

1ST REGULATORS' WORKSHOP ON PROACTIVE, RISK-BASED REGULATION

Cosponsored by the ABA Center for Professional Responsibility, Colorado Supreme Court Office of Attorney Regulation Counsel, and the Maurice Deane School of Law at Hofstra University¹

**MEETING MINUTES
May 30, 2015, 9:00 a.m. – 3:00 p.m.
Colorado Supreme Court Building
2 East 14th Avenue
Supreme Court Conference Room, 4th Floor
Denver, CO 80203**

Attendees:

- Deborah Armour, Chief Legal Officer, Law Society of British Columbia;
- Lawrence Bloom, Senior Staff Attorney, District of Columbia Court of Appeals Office of Bar Counsel;
- Charles Centinaro, Director, New Jersey Office of Attorney Ethics;
- Nancy Cohen, Principal, MiletichCohen PC;
- Felice Congalton, Associate Director, Washington State Bar Office of Disciplinary Counsel;
- Steve Gouch, President & CEO, Ohio Bar Liability Insurance Company (OBLIC);
- James Coyle, Attorney Regulation Counsel, Colorado Supreme Court Office of Attorney Regulation Counsel;
- Dolores Dorsainvil, Senior Staff Attorney, District of Columbia Court of Appeals Office of Bar Counsel;
- Doug Ende, Director, Washington State Bar Office of Disciplinary Counsel;
- Dawn Evans, Disciplinary Counsel and Director, Oregon State Bar Director of Regulatory Services;
- Susan Fortney, Howard Lichtenstein Distinguished Professor of Legal Ethics & Director of the Institute for the Study of Legal Ethics, Maurice A. Deane School of Law at Hofstra University;
- Paula Frederick, General Counsel, State Bar of Georgia;
- Art Garwin, Director, ABA Center for Professional Responsibility;

¹ Members of the Regulators' Conference Planning Committee were Jim Coyle, Susan Fortney, Art Garwin, Zeynep Onen, Darrel Pink, and Ellyn Rosen.

- Cori Ghitter, Director, Professionalism & Access, The Law Society of Alberta;
- Tahlia Gordon, Counsel, Creative Consequences Pty Ltd.;
- Linda Gosnell, Attorney & Lecturer, Eastern Kentucky University;
- Theresa Gronkiewicz, Deputy Regulation Counsel, ABA Center for Professional Responsibility;
- John Hicks, General Shareholder & Assistant Counsel, Baker Donelson;
- Honorable William Hood, III, Justice, Colorado Supreme Court;
- James Kawachika, Partner, O'Connor Playdon & Guben LLP;
- Tracy Kepler, Assistant Solicitor, Office of General Counsel, United States Patent & Trademark Office;
- Jerry Larkin, Administrator, Illinois Attorney Registration & Disciplinary Commission;
- Leslie Levin, Professor of Law, University of Connecticut Law School;
- Steven Mark, Counsel, Creative Consequences Pty Ltd.;
- Honorable Monica Marquez, Justice, Colorado Supreme Court;
- Kellyn McGee, Associate Dean of Students and Associate Professor, Savanna Law School;
- Wendy Muchman, Chief of Litigation & Professional Education, Illinois Registration & Disciplinary Commission;
- Zeynep Onen, Executive Director, Professional Regulation, The Law Society of Upper Canada;
- Margaret Plane, City Attorney, Salt Lake City Corporation;
- Darrel Pink, Executive Director, Nova Scotia Barristers' Society;
- Victoria Rees, Director, Professional Responsibility, Nova Scotia Barristers' Society;
- Amy Rehm, Deputy Chief Bar Counsel, Arizona State Bar;
- David Rolewick, Attorney, Rolewick & Gutzke, P.C.;
- Arnold Rosenfeld, Senior Counsel, Sarrouf Law, LLP;
- Ellyn Rosen, Deputy Director, ABA Center for Professional Responsibility;
- Ted Schneyer, Professor of Law Emeritus, University of Arizona James E. Rogers College of Law;
- Gene Shipp, Bar Counsel, District of Columbia Court of Appeals Office of Bar Counsel;
- William Slease, Chief Disciplinary Counsel, New Mexico Supreme Court;
- David Stark, Partner, Faegre Baker Daniels;
- Laurel Terry, Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law;
- Don Thompson, Executive Director, The Law Society of Alberta;
- Maret Vessella, Chief Bar Counsel, Arizona State Bar; and
- Lish Whitson, Attorney, Lish Whitson PLLC.

