

Super Vision

Presenter's Workbook

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The video *Super Vision* referred to in this workbook was developed by Law Mutual (Western Australia) and Ronwyn North of Streeton Consulting. Their contribution and that of Kriss Will of Kriss Will Consulting to this workbook is acknowledged.

Introduction

This material is designed to assist those presenting in-house risk management training using the *Super Vision* video. It is a resource to help choose and expand on issues for discussion and not intended to be given to attendees in its entirety. If there is material in the workbook that you would like to provide to attendees you are welcome to do so, giving appropriate acknowledgement of its source.

The themes raised by the video are:

- supervision obligations and responsibilities
- level and types of supervision – getting the balance right
- perspectives of supervisor and person supervised as to appropriate/effective supervision
- importance of two-way feedback for effective teamwork and providing high quality client service.

Why is supervision important?

Supervision is vital to employee satisfaction, client service, profitability and risk management as well as maintaining quality standards. It is a key ingredient of team performance and the success of most modern legal practices.

The importance of getting supervision right cannot be underestimated, as the performance of the practice, along with the development, experience and wellbeing of its people, often depends on it. Delegation and supervision problems can undermine teamwork and create a work environment that is stressful, potentially hostile and more prone to claims.

A major part of becoming a partner/principal of a law practice involves managing people but that step up the career ladder does not magically turn someone into a good people manager overnight.

LPLC sees claims where a practitioner's failure to supervise effectively was a significant factor. Inadequate supervision allows errors or negligence by those reporting to you to slip through the firm's quality control systems and cause damage to both clients and the practice.

Where an employee's failure to adhere to quality standards crosses the line into negligence, principals are vicariously liable. LPLC has had claims costing hundreds of thousands of dollars stemming from the mistake of a law clerk or junior lawyer.

Negligent or inadequate supervision can also result in costs orders against practitioners personally and action by regulators for breach of professional obligations to supervise or maintain appropriate management systems.

Many people recognise and appreciate when they have been supervised well. On the other hand, they are more conscious of when they are not supervised well. What people should – but often do not – know is what to do in order to get good supervision.

Supervision – what do you think it is?

This segment looks at various practitioners' attitudes to supervision. We see the perspective of the supervisor and those being supervised.

Video segment – Part 1 ('Hands on or hands off?') 0:00-4:35

Synopsis

A principal, senior associate and trainee lawyer, who work together, separately give their perspectives on delegation and supervision as applicable to their roles. They highlight disparities between their expectations and experience which affect their work performance, professional development and even their wellbeing.

Issues for discussion

Different people in the room may identify with the experiences of Harrison, Genevieve or Brett (perhaps more than one).

What are the needs and expectations of each person regarding delegation and supervision (noting many people both supervise and are supervised)?

- Harrison, the firm's founding principal, reflects on the growth of his practice and changing nature of his role. He comments on the importance of delegation and leverage to the success of a modern firm. Harrison is concerned about supervision but is not clear about his precise obligations. He feels that he cannot run a profitable practice in today's world with supervision levels of the past. Consequently, he has a 'hands off' approach to supervision which relies on people doing their best and asking for help when they need it.
- Genevieve is a senior associate who runs her own files and values her professional autonomy. Her practice is quite specialised and she doubts whether Harrison has the capacity to supervise her in a meaningful way. Genevieve takes personal responsibility for her own work and feels frustrated when the junior lawyer seeks her help with tasks that she has not delegated directly. She resents the lack of recognition for 'babysitting'.
- Brett is a trainee lawyer who feels 'thrown in the deep end'. He says he is delegated work with little guidance when he needs clear directions. Brett feels he has not received the levels of training, coaching and feedback promised and is disheartened when he is given work with little or no direction. He struggles with the work and it is taken back by the more senior practitioner.

Why is supervision relevant and important for all practitioners? Consider the duties and obligations of practitioners relating to:

- **delivery of legal services to clients in accordance with applicable professional standards**
- **administering the practice**
- **developing staff**
- **ensuring a safe and equitable work environment.**

What does your practice do to ensure the needs and concerns of each of these 'generations' are sufficiently heard?

An 'open door' policy is not supervision

From our claims information and talking to practitioners, it seems many practitioners have a 'hands off' approach to supervision, instead relying on a so-called 'open door' policy.

