

# **Proactive Regulation**

## **Frequently Asked Questions**

### **1. What is proactive regulation?**

“Proactive regulation” is a term used to describe approaches and programs that try to **prevent** lawyer regulatory and service problems from occurring, rather than dealing with alleged misconduct after complaints are filed. Proactive regulation is based on the premise that sometimes “an ounce of prevention is worth a pound of cure.”

### **2. If a jurisdiction uses proactive regulation, does that mean that it cannot discipline lawyers?**

No. While proactive regulation tries to prevent problems from occurring in the first place, it does not preclude a jurisdiction from disciplining a lawyer. A jurisdiction can have both a proactive regulation system and a lawyer discipline system.

### **3. Are there various forms of proactive regulation?**

Yes. Most U.S. jurisdictions use some kinds of proactive regulation. For example, most U.S. jurisdictions have mandatory Continuing Legal Education (CLE) requirements. CLE requirements have been adopted with the goal of having lawyers keep up-to-date and thus avoid problems. Other examples of proactive regulation include the following:

- Ethics hotlines;
- Law practice management assistance;
- Assistance for impaired lawyers;
- Bridge the gap, mentoring, professionalism or other programs for newly admitted attorneys;
- Practice standards for specific subject matter or practice areas;
- Monitoring discipline data to determine topics for future proactive regulation;
- Using registration data or discipline data to determine type of outreach for particular kinds of lawyers;
- Emailed newsletters that contain proactive tips; and
- Emails to lawyers who switch registration status to solo or small firms given the higher rate of client complaints against solo and small firm lawyers.

Appendix B to this Proactive Regulation FAQ identifies jurisdictions that use each of these methods.<sup>1</sup>

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<sup>1</sup> Please let us know if we haven't listed your jurisdiction and we should. If you have additional measures that aren't included that you think should be included, please let us know. You can reach the NOBC Proactive Regulation Committee by contacting its Chair, Jim Coyle, at [j.coyle@csc.state.co.us](mailto:j.coyle@csc.state.co.us).

Jurisdictions may adopt a few, many, or all of these proactive measures, and perhaps others as well. They may also vary in the extent to which they rely on, and commit resources to, proactive as opposed to the traditional, “reactive” tools -- disciplinary enforcement and malpractice liability. Some, such as the jurisdictions described later, have committed to consider, regularly and systemically, what proactive measures they might use when approaching a given issue.

#### **4. Have some jurisdictions made a systemic commitment to use a proactive regulatory approach?**

While most, if not all, jurisdictions use at least some proactive regulation tools, there is growing interest in jurisdictions around the world in approaching proactive regulation in a more comprehensive and systemic manner. For example, the regulator for the legal profession in Nova Scotia, Canada uses a “Triple P” regulatory approach – that is, its approach to regulation will be *proactive*, principled, and proportionate. See Nova Scotia Barristers’ Society, Framework Chart, <https://perma.cc/74AX-BTNT>. Several other Canadian provinces are considering whether to make a commitment to have a systemic and comprehensive approach to proactive lawyer regulation.<sup>2</sup>

In 2016, the Colorado Supreme Court adopted a preamble to its *Rules Governing the Practice of Law*. The new preamble sets forth regulatory objectives and includes proactive regulation among these objectives. See <https://perma.cc/H5HB-VYNW>. On January 25, 2017, Illinois issued a [press release](#) announcing that it was “the first state in the nation to adopt a Proactive Management Based Regulation (PMBR).” Among other things, Illinois adopted a rule that requires a lawyer to conduct a self-assessment of the operation of his or her law practice every two years if that lawyer does not have malpractice insurance.<sup>3</sup> The press release noted that the changes were based upon a multi-year study of PMBR initiatives in other countries and in the United States, and after consultation with key Illinois stakeholders, including many bar association and lawyer groups. Other U.S. jurisdictions, such as New Mexico, are considering the adoption of statements that express their commitment to a systemic approach to proactive regulation.

#### **5. What are the benefits of adopting a systemic commitment to proactive regulation?**

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<sup>2</sup> For a summary of the Canadian developments, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016). To find more recent developments, you can consult the Canadian portals, which are linked from the webpage of the Colorado Proactive Management Based Regulation subcommittee. See <https://perma.cc/RW6K-PTZQ>. As the Proactive Regulation law review article and the documents on these portals reveal, several Canadian provinces are combining their efforts to develop a more proactive regulatory system with efforts to develop or implement a system of entity regulation. This combination is often referred to as PMBR (Proactive Management Based Regulation). For additional information on PMBR and the combination of proactive and entity-based regulation, see the NOBC’s Entity Regulation FAQ document available at <http://www.nobc.org/index.php/jurisdiction-info/global-resources/entity-regulation>. For links to the Canadian web

<sup>3</sup> See Illinois Supreme Court Rules, Rule 756 on Registration and Fees, at Rule 768(e), available at [http://www.illinoiscourts.gov/SupremeCourt/Rules/Art\\_VII/artVII.htm#Rule756](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756).