1. Welcome and Introduction to the Workshop (9:00-9:10)

Ellyn Rosen welcomed participants to the conference. Ms. Rosen is Deputy Director of the American Bar Association Center for Professional Responsibility. Ms. Rosen thanked the Colorado Supreme Court and its Office of Attorney Regulation Counsel and Professor Susan Fortney and Hofstra University for their help in making the conference possible. She thanked the planning committee, and in particular Cheryl Lilburn of the Colorado Office of Attorney Regulation Counsel. She thanked Art Garwin, Deputy Director of the ABA Center for Professional Responsibility.

Ms. Rosen thanked conference participants for their responses to the pre-conference questionnaire.

Ms. Rosen stated that the McKay Commission recommendations explored a new frontier and an expanded system of regulation. We will explore an expanded regulatory system today. We will think about the future of lawyer regulation as a cradle-to-grave proposition encompassing the beginning, middle and end stages of lawyers' professional life. Currently, we think about the first stage and the end stage (discipline). Today, we will focus on middle stage. Ms. Rosen compared this type of regulation to preventive care at a doctor's office.

Ms. Rosen referred to a cartoon described in Susan Fortney's article on proactive regulation, in which a doctor asks a patient, "what fits your busy schedule better, exercising one hour a day or being dead 24 hours a day?"

Ms. Rosen explained that all jurisdictions have some form of proactive regulation, but it is often ad hoc and piecemeal. She encouraged participants to think in terms of evolution, not revolution, with respect to the current system. A shift to proactive regulation can be collaborative, not confrontational. Proactive regulation is not a "gotcha." We can look at some U.S. jurisdictions who are focusing on preventing problems, not responding to them, through risk-based schemes. These tools are designed to help lawyers practice better and avoid risks. We have good data—the experience in New South Wales suggests proactive regulation can result in a drop in disciplinary complaints by two thirds. These measures are cost effective to implement—for example, a secure portal with an automated process for self-assessment, which allows follow-up where needed. Data also shows that those who have gone through the process and were skeptical feel pretty good about it afterward.

Ms. Rosen suggested that today's goal should be to think about whether we should consider adding this kind of complementary regulatory program in the U.S., after having seen what's going on in the world. Could it work here? If so, how?

2. Developing a Vocabulary and Surveying the Landscape (9:10-10:40)

a. Welcome and Introduction – Susan Fortney and Zeynep Onen

Susan Fortney is the Howard Lichtenstein Distinguished Professor of Legal Ethics at the Maurice Deane School of Law at Hofstra University.

Zeynep Onen is the Executive Director of Professional Regulation at the Law Society of Upper Canada.

b. Introduction to Proactive Regulation and Questionnaire Results

Ms. Fortney introduced proactive regulation as those regulatory measures that help lawyers develop ethical infrastructures to address consumer concerns. The goal is to be ahead of the problem, rather than waiting to respond to complaints.

Ms. Fortney reviewed the results of the pre-conference questionnaire. According to the questionnaire responses, respondents understand they are moving away from the “police” regulator role, and instead are being a “partner” with firms and lawyers to improve practices and lower the likelihood that misconduct will occur.

Many of the programs now considered proactive are educational, for example bridge-the-gap programs or end-of-career programs. All jurisdictions have ethics hotlines. Many jurisdictions are analyzing complaint data, and most jurisdictions are using it for educational purposes, i.e. to identify areas where complaints arise. Other jurisdictions are doing more in terms of risk-profiling. For example, Colorado has a program for changes in practice areas. A 2011 ABA conference opening session was about lawyers who are victims of the recession. Many of those lawyers transitioned from big firms to solo practice. Now Colorado is systematically evaluating those practice changes and reaching out to those individuals. Colorado takes reports of attorneys’ practice areas, and then automatically sends a packet when changes are made. Mr. Coyle pointed out that this program was Attorney Regulation Advisory Committee Chair David Stark’s idea.

