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## Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession

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# ARTICLES

## Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession

SUSAN SAAB FORTNEY\*

### ABSTRACT

*Around the globe regulators are rethinking the scope of their mandates and responsibilities. They are assuming more expansive roles rather than limiting their efforts to disciplining lawyers after misconduct occurs. This Article examines such regulatory initiatives in three areas. First, it discusses developments related to proactive management-based programs in which regulators partner with lawyers who self-assess their firms' management systems. Data reveal that such assessments help lawyers avoid problems through developing their firms' ethical infrastructure. When misconduct occurs, injured persons often seek monetary redress. These persons may not be able to obtain recovery unless they have suffered substantial damages to support a contingency fee lawyer pursuing legal malpractice claims. The Article considers how two jurisdictions now provide injured persons an alternative avenue for seeking monetary recovery. The third category of regulatory initiatives deal with the serious problem of sexual harassment in the legal profession. Finally, the survey of regulatory programs reveals how U.S. regulators can learn from the systematic manner in which regulators in other countries study proposed changes and collaborate with other stakeholders in examining and designing new programs to improve the delivery of legal services, advance public protection, and promote the safety and diversity of lawyer workplaces.*

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## INTRODUCTION

In Shakespeare’s well-known play, Juliet challenged community norms by falling in love with Romeo, a member of a rival family.<sup>1</sup> Dismissing the importance of names and family allegiances, she posited the following: “What’s in a name? That which we call a rose, By any other name would smell as sweet.”<sup>2</sup> Regrettably, as Juliet soon found out, her name—and Romeo’s—impacted how they were perceived and treated. And while the consequences usually are not so deadly, experts in organizational dynamics and communications emphasize the role that the name plays in defining an organization, communicating its mission, and shaping perceptions.

Understanding the importance of messaging, regulatory and advisory bodies periodically revisit their names and make changes when their names do not properly reflect the group’s purpose and goals. In 2018, the American Bar Association Standing Committee on Lawyer Discipline (“ABA Standing Committee”) made such a move. Recognizing developments on the domestic and international fronts, Committee members recommended a name change.<sup>3</sup> As stated in a Committee report, the ABA Standing Committee’s jurisdictional statement incompletely described the “totality of the nature and scope of its work, expertise, and resources.”<sup>4</sup> Because the work of the ABA Standing Committee extended beyond lawyer and judicial disciplinary enforcement, the ABA Standing Committee

1. See Ryan O. Begley et al., *From Blood Feuds to Civility: Romeo and Juliet and the Changing Evolutionary Role of Cultural Norms*, 22 ASEBL J. 4 (2015).

2. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, scene 2.

3. According to the Standing Committee’s Report submitted in support of proposed amendments, “[t]he ABA, state supreme courts, and other regulators face a barrage of new and different regulatory challenges due to technology, globalization, and heightened pressure to address the crisis in access to legal services.” ABA STANDING COMM. ON PROF’L DISCIPLINE, REPORT SUPPORTING PROPOSED AMENDMENTS TO § 31.7 OF THE ABA’S BYLAWS (2018).

4. *Id.*

proposed that its name be changed to “Standing Committee on Professional Regulation.”<sup>5</sup> The American Bar Association (“ABA”) House of Delegates accepted the proposal, amending the Association’s Bylaws to change the Standing Committee’s name.<sup>6</sup>

Similarly, names and titles used by legal profession regulators may signify the nature and scope of the regulators’ work.<sup>7</sup> In Illinois, the Attorney Registration and Discipline Commission (“ARDC”) is charged with assisting the Supreme Court of Illinois in the regulation of the legal profession. The ARDC’s mission is “to promote and protect the integrity of the legal profession, at the direction of the Supreme Court, through attorney registration, education, investigation, prosecution and remedial action.”<sup>8</sup> Some state supreme courts may delegate the responsibility of overseeing admission to law practice to a body, such as the Board of Law Examiners, and assign attorney discipline to a separate body that often uses the title “Disciplinary Counsel.”<sup>9</sup> Other states use more inclusive titles, such as “Office of Lawyer Regulation,” to communicate that the office’s charge and responsibilities extend beyond lawyer discipline.<sup>10</sup> Such titles better capture the wide range of activities handled by the regulator.

These more inclusive titles reflect regulators’ increasingly expansive views of their roles.<sup>11</sup> Although they continue to discharge the important function of disciplining lawyers who engage in professional misconduct, these regulators also understand that they can better protect the public through more proactive

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5. *Id.*

6. On August 6, 2018, the ABA House of Delegates adopted Resolution 11-9 to change the committee name to “Standing Committee on Professional Regulation.” *ABA Standing Committee on Professional Regulation*, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/discipline\\_committee/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/discipline_committee/) [<https://perma.cc/JKH9-6AWQ>] (last visited May 18, 2020).

7. In the United States, the judiciary, as the branch of government that is primarily responsible for regulating lawyers, delegates regulatory functions to entities that may be under the direct control of the jurisdiction’s highest court or the state’s bar association. Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client and Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717, 720–21 (2016). For information on each state’s name and connection to the state bar association, see *id.* at app. 5.

8. ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, <https://www.iardc.org/> [<https://perma.cc/EM54-M6PS>] (last visited May 18, 2020).

9. For example, the Supreme Court of Hawaii formed the Office of Disciplinary Counsel to investigate complaints against Hawaii lawyers. *Office of Disciplinary Counsel*, HAW. STATE JUDICIARY, [https://www.courts.state.hi.us/legal\\_references/attorneys/hlffcp/office\\_of\\_disciplinary\\_counsel](https://www.courts.state.hi.us/legal_references/attorneys/hlffcp/office_of_disciplinary_counsel) [<https://perma.cc/KE3R-MHH9>] (last visited May 18, 2020).

10. See, e.g., *Ethics and Discipline*, STATE BAR OF NEVADA, <https://www.nvbar.org/member-services-3895/ethics-discipline/> [<https://perma.cc/3W85-M5RH>] (last visited May 18, 2020) (noting that the Nevada Office of Bar Counsel disciplines lawyers and “protects the public by educating and assisting lawyers to practice ethically and competently”).

11. In analyzing approaches to lawyer regulation in the U.S., Professor Laurel S. Terry uses the following three-stage analytical approach. The first stage involves admissions and entry into the profession. The middle stage includes the regulation of lawyers’ day-to-day activities. The end stage of lawyer regulation encompasses discipline and exclusion from the profession. Terry, *supra* note 7, at 754–55.

measures.<sup>12</sup> Rather than reacting to misconduct, many have taken steps to help lawyers avoid problematic behavior. These measures include establishing ethics hotlines, law practice management programs, and lawyer assistance offices.<sup>13</sup> Although such endeavors are worthwhile, they are criticized because participation in such programs is voluntary, the various programs are not coordinated, and practice reviews are not comprehensive and systematic.<sup>14</sup>

If misconduct occurs, U.S. jurisdictions provide limited relief to injured persons. To obtain monetary relief, injured parties generally must pursue legal malpractice actions.<sup>15</sup>

Another concern is that existing regulatory approaches in the U.S. do little to address the dynamics of group practice and improper conduct within organizations. Regulatory efforts to address problems related to organizational practice have largely been limited to disciplinary actions related to lawyers' supervisory responsibilities under the Model Rules of Professional Conduct 5.1 and 5.3.<sup>16</sup> In states that have adopted rules based on ABA Model Rule 8.4(g), regulators now are empowered to pursue complaints related to discriminatory conduct in lawyers' practice settings.<sup>17</sup> In the case of alleged violations of state versions of Model Rules 5.1, 5.3, and 8.4(g), regulators are reactionary, pursuing disciplinary matters after the misconduct has occurred.<sup>18</sup> What is missing are more targeted efforts to prevent and address discriminatory conduct, such as sexual harassment, that threatens the safety and security of clients, co-workers, and others with whom the alleged wrongdoer interacts.

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12. See, e.g., Jonathan P. White, *Self-Assessment Program Aims to Enhance Lawyer Competency and Client Satisfaction*, 46 COLO. LAW. 10, 12 (Oct. 2017).

13. See Terry, *supra* note 7, at 756–57.

14. Professor Terry notes that U.S. regulators have taken the proactive steps on a “rather ad hoc” basis, rather than “developing a comprehensive and systematic approach.” *Id.* at 760.

15. For a discussion of the challenges that plaintiffs encounter in pursuing legal malpractice actions, see Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2033 (2017) [hereinafter *Tort in Search of a Remedy*].

16. *Model Rules of Professional Conduct* 5.1 and 5.3 describe circumstances under which a lawyer serving in a supervisory or managerial capacity may be disciplined in connection with the conduct of another lawyer or nonlawyer assistant. MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2018) [hereinafter MODEL RULES]. In 1991, Professor Theodore Schneyer examined the limitations of relying on Model Rule 5.1. Theodore Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 17–20 (1991). In advocating for the imposition of “firm discipline” as opposed to individual discipline, he referred to Model Rule 5.1 as a “disciplinary dead letter.” *Id.* at 19. Close to thirty years later he recognized the limitations of using law firm discipline to enforce the provisions of Model Rule 5.1, advocating instead for use of proactive regulatory measures to encourage firms to develop their “ethical infrastructure.” Theodore Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011) [hereinafter *Professional Self-Regulation*].

17. For a discussion of how Model Rule of Professional Conduct 8.4(g) attempts to address discrimination in the legal profession and state versions of Model Rule 8.4(g), see Veronica Root Martínez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 814–33 (2019).

18. See Gregory C. Sisk, *Sources of Legal Ethics & the Law of Lawyering* § 4-1.5(a), at 132, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West Academic Press 2018).

Regulators in other countries have taken a variety of steps to address these problems. In sharp contrast to the focus of the reactive discipline systems commonly relied on in most U.S. jurisdictions, regulators in other countries are more directly addressing problematic behavior and offering alternative avenues for aggrieved persons.

This Article examines other countries' regulatory approaches that should spur changes in the U.S. The experience in other jurisdictions reveals the value of regulators using a systematic and collaborative approach to explore and implement regulatory initiatives. The discussion focuses on programs and possibilities in three areas.

Part I discusses legislative and regulatory actions requiring lawyers to proactively self-examine their management practices. Such self-assessments are intended to help lawyers avoid problems. When lawyer misconduct injures clients and third-parties, disciplinary systems provide little or no relief to aggrieved persons. Part II discusses British and Australian approaches to giving injured persons an avenue for obtaining monetary relief. Part III considers how regulators in other countries are taking steps to prevent and address sexual harassment and other discriminatory conduct in lawyers' workplaces. Each Part suggests actions that U.S. regulators may take. Drawing on the experiences of global regulators, the Conclusion proposes approaches that the judiciary, organized bar, and other regulators can take to advance public protection and promote the integrity of the legal profession.

## I. IMPLEMENTING PROACTIVE MANAGEMENT-BASED PROGRAMS TO FORTIFY ETHICAL INFRASTRUCTURE

In this Part, I first review the genesis of a law firm self-assessment process in Australia that became known as "proactive management-based regulation of firms."<sup>19</sup> After considering data evaluating the impact of the approach, I discuss Canadian efforts to examine the efficacy of proactive management programs. This discussion segues into an examination of approaches used in Colorado and Illinois. It concludes with the recommendations on approaches that U.S. regulators should take to explore and implement proactive programs.

In 2007, the Australian-based law firm of Slater & Gordon challenged traditional notions of lawyer independence and professionalism by becoming the first publicly-traded law firm in the world.<sup>20</sup> This public listing and sale of shares in the law firm followed new laws in the Australian state of New South Wales that liberalized the business structures available to firms.<sup>21</sup> These changes enabled

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19. See *infra* note 50 and accompanying text.

20. As noted by the Australian Legal Services Commissioner who worked with Slater & Gordon prior to listing to address concerns and objections, many considered the public listing as the "end of legal ethics in Australia." Steve Mark, *Views from An Australian Regulation*, 2009 PROF. LAW. 45, 54 (2009).

21. For background information on the legislative developments, see Steven Mark & Tahlia Gordon, *Innovation in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 505–07 (2009).

firms to incorporate their practices and to allow nonlawyer ownership in incorporated legal practices (“ILPs”) without restriction on the percentage of ownership.<sup>22</sup>

To address concerns related to the independence and ethics of legal practitioners in incorporated firms with nonlawyer owners, the Legal Profession Act included requirements related to management responsibilities and ethics.<sup>23</sup> One provision required that the ILP appoint at least one legal practitioner director to be responsible for managing the legal services provided by the incorporated firm.<sup>24</sup>

The Act also required that a legal practitioner director for the ILP ensure the implementation and maintenance of “appropriate management systems” (“AMS”) to enable the delivery of services in accordance with a provider’s legal obligations.<sup>25</sup> Although the legislative directive to establish AMS was clear, the Act did not define AMS.<sup>26</sup>

To develop guidelines, as well as an approach for evaluating whether the ILP met statutory requirements, the Office of Legal Services Commissioner for the Australian state of New South Wales (“OLSC”) collaborated with representatives from law firms, the Law Society, the College of Law, the state’s professional indemnity insurer, and other stakeholders.<sup>27</sup> The stakeholders first articulated ten areas that should be addressed in a firm’s management system.<sup>28</sup> According to the

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22. *Id.* at 506.

23. Tahlia Gordon et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, J. L. & SOC’Y (Dec. 23, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1527315](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527315) [<https://perma.cc/BL2P-PA3Q>] [hereinafter *Regulating Law Firm Ethics Management*] (noting that the new legislative provisions were intended to “improve the management and culture of each firm as a whole and prevent ethical risks associated with multidisciplinary practice and the commercial pressure of external investment in law practice.”).

24. Mark & Gordon, *supra* note 21, at 505–06 (noting that the rationale for the requirement stemmed from liberalization of ownership restrictions). The law also imposed reporting obligations, including the requirement that legal practitioner directors report to the Law Society any conduct of another director that is “likely to result in a contravention of that person’s professional obligations or other obligations” imposed by the law. Mark, *supra* note 20, at 48. The law also required the legal practitioner director to respond to professional misconduct or unsatisfactory conduct of a solicitor employed by the practice with remedial action.

25. “The failure to implement and maintain an appropriate management system may constitute professional misconduct.” Mark & Gordon, *supra* note 21, at 506.

26. *See id.* at 507 (noting that the regulator worked with the Law Society and others to “define the key criteria to ascertain whether an ILP had ‘appropriate management systems’ in place”).

27. *Id.*

28. The ten areas that became known as objectives are outlined as follows:

1. Negligence (providing competent work practices)
2. Communication (providing for effective, timely, and courteous communication)
3. Delay (providing for timely review, delivery and, follow-up of legal services)
4. Liens/file transfers (providing for timely resolution of document/file transfers)
5. Cost disclosure/billing practices/termination of retainer (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer)
6. Conflicts of interests (providing for timely identification and resolution of “conflict of interests,” including when acting for both parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees, and commissions, etc.)

