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## Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public

Susan Saab Fortney\*

Times . . . have changed. The expectations of the public and the client have changed. The existing system of regulating the profession is narrowly focused on violations of professional ethics. It provides no mechanism to handle other types of clients' complaints. [Furthermore] Discipline primarily offers prospective protection to the public. It either removes the lawyer from practice or seeks to change the lawyer's future behavior. Protection of clients already harmed is minimal.<sup>1</sup>

Although this observation could be made today, the excerpt above comes from the 1992 Report of the American Bar Association Commission on Evaluation of Disciplinary Enforcement, known as the McKay Commission.<sup>2</sup> After examining the inadequacy of relying principally on a disciplinary system that deals with lawyers after misconduct has occurred, the McKay Commission recommended various initiatives to help address and avoid professional conduct problems. As noted by Professor Ted Schneyer, the "McKay Commission identified several problem areas in which disciplinary complaints and harm to clients could be greatly reduced" by proactive measures such as random audits of trust accounts.<sup>3</sup>

Various jurisdictions followed the McKay Commission's recommendations, establishing educational and assistance programs, such as law practice management programs to assist lawyers with the nuts and bolts of managing their practices.<sup>4</sup> Now there exists a patchwork of programs that are designed to help law-

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1. AM. BAR ASS'N COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY (1992) *available at* [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html) [hereinafter "McKAY REPORT"].

2. The McKay Report was dedicated to Robert McKay, the Commission's chair until his death. *Id.*

3. Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 232, 262 (2013).

4. McKAY REPORT, *supra* note 1, at recommendation 4. "A number of U.S. jurisdictions have implemented this recommendation, establishing Law Office Management Assistance Programs

yers before misconduct occurs. Despite the great strides made by these programs, attorney regulation systems continue to largely rely on a reactive system of disciplining lawyers. Existing proactive measures often are not coordinated with the disciplinary system.<sup>5</sup>

Increasingly, lawyers and decision-makers are recognizing the limitations and consequences of current approaches to attorney regulation. Inspired by developments in other countries, regulators in the United States and Canada have started the process of exploring innovative approaches, including proactive management-based regulation.

As discussed in Part IV below, practical experience with proactive management regulation in non-US jurisdictions, as well as research analyzing that experience, including this author's extensive research, suggests that regulators should take the following steps when implementing new programs:

- (i) Clearly establish and communicate the educative role of the regulator;
- (ii) Develop resources and guidance for practitioners; and
- (iii) Effectively tailor each program's law firm self-assessment forms to achieving the program's particular objectives.

The term "proactive management-based regulation" (PMBR) was first used by Professor Schneyer to characterize a regulatory approach designed to promote ethical law practice by assisting lawyers with practice management.<sup>6</sup> An Entity Regulation Committee of the National Organization of Bar Counsel describes the features of PMBR programs as follows:

First, they emphasize proactive initiatives as a complement to traditional, professional discipline. Second, they tend to focus on the responsibility of law firm management to implement policies, programs and systems—in short, an "ethical infrastructure"—that is designed to prevent misconduct and unsatisfactory service. Third, they strive to improve legal services and reduce problems by establishing information-

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(LOMAPs)." Schneyer, *supra* note 3, at 263. Professor Schneyer explains that LOMAPs generally have two functions: (1) "they are tied to the reactive disciplinary process, serving as diversion programs for lawyers referred by disciplinary counsel after receiving complaints alleging minor violations that are likely to reflect deficiencies in office management" and (2) they regulate "proactively by advising lawyers who voluntarily seek their assistance on such matters as trust accounting, office technology, client relations and marketing, hiring and training policies, and conflicts checking systems." *Id.* at 263-64.

5. In referring to the inadequate legal and management skills that cause many disciplinary complaints, the McKay Commission urged the judiciary and profession to create and coordinate programs with the disciplinary process. MCKAY REPORT, *supra* note 1, at Introduction.

6. National Organization of Bar Counsel (NOBC), Entity Regulation, Frequently Asked Questions (hereinafter NOBC FAQs), *available at* <http://www.nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity%20Regulation%20Committee%20FAQs%20%20CLEAN%20%2006-09-16.pdf>

sharing and collaborative relationships between regulators and service providers.<sup>7</sup>

The seed for PMBR was first planted in the Australian state of New South Wales (NSW).<sup>8</sup> It grew out of the legislation that allowed limited liability and nonlawyer ownership of incorporated law practices (ILPs) without restrictions on percentages owned by nonlawyers. Intending to address concerns related to nonlawyer ownership and limited liability, the statute imposed requirements related to management and controls.<sup>9</sup> Specifically, the statute required the ILP appoint a legal practitioner director to be generally responsible for the management of legal services provided by the ILP.<sup>10</sup> In addition, the statute required that the legal practitioner director must ensure that “appropriate management systems” are implemented and maintained to enable the provision of legal services in accordance with obligations imposed by law.<sup>11</sup>

The “appropriate management systems” (AMS) requirement broke new ground by incorporating the concept of ethical infrastructure into the statute allowing lawyers to incorporate their law practices with no restrictions on nonlawyer ownership.<sup>12</sup> The requirement also paved the way for Steve Mark, the Legal Services Commissioner for NSW, to collaborate with various stakeholders to develop an approach for guiding firms in establishing and maintaining AMS. Through a series of meetings, the regulator, practitioners and other interested parties developed “ten objectives of sound legal practice.”<sup>13</sup> The regulator also developed a process for directors of incorporated firms to complete a self-examination process to evaluate the firm’s compliance with the ten objectives.<sup>14</sup> The self-assessment instrument requires directors to assess firm procedures and systems on a scale, reporting whether the firm is compliant or non-compliant.<sup>15</sup> If the rating is non-compliant or partially compliant, a member of the regulator’s staff assists the firm in achieving

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7. *Id.* As a member of the NOBC Entity Regulation Committee, I assisted with the drafting of the FAQs’ description of PMBR.

8. For a discussion of the evolution of PMBR in NSW, see Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 20 U. ST. THOMAS L.J. 152, 157-165 (2012).

9. Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY’S JOURNAL OF LEGAL MALPRACTICE & ETHICS 112, 118 (2013) (citing Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 PROF. LAW. 13, 31).

10. *Id.* (citing Steven Mark & Georgina Cowdroy, *Incorporated Legal Practice—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT’L L. REV. 671, 681 (2004)).

11. *Id.*

12. Fortney, *supra* note 9, at 117.

13. Mark & Cowdroy, *supra* note 10, at 689-90.

14. *Id.* at 689.

