3rd REGULATORS WORKSHOP ON PROACTIVE, MANAGEMENT-BASED REGULATION (PMBR)

REPORT OF PROCEEDINGS
June 3, 2017
8:30 AM to 12:30 PM – Hyatt Regency St. Louis at the Arch, Mills Studio 3, 4th Floor

Attendees

- Mark A. Armitage, Executive Director, Michigan Attorney Discipline Board, Detroit, MI;
- Lawrence Bloom, Senior Staff Attorney, District of Columbia Office of Disciplinary Counsel, Washington, DC;
- John T. Berry, Director, Legal Division, Florida Bar;
- Timothy Bertschy, Commissioner, Illinois Attorney Registration & Disciplinary Commission (ARDC), Peoria, IL;
- Paul J. Burgoyne, Deputy Chief Disciplinary Counsel, Disciplinary Board of the Supreme Court of Pennsylvania, Philadelphia, PA;
- Charles Centinaro, Director, Office of Attorney Ethics, Trenton, NJ;
- James Coyle, Attorney Regulation Counsel, Colorado Supreme Court, Denver, CO;
- Margaret Drent, Senior Counsel, Law Society of Upper Canada, Toronto, Ontario;
- Douglas Ende, Chief Disciplinary Counsel, Washington State Bar Association, Seattle, WA;
- Susan Fortney, Professor, Texas A&M University School of Law, Fort Worth, TX;
- Patrick “Sean” Ginty, Risk Control Consulting Director, CNA Global Specialty-Lawyers Professional Liability, Chicago, IL;
- Susan Humiston, Director, Minnesota Office of Professional Responsibility, St. Paul, MN;
- Tracy L. Kepler, Director, Center for Professional Responsibility, American Bar Association, Chicago, IL;
- Jerome E. Larkin, Administrator, ARDC, Chicago, IL;
- Stark Ligon, Chief Disciplinary Counsel, Office of the Committee on Professional Conduct, Little Rock, AR;
- Dawn McKnight, Deputy Regulation Counsel, Colorado Supreme Court, Denver, CO;
- James Mendillo, Commissioner, ARDC, Belleville, IL;
- Malcolm Mercer, Partner & General Counsel, McCarthy Tétrault LLP, Toronto; Bencher, and Member of the Task Force on Compliance-Based Entity Regulation of the Law Society of Upper Canada, Toronto, Ontario;
- Jenny Mittleman, Deputy General Counsel, State Bar of Georgia, Atlanta, GA;
Christopher L. Newbold, Executive Vice President, ALPS Corporation & ALPS Property & Casualty Insurance Company, Missoula, MT;
Darrel I. Pink, Executive Director, Nova Scotia Barristers Society, Halifax, Nova Scotia;
Amy Rehm, Deputy Chief Bar Counsel, State Bar of Arizona, Phoenix, AZ;
Ellyn S. Rosen, Regulation and Global Initiatives Counsel, ABA Center for Professional Responsibility, Chicago, IL;
Matthew A. Samuelson, Chief Deputy Regulation Counsel, Colorado Supreme Court, Denver, CO;
Ted Schneyer, Professor Emeritus, University of Arizona, Tucson, AZ;
Matt Simms, Standpoint Decision Support, Vancouver, British Columbia;
William D. Slease, Chief Disciplinary Counsel, Disciplinary Board of the New Mexico Supreme Court, Albuquerque, NM;
David Stark, Faegre Baker Daniels and Chair, Colorado Supreme Court PMBR Subcommittee, Denver, CO;
Mark A. Weber, Counsel for Discipline, Nebraska Supreme Court, Lincoln, NE.