Some have argued that there is a benefit to having a jurisdiction make a systemic commitment to proactive regulation, rather than adopting, on an ad hoc basis, proactive regulation tools. For example, in her *Proactive Regulation* law review article, Professor Laurel Terry from Penn State's Dickinson Law argued that a jurisdiction that has a comprehensive and systemic commitment to proactive regulation might find cost effective ways to prevent problems from occurring rather than responding after they occur. She offered the example of Colorado, which sends an email to all lawyers who move from a government legal position or large firm practice to a solo or small firm practice. The email summarizes the many resources that the Colorado regulator has available, including personal consultations. The email costs Colorado very little money up front, but in the long run, it should help avoid problems and save the state – and more importantly, clients – both money and aggravation. While a jurisdiction could certainly use an email tool like this without having adopted a comprehensive and systemic approach to proactive lawyer regulation, having such a commitment makes it more likely that a regulator will regularly take a moment to stop and reflect and consider whether it could be doing something additional, on a proactive basis, that would prevent problems, rather than simply responding to problems after they occur.

Darrel Pink, the Executive Director of the Nova Scotia Barristers' Society, has explained as follows the usefulness of having made a systemic commitment to proactive regulation: 'Our goal is to change the nature of the conversation between the Society, as regulator, and the profession. We will do this by actively engaging with lawyers and law firms about matters that we know, from experience, raise substantial risk of complaints, claims against our insurance program or other regulatory interventions, such as from trust account oversight. This engagement is a clear example of proactive regulation aimed at addressing issues before they escalate to the level where coercive action is required'. The Nova Scotia Barristers' Society has begun to use its proactive approach across the board, including, for example, when it approaches professional responsibility and credentialing issues.<sup>4</sup>

Arguably, proactive approaches protect the public more than reactive systems. In her article, *Promoting Public Protection through an "Attorney Integrity" System*, Professor Susan Fortney of Texas A&M University School of Law explains that an attorney regulation system that relies heavily on a complaint-driven process of prosecuting alleged misconduct after it occurs provides little direct relief to the client or other persons who have been injured by the lawyer's misconduct.<sup>5</sup> Rather than waiting for misconduct to occur, she asserts that a proactive system of "attorney" integrity, rather than "attorney discipline," helps improve ethical conduct and the quality of legal services, while reducing the number of complaints.<sup>6</sup> In the long run, she suggests that such a move can save regulators money and enable regulators to focus more on those complaints that are filed, while enhancing both client and lawyer satisfaction.<sup>7</sup>

## **6. Do jurisdictions that have entity regulation necessarily use proactive regulation?**

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<sup>4</sup> See Terry, *supra* note 2, at 89.

<sup>5</sup> Susan Saab Fortney, *Promoting Public Protection through an Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 PROFESSIONAL LAWYER, 16 (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906525).

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 7-8.

No. It is possible for a jurisdiction to regulate entities, but not to have adopted a proactive regulation approach. For example, regulators in both New York and New Jersey have the authority to discipline law firms, as well as individual lawyers. But neither New York nor New Jersey has, as yet, adopted a comprehensive proactive regulation system. Both states have proactive programs and measures, but neither uses a systematic approach, such as Triple P regulation being developed in Nova Scotia.

**7. Do jurisdictions need to adopt entity regulation in order to make a commitment to proactive regulation?**

No. Even if a jurisdiction has not adopted entity regulation, it is possible for that jurisdiction to decide that it wants to regulate proactively, in order to prevent problems before they occur. For example, a U.S. jurisdiction that has not adopted entity regulation could decide to use a Triple P approach to regulation – that is, to regulate in a manner that is proactive, principled, and proportionate.<sup>8</sup> It is common for U.S. regulators to have goals (or principles) such as client protection and public protection that they are trying to advance. It is also common for U.S. regulators to try to regulate in a manner that is appropriate and fair (i.e., proportionate). A jurisdiction could decide that even in the absence of entity regulation, proactive regulation would advance its regulatory goals (or principles) and that it would be appropriate to do so.

**8. If a jurisdiction wants to use proactive regulation, what tools are available?**

A jurisdiction that wants to regulate proactively has a number of tools available to it. It could adopt one or more of the tools found in the bulleted list in Question 3 above. It could send an email to lawyers who switch job settings, as Colorado has done. It could subscribe to the free *Legal Services Regulation Update e-newsletter*<sup>9</sup> circulated by the Nova Scotia Barristers' Society to see what new steps Nova Scotia is taking with respect to proactive regulation. It could also talk to other jurisdictions interested in proactive regulation to find out what tools they are using. (See one of the next FAQ for ways in which jurisdictions interested in this topic can connect with each other).

