Designated responsibility

The supervisory duties of a law firm principal

It is a breach of the *Solicitors Conduct Rules* to allow an employee to have conduct of a matter without reasonable supervision. This article considers two matters relating to the duty to supervise.

The *Legal Profession (Solicitors) Conduct Rules 2015* contain an express duty for solicitors with designated responsibility for a matter to exercise reasonable supervision over all employees engaged in the provision of legal services for that matter.[1] This is a non-delegable supervisorial responsibility.[2]

Allowing an employed solicitor, clerk, paralegal, or any other employee to have the conduct of a matter without reasonable supervision breaches that rule and, depending on the seriousness of the failure involved, may constitute unsatisfactory professional conduct or professional misconduct, especially in financial matters.[3]

Supervisors' duties

Kelly v Jowett [2009] NSWCA 278 (4 September 2009)

This case was an appeal from a Family Provision Act matter where an employed solicitor handling the matter in the first instance had, among other things, deliberately and consistently flouted the Court's orders and directions, and had failed to file affidavit evidence in the matter. The Court of Appeal considered whether there had been a failure by the firm to supervise the employed solicitor.

The employed solicitor signed a notice of appearance as the solicitor on record. During the conduct of the matter he failed to keep the client appraised of the progress of the matter, failed to comply with undertakings to file affidavit evidence within defined times, gave the clients 20 minutes' notice of a Court-ordered mediation (which the client was unable to attend due to the late notice), and had failed to inform the clients of the hearing because he had told them he would be seeking an adjournment. The employed solicitor appeared at the hearing, without the clients, and gave submissions.

In short, the carriage of the matter was left entirely to the employed solicitor. The partners of the firm did not take any direct role in supervising the employed solicitor's conduct of the matter. This remained the case even after the partners knew of the employed solicitor's unreliability and his serial delinquency in complying with the Court's directions. The partners told him "This file is your mess, clean it up".

By the time of the Appeal judgment, the employed solicitor was no longer practising. Other solicitors within the firm described the employed solicitor's conduct in intra-firm communications as "woeful".

After considering the circumstances, McColl JA (with whom Beazley JA and Barrett J agreed), held that:

> 78. Leaving [the employed solicitor] to conduct the Equity Proceedings, in my view, indicated a substantial failure on [the

partners]' parts to appreciate the extent to which they had failed, in the circumstances, to discharge their duty to the Court. [...] [One of the partner]'s statement to [the employed solicitor], "this file is your mess, clean it up", also manifested a serious failure by [the partners] to appreciate their duties to their clients, the opposing party and the court.

79. It was [the partner]'s responsibility to ensure that the court's orders and rules were complied with in relation to matters conducted by their law firms. They are as responsible for his persistent failures to comply with court directions from October 2007, as they are for his failures to comply in 2008 when they were clearly on notice of his omissions in this respect. In short, they were responsible for the neglectful manner in the way their firm conducted the Equity Proceedings: *Myers v Elman* (at 335) per Lord Porter.

[After considering the partners' conduct of the client's appeal proceeding]

88. I am of the view, accordingly, that [the respondent]'s costs of the substantive appeal were costs he incurred by [the partners]' serious neglect in the conduct of the Equity Proceedings, as well as without reasonable cause in circumstances for which they were responsible, such as to warrant making an order that they indemnify [the respondent] against the costs he has incurred in connection with that appeal: s 99, *Civil Procedure Act*.

As Barrett J observed, after considering the decision of

"It seems to me to be of the essence of the relationship that the solicitor retain individual, personal responsibility to his client. If a solicitor is employed by another, the retainer is with the latter. In relation to a covenant which forbad one of the parties to practise as a solicitor, Russell LJ in *Way v Bishop* [1928] Ch 647 at 660; [1928] All ER Rep 409 at 414, said: 'In my opinion, the phrase "practising as a solicitor" connotes a person who is a principal; it connotes a person who has clients'..."

— *Re Bannister* (1975) 5 ACTR 100 per Fox J at 104

HUMAN "I" IN CLOSEUP, BY NITHI ANAND

> "Solicitors in sole practice or in partnership should not allow an employed solicitor to be the solicitor on the record in proceedings, even if the employed solicitor holds an unrestricted practising certificate. As McColl JA has observed, the client does not retain the employed solicitor; the retainer is with the employer. The solicitor retained has clear and direct responsibility to the client for the execution of the retainer. Personal assumption of the role of solicitor on the record and the specific relationship with the court that it entails are part of that responsibility, even though day-to-day work may be delegated to an employee."
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> — *Kelly v Jowett* [2009] NSWCA 278 per Barrett J at 96

Blackburn CJ, Kelly and Gallop JJ in *Keppie v Law Society of the Australian Capital Territory* (1983) 62 ACTR 9:

> 99. Neither [partner] acted to "take control of the situation". Neither sat down with the employed solicitor to get to the bottom of the matter. Neither took over the file and gave it his personal attention or arranged for another solicitor to do the necessary work. [...]
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> 100. By their failure to act, the partners of the firm allowed to emerge the very situation they were duty bound to avoid, that is, one in which the clients' interests not only were left unprotected but came into conflict with their own.
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> 101. The court should exercise its supervisory jurisdiction over legal practitioners by making against [the partners] the [costs] orders proposed by McColl JA. To allow the matter to rest on an undertaking proffered by them would not sufficiently register the court's disapproval of their conduct.