Prior to the Workshop, Ellyn Rosen distributed the following items to participants:

- updates regarding efforts to implement PMBR in various jurisdictions;
- an article published in Bloomberg BNA on February 8, 2017 regarding the adoption of proactive self-assessment for uninsured lawyers in private practice in Illinois (“Illinois Adopts Proactive Self-Assessment for Uninsured Lawyers in Private Practice”);
- Proactive Regulation Frequently Asked Questions developed by an NOBC Committee. (This document is now available at http://www.coloradosupremecourt.com/PDF/PMBR/FAQs%20NOBC%20Proactive%20regulation%20Committee.pdf. It supplements the NOBC’s Entity Regulation FAQ document found here: http://nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity%20Regulation%20FAQs%2012.13.16.pdf);
- Appendix A to the NOBC’s Proactive Regulation FAQ document (Appendix A lists PMBR-related law review articles and other PMBR resources)
- Appendix B to the NOBC’s Proactive Regulation FAQ document (This item is a list of Current and Available Innovative Programs Used in U.S. and Canadian Jurisdictions)
- A compilation of survey questions and answers to the following:
- Identify at least one effective proactive regulatory tool that you use in your jurisdiction;
- What is on your wish list? Identify 2-3 of the best proactive regulatory devices/tools that you have seen and wish you could adopt in your jurisdiction; and
- For those 2-3 you have listed, what do you see as the barriers to implementation?

- Susan Saab Fortney, “Promoting Public Protection through an ‘Attorney Integrity’ System: Lessons from the Australian Experience with a Proactive Regulation System”, 23 Prof. Law. 16 (2015); and


8:30 AM Welcome
Tracy L. Kepler, Director, ABA Center for Professional Responsibility

Ms. Kepler welcomed participants to the Workshop and thanked them in advance for their participation. Ms. Kepler indicated that the Workshop was intended to build on themes discussed at the June 2016 Second Regulators’ Workshop on Proactive, Management-Based Regulation in Philadelphia. Some of the Workshop attendees had participated in the previous session. (The minutes from the prior workshops are available here: http://www.coloradosupremecourt.us/AboutUs/PMBRMinutes.asp).

Ms. Kepler also indicated that the following individuals had served on the Workshop Planning Committee: James C. Coyle, Attorney Regulation Counsel, Colorado Supreme Court; Professor Susan Saab Fortney, Texas A&M University School of Law; 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, Senior Counsel, Law Society of Upper Canada.

Ms. Kepler indicated that a survey of regulators regarding existing proactive initiatives conducted prior to the Workshop revealed that many jurisdictions already used various proactive measures. Participants were asked to respond to the following three questions:

(i) Identify at least one effective proactive regulatory tool that you use in your jurisdiction;
(ii) What is on your wish list? Identify 2-3 of the best proactive regulatory devices/tools that you have seen and wish you could adopt in your jurisdiction;
(iii) For the items you listed, what do you see as the barriers to implementation?
A document summarizing the answers to these questions was circulated prior to the Workshop.

8:35-8:50 AM Opening Remarks

Hon. Lloyd A. Karmeier, Chief Justice, Supreme Court of Illinois

Introduced by Jerome E. Larkin, Administrator, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois

Justice Karmeier indicated that the goal of PMBR in Illinois is to help lawyers better serve their clients. On January 25, 2017, the Illinois Supreme Court adopted a new rule that requires uninsured lawyers in private practice to undergo a self-assessment process aimed at helping them avoid disciplinary issues and malpractice claims. (See infra for relevant links). While skeptical at first, the Illinois Attorney Registration & Disciplinary Commission put together a proposal, vetted it around the state, forwarded all the information to the Court, and the Court decided to implement the proposal.

Illinois has been studying developments in other jurisdictions, including Nova Scotia and Colorado. Traditionally, attorney regulation has been reactive, rather than proactive. PMBR helps lawyers avoid issues before they occur. As a result of the adoption of PMBR, the role of the ARDC will evolve to become a more proactive one as opposed to purely disciplinary or reactive.

Justice Karmeier informed participants that a significant percentage of solo practitioners in Illinois do not have malpractice coverage (41%). The mandatory self-assessment that has been introduced in Illinois takes four hours, is available online, focuses on practice management issues, and enables participants to obtain Continuing Legal Education (CLE) credit.

Justice Karmeier also noted that the term “PMBR” may be difficult for some to understand, and recommended that consideration be given to simplifying the terminology that is used.