Ms. Fortney explained that Alberta is designating a lawyer to be responsible for each firm’s trust accounts, which has to do with entity regulation. In sum, different jurisdictions have different measures. Steve Mark and Tahlia Gordon are driving change in New South Wales.

c. Introductory Round

Ms. Fortney asked attendees to break into groups of two and discuss two questions: (1) why are you interested in this workshop; and (2) why are you interested in proactive regulation?

Upon reconvening, some of the attendees’ responses were as follows:

- A representative from the District of Columbia made three points: (1) change is the only constant; (2) regulation is ours to lose—changes in Australia were brought about by

legislation, not the courts; and (3) there has not been a period for reflection until now. These three days of conferences have allowed us to reflect. We all want to be proactive.

- Lawrence Bloom from the District of Columbia met with Jerry Larkin of Illinois and Deb Armour of British Columbia. He suggested compiling a list of what other jurisdictions are doing as far as proactive regulation. Who has done it successfully? That could be the model. His group would like to hear about models other than New South Wales. He is in favor of proactive regulation because we all want to get ahead of problems before they happen.
- Don Thompson from Alberta met with Ted Schneyer. He suggested the problems we are attempting to address through proactive regulation were easily identified three decades ago. There are issues around lawyer performance, some of which involve ethics issues, but most involve managing relationships with clients, staff, and other lawyers. Regulators have done little to address those issues. We need a coherent plan.
- Steve Gouch is the president of NABRICO and also works with the Ohio Bar Association. He met with Cori Ghitter from Alberta. He is here to take in this whole subject and try to help figure out how proactive regulation can work. From an insurance perspective, Steve has been preaching this same message to insured lawyers—but usually after the fact, after problems arise. There is currently education on the front end, but it is purely voluntary.
- Dave Stark is Chair of the Colorado Supreme Court Advisory Committee. He is also a professional responsibility partner at Faegre Baker Daniels, which is insured by ALAS. He is very interested in proactive work; his firm engages in it daily. It is a way to manage risk and serve clients. Colorado is heavily engaged in proactive regulation already, but there is always more to learn. He asked how we can implement proactive regulation in smaller firms.
- Steve Mark from New South Wales met with Jim Coyle of Colorado. Mr. Mark reported New South Wales’s regulatory system is a creature of legislation. The first principal they established in the office that took complaints was that the purpose of the office was to *reduce* complaints. To do so, he had to be proactive. He pointed out that small firms believe regulation is aimed only at them. He believes this proactive regulation is helpful to small firms.
- Leslie Levin from the University of Connecticut law school met with Victoria Rees from Nova Scotia. Ms. Rees is here to “reflect, test, share, and learn.” Leslie writes about regulation and has research interests in solo and small firm lawyers, as well as how to

understand lawyer behavior and how to measure what's happening. This group asked whether we can follow up on the solos who receive transition packets in Colorado.

- Bill Slease from New Mexico met with Dawn Evans from Oregon. Ms. Evans reported that Mr. Slease wants his office to become a resource, rather than a place to be feared. Oregon is the only state with mandatory legal malpractice coverage. There is a “wall” between PLF (Professional Liability Fund—the insurer) and the disciplinary system. She is excited about a potential self-assessment tool. She finds it easy to be discouraged about recidivism.
- Charles Centinaro from the New Jersey Office of Attorney Ethics met with Maret Vessella from Arizona. Mr. Centinaro reported that New Jersey is progressive. It was one of the first states to have a random audit program, an ethics hotline, and a diversion program. Entity-based regulation is natural extension of these proactive programs. His concern is, how do we implement such a program? We need buy-in from the bar. We need to convince the bar that the benefit outweighs the cost.
- Amy Rehm reported that her group is interested in values, and how to incorporate values and ethics into everyday lives. Practically, from regulatory standpoint, Ms. Rehm says proactive regulation reduces frequent flyers and reduces workload. She wondered how we can reduce our membership's suspicion and build trust.
- Doug Ende from Washington reported that he works for a court that's willing to go where no supreme court has gone before. His court is interested in new ways to protect the public.

d. Experiences in Other Countries

Ms. Fortney suggested thinking about the language we use. As an example, Mr. Coyle pointed out that he is “regulation counsel,” not “disciplinary counsel.” The group wondered whether we should call the attorney regulation system an “attorney integrity system” or some other appropriate name.

