diagnosis may reveal a more pervasive problem – for example, this particular individual is just not prepared to invest any of their non-billable time in building their skills to make themselves more valuable to clients; or to proactively engage in some serious business development efforts. Sometimes your choice is clear – the individual's fundamental performance may simply be uncoachable and therefore more extreme action may be warranted.

Raise your hand if you have ever encountered someone who seemed to be a lost cause.

How do you detect a lost cause? Posing that question to a group of leaders recently, together we developed the following list.

A lost cause is some professional who . . .

- blames others or uncontrollable circumstances for their unacceptable performance or behavior
- rarely executes on those promises made to the group
- is usually defensive and never accepts personal responsibility
- is constantly disruptive, uncommunicative or disrespects colleagues
- is combative and creates conflict and tension within the team
- may ask for others' opinions but regularly rejects those views when given
- acts as though he or she were a victim

Here are but a couple of indicators that may signal when you are dealing with one of these people.

• They think everyone else is the problem. Some time back I worked with a particular leader who, after a two high-profile departures, was concerned about morale. He led a successful firm, but feedback said that he played favorites. When I reported this feedback, he completely surprised me. He said he agreed with the charge and thought he was right to do so. He didn't think he had a problem. This successful professional has no interest in changing. If he doesn't care to change, you are wasting your time!

• Then there is the underperformer that is pursuing the wrong strategy for her practice. If this individual is insistent upon and already going in the wrong direction, all you're going to do with your coaching is help him get there faster. It's hard to help people who don't think they have a problem.

• Good luck with the perpetual pessimist. You can't change the behavior of unhappy people so that they become happy. You can only fix behavior that's making people around them unhappy.

Many characteristics define someone unwilling to become a better version of themselves. They may be individuals who are looking for a list of answers – seeking the secret sauce to a recipe for success. They may only want to share their views and don't feel the need to listen to anyone's experiences or ideas. They may get defensive when you offer a suggestion or an opinion. Some of the most intelligent professionals are unwilling to be coached. Unfortunately, it is difficult to get inside someone's head so when dealing with someone you sense is uncoachable, depending on the severity of the situation, here are a few final options to consider:

1. Attempt to discern the cause. Making a positive change can be difficult, and there may be understandable reasons why your colleague might resist trying new things or accepting your coaching. You are often dealing with very talented and successful professionals, which further feeds their rationale that they don't need to change because what they've been doing has been working. Talk to the individual about what dynamics might be leading to their ongoing resistance. Those factors could include a deep-seeded fear of failure, a pessimistic outlook that nothing could ever change, or even a fear of success.

2. Play a strong managerial role. Rather than continuing to try to coach this individual, tell the person what you, as the practice leader, expect of them. Some professionals need external pressure and expectations to succeed.

3. Talk about gains and consequences. Be frank. Sometimes, the most we can hope for is clarity. Clarity of what the consequences are if the performance or behavior is not improved. "What happens if you don't achieve the performance standards that the firm is wanting you to achieve?" All the while we are trying to create some intrinsic motivation.

What I've learned: **know when to stop**.

It is exceedingly difficult to coach attitude, work ethic, honesty or intelligence. Perhaps this individual was an incorrect hire to begin with; perhaps they were promoted to partnership well before they demonstrated the appropriate skill-set; perhaps they simply do not want to do the heavy lifting that is required. These are situations you are not likely to ever win.

So, if all else fails, you may have to ask your colleague to leave the firm. In that event . .

CAREFULLY MANAGE THE COMMUNICATIONS

After any initial shock, give your colleague sufficient time to clear their heads and ask them to think about how they want to work with you to carefully manage the communications surrounding their leaving the firm or changing their partnership status.

This situation should not cause undue embarrassment, harm to some professional's

reputation or be perceived to limit their future opportunities. Keep in mind that in the absence of reasonable information we can all gravitate to creating our own stories – sometimes involving dark conspiracies and shadow motives – eventually reaching our own misguided conclusions as to what really happened. You don't need that kind of scenario to unfold on your watch.

There are always reasons to put off the decision to take decisive action. A number of leaders have admitted to me, that in hindsight they came up with all kinds of rationalizations to postpone a painful decision that they just knew was inevitable. In the end all they succeeded in doing was hurting both their team and crippling the team's possible progress in a highly competitive marketplace.

No leader would ever tell you that this is the easy part of the job. It isn't!

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This is the subject of a Presentation that I am delivering, together with my old friend Nick Jarrett-Kerr, Author, Professor and Consultant on January 27, 2021 at Law Firm Compensation Strategy: A Virtual Conference hosted by Ark. Copyright Patrick J. McKenna

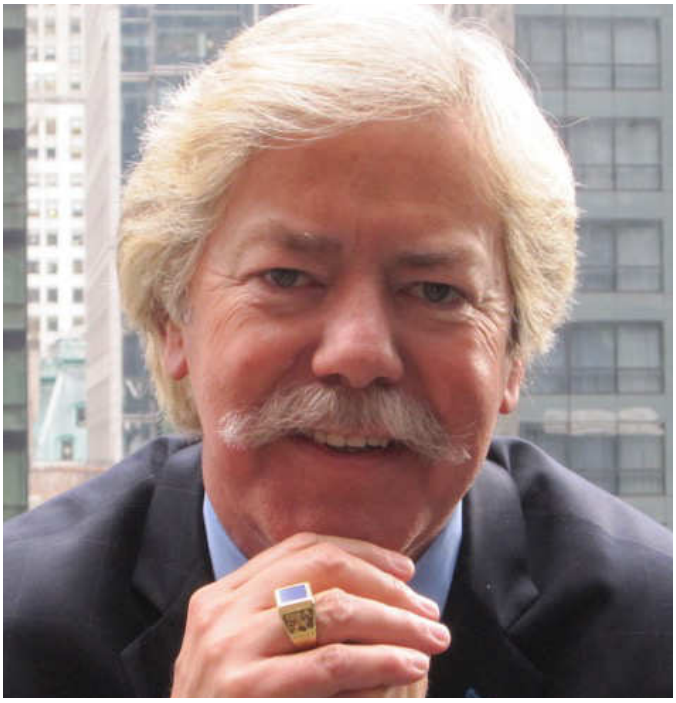
About the Author

Patrick is an internationally recognized author, lecturer, strategist and seasoned advisor to the leaders of premier law firms; having had the honor of working with at least one of the largest firms in over a dozen different countries. He is the author/co-author of 11 books most notably his international business best seller, First Among Equals (co-authored with David Maister), currently in its sixth printing and translated into nine languages. His two newest e-books, The Art of Leadership Succession and Strategy Innovation: Getting to The Future First (Legal Business World Publishing)) were released in 2019.

He proudly serves as a non-executive director (NED) or advisory board member with a variety of professional service firms and incorporated companies. His aim is to instigate innovation, provide independent strategic insight drawn from his years of experience, and support effective governance.

His three decades of experience led to his being the subject of a Harvard Law School Case Study entitled: "Innovations in Legal Consulting" and he is the recipient of an honorary fellowship from Leaders Excellence of Harvard Square.

Read more articles from Patrick McKenna, or read online/download his latest eBooks



Law Firms Increase Use of Alternative Legal Service Providers

By Yvonne Nath, strategy consultant with LawVision, and CEO of ALSP Advisor - (ghost-written by AI-Writer.com)

I am sharing this article to provide some food for thought. I did not write this. This article was auto generated in under 4 minutes at AI-writer.com. All I did was enter a phrase (the title of this article), *et voila!*

What's interesting is that AI-writer's articles are, on average, 94% unique. Furthermore, this article is full of buzzwords that might place this article higher in search results than something I may have written, but parts of this article are nonsensical. I find my eyes glazing over as I try to read through this fluff. How about you?

In an era where search engine optimization is important, and increasing the number of visitors is sometimes the end-goal of a website, I wonder: *how much does the quality of content matter if the goal is simply to generate more site traffic? What will happen to prestige of authorship? What about the issue of plagiarism if we take content created by artificial intelligence and call*

it our own? Curious what you think about all this. What questions do you have around the strategy and ethics of publishing AI-generated material?

Without further ado, what follows is the AI-generated article. While parts of this article are nonsense, I was somewhat impressed with certain excerpts which I have formatted in bold text.

Having lost to competition, law firms now understand that awarding services to an ALSP can allow them to focus more on their own core competencies and save money while providing better services to their own clients. In recent years, the rise of alternative legal services providers (AL SPs) in the legal services industry has created an opportunity for law firms that have traditionally operated in a specific geographic area. While it initially attracted clients who were primarily looking for cost-effective legal services, it now attracts corporate clients and others looking for specific areas of legal expertise. [Sources: 0, 1]

It is also worth noting that the integration of new technologies into the service offering is high, because **rapid technological change has led to more organisations turning to AL SPs for technology selection. ALSPs can help to bear the burden of technology selection and adoption**, while continuing to allow the legal department to maintain the benefits of their use. [Sources: 2]

For example, companies are now emerging that specialise in the analysis of financial transactions such as accounting and audit services. Such firms usually carry out the analysis of large data sets and provide accounting or auditing services. ALSPs complement legal services and enable potential clients to represent themselves in legal matters. We provide basic legal and documentation services and provide legal advice so that potential clients can be represented in legal matters. [Sources: 0, 1]

Law firms that partner with ALSPs generate an additional source of revenue and expand the firm's legal services offering compared to more attorneys who have to work from one office. Law firms that expand their legal services by exploiting the growth opportunities of ALSPs have the opportunity to expand outside their existing local markets. By expanding their market, they can continue to provide excellent legal services to a growing clientele. [Sources: 0]

There is no doubt that the ALSP model will stick around. Like-minded ALSP startups and those with the right expertise and corporate governance who know the local market for their services can innovatively maneuver their way into the market**.**

They can help to optimise business operations, but should not be taken for granted. [Sources: 1, 2]

Organizations tend to use ALSPs because cost savings are always likely to be the driving force, but not necessarily because of a lack of expertise in this area. [Sources: 2]

Indeed**, there is no shortage of alternative**
legal service providers adapting to web-based services and the IT automation that characterises them. As a result, more and more companies are encouraging their consultants to use ALSPs, and **more and more law firms are using them to differentiate, scale, and expand their business and cultivate customer relationships**. The combination of technology, specialization, and customer support has forced the industry to adopt a new approach to dissuade companies from doing it in house and focusing on value-based billing. **Law firms have even outsourced certain tasks to ALSPs that would have been time consuming in-house, such as accounting**, accounting **and compliance**. [Sources: 1, 2]

Experience has shown that this innovative aspect has proved very attractive for internal legal functions. **Experience has shown that it can have a competitive advantage when the right people are in the right place to do the most appropriate work in an overarching legal operating model, as opposed to something that is considered on a project-by-project basis.** [Sources: 2]

Local connections can help firms better serve their local client base and often lead to greater success in legal matters. Law firms with exceptional prospects of success can use this for important clients who are satisfied with their legal results. [Sources: 0]

Law firms have the opportunity to benefit from the growth of ALSPs while maintaining the same quality of service as their traditional legal service providers. This makes them more attractive to their clients and also to the firm's clients. [Sources: 0]

The Legal Department is not an island, it is part of the entire legal system, not an independent entity. ALSP transactions can be taken over and improved, so that the legal process can collapse and be carried out more efficiently. [Sources: 1, 2]

There is a wider range of potential clients and services that ALSP provides than was previously the case, and there are more common areas of legal practice that they offer. Examples are Nolo Rocket Lawyer, which offers a package of legal services at a low price, Legal Zoom and Legal Zoom. They are convenient for customers. Some of the most common areas of legal practice for AL SPs include business development, business law, taxation, insurance, financial services, healthcare, legal advice, law enforcement, public relations and more. [Sources: 0]

General Counsels may need time to come to terms with the fact that they can work with other trusted partners to obtain valuable and predictable legal services without having to pay the highest legal fees for the time they spend on a pro-base basis. The combination of technological advances in the legal system has made it more efficient and cost-effective - more effective than ever. **Higher legal fees, which put pressure on clients to pay more attention to their outsourcing practices, have opened up avenues for ALSPs to assert themselves. [Sources: 0, 1, 2]**

Sources:

[0]: https://www.biggerlawfirm.-com/how-law-firms-can-compete-with-alternative-legal-service-providers/
[1]: https://www.paralegaledu.org/alternative-legal-service-providers/
[2]: https://www.ey.com/en_us/tax/why-alternative-legal-service-providers-are-on-the-rise

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About the Author

Yvonne Nath is a strategy consultant with LawVision, and CEO of ALSP Advisor, a consultancy that connects law firms with alternative legal service providers.

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2020 STATE OF LEGAL INNOVATION IN THE ASIA-PACIFIC

[Download the Report]

LEGAL SERVICE

IS HERE TO STAY!

BUT WAIT A MINUTE...

WHAT IS SERVICE DESIGN?

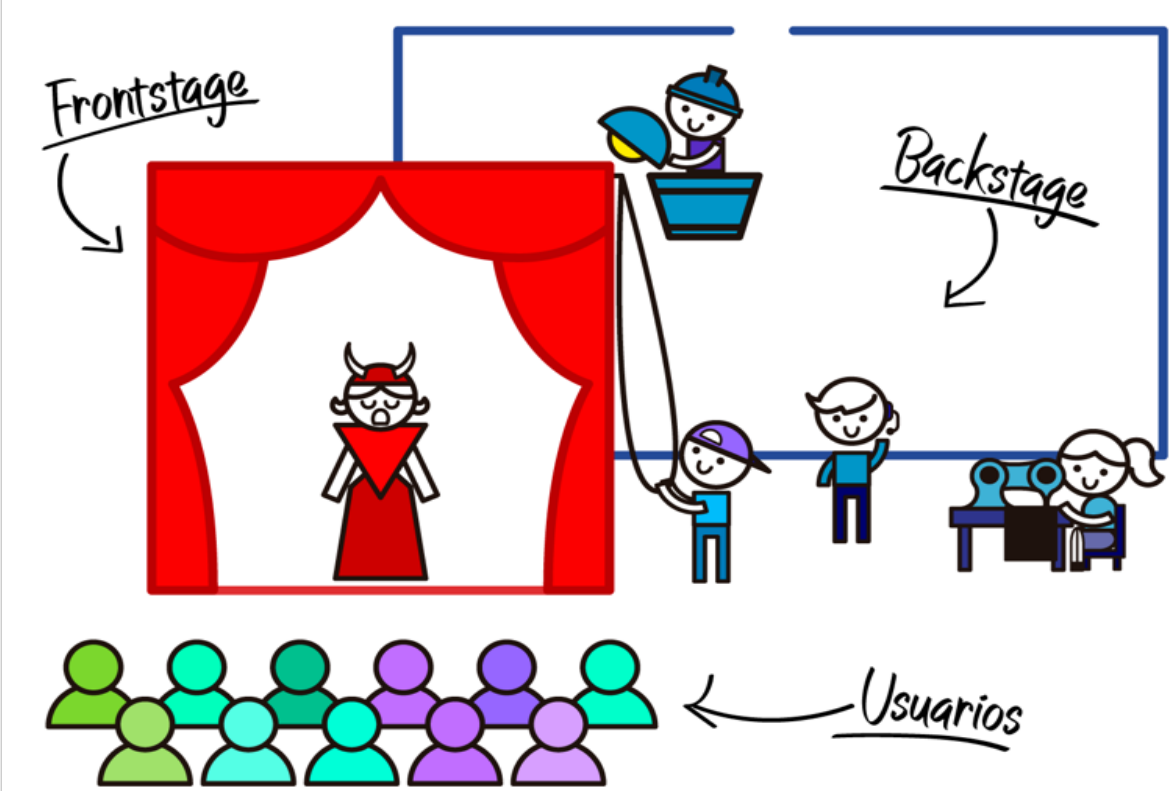
By Karol Valencia, Legal Designer at eID/ Facilitator & Mentor for Innovative Projects

There is a phrase that I love and it is the following one: "Before running you must learn to walk and in any case to crawl", it is a recurrent phrase in my articles.

In that sense I would like to start this article by emphasizing the definition of service design or better known as "Service Design", and for that we are going to break down the definition into small pieces: "...A service is a system of people, processes and goods that meet needs through the exchange of value..." [1] and so today we hear more about system design, but we will talk about that on another occasion.

So if we say that a service is a system of people, who makes up that system, I think that answer is going to depend a lot on the type of sector in which that system is going to operate, it could be the IT sector, the agro-industrial sector, the telecommunications sector or the legal sector, which is what we are interested in for the purposes of this article.

In the case of the design of legal services, the answer is more than obvious, the actors in this system are mostly lawyers and I say mostly because new actors are appearing -and are better integrated into this ecosystem- such as data scientists, designers (logically), engineers, developers, among others. The allegory that best exemplifies the design of services - legal and non-legal - is that of the theater and here you can visualize it and I will proceed to explain the role that both the actors in the front-stage and the support team in the back-stage play.



Picture 1. https://medium.com/repensareducativo/service-design-el-viaje-hacia-la-innovación-que-tu-empresa-necesita-af94b82e9ab3

The allegory that best exemplifies the design of services - legal and non-legal - is that of the theater and here you can visualize it and I will proceed to explain the role that both the actors in the front-stage and the support team in the backstage play

"...Imagine that you go to the theater. You locate your seat, sit down and wham! A light cannon is turned on towards the stage, the curtain opens and an actress dressed as a Viking appears and starts singing. The play ends and you are surprised by a handful of emotions that have gone from laughter to tears.

