Keeping a watchful eye:
Supervision in law practices

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AN ISSUE THAT ROUTINELY CAUSES VEXATION FOR RISK MANAGERS AND FOR REGULATORS OF THE LEGAL PROFESSION ARISES FROM QUESTIONS AROUND THE TYPE AND QUALITY OF SUPERVISION PROVIDED FOR LEGAL PRACTITIONERS AND SUPPORT STAFF. THE COST OF NOT PROPERLY SUPERVISING EMPLOYED STAFF CAN PRESENT IN A MULTITUDE OF WAYS.

Sources of obligation

Under the *Legal Profession Act 2006* (LPA) there are obligations which fall upon the principal of a law practice; including vicariously. Critically, a principal is personally responsible for their law practice's compliance with the obligation relating to operation of a trust account as set out in Part 3.1 of the LPA[1]. Principals will often employ support staff such as bookkeepers and office managers to assist them in complying with their various regulatory obligations. Bearing in mind the personal responsibility of the principal however, it becomes evident that a principal cannot simply delegate the task and think no more of it. A principal must maintain oversight. It is important to ensure that the person employed to undertake these day to day tasks has the appropriate experience or is provided with the necessary training to ensure that the principal is not left exposed to a claim because a support staff member has not understood the law practice's responsibilities or inadequately fulfilled their role. A defalcation on the trust account will fall at the principal's feet even if they were not directly involved in the dishonesty so proper supervision in that regard is critical.

Supervision of employed professional staff is just as critical. This includes reviewing the quality and accuracy of their work, encompassing Court work, as well as the preparation of bills for client. The decision of the New South Wales Administrative Decisions Tribunal in *Legal Services Commissioner v Keddie*[2] is an example of a principal being subjected to disciplinary proceedings as a result of a bill issued to a client that had been prepared under the direction of an employed solicitor of the firm and where the principal had approved the amount of the bill based simply on the assurance of the employed solicitor. In that matter there was evidence before the Tribunal that it was standard practice for a senior solicitor to prepare and send out a narrative bill to client and in respect of this particular client Keddie had not taken an active role in reviewing the bill or otherwise taking steps to ensure the bill was accurate. It transpired that the bill contained numerous errors and duplications resulting in a determination that the firm had overcharged by about $215,000 on a bill which originally was for an amount of just over $558,000 for professional fees. Principals therefore need to take an active role in reviewing all bills that leave the firm; ultimately they may be the one answering to a costs assessment, a taxation, or even a Law Society complaint investigation or an application in the Disciplinary Tribunal if problems arise.

Arguably the need for proper supervision is also a workplace health and safety issue. "Health" in the *Work Health and Safety (National Uniform Legislation) Act 2011* is specified to include psychological health[3]. Stories of the problems found after an employed solicitor or other support staff member leaves the firm abound; anecdotes about files found hidden in odd places around the office (in vents, desk drawers,

etc) and efforts by the person to cover up problems on their files are not uncommon. Is this a sign that the employee just wasn't coping and didn't know how to ask for help? Or that they felt there would be no support for them if they came forward? Behaviour such as this is very problematic for a firm. It can result in claims against the firm's professional indemnity insurance and complaints to the Society. It could however, also lead to stress leave and other work health related claims against the employer.

A legal practitioner on a Restricted practising certificate bears responsibility as well. It is a condition of their practising certificate that they only engaged in supervised legal practice. Such supervision must be provided by the holder of an unrestricted practising certificate – defined as meaning "an Australian practising certificate that is not subject to any condition under [the LPA] or a corresponding law requiring the holder to engage in supervised legal practice or restricting the holder to practise as or in the manner of a barrister[4].