One tool that has received significant attention in recent years is a self-assessment form. The first jurisdiction to use this tool was New South Wales, Australia, which required that a representative from an Incorporated Legal Practice (ILP) complete the self-assessment form.

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<sup>8</sup> Although the terms “principled” and “proportionate” are not commonly used in U.S. lawyer regulatory circles, the ideas they represent are common in the United States. For example, when the U.S. Supreme Court evaluates the constitutionality of restrictions on lawyers’ commercial speech that is not false or misleading, it uses the 3-part Central Hudson test. For speech that is not false or misleading, the test asks: 1) whether the asserted governmental interest is substantial; 2) whether the regulation directly advances the governmental interest asserted; and 3) whether the restriction is more extensive than is necessary to serve that interest. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). In *Michigan v. Environmental Protection Agency*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 702 (2015), the Supreme Court struck down a regulation because the agency in question failed to do a cost-benefit analysis which was required in order to decide whether the regulation was “appropriate and necessary,” as required by the statute. Both of these cases reflect ideas that are similar to a “proportionality” requirement.

<sup>9</sup> This newsletter can be found at <http://nsbs.org/legal-services-regulation-update>. Anyone may sign up to receive a copy.

The self-assessment form, which was developed by the New South Wales Office of the Legal Services Commissioner in consultation with stakeholders, asked firms to evaluate whether they had systems in place designed to prevent ten of the most common problems. The form addressed potential problems such as handling matters on which the firm was not competent, fee disputes, missed deadlines, conflicts of interest, and ensuring staff confidentiality regarding client matters. One of the reasons why the self-assessment tool has received so much attention is because of a study conducted by Professor Christine Parker with the cooperation of Steve Mark and Tahlia Gordon from the New South Wales Office of the Legal Services Commissioner. This academic study found that New South Wales ILP firms that used this tool significantly reduced the number of client complaints filed against them and had a significantly lower number of complaints than non-ILP law firms that did not use the self-assessment form.<sup>10</sup>

Subsequent to the publication of the study about the results in New South Wales, the Canadian Bar Association developed a voluntary self-assessment form that focused on a firm's 'ethical infrastructure'. Colorado has also made a self-assessment form available, and Nova Scotia will be evaluating in Spring 2017 the results of its self-assessment pilot project in which it had 50 firms test two different self-assessment forms, one of which was designed for solo practitioners and smaller law firms and the other of which was designed for larger law firms. (In Nova Scotia, the draft self-assessment form is called the "draft MSELP Self-Assessment Tool;" MSELP is the acronym that refers to the need for firms to have a Management System for Ethical Legal Practice. See <http://nsbs.libguides.com/mselpresources>.) Similar instruments are in active development in Ontario, the Prairie law societies and British Columbia in Canada.

Professor Fortney conducted a second empirical study of the New South Wales regulatory regime that required the adoption of appropriate management systems and the self-assessment process discussed above.<sup>11</sup> Using data from interviews and surveys, she evaluated the relationship between self-assessment and ethical norms, systems, conduct and culture in firms, and how the self-assessment process could be improved. On the effects of the self-assessment process, Professor Fortney found that almost three quarters of the respondents who completed the self-assessment revised their law firm policies as a result of going through the self-assessment process. Her study also found that close to half of the respondents had adopted new systems, policies, and procedures as a result of the self-assessment procedure. She concluded that:

“Quite simply, these findings point to the positive impact that the self-assessment process has in encouraging firms to examine and improve the firms’ management systems, training, and ethical infrastructure. Interestingly, with respect to most steps

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<sup>10</sup> See Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC’Y 466, 485–488, 493 (showing that on average, the complaint rate (average number of complaints per practitioner per years) for ILPs after self-assessment was two-thirds lower than the complaint rate before self-assessment).

<sup>11</sup> See Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152 (2012); available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2205301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205301).

taken by the firms, there was no significant difference related to firm size and steps taken.”<sup>12</sup>

Professor Fortney’s article included the table that is reproduced below that shows the impact of the self-assessment process:

**Table 1**  
**Steps Taken by Firms in connection with the First**  
**Completion of the Self-Assessment Process**

Reviewed firm policies/procedures relating to the delivery of legal services	84%
Revised firm systems, policies, or procedures	71%
Adopted new systems, policies, or procedures	47%
Strengthened firm management	42%
Devoted more attention to ethics initiatives	29%
Implemented more training for firm personnel	27%
Sought guidance from the Legal Services Commissioner/another person/organization	13%
Hired consultant to assist in developing policies and procedures	6%

One additional finding that is noteworthy but is not included in Table 1 is Professor Fortney’s finding that a majority of lawyers who used the self-assessment process were satisfied with it, including those lawyers who had been skeptical at the outset. The article notes that “sixty-two percent of the respondents reported that they agreed or strongly agreed with the following statement: the self-assessment process ‘was a learning exercise that enabled our firm to improve client service.’”