OLSC, these areas (colloquially known as the “ten commandments”) were “essentially a systemization of ethical conduct” and “refer to certain behaviors which, if followed, will result in greater consumer protection and satisfaction and, where necessary, effect cultural change.”<sup>29</sup>

The OLSC continued to work with the stakeholders to develop a process in which the ILP completed a self-assessment form to evaluate firm policies, practices, and management systems.<sup>30</sup> For each objective, the assessment form included key concepts for ILPs to consider, as well as examples of ways to achieve the objective.<sup>31</sup>

Because the form gave directors for ILPs the opportunity to learn from completing the form, the self-assessment process became known as “education toward compliance.”<sup>32</sup> The educational process for lawyer-directors continued after directors submitted completed self-assessment forms to the OLSC.<sup>33</sup> The OLSC staff would work with the director to help the firm achieve compliance if the completed form indicated that a firm was not compliant with an objective.<sup>34</sup>

The OLSC cooperated in three research studies to obtain data on the impact of the self-assessment process and to determine whether the “education toward compliance” approach affected the number of complaints against members of ILPs.<sup>35</sup> The first study, conducted by the Centre for Applied Philosophy and Public

7. Records management (minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving, etc., and providing for compliance with requirements regarding registers of files, safe custody, and financial interests)
8. Undertakings (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions, or other requirements of regulatory authorities such as the OLSC, courts, and costs assessors)
9. Supervision of practice and staff (providing for compliance with statutory obligations covering license and certificate conditions, employment of persons, and providing for proper quality assurance of work outputs and performance of legal, paralegal, and non-legal staff involved in the delivery of legal services)
10. Trust account regulations (providing for compliance with Part 3.1, Division 2 of the Legal Profession Act and proper accounting procedures).

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER, ANNUAL REPORT 2006–2007, at 16, [http://www.olsc.nsw.gov.au/Documents/olsc\\_ar\\_0607.pdf](http://www.olsc.nsw.gov.au/Documents/olsc_ar_0607.pdf). [<https://perma.cc/7MZC-VTKY>].

29. *Id.* The ten areas or objectives of sound practice were largely based on concerns that commonly trigger complaints against practitioners. Susan Saab Fortney, *Promoting Public Protection Through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 *PROF. LAW* 1, 2 (2015) [hereinafter *Promoting Public Protection*].

30. 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, 163–64 (2012).

31. *See id.* at 163.

32. *Id.* at 164.

33. *Id.* (describing how a staff member provided written guidance to help lawyers achieve compliance).

34. *Id.* at 164–65.

35. Gordon et al., *Regulating Law Firm Ethics Management*, *supra* note 23, at 15. “[T]he number of complaints made to the independent regulator is the best available measure of the impact of the [OLSC] approach on law firm management and ethical behaviour.” *Id.*



Ethics in 2004, relied on complaints data, as well as the self-assessment forms and other records relating to 200 ILPs.<sup>36</sup> The researchers reported a positive correlation between firms that reported high levels of compliance with the objectives and relatively low levels of complaints.<sup>37</sup>

Subsequently, Dr. Christine Parker conducted a second study focusing on the number of complaints relating to ILPs.<sup>38</sup> Dr. Parker analyzed complaints data on 620 ILPs to test whether the regulation of ILPs improves the “ethical management” of a firm.<sup>39</sup> The study results indicated that the self-assessment process made a substantial difference to the “ethics management” in firms as indicated by a dramatic lowering in the complaints rates after self-assessment.<sup>40</sup> Specifically, the findings revealed that the complaints rates for ILPs went down by two-thirds after completion of the initial self-assessment.<sup>41</sup> A second finding was that the complaints rates for ILPs that completed the self-assessment process was one-third of the number of complaints filed against non-incorporated firms that had not completed the process.<sup>42</sup> The researchers recognized the limitations in a study based on complaints that largely reflect consumer protection issues.<sup>43</sup> They suggested further investigation using other research methods such as in-depth interviews with lawyers and other stakeholders.<sup>44</sup>

I was interested in studying the Australian approach to management-based regulation and investigating how the “education toward compliance” approach impacted lawyer conduct and why complaints rates for ILPs fell. In 2008, I conducted a mixed-method study.<sup>45</sup> The study revealed that the self-assessment process effectively provided firm directors the “nudge” to examine and revise existing firm processes and the resources to implement and improve management systems.<sup>46</sup> A significant percentage of directors reported that they learned from the process and changed their attitudes about self-assessment after completing the forms.<sup>47</sup> Most importantly, the survey results suggested that proactive

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36. Fortney & Gordon, *supra* note 30, at 165 (citing the study report).

37. *Id.* at 165–66.

38. For a detailed discussion of the study methodology and results, see Gordon et al., *Regulating Law Firm Ethics Management*, *supra* note 23, at 15–37.

39. *Id.* at 3–4.

40. *Id.* at 31.

41. *Id.* at 23.

42. *Id.* at 25–26. On a third question related to the firm’s ratings on self-assessment forms, the researchers found “little evidence that the actual rating the firms gave themselves for their implementation of [AMS] makes a difference to complaints.” *Id.* at 31.

43. *Id.* at 37.

44. *Id.*

45. The study obtained data from ILPs through a survey and interviews of the designated director with the ILP. All legal practitioner directors of ILPs with two or more solicitors were invited to complete the online questionnaire. Of the 356 directors who received invitations, 141 completed the entire questionnaire for a response rate of 39.6%. Fortney & Gordon, *supra* note 30, at 169.

46. *Id.* at 182.

47. *Id.* at 175 (reporting that 62% of the respondents indicated that they agreed or strongly agreed that the self-assessment process was “a learning exercise that enabled their firms to improve client service”). Only 15% disagreed or strongly disagreed with the statement. *Id.*

approaches can help transform a lawyer disciplinary system from a reactive one to a proactive program in which the regulator partners with practitioners to help them improve the delivery of legal services.<sup>48</sup>

The Australian experience captured the attention of regulators and academics around the world.<sup>49</sup> Notably, Professor Theodore Schneyer (who first applied the term “ethical infrastructure” in legal ethics scholarship) used the title “proactive management-based regulation” (“PMBR”) to describe a regulatory approach focused on encouraging firms to maintain ethical infrastructures.<sup>50</sup> Rather than relying largely on reactive disciplinary processes that address misconduct after it occurs, Professor Schneyer proposed that state supreme courts adopt a “meaningful program of ‘proactive, management-based regulation’ (PMBR).”<sup>51</sup> According to Schneyer, PMBR has two essential features: (1) designation of a firm lawyer responsible for managing the firm’s ethical infrastructure, and (2) proactive collaboration between firms and regulators.<sup>52</sup> State supreme courts could adopt versions of PMBR that vary considerably, depending on local needs, resources, and regulatory traditions.<sup>53</sup> Because PMBR enables firms to regulate conduct within their own walls, PMBR is fully consistent with attorney self-regulation.<sup>54</sup>

New South Wales Legal Services Commissioner Steve Mark has acted as the chief regulatory proponent of management-based regulation. Around the world, he presented at numerous conferences and programs for academics and regulators, including the 1<sup>st</sup> Proactive Risk-Based Regulation Workshop.<sup>55</sup> More than forty people attended the workshop, including regulators and jurists from ten

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48. *Promoting Public Protection*, *supra* note 29, at 7.

49. Within Australia, the self-assessment regime for regulation of ILPs spread to other states. For example, the Legal Services Commission in Queensland adopted the self-assessment process pioneered in New South Wales and developed an entire suite of self-assessment forms to be used by firms. *See Ethics Checks for Law Firms*, LSC QUEENSLAND, <https://www.lsc.qld.gov.au/ethics-checks> [<https://perma.cc/YQR3-367D>] (last visited May 18, 2020) (including links for self-assessment forms). With the adoption of Uniform Legal Profession Law by states in Australia and changes in regulatory approaches, Australian Legal Services Commissioners discontinued the process of requiring that all ILPs complete a self-assessment process, moving instead to relying more on compliance audits. For a discussion of this shift in approach in the state of Queensland, see ROBERT BRITTAN, AUSTRALIA LEGAL SERVICES COMMISSION, REGULATING THE LEGAL PROFESSION IN QUEENSLAND (Oct. 2017).

50. *Professional Self-Regulation*, *supra* note 16, at 584.

51. *Id.*

52. *Id.* at 584–86.

53. *Id.* at 584.

54. *Id.* at 588–89.

55. The “1st Proactive Risk Based Regulation Workshop,” held on May 30, 2015, was co-sponsored by the ABA Center for Professional Responsibility, the Colorado Supreme Court Office of Attorney Regulation Counsel, and the Maurice C. Deane School of Law at Hofstra University. Meeting Minutes, *1st Regulators’ Workshop on Proactive, Risk-Based Regulation* (May 30, 2015), <https://www.coloradosupremecourt.com/PDF/PMBR/Regulators%20Conference%20Notes%20MINUTES.pdf> [<https://perma.cc/W2KY-HYLD>]. As a member of the workshop organizing committee, I saw the workshop as an opportunity for interested regulators and jurists to learn about PMBR and courses of action for exploring PMBR in their own jurisdictions.

U.S. states and four Canadian provinces.<sup>56</sup> Since then, many jurisdictions began to study the possibility of implementing proactive, management-based programs.<sup>57</sup> Although jurisdictional approaches may be somewhat different, each program involves the regulator partnering with firm managers to enhance the ethical delivery of legal services through education and a systematic evaluation of management systems.

Outside of Australia, Canadian regulators and bar associations were the first to pursue proactive management-based programs.<sup>58</sup> Impressed with the Australian data and experience, the Canadian Bar Association (“CBA”) commissioned Amy Salzyn, a Canadian law professor, to develop an online self-assessment tool for CBA members.<sup>59</sup> The introduction to the tool explains that the goal of the CBA’s Ethics and Professional Responsibility Committee was to prepare the Ethical Practices Self-Evaluation Tool “to assist Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports their legal practices.”<sup>60</sup> The tool structure and coverage areas are very similar to the one developed in New South Wales.<sup>61</sup> Under a section called, “Relationship to Firm Members,” the CBA tool includes objectives called “Hiring and Supervision, Retention/Lawyer and Staff Wellbeing.”<sup>62</sup> The last section of the CBA tool is comprised of an objective called “Access to Justice” and “Rule of Law and Administration of Justice.”<sup>63</sup>

In addition to the CBA tool that lawyers may voluntarily opt to consult as a resource, Canadian regulators recognized the value of requiring firms and organizations to systematically examine their ethical infrastructure and management systems. Using the same collaborative approach that was successful in Australia, Canadian regulators explored possibilities by engaging the practicing bar and other stakeholders interested in improving the delivery of legal services.<sup>64</sup> For example, in 2015 the Law Society in Ontario appointed the Compliance-Based

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56. Terry, *supra* note 7, at 761–62. Professor Terry also served as a member of the organizing committee for the “1st Workshop on Proactive Regulation.”

57. The author has personal knowledge of these events because following the workshop she consulted with and spoke at regulator and bar association events in the following jurisdictions: Nova Scotia, Ontario, Quebec, Colorado, New York, and Illinois.

58. See Terry, *supra* note 7, at 729–30 (discussing the early efforts in Canada to develop a self-assessment tool and explore the feasibility of proactive regulation).

59. “Regulatory Developments in New South Wales in Australia provide an excellent example of positive effects of this proactive model of ‘education towards compliance.’” CANADIAN BAR ASSOCIATION ETHICS & PROFESSIONAL RESPONSIBILITY COMMITTEE, ASSESSING ETHICAL INFRASTRUCTURE IN YOUR LAW FIRM: A PRACTICAL GUIDE (on file with author) [hereinafter CBA SELF-ASSESSMENT TOOL]. When it was first released, the self-assessment was available to the public online, but now is only available to CBA members.

60. *Id.* at Introduction.

61. For additional information on the CBA tool and how it compares to the New South Wales tool, see Terry, *supra* note 7, at 736–37.

62. CBA SELF-ASSESSMENT TOOL, *supra* note 59, at Objectives 7 & 8.

63. *Id.* at Objective 10.

64. See *infra* text accompanying notes 65–94.

Entity Regulation Task Force.<sup>65</sup> As defined by the Task Force, “‘compliance-based regulation’ is a proactive approach in which the regulator identifies practice management principles and establishes tools to assist practitioners in adhering to the principles in the most efficient way.”<sup>66</sup> After developing a practice assessment tool for lawyers in private practice, the Task Force initiated a consultation process, in which feedback on the tool would be solicited from focus groups facilitated by an outside moderator.<sup>67</sup> The Task Force is seeking input from the Equity Advisory Group, the Equity and Indigenous Affairs Committee, and the Indigenous Advisory Group.<sup>68</sup> With input from focus groups, affinity groups, and other stakeholders, the Task Force should be positioned to address concerns of practitioners and to design a regulatory approach that meets lawyers’ needs.<sup>69</sup>

The Nova Scotia Barristers Society (“NSBS”) also undertook a multi-year project to study proactive regulation. As part of its strategic plan to transform regulation in the public interest, the Council for the NSBS began its examination with a comprehensive study that examined both the form and nature of regulation, as well as global developments related to new regulatory approaches, including outcomes-based and proactive regulation.<sup>70</sup> Following years of study and effort, the NSBS pursued reforms that it characterized as “proactive, principled and proportional.”<sup>71</sup>

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65. *Compliance-Based Entity Regulation*, LAW SOCIETY OF ONTARIO, <https://lso.ca/about-lso/initiatives/compliance-based-entity-regulation> [https://perma.cc/D32G-HBDG] (last visited May 18, 2020). A Convocation approved a Task Force’s Report that recommended developing detailed options for a compliance-based regulatory framework and seeking legislative authority to regulate entities through amendments to the Law Society Act. COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, LAW SOCIETY OF ONTARIO, REPORT TO CONVOCATION 3 (May 26, 2016), [https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation\\_may\\_2016\\_cber.pdf](https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation_may_2016_cber.pdf) [https://perma.cc/8C3V-SN2Z].

66. COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, LAW SOCIETY OF ONTARIO, REPORT TO CONVOCATION 3 (May 24, 2018), <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-compliancebasedentityregulationtaskforcereport.pdf> [https://perma.cc/VFT9-92M6].

67. The draft practice assessment tool, attached to the report, set forth the following principles: “(i) client management, (ii) matter management, (iii) financial management and sustainability, (iv) people management, (v) access to justice, and (vi) equality, diversity and inclusion.” For each principle, the tool includes the following: objectives, best practices examples, requirements under applicable law, regulations, resources, and open-ended assessment questions on what the firm does well and how the firm could improve.” *Id.*

68. *Id.*

69. The 2018 Report to the Convocation states that the Task Force has not reached any conclusion on whether the practice assessment should be mandatory and that the Task Force will review and consider all of the feedback from the focus groups before determining next steps. *Id.* at 2–3.

70. Starting in 2013, the Council and administrators with the NSBS devoted time and resources to seriously studying options that would be both effective and appropriate for working with lawyers in firms and organizations of different sizes. Victoria Rees, *Transforming Regulation and Governance in the Public Interest*, N.S. BARRISTERS’ SOC’Y (Oct. 28, 2013), <https://iclr.net/wp-content/uploads/2016/03/2013-10-30transformingregulation.pdf> [https://perma.cc/4J5V-2697].

