

2ND REGULATORS WORKSHOP ON PROACTIVE, RISK-BASED REGULATION

REPORT OF PROCEEDINGS

June 3, 2016

**9:00 a.m. to 12:00 noon – Loews Philadelphia Hotel, Philadelphia, PA, Commonwealth D,
Second Floor**

Attendees

- Mark A. Armitage, Executive Director, Michigan Attorney Discipline Board;
- Melinda J. Bentley, Legal Ethics Counsel, Advisory Committee of the Supreme Court of Missouri;
- Lawrence Bloom, Senior Staff Attorney, DC Office of Disciplinary Counsel, Washington, DC;
- Henry “Harry” Sill Bryans, Senior Consultant, Aon Risk Solutions, Newtown Square, PA;
- Paul J. Burgoyne, President, National Organization of Bar Counsel Inc., Philadelphia, PA;
- Naomi Bussin, Senior Counsel, Professional Regulation Division, Law Society of Upper Canada, Toronto, Ontario;
- Lesley Cameron, Acting Executive Director, Professional Regulation Division, Law Society of Upper Canada, Toronto, Ontario;
- Charles Centinaro, Director, Office of Attorney Ethics, Trenton, NJ;
- Felice Congalton, Associate Director, Washington State Bar Association. Seattle, WA;
- Margaret Drent, Policy Counsel, Law Society of Upper Canada (Toronto, Ontario),
- Ross Earnshaw, Partner, Gowling Lafleur Henderson LLP, Kitchener, Ontario and Chair, Law Society of Upper Canada Task Force on Compliance-Based Entity Regulation;
- Douglas Ende, Chief Disciplinary Counsel, Washington State Bar Association, Seattle, WA;
- Dawn Evans, Disciplinary Counsel & Director of Regulatory Services, Oregon State Bar, Tigard, OR;
- Susan Fortney, Professor, Texas A&M University School of Law, Fort Worth, TX;
- Art Garwin, Director, Center for Professional Responsibility, American Bar Association, Chicago, IL;
- Sean Ginty, CNA, Chicago, IL
- Tracy L. Kepler, Associate Solicitor, Office of General Counsel, United States Patent & Trade Mark Office, Alexandria, PA;
- Jerome “Jerry” E. Larkin, Administrator, Illinois Attorney Registration & Disciplinary Commission, Chicago, IL;
- Steve Mark, Director, Creative Consequences, Sydney, Australia;
- Malcolm Mercer, Partner & General Counsel, McCarthy Tetrault LLP, Toronto; Bencher, Law Society of Upper Canada, Toronto, Ontario;
- Reba J. Nance, Director, Law Practice and Risk Management, Colorado Bar Association. Denver, CO ;
- Darrel I. Pink, Executive Director, Nova Scotia Barristers Society, Halifax, Nova Scotia;
- Dan Pinnington, Vice President, Claims Prevention, Lawyers’ Professional Indemnity Company, (LAWPRO) Toronto, Ontario;
- Amy Rehm, Deputy Chief Bar Counsel, State Bar of Arizona, Phoenix, AZ;

- Ellyn S. Rosen, Deputy Director, ABA Center for Professional Responsibility, Chicago, IL;
- Julia Shankland, Assistant General Counsel – Manager, Washington State Bar Association, Seattle, WA;
- Lynda C. Shely, The Shely Firm PC, Scottsdale, AZ;
- William D. Slease, Chief Disciplinary Counsel, Disciplinary Board of the New Mexico Supreme Court, Albuquerque, NM;
- Market Vessella, Chief Bar Counsel, State Bar of Arizona, Phoenix, AZ; and
- Mark A. Weber, Counsel for Discipline, Nebraska Supreme Court, Lincoln, NE

Prior to the workshop, Ellyn Rosen distributed the following papers to workshop participants:

- Susan Saab Fortney, “Back to the Future: Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public”; (final version to be published in the Journal of the Professional Lawyer); and
- Laurel S. Terry, “The Power of Lawyer Regulators to Increase Client & Public Protection through Adoption of a Proactive Regulation System” (to be published in Volume 20(3) of the Lewis & Clark L. Rev. (September 2016)).

Persons interested in the ABA National Conference on Professional Responsibility could also consult additional materials posted for the conference session on PMBR.

Welcome and Recap of the 2015 Denver Workshop (9:00 a.m. to 9:15 a.m.)

