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# THE POWER OF LAWYER REGULATORS TO INCREASE CLIENT & PUBLIC PROTECTION THROUGH ADOPTION OF A PROACTIVE REGULATION SYSTEM

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PennState Dickinson Law

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# ARTICLES

## THE POWER OF LAWYER REGULATORS TO INCREASE CLIENT & PUBLIC PROTECTION THROUGH ADOPTION OF A PROACTIVE REGULATION SYSTEM

*by*
*Laurel S. Terry*[*]

*This Article focuses on those who regulate U.S. lawyers. The Article argues that the lawyers who head regulatory bodies in the United States have the ability to adjust the focus of the regulator for which they work in a way that will increase client and public protection. The Article further argues that it is appropriate for lawyers in these positions to exercise this power and that they should do so. The Article concludes by offering two concrete recommendations.*

*The first recommendation is that those who are in charge should, upon reflection, adopt a mindset in which they recognize that the regulator should be systematically trying to prevent problematic behavior by lawyers, as well as responding to such behavior after it occurs. The second recommendation is that regulators should take advantage of a tool they already have at their disposal, which is their state's equivalent to ABA Model Rule of Professional Conduct 5.1. If jurisdictions added two ques-*

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*tions about Rule 5.1 to lawyers' annual bar dues statement, along with a link to additional online resources, they would be able to emulate actions that have been taken in Australia and Canada. The data suggest that such steps could dramatically reduce client complaints, lead to improved client service, and change the ways in which lawyers operate their law practices.*

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## INTRODUCTION

This Article is directed toward those who regulate the U.S. legal profession. The thesis of this Article is that those who lead these types of regulatory bodies can have a profound impact on the ways in which the regulators function. This Article suggests that these individuals should use their influence to steer the regulatory body they oversee towards a more comprehensive approach to proactive lawyer regulation. The Arti-

cle argues that a proactive approach to lawyer regulation is desirable because it would increase client and public protection by preventing problematic lawyer behavior before it occurs, in addition to responding to such behavior after it occurs.

Section I begins by providing background information about the lawyer regulatory bodies that are the subject of this Article. Section II reviews examples of proactive lawyer regulation outside of the United States and data that suggests that this type of proactive regulation has had a positive impact on clients and the public. Section III argues for a more systematic and comprehensive U.S. approach to proactive lawyer regulation. It begins by providing a structure that one can use to think about lawyer regulation. It continues by identifying U.S. examples of proactive lawyer regulation, but suggests that the U.S. approach has generally been ad hoc rather than systematic. This Section argues that it is appropriate for regulatory bodies—and those who are in charge of them—to adopt a comprehensive approach to proactive lawyer regulation. Section IV recommends that those who lead lawyer regulatory bodies take the necessary steps to develop a commitment to proactive regulation in which the regulator's mission is defined to include preventing problematic behavior by lawyers, as well as responding to such behavior after it arises. This Section also explains how regulators that want to employ a more proactive approach could—without any additional rule changes—adopt a more proactive approach to lawyer regulation. This Section suggests that regulators use ethics Rule 5.1 more creatively than they currently are doing. Section V responds to anticipated criticisms. Section VI offers examples of other contexts in which preventive work has been shown to produce results and be cost-effective.

## I. BACKGROUND INFORMATION ABOUT LAWYER REGULATORY BODIES IN THE UNITED STATES

This Article focuses on the regulatory bodies that are responsible for lawyer conduct in the United States and the individuals who lead these organizations. The lawyer regulatory situation in the United States is different than the regulatory situation one finds in some other countries. The 2007 U.K. Legal Services Act, for example, established the Legal Services Board (LSB) as a body that is independent of government and the legal professions and "is responsible for overseeing legal regulators in England and Wales."[1] The LSB is statutorily required to be led by some-

[1] *About Us*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/about_us/index.htm. *See generally* Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661 (2012) (addressing trends regarding "who" regulates lawyers).

one other than a lawyer and is required to have non-lawyers as the majority of its Board.[2] The LSB has oversight authority with respect to the Solicitors Regulation Authority (SRA), which is the independent regulatory body for solicitors in England and Wales (and is sometimes referred to as the "frontline [or front-line] regulator.")[3]

In the United States, regulation of lawyers is seen as primarily the obligation of the judicial branch of government, rather than the legislative or executive branches of government.[4] In virtually all U.S. states, the overarching responsibility for lawyer regulation belongs to the state's highest court.[5] (For ease of reference, these high courts will be referred to collectively as the state supreme courts.)[6] The reasons that traditionally are cited for state judicial regulation of lawyers include the constitutional doctrine of separation of powers and the inherent authority of the courts

[2] Legal Services Act, 2007, c. 29, § 2, sch. 1 (Eng., Wales), http://www.legislation.gov.uk/ukpga/2007/29/schedule/1 [hereinafter Legal Services Act 2007].

[3] *See Approved Regulators*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm; *see also Plant Lays Bare SRA/Law Society Tensions Caused by "Defective" Legal Services Act*, LEGAL FUTURES (Apr. 12, 2011), http://www.legalfutures.co.uk/regulation/solicitors/plant-lays-bare-sralaw-society-tensions-caused-by-defective-legal-services-act (referring to the SRA as the frontline regulator).

[4] *See generally* AM. BAR ASS'N COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201A: REPORT TO THE HOUSE OF DELEGATES, http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201a.authcheckdam.pdf [hereinafter REPORT 201A]. This resolution affirmed the ABA's "support for the principle of state judicial regulation of the practice of law." *See also Report of the Commission on Evaluation of Disciplinary Enforcement (1989–1992)*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html#4 (citing separation of powers and the inherent authority of the courts in support of the first recommendation, which was that "[r]egulation of the legal profession should remain under the authority of the judicial branch of government").

[5] *See, e.g.*, REPORT 201A, *supra* note 4. California is an example of a jurisdiction in which the legislature takes an unusually active role in regulating lawyers. *See* STEPHEN GILLERS ET AL., THE REGULATION OF LAWYERS: STATUES AND STANDARDS 749 (2015). New York used to be another exception to state high court regulation because lawyers were regulated by different judicial departments, depending on the lawyers' geographic location. In December 2015, however, New York adopted a unified system of lawyer regulation. *See* Press Release, N.Y. State Unified Court Sys., Chief Judge Announces New Rules to Ensure a More Efficient and Consistent Attorney Discipline Process in New York State (Dec. 29, 2015), http://www.nycourts.gov/press/PDFs/PR15_23.pdf.

[6] In some jurisdictions, the highest court is not called the Supreme Court, but has another name. For example, in New York, the highest court is the Court of Appeals and the Supreme Court is a trial level court. *See* N.Y. STATE UNIFIED COURT SYSTEM, THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE (2014), https://www.nycourts.gov/Admin/NYCourts-IntroGuide.pdf.

to regulate those appearing before them.[7] Although the state supreme courts typically have the overarching responsibility for lawyer regulation, the day-to-day regulatory efforts typically are handled by regulatory bodies that ultimately are subject to the authority of the state supreme courts. There are a variety of forms that such front-line regulation takes.[8] In some U.S. jurisdictions, the front-line lawyer regulation is handled by one or more entities that are under the direct control of the jurisdiction's highest court.[9] In other jurisdictions, however, the front-line regulatory function is not housed in a state supreme court entity, but in one or more branches of the unified state bar association.[10]

The state-based front-line regulators who are responsible for lawyer discipline in the United States have a variety of names.[11] For example, in

[7] *See* REPORT 201A, *supra* note 4. The recent Supreme Court case, N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015), certainly has the potential to change the nature of lawyer regulation in the United States and the regulators that are the subject of this Article. For resources that address the relevance of the Dental Board case to lawyer regulation, see *North Carolina Board of Dental Examiners Decision Resources*, A.B.A. CTR. PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/north-carolina-board-of-dental-examiners-decision-resources.html. Whether and how the Dental Board case will change U.S. lawyer regulation is beyond the scope of this Article. It is also, in my view, likely irrelevant to the thesis of this Article. Regardless of who regulates lawyers, I believe that regulatory entities (and those who lead those entities) should adopt a comprehensive approach to proactive lawyer regulation since a proactive approach would add additional protections for clients and the public.

[8] *See, e.g.*, Appendix 5 to this Article, which contains information about the regulators responsible for lawyer discipline. The term "front-line" regulator and "overarching regulator" have become more common since the adoption of the Legal Services Act 2007, *supra* note 2.

[9] *See, e.g.*, DISCIPLINARY BD. OF THE SUPREME CT. OF PA. HOMEPAGE, http://www.padisciplinaryboard.org; PA. BD. OF LAW EXAMINERS HOMEPAGE, http://www.pabarexam.org.

[10] *See, e.g.*, *Ethics and Professionalism*, STATE BAR OF GA., http://www.gabar.org/barrules/ethicsandprofessionalism/index.cfm ("Although the Supreme Court of Georgia retains ultimate authority to regulate the legal profession, the State Bar of Georgia's Office of the General Counsel serves as the Court's arm to investigate and prosecute claims that a lawyer has violated the ethics rules."); OFFICE OF ATT'Y REGUL. COUNSEL, *About Us*, COLO. SUP. CT., http://www.coloradosupremecourt.com/AboutUs/AboutUs.asp. ("The Office of Attorney Regulation Counsel's duties involve assisting the Colorado Supreme Court in regulating all phases of the practice of law in Colorado.").

[11] *See, e.g.*, the regulators identified in DIRECTORY OF LAWYER DISCIPLINARY AGENCIES, A.B.A. CTR. PROF. RESP. (Sept. 2015). These regulators are listed in Appendix 5 to this Article. This Article excludes from its coverage those regulators that are responsible for bar admission issues. See *infra* note 153 and accompanying text discussing the beginning, middle, and end stages of lawyer regulation. As is explained in greater detail, *see infra* Section III.A, for those jurisdictions that have

Colorado, the regulator is the Colorado Supreme Court Office of Attorney Regulation Counsel.[12] In Illinois, the regulator is the Attorney Registration & Disciplinary Commission.[13] In the District of Columbia, this regulator is the Office of Disciplinary Counsel, although it previously was called the Office of Bar Counsel.[14] In Pennsylvania, the regulator is the Office of Disciplinary Counsel.[15] The source of funding for these regulators varies: it may include money from state bar membership dues (which may or may not be earmarked for the discipline system), supreme court fees assessed on lawyers, and legislative appropriations.[16] Despite these differences, for the remainder of this Article, these front-line regulators will be treated similarly and will be referred to collectively as regulators, lawyer regulators, or sometimes as lawyer regulatory bodies.

It is common for the lawyers who work for these regulators to belong to the National Organization of Bar Counsel (NOBC).[17] The NOBC was formed in 1965 "to enhance the professionalism and effectiveness of law-

separate "front-line" regulators that handle admissions and discipline issues, I have concluded that it is the "end stage" discipline regulators that should assume the responsibility for middle stage proactive regulation, rather than the beginning stage admissions regulators.

[12] *See* OFFICE OF ATT'Y REGUL. COUNSEL, *Complaints/Discipline—Overview*, COLO. SUP. CT., http://www.coloradosupremecourt.com/Complaints/Complaints_Disc.asp.

[13] *See* Att'y Registration & Disciplinary Comm'n of the Supreme Court of Ill. Homepage, https://www.iardc.org.

[14] *See Office of Disciplinary Counsel Purpose and Mission*, D.C. ATT'Y DISCIPLINE SYS., https://www.dcbar.org/attorney-discipline/office-of-disciplinary-counsel/obcmission.cfm. For a link to the prior name, *see Office of Bar Counsel*, D.C. ATT'Y DISCIPLINE SYS., (on file with the Lewis & Clark Law Review).

[15] *See, e.g.*, *Structure of the Disciplinary System*, DISCIPLINARY BD. SUP. CT. PA., http://www.padisciplinaryboard.org/about/structure.php [hereinafter *Pa. Structure of the Disciplinary System*] (discussing the roles of the Disciplinary Board and the Office of Disciplinary Counsel).

[16] *See, e.g.*, AM. BAR ASS'N. CTR. PROF'L RESPONSIBILITY STANDING COMM. ON PROF'L DISCIPLINE, 2013 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D) (Oct. 2014) [hereinafter *S.O.L.D. 2013*], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2013_complete_sold_results.authcheckdam.pdf (CHART VI: BUDGET AND SOURCES OF FUNDING 2013); AM. BAR ASS'N. CTR. PROF'L RESPONSIBILITY STANDING COMM. ON PROF'L DISCIPLINE, 2014 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D) (Jan. 2016) [hereinafter *S.O.L.D. 2014*], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.authcheckdam.pdf (CHART VII: BUDGET AND SOURCES OF FUNDING 2014).

[17] *See, e.g.*, *NOBC History*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/about-us/nobc-history ("With membership of lawyer regulators from every state in the union and the District of Columbia, NOBC is unique as a national organization of agencies and lawyers professionally engaged in the enforcement of legal ethics rules.").

yer disciplinary counsel throughout the United States."[18] As the description in the previous sentence illustrates, it is common for the lawyers who regulate lawyers, the regulators for which they work, and the NOBC itself to define their mission in terms of lawyer *discipline*, rather than lawyer *regulation*.

Lawyer discipline is a sanction that is imposed *after* a lawyer has violated a rule of professional conduct.[19] While the type of discipline imposed can vary depending on the severity of the misconduct and the presence or absence of mitigating factors,[20] discipline typically is a responsive measure that happens *after* misconduct has occurred. The types of discipline that a regulatory entity may impose on a lawyer include, *inter alia*, informal or private admonitions, public admonitions, suspension from practice for a designated period of time, and disbarment.[21]

[18] *See id.* As this history page explains, the NOBC "had its genesis in the late 1950's and early 1960's when lawyer discipline counsel from around the country began meeting with each other at American Bar Association meetings about matters of common concern, such as professional ethics and the unauthorized practice of law. In August of 1964, four general counsel of state bar associations, Indiana, Illinois, Texas and California, met and decided to establish a vehicle through which bar counsel could regularly meet to share work experiences; exchange briefs, pleadings, and ideas; and facilitate reciprocal discipline." This pattern, in which a network of regulators starts small and grows over time, seems to be typical. *See, e.g.*, Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, B. EXAMINER at 18, 18–19 (June 2013); Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need to Create a Global Lawyer Regulatory Umbrella Organization*, MICH. ST. L. REV. 735, 767 (2012); *cf.* Elizabeth Chambliss & Dana Remus, *Nothing Could Be Finer: The Role of Agency General Counsel in North and South Carolina*, 84 FORDHAM L. REV. 2036, 2042–43 (2016) (noting the lack of vibrant agency general counsel networks).

[19] *See, e.g.*, ROBERT L. AGACINSKI & ROBERT E. EDICK, STATE OF MICHIGAN ATTORNEY DISCIPLINE BOARD & ATTORNEY GRIEVANCE COMMISSION: 2012 JOINT ANNUAL REPORT (Jan. 1–Dec. 31, 2012), http://www.adbmich.org/download/2012_JT_ANNUAL_RPT.pdf [hereinafter 2012 MICH. ANNUAL REPORT]; AM. BAR ASS'N, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, RULE 9 (2002), http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html; *see generally Standing Committee on Professional Discipline*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/disciplinecommittee.html [hereinafter *ABA Standing Committee on Professional Discipline*].

[20] *See, e.g.*, AM. BAR ASS'N, ANNOTATED ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2015); AM. BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992); *see also S.O.L.D. 2013, supra* note 16, at Chart II (state data about the different kinds of discipline imposed in 2013); *S.O.L.D. 2014, supra* note 16, at CHART III (state data about the different kinds of discipline imposed in 2014).

[21] *S.O.L.D. 2013, supra* note 16.

The American Bar Association (ABA) regularly collects and publishes data about lawyer disciplinary sanctions imposed by U.S. jurisdictions.[22] It also publishes information about the staffing in those offices, including the number of lawyers who hold the position of "Chief Disciplinary Counsel," the number of lawyers who are "Other Disciplinary Counsel," and the number of "Other Lawyers."[23]

Disciplining lawyers who have engaged in wrongful conduct clearly is a very important function of those who regulate lawyers. As the remainder of this Article argues, however, responding to improper lawyer conduct is not the only function that has been or should be performed by lawyer regulators. This Article argues that lawyer regulators—and the lawyers who head these regulatory bodies—should regulate in a proactive manner in order to *prevent* problematic behavior by lawyers from occurring.

## II. GLOBAL EXAMPLES OF PROACTIVE LAWYER REGULATION

As U.S. states consider whether to adopt the proactive approach recommended in this Article, they may find it helpful to review the experience of regulators located outside the United States. Most observers begin by looking at the experience in New South Wales, Australia because this is the jurisdiction that has been the subject of several empirical studies.

Starting in 2001, New South Wales lawyers were allowed to form "incorporated legal practices (ILPs)" that could include both lawyer and non-lawyer partners.[24] Most of the firms that took advantage of the ILP structure were small firms, many of whom used the ILP legal form not to raise capital, but in order to allow a non-lawyer manager or a spouse of one of the firm's lawyers to have an ownership interest in the firm.[25] The governing legislation required each ILP to appoint a legal practice director and required that each ILP have "appropriate management systems,"

[22] *Id.*

[23] *Id.* at Chart VIII: Staffing of Disciplinary Counsel Offices 2013: Part A, col. 28. The ABA discipline surveys include separate charts that track adjudicative staffing. *See id.* at Chart IX: Staffing Of Adjudicative Offices 2013: Part A.

[24] *See, e.g.*, Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 156–65 (2012) (includes a comprehensive history of the development of New South Wales's ILP system).

[25] *See, e.g.*, Tahlia Gordon & Steve Mark, *The Australian Experiment: Out with the Old, in with the Bold*, *in* THE RELEVANT LAWYER, REIMAGINING THE FUTURE OF THE LEGAL PROFESSION 185, 193 (Paul A. Haskins ed., 2015).

but did not provide any further details explaining what was meant by the phrase "appropriate management systems."[26]

After this legislation was enacted, the New South Wales Office of the Legal Services Commissioner (hereinafter OLSC) used the "appropriate management systems" language in the statute to develop a proactive approach to regulation.[27] After consultation with various stakeholders, the OLSC developed a list of ten objectives, or issues areas, that an appropriate management system should address.[28] The OLSC required each ILP to conduct a "self-assessment" to determine the ILP's level of compliance with these ten objectives.[29]

For each of the ten objectives, the self-assessment form required the ILP to rate itself as fully compliant plus, fully compliant, compliant, partially compliant, or noncompliant.[30] The self-assessment form was available in print initially and later online,[31] along with resources to help an ILP assess its compliance and to become compliant if it wasn't already.[32] The OLSC offered to provide help to those who requested it and conducted audits of ILPs that did not complete the self-assessment form.[33]

The ten items that New South Wales ILPs were asked to address look very similar to issues that have been identified in the United States.[34]

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[26] *See id.* at 187; Terry et al., *supra* note 1, at 2678. In 2014, New South Wales adopted the Uniform National Legal Profession Act, which took effect in July 2015 and replaced the act cited in this 2012 article. *See A New Framework for Practising Law in NSW*, LAW SOC'Y N.S.W., http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/nationalreform/. *See infra* notes 131–145 and accompanying text for a discussion of these changes.

[27] *See* Gordon & Mark, *supra* note 25, at 187.

[28] *Id.* at 189.

[29] *Id.*

[30] *See* OFFICE OF LEGAL SERVS. COMM'R, SELF-ASSESSMENT OF "APPROPRIATE MANAGEMENT SYSTEMS" FOR INCORPORATED LEGAL PRACTICES IN NSW (on file with the Lewis & Clark Law Review) [hereinafter NSW SELF-ASSESSMENT FORM]. An excerpt from New South Wales's Self-Assessment Form is found *infra* in Appendix 4(a).

[31] *See* Email from Tahlia Gordon, Dir. of Creative Consequences P'ship Ltd. & former Research & Projects Manager at the Office of the Legal Servs. Comm'r, N.S.W., Austl., to the author (Jan. 27, 2016) (on file with the Lewis & Clark Law Review).

[32] *See* Terry et al., *Trends, supra* note 1, at 2678.

[33] *See Meeting Minutes*, First Regulators' Workshop On Proactive, Risk-Based Regulation (Denver, May 30, 2015), http://www.coloradosupremecourt.com/PDF/PMBR/Regulators%20Conference%20Notes%20MINUTES.pdf [hereinafter 2015 Proactive Workshop Minutes]; *see also* Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 507 (2009).

[34] For a list of issues or common problems that give rise to discipline in U.S. jurisdictions, see, for example, 2012 MICH. ANNUAL REPORT, *supra* note 19, at 5.

They included, for example, helping lawyers avoid potential problems with negligence, communication, delay, the transfer of files, billing practices, conflicts of interest, records management, trust account regulations, and supervision of practice and staff.[35]

> Conduct characterized by a lack of diligence, lack of competence, and or neglect of client matters was the largest category of professional misconduct in 2012, accounting for 27% of the discipline orders issued in 2012. . . . Thirty Michigan lawyers were publicly disciplined in 2012 as the result of a criminal conviction. These cases accounted for 26% of discipline orders in 2012. . . .The third largest category of misconduct, accounting for 17% of all discipline orders in 2012, involved a lawyer's improper handling of client funds in cases ranging from poor bookkeeping practices to intentional misappropriation of client funds. Other types of misconduct resulting in discipline in 2012 included a lawyer's failure to comply with a prior discipline order; conflicts of interest; misrepresentations to a tribunal; and failure to supervise non-lawyer employees.

*Id.*; *see also* ILL. ATT'Y REGISTRATION & DISCIPLINE COMM'N, ANNUAL REPORT HIGHLIGHTS (2014).

- 5,921 grievances were docketed against 3,935 different attorneys, representing about 4% of all registered attorneys
- 54% of all grievances involved issues of poor attorney-client relations: neglect of a client matter (39% of all grievances) or failure to communicate with a client (15% of all grievances)
- Top practice areas likely to attract a grievance include criminal law, domestic relations, real estate, and tort
- 3% of all grievances resulted in the filing of formal disciplinary charges in 2014
- 118 formal disciplinary complaints were filed in 2014
- 76% alleged fraudulent or deceptive activity typically alleged in conjunction with other charges such as neglect, improper trust account management or criminal conduct
- 26% of all formal complaints voted in 2014 arose out of at least one attorney (aka "Himmel" report).

*Id.* at 3.

[35] *See Ten Areas to Be Addressed*, N.S.W. OFFICE LEGAL SERVICES COMM'R (on file with the Lewis & Clark Law Review). This same list of ten objectives appears on the current webpage of the New South Wales Office of the Legal Services Commissioner. *Practice Management*, OFFICE LEGAL SERVICES COMM'R, http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx [hereinafter *NSW OLSC Practice Management Webpage*]. Appendix 2, *infra*, contains a list of these ten issues, along with the issues or elements identified in other jurisdictions that are exploring proactive regulation. The issues that appear in Appendix 2 are similar to the problem areas that one sees in the United States. *See, e.g.*, ATT'Y GRIEVANCE COMM'N OF MD., 40TH ANNUAL REPORT: JULY 1, 2014 THRU JUNE 30, 2015 at 27 (2015), http://www.courts.state.md.us/attygrievance/docs/annualreport15.pdf [hereinafter Maryland Attorney Grievance Commission Annual Report] (showing that the greatest number of discipline cases were for issues of "[c]ompetent representation, diligence, communication, neglect and [failure to] abide by clients' decisions, followed by discipline related to dishonesty, fraud, deceit or misrepresentation").

After it created the self-assessment form and process, the New South Wales OLSC collaborated with Professor Christine Parker to study the results of the ILP self-assessment process. The resulting study found a dramatic reduction in client complaints, including these findings:

- On average the complaints rate for self-assessed ILPs drops by a full two thirds after they have completed their initial self-assessment.
- ILP self-assessment makes a big difference in the complaints rate.
- Even assuming ILPs were better managed to start, after self-assessment there is a huge difference between ILPs and non-ILPs.[36]

After this empirical study, Professor Susan Fortney conducted a second empirical study in which she explored the issue of *why* there had been such a dramatic reduction in client complaints.[37] This second study found that almost three-quarters of the firms that conducted the self-assessment revised their law firm processes as a result of going through the self-assessment process.[38] The data from her study help explain why the self-assessment process made a difference—they show that the self-assessment led to changes in behavior and practices by lawyers and law firms. While this data might not seem surprising and might intuitively seem correct, it is useful to have data to back up that intuition. Professor Fortney has published this table, which summarizes the results of her study regarding the actions of the lawyers and firms that conducted the self-assessment:[39]

[36] *See* Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & Soc'y 466, 485–88, 493 (2010) (showing that on average, the complaint rate (average number of complaints per practitioner per years) for ILPs after self-assessment was two-thirds lower than the complaint rate before self-assessment).

[37] *See generally* Fortney & Gordon, *supra* note 24.

[38] *Id.* at 172–73; *see also* Susan Saab Fortney, *Promoting Public Protection Through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation System*, 23 Prof. L. 16, 19–20 (2015); Amy Salyzyn, *What If We Didn't Wait? Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices*, 92 Canadian B. Rev. 507, 527–33 (2013). *See generally* Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 St. Mary's J. Legal Malpractice & Ethics 112 (2014).