8:50-9:05 AM PMBR Regional Update

James C. Coyle, Regulation Counsel, Supreme Court of Colorado

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

Progress towards the implementation of PMBR in various North American jurisdictions is summarized below:

Colorado: The Colorado Supreme Court’s subcommittee on PMBR has developed a voluntary online self-assessment tool. CLE credit is available for those who complete the tool. Colorado is exploring the possibility of insurance premium reductions in exchange
for participation in self-assessment. Resources may be consulted at http://www.coloradosupremecourt.us/AboutUs/PMBRMinutes.asp.

Illinois: As Justice Karmeier described, a mandatory program for those attorneys without malpractice insurance is in place. The rule may be found at http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756. The press release is available at https://iln.isba.org/blog/2017/01/25/illinois-supreme-court-adopts-proactive-management-based-regulation.

New Mexico: Sole practitioners have been identified as a group that are more likely to experience practice management challenges, given their circumstances. Self-assessment is currently being considered in New Mexico, as are the adoption of regulatory objectives.

Florida: There are three projects in this jurisdiction:

(i) the establishment of a proactive initiative to deal with disruptive attorneys;
(ii) exploration of a more proactive approach in response to telephone inquiries;
(iii) the adoption of regulatory objectives.

New Jersey: The Court is interested in PMBR, and has asked staff to provide information on possible costs to implement it.

Arizona: Lawyers who are diverted from the disciplinary process have an opportunity to have a personal consultation and discuss the regulatory issues that gave rise to the disciplinary issue. One of the issues that is discussed with participants is their practice management.

Nebraska: is exploring PMBR.

Washington State: The ABA Model Regulatory Objectives have just been adopted. Mandatory malpractice insurance is being reviewed.

Idaho: Mandatory malpractice insurance has just been adopted.

Minnesota: A Task Force on the Future of the Professional has been established. Regulatory objectives have been adopted.

Georgia: PMBR is under discussion.

Arkansas: There is an interest in collaborating with other states.

Nova Scotia: Recently completed a pilot project regarding the self-assessment tool. See http://nsbs.org/mselp-self-assessment-pilot-project. The Council of the Nova Scotia Barristers Society [NSBS] had voted several days before the workshop to move ahead with the tool, based on the results of the pilot. Fifty firms were selected to participate in the pilot project; ultimately, forty-six got involved. It became apparent during the pilot that it is necessary to tailor the self-assessment tool to the needs of sole practitioners and small firms. An online workbook was created for lawyers from these firms. The workbook
contains a checklist intended to assist in the completion of the self-assessment tool. Mr. Pink also noted that compliance issues generally, such as money-laundering requirements, will be dealt with separately and not in the tool.

Once implemented firms will be required to complete the tool every three years. The NSBS is now referring to this initiative as “Legal Services Support”.

Mr. Pink provided an update on developments elsewhere in Canada. Law Societies in six Canadian provinces have committed to move forward on entity regulation and self-assessment. In British Columbia, the Law Society is currently testing a self-assessment tool and is using the term “Professional Infrastructure Elements” to refer to the issues identified in the tool. Law Societies in the Prairie Provinces of Alberta, Manitoba and Saskatchewan have launched a joint pilot project and have asked law firms to participate in testing a self-assessment tool. The Law Society of Upper Canada is committed to moving ahead with Compliance-Based Entity Regulation, which is analogous to PMBR, although given the size of this jurisdiction, the associated infrastructure required to implement it would be considerable. Links to these reports are available here: http://nsbs.org/related-links.

9:10-10:30 AM  Rethinking How Legal Regulators Regulate – Developing a Comprehensive, Systematic Approach

Ellyn S. Rosen, Regulation and Global Initiatives Counsel, ABA Center for Professional Responsibility

Douglas J. Ende, Chief Disciplinary Counsel, Washington State Bar Association;

Malcolm Mercer, Partner and General Counsel, McCarthy Tétrault;

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

During this part of the morning, participants discussed the following issues in small groups:

- The role of Regulatory Objectives;
- Helping lawyers navigate the practice of law;
- Identifying the 10 best proactive initiatives and why they work – what are the measures of success?
- When can work be done ‘at the law firm level’?