An 'open door' policy is not adequate supervision. Following are some of the reasons why.

- If someone is unconsciously incompetent at a particular task, they will not recognise the need to walk in that open door.
- Some people can be reluctant to seek help in certain situations. Organisational culture and personalities can be important factors. People with supervisory responsibilities can lack awareness of how they are perceived by others however, such insight is essential to managing a functional legal practice. LPLC encountered a string of claims from inexperienced practitioners in a particular firm's property section. The lawyers involved found the partner in charge very intimidating and consequently tried to work through unfamiliar issues themselves rather than approach the partner for guidance. The firm dealt with the situation by placing a senior associate in the section who could supervise the less experienced practitioners and deal with the partner.
- The 'open door' is frequently an illusion. People soon learn when their supervisor is too busy to take their concerns or questions seriously. We often see cases where an inexperienced practitioner or clerk is left to deal with a difficult client in reception because the principal does not see it as their role, does not want to confront the problem or is too busy.

Legal Practitioners Complaints Committee and Benari [2005] WASAT 213

In this Western Australian case, the State Administrative Tribunal looked at a legal practitioner's obligation to supervise an employed law clerk. The practitioner was taken to the Tribunal regarding three separate complaints, one of which related to failing to properly supervise an experienced law clerk. The clerk saw clients, took instructions, imparted legal advice, opened files and ran those files acting on the client's behalf. The clerk had weekly meetings with the practitioner where she discussed any matter she needed to (or thought she needed to). While the clerk gave evidence it was protocol to discuss all issues of liability and settlement with the practitioner, there was no evidence of any involvement of the practitioner in the matter in question. There was evidence the client believed the clerk was a solicitor.

The Tribunal said that the practitioner should have a proper system in place to ensure his actual involvement or supervision of all files. He delegated all the functions mentioned and only issues brought to his attention were those that appeared out of the ordinary. The practitioner may have had an 'open door' but things were left completely up to the clerk as to when she needed guidance and his involvement in the matter. This was held not to be good enough.

The Tribunal referred (at paragraph 97) to a number of propositions regarding the obligations of a practitioner to supervise the work performed by a clerk within his or her firm derived from the reasons of Malcolm CJ in another Western Australian case, *D'Alessandro and D'Angelo v Bouloudas* (1994) 10 WAR 191 (at 211-213). These are:

- the obligation of the practitioner to supervise an employee clerk is imposed in order to ensure that the client receives an appropriate standard of advice and service
- failure to adequately supervise the work of the clerk may constitute unprofessional conduct
- the nature and extent of the obligation to supervise will depend upon the particular circumstances in which the solicitor's practice is conducted
- the level of supervision required will vary according to the level of competence and experience of the clerk, but it must remain supervision and not amount to complete delegation
- the supervising solicitor should settle and sign all of the clerk's letters (except formal letters)

- there should be in place a system by which each file relating to a matter to which the clerk has the conduct is reviewed by the solicitors at appropriate periodic intervals
- proofing witnesses and discovery and inspection of documents must be carried out under the direction of and specifically reviewed by the supervising solicitor
- so called general supervision which relies on the clerk bringing any difficulty to the attention of the solicitor would not be sufficient.

The practitioner was found guilty of neglect for failure to supervise and reprimanded, guilty of overcharging and fined, and not guilty of holding the clerk out as a solicitor.

LPLC comment: Most of the supervision principles outlined by Malcolm CJ are also broadly applicable in the context of employed solicitors. The exact form, amount and timing of required supervision will depend on the nature of the work and experience of the employed solicitor.

Delegation and supervision

There is nothing wrong with an 'open door' but it is not a substitute for proper supervision. Given that, what is good supervision?

Unfortunately, it is impossible to give a 'one size fits all' definition of proper supervision. Supervision is a flexible concept and what is appropriate will depend on the circumstances. Even within firms there are often large variations in how people are supervised. It can be difficult to tell what supervision is appropriate when work is delegated to experienced practitioners.

However, it is clear that an essential element of effective supervision is being proactive and maintaining some level of direct involvement and control. This does not mean micro-management; it means the supervisor giving consideration to what continued involvement in delegated work they need to have and a strategy for ensuring that involvement.