Professor Laurel Terry has recognized that virtually all U.S. jurisdictions currently have tools available to them that would allow them to deploy the self-assessment tools that have been used in Australia and Canada. Virtually all U.S. jurisdictions have adopted a version of Rule of Professional Conduct 5.1(a) that is substantially similar to the ABA Model Rule of Professional Conduct:

**Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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<sup>12</sup> Susan Saab Fortney, *Promoting Public Protection through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation System*, 23 PROF. LAW. 16 (2015) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906525) (shorter article that includes Table 1 and summarizes the results of the study).

Professor Terry has argued that jurisdictions should add two questions to each lawyer's annual bar dues statement. The first question would ask the lawyer if he or she was subject to Rule 5.1(a).<sup>13</sup> The second question would apply to those lawyers who answered "yes" to the first question and would ask them if they were in compliance with Rule 5.1(a). The bar dues statement would include a URL for a website that would have resources available and that could include one of the already-existing self-assessment forms. (The Appendix to Professor Terry's article includes examples from the New South Wales, Canadian Bar Association, Colorado, and Nova Scotia self-assessment forms).

Professor Fortney has identified a number of steps that can be taken to encourage or push lawyers to devote time to seriously examining and improving firm practices and controls. In suggesting that interested parties consider how to integrate management-based principles into current regulatory approaches, she urged regulators to adopt and expand the use of diversion programs to deal with minor misconduct and practice management concerns.<sup>14</sup> Recognizing the role that professional liability insurers play in promoting risk management, she recommended that lawyers' professional liability insurers require completion of an audit or practice review as a condition of obtaining insurance or a lower premium.<sup>15</sup> Finally, to address concerns related to the discovery of the results of the self-assessments or practice reviews, she also proposed that jurisdictions recognize a self-evaluation privilege<sup>16</sup>.

Professor Amy Salyzyn, who helped develop the Canadian Bar Association's Self-Assessment tool, has also recommended that malpractice carriers consider what sorts of incentives they could offer to lawyers or firms that completed the self-assessment form.<sup>17</sup> She has endorsed the proactive approaches currently being used or under development in Canada, arguing that the current approach focuses more on public interest than the prior regulatory approaches.<sup>18</sup>

As these brief examples show, there are a number of tools that might be available to jurisdictions that would like to use proactive regulation. While lawyer professional misconduct undoubtedly will still occur, proactive regulation tools, well-deployed, can educate lawyers, and reduce the number of client complaints, while improving lawyer and client satisfaction.

## **9. How can jurisdictions that are interested in considering proactive regulation connect with one another?**

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<sup>13</sup> If a jurisdiction had concerns that a lawyer would not know whether he or she was a lawyer who "possesses comparable managerial authority in a law firm," that jurisdiction could limit the first question to asking whether the respondent was a partner or shareholder in his or her law firm.

<sup>14</sup> Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 112, 131-37 (2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2375219](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375219)

<sup>15</sup> *Id.* at 138-41,

<sup>16</sup> *Id.* at 141-46.

<sup>17</sup> See Amy Salyzyn, *What if We Didn't Wait?: Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices*, 92 Canadian Bar Review 507, 543-44, 544 n.126 (2015) (endorsing the \$100 Risk Management Credit" offered by LawPro, which is Ontario's mandatory malpractice carrier, to lawyers who participate in qualifying programs, but recommending a larger discount than the current amount);

<sup>18</sup> Amy Salyzyn, *From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence*, 94 Canadian Bar Review \_\_ (2017) (forthcoming).

There are several ways that jurisdictions that are interested in proactive regulation can connect with one another. The members of the NOBC Proactive Regulation Committee are listed on the relevant NOBC Global Resources webpage – all committee members are willing to speak to jurisdictions interested in this topic. See <https://www.nobc.org/index.php/jurisdiction-info/global-resources>.

You can also see who the attendees were at the 1<sup>st</sup> and 2<sup>nd</sup> Proactive Management Based Regulation Workshops that were held immediately following the 2015 and 2016 National Conferences on Professional Responsibility. The minutes from those sessions, including the attendees, are available as links from the Colorado PMBR Webpage, <https://perma.cc/RW6K-PTZQ>.

