

**ACT Law Society Ethics Series –
'The Ethical Dimension of Supervision in Legal Practice'**

Supervisors' compliance with ethical and conduct obligations¹

A client's retainer is with the law practice (i.e. the employer) and not employees of that law practice. Whilst day-to-day work may be delegated to an employee, the employer remains responsible for fulfilling the client retainer.² A principal who fails to adequately supervise their staff potentially breaches his/her professional obligations, potentially committing professional misconduct.³

Inadequate supervision can also cause an employed lawyer to fall foul of their own professional obligations. Inadequate supervision does not relieve an employed lawyer of their professional obligations (e.g. where proper supervision might have avoided an employee's breach of their professional obligations) or the consequences of failing to observe those obligations.

Supervision is also relevant to:

- complying with practising certificate conditions requiring that a holder of a restricted practising certificate only practice whilst supervised;⁴ and
- eligibility for a lawyer to apply for an unrestricted practising certificate, having completed the minimum required 2 years of supervised legal practice.⁵

ACT solicitors' conduct rules

Rule 37 of the *Legal Profession (Solicitors) Conduct Rules 2015* ('**Conduct Rules**') requires:

Rule 37 — Supervision of legal services

- 37.1 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.

These Conduct Rules are based on the national model for solicitors' conduct rules developed by the Law Council of Australia, which includes a version incorporating

¹ This paper has been prepared by Athol Opas, barrister, Blackburn Chambers. It represents the author's views but does not purport to represent the views of the ACT Law Society.

² *Kelly v Jowett* [2009] NSWCA 278, McColl JA at [70] and Barrett J at [96].

³ *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238.

⁴ *Legal Profession Act 2006* (ACT), sections 47(7)(a)(iii) and 50.

⁵ *Legal Profession Regulation 2007* (ACT), section 10.

commentary for the benefit of constituent bodies and their members. Unlike various other Conduct Rules, rule 37 is not accompanied by additional commentary.

What is ‘reasonable supervision’?

Logically, ‘reasonable supervision’ does not amount to ‘strict liability’ and does not necessarily mean that every transgression will shoot home to the principal. Even with reasonable supervision, an employee can ‘go rogue’ and commit acts that a reasonable supervisor would not have approved. The Full Court of the ACT Supreme Court acknowledged:⁶

“[A] solicitor cannot possibly have a full knowledge of everything done by all his partners and employees. He must take all reasonable steps to exercise joint supervision and control.”

In *Foreman*, Mahoney JA listed five factors generally relevant to a solicitor discharging their duty to supervise a clerk:⁷

1. Knowledge of the law to be applied;
2. Proper application of the law to the transaction(s) in question;
3. Efficiently and effectively processing transactions from commencement to completion;
4. Observing statutory and other obligations applicable to moneys received into the practice; and
5. Observing the general obligations of those involved in the legal practice, such as conflicts of interest, fiduciary obligations, general ethics and lawyers’ etiquette.

In the event that a principal becomes aware of shortcomings by an employed solicitor, the principal must “*take control of the situation*”.⁸

The degree of required supervision will depend on factors such as the competence, integrity, experience, qualifications and role of the employee and the type and complexity of the work being performed.⁹

In online ‘Guidance for supervisors’, the Victorian Legal Services Board + Commissioner has provided useful and practical guidance on what it considers to be “good supervision”.¹⁰

⁶ *Re Johnston* (1979) 32 ACTR 37 at 40.

⁷ *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238 at 250. Despite references to ‘clerk’, I interpret these as applicable to employed lawyers.

⁸ *Kelly v Jowett* [2009] NSWCA 278, Barrett J at [98] and [99], citing *Keppie v Law Society of the Australian Capital Territory* (1983) 62 ACTR 9 at 19.

⁹ *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238 at 250; *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002 at [42].

¹⁰ https://lsbc.vic.gov.au/?page_id=5684

What good supervision looks like

Supervision will, naturally, be more focussed at the beginning of the supervised legal practice period. As the supervisee acquires more experience, and begins to undertake more complex legal work, the level of supervision required will change.

It is expected that a supervisor will:

- have daily contact with the supervisee;
- assign work to the supervisee that is within the capabilities of the supervisee;
- actively manage the supervisee's workflow;
- be aware of all work being undertaken by the supervisee;
- be aware of instructions the supervisee might receive directly from clients;
- conduct regular and structured one-on-one meetings with the supervisee;
- review all correspondence and advice prepared by the supervisee, to ensure it is accurate;
- be available to discuss issues with the supervisee as they arise ('open door policy');
- tailor the style of supervision to the supervisee;
- allow the supervisee to approach them with mistakes; and
- consider whether they require training/feedback on how to supervise.

This online Victorian publication usefully expands upon each of the above points.

Online guidance published by the Queensland Law Society describes what does not amount to 'reasonable supervision', stating:¹¹

The following is unlikely to constitute reasonable supervision:

- to simply leave the person who is being supervised to his or her own devices;
- to not have in place a system or practice involving the regular review of the matters¹ conducted by the person being supervised. Solely relying on that person to bring any difficulties to the attention of their supervisor is not sufficient – the supervising solicitor must be proactive in their supervision;
- to delegate the entire conduct of the matter; or
- simply tell the person being supervised that you have an 'open door policy' if they have any queries.

A failure to take proactive steps to check and supervise could result in disciplinary charges being levied against the supervisor.²

¹¹ https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_16_-_Supervision - see paragraph 3.1.

Supervision in changing legal practice - remote working arrangements

Supervisory obligations of principals over employed lawyers and other staff are probably more easily understood in traditional legal practice (a solicitor working within a law practice under the watchful eye of their supervising principal). However, the evolution of legal practice, including flexible working arrangements, ‘new law’ and secondment-based legal practice pose new questions about how to satisfy principals’ obligations to supervise staff. In 1991, Mahoney JA stated:¹²

“The kinds of practices now carried on vary considerably and the managerial and other structures within legal practices vary and will, no doubt, vary further to meet the needs of a changing profession. What will be proper in one kind of practice may not be proper in another.”

If an employed lawyer works remotely (e.g. from home), that should not effect the degree of supervision over their work. However, the practicalities will of course differ, as compared to being physically present at the office of a typical law practice.

The Victorian Legal Services Board recommends that an application for Board approval of a remote supervision arrangement¹³ should show how the supervisor will:¹⁴

- have daily contact with the supervised lawyer;
- assign work to the supervised lawyer that is within their capabilities;
- actively manage the supervised lawyer’s workflow;
- be aware of all work being undertaken by the supervised lawyer;
- be aware of instructions the supervised lawyer might receive directly from clients;
- conduct regular and structured one-on-one meetings with the supervised lawyer;
- review all correspondence and advice prepared by the supervised lawyer;
- be available to discuss issues with the supervised lawyer as they arise (“open door policy”);
- tailor the style of supervision to the supervised lawyer;
- encourage the supervised lawyer to approach them with mistakes; and
- consider whether they require training/feedback on how to supervise.

¹² *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238, Mahoney JA at 249.

¹³ Victoria requires Victorian Legal Services Board approval of remote supervisory arrangements.

¹⁴ https://lsbc.vic.gov.au/?page_id=6055.

The Queensland Law Society recommends proper systems for supervision, depending on the nature of the practice, the type of work and experience of the practitioner being supervised, which should ideally include regular face-to-face contact.¹⁵

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¹⁵ https://www.qls.com.au/Knowledge_centre/Ethics/Guidance_Statements/Guidance_Statement_No_16_-_Supervision - paragraph 3.3.