

As a lawyer, you are responsible for ensuring that your employees abide by the Rules of Professional Conduct and the By-Laws under the Law Society Act. Lawyers must assume complete professional responsibility for all business entrusted to them and must directly supervise all staff to whom they delegate particular tasks and functions pursuant to Part I of By-law 7.1 and subrule 5.01(2) of the Rules of Professional Conduct. Making supervision a priority is also a good way to reduce the use of claims.



Supervision of employees

The buck stops with you

When it comes to supervision, lawyers should think beyond just the people who are physically in their offices. In many law offices, there are various people working externally who do different types of work as employees or in other capacities. Examples include title searchers, private investigators, bookkeepers and technology support people. These people could be around the block, or on the other side of the world, and lawyers are obliged to properly supervise the work that they do as well.

What can't be delegated?

Section 6 of Bylaw 7.1 directs that a lawyer shall not permit a non-lawyer:

- to give the licensee's client legal advice;
- to act on behalf of a person in a proceeding before an adjudicative body, other than on behalf of the lawyer in accordance with subsection 5(1) of the Rules, unless the non-lawyer is authorized under the *Law Society Act* to do so;
- to conduct negotiations with third parties, other than in accordance with subsection 5(2) of the Rules;

- to sign correspondence, other than correspondence of a routine administrative nature (see the paragraph below for details on what staff can sign);
- to forward to the lawyer's client any document, other than a routine document, that has not been previously reviewed by the lawyer.

As well, non-lawyers cannot:

- use the lawyer's Teranet PSP or be given the lawyer's password (Rule 5.01(3)); or
- provide advice, information or opinions to a client concerning any insurance, including title insurance, without supervision (Rule 5.01(5)).

What can a lawyer delegate?

After noting the requirement of direct supervision in subsection 4(1), subsection 4(2) of Part 1 of By-law 7.1 gives some direction on what a lawyer can delegate and the extent to which work by a non-lawyer should be supervised. It provides that:

- a lawyer shall not permit a non-lawyer to accept a client on the lawyer's behalf;



- the lawyer shall maintain a direct relationship with each client throughout the lawyer's retainer;
- the lawyer shall assign only tasks and functions that the non-lawyer is competent to perform;
- the lawyer shall ensure that a non-lawyer does not act without the lawyer's instruction;
- the lawyer shall review a non-lawyer's performance of the tasks and functions assigned to her or him at frequent intervals;
- the lawyer shall ensure that the tasks and functions assigned to a non-lawyer are performed properly and in a timely manner;
- the lawyer shall assume responsibility for all tasks and functions performed by a non-lawyer, including all documents prepared by the non-lawyer; and
- the lawyer shall ensure that a non-lawyer does not, at any time, act finally in respect of the affairs of the lawyer's client.

Express instruction & authorization required

Section 5(1) of Part 1 of By-law 7.1 directs that a lawyer shall give a non-lawyer express instruction and authorization prior to permitting the non-lawyer to do the following things:

- give or accept an undertaking on behalf of the lawyer;
- act on behalf of the lawyer in respect of a scheduling or other related routine administrative matter before an adjudicative body; or
- take instructions from the lawyer's client.

Further, Section 5(5) directs that a lawyer shall obtain a client's consent to permit a non-lawyer to conduct routine negotiations with third parties in relation to the affairs of the lawyer's client and shall approve the results of the negotiations before any action is taken following from the negotiations.

Signing correspondence

Do you have to sign every piece of correspondence that leaves your office? No, but certain limits apply. Section 6(1)(d) of By-Law 7.1 provides that correspondence of a routine or administrative nature may be signed by non-lawyer employees. However, the lawyer should specifically direct the employee to sign and should ensure that the correspondence discloses that the person signing is not a lawyer and in what capacity the employee is signing the document. Only lawyers, within their permitted scope of practice, are permitted to sign correspondence containing legal opinions.

Collection letters

Section 7 of By-Law 7.1 has specific direction on collections letters. It provides that lawyers shall not permit a collection letter to be sent to any person unless:

- the letter is in relation to the affairs of the lawyer's client;
- the letter is prepared by the lawyer or by a non-lawyer under the direct supervision of the lawyer;
- if the letter is prepared by a non-lawyer under the direct supervision of the lawyer, the letter is reviewed and approved by the lawyer prior to it being sent;
- the letter is on the lawyer's business letterhead; and
- the letter is signed by the lawyer.