#### **10. Do some jurisdictions use terms other than “proactive regulation” to describe the concepts discussed in this FAQ document?**

As noted above, jurisdictions around the world have expressed interest in using a more systematic and comprehensive approach to proactive regulation in which they focus on trying to prevent lawyer misconduct, rather than waiting until after problems arise. To date, however, jurisdictions have used different terminology to express this idea. For example, the Prairie Provinces in Canada issued a consultation that used the term “compliance” based regulation. This term included the concept of proactive regulation. Some jurisdictions may use the term “risk-based” regulation in a way that includes proactive regulation.

Some of the participants from the 1<sup>st</sup> and 2<sup>nd</sup> Proactive Workshops recognized the potential confusion that arises when jurisdictions use different terminology. Some of the Workshop attendees have formed an *ad hoc* group that is trying to develop common language to discuss the recent developments, including the concepts in this FAQ. If common terminology is developed, this terminology will be included in future versions of this FAQ, on the NOBC’s Global Resources webpage, and on the Colorado PMBR webpage. (The minutes from that *ad hoc* terminology meeting currently are available on the Colorado page at this URL: <https://perma.cc/4PVL-963U>.)

Although the terminology may vary, it *is* possible to determine whether different individuals or jurisdictions are talking about the same concept, even though the words they use differ. One way to do so is to use the “who-what-when-where-why-and-how” structure that Steve Mark, Tahlia Gordon, and Laurel Terry used in their article entitled *Trends in Global Lawyer Regulation*.<sup>19</sup> As they noted in that article, a number of the recent global lawyer regulatory developments, such as the 2007 UK Legal Services Act, have adopted regulatory reforms that combine a number of these “who-what-when-where-why-and-how” factors. But it is possible for a jurisdiction to disaggregate these variables and change one of them without changing all of them. Proactive regulation deals with the issue of ‘when’ regulation occurs. As

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<sup>19</sup> See Laurel S. Terry, Steve Mark, Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 *FORDHAM L. REV.* 2661 (2012), [http://www.personal.psu.edu/faculty/l/s/lst3/TerryMarkGordon\\_Trends\\_Lawyer\\_Regulation.pdf](http://www.personal.psu.edu/faculty/l/s/lst3/TerryMarkGordon_Trends_Lawyer_Regulation.pdf).



noted earlier, proactive regulation is regulation that focuses on the time period *before* problems arise, rather than the time period *after* problems arise.

A number of jurisdictions either have adopted – or have proposed – reforms that combine changes to both the “what” and the “when” variables. These reforms have changed the focus of “when” regulation occurs so that it includes the time period before problems arise. But some of the recent changes, such as those in U.K. and Nova Scotia, have combined the ‘when’ reforms with reforms to ‘What’ is regulated. They have made law firms, as well as individual lawyers, subject to regulation. As is addressed in greater detail in the next Question 11 and in the separate NOBC Entity Regulation FAQ document, one reason why they have done that is because a number of people believe that proactive regulation will be most effective when combined with entity regulation – in other words, that it is useful to combine reforms to both “when” regulation occurs and “what” is regulated.

Although proactive regulation and entity regulation can be combined, it is possible for a jurisdiction to separate the “when regulation occurs” variable and the “what is regulated” variable. A jurisdiction might make reforms in one of these areas without making reforms in the other area. As the New York and New Jersey examples show, it is possible to have entity regulation without proactive regulation. (See a prior FAQ in this document regarding this point). It is also possible to have proactive regulation without entity regulation, as Colorado’s letter to lawyers changing law firms and Professor Terry’s Rule 5.1(a)-bar dues suggestion show. (See a prior FAQ).

### **11. What is “proactive management based regulation (PMBR)” and how does it differ from proactive regulation?**

As noted in Question 10, at the moment, terms such as PMBR may be used differently by different jurisdictions. This is why the Ad Hoc Terminology group is working to develop a set of terms that may be used consistently. In general, however, the term “proactive management-based regulation” (PMBR), is generally said to have been coined by Professor Ted Schneyer, refers to programs designed to promote ethical law practice by assisting lawyers with proactive management.<sup>20</sup>

These programs generally have three features. First, they emphasize proactive initiatives as a complement to traditional, professional discipline. Second, they tend to focus on the responsibility of law firm management to implement policies, programs, and systems – in short, an “ethical infrastructure” -- that is designed to prevent misconduct and unsatisfactory service. Third, they strive to improve legal services and reduce problems by establishing information-sharing and collaborative relationships between regulators and service providers. The NOBC’s Entity Regulation FAQ document, which is regularly updated, provides information about PMBR and jurisdictions that have combined changes to what is regulated and changes to when regulation occurs.

### **12. What are the potential arguments against proactive regulation (and the responses)?**

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<sup>20</sup> See Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233 (2013).

Before a regulator contemplates a change, it is worth considering some of the potential resistance that he or she might encounter. Here are some of the potential arguments against proactive regulation and some potential responses.