Under section 73, this is a mandatory condition of practising certificates and remains until the holder can demonstrate that they have satisfied the requirements to be eligible for an unrestricted practising certificate. In the Northern Territory there are four prescribed categories of practising certificate under the *Legal Profession Regulations 2007;* Unrestricted, Restricted (Barrister and Solicitor), Restricted Corporate and Barrister[5]. Regulation 7(3) clearly identifies that the holder of a Restricted (Barrister and Solicitor) practising certificate can only engage in supervised legal practice; in other words this is the type of practising certificate issued until such time as the statutory condition pursuant to section 73 is satisfied. The responsibility bears upon the practitioner to comply with the conditions of their practising certificate so it is important that as the holder of a Restricted (Barrister and Solicitor) practising certificate a practitioner can identify the unrestricted practitioner who is supervising their legal work. Non-compliance with the conditions of a practising certificate is an offence under the LPA[6]. Additionally it is a matter that can be taken into account when determining whether or not to renew a practising certificate or to grant a practising certificate[7]. There are similar legislative provisions in the other Australian jurisdictions so if non-compliance with a condition on a Northern Territory practising certificate is established it can stay with you if applying to practise elsewhere in Australia.

Consequences of lack of supervision

The consequences for a firm and its principal if staff are not properly supervised can present in a variety of different arenas, but the end result is essentially the same - time and money spent dealing with the fallout.

A lack of supervision of employed staff can result in disciplinary proceedings. There are a number of decisions where practitioners have faced disciplinary outcomes from failure to supervise support staff such as bookkeepers, conveyancers and clerks. Some examples include:

- *Re a Solicitor*[8] was a case where the misappropriation of clients' trust monies arose when a senior practitioner employed a clerk to attend to the practice's books. Whilst the Court accepted that the principal had no personal knowledge of the deficiency in the trust books and had no part in any misappropriation of funds, "the principal's neglect and lack of supervision made the misappropriation possible and he should be held guilty of misconduct. It is more than neglect; it is a deliberate failure to exercise any control or supervision on the clerk who handled his clients' moneys."[9]
- In *Council of the Queensland Law Society v Tunn* [10] the practitioner was found guilty of unprofessional conduct for failing to properly supervise the practice's conveyancing clerk. There were 10 separate complaints arising from a variety of errors on conveyancing matters over a period of 15 months. The Court found that whilst the practitioner had engaged an experienced conveyancing clerk, she found the position stressful and there was inadequate support as the practitioner was the only legally qualified member of the practice and was often away from the office. Even when this had been brought to the practitioner's attention, no steps were taken to resolve the situation. As a result of prior disciplinary findings and other conduct findings at the same hearing the practitioner was struck off.
- The decision in *Law Society of New South Wales v Foreman*[11] resulted in Foreman being

found guilty of professional misconduct as a result of failing to supervise the work of an employed clerk and that he permitted, or failed to supervise, transactions that involved the intermingling of the affairs of clients of the practice with the affairs of the clerk's wife and their companies. The background to that matter was that Foreman had acquired another law practice and inherited a clerk of that practice. The clerk had significant involvement in the operation of a mortgage practice for the other law practice which was continued in Foreman's law practice. The clerk became a bankrupt during his employment with Foreman. There were a number of trust account defalcations and transactions where a conflict of interest arose between the clients' interests and the clerk's own personal interests. It was found that whilst Foreman had not personally engaged in any dishonesty and had not completely abrogated his duty to supervise the clerk, he had not attached sufficient importance to the task of supervision and had not faced up to his responsibilities.

As to the considerations for what is needed in supervising employed staff Mahoney JA observed in *Foreman*[12]:

> "What will be required for the discharge of a solicitor's responsibilities in a case such as the present must, even within such confines, be affected by the circumstances of the case. It will, for example, be affected by the solicitor's knowledge on a continuing basis of the competence and integrity of the clerk. It will be affected also by the nature of the transactions taking place or apt to take place within the clerk's scope of activities. But, without seeking to be definitive or exhaustive, it will be of assistance to see as involved in the conduct of a solicitor's practice, inter alia, five things:
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> (1) a knowledge of the law to be applied;
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> (2) the proper application of the law to the individual transactions carried out by the clerk;
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> (3) the efficient and effective processing of those transactions from their commencement to the completion of them;
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> (4) the observance of the statutory and other requirements in respect of the dealing with moneys received into the practice; and
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> (5) the observance of the general obligations of those involved in the conduct of a legal practice, relating to, for example, conflict of interest, the conduct of fiduciaries, and the general ethics and etiquette of lawyers and those associated with them."