Ellyn S. Rosen, Deputy Director, ABA Center for Professional Responsibility
Susan Saab Fortney, Professor, Texas A&M University School of Law

Ms. Rosen and Professor Fortney welcome participants to the workshop and thanked them in advance for their participation. Ms. Rosen and Professor Fortney indicated that the workshop was intended to build on themes discussed at the first regulators’ workshop on proactive, risk-based regulation in Denver in May 2015.¹ Some of the workshop attendees had participated in the previous session in Denver.

Professor Fortney also indicated that the following individuals had served on the workshop organizing committee: James C. Coyle, Attorney Regulation Counsel, Colorado Supreme Court; Professor Susan Saab Fortney, Texas A&M University School of Law; Art Garwin, Director, ABA Center for Professional Responsibility; Ellyn S. Rosen, Deputy Director, ABA Center for Professional Responsibility; Darrel I. Pink, Executive Director, Nova Scotia Barristers Society; Laurel S. Terry, Professor, Penn State Dickinson Law, and Margaret Drent, Policy Counsel, Law Society of Upper Canada.²

Professor Fortney indicated that a survey of regulators regarding existing proactive initiatives conducted prior to the Denver workshop revealed that many jurisdictions already used various

¹ The May 2015 Record of Proceedings may be accessed at <https://www.coloradosupremecourt.com/PDF/PMBR/Regulators%20Conference%20Notes%20MINUTES.pdf>.

² Due to extenuating circumstances, Mr. Coyle was unable to participate in the workshop; Professor Terry had a scheduling conflict.

proactive measures. For example, all respondents already had an ethics hotline and the majority had law practice management programs. Participants in the 2015 Workshop indicated that issues to be considered included stakeholder engagement and outreach, and the development of mechanisms to address misconduct.

Professor Fortney noted that a key theme to be addressed in the second workshop is resistance by some lawyers to the concept of proactive regulation, which they perceive as increased bureaucratic control by regulators over their practices. Others have expressed concerns about how enhanced proactive regulation might increase the cost of regulation.

It has also been suggested that new proactive measures must be efficiently designed to avoid duplication with existing regulation. Further, from the regulators' point of view, helping lawyers is more fun than disciplining them!

9:15 a.m. to 10:00 a.m. Jurisdictional Update: Surveying the Landscape of Progress

William D. Slease
Chief Disciplinary Counsel
Disciplinary Board of the New Mexico Supreme Court

Regulators from New Mexico, Illinois, Colorado, Nova Scotia, Ontario and British Columbia, updated participants about progress in their jurisdictions.

New Mexico: Mr. Slease indicated that the Disciplinary Board of the New Mexico Supreme Court has oversight authority over 7000 lawyers. The Board already has a lawyer assistance program, but this information gathered by this program is not disclosed to staff involved in lawyer discipline.

A number of programs or divisions within the Disciplinary Board may work on the same lawyer's file, although information sharing among these departments is currently limited. The Board has approved a study of a variety of models of proactive regulation; however, in order to move forward, it is necessary for the Board to seek approval from the Supreme Court. At least one justice has indicated support for the concept.

As part of the consultation process, the Board plans to consult with lawyers, including counsel representing respondents in discipline matters. The goal is to reduce the number of complaints made regarding customer service issues.

One participant suggested that depending on the nature of the issue, information sharing among departments involved in professional regulation may not always be appropriate. In some cases, in order to build trust and co-operation, it may be necessary to keep information confidential. Mr. Slease acknowledged this, noting that in the event that an attorney had a substance abuse issue, it would not be appropriate that this information were shared with staff involved in discipline processes.

Another participant noted the distinction between personal information, on the one hand, and anonymized and aggregate information, on the other. In some instances it might be helpful for a regulator to know how many telephone calls were received regarding conflict of interest issues.

Illinois: Mr. Larkin informed the group that eight years ago, the ARDC adopted a Mission Statement indicating that education was a key component of their mandate. Last year, the

Attorney Registration & Disciplinary Commission offered 270 Continuing Legal Education programs to lawyer groups). One challenge identified by the Commission is that many lawyers do not have a succession plan.

Colorado: The Bar Association has engaged in a large number of stakeholders in discussions about proactive regulation. In 2015, regulatory objectives were adopted in 2015 by sole practitioners as well as by lawyers from medium and large firms. Various groups of lawyers are working on specific objectives, and developing a self-assessment tool. Various voluntary measures are proposed, such as awarding Continuing Legal Education (CLE) credit to lawyers who complete self-assessment, and working with insurers to obtain a premium discount for those who self-assess. There is recognition of the need to develop model policies and procedures.

The Colorado Bar Association has also been gathering information about risk. Forty percent of sole practitioners in that jurisdiction do not have malpractice insurance.