Ms. Fortney explained that New South Wales's regulatory system grew out of legislation, which requires that incorporated firms (those with nonlawyer ownership) must appoint a director and implement and maintain appropriate management systems. The idea was to make sure there are safeguards in place. Steve and Tahlia met with lawyers, insurers, and others to define “appropriate management systems.” They developed ten objectives of sound legal practice, which are ten areas that commonly lead to complaints.

In order to determine if the objectives are met, New South Wales implemented a self-assessment process (SAP). Firms rate themselves from “noncompliant” to “complaint plus.” The regulator

can then provide resources to firms who are not compliant. This system translates to reduced complaints and better client service.

One early quantitative study showed that complaints against participating firms went down by two thirds. Those firms generated only one third the complaints of those firms that had not gone through the process.

This idea is spreading throughout Australia, for example, to Queensland.

Ms. Fortney found the first study suggested there could be a follow-up study. The first study did not address *why* complaints went down. In a second study, Ms. Fortney found 50% of firms adopted new systems in response to the self-assessment process. The most significant impact was on supervision and risk management. There was less impact on client satisfaction and firm morale. Ms. Fortney found firms learned from the process. This is the basis of the idea of “education toward compliance,” or ETC.

Ms. Fortney suggested looking at how firms embraced proactive regulation in terms of a pyramid chart. 12% of firms resisted such regulation, and viewed it as “checking boxes.” More firms, though, embraced the idea. Implementation creates compliance, helps clients, manages risk, and develops business (having this certification helps firms land big clients).

Ms. Onen reported on the situation in England and Wales: in 2007, England and Wales passed the Legal Services Act, which places the focus on the firm, not the lawyer, and on outcomes-based regulation. Outcomes are identified through codes of conduct for firms and individuals. Regulation is risk-based, so a lot of information is collected about the entities. Firms appoint compliance officers to manage an ethical framework and trust accounts. The regulator conducts active monitoring of all firms. A risk framework guides interventions. Ms. Onen noted that some firms complain they are not getting enough information and support.

Ms. Onen has had difficulty determining what it costs to have thirty people in a risk-management office. England and Wales may have a cost the New South Wales system does not.

The Solicitors Regulation Authority (SRA) investigates firms. Its less-intrusive type of regulation results in more diversion programs. Intervention—the more-intrusive regulation—is rigorous; the individual and the firm are immediately suspended and client property is transferred to the SRA.

Nova Scotia is in process of implementing proactive regulation. British Columbia established a Law Firm Regulation Task Force in 2015. Alberta adopted a rule applicable to firms, including rules for trust accounts. Other Canadian provinces are also exploring proactive regulation.

e. Small Group Discussion with Reports – Mega-Planning

Ms. Fortney and Ms. Onen asked attendees to split into groups and discuss the following questions: what are your objectives for today? What guidance and tools do we need going forward? What are the challenges?

Some group comments were as follows:

- There was discussion about getting buy-in. What can attendees take back to their states to build support for proactive regulation?
- There was discussion about resources. How can attendees address concerns about the resources needed for proactive regulation? There was also some debate about the cost effectiveness of proactive regulation.
- There was discussion about overcoming political barriers.
- There was discussion about giving tools to solos and small firms. Some attendees expressed doubt that this will be cheap. Mr. Mark stated proactive regulation need not be expensive. Ms. Fortney concurred. She noted that she helped develop a self-assessment checklist for Texas insurers. Attendees wondered whether “build” costs for programs to help solos and smalls will be high. There was discussion about whether we can refocus resources we already have.
- There was discussion about addressing mental health and addiction issues earlier in the process.
- There was discussion about access to justice: the challenge is to make the case that proactive regulation is a key to help promote access to justice.