A synopsis of the small group discussions occurred during the “Reporting Back” session at the end of the Workshop.
Professor Fortney introduced this session, noting that Professor Schneyer was the first to use the term ‘ethical infrastructure”. Professor Fortney also noted that around the world there is increasing interest in how lawyers are regulated. The trend towards proactive regulation could in fact be referred to as an attorney integrity system. Professor Fortney then introduced Messrs. Coyle, Larkin, and Pink, all of whom shared their expertise regarding the development of a self-assessment tool.

Darrel Pink noted that the NSBS tool, based on the ten elements originally identified in New South Wales, Australia, is designed to advance the Society’s Regulatory Objectives. Its approach is to address areas where lawyer performance can be enhanced and therefore compliance issues, which are mandatory, such as trust accounting requirements, are not addressed. The NSBS tool also includes: ‘promotion of equity, diversity and inclusion’ and ‘working to improve the administration of justice’ as elements. The pilot project validated these elements as having value.

James Coyle advised that in Colorado, the committee that was created to consider PMBR included significant representation of sole practitioners and lawyers from small firms. After completing its consideration of regulatory objectives, the committee identified and developed principles for inclusion in the self-assessment tool, taking into consideration work that had been done in other jurisdictions, including Nova Scotia. Mr. Coyle suggested other jurisdictions should “feel free to steal from others” as no one should have to reinvent the wheel in this process. The Colorado committee felt it was important to identify trust accounting as an element, since this is a problematic area for some practitioners. The Colorado tool is focused on ethical infrastructure issues, with a special consideration for lawyer well-being. Answers that are provided to various questions asked in the tool are linked to resources, such as sample policies that may be adapted to the specific needs of the lawyer or law firm. Colorado resources may be found at http://www.coloradosupremecourt.com/PDF/PMBR/PMBR%20check%20list%20final.pdf and www.coloradosupremecourt.com/AboutUs/PMBRMinutes.asp

Mr. Coyle also mentioned the importance of having an outside mentor to assist in getting PMBR off the ground. Professor Fortney came to Colorado to assist in this regard.
Jerome Larkin referred to Professor Schneyer as the “godfather” of PMBR. He advised participants who are interested in introducing PMBR in their jurisdiction to consult with Professor Fortney as well as with Steve Mark and Tahlia Gordon, formerly of the Office of the Legal Services Commissioner in New South Wales.

In Illinois, 12 mandatory elements were identified, rather than 10. Mr. Larkin noted the importance of consultation with the Bar and that it might be necessary to adjust the approach to PMBR based on the feedback received from participants. He stressed that one’s own “local culture” makes a difference, and that there is much work to be done, including reaching out to every stakeholder, before any implementation may take place.

Professor Fortney noted that there is consistency among jurisdictions with respect to between eight and twelve elements. See also http://tinyurl.com/proactive-article (Appendices 2-4 list and compare the elements in various jurisdictions.) Several of the Workshop’s planners and participants intend to develop a tool kit that contains a model set of elements which will be disseminated to the attendees as well as placed on the soon-to-be developed ABA PMBR webpage.

The importance of liaison with insurers was also mentioned.

Douglas Ende noted the importance of developing a consistent, unified approach across jurisdictions and referenced Robert Creamer’s Michael Franck Award acceptance remarks (see page 3 https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017lawyers_manual_cprconference_report.authcheckdam.pdf) although it was also noted by another participant that differences were inevitable.

John Berry observed that PMBR is not just one thing; it’s lots of different things.

It was noted that in Illinois, there was some concern that the introduction of a self-assessment tool would create a standard of care for lawyers with respect to alleged disciplinary infractions. The absence of a succession plan, for example, could be used against the firm. Another concern related to confidentiality. Regulators should not be able to obtain information about the answers provided by lawyers to questions on the self-assessment tool. The Illinois Supreme Court rule adopting self-assessment provides that information gathered during the self-assessment is confidential. (Rule 756(e)(2) states: “All information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer.”)