[39] Fortney & Gordon, *supra* note 24, at 173. This table was numbered Table 2 in the original source; it was also reprinted as Table 1 in Fortney, *Promoting Public Protection*, supra note 38. *See also* Laurel S. Terry, *When it Comes to Lawyers, Is an Ounce of Prevention Worth a Pound of Cure?*, Jotwell (July 13, 2016), http://legalpro.jotwell.com/when-it-comes-to-lawyers-is-an-ounce-of-prevention-worth-a-pound-of-cure/.

Table 2: Steps Taken by Firms in connection with the First Completion of the Self-Assessment Process

| | |
|---|---|
| Reviewed firm policies/procedures relating to the delivery of legal services | 84% |
| Revised firm systems, policies, or procedures | 71% |
| Adopted new systems, policies, or procedures | 47% |
| Strengthened firm management | 42% |
| Devoted more attention to ethics initiatives | 29% |
| Implemented more training for firm personnel | 27% |
| Sought guidance from the Legal Services Commissioner/another person/organization | 13% |
| Hired consultant to assist in developing policies and procedures | 6% |

One noteworthy aspect of this second empirical study is the finding that a majority of lawyers who used the self-assessment process were satisfied with it, including those who had been skeptical at the outset.[40]

Queensland, Australia is another jurisdiction that has used self-assessment as part of a proactive system of lawyer regulation.[41] The anec-

[40] *Id.*

[41] *See* LEGAL SERVS. COMM'N [QUEENSL.], INCORPORATED LEGAL PRACTICES SELF-ASSESSMENT AUDIT (2012) (on file with the Lewis & Clark Law Review); *see also* John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era* (Paper presented at the Third Int'l Ethics Conference, July 13–16, 2008), http://www.lsc.qld.gov.au/__data/assets/pdf_file/0014/106214/incorporated-legal-practices.pdf). The following excerpts describe the Queensland system:

> We've said we will expect incorporated legal practices to complete self-assessment audits shortly after they commence engaging in legal practice. We've said that we want to conduct a complementary program of external audits and we've described a set of guiding principles we think should inform us in developing such a program. Those principles tell us we should have a visible presence with all the firms potentially subject to audit, not just those of them we assess to be 'at risk'; that we should keep their compliance costs proportionate to the potential significance of the information we are seeking to obtain; that we should direct our limited resources to "the measurement of impacts within small, specific and well defined problem areas"; and that we should design "creative-tailor made solutions [that] procure compliance while recognising the need to retain enforcement as the ultimate threat."
>
> We envisage conducting a wide variety of external audits of different kinds and different levels of intensity depending on the circumstances of the law firms subject to audit. We will separate them into two kinds for performance reporting and broader descriptive purposes—web-based surveys and on-site reviews. . . . We envisage developing a varied and ever-expanding suite of short, sharp web-based surveys which test discrete aspects of a law firm's ethical infrastructure. We're confident that web-based surveys can tell us a great deal. . . . More fundamentally, however, we've designed the auditing program that we've described in the pare deliberately and as a matter of principle so as not to add any significant additional regulatory burden to law firms unless there is some demonstrable risk-related reason in all the circumstances that justifies it and to remain consistent even then with the Administrative Review Council's best practice principles precisely so as to ensure that the compliance costs remain proportionate to the potential significance of the information we're seeking to obtain.

dotal evidence from Queensland is similar to the study results from New South Wales:

> We mentioned earlier that we and our counterpart regulator in New South Wales have conducted between us more than 1600 compliance audits comprising 1550 or so self-assessment audits and another 65 web-based surveys or 'ethics checks.' Notably we have conducted only 12 on-site reviews, 9 in New South Wales and 3 in Queensland, all of them in circumstances in which we had good reason to believe the law practices to be non-compliant.
>
> We don't have the New South Wales data, and the numbers here are too small to warrant drawing any particular conclusion, but we know that the number of inquiries and complaints we received about the Queensland practices in the 12 months following the audit is less than half the number of inquiries and complaints we received about those practices in the 12 months prior to the audit.[42]

In explaining the benefits of its proactive self-assessment driven system, the chief regulator in Queensland identified four disadvantages of the traditional regulatory system: 1) "complaints-driven processes are almost entirely reactive"; 2) "complaints-driven processes are highly selective in their application"; 3) "complaints-driven processes focus exclusively on minimum standards"; and 4) "complaints-driven processes focus exclusively on the conduct of individual lawyers."[43]

Jurisdictions and commentators in Canada are among those who have studied the New South Wales and Queensland examples.[44] For example, the Canadian Bar Association (CBA), which is a voluntary bar association, developed a self-assessment tool modeled after the New South Wales assessment tool.[45] The guide that accompanies the CBA's Self-

*Id.* at 17–18, 25.

[42] *See* John Briton & Scott McLean, *Lawyer Regulation, Consciousness-Raising and Social Science* 17–18 (Paper presented at Int'l Legal Ethics Conference IV, July 15–17, 2010), http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/106069/lawyer-reg-consciousness-raising-and-social-science.pdf.

[43] John Briton, *The Changing Face of Lawyer Regulation* 2–5 (Paper presented at 47th Annual Vincents' Queensl. Symposium, Mar. 28, 2009), http://www.lsc.qld.gov.au/__data/assets/pdf_file/0004/106195/changing-face-of-lawyer-regulation.pdf.

[44] *See, e.g.*, Salyzyn, *supra* note 38, at 531–32. When working on the CBA Self-Assessment Tool, Professor Salyzyn consulted with Tahlia Gordon, who had been a regulator in New South Wales and was very familiar with the New South Wales self-assessment form. *See* Email from Tahlia Gordon, *supra* note 31.

[45] *See Ethical Practices Self-Evaluation Tool*, CANADIAN BAR ASS'N, http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Resources/Resources/Ethical-Practices-Self-Evaluation-Tool (membership required) [hereinafter *CBA Ethical Practices Self-Evaluation Tool*]. The CBA Self-Assessment Tool previously was on the public part of the CBA webpage but has now been moved to a

Assessment Tool cites the Australian data to explain why it developed this tool.[46] The webpage that introduced the CBA's Self-Assessment Tool included the following explanation:

> The Canadian Bar Association's Ethics and Professional Responsibility Committee has undertaken this project to encourage better "ethical infrastructure" in legal practice. The project's goal is to assist lawyers and law firms by providing practical guidance on law firm structures, policies and procedures to ensure that ethical duties to clients, third parties and the public are fulfilled. To this end, the Committee has prepared an Ethical Practices Self-Evaluation Tool to assist Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports their legal practices. The Ethical Practices Self-Evaluation Tool can be found at Appendix A [to the Practical Guide and as a stand-alone document].[47]

Several other Canadian jurisdictions are now examining the feasibility of proactive regulation, including self-assessment forms such as the ones recommended by the CBA and the ones used in Australia.[48] For example, the Law Society of Upper Canada, which regulates Ontario lawyers, created a task force that is exploring this topic.[49] It has gathered da-

"members only" section. It had been included in a newsletter of the Colorado Office of Attorney Regulation Counsel, however, and is available at https://www.coloradosupremecourt.com/Newsletters/Winter2016/Canadian%20Bar%20Association's%20Ethical%20Practices%20Self-Evaluation%20Tool.pdf.

[46] *See* CANADIAN BAR ASS'N ETHICS & PROF'L RESPONSIBILITY COMM., ASSESSING ETHICAL INFRASTRUCTURE IN YOUR LAW FIRM: A PRACTICAL GUIDE 3 [hereinafter CBA SELF-ASSESSMENT TOOL E-GUIDE], http://www.cba.org/CBA/activities/pdf/ethicalinfrastructureguide-e.pdf (membership required) ("Regulatory developments in New South Wales (NSW) in Australia provide an excellent example of the positive effects of this proactive model of 'education towards compliance.'"). Similar to the CBA Self-Assessment Tool, *supra* note 45, this E-Guide has been moved from the public portion of the Canadian Bar Association webpage to a members only section.

[47] *See* CANADIAN BAR ASS'N, *Ethical Practices Self-Evaluation Tool,* http://www.cba.org/CBA/activities/code/ethical.aspx (webpage available on Sept. 9, 2014) (on file with the Lewis & Clark Law Review).

[48] *See* LAW SOC'Y UPPER CAN. TREASURER, REPORT TO CONVOCATION 8 (June 25, 2015), https://www.lsuc.on.ca/with.aspx?id=2147501582 [hereinafter JUNE 2015 REPORT TO CONVOCATION].

[49] *See Compliance-Based Entity Regulation*, LAW SOC'Y UPPER CAN., http://www.lsuc.on.ca/better-practices/ (main portal with links to materials) [hereinafter LSUC Compliance-Based Entity Regulation Webpage]. The documents on the Compliance-Based Entity Regulation web portal show the evolution and history of this task force. *See, e.g.*, LAW SOC'Y UPPER CAN. PROF'L REGULATION COMM., REPORT TO CONVOCATION 1438 (Feb. 27, 2014), http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf (ABS working group recommended further development of a compliance based regulatory system, concluding that firm or entity-based regulation is advisable whether or not ABS liberalization occurs). After interim

ta on this topic and offered preliminary reports to the Law Society's governing body.[50] In January 2016, these efforts culminated in a consultation paper seeking input on what it called "compliance-based entity regulation."[51] The paper explained the purpose of the consultation as follows:

> These limitations [of the existing regulatory system] have led the Law Society to look for a new approach, one that includes not only lawyers and paralegals, but also the entities through which they provide legal services. Compliance-based regulation supports individuals and entities to achieve best practices in a manner best suited to their environment. *Rather than reacting to misconduct after it occurs, it would be much better for both the public and for practitioners if the problem never occurred in the first place*. . . . "Compliance-based entity regulation" *refers to the proactive regulation* of the practice entity through which professional legal services are delivered. As noted in the Treasurer's June 2015 Report to Convocation, which established the Task Force, compliance-based regulation has generally been implemented together with entity regulation. The reason for this is that practice management principles relate to the practice, or entity, as a whole, and not only to the individual practitioner. . . . These two initiatives [of compliance-based regulation and entity regulation] do not necessarily have to be implemented together, but proactive regulation may be more effective if the business entity is also involved. To ensure compliance with these principles by the entity as a whole, the Task Force believes there is merit to considering the regulation of the practice itself, in addition to the individual practitioner.[52]

Approximately two months after the consultation period closed,[53] the Task Force issued its final report to Convocation, the governing body of

reports in January 2015 and April 2015, the Law Society established a Compliance-based Firm Regulation Task Force in June 2015. *See* JUNE 2015 REPORT TO CONVOCATION, *supra* note 48; Minutes of Convocation, Law Soc'y Upper Can. (June 25, 2015), https://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147501806; *see also Convocation Reports*, L. SOC'Y UPPER CAN., https://www.lsuc.on.ca/with.aspx?id=1069 (under heading Compliance-based Firm Regulation).

[50] *See, e.g.*, LSUC Compliance-Based Entity Regulation Webpage, *supra* note 49 (includes links to the Task Force's October 2015 and December 2015 interim reports to Convocation, which is the Law Society's governing body).

[51] *See* LAW SOC'Y UPPER CAN. COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, CALL FOR INPUT, CONSULTATION PAPER: "PROMOTING BETTER LEGAL PRACTICES" 5 (JAN. 2016), http://www.lsuc.on.ca/uploadedFiles/compliance-based-entity-regulation-consultation-paper.pdf [hereinafter LSUC COMPLIANCE-BASED ENTITY REGULATION TASK FORCE CALL FOR INPUT].

[52] *Id.* at 4–5 (emphasis added).

[53] *Id.* at 3 (establishing a March 31, 2016 deadline).

the Law Society of Upper Canada.[54] The Task Force report recommended that the Law Society seek an amendment to the Law Society Act to permit Law Society regulation of entities through which legal services are provided.[55] The report also recommended that Convocation approve development of a regulatory framework for consideration by Convocation based on the principles of compliance-based regulation set forth in the report. The report explained that compliance-based regulation is

> a proactive approach, in which the regulator identifies practice management principles and establishes goals, expectations, and tools to assist lawyers and paralegals in demonstrating compliance with these principles in their practices. This approach recognizes the increased importance of the practice environment in influencing professional conduct, and how practice systems can help to guide and direct professional standards.[56]

On May 26, 2016, Convocation approved these two recommendations; as a result, Canada's largest province will continue its work to develop both an entity-based regulatory system and a proactive system of regulation.[57] The Law Society of Upper Canada has a webpage devoted to

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[54] *See* LAW SOC'Y UPPER CAN. COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, [FINAL] REPORT TO CONVOCATION (MAY 26, 2016), http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2016/convocation_may_2016_cber.pdf.

[55] *Id.* at 3.

[56] *Id.*

[57] *Law Society to Move Forward with Proactive Entity Regulation*, LAW SOC'Y UPPER CAN., https://www.lsuc.on.ca/newsarchives.aspx?id=2147485737&cid=2147502518. The Press Release stated:

> The Law Society's governing body today approved the development of detailed options for a compliance-based regulatory framework, which will be the subject of focused consultation with lawyers and paralegals.
>
> "I am very pleased that the Law Society is proceeding with its work on proactive regulation," says Law Society Treasurer Janet E. Minor. "In the last few years, legal professions in Ontario have evolved rapidly and significantly. Our existing regulatory approaches do not fully reflect changes in practice over the past decades. New proactive approaches are expected to enhance protection of the public and benefit the professions by promoting better legal practices." The Law Society's Task Force on Compliance-Based Entity Regulation recommended the approach to the Law Society board based on its study of the experience in other jurisdictions, review of related research and an extensive consultation with lawyers and paralegals. "What we heard from the professions was general support for the concept of proactive entity regulation and its potential to support better practices," says Ross Earnshaw, Chair of the Task Force. "I am greatly encouraged that lawyers and paralegals are open and engaged on this front and interested in delving more deeply into potential regulatory frameworks. I look forward to hearing their views on best options."
>
> The Task Force will develop options, for review by the professions, reflecting the principles for compliance-based regulation outlined in its report. The Task Force plans to provide final recommendations for the board's consideration in

compliance-based regulation that includes these documents and additional information.[58]

British Columbia is another example of a Canadian jurisdiction that is working on further ways to regulate proactively. Unlike the Law Society of Upper Canada, the regulator in British Columbia already has statutory authority to regulate law firms and currently is deciding how best to implement this statutory authority.[59] The Law Society of British Columbia has a Law Firm Regulation Consultation webpage that includes general information and links to its October 2015 "Law Firm Regulation Consultation Brief," a Frequently Asked Questions document it prepared, a report summarizing the survey results it received, and presentation slides that it used in February 2016 when it met with lawyers in eleven cities throughout British Columbia.[60] As the Consultation Brief and other documents make clear, British Columbia sees law firm regulation as a regime

2017.

*Id.* (paragraph breaks omitted).

[58] *See* LSUC Compliance-Based Regulation Task Force Webpage, *supra* note 49.

[59] *See* Legal Profession Amendment Act, S.B.C. 2012, c.16 (Can.); *see also Law Firm Regulation Task Force*, LAW SOC'Y B.C., https://www.lawsociety.bc.ca/page.cfm?cid=3966&t=Law-Firm-Regulation-Task-Force; *Law Firm Regulation—Consultation*, LAW SOC'Y B.C., https://www.lawsociety.bc.ca/page.cfm?cid=4195&t=Law-firm-regulation [hereinafter B.C. Law Firm Regulation Consultation Webpage] (noting that "making law firm regulation a reality is part of the Law Society's Strategic Plan for 2015-2017"); *Entity Regulation Frequently Asked Questions*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity.Regulation.Committee.FAQs.FINAL.07142015.(00000003).pdf [hereinafter NOBC Entity Regulation FAQ].

[60] *See* B.C. Law Firm Regulation Consultation Webpage, *supra* note 59. At the time this Article was written, this webpage included links to the following sources and publications: *Law Firm Regulation Consultation Brief*, LAW SOC'Y B.C. LAW FIRM REGULATION TASK FORCE, (Oct. 26, 2015), available at https://www.lawsociety.bc.ca/docs/newsroom/highlights/FirmRegulation-brief.pdf [hereinafter B.C. Consultation Brief]; *Law Firm Regulation Consultation: FAQs*, LAW SOC'Y B.C., https://www.lawsociety.bc.ca/docs/newsroom/highlights/FirmRegulation-FAQ.pdf [hereinafter B.C. Firm Regulation FAQs]; *Survey Results*, LAW SOC'Y B.C. LAW FIRM REGULATION TASK FORCE, https://www.lawsociety.bc.ca/docs/publications/survey/LawFirmRegulation.pdf [hereinafter Law Firm Regulation Survey Results]; *Presentation Slides: Law Firm Regulation: Consultation with the Profession*, LAW SOC'Y B.C. LAW FIRM REGULATION TASK FORCE, (Feb. 2016), http://www.lawsociety.bc.ca/docs/about/2016PresentationLawFirmRegulation.pdf [hereinafter B.C. Presentation Slides]. With respect to the last two items, the B.C. Law Firm Regulation Consultation Webpage states that "Over 100 lawyers responded to a [Law Society of British Columbia] survey in November 2015 and over 110 lawyers attended sessions that were held in 11 cities around the province in February 2016." *See* B.C. Law Firm Regulation Consultation Webpage, *supra* note 59. The webpage also states that "It's not too late to be heard. Lawyers are encouraged to provide their comments for the task force to consider" and provides contact information. *Id.*

that, if implemented, would run parallel to individual lawyer regulation and would be a means to achieve proactive regulation.[61] The British Columbia Law Firm Regulation Task Force expects to develop a set of ethical infrastructure elements that will take into consideration the feedback the Task Force received throughout its consultations, the regulatory frameworks of other jurisdictions, the Legal Profession Act, Law Society of British Columbia's rules, and the British Columbia Code of Profession Conduct.[62]

The "Prairie" provinces of Alberta, Saskatchewan, and Manitoba are additional Canadian jurisdictions that are exploring proactive regulation. In November 2015, they issued a discussion paper called "Innovating Regulation" that examined the concepts of entity regulation, compliance-based regulation, and alternative business structures.[63] The paper noted the dynamic regulatory market and explained why the three Prairie Prov-

[61] *See* B.C. Consultation Brief, *supra* note 60, at 3 ("Law firm regulation is designed to create and enhance opportunities for proactive regulation, to take advantage of the shared interest of entities that employ lawyers in promoting competence and ethical conduct, and to obtain the benefit for the public interest deriving from a legal profession with the highest attainable levels of competence and ethical conduct."); B.C. Presentation Slides, *supr*a note 60, at 16 ("What do we want to achieve? . . . Proactive regulation–preventing problems from occurring in the first place."); B.C. Firm Regulation FAQs, *supr*a note 60, at 1 ("(b) What is 'proactive regulation?' Proactive regulation refers to steps taken by the regulator, or aspects built into the structure of regulation, that attempt to eliminate potential problems before they may surface in the form of actual complaints to the Law Society."); Law Firm Regulation Survey Results, *supra* note 60, at 1 ("Throughout 2015, the Law Firm Regulation Task Force has been working on a framework for an innovative regulatory environment where law firms work together with the Law Society to manage issues proactively as they emerge, rather than waiting until they become problems for the firm and the Law Society."); *see also* NOBC Entity Regulation FAQ, *supra* note 59.

[62] *See* Email from Deborah Armour, Chief Legal Officer, Law Society of British Columbia, to the author (May 30, 2016) (on file with the Lewis & Clark Law Review).

[63] *See* COLLABORATION OF THE PRAIRIE LAW SOC'YS, INNOVATING REGULATION: DISCUSSION PAPER (Nov. 2015), http://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf [hereinafter PRAIRIE PROVINCES' DISCUSSION PAPER]. A shorter version of this paper is also available. COLLABORATION OF THE PRAIRIE LAW SOC'YS, INNOVATING REGULATION: ABSTRACT (Nov. 2015), http://www.lawsociety.sk.ca/media/127103/ABSTRACTInnovatingRegulation.pdf [hereinafter ABSTRACT]. The discussion paper has been the subject of consultations by the law societies and is featured on recently-created webpages. *See, e.g.*, *Innovating Regulation*, LAW SOC'Y ALTA., http://www.lawsocietylistens.ca/; *Innovating Regulation: Collaboration on the Prairies*, LAW SOC'Y MAN., http://www.lawsociety.mb.ca/news/innovating-regulation-collaboration-on-the-prairies/; *Innovating Regulation*, LAW SOC'Y SASK., http://www.lawsociety.sk.ca/publications/innovating-regulation.aspx. The timing of the consultation is set forth on the Law Society of Alberta webpage ("The outcomes of the consultation will be documented here by the end of the year. This may include a summary of all input collected as well as recommendations for future action").

inces had decided to tackle the issues collaboratively.[64] Among other things, the Prairie Provinces Discussion Paper cited the potential benefits of a more proactive approach to lawyer regulation.[65] Although the Prairie Provinces paper and the Ontario working group consultations both refer to compliance-based regulation and discussed entity regulation as part of a compliance-based approach, it is clear that both jurisdictions were also discussing the question of "when" to regulate, which this Article refers to as proactive regulation.[66]

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[64] *See* PRAIRIE PROVINCES' DISCUSSION PAPER, *supra* note 63, at 3; *see also* ABSTRACT, *supra* note 63, at 1.

[65] *See* PRAIRIE PROVINCES' DISCUSSION PAPER, *supra* note 63, at 2; *see also* ABSTRACT, *supra* note 63, at 3. The Discussion Paper included this language:

> Further, as we began to investigate the possibility of entity regulation, it became clear that while paving the way for ABS was one motivation, even more important were the proactive regulatory possibilities that entity regulation presented. We know that most lawyers organize themselves into firms. In practice, it is the infrastructure of the firm that dictates how ethical issues such as conflicts are managed. The opportunity to influence everything from the way files are managed to the culture of the profession also resides at the firm level. If law societies were able to ensure that the appropriate infrastructures exist within a firm to avoid complaints, this would truly be a proactive and preventative approach to protecting the public. This took us back to the beginning and the recognition that three components—entity regulation, compliance-based regulation and ABS—are all intimately connected.

PRAIRIE PROVINCES' DISCUSSION PAPER, *supra* note 63, at 2.

[66] *See* PRAIRIE PROVINCES' DISCUSSION PAPER, *supra* note 63, at 7, 23–27. Although the paper describes compliance-based regulation as implicating questions of "how" one regulates, in my view, the discussion focuses as much on the "when" to regulate issue as the issue of "how" to regulate:

> In order to protect the public interest, which is the mandate of law societies, law societies regulate individual lawyers by prescribing and enforcing set rules with which lawyers are obligated to comply, thereby ensuring their "conduct meets the professional standards that legal regulators promise to the public." If a complaint is received about a lawyer's conduct, the law society's complaints process responds to the complaint. There are two significant criticisms of the traditional, rules-based, complaints-driven model of regulation. One criticism is that it is a reactive system. That is, the law society only reacts when a complaint is received that a lawyer's conduct failed to meet the professional standards as prescribed by set rules. The law society implements the complaints process, investigates the complaint and, where appropriate, enforces the standards by disciplining the lawyer. Therefore, the criticism is that rather than taking steps to prevent the conduct from occurring in the first place, the law society intervenes after the fact and then only to sanction the lawyer for the conduct that occurred. . . . Another significant criticism of complaints-driven, rules-based regulation is that it focuses exclusively on the conduct of individual lawyers while failing to recognize that many lawyers work in law firms. As discussed previously in the context of entity regulation, the firm sets the standards for the lawyers acting within the firm and those lawyers tend to make decisions that comply with the firm's systems and processes. Despite the law firm being responsible for

Both the Law Society of Upper Canada Consultation and the Prairie Provinces' Discussion Paper cited the CBA's Self-Assessment tool mentioned earlier and noted the potential benefits of using a self-assessment tool of this type.[67] The CBA Self-Assessment Tool has also been cited with approval in the CBA "Futures" report[68] which included proactive regulation as part of its recommendation regarding "compliance-based entity regulation" and recommended the use of the CBA Self-Assessment Tool.[69]

The CBA Self-Assessment Tool looks very similar to the self-assessment form developed by the New South Wales OLSC.[70] The issues that the CBA Self-Assessment Tool addresses are similar to the issues that were identified by the New South Wales OLSC (and that are commonly identified as U.S. problem areas).[71] For each of the ten issues it identifies,

> setting the environment in which the individual lawyer makes such decisions, the individual lawyer, rather than the firm, is regulated by the law society. Law societies can no longer afford to continue to ignore law firms in the regulation of the legal profession, hence the previous discussion on entity regulation. The issue then is how to regulate the legal entity. . . . Requiring a law firm to implement an ethical infrastructure could be achieved by prescriptive regulation of firms—that is, telling a firm what and how to do it. However, proactive approaches to regulation have been attracting considerable interest and attention. Proactive models of regulation comprise an educative component whereby the firm develops an ethical infrastructure—the systems and processes—to ensure lawyers comply with their ethical duties. Compliance-based regulation is such a model and is premised on the regulation of the entity using an outcomes based approach.

*Id.* at 24–25.

[67] *See, e.g.*, *id.* at 30; LSUC Compliance-Based Entity Regulation Task Force Call for Input, *supra* note 51, at 9.

[68] CBA Legal Futures Initiative, Futures: Transforming The Delivery of Legal Services in Canada 47 (2014), http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf ("The principles identified in the CBA tool could serve as an effective framework for compliance-based regulation so that regulation becomes broader in scope, more explicit, and proactive in ensuring high ethical conduct.").

[69] *Id.* at 46–47.