Then, you are allowed to visit the backstage and you go running behind the scenes to discover that, to achieve all those sensations, it took not only the 7 actors on stage, but also a team of technicians in lights, sound, costumes, makeup and so on, which amount to almost 50 people. [2]

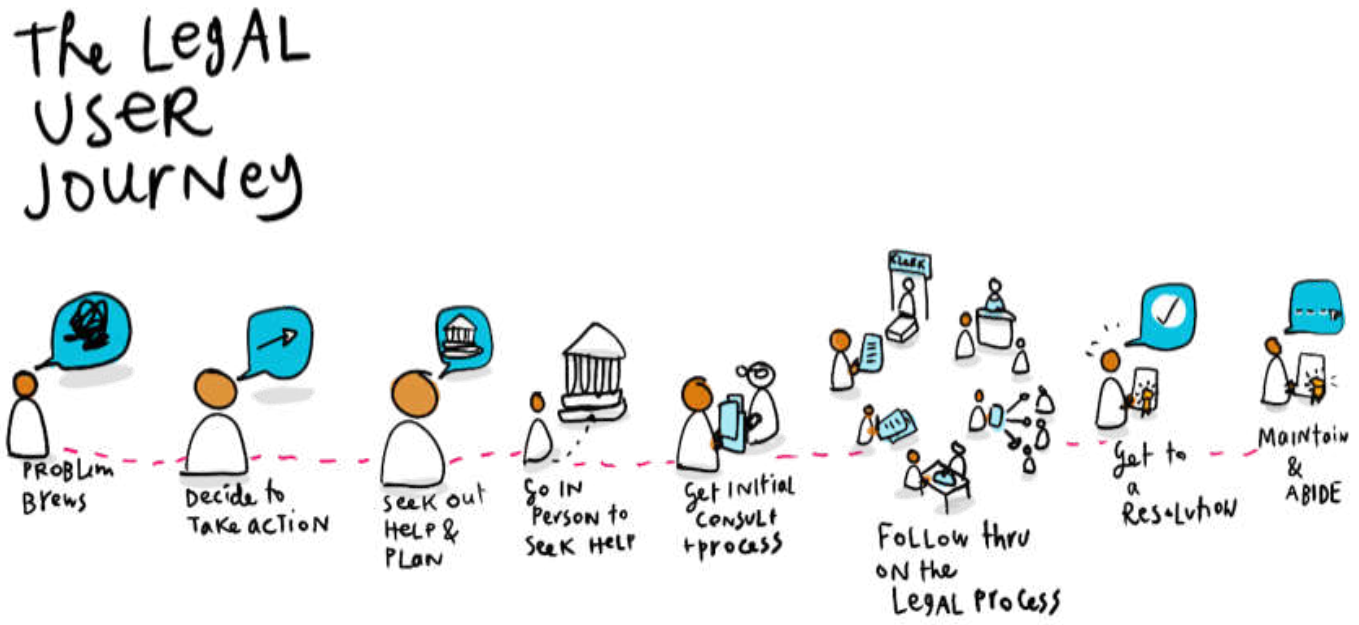
And of course that is also true of any organization, whatever it may be; also, let's remember that organizations do not offer just one service, but two, three or more, like, for example, telecommunications companies or the airlines themselves, and not to mention legal services, badly called -in my personal opinion- only law firms, why? The answer is simple, I say they are misnamed "just law firms" because:
By calling them that way, we are typecasting them in that the service is only created by lawyers, which is not necessarily the case and it should not be like that at all, and I have many reasons for that, but I would like to

highlight the interdisciplinary nature of the service, just because the accounting - except for small cases - is done by a certified accountant, or the firm's software is always done by an engineer. [3]

By calling them that and limiting it to the "legal" field, we do not provide law firms with that share of humanity and service that they are supposed to have and/or should have, some few firms have it, in others, it is halfway and there are those in which that sense is nonexistent. Aren't our "clients" at the end of the day supposed to be people who have emotions and feelings?

When we call them that we are not contemplating the service with a holistic perspective where all the actors intervene in its co-design and co-creation, on the contrary, we are again typecasting it as being thought and conceived by lawyers for a client who may also be another lawyer, since generally it is another lawyer who represents the interests of the client, of the counterpart, of the people, except in some systems that with enough limitations allow the legal self-representation in certain cases, but that is another song, in general lines the service that the legal firms offer is thinking by lawyers for lawyers and not for the receivers or those that finally are impacted by the decisions of their representatives, the people.

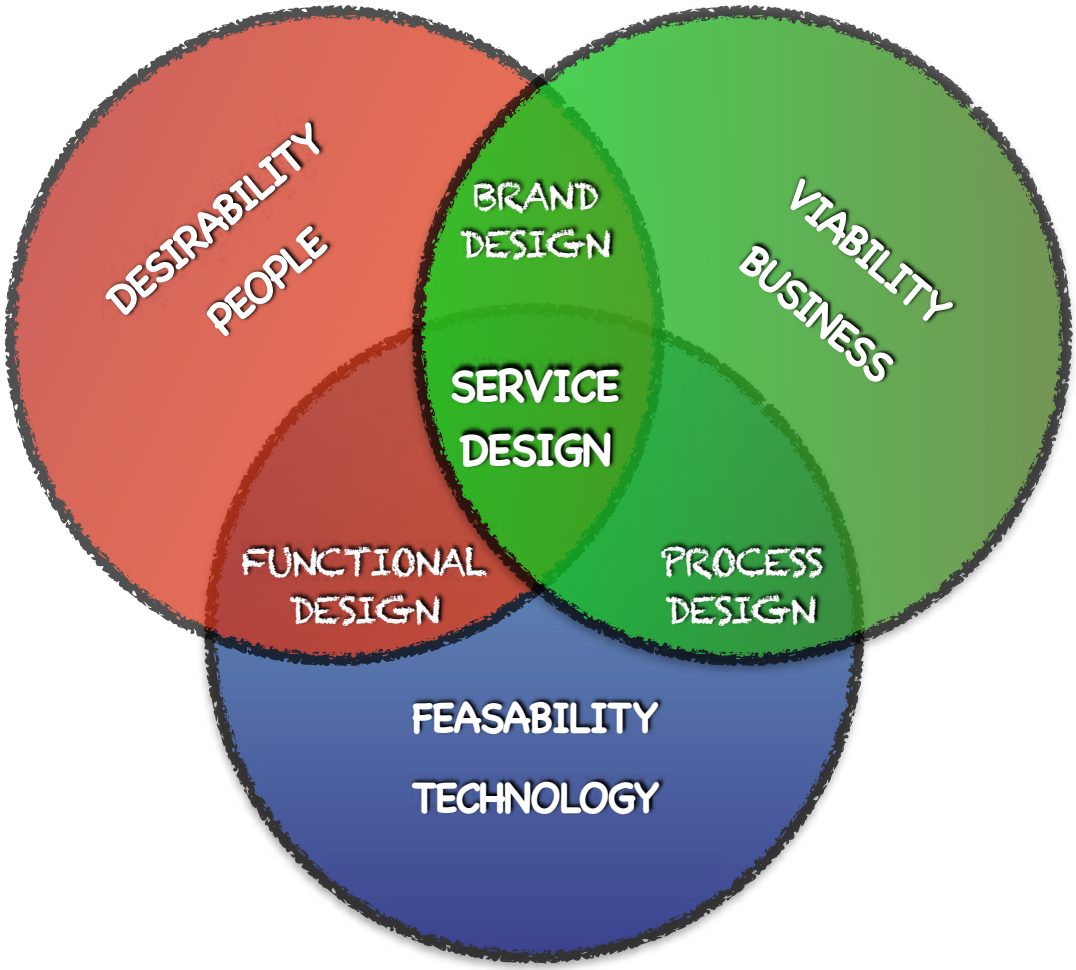
By calling them that way we indicate that the only thing that law firms do is legal assistance, but we castrate other service interactions and other services that complement the legal services that the law firm in question may provide such as proxy, representation which, is not the same as mere assistance in many cases, automation of procedures, collection of unpaid bills, design of documents and various papers, negotiations, among many others that come to mind and those that are missing.



Picture 2 : Service design approach to legal system- Margaret Hagan-Medium

Under this perspective, then we have not one, but several actors involved in the design and operation of the legal system which in turn as we see is composed of several services and that in any case we can redesign the concept of "only law firm" by that of legal services and in any case provide that concept with greater content and impact that really has and corresponds. In that line and according to the definition quoted in the first paragraph, which indicates that these people create and/or design artifacts or products, the next question would be what exactly do we design, what do the actors of the legal sector and the law firms design?

Service design acts and or allows for the design or intervention of a variety of objects and can influence or create change on a variety of levels. [4] I love this brilliant definition of Lucy Kimbell because it is so insightful, in that it introduces another important term that is "behavior change", just like one of my mentors the Behavioral Scientist, Matt Wallaert, in his book “Start at the end”[5], agree and I also agree that when we intervene the services and products and / or devices that they involve in the end what is sought is to generate a change in the behavior of people and although not looking for that change in some way or another a good product, device or service will somehow impact some behavior of people for whom it was designed or redesigned.

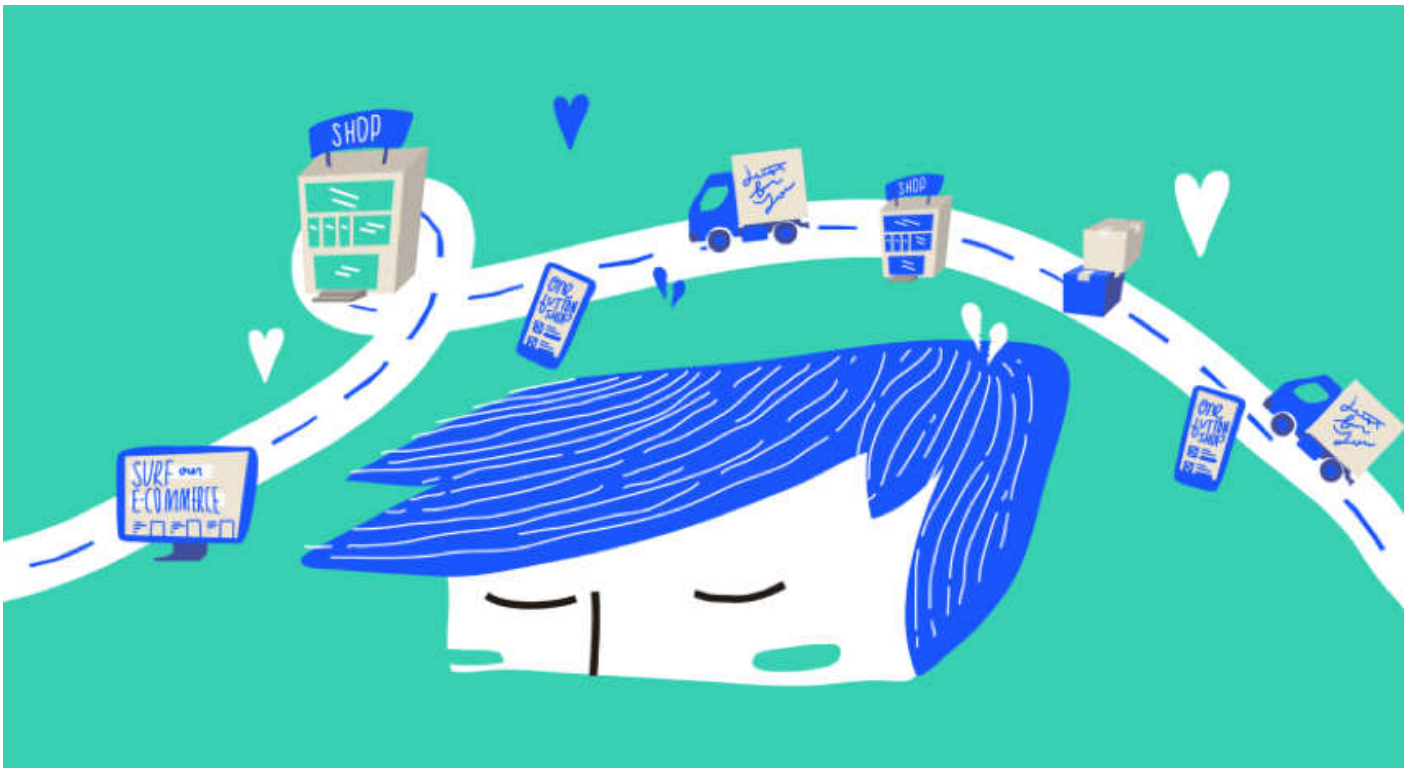


Since we are talking about the impact of technology and taking advantage of the fashion of "The social dilemma" [6] I recommend this series very much and it will be the subject of another delivery, in fact the designers of services and even more the designers of legal services have the "Enormous responsibility" to have in clear the following questions:

What do we design or redesign?
For whom do we design or redesign?
Why do we design or redesign?
What impact will my design have on the ecosystem?

fifth point which would be: Does the design or redesign of my product, device or service contribute to or facilitate access to justice?

The scale of this point will depend on the field in which the legal designer practices, because it can be wider or narrower depending on where he provides his services, however the golden rule in fashion applies here: "Less is more", the more always and limited your solution is, because much better, we are all in search of the "Eureka moment" when what we should do is to solve or at least try to design or redesign and solve everything around us and



Picture 4: https://www.domestika.org/es/blog/1898-que-es-el-service-design

And the analysis could continue, but at least those four points seem basic to me because they delimit the north of a designer in general and in the case of legal designers or those who intend to start in that career, I would add a

we consider can improve and this is already a final conclusion: I am more inclined to redesign - I explain it better in this article [7] - and "EVERYONE HAS OPPORTUNITIES FOR IMPROVEMENT" and I put it in capital letters because perhaps we will not all manage to have that "Eureka moment" but at least we

will have been useful, we will have served and contributed to improve the ecosystem in which we participate.

The third point of the definition referred to that the products, devices or services we design seek to meet the needs - of people - through the exchange of value, I leave it for a next article because there are more doubts and it is better to go breaking down the definition and the tools that are currently available that are many to design or redesign the legal services we provide to make them more accessible, attractive and usable by people, while generating and contributing to achieving a fairer and more humane society.

Notes

[1] "So, like, what is service design?"- Shahrzad Samadzadeh- Medium

[2] Service Design: el viaje hacia la innovación que tu empresa necesita- Repensar-Medium

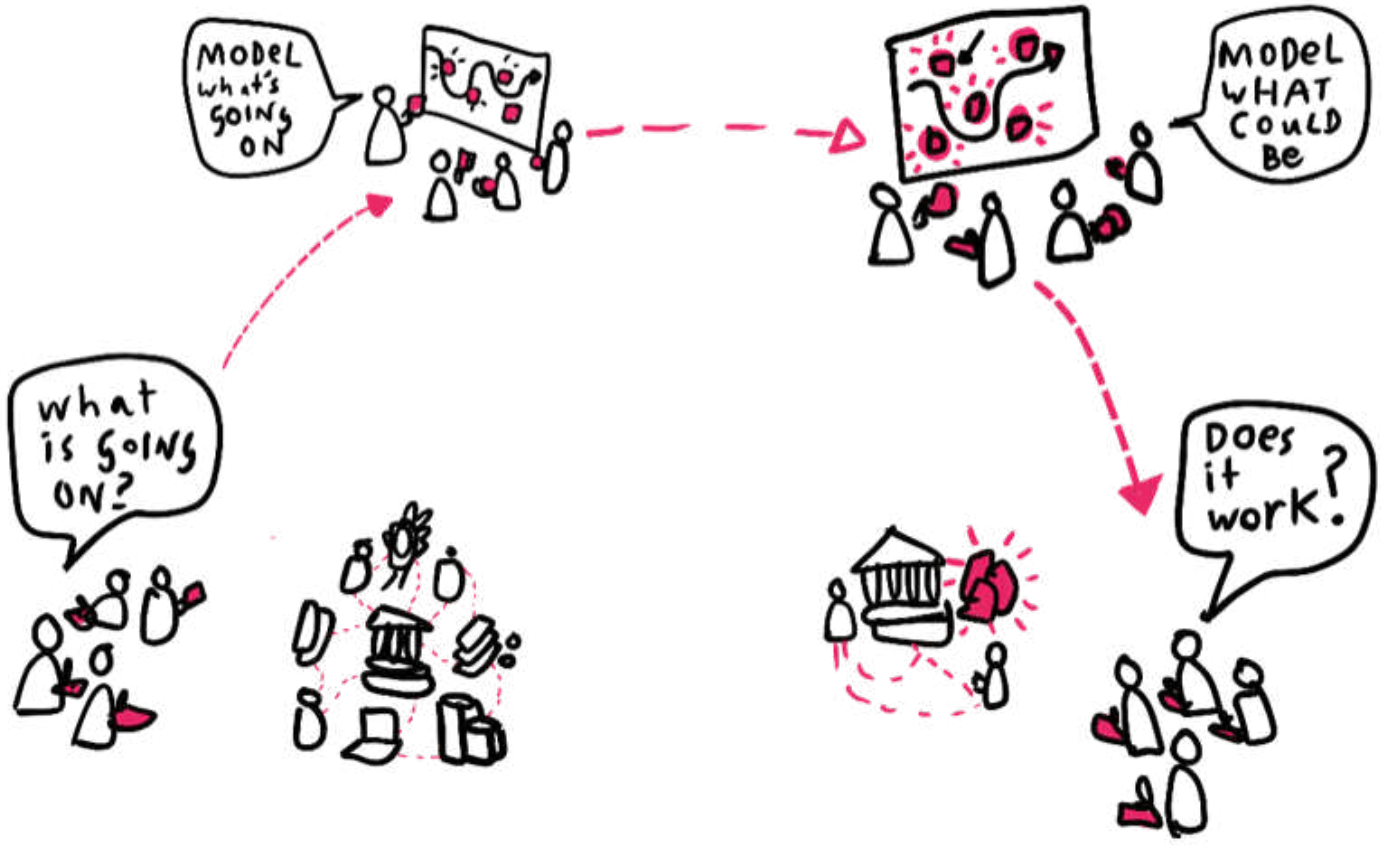
[3] Hybrid profiles for digital lawyers- Karol Valencia-Medium

[4] LDoc Keynote. Lucy Kimbell on Designing For Services: Past Moments and Possible Futures

[5] Wallaert, M: Start At The End: How to Build Products That Create Change

[6] The social dilemma trailer-netflix

[7] Legal design journey map:What it is, how it arises and where are we going-Karol Valencia-Medium



Picture 5: Service design approach to legal system- Margaret Hagan-Medium

About the Author

Karol Valencia works as Legal Project Leader & Legal Service Designer at eID. She develops private consulting and focuses on projects and services with a holistic perspective through her brand Karol Valencia (worldwide and in remote mode) and is Chief Community Manager at Eye Z Legal (India).