Delegation

Good supervision is set up by good delegation, although good supervision can in part remedy potential problems caused by defective delegation. Delegation means giving someone control or authority to act on your behalf **within set boundaries**.

When done properly, delegation enables efficient allocation of work and increased profitability. Unfortunately, we see cases where junior lawyers and clerks are put in positions where they feel they have to do things beyond their capabilities.

In one matter a junior lawyer was delegated personal injury work she felt she did not have sufficient training or expertise to do. She managed by doing the matters that required only a lump sum application pursuant to section 98A of the *Accident Compensation Act 1985* (Vic) and referring the clients with more serious injuries to other firms. However, in one instance the client had been injured as a result of a workplace accident and the lawyer felt the injury was sufficiently serious that a common law claim should be considered. She recommended the client see another firm that specialised in personal injury on a 'no win, no fee' basis. The client refused and insisted on taking the lump sum payment. The lawyer did not put any of her advice in writing because she did not want her principal to see that she had tried to refer the client elsewhere. She had previously told the principal she thought she should not be acting for this client, to which she was met with 'just do it, I'm running a business'.

To be most effective, delegation involves:

- choosing the right responsibility or task
- choosing for the right person (who has sufficient training to enable them to do the task well)
- handing the task over at the right time
- handing the task over in the right way (ie giving clear instructions on what they are to do, with clear boundaries on how they are to do it).

Leaving a file on someone's chair is not good delegation practice! Neither is handing a file over when things start to go pear-shaped, leaving the operator to sink or swim without adequate instruction and supervision, or declining to delegate appropriate work to save explanation and supervision time.

Tips for supervisors when delegating include:

- being clear about what you want done before delegating
- ensuring the delegation or 'handover' is a specific discussion, not on the run or a corridor conversation
- articulating what you require and give sufficient background/context for the operator to understand the client's needs and objectives
- being clear about deadlines, how long you expect it to take, the end product (eg form/audience/style/quality) and your accessibility
- explaining what the operator will get out of the task to encourage their enthusiasm
- giving the operator a 'heads up' about any potential difficulties
- specifying any review triggers (eg if the time the task is taking exceeds a certain amount)
- ensuring the delegate understands the purpose, intended audience, deadline, form of work product, time to be taken and reporting protocols, using two-way feedback where necessary.

Tips for delegates receiving the tasks include:

- committing to turnaround expectations and deliver on them

- seeking assistance if overburdened
- asking questions to clarify any aspects of the task
- starting early to ensure timelines are met
- speaking up immediately if you think the request is unreasonable.

Does your firm's reward/remuneration arrangements encourage delegation and efficient allocation of work?

Matching delegation style to the task

It perhaps goes without saying that the level of delegation and supervision will depend on the risk and complexity of the task and the experience of the operator.

The article *Coaching: Brushing up on the art of delegation* by Dermot Crowley of Adapt Training Solutions in the July 2010 edition of the *Australasian Law Management Journal* (<http://www.lmhub.com.au/coaching-brushing-up-on-the-art-of-delegation/>) specifies four delegation/supervision 'styles' and when to use them.

The styles are referred to as 'consult', 'tell', 'hands off' and 'oversee'.

Supervision

Supervision is about overseeing performance of delegated tasks and responsibilities. The level of involvement will depend on factors such as the nature of the task, experience of the person doing the work and relationships involved.

A supervisor should remain close enough to the work to be able to monitor progress, help when necessary, intervene and fix problems if required and ultimately approve the work done.

As described in the abovementioned article, a supervisor should consider the complexity and risk involved in the task, together with their level of confidence in the skill and experience of the delegate when determining which approach to supervision they should take. The four approaches to supervision referred to in the article can be summarised as:

- the supervisor has a *high level of confidence* in the skills and experience of the operator but due to the task's *high complexity/risk*, maintains a significant level of involvement, using a consultative approach to manage risk and ensure the quality of the product

- where the supervisor has a *low level of confidence* in the operator's skills and experience yet the task is *complex/high risk*, precise instructions are needed with active supervisor involvement throughout the task including regular interim checks to assess progress and make adjustments
- where the task is relatively *simple/low risk*, minimal reporting and supervisor input may be needed if there is a *high level of confidence* in the operator to do the job and problem-solve
- although the supervisor has a *low level of confidence* in the operator's skills, the provision of sufficient experience, guidance and assistance to the operator throughout a relatively *simple/low risk* task allows the operator to be given scope to think for him or herself, which helps develop skills and confidence.