15. *Id.* at 691.

compliance.<sup>16</sup> This exercise enables the director for the incorporated firm to generally learn about management systems related to the ten objectives and to take steps to implement management systems appropriate for the particular firm.<sup>17</sup> Because of this desired outcome, the self-assessment process is now referred to as an “education toward compliance” approach and the prototype for PMBR.<sup>18</sup>

Following the implementation of the new regulatory regime in NSW, Dr. Christine Parker conducted an empirical study to assess the impact of PMBR. The 2008 study found that complaints rates for ILPs went down by two thirds after the ILP completed its initial self-assessments.<sup>19</sup> In addition, the study determined that the complaints rate for ILPs that completed the self-assessment process was one third of the number of complaints filed against non-incorporated legal practices that had not completed the self-assessment process.<sup>20</sup>

Although the 2008 study was very noteworthy in pointing to the impact on complaints rates, the study did not seek to address the reasons why the complaints rates dramatically dropped for practitioners who went through the self-assessment process. To address that question, I conducted a mixed method study in 2012. Using a survey and interviews, that study sought to obtain more data on the impact of AMS and the self-assessment process. It also sought to identify possible measures to improve management-based regulation of firms. My first article related to the study discusses survey findings related to the effects of the self-assessment process and the AMS requirement.<sup>21</sup> A second article examines how management-based approaches might be incrementally integrated into current disciplinary systems.<sup>22</sup> This article focuses on information obtained in the interviews and survey findings that relate to designing and improving PMBR systems.

After describing the study’s hypotheses and methodology, Part I briefly describes select study findings related to effects of the AMS and self-assessment process in NSW. Drawing on data obtained in the study, Part II discusses respondents’ concerns related to the self-assessment process. Part III reviews law firm directors’ observations on improving the self-assessment process. Part IV outlines recommendations for regulators interested in improving and designing

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16. *Id.*

17. In this sense, the NSW approach to PMBR rejected a “one size fits all” approach. Rather, firms are encouraged to develop systems reasonable for their particular circumstances.

18. Ted Schneyer, *On Further Reflection How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 58 ARIZ. L. REV. 576, 584 (2011).

19. See Christine E. Parker, Tahlia Gordon & Steve A. Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, 37 J.L. Soc’y 466, 469 (2010). The study analyzed the SAFs and complaints data relating to 620 ILPs. *Id.*

20. *Id.* at 488 (noting that the improvement was statistically significant at the highest level).

21. Fortney & Gordon, *supra* note 8.

22. Fortney, *supra* note 9.

PMBR systems. Part V discusses progressive PMBR developments in Canada, and Part VI covers first steps toward PMBR in US jurisdictions. The Conclusion harkens back to the McKay Commission's call to action, urging regulators and practitioners to work together to implement PMBR as a system that protects the public by assisting lawyers.

## **I. Background on the PMBR Study and General Findings on the Impact of PMBR**

In 2012, I conducted a mixed method study in collaboration with the Office of Legal Services Commissioner (OLSC) in New South Wales. The primary research questions were (1) what is the relationship between the self-assessment and the ethical norms, systems, conduct and culture in firms? and (2) how can the self-assessment process be improved?<sup>23</sup>

In phase one of the study, I used an online questionnaire to obtain information on approaches, perspectives, effects, and experiences related to the AMS implementation and the self-assessment process. The legal practitioner directors for all incorporated firms (356) with two or more solicitors were invited to participate in the survey.<sup>24</sup> A total of 141 directors with ILPs completed the questionnaire, resulting in a response rate of 39.6 percent.<sup>25</sup> The respondents represented firms of varying sizes.<sup>26</sup> The respondents' firms were close to evenly divided between firms with home office in Sydney and firms with home office in other communities in NSW.<sup>27</sup>

Phase two of the study involved interviews of directors from ILPs with two or more solicitors. Professor Maxine Evers, Lecturer and Associate Dean at the University of Technology in Sydney, and I each conducted approximately half of the forty-two interviews. To identify directors to interview, we systematically pulled the names of firms and invited their designated directors to participate in interviews.<sup>28</sup> The interviews provided opportunities to explore issues covered in the questionnaire, directors' concerns related to AMS and the self-assessment process, and their opinions on improving the self-assessment process and the regulation of firms.<sup>29</sup>

To obtain information on the whether the self-assessment process contributed to the implementation of management systems, one survey question asked

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23. Fortney, *supra* note 9, at 120.

24. Fortney & Gordon, *supra* note 8, at 168-69.

25. For more detail on the methodology, the response rate, possible bias, and respondents' general profile, see *id.* at 168-72.

26. The following breaks down respondent firms by size: 1-2 solicitors (10%), 3-9 solicitors (78%), 10-19 solicitors (7%), and 20 or more solicitors (5%). *Id.* at 170.

27. *Id.*

28. Fortney, *supra* note 9, at 121. I systematically pulled names and invited respondents until we had over forty individuals who indicated interest in being interviewed. *Id.* at 121, note 48.

29. *Id.*

respondents to indicate steps taken in connection with the firm's first completion of the self-assessment process. The following summarizes the findings related to the steps taken by firms:

Seventy-one percent of the respondents indicated that they had actually revised firm systems, policies and procedures. Close to half (47 percent) reported that they adopted new systems, policies, and procedures. In terms of encouraging training and initiatives, 29 percent indicated that their firms devoted more attention to ethics initiatives and 27 percent implemented more training for firm personnel. Quite simply, these findings point to the positive impact of the self-assessment process in encouraging firms to examine and improve the firm's management systems, training and ethical infrastructure.<sup>30</sup>

After reviewing other study findings, I reached the following conclusion on the impact of PMBR in NSW:

In short, findings from my study revealed that management-based regulation in NSW successfully provides firm directors the incentive, tools, and authority to take steps to improve the delivery of legal services. A significant percentage of directors learned from the process, taking steps to avoid problems and complaints, as suggested by the significant reduction in the number of complaints against firms that completed the process. This quantitative complaints data, coupled with the findings from my study, make a compelling case for exploring proactive regulation of firms.<sup>31</sup>

Those interested in exploring and improving PMBR can be informed by other study findings that focus on survey and interview responses about concerns related to the self-assessment process (SAP) and opinions on how the process can be improved. The following discussion reviews study findings related to directors' concerns about the mandatory SAP and their observations on improving the SAP.

## II. Directors' Concerns Related to the Self-Assessment Process

Open-ended survey questions asked respondents to describe concerns about the self-assessment process and their opinions on improving the process.<sup>32</sup> In response to these inquiries, some patterns emerge. Most notably, when asked to de-

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30. Susan Saab Fortney, *Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 43 PROF. LAW. (2015) [hereinafter "Fortney, Attorney Integrity System"].

31. *Id.*

32. Susan Fortney, *Incorporated Legal Practice Questionnaire, Questions 21 & 22* (2012) (on file with author) [hereinafter "Questionnaire"].

scribe concerns related to the self-assessment form (SAF), slightly over half of the respondents stated that they did not have any concerns.<sup>33</sup> Similarly, many interviewees indicated that they did not have concerns about the SAP or recommendations for improving the SAP.