There seem to be only a handful of decisions regarding disciplinary proceedings containing a specific charge against a practitioner for failing to supervise their employed professional staff. In the Legal Practice Tribunal (Queensland) decision in *Legal Services Commissioner v Baker*[13] Moynihan SJA found that a charge that Baker had failed to adequately supervise the conduct of solicitors employed by the firm[14] was made out and constituted unprofessional conduct. The circumstances of that charge were that the Queensland Law Society had written to the firm on 24 May 2001 seeking its response to a complaint made by a client. The letter by a partner of the firm (not Baker) in response, dated 30 May 2001, contained information that was determined by the Tribunal to be patently incorrect. The letter had been prepared by the employed solicitor with conduct of the file. Moynihan SJA concluded that

> "Given the considerations canvassed it was irresponsible for the *practitioner* [Baker] to permit the letter to be sent without satisfying himself if (sic) was accurate and well founded."

The finding of guilt on this particular charge was overturned on appeal by the Court of Appeal[15], not on the basis that Baker could not be held accountable for failing to adequately supervise an employed solicitor but on the basis that there was no evidence that Baker had seen or was aware of the Law Society's letter or the firm's response to that letter.

The decision in *Keddie*[16] and the unreported decision of the Legal Practice Committee of Queensland in *Legal Services Commissioner v Duffield*[17] are instances where a principal has been found to have engaged in unprofessional conduct for charging grossly excessive fees in circumstances where an employed solicitor prepared and rendered a bill to the client and the lack of proper supervision was identified as causal to the disciplinary proceedings.

Not properly supervising staff, particularly professional staff, can lead to a claim on the firm's professional indemnity insurance. The Society's approved professional indemnity insurer, Marsh, has introduced a Risk Management Checklist for firms to self-audit their exposure to risk. This checklist is an invaluable tool for firms to take a moment to step back and review their processes and their employed practitioner's work.

Aside from the institutional risk of complaints processes and insurance claims there is the more invidious but equally (if not more) harmful reputational risk for a firm. Whilst a disgruntled client may not make a negligence claim or complain to the Society they are very likely to tell their family, friends and anyone else who will listen about their lawyer who "has no idea" and "screwed up their case". Generally it will be the firm's name, not just the individual practitioner, attached to these criticisms.

What constitutes adequate supervision arrangements?

Some Australian jurisdictions have introduced policies as to the requirements for supervision of employed legal practitioners. The Legal Practice Board of Western Australia has guidelines[18] about the minimum requirements for supervision which includes:

- Daily contact between the supervising practitioner and the practitioner on the restricted practising certificate for the purpose of review, guidance and instructions;
- Any legal advice or assistance by the restricted practitioner to clients is approved by supervising practitioner; and
- The supervising practitioner scrutinises and sign-off on correspondence and other documents.

The Legal Services Board in Victoria requires that the supervising practitioner provides regular support and feedback sessions and must be able to direct, amend, override or intervene in relation to legal work[19].

The Law Society Northern Territory does not have a formal policy regarding what constitutes adequate supervision arrangements for employed staff. Any complaints or concerns about supervision are reviewed and assessed on a case by case basis.

The extent of supervision required by a practitioner will be significantly impacted by the experience of the practitioner and the area of law in which they are engaged. The supervision required for a recently admitted practitioner will generally be different to that of someone who has been practising for two decades. The level of experience in a particular area of law may also have an impact; someone practising in criminal law for a decade who is now being given family law files is likely to require additional oversight.

Supervision can take many forms:

- regular meetings between the supervising practitioner and the employed practitioner;
- team meetings;
- regular or random file reviews (with or without the employed solicitor present);
- checking and approving any correspondence or documents.

Historically principals could to some extent keep an eye on the conduct of all files within the firm by the morning task of going through all incoming mail and flicking through the outgoing mail basket in the afternoon (or even requiring that all outgoing mail be signed by a principal). The efficacy of these practices has been significantly eroded by our increasingly technologically oriented workplaces; first with introduction of the facsimile machine and more recently with the onslaught of email communications. Principals need to be alert to the impact of the increased use of technology and the changing manner in which clients and other parties engage with the firm, and consider whether their supervision and risk management practices are keeping up.