Irrespective of which approach is used, supervisors should be proactive about following up at the end of the task and giving feedback about work, taking a teacher/learning rather than pass/fail approach.

The person supervised should:

- keep people updated
- build in time for reflection and supervisor adjustments, not just rushing to get the task done
- get the information needed including background/context at the outset
- request feedback at the conclusion of the task.

Being proactive

Whatever the supervisor's style, supervision needs to be proactive. One principal in the litigation area told us he has weekly meetings with each of his senior associates. These meetings are scheduled at the same time each week and it is expected that nothing but a court appearance will come before the meeting. At each meeting they go through the list of open files the senior associate has and briefly discuss what is happening on the matter, what needs to be done and what it would take to settle the matter tomorrow. Meetings like this enable the partner to stay informed about the solicitor's workload, stress levels and whether there are any 'too hard basket' files that are not being progressed due to the solicitor being out of their depth.

The protocol implemented such as type and frequency of contact and formal reporting will depend on the practice area, the experience of the supervised person and their workload. Practitioners in supervisory positions should have a

system and be disciplined about adhering to it.

Speaking on an ad hoc basis or when the senior practitioner 'finds time' is not active supervision. In addition to monitoring quality of legal work, regular meetings allow the senior practitioner to maintain control of the business and add value to the service provided, as well as mentor, train and give feedback to staff.

All practices should ensure clear boundaries are articulated to non-practitioners. One practitioner told us that his previous assistant sat only a few metres from him. He could hear every word of her phone conversations but could not see her emails. It was only after a client complained that the practitioner discovered his secretary had sent dozens of emails with the firm logo to clients and other parties, many containing what might be construed as legal advice. While he opened all of the mail that arrived in the post, he did not receive responses to the secretary's emails and had no idea of the email conversations she had been involved in.

People not directly involved in matters can also have proactive oversight functions. We were told of an instance where a senior associate was floundering on a matter and put it in the 'too hard' basket. To cover his lack of action the senior associate generated bills but did not send them to the client. However, this particular client was in the habit of paying all of his bills straight away. The file neglect came to light through someone in the firm's finance team regularly reviewing the unpaid accounts list with a critical mind.

Regulatory standards

Practitioners should consider their supervision obligations in light of applicable rules of conduct and practice.

Solicitors subject to the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* or the *Australian Solicitors' Conduct Rules* are required to:

- deliver legal services competently, diligently and as promptly as reasonably possible (Rule 4.1.3)
- follow a client's lawful, proper and competent instructions (Rule 8.1).

Rule 37.1 provides that 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.

Practitioners should be familiar with policies on supervised legal practice issued by local regulators. For example, the Legal Services Board's (Victoria) *Supervised Legal Practice Policy* (SLP) includes provisions such as:

3.13 The Act does not define “supervision,” however when considering the issue of supervision, the Board will consider the position and experience of potential supervisors. An appropriate supervisor will:

- be appropriately experienced
- not be subject to supervised legal practice restrictions
- provide regular support and feedback sessions
- have authority in respect of work performed by the supervised practitioner and be able to direct, amend, override or intervene in relation to the legal work performed in appropriate circumstances
- be employed by the same entity as the supervised legal practitioner, including in cases where a supervised legal practitioner is on secondment.

3.14 While the SLP requirement is imposed on the practitioner, supervisors should note that they are themselves subject to legal and professional obligations to act with all due skill and diligence.

3.15 While on secondment, the legal practitioner shall continue to be supervised by an Australian legal practitioner.

While conduct and practice rules place important overarching obligations on practitioners, further guidance as to what is expected can be found in case law.