She is an active member of the Institute for Internet & The Just Society, she also works in the #Barpocalypse project for the redesign of legal education in the USA and she is the LATAM ambassador of ILSA (Innovative Law Studies Association). As a polyglot, she works on the translation of various technical documents, papers, books, articles and more when requested or translates simultaneously as an interpreter at events.

She is a lawyer from Universidad Católica San Pablo, postgraduate studies at PUCP, and has a law degree from the UEM in Madrid, Spain. With training in digital transformation, innovation, programming and design in "En Estado Beta", "Iron Hack" and "Interaction Design Foundation"; self-taught, she participates in communities such as Legal Hackers Lima, PsychoLAWgy and others, in addition to different volunteer work.

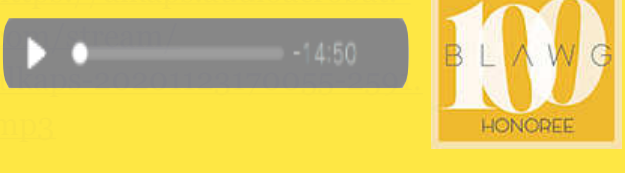
Former teacher of the UPN. Facilitator and international speaker of Legal Design & Legal Tech. Activist in mental health issues. Currently collaborates with columns and blogs such as: The Crypto Legal, her account at Medium, Idealex.press and Impact Lawyers. She believes in redesigning the legal system to achieve better access to justice for all. Contact: karol@karolvalencia.com

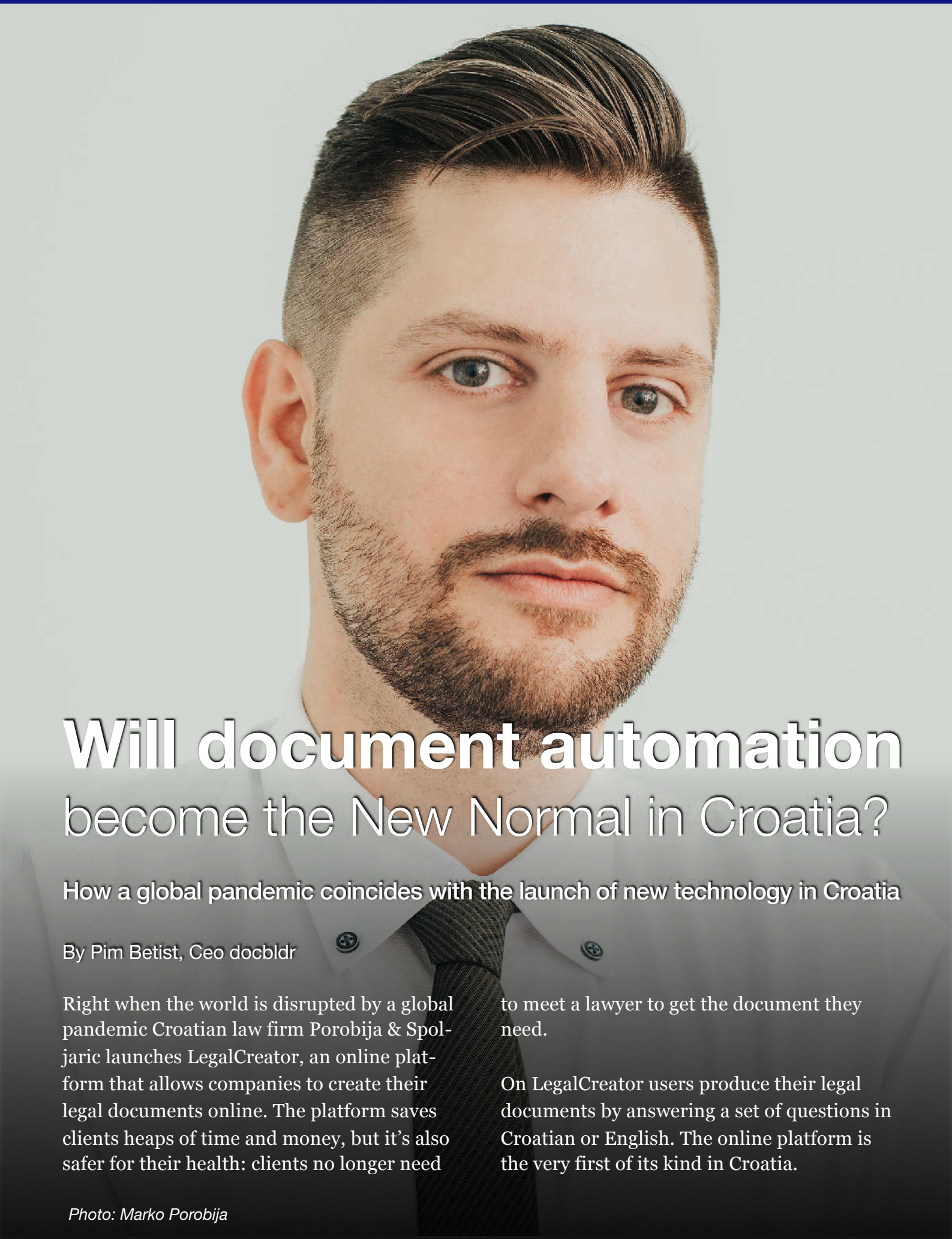
REINVENTING PROFESSIONALS

E-Discovery Unfiltered and Understanding Innovation Velocity

Ari Kaplan spoke with Victoria Blake, the senior director of product at Zapproved, a cloud-based software company that builds e-discovery tools for corporate legal, from legal holds through processing and review. They discussed the E-Discovery Unfiltered report, how the pandemic has impacted the way legal teams manage litigation, what litigants should understand about e-discovery, why the appetite for the cloud is so strong, and how e-discovery will evolve in 2021.

Click on the player below to listen to the podcast or read the transcript on page 58.





Will document automation become the New Normal in Croatia?

How a global pandemic coincides with the launch of new technology in Croatia

By Pim Betist, Ceo docbldr

Right when the world is disrupted by a global pandemic Croatian law firm Porobija & Spoljaric launches LegalCreator, an online platform that allows companies to create their legal documents online. The platform saves clients heaps of time and money, but it's also safer for their health: clients no longer need to meet a lawyer to get the document they need.

On LegalCreator users produce their legal documents by answering a set of questions in Croatian or English. The online platform is the very first of its kind in Croatia.

Photo: Marko Porobija

What led founder Marko Porobija to become the pioneer he is and will document automation become the New Normal in Croatia?

Why did you start LegalCreator?
A couple of years ago we saw a presentation in London about how document automation platforms are taking the European market by storm. It struck a chord with me. We get approached by so many small business who don't have the budgets for our services. They end up copy pasting contracts they find online and are bound to call us again. This time with serious legal problems which cost a lot more money to fix. I loved the idea of offering these companies a solution that is affordable whilst guaranteeing the quality they expect from our firm.

Isn't LegalCreator going to cannibalize your firm?
It is very unlikely. What we foresee happening is that we will welcome a lot of new clients to our firm via the platform. For example, a client might buy a purchase agreement and ask us to help with the negotiations. The cross selling options are endless. We will be focussing on the more complex assignments while the standard agreements are generated automatically through LegalCreator.

What is your vision of the future? Will document automation become the New Normal?
We believe any innovation that makes lives easier and more affordable will prevail the old way of doing things. So yes, document automation is definitely here to stay. Is that the end of law firms? Maybe for some, but definitely not for all. We need to re-assess where we deliver value as professionals and focus on those things. Intuition, creativity, experience, negotiation skills are all forms of added value a legal professional can bring to the table which cannot be automated.

How did you set up the platform?
Docbldr offers a plug and play solution. Our challenge was to match the docbldr team with the right local payment providers and to create the automated documents in English and Croatian. The latter took most of our time. It requires a different way of thinking. In stead of determining what article is important for one particular client in one situation we had to determine what could be important for all of our clients in multiple situations.

What have you learned from the experience?
We started with the most complicated documents. In stead, we should have started with simple ones and progressed to more complicated ones as we got the hang of it. We also made the mistake of trying to create a document for every single situation. We learned to create documents that are suitable for 80% of the situations. The remaining 20% are directed to professionals at our firm who finish the document the 'old way'.

Are you happy the launch of your platform coincided with the outbreak of a global pandemic?
The timing is good, but if given the choice, we would have preferred to launch the platform without a pandemic to worry about.

Next: How Brandl & Talos made municipal financing requests faster and easier for UniCredit Bank Austria.

Legal Des

Design in Practice

By Jasmin Bejaoui, Innovation Manager at Reinvent Law and Sebastian Schaub, Senior Product Development Manager at Baker McKenzie

Digitization continues to drive change in the legal profession. Clients, both internally and externally, are looking for lean processes, innovative solutions and the right technology. Resulting from this, the 'New Generation Lawyer' is increasingly concerned with merging legal knowledge with other competencies in order to better serve the clients' needs. Legal careers nowadays require a much broader skill set and new ways of thinking. Being in projects with project managers or data analysts requires a different approach of working and thinking than before. Focus, however, lies on collaboration and on meeting the real needs of clients by evaluating a specific problem and developing sustainable and scalable solutions.

The greatest danger in times of turbulence is not turbulence itself, but to act with yesterday's logic" - Peter Drucker

But how can we overcome yesterday's logic and develop user-centred solutions? A discipline called Legal Design can provide a path. Legal Design is an innovation technique, putting the human in the center of the legal system to understand where the crucial breakdowns in the system exist and to make the creative leap to define what a better system might be. Legal Design allows design that focuses on users, embeds solutions in a broader context and thus creates as much added value as possible. It is not just about the technically perfect performance, but also about interaction and human needs. Since our society is getting used to new ways of working due to the constantly developing technical progress, this is getting extremely important. It is a symbiosis of the lawyer's legal expertise with the designer's mindset and methodologies and technological potential to create legal systems, services, processes, training, and environments that are more useful, understandable, and engaging for all stakeholders. However, this approach can lead to a mindset change in the way law firms and legal departments are thinking about digital transformation: not as a short-term fixed-dated project but as a longer process that requires special investments. Tools that have been bought once, for example, must be integrated into existing processes and human environments, with analog aspects always having to be considered.

Legal design borrows design thinking – and doing. It majors on user research, lateral and visual thinking, ideation, prototyping, testing, and validating. Its ultimate goal is preventing legal problems from arising and empowering the end-user. One can use it to:

- Improve and redesign Legal Services,
- Improve Legal Products and
- Integrate Legal issues at an early stage of product and service development.

When putting the legal design methodology into practice, particularly information-, service-, and interaction-design skills are required to rethink the complexity of legal processes, services, and documents.

But how to initiate a Legal Design Thinking session?

The need as a central starting point

Identifying a suitable problem is the first hurdle to take. Suitable in this context means not only identifying an issue as difficult, but also to determine whether the Design Thinking approach can be applied for this issue. So called "wicked problems", which means highly complex questions that are often complicated and diffuse, are suitable for applying Design Thinking. Hence, the core question should be neither too concrete nor too narrow. This is related to the idea of so-called divergent thinking i.e. dealing with one's own cognitive processes, breaking out of known patterns of thinking, or thinking in unknown areas.

As these kinds of questions are not clearly defined, solutions have to be found in a more creative manner.

As a first step, a process map can prove to be very helpful to cluster the problems and related sub-issues. The second step might be so-called "How might we questions" which reduce complexity and enable the participants to focus easily.

The following sample demonstrates how different questions can be used to examine a problem situation from different perspectives, thus changing the direction and therefore the focus of the solution.

- How might the role of legal services change, if smart contracts are adopted into mainstream business transactions?
- How might legal services change, as organizations look to increase automation, machine learning and AI into their operations and/or services?
- How might legal services serve more emergent players (e.g. startups or early stage tech companies)?

Encourage and leverage diverse minds and skillsets

The Design Thinking methodology merges each participant's knowledge in order to explore the yet unknown problem area. A variety of participants with various backgrounds is not only a nice-to-have, a team must have different characteristics, such as a deep subject-specific knowledge, analytical skills, and a range of fundamental soft skills, such as the urge and motivation to drive change, intrinsic curiosity and, above all, openness towards other disciplines. To think outside the box, one must get rid of it.

A stakeholder map may provide clarity as it guides you to participants which are relevant to the project. In each project, there are stakeholders either directly affected by the given problem or related to or only influenced by it. This provides a deeper understanding of the persona cosmos, a better identification of the involvement of respective stakeholders as well as an insight who needs to be managed in what way in order for the project to achieve the best results.

Releasing creative energies

As already mentioned, the legal market today is confronted with radical changes to face multiple daunting challenges including complexity of legal work and pressure to reduce costs. Digitization continues to drive change in the legal profession. As a result, not only the demand for innovative ideas increases, but also for unconventional approaches. But good ideas cannot be bred, and creativity cannot be learned in the same way as science or a language. This is where Design Thinking comes in: It is not creativity per se that should be taught; but everyone can learn to release their creative energies.

The Design Thinking approach leads through a well-structured path and enables the moderator to initiate creative and interactive thought processes in a rather non-linear and iterative way. This innovative perspective on a "from problem to solution journey" helps the participants to focus on the user and their underlying needs.

Starting with ice breaker games (f.i. "Me, in images" or "Two truths and a lie") help creativity to flourish. Instead of just following a meeting agenda, coming up with fun stories sets the tone for the rest of the meeting.

Participants are more likely to come up with good ideas, be more creatively confident, and express themselves without fear. This creates a special open-minded atmosphere where each of the participants can develop their own

creativity. But be careful: Creative processes can quickly go in the wrong direction. The user / client often gets lost within an overwhelming number of options in particular when one comes up with many different functions which are redundant towards solving the actual problem. Throughout the session, the moderator must therefore always ensure that the participants are brought back to the core of the session as well as reduce complexity.

Unearthing pain points

To trigger pain point is key within each session as the customer often does not know where exactly the shoe pinches. An activity to unearth pain points can be the "Five Whys". Within this activity, participants are confronted with their work environment or processes by triggering their thoughts with certain questions. Slightly like peeling an onion, these questions help to identify the underlying problem, its underlying reasons, and sub-reasons. In order to streamline processes as well as identify bottlenecks and varieties of scenarios before aiming to digitize, making use of a process and stakeholder map might be of high value.

Choosing between the format

When using Legal Design Thinking, the question of the format in which this methodology can be applied always arises immediately. There are three possible formats, but some of the activities can also be implemented in projects independently of the overall approach:

- a 1–4 hours workshop: suitable for a rather simple scenario with the team in a short amount of time. Going through the whole Design Thinking process is not necessary.
- a 1–3 days workshop: provides an opportunity to explore the entire Design Thinking process ("Fast Forward") and is inviting for new topics. The aim of this is to come up with initial assumptions and ideas which need to be tested and validated.
- a 1–12 weeks project : offers great insight to get to grips with the challenge in depth, interview people, come up with more solid ideas and to build prototypes. Provides the possibility to properly deal with a topic and to take iteration loops for validation, which otherwise only occur on paper.

Of course, Legal Design is not a one fits all approach. The so-called "wicked problems" are often the starting point to innovation related projects which often imply a higher level of uncertainty and therefore experimental and exploratory procedures are used, which rarely follow strict linear guidelines. As with any new way and non-traditional way of working, some early adopters of the design thinking approach are needed. It is essential to have these pioneering colleagues who are willing to work collaboratively and also be prepared to fail. From there, gaining traction through positive client feedback, successful workshop results lead to use cases delivering a proof of concept.

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Jasmin works as an Innovation Manager at Reinvent Law, the first legal innovation hub in Continental Europe. With legal teams, she works on projects and initiatives on the digitisation of the law practice. Building a bridge

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E-Discovery Unfiltered and Understanding Innovation Velocity

By Ari Kaplan, Principal, Ari Kaplan Advisors

Ari Kaplan interviews Victoria Blake, the Senior Director of Product at Zapproved, a cloud-based software company that builds e-discovery tools for corporate legal from legal holds through processing and review.

Ari Kaplan
Tell us about your background in your role at Zapproved.

Victoria Blake
I have worked with software companies for about 15 years, largely in product roles. I am passionate about the intersection between the "why" of software, the needs that software is trying to solve, and the "how," which is the engineering itself. I really find that area endlessly fascinating. I've been at Zapproved for about a year and a half. I arrived in June of 2019 in the middle of building out ZDiscovery, our platform

that spans the stages of the EDRM. Zapproved is mostly known for its legal hold technology, but we also have this powerful ingestion and review tool powered by Nuix. We brought all that goodness under one matter centric workflow. I think that we are solving the right needs at the right time.

Ari Kaplan
How has the pandemic impacted the way legal teams manage litigation?

Victoria Blake
The steps of litigation and e-discovery are largely the same. We are not saying that the litigation workflow itself is changing because it is really about the environment in which that workflow is happening. Zapproved focuses on corporate legal, and we are deeply tied into the pain points and pressure points that our customers are experiencing inside of the corporate ecosystem. What we've been hearing from our customers more than anything else is that the pandemic is putting a strain on the relationship with IT, which has a long list of priorities it needs to get through to serve the needs of the business. While legal is part of those needs, they might not be at the top of IT's list. When you add the pandemic and the move to remote work, the IT priority list has become longer. This might accelerate a trend that we're already seeing, which is the creation of a specific legal IT role.