It was noted that insurers may be able to help lawyers develop model practice management policies and procedures.

Nova Scotia: Mr. Pink described the Transforming Regulation project of the Nova Scotia Barristers Society. The Society has collaborated with Steve Mark and Tahlia Gordon of Creative Consequences. As part of the Society's work on proactive regulation, it developed a draft self-assessment tool (the Management System for Ethical Legal Practice) which will be piloted to fifty selected entities beginning in the fall of 2016. The Society is recruiting volunteers, including skeptics, to participate in the pilot. Further information is available at <http://nsbs.org/draft-self-assessment-process-legal-entities>.

The NSBS has also embarked on a significant redesign of its processes and has worked extensively with staff members to this end. In order to implement PMBR, it will be necessary for there to be greater information-sharing among staff than is currently the case. The Society is developing new business processes and has also been working on a new risk framework.

Recent developments in Ontario, the Prairie Provinces, and British Columbia were also reviewed, as follows:

Ontario: on May 26, 2016 Convocation (the Board of Directors of the Law Society of Upper Canada) accepted the following recommendations of the Compliance-Based Entity Regulation Task Force:

- a. That the Law Society seek an amendment to the Law Society Act to permit Law Society regulation of entities through which legal services are provided; and
- b. The development of a regulatory framework for consideration by Convocation based on the principles of compliance-based regulation set out in this report.

The Task Force will continue to meet in the coming year and will organize additional focused consultations with lawyers and paralegals regarding options, or models of proactive regulation. It will report to Convocation in 2017.

British Columbia³: The Law Society of British Columbia currently has statutory authority over law firms, defined to mean “a legal entity or combination of entities carrying on the practice of law”. Law Firm Regulation Task Force, chaired by Herman Van Ommen, Q.C., is considering models of law firm regulation according to which firms would be required to maintain systems and policies in specific areas of practice in order to comply with a list of broadly stated principles. The model is proactive, in that it encourages firms to employ systems to improve the practice of lawyers working within the firm.

The Task Force published a consultation report, conducted a written consultation and travelled throughout the province to meet in person to obtain input and views from lawyers. Some consultation participants expressed concern that law firm regulation would add an additional lawyer of regulation. It was also suggested that that sole practitioners and small firms do not have the same resources as large firms. The Task Force is mindful of the need to consider how law firm regulation will impact sole practitioners and small firms.

Prairie Provinces: The Law Societies of Alberta, Saskatchewan, and Manitoba have established an interactive website, or engagement hub (www.lawsocietylistens.ca) and are currently consulting with lawyers regarding compliance-based regulation and entity regulation. This consultation also offers lawyers an opportunity to share their views about Alternative Business Structures. The consultation period ends on June 30, 2016.

10:00 a.m. – 11:00 a.m. Pursuing Possibilities: Promises and Challenges

Darrel I. Pink, Executive Director, Nova Scotia Barristers Society

Participants engaged in a moderated discussion designed to help them to identify positive aspects of proactive, management-based regulation and to identify specific challenges that have arisen, or that may arise, from various sectors of the legal profession.

Mr. Pink began by asking participants to identify all of the stakeholders whose views need to be taken into consideration in order to move forward with proactive regulation.

It was suggested by another participant that a key challenge is to communicate clearly about these regulatory changes and to develop terminology that everyone can understand. With respect to the Law Society of Upper Canada Task Force on Compliance-Based Entity Regulation, for example, the phrase “Better Practices” was used in the title to the Call for Input paper and on the dedicated web page to refer to the concepts being considered by the Task Force.

The term “compliance-based” regulation was first developed by Professor Ted Schneyer.⁴ Workshop participants noted that “proactive regulation” may be a more accessible term than “compliance-based”.

³ Prior to the workshop, Deborah Armour, Chief Legal Officer, Law Society of British Columbia, provided a summary of recent initiatives undertaken by the Law Society of British Columbia to the organizing committee.

⁴ See, for example, Ted Schneyer, “The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers”, 42 Hofstra L. Rev. 232 (2013), online at http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2014/05/40th-aba-national-conference-on-professional-responsibility/session1_24_ted_schneyer_article.authcheckdam.pdf.

Another participant asked for suggestions about how he could “turn the jets up” in his jurisdiction to encourage greater consideration of proactive regulation.

It was noted that insurance carriers need to be taken into consideration in developing a stakeholder list.

Another participant asked for empirical evidence that such changes are justified. In response it was suggested that the goal of proactive regulation is the avoidance of problems later by causing lawyers to reflect on their practices up front, thereby reducing the number of complaints. Self-assessment may be one tool to accomplish this objective.