Of those survey respondents who described “concerns,” approximately 10 percent noted “time,” apparently referring to the time directors must devote to completing the SAP.<sup>34</sup> As concisely stated by one respondent, “Finding the time to complete it.”<sup>35</sup> In survey responses, 18 percent of respondents indicated that they agreed with the following statement, “SAP takes too much time.”<sup>36</sup>

In interviews, a number of directors expressed a similar sentiment, noting that there were not “negatives” associated with the SAP, other than having to devote the time to it.<sup>37</sup> As explained by one interviewee, the SAP was particularly time-consuming the first time that it was required to be completed.<sup>38</sup>

A couple of directors elaborated on the time concern, suggesting that some lawyers may not recognize the connection between implementing systems, servicing clients, and producing revenue.<sup>39</sup> One interview described the resistance of some lawyers to devoting time to the SAP and development process as follows: “Unless you can say it’s going to give me more dollars or good will, what’s the point?”<sup>40</sup>

Some directors indicated that the time necessary to complete the SAP was particularly burdensome for small firms.<sup>41</sup> One respondent described the time commitment as having to “formally record what frequently occurs on an informal basis in some firms.”<sup>42</sup>

Beyond questioning the time that a small firm director must devote to completing the process, a number of respondents questioned the relevance of the SAP to smaller practices.<sup>43</sup> One characterized the SAP as “entirely irrelevant to small

33. The inquiry asked directors to “note any concerns you have about the Self-Assessment Process.” *Id.* at 22. Of the 81 text entries, 41 answered “none” or “nil.” Another seven persons stated “no comment.” *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at Question 18. Fifty percent disagreed with the statement and 32% indicated that they neither agreed nor disagreed.

37. *See, e.g.*, ME Interview 9, Line 155 and ME Interview 12, Line 232.

38. SF Interview 7, Lines 170-182 (noting that they devoted a “lot of time” to the initial survey “to be confident what we were saying was right.”)

39. *See, e.g.*, SF Interview 17, Lines 273-274 (noting that time is “precious” and that there is pressure when time devoted to management matters does not relate to producing revenue).

40. SF Interview 2, Line 299-301.

41. In the words of one respondent, the SAF is “Vastly too time consuming for small firms.” Questionnaire at Question 22.

42. *Id.*

43. “One size fits all is never going to work when firms vary so much in scale. With two solicitor directors it is likely that one will be responsible for the majority of management matters. In



firm especially sole practitioners with less than 4 employed solicitors.”<sup>44</sup> An interviewee shared the concern about relevance, stating that some of the elements of the SAF “don’t reflect the reality of small firms.”<sup>45</sup>

When asked about concerns related to the SAP, a few interviewees indicated that the SAP was not being taken seriously by some directors. As described by one interviewee, “If people aren’t honest with their response it can just be a tick the box, and move on.”<sup>46</sup> In response to a survey inquiry, 12 percent of the survey respondents agreed with the following statement: “SAP amounts to meaningless box ticking.”<sup>47</sup>

Some directors identified a concern related to the dual role of the regulator, as an educator who improves standards and an enforcer who disciplines and punishes lawyers. In describing the difficulty in balancing the two roles, one interviewee cautioned that the current model “discourages those who need support from seeking it” because the “person providing the support is the one that’s doing the enforcing.”<sup>48</sup>

Other directors shared the view that the dual role of the regulator contributes to firms not candidly disclosing deficiencies when completing the SAF. Specifically, a few firm directors indicated reluctance to disclose non-compliance on requirements described on the SAF if doing so would only subject their firms to more scrutiny.<sup>49</sup> One director explained the effect on disclosure as follows, “If you are someone who essentially . . . disciplines, people are not going to work with you, in terms of being frank open and honest about what they’re doing.”<sup>50</sup> As discussed below, a clear division between the educator and enforcer

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those circumstances many aspects of both the assessment and review are going to be a little artificial.” *Id.*

44. *Id.* Another respondent expressed a similar view noting that the SAF is “[n]ot really appropriate for single director/small ILPs.” One respondent stated that it imposed “unfair” obligations on small incorporated practices, “having regard to the time it takes to properly implement AMS and the fact that large partnerships have no such obligations.” *Id.* Another respondent recommended that “due consideration should be allowed for difficult situations most of small incorporated legal practices are facing such as thin profitability and severe competition when it comes to all issues covered by the SAP.” *Id.*

45. ME Interview 8, Lines 254-255.

46. SF Interview 10, Lines 253-254.

47. Questionnaire at Question 18. Sixty-six percent disagreed with the statement that the SAP amounted to meaningless box ticking. *Id.*

48. SF Interview 2, Lines 193-205. Another interviewee described the tension in the dual role as follows: “I do think there is a tension between the Legal Services Commission being responsible for punishment, and also trying to encourage good performance.” SF Interview 1, Lines 480-482.

49. One director recounted his thought process in completing the SAF as follows: “I don’t want to end up bringing the Legal Services Commission down on us with heavy boots that we’ve done everything wrong when we’re trying to do everything properly.” SF Interview 7, Lines 334-336.

50. SF Interview 1, Lines 199-201.

roles of the regulator could help to address this concern and the reluctance of firm lawyers to disclose deficiencies and seek assistance.

### III. Directors' Observations on Improving the SAP

Both the survey instrument and the interview questions asked directors to provide their opinions on how the SAP can be improved. In response to the open-ended question on the questionnaire, approximately 16 percent indicated that they were satisfied with the SAP and SAF.<sup>51</sup> Others provided more specific comments on the coverage of the SAF. For example, one respondent indicated that the SAF was comprehensive and a great reminder.<sup>52</sup> One stated that the form was fine, but it was “up to the lawyer to be honest.”<sup>53</sup>

In response to the survey question seeking opinions on how the SAP could be improved, a much smaller percentage of respondents provided general comments that were negative. Some who questioned the advisability of the SAP stated that the SAP was “not necessary” and that “overregulation” should be stopped.<sup>54</sup>

A number of directors provided specific suggestions on how the SAP can be improved. Most of the recommendations related to the (1) need for additional guidance, (2) the content and format of the SAF, and (3) the approach to the SAP.

#### A. Provide More Guidance

One theme that emerged related to the adequacy of the SAF in providing firms guidance on management systems. Eighteen percent of the respondents agreed with the following statement: “SAP does not provide enough guidance to firms.”<sup>55</sup>

In response to the survey questions and interview inquiries, respondents suggested specific forms of guidance. A number recommended that directors be provided written material that includes explanations, examples, pointers, case studies, and templates covering different management systems.<sup>56</sup> As stated by one respondent, “As a prelude to SAP, firms need better guidance and template procedures as a starting point. The concept of best practices only works where foundation principles are clearly identified.” Three respondents specifically noted that that written materials and templates would be particularly helpful for small

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51. For example, four respondents stated that the SAF was “working well.” Others used terms like “adequate” or “fine.” Questionnaire at Question 21. Some comments were more enthusiastic, referring to the positive features of the SAF and SAP, such as providing a “reminder on all areas of practice that need attention.” *Id.*

52. *Id.*

53. *Id.*

54. One stated, “Eliminate feel good program—overregulation.” *Id.*

55. One percent strongly agreed with the statement and 17% agreed with the statement, “SAF does not provide enough guidance to firms.” Forty-three percent disagreed or strongly disagreed with the statement. Questionnaire at Question 18.