Ms. Onen concluded by noting the Law Society of Upper Canada has seen a reduction in the number of disciplinary complaints. The Law Society is developing a report as part of its implementation of entity regulation.

3. Break (10:40-11:00)

4. Exploring Implementation Possibilities (11:00-12:30)

a. Introduction

Jim Coyle introduced Justice Marquez and Justice Hood of the Colorado Supreme Court. Justices Marquez and Hood are attending for part of the workshop.

Ellyn Rosen introduced Ted Schneyer of the University of Arizona James E. Rogers College of Law.

Mr. Schneyer stated that he started thinking about proactive regulation before many other people did. Rule 5.1 helped put in place proactive measures.

Mr. Schneyer suggested there should be law firm discipline because there are certain responsibilities that cut across the entire firm. We need some overarching firm response. Some rules have been adopted in New York and New Jersey, but it is disappointing how little they are used. Mr. Schneyer suggested there might be too many uses of the word “reasonable” in the rules, which makes enforcement difficult. Also, these are “second order” rules – they do not establish duties running to clients. Complaints do not come in about, for example, the lack of an “adequate calendaring system.”

These firm rules require governance through proactive systems, ones that do not focus on discipline. This is the idea behind “education toward compliance.” We do not necessarily want to *discipline* firms for violating these kinds of policies. There can still be discipline, but this is an additional program.

Also, proactive regulation can help clients who have grievances that do not necessarily rise to the level of discipline.

b. The Canadian Experience

Darrel Pink is the Executive Director of the Nova Scotia Barristers’ Society.

Mr. Pink stated proactive regulation is not a one-size-fits-all approach. We need to understand our own jurisdiction’s culture—what are the authorities, rules, and attitudes?

In Nova Scotia, there was an “epiphany” when the governing board was doing strategic planning. Mr. Pink asked, “does what you do as a regulator make any difference? Does it improve the quality of legal services offered to the public?” He began to invest time and energy in looking at how the system works.

The Barristers’ Society had authority to regulate and discipline law firms for ten years. Law firms have designated responsible lawyers for years. Firms have reported on trust accounts for years.

In Alberta, the Law Society of Alberta is the regulatory body. The Law Society itself adjudicates complaints. But the Law Society has said it adjudicates too much. If we could change things in attorneys’ practices earlier, those attorneys would not end up with complaints filed against them. The Law Society currently has employee assistance programs, addiction programs, practice

management advisors, and loss prevention (it operates its own insurance company). But there is no overarching strategy to deal with all these issues.

The Law Society has said we need to become more proactive in regulating. For individual practitioners, that means setting up ways to find out when something is wrong earlier. For entity regulation, it means restructuring law practices to minimize the risk profile.

To identify risk, we need to change our organizational structure to prevent minor complaints. We need to change the organizational culture of the regulator.

In Ontario, the Law Society of Upper Canada is the regulatory body. The Law Society oversees 47,000 lawyers and 7,000 paralegals.

The Law Society of Upper Canada processes complaints and discipline, as well as a large number of remedial resolutions. The Law Society puts on professional development and competence programs, which means licensing and twelve hours of education annually (including three hours on professionalism). There is also an audit system; the Law Society does practice audits and spot trust account audits, on both a random and targeted basis. If significant information, such as fraud, becomes apparent during an audit, the Law Society can investigate. This happens, but there hasn't been a loss of trust in the Law Society. Some significant frauds have been caught early. Generally, though, the auditor is seen as helping hand. This all provides better service to the public, especially for small firms and solo practitioners.

The Law Society Act does not currently give the Law Society authority to regulate entities, but a committee is expected to recommend such regulation.

Regulators in Nova Scotia are taking baby steps toward entity regulation. The idea is to regulate for "the public interest," which also enhances access to justice. Regulators in Nova Scotia researched what is happening around the world and looked at future of the legal profession in order to design a system that is effective not just today, but for the next ten or twenty years. Bar counsel hired Mr. Mark and Ms. Gordon, who did an "environmental scan" of legislation, rules, and culture in Nova Scotia. This is important because a jurisdiction cannot simply use another jurisdiction's model. Nova Scotia bar counsel created six regulatory objectives, which will be the road map for the organization. They are calling this a "management system for ethical legal practice." Bar counsel will ask firms to complete a self-assessment process. They are meeting with a risk consultant in August to develop risk tools.