[70] *CBA Ethical Practices Self-Evaluation Tool*, *supra* note 45; *see also* CBA Self-Assessment Tool E-Guide , *supra* note 46, at 5 (referring to interaction between the authors of the Australian and Canadian self-assessment forms); Laurel S. Terry, *A "How To" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 St. Louis U. L.J. 1135, 1138–39 (2007) (noting that globalization has changed the manner in which legal services regulators and experts operate, since it is now common for regulators and experts from one country to communicate with their counterparts in other countries).

[71] *Compare CBA Ethical Practices Self-Evaluation Tool*, *supra* note 45, at 1–12 *with* NSW Self-Assessment Form, *supra* note 30. Appendix 2, *infra*, identifies the issues in the CBA Self-Assessment Tool, which include: 1) Competence; 2) Client Communication; 3) Confidentiality; 4) Conflicts; 5) Preservation of Client

the CBA Self-Assessment Tool includes four columns: the first column lists the objective, the second column explains how a lawyer or firm might assess compliance with this objective, the third column suggests systems and practices to ensure the objective is met, and the fourth column provides resources.[72] In addition to providing resources in the fourth column, the CBA Self-Assessment Tool includes notes that provide useful data such as the volume of malpractice claims related to particular issues.[73]

Because the Canadian Bar Association, like the American Bar Association, is a voluntary bar, it cannot require that lawyers use the CBA Self-Assessment Tool. This is different than the situation of the New South Wales OLSC, which was able to require that ILPs complete the self-assessment form. There have been suggestions, however, that the CBA should try to convince one of the mandatory malpractice carriers, such as LawPro in Ontario, to offer a premium discount to lawyers or firms that use its self-assessment tool.[74]

Although the Canadian developments cited above have the potential to create a comprehensive and systematic approach to proactive lawyer regulation in many parts of Canada, the most far-reaching developments so far are those that have happened—and are continuing to happen—in Nova Scotia. In October 2013, the Nova Scotia Barristers' Society (NSBS) circulated a comprehensive report entitled *Transforming Regulation and Governance in the Public Interest* that contained information about developments elsewhere in the world and proposed an ambitious project to reexamine the lawyer regulation system and design a new system from

Property/Trust Accounting/File Transfers; 6) Fees and disbursements; 7) Hiring; 8) Supervision/Retention/Lawyer and Staff Wellbeing; 9) Rule of Law and the Administration of Justice; and 10) Access to Justice.

[72] *See CBA Ethical Practices Self-Evaluation Tool*, *supra* note 45, at 1–12.

[73] *See, e.g.*, *id.* at 1 ("Issues relating to competence give rise to significant risks for law firms. In Ontario, for example, LawPro reports that failures to know or apply the law accounted for approximately 2,703 claims and $9.1 million in costs between 1997 and 2007. In 2007, the Law Society of British Columbia reported that four or more lawyers miss a limitation period or deadline each week. Beyond the available statistics, many additional issues of competence undoubtedly exist, resulting in poor client service although never resulting in a formal complaint to the relevant law society or a civil malpractice action." (footnotes omitted)). An excerpt from the CBA Self-Assessment Tool is found *infra* in Appendix 4(b).

[74] *See, e.g.*, Salyzyn, *supra* note 38, at 543–44, 544 n.126 (noting that LawPro already offers a "Risk Management Credit" to lawyers who participate in qualifying programs, so the idea isn't foreign, but recommending a larger discount than the current amount, which is approximately $100); Remarks of Prof. Amy Salyzyn, Univ. of Ottawa Faculty of Law, on Compliance-Based Regulation in Canada to the Law Soc'y of Upper Can. Prof'l Regulation Comm. (Sept. 11, 2014) (The author was present when these comments were made).

the ground up.[75] In November 2013, the Council of the NSBS, which is its governing body, voted to proceed with regulatory reform.[76] This project was initially known as the "Transform Regulation and Governance in the Public Interest" project, but it is now known as the Legal Services Regula-

[75] *See* VICTORIA REES, N.S. BARRISTERS' SOC'Y, TRANSFORMING REGULATION AND GOVERNANCE IN THE PUBLIC INTEREST 4 (revised Oct. 28, 2013), http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf. This comprehensive report was prepared by the Director of Professional Responsibility of the Nova Scotia Barristers' Society (NSBS). This report reviewed a number of global developments and included a series of recommendations. The NSBS Council, which is the NSBS governing body, thereafter voted to proceed with reforms. *See Council Highlights*, N.S. BARRISTERS' SOC'Y (Nov. 22, 2013) http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2013-11-22_CouncilHighlights.pdf ("Transforming Regulation and Governance—Council approved the work plan for the next stage of this strategic priority . . . and discussed the October 24 Council Workshop on Transforming Regulation—What Might it Look Like."). Regulatory reform had also been a theme in the NSBS Strategic Framework for 2013–16, which was approved by the NSBS Council in Spring 2013. *See* VICTORIA REES & GABRIELA QUINTANILLA, NOVA SCOTIA BARRISTERS' SOCIETY: A JOURNEY TOWARDS A NEW MODEL OF REGULATION AND GOVERNANCE OF LEGAL SERVICES IN THE PUBLIC INTEREST (Oct. 2015), http://nsbs.org/sites/default/files/ftp/ERU_Newsletter/2015-06-24-IBATransformingRegulation.pdf ("The twin strategic directions that have been established are excellence in regulation and governance, and improvement of the administration of justice. Council also identified two strategic priorities that each resulted in separate work plans: transforming regulation and governance in the public interest, and enhancing access to legal services and the justice system for all Nova Scotians.").

[76] *See*, *e.g.*, *Council Meeting Documents*, N.S. BARRISTERS' SOC'Y (Jan. 24, 2014) at 8–9, http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2014-01-24_CouncilPkg.pdf [hereinafter NSBS Council Meeting Minutes for Nov. 22, 2013]. The NSBS has a webpage where it posts materials related to its Council meetings. *See Council Materials*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/council-materials [hereinafter NSBS Council Meeting Documents Webpage]. At the time this Article was written, this webpage included materials that dated back to September 2011. *Id.* The documents on this webpage include a "Council Highlights" document for each meeting and the agenda and supporting material circulated to the NSBS Council for each meeting. *Id.* The agenda and supporting documents for each meeting are found in a single pdf that appears when you click on the word "documents." *Id.* The pdf typically includes bookmarks that allow one to navigate directly to the item of interest. (The more recent minutes include an item or "tab" number as well as a title.) The minutes of a particular NSBS Council meeting are typically found in the supporting documents of the subsequent meeting. *See* NSBS Council Meeting Minutes for Nov. 22, 2013, *supra*. Thus, the minutes from the November 22, 2013 Council meeting are available in the Council documents for the January 24, 2014 meeting because that was the date of the next Council meeting. To aid in locating the NSBS Council minutes cited in this Article, each citation will include a shorthand reference that provides the date of the minutes cited as well as the full citation to the subsequent meeting agenda and supporting documents where the minutes are found.

tion project.[77] Since the November 2013 decision to proceed, the NSBS has engaged in a methodical, but relatively fast-paced, plan to transform its system of lawyer regulation.[78] It has circulated numerous news items, consultations, and reports, including reports prepared by outside consultants.[79] It has also engaged in a top-to-bottom review of its existing systems.[80] The NSBS Council receives regular reports about this initiative and has approved a number of policies related to these efforts.[81]

[77] *See, e.g., Transform Regulation*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/transform-regulation. This "Transform Regulation" webpage previously was the main portal for monitoring NSBS developments. Currently, the main website portal for monitoring NSBS regulation developments is the Legal Services Regulation webpage. *See generally Legal Services Regulation*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/legal-services-regulation [hereinafter NSBS Legal Services Regulation Webpage].

[78] *See, e.g.,* NSBS Legal Services Regulation Webpage, *supra* note 77*; Council Meeting Documents*, N.S. BARRISTERS' SOC'Y (Apr. 22, 2016), http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2016-04-22_CouncilPkg.pdf at 105–16 [hereinafter NSBS Council Meeting Minutes for Mar. 24, 2016]. Tab 5.iv(a) of these documents was the 4-13-16 *Legal Services Regulation Policy Framework Work Plan*. *Id.* at 105-113. Tab 13.iii was the *Activity Plan 2015-2016*. *Id.* at 139-145. Tab 5.ivb is a "legal services regulation maturity model." *Id.* at 115 [hereinafter NSBS Legal Services Regulation Maturity Model].

[79] *See* NSBS Legal Services Regulation Webpage, *supra* note 77 (the main portal includes, *inter alia*, links to news items about legal services regulation in Nova Scotia and elsewhere; a blog by the Legal Services Regulation Steering Committee; subscription information for the Legal Services Regulation Update e-newsletter; FAQ and glossary documents; and a link to the reports and resources section); *Reports & Resources*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/reports-resources. This page includes links to four consultation reports prepared by Creative Consequences P/L, which is an international consultancy founded by Steve Mark and Tahlia Gordon, who were the regulators primarily responsible for developing and implementing the system in New South Wales, Australia.

[80] *See* NSBS Legal Services Regulation Webpage, *supra* note 77, and the NSBS Legal Services Regulation Policy Framework Work Plan, NSBS Activity Plan 2015-2016, and NSBS Legal Services Regulation Maturity Model, *supra* note 78.

[81] Since November 2013, most if not all NSBS Council meetings have included a report about the Legal Services Regulation activity. *See* NSBS Council Meeting Documents Webpage, *supra* note 76 (includes links to Council Meeting documents). While the reforms discussed in this article have been mentioned at a number of NSBS Council meetings, some of the most significant activity took place at the November 2013, November 2014, November 2015, and March 2016 NSBS Council meetings *See, e.g.*, NSBS Council Meeting Minutes for Nov. 22, 2013, *supra* note 76, at 8–9 (Council passed a motion to approve the work plan as presented, which included development of 'regulatory objectives', consideration of trust account/client account oversight, and regulation of entities/law firms); Council Meeting Documents, N.S. BARRISTERS' SOC'Y 3 (Jan. 23, 2015) at 5–7 [hereinafter NSBS Council Meeting Minutes for Nov. 14, 2014], http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2015-01-23_council pkg.pdf (Council voted, *inter alia,* in favor of a motion that the six regulatory objectives be adopted as presented and voted in favor of five additional policy

One of the first steps the NSBS undertook after making the commitment to revise its regulatory system was to develop "regulatory objectives"—that is, to articulate the goals of its regulatory system.[82] In Novem-

principles, including the principle that regulation should be "proactive, principled and proportionate." *Id.* The six approved policies, as updated at the November 2015 NSBS Council meeting, appear in the Framework Summary Chart discussed *infra* in note 98 and accompanying text); Council Meeting Documents, N.S. BARRISTERS' SOC'Y 7 (Jan. 22, 2016) at 8, http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2016-01-22_CouncilPkg.pdf [hereinafter NSBS Council Meeting Minutes for Nov. 20, 2015] (Council adopted a motion that the Policy Framework, attached as Appendix 1, with amendments noted in the minutes, be approved); *see also* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78.

During the March 2016 meeting, the NSBS Council approved the Regulatory Objectives as circulated. *Id.* at 6. The NSBS Council also voted in favor of a motion that:

> 1. Approves the ten elements and descriptions to be included in the requirements for a management system for ethical legal practice;
> 2. Directs that there be established a pilot project to fully evaluate the self-assessment process that will support and the requirement for the MSELP; and
> 3. Directs the Executive Director to develop reporting requirements for lawyers and legal entities that, as near as possible, do not duplicate reporting of information, and separate requirements relating to matters that require compliance under the Act or Regulations, from those that are designed to assist lawyers and legal entities in meeting their professional standards).

*Id.* at 6–7. For a discussion of the March 2016 actions, *see infra* notes 84, 110–112, 124–128 and accompanying text.

The supporting documents for the Council decisions cited in this footnote can be found with the agenda and supporting materials for the meeting in question. *See* NSBS Council Meeting Documents Webpage, *supra* note 76 and accompanying text for information about how to access these supporting documents. *See also* Victoria Rees, Presentation Slides, Second Annual CBA [Canadian Bar Association] Ethics Forum (Mar. 2015) (on file with the Lewis & Clark Law Review) [hereinafter Victoria Rees, Presentation Slides] (discusses NSBS actions between 2013 and March 2015) ("Report to Council November 2014, where we obtained approval for: Regulatory Objectives, policies relating to Entity Regulation, being risk-focused and P3. No consensus on 'providing legal services to whom' and continued reluctance at this time for regulating non-lawyers or moving into ABS.").

[82] *See* NSBS Council Meeting Minutes for Nov. 14, 2014, *supra* note 81, at 5; NSBS Legal Services Regulation Maturity Model, *supra* note 78 (indicating the regulatory objectives were part of the foundational activities); Victoria Rees, Presentation Slides, *supra* note 81, at Slide 5 (listing regulatory objectives as one of the first actions undertaken). *See also infra* notes 83–84 for links to the NSBS Regulatory Objectives website, letter format regulatory objectives, and additional information. For more information about regulatory objectives including an Appendix that sets forth examples from a number of jurisdictions, including Canadian provinces, see generally Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2727–30, 2751–60 (2012). *See also* A.B.A. Resolution 105: ABA Model Regulatory Objectives for the Provision of Legal Services (adopted Feb. 8, 2016), http://www.americanbar.org/content/dam/aba

ber 2014, after the NSBS circulated drafts for comment,[83] the NSBS Council adopted six regulatory objectives; in March 2016, it adopted an updated version that included commentary.[84]

/directories/policy/2016_hod_midyear_105.docx [hereinafter Resolution 105]. In April 2016, the Colorado Supreme Court added a Preamble to Chapters 18 to 20, which are its rules governing the practice of law. State of Colo. Judicial Dep't, Rule Change: Rules Governing the Practice of Law (Apr. 6, 2016), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2016/2016(06)%20clean.pdf (Colorado Supreme Court approves regulatory objectives) [hereinafter Colorado Regulatory Objectives Preamble]. Among other things, this Preamble explains that in "regulating the proactive of law in Colorado in the public interest, the Court's objectives include:" and continues by identifying nine objectives. Colorado's regulatory objectives differ from the objectives found in ABA Resolution, which was an outcome contemplated by ABA Resolution 105. *See* Resolution 105, *supra*, at 3 ("As with any ABA model, a supreme court may choose which, if any, provisions to be guided by, and which, if any, to adopt.").

[83] *See generally NSBS Regulatory Objectives*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/nsbs-regulatory-objectives [hereinafter NSBS Regulatory Objectives Webpage]. In addition to listing the Regulatory Objectives and commentary adopted by the Council of the Nova Scotia Barristers' Society, this webpage includes links to the Consultation on proposed Regulatory Objectives (July 7, 2014) and the Draft Regulatory Objectives (May 16, 2014).

[84] The NSBS Regulatory Objectives Webpage, *supra* note 83, includes the text and commentary of the NSBS Regulatory Objectives. This webpage also includes a link that allows one to download the regulatory objectives "in a poster format. (PDF)." *See NSBS Regulatory Objectives* [PDF Poster Format], N.S. BARRISTERS' SOC'Y, http://nsbs.org/sites/default/files/ftp/NSBS_RegObjectives_lettersize.pdf [hereinafter NSBS Regulatory Objectives pdf].

For information about the adoption of these regulatory objectives, see NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 2–3 (Council adopts regulatory objectives with commentary). It should be noted that the March 17, 2016 Memo to Council described the November 14, 2014 version as "draft Regulatory Objectives." *See* Council Meeting Documents, N.S. Barristers' Soc'y (March 24, 2016)http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2016-03-24_CouncilPkg.pdf [hereinafter NSBS Council Meeting Documents for the March 24, 2016 Meeting] ("Whereas Council approved the draft Regulatory Objectives on November 14, 2014; And whereas the draft Regulatory Objectives (ROs) have been widely circulated within and beyond the profession, and have evolved and been used as the basis for the Society's ongoing Legal Services Regulation work. . . ."). *Id.* at 48. The minutes of the November 14, 2014 meeting do not clearly indicate that the November 2014 Regulatory Objectives were adopted as a draft. *See* NSBS Council Meeting Minutes for November 14, 2014, *supra* note 81, at 5 ("Following these discussions, Council considered each draft policy. [Policy] 1. Council adopts the six regulatory objectives for the Society as follows: [list of 6]. It was moved (Bartol/Giles) that the six regulatory objectives be adopted as presented. Motion carried.").

In addition to adding commentary and footnotes with resources and citations, the version of regulatory objectives approved in March 2016 changed the language of Regulatory Objective #4 from "Establish required standards for professional

NSBS representatives frequently use the phrase "Triple P regulation" when describing their ongoing reforms.[85] The sixth regulatory objective provides the source for this description, since it states that the NSBS will operate in a manner that is "proactive, principled and proportionate."[86] This formulation is so critical to the reform efforts that the NSBS Council separately affirmed its commitment to a Triple P approach when adopting its Policy Framework in November 2014.[87] Indeed, the NSBS has now begun to refer to "PMBR" as a way to highlight the fact that proactive regulation ("P") and management-based regulation ("MBR") are complementary but distinct ideas.[88] The NSBS plans to use its proactive approach across the board, including, for example, when it approaches professional responsibility and credentialing issues.[89] The NSBS's com-

responsibility and competence in the delivery of legal services" to "Establish required standards for professional responsibility and competence for lawyers and legal Entities." *Compare* NSBS Council Meeting Minutes for November 14, 2014, *supra* note 81, at 5 *with* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 48.

[85] *See, e.g.*, N.S. BARRISTERS' SOC'Y, Laying The Foundation For Legal Services Regulation, http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/lsr_frameworkforthefuture.pdf (referring to Triple P regulation, which is regulation that is proactive; principled; and proportionate); REES & QUINTANILLA, *supra* note 75, at Sec. 2.2 (referring to Triple P regulation); Darrel Pink, Remarks at The Changing Regulation of the Changing International Legal Profession, Am. Bar Ass'n Section of Int'l Law Spring Meeting (Apr. 30, 2015) The author was present when these remarks were made and heard the reference to Triple P regulation. For additional information about the "Laying the Foundation" document cited in this footnote, see *infra* note 98 and accompanying text.

[86] *See* NSBS Regulatory Objectives pdf, *supra* note 84.

[87] *See* NSBS Council Meeting Minutes for Nov. 22, 2014, *supra* note 81, at 3 ("In accordance with the Regulatory Objectives, the Society's regulation and manner of operation will be proactive, principled and proportionate and each specific change in the nature or extent of regulation will be evaluated against this approach. It was moved (*Perry/Gregan*) to adopt this policy formulation. *Motion carried with one abstention.*"). For additional information about the NSBS Policy Framework, see *infra* notes 91–92 and accompanying text.

[88] *See* Email from Victoria Rees, Dir. of Prof'l Responsibility, N.S. Barristers' Soc'y, to the author (Jan. 26, 2016) (on file with the Lewis & Clark Law Review). In my view, this is a critical distinction and refers to the differences between "what is regulated" and "when" regulation occurs, which are discussed *infra* notes 236–240 and accompanying text. While it may be ideal to combine the "when" and "what" developments, which is what Nova Scotia has done and what the Law Society of Upper Canada voted on May 26, 2016 to pursue, some U.S. jurisdictions may have more flexibility to address questions of "when" they regulate than questions of "what" they regulate. Accordingly, I believe it is useful to remind jurisdictions that these issues can be addressed separately, even if it would be optimal to address the issues together. This reminder is important because the goal of this Article is to encourage jurisdictions to address the "when" to regulate issue even if they are not willing to tackle the "what is regulated" issue.

[89] *See id.*; NSBS Legal Services Regulation Maturity Model, *supra* note 78.

mitment to a proactive approach is constantly reinforced by the reference to Triple P regulation. In my view, the use of this Triple P language has been extremely effective because it is catchy and easy to remember, while forcing the listener to remember and think about this sixth regulatory objective.

Nova Scotia's regulatory objectives, with the NSBS's overarching Triple P approach to regulation, are one part of what the NSBS refers to as its "framework for legal services regulation."[90] Those who are interested in Nova Scotia developments should be sure to explore both the main Legal Services Regulation webpage portal and the Framework for Legal Services Regulation webpage portal.[91] This latter webpage includes links to information about the following:

1) Legal Services Regulation: The Policy Framework, which consolidates the policies adopted by the NSBS Council;[92]
2) Regulatory objectives;[93]
3) Management Systems for Ethical Legal Practice (MSELP), which all regulated entities are required to develop;[94]
4) Draft self-assessment process for legal entities (to help them achieve the required Management Systems for Ethical Legal Practice or MSELP);[95]

[90] *See, e.g.*, NSBS Legal Services Regulation Webpage, *supra* note 77 ("Find out how the new framework for legal services regulation is shaping up, with NSBS Regulatory Objectives and outcomes sought, Management Systems for Ethical Legal Practice (MSELP), and the Triple P, risk-based approach at the heart of the new regulatory model.").

[91] *See* NSBS Legal Services Regulation Webpage, *supra* note 77, and *Framework for Legal Services Regulation*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/framework-legal-services-regulation [hereinafter NSBS Framework for Legal Services Regulation Webpage].

[92] *See Legal Services Regulation: The Policy Framework (As Approved by Council on Nov. 20, 2015)*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/legal-services-regulation-policy-framework [hereinafter *Legal Services Regulation: The Policy Framework*]. The names of Nova Scotia's documents and webpages clearly were not designed with law review footnotes in mind because of the similarity among webpage names and documents. The Policy Framework cited in this footnote is one of six items that is included in NSBS Framework for Legal Services Regulation Webpage, *supra* note 91. The item cited in this footnote is a policy document approved by the NSBS Council in November 2015. *See supra* note 81.

[93] *See generally* NSBS Regulatory Objectives Webpage, *supra* note 83.

[94] *See generally Management Systems for Ethical Legal Practice (MSELP)*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/management-systems-ethical-legal-practice-mselp [hereinafter NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage].

[95] *See Draft Self-Assessment Process for Legal Entities*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/draft-self-assessment-process-legal-entities [hereinafter NSBS Draft Self-Assessment Process for Legal Entities Webpage]. This webpage includes information

5) MSELP outcomes (still in draft form, the outcomes show the desired results for the regulator of a MSELP system);[96] and
6) Triple P, risk-based regulatory approach.[97]

The NSBS Framework for Legal Services Regulation webpage includes a link to a one-page framework summary chart entitled "*Laying the Foundation for Legal Services Regulation*" that captures much of the policy that has been adopted so far in Nova Scotia, including the six items that appear on the Framework webpage.[98] This "Framework Summary Chart" reinforces the idea that Nova Scotia's Triple P, risk-based approach is at the heart of its new regulatory model.[99] Indeed, the first "P" refers to proactive regulation, illustrating the degree to which proactive regulation is

about the development of the NSBS Self-Assessment Tool, which is intended to help legal entities develop their MSELP. At the time this Article was written, the NSBS Draft Self-Assessment Process Webpage included explanatory material, links to prior drafts, and a link to the Draft Self-assessment Tool which the NSBS Council voted on March 24, 2016 should be used in a Pilot Project. *Id.*; *see also* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78 and the discussion *infra* at notes 123–30 and accompanying text for information about the NSBS Council's decision to approve a Self-Assessment Tool pilot project.

[96] *See MSELP Outcomes*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/mselp-outcomes [hereinafter MSELP Outcomes Webpage]. *See infra* note 113 and accompanying text for the content of the MSELP Outcomes.

[97] At the time this Article was written, the Triple P risk-based regulatory approach, which was listed as the sixth item on the NSBS Framework for Legal Services Regulation webpage, was the only item that did not link to a separate webpage. *See* NSBS Framework for Legal Services Regulation Webpage, *supra* note 91.

[98] *See* N.S. BARRISTERS' SOC'Y, LAYING THE FOUNDATION FOR LEGAL SERVICES REGULATION, http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/lsr_frameworkforthefuture.pdf [hereinafter Mar. 2016 Framework Summary Chart]. This document has a large caption at the top that says "Laying the Foundation for Legal Services Regulation." But it is also called the Framework Summary Chart, which is how it was listed on the Framework for Legal Services Regulation Webpage. NSBS Framework for Legal Services Regulation Webpage, *supra* note 91.

The NSBS periodically updates the Framework Summary Chart to reflect the current components of the regulatory project (*compare* Mar. 2016 Framework Summary Chart, *supra*, *with* the versions updated Aug. 20, 2015 and Nov. 25, 2015 [the latter hereinafter Nov. 2015 Framework Summary Chart]) (on file with the Lewis & Clark Law Review).

[99] *See* Mar. 2016 Framework Summary Chart, *supra* note 98 (red column lists "Triple P regulation: • proactive • principled • proportionate" and black banner states "preventative risk-based"); *see also Legal Services Regulation: The Policy Framework*, *supra* note 92, at para. 2 (This policy document, adopted in November 2015, states: "In accordance with the Regulatory Objectives, the Society's regulation and manner of operation will be proactive, principled and proportionate, and each specific change in the nature or extent of regulation will be evaluated against this approach.").

an integral and indispensable part of Nova Scotia's Triple P regulatory approach.[100]

There are many ways in which the Nova Scotia regulatory system will strive to be proactive.[101] But one of the main ways in which it plans to achieve this is by helping those it regulates develop "Management Systems for Ethical Legal Practice (MSELP)."[102]

At the time this Article was written, the phrase "Management Systems for Ethical Legal Practice" and its acronym MSELP were unique to Nova Scotia. Both of these, however, reflect ideas that have been the subject of academic articles[103] and that have been used elsewhere.[104] MSELP is analogous to concepts that have been referred to elsewhere as ethical infrastructure, PMBR (proactive management based regulation), and compliance-based regulation.[105] The idea—in essence—is for the regulator to

[100] *See* NSBS Regulatory Objectives pdf, *supra* note 84, at para. 6; REES & QUINTANILLA, *supra* note 75.