56. Questionnaire at Question 21. One survey respondent suggested that a model template would enable firms “to assess against the model.”

firms.<sup>57</sup> Some interviewees provided additional detail on the types of written material that would provide guidance, such as examples of “compliant” software<sup>58</sup> and an online hub or portal that provides support.<sup>59</sup> As suggested by one director, “My contribution would be to focus on the positives of more efficient practice and informing practitioners of tools that are available out there that can help them achieve it.”<sup>60</sup>

Rather than relying only on written material, a number of directors recommended training courses, seminars, and continuing education programs that focus on practice management issues. One director recommended that the regulator conduct a session with directors before asking them to complete the SAP.<sup>61</sup> Another suggested seminars be conducted when there is a pattern of complaints in particular areas.<sup>62</sup> Some directors suggested that the seminar or workshop include an interactive component enabling directors to share experiences and procedures with colleagues.<sup>63</sup> Interview responses indicated that directors are interested in learning how other firms have successfully handled problems.<sup>64</sup>

Consistent with the comments in which directors indicate an interest in more training and information, a number of directors suggested other avenues for directors to obtain direct guidance from personnel with the regulator. Rather than general guidance, some directors wanted to have the ability to pose specific questions and get answers from the regulator.<sup>65</sup> One indicated an interest in “face-to-face interviews subsequent to the process so that any queries can be addressed in the most efficient process.”<sup>66</sup>

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57. As stated by one respondent: The provision of a standard “template” for each policy and procedure that the AMS requires is implemented, together with assistance/tips in implementing change. This would make it far easier for smaller firms to comply.” Questionnaire at Question 21.

58. ME Interview 10, Line 257 and ME Interview 23, Lines 254-55.

59. Questionnaire at Question 21. ME Interview 5 at Line 211.

60. ME Interview 10, Lines 267-268.

61. SF Interview 12, Line 354.

62. SF Interview 7, Line 238.

63. Questionnaire at Question 21. One specifically recommended “inter practitioner discussion.” *Id.*

64. As suggested by one interviewee:

If there was an ability to sit down with somebody and talk about the strengths and weaknesses, and the problems that other law firms suffered, and how others have dealt with them to make it better. But what you really need to have is, what are other lawyers are experiencing and how they dealt with it successfully. Too often we are told how people dealt with it unsuccessfully but that doesn’t really help. It’s how people have a problem, and how they deal with it successfully.

SF Interview 20, Lines 410-415.

65. As stated by one respondent, “We hope that Legal Services Commissioners provide some Q & A avenue to practitioners in relation to issues covered by the SAP.” Questionnaire at Question 21. One interviewee suggested an ethics hotline such as the one sponsored by the Law Society. SF Interview 12, Line 400.

66. Questionnaire at Question 21.

As revealed by the last comments, the challenge for the regulator may be to provide firms more guidance while continuing to allow firms to decide specifically how they will implement management systems. Although some directors indicated an interest in more guidance, a large percentage of respondents still endorsed the “soft touch” approach of providing general guidance, with limited prescription.<sup>67</sup>

### **B. Modify the Format and Content of the Self-Assessment Form**

In both the survey and interviews, a number of directors recommended that the SAP rely more on electronic communications and filings.<sup>68</sup> In recommending that the process go “paperless” through online submissions, one director suggested that the online version include video or audio explanations and illustrations.<sup>69</sup> Although recommending that directors be given the option to complete the form online, one director recognized that allowing electronic submissions may result in less collaboration among firm members.<sup>70</sup>

Directors also provided a wide array of suggestions on improving the content of the SAF, with little overlap in the observations. Three directors suggested eliminating repetitive questions.<sup>71</sup> Others suggested that the SAF itself provide more specificity<sup>72</sup> and refer to resources,<sup>73</sup> examples,<sup>74</sup> and best practices.<sup>75</sup> By contrast, another sentiment was that the SAF should be concise and brief.<sup>76</sup>

A few directors recommended the elimination of an aspect of the SAF that asks directors to rank systems as non-compliant, compliant and compliant plus. In lieu of the ranking systems, directors suggested that the form provide for comments and text answers.<sup>77</sup> As stated by one respondent, “Allow more scope for

67. *Id.* at Question 18. Based on responses to another inquiry, the majority of respondents indicated that they do not believe that the SAP interferes with firm autonomy. Fifty-five percent of respondents disagreed with the following statement: “SAF interferes with firm autonomy.” Only 11% agreed with the statement. *Id.* at 18.

68. One noted that “electronic self-assessment forms by OLSC systemized for quicker and more frequent review by Solicitor Directors.” *Id.* at Question 21.

69. SF Interview 4, Lines 295-299.

70. SF Interview 13, Lines 229-235.

71. Questionnaire at Question 21.

72. ME Interview 15, Line 193. By contrast, another director recommended that the SAF “not be more detailed.” ME Interview 17, Line 221.

73. Recommending more detail, one director suggested that the SAF include “reference to resources to improve management systems.” Questionnaire at Question 21.

74. As suggested by one director, an improvement would be providing “examples of practice issues and specific recommendations as to current issues.” *Id.* Another recommended more clarity in the questions by differentiating example and requirements.” *Id.*

75. Questionnaire at Question 21. One director recommended that the form be changed to include, “Suggestions in relation to best practice models for different categories based on information available to the LSC (Legal Services Commissioner) to allow an assessment as whether there is a better management system available that could be implemented.” *Id.*

76. SF Interview 13, Line 219.

77. ME Interview 18, Line 300.

comment, rather than box ticking.”<sup>78</sup> To simplify the process, another director suggested that a questionnaire form be used.<sup>79</sup>

### C. Change the Approach to the SAP and the Regulation of Firms

Directors’ suggestions related to the approach used in the SAP varied a great deal. Some believed that the SAP should be required less frequently<sup>80</sup> and anonymous. Others believed that firms should be required to complete the SAP more frequently<sup>81</sup> and be subject to an audit and advice process.<sup>82</sup> Other directors appeared to be comfortable with the regulator continuing the SAP without conducting practice audits.<sup>83</sup>

Although directors provided a wide range of suggestions on changing the approach to the SAF, three common threads run through many of the comments. One thread related to the role of the regulator and the second thread related to the uniform approach to requiring all incorporated firms complete the same SAF. The third recurring comment dealt with the regulatory regime that only requires incorporated firms, and not partnerships, to complete the SAP.

A number of directors suggested steps that the regulator could take in being more proactive in developing the “education toward compliance” program.<sup>84</sup> In noting the “model in place is wrong,” one director explained the need for a “support body” that encourages lawyers to seek assistance.<sup>85</sup>

As described in the discussion of concerns related to the SAP, some directors believed that the regulator’s dual role of enforcer and educator created problems,

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78. *Id.*

79. ME Interview 22, Line 228.

80. ME Interview 19, Line 19.

81. SF Interview 15, Line 280 (recommending that the SAP be imposed annually) and SF Interview 5, Line 29. One director who recommended that the SAP be required more frequently acknowledged that the downside would be the additional time that directors must devote to completing forms. *Id.*

82. Questionnaire at Question 21.

83. ME Interview 12, Line 273.

84. One director explained that the LSC could take a “very proactive approach . . . in making clear first and foremost the necessity for [the SAP]. Encouraging the completion of it as a process of self-reflection and betterment and providing guidelines or rather, examples, as to the latter. That is, how it can be used for betterment purposes.” SF Interview 9, Lines 208-215.