71. According to the website for the Barristers Society of Nova Scotia, they “regulate Nova Scotia lawyers in a manner that is risk-focused, proactive, principled, and proportionate . . . and embed this ‘Triple P’ approach . . . in all of [their] activities.” *Who We Are and What We Do*, N.S. BARRISTER’S SOC’Y, <https://nsbs.org/about/who-we-are-and-what-we-do/> [https://perma.cc/68AD-W37P] (last visited May 18, 2020). The following describes each aspect of the “Triple P” approach:

As a cornerstone of the “Triple P” regulatory approach, the NSBS developed a self-assessment program standard called Management Systems for Ethical Legal Practice (“MSELP”).<sup>72</sup> Under the new regulatory approach, every three years, law firms, including solo practices, must review and assess their MSELP.<sup>73</sup> The MSELP educational process consists of the following three elements: (1) a mandatory online self-assessment tool that sole practitioners and lawyers must complete and submit to the NSBS, (2) a more in-depth MSELP workbook that lawyers have the option to complete to delve more deeply into the self-assessment process, and (3) follow-up and support provided by the Legal Services Support personnel from the NSBS who assist lawyers by providing tools and resources addressing areas identified in the self-assessment process.<sup>74</sup>

The process of developing the tool and related material was very deliberate and research-based. After conducting in-person consultations with lawyers, the NSBS launched a Pilot Project in 2016 to test and evaluate the proposed self-assessment tools, related resources, and self-assessment process.<sup>75</sup> Initially, fifty firms were invited to participate in the Pilot Project and to commit to complete the MSELP Self-Assessment Tool (“SAT”), respond to an online user response survey (addressing questions around tool functionality, clarity, etc.), and to meet with the Project Manager and other staff to discuss user experience and feedback

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**Proactivity:** We do not simply react, but we engage the legal profession and Nova Scotia’s communities to discuss challenges and opportunities.

**Principled:** We set a regulatory framework that is aspirational and focused on our public interest mandate rather than based solely on narrowly prescriptive rules.

**Proportionate:** We apply efficient and effective regulatory measures to achieve objectives using, among others, risk assessment and risk management tools. It calls for a balancing of interests and a ‘proportionate’ response, both in terms of how the Society regulates and how it addresses issues of non-compliance.

*Id.*

72. *Self-Assessing your Law Firm (MSELP)*, N.S. BARRISTERS’ SOC’Y, <https://nsbs.org/legal-profession/your-practice/practice-support-resources/mselp/> [<https://perma.cc/K99B-LPYM>] (last visited May 18, 2020).

73. *Id.*

74. *Id.* (including an online portal for the self-assessment tool with links for the MSELP Workbook, FAQs, and Instructions).

75. For background information on the Pilot Project, see JENNIFER PINK & JANE WILLWERTH, LEGAL SERVICES SUPPORT PILOT PROJECT PRELIMINARY REPORT (2017) (on file with author). The following describes the purpose and focus of the Pilot Project:

The Pilot Project is designed to provide a preliminary evaluation on whether the MSELP has the potential to achieve its broad goal of assisting lawyers and legal entities in delivering highly competent and ethical legal services. Specifically, it seeks to assess whether the MSELP self-evaluation process has the capability to change behaviors, improve competence and quality of legal services, support ethical decision making, and enhance job and client satisfaction. It also aims to enable the Society to assess the staff and financial resources required to implement an impactful self-assessment process.

*Id.* at 3.

in more detail.<sup>76</sup> The communications with firm representatives provided opportunities to learn about lawyers' practice issues, as well as concerns and interests in the self-assessment process.<sup>77</sup>

Participants also provided valuable input on the content of the tool, the workbook, and the interplay of the two.<sup>78</sup> The following finding summarizes the feedback that the Pilot Project received on the process:

Taken together, all Pilot participants identified value in having participated in the process – whether because they learned something new; identified areas for improvement; refreshed their thinking about their practice infrastructure; or learned more about the Society's new approach to Legal Services Regulation and revisited their understanding of the Society and its role.<sup>79</sup>

Despite this positive learning experience, the Pilot Project Report concluded that a “regulatory obligation will be necessary to ensure full participation in the self-assessment process” and “[c]lear deadlines and eventually, if necessary, communication of a regulatory consequence for failure to self-assess will be required to ensure full participation.”<sup>80</sup> Based on the Pilot Project experience and lawyer input, the Pilot Project Report proposed a triennial self-assessment model in which one-third of the regulated law firms would be required to self-assess per year.<sup>81</sup>

In August 2019, the NSBS officially launched the self-assessment program.<sup>82</sup> The program was commenced with an eye toward gathering data to evaluate and improve the self-assessment process.<sup>83</sup> In considering program evaluation, the final report on the Pilot Project also recognized the value of pan-Canadian collaboration with other provinces pursuing a proactive regulatory regime based on self-assessment.<sup>84</sup>

Like the Law Society of Ontario and the NSBS, the Law Society of British Columbia used a task force approach to study proactive approaches and to engage

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76. *Id.* at 6.

77. For preliminary findings, see *id.* at 9–16.

78. *Id.*

79. See JENNIFER PINK, LEGAL SERVICES SUPPORT PILOT PROJECT FINAL REPORT 8 (2017) (on file with author) [hereinafter NSBS PILOT FINAL REPORT] (noting that for “approximately half the participants, ‘value’ was found through the online self-assessment process itself . . . [and for] the other half, the followup [sic] meeting is when meaningful reflection occurred, through deeper discussion and exploration of unique practice systems and considerations.”).

80. *Id.* at 6–7.

81. *Id.* at 13.

82. E-mail from Jennifer Pink, Legal Servs. Support Manager, N.S. Barristers' Soc'y, to author (Nov. 26, 2019) (on file with author). To build awareness and maximize voluntary participation in the program, a member of the Law Support Staff contacts each firm before sending the tool and related information. *Id.*

83. NSBS PILOT FINAL REPORT, *supra* note 79, at 17.

84. See *id.* (suggesting the value of an evaluation regime that uses common benchmarks against which to evaluate our work and propose enhancements). The NSBS staff expects to have results available sometime after August 2022 when the first round of lawyers completes the self-assessment forms. E-mail from Jennifer Pink, Legal Servs. Support Manager, N.S. Barristers' Soc'y, to author (Feb. 26, 2020) (on file with author).

the practicing bar and other stakeholders in exploring a proactive regulatory model. In July 2018, the Law Firm Regulation Task Force in British Columbia launched a British Columbia Pilot Project to obtain feedback on the proposed self-assessment tool and process.<sup>85</sup> Based on the results from the Pilot Project, the Task Force reported that the majority of the British Columbia Pilot Project participants found the self-assessment to be a useful learning activity.<sup>86</sup> After a comprehensive review of the project results and related material, the Task Force recommended that the self-assessment be rolled out across the profession.<sup>87</sup> In October 2019, the Benchers, the governing body for the Law Society, adopted the recommendation and approved the profession-wide implementation of the self-assessment process.<sup>88</sup>

In an impressive collaborative move, the Law Societies of Alberta, Saskatchewan, and Manitoba examined innovative regulatory approaches and determined that proactive regulation of firms was appropriate.<sup>89</sup> They worked together on a study paper<sup>90</sup> and a Prairie Societies Pilot Project to test a jointly

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85. For the Pilot Project, approximately 10% of the firms in British Columbia were randomly selected to participate in the Pilot Project and 267 firms submitted self-assessments, resulting in a 75% completion rate. Notably, solo practitioners comprised two-thirds of the completed self-assessments and firms of two or more lawyers represented one-third. L. SOC'Y OF B.C., LAW FIRM REGULATION PILOT PROJECT AND RECOMMENDATIONS REPORT, FINAL REPORT OF LAW FIRM REGULATION TASK FORCE 9, 13 (2019), <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LawFirmRegulation-2019.pdf> [<https://perma.cc/LP65-5RH7>] [hereinafter BRITISH COLUMBIA TASK FORCE REPORT].

86. As described in the final report of the Law Firm Regulation Task Force:

The results also confirm that the majority of pilot project participants found the self-assessment to be a useful learning activity. Most firms reported that both the mandatory Self-Assessment Report and the optional Workbook were relevant, clear and easy to navigate, and that the self-assessment exercise was valuable in terms of improving education and awareness at the firm about best practices and motivating firms to review their policies and processes. Very few firms reported that the self-assessment process was onerous, with the majority of participants taking less than two hours to complete the exercise.

*Id.* at 30.

87. The Task Force recommended a requirement that every three years all firms complete and submit a Self-Assessment Report to the Law Society, unless an exemption applied. The recommendation would require new firms to submit their self-assessment within one year of registration. It also provided that firms could be "required to complete a self-assessment outside the regular reporting period if the Executive Director of the Law Society considers it in the public interest to do so." *Id.* at 38.

88. *Law Firm Regulation Initiatives*, THE LAW SOC'Y OF B.C., <https://www.lawsociety.bc.ca/our-initiatives/law-firm-regulation-initiatives/> [<https://perma.cc/GGD2-UY77>] (last visited May 18, 2020). According to the implementation schedule included in the Task Force Report, during 2020 the Law Society will develop resources and the self-assessment materials and in 2021, the first mandatory assessment will be required for one-third of the firms in British Columbia. In 2022, another third of the firms will complete the process and in 2023, the remaining one-third of the firms will do so. BRITISH COLUMBIA TASK FORCE REPORT, *supra* note 85, at 50.

89. *Innovating Regulation*, LAW SOC'Y OF SASK., <https://www.lawsociety.sk.ca/initiatives/innovating-regulation/> [<https://perma.cc/9KER-XS5Q>] (last visited May 17, 2020).

90. For a full discussion of their study and conclusions, see CORI GHITTER, BARBRA BAILEY & DARCIA SENFT, *INNOVATING REGULATION: A COLLABORATION OF THE PRAIRIE SOCIETIES* (Nov. 2015), <https://www.lawsociety.sk.ca/media/127107/INNOVATINGREGULATION.pdf> [<https://perma.cc/TND3-M3VJ>].

developed Law Practice Management Assessment Tool.<sup>91</sup> The self-assessment tool includes seven objectives, called “Management Principles,” that are “aimed at implementing controls to manage risk for your firm, promote an ethical firm culture and contribute to the financial soundness and profitability of your firm.”<sup>92</sup>

The feedback from the pilot was positive and provided information for refining the tool and implementing proactive regulation.<sup>93</sup> Each law society is at a different stage of regulating firms, consulting their membership, and moving forward with developing their own approach to proactive law firm regulation.<sup>94</sup>

As Canadian regulators moved forward with exploring and implementing a mandatory regulatory regime for all firms, two U.S. regulators have taken different approaches to encouraging lawyers to examine their management systems and practices related to the ethical delivery of legal services.<sup>95</sup> Representatives from both regulatory offices have helped lead the national discussions of proactive regulation and shared their experiences with their proactive regulatory initiatives.<sup>96</sup>

In 2015, the Colorado Office of Attorney Regulation co-sponsored the first Proactive Risk-Based Regulation Workshop, attended by regulators from the U.S., Canada, and Australia, as well as justices from the Colorado Supreme Court and leading Colorado practitioners.<sup>97</sup> Following the workshop, the Colorado Supreme Court Advisory Committee formed a fifty-member subcommittee to study creating a proactive practice assessment program.<sup>98</sup> The subcommittee spent two years drafting regulatory objectives, identifying key practice risks, and establishing core practice principles on which a self-assessment tool would be based.<sup>99</sup> The subcommittee also developed a self-assessment process in which lawyers would voluntarily complete the survey tool that includes ten discrete self-assessments corresponding to the ten core practice principles.<sup>100</sup> The ten core principles are similar to those identified in other practice self-assessment tools,

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91. LAW SOC'Y ALBERTA, PRAIRIE LAW SOCIETIES LAW FIRM PRACTICE MANAGEMENT ASSESSMENT TOOL, <https://www.lawsocietylistens.ca/4074/documents/7970> [<https://perma.cc/D2G5-EF2M>].

92. *Id.*

93. *Innovating Regulation*, *supra* note 89 (reporting that over half of the lawyers in the consultation agreed or strongly agreed that management principles would improve customer service).

94. Terry Davidson, *Prairie Law Societies Hopeful Members Will Buy Into Law Firm Regulation*, THE LAW'S DAILY (Feb. 6, 2019, 2:38 PM), [https://www.thelawyersdaily.ca/articles/10141/-prairie-law-societies-hopeful-members-will-buy-into-law-firm-regulation-?article\\_related\\_content=1](https://www.thelawyersdaily.ca/articles/10141/-prairie-law-societies-hopeful-members-will-buy-into-law-firm-regulation-?article_related_content=1) [<https://perma.cc/72GT-XS6K>].

95. See *infra* text accompanying notes 97–118.

96. See *infra* text accompanying note 97.

97. White, *supra* note 12, at 10.

98. The Committee members represented a wide range of practice areas. *Id.* at 10–12 (reporting on the subcommittee perspective that assessment educational materials guide lawyers on how to build an ethical infrastructure and that the process is particularly useful to solo and small firm lawyers).

99. Cecil Morris, *Colorado's New Lawyer Self-Assessment Program*, TRIAL TALK, Dec./Jan. 2018, at 37.

100. White, *supra* note 12, at 11. For each assessment, a series of questions features a discussion of best practices, actual rule requirements, and educational resources. *Id.*



with the addition of a principle called “wellness and inclusivity.”<sup>101</sup> As stated in the introduction to the online tool, the self-assessment program is designed to help lawyers better serve clients and simplify their professional lives.<sup>102</sup>

The civil procedure rule that establishes the self-assessment program notes that the program gives lawyers and law firms the opportunity to improve the quality of legal services offered and to build great client satisfaction through proactive practice review.<sup>103</sup> To address any concern related to the access or use of information developed or recorded in connection with the Colorado self-assessment program, the civil procedure rule expressly defines as “confidential information” all information prepared or created in connection with a lawyer self-assessment.<sup>104</sup>

The last section of each Colorado assessment allows users to provide feedback.<sup>105</sup> Although most of the responses related to specific issues raised in the form, the majority of the general observations on the program have been positive.<sup>106</sup> In addition, lawyers have reported that the time that they devoted to the self-assessment was worthwhile.<sup>107</sup>

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101. The self-assessments in the Colorado tool focus on the following ten core principles:

1. Developing a competent practice;
2. Communicating in an effective, timely, professional manner and maintaining professional relations;
3. Ensuring that confidentiality requirements are met;
4. Avoiding conflicts of interest;
5. Maintaining appropriate file and records management systems;
6. Managing the law firm/legal entity and staff appropriately;
7. Charging appropriate fees and making appropriate disbursements;
8. Ensuring that reliable trust account practices are in use;
9. Working to improve the administration of justice and access to legal services; and
10. Wellness and inclusivity.

*Office of Attorney Regulation, Lawyer Self-Assessment Program*, OFFICE OF ATTORNEY REGULATION, COLORADO SUPREME COURT, <https://coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> [<https://perma.cc/R5EV-2SZU>] (last visited May 18, 2020).

102. *See id.* (noting that the “self-assessments emphasize high-quality client service, efficient law office management, and compliance with professional obligations”).

103. C.R.C.P. 256 (West 2020).

104. C.R.C.P. 256(4)(a) (West 2020). The rule expressly prohibits the use of any such confidential information in any disciplinary complaint or investigation. Another safeguard protecting the confidentiality of information is that “[n]either the Office of Attorney Regulation Counsel nor the survey platform host will see a user’s individual answers or report card.” *See White, supra* note 12, at 12. For a discussion of the importance of creating a privilege to protect information developed in self-assessments, see Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practice: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 112, 141–46 (2014).

105. *Lawyer Self-Assessment Form FAQ*, OFFICE OF ATTORNEY REGULATION, COLORADO SUPREME COURT, <https://coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> [<https://perma.cc/R5EV-2SZU>] (last visited May 18, 2020).

106. E-mail from Jonathan P. White, Prof’l Dev. Counsel & Inventory Counsel, Colo. Office of Attorney Regulation Counsel, to Susan Fortney (Jan. 17, 2020) (on file with author).