Mr. Mark and Ms. Gordon completed four reports for the Nova Scotia Barristers' Society: (1) an overview and environmental scan; (2) a report on complaints (major areas of complaints, compared to demographics, including insurance claims); (3) suggestions for regulatory objectives, in relation to complaints and conduct rules (this report was presented to counsel and focus groups); and (4) a report refining the ethical infrastructure and developing self-assessment tools. Total cost for this work was somewhere between \$25,000 and \$60,000.

c. Creating an Appetite for Change

The group considered the following questions: what is the most organic or achievable in terms of change? What is being done now in different jurisdictions that could be a model for a different approach to regulation?

Mr. Coyle reported he would like to build a self-assessment form. The self-assessment process would get lawyers engaged. We would then have data on what we as regulators need to do to be more effective. We could catch red flags early and could offer help. The self-assessment could use a web-based program. This would primarily help solo and small-firm practitioners. There would be some pushback, but a self-assessment program could be accomplished. Mr. Coyle suggested the self-assessment would not need to be mandatory, at least in the beginning.

Ms. Terry noted the importance of building trust with regulated lawyers.

Some other comments were as follows:

- “Boot camps” and diversion schools are examples of existing proactive regulation that could be expanded.
- Proactive regulation can be remedial in nature. The regulator can pick up the phone, call a person at a firm, and let them know they have a problem.
- It is important to expand outreach by reaching out to new firms. Should there be a new firm checklist?
- Mr. Coyle expressed interest in developing regulatory objectives, sound business management objectives, and an online self-assessment form. Should it be voluntary or mandatory? Interactive?
- An attendee pointed out Mr. Mark and Ms. Gordon’s article on regulatory objectives.
- An attendee noted that some work can be done through piloting or sampling. Mr. Pink agreed and added that early adopters can become advocates.

Ms. Rosen and Mr. Pink asked the group to break into small groups and consider (1) how could establishment of ethical infrastructure requirements improve individual or firm practice? (2) Is entity regulation a requirement to move forward w/ ethical infrastructure?

Comments from breakout groups included the following:

- There was discussion of differences in the entities we are regulating. Entities vary from jurisdiction to jurisdiction.

- Mr. Mark pointed out that the ten regulatory objectives are broad enough that they should apply to everyone. If some do not apply to you, that's fine. They are not one size fits all, but they can meet the need for each firm. Then, a self-assessment process can help lawyers decide how to comply with the objectives. Mr. Mark has rarely seen firms disciplined for failure to comply based on the self assessment. The firms that have been disciplined were the worst of the worst, because they wouldn't cooperate with the process.
- Mr. Hicks stated that as a member of a large firm, he would not want to participate in entity regulation; his firm already does this. Could there be an option to exempt firms who are, for example, ALAS members? He reiterated that one size does not fit all.
- A related concern is the appearance of picking on solos and small firms, and letting big firms off.
- Mr. Gordon commented that regulators who are implementing this type of regulation do not *tell* firms what they have to do to meet the objectives. That would create a bigger burden for smaller firms.
- There was discussion about the value of appointing a designated legal director to comply with entity regulation requirements. The designated legal director might or might not have increased liability and responsibility.
- There was general agreement that regulating proactively is much better than trying to fix problems retroactively.

Ms. Rosen and Mr. Pink asked the group to break into small groups and consider the first thing you want to do if you want to continue this discussion at home. Some comments were as follows:

- Mr. Coyle stated he would talk to the chair of his Supreme Court Advisory Committee; there are several areas he would like to move forward in.
- A participant from Washington State suggested making a list of the people who need to be involved in this conversation.
- A participant from British Columbia noted that B.C. has legislation for regulating law firms and has established a task force, which has met five times and created objectives for regulating firms. It would be useful to go back to that group after picking out nuggets from this workshop.
- Mr. Gouch suggested engaging with insurers on this topic.