85. The director described the need as follows:

There should be a support body . . . which encourages people in practices to say I’m having difficulties, not understanding it, it doesn’t make sense or I won’t be able to achieve it. And know that I could sit down with you . . . and say “let’s look at how we can unravel the problems that you’ve got, how we can solve them or provide you with additional support.” Or reflect on the fact that you’re doing a good job, you’re doing fine and we have no concerns.

SF Interview 2, Line 190-200.

including lack of candor when completing the SAP.<sup>86</sup> In describing perceptions and the impact of the dual role, one director pointed to solicitors' negative reaction to written communications related to the SAP.<sup>87</sup> Because the Legal Services Commissioner in NSW used the same stationery for all communications, the director indicated that the distinctive color of paper used in letters from the regulator caused the recipient to be concerned that a complaint had been filed.<sup>88</sup> The suggestion was that the perceptions of the SAP might be better if the regulator used different stationery for communications dealing with the SAP.<sup>89</sup> Another suggestion was to establish a formal division between the office and personnel who handle the SAP and those who handle complaints.<sup>90</sup>

Some directors suggested steps on how the educational focus of the regulator could capture the attention of practitioners.<sup>91</sup> Specifically, a few recommended that dealings with lawyers deemphasize the regulatory aspects of developing management systems. Rather, they suggested that the message focus on how strong practice management improves client service, enhances fees, and helps the firm distinguish itself in the marketplace.<sup>92</sup>

In both interviews and survey responses, a number of directors recommended that the SAF and SAP should be tailored to firm size.<sup>93</sup> Although self-assessment document may have been developed with the intention of allowing an ILP to design and maintain management systems "appropriate" for the particular firm, various directors articulated the concern that the SAF is ill-suited for small firms.<sup>94</sup> As suggested by one interviewee:

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86. See discussion in text at notes 48-50.

87. [W]hen you get a letter from the Legal Services Commissioner you don't say yippee here's my tax refund, this is a nice thing. It's "oh who's upset now." SF Interview 5, Lines 293-295.

88. SF Interview 5, Lines 295-298.

89. SF Interview 5, Lines 334-340.

90. In discussing the chilling effect of having the same office provide guidance on management systems and handle complaints, one director stated the following

I'd be rather loathe to call the Legal Services Commissioner and say, look I've got this management problem. I mean, it's a bit like ringing the Tax Office and saying I've got a problem with my tax, look how much cash I've got.

SF Interview 5, Lines 341-345

91. See SF Interview 1, Lines 470-472 (describing the value of changing the tone of exchanges to communicate that the regulator is attempting to assist in improving ethics and responsibilities in firms).

92. See, e.g., SF Interview 9, Line 250 (suggesting that the focus be "betterment of client relationship") and SF Interview 20, Lines 410-415 (noting that the regulator should show firms how management can enhance and help the firm "make a unique position in the marketplace").

93. See, e.g., ME Interview 7, Line 265 (urging that the SAF be tailored to the nature and size of the legal practice) and SF Interview 2, Lines 335-339 (suggesting that the assessment of ethics generally needs to take into account firm size because there are "ethical issues that will come up in a different guise depending on the practice's size").

94. The following provides the regulators' perspective on how the self-assessment document was designed to allow ILPs to determine what systems were "appropriate":

So one size fits all is clearly the most inappropriate way of running an ethics program.

You need to know that there's a basic program that should apply to a single practitioner.

That program should then be modified to take into account how a practice grows.<sup>95</sup>

A number of respondents echoed this view in answering the survey question seeking opinions on how the SAP can be improved.<sup>96</sup>

Another general sentiment that was frequently expressed in the survey responses and in interviews was the view that the AMS and SAP requirements should be extended to all firms and not limited to incorporated practices. Seventy-nine percent of respondents agreed with the following statement, "Unincorporated firms should be required to implement AMS."<sup>97</sup> Among the interviewees, approximately half indicated that the AMS requirement should be extended to all firms. The explanations for extending the requirement to all firms tended to focus on either the benefit or the burden of the regulation. In suggesting that AMS would be worthwhile for all firms, a number commented on the importance of management systems, regardless of the structure of the law practice.<sup>98</sup> Others pointed to the burden of the requirement, suggesting that imposing AMS on all firms would make the requirement "more palatable"<sup>99</sup> and level the "playing field."<sup>100</sup> One director pointed to both the benefit and burden, noting that that

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The self-assessment document takes into account the varying size, work practices, and nature of operations of different ILPs, eschewing an inappropriate "one size fits all" approach requiring fulfillment of uniform criteria. The self-assessment document instead suggests indicative criteria to assist legal practitioner directors to address each of the ten objectives along with examples of what an ILP *may do* that would provide evidence of compliance.

Steve Mark, *The Future is Here: Globalisation and the Regulation of the Legal Profession, Views From An Australian Regulator* 5 (2009), [http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/steve\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/steve_paper.authcheckdam.pdf).

95. SF Interview 1, Lines 163-165.

96. Questionnaire at Question 21. As concisely stated by one respondent: "I am not sure that a 'one size fits all approach' is necessarily appropriate or as helpful as a tailor-made approach would be." *Id.* One respondent took the position that the SAP not apply to incorporated firms with less than 5 solicitors. *Id.* In asserting that one "SAF cannot possibly be useful or appropriate for all firms," one director drew on his/her own experiences to explain that the resources and requirements are significantly different in firms of varying sizes. *Id.*

97. Questionnaire at Question 18. Fifty-one percent agreed with the statement and 28% strongly agreed with the statement. Only 7% disagreed with the statement.

98. ME Interview 8, Line 70 (noting that "AMS are appropriate for all legal practices") and SF Interview 1, Line 90 (stating that proper management systems should be the same for all firms).

99. SF Interview 13, Line 235.

100. SF Interview 10, Line 240.

it is unfair and onerous to only require ILPs to implement management systems and that it is useful to all to have systems in place.<sup>101</sup>

#### **IV. Recommendations for Improving and Designing Management-Based Regulatory Systems**

This study, coupled with earlier ones, provides data to be used in evaluating the experience and impact of PMBR in NSW. This information can assist regulators who want to improve the self-assessment process that they currently use. In addition, the observations can inform the work of regulators who are exploring how they can implement some form of PMBR.<sup>102</sup>

As a starting point, interested persons should focus on the purpose of the “education toward compliance” approach. That orientation should shape initiatives that can serve as a rallying point for practitioners and regulators interested in advancing the ethical delivery of legal services.

The study findings reveal that the SAP has promoted learning and assisted firms in improving their practices. In the survey, the majority of respondents agreed with the statement that the SAP was a learning exercise that enabled their firms to improve client service. A majority also reported that the SAP assisted their firms in addressing potential problems. As suggested by these responses, the “education toward compliance” approach appears to be providing practitioners an opportunity and motivation to get their firm’s house in order.