107. E-mail from Jonathan P. White, Prof’l Dev. Counsel & Inventory Counsel, Colo. Office of Attorney Regulation Counsel, to Susan Fortney (Oct. 24, 2019) (on file with author) (noting that attorneys valued the opportunity to review their practices and obtain continuing legal education credit).

In 2017, Illinois joined Colorado in implementing a self-assessment program for lawyers.<sup>108</sup> Rather than using a voluntary approach, similar to that used in Colorado, Illinois became the first state in the U.S. to require that a segment of the practicing bar complete a self-assessment process.<sup>109</sup> Beginning in 2018, the Illinois Supreme Court adopted rules requiring all uninsured Illinois attorneys in private practice to complete a four-hour interactive, online self-assessment regarding the operation of their law practice.<sup>110</sup> The self-assessment enables lawyers to earn continuing education credits while reviewing their firm's practices and considering ethics rules, as well as best practices.<sup>111</sup> In announcing the rule changes related to PMBR, Chief Justice Lloyd A. Karmeier explained that "PMBR promises a new level of protection for the public, and the Court is optimistic that it will be embraced by practicing attorneys with the same level of enthusiasm expressed by the numerous professional bodies that have urged its adoption."<sup>112</sup> According to James Grogan, one of the senior regulators with the ARDC, the point of requiring uninsured lawyers to complete a self-assessment process is to offer an assessment similar to that which attorneys must complete when they obtain insurance.<sup>113</sup>

The Illinois Court Rule requires that lawyers in private practice disclose whether they carry professional liability insurance and that those who are uninsured must complete a self-assessment related to the operation of their law practice.<sup>114</sup> The rule states that the self-assessment shall be confidential, and that neither the administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding.<sup>115</sup>

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108. See Press Release, Supreme Court of Illinois, Illinois Becomes First State to Adopt Proactive Management Based Regulation (Jan. 25, 2017), <https://courts.illinois.gov/Media/PressRel/2017/012417.pdf> [<https://perma.cc/7PT5-WTXZ>].

109. See *id.*

110. *Id.*

111. Brittney M. Bowater, *Proactive Management Based Regulation: ARDC Self-Assessment Course Will Provide Illinois Lawyers with the Tools for Better Practice Management*, ILL. CTS. CONNECT (July 25, 2017), [http://www.illinoiscourts.gov/Media/enews/2017/072517\\_ARDC.asp](http://www.illinoiscourts.gov/Media/enews/2017/072517_ARDC.asp) [<https://perma.cc/SX7X-X8ME>].

112. *Id.*

113. Lauren P. Duncan, *Court Rule Adds Online Assessment*, CHI. DAILY L. BULL. (Jan. 30, 2017, 2:23 PM), <https://www.chicagolawbulletin.com/archives/2017/01/30/no-mal-insurance-rule-1-30-17> [<https://perma.cc/69Y4-TMLB>] (quoting James Grogan, the ARDC's deputy administrator and chief counsel). According to the ARDC, annual registration information for 2016 revealed that 41% of the 13,500 sole practitioners in Illinois did not maintain malpractice insurance. *Id.* Insurance applications require lawyers to provide information on firm procedures and controls, such as conflicts-of-interest screening systems and calendaring systems. See RONALD E. MALLEEN, ET AL. LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 6:14 (2020 ed.) (suggesting that underwriters consider application answers in evaluating risks).

114. The rule states that the lawyer will earn continuing legal education credit for completing an online self-assessment and that ARDC will provide the lawyer with results of the self-assessment and resources for the lawyer to use to address any issues raised by the self-assessment. Ill. Sup. Ct. R. 756(e) (Westlaw 2020).

115. *Id.*

The first online PMBR course in Illinois consisted of eight modules.<sup>116</sup> In 2018, the first year the course was offered, 5303 of the 7186 lawyers who were required to take the course completed it.<sup>117</sup> Overwhelmingly, lawyers who completed the PMBR course reported very positive impressions of the program modules.<sup>118</sup>

The ABA Standing Committee on Professional Regulation and the Young Lawyers Division offered information on the Illinois and Colorado programs and data on PMBR abroad in support of an ABA House of Delegates Resolution they sponsored.<sup>119</sup> At its 2019 Annual Meeting, the ABA House of Delegates adopted their resolution urging state supreme courts to study and adopt jurisdictionally appropriate PMBR programs to “enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms.”<sup>120</sup> One month earlier, the U.S. Commission of Chief Justices adopted a resolution encouraging its members to study PMBR programs to “enable lawyers and law firms to develop and maintain ethical infrastructures that help prevent violations of applicable rules of professional conduct.”<sup>121</sup>

A number of U.S. jurisdictions are now exploring the implementation of proactive management-based programs.<sup>122</sup> U.S. regulators and lawyers interested in proactive management initiatives should consider following the approach used by regulators in Canada.<sup>123</sup> Those regulators carefully designed an exploration process to include various stakeholders and gather data through pilot programs.<sup>124</sup>

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116. E-mail from Britney Bowater, ARDC Senior Counsel, Educ. & Proactive Initiatives, to Susan Fortney (Nov. 6, 2019) (on file with author) [hereinafter Bowater E-mail]. The modules covered the following topics: attorney wellness, attorney-client relationship, conflicts of interest, diversity and inclusion, fees, costs and billing, civility and professionalism, technology and ethics, and trust accounts. *Id.*

117. ILLINOIS ARDC, ANNUAL REPORT OF 2018, at 3 (2018), <https://www.iardc.org/AnnualReport2018.pdf> [<https://perma.cc/PJN9-R78L>]. Only 350 lawyers did not meet the requirement. The balance changed their status or purchased insurance. An additional 3387 lawyers completed at least one of the modules for CLE credit in 2018 although not required to take the PMBR course, and 1053 lawyers completed all eight modules. *Id.* at 4.

118. *See* Bowater E-mail, *supra* note 116 (providing tables with survey results on lawyer feedback on the modules). According to survey results, over 95% rated the modules excellent, very good, or good on survey responses submitted from July 2018 to July 2019. *Id.*

119. *See* AMERICAN BAR ASSOCIATION, RESOLUTION 107, at 1 (2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/107-annual-2019.pdf>. [<https://perma.cc/99KD-BLZA>].

120. *Id.*

121. CONFERENCE OF CHIEF JUSTICES, RESOLUTION 4, at 1 (2019), <https://ccj.nsc.org/~media/Microsites/Files/CCJ/Resolutions/07312019-Proactive-Management-Based-Ethical-Lawyer-Regulation.ashx> [<https://perma.cc/JR5U-4C6Q>].

122. Twenty-six regulators from eighteen jurisdictions attended a February 14, 2020, roundtable discussion co-sponsored by the ABA Standing Committee on Professional Regulation, Texas A&M University School of Law, and the State Bar of Texas, Office of Chief Disciplinary Counsel. The author was a member of the planning committee for the roundtable.

123. *See* Susan Saab Fortney, *Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, 2016 J. PROF. LAW. 91, 99–109 (2016) (making recommendations based on a mixed-method study conducted on the PMBR system in New South Wales).

124. *See supra* text accompanying notes 64–94.

Based on the experience and the pilot programs, they are now positioned to implement mandatory programs and obtain full participation. In exploring proactive management-based initiatives, U.S. regulators should emulate the Canadian and Australian approaches to engaging practicing lawyers in designing proactive approaches and vigorously studying their efficacy through pilot programs.

## II. ADVANCING PUBLIC PROTECTION FOR INJURED PERSONS

Part I addressed how proactive management regulation advances public protection by helping lawyers improve their ethical infrastructure. This Part turns to a different approach to public protection in which injured persons are provided an avenue for obtaining monetary recovery through programs run by regulators. First, it considers how disciplinary systems in the U.S. do not provide injured persons an opportunity to obtain monetary recovery. For comparison, I discuss programs in the United Kingdom (“U.K.”) and Australia that allow injured persons to obtain compensation awards through disciplinary or ombudsman systems. I conclude by urging U.S. regulators to take public protection seriously by implementing changes to allow monetary awards in disciplinary proceedings.

In the U.S., courts and regulators commonly identify “public protection” as the purpose of imposing discipline on lawyers who depart from the minimum standards of professional conduct.<sup>125</sup> As suggested in the discussion above, a disciplinary system is reactive in attempting to address misconduct that has already occurred.<sup>126</sup> Although a person wronged by attorney malfeasance may file a grievance, the disciplinary regulator—not the complainant—determines whether the action moves forward and what professional discipline, if any, should be imposed.<sup>127</sup> Sanctions typically range from some form of private admonition or public reprimand, to suspension or revocation of the attorney’s license.<sup>128</sup> Although in limited circumstances disciplinary authorities or the court may order restitution, generally an injured person must seek recovery through a malpractice

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125. See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677–78 n.1 (2003) (citing numerous cases where courts have characterized the purposes of discipline as public protection). Professor Zacharias suggested that this “simplistic” characterization “masks a variety of functions that discipline might actually serve” and that “identifying the purpose of discipline more precisely would help rule-makers and disciplinary agencies achieve more consistent, and better, results.” *Id.* at 677–78.

126. See *supra* text accompanying note 48.

127. For an overview of disciplinary systems in the U.S., see Gregory C. Sisk, *supra* note 18, § 4-1.5.

128. *Id.* § 4-1.5(e) (outlining actions taken on a finding of professional misconduct).

A disciplinary proceeding, unlike tort or contract actions or summary proceedings, is not brought by a wronged client to recover what he has lost through his attorney’s malfeasance. Rather, such a proceeding is brought by those charged with the administration of justice to suspend, disbar, or otherwise discipline an attorney who has proved himself unfit to be entrusted with the duties and responsibilities belonging to the office of attorney, in order to protect the public and to maintain the dignity of the court and the legal profession.

Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney*, 75 A.L.R. Fed. 3d Art. 2 (originally published in 1977).

action.<sup>129</sup> This outcome shocks and dismays many lay people who believed that disciplinary authorities would provide relief to persons harmed by lawyers' professional misdeeds.<sup>130</sup>

Over 25 years ago, the ABA Commission on Evaluation of Disciplinary Enforcement, chaired by Robert McKay, recognized this inadequacy in the disciplinary system.<sup>131</sup> Its report described the following shortcomings with the existing disciplinary regime:

The existing system of regulating the profession is narrowly focused on violations of professional ethics. It provides no mechanisms to handle other types of clients' complaints. The system does not address complaints that the lawyer's service was overpriced or unreasonably slow. The system does not usually address complaints of incompetence or negligence except where the conduct was egregious or repeated. It does not address complaints that the lawyer promised services that were not performed or billed for services that were not authorized.<sup>132</sup>

Since the McKay Commission's report, the problem remains that state disciplinary systems generally do not provide monetary relief for persons injured by attorney neglect or negligence.<sup>133</sup> Persons damaged by lawyer malpractice must pursue their claims by filing a civil action against the attorney.<sup>134</sup> Recent empirical research and scholarship reveal how the civil liability regime provides no remedy for countless persons injured by attorney misconduct. In their book, *When Lawyers Screw Up*, Professor Herbert M. Kritzer and Neil Vidmar report on the findings of their mixed-method empirical examination of lawyers'

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129. Typically, restitution may be available when lawyers have wrongfully withheld or misused funds and property or when lawyers have not earned their fees. See Lamkin, *supra* note 128, at Art. 2 (surveying cases where the power to order restitution has been challenged).

130. As noted by a lawyer member of the Pennsylvania disciplinary board, "While clients are concerned about sanctions for the lawyer who has transgressed, what they want is a remedy, a result . . . . They want to be compensated." Marvin J. Rudnitsky, *Witnessing 'Glacial' Change*, 24 PA. LAW. 48, 50 (2002).

131. RAYMOND R. TROMBADORE, ABA, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT INTRODUCTION (1992), [https://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report/](https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/) [<https://perma.cc/UR9V-QKPP>].

132. *Id.*

133. Although the *Model Rules of Disciplinary Enforcement* allow for restitution in limited circumstances, restitution is rarely ordered. See Leslie C. Levin, *Book Review: When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109, 129 (2019) (discussing the limited circumstances and use of restitution). Although all U.S. and Canadian jurisdictions operate Client Protection Fund Programs that provide funding for programs intended to reimburse clients for financial losses they suffer from a lawyer's dishonest conduct, recovery under such programs is limited to a maximum amount per transaction. RONALD E. MALLEEN, *LEGAL MALPRACTICE* § 2.189 (2020 ed.).

134. Consumer guides advise aggrieved persons of the limitation on the actions available to disciplinary authorities. See, e.g., *File a Grievance, What the Grievance System Cannot Do*, ST. B. OF TEX., [https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/File\\_a\\_Grievance.htm#What](https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/File_a_Grievance.htm#What) [<https://perma.cc/TY7B-SZYT>] (last visited May 18, 2020) (noting that the Texas grievance systems cannot award damages).

professional liability.<sup>135</sup> Using qualitative inquiries and analysis of various data sets, they studied the state of legal malpractice claims in the U.S. and considered the challenges faced by victims of legal malpractice.<sup>136</sup> In particular, they identify the difficulties encountered by individuals and family businesses who comprise the personal services hemisphere of legal services.<sup>137</sup> Most notably, they conclude that individuals and small businesses have a significant likelihood of retaining solo and small firm lawyers who are uninsured, as compared to corporate clients who commonly hire larger firms with insurance.<sup>138</sup> The lack of insurance contributes to the unwillingness of experienced lawyers to agree to represent injured persons from the personal services hemisphere.<sup>139</sup>

A second important factor that limits the redress available to personal services clients is that a large proportion of the errors caused by lawyers in the personal services sector cause relatively modest harm to the clients.<sup>140</sup> Because of the complexity and expense associated with pursuing legal malpractice claims, the damages must be significant enough for an experienced plaintiff's attorney to agree to handle the matter on a contingent fee basis.<sup>141</sup> Despite the fact that many could establish damages caused by the lawyer's errors or omissions, the injured person is left without an ability to pursue an action when they cannot convince a plaintiff's attorney to pursue the claim when the amount of damages will not yield enough recovery to cover the costs and attorney's fees associated with prosecuting a legal malpractice claim.<sup>142</sup>

To improve the prospects for injured persons, scholars have proposed changes based on programs and initiatives implemented in other countries.<sup>143</sup> Some have proposed that U.S. jurisdictions join those common and civil law countries that require attorneys to carry insurance.<sup>144</sup>

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135. HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018).

136. In presenting a portrait of legal malpractice claims, their central argument is that the world of lawyers' professional liability is not a "unitary world," but two distinct worlds: "one involving claims in the context of legal services for individuals and family businesses and one for claims arising from the work on behalf of large corporations." *Id.* at 4.

137. *Id.* at 5.

138. *Id.*

139. *Id.* at 170.

140. *See id.* (noting that the harm may be modest in financial terms, but significant to a modest means person).

141. *Id.*

142. *See id.*

143. *See, e.g.,* Deborah L. Rhode & Alice Woolley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 30 *FORDHAM L. REV.* 2761 (2012).

144. *Id.* at 287–88; KRITZER & VIDMAR, *supra* note 135, at 170–72; *see* Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 *FLA. L. REV.* 1281, 1330 (2016) (suggesting the steps that a high court could take to explore the issue of mandatory insurance). For a discussion of the arguments in favor of mandatory insurance and responses to the opposition, *see* Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 *ST. MARY'S J. LEGAL MALPRACTICE & ETHICS* 190, 200–35 (2019) [hereinafter *Exposing Blind Spots*].