- There was a suggestion to take time for reflection. Proactive regulation is a chance to bring people closer. Disciplinary systems are often segregated; it can be difficult to get out of that box.
- One participant suggested informing the court, and then putting together a strategic plan. This would include identifying stakeholders and figuring out how to collaborate.
- An overarching concern was receiving buy-in from lawyers and the courts.

5. Lunch (12:30-1:30)

6. States as Laboratories – Articulating Steps for Moving Forward (1:30-3:00)

Jim Coyle is Regulation Counsel at the Colorado Supreme Court Office of Attorney Regulation Counsel. Laurel Terry is Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law at Penn State Dickinson School of Law.

Mr. Coyle and Ms. Terry confirmed that attendees agree focusing on preventing problems, as well as responding to problems, is appropriate. The question then becomes, how do we develop a systematic approach, rather than a piecemeal approach, to proactive regulation?

Mr. Coyle and Ms. Terry reviewed some of the top ideas from before the lunch break:

- Build trust
- Be jurisdiction-specific
- One size does not fit all
- Talk to and work with stakeholders
- Know where problems are (top 10 risks)
- Entity regulation can help but may not be necessary
- Know what you want to achieve – i.e. regulatory objectives or “purpose”

Comments from the group based on those points included the following:

- Rule of professional conduct 5.1 is an example of proactive regulation, but it is nearly impossible to enforce retroactively.

- We should build trust in 2 ways: the regulated need to understand what regulators want to achieve, and the regulators need to understand what the regulated want to achieve.
- We should develop a good plan before implementing proactive regulation.
- It might make sense to establish a separate group or entity that lawyers can call for advice, other than the regulator.
- We should start with a data-driven framework, and mine what data we have.
- The form of regulation will depend on the size of firm – this is another example of the lack of a one-size-fits-all solution.
- A participant noted that the word “help” has been used more than “regulate” today.
- Mr. Coyle noted we are talking about a holistic approach to regulating the practice of law.

Mr. Coyle and Ms. Terry listed some of the top ideas from previous sessions for implementing a proactive regulation action plan:

- Educating yourself
- Establishing goals
- Educating stakeholders
- Addressing funding issues

Some comments from the group on this list were as follows:

- We should aim to educate the public, not just ourselves and stakeholders. We should not just educate stakeholders, but collaborate with them. We must ensure their input is heard and create a partnership.
- Mr. Pink talked about the “power interest matrix.” The power interest matrix describes groups that need to be involved. He will post the matrix for people to look at. Nova Scotia is doing a newsletter and using social media. Mr. Pink advised using social media as tools; their reach is great and can result in exponential growth of information.

Mr. Coyle asked, what if we took bold action and moved toward proactive risk-based regulation? What would we do? He stressed getting buy-in. This could be achieved through committees.

There is a need to get the right stakeholders at the table. The committee would then present the idea to the court.

Mr. Coyle would like to implement regulatory objectives and a web-based self-assessment form, and he would like to designate an ethics compliance officer from each firm. All this would require rulemaking through the supreme court. The more Mr. Coyle talks about regulatory objectives, the more he realizes he needs them.

Mr. Coyle wondered what these changes would require. Amending the attorney registration rule? Amending the registration form? When would this need to be done? Is only one ethics compliance officer per firm enough? What are the operational needs? What are the software needs for the required databases? What are the human resources needs? Can we use volunteers from our committees? It's a useful exercise to think through these steps.

Mr. Mark and Ms. Gordon discussed funding and resources. Mr. Mark was given the responsibility to develop this program with no extra resources. He came up with the idea of self-assessment to save money. Self-assessment should catch the right people while spending the least amount of money, much like trust account audits.