[101] *See generally* NSBS Legal Services Regulation Webpage, *supra* note 77; *Committees*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/about_us/committees. The links to the Legal Services Regulation Working Groups show the variety of tasks they have undertaken.

[102] *See* NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage, *supra* note 94.

[103] *See generally* Salyzyn, *supra* note 38, at 509–510, 510 n.3 (recent article that does an excellent job of surveying the existing literature); *infra* notes 253–256 (citing a number of articles on this topic).

[104] *See supra* notes 24–43 (describing developments in Australia) and *infra* note 235 (describing developments in England and Wales). Although I have been skeptical of the degree to which the U.K. Solicitors Regulation Authority has embraced a proactive approach, I have no doubt that it has been a leader in developing entity-based regulatory systems that encourage ethical infrastructures and management systems for ethical practice. In other words, I think it has been a leader with respect to developments regarding "what" is regulated and "how" it regulates. While I realize that not all readers agree with me, in my view, the issues of "what" is regulated and "how" regulation occurs are theoretically separable from the issue of proactive regulation and "when" regulation occurs. *See infra* note 236 and accompanying text.

[105] *See generally* NOBC Entity Regulation FAQ, *supra* note 59, and articles cited *supra* note 38 and *infra* notes 228, 253–257. *See also* N.S. BARRISTERS' SOC'Y, LEGAL SERVS. REG. UPDATE (Dec. 2015), http://us11.campaign-archive1.com/?u=5270ccf46ba935b5023f865bc&id=dc5e81b827&e=2612ee67fa (NSBS newsletter defines ethical infrastructure as "[f]ormal and informal management policies, procedures and controls, work team cultures and habits of interaction and practice that support and encourage ethical behaviour within firms. The working title for the made-in-Nova Scotia version is a 'Management System for Ethical Legal Practice' (MSELP)."). Professor Ted Schneyer is generally credited with coining the phrase "proactive management-based regulation," or PMBR. *See NOBC Entity Regulation Frequently Asked Questions, supra*; *see also* Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV.

use an education-towards-compliance model, in which the regulator works proactively with lawyers and the entities in which they work to help them establish *systems* to avoid problems and better serve their clients.

The components of Nova Scotia's MSELP include the development of ten core elements and the development of a self- assessment tool.[106] The NSBS hired consultants to help develop its "made-in-Nova Scotia" MSELP and regulatory framework that would suit the culture and characteristics of the province's legal profession, the legal services sector, and the needs of the public.[107] The consultants—who had previously developed New South Wales's "appropriate management systems" regulatory approach and had implemented New South Wales's self-assessment form—did a comprehensive "environmental" scan before developing their recommendations.[108] Among other things, they examined Nova Scotia's demographic data and complaints history to help them develop their recommendations.[109]

233, 237 (2013).

[106] *See* NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage, *supra* note 94*; see also* REES & QUINTANILLA, *supra* note 75, at n.16 and accompanying text. The Rees & Quintanilla paper, which was written for a 2015 IBA meeting, also listed a third MSELP element, which was "a means for measuring outcomes and success, and communicating with legal entities in this regard." *Id.*

[107] REES & QUINTANILLA, *supra* note 75. *See also* Victoria Rees, Presentation Slides, *supra* note 81. Rees included the following among the points describing the consultation process:

> Engaged Creative Consequences because research showed modified New South Wales Incorporated Legal Practice model best suited to Nova Scotia. Aspects of SRA model being incorporated, particularly re: Risk, and Regulatory Objectives. • Had CC do an environmental scan of our current Act, regulations, Code and Standards, and means we use currently to regulate firms, to assess our readiness to move into Entity Regulation—identified strengths and areas for additional, attention (Phase 1) • Developed self-assessment questionnaire (SAQ) which helps entities self-identify their strengths and weaknesses in terms of achieving the 10 principles—we will develop a form of monitoring or auditing those firms at higher risk, and providing tools to assist • No more one-size-fits-all regulation. • Entity Regulation Working Group developing risk assessment by entity type, to help us begin to create the tools; sole and smalls [working group]—Phase 3• CC assisted with focus groups in May 2014 (soles and smalls; med-large firms; government, In House Counsel, Nova Scotia Legal Aid, Crown, etc.) to discuss Regulatory Objectives, Principles, self-assessment tool. Considerable engagement and consultation with all stakeholders. Phase 4 Report refines SAQ based on stakeholder feedback.

*Id.*

[108] *See* Victoria Rees, Presentation Slides, *supra* note 81; *see also* NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage, *supra* note 94 ("For details on the development of these draft elements, *see* Appendix A, page 26 of Transforming Regulation and Governance Project: Phase 4, prepared by Creative Consequences P/L.").

[109] *See generally Reports & Resources*, *supra* note 79 (including links to the Phase 1–4

In March 2016, after consultations and revisions by the regulator, the governing council approved the ten elements that are now the focus of Nova Scotia's MSELP and which will form the basis for Nova Scotia's pilot self-assessment tool.[110] The ten elements adopted in March 2016 differ from the September 2015 version in two respects: the March 2016 version deleted what formerly was element #7 and added a new element #9 ("Working to improve diversity, inclusion and substantive equality").[111] The minutes of the March 22, 2016 Council meeting provide insight into these changes.[112]

Appendices 2–4 to this Article list the elements found in selected self-assessment tools and provide a comparison. As these Appendices

Reports prepared by Creative Consequences P/L).

[110] *See* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 6 (Council approved the ten elements and descriptions to be included in the requirements for a management system for ethical legal practice and directed that there be established a pilot project to fully evaluate the self-assessment process that will support and the requirement for the MSELP); *see also* Mar. 2016 Framework Summary Chart, *supra* note 98 (includes the ten elements adopted by Council in March 2016); NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage, *supra* note 94 ("Lawyers and legal entities are required to have in place all of the elements that apply to the specific legal entity, in order to have an effective management system for ethical legal practice, and demonstrate that the lawyer or legal entity is engaged in and committed to the following [list of ten items]. Legal entities will be required to use these elements as principles for creating and maintaining an effective ethical infrastructure that fits the nature, scope and characteristics of their practice. The elements describe 'what' legal entities will be asked to achieve but not 'how' to get there.").

[111] *Compare* the elements found on Mar. 2016 Framework Summary Chart, *supra* note 98, *with* the elements found on Nov. 2015 Framework Summary Chart, *supra* note 98.

[112] *See* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 6. Page 6 of these minutes summarizes information that NSBS Executive Director Darrel Pink provided to Council before it approved the pilot project including the following: ten MSELP elements were originally approved by Council in September 2015, after which extensive consultations took place. These consultations led to the concept of separate reporting for required vs. recommended information, and to the addition of a new Element 9 providing clarity around cultural competency and equity. He explained the proposed plan to separate member/firm reporting into reporting about what's required (compliance) and reporting about what's recommended (SAT), both of which are components of an ethical infrastructure. He said the Council would be asked in April 2016 to consider changes to the Annual Member Report. He explained that work on the trust accounts monitoring and reporting process will begin in 2017, and the Trust Account Report will revert away from a checklist format to one better focused on Triple P, risk, and compliance. *Id.* at 6.

In my view, this division of reporting underlies the decision to remove from the March 2016 Draft Self-Assessment Tool what had previously been Element #7 ("having appropriate systems in place to safeguard client trust money and property").

show, Nova Scotia's ten MSELP elements are similar, but not identical to, the ten issues found in the New South Wales self-assessment form and the Canadian Bar Association's Self-Assessment Tool.

At the time this article was written, the NSBS Council had not been asked to vote on the desired "outcomes" for MSELP, but the NSBS had created an MSELP Outcomes webpage that lists the following as the desired results of MSELP:

1. Lawyers and legal entities provide competent legal services.
2. Lawyers and legal entities provide ethical legal services.
3. Lawyers and legal entities safeguard client trust money and property.
4. Lawyers and legal entities provide legal services in a manner that respects and promotes diversity, inclusion, substantive equality and freedom from discrimination.
5. Lawyers and legal entities provide enhanced access to legal services.[113]

As noted above, the NSBS Council has decided that an integral part of MSELP will be a self-assessment tool that regulated legal entities can use to help them develop management systems for ethical legal practice.[114] The goal of the self-assessment tool is to help lawyers and regulated entities perform better on the ten identified MSELP elements.[115] After seeking feedback on early drafts,[116] the NSBS posted on its webpage two different versions of the self-assessment tool and announced a consultation.[117] One of the draft MSELP self-assessment tools that was the subject

[113] *See* MSELP Outcomes Webpage, *supra* note 96.

[114] *See, e.g.*, NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95; NSBS Council Meeting Minutes for Nov. 14, 2014, *supra* note 81, at 6 (Council adopted policy that the NSBS will develop regulations that require each law firm and legal entity to designate an individual who will be responsible to the Society for the entity's compliance with its regulatory requirements; to establish and maintain a management system that promotes competent and ethical legal practice; and to self-assess and report to the Society on its management system with the frequency of such reporting is to be determined).

[115] *See generally* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95.

[116] *See, e.g.*, N.S. BARRISTERS' SOC'Y, *A Management System For Ethical Legal Practice* (Nov. 2015), http://nsbs.org/sites/default/files/cms/page/2015-10-19_selfassessmenttool.pdf [hereinafter NSBS Nov. 2015 Draft Self-Assessment Tool] (on file with the Lewis & Clark Law Review); N.S. BARRISTERS' SOCIETY, *A Management System For Ethical Legal Practice* (Oct. 2015) (on file with the Lewis & Clark Law Review).

[117] *See* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95; *Legal Services Regulation Update*, N.S. BARRISTERS' SOC'Y (Dec. 2015), http://us11.campaign-archive1.com/?u=5270ccf46ba935b5023f865bc&id=dc5e81b827&e=2612ee67fa; *Society News: Society Consultation on Proposed Self-Assessment Process for Legal Entities: Input Requested by Jan. 31*, N.S. BARRISTERS' SOC'Y (Nov. 23, 2015), http://nsbs.org/news/2016/01/society-consultation-proposed-self-assessment-process-legal-

of the consultation was described as a "general format" version;[118] the other was described as a "checklist" version that had the same content as the "general format" version, but incorporated a 'checklist' approach at the recommendation of the NSBS Legal Services Regulation Solo and Small Firm Working Group.[119] The NSBS requested feedback on the two draft self-assessment forms by January 31, 2016.[120] It stated that it was particularly interested in feedback on "whether [the examples and indicators] should be expanded or contracted based on the size and type of firm or legal entity; and [on the two] different formats as approaches to making the assessment."[121] According to the Executive Director of the Nova Scotia Barristers' Society, the Society received "significant engagement and strong support" for the direction it was taking.[122] The NSBS's Draft Self-Assessment Tool webpage summarizes some of the feedback that the NSBS received in response to its consultation.[123]

In March 2016, following this Consultation, the NSBS Council voted in favor of a pilot project to fully evaluate the self-assessment tool that will support the MSELP requirement.[124] The NSBS Draft Self-Assessment Process for Legal Entities Webpage explains the anticipated process and timing for the Self-Assessment Tool pilot project:

> The pilot project will engage at least 50 members and firms, and is expected to launch in the fall of 2016. The mandate includes the development of two derivative versions of the tool designed for solos and small firms (resulting from the work of the Solo and Small Firm Working Group) and in-house counsel. Several of the items that were compliance matters [such as trust fund matters] are now addressed in the Annual Lawyer Report. The plan is to simplify that document and to have all compliance type issues addressed in a single annual report.[125]

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entities-input-requested [hereinafter *NSBS SAT Input Requested*].

[118] *See* NSBS Nov. 2015 Draft Self-Assessment Tool, *supra* note 116. The general format version also came in an online version where comments and feedback could be typed in directly. *See* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95.

[119] *See* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95.

[120] *See NSBS SAT Input Requested, supra* note 117.

[121] *Id.*

[122] *See* Email from Darrel Pink, Exec. Dir., N.S. Barristers' Soc'y, to the author (Jan. 18, 2016) (on file with the Lewis and Clark Law Review).

[123] *See generally* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95.

[124] *See* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 6.

[125] *See* NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note

The NSBS Executive Director explained to the Council that "the Pilot Project will help us learn whether we've identified the correct and relevant elements, and to begin to measure the impact on our achievement of our Regulatory Objectives."[126] He reminded the Council that the Self-Assessment Tool will never be a static document, but will continue to evolve, particularly regarding resources.[127]

The March 2016 NSBS pilot project Self-Assessment Tool differs from the prior versions in a few respects. The March 2016 version uses the revised ten MSELP elements that were approved at the March 2016 NSBS Council meeting, including the new element related to diversity, inclusion and substantive equality; it also changes the format by identifying "things to think about" rather than the "examples of practices" and "considerations" format used in an earlier draft.[128]

Although Nova Scotia's draft Self-Assessment Tool is unique because it has been adapted to serve the needs of Nova Scotia stakeholders, it has features in common with the self-assessment tools previously developed

95. Additional information about the pilot project was included in the materials for the May 27, 2016 NSBS Council Meeting. *See* Council Meeting Documents, N.S. BARRISTERS' SOC'Y (May 27, 2016), http://nsbs.org/sites/default/files/ftp/Council Materials/2016-05-27_CouncilPkg.pdf at 101–05 [NSBS Council Meeting Minutes for April 22, 2016].

[126] *See* NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 6 (remarks by NSBS Executive Director Darrel Pink regarding the anticipated pilot project). Additional information is found on the NSBS Webpage. *See* N.S. BARRISTERS' SOC'Y, Consultation update: Management System for Ethical Legal Practice, http://nsbs.org/consultation-update-management-system-ethical-legal-practice:

> [T]he draft MSELP self-assessment process—and an alternative approach proposed by the Society's equity committees during the consultations—ask lawyers to consider whether their practices support equity, diversity and inclusiveness for equity-seeking groups and to consider how their practices support enhanced access to justice and legal services. Though the meetings showed strong support for the approaches being advocated, it's clear that both ongoing consultation and communication are required before a final system can be implemented. Members of the Legal Services Regulation Steering Committee—and eventually Council—are considering a recommendation for development of a pilot project to address the issues and concerns that have been raised. A pilot would allow the Society to clarify both how the self-assessment can be administered (alternative options are being considered), and how the Society can provide support to lawyers and firms. The nature and extent of the resources that will be available to support lawyers and firms will also be addressed as part of a continuing consultation process.

[127] NSBS Council Meeting Minutes for Mar. 24, 2016, *supra* note 78, at 6.

[128] *Compare Management System For Ethical Legal Practice [Self-Assessment Tool]*, N.S. BARRISTERS' SOC'Y, (Mar. 2016), http://nsbs.org/sites/default/files/cms/page/2016-03-29_revisedmselpselfassessment.pdf [hereinafter Mar. 2016 NSBS Self-Assessment Tool] *with* the versions available as links from the NSBS Draft Self-Assessment Process for Legal Entities Webpage, *supra* note 95. An excerpt from the Mar. 2016 NSBS Self-Assessment Tool is available *infra* at Appendix 4(c).

by the New South Wales OLSC and the Canadian Bar Association.[129] For example, similar to the New South Wales and CBA self-assessment tools, the Nova Scotia self-assessment tool identifies ten elements and, for each element, offers explanatory information; it also provides links to useful resources.[130] Appendix 4 to this Article provides excerpts from several self-assessment tools so that readers can see their similarities and differences with respect to the issue of lawyer competence.

At the time this Article was written, Nova Scotia had not yet launched its MSELP system and self-assessment tool. Accordingly, it is too early to know whether Nova Scotia's self-assessment tool will have the same proactive impact as the self-assessment tool used in New South Wales. The regulators designing the form, however, clearly have high hopes that the new proactive approach will yield benefits. Thus, because of developments in New South Wales that are described below, Nova Scotia is now one of the jurisdictions that is at the forefront of proactive regulation developments.

In December 2014, Australia adopted its long-awaited Uniform National Legal Profession Act.[131] New South Wales and Victoria have now adopted acts implementing the Uniform National Legal Profession Act.[132] These two jurisdictions are the largest in Australia and account for approximately 75–80% of Australia's lawyer population.[133]

New South Wales's 2015 Legal Profession Act, which implements the uniform national law, authorizes the regulator to conduct an "audit of

[129] Undoubtedly, one of the reasons why these self-assessment forms are similar is because of the influence of Steve Mark and Tahlia Gordon, who are the former regulators in New South Wales and the principals of Creative Consequences P/L. As noted *supra* note 79, Creative Consequences P/L was retained by the NSBS as a consultant and prepared four reports that were devoted to developing a framework for proactive management based regulation and contributed to the creation of the MSELP and a self-assessment form. *See supra* note 109 and accompanying text.

[130] *Compare* Mar. 2016 NSBS Self-Assessment Tool, *supra* note 128, *with CBA Ethical Practices Self-Evaluation Tool*, *supra* note 45.

[131] *See* Laurel S. Terry, *Transnational Legal Practice [2015]*, 50 ABA/SIL (n.s.) 531, 541–42 (2016); Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT'L LAW. 485, 495–96 (2013); Steve Mark, *The Regulatory Framework in Australia*, 10 (Prepared for 40th Nat'l Conference on Prof'l Responsibility, May 29, 2014), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1_02_mark_the_regulatory_framework_in_australia_final.authcheckdam.pdf.

[132] *See* Legal Profession Uniform Law 2014 (N.S.W.) (Austl.); Legal Profession Uniform Law Application Act 2014 (Vict.) (Austl.); *Legal Profession Uniform Law*, L. INST. OF VICTORIA, http://www.lawcouncil.asn.au/lawcouncil/index.php/current-issues/legal-uniform-professional-law-consultation (contains many useful links); *A New Framework for Practising Law in NSW*, *supra* note 26.

[133] *See* Mark, *supra* note 131, at 10.

the compliance of a law practice with this Law, the Uniform Rules and other applicable professional obligations if the designated local regulatory authority considers that there are reasonable grounds to do so" based on the conduct of the law practice or one or more of its lawyers, or if there has been a complaint against the law practice or one or more of its associates.[134] The regulator is authorized to give a "management system direction" to any law practice if the regulator considers it reasonable to do so after conducting any examination, investigation, or audit.[135] As part of this management system direction, the New South Wales regulator can direct the law practice to "ensure that appropriate management systems are implemented and maintained" and to provide "periodic reports" on compliance with the systems.[136]

The new system differs in significant ways from the prior system administered by the New South Wales Office of the Legal Services Commissioner. As noted earlier, under the prior regulatory system, incorporated legal practices were required to conduct a self-assessment.[137] The new system is broader because the compliance audit and the appropriate management systems provisions are not limited to incorporated legal practices, but apply to all lawyers.[138] The new system is narrower, however, because the regulator must have "reasonable grounds" to conduct a "compliance audit," which may be shown by the conduct of the firm or lawyer or by a complaint.[139]

The current webpage of the New South Wales Office of the Legal Services Commissioner includes a "Practice Management Webpage;" this webpage lists the ten objectives that were developed pursuant to the requirement in the prior law that ILPs have "appropriate management systems."[140] This webpage states that the regulator had "identified a set of 10 objectives covering the areas that are considered to be fundamental to ensure compliance with the Uniform Law, the Uniform Rules and other professional obligations."[141] (This carryover makes sense because these objectives are likely to remain the same, even if the regulatory system changes.) Because the current regulator cites these ten objectives and uses the label of "practice management" on the webpage,[142] prudent lawyers and firms clearly would be wise to continue to engage in a self-assessment

[134] *See* Legal Profession Uniform Law (N.S.W.) § 256(1).

[135] *Id.* at § 257(1).

[136] *Id.* at § 257(2)(b).

[137] *See supra* notes 24–38 and accompanying text.

[138] *See* Legal Profession Uniform Law (N.S.W.) § 256(1).

[139] *See id.*

[140] *See NSW OLSC Practice Management Webpage*, *supra* note 35.

[141] *Id.*

[142] *Id.*

process to ensure that they have appropriate management systems in place for each of these ten objectives.

One might argue that a self-assessment is different than a compliance audit and that the New South Wales regulator remains free to require a self-assessment of ILPs (and potentially others), even in the absence of the facts that can trigger a compliance audit.[143] There is no indication, however, that the current regulator views the prior self-assessment tool as something that can or should be required of all firms, or even all ILPs.[144] Thus, while some may argue that New South Wales still has a system of proactive lawyer regulation,[145] in my view and in the view of some others[146] the system currently in place in New South Wales is a less proactive system than previously existed. This is because: 1) problematic conduct or a complaint is required in order to trigger a compliance audit; and 2) there is no evidence that the regulator currently requires a self-assessment of all firms or all ILPs. While New South Wales will continue to be exceedingly important because of the data it generated in the past, it appears that going forward one must look to other jurisdictions, such as Queensland and Nova Scotia, for future studies and data.

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[143] There may be provisions in the Uniform Act with which I am not familiar or legislative history that would undercut this position. From a strictly textual perspective, however, I believe that it is possible to argue that a self-assessment is different from a compliance audit, especially since the regulator's webpage indicates that a compliance audit may last two days. *See Compliance Audit*, N.S.W. OFF. LEGAL SERVICES COMMISSIONER, http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/olsc_compliance_audits.aspx.

[144] *See id.* ("The NSW Legal Services Commissioner has the authority to conduct compliance audits of law practices where there are 'reasonable grounds' to do so based on the conduct or complaint history of the law practice or one or more of its associates.").

[145] *See, e.g.*, Steve Mark & Tahlia Gordon, *Status of Appropriate Management Systems in Australia* (Nov. 20, 2015) (unpublished paper) (on file with the Lewis & Clark Law Review) ("A belief appears to have emerged over the past few months that Australia, as a result of legislation introduced in two States (New South Wales and Victoria), has abandoned Appropriate Management Systems (AMS) as a regulatory model.").

[146] *See, e.g.,* John Briton, *Between the Idea and the Reality Falls the Shadow: A Case Study in Lawyer Regulation* (Oct. 2015) (unpublished paper) (on file with the Lewis and Clark Law Review) ("Thus the National Law 'shrinks' the power to conduct compliance audits in a way which robs it of its greatest strength as a regulatory tool, its proactivity. It narrows the broad, unconditional power the LPA gives the Commission to conduct a compliance audit of an ILP, albeit only of an ILP, to a discretion which is properly exercised like the power to investigate a complaint only in reaction to conduct which is alleged or suspected to have occurred in the past—and conduct which has come to attention through a process of reporting which is inevitably poorly targeted to risk.").

In sum, as these Australian and Canadian examples show, regulators elsewhere in the world have undertaken or currently are undertaking efforts to develop a systematic and comprehensive approach to proactive lawyer regulation. These examples provide models and data that may be instructive for United States regulators.

## III. DEVELOPING A MORE SYSTEMATIC AND COMPREHENSIVE APPROACH TO PROACTIVE U.S. LAWYER REGULATION

With this background in mind, one can now turn to the situation in the United States. Relying in part on this global data, this Section recommends that regulators in the United States adopt a more comprehensive approach to proactive lawyer regulation.

### *A. The Underdeveloped Middle Stage of Lawyer Regulation*

In the United States (and in many other countries), there are a variety of regulatory provisions that apply to lawyers.[147] For example, there are provisions that address issues such as the scope of the legal profession's monopoly,[148] rules about admissions or entry into the profession,[149] rules that govern the conduct of members of the profession,[150] mandatory continuing legal education requirements,[151] and lawyer discipline.[152] One way to think about these varied kinds of regulation is that they typically involve one of three different stages of lawyer regulation:

1) the *beginning* stage of lawyer regulation, which includes admissions issues and entry into the profession;
2) the *middle* stage of lawyer regulation, which includes regulation of lawyers' day-to-day activities, including conduct rules; and

[147] For information about the different kinds of tools that are used to regulate lawyers, see Terry et al., *Adopting Regulatory Objectives*, *supra* note 82, at 2697–2725.

[148] *Id.* at 2741; *see also* Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903 (2014).

[149] In the United States, the entry requirements typically include legal education, character and fitness, and bar examination requirements. *See generally* NAT'L CONF. OF BAR EXAMINERS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR., COMPREHENSIVE GUIDE TO BAR ADMISSIONS REQUIREMENTS (Erica Moeser & Claire Huismann eds., 2016), http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

[150] *See Links to Other Legal Ethics and Professional Responsibility Pages*, A.B.A. CTR. PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html (includes links to state codes of conduct and other rules).

[151] *See Mandatory CLE*, A.B.A., http://www.americanbar.org/cle/mandatory_cle.html.

[152] For resources related to lawyer discipline, *see ABA Standing Committee on Professional Discipline*, *supra* note 19.