Even with a mandatory insurance scheme, the economics of legal malpractice actions still make it highly unlikely for many injured persons to be able to secure a contingency fee lawyer when the damages are not significant.<sup>145</sup> Therefore, persons who cannot establish substantial damages should be able to obtain redress through some other process.

Understanding the challenges injured persons face in bringing civil claims for damages, innovations in other countries provide aggrieved persons avenues to seek redress through the attorney regulation system. Most notably, the consumer-minded legislation in the United Kingdom created a Legal Ombudsman (“LO”) scheme to handle attorney-client disputes that do not allege serious misconduct.<sup>146</sup> Under the Scheme Rules, the LO provides assistance in helping legal service providers and complainants resolve disputes related to service.<sup>147</sup> Descriptions of the LO emphasize that the LO’s job is to “look at complaints about legal service providers in a fair way and without taking sides.”<sup>148</sup> They emphasize speed and informality, “with the goal of resolving complaints by agreement rather than a quasi-judicial process.”<sup>149</sup>

The Scheme Rules and online guidance on the LO provide laypeople a road map of the procedures for registering, handling complaints, resolving disputes, and making determinations when agreements are not reached between the complainants and legal service providers.<sup>150</sup> As defined in the rules, a complaint means an “expression of dissatisfaction [that] alleges that the complainant has suffered (or may suffer) financial loss, distress, inconvenience, or other

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145. See *Tort in Search of a Remedy*, *supra* note 15, at 2039 (noting that the ability to retain counsel with requisite expertise “largely turn[s] on the economics of representation” because “the prospective client must possess the means to fund the litigation, or the underlying case must have significant value to support a malpractice attorney handling the litigation on a contingent fee basis”); KRITZER & VIDMAR, *supra* note 135, at 147 (reporting that most of the plaintiffs’ lawyers contacted had “a nominal potential damages threshold for what they would seriously consider handling [and] thresholds ranged from as low as \$100,000 to a high of \$5 million”).

146. For a discussion of the consumer-minded features of the Legal Services Act enacted in the United Kingdom, see Rhode & Woolley, *supra* note 143, at 2781 (noting that the Act identifies “protecting and promoting the interests of consumers” as one of its key objectives).

147. *Factsheet 1, Here to Help Sort Out Problems With Your Legal Service Provider*, LEGAL OMBUDSMAN, <https://www.legalombudsman.org.uk/wp-content/uploads/2017/11/Factsheet-1-Here-to-Help.pdf> [https://perma.cc/BV6T-PJJ8] (last visited May 17, 2020).

148. *Id.* “Our Service Principles and Standards are a reflection of our core values of being Open, Fair, Independent and Effective.” Customer Service Principles and Standards, LEGAL OMBUDSMAN, <https://www.legalombudsman.org.uk/about-us/#our-principles> [https://perma.cc/34EL-VL5P].

149. *The Role of the Legal Ombudsman*, THE LAW SOC’Y, <https://www.lawsociety.org.uk/support-services/risk-compliance/regulation/legal-ombudsman/> [https://perma.cc/3B7E-6TM5] (last visited May 17, 2020).

150. See *Our Scheme Rules*, LEGAL OMBUDSMAN, <https://www.legalombudsman.org.uk/?portfolio=our-scheme-rules> [https://perma.cc/3YQA-3KB2] (last visited May 17, 2020). “Ordinarily a complainant cannot use the Legal Ombudsman unless the complainant has first used the [legal service provider’s] complaints procedures.” LEGAL OMBUDSMAN, SCHEME RULES 4.1 (2019), <https://www.legalombudsman.org.uk/wp-content/uploads/2019/03/Scheme-Rules-1-April-2019.pdf> [https://perma.cc/3YQA-3KB2]. Generally, the provider has eight weeks to resolve the complaint to the complainant’s satisfaction. *Id.* at 4.2.

detriment.”<sup>151</sup> Once a complainant refers the matter to the LO, the LO attempts to resolve the complaint “at the earliest possible stage, by whatever agreed outcome is considered appropriate.”<sup>152</sup> When such a resolution is not possible, the LO may investigate the complaint and do the following: (1) ensure that both parties have an opportunity to make representations, (2) send the parties a case decision with a time limit for response, and (3) if any party indicates disagreement within that time limit, arrange for an ombudsman to issue a final decision.<sup>153</sup>

In deciding complaints, the LO will determine what is fair and reasonable based on the circumstances of the case.<sup>154</sup> The LO’s determination may issue directives that legal services providers take actions such as apologizing or paying compensation and interest to the complainant.<sup>155</sup> The Scheme Rules provide that the LO’s determination of compensation and costs cannot exceed £50,000.<sup>156</sup> To provide guidance and transparency, the LO publishes data on all cases that required an ombudsman’s decision.<sup>157</sup> The Annual Report for the year ending March 31, 2019 indicated that financial remedies were recorded in 40% of the complaints.<sup>158</sup>

In Australia, the Uniform Legal Services Profession Act gives aggrieved persons an alternative to going to court to seek compensation from legal services providers.<sup>159</sup> Rather than creating a separate body to resolve disputes between legal services providers and complainants, the Act empowers disciplinary tribunals and the Legal Services Commissioner (“LSC”) to award compensation

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151. *Id.* at 1.6.

152. *Id.* at 5.17.

153. *Id.* at 5.19.

154. *Id.* at 5.36, 5.37.

155. The ombudsman’s determination may contain one or more of the following directions to the legal services providers:

- (1) to apologize;
- (2) to pay compensation of a specified amount for loss suffered;
- (3) to pay interest on that compensation from a specified time;
- (4) to pay a specified amount of compensation for inconvenience/distress caused;
- (5) to ensure (and pay for) putting right any specified error, omission or other deficiency;
- (6) to take (and pay for) any specified action in the interests of the complaint;
- (7) to pay a specified amount for costs the complainant incurred in pursuing the complaint;
- (8) to limit fees to a specified amount.

*Id.* at 5.38.

156. *Id.* at 5.43. The Press Release that announced that the maximum that the LO could reward was increased from £30,000 to £50,000 reported that the majority of the complaints resulted in orders of less than £1,000. Legal Ombudsman Press Release, [http://www.legalombudsman.org.uk/downloads/documents/press\\_releases/0213-New-powers-for-the-Legal-Ombudsman.pdf](http://www.legalombudsman.org.uk/downloads/documents/press_releases/0213-New-powers-for-the-Legal-Ombudsman.pdf) [https://perma.cc/8L5B-Q4S4].

157. *Policy Statement, Publishing our Decisions* (2016), LEGAL OMBUDSMAN, <https://www.legalombudsman.org.uk/wp-content/uploads/2014/09/Publishing-Decisions-policy-statement-mar16.pdf> [https://perma.cc/A4LU-LLX6].

158. LEGAL OMBUDSMAN, OFFICE FOR LEGAL COMPLAINTS, ANNUAL REPORT AND ACCOUNTS FOR YEAR ENDING 31 MARCH 2019 14 (2019), <https://www.legalombudsman.org.uk/wp-content/uploads/2019/09/FINAL-OLC-Annual-Report-2018-19-Online.pdf> [https://perma.cc/55T5-BTTD].

159. Legal Profession Uniform Law (NSW) No. 16a § 306 (2018).



awards in limited circumstances.<sup>160</sup> In states that have adopted the Act, the maximum compensation award is A\$25,000.<sup>161</sup>

A few scholars have urged U.S. jurisdictions to adopt an ombudsman or compensation scheme similar to those used in the U.K., Australia, and other jurisdictions.<sup>162</sup> In their book, *When Lawyers Screw Up*, Professors Kritzer and Vidmar address practical issues on implementing a system similar to the ombudsman service.<sup>163</sup> In her review of their book, Professor Leslie C. Levin analyzes changes necessary to make monetary awards available in disciplinary proceedings in the U.S.<sup>164</sup> Despite the feasibility of such changes, Levin concludes by noting that the biggest problem is not devising solutions, but “the lack of will by the courts, legislatures, and the bar to adequately protect the public when lawyers screw up.”<sup>165</sup>

### III. TACKLING SEXUAL HARASSMENT IN THE LEGAL PROFESSION

This Part turns to the regulators’ role in addressing serious issues related to sexual harassment in the legal profession. To provide perspective on the nature and extent of the problem, I provide information on high profile sexual misconduct cases involving lawyers and empirical data related to sexual harassment in the legal workplace. I then review how regulators in Australia, New Zealand, the United Kingdom, and Canada are attempting to address sexual harassment. I conclude by recommending that U.S. regulators take steps to help lawyers prevent and deal with the sexual harassment where they work.

In 1994, a jury in California sent a clear message by awarding \$7.1 million in punitive damages in a sexual harassment case against a lawyer and his firm, Baker McKenzie.<sup>166</sup> At the time, Baker McKenzie was the world’s largest law firm, and the verdict was believed to be the largest ever in a sexual harassment

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160. The LSC can award compensation when the LSC is satisfied: (1) “that the complainant has suffered a direct loss as a result of the conduct complained of;” (2) “the complainant has not received and is not entitled to compensation from another source,” such as a court or the fidelity fund, and (3) “it is just and fair to order compensation.” See *Complaint Process*, OFFICE OF LEGAL SERVICES COMM’R, [http://www.olsc.nsw.gov.au/Pages/lsc\\_complaint/lsc\\_complaintprocess.aspx#CantheLSCawardcompensation?Ifso,isthereatimelimit?](http://www.olsc.nsw.gov.au/Pages/lsc_complaint/lsc_complaintprocess.aspx#CantheLSCawardcompensation?Ifso,isthereatimelimit?) [https://perma.cc/9YEV-WF9P] (last visited Apr. 10, 2020). In rare circumstances, a disciplinary tribunal may award compensation up to \$25,000. *Id.*

161. Where the compensation order is made by the designated tribunal, the maximum award is A\$25,000 or a greater amount agreed to with the consent of both the complainant and the respondent lawyer or law practice. Legal Profession Uniform Law (NSW) No. 16a § 308 (2018).

162. See Rhode & Woolley, *supra* note 143, at 2787; KRITZER & VIDMAR, *supra* note 135, at 176–79; *Tort in Search of a Remedy*, *supra* note 15, at 2055–56; Levin, *Book Review: When Lawyers Screw Up*, *supra* note 133, at 131.

163. KRITZER & VIDMAR, *supra* note 135, at 177–78.

164. Levin, *Book Review: When Lawyers Screw Up*, *supra* note 133, at 131–32.

165. *Id.* at 134.

166. Jane Gross, *Jury Awards \$7.1 Million in a Sex Case*, N.Y. TIMES, Sept. 2, 1994, at A16 [hereinafter *Baker McKenzie Jury Award*]. The trial court reduced the punitive damage award to \$3.5 million. *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1137–45 (1998).

case.<sup>167</sup> In her complaint, plaintiff Rena Weeks, a former secretary, alleged that partner Martin R. Greenstein sexually harassed her.<sup>168</sup> After filing the complaint, the plaintiff learned that other women had experiences with Greenstein similar to hers.<sup>169</sup> At trial, the plaintiff offered evidence that Greenstein's conduct unreasonably interfered with the plaintiff's work performance and/or created an intimidating, hostile, or offensive working environment.<sup>170</sup> At trial and on appeal, the firm disputed its liability for punitive damages.<sup>171</sup> On appeal, the California State Court of Appeals upheld the punitive damage award, concluding that the evidence supported the finding that the firm consciously disregarded the rights and safety of others by failing to take reasonable steps to prevent Greenstein's misconduct.<sup>172</sup>

At the time, commentary suggested that the jury award sent a powerful message about "employer's responsibility to respond promptly and vigorously to sexual harassment complaints, even when they come from low-level employees against powerful bosses."<sup>173</sup> Experts opined that the *Weeks* case would serve as a "wake-up" for firms that turn a "blind eye" to sexual harassment complaints.<sup>174</sup> The case "sent a message that 'juries take sexual harassment seriously and [lawyers] have to as well.'"<sup>175</sup>

Fast-forward to 2019. Twenty-five years after the *Weeks* verdict, it is "unclear just how much the legal profession did wake up to the problem" of sexual

167. *\$7.1 Million Awarded in Harassment: Courts: World's largest law firm is ordered to pay former secretary twice as much in punitive damages as she had sought. Company says it will appeal*, L.A. TIMES (Sept. 2, 1994), <https://www.latimes.com/archives/la-xpm-1994-09-02-mn-33865-story.html> [<https://perma.cc/9GJT-CQU6>]. The jury awarded nearly twice the amount sought by the plaintiff. *Id.*

168. For the facts of the case, see *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1137–45 (1998).

169. *See id.* at 1145. According to the court's account of facts, the firm dealt with prior sexual harassment complaints involving Greenstein in both the Chicago and Palo Alto offices. *Id.* at 1138–43.

170. *Id.* at 1147.

171. *Id.* at 1153. Based on the evidence related to the firm's conduct, the jury affirmatively answered "yes" to the following question:

Has plaintiff Rena Weeks provided by clear and convincing evidence that defendant Baker & McKenzie (a) had advance knowledge of the unfitness of defendant Martin R. Greenstein and with a conscious disregard of the rights or safety of others continued to employ him, or (b) ratified the conduct of Mr. Greenstein which is found to be oppression or malice?

*Id.*

172. *See id.* at 1159 ("Whatever the cause of Baker & McKenzie's inaction, it certainly tended to communicate both to Greenstein and to those who worked around him that Baker & McKenzie did not take his misconduct seriously.")

173. *Baker McKenzie Jury Award*, *supra* note 166, at 16. In referring to the jury decision, one workplace expert stated, "I would read it as law firms are not allowed to ignore the law . . . [and] a statement that highly successful professionals or revenue-producers are not entitled to be uncivil to support staff." *Id.*

174. Jane Gross, *When the Biggest Firm Faces Sexual Harassment Suit*, N.Y. TIMES, July 29, 1994, at 7 [hereinafter *When the Biggest Firm Faces Sexual Harassment Suit*].

175. Martha Neil, *Hidden Harassment*, 92 A.B.A. J. 42, 43 (Mar. 2006) (quoting Michael J. Leech, a professional liability expert). Another expert suggested that more awareness of sexual harassment may not translate to change in behavior. *Id.* (quoting Patricia K. Gillette, a labor and employment expert).

harassment in its ranks.<sup>176</sup> In another high-profile controversy involving sexual harassment at Baker McKenzie, the firm and three individuals are defending against misconduct claims involving sexual harassment by Gary Senior, the former managing partner of the firm's London office.<sup>177</sup> In a professional discipline case, the Solicitor's Regulatory Authority ("SRA") alleges that Senior "behaved in an inappropriate manner" toward a female associate.<sup>178</sup> The SRA is also prosecuting actions against the firm, its former human resources head, and its former litigation partner.<sup>179</sup> The SRA alleges that they failed to properly investigate the sexual harassment and failed to properly report serious misconduct to the SRA.<sup>180</sup> At a hearing, the SRA prosecutor stated that the firm's investigation amounts to "a collective failure to ask the right questions."<sup>181</sup> In a statement, the firm admitted that their "internal processes fell short of what should be expected and were undermined in a way that was unacceptable and should never have happened."<sup>182</sup> In acknowledging that there were "significant shortcomings" in the procedures they followed, the firm "introduced and reinforced robust processes to ensure these shortcomings can never be repeated."<sup>183</sup>

The circumstances of the 1992 case against Baker McKenzie and the 2019 matter against Baker McKenzie are strikingly similar. Both involve alleged sexual harassment by powerful partners, a junior female employee who reported the

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176. *Id.*

177. Kate Beioley, *Baker McKenzie Criticized Over Handling of Harassment Complaint*, FIN. TIMES (Dec. 2, 2019), <https://www.ft.com/content/15155bc0-152c-11ea-9ee4-11f260415385> [<https://perma.cc/9QS2-Z632>].