##### **A. Clearly Establish and Communicate the Educative Role of the Regulator**

Building on the apparent success of the SAP, persons interested in designing or improving on the PMBR scheme should focus on enhancing the “education toward compliance” approach. To do so, regulators should address the perception that the same regulator is serving as an “educator” and “enforcer.” As discussed above, some directors expressed concern that the same office that seeks information on their firm’s management systems and practices was the same office that handles complaints against practitioners. Because of the regulator’s role in policing the legal profession and prosecuting complaints, some practitioners believed that the regulator’s approach discouraged those who need support from seeking assistance.<sup>103</sup> As suggested, practitioners who share such a perspective are less likely to be candid and seek assistance from the regulator.

To address this concern and promote education toward compliance, regulators should take steps to separate the work of the personnel who assist with the SAP from those responsible for investigating and prosecuting complaints. In

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101. ME Interview 16, Lines 60-63.

102. For a thorough discussion in initiatives related to PMBR in various jurisdictions, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client and Public Protection through Adoption of a Proactive Regulation System*, LEWIS & CLARK L. REV (forthcoming Sept. 2016).

103. A more extreme view was that the regulator “was against lawyers.”



order to assure lawyers that information disclosed in connection with SAP will not be “used against them,” the regulator could create a formal wall between the PMBR office and the office personnel who handle complaints. With such a wall, the PMBR personnel would not be able to share information with disciplinary counsel, but disciplinary counsel could still refer lawyers to PMBR personnel. Provided that the lawyer is attempting to address deficiencies and there is no imminent risk of harm to clients or others, lawyers can be provided a safe harbor in which no information disclosed during the SAP will form the basis of a complaint.<sup>104</sup> Such a formal division will advance the view that the regulator is supporting lawyers in managing and developing their practices.<sup>105</sup>

The division of the offices should be explained in the transmittal letter asking directors to complete the SAF. In addition, the division should be explained in any description of the SAP, such as information posted on the regulator’s website. Furthermore, all correspondence related to the “proactive side” of the regulator’s work should be on different stationery. This helps communicate the separation between the “proactive management” functions of the regulator’s office as “educator” and the “reactive” responsibilities handled by personnel who handle complaints.

As suggested by one interviewee, the SAP could be refined by “more open communication.”<sup>106</sup> Communications related to the PMBR should also emphasize the educational and improvement purposes of the self-assessment process. The message should be clear that the SAP is not about “policing,” but about facilitating improvement through self-examination.<sup>107</sup> For firms that are struggling,

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104. To augment the “educational toward compliance” approach, another step would be to allow lawyers to self-report problems (outside the SAP) and obtain assistance. For problems that can be addressed, the lawyer would not be subject to discipline. For others, the act of self-reporting may be a mitigating factor in the event that the matter merits a formal investigation and professional discipline.

105. A formal division between different offices has been effectively used to encourage persons to contact and work with assistance programs for impaired attorneys. In some jurisdictions, lawyers may discharge their duty to report disciplinary violations by another lawyer by reporting the matter to a peer assistance program. *See, e.g.*, Texas Disciplinary Rules of Professional Conduct, R. 8.03(c) (2016). The lawyer’s assistance program does not report the matter to disciplinary authorities, but works with the impaired professional to address concerns. Impaired lawyers may also seek help from the Lawyers’ Assistance program with assurance that the matter will remain confidential and not reported to disciplinary authorities. This wall between disciplinary personnel and lawyer assistance personnel is intended to encourage early, full, and frank disclosure of problems. Experts in the lawyers’ assistance field believe that the separation between offices and confidentiality protection is essential to addressing problems and protecting the public. *See* MARYLAND LAWYER ASSISTANCE PROGRAM, <http://www.msba.org/committees/lawyerassist/confidentiality.aspx> (last visited Aug. 1, 2016) (noting that federal and state law ensures the confidentiality of those who seek assistance through the program or those who have been referred to the program).

106. SF 14, Line 345 (recommending more communication from the Legal Services Commissioner).

107. ME 16, Line 280 (questioning whether the Legal Services Commissioner is the “appropriate person” to oversee the self-assessment process because “essentially people see the Legal Services Commissioner as a policeman and a regulator”).

the regulator should provide assistance to help the firm take steps for minimum compliance with professional obligations. Beyond assisting firms to attain minimum compliance, the regulator could also help firms improve their management systems and practices.<sup>108</sup> Above all, the regulator should underscore the educative purpose of the process, emphasizing that the only “failure here is the failure to learn.”<sup>109</sup>

### **B. Provide More Guidance and Partner with Practitioners**

As discussed above, many directors encouraged the regulator to take a more proactive role in educating and assisting practitioners. Some identified specific steps that the regulator could take to provide more guidance. The following discussion synthesizes suggestions, recommending that the regulator take “education toward compliance” to the next level by providing practitioners more guidance and resources. The costs associated with taking the recommended steps will largely depend on devoting personnel to assisting practitioners and collaborating with others interested in providing practitioners more guidance.

The first recommendation is for the regulator to develop a comprehensive website that provides information on the SAP, management systems, and the regulation of lawyers. The website should provide a Question and Answer section, links to a wide variety of resources, and contact information for the person prepared to answer questions on the SAP. In addition, the website should invite practitioners to contact a designated person if the practitioners want specific guidance related to improving the firm’s ethical infrastructure and culture. The designated person should not only answer questions, but also be accessible to work with firms on an individual basis. This service would focus on assisting practitioners with issues related to management and concerns that supplement any assistance available from other ethics hotlines that handle general ethics questions. The overarching message in providing this service is that the regulator is available to help lawyers improve their practices by developing management controls.

The website should also include an online link for the SAF. This online version of the SAF should link various resources that can provide practitioners guidance in developing and improving their management systems.

To inform practitioners of the website and the regulator’s interest in assisting practitioners, the regulator should use electronic newsletters. The newsletter would serve as a low cost educational tool for communicating guidance and developments. Articles could discuss patterns of conduct that lead to complaints and malpractice claims, as well as stories that examine how firms have successfully avoided problems and excelled in successfully delivering legal services. A regular feature could relate to how good management systems and ethical conduct help firms attract and retain clients.

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108. One interviewee described this as assisting firms in “reaching for the stars.” SF 4, Line 170.

109. SF 20, Line 170 (quoting Tony Robbins).

Regularly scheduled training programs, seminars, and workshops can also be used to advance the educative function of the regulator's office. This could include a required seminar or online tutorial to be completed before directors complete their first SAP. There should also be more advanced programs for those interested in learning more about developments and resources, such as new office management software. Periodic open houses and presentations by designated personnel can also be used to improve the accessibility and visibility of the assistance office.

Providing the guidance, training, and materials suggested in this section will require that one or more individuals dedicate time and effort to working with lawyers. Improving the quality of representation and avoiding complaints justify the commitment of resources to provide proactive assistance.

