

# ARE YOU SUPERVISING AS YOU SHOULD? YOUR STAFF & YOUR PRACTICE DEPEND ON IT

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**T**he chief resource of a law practice is its workforce. To a large extent, success can depend on developing and retaining talented, well trained staff. The 'product' is legal services and delivery should be consistent regardless of which staff member has carriage of the matter. A sound, well implemented management system goes a long way to achieving this consistency.

Obligations surrounding supervision arise from legal profession legislation as well as under common law.

## Supervision of legal services

Rule 37 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* states: '[a] solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.'

The glossary to the conduct rules specifies that the 'solicitor with designated responsibility' means the solicitor ultimately responsible for a client's matter or the solicitor responsible for supervising the solicitor that has carriage of a client's matter. The case of *Kelly v Jowett* [2009] NSWCA 278 tells us that where a solicitor is employed by another solicitor, the client's retainer is with the employer.

What constitutes 'reasonable supervision' is not specifically defined however. What is required to meet the standard will vary depending on the particular circumstances existing at the time.

## 'Reasonable supervision' and the responsibilities of principals

The concept of reasonableness is reflected in s 34 of the *Legal Profession Uniform Law* (NSW) ('the *Uniform Law*'). This provision imposes an obligation on principals of law practices to ensure that reasonable steps are taken to ensure that all legal practitioner associates of the law

## Snapshot

- Good supervisory skills do not come naturally to everyone, which is why it is important for principals and supervisors to consider and acknowledge their strengths and weaknesses and 'up skill' accordingly.
- Importantly, principals and solicitors with 'designated responsibility' also have statutory obligations to exercise 'reasonable supervision' over their staff and the legal services provided by the firm.
- You, your staff and your practice will benefit from implementing a number of specific management systems.

practice comply with their professional obligations and also that the legal services provided by the law practice are provided in accordance with the *Uniform Law*.

Whilst it is impossible to comprehensively define the reasonable steps a principal must take (this will vary from practice to practice), a good starting point for all practices is to analyse the management system currently in place with the following question in mind: *is it still fit for purpose?*

The proverbial office 'open door' policy is unlikely to meet the required standard for a proper management system. Rule 37 implies a positive obligation to supervise. Declaring that your 'door is always open' shifts the responsibility from the supervisor to the supervisee. An inexperienced employee may not appreciate the extent of a potential problem until it is too late. Problems identified and addressed at an early stage are generally far easier to rectify.

## Liability of principals

Under s 35 of the *Legal Profession Uniform Law*, if a law practice contravenes any provision of the *Uniform Law* or the *Uniform General Rules* imposing an obligation on the law practice, a principal of the practice is taken to have contravened the same provision if:

- the principal knowingly authorised or permitted the contravention; or
- the principal was in, or ought reasonably to have been in a position to influence the conduct of the law practice in relation to its contravention of the provision and failed to take reasonable steps to prevent the contravention.

For example, s 174 of the *Uniform Law* imposes an obligation on a law practice to make costs disclosure to a client when or as soon as practicable after instructions are initially given in a matter unless there is an exception. In circumstances where disclosure is required to be made and is not made, the law practice contravenes this provision.

In addition to the consequences which flow under s 178 of the *Uniform Law* there may also be implications for the principal/s of the practice pursuant to s 35. This emphasises the importance of having appropriate management systems to ensure that all practitioners within the practice comply with cost disclosure requirements.

## The statutory condition to engage in supervised legal practice

Section 49 of the *Legal Profession Uniform Law* (NSW) imposes a statutory condition on an Australian practising certificate issued in NSW whereby a practitioner must, for a certain period of time (either 18 or 24 months) engage in supervised legal practice only. Supervised legal practice is defined in s 6 of the *Uniform Law*. In the case of an employee of, or other person working under supervision (eg a volunteer)

in a law practice, s 6 specifies that supervision must be by an authorised principal of the practice.

Rule 7 of the *Legal Profession Uniform General Rules 2015* also applies in the case of employees of, or other persons working under supervision in law practices and broadens the definition of supervised legal practice in these instances to include supervision by an employee of the law practice who is authorised by his or her practising certificate to supervise others (the supervisor need not be a principal of the law practice).

Rule 7 was amended in December 2015 and now specifies that where an employee is on secondment, supervision may be effected by a supervising lawyer subject to certain conditions.