178. James Booth, *Former Baker McKenzie London Head Gary Senior to Face Prosecution for Alleged Sexual Harassment*, CITY A.M. (July 30, 2019), <https://www.cityam.com/former-baker-mckenzie-london-head-gary-senior-to-face-prosecution-for-alleged-sexual-harassment/> [<https://perma.cc/4S2Y-WABA>]. "In 2012 Senior is alleged to have 'sought to initiate intimate activity with Person A' in circumstances where he was in a position of responsibility over Person A and knowingly caused Person A to be alone with him." *Id.* For the full account of the referral from the Solicitors Disciplinary Tribunal to the SRA, see Gary Senior, Solicitor, Case Number 135131, Decision – Prosecution, published July 30, 2019, available at <https://www.sra.org.uk/consumers/solicitor-check/135131/> [<https://perma.cc/4L5F-DDL5>]. At a December 2019 hearing before the Solicitors Disciplinary Tribunal, Senior admitted that behavior toward the associate had been "inappropriate" and "clearly an unwanted situation." Monidipa Fouzder, *Former Baker McKenzie Chief Admits 'Inappropriate' Behaviour*, L. SOC'Y GAZETTE (Dec. 4, 2019), <https://www.lawgazette.co.uk/news/former-baker-mckenzie-chief-admits-inappropriate-behaviour-5102395.article> [<https://perma.cc/33JZ-VLW2>].

179. Booth, *supra* note 178.

180. Baker McKenzie LLP, Case No. 421456, Decision – Prosecution, published July 30, 2019, available at <https://www.sra.org.uk/consumers/solicitor-check/421456/> [<https://perma.cc/U8JQ-AWPD>]. Among other errors, the SRA alleges that the firm's partners allowed Senior to improperly influence the internal investigation and its outcome. In referring the matter for a hearing before the SRA, the Solicitors Disciplinary Tribunal set forth its decision and allegations against the firm and its partners. For specifics on the prosecution referral of the firm and links to the charging documents against the partners, see *id.*

181. See Beioley, *supra* note 177 (reporting that Senior received a written warning after apologizing and the associate left the firm after signing a non-disclosure agreement).

182. Booth, *supra* note 178.

183. *Id.*

misconduct to firm representatives, and alleged improper handling of the concerns by firm principals.<sup>184</sup>

Despite the similarities, there is one major difference between the two matters. In 2019, the SRA made the allegations, rather than a private litigant.<sup>185</sup> This disciplinary prosecution marks a watershed event in lawyer regulation. Such disciplinary actions against partners in large firms are rare.<sup>186</sup>

Although disciplinary authorities occasionally allege a failure to report misconduct, the SRA action against Baker McKenzie represents a turning point in lawyer regulation because the regulator was challenging sexual misconduct involving a co-worker, not a client.<sup>187</sup> Noting that “times have changed,” one journalist recognized the new chapter in regulation by stating: “This year, largely thanks to the #MeToo movement, a series of top London lawyers have been investigated by the Solicitors Regulation Authority and subsequently called to appear before the Solicitors Disciplinary Authority.”<sup>188</sup> The journalist contrasted the prosecutions in the U.K. with the U.S., a much bigger market where there have been far fewer high-profile cases of top lawyers being tried or punished.<sup>189</sup>

In the U.S., very few disciplinary actions involving sexual harassment by colleagues have been litigated.<sup>190</sup> Given the large percentage of women lawyers who suffered or have seen harassment, the number of prosecutions may be “scratching the surface.”<sup>191</sup>

Although sexual harassment in the legal profession appears to be widespread, evidence related to its occurrence, reporting, and response is largely anecdotal.<sup>192</sup> All indications are that the number of reported claims underrepresents the prevalence of sexual harassment in the legal profession because the majority of victims do not report the misconduct.<sup>193</sup>

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184. See generally Gross, *supra* note 174 (suggesting that the partnership structure in which top lawyers share profits hobbles elimination of sexual harassment because partners have “a special interest in protecting each other”).

185. For a discussion of the SRA’s case against Baker McKenzie, see Beioley, *supra* note 177.

186. See Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 685 (2011) (noting that bar authorities seldom mete out discipline to lawyers in larger law firms).

187. Paul Hodkinson, *U.K. Lawyers are Facing Heavy Scrutiny for Misconduct. Will the Same Happen Here?*, AM. LAW. (Nov. 8, 2019), <https://www.law.com/americanlawyer/2019/11/08/u-k-lawyers-are-facing-heavy-scrutiny-for-misconduct-will-the-same-happen-here/> [<https://perma.cc/PA8M-2L24>].

188. *Id.*

189. See *id.* (suggesting differences may be attributed to the decentralized nature of the U.S. system, because state-level bodies do not get the same degree of attention as a national regulatory authority).

190. See Katherine Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57, 68 (2019) (discussing reported cases and potential explanations for under or nonenforcement).

191. See Hodkinson, *supra* note 187 (suggesting that most female lawyers have suffered or seen sexual harassment).

192. See Neil, *supra* note 175, at 43.

193. A March 2018 survey of 3000 people working mostly in law firms revealed that 68% of female respondents said they had experienced sexual harassment but only 30% reported it. Susan G. Hauser, *Time’s*

Studies and reports point to the large percentage of lawyers who have experienced or observed sexual harassment.<sup>194</sup> According to data from the “After the JD Study,” a large longitudinal research project in the U.S., more than one in five white women (21.9%) and one in four minority women (25.3%) report experiencing harassing behavior at work.<sup>195</sup>

In the largest-ever global survey of nearly 7000 legal professionals in 135 countries, one in three female respondents and one in fourteen male respondents reported that they had been sexually harassed.<sup>196</sup> According to the study conducted by the International Bar Association’s Legal Policy and Research Unit, 75% of sexual harassment cases globally go unreported.<sup>197</sup> Horacio Bernarde Neto, the International Bar Association (“IBA”) president, stated that the research provides “quantitative confirmation that bullying and sexual harassment are endemic in the legal profession.”<sup>198</sup> To raise awareness of the problem and inform the development of solutions, the report analyzes data and outlines ten recommendations for achieving positive change.<sup>199</sup> Recommendations cover steps that should be taken by employers, bar associations, legislators, professional regulators, and individual members of the profession.<sup>200</sup>

One recommendation urges bar associations, law societies, and professional regulators to engage more actively with their counterparts to discuss issues related to sexual harassment and bullying.<sup>201</sup> Through increased dialogue and best practice sharing, regulators and stakeholders can examine different approaches and learn about the effectiveness of initiatives designed to deal with a problem that plagues the legal profession worldwide.<sup>202</sup>

*Up Oregon: Reckoning with Sexual Harassment in the State’s Legal Community*, 79 OR. ST. B. BULLETIN 30, 31 (Sept. 2019) (reporting on results of a survey conducted by the ABA and Working Mother Research Institute). In the study, 52% indicated that they did not report the harassment because they feared doing so would negatively impact their jobs. *Id.*

194. *See, e.g.*, Lauren Stiller Rikleen, SURVEY OF WORKPLACE CONDUCT AND BEHAVIORS IN LAW FIRMS (Women’s Bar Ass’n of Mass. 2018), <https://wbawbf.org/sites/WBAR-PR1/files/WBA%20Survey%20of%20Workplace%20Conduct%20and%20Behaviors%20in%20Law%20Firms%20FINAL.pdf> [<https://perma.cc/N4SU-C7QL>] (reporting on the results of a 2018 survey that revealed that 28% of the respondents indicated that they felt they needed to engage in sexual behavior or develop a personal relationship in order to advance their careers).

195. Heather Antecol et al., *Bias in the Legal Profession: Self-Assessed Versus Statistical Measures of Discrimination*, 43 J. LEGAL STUD. 323, 332–33 (2014).

196. INT’L BAR ASS’N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 11 (2019), <https://www.ibanet.org/bullying-and-sexual-harassment.aspx> [<https://perma.cc/AX25-B764>] [hereinafter IBA REPORT].

197. *Id.* at 62 (noting that sexual harassment is “chronically underreported” and that there is “remarkably little variation in reporting rates by age, region or workplace”).

198. *Id.* at 7.

199. *Id.* at 10.

200. *Id.* at 99–111.

201. *Id.* at 102–03.

202. An appendix to the IBA Report outlines the key approaches to regulating bullying and sexual harassment in eleven jurisdictions, selected for their geographical, legal, and cultural diversity. *Id.* at 123. The analysis divides the regulatory approaches used into two categories: one that regulates sexual harassment as a form of discrimination and the other that regulates sexual harassment through the concept of personal dignity. *Id.*

Regulators in Australia, New Zealand, Canada, and the U.K. have implemented new programs to address sexual harassment in the profession.<sup>203</sup> These efforts recognize that effectively dealing with sexual harassment requires alternative approaches, rather than relying on the one-track disciplinary system of investigating and prosecuting complaints after they occur.

In Australia, professional regulators and bar leaders have made efforts to address concerns related to data gathering and reporting.<sup>204</sup> For example, the Bar in the Australian State of Victoria launched new conduct policies and related procedures dealing with sexual harassment, bullying, and discrimination.<sup>205</sup> Under the new policies and procedures, formal complaints of sexual harassment can be based on a barrister's violation of the conduct rule that prohibits sexual harassment in the course of legal practice.<sup>206</sup> In addition to formal complaints, barristers or persons who engage with barristers have two other options under the Victorian Bar internal grievance regime.<sup>207</sup> Under the internal process, a barrister may file a complaint against another barrister, seeking an investigation and response.<sup>208</sup>

When complaints are filed, the Bar uses the services of respected barristers who are trained to conciliate complaints and provide advice.<sup>209</sup> This conciliation appears to function as a form of voluntary mediation.<sup>210</sup> An alternative avenue is to report the occurrence of sexual harassment that the person experienced or witnessed.<sup>211</sup> The purpose of filing such reports is to better inform the training and awareness needs and initiatives of the Bar.<sup>212</sup> All information submitted to the Bar is treated confidentially and the identity of the person making such reports will not be disseminated or publicized in statistical reporting or in any other way.<sup>213</sup>

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203. See *infra* text accompanying notes 204–37.

204. For a comprehensive report on the status of efforts in Australia, see LAW COUNCIL OF AUSTRALIA, ADDRESSING SEXUAL HARASSMENT IN THE AUSTRALIAN LEGAL PROFESSION, DISCUSSION PAPER (July 2019), <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2019JUL16-Law-Council-Australia-Discussion-Paper-Addressing-Sexual-Harassment-in-the-Profession.pdf> [<https://perma.cc/255C-RNC2>].

205. See Press Release, Victorian Bar, Victorian Bar Supports Initiative to Address Sexual Harassment (Feb. 6 2019), <https://www.vicbar.com.au/news-events/media-release-victorian-bar-supports-initiative-address-sexual-harassment> [<https://perma.cc/ASM3-VVHF>] [hereinafter Victorian Bar Press Release] (announcing that the policies “outline the Bar’s processes for reporting or making complaints regarding instances of bullying, discrimination, and sexual harassment by barristers or persons who engage with barristers”).

206. See VICTORIAN BAR, *Policy Against Sexual Harassment*, <https://www.vicbar.com.au/sites/default/files/Policy%20Against%20Sexual%20Harassment.pdf> [<https://perma.cc/D85U-HNJ5>] (referring to Legal Profession Uniform Conduct (Barristers) Rule 123(b)).

207. *Id.*

208. See *id.* (“A Complaint of sexual harassment will be investigated and may be independently conciliated, where possible, to a mutually agreed outcome.”)

209. See Victorian Bar Press Release, *supra* note 205.

210. The conciliation route does not prevent a more formal complaint process from being initiated. See *Victorian Sexual Harassment Policy*, *supra* note 206.

211. *Id.*

212. *Id.*

213. *Id.* The online complaint and report form is available at [https://vicbar.formstack.com/forms/sexual\\_harassment\\_discrimination\\_and\\_workplace\\_bullying](https://vicbar.formstack.com/forms/sexual_harassment_discrimination_and_workplace_bullying) [<https://perma.cc/4WVVR-ZF8L>] (last visited Apr. 10, 2020).

The Victorian policies and procedures provide options to aggrieved parties concerned about pursuing complaints through the formal grievance process. They also enable trained conciliators to assist the aggrieved person and barrister with reaching a mutually agreeable outcome. The reporting option advances the collection of data from persons who observed or experienced sexual harassment but are unwilling to pursue a formal complaint.<sup>214</sup> In doing so, the confidential reporting process gives a “voice” to persons who otherwise may suffer in silence.<sup>215</sup>

To the south of Victoria, the New Zealand Law Society appointed a Working Group to study and report on the regulatory responses to sexual harassment complaints and other types of inappropriate workplace behavior.<sup>216</sup> Following the release of the Working Group’s comprehensive report, the New Zealand Law Society accepted a number of the recommendations, including the creation of a Specialized Complaints Unit for dealing with complaints related to sexual harassment and other types of personal conduct issues.<sup>217</sup> As described, the unit is to be staffed by nonlawyers with expertise in receiving sexual harassment and other workplace complaints and offering support.<sup>218</sup> The unit would not share information with the Law Society, but would provide support and assistance for people considering making a complaint.<sup>219</sup> The Law Society is moving forward with the creation of the specialized unit.<sup>220</sup>

The specialized unit described in the New Zealand Working Group report operates in a similar manner to the Office of the Discrimination and Harassment Counsel (“DHC”) in the Canadian province of Ontario.<sup>221</sup> The DHC program is

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214. According to Kieran Pender, the legal adviser to the IBA’s policy and research unit who led the IBA Study, found that “targets of bullying and sexual harassment very rarely report the misconduct to their workplaces or regulators” because of “the status of the perpetrators, fear of repercussions, and because the incidents are often endemic to the workplace.” Michaela Whitbourn, *Sexual Harassment ‘Alarming Commonplace’ Among Australian Lawyers*, THE SYDNEY MORNING HERALD (May 15, 2019), <https://www.smh.com.au/business/workplace/sexual-harassment-alarming-commonplace-among-australian-lawyers-20190509-p511od.html> [<https://perma.cc/6XFA-R76X>].

215. See Martinez, *supra* note 17, at 845–54 (proposing an online survey to combat the deleterious effects of silence by giving persons who have faced harassment, discrimination, and bias opportunities to voice their concerns and experiences).

216. The report notes that creation of the Working Group followed criticism on the handling of complaints related to sexual misconduct. See N.Z. LAW SOC’Y, REPORT OF THE NEW ZEALAND LAW SOCIETY WORKING GROUP (2018), [https://www.lawsociety.org.nz/\\_data/assets/pdf\\_file/0007/129922/Report-of-the-NZLS-Working-Group-December-2018.pdf](https://www.lawsociety.org.nz/_data/assets/pdf_file/0007/129922/Report-of-the-NZLS-Working-Group-December-2018.pdf) [<https://perma.cc/TB49-PU3Y>].

217. *Id.* at 13.