Regulators in Colorado consulted with Professor Fortney with respect to the confidentiality and privilege issues that may arise as a result of data collection during self-assessment. As the self-assessment is a personal inventory and the program itself is voluntary, the attorney does not submit any information to the regulator other than the fact that a self-assessment has been completed. As such, there is no confidentiality or privilege issue.
In Nova Scotia, the regulator has concluded that self-assessment information is covered by an existing statutory privilege. Legal Profession Act, SNS 2004, c 28, s 77 - [http://nslegislature.ca/legc/statutes/legalpro.htm](http://nslegislature.ca/legc/statutes/legalpro.htm) However, the information obtained could still be the subject of questions during a malpractice suit.

Professor Fortney noted that in New South Wales, lawyers were concerned about how data would be used. The session participants recommended that jurisdictions establish a “wall” between discipline information and the “Quality Assurance” type of information collected during a self-assessment.

In Illinois, the tool has been made available on an online platform. Lawyers have an opportunity to identify areas in which they would like to improve, but no data that is specific to an individual is collected, and the disciplinary regulators do not follow an attorney to determine whether self-study has been completed. Only the Registration Department, which is separate and apart from the regulators’ access, notes whether or not the attorney completed the assessment, CLE, worksheet and the evaluation. Under Illinois Supreme Court Rule 756(h), a lawyer may be removed from the Master Roll of attorneys if he or she is required to complete the self-assessment and has not done so.

Professor Fortney noted that in New South Wales, aggregate reporting worked well.

Another participant noted that reporting on the results of the self-assessment tool is another difficult issue. Should a lawyer be required to report to the regulator on the substance of the self-assessment, or merely on the fact of having completed it?

In Nova Scotia, firms participating in the pilot project said they wanted the tool to assist them in developing goals and the opportunity to indicate the steps they had taken to implement these goals.

In Colorado, completion of self-assessment is voluntary. There is no requirement to record the answers; lawyers are required to report to the regulator that they have completed the tool.

The goal is to get lawyers to reflect on their practice. In Nova Scotia, the elements are the “what”; it is up to lawyers and law firms to determine the “how”. With respect to the issue of what use is made by the regulator of the self-assessment answers, they will allow the Society to identify resources and other supports that will assist a firm but will not, by themselves, be the basis for investigation into a lawyer or firm’s behavior. In some cases the NSBS may take a more detailed look at a specific firm if the answers radically depart from information otherwise known by the regulator. In its changing approach to regulation, the Society is using risk-based criteria to determine the nature and degree of its involvement with firms. Though the self-assessment will assist in this evaluation process, but given that its focus is to assist firms in improving their practices, this is anticipated that rarely will there be any connection between the answers and the regulator’s intervention.
The panelists next discussed design of the self-assessment itself and whether an expert or instructional design consultant is required to develop the questions and answers. In Illinois, each question posed addresses a rule of professional conduct and identifies areas where the attorney may need additional study.

The panelists also discussed whether a scoring mechanism was required at the end of the self-assessment. The consensus among the group was that the whole purpose of the self-assessment is one of reflection rather than a graded score. Of note, however, is the fact that some graded scale may be valuable only because attorneys want the comfort that comes with a grade.

The next topic was readiness of the legal profession, and those being regulated, for PMBR. In Illinois, a meeting was held with all stakeholders offering participants and opportunity to express their concerns about a perceived regulatory burden. In Colorado, key stakeholders were also consulted, including representatives from various practice settings, particularly small firms. Professor Fortney noted the importance of getting sole practitioners to support this initiative.

Mr. Pink noted that the self-assessment tool is only one element of their regulatory transformation. If lawyers are to be seen as effective in the delivery of legal services, it will be increasingly important to demonstrate compliance with ethical and practice standards.

The discussion about enhancing lawyer quality of service is the reason to involve the insurers and law practice management groups in these conversations. They have relationships with lawyers and law firms and are most aware of the standards of care and the core obstacles that impact law firm performance.