Supervision of articling and law students

See subsection 34 (1) of By-Law 4 for information on the requirements for supervising articling students and law students.

More delegation

Delegation involves getting the job done through others. A governing tenet in every firm should be to push work down to the lowest capable level. You are wasting your time and the client's money if you or others at your firm are consistently doing tasks that lawyers with a lower hourly rate or staff can complete. Lawyers typically fail to delegate for any number of reasons, none of which stand up to scrutiny.

- **They don't want to give up control of the matter or client:** This is a bad behaviour often driven by a compensation system that rewards bad behaviours.
- **They think they can complete it better themselves:** With proper training, someone else can likely do the job just as well.
- **They think they can complete it faster themselves:** With proper training, someone else can likely do the job just as fast.
- **There is not enough time to properly train someone else to do the task:** This excuse is often cited in conjunction with the previous point – and it may make sense in the rush to get an individual matter done. However, this ignores the longer-term

benefits that once that person is trained, the task can be done much more quickly every time it is required in the future.

- **The work was not done properly the last time it was delegated:** This was likely because there was insufficient training or instructions.

Better delegation

Carefully review your common tasks and make an effort to identify which ones could be delegated. Then apply the following tenets of effective delegation:

- **Pick the right person for the task:** Often the right person can do the work without training. However, don't overlook an opportunity to challenge and engage someone who is willing and interested, and could do the task with training.
- **Don't talk down to the delegatee:** Treat staff members with respect and as equal members of the team.
- **Give clear instructions and all required information:** Highlight specific issues of concern, but also paint the bigger picture so that staff members understand the reasons behind the work that they are doing.
- **Explain any special parameters:** Are there resources to use or not to use, a sensitivity to high fees by the client, etc.?
- **Make deadlines realistic:** An unrealistic deadline is unfair and frustrating to the person being assigned the task.
- **Establish the reporting mechanism:** Do you expect the delegatee to simply return the completed work, or is the staff member to check in or provide updates as he or she works through the task?
- **Confirm instructions were understood:** Ask the delegatee to reiterate the task requested.
- **Always provide feedback when the work is done:** Don't just complain when there are mistakes or problems. Say thank you every time, compliment and reward good work, and make sure any criticism is constructive criticism.

The commentary to subrule 5.01(2) of the Rules further provides that the "lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion." Extra care may be warranted if there is something different or unusual in the matter at hand. Consider if special training or courses could help increase the skills of staff, allowing them to take on more complex tasks.

Hiring reliable staff

As you are ultimately responsible for their work, it is important to hire reliable and trustworthy employees for your firm. When interviewing potential employees, ask hard questions. Inquire about the candidate's past performance. Confirm details on a candidate's resumé, consult references and verify previous employment experience. Look for any red flags and be very cautious if someone appears to be withholding information or has false or misleading information on a resumé. If the position

involves handling money, ask for the applicant's consent to check his or her criminal record and credit reports. Ensure that you comply with privacy legislation and refer to subrule 5.04(3) of the lawyers' Rules for questions that can and cannot be asked of an applicant.

Internal controls

Ideally, your office should have clearly established internal controls for handling and documenting all types of financial transactions. These internal controls are really just policies and procedures that direct what steps should be taken when various financial transactions occur – indirectly they act to "supervise" these transactions. Although a lack of internal controls does not necessarily constitute a breach of the Rules of Professional Conduct or By-laws, you may consider implementing internal controls to assist your efforts to comply.

The Managing the Finances of Your Practice booklet (www.practicepro.ca/financesbooklet) has sample law office internal controls for several things including:

- cheque requisitions
- cheque signing policies
- trust records
- handling clients' valuable property
- staffing policies and procedures
- segregation of staff duties, and
- use and operation of trust accounts.

Internal fraud

The cost of fraud claims, including claims due to the frauds of law office staff, are a significant cost of the LawPRO insurance program. Proper supervision and internal controls can help to prevent fraud by staff members. For more information on how to recognize and respond to internal fraud, review the article What to do when partners, associates or staff commit fraud by David Debenham which appeared in the Surviving the Slide, Winter 2008/2009 (Vol. 7 no. 4) issue of LawPRO Magazine.