218. *Id.*

219. *Id.*

220. N.Z. LAW SOC’Y, *Law Society Plans Changes to Regulatory Process for Lawyers Accused of Inappropriate Behaviour* (Dec. 17, 2018), <https://www.lawsociety.org.nz/news-and-communications/news/law-society-plans-changes-to-regulatory-process-for-lawyers-accused-of-inappropriate-behaviour> [<https://perma.cc/5VFS-CQZD>].

221. Amy Salzyn, *Are Canadian Law Societies Ready for the Legal Profession’s Me-Too Moment? (Spoiler: Probs Not)*, SLAW (Feb. 7, 2019), <http://www.slw.ca/2019/02/07/are-canadian-law-societies-ready-for-the-legal-professions-me-too-moment-spoiler-probs-not/> [<https://perma.cc/WXQ2-A359>] (noting similarities between the New Zealand specialized complaints unit and the Ontario Discrimination and Harassment Counsel).

designed to prevent and respond to human rights based discrimination and harassment by Ontario lawyers, paralegals, and student members of the Law Society.<sup>222</sup> Persons who have either witnessed discrimination or harassment by a lawyer or a paralegal, or experienced such discrimination or harassment, may seek guidance and support from the DHC.<sup>223</sup> The DHC provides free confidential assistance, but does not operate a formal complaints process.<sup>224</sup> By request, the DHC may help the complainant by intervening informally as a neutral facilitator or by conducting formal mediation.<sup>225</sup> Persons can anonymously contact the DHC and obtain assistance from the DHC without disclosing either their own identity or the identity of the lawyer or paralegal about whom they have concerns.<sup>226</sup>

In addition to providing a range of confidential services to individuals who have concerns or complaints, the DHC provides anonymized statistical data to the Law Society of Ontario.<sup>227</sup> The DHC's bi-annual report provides information on the numbers and types of concerns and complaints, enabling the Law Society "to better address systemic issues of discrimination and harassment in the legal professions."<sup>228</sup> Leaders in the Canadian bar rely on data from the reports in helping lawyers understand the nature of harassment and discrimination in the legal profession and formulate steps to address the problems.<sup>229</sup>

In practice, non-disclosure agreements ("NDAs") can prevent regulators from gathering data and learning about incidents of sexual harassment.<sup>230</sup>

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222. The program was first established in 1999 to stop discrimination and harassment by lawyers and expanded to include complaints against paralegals when the Law Society began regulating paralegals in 2007. *See About DHC, DISCRIM. AND HARASSMENT COUNSEL PROGRAM*, <http://www.dhcounsel.on.ca/about-dhc.html> [<https://perma.cc/65QX-R2G9>].

223. The DHC website described the following services: "Listening to [] concerns; Clarifying the issues; Providing confidential information and advice; Reviewing your options and avenues of recourse (such as, for example, filing a complaint with the Law Society of Ontario or filing an application with the Ontario Human Rights Tribunal); Explaining the advantages and disadvantages of each option; and Referring [complainant] to other resources that may be of assistance." *See Services, DISCRIM. AND HARASSMENT COUNSEL PROGRAM*, <http://www.dhcounsel.on.ca/services.html> [<https://perma.cc/3NW4-XK2S>].

224. Persons desiring to file a formal complaint are directed to contact the Complaints Services department at the Ontario Law Society. *See id.*

225. *Id.*

226. *See FAQs, DISCRIM. AND HARASSMENT COUNSEL PROGRAM*, <http://www.dhcounsel.on.ca/faqs.html> [<https://perma.cc/3MXR-MASJ>].

227. FAY FARADAY ET AL., REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL FOR THE LAW SOCIETY OF ONTARIO, JULY 1, 2018–DECEMBER 31, 2018, at 1.

228. *Id.*

229. *See, e.g., Anita Balakrishnan, Harassment and Discrimination Complaints Skyrocket*, L. TIMES (Oct. 29, 2018), <https://www.lawtimesnews.com/practice-areas/human-rights/harassment-and-discrimination-complaints-skyrocket/263282> [<https://perma.cc/2Q2B-EH7D>] (quoting a presentation by the chair of the Law Society of Ontario's Equity and Indigenous Affairs Committee who presented the DHC statistics in urging others to take the issue of harassment and discrimination "seriously" and to improve).

230. This is a particular concern when an NDA may be used by a firm to chill reporting professional misconduct to the regulator. *See SOLICITORS REGULATORY AUTH., WARNING NOTICE, USE OF NON-DISCLOSURE AGREEMENTS (NDAS)*, issued Mar. 12, 2018, updated Nov. 25, 2019, <https://www.sra.org.uk/solicitors/guidance/warning-notice/use-of-non-disclosure-agreements-ndas-warning-notice/> [<https://perma.cc/BAR4->



Understanding that NDAs may be misused and undermine firms' and solicitors' responsibility to report misconduct, the SRA announced its position on NDAs.<sup>231</sup> In a March 2018 Warning Notice to solicitors and firms, the SRA cautioned the use of NDAs, noting that the SRA is concerned about the following:

[Using] NDAs in circumstances in which the subject of the NDA may, as a result of the use of the NDA, feel unable to notify the SRA or other regulators or law enforcement agencies of conduct which might otherwise be reportable;

[Failing] to notify the SRA of misconduct, or a serious breach of our regulatory requirements, by any person or firm: including wrongdoing by the firm, or harassment or other misconduct towards others such as employees or clients; and

[Using] NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies.<sup>232</sup>

The Warning Notice noted that inappropriate use of NDAs and failure to report actual or suspected misconduct, or other wrongdoing, criminal, and other inappropriate conduct, in connection with NDAs may breach one or more of the SRA Principles.<sup>233</sup>

Although the SRA has warned solicitors and firms about their reporting obligations, in a written submission to the Parliament, the SRA stated, "We do not anticipate taking any action against a solicitor for not reporting allegations of sexual harassment, where they had been the victim."<sup>234</sup>

The SRA announced that there was a clear increase in the number of reports they received on sexual harassment after they issued the warning on the inappropriate use of NDAs and the need to report concerns.<sup>235</sup> According to Paul Philip, the Chief Executive of the SRA, "This increase in the number of reports we received suggested that firms were taking these reports seriously."<sup>236</sup>

H5T2] (noting the SRA's concerns that subjects of NDAs may "feel unable to notify the SRA or other regulator or law enforcement agencies of conduct which might otherwise be reportable").

231. *Id.* Although the guidance in the notice is not part of the SRA Standards and Regulations, the Warning Notice states that the SRA "may have regard to it when exercising our regulatory functions." *Id.*

232. *Id.*

233. *Id.*

234. Solicitors Regulation Auth., *Written Submission from Solicitors Regulation Authority (SHW0021) to the Parliament* (Mar. 2018), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidence/document/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80184.html> [<https://perma.cc/7VM9-3AAS>].

235. Adam McCulloch, *Steep Rise in Sexual Harassment Complaints Involving Law Firms*, PERSONNEL TODAY (July 26, 2019), <https://www.personneltoday.com/hr/law-firms-use-of-ndas-to-hide-sexual-harassment-under-scrutiny/> [<https://perma.cc/7HDS-2J6G>].

236. *Id.*

As reflected by the SRA Warning Notice, their prosecutions of complaints involving sexual harassments, and efforts to improve the handling of complaints related to sexual harassment, the SRA is actively attempting to address sexual harassment among solicitors and firms.<sup>237</sup>

The progressive work of regulators in the U.K., Canada, New Zealand, and Australia should inspire U.S. regulators, bar associations, and firm leaders to reexamine the manner in which they approach the serious problem of sexual misconduct. States that have not yet adopted a rule of professional conduct that expressly addresses sexual harassment and misconduct should consider doing so.<sup>238</sup> Disciplinary authorities should also examine their handling of complaints that are made. Larger jurisdictions could follow the example of the SRA and employ lawyers with special expertise to handle complaints involving sexual harassment claims.<sup>239</sup> Following the collaborative approach Canadian provinces used in exploring proactive regulation,<sup>240</sup> the National Organization of Bar Counsel (“NOBC”) could develop approaches for handling sexual misconduct concerns in states with smaller lawyer populations and regulatory resources.

U.S. regulators and bar associations should work together to expose and address sexual misconduct in the legal profession. This effort requires tackling the problem from the perspective of the victim, as well as those who know about the misconduct.

First, in focusing on the position of persons who have been the targets of harassment, jurists, bar leaders, and regulators should recognize and address the impediments that impact the willingness of people to share their experiences and report misconduct. Most obviously, victims may be concerned about embarrassment, poor treatment,<sup>241</sup> and possible retaliation.<sup>242</sup> To address the possibility of

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237. Improvements in handling sexual harassment claims include using a dedicated in-house team with specialists trained in working with vulnerable witnesses. Letter from Paul Philip, Chief Exec. of Solicitors Regulation Auth. to Representative Miller MP, Chair of Women and Equalities Comm., UK House of Commons (Sept. 2018), <https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/180907-SRA-sexual-harassment-in-the-workplace.pdf> [<https://perma.cc/MC4D-3QFD>] [hereinafter Letter from Paul Philip].

238. For a discussion of the effectiveness of ABA Model Rule 8.4(g) and state versions of anti-discrimination rules, as well as the critique of the rules and steps to improve their effectiveness, see Martinez, *supra* note 17, at 820–33, 854–62.

239. See Letter from Paul Philip, *supra* note 237 (referring to the specially trained personnel that the SRA uses to work with vulnerable witnesses).

240. See *supra* text accompanying notes 89–94 (discussing the joint effort of the Law Societies of Alberta, Saskatchewan, and Manitoba to examine proactive management-based regulation).

241. One commentator suggests that the sparse case law involving law firm discrimination relates to lawyers' "reluctance. . . to speak out against discriminating employers" and concerns related to "professional ridicule and blackballing." Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 789 (2004).

242. In the large survey conducted by the IBA 75% of the sexual harassment respondents indicated that they had never reported the misconduct. IBA REPORT, *supra* note 196, at 106. The survey stated, "[a]mong the most commonly cited reasons for not reporting was fear of repercussion and a lack of confidence in reporting procedures." *Id.*

retaliation, steps should be taken to protect persons who report misconduct. Although state and federal laws provide remedies, current law presents hurdles for persons who encounter retaliation after reporting harassment and discriminatory conduct.<sup>243</sup> Rather than relying on applicable federal or state laws that provide remedies for retaliation under limited circumstances, state courts could recognize a cause of action for lawyers asserting adverse employment actions taken after reporting misconduct by another lawyer.<sup>244</sup>

Regardless of protections that may be afforded under applicable law or ethics rules, victims of sexual harassment may still feel uncomfortable reporting incidents internally or externally. They nevertheless could benefit from having an avenue to confidentially share their experiences and concerns. As discussed above, bar leaders and regulators in other countries evidently understood this when they created a confidential process through which aggrieved persons could share what they experienced or observed.<sup>245</sup> Following the lead of these jurisdictions, bar associations and regulators in the U.S. should explore providing an alternative means for persons to confidentially share information and obtain assistance.<sup>246</sup> The ABA Commission on Women and the Legal Profession could sponsor a study and tool kit relating to creating workplace safety assistance programs for those dealing with sexual harassment in the legal profession.<sup>247</sup>

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243. For an analysis of the obstacles encountered in retaliation claims, see Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE (2018–2019), <https://www.stanfordlawreview.org/online-archive/page/2/> [<https://perma.cc/38HN-XRQV>].

244. In a landmark professional responsibility case, *Wieder v. Skala*, the New York Court of Appeals concluded that an at-will associate in a law firm could maintain a breach of contract claim for discharging the associate for his insistence that the firm comply with professional conduct rules that required the reporting of professional misconduct by another lawyer. 609 N.E. 2d 105, 106 (N.Y. 1992). For jurisprudential developments related to a lawyer's retaliation claims, see William Jordan, *Law Firm Associate May Pursue Claim Alleging That His Employment Was Terminated For Reporting Concern That Partners May Have Committed Ethical Violations*, 43 NO. 7 PROF. LIABILITY REP. 15 (2018).

245. See *supra* text accompanying notes 209–26.

246. Around the U.S., state and local bar associations have a track record with lawyer assistance programs that provide confidential services and support to impaired lawyers. See Samantha Wilson, Note, *The Rise of the Lawyer Counseling Movement; Confidentiality and Other Concerns Regarding State Lawyer Assistance Programs*, 27 GEO. J. LEGAL ETHICS 951, 960 (2014) (noting that states have followed the ABA safeguards in adopting confidentiality provisions for communications related to peer assistance programs).

247. In 2018, the ABA Commission on Women and the Legal Profession published “Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession,” a manual that contains practical advice for legal employers and employees, including sample anti-harassment policies. This publication updates an earlier version of the manual and is available for purchase on the ABA website. See Stephanie Francis Ward, *ABA Women's Commission Updates Manual About Preventing and Addressing Sex Harassment*, A.B.A. J. (Mar. 26, 2018), [http://www.abajournal.com/news/article/aba\\_womens\\_commission\\_does\\_significant\\_updates\\_to\\_manual\\_about\\_preventing](http://www.abajournal.com/news/article/aba_womens_commission_does_significant_updates_to_manual_about_preventing) [<https://perma.cc/EW4S-DFKD>] (noting that the release of the manual followed a February 2018 ABA House of Delegates resolution urging that all employers adopt and enforce policies to “prohibit, prevent and promptly redress” harassment and retaliation based on “sex, gender, gender identity, sexual orientation and the intersection of sex with race and/or ethnicity.”). An article in the practitioner journal for defense counsel suggests that the “most effective” tool for preventing sexual harassment in law firms is to adopt a “comprehensive and well-communicated sexual harassment policy.” Rebecca J. Wilson, *How to Prevent Sexual Harassment Claims in Your Own Backyard*, 63 DEF. COUNS. J. 237,

Lawyers who are victims of harassment could be encouraged to report to the workplace safety program if they are uncomfortable reporting misconduct to disciplinary authorities. Regulatory counsel could also clarify that they do not intend to take action based on victims' failure to report sexual harassment to disciplinary authorities.<sup>248</sup>

Regulators can also help practitioners better understand their professional duty to report sexual misconduct as a form of professional misconduct by other lawyers. Using an approach similar to that used by the SRA in the U.K., U.S. regulators may warn lawyers that failure to report sexual misconduct by another lawyer could violate a lawyer's reporting duty under Model Rule 8.3.<sup>249</sup> Because of the complexity of issues related to NDAs and the duty to report, the NOBC could appoint a working group to study the issue and help regulatory counsel frame the proper message related to non-disclosure agreements and reporting obligations. In those jurisdictions that have adopted an anti-discrimination ethics rule, lawyers should be reminded that sexual harassment should be treated as serious misconduct reflecting on a lawyer's fitness to practice. Lawyers should understand that harassment is an illegal abuse of power that both threatens the safety and security of others, as well as the integrity of the legal profession.

Another approach is for regulators and ethics committees to examine supervising lawyers' responsibilities under state versions of Model Rule 5.1.<sup>250</sup> Professor Alex G. Long, an expert in employment and professional responsibility law, maintains that law firm managers' responsibilities under Rule 5.1 require them to take reasonable measures to ensure that their firms have in place adequate policies and procedures related to reporting and handling serious misconduct.<sup>251</sup> Applied to sexual harassment and discrimination claims, firm managers arguably violate Rule 5.1 by failing to establish internal processes for handling such misconduct allegations.<sup>252</sup>

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237 (1996). Such a policy should explicitly state that "retaliation against a complainant or a witness who assists in the reporting of a sexual harassment complaint or investigation will not be tolerated and that individuals who are guilty of retaliation will be appropriately sanctioned." *Id.* at 240.