Lastly, the panel considered privilege and confidentiality of the data obtained. In Illinois, the Supreme Court rule mandates that the data collected is confidential between the regulator and the attorney. Colorado is working on a statutory or rule privilege as they want to avoid and pre-empt any reasons for an attorney not to participate in the self-assessment. Nova Scotia has legislation, referred to above, prohibiting others from obtaining self-assessment information. Overall, the self-assessment tool is not to find misconduct, or to ask questions to solicit confessions, but rather to identify areas of concern.

12:00-12:30 PM Reporting Back and Wrap-up

Tracy L. Kepler, Director, ABA Center for Professional Responsibility

During the first 20 minutes of this session, Ms. Kepler asked each small discussion leader from the earlier session [9:10-10:30 AM] to summarize the discussions held at each table.
Doug Ende: As a result of the participants at the table, Mr. Ende’s group focused on the details of the current Illinois and Colorado programs and noted that there is a difference in structure moving forward between integrated and voluntary bars; in that with an integrated bar, the regulators may find themselves more beholden to the membership. Mr. Ende’s group determined that the ethics hotline was the most effective PMBR tool in place currently in his group’s jurisdictions. As for barriers to implementation, Mr. Ende’s group found internal barriers, e.g., mind set of staff, intrinsic resistance, and prosecutor v. proactive, were the biggest problems.

Amy Rehm: Ms. Rehm’s group came to the consensus that many jurisdictions already have “proactive” tools in use in their systems, e.g., intake departments, practice monitors, ethics hotlines, etc., they are just not labeled as such. Understanding the nature of current practices and how they are essentially proactive should be a great selling factor when it comes to PMBR proposals to courts, particularly when the financial aspects of implementation of a PMBR program are being addressed. The main barriers discussed were buy-in from the bar and court systems, costs, staffing, and how to change the culture.

Malcolm Mercer: Mr. Mercer’s group found that with regard to regulatory objectives, his table was “all over the map.” No one at the table believed that they were necessary, but all thought that they were desirable. The group also discussed why proactive approaches work in measuring success, and what tools, in particular, were helpful in this regard. Answers were as varied as law practice management programs, CLE programs for newly licensed attorneys, mentoring programs, trust account schools, and practice monitors. Barriers to implementation mentioned were: whether or not regulators actually possess the requisite skills and training to manage the programs, staffing, and specifically, who on staff has insight into what constitutes a solo practice and the issues/problems that solo or small firm practitioners face daily, staff embracing innovation and a different focus, regulatory agencies as “complaint driven” entities v. proactive regulators.

Tracy Kepler: As time was running short, Ms. Kepler promised to recount her table’s discussion in a few minutes. With regard to the role of regulatory objectives, the group felt nuances matter, and the approach must be jurisdictionally appropriate and sensitive. Ms. Kepler’s group determined that success in a PMBR approach will not be determined by the number of grievances declining, but rather by defining a set of behaviors and following a course of action to measure change. PMBR is a constantly evolving and growing system – education and evaluation are key components. Mr. Berry also stated that some measure of success is just that we are discussing proactive regulation, “saying this is important and sending a message.” Barriers to implementation of PMBR programs discussed were: financial, internal as with the other group, whether or not the staff has the skill to “manage human performance.” The group questioned whether this skill, which is something separate and apart from discipline, is something that can be taught or something that is innate. The group wondered whether attorney regulators can also be/need to be risk assessment consultants.
Before closing remarks, Ms. Kepler opened the floor to the insurance consultants in the room as well as Matt Sims for comment. Sean Ginty and Chris Newbold offered that the insurers will be as involved as regulators determine is appropriate. They are sensitive to the concern that PMBR and self-assessments are a cover for a push to mandatory insurance. Matt Sims also offered his perspective on how to best develop the assessment tools themselves and specifically to think of the answer regulators seek when asking the question.

Ms. Kepler then thanked the group of its attendance and participation, and to look forward to the creation of the website housing the PMBR resources as well as to the 4th Annual Workshop.