The regulator can use a collaborative approach to lower the costs involved in providing the additional guidance. Specifically, the regulator can work with other stakeholders, including professional organizations and legal malpractice insurers to provide resources and training for lawyers. Practitioners and firm leaders should also participate in forums, blogs and workshops where they share experiences and recommendations with one another. The regulator and lawyer bodies, such as bar associations and law societies, can encourage the establishment of various peer support groups. Ideally, these groups would be organized in ways that consider firm size, practice area, and location. Through live and online discussions, lawyers can develop networks to share their experiences with others who are similarly situated. Lawyers who handle professional liability cases and professors who teach practice management classes can play important roles in facilitating the discussion.

Finally, in-house counsel for corporations may also contribute to the peer support forums, sharing their thoughts on the types of management systems and practice controls that influence their hiring of outside counsel. Participation by sophisticated clients should help lawyers better appreciate that good management is good business.

### **C. Refine the Format of the Self-Assessment Form**

After the study, the regulator in NSW made the SAF available online. As suggested above, this online version should include links to useful information and resources that provide guidance to directors in establishing and improving their firm's management systems.

The SAF required that directors rate their practices as non-compliant, compliant or compliant plus. A few directors questioned the rating system, suggesting that the form be changed to require some type of text entries in which directors briefly describe the type of systems that their firm used to satisfy the management objective. Requiring such descriptions would avoid mindless box checking. Another approach would be to put the SAF in a questionnaire format.

To evaluate the feasibility and advisability of changing the SAF, the regulator could consult directors from firms of all sizes. Similar to the approach used in

first developing the SAF and assessment regime, the regulator should convene meetings with stakeholders and representatives from firms. During these sessions, the participants can examine the SAF. In doing so, they can determine if particular items should be eliminated or added.

Based on feedback from the survey and interviews, one area that deserves particular attention is designing a self-assessment that is tailored to fit the circumstances of practice in firms of different sizes. Representatives of firms of all sizes, including solo and small firm practitioners, should be involved in shaping the self-assessment process and instruments.

Results from my study and earlier studies indicate that the self-assessment process has had a very positive impact in reducing complaints and addressing matters that are specifically addressed in the self-assessment form. The form used in New South Wales largely addressed concerns that relate to client complaints. Because many directors appeared to be using the SAF as a type of checklist for reviewing and implementing management system, the challenge is to revise and expand the form to address other management systems and controls. Specifically, how can the SAF be expanded to address more general ethics concerns and non-client issues, including equity issues impacting firm employees and duties to the courts, the public and non-clients?

Above all, the self-assessment process and form should be designed to provide practitioners guidance, while minimizing the time devoted to the process. The instrument should be carefully crafted, presenting issues and questions in a way that focuses the attorney on examining what management systems, policies, and procedures can be implemented to meet the objectives set forth in the instrument. Rather than posing general questions in the self-assessment instrument, specific questions and references to management systems, policies, and procedures help focus practitioners on the measures they can take to improve and enhance their management systems and practice controls. If the self-assessment instrument effectively educates attorneys on how they can develop their management systems, they should see that it is worthwhile to devote time to evaluating firm policies, practices, and procedures.

## V. PMBR Progress in Canada

The spark that started in Australia is spreading around the world. First, the Canadian Bar Association (CBA) took the lead in developing a comprehensive self-assessment tool for lawyers to evaluate and improve the ethical infrastructure. Members of the CBA can access the form on the website of the CBA.<sup>110</sup> The form does an excellent job of covering firm management systems and a range of concerns, including non-client issues and access to justice. The online form also provides hyperlinks for resources that attorneys can consult for addi-

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110. Canadian Bar Association Ethics and Professional Responsibility Committee, *Assessing Ethical Infrastructure in Your Law Firm: A Practical Guide* (on file with author).

tional guidance. It is very important that this feature be included in any self-assessment process focused on educating and assisting lawyers.

Rather than relying on the voluntary self-assessment available to members of the CBA, specific Canadian jurisdictions have been engaged in in-depth reviews and consultations, studying PMBR and related issues. Beginning in 2012, the Nova Scotia Barristers' Society set an ambitious agenda for regulatory reform.<sup>111</sup> In 2014, the governing Council of the Nova Scotia Barristers' Society approved six regulatory objectives intended to guide the Nova Scotia Barristers Society in its efforts.<sup>112</sup> The sixth regulatory objective states that the Nova Scotia Barristers' Society is to "regulate in a manner that is proactive, principled and proportionate."<sup>113</sup> In connection with this regulatory objective, the Nova Scotia Barristers' Society has developed the following system: "The Management System for Ethical Legal Practice" (Management System).<sup>114</sup> This system includes the following components:

- (1) ten core elements;
- (2) a self-assessment tool; and
- (3) a means for measuring outcomes and success, communicating with legal entities (including the appointment by legal entities of a designated lawyer for communication purposes, and the use of audits).<sup>115</sup>

The ten core elements cover matters related directly to client service, such as "ensuring confidentiality" and "avoiding conflicts."<sup>116</sup> They also cover organizational concerns, such as working to improve diversity, inclusion and substantive equality" and working to improve the administration of justice and access to legal services.<sup>117</sup> On March 24, 2016, the governing Council for the Nova Scotia Barristers' Society approved the ten core elements and descriptors on which the Management System is founded.<sup>118</sup> To engage practitioners and test the Society's proposed self-assessment approach, the Society is conducting a pilot project that relies on volunteer firms.<sup>119</sup>

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111. For information on the Nova Scotia Barrister's Society Strategic Framework, see NOVA SCOTIA BARRISTER'S SOCIETY, <http://nsbs.org/transform-regulation> (last visited Aug. 1, 2016).

112. 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* (2015), [http://nsbs.org/sites/default/files/ftp/ERU\\_Newsletter/2015-06-24-IBATransformingRegulation.pdf](http://nsbs.org/sites/default/files/ftp/ERU_Newsletter/2015-06-24-IBATransformingRegulation.pdf).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Email from Nova Scotia Barristers' Society to Susan Fortney, dated April 12, 2016 (on file with the author).

119. *Id.*

Notably, the Nova Scotia Barristers' Society approach to PMBR is part of an overall Policy Framework that is guiding regulatory reforms.<sup>120</sup> That Policy Framework recognizes the importance of considering risk in all areas of regulation, including admissions, trust account oversight, complaints, discipline, ethics and practice advice.<sup>121</sup> As stated in Policy #3, "In carrying out its further work to transform regulation, the Society will focus on the anticipated risks associated with each area of regulated activity and, in assessing risk, will always give priority to protection of the public."<sup>122</sup> In this sense, Nova Scotia is advancing public protection by taking a holistic approach to transforming all aspects of regulation.