Cases

Mills Oakley Lawyers Pty Ltd v Huon Property Holdings Pty Ltd [2012] VSC 39 (see discussion in the following section of this workbook)

Kelly v Jowett [2009] NSWCA 278 (see discussion in the following section of this workbook)

Mills v Bale [2010] NSWDC 162 (decision subsequently set aside by the NSW Court of Appeal – see [2011] NSWCA 226)

Legal Practitioners Complaints Committee v B&M [2005] WASAT 217

Eaton v Owens [2010] VCAT 1123 (damages for distress may be awarded in a negligence claim relating to legal services)

The Council of the Law Society of NSW v Byrnes [2016] NSWCATOD 64 (considered with the practitioner had failed to supervise an office manager adequately)

What everyone can learn from ILPs

In Victoria, under the previous Act regulating the profession, the *Legal Profession Act 2004*, the Legal Services Board was entitled to audit Incorporated Legal Practices (ILPs) in relation to compliance with the legislation and rules and the management of the provision of legal services (s. 2.7.22). All ILPs were required to undertake a self-assessment audit as a means of demonstrating compliance with Part 2.7 of the *Legal Profession Act 2004*.

Part B, which comprises most of the audit form, relates to questions about the firm's management systems. It covered 10 areas known as the 'Ten Objectives of Appropriate Management Systems', the ninth of which is 'the effective supervision of the practice and its staff'.

Even in the first section relating to the first objective, 'competent work practices to avoid negligence', one of the points of reference is whether:

'Legal practitioner directors regularly consider and review workloads, supervision, methods of file review, and communication with clients'.

Relevant measures would include:

- keeping a written record of who is primary operator of each file in the firm and who is supervising that file and operator
- policies for how often the list is reviewed to assess workloads
- policies or practices for implementing regular team meetings or supervisor and junior staff meetings to discuss files
- protocols for regular random file audits.

The ninth section of the audit dealt specifically with supervision and included the following key concepts:

- a delegation process ensuring that:
 - staff are clear about the boundaries of their role, responsibilities and authority
 - staff are capable of doing the work delegated
- a structured induction and training program, which will ensure all staff are properly trained and qualified for the duties they are employed to perform. Induction and training should also cover statutory obligations in the Legal Profession Act and workplace issues such as workers compensation, holidays

and leave

- staff performance reviews should be carried out on a periodic basis no less frequently than once a year
- all current files are reviewed by a legal practitioner director or nominated supervising practitioner on an appropriate periodic basis.

These are all sound concepts to underpin effective supervision practices throughout a law firm. All firms, not just ILPs, are encouraged to consider whether there is scope for improving supervision policies, procedures and work practices in their firms.

Under the Uniform Law the Victorian Legal Services Board and Commissioner (VLSBC) can conduct audits of the compliance of any law practice if it considers it has reasonable grounds to do so.

The self-assessment audit is not currently available on the Victorian Legal Services Board and Commissioner's website.

Supervision failure

This segment focuses on how things can go very wrong for a client, a firm and a lawyer when there is supervision failure.

Video segment – Part 2 ('Your mess, you clean it up') 4:35-14:40

Synopsis

An employed solicitor, Adam, has the conduct of an estate dispute for Mrs Cantor. He does not progress the matter and when the firm's CEO, Ted, discovers the problems with the file he emails Adam and tells him to fix it.

Ted's email:

Your performance in the conduct of Mrs Cantor's matter has been pathetic. Your failure, given the recent transfer of these matters, to even have the courtesy to provide Selina 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. I have spoken with Margaret who directs you to comply with the court orders forthwith. This file is your mess, clean it up.

If this scenario seems far-fetched, it is based on the case of *Kelly v Jowett* [2009] NSWCA 278 (see below).

Issues for discussion

What was the real problem here?

There is probably not one answer. It could be a combination of the issues listed below:

- employee with poor judgment – this is often the only problem firms perceive!
- poor client engagement policies – allowing the employee solicitor to accept new work with no apparent involvement of a partner and to go on the record for the client
- no clear line of accountability – who was the responsible partner?
- poor supervision by whoever was supposed to be the responsible partner, especially in light of Adam's previous performance problems
- non-lawyer CEO intervening in an inappropriate manner – he should have determined who the responsible partner was and ensured they supervised the file properly or took it off Adam.

What is the one thing the firm could have done that would have made the biggest difference?

Arguably it is having a partner actively supervising Adam.

Could this occur in your firm?