There is of course the old chestnut of the "open door policy". It can be an invaluable opportunity to monitor the development of junior practitioners and have problems brought to a principal's attention at an early point when there is still the prospect of salvaging the situation (or notifying an insurer in a timely fashion). It should however also be treated with some caution.

For an open door policy to work effectively a number of key ingredients must be present. The employee must feel comfortable that they can approach their supervisor to ask questions and seek direction without being criticised or belittled. If an employee routinely receives an adverse reaction when they seek guidance then at some point they may simply stop asking. This can have dire consequences for the employee (at risk of becoming stressed and worried about their work with no system of support available to help them manage) and for the employer (insurance claims, complaints to the Society and unhappy clients who don't want to pay their bill).

The employee also needs to be able to recognise what is within their ability and what is beyond it. An employee who has over-exaggerated views of their own ability and competence is a danger to the firm. They won't utilise the open door policy because they don't feel they need any assistance and if they haven't recognised that their approach or advice is missing something critical the end result is the same – insurance claims, conduct complaints and unhappy clients.

Having a system or structure to supervision, in addition to an open door policy, has several advantages. The process of creating the system or structure, and periodic reviews of the effectiveness of the supervision arrangements, can be beneficial. It will cause the principal and their employed staff to reflect on what supervision is about, why it's necessary and what the principal is aiming to achieve through any supervision arrangements. It is also an opportunity to look at what is workable and practical for that particular firm and its staff. One size does not necessarily fit all.

Structured supervision also creates a paper trail. If called upon in responding to any insurance claim or questions from the Society about supervision of a particular employed practitioner, the ability to demonstrate a structured approach to supervision arrangements will be invaluable. Documentation of the implementation of the supervision policy (filenotes recording file reviews or supervision meetings, notation on file covers of dates and results of file reviews, etc) could be the difference between a good, early outcome for the principal on a claim/complaint and considerable stress and cost as a claim or complaint is pursued further.

See supervision as an opportunity

Supervision can be seen as a chore or a low priority. The costs of not properly and actively engaging in supervision of employees, professional and support staff alike can be significant. Time and money spent dealing with professional indemnity insurance claims, Work health claims, disciplinary complaints as well as loss of productivity for the firm overall are some examples. A proactive approach to supervision can result in potential problems being detected (and resolved) early together with more confident, capable and productive staff. ●

Endnotes

1. Section242
2. [2012] NSWADT 106
3. Section 4
4. Section 4
5. Regulation 7(1) of the *Legal Profession Regulations 2007*
6. Section 78
7. See sections 47(2)(b) and 11(1)(d)(iii)
8. [1960] VR 617
9. Ibid at page 622
10. [2004] QCA 412
11. (1991) 24 NSWLR 238
12. Ibid at page 250
13. [2005] LPT 002, 27 September 2005
14. The entire charge read "That the *practitioner* failed to adequately supervise the conduct by solicitors employed by the *firm* in the *Hajistamoulis* matter in that he failed to adequately supervise the drafting and sending of a letter of 30 May 2001 to the Queensland Law Society."
15. *Legal Services Commissioner v Baker* (No 2) [2006] 2 Qd R 249
16. *Legal Services Commissioner v Keddie* [2012] NSWADT 106
17. The Legal Practice Committee of Queensland found that the obligations of a legal practitioner, as the holder of an open practising certificate, are to be responsible for the proper management and supervision of his firm and that the practitioner had failed to discharge that responsibility, even though there were mitigating circumstances. The charges of charging fees that were grossly excessive and failing to maintain reasonable standards of competency or diligence in the preparation and rendering of statements of account were both made out and both constituted unsatisfactory professional conduct. The practitioner had refunded monies to the client. The practitioner was publicly reprimanded and ordered to pay the Legal Services Commissioner's costs.
18. http://practitioner.lpbwa.org.au/Restricted-Practice-and-Supervised-Legal-Practice/Supervised-Legal-Practice-Guidelines-(Legal-Profession-Act-2008)
19. http://www.lsb.vic.gov.au/documents/RRP_012_Supervised_Legal_Practice_Policy_V1_(Mar_12).pdf