3) the *end* stage of lawyer regulation, which includes lawyer discipline and exclusion (or "striking off") from the profession.[153]

Although the imagery of the beginning, middle, and end stages of regulation may seem obvious, it is easy to overlook its application. For example, I have been using this beginning, middle, and end stage language for a number of years because I have found it to be particularly helpful when speaking with individuals from other countries. When explaining the U.S. system to those in other countries, it has been common for me to describe the members of the National Conference of Bar Examiners (NCBE) as those involved in the beginning stage of lawyer regulation;[154] the National Organization of Bar Counsel's (NOBC) members as those involved in the end stage or discipline stage of lawyer regulation;[155] and the Conference of Chief Justices (CCJ) members as those who handle the middle stage of lawyer regulation.[156]

Over the course of the past year, however, I have come to believe that this analysis is incomplete. The characterization in the prior paragraph is wrong for two different reasons. First, the state supreme courts that are represented through the CCJ have the ultimate responsibility for all three stages of lawyer regulation, not just the middle stage of lawyer regulation.[157] This is because it is common for state supreme courts to

[153] *See, e.g.*, Laurel S. Terry, *Regulation of Lawyers*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 619–27 (2nd ed. 2015); Laurel S. Terry, Where Do We Go from Here?, Presentation slides for Int'l Conf. Legal Regulators (Sept. 28, 2012), http://www.personal.psu.edu/faculty/l/s/lst3/Laurel_Terry_London_ICLR.pdf.

[154] *See, e.g.*, Terry, Where Do We Go from Here? *supra* note 153; *see also About NCBE*, NAT'L CONF. BAR EXAM'RS, http://www.ncbex.org/about/ ("The National Conference of Bar Examiners is a not-for-profit corporation founded in 1931. The mission of the Conference is to work with other institutions to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law; and to assist bar admission authorities [to do various things].").

[155] *See* Terry, Where Do We Go from Here?, *supra* note 153; *see also About Us*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/about-us.

[156] The Conference of Chief Justices "was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters." *Conference of Chief Justices Homepage*, NATIONAL CTR. FOR STATE COURTS, http://ccj.ncsc.org.

[157] *See* CONFERENCE OF CHIEF JUSTICES, IMPLEMENTATION PLAN FOR THE CONFERENCE OF CHIEF JUSTICES': NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 1–2 (Aug. 2, 2001), http://www.americanbar.org/content/dam/aba/

adopt bar admission rules, rules of professional conduct, and discipline rules, even if there are others who are responsible for the "front-line" implementation of these rules.[158]

The second reason the analysis is incomplete is because it omits any reference to a front-line regulator for the middle stage of lawyer regulation. While state supreme courts have responsibility for all three stages of lawyer regulation, this is an overarching responsibility. They do not have the time or resources to be the front-line regulator as well as the overarching regulator. In my view, recent global developments have shown that there is a need to have a front-line regulator for the middle stage of lawyer regulation. Moreover, I believe that NOBC members, rather than NCBE members, are more likely to be the most suitable to handle this proactive middle stage of regulation because NCBE members often limit themselves to admissions issues, whereas NOBC members are concerned about lawyer conduct, conduct rules, and discipline.[159] Thus, in my view, NOBC members should view themselves as responsible for *both* the middle stage *and* the end stage of lawyer regulation.

### *B. U.S. Examples of Ad Hoc Proactive Middle Stage Lawyer Regulation*

After reading the prior paragraph, NOBC members might respond by noting that they do more than impose penalty-based, reactive, end stage regulation. There are many ways in which state lawyer regulators *already* act proactively in an effort to prevent future problems and thus better protect clients and the public. Regulators might point to the items listed below as examples of practices that might be characterized as proactive regulation since these practices are intended to prevent problematic lawyer behavior rather than responding to problematic behavior after it arises:

- Ethics hotlines;[160]

migrated/cpr/reports/impl_plan.authcheckdam.pdf.

[158] *See Links to Other Legal Ethics and Professional Responsibility Pages*, *supra* note 150; *State-by-State Jurisdiction Information*, NAT'L ORG. BAR COUNSEL, http://nobc.org/index.php/jurisdiction-info/jurisdiction-info (includes links to state rules on admission, ethics, and discipline). The term "front-line" regulator has become more common in the lawyer regulatory context as a result of the 2007 U.K. Legal Services Act which created the Legal Services Board, which was a new body created by the Act that is responsible for overseeing legal regulators in England and Wales including "front-line" regulators such as the Solicitors Regulation Authority. *See* Legal Services Act 2007, *supra* note 2.

[159] *See supra* notes 154 and 155 (citing materials from these organizations' webpages); *see also* Appendix 5 for information about U.S. regulators.

[160] *See, e.g.*, *Ethics and Professionalism*, STATE BAR OF GA., https://www.gabar.org/barrules/ethicsandprofessionalism/ ("Lawyers who would like to discuss an ethics dilemma with a member of the Office of the General Counsel

- Law practice management assistance;[161]
- Continuing legal education requirements;[162]
- Bridge the gap, mentoring, professionalism, or other programs for newly admitted attorneys;[163]
- Practice standards for specific subject matter or practice areas;[164]
- Monitoring discipline data to determine topics for future proactive regulation;[165]
- Using registration data or discipline data to determine type of outreach for particular kinds of lawyers;[166]
- Emailed newsletters that contain proactive tips;[167] and
- Emails to lawyers who switch registration status to solo or small firms given the higher rate of client complaints against solo and small firm lawyers.[168]

This is just a sample of things that "discipline" regulators already are doing in order to prevent problematic behavior by lawyers.[169] There un-

staff should contact the Ethics Helpline at [phone number]. . . .").

[161] *See, e.g.*, *Practice Management Advisory Service*, D.C. BAR, https://www.dcbar.org/bar-resources/practice-management-advisory-service/.

[162] *See, e.g.*, *CLE Planner*, ST. BAR OF N.M. BAR BULL., Dec. 9, 2015, at 2, http://www.nmbar.org/NmbarDocs/PubRes/BB/2015/BB120915.pdf (listing the "Ethicspalooza Redux" CLE); *Minimum Continuing Legal Education*, OR. STATE BAR, https://www.osbar.org/mcle.

[163] *See, e.g.*, STATE BAR OF GA., STATE BAR GOVERNANCE RULES HANDBOOK r. 8-104, https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=227; *Information about TILPP for Other Bars*, STATE BAR OF GA., http://www.gabar.org/membership/tilpp/other-bars.cfm.

[164] *See, e.g.*, *Resources*, OR. PROF'L LIABILITY FUND, https://www.osbplf.org/services/resources.html (includes links to "Checklists and practice aids for many areas of law" for members).

[165] *See, e.g.*, Email from Wallace E. Shipp, Jr., Disciplinary Counsel, D.C. Office of Disciplinary Counsel, to the author (Jan. 25, 2016) (on file with the Lewis & Clark Law Review).

[166] *See, e.g.*, Email from James Coyle, Attorney Regulation Counsel, Colo. Supreme Court, to the author (Jan. 19, 2016) (on file with the Lewis & Clark Law Review); Email from Maret Vessella, Chief Bar Counsel, State Bar of Ariz., to the author (Jan. 28, 2016) (on file with the author).

[167] *See, e.g.*, *Attorney E-Newsletter*, DISCIPLINARY BD. SUP. CT. PA. (Jan. 2016), http://www.padisciplinaryboard.org/attorneys/newsletter/.

[168] *See, e.g.*, Email from James Coyle, *supra* note 166. Excerpts from this email are reprinted in Appendix 4(d).

[169] In addition to the items discussed in notes 160–168 and accompanying text, jurisdictions are involved in activities that might be described as involving a combination of proactive and reactive steps. For example, some jurisdictions have a Central Intake or Consumer Assistance Programs that attempts to respond to concerns about lawyer behavior, even where discipline is not warranted. *See, e.g.*, Email from James Coyle, *supra* note 166. Some jurisdictions have alternative resolution of fee disputes (i.e., fee arbitration or mediation), random trust account

doubtedly are many more examples. The ABA also has taken steps to promote proactive lawyer regulation. These include, *inter alia,* articles, websites, model rules, and benchmarking.[170]

One noteworthy example of proactive regulation comes from Colorado. Lawyers who are licensed to practice law in Colorado are required to update their registration information within 30 days of a change in practice or physical address.[171] When the Colorado Supreme Court Office of Attorney Regulation Counsel learns that a lawyer has moved from a government position or a position in a large law firm to a small firm or solo practice, the Colorado regulator sends an email to that former government or large firm lawyer to make that lawyer aware of resources that might help the transition.[172] The Colorado regulator sends this email with resources and advice because lawyers who make these kinds of transitions likely will "face challenges in managing a private practice they likely did not face while working as government or large law firm attorneys."[173] The resources that are referenced in this standard email include the Colorado self-audit checklist, Colorado's trust account school, its "Hanging Your Shingle" seminar, a Lawyer Assistance Program, an Attorney Mentoring Program, and a list of online resources.[174]

The examples listed above are proactive steps that undoubtedly may help some lawyers avoid problems. Despite these examples, my sense is that U.S. lawyer regulators have developed these types of proactive steps on a rather ad hoc basis. In my view, most U.S. regulators have not seen themselves as responsible for developing a *comprehensive* and *systematic*

audits, or monitoring of financial dealings (e.g., trust accounts, attorneys filing bankruptcy). *See generally Directories, Surveys and Resources*, A.B.A. CTR. PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/directoriesandsurveys.html (includes links to model rules and many state rules). Some states have diversion programs. *See* Fortney, *supra* note 38, at 131 (noting that 25 jurisdictions have diversion programs). For a discussion of Canadian actions that might be described as proactive, see Salyzyn, *supra* note 38, at 533–36.

[170] *See, e.g.*, THERESA M. GRONKIEWICZ, AM. BAR ASS'N, TWELVE TIPS TO HELP YOU AVOID DISCIPLINARY PROCEEDINGS 1 (2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/12_tips_avoid_disciplinary_proceedings_scpd_2013.authcheckdam.pdf; *Directories, Surveys and Resources supra* note 169; *Law Practice Division*, A.B.A., http://www.americanbar.org/groups/law_practice.html; *Solo and Small Firm Resource Center*, A.B.A., http://www.americanbar.org/portals/solo_home/solo_home.html.

[171] *See* Email from James Coyle, Attorney Regulation Counsel, Colo. Supreme Court, to the author (July 22, 2015) (sample email and self-audit checklist attached) (on file with the Lewis & Clark Law Review). An excerpt from this email is reproduced in Appendix 4(d) to this Article, *infra*.

[172] *Id.*

[173] *Id.*

[174] *Id.*

approach to proactive regulatory systems in the same way that regulators in Australia and Canada have done or are contemplating.

Although most U.S. regulators have not yet embraced a comprehensive approach to proactive lawyer regulation, there is data to suggest that this situation might be starting to change. During her term as NOBC President, Tracy Kepler created four committees that were asked to examine global developments and share what they learned with NOBC members.[175] The documents prepared by these committees are now found on the public part of the NOBC's website under a new tab labelled "Global Resources."[176] The NOBC was sufficiently interested in proactive management based regulation (PMBR) that it created an "Entity Regulation" committee.[177] This committee is chaired by James Coyle, who is the Attorney Regulation Counsel for the Colorado Supreme Court.[178] The Entity Regulation committee not only has produced an FAQ document for NOBC members (and others), but it has made a commitment to keep that document updated.[179] While I believe that it is preferable to distinguish between proactive regulation and entity regulation,[180] the NOBC Entity Regulation FAQ document has a strong "proactive regulation" orientation. This document suggests that there might be growing interest in moving from an ad hoc approach to proactive regulation to a more comprehensive approach.

Colorado is probably the state that is furthest along in these efforts. In June 2015, the Colorado Supreme Court Office of Attorney Regula-

[175] *See Global Resources*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/jurisdiction-info/global-resources.

[176] *Id.*

[177] *See Information for Entity Regulation*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/jurisdiction-info/global-resources/entity-regulation.

[178] *See id.*; COLO. SUP. CT., OFFICE OF ATTORNEY REGULATION COUNSEL ANNUAL REPORT 3 (2015), https://www.coloradosupremecourt.com/pdf/aboutus/annual%20reports/2015%20annual%20report.pdf [hereinafter Colorado Office of Attorney Regulation Counsel 2015 Annual Report]; *James C. Coyle, Attorney Regulation Counsel*, COLO. CONTINUING LEGAL EDUC., http://cle.cobar.org/About/Faculty-Authors/Info/CUSTOMERCD/1864.

[179] The author is a member of the NOBC Entity Regulation Committee and has personal knowledge of these facts.

[180] *See supra* note 66 and *infra* note 230 and accompanying text for a lengthier discussion of my reasons. While it is true that the issue of proactive regulation often is intimately intertwined with the topic of entity regulation, it is useful to recognize that the issues can be separated. The reason why this is useful is because some U.S. jurisdictions might be willing to contemplate proactive regulation even if they are not ready to engage in entity regulation. For this reason, I regret that the NOBC Global Resources page does not include a separate link to information about proactive regulation.

tion Counsel Advisory Committee created a Proactive Management-Based Regulation Subcommittee.[181] Colorado's Regulation Counsel has established a PMBR website where relevant materials are posted.[182] Consistent with Colorado's PMBR "Roadmap" that shows the order in which Colorado plans to address PMBR issues,[183] one of the first tasks the Colorado PMBR Subcommittee undertook was to develop draft regulatory objectives for consideration by the Colorado Supreme Court.[184] This work culminated in the Colorado Supreme Court's April 2016 adoption of a Preamble to Colorado's professional rules.[185] The new Preamble articulates Colorado's regulatory objectives and several of these objectives refer to proactive programs.[186] Following this task, the Colorado PMBR Subcommittee identified ten common principles for effective law practice management.[187] The Subcommittee currently has a working group for each of the ten PMBR principles it identified.[188] In short, as the 2015 Annual Re-

[181] *See* Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 36; OFFICE OF ATT'Y REGUL. COUNSEL, *Subcommittees*, COLO. SUP. CT., http://www.coloradosupremecourt.com/AboutUs/Subcommittees.asp. This webpage states that the subcommittee meets monthly and that its meetings are open to the public. *Id.* See *infra* note 182 for a link to the webpage that includes subcommittee minutes, Colorado PMBR documents, documents prepared by other entities, and links to webpages of interest.

[182] *See* OFFICE OF ATT'Y REGUL. COUNSEL, *Proactive Management-Based Regulation Subcommittee Minutes and Materials*, COLO. SUP. CT., http://www.coloradosupremecourt.com/AboutUs/PMBRMinutes.asp [hereinafter Colorado PMBR Webpage]. In addition to posting the subcommittee's minutes and Colorado documents, this website includes documents prepared by other entities, such as the National Organization of Bar Counsel, and links to materials from Australia, Canada, and the U.K.. *Id.*

[183] *See Colorado PMBR Roadmap*, COLO. SUP. CT., https://www.coloradosupremecourt.com/Newsletters/Winter2016/PMBR%20Roadmap.pdf.

[184] *See* Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 36.

[185] *See* Colorado Regulatory Objectives Preamble, *supra* note 82 and accompanying text.

[186] *Id. See also* Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 17–18.

[187] *Id.* at 36. *See also* OFFICE OF ATT'Y REGUL. COUNSEL, *Ten Common Principles*, COLO. SUP. CT., http://www.coloradosupremecourt.com/PDF/AboutUs/PMBR/10%20PMBR%20Principles.pdf. The "common principles" on this list are similar, but not identical to, the issues that have appeared in several different versions of Colorado's self-audit checklist. *Compare id.*, *with* James Carlson, *Self-Audit Helps Solo and Small Practitioners: The checklist offers guidance on how to avoid common office management mistakes* (Fall 2013), http://www.coloradosupremecourt.com/newsletters/fall_2013/Self-audit.htm, *and* Self-Audit Checklist (on file with the Lewis & Clark Law Review). As Appendix 1 shows, Colorado's current list of "common principles" is similar, but not identical to, common principles identified in other jurisdictions.

[188] *See* Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 36; Colorado PMBR Webpage, *supra* note 182.

port explained in a section entitled "Colorado looks at proactive programs," Colorado's regulator has "spearheaded a radical shift in how the legal profession regulates lawyers."[189] The 2015 annual report does an excellent job summarizing Colorado's efforts and is well worth reading.[190] Colorado's chief regulator has stated that Colorado wants to develop a "long term relationship with Colorado's lawyers, a cradle to grave, or holistic approach."[191]

Although Colorado may be the U.S. jurisdiction that is the furthest along in the development of proactive regulation, it is not the only U.S. jurisdiction that seems interested in this topic. The NOBC Entity Regulation FAQ document identifies Illinois as an example of a U.S. jurisdiction that is interested in proactive regulation.[192] It notes that the experience in New South Wales was "met with interest among Illinois bar leaders" and that Illinois is "considering how to engage designated attorneys in entity assessments and educational efforts both to improve the delivery of services to clients and reduce client grievances."[193]

Other U.S. jurisdictions have shown interest in exploring these issues. For example, in May 2015, a number of U.S. and Canadian regulators and other stakeholders came together at the Colorado Supreme Court building for a one-day workshop called the "1st Proactive Risk Based Regulation Workshop."[194] The Workshop was cosponsored by the ABA Center for Professional Responsibility, the Colorado Supreme Court Office of Attorney Regulation Counsel, and the Maurice Deane School of

[189] *See* Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 35. This section of the Annual Report cited the 2015 Proactive Workshop and developments in Australia and Canada. It also indicated that a proactive approach "would complement the current disciplinary system, but also hopefully increase client satisfaction and thus reduce the need for discipline due to better compliance with the Rules of Professional Conduct. Colorado already leads the country with proactive programs, but wants to consider other potential programs to promote the public interest." *Id.*

[190] *See, e.g.*, *id.* at 6, 14, 17, 20, 35, 36 and Appendix L (many places in the report reveal Colorado's commitment to using proactive regulation).

[191] *See* Email from James C. Coyle, Attorney Regulation Counsel, Colo. Supreme Court, to the author (Jan. 19, 2016) (on file with the Lewis & Clark Law Review).

[192] NOBC Entity Regulation FAQ, *supra* note 59, at 13.

[193] *Id.*

[194] *See, e.g.*, 2015 Proactive Workshop Minutes, *supra* note 33. The minutes include as an Appendix the slides from Session 3. *See also* James Coyle & Laurel S. Terry, States as Laboratories: Articulating Steps for Moving Forward, Slides Collectively Generated by the Moderators & Participants at Proactive Risk Based Regulation Workshop (May 30, 2015), http://www.personal.psu.edu/faculty/l/s/lst3/Denver_proactive_workshop_Session3__2015.pdf.

Law at Hofstra University.[195] There were more than forty attendees, including representatives from ten U.S. jurisdictions and four Canadian jurisdictions.[196]

While these examples are encouraging, they have not changed my view that, in general, U.S. regulators approach proactive regulation on an ad hoc, rather than a systematic basis. Except perhaps in Colorado, I have not seen in the U.S. the same type of commitment to a comprehensive approach to proactive lawyer regulation that I have seen in Australia or that is under discussion or development in Canada. I don't think that proactive regulation is yet in the DNA of U.S. regulators. One can see this by looking at the names of U.S. regulatory bodies.[197] I also find it telling that the NOBC describes itself as an "organization of legal professionals whose members *enforce* ethics rules that regulate the professional conduct of lawyers who practice law in the United States, Canada, Australia and Great Britain;" the word "enforce" reinforces the organization's historic roots as an organization of those who were involved in lawyer discipline and the "end stage" of lawyer regulation.[198] In short, I think that most if not all U.S. regulators have developed a comprehensive approach to the "end stage" of lawyer regulation, but they have not yet developed a comprehensive approach to the "middle stage" of lawyer regulation, where they might work in a systematic way to prevent problematic behavior before it arises, rather than spending most of their energy and resources responding to problematic behavior after it arises.

### *C. The Need to Develop a More Comprehensive Approach to Proactive Regulation*

The thesis of this Article is that lawyer regulators should see themselves as responsible for both the middle stage and end stage lawyer regulation.[199] Moreover, those who lead lawyer regulatory bodies should not

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[195] *See* 2015 Proactive Workshop Minutes, *supra* note 33. A second workshop was held on June 4, 2016. *See* Agenda, Second Regulators' Workshop On Proactive, Management-Based Regulation (Philadelphia, June 4, 2016) (on file with the Lewis & Clark Law Review).

[196] The author has personal knowledge of these facts.

[197] *See infra* Appendix 5.

[198] *See About Us*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/about-us (emphasis added). The NOBC's "History" webpage explains that the NOBC "was formed in 1965 to enhance the professionalism and effectiveness of lawyer disciplinary counsel throughout the United States." *See NOBC History*, NAT'L ORG. BAR COUNSEL, http://www.nobc.org/index.php/about-us/nobc-history.

[199] Some lawyer regulation agencies are responsible for the beginning stage and end stage of lawyer regulation. *See supra* notes 8–15 and 153–156 and accompanying text. These regulators would be included within the scope of this Article. This Article is broader, however, because it is also directed at those who have traditionally have performed only "end stage" regulation, such as the Pennsylvania of Office of

underestimate the power they have as leaders to steer the regulatory body in the direction of proactive regulation.

In my view, U.S. jurisdictions should adopt explicit regulatory objectives that set forth what they are trying to accomplish with the lawyer regulatory system.[200] But even in the absence of *explicit* regulatory objectives, most observers undoubtedly would agree that U.S. lawyer regulation should protect clients and the public.

If client and public protection are goals of our regulatory system, then it seems appropriate for regulators to try to *prevent* problematic behavior rather than simply responding *after* the behavior arises. Moreover, if regulators agree that it is appropriate for them to try to prevent problematic behavior, then I believe they should ask themselves how they might develop a more systematic approach to this kind of proactive regulation, as opposed to the ad hoc approach that I suspect is currently the norm. The Section that follows accepts these premises and offers two concrete suggestions for lawyer regulators to consider in order to achieve a more comprehensive approach to proactive lawyer regulation.

## IV. TWO SUGGESTIONS FOR LAWYERS WHO LEAD LAWYER REGULATORY BODIES

### *A. Include Proactive Middle Stage Regulation as Part of the Regulator's Mission*

The first suggestion this Article offers is that lawyer regulators should reflect on their mission and what it is that they, as regulators, should be trying to achieve. If regulators do this, I hope they would conclude that the job of lawyer regulators should be to further the jurisdiction's implicit or explicit regulatory objectives. This means, among other things, that regulators' jobs include protecting clients and the public. If one translates this mission and these regulatory objectives into the beginning, middle, and end stages of lawyer regulation analysis described previously, this means that with the exception of authorities whose responsibility is clearly limited to admissions issues, lawyer regulators should view themselves as responsible for *both* the middle stage of lawyer regulation *and* the end stage of lawyer regulation. In other words, they should view themselves as having an obligation to try to *prevent* problematic lawyer behavior as well as *responding* to problematic lawyer behavior after it occurs.

While reflecting on one's mission may sound like trite advice (and may also seem obvious), it is advice worth noting. In a busy, underfunded world, it may be difficult for those who lead these organizations to take

Disciplinary Counsel. *See Pa. Structure of the Disciplinary System*, *supra* note 15.

[200] *See supra* notes 82–84 and accompanying text.

time to reflect on the regulator's mission. Reflection, however, is a powerful tool. The Australian data discussed in a prior Section showed that law firms that had completed the self-assessment reduced their own client complaints and had fewer client complaints than firms that had not gone through the ILP process.[201] The data also showed that almost 70% of those who used the self-assessment form adopted new systems, policies, or procedures and almost three-quarters of the firms revised their systems, policies, or procedures.[202] Moreover, despite some initial doubts going into the process, those who completed the self-assessment felt positive about the experience and thought it positively affected their client service.[203] As the CBA Self-Assessment Tool Guide noted when citing the New South Wales study, it is the "learning and changes prompted by the *process* of self-assessment" that is key, not "the actual (self-assessed) level of implementation of management systems."[204]

In my view, this is an important lesson. The data from Professor Fortney's study show that it is the *process* of self-assessment that is important. Self-reflection can be a valuable tool not only for law firms, but for those responsible for leading lawyer regulators such as those listed on Appendix 5. Comments that were made during the May 2015 Denver Proactive Regulation Workshop suggest that a number of regulators agree that it would be beneficial for them to reflect on their mission. During the first session of that workshop, the session moderators asked these questions: "Are we being the best regulators we can be?—Are we doing our jobs?"[205] A number of regulators who were present answered "no" and expressed the view that there was more they could be doing to help lawyers from getting into trouble.[206] A number of regulators also answered "yes" to a question about whether they believed it was appropriate for their jurisdiction to focus on preventing problems as well as responding to problems.[207]

During the course of the workshop these regulators discussed how one might create an action plan that would take proactive regulation from an ad hoc system to a more systematic approach.[208] Although there were a variety of answers, there seemed to be a consensus among the attendees that it would be beneficial for them to try to regulate proactively in a more systematic and comprehensive manner.

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[201] *See supra* note 36 and accompanying text.

[202] *See* Fortney, *Promoting Public Protection, supra* note 38 and accompanying text.

[203] *Id.*

[204] *See* CBA SELF-ASSESSMENT TOOL E-GUIDE, *supra* note 46, at 4 (emphasis added).

[205] *See* Coyle & Terry, *supra* note 194, at slide 2.

[206] The author has personal knowledge of these facts.

[207] The author has personal knowledge of these facts.

[208] *See* Coyle & Terry, *supra* note 194, at slide 4.

Jurisdictions are likely to differ in the ways in which they implement a more comprehensive proactive approach. It is also likely that they will differ with respect to the consultation and approval processes that they use. Ultimately, however, it is important to remember that the lawyers who lead these organizations have the power to influence their direction. These leaders are in a position to initiate steps that will bring about a changed mindset and a comprehensive, systematic approach to proactive regulation. Thus, my first set of recommendations is that those who lead lawyer regulatory bodies should take the time to reflect on the mission of the organization. As part of this reflection, I hope that they will decide that it is important for the entity to develop a proactive approach to regulation wherever possible. A change in mindset and this type of commitment can provide the basis for a comprehensive approach to proactive lawyer regulation.