First, Mr. Mark held workshops consisting of academics, lawyers, and others. That involved minimal cost. Then he built out the ten points and self assessment. That cost nothing because it was done with existing staff. Then he ran a trial of these ideas – that involved minimal cost but took some time. Once the program is in place, there is more cost. Currently in New South Wales, one third of firms are incorporated, or about 5,000 firms. That means 5,000 forms coming in. The firms respond to the self-assessment because it is mandatory. The letter tells firms that if they complete the self-assessment form and become compliant, they will not be audited. Cost is minimal; it only requires one person to process these forms. The regulator had to build a technology system, or portal, which cost \$90,000. Once that is established, everything comes in electronically and automatically goes into the system. The regulator is only notified by the system when lawyers do not comply. That generates a report. The staff person calls up those firms, and then writes to find out what we can do to help. The letter gives the firms three months to get the things they need and encourages firms to call us for help with resources for getting into compliance. The person answering the phone cannot give advice on how to comply because they are the regulator. No staff person actually physically goes to the firm, but we can refer them to resources – software help, ethics hotline, etc.

Mr. Mark reported that often, a small firm or sole practitioner will receive the self-assessment form and tell staff to complete it. The staff does not know how to do so, which creates a conversation that itself solves many of the problems. Mr. Mark noted that he does not impose systems. The firms have to come up with the system.

Mr. Pink stressed the importance of marketing proactive regulation.

Ms. Onen noted that in Ontario, women and small firm lawyers saw this as help, not regulation. This kind of regulation is easy to do in small populations but can be hard to do on a large scale.

Ms. Terry said the ABA state toolkit provides steps on how to create a committee and get broad representation.

Mr. Mark said his entire budget came out of the IOLTA fund.

Attendees discussed collaboration. What can the ABA do for us? How do we build coalitions?

Ms. Rosen pointed out that NOBC and the ABA Center for Professional Responsibility are partners. They work on programming together. NOBC is putting together a page on entity regulation. The ABA is working on gathering information, creating resources, and building coalitions. This working group has an international flavor. We are a global profession now.

A participant proposed that when a group decides to look at these issues, the ABA could provide a central location for “experts.” For example, if Jim Coyle gets court approval for this kind of program, he would be an expert, and the ABA could have a clearing house for these experts.

Ms. Fortney stated she is working on making this a regular working group. She has thought about when is easiest for everyone. This year, we held the workshop together with the Center for Professional Responsibility conference. We could discuss this at the upcoming International Conference of Legal Regulators in Toronto.

Ms. Rosen stated there will be a follow-up survey that will include this issue.

Mr. Coyle wondered whether there is an advantage to building consortiums. For example, western states could help each other. They might draw in a justice and a regulator from each jurisdiction. A participant pointed out that Canada is doing something similar. This depends in part on how far along different jurisdictions are and on geography.

The question was raised whether there is an ABA framework for proactive regulation. Ms. Rosen replied that the ABA is looking at that. The ABA Commission on the Future of Legal Services is working on a list of regulatory objectives; there might be a list within the month. The commission is looking at regulatory objectives from the 10 or 12 countries that have implemented them.

Ms. Terry has found that chief judges, i.e. Chief Judge Lippman in New York, are more open to ideas like this. The Conference of Chief Justices might be open to this.

7. Closing (3:00)

Ms. Rosen reminded participants that follow-up information will be distributed. There will be a survey, links to issues we talked about, and copies of PowerPoint slides.

An online forum could be created if people are interested. There could be continued education. The Conference of Chief Justices has a professionalism committee we could work through.

Ms. Fortney encouraged participants to look at the questionnaire responses to see what different jurisdictions are doing.

Ms. Fortney encouraged participants to consider their use of language. Think “branding.” Ms. Fortney has used the term “audit” in the past, and will not use that term anymore. “Practice reviews” might be better. “Compliance” is also not a great term; it has baggage. Terminology can inform the discourse.

Ms. Fortney urged participants to consider things they currently do that can include aspects of proactive regulation.

She suggested possibly giving CLE credit for completing self-assessment forms. There could also be NABRICO credit for completing self-assessment forms.

Ms. Fortney anticipated resistance to proactive regulation. This might include concerns about discovery. Might it be necessary to rework rules, or create a statutory privilege for self-evaluation?

Ms. Terry encouraged thinking of the questionnaire summary as living document. Participants should respond with comments on issues they think of in the future.

The workshop concluded at 3:00 p.m.

Respectfully submitted,

James C. Coyle
Attorney Regulation Counsel