Things you might consider:

- Does your firm supervise its practitioners and non-practitioners well?
- Do employees understand what they can and can't do?
- Do you have supervision standards in the firm so everyone understands what is expected?
- What role does your firm's culture play in attitudes towards supervision?
- Are people in supervisory positions given training or guidance on supervision?

Which protocols and work practices does your firm have in the following areas to ensure its people and matters are adequately supervised at all times?

Direct supervision/control

- Are principals required to meet new clients, accept new matters and take initial instructions? How does your firm ensure the client knows to contact the principal in case of problems?
- Are principals required to review and approve all matter strategy, documents and communications including non-client work such as legal articles and contact with media? How does your firm specify which critical steps and work product require principal review/approval, the degree of actual checking required, and how supervision and approval are to be evidenced in the file?
- How do supervisors monitor progress/compliance with timetable/critical dates for example is 'hands on' monitoring by the supervisor and reporting by the operator required or are people in the habit of relying on verbal assurances in corridor conversations?
- How proactive are principals and firm management in monitoring workload and work activity generally? Are there regular principal/practitioner meetings, team meetings, file reviews, WIP reviews, monitoring of inactive files and performance reviews? Are these measures routine or ad hoc?
- To what extent has your firm implemented financial controls and monitoring of matter progress –for example time recording, billing, unpaid accounts, trust accounts? Are these measures routine or ad hoc?

- How does your firm control the giving of undertakings? How are undertakings recorded?

Matter responsibility

- Does every matter have a responsible principal? Does your firm keep a written record of who is the primary operator on each file in the firm and who is supervising that file and operator?
- Does your firm require all solicitors on the record be principals?
- Does your firm have adequate protocols for transfer/'handover' of files for departure, holidays/other leave, secondments, unscheduled absences, rotations and matter reassignments?

Training

- How does your firm monitor compliance with CPD requirements? Is your firm supportive of training beyond minimum CPD requirements and not just training on substantive law topics?
- What steps does your firm take to explain policies and procedures to its people? Is there organised induction training for new joiners?
- What education does your firm give to its people to raise risk awareness? Is it regular or ad hoc?

Managing poor performance

- Does your firm have clear policies on what is expected of its people?
- Does your firm have adequate protocols for management of performance issues including investigation, counselling and formal warnings?
- How does your firm ensure that reasons for poor performance and wellbeing are adequately considered?

Intelligence gathering and troubleshooting

- Has your firm implemented protocols around reporting and responding to adverse incidents? How does your firm encourage self-reporting of mistakes or inappropriate behaviour? Are there protocols to govern how concerns about colleagues and complaints/criticism by clients, third parties, other practitioners and judiciary are handled?
- Are informal tip-offs well handled by the firm? Does your firm have a

whistleblowing policy?

[This list was adapted from the Super Vision seminar workbook developed by Law Mutual (Western Australia) and Ronwyn North of Streeton Consulting.]

Good supervision does not mean that employees are spoon fed and not permitted to make mistakes. Employees have to be given the opportunity to make decisions (within clear boundaries) and a system that catches any sufficiently important mistakes before they cause damage needs to be in place.

The damage from supervision failure can be significant. In some instances principals can be liable in a disciplinary sense for employee misconduct or conduct of other principals. Part 3.3 of the *Legal Profession Act 2004* (Vic) regarding trust money and trust accounts is an example; the question will be whether the principal was exercising proper control of the practice.

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.

Prior to 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 applicant 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 they were never informed 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 the principals had failed to properly supervise the lawyer they employed. The limited supervision of the lawyer was performed only by the CEO. The principals' neglect of their duty to ensure their client's affidavits were filed in time caused the applicant to incur costs relating to the proceedings, the stay application and the substantive appeal.

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

Mills Oakley Lawyers Pty Ltd v Huon Property Holdings Pty Ltd [2012] VSC 39

In this case a practitioner was found negligent in failing to actively supervise a senior associate. When advising a purchaser on a commercial transaction, the relatively inexperienced senior associate failed to realise that last minute changes to proposed funding arrangements could put certain assets at risk. As is often the case, the responsible practitioner gave evidence that he was not aware of the changes to the funding arrangements (especially the crucial email) but that, if he had been so aware, he would have been alert to the risks and then advised the client to consider restructuring the transaction.