***12.1 \* Leaders of regulatory bodies don't have the power to affect the type of change discussed, nor should they.***

**Response:** Proactive regulation does not mean that the leaders of regulatory bodies have to act unilaterally. But they should recognize their potential influence and understand that it might be easier to implement a proactive system than they realize.

***12.2 \*It is difficult to measure whether proactive regulation is effective; measurement is important to an organization that needs budget allocations and accountability.***

**Response:** It is true that well-established metrics for measuring reactive, discipline-based systems exist. (These metrics include things such as the number of cases filed, time to disposition, and the results of discipline). Organizations that adopt proactive measure or an overall proactive approach undoubtedly will want to think about metrics they can use to measure their efforts and effectiveness. The metrics might be quite different and might include factors such as website visits, download counts, and changes in practice (such as those demonstrated in the qualitative and quantitative studies that have been conducted in Australia). But the fact that new metrics may be needed should not discourage a jurisdiction from adopting more proactive regulation. Jurisdiction may, however, find it useful to work with one another to develop appropriate metrics and accountability factors. Depending on the type of proactive measure, some metrics currently can be used. For example, a regulator could monitor the success of diversion measures for law practice management concerns. Specifically, the regulator could track severity and frequency of disciplinary charges filed against lawyers who completed a diversion program.

***12.3 \* Some individuals might resist the idea of proactive regulation because of a view that the jurisdiction is not "ready" to develop a system of entity regulation in which law firms are regulated along with individual lawyers (entity regulation).***

**Response:** As this FAQ has demonstrated, it is possible for a jurisdiction to adopt proactive regulation without entity regulation (and entity regulation without proactive regulation). Thus, even if a jurisdiction is unwilling to adopt entity regulation, it could decide to adopt additional proactive measures or decide to make a systemic commitment to always consider what proactive measures might be appropriate. A reluctance to adopt entity regulation should **not** be a reason to avoid proactive regulation.

***12.4 \* Some individuals might oppose proactive regulation because of a belief that the regulatory body does not have funds available to implement proactive regulation.***

**Response:** Cost should not be a barrier to proactive regulation. First of all, changing one's mindset—in and of itself—is priceless, but does not have a price tag attached. A regulator

that had a proactive mindset might discover a range of low-cost ways in which it could implement its vision. Second, if proactive regulation prevents problems, it may reduce regulatory costs rather than increase them. It is true that some jurisdictions, such as the Nova Scotia Barristers' Society, have committed resources to restructuring the regulatory system. But it is possible for a jurisdiction to begin more modestly and adopt proactive measures and a proactive mindset in which the jurisdiction begins by looking for low cost but potentially very effective proactive measures such as the email that Colorado sends to lawyers who change practice settings. One goal of this NOBC Proactive Regulation FAQ document is to encourage regulators to share ideas and experiences with one another.

***12.5 \* Some might oppose proactive regulation out of the belief that it will be too burdensome for lawyers or too intrusive into law firm practices.***

**Response:** It is certainly possible to design a proactive regulatory system to which this criticism would apply. A regulator who adopts a proactive approach will undoubtedly want to consider the issue of “proportionality” and make sure the burdens being imposed are appropriate. (This is why Nova Scotia has a Triple P regulatory system – it is committed to regulation that is proactive, principles, and proportionate.)

There are several additional steps that regulators could take to address this concern, beyond a sensitivity to proportionality that should always be present. For example, when PMBR regulation was adopted in New South Wales, Australia, the regulators were on record as stating that they were trying to change their relationship with lawyers. They wanted to be seen as a partner who could provide lawyers with assistance and help, rather than simply as an “enforcer” who showed up after problems arose. The regulators in several Canadian jurisdictions are also attempting to offer services to lawyers proactively and to have lawyers recognize that the regulators, like the lawyers, would prefer to avoid problems and want to work with the lawyers proactively to prevent problems from occurring. They are trying to change the relationship so that they are recognized as partners who can help lawyers (which helps clients).

Another response to the concern about burden or intrusiveness might focus on the concept of risk-based regulation. Many jurisdictions that are pursuing more proactive approaches to lawyer regulation are pursuing a more risk-based approach to lawyer regulation. A risk-based approach means that resources are targeted to the areas where they are most likely to be needed. Colorado, for example, does not send its law practice management resource email to lawyers who leave government practice and join an extremely large law firm. Illinois' new Rule 756(e) that requires a self-assessment every two years from lawyers who do not carry malpractice insurance. Unlike lawyers who carry insurance, uninsured lawyers may not obtain practice management advice from malpractice carriers. Moreover, injured persons may be more at risk when lawyers do not carry malpractice insurance if the uninsured lawyers do not possess nonexempt assets to pay damages in the event of a malpractice claim. A number of jurisdictions outside the U.S. have made a commitment to a risk-based approach to regulation. Among other reasons, a risk-based approach can be a more effective way for an organization to deploy limited resources.)