### *B. Use Ethics Rule 5.1 to Create a More Proactive Regulatory System*

Whereas my first recommendation was quite lofty ("adopt a new mindset"), my second recommendation is quite narrow and focused. If a regulator decides that it would be appropriate for it to be engaged in middle stage proactive lawyer regulation, there are many ways in which this might manifest itself.[209] The point of this Section is to remind U.S. jurisdictions that they probably already have a tool at hand that they can begin using immediately. This tool, which would allow the jurisdiction to emulate some of the practices that have been used in Australia and Canada, is the state ethics rule that is equivalent to ABA Model Rule of Professional Conduct 5.1(a).

If a jurisdiction wanted to implement a more proactive approach to lawyer regulation, it could start that process by adding two questions and a URL to lawyers' annual bar dues statements. These two questions would state:

1) Are you subject to Rule of Professional Conduct 5.1(a)?
2) If so, are you in compliance with this Rule?

After the second question, the bar dues statement would include a URL that would link to a regulator webpage. This webpage might identify the most common problems lawyers face (similar to the list of issues covered in the self-assessment tools summarized in Appendices 2 through 4, or the list of problems that many jurisdictions include in their annual

[209] *See supra* notes 160–168 and accompanying text (list of examples of proactive regulation).

disciplinary-system reports).[210] The webpage could also include a self-assessment form similar to those discussed earlier.[211] The self-assessment would help a lawyer determine whether his or her firm has "systems" in place that would minimize the chance of ethical violations. The resources webpage could provide additional information such as the information that Colorado currently provides to lawyers who are transitioning from government or large law firm practice into solo or small law firm practice.[212]

In my view, adding these two questions to a lawyer's annual dues statement would accomplish a number of things. First, I believe that it would result in a number of lawyers reading (or rereading) Rule 5.1. The ABA Model Rule version of Rule 5.1(a) states:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.[213]

While Rule 5.1(a) will not apply to every lawyer in a particular jurisdiction, it certainly will apply to a significant number of lawyers and it will apply to those lawyers who are most likely to be in a position to affect the various practice management "systems" that their firms use. Thus, even though a significant number of lawyers might end up saying that they were not subject to Rule 5.1(a), I believe that the question is worth asking.

With respect to the second question, some might argue that all of the lawyers who are covered by the rule will automatically say "yes," they are in compliance, and will not consult the provided webpage. While there certainly is a risk that a lawyer would say yes without further thought, I believe that most lawyers are honest and will look up Rule 5.1(a) and the URL listed before they answer that they are in compli-

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[210] *See, e.g., supra* note 34.

[211] *See supra* notes 30, 45, and 125 and accompanying text. If I were designing a self-assessment form, I would consult the models that are available and come up with a Self-Assessment tool that is a hybrid of the existing forms and draws upon the best of those forms. (Excerpts from these models are available in Appendix 4, *infra*). As a starting point, I would use the Nova Scotia form, which is the most recent form, but add some of the issues found on other forms. For example, I would make technology a separate topic as Colorado has done. In the future, advice may be available in this article: Susan Saab Fortney, *Back to the Future: Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, 2016 J. PROF. L. __ (forthcoming).

[212] *See supra* notes 171–174.

[213] MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR ASS'N 2013).

ance.[214] It is possible that they might do this not only because they want to be honest and thorough, but also because they might be curious about the contents of the regulator's webpage. Some lawyers might want to find out, for example, additional information about the practice areas or problems that are most likely to lead to discipline and ways to avoid these situations.[215] While many lawyers may already receive some of this information from their malpractice carriers, not all carriers provide similar risk management services.[216] Accordingly, lawyers may not be receiving this sort of law practice management advice from their carrier that would help them avoid ethical problems (or they may be going "bare" without insurance since U.S. jurisdictions—other than Oregon—do not require malpractice insurance, in contrast to the situation in many developed countries).[217]

One might ask whether a self-assessment form and online resources truly would make a difference since lawyers already have available to them a wealth of law practice management resources.[218] While that observation is accurate, it is possible that the sheer volume of material available and the plethora of available sources can be overwhelming to lawyers who are responsible for helping their firms select law practice management systems. The value of a Rule 5.1 resources page, combined with a self-assessment form, is that it allows the regulator to tailor the resources

[214] For example, I believe that most, if not all, lawyers accurately complete their continuing legal education compliance forms (which is one reason why there are so many "on demand" CLE courses and why there often is a "rush" for end-of-the-compliance-period live courses). *See, e.g.*, *Online Courses (On-Demand)*, A.B.A. CONTINUING LEGAL EDUC., http://www.americanbar.org/cle/mandatory_cle/mcle_by_format/online_courses.html (noting that ABA online courses are *generally* accepted in 14 MCLE jurisdictions and noting that the ABA does not report the lawyer's participation to a state accrediting agency).

[215] *See* Maryland Attorney Grievance Commission Annual Report, *supra* note 35, at 29, 31 (listing discipline by lawyer practice areas and by rule violated); Colorado Office of Attorney Regulation Counsel 2015 Annual Report, *supra* note 178, at 78–79, 92 (same); *see also infra* note 219 for information on complaint rates against solo practicioners and those who practice in small firms.

[216] *See infra* notes 246–251 and accompanying text (discussing the financial incentives of carriers such as the Oregon Professional Liability Fund, the mutual insurance company ALAS, and mandatory providers such as LawPro in Ontario).

[217] Lawyers in Europe and in Canada are required to carry malpractice insurance. *See, e.g.*, MODEL CODE OF PROF'L CONDUCT § 7-8-2 (FED'N OF LAW SOC'YS OF CAN. 2014) (noting the requirement of mandatory liability insurance); BRUNO NASCIMBENE, THE LEGAL PROFESSION IN THE EUROPEAN UNION 189 (2009); *Insurance Committee*, COUNCIL OF BARS & LAW SOC'YS OF EUR., http://www.ccbe.eu/index.php?id=94&id_comite=61&L=0.

[218] *See, e.g.*, *Directories, Surveys and Resources*, *supra* note 169 (citing Law Practice Management websites).

to the most frequently encountered complaints. This type of webpage could also reduce the information overload for lawyers.

Partners who practice in large firms or law firms that already have strong law practice management systems should not have any difficulty completing the two questions on the bar dues statement. The questions would not pose a regulatory burden because, with a small amount of investigation, these lawyers would be in a position to answer "yes" and indicate that their firm does have "systems" in place sufficient to satisfy Rule 5.1. (If I were on the management committee of such a firm, I would send a notice to all partners notifying them of the systems in place so that they knew that they could answer "yes" on the questionnaire.) But lawyers who don't work for firms with strong law practice management systems might find the regulator's resources useful.[219]

Regulators who feel particularly strongly might want to go even further and *require* lawyers to complete a self-assessment form rather than simply making the form available on a website. As noted earlier in this Article, research shows that it is the reflection process that is particularly beneficial.[220] As previously mentioned, Colorado is an example of a U.S. jurisdiction that may consider the idea of requiring a self-assessment form.[221]

I suspect that at least initially, only a handful of U.S. jurisdictions, if that, would be willing to *require* a self-assessment. While I would welcome

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[219] The annual reports from several regulators suggests that solo practitioners and lawyers practicing in small law firms may be disciplined at a rate that is higher than their proportion of the lawyer population. *See, e.g.*, *Investigation and Prosecution of Disciplinary Complaints Against Attorneys in Solo Practice, Small Size Law Firms and Large Size Law Firms,* ST. BAR OF CAL., June 2001, http://www.calbar.ca.gov/LinkClick.aspx?fileticket=OydXJk36ys4%3D&tabid=224&mid=1534. *See* Martin A. Cole, *The Myth of Solo & Small-Firm Bias*, 64(11) Bench & Bar of Minnesota (Dec. 2007), http://www2.mnbar.org/benchandbar/2007/dec07/prof_response.htm (explaining why there likely is more discipline against solo practitioners and lawyers who practice in small law firms). Cole, who is a long-time regulator, noted that "[l]ess-experienced lawyers in solo or small-firm settings especially should work to establish solid procedures early in their careers." *Id.* at 2. *See generally* Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309 (2004).

[220] *See supra* notes 35–39 and accompanying text; *see also* Atul Gawande, *Letting Go,* NEW YORKER (Aug. 2, 2010), http://www.newyorker.com/magazine/2010/08/02/letting-go-2 (When doctors routinely discussed end of life decisions with patients, "[t]he discussion, not the list [of choices], was what mattered most. Discussion had brought La Crosse [Wisconsin's] end-of-life costs down to just over half the national average. It was that simple—and that complicated.").

[221] *See Colorado PMBR Roadmap, supra* note 183. Colorado's PMBR Roadmap does not explicitly indicate whether Colorado's Self-Assessment Tool would be mandatory. Colorado committee members, however, certainly are familiar with the fact that this type of tool has been mandatory in other jurisdictions. *See generally* 2015 Proactive Workshop Minutes, *supra* note 33.

a state rule that would require individual lawyers or law firms to complete a self-assessment form, this Article presents a more modest solution. It suggests that regulators make a self-assessment form available (and easily accessible) by having a link on lawyers' bar dues statements. Since Rule 5.1(a) is a preexisting rule in the overwhelming number of U.S. jurisdictions,[222] it would be easy for jurisdictions to reference this rule and ask lawyers whether they are subject to, and in compliance with, this already-applicable rule.

As Appendix 1 at the end of this Article shows, virtually all U.S. jurisdictions should be in a position to implement this second recommendation and add two questions and a URL to lawyers' bar dues statements. Although there are state variations in many of the ABA Model Rules, Rule 5.1(a) is among the rules for which there is the least variation.[223] The ABA's data indicate that all but six states have a version of Rule 5.1 that would allow them to do what this Section advocates.[224]

In sum, it is my hope that the individuals who lead lawyer regulatory bodies will take to heart the recommendations contained in this Article. I hope they will reflect on the mission of their organization, which probably includes client and public protection. I hope that as part of their reflection, they will decide that their organization should be responsible for the middle stage of lawyer regulation. As part of this middle stage responsibility, I hope that they will regularly and systematically consider what proactive steps, if any, they could take in order to help lawyers avoid problematic behavior.

I also hope that regulators begin to make better use of a tool that almost all jurisdictions already have at their disposal. It would cost jurisdictions very little money to use Rule 5.1 more effectively. This second recommendation urges jurisdictions to add two questions to lawyers' bar dues statements. The questions would ask lawyers whether they are sub-

[222] VARIATIONS OF THE MODEL RULES OF PROF. CONDUCT r. 5.1 (Am. Bar Ass'n Ctr. Prof. Resp. Policy Implement. Comm. Mar. 29, 2016) [hereinafter MRPC VARIATIONS. *See* Appendix 1, *infra*, and note 224, *infra*, for additional information about U.S. state adoption of ABA Model Rule of Professional Conduct 5.1(a).

[223] *See, e.g.*, MPRC VARIATIONS, *supra* note 222.

[224] *Id.* According to this ABA chart, 27 states have adopted Rule 5.1 verbatim. Of the variations that exist, some are grammatical and some delete the reference to someone with "comparable managerial authority." Only four states—California, Ohio, Oregon, and Texas—do not assign to partners in a law firm (or the firm itself) the responsibilities set forth in Rule 5.1(a) to make sure that the firm has adopted measures (i.e., systems) that give reasonable assurance that the lawyers in the firm will conform to the Rules of Professional Conduct. There are two states—New York and New Jersey—in which the reach of Rule 5.1 may be limited since the rule does not apply to all partners but only to those with managerial authority or to the firm itself. *See infra* Appendix 1.

ject to, and complying with, a rule that already exists in most U.S. jurisdictions. The questions would be followed by a link to a regulator webpage that includes useful resources (and ideally a self-assessment form).

## V. RESPONDING TO ANTICIPATED CRITIQUES

This Section anticipates and responds to arguments that might be made in opposition to the suggestions found in this Article. Some may criticize the suggestions in this Article by saying that it is not appropriate for someone who leads a lawyer regulatory body to try to change that organization's focus. My response is that such leaders should—of course—take into account both the regulatory body's structure and the fact that "all politics are local." Thus, it makes sense for the jurisdiction to build on proactive measures that it already has in place. Moreover, even if the head of the regulatory body has the power to act alone, it would be wise for that person to engage in outreach to make sure that stakeholders understand the issues and the proposed changes. It undoubtedly would be prudent to create a committee or go through an approval channel process since change is more likely to "stick" where there is broad understanding and support.[225] Thus, the goal of this Article is not to encourage leaders to act unilaterally, but to make sure that those who lead lawyer regulatory bodies consider their potential influence and understand that it might be easier to implement a proactive system than they realize. This Article urges them to consider doing this in order to provide greater protection to clients and the public.

A second critique of this Article's proposals might be that it will be difficult to measure whether these changes are successful. The issue of metrics is important. Organizations need budgets and also need to provide accountability for their budgets and actions. There is currently a well-established system of metrics that is used to measure the results of regulators that respond to problems through the disciplinary system. If a regulator were to adopt a proactive approach, however, it is not clear what metrics could be used to measure the success of the new proactive approach. For example, many of the metrics that appear in the ABA's annual Survey of Lawyer Discipline Systems will be inapplicable to proactive regulation since they measure methods of handling complaints that were filed, rather than complaints that were avoided.[226]

Despite potential difficulties in measurement, I believe that those who are in charge of lawyer regulatory bodies should move forward with

[225] *See, e.g.*, Briton, *supra* note 146, at 57–58 and 67 (discussing some of the breakdowns in support).

[226] *See supra* note 16 for links to the discipline surveys.

a more comprehensive and systematic approach to proactive lawyer regulation. These lawyer regulators may want to invite those with empirical expertise to collaborate with them to develop alternative metrics that can be used to evaluate the regulators' results under the new system—such metrics might include quantitative data such as download counts for advice and qualitative data such as the type of research that Professor Susan Saab Fortney conducted in New South Wales. But in my view, the issue of metrics should not be allowed to derail the development of a more systematic approach to proactive lawyer regulation.

A third reason that a jurisdiction might resist the ideas in this Article is because of a view that the jurisdiction is not "ready" to develop a system of entity regulation in which law firms are regulated along with individual lawyers. I reject this argument because I do not believe the reforms in this Article *require* entity regulation. While it is true that some jurisdictions have combined proactive regulation and entity regulation,[227] a United States jurisdiction would not *need* to adopt law firm or entity regulation in order to make a commitment to try to use proactive, middle stage regulation. As the Rule 5.1 analysis and the Colorado transition email example in the prior Section demonstrate, it is possible to obtain many of the benefits of proactive regulation through relatively low-cost tools that do not involve entity regulation. In my view, what is needed is recognition from a regulator that proactive regulation is both important and appropriate. If a regulator always considers what might be done on a proactive basis, this mindset might lead to solutions that assist lawyers, reduce problems, and are cost effective.

Proactive regulation, including the use of Rule 5.1, certainly can be combined with entity regulation, as Professor Ted Schneyer and others have noted in the context of recommending proactive management-based regulation—PMBR.[228] Indeed, this type of a solution might be ideal for reasons discussed in the literature; this might be why a number of Canadian jurisdictions are considering or have implemented changes that combine proactive regulation with entity regulation. But it is im-

[227] *See supra* note 35 and accompanying text for a discussion of the system in New South Wales; *see also* PRAIRIE PROVINCES' DISCUSSION PAPER, *supra* note 63, at 2 (noting that the components of entity regulation, compliance-based regulation, and ABS were all "intimately connected"). See also the Law Society of Upper Canada's May 26, 2016 decision to move forward with proactive entity regulation as discussed *supra* note 57 and accompanying text.

[228] *See* Schneyer, *The Case for Proactive Management, supra* note 105, at 237. Professor Schneyer is well known to many regulators and commentators as the ideas in his 1991 law review article on ethical infrastructure and disciplining law firms have come to fruition in a number of jurisdictions, albeit primarily in jurisdictions outside the United States, rather than within. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 45 (1991).

portant for U.S. regulators to realize that they can also make changes regarding "when" regulation occurs without necessarily making changes to "what" is regulated.[229] Entity regulation is not necessary in order to have proactive regulation, nor is it sufficient. New York and New Jersey both have entity regulation,[230] but neither jurisdiction has used it to develop a system of proactive regulation. Thus, the fact that a jurisdiction is not ready to adopt the type of law firm or "entity" regulation found in New York, New Jersey or elsewhere does not excuse a jurisdiction from adopting a more comprehensive and systematic approach to proactive lawyer regulation.

A fourth argument that might be offered against the proposed changes is that the regulatory body does not have funds available to implement the changes this Article recommends. I reject this argument. Changing one's mindset—in and of itself—is priceless, but does not have a price tag attached. A regulator that had a proactive middle stage regulation mindset might discover a range of low-cost ways in which it could implement its vision. The email that Colorado sends, for example, reflects a proactive mindset and probably is quite effective, but costs very little money.

The data from Australia support the view that it is possible to implement a proactive middle stage mindset in a cost-effective manner. In the

[229] *See* Terry et al., *Trends, supra* note 1, at 2663 (noting that it is possible to separate regulatory developments that involve "who" regulates lawyers; "what" is regulated; "when" regulation occurs; "where" regulation occurs; "how" regulation occurs; and "why" regulation occurs); *see also NOBC Entity Regulation Frequently Asked Questions, supra* note 59 (noting that the issue of proactive regulation is separable from the issue of entity regulation).

[230] N.J. RULES OF PROF'L CONDUCT r. 5.1(a) (N.J. COURTS 2015) ("Every law firm . . . and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct."). New Jersey's authorization to regulate law firms is found in N.J. CT. R. 1:20-1(a) ("Every attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court as set forth in the Constitution of 1947, Article 6, Section 2, Paragraph 3."). In 2009, New York changed its ethics code to a Model Rules format. N.Y. RULES OF PROF'L CONDUCT r. 5.1(a) (N.Y. STATE UNIFIED COURT SYS. 2009) provides that "[a] law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules." Rule 5.1(b)(1) states that "[a] lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules." Lawyers and law firms can be disciplined for violating these rules. "*Misconduct*: A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. . . . " N.Y. RULES OF PROF'L CONDUCT r. 8.4.

May 2015 workshop on proactive risk-based regulation, the regulators who implemented the New South Wales proactive system noted the modest costs that were involved.[231] While one may ultimately want to restructure the regulatory system in a way that requires some upfront investment,[232] changing one's mindset might allow one to envision a number of important but cost-effective innovations and changes.

A fifth argument that might be offered against these changes is that they are too intrusive into law firm practices. While I believe that is it certainly possible to design a regulatory system to which this criticism would apply,[233] I believe that this would not be true of a proactive middle stage regulatory approach, in which a regulator believes that a large part of its mission is to act proactively to help lawyers practice better and acts on this belief. Thus, it will be important that those who lead lawyer regulatory agencies undertake sufficient outreach so that relevant stakeholders, including lawyers and law firms, understand the changes the regulator has proposed. The experience in Australia shows that the failure to do so can torpedo a system of proactive lawyer regulation.[234] Properly under-

[231] Former OLSC Regulators Steve Mark and Tahlia Gordon have reported that the costs of establishing the new system were minimal. The costs included two one-day stakeholder sessions to develop the top 10 risk areas and, as the system evolved, the cost of building the online portal that included resources for lawyers. More than 5,000 firms received a letter from the regulator; there were no audits if a firm completed its self-assessment form, which almost all did. The system was designed to minimize costs since the regulator was not given any extra resources. Email from Tahlia Gordon, *supra* note 31.

[232] *See, e.g.*, NSBS Legal Services Regulation Webpage, *supra* note 77.

[233] *See infra* note 264 and accompanying text regarding the regulatory system in Queensland.

[234] *See* Briton, *supra* note 146, at 57–58. The former regulator in Queensland offered his view that lobbying by large law firms and existing regulators were among the reasons why Australia's Uniform National Legal Profession Act omitted an appropriate management systems requirement that would have allowed the regulators to continue to use a proactive self-assessment requirement. *Id.* at 57–58, 58 n.124.

> The power was watered down in the National Law that followed the consultations as a result presumably . . . of the ill-informed scare campaign waged by the professional bodies and the large law firm group during the consultation phase prior to the release of the first version of the Law in December 2010. Certainly all but one of the members of the Consultative Group to the National Legal Profession Reform Taskforce who represented the professional bodies and the large law firms were strongly, even viscerally opposed to extending the compliance audit power to all law firms however it was qualified. Interestingly and consistent with Professor Susan Saab Fortney's research which I cited earlier the one and only of them who supported the proposal was the one and only one of them who had personally participated in, and whose firm had completed a self-assessment audit.
>
> In any event the professional bodies and the Large Law Firm Group argued that

stood, adoption of a changed regulator mindset and the bar dues/Rule 5.1 suggestion advocated here should not pose the slightest threat to those lawyers or firms who already use law practice management systems to reduce their ethical and liability issues and it should be viewed as helpful assistance for those who do not have such systems.

A final critique might be that there is a conflict of interest between the regulator's discipline mission and the proactive regulation approach described in this Article. In my view, this argument is misplaced. I believe that all U.S. jurisdictions have as their implicit or explicit regulatory objectives protection of clients and the public. Proactive regulation and discipline are both intended to further those regulatory objectives. Provided the systems are designed appropriately, I see no inherent conflict between trying to prevent problems before they occur (e.g., by helping lawyers establish separate accounts for client and lawyer funds and setting up an office system regarding the operation of those funds) and disciplining lawyers after-the-fact if they engage in improper behavior by commingling or stealing client funds. The goal of both the proactive steps and the reactive discipline is to further the jurisdiction's regulatory objectives of client and public protection.

Those who worry about the cost and burden of the proposals contained in this Article might cite regulatory changes in England and Wales

> empowering regulators to conduct compliance audits of all law firms would impose an '*intrusive*', '*unnecessary*', '*clearly unwarranted*' and '*unjustified*' additional regulatory burden on law firms, to the extent even that it would risk create [sic] '*significant access to justice issues*' by causing '*small businesses in remote, regional and regional parts of Australia to close their doors*.' This is patent nonsense. One need only ask, if this were true, why it is that so many firms, most of them small firms, have opted to incorporate since that option became available to them, why incorporation so quickly became and remains the business structure of choice for start-up law firms, and why they haven't complained. Furthermore the risk that regulators might abuse the power by conducting unjustified and unnecessary compliance audits could be easily managed short of throwing out the baby with the bathwater. The National Law could easily and should include principles which require regulatory authorities never to impose any needless regulatory burden on low risk law firms but always to direct their regulatory resource to where it is most needed and can have the most beneficial impact in the public interest, and which require them to exercise the power (and indeed any of their coercive information gathering powers) in such a way, and to be able to demonstrate that the power has been exercised in such a way, as to keep the compliance costs to law firms proportionate to the value of the information sought to be obtained. The inclusion of principles to this effect would require that the power be exercised responsibly rather than rob it of its effectiveness, and would be fully consistent both with the principles-based approach to regulation reflected throughout the National Law and with regulatory best practice (*see* Report No.48 of the Administrative Review Council, *The Coercive Information Gathering Powers of Government Agencies*, May 2008).

*Id.* at 58 n.124.

in support of their arguments.[235] In my view, however, these arguments would be misplaced—because I have not recommended that the U.K. changes be used as a model for proactive regulation in the United States. The proposals in this Article are quite modest—this Article has simply asked U.S. regulators to think about the timing of regulation—which is the "*when* to regulate" question.[236] In contrast to the modest goals found in this Article, the 2007 U.K. Legal Services Act made significant changes that affected *who* regulates legal services, *what* is regulated, *why* regulation occurs, and *how* it occurs. Thus, even if one believes that the SRA has created an elaborate and expensive system of regulation that is overseen by a large staff,[237] the changes I have proposed are much more modest and the costs should be significantly less.

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[235] *See* Legal Services Act 2007, *supra* note 2. The 2007 U.K. Legal Services Act dramatically affected lawyer regulation in England and Wales in three ways. The Act: 1) changed the regulatory structure by creating the overarching Legal Services Board which was given the power to approve new front-line regulators; 2) changed the system for handling client complaints against lawyers; and 3) adopted a framework that allowed alternative business structures (ABS). *See, e.g.*, Laurel S. Terry, Carole Silver & Ellyn S. Rosen, *Transnational Legal Practice:* 2009, 44 INT'L L. 563, 565–66 (2010). *See generally* Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT'L L. 485, 495–96 (2013) (for more recent developments). It should be noted, however, that at the time this article was written, there were suggestions that the 2007 Legal Services Act would be amended by the U.K. government. *See, e.g.*, John Hyde, *SRA Backs Government Ambition for Independent Regulators*, LAW SOC'Y GAZETTE (Dec. 2, 2015), http://www.lawgazette.co.uk/news/sra-backs-government-ambition-for-independent-regulators/5052541.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ031215; Press Release, *LSB Welcomes Government Plans for Consultation on Reform of the Legislative Framework*, LEGAL SERVICES BOARD (Nov. 30, 2015), http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20151130_LSB_Chairman_Responds_To_Government_Game_Changing_Plan_For_Families_And_Firms.html (includes useful summary and links); Press Release, Competition & Mkts. Auth., Legal Services Study Launched by CMA (Jan. 13, 2016), https://www.gov.uk/government/news/legal-services-study-launched-by-cma.