The Court found that the senior associate should not have been completing the transaction without active supervision, given her experience in the type of matter. Had there been adequate, proactive supervision, the practitioner probably would have been able to fulfill the retainer to give competent legal advice, which included recognising and warning about the relevant risks.

LPLC comment: understanding the limits of an employee's abilities and experience is an important factor when delegating and supervising effectively. It is often difficult to assess.

ACT disciplinary action

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

In January 2012 the client wrote to the lawyer asking for a referral to another lawyer and received neither a referral nor the advice.

In June 2012 the client wrote to the principal explaining the history of the matter. The junior lawyer told the principal 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 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.

Failure to supervise non-practitioners

Failure to supervise non-practitioners is also a problem. Practitioners may be generally aware of their obligation to supervise non-practitioners but cases suggest they may be unaware of:

- what supervision means on a day to day basis
- the extent of supervision required even where the non-practitioner, such as a law clerk, is highly experienced.

See the discussion of *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213 in the previous section of this workbook.

In *Legal Services Commissioner v Peacock (Legal Practice)* [2008] VCAT 983 a practitioner admitted misconduct in failing to effectively supervise his office account, to which a conveyancer (not a solicitor) practising in the same building had also been a signatory.

In Canadian jurisdictions, it is common for codes of professional conduct to contain provisions that expressly prohibit lawyers from permitting a non-lawyer to do a number of specific things. See, for example, Chapter 6 of the Code of Professional Conduct for British Columbia:

<https://www.lawsociety.bc.ca/page.cfm?cid=2644&t=Chapter-6-Relationship-to-Students,-Employees,-and-Others#6.1-3>.

Would any part of those protocols not be applied by a court or tribunal in your jurisdiction in Australia? Would your work practices comply with it?

Teamwork and feedback

This segment focuses on the role of feedback in avoiding or resolving conflict within a team over supervision issues. The topic is equally relevant to lawyers and non-practitioners.

Video segment – Part 3 ('The F-word') 14:40-17:40

Synopsis

This segment portrays the unhappy situation where a personal assistant refuses to put the junior lawyer's work ahead of the partner's work. Brett (the junior lawyer) tries to improve the situation by giving Crystal feedback but it goes horribly wrong.

Issues for discussion

How could these issues be avoided?

Here are some possible answers:

- create a culture of teamwork so that Crystal understands it is not just the partner's work that is important or most urgent
- Harrison needs to make it clear that he does not expect his work to always be done first
- train people at all levels on how to give and receive feedback
- create a culture where feedback is regularly given, expected and welcomed
- any other thoughts?

What is the culture of feedback in your firm?

Reducing team conflict by increasing 'everyday feedback'

Feedback is communication about performance. It is an essential communication tool that requires training and practice in order to be used effectively.

The basis of a productive working relationship is people knowing when their performance or behaviour is appreciated, at the level expected or could be improved.

Constructive feedback should always be given in a supervisory relationship. Many people assume a lack of feedback from their supervisor indicates a lack of satisfaction with their performance.

The numerous benefits of feedback include:

- helping people learn their role
- assisting in setting work standards
- providing an opportunity to discuss areas of possible improvement (suggested by either giver or receiver)
- updating people on their professional development and career progression
- providing guidance on acceptable and unacceptable behaviour
- facilitating an opportunity to give praise, thanks and recognition setting expectations and informs on whether those have been met
- building skills, trust and productivity
- assisting to build resilience through learning from mistakes, growing confidence and increasing competence to speak up.

It is sometimes difficult to give feedback. Givers can often empathise with the receiver, be met with a defensive reaction and are wary of undermining relationships within the team.

Feedback should:

- be focused on the outcome, not on the person
- not be given when either the giver or receiver is too emotional or preoccupied with other matters
- be a conversation, not a one-way attack on the receiver
- be given to help the receiver, not make the giver feel better.

Givers should be mindful that receivers are not obliged to agree with criticism. However, givers should be clear about what they expect to change and spell out the consequences if the feedback is ignored. Consequences could involve some change in the person's responsibilities or accountability protocols, not necessarily dismissal.

