



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM

From: Darrel Pink

To: Participants in the PMBR Discussion at ICLR 2016 (Susan Fortney, Laurel S. Terry, James Coyle, Ellyn Rosen, Deb Armour, Kensi Gounden, Don Thompson, Cori Ghitter, Barbra Bailey, Kris Dangerfield, Margaret Drent, Malcolm Mercer, William Slease, Gene Shipp, Tracy Kepler, Jerry Larkin, Steve Mark)

Date: October 25, 2016

Subject: PMBR – A Discussion about Language

A group of interested regulators met over lunch at ICLR 2016 in Washington, DC to discuss whether there can be developed a common vocabulary or a common understanding of meaning when we use the title 'Proactive Management-Based Regulation' (PMBR) to describe what many are contemplating as a new and better approach to lawyer/law firm regulation. My initial letter of invitation is attached. Though there was no opportunity to consider specific proposals or to draft 'definitions', several themes did emerge that will merit further discussion and reflect the thinking of those who are immersed in new approaches to regulation.

Agreement – Clear language reflects clear thinking, and will also help with messaging and educational efforts. This alone is the basis for further discussion.

The language of PMBR – each word suggests many things. Some raise greater concern among lawyers than do others. Given that PMBR is intended to communicate an approach to regulation that could apply to and must be understood by lawyers, it must speak to them in clear and unambiguous ways.

Proactive – this refers to how we as regulators behave and not about what lawyers do. Because proactivity is the basis for designing a 'self-assessment' component for lawyers/law firms, it is foundational to a new way of thinking about lawyer regulation.

Management-Based – The goal is to influence lawyers to improve ethical behavior/ethical infrastructure by encouraging use of accepted management principles to achieve better practices. Initiatives that are designed to enhance management could be accompanied by incentives (an approach in some US states) or could be trending toward mandatory (the emerging Canadian approach). Early experience suggests that lawyers understand the value of programs that use management principles to improve their law practices.

Regulation – a word that may be falling from favour in some jurisdictions and which, because of how it is perceived, fosters resistance from the bar to the concept of PMBR. It is being replaced with ‘assistance’, ‘programs’, ‘professional development programs’, and ‘systems’ (to support lawyers in developing their infrastructures).

Issues:

‘Risk’ – there was a discussion about the use of ‘risk’ (described by one participant as Orwellian) and the language of ‘risk’ in this approach to regulation/program development. The idea is that regulators will target behavior that might cause harm. Most recognize that much of the risk of harm resides in a small percentage (say 15%) of the profession. The consultations in western Canada on ‘being proactive’ in order to address ‘risky practices’ have suggested this approach is welcome. Bad lawyers impact the whole profession, so they should be the focus.¹

‘Compliance’ – there was a discussion about ‘compliance’ (described by one participant as ‘ambiguous’) which might mean ‘achieving a better practice’. But it was suggested that if programs are designed to ‘assist’ through the provision of tools and resources or practice advisors, then ‘compliance’ with regulatory rules is really not the expected outcome. Therefore, it will be essential to define/describe what it is that a ‘compliance based approach’ to regulation is designed to achieve, and what happens to lawyers who do not comply.

‘Solos & Smalls’ – It is necessary to ensure that the language we use does not allow the profession to perceive these approaches are designed to target sole practitioners and small firms.

¹ Note to Reader - When we discuss risk, it is important to discuss risk assessment. And when we discuss risk assessment, we have available the data from which we drew such assessments of risk and the methods in which we obtained such data, or other sources of information we drew from (such as stats from the malpractice insurance carriers). And even if there is no hard data from the past that a jurisdiction is relying on, we then explain our assessments based on the collective experience of well-qualified and diverse groups in our respective jurisdictions (and the methods in which we obtained such collective experience), as well as support from similar assessments by other jurisdictions who may have used hard data, or similar collective experience or a mix of both methods in those jurisdictions. By discussing the underlying methods of our risk assessment approach, we are able to better explain our conclusions, allay Orwellian fears, and build greater coalitions for improving professional behavior through these proactive programs.

Conclusion –

We did not have anything close to the amount of time required to really address the issues we are collectively facing as we take the initial steps of embracing this new form of and approach to relationships with and regulating the legal profession in the public interest. We did not come close to addressing what I had hoped we would in my invitation. However, as jurisdictions gain experience, as they move from the theory to the reality of PMB'X' (note the new acronym). The value in these discussion can only grow. We have much to learn from both the successes and failures of others, from what has been tried and what has yet to be undertaken and from the research and consultations with the profession that are ongoing. My personal hope is that these notes will serve as a reminder of some of the thinking represented at this initial discussion and that others will follow in due course.

August 10, 2016

Dear Colleagues:

Re: Terminology Related to PMBR and Entity Regulation

Some of us, who attended the International Legal Ethics Conference in New York, began a conversation about what work we could continue to do together. We had a successful workshop in Philadelphia and it is clear that the more we learn and share from those who are advancing their work on proactive and management-based regulation the better off we will likely be. It was in that context I expressed my own concerns about moving forward with multiple projects, especially in Canada, where we are using different words to describe the same things. As so often happens in our world, by raising the issue, I was deputized by the group to carry it forward!

You have agreed to join us to begin a conversation during the International Legal Regulators Conference in Washington, Thursday, September 15 during the lunch break [Room number and arrangements for lunch to be confirmed].

I have taken a few minutes to canvass some published materials and attach some rough notes that again demonstrate that our language/labels/titles are inconsistent.

Here are some of the things that I see as examples of those inconsistencies:

- What do we call what we are proposing to do — PBMR, P&MBR, compliance-based regulation, entity regulation, legal services regulation?
- Who will we regulate and what are they- Law firms, legal entity, legal entities?
- What is the approach we will bring - Triple P (proactive, principled, proportionate) proactive regulation, compliance-based regulation?
- What are we building? - Ethical infrastructures, a management system for ethical legal practice?
- What do we regulate? - Delivery/provisional legal services, practice of law?
- What is “risk” and what role does it play?

Though I know we have all come at this from our own, maybe parochial perspectives, I believe that the more we use common language the easier it will be to sell the changes we wish to make to the profession, the courts and ,where appropriate, to governments. I also believe it will make it easier to deal with detractors or those who do not support these initiatives, often by asking why we are doing things differently than elsewhere.

I am writing to you now inviting you to contribute other issues, dealing with language and terminology, that you think properly belong in a discussion with the fairly narrow goals that I have set for our meeting in D.C.

With everyone’s input, I will compile an agenda .

There is no doubt that this type of collaboration is exciting. It also demonstrates the value of the international focus we have been able to bring to our thinking around improving how we regulate in the public interest.

I look forward to your thoughts and suggestions.