248. The state version of Model Rule 8.3 could provide that sexual harassment or discrimination victims discharge their duty to report another lawyer's misconduct if the victims report the matter to the workplace safety program. Some states have used a similar approach with reporting lawyer impairment. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03 (1995) (allowing a lawyer to report ethical violations to a peer assistance program when the lawyer knows or suspects that another lawyer is impaired by chemical dependency or by a mental illness).

249. *See supra* notes 231–37 and accompanying text.

250. ABA Model Rule 5.1 requires that firm partners and managers "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." MODEL RULES OF PROF'L CONDUCT R. 5.1 (2018).

251. Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 830–39 (2017).

252. *Id.* at 831 (referring to a New York State Bar Ethics Committee opinion that suggested "that the existence of a system that encourages internal reporting and that provides for investigation and resolution of suspected misconduct is an integral component of compliance with Rule 5.1(a)").

In the U.S., issues related to transparency and safety of the workplace for lawyers arise when mandatory arbitration provisions operate to silence persons who file claims related to sexual misconduct.<sup>253</sup> Generally, mandatory arbitration provisions “require employees to waive their right to sue or participate in class action lawsuits, and instead agree to resolve any employment dispute through confidential arbitration.”<sup>254</sup> Law firms, like many other employers, have included mandatory arbitration provisions in employment agreements, preferring confidential arbitration that may shield firms from publicity and damage associated with harassment claims.<sup>255</sup> While arbitration may protect the firm’s public image and reputation, it also prevents a victim from learning about other claims that may corroborate the employee’s claims.<sup>256</sup> Mandatory arbitration may also make it harder for aggrieved employees to secure legal representation.<sup>257</sup>

Commentators have objected to the widespread use of arbitration provisions that bind employees, most of whom feel forced to accept such provisions at the outset of their employment.<sup>258</sup> A group of law students called the People’s Parity Project has joined others in condemning the practice of firms requiring employees to accept mandatory arbitration provisions.<sup>259</sup> The student group has successfully exposed the use of these provisions, pressuring a number of firms to change their practices related to mandating arbitration of certain employee claims.<sup>260</sup>

Bar leaders also recognize the concerns related to widespread use of mandatory arbitration clauses in employment agreements used by law firms. At its January 2019 meeting, the ABA House of Delegates overwhelmingly passed Resolution 107B.<sup>261</sup> Resolution 107B states:

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253. See Maureen Mulligan, *Eliminating Mandatory Arbitration of Sexual Harassment Claims*, 45 No. 2 L. PRAC. 12 (Mar./Apr. 2019) (noting that “conversations about systemic change cannot take place if victims of harassment are silenced by nondisclosure and mandatory arbitration agreements that prevent instances of harassment from being discussed in the workplace”).

254. Samantha Stokes, *Another Law Firm Abandons Mandatory Arbitration as Pressure Continues*, AM. L. (Sept. 19, 2019), <https://www.law.com/americanlawyer/2019/09/19/another-firm-abandons-mandatory-arbitration-as-pressure-continues/> [<https://perma.cc/3YYA-Q6X4>].

255. See Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration Clauses*, A.B.A. J. (June 1, 2018), [http://www.abajournal.com/magazine/article/biglaw\\_mandatory\\_arbitration\\_clauses](http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses) [<https://perma.cc/K46U-ANFF>] (quoting an expert who notes that confidentiality is the main perk of arbitration for law firms).

256. See *id.* (noting that it is “also harder for a sexual harassment claimant in arbitration to protect herself against retaliation”).

257. Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 183 (2019).

258. See, e.g., *id.* (discussing how mandatory arbitration provisions have impacted vulnerable employees and stymied progress toward justice).

259. Stephanie Francis Ward, *A Group of Harvard Law Students Is Trying To Get Rid of Mandatory Arbitration Clauses*, A.B.A. J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/parity-to-the-people> [<https://perma.cc/82SD-NX7C>] (discussing the creation of the People’s Parity Project).

260. See Stokes, *supra* note 254.

261. Amanda Robert, *ABA House Urges Legal Employers Not to Require Mandatory Arbitration of Claims*, A.B.A. J. (Jan. 28, 2019), <http://www.abajournal.com/news/article/resolution-107b> [<https://perma.cc/7V6A-MN4X>].

Resolved, That the American Bar Association urges legal employers not to require pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, or status as a victim of domestic or sexual violence.<sup>262</sup>

The Report supporting the resolution clarified that the resolution builds on an earlier 2018 ABA resolution urging legal employers not to require mandatory arbitration of sexual harassment claims.<sup>263</sup> It also clarifies that the resolution focuses on mandatory pre-dispute agreements where arbitration is required, rather than post-dispute agreements desired by both sides of a dispute.<sup>264</sup>

Although the ABA's efforts are commendable, it is unclear how effective an aspirational resolution will be in pushing firms to change their insistence on the use of secretive arbitral processes for handling sexual harassment and discrimination claims. Outside the largest firms that are keen to recruit from law schools where the People's Parity Project is visible, law firms may be continuing to include mandatory arbitration clauses in their employment agreements.<sup>265</sup>

Understanding that many firms may have to be compelled to abandon compulsory arbitration clauses, interested ABA groups may consider the advisability of adopting a professional conduct rule that prohibits legal employers from requiring employees to accept a dispute resolution process that is confidential. The rule could provide that, post-dispute, claims could be handled in a confidential process if the employee so agrees. Prohibiting compulsory confidentiality fosters accountability by helping the aggrieved employee, as well as other current and prospective employees, obtain access to information.<sup>266</sup>

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262. ABA House of Delegates Resolution 107B, available at [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2019/house-of-delegates-resolutions/107b/](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2019/house-of-delegates-resolutions/107b/) [<https://perma.cc/2Y3M-696A>].

263. In August 2018, the ABA House of Delegates passed Resolution and Report 300, "urging legal employers not to require mandatory arbitration of sexual harassment claims." AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 107B AND REPORT 1, [https://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2019-midyear/2019-midyear-107b.pdf](https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2019-midyear/2019-midyear-107b.pdf) [<https://perma.cc/6C4J-DJXX>]. Resolution 107B "begins with the text of Resolution 300 . . . and broadens it to cover illegal discrimination, [and] harassment or retaliation" based on the categories described in the resolution. *Id.*

264. *Id.* at 6.

265. In May 2018, dozens of U.S. law schools sent a survey asking law firms to indicate whether they require new associates to sign mandatory arbitration agreements. See Stephani Russell-Kraft, *Many Big Law Firms Won't Disclose Arbitration Policy*, BLOOMBERG L. (June 12, 2018), <https://biglawbusiness.com/many-big-law-firms-wont-disclose-arbitration-policy> [<https://perma.cc/KK5X-VG8E>]. Nearly half of the 374 firms declined to respond, suggesting that many non-respondents may still require mandatory arbitration of employment disputes. *Id.*

266. Groups studying such an approach can evaluate whether a narrow rule would withstand preemption under the Federal Arbitration Act ("FAA") if the rule targets the confidentiality of the process for resolving employee disputes against legal employers. See Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019) (discussing U.S. Supreme Court interpretation of the FAA to require the enforcement of mandatory arbitration clauses for employment claims). Arguably, state laws that prohibit

## CONCLUSION

Around the world, regulators of the legal profession may approach their work with similar regulatory objectives.<sup>267</sup> In pursuing those objectives, they must decide when and how to regulate.<sup>268</sup> Various groups, such as the International Conference of Legal Regulators and the IBA, bring regulators and lawyers together to share knowledge, best practices, and solutions to common challenges.<sup>269</sup>

The discussion of initiatives related to proactive, management-based programs, compensation awards, and sexual harassment in the legal profession reveals that U.S. regulators can learn a great deal from their colleagues in other countries. Most fundamentally, regulators in Australia, Canada, and the U.K. appear to be taking a more holistic view of their roles. Rather than limiting their role to disciplining lawyers who depart from the minimum standards of professional conduct, they are taking steps to proactively help lawyers address problems before they occur. When persons are injured by lawyer misconduct, regulators in the U.K. and Australia play a role in helping persons obtain compensation. Regulators in Australia, Canada, and the U.K. also see that it is their responsibility to help address issues related to sexual harassment and discrimination that undermines efforts to improve the diversity and inclusivity of the legal profession.

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“agreements requiring confidentiality for discrimination claims” may survive preemption challenges, as arbitration does not require confidentiality, “and the FAA is silent on the issue.” *Id.* at 2678. *See also* Frances Kulka Browne & Erika Ghaly, *Mandatory Arbitration of Sexual Harassment Claims and FAA Preemption*, N.Y. L.J. (Aug. 19, 2019), <https://www.law.com/newyorklawjournal/2019/08/19/mandatory-arbitration-of-sexual-harassment-claims-and-faa-preemption> [<https://perma.cc/YJ3F-2TJR>] (in discussing state laws that attempt to curb mandatory arbitration of sexual harassment claims, the authors refer to a Washington law that declares unenforceable provisions in employee contracts that require employees to waive their right to publicly pursue causes of action and provisions that require employees to resolve discrimination claims in a dispute resolution process that is confidential). For a critique of expansive application of FAA preemption and steps that employment arbitrators can take to self-regulate “to ensure a fair, efficient process,” see Nicolas O’Connor, *The “Insurmountable Textual Obstacle”: A Narrow Interpretation of the Federal Arbitration Act*, 32 GEO. J. LEGAL ETHICS 855, 858–61, 873–78 (2019) (O’Connor served as one of the Executive Editors editing this article).

267. *See* Laurel S. Terry, Steve Mark, & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012) (analyzing and recommending different regulatory objectives).

268. For a discussion of common challenges facing regulators, see Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661, 2663 (2012).

269. For example, panels sessions at ICLR conferences have examined issues related to sexual harassment, PMBR, compensation orders, and the work of independent ombuds. These programs have enabled regulators to learn from one another. *See* Law Society of Scotland, *Regulation Paper*, Jan. 2018 (recommending a new complaints system and creation of an independent ombuds “based on our learning from other jurisdictions”); *see also* Email from Megteld de Regt to Susan Fortney (Nov. 12, 2019) (on file with author) (noting that the Nederlandse Orde van Advocaten (Dutch Bar Association) is developing a self-assessment tool). For a thoughtful analysis of the numerous ways stakeholders in lawyer regulation collaborate and advance one another’s work, see Laurel S. Terry, *Lawyer Regulation Stakeholder Networks and the Global Diffusion of Ideas*, 33 GEO. J. LEGAL ETHICS 1069 (2020).

Another lesson from abroad is the manner in which regulators explore initiatives by working closely with practitioners and other stakeholders. Such collaborations have involved investments in research and pilot programs. Following these collaborations and data gathering, the regulators are better prepared to make the case for regulatory changes that will be effective and embraced by lawyers.

Given recent challenges to mandatory bar associations in the U.S.,<sup>270</sup> the time may be right to pursue new approaches that provide more public protection and promote public confidence and trust in the integrity of the legal profession. This includes pursuing proactive regulatory schemes to prevent problems, compensation schemes that provide remedies to consumers injured by lawyer misconduct, and alternative approaches to prevent and address issues related to the safety of the lawyers' workplaces.

Finally, bar associations and regulators can also demonstrate that they take public protection seriously by engaging nonlawyers in deliberative and study processes. In the United States, public involvement is largely absent in both the decision-making and the deliberative processes involved in changing lawyer regulation.<sup>271</sup> By contrast, regulators in other countries take steps to formally seek public input on changes impacting the consumers of legal services.<sup>272</sup> By consulting consumers of legal services and seriously considering information obtained regarding their concerns and needs, regulators and bar associations communicate that they are consumer-minded as opposed to self-interested.<sup>273</sup> Another approach

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270. See Dean Rohrig, *Benefits of Mandatory Bars*, W. VA. LAW., Spring 2019, at 8.

271. Professor Leslie C. Levin reaches this conclusion after studying seven case studies related to lawyer regulation and malpractice issues. See Leslie C. Levin, *The Politics of Lawyer Regulation: The Case of Malpractice Insurance*, 33 GEO. J. LEGAL ETHICS 969, 1031 (2020) [hereinafter *Politics of Lawyer Regulation*] (noting that “the public is largely dependent on the bar to pursue certain public-regarding lawyer regulation.”).

272. For example in Australia, Professional Standards Councils (“PSC”) are independent statutory bodies with powers to assess and approve applications from professional associations for Professional Standards Schemes that limit the civil liability of members. See *About Us*, PROF'L SERVICE COUNCILS, <https://www.psc.gov.au/about-us> [<https://perma.cc/HZW3-E5AT>] (last visited Apr. 10, 2020). In considering applications from professional associations, the PSC publishes notifications informing the public of the proposed change in the liability scheme for the association's members. PROF. STANDARDS COUNCILS, Professional Standards Scheme Notification, available at <https://www.psc.gov.au/news-and-publications/notifications> [<https://perma.cc/76N7-KSEL>]. “Members of the public then have up to four weeks to submit comments to the [PSC]” and the PSC considers any comments before deciding “whether to approve, amend, or revoke the scheme.” *Id.* But see *Politics of Lawyer Regulation*, supra note 271 (noting that even with notification that public interest group theory suggests that it will be “difficult to mobilize the public to act”).

273. Events surrounding consideration of malpractice insurance issues reveal that decisionmakers in the U.S. have not given much weight to public opinion. For example, the Supreme Court of Texas declined to adopt a rule requiring lawyers to disclose their insurance status even though “80% of respondents [in a public opinion poll] indicated that it was ‘very important’ or ‘moderately important’ for them to know whether the attorney they are hiring carries insurance” and “70% of the respondents agreed that lawyers should inform potential clients whether or not the lawyer carries insurance.” Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 198 n.111 (2012). More recently, “[i]n a 2018 survey conducted by the National Opinion Research Center at the University of Chicago, 78% of California residents indicated that legal malpractice insurance should be required for lawyers to practice in California.” *Exposing Blind*



may be for courts and legislatures to recognize that the public would be better served and represented through the appointment of an independent and well-funded public advocate.<sup>274</sup>

Commonly, courts and commentators state that the purpose of attorney discipline is to protect the public and maintain the integrity of the legal profession.<sup>275</sup> A review of innovations in other countries reveals that this purpose should be reframed. Rather than focusing on disciplining attorneys and deterring other lawyers' misconduct, public protection should include more efforts to help lawyers prevent problems and to provide redress when members of the public are injured. The integrity of the legal profession is also advanced when steps are taken to protect those who occupy its corridors. When lawyers hold each other accountable on how they treat consumers and each other, they demonstrate that they can be trusted as professionals who keep their own house clean.

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*Spots*, *supra* note 144, at 221. Despite this clear message from consumers, the California Malpractice Insurance Working Group declined to recommend that malpractice insurance be required for lawyers in private practice but voted for more study. *See id.* at 194.

274. In suggesting the inclusion of a public advocate in the regulatory process, Professor Leslie Levin astutely notes that appointment of a public advocate may require courts to "admit (at least to themselves) that they are not sufficiently attending to the public interest when they regulate lawyers." *See Politics of Lawyer Regulation*, *supra* note 271, at 1034.

275. *See, e.g.*, *In re Hein*, 516 A.2d 1105, 1108 (N.J. 1986) (noting that the court's primary concern must remain "protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar"). For a comprehensive examination of the various purposes and orientations to discipline, see *Zacharias*, *supra* note 125, at 693–98.