Ari Kaplan
Are you seeing changes in how users apply your software in the current climate to adapt?

Victoria Blake
We look at basic interaction patterns and product usage statistics to ensure that we are hitting our core needs. In March, we saw about a 20% drop in the number of holds that were going out and about the same decrease in the amount of data being ingested. Three or four weeks later, however, we saw about a 120% increase and the trend has been pointing up since then so we haven't seen a change in the application of the tool, other than an uptick in use.

Ari Kaplan
What should litigants ultimately understand about e-discovery?

Victoria Blake
The first thing to recognize is that e-discovery is not a single problem to solve. The EDRM makes things look very linear, but there is not a single problem. Rather, it is a series of smaller problems that require a balance of people, process, and tools. At Zapproved, we don't see a world where in-house teams do everything that a single matter requires. Our vision is to help in-house teams manage the bulk of their matters from legal holds through processing, review, and production, making it easy to work with outside counsel. It is not an "either/or," it is an "and." I think that Zapproved strikes that critical balance because it is an easy to use tool that allows companies to bring more e-discovery in-house and save money by moving away from the billable hour. It also allows our users to reduce data volumes when outside counsel is needed.

Ari Kaplan
When I spoke with leaders at the beginning of the year for the E-Discovery Unfiltered report, 89% of corporate respondents and 75% of law

firm partners noted that they prefer to access their software solutions in the cloud rather than on-premises. Why is the appetite for the cloud so strong?

Victoria Blake
We are now at the tipping point. It took a lot longer than we all thought it would when the cloud first arrived on the scene. The cloud is where innovations are happening first and where new products or models are being created. I call that innovation velocity. My favorite metaphor for understanding cloud versus on-premises tools is my old compact disc library. I used to spend about $15 per CD and if I wanted other albums, I had to buy them. If I didn't want to spend more money, I was stuck with the music that I thought I'd like, but that really started to annoy me over time. Now, I stream, which gives me more access to more things more quickly than before. Innovation velocity is about how quickly a tool iterates to meet one's needs and how quickly one can access the best things on the market. This is where the cloud just beats on-premises hands down. There are two fundamental reasons why the cloud is so much faster for innovation: (1) cloud technologies are making strides every single day thanks to the mighty army of engineers at Azure or AWS, so when a SaaS company is building on top of their work, it just puts a rocket pack under what it is trying to do; and, (2) we can get work out the door faster and at Zapproved, we're down to daily releases. Innovation velocity allows customers who use cloud-based products to change and adapt quickly. The cloud is also elastic as its capacity and speed expand to meet certain needs, and that expansion does not require additional hardware maintenance or expertise. This has all been critical during the pandemic to support remote work and virtual collaboration.

Ari Kaplan
Another key point from the E-Discovery Unfiltered report is that prior to the pandemic, the respondents in both law departments and law firms indicated that searching and interpreting emojis, ephemeral messages, and non-custodial persistent communications were key issues for 2020. What can legal teams do to stay ahead of them?

Victoria Blake
The model in which we are working has really changed and a minority of my communication happens over email. Most of it takes place in Slack and other relatively new collaboration tools. I also use a ton of emojis in my correspondence. The best way to manage it all is to choose a vendor who can change quickly and adapt to new tools. They will ensure that you can preserve, collect, ingest, search, and review all of the emerging data sources.

Ari Kaplan
How do you see legal teams handling the proliferation of new forms of data from the remote communication platforms that have exploded during the pandemic?

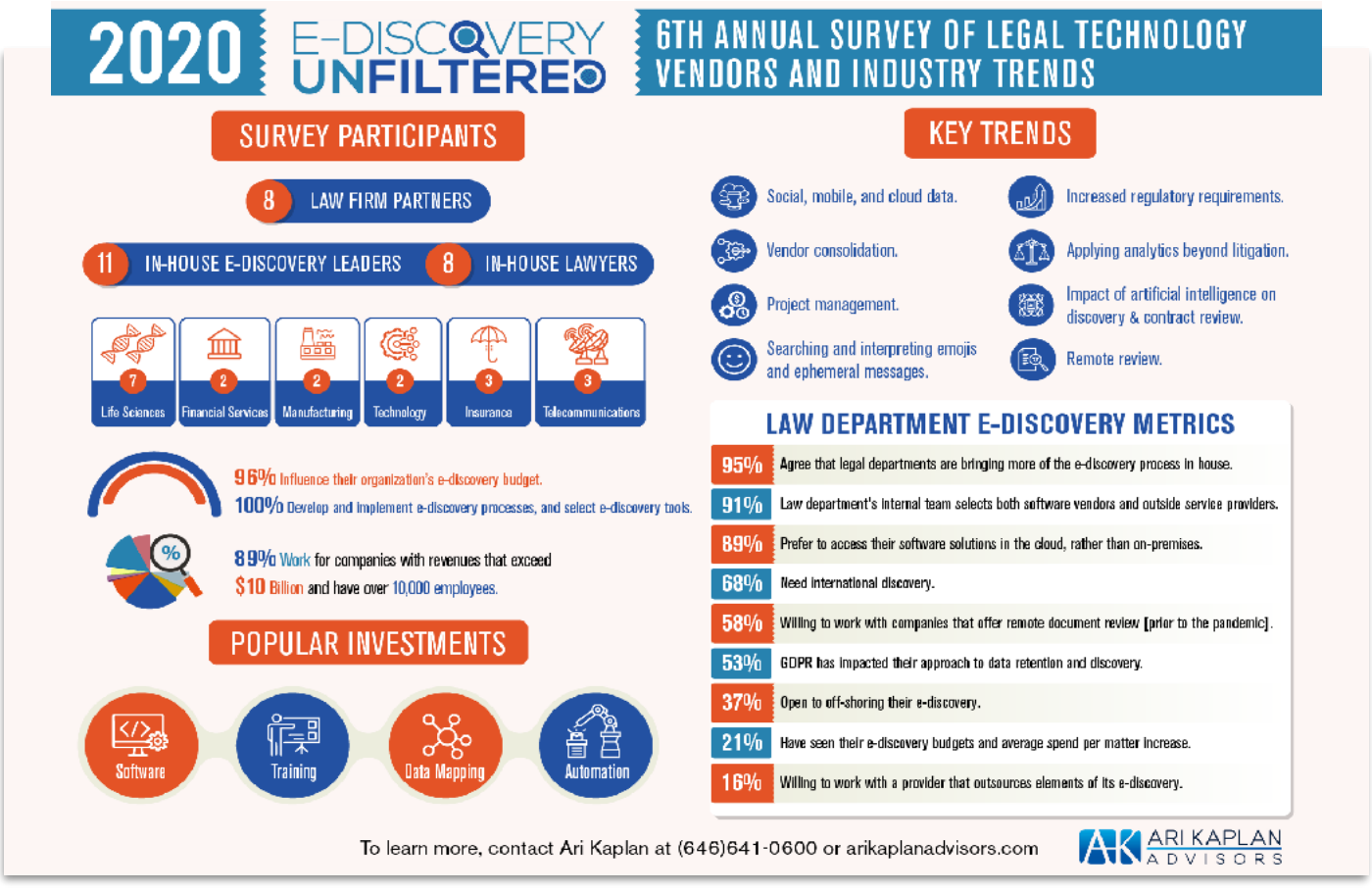
Victoria Blake
There has been a massive proliferation of data and with more and different tools being used every day, I don't think we will ever be able to hit the pause button. As a result, there are some really interesting proportionality implications. The two trends that have come

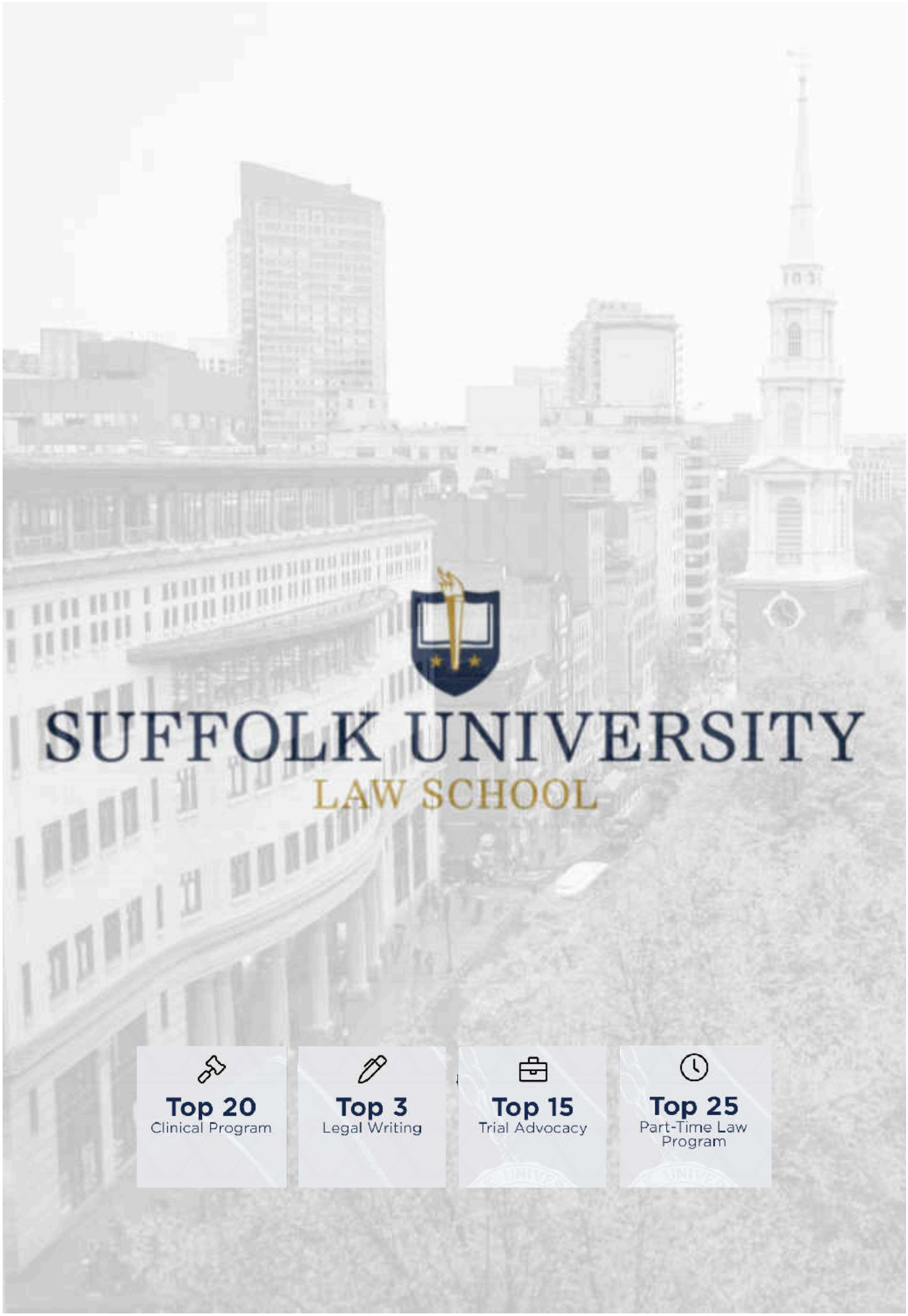
together are the: (1) recognition that the cloud is the future; and, (2) understanding that collaboration tools are driving further cloud adoption.

Ari Kaplan
How do you see e-discovery evolving in 2021?

Victoria Blake
2020 was a rollercoaster and making predictions in this environment is tricky to say the least, but I will offer three. First, there will be continued growth in corporate legal teams, including increased headcount and differentiated roles, such as a new legal IT position. Second, the proliferation of data sources will expand and we may be surprised by some of the new tools that come to market. Third, we will see an increased sensitivity to security and corporations will want to audit more of their vendors to ensure that they meet key security standards.

About the Author
Ari Kaplan regularly interviews leaders in the legal industry and in the broader professional services community to share perspective, highlight transformative change, and introduce new technology at http://www.ReinventingProfessionals.com.
Listen to this podcast at: https://alkaps.audioacrobat.com/stream/alkaps-20201123170055-2591.mp3





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Face Recognition Systems and Biometric Data

By Elif Hilal Umucu, Legal Analyst and Legal Advisor in the Presidential Digital Transformation Office, and Co-Founder of Ankara Legal Hackers

Why Is Our Face So Important?

In daily life, our faces are used by ID cards, driving licenses, videos, security cameras, school ID card photos and many other databases, by facial recognition technologies to identify real-life people or security videos and photos. The technology uses our faces, which are biometric data. [Dufaux, & Ebrahimi, 2006]. Unlike a

password, your face is unique to you. Passwords can be stored and reset if necessary, but your face will not be able to do this. For example, if your eye or lip is hacked, there is no way to delete this information. world they live in, they demand those with capacity to shape that future to be responsible and act with determination and at scale.

Your face is "different from other forms of biometric data such as fingerprints because when this type of technology is used in public places" facial surveillance is almost impossible to avoid. Unlike your fingerprint, your face can be tracked or analyzed without your knowledge. Your face can also be the key to aspects protected under international law,

such as your education or the right to practice your religion freely. For these reasons, facial recognition is highly intrusive and can violate privacy and personal data protection rights, along with many other rights.

Face recognition systems are generally designed to do one of three things. The first is to identify an unknown and unknown person: For example, it can be used to try to detect the unknown person on a surveillance camera, for example a police officer or watchtower on airlines.

Second, it is done to authenticate. For example, this face recognition system is used for unlocking systems in smart phones or computers. Third, it is designed to search for specific predefined faces.

This system can be used, for example, to identify card counters in the casino or certain customers in the mall.

Facial recognition technology dramatically reduces the time required to identify people or objects in photos and videos.

The researchers highlighted the "frightening assumptions that underpin much of the current deception about facial recognition", especially when used to categorize emotions or attributes based on individuals' facial movements or dimensions. Face recognition is also one of the biometric data with a high degree of reliability, but it may not be possible to distinguish similar siblings and identical twins using the facial recognition system. This is the only exception to this situation.

In the face recognition system, the distance between our two eyes, our jaw line, the width of our nose, our cheekbones, the shape of our mouth and other elements are analyzed and authenticated.

These systems can automatically identify or verify a person from a digital image or video frame by comparing the selected facial features with the stored image of the electronic document or face database ("Biometrics in identity", 2019). According to the research of the company named Gartner, it was stated that the number of missing people will decrease by 80% by 2023 compared to 2018 with the increase in the use of face recognition ("Biometrics in identity", 2019).

Mistaken Identity

No technology is 100% correct. and does not provide one hundred percent efficiency. Face recognition technology is no different from this situation. This technology can make false claims and produce unwanted false results. For example, there has been an incident recently in New York. The identity information of a person named Ousmane Bah was used while an apple store in Boston was stolen worth 1200 dollars. Using Ousmane's credentials, the principal criminal made the impression that he was guilty. Apple identified Ousmane as the real culprit using its facial recognition system. As a result of the enlightenment of the incident, Ousmane sued Apple for $ 1 billion.

Biometric Data Law GDPR, KVKK and Texas Biometric Law

Biometric data captured by facial recognition systems is one of the special categories according to the EU General Data Protection Regulation (GDPR). Face recognition systems are defined as a category of data in need of extreme special protection. Under the GDPR, the processing of biometric data can be obtained by obtaining the explicit consent of the data owner. But in addition, there is access to biometric data for the public interest.

Although not explicitly regulated by the GDPR, face recognition systems are one of the most used methods of processing personal data. Face recognition as a data processing method must be evaluated very carefully by any organization to be 100 percent in line with the provisions of the GDPR [Cliza, Olanescu

and Olanescu, 2018]. Video surveillance and GDPR compliance recommendations in the GDPR:

- Cameras should be used wisely. It should target only specially identified security problems, and should minimize the collection of irrelevant images.

- It is necessary to inform people about the rights of access to images and the processing of surveillance information regarding facial recognition.

- CCTV and video recordings that no longer have a purpose should be deleted. Information should be kept for a minimum period of time. When the information is not needed, it should be deleted.

- Policies and rules for legitimate monitoring should be easily accessible.

- Employers should pay attention to the principle of data minimization when using new technologies.

- The international transfer of employees' personal and biometric data should only take place if there is an adequate guarantee of protection.

- Comply with the obligation to appoint a data protection officer. (only applicable to professionals or public institutions for the processing of personal and biometric data).

- The latest technology products should be used for surveillance and video connections. Secure software must be constantly updated.

- Publish a privacy impact assessment (PIA) to state that all CCTV cameras and facial recognition purpose are legitimate service.

- For the secure storage of CCTV systems and biometric data records, the number of authorized personnel should be limited.

According to the Personal Data Protection Law in Turkey; It is prohibited to process personal data of special nature without obtaining the explicit consent of the data subject. The exception to this rule is the article in another law. I mean, if another law allows data processing (for example, to recognize the criminal or to maintain social order) then the data can be processed. The purpose of the personal data protection law is to prevent anyone access to biometric and personal data.

Texas Biometric Act is one of the most comprehensive laws that define biometric data. It has set four exceptions. With these four exceptions, it prohibited the disclosure of biometric data. These situations are:

- Identification of missing or dead person
- Completion of financial transaction
- Situations permitted by state law
- It can be expressed as the request of the police organization for arrest. (Krishan, et al., 2018).