For the last year in Ontario, the Law Society of Upper Canada has studied various regulatory reforms. In a report approved on May 26, 2016, by Convocation (the governing body of the Law Society of Upper Canada), the Compliance-Based Entity Regulation Task Force, announced that it would continue to develop a regulatory framework for consideration by Convocation based on principles of compliance-based regulation.<sup>123</sup> Convocation also approved the Task Force's recommendation that the Law Society seek an amendment to the governing legislation to permit Law Society regulation of entities through which legal services are provided.<sup>124</sup>

In a collaborative move, the Law Societies of Alberta, Saskatchewan and Manitoba (the Prairie Provinces) joined together to study changes related to the delivery of legal services and different regulatory approaches, including PMBR.<sup>125</sup> As part of their study and consultation, the Prairie Provinces sought input from lawyers using a range of methods, including online consultations and exchanges.<sup>126</sup> The ambitious outreach to the profession should improve the likelihood that practitioners' concerns and interests are considered in shaping the future of regulation in the Prairie Provinces.<sup>127</sup>

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120. See NOVA SCOTIA BARRISTERS' SOCIETY, LEGAL SERVICES REGULATION: THE POLICY FRAMEWORK, <http://nsbs.org/legal-services-regulation-policy-framework> (last visited Aug. 1, 2016). [hereinafter "NOVA SCOTIA POLICY FRAMEWORK"].

121. Email from Darrel Pink, Executive Director of the Nova Scotia Barristers' Society, to Susan Fortney, dated May 25, 2016 (on file with the author).

122. NOVA SCOTIA POLICY FRAMEWORK, *supra* note 120.

123. For additional information on the Law Society of Upper Canada's Task Force, see THE LAW SOCIETY OF UPPER CANADA, <http://www.lsuc.on.ca/better-practices/> (last visited Aug. 1, 2016).

124. *Id.*

125. A Collaboration of Prairie Law Societies, *Innovating Regulation* (Nov. 2015), available at <http://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf>.

126. *Law Society Launches Innovating Regulation Consultation*, LAW SOCIETY OF ALBERTA (May 3, 2016), available at [http://www.lawsociety.ab.ca/docs/default-source/bulletins/ebulletin\\_05032016.htm?sfvrsn=2](http://www.lawsociety.ab.ca/docs/default-source/bulletins/ebulletin_05032016.htm?sfvrsn=2) (describing the opportunities for Alberta lawyers to provide input).

127. *Id.*

## VI. First Steps toward PMBR in the United States

To the south in the United States, a few states have moved forward with exploring PMBR. In Colorado, the Supreme Court's Office of Attorney Regulation launched its study project by asking the Colorado Supreme Court Advisory Committee to appoint a subcommittee to review the attorney regulation system, create regulatory objectives, and investigate PMBR.<sup>128</sup> The PMBR Subcommittee developed a "road map" to guide the exploration and development process.<sup>129</sup> Following that road map, the subcommittee has diligently worked on developing management system principles.<sup>130</sup> In addition to client-related concerns, the Colorado principles cover "wellness and inclusivity."<sup>131</sup> In small working groups, subcommittee members are fleshing out specific guidance, measures, and resources for each principle.<sup>132</sup> The subcommittee is also developing a strategy for encouraging lawyers to complete the self-assessment tool.<sup>133</sup>

The Attorney Regulation and Disciplinary Commission (ARDC), an administrative agency of the Supreme Court of Illinois, has begun the process of designing a self-assessment program for Illinois attorneys. The "goal is to create a free, practical, online, interactive self-assessment CLE that will allow lawyers to assess and improve their law practices with the ARDC and others as the lawyers believe necessary."<sup>134</sup> As part of the exploration process, ARDC representatives have consulted professionals with the Illinois State Bar Association, other court-related entities, and legal malpractice insurers. In seminar presentations, ARDC attorneys have also discussed the self-assessment concept. Jerome E. Larkin, Administrator of the ARDC, reports that overall the response of stakeholders and seminar participants has been positive and that concerns identified will have a significant impact on the design of the self-assessment model.<sup>135</sup> As the program is developed, data

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128. SUBCOMMITTEES, COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL, <http://www.coloradosupremecourt.com/AboutUs/Subcommittees.asp> (last visited Aug. 3, 2016). The Colorado Supreme Court Advisory Committee appointed the PMBR Subcommittee on May 15, 2015.

129. COLORADO PMBR ROADMAP, COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION, [http://www.coloradosupremecourt.com/PDF/AboutUs/PMBR/PMBR%20Roadmap%20graphic%20\(2\)%20\(003\).pdf](http://www.coloradosupremecourt.com/PDF/AboutUs/PMBR/PMBR%20Roadmap%20graphic%20(2)%20(003).pdf) (last visited Aug. 3, 2016).

130. TEN COMMON PRINCIPLES, COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION, <http://www.coloradosupremecourt.com/PDF/AboutUs/PMBR/10%20PMBR%20Principles.pdf> (last visited Aug. 3, 2016).

131. *Id.*

132. *Proactive Management-Based Regulation Materials: 10 PMBR Principles and Working Group Members*, COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL, <http://www.coloradosupremecourt.com/AboutUs/PMBRMinutes.asp> (last visited Aug. 3, 2016). The Working Group includes a number of lawyers from solo practice, law firm administrators, and a representative from the Better Business Bureau.

133. *Id.*

134. Jerry E. Larkin, Illinois ARDC Study of Proactive Regulation, Mar. 25, 2016 (on file with the author).

135. Email and attachment from Jerry E. Larkin to Susan Fortney, dated June 17, 2016 (on file with author). "The ARDC has long been regarded as an ethics educator in Illinois, a key factor

will be examined to determine whether particular factors should be considered in identifying lawyers who may be required to self-assess.<sup>136</sup>

## VII. Conclusion

Regulators exploring PMBR are attempting to design a system that is suitable and effective for its practitioners in their particular jurisdictions.<sup>137</sup> I hope that data and recommendations from my study will help those interested in improving and designing PMBR systems. As suggested, regulators, in consultation with practitioners and other stakeholders, should refine the self-assessment approach to enhance the educational value of management-based regulation. Through this process, regulators partner with lawyers in fortifying the ethical infrastructure of their firms.<sup>138</sup> The expectation is that PMBR will improve client service, while enhancing lawyer satisfaction and ethics.<sup>139</sup> Arguably, a proactive system that addresses concerns before problems arise provides more public protection than disciplinary systems that react after misconduct occurs.<sup>140</sup>

As the McKay Commission recommended, proactive regulation should be expanded to protect the public by assisting lawyers. Now close to twenty-five years after the McKay Report, we applaud the Australians for spearheading PMBR and recognize the efforts of progressive regulators in Canada and the United States who are moving PMBR forward in their own jurisdictions.

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in its positive collaboration with stakeholders in the development of the self-assessment program.”  
*Id.*

136. Larkin, *supra* note 134.

137. *See, e.g.,* Rees & Quintanilla, *supra* note 112 (describing “proportionate” regulation as follows: “Proportionate calls for a selection of efficient and effective regulatory measure to achieve regulatory objectives. It calls for balancing of interests and a ‘proportionate response,’ both in terms of how the Society regulates, and how it addresses matters of compliance.”).

138. Fortney, Attorney Integrity System, *supra* note 30.

139. *Id.*

140. *Id.* (urging the adoption proactive systems that emphasize “attorney integrity” rather than relying on reactive systems that resort to attorney discipline).