Upon completion of the required period of supervised legal practice and by way of annexure to an application by the restricted solicitor seeking removal of condition 2 from his or her practising certificate, the supervisor must certify that the restricted solicitor completed supervised legal practice under his or her supervision.

The above provisions make clear the need for supervision, the focus then turns to implementing appropriate management systems.

### Management systems

As stated earlier, an 'open door' policy is just one component of what is needed to create an effective management system.

The system appropriate to a practice will vary depending on a variety of factors including the size of the practice, the type of legal work carried out and the qualifications and experience of employees.

All practices would never the less do well to consider the following components of their management systems:

#### Culture

The culture of the organisation must support the management system. It is vital to develop a supportive culture which promotes shared learning and encourages people to bring forward issues or mistakes. This can be achieved whilst also promoting accountability.

#### Meetings

Regular individual and team meetings are the cornerstone of keeping informed. Where possible, meetings should be scheduled for days and times that afford the opportunity for uninterrupted

discussion and physical perusal of files. Schedules will vary from practice to practice but whatever schedule is adopted, it is vital that it is adhered to.

#### File review

Fee earners should review all of their files on a regular (say monthly) basis. Complimenting this, supervisors should also take the time to physically review the files of their supervisees. This can be done on a random basis or supervisees may utilise this system to seek assistance on a particular issue by preparing a memo to accompany the file for review.

With competing demands of a busy practice there is a danger that inactive files are overlooked. Inactive files can be a sign that all is not well and these files should also be monitored on a regular basis.

#### Peer supervision

The well-known 1974 case of *Re Mayes v Legal Practitioners Act (1974)* 1 NSWLR 19 is a reminder that supervision should not be limited to junior employees. In this case, a solicitor was found guilty of professional misconduct as a result of failing to exercise any control over the trust account of the partnership, thus enabling the other partner to misappropriate trust funds. It was held that it is no answer for the solicitor to claim that he left the financial affairs of the firm to his partner. Each partner has a responsibility to see that there is a proper system in place to which each has access to see that the rules are being obeyed.

In addition to attending to obligations regarding trust accounts, a system of file review amongst peers should be an integral part of any management system.

A suggested file review checklist can be found in the Compliance Review Toolkit which is available for download from the Law Society website. See: <http://lawsociety.cld.bz/Compliance-Review-Toolkit>

#### Practice and procedure

Procedures and protocols form a crucial part of any management system. When adopted on a firm wide basis, they promote consistency in effective handling of matters. Staff must be fully briefed on all procedures and policies at an early stage.

The area of practice will dictate much in terms of policies, however most practices will have a need for procedures in areas such as client engagement,

file opening, conflict checking, client retainers, costs disclosure, client meetings, approval of letters of advices, briefing counsel, court appearances, undertakings policy and billing.

Diaring critical dates such as limitation periods and next in court dates, both electronically and on paper, is a valuable risk management tool. It is always wise to have the dates also noted in a central system which is checked daily and well in advance of critical dates becoming due.

If in the course of legal practice it is anticipated that the firm or an employee might be required to give an undertaking, it is important that the firm has in place a clear and comprehensive policy dealing with the giving of, review of, and discharge of undertakings. This policy needs to be strictly implemented and adhered to.

#### Training

Good supervisory skills do not come naturally to everyone, which is why it is important for supervisors to consider and acknowledge their strengths and weaknesses and 'up skill' accordingly. One of the most important skills to develop as a supervisor is the ability to communicate. By communicating effectively and knowing team members, appropriate tasks can be assigned to appropriate people. It is also critical that supervisors keep up to date with changes in legislation and current judicial opinion. Internal newsletters are an effective communications tool to keep staff updated on any changes.

#### Complaints register

The first step in handling complaints is to ensure that all complaints are logged in a register. A regular review of the register may provide a clear indication of where action is needed. Patterns may emerge concerning a particular individual or a particular practice area. Acting on and dealing with complaints at an early stage can often prevent the issue from escalating.

#### Regular audits/feedback sessions

The ebb and flow of legal practice requires regular auditing of the management system to ensure it remains fit for purpose. The focus should always remain on being proactive as opposed to reactive. As part of the audit process, it is also important to encourage regular feedback from team members (perhaps on an anonymous basis). **LSJ**