Positive feedback builds people's confidence and motivation, in turn helping to build competence regarding a particular task. It focuses attention on a person's strengths rather than nit-picking errors. Most people in supervisory positions can

probably remember how they felt when praised as a less experienced employee. Rewarded behaviour is likely to be repeated.

The way and location in which the feedback is delivered can have a major impact on how it is received. Therefore, the techniques used are important. Some feedback techniques are outline below:

- Choose a location that is appropriate. Feedback can be 'normalised' by giving it in the person's own space. However, always think about who is present.
- Be clear in your mind about the outcome you want and plan your opening line. Practice it if necessary.
- Do not start the conversation by discussing the impact of the behaviour on the team. First describe the specifics of the situation, then the behavior itself, followed by its impact. Give the person an opportunity to respond before specifying the outcome you expect.
- Manage the tone of the conversation and make 'I' statements. Explain the impact of the behaviour or performance on you using factual, non-blaming language.
- Talk in terms of 'gaps' between your expectations and performance, and how you want to help bridge those gaps. Treat it as a positive development process.
- Consider using a 'feedback sandwich'. This is a criticism 'sandwiched' between two compliments or pieces of positive feedback. However, there are some caveats: praise must be sincere, the positives should not overwhelm or obscure the criticism and the technique should not be overused such that people recognise the pattern and disregard the praise.
- Younger generations are accustomed to receiving positive feedback so be mindful of their expectations. This does not mean giving praise if it is not warranted.
- On some occasions or with some people, there is no need or point in softening criticism.

Some common feedback pitfalls are:

- forgetting that everyone makes mistakes
- not managing the tone of the conversation effectively

- thinking but not actually giving feedback
- telling people other than the person concerned
- using the sandwich technique to mask the real purpose of the feedback
- expecting others to resolve your working relationship issues
- failing to recognise your contribution to a situation (eg poor delegation)
- forgetting the power of your position when giving feedback.

Feedback skills and being able to have difficult conversations are important life skills as well as professional skills. Like all skills, feedback skills can be learned and honed through practice.

Performance reviews

This section has been primarily concerned with everyday feedback, which is typically unplanned and given as a result of specific incidents/behaviour (including positive incidents/behaviour). Nevertheless, formal assessment of people's skills and contributions is important. The ILP self-audit form stipulates that performance reviews should be carried out on a periodic basis no less frequently than once a year.

Many people may not relish either having a performance review or giving one. However, when staff do not have performance appraisals they often feel cheated, underappreciated and demotivated. Formal reviews are valued by staff because it is a focused time for finding out how their career is going. For some staff, it is the only time they feel they receive real feedback.

Giving honest and appropriate performance appraisals is a valuable tool and the person conducting the review needs to lead by taking the process seriously. There are expectations regarding formal reviews: they are conducted for a known purpose, the format is often familiar to the participants and the areas of review are set. The person under review expects that the process will assist to develop a longer term action plan that will impact their career, salary and relationships. Surprises for the person under review, such as dumping an accumulation of negative feedback on the person, are usually counterproductive and damaging to trust.

If you do not know how to conduct effective performance reviews there are numerous consultants and courses available to assist you.

Reflections

This final section of the video provides an opportunity for reflection on what is important about supervision and how changes in attitude can make a difference.

Video segment – Part 4 ('Reflections') 17:40-23:30

Synopsis

The characters we have met provide insight into their new understanding of the importance of good supervision.

What do you think about the characters' respective views on supervision?

Firm supervision quiz

Can your practice improve in any of the following areas:

- recognising supervision problems exist such as over-delegation and under-supervision
- setting clear boundaries or limits on 'freedom to make mistakes' for practitioners and non-practitioners
- being involved in matters and close enough to the action to see what is going on and step in when necessary
- understanding staff capabilities
- ensuring style of supervision matches task and practitioner
- people's attitudes to being supervised
- people's knowledge of supervisory obligations
- differentiation between professional and management responsibilities
- oversight of management
- supervisory policies and protocols
- culture of consultation and continuous improvement
- willingness to speak up and having a culture/environment where people are comfortable speaking up
- training and developing staff



- reducing team conflict by improving 'everyday' two-way feedback?

[This list was adapted from the Super Vision seminar workbook developed by Law Mutual (Western Australia) and Ronwyn North of Streeton Consulting.]