

ETHICAL DEVELOPMENT DURING SUPERVISED LEGAL PRACTICE

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DUTY TO SUPERVISE V. SUPERVISED LEGAL PRACTICE

- The Duty to Supervise and Supervised Legal Practice are not one and the same.
- Duty to Supervise is a general aspect of a lawyer's professional responsibility associated with management and oversight of all legal work for which they have responsibility. It features in professional conduct rules. See ASCR R37.
- Supervised Legal Practice is best viewed as a continuation of legal training for newly admitted lawyers, and not merely as a process of management and oversight.
- There is of course a natural overlap.

SUPERVISED LEGAL PRACTICE: THE STATUTORY FRAMEWORK

- Supervised Legal Practice is a creature of statute found in state/territory Legal Profession Acts. For the vast majority of newly admitted lawyers, those who have completed a PLT course, the period of supervised practice is two years. For those who have completed a traineeship/articled clerkship, the period is 18 months.
- The definition of Supervised Legal Practice is tautological and hinges of the meaning of “supervision”. However, supervision is not defined.
- ‘Supervised Legal Practice’ has not been the subject of any useful, in terms of understanding the nature of supervision, judicial consideration.

IS SUPERVISED LEGAL PRACTICE “THE NEW ARTICLES” ?

- Supervised Legal Practice comes after a practical legal training (PLT) program and PLT programs have virtually replaced articles of clerkship
- Supervised Legal Practice was intended to supplement PLT as a final stage of professional training.
- ‘A lawyer must demonstrate a thorough understanding of the principles of professional responsibility’ (Law Council of Australia, *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services* (1994), Supervised Legal Practice, Principle 8)
- Currently, Supervised Legal Practice does not seem to be used, on a profession-wide basis, for systemized training in professional responsibility and/or the ethical development of supervisees.

BEYOND TEACHING ETHICS: UNDERSTANDING THE EXPERIENCE OF JUNIOR LAWYERS

- ‘The best way to improve ethical judgment is generally through engagement with real problems, involving real clients’
 - *Deborah L. Rhode, 'Teaching Legal Ethics' (2007) 51(4) Saint Louis University Law Journal 1043, 1052.*
- If this is accepted then Supervised Legal Practice is an appropriate medium for working through ethical issues as part of day to day work.
- However, previous research indicates that junior lawyers face structural problems which may hinder their ability to work through ethical issues with their supervisor as part of their day to day work.
 - *For an overview of that research see Conference Paper Section III(B)*

THE QLSC SURVEY – ETHICS AND SUPERVISION

- Overall these results point towards a general acknowledgement that ethical practice is an important component of supervision.
- However, there appears to a discord between the perceptions and attitudes of supervisors and supervisees. Overall, supervisors appear more positive in terms of what supervision can and does achieve in relation to ethical behaviour and promoting ethical practices.
- In terms of the perceived ‘focus’ of their supervision, ‘ethical behaviour’ falls below ‘potential risks’ and ‘client relationship management and service’.
- Despite the superficial acknowledgement of ethical practice/ ethical behaviour being a feature of supervision, a more pervasive issue may be the lack of know-how in terms in relation to supervision.
- *For a discussion of these aspects of the QLSC survey, see Conference Paper Section IV*

A FUNCTIONAL UNDERSTANDING OF SUPERVISION: A FORUM FOR DEVELOPING ETHICAL MATURITY

- The legal profession has largely treated supervision as a component of practice management, where the primary concerns are risk management, productivity and profitability.
- However, there is a general consensus among supervision scholars from other professions that supervision has three main functions:
 - Formative – ‘maintaining and facilitating the supervisees’ competence, and general effectiveness’
 - Restorative – ‘encouraging emotional experiencing and processing’
 - Normative – ‘case management and quality control issues’

Derek Milne, Evidence-Based Clinical Supervision: Principles and Practice (Wiley-Blackwell, 2009) 15–16

TWO ETHICAL RESPONSIBILITIES OF SUPERVISION

- ‘The first ethical responsibility of supervision is to help the supervisee ethically reflect on their practice from both internal and external perspectives ...’
- ‘The second ethical responsibility is to help the supervisee not just resolve current ethical dilemmas, but also to use ethical challenges to develop their ethical maturity.’

*Peter. Hawkins and Robin. Shohet, Supervision in the Helping Professions
(McGraw-Hill/Open University Press, 2012) 62*

ETHICAL MATURITY

‘Ethical maturity involves having the reflective, rational and emotional capacity to decide actions are right and wrong or good and better, having the resilience and courage to implement those decisions, being accountable for ethical decisions made (publicly or privately), and being able to learn from and live with the experience.’

Michael Carroll, 'Ethical maturity: Compasses for life and work decisions-Part I' (2011) 17(3) *Psychotherapy in Australia* 34, 41

Five-step Model of Ethical Maturity

Carroll proposes the following five step model of ethical maturity:

1. Fostering ethical sensitivity and thoughtfulness (moral education)
2. Ethical discernment and decision making (moral judgment)
3. Ethical implementation (ethical capability and moral duty)
4. Ethical accountability (moral defence)
5. Ethical sustainability and peace (living with the ambiguities of ethical decision making)

Michael Carroll, 'Ethical maturity: Compasses for life and work decisions-Part I' (2011) 17(3) Psychotherapy in Australia 34 41-43

- **What can supervisors do to help supervisees work through these steps?**

Some Final Thoughts

- Looking to other professions for examples: Supervised Practice is a feature of professional training for Medical Practitioners, Psychologists, and Pharmacists. Common to all three professions, supervised practice occurs as part of an organized training program (“Internship”) which are accompanied (especially in psychology) by useful and detailed guidelines. This model *may* be appropriate for the legal profession.
- Arguably, supervisors should be required to undergo training programs which would cover such things as the “ethical responsibilities of supervision”

SOME QUESTIONS FOR YOU

- Is Supervised Legal Practice, *really*, the “New Articles?”
- Has the potential for ethical development during Supervised Legal Practice been overlooked?
- ‘The consensus among experts in professional responsibility is that courses in the subject are among the most difficult to teach’. (Deborah L. Rhode, 'Teaching Legal Ethics' (2007) 51(4) *Saint Louis University Law Journal* 1043, 1047) Is this statement true? If so, does this statement stand true in the context of learning during supervised experience?

ANY QUESTIONS FOR ME?