Conclusion

It is a big responsibility to assume complete professional responsibility for all business entrusted to you, including any tasks done by your staff or third parties. Take steps to meet these obligations by properly supervising all tasks and functions that are delegated in your office. For additional information regarding education and training for non-lawyers and the supervision of staff and assistants, see the Law Society's Professional Management Guideline, and the Commentaries on the Rules.

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Common claims scenarios involving lack of supervision issues

LAWPRO sees various claims arising due to lack of supervision issues. LAWPRO may not even cover the claim if a lawyer has completely abdicated all control and responsibility for the practice (e.g., signing cheques and leaving the practice in the hands of the staff). The following are some of the common scenarios we see.

REAL ESTATE-RELATED SUPERVISION CLAIMS

LAWPRO sees many claims in the real estate area in which lawyers do not read the material in the file or discuss it with their clerks in order to confirm that issues of concern have been identified and properly dealt with. Common examples include:

- Lawyer instructs clerk to order condominium status certificate; clerk orders and receives it, but either does not read it at all, or reads it but misses the serious problems it discloses, such as special assessments for repairs, outstanding common expense payments or lack of sufficient reserve fund;
- Clerk obtains statement from mortgage lender of amount needed to obtain discharge of mortgage, but fails to note that there is more than one debt secured by the mortgage and that the lender won't give a discharge unless all the debts secured by the mortgage are paid;
- In mortgage deal, clerk fails to search executions against the mortgagors prior to closing, resulting in executions taking priority over mortgage;
- Clerk fails to read title search or fails to note important items on title search and draw them to the lawyer's attention (such as "no dealings" indicators, construction liens, mortgages, certificates of pending litigation, restrictive covenants, etc.).

BALL IS DROPPED ON CLERK-TO-CLERK FILE TRANSFER

Clerk A is assigned to the mortgage loan file. Law firm is instructed to obtain title insurance to protect the lender's security interest in the title. Clerk A goes on vacation and file is transferred to Clerk B. Clerk B is under the impression that the file is ready to close. Unfortunately, no binder, commitment or pre-approval for a title insurance policy had been obtained by Clerk A. Mortgage transaction is completed, presumably without someone reviewing the file (from a control perspective) and discovering the lack of title insurance protection. A problem is discovered after closing that would have been covered under the title insurance policy, but not on an E&O basis. (In other words, there was no breach necessarily of any standard of practice in terms of the specific problem or complaint, but because title insurance coverage goes beyond

the negligence standard in certain respects, the title insurance policy would have offered complete protection for the type of problem/complaint.) The failure to obtain title insurance then becomes the basis of the allegation of negligence, and the lawyer is responsible for failure to supervise the work on the file.

LAW CLERK ACCEPTED MATTER WITHOUT LAWYER'S KNOWLEDGE

Business loan instructions were faxed to a law office, addressed to a lawyer in the usual way. The secretary intercepted the instructions without drawing them to the lawyer's attention, and simply proceeded as if the lawyer had accepted the retainer in the normal course. The lender, wrongly, assumed that the lawyer had received and accepted the retainer. The lawyer was never told about the matter. The clerk made errors that prevented the deal from closing.

LAWYER OUT OF OFFICE DUE TO PERSONAL INJURY

Lawyer was badly injured in a slip-and-fall. Her injuries required a hospital stay of one month followed by a convalescence at home for a further two months. During that entire period of time the office remained open and her long-time clerk handled all of the real estate transactions on her behalf. The lawyer allowed the clerk to use the lawyer's Teraview PSP. The clerk simply forged the lawyer's name along with the names of various mortgagors. The lawyer had authorized the clerk to sign her name on documents or cheques the "odd time." The lawyer did personally sign some cheques (presumably delivered to him for signature by the clerk) over the three months, and was aware that numerous real estate transactions were being handled and concluded by the clerk in her absence.

BALL IS DROPPED ON LAWYER-TO-LAWYER TRANSFER

In all areas of the law, LAWPRO sees claims arising when files are transferred at the time of extended lawyer absences from the office (e.g., maternity, parental or medical leaves). This is an example from the family law area. Law firm has very busy family law practice. The firm has some senior lawyers, and several associates. A junior associate goes on maternity leave. At the direction of the senior family law partner, her files are split between the other associates. No file transfer memos are created and the transfer of the files is not otherwise organized or supervised. The associates receiving the files are very busy and place greater reliance on the staff and clerks that have worked on the departed associate's files. On various files mistakes are made, including missing limitation periods and other deadlines.