[236] I continue to find it useful to use the "*who-what-when-where-why-and-how*" way of categorizing lawyer regulation developments. *See* Terry et al., *Trends, supra* note 1, *and supra* note 229 and accompanying text.

[237] *See Annual Report 2012: Moving Forward*, SOLICITORS REGULATION AUTHORITY, http://www.sra.org.uk/sra/how-we-work/reports/moving-forward.page# ("As at 31 December 2012, the SRA had 491 full time equivalent (FTE) permanent employees. In addition, there were 41 FTE fixed term temporary employees and 81 FTE agency and contractor staff."); *Annual Review 2013/14*, SOLICITORS REG. AUTHORITY (Dec. 11, 2014), http://www.sra.org.uk/sra/how-we-work/reports/review-2013-2014.page (showing approximately £35 million in expenditures and £23 million in net expenditures). It should be noted, however, that the regulatory costs have been coming down since 2007 and that bringing down regulatory and compliance costs is one of the main jobs of the LSB. *See Cost of Regulation In-depth Research*, LEGAL SERVICES BOARD (2012), https://research.legalservicesboard.org.uk/news/latest-research-7/.

There is a second reason why I believe that it would be inappropriate to cite the U.K. SRA's cost or structure as grounds for opposing the arguments found in this Article. In my view, the SRA's regulatory system has been dominated by its interest in developing regulation that is "outcomes-focused" and "risk-based." While there certainly are aspects of the SRA's regulatory approach that might be said to be "proactive" such as its "starter" pack for solo practitioners,[238] my overall impression is that risk-based regulation and outcomes-focused regulation (i.e., the "how to regulate" issues) have been given a greater priority in the SRA than the issue of "when" to regulate and proactive regulation.[239] Because I do not think

[238] *See, e.g.*, *Sole Practitioners and Small Firms Regulatory Starter Pack*, SOLICITORS REG. AUTHORITY (Jan. 8, 2016), https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Sole-Practitioners-and-Small-firms-regulatory-starter-pack.page.

[239] *See, e.g.*, *Risk-based Regulation*, SOLICITORS REG. AUTHORITY, http://www.sra.org.uk/risk/risk.page (A "vital activity that the SRA undertakes, as a risk-based regulator, is the identification of risks to the regulatory objectives set out in the Legal Services Act 2007."). The SRA's risk webpage shows an elaborate system it has developed to help it determine how to deploy risk-based regulation. Its "risk products" include an annually-prepared Risk Outlook; Framework; Index; Assessment; Research and Reports; and Risk Resources. *Id.* The sheer volume of material on the SRA website and the preponderance of material that address how the regulator will deploy its own resources have left me with the impression that risk is primarily used to help the regulator deploy its resources effectively—in other words, the bulk of the "risk" material goes to the issue of "how" to regulate, rather than the issue of "when" to regulate. *See id.* The second sentence that appears on the SRA's risk page, immediately following the sentence about the SRA using risk to deploy its resources effectively, states: "We require firms to ensure that they, too, are managing identified risks to the regulatory objectives." *Id.* The subject of this sentence is the SRA; the focus arguably is enforcement. While it is undeniable that the SRA wants to prevent problems from occurring, as evidenced by its "suitability" test for qualification and the educational materials on its webpage such as those cited *supra* note 238, I am nevertheless left with the impression that the issues of "what" to regulate, "how" to regulate, and "why to regulate" have received more attention than have issues related to "when" to regulate. *See also* Richard Moorhead et al., *Designing Ethics Indicators for Legal Services Provision* 13 (Sept. 2012), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/designing_ethics_indicators_for_legal_services_provision_lsb_report_sep_2012.pdf (a paper commissioned by the U.K. Legal Services Board noted that with the exception of regulators in Australia, "overall, the emerging picture was that [domestic and international] regulators relied on regulating ethics through training and complaints monitoring. Very few regulatory bodies took monitoring further than that.").

Although the "who-what-when-where-why-and-how" issues obviously can be intertwined and although it may seem artificial to try to apply these kinds of distinctions to an integrated system such as the 2007 Legal Services Act, I continue to believe that it is useful to remind regulators that it is possible to "decouple" the "who-what-when-where-why-and-how" issues. The goal of this Article is to convince U.S. regulators that they can and should change the "when" issue, even if they aren't ready to change the "what is regulated" issue and adopt entity regulation, or the "how to

U.S. regulators should look to the U.K. as a model of proactive regulation, I do not think it is appropriate to point to U.K. costs or structure as a way of dismissing the arguments contained in this Article.

At the end of the day, jurisdictions that are attempting to embark on a comprehensive approach to proactive lawyer regulation undoubtedly will have many questions.[240] The goal of this Article is not to provide answers to all of the logistical questions, but to encourage regulators to make a commitment to think about what they could and should be doing with respect to proactive regulation, which is the middle stage of lawyer regulation, and to begin to think about tools that already are available to them, including Rule 5.1.

## VI. OTHER CONTEXTS IN WHICH PREVENTATIVE ACTION HAS BEEN EFFECTIVE

Before concluding this Article, it is worth noting that there are many other contexts in which we accept the value of a proactive, preventative approach. Most U.S. readers will be familiar with famous quotes such as Ben Franklin's statement that "an ounce of prevention is worth a pound of cure" or the well-known advice to "measure twice, cut once." Pilots were among the first required to take preventative action in the form of checklists used for takeoff; this proactive approach yielded dramatic results.[241] Many individuals get an annual preventative flu shot. Preventative

regulate" issue and adopt principles-based outcome-focused regulation. Because I think many of England's changes have focused on the "what" and "how" issues, I have not focused on it in this Article.

[240] Some of the questions identified at the Denver conference included the following: how a regulator will build knowledge among various constituencies; how a regulator will keep the level of regulation/burden on lawyers down; how a regulator will define "success" and what metrics can be used to measure it; how proactive regulation can be done in a cost-effective manner; for those that have begun implementing a proactive approach, what steps have seemed successful, what should be avoided, and what concrete help could be provided to regulators to help them transition to more comprehensive proactive middle stage lawyer regulation. Some regulators at the Workshop offered the following advice to their fellow regulators: 1) Educate yourself; 2) Establish your goals (with a feedback loop); 3) Engage your stakeholders; and 4) Consider issues regarding authorization needed, operations, funding, and education, outreach, and accountability. *See* Coyle & Terry, *supra* note 194, at slide 10; 2015 Proactive Workshop Minutes, *supra* note 33, at 14.

[241] *See* Atul Gawande, *The Checklist: If Something So Simple Can Transform Intensive Care, What Else Can It Do?*, NEW YORKER (Dec. 10, 2007), http://www.newyorker.com/magazine/2007/12/10/the-checklist (After a 1935 crash of a new Boeing plane by an experienced pilot, "a group of test pilots got together and considered what to do. . . . [T]hey came up with an ingeniously simple approach: they created a pilot's checklist. . . . With the checklist in hand, the pilots went on to fly the Model 299 a

approaches have become more common elsewhere in the health care field; interesting enough, the first serious study of medical checklists was done less than fifteen years ago, in 2001.[242] The improvements in patient outcomes and the millions of dollars that were saved by using a preventative checklist were so dramatic that the "checklist" movement has spread and the World Health Organization, among others, has now developed a series of (preventative) checklists that it recommends.[243] In the United States, a number of hospitals have mandated their use: many doctors and surgeons have overcome their initial reluctance at being told what to do via a checklist because they now recognize the value of such a proactive, preventative approach to problems.[244]

Proactive action is not limited to the medical or aviation fields. For example, there are numerous federal and state agencies whose mission includes protecting workers and the public. Although the work of regulatory agencies such as the Federal Drug Administration, the Department of Labor, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Highway Traffic Safety Administration have sometimes been criticized for not reaching the proper balance of protection and administrative burden, few would argue that it is improper for the government to regulate proactively to prevent problems. Most agree that the issue is not whether proactive reaction designed to prevent problems is appropriate. Instead, the issue is the proper balance of regulatory benefits and burdens in any given fact pattern.

The Nova Scotia Barristers' Society has responded to this concern about "balance" through its third "P." In its new system, lawyer regulation must not only be proactive and principled, but it must also be *proportionate*.[245] The principle of regulatory proportionality is consistent with the advice given by a number of organizations that are focusing on regulatory principles.[246] A concept of proportionality should go far to diffuse potential concerns about a proactive system.

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total of 1.8 million miles without one accident.").

[242] *Id.*

[243] *See* WORLD ALLIANCE FOR PATIENT SAFETY, IMPLEMENTATION MANUAL: SURGICAL SAFETY CHECKLIST (May 2008), http://www.who.int/patientsafety/safesurgery/tools_resources/SSSL_Manual_finalJun08.pdf?ua=1.

[244] *See* Lisa Chow, *3 Ways Obamacare Is Changing How a Hospital Cares for Patients*, NAT'L PUB. RADIO (Nov. 26, 2013), http://www.npr.org/sections/money/2013/12/02/247216805/three-ways-obamacare-is-changing-how-a-hospital-cares-for-patients ("'When we came up with this, I kind of felt a little silly for the first few weeks following a sort of checklist or menu,' surgeon Eric Espinal says. But, he concedes, pilots and NASCAR drivers use checklists because they reduce complications. So checklists could be better for patients—and, in the new system, the hospital's bottom line.").

[245] *See* NSBS Regulatory Objectives Webpage, *supra* note 83, at objective 6.

[246] *See, e.g.*, *Regulatory Reform*, ORG. FOR ECON. CO-OPERATION & DEV., http://

The benefit of a proactive approach that seeks to prevent problems, rather than simply responding to them after they arise, should not seem foreign to lawyers since this is commonly done within law firms. For example, most of those in the legal ethics field are familiar with the Attorneys' Liability Assurance Society (ALAS), which is a mutual insurance company owned by a number of leading U.S. law firms.[247] ALAS representatives are frequent speakers at the ABA's national ethics conferences where they give presentations that provide insight into the proactive, preventative advice they give their members.[248] ALAS has explained its proactive risk-management policy as follows:

> ALAS, Inc.'s (ALAS) loss prevention program is the most comprehensive available in the lawyers' professional liability insurance industry. Good firms have always understood the importance of sound loss prevention practices. Significant growth in the size of law firms, important developments in lawyer liability, and changes in the law that affect how lawyers practice have only heightened the importance of loss prevention.[249]

ALAS member firms receive resources that include a Loss Prevention Manual and a Prototype Lawyers' Manual that includes more than 100 sample policies and related forms designed to address the needs of insured firms.[250] ALAS provides hotlines, e-newsletters, conferences, and Law Firm Management Guides, among other things.[251]

ALAS' approach is not unique in the legal field. Malpractice carriers that insure all lawyers—such as the Oregon Professional Liability Fund and LawPro in Ontario—have long understood the importance of acting

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www.oecd.org/regreform/.

[247] *See About the ALAS Companies*, ATTORNEYS' LIABILITY ASSURANCE SOC'Y, http://www.alas.com/public/about.aspx.

[248] *See, e.g.*, Program Schedule, National Conference on Professional Responsibility (Jun. 3–5, 2010), http://apps.americanbar.org/cpr/events/toc.pdf (Jeffrey Kraus spoke on a panel on Current Issues Regarding Confidentiality and the Attorney-Client Privilege); Program Schedule, National Conference on Professional Responsibility (May 31–Jun. 2, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conference_toc.authcheckdam.pdf (Jeffrey Kraus spoke on a panel entitled Old Rules, New Tools: The Challenge of Social Media for Bar Associations and Lawyers). Mr. Kraus serves as Vice President and Loss Prevention Counsel at ALAS, Inc.) *See, e.g.*, *Speakers*, AM. BAR ASS'N, http://www.americanbar.org/calendar/2012/05/38th_aba_nationalconferenceonprofessional/speakers.html.

[249] *See Loss Prevention*, ATTORNEYS' LIABILITY ASSURANCE SOC'Y, http://www.alas.com/public/about_lp.aspx.

[250] *Id.*

[251] *Id.*

proactively to prevent problems, rather than simply responding after problems and claims arise.[252]

In the legal services context, malpractice carriers aren't the only ones who have discovered the value of an ounce of prevention. Law firms—and those who write about law firms—have also noted the importance of preventing problems, rather than simply responding to problems after they arise. Professor Ted Schneyer has been a leader in calling for regulation that creates an "ethical infrastructure" and that operates in a proactive manner.[253] He and others have urged law firms to create this type of ethical infrastructure. Professor Susan Saab Fortney was an early leader in studying and writing about the importance of firms taking preventative steps to avoid problems.[254] Professors Elizabeth Chambliss and David Wilkins have written about how law firms can create ethical infrastructures.[255] Others have also addressed the importance of proactive work.[256] Law firms seem to have embraced this advice. For example, a number of commentators have noted the rise of law firm ethics committees and general counsel over the past decade.[257]

[252] *See generally About Practice Pro*, PRACTICE PRO, http://www.practicepro.ca/facts/default.asp; *Practice Management*, LAWYER'S PROF'L INDEM. CO., http://www.lawpro.ca/claimsP_area_law.asp?PM=yes; *Services*, OR. STATE BAR PROF. LIABILITY FUND, https://www.osbplf.org/practice-management/services.html ("Administrative errors, such as missed dates and deadlines, account for the majority of legal malpractice claims. Improving your office systems can substantially reduce your risk of potential claims and enhance the enjoyment of practicing law. Free and confidential assistance with office systems is available to all Oregon lawyers for a wide range of needs through the Professional Liability Fund's Practice Management Advisor (PMA) Program.").

[253] Schneyer, *The Case for Proactive Management*, *supra* note 105, at 265; Ted Schneyer, *On Further Reflection, How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 585 (2011); Schneyer, *Professional Discipline*, *supra* note 228, at 10.

[254] *See, e.g.*, Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. L. 131, 148; Susan Saab Fortney & Jett Hanna, *Fortifying A Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 674 (2002).

[255] *See, e.g.*, Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63 (2009); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and other Compliance Specialists in Large Law Firms,* 44 ARIZ. L. REV. 559 (2002); Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002).

[256] *See, e.g.*, Paul R. Tremblay & Judith A. McMorrow, *Lawyers and the New Institutionalism*, 9 U. ST. THOMAS L. J. 568 (2011).

[257] *See* Chambliss & Wilkins, *Emerging Role of Ethics Advisors*, *supra* note 255, at 559.

In sum, there are numerous examples outside the world of lawyer regulation that suggest the value of a proactive mindset in which one seeks to avoid problems, rather than simply responding to problems after they arise. It appears that Ben Franklin had it right when he said that "an ounce of prevention is worth a pound of cure."

## CONCLUSION

This Article has argued that the time has come for lawyer regulators to embrace the middle stage of lawyer regulation. Lawyer regulators should, of course, continue to administer a lawyer discipline system, which this Article refers to as the end stage of lawyer regulation. But in addition to responding to problems after they occur, this Article argues that lawyer regulators should define their missions so that they try to *prevent* problems before they occur. While this type of preventative, proactive approach to lawyer regulation already occurs in the United States on an ad hoc basis, with various jurisdictions using various different tools, this Article argued that lawyer regulators should make a commitment to developing a more *comprehensive* and *systematic* approach to *proactive* lawyer regulation. In other words, they should think of themselves as responsible for the middle stage of lawyer regulation as well as the end stage of lawyer regulation. Embracing this mindset would lead to better protection of clients and the public; these two goals probably are among the jurisdiction's explicit or implicit regulatory goals.

This Article offered two suggestions for regulators' consideration. First, it recommended that lawyer regulatory bodies and those who lead them take time for reflection. It asked regulators to make a commitment to develop a comprehensive, systematic approach to proactive lawyer regulation. The Article argues that there are many different ways that such a commitment could be reflected, ranging from things as simple as mission statements to staff briefings to emails such as those sent by Colorado to changes in the organizational names that appear on Appendix 5.

The second recommendation in this Article was that regulators begin using a tool that already is available in order to implement a more proactive system of regulation. The Article recommended that regulators add two questions and a URL to each lawyer's annual bar dues statement. The first question would ask whether the lawyer is subject to Rule 5.1(a). Because Rule 5.1(a) has been adopted in most U.S. jurisdictions and because it applies to all lawyers who are law firm partners, the reach of this rule is quite broad.

The second question would ask whether a lawyer who is subject to Rule 5.1(a) is in compliance with that rule. This rule, in effect, places re-

sponsibility on lawyers who are partners to make sure that their law firms have in place measures or "systems" to avoid ethical violations.[258] These two questions could be followed by a link to a regulator webpage that includes resources such as a list of common client complaints, links to law practice management information, and to a self-assessment form. The goal would be to emulate systems that have been used in Australia and Canada. Empirical studies indicate that lawyers who use a self-assessment form change their practices and have fewer problems.[259]

Up until now, Rule 5.1(a) has been largely ignored. This Article encouraged regulators to consider using this rule as a tool that will help them transition to a more systematic proactive regulatory approach. If lawyer regulators embraced the middle stage of lawyer regulation, in addition to the end stage of discipline, it could be a win-win situation that benefits lawyers, clients, and the public.

[258] The ethics rules cover issues that are the subject of many client complaints, including *inter alia*, competent practice, communicating with clients, diligence and its flip side of delay, avoiding conflicts of interest, the amount of legal fees, communication about legal fees, and proper handling of money and property. *See, e.g.*, *supra* notes 34–35. If a law firm lacks law practice management systems, it is hard to see how a partner could assert that his or her firm has "measures" that are designed to ensure compliance with these rules.

[259] *See supra* notes 30–36.

APPENDIX 1: SUMMARY OF ABA DATA REGARDING STATE IMPLEMENTATION OF ABA MODEL RULE 5.1(a) AND SAMPLE BAR DUES QUESTIONS[260]

| | Have Adopted Rule 5.1(a) Verbatim[261] | Have Adopted Rule 5.1(a) partner responsibility with minor changes[262] | Have Adopted Rule 5.1(a) with major changes | Do Not Have a Rule Equivalent to Rule 5.1(a) *re* partner responsibility |
|---|---|---|---|---|
| | 33 | 12 | 2 | 4 |
| Jurisdiction | AK, AZ, AR, CO, CT, DE, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MN, MO, MT, NE, NV, OK, PA, RI, SC, SD, TN, UT, WA, WV, WI, WY | AL, DC, FL, GA, MI, MS, NH, NM, NC, ND, VT, VA | NJ (the entity, rather than individual lawyers, has the responsibility), NY (applies to a firm and to a "lawyer with management responsibility in a law firm") | CA, OH, OR, TX |

**Sample Bar Dues Questions that Might Be Used By Jurisdictions That Have Adopted ABA Model Rule of Professional Conduct 5.1(a) verbatim or with minor changes:**

I recommend that jurisdictions add the two questions listed below to each lawyer's annual bar dues statement. I further recommend that the bar dues statement include a citation to a webpage that would provide a self-assessment tool and resources analogous to those described in this Article and referenced in Appendices 2–4. The questions are:

*1) Are you subject to Rule of Professional Conduct 5.1(a)?*

*2) If so, are you in compliance with this Rule? See [citation to the regulator's proactive regulation resources page].*

[260] VARIATIONS OF THE MODEL RULES OF PROF. CONDUCT r. 5.1 (AM. BAR ASS'N CTR. PROF. RESP. POLICY IMPLEMENTATION C'EE., Mar. 29, 2016).

[261] I have included a jurisdiction in the first "verbatim" column if that jurisdiction has a paragraph in its rule that is identical to ABA Model Rule 5.1(a), even if the title of the rule is different in the jurisdiction or the jurisdiction has omitted or changed parts of ABA Model Rule 5.1 other than Model Rule 5.1(a).

[262] The characterization of changes as "minor" or "major" represents my evaluation of the differences described in the ABA's comparison charts. For example, I have treated as a minor change rules that apply Rule 5.1(a) to partners but do not apply the rule to those with "comparable managerial authority." While one might characterize this as a major change, for purposes of this Article, if a jurisdiction has a version of Rule 5.1(a) that applies to partners, then that jurisdiction is in a position to add to its bar dues statement the two questions this Article recommends. Similarly, if a Rule adds responsibilities to entities such as law firms or government lawyers, as the District of Columbia has done, I have treated that as a minor change. One might argue that for purposes of this Article, New York's change is minor since it extends Rule 5.1 to lawyers with "management responsibility in a law firm." I have erred, however, on the side of a conservative interpretation.

## APPENDIX 2: ISSUES IDENTIFIED IN SELECTED SELF-ASSESSMENT TOOLS

| New South Wales[263] and Queensland[264] | Nova Scotia Barristers' Society: A Management System for Ethical Legal Practice (MSELP) [265] |
|---|---|
| 1. Negligence | 1. Developing Competent Practices [To Avoid Negligence] |
| 2. Communication | 2. Communicating in an effective, timely and civil manner |
| 3. Delay | 3. Ensuring confidentiality |
| 4. Liens/file transfer | 4. Avoiding conflicts of interest |
| 5. Cost disclosure/billing practices/termination of retainer | 5. Maintaining appropriate file and records management systems |
| 6. Conflicts of interest | 6. Ensuring effective management of the legal entity and staff |
| 7. Records management | 7. Charging appropriate fees and disbursements |
| 8. [Authorising and monitoring compliance with] Undertakings | 8. Sustaining effective and respectful relationships with clients, colleagues, courts, regulators and the community |
| 9. Supervision of practice and staff | 9. Working to improve diversity, inclusion and substantive equality; and |
| 10. Trust account requirements [& accounting procedures] | 10. Working to improve the administration of justice and access to legal services |

[263] This list of issues is taken from the summary previously provided on the webpage of the New South Wales Office of the Legal Services Commissioner. These issues were the focuse of the New South Wales Self-Assessment Form. Although the system has changed in New South Wales as a result of the adoption of the Uniform National Legal Profession Act, this same list of ten issues appears on the current "Practice Management" page of the Office of the Legal Services Commissioner. *See NSW OLSC Practice Management Webpage*, *supra* note 35.

[264] This list of issues in Queensland is included in Briton, *Changing Face of Regulation*, *supra* note 43, at 11. The bracketed language in this list comes from Queensland's articulation of the issue.

[265] *See supra* note 110 and accompanying text for a discussion of the ten MSELP elements Nova Scotia approved in March 2016.

| Canadian Bar Association[266] | Colorado[267] |
|---|---|
| I. Relationship to Clients | 1. Developing competent practices |
| 1. Competence | 2. Communicating in an effective, timely, professional manner and maintaining professional relations |
| 2. Client Communication | 3. Ensuring that confidentiality requirements are met |
| 3. Confidentiality | 4. Avoiding conflicts of interest |
| 4. Conflicts | 5. Maintaining appropriate file and records management systems |
| 5. Preservation of Clients' Property/Trust Accounting/File Transfers | 6. Managing the law firm/legal entity and staff appropriately |
| 6. Fees and disbursements | 7. Charging appropriate fees and making appropriate disbursements |
| II. Relationship to Firm Members | 8. Ensuring that reliable trust account practices are in use |
| 7. Hiring | 9. Working to improve the administration of justice and access to legal services |
| 8. Supervision/Retention/ Lawyer and Staff Well-being | 10. Wellness and Inclusivity |
| III. Relationship to Regulator, Third Parties, and the Public Generally | |
| 9. Rule of Law and the Administration of Justice | |
| 10. Access to Justice | |

[266] *See supra* note 45 and accompanying text for a discussion of the CBA Self-Assessment tool.

[267] This list of "ten common principles" are available on the Colorado Office of Attorney Regulation Counsel PMBR webpage. *See supra* note 187. *See also supra* notes 185–191 and accompanying text for more information about Colorado's initiatives.

## APPENDIX 3: A COMPARISON OF THE TOPIC HEADINGS IN SELECTED SELF-ASSESSMENT TOOLS[268]

| | New South Wales | Nova Scotia | CBA | Colorado | Relevant ABA Model Rule |
|---|---|---|---|---|---|
| Competence | Yes (#1) | Yes (#1) | Yes (#1) | Yes (#1) | 1.1 |
| Communication | Yes (#2) | Yes (#2) | Yes (#2) | Yes (#2) | 1.3 |
| Diligence/Delay | Yes (#3) | Yes (#1 & 2) [competent, timely] | Not explicitly | Yes (#1 & 2) [competent, timely] | 1.4 |
| Confidentiality | Not explicitly | Yes (#3) | Yes (#3) | Yes (#3) | 1.6, 1.9, 1.18 |
| Conflicts | Yes (#6) | Yes (#4) | Yes (#4) | Yes (#4) | 1.7–1.13 |
| Billing/Fees | Yes (#5) | Yes (#7) | Yes (#6) | Yes (#7) | 1.5 |
| Money Handling–Trust Accounts | Yes (#10) | Not explicitly (but see ##1, 5, &7) | Yes (#5) | Yes (#8) | 1.15 |
| Staff Supervision | Yes (#9) | Yes (#6) | Yes (#8) | Yes (#6) | 5.1–5.3 |
| Access to Justice–legal services | Not explicitly | Yes (#10) | Yes (##9–10) | Yes (#9) | 6.1 & 6.2 |
| File management–Liens-transfers | Yes (##4&6) | Yes (#5) | Yes (#5, pt. 2) | Yes (#5) | Not explicitly; *cf.* Rule 1.1, 1.15 |
| Other | Compliance with Undertakings #8 | Effective and respectful relationships, etc. (#8);Working to improve diversity, inclusion and substantive equality (#10) | Hiring (#7) | Wellness and Inclusivity (#10) | *Cf.* Rule 4.4 regarding relationships |

[268] Where a topic is listed as "not explicitly," it does not mean that the topic does not appear at all in a self-assessment. Some of the issues listed as "not explicitly" appear in the form of subheadings or questions under the main topic. This list identifies whether this subtopic is one of the first-level categories of issues addressed.