**12.6 \*Some might oppose proactive regulation, arguing that there is a conflict of interest between the regulator’s discipline mission and a proactive regulation approach.**

**Response:** In the view of the authors of this FAQ, there isn’t an inherent conflict between trying to prevent problems before they occur (e.g., by helping lawyers establish separate accounts for client and lawyer funds and setting up an office system regarding the operation of those funds) and disciplining lawyers after-the-fact if they engage in improper behavior (e.g., by commingling or stealing client funds). The goal of both proactive measures and a reactive discipline systems is to further a jurisdiction’s regulatory objectives of client and public protection. Both proactive and “reactive” methods can advance those goals. Regulators considering proactive regulation, however, should, however, be sensitive to these concerns when designing their systems.

**13. Is there anything else that might be helpful to read?**

The authors of this Proactive Regulation FAQ decided not to repeat in this document the same information about jurisdictional developments that appears in the NOBC Entity Regulation FAQ document. The authors also chose not to repeat in this document the information summarizing the *process* that has been used by jurisdictions that have made or are considering these changes and the recommendations in that document for jurisdictions that want to consider changes. Thus, individuals and jurisdictions who are interested in proactive regulation likely will find it helpful to read the NOBC’s Entity Regulation FAQ document, which is found on the NOBC’s Global Resources webpage. See <https://www.nobc.org/index.php/jurisdiction-info/global-resources/entity-regulation>. Some of the potential critiques of proactive regulation (and the responses to those critiques) are included in the Proactive Regulation law review article cited in note 1. Thus, useful resources for those who want to pursue this topic include the NOBC’s Entity Regulation FAQ and the Proactive Regulation 4-page blog post and the longer law review article. Regulators and others interested can also consult a 2016 article written by Professor Fortney, *Designing and Improving a Systems of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*.<sup>21</sup> Drawing on data that she obtained in her empirical study of lawyers who completed the self-assessment process, the article discusses respondents concerns and outlines recommendations for persons interested in improving and designing PMBR systems.<sup>22</sup>

In addition to these resources, Appendix A to this document lists a number of additional websites, articles, and other resources. Appendix B identifies a variety of proactive measures and identifies jurisdictions that are using these measures. We encourage you to contribute to Appendix B by providing examples of proactive regulation in your jurisdiction. Please send that information to the NOBC Proactive Regulation Committee Chair Jim Coyle at [j.coyle@csc.state.co.us](mailto:j.coyle@csc.state.co.us).

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<sup>21</sup> Susan Saab Fortney, *Designing and Improving a Systems of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, JOURNAL OF THE PROFESSIONAL LAWYER (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2812906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812906).

<sup>22</sup> *Id.* See also Terry, *Proactive Regulation*, *supra* note 1, at 788-797 ( Appendix 4 contains examples of the self-assessment forms from New South Wales, Australia, the Canadian Bar Association, Nova Scotia, and Colorado).

## Appendix A

### Webpages:

ABA Center for Professional Responsibility webpage (forthcoming)

NOBC Global Resources Webpage, See <https://www.nobc.org/index.php/jurisdiction-info/global-resources>

Nova Scotia Barristers' Society, MSLEP Webpage, <http://nsbs.org/management-systems-ethical-legal-practice-mslep>

Colorado PMBR Subcommittee Webpage, <http://www.coloradosupremecourt.us/AboutUs/PMBRMinutes.asp> (in addition to links to Colorado and U.S. materials, this webpage includes links to the relevant portals of all of the Canadian provinces)

### Law review and other articles focusing on proactive regulation:

Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016) (traditional law review article about proactive regulation that includes a discussion of developments around the world through May 2016; the appendices include examples from the various lawyer self-assessment forms that have been developed)

Laurel S. Terry, *When it Comes to Lawyers, Is an Ounce of Prevention Worth a Pound of Cure?*, JOTWELL (July 13, 2016) (4 page blog post about proactive regulation and recent developments), <http://tinyurl.com/Terry-proactive-Jot>

### Law review and other articles focusing on PMBR:

Susan Saab Fortney, *Designing and Improving a Systems of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, JOURNAL OF THE PROFESSIONAL LAWYER (2016) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2812906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812906)

Susan Saab Fortney, *Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation System*, 23 PROF. LAW. 16 (2015) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906525)

Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 112 (2014) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2375219](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375219) (after examining study findings and recommendations related to the effects of the self-assessment process, the article examines how features of management-based regulation may be integrated into lawyer regulation in the U.S. and how regulators, insurers, and bar leaders can create incentives encouraging lawyers and firms to examine and improve their management systems and practice controls).

Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152 (2012), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2205301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205301) (examining the results of a an empirical study on PMBR in New South Wales and recommending an agenda for regulators, insurers, professional associations and researchers).

Susan Saab Fortney, *Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Too*, BUSINESS LAW TODAY, March 2015 (ethics column).

Ted Schneyer, *The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers*, 42 HOFSTRA L. REV. 233 (2013).

Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577 (2011).

### **Law review and other articles with a broader focus:**

Amy Salyzyn, *From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence*, 94 CANADIAN BAR REVIEW \_\_ (2017) (forthcoming) (Over the last several decades, Canadian law societies have significantly expanded their regulatory reach in relation to the post-entry competence of lawyers. In this article, a novel framework is proposed to trace the path to this current state of affairs: specifically, four different “waves” or models are identified. It is argued that the current approach represents a positive material regulatory shift towards focusing on the public interest as opposed to lawyer interests, which had dominated historically. At the same time, issues of transparency, expertise and costs remain of concern. The Hybrid Model approach embodied in new entity-based regulatory initiatives now under consideration is identified as one way to address these concerns. However, both the process used to implement such a model and the model’s ultimate content will be key determinants of its success in any given jurisdiction.)

Amy Salyzyn, *What if We Didn't Wait? Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Canadian Legal Practices*, 92 CAN. BAR. REV. 507 (2015). (This article explores whether and how law societies might become more active in promoting effective ethical infrastructures within Canadian law practices. The case presented in this article for expanded law society involvement in the ethical infrastructures of Canadian law practices is three-fold: (1) there are reasons to believe that these infrastructures could, as a general matter, be improved; (2) this improvement would, in turn, lead to improved outcomes in relation to lawyers’ ethical duties; and (3) current law society regulatory efforts are not optimally situated to assist with this improvement. Stated otherwise, law societies should become more involved in the ethical infrastructures of Canadian law practices because neither the market nor current regulatory efforts are effectively addressing this important aspect of law practice.)

Laurel S. Terry, *Globalization and the ABA Commission on Ethics 20/20: Reflections on Missed Opportunities and the Road Not Taken*, 43 HOFSTRA L. REV. 95, 128, n. 142 (2014)(suggesting the idea of using Rule 5.1 to achieve PMBR even in the absence of entity regulation).

Laurel S. Terry, [\*Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon\*](#), 22(1) PROF. LAW. 28 (Dec. 2013). (This article is a 15 page version of the Terry/Mark/Gordon 2012 regulatory objectives article. It is targeted to state supreme courts and lawyer regulators in the United States.)

Laurel S. Terry, Steve Mark, Tahlia Gordon, [\*Adopting Regulatory Objectives for the Legal Profession\*](#), 80 FORDHAM L. REV. 2685 (2012). (This article provides a thorough treatment of regulatory objectives in a number of jurisdictions. It includes a discussion of the different methods by which lawyers are regulated (e.g., legislation, court rules, law society bylaws); legislative history, and an analysis and comparison of the regulatory objectives in a number of jurisdictions. The regulatory objectives from a number of jurisdictions are included as appendices.)

Laurel S. Terry, [\*Trends in Global and Canadian Lawyer Regulation\*](#), 76 SASKATCHEWAN L. REV. 145 (2013). (This article uses the “who-what-when-where-why-and-how” structure developed in the 2012 Terry/Mark/Gordon “Trends” article to analyze Canadian lawyer regulation developments.)

Laurel S. Terry, Steve Mark, Tahlia Gordon, [\*Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology\*](#), 80 FORDHAM L. REV. 2661 (2012). (This “Trends” article uses a “who-what-when-where-why-and-how” structure as a means to discuss global lawyer regulation developments around the world. Although many jurisdictions combine these developments, it offers a means to analyze the issues separately and compare regulatory approaches in different countries.)

See also <http://tinyurl.com/laurelterryslides> (includes links to presentation slides, organized by topic) and [http://works.bepress.com/laurel\\_terry/](http://works.bepress.com/laurel_terry/) (contains links to articles on a number of issues related to globalization and the legal profession, including foreign lawyer mobility provisions, a comparative analysis of UPL/lawyer monopoly provisions in countries, interest in the legal profession by antitrust authorities, EU regulation of lawyers (the most recent analysis is found in the Bologna Process articles), trade agreements’ application to legal services, FATF and “gatekeeper” issues, and transnational legal practice year-in-review articles, among other topics).

**(1) Adam Dodek, “Regulating Law Firms in Canada” (2011) 90 CANADIAN BAR REVIEW 383 (arguing that Law Societies should regulate law firms. They should do so primarily on the basis of ensuring public confidence in self-regulation and respect for the Rule of Law and only secondarily out of concerns regarding public protection.)**