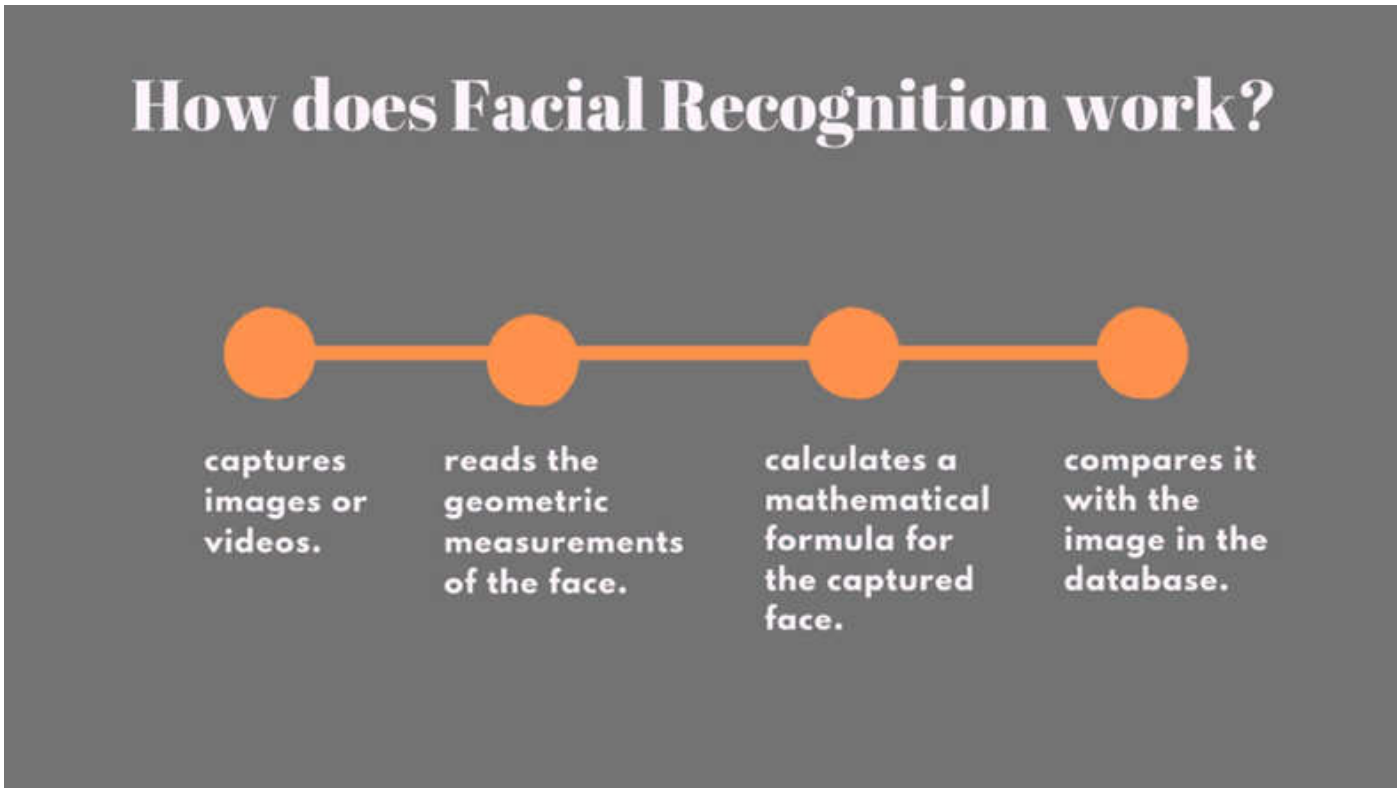
There is also the Washington Biometric Act, but less comprehensive.

"Would you be happy if your facial data is being used by a company or government without your consent? For example, Illinois biometric privacy law makes it illegal to take someone's photo without consent." - Prof. Anil

How Face Recognition Systems Work?
With programs like DeepFake, we have actually seen the importance of face recognition algorithms. FRS can typically be used for authentication, identification and tracking. Authentication or authentication is actually the simplest task for an FRS. A person who has a pre-existing relationship with an institution (already registered with the gallery) submits his biometric properties to the system and claims to be in the reference database or gallery.

The first step in the face recognition process is to capture the face image, also known as the probe image. This is done using a photo or video camera. So, in principle, we can include it in existing good quality "passive" CCTV systems. The system will then try to match the probe image with the template in the reference database. in this case there are two possible outcomes that are possible: (1) the person whose face is identified is not recognized, or (2) the person is recognized.

If the person is not recognized, that is, the identity is not verified, it may be possible that the person is fraudulent (ie, making an incorrect identity claim) or the system made a mistake (system error). The system can also make mistakes in accepting a claim that is actually false (this is called false acceptance). However, it is important to find a face in a video data stream, as we will show below. The efficiency of the entire system is highly dependent on the quality and characteristics of the captured facial image. The face recognition process begins with face detection and the process of extracting larger images, often involving other human faces.



Face Recognition Accuracy
The graph below shows "recognition accuracy" in identifying known and unknown persons using an unknown class and unknown trust in the classifier.

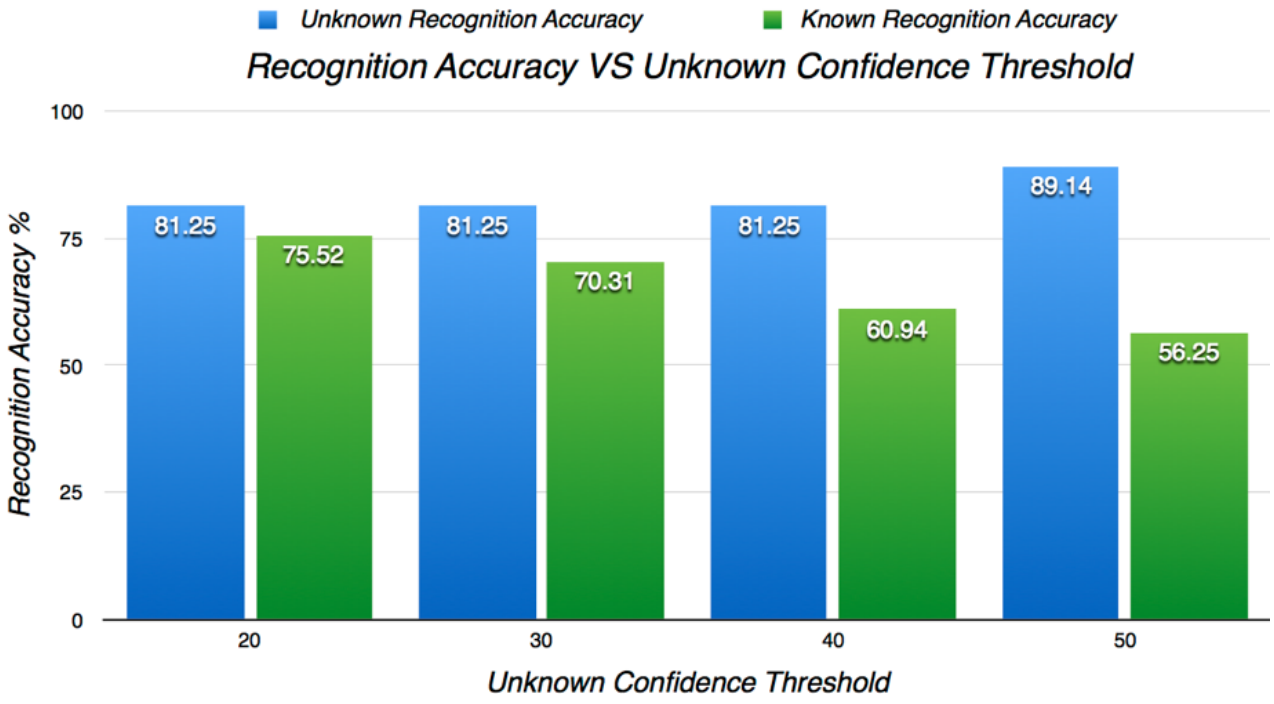
Currently, Openface has an accuracy of 0.9292 ± 0.0134 in the LFW benchmark. Benchmark tests provide great results for comparing the accuracy of different techniques and algorithms. Face images from both the LFW database and the FEI database to test the recognition accuracy of identifying unknown persons and create the unknown class in the classifier receipt.

What Are Possible Privacy Issues?
In investigating possible threats to privacy, the following questions are important:

- Which faces are recorded by the cameras used to maintain order in society?
- Are the data policies of the countries carefully determined and clearly stated at the point of face recognition systems?
- Are people aware that they are being filmed for identification or criminal identification? Are there and how did they consent?
- Are the policies for access to all information collected by the system carefully determined and clearly stated?
- Where is the information stored? How many people can access this data?
- From whom will people learn about face recognition systems?

"Scientific and technological progress might change people's capabilities or incentives in ways that would destabilize civilization." - Professor Nick Bostrom, Future of Humanity Institute, University of Oxford

Nick Bostrom's fascinating paper surfaced in



2018 titled, “The Vulnerable World Hypothesis”

Worldwide FRS Studies and Facial Recognition Gate

The first face recognition case in the world occurred in the divided court in Cardiff in the European Union. South Wales Police became the first police in the UK to use facial recognition technology at sporting events. There were 310,000 people in the UEFA Champions League. The system has been used here.

Later, in France, the Marseille Administrative Court also made a decision regarding face recognition systems. The use of face recognition systems in French High Schools has come to the fore. Recording the images of the students without their consent was the subject of this court. As a result of the court decision, it was decided that the GDPR was violated. It was stated that different methods should be used for the benefit of the students.

The White Paper report was drafted by the European Commission as an artificial intelligence draft. But before it was released, it was leaked. The European Commission stated in this report that it will develop a system to prevent the abuse of face recognition systems. and decided to ban this technology for 5 years.

As another example, facial recognition systems have been used in the Temple of Heaven in Beijing. Considering the savings of toilet paper in this way, the government was obtaining biometric data at the same time while saving this money (“Biometrics in identity”, 2019).

For example, facial recognition technology was

used for the G20 summit in July 2017. In Germany, Hamburg Police used this technology to detect people and possible criminal activities. Then the Hamburg Data Protection Commissioner (Hamburgische Beauftragte für Datenschutz und Informationsfreiheit) published a report on facial recognition technologies used at the G20 summit. It found that the use of this technology is not in compliance with data protection law. No valid reasons were found for using it at this summit. For this reason, legal responsibility has been initiated.

As another example, the Berlin police conducted a large trial of live facial recognition technologies at the train station in 2017 and 2018. The aim was to test technical performance and identify shortcomings. 300 volunteers participated in this live trial. The software tried to detect the photographed volunteers while passing through the train station.

Finally, from February 2020, the Metropolitan Police has been trying to stop criminals by using facial recognition systems in areas such as Oxford Circus. It was announced that they analyzed the right people in detecting the criminal.

In Japan, the Ministry of Justice started verification tests on facial recognition at Narita International Airport and Tokyo International Airport in 2014. At the same time, a system called "Face Recognition Gate" by Panasonic came to the fore.

The main goal in making the Face Recognition Gate was to expand the measures. Before that, fingerprint recognition systems provided this security. Face recognition gates use a facial recognition system to recognize people's identities. In order for this recognition to be useful, the image of everyone's face was previously recorded on the IC chip in the passport. After that, the images match.

Facial recognition doors made by Panasonic were designed a long time ago. Technically, it was started in the 1990s. This system was also used in the operation of the LUMIX digital camera series. This technology is currently used in international airports and large shopping malls. For example :

Three Facial Recognition Gates introduced for the arrival processes of Japanese nationals at Tokyo International Airport (Haneda Airport) Hajime Tamura, who was responsible for the development of facial recognition technology at Panasonic, said, *"At a glance, it may seem easy to recognize a face by comparing two face images, but this was different from what it seemed. In Japan, passports can be used for up to 10 years. This is with the face image recorded on the passport's IC chip. means that there is an age difference of up to 10 years between the person's current face. Of course, within a decade, the appearance of someone's face often changes dramatically. Naturally, Facial Recognition Gate has dealt with things like changes in hairstyle and glasses, but things like cosmetics and wrinkles. Despite these differences, of course, the system had to verify the person with certainty .. On the other hand, when there is another person with an extremely close appearance, the system has to separate the two and verify that they are 'another person'. We've worked hard to resolve this issue, but past knowledge By combining our technology and new*

technologies, we have succeeded in obtaining a high performance Face Recognition Engine with high accuracy". (Hajime Tamura)

As a result

As the use of technology and artificial intelligence becomes widespread, the use and importance of our biometric data increases. Discussions continue in the international arena. Laws are being rewritten in the light of these developments. For example, this technology is beneficial for people wanted in connection with terrorism, sex offenders, long sentences, or missing children. This technology, which has become widespread in international borders and customs, requires new laws and regulations to protect personal and biometric data more securely in the future.

While the number of data shared on digital media and social media is increasing day by day, the level of awareness on this issue should also increase.

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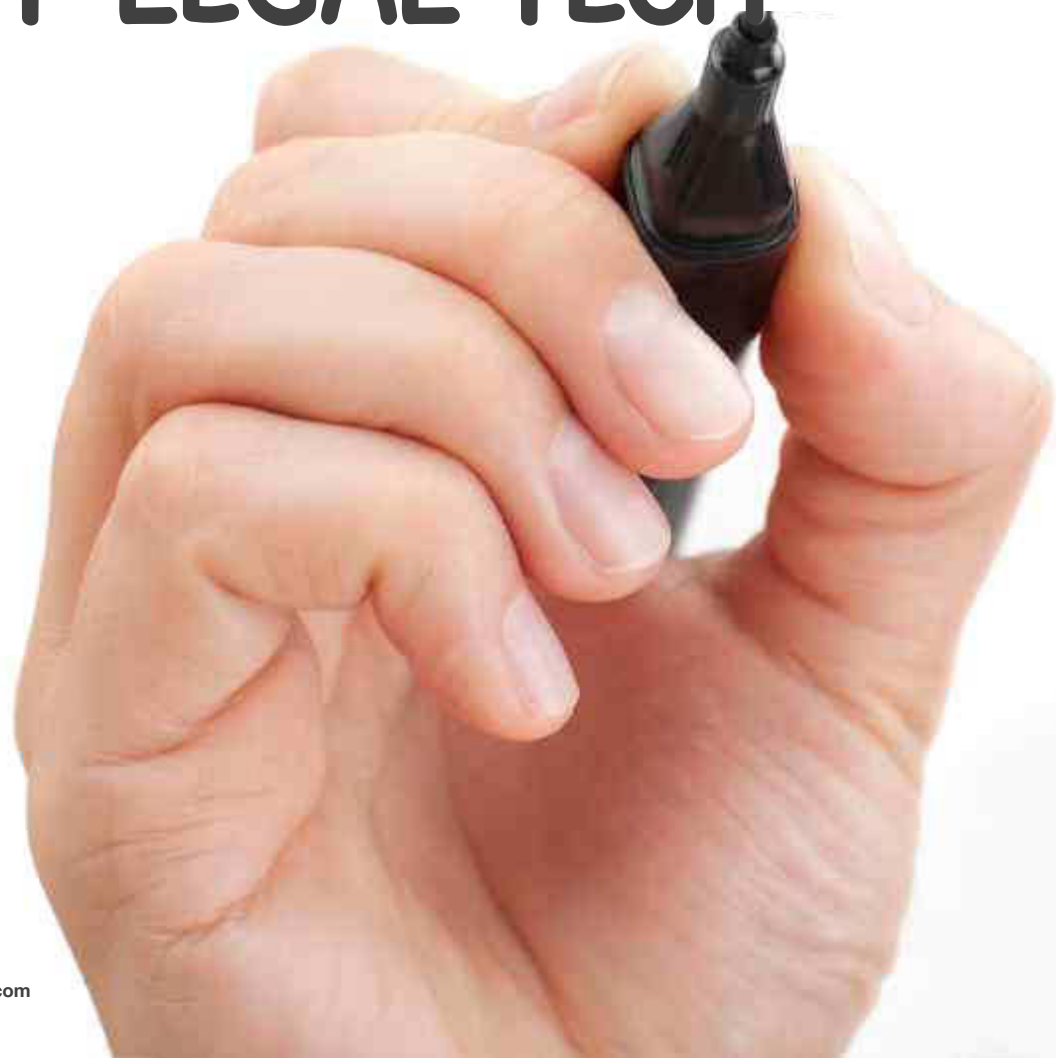
WHY BUSINESS MODEL INNOVATION IS THE REAL DISCUSSION ABOUT LEGAL TECH



By Daniel Acosta, Founder and Director of Innovation of Legalnova

The adoption of technologies doesn't guarantee business success. Even though this statement might be controversial, I believe that the adoption of technologies for organisations is just a step in a process. Volti (2001) argues that technologies are conceived for achieving specific objectives. Hence, for firms and ventures, the decision to allocate resources on inventions must be a stage of a comprehensive strategy.

Certainly, the introduction of artificial intelligence or machine learning to the legal industry might be a milestone as lawyers have been historically reluctant to changes compared to other professionals. Yet, technology is far from being a purpose itself. In fact, investing in novelties without setting a proper blueprint, might be catastrophic.

History provides multiple examples of business failure caused by mistaken approaches to the adoption of technologies. For instance, when the centralised electricity system was introduced by Edison at the end of the XIX century, incumbents of the gaslighting industry increased the improvement of the old and established technology. As a result, the gas sector has mostly disappeared. It was replaced by a new invention. Theories such as the Sailing Ship Effect introduced by Ward (1967) and the Innovator's Dilemma (Christensen, 1997) further illustrate this situation. Nonetheless, a full discussion of them lies beyond the scope of this article.

One of the most significant contemporary challenges for lawyers concerns about the intersection of the legal industry and technologies. Several attempts have been made to explain how technology is shaping the future of legal services. For instance, how big data and analytics can complement or substitute the tasks executed by lawyers. So far, however, there has been a surprising paucity of conversations focusing specifically on the prominence of innovation and the business model to successfully transform.

