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THE COST OF NEGLECT

Little supervision of lawyers and clerks equals big risk for principals.

We often make the point that legal practices cannot manage risk effectively without proactive supervision of employed lawyers and clerks – notwithstanding their competence and diligence. Moreover, cases such as *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213 confirm that practitioners must have some way of ensuring their actual involvement in, or supervision of, every matter for which they are responsible.

Some practitioners find it difficult to supervise as actively as they would like, especially when busy with their own work and supervision time is neither billable nor recognised for internal reporting purposes. However, consider the following cases.

Kelly v Jowett [2009] NSWCA 278

The clients were executors of an estate that was the subject of a maintenance application brought by the deceased's son. An employed lawyer had the conduct of the matter and signed the Notice of Appearance as lawyer on the record.

Before the hearing of the proceeding, various court rules, orders and directions relating to the filing of the executors' affidavits were not complied with. The matter was heard with the executors leading no evidence and no cross-examination of any of the witnesses. An order was made for the plaintiff to receive a legacy from the estate and a costs order was made against the lawyer personally as well as the executors.

The clients (executors) subsequently appealed those orders and were granted an order to stay the judgment, having adduced evidence that they were never informed that the matter was not proceeding satisfactorily, and had assumed the lawyer was looking after their case and everything was proceeding normally.

On appeal, evidence that the firm's principals knew, or ought to have known, of the lawyer's unreliability and delinquency in this and other matters (he had apparently been warned for appearing in court without his principals' knowledge and failing to account to the firm when acting for a client on a cash basis) was adduced. At one point, another of the firm's lawyers had approached the firm's CEO with concerns about his colleague's handling of the matter, causing the CEO to send an email to the lawyer, copied to the firm's principals, stating:

"Your performance in the conduct of this matter has been pathetic. Your failure, given the recent transfer of these matters, to even have the courtesy to provide (your colleague) with a memo regarding the status of the file is totally inconsiderate of a colleague already burdened with some of your other similarly neglected files. This file is your mess, clean it up."

The Court held that a client's retainer is with the firm's principals and, in the present case, the principals had failed to properly supervise the lawyer they employed. To the extent that he was supervised, that was apparently done only by the CEO. The principals' neglect of their duty to ensure their clients' affidavits were filed in time caused the plaintiff to incur costs in relation to the proceedings, the stay application and the substantive appeal.

The principals were ordered to pay all of those costs on an indemnity basis.

ACT disciplinary action

In the September 2013 edition of the ACT Law Society's *Ethos* magazine, Rob Reis described (at pp 25-27) recent disciplinary action against the principal of a local practice, who had more than 20 years experience.

The practice employed a junior lawyer admitted in the ACT Supreme Court in December 2009. In December 2010, the client consulted the junior lawyer about a criminal law matter. The lawyer answered some queries during the consultation and was asked to provide a written advice. There was no evidence that the lawyer had any experience regarding the relevant aspect of law.

On 16 February 2011, the client wrote to the lawyer asking about the advice. The client followed up on 1 March and 9 March but none of those queries was met with a response. When the client phoned on 11 March, the lawyer undertook to the client to work on the letter over the weekend but failed to send it.

After several months had passed, the client wrote to the lawyer in January 2012 asking for a referral to another lawyer. The client subsequently received neither a referral nor the advice.

In June 2012, the client wrote to the principal explaining the history of the matter. Following this, the junior lawyer told the principal that he would write to the client but failed to do so.

In January 2013, the client filed a complaint with the ACT Law Society.

The practice's accounting records showed that the client was charged for personal attendance on the client ($175) and a "Letter for you" ($125). In January 2011, the firm withdrew those amounts from funds the client had paid into trust. The client denied receiving an invoice.

By consent, the principal was found guilty of unsatisfactory professional conduct in respect of several charges including failure to supervise an employed practitioner and failure to ensure the practitioner carried out the client's instructions.

> Practitioners must have some way of ensuring their actual involvement in, or supervision of, every matter for which they are responsible.

Test your own practice

To the profession's credit, cases at this end of the spectrum are uncommon. Nevertheless, they do occur and provide good reason to pause for thought. How confident are you that a similar situation could not occur in your own practice? ●

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