The Council of the Law Society of NSW v Byrnes [2016] NSWCATOD 64

This case involved an allegation that a practitioner failed to supervise an office manager. The practitioner had been acting for a wife in a family law matter. Relations between the practitioner and the wife were strained due to an earlier unfounded complaint she had made against him about his fees.

The Federal Circuit Court made orders that the husband pay $25,000 within three months and a further $20,000 within six months of the orders. The payments were to be made to the wife's solicitors. The first payment was made two days late, but was otherwise paid in accordance with the orders.

By the time the second payment was due, the practitioner was owed about $15,000 in fees. He had an irrevocable authority from the wife authorising the payment of part of the second payment toward those fees. The practitioner became concerned that the husband might pay the second payment directly to the wife, thereby preventing him from applying it to his fees.

The practitioner sought confirmation from the husband's solicitor

that payment would be made in accordance with the Court's orders. The husband's solicitor failed to respond on several occasions and was then unable to confirm with any certainty that payment would be in accordance with the orders.

The practitioner then instructed his office manager to contact the husband directly to confirm that the second payment would be made accordance with the Court's orders.

Later that day the husband sent an email to the practitioner expressing his annoyance at having been contacted directly and asked for an apology. The practitioner responded by saying that he had attempted to communicate via the husband's solicitor, but had been ignored, and threatened debt recovery action if payment was not received by the specified date.

The husband complained to the NSW Law Society. The NSW Law Society charged the practitioner for (a) instructing his office manager to communicate with a client of another solicitor; (b) failing to supervise his office manager in that she breached confidentiality by inquiring with the husband's receptionist when payment would be made; and (c) communicating with a client of another solicitor and threatening recovery action.

Relevantly, the practitioner acknowledged that he had breached his professional obligations, and had expressed contrition and remorse for doing so. The NSW Civil and Administrative Tribunal found that technical breaches of the Rules had occurred. However, the Tribunal disagreed that the practitioner had failed to supervise his office manager in respect of the breach of confidentiality. The Tribunal found that:

> 29. [...] when one considers the nature of the communication, it is impossible to be satisfied that any confidential information was provided to anyone other than the husband or his secretary. Further, the only information that was provided was an enquiry when a payment was to be made. This is not an instance where confidential information was disclosed of a kind which was obtained, for example, through a conference or through other circumstances warranting total confidentiality.

> 30. […] The Tribunal is satisfied that such conduct arose out of the Respondent's exasperation, and not for the purpose of seeking to convey any confidential information. Rather, the contact was in the nature of an enquiry.

In respect of the penalty for communicating with another solicitor's client (emphasis added):

> 36. The Tribunal is satisfied that the Respondent would not have so breached the Rules, but for the particular aggravated circumstances on the afternoon of 18 January 2013. The Tribunal acknowledges that such events occurred in the culmination of prolonged and difficult litigation and of the genuine concern held by the Respondent that the order would be subverted or not complied with in view of the prior history of noncompliance with orders by the husband. Further, the circumstances were further heightened by the lack of communication from the husband's solicitor.
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> 38. For these reasons, whilst the Tribunal accepts the Respondent's acknowledgement that his conduct was unprofessional in that he breached Rules 2 and 31, **the Tribunal does not consider that any penalty is required in respect of either breach**. The Tribunal is satisfied that the proceedings alone, together with the costs which were ordered against the Respondent, will provide sufficient safeguard for the public in the future.

These matters provide important insights into the duty to supervise. *Kelly v Jowett* involved a catastrophic outcome for the client, the opposing party, the Court, and the partners who bore the responsibility to ensure the proper conduct of the matter. Notwithstanding the dismissal of the alleged breach against the practitioner in *The Council of the Law Society of NSW v Byrnes*, it is a reminder to practitioners to take care in the supervision of employees so as to avoid, where possible, even the possibility of a breach of the duty to supervise.

Quick reference guide

The most important features of the duty to supervise include (this is by no means an exhaustive list):

- **The retainer is with the principal** — The principal solicitor[4] has a non-delegable personal responsibility to the client, as the retainer is with the principal (not an employed solicitor).
- **The principal is ultimately responsible** — Principals retain the responsibility to ensure that court orders and rules are complied with in all matters conducted by their law firms.
- **The principal should be the solicitor on record** — A principal solicitor should not allow an employed solicitor to be the solicitor on the record in proceedings.
- **The principal must maintain *reasonable* supervision** — In order to exercise reasonable supervision, a principal solicitor should maintain sufficient knowledge of a matter to be satisfied that the retainer is being properly fulfilled. As a matter of common sense, this will necessitate closer supervision of an inexperienced solicitor than might be the required for an employed 'special counsel' who has retired from partnership after 30 years (or more) experience. 'Supervision' extends to all employees, including office managers.
- **The principal must take control where a matter is being inadequately conducted** — Where a principal is on notice of an employed solicitor's inadequate handling of a matter, the principal must take control of the matter to ensure any inadequacies or breaches are rectified.
- **Principals may be ordered to pay costs** — Principals may be responsible for the costs wasted by their employed solicitor's unreliable handling of matters.

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Endnotes

1. *Legal Profession (Solicitors) Conduct Rules 2015* (ACT), r 37.1; this rule is identical to that contained in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).

2. *Legal Services Commissioner v Mould* [2015] QCAT 440 (16 October 2015) at [113].

3. Ibid. at [10].

4. Although the phrase "solicitors with designated responsibility for a matter" is used in the Solicitors Conduct Rules, this term is regarded in this article as being synonymous with the roles of 'partner' or 'principal' being the individuals, or the directors of an incorporated legal practice, who have the retainer with the client.