In the pages that follow, I will argue that the relevance of adopting technologies for both incumbents and new entrants in the legal industry, lies in a comprehensive business model innovation strategy. Before inquiring about new technologies, their features and potential to replace lawyers, I suggest you should be asking about the value proposition that is intended applying technologies to the legal business. Enhancing our understanding of the relationship between business model innovation and the adoption of technologies will increase the odds to thrive in the future of the legal industry.

1. What is innovation?

As a business, comprehending what an innovation means may be the most accurate way to approach the incorporation of technologies. According to Tidd and Bessant (2009), innovation is a process. -Yes, a process-. The extent to which new ideas are created and taken into a market, securing value from them. innovation transcends de creation of a device or an invention. It involves the capability to identify connections, to sense opportunities and to seize them.

People tend to consider inventions and innovations as synonyms. However, this is a misconception. Allow me to go back to the example of Edison and the electricity. Did you know that Edison did not invent the lightbulb? In fact, the incandescent light was created by Joseph Swan. I guess most of you have heard about Thomas Alba Edison, but no Mr Swan. Why is it so? How did the former become a worldwide recognised figure, instead of the later?

Edison succeeded because he was able to capture value from the invention. He innovated with a whole system of electric lighting, power generation and distribution that supported the diffusion of the lightbulb. In other words, Edison deployed a strategy to take advantage of the opportunities he discovered (or created) in the market. (Please, bear in mind that this article does not engage with the IP lawsuit that took place between them. Spoiler alert, Swan won).

The case of Edison and Swan illustrates the difference between an invention and innovation. On the one hand, Swan failed to secure value from the lightbulb. Inventions – as technologies- don't have a value proposition *per se*. Neither they are essentially linked to a process of commercial realisation. On the other hand, Edison created a business model around the incandescent light, offering a novel solution to customers. Edison created an innovation, positioning the new product in the market.

As shown by the illustration, the adoption of technologies without considering a strategy to approach the market might decrease dramatically the probability to excel. Hence, the process of innovation is essential for: i) bringing new ideas into the firm (what necessity is out there in the market and how can you solve it with technologies). ii) selecting the optimal idea to implement (which is the best technology to enhance your value proposition). iii) converting ideas into reality (acquire or develop the chosen technology). And iv) capturing value from the idea (gaining new clients, efficiency, or reputation for the firm).

2. What is a business model?

Awareness about the business model for entrepreneurs and established organisations is vital for innovation. Legal firms tend to implement technologies only for enhancing their services -this is called a downstream model since barely relates to clients-. Nevertheless, changes can be made in relation with partners, suppliers or processes -a upstream model-. The upstream model is often neglected as the business model is not fully understood. Thus, one of the objectives of this section is to explain how you can characterise your business model to determine where is it possible for you to innovate.

Moreover, having a business model will guide you through the process of innovation. Once you have a clear idea of what is -or could be- your value proposition, you can start looking for technologies that will develop further your business strategy. The business model should be the 'wind rose' for the adoption of technologies.

Scholars have long debated the importance of having an explicit business model in a firm and its characteristics. Moreover, whether developing a business plan is a preferable option. I would like to explain essential elements that can be found across multiple theories. Yet, a note of caution is due here since this information may be somewhat limited.

Although there is a multiplicity of theories and conceptualisations, a business model refers to a description of how a firm can capture, create and deliver value in connection with its stakeholders (Massa and Tucci, 2013). In other words, the business model allows an organisation to harmonise what it has to offer with customers considering external players and resources required to do so (Desyllas and Sako, 2012).

Four are the main elements of a business model. First, a value proposition -and the most relevant one-.

The extent to which the firm decide what is it going to be offered to clients and why is it different from the competitors' solutions. Second, the profit formula. How the business generates a profit from the value proposition. Third, key resources. What is needed to deliver the value proposition? Finally, processes. The activities that the firm must develop to offer the value proposition.

These four elements can be represented in multiple ways. Osterwalder and Pigneur (2010) offered the concept of Business Model Canvas as a simplified guide to develop businesses. Canvas is an alternative to gather and clarify hypothesis, instead of pursuing a cumbersome exercise or planning. Figure 1 (next page) shows nine points that should be considered to create a canvas.

Sadly, the business model of the legal industry has been identified as a central barrier to innovation.

This reality supposes an extra effort that must be made by lawyers to innovate. Further barriers (such as uncertainty, fear, lack of interest or no sense of urgency) could affect other markets.

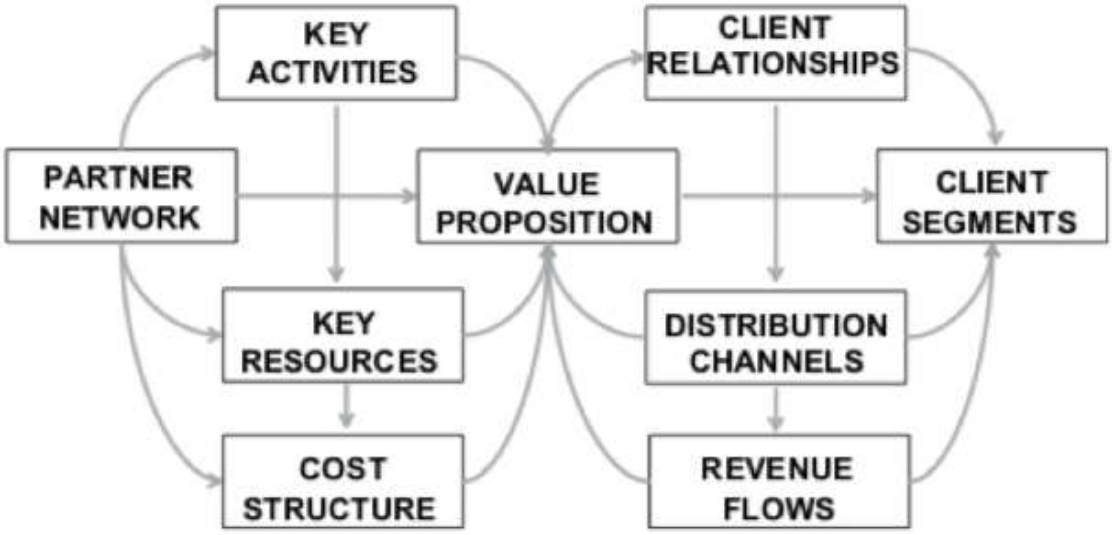


Figure 1: the 9-point deconstruction of a business model canvas (Chesbrough, 2010).

For instance, the revenue flows of law firms are often based on billable hours which grants lawyers the control of the incomes. Hence, changing how fees are perceived might be counterintuitive. Nonetheless, alternative revenue structures as fix prices might be more customer-friendly.

Another example is the partnership model. The majority of law incumbents -and professional service firms- are organised as partnerships. The partnership model results problematic for innovation for multiple reasons. One of them is homophily. Heterogeneity enhances the formation of networks, the transmission and circulation of knowledge, grants access to resources and increases the creativity and innovative potential of firms. Adopting technologies -as a process of innovation- requires capabilities that are not often thought in law schools.

3. Conclusion

The discussion about implementing technologies is not just a matter of acknowledging, buying or developing them. Technologies must be adopted and diffused considering internal and external factors of the organisation. For that, having a business model is paramount. A value proposition might serve as the compass to guide the process of innovation that law firms should develop to implement trending inventions such as artificial intelligence, big data or machine learning.

The first step in this journey should be identifying the opportunities to transform. The following questions might help you to start innovating: What are the market signals? What are customers asking for? How can the business model be improved? After that, select what is going to be done. Determining priorities is imperative as resources are limited.
Then, implement. Here, technologies might help you out to deploy the value proposition aimed. Furthermore, to enhance any element of the business model. Finally, consider how the benefits are going to be secured by the firm.

As new entrants are disrupting the sector with innovative business models, lawyers might have to change the roots of its business to cope with the latest solutions claimed by clients. Perhaps, this is the reason why changing process inside law firms is burdensome. The introduction of technologies is asking practitioners to pivot what they have been doing for centuries.

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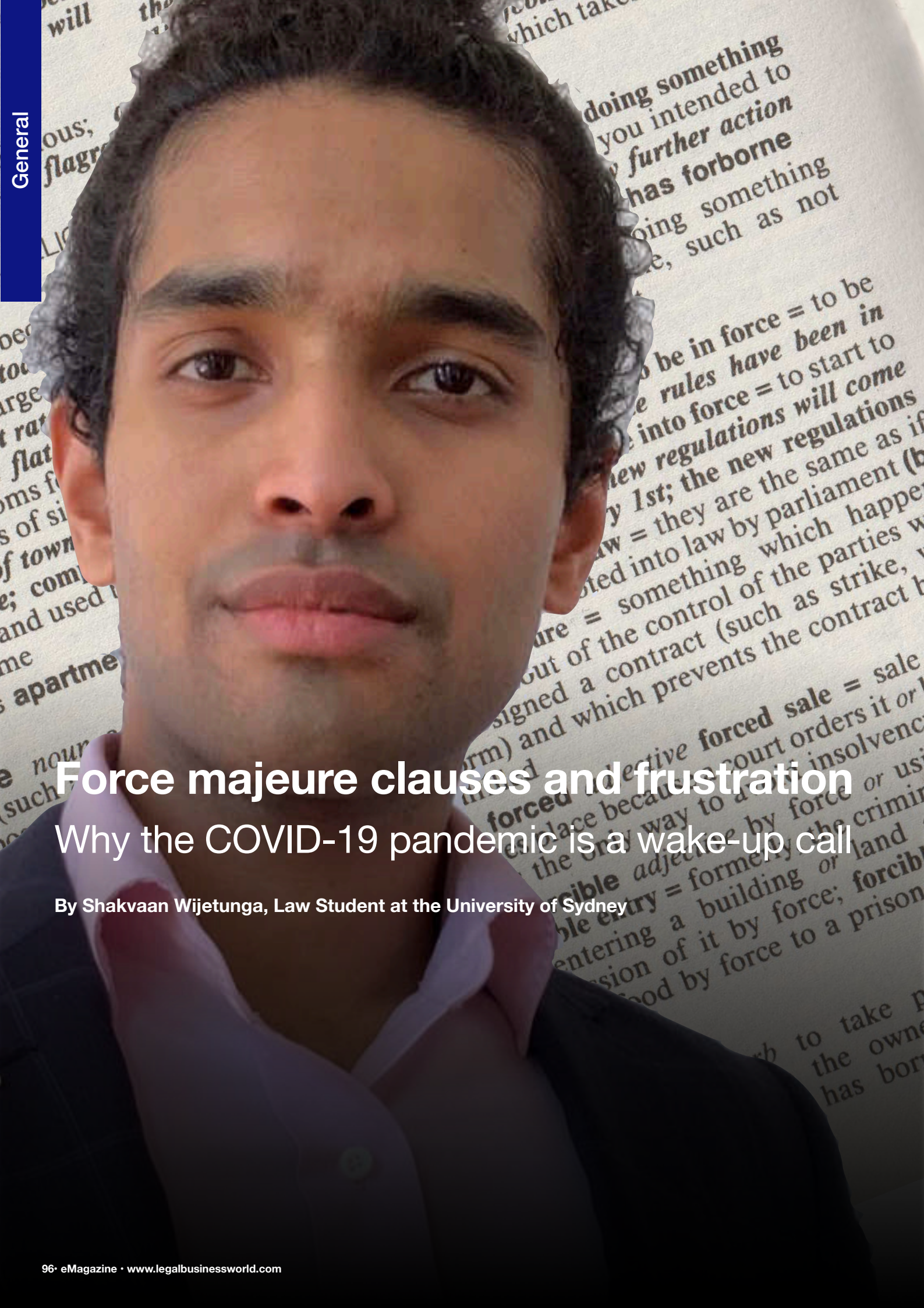

Force majeure clauses and frustration

Why the COVID-19 pandemic is a wake-up call

By Shakvaan Wijetunga, Law Student at the University of Sydney

What is a force majeure clause?
A force majeure clause is a method of allocating the risk of a disruptive event. It is a broad catch-all provision whereby the parties list categories or specific instances of otherwise frustrating events and specify which party or parties bear the risk of the event occurring.

The clause can grant the option to vary, suspend or terminate the contract to one or more of the parties. [1]

No force majeure clause? Use the doctrine of frustration
A party may invoke the doctrine of frustration when the sort of event triggering a force majeure clause arises, and there is no provision for the course of conduct to follow, that is, there is no force majeure clause.

The doctrine of frustration is a common law doctrine that discharges the parties to a contract from future performance when an unforeseen event ("act of God") presents itself without default of either party, either rendering the contract impossible or its essence radically different from that which was agreed. [2]

The approach to frustration is a question of construction, [3] with the courts' reluctance to absolve parties of their obligations traceable to the 17th century: parties who have agreed to bind themselves ought not to be readily discharged from their duties because they failed to provide against an accident. [4]

Tempering the uncertainty surrounding the invocation of frustration
With the doctrine of frustration being an exercise in gap-filling, express terms providing for a robust and comprehensive list of frustration events would remove the need for the principle to operate.

These express terms are force majeure clauses.

General comments on force majeure clauses in light of the pandemic
A pandemic exemplifies an interruption susceptible of being overlooked at the drafting stage. Express provisions carefully crafted would avoid the need for litigation in such a circumstance.

It is opportune for parties to reassess the safeguards in place to protect themselves from misfortune, and not only ensure the security of their positions during the current affliction but also in preparation for any future disaster.

Interpreting force majeure clauses
The law regarding the construction of force majeure clauses comes from a landmark decision of the Privy Council on an appeal from the Court of Appeal of Hong Kong. [5]

The force majeure clause from that case appears in the following terms:

> *Force majeure: Should [the sellers] fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be duly extended, or alternatively a part/whole of the contract might be cancelled, but [the sellers have] to furnish [the buyers] with a certificate issued by China Council for the Promotion of International Trade ('C.C.P.I.T.') or an*

independent and competent Chinese authority attesting such event or events. [6]

Note that the sellers (the appellants) are the party seeking to avoid liability. The force majeure was a severe drought which devastated the area from which the cotton to be sold to the buyers (the respondents) originated.

The construction relied upon by the Privy Council required there to exist a tripartite state of affairs to enliven the clause's operation successfully. The three limbs are:

1. There had been a stipulated force majeure event at the relevant time;
2. This event had adversely affected their (i.e. the sellers') ability to supply the goods; and
3. The sellers could not overcome these adverse effects by obtaining the goods from another source (other than the one provided for in the contract) while still matching the contractual requirements. [7]

The same process of investigation applies to both invoking the doctrine of frustration and activating a force majeure clause.

The Privy Council deemed the focus of construction as being on the requirement for a certificate to be issued. [8] It is this stipulation which distinguishes the situation created by a force majeure clause from the case instituted by reliance on frustration.

A force majeure clause clarifies the parties' obligations, hence the requirement that a certificate is a minimum hurdle for the operation of the clause.

It is this sort of unambiguously prescribed course of conduct that explains the efficacy of express terms dealing with frustration. Nevertheless, the parties may still, as the following will show, express requirements with more clarity.

When being asked to determine compliance with the clause, it appears the courts shall be satisfied with a low threshold of proof. However, they need more than the mere production of a vague document and nothing else. [9]

Instead, producing a certificate involved a twofold task for the sellers:

1. To prove that it was a stipulated event which had caused them to fail to perform their duties; and
2. To produce a certificate in the prescribed form.

With a choice of three possible constructions of what the twofold task entailed, the Privy Council chose the one placing the lightest burden on the sellers. [10]

The sellers, under the Privy Council's interpretation, were only required to issue a document certifying the first limb of the tripartite state of affairs. [11] The alternatives would have required, respectively, certification of all three components, or certification of only two, permitting the omission of impossibility.

As a matter of construction, the Privy Council found that the language of the force majeure clause merely required the certificate (document) to be added to the tripartite state of affairs. [12] The certificate did not need to cover the tripartite state of affairs. To require the certificate to attest to all three limbs would be of no practical value and would

entail a semi-judicial investigation. [13]

Attesting to not only the existence of force majeure but also to its effects on a transaction is an inquiry into complex facts that would need to be conducted again at the litigation stage. [14]

In short, only the force majeure needs to be identified by the certificate (which was not a substitute for proof of the force majeure).

Where the certificate attesting to all three limbs to the tripartite state of affairs would have practical value is in the event of a challenge to the party relying on it, [15] allaying suspicions that the relying party has fabricated excuses to avoid performance. Furthermore, an independent authority would be in a better position than an entity after the fact to conclude a bona fide, contemporaneous and accurate assessment of the conditions and force majeure at the appropriate time and place.

Extractable from the Privy Council's finding is that, since multiple constructions of the impugned clause were available, careful drafting is imperative.

Less authoritative than the Privy Council, the Ontario Court of Appeal addressed whether a specific force majeure clause refers to occurrences suffered only by one party or to those suffered by each party. [16] The business relationship between the parties was the supply and distribution of natural gas to the buyer's customers (under separate agreements).

This case concerns a force majeure clause containing latent ambiguity. Notwithstanding, the Court of Appeal prohibited extrinsic evidence, affirming that a clause which is merely difficult to interpret is not necessarily ambiguous.

The clause reads as follows:

> ***XI FORCE MAJEURE***
> *In the event of either Buyer or Seller being rendered unable, wholly or in part, by force majeure to perform or comply with any obligation or condition hereof or any gas sales contract into which these General Terms and Conditions are incorporated, such party shall give notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, and the obligations of the party giving such notice, other than obligations to make payments of money then due, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch. The term "force majeure" as used herein shall mean acts of God, strikes, lock-outs or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, temporary failure of gas supply, inability to obtain materials, supplies, permits or labour, any laws, orders, rules, regulations, acts or restraints of any governmental body or authority, civil or*

military, any act or omission (including failure to deliver gas) of a supplier of gas to, or a transporter of gas to or for, Seller which is excused by any event or occurrence of the character herein defined as constituting force majeure, any act or omission by parties not controlled by the party having the difficulty and any other similar causes not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome.