It was further suggested that mandatory liability insurance should be on the agenda in the U.S., as this could assist lawyers in preventing problems, since information regarding their existing practice management systems would need to be provided to the insurer.

In Canada, given the presence of national law firms, harmonization among jurisdictions is another factor to be taken into consideration by regulators contemplating a move to a more proactive system of regulation.

Another participant noted that it would be very helpful if there were additional empirical evidence and analysis of the impact of these changes. It was also suggested that discipline will still have a role, even in a more proactive system.

In Illinois, consideration is being given to the creation of an online platform that would enable lawyers to receive CLE credit in exchange for fulfilling certain proactive regulatory requirements. If a lawyer purchases malpractice insurance, they would not be required to self-assess. Another participant suggested that CLE credit was an excellent idea that could be a selling point in his jurisdiction.

Professor Fortney reported that in Texas, funding has been made available to assist newly-admitted lawyers who are going into sole practice and are setting up practice management systems for the first time.

Summing up, the following issues were identified by participants during this workshop segment:

- development of terminology to describe the components of PMBR that is easy to understand;
- stakeholder engagement;
- attention to systems;
- harmonization of requirements among jurisdictions;
- concerns about the cost of proactive regulation, and that these would be borne by the profession;
- whether proactive measures should be voluntary or mandatory;
- whether there should be greater information-sharing of discipline information among jurisdictions.

11:00 a.m. to 12:00 p.m. – Moving Forward: Identifying Opportunities to Collaborate

Susan Saab Fortney, Professor, Texas A&M University School of Law

Margaret Drent, Policy Counsel, Law Society of Upper Canada

Participants discussed next steps to advance the explorations and implementation of proactive, management-based regulation (PMBR) and help ensure continued collaboration and examination. Participants were asked to consider working together in small groups following the workshop, launching an information web resource housed with the Center for Professional Responsibility, and creating a turnkey road show program for use by regulators that could be adapted based on the needs of the individual jurisdiction.

During the final segment of the workshop, participants were divided into groups to discuss the following questions:

- (1) what steps should be taken to explore and implement Proactive Management Based Regulation (PMBR)?
- (2) What assistance, if any, is needed to explore PMBR in the participant's jurisdiction?

With respect to steps to be taken to implement PMBR, some themes identified by workshop participants to move PMBR forward were

- What are the audiences that must be reached?
- How ready is each jurisdiction to begin discussions about proactive regulation?
- How should additional data points be identified?
- What is the "elevator speech" (in other words, short description of the essence of this initiative)
- Development of Model Policies and Procedures;
- How might discipline change as a result of the implementation of PMBR?
- What legislative or regulatory amendments are required?
- What is the role of insurers?

Each group designated a spokesperson who reported back about the discussion, as follows:

- Table A discussed the development of a generic self-assessment tool. This could be made available through a wiki.
- Table B explored the possibility of a requirement that each state implement some form of PMBR. As part of this process, it is necessary to complete an inventory of existing proactive initiatives. Another issue for consideration is whether proactive regulation should apply both to government and in-house counsel as well as to private practitioners.
- Table C discussed the possibility of developing uniform definitions of terms, and a list of resources accessible to all.
- Table D noted the importance of identifying the components of PMBR.

The importance of building coalitions was also identified. Participants suggested the following projects for additional consideration:

- the development of a generic self-assessment tool;
- the creation of a guide to PMBR, including explanation of relevant vocabulary;
- enhanced information sharing among jurisdictions;
- the creation of a web page or wiki with relevant PMBR resources;
- re-examination of the recommendations made by the Report of the American Bar Association Commission on the Evaluation of Disciplinary Enforcement (McKay

Commission), which recommended various initiatives to address and avoid professional conduct issues;

- development of a list of statutory impediments to PMBR;
- liaison with the Conference of Chief Justices;
- the organization of additional PMBR workshops; and
- building coalitions.

Participants then voted on their preferred top four steps for moving PMBR forward, which were as follows:

- development of a PMBR guide, including explanation of relevant vocabulary (14 votes);
- development of a web page to organize relevant resources, including the recommendations of the Report of the American Bar Association Commission on Evaluation of Disciplinary Enforcement (McKay Commission), which recommended various initiatives to address and avoid professional conduct issues, (7 votes);
- development of a generic self-assessment tool (7 votes);
- additional workshops to enable further information-sharing (7 votes); and
- reaching out to the Conference of Chief Justices (7 votes).

On behalf of the organizing committee, Professor Fortney thanked participants in the workshop and indicated that the minutes would be circulated in the coming weeks.