## APPENDIX 4: EXCERPTS FROM SELECTED SELF-ASSESSMENT TOOLS

This Appendix provides excerpts from the various Self-Assessment tools in order to illustrate similarities and differences in approach. The first item in this Appendix 4 is an excerpt from the Self-Assessment tool used by the New South Wales Office of the Legal Services Commissioner. Appendix 4(b) contains an excerpt from the Self-Assessment Tool developed by the Canadian Bar Association. Appendix 4(d) contains an excerpt from the Self-Audit checklist the Colorado Office of Attorney Regulation Counsel had on its webpage in May 2016. Appendix 4(c) contains an excerpt from Nova Scotia's Self-Assessment tool that was approved in March 2016 for use in a pilot project. All of the selected excerpts address the issue of competence. (Note that some of the Self-Assessment forms include additional items that are relevant to the issue of lawyer competence. These excerpts are included for information purposes.)

## *Appendix 4(a): Excerpts from the Self-Assessment Tool Used by the New South Wales, Australia Office of the Legal Services Commissioner (2008 version)*[269]

SUGGESTIONS CONCERNING THE ELEMENTS OF "APPROPRIATE MANAGEMENT SYSTEMS" FOR INCORPORATED LEGAL PRACTICES IN NSW

Section 140(3)(a) of the Legal Profession Act 2004 requires legal practitioner directors of incorporated legal practices (ILPs) to ensure that "appropriate management systems" are implemented and maintained to ensure that the provision of legal services by ILPs comply with the requirements of the Act and Regulations. Failure to comply can amount to professional misconduct. The Office of the Legal Services Commissioner (OLSC) and the Council of the Law Society of NSW (LSC) each has power under the Act (Chapter 6) to investigate or audit ILPs in connection with the provision of legal services.

While the legislation does not define "appropriate management systems", OLSC, working collaboratively with LSC, LawCover and the College of Law, has adopted an "education towards compliance" strategy to assist ILPs. This document deals with the ten areas (reflected in the Objectives column in this document) that OLSC suggests should be addressed in considering "appropriate management systems".

To enable legal practitioner directors to assess the systems in place in their practices when considering these "appropriate management systems", it might be helpful to use the ratings shown below. All examples provided in this document are suggestions only because ILPs vary in terms of size, work practices and nature of operations and thus no "one size fits all". Legal practitioner directors are encouraged to contact the OLSC or the Law Society of NSW for any clarification needed or additional examples.

| SELF-ASSESSMENT RATING | CODE | EXPLANATION |
|---|---|---|
| Non-Compliant | NC | Not all Objectives have been addressed. |
| Partially Compliant | PC | All Objectives have been addressed but the management systems for achieving these Objectives are not fully functional. |
| Compliant | C | Management systems exist for all Objectives and are fully functional. |
| Fully Compliant | FC | Management systems exist for all Objectives and all are fully functional and all are regularly assessed for effectiveness. |
| Fully Compliant Plus | FC Plus | All Objectives have been addressed, all management systems are documented and all are fully functional and all are assessed regularly for effectiveness plus improvements are made when needed. |

[269] *See supra* notes 24–38 and accompanying text for a discussion of the Self-Assessment form used by the New South Wales Office of the Legal Services Commissioner. Because this document no longer appears on the regulator's website, these excerpts are taken from a 2008 version that I had in my files. (Self-Assessment Form on file with the Lewis & Clark Law Review).

Please consider each key concept and rate yourself as either "NC/PC/C/FC/FC PLUS". If you rate yourself NC or PC please outline the action you will take to comply. If you use an alternate system to those described in this form as most likely to lead to compliance, please describe it. If you believe any of the key concepts are not applicable, please note them as being inapplicable and provide reasons.

| Objective | Key concepts to consider when addressing the Objective | Examples of possible evidence or systems most likely to lead to compliance | Action to be taken by ILP (if needed) |
|---|---|---|---|
| Competent work practices to avoid NEGLIGENCE | Fee earners practise only in areas where they have appropriate competence and expertise. | A written statement setting out the types of matters in which the practice will accept instructions and that instructions will not be accepted in any other types of matters. | |
| | All fee earners have a good grasp of issues involved in running a practice and serving clients. | Written records of attendance at CLE programs indicating some attendance at programs concerning practice management, staff management and risk management. | |
| | The legal practitioner directors meet on a regular basis to review the performance of the practice or, in the case of sole practitioner practices, meetings are held regularly with staff. | Minutes/notes recording the decisions taken at meetings and the actions taken. | |
| | Legal practitioner director/s regularly consider and review workloads, supervision, methods of file review, and communication with clients. | Written records including file registers, number of files assigned to each fee earner, dates and methods of file review. | |
| | Legal practitioner director/s ensure that legal services are always delivered at a consistently high standard. | Up to date precedents covering relevant practise areas are available and used, the practice has appropriate resources for legal research in the areas in which it accepts instructions (whether subscriptions to loose leaf services, up to date text books, training in internet based research) and the work of all employed solicitors and paralegals is properly supervised. | |

| Objective | Key concepts to consider when addressing the Objective | Examples of possible evidence or systems most likely to lead to compliance | Action to be taken by ILP (if needed) |
|---|---|---|---|
| | | | Overall rating for Objective (Please circle one rating)<br><br>NC PC C FC FC Plus |

### *Appendix 4(b): Excerpts from the Canadian Bar Association Ethical Practices Self-Evaluation Tool (2014)*[270]

1. Competence

Issues relating to competence give rise to significant risks for law firms. In Ontario, for example, LawPro reports that failures to know or apply the law accounted for approximately 2,703 claims and $9.1 million in costs between 1997 and 2007.[1] In 2007, the Law Society of British Columbia reported that four or more lawyers miss a limitation period or deadline each week.[2] Beyond the available statistics, many additional issues of competence undoubtedly exist, resulting in poor client service although never resulting in a formal complaint to the relevant law society or a civil malpractice action.

Given the complex and dynamic nature of legal practice, continuing legal education is essential to ensure the competent delivery of legal services. In the area of ethics, the availability of informal opportunities for lawyers to discuss and deliberate on ethical issues is likely to be particularly important.[3] Competence also goes beyond securing appropriate legal knowledge and skills, encompassing broader areas of concern, such as understanding of equity issues and the use of technology in practice.

1 LawPro, "The Biggest Malpractice Risks" (online: http://www.practicepro.ca/facts/malpracticerisks.asp).

2 Law Society of British Columbia, "Stay tuned for more than 70 tips to prevent missed limitations and deadlines" (2007) *Benchers' Bulletin* (online: http://www.lawsociety.bc.ca/page.cfm?cid=790&t=70-tips-to-prevent-missed-limitations-and-deadlines).

3 *See*, for example, the discussion in Christine Parker et al, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31(1) UNSW Law Journal 158.

[270] *See CBA Ethical Practices Self-Evaluation Tool*, *supra* note 45 and accompanying text.

| Objective | Possible questions to ask in assessing compliance with this objective | Potential systems and practices to ensure objective is met | Examples of available resources [In the CBA tool, all of the following are linked web pages] |
|---|---|---|---|
| Clients receive competent legal services | Do lawyers have appropriate and current knowledge of applicable substantive and procedural law in areas in which they practice?<br><br>Do lawyers apply appropriate skills in delivering legal services?<br><br>Does the law firm have appropriate resources for research to enable lawyers to access current knowledge?<br><br>Do lawyers comply with applicable deadlines and limitation periods?<br><br>Do lawyers and other members of the firm understand the technical and ethical aspects of using technology?<br><br>Do lawyers and other members of the firm have adequate awareness, knowledge and training in order to ensure that clients with disabilities and other equality-seeking groups receive competent legal services? | Systems are in place to ensure lawyers receive regular feedback on work product (for example, regular performance reviews are conducted; peer review, where appropriate, is encouraged).<br><br>Continuing education efforts are recorded and are considered in the context of performance reviews.<br><br>Lawyers prepare professional development plans that are reviewed by senior colleagues and considered in the context of performance reviews.<br><br>Checklists by matter type are used where appropriate.<br><br>A system is in place for keeping lawyers up-to-date with changes in the law (for example, electronic updates are used or regular meetings are held).<br><br>Guidelines for the correct steps in conducting legal research are available to lawyers.<br><br>Dialogue on ethical questions is facilitated (for example, ethics "lunch and learn" seminars or "open door" policies with designated ethics counsel).<br><br>All firm lawyers receive training on and use bring-forward systems to keep track of key dates (for example, limitation periods, court and tribunal appearances, filing deadlines, undertakings, closing dates). | Professional Management Practice Management Guideline (Law Society of Upper Canada)<br><br>Practice Checklist Manual (Law Society of British Columbia)<br><br>Checklists by fields of practice (Barreau du Québec)<br><br>Legal Research Checklist (Law Society of Saskatchewan)<br><br>Keeping Current (Nova Scotia Barristers' Society)<br><br>Making Knowledge Management Work (CBA)<br><br>Limitation period charts (LawPro)<br><br>Time management/ missed limitations (Lawyers' Insurance Association of Nova Scotia)<br><br>Missed Limitations and Deadlines: Beat the Clock (Law Society of British Columbia)<br><br>Saskatchewan Limitations Manual (Law Society of Saskatchewan)<br><br>Technology Practice Management Guidelines (Law Society of Upper Canada)<br><br>Guidelines for Practicing Ethically with New Information Technologies (CBA)<br><br>Guide des TI - Gestion et sécurité des |

| | | | |
|---|---|---|---|
| | | Technology training is made available and encouraged.<br><br>Ethical issues pertaining to the use of technology are raised and discussed.<br><br>All members of the firm receive training on the provision of services to persons with disabilities, language rights and cultural competence.<br><br>An accessibility policy is in place. | Technologies de l'information pour l'avocat et son équipe (Barreau du Québec)<br><br>Respectful Language Guideline (Law Society of British Columbia)<br><br>Accessible Customer Services (Law Society of Upper Canada)<br><br>Providing Legal Services to People with Disabilities |

## *Appendix 4(c): Nova Scotia Barristers' Society, MANAGEMENT SYSTEM FOR ETHICAL LEGAL PRACTICE [Draft Self-Assessment Tool] (March 2016)*[271]

ELEMENT 1—DEVELOPING COMPETENT PRACTICES

| Your legal entity delivers legal services with appropriate skill and expertise |
|---|

When you prepare your answer, please reflect on the THINGS TO THINK ABOUT that support your conclusions. Though none of these are mandatory, they provide some illustrations of what a prudent legal entity should have in place, dependent upon the type or area of practice.

In the COMMENT box, you may add any additional information or explanation that you think will assist in understanding your assessment.

| RATING: | COMPLETELY DISAGREE | 1 | 2 | 3 | 4 | 5 | COMPLETELY AGREE |
|---|---|---|---|---|---|---|---|

| THINGS TO THINK ABOUT |
|---|
| • The requirements for competence in 3.1 of the *Code of Professional Conduct*<br>• The processes you use to hire and employ competent staff<br>• The processes you use to supervise staff<br>• The processes you use to assign work to staff with the experience and qualifications to provide a competent level of service<br>• The nature of your office policy and procedures manual, and how it is updated and accessible to staff<br>• You only take a retainer for services where you have or can obtain the necessary skills and resources to carry out the client's instructions<br>• You understand the need for and have performance objectives to deliver quality legal services<br>• The processes you use for identifying performance objectives, and staff performance reviews<br>• The processes you use to review complaints, both internal and those made to the Nova Scotia Barristers' Society, as well as claims reported to LIANS<br>• The processes you use to provide staff with ongoing education and training<br>• The processes you use to ensure that professional staff has professional development plans that are relevant to their areas of practice<br>• How you and your staff are current on the use of appropriate technology for your practice |

| COMMENT: |
|---|
| |

[271] This excerpt is taken from the Mar. 2016 NSBS Self-Assessment Tool, *supra* note 128. *See also* NSBS Management Systems for Ethical Legal Practice (MSELP) Webpage, *supra* note 94 and 124 and accompanying text for information about the history of this document.

RESOURCES

- Nova Scotia Barristers' Society / *Code of Professional Conduct* [Rule 3.1: Competence; Rule 3.2: Quality of Service; Chapter 6: Relationship to Students, Employees and Others]
- NSBS Family Law Standards / Standard #3: Lawyers' Competence
- CBA Ethical Practices Self-Evaluation Tool

## *Appendix 4(d): Colorado Self-Audit Checklist And Sample "Change of Practice" Email (as of May 2016)*[272]

I. CLIENT RELATIONS

The relationship with the client is a critical consideration for law office management. Everything that happens in a law firm has a direct or indirect effect on the client. The way a law firm conducts its business will also influence its relationship with its clients.

Law firms are often set up so that the critical element of administrative support is service to the attorney. The attorney, in turn, serves the client. Today, a client-centered law firm involves all personnel directly serving the client. The attorney is a team member involved in providing overall service to the client.

Examine your client relation efforts by asking the following questions:

| | YES | NO | N/A |
|---|---|---|---|
| Do we return clients' phone calls and email within 24–48 hours? | | | |
| Do we perform all the work we told the client we would? | | | |
| Do we send follow-up letters after a meeting or telephone conversation in which new decisions have been reached? | | | |
| Do we complete the work in a timely fashion? | | | |
| Do we follow up with clients at least every six weeks even when their cases are inactive? | | | |
| Do we acknowledge staff members for good client relations? | | | |
| Do we ask the client for feedback as the matter moves along? | | | |
| Do we use engagement letters to describe our office practices? | | | |
| Do we use fee agreements and fee statements to clearly explain what clients will be charged and when fees will be earned? | | | |
| Do we use email with client permission? | | | |
| Is our email marked "Confidential Privileged Communication?" | | | |
| Do we have a policy regarding texting with clients? | | | |

[272] Colorado has had a self-audit checklist available to its attorneys since at least 2013. *See supra* note 187 (citing a 2013 Colorado newsletter that referred to the self-audit checklist). The version that appeared on the Regulators' website in May 2016 had not yet been revised to match the structure found in Coloardo's recently-adopted ten common principles, discussed *supra* note 187 (citing Colorado's Ten Common Principles). In my view, the section of the Self-Audit checklist reprinted above, which is entitled "Client Relations" corresponds most closely to Colorado's new principle #1, which is "Developing Competent Practices." The "Change of Practice" email is discussed in greater detail in *supra* note 171 and accompanying text.

Excerpt from an Email That Colorado Sends to Lawyers Changing Practice Settings[273]

> Lawyers in Colorado who change their practice settings from a large firm or government setting to a small firm or solo practitioner setting receive an email from the Colorado Office of Attorney Regulation Counsel. Reprinted below is an excerpt from one of those emails:
>
> You have recently filed a change of address form with the Office of Attorney Registration in which you changed your reported area of practice from a public service position to a "Private Attorney: Sole Practitioner" or "Private Attorney: 2–5 attorneys." Congratulations on this new and exciting period in your life!
>
> Each year this office receives grievance complaints about good lawyers who run into ethical issues upon entering private practice simply because they are not familiar with certain practical requirements under the Rules of Professional Conduct. My goal is to give you some tools to prevent or reduce the likelihood of receiving a grievance complaint.
>
> To address potential problems before they occur, I encourage you to fill out a Self-Audit Checklist posted on our website. This checklist is a tool for the small law office to help identify strengths and weaknesses of office management practices. Such knowledge will enable you take the requisite action to ensure that the office is managed properly. To complete the Self Audit Checklist, click on Self Audit Checklist—PDF document or Self Audit Checklist—Word document. Once completed, I encourage you to discuss this completed form with a seasoned sole practitioner. [This email also referred to other Colorado programs and resources including practice resources, trust account school, a "Hanging Your Shingle" seminar, a mentoring program, and lawyer assistance programs.] . . . I wish you great personal and professional success as you embark on your new career.
>
> Jim Coyle [contact information.]

[273] Use of this and similar emails are described in *supra* notes 171–174 and accompanying text.

## APPENDIX 5: A SUMMARY OF INFORMATION PREPARED BY THE ABA REGARDING LAWYER REGULATORS (WHICH IS THE AUDIENCE TO WHOM THIS ARTICLE IS DIRECTED)

| Jurisdiction | Lawyer Disciplinary Entity[274] | Unified State Bar—Status[275] | Unified Bar Functions[276] |
|---|---|---|---|
| Alabama | Alabama State Bar<br>Center for Professional Responsibility | Unified State Bar | A, D, CLE |
| Alaska | Bar Counsel<br>Alaska Bar Association | Unified State Bar | A, CP, D, FDA |
| Arizona | Chief Bar Counsel<br>State Bar of Arizona | Unified State Bar | A, CP, D, FDA, SA, CLE |
| Arkansas | Office of the Committee on Professional Conduct | Voluntary Bar | ——— |
| California | State Bar of California | Unified State Bar | CP, D, FDA, SA, |

[274] The information in this column comes from DIRECTORY OF LAWYER DISCIPLINARY AGENCIES, *supra* note 11 at 1–18. This directory is published by the ABA.

[275] *See DBS Resource Pages*, UNITED BAR ASS'NS, http://www.americanbar.org/groups/bar_services/resources/resourcepages/unifiedbars.html (contains resources for and about unified bar associations). It is beyond the scope of this Article to address the topic of unified bar associations because this Article is directed to lawyer regulators, whoever they are. It should be noted, however, that there are pressures that may affect the regulatory roles of Unified Bar Associations. *See, e.g., Unified Bar Association Fact Sheet*, A.B.A., http://www.americanbar.org/content/dam/aba/uncategorized/barservices/resourcepages/unifiedbars_factsheet.authcheckdam.pdf (stating that data from an "unpublished section from the 2014 Membership, Dues & Finance Survey published by the ABA Division for Bar Services" indicated that one of the top five issues facing unified bar associations are threats to their bar's unified status; that 8 of 33 unified bar associations have faced a threat to their unified status in the past ten years; 3 of 33 bar associations believe that their bar association will be a hybrid model (similar to Nebraska's structure)); *Committee to Examine Future of State Bar of Arizona*, ALBUQUERQUE J. (Oct. 10, 2015), http://www.abqjournal.com/657808/news-around-the-region/committee-to-examine-future-of-state-bar-of-arizona.html; Fleck v. McDonald et al, No. 1:2015cv00013 (D.N.D. 2015) (challenging the constitutionality of North Dakota's unified state bar). It should be noted that the Unified State Bar Fact Sheet cited *supra* used 33 as the number of unified bar associations it reports on, but one of the rotating pictures on the DBS Resource Pages webpage cited *supra* states that "[t]oday, 37 bars claim unified status. South Dakota was the first bar to unify in 1921. Hawaii was the last, in 1990." *Id.*

[276] This column consolidates information found on an ABA webpage. *See* Mandated Core Functions of Unified Bars (2015), https://magic.piktochart.com/output/6098174-core-functions [hereinafter ABA Dynamic Map]. This Appendix uses the following abbreviations to refer to the functions of the unified state bar that appear on those dynamic maps: A=Admissions, CP=Client Protection, D=Discipline, FDA=Fee Dispute Arbitration, SA=Lawyer Substance Abuse, CLE=MCLE/ CLE. *See also North Carolina Board of Dental Examiners Decision Resources*, *supra* note 7, for a better understanding of the pressures on unified bar associations.

| Jurisdiction | Lawyer Disciplinary Entity[274] | Unified State Bar—Status[275] | Unified Bar Functions[276] |
|---|---|---|---|
| | Intake Unit | | CLE |
| Colorado | Office of Attorney Regulation Counsel | Voluntary Bar | ——— |
| Connecticut | Statewide Grievance Committee | Voluntary Bar | ——— |
| Delaware | Delaware Office of Disciplinary Counsel | Voluntary Bar | ——— |
| District of Columbia | District of Columbia Office of Bar Counsel | Not listed on the map [277] | No information available |
| Florida | The Florida Bar | Unified State Bar | CP, D, SA, CLE |
| Georgia | General Counsel<br>State Bar of Georgia | Unified State Bar | D, FDA |
| Hawaii | Disciplinary Board of the Hawai'i Supreme Court<br>Office of Disciplinary Counsel | Unified State Bar | CP, D |
| Idaho | Bar Counsel<br>Idaho State Bar | Unified State Bar | A, CP, D, FDA |
| Illinois | Illinois Attorney Registration & Disciplinary Commission | Voluntary Bar | ——— |
| Indiana | Indiana Supreme Court Disciplinary Commission | Voluntary Bar | ——— |
| Iowa | Iowa Supreme Court<br>Office of Professional Regulation | Voluntary Bar | ——— |
| Kansas | Kansas Disciplinary Administrator Office | Voluntary Bar | ——— |
| Kentucky | Chief Bar Counsel<br>Kentucky Bar Association | Unified State Bar | CP, D, FDA, CLE |
| Louisiana | Office of the Disciplinary Counsel | Unified State Bar | A, CLE |
| Maine | Bar Counsel<br>Maine Board of Overseers of the Bar | Voluntary Bar | ——— |
| Maryland | Attorney Grievance Commission of Maryland | Voluntary Bar | ——— |
| Massachusetts | Office of the Bar Counsel | Voluntary Bar | ——— |
| Michigan | Grievance Administrator<br>Michigan Attorney Grievance Commission and<br>Attorney Disciplinary Board | Unified State Bar | A, D, CLE |
| Minnesota | Minnesota Office of Professional Responsibility | Voluntary Bar | ——— |
| Mississippi | General Counsel<br>Mississippi State Bar | Unified State Bar | D |

[277] The ABA Dynamic map, *supra* note 276, does not include data for the District of Columbia, Missouri or Rhode Island. Because Appendix 5 is derivative of the data that appears on the ABA's Dynamic Map, this Appendix does not include information for these three jurisdictions, which are listed here with a question mark. (The District of Columbia was not visible on the ABA Dynamic Map. Rhode Island was colored green on the ABA Dynamic Map, thus indicating that it has a Unified Bar, but the pop-up data was not available for Rhode Island. Although Missouri has a Unified Bar, the ABA Dynamic Map indicated that it was not a unified bar and thus no data was provided.)

| Jurisdiction | Lawyer Disciplinary Entity[274] | Unified State Bar—Status[275] | Unified Bar Functions[276] |
|---|---|---|---|
| Missouri | Missouri Supreme Court Office of Chief Disciplinary Counsel | Unified State Bar (but not listed on the map as a Unified State Bar) | No information available |
| Montana | Disciplinary Counsel | Unified State Bar | CP, CLE |
| Nebraska | Counsel for Discipline Nebraska Supreme Court | Unified State Bar | CP, SA, CLE |
| Nevada | Bar Counsel State Bar of Nevada | Unified State Bar | A, D, CLE |
| New Hampshire | New Hampshire Supreme Court Attorney Discipline Office | Unified State Bar | CP, FDA, SA, CLE |
| New Jersey | Office of Attorney Ethics Supreme Court of New Jersey | Voluntary Bar | ——— |
| New Mexico | Disciplinary Board of the Supreme Court of New Mexico | Unified State Bar | CP, FDA, SA, CLE |
| New York | TBD by New York Court of Appeals[278] | Voluntary Bar | ——— |
| North Carolina | North Carolina State Bar | Unified State Bar | CP, D, FDA, SA, CLE |
| North Dakota | Secretary of the Disciplinary Board | Unified State Bar | D, CLE |
| Ohio | Office of the Disciplinary Counsel of the Supreme Court of Ohio [plus several county bar association officials listed] | Voluntary Bar | ——— |
| Oklahoma | General Counsel Oklahoma Bar Association | Unified State Bar | CP, D, SA, CLE |
| Oregon | Disciplinary Counsel Oregon State Bar | Unified State Bar | D |
| Pennsylvania | Chief Disciplinary Counsel | Voluntary Bar | ——— |
| Rhode Island | Disciplinary Board of the Supreme Court of Rhode Island | Unified State Bar | No information available on the map |
| South Carolina | Office of Disciplinary Counsel | Unified State Bar | CA, FDA, CLE |
| South Dakota | Disciplinary Board Counsel | Unified State Bar | D |
| Tennessee | Board of Professional Responsibility of the Supreme Court of Tennessee | Voluntary Bar | ——— |
| Texas | Chief Disciplinary Counsel State Bar of Texas | Unified State Bar | D |
| Utah | Utah State Bar, Office of Professional Conduct | Unified State Bar | A, CP, D, CLE |
| Vermont | Disciplinary Counsel, Professional Conduct Board of the Supreme Court of Vermont | Voluntary Bar | ——— |
| Virginia | Bar Counsel Virginia State Bar | Unified State Bar (and voluntary state bar) | D, CLE |
| Washington | Director of the Office of Disciplinary Counsel, Washington | Unified State Bar | A, D, CLE |

[278] *See* Press Release, *supra* note 5 (new uniform statewide rules to govern New York's attorney disciplinary process).

| Jurisdiction | Lawyer Disciplinary Entity[274] | Unified State Bar—Status[275] | Unified Bar Functions[276] |
|---|---|---|---|
| | State Bar Association | | |
| West Virginia | Office of Disciplinary Counsel | Unified State Bar (and voluntary state bar) | D, SA, CLE |
| Wisconsin | Office of Lawyer Regulation | Unified State Bar | CP |
| Wyoming | Office of Lawyer Regulation | Unified State Bar | CP, D, FDA, SA, CLE |