A force majeure clause need not be lengthy to be adequate.

The buyer, in this case, is the respondent and the seller the appellant.

The alleged force majeure was a series of strikes and an explosion within the space of three years, all of which affected some of the buyer's large customers (rather than the buyer itself). These events led to the buyer selling less gas to its customers during those years. (The word "strike" was attributed a broad meaning to include labour disputes).

Latent ambiguity emanates from the clause. Whilst each word is to be given its dictionary meaning; it is unclear whether the events occur solely on the seller's part or refer to events that also happen on the buyer's side.

The parties agreed to break the clause down into four segments for construction:

1. The occurrences rendering the buyer or seller unable, wholly or in part, to perform an obligation;
2. The failure of a supplier or transporter to deliver gas to the seller;
3. An act or omission by parties not controlled by the party having the difficulty; and
4. Other similar causes not within the control or scope of prevention of the party claiming suspension.

The ambiguity lies in the second segment. It expressly excludes the seller from liability if met with force majeure, but no equivalent appears excluding the buyer from same. Such a specific clause, if appearing for one party, should also appear for the other, unless the parties' specific intention was only to endow the seller with that protection.

Acknowledging that without gas from the seller/supplier, the buyer cannot fulfil its contracts with its customers, creates an assumption that an express exclusion of the seller from liability should extend to the buyer.

Given the nature of the relationship between the buyer and seller, the seller has no control over the contracts the buyer enters. The buyer, to protect itself against misfortune, has other courses of action available to it.

Some of these courses of action include applying to the public body controlling it to increase the rates charged to customers or containing in its contracts with those customers mandatory minimum payments, despite any force majeure.

The parties must limit the operation of a force majeure clause to events of force majeure besetting the parties unless the parties have agreed to an express widening of the scope of its application.

Force majeure on the system of the buyer's customers is not equal to force majeure on the buyer.

The Court of Appeal applied the express and unambiguous terms of the other three segments.

To reconcile the approaches taken by the Privy Council and Ontario Court of Appeal. When a force majeure clause makes express provisions, a court will give effect to those express provisions, even if they may, prima facie, seem to be overlooking one party's susceptibility to risk.

Therefore, if the clause permits a minimum tender in satisfaction of its threshold or permits only one party to benefit from the exclusion of liability, a court will give full weight to that permission. The purpose behind force majeure clauses being to clarify obligations in times of difficulty can never override their express words.

Accordingly, it is essential to objectively clarify all risk apportionment, exclusion clauses and requisite thresholds to effect subjective intentions.

Force majeure and COVID-19

While some case law refers to the effects of COVID-19, few courts have dealt directly with the pandemic's impact on an industry, apart from Canada's Federal Court of Appeal. [17] The factual matrix of that case involves the Canadian Transportation Agency making public statements on its website, seeking to strike a balance between airline customer protection and airlines' operational realities. The statements suggest it would be reasonable for airlines to provide affected passengers with vouchers or credits for future travel rather than reimbursement. [18] Air Passenger Rights, an advocacy group, asserts that the CTA's statements are likely to mislead passengers concerning their rights. [19]

COVID-19 is acknowledged undisputedly as a frustrating event and force majeure. [20]

The Court dismissed APR's assertions. They accorded a level of leeway to non-binding administrative decisions in their approach to reaching pandemic-related solutions to stressful situations. Provided those solutions, such as vouchers, do not expire in an unreasonably short time. [21]

Furthermore, the Court conceded that these administrative decisions might have the effect of potential harm to customers, for example, who are not seeking credits but monetary reimbursement.

Yet, at any rate, these adverse effects would not reach the standard of irreparable harm required to delineate standing for a serious (arguable) case. [22]

What this case shows is that COVID-19, or any pandemic forcing the curtailment of industry, classifies as force majeure warranting creative and urgent solutions to be quickly made that may not wholly satisfy all parties, but, on balance, adequately address all interests.

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The New Zealand High Court similarly recognised COVID-19 lockdowns as an unforeseen event which cloaked the performance of contractual duties in uncertainty and delay. [23] The Court accordingly made allowances for the speculative but imminent losses. [24]

Although not the main issue, it appeared COVID-19 fell within the scope of the force majeure clause, which reads:

"If MPD is not able to complete the enabling works (other than the sewerage works under clause 1.4) by 30 April 2019 or any extended date permitted under this clause (Enabling Works Sunset Date) then GCD is entitled to instruct and engage a third party contractor to complete the enabling works at market competitive prices, at the cost of MPD provided that GCD must act reasonably, in good faith and work collaboratively with MPD before engaging the third party contractor and have regard to the nature and extent of the remaining incomplete works, the reasons for the delay, whether or not MPD has the right to terminate its works contract with its contractor and the need to practically transition works between MPD's contractor and the third party contractor. GCD may pay for such costs on behalf of MPD under this clause and any payments made shall be a debt from MPD to GCD City and shall be paid by MPD to GCD within 10 working days of GCD issuing a tax invoice to MPD.

Where there is any delay in completing the enabling works as a result of any force majeure which is beyond the control of MPD (including adverse weather conditions, strikes, lockouts, unavailability of materials, fire, earthquake, flood, explosion, storm, tempest, riot or civil commotion) then, in that case, the Enabling Work Sunset Date will be extended by a reasonable period of time which takes into consideration the cause of delay." [25]

Under this clause did the parties agree to a variation? [26]

As expected, COVID-19 merely causing delays did not amount to frustration, nor was the possibility even raised in the judgement.

How to draft a reasonable force majeure clause?

Considering the dicta of the Privy Council and Ontario Court of Appeal, it follows that drafting a force majeure clause should be done as follows:

1. Allocate risk clearly and precisely;
2. Explain how the parties must evince their invocation of the clause;
3. Specify the process and details required to satisfy reliance upon the clause;
4. Outline the standard of severity required of the misfortune to enliven the clause. There are clear benefits in express terms dealing with frustration. Absurd results may arise from the doctrine's invocation setting a limit lower than impossibility.

The enlivening standard ought to be nearer to hindrance than to absolute invalidity.

Business interests, commercial purposes and envisaged expectations should be protected more carefully by a clause permitting termination upon an indication that circumstances are changing than by waiting until after the damage to invoke a strict doctrine;

5. Set out the force majeure circumstances which would and would not permit termination;
6. Frame all lists as non-exhaustive and inclusive or exemplary of a potentially much longer list;
7. Use sweeping-up to ensure interpretation loopholes would not exclude rare or unique events. The parties should leave no room for inconsistent, competing interpretations;
8. In the interests of brevity and ease of reading, prioritise classes and categories of force majeure over lists of individual events. Account for all desired circumstances;
9. Consider particular circumstances and frustrating events uniquely harmful to the industry.

COVID-19 is a wake-up call because it is an example of a rare occurrence – a pandemic – that boilerplate force majeure clauses would not have identified.

Given its grave impact on commerce, it is vital that for the future, rare occurrences that are currently unforeseeable, as COVID-19 once was, and therefore futile to attempt to identify, have as little impact as possible.

Mistakes in drafting may be difficult to rectify, in light of the parol evidence rule. [27]

Notes

[1] *eg Yara Nipro P/L v Interfert Australia P/L* [2010] QCA 128, [26].
[2] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, 729; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 357.
[3] See *Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, 184.
[4] *Paradine v Jane* (1647) Aleyn 26, 27.
[5] *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404, 408 *('Hoecheong Products').*
[6] *Hoecheong Products* [1995] 1 WLR 404, 406.
[7] *Hoecheong Products* [1995] 1 WLR 404, 409.
[8] *Hoecheong Products* [1995] 1 WLR 404, 409-410.
[9] *Hoecheong Products* [1995] 1 WLR 404, 410.
[10] *Hoecheong Products* [1995] 1 WLR 404, 410.
[11] *Hoecheong Products* [1995] 1 WLR 404, 410.
[12] *Hoecheong Products* [1995] 1 WLR 404, 410.
[13] *Hoecheong Products* [1995] 1 WLR 404, 405.
[14] *Hoecheong Products* [1995] 1 WLR 404, 411.
[15] *Hoecheong Products* [1995] 1 WLR 404, 410.
[16] *Transcanada Pipelines Ltd v Northern*

and Central Gas Corp Ltd (1983) 146 DLR (3rd) 293. (Pinpoints unavailable for this case)
[17] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630.
[18] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630, [5]-[7].
[19] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630, [3].
[20] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630, [10].
[21] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630, [21], [25].
[22] *Air Passengers Rights v Canada (Transportation Agency)* [2020] FCJ No 630, [31].
[23] *Murphys Park Development LP v Green City Developments Ltd* [2020] NZHC 813, [13], [51].
[24] *Murphys Park Development LP v Green City Developments Ltd* [2020] NZHC 813, [58].
[25] *Murphys Park Development LP v Green City Developments Ltd* [2020] NZHC 813, [7].
[26] *Murphys Park Development LP v Green City Developments Ltd* [2020] NZHC 813, [9].
[27] *Inglis v John Buttery & Co* (1878) 3 App Cas 552, 577; *Gordon v Macgregor* (1909) 8 CLR 316, 323; At the following URL is a self-service style of generating tailored force majeure clauses: https://coda.io/@denis-potemkin/force-majeure-clause-generator-2-0/generator-1

About the Author

Shakvaan Wijetunga is a law student at the University of Sydney, combining his LLB with a BA where he studies Latin and majors in Classical Greek.

2020's conclusion will see the completion of his third year of studies, graduation from his BA and passage into the penultimate year of his LLB.

Since early 2018, Shakvaan has worked at several law firms, currently serving as a Virtual Intern with Blue Ocean Law Group℠, whereby he has collectively gained experience in matters of corporate + commercial law, as well as civil litigation.

Shakvaan is also a part-time musician, playing bass guitar in an internationally touring band while producing and performing as part of an electronic music project.

THE INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS

Founders

As creators of The Academy, Stéphane Bonifassi, Lincoln Caylor and Elizabeth Ortega recognized the need for a multijurisdictional approach, based on ethical and intellectual principles, to navigating one of law's fastest-evolving disciplines – financial-crime litigation. They saw the Basel Institute as a valuable and necessary partner to help The Academy expand the body of knowledge about economic crimes and how to address them.

Stéphane Bonifassi, founder of Bonifassi Avocats in Paris, has concentrated his practice on complex, international financial crimes for nearly three decades. Working in the criminal courts, Bonifassi combines targeted investigative and litigation tactics to track and recover stolen or hidden assets, as well as defend those accused of committing financial crimes. He has been recognized as the "dean of the Parisian Bar" for his mastery of all aspects of the French legal system, paired with his ability to manage corresponding proceedings abroad.

Lincoln Caylor, of Bennett Jones in Toronto, has similarly dedicated his practice to litigation involving international economic crimes and is regarded as the No. 1 asset-recovery lawyer in Canada. He leads groundbreaking asset-tracing investigations and pursues asset-recovery litigation and enforcement actions in prominent, high-value international financial frauds and other economic crimes. Caylor is regularly retained or invited to advise on complex, multi-jurisdictional asset-recovery strategies. For his contributions to Canada, he is a recipient of the Queen Elizabeth II Diamond Jubilee Medal.

Elizabeth Ortega, a legal marketing strategist and founder of ECO Strategic Communications in Miami, has collaborated with international and domestic law firms in nearly every aspect of the business of law for more than 20 years. Her educational background in journalism and mass communications together with her commitment to leadership development guides her counsel to lawyers who are international thought leaders.

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LBW TELEVISION

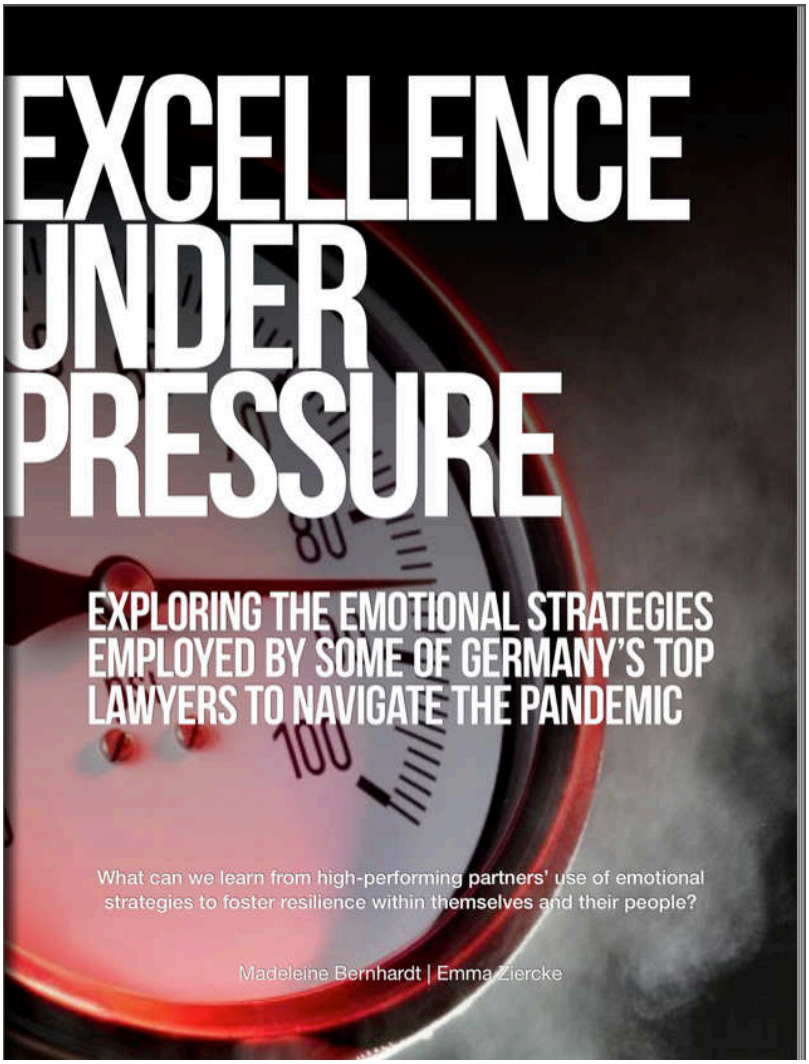
New eBook

Excellence Under Pressure

Exploring the emotional strategies employed by some of Germany's top lawyers to navigate the pandemic

What can we learn from high-performing partners' use of emotional strategies to foster resilience within themselves and their people?

By Madeleine Bernhardt and Emma Ziercke



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EXECUTIVE Summary

Given the VUCA-world in which we live, emotional intelligence and resilience are essential skills for law-firm partners' success in navigating disruptive times. How do high performing partners use their emotional capital in order to foster their individual resilience, to motivate and support their people and to help their firm thrive, especially in highly challenging times? In order to answer these and further questions, the Bucerius Center on the Legal Profession conducted in-depth interviews in August and September 2020 with 14 of Germany's most successful lawyers. We wanted to examine the emotional strategies employed by such top performers in order to share best-practices used by partners in highly challenging times.

Our results demonstrate that top performers employ emotional strategies both intentionally and unintentionally. The partners tended towards rather diverse notions of emotional intelligence and resilience, and this resulted in diverging opinions on whether such competencies would be relevant to law firm success in the future, and whether there was scope was for making strategic use of emotional intelligence for organisational development.

As a result, we have developed a model of a four-dimensional partner which seeks to expand our understanding of emotional intelligence and resilience by combining the dimensions of cognitive behaviour (cognitive awareness and regulation), emotional behaviour (emotional awareness and regulation), physical behaviour (sport, nutrition, sleep) and motivational aspects (values, purpose, inner compass). Considering and further developing all four dimensions will enhance partners' individual resilience and emotionally intelligent behaviours and thus contribute to a healthy working environment and a successful law firm.

About the Authors

Madeleine Bernhardt

Prof. Dr. jur. Madeleine Bernhardt, LL.M. is a lawyer, psychologist and certified Business Coach (European Coaching Association). She is the founder of Deep Human Science (www.deephumanscience.de), a consultancy that focuses on taking leadership in professional service firms to the next level. Madeleine Bernhardt is member of the Executive Faculty of the Bucerius Center on the Legal Profession (Hamburg). She regularly conducts leadership development programs for professional service firms and consults to international law firm partners on the strategic development of leadership. She holds a professorship for

personnel and organizational development at the University of Applied Sciences of the State Police of Brandenburg and focuses in her research on leadership in organizations and the effective implementation of tools for personnel and organizational development as well as on the improvement of organizational efficacy. Contact details: madeleine.bernhardt@law-school.de

Emma Ziercke

Emma Ziercke, Senior Research Associate, is a non-practising solicitor (England & Wales) and senior research associate at the Bucerius Center on the Legal Profession

(CLP) at the Bucerius Law School, Hamburg. Following her studies in Law and French Law and Language at the Universities of East Anglia (Norwich, England) and Jean Moulin Lyon III (France), Emma Ziercke worked as a Corporate Solicitor for Linklaters in London from 2002 until 2009. As a Managing Associate she was primarily involved in private international mergers and acquisitions, reorganisations,

public takeovers by scheme of arrangement and general company law.

After moving to Hamburg, Emma studied part-time for an Executive MBA at Nottingham University Business School, focussing on law firm management and organisational behaviour. In 2014 she completed her studies with distinction and won an award for best overall performance together with an award for her dissertation on Gender Diversity in Law Firms. The dissertation was carried out as a case study, the purpose of which was to understand the underlying reasons for the high attrition rate of talented female lawyers in the United Kingdom and Germany.

Emma currently works at the Bucerius Center on the Legal Profession as a senior research associate in the fields of Law Firm Management, Gender Diversity and Organisational Behaviour. Her main interest is in gender and generational diversity in the profession, and she has spoken on this topic at a number of events. A list of her publications can be found here: https://www.linkedin.com/in/emmaziercke/. Furthermore, Emma teaches *Law Firms of Tomorrow*, a course on law firm management, for the International Exchange Students at the Bucerius Law School. Contact details: emma.ziercke@law-school.de | www.bucerius-clp.de

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BUCERIUS CENTER
ON THE LEGAL PROFESSION

The Innovation in Law Studies Alliance, ILSA, is founded with the mission to foster innovation in Law and Technology faculties all over the world

"The alliance is open to all universities from around the world and its aim is to support them in transforming their curricula, relying on technology and becoming more global."

"It will develop activities to prepare universities and their teachers to train their students in the competences and skills that the future demands."

By María Jesús González-Espejo García

Madrid, November 4th 2020.

The **Instituto de Innovación Legal** has launched **Innovation in Law Studies Alliance (ILSA)**, an **alliance of law and technology faculties** whose mission is to **support their transformation** through the collaboration between its members, the organisation of innovative events and training activities as well as the exchange of good practices on innovation, among other activities. Over 15 universities from various countries worldwide, such as France, Poland, Spain, Colombia, Ecuador, México and South Africa, are already part of the network.

ILSA works with faculty leaders and teachers to help them acquire the new knowledge and skills they need to train their students in areas such as legal innovation, digital transformation, LegalTech, law firm management... In sum, the new knowledge and skillset that will be demanded by future employers.

María Jesús González-Espejo, managing partner of the Instituto de Innovación Legal, vice-president of the European LegalTech Association (ELTA) and promoter of ILSA, explains the envisioning: "we have made a reality of an idea that has been maturing for several years. We have always believed that the transformation of the legal sector had to start

with the universities, and these need to commit to open innovation, encourage collaboration with other universities and be more global. ILSA will help them to achieve these goals. Furthermore, we want to bring the best LegalTech applications closer to students, so that when they start working, they can become fundamental pillars of the digital transformation within their organisations".

To achieve its objectives, ILSA has created an ambitious activity programme that collaborating or associated universities will be able to enjoy, including:

1. **Events** such as webinars by experts in subjects related to new technologies, methodologies, etc. (Access here the agenda of those planned for the coming months), as well as regular meetings for the exchange of good practices in educational innovation and the annual congress.
2. **Training in LegalTech**, offered by the LegalTech companies that are onboard in the project. These include Docxpresso (Spanish document automation application), HighQ (British collaborative platform for working with your team, partners and suppliers), Jeffit (Russian ERP for law firms) or Nymiz (Spanish platform for the anonymisation of legal documents). These companies will be offering training activities for students and teachers to introduce them to the use of their software. The aim is to provide students with the unique skills that will enable them to stand out when searching for a job.
3. Access to the **collaborative and knowledge management platform**, which has been created with HighQ, where members can find documentation on innovation and LegalTech, share news, generate debates, make queries to other members of the network or contact faculties in other countries to organise international activities.
4. The **ILSA seal**, which will be launched in 2022 and will certify each university's commitment to innovation.

In addition, the Alliance will promote in a second phase, the creation of a community of innovative teachers. This database will be very useful to help universities locate the best experts for each subject they decide to include in their training offer. As Iga Kurowska, ILSA's representative in France and Poland, has pointed out, «one of the reasons why the much-needed modernisation of Law studies is not progressing, is the difficulty of finding teachers trained to teach these subjects». Moreover, the alliance offers support to universities and teachers who share the same concerns about the application of innovation in studies. Thus, relying on the experience of the Instituto de Innovación Legal (a consultancy firm specialised in advising operators in the legal sector on innovation, LegalTech, digital transformation and management) will provide training services for teachers, support in the organisation of events, collaborate in the preparation of training programmes or help in the search and selection of teachers.

ILSA has a strong network of partners in various countries and regions that represent and coordinate activities locally, and this network

coordinate activities locally, and this network is projected to progressively expand. Amongst them: **Sergio Arellano**, president of the Inter-American Institute for Research and Teaching in Human Rights; **Paulius Astromskis**, partner of exe. legal; **Daniel Bermejo**, expert in digital projects of the Instituto de Innovación Legal; **Mauricio Bermudez**, managing partner of Acuña, Acuña y Bermudez; **Virginia Carmona**, professor of the Department of Private Law and Labour and Social Security Law of the University Rey Juan Carlos of Madrid; **Janet Huerta**, Editor of Foro Jurídico; **Iga Kurowska**, founding partner of Verne Legal and Professor of Law at the Université Catholique de Lille; **Jackie Nagtegaal**, Director of LIPCO – Law for all and founder of the Futures Law Faculty; **Alice Namuli**, partner and Head of Technology and Innovation at Katende, Ssempebwa & Co. Advocates; **Karol Valencia**, LegalTech project consultant, Legal Designer and Compliance Officer at Electronic IDentification; and **Alexandra Villacís**, President of the Association of Latin American Women Lawyers (AMJI) and Director of LATAM projects at the Instituto de Innovación Legal.

For more information on ILSA's services, please visit its website.

ILSA
Innovation in Law Studies Alliance

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Is Your Contract Biased?

By Nada Alnajafi, award-winning attorney, Corporate Counsel at Franklin Templeton and Founder of Contract Nerds

Contracts are documents reflecting agreements between people and companies run by people. As humans, we are all guilty of having implicit biases. That's why, our implicit biases can often seep into our contracts. If we're not careful, these implicit biases can cause us to communicate unintended (and sometimes offensive or unfair) messages to the other party that can put the contract and underlying relationship at risk.

Recently, companies, employers, and schools, are promoting the principles of diversity, equity, and inclusion in order to eliminate bias. Good companies have recognized the importance of eliminating common biases in the workplace. Customers are demanding heightened awareness from their vendors. Even in-house legal departments are expecting outside counsel law firms to align with these values. What are we doing to eliminate bias in our contracts, contract negotiations, and (by proxy) contract management tools? When was the last time you checked if your contract was biased?

Unfortunately, the legal community has done little to address implicit biases in contracts. But it's never too late to start. In this article, I will address how to identify and eliminate implicit biases – such as language, gender, and resource bias – from our contracts.

1. Language Bias in Contracts

Language bias occurs when the contract drafter [1] assumes the other party is as fluent in English and English "legalese" as the contract drafter. This type of bias commonly appears in international contracts when one or more parties are not native English speakers. If you've

ever thought this to yourself, "Wow, their English is surprisingly really good!" then you probably have implicit language bias. It's ok; all of us have implicit biases to some degree. The important thing is that we recognize it and do something about it.

Throughout my career as in-house counsel, I negotiated hundreds of vendor agreements on behalf of clients residing outside the U.S. and with opposing counsel or counter-parties from non-English speaking jurisdictions. The one common thread I noticed across all of these contracts is that they are always – 100% of the time – drafted in English.

"English is used in contracts around the world, not just contracts between companies from English-speaking countries."[2] When the parties' command of the English language differs, and the contract is drafted solely in English, the parties automatically start on uneven footing. Without a full grasp of the English language, how can the international party fully understand the contract or fully advocate for their client's position? How can they fully deliver on your ask? And when the English-speaking party notices this inherent difference, is that knowledge used for good or trickery?

While many international parties are English savvy and can get by with the basics, the type of English used in contracts (as many of us can attest) is not always straightforward or intuitive. Sure, I can speak conversational Spanish and tell the Uber drive where I want to go. But that doesn't mean I'm prepared to negotiate a contract in Spanish. Plus, even if you know conversational English, English legalese is arguably a language all its own!

To eliminate language bias from contracts, contract drafters should consider: 1) whether the contract should be in English, another language, or both, and 2) which language will govern if a dispute arises. In addition, we should implement these modern contract drafting principles into our contracts – not only because they will help eliminate bias, but also because they are regarded as general best practices.

- Create a valid non-English translation of the English contract and consider using the non-English version as the primary contract, if suitable.
- Use visual contracts that incorporate images alongside or even replace text – a picture is worth a thousands words.
- Conduct the contract negotiation via email instead of phone to slow the pace and develop genuine understanding between the parties.
- Replace English legalese with English plain language that even a non-native English speaker could understand.

2. Gender Bias in Contracts

Gender bias occurs when the contract drafter presumes to know a party's gender preference

implying that one sex or gender preference is the norm. This type of bias commonly appears in employment agreements, such as confidentiality and intellectual property agreements, offer letters, or termination letters.

In order to promote inclusivity in our business relationships, contract drafters should steer away from using gender-specific pronouns or language in contracts. In 2018, Thompson Reuters noticed an increase in the number of clients requesting gender-neutral documents. More and more, clients are expecting contract templates to create a path of least resistance, speed up contract negotiations, and align with their core values. How can we do that if we use incorrect pronouns that can offend the other party right off the bat?

The truth is, gender roles and pronouns have no place in contracts. They do not add any value to contracts, nor would elimination of gender-specific pronouns detract value from contracts. As the world moves towards gender neutrality, our contracts should, too.

To eliminate gender bias from contracts, contract drafters should:

- Move away from third-person pronouns altogether. Instead, reference the parties' names as defined in the contract. For example, instead of writing "his services" you should write "the Contractor's services."
- Use gender fair or gender-neutral language throughout the contract. Until a gender-neutral pronoun is decided upon as a community, we should not be assuming that parties like one gender-neutral pronoun over another. For example, "they" is used as a gender-neutral singular pronoun in English, but not everyone likes it. In addition, courts have not yet ruled on the interpretation of "they" in a contract, which can be interpreted as either a singular gender-neutral pronoun or the plural pronoun referring to multiple people.
- Don't use a gender catch-all clause like, "Unless the context otherwise requires, a reference to one gender shall include reference to the other genders." That only reinforces gender stereotypes.
- Ask clients what their preferred gender pronoun is before entering into contract negotiations on your client's behalf. This way, when you refer to your clients in a negotiation with external parties, you represent your clients the way your clients want to be represented. (See how I avoided using a pronoun in this sentence?)

3. Resource Bias in Contracts

Like contracts, contract lifecycle management (CLM) platforms are powered by humans to some extent. Many artificial intelligence (AI) algorithms are trained by humans. Contract templates offered by CLMs are drafted by humans. Therefore, our humanistic tendency towards bias can permeate the world of legal technology. If we let it.

In fact, access to such legal technologies is, in and of itself, a presumption made by those of us who are guilty of implicit resource bias. We assume that everyone can review contracts as quickly as we can. Every jurisdiction has legalized e-signatures. All companies leverage systems to help manage contracts better. Why do we make this assumption? Because we assume other parties have the same resources we do. And if they're too slow or too disorganized, it's their fault for not putting a better system in place.

Here's a thought. What if the other party doesn't have access to future forward tools? What if they don't have the budget for it? How many times are you going to email them asking for an update before you realize that you're not helping?

While adoption of CLM and electronic signature tools is on the rise in the U.S., that is not the case in many other countries. When dealing with international contracts and parties who don't speak English, consider first whether the party's response time is impeded by their lack of access to legal technology. Then, ask what you can do to help. Here are a few ideas.

- Offer to create the final clean template for signature instead of asking the other party to do this. Finalizing a document is always easier when you have the right tools, like Word and Adobe, to create a clean document.
- Expect more time for contract review, negotiation and execution. While you may be a part of the most state-of-the-art legal department with a 24-hour contract review KPI, that doesn't mean the other party can keep up. To best manage this situation, practice some patience. If that is not possible because of an impending deadline, then offer to take on the next round of redlines or the bulk of the work.
- Leverage your tools for their gain. Legal technologies are generally SaaS tools that are charged on a subscription basis per user. Most of the time, use of the tool by third parties (vendors or customers) is built into the pricing. For example, you can leverage your instance of DocuSign to obtain a third-party signature on a contract with paying extra fees.

Contracts are the medium by which human relationships, ideas, and expectations, are brought to life and maintained over time. Therefore, contract drafters need to be mindful of implicit biases that can arise in contracts, contract negotiations, and contract management systems. Eliminating implicit bias in your contracts will help you negotiate better contracts, forge deeper relationships, and promote the principles of diversity, equity and inclusion.

If you would like to learn more about this topic, I have created a unique course for legal departments and sales and procurement teams, on Eliminating Bias in Contracts and Contract Negotiations through The Conscious Inclusion Company. Please reach out for more information.

Notes

[1] In the context of this article, "contract drafters" includes attorneys, contract managers, procurement specialists, or lay business persons – whomever is drafting and negotiating the contract at hand.

[2] Kenneth A. Adams, A Manual of Style for Contract Drafting XXXV (4th ed. 2018).

About the Author

Nada Alnajafi is an award-winning attorney with deep experience serving as in-house counsel for startups and public companies over the past 12 years.

She currently serves as Corporate Counsel for Franklin Templeton, a Fortune-500 global financial services organization. Previously, she worked in-house for Faraday Future, Lexus, and Concannon Business Consulting where she gained experienced in the automotive and tech industries.

Nada is passionate about leveraging the latest in legal tech to gain efficiencies in the contracts management process. With her dynamic legal and consulting background, she is more than just an attorney; she is a trusted advisor, business partner, project manager, creative problem-solver, and skilled negotiator. In addition, Nada enjoys training contract negotiators on the ins and outs of contracts negotiations and redlining etiquette.

During the pandemic, Nada wanted to find a way to connect with other contract professionals and, as a result, she created Contract Nerds – the new home for everything contracts.

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- Unique Offer by Thought Leader Patrick J. McKenna-

HELPING THE NEW FIRM LEADER SUCCESSFULLY TRANSITION

VIRTUAL ADVISORY SESSIONS

Leadership transitions do not occur as a series of linear or logical steps. If you are about to take the reins and transition into the role of Firm Leader, you are about to make a quantum leap into a new reality – one often containing big goals and complex challenges. Will you be prepared to successfully navigate this transition? Do these sound like some of the perplexing questions that you have been asking yourself:

- Am I really clear on the reasons why I accepted this position?
- How can I be sure that I have correctly understood what is expected of me?
- Which tasks should be a priority and which tasks can be put on hold?
- Who am I going to meet with first and what am I going to say?
- Have I defined the challenges and determined an approach for dealing with them?
- When can I begin to introduce change and what is my initial plan of action?
- How do I make sure that I have the support I need from the partnership?

These questions can rattle around in your brain with little clarity. My name is Patrick J. McKenna and since 2007, I have helped dozens of new firm leaders, many from AmLaw 100 and 200 firms, navigate their first 100 days by way of my highly successful Master Class (see: First 100 Days Masterclass with the various testimonials). These advisory sessions provide that same content – only in a highly interactive and customized one-on-one process. I can help you achieve the clarity you need and here is how I propose that we tackle your transition:

One-On-One Consultations
We will schedule a session approximately every second week (or weekly if required) – each lasting about 60-90 minutes by telephone or desktop video; and I will provide additional counsel by email as needed. The intensity of the support depends entirely on your unique needs. I am here to help you get the job done and your problems are my problems.

Homework and Reflections Assignments
You may expect to be provided with prescriptive reading materials, things to think about, thought-provoking exercises, and homework assignments – all to help you be highly successful in your leadership transition.

Document Review
I will also review and provide detailed feedback on any documents, reports or written notes related to your leadership transition – from formal job descriptions to your First 100 Days action plan.

These sessions will give you practical insights and actionable perspectives about how to succeed in your new role. And my entire process is:

TOTALLY CONFIDENTIAL – no one in your firm need know that you have retained a special advisor to assist you with your leadership transition.

EASILY ACCESSIBLE – from anywhere in the world through audio (telephone) or video (Zoom or other) desktop conferencing and either during regular office hours or at a time that is most convenient to you.

AFFORDABLE – your one-on-one advisory assistance is priced on a flat fee for Ten (10) sequential sessions (plus any disbursements) complete with my satisfaction guarantee – If you are not completely satisfied with the services provided during any session in this engagement, I will, at your option, either completely waive my professional fees or accept a portion of those fees that reflects your level of satisfaction.

WHAT IS INVOLVED IN MY FIRST 100 DAYS ADVISORY SESSIONS

Here are the issues that we will address over the course of our sessions together.

Session 1: **Beginning Before the Formal Handoff**
What competencies, resources, and skills do you bring to this new role and how will you lever age them?

Session 2: **Getting Clear on Your Mandate**
Review 4 predictable stages of your transition and 10-point critical action plan for working with your predecessor.

Session 3: **Understanding Your New Role**
How does your firm's current circumstances shape your expectations of what your first steps should be?

Session 4: **Hitting the Ground Listening**
Determine partners views of the important areas where you must succeed and what their ap petite is for change.

Session 5: **Working with Your Administrative Professionals**
Identify how well your administrative professionals are performing and how they should work with you.

Session 6: **Working Effectively with Your Business Units**
Review 10 elements of structural integrity and how you can help your practice/industry groups accomplish results.

Session 7: **Setting Your Strategic Agenda**
We will develop your specific 100 Day Action Plan identifying your priorities going forward

Session 8: **Stimulating Change That Sticks**
Review 25 different strategic levers you have available to you to stimulate productive change

Session 9: **Securing Early Wins**
Design some 'early wins' pivotal to building political capital and momentum around results

Session 10: **Managing Your Time – Priorities Dilemma**
How will you balance your time in the early weeks, given the demands that will be made?

LET'S ARRANGE A NO-OBLIGATION INITIAL DISCUSSION

Contact me (patrick@patrickmckenna.com) to set up a time for a get-to-know-you conversation. I will ask about the challenges and issues you are expecting to face in your first 100 days and you may ask me any questions you wish about my background and specific expertise.

There is no obligation to enlist my services as a result of our discussions and at the very least, I'm sure that I can provide you with some valuable initial counsel

Patrick J. McKenna

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